

The consumption of alcohol has been a part of the American culture since the Puritans landed in North America while attempting to avoid persecution in Britain. The very ship that brought John Winthrop to Massachusetts in 1630 had over ten thousand gallons of wine in its hold. By 1830, the average American adult was consuming seven gallons of pure alcohol a year, or the modern equivalent of 1.7 bottles of 80-proof liquor every week. Indeed, booze had drowned a good deal of the United States in the nineteenth century so much that a young Abraham Lincoln summarized domestic life in Sangamon County, Illinois by saying, “We found intoxicating liquor used by everybody, repudiated by nobody,” and labeled alcohol as “the devastator.” Lucy Stone wrote, “Intemperance is the great foe to woman's peace and happiness,” in her temperance publication *The Lily*.

In response to the perceived habitual drunkenness in communities across the country, temperance organizations formed and advocated for legislation that would impose teetotalism in their states. One of the first of such laws came in Maine in 1851 and influenced twelve other states to adapt similar legislation by 1855. Though the “Maine Law” was repealed in 1856 after riots broke out, “Prohibition” served as a rallying cry to those who sought to remove the source of deplorable behavior and moral decay for so many.

The Anti-Saloon League had become the national organization that took leadership in this temperance crusade in 1895 and by the first decade of the 20<sup>th</sup> century had achieved success in several states. Unfortunately for Prohibitionist forces, their successes were at times countered by legal and illicit challenges to anti-alcohol legislation.

In fact, the legal challenges encountered by the Prohibition movement at the state level had an enormous influence on the formation of subsequent national legislation, long before the temperance movement in the United States in 1920 utilized the constitutional and statutory form of the Eighteenth Amendment to the Constitution and the National Prohibition Act. The “dry” cause contended with the problems experienced with the enforcement of national Prohibition at the state level for decades before and struggled to respond effectively in both instances. Originally, the goal of the prohibitionists was

the federal recognition of the supremacy of state-based preferences but shifted to the expansion of federal power and the modification of federalism from its contemporary form.

One of the first states to enact “dry” legislation, Kansas had regulated the sale of liquor since March 3, 1868 through a statute that made it a misdemeanor to sell alcoholic beverages without a dram-shop, tavern, or grocery license. By 1881, Kansans voted for an amendment to its state’s constitution, the first state to do so, that banned the manufacture, sale, and consumption of “intoxicating liquors.” It was challenged in four separate appeals to the state supreme court, collectively known as the Prohibitory Amendment Cases.<sup>1</sup> Justice David J. Brewer, in his majority opinion, chose not to address the issues of personal liberty and rights of property, but focused the validity of the manner in which the amendment was voted on and presented. After finding the means for the amendment to be legally sufficient, the court relied on precedent to determine that the prohibitory amendment did not conflict with the Fourteenth Amendment of the United States Constitution which required due process before the deprivation of life or property.<sup>2</sup> This was significant because a constitutional amendment that prohibited the manufacture, sale, or consumption was recognized to be a legally valid exercise of the state’s police power and was an example to Prohibitionists of what was palatable in the eyes of the judiciary.

Three years previously, Kansas enacted a law that authorized county commissioners to grant licenses for the sale of intoxicating liquors for medicinal purposes. Prescriptions brought in a substantial income for physicians and druggists, and there was ample opportunity for individuals to obtain alcohol under false pretenses. Once statewide prohibition went into effect, this exception quickly became the most exploited loophole in Kansas<sup>3</sup>. The same would be true on the national stage once the Eighteenth Amendment was ratified as suddenly numerous afflictions affecting Kansans and

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<sup>1</sup> 24 Kan 700 (1881)

<sup>2</sup> The precedents used by Justice Brewer include *Wynehamer v. The People*, 13 N.Y. 378, *Beer Co. v. Massachusetts* 97 U.S. 25, and *Bartemeyer v. Iowa*, 18 Wall. 129, all decisions from other states. This is known as “persuasive authority.”

