

ALCOHOLIC BEVERAGE CONTROL BEFORE REPEAL

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The adoption of the Twenty-first Amendment on December 5, 1933 terminated the experiment in national prohibition and established a new liquor control policy within the framework of which federal and state governments were to regulate the manufacture, distribution, and sale of intoxicating beverages. Post-Repeal liquor control legislation followed no uniform pattern; the states utilized the control systems of prohibition, state monopoly, and licensing, while the Federal Government established the Federal Alcohol Administration to regulate phases of the liquor traffic that could not be controlled effectively by the states. Legislators seeking to incorporate into those systems the most effective control devices and to avoid the errors of the past looked to the rich history of previous legislative attempts to cope with the liquor problem. The purpose of this paper will be to sketch the salient features of pre-Repeal control systems and to suggest briefly the meaningful lessons that may be learned from the history of American liquor control before Repeal.

CONTROL OVER RETAILERS OF ALCOHOLIC BEVERAGES¹

American legislative attempts to regulate the retail trade in alcoholic beverages have almost invariably been based upon a system of licensing. Patterned after contemporaneous English liquor regulation, colonial control legislation generally required retail liquor sellers to secure licenses.² Colonial legislatures sometimes granted licenses, but usually this power was delegated to the governor, lieutenant governor, local courts, or town councils.³ In some colonies, the number of licenses that could

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¹ There were two classes of liquor retailers: (1) those who sold for on-premise consumption, proprietors of taverns and saloons; (2) those who sold for off-premise consumption, usually grocers and druggists. This section of the paper will emphasize the former because (1) colonial and state legislation detailedly regulated their sales and practices, while off-premise vendors were comparatively unrestricted, and (2) sales for on-premise consumption constituted a much graver threat to the welfare of society than did sales for off-premise consumption.

² On the English experience, see WEBB, *THE HISTORY OF LIQUOR LICENSING IN ENGLAND* (1903) 1-48; Porritt, *Five Centuries of Liquor Legislation in England* (1895) 10 *POL. SC. Q.* 615.

³ 1 *DEL. LAWS* (1700-1792) 193 (governor); *PA. ACTS* (1775) 59, passed in 1710 (lieutenant governor) [the gubernatorial licensing power was only nominal, licenses being issued as a matter of course to those applicants who were recommended by the local court. See SITES, *CENTRALIZED ADMINISTRATION OF LIQUOR LAWS* (1899) 36-38]; *N. C. LAWS* 1741, c. 20, §4 (court); *R. I. ACTS* 1711, 11 (town council). In Massachusetts, the General Court licensed public houses until 1644. *KROUT, THE ORIGINS OF PROHIBITION* (1925) 8, n. 22.

This compilation is of course not exhaustive. It is sufficient for a study of this nature to cite illustrative instances; that procedure has been followed in this footnote and it will be adhered to in subsequent citations.

be issued in certain counties, towns, or municipalities was established by statute.⁴ In others, where no limit was fixed, the licensing agencies were generally very liberal in granting licenses to applicants who were "fit and suitable," paid the necessary license fee, and posted a bond which was conditioned upon compliance with the liquor regulations of the colony.⁵ Some licensing agencies were so liberal that the legislature found it necessary to direct them "to take special care for the suppressing and restraint of the exorbitant number of ordinaries and tipling houses in their respective counties, and not to permit in any county more than one or two."⁶ Violation of the liquor laws by a licensee might involve a fine, forfeiture of his bond, revocation or suspension of his license, refusal of a renewal license, or a combination of these penalties, depending upon the nature of the offense and the number of times the licensee had transgressed.⁷

Public houses—variously termed "ordinaries," "inns," or "taverns"—at which travelers were lodged and liquor was sold for on-premise consumption were the chief dispensers of intoxicating liquors and consequently were the principal objects of colonial liquor legislation. Vendors who sold for off-premise consumption were obliged to comply with some of the rules governing the keeper of a public house, but the latter was subject to a much more pervasive control. In addition to securing a license and posting a bond, the public house proprietor was compelled to comply with a host of restrictive requirements.

His prices were fixed by the legislature or the courts.⁸ Because tavernkeepers often evaded price-fixing regulations by adulteration and short measure, colonial legislatures prescribed standards of measure and interdicted the "fraudulent corrupting and mixing of wines and strong waters."⁹ The prices established by the price-fixing agency were to be "set up in the most public room of his, her, or their houses."¹⁰ Sales to minors, slaves, and servants were not allowed, but this prohibition could generally be removed by the consent of the parent, owner, or master.¹¹ No drinks could be served to "tavern-haunters [whose names] were to be posted at the Door of every Tavern in the same town,"¹² and because many Rhode Island tavern-haunters evaded this restriction by going to neighboring towns, the legislature provided that tavern-haunters should also be posted in as many neighboring towns as the magis-

⁴ 2 N. H. LAWS (1702-1745) 198; MASS. COL. LAWS (1672-1686) 351; Howie, *Three Hundred Years of the Liquor Problem in Massachusetts* (May, 1933) 18 MASS. L. Q. 79, 109.

⁵ KROUT, *op. cit. supra* note 3, at 12.

⁶ 2 VA. LAWS (Hening, 1660-1682) 269; see also 1 N. H. LAWS (1679-1702) 454.

⁷ CONN. ACTS AND LAWS (1784) 243; 1 DEL. LAWS (1700-1792) 194; MD. LAWS (1780) c. 24, §7; MASS. COL. LAWS (1672-1686) 81; 3 VA. LAWS (Hening, 1682-1710) 398.

⁸ MASS. COL. LAWS (1672-1686) 80, 251 (legislature); 1 VA. LAWS (Hening, 1619-1660) 300 (legislature); N. C. LAWS 1741, c. 20, §7 (court); PA. ACTS (1775) 88, passed in 1718 (court; in Philadelphia, the mayor, recorder, and aldermen).

⁹ THOMANN, COLONIAL LIQUOR LAWS (1887) 49. See also 1 VA. LAWS (Hening, 1619-1660) 300; 2 *id.* (1660-1682) 112-113; PA. ACTS (1775) 40, 47, passed in 1705.

¹⁰ 1 DEL. LAWS (1700-1792) 196; Va. Acts 1769, 241.

¹¹ CONN. ACTS AND LAWS (1784) 241; MD. LAWS (1780) c. 24, §17; 1 N. H. LAWS (1679-1702) 36, 117. The restriction against sales to servants and slaves was based partly upon a desire to prevent time-wasting by those classes and partly upon fears of a slave insurrection. KROUT, *op. cit. supra* note 3, at 17.

¹² CONN. ACTS AND LAWS (1784) 242; R. I. LAWS (1798) 394, passed in 1721.

trates thought necessary.¹³ Some colonies provided that liquor debts could not be recovered in the courts while others limited the amount of credit that could be extended.¹⁴ Tavernkeepers were not to serve drinks, except to travelers, after nine o'clock in the evening¹⁵ or on the Sabbath¹⁶ and they were to prevent drunkenness, gambling and disorderly conduct in their establishments.¹⁷ Some innkeepers were not to sell "above halfe a pinte of wyne for one person at one time" or to permit "tipping above the space of halfe an houre."¹⁸

Tavernkeepers were also required to provide "convenient lodging and diet for travellers, and pasturage, fodder, provender and stableage for horses."¹⁹ The requirement was imposed not as a restrictive regulatory measure but for the purpose of encouraging colonial commerce and travel. The same reason induced some legislatures to encourage the establishment of inns by providing that the innkeeper should be the sole seller of liquors in the particular district in which the inn was located.²⁰

Revenue considerations also weighed heavily with the colonial legislator. A wide range of governmental activities had to be supported and the liquor traffic was required to contribute by paying fees, excises, and duties. The taxing power was also used to promote the economic development of the colonies and the empire. Duties were imposed on imported liquors "except alwise what shall come directly from England."²¹ Some colonies, desiring to encourage domestic liquor production, levied discriminatory duties against liquor imported from neighboring colonies.²² Apparently no consideration was given to using the taxing power to promote tem-

¹³ R. I. LAWS (1798) 395, passed in 1725.

¹⁴ MASS. COL. LAWS (1672-1686) 271 (no liquor debts recoverable); 1 VA. LAWS (Hening, 1619-1660) 287 (no liquor debts recoverable); repealed 1 *id.* 295; PA. ACTS (1775) 104, passed in 1721 (limited to 20 shillings); *cf.* CONN. ACTS AND LAWS (1784) 243 (all actions must be brought within two days of the sale). And see Johnson and Kessler, *The Liquor License System—Its Origin and Constitutional Development* (1938) 15 N. Y. U. L. Q. REV. 210, 230 (in Maryland, licensees were required to sell on credit).

¹⁵ CONN. CODE (1650) 59; MASS. COL. LAWS (1672-1686) 80.

¹⁶ 2 N. H. LAWS (1702-1745) 196. Massachusetts required "all Taverners . . . that are within one mile of the meeting-house [to] clear their houses of all able to go to Meeting," and Pennsylvania prohibited tipping on Sunday but permitted tavernkeepers to furnish "victuals and drink in moderation for refreshment only." MASS. COL. LAWS (1672-1686) 83; PA. ACTS (1775) 25, passed in 1705.

¹⁷ 1 DEL. LAWS (1700-1792) 193; PA. LAWS (1738) 96; 1 MASS. ACTS (1692-1714) 57, 154.

¹⁸ CONN. CODE (1650) 58; MASS. COL. LAWS (1672-1786) 81. Both colonies later extended the tipping period to one hour. CONN. ACTS AND LAWS (1784) 242; 1 MASS. ACTS (1692-1714) 154. In New Hampshire, the permissible period was two hours. 2 N. H. LAWS (1702-1745) 196.

¹⁹ 3 VA. LAWS (Hening, 1682-1710) 396. In Maryland, this requirement was enunciated in greater detail: "Every ordinary-keeper . . . shall . . . be obliged to provide and maintain (if such ordinary be kept at the court-house in any county) six good feather beds, more than sufficient for the private use of such ordinary-keeper, with sufficient covering for the same, and Indian corn, oats, hay, straw, and stabling, for ten horses at least; and if at any place in the county other than the court-house, three spare beds, with covering, and sufficient stabling and provender for six horses at least. . . ." MD. LAWS (1780) c. 24, §5. See also CONN. CODE (1650) 61; Duke of Yorke's Laws 1676, 31.

²⁰ Johnson and Kessler, *loc. cit. supra* note 14.

²¹ 3 VA. LAWS (Hening, 1682-1710) 88; N. C. LAWS 1752, c. 1, §5.

²² N. C. LAWS 1751, c. 6: "Whereas, the inhabitants of Anson County do make quantities of strong liquors sufficient for their own use . . . be it enacted . . . that every importer of wine, rum and other spirituous liquor from South-Carolina into Anson County shall pay as a duty. . . ." *Cf.* 2 N. H. LAWS (1702-1745) 361 (imposing duties upon all imports of wine and rum and upon all exports of boards and fish) with 2 MASS. ACTS (1715-1741) 230 (retaliating against the New Hampshire law by imposing duties upon "every hogshhead of rhum that shall be imported from the province of New Hampshire. . .").

perance. Insofar as the imposition of fees, excises, and duties increased the cost of alcoholic beverages and thus discouraged consumption by making liquor more difficult to obtain, the taxing policy was restrictive in effect; but there are few, if any, indications that colonial legislatures consciously used the taxing power for purposes of restrictive social control.

