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Let Us Now Try Liberty: Freeing the Private Sector to Tackle North Carolina's Tobacco Addiction by Reinstating Employment Freedom of Contract

James Ruffin Lawrence III

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"LET US NOW TRY LIBERTY": FREEING THE PRIVATE SECTOR TO TACKLE NORTH CAROLINA’S TOBACCO ADDICTION BY REINSTATING EMPLOYMENT FREEDOM OF CONTRACT

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We have this notion that you can gorge on hot dogs, be in a pie-eating contest, and drink everyday and society will take care of you. We can't afford to let individuals drive up costs because they're not willing to address their health problems.

—Michael E. Porter, Harvard Business School

We tried carrots. Carrots didn't work.

—Pam Kuryla, Scotts's Health Benefits Executive

It's a righteous cause.

—Jim Hagedorn, Scotts's Chief Executive Officer

INTRODUCTION

The Scotts Miracle-Gro Company ("Scotts"), a lawn and garden care products company, had a multi-million dollar problem. It is a familiar problem facing businesses across North Carolina and America: how to contain the costs of providing health insurance to employees. Over a four-year period, Scotts's executive team looked...
on helplessly as the company’s annual health care bill ballooned by forty-two percent to a total of $20 million in 2003.\(^5\) Facing another twenty percent annual rate hike, Jim Hagedorn, CEO of the Marysville, Ohio-based corporation, set out on an ambitious, uncharted course.\(^6\) With approval from Scotts’s Board of Directors, Hagedorn declared war on health care spending by implementing one of the most controversial health and wellness programs in America.\(^7\) The primary objective in this campaign: rid Scotts of the health care costs associated with tobacco dependency and obesity by empowering workers to make better health care decisions.\(^8\)

As a first step, Hagedorn reviewed a comprehensive health assessment of Scotts’s workforce.\(^9\) The survey confirmed his suspicions about the employees’ health: half of Scotts’s personnel were overweight and a quarter smoked cigarettes.\(^10\) Hagedorn resolved that the problems associated with these unhealthy lifestyle choices called for a radical solution.\(^11\)

For Scotts, the answer came in the form of a comprehensive health and wellness program with two key elements. First, in an effort to improve employee health, Scotts offered perks to its workforce. The company engaged a vendor to provide on-site primary care and

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\(^5\) Conlin, supra note 1, at 62. The $20 million in health care expenditures represented twenty percent of Scotts’s net profits in 2003. Id.

\(^6\) Id. at 63.

\(^7\) “Man you have balls of steel,” former General Electric CEO Jack Welch reportedly told Hagedorn upon learning about Scotts’s health and wellness initiative. Id. at 60. After the board approved the overall health and wellness strategy, Lynn J. Beasley, Chief Operating Officer at Winston-Salem, North Carolina cigarette manufacturer R.J. Reynolds, and a Scotts’s board member since 2003, decided against running for re-election to the board. Scotts Miracle-Gro Co., Definitive Proxy Statement (Form DEF 14A), at 7 (Dec. 20, 2005), available at http://www.sec.gov/Archives/edgar/data/825542/000095015205010095/117362adef14a.htm. Scotts’s filing with the SEC stated that Beasley did not stand for re-election due to “personal reasons.” Id. Business Week reported that Beasley “saw the conflict” between her position at a cigarette manufacturer and Scotts’s new policies and that she “quit the Scotts board” as a result. Conlin, supra note 1, at 63. These events marked the beginning of Scotts’s struggle against tobacco.

\(^8\) These two conditions, traceable at least to some extent to lifestyle choices, were the primary targets in the campaign. See Conlin, supra note 1, at 63 (“Hagedorn ... wanted to ban smoking and go after obesity.”). Business Week did not indicate whether Scotts attempted to address any other health care targets.

\(^9\) Id. at 62.

\(^10\) Id. at 62–63.

\(^11\) The tactics Hagedorn endorsed were akin to treatment for substance abuse. According to the Business Week report, Hagedorn “proposed launching the kind of companywide intervention that families use to help an addicted relative.” Id. at 63.
health coaching services.\textsuperscript{12} Scotts also constructed a $5 million dollar, 24,000 square foot wellness facility complete with a fitness center, a full-time medical staff, and a drive-through window with free generic prescription drugs.\textsuperscript{13} Second, Scotts crafted a policy to enforce its commitment to health and wellness. Employees who refused to take a health assessment and follow the recommendations of their health coach were charged an additional amount in their monthly health insurance premiums.\textsuperscript{14} Then, in its boldest move, Scotts instituted a no-tobacco policy. Under the new policy, effective October 1, 2006, Scotts refused to hire tobacco users.\textsuperscript{15} Current employees were offered the chance to participate in Scotts's smoking cessation program.\textsuperscript{16} If they continued to use tobacco, they would be dismissed.\textsuperscript{17} Scotts's message to its employees was clear: we will give you all the necessary tools to make healthy lifestyle choices, but if you choose to continue to engage in destructive behavior and saddle us
with the costs, we will ask you to leave. In other words, get healthy or get out. Scotts's policy worked. The rate of tobacco use at Scotts plunged from 30% to 8%.19

In September 2006, a Scotts lawn care technician named Scott Rodrigues learned just how serious Scotts was about its new health and wellness program. Scotts informed Rodrigues of its tobacco policy.20 After a drug screening showed that Rodrigues had nicotine in his system, Scotts fired him.21 Rodrigues filed suit against Scotts in federal court alleging that his dismissal violated Massachusetts state employment laws and certain provisions of the federal Employee Retirement Income Security Act of 1974 ("ERISA").22 In Rodrigues v. EG Systems, Inc.,23 the district court granted summary judgment to Scotts on both the state and federal law claims.24 Rodrigues initially sought to appeal the decision to the First Circuit Court of Appeals,25 but the parties ultimately reached a settlement.26 The case drew national attention in part because of its implications for organizations that may try to follow a similar path to Scotts. Macy's and PepsiCo

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18. See id. at 64 ("If people understand the facts and still choose to smoke, it's suicidal,' [Hagedorn] says. 'And we can't encourage suicidal behavior.'").
20. Conlin, supra note 1, at 60.
22. See Second Amended Complaint and Jury Trial Demand, Rodrigues v. EG Sys., Inc., 639 F. Supp. 2d 131 (D. Mass. 2009) (No. 07-10104-GAO), 2007 WL 2383241; see also ERISA § 510, 29 U.S.C. § 1140 (2006) (making it unlawful "to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan"); MASS. ANN. LAWS ch. 12, § 11I (LexisNexis 2000) (providing a private right of action for those deprived of their rights under the U.S. and Massachusetts Constitutions); MASS. ANN. LAWS ch. 214, § 1B (LexisNexis 2011) ("A person shall have a right against unreasonable, substantial or serious interference with his privacy.").
24. The district court held that Rodrigues's claim under Massachusetts privacy law failed because his smoking habit was not private. See id. at 134 ("Rodrigues does not have a protected privacy interest in the fact that he is a smoker because he has never attempted to keep that fact private."). The court also denied Rodrigues's claim under ERISA because Scotts's offer of permanent employment to Rodrigues was contingent on him completing a pre-hire screening process. Id. at 135. Thus, according to the district court, Rodrigues did not have a cognizable expectation of employment benefits under ERISA. Id. at 136.
have added health insurance surcharges for employees who smoke.27 The City of Chicago has announced that it will require city workers to enroll in a health and wellness program or pay an extra fifty dollars per month in health insurance premiums.28 Other employers, such as Union Pacific, Cleveland Clinic, Weyco, and community fire departments, like Scotts, simply refuse to hire smokers.29

While Rodrigues did not provide any definitive guidance on the fate of these particular programs, one thing is certain: the case would have come out much differently under North Carolina law. Section 95-28.2 of the North Carolina General Statutes (here referred to as the “Smoker’s Protection Act”) forbids an employer from discriminating in employment decisions based on a person’s use of

27. As of July 1, 2011, Macy’s added a $420 annual health insurance surcharge for workers who smoke cigarettes. Pat Wechsler, And You Thought Cigarettes Were Pricy, BUS. WK., July 4, 2011, at 24, 24–25. PepsiCo requires smokers to pay an additional $600 per year for health care benefits. Id. at 25.


tobacco products off-duty and after work hours. Under North Carolina law, Scott Rodrigues would have obtained damages and a court order requiring Scotts to reinstate his employment. Thus, Rodrigues would be free to continue his tobacco habit and, under the full force of the law, Scotts would be required to continue providing Rodrigues with health care benefits.

This Comment rejects that result. It maintains that the Smoker's Protection Act is an affront to freedom of contract in the labor market, that it unjustifiably limits the ability of North Carolina firms to pursue health and wellness programs, and that it gives tobacco addiction the support of North Carolina law. This Comment argues that the Act should be repealed as it represents an illegitimate intrusion by state government into employment freedom of contract and corporate governance in North Carolina. Ostensibly in the name of personal liberty and privacy, the Smoker's Protection Act infringes on freedom of contract by creating an unwarranted exception to North Carolina's at-will employment doctrine, a regime that recognizes the right to terminate an employment relationship on essentially any grounds. In addition to being an attack on freedom of contract, this Comment argues that by forbidding employers from considering personal smoking habits in employment decisions, the State of North Carolina subsidizes tobacco dependency by forcing employers to shoulder the burden of insuring smokers. This means the Act promotes inconsistent, Janus-like public policy in North Carolina, where state government decries the negative public health effects of tobacco at the same time as it elevates cigarette smoking to a civil right. Treating smokers as a protected class prevents employers from requiring smokers to absorb the full, true costs of their tobacco addiction and forces others to subsidize their habit.


31. § 95-28.2(e). Rodrigues would have been entitled to lost wages, § 95-28.2(e)(1), and reinstatement of his employment, § 95-28.2(e)(2). As the prevailing party in litigation, Rodrigues could have also recovered reasonable attorney's fees and court costs from Scotts. § 95-28.2(f).

32. Once a person becomes an employee, ERISA requires that health benefits be made available. See ERISA § 510, 29 U.S.C. § 1140 (2006) ("It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . .").

33. To behave in a Janus-like manner means "looking or acting in opposite or contrasting ways." 1 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1209 (1993). Janus was the god of beginnings and endings in Roman mythology. 5 THE OXFORD ENGLISH DICTIONARY, Vol. VIII, 189 (1989). Janus was depicted as having two faces, one looking forward and the other looking backward. Id.
This Comment proceeds in four parts. Part I provides the economic and business justifications for corporate health and wellness programs. It explores why, in the American system of health care finance, employers are trying to influence the health care choices of employees. Part II examines the origins and intent of North Carolina's Smoker's Protection Act. It chronicles how an odd political alliance between the tobacco industry and the American Civil Liberties Union ("ACLU") played an important role in persuading the North Carolina General Assembly to enact this legislation. Part III considers the provisions of the Smoker's Protection Act, paying particular attention to how the statute modifies North Carolina's at-will employment doctrine. The Act is also analyzed from the perspective of how the statute interacts with federal law, including the recently enacted Patient Protection and Affordable Care Act ("PPACA"),\(^34\) to limit North Carolina employers' liberty to pursue effective health and wellness strategies. Finally, Part IV makes the case for repealing the Smoker's Protection Act and calls for a return to employment freedom of contract in North Carolina.

