Reexamining the Prohibition Amendment


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Richard Hamm’s book, *Shaping the Eighteenth Amendment*, is a welcome addition to the literature on prohibition and the history of drinking in America. The author's most important contribution is to demonstrate the significance of law and the courts, both for prohibition in particular and for progressive politics more generally. He shows how the internal dynamics of legal processes, including the give and take of legislative and judicial bodies, provide the structure within which politics takes place. For reformers, both in the progressive era and more generally, this is a crucial insight: The reform impulse, usually nebulous and general, can only be realized in the political realm through policies that operate within the governmental structure. In a sense, all politics must relate to existing statutes and court decisions, but advocates of the status quo are likely to find inertia congenial, while reformers bear the special burden of seeking to use law and the courts to overturn powerful forces that are legally entrenched. The particular way that reformers choose to move is, to a surprising extent, dictated by the legal frame of reference. As Hamm demonstrates, the popularity of federalism long hampered prohibition and led to the adoption of national prohibition with an unworkable policy of concurrent federal and state enforcement. Although prohibition failed for many reasons, Hamm shows that the legal framework predetermined failure even if other conditions had been favorable.

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Shaping the Eighteenth Amendment contains two parts. In the first, Hamm reviews the late nineteenth century, when the moral unctuousness of the radical drys limited their political effectiveness, while the shrewdly practical liquor industry, led by the brewers, exerted considerable influence. Largely dependent upon statutes, public officials had to construct alcohol policy within that era’s prevailing laissez-faire values. In the second part, Hamm shows how matters changed after 1900. Borrowing lessons from the liquor lobby, pragmatic prohibitionists made incremental political demands that could be met through bureaucratic action or court rulings, as well as through new statutes. Wets found it increasingly difficult to oppose prohibition, because drys generally embraced other popular reforms. This progressive belief in using government to remake American society, along with the era’s experimentalist mood, enabled drys to win.

Hamm’s book has many pluses. It is impeccably researched, and the notes form an elegant guide to both primary sources and secondary literature; reading them is a pleasure. Manuscript collections are handled skillfully, and Hamm’s use of newspapers is especially noteworthy for providing a sense of the national scale and variety of opinions about prohibition. Twists and turns of Congress and the courts are diligently traced and analyzed. One only wishes that the book were less repetitious, better organized, and more concrete about issues other than prohibition.

Before discussing Hamm’s study in detail, it is helpful to review the period’s historical context. In the nineteenth century, American society underwent rapid upheaval: immigration, urbanization, industrialization, western settlement, resource exploitation, and technological innovation. The Civil War saved the Union, ended slavery, and made federal power supreme, but the United States remained heterogeneous, a vast country with strong traditions of localism, with a devotion to individual liberty, and with an attachment to nineteenth-century laissez-faire ideas. Americans found it difficult to centralize government power; instead, the nation’s huge new industrial enterprises became the most powerful forces of the late nineteenth century.2

Reformers, such as Henry Adams, noticed rising economic inequality, watched the wealthy grow more powerful, and saw the

political system become a cesspool of corruption. One of the worst episodes occurred in 1875, when distillers in the “Whiskey Ring” were caught bribing federal tax officials. Paralyzed by pre-industrial traditions, laissez-faire ideology, and the stupefying pace of socioeconomic change, reformers proved unable to organize effectively until around 1900. Then, a new generation of remarkable leaders emerged. Presidents Theodore Roosevelt and Woodrow Wilson, as well as Wisconsin Governor Robert La Follette and California Governor Hiram Johnson, not only defied tradition by refusing to wear beards but rallied long-alienated rural Americans into a politically powerful coalition with the more recently discontented urban middle class. They dared to attack both the unbridled power of capital and the nation’s social ills, including workplace accidents, child labor, prostitution, impure food and drugs, and drunkenness.3

The progressives, as they called themselves, both reinvigorated and reinvented government. Seeking vastly increased power for government, they redefined government’s proper functions and devised new, more sophisticated ways for officials to carry out their duties. In particular, they expanded the scope of regulatory agencies and enhanced the power of law by innovating administrative law. For example, many states established new public utility commissions to set rates; these commissions gained extensive power through substantive administrative rulings that acquired the force of law in the absence of detailed statutory regulation. Progressives recognized that the main traditional source of governmental power, the statute, was inadequate for governance in the complex modern age. Laws provided rough guidelines for action, but effective enforcement of matters such as shipping policies and rates, industrial safety and work rules, and the operation of public utilities required more refined judgments. These came increasingly through administrative regulations and the workings of complex bureaucratic processes. It was the age of the expert.

