

spotlight

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THE SMOKING BAN BILL

Make no mistake; it's an attack on property rights

KEY FACTS: • **Either version (House or Senate) of the smoking ban bill is a major threat to personal freedom and property rights.**

- **The Senate is considering a bill that would prohibit smoking in “public places” and “places of employment,” such as restaurants. The House version has the same general prohibition, but it also would include a very narrow exception for businesses that do not serve or allow entry to minors.**
- **The ban is being sold as a way to protect people from secondhand smoke. This is a dangerous slippery slope. There are many things, other than exposure to secondhand smoke, that the government could ban under this nanny-state mindset, including diet and sexual behavior.**
- **The ban violates property rights by prohibiting property owners from being able to use their properties for legal activities, such as smoking. Private property does not somehow get transformed into public property because the public is permitted to enter.**
- **There is no conflict between property rights and health rights, as ban proponents argue. All citizens have the freedom to decide whether they want to go to a place that allows smoking.**
- **Smokers do not have a right to smoke on someone else's property. Similarly, nonsmokers do not have a right to a smoke-free environment when the environment belongs to someone else.**
- **Smoking-ban proponents actually want to create a new right: the “right” to be able to go anywhere they want, including for-profit private clubs, and not encounter cigarette smoke. Instead of respecting property rights, they want their preferences to take precedence over others' property rights.**

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the North Carolina Senate is considering legislation (HB 2) that would prohibit smoking in “public places” and “places of employment,” such as restaurants and offices.¹ The House's version of the bill includes the same general prohibition but also includes a very narrow exception for businesses that do not serve or allow entry to any person less than 18 years old.²

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The stated intent of the proposed legislation³ is to protect individuals “from the risks related to secondhand smoke.”⁴ This *Spotlight* will explain the problems with smoking bans generally and then highlight some specific problems that exist in both the House and Senate smoking bans.

Attack on Personal Freedom

Proponents of the smoking ban, as evidenced in the bill’s own language, are not primarily concerned with the harm of smoking — smokers still are going to smoke. Instead, proponents are ostensibly concerned with secondhand smoke (in other words, they are concerned with the harm to nonsmokers). At least, that is how they have packaged the proposed ban.

A smoking ban certainly affects smokers, but it also directly affects nonsmokers and their ability to make personal choices. When the government decides to ban personal choices because of their potential harm, it has embarked down a dangerous slope. There are a host of things other than exposure to secondhand smoke that the government could ban under this nanny-state mindset, including diet and sexual behavior.

Violating Property Rights

In General

Property owners generally are able to use their property for any legal activity (in this case, smoking) so long as it does not infringe on the property rights of others. This proposed ban would take away that right and force property owners to restrict smoking on their own property, even though smoking would still be a legal activity.

Private property does not somehow get transformed into public property because the public is permitted to enter. For example, citizens who own restaurants or stores still would suffer their property rights being infringed upon if they were prohibited from allowing someone to smoke in their establishments.

A False Conflict: Property Rights vs. Health Rights

Rep. Jeff Barnhart (R-Cabarrus), one of the primary sponsors of HB 2, recently argued, in order to justify the ban, “Property rights are important, but your health rights are more important.”⁵ That statement is riddled with errors. There is no conflict between property rights and “health rights.”

Even assuming there were health rights, nobody’s “health rights” are being violated as the law currently stands. Nobody, including the government, is forcing people to expose themselves to secondhand smoke. Rep. Barnhart and all other citizens have the freedom to decide whether they want to go to a place that allows smoking.

This health-rights argument is similar to smokers arguing that restaurants and other businesses are violating their rights when they are prohibited from smoking. Property owners have the right to let people smoke or to prohibit smoking on their property. Smokers do not have a right to smoke on someone else’s property. Similarly, nonsmokers do not have a right to a smoke-free environment when the environment belongs to someone else.

Smoking-ban proponents actually want to create a new right: the right to be able to go anywhere they want, including for-profit private clubs,⁶ and not encounter cigarette smoke. Instead of respecting property rights, they want their preferences to take precedence over others’ property rights. They want to use the force of government to impose their preferences on property owners.

Health and Safety Regulations

Proponents often argue that the ban would not be a violation of property rights, because it would be no different from other health and safety regulations. When it comes to restaurants, ban proponents often argue that prohibiting

smoking would be no different from a health inspector regulating the conditions of the establishment. This argument provides further evidence that proponents do not understand that the smoking ban issue is largely about informed and voluntary consent.