I. WHY EMPLOYEE HEALTH MATTERS TO EMPLOYERS: UNDERSTANDING THE RATIONALE FOR CORPORATE HEALTH AND WELLNESS PROGRAMS

A. The Role of Private Employers in Health Care Finance in the United States

Accounting for the growth of corporate health and wellness programs starts with understanding the role employers play in the American system of health care finance. In the United States, health care is paid for through three primary channels: Medicare, Medicaid, and private employers.\(^35\) Medicare provides health insurance through a plan sponsored by a private employer, 15.7% of Americans obtained coverage through Medicaid, and 14.3% received coverage through Medicare in 2009. Others obtained health insurance by purchasing it directly from health insurance companies (8.9% of Americans) or through service in the military (4.1% of Americans). Nearly 17% of Americans were uninsured in 2009.\(^{Id.}\)
coverage to the elderly while Medicaid insures the poor. Of the remaining Americans under the age of sixty-five, a majority obtain health insurance through a private employer. In this arrangement, both employers and employees make a financial contribution toward a worker's monthly health insurance premium. This employer-based model of health care finance is supported by favorable federal tax treatment.


37. See DENAVAS-WALT ET AL., supra note 35, at 22 (reporting that in 2009 55.8% of Americans received health insurance through a plan sponsored by a private employer). The proportion of Americans receiving employer-based health insurance in 2009 was the lowest since 1993. See id. at 71 (reporting that 57.1% of Americans obtained health insurance through a private employer in 1993). This is likely a consequence of high unemployment due to the 2008 financial crisis.

38. In its annual survey of employer health benefit practices, the Kaiser Family Foundation found that the average annual premium for an employer-sponsored family health insurance plan increased by almost 114% from $6,438 in 2000 to $13,770 in 2010. THE KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, EMPLOYER HEALTH BENEFITS: 2010, at 1 (2010) [hereinafter KAISER FAMILY FOUND.], available at http://ehbs.kff.org/pdf/2010/8085.pdf. From 2000 to 2010, the average employer contribution to a worker's annual premium for a family health insurance plan more than doubled from $4,819 to $9,773. Id. At the same time, the corresponding employee contribution increased from $1,619 in 2000 to $3,997 in 2010, or nearly 147%. Id.


Extensive government involvement in subsidizing the employer-sponsored system makes some of the more strident anti-government planning rhetoric in the debate leading up to the passage of the PPACA at least somewhat ironic. The same is true for the claims that passing the PPACA presented a decisive, Waterloo moment for a free market health care system in the United States. See, e.g., Dick Morris & Eileen McGann, Urgent Action Needed on Health Care, DICKMORRIS.COM (July 17, 2009), http://www.dickmorris.com/blog/urgent-action-needed-on-health-care/ ("The stakes have never been higher."). Yet the realities of the American health care system stand in stark contrast to this bombastic
There are two models of employer-sponsored health insurance. In the first, employers independently provide insurance to employees. These self-insured employers absorb health care costs as their workers utilize health care services. These plans are governed by ERISA, which preempts state law. In the second model of political rhetoric. Consider just a few characteristics of our allegedly free market approach: occupational licensing laws erect barriers to entry, putting government between patients and potential providers. See, e.g., N.C. Gen. Stat. § 90-18(a) (2011) (making it a crime to practice medicine in North Carolina without a government license). The United States Food and Drug Administration ("FDA") must approve new drugs before they can be sold on the market. See 21 U.S.C. § 355(a) (2006) (prohibiting any person from entering into "interstate commerce any new drug, unless" approved by FDA). Government mandates the medical conditions health insurers must cover in their policy offerings. See, e.g., N.C. Gen. Stat. § 58-67-74(a) (2011) (mandating coverage for diabetes). Finally, around three in every ten Americans already finance their care through government programs. See DeNavas-Walt et al., supra note 35, at 71 (reporting that, in 2009, 15.7% and 14.3% of Americans received health insurance coverage through Medicaid and Medicare, respectively).

Whatever this system is, it is far from free, guided only by the invisible hand. On the contrary, American health care bears the hallmarks of the planned economy, riddled with regulation and increasingly socialized. Professor Hans-Hermann Hoppe describes the result:

[T]he socialization of the health care system through institutions such as Medicaid and Medicare and the regulation of the insurance industry (by restricting an insurer's right of refusal: to exclude any individual risk as uninsurable, and discriminate freely, according to actuarial methods, between different group risks) [has created] a monstrous machinery of wealth and income redistribution at the expense of responsible individuals and low-risk groups in favor of irresponsible actors and high-risk groups . . . .


40. The Kaiser Family Foundation estimates that 55% of American workers were insured through a partially or totally self-insured employer in 2008. THE KAISER FAMILY FOUND., EMPLOYER HEALTH BENEFITS: 2008, at 155 (2008), available at http://ehbs.kff.org/pdf/7790.pdf. Self-insured employers are typically larger. See id. (reporting that, in 2008, 12% of employers with 5–199 workers were self-insured, compared to 47% of employers with 200–999 workers, 76% with 1,000–4,999 workers, and 89% with 5,000 or more workers).

41. Self-insured firms "act[] as [their] own insurer." Paul Fronstin, Capping the Tax Exclusion for Employment-Based Health Coverage: Implications for Employers and Workers, EMP. BENEFIT RES. INST., Jan. 2009, at 1, 6, available at http://www.ebri.org/pdf/briefpdf/EBRI_IB_1-2009_TaxCap1.pdf. In other words, self-insured firms must forecast health care expenditures and allocate portions of their budgets to defray future costs. These firms typically contract with a third party administrator to manage employee health care claims and the reimbursement process. Id. at 7. Since they do not purchase insurance through a third party, these employers "bear[] the risk associated with offering health coverage." Id.

42. See ERISA § 514(a), 29 U.S.C. § 1144(a) (2006) ("[T]his chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."). The fact that ERISA contains a strong preemption provision has been described as
employer-sponsored health insurance, an employer purchases a health plan from a health insurance company.\textsuperscript{43} These plans are governed primarily by state law and are subject to extensive state regulation.\textsuperscript{44} This means that unlike their self-insured counterparts, firms that choose this model of insurance are more restricted in the way they can structure employee benefits.

B. The Business Case for Health and Wellness Programs

1. Health Care Market Dynamics and the Basic Business Case

Given the steady increase in health insurance premiums\textsuperscript{45} and the inevitable impact of this trend on balance sheets, it is not surprising that firms would try to limit the costs of providing employees with health care. This was the dilemma facing Scotts. As a self-insured firm, Scotts could (1) continue to try to absorb the costs of rising

\begin{itemize}
\item an advantage for self-insured employers who are thought to have more freedom to customize and tailor their employee benefits. See Fronstin, \textit{supra} note 41, at 6–7 (describing self-insured employers, particularly larger employers with operations in multiple states).
\item These plans are generally referred to as fully-insured plans. See Fronstin, \textit{supra} note 41, at 6. The Employee Benefits Research Institute estimates that in 2008, 45% of employers provided health insurance to their workers through a fully-insured model. \textit{Id.} This is the most common form of health insurance provided by small firms. See \textit{Kaiser Family Found.}, \textit{supra} note 38, at 155 (reporting that only 12% of employers with 3–199 workers were self-insured, meaning that 88% of insured workers would have received coverage through a fully-insured model). In North Carolina, Blue Cross Blue Shield of North Carolina ("BCBSNC") is by far the largest player in the private health insurance market. See James Gallagher, \textit{BCBSNC Dominates N.C. Insurance Pie}, \textit{Triangle Bus. J.}, Oct. 2, 2009, at 1, available at http://www.bizjournals.com/triangle/stories/2009/10/05/story2.html (reporting that BCBSNC “took in nearly 70 percent of all dollars spent on health insurance premiums in North Carolina in 2008”). United Healthcare and WellPath Select accounted for over half of the remainder of the private health insurance market. \textit{Id.}
\item The McCarran-Ferguson Act provides that insurance regulation is primarily the province of the states. McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1011–15 (2006). The McCarran-Ferguson Act “declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.” \textsection{} 1011. Since 1899, the North Carolina Department of Insurance has regulated the insurance industry in North Carolina. \textit{About the North Carolina Department of Insurance, N.C. DEP'T OF INS.}, http://www.ncdoi.com /main.asp (last visited Dec. 29, 2011). For additional background on the origins of state regulation of the insurance industry, see Susan Randall, \textit{Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners}, 26 FLA. ST. U. L. REV. 625, 629–34 (1999) (describing the development of state regulation of the insurance industry beginning with the Supreme Court of the United States’s decision in \textit{Paul v. Virginia}, 75 U.S. 168 (1869)).
\item See \textit{supra} note 38 (noting the rapid rise in health insurance premiums and the increased employer share of expenses).
\end{itemize}
health insurance premiums at the risk of compromising its competitive position in the marketplace,\textsuperscript{46} (2) require employees to make an increased contribution to their health insurance premium, or (3) attempt to make Scotts's workforce a more attractive, low-risk pool of employees to insure by pursuing a health and wellness program with the goal of limiting the cost of unhealthy lifestyle choices.\textsuperscript{47}

Scotts, like other companies facing a similar predicament,\textsuperscript{48} chose the third course. As Professor M. Todd Henderson explained in his account of the rise of so-called “corporate nannyism,” taking this route epitomizes rational economic behavior for firms:

> It is in . . . cost bearing by third parties that nannyism starts. Third parties who are liable for the costs imposed by others will inevitably engage in actions designed to reduce those costs. In fact, it would be irrational for the third parties not to try to influence the behavior of the individuals imposing the costs, since it would be subsidizing socially inefficient conduct.\textsuperscript{49}

Firms that provide health care benefits to employees are the kind of third parties to which Professor Henderson refers. At some point these organizations inevitably absorb the costs of an employee’s health care choices.\textsuperscript{50}

The costs tobacco addicts impose on firms are significant. A study by the Centers for Disease Control and Prevention (“CDC”) found that in the late 1990s, the average additional annual cost of

\textsuperscript{46} This competitive position would include Scotts's stock price since it is a publicly traded company. Scotts is thought to be one of the few public companies pursuing its brand of health and wellness strategy. According to Scotts's CEO Jim Hagedorn, “[public companies] want to play where it's really safe” and are timid about pursuing cutting-edge health and wellness programs. Michelle Conlin, Online Extra: Hagedorn: “We Care About Our People”, BUS. WK. (Feb. 26, 2007), http://www.businessweek.com/magazine/content/07_09/b4023005.htm.

