

**‘TIL NAUGHT BUT ASH IS LEFT TO SEE’:  
STATEWIDE SMOKING BANS, BALLOT INITIATIVES, AND THE PUBLIC SPHERE**

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***Abstract:*** *This Article examines the recent surge in statewide smoking bans. Nearly all states have some form of statewide ETS legislation, and the last five years have seen a revolution in the legal landscape, reversing the default rule on smoking in public from permissive to prohibitive of smoking. After establishing an analytical framework within which statewide ETS legislation coheres, and a typology of statewide smoking bans, this Article examines a disturbing trend in statewide ETS legislation: the increasing use of statewide ballot initiatives. After examining the shortcomings of direct legislation in the context of ETS legislation, this Article proposes a balancing test for remedial use by legislators, and demonstrates its application to an exemption area on which states divide: the tobacco lounge.*

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## INTRODUCTION

Governments have regulated tobacco for at least half a millennium.<sup>1</sup> Tobacco regulation in America can be traced to 1629, when the first General Letter of Instructions from the New England Company limited the production and use of tobacco in the Massachusetts Colony to medicinal purposes.<sup>2</sup> Soon thereafter, “Blue Laws” grew up in the more theocratic colonies like New Haven, rigorously enforcing chaste Christendom by regulating ostentatious dress, the maternal kissing of children on the Sabbath, and the consumption of tobacco and liquor.<sup>3</sup> Smoking on the streets was prohibited in Plymouth County in 1638, and Massachusetts prohibited smoking within five miles of any town in 1646.<sup>4</sup> These regulations proved short-lived, however, as did the later revival of tobacco legislation during the Temperance movement.<sup>5</sup>

This Article examines the modern descendant of these early efforts: the regulatory movement against secondhand smoke, more formally known as “Environmental Tobacco Smoke” (ETS). In the past thirty-five years, as the adverse consequences of ETS have been established and reaffirmed by Surgeons General and medical scholarship, laws regulating where smoking is permissible have swept the American states. The first seven years of the new millennium, in particular, have witnessed a transformative legislative crackdown on secondhand smoke across the nation—and, indeed, the globe.

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<sup>1</sup> In 1624, Pope Urban VIII banned the taking of snuff, finding the effects of tobacco too close to sexual ecstasy for comfort. SANDER GILMAN AND XUN ZHOU, *SMOKE: A GLOBAL HISTORY OF SMOKING* 15-16 (2004). In 1633, Sultan Murad IV closed the coffee-houses of Istanbul and prohibited the smoking of tobacco: “Smokers unfortunate enough to be caught red-handed were executed on the spot.” James Grehan, *Smoking and “Early Modern” Sociability: The Great Tobacco Debate in the Ottoman Middle East (Seventeenth to Eighteenth Centuries)*, AM. HIST. REV., Dec. 2006 at 1363. In 1634, the Patriarch of Moscow prohibited the sale of tobacco, penalized by nose-slitting and whipping. In China, following the prohibition of tobacco-smoking in 1637, an enforcement decree was issued providing that “Those who hawk clandestinely Tobacco, and sell it to foreigners, shall, no matter the quantity sold, be decapitated, and their heads exposed on a pike.” L. Carrington Goodrich, *Early Prohibitions of Tobacco in China and Manchuria*, J. AM. ORIENTAL SOC’Y, Dec. 1938, at 650.

<sup>2</sup> GUSTAVUS MYERS, *YE OLDEN BLUE LAWS* 10-11 (The Century Company, 1921); Leon Goodman, *Blue Laws, Old and New*, 12 VIRGINIA LAW REGISTER 663,668 (1927).

<sup>3</sup> Blue laws, *inter alia*, regulated the modesty of clothing, imposed penalties for entertaining Quakers, and prohibited the kissing of children on the Sabbath. *See id.*; Henry G. Newton, *Blue Laws of New Haven*, 7 YALE L. J. 75 (1897).

<sup>4</sup> Goodman, *supra* note 2.

<sup>5</sup> After securing the Prohibition amendment, the National Women’s Christian Temperance Union unsuccessfully attempted a similar constitutional tobacco ban. *See* Maureen O’Doherty, *Price of a Soul: At What Cost Can The Tobacco Issue Be Resolved*, in Ward, Kershaw, and Minton Environmental Symposium: Up In Smoke: Coming To Terms With The Legacy Of Tobacco: Introduction, 2 J. Health Care L. and Pol’y (1998-1999) at ix. Fourteen American states passed legislation restricting the sale or use of cigarettes, and New York prohibited women from smoking in public. *See* Peter D. Jacobson et al., *Historical Overview of Tobacco Regulation and Legislation*, 53 J. SOC. ISSUES 75, 77 (1997).

This eruption of legislation has transformed the public domain in American states from a predominantly smoke-friendly to a predominantly smoke-free space. As this Article will propose, America has been—and continues to be—engaged in the process of reversing the default rule on smoking in public from permissive to prohibitive. Where once smoking was generally permitted in public, excepting designated “No Smoking” areas, we increasingly live in a world in which insular smoking spaces are carved out of a public domain in which smoking is generally forbidden.

Central to this transformation has been the widespread enactment of modern statewide smoking bans, the subject of this Article. Replacing earlier, more tentative regulations, these modern statewide bans eliminate second-hand smoke in workplaces, bars, restaurants, and other public places, with few exceptions. In the last five years, twenty-eight states have passed comprehensive ETS legislation. Texas, Iowa, Pennsylvania, and South Dakota legislatures are currently considering passing modern smoking bans, and in the next few years, more restrictive provisions of several states’ smoking regulations will take effect. Lawsuits challenging this legislation for both under-inclusiveness and over-inclusiveness march to trial, and legislative committees consider amendments to smoking bans passed by ballot initiative.

Despite the profound reach of these recent developments, the statutory landscape is deeply undertheorized. We lack as yet a theoretical framework within which to place statewide smoking bans—or even a basic survey of laws. Presently, an inchoate landscape of confused legislation confronts the observer as she surveys the several states’ ETS regimes. A baffling array of exemption provisions emerges from the catalogue of legislation, documenting states’ efforts simultaneously to prevent involuntary exposure to secondhand smoke, limit unnecessary regulation and protect unintended consequences.

As the legal landscape continues to evolve, the need for theoretical guidance becomes increasingly acute. This Article offers a modest beginning to a comprehensive study of statewide ETS legislation—surveying the state of the law, identifying major areas of concern, and suggesting directions in which solutions might usefully be sought. Part I reviews the landscape of statewide ETS legislation, and proposes a theoretical framework within which it coheres. Part II undertakes a case study of an ETS statute passed by ballot initiative, which, as Part III concludes, presents serious procedural concerns. Part IV proposes a balancing test for use in evaluating exemptions, which can be used both to remedy deliberative failures in the passage of ballot initiatives, and to evaluate regimes currently in place. Part V applies this test to an exemption area—tobacco lounges—on which strong ETS regimes conflict. It is hoped that this Article will

provide a starting point for analysis, as American states aspire to craft ETS regimes which are both effective and responsible.

## I. THE LANDSCAPE OF STATEWIDE ETS LEGISLATION

Modern statewide smoking bans share a common intent: to protect unconsenting individuals from exposure to tobacco smoke in the public domain. From this common purpose, however, a chaotic landscape of wildly varying legal regimes has ensued. Though they may agree that nonsmokers should be protected from secondhand smoke, lawmakers have struggled to determine how and where the line between smoking and nonsmoking domains should be drawn.

This, ultimately, is the central question in crafting effective and responsible ETS legislation. Which, if any, areas should be exempted from the operation of the new default rule? Ultimately, this Article will propose a balancing test to address this question, and suggest conclusions on some common exemption areas. Before we can position ourselves to determine how lines between smoking and nonsmoking spaces should be drawn, we must first understand how states are drawing them now. Accordingly, this Part establishes a typology of modern statewide smoking bans, and proposes an Ayresian analytical framework for understanding the landscape of statewide ETS legislation.

Modern ETS legislation in American states can be traced to 1972. Six years after exposing the dire health consequences of smoking,<sup>6</sup> the Surgeon General's office issued a report demonstrating that ambient tobacco smoke could damage the health of nonsmokers as well.<sup>7</sup> Arizona passed the first statewide ETS legislation in 1973, banning smoking in all theaters, museums, libraries, elevators, and buses used by the public.<sup>8</sup> Since then, state and local governments across America have gradually gone on to expand the sphere of nonsmoking public establishments. In 1975, Minnesota passed the first statute to forbid smoking in most workplaces.<sup>9</sup> Other states followed suit with Clean Indoor Air Acts, and by 1980, over half the country—twenty-eight states—had statutes on the books restricting public smoking in some form, usually covering the types of spaces covered in the Arizona ban.<sup>10</sup> Through the eighties and nineties, various county and city governments followed Minnesota's lead, instituting smoking restrictions in many workplaces. State and federal government action in those years, however,

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<sup>6</sup> ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE, SMOKING AND HEALTH (1964).

<sup>7</sup> OFFICE OF THE SURGEON GENERAL, THE HEALTH CONSEQUENCES OF SMOKING 125-7 (1972) (noting harmful effects of carbon monoxide exposure caused by proximity to smoking).

<sup>8</sup> ARIZ. REV. STAT. ANN. § 36-601.01 (1991).

<sup>9</sup> MINN. STAT. § 144.414 (2005).

<sup>10</sup> Robert A. Kagan & William P. Nelson, *The Politics of Tobacco Regulation in the United States*, in REGULATING TOBACCO 11, 11 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

was limited. At the state level, little was banned aside from the narrow range of uncontroversial public spaces, such as schools and elevators, covered in Arizona's 1973 statute. The federal government lent the anti-ETS movement only occasional and minor assistance—such as, for instance, the EPA's designation of ETS as a Class A carcinogen in 1993.<sup>11</sup>

Shortly after the EPA's designation, legislative action on the state level picked up. In 1994, states started passing a new category of laws—laws we refer to in this article as “modern statewide bans.” Modern statewide bans extend smoking prohibitions to three crucial categories of establishments: (1) restaurants, (2) bars, and (3) most other enclosed workplaces – nearly the entire indoor public domain. California, a pioneer in antismoking legislation, was the first to institute a modern statewide ban, amending its labor code in 1994 to immediately prohibit smoking in most enclosed places of employment, including restaurants.<sup>12</sup> Though bars were initially exempt from the new law's coverage, they too were required to be smoke-free by 1998.<sup>13</sup> In the five years after California's ban took full effect, a handful of other vanguard states joined California—including Delaware, which passed a modern statewide ban in 2002, and New York, which instituted a much-discussed statewide ban in 2003. The true snowballing of statewide ETS legislation, however, has taken place in the last five years. Since 2003, twenty-eight state legislatures have passed statewide bans.<sup>14</sup>

As thoroughgoing as the transformation wrought by the march of modern ETS legislation has been, we lack both a general survey of laws, and an analytical framework within which to understand the function and cumulative effect of these laws. These are the tasks of this Part. Thus far, the only systematic evaluation of ETS legislation has been conducted inside the public health community. In 2002, an advisory committee convened by the National Cancer Institute published a study rating state clean indoor air laws. The study analyzed the extent to which statewide bans regulate smoking in various categories of locations, such as retail stores and schools, as well as the severity of their penalties and the effectiveness of their enforcement procedures.<sup>15</sup> In years since, the American Medical Association has published an annual “Report Card” which, drawing largely from

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<sup>11</sup> ENVIRONMENTAL PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS, EPA/600/6-90/006F (1993). Press Release available at <http://www.epa.gov/history/topics/smoke/01.htm> In 1994, the Occupational Health and Safety Administration proposed to institute a comprehensive ban on smoking in over six million workplaces. See William N. Evans, Matthew C. Farelly & Edward Montgomery, *Do Workplace Smoking Bans Reduce Smoking?*, in TOBACCO CONTROL POLICY 234 (Kenneth E. Warner, ed., 2006).

<sup>12</sup> 1994 CAL. STAT. 310.

<sup>13</sup> CAL. LAB. CODE § 6404.5 (West 2003).

<sup>14</sup> See Appendix A.

<sup>15</sup> J.F. Chiqui et al., *Application of a Rating System to State Clean Indoor Air Laws*, 11 TOBACCO CONTROL 26-34 (2002).

the ranking methodologies established in the NCI's original study, ranks individual states on the effectiveness of their clean indoor air laws.<sup>16</sup> These releases are concerned with the functional medical consequences of statewide bans, however, and elide the legal mechanics of statewide ETS regimes.

The legal academy has not yet provided an overview of statewide ETS legislation.<sup>17</sup> Some studies focus in detail on an individual state or countywide ban, but provide only cursory glimpses of broader nationwide trends in anti-ETS legislation.<sup>18</sup> The rest are almost entirely normative pieces—some of which advocate stronger legislation, such as a federal clean air act,<sup>19</sup> while others bluntly repudiate efforts at ETS regulation.<sup>20</sup> This Part, in conjunction with Appendix A, seeks to address this gap by providing an overview of statewide smoking bans from a primarily legal perspective, and proposing a theoretical framework within which to understand them.

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<sup>16</sup> See AMERICAN LUNG ASSOCIATION, STATE OF TOBACCO CONTROL 2007 REPORT, available at [www.lungusa.org](http://www.lungusa.org).

<sup>17</sup> The closest we have to a general survey is 3 YALE J HEALTH POL'Y L. & ETHICS 157 (2002), which usefully assembles citations to cases and legislation concerning smoking in public. Sadly, this survey has become outdated. Jessica Niezgoda provides a good but limited review of California and New York regimes, and does not develop the national landscape. Jessica Niezgoda, Note, *Kicking Ash(trays): Smoking Bans in Public Workplaces, Bars, and Restaurants*, 33 J. LEGIS. 99 (2006). Marot Williamson collects constitutional challenges to statewide smoking bans, but the analysis is both limited and superficial. Marot Williamson, Note, *When One Person's Habit Becomes Everyone's Problem: The Battle Over Smoking Bans in Bars and Restaurants*, 14 VILL. SPORTS & ENT. L. J. 161,168 (2007) ("The main debate surrounding smoking bans is whether or not they are legal.")

<sup>18</sup> Though narrow, some of these articles are quite helpful. Raphael's piece in particular effectively reviews the early history of ETS legislation. See, e.g., Jordan C. Raphael, *The Calabasas Smoking Ban: A Local Ordinance Points the Way for the Future of Environmental Tobacco Smoke Regulation*, 80 S. CAL. L. REV. 393 (2007); Jody Hogdon, *Live Smoke Free or Die: The Battle for Smoke Free Restaurants in New Hampshire*, 3 PIERCE L. REV. 49 (2004); Keith Woodeshick, note, *Smoking Ban Legislation in New Jersey: Should Casinos Be Immune From Smoke?*, 3 RUTGERS J. L. & URB. POL'Y 496 (2006); Justin C. Levin, note, *Protect Us or Leave Us Alone: The New York State Smoking Ban*, 68 ALB. L. REV. 183 (2004); Adrienne Detanico, comment, *Banning Smoking in Chicago's Social Scene: Protecting Labor and Broadening Public Health Policy*, 40 J. MARSHALL L. REV. 1063 (2007). Out of sympathy to readers who will soon tire of saccharine smoking puns which suffuse the literature, I omit several unremarkable pieces from this review.

<sup>19</sup> Samuel J. Winokur, note, *Seeing Through The Smoke: The Need For National Legislation Banning Smoking In Bars and Restaurants*, 75 GEO. WASH. L. REV. 662 (2007).

<sup>20</sup> See, e.g., Thomas A. Lambert, *The Case Against Smoking Bans*, 13 MO. ENV. L. & POL'Y REVIEW 94 (2005); Mark J. Horvick, *Examining the Underlying Purposes of Municipal and Statewide Smoking Bans*, 80 IND. L. J. 923 (2005); Joni Ogle, *Why Smoking Bans Are a Butt to Texas: The Impact of Smoking Bans on Private Property Rights and Individual Freedom*, 39 TEX. TECH L. REV. 345 (2007) (arguing that, "by using smoking bans to protect citizens from their own choices, the government violates the sacred right of private property.");

## A. THE FUNCTION AND INTENT OF STATEWIDE ETS LEGISLATION

Statewide ETS statutes share a similar intent: to prevent involuntary exposure to secondhand smoke, which has been identified in a number of Surgeon General's reports as a "serious public health hazard".<sup>21</sup> Statewide ETS legislation does not aim to prevent smokers from harming themselves, but rather to prevent them from harming nonsmokers by producing ambient tobacco smoke in their presence.<sup>22</sup> Employees are often a chief concern, as potentially unwilling but captive participants in the activities of co-workers or customers.<sup>23</sup> In short, it is the externality problem posed by smoking—the costs smokers impose upon unconsenting nonsmokers by subjecting them to carcinogens—on which ETS legislation focuses and seek to eliminate.

In seeking to prevent the exposure of unwilling individuals to ambient tobacco smoke, ETS legislation reflects public opinion fairly accurately. As Fred Pampel summarizes, "Public opinion surveys indicate that people respect the rights of smokers to enjoy their tobacco, if they are aware of the harm it does themselves, but also the rights of nonsmokers to stay free from the unwanted smoke of others and from the risks of involuntary smoking. Likewise a majority

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<sup>21</sup> See, e.g., OFFICE OF THE SURGEON GENERAL, THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE, i (2006) ("We have made great progress since the late 1980s in reducing the involuntary exposure of nonsmokers in this country to secondhand smoke. . . . Despite the great progress that has been made, involuntary exposure to secondhand smoke remains a serious public health hazard that can be prevented by making homes, workplaces, and public places completely smoke-free.")

<sup>22</sup> See, e.g., OR. REV. STAT. § 433.840 (2005) ("The people of Oregon find that because the smoking of tobacco creates a health hazard to those present in confined places, it is necessary to reduce exposure to tobacco smoke by requiring nonsmoking areas in certain places"). Oregon further provides that the Department of Human Services can waive the prohibition in areas "where a waiver will not significantly affect the health and comfort of nonsmokers". OR. REV. STAT. § 433.865 (2005). See also 2007 TENN. PUB. ACTS 410 ("The Tennessee Non-Smoker Protection Act"); MINN. STAT. § 144.412 (2007) ("The purpose of [this statute] is to protect employees and the general public from the hazards of secondhand smoke by eliminating smoking in public places, places of employment, public transportation, and at public meetings."); 2006 Haw. Sess. Laws 295 ("The purpose of this act is to protect the public health and welfare by prohibiting smoking in places open to the public and places of employment to ensure a consistent level of basic protections statewide from exposure to secondhand smoke.")

<sup>23</sup> 2004 Mass. Acts 137 ("to protect the health of the employees of the commonwealth."); N.H. REV. STAT. ANN. § 155.64 (2008) ("The purpose of this subdivision is to protect the health of the public by regulating smoking in enclosed workplaces and enclosed places accessible to the public, regardless of whether publicly or privately owned, and in enclosed publicly owned buildings and offices.") WASH. REV. CODE § 70.160.011 (2008) ("The people of the state of Washington recognize that exposure to secondhand smoke is known to cause cancer in humans. Secondhand smoke is a known cause of other diseases including pneumonia, asthma, bronchitis, and heart disease. Citizens are often exposed to secondhand smoke in the workplace, and are likely to develop chronic, potentially fatal diseases as a result of such exposure. In order to protect the health and welfare of all citizens, including workers in their places of employment, it is necessary to prohibit smoking in public places and workplaces.")

of smokers accept the need to place restrictions on where they can light up.”<sup>24</sup> It is thus unsurprising that the modern statewide bans we see today—legislation that attempts to protect the latter “right” (a nonsmoker’s right to smokeless air) without trampling unnecessarily on the former “right” (a smoker’s right to smoke)—have been so popular. They are motivated by a goal that, excepting the hardcore fringe of “smokers’ rights” advocates, is universally accepted: protecting the unwilling from being exposed to the ill effects of secondhand smoke.

## B. A TYPOLOGY OF MODERN STATEWIDE ETS LEGISLATION

Despite sharing a common intent, American states range widely in the nature and scope of their ETS regimes. Five distinct classes, however, can be discerned with reference to exempted areas and pre-emption provisions, ranging from the most smoke-friendly to the most smoke-free: (I) “Thou Shalt Not Ban” States; (II) “Hands Off” States; (III) Mild Ban States; (IV) Strong Ban States; and, finally, (V) Teetotaling states.

### *CLASS I: “THOU SHALT NOT BAN” STATES: THE NORTH CAROLINA MODEL*

We start at the smokiest end of the spectrum, a narrow category including only three states: North Carolina, Pennsylvania, and Iowa. Though these states have passed ETS legislation which regulates smoking in public areas, the function of these state laws is far more pre-emptive than regulatory. Class I statutes share the two characteristics. First, the smoking regulations are quite lax, permitting smoking in bars and restaurants. Second, each of these statutes pre-empts local jurisdictions from passing more aggressive smoking bans.

North Carolina’s ETS regime is the weakest in the country.<sup>25</sup> Most statewide bans exclusively target the health interests of nonsmokers, but North Carolina’s statute expressly adopts the interests of smokers, expressly intended “to address the needs and concerns of both smokers and nonsmokers in public places by providing for designated smoking and nonsmoking areas.”<sup>26</sup> Solicitude

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<sup>24</sup> FRED C. PAMPEL, TOBACCO INDUSTRY AND SMOKING 62 (2004). 2007 Gallup poll data reveal that 54% of Americans would totally ban smoking in restaurants, 29% would totally ban smoking in bars, and 44% would totally ban smoking in workplaces. See GALLUP POLITICS AND GOVERNMENT, TOBACCO AND SMOKING, (Jul. 12-15, 2007) available at <http://www.gallup.com/poll/1717/Tobacco-Smoking.aspx>.

<sup>25</sup> This has everything to do with the primacy of North Carolina’s tobacco crop to the state’s heritage and economy. See NORTH CAROLINA DEPARTMENT OF AGRICULTURE & CONSUMER SERVICES (MARKETING DIVISION), FIELD CROPS: TOBACCO, available at <http://www.ncagr.com/markets/commodit/horticult/tobacco>. (“Tobacco has always been an important part of North Carolina’s economy and a vital crop to our producers. Many people raised in this state can find a heritage relating to some area of the tobacco industry.”)

<sup>26</sup> N.C. GEN. STAT. § 143-595 (“It is the intent of the General Assembly to address the needs and concerns of both smokers and nonsmokers in public places by providing for designated smoking

for the rights of smokers is manifest in the operation of the statute. Aside from a narrow class of uncontroversial public spaces including schools and school buses, hospitals and nursing homes, libraries, museums, elevators, and a few other public spaces—largely mirroring Arizona’s 1973 ban—North Carolina’s current statute permits smoking in virtually all enclosed areas frequented by the public, including all restaurants and bars.<sup>27</sup> State-owned arenas, coliseums, or auditoria may be designated nonsmoking—but only if they provide smoking areas in their lobbies.<sup>28</sup> The statute bears the second hallmark of Class I regimes: a preemption clause prohibiting local governments from implementing stricter measures, effectively enshrining a right to smoke in every bar and restaurant in the state.<sup>29</sup>

Pennsylvania and Iowa fill out Class I.<sup>30</sup> Like North Carolina’s statute, both are relatively old as far as ETS laws are concerned—Iowa’s was passed in 1987, Pennsylvania’s in 1988—and share the twin characteristics of Class I regimes. First, both adopt a permissive stance on smoking in enclosed spaces frequented by the public. All bars, for instance, are exempted from coverage in both states. As for restaurants, small dining establishments are completely free from smoking regulation: Pennsylvania exempts all restaurants with seventy-five seats or fewer, and Iowa’s all restaurants with fifty seats or fewer. Even the larger restaurants that are covered by the statewide bans, however, need only designate a separate non-smoking area for compliance.<sup>31</sup> Second, both the Iowa and Pennsylvania laws contain preemption clauses prohibiting stricter regulations

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and nonsmoking areas.”)

<sup>27</sup> The statute provides that a narrow category of state government buildings, such as libraries and museums, “may be designated as nonsmoking”. They do not, however, have to be. Other state-government buildings may include designated nonsmoking areas so long as at least twenty percent of interior space—of equal quality—is reserved for smoking. In all such buildings, the authority to decide whether to make any given state building predominantly nonsmoking is vested in “the appropriate department, institution, agency, or person in charge of the State-controlled department.” Even when such officials decide to include nonsmoking areas on their premises, however, the statute almost bends over to ensure the inadequacy of such nonsmoking areas by explicitly stating that it does *not* require installation of separate ventilation systems or other physical barriers designed to protect nonsmokers from secondhand smoke “in a manner which adds expense.” See N.C. GEN. STAT. § 143-597 (2007).

<sup>28</sup> N.C. GEN. STAT. § 143-597(a)(4).

<sup>29</sup> N.C. GEN. STAT. § 143-601(b) (“Any local ordinance, law, or rule that regulates smoking adopted on or after October 15, 1993 [the date of the state statute’s enactment], shall not contain restrictions regulating smoking which exceed those established in this Article.”)

<sup>30</sup> Though something of a unique case, South Dakota’s ETS statute is most accurately placed with Class I regimes. The text of the bill exempts “restaurants”, but then grants an exemption to licensed premises, so restaurants which serve alcohol are exempted. This makes categorization with Class III regimes improper. As the statute preempts local jurisdictions from passing more restrictive bans, South Dakota must be placed in Class I. See S.D. CODIFIED LAWS § 22-36-2 (2002). More restrictive legislation has been proposed, which would prohibit smoking in restaurants and bars. See 2008 SD H.B. 1237 (Introduced Feb. 12, 2008) (Deleting provisions from statewide smoking ban which permit smoking on licensed premises).

<sup>31</sup> 35 PENN. STAT. § 1230.1 (2007).

from being imposed at the local level.<sup>32</sup> These pre-emption provisions have survived legal challenges.<sup>33</sup> Save for a narrow group of buildings subject to public ingress, the designation of an area as smoking or non-smoking is entirely at the discretion of its owner. Both Iowa and Pennsylvania legislatures, however, are presently considering bills which would implement modern statewide bans.<sup>34</sup>

## CLASS II: “HANDS OFF” STATES: THE TEXAS MODEL

The next class of statewide smoking ban adopts a more freewheeling approach. Like their Class I counterparts, Class II states have not adopted general prohibitions on smoking in restaurants, bars, and most workplaces. They differ, however, in one key regard – preemption. Unlike North Carolina and its brethren, the states in this second category permit local jurisdictions to ban secondhand smoke wherever they choose, including restaurants and bars. These states, in short, take a “hands-off” approach to ETS regulation of bars and restaurants, leaving the matter to local jurisdictions. This is the most common form of statewide ETS legislation presently in force: Alabama, Alaska, Kansas, Kentucky, Michigan, Mississippi, Missouri, Nebraska, Oklahoma, South Carolina, Texas, Virginia, West Virginia, Wisconsin, and Wyoming all implement statewide Class II regimes.