<sup>3</sup> “Liquor Wars and the Law: Decisions of the Kansas Supreme Court 1861 to 1920.” *Kansas History: A Journal of the Central Plains* 28 (Summer 2006): 84-99, 89

later Americans were prescribed quantities of liquor for their treatment<sup>4</sup>.

The Kansas Supreme Court encountered the most difficulty with defining the term “intoxicating liquors” in another series of appellate cases known as the Intoxicating Liquor Cases<sup>5</sup>. Although the broad language of the amendment prohibited the sale and use of any intoxicating liquors, the court held that this did not include articles containing alcohol used for culinary, medical, and toilet purposes. Some defendants in this case were accused, with charges later dismissed, of violating the liquor laws by selling bay rum, tincture of gentian, essence of lemon, and a preparation of whiskey while others had their convictions upheld for selling brandy and alcohol in beverage form. The significance of these cases is the further narrowing of what constituted “intoxicating liquors” and exemplified what challenges Prohibitionists were encountering.

A more famous case concerning Prohibition from the era, Mugler v. Kansas<sup>6</sup>, raised the same issues that came up in Kansas' earlier Prohibitory Amendment Cases. The United States Supreme Court Justices utilized nearly identical methods in deciding that Kansas' prohibitory statutes were, most significantly, valid exercises of police power and that the state could claim the building being used as a brewery to be a common nuisance, shut it down, and not have to compensate the owners, Peter Mugler and his associates. Justice John M. Harlan relied on precedent, just as Kansas Supreme Court Justice Brewer did, in explaining why the Fourteenth Amendment did not protect Mugler and his co-owners from having their brewery taken away. The decision secured a legal basis for statewide prohibition in the eyes of the federal government<sup>7</sup>.

Interestingly, Justice Harlan responded to the argument by Mugler's attorneys regarding the inability for the state of Kansas to regulate interstate commerce by stating nothing in the record regarding the case was found to indicate interstate commerce had transpired. Mugler's attorneys argued

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<sup>4</sup> Okrent, Daniel. *Last Call: The Rise and Fall of Prohibition*. Pg. 198

<sup>5</sup> 25 Kan 751 (1881)

<sup>6</sup> 123 US 623 (1887)

<sup>7</sup> Justice Harlan cites the *License Cases* 5 How 504, *Bartemeyer v. Iowa* 18 Wall. 129, and *Beer Co. v. Massachusetts* 97 US 25

that the beer being made at Mugler's brewery was intended for export to customers in other states but there was no evidence presented to prove that. Justice Harlan essentially gave a non-response and said, “We observe that it will be time enough to decide a case of that character when it shall come before us,” anticipating the likely event.

The Kansas Supreme Court decided a case in 1914, State v. Miller<sup>8</sup>, that concerned the sale of a liquid concoction known as “Jamaican ginger” by retail druggists. The defendants contended that the drink was of a medicinal character, ordinarily used to treat certain disorders like colic and diarrhea and, most importantly, not an intoxicant. Their conviction was upheld partly because the court had learned Kentucky courts declared the drink an intoxicant for it truly was nothing more than a flavored whiskey. It is likely that prohibitionists took notice of this case, and others like it, and resolved to leave no doubt as to what would be considered intoxicating beverages when writing their Prohibition statutes in future years.

Though states were able to regulate and prohibit the manufacture and consumption of alcoholic beverages within their state, they struggled to resolve the problem of out-of-state producers shipping liquor into their counties to paying customers. States, such as Iowa, attempted to resolve this by crafting legislation that would forbid these sorts of transactions or at the very least regulate it with certifications. These certifications were an attempt by Prohibitionists to obtain prima facie evidence that a violation of state Prohibition had transpired.