A health inspector identifies and regulates unknown harms to the customer. In other words, a health inspector exists to help customers make informed choices (whether government inspectors are necessary is beyond the scope of this paper). A customer knows whether smoking is allowed at the restaurant (through a sign, simple question, or opening one's eyes) — the customer can make an informed and voluntary choice whether to stay or seek a nonsmoking alternative.

Another primary sponsor of the bill, Rep. Hugh Holliman (D-Davidson), makes the following health and safety regulation argument. According to a recent Fox News article,

A business-owner himself, [Holliman] doesn't buy the argument that his bill would infringe on private property rights. He says local governments pass health and safety regulations all the time, like mandating clearly marked and accessible fire exits.⁷

There is a big difference between having clearly marked and accessible fire exits and banning a legal activity. These notices are provided because people may not know where the exits would be — people do know when smoking is allowed.

Across the board, health and safety regulations exist to provide relevant information or to protect people from *unseen* risks (such as dangerous electrical wiring). Again, it comes back to informed and voluntary choices.

Ban proponents also argue that employees have no choice whether to be exposed to secondhand smoke. Individuals can choose to work anywhere they like — they make informed and voluntary choices about where to work. People often make choices about the kind of employment they are willing to take based on the risks that are posed.

For example, construction workers, police officers, firemen, and mineworkers make informed and voluntary choices to be employed in higher-risk fields. There is no reason why restaurant workers and other employees affected by this ban should not be trusted to make the same kind of informed choices.

Problems with the Specific Bills

There are several problems with this specific bill, beyond the general problems with smoking bans already given here.

The "Minor Exception"

The current Senate bill is so extreme that it does not even include the very narrow exception of permitting smoking in "places of employment" and "public places" that do not serve or allow entry to minors.⁸ Some House legislators may have thought they were creating a major exception to the smoking ban by permitting smoking in "places of employment" and "public places" that do not serve or allow entry to minors.⁸ Most restaurants, for example, are not going to choose smoking over allowing minors. It would be the rare business that deemed excluding minors (and as a result, families) as being more beneficial than allowing smoking.

The biggest problem with the minor exception is that it does not take into consideration *when* smoking is allowed. Since the legislation is ostensibly concerned with secondhand smoke, the bill would logically prohibit smoking when minors are in the establishment. The exception, however, would prohibit smoking even when minors are *not* in the establishment. As a result, a restaurant could not serve families during the day if it allowed smoking for its late-evening bar business when minors would not be around.

Goes Beyond Protecting Against Secondhand Smoke

Under the ban, local governments could ban smoking in *unenclosed* areas, including parks and sidewalks.⁹ This possibility is a good example of how the law's intent (addressing secondhand smoke) is not consistent with the bill's own provisions — unenclosed areas have nothing to do with secondhand smoke.

Another bill provision would prohibit hotels and other lodging establishments from designating more than 20 percent of all sleeping rooms as smoking rooms¹⁰ — this prohibition would help with the *smell* of smoke, but it has nothing to do with secondhand smoke. Such overreaching provisions make the bill's supposed concern over secondhand smoke appear to be simply a pretext for other motivations.

Private Enforcement

One of the strangest provisions in the bill deals with enforcement. A person who “manages, operates, or controls a public place or place of employment in which smoking is prohibited”¹¹ would be required to provide oral or written notice to a smoker to stop smoking.¹² If the smoker failed to stop smoking, then he would be subject to a \$50 fine.¹³

How would the fine be imposed? One way would be for the business somehow to get the smoker to turn over personal information voluntarily so he could be fined, which is unlikely. The business also could call the police each time a person would refuse to stop smoking, which would place an absurd burden on law enforcement. The bottom line is, as with many parts of the bill, this enforcement provision has been poorly thought out and would have many unintended negative consequences. For all practical purposes, this provision would be impossible to enforce.

Unique Problems of the Senate Version

The current Senate legislation would, among other things:

- Prohibit truck drivers from smoking in their trucks.¹⁴
- Prohibit anyone that uses a “company car,” for business and personal use, from smoking in the vehicle.¹⁵
- Prohibit the owner(s) of a business from smoking in a “public place” or “place of employment” even when nobody else is around (the prohibition does not take into consideration *when* smoking is taking place).¹⁶
- Prohibit smoking even if all employees smoke.¹⁷
- Prohibit a “home-based” business from allowing smoking if the business is located outside of the private dwelling but on the private property — for example, a farmer could not smoke in a barn and a mechanic could not smoke in a detached garage.¹⁸

Conclusion

Smoking ban proponents may hate smoking but that does not justify imposing their personal preferences over the fundamental rights of property owners. The rights of North Carolinians should not be discarded at the whim of some legislators.

