

**“Till Naught but Ash Is Left To See”:<sup>1</sup> Statewide Smoking Bans, Ballot Initiatives, and the Public Sphere**

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\* B.A., History, Colgate University. J.D. Candidate, Yale Law School. This Note is deeply indebted to the yeomanly work of Nick Pedersen and his assistance in compiling the survey of laws in Part I and Appendix A. My gratitude goes to Theodore Ruger for encouragement and criticism, and to Vikram Fielding-Singh for his meticulous editing. Justin Henderson, Michael Trow, J.W. Victor, Brandon McKenzie, and Matt Wisnieff assisted in tracking down a number of elusive sources, and thanks are also due to Bill Raffaele, Joe Lentine, Glen Greenberg, and the staff of New Haven’s Owl Shop. Any errors or omissions are entirely my own.

1. JOHANN SEBASTIAN BACH, *Edifying Thoughts of a Tobacco Smoker*, in THE SECOND LITTLE CLAVIER BOOK FOR ANNA MAGDALENA BACH, *reprinted in* THE BACH READER 98 (Hans T. David & Arthur Mendel eds., 1945).

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## INTRODUCTION

The new millennium has witnessed a quiet revolution in smoking regulation. Legislation targeting secondhand smoke—formally known as Environmental Tobacco Smoke (ETS)—has erupted across the country in a majority of American states and countless municipalities. In the last five years, thirty-one states have passed comprehensive ETS regimes. In 2008 alone, Iowa, Nebraska, and Pennsylvania passed statewide smoking bans, Indiana debated and rejected one, the Illinois ETS statute took effect, and the Ohio Department of Health was dragged by advocacy groups through the full range of Ohio courts as it sought to implement the state's recent ban. Major ETS legislation is pending in South Dakota, substantial exemption revisions are pending in Ohio, and in the next few years, more restrictive provisions of several states' laws will kick in. These regimes are rapidly transforming the public domain from predominantly smoke-friendly to presumptively smoke-free.

It is high time to take stock of these developments, both to understand how the legal landscape is changing and to ensure that it develops responsibly. As this Note proposes, American states have been—and continue to be—engaged in the process of reversing the default rule on smoking in public from permissive to prohibitive. Whereas smoking was previously permitted in public, save for designated “No Smoking” areas, we increasingly live in a country where insular smoking spaces are carved out of a public domain in which smoking is generally forbidden.

This is hardly the first sea change in smoking regulation. Both the mid-seventeenth century<sup>2</sup> and the early twentieth century<sup>3</sup> saw global surges in

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2. See SANDER L. GILMAN & ZHOU XUN, *SMOKE: A GLOBAL HISTORY OF SMOKING* 15-16 (2004). In 1624, Pope Urban VIII banned the taking of snuff in churches, finding the effects of tobacco sacrilegiously similar to sexual ecstasy. See IAIN GATELY, *LA DIVA NICOTINA: THE STORY OF HOW TOBACCO SEDUCED THE WORLD* 80 (2001). In 1633, Sultan Murad IV closed the coffeehouses of Istanbul and prohibited the smoking of tobacco. See James Grehan, *Smoking and “Early Modern” Sociability: The Great Tobacco Debate in the Ottoman Middle East (Seventeenth to Eighteenth Centuries)*, 111 *AM. HIST. REV.* 1352, 1363 (2006). A Tobacco Court established by Mikhail Feodorovich, Russia's first Romanov tsar, doled out such barbarous punishments as lip-splitting and castration. See GATELY, *supra*, at 85. In China, following the prohibition of tobacco-smoking in 1637, an enforcement decree was issued providing that “[t]hose 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*, 58 *J. AM. ORIENTAL SOC'Y* 648, 650 (1938).

3. The global temperance movement was the motivating force at this stage. In the United States, the effects were slightly delayed, but after securing the Prohibition Amendment, the National Women's Christian Temperance Union unsuccessfully attempted a similar constitutional

regulatory activity—often severe, always transient. 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>4</sup> Soon thereafter, “Blue Laws” grew up in 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>5</sup> Smoking on the streets was prohibited in Plymouth County in 1638, and Massachusetts banned smoking within five miles of any town in 1646.<sup>6</sup> These regulations proved short-lived, however, as did the later revival of tobacco legislation during the Temperance Movement.

Recent legislation, however, marks a radical departure from earlier efforts. Where governments once cited religious or moral reasons for prohibiting smoking, we now regulate smoking for a public health purpose: to prevent unwilling exposure to secondhand smoke. The health consequences of ETS have been established and confirmed by a parade of Surgeons General. If we proceed responsibly with ETS legislation, we will leave an important and enduring legacy.

This departure, however, presents a new set of challenges. When smoking was prohibited on moral or religious grounds, regulatory schemes could be bluntly drawn—simply execute smokers on the spot, for instance.<sup>7</sup> With a public health rationale, however, the endeavor becomes more complicated and requires greater nuance. Legislators must tread the line between protecting the unwilling from exposure to secondhand smoke and allowing consenting smokers to gather where unwilling exposure is unlikely. This delicate balancing act is the central challenge of ETS regimes that aspire to be both effective and responsible.

Early ETS regimes were extremely tentative, leaving most of the public domain unregulated. With the recent introduction of what this Note terms “modern statewide bans,” or bans which fully reverse the default rule by

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tobacco ban. See Maureen O’Doherty, *The Price of a Soul: At What Cost Can the Tobacco Issue Be Resolved?*, 2 J. HEALTH CARE L. & POL’Y at v, 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, Jeffrey Wasserman & John R. Anderson, *Historical Overview of Tobacco Legislation and Regulation*, 53 J. SOC. ISSUES 75, 77 (1997).

4. See GUSTAVUS MYERS, YE OLDEN BLUE LAWS 10-11 (The Century Co. 1921); Leon Goodman, *Blue Laws, Old and New*, 12 VA. L. REG. (n.s.) 663, 668 (1927).

5. Blue laws regulated the modesty of clothing, imposed penalties for entertaining Quakers, and prohibited the kissing of children on the Sabbath. See Goodman, *supra* note 4, at 667, 669-70; Henry G. Newton, *Blue Laws of New Haven*, 7 YALE L.J. 75 (1897).

6. See Goodman, *supra* note 4, at 668.

7. See Grehan, *supra* note 2, at 1363 (“Smokers unfortunate enough to be caught red-handed were executed on the spot.”).

prohibiting smoking in most restaurants and bars, ETS regimes abandoned their reticence. Now, a new and different danger looms, as many recent ETS regimes fail to tailor regulatory provisions to their public health purpose. Disturbingly, the exemption provisions which, as this Note contends, determine the character of an ETS regime, receive very little attention. Debates over smoking regulation focus on the larger question—to ban or not to ban—and ignore the finer but equally essential questions of which areas to exempt. As a result, we have ceased to ask how far is far enough, or how far is too far.

Procedural realities of the ETS debates, which this Note will explore, have exacerbated this disturbing state of affairs. As the regulatory juggernaut advances, the passage of smoking legislation has become a brawl between health advocacy lobbyists on the one side, and the tobacco and hospitality industries on the other side. Advocacy groups demand regimes that exceed the regulatory warrant, eliminating smoking even in places which exclude non-smokers. On the other hand, tobacco and hospitality industries urge complete non-regulation, dismissing the well-documented threat posed by ETS to the public health. Exemption areas are ignored or shouted over. This stalemated conversation is badly in need of reorientation.

When ETS legislation was passed by state legislatures, the influence of these contending lobbies could be tempered by legislative deliberation. In the last three years, however, advocacy groups have successfully foreclosed legislative oversight, taking advantage of ballot initiative provisions in state constitutions and circumventing the legislative process. Increasingly, the shape of ETS legislation is determined entirely by the savvy with which advocacy groups outmaneuver their opponents in persuading a malleable and inexperienced voting population. If we aspire to create responsible and enduring ETS regimes, we must revisit these laws and tailor new legislation more closely to its proper function: to prevent unwilling exposure to environmental tobacco smoke.

Despite the profound reach of these recent developments, the statutory landscape is deeply undertheorized. We lack 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 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 avoid unintended consequences.

As the legal landscape evolves apace, the need for theoretical guidance becomes increasingly acute. This Note offers a modest beginning—surveying the current 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 examines a recent and disturbing trend in the

passage of ETS legislation through a case study of a recent ballot initiative. Part III analyzes the factors that make direct legislation such a clumsy tool for creating responsible ETS regimes, and Part IV calls for remedial legislative attention to exemption provisions, proposing a balancing test that can be used to remedy deliberative failures in ETS statutes passed by direct or conventional legislation. Part V applies this test to an exemption area—tobacco lounges—on which strong ETS regimes divide. This Note aims to provide a starting point for renewed analysis as American states aspire to craft effective ETS regimes without sacrificing regulatory responsibility.

## I. THE LANDSCAPE OF STATEWIDE ETS LEGISLATION

The health consequences of tobacco smoking were widely revealed by the Surgeon General in 1964,<sup>8</sup> but the regulatory imperative for ETS legislation did not emerge until 1972, when the Surgeon General reported that ambient tobacco smoke could damage the health of non-smokers as well.<sup>9</sup> Arizona passed the first statewide ETS legislation in 1973, banning smoking in all indoor theaters, art museums, libraries, elevators, and buses used by the public.<sup>10</sup> Since then, state and local governments across America have gradually gone on to expand the sphere of non-smoking public establishments.<sup>11</sup> In 1975, Minnesota passed the first statute to forbid smoking in most workplaces.<sup>12</sup> Other states followed suit with tentative ETS legislation, and by 1980, over half the country—some twenty-eight states—had statutes on the books restricting smoking in public areas.<sup>13</sup> Through the eighties and nineties, various county and city governments followed Minnesota’s lead, prohibiting smoking in many workplaces.

State and federal government action in those years was limited. At the state level, little was banned aside from smoking in the narrow range of

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8. ADVISORY COMM. TO THE SURGEON GEN. OF THE PUB. HEALTH SERV., *SMOKING AND HEALTH* (1964).

9. See OFFICE OF THE SURGEON GEN., *THE HEALTH CONSEQUENCES OF SMOKING* 125-27 (1972) (noting harmful effects of carbon monoxide exposure caused by proximity to smoking).

10. ARIZ. REV. STAT. ANN. § 36-601.01 (1991).

11. Though many localities have implemented innovative ETS regimes atop state legislation, the landscape of ETS regulation can be most clearly discerned with reference to state legislation. Nearly every American state has an ETS regime that sets a baseline prohibition on smoking in public places. Increasingly these laws are quite comprehensive, leaving little room in most cases for significant regulation at a local level. Accordingly, this Note focuses primarily on state legislation, noting significant local variations when appropriate.

12. MINN. STAT. § 144.414 (2005).

13. See Robert A. Kagan & William P. Nelson, *The Politics of Tobacco Regulation in the United States*, in *REGULATING TOBACCO* 11, 20 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

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 the Environmental Protection Agency's (EPA's) designation of ETS as a Class A carcinogen in 1993.<sup>14</sup>

Shortly after the EPA's designation, legislative action on the state level picked up. In 1994, states started passing new types of laws, which this Note terms "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—effectively the entire indoor public domain. California was the first to institute a modern statewide ban by amending its labor code in 1994 to prohibit smoking in most enclosed places of employment, including restaurants.<sup>15</sup> Bars, initially exempt from the new law's coverage, were required to be smoke-free by 1998.<sup>16</sup> In the five years after California's ban took full effect, a handful of other vanguard states joined in—including Delaware, which passed a modern statewide ban in 2002, and New York, which instituted a much-discussed statewide ban in 2003.<sup>17</sup> In the past five years, statewide ETS legislation has snowballed. Since 2004, thirty-one state legislatures have passed statewide smoking bans.<sup>18</sup>

As thoroughgoing as the transformation wrought by modern ETS legislation has been, we lack both a general survey of laws and an analytical framework within which to understand them. Thus far, the only systematic evaluation of ETS legislation has been conducted inside the public health community.<sup>19</sup> The

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14. Press Release, Env'tl. Prot. Agency, EPA Designates Passive Smoking a "Class A" or Known Human Carcinogen (Jan. 7, 1993), <http://www.epa.gov/history/topics/smoke/01.htm>. In 1994, the Occupational Safety and Health Administration proposed a comprehensive ban on smoking in over six million workplaces. See William N. Evans, Matthew C. Farrelly & Edward Montgomery, *Do Workplace Smoking Bans Reduce Smoking?*, in TOBACCO CONTROL POLICY 233, 234 (Kenneth E. Warner ed., 2006).

15. 1994 Cal. Adv. Legis. Serv. 310 (Deering).

16. CAL. LAB. CODE § 6404.5 (West 2003).

17. See, e.g., DEL. CODE ANN. tit. 16, §§ 2901-2908 (2008); N.Y. PUB. HEALTH LAW §§ 1399-n to -x (McKinney 2008).

18. See *infra* Appendix A.

19. In 2002, an advisory committee convened by the National Cancer Institute published a study rating state clean indoor air laws by the extent of regulation, effectiveness of enforcement procedures, and severity of penalties. J.F. Chriqui et al., *Application of a Rating System to State Clean Indoor Air Laws (USA)*, 11 TOBACCO CONTROL 26, 31 (2002). In years since, the American Lung Association has published an annual "Report Card" that, drawing largely from the ranking methodologies established in the NCI's original study, ranks individual states on the effectiveness of their clean indoor air laws. See AM. LUNG ASS'N, STATE OF TOBACCO CONTROL 2007 REPORT, available at <http://www.lungusa.org> (follow "Tobacco Control" tab; then select "Tobacco Control Reports"). Concerned primarily with the medical consequences of statewide bans, these releases

legal academy has not provided a theoretical overview of statewide ETS legislation.<sup>20</sup> Some studies focus in detail on an individual state or countywide ban, but provide only cursory glimpses of broader nationwide trends in ETS legislation.<sup>21</sup> The rest are almost entirely normative pieces—some of which advocate stronger legislation, such as a federal clean air act,<sup>22</sup> while others bluntly repudiate ETS regulation wholesale.<sup>23</sup> This Part seeks to address this gap by providing an overview of statewide smoking bans and proposing a theoretical framework for the disorderly corpus of statewide ETS legislation.

Most modern statewide bans share a common intent: to protect non-consenting 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 non-smokers should be protected from secondhand smoke, lawmakers have struggled to determine how and where the line between smoking and non-smoking domains should be drawn.

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elide the legal mechanics and broader policy questions presented by statewide ETS regimes.

20. The closest we have to a general survey is *Synopsis of State Case and Statutory Law*, 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 is now outdated. Jessica Niezgoda provides a good but limited review of California and New York regimes, but she does not develop the national landscape. Jessica Niezgoda, Note, *Kicking Ash(trays): Smoking Bans in Public Workplaces, Bars, and Restaurants: Current Laws, Constitutional Challenges, and Proposed Federal Regulation*, 33 J. LEGIS. 99 (2006). Marot Williamson collects information on constitutional challenges to statewide smoking bans, but provides limited analysis. 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).

21. Though narrow, some of these articles are quite helpful. See, e.g., Jody Hodgdon, *Live Smoke Free or Die: The Battle for Smoke Free Restaurants in New Hampshire*, 3 PIERCE L. REV. 49 (2004); Jordan 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); Adrienne Detanico, Comment, *Banning Smoking in Chicago’s Social Scene: Protecting Labor and Broadening Public Health Policy*, 40 J. MARSHALL L. REV. 1063 (2007); Justin C. Levin, Note, *Protect Us or Leave Us Alone: The New York State Smoking Ban*, 68 ALB. L. REV. 183 (2004); Keith Woodshick, Note, *Smoking Ban Legislation in New Jersey: Should Casinos Be Immune from Smoke?*, 3 RUTGERS J.L. & URB. POL’Y 496 (2006). Jordan Raphael’s piece in particular effectively reviews the early history of ETS legislation.

22. See 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).

23. See, e.g., Mark J. Horvick, *Examining the Underlying Purposes of Municipal and Statewide Smoking Bans*, 80 IND. L.J. 923 (2005); Thomas A. Lambert, *The Case Against Smoking Bans*, 13 MO. ENVTL. L. & POL’Y REV. 94 (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, 347 (2007) (arguing that “by using smoking bans to protect citizens from their own choices, the government violates the sacred right of private property”).

Nonetheless, organizing principles emerge. All statewide smoking bans 1) establish a default rule on smoking in public, and 2) carve out exemptions from that default rule. Indeed, a coherent spectrum of statewide ETS legislation is evident from a survey of states' exemption schemes, for it is through exemption provisions that the line between smoking and non-smoking domains is drawn. After all, the central question in crafting effective and responsible ETS legislation is which, if any, areas should be exempted from the operation of the new default rule? Responsible ETS legislation must strike a delicate balance. With overly expansive exemptions, states fail to meaningfully reverse the default rule and protect the public health. On the other hand, overly narrow exemption schemes lead to regimes that exceed the public health justification for statewide ETS legislation, with serious and often unintended consequences.

