ONE

Temperance

> One can scarcely study the history of liquor legislation leading up to the adoption of the Prohibition Amendment without coming to the conclusion that too often we have attempted to impose on law a burden which law by itself is not equipped to carry.
>
> RAYMOND B. FOSDICK AND ALBERT L. SCOTT
> *Toward Liquor Control (1933)*

Since the early days of the republic, Americans have turned to the law to achieve their social goals with respect to wine, devising elaborate systems of legal incentives, subsidies, restrictions, and penalties in an effort to shape behavior. American laws since the early seventeenth century have regulated everything from the manufacture and marketing of wine to its distribution and consumption, and these laws have been almost continuously generated, dismantled, revived, revised, and reimagined.

The content of the laws and regulations regarding wine has varied dramatically as cultural perspectives on alcoholic beverages changed.[1] Over time, wine laws have been used for achieving highly divergent goals, ranging from directly encouraging viticulture in the colonies and the early republic to imposing stiff fines and criminal penalties upon people who distributed wine during statewide, and later national, prohibition. The early colonial governments went so far as to legally *require* citizens to plant vines; several hundred years later, state and federal governments were dispatching agents to wineries to enforce their permanent closure.

Historically, temperance has been the most important objective of American liquor law, but the meaning of temperance has changed dramatically over time. In the eighteenth century, temperance meant the moderate use of all intoxicating liquors, including beer, wine, and spirits.[2] By the early nineteenth century, it meant the moderate use of fermented liquors and

total abstinence from distilled spirits. By the mid-1800s, it meant abstinence from all liquors, including fermented drinks.

These varying conceptions of temperance have been influenced by changing moral, religious, medical, social, and economic factors, which in turn shaped American culture and drinking customs. Key figures in American history have embraced and personified these views of temperance, and they have relied on various legal approaches to achieve their objectives, including the criminalization of public drunkenness, liquor licensing, local plebiscites on whether and when to allow alcoholic beverage sales (known as local option), and prohibition. During the nineteenth century, these laws were challenged repeatedly in the courts on constitutional grounds ranging from free trade to due process. The courts became the battleground for the fight between individual liberties (the right to manufacture wine and drink it) and public welfare (the concept of order and public health).

Despite the support of a domestic wine industry by early American leaders like Puritan Minister Increase Mather and President Thomas Jefferson, wine could not escape the drive toward prohibition in the nineteenth century. The failed early efforts at domestic viticulture stymied the development of a wine tradition that might have withstood the onslaught of those who were now advocating abstinence. By the mid-1800s, when technical progress in grape growing and winemaking enabled the production of decent wine, prohibition already was taking hold of the country. Wine became just another form of alcohol, caught up in the crusade against "demon rum," the whiskey trust, and brewery-owned saloons.

The courts, which for a time insisted on free trade among the states, could not thwart the political and ideological zeal of the prohibitionists. Local option led to statewide prohibition and, eventually, National Prohibition. Yet this evolution did not ultimately promote the cause of temperance. Regulating personal behavior was both unpopular and unrealistic, and those who wanted to drink found a way to do so.

EARLY ASPIRATIONS FOR WINE

The earliest wine laws in America were designed by settlers and colonial governments to actively develop and encourage an American wine tradition. The settlers had come to the New World in search of riches and the trappings of a prosperous life, and they viewed wine cultivation as a tangible sign of colonial success.[3]

The colonial governments wasted no time in devising a range of laws and

inducements to encourage vineyard development and wine production. One form of support to arrange and sponsor the immigration of experts from France to advise the settlers in Virginia, Massachusetts, Pennsylvania, and the Carolinas on vine planting and to share technical expertise about viticulture and winemaking.[4] In 1621, the king of England instructed the governor of Virginia "to plant abundance of vines, and take care of the vignerons sent."[5] The first legislature of that colony in 1623 required every man to plant a quarter-acre garden with vines.[6]

The pilgrims and other separatist Puritans who settled in New England and along the Atlantic seaboard accepted the consumption of alcoholic beverages. They regarded fermented beverages, in particular, as "gifts to be revered," safer to drink than water.[7] The Puritans had carried copious amounts of beer and cider with them on their maiden voyages to the New World.[8] Conspicuously absent was wine, a beverage that "found its way to the tables of only the most opulent," just as it had in England prior to the colonial enterprise.[9]

Alcoholic beverages were an integral part of the colonial social fabric. The Puritans believed that alcohol, consumed in moderation, had "rejuvenative powers."[10] Wine, for example, was prescribed by physicians to keep the body warm in cold weather, aid digestion, and ward off fevers.[11] Alcohol also was a stimulant for physical labor and an aid to conviviality.

The most common drinking establishment was the tavern—sometimes referred to as "the ordinary"—which, along with the church, was at the center of community life. Although its main purpose was to cater to the needs of the traveler, the tavern primarily served local clientele, offering food, drink, and various forms of social recreation, from music to political discourse to gambling.

The Puritan "work ethic" extolled the industriousness necessary to promote a domestic wine industry. Yet the Puritans also decried drunkenness as a sin. Increase Mather, the minister of Boston's Old North Church and later president of Harvard University, expressed a commonly held view in his *Wo to Drunkards* (1673): "The wine is from God, but the Drunkard is from the Devil."[12] Increase and his son, Cotton, preached incessantly against intemperance. They feared that the abuse of alcohol would ruin the Puritans physically and economically and, in so doing, "drown very much of Christianity."[13]

The colonies imposed legal sanctions against public drunkenness to thwart intemperance.[14] Some colonial governments defined excessive drinking in their statutes. In Massachusetts Bay colony in 1672, it was illegal for

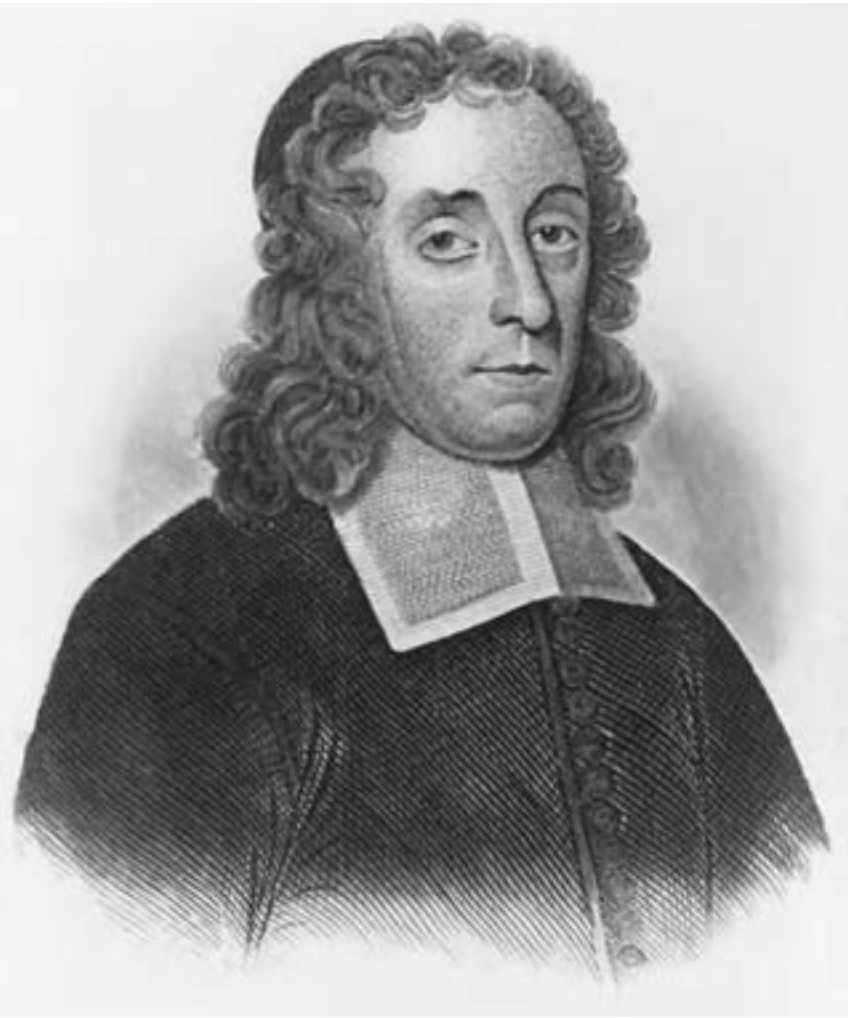

Figure 1. Reverend Increase Mather, who said, "Drunkenness is a sin." Engraving from *The New England Historical and Genealogical Register,* 1849. Prints and Photographs Division, Library of Congress. Reproduction No. LC-USZ62-75070.

an innkeeper to permit drinking "above a half pint of wine for one person, at a time, or to continue Tipling above the space or half an hour, . . . or after nine of the Clock at night."[15] Even the "Keeper of Wines" was prohibited from allowing anyone to drink to excess in his wine cellars.[16] The drunkard paid a fine for the first offense, double fines for the second offense,

and treble fines for the third offense. "If the parties be not able to pay the fines, then he that is found Drunk shall be punished by whipping, to the number of ten stripes; and he that offends in excessive or long Drinking, shall be put into the Stocks for three hours, when the weather may not hazard his life or limbs. And if they offend the fourth time, they shall be imprisoned until they put in two sufficient sureties for their good Behaviour."[17] Many colonies banned liquor sales altogether to habitual drunkards, minors, and Native Americans.[18]

Unfortunately for the Puritans, both the development of a domestic wine industry and the struggle to control drunkenness failed. The English colonists in New York, New Jersey, the Virginias, and the Carolinas, as well as the Germans in Pennsylvania tried earnestly, but unsuccessfully, to make wine from native grapes.[19] In Virginia, the legislature informed the king of England in 1628, "With respect to the planting of vines, they have great hope, that it will prove a beneficial commodity; but the vignerons sent here either did not understand the business, or concealed their skill; for they spent their time to little purpose."[20]

More than a century later, in 1733, the inventor, author, politician, and bon vivant Benjamin Franklin offered instructions in his famous *Poor Richard's Almanack* on how to make "Wine of the Grapes which grow Wild in our Woods."[21] But the wines were foxy[22] and of poor quality, made drinkable only by adulteration—with sugar, flavorings, and preservatives—and fortification.[23] Cider, made from fermented apples, was far more drinkable and more popular than wine. The settlers tried planting the European grape species known to produce fine wines, *Vitis vinifera,* which they imported, but those vines died because of excessively cold winters or high humidity that led to mildew and rot.[24] It was not until the 1820s, when American hybrids were introduced, that decent "dry" wines began to be produced.[25]

The battle against public drunkenness was similarly ineffectual because of the allure of "ardent spirits."[26] Rum aficionado Wayne Curtis writes: "Starting about 1700, the colonial taste for home-brewed beer and cider began to fade and was displaced by an abiding thirst for stronger liquors."[27] The nation's first rum distillery was established in 1664 on what is now Staten Island, and the production of rum from fermented molasses or sugarcane quickly became an essential industry in colonial America. American rum was exported and celebrated around the world, especially in Europe, and Americans themselves partook liberally of this domestic product. By 1770, the average white inhabitant of the Continental Colonies drank 4.2 gallons of rum per year.[28]

One wonders whether an American wine culture would have been more readily established if the French had won the French and Indian War and not ceded its territory in North America to Britain in 1763.[29] Given the historic importance of wine in everyday French life, perhaps that would have been so. The British favored spirits, particularly gin,[30] and the fortified wines of Portugal and Spain—Port, Sherry, and Madeira—which British traders shipped around the world. Madeira, with its unique burnt flavor from trans-Atlantic shipment in casks exposed to the sun, was preferred by society families in America from colonial times until the mid-1800s.