The courts also became an essential part of progressive governance, for without judicial support, law failed and policy floundered. In contrast with the laissez-faire ideas of the late nineteenth century, both state and federal courts after 1900 frequently upheld governmental regulation, including such initiatives as workmen’s compensation, child labor regulations, and minimum wages for women. This expansion of the concept of law, the creation of supportive mechanisms, and the enlargement of governmental power gave overall shape to the progressive era. We still live with the consequences of these changes today.4

Alcohol use was among the many issues of the day to which the progressives applied their ideas about governance. The issue was not a new one. To many Americans, especially the majority raised in rural or small-town evangelical Protestant environments, Demon Rum explained almost all of society’s ills, from poverty and unemployment to prostitution, wife beating, and murder. To stop the use of alcohol had long been an evangelical goal. The temperance campaign that started in the 1820’s demanded personal abstinence both as the price of church membership and as a badge of middle-class respectability. By the 1850’s, increased immigration, especially by whiskey-imbibing Irish and beer-drinking Germans, gave abstinence a patriotic twist: To drink was to be un-American.5

Abstainers began with their own salvation through teetotalism. Like other moral absolutists, they soon became obsessed with imposing their own particularist views upon the entire population through a legal ban. In 1851, Maine became the first state to enact prohibition, and, within four years, twelve states followed.6 However,

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enforcement generally failed, at least in part because of liquor shipped across state lines, and these early laws were all repealed. Prohibitionists concluded that dry areas would only be safe when the whole country was dry. Despite this conclusion, national prohibition did not occur for two generations. One important impediment was Frances Willard, the longtime head of the Woman's Christian Temperance Union (WCTU). From the 1870's until Willard's death in 1898, the WCTU dominated the anti-liquor movement. Although Willard favored prohibition, she stressed educating the public about personal abstinence. She also worried that a premature emphasis on prohibition would defeat her other great reform, women's suffrage. In Willard's lifetime, national prohibition seemed unlikely. It appeared unworkable inside the federal political system due to the limited role permitted for national government. All of this would change in the progressive era.  

No issue vexed the progressives more than prohibition. Many reformers were personal abstainers, and others who were not recognized the strong influence of prohibitionists upon the political system. The demand for growing governmental power to control alcohol was consistent with the more general progressive advocacy of governmental power to regulate other aspects of life, including slums, public health, education, and untamed capitalism. Yet prohibition, because of the particular nature of the reform, raised interesting questions. Could the federal government interfere with basic human rights? Could government at any level deprive a person of the right to personal possession and use of a product? Because alcohol was a commodity, was interstate shipment constitutionally protected? What were the limits of state control and federal power? At what precise point did federally-controlled shipment cease and state-controlled possession begin? Could a government collect taxes on illegal goods? Could a state obtain federal tax information about goods banned by a state? These were just some of the questions that emerged in this era.

One of the main themes in Hamm's book is that state and federal laws and United States Supreme Court rulings were not always consistent and frequently meandered. Public policy emerged from existing laws and past rulings, from what might be attained politically in the present, and from expectations about the future. In 1887, the

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Supreme Court ruled in Mugler v. Kansas that dry states could seize liquor without having to pay compensation.\textsuperscript{8} As Hamm points out, Mugler created the possibility of effective state prohibition. The Court, however, was anything but a dry bastion. In Bowman v. Chicago and Northwestern R.R., the Court barred Iowa from banning interstate alcohol so long as the product remained in its original package.\textsuperscript{9} However, the Court hinted that Congress might reverse this ruling by a specific statute or by authorizing state legislation. This decision, along with its affirmation in Leisy v. Hardin,\textsuperscript{10} led the distillers to ship two- or four-ounce bottles unboxed in loose straw.\textsuperscript{11} Angry drays persuaded Congress to overturn Leisy with the Wilson Act (1890), which allowed states to ban, tax, or regulate interstate alcohol.

Tax issues, as Hamm discusses in two fine, detailed chapters, frequently arose. After the federal government began to tax alcohol in 1862, the Internal Revenue Service (IRS) took the position that it would not share any information with the states. Thus, the IRS routinely demanded and received taxes on liquor illegally sold in dry states. This policy was driven by revenue needs, for, by the mid-1890's, liquor taxes constituted about two-fifths of all federal revenues.\textsuperscript{12} Drays divided on this issue. Some believed that high taxes reduced demand and thereby helped dry the country. Others, including the WCTU, opposed liquor taxes because they thought that the large amounts of money collected made national prohibition impossible. Prohibitionists became strong advocates for a federal income tax in order to replace liquor taxes. Politicians, however, tended to prefer the existing alcohol tax to any new tax.