Ultimately, this Note calls upon state legislatures to tailor exemption schemes more closely to the public health function of an effective ETS regime and articulates an approach which legislators may find useful. Before we can determine how the lines between smoking and non-smoking spaces should be drawn, however, we must understand how states draw them now.

#### *A. The Function and Intent of Statewide ETS Legislation*

All ETS statutes are drafted to prevent involuntary exposure to secondhand smoke, a threat identified by several Surgeons General as a serious public health hazard.<sup>24</sup> Significantly, statewide ETS legislation does not seek to prevent smokers from harming themselves, but rather to prevent them from harming non-consenting bystanders by producing ambient tobacco smoke.<sup>25</sup> Employees, therefore, are a chief concern as potentially unwilling but captive participants in

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24. See, e.g., OFFICE OF THE SURGEON GEN., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL, at i (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/report/fullreport.pdf>.

25. 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."). Until 2009, when more restrictive provisions kick in, 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 MINN. STAT. § 144.412 (Supp. 2008) ("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."); 2007 Tenn. Pub. Acts ch. 410 ("Non-Smoker Protection Act").

the activities of co-workers or customers.<sup>26</sup> In short, it is the externality problem posed by smoking—the costs smokers impose upon non-consenting non-smokers by subjecting them to carcinogens—which ETS legislation targets.

By 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 of smokers accept the need to place restrictions on where they can light up.<sup>27</sup>

It is thus unsurprising that the modern statewide bans we see today—legislation intended to protect the latter “right” (a non-smoker’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 a hardcore fringe of “smokers’ rights” advocates, is almost universally accepted: protecting the unwilling from being exposed to the ill effects of secondhand smoke.

### *B. A Typology of Modern Statewide ETS Legislation*

ETS regimes in American states vary widely in both nature and scope. Five distinct classes, however, can be discerned with reference to exempted areas and preemption provisions, ranging from the most smoke-friendly to the most smoke-free, which this Note labels as follows: (I) “Right To Smoke” States; (II) “Hands-Off” States; (III) “Mild Ban” States; (IV) “Strong Ban” States; and (V) “Draconian” States.

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26. See, e.g., 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 (Supp. 2008) (“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.”); 2004 Mass. Acts 137 (“to protect the health of the employees of the commonwealth”).

27. See, 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. Gallup Politics & Gov’t, Tobacco and Smoking, <http://www.gallup.com/poll/1717/Tobacco-Smoking.aspx> (last visited Nov. 17, 2008).

*1. Class I: Right To Smoke States*

We start at the most permissive end of the spectrum, a narrow category that has dwindled to only two states: North Carolina and South Dakota.<sup>28</sup> Though these states have passed ETS legislation that regulates smoking in public areas, the function of these state laws is far more preemptive than regulatory. Class I statutes share two characteristics. First, the smoking regulations are quite lax, permitting smoking in bars and restaurants. Second, each of these statutes preempts local jurisdictions from passing more aggressive smoking bans.

North Carolina's ETS regime is the weakest in the country.<sup>29</sup> Most statewide bans exclusively target the health interests of non-smokers, but North Carolina's statute expressly adopts the interests of smokers, seeking "to address the needs and concerns of both smokers and nonsmokers in public places by providing for designated smoking and nonsmoking areas."<sup>30</sup> Solicitude 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>31</sup> State-owned arenas, coliseums, and auditoriums may be designated non-smoking—but only if they provide smoking areas in their lobbies.<sup>32</sup> The statute bears the second hallmark of Class I regimes: a preemption

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28. See *infra* Appendix A. Except where other statutes have been cited, references to state statutes discussed in this Note are located *infra* Appendix A.

29. This has everything to do with the primacy of North Carolina's tobacco crop to the state's economy. North Carolina remains the biggest producer of tobacco in the United States. See N.C. Dep't of Agric. & Consumer Servs. (Mktg. Div.), Field Crops: Tobacco, <http://www.ncagr.com/markets/commodit/horticul/tobacco> (last visited Nov. 17, 2008) ("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.").

30. N.C. GEN. STAT. § 143-595 (2007).

31. The statute provides that a narrow category of state government buildings, such as libraries and museums, "may be designated as nonsmoking." *Id.* § 143-597(a). They do not, however, have to be. Other state-government buildings may include designated non-smoking areas so long as at least twenty percent of interior space—of equal quality—is reserved for smoking. *Id.* In all such buildings, the authority to decide whether to make any given state building predominantly non-smoking is vested in "the appropriate department, institution, agency, or person in charge of the State-controlled building or area." *Id.* § 143-597(b). Even when such officials decide to include non-smoking areas on their premises, however, the statute ensures the inadequacy of such non-smoking areas by explicitly stating that it does *not* require installation of separate ventilation systems or other physical barriers.

32. *Id.* § 143-597(a)(4).

clause prohibiting local governments from implementing stricter measures.<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. Enterprising publicans could, of course, voluntarily implement and enforce house rules prohibiting smoking, but such measures are virtually unheard of.

This is a disappearing class of statewide smoking ban. Until 2008, Pennsylvania and Iowa filled out Class I, with older statutes—1988 and 1987, respectively—which exempted bars and most restaurants statewide<sup>34</sup> and preempted further regulation.<sup>35</sup> After contentious litigation affirmed the preemptive authority of the state statutes, state action became the only available avenue for ETS regulation.<sup>36</sup> Both states have passed omnibus ETS statutes within the last year, replacing their earlier Class I regimes.<sup>37</sup>

South Dakota is North Carolina’s last remaining companion in Class I. Though South Dakota’s current ETS statute formally prohibits smoking in restaurants, licensed premises are exempt from coverage, leaving restaurants that

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33. *Id.* § 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.”). Recent legislation suggests that this regulatory freeze is starting to thaw, however slowly. In 2007, North Carolina banned smoking in state government buildings and permitted local governments to regulate smoking in local government buildings. *Id.* §§ 130A-493, 130A-498.

34. *See, e.g.*, 35 PA. CONS. STAT. § 1230.1 (2003) (exempting all restaurants with seventy-five seats or fewer and requiring larger restaurants to designate a non-smoking seating area).

35. *See* IOWA CODE § 142B.6 (2008) (explaining preemption rationale as promoting “equitable and uniform implementation, application, and enforcement of state and local laws and regulations”); 35 PA. CONS. STAT. § 1235.1 (2003).

36. As states across the country were passing modern statewide bans, rebellious local jurisdictions in both Iowa and Pennsylvania tested the preemption 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 6:00 a.m. and 8:30 p.m. *See* Anita Srikameswaran, *Allegheny City Council Passes Smoking Ban*, PITTSBURGH POST-GAZETTE, Sept. 27, 2006, available at <http://www.post-gazette.com/pg/06270/725335-85.stm>; Frank Santiago, *Cities, Towns Monitor Fate of Ames Smoking Ban*, DES MOINES REG., Aug. 19, 2002, at 1B. In both cases, restaurants financially backed by tobacco companies 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 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 & Rest. v. Allegheny County, 924 A.2d 730 (Pa. Commw. Ct. 2007). Neither argument prevailed. *See, e.g., id.* at 739.

37. *See* IOWA CODE §§ 142D.1 to .9 (Supp. 2008); 2007 Pa. Laws 27.

serve alcohol unregulated.<sup>38</sup> As the statute preempts municipal regulation, South Dakota is properly considered a Class I state, though perhaps not for long.<sup>39</sup>

## 2. Class II: Hands-Off States

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. These states 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 implemented in Alabama, Alaska, Idaho, Indiana, Kansas, Kentucky, Michigan, Mississippi, Missouri, Oklahoma, South Carolina,<sup>40</sup> Texas, Virginia, West Virginia, Wisconsin, and Wyoming.

Naturally, in granting broad discretion to local governments, Class II regimes vary widely in practice. Across the board, large cities located in Class II states—such as Detroit, Milwaukee, and major Texan cities—have their own smoking bans, many of which ban smoking in restaurants and bars. Living in a large city in a “Hands-Off” state can be much like living in one of the Class III, IV, or V states discussed below. Even among major metropolises, 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 Class III.<sup>41</sup> Other large cities in Class II, such as Madison, Wisconsin, and Fort Wayne, Indiana, have made virtually all enclosed public spaces—including smoking lounges—smoke free, situating themselves closer to Class V.<sup>42</sup> Smaller towns occasionally implement their own bans, as do some rural areas. As a general

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38. S.D. CODIFIED LAWS § 22-36-2 (2002).

39. The early months of 2008 saw serious debate about eliminating the preemption clause. See Terry Woster, *Local Control Bill Killed*, ARGUS LEADER, Feb. 1, 2008, at 4A (bill to eliminate preemption provision rejected nine to four in committee). The state legislature is considering a bill that would expand ETS regulations. See H.B. 1237, 2008 Leg. Assem., 83d Leg. Sess. (S.D. 2008).

40. In *Foothills Brewing Concern, Inc. v. City of Greenville*, 660 S.E. 2d 264 (S.C. 2008), the South Carolina Supreme Court reversed a trial court ruling that invalidated a local ETS ordinance. The court ruled that the ordinance violated neither state law nor the state’s constitution. *Id.*

41. DALLAS CITY CODE § 41-2(d)(3).

42. Madison passed a city-wide ban in 2005 that prohibits smoking in restaurants, bars and workplaces, but grandfathers in specially designated, separately ventilated rooms presently in existence in restaurants if approved by the Public Health Department. See Madison, Wis., Ordinance 23.05 (July 1, 2005), available at <http://publichealthmdc.com/documents/23.05-070105.pdf>. The Fort Wayne City Council passed an extremely rigorous smoking ban in 2007. FORT WAYNE, IN., CODE OF ORDINANCES § 95.60-99 (June 1, 2007), available at <http://www.fw-ac-deptofhealth.com/PDF/Smoking%20Resources/Fort%20Wayne%20Ordinance.pdf>.

matter, however, aggressive regulation is far more common in larger cities. In Michigan, for instance, only twenty-four counties—counties that include all of the state’s major cities—have adopted their own smoking bans.<sup>43</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 fall 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 that 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>44</sup>

### 3. Class III: Mild Ban States

Continuing along the spectrum of statewide ETS legislation from permissive to prohibitive, the next class is composed of states that begin to reverse the default rule. Prohibiting smoking in restaurants but exempting bars, Class III states include Arkansas, Florida, Georgia, Idaho, Louisiana, Montana,<sup>45</sup> Nevada, North Dakota, Oregon,<sup>46</sup> Pennsylvania, and Tennessee.<sup>47</sup> This compromise 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>48</sup>

Class III bans vary on two important points: the definition of a “bar” and the

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43. See MakeMIAirSmokeFree, Smokefree Progress, <http://www.makemiairsmokefree.com/smokefree-progress.php> (follow “In Michigan” hyperlink) (last visited Nov. 17, 2008).

44. OFFICE OF THE SURGEON GEN., *supra* note 24, at 145-54 (identifying restaurants, cafeterias, and bars as public places presenting the most serious ETS concerns).

45. In 2009, Montana will become a Class V state. See *infra* Appendix A.

46. In 2009, Oregon will become a Class IV state. See *infra* Appendix A.

47. Some qualification is necessary with respect to Georgia and Oregon. In these states, the dispositive factor is not the nature of the establishment—restaurant or bar—but the age of the patrons. An establishment which neither employs minors nor permits them to enter its premises may allow smoking. See GA. CODE ANN. § 31-12A-6 (2006); OR. REV. STAT. § 433.835 (2005). It is likely that this functions much like a restaurant/bar split, however, because most restaurants permit children.

48. See Lydia Saad, *More Smokers Feeling Harassed by Smoking Bans*, GALLUP NEWS SERVICE, July 25, 2007, at 2, available at <http://www.gallup.com/poll/28216/More-Smokers-Feeling-Harassed-Smoking-Bans.aspx> (quoting survey results from July 2007 showing that, while 54% of Americans support smoking bans in restaurants, only 29% favor banning it in bars).

question of preemption. For example, Florida limits the bar exemption to “stand-alone bars,” with a list of specific qualifications.<sup>49</sup> Other states define bar fairly generally.<sup>50</sup> With regard to preemption, the majority of Class III statutes function as floors, not ceilings: local jurisdictions remain free to ban smoking in bars.<sup>51</sup> Some states explicitly preserve this authority.<sup>52</sup> As a result of these variations, Class III laws 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 Classes I and II towards the aspiration expressed in the 2006 Surgeon 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 section of the public domain unregulated.

#### 4. Class IV: Strong Ban States

Fourth on the ETS spectrum are regimes that ban smoking in the vast majority of enclosed public spaces statewide, including not only all restaurants,

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49. FLA. STAT. § 386.203 (2007) (stipulating 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”).

50. *See, e.g.*, GA. CODE ANN. § 31-12A-2 (2006) (“‘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.”).

51. Only Oregon, Tennessee, and now Pennsylvania employ preemption clauses. *See* OR. REV. STAT. § 433.863 (2007); TENN CODE ANN. § 39-17-1551 (2003); 2007 Pa. Laws 27, § 11(a)(2). Oregon’s preemption clause expires, however, in 2009. 2007 Ore. Laws 602, at § 12. Pennsylvania’s 2008 smoking ban presents a special case on preemption, which was a contentious issue in the ban’s passage. Initially, the bill was deadlocked until a compromise committee agreed that the statute would preempt local regulations, but that Philadelphia would be exempted from the preemption statute and permitted to retain its stricter municipal ban. Amy Worden, *Pa. Smoking Ban Approved*, PHILA. INQUIRER, June 11, 2008, at A1. Representatives from municipalities that wanted to pass their own, stricter ordinances blocked the bill once again, until the deadlock was broken in early June when state representatives from Allegheny and Scranton were promised the opportunity to introduce legislation which would permit their municipalities to pass stricter smoking bans. Tom Barnes, *Smoking Ban Passes in Senate Reversal*, PITTSBURGH POST-GAZETTE, June 11, 2008, at A1.

52. *See, e.g.*, GA. CODE ANN. § 16-12-2(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.”).

but conventional bars as well. These states carve out exemptions, however, for bars and cafés devoted primarily to the smoking of tobacco. California, Colorado, Connecticut, the District of Columbia, Maine, 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, taking effect between 2003 and 2007. Both Class IV and V regimes warrant the designation “modern statewide ban,” which this Note uses to distinguish these strong, recent regimes from other forms of statewide ETS legislation.

Class IV regimes differ most significantly in how they define exempted smoking establishments. These statutes generally distinguish tobacco lounges from conventional bars by specifying a minimum percentage of revenue that must issue 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>53</sup> Some states, 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 that serve alcohol to meet.<sup>54</sup> Other states, such as Massachusetts, impose no mandatory numerical minimum percentage of revenue that must come from tobacco products, but require that the sale of tobacco be the store’s “primary” purpose and that the sale of food and drink be “incidental to” the sale of tobacco products.<sup>55</sup>

Not all states, however, exempt all forms of the 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>56</sup> Colorado exempts “cigar-tobacco bars.”<sup>57</sup> These curious distinctions have caused quite a bit of confusion.<sup>58</sup>

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53. D.C. CODE § 7-741 (2001).

54. R.I. GEN. LAWS § 23-20.10-2 (Supp. 2007) (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”).

55. MASS. GEN. LAWS ch. 270, § 22 (2008). California exempts “private smokers’ lounges,” which must be in or attached to retail shops. CAL. LAB. CODE § 6404.5 (Deering 2007).

56. 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.”).

57. COLO. REV. STAT. § 25-14-203 (2008) (defining a cigar-tobacco bar as generating more than five percent of total gross revenue from the on-site sale of tobacco products).

58. 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, at B3

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 tobacco bars regardless of incumbency. Class IV states extending per se exemptions to tobacco bars include California, the District of Columbia, Massachusetts, and Rhode Island. These statutes typically define and exempt “tobacco” or “cigar” bars and require all such bars to satisfy some form of registry or permit requirement.

Grandfather clause exemptions, which only exempt tobacco bars in operation at the time of a ban’s passage, have been implemented in Colorado, Connecticut, Maine,<sup>59</sup> New York, New Jersey, and New Mexico. These function much as do the comprehensive exemptions above—only the definition includes a cut-off date. No tobacco lounge opened after this cut-off date qualifies for 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 finds a different loophole, such as those for “owner-operated businesses” or “private clubs.” Most grandfather clause provisions not only forbid new tobacco lounges from opening, but they also forbid existing lounges from expanding or even changing ownership—a condition which may facilitate their gradual extinction.<sup>60</sup> On the spectrum from smoke-friendly to smoke-free states, 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.

### 5. *Class V: Draconian States*

At the end of the ETS spectrum, Class V bans are the most aggressive. These states, which include Arizona, Delaware, Hawaii, Illinois, Iowa, Ohio, Maryland, Minnesota, Nebraska, New Hampshire, Utah, Vermont and Washington, are

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(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 avoids confusion by expanding 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 (West 2007).