Beloved as rum came to be in the early American republic, whiskey—distilled from such grains as barley, corn, and rye—became the American alcohol of choice after the Revolutionary War. When the British blockade interrupted the importation of foreign rum and molasses, farmers began to distill their surplus grains into whiskey. These "liquid assets" could easily be shipped or bartered.

According to the historian Thomas Pegram, "Americans between 1780 and 1830 drank more alcohol, on an individual basis, than at any other time in the history of the nation."[31] Liquor was ubiquitous. Workers received daily rations of spirits—"a half gill of rum-and-water at eleven o'clock in the forenoon, and again at four in the afternoon."[32] And there was drinking at every social occasion. In 1790, alcohol consumption in America was 5.8 gallons per person of drinking age—mostly spirits and cider; it had increased to 7.1 gallons by 1810.[33]

Wine was not consumed in large quantities—a mere six-tenths of a gallon per person of drinking age at the end of the eighteenth century. At one dollar per gallon (four times the price of a gallon of whiskey), wine was a luxury.[34] Nevertheless, wine occupied a uniquely privileged role because American leaders actively supported the establishment of an American wine industry and were known to drink it regularly themselves. Domestic vines and wine were exempt from taxation throughout the early republic, and the fledgling liquor industry was protected from international competition by import duties.[35]

The first five presidents of the United States—Washington, Adams, Jefferson, Madison, and Monroe—"were all close friends, enjoyed wine together on innumerable occasions and spoke and wrote much about the moderate beverage."[36] Of them all, Jefferson was the true connoisseur and "the great patron and promoter of American wines for Americans."[37] Born and raised on a farm in Virginia and trained as an attorney, Jefferson later served as minister to France and tasted his way through the wine regions of that

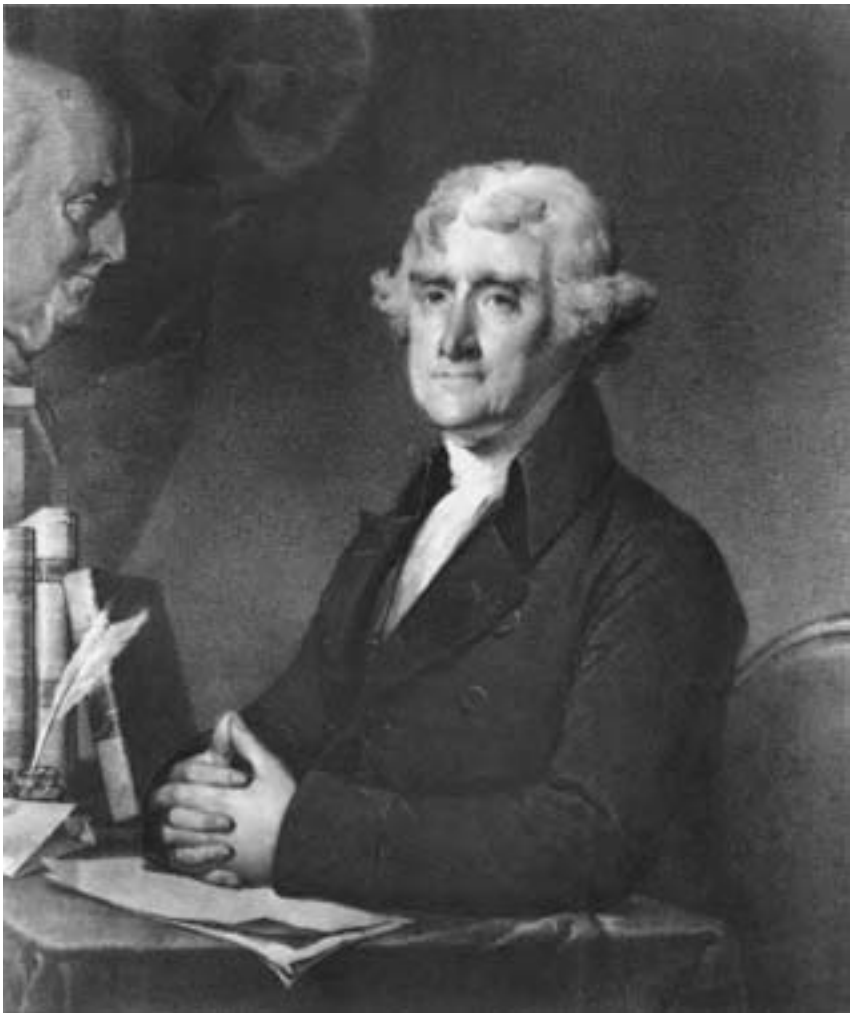

Figure 2. Thomas Jefferson (seated) and Benjamin Franklin (in profile, left) were early wine partisans who actively promoted domestic wines. Lithograph from the original series painted by Gilbert Stuart for the Messrs. Doggett of Boston, circa 1828. Prints and Photographs Division, Library of Congress. Reproduction No. LC-USZ62-117117.

country. He promoted wine as a "natural medicine for health"[38] and prescribed for his ailing daughter Maria sherry, which was, in his opinion, "as effectual to prevent as to cure [her] fever."[39] Jefferson drank wine, not spirits; in his later years, he even shunned fortified wines.[40] [Figure 2 here]

Fortified wines, however, had many partisans among early American leaders. The wines had an appealing sweetness, and the extra alcohol helped them to withstand the trans-Atlantic voyage. Chief Justice John Marshall was particularly fond of Madeira. He joined the other justices each year in the traditional importation of specially labeled "Supreme Court Madeira."[41] A fellow jurist commented that Marshall was "brought up upon Federalism and Madeira, and he is not the man to outgrow his early prejudices."[42]

THE CHANGING TIDES OF TEMPERANCE

The rise of a temperance movement in America was deeply linked to the fear many Americans were feeling as their new nation took shape. In the decades following independence from Britain, young America was in the throes of political, demographic, and cultural upheaval. Settlers were moving west, immigrants were streaming in, and new systems of governance were being established. The historian Norman Clark describes the period around the turn of the century as one of "continual surges of migration and immigration, of settlement and dispersion" in which Americans grew terrified of the "frontier country" and the challenges it posed to their traditions and values.[43]

The American Revolution had been guided by a bold ideology of equality, justice, and individual rights. The war was fought in the cause of a more representative, egalitarian social structure, and when independence was achieved, the young nation faced the challenge of creating order in the absence of the existing hierarchies. Many native-born Americans feared that without those traditional hierarchies of power and control the nation would descend into chaos. Upper-class Americans feared that the ideology of egalitarianism would undermine the deference they had been granted in the old social structure. Unsurprisingly, wealthy capitalists also supported temperance to promote "industry, sobriety and thrift."[44] For them, "this 'temperate' character type or life style was disciplined, orderly, hard-working, frugal, responsible, morally correct, and self-controlled; it thoroughly fused the Protestant ethic and the ethos of capitalism."[45]

The ideological touchstone for the temperance movement was provided by Dr. Benjamin Rush, celebrated as one of the signers of the Declaration

of Independence and as surgeon general of the Revolutionary Army. Dr. Rush's scathing indictment of distilled spirits, *An Inquiry into the Effects of Ardent Spirits upon the Human Mind and Body,*[46] first published in 1784, posed a powerful challenge to accepted wisdom in America about the value and effects of alcohol. Rush attacked the prevailing belief that alcohol had healthy effects on the human body and instead claimed that the habitual use of ardent spirits led to liver disorders, gout, epilepsy, memory impairment, and immoral behavior. His work included a famous "Moral and Physical Thermometer," which associated "degrees" of alcohol with points on a scale of temperance (moderation) and intemperance (excess). Water, milk, and molasses were at one end of the scale, identified with health, wealth, and happiness. Wine, toward the middle of the scale but still clearly temperate, was indicated as inducing cheerfulness and strength and providing nourishment when drunk with meals and in moderate quantities. Spirits were the most intemperate beverages.

Dr. Rush's influential opinions paved the way for an early American temperance movement based on the notion that ardent spirits were harmful and posed a threat to physical health, mental faculty, social stability, and productivity. Early temperance activists followed Rush's lead in arguing that intemperance was "the principal contributing factor in wife-beatings, murders, incest involving a child and her drunken father, neglect and abandonment of families, assaults, lewd behavior, sexual promiscuity, increased indebtedness and idleness."[47] Some physicians believed that the consumption of spirits could result in spontaneous human combustion, a theory later popularized by Charles Dickens in his novel *Bleak House.*[48]

beverages. [Figure 3 here]

Even Alexander Hamilton, the nation's first secretary of the treasury under President Washington, who disliked Rush and later blocked the doctor's appointment to the faculty of Columbia Medical School, shared Rush's assessment of distilled spirits.[49] In *Federalist* No. 12, Hamilton signaled his penchant for a whiskey tax. "The single article of ardent spirits, under federal regulation, might be made to furnish a considerable revenue. . . . That article would well bear this rate of duty; and if it should tend to diminish the consumption of it, such an effect would be equally favorable to the agriculture, to the economy, to the morals and to the health of the society."[50] Little wonder that Hamilton did not also tax wine; his doctor had to limit his wine consumption to three glasses daily.[51]

In its early stages, the American temperance movement allowed wine to maintain its distance from spirits, which bore the brunt of mainstream temperance advocates' scorn.[52] Rush, for example, did not extend his indictment