Despite the pervasive control imposed upon liquor sellers, colonial liquor regulation was not designed to interfere with deeply rooted social customs. The use of liquor was generally approved and the colonial legislator did not desire either to discourage or prohibit the consumption of liquor.²³ His main purposes were to suppress public disorder and drunkenness, prevent profiteering and adulteration by tavernkeepers and time-wasting by servants and slaves, encourage domestic and empire liquor production, facilitate colonial commerce and travel, and secure an adequate revenue for colonial treasuries.

The pattern of colonial liquor control was not perceptibly altered after the establishment of the federal union. The colonial opinion that moderate use of intoxicants was helpful and stimulating continued to prevail. But gradually the temperance societies which opposed the use of intoxicants except for medicinal purposes succeeded in changing the popular attitude.²⁴ As a result, several states enacted prohibitory laws in the eighteen thirties and forties²⁵ and licensing restrictions became more numerous and onerous.

Some restrictions that originated in the colonies were also imposed upon the saloonkeeper of the nineteenth and twentieth centuries. Sales on Sundays, or after closing hours, or to minors, habitual drunkards, and intoxicated persons were prohibited in practically every state.²⁶ Gambling in saloons and sales on credit were also forbidden.²⁷ A few states preserved the provision that sales for on-premise consumption should be limited to establishments able to furnish lodging for travelers,²⁸ but this requirement which was a distinctive feature of colonial control systems was not generally retained after the first half of the nineteenth century. Legislative determination of the number of outlets and judicial or legislative price fixing were also abandoned by most states.²⁹ Other restrictive measures prohibited the employment of women or minors and provided that saloons should not be operated within certain distances of schools, churches, and public parks and should be closed on election

²³ CHERRINGTON, *THE EVOLUTION OF PROHIBITION IN THE UNITED STATES* (1920) 11. See also Howie, *supra* note 4, at 110.

²⁴ COLVIN, *PROHIBITION IN THE UNITED STATES* (1926) c. I.

²⁵ See *infra*, p. 558.

²⁶ See *CYCLOPEDIA OF TEMPERANCE AND PROHIBITION* (1891) 275-360; and Osborn, *Liquor Statutes in the United States* (1888) 2 HARV. L. REV. 125, for a digest of state liquor laws.

²⁷ *Ibid.*

²⁸ DEL. CODE (1915) §161 (not applicable to licensees in towns of over 2,000 inhabitants); N. Y. Laws 1857, c. 629.

²⁹ But see KY. STAT. (1873) c. 106, art. I, §11 (county court to fix prices). Limitation of outlet legislation was, however, later enacted by several states. See, e.g., Mass. Laws 1888, c. 340 (one licensee for every 1,000 population; in Boston, one to every 500); Ohio Laws 1913, no. 108, §24 (one saloon for every 500 population; on petition of 35 percent of voters, election to be held to determine whether the number of saloons should be further limited).

days and holidays.³⁰ Less frequently the statutes prohibited indecent pictures, games, music, sales to women, the use of screens, curtains, and blinds to obstruct a clear view of the interior of the premises, and the practice of "treating."³¹

A substantial number of states further burdened the dispenser of intoxicating beverages by enacting civil damage acts.³² One form of these statutes gave a right of action against the liquor dealer and his lessor to persons damaged because of the intoxication of persons supplied with liquor by the dealer. Another form provided that liquor sellers who sold intoxicants to an habitual drinker, contrary to instructions from the drinker's relatives, should pay the latter a statutory penalty. These laws differed in detail but their underlying purpose was the same: to impose upon the liquor dealer responsibility for some of the consequences of his traffic. Although many wives were reluctant to bring suit either because of the uncertainties and expense of litigation or because husbands "persuaded" them not to do so, these statutes did have a wholesome effect in deterring saloonkeepers from engaging in activities that would subject them and their bondsmen to liability under the civil damage acts.³³

Several states created still another weapon to be used in suppressing the illegal liquor traffic by providing that the unlawful sale of intoxicants constituted a nuisance which could be enjoined; these statutes also authorized the abatement of the nuisance by the removal and sale or destruction of the liquors and the closing of the building for a given period.³⁴ The advantages of this procedure were that a hostile jury could not thwart the statutory policy by refusing to convict and that equitable proceedings, usually being more expeditiously administered than criminal proceedings, permitted a speedy disposition of liquor cases.

Practically every person who retailed intoxicating liquors was required to secure a license from the proper licensing agency.³⁵ The underlying theory of a license

³⁰ *Loc. cit. supra* note 26. Some southern states, instead of prohibiting sales within 200, 300, or 400 feet of schools, as was commonly done by northern states, enacted special laws banning sales within one, two, three, or four miles of a particular school, thereby imposing prohibition upon the surrounding community. See, e.g., Ark. Laws 1881, nos. 9, 10, 11, 20, 30, 34, 55, 64, 91; and see no. 74, providing that if a majority of the adult inhabitants residing within three miles of any school should petition that liquor sales be prohibited within three miles of the school, the county court should so order. See also *infra*, p. 558.

³¹ IOWA CODE (1897) §2448 (prohibiting indecent pictures, games and music); R. I. Pub. Laws 1889, c. 816, §12 (prohibiting sales to women); DEL. CODE (1915) §183 (anti-screen provision); NEB. COMP. STAT. (1889) c. 50, §31 (anti-treating provision); and see Woods, *License in Place of Licensing* (1916) 36 SURVEY 635.

³² LAWSON, *The Civil Remedy for Injuries Arising from the Sale or Gift of Intoxicating Liquors*, published in BOOK OF MONOGRAPHS (1877); BLACK, *INTOXICATING LIQUORS* (1892) c. 13; Vicars, *Construction of the Illinois Dram Shop Act Imposing Liability upon Tavernkeeper and His Lessor for Injuries Caused by Intoxicated Persons* (1939) 14 NOTRE DAME LAWY. 295.

³³ FANSHAWE, *LIQUOR LEGISLATION IN THE UNITED STATES AND CANADA (circa 1894)* 94.

³⁴ Rounds, *Injunctions Against Liquor Nuisances* (1896) 9 HARV. L. REV. 521; BLACK, *op. cit. supra* note 32, c. 14.

³⁵ Two states, however, did not in theory require a license. In Ohio, the constitution of which provided that "No license to traffic in intoxicating liquors shall . . . be granted in this State," and in Iowa, the statutes of which prohibited the sale of intoxicants, licenses were not granted, but "mulct laws" levied a tax upon all who sold alcoholic beverages. The payment of the tax did not constitute a license or legalize the business. In Iowa, upon compliance with certain other conditions [see IOWA CODE (1897) §2448], pay-

system being that licenses should be granted only to competent and trustworthy persons on such conditions as will protect the community from evils incident to the sale and consumption of liquor, the functioning and nature of the licensing authority is crucially significant. Despite the importance of selecting the best possible licensing agency, the licensing statutes contained a bewildering assortment of schemes. Some states vested the licensing power in the local governing body—county commissioners, city or village council, township board—or provided that the local governing body should appoint a licensing agency.³⁶ Other statutes placed the power in a commissioner or board appointed by the governor.³⁷ Still other states gave the licensing power to the courts.³⁸ Even within a single state there might be a variety of expedients.³⁹

Other provisions pertaining to licensing liquor sellers exhibited the same variety of treatment. Most statutes gave the licensing agency a broad discretion to refuse licenses, but in some states licenses could only be refused for cause.⁴⁰ Sometimes the applicant had to secure the approval of the adjoining property owners, or of a majority of the freeholders within the licensing area or within three miles of the premises, or of a stated number of persons within the political unit in which the saloon was to be located.⁴¹ Provisions for public notice of the application and opportunity for

ment of the tax merely suspended the penalties that otherwise would have been imposed for an illegal sale; and in Ohio, failure to pay the tax merely subjected the defaulter's goods and chattels to levy and sale by the county treasurer. See WINES AND KOREN, *THE LIQUOR PROBLEM IN ITS LEGISLATIVE ASPECTS* (1897) 136-140, 292-299.

³⁶ R. I. PUB. LAWS (1896) c. 102, §§1-3; WASH. STAT. (Hill, 1891) §§2808, 2809; WIS. REV. STAT. (1878) §1548; WYO. COMP. STAT. (1901) §2833.

³⁷ 2 MO. REV. STAT. (1909) c. 63, art. II (in cities over 300,000 an excise commissioner appointed by the governor grants licenses); MASS. PUB. STAT. (1882) c. 100, §26, Mass. Laws 1885, c. 323 (Boston board of police which grants licenses is appointed by the governor); N. H. LAWS 1903, c. 95 (governor appoints a state board which grants licenses). See also Ohio Laws 1913, no. 108 (establishing a state board to be appointed by the governor, the state board to appoint local licensing boards).

³⁸ KY. STAT. (1873) c. 106, art. I, §1; 2 PA. DIG. STAT. (Purdon, 1700-1903) Liquors, §17; TEX. REV. STAT. (1911) art. 7447; 2 VA. CODE (Pollard, 1904) 2254.

³⁹ See Koren, *The Status of Liquor License Legislation* (1913) 2 NAT. MUN. REV. 629, where it is stated at 631: "Perhaps no commonwealth furnishes a more perfect example of confused conditions relative to licensing authorities than New Jersey. There licenses to sell liquor may be granted: (1) By the court of common pleas; (2) by a city council, common council, board of aldermen or other governing body; (3) by an excise board appointed by the court of common pleas; (4) by an excise board elected by a city council or other governing body; (5) by an excise board nominated by a mayor and confirmed by a city council; and (6) by an excise board chosen at a general election. It is held, moreover, that when a city adopts the commission form of government under the new law, all power to deal with liquor licenses becomes vested in the commissioners. The statutes from which the different licensing bodies derive their existence date as far back as 1838 and reach down to 1911. It can hardly be maintained that New Jersey attempted to meet half a dozen essentially different conditions within her borders by as many varieties of licensing authorities. They appear largely to be the results of accident rather than of a well-conceived plan."

⁴⁰ FANSHAW, *op. cit. supra* note 33, at 82-83, 288.

⁴¹ Ga. Laws 1884, c. 422 (applicant must file written consent of ten "of the nearest *bona fide* residents, five of whom shall be freeholders, owning land . . . nearest to the place of business where" the liquors were to be sold); Mo. Laws 1883, 86, §4 (majority of assessed taxpaying citizens in the square or block in which the saloon was to be located had to sign a petition); Ind. Acts 1873, c. 59, §2 (applicant must file a petition signed by a majority of the voters in the town, township, or ward in which the saloon was to be located); Ga. Acts 1887, no. 189, *id.* 1889, no. 481 (requiring applicants in named counties to file a petition signed by two thirds of the freeholders residing within three miles of the premises or signed by two thirds of the freeholders residing within the corporate limits of towns or

remonstrance by interested parties were incorporated into some statutes and omitted in others.⁴² Generally a bond—varying in amount from \$250 to \$6,000—conditioned upon compliance with the liquor laws and payment of civil damage act liabilities was required.⁴³ Violation of the liquor statutes usually involved, in addition to a fine and/or imprisonment, forfeiture of the license and disqualification for future licenses; but here again there were various provisions. In some cases, the licensing authority was given power to revoke the license of a licensee who had violated the liquor laws; in others it was required to do so; and in still others, the court was authorized to forfeit the license of a convicted licensee.⁴⁴ A person whose license had been revoked was thereafter disqualified from securing another license until a stated period had elapsed.⁴⁵

Some statutes fixed a single fee for a single license that was to be issued to all sellers of intoxicants; others established several classes of licenses and fixed different fees for them.⁴⁶ Occasionally the amount of the fee depended upon the volume of the licensee's sales or upon the amount of stock on hand or intended to be kept on hand.⁴⁷ Several states, following the lead of Nebraska which in 1881 fixed a minimum annual fee of \$500 for saloons in towns of less than 10,000 population and one of \$1,000 for those in cities of more than 10,000, enacted so-called "high-license" laws.⁴⁸ These laws were originally sponsored by prohibitionists in the hope that they would decrease the drink traffic by eliminating a large number of sellers. It was also felt that a licensee who paid a high price for his privilege (a) would not risk its revocation by violating the restrictions imposed and (b) would assist in suppressing unlicensed

villages); DEL. REV. CODE (1915) §161 (twelve respectable citizens, half of whom shall be substantial freeholders, must petition).