59. Maine exempts all “tobacco specialty store[s]” 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(2)(L) (Supp. 2007).

60. *See, e.g.*, N.Y. PUB. HEALTH LAW § 1399-q(5) (McKinney 2008) (stating that an exemption, which must be annually reauthorized, is only granted if “the cigar bar has not expanded its size or changed its location from its size or location since December thirty-first, two thousand two”).

similar in virtually all regards to Class IV bans, except that they do not exempt tobacco lounges. Due to their uncompromising rigor in stamping out smoking from the public domain, and their refusal to countenance establishments populated exclusively by consenting smokers, statutes in this category earn the moniker “Draconian.” These statutes represent the most recent wave of statewide smoking bans, and they are increasingly drafted by health advocacy lobbies and passed as ballot initiatives rather than debated and passed by lawmakers.

Under Class V regimes, smoking indoors is prohibited nearly everywhere outside private residences. Other exemptions are either tightly constrained or insubstantial. Washington, for instance, nebulously exempts “certain private workplaces” and virtually nowhere else.<sup>61</sup> Other Class V statutes exempt several tightly defined areas. Minnesota’s Clean Indoor Air Act, for example, allows smoking in several areas ranging from heavy commercial and farming vehicles to buildings where scientific studies of smoking are being conducted, or where traditional Native American ceremonies are held.<sup>62</sup> Whether they choose a very small number of broad exemptions, or a large number of narrow ones, the result is largely the same: smoking in virtually the entire indoor public domain—and some of the outdoor—is verboten. Some bans, such as Washington’s, also prohibit smoking within a certain distance of a building opening through which smoke could conceivably enter—such as building entrances, windows, or ventilation intakes.<sup>63</sup>

Consistent with this aggressive stance on secondhand smoke, none of the Class V statutes are negatively preemptive. Though “Draconian” smoking bans would seem to leave little room for additional municipal strictures, some creative localities have expanded coverage to prohibit smoking in parks, sidewalks, and cars with open windows.<sup>64</sup> Some local jurisdictions are beginning to extend smoking bans into the home.<sup>65</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

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61. The statute defines these as “a private enclosed workplace, within a public place, even though such workplace may be visited by nonsmokers.” WASH. REV. CODE ANN. § 70.160.060 (West 2002).

62. MINN. STAT. ANN. § 144.4167 (West Supp. 2007).

63. WASH. REV. CODE ANN. § 70.160.075 (West Supp. 2008).

64. See, e.g., Pam Belluck, *Maine City Bans Smoking in Cars Carrying Children*, N.Y. TIMES, Jan. 19, 2007, at A16.

65. See, e.g., Sanjay Bhatt, *Smoking Foes Bring the Fight to Apartment Buildings*, SEATTLE TIMES, Jan. 16, 2007, at A1.

landscape of law. A regulatory spectrum can be discerned, however, with reference to exemption provisions, to which we look to determine whether the default rule of the resulting regime is meaningfully prohibitive or permissive of smoking in public.

On the permissive 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). In permitting smoking in restaurants and bars at a state level, however, both Classes leave the pre-regulation default rule substantially unmodified. Class III regimes challenge the default rule, but by leaving bars unregulated at a state level, and in some cases preempting local action, Class III statutes ultimately fail to reverse the default rule. On the prohibitive side are bans that successfully reverse the default rule and carve out exemption areas in which smoking is permitted. Some (Class IV) tailor legislation narrowly to exempt areas where non-smokers are unlikely to be present, such as tobacco bars. Others (Class V) create a near-complete prohibition of smoking in public with little concern for whether a threat to non-consenting non-smokers is plausible. It is clear that Classes IV and V, or “modern statewide bans,” are a distinct species of statewide ETS legislation. These statutes reverse the default rule to establish a presumptive prohibition of smoking in public, against which exemptions can be carved by state legislatures. Codified in twenty-three states, modern statewide bans are incrementally reversing the nationwide default rule on smoking in public places.

The element that distinguishes modern statewide bans from earlier efforts, however, is precisely the element that makes them so difficult to implement responsibly. Though we still tend to ask simply whether or not a state has a smoking ban on the books, the key element is hardly the existence of a ban, but rather the nature of its exemption scheme. Modern statewide bans have—or should have—changed the focus of the debate: today, the central question is which public spaces should be exempted from the operation of the new default rule. And this calls for a far more sensitive approach to ETS regulation than has historically been the case, for modern statewide bans are truly exemption-centric, delicately poised between strong and draconian. Whether a statute reverses the default rule is determined by its exemption scheme, and the happenstance of a single exemption provision, or a fine point in a definition, may change the character of a ban from controlled to severe.

For this reason, variations among modern statewide bans may be less innocent than one might wish. Modern statewide bans share a common intent: to prevent unwilling exposure to environmental tobacco smoke. At their best, then, modern statewide bans attempt to balance the two “rights” in play—the smoker’s against the non-smoker’s—by isolating areas that do not undermine the function of an effective ETS regime: those in which non-smokers are unlikely to be

exposed to ambient tobacco smoke. However, modern statewide bans are startlingly incoherent in judging which areas do not undermine a strong ETS regime. This should give us reason for pause. Perhaps the variety represents the considered judgment of different states concerning how much protection is warranted—an optimistic “states as laboratories” view—but it may also be that some caprice is responsible for the variation, and deliberative failures drew states away from narrowly tailored, responsible, and effective ETS legislation. The delicately balanced, exemption-centric nature of ETS legislation invites these types of errors, because the character of an ETS regime can be dramatically altered by the inclusion of one exemption, the exclusion of another, or the manner in which an exemption is defined. The next Part examines a recent trend in the passage of statewide smoking bans that presents serious concerns on this point: the aggressive use of the ballot initiative by interest groups to pass ETS legislation.

#### *D. ETS Legislation by Ballot Initiative*

“Plebiscite, *n.* A popular vote to ascertain the will of the sovereign.”<sup>66</sup>

Through the enactment of modern statewide bans, we have made significant progress in flipping the default rule on smoking in public. Though in the past this has been chiefly accomplished 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 Nebraska.<sup>67</sup>

Insofar as ballot initiatives have contributed to the process of reversing the default rule on smoking in public, they should be commended. However, ballot initiatives present serious dangers to good law in the context of ETS legislation, because such initiatives are prone to focusing attention on a yes-or-no policy question at the expense of discrete elements within the proposal. As we have seen, in reversing the default rule on smoking in public, the essential question is which areas will be exempted. Many areas may be consistent with the public health function of ETS legislation, and recognizing this, states have carved out exemptions from the default rule that tailor the legislation more closely to its purpose. Though some are overbroad, and others are overly narrow, these exemptions represent the efforts of states to confront the problem—to debate and decide where the line is best drawn between protecting the public health and

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66. AMBROSE BIERCE, *THE DEVIL’S DICTIONARY* 101 (Dover 1958) (1911).

67. See ARIZ. REV. STAT. ANN. § 36-601.01 (2003); NEB. REV. STAT. §§ 71-5716 to -5734 (LEXIS 2008); OHIO REV. CODE ANN. §§ 3794.01 to .09 (LexisNexis Supp. 2008).

needlessly intruding on unproblematic areas of the public domain. Ballot initiatives are ill-suited to draw this fine line.

This Part undertakes a case study of a recent ETS law passed by ballot initiative. As Ohio's unfortunate experience reveals, 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.

This Part then proceeds to analyze the procedural and structural deficiencies that make direct legislation such a poor vehicle for responsible ETS legislation. From the outset, the odds of meaningful public deliberation are discouraging. The interest landscape in ETS debates makes for poor proposals and poorer deliberation. The most powerful voices are situated on the extreme ends of the debate—lobbyists from well-funded advocacy groups and the tobacco industry—while the voices central to crafting reasonable exemptions, such as retailers, private clubs, and tobacco lounges, are marginalized. The balloting process invites procedural exploitation, as cleverly defined statutes, briefly summarized on a voter's ballot, can hide their true nature until after passage. Most fatally, ballot initiatives are shrink-wrapped packages, incapable of expressing voter conclusions on specific exemption areas. Nonetheless, once passed, courts will not inquire into the circumstances of passage and victorious lobbyists can claim the imprimatur of the people, rendering ballot initiatives substantially irremediable either by courts or executive agencies.

## II. THE OHIO SMOKE FREE WORKPLACE ACT

The passage of the Ohio Smoke Free Workplace Act presents a sharp example of the dangers ballot initiatives pose to responsible ETS legislation. 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 patios, tobacco stores, private clubs, and most private residences.<sup>68</sup> The statute had been cleverly drafted, however, and within weeks it was clear that the exemptions promised by the bill's sponsors and on the ballot had been cleverly defined out of existence. In the words of an infuriated law professor, Ohioans had "voted for a lie."<sup>69</sup> Though the Department of Health attempted to give force to several exemptions that had been promised on the ballot and referred to in statutory language, its rulemaking was immediately

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68. See Ohio Sec'y of State, State Issue 5 Certified Ballot Language (Nov. 7, 2006), <http://www.sos.state.oh.us> (follow "Elections & Ballot Issues" hyperlink; then follow "Election Results" hyperlink; then follow "2006 Official Results" hyperlink; then follow "State Issue 5" hyperlink; then follow "Certified Ballot Language" hyperlink) [hereinafter Ballot Language]. The full text of the ballot is reproduced *infra* Appendix B.

69. David F. Forte, Op-Ed., *More Smoke-Free Than You Thought*, CLEV. PLAIN DEALER, Nov. 17, 2006, at B9.

challenged by special interest groups. An Ohio trial court was forced to concede that a prominent exemption had never existed in fact.<sup>70</sup> By December 2007, an appellate court threw up its hands and handed the imbroglio over to the General Assembly to resolve.<sup>71</sup>

Incredibly, legislators have been pressured by lobbyists to reject any amendments out of deference to the Act’s status as “the will of Ohio voters.” A fuller understanding of the more tragic elements in this farce, however, exposes the unsightly underbelly of direct legislation and its liability to procedural abuse by well-funded special interests. In the context of ETS legislation, there is nothing more dangerous to good law.

### *A. Proposals*

On March 10, 2005, the American Cancer Society (ACS), through its Ohio agent “SmokeFree Ohio” (SFO) delivered an ultimatum to the Ohio General Assembly. Having drafted an ETS bill, SFO demanded a rubber-stamp. If the General Assembly were to debate and possibly amend the proposal, SFO would launch a petitioning campaign to pass the draft statute by ballot initiative.<sup>72</sup>

Ohio, one of the states swept up by the tide of direct democracy during the Progressive era, amended its Constitution in 1912 to provide for legislation by ballot initiative. By filing a sufficient number of signatures with the Secretary of State, any citizen or organization can place legislation before the General Assembly. The legislature may then elect to pass, amend and pass, or reject the proposal. If amended or rejected, upon the filing of further signatures the petition is placed on the state ballot for adoption by Ohio voters, and trumps any amended version passed in the interim by the legislature.<sup>73</sup> Once passed, the initiative is codified.

That ETS legislation for Ohio was imminent was not in dispute. As a lobbyist for the Ohio Licensed Beverage Association (OLBA) observed, “there

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70. Ohio Licensed Beverage Ass’n v. Ohio Dep’t of Health, No. 07CVH04-5103, slip op. at 7 (Franklin County Ct. C.P. May 17, 2007).

71. Ohio Licensed Beverage Ass’n v. Ohio Dep’t of Health, 2007-Ohio-7147, ¶ 41, *available at* <http://www.precydent.com/OriginalVersion/2007-ohio-7147.pdf?id=190595> (“[A]ny potential change to the exemption as enacted would be a matter for the legislature, not the administrative agency, to address.”).

72. Press Release, SmokeFree Ohio, American Cancer Society Launches Campaign To Pass a Statewide Clean Air Law (Mar. 10, 2005), <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.”).

73. OHIO CONST. art. II, § 1b.

will be a statewide policy. The question is what will that be?”<sup>74</sup> On that point, however, public opinion was unclear. A 2005 poll conducted by the statewide trade organization revealed a 55% majority in support of a very limited statewide ban. A 2006 poll conducted by health activists, on the other hand, revealed a 52.3% majority in favor of a blanket ban, with a 3.4% margin of error.<sup>75</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>76</sup> Unwilling to subject their bill to potential amendment by the legislature, however, the ACS’s lobbyists instructed the legislature “to do nothing” and “leave this to the Ohio voters,”<sup>77</sup> insisting that the legislature neither debate nor amend their bill and “allow the issue to go to the statewide ballot next November.”<sup>78</sup> Legislators obliged, but 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 “[t]heir plan leaves no room for compromise.”<sup>79</sup>

The hospitality industry responded to the ACS’s ultimatum with a proposal of its own. On April 19, Ohio’s Attorney General approved language for a constitutional amendment sponsored by OLBA, which had formed an organization called “SmokeLess Ohio” (SLO) for the purpose, generously backed by the tobacco industry. Where SFO’s approach had been anti-deliberative, OLBA’s 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 secondhand smoke in restaurants and bars, effectively enshrining the right to smoke in restaurants and bars in the Ohio Constitution.<sup>80</sup>

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74. Jim Provance, *Anti-Tobacco Activists File Petitions to Ban Most Public Smoking in Ohio*, TOLEDO BLADE, Nov. 18, 2005, available at <http://toledoblade.com/apps/pbcs.dll/article?AID=/20051118/NEWS24/511180417>.

75. Peggy O’Farrell, *Smoking Ban Gets Support*, CINCINNATI ENQUIRER, Feb. 6, 2006, at 1B.

76. Provance, *supra* note 74.

77. See Podcast: Oct. 30, 2006 featuring Jacob Evans vs. Tracy Sabetta, Debate: Smoke Less Ohio vs. Smoke Free Ohio, held at the Cleveland City Club, at 8:50-9:19, available at <http://www.cityclub.org/content/podcasts/index/Podcasts.aspx>.

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

79. Harlan Spector, *Cancer Society Tells Ohio to Ban Indoor Smoking*, CLEV. PLAIN DEALER, Mar. 11, 2005, at A1.

80. Reginald Fields, *Smoking Ban Amendment Exempts Bars, Eateries*, CLEV. PLAIN DEALER, Apr. 20, 2006, at B2.

### B. Petitioning

Through the summer of 2006, the restaurant and bar lobby faced off against the ACS lobby in a race to gather enough petitions to appear on the November 2006 ballot. The ACS, through SFO, pushed its legislation on public health grounds, and the OLBA, through SLO, opposed the initiative on economic grounds, concerned that small businesses relied on smoking patrons. These arguments were blurred, however, by the deceit, confusion, and misinformation that marred the signature-gathering phase. Both organizations employed professional signature-gathering companies, either paying a set price per signature or contracting to purchase a set number of signatures.<sup>81</sup> Enterprising signature-gatherers worked for both organizations, simultaneously obtaining signatures for both bills.<sup>82</sup>

Petition-gatherers suffered no restrictive allegiance to the truth. SLO circulators pitched the constitutional amendment as a more reasonable alternative to the ACS bill, asking registered voters to sign and indicate support for “the statewide ban on public smoking” and falsely assuring signatories that the initiative would not supersede municipal clean air ordinances.<sup>83</sup> SFO circulators employed scare tactics bolstered by well-spun data. Indeed, SFO’s cavalier use of scientific studies drew fire from a professor of public health, who denounced SFO propaganda as “wildly misleading and inaccurate.”<sup>84</sup> Tactics grew increasingly desperate as the summer wore on. A health official reported that SLO petition circulators told him that the stricter SFO proposal would “prohibit smoking in your home, which it doesn’t.”<sup>85</sup> Petition circulators forged signatures, sometimes with the names of deceased voters.<sup>86</sup> Contracted petition circulators traded on the ACS’s reputation, concealing their mercenary status and incentive structure by passing themselves off as concerned ACS employees.<sup>87</sup> This last

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81. See *In re* Protest of Evans, 2006-Ohio-4690, ¶ 20, available at <http://www.sconet.state.oh.us/rod/docs/pdf/10/2006/2006-ohio-4690.pdf> (describing the American Cancer Society’s contract with Arno Political Consultants to collect 75,000 signatures).

82. Harlan Spector, *Anti-Smoking Group Alleges Deception by Opposing Effort*, CLEV. PLAIN DEALER, Aug. 1, 2006, at B2.

83. See, e.g., Spector, *supra* note 82; Alice Duncanson, Letter to the Editor, *Smoking Lobby Disingenuous with Petition*, COLUMBUS DISPATCH, May 15, 2006, at 06A.

84. Harlan Spector, *Health Advocate Questions Anti-Smoking Drive’s Data*, CLEV. PLAIN DEALER, June 28, 2006, at A3.

85. Spector, *supra* note 82.

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

87. T.C. Brown, *SmokeLess Amendment OK’d for Ballot*, CLEV. PLAIN DEALER, Sept. 28, 2006, at B2.

development resulted in a lawsuit and a string of appeals, all of which were resolved against SFO.<sup>88</sup> The full extent of confusion caused by these contracted signature-gatherers is impossible to ascertain, but even from the documented frauds, there can be no doubt that it was severe. 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>89</sup>

### C. Balloting

More problems emerged during the balloting stage, as ballot language was adopted and campaigning began. For most voters, the ballot summaries would be the full extent of engagement with the initiatives themselves, but the Ballot Board devoted only cursory attention to the ballot language, deferring entirely to the language drafted by the initiative sponsors.