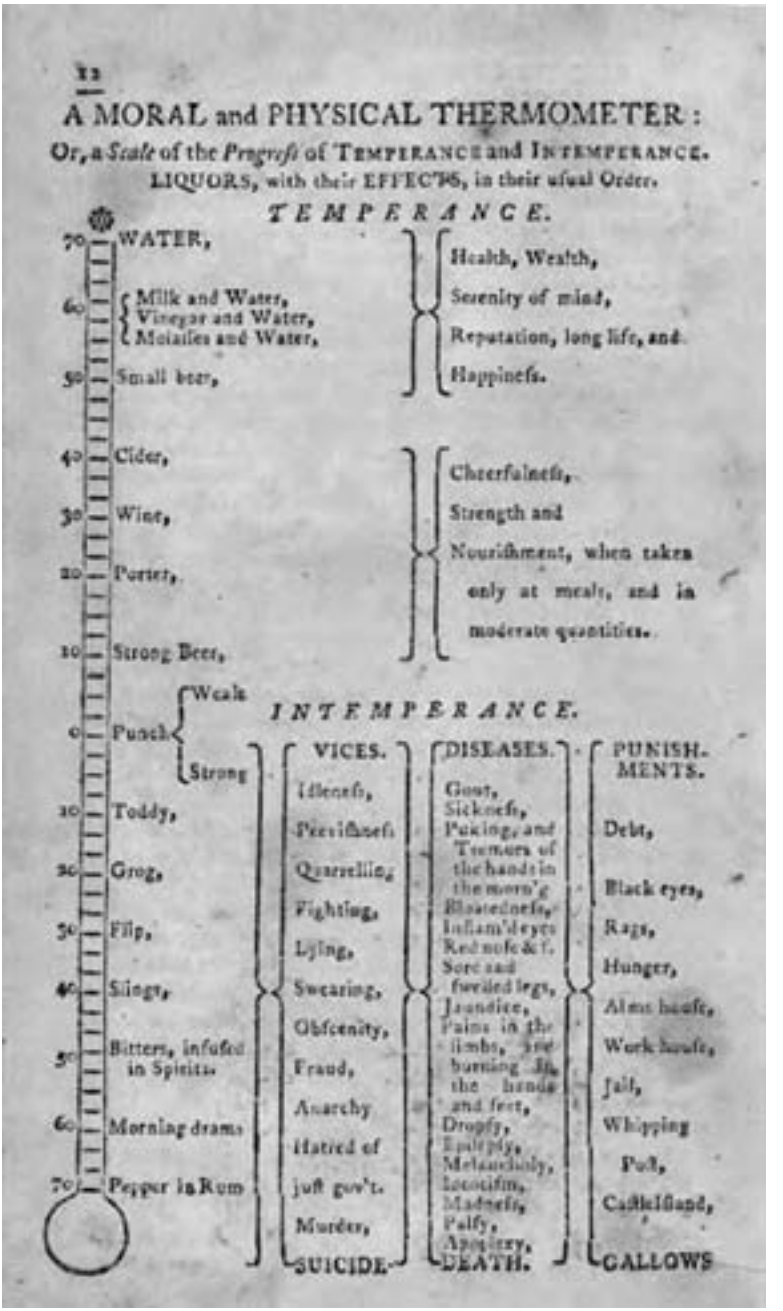

Figure 3. Dr. Benjamin Rush's "Moral and Physical Thermometer." From *An Inquiry into the Effects of Spirituous Liquors* (Boston: Thomas & Andrews, 1790).

to wine or other fermented beverages. He not only tolerated the moderate consumption of wine but actually *prescribed* it, arguing that soldiers' alcohol rations should be changed from distilled liquor to wine, and writing in his *Inquiry* that "it must be a bad heart indeed that is not rendered more cheerful and more generous by a few glasses of wine."[53] Thomas Jefferson concurred, stating in 1787 that "no nation is drunken where wine is cheap, and none sober where the dearness of wine substitutes ardent spirits as the common beverage. It is, in truth, the only antidote to the bain of whiskey."[54]

Although Rush, Hamilton, and Jefferson shared an antipathy to distilled spirits, Americans' attachment to ardent spirits ran deep. In 1791, Hamilton imposed an excise tax on distilled spirits, the proceeds of which would be used to pay down debt from the Revolutionary War. This was the first internal revenue act of the United States. An internal revenue service was established to collect the tax at the point of production.[55]

Farmers throughout the young republic angrily protested against Hamilton's so-called whiskey tax until, in 1794, their uprising took a violent turn. That year, President Washington was compelled to lead a 13,000-man militia to western Pennsylvania to quell the violent insurgency, which is now remembered as the Whiskey Rebellion.[56] Although widely heralded as a victory for the federal government and its taxing authority, much of the American backcountry outside of western Pennsylvania refused to pay the whiskey tax. In 1802, during Jefferson's first term as president, the whiskey tax and the rest of the Federalist excise tax program were repealed. For the following sixty years, except during the War of 1812, there was no federal tax on liquor.[57]

After the federal government retreated from spirits taxation, a voluntary, largely local temperance movement took hold in America. By 1833, 1.5 million Americans had enrolled in 8,000 voluntary temperance associations. Many took personal pledges to abstain totally from spirits;[58] their pledges generally allowed for the use of wine, beer, and cider, which Americans continued to consider healthful and morally acceptable. In the first *Pharmacopoeia of the United States,* published in 1820, numerous "medicated wines" were mentioned, but not whiskey, gin, or rum.[59] As wine advocates would recall indignantly in the years to come, early temperance advocates believed that beer and wine played a critical role in *encouraging* a life of temperance. So accepted was this wisdom that "the Massachusetts Society for the Suppression of Intemperance, one of the first prominent temperance organizations, served wine at its gatherings."[60]

Unfortunately for American wine lovers, the protected status of wine was not to endure. Americans had long believed that products of fermentation were not intoxicating and that they were distinctly different than their distilled counterparts. As the temperance movement grew, its leaders watched growing numbers of people struggle with the effects of fermented beverages even while abstaining from spirits. In the early 1800s, the chemist William Brande established for the first time through scientific methods the presence of alcohol in wine, beer, and cider.[61] The distinction between products of fermentation and distillation became increasingly dubious as evidence mounted for their fundamental similarity.

The growing skepticism about wine in the temperance movement coincided with a marked rise in Christian evangelism in America. The Second Great Awakening swept through the United States in the 1820s and 1830s, reviving the role of religious language, imagery, and ideology in everyday American life and reenergizing Christian-based activism. Leaders such as the Congregationalist minister Lyman Beecher and the Methodist minister John Wesley applied their fiery rhetoric and evangelical zeal to questions of temperance and intemperance. They delivered impassioned sermons about the evils of alcohol consumption and the moral necessity of abstaining from ardent spirits, and they encouraged direct political action. Beecher captured the intensity of the movement when he famously denounced intemperance as a "national sin" and beseeched "the temperate part of the nation [to] awake, and reform, and concentrate their influence in a course of systematic action . . . set in array against the traffick in ardent spirits, and against their use."[62]

Beecher's own life and career exemplify the changing attitudes toward wine and beer characteristic of the time. Early in his career, Beecher carefully defined intemperance as the "daily use of ardent spirits" and exempted wine from his moral scorn.[63] He was deeply involved with the establishment of the American Temperance Society in 1826, which called upon individuals to "refrain from drinking spirits" but did not require abstinence from fermented beverages.[64] Undoubtedly, wine's special status was due in large part to its widespread sacramental use and the repeated biblical references to wine, but equally important was its use at "every proper wedding [which] gave it almost an equal sanctity."[65]

As the temperance movement progressed, however, total abstention came to be seen as a matter of personal dignity, piety, and physical necessity. Dr. Samuel Woodward, one of the nation's leading mental health experts, suggested that chronic drunkenness was an addictive physical disease.

He lambasted distilled spirits in particular, but he also contended that "no wine is found that does not contain from one quarter to one half brandy or spirits."[66] To avoid addiction, he recommended total abstinence from all forms of alcohol. Ten years after the founding of the American Temperance Society, Beecher and his organization reversed their views about fermented beverages. Rather than tolerating—and even encouraging—the consumption of wine and beer, the American Temperance Society required its members to pledge total abstinence.[67] Those who did so wrote T (total) on their pledges and became known as teetotalers.[68]

Temperance advocates prided themselves on the powerful and immediate impact of their movement. According to Cherrington, the 1840s "witnessed the founding of more temperance organizations of a general and national character than [at] any other period in the history of the United States."[69] This was nowhere more evident than in the working-class Washingtonian movement that swept the nation in the 1840s. The Washingtonians focused on the rehabilitation of drunkards, a theme that a century later would motivate Alcoholic Anonymous. Washingtonians were indifferent to religion and eschewed coercion.[70] At their revivals, reformed drinkers recounted real-life experiences of drunkenness and degradation and attested to how abstinence could help restore financial solvency and respectability. Statistics reflect the remarkable efficacy of the movement: annual per capita consumption of absolute alcohol dropped dramatically from about 7.1 gallons in 1810 to 3.1 gallons in 1840.[71]

THE RISE OF LEGAL COERCION: FROM LOCAL OPTION TO STATEWIDE PROHIBITION

Demographic and social changes began to threaten the steady advance of the temperance movement. As Pegram notes, "Between 1845 and 1855, nearly three million immigrants, the vast majority from Ireland and Germany, arrived to start a new life in America."[72] These immigrants brought with them a foreign and more lenient view of alcohol consumption. Drinking beer, wine, and spirits was an experience to be celebrated, enjoyed, and shared both at home and in public. Due largely to the presence of German immigrants, beer grew in popularity, overtaking cider as the fermented beverage of choice, and beer gardens began to appear as a fixture in German-American communal life.[73]

Perceiving a threat to the success of their movement, leaders of the American temperance movement began to consider new ways to control alcohol

consumption and maintain social stability. They turned to legal coercion as the primary means to achieve temperance.

From colonial times through the early days of the republic, liquor laws had focused primarily on the drunkard. The server, however, played a critical role as gatekeeper and also was subject to strict controls. Producers and distributors of wine, beer, and cider, by contrast, were largely unregulated.[74] Borrowing from the liquor licensing practices of England in the middle of the sixteenth century, retail liquor licenses were granted to "fit and suitable" applicants.[75] Often, local citizens would have to attest to the owner's good reputation and the need for the tavern.[76] The tavern owner paid a license fee and posted a bond to ensure compliance with the liquor laws. Those laws typically established fixed liquor prices that were posted inside the tavern, ensured standard measures (short measures were a common way to evade fixed prices), prevented adulteration, and required closure during certain hours and on Sundays (known as "blue laws").[77]

As the society of drinkers grew more diverse and problems of public drunkenness increased, temperance advocates sought to limit the number of liquor licenses at the local level in an effort to control drinking.[78] Liquor licenses were granted by local authorities such as selectmen, boards of excise, municipal councils, and the county court. Where these local officials were elected and had discretion in making licensing decisions, they could be influenced politically.[79] In 1833, certain counties of Georgia achieved a "no license" result when voters intentionally elected county judges who rejected all liquor license applications.[80] The next year, the city aldermen of Rochester, New York, were given complete authority over liquor licensing in that city; when the local Whigs, allied with anti-liquor forces, swept into office, liquor licenses were cut back dramatically.[81] In other communities, local officials were beholden to the liquor trade for their election or were dependent upon the revenue from license fees, bonds, and fines for liquor violations. The historian Herbert Asbury has written, "There was much evidence of laxity in the enforcement of regulatory laws, and of corruption in the administration of the licensing system."[82]

By the late 1830s, temperance reformers began pressuring state governments to get involved in the fight against intemperance. The diversity of local licensing systems and the unique nature of local charters—each with its own set of rights and procedures—made the local licensing approach random and complicated. The state legislatures responded to large-scale petition drives by attacking the "by the drink" trade, where liquor was consumed at the place where sold, often to excess. Massachusetts's landmark

"15 gallon law" of 1838 prohibited the sale of spirituous liquors in any amount less than fifteen gallons at a time, except by licensed apothecaries and practicing physicians.[83] The state law was widely unpopular and repealed two years later at the request of the governor, who considered it an unwarranted interference with business and property rights.

Temperance reformers also exhorted state legislators to codify, on a statewide basis, the concept of local option. Under this approach, the state would authorize the voters of each locality (generally a town, city, or county) to determine whether to permit or prohibit the sale of alcohol within that jurisdiction. This form of majority rule, exercised locally, was considered to be fully consistent with democratic ideals. It seemed appropriate to address the liquor problem, in particular, at the smallest geopolitical unit. Voters of one jurisdiction could elect to go dry even if the surrounding jurisdictions were wet.