\textsuperscript{47} In this sense, self-insured firms have the same basic strategic position as insurance companies generally. Insurance is “[a] contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage, or liability arising from the occurrence of some specified contingency.” BLACK'S LAW DICTIONARY 870 (9th ed. 2009). Insurance thus involves pooling and effectively managing risks posed by uncertain future events and expenses.

\textsuperscript{48} See supra notes 27–29 and accompanying text (describing anti-tobacco policies at various organizations).


\textsuperscript{50} These costs can take the form of both direct and indirect costs. Direct costs involve medical care attributable to health care choices. Indirect costs refer to worker absenteeism caused by illness and lost workplace productivity. This Comment considers both.
employing a smoker was $3,383.\textsuperscript{51} After adjusting for inflation, this figure amounts to $4,570.64 in additional annual costs per smoker in 2011 dollars.\textsuperscript{52}

2. The Economics of Smoking in North Carolina

Extrapolating from the CDC study,\textsuperscript{53} Table 1 attempts to summarize the economic impact of smoking on a typical North Carolina firm.\textsuperscript{54}

\textit{Table 1: Financial Impact of Smoking on an Average-Sized North Carolina Firm (Medical Costs Indexed to General Rate of Inflation)}

<table>
<thead>
<tr>
<th>Average annual cost of smoking per employee (adjusted for inflation in USD)</th>
<th>$4,570.64</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average size of a North Carolina employer (number of 20 workers)</td>
<td>20</td>
</tr>
</tbody>
</table>

\textsuperscript{51} As compared to non-smokers, smokers typically use more health care services and are prone to increased absenteeism. See Ctrs. for Disease Control and Prevention, \textit{Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Economic Costs—United States, 1995–1999}, 51 \textsc{Morbidity & Mortality Wkly. Rep.} 300, 302 (2002), available at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5114a2.htm (finding the average annual productivity costs of smoking to be $1,760 and the average annual increased medical costs for a smoker to be $1,623, for a total of $3,383 in increased annual costs based on data from 1998). From this CDC estimate, Professor Henderson used mass retailer Wal-Mart as a case study on which to extrapolate the costs of smoking. See Henderson, supra note 49, at 1545 (finding that Wal-Mart could save $1.4 billion in health care costs if it instituted “a zero-tolerance policy for smoking”).

\textsuperscript{52} The adjustment for inflation was made in January 2011 using the United States Bureau of Labor Statistics' Inflation Calculator. See CPI Inflation Calculator, \textsc{Bureau of Laboratory Stat.}, http://www.bls.gov/data/inflation_calculator.htm (last visited Dec. 29, 2011). The calculation was performed by setting the initial year to 1998 and the pre-adjusted amount to $3,383. The amount, adjusted to January 2011 dollars, comes out to $4,570.64 on the inflation calculator.

\textsuperscript{53} See Ctrs. for Disease Control and Prevention, supra note 51, at 302.

\textsuperscript{54} Using a similar method to Professor Henderson, assuming a twenty percent smoking rate, an average-sized North Carolina firm absorbs $18,282.56 in additional annual costs due to tobacco use. See \textit{Statistics of U.S. Businesses}, U.S. \textsc{Census Bureau}, http://www2.census.gov/econ/susb/data/2008/us_state_totals_2008.xls (last visited Dec. 29, 2011). This figure is arrived at by multiplying the average annual cost of smoking by the average number of North Carolina employees who smoke per firm.
Table 1 provides a conservative estimate of the costs of smoking imposed on a firm because it is based on the assumption that the rising rate of medical costs tracks the average general rate of inflation. Yet there is a substantial body of empirical evidence that indicates this is not the case. In fact, evidence suggests that health care costs greatly outpace the average rate of inflation. Table 2 presents an estimate of the costs of smoking for North Carolina firms based on this estimated adjusted rate.

Table 2: Financial Impact of Smoking on an Averaged-Sized North Carolina Firm (Costs Indexed to Rate of Rising Health Care Costs)

<table>
<thead>
<tr>
<th>Average annual cost of smoking per employee (adjusted for rising health care costs in 2011 USD)</th>
<th>$6,791.82</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average size of a North Carolina employer (number of workers)</td>
<td>20</td>
</tr>
</tbody>
</table>

55. The Kaiser Family Health Foundation estimates that nearly 20% of North Carolina adults smoke cigarettes, which is over 2% higher than the national average. See Kaiser Family Health Found., North Carolina: Percent of Adults Who Smoke, 2010, STATEHEALTHFACTS.ORG, http://www.statehealthfacts.org/profileind.jsp?ind=80&cat=2&rgn=35 (last visited Dec. 29, 2011) (estimating the percentage of North Carolina adult smokers at 19.8% as compared to the U.S. average of 17.2%); see also KENDRA A. HOVEY & HAROLD A. HOVEY, CO’S STATE FACT FINDER 2007, at 246 (2007) (reporting that 22.6% of North Carolina adults smoked cigarettes in 2005, a rate 2% higher than the U.S. average of 20.6%).


57. See id. (reporting an 8.7% annual increase in health care costs since 1999 and that “[i]n each of the past 10 years, insurance increases have outpaced inflation--sometimes by as much as 11 percentage points”).

58. In Table 2, the rate is assumed to be 8% per year, which is a conservative estimate based on the 8.7% average annual increase. Id.

59. This figure is the sum of productivity costs ($1,760 in 1998, adjusted for inflation) and medical costs ($1,623 in 1998, compounded 8% annually).
Table 1 and Table 2 together suggest that employees who use tobacco impose approximately $18,000 to $27,000 in additional costs on average-sized North Carolina firms. In per employee terms, this means North Carolina firms pay an estimated 12% to 18% premium over and beyond normal payroll costs for each smoker. From an aggregate perspective, tobacco addicts impose an estimated $3.2 to $4.8 billion in annual direct and indirect costs on North Carolina’s private sector.

3. Even with a Business Case, Active Employers Are an Exception

Given the costs associated with tobacco use, it is somewhat surprising that aggressive health and wellness programs like the one

<table>
<thead>
<tr>
<th>Estimated percentage of North Carolinians who smoke cigarettes</th>
<th>20%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average number of North Carolina employees who smoke per firm</td>
<td>4</td>
</tr>
<tr>
<td>Average annual cost of smoking to North Carolina employers (adjusted for rising health care costs in 2011 USD)</td>
<td>$27,167.28</td>
</tr>
</tbody>
</table>

60. For estimates on North Carolina smoking rates, see Kaiser Family Health Found., supra note 55.

61. This figure is the product of the average annual cost of smoking ($6,791.82) and the average number of employed smokers at a North Carolina firm (four).

62. The 12% to 18% premium ($P_{smoker}$) was determined according to the following equation:

$$P_{smoker} = \frac{SP_{low}}{Payroll\ per\ employee} \times \frac{SP_{high}}{Payroll\ per\ employee}$$

Here, total payroll spending by employers per employee (Payroll per employee) in North Carolina is $36,930.59, the most conservative estimate for the cost of smoking ($SP_{low}$) in 2011 dollars is $4,570.64, and the cost of smoking adjusted for medical inflation ($SP_{high}$) is $6,791.82. U.S. Census Bureau, supra note 54; see also supra text accompanying notes 50–59.

63. This figure, the aggregate cost of smoking ($CS_{aggregate}$), is arrived at according to the following equation:

$$CS_{aggregate} = [E_{NC} \times SP_{low} \times NC_{smoke\%}, E_{NC} \times SP_{high} \times NC_{smoke\%}]$$

Where total North Carolina employment ($E_{NC}$) is 3.5 million workers, a conservative estimate of the cost of smoking ($SP_{low}$) is $4,570.64, the cost of smoking adjusted for medical inflation ($SP_{high}$) is $6,791.82, and the estimated percent of North Carolinians that smoke cigarettes ($NC_{smoke\%}$) is twenty percent. U.S. Census Bureau, supra note 54; see also supra text accompanying notes 51–59.
at Scotts are not more commonplace. There are at least three possible explanations for this. First, a firm may lack the economies of scale necessary to receive an adequate return on investment on a health and wellness program. Unless a firm has enough employees, and thus a significant opportunity to capture cost savings from limiting tobacco use by its employees, it will be difficult to justify the financial investment required to establish a rigorous health and wellness program. Second, firms may decide against pursuing a rigorous wellness program for fear of suffering backlash from current employees and the labor market, in addition to incurring the scorn and ridicule of consumers and media outlets. Third, in jurisdictions with laws that forbid employment discrimination against tobacco users, firms are severely limited in the costs they can pass on to tobacco addicts. These laws, and the relative uncertainty pertaining

64. The Kaiser Family Foundation’s annual survey of health benefits found that 74% of private employers provide their employees with some form of wellness program. See KAISER FAMILY FOUND., supra note 38, at 170. However, only 1% of surveyed firms varied their contribution to health insurance premiums based on an employee’s participation in a wellness program. Id.

65. Recall that the initial, fixed investment in the Scotts wellness program was at least $5 million, in addition to $4 million in recurring annual costs. See supra note 13 and accompanying text. Applying the financial modeling methods described above at supra note 63, it is conceivable that Scotts’s no-tobacco policy is saving the company $5.6 million annually. This more than pays for the annual operating costs of the Scotts wellness facility. Assuming a potential costs savings of $4,570.64 per smoker per year from instituting a no-tobacco policy, Scotts would cover the annual costs of its wellness facility with a workforce of 3,633. This helps to explain why large employers have been more likely to pursue health and wellness programs than smaller ones. See KAISER FAMILY FOUND., supra note 38, at 176 (finding employers with 200 or more workers were the most likely to offer health insurance premium discounts in connection with health and wellness programs). Firms may also balk at starting a health and wellness program because of the time required to realize any return. On this point, in 2008, Scotts CEO Jim Hagedorn noted it could take “up to three to five years” before such an initiative generates a financial return. Bridgeford, supra note 3, at 52.

66. Some consumers responded negatively to Scotts’s program. One called the policy “shameful” and vowed to “never buy Scotts’s products again.” Bob Bevill, Letter to the Editor, BUS. WK., Mar. 19, 2007, at 82, 82. Another called the program a “creepy abuse of power.” Anne Jones, Letter to the Editor, BUS. WK., Mar. 19, 2007, at 83, 83. After the Baylor Health Care System announced its new no-tobacco policy, one local media commentator remarked that “Baylor’s new policy crosses a line.” Ashley Sanchez, Baylor Crosses Line with ‘No Smoking’ Rule, AUSTIN AMERICAN-STATESMAN, (Sept. 29, 2011, 7:24 PM), http://www.statesman.com/opinion/sanchez-baylor-crosses-line-with-no-smoking-rule-1887230.html?extype=rss_ece_frontpage. Indeed, this particular critique maintained that the inexcusable defect with the policy was that it treated job applicants “like toddlers by telling them what they have to do.” Id. But see Editorial, Baylor’s Preventive Measure, DALL. MORNING NEWS, Sept. 28, 2011, at A12 (calling the Baylor policy “refreshing” while praising the health care provider for “acting sensibly”).