⁴² The remonstrance provisions varied considerably. In Pennsylvania [2 PA. DIG. STAT. (Purdon, 1700-1903) LIQUORS, §17], the licensing authority was to conduct a hearing (at which the remonstrants could present their objections) and then decide whether a license should be issued, while in Rhode Island [R. I. PUB. STAT. (1882) c. 87, §2], if the owners or occupants of the greater part of the land within 200 feet of the premises should object, no license could be issued, and in Mississippi [MISS. REV. CODE (1880) §1103], the petition of a majority of the legal voters resident in the supervisor's district or incorporated town against granting a license would prevent its issuance. A similar Kentucky statute [KY. STAT. (Carroll, 1909) §4203] provided that the protests of a majority of the legal voters "in the neighborhood where the liquor is to be sold" would invalidate an applicant's petition; the licensing agency, which was the county court, was to determine what constituted the "neighborhood." In Massachusetts [1 MASS. REV. LAWS (1902) c. 100, §15], the written objection of any owner of real estate within 25 feet of the premises described in the application was sufficient to prevent the issuance of a license.

⁴³ Osborn, *supra* note 26, at 131.

⁴⁴ ILL. REV. STAT. (Hurd, 1887) c. 43, §4 (licensing agency authorized but not required to revoke license); 1 WIS. STAT. (Sanborn & Berryman, 1889) §1559 (licensing agency required to revoke license for violation of liquor laws); 2 PA. DIG. STAT. (Purdon, 1700-1903) LIQUORS, §17 (court required to revoke license); see *In re Carlson's License*, 127 Pa. 330, 18 Atl. 8 (1889); BLACK, *op. cit. supra* note 32, §§189-197; FANSHAW, *op. cit. supra* note 33, at 87.

⁴⁵ 1 MASS. REV. LAWS (1902) c. 100, §47 (one year); R. I. LAWS 1889, c. 816, §11 (five years); 1 MO. REV. STAT. (1899) §3013 (no license to be issued to person whose license has once been revoked).

⁴⁶ VT. ACTS 1902, no. 90, §23 (7 classes); N. H. LAWS 1903, c. 95, §6 (8 classes); 1 MASS. REV. LAWS (1902) c. 100, §18 (7 classes). In a few states, license fees could be determined by the voters at an election held for that purpose. See *e.g.*, 1 WIS. STAT. (Sanborn & Berryman, 1889) §1548b.

⁴⁷ ARIZ. REV. STAT. (1887) §2239 (volume of sales); CALIF. POLIT. CODE (Deering, 1885) §3381 (volume of sales); MD. CODE (1888) Licenses, §§57-68 (amount of stock).

⁴⁸ 4 STANDARD ENCYCLOPEDIA OF THE ALCOHOL PROBLEM (1928) 1541-1547.

sellers. The prohibitionists soon turned against high license on the grounds that the payment of a high license fee was an incentive to stimulate sales and that the substantial revenue received from the license fees perverted the better judgment of prohibition-inclined voters. High license certainly did not accomplish all its sponsors hoped, but in the opinion of most observers the objectives of reducing the number of liquor sellers and of coercing a higher standard of action were partially achieved.⁴⁹

The patchwork of pre-Repeal licensing legislation did not represent a satisfactory solution of the liquor problem.⁵⁰ Only rarely was there a recognition that the drink evil was primarily caused by the use of liquors in which the percentage of alcohol was comparatively high—the so-called hard liquors, particularly whisky. Consequently there was no appreciable effort to encourage the use of beer and light wines by legislation that discriminated in their favor and against hard liquors. At best, however, the system of licensing private retail liquor sellers was basically unsound for it did not remove the element of private profit. The objective of all liquor legislation should be the encouragement of temperance. Stimulation of liquor sales—an inevitable accompaniment of a licensing system based upon private profit—is incompatible with that goal. Further, the liquor problem became a recurring political issue that occupied the interest of the electorate to the exclusion of equally or more significant questions, often causing the election of incapable executive and legislative officials solely because of their views concerning the liquor question.⁵¹ Finally, many restrictions were often violated with impunity because the liquor interests had sufficient political power to prevent prosecution. This “unholy alliance” between liquor and politics was usually most pronounced where the liquor traffic was regulated by the local governing agency, and public disapproval of it was a prime reason for the adoption of the Eighteenth Amendment.⁵²

CONTROL OVER PRODUCERS AND DISTRIBUTORS OF ALCOHOLIC BEVERAGES

Liquor producers and distributors were comparatively free from the restrictive control imposed upon retailers. Some colonies regulated certain manufacturing processes (such as the Massachusetts prohibition against use of lead pipes by distillers), interdicted adulteration, and encouraged domestic liquor production.⁵³ State regulation did not go far beyond this. Licenses were usually required; and in securing the license, applicants were sometimes obliged to comply with provisions similar to those governing the issuance of retailer licenses, such as securing the approval of a stated number of electors.⁵⁴ Several statutes enabled a liquor producer to protect his brand name by filing it with the appropriate functionary,⁵⁵ and some states in which a

⁴⁹ FANSHAWE, *op. cit. supra* note 33, at 76. Compare HARRISON AND LAINE, *AFTER REPEAL* (1936) 194.

⁵⁰ KOREN, *supra* note 39, at 634.

⁵¹ *Report of the Committee on Liquor Control Legislation of the National Municipal League* (1934) 23 NAT. MUN. REV. 47, 50.

⁵² See THE LIQUOR PROBLEM (Committee of 50, 1905) 75-78, and see *infra* p. 564.

⁵³ THOMANN, *COLONIAL LIQUOR LAWS* (1887) 34, 35, 69.

⁵⁴ See *e.g.*, DEL. CODE (1915) §185.

⁵⁵ 1 MD. LAWS (1903) art. 27, §297; 2 WIS. STAT. (Sanborn and Berryman, 1889) §4470a.

particular type of intoxicant was produced enacted legislation regulating its manufacture.⁵⁶ But the most pervasive regulation to which liquor producers were subject was that imposed by the Federal Government to ensure the collection of taxes levied upon producers of distilled spirits and fermented liquors.⁵⁷ The requirements concerning distillers (chosen at random from the United States Revised Statutes of 1875) that are listed in the footnote sufficiently illustrate the pervasive nature of internal revenue control.⁵⁸

State and federal governments were fairly active in preventing adulteration and misbranding of intoxicating liquors. Early legislation prohibiting adulteration was sometimes directed specifically against the practice of adulterating intoxicants.⁵⁹

⁵⁶ See *e.g.*, Calif. Laws 1887, c. 36, *id.* 1907, c. 104 (regulating manufacturing of wine); Ky. STAT. (1909) §2572a (regulating certain distillery practices). *Cf.* Wis. STAT. (1913) §1557 (establishing standards and definitions for malt beverages).

⁵⁷ Federal taxation in this field consisted of (1) a relatively small annual "special tax" imposed upon producers and distributors and (2) an excise tax measured by the quantity of liquor produced. Internal revenue taxes were first imposed in 1791, repealed in 1802, re-enacted in 1813 to help defray the cost of the War of 1812, and repealed again in 1817. In 1862, because of Civil War expense, Congress enacted a comprehensive internal revenue bill, a portion of which imposed excise taxes on distilled and fermented liquors and a "special tax" upon producers and distributors.

A "special tax" was also imposed upon all retailers of intoxicating liquors. Many state statutes provided that payment of the United States tax as a liquor seller constituted *prima facie* evidence that the persons paying it were sellers of intoxicating liquors. Internal revenue records concerning the tax on retailers generally disclosed, especially in prohibition states, that large numbers of individuals, who according to state law could not legally sell liquor, paid the federal retailer tax. The only fair conclusion is that there was widespread violation of state liquor laws. See *infra* note 91, and see ROWNTREE AND SHERWELL, *THE TEMPERANCE PROBLEM AND SOCIAL REFORM* (7th ed. 1900) 131-134.

⁵⁸ Before a person could become a distiller, he had to file a notice of intention to carry on the business of distiller, specifying the kind of stills, the cubic contents thereof, and other pertinent information, and also file a bond conditioned that he would comply with the law, pay all penalties and fines, and not permit the land on which the distillery was situated to become encumbered during the time in which he carried on the distilling business (§§3259, 3260). He was required either to own in fee, unencumbered by any lien, the land on which the distillery was to be situated or to secure the written consent of the owners and any lienholders that the lien of the United States for taxes and penalties should have priority; if, for enumerated reasons, such consent could not be obtained, the applicant was to file a bond signed by not less than two sureties conditioned that if the distillery were forfeited for violation of the law, the obligors would pay the amount stated in the bond, which was to be equal to the appraised value of the land (§3262). Prior to the approval of his bond, the would-be distiller had to submit an accurate plan of the distillery and no alteration could be made in the distillery without the consent in writing of the collector of internal revenue (§3263). The building and plant had to conform to certain specifications established by Congress and some parts of the distillery were to be under the lock and seal of an officer of the internal revenue department (§3267). At any time of the night or day, any revenue officer could lawfully enter any distillery and it was the duty of the distiller to furnish him with all means necessary to inspect the premises (§3277). Every distiller was required to post a sign, "Registered Distillery," outside his place of business (§3279). It was illegal to operate any still between eleven p.m. Saturday and one a.m. Monday or to make any mash or remove any liquor in the absence of the government storekeeper (§§3283, 3284). Fermenting tubs could not be filled more often than was prescribed by law and liquor was drawn off, gauged, and marked subject to the regulations of the Commissioner of Internal Revenue (§§3285, 3287). These and other regulations (§3449) providing for the marking of liquor came to be regarded by the trade as a guarantee of the genuineness of the product. 3 *STANDARD ENCY. OF THE TEMPERANCE PROBLEM* (1926) 1329. This list of internal revenue requirements is by no means complete; it is sufficient however to illustrate its detailed character.

⁵⁹ *E.g.*, Pennsylvania in 1705 prohibited the adulteration of "rume, brandy, or such like spirits." PA. LAWS (Dunlop, 1700-1852) 56. See also THOMANN, *COLONIAL LIQUOR LAWS* (1887) *passim*.