In the License Tax Cases, decided in 1866, the United States Supreme Court upheld the right of the federal government to collect alcohol taxes in dry jurisdictions.\textsuperscript{13} Dealers in such locations often boasted, to the irritation of drays, about their federal “licenses.” Drays were also annoyed that the federal government routinely seized untaxed liquor and then sold it at public auctions on post office steps in dry jurisdictions. In order to maintain a working relationship with producers, IRS officials refused to cooperate in dry state prosecutions, a policy upheld by the Supreme Court in Boske v. Comingore\textsuperscript{14} in

\textsuperscript{8} 123 U.S. 623 (1887).
\textsuperscript{9} 125 U.S. 465 (1888).
\textsuperscript{10} 135 U.S. 100 (1890)(reaffirming that Iowa was constitutionally barred from banning interstate alcohol shipments).
\textsuperscript{11} Hamm, 71.
\textsuperscript{12} Ibid., 96.
\textsuperscript{13} McGuire v. Mass., 70 U.S. (3 Wall.) 382 (1866).
\textsuperscript{14} 177 U.S. 459 (1900).
1900. Local officials, like the rest of the public, had only the right to inspect the list of federal liquor taxpayers that each IRS office was required to maintain. In 1906, under Anti-Saloon League (ASL) influence, Congress passed the Certified List Law, which required local IRS officials to provide dry state officials with the names of persons who had paid federal liquor taxes. As a result of this law, twelve dry states declared that being listed was *prima facie* evidence of a state law violation. Hamm notes that state prosecutions correspondingly became more robust.

Even after passage of the Wilson Act, the interstate shipment of liquor continued to be a source of legal trouble because of the uncertain boundary between federal and state jurisdiction. In 1898, the Supreme Court held in *Rhodes v. Iowa* that a dry state could not interfere with alcohol that was "in transit." Thus, a state could not seize liquor as a common carrier crossed the state line. That same year, the Court declared in *Vance v. W.A. Vandercook Co.* that a state could not stop the interstate shipment of liquor for personal use. In 1905, the Court protected interstate shippers by extending federal protection to the point where the liquor actually reached the consignee. These rulings resulted in an open liquor trade in dry areas. Express companies received liquor on behalf of fictitious consignees and then sold it to anyone who put in a claim.

While wets focused on the right to personal use, Hamm observes that the ASL shrewdly dodged the issue. It ignored individual consumers and instead concentrated on stopping large volumes of alcohol being sent for sale in dry areas. In 1906, the IRS, following an ASL suggestion, began to demand liquor taxes from the express companies, who responded by curtailing their business. Producers filed lawsuits demanding that common carriers accept all goods, a position upheld by the Supreme Court six years later in *Louisville and Nashville R.R. Co. v. Cook Brewing Co.* That decision provoked drys to seek relief from Congress. At the same time progressives pursued an expansion of federal power using the Constitution's Commerce Clause. The Mann Act, passed in 1910 and upheld in

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15. Hamm, 166.
17. 170 U.S. 412 (1898).
18. 170 U.S. 438 (1898).
1913, had already attacked the interstate white slave trade in prostitution through this clause.\footnote{22}

The Commerce Clause formed the basis of the C.O.D. Act, passed in 1909, which required shippers to label clearly both the consignee’s name and the package’s contents. Congruent state laws produced rigorous enforcement. By this point, according to Hamm, unity between the ASL and the WCTU, as well as the growing comfort among progressives with use of the Commerce Clause, led Congress to pass the Webb-Kenyon Act in 1913.\footnote{23} This law stopped the interstate shipment of alcohol into dry areas, unless state law allowed personal use. Although the federal government could confiscate liquor, only the states could impose penalties under this statute. Southerners liked the states’ rights features of the Webb-Kenyon measure, a fact that the ASL noticed.

