FEDERALISM, POSITIVE LAW, AND THE EMERGENCE OF THE AMERICAN ADMINISTRATIVE STATE: PROHIBITION IN THE TAFT COURT ERA

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ABSTRACT

This Article offers a detailed analysis of major Taft Court decisions involving prohibition, including Olmstead v. United States, Carroll v. United States, United States v. Lanza, Lambert v. Yellowley, and Tumey v. Ohio. Prohibition, and the Eighteenth Amendment by which it was constitutionally entrenched, was the result of a social movement that fused progressive beliefs in efficiency with conservative beliefs in individual responsibility and self-control.

During the 1920s the Supreme Court was a strictly "bone-dry" institution that regularly sustained the administrative and law enforcement techniques deployed by the federal government in its

† This Article makes extensive use of primary source material, including the papers of members of the Taft Court. All unpublished sources cited herein are on file with the author.

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losing effort to prevent the manufacture and sale of liquor throughout the continental United States. This is surprising, because the Taft Court was in other respects dominated by conservative Justices, who were temperamentally opposed to the expansion of the national administrative state, particularly in contexts in which the national government sought to displace local police power. Prohibition represented the greatest expansion of federal regulatory authority since Reconstruction. It caused a major crisis in the theory and practice of American federalism, as the national government, which lacked the courts or police necessary for implementing the Eighteenth Amendment, sought to conscript state judicial and law enforcement resources.

Close inspection reveals that the Taft Court’s support for prohibition came from an unlikely alliance between two liberal Justices—Holmes and Brandeis—and three conservative Justices—Taft, Van Deaver, and Sanford. Three conservative Justices—McReynolds, Sutherland, and Butler—remained adamantly opposed to prohibition.

Holmes’s and Brandeis’s support of prohibition likely reflects pre-New Deal liberalism’s conviction that courts ought to defer to democratic lawmaking. This conviction was sorely tested by the flagrant and persistent defiance of prohibition, as well as by the repressive criminal and administrative techniques used to secure prohibition’s enforcement. Not only did progressives grow suspicious of federal regulatory efforts to enforce sumptuary legislation, but they began to question the legitimacy of positive law that lacked resonance with the customs and mores of the population. These trends in American liberalism are visible in Brandeis’s famous dissent in Olmstead. They would vanish with the advent of the New Deal and not reappear until the 1960s, in cases like Griswold v. Connecticut, at a time when the American administrative state had become as effectively entrenched as it had been during prohibition in the 1920s.

The opposition to prohibition of McReynolds, Sutherland, and Butler represents the traditional pre-New Deal judicial conservative position that positive law, particularly positive national law, was to be judicially disciplined whenever it departed from customary social values. The vigorous support of prohibition by otherwise conservative Justices like Taft, Van Deaver, and Sanford, by contrast,
represents a new development in American judicial conservatism. These Justices fused a conservative belief in social control with an embrace of legal positivism. This fusion disappeared from judicial conservatism with the repeal of the Eighteenth Amendment, and it did not reappear until the 1970s and the philosophy of Justice Rehnquist, when judicial conservatism finally came to terms with the entrenchment of the American administrative state.

The brief constitutionalization of prohibition, in other words, forced Justices on both the right and the left to stop debating whether there should be an American administrative state, and required them instead to reconstruct their judicial philosophy on the assumption that the administrative state was an unalterable reality. It provoked a brief efflorescence of judicial perspectives that would not come into full flower until late in the twentieth century. Prohibition also forced a rethinking of the appropriate limits of national power, as well as fundamental developments in the meaning of Fourth Amendment limitations on law enforcement.
INTRODUCTION

To recover the significance of prohibition in the United States is to engage in what Michel Foucault would call archaeology. The normal history of the American administrative state simply omits the era of prohibition. The hiatus is especially striking because the Eighteenth Amendment’s prohibition on the sale and manufacture of liquor prompted the greatest expansion of federal administrative responsibility since the days of Reconstruction. Yet the ordinary narrative of American institutional development leaps directly from prewar progressivism to FDR’s New Deal, skipping lightly over the 1920s. Apparently the collapse of prohibition was so traumatic that the whole episode has simply dropped from our historical consciousness.

This is a pity, for prohibition has much to teach us about important themes of American constitutional history. The Eighteenth Amendment, ratified on January 16, 1919, prohibited “the manufacture, sale, or transportation of intoxicating liquors,” and the bone-dry Volstead Act, enacted by Congress to implement the Amendment, defined liquor as intoxicating whenever it contained more than 0.5 percent alcohol. Although the Eighteenth Amendment had been approved by forty-six of the forty-eight

2. The Amendment provides:
   Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
   Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.
   Sec. 3. This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.
   U.S. CONST. amend. XVIII, repealed by U.S. CONST. amend. XXI.
3. The official name for the Volstead Act was the National Prohibition Act, ch. 85, 41 Stat. 305 (1919), repealed by Liquor Law Repeal and Enforcement Act, ch. 740, 49 Stat. 872 (1935).
states, and although the majority of the states had some form of local prohibition prior to ratification, national prohibition was


6. State prohibition laws preexisted national prohibition. The prevalence of such laws had increased dramatically in the years before the United States entered World War I. At the turn of the century there were only five states with "state-wide laws prohibiting the manufacture and sale of intoxicating beverages," but by April 1917 that number had increased to twenty-six. JAMES H. TIMBERLAKE, PROHIBITION AND THE PROGRESSIVE MOVEMENT 1900-1920, at 149-66 (1986). Of these, only thirteen—all in the southern or western regions of the country—"had sought to anticipate on a state-wide basis the drastic bone-dry legislation of the Eighteenth Amendment." CHARLES MERZ, THE DRY DECADE 22 (1931). The remaining "dry" states allowed the importation and/or manufacture of alcohol for personal use, although some restricted the type of alcohol permitted and many limited the amount that could be imported during any given period. See id. at 20-22. Virtually all of the "wet" states had local option laws that allowed localities to vote themselves dry or refuse liquor licenses. See generally WAYNE B. WHEELER, FEDERAL AND STATE LAWS RELATING TO INTOXICATING LIQUOR (2d ed. 1918). For a compilation of state prohibition laws in effect in 1918, based on Wheeler's work, see Tables 2 and 3 in the Appendix. It is noteworthy that the effect of the 1917 Reed Amendment, Law of Mar. 3, 1917, ch. 162, § 5, 39 Stat. 1058, 1069 (1917), was to transform states that forbade the sale and manufacture of liquor, but that permitted the importation of liquor for personal use, into bone-dry states. It was observed in 1930:

It is not generally known that bone-dryness is an absolutely new thing in this country. It did not exist at all before 1914, and substantially not at all before 1917, when the Reed Amendment (a Federal Statute), as a war-time measure, made it unlawful to ship intoxicants into "dry" states. Before the Reed amendment went into effect on July 1, 1917, it was lawful in almost every dry state for residents to have liquor shipped to them from wet states. Many of these dry states also permitted residents to make their own alcoholic beverages. It was, accordingly, the fact that before 1914 all, and before 1917 substantially all, of the dry states were merely partially dry,—the idea being to abolish the saloon, not to force total abstinence on everyone. These semi-dry laws commanded a large public support and respect and accordingly did not cause the resentment which the bone-dry Volstead Act has since aroused. They appear, accordingly, to have worked much better in practice than the more recent bone-dry law.

THE MODERATION LEAGUE, A NATIONAL SURVEY OF CONDITIONS UNDER PROHIBITION 1930, at 5-6 (1930).

It is difficult to gauge the effectiveness of state prohibition in the years immediately preceding the Eighteenth Amendment. For a good discussion, see Harry M. Cassidy, Liquor Control in the United States, 1928 EDITORIAL RES. REP. 683, 693-705. In 1917, the Literary Digest offered a useful and detailed survey of conditions under state prohibition. Nation-wide Prohibition as a War Measure: The Story of Prohibition in States Dry for At Least a Year Told by Their Newspapers, LITERARY DIG., May 26, 1917, at 1573. One Maine newspaper observed that state prohibition was sometimes undermined by "weak and nullifying officials" but
divisive from the start. Two constitutional foci of the controversies that swirled around prohibition are of particular interest.

The first is federalism.\textsuperscript{7} The United States had never before attempted to control the details of everyday life, and the nation lacked the institutional structures necessary independently to

\textsuperscript{7} Nonetheless concluded that in rural areas "the law has 'fulfilled its high purpose in a degree that is admirable beyond measure.'" \textit{Id.} at 1576. Newspapers in Kansas, which had a long history of prohibition efforts, thought highly of state prohibition laws. The editor of the Topeka \textit{State Journal} esteemed them "a great success ... and would recommend [them] to other States." \textit{Id.} at 1603. Many newspapers noted that although prohibition had achieved desirable effects, it had also spawned an underground trade in alcohol that was difficult to stamp out. The Tulsa \textit{World} in Oklahoma declared that, while prohibition had succeeded in eliminating the licensed saloon, "instead we have the 'blind tiger' [i.e., the speakeasy] and the bootlegger .... The irony of the new condition is that the new evils are not amenable to regulation, are outlaws from start to finish, yet because of popular demand they remain and flourish 'in spite of police activity and religious crusades.'" \textit{Id.} at 1613. The \textit{Courier News} of Fargo, North Dakota, interpreted this shift as a sign of progress. Believing that "antiprohibition sentiment is losing ground rather than gaining, with the result that enforcement makes constant progress," the paper noted that the consumption of alcohol had moved "from marble-front and beveled-glass interior locations on the best business corners" to "low dives, and nauseating places" where "the social element of drinking" had been eliminated. \textit{Id.} at 1607. Several newspapers expressed the view that the success of enforcement depended upon popular opinion. A Georgia paper asserted that "[t]he drink habit is not going by enforcement until more people believe it is wrong to drink.... So long as a fairly large number of individual citizens want it, liquor will continue to come to Georgia." \textit{Id.} at 1610. State prohibitionists expressed optimism on this score. \textit{Id.} at 1619. In sum, as the Fayetteville \textit{Observer} of North Carolina noted, "prohibition has prohibited as much as most other laws, for all laws are violated." \textit{Id.} at 1620. What this success portended for national prohibition, however, was unclear, for, as the \textit{Cocino Sun} of Arizona presciently warned, "[g]radually, the United States is going 'dry,'" by education and by a general inclination of the people, but a nation-wide prohibition law would seem at this time so drastic that a revolution of feeling might result in undoing the good work already done by the States." \textit{Id.} at 1633.

\textit{7}. Columbia University political scientist John Burgess remarked that in discussions "preceding the adoption" of the Eighteenth Amendment, \textit{[m]en did not seem so much impressed by the fact that the individual was to be totally deprived of his right to determine for himself what he would drink as by the fact that the jurisdiction of the States was to be reduced.\ldots A number of the States of the Union had already prohibited the manufacture and sale of intoxicating drinks and we had become somewhat accustomed to Government exercising control of the subject. It did not seem so much, therefore, a deprivation of individual liberty as a centralization of governmental power already exercised."

\textbf{JOHN W. BURGESS, RECENT CHANGES IN AMERICAN CONSTITUTIONAL THEORY 87-88 (1923). At the time of the adoption of the Eighteenth Amendment "[t]he power of the states ... to prohibit the manufacture and sale of intoxicating liquor" was considered "so well settled that it is no longer an open question." ARCHIBALD DOUGLAS DABNEY, LIQUOR PROHIBITION 61 (1920).}
implement the Eighteenth Amendment. The federal government was virtually forced to attempt to conscript state law enforcement resources, which provoked sustained controversy about the proper boundary between state and national sovereignty. Both supporters and opponents of prohibition struggled to understand how the Eighteenth Amendment’s radical enlargement of federal authority could be reconciled with received ideals of federalism. Many Americans came to reject the idea that the national government ought to be involved in detailed police regulations seeking to control the minutiae of everyday life.

The second is positive law. Positive legislation, as distinct from common law customary standards, is essential for the development of an administrative state. Prohibition was a conspicuous form of such legislation; it sought to reform the entrenched values and behavior of important segments of the American population. Not surprisingly, prohibition provoked a fierce and roiling debate about the legitimacy of positive law which, although democratically enacted, nevertheless seeks to override engrained social mores. This debate exposed surprisingly widespread reservations about the validity of positive legislation. The debate also revealed an intimate connection between distrust of positive law and distrust of federal authority.

During the 1920s the Supreme Court, under the leadership of Chief Justice William Howard Taft, was at the storm center of prohibition enforcement. The Court split violently over the interpretation and administration of prohibition. Taft remarked to his son Charles that “[i]t would seem as if more feeling could be engendered over the Prohibition Act than almost any other subject

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8. The Eighteenth Amendment represents the first effort in our history to extent [sic] directly by Constitutional provision the police control of the federal government to the personal habits and conduct of the individual. It was an experiment, the extent and difficulty of which was probably not appreciated. The government was without organization for or experience in the enforcement of a law of this character.

that we have in the Court."9 "There is something about the issue that seems to engender bitterness,"10 Taft observed two years later:

We have had two five to four decisions, Brandeis writing the majority opinion in each case. Our dear friends Pierce Butler and George Sutherland are most sensitive on the subject of the Volstead law, but Holmes, Van Devanter, Brandeis, Sanford and I are still steady in the boat. Stone wobbles a good deal on the subject, and I don't quite see where he stands, and I am not quite sure that he does.11

Taft suggests, and independent analysis confirms, that the disagreements inspired by prohibition cut across the usual divide that separated judicial conservatives from liberals.12 That divide

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9. "[U]nless," Taft continued, "it be the technical questions of jurisdiction, the excited feelings over which among the members of the Court amaze me." Letter from William Howard Taft (WHT) to Charles P. Taft, 2nd (Dec. 28, 1924), microformed on WILLIAM H. TAFT PAPERS, Reel 270 (Library of Cong. 1969) [hereinafter TAFT PAPERS]. During the 1921 to 1928 Terms, inclusive, the Taft Court decided 1554 opinions, of which 84.5 percent were unanimous, by which I mean that they had no dissenting or concurring opinions. During that same period the Taft Court, by my count, decided sixty-six cases that were connected to prohibition. Of these cases, only 74.2 percent were unanimous.

10. Letter from WHT to Horace D. Taft (Dec. 12, 1927), microformed on TAFT PAPERS, supra note 9, Reel 287. Taft was very frank about the opposition provoked by federal statutory enforcement of Prohibition: "There are certain members of our Court who I dislike to say are becoming a bit raw in their opposition to the Volstead Act." Id.

11. Id. The only major prohibition case that the Court decided in December of 1927 was Gambino v. United States, 276 U.S. 310 (1927), a unanimous but politically delicate opinion authored by Brandeis. Id. at 312. The only five-to-four decision about prohibition that the Taft Court decided prior to 1927 was Lambert v. Yellowley, 272 U.S. 581 (1926), a decision authored by Brandeis. Id. at 587. Justices McReynolds, Sutherland, Butler, and Stone dissented. Id. at 597, 605. In referring to a second five-to-four decision, Taft might have had in mind United States v. One Ford Coupe Automobile, 272 U.S. 321 (1926), which was also authored by Brandeis. Id. at 323. McReynolds, Sutherland, and Butler dissented in that case, and Stone filed a special and limited concurrence. Id. at 335.

12. The Taft Court was a vigorous supporter of prohibition. See infra note 142 and accompanying text. Figures A and B in the Appendix contrast the voting patterns of Justices Sutherland, Butler, and McReynolds to those of Taft, Holmes, Van Devanter, and Sanford. These figures indicate that Sutherland, Butler, and McReynolds were, during the 1920s, less likely to join or author an opinion for the Court in cases involving prohibition than they were in cases generally, whereas the reverse was true for Taft, Holmes, Van Devanter, and Sanford. On the roots of Stone's ambivalent attitude toward prohibition, see infra note 269.

From the time he was appointed to the Court until the end of the 1928 Term, Justice Sutherland either joined or authored the opinion for the Court in 96.7 percent of the cases in which he participated. During that same period, however, he either joined or authored the opinion for the Court in only 90.7 percent of cases involving prohibition. Infra App. Fig. A. For
was ordinarily drawn over the question of how deferentially courts ought to review manifestations of the administrative state, and most especially of the national administrative state. But the Eighteenth Amendment confronted the Court with a massive fait accompli committing the national government to a wide-ranging project of social control. Faced with a seemingly unalterable constitutional mandate for prohibition, the conservative wing of the Court split into two factions.

Justices McReynolds, Sutherland, and Butler remained faithful to a traditional conservative view that was suspicious of positive governmental regulation. They detested prohibition both because they opposed the expansion of the national administrative state and because they believed that positive law ought to be subordinated to received social values. Conservatives like Taft, Van Devanter, and Sanford, by contrast, strongly supported prohibition because they interpreted opposition to the Eighteenth Amendment as resistance to the legal order itself. Accepting prohibition as irreversible positive law requiring rigorous enforcement, these Justices pio-

examples of Sutherland's discomfort with the Court's support of prohibition, see Donnelley v. United States, 276 U.S. 505, 518 (1928) (Sutherland, J., dissenting); Lambert, 272 U.S. at 597 (Sutherland, J., dissenting); One Ford Coupe Automobile, 272 U.S. at 335 (Butler, J., dissenting); Carroll v. United States, 267 U.S. 132, 163 (1925) (McReynolds & Sutherland, JJ., dissenting); and Cunard Steamship Co. v. Mellon, 262 U.S. 100, 133 (1923) (Sutherland, J., dissenting).

From the time he was appointed to the Court until the end of the 1928 Term, Justice Butler either joined or authored the opinion for the Court in 97.8 percent of the cases in which he participated. During that same period, however, he either joined or authored the opinion for the Court in only 89.3 percent of cases involving prohibition. Infra App. Fig. A. For examples of Butler's opposition to prohibition, see Lambert, 272 U.S. at 597, 605 (Sutherland, J., dissenting); Port Gardner Investment Co. v. United States, 272 U.S. 564, 567 (1926) (Butler, J., concurring); One Ford Coupe Automobile, 272 U.S. at 335 (Butler, J., dissenting); and Samuels v. McCurdy, 267 U.S. 188, 200 (1925) (Butler, J., dissenting).

In a 1922 conversation with Frankfurter, Brandeis remarked that "Day & Clarke & Mc[Reynolds] are quite wild about prohibition." Melvin I. Urofsky, The Brandeis-Frankfurter Conversations, 1985 Sup. Ct. Rev. 299, 306. From the time of Taft's appointment as Chief Justice until the end of the 1928 Term, McReynolds either joined or authored the opinion for the Court in 94.0 percent of the cases in which he participated. During that same period, however, he either joined or authored the opinion for the Court in only 87.9 percent of cases involving prohibition. Infra App. Fig. A. For examples of McReynolds's opposition to prohibition, see Lambert, 272 U.S. at 597, 605 (Sutherland, J., dissenting); One Ford Coupe Automobile, 272 U.S. at 335, 351 (Butler, J., dissenting); Carroll, 267 U.S. at 163; Cunard Steamship Co., 262 U.S. at 132 (McReynolds, J., dissenting); Vigliotti v. Pennsylvania, 258 U.S. 403, 409 (1922) (McReynolds, J., dissenting); and Corneli v. Moore, 257 U.S. 491, 499 (1922) (McReynolds, J., dissenting).
neered an innovative fusion of conservatism and positivism that would vanish after the repeal of prohibition and that would not again reemerge on the Court until William Rehnquist a half century later. 13

Liberals on the Court, like Holmes and Brandeis, also vigorously upheld prohibition, a stance that reflected both their embrace of national authority and their customary progressive deference to the democratic enactments of positive law. An odd and singular alliance of conservatives and liberals thus converted the Taft Court into an institution so staunchly dry that it would eventually be transformed into a potent symbol of the oppressive bureaucratic apparatus necessary to sustain prohibition. By the end of the decade the disparity between this apparatus and fundamental social norms had become so sharp that Brandeis was prompted to explore issues of legal legitimacy arising from the contradiction between positive law and basic social values. In his famous dissent in Olmstead v. United States, 14 Brandeis sketched constitutional protections for privacy that would foreshadow the subsequent emergence of a liberal communitarianism dedicated to using essential social norms to check the potential abuses of government administration. The repeal of prohibition and liberal support for the New Deal would defer the emergence of this kind of liberal communitarianism until the 1960s and cases like Griswold v. Connecticut. 15

Prohibition, in short, sparked new forms of jurisprudential thinking for both conservatives and liberals. These developments would be short lived because they would vanish with the Twenty-First Amendment and would not reappear until many years later, when the existence vel non of the national American administrative state had come to seem inevitable and irrevocable. To excavate the lost constitutional debates surrounding prohibition is thus to uncover the drama of Americans struggling for the first time to understand the relationship between positive federal law and

15. 381 U.S. 479, 486, 494 (1965) (Goldberg, J., concurring).
popular values under conditions in which such law no longer seemed optional, but instead an inescapable national destiny.

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If one were forced to identify the single issue that most dominated political attention and debate during the 1920s, prohibition would certainly be a strong candidate.\(^{16}\) It was “the largest political issue ... since the Civil War.”\(^{17}\) In his 1922 State of the Union Address, President Harding was moved to complain “that many voters are disposed to make all political decisions with reference to this single question. It is distracting the public mind and prejudicing the judgment of the electorate.”\(^{18}\) In contrast to the enforcement of state and local prohibition laws that predated prohibition,\(^{19}\) federal efforts to enforce the Eighteenth Amendment were so conspicuously ineffectual that widespread violation of prohibition became, in Harding’s words, a “nation-wide scandal” that was “the most demoralizing factor in our public life.”\(^{20}\)

“Conspicuous and flagrant violations”\(^{21}\) of prohibition provoked a vigorous discussion about the extent to which federal law could be used “to effect a radical change in the personal habits of a large

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\(^{16}\) Prohibition “has been marked by controversy, nation-wide in scope and almost unparalleled in intensity.” Fabian Franklin, *Prohibition Ten Years After*, 83 FORUM 209, 209 (1930).

\(^{17}\) HOWARD LEE MCBAIN, *PROHIBITION LEGAL AND ILLEGAL* 14 (1928).


\(^{19}\) See supra note 6; see also NAT’L COMM. ON LAW OBSERVANCE AND ENFORCEMENT, supra note 8, at 39 (“At the time of the adoption of the Eighteenth Amendment, thirty-three states had adopted prohibition by law or constitution .... In many of ... [these] states the laws were quite generally enforced before national prohibition.”); W.H. Stayton, *Our Experiment in National Prohibition: What Progress Has It Made?*, 109 ANNUALS AM. ACAD. POL. & SOC. SCI. 26, 26 (1923) (“[U]ntil the outbreak of the World War, the only prohibition known in this country was state or district prohibition—something resting on home rule and local self-government.... State prohibition laws ... were well known and in some states were favored by a majority of the voters.... [T]hey were fairly well obeyed and respected,—about as other laws were; they required for their execution no separate and expensive enforcement divisions, but were administered by the regular judicial and police forces; they brought no great scandals, and were reasonably free from corrupting effects. None of these things can, as yet, fairly be said for the Volstead Act.”).

\(^{20}\) Harding, supra note 18, at 2636.

part of the population, under the compulsion of the combined executive and judicial branches of the government of the United States." Prohibition provoked this debate because the Eighteenth Amendment was a truly astonishing and disorienting social innovation. Contemporaries of all political stripes recognized the Eighteenth Amendment as "the most radical political and social experiment of our day," and prohibition as "one of the most extensive and sweeping efforts to change the social habits of an entire nation recorded in history."

The radical reach of prohibition was made possible by the "frenzy" of World War I. The ratification of the Eighteenth Amendment was

22. Martin Conboy, Has the Volstead Act Nullified the Eighteenth Amendment, 16 GEO. L.J. 348, 350 (1928).
24. NAT'L COMM'O ON LAW OBSERVANCE AND ENFORCEMENT, supra note 8, at 10. Prohibition "marks what is perhaps the most radical change that has ever taken place in the history of a nation." Frank Crane, The Little Church on Main Street, 72 CURRENT OPINION 736, 736 (1922).
25. Progressivism and Prohibition, supra note 23, at 262; see also RICHARD F. HAMM, SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880-1920, at 240 (1998) ("The frenzied emotions of war mobilization carried over into the drive for national constitutional prohibition."). Woodrow Wilson addressed both Houses of Congress on April 2, 1917, urging that war be declared on Germany. 55 CONG. REC. 102-04 (1917). The Eighteenth Amendment was introduced into Congress two days later, on April 4, 1917, 55 CONG. REC. 197-98 (1917), and proposed by Congress to the States on December 19, 1917, S.J. Res. 17, 65th Cong., 40 Stat. 1080 (1917). Congress did not formally declare war until April 6. S.J. Res. 1, 66th Cong., 40 Stat. 1 (1917). "[I]t was universally recognized that one of the most essential steps in winning the war was to suspend the liquor traffic." NAT'L COMM'O ON LAW OBSERVANCE AND ENFORCEMENT, supra note 8, at 5. Accordingly, on May 18, 1917, Congress prohibited the sale to soldiers of all intoxicating liquor, including beer, ale, or wine. Law of May 18, 1917, ch. 15, § 12, 40 Stat. 76, 82-83 (1917).

By the Act of August 10, 1917, c. 53, § 15, 40 Stat. 276, 282, a war measure known as the Lever Act, Congress prohibited the use after September 9, 1917, of food materials or feeds in the production of distilled spirits for beverage purposes and authorized the President to limit or prohibit their use in the production of malt or vinous liquors for beverage purposes, so far as he might, from time to time, deem it essential to assure an adequate supply of food, or deem it helpful in promoting the national security or defense. Under the power so conferred the President, by proclamation of December 8, 1917, 40 Stat. 1728, prohibited the production after January 1, 1918, of any "malt liquor except ale and porter" containing more than 2.75 per centum of alcohol by weight. By proclamation of September 16, 1918, 40 Stat. 1848, the prohibition was extended to "malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol" .... Jacob Ruppert v. Caffey, 251 U.S. 264, 278-79 (1920). On November 21, 1918, after the Armistice of November 11, Congress passed the War-Time Prohibition Act, which provided
The law of Nov. 21, 1918, ch. 212, 40 Stat. 1045, 1046 (1918); see Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 153 (1919). The entire ratification process for the Eighteenth Amendment thus occurred under various forms of emergency national wartime prohibition. For a good discussion of wartime prohibition, see Christopher N. May, In the Name of War: Judicial Review and the War Powers Since 1913, at 50-53 (1989). For a summary of federal prohibition in the period before 1920, see Table 1 in the Appendix.

26. War Breaking Down the Barriers to Prohibition and Woman Suffrage, 64 CURRENT OPINION 82, 83 (1918); accord Timberlake, supra note 6, at 178 ("In speeding the [Eighteenth] Amendment through Congress and the state legislatures, the war undoubtedly played an important part."); The Problem of Prohibition in War Time, 119 OUTLOOK 515, 515 (1918) ("The sentiment in favor of National prohibition is due primarily to the growing belief that the evils of the liquor traffic can be overcome only by National action. But it has received a great impulse from the growing conviction that it is necessary as a war measure.").

27. William Howard Taft, Foreword to Lord Shaw of Dunfermline, The Law of the Kinsmen 10 (1923); see Nat'l Comm'n on Law Observance and Enforcement, supra note 8, at 46; Walter Thompson, Federal Centralization: A Study and Criticism of the Expanding Scope of Congressional Legislation 183 (1923) ("Prohibition became associated with winning the war."); A. Lawrence Lowell, Reconstruction and Prohibition, 143 ATLANTIC MONTHLY 145 (Feb. 1929); Editorial, The Prohibition Amendment and Its Outlook, 108 COM. & FIN. CHRON. 1212, 1212 (1919) ("It is probable that when we have had ten years of perspective ... it will be freely acknowledged that the reformers pressed their advantage (the advantage of an admission that the war measure was best) at a time when the thought of the people was engrossed with war, peace, and reconstruction."). But see Nolan R. Best, Yes, "IT'S THE LAW" AND IT'S A GOOD LAW 63 (1926) (arguing that "national prohibition was not a fruit of the Great War," but conceding that "[i]t would indeed not have been brought to pass quite so soon if there had been no national emergency which compelled economy of food resources and man power.")


By the time of the armistice the government had taken over the ocean shipping, railroad, telephone, and telegraph industries; commandeered hundreds of manufacturing plants; entered into massive economic enterprises on its own account in such varied departments as shipbuilding, wheat trading, and building construction; undertaken to lend huge sums to businesses directly or indirectly and to regulate the private issuance of securities; established official priorities
aftermath of the war the nation scrambled frantically to return to "normalcy" by dismantling the extensive emergency authorities that had been allocated to the national government, prohibition endured because it had been constitutionally entrenched. In the Republican and conservative environment of the 1920s, prohibition was a striking reminder of the excesses of the war; it was "something out of the normal."

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for the use of transportation facilities, food, fuel, and many raw materials; fixed the prices of dozens of important commodities; intervened in hundreds of labor disputes; and conscripted millions of men for service in the armed forces.

Id.


31. Conboy, supra note 22, at 353; see THOMPSON, supra note 27, at 361-62 ("Perhaps what makes the enforcement of federal liquor laws especially difficult is that prohibition is a standard adopted under an agitated and abnormal condition of the public mind created by war psychology and prematurely imposed."); see also FREDERIC LYMAN COBB, PROHIBITION! THE CROWNING FOLLY OF THE GREAT WAR'S AFTERMATH 1 (1922):

During the war anything that had the slightest bearing on helping to "win the war" was proposed and put in operation.

Some of these energies were sane and necessary—many others were nothing but rampant hysteria, and should have ceased as soon as the war ended. But the momentum was so great most of them were swept over into peacetime.

What, during the fever of war, seemed perfectly natural and sensible is entirely out of place now that the war is over.

In this class Prohibition leads them all.

Id.
The “abnormal”\textsuperscript{32} circumstances of prohibition’s ratification set it athwart the ordinary lines that divided liberals from conservatives. The roots of prohibition lay in evangelical protestant moralism, so much so that Richard Hofstadter could dismiss it as “a pseudo-reform” produced by a “rural-evangelical virus” capable of transmuting “the reforming energies of the country ... into mere peevishness.”\textsuperscript{33} But prohibition, at least as it matured in the second decade of the twentieth century, was also “one of the reforms of the Progressive Movement.”\textsuperscript{34} Prohibition expressed “middle-class”\textsuperscript{35} aspirations to use “government action to protect or

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32. Letter from WHT to Allen B. Lincoln (Sept. 2, 1918), \textit{microformed on TAFT PAPERS}, supra note 9, Reel 197 (“We are acting now under the heroic impulse of a war, which stirs our feelings and makes us think that we can have a millennium of virtue and self-sacrifice for the future. This is a fundamental error. I profoundly deplore having our constitutional structure seriously amended by a feverish enthusiasm, which will stand to neglect and laxity in many states as the years go on. If, through the abnormal psychology of war, the thirty-six states are induced to approve a national prohibition amendment now, we can never change it, though a great majority of the people may come later to see its utter failure.”). At the time of the proposal of the Eighteenth Amendment, William H. Anderson, state superintendent for New York for the Anti-Saloon League of America, the primary lobbying group for prohibition, remarked:

If an emergency, by opening a short cut which avoids the necessity for settling a lot of technical questions, enables the doing of certain desirable things with less delay and less friction than would be possible under normal conditions, that is one of the compensations of such a catastrophe as war.


33. Richard Hofstadter, \textit{The Age of Reform: From Bryan to F.D.R.} 287-88, 290 (1955). “[In the twenties,” Hofstadter notes, prohibition “was the skeleton at the feast, a grim reminder of the moral frenzy that so many wished to forget, a ludicrous caricature of the reforming impulse, of the Yankee-Protestant notion that it is both possible and desirable to moralize private life through public action.” Id. at 287. Hofstadter stressed the extent to which prohibition in the 1920s had become associated with anti-immigrant prejudice, most especially that associated with the Ku Klux Klan. Id. at 291-93.

34. Timberlake, \textit{supra} note 6, at 100; see Dewey W. Grantham, \textit{Southern Progressivism: The Reconciliation of Progress and Tradition} 160, 173 (1983) (explaining that prohibition “enlisted the strong support of most southern progressives” and was “the manifestation of a desire for social uplift of the poor and of a zeal to promote social justice”); J.C. Burnham, \textit{New Perspectives on the Prohibition “Experiment” of the 1920’s}, 2 \textit{J. SOC. HIST.} 51, 52-53 (1968); Robert A. Hohner, \textit{The Prohibitionists: Who Were They?}, 68 S. \textit{ATLANTIC Q.} 491, 500-01 (1969) (“Both prohibitionists and progressives reflected a moral idealism; both had great faith in progress, efficiency, and science; both attempted to curb the arrogance and power of big business, to eliminate political corruption, and to reduce crime, poverty, and disease; both sought to uplift the masses by direct legislation.”).

35. Timberlake, \textit{supra} note 6, at 152.
advance the public interest.”36 It was advocated to promote health,37 workplace effectiveness,38 “war efficiency,”39 crime reduction,40 the


37. So, I am bound to believe, on the evidence, that if you take alcohol habitually, in any quantity whatever, it is to some extent a menace to you. I am bound to believe, in the light of what science has revealed: (1) that you are tangibly threatening the physical structures of your stomach, your liver, your kidneys, your heart, your blood-vessels, your nerves, your brain; (2) that you are unequivocally decreasing your capacity for work in any field, be it physical, intellectual, or artistic; (3) that you are in some measure lowering the grade of your mind, dulling your higher esthetic sense, and taking the finer edge off your morals; (4) that you are distinctly lessening your chances of maintaining health and attaining longevity; and (5) that you may be entailing upon your descendants yet unborn a bond of incalculable misery.

Such, I am bound to believe, is the probable cost of your “moderate” indulgence in alcoholic beverages. Part of that cost you must pay in person; the balance will be the heritage of future generations.

Henry Smith Williams, Alcohol and the Individual, 31 McCLURE’S MAG. 704, 712 (1908); see Eugene Lyman Fisk, The Relationship of Alcohol to Society and to Citizenship, 109 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 5 (1923).

38. Edward Alsworth Ross, Prohibition as the Sociologist Sees It, 142 HARPER’S MAG. 186, 188 (1921) (“The factory system supplanted the handicrafts, and a new class, the employers, came to realize how drink plays havoc with production. As workers became machine tenders the damage from the liquor habit in impairment of efficiency and in injury to delicate and costly machinery became ever more unmistakable. More and more employers came to look upon prohibition as a labor-efficiency policy and it was largely these men who financed the movement which brought the liquor interests to grief, despite their millions for propaganda.”); see Roy A. Haynes, Says Business Man Upholds Prohibition; Haynes Convinced that Industry Is Won Over by Reason of More Efficiency, N.Y. TIMES, Aug. 23, 1923, at 17.

39. The Independent, the official organ of The Efficiency Society, agitated for wartime prohibition because “human efficiency must be saved to win the war.” Editorial, To Win the War, 90 INDEPENDENT 486, 487 (1917). “We must not forget that when efficiency is concerned any drink, beer as well as whiskey, is bad.” Id. (On the relationship between The Independent and The Efficiency Society, see id. at 488.); see also Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 157 (1919) (“[P]rohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency.”).

40. George Elliott Howard, Alcohol and Crime: A Study in Social Causation, 24 Am. J. SOC. 61, 79-80 (1918) (“Without doubt the saloon is the chief laboratory of the vice and crime attributable to the use of intoxicating drinks. The closing of the saloon is the indispensable condition of any successful effort to eliminate the evils caused by alcohol. Wherever the saloon has been closed, whether by local option or by state-wide prohibition, drunkenness and therefore vice and crime have been lessened. Everywhere ‘dry’ towns compare favorably with license towns in this regard. Why stop with local or state action? Why not demand nationwide prohibition? Are not the American people ready to empower and to require the federal government to outlaw a traffic so destructive of the moral and vital resources of the nation?”); see also Richard J. Hopkins, Prohibition and Crime, 222 N. Am. Rev. 40, 41 (1925) (“The liquor traffic has been the dominant cause of crime, misery and pauperism. Intoxicants, directly or
Americanization of new immigrants, and the control of southern blacks.\textsuperscript{41}

The anomalous political status of prohibition was rooted in its unique capacity to serve as a "bridge between the old and the new, between those who wanted to reform individuals and those who wanted to reform society."\textsuperscript{42} As one astute observer remarked, "[w]hile the propaganda of prohibition still is pre-eminently a moral one, ... the conclusion is inescapable ... that the extra-religious support which vitalizes it today has been gained through its attempted assimilation of the gospel of mental and physical efficiency which now stands so firmly embodied in our national character."\textsuperscript{43} Conservatives supported prohibition because of its pietistic moralism,\textsuperscript{44} its hostility to large unruly urban populations,\textsuperscript{45} its nativism,\textsuperscript{46} and its commitment to authoritarian social control.\textsuperscript{47} Progressives supported prohibition because of its indirectly, have sent more people to the jails, penitentiaries and insane asylums than any other cause."\textsuperscript{48}

\textsuperscript{41} GRANTHAM, supra note 34, at 176; TIMBERLAKE, supra note 6, at 115-24.

\textsuperscript{42} GRANTHAM, supra note 34, at 173.

\textsuperscript{43} L. Ames Brown, Is Prohibition American?, 203 N. AM. REV., 413, 414 (1916).

\textsuperscript{44} See, e.g., GRANTHAM, supra note 34, at 173-74; Brown, supra note 43, at 416-18; Crane, supra note 24, at 741; Jeremiah Hevenward, Upholding the Constitution, 153 HARPER'S MAG. 476, 476 (1926); Hohner, supra note 34, at 494-95; "Prohibition Anderson" Answers Pertinent Questions on the Battle Against Alcohol, FORUM, July 1919, at 68-69.

\textsuperscript{45} See JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT 97-98 (1963); Hohner, supra note 34, at 495.

\textsuperscript{46} PEGRAM, supra note 36, at 169-73; see also Haynes, supra note 38 ("The foreign element in our population ... especially in the large cities, perhaps will be a problem always. Through all our history we have shown the world that foreign standards of life, types of citizenship, ideals and customs are not sufficient for us. Continued violation of, and contempt for, our prohibition laws have brought many loyal Americans to this definite conviction: If any of our ... un-American sons of Europe revolt against the very forces from which has sprung our greatness, then let them leave our shores. America is working out her destiny in her own American way. There is no place for the foreigner, or the native born, who ... sets himself against or apart from American tradition, American institutions.").

\textsuperscript{47} See, e.g., The Economics of War Prohibition, 38 SURVEY 143, 143 (1917) ("The public is far better advised today than ever before concerning the effects of the habitual use of intoxicants in producing criminal, insane and untrustworthy men and women and degenerate children. Prisons, asylums and public reformatories furnish continuous and abundant evidence along these lines. The increasing undiscipline of Americans has been observed and noted by investigators and students for many years. This is evidenced in lack of respect for parents, for the aged, for officers of the law and for the law itself. It has also been a uniform observation that these conditions become aggravated whenever and wherever intoxicating liquors are habitually used." (quoting Maj.-Gen. William Harding Carter)); see also GRANTHAM, supra note 34, at 176-77.
association with moral uplift, its affirmation of efficiency, and its use of social engineering to achieve social mastery.

For both conservatives and progressives, however, prohibition came at a price. For conservatives the price was commitment to a social reform that unabashedly sought to use state compulsion to improve society. Prohibition was in many ways the apotheosis of the administrative state, for it deployed a vast governmental apparatus to control intimate details of personal consumption. Even if this control were acceptable when exercised at the local level by individual states, the Eighteenth Amendment located responsibility in the national government, which was required to issue uniform regulations preempting all local variation. Conservatives could

48. GRANTHAM, supra note 34, at 173.
49. See TIMBERLAKE, supra note 6, at 67 (noting that the 1899 Committee of Fifty, which undertook an investigation of alcohol's role in poverty and crime, believed that the increased speed, precision, and danger of industrial machinery, as well as the greater intensity and length of the workday, necessitated workers' sobriety); id. at 80-81 (explaining that the aspiring middle class and labor unions also identified a relationship between sobriety and efficiency).
50. See PEGRAM, supra note 36, at 169 ("From its origins in the nineteenth century, temperance reform had developed as a forward-looking, optimistic social movement. Its proponents had been modernizers, those who looked forward to social, economic, and moral improvement."). Prohibition, it was said, "was bound to come as the inevitable consequence of technical and scientific progress." Henry W. Farnam, Law, Liberty, and Progress, 15 YALE REV. 433, 441 (1926).
51. In a remarkable series of editorials, for example, the New York Times, objecting to the "imposition of the prohibition amendment by the Anti-Saloon League and all the pragmatical busybodies who have bulldozed Congress and are now seeking to bulldoze the State Legislatures," charged southern conservative Democrats with hypocrisy:

When so many Democrats are more Hamiltonian than HAMILTON, when they miss no chance to add to the overgrown powers of the central Government, who could blame the Republicans if they should seek to regulate Federal elections in the Southern States? If "white supremacy" and local self-government are threatened at any time in the South, whose fault will it be? The fault of Democrats who have forgotten or renounced the historic and cardinal doctrines of the Democratic Party.