Later enactments, including the Federal Food and Drugs Act of 1906,⁶⁰ were more comprehensive, being designed to prevent adulteration and misbranding of foods and drugs.⁶¹ Inasmuch as the term "food" was almost invariably defined to include liquor, these laws regulated liquor manufacturing and labeling practices.⁶² The procedure followed in administering these acts generally involved the adoption of definitions or standards to which the product and its label were to comply. In a few states, certain types of liquor were defined by statute, while in others, power to adopt definitions and standards was delegated to the enforcing officials.⁶³ In still others, the standards and definitions established by the Secretary of Agriculture were to be incorporated into the state law.⁶⁴ In fact, the Food and Drugs Act did not give the Secretary power to establish food standards; but he did promulgate advisory standards which satisfied the requirements of these state statutes.⁶⁵

The most prominent Food and Drugs Act ruling concerning intoxicants involved the proper use of the term "whisky." The story of its promulgation merits telling, for it depicts the administration of the Food and Drugs Act in the alcoholic beverage field and presents a revealing sidelight on the character of President Taft who gave vent to his judicial temperament by participating in the administration of the Food and Drugs Act. Shortly after the adoption of the Act, the Department of Agriculture, which administered it, ruled that a mixture composed of 51 percent straight whiskies and 49 percent neutral spirits could not be labeled blended whiskies because such a label would be misleading.⁶⁶ A few months later, Attorney General Bonaparte, acting at the request of President Roosevelt, issued an opinion which approved the Department's ruling.⁶⁷ The opinion reasoned that neutral spirits were not whiskies and inasmuch as Section Eight of the Act defined a blend as a "mixture of like substances," a mixture of straight whisky and neutral spirits could not properly be labeled a blend. Such a mixture should be branded "Whisky. A compound of grain distillates."⁶⁸ The opinion also ruled that neutral spirits mixed with harmless coloring

⁶⁰ 34 STAT. 708 (1906).

⁶¹ Conover, *National, State and Local Cooperation in Food and Drug Control* (1928) 22 AM. POL. SC. REV. 910; Salthe, *State Food, Drug and Cosmetic Legislation and Its Administration* (1939) 6 LAW AND CONTEMP. PROB. 165.

⁶² The federal definition is illustrative: "The term 'food,' as used herein shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound." FOOD AND DRUGS ACT, §6.

⁶³ WESTERVELT, *AMERICAN PURE FOOD AND DRUG LAWS* (1912) contains a comprehensive digested compilation of the various food and drugs acts, and related legislation. See especially §§26, 28, 61.

⁶⁴ *Ibid.*

⁶⁵ Salthe, *supra* note 61, at 167.

⁶⁶ Food Inspection Decision 45 (1906) (hereinafter cited F. I. D.). Food Inspection Decisions are in the nature of expressions of opinion by the Department of Agriculture. The Department thus explained their status: "The opinions or decisions of this Department do not add anything to the rules and regulations nor take anything away from them. They therefore are not to be considered in the light of rules and regulations. On the other hand, the decisions and opinions referred to express the attitude of this Department in relation to the interpretation of the law and the rules and regulations. . . . They are . . . issued more in an advisory than in a mandatory spirit." F. I. D. 44 (1906), quoted in Hayes and Ruff, *The Administration of the Federal Food and Drugs Act* (1933) 1 LAW AND CONTEMP. PROB. 16, 20.

⁶⁷ 26 OPS. ATTY. GEN. 216 (April 10, 1907).

⁶⁸ *Id.* at 228-231. This ruling was qualified by the requirement that the neutral spirits be distilled from grains and that there be "enough whisky in [the mixture] to make it a *real* compound and not

and flavoring substances so as to have the appearance and flavor of whisky should be labeled "Imitation whisky." These rulings were approved by President Roosevelt who directed the Secretary of Agriculture to administer the Act in accordance therewith.⁶⁹ Distillers who were thus obliged to use the labels "Imitation whisky" and "Whisky. A compound of grain distillates," contrary to trade practices that had to some extent prevailed for many years,⁷⁰ induced the Attorney General to grant a hearing concerning the correctness of his opinion, but the earlier decision was not changed.⁷¹ Approximately nine months later, on February 19, 1909, the Attorney General rendered a third opinion in which he re-affirmed the conclusions of his earlier decisions.⁷² A few weeks later Mr. Taft became President, and the distillers immediately appealed to him. The President referred the question to Solicitor General Bowers who conducted a hearing and submitted an opinion.⁷³ President Taft then took sufficient time from his executive duties to hear arguments on the correctness of the Solicitor General's findings, to read "with care the entire evidence adduced,"⁷⁴ and to write and issue what is known as the Taft Report.⁷⁵ The President maintained that the question was "one of correct branding to prevent deception of the public as to what it was buying" and he concluded that it was the understanding of the trade and of consumers that the term whisky "included all potable liquor distilled from grain."⁷⁶ Therefore neutral spirits which were distilled from grain and which were colored and flavored with harmless substances in the customary manner were entitled to be labeled whisky; and a mixture of neutral spirits distilled from grain and straight whisky could rightfully be labeled a "Blend of whiskies" because both substances were whiskies and a blend is a mixture of like substances. The Report also ruled that whisky should be so branded as to show exactly the kind of whisky it was. These Presidential rulings were accepted by both the Department of Agriculture and the trade, and apparently settled the question of how whisky

the mere semblance of one." On December 7, 1908, the Attorney General ruled that "enough whisky" would be not less than one third by volume of straight whisky. F. I. D. 98 (1908).

⁶⁹ F. I. D. 65 (1907).

⁷⁰ *Woolner & Co. v. Rennick et al.*, 170 Fed. 662, 665 (C. C. S. D. Ill. 1908).

⁷¹ 26 OPS. ATT. GEN. 262 (May 29, 1907).

⁷² 27 *Id.* 202 (Feb. 19, 1909). In this opinion the Attorney General cited two cases involving an internal revenue provision, Section 3449 of the Revised Statutes (making it illegal to ship, transport or remove any liquors "under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks or packages containing the same") that sustained his position.

⁷³ *Report of the Solicitor General to the President upon Certain Questions Submitted to Him Concerning the Meaning of the Term "Whisky"* (1909), printed in FEDERAL FOOD AND DRUGS ACT AND DECISIONS (1914) 818.

⁷⁴ The hearing before Mr. Bowers was very extended; the testimony comprised 2,365 pages, in addition to a voluminous mass of documentary evidence.

⁷⁵ Taft, *What Is the Meaning of the Term "Whisky" Under the Pure Food Act and the Proper Regulations for Branding Various Kinds of Whisky Under the Internal Revenue Act?* (1909), printed in THORNTON, LAW OF FOOD AND DRUGS (1912) 450-461.

⁷⁶ The President also stated that ". . . straight whisky is, as compared with the whisky made by rectification or redistillation and flavoring and coloring matter, a subsequent improvement, and . . . therefore it is a perversion of the pure food act to attempt now to limit the meaning of the term 'whisky' to that which modern manufacture and taste have made the most desirable variety." THORNTON, *op. cit. supra* note 75, at 457.

should be labeled until some 25 years later when the adoption of the Twenty-first Amendment raised the problem anew.⁷⁷

Consumer protection against adulterated and misbranded liquors given by the food and drugs acts was not paralleled by effective governmental action against price control by producers. Despite the Sherman Anti-Trust Act of 1890⁷⁸ and similar state constitutional and statutory provisions, some of which were in force before the federal enactment,⁷⁹ combinations of liquor producers kept liquor prices at relatively high levels.⁸⁰ From 1890 to the time of Repeal, the price of spirits was substantially higher than the general price level—in some years, more than 30 percent over the general index.⁸¹ Failure of the appropriate enforcing officials to curb these combinations may perhaps be attributed to the political power of the liquor interests, for there is ample evidence of their political force.⁸² Whatever the reason, there was a deplorable failure to prevent price fixing.

Another instance of governmental inability to control effectively the activities of producers and distributors is found in the so-called "tied-house" relationship between producers and distributors on one side, and retailers on the other. Under the tied-house arrangement, brewers, distillers, and wholesalers financed the establishment and/or maintenance of saloons and thereafter controlled the saloonkeeper they had assisted. Legislation against the tied-house system was occasionally enacted,⁸³ but it was not very effective.⁸⁴ Several undesirable consequences resulted from this tie-up between saloons and the liquor interests. Saloonkeepers were under a continual

⁷⁷ Some other distilled spirits labeling problems under the Food and Drugs Act were treated in the following: Regulatory Announcement of Jan. 25, 1916, printed in 1 DUNN, *FOOD AND DRUG LAWS* (1927) 35 (the statement of quantity on the bottled-in-bond internal revenue stamp does not satisfy the requirements imposed by the amendment of March 3, 1913, 37 STAT. 732, that the quantity of the contents of any package shall be plainly and conspicuously marked on the outside thereof); Regulatory Announcement of Jan. 26, 1916, printed in 1 DUNN, *op. cit.*, at 54 (substances labeled or sold as "Scotch whisky" which are not manufactured in Scotland are deemed misbranded); F. I. D. 126 (1910) ("Canadian Club Whisky" is such a "distinctive" name under the provisions of Section 8, paragraphs 10 and 11, that it need not be labeled "A blend of whiskies"); *United States v. 36 Bottles of London Dry Gin*, 205 Fed. 111 (E. D. Pa., 1913) (jury question whether the use of the label "London Dry Gin" resulted in false branding as to the country in which the liquor was produced) *rev'd on other grounds*, 210 Fed. 271 (C. C. A. 3d, 1914).

⁷⁸ 26 STAT. 209 (1890).

⁷⁹ Legis. (1932) 32 COL. L. REV. 347.

⁸⁰ JENKS AND CLARK, *THE TRUST PROBLEM* (5th ed. 1929) 99-107. See also 1 Ind. Comm. Rep. 74 (1900); House Rep., No. 2601 (Mar. 1893); Jenks, *The Development of the Whiskey Trust* (1889) 4 POL. SC. Q., 296.

⁸¹ JENKS AND CLARK, *op. cit. supra* note 80, at 107.

⁸² Nat. Comm. on Law Obs. and Enf., *Report on the Enforcement of the Prohibition Laws of the United States*, H. R. Doc. No. 722, 71st Cong., 3d Sess. (1931) 6; COLVIN, *PROHIBITION IN THE UNITED STATES* (1926) 551 *et seq.*

⁸³ See *e.g.*, Iowa Laws 1894, c. 62, §17; Ohio Laws 1913, no. 108, §19. The Iowa provision prohibited any person from being surety on more than one liquor bond. Ohio was more thorough, providing: "License shall not be granted to any applicant who is in any way interested in the business conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage, nor shall such license be granted unless the applicant or applicants are the only persons in any way pecuniarily interested in the business for which the license is sought, and no other person shall be in any way interested therein during the continuance of the license. . . ."

⁸⁴ Nat. Comm. on Law Obs. and Enf., *loc. cit. supra* note 82; Grant, *The Liquor Traffic Before the Eighteenth Amendment* (Sept., 1932) 163 ANNALS 1, 4 (it was being charged at the time of the Eighteenth Amendment that 80 percent of the retail outlets were tied-houses).

pressure to stimulate sales, thus increasing consumption which often led to intemperance. The distiller or brewer, being an absentee owner, cared little for the social disruption that resulted from a policy of forcing saloonkeepers to stimulate sales; his interest was in increased sales, not in social welfare.⁸⁵ The tied-house system also resulted in the establishment of a great number of retail outlets because every producer felt that he had to have an outlet in each market. An excess of outlets meant a stimulation of sales, with resulting intemperance. The evils of the tied-house system and the corrupting political influence of the liquor interests were major causes for the adoption of national prohibition.⁸⁶

GOVERNMENT MONOPOLY CONTROL

Government monopoly of the sale of liquor for general consumption originated in the United States in the college town of Athens, Georgia, in 1891.⁸⁷ During the next 25 years many other towns and counties in Alabama, Georgia, North Carolina, South Carolina and Virginia established similar municipal monopolies.⁸⁸ And in 1893, South Carolina instituted a statewide monopoly.⁸⁹ Under this plan, the state was to be the sole seller of liquors. A central wholesale dispensary was to be established; saloons were to be abolished and their place taken by retail dispensaries where

⁸⁵ See FOSDICK AND SCOTT, *TOWARD LIQUOR CONTROL* (1933) 43. As Captain W. S. Alexander, Administrator of the Federal Alcoholic Administration, succinctly observes, ". . . the fact remains that under the tied house system the retailer is not responsible to society. When someone else sets a licensee up in business, buys his license, furnishes him with a house to do business in and puts in the fixtures and his stock who is Lord and Master there—society or the man who pays for all this?" Address before the Nat. Alcoholic Beverage Control Ass'n, Aug. 24, 1938. FA-152.