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<sup>32</sup> See 35 PENN. STAT. § 1235.1; IOWA CODE § 14.2.B.6. Of the three Class I statutes, only Iowa’s states a policy rationale for preemption. “For the purpose of equitable and uniform implementation, application, and enforcement of state and local laws and regulations, the provisions of this chapter shall supersede any local law or regulation which is inconsistent with or conflicts with the provisions of this chapter.” *Id.*

<sup>33</sup> In recent years, as states across the country were passing modern statewide bans, rebellious local jurisdictions in both Iowa and Pennsylvania tested the pre-emption clauses by passing more stringent local bans. Allegheny County, Pennsylvania sought to completely ban smoking in restaurants and bars, and the city of Ames, Iowa passed a citywide ordinance seeking to ban smoking in all of its restaurants between the hours of 6:30am and 8:30pm.. See Anita Srikaneswaran, *Allegheny City Council Passes Smoking Ban*, PITTSBURGH POST-GAZETTE, Sep. 27, 2006; Frank Santiago, *Cities, Towns Monitor Fate of Ames Smoking Ban*, DES MOINES REGISTER, Aug. 19, 2002, at 1B. In both cases, restaurants financially backed by Big Tobacco promptly sued, arguing that the counties had exceeded their authority under state law and that the local bans should thus be overturned. Ames responded by claiming it had an inherent authority to pass such an act under “home rule” powers granted by the state constitution. See *James Enterprises, Inc. v. City of Ames*, 661 N.W.2d 150 (Iowa, May 7, 2003). Allegheny County defended its smoking ban by arguing that the state law’s preemption clause had been implicitly overridden by subsequent state legislation. See *Mitchell’s Bar & Restaurant, Inc. v. Allegheny County*, 924 A.2d 730 (Pa. Cmwlth., May 22, 2007). Neither argument prevailed: unable to disregard the preemption clauses in the state statutes, courts in both states ruled in favor of the restaurants and struck down the local bans. See, e.g., *Mitchell’s Bar*, 924 A.2d at 739 (“Regardless of our own sense as to whether local communities should be permitted to impose stricter regulations in this area, we may only interpret and apply the law as set forth by the General Assembly and, when they specify that the Act preempts local legislation, we must apply the Act to do so.”).

<sup>34</sup> See Conclusion, *infra*.

Granting broad discretion to local governments, Class II regimes vary widely in regulating secondhand smoke. Across the board, the large cities located in this Category II—cities such as Detroit, Milwaukee, Omaha, and the major Texas cities, among others—have their own smoking bans, many of which ban smoking in restaurants in bars. Living in a large city in a “Hands-Off” state can be much like living in one of the Category III, IV, or V states discussed below. Even among metropolises governed by Class II regimes, however, there is enormous variation. Some large cities, such as Dallas, still permit smoking in all bars—placing themselves closer to the regulatory regimes found in Category III. Other large cities in Category II, such as Madison, Wisconsin, and Fort Wayne, Indiana, have made virtually all enclosed public spaces smoke free, including smoking lounges—placing them closer to Category V.<sup>35</sup> Smaller towns may have their own bans as well, as do some rural areas. As a general matter, however, aggressive regulation is far more common in larger cities. In Michigan, for instance, only twenty counties—counties including all of the state’s major cities—have adopted their own smoking bans.<sup>36</sup> Michigan’s other sixty-three counties, which together account for the vast majority of the state’s rural area, are currently ban-free.

Despite these variations in practice, the state-level legal regimes of Class II states cohere on the more permissive end of the state law spectrum. Neither Class I nor Class II regimes attempt to reverse the default rule at the state level. Rather, these regimes declare narrow classes of the public domain smoke-free, and Class I regimes prohibit local jurisdictions from regulating further. All of the remaining states which have passed statewide ETS legislation, however, do attempt to reverse the default rule from generally permissive to generally prohibitive of smoking in public, addressing one or both of the areas identified in the 2006 Surgeon General’s report—restaurants and bars.<sup>37</sup> It is to those states that we turn next.

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<sup>35</sup> Madison passed a city-wide ban in 2005, prohibiting smoking in restaurants, bars and workplaces, but grandfathered in specially designated, closed-off, separately ventilated rooms presently in existence in restaurants, if approved by the Public Health Department. See MADISON, WIS., Ordinance 23.05 (Jul. 1, 2005). Available at <http://www.cityofmadison.com/health/envhealth/23.05-070105.pdf>. The Fort Wayne City Council passed an extremely rigorous smoking ban in 2007. FORT WAYNE, IN., CODE OF ORDINANCES ch. 95 § 95.60-99 (Jan. 16, 2007).

<sup>36</sup> See <http://www.makemaiirsmokefree.com/smokefree-progress.php> (follow “In Michigan” hyperlink).

<sup>37</sup> OFFICE OF THE SURGEON GENERAL, *supra* note 22 at 145-154 (identifying restaurants, cafeterias, and bars as public places presenting most serious ETS concerns).

### CLASS III: MILD BAN STATES: THE IDAHO MODEL

As we continue our progress on the spectrum of statewide ETS legislation from smokiest to most smoke-free, the next Class we encounter is composed of states which begin to make inroads on the default rule. Class III states, which prohibit smoking in restaurants but exempt bars, include Arkansas, Florida, Georgia, Idaho, Louisiana, Montana, Nevada, North Dakota, Oregon, and Tennessee.<sup>38</sup> This stance reflects the opinion of many Americans that, while smokers should be prevented from lighting up in dining establishments, they should be allowed to do so in bars.<sup>39</sup>

Class III bans vary on two important points: the definition of “bar,” and the question of preemption. Florida limits the bar exemption to “stand-alone bars”, with a list of fairly specific qualifications.<sup>40</sup> Other states define “bar” fairly generally.<sup>41</sup> With regard to preemption, the majority of Class III states do not forbid local governments from passing stricter local ordinances. Some explicitly preserve this authority.<sup>42</sup>

Virtually all of the mild ban states thus function as a floor rather than a ceiling; local jurisdictions in these states remain free to ban smoking in bars.<sup>43</sup> Class III laws therefore range from states like Arkansas—which defines “bar” broadly and frees local jurisdictions to impose their own more rigorous bans, to states such as Oregon, which defines “bar” more narrowly and preempts local jurisdictions from passing stricter bans. In prohibiting smoking in restaurants statewide, however, Class III states cohere as having made significant progress beyond Class I and II towards the aspirations expressed in the 2006 Surgeon

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<sup>38</sup> Some qualification is necessary with respect to Georgia and Oregon. With these, the dispositive factor is not the nature of the establishment—restaurant or bar—but the age floor of the patrons. An establishment which neither employs minors nor permits them to enter its premises may allow smoking. GA. CODE ANN. § 31-12A-6 (2007); OR. REV. STAT. § 433.835 (2005). It is likely that this functions much like a restaurant/bar split, however, because most restaurants permit children.

<sup>39</sup> See Lydia Saad, *More Smokers Feeling Harassed by Smoking Bans*, GALLUP NEWS SERVICE, July 25, 2007 (quoting survey results from July 2007 showing that, while 54% of Americans support smoking bans in restaurants, only 29% favor banning it in bars). Available at <http://www.gallup.com/poll/28216/More-Smokers-Feeling-Harassed-Smoking-Bans.aspx>.

<sup>40</sup> FLA. STAT. § 386.203 (2007) (Stipulating *inter alia* that “the licensed premises is not located within, and does not share any common entryway or common indoor area with, any other enclosed indoor workplace”).

<sup>41</sup> See, e.g., GA. CODE ANN. § 31-12A-2 (2007) (“‘Bar’ means an establishment that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of those beverages, including, but not limited to, taverns, nightclubs, cocktail lounges, and cabarets.”)

<sup>42</sup> See, e.g., GA. CODE ANN. § 31-12-2(b) (2007) (“This Code section shall be cumulative to and shall not prohibit the enactment of any other general and local laws, rules and regulations of state or local agencies, and local ordinances prohibiting smoking which are more restrictive than this Code section.”)

<sup>43</sup> Oregon and Tennessee have pre-emption clauses. See OR. REV. STAT. § 433.863 (2005); TENN. CODE ANN. § 39-17-1551 (2008).

General's report, to protect the unwilling from exposure to ETS. By exempting bars from statewide coverage, however, and in some cases preempting further regulation, Class III states leave a significant swath of the public domain unregulated.

*CLASS IV: STRONG BAN STATES: THE D.C. AND NEW YORK MODELS*

Fourth on the ETS spectrum lie those regimes that ban smoking in the vast majority of enclosed public spaces statewide, including not only all restaurants, but conventional bars as well. These statutes carve out exemptions, however, for bars and cafes devoted exclusively to the smoking of tobacco. California, Colorado, the District of Columbia, Massachusetts, New Jersey, New Mexico, New York, and Rhode Island are all Class IV states. Though the first statute went into force in 1998, the vast majority of Class IV regimes are far more recent, becoming effective between 2003 and 2007. This novelty, combined with the strong protections provided by Class IV and V regimes, warrants the designation “modern statewide ban”, which will be used in this Article to distinguish these strong, recent regimes from other forms of statewide ETS legislation.

Within Class IV, statutes differ most meaningfully in how they define the exempted smoking establishments. These statutes generally set tobacco lounges apart from regular bars by specifying a minimum percentage of revenue that must come from the on-site sale of tobacco products. Washington D.C., for instance, defines a “tobacco bar” as “a restaurant, tavern, brew pub, club, or nightclub that generates 10% or more of its total annual revenue from the on-site sale of tobacco products, excluding sales from vending machines, or the rental of on-site humidors.”<sup>44</sup> Not every Class IV state defines tobacco lounges this way. Some, such as Rhode Island, require more than half of the store's revenue to come from sale of tobacco products—a standard that can be very difficult for establishments which serve alcohol to meet in practice.<sup>45</sup> Others, such as Massachusetts, impose no mandatory numerical minimum percentage of revenue that must come from tobacco products, but merely require that sale of tobacco be the store's “primary” purpose, and that sale of food and drink be “incidental to” the sale of tobacco products.<sup>46</sup>

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<sup>44</sup> D.C. CODE § 7-741 (2008).

<sup>45</sup> R.I. GEN. LAWS § 23-20.10-2 (requiring that exempted smoking bars “annually demonstrate that revenue generated from the serving of tobacco products is greater than the total combined revenue generated by the serving of beverages and food.”)

<sup>46</sup> MASS. GEN. LAWS ch. 270, § 22 (2008) (defining a “Smoking bar” as “an establishment that occupies exclusively an enclosed indoor space and that primarily is engaged in the retail sale of tobacco products for consumption by customers on the premises; derives revenue from the sale of food, alcohol or other beverages that is incidental to the sale of the tobacco products; prohibits entry to a person under the age of 18 years of age during the time when the establishment is open for business; prohibits any food or beverage not sold directly by the business to be consumed on

Not all states, however, exempt all forms of tobacco lounge. Maine's statute, for instance, allows most types of tobacco products to be smoked in specialty tobacco stores, but was amended in 2007 expressly to disallow the smoking of hookah pipes.<sup>47</sup> Colorado exempts "cigar-tobacco bars".<sup>48</sup> These inexplicable distinctions have caused quite a bit of confusion.<sup>49</sup>

Class IV states vary in one other significant respect: whether they include *per se* exemptions for tobacco bars or grandfather clause provisions. The first category of statute, the less restrictive of the two, permits smoking in both (a) all currently existing tobacco bars, and (b) any tobacco bars that may be opened in the future. Class IV states extending *per se* exemptions to tobacco bars include California, the District of Columbia, Massachusetts, and Rhode Island. These statutes function by simply (A) defining a "tobacco" or "cigar" bar in one of the ways noted above, (B) including such a bar their lists of exemptions, and (C) requiring that all such bars maintain valid state permits.

The use of grandfather clause exemptions is more limited in scope. Colorado, Connecticut, Maine,<sup>50</sup> New York, New Jersey, and New Mexico exempt only pre-existing tobacco lounges. Grandfather clause exemptions

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the premises; maintains a valid permit for the retail sale of tobacco products as required to be issued by the appropriate authority in the city or town where the establishment is located; and, maintains a valid permit to operate a smoking bar issued by the department of revenue.") California exempts "private smokers' lounges", which must be in or attached to retail shops. CAL LAB CODE § 6404.5 (Deering 2007)

<sup>47</sup> ME. REV. STAT. ANN. tit. 22, § 1542 (2007) ("Smoking a waterpipe or hookah is prohibited in a tobacco specialty store that is newly licensed or that requires a new license after January 1, 2007.").

<sup>48</sup> COLO. REV. STAT. 25-14-203 (2007) ("a bar that, in the year ending December 31, 2005, generated at least five percent or more of its total annual gross income or fifty thousand dollars in annual sales from the on-site sale of tobacco products and the rental of on-site humidors, not including any sales from vending machines. In any calendar year after December 31, 2005, a bar that fails to generate at least five percent of its total annual gross income or fifty thousand dollars in annual sales from the on-site sale of tobacco products and the rental of on-site humidors shall not be defined as a 'cigar-tobacco bar' and shall not thereafter be included in the definition regardless of sales figures.")

<sup>49</sup> Many of the shisha lounges in New York, for instance, were initially held not to qualify for the state's cigar bar exemption because they did not serve alcohol on their premises. *See* Corey Kilgannon, *A Cultural History Faces Stringent Smoking Laws*, N.Y. TIMES, Mar. 9, 2004 (quoting City Councilman Mark Vallone: "I've asked that the city give [the shisha lounges] exclusion from the smoking laws because they fit into a cigar bar exemption . . . . The only difference is that they don't serve alcohol. But should they be punished for that?"). New Jersey's exemption partially—but only partially—avoids such confusion by expanding its coverage to include the "cigar lounge" as well as the "cigar bar," thereby clarifying that an establishment need not serve alcohol in order to qualify for the exemption. N.J. STAT. ANN. § 26:3D-57 (2007).

<sup>50</sup> Maine exempts all "tobacco specialty stores" that, by the end of 2006, possessed licenses to serve alcohol or food, effectively creating a grandfather clause exemption for tobacco lounges. ME. REV. STAT. ANN. Tit. 22, § 1542(L) (2007) ("Smoking is not prohibited in a tobacco specialty store. The on-premises service, preparation or consumption of food or drink, if the tobacco specialty store is not licensed for such service or consumption prior to January 1, 2007, is prohibited in such a store.").

function much as do the comprehensive exemptions above—only they insert temporal limitations into their definitions of the “tobacco bars” that qualify. That is, in addition to establishing a definition of “tobacco bar,” and a regulatory framework that such bars must use to remain exempt, the grandfather clause states also impose on all tobacco bars eligible for the exemption a mandatory cut-off date for being in business—a cut-off disqualifying all new tobacco bars from the exemption.

Where grandfather clause exemptions are in effect, no new cigar bar or shisha lounge seeking to allow its patrons to smoke is permitted to do so—unless it can manage to squeeze itself through a different loophole, such as those for “owner-operated businesses” or “private clubs.” Most, like New York, not only forbid new tobacco bars from opening; they also forbid existing ones from expanding or even changing ownership, which may facilitate their gradual extinction.<sup>51</sup> On the spectrum from smoke-friendly to smoke free states, then, the strong ban states with grandfather clauses toe the line between their *per se* counterparts in Class IV and the final category of statewide smoking bans.

#### *CLASS V. TEETOTALING STATES: THE WASHINGTON STATE MODEL*

Sitting at the farthest end of our ETS spectrum, Class V statewide smoking bans are the most aggressive in the nation. These states are similar in virtually all regards to Class IV bans, save that they do not exempt tobacco lounges. Due to their uncompromising rigor in stamping out smoking from the public domain, bans in this category earn the moniker “Teetotaling”. States with Class V bans include Arizona, Delaware, Ohio, Maryland, Minnesota, and Washington State. These statutes are the most recent, and are increasingly passed by health advocacy lobbies through ballot initiatives: Washington State in 2005, followed quickly by Ohio and Arizona in 2006.

Teetotaling statutes’ coverage is so broad that they generally need not specify specific types of establishments—such as “restaurants” or “bars”—to which the prohibitions apply. Instead, they tend to operate by banning smoking in all indoor “public places” and all indoor “places of employment,” and then carving out extremely narrow, tightly (and often deceptively defined) exemptions.

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<sup>51</sup> N.Y. PUB. HEALTH LAW § 1399-q (Consol. 2008) ( Exempting “Cigar bars that, in the calendar year ending December thirty-first, two thousand two, generated ten percent or more of its total annual gross income from the on-site sale of tobacco products and the rental of on-site humidors, not including any sales from vending machines, and is registered with the appropriate enforcement officer . . . Such registration shall remain in effect for one year and shall be renewable only if: (a) in the preceding calendar year, the cigar bar generated ten percent or more of its total annual gross income from the on-site sale of tobacco products and the rental of on-site humidors, and (b) the cigar bar has not expanded its size or changed its location from its size or location since December thirty-first, two thousand two.”)

All exempt private residences, but exemptions for other enclosed spaces are sparingly granted. Some Class V states include a very small number of extremely vague exemptions. In Washington State, for instance, “certain private workplaces” are the only workplaces exempt from the state’s clean indoor air law. The statute nebulously defines these as “a private enclosed workplace, within a public place, even though such workplace may be visited by nonsmokers.”<sup>52</sup> Other Class V statutes take the opposite tack, including longer lists of very specific exemptions. Minnesota’s Clean Indoor Air Act, for example, in addition to exempting private residences from coverage, allows smoking in retail tobacco shops, heavy commercial and farming vehicles, family farms, disabled veterans rest camps, and theatrical productions, buildings where scientific studies of smoking are being conducted, and buildings where traditional Native American ceremonies are held.<sup>53</sup> Whether they choose a very small number of broad exemptions, or a large number of narrow ones, however, the result is largely the same: smoking in virtually the entire indoor public domain—and some of the outdoor—is *verboden*. Some bans, such as Washington’s, also ban smoking within a certain distance of a building opening through which smoke could conceivably enter—such as building entrances, openable windows, or ventilation intakes.<sup>54</sup>

Consistent with this aggressive stance on secondhand smoke, none of the Category V statutes are expressly negatively preemptive.<sup>55</sup> Each imposes a floor on ETS regulation rather than a ceiling. Though teetotaling smoking bans tend to leave little room for municipal action, some creative localities have managed to expand coverage to prohibit smoking in parks, sidewalks, and cars with open windows.<sup>56</sup> Some local jurisdictions are beginning to extend smoking bans into the home.<sup>57</sup>

### C. ETS LEGISLATION: FLIPPING THE DEFAULT

American states have established a patchwork quilt of ETS regimes, intended to protect the unwilling from exposure to ambient tobacco smoke. At first glance, statewide ETS legislation seems to present a jumbled and unsightly landscape of law. Upon closer analysis, however, several organizing principles

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<sup>52</sup> WASH. REV. CODE § 70.160.060 (2008).

<sup>53</sup> MINN. STAT. § 144.4167 (2007).

<sup>54</sup> WASH. REV. CODE § 70.160.075 (2008).

<sup>55</sup> Courts, however, have held provisions to be preemptive. *See* J.T.R. Colebrook, Inc., v. Town of Colebrook, 829 A.2d 1089 (N.H. 2003) (Because the New Hampshire State Indoor Smoking Act is a comprehensive and detailed regulatory scheme, it preempts regulation by local authorities).

<sup>56</sup> *See, e.g.,* Pam Belluck, *Maine City Bans Smoking In Cars With Children*, N.Y. TIMES, Jan. 19, 2007.

<sup>57</sup> *See, e.g.,* Sanjay Bhatt, *Smoking Foes Bring The Fight To Apartment Buildings*, SEATTLE TIMES, Jan. 16 2007.

emerge, allowing us more effectively to understand the function and effect of statewide ETS legislation.

As the foregoing survey demonstrates, the mere fact of having a statewide ETS regime on the books reveals very little about a state's regulatory policy. A regulatory spectrum can be discerned with reference to exemption provisions, ranging from states which prohibit meaningful ETS regulation, to states which prohibit smoking in virtually all places subject to public ingress.

I believe we can most effectively understand this spectrum, and the emerging landscape of what this Article will call "modern statewide bans", in Ayresian terms. Under this analysis, the fundamental question distinguishing mere ETS legislation from a meaningful ETS regime concerns the nature of the default rule. Is the default rule prohibitive, or permissive, of smoking in public?

On the one side lie bans which leave the pre-regulation default rule in place, and prohibit smoking in narrow categories of public places. These regimes may prohibit further regulation at a local level (Class I), or permit municipalities to institute further prohibitions, (Class II) but both Classes leave the pre-regulation default rule unmodified at a state level. Class III regimes make inroads on reversing the default rule, but in leaving bars, a major source of involuntary ETS exposure, unregulated at a state level, and in some cases pre-empting local action, fail fully to reverse the default rule.

On the other side are bans which successfully reverse the default rule, and carve out exemption areas in which smoking is permitted. Some (Class IV) tailor the legislation narrowly to exempt areas where nonsmokers are unlikely to be present, such as tobacco bars. Others (Class V) create a near-complete mandatory rule against smoking in public.

Under this analytical framework, it is clear that "modern statewide bans", or Classes IV and V, are a distinct species of statewide ETS legislation. These statutes reverse the default rule to establish a presumptive prohibition of smoking in nearly all public places, against which exemptions can be carved by state legislatures.<sup>58</sup> Codified in nineteen American states, modern statewide bans have been incrementally reversing the nation-wide default rule on smoking in public places.

These modern statewide bans are the subject of this Article. If we are to understand them, we must understand one critical point: they are exemption-centric. The point about which a state reverses the default rule is determined by its exemption scheme. This, after all, is the central question posed by modern statewide bans: which public spaces should be exempted from the operation of the new default rule? At their best, modern statewide bans attempt to balance the two "rights" in play – the smoker's against the non-smoker's – by isolating areas

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<sup>58</sup> Ayres & Gertner, 99 YALE L. J. 87 (1989).

which do not undermine the function of an effective ETS regime, like areas in which non-smokers are unlikely to be exposed to ambient tobacco smoke.

Even among modern statewide bans, however, states exhibit a startling degree of variation in determining which areas do not undermine a strong ETS regime. Perhaps this represents the considered judgment of different states concerning how much protection is warranted—an optimistic “states as laboratory” view—but it may be that a certain amount of caprice may be responsible for the variation, and deliberative failures draw states away from narrowly tailored, responsible, and effective ETS legislation. Certainly the delicately balanced, exemption-centric nature of ETS legislation gives reason for pause, because the character of an ETS regime can be dramatically altered by the choice of one exemption against another. In the next Part, I will examine a recent trend in the passage of statewide smoking bans that presents particularly severe concerns on this point: the increasing use by pressure groups of the ballot initiative as a mechanism for passing statewide ETS legislation.

## II. CASE STUDY: THE OHIO SMOKE FREE WORKPLACE ACT

[W]as the Ohio voting public fooled by a ballot issue that purported to be something that it was not?

*Ohio Licensed Beverage Association v. Ohio Department of Health*, (Cain, J.)<sup>59</sup>

Thanks to the laudable work of Surgeons General, we are now aware of the health threats posed by environmental tobacco smoke, and we have made significant progress in flipping the default rule on smoking in public from smoking to nonsmoking. Though in the past this has been chiefly accomplished by state statutes passed by conventional legislative means, the tempo of ETS ballot initiatives has accelerated dramatically in recent years. Following the successful 2005 passage of a statewide ETS ballot initiative in Washington, three states saw the passage of similar initiatives in 2006: Ohio, Arizona, and Nevada.

Insofar as ballot initiatives have contributed to the process of reversing the default rule on smoking in public, they must be commended. However, ballot initiatives present unique dangers to good law in the context of ETS legislation. ETS legislation is essentially a choice of exemptions: exempting some areas, like restaurants and bars, undercuts the purpose of modern ETS legislation and may fail to flip the default, while failing to exempt others may take the legislation well beyond what is necessary to protect the public health.

As we have seen, in reversing the default rule from a general permission for smoking in public places to a general prohibition, the essential question is where a state draws the line—which areas will be exempted. Excellent arguments obtain for several exemption areas which are consistent with the public health function of ETS legislation. Recognizing this, states have carved out exemptions against the default rule which tailors the legislation more closely to its public health purpose. Though some seem overbroad, and others are overly narrow, these exemptions represent the efforts of states to confront the problem head-on – to decide where the line is best drawn between protecting the public health and intruding unnecessarily on the public domain.

Ballot initiatives, however, are prone to focus attention on a general policy question at stake, at the expense of significant details. They are therefore particularly worrying legislative vehicles for ETS legislation, to which the finer points of the exemption scheme are of paramount importance in determining the character of the new regime. The mere fact of an ETS bill's passage by ballot initiative may say very little about public support for, let alone the substantive advisability of, its exemption scheme.

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<sup>59</sup> *Ohio Licensed Beverage Assn. v. Ohio Dep't of Health*, 07CVH04-5103 (¶ 2) (Oh. Ct. Com. Pl. 5/17/07).

The passage of the Ohio Smoke Free Workplace Act presents a sharp example of the dangers to responsible legislation posed by ETS ballot initiatives. According to the summary on the ballots, the proposed statute would “restrict smoking in places of employment and most places open to the public”, with a list of exemptions including outdoor restaurant patios, tobacco stores, private clubs, and most private residences.<sup>60</sup> Within weeks it was clear, in the words of an Ohio law professor, that “we voted for a lie.”<sup>61</sup> Within months an Ohio trial court had declared that despite statutory language to the contrary, “no such exemption [for private clubs] actually does exist.”<sup>62</sup> By December 2007, an Ohio appellate court threw up its hands and handed the imbroglio over to the General Assembly to resolve.<sup>63</sup>

As legislators tackle this unenviable task, they are confronted with vexing questions of deference: what exactly did Ohio voters intend to enact, and how extensively should legislators defer to the text of the proposed bill? A fuller understanding of the more tragic elements in this farce will provide guidance for legislators as they attempt to decipher what voters intended to express at the polls, determine what degree of deference the bill should be afforded in amendment, and perhaps recover missed opportunities for carefully crafted and responsible ETS legislation.