Editorial, State Rights Democrats, N.Y. TIMES, Apr. 15, 1918, at 14. Three months earlier the Times, apropos of Southern Democrats, had made the same point:
The old ragers against "centralization" have become its devotees. To speak of "State rights" is almost like speaking of an ancient world, of the Kentucky and Virginia resolutions. Yet the preservation to the several States of their undelegated and unprohibited ... powers ... should be striven for by every man who wants the American form of government to retain something of its original principles, who believes in local initiative and self-government, who is not willing to sacrifice the power of the State to the all-swallowing Federal monster.

State Rights and Prohibition, N.Y. TIMES, Jan. 9, 1918, at 12. In 1922 Fabian Franklin
support prohibition only by advocating "an experiment in federal centralization, which, if successful, would radically alter the customary and the appropriate distribution of responsibility for social welfare between Washington and the state capitals."

For progressives the price was more subtle. Progressives had long aspired to endow the federal government with the democratic legitimacy necessary to sustain the kind of extensive social regulation required by prohibition. But progressives in the 1920s were highly ambivalent about prohibition, 53 because the Eighteenth Amendment was a legal cataclysm of such unimaginable proportions that it undermined basic progressive assumptions about the desirability of the national administrative state. As the New Republic reported, "[n]ational prohibition" had been ratified "on the supposition that the American people would on the whole support

confirmed the accuracy of the Times's prediction. He caustically observed that after 1919 Southern Senators and Representatives and Legislaturemen who, forgetting about their cherished doctrine of State rights, had fallen over themselves in their eagerness to fasten the Eighteenth Amendment upon the country, suddenly discovered that they were deeply devoted to that doctrine when the Nineteenth Amendment came up for consideration. But nobody would listen to them.

Fabian Franklin, What Prohibition Has Done to America 30-31 (1922).

52. The Progressive Attitude Towards Prohibition?, 56 New Republic 166, 167 (1928).

The eighteenth amendment has profoundly altered our federal system of government. In comparison, the commerce clause is a frail instrument of potential centralization. If Congress ever casts off hypocrisy and sets up the necessary machinery for adequate federal enforcement, we shall enjoy a national bureaucracy worthy of our boasted "bigness" in other respects. No wonder Congress pauses before the plain logic of the amendment.

McBain, supra note 17, at 168.

53. The New Republic reported that the question of prohibition divides the progressives one from another just as sharply and irreconcilably as it does the Democrats and the Republicans. The western progressives outside of Wisconsin are for the most part dry, but there are many exceptions to this rule particularly among labor-union groups. The eastern progressives who live for the most part in large cities are more likely to be wet, but there is probably a larger proportion of dry progressives in the east than of wet progressives in the west. The social workers, for instance, who tend to be progressive are usually convinced supporters of prohibition, and while this group is not numerous, it is composed of unusually disinterested and intelligent voters. There is no consensus of opinion in any part of the country among progressives as to what attitude as progressives they should adopt toward prohibition.

Progressivism and Prohibition, supra note 23, at 261.
its enforcement," but "this calculation ... prove[d] to be entirely false." The Eighteenth Amendment instead provoked a stubborn and widespread violation of the law, and as the years have come and gone this resistance has increased rather than diminished.... [I]t has provoked dogged resistance on the part of several states .... The resistance has attained at the present time almost the dignity and importance of an organized insurrection against the authority of the federal government .... It is certain now that the rules of conduct prescribed for all American citizens by the Eighteenth Amendment and the Volstead act will be disobeyed by a minority of the American people so large and so segregated that they cannot be forced to obey without some huge expenditure of money and police power by the federal government.

It was almost immediately evident that prohibition could succeed only if it were sustained by the kind of focused national coercive power that risked making the federal government "f feared, disliked and suspected by many millions of American citizens." To the extent that enforcing prohibition "brought [the national government] into suspicion, disrepute and even contempt," it contradicted "[t]he first condition of a progressive revival," which was "the restoration of the federal government in the esteem, the loyalty and the obedience of the American people." Prohibition thus provoked progressives to rethink the normative foundations of American federalism. It forced liberals to consider whether certain forms of "social behavior" should "in any well balanced federal system ... be treated at least partly as a matter of local rather than of national responsibility."

Prohibition also required progressives to question the proper boundaries of the administrative state. The "volume, the stubbornness and the unscrupulousness of the existing resistance to the

54. Id. at 262. The "doctrine of cooperative exercise of state and national power over liquor" was at the heart of the dry movement. HAMM, supra note 25, at 255.
55. Progressivism and Prohibition, supra note 23, at 262.
56. Id. at 262-63.
57. Id. at 263.
58. The Progressive Attitude Towards Prohibition?, supra note 52, at 167.
59. Id.
60. Id. at 166.
law by millions of citizens who were "in other respects law-abiding," and who included "all the business, artistic, professional, labor and political leaders of the larger cities," raised for progressives the "totally new question" of whether law could "exterminate a habit of popular conduct to which people are so stubbornly attached." To the extent that progressivism aspired to express "the collective conscience of the community in its effort to make for more and better human life," prohibition required progressives to think anew about the relationship between traditional values and positive law.

The New Republic, for example, concluded that government "must expect to have its authority flouted" when "it forbids its citizens to perform innocent and inoffensive acts of private conduct." This dependence of legal legitimacy on the brute facts of popular custom carried with it the startling idea that progressives may previously have "over-emphasized the importance of government as the instrument of human amelioration," because the "moral authority of the government does not rest on its legal right to issue commands." Prohibition exposed the many ways in which legal legitimacy was dependent upon custom, even as progressives sought to use positive law to reform traditional mores.

It was of course possible for conservatives and liberals to debate prohibition in the old and familiar ways. Conservatives could condemn prohibition because it was "a gross outrage upon personal liberty" that represented a giant stride toward socialism, and because it entailed "the suppression of individuality, the exaltation of the collective will and the collective interest, the submergence of the individual will and the individual interest."

The cause of Prohibition has owed its rapid success in no small measure to the support of great capitalists and industrialists.

61. Progressivism and Prohibition, supra note 23, at 263.
63. Progressivism and Prohibition, supra note 23, at 263.
64. The Progressive Attitude Towards Prohibition?, supra note 52, at 166.
65. Id. at 167.
66. Id. at 166.
67. Id. at 167.
68. FRANKLIN, supra note 51, at 98.
69. Id. at 117-18.
bent upon the absorbing object of productive efficiency; but they have paid a price they little realize. For in the attainment of this minor object, they have made a tremendous breach in the greatest defense of the existing order of society against the advancing enemy. To undermine the foundations of Liberty is to open the way to Socialism.\(^70\)

And progressives could counter by reaffirming the necessity for active state intervention in order to achieve required social reform. In 1927 the president of the National Conference of Social Work invoked "the great progressive movement of 1910 to 1914"\(^71\) as a platform from which to lambaste "[t]he anti-prohibitionists" who, "with their cry of personal liberty, ... have about wrecked the true conception of government control of evils."\(^72\)

To be consistent those same destructionists go so far as to condemn any and all control of conduct .... What may the government regulate, control, or prohibit if not such human destroyers as ... intoxicating liquors? ... No previous time in our history has seen such a concerted movement to break the confidence of the people in their government as an instrument for human betterment.\(^73\)

Framed in this way, prohibition merely prompted an old and familiar dialogue about the desirability of the emerging administrative state. These issues had been debated throughout the progressive era and would continue to be discussed throughout the

\(^70\) Id. at 120. The Commercial & Financial Chronicle opposed prohibition as part of its general hostility to what it called "reform":

The moral of it all is, and it is a very big moral, that we cannot preserve either our liberties, our institutions, or our peculiar form of government, if we are to let self-appointed guardians of the public weal seek the cover of general law for the purpose of obtaining their self-satisfying ends. This prohibition measure and mandate is but one of these ends. It is, whether good or bad, a theory of the proper social life. In precisely the same manner theorists are seeking to control individual life in commerce .... And, it is worth repeating, while we are saving the world we are sleeping on our own rights ....

The Prohibition Amendment and Its Outlook, supra note 27, at 1212-13.


\(^72\) Id. at 7.

\(^73\) Id.
twentieth century. The unique characteristic of prohibition, however, was that it could provoke a discussion that transcended this debate, because it forced sophisticated Americans to face the jurisprudential and constitutional challenges that would emerge once the existence of the national administrative state was already in place and constitutionally entrenched. Prohibition required both conservatives and liberals to reconsider the fraught relationship between positive law and traditional values, and, in particular, to address the difficult question of how the continuous deployment of state coercion could undermine the legitimacy of the legal order itself. It forced both conservatives and liberals to address this question in the context of specifically national responsibility and authority.

II

Prohibition put enormous strain on the ideals of federalism to which the country was committed in the years before World War I. Most constitutional grants of federal power simply authorize the national government to regulate in a particular domain, such as interstate commerce. But the Eighteenth Amendment was different because, like the Thirteenth Amendment, it imposed a particular rule of conduct that forbade “the manufacture, sale, or transportation of intoxicating liquors ... for beverage purposes.”\(^{74}\) The Volstead Act, passed on October 28, 1919, over Woodrow Wilson’s veto, used a strict 0.5 percent alcohol content standard to define “intoxicating liquors.”\(^{75}\) With the passage of the Act, the federal government

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74. U.S. CONST. amend. XVIII, § 1.
75. Volstead Act, ch. 85, 41 Stat. 305 (1919) (repealed 1935); see Jacob Ruppert v. Caffey, 251 U.S. 264, 280 (1920). The Volstead Act “was designed as ‘a 1920 model of efficiency and speed.’” HAMM, supra note 25, at 251. The Act defined intoxicating beverages by reference to the standard previously used in the application of the War-Time Prohibition Act. See supra note 25 and accompanying text.

On February 6, 1919, the Commissioner of Internal Revenue ruled ... that a beverage containing as much as one-half of one per centum of alcohol by volume would be regarded as intoxicating within the intent of the Act of November 21, 1918 .... [S]ince 1902 ... fermented liquor containing as much as one-half of one per centum of alcohol had been treated as taxable under Rev. Stats. §§ 3339 and 3242; and this classification was expressly adopted in the War Revenue Act of October 3, 1917, c. 63, § 307, 40 Stat. 311.

Jacob Ruppert, 251 U.S. at 279-80.
suddenly found itself responsible for suppressing all trade and manufacture of liquor in the United States, a task for which it was utterly unprepared.  

Over the opposition of the Secretary of the Treasury and the Commissioner of Internal Revenue, Congress specified in the Volstead Act that prohibition be enforced by the Bureau of Internal Revenue. But compliance with the draconian provisions of the Volstead Act could be ensured only by “an army of enforcement agents far larger than it would be practicable to assemble or obtain an appropriation for.” The Commissioner therefore promptly announced that the Bureau could fulfill its responsibility only by securing “the closest cooperation between the Federal officers and all other law-enforcing officers—State, county, and municipal.”

The striking fact about prohibition was that this cooperation was not forthcoming, even though virtually every state eventually

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76. The origins of the now-familiar debate about the “federalization of local crime” lie in prohibition. For a contemporary example of that debate, see John S. Baker, Jr., State Police Powers and the Federalization of Local Crime, 72 Temp. L. Rev. 673 (1999).

77. Volstead Act, ch. 85, tit. 1, § 2, 41 Stat. 305 (1919) (repealed 1935). Evidently, said the Commissioner of Internal Revenue in his report for 1919, Congress was impressed by “the similarity of some phases of the work of internal-revenue agents in the field who are assigned to secure evidence and aid in the prosecution of persons who have evaded the taxes imposed by law on the manufacture and sale of alcoholic beverages with the police function of prohibition enforcement officers.” 1919 Comm’r Internal Revenue Ann. Rep. 52. The Anti-Saloon League vigorously advocated allocating prohibition enforcement to the Treasury Department in part because the League anticipated that an overworked IRS commissioner would rely on League advice in decisions involving personnel and enforcement policy. Pegram, supra note 36, at 153-54; Andrew Sinclair, Prohibition: The Era of Excess 273-76 (1962).


79. Comm’r Internal Revenue Ann. Rep., supra note 77, at 62. Plainly daunted by the task imposed upon him, the Commissioner declared:

The Bureau naturally expects unreserved cooperation also from those moral agencies which are so vitally interested in the proper administration of this law. Such agencies include churches, civic organizations, educational societies, charitable and philanthropic societies, and other welfare bodies. The Bureau further expects cooperation and support from all law-abiding citizens of the United States who may have been opposed to the adoption of the constitutional amendment and the law, which in pursuance of that amendment makes unlawful certain acts and privileges which were formerly not unlawful. Thus, it is the right of the Government officers charged with the enforcement of this law to expect the assistance and moral support of every citizen in upholding the law, regardless of personal conviction.

Id.
passed its own version of a prohibition statute. By 1923 President Harding was complaining that although "the Federal government is not equipped with the instrumentalities to make enforcement locally effective" because "it does not maintain either a police or a judicial establishment adequate or designed for such a task," the States were nevertheless disposed to abdicate their own police authority in this matter, and to turn over the burden of prohibition enforcement to the Federal authorities. It is a singular fact that some States which successfully enforced their own prohibition statutes before the eighteenth amendment was adopted have latterly gone backwards in this regard.

80. "If one fact was abundantly clear by 1930 it was the failure of the federal government, after ten years of earnest exhortation, to persuade the states to make a realistic effort to enforce prohibition in the United States." MERZ, supra note 6, at 279. Parsimonious state legislatures, even the ultra-dry Oklahoma General Assembly, refused to allocate sufficient funds for implementation of prohibition on the grounds that the national government should pay for enforcement. Officials in thirsty states did as little as they could and let federal officials bear the brunt of their constituents' hostility to the enforcement of prohibitory laws. In 1926 the state legislatures allocated eight times more to implement fish and game laws than to enforce prohibition.

HAMM, supra note 25, at 266; see also Burnham, supra note 34, at 58 ("[I]n 1927 only eighteen of the forty-eight states were appropriating money for the enforcement" of prohibition.). In 1927 total state expenditure for the enforcement of prohibition was about $690,000. PEGRAM, supra note 36, at 159.

81. Dry Law To Be Enforced, With or Without States' Help, Says President; Policy Will Not Be Modified Except by Adding Strength, WASH. POST, June 26, 1923, at 9 (quoting President Harding). Harding observed that "[c]omunities in which the policy was frankly accepted as productive of highly beneficial results, and in which there was no widespread protest so long as it was merely a State concern, report that since the Federal government became in part responsible there has been a growing laxity on the part of State authorities about enforcing the law." Id. Harding warned that

[i]f the burden of enforcement shall continue to be increasingly thrown upon the Federal government, it will be necessary, at large expense, to create a Federal police authority, which in time will inevitably come to be regarded as an intrusion upon and interference with the right of local authority to manage local concerns. The possibilities of disaster in such a situation hardly need to be suggested.

Id. Leading prohibitionists acknowledged the "embarrassment to enforcement" caused by the indifference of State and local officials in many sections who shifted to the Federal Government the entire responsibility for ferreting out violators of the law and seeing that it was enforced. It had never been expected that State and local authorities would abdicate their duties and responsibilities and place on the national authorities the enormous task of policing our entire territory.
Four years later, Lincoln Andrews, the Assistant Secretary of the Treasury in charge of prohibition enforcement, grumbled that

[...] state, county and municipal law officers tended to overlook their own civic responsibilities under their community laws, and to pass the responsibility for prohibition law enforcement to the Federal law and its agents. The citizens of the country generally ... looked to the national law in Federal hands for the enforcement of prohibition. 82

Andrews observed that citizens “resented this exercise of police power on the part of the Federal agents within their own communities ... in previously dry states, as well as in those that had never previously accepted state prohibition.” 83

Without the active and willing assistance of state police, the only option for federal prohibition enforcement would be, as Taft had pointed out in 1915, a “horde of Federal officials” who would constitute “a direct blow at local self-government and at the integrity of our Federal system, which depended on preserving the control by the States of parochial and local matters.” 84 “[S]uch a superimposed Federal police power,” said Andrews, “is to my mind absolutely unthinkable in America, and bad enough in Russia. Such a solution is predicated upon so false a conception of our government as to offend the very fundamentals of our institutions, and I believe it could never be accepted by a thoughtful public.” 85

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Edwin C. Dinwiddie, Is National Prohibition a Success?, 4 CONG. DIG. 26, 26 (1924).

82. Lincoln C. Andrews, Prohibition Enforcement as a Phase of Federal Versus State Jurisdiction in American Life, 129 ANNALS AM. ACAD. POL. SCI. 77, 82 (1927); see also Hibben, supra note 21, at 217 (“The states cannot be compelled to exercise concurrent power and corresponding legislation; this, according to the decision of the United States Supreme Court. Many states have refused to do so. Their attitude for the most part, and this is true also even of the states which had prohibition laws before the National Prohibition Act, is in a way a natural one: that the enforcement of prohibition is now a federal concern in which the state has no further responsibility and that many states do not care to assume the financial obligation thus necessitated.”).

83. Andrews, supra note 82, at 82-83. For a good history of failed federal efforts to stimulate state enforcement of prohibition, see MERZ, supra note 6, at 257-81.

84. Letter from WHT to Mrs. Elizabeth Hewes Tilton (Jan. 3, 1913), in For Local Option, Mr. Taft Explains; Ex-President Amplifies Recent Address in Which He Opposed National Prohibition, N.Y. TIMES, Jan. 24, 1915, at 10.

85. Andrews, supra note 82, at 84. “No one knows,” observed Andrews, how many policemen would be necessary, and how many Federal police courts
Whether for this or for some other reason, Congress throughout the 1920s refused to fund federal prohibition enforcement at anything close to the levels that would have been required to ensure full compliance with the law.\textsuperscript{86} National prohibition enforcement was understaffed,\textsuperscript{87} with agents who were underpaid\textsuperscript{88} and unprofessional.\textsuperscript{89} The federal judicial system was completely unprepared to

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would be required, but the numbers certainly would be tremendous, and the political and social effects of their daily contact with the intimate affairs of the citizens of the communities might easily be most disastrous to democratic institutions.

\textit{Id.}

86. MERZ, supra note 6, at 75-157, 265. "Congress has never seen fit to set up the machinery for" the "complete enforcement" of prohibition. McBAIN, supra note 17, at 32.

That would entail a vast increase in the number of prohibition agents, of prosecuting attorneys, and of courts. The cost would be staggering....

The monetary cost, however, would be as nothing compared to the cost to our system of government.... If Congress should create the machinery for its up-to-the-hilt enforcement, it must of necessity spread a veritable army of federal policemen over the land. It must set up a giant bureaucracy emanating from Washington....

Why does Congress hesitate? No doubt its motives are mixed. To plead poverty is to hide behind a shadow....

... A gigantic national police force is antipathetical to our federal scheme of things. Such a force is nevertheless the plain logic of national prohibition .... To enact a stringent enforcement law, such as the Volstead Act, and to provide enforcement machinery that is notoriously far short of adequacy is a gesture of sheer hypocrisy.

\textit{Id.} at 32-34. "[M]eager allocations guaranteed only token federal enforcement, carried on by a skeleton force unequal to the task." HAMM, supra note 25, at 267. Between 1921 and 1926, annual congressional appropriations for the Prohibition Bureau were between six and ten million dollars. PEGRAM, supra note 36, at 159.

87. MERZ, supra note 6, at 119-21.

88. \textit{Id.} at 79.

89. Until 1927, prohibition agents were not in the regular civil service, and as a consequence positions in national prohibition enforcement were an important source of political patronage. \textit{Id.} at 94-97, 106-07, 189-90. The ranks of federal enforcement officials were filled by "party hacks and patronage hunters. The National Civil Service League, along with many Americans, thought that most federal prohibition officers were at best incompetent and untrained and at worst venal and dishonest." HAMM, supra note 25, at 267. Assistant Attorney General Mabel Willebrandt, who was in charge of prohibition enforcement at the Justice Department, complained:

At present we haven't had the right kind of investigators. Many of them are well-meaning, sentimental and dry, but they can't catch crooks. The sole object of others has been to appropriate all the graft in sight, and they won't catch crooks. These two classes have obtained their positions largely because prohibition enforcement officers have been appointed at the instance of Senators, Congressmen and political leaders. The average Senator or
deal with the huge influx of cases generated by prohibition. H.L. Mencken famously quipped that “[p]erhaps the chief victims of Prohibition, in the long run, will turn out to be the Federal judges,” whose “typical job today, as a majority of the plain people see it, especially in the big cities, is simply to punish men who have refused or been unable to pay the bribes demanded by Prohibition enforcement officers.” The massive numbers of prohibition prosecutions forced federal courts “to perform the function of petty police courts.”

Congressman recommends a man because he has been useful politically or because he is an Anti-Saloon Leaguer, a confirmed dry or a widely known Sunday school teacher; but that kind of man doesn’t often make a good detective.

A.H. Ulm, A Woman Directs the Dry Battle: Mrs. Willebrandt, In Charge of the Legal End of Prohibition, Believes the Law Must Be Enforced Without Fear or Political Favor, To Protect the Nation’s Honor, N.Y. TIMES, Jan. 25, 1925, § 4 (Magazine), at 1 (quoting Mabel Walker Willebrandt); see MABEL WALKER WILLEBRANDT, THE INSIDE OF PROHIBITION 111-41 (1929). “When in 1927 Congress finally got around to requiring professional examinations for field agents, the results were disastrous. The Commissioner of Prohibition admitted that almost three-quarters of his men had failed the test.” WALTER F. MURPHY, WIRETAPPING ON TRIAL: A CASE STUDY IN THE JUDICIAL PROCESS 11-12 (1965). “During the first six years of prohibition, one of every twelve [prohibition] agents was fired” for some form of corruption.

PEGRAM, supra note 36, at 159.

90. “The condition of the American judiciary in the twenties was such that there was no hope of enforcing the Volstead Act.” SINCLAIR, supra note 77, at 211; see id. at 209-14.


92. Prosecutions for violations of the Volstead Act increased from 29,114 in 1921 to 74,723 in 1929. MERZ, supra note 6, at 332-33.

93. PROHIBITION AND FEDERAL JUDGES, N.Y. TIMES, May 29, 1925, at 16; see also NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, supra note 8, at 56:

Lawyers everywhere deplore, as one of the most serious effects of prohibition, the change in the general attitude toward the federal courts. Formerly these tribunals were of exceptional dignity, and the efficiency and dispatch of their criminal business commanded wholesome fear and respect. . . . The effect of the huge volume of liquor prosecutions, which has come to these courts under prohibition, has injured their dignity, impaired their efficiency, and endangered the wholesome respect for them which once obtained. Instead of being impressive tribunals of superior jurisdiction, they have had to do the work of police courts and that work has been chiefly in the public eye. These deplorable conditions have been aggravated by the constant presence in and about these courts of professional criminal lawyers and bail-bond agents, whose unethical and mercenary practices have detracted from these valued institutions.

Id. A more colorful assessment was offered in 1924 in a private letter by federal district judge Martin J. Wade:

When I came on the Bench ten years ago in March next, the position was one of dignity and honor, to-day, if one stepped into a Federal Court during more than fifty per cent of each Session, he would think he was in a police court,
It is no wonder that Coolidge sought to solve the problem of prohibition enforcement by arguing that the Eighteenth Amendment "puts a concurrent duty on the States. We need their active and energetic cooperation, the vigilant action of their police, and the jurisdiction of their courts to assist in enforcement." Coolidge appealed to the enigmatic second section of the Eighteenth Amendment, which provided that "[t]he Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." Section 2 of the Eighteenth Amendment raised a deep question about the constitutional structure of American federalism, for it forced contemporaries to theorize the relationship between independent state sovereignty and the affirmative constitutional requirement of prohibition.

swarming with Italians and Poles, and Greeks, Chinamen, "niggers", and samples of nearly all the races, with weeping wives and bawling children, bootleggers, dope fiends, dope peddlers, White Slavers, etc. etc. The work, the worry, the responsibility, are more than double what they were in 1915. Letter from Martin J. Wade to Senator Thomas Walsh (Dec. 30, 1924) (Walsh Papers). Wade was writing in support of an increase in pay for federal judges. Many thanks to Ed Purcell for this reference.


[O]fficers of the Department of Justice throughout the country should be vigilant in enforcing the law, but local authorities, which had always been mainly responsible for the enforcement of law in relation to intoxicating liquor, ought not to seek evasion by attempting to shift the burden wholly upon the Federal agencies. Under the Constitution the States are jointly charged with the Nation in providing for the enforcement of the prohibition amendment.

Calvin Coolidge, Fourth Annual Message (Dec. 7, 1926), in 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, supra note 18, at 2706; see Calvin Coolidge, Sixth Annual Message (Dec. 4, 1928), in 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, supra note 18, at 2743 ("Under the terms of the Constitution, however, the obligation is equally on the States to exercise the power which they have through the executive, legislative, judicial, and police branches of their governments in behalf of enforcement."). In his inaugural address, Herbert Hoover continued this same appeal, stressing that "the undoubted abuses which have grown up under the Eighteenth Amendment" were in part "due to the failure of some States to accept their share of responsibility for the concurrent enforcement and to the failure of many State and local officials to accept the obligation under their oath of office zealously to enforce the laws." Herbert Hoover, Inaugural Address (Mar. 4, 1929), in 3 THE INAUGURAL ADDRESSES OF THE PRESIDENTS 438-39 (Renz D. Bowers ed., 1929).

Speaking before a conference of state Governors that he had convened "to consider co-operation between the State and Federal Governments in the enforcement of the Eighteenth Amendment," Coolidge argued that the Amendment imposed on states "a joint responsibility to enact and execute enforcement laws." Throughout the decade federal officials and supporters of prohibition maintained

96. Governors Accept Coolidge Program To Back Up Dry Law, N.Y. TIMES, Oct. 21, 1923, at 1. Coolidge's conclusions were seconded by Attorney General Daugherty, who asserted that "[t]he States owe to the Federal Government a reciprocal loyalty to support and enforce the Constitution of the United States and the laws enacted by Congress pursuant thereto." Id. Noting "the congestion of the dockets of the Federal courts ... from prohibition cases pending," Daugherty proposed that "larger conspiracies" be prosecuted in federal courts, whereas "smaller offenses ... be handled by local, State or Police Courts." Id. For a lively description of the conference, see Governors Pledge Full Cooperation To Aid Prohibition, WASH. POST, Oct. 20, 1923, at 1. Three years later, on May 8, 1926, Coolidge issued Executive Order No. 4439 providing that to "more efficiently function in the enforcement of the National Prohibition act, any state, county or municipal officer may be appointed, at a nominal rate of compensation, as prohibition officer of the Treasury Department to enforce the provisions of the National Prohibition act, and acts supplemental thereto." Coolidge's Dry Order Amends Grant's Decree Issued in 1873 and in Force Since Then, N.Y. TIMES, May 22, 1926, at 2. The order provoked "a flood of bitter criticism in the Senate," and was "denounced as illegal and unconstitutional and as an encroachment on State rights." Coolidge Dry Order Attacked in Senate as Unconstitutional; President Permits County, Municipal and State Officers To Enforce Federal Law, N.Y. TIMES, May 22, 1926, at 1; see Andrews To Try Out Coolidge Dry Order First in California; Will Employ Deputy Sheriffs at Nominal Pay To Aid in Enforcement, N.Y. TIMES, May 23, 1926, at 1; Congress Renews Assault on Order; Senator Robinson Calls Coolidge Action Invalid and Urges Referendum, N.Y. TIMES, May 25, 1926, at 1; House Body Denies Action To Nullify Coolidge Dry Order; Britten Resolution To Prevent Use of State Police Is Rejected, WASH. POST, June 11, 1926, at 4; House Wets To Push Bill To Let States Fix Alcohol Ratio, N.Y. TIMES, May 27, 1926, at 1; Storm Grows on Coolidge Dry Order; Give State Rights Views, N.Y. TIMES, May 25, 1926, at 1. For a discussion of the order, see James Hart, Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement, 13 VA. L. REV. 86 (1927). In the end "[n]o state officials were appointed as agents of the federal government.... No change was made in the enforcement of the law. Mr. Coolidge's order was filed away ... and the whole question was forgotten." MERZ, supra note 6, at 193. For a fascinating survey of the various forms of state and federal cooperation that developed during prohibition, see J.P. Chamberlain, Current Legislation: Enforcement of the Volstead Act Through State Agencies, 10 A.B.A. J. 391, 394 (1924): [The Eighteenth Amendment] has brought into strong relief the inadequacy of the organization of the federal government, especially its judicial branch, to deal with so widespread a question as prohibition; it has shown that state and national government machines must operate harmoniously to put into effect a police policy declared to be national, but affecting individuals so widely, and it has brought into the open the inconvenience of a double system of police regulations of the same article in the same country. The attempts made by the states and the nation to meet the situation constitute a chapter in our constitutional development well worth watching.
the position that the Eighteenth Amendment created affirmative state obligations to enforce the law. In 1929, for example, James M. Doran, Commissioner of Prohibition, proclaimed that there was “no doubt” that States were required “to exercise in their appropriate sphere of action the full police powers of the State, in order to properly discharge their obligations under the Eighteenth Amendment.” Idaho Senator William E. Borah, a noted dry, wrote an entire article for the New York Times arguing that even though “[w]e cannot mandamus a State to pass a State law, to execute or enforce a law,” a state was nevertheless under a “legal obligation ... to support the law under which it lives.”

Against this interpretation of the Eighteenth Amendment, Maryland Governor Albert C. Ritchie advanced the position that “the Eighteenth Amendment ... does not mean that the States are legally or morally obliged to exercise” their concurrent power of enforcement.

97. See Haynes Answers Pinchot’s Attack; Says State Officers Must Do Their Share To Enforce Prohibition Laws, N.Y. TIMES, Nov. 5, 1923, at 3.
98. Ritchie and Doran Clash at Institute, N.Y. TIMES, Aug. 16, 1929, at 8 (quoting James M. Doran); see also Dry Law Needs Help of State Says Dr. Doran, CHRISTIAN SCI. MONITOR, Dec. 13, 1929, at 1 (“I am of the opinion,” he said, “that the obligation to enact enforcement laws under the concurrent clause of the Eighteenth Amendment is equally obligatory upon the states, as well as upon the Federal Government.”). Arthur J. Davis, Massachusetts state superintendent of the Anti-Saloon League, made a similar argument: “The Eighteenth Amendment ... imposes on the states the same obligation to enforce prohibition by appropriate legislation that it imposes upon Congress.” Ritchie’s Attack on Prohibition Challenged by State Dry Leader; Davis Declares Amendment Demands States’ Help in Enforcing Law, CHRISTIAN SCI. MONITOR, Dec. 11, 1929, at 2.
99. William E. Borah, The State’s Duty Under Prohibition; Senator Borah Holds that, Although a State Cannot Be Mandamused To Pass or Enforce a Statute, It Has a Legal and Moral Obligation To Support the Mandates of the United States Constitution, N.Y. TIMES, July 28, 1929, § 9, at 1. The article developed ideas Borah had earlier presented in William E. Borah, Civic Righteousness: Lawlessness the Insidious Disease of Republics, 114 CENTURY MAG. 641, 644-46 (1927) [hereinafter Borah, Civic Righteousness], and in Senator William E. Borah, Shall the Constitution of the United States Be Nullified?, Address at the Citizenship Conference (Oct. 13-15, 1923), in LAW VS. LAWLESSNESS 163-80 (Fred B. Smith ed., 1924). For similar positions, see William Gibb McAdoo, The Challenge; Liquor and Lawlessness Versus Constitutional Government 65-79 (1928); M’Adoo Sees a Wet Plot by Corrupt City Machines To Gain Federal Control, N.Y. TIMES, Jan. 29, 1927, at 7 (“The same affirmative duty rests upon the State Governments as upon Congress to provide for effective enforcement [of the Eighteenth Amendment].”) (quoting William McAdoo)).
100. Politics Institute Debates Dry Law; Governor Ritchie Denies Maryland Is Compelled To Enforce Federal Statute, N.Y. TIMES, Aug. 15, 1929, at 48 (quoting Albert C. Ritchie).
No State is called upon to provide enforcement machinery for the Federal income tax law or the narcotic law or the Mann act or any other Federal enactment that I know of. Why, then, should any State be obligated to set up State machinery to enforce just one out of all the thousands of Federal laws—the Federal prohibition law—merely because the Eighteenth Amendment says that it has the power to do so?\textsuperscript{101}

The idea that states were obligated independently to enforce the Eighteenth Amendment would seem to imply that states were constitutionally required to enact statutes prohibiting the sale and transportation of liquor. But in 1923 New York repealed its antiliquor statute, the Mullan-Gage law.\textsuperscript{102} In discussing his decision not to veto the repeal,\textsuperscript{103} Governor Smith essentially


\textsuperscript{102} Act effective June 1, 1923, ch. 871, 1923 N.Y. Laws 1690. Although New York had ratified the Eighteenth Amendment, it had also passed in 1920 the "so-called Walker Act," \textit{Ex parte Finegan}, 270 F. 665, 665 (N.D.N.Y. 1921), which "purported to make it lawful ... for persons who" paid a state liquor tax "to traffic in liquor containing" less than "2.75 per centum of alcohol by weight." People v. Cook, 188 N.Y.S. 291, 293 (N.Y. App. Div. 1921); see also Act of May 24, 1920, ch. 911, §§ 2, 8, 1920 N.Y. Laws 2276, 2277, 2282. Because the Volstead Act prohibited transporting and selling beverages having in excess of 0.5 percent alcohol, the Walker Act was declared pro tanto unconstitutional. Cook, 188 N.Y.S. at 296. In 1921, therefore, the New York Legislature enacted the Mullan-Gage Act, which "put into the penal statutes substantially all of the provisions of the Volstead Act, but accompanied them by even more rigorous provisions as to search and seizure." Alfred E. Smith, \textit{The Governor's Statement}, \textit{N.Y. Times}, June 2, 1923, at 1 (reprinting Smith's signing statement for the bill repealing the Act). The Mullan-Gage Act proved impossible to enforce. \textit{Merz, supra} note 6, at 203-05.

\textsuperscript{103} Smith was under enormous pressure to veto the repeal. Responding to a letter from a private citizen arguing that "[e]very State official who voted" for the repeal of the Mullan-Gage law "is subject to the law of treason, having taken the oath to sustain the Constitution of the United States," President Harding announced that

[w]ith much of what you say I am fully in accord.... The executives of the nation and equally the executives of the States are sworn to enforce the Constitution. It is difficult to believe that public approval will ever be given to any other than a policy of fully and literally discharging this duty.... The States are equipped with police organizations and judicial establishments adequate to deal with such problems. The Federal Government is not thus equipped.

\textit{Harding Sees Clash if Gov. Smith Signs Dry Law Repealer}, \textit{N.Y. Times}, May 17, 1923, at 1; see \textit{Sinclair, supra} note 77, at 296-97. Smith's decision to sign the repeal marked the beginning of the alignment of the national Democratic Party with antiprohibitionism, an alignment that would have momentous consequences for prohibition with the eventual
adopted Ritchie's position. He asserted that he was "entirely unwilling to admit the contention that there was put upon the State, either by the Eighteenth Amendment [or] the Volstead act ... any obligation to pass any law adopting into the State law the provisions of the Volstead act." The Eighteenth Amendment was "not a command but an option. It does not create a duty", any other conclusion, Smith contended, would be inconsistent with "the supremacy of the Federal Government in its own sphere and the sovereignty of the several States in theirs," which is "one of the great elements in the strength of our democracy."

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election of FDR. See JAMES M. BECK, THE REVOLT AGAINST PROHIBITION 12 (1930) ("The Republican Party cannot longer afford to sell its soul to the fanatical Drys and if it does, and thus becomes the party of Prohibition, it may have a like fate.").

104. Smith, supra note 102, at 1. Smith directly answered the suggestion in Harding's critique that, because the States have a larger police force than the Federal Government has, and because the Federal Government has at this time what the President describes as an inadequate machinery for the enforcement of the Volstead act, therefore the States are obligated severally to enact statutes duplicating the Volstead act. I am unable to understand from what source he believes this obligation to be derived and he does not disclose it. The President might, with equal force, suggest that at any time Congress in its wisdom saw fit to withhold adequate appropriation for the enforcement of any Federal law that there immediately devolved a duty upon each State to enact that Federal law into a State statute and make every offense against Federal law not enforced a duty upon the States to punish it as a State offense and at State expense.

Id.

105. Id.

106. Id. With something less than analytic consistency, Smith also stated that New York "peace officers" would nevertheless retain the sacred responsibility of sustaining the Volstead act with as much force and as much vigor as they would enforce any State law or local ordinance and I shall expect the discharge of that duty in the fullest measure by every peace officer in the State....

Let it be understood at once and for all that this repeal does not in the slightest degree lessen the obligation of peace officers of the State to enforce in its strictest letter the Volstead act, and warning to that effect is herein contained as coming from the Chief Executive of the State of New York.

Id. Either Smith meant to argue that state legislatures had no obligation to enforce federal law, whereas state executive officials did have such an obligation, or he meant to argue that the "obligation" of state police officers to enforce the Volstead Act depended entirely on the discretionary policy of the Governor.
The Taft Court considered the implications of New York's repeal of its state prohibition law in *Gambino v. United States.* The defendants in the case were arrested and searched by New York state troopers while transporting intoxicating liquor in an automobile in violation of the Volstead Act. "[T]he liquor and other property taken were immediately turned over to a federal deputy collector of customs for prosecution in the federal court for northern New York." The defendants moved to suppress the evidence on the ground that "the arrest, the search and the seizure were without a warrant and without probable cause; in violation" of the Fourth and Fifth Amendments. The Court agreed that the search and seizure lacked probable cause, but at the time the restrictions of the Fourth and Fifth Amendments did not apply to the States, and evidence acquired through "the wrongful act of a stranger" to the federal government would not be suppressed.

107. 275 U.S. 310 (1927).
108. Id. at 312-13.
109. Id. at 313.
110. Id. The Court refused to explain this conclusion, stating simply that "[w]e are of opinion on the facts, which it is unnecessary to detail, that there was not probable cause." Id. Kenneth M. Murchison calls *Gambino* an "enigmatic" decision, because the Court's holding that the officers lacked probable cause was reached "without explaining why the facts known to the investigating officers were insufficient" and because the holding was inconsistent with the Court's earlier explication of probable cause in *Carroll v. United States*, 267 U.S. 132 (1925). KENNETH M. MURCHISON, FEDERAL CRIMINAL LAW DOCTRINES: THE FORGOTTEN INFLUENCE OF NATIONAL PROHIBITION 62-63 (1994). In fact we know that Justice Holmes was quite troubled by this aspect of the case. See infra note 119.
112. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391 (1920); see also Burdeau v. McDowell, 256 U.S. 465, 475 (1921).
113. Because of the obvious advantages "of basing a case even in a United States court upon a search beyond the condemning reach of the federal rule," United States attorneys began routinely to use "evidence secured by local police. Indeed, it has been said that, because of the rigidly narrow grounds upon which a federal search will be declared reasonable, the activity of the state officers is indispensable." Note, *Prohibition Searches by New York State Police*, 37 YALE L.J. 784, 785 (1928). "The number of prosecutions based on searches by state officers has rapidly increased and it is now the admitted policy of the federal authorities to rely wherever possible upon the activity of the local peace officers for the arrest and prosecution of the typical bootlegger and inland rumrunner." Id. Federal use of evidence gathered by state actors in violation of constitutional norms applicable to the federal government later became known as the "silver platter doctrine." See, e.g., Elkins v. United States, 364 U.S. 206, 252 (1960) (Harlan, J., dissenting); Lustig v. United States, 338 U.S. 74, 79 (1949).
As the Court framed the question, therefore, the issue was whether New York state troopers were in effect federal agents, even though there was no evidence that the troopers had "acted under the directions of ... federal officials in making the arrest and seizure."\textsuperscript{114} If "the search and seizure was made solely for the purpose of aiding the United States in the enforcement of its laws,"\textsuperscript{115} the evidence would be suppressed; but if the New York troopers were acting to enforce "state law,"\textsuperscript{116} the evidence would be admitted.\textsuperscript{117}

After the repeal of the Mullan-Gage law, New York had no state statute prohibiting the sale and transportation of liquor. But if, as those like Coolidge and Borah contended, states were nevertheless under an affirmative obligation to enforce the Eighteenth Amendment, the defendants' arrest might have been in the service of fulfilling New York's independent legal responsibilities. In \textit{Gambino}, the Court, speaking unanimously through Justice Brandeis, evaded this question, holding that "[w]hether the laws of the state actually imposed upon the troopers the duty of aiding the federal officials in the enforcement of the National Prohibition Act we have no occasion to inquire."\textsuperscript{118} Instead the Court concluded that the evidence should be suppressed because Governor Smith had declared that ... state troopers are required to aid in the enforcement of the federal law "with as much force and as much vigor as they would enforce any state law or local ordinance," and that the repeal of the Mullan-Gage law should make no difference in their action, except that thereafter the peace officers must take the offender to the federal court for prosecution.\textsuperscript{119}

\textsuperscript{114} \textit{Gambino}, 275 U.S. at 316. "[T]he rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by ... co-operation, as by the state officers' acting under direction of the federal officials." \textit{Id}.
\textsuperscript{115} \textit{Id.} at 317.
\textsuperscript{116} \textit{Id}.
\textsuperscript{117} Edward P. McGuire, Note, \textit{Evidence: Admission of Liquor Seized by State Troopers in a Prosecution by the Federal Government}, 3 NOTRE DAME L. REV. 156, 158 (1928) ("Had [the police] been acting for the state of New York the evidence would have been admissible in a Federal Court."); see also Chamberlain, \textit{supra} note 96, at 392.
\textsuperscript{118} \textit{Gambino}, 275 U.S. at 317. The New York Court of Appeals was similarly disinclined to determine whether state police officers were independently obliged to enforce federal prohibition law. \textit{See, e.g.}, People v. Lafaro, 165 N.E. 518, 519-20 (N.Y. 1929); Note, \textit{The Duty of the States in Respect of Prohibition}, 63 U.S. L. REV. 561 (1929).
\textsuperscript{119} \textit{Gambino}, 275 U.S. at 315; see also \textit{supra} note 106. Brandeis stressed that "[a]id so
Although in *Gambino* the Taft Court sidestepped the deep questions of federalism raised by New York's repeal of its Mullan-Gage law, the Court had actually addressed these issues by

given was accepted and acted on by the Federal officials." *Gambino*, 275 U.S. at 315. The conference notes of Justice Stone reveal that at conference only Butler and Stone had initially voted to suppress the evidence. Taft, Holmes, Van Devanter, Brandeis, and Sanford had voted to affirm the defendants' conviction. (McReynolds had passed, and Sutherland was absent.) The opinion was assigned to Brandeis, who apparently changed his mind and carried the Court with him for his new conclusion.