⁸⁶ Nat. Comm. on Law Obs. and Enf., *loc cit. supra* note 82.

⁸⁷ 2 Ga. Acts 1890-1891, no. 345. A possible qualification of the statement in the text is that some prohibition states had earlier established quasi-governmental "town agencies" which were given the sole right to sell liquors for "medicinal, chemical, and mechanical purposes" [Mass. Acts 1852, c. 322, §2]. SITES, *CENTRALIZED ADMINISTRATION OF LIQUOR LAWS IN THE AMERICAN COMMONWEALTHS* (1899) 102-106. But the town agency system was used only in prohibition states and was not in any sense a substitution for the licensing system, as was the dispensary plan.

The European precursor of the American dispensary system was the so-called Gothenburg system that originated in Gothenburg, Sweden, in 1865. The basis of this system was the elimination of private profit from the sale of liquor by giving to a company of private citizens a monopoly of the liquor trade. The company was to establish retail outlets that were to be strictly supervised and all company profits in excess of six percent on its investment were to be paid over to the town treasury. On the Gothenburg system, see GOULD, *POPULAR CONTROL OF THE LIQUOR TRAFFIC* (1895).

⁸⁸ BLAKEY, *THE SALE OF LIQUOR IN THE SOUTH* (1912) c. 3. On Nov. 8, 1898, the electorate of the state of South Dakota by a vote of 22,170 votes for and 20,557 against approved the following constitutional amendment:

"Section 1. The manufacture and sale of intoxicating liquors shall be under exclusive state control and shall be conducted by duly authorized agents of the state who shall be paid by salary and not by commissions. . . .

"Section 2. The legislature shall by law prescribe regulations for the enforcement of the provisions of this article and provide suitable and adequate penalties for the violation thereof."

The legislature, however, did not enact enabling legislation, allegedly because of pressure exerted by the Sioux Falls Brewery [ROWNTREE AND SHERWELL, *op. cit. supra* note 57, at 431] and the Supreme Court of South Dakota held in the case of *State v. Bradford*, 12 S. D. 207, 80 N. W. 143 (1899), that until the legislature prescribed regulations for enforcement of the constitutional provision, the old licensing law remained in effect. At the general election of 1900, the electorate voted 48,673 to 33,927 to repeal the above amendment thus ending the incipient dispensary movement.

⁸⁹ S. C. Acts 1892, no. 28, effective July, 1893.

liquor would be sold by the bottle for off-premise consumption; purchasers were to be registered; sales were not to be made in the evenings or to minors, habitual drunkards or intoxicated persons. The administration of the system was to be vested in a Board of Control consisting of the governor, the attorney general, and the comptroller general; later it became a five-man board elected by the legislature.⁹⁰ The Board was to appoint dispensary officials and county boards of control which in turn were to appoint local dispensers. The profits of the wholesale dispensary were to be allotted to the school fund and local dispensary profits were to be divided equally between the county and the municipality.

Theoretically such a system was ideal; and there is evidence of its accomplishments. In 1892, before the dispensary law was enacted, there were 613 licensed saloons, while at no time during the history of the dispensary system were there more than 146 dispensaries.⁹¹ Arrests for drunkenness fell off from one third to one half under the dispensary law.⁹² Mr. John Koren who investigated the system for the Committee of Fifty⁹³ concluded that "It is . . . beyond all cavil true that in the cities and towns formerly under license the dispensary law has promoted sobriety and in a truly wonderful degree."⁹⁴ Yet in 1907, the commonwealth dispensary system was replaced by a county dispensary system⁹⁵ and in 1915, statewide prohibition was adopted.⁹⁶ Why the change? Does the experience of South Carolina presage a similar failure for subsequent attempts to remove the private profit element from retail liquor selling?

The South Carolina dispensary system failed (1) because it was administered by corrupt politicians who used the system (a) to strengthen their political machines and (b) to enrich their own private fortunes and (2) because it did not eliminate the private profit motive from retail sales. The dispensary law was originally sponsored by Governor Tillman as a compromise measure that would stave off prohibition and at the same time not alienate the prohibitionist vote which was essential to the maintenance of his political power.⁹⁷ Political considerations, so easily discernible in the inception of the dispensary system, also determined the nature of its administration. Politics decided who should be appointed officials and the appointees in turn kept faith by working diligently for the welfare of the party.⁹⁸ Besides, those

⁹⁰ S. C. Acts 1896, no. 61, §2.

⁹¹ Christensen, *The State Dispensaries of South Carolina* (Nov. 1908) 32 ANNALS 545. These figures do not include the number of illicit sellers that existed under both systems. In 1900, there were 388 persons other than legal dispensers who paid the United States "special tax" imposed on liquor sellers. 11 ENCYC. BRIT. (11th ed. 1911) 768.

⁹² WINES AND KOREN, *op. cit. supra* note 35, at 176-178.

⁹³ The Committee of Fifty which was composed of such eminent men as Charles W. Eliot, President of Harvard, Seth Low, and others sponsored a ten-year survey of the liquor question.

⁹⁴ WINES AND KOREN, *op. cit. supra* note 35, at 179.

⁹⁵ S. C. Acts 1907, no. 226.

⁹⁶ S. C. Acts 1915, no. 76. Prohibition was voted upon on Sept. 14, 1915, and was approved by a majority of over 24,000 or 71 percent of those voting. CHERRINGTON, *THE EVOLUTION OF PROHIBITION IN THE UNITED STATES* (1920) 342; COLVIN, *PROHIBITION IN THE UNITED STATES* (1926) 302.

⁹⁷ WINES AND KOREN, *op. cit. supra* note 35, at 141-147.

⁹⁸ COLVIN, *op. cit. supra* note 96, at 298-299.

in charge of the dispensary system sold offices, accepted bribes from distillers and others who were interested in selling liquor to the state, and embezzled substantial sums from the system.⁹⁹ Finally, the elimination of the personal profit motive which should be a cornerstone of government monopoly control was not achieved by the South Carolina dispensary system. Quite the contrary, the retail dispenser had every reason to stimulate sales, for his salary depended upon the amount of liquor sold.¹⁰⁰ South Carolina's experience is thus an object lesson of the prostitution of government monopoly control. It in no way presages failure for more soundly conceived and better administered monopoly plans.

PROHIBITION CONTROL

National prohibition in the United States did not represent an abrupt break with previous control legislation. On the contrary, it climaxed a long history of temperance reform. During the first three or four decades of the nineteenth century, the primary objective of the temperance movement was to secure individual pledges of personal abstinence.¹⁰¹ Prohibitory legislation was resorted to only after moral suasion had failed. Prohibitory measures for which the temperance movement was chiefly responsible include high license laws,¹⁰² local option statutes, state prohibition provisions, federal legislation in aid of state prohibitory policies, and the Eighteenth Amendment.¹⁰³

Local Option.

Under local option legislation, local political units are permitted to decide whether licenses to sell liquor should be granted. Maine in 1829, Indiana in 1832, and Georgia in 1833, were apparently the first American commonwealths to experiment with the local option principle.¹⁰⁴ During the next 20 years, a number of states enacted similar legislation and by 1906, there were 30 states with local option laws.¹⁰⁵ A few of the early statutes were held to be invalid on the theory that the legislature had delegated law-making power to the people, but the courts later almost unanimously sustained the laws.¹⁰⁶

The local option measure that prevailed in most states permitted the electorate of a local political unit to vote that no licenses should be granted; thereafter no licenses

⁹⁹ Christensen, *supra* note 91; BLAKEY, *op. cit. supra* note 88, at 19, quoting from the report of the committee appointed to liquidate the state dispensary system: "Some of the 'officials who fattened at the expense of the State became shameless in their abuse of power, insatiable in their greed, and perfidious in their disregard of their oaths of office. . . . We desire to express satisfaction at having reached the end of a business . . . disgusting in revelations of corruption which had so deplorably permeated the business. . . .'"

¹⁰⁰ WINES AND KOREN, *op. cit. supra* note 35, at 168; COLVIN, *op. cit. supra* note 96, at 296.

¹⁰¹ Warburton, *Prohibition* (1934) 12 ENCYC. SOC. SCIENCES 499, 500.

¹⁰² See *supra* pp. 550-551.

¹⁰³ Although these measures were originally sponsored by temperance leaders, they later rejected high license and local option as desirable methods for reaching their objective.

¹⁰⁴ Me. Pub. Acts 1829, c. 133; Ind. Laws 1832, c. 170; Ga. Acts 1833, 125.

¹⁰⁵ Vance, *The Fight for More Anti-Liquor Legislation* (1916) 23 CASE & COM. 38, 43; Warburton, *supra* note 101, at 502.

¹⁰⁶ BLACK, INTOXICATING LIQUORS (1892) §45; Note (1938) 23 IOWA L. REV. 635.

were to be issued until a subsequent election reversed the no-license decision. In Arkansas, however, the statute provided that unless a majority of the votes cast in the county were "For license" no licenses should be granted.¹⁰⁷ Thus the Arkansas system was prohibition with local option for license, rather than license with local option for prohibition, as in most states.¹⁰⁸ Other provisions embodying a local option principle required each applicant for a liquor license to secure the approval of a majority or two thirds of the voters of the political unit within which the saloon was to be located, or provided that the remonstrance of a majority of the voters would prevent the issuance of a license or that no licenses should be issued in the locality if a majority of the voters so petitioned.¹⁰⁹ Local option was accomplished indirectly in some states by the licensing agency's refusal to issue licenses.¹¹⁰ In others, localities secured local prohibition pursuant to special legislation that permitted the electorate to vote for local prohibition but made no provision for resubmitting the question.¹¹¹ The latter cannot strictly be called local option, for the option feature was eliminated after prohibition was voted in.

Legislation governing other local option features was similarly diversified. In some states, the local option unit was the county;¹¹² in others, the vote was taken by cities, villages, or towns;¹¹³ and in still others, districts within a city could exclude saloons.¹¹⁴ Some statutes provided that local option elections should be held every one or two years, but in most states, local option elections were held only after a petition of a certain percentage of the voters.¹¹⁵ No such election was to be held within one, two, three, or four years of a previous local option election, and often it could not be held at the time of any general election.¹¹⁶ Although the question voted on usually involved only the issue of whether the sale of all intoxicating liquors should be approved or disapproved, a few statutes did permit local option voters to prohibit the sale of distilled liquors and/or lighter intoxicants, or to prohibit sales for on-premise consumption and/or for off-premise consumption.¹¹⁷

The chief value of a local option system is that it permits local sentiment to de-

¹⁰⁷ ARK. DIG. STAT. (1884) §4515.