The law was challenged in Bowman v. Chicago Northwestern Railroad<sup>9</sup> and the Supreme Court essentially gutted Iowa Code § 1553 in its decision. The Court ruled that the statute was “repugnant” to the United States Constitution since it regulated commerce among the states and not a valid exercise of police powers. Fred Bowman sought to transport 5,000 barrels of beer to Iowa. When the railroad refused to receive the beer for shipment, the shipper brought suit. The Iowa law specifically forbid any

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<sup>8</sup> 92 Kan 994

<sup>9</sup> 125 US 465 (1885)

common carrier from bringing into the State any intoxicating liquors from any other state without first having been furnished with a certificate declaring that the person to whom the liquor was to be transported was authorized to sell intoxicating liquors in the county. It was the railway's duty to carry from and to all stations upon its line of railway all goods and merchandise that might be entrusted to it for that purpose. Section 1553 illegally imposed upon interstate commerce by interfering with that duty according to the U.S. Supreme Court.

In 1890, the United States Supreme Court again invoked the Commerce Clause<sup>10</sup> and all but voided the already-mentioned Iowa law. A constable, A.J. Hardin, acting on behalf of the Iowa State government, seized imported beer and liquor from an Illinois producer, Gus. Leisy & Co. The liquor producer appealed the seizure and convictions under the Iowa law and the case, Leisy v. Hardin<sup>11</sup>, was another example of a successful legal challenge that foiled the efforts of a state's prohibition efforts. The decision denied the states' control over alcohol shipped interstate as long as it remained in its original package. Despite the sale of alcoholic beverages being expressly forbidden within the state by law, out-of-state manufacturers or retailers were able to ship their goods to customers within Iowa as long as no repackaging of the product occurred.

The Wilson Act of 1890<sup>12</sup>, also known as the Original Packages Act, was a direct response by Prohibitionists to the Leisy decision and similar legal challenges. It sought to make any alcohol shipped into a dry state subject to the laws of that state as though the alcohol had been produced there. It ultimately failed to do so because the Commerce Clause was again invoked with frequent regularity in a host of different ways. But it is important to note the recognition on the part of Prohibitionists that statewide enforcement of dry laws were hamstrung by the supremacy of the federal government and identify the influence this had on their change of tactics and future efforts.

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<sup>10</sup> Article I § 8 Clause 3

<sup>11</sup> 135 US 100 (1890)

<sup>12</sup> 27 USC 121

An instance of a successful legal challenge to the Wilson Act was Rhodes v. Iowa.<sup>13</sup> A company had delivered what they claimed were groceries to a railroad in Illinois that was then shipped into Iowa. Upon its delivery, the box was moved into a warehouse where it was later seized under a search warrant on the ground that it contained liquor. The U.S. Supreme Court ruled that Wilson Act, despite being expressly passed for such a situation, did not cause the liquor to be subject to those state laws upon their arrival at the state line during the course of interstate transportation. They were only subject to dry state laws only after their arrival into the state and following the consummation of their shipment. The Justices in the case went on to state that moving intoxicating liquors from the station platform to the freight warehouse of a railroad depot, on their arrival at their destination in Iowa from another state, is a part of the interstate commerce transportation not a violation of the Iowa statute. The distinctions made are important for the facts of the case and also demonstrate how the very intent of the Iowa law was thwarted by the supremacy of the federal government.

A very similar case was decided on that same day by the United States Supreme Court with a nearly identical outcome. South Carolina had enacted similar prohibitory laws to Iowa and found them challenged much in the same way. The owner of a large corporate vineyard had wine and brandies shipped from San Francisco to Charleston, South Carolina, via railroad. Officials in the latter state, enforcing the “dispensary laws” as they were called in South Carolina, seized the contents and charged the recipient for violation.

As in Iowa, the seller challenged the state law as “repugnant” to the United States Constitution and the Supreme Court agreed. The decision in Vance v. W.A. Vandercook Company<sup>14</sup> held that the Wilson Act authorized the state to regulate the sale of liquor in its original packages but it could not restrict the right to ship liquor to a resident for their personal use. The Commerce Clause was again cited for the reason for the state’s overreach.