The initial draft of Brandeis's proposed opinion survives. In that draft Brandeis had authored a long footnote detailing Smith's oft-repeated desire for New York peace officers to enforce the Volstead Act. He also included a long footnote that explained the extent of cooperation between federal and state police in New York and the consequent urgency of clarifying whether "such a system of cooperation constitutes the New York City police a Federal agency which makes its officers amenable to the Fourth amendment." *The Louis Dembitz Brandeis Papers*, Reel 35 (Univ. Publ'ns of Am., 1985) [hereinafter *BRANDEIS PAPERS*]. When Taft concurred in Brandeis's opinion, he wrote: "I don't think it either necessary or proper to make the Governor's remarks a basis of this opinion. I think that ought to be stricken out. It will be the occasion of great comment." *Id*. Van Devanter concurred in Brandeis's change of outcome, but noted his agreement "with suggestion of others that it would be well to omit" the footnotes referring to Governor Smith and to the New York City police. *Id*. Butler also concurred in the opinion "subject to elimination of the footnote as suggested by Justice Van Devanter." *Id*. Sanford concurred with the thought "that certain of the notes should be omitted." *Id*. Stone also suggested the elimination of the footnotes discussing the relationship between New York police and federal authorities. He wrote Brandeis: "I think this will ameliorate the mistakes made in *Burdeau v. McDowell* and like cases and I am for it." *Id*. Brandeis omitted the two footnotes in his published opinion. Of all the Justices, only Holmes seemed to retain his initial reservations about the ultimate disposition of the case. He wrote Brandeis: "Is this consistent with *Hester v. United States*, 265 U.S. at 57? It is a model of research and thoroughness and I admire it—but I should like to see the Const. protection limited." *Id*.

The Court's decision in *Gambino* was "far reaching," because it rendered "the enforcement of liquor laws in New York much more difficult, and in many instances impossible." Note, *supra* note 113, at 790. It rapidly became grounds for mobilization for New York prohibitionists:

Assemblyman Jenks indicated that in their fight this year the Drys would stress the recent decision of the United States Supreme Court which held that State police cannot search for liquor unless armed with a search warrant.

"I think the recent decision of the Supreme Court ... has shown the fallacy of Governor Smith's claim that State officers can enforce prohibition," said Assemblyman Jenks.

"We have got to have a State enforcement law to make State agencies really effective in the enforcement of prohibition. Events of the last few years have shown that the State officers cannot aid very materially in the enforcement of prohibition without a State law."

*Dry Bills Start Battle in Albany; State Parallel to Volstead Act Offered by Jenks in Two Assembly Measures*, N.Y. TIMES, Jan. 10, 1928, at 4.
implication in an earlier decision, *United States v. Lanza.* At issue in *Lanza* was the question of whether the Fifth Amendment bar against double jeopardy applied to defendants who had been convicted of violating a state prohibition statute forbidding the possession, manufacture, and transportation of liquor, and who were subsequently charged by the federal government with violations of the Volstead Act based on the identical acts. The Court, in a unanimous opinion authored by Taft, concluded that although the Double Jeopardy Clause protected citizens against successive prosecutions for the same offense, states and the federal government were “two sovereignties, deriving power from different sources” and hence that the defendants had for constitutional purposes “committed two different offenses by the same act.” Successive prosecutions for distinct offenses did not violate double jeopardy. *Lanza* offered a “classic formulation” of what later became known as the “dual sovereignty” concept of double jeopardy, a concept that has remained valid constitutional law until this very day.

120. 260 U.S. 377 (1922).
121. Id. at 379-80.
122. Id. at 382. Four years later, in *Hebert v. Louisiana*, 272 U.S. 312 (1926), the Court unanimously reaffirmed the holding of *Lanza* in an opinion by Van Devanter:

[O]ne who ... commits two distinct offenses, one against the United States and one against the State ... may be subjected to prosecution and punishment in the federal courts for one and in the state courts for the other without any infraction of the constitutional rule against double jeopardy, it being limited to repeated prosecutions “for the same offense.”

*Id.* at 314 (quoting *Lanza*, 260 U.S. at 382); see *Dry Law’s Teeth Whetted; Supreme Court Holds Same Offense Punishable by Both State and Federal Agencies*, L.A. TIMES, Nov. 2, 1926, at 2.

Lanza was the first decision "in which the Supreme Court, faced with an actual instance of double prosecution, failed to find some remedy, consistent with the law, to avoid it."\(^{125}\) In the popular press the decision was blasted as "repulsive to believers in justice"\(^{126}\) and as nullifying "a fundamental American principle ... in order to impose a measure of discipline on the American people."\(^{127}\) In New York, opposition to the possibility of successive prosecutions became a major rallying-cry for the repeal of the Mullan-Gage law.\(^{128}\)

125. Grant, supra note 124, at 1311. Lanza was contrary to the explicit legislative history of the Eighteenth Amendment, as well as to the explicit representations of major prohibition lobbying groups, like the Anti-Saloon League, who were responsible for the Amendment's passage. Id. at 1311 & n.13. The Eighteenth Amendment's reference to "concurrent power" was drafted by a House committee, whose Chairman explicitly stated that the reference meant that the federal government could not prosecute for an offense based upon an act "if the state government does." 56 Cong. Rec. 424 (1917); see Murchison, supra note 110, at 109-11.

126. Double Dry Enforcement, N.Y. Times, Mar. 13, 1923, at 20. Three years later, after the Court's decision in Hebert, 272 U.S. 312, the New York Times could find consolation only in the thought that "each fresh reminder of how much liberty has been thrown away in an attempt to repeal custom and to enact the morality of the Anti-Saloon League is helpful for the return of common sense and something at least of earlier freedom." Double Jeopardy, N.Y. Times, Nov. 3, 1926, at 22. Public reaction to Hebert was particularly violent. The decision was widely held to evidence a "sinister departure from American fairness" caused by the fact that "Prohibition destroys, not only the written, but the unwritten law of the land. It is a solvent in which the letter and the spirit alike are blended into the current cure-all reform." Bad News for Bootleggers, Literary Dig., Nov. 20, 1926, at 18 (quoting the St. Louis Post Dispatch). The Baltimore Sun opined that

[i]t is inconceivable that a Supreme Court ... should have made such a decision only a few years back. But since Volsteadism became the law of the land many things have changed.... [It] is not surprising that legal doctrines which have no place in justice or in common sense should be enunciated and supported.

Id.


128. It was widely said at the time that "the most startling immediate result" of Lanza "was the repeal of the New York state prohibition act," Grant, supra note 124, at 1310, because the implication of Lanza was that the only way for a state to avoid double prosecution was to repeal its own prohibition law. "In 1923 ... in New York the cry of double jeopardy was the most important slogan of the campaign for repeal. This was due to the fact that in December, 1922, the Supreme Court [in Lanza] had laid down the law in no unequivocal terms." McBain, supra note 17, at 146. As Governor Smith noted, the repeal of the Mullan-Gage law would do away entirely with the possibility of double jeopardy for violation of the laws enforcing the Eighteenth Amendment.... Under the United States Supreme
Because *Lanza's* holding was not compelled by existing precedents, the case has been interpreted as expressing "the inclination of the Court—and the public—to support enforcement authorities during the early years of prohibition." And it is certainly true that the decision was, as contemporaries said, "a sweeping victory" for "dry enforcement," because *Lanza* meant "that prisoners charged with breaking the dry laws may be severely penalized by more than one tribunal."

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Court decision in the Lanza case, a citizen is today subjected to double trial and even to double punishment for a single offense .... This is an unwarranted and indefensible exception to the fundamental constitutional guarantee contained in both the Federal and State Constitutions that no person shall be twice tried or punished for the same offense.

Smith, *supra* note 102, at 1; see also Austen G. Fox, *Concurrent Enforcement: Neither Conviction Nor Acquittal in the State Courts a Bar to Federal Prosecution*, *N.Y. Times*, Mar. 13, 1923, at 20. In his private correspondence Taft refused to acknowledge the moral force in the argument against double jeopardy. He insisted that the argument was merely a makeweight for an underlying opposition to prohibition itself:

Austen Fox has risen in his majesty and thinks that the [Mullan-Gage] law ought to be abolished, that the State ought to take no part in enforcing the law because of the danger of double jeopardy. If it had not been through opposition to the principle of the law altogether, double jeopardy would not have been mentioned. The instances in which people have been punished twice for the same act are so few, and the danger from them is so slight, that the use of that as an argument to a practical man is ridiculous. In other words ... because the wealthy classes, those who consult their own comfort before anything else, as other people possibly do, don't like this limitation upon what they regard as their personal liberty, but which is not personal liberty under the Constitution, they are seizing on every little technicality to attack the law.

*Letter from WHT to James R. Sheffield (July 8, 1923), microformed on TAFT PAPERS, supra note 9, Reel 255.*

129. MURCHISON, *supra* note 110, at 121. For an argument that *Lanza's* holding makes sense if, but only if, Fifth Amendment protections against double jeopardy are not incorporated against states via the Fourteenth Amendment, see Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 8 (1995).

130. MURCHISON, *supra* note 110, at 121; see DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION* 32-33 (2d ed. 2000).


132. *Double Penalties in Dry Law Cases; Supreme Court Holds the Same Offense Punishable by State and Nation*, *N.Y. Times*, Dec. 12, 1922, at 5. In a prewar tract written for the Anti-Saloon League, Wayne Wheeler had advised prohibitionists to draft your laws so that you can secure cumulative penalties. In other words, with the same evidence you can make a law violator pay the federal tax, and also the state liquor tax... By the above method you can hit a law violator from three to five times successively and it usually puts them out of commission.

*Wheeler, supra* note 6, at 95-96.
But _Lanza_ should also be understood as a contribution to the debate about the nature of state duties under the Eighteenth Amendment. If the "concurrent power" provision of the Eighteenth Amendment were itself to obligate states to enforce prohibition, state prohibition statutes would reflect a single national, constitutional sovereignty.\(^{133}\) _Lanza_, however, specifically rejected this interpretation of the Amendment. "To regard the Amendment as the source of the power of the States to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter."\(^{134}\) State prohibition measures do not "derive their force"\(^{135}\) from the Eighteenth Amendment,

but from power originally belonging to the States, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution....

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense

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133. Thus in repudiating the conclusion of _Lanza_, one commentator argued:

The Eighteenth Amendment, if it is a law at all, is one law—a law for the whole Union. It has, indeed, appointed several agents ... to wit, the Congress and the several States, to enforce its prohibitions, but it begins and ends with being one law.

The thesis that one act which violates one law can be two crimes is shocking and false. The misconception has come about through failure to perceive the degraded position to which the States have been reduced by the Eighteenth Amendment. In legislating under it they are not acting as legislative sovereignties; they are acting as Federal agents. The Mullan-Gage act, for example, is ... the act of a legislative agent who is deputized under the second section of the amendment to exert what is there described as a "concurrent power."

....

The Fifth Amendment, prohibiting double jeopardy for the same offense ... forbids double jeopardy for one offense against the Eighteenth Amendment, even when the act is punished both by the Congress and the States.

_Lex Talionis, No Double Jeopardy; Contention that Mullan-Gage Act Is Not a State but a Federal Law, N.Y. TIMES, May 26, 1923, at 14; see Alexander Sidney Lanier, Prohibition and Double Jeopardy, 8 VA. L. REG. 740, 740 (1923); Note, Prohibition and Double Jeopardy, 8 VA. L. REG. 774, 776 (1923)._

135. _Id._ at 381-82.
against its peace and dignity is exercising its own sovereignty, not that of the other.\textsuperscript{136}

Contemporaries recognized that this reasoning effectively settled the debate about the existence of affirmative state obligations to enforce the Eighteenth Amendment. Howard Lee McBain, Ruggles Professor of Constitutional Law at Columbia, characterized the implications of \textit{Lanza} as of

the highest importance. For manifestly if the states derive from the amendment no power to enact prohibition laws, they are of a certainty under no obligation, moral or legal, to enact such laws because of the amendment.... [A] state has today ... complete option to adopt or decline to adopt prohibition as a state policy.\textsuperscript{137}

His logic was widely cited\textsuperscript{138} and accepted,\textsuperscript{139} with the consequence that those who sought seriously to defend state responsibilities to enforce prohibition were forced to confront or distinguish Taft’s opinion in \textit{Lanza}.\textsuperscript{140}

In \textit{Lanza}, the Taft Court neutralized the potential for the Eighteenth Amendment radically to restructure the American polity. The Court refused to conceptualize states as mere instrumentalities of national prohibition. But it also for the first time explicitly

\textsuperscript{136} \textit{Id.} at 382; see Hebert v. Louisiana, 272 U.S. 312, 314-15 (1926).


\textsuperscript{139} “Since the states do not derive their power to legislate from the eighteenth amendment, it follows that the amendment imposes no obligation upon the states to adopt a policy of state prohibition.” Karl Huston, \textit{A Survey of All Laws At Present Affecting Intoxicating Liquors in Oregon and a Consideration of the Proper Enforcing Agents for Such Laws}, 12 OR. L. REV. 293, 295 (1933). \textit{Lanza} suggests “that the 18th Amendment itself imposes no obligations upon the states to aid in its enforcement. Such enforcement laws as a state may choose to pass derive their validity, not from the Amendment, but from the original police power of the state.” Note, supra note 118, at 562.

\textsuperscript{140} See, e.g., Borah, \textit{Civic Righteousness}, supra note 99; \textit{M’Adoo Sees a Wet Plot by Corrupt City Machines To Gain Federal Control}, supra note 99; Jesse F. Orton, \textit{State Enforcement Acts; Mr. Orton Holds Eighteenth Amendment Places Mandate on Commonwealths}, N.Y. TIMES, Nov. 23, 1930, § 3, at 2; Ritchie and Doran Clash at Institute, supra note 98.
legitimated successive prosecutions by federal and state entities for the same act, even though such double prosecutions were widely regarded as unjust and repulsive. *Lanza* signified that the Court would sustain the "discipline"\(^{141}\) that effective prohibition enforcement demanded, even if that discipline were inconsistent with traditional conceptions of fairness. Faced with a choice between customary norms and the need effectively to enforce prohibition, the Taft Court opted for the latter. *Lanza* in this regard set a pattern that would continue throughout the 1920s. The Taft Court would be widely and correctly perceived as a "bone dry" institution grimly committed to the success of prohibition.\(^{142}\)

\(^{141}\) See supra text accompanying note 127.

\(^{142}\) Herbert Little, *The Omnipotent Nine*, AM. MERCURY, Sept. 1928, at 48, 54 ("The Supreme Court is bone dry.... The validity of the Eighteenth Amendment and of the enforcement acts has been upheld completely ...."); see KYVIG, supra note 130, at 32-35; *Dry Law Stands Firm Against All Assaults; The Eighteenth Amendment and Volstead Act Have Won an Unbroken Series of Victories in the Federal Courts over a Period of Nearly Eight Years*, N.Y. TIMES, Nov. 20, 1927, § 10, at 9; Roy A. Haynes, *High Court's Stand Praised by Haynes; Decisions on Prohibition Pointed to as Bulwark of Enforcement*, N.Y. TIMES, Aug. 21, 1923, at 19; John E. Monk, *Observations from Times Watch-Towers; Drys Eye High Court; Count Possible Retirement in Fear Successors Might Incline to Wet Views*, N.Y. TIMES, July 1, 1928, § 3, at 1 ("The Supreme Court, as at present constituted, uniformly has upheld the Eighteenth Amendment and the Volstead act in all cases brought before it."); A. H. Ulm, *New Dry Enforcement Code Slowly Evolved*, N.Y. TIMES, Feb. 21, 1926, § 8, at 22 ("The Supreme Court has been very strict in construing the Eighteenth Amendment and the Volstead act favorably to the contentions of those who have been charged with enforcement," said a lawyer who has had a good deal to do with the handling of the Government's side in many cases. "The Court at times has been stricter than we expected it would be."). The decisions of the Court were in fact regarded as so important to the maintenance of prohibition that "the politicians of the Anti-Saloon League" insisted in 1928 that the composition of the court is one of the great issues of this campaign.... The inference is drawn that if the next President is personally and politically dry, he will make sure that only thorough-going prohibitionists are put on the bench. But if the next President is not himself a believer in the prohibition theory then he will make it his business to nominate wets only for the court. *Packing the Supreme Court*, HARTFORD COURANT, July 4, 1928, at 6; see Monk, supra. For examples of Taft Court decisions upholding prohibition, see *Olmstead v. United States*, 277 U.S. 438 (1928); *Dugan v. Ohio*, 277 U.S. 61 (1928); *Grosgold v. United States*, 276 U.S. 494 (1928); *United States v. Lee*, 274 U.S. 559 (1927); *Maul v. United States*, 274 U.S. 501 (1927); *Ford v. United States*, 273 U.S. 593 (1927); *McGuire v. United States*, 273 U.S. 95 (1927); *Murphy v. United States*, 272 U.S. 630 (1926); *Lambert v. Yellowley*, 272 U.S. 581 (1926); *Port Gardner Investment Co. v. United States*, 272 U.S. 564 (1926); *Dodge v. United States*, 272 U.S. 530 (1926); *Van Oster v. Kansas*, 272 U.S. 465 (1926); *United States v. One Ford Coupe Automobile*, 272 U.S. 321 (1926); *Ma-King Products Co. v. Blair*, 271 U.S. 479 (1926); *Maryland v. Soper*, 270 U.S. 9 (1926); *Druggan v. Anderson*, 269 U.S. 36 (1925); *Selsman v. United States*, 268 U.S. 466 (1925); *Dumbr v. United States*, 268 U.S. 435 (1925); *Samuels
III

The logic of "dual sovereignty" that underlay *Lanza* permeated the federalism jurisprudence of the Taft Court. Yet because the Taft Court insisted on reading the "concurrent power" provision of the Eighteenth Amendment as primarily augmenting the power of the federal government, the Court read the Supremacy Clause as requiring that national prohibition preempt all inconsistent state law. The Court was thus forced to uphold the constitutional legitimacy of national police regulations that widely suppressed the prerogatives of local state authority to regulate intimate details of personal conduct. In other contexts, however, the Taft Court had interpreted the logic of dual sovereignty precisely to require constitutional respect for the distinct sphere of local self-government.

In 1922, for example, the Court in *Bailey v. Drexel Furniture Co.* had sought to preserve "the ark of our covenant" by refusing to enforce a federal child labor tax statute that dealt with subjects not entrusted to Congress but [were] committed by the supreme law of the land to the control of the States.... In the maintenance of local self government, on the one hand, and the

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144. (Child Labor Tax Case), 259 U.S. 20 (1922).

145. *Id.* at 37.

national power, on the other, our country has been able to endure and prosper for near a century and a half.\textsuperscript{147}

Prohibition would split the Taft Court because there were some, like Taft, who believed that the enforcement of prohibition was a fundamental constitutional imperative, whereas there were others, like Sutherland, who believed that it was far more important to preserve the constitutional prerogatives of the states. In the end the Taft Court would repudiate these prerogatives in ways that strikingly anticipate the nationalism of the New Deal.

Federalism was a highly contentious subject during the 1920s. The importance of decentralization was acknowledged by all, but progressives tended to regard localism as merely a functional principle, whereas conservatives tended to invest it with independent normative significance. The second section of the Eighteenth Amendment, with its obscure reference to the “concurrent power” of “Congress and the several States,”\textsuperscript{148} served as a mirror in which contemporaries could read their own preferred account of the meaning of American federalism.

In 1923 Woodrow Wilson asked Brandeis to draw up a “statement of principles” about prohibition for the Democratic Party,\textsuperscript{149} and Brandeis’s reply well expressed a progressive, functional account of federalism. Brandeis interpreted the Eighteenth Amendment’s reference to “concurrent power” to signify that the American people “recognized fully that the law could not be enforced without the co-operation of the States with the Nation.... The intention was that each government should perform that part of the task for which it was peculiarly fitted.”\textsuperscript{150} Brandeis postulated that “[t]he Federal

\textsuperscript{147} Bailey, 259 U.S. at 37.
\textsuperscript{148} U.S. CONST. amend. XVIII, § 2.
\textsuperscript{149} Letter from Woodrow Wilson to Frank I. Cobb (Apr. 18, 1923), microformed on WOODROW WILSON PAPERS, Series 12, Reel 526 (Library of Cong. 1974); see ALFRED LIEF, BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL 427-28 (1936); ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN’S LIFE 567 (1946). The Brandeis statement, attributed to Woodrow Wilson, together with an account of its submission to the platform committee of the 1924 Democratic Convention, may be found in Carter Glass, New Light on Wilson and Prohibition; In a Challenge to Wets, Senator Glass Reveals Inner History of the Late President’s Attitude and Shows How He Devised a Different Enforcement Policy for the States and the Federal Government, N.Y. TIMES, Mar. 3, 1929, § 9, at 1.
\textsuperscript{150} Letter from Woodrow Wilson to Frank I. Cobb, supra note 149. In 1916 Wilson's
Government's part is to protect the United States against illegal importation of liquor from foreign countries and to protect each State from the illegal introduction into it of liquor from another State.” Brandeis acknowledged that “[t]o perform that part of the task effectively requires centralized, unified action and the employment of the large federal powers and resources.”

The job of a state, by contrast, was to police “the illegal sale within it of liquor illegally manufactured in it,” for that is a task for which the State Governments are peculiarly fitted; and which they should perform. That part of the task involves diversified governmental action and adaptation to the widely varying conditions in, and the habits and sentiments of the people of, the several States. It is a task for which the Federal Government is not fitted.

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151. Brandeis as Associate Justice had been opposed by the Anti-Saloon League, because in 1891 Brandeis had represented the Massachusetts Protective Liquor Dealers’ Association, and he had argued against prohibition. 2 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1972, at 1054-72 (Roy M. Mersky and J. Myron Jacobstein eds., 1975). Brandeis had taken the position that:
- Liquor drinking is not a wrong; but excessive drinking is.
- Liquor will be sold; hence the sale should be licensed.
- Liquor is dangerous; hence the business should be regulated.
- No regulation can be enforced which is not reasonable.

Id. at 1057. Brandeis had argued that Massachusetts legislators should take the community in which you live; do not imagine one very different from your own, where men will not drink because you say they shall not. No law can be effective which does not take into consideration the conditions of the community for which it is designed; no law can be a good law—every law must be a bad law—that remains unenforced.

Id. at 1059. When asked if the enactment of a statute banning liquor would demonstrate the actual will of a community, Brandeis responded: “No. It is evidence which creates presumption; but the presumption may be rebutted by the facts.” Id. at 1064.

151. Letter from Woodrow Wilson to Frank I. Cobb, supra note 149.

152. Id. Felix Frankfurter would later use almost this exact language to argue the identical position. See Felix Frankfurter, A National Policy for Enforcement of Prohibition, 109 ANNALS AM. ACAD. POL. & SOC. SCI. 193, 193 (1923). Frankfurter explained that “[c]entralized nationwide enforcement is impossible of achievement. It will either break or corrupt the federal machinery that attempts it ....” Id. at 194. Brandeis would write Frankfurter approvingly of his article:

Do not change the Volstead Law in any respect. Leave the percentage of alcohol where it is. Merely provide in the annual appropriation bills that the prohibition money shall be used for protection against smuggling from abroad & from one state or territory into another, and the suppression in the District
"To relieve the States from the duty of performing" this task, said Brandeis, "violates our traditions; and threatens the best interests of our country."

It was a duty, however, that was purely political, for to ensure its fulfillment "the people of each State must look to their state governments."

Brandeis's account of federalism turns on principles of institutional design; it postulates that national and state governments should each be assigned duties commensurate with their institutional competencies. Brandeis interpreted the "concurrent power" provision of the Eighteenth Amendment to divide state from federal authority along lines of instrumental capacity. He assumed that the constitutional question was not whether prohibition should be enforced, but which level of government could best enforce it. But in the context of prohibition this assumption was spectacularly misplaced. As evidenced by the repeal of the Mullan-Gage law, wet states like New York had no intention of enforcing prohibition, which they regarded as a national imposition.

The vulnerability of Brandeis's account of federalism became evident in July 1929, when George Wickersham, newly appointed Chairman of Herbert Hoover's National Commission on Law Observance and Enforcement, proposed to the Conference of Governors a plan essentially identical to that crafted by Brandeis. Noting that "open disrespect for the Volstead law" was a "great
source of demoralizing and pecuniarily profitable crime,” and noting that “[t]hus far the Federal Government alone has borne the brunt of enforcement,” Wickersham suggested that the “burden” of implementing prohibition be shared between the federal government and the states. “If the National Government were to attend to preventing importation, manufacture and shipment in interstate commerce of intoxicants, the State undertaking the internal police regulations to prevent sale, saloons, speakeasies and so forth, national and State laws might be modified so as to become reasonably enforceable ....” 157

Wickersham’s proposal was immediately attacked on the ground that it would negate a major purpose of the Eighteenth Amendment, which was to create a national policy against liquor. The proposal was said to “nullify the Eighteenth Amendment,”158 because suspension of federal enforcement would “in effect repeal the Eighteenth Amendment in wet localities.”159 Insofar as the Wickersham plan meant “the virtual substitution of local option by States in place of national prohibition,”160 it set off an explosive controversy that was politically fatal.161 The lesson was that the division of authority between the national government and the

157. Wickersham’s letter, which was sent to New York Governor Franklin Roosevelt for presentation to the Conference of Governors, is reproduced in Wickersham Would Change Dry Law, States Taking Over Local Enforcement; Asks Governor To Consider His Plan, N.Y. TIMES, July 17, 1929, at 1. Wickersham argued:

    Every State Executive has sworn to support and defend the Constitution of the United States. The Eighteenth Amendment is a part of the Constitution, just as much as any other part of it. Surely it is pertinent to their conference to suggest and consider how they may best carry out their solemn undertaking.

    Id.

158. Dry Foes To Oppose Wickersham Board in Obtaining Funds, N.Y. TIMES, July 20, 1929, at 1.

159. Wickersham Views Attacked by Volstead; Proposal Would In Effect Repeal 18th Amendment, Dry Leader Contends, N.Y. TIMES, July 17, 1929, at 2. This was because “State enforcement will depend on the local attitude toward prohibition.” Wickersham Plan Splits Governors, N.Y. TIMES, July 18, 1929, at 1.

160. The Wickersham Letter, 129 Nation 107 (1929) (“Mr. Wickersham’s plan is not a scientific solution of the liquor problem; it is not even a strictly honest one. But in the light of ten years’ experience with the Volstead Act, and in the midst of the hypocrisy and failure of present methods of enforcement, one is compelled to consider results rather than technique.”).

161. Governors Shelve Wickersham’s Plan and Drys’ Motions, N.Y. TIMES, July 19, 1929, at 1; Mr. Wickersham’s Bomb, N.Y. TIMES, July 17, 1929, at 24.
states could not be constructed along merely functional lines so long as the Eighteenth Amendment required a commitment to national prohibition that States did not share.\(^{162}\)

Prohibition therefore raised issues of federalism that could not be resolved merely by what we may call "functional dual sovereignty." Instead prohibition required contemporaries to address the question of whether the regulation of liquor should be assigned to states or to the national government. In other contexts the Taft Court did not shy away from explicitly embracing such a frankly normative account of federalism, which we may call "normative dualism." For example, the Taft Court had appealed to exactly this idealized version of federalism in Bailey to strike down the child labor tax statute.\(^{163}\)

The ideals of normative dualism had been mobilized from the outset in order to resist national prohibition. In the National Prohibition Cases these ideals were used to attack as unconstitutional the Eighteenth Amendment itself.\(^{164}\) This seemingly paradoxical claim rested on the notion that prohibition entrenched a particular rule of conduct in the Constitution, and that this entrenchment so deeply invaded "the police powers of the States," and so violently undermined the status of States "as true local, self-governing sovereignties," that the Eighteenth Amendment constituted a "complete subversion of our dual and federal system of government."\(^{165}\) As used by advocates in the National Prohibition

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162. Given this tension, Wickersham's letter appeared to offer wet states the implicit option of modifying the national Volstead Act so as to make enforcement of prohibition more locally palatable. The possibility of this option outraged prohibition advocates. See Bishop Cannon Hits Wickersham's View, supra note 156, at 11. Cannon and Crawford charged that the possibility of modifying the Volstead Act "seems to intimate the necessity for some kind of bargaining by means of which certain states would be persuaded to perform their prohibition enforcement duties, should they be given certain concessions, which concessions, however, are not indicated ...." Id.

163. See supra text accompanying notes 144-47.


165. Id. at 366-67 (reporting the argument of Elihu Root). "It is submitted that the authority conferred in Article V to amend the Constitution carries no power to destroy its federal principle in a most fundamental aspect." Id. at 367. An eyewitness described Root's summation:

Mr. Root put his glasses in his pocket, and, drawing himself up to his full height, pointing his finger at the Chief Justice, with the whole nine Justices fixing their eyes upon him, he concluded his argument with these memorable words, which
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Cases, "the dual sovereignty in our federal system of Nation and State each supreme within its own sphere"\(^{166}\) did not signify a merely functional division of labor between state and federal governments, but instead a fundamental constitutional commitment, symbolized by the Tenth Amendment,\(^ {167}\) to maintain "state control over local affairs."\(^ {168}\)

This line of argument resonated widely throughout the 1920s.\(^ {169}\) Even the Nation opined that if the Eighteenth Amendment were overthrown, "the right of self-government which the Constitution guarantees to the people of all the States will continue unimpaired," but that if the Amendment were sustained, "that right will perhaps

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have burned themselves forever into my memory: "If Your Honors ... shall find a way to uphold the validity of this amendment, the government of the United States, as we have known it, will have ceased to exist.... Your Honors will have found a legislative authority hitherto unknown to the Constitution and untrammeled by any of its limitations.... In that case, Your Honors, John Marshall need never have sat upon your Bench...."

2 PHILIP C. JESSUP, ELIHU ROOT 479-80 (1936) (quoting Nicholas Murray Butler, address at the Odeon, St. Louis, Missouri (Dec. 14, 1927)).

\(^{166}\) Nat'l Prohibition Cases, 253 U.S. at 370 (reporting the argument of William D. Guthrie).

\(^{167}\) "The Eighteenth Amendment must be read in connection with the Tenth Amendment." Id. at 377.

\(^{168}\) Id. at 371.

\(^{169}\) See, e.g., Nicholas Murray Butler, The Constitution One Hundred and Forty Years After, 12 CONST. REV. 121, 123 (1928):

It is the complete departure from the fundamental principles of the Constitution ... that makes the Eighteenth Amendment so objectionable and so offensive to everyone who understands American government and who believes in it. The incorporation in the Constitution for the first time of definite legislation and the attempted transfer by amendment to the Federal Government of the police power of the States, which can not be taken away without shaking the very foundations of the Constitution itself, are the real cause of the nation-wide dissatisfaction and revolt against the Eighteenth Amendment and the legislation built upon it.

James Beck, Solicitor General of the United States from 1921 to 1925, was particularly exercised by this point:

Certainly, the leaders of prohibition showed scant respect for the Constitution when they wrote this illegitimate amendment into that noble instrument and thus destroyed its perfect symmetry and turned a wise compact of government into a mere police code. Certainly, they had scant respect for the Constitution when they thus destroyed its basic principle of local self government and in this matter of daily habit, relegated the sovereign States to the ignominious position of mere police provinces.

BECK, supra note 103, at 14-15; see id. at 23.
disappear so far as the police power is concerned, and the way be opened for a Federal centralization practically complete."170 There was widespread concern that prohibition imposed a "rigid uniformity"171 that was "in essence a complete repudiation of the spirit of our federal system of self-governing states."172 The Eighteenth Amendment was said to introduce "a radical change in the organic structure of our federal Government" by commissioning the federal government "to legislate upon the purely local and domestic affairs of every community in every state of the Union," while simultaneously denying "to them the power all communities have been accustomed to exercise for more than a century and a quarter," which was "to regulate their conduct according to their own conceptions of propriety."173

From the perspective of normative dualism, the failure of George Wickersham's plan for a functional division of labor was the readily predictable consequence of Congress's effort to deploy national police power to enact "morals legislation for such a vast area as the United States."174 Prohibition was tolerable when enacted by a state because "[t]he people of a state are vitally interested in its legislative and administrative policies" and "subconsciously feel that these policies, in a way, are theirs and for this reason they submit to them

170. Prohibition and the Supreme Court, 109 NATION 818, 819 (1919). The appeal of this argument was surprisingly broad, although not necessarily decisive. See, e.g., Charles K. Burdick, Is Prohibition Lawful?, 21 NEW REPUBLIC 246 (1920).
172. Fabian Franklin, What's Wrong with the Eighteenth Amendment?, 109 ANNALS AM. ACAD. POL. & SOC. SCI. 48, 49 (1923).
173. Henry S. Priest, The Eighteenth Amendment an Infringement of Liberty, 109 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 44 (1923). Under the Eighteenth Amendment "the right of local self-government is torn from the individual states, whose people are made subject, even in the small routine affairs of their daily lives, to those living in far distant localities and under other conditions." Stayton, supra note 19, at 30; see also Seymour C. Loomis, The Legal and Constitutional Aspects of the Proposed Prohibition Amendment to the Federal Constitution, 8 SCI. MONTHLY 335, 336-37 (1919) (arguing that the amendment was an unprecedented inclusion of police regulation in a document previously limited to a statement of principles).
174. THOMPSON, supra note 27, at 378. The essential difficulty with Congress passing "sumptuary laws controlling the private life and conduct of affairs in local communities" was that "our local governments will grow weaker and the central government stronger in control of local affairs until local government is dominated from Washington by the votes of distant majorities indifferent to local customs and needs." Elihu Root, President, Am. Bar Ass'n, Address of the President: Public Service by the Bar (Aug. 30, 1916), in 2 A.B.A. J. 736, 752 (1916).
more readily.”\textsuperscript{175} “Such intimacy between the government and the
governed,” however, “is not possible with a centralized control at
Washington.”\textsuperscript{176} One observer noted: “The Marylander is quite
willing to yield even respect and obedience to a law he believes
oppressive, provided it was passed by his own people, but his
innate sense of independence resents the effort of Kansans to
impose a law on him through what he believes to be a smug piece of
sanctimonious humbuggery.”\textsuperscript{177}

Those who attacked national prohibition essentially argued that
federal police legislation was antidemocratic. Positive law could
transform custom, but only if positive law was backed by democratic
legitimacy. Democratic legitimacy required that those affected by a
law identify with the governmental unit enacting the legislation,
and that they conceive the governmental unit enacting the legislation
as an appropriate vehicle for the expression of popular will.
National prohibition lacked democratic legitimacy to the extent that
Marylanders experienced it merely as a law imposed upon Maryland
by Kansas, rather than as the expression of the democratic will of

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\textsuperscript{175} THOMPSON, supra note 27, at 366.
\textsuperscript{176} Id. at 367.

The danger is that we will burden Washington with a mass of powers,—growing
out of undigested ideas, relating to controversial matters not fundamental in
center, and about which no real consensus of opinion exists,—that, in most
instances, properly belong to the several states, where they can be more
effectively, because more sympathetically, handled than by what, of necessity,
must always seem a comparatively distant national government.
Robert von Moschzisker, Dangers in Disregarding Fundamental Conceptions when Amending
the Federal Constitution, 11 CORNELL L.Q. 1, 13 (1925).
\textsuperscript{177} Stayton, supra note 19, at 33.

One who studies the psychology of the subject is inevitably struck by the
anomaly that while state prohibition laws were generally obeyed and respected,
people seem to feel it a sort of duty to flout the Volstead Act. And inquiry quickly
reveals at least one reason—a belief that the law was passed not by a man’s
neighbors, who had an interest in him and his affairs, but by some one living at
a distance, by strangers acting in a spirit of meddlesomeness.

\textit{Id.}

Feeling that they have had a part in making the regulations, people will submit
more readily to local restrictive legislation. But if the regulations are made by
Congress, which is far removed from local interests, they are apt to be resented
as being superimposed. Violations of these regulations then become justified by
a local public opinion. This breeds a disrespect for federal law and for the
government that attempts to enforce it.

THOMPSON, supra note 27, at 384.
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the single unified people of the United States, of which Maryland was merely one part.\textsuperscript{178}

Normative dualism allowed prohibition's critics to condemn the Eighteenth Amendment as a form of domestic "imperialism."\textsuperscript{179} Although the ratification procedures of Article V were designed to preclude the possibility of such imperialism, throughout the 1920s inhabitants of wet states continued to attack prohibition as a national imposition.\textsuperscript{180} This objection to prohibition demonstrated

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178. It was thus argued that "[t]he exercise of police power was withheld from the United States" because "[i]n the Federal system the people cannot act collectively as a single nation." ARCHIBALD E. STEVENSON, STATES' RIGHTS AND NATIONAL PROHIBITION 80-81 (1927). Only "[i]n each of the States" do "the people [act] collectively as a single unit." Id. Prohibitionists, of course, denied this argument. "[W]hat is good democracy in a small area is just as good in a large area ...." BEST, supra note 27, at 40.

179.

Every restriction of the authority of local self-government must show cause in the interest of the liberties and opportunities of all and not in the mere desire of one or more communities or groups to govern the life of others, albeit for their own good. There may be an imperialism at home as well as abroad.


180. The absence of any national community capable of endowing national prohibition with democratic legitimacy is the essential thrust of Fabian Franklin's complaint:

The population of the United States is, in more than one respect, composed of parts extremely diverse as regards the particular subject of this legislation. The question of drink has a totally different aspect in the South from what it has in the North; a totally different aspect in the cities from what it has in the rural districts or in small towns.... How profoundly the whole course of the Prohibition movement has been affected by the desire of the South to keep liquor away from the negroes, needs no elaboration; it would not be going far beyond the truth to say that the people of New York are being deprived of their right to the harmless enjoyment of wine and beer in order that the negroes of Alabama and Texas may not get beastly drunk on rotgut whiskey.... [T]he Prohibitionist tyranny is in no small measure a sectional tyranny, which is of course an aggravated form of majority tyranny.

But what needs insisting on even more than this is the way in which country districts impose their notions about Prohibition upon the people of the cities, and especially of the great cities.... Could the tyranny of the majority take a more obnoxious form than that of sparse rural populations, scattered over the whole area of the country from Maine to Texas and from Georgia to Oregon, deciding for the crowded millions of New York and Chicago that they shall or shall not be permitted to drink a glass of beer?