On August 22, the Ohio Ballot Board rubberstamped language from SLO that would summarize its proposed constitutional amendment as Issue 4 on the November ballot.<sup>90</sup> At the language hearing, which was attended by lobbyists from SFO and SLO, the Ballot Board “quickly handled” SLO’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>91</sup>

SFO’s language was equally misleading, promising a lengthy list of exemptions including retail tobacco shops, private clubs, outdoor patios, and

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88. *In re* Protest of Evans, 167 Ohio App. 3d 674, 2006-Ohio-3453, 856 N.E. 2d 999, ¶ 3 (granting summary judgment to plaintiff Evans, the SmokeLess lobbyist, on grounds 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”), *aff’d*, 2006-Ohio-4690.

89. Provance, *supra* note 74. For a detailed description of the process, see *State ex rel. Evans v. Blackwell*, 2006-Ohio-2076, available at <http://www.sconet.state.oh.us/rod/docs/pdf/10/2006/2006-ohio-2076.pdf>.

90. The Ballot Board, a five-member panel composed of the Secretary of State and four other legislators, is charged with prescribing ballot language on initiative petitions and constitutional amendments. See OHIO CONST. art. II § 1g; *id.* art. XVI § 1. Its obligations are less than strenuous: 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.” *Id.*

91. Aaron Marshall, *State Preps Ballot Text on Slots; Approved Language Underwhelms Both Sides*, CLEV. PLAIN DEALER, Aug. 23, 2006, at B1. See *infra* Appendix B for the text of the statement.

private residences.<sup>92</sup> Nonetheless, it was unanimously approved.<sup>93</sup> Though the fine print of the statute undid most of these exemptions, the Ballot Board hardly batted an eye at SFO’s proposed language for what would become Issue 5 on the ballot. 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 the ballot campaign commenced in earnest, SFO focused its efforts on defeating Issue 4, playing the moral villain card against the tobacco lobby.<sup>94</sup> Despite a significant financial disadvantage (only \$1.5 million, to R.J. Reynolds’ \$5.3 million),<sup>95</sup> the ACS held and exploited 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 the tobacco lobby and urged Ohio voters to support Issue 5.<sup>97</sup> The villain factor of SLO’s largest donor would be a—perhaps *the*—decisive factor in the ballot results.<sup>98</sup>

SLO, 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, SFO 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. Attempting to persuade voters that the economic

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92. See *infra* Appendix B.

93. Aaron Marshall, *Smoke Free Group’s Wording To Go on Ballot*, CLEV. PLAIN DEALER, Aug. 24, 2006, at B5.

94. Harlan Spector, *Public Smoking Issues Offer Two Choices: Less or None*, CLEV. PLAIN DEALER, Oct. 22, 2006, at T14.

95. See Jon Craig & Annie Hall, *Smoking and Gambling Campaigns Well Funded*, CINCINNATI ENQUIRER, Oct. 27, 2006, at 5B; Spector, *supra* note 94.

96. See Regina Brett, Editorial, *Let’s Clear the Air on 2 Hot Issues*, CLEV. 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 R.J. Reynolds “has marketed candy-flavored cigarettes, clearly targeted toward our youth”).

97. Peggy O’Farrell, *Tobacco Heir Backs Smoke Ban*, CINCINNATI ENQUIRER, Oct. 27, 2006, at 1B.

98. Harlan Spector, *Sweeping Prohibition on Smoking Is Adopted*, CLEV. PLAIN DEALER, Nov. 8, 2006, at S7 (crediting SmokeFree Ohio’s “relentless public relations blitz” and messaging of Issue 4 as a “big-tobacco campaign to deceive Ohio voters” with success at voting booths).

99. Harlan Spector, *Many Cleveland Bar Workers Afraid To Lose Their Customers*, CLEV. PLAIN DEALER, Oct. 30, 2006, at A9.

harms to small businesses outweighed the public health concerns of unregulated ETS in all restaurants and bars, SLO was tilting at windmills.

As voting day drew near, the ACS effectively commanded the public discussion, focusing on the importance of voting against the tobacco lobby's creature.<sup>100</sup> Through the ACS's successful messaging, voters became aware that they were choosing between a ban on smoking in restaurants and bars and an industry plot to give constitutional protection to its bottom line. Political endorsements were quick to follow, beginning in late September with the Governor's unsolicited endorsement<sup>101</sup> and climaxing with a blowout news conference in October, at which the influential support of the Mayor and the Cleveland Clinic was announced.<sup>102</sup>

On voting day, Ohio voters passed Issue 5. In sum, 58.52% of ballots cast supported Issue 5.<sup>103</sup> Issue 4 was more clearly repudiated, receiving only 35.89% of votes cast.<sup>104</sup> Voter turnout was approximately 56%.<sup>105</sup>

Throughout the balloting process, the SFO proposal had gone almost entirely unexamined. Public attention had been diverted from the mechanics of the ACS bill to the tobacco industry's sponsorship of the competing proposal, and this had been a decisive factor.<sup>106</sup> Forced to choose between a bill that would "make it

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100. See Brett, *supra* note 96 ("Big Tobacco is spending millions to confuse you . . . . Issue Four means smoke more. Issue Five keeps you alive."); Craig & Hall, *supra* note 95 ("R.J. 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."); Editorial, *No to Issue 4; Yes to Issue 5*, CLEV. PLAIN DEALER, Oct. 8, 2006, at M2 ("Many lawmakers may be willing to surrender their consciences to the tobacco industry, but voters should be wiser."); O'Farrell, *supra* note 97 (quoting the grandson of R.J. Reynolds in opposition to the tobacco lobby's proposal: "They're doing it to protect future profits."); Harlan Spector, *A Clear Look at Two Smoking Initiatives*, CLEV. PLAIN DEALER, Oct. 30, 2006, at A1 (noting "deceptive tactics" of R.J. Reynolds); Taft, *supra* note 96.

101. Reginald Fields, *Taft Backs SmokeFree Ohio Ballot Measure*, CLEV. PLAIN DEALER, Sept. 21, 2006, at B3.

102. Harlan Spector, *Smoking Ban Gains Political Clout*, CLEV. PLAIN DEALER, Oct. 12, 2006, at B4.

103. 2,370,369 votes were counted in favor of Issue 5, and 1,679,956 against. 135,272, or approximately 3.2% of voters, did not express an opinion on Issue 5. See Ohio Sec'y of State, State Issue 5: November 7, 2006, <http://www.sos.state.oh.us> (follow "Elections & Ballot Issues" hyperlink; then follow "Election Results" hyperlink; then follow "2006 Official Results" hyperlink; then follow "State Issue 5" hyperlink).

104. Ohio Sec'y of State, State Issue 4: November 7, 2006, <http://www.sos.state.oh.us/SOS/ElectionsVoter/results2006.aspx?Section=1858> (follow "Elections & Ballot Issues" hyperlink; then follow "Election Results" hyperlink; then follow "2006 Official Results" hyperlink; then follow "State Issue 4" hyperlink).

105. *Id.*

106. See Harlan Spector, *Partnership Key to SmokeFree's Success; Medical Community Helped*

unconstitutional to protect half a million Ohioans employed in the hospitality industry from secondhand smoke<sup>107</sup> and an ETS law that would function as such, voters passed the latter.

Throughout the entire balloting process, voters had paid little attention to the bill itself—much less the details of its exemption scheme. Private clubs were never discussed. Cigar and hookah bars were never mentioned. The absurd mechanics of the bill’s exemptions for outdoor areas and the nonsensical structural requirements for retail tobacco shops were not discussed. Voters believed that they were voting for a bill that would “restrict smoking in places of employment and in most public places,”<sup>108</sup> under which “servers and bartenders would be protected from the ill effects of secondhand smoke,”<sup>109</sup> preserving “reasonable exclusions”<sup>110</sup> that “legislators can tweak . . . if necessary.”<sup>111</sup> Throughout, exemptions had been less than an afterthought.

#### *D. Backlash*

Ohioans were stunned to discover what they had voted into law.<sup>112</sup> Within two weeks of the Smoke Free Workplace Act’s passage, a blistering opinion piece by a local professor of law appeared in the *Cleveland Plain Dealer*, revealing the functional non-existence of promised exemptions and highlighting the stark disjuncture between what voters had been led to expect and what the text of the bill provided. Noting the general belief 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>113</sup>

As the disingenuous exemption scheme was finally revealed, the voting

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*Issue 5 Pass*, CLEV. PLAIN DEALER, Nov. 12, 2006, at A1 (“Some say reports that R.J. Reynolds bankrolled the campaign with \$5.4 million was the kiss of death for Issue 4. It also may have swung some undecided voters to Issue 5.”); *see also* Harlan Spector, *Voters Send a Message: No Ifs, Ands or Butts in Ohio*, CLEV. PLAIN DEALER, Nov. 9, 2006, at B1 (quoting Cleveland doctor’s characterization of the results as “giving [R.J. Reynolds] the finger”).

107. O’Farrell, *supra* note 97.

108. Ballot Language, *supra* note 68; *see also infra* Appendix B.

109. Editorial, *supra* note 100; *see also* O’Farrell *supra* note 97 (summarizing Issue 5 as banning smoking “in workplaces and public places such as restaurants and bars”); Spector, *supra* note 99 (characterizing ETS effects on bartenders as an “important theme” in the SmokeFree campaign).

110. Editorial, *supra* note 100.

111. *Id.*

112. Cliff Peale, John Eckberg & Polly Campbell, *Smoking Just Got Harder*, CINCINNATI ENQUIRER, Nov. 9, 2006, at 1A (“[P]eople were confused . . . . They didn’t have a good understanding of what Issue 4 and Issue 5 meant.”).

113. Forte, *supra* note 69.

public was blindsided. 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>114</sup> The “reasonable exceptions” promised in the ballot summary of the bill were functionally nonexistent. Definitions of private clubs,<sup>115</sup> restaurant patios,<sup>116</sup> and retail tobacco shops<sup>117</sup> had been cleverly written so as to render the purported “exemptions” meaningless.

Professor 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>118</sup>

The exemption scheme was opaque even to the state agency responsible for putting the new law into effect. Responding to confusion and frustration, a spokesman demurred that “[we] didn’t write it,”<sup>119</sup> and another noted that “we

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114. Chris Seper, *Hookah Bars Smoke Out Loopholes in Ban*, CLEV. 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.*

115. Private clubs were required to have no employees, to be located in a free-standing structure, and to prohibit guests from the premises. OHIO REV. CODE tit. 37, § 3794.03 (Supp. 2008). Furthermore, the statute broadened the definition of employee to include anyone who “performs services” in the club, whether compensated or not. *See id.* § 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.”).

116. Doors and windows that connect a restaurant patio to the restaurant must be closed. *Id.* § 3794.03(F).

117. A retail tobacco shop was required to be the sole tenant of a free-standing building. *Id.* § 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.*

118. Forte, *supra* note 69; *see also* Peter Bronson, Editorial, *Stop Smoking or We Will Kill You*, CINCINNATI ENQUIRER, Dec. 12, 2006, at 7B (noting that “even some supporters are wondering, ‘I voted for what?’”). Investigative reporters were confused as well: *The Plain Dealer* printed a correction on November 15 to an article mentioning the “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*, CLEV. 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” (emphasis added)).

119. Bronson, *supra* note 118.

had to play the hand we were dealt.”<sup>120</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. Neither could be resolved, however, because the law was insufficiently specific to evaluate the specious constitutional violations alleged by the plaintiffs.<sup>121</sup> Accordingly, the Attorney General’s office, 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>122</sup>

In the meantime, confusion and frustration continued. Restaurateurs and bar owners were unable to determine how the ban would affect them or how it would be enforced.<sup>123</sup> Hookah bars received a provisional exemption until the Cleveland Health Department figured out what to make of the ethnic tradition.<sup>124</sup> Stadiums and outdoor concert pavilions wrote to state officials seeking compliance advice, to no avail.<sup>125</sup> After the state’s non-enforcement agreement, hard feelings erupted between voluntarily compliant establishments and those renegade outposts that still permitted smoking.<sup>126</sup> A frustrated suburban mayor demanded immediate

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120. Mike Boyer, *Health Department Speeds Up Process*, CINCINNATI ENQUIRER, Jan. 5, 2007, at 15A.

121. 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 the 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 v. Ohio Dep’t of Health*, No. A0610614, at 3 (Hamilton County C.P. Ct. May 2, 2007), available at [http://www.hamilton-co.org/cinlawlib/blog/Nelson\\_decision.pdf](http://www.hamilton-co.org/cinlawlib/blog/Nelson_decision.pdf) (order denying plaintiffs’ motion for preliminary injunction).

122. See Bill Bush & Matt Tullis, *Smoking Ban Put on Hold; Deal Means Law Might Not Be Enforced Until June*, COLUMBUS DISPATCH, Dec. 8, 2006, at 1A; James McNair, *Smoking Ban Takes a Breather*, CINCINNATI ENQUIRER, Dec. 8, 2006, at 1A.

123. See Henry Gomez, *Snuff ‘Em Out: It’s the Law; Employers Hurry To Comply, Figure Out What Happens if They Don’t Ban Smoking*, CLEV. PLAIN DEALER, Dec. 4, 2006, at E1; James McNair, *Smokers Fume as Ban Draws Near*, CINCINNATI ENQUIRER, Dec. 3, 2006, at 1A.

124. See Tony Brown & Debbie Snook, *They Had ‘Em, Smoked ‘Em, Put ‘Em Out*, CLEV. PLAIN DEALER, Dec. 7, 2006, at 16; Seper, *supra* note 114 (“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 (proprietor “still without clear answers”).

125. See Lori Kurtzman & 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”); James McNair, *Ban’s Coming, But How Do You Enforce It?*, CINCINNATI ENQUIRER, Dec. 3, 2006, at 10A.

126. Harlan Spector, *Air’s Still Not Clear at Bars, Restaurants*, CLEV. PLAIN DEALER, Dec. 16,

enforcement by the Ohio Health Director: “Make the rules. It’s not rocket science.”<sup>127</sup> In the end, all parties had to wait until the Ohio Department of Health promulgated the rules that would determine how the statute was to be enforced.

### *E. Enforcement Rules*

The process by which enforcement rules would be promulgated appeared to encourage meaningful public comment on the bill. After private meetings with lobbyists and business associations, the Department of Health posted draft rules on the bill, accepted comments, and held a public hearing.<sup>128</sup> Appearances, unfortunately, foundered in the face of vigorous lobbying. Though this process began at last to air the defects in the proposed legislation, it compounded the narrow interest landscape at the petitioning and ballot stages with a new problem. ACS lobbyists took this opportunity to advance more aggressive agendas in the guise of “the voters’ intent,” ultimately rebuffing efforts by the Department of Health to remedy some of the more misleading definitions.

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 Trojan nature of the bill. One attendee testified that voters had been betrayed by the ballot language: “It said private clubs were exempt . . . we were misled.”<sup>129</sup> The Department of Health responded by proposing new rules that 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>130</sup> and “we feel we are more in line with the will of the voters having made this change.”<sup>131</sup>

Responding to testimony from voters who took the ballot language at its word, the Health Department had given substance to the promised exemption. Having secured the Act’s passage, however, the ACS no longer needed to maintain a reasonable façade. Its lobbyists executed a startling *volte-face*, condemning the exemption promised by their own ballot language as “this

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2006, at A1.

127. Harlan Spector, *Patrons Complain Smoke Ban Ignored; Parma Mayor Wants Taft To Enforce Law Now*, CLEV. PLAIN DEALER, Dec. 21, 2006, at B1.

128. Boyer, *supra* note 120.

129. Liz Long, *State’s Rule Makers Hear Debate on Smoking*, CINCINNATI ENQUIRER, Feb. 28, 2007, at 1B.

130. Harlan Spector, *Cancer Society Sues, Challenges Smoking in Private Clubs*, CLEV. PLAIN DEALER, Apr. 19, 2007, at B2.

131. Dan Horn, *Cancer Society Sues over Smoking Exemption*, CINCINNATI ENQUIRER, Apr. 19, 2007, at 1B.

loophole that skirts the law.”<sup>132</sup> Noting that “the revised rules would allow private clubs to get an exemption by making their employees members,” ACS and American Lung Association lobbyists declared the prospect of a meaningful private club exemption “contrary to the intent of what voters approved in November.”<sup>133</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>134</sup>

Suddenly 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>135</sup> OLBA, too, construed the voters’ intent against the language on the very ballot they adopted. Their lobbyist (and former SLO 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 law.”<sup>136</sup> In the context of a ban that was presented to voters as including an exemption for private clubs while prohibiting smoking in restaurants and bars, this was a bold claim. Nonetheless, because the voters’ intent was an inscrutable black box, it could be reconstructed with impunity, even against contrary ballot language. Both OLBA and the ACS would press this claim in Ohio trial courts.