67. These anti-discrimination employment laws are discussed in further detail in Part III infra.
to their application, may be responsible for producing a chilling effect on the willingness of firms to engage in proactive, strategic thinking about managing employee health care benefits.68

C. Beyond the Balance Sheet: Health and Wellness Programs and Corporate Social Responsibility

Academic debate continues as to the appropriate role of the firm in society. Milton Friedman, the 1976 Nobel Prize winner in Economic Science and one of the founding members of the University of Chicago School of Economics,69 advanced the shareholder primacy view of the firm.70 This theory maintains that the firm has a narrow role. The firm exists to pursue profits and to secure financial returns for the shareholders who own it.71 By contrast, progressive corporate law theorists promote a view of the firm that asks a company’s management to consider the broader interests of social constituencies when making decisions, as opposed to the narrow interests of shareholders.72

68. See Conlin, supra note 1, at 63 (describing the efforts of Hagedorn in managing implementation of the Scotts wellness program in what he termed a “FEBA” or “forward-edge battle area” characterized by a large amount of legal uncertainty and the potential for lawsuits); Conlin, supra note 46 (“[Scotts’s legal team] told me we were going into FEBA (forward edge of battle area). FEBA is not a cleanly defined area. On the ground there’s a lot of smoke, yelling and screaming and noise. FEBA is a kind of dangerous place to be. For a public company, people don’t want to be in FEBA. People want to play where it’s really safe.” (quoting Scotts CEO Jim Hagedorn)). Hagedorn also noted the uncertainty in finding adequate legal representation to defend an aggressive anti-tobacco policy. “[T]rying to find a good litigator will be a challenge because the tobacco folks have them conflicted out.” Bridgeford, supra note 3, at 52. “You go to a good law firm, and they basically say ‘I can’t take your business because I have tobacco money.’ ” Id.


71. See Milton Friedman, The Social Responsibility of Business is to Increase its Profits, N.Y. TIMES MAG. (Sept. 13, 1970), available at http://scholar.google.com/scholar?hl=en&q=http://www.umich.edu/~thecore/doc/Friedman.pdf&sa=X&scisig=AAGBhm2ow5EKppLLxORc16D8HywHTWN0g&oi=scholarr (describing the features of the shareholder primacy model while criticizing the notion of corporate social responsibility); see also MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (Univ. of Chi. Press 40th anniversary ed. 2002) (arguing against corporate social responsibility, characterizing “the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible” as “a fundamentally subversive doctrine”).

72. See Stout, supra note 70, at 1190 (describing the so-called entity view of the firm characteristic of progressive corporate law theorists).
In addition to differing on the economic benefits of these two theories, proponents of both models also differ as to the role of the law in corporate governance. Corporate law scholars can debate the merits of a legal rule that encourages firms to consider the interests of those outside the firm, but even the most strident libertarian would concede the right of corporations, or any group of individuals for that matter, to pursue broader social goals free from the coercive power of government. In this regard, some firms appear to be voluntarily pursuing social goals that have no clear, discernible, or immediate impact on the firm’s balance sheet. One need only scan the pages of a recent edition of The Wall Street Journal to see major corporations proclaiming their support for an expansive social agenda, which

73. Advocates of corporate social responsibility have labored to demonstrate that there is a compelling business case for such practices. See David Vogel, The Market for Virtue 29 (Brookings Inst. Press 2005) (noting that “[a]n extensive body of academic research [has] examine[d] the relationship between corporate responsibility and profitability”). The business case for corporate social responsibility has not been vindicated. See id. (“[The] central conclusion [of empirical analysis of corporate social responsibility] can be easily summarized: at best, it is inconclusive.”). But see id. at 45 (recognizing that the literature on corporate social responsibility indicates that the doctrine “does make business sense for some firms in specific circumstances”); Aneel Karnani, CSR Stuck in a Logical Trap, CAL. MGMT. REV., Winter 2011, at 105, 105 (arguing that firms will not engage in corporate social responsibility if it “is not profitable” or “unless required to do so by law or regulation”).

74. Supporters of progressive corporate law theory tend to advocate for state legislatures to enact constituency statutes. These enabling statutes allow corporate directors who traditionally owe fiduciary duties exclusively to shareholders to consider the interests of other groups in performing their role as fiduciaries. See Brett H. McDonnell, Corporate Constituency Statutes and Employee Governance, 30 WM. MITCHELL L. REV. 1227, 1230–32 (2004) (providing an overview of state corporate constituency statutes). To date, North Carolina has not enacted a constituency statute.

75. For a debate among self-identified free-market libertarians regarding Friedman’s shareholder primacy model, see Milton Friedman, John Mackey & T.J. Rodgers, Rethinking the Social Responsibility of Business, REASON, Oct. 2005, at 28, 29.

76. This is not to deny the point made by Friedman that economic profit, in and of itself, can be a useful social end. See Friedman, supra note 71, at 126 (criticizing the “prevalent view that the pursuit of profits is wicked and immoral and must be curbed and controlled by external forces”).

77. Firms pursue these ends with support from a significant portion of the American public. A 2011 survey found that fifty-six percent of Americans agree with the proposition that “the social responsibility of business is to increase its profits.” Milton Friedman Goes on Tour, ECONOMIST, Jan. 29, 2011, at 63, 63. The same survey found support for the shareholder primacy model to be strongest in the United Arab Emirates, India, and Japan. Id. Germany, Italy, and Spain, by contrast, were the least receptive to shareholder primacy. See id. (noting that less than forty percent of those surveyed in each of those countries agreed with Friedman’s position).
includes promoting public health, renewable energy, and community development.\textsuperscript{78}

These efforts aimed at promoting corporate social responsibility provide an additional lens through which to view firm health and wellness programs in general and anti-tobacco policies in particular. Regardless of the firm's ability to fully justify a health and wellness program on financial grounds,\textsuperscript{79} any financial upside does not eliminate a purely altruistic motivation. For example, firms may create such programs out of genuine concern for employee welfare or a desire to engage in a broader social mission of corporate social responsibility.\textsuperscript{80}

The Smoker's Protection Act conflicts with both the shareholder primacy model and the progressive corporate view of the role of the firm. From the standpoint of the shareholder primacy model, the Act limits management's ability to pursue shareholder value through programs that have the potential to limit the costs incurred as a result of employee tobacco use. At the same time, the Act limits the freedom of North Carolina firms to pursue alternative theories of corporate governance that promote goals other than securing financial returns for shareholders.\textsuperscript{81}

\begin{footnotesize}
\begin{itemize}
\item[78.] See, e.g., Chevron Corp., \textit{Oil Companies Should Put Their Profits to Good Use—We Agree}, \textit{WALL ST. J.}, Oct. 19, 2010, at A7. Chevron’s global “We Agree” advertising campaign, while proclaiming Chevron’s support for the global fight against AIDS, also pledges that the multi-national energy corporation will support small businesses and community development. See Chevron Corp., \textit{Chevron Launches New Global Advertising Campaign: “We Agree”}, CHEVRON.COM (Oct. 18, 2010), http://www.chevron.com/chevron/pressreleases/article/10182010_chevronlaunchesnewglobaladvertisingcampaignweagree.n ews (announcing the launch of Chevron's advertising campaign); see also Ben Gasselman, \textit{Chevron Ad Campaign Answers Critics Head-On}, \textit{WALL ST. J.}, Oct. 18, 2010, at B10 (discussing Chevron's campaign in response to critics of the oil industry following BP's oil spill in the Gulf of Mexico in April 2010).
\item[79.] As discussed earlier in this Comment, there are reasons to doubt, for certain types of employers, that a rigorous health and wellness program would generate adequate financial returns. See supra note 62 (providing a brief financial model of the benefits of an anti-tobacco policy).
\item[80.] In describing Scotts's health and wellness program, Hagedorn hinted at motivations that go beyond the bottom line of returning shareholder value: “I always hope people feel we care about them and we’re a family. What’s wrong with saying we care about our people?” Conlin, supra note 46. According to one estimate, over 12,000 North Carolinians die every year due to cigarette smoking. Tobacco-Free Kids Campaign, \textit{The Toll of Tobacco in North Carolina}, TOBACCOFREEKIDS.ORG, http://www.tobaccofreekids.org/facts_issues/toll_us/north_carolina (last updated Nov. 28, 2011).
\item[81.] In this sense, the goal would be improving the overall health of employees.
\end{itemize}
\end{footnotesize}
II. THE HISTORY AND ORIGINS OF THE SMOKER'S PROTECTION ACT

This Part examines the events leading to the passage of the Smoker's Protection Act. It describes these events against the historical backdrop of the early 1990s, a period which saw North Carolina firms begin to fashion policies to restrict employee tobacco use. This Part also draws upon previously uncanvassed material, including legislative committee testimony and contemporaneous newspaper accounts, in an attempt to ascertain the General Assembly's intent in enacting the Smoker's Protection Act.

A. The Movement Against Lifestyle Discrimination

At the time the Smoker's Protection Act was passed in 1992, public sentiment in the United States increasingly disfavored employment discrimination based on lifestyle choices. In North Carolina, this opposition to lifestyle discrimination was fueled in no small part by the actions of some private employers. In 1989, the North Carolina firm Litho Industries Carolina ("Litho") took a hard line against tobacco use. Similar to Scotts, the Raleigh-based printing company announced that it would stop hiring cigarette smokers.

Also like Scotts, Litho justified the decision on the basis of health care costs and the lost productivity attributable to smoking. At the same time, in a much less aggressive move, pharmaceutical manufacturer Glaxo, a predecessor to GlaxoSmithKline, forbade employees from smoking on company property during work hours. As these North Carolina employers implemented discriminatory policies against tobacco users, the North Carolina General Assembly


83. See John Cleghorn, Philip Morris Huffs, Puffs Over Firms' Smoking Stance, CHARLOTTE OBSERVER, Oct. 9, 1989, at 2C ("We saw some long-term smokers who were valued employees suffer. One lost a lung," says [Litho Vice President Stanley] Morris. "Some companies silently discriminate against smokers. We went out in the open."). The policy drew the ire of cigarette manufacturer Philip Morris, which maligned Litho for its alleged "abuse of power." Id.

84. See id. ("[Litho] stand[s] firmly behind ... [its] rules .... [Litho] say[s], the policies are cutting costs and should boost productivity.").

85. Glaxo's no-smoking policy also offended Philip Morris's sensibilities. Id. As with Litho, Philip Morris condemned the pharmaceutical manufacturer for abusing its power over employees. Id.
began to look at anti-discrimination employment laws more generally. For example, following the enactment of the federal Civil Rights Act of 1991,86 North Carolina legislators considered whether the federal legislation went far enough in protecting workers from racial discrimination.87 The Legislative Research Study Committee on Discrimination in Employment listened to testimony from workers, law professors, public interest groups, and industry lobbyists.88 It also heard testimony on lifestyle discrimination issues in employment.