#### A. PROPOSALS

On March 10, 2005, the American Cancer Society, through its Ohio agent “SmokeFree Ohio” (SFO) delivered an ultimatum to the Ohio General Assembly. Having drafted an ETS bill, SFO demanded a legislative rubber-stamp. If one were not forthcoming, or if the Ohio Assembly were to debate and possibly amend the proposal, SFO would launch a petitioning campaign to pass the bill by ballot initiative.<sup>64</sup>

Ohio, one of the states swept up by the Progressive era tide of direct democracy, had amended its Constitution in 1912 to provide for legislation by

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<sup>60</sup> See Ohio Sec’y of State, State Issue 5 Certified Ballot Language (Nov. 7, 2006), available at [www.sos.state.oh.us/SOS/ElectionsVoter/results2006.aspx?Section=2322](http://www.sos.state.oh.us/SOS/ElectionsVoter/results2006.aspx?Section=2322).

<sup>61</sup> David F. Forte, Op-ed., *More Smoke-Free Than You Thought*, CLEVELAND PLAIN DEALER, Nov. 17, 2006, at B9.

<sup>62</sup> *Ohio Licensed Beverage Assn. v. Ohio Dep’t of Health*, supra note 60, ¶ 9.

<sup>63</sup> *Ohio Licensed Beverage Assn. v. Ohio Dep’t of Health*, 2007-Ohio-7147, ¶ 41 (“[A]ny potential change to the exemption as enacted would be a matter for the legislature, not the administrative agency, to address.”); 2007 Ohio App. LEXIS 6277.

<sup>64</sup> Press Release, SmokeFree Ohio, American Cancer Society Launches Campaign To Pass a Statewide Clean Air Law (Mar. 10, 2005) available at <http://smokefreeohio.org/oh/news/050310LaunchCampaign.aspx> (“If the Ohio General Assembly does not take action, or tries to amend the law, the American Cancer Society and its partners will collect another 100,000 signatures to put the ordinance before all Ohio voters in November 2006.”)

ballot initiative. Under Article II, Section 1B, by filing a sufficient number of signatures with the Secretary of State, any citizen or organization could place legislation before the General Assembly. The legislature could pass, amend and pass, or reject the proposal. If amended or rejected, upon the filing of further signatures the petition would be placed on the state ballot for adoption by Ohio voters, and would trump any amended version passed by the legislature.<sup>65</sup>

That ETS legislation for Ohio was imminent was not in dispute. As a lobbyist for the Ohio Licensed Beverage Association (OLBA) observed, “there will be a statewide policy. The question is what will that be?”<sup>66</sup> On that finer point, however, public opinion was unclear. A 2005 poll, conducted by the statewide trade organization, revealed a 55 percent majority in support of a very limited statewide ban. A 2006 poll conducted by health activists, on the other hand, revealed a 52.3 percent majority in favor of a blanket ban, with a 3.4 percent margin of error.<sup>67</sup>

The restaurant and bar industry hoped that the legislature would tackle the issues raised in the bill and craft a more “reasonable” bill.<sup>68</sup> Unwilling to subject their bill to examination and potential amendment by the legislature, however, the American Cancer Society instructed the legislature “to do nothing” and “leave this to the Ohio voters”,<sup>69</sup> insisting that the legislature should not debate or amend the bill and “allow the issue to go to the statewide ballot next November”.<sup>70</sup> The anti-deliberative nature of this tactic was not lost on the news media. Noting the “aggressive” character of SFO’s proposal, the Cleveland Plain Dealer observed that “their plan leaves no room for compromise”.<sup>71</sup>

The restaurant and bar lobby responded to the American Cancer Society’s ultimatum with a proposal of its own. On the 19<sup>th</sup> of April, Ohio’s Attorney General approved language for a constitutional amendment sponsored by OLBA, which had formed an organization called “SmokeLess Ohio” (SLO) for the

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<sup>65</sup> OHIO CONST. art. II, § 1b.

<sup>66</sup> Harlan Specter, *Cancer Society Tells Ohio to Ban Indoor Smoking*, CLEVELAND PLAIN DEALER, Mar. 11, 2005, at A1.

<sup>67</sup> Peggy O’Farrell, *Smoking Ban Gets Support*, CINCINNATI ENQUIRER, Feb. 6, 2006, at 1B.

<sup>68</sup> Jim Provance, *Anti-Tobacco Activists File Petitions to Ban Most Public Smoking in Ohio*, TOLEDO BLADE, Nov. 18, 2005.

<sup>69</sup> See podcast, Cleveland City Club, Jacob Evans vs. Tracy Sabetta, Debate: Smoke Less Ohio vs. Smoke Free Ohio (108), (Oct. 30, 2006) available at

<http://www.cityclub.org/content/podcasts/index/Podcasts.aspx>. Tracy Sabetta, co-chair of SmokeFree Ohio, explained that the bar and restaurant industry voiced support for “a weaker proposal, something which did not protect all workers and all customers and certainly didn’t level the playing field for business in Ohio. At that point in time we made a very simple request of the legislature; not one that they get very often. We asked them to do nothing.” *Id.* at 8:50-9:19.

<sup>70</sup> Press Release, SmokeFree Ohio, SmokeFree Ohio Turns in Petitions for Statewide Law, (Nov. 17, 2005) available at <http://smokefreeohio.org/oh/news/051117Petition.aspx>.

<sup>71</sup> Harlan Specter, *Cancer Society Tells Ohio to Ban Indoor Smoking*, CLEVELAND PLAIN DEALER, Mar. 11, 2005, at A1.

purpose, and was generously backed by the tobacco industry. Where SFO's approach had been anti-deliberative, OLBA's tack was flatly misleading. Though the proposed constitutional amendment was pitched as an alternative "smoking ban", prohibiting smoking in some limited public spaces, it would also supersede municipal clean air ordinances and preempt legislation concerning second-hand smoke in restaurants and bars, effectively enshrining the right to smoke in restaurants and bars in the Ohio constitution.<sup>72</sup>

No other proposals appeared. The Ohio legislature followed the American Cancer Society's *laissez-faire* instructions, and the proposals, neither debated nor amended, would soon be hawked by signature-gatherers as the petitioning process began.

## B. PETITIONING

Through the summer of 2006, the restaurant and bar lobby faced off against the American Cancer Society lobby in a race to gather enough petitions to appear on the November 2006 ballot. The arguments seemed straightforward enough. The American Cancer Society, through its organization SmokeFree Ohio, pushed its legislation on public health grounds, and the Ohio Licensed Beverage Association, through SmokeLess Ohio, opposed the initiative on economic grounds, concerned that small businesses relied on smoking patrons.

The petitioning phase was fraught with deceit, confusion and misinformation. Both organizations employed professional signature-gathering companies, paying a set price for each signature obtained, or contracting to purchase a set number of petition signatures.<sup>73</sup> Enterprising signature-gatherers worked for both organizations, simultaneously obtaining signatures for both bills. The SLO petitioners, paid between \$1 and \$2 per signature, bore no particular allegiance to the truth in their quest to assemble signatures. Petition circulators pitched the constitutional amendment as a more reasonable alternative to the ACS bill, asking registered voters to sign and indicate support for "the smoking ban" and falsely assured signatories that the initiative would not supersede municipal clean air ordinances.<sup>74</sup> Tactics grew increasingly desperate as the summer wore on, and affirmative deceptions emerged. A health official reported that SLO

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<sup>72</sup> Reginald Fields, *Smoking Ban Amendment Exempts Bars, Eateries*, CLEVELAND PLAIN DEALER, Apr. 20, 2006, at B2.

<sup>73</sup> See *In Re: Protest of Evans Against Initiative Petition Proposing Smoke Free Workplace Act*, 2006-Ohio-4690 at ¶ 20 (Ohio. Ct. App., 2006) (Describing the American Cancer Society's contract with Arno Political Consultants to purchase 75,000 signatures, paying "a set amount for each signature obtained"). For SmokeLess's use of petition-gatherers, see *infra*.

<sup>74</sup> See, e.g., Harlan Specter, *Anti-Smoking Group Alleges Deception By Opposing Effort*, CLEVELAND PLAIN DEALER, Aug. 1, 2006; Alice Duncanson, Letter to the Editor, *Smoking Lobby Disingenuous With Petition*, COLUMBUS DISPATCH, May 15, 2006.

petition circulators told him that the stricter SFO proposal would “prohibit smoking in your home, which it doesn’t.”<sup>75</sup> NBC news crews caught several of these misleading statements on camera during an exposé on deception in the petitioning process.<sup>76</sup> Petition circulators forged signatures, sometimes with the names of deceased voters.<sup>77</sup>

SmokeFree Ohio was not without fault in the early stages of the petitioning process. Contracted petition circulators misrepresented their employer, falsely declaring affiliation with the American Cancer Society instead of correctly identifying the publicity company.<sup>78</sup> This last development resulted in a lawsuit and a string of appeals, all of which were resolved against SmokeFree Ohio.<sup>79</sup> Potential signatories were presented with well-spun data, and SmokeFree Ohio’s cavalier use of scientific studies drew fire from a Boston public health professor, who found a number of SFO statements “wildly misleading and inaccurate”.<sup>80</sup>

The full extent of confusion caused by these contracted signature-gatherers is impossible to ascertain, but as complaints were filed by both sides, courts and agencies attempted to control the damage. SmokeFree was censured for the misrepresentations of its petitioners, and required to file extra signatures. After SmokeFree sent an open letter to SmokeLess alleging deception by contracted petitioners,<sup>81</sup> and subsequently filed a formal complaint to the Secretary of State,<sup>82</sup> startlingly overt acts of fraud by SmokeLess petitioners were exposed by several county Board of Election inquiries. The Cuyahoga County Board of Elections discovered that 1,122 signatures turned in by a SLO petition circulator appeared to be written in a single hand.<sup>83</sup> Later reports turned up dead

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<sup>75</sup> Specter, *supra* note 76.

<sup>76</sup> Video available <http://smokefreeohio.org/oh/NBCNightlyNews.wmv>.

<sup>77</sup> Press Release, SmokeFree Ohio, Smoke Less Ohio Turns in Additional Signatures: Expect More of the Same Lies, Dead Voters, and Fraud, (Sept. 22, 2006) available at <http://smokefreeohio.org/oh/news/documents/092206nr.pdf>.

<sup>78</sup> T.C. Brown, *SmokeLess Amendment OK’d for Ballot*, CLEVELAND PLAIN DEALER, Sept. 28, 2006, at B2 (noting that SmokeFree must submit 23,000 additional signatures “because some circulators improperly identified the American Cancer Society and not the petition circulating company as their employer.”)

<sup>79</sup> *In Re: Protest of Evans Against Initiative Petition Proposing Smoke Free Workplace Act*, 167 Ohio App. 3d 674, 675 (granting summary judgment to plaintiff Evans, the SmokeLess Lobbyist, who alleged “first, that the circulators of the petitions were not Ohio residents, and second, that the circulators had failed to disclose that they were employed by professional petition circulating companies, not the sponsors of the electoral initiative.”); 2006-Ohio-4690 (Ohio Ct. App. 2006) (Affirming judgment).

<sup>80</sup> Harlan Specter, *Health Advocate Questions Anti-Smoking Drive’s Data*, CLEVELAND PLAIN DEALER, June 28, 2006, at A3.

<sup>81</sup> Specter, *supra* note 74.

<sup>82</sup> Press Release, SmokeFreeOhio, SmokeFreeOhio Files Formal Election Complaint (Aug. 9, 2006) available at <http://smokefreeohio.org/oh/news/documents/nr080906.pdf>.

<sup>83</sup> Press release, SmokeFreeOhio, SmokeFreeOhio Appeals to Ohio Supreme Court, (September 11, 2006) available at <http://smokefreeohio.org/oh/news/documents/091106nr.pdf>.

voters' names on petitions.<sup>84</sup> In September, after several counties' boards of elections invalidated fifty-three percent of SmokeLess Ohio's signatures, the group had to come up with 323,000 signatures in ten days to stay on the ballot.<sup>85</sup>

As a Cincinnati political scientist observed, the petitioning process suffered from a disturbing lack of "conscientiousness".<sup>86</sup> The constitutional requirements for placing the initiatives on the ballot, however, had been satisfied. Both groups had marshaled enough signatures to present their proposals to Ohio voters for ratification. The two opposing initiatives would be placed on the November 2006 ballot.<sup>87</sup>

### C. BALLOTING

More problems emerged during the balloting stage, as ballot language was adopted and campaigning began. On August 22<sup>nd</sup>, the Ohio Ballot Board rubberstamped language from SmokeLess Ohio which would summarize for Ohio voters the proposed constitutional amendment appearing as Issue 4 on the November 2006 ballot. The Ballot Board is a five member panel composed of the Secretary of State and four other legislators, charged with prescribing ballot language on initiative petitions and constitutional amendments.<sup>88</sup> In doing so, the Ballot board need merely "properly identify the substance of the proposal to be voted upon. The ballot need not contain the full text nor a condensed text of the proposal."<sup>89</sup> At the language hearing, which was attended by lobbyists from SmokeFree and SmokeLess, the Ballot Board "quickly handled" SmokeLess's proposed language after ruling on language for two other ballot measures, allowing SLO to summarize the proposed constitutional amendment as a prohibition of, rather than protection for, public smoking.<sup>90</sup> The American Cancer Society lobby, which argued strenuously for a more honest explanation, was furious.<sup>91</sup>

The next day saw a correspondingly low-level review of SmokeFree Ohio's proposed ballot language.<sup>92</sup> Their language, which promised a lengthy list

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<sup>84</sup> *Id.*

<sup>85</sup> CLEVELAND PLAIN DEALER, *Smoking Ban Signatures Invalid*, Sept. 12, 2006, at B3.

<sup>86</sup> Jon Craig, *Initiatives Deadline is at Hand*, CINCINNATI ENQUIRER, Aug. 6, 2006, at 1A.

<sup>87</sup> Jim Provance, *Anti-Tobacco Activists File Petition to Ban Most Public Smoking in Ohio*, TOLEDO BLADE, Nov. 18, 2005. For a description of the process, see *State of Ohio ex rel. Evans v. Blackwell*, 2006-Ohio-2076 at ¶11.

<sup>88</sup> OHIO CONST. art. II § 1g; OHIO CONST. art. XVI § 1.

<sup>89</sup> OHIO CONST. art. XVI § 1.

<sup>90</sup> Aaron Marshall, *State Preps Ballot Text On Slots: Approved Language Underwhelms Both Sides*, CLEVELAND PLAIN DEALER, Aug. 23, 2006, at B1. See Appendix for text of ballot statement.

<sup>91</sup> *Id.*

<sup>92</sup> Aaron Marshall, *Smoke Free Group's Wording To Go On Ballot*, CLEVELAND PLAIN DEALER, Aug. 24, 2006, at B1.

of exemptions including retail tobacco shops, private clubs, outdoor patios, and private residences, was unanimously approved, though the fine print in the definitions of the bill effectively undid most of these exemptions.<sup>93</sup> For most voters, the ballot summaries would be the full extent of engagement with the initiatives themselves, but at the close of the hurried hearings, the ballot language for the competing proposals failed in both completeness and accuracy to describe the bills they purported to summarize.

As voting day drew nearer, SmokeFree Ohio focused its efforts on defeating Issue 4, playing the moral villain card against Big Tobacco.<sup>94</sup> Despite a significant financial disadvantage (only \$1.5 million, to R. J. Reynolds' \$5.3 million<sup>95</sup>), the American Cancer Society held the moral high ground. Editorial columnists took up the cause, and letters to the editor revealed public ire over the tobacco industry's role in the proceedings.<sup>96</sup> Indeed, R. J. Reynolds' grandson publicly condemned the profiteering motives of Big Tobacco and urged Ohio voters to support Issue 5.<sup>97</sup> The villain factor of SmokeLess Ohio's largest donor would be a decisive factor in the ballot results.<sup>98</sup>

SmokeLess, for its part, still relied on economic arguments, forecasting the loss of Ohio jobs and the closure of bars and restaurants.<sup>99</sup> Despite some sympathetic press coverage, these efforts were doomed. Ohioans' sympathies for the profits of the small-business owner were understandably wanting in light of the very real public health threat posed by ETS in restaurants and bars. Additionally, SmokeFree did an excellent job of exposing faults in the details of the ill-conceived constitutional amendment. In the weeks leading up to the election, the tide swiftly turned against Issue 4. In attempting to persuade voters that the economic harms to small businesses outweighed the public health concerns of unregulated ETS in all restaurants and bars, SmokeLess was tilting at windmills.

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<sup>93</sup> OHIO REV. CODE Tit. 37, § 3794.01. Further discussion of illusory exemption scheme *infra*.

<sup>94</sup> Harlan Spector, *Public Smoking Issues Offer Two Choices: Less or None*, CLEVELAND PLAIN DEALER, Oct. 22, 2006, at T14.

<sup>95</sup> *Id.*; Jon Craig and Annie Hall, *Smoking and Gambling Campaigns Well Funded*, CINCINNATI ENQUIRER, Oct. 27, 2006, at 5B.

<sup>96</sup> Regina Brett, Editorial, *Let's Clear The Air On Two Hot Issues*, CLEVELAND PLAIN DEALER, Oct. 29, 2006, at B1 (noting that "Big Tobacco is spending millions to confuse you"); Bob Taft, Op-Ed, *Reject Issue 4 But OK Issue 5*, CINCINNATI ENQUIRER, Oct. 30, 2006, at 7B (Editorial by Ohio Governor noting that RJReynolds "has marketed candy-flavored cigarettes, clearly targeted towards our youth").

<sup>97</sup> Peggy O'Farrell, *Tobacco Heir Backs Smoking Ban*, CINCINNATI ENQUIRER, Oct. 27, 2006, at 1B.

<sup>98</sup> Harlan Spector, *Sweeping Prohibition on Smoking is Adopted*, CLEVELAND PLAIN DEALER, Nov. 8, 2006, at S7 (crediting SmokeFree Ohio's "relentless public relation blitz" and messaging of Issue 4 as a "big-tobacco campaign to deceive Ohio voters" with success at voting booths.)

<sup>99</sup> Harlan Spector, *Many Cleveland Bar Workers Afraid to Lose Their Customers*, CLEVELAND PLAIN DEALER, Oct. 30, 2006, at A9.

This doomed encounter is best captured in the most direct encounter between SmokeFree and SmokeLess: a structured debate between the respective lobbyists for Issue 4 and Issue 5. Hosted by Cleveland's City Club, a local bastion of free speech and civic dialogue, this was the only direct interchange between the two opposing lobbies. It captures the most striking features of public consideration surrounding the initiatives: lack of inquiry into details of the SmokeFree proposal, sustained focus on the deceptive constitutional amendment and the villainy of Big Tobacco's sponsorship, and the hospitality industry's continued reliance on a doomed economic defense.

Opening for SmokeFree Ohio, Tracy Sabetta acknowledged "a lot of confusion in the general public about these two issues" and constructed the case for Issue Five around its status as a statute, rather than a constitutional amendment.<sup>100</sup> This was SmokeFree's biggest concern – not so much passing the initiative, but preventing the passage of Issue Four, which would supersede in the event of a joint passage. Given the startlingly misinformed condition of the Ohio electorate, confusion between the two initiatives was a real threat to Issue 5, and Sabetta spent the bulk of her time establishing the polarity of the two proposals.

For SmokeLess, Jason Evans contended that a ban was indeed warranted, but "reasonable exemptions" (Evans presented the entire hospitality industry as an "exemption", rather than the target of ETS legislation) were necessary because "a total ban ignores the reality that there are places out there that do have smoking customers." Sidestepping the unassailable public health arguments against permitting smoking in restaurants and bars, Evans elected to fight his battle on publicans' right to defer to their customers, which was received with audible hostility by the audience.

Sabetta countered by noting that the target of ETS legislation was the hundreds of thousands of hospitality workers who had no choice but to suffer ETS on the job. "No-one should have to choose between making a living and protecting their health", she noted, which drew the first and loudest spontaneous burst of applause from the audience. From the placement of applause and the nature of the questions (only one question from the audience was directed to Sabetta) it was clear that the audience assembled at the City Club Forum favored Issue Five. The most enthusiastic audience responses were to Sabetta's point regarding the necessity of protecting workers in bars and restaurants, and her indictment of the obfuscatory presence of Big Tobacco, with which she closed: "R.J. Reynolds is spending millions to try and buy its own page in the Ohio constitution."<sup>101</sup>

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<sup>100</sup> Podcast, *supra* note 71, at 4:28.

<sup>101</sup> *Id.* at 53:39. Evans was criticized in questions for SmokeLess's use of a constitutional amendment, to which he responded with the interesting but not quite on-point observation that Issue 5 also preempted municipal laws.

As voting day drew near, public discussion focused overwhelmingly on the necessity of voting down the Big Tobacco creature.<sup>102</sup> Because the constitutional amendment would trump the legislative proposal if both passed, SmokeFree Ohio devoted all of its energy to defeating Issue Four.<sup>103</sup> Through the exertions of SmokeFree Ohio, voters became aware that they were choosing between a ban on smoking in restaurants and bars and a Big Tobacco plot to give constitutional protection to their bottom line. Endorsements rolled in, beginning in late September, when Governor Bob Taft gave an unsolicited endorsement to the SmokeFree Ohio measure.<sup>104</sup> When SmokeFree Ohio organized a blowout news conference on October 11<sup>th</sup>, at which the support of Cleveland's Mayor Frank Jackson was declared, two health commissioners and the CEO of the Cleveland Clinic, Toby Cosgrove, spoke in favor of the SmokeFree Ohio initiative.<sup>105</sup> The Cleveland Clinic's endorsement was a major factor: Cosgrove had issued a series of emails to the 34,000 employees of the Cleveland Clinic urging his employees to vote for Issue 5 and against Issue 4, contributed \$30,000 to the campaign, hung an Issue 5 banner across a major traffic artery downtown, and distributed 5,000 yard signs to his employees, courtesy of SmokeFree Ohio.<sup>106</sup> Each speaker emphasized the importance both of voting down Issue 4, the SmokeLess Ohio petition, as well as supporting Issue 5, because the constitutional amendment would trump the proposed bill. Speeches, naturally, focused on the less than altruistic motives of Big Tobacco, and on the importance of protecting workers in restaurants and bars from secondhand smoke.<sup>107</sup>

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<sup>102</sup> See Editorial, CLEVELAND PLAIN DEALER, *No to Issue 4; Yes to Issue 5*, Oct. 8, 2006 ("Many lawmakers may be willing to surrender their consciences to the tobacco industry, but voters should be wiser."); Craig and Hall, *supra* note 93 ("RJ Reynolds Tobacco company has spent more than five times as much money as the American Cancer Society in a statewide battle over how far Ohio should go in banning smoking at work, restaurants, and other public places."); O'Farrell, *supra* note 99 (Quoting the grandson of R.J. Reynolds in opposition to Big Tobacco's proposal: "They're doing it to protect future profits"); Brett, *supra* note 98 ("Big Tobacco is spending millions to confuse you....Issue Four means smoke more. Issue Five keeps you alive."); Taft, *supra* note 98 (noting that Issue Four is backed by RJR, "a company that has marketed candy-flavored cigarettes, clearly targeted toward our youth"); Harlan Spector, *A Clear Look At Two Smoking Initiatives*, CLEVELAND PLAIN DEALER, Oct. 30, 2006, at A1 (Noting "deceptive tactics" of RJR).

<sup>103</sup> Spector, *supra* note 96 ("Knowing the smoking ban could lose even if it wins, SmokeFree Ohio has focused efforts on defeating Issue 4.")

<sup>104</sup> Harlan Spector, *Taft backs SmokeFree Ohio Ballot Measure*, CLEVELAND PLAIN DEALER MEDICAL AND SCIENCE WEBLOG, September 21, 2006.

<sup>105</sup> Harlan Spector, *Smoking Ban Gains Political Clout*, CLEVELAND PLAIN DEALER, Oct. 12, 2006, at B4.

<sup>106</sup> Harlan Spector, *Partnership Key to SmokeFree's Success; Medical Community Helped Issue 5 Pass*, CLEVELAND PLAIN DEALER, Nov. 12, 2006, at A1.

<sup>107</sup> *Id.*

On ballot day, Issue 5 was passed by Ohio voters. In sum, 58.52% of ballots cast supported Issue Five.<sup>108</sup> Voter turnout was approximately 56%: of Ohio's 7,860,052 registered voters, only 4,186,207 turned out to the polls on November 7.<sup>109</sup> In total, 30.15% of registered Ohio voters supported Issue 5, and 21.37% voted against it. Issue 4 was more clearly repudiated, receiving only 35.89% of votes cast.<sup>110</sup>

SmokeLess Ohio had chosen a losing battle. In light of the Surgeon General's 2006 report, efforts to preserve smoking in bars and restaurants were untenable. Ohioans wanted some form of ETS legislation, and repudiated SLO's increasingly transparent efforts to circumvent meaningful ETS legislation. In the weeks leading up to the election, the major arguments advanced by SmokeLess Ohio were thoroughly discredited. The economic arguments had been seriously undercut by studies showing that smoking bans had no effect on restaurants and bars in other states.<sup>111</sup> The notion that separate smoking sections could satisfactorily mitigate ETS in restaurants had been comprehensibly dismissed by a study released a week before the election.<sup>112</sup> The preemptive power of the constitutional amendment worried voters as well, concerned that municipal clean air acts would be undone.<sup>113</sup>

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<sup>108</sup> 2,370,369 votes were counted in favor of Issue 5, and 1,679,956 against. 135,882, or approximately 3.2% of voters did not express an opinion on Issue 5. See Ohio Sec'y of State, State Issue Five Official Results, November 7 2006, *available at* <http://www.sos.state.oh.us/SOS/ElectionsVoter/results2006.aspx?Section=1857>.

<sup>109</sup> Of 7,860,052 registered voters statewide, 4,186,207, or 56% turned out to the polls on November 7.

Ohio Sec'y of State, Voter Turnout Official Results, November 7 2006, *available at* <http://www.sos.state.oh.us/SOS/ElectionsVoter/results2006.aspx?Section=1839>.

<sup>110</sup> Ohio Sec'y of State, State Issue Four Official Results, November 7 2006, *available at* <http://www.sos.state.oh.us/SOS/ElectionsVoter/results2006.aspx?Section=1858>.