When rights are seen as having such little value, every personal action could be prohibited simply because it is popular among legislators one day. Smoking ban proponents may cheer on passage of HB 2, but under the legislative precedent they wish to set, they could soon find that some of their own actions subject to prohibition. The legislature should respect all rights, including property rights, and stop trying to enforce its own choices on its citizens.

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End Notes

1. General Assembly of North Carolina, Session 2009, House Bill 2 (version 6), www.ncga.state.nc.us/Sessions/2009/Bills/House/HTML/H2v6.html.
2. General Assembly of North Carolina, Session 2009, House Bill 2 (version 5), www.ncga.state.nc.us/Sessions/2009/Bills/House/HTML/H2v5.html.
3. Throughout the paper, when “bill” or “legislation” is used in a general fashion, it refers to both the House and Senate versions of HB 2.
4. Senate Bill: General Assembly of North Carolina, Session 2009, House Bill 2 (version 6), Section 1 rewriting § 130A-491(b); version 5, Section 1 rewriting § 130A-491(b).
5. Emery P. Dalesio, “NC House committee debates public smoking ban,” Associated Press, February 27, 2009, finance.yahoo.com/news/NC-House-committee-debates-apf-14491972.html?v=1.
6. Both bills would exempt nonprofit private clubs from the smoking prohibition, but not for-profit clubs. Senate Bill: General Assembly of North Carolina, Session 2009, House Bill 2 (version 6), Section 1, adding new language under § 130A-492(8(b)); House Bill: General Assembly of North Carolina, Session 2009, House Bill 2 (version 5), Section 1, adding new language under § 130A-492(8(b)).
7. Brooks Blanton, “Banning Smoking in Tobacco Country,” Fox News Channel’s “On the Scene,” March 11, 2009, onthescene.blogs.foxnews.com/2009/03/11/banning-smoking-in-tobacco-country.
8. The minor exception can be found in the House bill at General Assembly of North Carolina, Session 2009, House Bill 2 (version 5), Section 1, adding new language under § 130A-496(b)(7). There is no such language in the Senate bill.
9. Senate Bill: General Assembly of North Carolina, Session 2009, House Bill 2 (version 6), Section 1, adding new language under § 130A-498 and § 130A-492(4); House Bill 2 (version 5), Section 1 adding new language under § 130A-498 and § 130A-492(4).
10. Senate Bill: General Assembly of North Carolina, Session 2009, House Bill 2 (version 6), Section 1 adding new language under § 130A-496(b)(5); House Bill: General Assembly of North Carolina, Session 2009, House Bill 2 (version 5), Section 1 adding new language under § 130A-496(b)(5).
11. Senate Bill: General Assembly of North Carolina, Session 2009, House Bill 2 (version 6), Section 1 adding new language under § 130A-497(a); House Bill: General Assembly of North Carolina, Session 2009, House Bill 2 (version 5), Section 1 adding new language under § 130A-497(a).
12. Senate Bill: General Assembly of North Carolina, Session 2009, House Bill 2 (version 6), Section 1, adding new language under § 130A-497(b); House Bill: General Assembly of North Carolina, Session 2009, House Bill 2 (version 5), Section 1, adding new language under § 130A-497(b).
13. *Ibid.*
14. Smoking is allowed in private vehicles — a private vehicle is any privately owned vehicle “not used for commercial or employment purposes.” This is no different from the House bill’s definition, but in the House bill, a truck driver or other “employee” that uses a “company car” would generally not be affected by the smoking ban because of the minor exception (unless they did allow a minor in the truck or vehicle). Under the Senate bill, a truck driver using a truck for employment purposes (or an employee using a company car) would not be allowed to smoke because the vehicle would not be considered a “private vehicle” and there is no minor nor other exceptions that would apply. See General Assembly of North Carolina, Session 2009, House Bill 2 (version 6), Section 1, adding new language under § 130A-492(8b)
15. *Ibid.*
16. There would be no protection in the Senate bill for owners of businesses to smoke when nobody else is around. The House bill would have protection on this issue; see General Assembly of North Carolina, Session 2009, House Bill 2 (version 5), Section 1 adding new language under § 130A-492(8a).
17. Even if all employees smoke, the Senate bill provides no protection. The House bill only provides protection to the extent that owners are the employees.
18. In the Senate bill, smoking would be allowed in private residences, which are defined as “private dwellings.” This definition is no different from that of the House bill; however, because of the latter’s “minor exception” and the “owner exception,” it would be rare for there to be an issue over, for example, a farmer smoking in a barn on his own property. The Senate bill provides no such exceptions. Barns or detached garages, for example, would likely not be considered private dwellings, so the exception for private residence would not be applicable (and the minor or owner exceptions do not exist).