87. To this end, the Legislative Research Commission Study Committee on Discrimination in Employment held a series of hearings over a year long period from 1991 to 1992 in order to investigate employment discrimination in North Carolina. The sixteen-member committee held nine separate hearings. See STUDY COMM. ON DISCRIMINATION IN EMP’T, LEGISLATIVE RESEARCH COMM’N, ATTENDANCE, 1991–1992 GEN. ASSEMB., 1991–1992 SESS. (N.C. 1992) (providing attendance record for committee hearings held on December 16, 1991, January 21, 1992, February 25, 1992, March 31, 1992, April 22, 1992, October 7, 1992, November 4, 1992, November 23, 1992, and December 18, 1992). In his testimony, Wake Forest University School of Law Professor J.W. Parker argued that the Civil Rights Act of 1991 did not go far enough in scaling back the Supreme Court’s decisions. See STUDY COMM. ON DISCRIMINATION IN EMP’T, LEGISLATIVE RESEARCH COMM’N, MINUTES OF JAN. 21, 1992 MEETING, 1991–1992 GEN. ASSEMB., 1991–1992 SESS., at 4 (N.C. 1992) (“In conclusion, Professor Parker stated what the Committee needs to consider when drafting a statute is to look at Title VII and the entire range of civil rights legislation and adopt statutes to be interpreted by our State courts as remedial legislation which advances the civil rights of our citizens and not in a way that is hostile to them.”); see also F. Alan Boyce, N.C. is Urged to be the Guardian of Civil Rights, CHARLOTTE OBSERVER, Jan. 22, 1992, at 3C (summarizing Professor Parker’s testimony before the committee).

B. Strange Bedfellows: The ACLU and Others Join Forces with the Tobacco Industry to Promote the Smoker's Protection Act

It is rare for the goals of the ACLU and the tobacco industry to align. Yet in the case of the Smoker's Protection Act, their interests aligned. Indeed, a strategic alliance between the ACLU and the tobacco industry was instrumental in helping to convince the North Carolina General Assembly to pass the Act.

In 1991, the ACLU and cigarette manufacturer R.J. Reynolds discussed a partnership to finance a study on employment discrimination against smokers. Though the results of that study were apparently not made available to the public, the ACLU sent an expert to testify to the Legislative Research Commission Study on Discrimination in Employment on the need for North Carolina to enact lifestyle discrimination legislation. Lewis Maltby, at that time the director of the ACLU's task force on lifestyle discrimination in employment, testified before this committee. Maltby started his testimony by providing a brief historical overview of lifestyle discrimination in the workplace.

89. The interests of the tobacco industry in the fight for the Smoker's Protection Act are fairly easy to understand. If a significant number of private employers either refused to hire cigarette smokers or fired them, there would be less demand for cigarettes. The ACLU's motivations appeared to stem from a desire to protect worker privacy rights from encroachment by private employers. See Lifestyle Discrimination in the Workplace: Your Right to Privacy Under Attack, ACLU.ORG (Mar. 12, 2002), http://www.aclu.org/racial-justice_womens-rights/lifestyle-discrimination-workplace-your-right-privacy-under-attack (making a case against employer lifestyle discrimination). Judge Robert H. Bork, who served on the United States Court of Appeals for the District of Columbia Circuit and was President Ronald Reagan's nominee to the Supreme Court in 1987, Robert H. Bork, HUDSON INST., http://www.hudson.org/learn/index.cfm?fuseaction=staff_t-bio&eid=BorkRob (last visited Dec. 29, 2011), has commented on the organization's selective commitment to individual rights: "[T]he ACLU argues on the one hand for rights to abortion, to practice prostitution, to homosexual marriage, to produce and consume pornography, and much more." ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 97 (rev. ed. 2003). Yet, at the same time, "the ACLU is ... for more government limitations on the freedoms of business owners and managers, such as the power to discharge an employee for unsatisfactory performance." Id. at 98.

90. Throughout 1992 at the North Carolina General Assembly, the ACLU and the tobacco industry worked side-by-side to lobby legislators for the Smoker's Protection Act. See Jack Betts, Smoking, Health and Civil Liberties Tobacco Lobby—This Time Siding with the ACLU—Proves It's Still a Powerful Voice in N.C. General Assembly, CHARLOTTE OBSERVER, Aug. 15, 1992, at 15A (characterizing the relationship between the ACLU and the tobacco industry as involving "the strangest of bedfellows" while describing the collaborative efforts of the ACLU and cigarette manufacturers in securing the passage of the Smoker's Protection Act).

discrimination by focusing on the case of Henry Ford and the Ford Motor Company. He claimed that workers "were fired if they did not live up to Henry Ford's standards" and decried Ford's "meddling into the private lives of his employees." Maltby apparently did not disclose to the committee that Henry Ford voluntarily abandoned his social program without legislative interference.

In addition to the ACLU, two North Carolina newspapers, neither of which had a history of supporting the tobacco industry, lent their powerful voices to the cause of the Smoker's Protection Act. The Raleigh News and Observer lauded the legislation as a necessary step to prevent North Carolina firms from creating a "jungle of discriminatory treatment." Similarly, the Greensboro News and Record editorialized in favor of the legislation, maintaining that employees should not have to "change [their] personal habits in order to keep [a] job." The article added "[e]mployers must not be able to indiscriminately dictate what employees do away from work."

93. Id. While Ford's program certainly had paternalistic qualities, it is far from clear that workers were terminated in a callous, arbitrary manner for their failure to live up to unrealistic standards. See generally STEVEN WATTS, THE PEOPLE'S TYCOON: HENRY FORD AND THE AMERICAN CENTURY 199-224 (2005) (describing Ford Motor Company's sociological program). Ford workers were apparently "mixed" in their support of Ford's sociological department, but far from unanimous in opposition. Id. at 220-21.
94. By the end of 1921, Ford had abandoned his sociological program. WATTS, supra note 93, at 223-24. It is thought that resistance from management was the program's undoing. Id. at 224.
96. Editorial, On Your Time—Not the Boss's, NEWS & OBSERVER (Raleigh, N.C.), June 24, 1992, at A12 (arguing that the law was necessary to prevent employers from engaging in such discrimination and maintaining that allowing such discrimination would be "the start of a slippery slope").
98. Id.
C. The Legislative History of the Smoker's Protection Act

The Smoker's Protection Act, as originally proposed, sought to protect workers from employment discrimination based on engaging in any "lawful activity." After the bill emerged from the Senate Judiciary Committee, it was stripped of the "lawful activity" language during Senate debate and instead amended to bar discrimination on the basis of "lawful use of lawful products or political activity." The bill passed the North Carolina Senate in this form. Protection for "political activity" was dropped from the bill after it came out of committee in the North Carolina House of Representatives. At that point, the bill only protected an employee's "lawful use of lawful products" while off duty. The bill, as eventually passed by the North Carolina House, retained the same language approved by the House committee. After the bill emerged from a joint Senate-House conference committee, it contained the same "lawful use of lawful products" language. Thus attempts to draw the Smoker's Protection Act to protect a broader class of activity failed as this more narrow language ultimately became law.

III. Cigarette Smoking as a Civil Right: The Law of the Smoker's Protection Act

This Part considers the Smoker's Protection Act with respect to how the statute modifies North Carolina employment law, as well as how it interacts with federal law. It also discusses the Act's fundamental objectives exception, a provision that exempts some organizations from the strictures of the statute.

99. An in-depth account of the legislative history of the Smoker's Protection Act has been given elsewhere. See generally Frye, supra note 82, at 1980–81 (providing a broad overview of the Act's legislative history and committee hearings, while emphasizing a concern for employee privacy and the freedom to pursue legal activities outside of work hours).
104. Id.
107. Id.
A. How the Smoker's Protection Act Modifies North Carolina's At-Will Employment Regime

Employment arrangements in North Carolina are, by default, "at-will."This means that in the absence of an employment contract to the contrary, an employer has the right to fire an employee at any time, for any reason. North Carolina law recognizes three exceptions to this doctrine. First, the at-will employment doctrine does not apply if there is an employment contract in place. Second, employers are not permitted to discriminate on the basis of race, sex, or disability in employment decisions. Third, an employer may not terminate an employee if the dismissal would violate public policy. The public policy implicated must involve an "express ... declaration within the North Carolina Constitution or General Statutes."

The Smoker's Protection Act falls under the third type of exception to the at-will employment doctrine. The Act shields cigarette smokers from North Carolina's traditional at-will employment doctrine by placing smokers in a protected class and making firings based on the "lawful use of lawful products" an illegal employment practice.

B. The Mechanics of the Smoker's Protection Act

The Smoker's Protection Act is a type of lifestyle discrimination statute. Depending on the jurisdiction, lifestyle discrimination
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statutes vary in the level of protection they offer workers. Some protect employees from discrimination based on any lawful activity,115 others protect use of lawful products,116 while still others explicitly protect use of tobacco products.117

The Smoker’s Protection Act is a “lawful products” statute. It prevents an employer118 from discriminating in employment decisions as to the terms and conditions of employment “because the prospective employee or the employee engages in or has engaged in

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115. Four jurisdictions have enacted lawful activity statutes. See CAL. LAB. CODE §§ 96(k), 98.6; COLO. REV. STAT. § 24-34-402.5; N.Y. LAB. LAW § 201-d; N.D. CENT. CODE § 14-02-4-01.


118. The reach of the Smoker’s Protection Act is very broad in that an “employer” under the statute includes the State of North Carolina, all of its political subdivisions, and all “private employers with three or more regularly employed employees.” N.C. GEN. STAT. § 95-28.2(a).

From Murphy to Manteo, North Carolinians boast of their cultural and geographical diversity. By making the Act applicable to all the state’s political subdivisions, the General Assembly sent this message to North Carolina’s local governments: Raleigh knows best. The Smoker’s Protection Act casts aside concerns for the particular needs of local communities by substituting a one-size-fits-all solution for decentralized, local self-government.
the lawful use of lawful products if the activity occurs off the premises of the employer during nonworking hours."  

The Act makes an exception for smoking that adversely impacts job performance and for organizations that have anti-smoking activism as a "fundamental objective" of the organization. The statute also provides that employers may discriminate in offering differential rates for health insurance policies to employees based on their use of lawful products.

Previous commentary on the Smoker's Protection Act suggested that, because of the uncertain application of these exceptions, "the courts will play a critical role in determining the scope" of the Smoker's Protection Act. Yet, to date, there are no North Carolina cases interpreting the Act.

C. The Smoker's Protection Act and Federal Law

The Smoker's Protection Act supplements federal law. The statute does nothing to modify the rights workers enjoy under federal anti-discrimination laws. However, firms seeking to pass along the costs of tobacco use to employees who smoke under the health insurance discrimination exception of the Act run the risk of violating federal law. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") limits the amount of costs an employer may pass along to employees, the provision is of limited practical use to North Carolina firms.