Like many of the temperance reforms to follow, local option laws hit the books in waves. Between 1838 and 1847, a dozen states, primarily in the northeast, experimented with some form of local option.[84] The variations were numerous, including who could initiate a local option vote, the area of adoption, the frequency of elections, and the precise subject of the vote. Some local option elections decided whether there would be any liquor retailing; others pertained only to liquor by the drink, usually specified as sales of liquor in less than a specified quantity such as a quart or a gallon. Although "Demon Rum" was the bête noire of local option campaigns, frequently wine was included in the legislation. Rhode Island's 1845 law covered "the retailing of wines or strong liquors."[85] New Hampshire's 1838 law specifically extended its restrictions to "wine, rum, gin, brandy, or other spirits."[86] Illinois, however, applied local option only to "spirituous liquors."[87]

Local option laws enjoyed broad popularity during this period because they enabled state legislators to avoid the complex and thorny political issues related to alcohol control. State politicians could support local option laws without having to take a stance on the regulations themselves or to assume responsibility for the enforcement of those laws.[88]

Nevertheless, local option laws were largely unsuccessful. Without federal or state assistance to enforce them, and with alcoholic beverages readily available in neighboring wet communities, the local laws were often meaningless. At times, the laws were simply disregarded. To the great frustration of temperance advocates, voters at the local level proved fickle, and local option victories were temporary. The state legislatures were similarly

conflicted about local option—striking the laws from their books, revising them, and reenacting them frequently throughout the 1840s and into the 1850s. New York, for example, enacted local option in 1845 and repealed it in 1847. Ohio passed a local option law in 1846, then repealed it the following year.

Local option laws often were overturned by the courts. In Pennsylvania, Delaware, Indiana, and Texas, judges held that local option was an unconstitutional delegation of legislative power to the people.[89] The Pennsylvania Supreme Court, for example, declared that neither the legislature nor the judiciary "can legally invite the people to exercise a function which the constitution makes the peculiar business of selected bodies of persons, and therefore, in effect, denies to every other person."[90]

As local option laws were defeated, overturned, or simply not enforced, temperance advocates sought more coercive statewide legal measures. Neal Dow, the mayor of Portland, Maine, earned the title of the "Prophet of Prohibition" for his advocacy of statewide prohibition mid-century. Born into a devout family firmly entrenched in the society of elite, native-born Protestants and himself a prosperous merchant and an astute politician, Dow "was appalled by what seemed to him an obvious relationship between drunkenness, poverty, depravity, and family disintegration."[91] Suspicious of immigrants and especially Catholics who "seemed to him excessively given to lower-class indulgences and disgracefully lax in family disciplines," Dow led a crusade against all forms of alcohol production and consumption and set in motion what would become the first of several waves of statewide prohibition in America.[92]

Dow's timing was impeccable. In 1847, the United States Supreme Court in the *License Cases* had upheld the early temperance legislation of Rhode Island, New Hampshire, and Massachusetts.[93] Rhode Island prohibited liquor sales in quantities less than ten gallons. New Hampshire required licenses for all liquor retailers. Massachusetts combined the two approaches and required license fees to be paid by retailers who sold less than twenty-eight gallons of liquor at a time; retailers who sold only fermented beverages were exempt from the license fee. Although there were six different opinions in the *License Cases,* the justices all agreed that a state acting under its "police power" had the right, "free from any controlling power on the part of the general [federal] government . . . [to] regulate its own internal traffic, according to its own judgment and upon its own views of the interest and well-being of its citizens."[94]

The court, however, also confirmed that there were limits to the state's

police power. Under Article I, Section 8, of the Constitution, Congress has the authority to "regulate Commerce with foreign nations, and among the several States and with the Indian Tribes."[95] In 1827, the Supreme Court in *Brown v. Maryland* had relied on this provision, known as the Commerce Clause, in holding that a state could not levy a license fee on importers of liquor and other foreign commodities until the import had "lost its distinctive character as an import" and "become incorporated and mixed up with the mass of property in the country."[96] Chief Justice Marshall stated that Congress, by authorizing the importation of the commodity, had asserted its exclusive Commerce Clause power, with which the states could not interfere. This notion that imports in their "original form or package" were part of foreign commerce and exempt from state regulation was called the "original packages doctrine."

The *License Cases* involved interstate commerce, not foreign commerce. Because Congress had never exercised its Commerce Clause authority over interstate liquor shipments, the court upheld the state liquor laws. In *Pierce v. New Hampshire,* one of the three cases that comprise the *License Cases,* Chief Justice Taney wrote:

> Upon the whole, the law of New Hampshire is in my judgment a valid one. For although the gin sold was an import from another state, and congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several states, yet, as congress has made no regulation on this subject, the traffic in the article may be lawfully regulated by the state as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or a sale altogether prohibited, according to the policy which the state may suppose to be its interest or duty to pursue.[97]

This decision emboldened Dow and other prohibitionists, assuring them that state laws could halt interstate liquor sales, even if the trade in "original package liquor" from abroad was immune from state interference. The *License Cases* "created a climate in which state prohibition could flourish."[98]

Dow seized the moment. The Maine Law of 1851, officially entitled "An Act for the Suppression of Drinking Houses and Tippling Shops," prohibited both the sale and, for the first time, the manufacture of intoxicating liquors, with two exceptions: liquor used for mechanical and medicinal purposes, which was to be sold by an agent of the city or town, and liquor "of foreign production . . . imported under the laws of the United

States . . . contained in the original packages."[99] The Maine Law allowed for property searches where liquor was believed to be stored, authorized the seizure of alcohol, and prescribed stiff penalties for violators, first offenses by fines and subsequent offenses by fines and imprisonment. It was the duty of selectmen of towns and mayors or aldermen of cities to prosecute violations "on being informed of the same, and being furnished with proof of the fact."[100]

Within four years after the passage of the Maine Law, twelve other northern states had enacted similar statutes as part of the first wave of state prohibitory laws in America: Minnesota, Rhode Island, Massachusetts, and Vermont in 1852; Michigan in 1853; Connecticut in 1854; and Indiana, Delaware, New York, Iowa, Nebraska, and New Hampshire in 1855.[101] Most of these laws adopted the language of the Maine Law verbatim, prohibiting the production as well as the sale of all alcoholic beverages with limited exceptions. Occasionally wine and cider produced in the state or, more commonly, made from fruit grown in the state were excluded. Vermont's 1852 law allowed for "the manufacture, by anyone for his own consumption and use, of any fermented liquor."[102] Iowa and Indiana exempted the manufacture and sale of "wine from grapes, currants or other fruits grown in this State."[103] Three years after Iowa's prohibitory law was enacted, the exemption was extended to beer as a concession to the large German population of that state.

The Maine Laws of the 1850s were dramatically more ambitious than the earlier local option laws. They propelled alcohol law in a new direction by introducing the possibility of total prohibition. However, the fate of statewide prohibition was not unlike that of the local option laws before them. In many states, the provisions were only minimally enforced, and public opinion evaporated as quickly as it formed. In the years leading up to the Civil War, the Maine Laws were amended or dismantled one by one. Some state laws, like Wisconsin's, were vetoed by the governor following passage by the legislature. Others were rejected at the polls by voters, as occurred in Illinois.

In addition to insufficient public support and inadequate enforcement, crosscutting messages from different branches of the government undermined the Maine Laws. In 1862, to raise money for the impending Civil War, the federal government imposed the first excise tax on "wine, made from grapes."[104] License fees, known as occupational taxes, also were assessed on wholesalers, retailers, and producers other than those vintners "selling wine of their own growth at the place where made."[105] The drys, as those opposed to all alcohol consumption were known, regarded this as a

staggering blow to their efforts, an implicit legitimization of the liquor industry that they preferred to condemn.

The government soon came to rely on liquor taxes as a source of funding. According to the records of the Internal Revenue Service, "from 1868 until 1913, 90 percent of all revenue came from taxes on liquor and tobacco," the so-called sin taxes.[106] Because of this revenue link, the alcoholic beverage industry became increasingly entrenched in American law, culture, and politics, and from the perspective of the industry's critics, the alcohol problem grew more intractable.

Perhaps the most enduring and crippling challenge to the Maine Laws came from the judicial branch in a series of decisions that weakened and, in some instances, entirely invalidated the statutes. The enforcement of prohibitory laws depended largely on keeping liquor from being diverted into illicit channels. To carry out this policy, seizure and forfeiture provisions were included. In 1856, the New York Court of Appeals overturned that state's prohibitory law because it called for the forfeiture of liquors owned and lawfully possessed at the time the law was passed, thereby violating the state's constitutional guarantees that no person shall be deprived of property without due process of law and that private property shall not be taken for public use without just compensation.[107] Indiana's version of the Maine Law was invalidated as an invasion of the right to private property because the state's supreme court found that the temperate use of alcoholic beverages—particularly beer, which was at issue in that case—was not harmful and the intemperate use is "not the fault of the manufacturer or seller."[108]

The wine industry was absent in this series of legal challenges. Years later, when National Prohibition was forcing the permanent closure of wineries, the wine industry was criticized for failing to have seen the writing on the wall. After all, as far back as the 1850s, temperance ideology had made serious inroads into the American political consciousness. And although the waves of prohibition rose and receded, the temperance movement had proven by the time of the Civil War that it was capable of bold, far-reaching legal action. The brewers, who founded the United States Brewers Association in 1862, were the best-organized industry group to fight prohibition. They readily invoked the federal courts to protect their interests. The distillers did not form a national association until 1879; they instead relied on their political connections—what prohibitionists called the corrupt alliance between spirits and politics—that had grown out of the federal tax on spirits of 1791 and the close governmental inspection of distilling operations

ever since. The wine industry, by contrast, remained largely silent in the political and legal discourse.

To a large extent, the small size of the domestic wine industry explains this noninvolvement. By 1840, winegrowing operations had begun in Alabama, California, Missouri, Ohio, Maryland, New York, North Carolina, Massachusetts, Virginia, and Kentucky,[109] but only on a small scale. Ohio, with three thousand planted acres, was the leading grape growing state in 1850, followed by Missouri. California, with its tradition of Mission wines, was not far behind, and sprang to the fore during the Gold Rush of the 1850s.[110] By 1860, California, New York, and Ohio were the leading states in wine production.[111] Throughout the period, the consumption of wine in the United States was dwarfed by that of the other alcoholic beverages. In 1869, Americans consumed 12.2 million gallons of wine, compared to 79.9 million gallons of distilled spirits and 204.7 million gallons of beer.[112] In other words, wine comprised around 4 percent of the total volume of alcoholic beverages consumed. If brewing interests were quicker to respond to the threat of prohibitory laws, it was largely because there was more to lose and a greater number of actors to unite over the cause.