<sup>111</sup> See Harlan Spector, *supra* note 96 (noting Center for Disease Control and and Federal Reserve Bank of St. Louis studies revealing "no significant impact on sales or employment"); John Eckburg, *Issues Duel on Smoking*, CINCINNATI ENQUIRER, Oct. 8, 2006 (noting no effect on businesses in NY and CA); Peggy O'Farrell, *supra* note 99 (noting studies from CA and MA which demonstrated no ill effects on revenues from bars and restaurants).

<sup>112</sup> Peggy O'Farrell, *Smoke filters found less effective than bans*, CINCINNATI ENQUIRER, Nov. 1, 2006, at 1B.

<sup>113</sup> See City Club Podcast, *supra* note 71, at 38:27 (Question from audience charging constitutional amendment with "usurping" municipal authority) See also Editorial, *Voters Have To Peer Through The Smoke To Make Sense of Two Similarly Named Issues on the Nov. 7 Ballot*, CLEVELAND PLAIN DEALER, Oct. 8, 2006 ("Issue 4 is a bad idea that would clutter the Ohio Constitution, repository of the state's bedrock legal principles, with a public health issue far better suited for city or state law books."); John Eckburg, *Issues Duel on Smoking*, CINCINNATI ENQUIRER, Oct. 8, 2006 ("It would toss out existing local anti-smoking laws"); Harlan Spector, *In Columbus, City's Own Ban Seems To Be Working Just Fine*, CLEVELAND PLAIN DEALER, Oct. 30, 2006, at A9. Interestingly, no-one pointed out that Issue Five, as a state law, would be preemptive of municipal bans as well, though the ACS lobbyist appears to have anticipated this argument at the City Club debate, noting that the legislation could be "tweaked". City Club Podcast at 38:52.

The well-publicized presence of Big Tobacco, compounded by its deceptive tactics, had been a major and perhaps decisive factor.<sup>114</sup> Certainly “voters were put off by the R.J. Reynolds Tobacco Co. sponsorship of the amendment.”<sup>115</sup> One paper characterized the victory as due in large part to SmokeFree Ohio’s “attacking what it claimed was a big-tobacco campaign to deceive Ohio voters”.<sup>116</sup> Forced to choose between a ban which prevented the indisputably devastating effects of ETS in bars and restaurants, and a ploy by Big Tobacco to “make it unconstitutional to protect half a million Ohioans employed in the hospitality industry from secondhand smoke”<sup>117</sup>, voters naturally chose the former.

In the midst of this furor, no meaningful examination of the SmokeFree proposal had transpired. Private clubs were never discussed. Cigar and hookah bars were never mentioned. The mechanics of the bill’s patio exemption were not enquired into. Throughout the public discussion leading up to the election, the only issues to arise were the economic doomsday predictions delivered by Big Tobacco and the hospitality industry, and the trenchant arguments for a ban which actually functioned as such from SmokeFree Ohio. Voters believed that they were voting for a bill which would “restrict smoking in places of employment and in most public places”,<sup>118</sup> under which “servers and bartenders would be protected from the ill effects of secondhand smoke”<sup>119</sup>, preserving “reasonable exclusions”<sup>120</sup> that “legislators can tweak...if necessary”.<sup>121</sup> Throughout, exemptions had been less than an afterthought.

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<sup>114</sup> See Harlan, *supra* note 98 (“R.J. Reynolds Co.’s strategy to place a counterproposal on the ballot appeared to have backfired. . . . Some say reports that R.J. Reynolds bankrolled the campaign with \$5.4 million was the kiss of death for Issue 4. It may also have swung some undecided voters to Issue 5.”) The director of the Cleveland State University School of Communication opined that “A lot of it [the passage of the ban] was the very negative image the tobacco industry has”. *Id.* See also Harlan Spector, *Voters Send A Message: No Ifs, Ands, or Butts in Ohio*, CLEVELAND PLAIN DEALER, Nov. 9, 2006, at B1. (Noting opinions that “the lopsided vote was repudiation of the North Carolina tobacco company’s \$5.4 million effort to constitutionally protect smoking rights in Ohio”)

<sup>115</sup> Spector, *supra* note 100.

<sup>116</sup> *Id.*

<sup>117</sup> O’Farrell, *supra* note 99.

<sup>118</sup> Ballot Language, *supra* note 61. See Appendix B.

<sup>119</sup> Editorial, *supra* note 104. See also Spector, *supra* note 101 (characterizing ETS effects on bartenders as “important theme” in SmokeFree campaign); O’Farrell *supra* note 99 (summarizing Issue 5 as banning smoking “in workplaces and public places such as restaurants and bars.”)

<sup>120</sup> Spector, *supra* note 100.

<sup>121</sup> *Id.*

#### D. CONFUSION

Ohioans were stunned to discover what had been voted into law.<sup>122</sup> Within two weeks, a blistering opinion piece by a local professor of law appeared in the *Cleveland Plain Dealer*. Addressing the electorate, Professor Forte revealed the the functional non-existence of the promised exemptions, highlighting the stark disjuncture between what voters had been led to expect, and what the text of the bill provided for. Noting the general belief by those who voted for it that Issue 5 was “a ban on smoking in public places, with some reasonable exceptions”, Professor Forte explained that “[w]hat you are getting is not what you voted for.”<sup>123</sup>

The disingenuous exemption scheme of the bill was finally revealed, and the voting public was blindsided. Confusion was rampant – a Cleveland doctor who voted for the ban told a reporter that “it didn’t occur to him” that the hookah bar he frequented was a target of the legislation.<sup>124</sup> As Forte explained, the “reasonable exceptions” promised in the ballot summary of the bill were functionally nonexistent. Each category had been defined out of existence. Many private clubs, largely veterans’ organizations and charitable societies, retained a designated room in which members could smoke. However, to satisfy the statutory definition, a private club could have no employees – defined extremely broadly by the statute as anyone providing any service, paid or unpaid.<sup>125</sup> Thus, a private club simply could not operate – anyone pouring a drink, serving as club secretary, or turning out the lights would be an “employee”. Furthermore, the club was to be located in a free-standing, wholly-owned building, and could not permit guests.<sup>126</sup> As Ohio courts would later observe, under this definition, no private clubs had ever existed. The definition of outdoor patios, also exempted on the summary of the bill, was equally clever. No door could connect a restaurant to its patio.<sup>127</sup> To meet the definition of a retail tobacco shop, also exempted *de jure*, a business had to be the sole occupant of a free-standing building – a circumstantial

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<sup>122</sup> Peale *et al.*, *Smoking Just Got Harder*, CINCINNATI ENQUIRER, Nov. 9, 2006 ( “people were confused....They didn’t have a good understanding of what Issue 4 and Issue 5 meant.”)

<sup>123</sup> Forte, *supra* note 62.

<sup>124</sup> Chris Seper, *Hookah Bars Smoke Out Loophole in Smoking Ban*, CLEVELAND PLAIN DEALER, Dec. 18, 2006, at A1. Another Cleveland doctor and regular at Kan Zaman noted that the hookah was “the centerpiece of an evening of conversation”. *Id.*

<sup>125</sup> OHIO REV. CODE Tit. 37, § 3794.01(D) (“‘Employee’ means a person who is employed by an employer, or who contracts with an employer or third person to perform services for an employer, or who otherwise performs services for an employer for compensation or for no compensation.”)

<sup>126</sup> OHIO REV. CODE Tit. 37, § 3794.01(D) (Narrowing, for the purposes of the Act, the definition of private clubs otherwise provided for in Ohio law to those establishments with “no employees”, located in a “freestanding structure occupied solely by the club”, from which non-members are prohibited.)

<sup>127</sup> OHIO REV. CODE Tit. 37, § 3794.03(F).

requirement violently at odds with general business practice.<sup>128</sup> A little-known and poorly thought-through element of the bill, requiring “smoking prohibited” signs large or numerous enough to be visible everywhere in the space to be posted “in every public place and place of employment”, would create unprecedented visual pollution.<sup>129</sup>

Forte’s piece effectively captures the sense of betrayal felt by supporters of the measure. “With so many important issues on the ballot, many of us did not read the lengthy statute itself. Instead, we relied on the good faith of those who summarized the law for us. That good faith was misplaced. . . . The fact is that we did not vote for a reasonable limitation on smoking on Nov. 7. Without knowing it, we voted for a lie.”<sup>130</sup>

Indeed, the broad strokes of the Smoke Free Workplace Act were clear – no smoking in restaurants and bars – but implementation details and the exemption scheme were opaque even to the state agency responsible for putting the new law into effect. The bill was insufficient within its four corners to give guidance to the Ohio Department of Health enforcement officers. Responding to confusion and frustration, a spokesman demurred that “[we] didn’t write it”,<sup>131</sup> and another noted that “we had to play the hand we were dealt.”<sup>132</sup>

Two lawsuits challenging the new regime were filed immediately, one by a state liquor trade association alleging violation of the state constitution and another by an Ohioan alleging unlawful taking, but could not be resolved, because the law was insufficiently specific even to evaluate the specious constitutional violations alleged by the plaintiffs.<sup>133</sup> Accordingly, the Attorney General’s office,

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<sup>128</sup> OHIO REV. CODE Tit. 37, § 3794.03(E). A grandfather clause permitted existing tobacco shops temporarily to continue in operation, but when ownership changed, or if the building moved, the exemption would disappear. *Id.*

<sup>129</sup> OHIO REV. CODE Tit. 37, § 3794.06.

<sup>130</sup> Forte, *supra* note 52. See also Peter Bronson, Editorial, *Stop Smoking Or We Will Kill You*, CINCINNATI ENQUIRER, Dec. 12, 2006 (noting that “even some supporters are wondering, ‘I voted for what?’”). Even investigative reporters were confused: the Plain Dealer was obliged to print a correction on November 15<sup>th</sup> to an article mentioning the a “private club” exemption, stating that only a narrowly defined entity qualified. The inaccurate former description was no mere oversight: the reporter had been misinformed. Harlan Spector, *Voters Send A Message: No Ifs, Ands, or Butts in Ohio*, CLEVELAND PLAIN DEALER (Correction Appended Final Edition), Nov. 9, 2006, at B1 (Incorporating November 15 correction: “Because of inaccurate information provided to a reporter, stories on Oct. 30 and Nov. 9 gave an incomplete account of the status of private clubs under the smoking ban. Private clubs are exempt only if they have no employees . . .”)

<sup>131</sup> Bronson, *supra* note 132.

<sup>132</sup> Mike Boyer, *Health Department Speeds Up Process*, CINCINNATI ENQUIRER, January 5, 2007, at 15A.

<sup>133</sup> The trade association, Buckeye Liquor Permit Holders Association, filed a complaint on December 6, 2006, alleging that the act was unconstitutional on its face and requesting injunctive relief. After negotiations with defendant Ohio Department of Health, the Court entered a consent decree providing that enforcement would be delayed until the Department of Health promulgated rules. See *Buckeye Liquor Permit Holders Ass’n Inc., et al., v. Ohio Dep’t of Health, et. al*, No. A0610614, at ¶ 5 (Ohio Ct. C.P., 2007) (reviewing history of complaint).

through settlement negotiations with the plaintiffs, agreed that the ban would not be enforced until specific enforcement rules had been promulgated by the Ohio Department of Health, for which task the agency was given six months.<sup>134</sup>

In the meantime, confusion and frustration ruled the day. Restaurateurs and bar owners were unable to determine how the ban would affect them, or how it would be enforced.<sup>135</sup> Hookah bars, inexplicably, received a provisional exemption until the Cleveland Health Department figured out what to make of the ethnic tradition.<sup>136</sup> Stadiums and outdoor concert pavilions wrote to the Attorney General seeking compliance advice, to no avail.<sup>137</sup> After the state's non-enforcement agreement, hard feelings erupted between voluntarily compliant establishments and those renegade outposts which still permitted smoking.<sup>138</sup> With an almost offensive degree of naïveté, a suburban mayor demanded immediate enforcement of the Ohio Health Director: "Make the rules. It's not rocket science."<sup>139</sup> In the end, all parties had to wait until the Ohio Department of Health promulgated the rules which would determine how the statute was to be enforced – in essence, to determine what it meant, and how it would operate.

#### E. ENFORCEMENT RULES

The process by which enforcement rules would be promulgated appeared to encourage meaningful public comment on the bill. Though this process began at last to air the defects in the proposed legislation, it compounded the narrow interest landscape at petitioning and ballot stages with a new problem, as the clashing special interests took this opportunity to advance more aggressive

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<sup>134</sup> James McNair, *Smoking Ban Takes A Breather*, CINCINNATI ENQUIRER, Dec. 8, 2006, at 1A; Bill Bush and Matt Tullis, *Smoking Ban Put On Hold: Deal Means Law Might Not Be Enforced Until June*, COLUMBUS DISPATCH, Dec. 8, 2006, at 1A.

<sup>135</sup> James McNair, *Smokers Fume As Ban Draws Nearer*, CINCINNATI ENQUIRER, Dec. 3, 2006, at 1A (noting rampant uncertainty among proprietors about compliance with the new law). Henry Gomez, *Snuff 'Em Out: It's The Law; Employers Hurry To Comply, Figure Out What Happens If They Don't Ban Smoking*, CLEVELAND PLAIN DEALER, Dec. 4, 2006, at E1 (noting confusion about enforcement).

<sup>136</sup> Tony Brown and Debbie Snook, *They Had 'Em, Smoked 'Em, Put 'Em Out*, CLEVELAND PLAIN DEALER, Dec. 7, 2006, at 16 (Noting Cleveland Health Department's temporary moratorium for local hookah bar); Seper, *supra* note 126 ("Cleveland's Health Department has told Kan Zaman it can keep letting customers smoke its hookahs until the state provides more guidance"); Quon Truong, *Smoking Ban Threatens To Put Local Hookah Restaurants Out Of Business*, CINCINNATI ENQUIRER, Dec. 31, 2006 at 2B (noting that proprietor is "still without clear answers").

<sup>137</sup> James McNair, *Ban's Coming, But How Do You Enforce It?*, CINCINNATI ENQUIRER, Dec. 3, 2006, at 10A; Lori Kurtzman and Mike Boyer, *Dozens of Places Still Allow Smoking*, CINCINNATI ENQUIRER, Jan. 5, 2007 at 1A (Cincinnati Bengals stadium officials still "waiting for direction from the state").

<sup>138</sup> Harlan Spector, *Air's Still Not Clear At Bars, Restaurants*, CLEVELAND PLAIN DEALER, Dec. 16, 2006, at A1.

<sup>139</sup> Harlan Spector, *Patrons Complain Smoke Ban Ignored; Parma Mayor Wants Taft To Enforce Law Now*, CLEVELAND PLAIN DEALER, Dec. 21, 2006, at B1.

agendas in the guise of “the voters’ intent”, ultimately rebuffing efforts by the Department of Health to remedy some of the more misleading definitions.

On December 20, the Ohio Department of Health posted draft rules on its website, and accepted comments until January 11<sup>th</sup>. Following that, a thirty-member “advisory council” comprised of lobbyists from pressure groups and business associations would review the comments privately in several meetings beginning January 16<sup>th</sup>. A public hearing followed, after which a joint committee of the General Assembly would have 30 days to review the rules before entry into force.<sup>140</sup>

The first public hearing before the advisory council on rule promulgation was scheduled for 10 AM January 30<sup>th</sup> at the William Green federal building in Columbus.<sup>141</sup> On February 27, 2007, another hearing was held in Columbus, and bar owners, veterans, and advocacy groups testified on the proposed rules. The ACS sent Tracy Sabetta, and a number of bar owners represented the economic interests of the hospitality industry. No variation on the pre-passage arguments was evident: business owners complained about “the state infringing on their private business rights”, and the American Cancer Society and other health policy and advocacy groups reminded the committee that the law was “fully constitutional and legal”.<sup>142</sup>

For the first time in official channels, however, the deceptive statutory language was confronted as the Health Department’s efforts to promulgate enforcement guidelines revealed the bill’s Trojan nature. The state commander for Veterans of Foreign Wars of Ohio appeared on behalf of the VFW clubs, testifying that voters had been betrayed by the ballot language: “It said private clubs were exempt...we were misled.”<sup>143</sup> The Department of Health responded by proposing new rules which would enable the promised exemption for private clubs to operate in practice by amending the definition of “employee” to exclude members of the club. As the Health Department’s spokesman observed “Many people [at the hearing] pointed to that ballot language and said we voted for an exemption for private clubs”<sup>144</sup> and “we feel we are more in line with the will of the voters having made this change.”<sup>145</sup>

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<sup>140</sup> Mike Boyer, *Health Department Speeds Up Process*, CINCINNATI ENQUIRER, Jan. 5, 2007, at 15A.

<sup>141</sup> Aaron Marshall, *THIS WEEK AT THE STATEHOUSE*, CLEVELAND PLAIN DEALER, Jan. 29, 2007, at B3.

<sup>142</sup> Liz Long, *State’s Rule Makers Hear Debate On Smoking*, CINCINNATI ENQUIRER, Feb 28, 2007, at 1B.

<sup>143</sup> *Id.*

<sup>144</sup> Harlan Spector, *Cancer Society Sues; Challenges Smoking in Private Clubs*, CLEVELAND PLAIN DEALER, Apr. 19, 2007, at B2.

<sup>145</sup> Dan Horn, *Cancer Society Sues Over Smoking Exemption*, CINCINNATI ENQUIRER, Apr. 19, 2007, at 1B (Quoting Jay Carey).

This was the only substantive change introduced by the new rules. On April 16<sup>th</sup>, the amended rules passed the legislature's Joint Committee on Agency Rule Review, a "little-covered, obscure agency" comprised of 10 state legislators.<sup>146</sup> The Joint Committee did not have the power to amend the rules, but it could strike them down. As the chairman of the committee pointed out, legislators were loathe to touch the bill and its rules. "I don't think any members of the General Assembly want to change what the voters voted on..."<sup>147</sup> Having passed the Joint Committee, the rules were slated to enter into force on May 3<sup>rd</sup>.

Responding to testimony from voters who took the ballot language at its word, the Health Department had given substance to the promised exemption. The American Cancer Society, however, having secured passage, no longer needed to maintain the façade of reasonableness. Its lobbyists executed a startling volte-face, condemning the exemption promised by their own ballot language as "this loophole that skirts the law".<sup>148</sup> Noting that "the revised rules would allow private clubs to get an exemption by making their employees members", ACS lobbyists found the prospect of a meaningful private club exemption "contrary to the intent of what voters approved in November".<sup>149</sup> Arguing that "[t]he will of the voters and the letter of the law is to protect every single worker from secondhand smoke" and that "[t]he point of the law was to be strong – it provided no loopholes", the American Cancer Society filed suit in Franklin County immediately after the rules had been approved.<sup>150</sup>

OLBA found itself allied with its former nemesis: now that the promised exemption for private clubs appeared to have substance, restaurants and bars feared having to compete with private clubs for customers.<sup>151</sup> OLBA, too, construed the voters' intent against the language on the very ballot they adopted: their lobbyist (and former SmokeLess lobbyist) Jacob Evans argued that the new language "was not at all what was presented to voters. Private businesses – clubs and taverns – should be treated the same as private clubs in regard to the smoking

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<sup>146</sup> Jon Craig, *Smoking Ban Ready to Pass Final Review*, CINCINNATI ENQUIRER, Apr. 16, 2007, at 1A.

<sup>147</sup> *Id.*

<sup>148</sup> Horn, *supra* note 147 (Quoting spokeswoman for the Ohio division of the American Cancer Society).

<sup>149</sup> Mark Rollenhagen, *Ohio VFW Wins One In The Smoking Wars; Veterans Posts May Be Able To Allow Puffing*, CLEVELAND PLAIN DEALER, Mar. 22, 2007, at B1.

<sup>150</sup> Spector, *supra* note 144; *American Cancer Society v. Ohio Dept. of Health*, 07-CV-005306, (Franklin Co. C.P. Ct., 2007) (filed 4/18/2007). This case is scheduled for trial on April 30<sup>th</sup>, 2008. Docket available at <http://fcdcfjs.co.franklin.oh.us/CaseInformationOnline/caseSearch?mQTy92apUeBMhR5os8Hw>.

<sup>151</sup> Jon Newberry, *Smoking Ban Remains Hazy*, CINCINNATI ENQUIRER, Apr. 30, 2007, at 1A (reviewing proprietors' anxiety over lost profits to private clubs).

law.”<sup>152</sup> In the context of a ban which was presented to voters as including an exemption for private clubs while prohibiting smoking in restaurants and bars, this is a curious claim. Nonetheless, because the voters’ intent was an inscrutable black box, it could be creatively reconstructed with impunity, even against contrary ballot language. Both OLBA and the ACS would press this claim in Ohio trial courts.

#### F. THE COURTS

After the health department’s Rules were “final filed” on April 23, 2007, litigation began. The first case to be disposed was a holdover from the previous December which had been deferred until the rules were promulgated. This constitutional challenge, filed by Buckeye Liquor Permit Holders Association, simply rehearsed the economic arguments advanced during the ballot campaigns: after a hearing on the request for injunctive relief pending resolution of the constitutional claims was held on April 25<sup>th</sup>, relief was denied at summary judgment.<sup>153</sup> Rejecting “any invitation to find that the right to smoke in public is among those fundamental rights so ‘implicit in the concept of ordered liberty’ that ‘neither liberty or justice would exist if they were sacrificed’”, the court dispensed with the plaintiff trade association’s state and federal constitutional arguments, and easily found ETS legislation well within the province of the State’s police power.<sup>154</sup> The court carefully disclaimed any position on the “wisdom” of the policy,<sup>155</sup> holding that “Absent some warrant in the law, this court is not permitted to set aside the will of the people of the State of Ohio as expressed in legislation duly enacted under the popular vote provisions of Ohio’s Constitution.”<sup>156</sup> This was a straightforward application of well-wrought law: as the court noted in a lengthy review of similar cases, these constitutional claims have universally failed.<sup>157</sup>

A more serious legal challenge to the new legislation emerged when OLBA filed a lawsuit on April 13<sup>th</sup>, 2006 alleging that the Ohio Department of Health, in giving substance to the private club exemption, had exceeded its rulemaking authority. This argument had been raised but not pursued as a void for vagueness challenge in *Buckeye Liquor Permit Holders*.<sup>158</sup> OLBA now made it

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<sup>152</sup> Kevin Mayhood and James Nash, *For Now, Smoking Lamp Dark at VFW*, COLUMBUS DISPATCH, Apr. 30, 2007, at 1A.

<sup>153</sup> *Buckeye Liquor*, *supra* note 135.

<sup>154</sup> *Id.* at ¶ 11-13.

<sup>155</sup> *Id.* at ¶ 8.

<sup>156</sup> *Id.* at ¶ 25-26.

<sup>157</sup> *Id.* at ¶ 12.

<sup>158</sup> *Id.* at ¶ 22 (“Plaintiffs suggest in their brief that the Department’s revised rules unduly enlarge the Act’s private clubs exception, and thus to that extent would not enforce the Act’s smoking ban rigorously enough . . . . Plaintiffs provide no rationale or authority for the proposition that any

central, alleging that in amending the definitional elements of the private club exemption to accord with the ACS's ballot language, the Department of Health exceeded its limited authority to promulgate enforcement rules and entered the forbidden territory of lawmaking.

The lawsuit cut directly to the heart of the problematic enactment process. Opening the opinion, Judge Cain's frustration was evident in his recitation of questions which were barred from the scope of his analysis:

Was the ballot language concerning Issue 5, *i.e.* the SmokeFree Workplace Act ("hereinafter the "SmokeFree Act"), presented to the public on November 7, 2006 misleading? Did the sponsors, promoters and drafters of the SmokeFree Act sell it to the public under the presumption of the existence of an exemption that was not really there? Did these same sponsors, promoters, and drafters secure the votes of the members of various private clubs via the assurance that the SmokeFree Act would not cover their establishments? In short, was the Ohio voting public fooled by a ballot issue that purported to be something that it was not? These are all great questions that should be answered. However, contrary to the beliefs of some, these questions have nothing to do with the present case.

This is not a case concerning whether the sponsors, promoters, and drafters of the SmokeFree Act and its accompanying ballot language misled the public, or more particularly the members of private clubs. This is not a case concerning whether the inclusion of the "private club" exemption in the SmokeFree Act was just a sham to get more votes.<sup>159</sup>

The legal issue presented was quite narrow. Did the Department of Health, in an effort to give substance to the private club exemption, exceed its rule-making authority? Because the listed exemption was effectively undone by the definitional elements of the bill, Judge Cain found that the text of the bill taken as a whole did not actually exempt private clubs, and concluded that the Department of Health had exceeded its rulemaking authority in giving substance to this illusory exemption.

When viewing the above definitions . . . it becomes clear that the "private club" exemption found in the SmokeFree Act is an exemption in name alone. It lacks all substance. . . . The Court cannot think of a scenario under the SmokeFree Act in which the "private club" exemption would actually apply. Regardless of the statements made in R.C. 3794.03(G) that a "private club" exemption exists, no such exemption actually does exist.<sup>160</sup>

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defect in the definitional sentence to which they object . . . constitutes grounds on which to enjoin operation and enforcement of the entire Act").

<sup>159</sup> *Ohio Licensed Beverage Assn. v. Ohio Dep't of Health*, 07CVH04-5103 (¶ 2-3) (Oh. Ct. Com. Pl. 5/17/07).

<sup>160</sup> *Id.* at ¶9.

Reviewing the Health Department's arguments, Judge Cain was quite sympathetic to the agency's efforts to redefine "employee" in order to give substance to the voters' intent, but ultimately had to follow the legal fiction of ballot initiatives and presume that voters had intended every definitional intricacy, "regardless of how the ballot language read".