#### F. The Courts

OLBA prevailed over the Ohio Department of Health in the summer of 2007, alleging that by amending the definitional elements of the private club exemption to accord with the ACS’s ballot language, the Department of Health had exceeded its rulemaking authority.<sup>137</sup> Reconstructing voter intent from an

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132. *Id.* (quoting spokeswoman for the Ohio division of the American Cancer Society).

133. Mark Rollenhagen, *Ohio VFW Wins One in the Smoking Wars; Veterans Posts May Be Able To Allow Puffing*, CLEV. PLAIN DEALER, Mar. 22, 2007, at B1.

134. Complaint, State *ex rel.* Am. Cancer Soc’y v. Ohio Dep’t of Health, No. 07-CV-005306 (Franklin County Ct. C.P. Apr. 23, 2008). The case was resolved against the Department of Health on April 23, 2008. State *ex rel.* Am. Cancer Soc’y v. Ohio Dep’t of Health, No. 07-CV-005306 (Franklin County Ct. C.P. Apr. 23, 2008). Both parties cross-appealed, largely on organizational standing issues, but voluntarily dismissed the appeals following the Ohio Supreme Court’s refusal to take the OLBA case. Notice of Joint Voluntary Dismissal, Am. Cancer Soc’y v. Ohio Dep’t of Health, No. 08AP436 (Ohio Ct. App. June 27, 2008).

135. Jon Newberry, *Smoking Ban Remains Hazy*, CINCINNATI ENQUIRER, Apr. 30, 2007, at 1A (reviewing proprietors’ anxiety over lost profits to private clubs).

136. Kevin Mayhood & James Nash, *For Now, Smoking Lamp Dark at VFW*, COLUMBUS DISPATCH, May 1, 2007, at 1A.

137. This argument had been raised but not pursued as a void for vagueness challenge in

audacious angle, given ballot language that had specifically promised a private club exemption, the hospitality industry argued that “[p]rivate businesses—clubs and taverns—should be treated the same as private clubs in regard to the smoking law.”<sup>138</sup>

Though the trial court ultimately sustained OLBA’s challenge, palpable frustration is unmistakable in the opinion. The question, “Was the ballot language . . . misleading[?]” was only the beginning.<sup>139</sup> Judge Cain unleashed a barrage of questions barred from his analysis, including, “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?” and “Was the Ohio voting public fooled by a ballot issue that purported to be something that it was not?”<sup>140</sup>

Though Judge Cain clearly suspected that the inclusion of the private club exemption was “just a sham to get more votes,”<sup>141</sup> the legal issue presented was quite narrow. Because the exemption in question was undone by the definition of private club—“The Court cannot think of a scenario under the SmokeFree Act in which the ‘private club’ exemption would actually apply”<sup>142</sup>—the court reluctantly concluded that the text of the bill taken as a whole did not actually exempt private clubs, and therefore 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. . . . Regardless of the statements made in R.C. 3794.03(G) that a “private club” exemption exists, no such exemption actually does exist.

Reviewing the Health Department’s arguments, Judge Cain was sympathetic to the agency’s efforts to redefine “employee” in order to give substance to the voters’ intent, but ultimately had to presume that voters had intended every definitional intricacy.

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

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*Buckeye Liquor*. *Buckeye Liquor Permit Holders Ass’n v. Ohio Dep’t of Health*, No. A0610614, at 14 (Hamilton County C.P. Ct. May 2, 2007), available at [http://www.hamilton-co.org/cinlawlib/blog/Nelson\\_decision.pdf](http://www.hamilton-co.org/cinlawlib/blog/Nelson_decision.pdf) (order denying plaintiffs’ motion for preliminary injunction).

138. *Mayhood & Nash*, *supra* note 136.

139. *Ohio Licensed Beverage Ass’n v. Ohio Dep’t of Health*, No. 07CVH04-5103, slip op. at 2 (Franklin County Ct. C.P. May 17, 2007).

140. *Id.*

141. *Id.*

142. *Id.* at 7.

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.<sup>143</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 limited ability to offer equitable relief. He concluded his opinion with “a final thought on this matter”:

[F]rom 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 exist. It is not within the Court’s power to correct this situation.<sup>144</sup>

The frustration evident in Judge Cain’s opinion speaks to the powerlessness of courts to correct the deception and misinformation that can plague interest-group politics.<sup>145</sup>

On appeal, Judge Cain’s conclusions were affirmed, bolstered by the court of appeals’ reliance on an interpretative note buried in the text of the bill, stipulating that provisions “shall be liberally construed so as to further its purposes.”<sup>146</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>147</sup>

Unable to look behind the statute regardless of the immensely problematic circumstances attending its passage, and suspicious that the inclusion of the

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143. *Id.* at 8.

144. *Id.* at 11.

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

146. *Ohio Licensed Beverage Ass’n v. Ohio Dep’t of Health*, 2007-Ohio-7147, ¶ 40.

147. *Id.* ¶ 41.

private club exemption was a “sham to get more votes,” the courts declared themselves powerless to resolve the issues at the root of the exemption controversy.<sup>148</sup> 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 rulemaking authority within the textual boundaries of the misleading Act. The legislature, however, knew no such bounds: Once passed, the initiative was simply another amendable statute. 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 two proposed exemptions.

The first, for performing arts spaces, responded to fears that the Act jeopardized the ability of theaters to acquire the rights to stage dramas that specifically called for smoking onstage. Senate Bill 38 was to be an “antidotal” exemption to “allow smoking by a performer while performing a theatrical

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148. This conclusion has since been affirmed by the Supreme Court of Ohio. The Solicitor General of Ohio declared the case “of public and great general interest,” and sought review of the appellate opinion. Memorandum in Support of Jurisdiction of Defendants-Appellants at 8, *Ohio Licensed Beverage Ass’n v. Ohio Dep’t of Health*, No. 2008-08-0356 (Ohio June 4, 2008). The Solicitor General contended that voter-enacted laws should be subject to the same canons of construction as conventional legislation to execute the will of the voters, *id.* at 11-13, and that the private-club exemption as implemented by the Department of Health was consistent with the overall statutory scheme, *id.* at 13-15. Unsurprisingly, the ACS filed an extensive *amicus* brief on the basis that “[f]rom 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.” Memorandum in Response to Memorandum in Support of Jurisdiction of Amici Curiae American Cancer Society et al. at 5-6, *Ohio Licensed Beverage Ass’n v. Ohio Dep’t of Health*, No. 2008-0356 (Ohio June 4, 2008). Despite the Solicitor General’s forceful arguments that that review was necessary “to vindicate the public’s right to direct democracy,” Memorandum in Support of Jurisdiction of Defendants-Appellants, *supra*, at 9, and redress wrongs done to public trust, the Supreme Court, divided four to three, declined jurisdiction. *See Ohio Licensed Beverage Ass’n v. Ohio Dep’t of Health*, No. 2008-0356 (Ohio June 4, 2008) (dismissing appeal “as not involving any substantial constitutional question”); *see also* Jim Provance, *Smoke-Ban Appeal Loses Legal Battle; Justices Refuse To Hear Case Seeking Some Exemptions*, TOLEDO BLADE, June 5, 2008, available at <http://www.toledoblade.com/apps/pbcs.dll/article?Date=20080605&Category=NEWS02&ArtNo=806050409&Ref=AR>.

production if smoking is integral to, or is directed by the script or other story line of the performance being given.”<sup>149</sup>

Worryingly, much of the testimony had nothing to do with the merits of the proposed exemption. Though some testimony was quite on point—the director of the Cleveland Playhouse testified in support that, as a result of licensing contracts, he would not be able to produce a number of well-known plays under the Act,<sup>150</sup> and an actor testified in opposition to the verisimilitude of special stage cigarettes<sup>151</sup>—ACS lobbyists demanded that the legislative committee adopt a hands-off policy.<sup>152</sup> According to opposition’s 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>153</sup>

The next proposal was from the beginning a clumsy effort at a tobacco lounge exemption—largely because the establishment that inspired the exemption was not, strictly speaking, a cigar bar, but a steakhouse run by a constituent of the bill’s sponsor. Defining “cigar bar” as an establishment containing a sufficiently large “walk-in humidior” with filtration systems,<sup>154</sup> Senate Bill 195 provided nearly no meaningful guidance as to what would constitute a cigar bar, nor did it distinguish cigar bars from restaurants and bars that happened to sell cigars. As opponents pointed out, this would open a Pandora’s Box and functionally doom the Act if restaurants and bars statewide exploited the definitional vagueness.<sup>155</sup>

Testimony in support of the proposal was given by the proprietor of a large Cincinnati nightclub, the owner of the “cigar bar and grille” that inspired the bill, and letters from two national trade organizations representing cigar retailers and distributors. The chief arguments made by proponents were the same tired economic complaints concerning the diminishing profit margins of small business owners that had failed at the polls. Cigar bars per se were entirely

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149. *Hearing on S.B. 38 Before the S. Health, Human Services, and Aging Comm.*, 127th Gen. Assem., Reg. Sess. (Ohio 2007) (statement of Sen. Schuler).

150. *Id.* (statement of Buzz Ward, Executive Dir., Cincinnati Playhouse in the Park).

151. *Id.* (statement of Susan Jagers, Am. Cancer Soc’y, referencing demonstration by actor Robert Dubec).

152. *Id.* (testimony of Tracy Sabbetta, Am. Cancer Soc’y) (“[O]ur organizations are adamantly opposed to opening up the Smoke Free Workplace Act to changes only a few short months after its passage.”).

153. *See id.* (testimony of Marjorie Broadhead, Health Comm’r, Seneca County) (“[W]e 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.”).

154. S.B. 195, 127th Gen. Assem., Reg. Sess. (Ohio 2007).

155. *Hearing on S.B. 195 Before the S. Health, Human Services & Aging Comm.*, 127th Gen. Assem., Reg. Sess. (Ohio 2007) (statement of Micah Berman, Executive Dir., Tobacco Pub. Policy Ctr. at Capital Univ. Law Sch.).

unrepresented—indeed, cigar bar owners appear to have been unaware that the hearing was taking place.<sup>156</sup>

As a result of the proposal's inadequacy, the merits of a cigar bar exemption were not debated. No arguments were made that might have distinguished cigar bars from conventional bars and restaurants for the public health purposes of the ban. Though the ACS renewed its demands to protect the "will of the voters" by refusing to consider any modifications to the Act, its vigorous exertions may have been unnecessary. Senate Bill 195 was a sufficiently ham-handed attempt at a cigar bar exemption that it will likely be condemned on unworkability alone.<sup>157</sup>

Following the Supreme Court's decision to decline review of the OLBA suit, two other exemption bills surfaced. One, Senate Bill 396, would remedy the outdoor patio and private club exemptions, but would also introduce an exemption for "family owned businesses."<sup>158</sup> The other, House Bill 592, would address the outdoor patio distinction, but would also exempt "stand-alone bars," changing Ohio's regime from Class V to Class IV.<sup>159</sup> These proposals will be hotly debated in the next legislative session, but have already drawn fire from both OBLA and ACS lobbyists.<sup>160</sup>

#### *H. Conclusion*

Reviewing the tortured enactment of the Smoke Free Workplace Act, the chief conclusion is that public deliberation, particularly concerning the exemption scheme, was stifled, enabling the ACS to slide an extremely 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 that 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 realities of

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156. 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.").

157. The bill remains undisturbed in the Senate Health, Human Services, and Aging Committee since the 2007 hearings. An enlightened friendly amendment may yet be introduced.

158. S.B. 346, 127th Gen. Assem., Reg. Sess. (Ohio 2008).

159. H.B. 592, 127th Gen. Assem., Reg. Sess. (Ohio 2008).

160. See *Anti-Smoking Coalition Cautions Legislature Against Revising SmokeFreeOhio Law; Poll Shows Support for Smoking Ban*, 77 GONGWER NEWS SERVICE, Ohio Rep. 180, Sept. 16, 2008; *State Tallies More Than 800 Smoking Ban Fines; Lawmakers Introduce Bills To Expand Exemptions*, 77 GONGWER NEWS SERVICE, Ohio Rep. 119, June 19, 2008, available at <http://cpmra.muohio.edu/otaohio/Legislation/Weekly%20Updates/2008/062708.pdf>.

direct legislation facilitated the usurpation of citizen authority and exacerbated the damage. Exemption candidates lacked the financial resources of the major players, the tobacco lobby and the ACS, and were unable to communicate with the voting public. Strategic drafting by the ACS 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, though savvy to the confusion and ignorance that plagued the electorate at the polls, were obliged to presume 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 ACS and the OLBA.

The Ohio Smoke Free Workplace Act is a case study in the liability of ballot initiatives to procedural abuse, and it demands remedial legislative attention. This was not a 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 signatures gathered by paid professionals, 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 Madison aptly put it, “the blow mediated by the people against themselves.”<sup>161</sup>

### III. BALLOT INITIATIVES: A BLUNT TOOL FOR A DELICATE TASK

As the foregoing case study demonstrates, ballot initiatives can be a clumsy mechanism for instituting ETS regimes, ill-suited to address the central question—exemptions—posed by modern statewide bans. The passage of Ohio’s Smoke Free Workplace Act highlights several aspects of ETS ballot initiatives that 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

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161. THE FEDERALIST NO. 63, at 382-83 (James Madison) (Clinton Rossiter ed., 2003).

unrepresented in the public conversation. Second, deception and misinformation crippled 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, although ballots can indicate support for an ETS regime, they cannot capture public opinion on exemption provisions. The danger is that our executive agencies and courts are required to pretend that they do.

#### *A. Inadequate Interest Representation*

Ballot initiatives are notoriously bad at eliciting meaningful public discussion, and in the context of ETS legislation this begins with poor interest representation. In Ohio, the interest landscape with respect to ETS policy was commanded entirely by voices on opposite extremes. On the one side, the ACS and its affiliates pushed a draconian bill that had been cleverly drafted to eliminate smoking even in promised exemption areas. On the other side, the tobacco and hospitality lobbies opposed meaningful ETS legislation entirely, peddling a constitutional amendment in the guise of a smoking ban that would have rendered 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. In the context of a regulatory arena in which the devil truly is in the details, this is a problematic state of affairs.

The interests most directly affected by the exemption scheme (and consequently most able to raise salient policy points), like private clubs, performing arts centers, hookah bars, cigar bars, and tobacco retailers, were marginalized. Despite 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 SFO'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 SFO 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 a third, more

nuanced 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 aggressive tactics of OLBA and the tobacco industry did exemption areas more harm than good, inviting inferences of guilt by association.

Unfortunately, this impoverished landscape of interests is fairly typical in the context of ETS ballot initiatives. ETS ballot initiatives have universally been sponsored by health advocacy groups, which generally propose extremely severe legislation.<sup>162</sup> Major players in the tobacco industry have sponsored opposition efforts quite similar to SLO’s constitutional amendment in a number of other initiative contests, which are characteristically absolutist.<sup>163</sup> Theatres, shisha cafés, 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 can they 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, deferral by the legislature at the proposal stage is fairly common, even in states like Ohio that provide the legislature with an opportunity to amend and pass a proposed statute.<sup>164</sup> Though perhaps politically understandable—no doubt a legislator proposing an exemption would be condemned by opposition lobbyists as “pro-smoking,” even if generally supportive of the ban—by deferring, a legislature squanders an opportunity to

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162. 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, *Pharmaceutical Players: Drug Companies Involved with “Cessation” Products*, July 13, 2001, <http://www.forces.org/evidence/pharma/pdf/players.pdf> (“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 8 KAREN GERLACH & MICHELLE LARKIN, *TO IMPROVE HEALTH AND HEALTH CARE: THE ROBERT WOOD JOHNSON PROGRAM 29-46* (2005), available at <http://www.rwjf.org/pr/product.jsp?ia=143&id=14912> (describing how the Foundation “encouraged” political activism and lobbying in grantees, and its reliance on grantees like the American Cancer Society to conduct lobbying initiatives that the nonprofit Foundation “could not support directly”).

163. Such competing proposals were made in Arizona, Nevada, and Ohio. See Amanda J. Crawford, *Tobacco Firm Joins Smoking Ban Fight; It Aims To Defeat Stricter Measure*, ARIZONA REPUBLIC, July 31, 2006, at A1; Steve Friess, *Even In Nevada, Smokers’ Options Are Shrinking*, N.Y. TIMES, Oct. 31, 2006, at A19 (noting that the hospitality industry, proposing a more moderate ban, spurned the support of the tobacco lobby for fear of being “tainted” by association).

164. See OHIO CONST. art. II, § 1b.

consider the arguments of interested parties that cannot afford to be heard.

### *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 the tobacco lobby's effort to purchase a page of the Ohio Constitution consumed public attention.