In addition, vintners and growers underestimated the threat that the Maine Laws and other prohibitory legislation posed. Perhaps they were lulled into a false sense of security by the specific and active government support for their industry, which persisted even as the waves of prohibition swept through the country. At the same time as the states were enacting prohibitory laws in the 1850s, the Agricultural Division of the United States Patent Office, which predated the establishment of an independent Department of Agriculture in 1862, was helping viticulturalists and winemakers by collecting and publishing information about grape varieties, vine health, and grape chemistry. By 1861, the commissioner of patents claimed to have discovered "the cause of, and a simple remedy for, the musky or foxy flavor peculiar to our wines. It was ascertained that our native grapes generally contained in abundance the elements of good wine, and, in most cases, tartaric acid in excess."[113] He promised to carry on the research "to the end that pure domestic wines may supplant the vile and poisonous adulterations, foreign and domestic, now in use."[114]

In California, government support was even more direct and unequivocal. The California legislature in 1859 encouraged vine planting by exempting new vine plantings from taxation until they were four years old; in that way, growers would not have to pay on their investment until they produced a

saleable crop.[115] Two years later, the legislature chartered a "Commission upon the Ways and Means best adapted to promote the Improvement and Growth of the Grape-vine in California."[116]

Wine-friendly California legislators sought to exclude wine from any prohibitory proposition. In 1855, when temperance advocates introduced a prohibitory statute in California, the assembly passed an amendment to exempt "wine manufactured from grapes grown within the limits of this state."[117] The author of the 1855 amendment offered an Old World, romantic defense for the "temperance drink" exemption:

> The land of the olive and the vine has always had clinging around it pleasant and delightful recollections. We love to read the tales of travelers through the vine lands of France and Italy and Spain, and have dwelt with delight upon their descriptions of the pleasures and the merry-makings of the harvest season, when the grapes bursting in their rich and juicy ripeness are gathered by men. . . . As Keats in his Ode to the Nightingale has sung, so have all poets in all ages sung.[118]

Although the Senate failed to adopt the amendment, a substitute bill was introduced that called for a nonbinding referendum on whether to prohibit the manufacture and sale of all alcoholic beverages except for mechanical, chemical, medicinal, and sacramental purposes. That referendum was defeated.

Many vintners actually supported temperance, or at least their conception of it, by decrying distilled liquor and the culture surrounding it. Viewing wine as an agricultural product, far removed from the images of public drunkenness and rowdy, lower-class barrooms around which the early temperance movement rallied, American winemakers, especially the growing California contingency, simply did not perceive themselves to be under siege.

Californians in the nineteenth century may have viewed wine in a similar fashion as the early settlers—as a benchmark of sophistication, success, luxury, and historical continuity. Unfortunately, the wines of the era did not live up to this romantic image. Efforts to make high-quality, lower-alcohol dry wines had continued since Jefferson's time, but they had failed. The viticulturalist and winemaker Nicholas Longworth of Ohio, widely regarded as the father of American grape culture, believed, as Jefferson had before him that these wines could be produced "in the name of 'temperance' (already a rallying cry among the moralists of the United States)" and

that they were "the necessary basis of any sound winemaking industry in any country."[119] But Longworth was frustrated in his early efforts to make dry wine from native grapes. Like the early American settlers, he could make the wine drinkable only by adding sugar and fortifying it with brandy, producing what he called "a tolerable imitation of Madeira."[120]

After his initial failures with native grapes, Longworth fared better with the hybridized Catawba grape. That wine was widely accepted among the growing population of German immigrants in Ohio who wanted an affordable, drinkable dry wine. Longworth's market expanded nationally in the 1840s and 1850s when he introduced his sparkling Catawba. George Husmann, a winegrowing pioneer in Missouri, predicted in 1860 that soon "wine, the most wholesome and purest of all stimulating drinks, will be within the reach of the common laborer and take the place of the noxious and poisonous liquors which are now the curse of so many of our laboring men and have blighted the happiness of so many homes."[121]

To help build a legitimate domestic wine industry, California winemakers fought against the "doctoring" of wine with glucose, acid, flavorings, and alcohol. There was plenty of sunshine, good soils, and, increasingly, high-quality plant material in the state to grow ripe grapes that would produce decent dry wines without these additives. In 1860, the California legislature enacted a statute to penalize the sale of adulterated wines.[122] The state next called on the federal government to enact legislation to curb the marketing of "spurious" and "imitation" wines.[123] That effort failed.

The Californians who spearheaded this fight to protect domestic wine quality did not have the time or the interest to participate in the various legal battles over alcohol control laws that were taking place at every level of the American judiciary. Most of those cases involved beer or spirits, not wine. Nevertheless, by the time of the Civil War, the courts already had identified and considered some of the critical constitutional issues at play in the effort to control all forms of alcohol in America.[124]

THE WOMEN'S CRUSADE

The Civil War overshadowed the temperance movement. During the war years, only three Maine Laws persisted—those of Maine, Vermont, and New Hampshire—and they were not vigorously enforced.[125] According to the historian Jack Blocker, the military experience was itself a setback for temperance.[126] Both Union and Confederate troops were given liquor rations that temperance reformers somewhat disingenuously claimed "in-

troduced the taste of alcohol to young men who otherwise would have been unsullied."[127]

When the temperance movement surfaced again in the late 1860s and early 1870s, it was initially very different from its prewar counterpart in both appearance and tone. Instead of fiery, outspoken men pushing for bold and immediate legal reform, the postwar temperance movement was composed primarily of women who returned to the use of moral suasion, religious language, and social pressure to meet their objectives. These early female activists used tactics that appear to have been informed more by their specific moral and social concerns and their own social entitlements than by the legal precedents established in previous years.

The early women's movement, known as the Women's Crusade, was diffuse and almost spontaneous in nature. It arose as a "direct response to a sharp postwar increase in the number of barrooms and a precipitous rise in drinking" that compelled "thousands" of previously apolitical women to take to the streets to denounce beer, wine, and spirits—indeed, the entire liquor industry—and the increasingly bawdy and licentious culture of male alcohol consumption.[128] The women's goals, however, were broader than abstinence and included the encouragement of social cohesion, civility, and Christian family values.[129] Not entitled to vote themselves, these early female activists believed that "religious duty and family devotion compelled them to act."[130]

act."[130] [Figure 4 here]

Gradually, the various scattered temperance movements took on a unified, organizational character and extended beyond women. In 1869, the Prohibition Party was formed as a third political party to promote a dry platform that neither the Democrats nor the Republicans were wholeheartedly endorsing.[131] In 1874, the nonpartisan Women's Christian Temperance Union (WCTU) was founded to battle against the "destructive power of alcohol."[132] The WCTU was led by the Methodist Frances Willard, who, when her statue was placed in the national capitol in 1905, was described as "the first woman of the nineteenth century, the most beloved character of her time."[133] Although Willard advocated tirelessly for women's rights, including suffrage, prison reform, and protection of the home and family, her main focus was the liquor industry. She believed that temperance was "the seedbed where other reforms would be nourished."[134]

As with earlier waves of temperance activity, the post–Civil War movement gradually progressed from moral suasion to legal approaches, and from localized legal efforts to statewide legislative campaigns. Within years of its establishment, the WCTU made real progress by advocating for measured

Figure 4. The Ladies of Logan sing hymns in front of barrooms in aid of the temperance movement. *Frank Leslie's Illustrated Newspaper*, February 21, 1874. Prints and Photographs Division, Library of Congress, Briggs Collection. Reproduction No. LC-USZ62-90543.

legal and political reforms at the local level. Local option made a resurgence; in the 1870s and 1880s, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, New Jersey, North Carolina, Pennsylvania, South Carolina, and Texas all adopted some form of local option for their towns, cities, or counties.[135] States also experimented with new measures and reinstituted old ones in an effort to limit the excesses of alcohol. For example, Alabama in 1872 banned alcohol near churches, factories, and schools. Nebraska instituted "high license" in 1881, imposing steep license fees that were supposed to restrict the number of retail establishments.[136] New Hampshire, Rhode Island, Iowa, and Kansas in the 1880s authorized nuisance actions to shut down offensive barrooms. Under the nuisance theory, a court or legislature could find the liquor trade to be offensive and noxious and, on that basis, enjoin or abate it.[137]

In keeping with historical trends, the advance of local option and other prohibitory laws was uneven. Although most state courts had come to accept local option by the 1870s,[138] many states wobbled back and forth be-

tween approving, enacting, and repealing these laws. Often they alternated local option with other approaches, such as civil damages laws that held liquor vendors liable for damages caused by intoxicated customers.[139] In New York, for example, a local option law was vetoed in 1872, replaced the following year by a civil damages law, and then supplemented four years later with a strict liquor licensing law.

As America modernized, urbanized, and diversified in the last quarter of the nineteenth century, the movement toward increasingly restrictive alcohol control laws gained momentum. Indeed, the specific cultural context of late nineteenth-century America is critical to making sense of the march towards state and national prohibition. In a pattern not unlike that which ushered in the temperance movement following the American Revolution, rapid social and demographic changes, changing patterns of alcohol consumption, and fear that the "American" identity was under siege contributed to the rise of temperance ideology and restrictive laws. Surges of immigration, rapid urbanization, and mass industrialization thoroughly transformed America in the late nineteenth century. As burgeoning urban centers absorbed the growing population, America began to lose its pastoral, rural identity.[140] America increasingly came to be economically organized not around farms and cottage industries in small towns but rather around assembly lines and mass production taking place in crowded factories. Upton Sinclair's muckraking novel *The Jungle* famously captured the dreariness of these new cities, with their crowded tenements and rusty factories billowing smoke.

It was in the context of these dramatic changes to American daily life that the next wave of alcohol legislation found its new rallying cry—the saloon. With all its seedy implications and associations, the saloon became the unifying image for an increasingly politically ambitious and legally oriented temperance movement. Its role as a social center for working-class and immigrant men and its association with urban vice and corruption made the saloon an ideal target for anxious Americans seeking to control the social changes around them.

Although the historical record is mixed as to whether saloons wholly deserved their loathed place in American political discourse, there is no question that they represented the convergence of many of the most bemoaned changes to American culture. In early nineteenth-century America, taverns sold liquor and provided food and lodging. After the Civil War, the growth of railroads enabled people to bypass the rural taverns, and states "began to recognize and to license the separate existence of the barroom [saloon],

Figure 5. Patrons gather around the bar inside a saloon in the mining town of Turret, Chaffee County, Colorado, circa 1900. Denver Public Library, Western History Collection, x-13904.

which became a place where drinking was not an adjunct to relaxation but rather the central indulgence."[141]

The saloon quickly became a fixture in American urban life. Already by 1872, there were about one hundred thousand saloons in America, which translated to about one for every four hundred persons.[142] By 1900, the number of saloons reached almost three hundred thousand, most of which were in the urban Northeast and Midwest.[143]

Mid-
west.[143] [Figure 5 here]

A key difference between the saloon and the colonial tavern was the introduction of the English tied-house system. Under this system, saloon keepers were not independent operators but rather agents of manufacturers, principally brewers. "In return for a fixed monthly payment and a pledge to sell only a specified brand of beer, brewers would set saloon keepers up in business. Brewers provided the bar, mirrors, taps, and other fixtures, paid saloon licenses, leased the property, and sometimes even built the saloons on land they had purchased."[144] By some accounts, 80 percent of retail outlets saloons in the early twentieth century were tied houses.[145] The increasing competition among brewers led their owners to offer special deals—free

lunches,[146] free rounds (known as "treating"), free goods such as glassware and serving trays, and activities such as billiards, not to speak of gambling and prostitution—all designed to promote the sale of the owner's brand of beer. To attract customers, the saloons stayed open longer hours, often all day and night, and engaged in price wars.[147] These practices occasioned a dramatic increase in the availability of liquor, especially beer, and were a particularly visible display of the culture surrounding alcohol consumption. No longer were retailers the primary symbol of the nefarious liquor trade. Producers, behind the scenes, were calling the shots.