¹⁰⁸ Osborn, *supra* note 26, at 125, 129. The Iowa system was somewhat similar. The state had a prohibition statute; but the mulct law (see *supra* note 35) provided that if the seller paid a "tax" and, in cities of 5,000 or more, if "a written statement of consent signed by a majority of voters residing in said city who had voted at the last general election" should be filed with the county auditor, prosecutions for violating the prohibitory law should be barred. IA. CODE (1897) §2448.

¹⁰⁹ *Supra* notes 41, 42; Ill. Laws 1838-1839, 71-72; Ga. Laws 1860, no. 152.

¹¹⁰ ROWNTREE AND SHERWELL, *op. cit. supra* note 57, at 285-296.

¹¹¹ Ga. Acts 1875, no. 263; Md. Laws 1876, c. 79; Miss. Laws 1856, c. 80. Local prohibition was also often secured by special acts of the legislature that prohibited the sale of intoxicants in a particular locality. See Ga. Acts 1875, nos. 117, 281, 332; Md. Laws 1876, c. 313; Miss. Laws 1856, c. 150.

¹¹² MICH. COMP. LAWS (1897) §5414; MONT. REV. CODE (1907) §2041.

¹¹³ WIS. STAT. (1898) §§1565a-1565c; S. D. REV. CODE (1903) §2856.

¹¹⁴ OHIO CODE (1910) §§6140-6168; ILL. REV. STAT. (Hurd, 1913) c. 43, §§25-43.

¹¹⁵ These provisions and the states which enacted them are collected and discussed in Osborn, *supra* note 26, at 128-130; ROWNTREE AND SHERWELL, *op. cit. supra* note 57, c. 4; COLVIN, *op. cit. supra* note 96, c. 20; 4 STANDARD ENCYC. OF THE ALCOHOL PROBLEM (1928) 1586.

¹¹⁶ *Ibid.*

¹¹⁷ N. Y. CONSOL. LAWS (1909) c. 34, §13; Vt. Laws 1902, no. 90; CYCLOPEDIA OF TEMPERANCE AND PROHIBITION (1891) 390.

termine the liquor policy of the community; the same public opinion that resolves the question of sale or no sale is responsible for enforcement. But pre-Repeal local option was deficient in three particulars. Because only a comparatively short time was required to elapse between one election and another—generally two years or less—the liquor problem became a recurring political issue that perverted the attention of the electorate from more significant questions.¹¹⁸ Failure to permit local option voters to discriminate between the various types of intoxicants or between sales for on-premise and those for off-premise consumption unduly canalized public opinion. The general practice of making large and populous political divisions the local option unit was unsatisfactory because those divisions very often contained smaller homogeneous areas which should have been permitted to determine their own liquor policies. A local option measure that has been strengthened by careful draftsmanship to remove these weaknesses¹¹⁹ can be a valuable adjunct to a control system, for local option rests upon the sound premise that laws, especially sumptuary laws, must express the will of the governed—a premise too often forgotten or disregarded by temperance leaders.

*State Prohibition.*¹²⁰

Statewide prohibition was first adopted by an American state or territory in 1844 when the territorial legislature of Oregon enacted a general prohibition law.¹²¹ After the Oregon enactment, Maine in 1846 and Delaware in 1847 also adopted prohibition laws;¹²² and New Hampshire in 1849 and Michigan in 1850 prohibited the issuance of liquor licenses.¹²³ During the next five years, these four states strengthened their laws¹²⁴ and another ten states enrolled under the prohibition banner.¹²⁵ But this first

¹¹⁸ This evil was of course aggravated in those states where local option elections were held at the time of the general election.

¹¹⁹ See PROPOSALS OF FOSDICK AND SCOTT, TOWARD LIQUOR CONTROL (1933) 54, and for post-Repeal practices, see HARRISON AND LAINE, AFTER REPEAL (1936) 72-73.

¹²⁰ It should be noted at the outset that the term "prohibition" is really a misnomer, for most laws did not *completely* prohibit the manufacture or sale of intoxicating beverages. In most prohibition states, drug stores or town agencies were permitted to sell intoxicating liquor for medicinal purposes; generally personal manufacture of wine and beer for personal use was not forbidden, and many dry states permitted importation for personal use. See FOSDICK AND SCOTT, *op. cit. supra* note 119, at 22-23.

¹²¹ Ore. Laws 1843-1849, 94, repealed in 1849. CHERRINGTON, *op. cit. supra* note 96, at 126, 133.

Earlier United States prohibition measures include: (1) a regulation of the Board of Trustees of the colony of Georgia, enacted in 1733 and repealed in 1742, that prohibited importation and consumption of rum in the colony [3 STANDARD ENCYC. OF THE ALCOHOL PROBLEM (1926) 1077; THOMANN, COLONIAL LIQUOR LAWS (1887) 194-196]; (2) prohibitions against the sale of intoxicating liquors to Indians which were enacted in practically every colony [THOMANN, *passim*]; (3) statutes enacted in several New England states that prohibited the sale of liquor in quantities less than 28 or 15 gallons [Vance, *Growth of Anti-Liquor Legislation* (1916) 23 CASE & COM. 824, 827]; (4) federal statutes prohibiting sales of intoxicating liquor to Indians [4 STAT. 732 (1834); 13 STAT. 29 (1864); United States v. Holliday, 70 U. S. 407 (1865); United States v. 43 Gallons of Whisky, 93 U. S. 188 (1876)].

¹²² Me. Acts 1846, c. 205; Del. Laws 1847, c. 184.

¹²³ N. H. Laws 1849, c. 846; Mich. Const., art. IV, §47.

¹²⁴ Me. Acts 1851, c. 211, 1853, c. 48; Del. Laws 1855, c. 255; N. H. Laws 1855, c. 1658; Mich. Laws 1855, no. 17.

¹²⁵ Conn. Pub. Acts 1853, c. 57; Ill. Pub. Laws 1851, 18-19; Ind. Laws 1855, c. 105; Iowa Laws 1855, c. 58; Mass. Laws 1852, c. 322; Neb. Laws 1855, 158; N. Y. Laws 1855, c. 231; R. I. Acts 1852, 3; Vt. Laws 1852, no. 24; Pa. Laws 1855, no. 239, repealed before it went into operation. COLVIN, *op. cit. supra* note 96, at 34.

wave of state prohibition was short-lived. Some of the laws were held to be unconstitutional;¹²⁶ others were amended to permit the sale of some intoxicants;¹²⁷ and still others were completely repealed.¹²⁸ Divided public sentiment caused the reaction from this first prohibition crusade. The temperance societies were strong enough to secure a trial for prohibition, but they were not sufficiently powerful to force its retention.¹²⁹

At the beginning of the decade between 1880 and 1890, during which the second great prohibition movement occurred, only three states—Maine, Vermont, and New Hampshire—had a dry status. During that decade five more states adopted prohibition, but one of these, Rhode Island, abandoned it before 1890.¹³⁰ During that time, too, the legislatures of nine states either refused to submit the question of prohibition to the electorate, or rejected prohibition proposals, and in 11 other states where the question was submitted to the voters, prohibition was not adopted.¹³¹ During the ten-year period, then, four states had been added to the prohibition list, making a total of seven prohibition commonwealths in 1890 (four of whom deserted the dry ranks by 1903)¹³² and 21 states had refused to accept prohibition. The next prohibition wave was, however, much more successful. Engineered by the Anti-Saloon League, it began in 1907 and ended in 1919, during which time 30 states adopted prohibition laws.¹³³

Judged by any objective standard, statewide prohibition was not a satisfactory answer to the liquor question. Liquor consumption did not decrease during the period when the statewide prohibition movement was strongest.¹³⁴ The records of competent students who carefully observed state prohibition in operation clearly demonstrate that the laws were widely violated, surreptitiously in some localities, openly and notoriously in others.¹³⁵ Public officials were corrupted and otherwise law-abiding citizens who opposed what they conceived to be unwarranted interference with their freedom, participated in illegal sales.¹³⁶ Official corruption and habitual law violation begot a widespread disrespect for law and order—"too great a price to

¹²⁶ *O'Daily v. State*, 9 Ind. 494 (1857); *Beebe v. State*, 6 Ind. 501 (1855) *Wynchamer v. People*, 13 N. Y. 378 (1856).

¹²⁷ See Clark, *The History of Liquor Legislation in Iowa* (1908) 6 IOWA J. OF HIST. AND POL. 55, 83-87.

¹²⁸ Conn. Pub. Acts 1872, c. 99, §13; Del. Laws 1857, c. 330; Ill. Pub. Laws 1853, 127; Mich. Laws 1875, no. 228; Mass. Laws 1868, c. 141; Neb. Laws 1859, 256; Pa. Laws 1856, no. 233, §35; R. I. Acts 1863, c. 444, §11.

¹²⁹ Warburton, *supra* note 101, at 501.

¹³⁰ Kansas (1880), Rhode Island (1886), repealed in 1889, Iowa (1884), South Dakota (1889), and North Dakota (1889). See CHERRINGTON, *op. cit. supra* note 96, at 176-184.

¹³¹ *Ibid.*

¹³² Iowa Laws 1894, c. 62 (the mulct law that retained prohibition in name but in fact permitted retail sale of intoxicants. See *supra* notes 35, 108; and see Clark, *supra* note 127, at 596 *et seq.*); S. D. Laws 1897, c. 72 (enacted after constitutional prohibition had been repealed in 1896); Vt. Laws 1902, No. 90; N. H. Laws 1903, c. 95.

¹³³ For an interesting account of the Anti-Saloon League, see ODEGARD, *PRESSURE POLITICS* (1928). The thirty states and the dates they adopted prohibition are listed in Warburton, *supra* note 101, at 502, and in COLVIN, *op. cit. supra* note 96, at 435.

¹³⁴ Warburton, *supra* note 101, at 503.

¹³⁵ WINES AND KOREN, *op. cit. supra* note 35; FANSHAWE, *op. cit. supra* note 33; ROWNTREE AND SHERWELL, *op. cit. supra* note 57.

¹³⁶ *Ibid.*

pay for whatever gains may [have been] secured."¹³⁷ These evils were the inevitable result of divided public sentiment; prohibition, which interferes so drastically with deeply rooted habits and customs, cannot be successful unless there is an overwhelming public support behind it. This bitter lesson was well learned during national prohibition; it is unfortunate that the United States did not heed the failure of state prohibition and thus avoid the painful experience of the "noble experiment."

Federal Legislation in Aid of State Prohibitory Laws.

The need for legislation of this type was convincingly demonstrated by two Supreme Court cases involving prohibition laws. In the first, an Iowa statute which prohibited the transportation of intoxicating liquor into Iowa by a carrier unless the shipper furnished a certificate that the consignee was authorized to sell liquor was held invalid because it conflicted with Congressional "intention" that the transportation of commodities between states shall be free.¹³⁸ The second decision applied the original package doctrine to deny the right of the state to prohibit the sale of intoxicating liquors in their original packages.¹³⁹ State prohibition laws were thus largely nullified, for liquor dealers could and did sell intoxicants in their original packages and the states were powerless to interfere.¹⁴⁰

Legislation to remedy this situation was sought from Congress which promptly passed the Wilson Act.¹⁴¹ This law provided that liquors upon "arrival" in a state should be "subject to the operation and effect of the laws of such State . . . in the same manner as though such . . . liquors had been produced in such State. . . ." The statute was held to be constitutional,¹⁴² but the word "arrival" was construed to mean delivery to the consignee and not a mere arrival within the boundaries of the state.¹⁴³ Thus until the goods were delivered to the consignee they were in interstate commerce and the states had no power to interfere with the free flow of that commerce.¹⁴⁴ Accordingly, while a drinker could not legally purchase from a state liquor vendor, it was perfectly permissible for him to order from out-of-state dealers. The Wilson Act made it more inconvenient to secure liquor, but that was all.