119. § 95-28.2(b). Remedies for successful plaintiffs under the statute include lost wages, reinstatement of benefits and employment, and attorney's fees. § 95-28.2(e). The statute of limitations for claims under section 95-28.2 is one year. Id.

120. § 95-28.2(b).

121. § 95-28.2(c)(2). For additional discussion of the fundamental objectives exception, see infra Part III.D.

122. § 95-28.2(d). However, as shown in Part III.C infra, since federal law places limits on the costs an employer may pass along to employees, the provision is of limited practical use to North Carolina firms.


124. Looking to other jurisdictions, there is one South Dakota case that provides an on-point interpretation of a similar statute. In Wood v. S.D. Cement Plant, the Supreme Court of South Dakota held that its state's tobacco products statute was not violated by an employer restricting the off-duty smoking of a kiln plant operator. 1999 SD 8, ¶ 17, 588 N.W.2d 227, 231.


126. N.C. GEN. STAT. § 95-28.2(d).
employer can pass along to an employee based on an individual’s health status.\textsuperscript{127} Regulations promulgated under HIPAA set a limit at twenty percent of total health insurance premiums.\textsuperscript{128} The new federal Patient Protection and Affordable Care Act (“PPACA”) changed the law to allow employers to pass thirty percent of the costs on to employees.\textsuperscript{129} The PPACA gives discretion to the United States Department of Health and Human Services and the Department of the Treasury to raise the limit to a maximum of fifty percent.\textsuperscript{130}

Even with the increased leeway given to firms under the PPACA, the insurance discrimination exception in the Smoker’s Protection Act is practically ineffectual. As discussed above, a conservative estimate of the average annual costs associated with employing a smoker are $4,570.64 more than employing a non-smoker.\textsuperscript{131} The average annual employee premium contribution in 2010 was $3,997.\textsuperscript{132} Even allowing for a fifty percent increase in premium contribution, an employer would run a cost deficit of $2,572.14 in employing a smoker instead of a non-smoker.\textsuperscript{133}

\begin{footnotes}
\footnote{127. HIPAA forbids employers from excluding employees and their dependents from coverage based on health status and a number of other factors. Health Insurance Portability and Accountability Act of 1996, 29 U.S.C. §§ 1182(a)(1)(A)-(H) (2006). HIPAA also forbids employees and their dependents from “pay[ing] a premium or contribution which is greater than such premium or contribution for a similarly situated individual enrolled in the plan.” § 1182(b)(1). However, this prohibition does not prevent employers “from establishing premium discounts or rebates or modifying otherwise applicable copayments or deductibles in return for adherence to programs of health promotion and disease prevention.” § 1182(b)(2)(B).


\footnote{130. See 42 U.S.C.A. § 300gg-4(j)(3)(A) (Supp. 2011) (“The Secretaries of Labor, Health and Human Services, and the Treasury may increase the reward available under this subparagraph to up to 50 percent of the cost of coverage if the Secretaries determine that such an increase is appropriate.”). This provision of the PPACA appears to be a direct response to certain industry leaders who asked for the limit to be increased as a part of health care reform legislation. See, e.g., Steven A. Burd, How Safeway is Cutting Health-Care Costs, WALL ST. J., June 12, 2009, at A15.

\footnote{131. See supra notes 51–52 and accompanying text.

\footnote{132. See KAISER FAMILY FOUND., supra note 38, at 1.

\footnote{133. This figure is arrived at by finding the maximum allowable premium contribution increase above $3,997 (this is equal to fifty percent of $3,997, or $1,998.50) and then subtracting this amount from the estimated annual costs of employing a smoker ($4,570.64).}
D. A Possible Exception to the Exception: Does the Fundamental Objectives Exception Provide Firms an Escape?

Perhaps the most ambiguous part of the Smoker’s Protection Act is the so-called fundamental objectives exception. This exception provides that it is permissible, notwithstanding the language of the statute, for employers to “[r]estrict the lawful use of lawful products by employees during nonworking hours if the restriction relates to the fundamental objectives of the organization.” No North Carolina court has construed this language. From a linguistic standpoint, it seems clear that based on the phrase “by employees,” the statute covers existing employees as opposed to prospective employees. In other words, a firm could not use the fundamental objectives exception to institute a “no smokers need apply” policy. A firm could, however, limit the off-duty smoking of persons already employed to the extent such a restriction “relates to the fundamental objectives of the organization.”

It is unclear what organizations are covered by the fundamental objections exception. Almost certainly a nonprofit, educational organization that opposes the use of tobacco would qualify under the terms of the Act, but what about hospitals, physician practices, and nursing homes? Does the exception extend to a health club? What about a pharmaceutical and medical products company? In an ironic twist, could a cigarette manufacturer invoke the exception to forbid its employees from smoking another manufacturer’s brand of cigarettes?

135. Id.
136. See Frye, supra note 82, at 1986 (“The fundamental-objectives exemption certainly should apply to employers like the American Cancer Society or the American Heart Association, organizations that discourage smoking because their primary objective is to promote good health.”).
137. See id. at 1986–87 (“The harder question is whether the exemption would apply to organizations whose primary objectives include promoting good health generally.”).
138. A similar type of situation has arisen in at least two beer company firings. Ross Hopkins, formerly employed by American Eagle Distributing Company, an Anheuser-Busch wholesaler, was fired after he was caught drinking Coors beer off duty. Monte Whaley, Firing Brings Issue to a Head: Off-Clock Beer Led to Dismissal, DENVER POST, May 18, 2005, at Cl. Hopkins filed suit against his former employer but dropped the case just before it was about to go to trial in Colorado state court. Monte Whaley, Man Drops His Case of Bud, DENVER POST, Oct. 27, 2005, at B2. In a similar situation, a Wisconsin employee at a Miller Brewing Company distributor was fired for being photographed drinking a Bud Light. Miller Distributor Worker Says Bud Choice Cost Job, CAPITAL TIMES (Madison, Wis.), Feb 12, 2005, at D10, available at 2005 WLNR 2043148. There is no evidence that the employee filed suit under Wisconsin’s lawful products statute. WIS. STAT. ANN. § 111.35 (West 2002). This is probably because Wisconsin law provides an
The text of the Smoker's Protection Act does not provide a simple answer to any of these questions. If a bold, enterprising North Carolina firm were to challenge the Smoker's Protection Act under the fundamental objectives exception, it would have to demonstrate that limits on tobacco use relate to the firm's objectives. Since the plain text of the exception is ambiguous, North Carolina courts would apply the rules of statutory construction as set out by the Supreme Court of North Carolina. In interpreting ambiguous statutes, North Carolina courts have been instructed to construe the statute in order to "ascertain the legislative will." Legislative intent is determined by looking at the legislative history of a statute as well as the circumstances surrounding its enactment.

The legislative history of the Smoker's Protection Act favors a broad reading of the exception. The fundamental objectives exception did not appear in the bill that eventually became the Smoker's Protection Act until the language was introduced in the conference report adopted by both the North Carolina House and Senate. After the bill was adopted by the Senate and moved to the House, Representative Coy Privette proposed an amendment that would have explicitly exempted certain nonprofit organizations from the Act, but it failed by a fifty-three to fifty-two vote in the House. The bill moved to the House-Senate conference committee with no exception provision, but emerged with the ambiguous, much broader fundamental objectives exception that is now part of the Smoker's Protection Act.

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exception when the use of the lawful product "creates a conflict of interest, or the appearance of a conflict of interest, with the job-related responsibilities of that individual's employment, membership or licensure." § 111.35(2)(b). Drinking a competitor's beer would arguably be a conflict of interest under the Wisconsin statute.


140. See id. ("This intent 'must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied.' " (quoting North Carolina Milk Comm'n v. Food Stores, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967))).


143. Id.

144. The exception contained in the floor amendment was actually narrower than the one that eventually became law. See id. That fact is at least somewhat counter-intuitive
In addition to the surrounding circumstances supporting a broad construction of the fundamental objectives exception,\(^{145}\) a North Carolina court would be justified in construing the exception broadly, declining to reward poor legislative drafting, especially against the backdrop of the common law presumption of at-will employment.\(^{146}\) To hold otherwise, it seems, would allow advocates of a narrow exemption to achieve through judicial interpretation what they failed to accomplish through the legislative process.

A firm interested in challenging the Smoker’s Protection Act could consider amending its articles of incorporation or bylaws to explicitly include limiting tobacco use as a fundamental objective of the firm. If the policy were challenged under the Smoker’s Protection Act, the firm could bring those documents to the attention of the court. It could then point to the text of the statute and claim that since limiting the tobacco use of its employees is now, along with conducting its regular business, one of its fundamental objectives, the Smoker’s Protection Act should not apply. Since the Act has not been tested in any North Carolina court, it remains to be seen whether this argument would ultimately be effective. It is, at the very least, a tenable position for a firm to take in light of the text and legislative history of the Smoker’s Protection Act.

IV. THE CASE FOR REPEALING THE SMOKER’S PROTECTION ACT

This Part outlines several reasons for repealing North Carolina’s Smoker’s Protection Act and for restoring to employers the freedom to discriminate in employment decisions based on a person’s tobacco use. It first suggests that the Smoker’s Protection Act actually subverts the values it allegedly advances, namely that the Act considering that of the twelve members of the House on the conference committee, nine voted against Privette’s amendment, two voted for it, and one abstained. See CONF. REP., S.B. 1032, at 3 (providing a list of conferees from the North Carolina House). North Carolina’s fundamental objectives exception is much broader than those in other states with similar anti-discrimination laws. For example, others typically apply either to anti-smoking nonprofit organizations. See, e.g., 820 ILL. COMP. STAT. ANN. 55/5 (West 2008); MONT. CODE ANN. § 39-2-313 (2011), or health care organizations, see MO. ANN. STAT. § 290.145 (Supp. 2011).

\(^{145}\) For a discussion of the historical context surrounding the enactment of the Smoker’s Protection Act, see supra Part II.A. This account tends to support the view that the legislature wanted to prohibit discrimination against tobacco users.

\(^{146}\) This presumption of at-will employment was critical in another case in which the Supreme Court of North Carolina construed an employment discrimination statute. In Burgess v. Your House of Raleigh, Inc., the court held that HIV-positive persons were not protected by North Carolina’s Handicapped Persons Protection Act. 326 N.C. 205, 218, 388 S.E.2d 134, 142 (1990).
advances individual liberty over nannyism and paternalism. It then describes how the Act infringes on the freedom of North Carolina businesses to explore corporate social responsibility. Finally, it examines the Act in the context of the free market for labor and criticizes the contradictory public policy message the Smoker's Protection Act sends to North Carolinians.