Although there is evidence that saloons played constructive and necessary roles, functioning variously as hiring halls, shelters for the unemployed, and meeting grounds for unions and cultural associations, many saloons earned their reputation for "filth, permissiveness, and irreverence."[148] The historian Thomas Pegram has written, "Among the low-grade places, curtained 'wine rooms,' upstairs bedrooms, and the presence of prostitutes confirmed to worried observers the connection between alcohol and sexual transgression."[149] Saloons, Pegram says, functioned as a site for illegal dealings and electoral corruption, and they came to be "deeply involved in the corrupt flow of money and favors that lubricated the system between elections."[150] Their entrances often were shaded so that passersby could not peer in, and some were situated on upper floors of buildings to heighten the sense of anonymity and unaccountability.

Few things could have propelled Americans toward prohibitory legislation so decisively as the threat of urban decay and physical and moral degeneration. Passed alongside laws to outlaw gambling and prostitution and to curtail the spread of saloons into residential areas and near schools, the local option laws of the 1870s, from the perspective of temperance workers seeking to slow overall liquor consumption, were plainly inadequate. In spite of their value in "isolating wet centers" and breaking "wet opposition into incohesive geographical fragments," local option laws simply did not go far enough to stop the flow of alcohol across city, county, and state lines.[151]

Temperance measures began to make headway even in the historically alcohol-friendly state of California. In 1873, the California legislature passed a bill to ban the sale of liquor within two miles of the Berkeley campus of the University of California.[152] In 1874, the legislature adopted an even bolder measure, which prohibited the sale of liquor on election days.[153] Later that year, a local option law cleared the California legislature, which for the first time authorized regions of the state to prohibit alcohol sales.[154]

In reality, California's election day prohibition was rarely enforced, and the local option bill was extremely mild. Under the law, special local option elections could be held only under very specific circumstances. Even if a majority vote *was* cast for prohibition, liquor still could be sold in the area—just not in quantities of less than five gallons. That law, which essentially functioned as a mild antisaloon measure, existed in the California legal canon for less than six months. In September 1874, the California Supreme Court declared it unconstitutional for unlawfully delegating lawmaking authority to the townships, which were thereby given "governmental and police powers which had never been conferred upon them."[155]

THE SUPREME COURT DIRECTS THE LIQUOR TRADE

The chief obstacle to outlawing liquor in the United States was the fickle voter. In the search for a stable solution, temperance activists lobbied for the adoption of state constitutional amendments to ban alcohol. Although they required a referendum for adoption, constitutional amendments were less susceptible to repeal or to dismantlement by the courts than state or local laws.

Kansas's constitutional amendment of 1880 led the next wave of prohibitory measures in America. During that decade, eighteen other states held referenda on constitutional prohibition.[156] In three of these states, the referendum was called for by a constitutional convention; in the others, the referendum was initiated by the state legislature. Whatever the procedure, voter approval would ensure majority support.

In fact, voters rejected prohibition in two-thirds of the states where referenda were held. Only in Kansas, Maine, North Dakota, South Dakota, Rhode Island, and Iowa did voters approve the referendum. In Rhode Island, the constitutional amendment was repealed almost as soon as it was passed.[157] No additional prohibitory referenda were held from 1891 through 1906. By 1900, only Kansas, Maine, and North Dakota retained constitutional prohibition, and only Vermont and New Hampshire maintained statutory prohibition. Nevertheless, temperance reformers were persistent. Where constitutional amendments and statewide legislation failed, local option often succeeded in drying up large territories, particularly in rural areas.[158]

For its part, the post–Civil War Supreme Court actively directed the course of the liquor trade in America through key rulings on two constitutional precepts: the police power of the states and free trade among the states. In

1868, the Fourteenth Amendment to the United States Constitution was adopted. It provides that "no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Prior to the passage of this amendment, constitutional challenges to state prohibitory laws asserting a "right to manufacture" alcoholic beverages or a "taking" of the manufacturer's products could only be brought under state law; there was no federal jurisprudence. Over the next two decades, the court issued key decisions affirming, as the law of the land, that statewide prohibition did not abridge any rights under the Fourteenth Amendment. In 1874, the court held in *Bartemeyer v. Iowa* that "the right to sell intoxicating liquors, so far as such a right exists, is not one of the rights growing out of citizenship of the United States."[159] Three years later, in *Boston Beer Co. v. Massachusetts,* the Supreme Court upheld Massachusetts's prohibitory law, stating that "if the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State."[160]

Kansas, which was the spiritual center of the temperance movement in nineteenth-century America, was party to the lawsuit that definitively established the right of a state, acting under its police power, to prohibit the manufacture and sale of intoxicating liquors within its borders. In the 1887 case of *Mugler v. Kansas,* a Kansas brewer, backed by the United States Brewers Association, challenged Kansas's constitutional prohibition as a violation of due process under the Fourteenth Amendment. The brewer argued that the state should pay him for a taking of his brewery, which had depreciated in value from fifty thousand to five thousand dollars as a result of statewide prohibition. The court disagreed.

> We cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to everyone, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. . . . The power which the states unquestionably have of prohibiting such use by individuals of their property as shall be prejudicial to the health, the morals or the safety of the public is not, and—consistently with the existence and safety of organized society—cannot be burdened

with the condition that the state must compensate such individual owners for pecuniary losses they sustain by reason of their not being permitted by a noxious use of their property to inflict injury upon the community.[161]

In both its holding and dicta, the court was no friend of the liquor industry. The court's disdain for alcohol, however, did not mean that it would be uphold every exercise of states' rights over the liquor trade. If the prohibitory state law was not uniform in application or discriminated against interstate trade, the Supreme Court would invalidate it. This principle was enunciated in the 1876 case of *Welton v. Missouri,* in which the court overturned a "discriminating" Missouri law that imposed a tax on dealers of goods manufactured out of state (in this case, sewing machines), while exempting dealers of the same goods manufactured in state.[162] The court declared that congressional silence was not an implicit authorization of state regulation. "The fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce . . . is equivalent to a declaration that inter-State commerce shall be free and untrammeled."[163] The court overturned equally discriminatory state liquor laws in *Tiernan v. Rinker* (1880) and *Walling v. Michigan* (1884).[164] In *Tiernan,* a Texas statute imposed taxes on wines shipped from abroad but not on wine produced in state. In *Walling,* the Michigan statute imposed higher taxes on spirits shipped from another state than it did on those distilled in state.

According to the Supreme Court, the Commerce Clause prevented discrimination against interstate trade and affirmatively guaranteed, even in states with nondiscriminatory prohibitory laws, the shipment of alcoholic beverages in their original packages. While seemingly straightforward, this Commerce Clause jurisprudence proved so perplexing that, at a certain point in the march toward National Prohibition, the development of alcohol control law is best understood as an interplay between the courts and the various state and national legislatures over this very issue.

Iowa was the key battleground throughout the second half of the nineteenth century. A dry-leaning state surrounded by wet states—specifically, Missouri and Illinois—Iowa had experienced problems with its liquor laws from the inception of statehood in 1846. Iowa first adopted local option that was never effectively enforced, followed by a license law, and then a "no-license" law under which the state neither licensed nor taxed the retail liquor trade.[165] In 1855, the state enacted its version of the Maine Law, which survived both a vote of the people and a court challenge, but the law was ineffective. Rather than repealing it, the Iowa legislature author-

ized the issuance of liquor licenses if approved by the majority of voters in any county. That never took effect because the law was declared invalid. In 1881, the legislature proposed a prohibitory amendment to the state constitution that was ratified by voters but overturned by the state court.[166] In 1886, Iowa passed a law declaring liquor manufacturing, retailing, and storage to be a public nuisance.[167] When a Chicago railway relied on that law to refuse to ship an Illinois brewer's beer into Iowa, the brewer sought to invalidate the law.[168]

The brewer's case, *Bowman v. Chicago Northwestern Railroad,* was the first of two cases in which the Supreme Court expanded its Commerce Clause jurisprudence. In *Bowman,* the court first reviewed its 1847 decision in the *License Cases* but found that "it was strictly confined to the right of the States to prohibit the sale of intoxicating liquor after it had been brought within their territorial limits. The right to bring it within the States was not questioned."[169] In backing the brewery, the court stated that "the precise line which divides the transaction, so far as it belongs to foreign or interstate commerce, from the internal and domestic commerce of the State, we are not now called on to delineate. It is enough to say that the power to regulate or forbid the sale of a commodity, after it had been brought into the State, does not carry with it the right and power to prevent its introduction by transportation from another State."[170]

From the perspective of frustrated temperance advocates, the court's robust defense of open state borders in *Bowman* meant that the "very existence of wet states" posed a "constant and insidious threat . . . to the order and security of dry states."[171] Mainstream temperance activists wasted no time calling for national action. "Soon after the ruling, the [temperance newspaper] *Voice* declared, 'The Supreme Court makes prohibition a national question.'"[172] In 1888, the WCTU adopted a resolution stating that "all ultimately effective action for suppression of the liquor traffic must come through national legislation."[173]

If the *Bowman* decision nudged the temperance movement towards accepting national approaches to alcohol control, the Supreme Court's 1890 decision in *Leisy v. Hardin* practically ushered in congressional legislation. Leisy Brewery, also in Illinois, had shipped its packaged beer to an Iowa retailer who sold it to consumers in its original package. The local constable, acting under a search warrant, seized the beer, and Leisy petitioned the court to strike down Iowa's prohibitory law as a violation of the Commerce Clause.[174] The court did so in no uncertain terms, overturning the *License Cases* and establishing for the first time the point at which interstate com-

merce protection ended and the state's police power attached. "[The plaintiffs] had the right to import this beer into [Iowa], and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time, we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action, in prohibition of importation and sale."[175] The original package doctrine, which allowed the importation and sale of foreign wine in its original package, now officially included out-of-state liquor.

"The *Leisy* ruling," according to Hamm, "flooded the dry states with liquor."[176] "Within a month of the ruling, 'original packages houses' . . . had sprung up in every prohibition state."[177] These houses, primarily owned by brewers and distillers, soon morphed into so-called supreme court saloons, where customers could buy imported packaged liquor and drink it on the premises in the company of others.[178] Suddenly, dry states that had been waging war against the saloon for decades were confronted by a new and lawful incarnation of their old foe.

Dry crusaders across the country were outraged as they watched years of hard work crumble. Not only dry states but also wet ones were inundated with liquor, because the original package ruling shielded retailers of imported liquor from the state laws that imposed high taxes and stringent operating restrictions.[179] Within three months of the *Leisy* decision, mainstream newspapers were decrying the situation and calling on Congress to take action.