Again there was a request for Congressional aid, resulting in the passage of the Webb-Kenyon Act which prohibited the shipment of liquor into a state in violation

¹³⁷ FOSDICK AND SCOTT, *supra* note 119, at 25.

¹³⁸ Bowman v. Chicago & N. W. R. R., 125 U. S. 495 (1888).

¹³⁹ Leisy v. Hardin, 135 U. S. 100 (1890). Cf. License Cases, 5 How. 504 (1847).

¹⁴⁰ Dowling and Hubbard, *Divesting an Article of its Interstate Character* (1920) 5 MINN. L. REV. 100, 104.

¹⁴² *In re Rahrer*, 140 U. S. 545 (1891).

¹⁴¹ 26 STAT. 313 (1890).

¹⁴³ Rhodes v. Iowa, 170 U. S. 412 (1898).

¹⁴⁴ Subsequent Supreme Court decisions further emasculated the Wilson Act: Vance v. Vanderclock, 170 U. S. 438 (1898) (a state cannot compel a resident-consignee to certify to a state official the quantity and kind of liquor to be imported; nor can it require the nonresident-consignor to attach a certificate to the package); Heyman v. Southern R. R., 203 U. S. 270 (1906) (a state's power over imported liquor does not attach before the expiration of a reasonable time); Adams Express Co. v. Kentucky, 206 U. S. 129 (1907) (a state cannot prohibit C. O. D. shipments of liquor). The decisions in all these cases rested on a "construction" of the Wilson Act and the inability of a state unreasonably to interfere with interstate commerce.

of its laws.¹⁴⁵ Violation of the Act was not made a federal offense; the legislation merely divested intoxicating liquors of their interstate character, thereby subjecting all shipments to state control as soon as they reached the state line. This statute thus accomplished the prohibitionist objective of removing the protection of the commerce clause from shipments of alcoholic beverages into a state in violation of its laws.¹⁴⁶

But despite this legislation and other laws passed by Congress to aid dry states,¹⁴⁷ the prohibitionists continued to press for more drastic federal liquor legislation. In 1917, their efforts resulted in the passage of the Reed Amendment.¹⁴⁸ This law provided that "whoever shall order, purchase or cause intoxicating liquors to be transported in interstate commerce" into any state the laws of which prohibit the manufacture or sale of intoxicating liquors should be fined and/or imprisoned.¹⁴⁹ By its terms, the Reed Amendment was applicable even though the state permitted liquors to be imported for personal use. Thus the Amendment imposed a "bone-dry" policy concerning interstate shipments of intoxicating liquors upon any state that prohibited the manufacture or sale of intoxicants.^{149a} National prohibition was one step nearer to realization.

National Prohibition.

Shortly after the entry of the United States into World War I, Congress prohibited the sale of liquor at any military station or enlisted men's club or to any member of the military forces while in uniform and gave the President power to prohibit the sale of alcoholic liquors in or near military camps and to members of the army.¹⁵⁰ Congress then passed the Food Control Act of August, 1917, which prohibited the use of food materials or feeds in the production of distilled spirits for beverage pur-

¹⁴⁵ "The shipment or transportation . . . of any . . . liquor of any kind, from one State . . . into any other State, . . . which . . . liquor is intended . . . to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited." 37 STAT. 699 (1913).

¹⁴⁶ *Clark Distilling Co. v. Western Maryland R. R.*, 242 U. S. 311 (1916); *Seaboard Air Line R. R. v. North Carolina*, 245 U. S. 298 (1917).

¹⁴⁷ Four provisions enacted by Congress in 1909 aided the dry cause: (1) intoxicating liquors were declared to be nonmailable; (2) express companies and other common carriers were not to deliver intoxicants to fictitious consignees; (3) they were not to deliver C. O. D. liquor packages; and (4) all packages containing liquors were to be so labeled as "to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein." 35 STAT. 1131, 1136-37.

¹⁴⁸ 39 STAT. 1069 (1917), amended by 39 STAT. 1202 (1917), 40 STAT. 329 (1917), 40 STAT. 1151 (1919), 41 STAT. 313 (1919), 48 STAT. 316 (1934). Held constitutional in *United States v. Hill*, 248 U. S. 420 (1919). Repealed by 49 STAT. 1930 (1936). See Graves, *The Reed "Bone-Dry" Amendment (1917)* 4 VA. L. REV. 634; Russell, *The States Did Not Fail in Liquor Control (1933)* 23 KY. L. J. 427.

¹⁴⁹ It also provided that no advertisement of, or order for, intoxicating liquors should be desposited in, or carried by, the mails when addressed to any person in a state, the laws of which made it unlawful to advertise or solicit orders for such liquors; and provided for certain penalties if a publisher or dealer in liquors should "knowingly" violate the provisions of this part of the Amendment.

^{149a} See *United States v. Collins*, 254 Fed. 869 (W. D. La. 1919); Rockwell, *Federal Legislation After Repeal (1933)* 37 LAW NOTES 84, 86; Cushman, *The National Police Power Under the Commerce Clause of the Constitution (1919)* 3 MINN. L. REV. 381, 409.

¹⁵⁰ 37 STAT. 82 (1917), amended by 40 STAT. 393 (1917). See President's Proclamation of June 27, 1918; *Evans v. United States*, 261 Fed. 103 (C. C. A. 2d, 1919) (as to the extent of the prohibited zone); *United States v. Kinsel*, 263 Fed. 141 (N. D. Wash., 1918) (as to liquors prohibited).

poses¹⁵¹ and the War Prohibition Act of November, 1918, which provided that after June 30, 1919, until the termination of demobilization it should be illegal to sell intoxicating liquors.¹⁵² Finally, the adoption of the Eighteenth Amendment in January, 1919, made the federal policy of national prohibition supreme.

Many factors help to explain the adoption of the Amendment. Public opinion was profoundly disturbed by the evils of the saloon (which were aggravated by the tied-house system¹⁵³) and the corrupt alliance between liquor and politics. In addition to these two major causes, there was the argument that by enforcing prohibition the productivity of the nation would be enlarged, because workers would be more efficient and the money theretofore spent for liquor would be invested in more productive enterprises.¹⁵⁴ Business interests, convinced that sober employees would result from the adoption of national prohibition, supported the dry crusade.¹⁵⁵ It was also urged that wages would be increased and that standards of living would be raised. Closely akin to the economic argument was the appeal to patriotism: that if the Amendment were adopted, the grain, labor and capital theretofore used in the brewing and distilling industries would be directed toward helping America win the war.¹⁵⁶

All these factors were skillfully exploited by the driving force against liquor, the Anti-Saloon League. Congress acquiesced;¹⁵⁷ so did a sufficient number of states.¹⁵⁸ The result was the Eighteenth Amendment to the Constitution which prohibited the manufacture, sale or transportation of intoxicating liquors. The unfortunate results of this attempt at legal coercion are well known. The saloon was replaced by the speakeasy which served adults and minors with impartiality. Instead of being able to secure liquor made by an experienced distiller with a national or local reputation, the average consumer was forced to accept "bath tub" gin, or alcohol that had been "cut," colored, and flavored to resemble whisky. Bootleggers did a thriving business,

¹⁵¹ 40 STAT. 276 (1917).

¹⁵² 40 STAT. 1045 (1918), construed and held valid in *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146 (1919). Cf. *United States v. Standard Brewery, Inc.*, 251 U. S. 210 (1920). See also Ehrlich, *War-Time Prohibition* (1919) 8 CALIF. L. REV. 44.

¹⁵³ See *supra* pp. 555-556.

¹⁵⁴ But see WARBURTON, *THE ECONOMIC RESULTS OF PROHIBITION* (1932) 26, concluding that "prohibition has not been a fact of measurable significance in the increased industrial productivity of recent years."

¹⁵⁵ "The Rockefellers, S. S. Kresge, James N. Gamble, John Wanamaker, Joseph Boyer of the Burroughs Adding Machine Company, James Horton Ice Cream Company, J. L. Hudson of the Hudson Motor Company, R. E. Olds of the Reo Motor Company, S. S. Martin of the National Biscuit Company, the United States Steel Corporation—all donated freely." And Henry Ford said, "The Eighteenth Amendment is recognized by the men and women of our country, the women especially, as the greatest force for the comfort and prosperity of the United States." Hacker, *The Rise and Fall of Prohibition* (1932) 36 CURR. HIST. 662, 670.

¹⁵⁶ In addition there was the emotional appeal that "German brewers in this country have rendered thousands of men inefficient and are thus crippling the Republic in its fight on Prussian militarism." Quoted by Hacker, *supra* note 155, at 665. Thus the fight for prohibition was coalesced with the fight against Germany.

¹⁵⁷ The Joint Resolution of Dec. 18, 1917, 40 STAT. 1050, proposed an Amendment to the Constitution which later became the Eighteenth.

¹⁵⁸ On Jan. 29, 1919, the Secretary of State proclaimed that on or before Jan. 16, the necessary 36 states had ratified the Amendment.

charged high prices, paid their taxes in the form of protection money, and corrupted local, state, and national officials.¹⁵⁹ Thus the unholy alliance between liquor and politics, one of the causes of Prohibition, returned in an aggravated form. With political protection assured, the bootlegging element branched out into other criminal activities, particularly into the fields of racketeering and gambling.

Law enforcement agencies failed to cope with the problem successfully.¹⁶⁰ Many factors explain this failure. Congress refused to establish an adequate enforcement agency. It voted dry, but apparently was quite wet when it came to giving the Prohibition Bureau adequate appropriations.¹⁶¹ Even with decent appropriations, it would have been well-nigh impossible for the Federal Government to police the liquor activities of its citizenry. There is a limit to effective federal action. This weakness might possibly have been remedied by state assistance, but the states refused to cooperate with the Federal Government in its attempt to enforce the law.¹⁶² In no one year did the combined enforcement appropriations of the states equal one million dollars.¹⁶³ Courts, bogged down with a flood of liquor prosecutions, held "bargain days" on which alleged violators could plead guilty and be assured of a light fine or suspended sentence.¹⁶⁴

The most important reason for the failure in enforcement is found in the attitude of the public. Indeed, this attitude probably explains why state and federal governments failed to establish adequate enforcement agencies. People resented being ordered by a Constitutional command not to indulge in even a glass of mildly euphoric beer.¹⁶⁵ They objected to the disregard of the law by the wealthy who were able and willing to pay high prices in order to keep a well-stocked cellar. Law enforcement officials often used crude methods that stirred up opposition to them and the law they represented.¹⁶⁶ All this resulted in public apathy or opposition to national prohibition and made effective enforcement practically impossible. With the breakdown in law enforcement and the widespread violation of the laws that had been enacted pursuant to the power granted in the Amendment, there arose a general disregard for law and order. It is precisely here that Prohibition caused the most havoc, for law and order, respect for authority, are basic to the well-being of any government. The effort to eradicate the acknowledged evils of the pre-Prohibition era resulted in the greater evil of disrespect for and violation of law.¹⁶⁷

¹⁵⁹ Nat. Comm. on Law Obs. and Enf., *op. cit. supra* note 82, at 44.

¹⁶⁰ *Id.*, 22 *et seq.*

¹⁶¹ Hacker, *supra* note 155, at 666.