A. The Smoker's Protection Act as a Pyrrhic Victory

Supporters of the Smoker's Protection Act hailed it as an advance for individual liberty and a triumph over employer nannyism, paternalism, and control. In reality, contrary to the claims of these

147. After the bill passed the North Carolina Senate, Senator Alexander P. Sands, III noted that "[w]hat this bill is about is freedom." Jim Morrill, Bill Bars Bosses from Controlling Workers' Off-Hour Habits, CHARLOTTE OBSERVER, June 24, 1992, at 1A. Senator Sands elaborated on this point, invoking the memory of America's war dead: "This is the reason so many men and women have died in this country, for freedom." Id. Senator Helen Marvin also struck the chord of individual freedom: "Freedom of certain rights of individuals is more important than the state trying to enforce a provision that would help companies reduce their insurance costs." Id.

Based on contemporaneous newspaper reports, one could be forgiven for questioning whether the Act's sole intent was to cause liberty to reign as a high-minded posthumous tribute to the sacrifice of America's troops. The Raleigh News and Observer reported that, about a week before the North Carolina Senate voted on the Smoker's Protection Act, Senator Kenneth Royall was treated to a retirement celebration that "wasn't just another party." Van Denton, Financing of Galas Criticized, NEWS & OBSERVER (Raleigh, N.C.), July 3, 1992, at Al. According to the News and Observer report, sponsors of the Royall tribute "shelled out $31,000—more than enough to pay for the $6,300 golf tournament at Treyburn Country Club and for the $10,400 dinner at the Sheraton Imperial." Id. At the dinner, the News and Observer reported that 360 people, "including most of the state Senate," feasted on prime rib as they honored Royall. Id. Tobacco interests reportedly contributed "more than $5,000" for the event and tobacco lobbyist Lawrence A. Bewley, "a former corporate lobbyist for R.J. Reynolds Tobacco Co.,” organized the extravaganza. Id. At a little more than a week after the event, the North Carolina Senate voted to enact the Smoker's Protection Act. Id. “That had absolutely nothing to do, even remotely, with the Royall tribute,” Bewley reportedly told the News and Observer. Id. “ ‘No one was out there discussing a specific piece of legislation,’ Bewley said. ‘Everyone was there to simply honor Kenneth for his 26 years of working for the people of North Carolina.’ ” Id. The News and Observer reported that North Carolina Secretary of State Rufus Edmisten, the official responsible for enforcing state lobbying laws at the time, agreed with Bewley that the event was not lobbying. Id. “I think it would be callous for us to require them to report that.” Id.

It appears the retirement party was not the first time Senator Royall received benefits from the tobacco industry. A year earlier, as the General Assembly considered tobacco taxes, The Charlotte Observer reported that Royall “played golf as a guest of Philip Morris U.S.A. tobacco company” in Pinehurst. Legislators Treated to Golf Outing, CHARLOTTE OBSERVER, June 25, 1991, at 1B. To his critics, The Charlotte Observer reported that Senator Royall said, “I've been there [in the General Assembly] for 25 years, and nobody's even questioned anything I've done about that type of thing.” Id. The Charlotte Observer also reported that Senator Sands, one of the primary advocates of the
proponents, the Smoker’s Protection Act actually undermines these values.

1. Individual Liberty

One of the key objectives of the smokers’ rights movement is that it seeks to defend an individual’s right to smoke cigarettes free from government intervention. As far as this movement bases its

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Smoker’s Protection Act in the North Carolina Senate, played golf at the same event as “a guest of R.J. Reynolds Tobacco Co.” Id.

148. The smokers’ rights movement is decentralized. It consists of a number of different organizations that lobby against smoking bans. Much of its rhetoric sounds in property rights and individual freedom against government power. See, e.g., The Property Rights Newsletter, SMOKERS CLUB, http://www.smokersclubinc.com/ (last visited Dec. 29, 2011). The distinction between private and government power is crucial to matters of constitutional law. Some of the literature on smoker’s protection statutes appears to contain the idea that there could be a cognizable constitutional claim against a private employer for discrimination on the basis of cigarette smoking. See Frye, supra note 82, at 1972 (arguing that the constitutional law of a smoking ban enforced by a private employer “defies prediction”). These claims center on unenumerated privacy rights the Supreme Court has created out of the Due Process Clause of the Fourteenth Amendment. See U.S. CONST. amend. XIV, § 1, cl. 3; see also Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (finding that the right to engage in intimate, consensual, sexual conduct—including same-sex relations—is a protected liberty interest); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 834–36 (1992) (affirming the right to an abortion); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (holding that there is a right to marital privacy). Drawing on these cases, one might argue that the right to smoke cigarettes can be found in the Due Process Clause of the Fourteenth Amendment. Even if there was such a right, it would be unenforceable against private employers. The Supreme Court has held time and again that the rights guaranteed by the Constitution are not implicated by private conduct. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) (“As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that ‘most rights secured by the Constitution are protected only against infringement by governments.’ ” (quoting Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 156 (1978))); see also Moose Lodge v. Irvis, 407 U.S. 163, 172 (1972) (noting that under The Civil Rights Cases, 109 U.S. 3 (1883), the Fourteenth Amendment Equal Protection Clause does not apply to private conduct). For the Constitution to apply, then, there must be public conduct or government agency. Absent government action, smokers do not have a constitutional right to smoke that is enforceable against private actors or firms. Smokers may pursue statutory protections by lobbying Congress or their state legislature, but their rights against other private parties are not anchored in the Constitution.

State action triggers the Constitution. Thus if the City of Chicago were to entirely forbid city workers from smoking cigarettes, a city employee could bring a cognizable claim under both the United States and Illinois state constitutions. In Grusendorf v. City of Oklahoma City, the Court of Appeals of the Tenth Circuit sustained such a policy against constitutional challenge. See 816 F.2d 539, 543 (10th Cir. 1987). Grusendorf involved an employment agreement between a firefighter trainee and a city fire department. Id. at 540. In the agreement, the trainee promised “he would not smoke a cigarette, either on or off duty, for a period of one year from the time he began work.” Id. Applying rational basis scrutiny, the Tenth Circuit upheld the agreement. Id. at 543. Similarly, in City of North Miami v. Kurtz, the Florida Supreme Court upheld a local government’s restrictions on
arguments in property rights and, by extension, an individual's right to use his property, it has sound points. A commitment to respect for private property would imply that individuals have a right to smoke cigarettes without interference from government. Similarly, a commitment to property rights should protect the right of owners of bars and other local establishments to permit smoking on the premises of their enterprises.149

What the Smoker's Protection Act represents is a significant deviation from this argument for smokers' rights. The Act forces employers who either object to smoking or wish not to pay for it into subsidizing the habits of tobacco addicts under force of law.150 Far from a victory for liberty, the Smoker's Protection Act is in reality a triumph for government coercion and an attack on freedom of contract in North Carolina. As Professor Richard Epstein has explained, such an effort to undermine freedom of contract is also an affront to individual freedom.

Freedom of contract is an aspect of individual liberty, every bit as much as freedom of speech, or freedom in the selection of marriage partners or in the adoption of religious beliefs or affiliations .... The desire to make one's own choices about employment may be as strong as it is with respect to marriage or participation in religious activities, and it is doubtless more pervasive than the desire to participate in political activity.151

Instead of employment arrangements reflecting the freedom of choice in the marketplace, this statute takes some terms off the table. It substitutes the wisdom of the market with central state planning by the North Carolina General Assembly.

2. Nannyism and Paternalism

Objections to private firms limiting off-duty smoking are typically anchored in an abhorrence of the paternalistic nature of the arrangement.152 The Smoker's Protection Act supposedly eliminates
this paternalism in favor of an individual's freedom to smoke cigarettes. This objection to what Professor Henderson calls the "nanny corporation" misunderstands what this statute actually accomplishes.\textsuperscript{153} Far from an exercise in liberating helpless individuals from the excessive paternalism of firms, the Smoker's Protection Act is in reality an exercise in nanny statism. The Act interposes the might of government between employer and employee. It operates on the basic assumption that employees are not capable of bargaining with an employer for off-duty smoking rights and thus promotes the notion that "people who are competent enough to marry, vote, and pray are... unable to protect themselves in their day-to-day business transactions."\textsuperscript{154} In that sense, the statute infantilizes employees and job applicants as it deprives North Carolinians who might actually

\textsuperscript{153} See generally Henderson, supra note 49 (describing the characteristics of a nanny corporation).

\textsuperscript{154} Epstein, supra note 151, at 954. At one time, such employment decisions were held by the Supreme Court to be shielded from government power by the Constitution. Indeed, in Adair v. United States, the Court boldly stated:

\text{[I]}t is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another.

208 U.S. 161, 174 (1908); see also David N. Mayer, Liberty of Contract: Rediscovering a Lost Constitutional Right 87–88 (2011) (discussing Adair and the quoted passage). This principle from Adair, a part of the Lochner v. New York, 198 U.S. 45 (1905), line of cases ultimately met its demise in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Following Parrish, in United States v. Carolene Prod. Co., the Court announced that it would uphold economic legislation so long as "it rests upon some rational basis." 304 U.S. 144, 152 (1938). As for legislation affecting the political process or "discrete and insular minorities," the Court explained "[t]here may be narrower scope for operation of the presumption of constitutionality." Id. at 152 n.4. Thus, commenting on the legacy of Carolene Products, one commentator has suggested there is a difference between so-called "preferred freedoms" and other somewhat less important freedoms, with laws limiting the former subjected to a higher level of scrutiny than those affecting the latter. See Mayer, supra, at 112.

The Supreme Court has constructed a charter of these preferred constitutional freedoms in its modern substantive due process cases. As the Supreme Court explained in Planned Parenthood of Southeastern Pennsylvania v. Casey, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." 505 U.S. 833, 851 (1992). This liberty includes the right to privacy, Griswold v. Connecticut, 381 U.S. 479, 486 (1965), an abortion, Casey, 505 U.S. at 871; Roe v. Wade, 410 U.S. 113, 154 (1973), and intimate, consensual, sexual relations, Lawrence v. Texas, 539 U.S. 558, 578–79 (2003). As the Court's rejection of Lochner and its progeny shows, the liberty does not include the right of employer and employee to freely make employment arrangements. We are left with the seemingly anomalous conclusion that the Constitution shields from government power a woman's decision to end her pregnancy, but is silent when it comes to her decision to enter a consensual employment relationship where she forgoes the right to smoke cigarettes.
want to be part of a nanny corporation from enjoying the full benefits of a corporate health and wellness program.  

B. Waving the White Flag: The Smoker’s Protection Act Against Corporate Social Responsibility

In the fight against tobacco addiction, private employers are an indispensable ally. As discussed above, private employers are the primary conduit through which Americans finance their health insurance. Employers take on a financial burden to provide health insurance to their employees and pay a higher premium for employees who smoke cigarettes than they do for employees who do not smoke cigarettes. Due to these cost factors, some employers have implemented comprehensive health and wellness programs to force employees to change unhealthy behaviors. These employers gave their employees a chance to change. If carrots did not work, employees faced the stick of termination. Since these programs can help smokers realize the cost of their addiction, they are more likely to quit smoking.