FRANKLIN, supra note 51, at 72-75. Of course those concerned to defend prohibition sought to evoke precisely the kind of national community denied by Franklin. See, e.g., MCADOO, supra note 99, at 214-15 ("The National Government, like the state governments, is not an alien and external force imposed upon the people by some outside agency. The National Government,
the existence of a strange and unsettling gap between the positive law of Article V and the brute sociological fact of democratic identification. The attraction of normative dualism depended upon the existence of this gap.

Normative dualism sought to resist the imperialism of federal authority by excluding the federal government from the sphere of local police regulations. States could properly enact police regulations because they were imagined as natural units of community identification capable of expressing a popular will that would endow

like the state governments, is the people’s government.”); see also Hevenward, supra note 44, at 478 (“The issue of battle is drawn! On the one side are those who for the satisfaction of their own ungodly purposes, set themselves against what they presumptuously call ‘the encroachments of Federal authority.’ These men are bent on sapping and mining our national solidarity and making their liberty a cloak for detestable license. They would reduce the Constitution to a form of words devoid of force or meaning, and so manipulate the smaller political units as to bring forth confusion and every evil work. On the other side are those upon whom rests the spirit of our godly ancestors who through the agency of the Constitution welded the colonies together into a unity that should be then and forever indissoluble.”). The contestable nature of the national community in the context of prohibition was particularly evident in congressional antagonism to the Act of September 14, 1922, Pub. L. No. 67-298, ch. 306, 42 Stat. 837 (1922), which authorized the Chief Justice to assign district court judges temporarily to sit wherever in the country the needs of the docket were greatest. Taft strongly supported the Act, see Robert Post, Judicial Management and Judicial Disinterested: The Achievements and Perils of Chief Justice William Howard Taft, 1998 J. SUP. CT. HIST. 50, 54-57, but it was opposed by those who deplored the possibility of a “flying squadron ... of the judiciary—a perambulatory crowd of judges to be floating in space throughout the entire United States.” 62 CONG. REC. 5106-07 (1922). In particular, it was feared that the Anti-Saloon League, finding some judge in some district to be perhaps lenient toward those who offend against the prohibition laws, will be able to transfer a judge from a remote section of the country who harbors different views upon that subject and thus displace the local judge in the administration of the law.

62 CONG. REC. 5154-55 (1922). Of course this form of national discipline was exactly what some supporters of the Act had in mind. Representative William J. Graham, a Republican from Illinois, explicitly linked the bill to prohibition enforcement: “The [national prohibition] law is being openly flouted .... I want to see additional judges appointed on the bench of the United States ... who will inject some fear of God into the breasts of lawbreakers in this country.” 62 CONG. REC. 203 (1921). Opposition to the Act of September 14th displayed an implicit background assumption that the very legitimacy of national federal law depended upon its dialectical reconciliation with local values, so that during congressional debate it could be said without contradiction that “it is absolutely contrary to the principles of our Government to assign a judge from a distant territory to preside over cases arising in another community.” 62 CONG. REC. 4847 (1922). Southerners in particular viewed the Act within a larger context of regional hostility: “[T]his is merely a provision which is an entering wedge to having what once was called a lot of ‘carpetbag judges’ transported from one section of the country to another.” 62 CONG. REC. 204 (1921) (statement of Rep. Stevenson).
such regulations with democratic legitimacy.\textsuperscript{181} It was commonly said in the 1920s that the transfer of state authority to Washington threatened the very value of “self-government,”\textsuperscript{182} for the national regime was “too far removed from the people who are affected by its regulations” and hence perennially in danger of becoming merely “bureaucratic.”\textsuperscript{183}

If an essential challenge of progressivism was to foster an identification with the federal government capable of endowing routine police regulations with democratic legitimacy,\textsuperscript{184} and if this identification did not definitively occur until the national crisis of the Great Depression, the history of stubborn and unrepentant resistance to national prohibition during the 1920s stands as stark evidence of how precarious was the federal government’s claim to the resource of democratic identification during the preceding decade. Throughout the 1920s prohibition was relentlessly attacked as a form of domestic imperialism that exemplified “[t]he despotism of absolute democracy.”\textsuperscript{185}

\textsuperscript{181} The police power could be effectively and democratically exercised by states because “there is more likelihood of a general community of opinion in most of the states than in the country as a whole, and that is of no small importance in the enforcement of a law.” Lowell, \textit{supra} note 27, at 147-48. See \textit{STEVenson, supra} note 178, at 82-83 (“State sovereignty has been the main bulwark against the bureaucracy and absolutism of centralization. The States ... respect local customs and habits. They authorize the exercise of sectional prejudices in both social and political matters. Such local prejudices are created by long established custom in which the history of the people, their climatic, economic and social conditions play an important part. The right of our citizens to satisfy these prejudices has been considered an essential in our conception of civil liberty.... In a country covering such wide geographical area as the United States, local interests and prejudices will inevitably be widely divergent. Laws enacted in one part of the country may be offensive or serve no useful purpose in another where the people live under vastly different circumstances.”).

\textsuperscript{182} \textit{See Post, supra} note 143, at 1669-72.

\textsuperscript{183} \textit{Thompson, supra} note 27, at 366.

Advocates of the old order see in the change a breaking down of the principle of local self-government. To their minds the danger of majority tyranny, made possible by a centralization of power in a republic of such vast extent and varied interests, outweighs all the advantages of national uniformity and efficiency. Advocates of the new order think otherwise. They argue, moreover, that the states have become too great and populous to serve as units for purposes of home rule; that their boundaries are for the most part artificial and correspond to no real distinctions in the ordinary life of men.


\textsuperscript{184} \textit{See supra} text accompanying note 59.

\textsuperscript{185} Priest, \textit{supra} note 173, at 43. The insight of normative dualism was that legislation enacted according to democratic procedures could nevertheless be experienced as tyrannical
Justice Sutherland well expressed the constitutional implications of normative dualism in 1920, two years before his appointment to the Court. Noting that when he was in the Senate nobody “in either house of Congress had the slightest idea what was intended by” the idea of “concurrent power” in Section 2 of the Eighteenth Amendment, Sutherland proposed that Section 2 be interpreted in light of “the general plan and purpose of the constitution as a whole, which clearly is to commit to the general government control over the inter-relations of the states and their peoples, while leaving to the states control over individuals and individual interests, and over local and internal matters of police.” Sutherland did not conceive this division, as did Brandeis, as merely functional. He instead imagined the division between state and federal power as intrinsically normative. Sutherland interpreted Section 2 “as authorizing Congress to enforce [prohibition] by appropriate legislation” and “as authorizing the several States to enforce it by appropriate legislation,” so that Congress and the States would be confined to legislating “within their respective and historic fields of jurisdiction.”

Construed in this way, the Eighteenth Amendment would not authorize Congress to invade “the field of state jurisdiction,” because the “framers of the Amendment ... did not desire to interfere with the internal powers of the States to deal with the subject in its local as distinguished from its national import.”

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186. Letter from George Sutherland (GS) to William D. Guthrie (Mar. 15, 1920) (Sutherland Papers).
187. Letter from GS to William D. Guthrie (Mar. 18, 1920) (Sutherland Papers). Sutherland’s ideas were conveyed to William Guthrie as the latter was preparing his brief in the National Prohibition Cases, 253 U.S. 360 (1920). Guthrie incorporated into his brief Sutherland’s ideas and even language. Letter from William D. Guthrie to GS (Mar. 25, 1920) (Sutherland Papers).
188. Letter from GS to William D. Guthrie (Mar. 15, 1920) (Sutherland Papers).
189. Letter from GS to William D. Guthrie (Mar. 18, 1920) (Sutherland Papers).
190. Letter from GS to William D. Guthrie (Mar. 15, 1920) (Sutherland Papers).
Sutherland therefore rejected as improper Congress's use of the Volstead Act to preempt the meaning of "intoxicating beverages" in Section 1 of the Amendment, because the Act made "the power of the state ... not 'concurrent' but subordinate and, in effect, really no power at all."  

The Court decisively rejected Sutherland's reading of Section 2 in the National Prohibition Cases. In conclusions recited by Justice Van Devanter, the Court held:

The words "concurrent power" ... do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them; nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

... The power confided to Congress ... while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions ... and is in no wise dependent on or affected by action or inaction on the part of the several States or any of them.

This holding plainly suggested "that Congress may legislate ... on the subject of intoxicants for the whole country, and that any inconsistent state legislation would be annulled by such federal enactments."  

193. CHARLES K. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT 616 (1922). Only Justice McKenna, in dissent, interpreted "concurrent power" to mean that "there must be united action between the States and Congress, or, at any rate, concordant and harmonious action." Nat'l Prohibition Cases, 253 U.S. at 405 (McKenna, J., dissenting). He explained that this interpretation would "bring to the States ... or preserve to them, a partial autonomy, satisfying, if you will, their prejudices, or better say, their predilections" upon which "our dual system of government is based." Id. at 406. "And this predilection for self-government the Eighteenth Amendment regards and respects." Id. McKenna argued against the supremacy of federal statutes enforcing the Eighteenth Amendment on the ground that the "source" of supremacy was "the Constitution of the United States," and "that § 2, by giving concurrent power to Congress and the States," endowed state statutes enforcing the Amendment with a constitutional source that did not give "Congress supreme power over the States." Id. at 400-01. "The Eighteenth Amendment is part of the Constitution of the United States, therefore of as high sanction as Article VI." Id. at 401.
The Court refused to interpret the Eighteenth Amendment through the lens of normative dualism, and as a result prohibition became definitively associated with national regulation and national enforcement. This made the tension between prohibition and regionally-based customary norms particularly intense, leading in some contexts, as in the repeal of the Mullan-Gage law, to outright defiance. It also put particular strain on the viability of normative dualism as a convincing constitutional account of American federalism. This strain was especially evident in two decisions of the Taft Court that followed the *National Prohibition Cases* in reading the Eighteenth Amendment to reject normative dualism.

In the first, *James Everard’s Breweries v. Day*, the Taft Court upheld the authority of Congress to forbid “physicians from prescribing intoxicating malt liquors for medicinal purposes.” In a unanimous opinion authored by Justice Sanford, the Court reasoned that even though the Eighteenth Amendment prohibited traffic in intoxicating liquors only “for beverage purposes,” nevertheless Congress could ban the medicinal use of beer in order “to make that prohibition effective.” Sanford’s opinion was ruthlessly nationalistic. If the prohibition “is within the authority delegated to Congress by the Eighteenth Amendment,” Sanford wrote,

> its validity is not impaired by reason of any power reserved to the States.... And if the act is within the power confided to Congress, the Tenth Amendment, by its very terms, has no application, since it only reserves to the States “powers not delegated to the United States by the Constitution.”

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194. 265 U.S. 545 (1924).

195. *Id.* at 554, 560. At issue was the Supplemental Prohibition Act of Nov. 23, 1921, ch. 134, 42 Stat. 222. The statute was enacted to prevent the issuance of permits authorizing the manufacture and sale of beer for medicinal purposes. Attorney General A. Mitchell Palmer had ruled in 1921 that such permits were not prohibited by the Volstead Act. 32 Op. Att’y Gen. 467 (1921). *See Beer as Medicine, 2½ Gallons at Time; New Regulations Issued by Revenue Bureau Cause Consternation in Dry Camp, N.Y. Times*, Oct. 25, 1921, at 1; *Under the Whip, N.Y. Times*, June 29, 1921, at 14 (“Another triumph of discipline has been achieved by the Anti-Saloon League.”).


Deliberately invoking the expansive construction of *McCulloch v. Maryland*, *Everard's Breweries* held that Congress had power to achieve the purposes of the Eighteenth Amendment by "any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution." The Court "may not inquire into the degree" of the necessity of these means, "as this would be to pass the line which circumscribes the judicial department and to tread upon legislative ground." The only question for the Court was whether "prohibiting traffic in intoxicating malt liquors for medicinal purposes has no real or substantial relation to the enforcement of the Eighteenth Amendment, and is not adapted to accomplish that end and make the constitutional prohibition effective." In answering that question, the judgment of Congress "must be given great weight," and the Court would extend "every possible presumption ... in favor of the validity" of a federal statute.

Anticipating the *Darby* Court's dismissal of the Tenth Amendment as a mere "truism," *Everard's Breweries* reads strikingly like post-New Deal decisions ceding to Congress virtually unfettered authority. The Court's opinion meant that Congress could "do just about anything it wants to under" the Eighteenth Amendment. As Thomas Reed Powell quipped, it appears "that Congress might have saved the space which the word 'beverage' takes up in the printed Amendment." *Everard's Breweries* gave to the national government a breadth of power that prompted profound popular disquiet, testimony to national prohibition's threat to entrenched ideas of normative dualism.

198. *Id.* at 559.
199. *Id.*
200. *Id.* at 560.
201. *Id.* (quoting *Adkins v. Children's Hospital*, 261 U.S. 525, 544 (1923)).
202. United States v. Darby, 312 U.S. 100, 123-24 (1941) ("Our conclusion is unaffected by the Tenth Amendment which provides: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The amendment states but a truism that all is retained which has not been surrendered.").
205. The *Literary Digest* could discover only a single newspaper editorial "approving the
Almost as an afterthought, Sanford concluded his opinion with the idea that the statute could not be characterized as "an arbitrary and unreasonable prohibition of the use of valuable medicinal agents"206 because beer and malt liquor "are not generally recognized as medicinal agents" and the question of their medical value is, "at the most, debatable."207 The afterthought was to prove highly significant when the Taft Court decided its second and far more controversial decision about the nature of federal power under the Eighteenth Amendment.208

ruling." The Supreme Court's Ban on Beer, LITERARY DIG., June 28, 1924, at 17. The response of the New York Times was typical:

Apparently, there is no limit to the power of Congress in the enforcement of the Eighteenth Amendment....

... As Dr. GEORGE DAVID STEWART, President of the Academy of Medicine, said:

Only the doctor knows how necessary alcohol is in certain cases, and how much should be used. In diphtheria cases, for example, especially where secondary infection has set in, nothing on God's earth will cure them but alcohol.

Let them die, then! What is the judgment of mere physicians compared with the judgment of Congress?

Editorial, Dr. Congress, N.Y. TIMES, June 10, 1924, at 20; see also Editorial, Prescription by Legislation?, WASH. POST, June 12, 1924, at 6 ("It would be interesting to know how far the process of prescription by legislation can be carried.... Is the pharmacopeia to be embodied in the revised statutes, and is Congress to enact what medicines may and may not be prescribed, and what surgical operations may and may not be performed?"). At the very moment that Everard's Breweries was provoking such controversy, "many States" were routinely—and apparently noncontroversially—banning medical uses of beer pursuant to local prohibition laws. Everard's Breweries, 265 U.S. at 562. This disparity can best be explained as reflecting the popular influence of the ideals of normative dualism.

206. Everard's Breweries, 265 U.S. at 561.

207. Id. at 562.

208. I should also mention, in this context, Seltzman v. United States, 268 U.S. 466 (1925), in which the Court unanimously upheld federal power under the Eighteenth Amendment to regulate denatured alcohol, stating:

The power of the Federal Government, granted by the Eighteenth Amendment, to enforce the prohibition of the manufacture, sale and transportation of intoxicating liquor carries with it power to enact any legislative measures reasonably adapted to promote the purpose. The denaturing in order to render the making and sale of industrial alcohol compatible with the enforcement of prohibition of alcohol for beverage purposes is not always effective. The ignorance of some, the craving and the hardihood of others, and the fraud and cupidity of still others, often tend to defeat its object. It helps the main purpose of the Amendment, therefore, to hedge about the making and disposition of the denatured article every reasonable precaution and penalty to prevent the proper industrial use of it from being perverted to drinking it.

Id. at 468-69.
In *Lambert v. Yellowley*\(^{209}\) the Court upheld Congress's authority to regulate the prescription of vinous and spirituous liquors,\(^{210}\) which at the time was a far more common and accepted medical practice than the prescription of beer and malted liquor.\(^{211}\) The decision was five to four. Brandeis wrote the opinion for the Court, and he was joined by Taft, Holmes, Van Devanter, and Sanford.\(^{212}\)

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210. At issue were the provisions of two statutes. The first was chapter 85, title 2, section 7 of the National Prohibition Act, which provided:

> No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor.... Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once.

*Lambert*, 272 U.S. at 587. The second was chapter 134, section 2 of the supplemental Act of November 23, 1921, which provided:

> No physician shall prescribe nor shall any person sell or furnish on any prescription, any vinous liquor that contains more than 24 per centum of alcohol by volume, nor shall any one prescribe or sell or furnish on any prescription more than one-fourth of one gallon of vinous liquor, or any such vinous or spirituous liquor that contains separately or in the aggregate more than one-half pint of alcohol, for use by any person within any period of ten days. No physician shall be furnished with more than one hundred prescription blanks for use in any period of ninety days, nor shall any physician issue more than that number of prescriptions within any such period unless on application therefor he shall make it clearly apparent to the commissioner that for some extraordinary reason a larger amount is necessary whereupon the necessary additional blanks may be furnished him.

*Lambert*, 272 U.S. at 591. Almost from the start these statutes were attacked as violating the rights of physicians and the needs of patients.

Here we are beyond any question of the merits or demerits of prohibition in itself. Here, as some of the most distinguished physicians of this city have written, "the point at issue is the right of the physician to select his remedies and to decide what doses of these remedies each patient requires." That right, so far as the use of alcohol as a remedy is concerned, Dr. Congress proposes to take away.... [T]his Federal prescription of prescriptions will force conscientious physicians who believe in the therapeutic use of alcohol to break the law. The health, the life, of their patients will necessarily outweigh in their minds the ignorant interference of fanatical or fanatic-frightened laymen with medical practice.


211. *Lambert* was "regarded as one of the most important tests to which the Volstead Act has been subjected." *Liquor Rule Sustained; Prescriptions To Retain Limit*, L.A. TIMES, Nov. 30, 1926, at 1. The banner over the story in the *Chicago Tribune* read: "High Court Upholds 'Dr.' Volstead." Chi. TRIB., Nov. 30, 1926, at 1.

212. The Brandeis papers indicate that he initially circulated a brief and abrupt opinion that cited *Everard's Breweries*, documented extensive state regulation of the prescription of alcoholic beverages for medicinal purposes in order to enforce municipal prohibition laws, and
Sutherland authored a spirited dissent, joined by McReynolds, Butler, and Stone. The plaintiff in the case was Dr. Samuel then concluded with the peremptory announcement that “[t]here is no right to practice medicine which is not subordinate to the police power ... or to the power of Congress to make laws necessary and proper for carrying into execution the command of the Eighteenth Amendment.” Brandeis Papers, supra note 119, Reel 29. Holmes and Sanford signed on to the draft, but Taft and Van Devanter were apparently dissatisfied, and Van Devanter drafted everything between what is now footnote 2 of the published opinion and its last paragraph, which Van Devanter also extensively edited. Id. Brandeis mostly accepted these changes, and circulated the new draft with the notation: “Additions and Changes made at the suggestion of the Chief Justice and Mr. Justice Van Devanter are indicated in pencil on the margin.” Id. Taft wrote Van Devanter that “I am perfectly delighted that you made your addition to B’s opinion. It shows up the weakness of the dissent.” Letter from WHT to Willis Van Devanter (WVD) (Nov. 30, 1926) (Van Devanter Papers).

213. There is a note in the Brandeis papers to the effect that “McR. B & Su. say one of them will write a dissent & ask that it go over to the next term so that it can be done. Sf[one] says he will await dissent to see whether they can get away from the ¼ per cent case. If not he will go with the majority.” Brandeis Papers, supra note 119, Reel 29. Stone wrote Sutherland that, while he “entirely” agreed with Sutherland’s dissent.

the point in the case with which I have great difficulty is the aspect given this whole question by the decision of the Court in the half per cent case, which is Rappert v. Coffrey [251 U.S. 264 (1920)] ... if I remember correctly. There the Court held that conceding that half per cent beer was not intoxicating and that there was no general power lodged with the federal government to regulate or prohibit the consumption of non-intoxicating beverages, nevertheless the power to prohibit this particular type of non-intoxicating beverage was incidental to the general power to prohibit intoxicating beverages. Had I been on the Court at that time I should have voted with the minority, but I now find difficulty in distinguishing the reason adopted by the majority from that applicable to the present case.

In the foregoing I am indicating, not a conclusion, but a doubt, which I think should be dealt with in your dissent.

Letter from Harlan Fiske Stone (HFS) to GS (Sept. 30, 1926) (Stone Papers). Several months later Stone wrote Sutherland asking if he would incorporate the following passage in his dissent:

The question whether a state has power to regulate or prohibit the use of intoxicating liquor as a medicine is different from the question presented here. A state has plenary power in that respect, save only as it is limited by the Fourteenth Amendment. Linder v. United States, supra. But here the question is whether that power was transferred from the state to the national government by the adoption of the Eighteenth Amendment, not whether its exercise is unreasonable or arbitrary. It is insisted that the power is incidental to the granted power to prohibit the use of intoxicating liquor as a beverage and that by the grant of the incident the power of the state to regulate the practice of medicine, so far as the use of intoxicating liquor as a medicine is concerned, has been destroyed notwithstanding the limitation of the Tenth Amendment.

Letter from HFS to GS (Nov. 27, 1926) (Stone Papers). Stone continued, “I think this comes a little closer to the real vice of the argument of the majority than your statement that the authority of Congress is here exercised not as ancillary to the power granted, etc. etc.” Id.
W. Lambert, "a distinguished physician," who alleged that the

Lambert was decided on November 29, and Sutherland's dissent does not contain Stone's proposed paragraph, with its striking invocation of the Tenth Amendment.

214. Lambert, 272 U.S. at 588. Lambert was the "president of the Association for the Protection of Constitutional Rights, which was organized ... by 105 physicians" to challenge federal control of the authority of doctors to prescribe liquor. Unlimited Liquor Prescriptions, LITERARY DIG., May 26, 1923, at 10. From 1904 to 1919 Lambert was the Dean of the Columbia College of Physicians and Surgeons, and he was president of the New York Academy of Medicine from 1927 to 1929. For a full biography, see 37 NAT'L CYCLOPEDIA AM. BIOGRAPHY 281-82 (1951).

Lambert was a close personal acquaintance of Taft and served as a physician to Taft's relatives in the New York area. See Letter from Horace D. Taft to WHT (Nov. 2, 1922), microformed on TAFT PAPERS, supra note 9, Reel 247; Letter from WHT to Horace D. Taft (Nov. 9, 1922), microformed on TAFT PAPERS, supra note 9, Reel 247 ("I am very glad that Sam thinks you have gained in the last eight months. It seemed to me, when I saw you in New York, that you looked much better."); Letter from WHT to Horace D. Taft (Oct. 26, 1922), microformed on TAFT PAPERS, supra note 9, Reel 246; Letter from WHT to Mrs. William A. Edwards (Nov. 17, 1922), microformed on TAFT PAPERS, supra note 9, Reel 247 ("I am glad to think that Horace is better. The trace of albumen hasn't disappeared, but his diet has evidently done him good, and Sam Lambert has now [illegible] him to eat some eggs but no meat."). After the decision in Lambert, Taft wrote his brother:

Sam Lambert's wife was here as one of Nellie's Colonial Dames and when I saw her I told her that if she had managed the case, with her direct methods, because she appealed to me, as I told you, by seizing my coat lapel and saying that I must decide for Sam, the case might have gone what she thought was the right way. I told her to tell Joe Auerbach that if she had been employed as counsel, the result might have been different.

Letter from WHT to Horace D. Taft (May 24, 1927), microformed on TAFT PAPERS, supra note 9, Reel 282. After the Court's decision, Lambert filed a petition for rehearing, arguing that the Court had in its opinion mistakenly believed that the majority of physicians were "opposed to the use of alcohol as a therapeutic." Liquor as Medicine Ruling Under Fire; Committee of Doctors To Seek Reversal of Limiting Decision by Supreme Court, N.Y. TIMES, Dec. 14, 1926, at 17. See Medicinal Liquor up in Court Again; Dr. Lambert Asks Supreme Bench To Reopen Case Rejected Five to Four, N.Y. TIMES, Jan. 6, 1927, at 3. Taft wrote his brother Horace:

I don't see just how Sam Lambert can try again on the question, for we intended to make an end of him, and I think we have done so. If he thinks we are going back to try over the question whether a majority of doctors are in favor or opposed to larger liberality in the matter of the use of whiskey as a medicinal agent, he is greatly mistaken. I used to think that the prohibitionists were the craziest people in the landscape, but I really think their opponents are more nearly lunatics than they.

Letter from WHT to Horace D. Taft (Jan. 16, 1927), microformed on TAFT PAPERS, supra note 9, Reel 288. After the Court's denial of Lambert's petition, Horace replied, "I see that you have turned down Sam Lambert and I hope that now he can get some sleep." Letter from Horace D. Taft to WHT (Jan. 18, 1927), microformed on TAFT PAPERS, supra note 9, Reel 288. Lambert, however, continued to press his case, arguing for the medicinal value of liquor "in the treatment of many diseases and nervous conditions, particularly those of the aged." Advocates Liquor as Benefit to Aged; Lambert of Medical Academy Urges Doctors To Force New Dry Law from Congress, N.Y. TIMES, Oct. 5, 1928, at 27; Says Dry Act Curbs Medical
relevant statutory restrictions interfered with his practice of medicine because he presently had under his care patients whose treatment required prescriptions of alcohol that Congress prohibited.215

The Court essentially treated Everard's Breweries as dispositive.216

If Congress may prohibit the manufacture and sale of intoxicating malt liquor for medicinal purposes by way of enforcing the Eighteenth Amendment, it equally and to the same end may restrict the prescription of other intoxicating liquor for medicinal purposes. In point of power there is no difference; if in point of expedience there is a difference, that is a matter which Congress alone may consider.217

Congressional limitations on the amount of liquor that physicians could prescribe218 "must be taken as embodying an implicit congressional finding that such liquors have no such medicinal value as gives rise to a need for larger or more frequent prescriptions. Such a finding, in the presence of the well-known diverging opinions of physicians, cannot be regarded as arbitrary or without a reasonable basis."219 The Court concluded:

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Practice; Dr. Samuel W. Lambert Asserts Definition of Intoxicants Invades Doctors' Rights, N.Y. TIMES, Jan. 28, 1927, at 3; see also Letter from Horace D. Taft to WHT (Oct. 19, 1928), microformed on TAFT PAPERS, supra note 9, Reel 305 ("Another piece of delicious absurdity comes from a quotation by the Wets of Sam Lambert. Nothing is so firmly fixed in the minds of the Wets or so loudly trumpeted as that we are drinking more than ever under prohibition. Now comes Sam in an address and states that there has been a dreadful increase in diabetes, because alcohol is needed to burn up the sugar in the human system and now that people have so largely given up alcoholic drinks the increase in diabetes occurs. The Wets rejoice over this decision by a high medical authority and are quite capable of citing in parallel columns the two arguments against prohibition, one that we are drinking more than ever and the other that the fact that we are drinking so little is destroying us.").


216. Lambert, 272 U.S. at 594 ("We have spoken of that case at length because the decision was by a unanimous court and if adhered to disposes of the present case.").

217. Id. at 595. This language was actually written by Justice Van Devanter. See supra note 212.

218. See supra note 210.

219. Lambert, 272 U.S. at 595. This language was actually written by Justice Van Devanter. See supra note 212.
High medical authority being in conflict as to the medicinal value of spirituous and vinous liquors taken as a beverage, it would, indeed, be strange if Congress lacked the power to determine that the necessities of the liquor problem require a limitation of permissible prescriptions, as by keeping the quantity that may be prescribed within limits which will minimize the temptation to resort to prescriptions as pretexts for obtaining liquor for beverage uses.\textsuperscript{220}

In dissent, Sutherland sardonically noted that he was “very certain” that \textit{Everard’s Breweries} “would not have been a unanimous” decision if it had stood for what the Court now interpreted it to mean.\textsuperscript{221} Sutherland understood \textit{Everard’s Breweries} to rest “upon the ground that Congress, upon conflicting evidence, had determined that \textit{malt} liquors possessed no substantial medicinal value and judicial inquiry upon that question was, therefore, foreclosed.”\textsuperscript{222} In \textit{Lambert}, by contrast, Congress had concluded that vinous and spirituous liquors were “of medicinal value,” although requiring regulation to prevent possible abuse.\textsuperscript{223}

Because there were no congressional findings about proper prescription dosages for alcohol,\textsuperscript{224} the “only fact in this record bearing upon that subject” was Lambert’s allegation that the statutory regulations were contrary to his medical judgment.\textsuperscript{225} In

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\item \textit{Lambert}, 272 U.S. at 597. In Brandeis’s original draft, this sentence had read: “High medical authority is in conflict as to the medicinal value of spirituous and vinous liquors taken as a beverage. It would, indeed, be strange if Congress lacked the power to determine that the necessities of the liquor problem require a reasonable limitation of the permissible doses.” BRANDEIS PAPERS, \textit{supra} note 119, Reel 29. Changes in the paragraph were all drafted by Van Devanter. The Court’s reference to conflict of medical authority referred to a 1917 resolution of the American Medical Association declaring “that the use of alcoholic liquor as a therapeutic agent was without ‘scientific basis’ and ‘should be discouraged.’” \textit{Lambert}, 272 U.S. at 591. In \textit{Lambert} itself, however, the American Medical Association filed an amicus brief disavowing its previous resolution and arguing that the “limitations on dosage of which complaint is now made ... have no foundation in scientific observation or in experience.... They are, it is believed arbitrary and unreasonable.” Brief for American Medical Ass’n as Amicus Curiae Supporting Appellant, \textit{Lambert} v. Yellowley, 272 U.S. 581 (1926) (No. 47).
\item \textit{Lambert}, 272 U.S. at 600 (Sutherland, J., dissenting). Sutherland, of course, had participated in \textit{Everard’s Breweries}.
\item \textit{Id.}
\item \textit{Id.} at 600, 602.
\item \textit{Id.} at 601-02.
\item \textit{Id.} at 602. There were, moreover, no congressional findings connecting dosage limitations to the necessities of enforcement. \textit{Id.} at 603.
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such circumstances, to give essentially unlimited deference to congressional judgments of necessity would "deprive the states of the exclusive power, which the Eighteenth Amendment has not destroyed, of controlling medical practice and transfer it in part to Congress."[226] [U]nder the pretense of adopting appropriate means, a carefully and definitely limited power" of prohibiting intoxicating liquors for beverage purposes "will have been expanded into a general and unlimited power" of prohibiting such liquors for all purposes, including medicinal ones.227 This would contradict "the letter and spirit of the Constitution ... and especially of the Tenth Amendment."[228]

Because this statute by fixing inadequate prescriptions prohibits to the extent of such inadequacies the legitimate prescription of spirituous and vinous liquors for medicinal purposes, it exceeds the powers of Congress, invades those exclusively reserved to the states, and is not appropriate legislation to enforce the Eighteenth Amendment.229

Sutherland's dissent expresses the same concept of normative dualism that had informed his earlier interpretation of "concurrent power."[230] In contrast to the legislation at issue in Everard's Breweries, the statutes in dispute in Lambert regulated the practice of medicine and therefore directly intruded into the police power of the states.231 In order to protect the integrity of that power, the statutes were to be allowed only if truly necessary.232 Sutherland

226. Id. at 604. That state prohibition statutes were accorded deference in their regulation of medical prescriptions of vinous and spirituous liquors, a fact extensively documented by Brandeis's opinion, was thus irrelevant for Sutherland, because state regulations did not undermine the constitutional values protected by normative dualism. Id. at 603.
227. Id. at 604.
228. Id. at 603-04.
229. Id. at 605.
230. See supra text accompanying notes 186-91.
231. See, e.g., Linder v. United States, 268 U.S. 5, 18 (1925) ("Obviously, direct control of medical practice in the States is beyond the power of the federal government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure.").
232. As Sutherland put it in his presidential address to the ABA:
I believe in the most liberal construction of the national powers actually granted, but I also believe in the rigid exclusion of the national government from those powers which have been actually reserved to the states. The local government
regarded the statutes at issue in Lambert as a “transfer” of police power to the federal government and a consequent loss of the democratic legitimacy inherent in local self-government. It is “striking,” however, that in both Everard’s Breweries and Lambert the Taft Court decisively rejected this vision of normative dualism, which is perhaps most conspicuously signified by Sanford’s repudiation of the Tenth Amendment as a symbol of the constitutional value of local self-government that was to be balanced against the deployment of federal power.

is in immediate contact with the local problems and should be able to deal with them more wisely and more effectively than the general government having its seat at a distance. The need of preserving the power and enforcing the duty of local self-government is imperative, and especially so in a country, such as ours, of vast population and extent, possessing almost every variety of soil and climate, of greatly diversified interests and occupations, and having all sorts of differing conditions to deal with.

George Sutherland, President, Am. Bar Ass’n, Address of the President: Private Rights and Government Control, in REPORT OF THE FORTIETH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 212 (1917).


234. David F. Currie, The Constitution in the Supreme Court: 1921-1930, 1986 DUKE L.J. 65, 120 (“It remains striking, however, that under the influence of the popular uprising that culminated in the adoption of the amendment, a Court so strict in its scrutiny of legislative means under the innocuous-looking due process clauses would assume such a relaxed attitude in determining the appropriateness of means to achieve limited congressional goals—especially since nothing in the opinions suggested that the Court’s principles of broad construction applied only to Prohibition cases.”) (footnote omitted). The extreme deference evinced by the Court in Everard’s Breweries and Lambert should be contrasted to the Court’s pinched reasoning in Schlesinger v. Wisconsin, 270 U.S. 230 (1926), in which, over the dissent of Holmes, Brandeis, and Stone, the Court struck down a Wisconsin statute conclusively presuming that all gifts made within six years of death are “in contemplation of death” and hence subject to an inheritance tax. Id. at 239. In dissent Holmes specifically cited Everard’s Breweries for the proposition that “with the States as with Congress when the means are not prohibited and are calculated to effect the object we ought not to inquire into the degree of the necessity for resorting to them.” Id. at 242 (Holmes, J., dissenting).

235. See supra text accompanying note 197. Sanford’s opinion in Everard’s Breweries may be contrasted with Hammer v. Dagenhart, 247 U.S. 251 (1918):

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.

Id. at 273-74. Hammer ruled that the value of local self-government was to be protected by judicial vigilance to ensure that congressional authority was exercised in a manner that was consistent “with constitutional limitations and not by an invasion of the powers of the States.”
Although the Taft Court was, on the whole, a highly nationalist institution, Everard’s Breweries and Lambert nevertheless contrast sharply to the normative dualism that infused many of the Court’s most important decisions, like Bailey v. Drexel Furniture Co., which were much closer in spirit to the perspective expressed in Sutherland’s Lambert dissent. The pressure to uphold prohibition led the Court in Everard’s Breweries and Lambert to a vision of dual sovereignty that we may call “positive dualism,” for it awarded to both the federal government and the states the full, unqualified measure of the authority enacted in the positive text of the Constitution. Positive dualism necessarily tilts the balance of power decisively toward the national government, because the Supremacy Clause preempts all state law that is inconsistent with federal regulation. The manifest tension between the normative dualism of Bailey, so well expressed by Sutherland’s dissent in Lambert, and the positive dualism of the Court’s opinions in Everard’s Breweries and Lambert, caused great consternation among contemporaries, who asked whether there shall “be two constitutions, one for prohibition and one for all other matters whatsoever?”

IV

The story of ascendancy of federal power in America is usually told in terms of a response to the increasing growth and interdependence of national markets, “as a natural development and outgrowth of modern industry.” Prohibition, however, suggests

Id. at 276. Sutherland’s dissent drew direct inspiration from this passage. Lambert, 272 U.S. at 604 (Sutherland, J., dissenting).


237. (Child Labor Tax Case), 259 U.S. 20 (1922).

238. For a discussion of Bailey, see Post, supra note 143, at 1558-63.


240. Thompson, supra note 27, at 10.

[Progress toward the unitary state is not an accident but a logical development, once national unity has been attained. The system of concurrence of powers subject to national supremacy is the one to which the future belongs. States will have to be content with what cities enjoy under constitutional home rule.

that this story must be expanded to include a distinct theme, which is the growth of the belief that the nation, as distinct from individual states, was a natural unit of democratic self-determination.\textsuperscript{241} Because this belief may apply to some spheres of federal competence—war, foreign affairs, railroads—but not to others, we can profitably conceive the remarkable advancement of federal authority in the twentieth century as an expansion of the domains of federal action to which this belief has attached.

The ratification of the Eighteenth Amendment represented a proleptic leap of faith that the American people were ready to accept the democratic legitimacy of federal regulation of intimate habits of consumption.\textsuperscript{242} This faith was misplaced, for the “light-hearted contempt with which the Eighteenth Amendment” was “treated by millions of good citizens—citizens who in other things are as law-abiding as anybody” proved to be a “phenomenon” that was entirely unanticipated.\textsuperscript{243} It was not merely that prohibition was flouted, it was rather that “great centers of population” were “wet in practice and wet in principle.”\textsuperscript{244} “The real problem of prohibition enforcement turns on the intensity of the conviction in certain communities not merely that the law is a failure, but that it ought to be a failure.”\textsuperscript{245} The widespread and flagrant defiance of

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\item Consider the form of democratic identification implicitly underlying this typical objection to federal centralization:
\begin{quote}
Shall the conduct of citizens of Mississippi be prescribed by vote of congressmen from New York, or supervised at the expense of New York taxpayers? Will an educational system suitable for Massachusetts necessarily fit the young of Georgia? Such suggestions carry their own answer. In the very nature of things there is bound to be a reaction against centralization sooner or later.
\end{quote}
\item PIERSON, supra note 183, at 145.
\item It was the great body of our people who represent the homes and firesides and who comprise the bone and sinew of our body politic that made prohibition possible. These people, through long years of observation of the evils of the liquor traffic and experience of the benefits obtained through applying the principle of prohibition to small communities by local option and State-wide laws, came to believe its application to the Nation as a unit would be to the best interests of our national welfare.
\item Wesley L. Jones, \textit{Is Nation Ready To Respect Prohibition Law?}, 4 CONG. DIG. 20 (1924).
\item FRANKLIN, supra note 172, at 50.
\item Walter Lippmann, \textit{Our Predicament Under the Eighteenth Amendment}, 154 HARPER'S MAG. 51, 52 (1926).
\item \textit{Id.} at 53. To violate the law “even secretly should be a burden of shame to be
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PROHIBITION IN THE TAFT COURT ERA

prohibition thus involved not merely inadequate mechanisms of enforcement, but also, and more distressingly, a calamitous collapse of the law's legitimacy.  

undertaken by no respectable person; and yet all of us are well aware of the pride which many otherwise excellent citizens take in breaking the Volstead Act." George S. Buck, The Crime Wave and Law Enforcement, 131 OUTLOOK 16, 17 (1922).


It has brought about close working relations between the bootlegger and thousands of the most intelligent and virtuous members of American society who feel no more compunction about violating the Volstead Act than the free-soiler did about violating the fugitive slave law, or the southern white did about nullifying ignorant negro suffrage; the Federal Constitution in each instance to the contrary notwithstanding.

Id. "Any law that has brought in its trail the havoc, the defiance, and the corruption which has followed the Volstead Act can not be successfully defended.... Today we have ... a general disrespect for all law that threatens the very foundation of the Republic." Walter E. Edge, U.S. Senators Discuss Prohibition Issue, 5 CONG. D I G. 191, 193 (1926). As early as 1922 Charles H. Strong, the President of the Unitarian Laymen's League, wrote Taft that "[e]verybody knows that the Prohibition Amendment and the Volstead Act have probably been more persistently and flagrantly violated than any other law ever adopted in this country." Letter from Charles H. Strong to WHT (Oct. 31, 1922), microformed on TAFT PAPERS, supra note 9, Reel 246. For a fascinating and official map of wet and dry America that has a strong correlation with present maps that distinguish red states from blue states, see Jack O'Donnell, Wet Around the Edges, COLLIER'S WEEKLY, Jan. 26, 1924, at 5. In an engrossing first-hand account of conditions in Pennsylvania, for example, the State was described as "[e]ffuring from 'a liquor deluge,' where practically every city is 'wet as the Atlantic Ocean,' ... a 'bootleggers' Elysium,' brazen in its defiance of Prohibition laws, where 'there are far more wide-open saloons than ever flourished in pre-Prohibition days." How Wet Is Pennsylvania?, LITERARY DIG., Nov. 10, 1923, at 38. By contrast, J.C. Burnham reports that "local enforcement in many Southern and Western areas was both severe and effective." Burnham, supra note 34, at 58.