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<sup>13</sup> 170 US 412 (1898)

<sup>14</sup> 170 US 438 (1898)

Prohibitionists in Kentucky had taken notice of the Supreme Court decisions regarding these interpretations of the Commerce Clause and fashioned the “C.O.D” law, formally known as the 1903 Kentucky Statute § 2557(b), subsection 4. The law had made all shipments of alcohol that were paid for on delivery illegal, the place where they were delivered to or held for delivery to be a place of sale, and the carrier jointly liable for violating the law. Like in other states, a legal challenge and court case arose from the execution of this law.

In Adams Express Company v. Kentucky<sup>15</sup>, a local agent for the Adams Express Company agreed to hold a shipment that contained liquor for the consignee. When Kentucky law enforcement officials charged the carrier with violating the C.O.D law, the carrier appealed its conviction to the United States Supreme Court. The court held that the interstate nature of the shipment, alcohol or otherwise, was not changed because the carrier held the shipment for the convenience of the consignee and consequently the express company cannot be prosecuted for violating the state law. Once again, the intent of a state law that sought to eliminate shipments of out-of-state liquor from coming into the state was defeated by the contemporary interpretation of the Commerce Clause.<sup>16</sup>

Though the Wilson Act and various C.O.D. laws failed to achieve the goal of keeping states dry through the protection of the state’s prohibitory preferences, Prohibitionists continued their shift in tactics towards national legislation but through an expansion of federal power. First was the 1909 Cash on Delivery Law that required all common carriers in the United States who were engaged in the interstate shipment of liquor to clearly label their packages with the type and quantity of the contents. It also forbid carriers and their agents from delivering packages containing alcoholic beverages to anyone except the stated consignee and from collecting the purchase price for those orders. The Webb-Kenyon Act in 1913 further regulated the interstate transportation of liquor by declaring any shipment or transportation, in any manner and by any means, from any state or territory of the United States to

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<sup>15</sup> 206 US 129 (1907)

<sup>16</sup> There was also a 1905 case with an identical name that also held the protection afforded by the Commerce Clause extended to COD liquor shipments.

any state with dry laws to be illegal. Essentially, the act was an endorsement by the federal government of the right of each state to control the receipt, distribution, and consumption of liquor within its borders.

Legal challenges were inevitable and the United States Supreme Court had the final say in a series of cases lumped together that involved the Clark Distilling Company<sup>17</sup>. Chief Justice Edward D. White, in his majority opinion, concluded that there was no constitutional right to receive liquor shipments that were intended for personal use. Furthermore, and most importantly, Congress did not exceed its power under the Commerce Clause in forbidding the interstate shipment of alcoholic beverages to dry states. Common carriers, namely the railroads, were free to refuse shipments of liquor intended for customers or receivers in states with prohibitory laws that forbid its importation. With state prohibition laws holding carriers also liable for violating laws, transportation companies ceased to traffic alcohol for wet state liquor producers and suffer penalties under law.

The national effort on the part of the prohibitionists in the United States would reach fruition in the form of the Eighteenth Amendment to the Constitution of the United States. A year after its ratification in 1919, the manufacture, sale, or transportation of “intoxicating liquors” was prohibited in the United States with the federal government and states having “concurrent” enforcement powers.

To enforce the Amendment, Congress passed the National Prohibition Act, commonly known as the Volstead Act, on October 28, 1919. The intent of this piece of legislation was to prohibit intoxicating beverages and regulate the production of non-beverage spirits in addition to insuring an ample supply of alcohol for legitimate uses. It also declared that any place where liquor was sold or produced could be declared a “public and common nuisance” and thus subject to seizure. To eliminate any doubt about the nature of a drink or concoction, “intoxicating liquor” was to be construed as any beverage containing “one-half of 1 per centum or more of alcohol by volume.” Several exceptions

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<sup>17</sup> *Clark Distilling Company v. Western Maryland Railway Company and State of West Virginia* and *Clark Distilling Company v. American Express Company and State of West Virginia* were heard collectively as 242 US 311 (1915)

were written into the Volstead Act, including medicinal uses, wine for religious purposes, and “preserved sweet cider” for rural producers. These exceptions and the loophole of the Eighteenth Amendment that did not prohibit personal use or consumption undermined the effectiveness of Prohibition.