The public was not alone in rallying for congressional action. The language of the *Bowman* and *Leisy* decisions suggests that the court may have been intentionally pressing Congress to get involved. Both decisions are relatively deferential to the goals of temperance ideology, and they specifically point to the absence of congressional direction as the critical factor in their conclusions. In *Bowman,* the court explained that it was legally bound to strike down the state's alcohol regulations "however desirable such a regulation might be," and that only the "consent of Congress, express or implied" could enable such laws to advance.[180] The *Leisy* decision made similar references to "the absence of legislation" on the part of Congress and pointed out that the outcome was unrelated to the justices' "individual views" about "the deleterious or dangerous qualities" of the regulated items.[181]

These various calls for congressional action did not fall on deaf ears. But Congress, in designing its response, refused to enter the prohibition debate directly. As state politicians had done previously with respect to local op-

tion, the national representatives took the most politically expedient course of action—deferring to others, which in this case meant enabling states to implement their own laws. In the summer of 1890, Congress passed the Original Packages Act, commonly known as the Wilson Act after James Wilson, chairman of the Senate Judiciary Committee, who authored it. The Wilson Act provided that "all . . . intoxicating liquors . . . transported into any state or territory . . . for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such . . . liquors had been produced in such state . . . and shall not be exempt by reason of being introduced there in original packages or otherwise."[182] The act was intended not to implement prohibition at a national level but to overcome the constitutional barriers to state prohibitory laws. As the Supreme Court would later opine, the law "empowered the States to regulate imported liquor on the same terms as domestic liquor."[183]

Not surprisingly, the brewers challenged the Wilson Act, alleging that it was an unconstitutional delegation of Congress's commerce power to the states.[184] The court disagreed, finding that "Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. It has taken its own course, and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws."[185] The Wilson Act had immediate consequences: a state for the first time could impose a tax on imported liquor in its original package[186] or regulate the sale of liquor taking place on an interstate carrier within its borders.[187]

THE ANTI-SALOON LEAGUE

Navigating this legal minefield required more than a sense of moral outrage. Howard Russell, a lawyer turned minister, recognized the need for aggressive political and legal action and founded the Anti-Saloon League (ASL) in 1895 as a "temperance trust," combining the support of the churches with that of the business community. The organization had no mass following among voters, but its posture as the "churches united against the saloon" and its endorsement of "omnipartisanship" assured it of much wider influence than its membership rolls would have suggested.[188]

Unlike the WCTU, which was highly selective in picking its battles, the

ASL fought a war against alcohol on all fronts. The ASL also had a "pragmatic and functional approach to law."[189] It pursued constitutional amendments in states where those seemed feasible and offered a model law for states that took the legislative route. Where neither approach was feasible, the ASL focused on turning the tide against the liquor industry with local option battles; the ASL did not share the view among temperance zealots that local option was "too local and too optional."[190] Where local option was infeasible, the ASL pushed for high license and high taxation.

The resulting legal landscape around the turn of the century was complicated and fluid. This was in large part due to the tactics of the ASL, which Szymanski describes as "local gradualism"—focusing on local issues before targeting state and national governments and setting moderate goals before pursuing more radical ones.[191] The Committee of Fifty, a private group of prominent and predominantly Eastern businessmen and academicians investigating the "liquor problem" in the 1890s,[192] captured this diversity of approach when its researchers studied the liquor legislation of eight states during the latter part of the nineteenth century. The committee chronicled five forms of local option operating at various jurisdictional levels down to the township and ward,[193] with different frequencies of voting (from once a year to once every four years); high license; no license; license schemes regulating the number and location of retail premises; laws restricting sales to minors, intoxicated persons, habitual drunkards, and Native Americans; the prohibition of entertainment in barrooms; and the closing of bars on certain days and at certain hours.

Some of these laws were enforced; most were not. For example, in Maine, where prohibitory legislation had existed in one form or other for more than four decades, John Koren, member of the Committee of Fifty, spent three months in 1894 on the streets of Portland, Maine. Koren recounted stories of "blind pigs" (places where liquor was illegally sold), protection and hush money, teenage pocket peddlers selling spilt (a concoction of the cheapest alcohol, sometimes wood alcohol, mixed with water, a dash of rum for flavor and some coloring matter), policemen vying for the rum beats where payoffs were common, and druggists in business solely to sell liquor.[194] Koren's report vividly demonstrated the pitfalls of prohibition, including unavoidable evasion and corruption.[195]

Even when the state intervened more directly, the liquor trade was problematic. In South Carolina, Governor Tillman in 1893 set up a state dispensary and a state board of control to handle all alcohol sales. All production of alcohol in the state was banned. But mismanagement, shoddy enforce-

ment, and corruption were widespread, and the system was dismantled in 1907. "The lesson educed was that half measures could not work, especially when they implicated the state in a dirty business . . . ; once the state sought to rehabilitate the liquor trade by becoming an accomplice, the principles of temperance were irrevocably compromised."[196]

In this lawless setting, Carry Nation, the abused wife of an alcoholic, started her "hatchetation" campaign, smashing up saloons with her band of female brigands, first in Kansas and later around the country between her numerous, but brief, stays in prison. Although treated by the press as a comical figure, Nation focused the nation's attention on the saloon as never before.

before. [Figure 6 here]

The ASL believed that the lawlessness surrounding liquor was largely due to the fact that local police departments and courts, which bore the burden of enforcing the liquor laws, were subject to local political influences. The ASL lobbied for state-level agencies to investigate and enforce liquor laws.[197] The organization also backed the "law and order" movement that had begun in the 1880s, which sought total compliance with federal, state, and local liquor laws.[198] Wayne Wheeler, the politically astute ASL lawyer, advised prohibitionists to "draft your laws so that you can secure cumulative penalties. In other words, with the same evidence you can make a law violator pay the federal tax, and also the state liquor tax. . . . By the above method you can hit a law violator three to five times successively and it usually puts them out of commission."[199]

The ASL, like the WCTU, was in the propaganda business and operated its own publishing company. But the ASL's goals were quite different than those of the WCTU. Befitting its emphasis on education, the WCTU introduced "Scientific Temperance Instruction" into public school curricula around the nation. The WCTU publication *Hygiene for Young People* warned students that "alcohol is a poison" and that "in smaller quantities, or in the lighter liquors—beer, wine, and cider—when used as a beverage, [alcohol] injures the health in proportion to the amount taken."[200] By contrast, Ernest Cherrington, who ran the ASL's publishing arm, commissioned studies to establish the correlation and causation between alcohol (any form of it) and a host of social evils—poverty, crime, child neglect, and an unproductive work force. The ASL then used that information to pressure elected officials and candidates for office, seeking alliances among Progressives, business leaders, church officials, and the intelligentsia.[201]

Other dry organizations further expanded the prohibitory dogma. Mentions of wine were removed from school textbooks, even including the Greek

Figure 6. "A woman's liquor raid—how the ladies of Fredericktown, O., abolished the traf[f]ic of ardent spirits in their town." *The National Police Gazette*, 1879. Prints and Photographs Division, Library of Congress. Reproduction No. LC-USZ62-63909.

and Roman classics. And books were published to prove that biblical references to wine really meant unfermented grape juice.[202]

CALIFORNIA WINES ADVANCE

Paradoxically, as prohibition swept through the country, wine production in California and the rest of the United States continued to grow in volume and prominence. Between 1870 and 1880, the number of vines in the state tripled, and wine production increased proportionately.[203] By 1880, California accounted for 75 percent of the country's wine production.[204] Wine consumption in that year reached a national, century high of one gallon annually per person of the drinking-age population. The California Wine Association (CWA), a privately owned consortium of more than fifty wineries, accounted for 80 percent of California's growing wine trade. Transcontinental rail shipping allowed CWA to access the expanding urban markets back East. Eastern wines also were growing in importance, as

new fungicides, yeasts, and hybrids were developed that improved vineyard and wine quality. The New York "Champagnes"[205] of Great Western and Gold Seal were popular, as were Paul Garrett's "Virginia Dare" wines, originally made from southern Scuppernong grapes.[206]

The wine industry's primary attention was directed not toward prohibition but to three seemingly more pressing problems: the root louse phylloxera, adulteration and misbranding, and liquor taxation. About phylloxera, the winemaker and author Philip Wagner has written: "First it mystified, then it was dismissed as a passing blight, then it was fought with oratory and indignation, and finally it aroused something approaching panic."[207] During the 1880s, after ravaging the vineyards of France, phylloxera attacked most of the vineyards of California. The State Board of Viticultural Commissioners implemented strict quarantine and control measures, but they were ineffective. The ultimate solution was to replant the vineyards using resistant native American rootstock onto which *Vitis vinifera* budwood could be grafted. This had worked in France, with American viticulturalists cast in the role of savior. But it meant that phylloxera-infested vineyards had to be replanted.

Despite this financial setback, California continued to produce fine wines. At the Paris *Expositions Universelles* (World's Fairs) of 1889 and 1900, California wines won twenty-seven gold, silver, and bronze medals on each occasion.[208]

As the reputation and value of California wines grew, and particularly with the shortages due to phylloxera, the number of adulterated and misbranded wines in the market escalated. It was not uncommon to find inferior wines, both foreign and domestic, marketed under California labels. A wine dealer on the East coast, for example, might blend bulk wine from New York and California and, if the resulting quality was poor, adulterate it, then sell it as California wine.[209]

To protect its reputation, California in 1887 adopted the country's first "pure wine" act. The law defined different wine types, such as dry and sweet, and prevented the use of impure "substitutes for grapes," coloring agents, and certain preservatives. It called for inspection of wine samples and the use of bottleneck seals and label certificates identifying the product as "Pure California Wine."[210] Other states followed California's lead. New York and Colorado passed laws against misbranding and adulteration of alcoholic beverages in 1887, Ohio in 1889, Arkansas in 1897, and Oregon in 1905.[211]

Foreign place names were misused even more often than was the name California. The practice of referring to domestic wines as Burgundy, Chablis,

Sauterne, and the like dated back to the earliest days of the American wine industry, when European immigrants used familiar place names to describe the wines they were making in America. After these wines achieved some success in the marketplace, France struck back. At the 1900 Paris World's Fair, all the American wines "with labels affixed bearing a false indication of origin" were rejected.[212] The sole American juror at the World's Fair wine competition was Dr. Harvey Wiley, chief of the Department of Agriculture's Bureau of Chemistry, who later would spearhead the adoption of the federal Pure Food and Drugs Act of 1906. Wiley defended the American wine nomenclature:

> In California the grapes of the Rhine, the grapes of the Gironde, and the grapes of Burgundy are grown. These different varieties of grapes produce different kinds of wine, more or less similar to those of the districts in the old country from which the grapes respectively came. . . . Has not the vinedresser the right to present these different wines to the public under the name of their prototypes, provided their American origin is not concealed or rendered doubtful? . . . [M]oreover, he may have some just claim upon the name of the kind of wine known to the trade and the public as the type that this special product of his most resembles.[213]

Wiley succeeded in overturning the French decision, whereupon the American wine entries were reinstated for judging. But he chided the domestic wine industry to "drop at once and forever the use of all names of foreign origin, and establish the merits of their brands on new and distinctly American names."[214] Wiley's entreaties were ignored; names of foreign origin are used on domestic wines to this day.