For fascinating data on arrests for intoxication and death rates from alcoholism in both wet states and dry states, see THE MODERATION LEAGUE, supra note 6. The League concluded that "in wet states— that is, the states which had no state prohibition before national prohibition—the low point of drunkenness was in 1920, the first year of national prohibition." Id. at 4. By 1929, however, arrests for intoxication had "risen substantially to the level of pre-prohibition or saloon days." Id. Dry states reached the low point for intoxication arrests in 1919, but by 1929 arrests were "39% above the 1914 level," which "indicates that conditions of intemperance in these 'dry' states are worse today than before national prohibition." Id. at 5. Examining death rates from alcoholism (excluding deaths from wood or poison alcohol, which virtually did not occur before national prohibition, id. at 13), the League found that the low point in such death rates in wet states was in 1920, but that by 1929 "the death rate from alcoholism is now as high as it formerly was in the saloon days." Id. at 11. In dry states "more persons per capita are dying now from intemperate use of liquor than under state prohibition." Id. at 13.

247. The "widespread and scarcely or not at all concealed contempt for the policy of the
Contemporaries understood this collapse as caused by the fact that prohibition had "no sanction in common sense or morals.... The preposterous Volstead act, with all its unforeseen consequences ... is not and cannot be enforced in great reaches of the country because it has no hold on the reason or the moral sense of the majority." 248 It was endlessly reiterated that prohibition was a National Prohibition Act" was generally acknowledged. NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, supra note 8, at 22. The best formulation of the point was by Walter Lippmann:

No law is enforced absolutely. The penal law is broken by murderers and thieves. The tariff law is broken by smugglers. The commercial law is broken by swindlers. The tax laws are broken by tax-dodgers. Is a breach of the Volstead Act in the same category of law breaking? Well, Harper's Magazine does not publish articles by murderers, thieves, smugglers, swindlers, and tax-dodgers discussing the policy of the law they break. The opponents of capital punishment do not form associations of murderers. The free traders do not hold banquets attended by smugglers. The Secretary of the Treasury does not make speeches to tax-dodgers. But cabinet officers, senators, congressmen, governors, mayors, judges, chiefs of police, bankers, editors, and other pillars of society are openly convivial with men who make no bones about their defiance of the Volstead Act. Now a law which can be violated openly and without shame by men who are normally law-abiding may fairly be called a law which is not enforced.

Lippmann, supra note 244, at 52. See also Hibben, supra note 21, at 218:

Men and women in significantly large and increasing numbers who command the respect and confidence of their communities and who are naturally expected to be supporters of law are in possession of liquor, serve it in their homes on public as well as private occasions, and do so with no attempt whatsoever at concealment, exactly as if there were no such thing as the Eighteenth Amendment and the National Prohibition Act. They not only do not regard the law seriously, they go further; the law has become in many social circles the butt for ridicule and poor outworn jokes.

No law can be effectually enforced when the normal law-abiding citizens of the community do not lend it their approval and support both in pronounced opinion and practice.... When I speak of normally law-abiding citizens ... I have in mind judges of our courts, members of Congress, lawyers, men of public-spirited citizenship and the leaders in their communities of every good cause ....


And why is the Volstead Act unenforceable? It is because the idea that it is a criminal thing at all times and under all circumstances to make, sell, or use an intoxicating beverage is a purely artificial conception, at war with the fundamental facts of human existence, and untenable in the forum of sound human reasoning.

malum prohibitum rather than a malum in se,\textsuperscript{249} for prohibition sought to interdict long-standing "traditions of habit and mind."\textsuperscript{250} If an essential insight of federalism was that law, particularly police regulations, should be kept as decentralized as possible so as to ensure responsiveness to local mores and norms, the spectacular failure of national prohibition confirmed the underlying and conservative thought that the legitimacy of law depended upon its being the

creation of historical growth ... supported in reality not so much by organized force as by that sense of mutual obligation and respect for the rights of others which lies at the root of, and forms the foundation of, those settled rules of conduct among individuals which alone make law and order in the community possible.\textsuperscript{251}

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\item \textsuperscript{250} Conboy, \textit{supra} note 22, at 359.
\par Only when public spirit is on the side of the law is the law generally obeyed. Enforcement is always difficult, but when the law declares that conduct widely practiced and widely regarded as innocent is a crime, enforcement is impossible....
\par Prohibition aims directly at ... a social custom, the indulgence of which is not in and of itself morally wrong. Constitutional and legislative fiat alone do not and cannot restrain this custom or modify the mental attitude toward it.
\item David I. Walsh, \textit{Can Prohibition Be Enforced?}, 9 CONG. DIG. 81, 81 (1930); see \textit{Prohibition Is Dying Natural Death: Darrow, CHI. DAILY TRIB.}, Sept. 25, 1927, at 2 ("Mr. Darrow believes that to try to enforce a law in which the masses obviously do not believe and intend to avoid is asking trouble. He said in many cities the authorities had ceased trying to enforce prohibition.").
\item \textsuperscript{251} Conboy, \textit{supra} note 22, at 354-55 (quoting Lord Parker); see Struthers Burt, \textit{The Sense of Law}, 80 SCRIBNER'S MAG. 157, 158-61 (1926) ("Law ... is man's sense of fair play .... [I]t is a common thing, an ordinary thing, a daily thing; it is not even preserved for Sundays or illnesses .... To the lay mind, which conceived law and which must live by law, a law is not a law if it offends the sense of law, and millions of misguided experts cannot prove otherwise. The sense of law stands above all law and all laws are subject to it and refer back to it.... There were, for instance, laws against drunkenness; there were not, before war with its false legal values blurred the sense of all civilian law, laws against drinking, for drinking is not in itself antisocial; to the contrary, it may frequently be social.... We are witnessing to-day ... the curious spectacle of the law being punished by the sense of law, and this punishment will continue, with all its disastrous consequences, until the law reforms itself.").
\end{itemize}
By losing touch with these foundations, national prohibition was said to succumb to the "viciousness" characteristic of all "laws which express excellent views of conduct but which run counter to the settled habits or fixed desires of a part of the community." Justice Clarke observed in 1922 that "the Eighteenth Amendment required millions of men and women to abruptly give up habits and customs of life which they thought not immoral or wrong, but which, on the contrary, they believed to be necessary to their reasonable comfort and happiness." The inevitable consequence was that "respect not only for that law, but for all law, has been put to an unprecedented and demoralizing strain in our country, the end of which it is difficult to see." Paradoxically, by upholding prohibition in the teeth of contrary commitments to the prevention of double jeopardy and to normative dualism, the Taft Court itself contributed to the growing fear that the positive law of prohibition was somehow incompatible with deeply held national values.

This fear was reinforced by a pervasive anxiety during the 1920s that law itself was spinning out of control because it was proliferating wildly and increasingly detached from tradition and custom. In an influential article, Arthur Twining Hadley, a former president of Yale, complained that "[o]ne of the greatest dangers which now confronts us is the increasing demand for ill-considered legislation, and the increasing readiness of would-be reformers to rely on authority rather than on public sentiment for securing their ends." The popular press was flooded with complaints about "the

254. Id.; see also Justice Clarke Warns of Perils, N.Y. TIMES, Feb. 5, 1922, at 1. Clarke was promptly criticized by Senator Harris of Georgia, who said that "[t]he Supreme Court should look after its own affairs." Criticizes Justice Clarke; Senator Harris Says He Should Attend to Duties in Supreme Court, N.Y. TIMES, Feb. 15, 1922, at 2. Harris specifically criticized Clarke's reference to prohibition. 62 CONG. REC. 2582 (1922). For examples of Clarke's opposition to prohibition, see Grogan v. Hiram Walker & Sons, 259 U.S. 80 (1922); National Prohibition Cases, 253 U.S. 380 (1920); Jacob Ruppert v. Caffey, 251 U.S. 264 (1920).
255. See supra notes 126-28, 205 and accompanying text.
256. Arthur Twining Hadley, Law Making and Law Enforcement, 151 HARPER'S MAG. 641, 643 (1925). Hadley identified self-government with voluntary obedience to the law: "Conscience and public opinion enforce the laws; the police suppress the exceptions." Id. at 641. A law that can be enforced only by compulsion, rather than voluntary obedience,
torrent of new laws which are deluging the country to the confusion of everyone, lawmakers included. Contemporaries believed they were witnessing the "greatest outpouring of statutory law the world has ever seen. Statute is piled upon statute, administrative agency upon administrative agency, and to the great body of statutory law has been added a mass of administrative orders ... until in the general confusion we have almost lost our place." "We have hundreds of thousands of laws that should have no place upon the statute books and that come to be disregarded as a matter of course and merely stimulate a disregard of all law of whatever character," one commentator observed. "The Eighteenth Amendment and its enforcing Act are a conspicuous type of such frivolous enactments." Prohibition was repeatedly cited as "an extreme case" of the kind of "legislative turpitude" that enacted laws without regard

substitutes "autocracy" for "self-government." Id. at 643. Manifestly pointing at prohibition, Hadley declared that "[t]oday it is from the law maker rather than from the law breaker that our American traditions of self-government have most to fear." Id. "What can we do to protect ourselves," Hadley asked, "against this spirit of over-regulation which seeks to place under official control not only the organization of industry and commerce but the conduct and even the thought of the people themselves?" Id. at 644. His provocative answer was "nullification," a "process of blocking the law by disobedience." Id. at 645. "The Fugitive Slave Law was thus nullified by the people of the North; the Reconstruction Acts were thus nullified by the people of the South." Id. Nullification is "the safety valve which helps a self-governing community avoid the alternative between tyranny and revolution." Id. at 646.

257. Excessive Lawmaking the Bane of America, 74 CURRENT OPINION 461, 461 (1923). "The people," it was said, "are genuinely disturbed by the flood of lawmaking which each year engulfs our country." Editorial, Laws upon Laws, SATURDAY EVENING POST, Aug. 6, 1927, at 26. "Railing at law and law-makers has become of late one of our popular national sports." Farnam, supra note 50, at 433. For examples, see Philos Cooke, Anarchy in the Law: Throughout the United States Average of 2,123 Laws Passed Each Month upon Which Citizen Must Inform Himself, 14 LA FOLLETTE'S MAG. 172 (Nov. 1922); Epidemic Insane Lawmaking, 110 INDEPENDENT 307 (1923); The Rain of Law, LITERARY DIG., Apr. 7, 1923, at 15.

258. Marvin B. Rosenberry, Law and the Changing Order, 220 N. AM. REV. 18, 22-23 (1924). "Each year upwards of 12,000 new statutes are ground out, and the highest courts supplement these with 13,000 interpretive decisions. It is little wonder if in this maze of legal entanglements justice wanders helplessly." Editorial, Current Comment, 8 FREEMAN 601, 601 (1924). The law has become "so complex and extensive that no living man can hope to learn its provisions or observe it in full." William P. Helm, Jr., The Plague of Laws, 10 AM. MERCURY 10, 16 (1927). "Ten thousand law-mills have submerged America beneath their grist. No living man can hope to know the law, and he who claims to do so is deserving only of long hairy ears and a bale of hay." Id. at 10; see also The March of Events; Too Many Laws!, 54 WORLD'S WORK 8, 9 (1927) ("Legislation, taken as a remedy, has itself become an ill.").

259. Priest, supra note 249, at 600.
to public sentiment$^{260}$ and sought to change longstanding customs by "constitutional and legislative fiat alone."$^{261}$

To stalwart progressives, of course, this more general "cry to the uninformed against excessive legislation" was simply an "effort to destroy confidence in public action, and especially in legislation," with the "purpose" of discrediting government as "the only agency that can effectually protect human beings in their essential integrity ... If confidence in legislation and in government is destroyed exploitation will go unchecked."$^{262}$ Yet the debacle of prohibition undercut confidence in the use of state power, and in particular in laws that did not embody "inherited customs ... fortified by long public acquiescence," but that resulted instead "from the vehemence of some cult, bloc, class, or an economic or social 'ism; —all statutory and all frankly designed to further or coerce, control, favor or suppress a minority, a business, or the social conduct of private citizens in a new and unaccustomed manner."$^{263}$

The distinction between law as the positive enactment of the state and law as the organic expression of traditional social norms was exactly the point of George Sutherland's presidential address to the American Bar Association in September 1917. Sutherland asserted that the most distinguishing characteristic of "our present-day political institutions" was "[t]he passion for making laws."$^{264}$ "The prevailing obsession," Sutherland observed, "seems to be that statutes, like crops, enrich the country in proportion to their

$^{260}$ Katharine Fullerton Gerould, Our Passion for Lawmaking: An Exploration of the American Mind, 157 HARPER'S MAG. 700, 700 (1928). "I do not doubt that many of the people who supported Prohibition actually believed that the inclusion of it in the Constitution would turn a nation sober—not merely by the aid of guns and poisons, but by some miracle involved in the words of the amendment." Id. at 702. But "[w]e cheapen law itself, the whole principle of self-government, by enacting laws that public opinion will not sanction." Id. at 704.

$^{261}$ Walsh, supra note 250, at 81; see James Truslow Adams, Hoover and Law Observance, 82 FORUM 1, 1-7 (1929).

$^{262}$ Lapp, supra note 71, at 12-13.

$^{263}$ Letter from Judge Charles M. Hough to Charles S. Whitman (June 16, 1923), in ABA SPECIAL COMM. ON LAW ENFORCEMENT, REPORTS OF THE SPECIAL COMMITTEE ON LAW ENFORCEMENT 39, 39-40 (1923).

$^{264}$ Sutherland, supra note 232, at 198; see also Pierce Butler, Some Opportunities and Duties of Lawyers, Address at the Joint Meeting of the American Bar Association and Minnesota Bar Association (Aug. 29, 1923), in 9 A.B.A. J. 583, 586 (1923) ("A passion for new enactments prevails. The enormous number of bills introduced in the legislatures shows the extent to which it is thought that welfare can be promoted by lawmaking.")
volume." Sutherland used prohibition to illustrate the contemporary "mania for regulating people." To put the consumer of a glass of beer in the penitentiary along with the burglar and the highwayman is to sacrifice all the wholesome distinctions which for centuries have separated debatable habit from indisputable crime. Prohibition was bound to fail, Sutherland predicted, because "[t]he successful enforcement of the law in a democracy must always rest primarily in the fact that on the whole it commends itself to a universal sense of justice, shared even by those who violate it."

265. Sutherland, supra note 232, at 198. "Throughout the country the business world has come to look upon the meeting of the legislature as a thing to be borne rather than desired, and to regard with grave suspicion pretty much everything that happens, with the exception of the final adjournment ...." Id. at 199. Sutherland added:

The difficulty which confronts us ... is that we are going ahead so fast—so many novel and perplexing problems are pressing upon us for solution—that we become confused at their very multiplicity. Evils develop faster than remedies can be devised. Most of these evils, if left alone, would disappear under the powerful pressure of public sentiment, but we become impatient because the force of the social organism is not sufficiently radical and the demand goes forth for a law which will instantly put an end to the matter.

Id. at 200.

266. Id. at 201.

267. Id. at 201-02.

268. It does not require a prophet to foresee that laws of this character exacting penalties so utterly disproportionate to the offense, can never be generally enforced, and to write them into the statutes to be cunningly evaded or contemptuously ignored will have a strong tendency to bring just and wholesome laws dealing with the liquor question into disrepute.

Id. at 202. It was said of Sutherland that he personally approved "of abstinence from alcoholic beverages and of prohibition by local option." Proceeding in the Supreme Court of the United States in Memory of Mr. Justice Sutherland, 323 U.S. v, xii (1944) (remarks of Attorney General Biddle).

269. Sutherland, supra note 232, at 203.

Any attempt, therefore, to curtail the liberties of the citizen, which shocks the sense of personal independence of any considerable proportion of the community is likely to do more harm than good, not only because a strong feeling that a particular law is unjust lessens in some degree the reverence for law generally, but because such a law cannot be successfully enforced, and a law that inspires neither respect for its justice nor fear for its enforcement is about as utterly contemptible a thing as can be imagined.

Id. at 203-04.

It is plausible that Stone's attraction to this premise explains why he was more ready than either Holmes or Brandeis to join conservatives on the Court to constrain prohibition. See Appendix, Figures A, B; supra text accompanying note 11. In 1926 Stone wrote to Huger W.
In popular discussion the "mania" for regulation was almost entirely associated with positive legislation, as distinct from common law. Statutes were produced by political pressure and lobbying. Common law, by contrast, was made by judges whose task it was to express "long-accepted custom, proved by experience."  

Jervey, his replacement as Dean of the Columbia Law School, that the problems of criminal law and crime depression are not primarily legal. They grow out of social conditions which are the result of our sudden expansion as an industrial country, of a breaking down of social restraints which have come from the change in family life, and to sudden prosperity, and they have been accelerated by the attempts to carry legislation too far in such acts as the Volstead law and other similar types of legislation.

Letter from HFS to Huger W. Jervey (Dec. 6, 1926) (Stone Papers). The year before Stone had publicly elaborated the same point, although without explicit reference to prohibition: Certain it is that never before in history has any people exhibited such a child-like and implicit faith in the efficacy of legislation to bring about the social Utopia as have our own people in our own time. Forgetting that social custom and the average moral standards of the community are more potent in the control of human conduct than formal law, we nevertheless seem to regard statute making as the chief and only ultimate agency of social reform and the never failing means for the minute regulation and control of all human activities. The vice of this procedure is that it leaves out of account the evils which inevitably flow from the attempt to impose rules of conduct by legal command which do not have the moral support of the great mass of the community or which are not of sufficient importance to arouse active public interest in their behalf. Ponderous volumes filled with statutes which by common consent are ignored or are only partially or occasionally enforced are a heavy burden on the spirit of obedience to law and they represent a costly experiment in government. For whatever advantages we gain from a partial or inadequate enforcement of the rule we adopt we pay a high price in loss of respect for law and law enforcement agencies ....

Harlan F. Stone, Obedience to Law and Social Change, Annual Address of the Bar Association of the State of New Hampshire, in 5 PROCEEDINGS OF THE BAR ASSOCIATION OF THE STATE OF NEW HAMPSHIRE 27, 37 (1925). Stone's son reported that although Father recognized the validity and binding effect of the 18th Amendment and the laws passed pursuant thereto and enforced them vigorously as Attorney General, he thought they were bad laws and were an undue infringement of individual freedom. He thought the prohibitionists were "do-gooders" and referred to the WCTU as the "We-see-to-you-ers." He did not care for "hard liquor" and rarely took any, but he did enjoy and saw no harm in table wines, sherry and the like.


270. Barrett Wendell, Law and Legislation, 65 SCRIBNER'S MAG. 177, 177 (1919). Wendell associated respect for custom with "the English conception of the Common Law," and a misplaced faith in statutes with the "Continental type of mind." Id. at 178. He warned that
was generally recognized that a modern state needed both kinds of law, because in many contexts "rapid changes of conditions" moving "too rapidly for customs to form" were "the chief reason why we are bombarded by such a multitude of statutes, good, bad, and indifferent, seeking to accomplish changes by express prohibitions, commands, and statutory remedies." 271 The important question, therefore, was how active courts ought to become in supervising "this mass of ill considered, badly drawn, experimental, first impression legislation with which the country is flooded from year to year," 272 and how forceful courts ought to be in interpreting such statutes in light of their understanding of "the customs and needs of the community to be affected." 273

These questions arose in a number of contexts, of which perhaps the most prominent was the issue of how far courts should go in incorporating statutory principles into their judicial reasoning. More than a decade before prohibition Roscoe Pound had presciently identified as a "notable" characteristic "of American law today ... the excessive output of legislation in all our jurisdictions and the indifference, if not contempt, with which that output is regarded by courts and lawyers." 274 This disregard was justified on the ground that "common law was superior to legislation because it was customary and rested upon the consent of the governed." 275 A

"[i]n regarding legislation as inherently absolute ... we are at least perilously near the danger of forgetting that it cannot safely stray too far from the limits of custom."  Id.  at 179.

271.  Root, supra note 174, at 748-49; see also Elihu Root, The Layman's Criticism of the Lawyer, in REPORT OF THE THIRTY-SEVENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 388, 391-94 (1914) [hereinafter Root, Layman’s Criticism] ("Undoubtedly there is much reason in these later days for new legislation. Our social and industrial conditions are changing very rapidly. New relations, new rights, new obligations are being created for the regulation of which the old laws and customs of the country are inadequate, and there must be new laws to prevent injustice."); Farnam, supra note 50, at 437 ("New inventions and new methods have led to new evils, economic, sanitary, and social, which do not cure themselves and which have come so suddenly that there has been no time for the creation of a customary law, still less of social conventions, to deal with them.").

272.  Root, Layman’s Criticism, supra note 271, at 393.

273.  Id.  at 392. The implicit assumption, of course, was that, left to their own devices, “courts wish to do justice, and they will if they are permitted to.”  Id.  at 399.


275.  Id.  at 406. Pound had no patience with this justification:

Today we recognize that the so-called custom is a custom of judicial decision, not a custom of popular action. We recognize that legislation is the more truly democratic form of law-making. We see in legislation the more direct and
particularly pointed expression of the presumed superiority of common law to statutory law could be found in the maxim that "statutes in derogation of the common law are to be construed strictly."\textsuperscript{276} The Taft Court adhered to this maxim in at least one decision, \textit{Panama Railroad Co. v. Rock},\textsuperscript{277} authored, not accidentally, by Justice Sutherland.

Writing for a five-Justice majority, Sutherland overturned a verdict in favor of a husband seeking damages for the wrongful death of his wife on the ground that the meaning of the article of the Civil Code of Panama authorizing recovery for "damage" caused by "fault" was "to be determined by the application of common law principles," which do not create a "private cause of action ... from the death of a human being."\textsuperscript{278} No doubt Sutherland understood his decision as expressing a commitment to the continuity of custom and tradition represented by the common law. The decision was roundly criticized, however, not only for misunderstanding the

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accurate expression of the general will.... Courts are fond of saying that they apply old principles to new situations. But at times they must apply new principles to situations both old and new. The new principles are in legislation. The old principles are in common law. The former are as much to be respected and made effective as the latter—probably more so as our legislation improves.
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\textit{Id.} at 406-07. Pound argued:

\begin{quote}
[M]odern statutes are not to be disposed of lightly as off-hand products of a crude desire to do something, but represent long and patient study by experts, careful consideration by conferences or congresses or associations, press discussions in which public opinion is focussed[sic] upon all important details, and hearings before legislative committees.
\end{quote}

\textit{Id.} at 384. "Courts," by contrast,

\begin{quote}
are less and less competent to formulate rules for new relations which require regulation. They have the experience of the past. But they do not have the facts of the present.... Judicial law-making for sheer lack of means to get at the real situation, operates unjustly and inequitably in a complex social organization.
\end{quote}

\textit{Id.} at 403-04.

\textsuperscript{276} \textit{Id.} at 387. Pound attacked this principle as assuming that legislation is something to be deprecated. As no statute of any consequence dealing with any relation of private law can be anything but in derogation of the common law, the social reformer and the legal reformer, under this doctrine, must always face the situation that the legislative act which represents the fruit of their labors will find no sympathy in those who apply it, will be construed strictly, and will be made to interfere with the \textit{status quo} as little as possible.

\textit{Id.}

\textsuperscript{277} 266 U.S. 209 (1924).

\textsuperscript{278} \textit{Id.} at 211, 214.
meaning of Panama’s civil law code, but also for its failure to accord any weight at all to the fact that “substantially every State in the Union” had modified the common law by adopting a wrongful death statute.

By interpreting the Panama Code in a manner that ignored such statutes, Sutherland in effect refused to recognize state legislation as evidence of evolving custom. In a dissent joined by Taft, McKenna, and Brandeis, Holmes was explicit that

courts in dealing with statutes sometimes have been too slow to recognize that statutes even when in terms covering only particular cases may imply a policy different from that of the common law, and therefore may exclude a reference to the common law for the purpose of limiting their scope.

None other than Roscoe Pound wrote Holmes congratulating him on his dissent, stating that Sutherland’s opinion “would have been fine ammunition for the Populists a generation ago.”


281. *Panama R.R. Co.*, 266 U.S. at 216 (Holmes, J., dissenting). *Panama Railroad Co.* was later repudiated by the Court. *Moragne v. State Marine Lines*, Inc., 398 U.S. 375, 390-93 (1970) (“This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved.”); see also *Gooch v. Or. Short Line R.R. Co.*, 258 U.S. 22, 24 (1922) (“For although courts sometimes have been slow to extend the effect of statutes modifying the common law beyond the direct operation of the words, it is obvious that a statute may indicate a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind.”).

282. Letter from Roscoe Pound to Oliver Wendell Holmes (OWH), (Jan. 13, 1925) (Holmes Papers).

The spectacle of a great court astute to find reasons for holding that a railroad company in 1924 is not liable for death by wrongful act committed under the jurisdiction of the civil law unless an express text so declaring in so many words can be found, is not edifying.

Id. Sutherland’s opinion, wrote Pound, “gives much aid and comfort to the adherents of an extreme economic interpretation. It is not easy to find any other ratio decidendi, unless it be
Panama Railroad Co. should be contrasted to Gleason v. Seaboard Air Line Railroad Co., in which Justice Stone, writing for a unanimous Court, overruled the venerable and influential precedent of Friedlander v. Texas & Pacific Railroad Co. to hold that a carrier could be liable for a fraudulent bill of lading issued by an employee for his own benefit. Stone crafted his opinion to reflect "accepted notions of social policy," which in his view included the idea that even an innocent principal ought to be liable for the torts of its agents. In contrast to Panama Railroad Co., Stone explicitly deduced this principle of social policy from "[t]he tendency of modern legislation in employers' liability and workmen's compensation acts and in the [federal] Bills of Lading Act ... and of judicial decision as well." Stone's opinion, which accepted statutes as evidence of evolving norms, brought the Court's jurisprudence into conformity with the Uniform Bills of Lading Act, which had been adopted by "a large number of states."

Sutherland refused to join Stone's opinion. It was not that Sutherland objected to the outcome of the Court's decision, for he specifically noted his concurrence in the Court's judgment. Sutherland's disagreement turned instead entirely on questions of method. Sutherland had insisted to Stone that the Court put its opinion "squarely and explicitly upon" the judicially constructed common law maxim that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Evidently

an assumption that Anglo-American common law is the jural order of the universe." Id.

283. 278 U.S. 349 (1929).
284. 130 U.S. 416 (1889).
287. George S. Koles, Note, Principal and Agent: Fraudulent Acts of Agent for Own Benefit, 14 CORNELL L.Q. 363, 367 (1929). It also conformed the Court's jurisprudence with the so-called "New York" rule, which had previously been a minority position. See Note, Carriers-Agency-Bills of Lading-Liability for Fraudulent Act of Agent in Issuing Bill of Lading, 15 VA. L. REV. 670, 673 (1929).
288. Letter from GS to HFS (Dec. 28, 1928) (Sutherland Papers); Return of GS to HFS (Stone Papers). Sutherland had also pressed Stone "expressly" to overrule Friedlander, id., a step which the original draft of Stone's opinion had tactfully avoided. Stone eventually modified his opinion to meet Sutherland's request. Letter from HFS to GS (Dec. 19, 1928) (Stone Papers). When Frankfurter later wrote Stone to congratulate him "for frankly rejecting
an untenable authority rather than refining it away," Letter from Felix Frankfurter to HFS (Jan. 5, 1929) (Stone Papers), Stone was quite willing to accept credit for the boldness of the act. "It is quite impossible to ever completely overtake such an error, but the old practice of overruling in silence or by attempting to get around the difficulty by refinements and thin distinctions is almost as mischievous as the original fault." Letter from HFS to Felix Frankfurter (Jan. 8, 1929) (Stone Papers).

In contrast to Sutherland, and in keeping with his vote in Panama Railroad Co., Taft had professed himself quite pleased with Stone's draft opinion, writing, "Good. I am very glad you have cleaned this up so well." Return from WHT to HFS (Stone Papers). Holmes had dissented from the Court's holding in conference, later writing Stone about the first draft of his opinion that

[you make out very handsomely the liability of the Ry. Co. for the representation that the cotton had been received. But the fact that the railroad had received the cotton does not make it liable to a party paying on the faith of a forged bill of lading. This bill of lading stands like one forged by a third person. Letter from OWH to HFS (Dec. 15, 1928) (Stone Papers). Stone sought to placate the elder Justice in a note arguing that the jury in the case had specifically found inducement and reliance. Letter from HFS to OWH (Dec. 19, 1928) (Stone Papers). Holmes, however, was implacable: "Non obstante your letter I don't see how a representation that goods had been received could warrant or induce payment on a forged bill of lading—whatever the jury found. I do not see how the representation could have more effect because false than if it had been true." Letter from OWH to HFS (Dec. 20, 1928) (Stone Papers). Stone eventually withdrew from the field:

Sorry we are not in entire accord about the cotton bill of lading case. We are so seldom on opposite sides of the fence that I hate to break a good precedent, but I suppose the pleadings, the facts and the verdict in this case establish what is in accord with common experience, that the payor on a draft drawn against a casual shipment of merchandise would not pay the draft until he knew that there were goods represented by the documents and that they had in fact arrived, however fair the documents might be on their face. I don't suppose that a false representation has to be the sole cause of the injury. It is enough that it is a contributing cause and that the injury would not have happened without it. However, I withdraw from the debate before I am beaten, but as is the way of humankind, cling to my error.

Letter from HFS to OWH (Dec. 21, 1928) (Stone Papers). Eventually Holmes signed on to the opinion, noting that "I doubt if I shall dissent—but I don't think my objection was answered the other day and I doubt if it can be logically." Return from OWH to HFS (Stone Papers).

Oddly, in the original draft of his opinion, Stone had included a passage to the effect that "[a] good many years ago Mr. Justice Holmes pointed out that the arguments in favor of creating such an exception [to the rule of principal liability for the fraud of an agent] are equally objections to the rule itself. Holmes, The Common Law, 231 n.3." (Stone Papers). Butler had flagged the passage, commenting "I doubt whether this should be done. It is not necessary and I am not sure that it is in the best taste." (Stone Papers). McReynolds also objected to the passage, writing "I think this is badly stated & I do not like the reference to a book by a living member of this court." (Stone Papers). McReynolds, with typical tact, went on to comment: "I am with the result you reach. But I think you would be wise to revise the opinion and put it into more carefully chosen words. It is important & should show great care." (Stone Papers). Eventually Stone revised the passage to read: "The arguments in favor of creating such an exception are equally objections to the rule itself. Holmes, The Common
Sutherland would join an opinion that drew its premises from common law principles, but not an opinion that sought to identify relevant social norms from evolving statutory policies.

Sutherland's opinion in *Lambert* shares with his approach in *Panama Railroad Co.* and *Gleason* the premise that democratic enactments should be subject to the discipline of judicial evaluation for the purpose of integrating positive law into deeply held and long-standing social values. It must not be forgotten that democracy is after all but a form of government whose justification must be established in the same way that the justification of any other form of government is established; namely, by what it does rather than by what it claims to be. The errors of a democracy and the errors of an autocracy will be followed by similar consequences. A foolish law does not become a wise law because it is approved by a great many people.

Sutherland, *supra* note 232, at 203.


291. See *supra* note 10.

292. Sutherland also disliked prohibition because he regarded it as a violation of personal liberty:

The liberty of the individual to control his own conduct is the most precious possession of a democracy and interference with it is seldom justified except where necessary to protect the liberties or rights of other individuals or to safeguard society....

In passing legislation of this character doubts should be resolved in favor of the liberty of the individual and his power to freely determine and pursue his own course in his own way should rarely be interfered with, unless the welfare of other individuals or of society clearly requires it.


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Law (1892) 231 n. 3." *Gleason*, 278 U.S. at 357.
Although Justice Holmes was personally impatient with prohibition\textsuperscript{293} and did not conceal "his genial scepticism" of the idea that liquor ought to be banned,\textsuperscript{294} he nevertheless felt obliged to use his

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In \textit{Hamilton v. Kentucky Distilleries \& Warehouse, Co.}, 251 U.S. 146 (1919), Brandeis, writing for a unanimous Court, had upheld a wartime ban on the sale of liquor against the claim that the ban constituted an unconstitutional taking of private property. Four years later, in conversation with Felix Frankfurter, Brandeis explained: "At first went the other way 5 to 4, the Chief (White) was with me, Holmes against... Holmes balked on 'Due Process'—the thing that prevailed with him in the Mahon case later. I told him Mugler v. Kansas, 123 U.S. 623 (1887)] governed but he never has liked that case. Undoubtedly his impatience with prohibition explains this." Urofsky, supra note 12, at 324.
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Zechariah Chafee, Jr., \textit{ILL. STARRED PROHIBITION CASES: A STUDY IN JUDICIAL PATHOLOGY}, 45 HARV. L. REV. 947, 949 (1932) (reviewing Forrest R. Black's book of that name); see also Tyson v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting) ("Wine has been thought good for man from the time of the Apostles until recent years."); Knickerbocker Ice Co. v. Stewart, 253 U.S. 148, 169 (1920) (Holmes, J., dissenting) ("I cannot for a moment believe that apart from the Eighteenth Amendment special constitutional principles exist against strong drink."). In response to her inquiries about prohibition, Holmes wrote to his friend Charlotte Moncheur that
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[m]y way of thinking is that whatever may have been the defects in knowledge and forethought when the experiment was launched it must be given fifty years or a century before we can be sure whether it is a great social improvement or a mistake. Of course it has banished much fog and much poetry from life, but it may pay in the long run. I don't like to hear of people who should set an example buying from bootleggers and giving dinners in the old form. On the other hand I still have a little whiskey that I had before the 18th Amendment and on rare occasions give a friend a glass. And when a friend has sent me a bottle as a Christmas present I have not felt bound to return it, although I should prefer that it should not be done.
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Letter from OWH to Baroness Moncheur (Jan. 27, 1928) (Holmes Papers). In his private correspondence, Holmes reported telling "a casual unknown dame who came in here one Monday" that "alas the exquisite vanished in this Country with the 18th Amendment." Holmes "told her that abuses were the parents of the exquisite—and then remembered that she might be a reporter, for all I know. But no headlines have exposed my cynicism." Letter from OWH to Mrs. John Chipman Gray (Mar. 25, 1922) (Holmes Papers). Holmes wrote Lady Leslie Scott that he was "rather amused that two men have each sent me a present of a bottle of whiskey, which I fear is an infringement of the law on their part, if not on mine.... At all events, as I wrote to one of them, I have not forgotten the prayer 'Lead us into temptation.'" Letter from OWH to Lady Leslie Scott (Dec. 24, 1927) (Holmes Papers). Earlier that year Holmes's close friend Frederick Pollock had written Holmes recounting "lurid reports... about the demoralizing effects of Prohibition in the Middle Western States... Bolshevism is not the only alarming product of half-educated sentimentalism." Letter from Frederick Pollock to OWH (Mar. 17, 1927), in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDDERICK POLLOCK 1874-1932, at 195 (Mark DeWolfe Howe ed., 1941)
judicial offices to sustain it. Because Holmes denied the existence of any "transcendental body of law" to which judges could appeal in order to discipline positive statutory and constitutional enactments, he believed a judge must perform a kind of self-abnegation, subordinating himself to the social policies and objectives of positive and enacted law. "I strongly believe," he wrote, "that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law." Holmes concluded that those who drafted and ratified the "Eighteenth Amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute book," and he accordingly understood his judicial duty to be to interpret the Eighteenth Amendment and its implementing legislation in ways designed to effectuate that revolution. As he wrote Frankfurter in a sentence that contained a reference to prohibition: "I loathed most of the things I decided in favor of." 

[hereinafter HOLMES-POLLOCK CORRESPONDENCE].


296. On the connection between Holmes's positivism and his deference to majoritarian decision making, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 140-42 (1992). Horwitz identifies Holmes's 1897 essay The Path of the Law as the moment when Holmes realized that "custom was no longer the buffer between consent and coercion." Id. at 140. "[J]udicial restraint," Horwitz writes, "follows from the collapse of [Holmes's] search for immanent rationality in customary law." Id. at 142; see Robin West, Three Positivism, 78 B.U. L. Rev. 791 (1998).


298. Grogan v. Hiram Walker & Sons, 259 U.S. 80, 89 (1922). Holmes's observation in Grogan was immediately recognized as signifying "the earnest desire of the Supreme Court to aid the government generally in its attempt to carry out a noble experiment." Forrest Revere Black, An Ill-Starred Prohibition Case: Olmstead v. United States, 18 Geo. L.J. 120, 124-25 (1930); see, e.g., Wayne B. Wheeler, Enforcing the Dry Law, 68 FORUM 747, 747-48 (1922).


I have been chuckling since Monday with some devil talk I let off to an unknown female at our At Home. I told her abuses were the parents of the exquisite which disappeared from this country with wine—that you couldn't have a society like that of Greece except on some sort of slavery—and that I
Unlike Sutherland, Holmes did not believe that judges had unique access to authoritative social customs and traditions. This contrast led to a sharp difference in the voting pattern of the two Justices in the context of prohibition, with Holmes far more likely than Sutherland to uphold the enforcement of the Eighteenth Amendment.\textsuperscript{301} We have come to associate this difference with the distinction between pre-New Deal liberalism and pre-New Deal conservatism, with the former aspiring to judicial restraint and the latter to aggressive protection of fundamental values. But on this account we must explain the voting patterns of conservatives like Taft, Van Devanter, and Sanford, whose conduct in the context of prohibition, as \textit{Lambert} indicates, was closer to Holmes's than to that of Sutherland.\textsuperscript{302} Why did these conservative Justices persistently seek to strengthen and sustain prohibition, rather than to mollify it?

Van Devanter and Sanford\textsuperscript{303} have not left us a documentary record in which to search for an answer to this question. But Taft has bequeathed us a rich trove of letters and publications that allow us to understand why he consistently sought, like Holmes, to effectuate the objectives and authority of prohibition. The puzzle of his behavior is particularly sharp, because prior to 1919 Taft had consistently opposed prohibition on grounds very similar to those of Sutherland. In 1907, for example, Taft had attacked statewide prohibition, observing:

\begin{quote}
It is, of course the duty of the legislator in the enactment of laws to consider the ease or difficulty with which, by reason of popular feeling or popular prejudice, laws after being enacted can be enforced. Nothing is more foolish, nothing more utterly at variance with sound public policy than to enact a law which, by reason of the conditions surrounding the community in which it is declared to be law, is incapable of enforcement. Such an instance is sometimes presented by sumptuary laws, by which loathed most of the things I decided in favor of.
\end{quote}

\textit{Id.}

\textsuperscript{301} The difference between Holmes and Sutherland is well represented in Figures A and B in the Appendix.

\textsuperscript{302} See Figures A and B in the Appendix.

\textsuperscript{303} It was said of Sanford that he "displayed a marked zeal for prohibition enforcement."

the sale of intoxicating liquors is prohibited under penalty in
localities where the public sentiment of the immediate com-
munity does not and will not sustain the enforcement of the law. In
such cases the legislation is usually the result of agitation by
people in the country who are determined to make their fellow-
citizens in the city better. The enactment of the law comes
through the country representatives, who form a majority of the
legislature; but the enforcement of the law is among the people
who are generally opposed to its enactment, and under such
circumstances the law is a dead letter.304

As national prohibition became an issue, Taft’s analysis con-
verged with that of Sutherland’s. Taft conceptualized national
prohibition as a symptom of the larger “evil” of “excess of legisla-
tion,”305 which was caused by “the erroneous belief that any reform
could be accomplished merely by legislation.”306 Statutes did not
necessarily reflect the sentiments and morals of the community,
because they tended to be passed by legislators “prone to enact laws
... only because their votes would profit them politically.”307 Taft
explained the passage of an early version of the Eighteenth
Amendment in the House of Representatives on the ground that
congressmen had been frightened into voting for prohibition by well
organized minority groups “whose votes [congressmen] feared might
defeat them if they voted their own convictions.”308 Taft argued that

304. WILLIAM HOWARD TAFT, FOUR ASPECTS OF CIVIC DUTY 46-47 (1906).
305. For Local Option Mr. Taft Explains; Ex-President Amplies Recent Address in Which
He Opposed National Prohibition; Suggests Another Plan, N.Y. TIMES, Jan. 24, 1915, at 10
[hereinafter Local Option]; see Taft Hits Prohibition; National Legislation, He Says, Would
Revolutionize Government, N.Y. TIMES, Dec. 29, 1914, at 4; Misunderstood on Prohibition,
Says Prof. Taft, CHRISTIAN SCI. MONITOR, Jan. 6, 1915, at 5; Editorial, The Question of
306. Local Option, supra note 305.
307. Id.; see, e.g., Butler, supra note 264, at 586 (“In many places legislative method is
imperfect.... Lawmakers are influenced by powerful groups and yielding to pressure—and
often to manufactured public opinion—pass laws and yet more laws. Leaders of selfish
organizations control large numbers of votes. Their power continues after election day and
drivers determinations, made without regard to any interest save their own, communicated
sometimes in the form of orders, unduly affect the conduct of legislators and other public
officials.”).
308. Local Option, supra note 305. Almost from the outset there were those who doubted
that prohibition was ever supported by a majority of the American people. See, e.g.,
Prohibition as a Warning, 17 NEW REPUBLIC 359, 360 (1919) (“The history of non-enforcement
in prohibition states gives color to the belief that scarcely anywhere have the convinced
national prohibition was a very bad idea because: "[I]t was a direct blow at local self-government and at the integrity of our Federal system, which depended on preserving the control by the States of parochial and local matters.... [T]he regulation or prohibition of the liquor traffic was essentially a local matter, because opinions with reference to how it should be treated varied with every community."309

Taft maintained his public opposition to the Eighteenth Amendment right up to the moment of its ratification. Calling national prohibition "an irretrievable national blunder" that would "hang a permanent millstone around our necks,"310 his analysis was eloquent, forceful, and remarkably prescient:

A national prohibition amendment to the Federal Constitution will be adopted against the views and practices of a majority of the people in many of the large cities .... The business of manufacturing alcohol, liquor and beer will go out of the hands of law-abiding members of the community, and will be transferred to the quasi-criminal class. In the communities where the majority will not sympathize with a Federal law's adherents of prohibition commanded a substantial majority. Nobody supposes that the remarkable progress of the eighteenth amendment through Congress and the state legislatures represents a corresponding fervency of purpose in the body of the people. Would a universal referendum on federal prohibition yield even a majority vote? We doubt it. But a majority is not needed to pass a law or a constitutional amendment if a clearly drawn moral issue is involved. No legislator, no man with political aspirations, can afford to have himself counted on the wrong side of a moral issue. He will vote on the side of morality, even if he considers it a bogus morality. For the memory of the moral is tenacious, and the vengeance of the moral is relentless, ruthless."