The Court applauds the efforts of Defendants in attempting to effectuate the will of the people. However, by doing so they have exceeded their rule making authority. The Court cannot determine the intent of individual voters when they voted for the SmokeFree Act. This intent cannot be gleaned from the SmokeFree Act itself because it provides for both a "private club" exemption and definitions that swallow that exemption. The Court has to presume that the public at large knew what they were voting for. This is regardless of how the ballot language read. As to the ballot language, it is impossible for the Court to poll each and every voter who voted for the SmokeFree Act in order to determine if they were swayed by the ballot language or the actual language of the SmokeFree Act. The Court cannot poll the public to determine if it was their intent to have a "private club" exemption that mirrors the language found in [the ACS statute] or one that mirrors the language of [the Department of Health's rule]. As can be seen, intent is impossible to determine in this case and is frankly completely irrelevant to the issue presently before the Court.<sup>161</sup>

This conclusion, however legally clear, was unwelcome from an equitable standpoint, and Judge Cain made no attempt to conceal his irritation with the misleading statute and his limitable ability to offer equitable relief. He concluded his opinion with "a final thought on this matter":

[I]t is not this court that has nullified the "private club" exemption. It is not the Ohio Department of Health that has nullified it, nor will the Ohio Department of Health be in error by enforcing the smoking ban against private clubs. This is true because from the very beginning there never was a "private club" exemption in the SmokeFree Act. There was an apparition that called itself a "private club" exemption, but that exemption did not really did not exist. It is not within the Court's power to correct this situation.<sup>162</sup>

The narrative frustration evident in Judge Cain's opinion speaks to the powerlessness of courts, confined by the legal fiction of a ballot initiative, to correct the deception and misinformation that can plague interest-group politics.<sup>163</sup>

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<sup>161</sup> *Id.* at ¶ 11.

<sup>162</sup> *Id.* at ¶ 16.

<sup>163</sup> Jane Schacter has argued persuasively for differential review of direct legislation. See Jane S. Schacter, *The Pursuit of Popular Intent: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995). Though this case was a question of agency competence, not statutory construction, voter intent may not have been "frankly irrelevant" to the disposition of the case if the court had been willing to look beyond the four corners of the text of the statute, as Schacter recommends, to ballot language and the media, and find that voters intended a private club

On appeal, Judge Cain's conclusions were affirmed, bolstered by the Court of Appeals' additional reliance on an interpretative clause buried in the text of the bill, stipulating that provisions "shall be liberally construed so as to further its purposes".<sup>164</sup> The Court of Appeals echoed Judge Cain's observations on the limited role the Ohio courts could play in resolving the deeper issues raised:

Assuming that the SmokeFree Act falls short of providing the exemption contemplated by the agency or other groups, any potential change to the exemption as enacted would be a matter for the legislature, not the administrative agency, to address.<sup>165</sup>

Thus did the former antagonists, OLBA and ACS, find themselves allied in successful opposition to a meaningful private club exemption. The ACS executed a startling volte-face, now that the statute had passed, and seized this opportunity to narrow the exemption scheme even further. OLBA's jealous opposition, on the other hand, was motivated by the improbable argument that bars and restaurants would lose business to membership clubs. Both, however, invoked and reimagined the murky "intent" expressed by Ohio voters in directed opposition to the newly meaningful exemption.<sup>166</sup> Unable to look behind the statute, regardless of the immensely problematic circumstances attending its passage, the judiciary was powerless to resolve the issues at the root of the Rule controversy. The only way Ohio could remedy its runaway statute was through the legislature.

#### G. THE LEGISLATURE

Even as legislators turned to address the Act's nebulous exemption scheme, meaningful deliberation over the merits and demerits of specific exemptions was hamstrung by the vexing question of voters' intent. As Judge Cain made perfectly clear, the Ohio Department of Health was limited to rule-

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exemption. As Schacter notes, however, this would place a heavy burden on courts and might incentivize further manipulation of balloting procedures. *Id.* at 150.

<sup>164</sup> *Ohio Licensed Beverage Assn. v. Ohio Dep't of Health*, 2007 Ohio 7147 (¶ 40) (Ohio App. 2007). This too begs the question of intent – the court relied on "the intent of the drafters". *Id.* at ¶ 35 ("the definition of employee . . . is broad, apparently reflecting intent on the part of the Act's drafters to afford wide protection to Ohio workers in places of employment.")

<sup>165</sup> *Id.* at ¶ 41.

<sup>166</sup> In a startling turnabout, Tracy Sabetta maintained that "the private-club employee rule was not part of the ballot measure and changes the intent of what voters approved." Reginald Fields, *Put 'Em Out May 3<sup>rd</sup> or Pay: State OK's Rules to Enforce Smoking Ban; Businesses, Others Balk*, CLEVELAND PLAIN DEALER, Apr. 17, 2007, at B1. *See also* Jon Craig, *Smoking Ban Ready To Pass Final Review*, CINCINNATI ENQUIRER, Apr. 16, 2007, at 1A (Quoting OLBA president Kathleen Bean arguing that the exemption for private clubs "not only creates an unlevel playing field for many small, private businesses, but is also incongruent with the issue as passed by Ohio voters.")

making authority within the textual boundaries of the misleading Act. The legislature, however, knew no such bounds. Thus, creative reconstruction of “voters’ intent” reached a high-water mark as lobbyists flooded hearings with testimony, consistently pushing deference to “the will of Ohio voters” to discourage serious consideration of particular exemptions.

Throughout this process, the message pushed by lobbyists and activists with the resources to maintain presences at the Columbus statehouse and in local government offices was that Ohio voters had intended to enact a bill without exemptions, and had intended to foreclose any further exemptions proposed by legislators. Consistently with the ACS’s earlier strategy of limiting the deliberative functions of the state legislature, lobbyists paraded the chimerical “will of Ohio voters” in testimony as grounds for legislative inaction.

### *THE THEATER*

In April, Ohio Senator Schuler introduced Senate Bill 38, proposing a theatrical exemption to the Smoke Free Workplace Act.<sup>167</sup> At a hearing on March 7, 2007, Senator Schuler explained that the “current vague smoking ban language” of the Act jeopardized the ability of theaters to acquire the rights to produce scores of plays, and proposed an “antidotal” exemption “to allow smoking by a performer while performing a theatrical production if smoking is integral to, or is directed by the script or other story line of the performance being given.”<sup>168</sup> The director of the Cincinnati Playhouse testified that, on account of the strict licensing clauses proscribing alterations to licensed works, he would not be able to produce a number of well-known plays.<sup>169</sup> Legislative consideration of this exemption seemed appropriate, because directors of non-profit theaters could not afford the costly legal fees which would attend First Amendment litigation.<sup>170</sup>

Senator Coughlin, the chairman of the committee before which testimony was delivered, the Senate Committee on Health, Human Services, and Aging, elected to keep the proposal in committee. He feared that the bill would become riddled with exceptions, “many of which I don’t think are legitimate.”<sup>171</sup> Encouragingly, Senator Coughlin evinced a willingness to tackle exemption proposals on the merits, acknowledging that “There are some reasonable exceptions, and the theatrical one is one that I support”.<sup>172</sup> The director of the

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<sup>167</sup> Tony Brown, *Will Theater Feel Effects Of Nicotine Withdrawal? Arts Leaders Call Onstage Smoking Ban Censorship*, CLEVELAND PLAIN DEALER, Apr. 15, 2007, at J1.

<sup>168</sup> *Hearing on S.B. 38 Before the S. Health, Human Services, and Aging Comm.*, 127<sup>th</sup> Gen. Assemb. (Mar. 7, 2007) (statement of Senator Schuler.)

<sup>169</sup> *Id.* (Statement of Buzz Ward, Director, Cincinnati Playhouse).

<sup>170</sup> Brown, *supra* note 168.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

Cincinnati Playhouse testified to plays that would be affected and language from licensing agreements, while one of the Health Commissioners presented a useful review of on-point First Amendment cases.<sup>173</sup> An actor was invited to demonstrate the verisimilitude of a fake cigarette for the committee.<sup>174</sup> Anecdotal evidence concerning an unpleasant experience at a dramatic production featuring a lighted cigarette was presented. The possible abrogation of licensing agreements by the use of fake cigarettes was raised, and concern about the artistic integrity of productions was aired. The thoroughness of the hearing is heartening: certainly the committee heard sufficient testimony on both sides of the issue to arrive at a well-founded conclusion.

Opposition testimony, however, threatened to derail the hearing. Opponents relentlessly maintained the supposed intent of the voters to enact an exemptionless ban. Testimony was heard from the health commissioner of Seneca County, the health commissioner of Union County, Tracy Sabetta for the American Cancer Society, Micah Berman for the Tobacco Public Policy Center at Capitol University Law School, Susan Jagers for the American Cancer Society, and two actors. The common thread running throughout this avalanche of opinion was the argument that any exemption to the ban was an impermissible abrogation of the “will of the voters”. As Tracy Sabetta put it, “our organizations are adamantly opposed to opening up the Smoke Free Workplace Act to changes only a few short months after its passage. . . . Nearly 60 percent of Ohio voters supported this law at the ballot, and legislation such as Senate Bill 38 only invites the introduction of amendment that would carve out exemptions for other entities and weaken the protections of the Smoke Free Workplace Act.”<sup>175</sup> According to opposition testimony, “keeping the law strong and giving the voters of this state what they want and deserve” necessarily entailed a hands-off policy without debate or amendment.<sup>176</sup> This tactic will only impoverish the quality of deliberation, and encourage the legislature once again to avoid confronting the exemption scheme of the juggernaut Act. It can only be hoped that the proposed theater exemption will be decided on the merits.

### *CIGAR BARS*

On October 10, 2007, Senator Cates introduced Senate Bill 195, proposing to exempt cigar bars and outdoor seating areas of restaurants situated 20 feet away from apertures to dining areas. The hearing on this proposal lacked the quality of

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<sup>173</sup> *Supra* note 169 (statement of Martin J. Tremmel, Health Commissioner, Union County).

<sup>174</sup> *Id.*, (statement of Susan Jagers, referencing demonstration by actor Robert Dubec)

<sup>175</sup> *Id.*, (Testimony of Tracy Sabetta, American Cancer Society).

<sup>176</sup> *See id.*, (Testimony of Marjorie Broadhead ) (noting that “we are concerned that Senate Bill 38 would also offer the opportunity for other exemptions to be made to the law – exemptions which were clearly not the will of Ohio voters when they passed Issue 5...”)

advocacy and the fullness of information presented with respect to Senate Bill 38, while suffering the same reductive obsession with “the voters’ intent”.

Senate Bill 195 was from the beginning a clumsy effort at a tobacco lounge exemption. Inspired, according to Senator Cates’ testimony, by the experience of one of his constituents, the owner of a “cigar bar and grille” which had suffered serious financial losses after the ban took effect, the exemption relied on the failed economic arguments which had been repudiated at the polls. Indeed, “Anthony’s Cigar Bar and Grille” was not, strictly speaking, a cigar bar, but a restaurant cum cigar lounge, so the definitional elements of the proposed exemption were immensely problematic. Defining “cigar bar” as an establishment containing a sufficiently large “walk-in humidor” with filtration systems,<sup>177</sup> Senate Bill 195 provided nearly no meaningful guidance as to what would constitute a cigar bar, or differentiate it from a bar which sold a few cigars. As opponents pointed out, this would open a Pandora’s Box if standard bars and restaurants exploited the definitional vagueness. Micah Berman, executive director of the Tobacco Public Policy Center at Capitol University Law School, testified to the bill’s “problematic definitions and unclear drafting”, noting that “the statute does not require the sale of a single cigar in order for a bar to qualify as a “cigar bar”.”<sup>178</sup> The American Cancer Society sent a lobbyist who made substantially the same point, as did the Health Commissioner for Seneca County.

Testimony in support was given by the proprietor of a large Cincinnati nightclub, the owner of the “cigar bar and grille” which inspired the bill, and letters from two national trade organizations representing cigar retailers and distributors. Conventional cigar bars were unrepresented – indeed, cigar bar owners appear to have been unaware that the hearing was taking place.<sup>179</sup> In testimony, proponents tilted at the public health windmill – arguing that an exemption was justified for cigar bars on largely economic grounds. Only one brief paragraph in Senator Cates’ introduction, and scattered sentences in the letters from the trade unions, mentioned the essential difference between cigar bars and restaurants, noting the consensual nature of smoking in the former.

Not surprisingly, the American Cancer Society renewed its claims to express the “will of the voters”, opposing any deliberative examination of exemptions on the grounds that “opening up the Smoke Free Workplace Act to

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<sup>177</sup> S.B. 195, 127 Gen. Assemb. (Ohio 2007) (defining “cigar bar” as “a walk-in humidor that consists of a minimum volume of three hundred cubic feet and that has HEPA-designed air filtration systems, carbon filtration, carbon dioxide filtration, smoke eaters, and ozone machines”).

<sup>178</sup> *Hearing on S.B. 195 Before the S. Health, Human Services, and Aging Comm.*, (Oct. 10, 2007) (Testimony of Micah Berman, Director, Tobacco Public Policy Center at Capital Law School).

<sup>179</sup> Posting of Tiffany Wuensch to Cigar Jack’s News and Reviews, <http://www.cigarjack.net/2007/07/19/ohio-cigar-bar-exemption-news/#comment-1960> (Oct. 19, 2007, 11:55 AM) (“I can’t believe that all Cigar Bar Owners and Managers weren’t properly informed.”)

changes only a few short months after full enforcement began” “only invites the introduction of legislation that would carve out exemptions for other entities and weaken the protections of the Smoke Free Workplace Act.”<sup>180</sup> The ACS lobbyist, evidently unacquainted with the deliberative functions of a legislative committee, found it “ironic that legislation that allows for the erosion of health protections is being considered by the Health Committee”.<sup>181</sup>

The chief defect in the testimony, however, was the absence of any debate on the merits of exempting cigar bars. No effort was made to distinguish cigar bars from bars which allowed smoking. Without any such distinction, the proposed exemption would certainly seem inconsistent with the larger purpose of the ban. Overtures were made in scattered sections of proponents’ testimony – Senator Cates and both trade associations noted that in cigar bars, patrons and employees were informed, consenting, and enthusiastic participants – but this line of analysis was not pursued, nor was it reflected in the bill’s text. Rather, the bill was motivated by concerns over the “overall decline in sales revenues for restaurants and bars.” Senator Cates testified that he was “not here to undermine the smoking ban that was passed by the voters”, and was merely advocating “a more common-sense approach to this issue”, but by rehearsing the failed economic arguments from the balloting phase of the Act, and proposing a clumsily drafted and potentially limitless exemption, SB 195 would have radically changed the operation of the smoking ban.<sup>182</sup> There are excellent arguments both for the exemption of cigar bars within the context of ETS legislation, and one might think that in proposing such an exemption, some of these cigar-bar specific arguments might be pursued. None were, and opposition testimony resoundingly condemned the SB 195 on its unworkability alone. As a result, the bill is likely to fail in committee, unsuccessful even in reaching the merits of the proposed exemption.

## H. CONCLUSION

Ohio voters enacted the Smoke Free Workplace Act by ballot initiative, expressing support for legislation that would protect unconsenting individuals from exposure to ETS in restaurants, bars, and the workplace. Reviewing the tortured enactment of the Smoke Free Workplace Act, however, the chief conclusion is that public deliberation, particularly concerning the exemption scheme, was stifled, enabling the American Cancer Society to slide an extremely

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<sup>180</sup> *Hearing, supra* note 179 (Testimony of Susan Jagers, lobbyist, American Cancer Society).

<sup>181</sup> *Id.*

<sup>182</sup> Micah Berman’s testimony on this point is accurate, noting that “If read broadly, this bill could create a giant exemption to the smoke-free law that would cause much confusion and undermine the public health purpose of the law.” *Hearing, supra* note 179.

aggressive ETS bill into law under the noses of Ohio voters. If the Ohio Smoke Free Workplace Act ever aspired to represent the considered deliberation of a state which supports effective ETS legislation, containing an exemption scheme reflecting the reasoned preferences of her citizens, it can only be adjudged a monumental failure.

Though responsibility for the deceptive bill and its illusory exemption scheme must ultimately rest with drafters of the legislation, structural aspects of direct legislation facilitated this usurpation of citizen authority and exacerbated the damage. Exemption candidates lacked the financial resources of the major players, Big Tobacco and the ACS, and were unable to pressure the big players or communicate with the voting public. Strategic drafting by the American Cancer Society successfully presented the mirage of a reasonable exemption scheme. Ohioans, evidently, were content to rely on assurances of a “reasonable” exemption scheme, reading the list of “exempted” areas on the ballot with a presumption of good faith, and the knowledge that the legislature could amend the bill to work out any unsatisfactory details.

Institutional remedies were foreclosed by a stylized understanding of ballot initiatives as perfectly representative of voter intent. The Department of Health was prevented from giving force to what it concluded, based on the testimony of voters at public hearings, to be voter intent, because its authority was limited to enforcing the text of the bill. Courts presumed an unrealistic level of voter sophistication, enforcing the definitional language, which few voters read, against the ballot language, which most voters read. The legislature, the only institutional actor with the authority to pierce the veil of voter intent and consider the issues and exemptions on their merits, was assailed by commands of deference to “the will of Ohio voters” as retroactively (and inconsistently) explained by the American Cancer Society and the Ohio Licensed Beverage Association.

The Ohio Smoke Free Workplace Act is a case study in the liability of ballot initiatives to procedural abuse, and demands remedial legislative attention. This was no grassroots proposal, representing the considered deliberation of Ohio voters on all interests in play. This proposal was cleverly drafted by a well-funded special interest group, qualified for the ballot with purchased signatures and sold to Ohio voters without meaningful consideration of the exemption scheme. It can only be hoped that enlightened legislators will have the courage to supply the deliberation absent from the enactment process – to moderate, as Hamilton aptly put it, “the blow mediated by people against themselves.”<sup>183</sup>

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<sup>183</sup>THE FEDERALIST NO. 63 (Alexander Hamilton).

### III. ETS LEGISLATION BY BALLOT INITIATIVE

*Plebiscite, n. A popular vote to ascertain the will of the sovereign.*

-Ambrose Bierce<sup>184</sup>

As the foregoing case study demonstrates, ballot initiatives are a clumsy mechanism for instituting ETS regimes. In reversing the default rule from permitting to prohibiting smoking in public, the key question is which areas will be exempted. This, as this Part seeks to establish, is precisely the question ballot initiatives are most ill-suited to address.

The passage of Ohio's Smoke Free Workplace Act highlights two aspects of modern ETS ballot initiatives which prevent meaningful consideration of proposed exemptions. First, the interests most active in ETS disputes marginalized the areas directly affected by the details of the ban. Despite plausible arguments for exemption, these voices were unrepresented in the public conversation. Second, deception and misinformation cripple meaningful public deliberation. The full extent of the damage is impossible to ascertain, but there can be no question that the use of paid signature-gatherers muddled the proposals, and that strategic drafting shielded the details of the exemption scheme from public scrutiny.

The ballot initiative is an impermissibly clumsy vehicle for ETS legislation for a third reason. Though the focal point of modern ETS legislation is the exemption scheme, which determines where a state chooses to draw the line after flipping the default rule, voters on ballot initiatives not only tend to be uninformed concerning the exemption provisions, but are constrained to the shrink-wrapped package crafted by the drafters of the proposal, unable to indicate preferences on discrete points. Thus, though ballots can indicate a support for an ETS regime, they cannot capture public opinion on exemption provisions. The danger, of course, is that our legal system persists in pretending that they do. Ballot initiatives, therefore, are not only clumsy legislative tools for instituting responsible ETS legislation; they are uniquely irremediable.

#### A. POOR INTEREST REPRESENTATION AND CONSTRAINED PUBLIC CHOICE

In Ohio, the interest landscape was commanded entirely by voices on opposite extremes. On the one side, the American Cancer Society and its affiliates pushed a deceptively draconian bill which had been cleverly drafted to eliminate smoking in public, even in areas commonly exempted under effective ETS regimes. On the other side, the Big Tobacco/hospitality industry junta opposed

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<sup>184</sup> Ambrose Bierce, *THE DEVIL'S DICTIONARY* (1911; 1993) at 95.

meaningful ETS legislation entirely, peddling a constitutional amendment in the guise of a smoking ban which would render meaningful ETS legislation unconstitutional. These were the only groups with the financial resources to mount ballot proposals, however, leaving voters generally in favor of ETS restrictions with an all-or-nothing choice.

The interests most directly affected by the exemption scheme, like private clubs, performing arts centers, hookah bars, cigar bars, and tobacco retailers, were marginalized between the major players. Despite their persuasive claims for exemption, plausibly consistent with the larger purpose of ETS legislation, these spaces were unable to present their arguments because they lacked the resources of the major players. Even if the illusory nature of SmokeFree Ohio's exemption scheme had been apparent during the balloting process, these establishments did not have powerful lobbies to represent their unique circumstances. They could not pressure SmokeFree Ohio to craft a more meaningful exemption scheme, nor could they afford to place a third ETS initiative on the ballot which might offer a strong ETS regime with more reasonably drafted exemptions, offering voters a chance to express an opinion. The hospitality industry did not advocate on behalf of these fringe establishments, as they presented different circumstances than the bars or restaurants targeted by ETS legislation. Indeed, the dishonorable and absolutist opposition efforts of OLBA and Big Tobacco did exemption areas more harm than good, inviting inferences of guilt by association.

Trapped in limbo between the draconian ban and the hospitality industry's doomed total opposition, the exemption areas were incidental casualties of the SmokeFree Workplace Act. They were abandoned by legislators who might have spoken for them. They were ignored by voters who took assurances of a "reasonable" exemption scheme on faith, or who would rather pass an imperfect ETS bill than lose the opportunity because of a few insignificant victims, these fringe establishments had no voice in the process. Rational social choice, therefore, was precluded, because the two proposals neither responded to the arguments raised by exemption candidates, nor provided voters with any way to express opinions on exemptions.

This impoverished landscape of interests is fairly typical in the context of ETS ballot initiatives. ETS ballot initiatives are sponsored by health advocacy groups, which propose quite severe legislation.<sup>185</sup> Major players in the tobacco

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<sup>185</sup> Every ETS ban since 2005 passed by ballot initiative exhibits this characteristic. Opponents of tobacco regulation observe that political advocacy for smoke-free campaigns has been generously funded by the Robert Wood Johnson Foundation, the largest shareholder in a pharmaceutical manufacturer of cessation products. See Wanda Hamilton, *Drug Companies Involved with Cessation Products*, Jul. 13, 2001, <http://www.forces.org/evidence/pharma/players.htm> ("The Robert Wood Johnson Foundation is the biggest single shareholder in J&J and began its massive funding of tobacco control in the U.S. in 1991, the same year the FDA approved the nicotine patch as a prescription drug"). See also Gerlach and Larkin, TO IMPROVE HEALTH AND HEALTH CARE:

industry have sponsored opposition efforts quite similar to SmokeLess Ohio's constitutional amendment in a number of other initiative contests, and the opposition strategies are typically absolute.<sup>186</sup> Theatres, shisha cafes, private clubs, veterans organizations, and cigar bars, which are relatively scarce to begin with, cannot muster enough money to purchase the signatures required to enter the contests at the proposal stage, nor purchase enough political speech effectively to present their arguments for exemption. Thus, the clashing titans have no incentive to incorporate the concerns of these fringe areas into their proposals. As a result, voters are not called upon to consider the distinctive claims these establishments might have for exemption.

Furthermore, legislative demurral at the proposal stage is fairly common, even in states which provide for a legislative once-over. Though perhaps politically understandable – no doubt a legislator proposing an exemption would be condemned by ACS lobbyists as “pro-smoking”, even if generally supportive of the ban – this type of demurral squanders an opportunity to consider arguments raised by interests which cannot afford to be heard.

To a great extent, available options shape results. Developed as Arrow's Paradox by economists and social choice theorists, this critique observes that outcomes can be managed by those able to define the options on the agenda.<sup>187</sup> In the context of ETS ballot initiatives, the marginalization of the interests most directly affected by the exemption scheme invites tyranny by the vocal minority, as voters are neither presented with the full array of interests at stake, nor, as we will see, able to express preferences on specific points.

## B. MISINFORMATION AND DECEPTION

Misinformation and deception exacerbated the considerable problems of interest representation during the passage of the Smoke Free Workplace Act. The use by both sides of mercenary signature-gathering companies with no particular allegiance to the truth clouded the issues at stake throughout the signature-gathering and balloting stages. As voting day approached, voters were too busy trying to figure out the difference between the two proposals to consider the operation of the Smoke Free Workplace Act in any detail. Repudiating Big

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THE ROBERT WOODS JOHNSON PROGRAM (2005) at 29-46,

<http://www.rwjf.org/pr/product.jsp?ia=143&id=14912>.

<sup>186</sup> Arizona, Nevada, and Ohio saw these competing proposals. See Amanda J. Crawford, *Tobacco Firm Joins Smoking Ban Fight*, THE ARIZONA REPUBLIC, Jul. 31, 2006; Steven Freiss, *Even In Nevada, Smokers' Options Are Shrinking*, THE NEW YORK TIMES, Oct. 31, 2006 (noting that the hospitality industry, proposing a more moderate ban, spurned the support of Big Tobacco for fear of being “tainted” by association).

<sup>187</sup> KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2nd. ed. 1963).

Tobacco's effort to purchase a page of the Ohio Constitution consumed public attention.

Strategic drafting by the American Cancer Society had produced a remarkably clever bill, the definitions of which undid the promised exemptions. Having warned the legislature off of the proposal, the ACS ensured that the deceptive drafting would not become apparent until after the bill's passage. Certainly OLBA's proposed constitutional amendment was as fully a Trojan horse as was the Smoke Free Workplace Act, but with less artfully concealed contents. When it backfired in spectacular fashion, the credibility of the other, more subtle artifice was enhanced. Thus, the finer points of the Smoke Free Workplace Act, particularly the illusory exemption scheme, remained concealed from Ohio voters, who took ballot language at face value and assurances of reasonable exemptions on faith.

#### *PAID SIGNATURE-GATHERERS AND SIMPLISTIC CAMPAIGNING*

These twin dangers, misinformation during the signature-gathering and advocacy processes, and affirmative deception by strategically drafted legislation, are ineluctable features of what has been termed the modern "initiative industry".<sup>188</sup> Political scientists have noted the omnipresence of "highly professional operations dominated by media consultants who run deceptive or simplistic operations" with concern.<sup>189</sup> In 1992, the California Commission on Campaign Financing published a report on ballot initiatives, observing that "Professional signature-gathering firms now boast that they can qualify any measure for the ballot (one "guarantees" qualification) if paid enough money for cadres of individual signature-gatherers, and their statement is probably true. Any individual, corporation, or organization with approximately \$1 million to spend can now place any issue on the ballot". . . . Qualifying an initiative for the statewide ballot is thus no longer a measure of general citizen interest as it is a test of general fundraising ability."<sup>190</sup> The rising use of paid petition-circulators has

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<sup>188</sup> DAVID MAGLEBY, *DIRECT LEGISLATION* 59 (1984).