Strategic drafting by the ACS 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, subtler 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 accepted assurances of reasonable exemptions on faith.

#### *1. 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>165</sup> Political scientists have noted with concern the omnipresence of "highly professional operations dominated by media consultants who run deceptive or simplistic operations."<sup>166</sup> In 1992, the California

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165. DAVID MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 59 (1984).

166. BETTY ZISK, *MONEY, MEDIA, AND THE GRASS ROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS* 258 (1987); see also MAGLEBY, *supra* note 165, at 61-65 (reviewing abusive practices by initiative industry signature-gatherers); Todd Donovan & Shaun Bowler, *An Overview of Democracy in the American States*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 12 (Shaun Bowler, Todd Donovan & Caroline J. Tolbert eds., 1998) [hereinafter *CITIZENS AS LEGISLATORS*] ("An 'initiative industry' has evolved, seemingly supplanting the original idea of a populist system that provides access to the legislative process. Composed of law

Commission on Campaign Financing published a report on ballot initiatives, observing the following:

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 so much a measure of general citizen interest as it is a test of fundraising ability.<sup>167</sup>

The rising use of paid petition-circulators has created incentives for ruthless and deceptive practices.<sup>168</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>169</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>170</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 prohibited certain well-known tactics, like the use of “dodger cards,” which obscure the text of the proposal from the prospective signatory.<sup>171</sup> Illinois

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firms that draft legislation, petition management firms 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*, *supra*, at 55 (tracing the central role professional consultants have come to play in California ballot propositions).

167. CAL. COMM’N ON CAMPAIGN FIN., *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH BRANCH OF GOVERNMENT* 265 (1992), available at <http://www.cgs.org/images/publications/DemocracybyInitiative.pdf>.

168. See MAGLEBY, *supra* note 165, at 62 (reviewing data suggesting that voters rarely read the petitions they sign); 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.”).

169. Caroline Tolbert, Daniel H. Lowenstein & Todd Donovan, *Election Law and Rules for Initiatives*, in *CITIZENS AS LEGISLATORS*, *supra* note 166, at 34.

170. ZISK, *supra* note 166, at 260.

171. *Id.* at 260-61.

required an extraordinary demonstration of popular support, requiring that 25% of registered voters sign a petition to place a question on the ballot.<sup>172</sup>

These and other efforts to revive the integrity of the ballot initiative, however, have been ruled unconstitutional on First Amendment grounds.<sup>173</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 it gives initiative drafters little incentive to create responsible exemption schemes.

## 2. Deceptive Drafting

The threat of deceptive drafting is similarly inextricable from modern ballot initiatives. As Jane Schacter observes, “the direct lawmaking process gives powerful leverage to initiative drafters, who are situated to construct a phantom popular intent through strategic drafting.”<sup>174</sup> Because voters are likely to 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>175</sup> Exemption schemes in ETS proposals are particularly vulnerable to this phenomenon, both because they tend to be absent from the public conversation and because the fine points of an exemption’s operation require a sophisticated analysis of the relevant provisions and definitions. As Schacter observes, “The risk of abuse is especially severe . . . where the ballot measure is so lengthy or complex that legally significant details can easily be buried.”<sup>176</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. Though the proposed default rule may be fairly easy to understand, the severity

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172. *Georges v. Carney*, 546 F. Supp. 469, 477-78 (N.D. Ill. 1982).

173. 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.” 546 F. Supp. at 477.

174. Schacter, *supra* note 145, at 111.

175. *Id.* at 129.

176. *Id.*

of the measure depends on the exemption scheme, and as a result an ETS regime is a complicated series of proposals. Voters’ attention spans are limited, however, and ballot boards have a powerful incentive to sacrifice completeness for brevity. Most problematically, 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. Constrained Public Choice and the Problem of Voter Intent*

For the reasons reviewed above, meaningful public choice is unlikely in the context of ballot initiatives. Poor interest representation limits ballot options to extreme proposals, and the relative weakness of specific exemption constituencies makes it unlikely that the ballot proposals will accommodate their interests. Moreover, ballot initiatives tend to produce a nightmarish deliberative environment, replete with misinformation and outright deception. Powerful incentives exist for initiative sponsors to draft deceptive bills, for they can re-imagine voter intent after the fact with impunity and justify even the most offensive provisions.

Even in a deliberative Elysium, however, ballot initiatives would remain impermissibly clumsy vehicles for responsible ETS legislation for a straightforward structural reason: voters are not empowered to indicate preferences on the factors that determine how severe the regime will be. Rather, voters are restricted to the package of provisions crafted by the drafters of the proposal. As David Magleby has observed, this presents a number of problems:

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. . . . [V]oters often must choose the least inaccurate expression of their opinion.<sup>177</sup>

This is not to suggest that ballot results are meaningless. ETS ballot initiatives can certainly reveal general support for some form of ETS regime that reverses the default rule. In Ohio, the broad policy question was certainly evident: on the one hand, voters were presented with a “smoking ban” that failed to reverse the default rule by exempting bars and restaurants; on the other, voters considered a smoking ban that promised to reverse the default rule and take a strong stance on ETS in public places, with reasonable exceptions. On this point, the voters spoke relatively clearly.<sup>178</sup> In voting down Issue 4 and adopting Issue 5, Ohioans voted to reverse the default rule on smoking in public places.

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177. MAGLEBY, *supra* note 165, at 183.

178. Relatively, because some confused voters cast ballots for the two incompatible proposals.

Beyond the default rule, however, seeking intent with respect to particular elements of an ETS statute passed by ballot initiative is a Sisyphean endeavor. This became painfully apparent in Ohio. Not only were voters unaware of the operation of the exemption scheme, but also when it was implemented even voters who supported the initiative repudiated significant points. As Jane Schacter observes, analyzing what she aptly terms “the intractable search for popular intent,” ascribing a single intent to the passage of a ballot initiative is even more problematic than in the context of conventional statutes.<sup>179</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>180</sup> Additionally, voters are typically uninformed,<sup>181</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>182</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 provisions) that determine the character of the new regime. Furthermore, voters may cast strategic ballots, abandoning specific exemption areas for the larger purpose of seeing the bill through. ETS ballot initiatives can certainly serve as referenda on whether a state chooses to switch the default rule, but they are structurally incapable of expressing voter intent on exemption provisions. When the dust settled, potential exemption areas like private clubs and tobacco lounges were incidental casualties of the Smoke Free Workplace Act. They were trapped in limbo between the draconian bill written by the ACS and the anti-regulatory constitutional amendment proposed by the tobacco industry. 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. Because these fringe establishments lack the clout to elicit more nuanced propositions from the powerful, diametrically opposed interests, voters are neither presented with a full array of potential options nor able to express preferences on specific points.

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179. Schacter, *supra* note 145, at 123-30; *see also* MAGLEBY, *supra* note 165, at 144 (“For many voters, direct legislation can be a most inaccurate barometer of their opinions.”).

180. Schacter, *supra* note 145, at 125.

181. *See* MAGLEBY, *supra* note 165, at 62, 129-30, 144; *id.* at 198 (describing voting on ballot questions as “electoral roulette”).

182. Schacter, *supra* note 145, at 127.

*D. Limited Executive and Judicial Remedies*

Courts, however, ignore these limitations and adhere to a stylized portrait of direct democracy, foreclosing remedial action by executive agencies. In Ohio, frustration with this legal pretense suffused Judge Cain’s opinion; other courts have registered similar concerns.<sup>183</sup> As Professor Schacter’s survey of relevant case law 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 that characterize ballot initiatives and “hold the legislature and the citizenry to the same standard when interpreting the laws they enact,”<sup>184</sup> they also “invert the informational hierarchy” in searching for popular intent, relying almost exclusively on formal sources, such as the text of legislation, instead of sources that more fully express public opinion, such as advertisements and the news media.<sup>185</sup>

Legal scholars have proposed interpretive methodologies that 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>186</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>187</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 well 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 have provided Ohio courts with a justification for giving force to the private club

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183. *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 directly by the electorate.”).

184. *Backman v. United States*, 516 A.2d 923, 926 (D.C. 1986).

185. Schacter, *supra* note 145, at 130.

186. Julian Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503, 1558 (1990).

187. Schacter, *supra* note 145, at 164.

exemption, but exemption areas that were not drafted into the proposal could not have been interpreted into existence *ex nihilo*. Moreover, the resources required to pursue an interpretative challenge would most likely present exemption areas with an insuperable obstacle. The litigation that presented these questions to the Supreme Court of Ohio was pursued by the state Attorney General's office. If the Department of Health had not attempted remedial action that 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—particularly cigar and hookah bars—would be similarly unable to contest exemption provisions.

ETS ballot initiatives are thus 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>188</sup> It is clear, however, that state constitutions that include such provisions do so at their own peril.<sup>189</sup> Courts have prevented states from implementing procedural requirements that 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>190</sup> In short, courts have limited ability to remedy clumsy ETS legislation passed by ballot initiative. To the contrary, they must hold executive agencies accountable for every detail of the statute.<sup>191</sup>

#### IV. A PROPOSAL

Ballot initiatives are prone to produce bad ETS legislation. In responsibly

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188. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

189. *See Georges v. Carney*, 546 F. Supp. 469, 476-77 (N.D. Ill. 1982) (“[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.”).

190. *See Meyer v. Grant*, 486 U.S. 414 (1988); *Carney*, 546 F. Supp. 469.

191. Though courts are obliged to demand stricter enforcement when the question is litigated, courts give executive agencies a great deal of leeway in the manner of enforcement. *See Young v. Ohio Dep't of Health*, No. 07CV-11-15317 (Franklin County Ct. C.P. Apr. 25, 2008) (upholding Board of Health's imposition of a fine on a private club for an ashtray found in a closed storage cabinet because “it could easily be taken out and used for smoking,” despite conflicting testimony). Interesting Fourth Amendment issues may arise in the context of government investigators inspecting private clubs for violations. Young's Fourth Amendment challenge foundered because the investigator was invited in, waiving its expectation of privacy. *Id.*

reversing the default rule on smoking in public, the key question is which areas should be exempted—a question that ballot initiatives are ill-suited to answer.

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>192</sup> In 2005, the ACS and its affiliates drafted and secured the passage of Initiative 901 in the state of Washington. In 2006, the ACS and its affiliates shepherded three similar bills into law by statewide ballot—in Ohio, Nevada, and Arizona. These regimes are among the most draconian nationwide—Washington’s is the most severe, followed closely by Ohio and Arizona. The ballot campaigns in these states were bipolar affairs, pitting legislation drafted by the ACS 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 ETS ballot initiatives proliferate, the need for remedial action becomes increasingly acute. As we have seen, courts are unable to—indeed should not—undertake to make bad law good, and exemption schemes present policy questions that 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.

Given the inability of direct legislation to reflect the reasoned opinions of voters on discrete points, it is likely that ETS exemption schemes are more the product of happenstance and procedural manipulation than “the will of the voters,” to say nothing of sound policy judgment. This Part contends 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*

In amending exemption schemes, 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 on specific provisions in the text of the legislation and condemning efforts to undermine the “intent of voters.”

Deference of this sort is misplaced and pernicious, grounded in an anachronistic understanding of direct legislation and producing inaction where

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192. FLA. STAT. ANN. § 386.201 (LexisNexis 2008).

there should be action. 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 during the Progressive era.<sup>193</sup> Pushed at a grassroots 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>194</sup>

As the twentieth century wore on, however, the professionalization of direct legislation and the rise of the initiative industry subverted the Populist ideal of direct democracy as the grassroots 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>195</sup> The excellent work of political scientists and legal academics has swept the veil from our deformed descendent of an antique ideal. We know quite well that ballot initiatives cannot reveal intent on statutory niceties. Under these well-known conditions, legislative deference to exemption provisions on the theory that they represent the specific intent of voters is flatly impermissible.

Legislators may nonetheless be cowed into silence by political pressure, loath to draw fire from 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 direct legislation into deference to specific exemption provisions. Rather, legislators must take up the gauntlet and examine the exemption schemes of ballot initiatives directly. As Madison put it in *The Federalist No. 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>196</sup> To do otherwise is to become complicit in what Schacter has accurately described as the appropriation of political authority by well-funded but unrepresentative interest groups.

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193. THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 50-59 (1989).

194. Donovan & Bowler, *supra* note 166, at 2.

195. MAGLEBY, *supra* note 165, at 183.

196. *THE FEDERALIST* NO. 10, at 76 (James Madison) (Clinton Rossiter ed., 2003).

*B. A Balancing Test for Exemptions*

Legislators, however, are presently ill-equipped to analyze potential exemption areas. The pluralist ideal of comprehensive interest representation has failed in the context of ETS legislation, and debates—both in policy circles and in secondary literature—have been crippled by extremism. The interests well-funded enough to exert significant pressure on legislators or influence the adoption process—hospitality trade organizations, tobacco companies, 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 that should be considered in the context of exemption schemes may once again be shouted over.

It is imperative that legislators revisit modern statewide bans, with analytically rigorous attention to exemptions before they attain regulatory inertia.<sup>197</sup> It is time that legislators returned to the exemption schemes with the purpose of ETS regulation as the sole guiding light: to prevent unwilling exposure to tobacco smoke.

This Section focuses the analysis which should guide legislators evaluating exemption proposals into a straightforward balancing test. It consists of two prongs tailored to address deficiencies inherent in ETS ballot initiatives and the contorted interest landscape of ETS policy, while remaining compatible with the function of an effective regime. 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 reorient the regulatory conversation and provide clarity amidst the fanciful *ex post* reconstructions of special interest lobbyists.

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 secondhand 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.

By 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

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197. While this Note has focused on ballot initiatives, which are easily the most concerning mechanism for ETS legislation, renewed analysis is highly appropriate for conventional legislation as well. Indeed, powerful lobbies have exerted decisive influence on statewide bans passed through state assemblies—one need only review the frequent appearance of casino exemptions even in strong ETS regimes, which defy any consistent public health rationale, or observe the exertions of ACS and hospitality industry lobbyists in seeing Class V bans into law, to have serious concerns about the extent to which pure policy analysis drove the exemption schemes.

highlights the fact that exemption candidates may offend the function of ETS legislation to different degrees and in 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 a nursing home, and an Egyptian'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. These differences must be probed on their merits, not on the degree to which they accord with the interests and relative clout of advocacy groups and organized lobbies.

The choice of exemptions represents a judgment on the severity of an ETS regime, a judgment ballot initiatives cannot express and one particularly 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 that choose to institute extremely severe regimes to confront the variable degrees to 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 significant “soft” factors: legislating the public health, after all, has consequences in a number of areas of concern to the state which may lack a scholarly niche or mobilized pressure groups. The vitality of cultural traditions, local institutions, artistic liberty, community life, and other concerns may all play different roles in how a state might appraise a particular exemption candidate, and this prong provides legislators with a way precisely to account for these inchoate factors against the extent to which they offend the core purpose of an effective ETS regime.

Significantly, this second prong avoids the deliberative stalemate 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 asking legislators to measure the precise degree to which a given area offends the statutory purpose directly against the virtues of exemption, the second prong reframes the debate from the usual balancing of autonomy concerns against public health benefits, to an analysis that accepts the necessity of reversing the default rule but focuses on narrowly tailoring the exemption scheme to the specific circumstances of different exemption areas. Perhaps under this framing, the never-far-enough atmosphere that presently suffuses ETS advocacy will be tempered, unnecessary casualties will be avoided, and ETS legislation, having swung from extremely cautious to extremely aggressive, will at last settle at a responsible regulatory balance.

## V. TOBACCO LOUNGES

“[I]t is our task not to complain or condone but only to understand.”<sup>198</sup>

To illustrate the operation of the balancing test, this Part applies it to an exemption area that appears in many statewide ETS regimes, the tobacco lounge. The tobacco lounge merits particular attention, not only because it presents an intuitively strong case for exemption, but also because exemptions currently in operation are varied and uneven, producing substantial regulatory confusion. As we have seen, some states provide tobacco lounges with a permanent per se exemption, generally defining the establishments as those that 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>199</sup> Some states exempt hookah bars, but not cigar bars, and others have done the opposite. Particularly uncompromising ETS regimes have produced “smoke-easies,” or underground smoking bars, in many cities.<sup>200</sup>

Much of this confusion can be attributed to the fact that tobacco lounges, a rare species of public establishment, are poorly understood. Legislators may lack familiarity with the subject. Additionally, many shisha cafés and hookah bars are cultural outposts in ethnic enclaves that interface infrequently or ineffectively

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198. GEORG SIMMEL, *THE METROPOLIS AND MENTAL LIFE* (1903), reprinted in GEORG SIMMEL *ON INDIVIDUALITY AND SOCIAL FORMS* 339 (Donald N. Levine ed., Univ. of Chicago Press 1971).

199. David Savona, *A Smoker's Last Refuge*, CIGAR AFICIONADO, Sept./Oct. 2007, available at [http://www.cigaraficionado.com/Cigar/CA\\_Archives/CA\\_Show\\_Article/0,2322,2065,00.html](http://www.cigaraficionado.com/Cigar/CA_Archives/CA_Show_Article/0,2322,2065,00.html) (noting trend among retail shops to create smoking lounges).