309. Local Option, supra note 305. Taft declared himself in favor of local option, by which the sale of liquor is forbidden in communities that by the expression of a majority of the voters show that public opinion will sustain the enforcement of such a law. To pass laws forbidding the manufacture and sale of liquor and then have large parts of a State where liquor is sold freely and in defiance of the law is a demoralization of all law that is most detrimental to the interest of the whole community.

Id. For expressing these sentiments, Taft was briefly advanced as a "wet" candidate for President. See Wets Want Taft for President, CHI. TRIB., June 4, 1915, at 17. He was also opposed by the National Anti-Saloon League as a potential nominee for the Supreme Court. See Protest on Lehmann or Taft for Supreme Bench; National Anti-Saloon League Urges Wilson Not To Name Either Man—Labeled Foes of Prohibition, CHI. DAILY TRIB., Jan. 28, 1916, at 7.

310. Letter from WHT to Allen B. Lincoln (Sept. 2, 1918), microformed on TAFT PAPERS, supra note 9, Reel 197.
restrictions, large numbers of Federal offices will be needed for its enforcement.....

... [T]he pressure for violation and lax execution in communities where the law is not popular, will be constant and increasing. The reaching out of the great central power to brush the doorsteps of local communities, far removed geographically and politically from Washington, will be irritating in such states and communities, and will be a strain upon the bond of the national union. It will produce variation in the enforcement of the law. There will be loose administration in spots all over the United States, and a politically inclined National Administration will be strongly tempted to acquiesce in such a condition. Elections will continuously turn on the rigid or languid execution of the liquor law....

The theory that the National Government can enforce any law will yield to the stubborn circumstances and a Federal Law will become as much a subject of contempt and ridicule in some parts of the Nation as laws of this kind have been in some states....

....

The regulation of the sale and use of intoxicating liquor should be retained by the states. They can experiment and improve.... If the power of regulation is irrevocably committed to the General Government, the next generation will live deeply to regret it.

For these reasons, therefore, first, because a permanent National liquor law in many communities will prove unenforceable for lack of local public sympathy, second, because attempted enforcement will require an enormous force of Federal policemen and detectives, giving undue power to a sinister and partisan subordinafe of the National Administration, and third, because it means an unwise structural change in the relations between the people of the States and the Central Government, and a strain to the integrity of the Union, I am opposed to a national prohibition amendment.311

311. Id.; see Letter from WHT to Allen B. Lincoln (June 8, 1918), microformed on TAFT PAPERS, supra note 9, Reel 195. Taft's letters to Lincoln were published in the New Haven Journal-Courier. They were revived and republished in October 1928, and trumpeted as an "amazingly accurate forecast of what would result after the enactment of the amendment, and the passage of the Volstead act." Taft Condemned National Dry Law; Letters Written in 1918 Show His Views Were as Smith's Now; Made Striking Prediction; Foresaw Contempt for Law and Rise of Bootlegging, WORLD, Oct. 2, 1928, at 1, 4. The letters were republished in the Baltimore Sun and the St. Louis Post-Dispatch, and also in the Outlook, which called Taft "a
Within a week of the Eighteenth Amendment's ratification, however, Taft swallowed his antagonism and announced that "[i]t is now the duty of every good citizen in the premises, no matter what his previous opinion of the wisdom or expediency of the amendment, to urge and vote for all reasonable and practical legislative measures by Congress adapted to secure the enforcement of this amendment."312 “This is a democratic government,” Taft pleaded, “and the voice of the people expressed through the machinery provided by the Constitution for its expression ... is

supreme. Every loyal citizen must obey. This is the fundamental principle of free government."313 "A citizen who is in favor of the enforcement of only the laws for which he has voted, and in the principle and wisdom of which he agrees," Taft argued,

is not a law-abiding citizen of a democracy. He has something of the autocratic spirit. He is willing to govern, but not to be governed. He is not willing to play the game according to the rules of the game. Therefore, whatever my previous view, I am strongly in favor now of putting the amendment to a test as favorable as possible for its successful operation.314

313. Id. at 173.
One who, in the matter of national prohibition, holds his personal opinion and his claim of personal liberty to be of higher sanction than this overwhelming constitutional expression of the people, is a disciple of practical Bolshevism....
... The only proper and effective plan ... is to unite with the advocates of prohibition in a real bona fide effort to enforce the law. If it is successful and improved morality follows, let the opponents of the amendment confess themselves wrong and rejoice in a real reform in the welfare of society. If, on the other hand, in spite of the best teamwork, the hopes of those responsible for the amendment are blasted and only failure and demoralization follow, the case for a retracing of steps is made.

Id.; see Taft on the Liquor Question; Prohibition Amounts to Confiscation in Some Cases, but It Must Be Enforced with a Heavy Hand—No Use To Talk of Knocking Out the Law, L.A. TIMES, Feb. 9, 1919, at III3.
314. William Howard Taft, Is Prohibition a Blow at Personal Liberty? LADIES HOME J., May 1919, at 78. Taft rejected the argument against prohibition based on the postulate that in a free government like ours, in which no man is to be deprived of life, liberty and property except after due process of law, it is contrary to the spirit of our civilization and constitution to enforce upon people such a curtailment of their freedom of action in their diet.

Id. at 31. He explained:
How far we should go in limiting liberty for the welfare of all is, of course a constantly recurring question....
Reasonable restraint of personal liberty of action for the common welfare is really a matter of degree. It is to be settled by the general and dominant opinion of all the people in a community of common purpose, common ideals and the common enjoyment of the blessings of liberty and justice. This crystallizes into a kind of moral code based on the vicious effect of practices sufficiently serious to affect the welfare of the community.

Our courts recognize this crystallization of public sentiment. When it is manifested in constitutional amendment and statute, they enforce it as part of the law of the land. They hold that it is not a forbidden restriction of personal liberty, but it is only the curtailment of complete freedom of action that is necessary in the interest of society....
Taft stuck to this attitude throughout the 1920s.\textsuperscript{315} In 1923 he lamented the "present lack of respect for law in this country," tracing its origins to prohibition which was "at variance with the habits of many of our people, especially in the large cities."\textsuperscript{316} Acknowledging that his own "fears" about prohibition "have been realized only too fully," he nevertheless concluded that "there is nothing to be done ... except to set ourselves to the serious task of enforcing the law and to cease protesting against its enactment and by such an attitude encouraging its violation."\textsuperscript{317} That same year he addressed Yale alumni and roundly condemned the tendency of "the intelligent and the well-to-do" to treat prohibition "with contempt."\textsuperscript{318} Defending prohibition on the ground that it had been fairly enacted under "the rules of the game of popular government," he argued that "[I]t is not patriotic, it is not sportsmanlike to evade or disobey."\textsuperscript{319}

[The] array of the immoral and vicious effects of the free manufacture and sale of liquor upon the community can leave no doubt that the curtailment of personal freedom in effective prohibition is small as compared with its benefit to society. This settles its conformity to true principles of personal liberty.

\textit{Id.} at 78.

315. Upon Taft's resignation from the bench in 1930, the \textit{New York Herald Tribune} said of him: "Chief Justice Taft, though outspokenly opposed to the Eighteenth Amendment and the Volstead act, long before he went to the bench, took the position that these enactments being law they should be enforced. All his decisions consistently upheld the letter and spirit of the prohibition laws." \textit{Retiring Chief Justice First To Be Honored by Two Highest Offices Within Gift of Republic}, N.Y. \textit{HERALD TRIB.}, Feb. 4, 1930, at 12.

316. \textit{Taft, supra} note 27, at 10-11.

317. \textit{Id.} at 12.

318. \textit{Extract from Address Delivered by William H. Taft at the Yale Alumni Luncheon, New Haven, Connecticut (June 20, 1923)}, microformed on \textit{TAFT PAPERS, supra} note 9, Reel 590 [hereinafter \textit{Extract}]; see \textit{Taft Warns at Yale on Breaking Laws; Speaking at Dinner After Commencement, He Says Dry Infractions Breed Evil, N.Y. TIMES, June 21, 1923, at 10; Mr. Taft Demands Obedience to Law; Tells Yale Alumni Prohibition Observance and Enforcement Is Test of All Law, CHRISTIAN SCI. MONITOR, June 21, 1923, at 5. "The people whom I have in mind are the first to complain of mob law, lawless violence of laborites and other disturbances of the peace, but when it comes to a violation of the 18th Amendment, and the Volstead law, they seem to feel no obligation to protest." \textit{Extract, supra}, at 2. "It is most discouraging," Taft wrote in a letter, "that those who are educated and ought to know the vice of a disregard of law should be willing to violate it and set an example for others to do so." Letter from WHT to Clement G. Clarke (Mar. 20, 1925), microformed on \textit{TAFT PAPERS, supra} note 9, Reel 272.

Some of Taft's remarks to the Yale Alumni were later republished in 150 \textit{OUTLOOK} 1156 (1928).

319. \textit{Extract, supra} note 318, at 3. Defiance, Taft said, would endanger "the traditional Anglo-Saxon respect for the administration of the law." \textit{Id.} at 1.
You can say it is parochial and that there ought not to have been a constitutional amendment of that sort because it is parochial, but it is on the statute books and we can't get rid of it, and it is there by a vote according to the form of the Constitution. 320

Strict compliance with prohibition was necessary, in other words, because prohibition was the positive law of the nation; it had been enacted according to the rules of Article V. 321

The claim that prohibition should be vigorously enforced because it had been enacted according to the governing procedures of democratic lawmaking sounds like the liberal positivism of Holmes. At times Taft would strike a Holmesian note of judicial restraint and self-denial. "I was opposed very much to prohibition because of

320. Id. at 4.

321. Taft's emphasis on respecting the integrity and authority of these rules made him particularly hostile to the claims advanced in National Prohibition Cases, 253 U.S. 350 (1920), see supra text accompanying notes 164-68, which were to the effect that the Eighteenth Amendment was itself unconstitutional:

I think that the claims made by the Wets in the higher courts were the most extraordinary collection ever put forward by serious-minded men. It only shows how bitter they were.... I cannot believe that any Supreme Court would read into any Amendment a change in the Amendment article of the constitution, the subject of Amendment not being mentioned in the article. If ever an instrument was plain the constitution is plain in regard to the method of Amendment. Any alteration of it seems so utterly gratuitous that it is hard to see where a Supreme Court would stop if it accepted such a thing. Any limitation of that power seems equally preposterous. Think of the reductio ad absurdum. The Supreme Court has been under fire and in great danger a number of times owing to the discovery that the power of interpretation of the constitution is so great.... The friends of the Court have said that if the interpretation put upon the constitution at any point by the Court does not suit the people they can amend it. The angry answer is that everybody knows that to amend the constitution is practically impossible, it has been made so difficult. Now come these gentlemen and propose that when an Amendment has been put through the very difficult process outlined by the constitution itself and has the support of two-thirds by both houses of Congress and the ratification by forty-six states that nine elderly gentlemen on a bench shall put the people on the head and say, "We think this is not good for little boys". They must reach up into the air or into their inner consciences or somewhere and without any limitation whatever except their own fitness of things decide that this Amendment does not belong in the constitution. It is the most extraordinary gift of absolute power that can be imagined and something that the court has never dreamed of claiming.

Letter from WHT to Jesse F. Orton (Nov. 28, 1928), microformed on TAFT PAPERS, supra note 9, Reel 306.
the difficulties of its enforcement, and I utterly deny the principle that the drinking of whiskey or wine or beer is in itself, aside from the law, immoral,” he once wrote a close friend.322 “But,” Taft continued:

the people of the United States differed from me and amended the Constitution and made this law. Now I believe in popular government, and the only method by which popular government can be made useful and effective is that when one is beaten at the polls or in the Legislature, to bow to the result and lend all his efforts to the maintenance of the dignity of law and the preservation of its strength, else we shall have demoralization of all law, and that means anarchy.323

But we know that Taft was not a liberal, like Holmes, who believed that judges ought to refrain from evaluating democratically enacted legislation according to fundamental social values.324 Taft’s

322. Letter from WHT to Gertrude Ely (Dec. 22, 1923), microformed on TAFT PAPERS, supra note 9, Reel 259.
323. Id. Taft added:

In the attitude of people like those who join the Molly Pitcher Club, and others in New York with whom I am familiar, and some of whom are members of my family, is that all laws should be enforced except those which affect their comfort and convenience and tastes, and as to those evasion is justifiable. Well of course such an attitude is utterly indefensible and if encouraged and successful means an end to useful popular government.

Id. Taft had no patience at all with Arthur Hadley’s call for nullification, supra note 256, which he regarded as representing the view of “the luxury loving rich” that “the way to defeat the law is to disobey it.” Letter from WHT to Charles H. Strong (July 1, 1925), microformed on TAFT PAPERS, supra note 9, Reel 275. Taft believed that “[a] republic is where the majority must rule and the minority must bend to the laws made by the majority—otherwise the members of the minority are not good Republicans or Democrats either.” Letter from WHT to J.H. Kelley (Nov. 7, 1923), microformed on TAFT PAPERS, supra note 9, Reel 258. Elsewhere, Taft used his own history as an example of proper citizenship:

The truth is that I was one of the foremost in opposing the 18th Amendment, chiefly for the reason that I thought its enforcement would be full of difficulty and present problems that we ought not to undertake. But I was overcome, and the 18th Amendment has become the law of the land, and like a loyal American, obedient to the Constitution, I am in favor of enforcing the Amendment in every possible and reasonable way.

Letter from WHT to Louis A. Cuvillier (Nov. 9, 1926), microformed on TAFT PAPERS, supra note 9, Reel 286.

urgent need to sustain prohibition did not derive, therefore, from a simple commitment to uphold democratic decision making. Taft was in fact concerned about something quite different. Although Taft had originally "opposed the constitutional amendment" because he "felt that it would meet a lack of sympathy ... by a lot of foreigners of the lower classes who would violate it if they could," what shocked him after ratification was the extent of the "spirit of lawlessness among the intelligent and wealthy which now exists."325 The


325. Letter from WHT to James R. Sheffield (July 8, 1923), microformed on TAFT PAPERS, supra note 9, Reel 255. Taft continued:

My impatience at the present situation is toward the well-to-do class, the intelligent part of the community, who are not willing to give up something that isn't essential to their life or happiness, and insist upon violating the law because they don't like it. They are very much troubled over the lawlessness of somebody else—the lawlessness of the labor unions and the weakness of legislatures and of Congress in dealing with questions of that sort, but the minute that their convenience or comfort or tastes are interfered with by a law declared to be valid, according to the only machinery that we have for that purpose, then they settle back and connive at the violation of law and make fun of it, and have no sympathy with its enforcement, naturally, because they are engaged in violating it, or at least in encouraging bootleggers to violate it. This shows such inconsistency on the part of persons who are intelligent enough to see the necessary trend of their conduct toward a demoralization of all law, that I have no sympathy with them at all.... There is a disposition to condemn the Volstead law without knowing much about what it involves. There is in it some machinery which is extreme. I don't like the use of an injunction in enforcing criminal law, but those defects are only emphasized because there is opposition to the law altogether.

Id. In a letter to his brother, Taft described a typical incident of upper-class contempt for prohibition involving Nicholas Longworth, a congressional representative from Ohio who the following year would become Speaker of the House, and his wife Alice, the daughter of Theodore Roosevelt:

I was very much amused at the dinner which was given by Eugene Meyer, a successful Jew, who has done some very good work for the Government under
“attitude of intelligent and well-to-do people toward the law and its enforcement” was “most alarming,” because “[t]hey should know that demoralization is the necessary consequence of the attitude which they are now taking in the patronizing of bootlegging and in their general contemptuous attitude toward the law.”  

This suggests that Taft strongly supported prohibition because he was alarmed that prohibition was a “conspicuous” law under sustained attack by influential sectors of the population whose attitudes mattered because they could “impair the influence of the Constitution and laws of the country” and thereby “wreck the future of the society whose basis must rest upon them.”  

For Taft

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Wilson’s regime and also under the present Administration, to help, in a sensible way, credits to farmers. He has a pretty wife, and they wished to give us a dinner. It came off Saturday night, and among others there were Alice and Nick Longworth. Out of what I regard as proper respect, they did not have any liquor at all, and Alice was making fun of Nick because he could not get anything to drink. His hostess was engaged in the same thing. Apparently it is necessary for Nick to liquor up at every dinner. It is that sort of thing that encourages the youth....

Letter from WHT to Horace D. Taft (Mar. 10, 1924), microformed on TAFT PAPERS, supra note 9, Reel 282. Taft’s concerns in this regard were widely shared:

Not the least demoralizing feature of enforcement of national prohibition, is the development of open or hardly disguised drinking winked at by those in charge in respectable places where respectable people gather. People of wealth, professional and business men, public officials and tourists are drinking in hotels, cafes and tourist camps....

NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, supra note 8, at 39. It was commonly believed that

[O]ur highest officials violate the law privately when there is no danger of discovery or publicity. We heard one remark not so very long ago that he had built one of the most marvelous cellars in America and stocked it with more than enough to last him a lifetime—at least six varieties of wine were served at his table—but he is viciously against all “reds” and laboring men and anybody else who “will not obey our laws, by heaven, sir.” Inveighing against those who would undermine our Constitution, he himself does his utmost to bring it into contempt and to prove the theory that those sworn to uphold this particular law are our worst lawbreakers.


326. Letter from WHT to Francis Peabody (July 12, 1923), microformed on TAFT PAPERS, supra note 9, Reel 255.

327. Extract, supra note 318, at 7-8; see Letter from WHT to Mrs. George H. Stanlidge (Jan. 24, 1923), microformed on TAFT PAPERS, supra note 9, Reel 250 (“Everyone I think who sees clearly deprecates the contemptuous tone toward the prohibition law which so many affect. I was opposed to prohibition because I was afraid of the difficulties of the enforcement and the demoralization of all law by the neglect to enforce such an important measure as that of prohibition, but now that the amendment has been adopted, the laws passed in pursuance of
the question of the enforcement of prohibition had become "fundamental" because it had become the front line in the battle for the rule of law itself. At risk was "traditional Anglo-Saxon respect for the administration of the law." Prohibitionists had initially argued for ratification of the Eighteenth Amendment on the ground of its substantive merits, but after 1919, as resistance to prohibition and the Volstead Act began to swell, arguments in favor of prohibition shifted decisively toward the rule-of-law themes that so moved Taft. Senator William E. Borah, for example, argued:

\[\text{it should be obeyed and all good citizens should preserve an attitude of obedience toward it and respect for its enforcement.}\]

328. Letter from WITF to Clarence H. Kelsey (May 18, 1923), microformed on Taft Papers, supra note 9, Reel 253.

329. For this reason Taft apparently believed that all efforts to modify prohibition to accommodate community sentiment should be resisted. It is fascinating that when a reporter misinterpreted Taft to have proposed amending the Volstead Act to allow for beer and light wine, \textit{Taft Stops Here, Pours Out Hopes for Dry Throats}, Chi. Daily Trib., June 26, 1920, at 4, Taft was quick to disavow the proposal:

As a matter of fact, I am not in favor of amending the Volstead act in respect to the amount of permissible alcohol in beverages. I am not in favor of allowing light wines and beer to be sold under the eighteenth amendment. I believe it would defeat the purpose of the amendment. No such distinction as that between wines and beer on the one hand, and spirituous liquors on the other, is practical as a police measure.... Any such loophole as light wines and beer would make the amendment a laughing stock.

WHT, Letter to the Editor, \textit{Mr. Taft on the Dry Law}, Chi. Daily Trib., July 27, 1920, at 6; \textit{Taft Would Not Amend the Volstead Act}, N.Y. Times, July 27, 1920, at 13. Taft did concede, however, that the Volstead Act "could be better enforced by moderate penalties and reasonable provisions than by draconian severity, and that harshly inquisitorial measures and heavy penalties, sought by fanatics, would obstruct rather than aid the law and would stir protest and turn the people against prohibition." \textit{Id.}


331. \textit{See} Charles H. Brent, \textit{Law and Order}, 42 WORLD'S WORK 267, 268-69 (1921) ("The most alarming feature of the situation just now is not merely disregard for the laws but also symptoms of disregard for the Constitution. The Eighteenth Amendment is just as much a part of the Constitution as any of the original articles. I am not concerned with the character of this amendment. I am viewing it solely as an integral part of the most sacred and binding obligation governing American citizenship. The only possible excuse for disobeying it is self-indulgence.... The fact of the matter is that successful democracy presupposes individual self-respect and self-restraint for the sake of the commonwealth.... There can be no corporate self-control where every citizen is part of the Government unless there is personal self-control. Towering above all public measures and mass movements to-day, stands the need of a new steadiness and a new determination to discipline our tastes, our customs, our recreations.").
Important as the question of prohibition is, the question that is now presented is ... the higher and bigger and broader question of whether we, as a free people, can maintain and enforce the provisions of the Constitution as they have been written. That involves the whole question of constitutional integrity, of constitutional morality—indeed, of the ultimate success of free government itself.332

As early as 1921 the Judicial Section of the American Bar Association distributed “A Warning to the American People”:

Reverence for law and enforcement of law depend upon the ideals and customs of those who occupy the vantage ground of

Of course this shift of emphasis was noticed by the opponents of prohibition. See, e.g., Stephen Leacock, 5 CONG. DIG. 200 (1926) (“[Prohibitionists] are putting their trust in coercion, in the jail, in the whip and the scourge. They are done with the moral appeal. They are finished with persuasion. They want, however, authority. They want to say ‘Thou shalt’ and ‘Thou shalt not,’ and when they say it, to be obeyed under the fear of the criminal law.... What they propose is virtually to send all people to jail who dare to drink beer, and to send them again and again for each new offense, to break them into compliance as people were once broken upon the wheel.”); see also Temperance?, 126 NATION 6 (1928) (“The truth of the matter is that in the bitterness provoked by the efforts to defy and to enforce the Eighteenth Amendment its original purpose has been lost sight of.... [M]any of its protagonists ... forgetting their humanitarian purpose, have allowed their zeal for good to pass the proper bounds.”).

332. Borah, Civic Righteousness, supra note 99, at 644. Borah asserted that “there can be no more vital problem presented to a free people than the problem of whether or not they can hold and maintain the Constitution of which they have deliberately written.” Id. Borah continued:

We all know from a review of history that lawlessness is the insidious disease of republics. It is the one great malady against which every true patriot will ever be on guard. It is but a short step from the lawlessness of the man of means who scouts some part of the fundamental law because forsooth it runs counter to his wishes, to the soldier who may be called into the street to protect property, but who, taking counsel of his sympathies, fraternizes with the mob. The great question, therefore, before the American people now is, not that of prohibition, because that as a policy, has been settled. The supreme question is: after we have determined as a people on prohibition, whether we have the moral courage, the high determination, and the unwavering purpose to enforce that which we have written into the Constitution.

Id. at 647. In another setting, Borah proclaimed:

Whether prohibition stays or goes, the Constitution should be maintained and supported as it is written by all law-abiding people until it is changed in the manner pointed out by the Constitution. Obedience to the law is the rock foundation upon which our whole structure rests. To disregard it is to strike at the life of the Nation.

life in business and society. The people of the United States by solemn constitutional and statutory enactment, have undertaken to suppress the age-long evil of the liquor traffic. When, for the gratification of their appetites, or the promotion of their interests, lawyers, bankers, great merchants and manufacturers, and social leaders both men and women disobey and scoff at this law, or any other law, they are aiding the cause of anarchy and promoting mob violence, robbery and homicide. They are sowing dragon's teeth, and they need not be surprised when they find that no judicial or police authority can save our country or humanity from reaping the harvest.  

The idea that defiance of prohibition threatened the authority of all law became a pervasive feature of pro-prohibition rhetoric. Canton Coolidge proclaimed that "for any of our inhabitants to observe such parts of the Constitution as they like, while disregarding others, is a doctrine that would break down all protection of life and property and destroy the American system of ordered liberty." Herbert Hoover named "disregard and disobedience of law" as "[t]he most malign" of the "dangers" facing the country. Hoover explained:

Our whole system of self-government will crumble either if officials elect what laws they will enforce or citizens elect what laws they will support. The worst evil of disregard for some law is that it destroys respect for all law. For our citizens to patronize the violation of a particular law on the ground that they are opposed to it is destructive of the very basis of all that protection

333. Sections and Allied Bodies, 7 A.B.A. J. 483, 484-85 (1921).
334. See, e.g., M'Adoo's Ohio Talk Fails To Disclose His Plans for 1928, WASH. POST, Jan. 29, 1927, at 3 ("He declared the United States, in continued flouting of prohibition laws, is approaching 'the slippery path to anarchy.'").
335. Calvin Coolidge, Fourth Annual Message (Dec. 7, 1926), in 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, supra note 18, at 2690, 2706. In his first State of the Union Message, Coolidge had announced that "[f]ree government has no greater menace than disrespect for authority and continual violation of law. It is the duty of a citizen not only to observe the law but to let it be known that he is opposed to its violation." Calvin Coolidge, First Annual Message (Dec. 6, 1923), in 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, supra note 18, at 2642, 2648; see MCADEO, supra note 99, at 259.
336. Herbert Hoover, Inaugural Address 1929: President Hoover's Statement to the American Public, 8 CONG. DIG. 76, 76 (1929).
of life, of homes and property which they rightly claim under other laws.  

Wayne Wheeler, leader of the powerful Anti-Saloon League, put the argument in garish tones:

For officers or the people to permit laws to be violated is a deadly attack upon the Government. Its contagion spreads from one law to another. It distills its deadly poison into the arteries of our jurisprudence.... It assassinates the vital processes of orderly control. It is a prolific source of disease to the whole social order, and jeopardizes the life of the race.  

337. Id. at 77. Criminologist George W. Kirchwey argued that Hoover was incorrect to argue that defiance of prohibition automatically implied anarchic disrespect for all law:

That in this period of "lawlessness" and "demoralization" incident to the attempted enforcement of the prohibition law, the offenses of assault, fraud, vagrancy, prostitution and larceny... should all have fallen off by 50 per cent or more and burglary by 10 per cent or more should give pause to our Jeremiah.

George W. Kirchwey, Our Lawlessness that Alarms Hoover, N.Y. TIMES, May 26, 1929, § 5 (Magazine), at 5. Kirchwey concluded: "Our flippant attitude with respect to prohibition does not in the slightest degree affect our abhorrence of crime. We may not believe, as [Hoover] does, in the sanctity of 'law as law' (there are pernicious and foolish laws as well as wise and good ones)." Id. Analogous arguments were made on the constitutional level:

I would venture to make a... suggestion to the Hoover commission....

...[W]hy not invite Messrs. Taft, Coolidge, and Hoover to appear... and state why they have done nothing, while in the White House, to enforce the Negro suffrage provisions of the Constitution? What President has sent a special message earnestly recommending reduction of the representation of the South in Congress? If no such message has ever been sent, why has a part of the sacrosanct Constitution been treated as a dead letter? And what has the President or either of the living ex-Presidents to say about the example they set to the nation by their indifference and hostility to that part of the Constitution?

Yarros, supra note 249, at 60-61.

338. Wayne B. Wheeler, Law and Order, 124 OUTLOOK 146, 146 (1920). "There is only one way for this Nation to avert the disaster that was visited on Rome, on France, on Russia, on all nations that sowed the seed of anarchy," Wheeler wrote. "Every loyal, Christian patriot, every hundred per cent American, must stand for law and order. Every officer of the law who deserts his office should be treated like the soldier who deserts his country in a war. We can have treason in times of peace as well as in days of national warfare." Id. at 146-47.

Debating Wheeler in Carnegie Hall on the question of whether prohibition should be nullified by disobedience, Clarence Darrow scoffed at the idea that defiance of prohibition would corrupt the legal order itself. To Wheeler's claim that "it is the duty of every good citizen to obey every provision of the Constitution," Darrow replied:

I undertake to say that there isn't a man in the United States who does it or tries to do it. Not one. I am not going to camouflage this. Does Mr. Wheeler believe it? He knows better. Dare he go down among the Southern constituents
Taft was as aware as anyone of "the inherent difficulties in enforcing a law which changes the habits of a great many people." He had early on articulated his appreciation of the limited scope that could or should be accorded to merely positive law. But he had come to believe that widespread defiance of prohibition by otherwise law-abiding citizens had to be terminated because it threatened to undermine the legitimacy of the legal order itself. "The solution," Taft concluded, "requires a great deal of time and patience. The habits of an important section of a congested part of the country can not be changed over night or in years. The reform and the adaptation of society to that at which the Amendment aims must be gradual." Although before ratification Taft had "despaired of any success," by 1928 Taft came to "really think that it is possible ... to achieve a satisfactory result." The persistence with which the people maintain in Congress a two-thirds majority in both Houses," Taft wrote, "gives me much hope, and I am inclined to think that

and tell them to give the negroes the rights that are guaranteed by at least three provisions?

I tell you this, there isn't a man of the intelligence of an ordinary moron who doesn't know that people believe in enforcing only those laws that they believe in. For sixty years every Federal provision in reference to the constitutional rights of the negroes and every law has been notoriously violated in every Southern prohibition State, and no prohibitionist dare raise his voice, and you daren't.

Wheeler Clashes with Darrow Here in Dry Law Debate, N.Y. TIMES, Apr. 24, 1927, at 1; see Should We Obey the Prohibition Laws? A Socratic Dialogue, supra note 185, at 331:

MR. [GEORGE] MARTIN.... The Fifteenth Amendment has been nullified, as everyone knows; and the very fact that an amendment can be nullified and that the country can forget about it, provides a needed safety valve for a constitution that can't be amended. If you tried to get a repeal of the Fifteenth Amendment to-day, you couldn't do it. So the only way out is for the South to nullify it and let the rest of the country forget about it.

MR. [IRVING] FISHER. But this isn't the Fifteenth Amendment. That amendment really affected just the South.

MR. [GEORGE] MARTIN. It seems to me that this Prohibition question is another sectional issue pretty much of the same kind. Eventually the West and the South, which are aridly dry, will forget that the East is wet and will grow tired trying to enforce their will upon it.

339. Letter from WHT to Charles H. Strong (July 1, 1925), microformed on TAFT PAPERS, supra note 9, Reel 275.

340. Letter from WHT to Irving Fisher (Nov. 21, 1928), microformed on TAFT PAPERS, supra note 9, Reel 306.

341. Id.
this will wear down the moderate wets to a consciousness that the only solution is pressure in favor of enforcement.\footnote{342}

This conclusion separated Taft from Sutherland,\footnote{343} with whom Taft otherwise self-consciously shared a similar conservative jurisprudence.\footnote{344} If Sutherland believed that his judicial role was to interpret prohibition statutes so as to align them more closely with underlying social norms,\footnote{345} Taft took it as his responsibility to

\footnote{342} Id.

343. The disparity between Taft and Sutherland may have been even more stark than the public record discloses. For example, in \textit{Byars v. United States}, 273 U.S. 28 (1927), Sutherland wrote an opinion for a unanimous court reversing the judgment below and excluding evidence found as a result of a warrant to search for liquor that had not been based upon probable cause. Stone's docket book indicates that Taft, Holmes, and McReynolds had at conference voted to affirm. In \textit{Agnello v. United States}, 289 U.S. 20 (1925), there was a similar disparity between Taft's public and private views. \textit{Agnello} was a unanimous decision authored by Butler addressing the question, as Butler put it in his docket book, "Is a search warrant necessary to search a man's house for drugs? Lower court held not in the circumstances here." Butler's docket book records that all members of the Court at conference voted to reverse the lower court decision except for Holmes and Taft, who voted to affirm. Although \textit{Agnello} concerned a prosecution for cocaine rather than liquor, it had plain and obvious implications for prohibition.

344. When Taft was appointed Chief Justice in 1921, he sent a note to Sutherland to the effect that "I look forward to having you on the Bench with me... Our views are much alike and it is important that they prevail." Letter from WHT to GS (July 2, 1921) (Sutherland Papers). When Sutherland was appointed to the Court in 1922, Taft wrote him a long letter of welcome as someone who was coming "into the Court with a general opinion as to the functions of the Court similar to my own." Letter from WHT to GS (Sept. 10, 1922) (Sutherland Papers).

345. A striking example of the strange political bedfellows created by prohibition can be seen in the fact that Sutherland's stance in this regard coincided almost exactly with the position of Walter Lippmann. Lippmann argued that because in the case of prohibition "we are faced with a law which cannot be enforced and which cannot be repealed," the only solution was for the Supreme Court, bowing to public opinion, to find by the proper reasoning that the States are not violating the Eighteenth Amendment.... [T]he Constitution, thank heavens, means whatever a living Supreme Court says it means. And the Supreme Court, thank heavens, is composed on the whole not of worshippers of a scared text, but of jurists and statesmen and human beings.

Lippmann, \textit{supra} note 244, at 54, 56. Adverting to the example of the Fifteenth Amendment, Lippmann argued that whenever the Supreme Court has faced a constitutional provision generally defied by "orderly disobedience"—"a disobedience which is open, frankly avowed, and in conformity with the general sense of what is reasonable"—it has reinterpreted the Constitution to align it with dominant public sentiment. \textit{Id.} at 56.

When the Constitution has come into conflict with the living needs of the nation, and when amendment was impossible, the method of changing the Constitution has been to change it and then get the very human Supreme Court to sanction it....
harden the teeth of prohibition so as to "wear down the recklessness of those who would try to defeat the law by disobeying it."346 "It sometimes seemed as though there were no lengths to which [Taft] would not go, and along which he would not attempt to lead the court, in his determination to uphold prohibition enforcement."347 In that crusade, Taft, and we can assume also Van Devanter and Sanford, committed judicial conservatism to a policy of respect for positive law in the context of what was surely the most controversial and momentous issue of their time. That was the essential message conveyed by the triumph of positive dualism in Lambert.

Over the rock of prohibition, therefore, judicial conservatism on the Supreme Court splintered into two blocs. The first, associated with Sutherland, Butler, and McReynolds, believed that legal legitimacy could best be maintained if the positive law of prohibition were ameliorated by widespread social values. The second, associated with Taft, Van Devanter, and Sanford, believed that defiance of prohibition so threatened the survival of the legal order as to require that these values be overridden by positive law. By emphasizing the need for law enforcement over the requirements of legal legitimacy, Taft and his colleagues split conservative ranks in the decade immediately preceding the New Deal, when the claims of judicial conservatism to subordinate positive law to the immanent values of custom were to be conclusively and forcefully repudiated.

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... If the test of loyalty to the laws were loyalty to the original intent of each law, we should have to confess that we are a thoroughly lawless people.

Id. at 55-56.
346. Letter from WHT to Moses Strauss (Apr. 1, 1929), microformed on TAFT PAPERS, supra note 9, Reel 310. The full passage reads:

We must be patient. We can not change the habits of a whole nation all at once, and we have got to go through a trying experience in the non-enforcement of the law, but if we keep up the strength of the conscience of the majority of the people, which we now enjoy, I am quite sure that we shall wear down the recklessness of those who would try to defeat the law by disobeying it.

VI

In the 1920s Americans believed themselves swept up in a crime wave of awful proportions. 348 “Few subjects occupy more space in contemporary literature,” one author observed, “than analyses of the crime wave, its extent, causes and possible remedies.” 349 Solicitor

348. For a sampling of the myriad of articles about the crime wave in the 1920s, see C.P. Connolly, America—Land of the Lawbreaker, McClure’s Mag., July 1923, at 40 (“Tear gas, machine guns, armored cars—all the paraphernalia of modern war—have been called into play by the police in fighting the great American crime wave. Yet lawlessness in the United States still keeps mounting to ever more appalling proportions.”); Chicago Crime Wave Still Sweeps On, N.Y. Times, Dec. 24, 1920, at 2; Crime Wave Fills Prisons, N.Y. Times, May 15, 1922, at 20; Crime Wave Now Greatest in Secret Service Records, N.Y. Times, Dec. 30, 1920, at 1; Governor Sees Crime Wave Due to ‘Living Fast’, N.Y. Times, Jan. 20, 1922, at 1; Huge Crime Drive Planned; Authorities Here Unite Forward on Underworld, L.A. Times, Nov. 21, 1929, at A1; Judges Draft Bills To End Crime Wave; Measures Would Increase Penalties and Deal with Bail of Past Offenders, N.Y. Times, Dec. 22, 1920, at 2; Lawlessness: The Shame of America 77 CURRENT OPINION 15, 15 (1924) (“America is the land of Laws and Lawlessness. At the same time that our legislative factories are turning out innumerable laws making us on paper the most perfect nation in the world, murderers and robbers are rendering our lives and property more insecure than in any other civilized and most uncivilized countries.”); Mothers Blamed for Painted Faces and Daring Dress, Wash. Post, Oct. 29, 1924, at 3; Our Criminals Are New Ones; National Crime Wave Due to Them, Says Pinkerton, L.A. Times, Jan. 6, 1920, at I15; Remedy for Rising Crime Wave Essential to National Welfare, Bar Inquiry Shows, N.Y. Times, Mar. 12, 1922, at 1 (“A committee of the American Bar Association recently appointed to investigate the increase of crime in the United States has decided to report to the annual meeting ... that a remedy for increasing lawlessness is essential to the welfare of the country.”); Simon Says Drugs Cause Crime Wave; Declares Prohibition Has Driven Criminals from Whisky to Narcotica, N.Y. Times, Dec. 19, 1920, at 2; 200 Police Chiefs Meet; Crime Wave as By-Product of War Cited by Convention Speaker, N.Y. Times, June 8, 1920, at 11; Editorial, War on Crime, Wash. Post, Dec. 25, 1928, at 6.

349. Harry Elmer Barnes, Reflections on the Crime Wave, Bookman, Sept. 1926, at 44. Often the crime wave was linked to the overproduction of statutory law. See, e.g., Adams, supra note 261, at 2-5. The linkage was well expressed by a letter to the New York Times:

Lawlessness is rampant throughout the country today as never before ... and it is no idle statement to say that America is the most lawless nation on earth. Nowhere is there such utter disrespect and contempt of law as here, and the question naturally arises, What is the cause of it?

It can be summed up briefly: Too much law by stupid legislation and a general indifference and apathy by the people toward public officials. The adherents of prohibition promised us a sort of millennium which was to follow the adoption and enforcement of the Eighteenth Amendment. Results speak for themselves, and instead of a utopian Sahara we have a land where crime and acts of violence fill the first page of every daily newspaper.

Laws that cannot be enforced only breed contempt and hypocrisy, and should be wiped off the statute books. Eliminate 50 per cent. of the existing laws and give honest enforcement to the rest of them.
General James M. Beck remarked "that the present wave of crime had no parallel since the eighteenth century."\(^{350}\) A 1926 poll named "[l]awlessness or disrespect for law" as "the greatest problem confronting this country at this time."\(^{361}\) Herbert Hoover made lawlessness a major theme of his new administration, announcing in his Inaugural Address that "[c]rime is increasing. Confidence in rigid and speedy justice is decreasing."\(^{352}\) Hoover pledged to meet the challenge by appointing "a national commission for a searching


350. Beck on the Crime Wave; Suggests Application of the Venetian Code in Dealing with Robbers, N.Y. TIMES, Jan. 23, 1921, at 14; see MCDADD, supra note 99, at 41 ("The transcedent problem before the country today is the problem of law and order.").