<sup>189</sup> BETTY ZISK, *MONEY, MEDIA, AND THE GRASS ROOTS* 258 (1987). *See also* SHAUN BOWLER ET AL., *CITIZENS AS LEGISLATORS* 12 (1998) ("An "initiative industry" has evolved, seemingly supplanting the original idea of a populist system that provides access to the legislative process. Composed of law firms that draft legislation, petition managers that guarantee ballot access, direct-mail firms, and campaign consultants who specialize in initiative contests across several states, the industry is visible in nearly all states where initiatives are used frequently."); David McCuan et. al., *California's Political Warriors: Campaign Professionals and the Initiative Process*, in *CITIZENS AS LEGISLATORS*, *Id.*; MAGLEBY, *supra* note 188 at 61-5 (reviewing abusive practices by initiative industry signature-gatherers).

<sup>190</sup> Carolie Tolbert et al., *Election Law and Rules for Initiatives*, in *CITIZENS AS LEGISLATORS*, *supra* note 190 at 35 (Quoting report of California Commission on Campaign Financing: "Democracy by Initiative: Shaping California's Fourth Branch of Government" at 265).

created incentives for ruthless and deceptive practices.<sup>191</sup> Perhaps the most damning evidence is the statement of an immensely successful California petition drive manager, Ed Koupal: “Hell no, people don’t ask to read the petition and we certainly don’t offer. . . . why try to educate the world when you’re trying to get signatures?”<sup>192</sup>

Some states have attempted to limit the damage. Oregon, for example, amended its provisions for direct legislation in 1935 “to prohibit paid signature collection because of fear that wealthy interests were beginning to subvert the initiative process.”<sup>193</sup> In 1974, finding that “voters had been misled, in some campaigns, about the purpose of the petitions they had signed”, California legislators capped early spending on signature-gathering at \$10,000 and prohibiting certain well-known tactics like the use of “dodger cards” which obscure the text of the proposal from the prospective signatory.<sup>194</sup> Illinois required an extraordinary demonstration of popular support, requiring that 25% of registered voters sign a petition for an advisory ballot question.<sup>195</sup>

These and other efforts to revive the integrity of the ballot initiative, however, have been ruled unconstitutional on First Amendment grounds.<sup>196</sup> The use of paid signature gatherers remains a constitutionally protected and omnipresent aspect of modern ballot initiatives. In the context of ETS regulation, where so much hangs on the details of the exemption scheme, this is especially worrying. Misinformation seeded by ambitious signature-gatherers obscures potentially significant aspects of the exemption scheme, and gives initiative drafters little incentive to create responsible exemption schemes.

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<sup>191</sup> JOSEPH ZIMMERMAN, PARTICIPATORY DEMOCRACY: POPULISM REVIVED 49 (1986) (“A major problem with the employment of the petition referendum (and the initiative and the recall) is fraudulent petition signatures. The cost of collecting signatures leads unscrupulous petition circulators to forge signatures on petitions); *Id.* at 59 (“the public can be misinformed by both proponents and opponents of a proposition.”); MAGLEBY, *supra* note 188 at 62 (Voters rarely read the petitions they sign).

<sup>192</sup> Tolbert et. al., *supra* note 190 at 34.

<sup>193</sup> ZISK, *supra* note 189 at 112.

<sup>194</sup> *Id.* at 260-61.

<sup>195</sup> *Georges v. Carney*, 546 F. Supp 469, 477 (N.D. Ill. 1982).

<sup>196</sup> In *Meyer v. Grant*, the Supreme Court unanimously struck down a Colorado statute criminalizing the use of paid petition circulators, rejecting “the State’s arguments that the prohibition is justified by its interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot, or by its interest in protecting the integrity of the initiative process.” 486 U.S. 414, 425 (1988). In *Georges v. Carney*, the Northern District of Illinois invalidated the 25% signature requirement, stating that “we cannot suppose the legislature intended that professional canvassers be employed in order to allow citizens to exercise their statutory right to place on the ballot advisory public questions.” *Id.* at 477.

## DECEPTIVE DRAFTING

The threat of strategic drafting is similarly inextricable from modern ballot initiatives. As Jane Schacter has observed, “the direct lawmaking process gives powerful leverage to initiative drafters, who are situated to construct a phantom popular intent through strategic drafting.”<sup>197</sup> Because voters generally rely on the ballot summary to form an opinion, strategic drafting of the generally unread full-text of direct legislation “enables small groups to appropriate the political authority of the electorate”.<sup>198</sup> Exemption schemes in ETS proposals are particularly liable to this phenomenon, both because they tend to be absent from the public conversation, but also because the fine points of an exemption’s operation requires a sophisticated analysis of the relevant provisions and definitions. As Schacter observes, “The risk of abuse is particularly grave...where the ballot measure is so lengthy or complex that legally significant details can easily be buried.”<sup>199</sup> As Ohio voters discovered to their dismay, the presence of an exemption entitled “Private Clubs” on the ballot and in the text of the initiative provides no guarantee that it will be operational.

Ballot language is a serious problem in the context of ETS legislation. An ETS regime is a complicated series of proposals: though the proposed default rule may be fairly easy to understand, the severity of the measure depends on the exemption scheme, the details of which are poorly captured by a ballot summary. Ballot boards have a powerful incentive to sacrifice completeness for brevity, as voters’ attention spans are limited, and ballots can be quite cluttered. Furthermore, the process of adopting ballot language relies in large part on the good faith of the proponents. Even public hearings, as was unfortunately demonstrated in Ohio, provide no guarantee that ballot language will be accurate.

### C. THE PROBLEM OF VOTER INTENT

The chief reasons why ETS ballot initiatives poorly able to express the considered opinion of the electorate on exemptions are structural.

Interpreting direct legislation results as mandates or expressions of the popular will is . . . problematic. One problem is that voters are not permitted to vote on alternative bills; another is that voters cannot attempt to amend the proposed legislation to make it more acceptable. An additional problem is that voters are limited to an affirmative vote, a negative vote, or an abstention. Because of the

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<sup>197</sup> Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 111 (1995).

<sup>198</sup> *Id.* at 129.

<sup>199</sup> *Id.* at 127.

way in which propositions are worded, voters often must choose the least inaccurate expression of their opinion.<sup>200</sup>

This is not to suggest that ballot results are meaningless. ETS ballot initiatives can reveal general support for some form of ETS regime which reverses the default rule. In Ohio, the broad policy question was certainly apparent: on the one hand, a “smoking ban” which exempted bars and restaurants, and on the other, a smoking ban which did not. Ultimately, the issue at the voting booths was whether or not restaurants and bars deserved *per se* protection from clean air legislation. On this point, the voters spoke relatively clearly.<sup>201</sup> In voting down Issue 4 and adopting Issue 5, Ohio voters denied such protection and reversed the default rule on smoking in public places.

Beyond the default rule, however, ETS ballot initiatives can reveal very little about voters’ intent. This became painfully apparent in Ohio: not only were voters unaware of the operation of the exemption scheme, but when it was implemented, even voters who supported the initiative repudiated significant points. Jane Schacter’s analysis of “the intractable search for popular intent” effectively demonstrates that ascribing a single intent to the passage of a ballot initiative is even more problematic than in the context of conventional statutes.<sup>202</sup> The problem of intentionality in multi-member deliberative bodies is magnified in the context of ballot initiatives, which aggregate “what may be millions of voter intentions.”<sup>203</sup> Additionally, voters are typically uninformed,<sup>204</sup> and strategic drafting may hide significant aspects of the proposal. Thus, “A vote in favor of a ballot question will often signify, at best, an electoral judgment on the salient and general policies in question”.<sup>205</sup>

These problems are particularly acute in the context of ETS ballot initiatives, which present one easily-understood, general proposition (whether or not to flip the default rule) and a number of discrete, detail-oriented proposals (the exemption scheme). Ballot initiatives can certainly serve as referenda on whether a state chooses to switch the default rule, but they cannot express voter intent on exemption provisions.

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<sup>200</sup> MAGLEBY, *supra* note 188 at 183.

<sup>201</sup> Relatively, because some confused voters cast ballots for both incompatible proposals.

<sup>202</sup> Schacter, *supra* note 197, at 123-130. *See also* MAGLEBY, *supra* note 191 at 144 (Concluding that “for many voters, direct legislation can be a most inaccurate barometer of their opinions.”);

<sup>203</sup> *Id.* at 125.

<sup>204</sup> MAGLEBY, *supra* note 188 at 62, 129-30, 144 (reviewing self-reported voter uninformedness); *Id.* at 198 (Describing random voting on ballot questions as “electoral roulette”); *Id.* at 106-8 (Reviewing patterns of voter “drop off” and unrepresentativeness of remaining ballots).

<sup>205</sup> Schacter, *supra* note 197, at 129.

#### D. LIMITED JUDICIAL REMEDIES

Courts, however, adhere to a stylized portrait of direct democracy, and ignore these limitations. In Ohio, frustration with this legal pretense suffused Judge Cain's opinion; other courts have registered similar concerns.<sup>206</sup> As Schacter's survey of relevant caselaw from 1984 through 1994 demonstrates, most courts continue to employ an intentionalist methodology in interpreting direct legislation which renders them powerless to correct the grave procedural dangers presented by ballot initiatives. Not only do courts ignore the severe deliberative deficiencies which characterize ballot initiatives and "hold the legislature and the citizenry to the same standard when interpreting the laws they enact",<sup>207</sup> but courts also "invert the informational hierarchy" in searching for popular intent, relying almost exclusively on formal sources, such as the text of legislation, instead of media sources which more fully express public opinion, such as advertisements and the media.<sup>208</sup>

Legal scholars have proposed interpretive methodologies which might empower courts to align direct legislation more closely with the will of the electorate through active interpretation of key provisions. Julian Eule proposes that courts take a "harder look" at ballot initiatives when constitutional rights are implicated.<sup>209</sup> Schacter proposes a compelling "metademocratic" interpretive framework, whereby courts acknowledge the problems inherent in ballot initiatives and apply more rigorous judicial oversight accordingly, perhaps looking beyond the text of the statute to other sources of public opinion or interpreting ballot initiatives as "a general policy directive rather than a vehicle for enacting specific rules in complex areas."<sup>210</sup>

Even if adopted, however, these approaches cannot fully remedy the deficiencies of ETS legislation by ballot initiative. Eule's model, relying on more rigorous constitutional analysis, does not apply to ETS regulation, which is quite properly within the bounds of a state's police power. Schacter's proposals rely on the existence of provisions ripe for interpretation. Her interpretive model might provide Ohio courts with a basis for giving force to the private club exemption, but exemption areas which were not drafted into the proposal cannot be interpreted into existence *ex nihilo*. Moreover, the resources required to pursue an

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<sup>206</sup> See, e.g., *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 799 P.2d 1220, 1235 (Cal. 1990) ("[T]his court must on occasion indulge in a presumption that the voters thoroughly study and understand the content of complex initiative measures"); *Lemon v. United States*, 564 A.2d 1368, 1381 (D.C. 1989) ("The difficulties inherent in discerning the collective intent of a legislative body...are even more pronounced where the decision was made by the electorate").

<sup>207</sup> *Backman v. United States*, 516 A.2d 923, 926 (D.C. 1986).

<sup>208</sup> Schacter, *supra* note 197, at 130.

<sup>209</sup> Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L. J. 1503 (1990).

<sup>210</sup> *Id.* at 163.

interpretative challenge would most likely present exemption areas with an insuperable obstacle. The Ohio lawsuit was brought by the Attorney General's office: if the Department of Health had not attempted remedial action which implicated statutory interpretation, private clubs may not have been able to contest the provision. Certainly, as testimony from the hearing on the theater exemption made clear, performing arts spaces cannot afford litigation, and much smaller operations such as cigar bars and hookah bars would be similarly unable to contest exemption provisions.

ETS ballot initiatives are largely judicially irremediable. Interestingly, the ultimate remedy has not been formally foreclosed: the Supreme Court has not determined whether or not direct legislation is compatible with the Guaranty Clause, holding in 1912 that the question was properly for Congress.<sup>211</sup> It is clear, however, that state constitutions which include such provisions do so at their own peril.<sup>212</sup> Courts have prevented states from implementing procedural requirements which would ameliorate the more egregious abuses of the balloting process – the First Amendment precludes limitations on the use of paid petition-gatherers, or requirements that high percentages of public support be demonstrated before a proposal can be certified for the ballot.<sup>213</sup> Courts, in short, have limited ability to remedy clumsy ETS legislation passed by ballot initiative.

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<sup>211</sup> *Pacific States Telephone and Telegraph Co. v. Oregon*, 223 U.S. 118 (1912).

<sup>212</sup> See *Georges v. Carney*, 546 F. Supp. at 477 (“[A]lthough the right to place a question on the ballot is not fundamental in Illinois, the legislature has seen fit to confer such right. Once Illinois decided to extend this forum, it became obligated to do so in a manner consistent with the Constitution.”)

<sup>213</sup> *Meyer v. Grant*, 486 U.S. 414 (1988); *Georges v. Carney*, 546 F. Supp 469 (N.D. Ill. 1982).

#### IV. A PROPOSAL

*Wandering between two worlds, one dead  
The other powerless to be born  
-Matthew Arnold<sup>214</sup>*

States have made laudable progress in reversing the default rule on smoking in public. Recent years, however, have seen a rising tide of ETS ballot initiatives, bearing many of the same worrying features of Ohio's Smoke Free Workplace Act. Florida's Clean Air Indoor Act was the first statewide ban passed by ballot initiative, in 2002.<sup>215</sup> In 2005, the American Cancer Society and its affiliates passed Initiative 901 in the state of Washington. In 2006, the American Cancer Society and its affiliates passed three bills by statewide ballot—in Ohio, Nevada, and Arizona. These bills are among the most draconian nationwide – Washington's is the most severe, followed closely by Ohio and Arizona. These ballot campaigns were bipolar affairs, pitting legislation drafted by the American Cancer Society against competing initiatives supported by hospitality organizations and the tobacco industry (or, in the case of Nevada, gambling trade associations), and exemption areas were marginalized.

As the foregoing Part suggests, ballot initiatives are a problematic vehicle for ETS legislation. As ETS ballot initiatives proliferate, the need to evaluate and possibly amend this legislation becomes increasingly acute. In this Part, I contend that state legislatures must devote specific remedial attention to ETS bills passed by ballot initiative. To assist legislators in this task, I propose a balancing test for use in evaluating exemption proposals.

##### A. THE QUESTION OF DEFERENCE

Ballot initiatives are prone to produce bad ETS legislation. Courts are unable to—indeed should not—undertake to make bad law good, and exemption schemes present policy questions which implicate neither state nor Federal constitutions. Executive agencies are bound to enforce the text of these bills, and advocacy groups enthusiastically police their efforts. Remedial action, therefore, is incumbent upon state legislatures, who can supply the deliberation and interest representation in proportion to the deficiencies apparent in ballot campaigns.

In amending exemption schemes, however, legislators are confronted by a vexing question of deference. Though ballot initiatives can only meaningfully express a public consensus on reversing the default rule, vested interests pressure legislators against amending ETS bills, irresponsibly claiming a popular mandate

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<sup>214</sup> *Stanzas From the Grand Chartreuse*

<sup>215</sup> F.S.A. § 386.201 (2007).

on specific provisions in the text of the legislation and condemning efforts to undermine the ‘intent of voters’.

Legislators are saddled with an anachronistic view of direct legislation, but a glance at how the populist roots of the ballot initiative have been undone by the rise of the modern initiative industry should counteract legislative reticence. Direct legislation in American states is the product of a particular historical moment in which rampant corruption in state legislatures created a siege mentality between the electorate and its representatives. The ballot initiative was born in the Midwest and West with the rise of the Populist Party in the last decade of the nineteenth century, and spread rapidly to over twenty states in the first decades of the twentieth century during the Progressive era.<sup>216</sup> Pushed at a grass-roots level by cause organizations, notably “grange organizations, single-taxers, socialists, labor groups, prohibitionists, and evangelists”, this new mechanism was introduced to combat the operation of machine politics in legislatures dominated by the influence of powerful special interests, notably railroads and large industrial corporations.<sup>217</sup>

As the twentieth century wore on, however, the professionalization of direct legislation subverted the Populist ideal of direct democracy as the grass-roots expression of an enlightened electorate. In this unanticipated environment, “interpreting direct legislation results as mandates or expressions of the ‘popular will’”, as the most comprehensive study of voter behavior in ballot initiatives concludes, is “problematic”.<sup>218</sup> We have already reviewed the excellent work of political scientists and legal academic, which has swept the veil from our deformed descendent of direct democracy’s early ideal. We know quite well that ballot initiatives cannot reveal intent on legislative niceties. Legislative deference to exemption provisions on the theory that they represent the specific intent of voters is either little more than self-indulgent sloth, or little less than cowardice.

Legislators may also be cowed into silence by political pressure. Legislators are loathe to disturb ETS legislation, fearing the political consequences of running afoul of the special interest groups keen to reconstruct the “intent” of the legislation and incurring charges of abrogating the will of the people.

Given the inability of ballot initiatives to express popular will on discrete, specific points, however, and the particular liability of ETS ballot initiatives to procedural concerns, legislators should not be shamed by a stylized portrait of

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<sup>216</sup> See generally MAGLEBY, DIRECT LEGISLATION (1984); THOMAS CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL (1989); SHAUN BOWLER ET AL., CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES (1998).

<sup>217</sup> Shaun Bowler and Caroline Donovan, *An Overview of Direct Democracy in the American States*, in CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 2, 12 (Bowler et al., eds., 1998).

<sup>218</sup> Magleby, *supra* note 217 at 183.

direct legislation into deference to specific exemption provisions. Rather, legislators should take up the gauntlet and examine the exemption schemes of ballot initiatives directly. As Madison put it in Federalist 10, representative governments should serve “to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country.”<sup>219</sup> To do otherwise is to become complicit in what Schacter has accurately described as the “appropriat[ion]” of political authority by well-funded but unrepresentative interest groups.

## B. A BALANCING TEST FOR EXEMPTIONS

Legislators, however, are presently ill-equipped to analyze the exemption areas. The pluralist ideal of comprehensive interest representation has failed in the context of ETS legislation, and debates concerning proper exemptions have been crippled by extremism. The interests well-funded enough to exert significant pressure on legislators or influence the adoption process – hospitality trade organizations, Big Tobacco, and advocacy groups – recreate the problem of interest representation at legislative hearings on proposed exemptions, and revive a pernicious obsession with “voter intent”. As a result, perspectives which should be considered in the context of exemption schemes, or moderate arguments for the narrow tailoring of ETS legislation, may be shouted over.

The secondary literature currently available is similarly impoverished by polarization and unlikely to assist legislators in considering proposed exemptions. On the one hand, critics of ETS legislation tend towards libertarian zealotry, opposing ETS legislation in principle instead of encouraging moderation compatible with the larger aims of ETS legislation.<sup>220</sup> Proponents, on the other hand, tend to be equally immoderate, and push well beyond the purview of responsible ETS legislation. No study which supports ETS legislation but demands closer attentiveness to the exemption schemes has yet emerged.

Legislators need both courage to address ETS exemption schemes, and the analytical tools with which to do so effectively. I believe that a balancing test will assist legislators on both fronts. Emboldened by reliance on a neutral analytical tool, tailored specifically to address documented deficiencies inherent in ETS ballot initiatives while remaining compatible with the function of an effective ETS regime, legislators may be more willing to revisit the legislation. Focusing attention specifically on the merits of particular exemptions in the context of a rational, coherent, and narrowly tailored ETS regime, such a balancing test would provide clarity amidst the fanciful *ex post* reconstructions of special interest lobbyists and enable specific exemption areas to be considered on their merits.

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<sup>219</sup> THE FEDERALIST No. 10 (Madison).

<sup>220</sup> See *Supra* note 21 (reviewing oppositional literature).

Accordingly, I propose the following test for use in considering proposed exemptions to ETS regimes. On the one side of the scale lies the extent to which the proposed exemption area offends the essential purpose of ETS legislation – to eliminate involuntary exposure to second-hand smoke in public. On the other side of the scale lie any virtue defenses the proposed area may have to offer. If the virtues outweigh the vice, exemption is proper.

In asking legislators to examine the extent to which a proposed exemption area offends the purpose of ETS legislation, the first prong of the balancing test foregrounds the fact that exemption candidates may offend the function of ETS legislation in different degrees and different ways, and may warrant correspondingly greater or lesser degrees of state intrusion. The actor smoking a cigarette onstage presents a different circumstance than the veteran who smokes in his room at the nursing home, and an Egyptian native's desire to smoke hookah at a neighborhood shisha café may be distinguished from a diner's desire to have a cigarette after a meal in a crowded restaurant populated by smokers and nonsmokers alike. As Part I demonstrates, a number of different conclusions may be possible on the extent to which these areas warrant exemption. The choice of exemptions represents a judgment on fine points of an ETS regime, a judgment ballot initiatives cannot express, and a judgment prone to distortion by vocal interest groups. In focusing legislative attention on the precise degree to which an exemption candidate may offend the statutory purpose, this prong requires states which choose to institute extremely severe regimes confront the variable ways in which exemption areas offend the function of ETS legislation. Exemptions should, after all, be narrowly tailored within the context of an ETS regime and neither undermine its essential function, nor outstrip it.

The second prong of the balancing test requires an evaluation of any virtues the proposed area may offer society – the reasons it warrants exemption. This “virtue defense” prong provides for the aggregation of “soft” factors which lie between the twin poles of health advocacy groups and their libertarian opponents to be considered. Legislating the public health bears consequences in several different areas of concern to the state, which may lack a designated scholarly niche or mobilized pressure groups. As will be developed *infra*, public health measures can have significant effects on core elements of our democracy. The vitality of cultural institutions, local traditions, artistic liberty, community life, and other pragmatic concerns may all play different roles in how a particular state might consider exemption areas, and this prong provides legislators with a way precisely to account for these inchoate factors against the extent to which they offend the default purpose of ETS legislation.

Significantly, this second prong avoids the deliberative stalemate of characteristic of ETS debates. Autonomy arguments are often intractable, and in

the context of ETS legislation, must be subordinated to the public health function of the regime. Some exemption areas, however, pose little or no threat to the function of an effective ETS regime. By reframing the question from the usual balancing of autonomy concerns against public health benefits, to an analysis which accepts the necessity of reversing the default but focuses on the exemption scheme, this second prong enables legislators to measure the precise degree to which a given area offends the statutory purpose directly against the virtues of exemption without succumbing to the binary stalemate to which ETS debates have been prone.

## V. TOBACCO LOUNGES

*It is our task not to complain or condone but only to understand.*  
-Georg Simmel<sup>221</sup>

To illustrate the operation of the balancing test proposed above, Part V demonstrates its application to an exemption area which appears in many statewide ETS regimes, the tobacco lounge. As we have seen, some states provide tobacco lounges with a permanent *per se* exemption, generally defining the establishments as those which derive a large percentage of revenue from the on-site sale of tobacco products. Others include a limited grandfather clause exemption for cigar bars, unwilling to countenance immediate destruction of local or cultural landmarks, or perhaps unwilling to provide proprietors of existing tobacco lounges with the incentive to raise strenuous and perhaps compelling objections. Finally, Class V regimes simply prohibit the operation of tobacco lounges altogether. Conceptual boundaries, however, are not always neatly drawn, leading to confused implementations of exemptions relating to tobacco lounges. Some states preserve a retail exemption, but not a cigar bar exemption, so retailers have begun to construct smoking lounges to provide a home for vagrant regulars of disestablished cigar bars.<sup>222</sup> Some states exempt hookah bars, but not cigar bars, and others have done the opposite. These uncompromising ETS regimes have produced “smokeasies”, or underground smoking bars, in many cities.<sup>223</sup>

Some of the confusion can be attributed to the fact that tobacco lounges, a rare species of public establishment, are poorly understood. Legislators may lack familiarity with cigar bars. Additionally, many shisha cafes and hookah bars are cultural outposts in ethnic enclaves which interface infrequently or ineffectively with the machinery of state and local government. As a result, tobacco lounges are often analytically undifferentiated from conventional bars and cafes, the primary target of ETS legislation.

Furthermore, tobacco lounges rarely have informed advocates who can effectively assess their proper place within ETS regimes. Comprising a tiny slice of hospitality markets, and unrepresented by specific lobbies or activist groups, these establishments must rely on membership in licensed beverage associations

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<sup>221</sup> Georg Simmel, *The Metropolis and Mental Life* (1903), in GEORG SIMMEL ON INDIVIDUALITY AND SOCIAL FORMS 324-340 (Donald N. Levine, trans., 1972).

<sup>222</sup> David Savona, *A Smoker's Last Refuge*, CIGAR AFICIONADO, Nov. 28, 2007 (noting trend among retail shops to create smoking lounges).

<sup>223</sup> See, e.g., Charlie Vascallero, *Smoke-easies Offer Cover From Puff Police; Aficionados Just Want A Place To Light Up, Relax*, THE WASHINGTON TIMES, Nov. 20, 2003, at M14; Stu Bykofsky, “Smoke-easys” Ignore The Tobacco Ban, THE PHILADELPHIA DAILY NEWS, Mar. 26, 2007. Some attempts are more creative, including “theater night” at Minneapolis bars, designating costumed patrons “actors” and their cigarettes “props”. This attempt failed. See

which take a much more absolutist and oppositional approach than is appropriate in the context of tobacco lounges. General hospitality lobbies have no interest in demonstrating the unique circumstances of such a narrow interest, however compelling, for to do so would be to undercut their more sweeping, industry-wide opposition to the proposals. Indeed, it can be far easier for legislators to ignore the conceptual difficulties posed by tobacco bars than it is to tailor legislation closely to their circumstances within an ETS regime. Under these circumstances, the application of our balancing test to the tobacco lounge exemption is especially warranted.

The application of this test will aid legislators in isolating the merits and demerits of the tobacco lounge exemption. Additionally, the test will also aid legislators in evaluating different types of tobacco bar exemptions, a function particularly useful given the panoply of available exemption mechanisms.

In this section, then, I apply the balancing test in detail to tobacco bar exemptions. I begin by establishing portraits of the two most common types of tobacco lounges. Then I consider the extent to which tobacco lounges infringe the statutory purpose of ETS legislation, and evaluate virtue defenses tobacco lounges may offer. After weighing these two prongs, I proceed to evaluate different tobacco bar exemption mechanisms in the context of the virtues and vices illuminated by the balancing test. Finally, I propose a new mechanism for the exemption of tobacco lounges within the context of effective ETS legislation.