Consider a hypothetical worker who makes $50,000 per year. The worker smokes cigarettes. Assume that the extra costs associated with this particular smoker are $3,000 per year. If an employer could pass all of that cost along to the smoker, this would amount to the tobacco user paying an additional $250 per month to fund his tobacco use. The Smoker’s Protection Act, in combination with federal law, prevents this kind of cost shifting from happening in North Carolina. Instead, the Act requires private employers to pay for cigarette smoking under force of law. The Act discourages innovation in the marketplace and stunts the potential North Carolina firms have to implement corporate wellness programs that can improve public health and save money.

155. For example, an employee at Cleveland Clinic—and a thirty-year smoker—praised his employer’s decision to implement a no-tobacco policy. Sulzberger, supra note 29. “It’s a good idea,” the former smoker said. Id. A study of smokers and non-smokers who worked at a firm with a no-tobacco policy found the workers had positive and negative reactions to the policy. See Hee Sun Park et al., Employee Responses to the Implementation of a Smoke Free Workforce Policy: An Interview Study, INT’L J. MGMT., Mar. 2011, at 40, 43 (“Interestingly, it was not all non-smokers who had positive reactions: some smokers also indicated that they thought the policy was good.”). Of the twenty subjects involved in the study, only three identified themselves as “casual or social smokers.” Id. Since the sample size of smokers included in the study was so small, it is not possible to extrapolate the findings of that study to smokers as a population.

156. See infra Part I.A.

157. Recall that a conservative estimate of the average annual costs associated with cigarette smoking is $4,570.64. See supra note 52 and accompanying text.
C. The Free Market for Labor and Voting with Your Feet

If North Carolina repealed the Smoker’s Protection Act, smokers could still bargain with their employers for smoking rights. If the total economic value of a smoker’s contributions as an employee outweighs the costs of the employee’s smoking habit, an employer might be inclined to tolerate tobacco use. However, the employer should have the right to exclude tobacco users from the firm and fashion its employment policy in the way that it sees fit. Likewise, the employee should have the right to enter into a contractual relationship with the employer.

Implicit in this freedom is the right to discriminate. Repealing the Smoker’s Protection Act would mean restoring to employers the right to discriminate among employees and job applicants on the basis of tobacco use. Of course, the law condemns discrimination on certain grounds—race, sex, age, and disability, among others. Yet if the law were to forbid discrimination on all grounds, society would essentially cease to function. We discriminate in who we choose to marry, the friends we make, the neighborhoods in which we live, and how we spend our time. The questions that remain then are (1) what are the permissible grounds for discrimination, and (2) is discrimination against tobacco users one of these grounds?

In his influential article on the ethics of discrimination in employment decisions, Alan Wertheimer suggests that there are four factors to consider in whether one is justified in discriminating on particular grounds. First is “the nature of the preference upon which [discrimination] is based,” particularly whether the grounds involve “purely innate characteristics.” Second is whether the discrimination is based on unjustified, irrational “hierarchic beliefs” about social groups. Third is whether the members of the excluded group have been historically disfavored. The fourth consideration is whether one’s reaction to a member of the excluded group is “rooted in developmental patterns.”

158. See statutes cited supra note 125 (listing the primary federal anti-discrimination laws).
160. Id.
161. Id.
162. Id.
163. See id. at 107–08 (“If it were a general fact of child development that six-year-olds respond better to female teachers, I believe it would not be unreasonable to attempt to accommodate that fact in hiring elementary school teachers.”).
Private discrimination against tobacco users is justified on each of these grounds. First, smoking is not an immutable characteristic. Thousands of tobacco addicts quit smoking every year. Second, the beliefs about tobacco users that lead to discrimination are not irrational. Empirical evidence strongly establishes that tobacco use is unhealthy and that it imposes significant costs. Third, there is no history of irrational discrimination against tobacco users as there is against other groups such as racial and religious minorities. Finally, discriminating against tobacco users entails no developmental distinctions. Of course, even if discrimination against tobacco users was not ethically permissible under Wertheimer's formulation, it does not necessarily follow that such discrimination should be circumscribed by the law. As the Supreme Court of the United States itself has repeatedly emphasized, the Constitution mandates that individuals have the right to make certain controversial choices, even if those choices are deemed immoral and ethically unacceptable by legislatures.

There is no evidence that repealing the Smoker's Protection Act would essentially eliminate job opportunities for smokers. In its editorial supporting the Smoker's Protection Act, the Raleigh News and Observer urged the law was necessary to prevent employers from creating a "jungle of discriminatory treatment." Yet, in twenty-one states, this type of discrimination is legal—and has been for some time—and there are still no widespread reports of unemployment among smokers. Those states, at least in this area, chose to allow the free market for labor to operate. If a company refused to hire smokers, tobacco users found work elsewhere.

164. See supra note 51–52 (describing the economic costs of tobacco use).
165. Anti-discrimination laws, including those that forbid private discrimination on the basis of race, sex, religion, and disability, are anti-libertarian in that they limit freedom of contract and constrain freedom of association. For an argument for the repeal of anti-discrimination laws, see generally RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1995) (making a comprehensive case against race, sex, age, and disability discrimination laws as applied to private employers).
166. The Supreme Court's First Amendment decisions recognizing the right of individuals to possess and view pornographic materials present a number of such examples. See, e.g., Stanley v. Georgia, 394 U.S. 557, 566 (1969) (holding a state's criminalization of possession of pornographic material to be a violation of the First Amendment). So too do the Court's decisions on abortion and intimate relations, described supra note 154.
167. See Gilding the Golden Leaf, supra note 95.
168. In surveying the literature favoring these statutes, this author found no evidence on employment differentials between smokers and non-smokers in jurisdictions with a law like the Smoker's Protection Act as compared to a jurisdiction with no such law.
If employers overreach, the labor market will respond and adjust accordingly. Firms can only go as far as the labor market will allow. In a society with a mobile workforce, employees can leave firms to pursue employment on better terms elsewhere. As Professor Henderson has pointed out, even in the early twentieth century, a time when employees had much less mobility in comparison to today's workforce, workers' ability to find alternative employment "constrained arbitrary and capricious corporate nannyism." If this very limited worker mobility was capable of limiting firm discretion one hundred years ago, modern workers, who can claim the benefit of modern communication and travel, should be able to do so as well. Striking the appropriate balance between firm interests and individual autonomy is a decision best made by free parties in the labor market, not the North Carolina General Assembly.

D. The Januslike Public Policy of the Smoker's Protection Act

North Carolina state government spends a significant amount of money trying to combat tobacco use. The State of North Carolina spends millions of dollars on public awareness campaigns highlighting

169. The Bureau of Labor Statistics reports that nearly fifty percent of Americans between the ages of eighteen and forty-four have held eleven or more jobs in their lifetimes. See Number of Jobs Held by Individuals From Age 18 to Age 44 in 1978 to 2008 by Educational Attainment, Sex, Race, and Hispanic or Latino Ethnicity, BUREAU OF LABOR STATISTICS, http://www.bls.gov/nls/nlsy79r23jobsbyedu.pdf (last visited Dec. 29, 2011). A recent survey found that the median number of years a person was at a single employer was 4.4 years. See Employee Tenure, January 2010, BUREAU OF LABOR STATISTICS, http://www.bls.gov/opub/ted/2010/ted_20100927.htm (last updated Sept. 27, 2010).

170. Henderson, supra note 49, at 1538; see also Watts, supra note 93, at 224 (noting that Henry Ford closed down his sociological program, at least in part, due to worker unrest and resistance from middle management at the Ford Motor Company).

the health hazards of cigarette smoking. In light of these efforts, the Smoker's Protection Act compromises the moral authority of the state in pursuing this public health campaign. The Smoker's Protection Act sends a contradictory message to North Carolina's citizens. In some contexts, North Carolina says that cigarette smoking is dangerous and hazardous to health. In others, North Carolina claims that cigarette smoking is a protected activity—in essence, a civil right—and that employers are forbidden from forcing smokers to pay the costs of their habit. By sending this confusing message, the Smoker's Protection Act actually helps to undermine the state government's ability to fight tobacco addiction and promote public health.

CONCLUSION

As health care costs continue to climb, the issue of smoking and employment is not likely to go away. Already there is a call for the federal government to step in and set a national policy against lifestyle discrimination. This proposal for federal legislation uses the rhetoric of freedom and individual rights, just like the advocates of the Smoker's Protection Act did in North Carolina. Yet the proposal suffers from the same critical defects as the Smoker's Protection Act. Under the employment law regime it envisions, it is true that an employer would no longer be able to be the boss of an


173. Health care industry analysts expect that an employee's share of health care expenses will rise by nearly six percent in 2012. See Sandra Block, Employee Health Insurance Cost Rising Again, USA TODAY, Oct. 10, 2011, at B3 (citing estimates from Tower Watson and Mercer, two human resources consulting firms).

174. For a discussion of the private organizations and public entities that have taken on this issue recently, see supra notes 27–29 and accompanying text.

175. See Ann L. Rives, Note, You're Not the Boss of Me: A Call for Federal Lifestyle Discrimination Legislation, 74 GEO. WASH. L. REV. 553 passim (2006). Federal legislation is particularly necessary, according to this commentator, in order to allow "an employee to know what conduct he can and cannot engage in off the clock and to know that these expectations will not change simply because he decides to move to another state." Id. at 568.

176. See id. at 553 ("[I]magine working for a company where eating [a] hamburger and drinking [a] beer could cost you your job."); id. at 554 (calling for "federal legislation, which would curtail private employers' ability to interfere in the off-duty conduct of their employees and thereby keep employers from infringing on their employees' privacy rights").
employee after work hours. Instead, a paternalistic federal government would sweep in, preventing parties from freely making an employment agreement on their own terms. In essence then, the federal government would be the boss. Worse yet, the proposal further extends the federal government’s authority at the expense of the police powers of the sovereign states and nationalizes questionable public policy.177

The Smoker’s Protection Act represents an unjustified intrusion into the relationship between employer and employee in North Carolina. The Act maintains the illusion of advancing liberty and individual autonomy, but actually succeeds in subverting freedom of contract in the labor market while promoting incoherent public health policy. It is the architects of this kind of law that nineteenth century classical liberal Frederic Bastiat might have had in mind when he wrote: “Too many persons place themselves above mankind; they make a career of organizing it, patronizing it, and ruling it.”178 Bastiat’s response to the statists of his day is as instructive today as it was in the nineteenth century. “Let Us Now Try Liberty,” he said.179

Now let North Carolina again try liberty.

JAMES RUFFIN LAWRENCE, III**

177. The Tenth Amendment guarantees that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. The states are free to legislate in this area. One can support a repeal of the Smoker’s Protection Act while supporting the right of other states to make their own decisions on this matter.


179. Id. at 76.

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