The decision in the National Prohibition Cases<sup>18</sup> confirmed the constitutionality of the Eighteenth Amendment and defined “concurrent powers” not as joint or divided powers but territorial coextensive and that the exercise of those powers is not dependent upon either the federal government or the states. Though the case also dealt with the process by which the Eighteenth Amendment was ratified, the decision completely omitted a discussion of personal liberties infringed upon by Prohibition. In the words of Chief Justice White, in his concurring opinion:

“I profoundly regret that in a case of this magnitude, affecting as it does an amendment to the Constitution dealing with the powers and duties of the national and state governments and intimately concerning the welfare of the whole people, the Court has deemed it proper to state only ultimate conclusions, without an exposition of the reasoning by which they have been reached.”

Justice Joseph McKenna, in his dissenting opinion, found the Court's declaration of conclusions without giving any reasons for them baffling and the definition of “concurrent powers” given to be lacking as it does not expressly spell out the meaning of concurrent without relying on the concept of “substitute action.” The concurrent enforcement provision allowed both federal and state governments to shirk their respective responsibility for enforcement as it then largely relied on the prerogative of enforcement officials.

A contemporary law review was highly critical of the use of this phrase “concurrent powers” and the use of the amendment process to the Constitution for enacting Prohibition. O.K. Cushing in California Law Review<sup>19</sup>, questioned how legislation, which interferes with individual rights, was justifiably amended to the Constitution. Such a process, in his opinion, was reserved for rights as

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<sup>18</sup> 253 US 350 (1920)

<sup>19</sup> Vol 8, No. 4 (May 1920)

described in the Bill of Rights and the Thirteenth Amendment, which barred slavery. “The war amendments [following the Civil War] were designed to increase the liberty of the individual” whereas the Eighteenth Amendment diminishes them. Compared with how the Constitution dealt with the organization of the government, it was odd that the Eighteenth Amendment laid out a rule of conduct for American citizens.

Cushing also brought notice to the potential for differing opinions on what constituted “intoxicating liquors” and how that would affect the “concurrent” enforcement of prohibitory legislation. Perhaps a California law would define intoxicating liquors as a beverage with less than 3% alcohol per volume while the Volstead Act defined it as possessing less than half a percent? How could a law intended to be concurrently enforced be enforceable by the federal government and not the state because of the definition of an “intoxicating beverage?” Certainly there were states that were not in favor of Prohibition legislation and chose non-enforcement as the most plausible method of conducting the affairs of their state. The comparison to the current discussion of marijuana laws in the United States is unavoidable.

Most problematic for the interpretation of the phrase “concurrent power,” in Cushing's opinion, was that while it occurred frequently in court opinions, it was loosely used and had no fixed legal meaning. The only fixed meaning it had was the interpretation of the famous case McCulloch v Maryland<sup>20</sup> and dealt with the taxing powers of the state and federal government.

The flawed nature of the law presented itself in the failed enforcement efforts on the parts of both the States and federal government. There is no need to discuss the extent of law-breaking committed to bring booze to the masses and the profit reaped by such efforts. On all levels there was corruption and usurpation of law.

Prohibition on a national level in the United States, from the strategies of its implementation to its flaws, can be traced back and seen first at the various state-level attempts in places like Kansas,

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<sup>20</sup> 4 Wheat 316 (1819)

Iowa, and Kentucky. “Dry” forces initially tried to fight for the liquor-free preference of the states but utilized and expanded federal power after the legal challenges to those statewide efforts. The legal battles and court decisions informed and influenced the shape Prohibition would take when the Anti-Saloon League fashioned the Eighteenth Amendment to the U.S. Constitution and the accompanying enforcement legislation.