#### A. SHISHA CAFES AND CIGAR BARS

There are two types of tobacco lounge: the cigar bar, and the shisha café or hookah bar. The hookah bar, a modern descendent of the traditional Middle Eastern coffee house, is a small café in which patrons gather to drink coffees or teas and smoke shisha, a fruit-flavored tobacco, through an elaborate, stationary water-pipe called a hookah or *nargile*.<sup>224</sup> Typically owned by Yemeni, Moroccans, Egyptians, and other Arab nationals, shisha cafes function as cultural centers in traditionally Middle Eastern enclaves in major cities.<sup>225</sup> Smoking a

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<sup>224</sup> James Grehan, *Smoking and Early Modern Sociability: The Great Tobacco Debate in the Ottoman Middle East*, AM. HIST. REV. 1352, 1356 (Dec. 2006) (“First popularized in India and Iran during the early seventeenth century, [the hookah] had quickly migrated westward to the Ottoman Middle East.”)

<sup>225</sup> Bill Werde, *NEW YORK SMOKING; A Sad Ballad for the Water-Pipe Cafes of Astoria*, N.Y. TIMES, Feb. 23 2003 (quoting patron as explaining “Shisha to an Arab is like cappuccino to an Italian. If this café closes, my social life will be shut down.”); Corey Kilgannon, *A Cultural History Faces Stringent Smoking Laws*, N.Y. TIMES, Mar. 9 2004 (reviewing shisha cafes “owned mostly by Egyptian immigrants” who “contend that hookah smoking is a vital part of their culture.”).

hookah takes between forty minutes and two hours.<sup>226</sup> Increasingly, college students have become occasional patrons of hookah bars.<sup>227</sup> Patrons gather at hookah bars for shisha, culture, and camaraderie, finding hookah bars uniquely conducive to public sociability.<sup>228</sup>

The cigar bar is a similarly small operation in which patrons gather primarily to smoke cigars. An intimate establishment with few employees—typically a bartender or barista, and a cigar expert—cigar bars function as local gathering places in urban areas. Unlike shisha cafes, cigar bars are often licensed premises, serving cocktails and liquors in the evenings, though during the afternoons many serve espresso drinks. Beverages, however, are a peripheral complement to the primary item sold at cigar bars, the cigar. Cigar bars sell only so-called “premium” cigars, or hand-rolled cigars consisting of long-leaf tobacco made by family-owned companies in Honduras, Nicaragua, or the Dominican Republic.<sup>229</sup> Sold for consumption on the premises, premium cigars are stored in large wall-mounted humidors, and some cigar bars rent out “lockers”, or small humidors in the wall, in which regular patrons can keep their favorite cigars.

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<sup>226</sup> Kandela, *Nargile Smoking*, (Distinguishing *nargiles* – “which take at least an hour to finish” and “are for people who want to ‘get away from it all’ and have a ‘philosophical’ discussion” – from cigarettes – which are “for busy people who are always on the move”). For a detailed description of the operation of a shisha pipe, see Sebnem Timur, *The Eastern Way of Timekeeping: The Object and Ritual of Nargile*, DESIGN ISSUES 2, Spring 2006, at 19-20.

<sup>227</sup> Tamar Lewin, *Collegians Smoking Hookahs... Filled With Tobacco*, N.Y. TIMES, April 19, 2006 (quoting collegiate patron: “It’s just a nice way to relax and be sociable”).

<sup>228</sup> Peter Kandela, *Nargile Smoking Keeps Arabs in Wonderland*, THE LANCET vol. 356, p. 1175 September 30, 2000 (“In traditional Arab society...the *nargile* signifies a social occasion in which everyone can participate”); Kilgannon, *Cultural History* (Quoting patron: “Smoking [shisha] brings our people together.”); Werde, *Sad Ballad* (quoting patron: “people come to these cafes to sit with friends and smoke shisha.”).

<sup>229</sup> The designation “premium” does not reflect pricing, which can range from \$3 to over \$20. It merely distinguishes the cigars from the flavored, machine-made “blunts” with cardboard fillers and chemical additives sold at drugstores and gas stations. See NATIONAL CANCER INSTITUTE, NCI SMOKING AND TOBACCO CONTROL MONOGRAPH NO. 9: CIGARS: HEALTH EFFECTS AND TRENDS (1998) (Hereafter “NCI Monograph”). Cigar bars do not carry “blunts”. This point deserves particular emphasis, because the important distinction has been blurred by health advocates who have targeted a rise in “cigar” smoking among urban youth, in recent years, as part of a call for stricter measures. Incredibly, the NCI monograph fails to differentiate, except to note that these “blunts” accounted for over 60% of cigar sales. Premium cigars accounted for 6.5%. NCI Monograph at 52. In the context of cigar bars, this could not be more misleading. These studies conflate what most cigar smokers would call a cigar with flavored, slightly outsized cigarettes, often padded internally with “filler” cardboard and chemicals. Big Tobacco is responsible for these, with high-selling brands such as Philly Blunts and Swisher Sweets, designating them “cigars” simply to evade the stricter ingredient disclosure requirements triggered by a “cigarette” label. However, these “blunts” are no more cigars than were the brown, cigarette-sized “little cigars” marketed by Big Tobacco in the 1970s to evade television cigarette advertising regulations. See Cristine D. Delnevo, “A Whole ‘Nother Smoke” or a Cigarette in Disguise: How R.J. Reynolds Reframed the Image of Little Cigars, AM. J. PUB. HEALTH, Aug. 2007. See also David Satcher, *Cigars and Public Health*, 340 NEW ENGLAND J. MED. 1829-1831. In failing to distinguish between the very different products, very different consumption habits are conflated.

Cigar bars generally install the most sophisticated ventilation systems on the market. Even in states which exempt cigar bars, there are never more than a few per city – major metropolitan areas may have as many as five,<sup>230</sup> where smaller cities will have fewer<sup>231</sup> and towns and villages rarely have such establishments.

Patrons come to cigar bars primarily to smoke premium cigars.<sup>232</sup> Smoking a premium cigar takes between thirty and sixty minutes, and cigar smokers treat cigars more like a fine wine than a cheap beer, preferring tobaccos from different soils, regions, and different curing processes.<sup>233</sup> Cigar smokers tend overwhelmingly to be “occasional” smokers, enjoying cigars infrequently.<sup>234</sup> An evening at a cigar bar tends to be a social occasion, and cigar smokers gather at cigar bars for an evening of conversation. Indeed, proprietors of cigar bars pride themselves on the conversational and civil character of their destinations. Décor is structured accordingly: couches and clusters of armchairs are the essence of traditional cigar bar décor. Chess tables are a common fixture. Despite the well-known stereotype of cigar smoking as an activity practiced by rich white males on Wall Street,<sup>235</sup> cigar smoking is increasingly gender-balanced<sup>236</sup> and

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<sup>230</sup> New York City has five: the Carnegie Club, Club Macanudo, Bar and Books (Hudson), Bar and Books (Lexington), and Merchant’s NY.

<sup>231</sup> New Haven, CT has one: The Owl Shop.

<sup>232</sup> See Appendix C.

<sup>233</sup> Cigar reviews read very much like wine reviews. See, e.g., Dale Roush, *Camacho Diploma Cigar Review*, CigarJack.net, <http://www.cigarjack.net/2008/03/14/camacho-diploma-cigar-review/#comment-5765>, last visited March 15, 2008 (“The flavors start out nutty with toasted wheat. . . . Leather, exotic spice and damp earthiness join the chorus. The room aroma is heady and intoxicating. In the final third, the cigar just becomes full on power, yet no harshness. Pepper creeps in, the savory grain flavors subside . . . . The finish is long and retains that blend of leathery spice.”).

<sup>234</sup> Cigar smokers in the early years of the twentieth century were more likely to smoke cigars daily. Today, cigar smokers are overwhelmingly “occasional”. See NCI Monograph at iii (“Most cigarette smokers smoke every day. In contrast, as many as three quarters of cigar smokers smoke only occasionally, and some may smoke only a few cigars per year”: in 1990, only 9% of California cigar smokers smoked cigars daily; this had dropped to 4.5% by 1996. See Gilpin and Pierce, *Cigar Smoking in California: 1990-1996*, 16 AM. J. PREVENTATIVE MEDICINE, 195-197 (1999). See also Nyman et al., *Trends in Cigar Smoking and Perceptions of Health Risks Among Massachusetts Adults*, TOBACCO CONTROL (2002) at 26 (“the majority of the young [18-34]men using cigars reported smoking them “some days” (98%) rather than “every day” (2%).”); Appendix C.

<sup>235</sup> See, e.g., WALL STREET (Amercent Films, 1987) (Main character curries favor with Wall Street tycoon Gordon Gekko by delivering a box of Cuban cigars).

<sup>236</sup> Though the profile of the typical cigar smoker is male and educated, this is becoming less overwhelmingly true. See NCI Monograph at 11 (“Increasing numbers of women, who historically have had very low rates of cigar use, are currently smoking cigars.”) A major California study found that “Although cigar smoking is still a predominately male activity, there are indications that younger females, especially current cigarette smokers, are starting to smoke cigars at appreciable rates.” Gilpin and Pierce, *Cigar Smoking*, *supra* note 236 at 199. A study of Massachusetts cigar smokers found that the percentage of women smoking cigars had more than doubled between 1993 and 2000. Nyman et al, *supra* note 234 at 26. Indeed, third-wave feminists have been described as “likely to be found at the ‘local cigar bar’”. Jennifer Purvis, *Grrrls and Women Together in the Third Wave: Embracing the Challenges of Intergenerational Feminism(s)*,

socioeconomically diverse<sup>237</sup> and proprietors pride themselves on inclusiveness.<sup>238</sup>

## B. CONTRAVENTION OF STATUTORY INTENT?

The first prong of test provides an opportunity to consider the specific circumstances of tobacco bars, divorced from imperfect analogies to conventional bars and cafes. Tobacco lounges interface differently with the intent of modern ETS legislation, but these differences are often elided. The purpose of ETS legislation is to prevent involuntary exposure to tobacco smoke. As tobacco lounges are patronized exclusively by consensual smokers, concerns which attach to restaurants and bars simply fail to apply. It would be superfluous to belabor this point, but its simplicity should not undo its force: the primary justification for ETS legislation *does not apply to tobacco lounges*.

By reversing the default rule, modern statewide bans moot the “captive employee” problem to which hospitality workers were once subject. The assignation of this problem to tobacco lounges has always been somewhat unpersuasive. First, they are numerically scarce, making it far easier to get a job at a conventional restaurant or bar than at a rare specialist shop with few employees. Second, employees are largely self-selecting: bartenders often choose to work at tobacco bars, instead of the far more numerous bars and restaurants, because of an interest in the product. Personnel managers, in fact, screen non-smokers for an eminently practical reason: employees uncomfortable in smoky environments will likely be ineffective bartenders in tobacco lounges. In the context of the new default rule created by ETS legislation, however, the “captive employee” argument becomes wholly inapposite. Jobs in tobacco lounges, already scarce and selective for bartenders and baristas who have an interest in shisha or cigars, are coveted by bartenders with smoking habits.

So do tobacco lounges offend the statutory intent of statewide ETS legislation? Simply put, they do not. Patrons actively consent, entering tobacco lounges for the purpose of smoking. As ETS legislation flips the default in the hospitality industry from smoking to non-smoking, jobs at the few tobacco lounges in major metropolitan market become increasingly competitive, and

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NATIONAL WOMEN’S STUDIES ASSOCIATION JOURNAL (Fall 2004) at 96. *See also* Michael S. LaTour et al., *Is A Cigar Just A Cigar? A Glimpse At The New-Age Cigar Consumer*, ACADEMY OF MARKETING SCIENCE REV. (2003) (noting signs that “mixed gender and “all-female” cigar “outings” were becoming part of the cigar culture”).

<sup>237</sup> Though Gilpin and Pierce characterized cigar smokers in 1996 as “predominately male, younger, and more likely to be white, highly educated, and have higher household incomes”, dramatic increases in percentages of cigar-smoking populations were documented among Hispanics and African-Americans, and the lower surveyed income brackets (under \$20,000 and between \$20,000 and \$50,000). Gilpin and Pierce, *supra* note 236. *See Also* Appendix C.

<sup>238</sup> *See* Savona, *supra* note 224.

already dubious concerns about employee coercion disappear. In fact, recent studies suggest that preserving a few public places where smokers can enjoy a cigar or hookah with friends away from the home might actually further the purposes of ETS legislation: economists have found that smokers are smoking more frequently at home after restrictive ETS legislation is passed.<sup>239</sup> In sum, the operation of a tobacco lounge fails to expose unconsenting individuals to second-hand smoke in public, and does not offend the statutory intent of modern ETS legislation.

### C. VIRTUE DEFENSE

Poorly understood and unrepresented by specific lobbies, the civic virtues peculiar to cigar bars and shisha cafes have gone largely unacknowledged. Though the economic arguments unsuccessfully raised by restaurants and bars in opposition to ETS legislation obtain with unique force in the context of tobacco lounges, no affirmative reason for exemption has been heard. In applying the second prong of our balancing test to tobacco lounges, the distinctive and important social role served by these establishments can be accounted for, and an unintended casualty of ETS legislation can perhaps be preserved. Furthermore, understanding the virtues of cigar bars and shisha cafes will assist legislators and health department officials in tailoring exemptions to ensure that only deserving tobacco lounges secure exemptions.

The proposition that public spaces which promote social exchange between members of society play a vital role in a healthy democracy is neither novel nor daring. Sociologists and political scientists have spilled a great deal of ink on this idea, pursuing influential conceptualizations such as Habermas's "public sphere"<sup>240</sup> and Arendt's "public realm".<sup>241</sup> Crudely generalizing, these theses demonstrate the ways in which publicness, particularly in the form of public interactions between individuals which promote the forming of social ties and the exchange of ideas and perspectives, bolsters healthy political community in a democracy by providing an arena where public opinion can be formed,

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<sup>239</sup> See, e.g., Jerome Adda and Francesca Cornaglia, *The Effect of Taxes and Bans on Passive Smoking*, INSTITUTE FOR THE STUDY OF LABOR DISCUSSION PAPER NO. 2191, 19-25 (observing increased exposure of nonsmokers to secondhand smoke produced by the "displacement effect" when smoking is banned in recreational destinations).

<sup>240</sup> Habermas defined his influential conception of the public sphere as "a realm of our social life where something approaching public opinion can be formed." Jürgen Habermas, *The Public Sphere: An Encyclopedia Article*, NEW GERMAN CRITIQUE, Autumn 1974, at 49. See Also Jürgen Habermas, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* (Thomas Burger, trans., MIT Press, 1989).

<sup>241</sup> HANNAH ARENDT, *THE HUMAN CONDITION* (1958).

promoting interaction with and understanding of different perspectives, and encouraging civic engagement and mobilization.

An equivalent wealth of attention has been devoted to diagnosing what emerges as a chief feature of the twentieth century – the erosion of publicness and the disintegration of civic community. Habermas and Arendt foreground these concerns in *The Structural Transformation of the Public Sphere* and *The Human Condition*; similar analyses have followed in their footsteps.<sup>242</sup> The immediacy of these concerns for present-day America has been highlighted by Robert Putnam in his sweeping study of American community and civic engagement, *Bowling Alone*. Bringing a remarkable body of statistical evidence to bear, Putnam paints a disturbing picture of “the decimation of American community life”.<sup>243</sup> By all available markers, every form of community involvement has receded,<sup>244</sup> political participation has plummeted,<sup>245</sup> and informal social connectedness has collapsed.<sup>246</sup> Americans are increasingly unlikely to meet new people, make new friends, are prone to stay at home in the evenings, and are loath to participate meaningfully in civic organizations or politics.<sup>247</sup> This disappearance of “social capital” has, Putnam argues, severely undermined the health of our democracy.<sup>248</sup>

The effects of this phenomenon are particularly stark in cities. Social theorists have long observed the unique predisposition of urban life to erode community ties – the German sociologist Georg Simmel’s important early observations in “The Metropolis and Mental Life” of the blasé attitude, the ‘privilege of suspicion’ and public reserve, and the atmosphere of individuated isolation as essential elements of life in the modern metropolis, have been sustained throughout the twentieth century.<sup>249</sup> Recently, the call has been raised for renewed attention to the effects of the character of urban life on the health of American democracy.<sup>250</sup>

These trends throw the virtues of tobacco lounges into sharp relief. Given the importance of the public sphere, and its striking recession, public places

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<sup>242</sup> See, e.g., RICHARD SENNETT, *THE FALL OF PUBLIC MAN*.

<sup>243</sup> ROBERT PUTNAM, *BOWLING ALONE* 42 (2000).

<sup>244</sup> *Id.* at 41.

<sup>245</sup> *Id.* at 38-9.

<sup>246</sup> *Id.* at 108 (“Informal social connectedness has declined in all parts of American society”).

<sup>247</sup> *Id.* at 154-66.

<sup>248</sup> *Id.* at 339-349.

<sup>249</sup> See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961) (highlighting the disassociative pressures of city life); RICHARD SENNETT, *THE FALL OF PUBLIC MAN* (1974) (surveying the “end of public life” in cities against a backdrop of the eighteenth-century metropolis).

<sup>250</sup> Susan Bickford, *Constructing Inequality: City Spaces and the Architecture of Citizenship*, *POLITICAL THEORY*, Jun. 2000, at 355-376 (seeking “to reconnect political theory to the study of cities by probing the link between built environment, public life, and democratic politics.”)

conducive to its expression assume heightened importance. Habermas located the inception of the public sphere in the English coffee houses of the eighteenth century – those cheery places, conceptually situated between the privacy of the home and the formal publicness of state affairs, where patrons gathered to drink a “dish” of coffee, smoke a tobacco-pipe, and discuss affairs of common concern. The aristocracy was brought face-to-face with “intellectuals of the middling sort”, and conversation was grounded by the literary and political pamphlets strewn about the coffee houses. By this measure, “something approaching public opinion” without the artifice of state was produced. The finer points of Habermas’ description of the eighteenth-century English coffee house has been picked at by historians for its descriptive accuracy, but, as has been observed, his articulation of the virtues inherent in these places is better understood as comprising a normative claim for their value.<sup>251</sup>

The coffee-house has long served as the paradigm-setting anchor for a vibrant public sphere.<sup>252</sup> In modern times, an analogue to these observations on the role of the English coffee houses has been introduced by Ray Oldenberg, who finds particular value in what he calls “the third place”, or those places where informal conversation and interaction arises between non-intimates in public.<sup>253</sup> In *The Great Good Place*, Oldenberg makes a case for a similar role played by modern-day coffee shops,<sup>254</sup> but as the leading scholar of coffee-houses has observed, “in their ubiquity, and uniformity, the branded coffee-shops also seem to reinforce the feelings of emptiness and alienation caused by modern life.”<sup>255</sup> Local, independent coffee-houses may function analogously to the English coffee-houses of old, sponsoring book discussions, reading groups, and distributing local pamphlets and bulletins, but the dominance of branded chains and an oppressive to-go mentality have increasingly eroded the ability of modern-day coffee shops effectively to discharge the expectations of their archetype.

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<sup>251</sup> MARKMAN ELLIS, *EIGHTEENTH CENTURY COFFEE HOUSE CULTURE, VOLUME I: RESTORATION SATIRE xvii* (2006).

<sup>252</sup> The nineteenth-century English social historian Leslie Stephen identified the community of opinions created within the coffee houses as “the town”, or “the literary organ of society”. In 1913, Harold Victor Routh explored the role of the coffee-house in the social fabric of the metropolis, crediting these places with creating new affinities between members of different social classes. In the 1930s, the inescapable social historian George Macaulay Trevelyan echoed these conclusions and eulogized the role played by coffee houses in shoring up democratic liberties: “The ‘universal liberty of speech of the English nation’ uttered amid clouds of tobacco smoke, with equal vehemence whether against the Government or the Church, or against their enemies, had long been the wonder of foreigners; it was the quintessence of Coffee House life.” Just before Habermas began his post-doctoral dissertation, the sociologist Hans Speier observed the vital role played by the English coffee-houses in “forg[ing] the prominent role of public opinion in democratic politics.” See generally *id.* at xvii-xxiv (Reviewing historiography of coffee house culture).

<sup>253</sup> Ramon Oldenberg and Dennis Brisset, *The Third Place*, J. QUALITATIVE SOCIOLOGY (1982).

<sup>254</sup> RAY OLDENBERG, *THE GREAT GOOD PLACE* (1999).

<sup>255</sup> ELLIS, *supra* note 257, at xiii.

Tobacco lounges in modern cities, however, have taken up the role attributed to the early coffee-houses and abandoned by their modern, branded counterparts. Indeed, Habermas' typology of the elements which made coffee-houses such exemplary foci for the public sphere applies neatly to tobacco lounges.<sup>256</sup> Tobacco lounges, to a greater or lesser degree, contain the essential elements of the coffee houses Habermas found so crucial to the public sphere: conducive to an unfettered range of debate and conversation, relatively non-hierarchical, and accessible and inclusive.

First, and most importantly, tobacco lounges are centers of public conversation. This is partially inherent in the nature of the product – patrons associate the cigar or hookah with conversation, and their expectations shape social interactions at tobacco lounges.<sup>257</sup> Indeed, in both cases, the product is extremely conducive to conversation – a premium cigar or a shisha pipe takes a relatively long time to smoke, creating a situational stability which encourages longer and more in-depth discussions. Additionally, conversations frequently spring up between complete strangers who share this common interest.<sup>258</sup> As tobacco lounges constitute a “niche” market, the shared interest in cigars or shisha is far more facilitative of informal social interactions between non-intimates than the default affinity for libations shared by patrons of conventional bars. Evidence can be found all over the Internet: as ETS legislation eliminates local tobacco lounges, a rich online community of cigar enthusiasts has grown up in chat rooms and discussion boards, seeking to recreate online the conversations which have been prohibited in public.<sup>259</sup>

The traditionally conversational character of tobacco lounges drives is reinforced by structural and operational features. Unlike conventional bars, tobacco lounges remain open during the daytime hours, and the atmosphere during daytime hours is even more conversational. Indeed, patrons of tobacco lounges become irritated when their local institutions become more like conventional bars, increasing volume levels and patron density.<sup>260</sup> The physical arrangement of tobacco lounges promotes relaxed conviviality – ottomans, lounge chairs, and small tables are the norm, instead of standing-room cocktail tables or a

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<sup>256</sup> Markman Ellis characterizes these elements as (1) non-hierarchical, (2) encouraging an unfettered range of debate and conversation, and (3) accessible and inclusive. *Id.* at xv.

<sup>257</sup> See LaTour, *supra* note 236; Appendix C.

<sup>258</sup> 45% of survey respondents at the Owl Shop reported conversing “often” with new people; 41% reported doing so “sometimes”. See Appendix C.

<sup>259</sup> A thriving online community of cigar-smokers, discussing everything from cigars to music, sports, and politics, has emerged. See, e.g., [www.botl.org/community/forums](http://www.botl.org/community/forums); [www.socialcigar.com](http://www.socialcigar.com).

<sup>260</sup> Dave Thier, *Owl Shop: Old Yale in New Haven*, YALE DAILY NEWS, Nov. 9, 2007 (longtime patron disgusted with bar-like atmosphere at night).

monolithic bar.<sup>261</sup> Additionally, tobacco lounges effectively bear the costs of multiple periodical subscriptions, which, as they did in eighteenth-century England, promotes a lively and engaged reading culture and serves to ground conversation.

Second, tobacco lounges are non-hierarchical. Patrons are surprisingly socioeconomically diverse,<sup>262</sup> and represent a wide range of occupations.<sup>263</sup> Certainly the products are not priced prohibitively: a cigar or shisha costs about as much as a drink at a conventional bar, and lasts much longer.<sup>264</sup> Cigars are no longer the province of Wall Street fat cats; hookah is no longer an ethnic curiosity. In remaining open during the daytime hours, the tobacco lounge can serve as a gathering place for individuals in different professions, particularly the hospitality industry and retirees, who might otherwise not join the “happy hour” crowd.

Third, tobacco lounges are accessible and inclusive, serving in many cases as a center of local or cultural community. Operational characteristics help to explain this phenomenon – in remaining open during the daytime, tobacco lounges assume a perpetuity in the social life of a city which conventional bars are unable to replicate. The uniquely conversational nature of tobacco lounges serves to make these places particularly inviting for local residents in search of relaxed, informal time with fellow residents. For shisha cafes, the accretion of local character is related to cultural traditions – the hookah bar functions as a neighborhood gathering place for Middle Eastern residents. The inviting character of cigar bars develops along more strictly local lines – cigar bars function as gathering places for those who enjoy cigars, and assume a local character and identity along with a crowd of regulars.

In asserting the uniquely conversational aspect of tobacco lounges, it is not necessary to claim that the social capital of a city relies exclusively on tobacco lounges. It is sufficient simply to note that tobacco lounges can be a fertile source for social capital and community vitality. We do not presume that all tobacco lounges meet the aspirations of the ideal “third place”, nor do we make the case that the shisha café or cigar bar is a perfect microcosm of political society – a melting pot of diverse interests and viewpoints, invariably erupting into rich discussion on pressing issues of social import. Perhaps some are, but they needn’t be. Nor do we assert that the cigar bar or shisha lounge is so inviting and accessible as to exercise an inexorable draw on all passers-by. Tobacco lounges

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<sup>261</sup> See Vascallero, *supra* note 223 (quoting patron ““There’s a certain atmosphere about a cigar bar where you feel more relaxed.””)

<sup>262</sup> NCI MONOGRAPH at 36; *see also* Gilpin & Pierce, *supra* note 237.

<sup>263</sup> *See* Appendix C.

<sup>264</sup> *See* Lewin, *supra* note 227 (student patron explaining relative inexpensiveness of a night at a hookah bar).

do, however, welcome individuals interested in cigars or shisha, interests which cut across factors which have historically been linked with exclusion and hierarchy, such as race, class, and gender.

Tobacco lounges, where they survive, play a role in modern cities which is both increasingly rare and valuable, functioning as a rich locus for the expression of the public sphere. As Habermas observed, “A portion of the public sphere comes into being in every conversation in which private individuals assemble to form a public body”.<sup>265</sup> Places which promote this phenomenon warrant special attention. Not all individuals enjoy cigars or smoke hookah, but the tobacco lounge nonetheless creates a vibrant public sphere where individuals from widely varying walks of life assemble to enjoy a common pastime and conversation. And according to scholars who evaluate the health of democracy in modern America, this is precisely what we need more of.