200. See, e.g., Stu Bykofsky, “Smoke-easys” Ignore the Tobacco Ban, PHILA. DAILY NEWS, Mar. 26, 2007, at 6; Charlie Vascallero, *Smoke-Easies Offer Cover from Puff Police; Aficionados Just Want a Place To Light Up, Relax*, WASH. TIMES, Nov. 20, 2003, at M14. Some attempts are more creative, including “theater night” at Minneapolis bars, designating costumed patrons “actors” and their cigarettes “props.” This attempt failed. Of particular interest from a law and economics perspective is the approach taken by an Iowa citizen, who openly rents ashtrays for \$1 to patrons under the theory that the revenues will pay for the fines she incurs for violations. Scott Niles, *Owner Wants State To Butt Out: Birmingham Bar Allows Smoking*, OTTUMWA COURIER (Iowa), Sept. 12, 2008, available at [http://www.ottumwa.com/local/local\\_story\\_256232617.html](http://www.ottumwa.com/local/local_story_256232617.html).

with the machinery of state and local government. As a result, tobacco lounges may remain analytically undifferentiated from conventional bars and cafés, 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 that 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.

This test will aid legislators in isolating the merits and demerits of the tobacco lounge exemption. Additionally, the test will help evaluate different types of tobacco bar exemptions, a function particularly useful given the panoply of available exemption mechanisms.

In this Part, 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 on the statutory purpose of ETS legislation, and evaluate virtue defenses tobacco lounges may offer. After weighing these two prongs, I 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 Cafés 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 descendant of the traditional Middle Eastern coffeehouse, 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>201</sup> Typically owned by Yemeni,

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201. See Grehan, *supra* note 2, at 1356 (“First popularized in India and Iran during the early seventeenth century, [the hookah] had quickly migrated westward to the Ottoman Middle East.”); Kilgannon, *supra* note 58 (reviewing shisha cafés “owned mostly by Egyptian immigrants” who “contend that hookah smoking is a vital part of their culture”); Sebnem Timur, *The Eastern Way of Timekeeping: The Object and Ritual of Nargile*, DESIGN ISSUES, Spring 2006, at 19, 20.

Moroccans, Egyptians, and other Arab nationals, shisha cafés function as cultural centers in traditionally Middle Eastern enclaves in major cities.<sup>202</sup> Smoking a hookah can take an hour.<sup>203</sup> Increasingly, college students are becoming occasional patrons of hookah bars.<sup>204</sup> Patrons gather at hookah bars for shisha, culture, and camaraderie, finding hookah bars uniquely conducive to public socializing.<sup>205</sup>

The cigar bar is a similarly small operation in which patrons gather 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 cafés, 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>206</sup> Sold for

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202. See Kilgannon, *supra* note 58; Bill Werde, *A Sad Ballad for the Water-Pipe Cafes of Astoria*, N.Y. TIMES, Feb. 23, 2003, § 14, at 7 (quoting patron as lamenting that “[s]hisha to an Arab is like cappuccino to an Italian. If this cafe closes, my social life will be shut down”).

203. See Timur, *supra* note 201.

204. Tamar Lewin, *Collegians Smoking Hookahs . . . Filled with Tobacco*, N.Y. TIMES, Apr. 19, 2006, at B9 (quoting collegiate patron as saying that “[i]t’s just a nice way to relax and be sociable”).

205. Peter Kandela, *Nargile Smoking Keeps Arabs in Wonderland*, 356 LANCET 1175, 1175 (2000) (“In traditional Arab society. . . the nargile signifies a social occasion in which everyone can participate . . .”); Kilgannon, *supra* note 58 (quoting patron as saying that “[s]moking [shisha] brings our people together”); Werde, *supra* note 202 (quoting patron as saying that “people come to these cafes to sit with friends and smoke shisha”).

206. The designation “premium” does not reflect pricing, which can range from three dollars to over twenty dollars. It merely distinguishes the cigars from the flavored, machine-made “blunts” with cardboard fillers and chemical additives manufactured by major cigarette companies and sold at drugstores and gas stations. See NAT’L CANCER INST., SMOKING AND TOBACCO CONTROL MONOGRAPH NO. 9: CIGARS: HEALTH EFFECTS AND TRENDS 52 (1998), available at <http://cancercontrol.cancer.gov/tcrb/monographs/9/index.html> (noting that large inexpensive cigars and cigarettes account for over 60% of “cigar” sales, while large premium cigars account for 6.5%). Cigar bars do not offer blunts, which have only been designated “cigars” to evade the stricter ingredient disclosure requirements triggered by a “cigarette” label. 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, at 1373; David Satcher, *Cigars and Public Health*, 340 NEW ENG. J. MED. 1829, 1830-31. This point deserves particular emphasis, because the important distinction has been blurred by health advocates who have cited a rise in “cigar” smoking among urban youth as part of a call for more severe regulation. This extension of guilt by association makes for poor regulation, for by failing to distinguish between these very different products, different consumption habits are conflated.

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 store their favorite cigars. Cigar bars generally install the most sophisticated ventilation systems available. Even in states that exempt cigar bars, there are never more than a few per city—major metropolitan areas may have as many as five,<sup>207</sup> where smaller cities have fewer, if any.<sup>208</sup>

Patrons come to cigar bars for premium cigars and conversation.<sup>209</sup> Smoking a premium cigar takes between thirty and sixty minutes, and cigar smokers are somewhat like oenophiles in preferring tobaccos from different soils, regions, and different curing processes.<sup>210</sup> Cigar smokers tend overwhelmingly to be

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207. For example, New York City has five cigar bars: the Carnegie Club, Club Macanudo, Bar and Books (Hudson), Bar and Books (Lexington), and Merchant’s NY.

208. For example, New Haven, Connecticut has one cigar bar: the Owl Shop.

209. Indeed, to enter a cigar bar without the intention of having a cigar is extremely unusual. This is an important point, and it explains why this Note seems to ignore cigarette smokers. This Note focuses on cigar and hookah lounges because these establishments only attract smokers, and similar establishments have not yet materialized for cigarette smokers. Indeed, the tightly defined cigar bar exemption which will take effect in Oregon in 2009 expressly prohibits the smoking of any tobacco products other than cigars, presumably for this very reason. *See* 2007 Or. Laws 602, § 1(c) (requiring cigar bars to prohibit “the smoking of all other tobacco products in any form including, but not limited to, loose tobacco, pipe tobacco, cigarettes as defined in ORS 323.010 and cigarillos as defined by the Department of Human Services by rule”). That this reflects a rationale presuming the self-selective nature of cigar smokers is suggested by the waiver provisions that apply in the interim, before the cigar bar exemption is triggered. OR. REV. STAT. § 433.865(2) (2007) (permitting waivers where a “waiver will not significantly affect the health and comfort of nonsmokers”). Cigarette lounges, however, are not unthinkable under a per se exemption, and many of the same arguments would apply if some mechanism were established which would put potentially non-consenting individuals fully on notice, and the number of these establishments were restricted sufficiently to avoid the captive employee problem. In fact, R.J. Reynolds opened a showroom “cigarette lounge,” Marshall McGearty’s, in Chicago in 2005. The establishment surrendered its liquor license early on to operate under a retail exemption, and as the statewide ban loomed, it attempted creative solutions such as providing coffee free of charge and contemplated a bring-your-own-beverage policy. It ultimately closed soon after the statewide ban passed. *See* Newcity Chicago, *411: Seven Days in Chicago*, Jan. 15, 2008, <http://www.newcitychicago.com/chicago/7346.html>.

210. 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 Nov. 17, 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.”).

“occasional” smokers, enjoying cigars infrequently.<sup>211</sup> An afternoon or evening at a cigar bar is a relaxed social occasion, and proprietors pride themselves on the conversational and civil character of their destinations. Decor is structured accordingly: couches and clusters of armchairs are the essence of traditional cigar bar design. Chess tables are common fixtures. Despite the well known stereotype of cigar smoking as an activity practiced by rich white males on Wall Street,<sup>212</sup> cigar smoking is increasingly gender-balanced<sup>213</sup> and socioeconomically diverse.<sup>214</sup> Indeed, proprietors pride themselves on inclusiveness.<sup>215</sup>

### *B. Contravention of Statutory Intent?*

The first prong of the test provides an opportunity to consider the specific circumstances of tobacco bars, divorced from imperfect analogies to conventional bars and cafés. 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, the concerns that 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

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211. Cigar smokers are overwhelmingly “occasional.” See NAT’L CANCER INST., *supra* note 206, at iii (“Most cigarette smokers smoke every day. In contrast, as many as three quarters of cigar smokers smoke only occasionally, and some may only smoke a few cigars per year.”); Elizabeth A. Gilpin & John P. Pierce, *Cigar Smoking in California: 1990-1996*, 16 AM. J. PREVENTATIVE MED. 195, 195-97 (1999); A.L. Nyman, T.M. Taylor & M. Biener, *Trends in Cigar Smoking and Perceptions of Health Risks Among Massachusetts Adults*, 11 TOBACCO CONTROL (Supp.) ii25, ii26 (2002).

212. 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).

213. See NAT’L CANCER INST., *supra* note 206, at 11 (“Increasing numbers of women, who historically have had very low rates of cigar use, are currently smoking cigars.”); Gilpin & Pierce, *supra* note 211, at 199; Michael S. LaTour, Tony Henthorne & Kathryn Braun-LaTour, *Is a Cigar Just a Cigar? A Glimpse at the New-Age Cigar Consumer*, ACAD. OF MKTG. SCI. REV., 2003, at 9, <http://www.amsreview.org/articles/latour12-2003.pdf> (noting signs that “mixed gender and ‘all-female’ cigar ‘outings’ were becoming part of the cigar culture”); Nyman et al., *supra* note 211, at ii26. Cigar-smoking has been described as characteristic of third-wave feminists, who are “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)*, NAT’L WOMEN’S STUDS. ASS’N J., Fall 2004, at 93, 96.

214. Gilpin & Pierce, *supra* note 211, at 198-99.

215. See Savona, *supra* note 199.

assignment 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 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 evaporates. Jobs in tobacco lounges, already scarce and selective for bartenders and baristas who have an interest in shisha or cigars, are coveted by bartenders who smoke.

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 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>216</sup> The operation of a tobacco lounge fails to expose non-consenting individuals to secondhand 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 cafés 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 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 cafés will assist legislators and health department officials in tailoring exemptions to promote important civic functions.

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216. See, e.g., Jérôme Adda & Francesca Cornaglia, *The Effect of Taxes and Bans on Passive Smoking* 19-25 (Inst. for the Study of Labor, Discussion Paper No. 2191, July 2006) (observing increased exposure of non-smokers to secondhand smoke produced by the “displacement effect” when smoking is banned in recreational destinations).

The proposition that public spaces that promote social exchange between members of society play a vital role in a healthy democracy is well rehearsed. Sociologists and political scientists have spilled a great deal of ink on this idea, pursuing influential conceptualizations such as Habermas’s “public sphere”<sup>217</sup> and Arendt’s “public realm.”<sup>218</sup> Crudely generalizing, these theses demonstrate the ways in which publicness, particularly in the form of public interactions between individuals that 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, 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 highlight these problems, respectively, in *The Structural Transformation of the Public Sphere* and *The Human Condition*; similar analyses have followed in their footsteps.<sup>219</sup> Recently, Robert Putnam has renewed the immediacy of these concerns, painting a stark portrait of “the decimation of American community life” in his sweeping study of American community and civic engagement, *Bowling Alone*.<sup>220</sup> By all available markers, every form of community involvement has receded,<sup>221</sup> political participation has plummeted,<sup>222</sup> and informal social connectedness has collapsed.<sup>223</sup> Americans are increasingly unlikely to meet new people or make new friends; they are prone to stay at home in the evenings and are loath to participate meaningfully in civic organizations or politics.<sup>224</sup> This disappearance of “social capital,” Putnam argues, has severely undermined the health of our democracy.<sup>225</sup>

The effects of this phenomenon are particularly stark in cities. Social

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217. Habermas defines 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, 49; see also JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* (Thomas Burger trans., MIT Press 1989) (1962).

218. HANNAH ARENDT, *THE HUMAN CONDITION* (1958).

219. See, e.g., RICHARD SENNETT, *THE FALL OF PUBLIC MAN* (1978).

220. ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 42 (2000).

221. *Id.* at 41.

222. *Id.* at 38-39.

223. *Id.* at 108 (“[I]nformal social connectedness has declined in all parts of American society.”).

224. *Id.* at 154-66.

225. *Id.* at 339-49.

theorists have long observed the unique predisposition of urban life to erode community ties.<sup>226</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>227</sup>

These trends throw the virtues of tobacco lounges into sharp relief. Given the importance of the public sphere, and its striking recession in modern American cities, places that promote social publicness assume heightened importance. The coffeehouse has long served as the paradigm-setting anchor for a vibrant public sphere: indeed, Habermas located the inception of the public sphere in the English coffeehouses of the eighteenth century. In those cheery places, conceptually situated between the privacy of the home and the formal publicness of state affairs, 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 coffeehouses.<sup>228</sup> Today, however, we are hard-pressed to think of establishments—usefully termed “third places,” or places where informal conversation arises between non-intimates in public—that play this role.<sup>229</sup>

Tobacco lounges in modern cities, however, have taken up the role attributed to the early coffeehouses and abandoned by their modern, branded counterparts. Indeed, Habermas’s typology of the elements that made coffeehouses such

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226. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961) (highlighting the dissociative pressures of city life); SENNETT, *supra* note 219, at 121-22 (surveying the “end of public life” in cities against a backdrop of the eighteenth-century metropolis); SIMMEL, *supra* note 198, at 329 (noting the blasé attitude of city dwellers and the isolation of urban life).

227. Susan Bickford, *Constructing Inequality: City Spaces and the Architecture of Citizenship*, *POL. THEORY*, June 2000, at 355, 355 (seeking “to reconnect political theory to the study of cities by probing the link between built environment, public life, and democratic politics”).

228. The finer points of Habermas’ description of eighteenth-century English coffeehouses have been picked at by historians for 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. See Markman Ellis, *Introduction to 1 EIGHTEENTH-CENTURY COFFEE-HOUSE CULTURE*, at xvii (Markman Ellis ed., Pickering & Chatto 2006).

229. Ramon Oldenburg & Dennis Brisset, *The Third Place*, 5 *J. QUALITATIVE SOC.* 265, 267 (1982). In *The Great Good Place*, Oldenburg makes a case for a similar role played by modern-day coffee shops. RAY OLDENBURG, *THE GREAT GOOD PLACE* (1989). As the leading scholar of coffeehouses has observed, however, “in their ubiquity, and uniformity, the branded coffee-shops also seem to reinforce the feelings of emptiness and alienation caused by modern life.” Ellis, *supra* note 228, at xiii. Local, independent coffeehouses, sponsoring book discussions, reading groups, and distributing local pamphlets and bulletins, may yet carry the torch, 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 civic function of their antecedents.

exemplary foci for the public sphere applies neatly to tobacco lounges.<sup>230</sup> Tobacco lounges contain the essential elements of the coffeehouses Habermas found so crucial to the public sphere: they are conducive to an unfettered range of debate and conversation, they are relatively non-hierarchical, and they are 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>231</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>232</sup> 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 once sprung up spontaneously in public.<sup>233</sup> The traditionally conversational character of tobacco lounges is reinforced by 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, with increased volume levels and patron density.<sup>234</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 monolithic bar.<sup>235</sup> Additionally, tobacco

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230. Ellis characterizes these elements as 1) non-hierarchical, 2) encouraging an unfettered range of debate and conversation, and 3) accessible and inclusive. Ellis, *supra* note 228, at xv.

231. See LaTour, Henthorne & Braun-LaTour, *supra* note 213. Of twenty-two patrons at the Owl Shop in New Haven, CT between 3:30 p.m. and 4:30 p.m. on a Saturday afternoon, seventy-six percent found the Owl Shop extremely conducive to conversation, and five respondents independently attributed this to a shared affinity for cigars, citing “a common bond,” “something in common,” and observing that “cigars open up people to talk.” Survey results on file with author.

232. Forty-five percent of survey respondents at the Owl Shop reported conversing “often” with new people; forty-one percent reported doing so “sometimes.”

233. A thriving online community of cigar-smokers, discussing everything from cigars to music, sports, and politics, has emerged. See, e.g., Brothers of the Leaf, Community Forums, <http://www.botl.org/community/forums> (last visited Nov. 17, 2008); SocialCigar.com, Social Cigar Forum, <http://www.socialcigar.com/forum> (last visited Nov. 17, 2008).

234. Dave Thier, *Owl Shop: Old Yale in New Haven*, YALE DAILY NEWS, Nov. 9, 2007, at B4 (citing longtime patrons’ disgust with bar-like atmosphere at night).