351. Vote Lawlessness Gravest Problem; Plurality of Leading Citizens in National Economic League Rank It First, N.Y. TIMES, Nov. 29, 1926, at 21. The poll was of the National Council of the National Economic League:

[T]he members of the council were asked if they believed an abnormal amount of lawlessness and disrespect for law existed in this country at present, and 1489 answered in the affirmative and 105 in the negative. This question was then propounded:

"If so, what in your opinion is most to blame ... ?"

These causes were given:

- Improper laws ........................................... 649
- Law enforcement ........................................... 895
- Condition of public sentiment .............................. 1,065

The question "If you think it is due, wholly or in part, to improper laws, what specific laws in your opinion are most responsible?" brought the following replies:

Prohibition laws, Volstead act, Eighteenth Amendment, 507; too many laws, 105; laws relating to personal liberty, 84; laws governing courts and criminal procedure, 78.

Id.; see Lawlessness Our Greatest Problem, LITERARY DIG., Jan. 1, 1927, at 24; Richard Lee Strout, Why Are We Lawless, WOMAN'S J., Dec. 1930, at 12, 12 ("An increasing number of people ... considered" the problem of criminality "the most serious one before the American nation. They read daily reports of lawlessness, of rampant crime, of police impotency, of corruption in office, of alliance between and underworld, of men shot down in cold blood, of no subsequent arrests.").

352. Hoover, supra note 336, at 76. According to Taft, this part of Hoover's inaugural was "suggested and contributed" by Justice Stone, to whom Hoover was very close. Letter from WHT to Samuel H. Fisher (May 2, 1929), microformed on TAFT PAPERS, supra note 9, Reel 311; MASON, supra note 269, at 271. In a speech that Taft believed "was largely the result of" Hoover's "conference with Stone," Letter from WHT to Samuel H. Fisher, supra, Hoover declared that "the enforcement and obedience to the laws of the United States, both Federal and State" was "the dominant issue before the American people." Text of President Hoover's Speech on Law Observance, N.Y. TIMES, Apr. 23, 1929, at 2; see Hoover Demands Respect for Law; Calls It Nation's 'Dominant Issue' in Speech Before Publishers Here, N.Y. TIMES, Apr. 23, 1929, at 1.
investigation of the whole structure of our Federal system of jurisprudence” that would “make such recommendations for reorganization of the administration of Federal laws and court procedure as may be found desirable.” 353

353. Hoover, supra note 336, at 77. The commission eventually became the National Commission on Law Observance and Enforcement. Hoover was “most anxious” to appoint Stone to chair the Commission. Letter from WHT to Charles P. Taft, 2nd (Mar. 17, 1929), microformed on TAFT PAPERS, supra note 9, Reel 309. Taft reports that Hoover “sent for me to lunch with him” to discuss the matter. Letter from WHT to Mrs. Frederick J. Manning (Mar. 17, 1929), microformed on TAFT PAPERS, supra note 9, Reel 309. Hoover wanted to put Stone on the Commission and still have him retain his place on the Court, and I told him I did not think it possible. I have suggested that if he needs the Court ... although we would hate to let them go, he could take members of the Court who could retire. There are two of them at least he could take and who would make very good members. The best man in the United States for the place is Willis Van Devanter.... Another man who is entitled to retire is Brandeis. I told the President that if he would take Van Devanter as Chairman and put Brandeis on with him, he would lay a basis for a Commission noteworthy in the history of the country and a Commission that would do something. I told him that Stone did not have the qualities and that Stone would not retire, but he did not seem convinced.

Letter from WHT to Robert A. Taft (Mar. 17, 1929), microformed on TAFT PAPERS, supra note 9, Reel 309. In Taft’s view, Hoover was “daft in respect to the qualities” of Stone, “because he has known him for a long time, and not being a lawyer has not had full opportunity to understand and gauge his qualities in action.” Id. Taft thought that Hoover was “quite indisposed properly to weigh the limitations upon the Court’s action.” Letter from WHT to Charles P. Taft, 2nd, supra. “We are not disposed to give up an active member of the Court and retain him in the Court while he does work in another jurisdiction,” Taft wrote to his son. “We need all we have, because we can not very well render decisions in a number of cases, and those most important, without a full Court.” Letter from WHT to Charles P. Taft, 2nd (Mar. 31, 1929), microformed on TAFT PAPERS, supra note 9, Reel 310. “Moreover, there was a good deal of grave doubt as to whether a member of our Court ought to be on the Commission and then have to pass on questions arising out of the proposals of the new Code or whatever may be developed.” Letter from WHT to Samuel H. Fisher (May 2, 1929), microformed on TAFT PAPERS, supra note 9, Reel 311.

Taft reported that Hoover “thinks that Stone is keen to get into the work. Stone tells me he is not and wishes to be let alone in the Court.” Letter from WHT to Robert A. Taft (Mar. 31, 1929), microformed on TAFT PAPERS, supra note 9, Reel 310. Hoover pressed the question, however, and eventually Taft wrote Hoover that he would call a meeting of the full Court to decide the question. The meeting was held on April 6, 1929, but before Taft could report its outcome to the President, Hoover again wrote Taft “to express my anxiety that you will be able to acquiesce in” the suggestion that Stone be permitted to chair the Commission without retiring from the Court:

I realize the extra burden it imposes on the Court.... I also realize the desire of the Court that its members should not, as in the past, head up commissions in public matters. On the other hand, it seems to me that this is so closely affiliated and so vital to the whole of the future of our judicial system that it
would not comprise a precedent in your newly established custom.

I have again this week, with the assistance of several of our best members of the Bar, traversed the personnel of the Bench and Bar of the whole country, and I have not received a single suggestion of a man who, in the view of these helpers, can adequately undertake the job with any hope of its successful consummation and the necessary support of its conclusions by the public, except Justice Stone.

....

I now realize that I should not have launched and pledged my administration to this venture. Many of my advisers are strongly recommending that I should abandon the major purpose of this inquiry until some future successor can find himself in position to command the talent necessary to effectually carry it through.

Letter from Herbert Hoover to WHT (Apr. 7, 1929), microformed on TAFT PAPERS, supra note 9, Reel 310. Taft grimly replied to Hoover:

[W]e had a meeting yesterday and confirmed the conclusion which by previous personal conferences with all the members of the Court, I had found to be its judgment. But in view of your letter, I shall ask the members to meet me in the morning ... so that I may submit the question to them again for further consideration.

Letter from WHT to Herbert Hoover (Apr. 7, 1929), microformed on TAFT PAPERS, supra note 9, Reel 310.

As good as his word, Taft circulated a suggestion for a meeting to the whole Court, attaching the President's letter. Letter from WHT to the Court (Apr. 7, 1929) (Van Devanter Papers). On April 8, Taft wrote once again to Hoover, saying that there had been a misunderstanding between us, which a visit from Mr. Justice Stone this morning makes clear.” Letter from WHT to Herbert Hoover (Apr. 8, 1929), microformed on TAFT PAPERS, supra note 9, Reel 310. Taft reported that the decision of the initial conference had been “taken upon a full understanding of your position in the matter,” and that it was therefore “unnecessary ... to call a second meeting of the Court.” Id. To his son Robert, Taft expressed exasperation and some suspicion of Stone's role:

I have been going through ... a trial with Hoover, in which he has attempted to take from our Court, and still retain him on the Court, his favorite Stone. I opposed it and made some other suggestions which did not suit him, and he hammered at me through Stimson and through the Attorney General. But I submitted the question to the whole Court and they stood by me, every one, so that he had to come down. Stone presented the view that he would go but that he was not in favor of it. I am not quite sure what his attitude is in respect to that issue, because I think when he talked with Hoover, he took a little different view from that which he took when he talked with me. However, it is settled .... I rather think the best man they could get now would be George Wickersham, but I don’t think that Hoover’s friends like him. I think Hoover himself is disposed rather in that direction, but my impression is that Hoover is so much under the Progressive influence that it would be enough to be against George on account of his relation to me in the past, although I would think that George could put the thing through rather more promptly and effectively than any of them. Indeed I consider him a very much better man than Stone would be, because of George’s experience.

Letter from WHT to Robert A. Taft (Apr. 7, 1929), microformed on TAFT PAPERS, supra note
Hoover was careful to stress that prohibition "was not the main source of the lawlessness" afflicting the country.\textsuperscript{354} Although his plea for legality was nevertheless interpreted "as an appeal to respect the Volstead act,"\textsuperscript{355} Hoover was correct in his perception that Americans in the 1920s were anxious about the problem of lawlessness in registers that transcended prohibition. Apart from the anxiety generated by what Taft called "[t]he great wave of crime that we have been facing," which involved not merely liquor but also an "increase of violence" like "murder and robbery,"\textsuperscript{356} the problem

9, Reel 310. A decade later, Stone wrote his sons that although Hoover was very much enamored of the idea that I should head the Commission ... I was equally desirous of not serving in that capacity.... I tried to convince him that such a service on my part was incompatible with my position as a member of the Supreme Court, both because it was too time-absorbing ... and because I felt that discussions of my action as chairman ... might readily impair my public standing as a member of the Court. I was not at all disposed to hazard such little reputation and public standing as I had by monkeying with the prohibition buzzsaw.

Letter from HFS to his sons (Nov. 3, 1929) (Stone Papers); see Mason, supra note 269, at 271-74. Eventually Hoover chose George Wickersham to chair the Commission. Wickersham had been Taft's Attorney General and was at that time the law partner of Taft's brother Henry. 354. Hoover Demands Respect for Law, supra note 352.

In order to dispel certain illusions in the public mind on this subject, let me say at once that while violations of law have been increased by inclusion of crimes under the Eighteenth Amendment and by the vast sums that are poured into the hands of the criminal classes by the patronage of illicit liquor by otherwise responsible citizens, yet this is only one segment of our problem. I have purposely cited the extent of murder, burglary, robbery, forgery and embezzlement, because only a small percentage of these can be attributed to the Eighteenth Amendment. In fact, of the total number of convictions for felony last year, less than 8 per cent came from that source. That is, therefore, but a sector of the invasion of lawlessness.

What we are facing today is something far larger and far more fundamental—the possibility that respect for law as law is fading from the sensibilities of our people.

Text of President Hoover's Speech on Law Observance, supra note 352; see also Hoover, supra note 336, at 76 ("The problem is much wider than [prohibition]."). Hoover's account of an increase in crime distinct from prohibition was vigorously disputed. See Burnham, supra note 34, at 61 ("During the 1920's there was almost universal public belief that a 'crime wave' existed in the United States.... [T]here is no firm evidence of this supposed upsurge in lawlessness."); Kirchwey, supra note 337.

355. Editorial, A Long Task, N.Y. Times, May 11, 1929, at 18. This was no doubt because, as Senator George Wharton Pepper observed, "The question of law enforcement is popularly thought of just now in connection with prohibition enforcement." 64 Cong. Rec. 389 (1922).

356. Letter from WHT to Percy L. Edwards (Jan. 28, 1927), microformed on Taft Papers, supra note 9, Reel 288. Taft understood, as Richard Nixon later understood, that support for
of "law and order" in the 1920s was also associated with issues of labor unrest,\textsuperscript{357} as well as with various forms of racial violence like law enforcement could create a powerful political platform. Taft was concerned to transform anxiety over crime into pressure "to stir up Legislatures to an effort to furnish machinery for the better apprehension of criminals." \textit{Id}. Like Nixon, who claimed to speak for the "silent majority," Taft purported to speak for "the forgotten man, the victim of the murderer and robber and the criminal." \textit{EIGHTY-THIRD ANNUAL REPORT OF THE PRISON ASSOCIATION OF NEW YORK, reprinted in E.R. Cass, REVIEW OF NATIONAL CRIME COMMISSION CONFERENCE 9 (1928)} (quoting William Howard Taft). "[S]omebody or some organization," Taft argued, ought "to look after the Forgotten Man—that is, society at large"—in order "to have an improvement in the administration of the criminal law as we ought to have." \textit{American Law Institute Holds Fifth Annual Meeting, 13 A.B.A. J. 243, 246 (1927)}. Taft's plea was received as "stirring." \textit{National Clearing House of Criminal Statistics Urged, WASH. POST, Nov. 4, 1927}, at 1. It was said that Taft, "in a speech delivered recently, packed into a single phrase his criticism of American justice as it is now directed. This phrase was: 'The forgotten man.'" Editorial, \textit{The Forgotten Man, CHI. DAILY TRIB., Dec. 14, 1927}, at 10.

Ever since 1905, when Taft had issued his famous challenge that "the administration of the criminal law in all the states in the Union ... is a disgrace to our civilization," William Howard Taft, \textit{The Administration of Criminal Law, 15 YALE L.J. 1, 11 (1905)}—a challenge that became the rallying cry for reform and that was deemed "one of the most beneficent utterances in American history," \textit{What's Wrong with the Law?, WORLD, Nov. 11, 1926}, at 14—Taft had campaigned to rouse "the people to demand that an improvement be made in stiffening the powers of criminal prosecution, in enlarging the police, and in giving the Judges in the Courts more power to control the trials." Letter from WHT to George W. Burton (Aug. 4, 1925), \textit{microformed on TAFT PAPERS, supra note 9, Reel 275}. Taft believed that the best way to diminish "crime ... is to make more efficient your laws for prosecuting it.... [W]e can not abandon the police force in the thorough prosecution of crime as we find it, and hope that general causes will then take the place of prosecution to restrain it. They won't do it." Letter from WHT to Moses Strauss (Mar. 5, 1928), \textit{microformed on TAFT PAPERS, supra note 9, Reel 300}. Taft displayed real violence of feeling on the subject, writing, for example, to his son Charles who was a public prosecutor:

\begin{quote}
I don't agree with the opponents of capital punishment at all. I think that those who commit crimes of violence in robbery are directly affected by the fear of capital punishment, and that it leaves the public helpless to abolish that as the extreme penalty....

\ldots This man Darrow, who came very near being convicted of suborning perjury, is a great advocate of the abolition of the death penalty. I can not understand what the vogue is which makes him so popular a lecturer.... I think the escape of those two young Jews who tortured that other young Jew to death is one of the greatest miscarriages of justice that we have had, in that it did not result in their execution.
\end{quote}

Letter from WHT to Charles P. Taft, 2nd (July 9, 1927), \textit{microformed on TAFT PAPERS, supra note 9, Reel 293; see infra note 408}. As the decade progressed, Taft's campaign for efficient law enforcement reached a crescendo. \textit{See, e.g., Basil Manly, Chief Justice Taft Replies to Three Vital Questions, BOSTON GLOBE, Jan. 9, 1929}, at 32; Oliver P. Newman, \textit{Stop Helping the Criminal: An Authorized Interview with the Chief Justice William Howard Taft}, \textit{COLLIERS}, Jan. 22, 1927, at 8; WHT, \textit{Some Possible Reforms in Our Criminal Law, ST. LOUIS POST-DISPATCH, Dec. 9, 1928 (Supplement)}, at 2.

\textsuperscript{357} Felix Frankfurter, \textit{Law and Order, 9 YALE REV. 225, 226 (1920)} ("Were the proverbial
lynching and extralegal organizations like the Ku Klux Klan.

messenger from Mars to visit this country he would find ... a veritable devil's dance, with 'law and order' emblazoned on the banners.'). At the beginning of the 1920s the country was rocked by coal and railway strikes that produced what Harding, in an address to Congress on the industrial crisis, called "a state of lawlessness shocking to every conception of American law and order.... In these strikes ... rights have been denied by assault and violence, by armed lawlessness ... until liberty is a mockery and the law a matter of common contempt." The President's Address to Congress on Industrial Crisis, N.Y. TIMES, Aug. 19, 1922, at 2. Harding's "remarks condemnatory of lawlessness growing out of the coal and railway strikes were commended heartily by Democrats as well as Republicans." Harding's Stand on Strike; Will Use All Power To Keep Roads Running and Let Men Work, N.Y. TIMES, Aug. 19, 1922, at 1. It also received editorial approval. See Editorial, The President to Congress, N.Y. TIMES, Aug. 19, 1922, at 10. Taft believed that "the lawlessness of the trades-unions must be restrained." Letter from WHT to Mrs. Frederick J. Manning (Oct. 6, 1922), microformed on TAFT PAPERS, supra note 9, Reel 246. Writing to George Harvey, United States Ambassador to Great Britain, Taft observed:

The situation in the United States now is ... quite critical in respect to the coal strike and the railway strike.... The war and general lawlessness everywhere stimulate bloody, murderous violence on the part of the strikers and their sympathizers, but that is not so much a dangerous symptom as it is a symptom of the times.

Letter from WHT to George Harvey (July 21, 1922), microformed on TAFT PAPERS, supra note 9, Reel 244.

358. "The epidemic of lawlessness that has swept the United States in the last few years is held by many influential southern papers to be a direct result of the lynching bees and the fact that the participants in these go practically unpunished." Editorial, Law Breaking, L.A. TIMES, Oct. 3, 1923, at II4. In Congress, debates over the Dwyer antilynching bill turned on the need to combat "contempt for law and order." 62 CONG. REC. 547 (1921) (statement of Rep. Ansorge). "Whenever anyone excuses an act that is not lawful, no matter what the provocation may be, he invites the collapse of all authorized government. He is opening a door to lawlessness, the extent of which no man can see." 62 CONG. REC. H543 (1921) (statement of Rep. Fess). "[L]awlessness of this character allowed to go unchecked and unpunished will eventually seek out as its victims any against whom there may be a local prejudice." 62 CONG. REC. 1700 (1922) (statement of Rep. Mondell). Taft had been one of several prominent Republicans who, at the request of the NAACP, had petitioned Senators for an investigation of lynching and race riots. ARTHUR I. WASKOW, FROM RACE RIOT TO SIT-IN, 1919 AND THE 1960S, at 205 (1966). Taft publicly branded lynching as a cause of lawlessness equal to that of organized crime:

[L]ynch law, prompted by the same lawlessness and a sense of cheapness of human life, and often a real race cruelty, has been until very recently looked upon as an outbreak not under control. It has rarely been made the subject of investigation and prosecution because supported by neighborhood sympathy.

Newman, supra note 356 (quoting WHT).

359. The Klan was widely understood to be a symptom of "the penetration" into the North of a "Southern spirit of lawlessness." Lawlessness as an American Tradition, 74 AM. REV. REVS. 653, 654 (1926). It was also excoriated as a form of "organized lawlessness," Arthur Sears Henning, Frown Would End Volstead Terror Reign, CHI. DAILY TRIB., Mar. 30, 1929, at 1, as an instrument "of terror, oppression, and violence." Knights of the Ku Klux Klan v. Strayer, 26 F.2d 727, 728 (W.D. Pa. 1928). Ironically, the Klan was also regarded as "the
Embedded in the atmosphere of this anxiety, the Taft Court was, as historians have noted, “preoccupied” by “law and order issues.”\textsuperscript{360} We owe to Robert Cover the insight that the Taft Court managed to achieve an “extraordinary area of consensus” about the need to shock troops of the prohibition forces,” because “many of its atrocities the klan commits in the name of unofficial enforcement of the Volstead act.” Henning, \textit{supra}. Prohibition helped fuel the revival of the Klan in the 1920s:

With prohibition came the bootlegger, and many anxious parents, seeing their sons and daughters going in for “petting parties,” all-night automobile escapades and bad gin, sincerely thought the foundations of society were being undermined by the vicious elements identified in their minds with the illegitimate traffic in liquor. In town after town, all over the country, the first act of the newly formed Klan was to horsewhip the proprietor of the most notorious local speak-easy, and no inconsistency was felt because in the party which did so there might be men who themselves drank.

\textit{The Rise and Fall of the K.K.K.}, 53 \textbf{NEW REPUBLIC} 33, 34 (1927). Taft himself believed that “[t]he progress of the Klu Klux Klan [sic] in our country of course is a subject that should cause us humiliation and arouse in us an earnest wish to suppress such lawlessness as it evidently encourages.” Letter from WHT to Mrs. Bellamy Storer (Sept. 20, 1923), \textit{microformed on Taft Papers, supra} note 9, Reel 256; see Letter from WHT to Mrs. Bellamy Storer (Nov. 13, 1923), \textit{microformed on Taft Papers, supra} note 9, Reel 258 (predicting that the popularity of the Klan would subside: “The absurdities and the extent of the lawlessness for which it is responsible create opposition. It carries its own antidote ...”).

The confluence of phenomena like prohibition, proliferation of legislation, labor unrest, lynching, and the Klan, formed a witches’ brew of anxiety over the rule of law. A typical example is this editorial in the \textit{Newark Evening News}:

That today in this country the fundamental principle underlying all Anglo-Saxon political order, “the rule of law,” is threatened is no idle foreboding. Forces from without and within the law are at work with their undermining influences.

Legislators at both the National Capitol and at the state capitols have enacted a mass of legislation which in complexity and volume is without parallel in the ancient or modern world. They have attempted to uplift society by the mere passage of a statute.

The inevitable results in the fabric of society itself have made themselves felt. Flagrant violations of the prohibition amendment, an integral part of the supreme law of the land, furnish an incontrovertible evidence of the growing disrespect for the rule of law. Growing forces of lawlessness are to be seen in the advocates of direct action among the extremists in labor circles. Lynching furnishes another conspicuous example. The misguided efforts of thousands of well-meaning citizens in the Ku Klux Klan are employed to accomplish outside the law results which in themselves and if effected by other than extra-legal means would win the respect of their fellow citizens.


360. M. Browning Carrott, \textit{The Supreme Court and Law and Order in the 1920s}, MD. HISTORIAN, Fall/Winter 1985, at 12, 22. For Pierce Butler’s long discussion of the dangers of “the spirit of lawlessness that threatens now,” see Butler, \textit{supra} note 264, at 585-87.
uphold the rule of law and eliminate "private violence." Although the Court split deeply on the question of whether labor violence should be regulated by courts or by legislatures, and on the question of the proper scope of labor pressure, it was nevertheless united in its ambition to inaugurate "a new era in the effort to extend the rule of law into the field of industrial controversy." In decisions like American Steel Foundries v. Tri-City Central Trades Council and United Mine Workers v. Coronado Coal Co. the Court sought to substitute legal form for uncontrolled violence in the context of labor disputes. In New York ex rel. Bryant v. Zimmerman, the Court upheld a New York statute designed to

365. 257 U.S. 184 (1921).
366. 259 U.S. 344 (1922).
368. 278 U.S. 63 (1928). Zimmerman arose in the context of a habeas petition challenging the constitutionality of the New York statute under which the defendant had been imprisoned. In dissent, McReynolds charged:

\[\text{[O]ver and over again this Court has asserted that it will not permit habeas corpus to perform the office of a writ of error.} ]

\[\text{It must now be accepted as settled doctrine in this Court that one is not deprived of any federal right merely by being put on trial for violating a state statute which conflicts with the Federal Constitution. Nor is one deprived of his federal right solely because he may be imprisoned after conviction of violating a state statute admittedly in conflict with the Federal Constitution.} ]

\[\text{It follows that when the petition for habeas corpus alleged that plaintiff in error was imprisoned under a charge of violating a state statute said to be unconstitutional and void, no real federal question was raised.} ]

\[\text{Id. at 83-84 (McReynolds, J., dissenting). There is an interesting note from Holmes to Van Devanter, who authored Zimmerman, to the effect that Holmes agreed with McReynolds that a habeas petition could not be used to "assail ... the constitutionality of the law upon which the judgment was based. The judgment is no less valid when based on bad than when on good law. This I think sound doctrine." Letter from OWH to WVD (Nov. 15, 1928) (Van Devanter Papers). Holmes noted, however, that} ]

\[\text{if a State chooses to say that the validity of the judgment shall depend on the validity of their statute or for any other reason that the constitutional question may be raised by habeas corpus, the state has power to do so, and the question will be raised and we shall have to deal with it. That I understand is the case in New York, and it seems to me something to the above effect should be said.} \]
clamp down on the Ku Klux Klan, an organization that was "taking into its own hands the punishment of what some of its members conceived to be crimes," by requiring the Klan to disclose the identity of its members. In Moore v. Dempsey, the Court sought to bring federal authority to bear in controlling lynching and race violence. Essentially overruling the recent precedent of Frank v. Mangum, Moore held that federal courts could use their power under habeas corpus to review state trials that had been rendered lawless by a mob. In effect the Court declared "lynch law as little valid when practiced by a regularly drawn jury as when administered by one elected by a mob intent on death."

*Id. According to Stone's docket book, Taft had at conference initially voted with McReynolds to reverse the judgment below.*


370. On the controversial origins of the New York statute, see The Klan Defies a State, LITERARY DIG., June 9, 1923, at 12-13. On the sordid details of the case before the Court, see David M. Chalmers, Hooded Americanism; The History of the Ku Klux Klan 258-59 (2d ed. 1981). Zimmerman was authored by Van Devanter, who later remarked to a confidante:

Personally I should be very loathe to stigmatize the general membership of the old Klan and equally loathe to stigmatize the general membership of the present order. Indeed, I have some near relatives who were members of the former Klan and for whom I entertain a high and affectionate regard.

Letter from WVD to Joseph M. Hill (Nov. 29, 1928) (Van Devanter Papers).


372. 237 U.S. 309 (1915). The opinion for the Court in Moore was by Holmes, who had dissented in Mangum. The Court in Mangum had basically stood for the proposition "that a man is entitled only to the justice which the community gives him and that the federal government cannot undertake the task of civilizing the whole country to the wishes of the local communities." Legal Lynching and the Constitution, 34 NEW REPUBLIC 84, 85 (1923). Consistent with their opposition to prohibition on the ground of community sentiment, McReynolds and Sutherland dissented in Moore's effective overruling of Mangum. Moore, 261 U.S. at 92-102 (McReynolds and Sutherland, JJ., dissenting).

373. Cover attributes the reversal of Frank to the personal influence of Taft. See Cover, supra note 361, at 355-57. Taft himself said of the Moore opinion that

I would have written the opinion in a different way and would have dwelt more on our hesitation at interfering with the state court's decision and the state rule that subsequently discovered evidence is not receivable as a basis for a rehearing etc. But I doubt whether the opinion as now framed will make an uncomfortable precedent. No state officers will ever again be fools enough to let the defendants make an uncontestable case by affidavits and then demur.

Letter from WHT to WVD (Feb. 13, 1923) (Van Devanter Papers).

374. Mangum, 237 U.S. at 350 (Holmes, J., dissenting). T.R. Powell summarized the lesson...
The Taft Court maintained this commitment to legality even in the context of prohibition. In *Tumey v. Ohio*, the Court sought to define, as it had in *Moore*, the "content of the concept of the fair trial required by due process of law." Ohio had by statute authorized tiny villages to create small magistrate courts, popularly known as "liquor court[s]," in which the judge, who might also be the village mayor, would receive as supplementary income a percentage of the fees and costs that a convicted defendant was required to pay. Ohio law also authorized villages to receive one-half of all fines assessed by its liquor court. This allocation of funds cleverly created powerful incentives for villages to enforce prohibition in an entrepreneurial fashion, for the jurisdiction of liquor courts ran to the entire county in which a village was situated.

The facts of *Tumey* perfectly illustrate these incentives. *Tumey* involved the small village of North College Hill, which had a population of 1,104 but which was situated in Hamilton County near the "very 'wet' city" of Cincinnati. The liquor court of North College Hill could thus generate significant income for the village, as well as significant personal income for the North College Hill mayor who presided over its liquor court, by prosecuting and fining Cincinnati residents. To sustain such prosecutions, North College Hill provided by ordinance that one half of the income generated by its liquor court would be reinvested in a "Secret Service Fund to be

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of *Moore* to be that "in criminal proceedings a court must behave like a court and not like a vigilance committee." Thomas Reed Powell, *The Supreme Court and State Police Power, 1922-1930-VIII*, 18 VA. L. REV. 481, 505 (1932).


378. *Tumey* involved an appeal from a village that had authorized its mayor to receive $12 in costs for each conviction. *Id.* at 523.

379. Fines for the violation of Ohio's prohibition statute were between $100 and $1000 for the first offense, between $300 and $2000 for the second offense, and for a third and each subsequent offense between $500 and $2000, as well as a year's imprisonment. *Id.* at 516.

380. Letter from WHT to James R. Angell (Dec. 12, 1927), *microform on Taft Papers, supra* note 9, Reel 297.

381. Between May 11, 1923, and December 31, 1923, the liquor court of the tiny village of North College Hill had assessed "upwards of $20,000" in fines, from which the village had received a little more than half. The mayor, who was the chief executive of the village and responsible for its budget, had also received for his personal income $696.35 from the "fees and costs" of convicted liquor defendants. *Tumey*, 273 U.S. at 521-22.
used for the purpose of securing the enforcement of any prohibition law." In this way Ohio created a "reign of terror" in which dry villages used their liquor courts to fund self-sustaining squads that would earn income for villages by raiding adjacent wet cities to enforce prohibition legislation.

In Tumey, Taft, writing for a unanimous Court, held that the Ohio statute was unconstitutional, because it "vested the judicial power in one who by reason of his interest, both as an individual and as chief executive of the village, is disqualified to exercise it in the trial of the defendant." Taft knew that Tumey was "a very

382. Id. at 518. The village used the income to fund marshals, inspectors, and detectives.
384. See Editorial, Outrageous, CLEV. PLAIN DEALER, Nov. 8, 1926, at 10 ("It would be difficult to imagine a more deplorable perversion of justice than the Ohio law which gives county wide jurisdiction to township justices of the peace.... A township justice who is elected by a mere handful of votes is, under the Ohio law, given authority to carry on liquor raiding operations in any part of a county having a population of over a million.... Under this provision the county justices establish permanent raiding squads.... It is, of course, wholly needless to remark that many of these agents are in no degree interested in the enforcement of the prohibition laws. It is seldom that this type goes after bootleggers or rum runners. Its activities are largely confined to violent raids on private dwellings, preferably in districts inhabited by foreign-born residents. Unfortunate victims are dragged before venal justices, heavy fines imposed, and the money thus obtained so split that the raiders themselves obtain greater remuneration than they could possibly hope for in any respectable bread-winning activity. In some cases villages and townships are enriched; in most cases the rural magistrates are rewarded with copious fees. In every case fees depend upon convictions, a condition so obviously unsound as to warrant no discussion.").
385. Tumey, 273 U.S. at 535. Tumey was regarded as "a case of considerable significance," Robert E. Cushman, Constitutional Law in 1926-1927, 22 AM. POL. SCI. REV. 70, 101 (1928), because it shook "the very foundation upon which rests the Justice of the Peace system in the United States." Note, Constitutional Law—Officers Acting in Judicial Capacity Are Disqualified by Interest in Controversy—Due Process of Law, 13 VA. L. REV. 584, 585 (1927); see Editorial, Justice—Above and Below, 13 A.B.A. J. 266 (1927); John M. Pflueger, The Mayor's Court and Due Process, 12 IOWA L. REV. 393, 393-403 (1927); Comment, The Constitutionality of Fee Compensations for Courts, 36 YALE L.J. 1171 (1927). In Dugan v. Ohio, 277 U.S. 61 (1928), Taft, also writing for a unanimous court, upheld a magistrate court in a different Ohio village, because, although the mayor presided as judge, he was paid a salary from the general fund that was independent of the outcome of particular cases, and because the mayor had judicial functions but no executive functions. Id. at 65. For modern development of the Tumey doctrine, see Ward v. Village of Monroe, 409 U.S. 57 (1972); Note, Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Impropieties Arising from Judicial Campaign Contributions from Lawyers, 86 MICH. L. REV. 382, 392-96 (1987).
important” but his first fidelity was to the rule of law. The fact is that the prohibitionists controlling the Legislature of Ohio have been so fierce that they have transgressed the Constitution of the United States, and we have to say so.” Taft was “very anxious that it shall not interfere with the efficient enforcement of law, but it does not help to enforce law by methods involved in the procedure which we condemned.”

386. Letter from WHT to Horace D. Taft (Mar. 7, 1927), microformed on TAFT PAPERS, supra note 9, Reel 289.
387. Letter from WHT to Mrs. Frederick J. Manning (Mar. 6, 1927), microformed on TAFT PAPERS, supra note 9, Reel 289.
388. Taft hoped that Tumey will not greatly embarrass the Legislature of Ohio.... They will have to spend some more money to pay the compensation of their justices of the peace and inferior judges, and they will have to separate the office of mayor of a village from that of the judge in prohibition cases where the fines are permitted.
389. Letter from WHT to Moses Strauss (Mar. 8, 1927), microformed on TAFT PAPERS, supra note 9, Reel 289. Taft sadly noted:

We could not avoid declaring the law in respect to such trials to be contrary to due process. It is one of those instances in which an enthusiastic Attorney General anxious to secure the proper enforcement of the prohibition law forgot the rights of individual defendants as secured by the Constitution.

Id.

390. Letter from WHT to Mrs. Frederick J. Manning (Mar. 6, 1917), microformed on TAFT PAPERS, supra note 9, Reel 289. Taft noted that “Wayne Wheeler was counsel in the case, but we have to distribute our favors equally and justly.” Id. In fact the powerful Anti-Saloon League, which Wheeler effectively ran, had originated in Ohio and did not take Tumey lightly. It immediately caused the Ohio Legislature to submit to Ohio voters a substitute act, known as the Marshall Bill, which would maintain the financial incentive for village courts to try prohibition cases, but which would compensate magistrates only for time actually spent in court. The bill was soundly defeated by a two-to-one vote, and it constituted the first major legislative setback for the Anti-Saloon League. See Ohio Kills the "Kangaroo Courts," LITERARY DIG., Nov. 19, 1927, at 12; W.C. Howell, Project To Revive J.P. Fee Courts Defeated in Supposed Strongholds, CLEV. PLAIN DEALER, Nov. 9, 1927, at 1. The Cleveland Plain Dealer opined:

Defeat of the Marshall bill Tuesday by the amazing margin of more than 450,000 votes is not a defeat for prohibition. It is merely a defeat for an organization which crammed the measure down the throat of a none too willing Legislature and then sought to justify the enactment on the ground that it was a dry measure and essential to successful liquor enforcement.

.... The very emphatic result should teach the much-needed lesson that Ohio stands unequivocally for decency and justice in prohibition enforcement.


390. Letter from WHT to Moses Strauss (Mar. 21, 1927), microformed on TAFT PAPERS, supra note 9, Reel 290.
our decision ... gives me some concern," Taft wrote his son, "but I hope it will all be straightened out so that the effect of our decision will be seen to be just what it is and not to mean a general jail delivery."\(^{391}\)

*Tumey* lay at the intersection of Taft's desire effectively to enforce prohibition and his equal desire to maintain the forms of legality essential to the rule of law. Taft wished to maintain the distinction between legal state violence and mere official lawlessness. This tension was most conspicuously and persistently played out in the Taft Court's lively and developing Fourth Amendment jurisprudence of search and seizure. Because prohibition had flooded the federal courts with criminal defendants, because many of these were wealthy enough to afford lawyers,\(^{392}\) because most prohibition prosecutions required the production of evidence of liquor seized by law enforcement officials,\(^{393}\) and because the Taft Court was

\(^{391}\) Letter from WHT to Charles P. Taft, 2nd (Mar. 24, 1927), microformed on TAFT PAPERS, supra note 9, Reel 290. Fear that the opinion might be misinterpreted was a major theme in Taft's correspondence:

I hope it will do good and will make the Legislature of Ohio understand that when they establish a court, they shall see to it that the Judge is a man who will be indifferent between the parties and do justice without a motive for doing injustice. I fear that the approval of our opinion grows more out of the feeling against prohibition than it does against the maintenance of an unjust system. That is the difficulty when you get to the liquor question—it is very hard to find anybody who does not become a partisan.

Letter from WHT to Charles P. Taft, 2nd (Mar. 20, 1927), microformed on TAFT PAPERS, supra note 9, Reel 290.

\(^{392}\) Glenn Roberts, for example, writing from "the practical standpoint of a prosecuting official" trying to enforce prohibition, noted that those he sought to investigate "were generally reasonably well off as a result of their unlawful activities, and they resisted our efforts to destroy their business to the very limit. Counsel was employed to take advantage of every single defense that was available, and scarcely a single search warrant went unchallenged." Glenn D. Roberts, *Does the Search and Seizure Clause Hinder the Proper Administration of the Criminal Justice?,* 5 WIS. L. REV. 195, 195, 197 (1929). Roberts attributed the explosion of Fourth Amendment law in the 1920s to the presence of well-paid counsel willing and able to contest searches. *Id.* at 202-03.

\(^{393}\) John B. Wilson, *Attempts To Nullify the Fourth and Fifth Amendments to the Constitution,* 32 W. VA. L.Q. 128, 128 (1926). In Wilson's view:

Until the "National Prohibition Act" came into effect, the average citizen had, if any, a very hazy conception of his rights under the fourth amendment. And ... many lawyers were in the same fix because of the infrequent use of the Federal search and seizure warrant.... But, with the coming of prohibition, the situation has changed, and the fourth has come to the front with a rush, and search and seizure has become the almost universal means of enforcing the law, and
committed to the exclusionary rule as a means of enforcing the Fourth Amendment, prohibition sparked a virtual "doctrinal explosion" of Fourth Amendment jurisprudence.

especially the prohibition law.

Id.

394. See generally Weeks v. United States, 232 U.S. 383 (1914). Zechariah Chafee believed that "[t]he Fourth Amendment would be a dead letter if the United States Supreme Court had not since the decision in Weeks v. United States adopted the exclusion theory." Zechariah Chafee, Jr., The Progress of the Law, 1919-1922: Evidence, 35 Harv. L. Rev. 673, 695 (1922) (footnote omitted). In 1920 only one state, Michigan, agreed with Weeks that constitutional restrictions against unreasonable searches and seizures should be enforced by an exclusionary rule, but by 1928 there could be counted in support of the federal rule eighteen states, in opposition nineteen, non-committal six, the remaining five not having reviewed the new rule but having approved the old. It can no longer be said that there is weight of authority against the federal rule, especially in view of the fact that in many of the cases opposing the rule the question was not necessary to the decision and often the result depended on one judge's vote.


It was said that state courts began adopting the exclusionary rule in the 1920s because of "the personal reaction of judges to the prohibition law." Note, Search and Seizure—No Wire Tapping—Judicial Method, 27 Mich. L. Rev. 78, 81 (1929); see Margaret Lybolt Rosenzweig, The Law of Wire Tapping, 32 Cornell L.Q. 514, 525 (1947) ("The indiscriminate raids of the prohibition agents and the fact that many defendants were erstwhile law-abiding citizens rather than hardened criminals led court after court to adopt the rule of the Weeks case.").

395. Murchison, supra note 110, at 47, 71. This was the contemporary perception. See Cornelius, supra note 394, at iii ("The wide-spread violations of the state and national prohibition laws and the increasing use of the raid as a means of procuring evidence by police officers; the frequent arrests and holding of suspected persons for 'investigation,' and the incidental searches in connection with such arrests have caused the subject of search and seizure to assume an importance scarcely dreamed of a few years ago. Legal problems involving search and seizure are now presented before the courts with astonishing frequency."); see also Morgan Cloud, The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory, 48 Stan. L. Rev. 555, 602 n.218 (1996); Orin S. Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich. L. Rev. 801, 842-43 (2004) ("The National Prohibition Act of 1919 changed everything... The federal courts began to hear a regular run of Fourth Amendment cases as federal agents investigated illegal alcohol schemes.").

396. See John P. Bullington, Note, Constitutional Law—Searches and Seizures—A New
The perceived difficulty of enforcing prohibition within the constitutional restraints of the Fourth Amendment led some to

Interpretation of the Fourth Amendment, 3 TEX. L. REV. 460, 461 (1925). Bullington concluded that although since Boyd
relatively few cases have reached the Supreme Court involving the Fourth Amendment,... the adoption of the Eighteenth Amendment and the passing of statutes directed towards enforcing the provisions of that amendment elevated the Fourth Amendment to a place of prime importance, and presented the lower federal courts with problems which have resulted in considerable diversity of opinion.