#### D. EVALUATION

Weighing the prongs of our balancing test, we find a relatively close case, but one which ultimately favors the exemption of tobacco lounges. On the one hand, though the tobacco lounge plays a unique role in the social fabric of a city and addresses a pressing item of concern to American democracy, it is hardly the keystone by which the entire edifice will stand or fall. On the other hand, the tobacco lounge fails entirely to offend the purpose of statewide ETS regimes. With an informed and consenting patron base, the open and notorious shisha cafe or cigar lounge presents a fundamentally different case than restaurants and bars, the main targets of ETS legislation. Employees are fully on notice of the centrality of their product to the establishment, and the rarity of tobacco lounges in the hospitality industry means that the choice to work at such an establishment is not only meaningful, but jobs are hotly contested. Moreover, a regime which prevents consenting individuals from assembling away from non-smokers for the purpose of smoking shisha pipes or cigars more severely offends general notions of personal autonomy than does a prohibition on smoking in restaurants. In the absence of specific guidance from ballot initiative states on this point, or clearer statements of legislative intent beyond a “broad construction” clause and general solicitude for the health of employees, failure to exempt tobacco lounges which present a unique circumstance under a conventional ETS regime simply exceeds the regulatory warrant.

On balance, then, the tobacco lounge should receive some form of exemption from ETS legislation. Both sides of the scale are weighted lightly, but

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<sup>265</sup> See Habermas, *The Public Sphere: An Encyclopedia Article*, NEW GERMAN CRITIQUE, Autumn 1974, at 49.

the balance clearly favors exemption. In an age characterized by the recession of the public sphere, places which promote its expression are uniquely valuable, and we should not eliminate them if we can conscientiously avoid doing so.

#### E. EXEMPTION SCHEMES

The question arises, however, how exempt? Given the panoply of available models, legislators may find it difficult to evaluate the merits of exemption schemes. Happily, in focusing attention on the merits and characteristics of the tobacco lounge, the balancing test can provide useful guidance. On the one hand, care must be taken to ensure that the first side of the scale does not become overbalanced, and that conventional bars and cafes do not secure frivolous exemptions and subvert the default rule. On the other hand, the virtues of the tobacco lounge must be enabled by the exemption. Care must be taken to ensure that the exemption is meaningful; that clever definitions or practical consequences do not render the exemption illusory.

Ohio's proposed amendment fails the first avenue of analysis. Merely by constructing some form of on-site, walk-in humidior, and purchasing an inexpensive air filter, a bar can become a "cigar bar" and permit its patrons to smoke. On the second, as we have seen, cigar bars and shisha cafes bear virtues precisely because their products – premium cigars and hookah – are conducive to conversation and local traditions. Permitting any bar with the wherewithal to engage in minor remodeling to become a dumping ground for revelers who find a cigarette aptly to accompany their drinks unseats the virtue defense. Accordingly, a *per se* exemption defined as in Ohio's Senate Bill 195 is unwise.

Grandfather clauses are similarly problematic. In addition to expressing an inchoate principled basis for exemption, effectively stating "we don't exempt you, but we feel bad, so we'll look the other way," grandfather clauses undermine the second half of the balancing test. Stipulating that any change in ownership renders the exemption moot, grandfather clause exemptions function over the long haul as a death warrant. Additionally, they prevent any future tobacco lounges from opening. If an urban market will support another shisha café or cigar bar, provided some satisfactory definition can be achieved, there is no sound reason to prevent its operation while permitting the older establishment. Finally, and most disturbingly, they grant a functional monopoly to proprietors of tobacco lounges. Proprietors have the incentive to capitalize on their monopoly on smoking in public and cater to the masses of cigarette smokers who have been expelled from conventional bars, and increase the volume of the more profitable

alcohol sales. This irrevocably changes the character of, and undoes the virtues peculiar to, the traditional tobacco lounge.<sup>266</sup>

The best tobacco lounge exemptions currently in place are the *per se* exemptions which define tobacco bars as those receiving a certain percentage of gross profits from the on-site sale of tobacco products for consumption. This scheme effectively balances the competing concerns: it prevents conventional bars from subverting the default rule, and simultaneously protects the shisha or cigar focus of the establishment and preserves the virtue defense. However, given the realities of pricing, and the fact that drinks tend to be more expensive than cigars or hookah, these lines can be difficult to draw. Some establishments have taken to adding a cigar surcharge to meet requirements, some hookah bars simply cease to sell the more expensive alcohols. Most cigar lounges simply raise the prices of cigars, deterring the diversity found in more traditional lounges. Furthermore, with sufficient ingenuity, proprietors of more conventional bars might be able to manipulate ledgers to satisfy exemption requirements. A superior *per se* definition might track the recent Oregon proposal, in preserving the structural characteristics of traditional cigar bars, but again, regulation efforts at this level are likely to be imperfect and exploitable.

One mechanism which has not been proposed, but which may furnish an optimal way to balance the twin concerns inherent in tobacco lounge exemptions, is to be found in local governments. Empowering local boards of health, in conjunction with chambers of commerce, to license the on-site sale of tobacco in much the same way that liquor licenses are currently issued, would permit establishments to be judged on a case-by-case basis, and more precisely evaluated for offense against the integrity of the ETS regime on one hand, and preservation of civic virtues on the other.<sup>267</sup> Establishments which fail to live up to the ideal would be denied licenses. This solution effectively manages the first concern, as boards of health can promulgate guidelines for distinguishing authentic tobacco lounges from mere chameleons. The possibility of institutional overreaching which might undermine the virtues inherent in tobacco lounges might be effectively countered by the inclusion of members of the chamber of commerce on the review committee, and guidance could be provided in the form of a specific committee charge contained in the exemption language which accounts

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<sup>266</sup> Oregon, however, has recently proposed a bill which would create a grandfather clause exemption for cigar bars, but would limit exempted cigar bars to 40 patrons, and prohibit smoking anything but cigars. 2007 OR. LAWS 602. This addresses some of the concerns presented by grandfather clause exemptions, but falls liable to the characteristic inconsistency of principle.

<sup>267</sup> This has nearly been done in Oregon, which provides that the prohibition can be waived by the Department of Human Services “for any public place if it determines that: (1) There are valid reasons to do so; and (2) A waiver will not significantly affect the health and comfort of nonsmokers.” OR. REV. STAT. § 433.865 (2005).

for the fact that the exemption is to be discharged in a manner as consistent as possible with promoting the vitality of local and cultural community at tobacco lounges.

## CONCLUSION

Many states have made inspiring progress in combating the involuntary exposure of their citizens to second-hand smoke, reversing the default rule on smoking in public. Increasingly, Americans live in a country in which smoking in public is generally prohibited, which is a remarkable achievement. Much work, however, remains to be done to ensure that the default rule is reversed in a responsible manner.

In some states, this will mean passing more rigorous legislation. Further study will be required, particularly with regard to the exemption of bars and casinos, which the Surgeon General identified as presenting serious ETS concerns. Presently, four states are considering implementing more meaningful ETS regimes. The Pennsylvania legislature is presently working to reconcile the exemption provisions of two bills currently in session, either of which would create a strong ETS regime.<sup>268</sup> Iowa, South Dakota, and Indiana have legislation pending which would significantly strengthen the operation of their ETS regimes.<sup>269</sup>

In most other states, the challenge will be ensuring that the new default rule is implemented in a responsible manner, tailoring strong ETS regimes to remedy unduly draconian provisions as Ohio struggles to do. Presently, proposed exemptions sit in committee, but the cigar bar exemption is deeply unsatisfactory and in need of redrafting. The Solicitor General of Ohio has asked the state Supreme Court to revisit the private club exemption, presenting an opportunity to remove the veil currently obscuring the deeply worrying passage of the Ohio Smoke Free Workplace Act.<sup>270</sup> Oregon has a reasonably well-drafted bill before

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<sup>268</sup> Two bills were introduced in 2007. The Smoke Free Pennsylvania Act, 2007 PA. S.B. 246, would exempt cigar bars; the Clean Indoor Air Act, 2007 PA H.B. 720, would exempt both cigar bars and private clubs. A compromise committee has been convened to reconcile the two proposals. See Amy Worden, *PA Smoking Ban: Not If, But How*, THE PHILADELPHIA ENQUIRER, Feb. 28, 2008.

<sup>269</sup> H.B. 187, 82<sup>nd</sup> Gen. Assem., 1<sup>st</sup> Sess. (Ia. 2007) (Would undo the pre-emption provisions of the statewide ban); H.B. 1237, 83<sup>rd</sup> Leg. Assem., Reg. Sess. (S.D. 2008) (Would delete provisions from statewide smoking ban which permit smoking on licensed premises); H.B. 1057, 115<sup>th</sup> Gen. Assem., 2<sup>nd</sup> Reg. Sess. (In. 2008).

<sup>270</sup> See *Ohio Lic'd Bev. Assn. v. Ohio Dep't. Health*, Case No. 2008-0356 (Ohio 2008) (docket available at [http://www.sconet.state.oh.us/clerk\\_of\\_court/ecms/resultsbycasenumber.asp?type=3&year=2008&number=0356&myPage=searchbycasenumber%2Easp](http://www.sconet.state.oh.us/clerk_of_court/ecms/resultsbycasenumber.asp?type=3&year=2008&number=0356&myPage=searchbycasenumber%2Easp)). The Solicitor General argues, in support of jurisdiction, that the statute must be construed as a whole to create a meaningful private club exemption. OHIO SOLICITOR GENERAL, MEMORANDUM IN SUPPORT OF JURISDICTION (filed Feb.

it, which would exempt cigar bars. Many other states which have recently implemented Class V regimes would be well served to revisit their exemption provisions.

This Article has attempted to provide some guidance, shedding light on the landscape of laws and highlighting some areas of concern presented by modern ETS regimes. Ballot initiatives, in particular, raise disturbing questions, and tobacco lounges may warrant more attention than they have hitherto received. The balancing test proposed in this Article may offer a useful starting point for considering exemption schemes, which are the beating heart of responsible ETS legislation.

In conclusion, it is useful to be reminded that legislating the public health implicates important questions of both personal autonomy and public sociability. Certainly the Prohibition, if fully implemented, would have produced a healthier society, but at what cost? Smoking presents a different concern, with the dispersion of ambient tobacco smoke, and eliminating involuntary exposure is a proper regulatory goal. However, clumsy legislation can serve to preclude voluntary exposure as well, with unnecessary and unfortunate effects. In the last Part of this Article, consequences for the civic life of our democracy have been suggested. As we seek to optimize the health of our fellow-citizens by regulatory fiat, it is well to remember that the possibility of unnecessary casualties and undesirable consequences remains an ineluctable danger, that we may responsibly continue the noble work of protecting the public health.

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14, 2008). The American Cancer Society has filed an extensive *amicus* brief on the basis that “From its inception, the *amici* have led efforts to draft, pass, and bring this law to fruition through a vote of the People, and prevent the People's will from being undermined”, and arguing that “the exemption ODH seeks to vindicate does not exist.” AMERICAN CANCER SOCIETY, OHIO DIVISION, RESPONSE TO MEMORANDUM IN SUPPORT OF JURISDICTION at 5-6 (filed Mar. 14, 2008).

## APPENDIX A: STATEWIDE ETS LEGISLATION

State	Statewide ETS Law in effect	Modern Statewide Ban? <sup>271</sup>	Effective Date	Class	Smoking permitted in retail tobacco stores?	Smoking permitted in tobacco lounges?
AL	ALA. CODE § 18.35.300 et seq.	No	2003	II	Yes	Yes
AK	ALASKA STAT. § 18.35.300 et seq.	No	1990	II	Yes	Yes
AZ	ARIZ. REV. STAT. ANN. § 36-601.01	Yes	2007	V	Yes	No
AR	ARK. CODE ANN. § 20-27-1801 et seq.	Yes	2006	III	Yes	Yes <sup>272</sup>
CA	CAL. LAB. CODE § 6404.5	Yes	1997	IV	Yes	Yes
CO	COLO. REV. STAT. ANN. § 25-14-201 et seq.	Yes	2006	IV	Yes	Yes*
CT	CONN. GEN. STAT. § 19a-342 et seq.	Yes	2004	IV	No	Yes*
DE	DEL. CODE ANN. tit. 16, § 2901 et seq.	Yes	2002	V	No	No
DC	D.C. CODE § 7-731 et seq.	Yes	2007	IV	Yes	Yes
FL	FLA. STAT. § 386.201 et seq.	Yes	2003	III	Yes	Yes
GA	GA. CODE ANN. § 31-12A-1 et seq.	Yes	2005	III	Yes	Yes
HI	HAW. REV. STAT. § 328J-3 et seq.	Yes	2006	V	No	No
ID	IDAHO CODE ANN. §§ 39-5501 et seq.	No	2007	II	Yes	Yes
IL	ILL. COMP. STAT. 82/10-410	Yes	2008	V	Yes	No
IN	IND. CODE § 16-41-37-1 et seq.	Pending <sup>273</sup>	1998	II	Yes	Yes
IA	IOWA CODE § 142.B et seq.	Pending <sup>274</sup>	1993	I	Yes	Yes
KS	KAN. STAT. ANN. § 21-4009 et seq.	No	1987	II	Yes	Yes
KY	KY. REV. STAT. ANN. § 61.165 et seq.	No	2006	II	Yes	Yes
LA	LA. REV. STAT. ANN. § 40:1300.251 et seq.	No	2007	III	Yes	Yes
ME	ME. REV. STAT. ANN. tit. 22, § 1541 et seq.	Yes	2007	IV	Yes <sup>275</sup>	Yes* <sup>276</sup>
MD	MD. CODE ANN. HEALTH-GEN. §§ 24-205 & 24-501 et seq.	Yes	2008	V	Yes	No
MA	MASS. GEN. LAWS ch. 270, § 22 et seq.	Yes	2004	IV	Yes	Yes
MI	MICH COMP. LAWS § 333.12601 et seq.	No	1989	II	Yes	Yes
MN	MINN. STAT. § 144.414 et seq.	Yes	2007	V	Yes	No
MS	MISS. CODE ANN. § 29-5-161 et seq.	No	2000	II	Yes	Yes
MO	MO. REV. STAT. § 191.765 et seq.	No	1992	II	Yes	Yes
MT	MONT. CODE ANN. § 50-40-101	Yes	2009	V <sup>277</sup>	No	No
NE	NEB. REV. STAT. § 71-5701 et seq.	Yes	2009	II	Yes	Yes
NV	NEV. REV. STAT. §§ 202.2483 et seq.	Yes	2006	III	Yes	Yes
NH	N.H. REV. STAT. ANN. § 155:64 et seq.	Yes	2007	V	No <sup>278</sup>	No

\* Designates a tobacco lounge exemption protected through a grandfather clause.

<sup>271</sup> Reverses default rule by prohibiting smoking in restaurants and bars

<sup>272</sup> The statute's exemption applies to *all* bars, not merely tobacco bars.

<sup>273</sup> See H.B. 1057, 115<sup>th</sup> Gen. Assemb., 2<sup>nd</sup> Reg. Sess. (In. 2008).

<sup>274</sup> See H.B. 187, 82<sup>nd</sup> Gen. Assem., 1<sup>st</sup> Sess. (Ia. 2007)

<sup>275</sup> The Maine Legislature amended the Clean Indoor Law in May 2007, specifically prohibiting smoking hookah in tobacco specialty stores licensed after January 1<sup>st</sup>, 2007.

<sup>276</sup> Maine exempts "tobacco specialty stores" that, by the end of 2006, possessed licenses to serve alcohol or food. This statute functions in precisely the same way as a grandfather clause exemption for tobacco bars. See 22 M.R.S.A. § 1542(L) ("Smoking is not prohibited in a tobacco specialty store. The on-premises service, preparation or consumption of food or drink, if the tobacco specialty store is not licensed for such service or consumption prior to January 1, 2007, is prohibited in such a store.").

<sup>277</sup> Montana will become a Category V state once its bars go smoke-free on October 1<sup>st</sup>, 2009.

<sup>278</sup> There is no explicit exemption for retail tobacco shops. "Smoking may," however, according to the statute, "be permitted in [certain] enclosed places of public access and publicly-owned

NJ	N.J. STAT. ANN. § 26:3D-55 et seq.	Yes	2006	IV	Yes	Yes
NM	N.M. STAT. § 24-16-1 et seq.	Yes	2007	IV	Yes	Yes*
NY	N.Y. PUB. HEALTH LAW §§ 1399-n et seq.	Yes	2003	IV	Yes	Yes*
NC	N.C. GEN. STAT. § 143-595 et seq.	No	1993	I	Yes	Yes
ND	N.D. CENT. CODE § 23-12-9 et seq.	No	2007 <sup>279</sup>	III	Yes	Yes
OH	OHIO REV. CODE ANN. § 3794.01	Yes	2007	V	Yes <sup>280</sup>	No
OK	OKLA. STAT. tit. 63 § 1-1521 et seq.	No	2003	II	Yes	Yes
OR	OR. REV. STAT. §§ 433.835 et seq.	Yes	2009	III	Yes	Yes
PA	35 PA CONS. STAT. ANN. §§ 1230.1; 1235.1; 1223.5; & 361	Pending <sup>281</sup>	1988	I	Yes	Yes
RI	R.I. GEN. LAWS § 23-20.10-1 et seq.	Yes	2004	IV	Yes	Yes
SC	S.C. CODE ANN. §§ 44-95-10 et seq.	No	1990	II	Yes	Yes
SD	S.D. CODIFIED LAWS § 22-36-2 et seq.	Pending <sup>282</sup>	2002	I	Yes	Yes
TN	TENN. CODE ANN. § 39-17-1801 et seq.	No	2007	III	Yes	Yes <sup>283</sup>
TX	TEX PENAL CODE ANN. § 48.01	No	1975	II	Yes	Yes
UT	UTAH CODE ANN. § 26-38-1 et seq.	Yes	2007 <sup>284</sup>	V <sup>285</sup>	No	No
VT	Vt. STAT. ANN. tit. 18, § 37-1741 et seq.	Yes	2005	V	No	No
VA	VA. CODE ANN. § 15.2-2801 et seq.	No	1990	II	Yes	Yes
WA	WASH. REV. CODE § 70.160.010 et seq.	Yes	2005	V	No	No
WV	W. VA. CODE § 16-9A-4 et seq. & 31-20-5b	No	1987	II	Yes	Yes
WI	WIS. STAT. § 101.123	No	1983	II	Yes	Yes
WY	N/A <sup>286</sup>	N/A	N/A	II	Yes	Yes

buildings and offices, including workplaces . . . in effectively segregated smoking-permitted areas designated by the person in charge.” NH Rev Stat. §§ 155:66.

<sup>279</sup> Legislative Assembly rejected exemptions from prior Act, which became effective in 2005.

<sup>280</sup> The exemption is narrowly worded, however, stipulating that retail shops must stand alone. Currently operating retail shops are exempt from the operation of this narrow definition by grandfather clause.

<sup>281</sup> See note 268, *supra*.

<sup>282</sup> See note 269, *supra*.

<sup>283</sup> Exempts all age-restricted (21 and over) venues.

<sup>284</sup> Some exemptions – private clubs and taverns – are preserved until 2009.

<sup>285</sup> II until 2009, when exemptions disappear.

<sup>286</sup> Wyoming is the only state in the union without a single ETS statute on its books.

**APPENDIX B: CERTIFIED BALLOT LANGUAGE, THE OHIO SMOKE FREE  
WORKPLACE ACT**

State Issue 5 Certified Ballot Language

**Prohibit smoking in places of employment and most public places - Smoke Free**

**PROPOSED LAW**  
(Proposed by Initiative Petition)

To enact Chapter 3794. of the Ohio Revised Code to restrict smoking in places of employment and most places open to the public.

The proposed law would:

- Prohibit smoking in public places and places of employment;
- Exempt from the smoking restrictions certain locations, including private residences (except during the hours that the residence operates as a place of business involving non-residents of the private residence), designated smoking rooms in hotels, motels, and other lodging facilities; designated smoking areas for nursing home residents; retail tobacco stores, outdoor patios, private clubs, and family-owned and operated places of business;
- Authorize a uniform statewide minimum standard to protect workers and the public from secondhand tobacco smoke;
- Allow for the declaration of an establishment, facility, or outdoor area as nonsmoking;
- Require the posting of “No Smoking” signs, and the removal of all ashtrays and similar receptacles from any area where smoking is prohibited;
- Specify the duties of the department of health to enforce the smoking restrictions
- Create in the state treasury the “smoke free indoor air fund;”
- Provide for the enforcement of the smoking restrictions and for the imposition of civil fines upon anyone who violates the smoking restrictions.

a majority yes vote is necessary for passage.

	<b>YES</b>	<b>SHALL THE PROPOSED LAW BE ADOPTED?</b>
	<b>NO</b>	

## APPENDIX C: A SNAPSHOT OF A CIGAR BAR

### I. SURVEY METHODS

A one-page survey form was given to every patron at the Owl Shop, a cigar bar in New Haven, Connecticut, who entered between 3:30 and 4:30 on Saturday, March 15, 2008. There were three non-respondents. The survey asked:

1. How many times per week do you come to the Owl Shop? Of those times, how many do you have a cigar?
2. What time do you typically come to the Owl Shop, and how long do you typically stay?
3. Do you find the Owl Shop to be more or less conducive to conversation than other social establishments? Please explain.
4. At the Owl Shop, do you find yourself talking with new people (a) never; (b) sometimes; or (c) often?
5. Please circle any of the following subjects frequently covered during your conversations at the Owl Shop: local politics, national politics, local cultural events, local news,
6. What do you do for a living?
7. Would you mind sharing your age, gender, and ethnicity?
8. Are you a New Haven resident?
9. How many cigars do you smoke per week? Of those, how many at the Owl Shop?
10. Why do you smoke cigars?
11. How would you describe the Owl Shop to someone who had never been here?

### II. SUMMARY OF RESPONSES

The snapshot revealed an overwhelmingly regular patron base, with a few newcomers. Patrons who had been there before averaged 1.3 visits per week. Nearly all came for the purpose of smoking a premium cigar, and 76% found the Owl Shop exceptionally conducive to conversation. Every patron was a smoker. The average reported length of stay was just over three hours. 59% of respondents “often” conversed with new people, with 36% reporting occasional conversations with new people. 42% reported frequently discussing local politics, with 63% reporting similarly for national politics, 68% for local cultural events, and 68% for local news. Respondents’ occupations ranged across both traditionally blue-collar and white-collar fields.

Survey results reveal a rich, convivial atmosphere, in which patrons feel comfortable interacting with strangers. “The atmosphere of the Shop is relaxing and I feel more comfortable talking to people I don’t know.” Many respondents cited the “relaxing” atmosphere as encouraging conversation. Respondents associated a shared affinity for cigars as an essential component of this conviviality: “Cigars open up people to talk” (V) and provide “common ground” (M), a “common bond”, (E) and “something in common” (R). G wrote “Smoking cigars is also something I won’t do by myself.”

Describing the Owl Shop, respondents noted a relaxed, intimate atmosphere (C)(D)(K)(L) (S) and a friendly clientele (B)(J)(N)(Q)(U). For one respondent (F), the Owl Shop was “home away from home”, for another (A) “a bar in which you can sit & enjoy a drink & a smoke in a cozy atmosphere w/intelligent people”, and for another (M) simply “Heaven.”

### III. TABLE

	Visits Per Week (Cigar Every Time?)	Arrival Time <sup>287</sup> (Length of Visit)	More or Less Conductive to Conversation	Conversations with non-intimates	Subjects*	Occupation	Age, Gender, Ethnicity	Cigars/ Week (# at Owl Shop)
A	.25 (Y)	LA (2)	More.	Sometimes.	LP, NP, LN	Architect	27, M, White	.5 (.5)
B	4 (Y)	E (4-6)	More.	Often.	LP, NP, LC, LN	Hospitality/ Artist	38, M, Black	4 (4)
C	FV (Y)	A (N/A)	More.	Yes.	LC, LN	Beverage Delivery	47, M, White	10-15 (3)
D	.375 (Y)	A (4-6)	More.	Often.	LP, NP, LN	Beverage Distributor	43, M, White	8-12 (2-3)
E	FV (Cigarette)	LA (2)	More.	Often.	LP, NP, LC, LN	Technical	42, M, White	N/A
F	1 (Y)	A (3)	Same.	Sometimes.	LC	Industrial Designer	25, M, White	1-2 (1-2)
G	1 (Y)	A (2-3)	More.	Sometimes.	LN	Sales Rep.	24, M, White	1 (1)
H	FV (Y)	A (N/A)	More.	Often.	N/R	Computer Engineer	28, M, N/R	3-4 <sup>288</sup> (1)
I	2 (Y)	A (6)	More.	Often.	LN	Construction	26, M, Turkish	2-4 (2-4)
J	2 (Y)	NR (2-3)	More.	Often.	LP, NP, LC, LN	Service	29, M, White	2 (2)
K	1 (Cigarette)	LA/E	More.	Sometimes.	N/R.	Tree Removal	28, F, White	N/A
L	FV	A (N/A)	More.	Yes.	NP, LC, LN	Magazine Promotions	25, F, White	0 (0)
M	1 (Y)	A (2)	More.	Often.	NP, LC, LN	Restaurateur	42, M, White	N/R
N	1 (Y)	LA	N/R.	Sometimes.	LC	Self-Employed	42, M, N/A	2 (N/R)
O	.5 (Y)	LA/E (1)	Same.	Never.	NP, Sports	Real Estate	43, M, White	3 (N/R)
P	.25 (N)	E (2)	Same.	Sometimes.	International Politics	Student	27, F, N/A	0 (0)
Q	1 (Y)	E (2)	Same.	Sometimes.	LP, NP, LC, LN	Real Estate	30, M, White	1 (1)
R	3 (Y)	A (5)	More.	Yes.	NP, LC	Restaurateur	34, M, White	2 (N/R)
S	1 (N)	LA (NR)	Yes.	Often.	LC	Geographer	42, F, White	0 (0)
T	.25 (N)	A (NR)	Same.	Sometimes	N/R	Medical Sales	35, F, White	0(0)
U	2.5 (Y)	A (4-6)	More	Often	LP, NP, LC, LN	Registered Nurse	65, F, White	1-2 (1-2)
V	2.5 (Y)	E (4-6)	More	Often	LP, NP, LC, LN	Publishing	52, M, White	5-7 (4-6)

<sup>287</sup> A: Afternoon (12-3 PM); LA: Late Afternoon (4-6 PM); E: Evening (7 PM and on)

<sup>288</sup> Intends to be a weekly regular.