¹⁶² Maryland's attitude is illustrative: "In Maryland we decline to make the Volstead Act a law of the state. . . . We simply say it is a federal law and not Maryland law, and it is no part of our duty as a State to adopt it as our own and set up State machinery to carry it out. We leave its enforcement in our State to the federal government which made it." Address by Gov. Albert Ritchie, *Enforcement of the Eighteenth Amendment and the Volstead Act*, Aug. 14, 1929, quoted in Note (1938) 23 IOWA L. REV. 635, 645 n. 68.

¹⁶³ Hacker, *supra* note 155, at 669.

¹⁶⁴ Stevenson, *Fallacies of Volsteadism* (1926) 25 LAW NOTES 211.

¹⁶⁵ NATIONAL PROHIBITION ACT, 41 STAT. 305 (1919) tit. II, §29, made all beverages containing one half of one percent or more of alcohol by volume "intoxicating liquors."

¹⁶⁶ Nat. Comm. on Law Obs. and Enf., *op. cit. supra* note 82, at 55 *et seq.* The material in this paragraph is based upon that source.

¹⁶⁷ Henry W. Anderson, a member of the so-called Wickersham Commission, (*id.* at 90) listed the

Such a situation could not long endure. Individuals not associated with the liquor interests organized and headed associations against the continuance of national prohibition.¹⁶⁸ Prominent leaders who had theretofore been noncommittal or active supporters of the Amendment publicly announced their opposition.¹⁶⁹ A Literary Digest poll in 1930 indicated that the Amendment was very unpopular.¹⁷⁰ However, many felt that the prosperity of the twenties was caused in part at least by Prohibition, and Anti-Saloon League spokesmen played this theme at every opportunity.¹⁷¹ But this prop was removed by the depression of the thirties. The wets, missing no chances, publicized the theory that legalizing the liquor traffic would provide the necessary impetus for economic recovery. Federal and state governments, their budgets unbalanced by relief expenditures and decreased tax returns, looked anxiously for new sources of revenue. Eventually these forces became sufficiently strong, and on December 5, 1933, Utah, the thirty-sixth state, ratified the Twenty-first Amendment:

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited.

AT REPEAL

With the adoption of the Twenty-first Amendment, the states again became the primary instruments of alcoholic beverage control, free to experiment with new control systems or to return to pre-Prohibition plans. The Federal Government was to coop-

evils which he found resulted from the attempt to make "the entire population of the United States total abstainers in disregard of the demand deeply rooted in the habits and customs of the people." He stated in his separate statement:

"As a result [of Prohibition] we are confronted by new evils of far-reaching and disturbing consequence. . . . The fruitless efforts at enforcement are creating public disregard not only for this law but for all laws. Public corruption through the purchase of official protection for this illegal traffic is widespread and notorious. The courts are cluttered with prohibition cases to an extent which seriously affects the entire administration of justice. The prisons . . . are overflowing. . . . The people are being poisoned with bad and unregulated liquor. . . . The illicit producer, the bootlegger and the speakeasy are reaping a rich harvest of profits. . . . The enormous revenues (estimated at from two to three billion dollars per annum) placed in the hands of the lawless and criminal elements of society through this illegal traffic are not only enabling them to carry on this business, but to organize and develop other lines of criminal activity to an extent which threatens social and economic security."

¹⁶⁸ Pierre S. Du Pont headed the Association Against Prohibition; Mrs. Charles S. Sabin, the Women's Organization for National Prohibition Reform.

¹⁶⁹ "John D. Rockefeller, Jr., regarded as the most prominent individual in the ranks of prohibition supporters, one of the largest contributors to the Anti-Saloon League, and who with his father subscribed \$350,000 to make possible the adoption of prohibition legislation, declared himself yesterday in favor of repeal of the Eighteenth Amendment." Two days later Dr. John R. Mott, president of the Y. M. C. A. declared himself in favor of resubmission of the question to the voters. N. Y. Times, June 7 and 9, 1932, p. 1.

¹⁷⁰ 20,000,000 ballots were distributed; over 4,000,000 were voted, 73.9 percent of which opposed the Amendment.

¹⁷¹ This Anti-Saloon League declaration is illustrative: "Industry, commerce, art, literature, music, learning, entertainment, and benevolence find their finest expressions in this saloonless land." Quoted by Hacker, *supra* note 155, at 670.

erate to the extent of protecting dry states from interstate or foreign importations and regulating those phases of the traffic that could not effectively be controlled by the states.¹⁷² Within this framework legislators were to evolve regulatory systems that would avoid the errors of Prohibition and pre-Prohibition eras and thus contribute a reasonably permanent solution to the problem which over two centuries of legislation had failed to solve satisfactorily.

The first objective of post-Repeal liquor legislation should have been to abolish lawlessness and restore respect for law and order.¹⁷³ The widespread disrespect for the Prohibition Amendment and its implementing laws proved again that there is a limit to effective legal action and that law must bear a reasonably close relation to the *mores* of the community. Post-Repeal control systems then should have been based upon the habits, customs, and desires of the persons regulated. Local option, provision for personal importation in dry states, and an intelligent educational program are all desirable expedients. Also, because the bootlegger was so strongly entrenched at the time of Repeal, governments should have made inexpensive legal liquor so easily obtainable that the illegal seller could not compete, thereby destroying his insidious power. This could have been done by imposing low fees and taxes during the first years after Repeal. Social and not revenue considerations should determine liquor-taxing policies.¹⁷⁴

The second important aim should have been to encourage temperance and moderation in the consumption of alcoholic beverages. This could best, and perhaps only, be accomplished through a long-range process of education. But education is a slow procedure and there were supplementary devices that could have been utilized immediately. Chief among these was the state monopoly plan under which the state would be the sole retailer of intoxicating beverages. Liquors would be fairly easily obtained by those who wished to drink, but the motive of private profit in retail sales having been eliminated, there would be no stimulation of sales. Certainly this plan offered the most hope for avoiding pre-Prohibition abuses and it was the one recommended by the Rockefeller committee.¹⁷⁵ But if a state rejected the monopoly plan, temperance and moderation could still have been fostered by subjecting the sale of light wines and beers to little restraint and by so taxing those liquors as to make them

¹⁷² The 1932 platforms of both major parties contained planks urging protection for dry states. The same thought was expressed in Congress during the debate on the way in which an amendment should be phrased. 70 CONG. REC. 1070 *et seq.* (1933). See also the testimony of Mr. Joseph H. Choate, Jr., before the Ways and Means Committee, "Now of course, another tremendous part of the obligation of the government is to do what has to be done in order to enforce the twenty-first amendment itself." Mr. Choate who was Administrator of the Federal Alcohol Control Administration, also stated that the United States should "do for those states and for the people at large those things which no single state could do." *Hearings before Committee on Ways and Means on H. R. 8539, 74th Cong., 1st Sess. (1935) 9-10.*

¹⁷³ FOSDICK AND SCOTT, *TOWARD LIQUOR CONTROL* (1933) 15. This work was the result of a thorough study of the liquor problem undertaken by Messrs. Fosdick and Scott at the request of Mr. John D. Rockefeller, Jr. The authors were aided by a large research staff, among them, Mr. Leonard V. Harrison and Miss Elizabeth Laine who later wrote the book, *After Repeal. Toward Liquor Control* has been an invaluable aid in the preparation of this paper and it is a pleasure to acknowledge here my indebtedness.

¹⁷⁴ Cf. Studenski, *The Taxation of Liquor* (1936) 14 TAX MAG. 8.

¹⁷⁵ *Supra* note 173.

comparatively inexpensive. The latter could have been accomplished by the application of Professor Yandell Henderson's "principle of dilution." According to this theory, liquor taxes should be levied upon the alcohol contained in the beverage and the alcohol in diluted beverages (in which the percentage of alcohol is relatively small) should be taxed at a much lower rate than the alcohol in concentrated beverages.¹⁷⁶ Temperance might also have been furthered by limiting sales for on-premise consumption to *bona fide* restaurants and by requiring that drinks only be sold with meals.¹⁷⁷ However the obvious difficulty of enforcing the latter requirement strongly suggests that it not be adopted. Lastly, the temperance cause should have been advanced by subjecting alcoholic beverage advertising to rigorous control.

Third, the old saloon could not be permitted to return. Legislation against the tied-house in any of its forms was in order, and the location and character of establishments where liquor was to be sold should have been strictly regulated. The old pre-Prohibition regulations concerning the number of outlets, their location, persons to whom liquor could not be served, hours and days of sale, sales on credit, and similar restrictions might profitably have been supplemented by requirements designed to improve the appearance of places where liquor was to be sold.

Fourth, the consumer interest in being protected from deception and in securing a pure product at the lowest possible price pressed for recognition. Labeling and advertising practices as well as manufacturing processes and oligopolistic tendencies required supervision and regulation; and suitable legislation to meet these needs should have been enacted. These functions might have been allocated to existing agencies such as the Food and Drugs Administration, the Federal Trade Commission, the Bureau of Internal Revenue, and the Anti-Trust Division of the Department of Justice, but that would involve a division of responsibility and often result in a duplication of investigatory and enforcement procedures, expensive to both the industry and government.¹⁷⁸ Avoidance of these consequences would seem sufficient reason for establishing a single administrative agency to regulate all phases of the liquor traffic.

It should also be noted that at the time of Repeal, the liquor industry was a new business. Governments did not have to worry about shifting existing patterns or interfering with allegedly "vested" interests. Transitional difficulties which so often thwart a program of social reform were absent or negligible. It is much easier to *prevent* oligopoly than it is to atomize huge industrial units *after* oligopoly has become entrenched. The very fact that the liquor industry had a record of price fixing and restriction of production by agreement should have induced governments to act quickly and firmly against the danger of monopolistic practices.

Fifth, so far as possible the liquor question should have been eliminated as a

¹⁷⁶ HENDERSON, A NEW DEAL IN LIQUOR (1934).

¹⁷⁷ See Sheppard, *After Five Years, What Has Repeal Achieved?*, N. Y. Times Mag., Dec. 4, 1938, p. 5.

¹⁷⁸ Handler, *The Control of False Advertising Under the Wheeler-Lea Act* (1939) 6 LAW AND CONTEMP. PROB. 91, 108.

political issue and the corruptive political influence of the liquor interests should have been forestalled. These objectives could have been most easily achieved by establishing a central administrative agency, delegating to it adequate powers, staffing it with capable personnel, freeing it from political pressures, and supplying it with ample funds. This would have removed the liquor question from the legislative and public forum where it had too long been the center of attention and placed it in the hands of an expert administrative tribunal, free to devote its time and energies to liquor control. It would also have prevented in large measure a recurrence of the insidious political influence exerted by the liquor trade, particularly if the administrative body were a state agency and therefore free to disregard the pressures of local political leaders. Also, cooperation concerning liquor regulation between the various states and the Federal Government would be facilitated by vesting the administration of control legislation in administrative tribunals.

Finally, because any permanent liquor reform must involve a program of public education, which presupposes the existence of a body of information worthy of communicating to the public, and because sound liquor legislation presupposes an informed law-making body, there should have been established some agency or agencies to engage in a program of research for ascertaining the facts concerning liquor and liquor control. Inasmuch as most private agencies would be subject to the charge of bias and probably would not carry on a sustained program of research, the task devolved upon government.

Legislation embodying these suggestions would have represented real and significant progress in the field of alcoholic beverage control. But the liquor problem cannot be solved by a statute, however wisely designed and however soundly administered. Goodness cannot be legislated into men. Temperance, moderation, self-control—these must be the bases of any lasting reform.