To secure its position as market leader, the California wine industry successfully sought protection from foreign competition. Under the McKinley Act of 1890, high tariffs were imposed on imported wines and champagnes, with the result that the domestic market was reserved largely for California wines.[215] California also convinced Congress to eliminate the excise tax on wine spirits used to fortify domestic wines.[216] The act taxed fortified wines solely on the basis of the alcoholic content of the final product, rather than imposing a separate tax on spirits added to the wine. According to Johnson, this saved the winemaker over fifty cents per gallon of wine. "The business of fortifying wines at once began to grow by leaps and bounds under the stimulus, and fortified wines began to crowd 'light' wines out of the market."[217] This was a mixed blessing. Although lucrative, the rapid

growth of fortified wine sales—1.08 million gallons consumed in 1890, 9.725 million gallons in 1900, and 19.5 million gallons in 1910[218]—hurt the industry's image and undercut the claim of wine as a temperance beverage. The government complained loudly about the loss of tax revenue, resulting in the reimposition—with the consent of the fortified wine industry—of a three-cent-per-gallon tax on the added spirits in 1906.[219]

CLOSING THE LOOPHOLES: THE WEBB-KENYON ACT

The simultaneous advance of the wine industry and temperance reform suggested that Americans might perceive wine as being different from beer and spirits, which would have given the wine industry an opportunity to establish a protected niche. If the growth of fortified wines made that more difficult, the Supreme Court's invalidation of the Wilson Act made it plainly impossible.

With that court decision, the state of Iowa was once again front and center in the battle over interstate liquor shipments. A railway station agent in the state had been charged and convicted under the state's prohibitory law—essentially, the same law that was invalidated prior to the Wilson Act—for having received a box of liquor shipped from Illinois to an Iowa resident. The railway company appealed the conviction in the case of *Rhodes v. Iowa,* arguing that neither the Wilson Act nor Iowa's prohibitory law could lawfully apply to consumer-direct interstate liquor sales. The court exonerated the station agent, holding that the state law could not attach to imports before they reached their point of destination within the state.[220] Acknowledging that the Wilson Act "undoubtedly" was intended "to enable the laws of the several states to control the character of merchandise therein enumerated" at an earlier date than would have been otherwise the case, the court interpreted the statutory language "upon arrival in such state" to mean following delivery to the consignee rather than upon crossing the state line.[221] "The right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect, and . . . necessarily must be governed by laws apart from the laws of the several states."[222]

In its holding, *Rhodes* carved out yet another loophole for the entry of liquor into dry states. Although a drinker might be prohibited from purchasing liquor in a dry state, he could order it without unreasonable state interference from out-of-state dealers. The liquor industry quickly reestab-

lished the direct shipment business. Out-of-state dealers in bottled beer and hard liquor advertised in newspapers and mailed circulars, and they employed "drummers" who were paid a commission for orders from dry states.[223] Liquor dealers and transport companies even began to handle shipments addressed to people who had not ordered them, allowing anyone who claimed the original packages to buy them. These cash-on-delivery (COD) stores essentially operated as retailers, and they were ubiquitous.[224] Not surprisingly, dry states reacted by adopting anti-COD laws, but these laws were struck down as an infringement of interstate commerce.[225]

In response to the opening of state borders for liquor sales, the ASL and the dry states turned once more to Congress for national legislation, just as they had after *Leisy.* But this time their demands were more strident. In 1909, Congress passed a National COD Liquor Shipment bill requiring all liquor shippers using interstate commerce to label their packages clearly with the name of the consignee and the shipment's contents.[226] The federal law created strict penalties for agents who delivered shipments to anyone other than the consignee. The prohibitionists, fearful of the court's Commerce Clause jurisprudence, appealed to Congress to do more.

Beginning in 1907, a new and stronger wave of state prohibitory laws rolled across the southern states, attesting to the disconnect between the recent Supreme Court decisions and popular sentiment. The stage had been set by yet another resurgence of local option. According to Cherrington, by 1906 more than a third of the population of the United States was living in territory that was under prohibition by a vote of the people. The prohibitory wave began in the south. In 1907, Georgia and Oklahoma adopted statewide prohibition, the former statutory and the latter by way of a constitutional amendment ratified by voters in a referendum election. The following year, three other southern states joined the movement: Alabama, North Carolina, and Mississippi. Tennessee adopted statewide prohibition in 1909. The vintner Paul Garrett moved his operations from North Carolina to Virginia, and later to New York, to escape the wave of statewide prohibition and expanding local option.[227]

Even after the wine industry recognized the threat of prohibition, its representatives were unable to coordinate their efforts with those in the spirits and beer sectors. The distillers had formed the National Model License League in 1908 to promote the licensing of saloons and to regulate their number and operations. As the historian Austin Kerr has written, "This was a positive program to eliminate the abuses that arose from competition

among the brewers, protect legitimate businessmen, and extinguish the fires of prohibitionist rhetoric in the process."[228] The brewers declined to participate. There were similar rifts among other industry sectors. The historian Gilman Ostrander, who chronicled the prohibition movement in California, has described the politics:

> When, as soon happened, the liquor industry was faced with temperance measures which would outlaw hard liquor while permitting the sale of beer and wine, the wine and beer interests proved themselves willing and eager to throw the liquor men to the drys. Nor was there much love lost between the beer and the wine interests. The sale of beer at retail was thoroughly bound up with the fortunes of the saloon, but only a negligible amount of wine produced in the state was sold over the bar. The wine men, therefore, had no real direct interest in protecting the saloon, so long as the home consumption of alcoholic beverages was not disturbed.[229]

Even within a given tier of the industry, there was dissension. When the National Wholesaler Liquor Dealers Association solicited funds to fight prohibitory laws, only those dealers facing an imminent threat contributed. Some dealers involved in the mail order business declined to join in because prohibitory laws gave them a competitive advantage.[230]

Internal dissension similarly plagued the wine industry. In 1914, the state association of grape growers and vintners, the California Wine Growers' Association, proposed a serious saloon reform measure that entailed strict population limits (one saloon per thousand persons), midnight and Sunday closing, heavy bonds for the proprietors, and the disallowance of any pecuniary interest in a saloon held by a winery, distillery, brewery, or wholesaler. Following "pressure and persuasion by the liquor interests," the Wine Growers' Association dropped the proposal; as Ostrander reported, "Distribution of wine outside the state was in the hands of the wholesale liquor business, and pressure was apparently exerted from that quarter."[231] Similarly, when the grape growers and wine producers considered the possibility of defending their industry on the basis of their production of dry wines, producers of fortified wines protested, as did the State Board of Viticultural Commissioners. The economic justification for their protest was clear: during the years 1909–1913, fortified wines constituted 44 percent of the total wine output of California.[232]

Despite these internal divisions, the consistent popular image of the wine, beer, and spirit industries was of a concentrated "liquor trust." According

to Kerr, "spokesmen for the Anti-Saloon League were well aware that their own rhetoric about 'the liquor trust' was more an exercise in mythmaking than a description of reality. That is, there was no centralized liquor business force."[233] Nevertheless, in an era marked by rapid industrialization, business consolidations, and the birth of antitrust laws, the public generally believed that the liquor trust was monolithic, monopolistic, opportunistic, politically astute, and motivated solely by the aim of selling as much liquor to as many people as possible.

The ASL played repeatedly on this popular conception of the nefarious liquor trade and did not waver in its pursuit of prohibition at all governmental levels. A national presence was important not only because of ongoing Commerce Clause litigation but also because the wave of state prohibitory laws that began in 1907 had crested by 1910. Voters rejected prohibition in Florida, Oregon, and Missouri in 1910, in Texas in 1911, and in Arkansas in 1912. Indeed, prohibition in Alabama was repealed in 1912. Even where state prohibition prevailed, it could not halt all trade in alcohol, as *Rhodes* made clear. Based on a report from the federal Interstate Commerce Commission, one senator estimated that shipping companies in 1911 delivered more than twenty million gallons of liquor into dry territory.[234]

The ASL's national campaign insisted on the right of dry states to stop liquor shipments from outside their borders. In 1913, Congress heeded the dry call and passed the Webb-Kenyon Act. That law, still on the books today, removed the loophole in the Wilson Act that *Rhodes* had uncovered. It prohibits the interstate shipment of "spirituous, vinous, malted, fermented, or other intoxicating liquor [which] is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise," in violation of any law of the state into which they are shipped.[235] Congress's clear intent was to stop consumer-direct interstate liquor shipments.

The Webb-Kenyon Act epitomized the dry conception of the role of federal and state power over alcoholic beverages. The states established the liquor laws, and the federal government assisted the states and facilitated the operation of the state laws.[236] The Webb-Kenyon Act carried no specific provisions for federal enforcement and included no penalties; that was the role of the states. Prosecutions for violation of the state prohibitory laws were to be in state courts. President Taft vetoed the law as an unconstitutional delegation to the states of Congress's power to regulate interstate commerce. So strong was the prohibitionist sentiment that Congress overrode President Taft's veto.

In 1917, the liquor lobby sought to revive the concept of free movement of liquor in interstate commerce by challenging the Webb-Kenyon Act. A divided Supreme Court, in *Clark Distilling Co. v. Western Maryland Railway Co.,* upheld the law. The case concerned West Virginia's seizure at the border of a shipment of distilled spirits destined for personal use inside the state.[237] The court said that the state's prohibition of liquor shipments applied "whether for personal use or otherwise, and whether from within or without the state."[238] Chief Justice White wrote:

> We can see no reason for saying that although Congress, in view of the nature and character of intoxicants, had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one state to violate the prohibitions of the laws of another state through the channels of interstate commerce.[239]

The Webb-Kenyon Act had a significant impact on state lawmakers. West Virginia, for example, passed a point-of-sale law that defined the place of delivery as the place of sale; the state then halted interstate liquor deliveries to dry areas because they violated the state law against liquor "sales." Texas and Delaware adopted laws specifically prohibiting the intrastate shipment of liquor into dry areas; the state then applied those laws via Webb-Kenyon to halt liquor shipments from outside the state. North Carolina made it unlawful to deliver more than a certain amount of liquor per person per month or to possess more than a small amount of liquor. Transportation companies had to keep records of all liquor deliveries, whether from inside or outside the state.[240]

The Webb-Kenyon Act was also decisive at the federal level. According to Cherrington, it "committed the Congress of the United States to a policy which, in essence, recognized the liquor traffic as an outlaw trade and indicated a special desire on the part of Congress to assist the states in the complete enforcement of all prohibitory legislation against the traffic."[241] The ASL, however, realized that liquor laws, once adopted, could just as readily be rescinded. So, in 1913, it formally committed to lobbying for the most stable and permanent form of national prohibition—a prohibitory amendment to the United States Constitution.

In that year, more than 50 percent of the total population of the United States and more than 71 percent of the land mass were under prohibitory

laws.[242] After the elections of 1914, the Senate was comfortably dry.[243] Statewide prohibition, buttressed by the Webb-Kenyon Act, was again resurgent and now spread further through the South and into the West. These developments were important because any constitutional amendment approved by Congress would have to be ratified by three quarters of the states. The stage was set for National Prohibition.