235. See Vascallero, *supra* note 200 (quoting a patron: “There’s a certain atmosphere about a cigar bar where you feel more relaxed”).

lounges often subscribe to multiple periodicals, which, as they did in eighteenth-century England, ground conversations.

Second, tobacco lounges are non-hierarchical. Patrons are surprisingly socioeconomically diverse<sup>236</sup> and represent a wide range of occupations.<sup>237</sup> Certainly the products are not priced prohibitively: a cigar or shisha costs about as much as a drink at a conventional bar, and it lasts much longer.<sup>238</sup> Cigar bars are no longer the province of Wall Street fat cats; hookah is no longer an ethnic curiosity. And by 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 as well—by remaining open during the day, tobacco lounges assume a perpetual presence in the social life of a city that 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 cafés, 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 they 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 modern metropolis 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. Undoubtedly, not all tobacco lounges meet the aspirations of the ideal “third place,” nor is a shisha café or cigar bar always a perfect microcosm of political society. Nor is it necessary to argue that the cigar bar or shisha lounge is so inviting and accessible as to exercise an inexorable draw on all passers-by. It is sufficient that for those who choose to smoke shisha or cigars, tobacco lounges are welcoming establishments. Indeed, an enjoyment of cigars or shisha cuts across factors that are often linked to exclusion and hierarchy, such as race, class, and gender.

Though rare, and though hardly indispensable to the expression of a rich

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236. See NAT'L CANCER INST., *supra* note 206, at 36; Gilpin & Pierce, *supra* note 211, at 198.

237. The Owl Shop survey returned an extremely varied list of occupations ranging from blue to white collar, skilled labor to service industry, hospitality to delivery, student to professional.

238. See Lewin, *supra* note 204 (quoting a student patron explaining the relative inexpensiveness of a night at a hookah bar).

urban community, tobacco lounges play a role in modern cities that 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>239</sup> Places that 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 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*

Applying the balancing test, there is a clear case in favor of exemption. 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 café 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 not only that the choice to work at such an establishment is meaningful, but also that jobs are hotly contested.

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.

#### *E. Exemption Schemes*

But how to exempt? Given the panoply of available models, legislators may find it difficult to evaluate the merits of exemption schemes. Here, 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 cafés 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 and that clever definitions or practical consequences do not render the exemption

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239. See Habermas, *The Public Sphere: An Encyclopedia Article*, *supra* note 217, at 49.

illusory.

Ohio's proposed amendment fails the first avenue of analysis. Merely by constructing some form of on-site, walk-in humidor, and purchasing an inexpensive air filter, a bar can become a "cigar bar" and permit its patrons to smoke. This undermines the self-selective nature of traditional cigar bar patrons, and may expose the unwilling to secondhand smoke. On the second, as we have seen, cigar bars and shisha cafés are virtuous precisely because their products—premium cigars and hookah—are particularly 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 hope to avoid interrupting the continuity of a night's drinking for periodic sidewalk cigarette breaks largely unseats the virtue defense. Accordingly, a per se exemption, if defined as in Ohio's Senate Bill 195, is unwise.

Grandfather clauses are similarly problematic. Laxity of principle is just the beginning: A first-iron rule for proprietors of existing tobacco lounges begs the question, from a public health perspective, why some if not all? More worrying, however, are the long-term effects of the grandfather clause. By withdrawing exemption upon change in ownership, grandfather clauses function as a maturing death warrant. Additionally, in preventing tobacco lounges from opening in the future, a grandfather clause grants a functional monopoly to incumbents, creating an incentive to leverage the monopoly on smoking in public by catering to a captive market of cigarette smokers who have been expelled from conventional bars and increasing the volume of alcohol sales. Rather than exempting cigar bars, these poisonous exemptions maim their character and destroy their virtues.<sup>240</sup>

The best tobacco lounge exemptions currently in place are the per se exemptions that 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 by preventing conventional bars from subverting the default rule while protecting the shisha or cigar focus of the establishment, thus preserving the virtue defense. Given the realities of pricing, however, and the fact that drinks tend to be more profitable 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, eroding the diversity characteristic of traditional lounges. Furthermore, with sufficient ingenuity, proprietors of conventional bars might be able to manipulate ledgers to satisfy exemption requirements. A superior per se definition might track Oregon's efforts to stipulate the structural characteristics

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240. 2007 Or. Laws 1557, § 1(c), 1(g) (limiting seating capacity of grandfathered cigar bars to 40 patrons and prohibiting smoking anything but cigars).

of traditional cigar bars, but regulations at this level of detail are likely to be imperfect and exploitable.

One mechanism that has not been proposed, but which may furnish an optimal way to balance the twin concerns of responsible ETS legislation, may lie with local governments.<sup>241</sup> 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>242</sup> Establishments that fail to live up to the ideal would be denied licenses, and the threat of revocation would ensure continued compliance. This solution effectively manages the first concern, as boards of health can promulgate guidelines for distinguishing authentic tobacco lounges from profit-seeking chameleons that pose a public health threat. The possibility of institutional overreaching by aggressive health commissioners 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 would stipulate 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 secondhand smoke, reversing the default rule on smoking in public. Twenty-five states currently have modern statewide bans on

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241. Massachusetts' excellent definition comes quite close to implementing this model. MASS. GEN. LAWS ch. 270, § 22 (Supp. 2008) (“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 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”). This is perhaps the finest definition currently in place.

242. This has been employed as a temporary measure in Oregon until the more restrictive provisions of the statute kick in. The current statute 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 (2007).

the books—and relying on municipalities in Class II and III states to make up the balance, we can declare with some confidence that we have reversed, however narrowly, the national default rule on smoking in public. Increasingly, Americans live in a country in which the non-consenting need not fear exposure to secondhand smoke. The challenge, going forward, will be to ensure that the default rule is reversed in a responsible manner.

In some states, this will still mean passing more rigorous legislation. These states are rapidly disappearing, however. As we have seen, Class I is nearly extinct. South Dakota attempted to pass a statewide smoking ban, and even North Carolina is beginning to show willingness to regulate smoking in some public places. In Indiana, the state's recent failure to arrive at a workable compromise on an ETS bill may produce a ballot initiative in the near future.<sup>243</sup> Legislatures must take a proactive role if they hope to avert the type of deliberative catastrophe that struck Ohio. And it ought to be remembered that even in strong ban states, a number of exemptions might warrant examination under the balancing analysis articulated in this Note, particularly casinos and performance spaces.

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. In Ohio, with the disposition of the Solicitor General's suit, it will be the task of the General Assembly to undo the damage done to public trust by the unfortunate passage of the Smoke Free Workplace Act. Several proposed exemption bills sit in committee, and the legislature will face a difficult task in evaluating and amending the proposals. The cigar bar exemption is deeply unsatisfactory and in need of redrafting, and the other two bills will introduce significant and very different changes to the state's ETS regime. All twelve Class V states, but particularly the ballot initiative states Ohio, Washington, and Arizona, would be well served to take a direct look at tobacco lounge exemptions. This Note has attempted to provide some guidance in this enterprise, 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 and better advocates than they have received. The balancing test proposed in this Note may prove to be a useful tool for legislators in crafting exemption schemes that both prevent unwilling exposure to environmental tobacco smoke and preserve virtuous and unoffending spaces.

This Note achieved its goal, however, if it imposed some order on the corpus of statewide smoking bans and drawn attention to a regulatory juggernaut that

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243. Woster, *supra* note 39 (“After the decision [to reject a bill that would have given local governments the power to regulate ETS], Gov. Mike Rounds said he wouldn’t be surprised by a statewide initiative on local control of tobacco, or on a total ban on smoking.”).

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threatens exemptions on principle, whether repugnant to the public health purpose of ETS legislation or not. Exemption provisions warrant a more searching examination than they have hitherto been afforded, for they are indeed the beating heart of responsible ETS legislation.

**APPENDIX A: STATEWIDE ETS LEGISLATION**

(Complete and accurate to September 17, 2008)

State	Statewide ETS Law in effect	Modern Statewide Ban? <sup>244</sup>	Effective Date	Class	Smoking permitted in retail tobacco stores?	Smoking permitted in tobacco lounges?
AL	ALA. CODE §§ 22-15A-1 to -10	No	2003	II	Yes	Yes
AK	ALASKA STAT. §§ 18.35.300 to .365	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 to -1809	Yes	2006	III	Yes	Yes <sup>245</sup>
CA	CAL. LAB. CODE § 6404.5	Yes	1997	IV	Yes	Yes
CO	COLO. REV. STAT. ANN. §§ 25-14-201 to -209	Yes	2006	IV	Yes	Yes*
CT	CONN. GEN. STAT. § 19a-342	Yes	2004	IV	No	Yes*
DE	DEL. CODE ANN. tit. 16, §§ 2901 to 2908	Yes	2002	V	No	No
DC	D.C. CODE §§ 7-741 to -747	Yes	2007	IV	Yes	Yes
FL	FLA. STAT. §§ 386.201 to .2125	Yes	2003	III	Yes	Yes
GA	GA. CODE ANN. §§ 31-12A-1 to -13	Yes	2005	III	Yes	Yes
HI	HAW. REV. STAT. §§ 328J-1 to -15	Yes	2006	V	No	No
ID	IDAHO CODE ANN. §§ 39-5501 to -5511	No	2004	III	Yes	Yes

244. Reverses default rule by prohibiting smoking in restaurants and bars.

245. The statute's exemption applies to *all* bars, not merely tobacco bars.

\* Designates a tobacco lounge exemption via grandfather clause.

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State	Statewide ETS Law in effect	Modern Statewide Ban? <sup>244</sup>	Effective Date	Class	Smoking permitted in retail tobacco stores?	Smoking permitted in tobacco lounges?
IL	410 ILL. COMP. STAT. 82/1 to /75	Yes	2008	V	Yes	No
IN	IND. CODE §§ 16-41-37-1 to -9	No <sup>246</sup>	1998	II	Yes	Yes
IA	IOWA CODE §§ 142D.1 to .9	Yes	2008	V	Yes	No
KS	KAN. STAT. ANN. §§ 21-4009 to -4014	No	1987	II	Yes	Yes
KY	KY. REV. STAT. ANN. §§ 61.165 to .167	No	2006	II	Yes	Yes
LA	LA. REV. STAT. ANN. §§ 40:1300.251 to .263	No	2007	III	Yes	Yes
ME	ME. REV. STAT. ANN. tit. 22, §§ 1541 to 1548	Yes	2007	IV	Yes <sup>247</sup>	Yes* <sup>248</sup>
MD	MD. CODE ANN. HEALTH-GEN. §§ 24-205, 24-501 to -511	Yes	2008	V	Yes	No
MA	MASS. GEN. LAWS ch. 270, § 22	Yes	2004	IV	Yes	Yes
MI	MICH. COMP. LAWS §§ 333.12601 to .12617	No	1989	II	Yes	Yes

246. A 2008 bill that would have implemented a modern statewide ban, H.B. 1057, 115th Gen. Assemb., 2d Reg. Sess. (Ind. 2008), failed. Rick Yencer, *Statewide Smoking Ban Dies In Committee; Pull Tabs OK'd*, STAR PRESS (Muncie, Ind.), Jan. 24, 2008, at A1. The bill's sponsor has promised to continue to reintroduce the bill until the ban passes. *Id.*

247. The Maine Legislature amended the Clean Indoor Law in May 2007, specifically prohibiting smoking hookah in tobacco specialty stores licensed after January 1, 2007.

248. 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 ME. REV. STAT. ANN. tit. 22, § 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.”).

State	Statewide ETS Law in effect	Modern Statewide Ban? <sup>244</sup>	Effective Date	Class	Smoking permitted in retail tobacco stores?	Smoking permitted in tobacco lounges?
MN	MINN. STAT. §§ 144.411 to .417	Yes	2007	V	Yes	No
MS	MISS. CODE ANN. §§ 29-5-161 to -163	No	2000	II	Yes	Yes
MO	MO. REV. STAT. §§ 191.765 to .777	No	1992	II	Yes	Yes
MT	MONT. CODE ANN. §§ 50-40-101 to -120	Yes	2009	V <sup>249</sup>	No	No
NE	NEB. REV. STAT. §§ 71-5716 to -5734	Yes	2009	V	Yes	No
NV	NEV. REV. STAT. § 202.2483	Yes	2006	III	Yes	Yes
NH	N.H. REV. STAT. ANN. §§ 155:64 to :77	Yes	2007	V	No <sup>250</sup>	No
NJ	N.J. STAT. ANN. §§ 26:3D-55 to -64	Yes	2006	IV	Yes	Yes
NM	N.M. STAT. §§ 24-16-1 to -20	Yes	2007	IV	Yes	Yes*
NY	N.Y. PUB. HEALTH LAW §§ 1399-n to -x	Yes	2003	IV	Yes	Yes*
NC	N.C. GEN. STAT. §§ 143-595 to -601	No	1993	I	Yes	Yes
ND	N.D. CENT. CODE §§ 23-12-9 to -11	No	2007	III	Yes	Yes

249. Montana will become a Class V state once its bars go smoke-free on October 1, 2009. Until that date it is a Class III state.

250. 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 buildings and offices, including workplaces . . . in effectively segregated smoking-permitted areas designated by the person in charge." N.H. REV. STAT. § 155:67II (Supp. 2007).

“TILL NAUGHT BUT ASH IS LEFT TO SEE”

State	Statewide ETS Law in effect	Modern Statewide Ban? <sup>244</sup>	Effective Date	Class	Smoking permitted in retail tobacco stores?	Smoking permitted in tobacco lounges?
OH	OHIO REV. CODE ANN. §§ 3794.01 to .09	Yes	2006	V	Yes <sup>251</sup>	No
OK	OKLA. STAT. tit. 63 §§ 1-1521 to -1527	No	2003	II	Yes	Yes
OR	OR. REV. STAT. §§ 433.835 to .875	Yes	2009	IV <sup>252</sup>	Yes	Yes <sup>253</sup>
PA	2007 Pa. Laws 27 §§ 1 to 30	Yes	2008	III	Yes	Yes
RI	R.I. GEN. LAWS §§ 23-20.10-1 to -16	Yes	2004	IV	Yes	Yes
SC	S.C. CODE ANN. §§ 44-95-10 to -60	No	1990	II	Yes	Yes
SD	S.D. CODIFIED LAWS § 22-36-2	Pending	2002	I	Yes	Yes
TN	TENN. CODE ANN. §§ 39-17-1801 to -1812	No	2007	III	Yes	Yes <sup>254</sup>
TX	TEX. PENAL CODE ANN. § 48.01	No	1975	II	Yes	Yes
UT	UTAH CODE ANN. §§ 26-38-1 to -9	Yes	2009	V <sup>255</sup>	No	No

251. 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.

252. On January 1, 2009, Oregon’s Indoor Clean Air Act will become a Class IV statute, pursuant to legislation passed in 2007. 2007 Ore. Laws 602, §§ 1-13. Until then, Oregon remains a Class III state.

253. On January 1, 2009, cigar bars, defined tightly to preserve their traditional character, will be exempt under a grandfather clause. 2007 Ore. Laws 602 at § 1. Until then, cigar bars may receive protection by seeking waivers from the Department of Human Services. OR. REV. STAT. § 433.865 (2007) (permitting waivers “where there are good reasons to do so” and where “a waiver will not significantly impact the health and comfort of nonsmokers”). This waiver provision will be eliminated in 2009 when the grandfather clause becomes operative. 2007 Ore. Laws 602, § 12. Thus, waivers could potentially be sought in the case of new cigar bars.

254. Exempts all age-restricted (twenty-one years and over) venues.

255. Utah remains Class II until 2009, when a number of exemptions, including some for private clubs and taverns, disappear.

State	Statewide ETS Law in effect	Modern Statewide Ban? <sup>244</sup>	Effective Date	Class	Smoking permitted in retail tobacco stores?	Smoking permitted in tobacco lounges?
VT	VT. STAT. ANN. tit. 18, §§ 37-1741 to -1746	Yes	2005	V	No	No
VA	VA. CODE ANN. §§ 15.2-2800 to -2810	No <sup>256</sup>	1990	II	Yes	Yes
WA	WASH. REV. CODE §§ 70.160.010 to .900.	Yes	2005	V	Yes	Yes
WV	W. VA. CODE §§ 16-9A-1 to -9; 31-20-5b	No	1987	II	Yes	Yes
WI	WIS. STAT. § 101.123	No	1983	II	Yes	Yes
WY	N/A <sup>257</sup>	N/A	N/A	II	Yes	Yes

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256. In February 2008, a series of ETS proposals were rejected decisively by a House subcommittee. Mason Adams, *8 Bills that Ban Public Smoking Die in House*, ROANOKE TIMES, Feb. 8, 2008, at B1.

257. Wyoming is the only state in the country without a single ETS statute on the books.

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

State Issue 5: Certified Ballot Language<sup>258</sup>

**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[;]

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258. Ballot Language, *supra* note 68.

- 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.

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