As prohibition gained popularity, the law kept pace. By 1917, eighteen states had “bone-dry” laws that banned alcohol for personal use.\footnote{24} These laws were upheld by the Supreme Court.\footnote{25} Meanwhile, Congress had taken the United States into World War I, enacted wartime prohibition, and banned liquor from being sent into dry areas for any reason. Some dry states outlawed liquor advertising. It is a curious fact that the most strenuous dry provisions, including Webb-Kenyon, wartime prohibition, and the Eighteenth Amendment, were passed by Congresses controlled by Democrats. Although the Democratic South came late to prohibition, the region embraced the idea with zeal in the progressive era. Prohibition, however, was less a partisan issue than a geographical idea rooted in the rural, evangelical South and West.

After 1913, the ASL concentrated on national prohibition by constitutional amendment. This idea meshed with a general progressive faith in the utility of constitutional amendments. Although some proposals, such as the election of federal judges and a ban on child labor, failed, progressives ultimately passed four amendments, including the prohibition amendment. Collectively, these amendments demonstrated the progressive belief in powerful government action and expressed a consistent hostility to alcohol. The direct election of senators removed political decision-making from liquor-filled backrooms; the income tax enabled the federal government to replace the liquor tax; and female suffrage greatly expanded the dry electorate. Far from being an embarrassing anomaly, prohibition, then,
was just one of a matrix of progressive reforms designed to remake the United States.

Hamm stresses that the Eighteenth Amendment, as passed by Congress in December 1917, did not ban personal possession or use of alcohol. The ASL feared that such a ban would sound too extreme and would defeat ratification. The ASL also paid attention to the Southern concern for states' rights, and thus the amendment called for a curious concurrent enforcement by federal and state authorities. At the time, legal experts disagreed about the meaning of dual control. In 1920, the Supreme Court upheld the ASL's definition: Essentially, federal and state governments could each enforce federal prohibition, though the states were free to enforce stricter state standards. 26 The main federal law, the Volstead Act of 1919, 27 was heavily influenced by the ASL and passed over Wilson's veto. It outlawed any beverage with more than .5 percent alcohol. Wet states, however, resisted enforcement, discredited prohibition by their inactivity, and helped bring about repeal in 1933. In practice, concurrent enforcement did not work. 28

Hamm's study makes all of these points clear and enables us to draw a larger conclusion. Other reformers, including today's, need to be alert to the way in which the legislative and judicial structures, precedents, and processes encourage certain approaches, bar others, and provide the framework within which outcomes are shaped. As Hamm shows, the result may be that certain reforms are all but impossible. Other reforms may be possible, but only with carefully targeted effort, and some changes may be obtained only in partial ways that might not resemble the outcomes imagined by supporters.

It is worth considering prohibition in terms that go beyond Hamm's book. Ultimately, prohibition's failure was due to a lack of popular support for enforcement. For example, in the evangelical, Republican, and respectable small town in Pennsylvania where my father grew up, the only difference prohibition brought was that the saloon's front door was locked; patrons had to knock on the back door to gain admittance. Throughout prohibition, this town's Veterans of Foreign Wars post served liquor—and had slot machines. prohibition may be seen as a crusade by reformers whose zeal outran their sense, as the worst kind of pressure group politics, or as an

27. 41 Stat. 305 (1919).
idealistic idea born of naiveté. In any case, prohibition speaks volumes about the limited good that comes from reform movements.

At the same time, as Hamm demonstrates, the reformers’ use of the legal structure, the passage of new laws, and the frequent, crucial Supreme Court decisions show that prohibition was not merely a matter of ideas and dry political power. There were many forces at work, many players in the political system, wets as well as drys, and all used the Congress, the courts, and bureaucratic agencies with varying degrees of success. This is surely a cautionary tale about hubris. Although the drys used political power to gain prohibition, both the movement and the laws ultimately failed. In a democracy, public opinion will ultimately triumph.

Then, too, the federal system, perhaps as James Madison intended, had made prohibition unworkable. A nationally enforced federal law was too large a grant of police power to the distant central government to enjoy popular support. Yet dry state action alone had failed even before the progressive era, and concurrent federal-state enforcement proved impractical. Court decisions cannot all go one way, even if, as Mr. Dooley said, the Supreme Court follows the election returns, because the balance of forces inside the Court will shift over time, and issues will be reframed in ways that result in different decisions. The Court also seeks to balance state power and individual rights; many of the decisions that most distressed drys were based on American ideas about personal liberty. That ideal also defeated prohibition. Although the drys had energy and zeal, they found themselves opposing popular American ideas about alcohol, personal freedom, government, and federalism. Any government proscription in America may well produce strange, quixotic results. It is unlikely to produce the clear victory its advocates want.