Id. One student comment observed that before prohibition "cases in which evidence had been procured by unconstitutional searches and seizures were relatively infrequent.... But an entirely different situation prevails today. The courts in jurisdictions" with an exclusionary rule "are crowded with prohibition cases and the most popular mode of defense is to seek the suppression of evidence on the ground that it was unreasonably seized." Comment, The Meaning of the Federal Rule on Evidence Illegally Obtained, 36 YALE L.J. 536, 537 (1927). The student comment counted approximately 575 reported opinions dealing with the admissibility of illegally obtained evidence in prohibition cases in the period since 1920, of which 490 were in federal court. Id. at 537 n.2; see McBain, supra note 17, at 81-82. A federal magistrate writing in 1924 remarked on how utterly prohibition had changed the constitutional landscape:

The century-old formulas about inviolable homes and persons against searches and seizures began to be cherished—though largely by men who two years before could not have quoted one of them accurately. The entire aspect of the docket of the criminal magistrates changed. I served nearly twenty years in Boston as a Federal criminal magistrate and was then made familiar with substantially all that was done in the Federal repression of crime and the application of the Federal Constitution. I had practically nothing to do with the Fourth Amendment against unreasonable searches and seizures and against general warrants. It was as strange to me as the Second Amendment about the right to keep and bear arms would be to a liquor magistrate of to-day.

Richard W. Hale, Liberty and Liquor, 48 WORLD'S WORK 417, 421 (1924). By 1930 a federal commissioner could observe "that eighty per cent of the United States Commissioner's business is liquor work, and of this, by far the greater number of cases begin with a search warrant as a foundation." Robert H. Alcorn, Search Warrants and Prohibition Enforcement, 3 DAKOTA L. REV. 171, 171 (1930). The Fourth Amendment problems posed by prohibition bear a notable resemblance to those that would later arise in the "war on drugs." See Craig S. Lerner, The Reasonableness of Probable Cause, 81 TEX. L. REV. 951, 986 (2003); Thomas Regnier, The "Loyal Foot Soldier": Can the Fourth Amendment Survive the Supreme Court's War on Drugs?, 72 UMKC L. REV. 631, 631 (2004).

Great natural difficulties oppose the possibility of enforcement in a manner compatible with constitutional guarantees. Violations are widespread and difficult of detection, for a chemical analysis is necessary for the recognition of intoxicating liquor. And yet an arrest or search to be lawful must be based on facts, not unfounded suspicion.

Comment, Legal Search and Arrest Under the Eighteenth Amendment, 32 YALE L.J. 490, 494 (1923). "Hence it follows that in certain jurisdictions the federal authorities rely almost wholly on state discoverers. This is not legal theory; it is fact. In more than one jurisdiction it is the
advocate that the Supreme Court "recognize frankly that the 4th Amendment is inconsistent with the 18th" and "that the 4th Amendment has actually been repealed, where enforcement of the Volstead Act is concerned." At least one federal court reasoned that

\[\text{the Eighteenth Amendment must be considered in determining the question of what is an unreasonable search and seizure as prescribed by the Fourth Amendment. If there were no Eighteenth Amendment to the Constitution to be enforced, the court might have an entirely different idea of what is an unreasonable search or seizure.}^{399}\]

The Taft Court, however, was not tempted by this path. Instead it sought to maintain the form of legality by affirming its commitment to both the Fourth Amendment and the exclusionary rule,\(^{400}\) while daily practice." See McBAIN, supra note 17, at 98.


399. United States v. Bateman, 278 F. 231, 233 (S.D. Cal. 1922). The court added:
If an automobile, a suit case, satchel, tin container, jug, or bottle could not be searched and seized without a search warrant, they could not be seized at all, as a search warrant, under the law, can only be obtained upon affidavit showing that such automobile or other container had intoxicating liquor in it....

Under those circumstances the Eighteenth Amendment would have been stillborn. The act of more than two-thirds of the House of Representatives, more than two-thirds of the United States Senate, in passing such Eighteenth Amendment, and all the states of the Union, with the exception of the two smallest, in approving the Eighteenth Amendment, would have been utterly futile, and would have brought about only chaos and confusion.

Id. at 234; see Milam v. United States, 296 F. 629, 631 (4th Cir. 1924) ("The constitutional expression, 'unreasonable searches,' is not fixed and absolute in meaning. The meaning in some degree must change with changing social, economic and legal conditions. The obligation to enforce the Eighteenth Amendment is no less solemn than that to give effect to the Fourth and Fifth Amendments.").

400. The intrusive and pervasive character of prohibition enforcement might actually have reinforced the Court's dedication to the exclusionary rule. In the context of prohibition, illegal searches would not involve

an occasional blundering constable. The state rule positively invites illegal searches. The searching officer knows that he is relatively safe .... He knows that he can do a lot of searching on mere suspicion. And he does. And whenever he turns up evidence it is used, whether he had the legal right to turn it up or not. He is not blundering. He is following the line pointed to him by the courts.

McBAIN, supra note 17, at 97. Because everyone understood that remitting those subject to illegal search to a civil remedy in damages or to criminal prosecution of the offending police
at the same time vigorously reinterpreting search and seizure law so as to render it compatible with the "many situations of prohibition enforcement." 401

The Taft Court decision that most exemplifies this approach, and that has had the most "lasting influence," 402 is unquestionably Carroll v. United States. 403 Carroll addressed the

officer was to offer "remedies so remote as practically not to threaten or restrain at all," id. at 96, the only way citizens, including influential and "earmash law-abiding citizens," Rosenzweig, supra note 394, at 525, could actually be protected from systematic illegal search was by an exclusionary rule.

401. Comment, supra note 396, at 542. "It is only natural to find that some courts desirous of enforcing prohibition efficiently, should seek to deny, distinguish or limit the" exclusionary rule of Weeks. Thomas E. Atkinson, Prohibition and the Doctrine of the Weeks Case, 23 Mich. L. Rev. 748, 748 (1925). The upshot was that Fourth Amendment jurisprudence emerged from the prohibition era in what has now become its familiar "highly chaotic state." McBain, supra note 17, at 82. As one student commentator complained,

[i]n the generalization in the Boyd case has been found incompatible with prohibition enforcement. In an attempt to adapt it to the new conditions courts have lost sight of its function as a constitutional safeguard... So frequently are courts shaping exceptions to the rule, so rapidly is an unwieldy mass of precedent growing, that an exact definition of the rule no longer is possible. The original federal rule against illegally seized evidence has been broken down; confusion and uncertainty remain.

Comment, supra note 396, at 542.

402. Lerner, supra note 396, at 987.

403. 267 U.S. 132 (1925). Other Fourth Amendment decisions involving prohibition decided by the Taft Court include Dumba v. United States, 268 U.S. 435 (1925), in which the Court in a unanimous opinion by Stone held that the application for a warrant alleging personal experience of an illegal sale of liquor met constitutional standards even though the application failed to disclose that the target of the warrant was legally licensed to produce religious wine. Id. at 437-38, 440-41. In the original draft of his opinion, Stone had written that the circumstances disclosed by the affidavits gave rise to a reasonable suspicion that the liquors possessed on the suspected premises were possessed for the purpose and with the intent of selling them unlawfully to casual purchasers. Absence of a well-grounded suspicion that such was the fact could be ascribed only to a lack of intelligence or a singular lack of practical experience on the part of the officer.

(Stone Papers) (emphasis added). Brandeis wrote to Stone: "Would it not be desirable to avoid mis apprehension that the word 'suspicion' ... be deleted. Its presence will, I fear, lead officials to assume that well grounded suspicion is enough—despite what you say" elsewhere. (Stone Papers). Brandeis suggested that the word "belief" be substituted, which Stone did. In the original draft of his opinion, Stone had also written that the resort to the summary procedure of search and seizure, without disclosing, in the affidavit submitted to the judge issuing the warrant, that a permit had been granted authorizing the possession of wine on the premises was, to say the least, dangerous, and would seem to have been a harsh and unnecessary exercise of governmental power by the officials concerned.
(Stone Papers) (emphasis added). Butler suggested removing the italicized words, and substituting the word "disingenuous" for the word "dangerous," changes which Stone made. Stone had also originally written that

[un]der such circumstances search and seizure are not unauthorized or unconstitutional and under the law, holders of Government permits must rely for protection from the harsh and unreasonable resort to that procedure, on the self restraint and sense of moral responsibility of law enforcement officers rather than on constitutional limitations.

(Stone Papers) (emphasis added). Butler starred the italicized words and suggested their removal: "Does not this tend to assure such officers that their own self restraint is the limit? Can't we avoid that? Disingenuousness in some circumstances might evidence malice, want of probable cause, and the like." Id. Stone obligingly removed the offending language.

In 1927 the Court decided Byars v. United States, 273 U.S. 28 (1927), which featured a unanimous opinion by Sutherland holding that a search warrant based upon mere belief did not meet the standards of probable cause. Id. at 29. Byars also held that the requirements of the Fourth Amendment would apply to a search conducted by state police if a federal official had participated in the search "under color of his federal office and ... the search in substance and effect was a joint operation of the local and federal officers." Id. at 33. This holding later became the basis for the so-called "silver platter" doctrine. Lustig v. United States, 338 U.S. 74, 78-79 (1949) (opinion of Frankfurter, J.); see Elkina v. United States, 364 U.S. 206, 211 (1960). Justice Stone's docket book indicates that at conference Taft, Holmes, and McReynolds had initially voted in Byars to affirm the defendant's conviction.

In 1927 the Court also decided Marron v. United States, 275 U.S. 192 (1927), which nicely illustrates the Taft Court's complex effort both to maintain fidelity to Fourth Amendment standards and to allow ample room for prohibition enforcement. Marron was a unanimous opinion by Butler. On the one hand it held that a warrant authorizing the seizure of liquor could not constitutionally justify the seizure of books and ledgers used in a bootlegger's business: "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Id. at 198; cf. Steele v. United States, 267 U.S. 498 (1925) (upholding ambiguous warrant). But Marron also held, on the other hand, that the books and ledgers could nevertheless constitutionally be introduced into evidence because they had been seized as an incident to a lawful arrest, having been discovered by prohibition agents when entering the defendants' premises and witnessing an ongoing illegal enterprise for the sale of liquor. Marron, 275 U.S. at 199.

The officers were authorized to arrest for crime being committed in their presence .... They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. The closet in which liquor and the ledger were found was used as a part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on [the defendant's] person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose.

Id. at 198-99 (citations omitted). The authority of police to search without warrant incident to a valid arrest was not a new rule invented by the Taft Court. It had been strongly
question of whether prohibition agents could constitutionally conduct a warrantless search of an automobile that they suspected was carrying illegal liquor. 404 The issue of automobile searches involved "one of the most important practical difficulties in the enforcement of prohibition," because

the passage of automobiles in pleasant weather with their tops and curtains closed and of trucks apparently loaded with furniture or other harmless freight is now so common on certain main roads in some parts of the country as to excite little comment, and the procuring of a search warrant to stop such traffic is manifestly impossible. If the officers cannot stop and search vehicles which they strongly suspect of illegal transportation they cannot stop the traffic at all and the law will be made nugatory. 405

reaffirmed in Weeks, which asserted that "the right on the part of the Government ... to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime ... has been uniformly maintained in many cases." Weeks v. United States, 232 U.S. 383, 392 (1914). But Marron interpreted that authority in an extremely generous way that more than compensated for its strict interpretation of the requirements for a formal search warrant.

404. Carroll, 267 U.S. at 134.

405. ARTHUR W. BLAREMORE, NATIONAL PROHIBITION § 25 (2d ed. 1925). The conclusion was a common one. See, e.g., Milam v. United States, 296 F. 629, 631 (4th Cir. 1924) ("In view of the difficulties of enforcing the mandate of the Eighteenth Amendment and the statutes passed in pursuance of it, we cannot shut our eyes to the fact known to everybody that the traffic in intoxicating liquors is carried on chiefly by professional criminals in motor cars. Robberies and other crimes are committed, and criminals escape by their use. To hold that such motor cars must never be stopped or searched without a search warrant would be a long step by the courts in aid of the traffic outlawed by the Constitution.... Objections to such searches made by officers with due courtesy and judgment generally come, not from citizens interested in the observance of the law, but from criminals who invoke the Constitution as a means of concealment of crime."); see also United States v. Bateman, 278 F. 231, 234 (S.D. Cal. 1922) ("There is now and has been ever since this amendment went into effect almost a continuous stream of automobiles from at or near the Mexican border to Los Angeles and other parts of the country. If these automobiles could not be stopped and searched without a search warrant, the country, of course, would be flooded with intoxicating liquors, unlawfully imported."); People v. Case, 190 N.W. 289, 292 (Mich. 1922) ("The automobile is a swift and powerful vehicle of recent development, which has multiplied by quantity production and taken possession of our highways in battalions, until the slower, animal-drawn vehicles, with their easily noted individuality, are rare. Constructed as covered vehicles to standard form in immense quantities, and with a capacity for speed rivaling express trains, they furnish for successful commission of crime a disguising means of silent approach and swift escape unknown in the history of the world before their advent. The question of their police control and reasonable search on highways or other public places is a serious question.... The baffling
The Court's opinion in *Carroll* was authored by Taft; McReynolds wrote a dissenting opinion joined by Sutherland.\(^{496}\)

extent to which they are successfully utilized to facilitate commission of crime of all degrees, from those against morality, chastity, and decency to robbery, rape, burglary, and murder, is a matter of common knowledge. Upon that problem a condition and not a theory confronts proper administration of our criminal laws.

406. *Carroll*, 267 U.S. at 143, 163. *Carroll* was originally argued on December 4, 1923. *Id.* at 132. It was reargued on March 14, 1924, and not decided until March 2, 1925. *Id.* We know that the Court had first voted to affirm the judgment below admitting the evidence seized without a warrant. Taft had assigned the opinion to McReynolds, who "in the course of writing the opinion ... changed his mind and concluded that the judgment should be reversed." C. Dickerman Williams, *The 1924 Term: Recollections of Chief Justice Taft's Law Clerk, in YEARBOOK 1988*, at 47 (Supreme Court Historical Soc'y ed., 1988). McReynolds's change of mind evidently caused the case to be reargued. Butler's docket book for the 1923 Term shows a vote taken in the *Carroll* case, most likely for the conference of March 29, 1924, after reargument, in which McReynolds, Sutherland, Butler, and Sanford voted for reversal, against the votes of Taft, McKenna, Holmes, Van Devanter, and Brandeis to affirm. Butler's docket book contains some tantalizing clues about the discussion at conference: "O.W.H. Different principles. W.H.T. suggests auto-mobile differs from house." "Common law right of peace officer to arrest. [Park v. United States, 294 F. 776 (1st Cir. 1924)][]. What are reasonable grounds for belief of present commission. Must have ascertained facts. 'In presence of immediate knowledge.' O.W.H. 'Probable cause to surmise.'" There is an ambiguous reference to Brandeis:

L.D.B. Court could find business
Stopping & Arrest misdemeanor on suspicion.

Whether the second line refers to Brandeis's comments is not clear.

It is probable that after this conference Taft reassigned the opinion to himself. Almost a year later he wrote to his brother:

I have had ready for delivery an important opinion in respect to the right of Gov't officers to seize automobiles which they have reasonable ground for thinking contain unlawful liquor. We have had the case for two years. I gave the case to McReynolds. He brought it back saying he could not write for the validity of the seizure. On a vote we lost once but McKenna came over so that I was able to assign it to myself. I have been working on the thing since October. I brought in an opinion the last of the year. I succeeded in winning over all but McR and Sutherland. McR has written a dissent and a strong one. I don't know whether Sutherland will go with him or not. Van Devanter thinks not. At any rate we carry the day and I am rejoiced because I think it important to establish the correct principle in respect to the search of this instrument of evil the automobile.

Letter from WHT to Horace D. Taft (Mar. 1, 1925), *microformed on TAFT PAPERS, supra* note 9, Reel 272; see Letter from WHT to Robert A. Taft (Mar. 8, 1925), *microformed on TAFT PAPERS, supra* note 9, Reel 272 ("I am especially interested in the opinion with reference to seizure of liquor in automobiles. I was once outvoted in the Conference, but by dint of argument and opinion writing I got all votes but two.").

The date of McKenna's switch is of some importance, because his mental deterioration by the 1924 Term was such that on November 9, 1924, eight Justices of the Court voted formally not to "decide any case in which there were four on one side and four on the other, with Mr. Justice McKenna's casting the deciding vote." Memorandum from WHT, Nov. 10, 1924,
microformed on TAFT PAPERS, supra note 9, Reel 639, reprinted in WALTER MURPHY & C. HERMAN PRITCHETT, COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 199-201 (3d ed. 1979). The published opinion of Carroll states, most unusually, "Mr. Justice McKenna, before his retirement, concurred in this opinion." 267 U.S. at 163. Six weeks after November 9, however, Taft was still apparently unsure of his majority. On December 22, 1924, Taft wrote his son Robert,

I have got a case in which the Court is not agreed, and I am very doubtful of my majority after I get the opinion written. I am not at all sure that I can hold it, a result that entitles one to no credit so far as the known work of the Court is concerned.

Letter from WHT to Robert A. Taft (Dec. 22, 1924), microformed on TAFT PAPERS, supra note 9, Reel 270; see also Letter from WHT to Charles P. Taft, 2nd (Dec. 22, 1924), microformed on TAFT PAPERS, supra note 9, Reel 270 ("[I am] preparing myself to write an opinion in a case in which I may not succeed in winning the majority after I have got it written, although we have a vote of that kind. It is a most important case, and I am greatly interested, but I don't know that I shall succeed. It is a good deal easier to write an opinion when the Court is all with you than where the distinctions are narrow, the record is badly made and some rather new principle is to be established against a vigorous opposition."). In December 1924 Taft was corresponding with Van Devanter about Carroll. On December 22, 1924, Van Devanter sent Taft a dictated memorandum on how the opinion could be drafted, together with "some suggestions of things to avoid." Letter from WVD to WHT (Dec. 22, 1924), microformed on TAFT PAPERS, supra note 9, Reel 270. Van Devanter wrote:

I... am still of opinion that our vote was right.... I really think Beck's substituted brief a good one.... That it has not had a better effect is to be regretted.... I am at a loss to understand why its better parts have not carried conviction to others. The more I think of the case the more I think the view we entertain is right and that the other view would be productive of harmful results in many ways.

Id. Taft replied that he had already "blocked out an opinion" which "noted the very distinction, which you emphasize, between the searching of houses and the searching of ships." Letter from WHT to WVD (Dec. 23, 1924), microformed on TAFT PAPERS, supra note 9, Reel 270. Apparently Taft learned from Van Devanter's memorandum, which does not now survive, about the Acts of May 1822 and June 1834, dealing with searches and seizures of liquor in Indian territory. See Carroll, 267 U.S. at 152-53. Van Devanter was an expert in Indian law.

Most importantly, Taft's letter to Van Devanter suggested something of Taft's strategy to convince Butler to join the majority opinion: "I note what you say about brother Butler," Taft wrote Van Devanter, "and I shall try to steer away from the suggestion that we are introducing any new law and new principle of constitutional construction, but are only adapting old principles and applying them to new conditions created by the change in the National policy which the 18th Amendment represents." Letter from WHT to WVD, supra. In a letter to his son Charles the day before, by contrast, Taft had himself referred to his Carroll opinion as having to establish "some rather new principle." Letter from WHT to Charles P. Taft, 2nd (Dec. 22, 1924), microformed on TAFT PAPERS, supra note 9, Reel 270; see infra note 409.

It is possible that the wavering fifth vote in Carroll in December 1924 was not McKenna, but Brandeis, for on December 26, 1924, Taft wrote to his brother Horace:

I have been working for nearly ten days on an opinion of much importance, upon which the Court is divided, and with which I have had a good deal of trouble. I sent the opinion to the printer to-day, and hope to get back the first copy this evening. I would like to get a majority of the Court because of the importance of
The case presented a new and exceedingly difficult problem that was "most important,"\textsuperscript{407} because there was a pressing need to control criminal deployment of that "instrument of evil the automobile."\textsuperscript{408} In its supplemental brief the federal government

the principle, but I don't know that I shall. Brandeis was with me strongly before the summer vacation, but he went up to Cambridge and must have communed with Frankfurter [sic] and that crowd, and he came back with a notice to me that he was going to change his vote. Brandeis tries as hard as he can to be a good fellow, and in many respects he is, but when he gets into the field of politics and political economics, his judgment is all awry and his methods are not above criticism.

Letter from WHT to Horace D. Taft (Dec. 26, 1924), \textit{microformed on Taft Papers, supra} note 9, Reel 270. We do not know the grounds of Brandeis's dissatisfaction, but see Letter from LDB to WHT (Jan. 15, 1925), \textit{microformed on Taft Papers, supra} note 9, Reel 270. It does appear, however, that at least by December 28 Taft no longer regarded the vote in \textit{Carroll} as five-to-four. At that time he wrote his son Charles:

I have finished one opinion. It took me a full two weeks to prepare and write it. It is on a very important phase of the National Prohibition Act. Our Court is going to be divided, but I am quite hopeful that I may command six of the Court. It is a case that came over from last year and has given me a great deal of trouble, so that I feel somewhat relieved for getting as far as I have with it, although I shall probably encounter considerable discussion tomorrow when we hold our Conference. It would seem as if more feeling could be engendered over the Prohibition Act than almost any other subject that we have in the Court, unless it be the technical questions of jurisdiction, the excited feelings over which among the members of the Court amaze me.

Letter from WHT to Charles P. Taft, 2nd (Dec. 28, 1924), \textit{microformed on Taft Papers, supra} note 9, Reel 270.

\textsuperscript{407} Letter from WHT to Charles P. Taft, 2nd (Dec. 22, 1924), \textit{microformed on Taft Papers, supra} note 9, Reel 270.

\textsuperscript{408} Letter from WHT to Horace D. Taft (Mar. 1, 1925), \textit{microformed on Taft Papers, supra} note 9, Reel 272. As early as 1923 Taft was convinced that "the automobile is the greatest instrument for promoting immunity of crimes of violence that I know of in the history of civilization." Letter from WHT to Francis Peabody (July 12, 1923), \textit{microformed on Taft Papers, supra} note 9, Reel 255. Four months later Taft repeated the observation:

The statistics of crime are I agree most disheartening, and yet a large percentage of the increase, so far as crimes of larceny and robbery are concerned, is due to the automobile. That is the greatest instrument to promote immunity from punishment for crime that we have had introduced in many, many years, and we haven't as yet neutralized its effect. Whether we can do so or not is a question for men engaged in the detection of crime. When we see how much crime there is, and with what immunity criminals commit murder in order to further their crimes of robbery, it makes one gag with indignation to think of the milk and water people who with their philanthropies are engaged in trying to make our penitentiaries sweet homes for the luxurious betterment of murderers and robbers.

Letter from WHT to Horace D. Taft (Nov. 16, 1923), \textit{microformed on Taft Papers, supra} note 9, Reel 258. In 1927 Taft gave an authorized interview in which he remarked that
had argued that “the invention, the rapid development, and the
general use of automobiles” had so disturbed the “proper balance
between the necessities of public authority, on the one hand, and the
demands of personal liberty, on the other,” that the Court had to act
in order to end “the unprecedented ‘crime wave.’”409
The fundamental difficulty was that received constitutional
document did not seem adequate to cope with the challenge of the
automobile. The transportation of stolen liquor in cars could not be
intercepted if searches required warrants, because cars would
disappear by the time any warrant could be obtained. It was
generally assumed that warrantless searches were constitutional
only if they were incident to a legitimate arrest.410 The legitimacy of
an arrest was determined by reference to common law, which was
understood to allow a police officer to arrest a suspect without
warrant only if there was probable cause that the suspect had
committed a felony, or if the suspect had, in the presence of the
officer, committed a misdemeanor amounting to a breach of the
peace.411

409. Substituted Brief for the United States on Reargument, at 20-21, Carroll v. United
States, 267 U.S. 132 (1925). The brief was submitted by Solicitor General James M. Beck. The
government frankly conceded “the novelty of the question” presented by Carroll. Id. at 21. For
Beck’s view on the crime wave, see supra note 356 and accompanying text.

410. Cornelius, supra note 394, § 35; Jacob W. Landynski, Search and Seizure and the
Supreme Court: A Study in Constitutional Interpretation 87 (1966); H.C. Underhill,
A Treatise on the Law of Criminal Evidence § 746 (3d ed. 1923) (“The right to seize
intoxicating liquor without a warrant is coextensive with the right to arrest without a
warrant.”); Hugh E. Willis, Unreasonable Searches and Seizures, 4 Ind. L.J. 311, 313-15
(1929). For arguments challenging this assumption, see Akhil Reed Amar, The Bill of
Rights: Creation and Reconstruction 64-77 (1998); Telford Taylor, Two Studies in
Constitutional Interpretation: Search, Seizure and Surveillance and Fair Trial and

411. Carroll, 267 U.S. at 155-56; see Snyder v. United States, 285 F. 1 (4th Cir. 1922);
William E. Mikell, Handbook of Criminal Procedure 8 (2d ed. 1918); 1 Francis
Wharton, A Treatise on Criminal Procedure 69-77 (10th ed. 1918); 1 Elijah N. Zoline,
The Volstead Act made transportation of illegal liquor a misdemeanor, unless the accused had been guilty of two previous violations of the Act, in which case he was guilty of a felony.\footnote{412} Because the concealed transportation of liquor in a car was neither a “breach of the peace” committed “in the presence” of an officer, nor was it in most cases a felony, it did not seem possible to justify the search of a car as incident to a lawful arrest, even if there was probable cause to believe that the car contained unlawful liquor. Yet “the impossibility of enforcing the Eighteenth Amendment”\footnote{413} was the obvious consequence of failing to find some constitutional way to allow effective searches of automobiles.\footnote{414} Lower courts splintered badly on how to handle this problem.\footnote{415}

412. Carroll, 267 U.S. at 154. The Volstead Act provided that offenders were to be punished by a fine of not more than $500 for the first offense, by a fine of not more than $1000 or by not more than 90 days' imprisonment for the second offense, and “by a fine of $500 or more and by not more than 2 years' imprisonment for the third offense.” Id. Thus an offender “is to be arrested for a misdemeanor for his first and second offenses and for a felony if he offends a third time.” Id. In 1929, in an effort to ratchet up prohibition enforcement, these penalties were changed by the Jones Act, which provided that the penalty for a first violation of the National Prohibition Act

shall be a fine not to exceed $10,000 or imprisonment not to exceed five years, or both: Provided, That it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law.

Jones Act, ch. 473, § 1, 45 Stat. 1446 (1929).


414. "If the Eighteenth Amendment is to be enforced at all, the courts should be permitted to consider the practical necessities of the particular situations.” Note, Search and Seizure: Constitutional Prohibition Applied to Transportation of Contraband Liquor in Automobile, 12 Va. L. Rev. 123, 128-33 (1926).

415. Blakemore, supra note 405, at 476; Note, Search of Automobile Without Warrant—When Reasonable, 23 Mich. L. Rev. 891, 894-97 (1925). Some courts held that old understandings of the Fourth Amendment would have to bend because courts were “under the duty of deciding what is an unreasonable search of motor cars, in the light of the mandate of the Constitution that intoxicating liquors shall not be manufactured, sold, or transported for beverage purposes.” Milam v. United States, 296 F. 629, 631 (4th Cir. 1924); see United States v. Bateyman, 278 F. 231 (S.D. Cal. 1922). Others held that it was “a breach of the peace to transport intoxicating liquors.” Hughes v. State, 238 S.W. 588, 596 (Tenn. 1922). Other courts effaced the common law distinction between felonies and misdemeanors. See, e.g., United States v. Vatue, 292 F. 497, 499 (N.D. Cal. 1923) ("In these days of widespread violation of the law, due to large temptation, big profits, and unrestrained appetites, together with the facile employment of the automobile in aid of successful consummation thereof, an officer ought not to be censured nor society penalized by a meticulous refusal to support a prosecution, if the officer, even in the absence of a warrant, and even with respect to a mere
Taft constructed a solution that turned fundamentally on recognizing the authority of positive statutory law to modify traditional common law understandings. Taft began with the premise that "the main purpose" of the Volstead Act was "to reach and destroy the forbidden liquor in transportation";416 "provisions for forfeiture of the vehicle and the arrest of the transporter were incidental."417 It did not matter whether the transporter was guilty of a misdemeanor (for his first two offenses), or of a felony (for his third offense), because the object of federal intervention was "to forfeit and suppress the liquor, the arrest of the individual being only incidental."418 The validity of the seizure, therefore, depended

misdemeanor, acting upon the appearances, determines that the law may be maintained only by the "immediate apprehension" of the offender, providing, always, of course, that the officer acts in good faith and upon reasonable grounds of suspicion." (citation omitted)); see also Lambert v. United States, 282 F. 413, 417 (9th Cir. 1922). Other courts expanded the concept of "in the presence of," so that police officers could search automobiles if they had (in effect) probable cause to believe that illegal liquor was being transported. See Park v. United States, 294 F. 776, 783 (1st Cir. 1924); Hilsinger, 284 F. at 888-89 ("The federal courts seem generally to have recognized the right to apprehend, search, and seize an automobile truck in transit with contraband liquor, when the officers have reasonable and probable cause ...."). Still other courts held that because liquor was contraband, which was forfeit and in which there was no right of private property, a defendant had "no right to return of the property, nor to object to its use in evidence." United States v. Fenton, 268 F. 221, 222 (D. Mont. 1920); see also Boyd v. United States, 286 F. 930 (4th Cir. 1923). This last rationale provoked particular outrage, for it seemed to imply that no remedy would lie whenever a search, however illegal, turned up contraband:

[[It is not and cannot be the law in criminal cases that an illegal arrest or search could be legalized by the finding of evidence that a crime had been committed, for a search or arrest illegal to begin with remains illegal, and no injury should be allowed to flow to the defendant by reason of his submission to it.

United States v. Rembert, 284 F. 996, 1003-04 (S.D. Tex. 1922). The holding in Fenton was described as a fine example of precisely what the law is not .... Forfeiture proceedings are necessary to determine the disposition of things seized as contraband. For a seizure for forfeiture is not in itself a complete proceeding. It must be followed by judicial proceedings, wherein the government must prove its title to forfeiture.

Moreover, the legality of the arrest of search must be determined by the facts as they were known to the officer at the moment the arrest was made or the search instituted, and can never be justified by what has been found. A search that is unlawful when it begins is not made lawful when it ends by the discovery and seizure of liquor.


417. Id. at 155.
418. Id. at 157.
upon constitutional limits on congressional authorizations of "seizure and forfeiture" of illegal liquor. Taft rejected the theory, advanced by the defendants, that the "validity of the seizure" depended "wholly on the validity of the arrest without a seizure," holding instead that "[t]he right to search and the validity of the seizure" depended upon "[t]he rule for determining what may be required before a seizure may be made by a competent seizing official." To determine the nature of that rule, Taft turned to a string of federal statutes beginning in the first Congress in 1789 that authorized searches of ships and other vehicles for contraband goods. Taft argued that these statutes implied that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Recognizing that it "would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using

419. Id. at 158.
420. Id.
421. Id.
422. Id. at 155. That rule, said Taft, was "not to be determined by the character of the penalty to which the transporter may be subjected," id., nor was it to be determined by the common law "right to arrest." Id. at 158. "The character of the offense for which, after the contraband liquor is found and seized, the driver can be prosecuted does not affect the validity of the seizure." Id. at 159.
423. Taft's use of the earliest of these statutes has been criticized as seriously misconstruing the history of the Fourth Amendment. See generally LANDYNISKI, supra note 410, at 90; Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 MICH. L. REV. 547 (1999).
the highways to the inconvenience and indignity of such a search." Taft read the Volstead Act to authorize only seizures in which "the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported." Sliding easily from the statute to the Constitution, Taft moved to the conclusion that under the Fourth Amendment the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.

Taft self-consciously reached this interpretation of the Fourth Amendment "in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." Taft's heroic effort to reinterpret Fourth Amendment doctrine in light of the pragmatic needs of law enforcement, balanced against the interests of citizens to be free from

425. Id. at 153-54. "Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." Id. at 154.

426. Id. at 156. Taft reached this conclusion by noting that the Volstead Act referred to Section 970 of the revised statutes, which immunized seizing officers from damage suits if "there was reasonable cause of seizure." Id. at 155. Taft assimilated the statutory standard of "reasonable cause" to the common law standard of "probable cause," which determined the legality of "arrests without warrant for past felonies, and in malicious prosecution and false imprisonment cases." Id. at 161.

427. Id. at 149. Taft's careful statement of the rule seemed to imply that the constitutional legitimacy of warrantless searches and seizures required a "law" that made goods "subject to seizure and destruction." Id.

428. Id. One commentator deemed the outcome "a very practical desirable result [that] gives vitality to the eighteenth amendment and its enforcement while still staying within and complying with the spirit and requirements of the fourth amendment." Note, supra note 415, at 898. "The decision and reasoning in the Carroll case represent a sensible interpretation of the Fourth Amendment, and should enable federal prohibition officers to do their duty without undue risk and hindrance." James Parker Hall, Comment, Constitutional Law—Search and Seizure—Contraband Liquor in Automobile, 20 Ill. L. Rev. 162, 165 (1925).

429. Carroll has been termed "the leading Lochner era example" of "pragmatist reasoning." Cloud, supra note 395, at 602.
arbitrary interference, essentially set the framework for modern search and seizure jurisprudence.\footnote{\citenum{430}}

In order to sustain his resolution of the case, Taft was forced to offer a very strained reading of the Volstead Act. Unlike the historical statutes upon which Taft based his discussion, which explicitly authorized officials to search for contraband if they had reasonable cause,\footnote{\citenum{431}} the Volstead Act provided merely that

\begin{quotation}
[when the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law.\footnote{\citenum{432}}
\end{quotation}

Taft was thus put in the awkward position of reading the term "shall discover" to mean "shall have probable cause to believe."\footnote{\citenum{433}}

This was precisely the point at which McReynolds, joined by Sutherland, aimed his forceful dissent.\footnote{\citenum{434}} Objecting strenuously that "[c]riminal statutes must be strictly construed and applied, in harmony with rules of the common law,"\footnote{\citenum{435}} McReynolds argued that

\begin{quotation}
Certain it is that the Carroll Case presented the court with a balance of interests of unusual importance. On the one hand, to hold that the Fourth Amendment inhibited the search of an automobile without a search warrant, unless circumstances warranting a common-law arrest existed, would have seriously crippled the enforcement of the Eighteenth Amendment; while on the other hand, the old conservative opinions of the court had to be gotten rid of, and a burden of unknown weight be put upon the individual for the benefit of a newly appended amendment.
\end{quotation}

\begin{quotation}
\ \begin{itemize}
\item [-] Bullington, supra note 396, at 469.
\item \citenum{430} Davies, supra note 423, at 733-34.
\item \citenum{431} Carroll, 267 U.S. at 150-53.
\item \citenum{432} Id. at 144.
\item \citenum{433} See, e.g., id. at 158.
\item \citenum{434} At the announcement of the case, McReynolds delivered himself without reference to his written opinion in such a way that Holmes remarked (as Holmes told me) to our new member Stone that there were some people who could be most unmannerly in their dissenting opinions, but as I had seven-two, I was not particularly affected by McReynolds' appeal to the galleries.
\item Letter from WHT to Robert A. Taft (Mar. 8, 1925), microformed on TAFT PAPERS, supra note 9, Reel 272.
\item \citenum{435} Carroll, 267 U.S. at 164 (McReynolds, J., dissenting).
\end{itemize}
\end{quotation}
"[t]he Volstead Act contains no provision which annuls the accepted common law rule or discloses definite intent to authorize arrests without warrant for misdemeanors not committed in the officer's presence."\(^{436}\) "Certainly, in a criminal statute, always to be strictly construed, the words 'shall discover ... in the act of transporting in violation of the law,'" McReynolds contended, "cannot mean, shall have reasonable cause to suspect or believe that such transportation is being carried on. To discover and to suspect are wholly different things."\(^{437}\) The Court ought to be extraordinarily cautious, McReynolds urged, before inferring that "Congress intended to remove ancient restrictions" that circumscribed the discretion of police to arrest for misdemeanors.\(^{438}\)

In the absence of congressional authorization, the defendants' arrest was undoubtedly illegal under common law principles, and because "the seizure followed an unlawful arrest, and therefore became itself unlawful,"\(^{439}\) McReynolds concluded that the evidence

\(^{436}\) Id. at 165-66.

\(^{437}\) Id. at 166.

Since the beginning apt words have been used when Congress intended that arrests for misdemeanors or seizures might be made upon suspicion. It has studiously refrained from making a felony of the offense here charged; and it did not undertake by any apt words to enlarge the power to arrest. It was not ignorant of the established rule on the subject, and well understood how this could be abrogated ....

\(^{438}\) Id. at 168.

\(^{439}\) Id. This point also struck at a vulnerability in Taft's opinion. Taft argued that the Volstead Act itself contemplated that "[t]he seizure ... comes before the arrest." Id. at 159 (majority opinion). But this was an obvious non-sequitur. It did not follow that because Congress authorized a seizure without warrant that it either could or did also authorize an arrest without warrant. Taft's argument, if accepted, established only that the Volstead Act rendered constitutional seizures justified by probable cause in the absence of a warrant. This conclusion would certainly justify seizure of liquor without warrant in circumstances where there was no need to arrest, as for example, from an unoccupied car. In Carroll, by contrast, prohibition agents could not search the defendants' vehicle until they had first stopped a moving car and placed the drivers "into custody under and by virtue of the authority of the law," JOHN G. HAWLEY, THE LAW OF ARREST ON CRIMINAL CHARGES 13 (3d ed. 1919), which is to say that they could not seize until they had, in the understanding of the time, first arrested a vehicle's driver. See Henry v. United States, 361 U.S. 98, 103 (1959) (stopping of car deemed an "arrest"); Brinegar v. United States, 338 U.S. 160 (1949) (stopping of car deemed an "arrest"); Forrest R. Black, A Critique of the Carroll Case, 29 COLUM. L. REV. 1068, 1077-78 (1929); Note, Constitutional Law—Search and Seizure—Search of Automobile for Intoxicating Liquor, 4 NEB. L. BULL. 171, 172-73 (1925); Note, Scope of the Government's Privilege of Search and Seizure Without a Warrant, 27 COLUM. L. REV. 300, 306 n.38 (1927);
ought to be suppressed. "If an officer, upon mere suspicion of a misdemeanor, may stop one on the public highway, take articles away from him and thereafter use them as evidence to convict him of crime," McReynolds asked, "what becomes of the Fourth and Fifth Amendments?"440

cf. Robert Meisenholder, Note, Arrest—Stopping and Questioning as an Arrest—Reasonable Suspicion from Facts Disclosed by Questioning as Justification, 37 Mich. L. Rev. 311, 311-13 (1938). That is why McReynolds forcefully argued that the defendants "were first brought within the officers' power, and, while therein, the seizure took place." Carroll, 276 U.S. at 169 (McReynolds, J., dissenting). In the face of McReynold's challenge, Taft's bland assertion that the arrest came "after" the seizure simply assumes what needed to be demonstrated.

Taft might have argued that the search and seizure were valid, because legislatively authorized, even if the arrest of the defendants' was illegal. An "illegal arrest" was not thought to have any "effect on the evidence or upon the jurisdiction of the court in a criminal case." Thomas E. Atkinson, What Is an Unreasonable Search?, 24 Mich. L. Rev. 277, 280 (1926). In such circumstances, however, the defendants "would have at least a technical right to recover damages for the illegal arrest, even though the subsequent search be held valid." Id. at 279. Atkinson was the attorney of record for the defendants in the Carroll case. Carroll, 267 U.S. at 136.

Taft might alternatively have argued that stopping a moving vehicle was not equivalent to arresting its occupants. But he did not make this argument, and I can find no contemporary author who adopted that view. See, e.g., Terry v. Ohio, 392 U.S. 1, 16 (1968) ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."). Taft might also have argued that a statutory authorization to seize without warrant was also a statutory authorization to arrest without warrant. Brandeis came close to advancing this logic in United States v. Lee, 274 U.S. 559 (1927), which involved the authority of the Coast Guard to seize and search vessels suspected of violating revenue laws. Brandeis argued that

[o]fficers of the Coast Guard are authorized, by virtue of Revised Statutes, § 3072, to seize on the high seas ... an American vessel subject to forfeiture for violation of any law respecting revenue. From that power it is fairly to be inferred that they are likewise authorized to board and search such vessels when there is probable cause to believe them subject to seizure for violation of revenue laws, and to arrest persons thereon engaged in such violation.

Id. at 562 (citation omitted). If the Coast Guard had probable cause to suspect illegal liquor, Brandeis wrote, "search and seizure of the vessel, and arrest of the persons thereon ... is lawful, as like search and seizure of an automobile, and arrest of the persons therein, by prohibition officers on land is lawful. Compare Carroll v. United States, 267 U.S. 132, 149."
Id. at 563. Brandeis does not quite claim that arrest of persons before the discovery of the contraband is lawful, but he comes very close, and his argument appears to contemplate what would be warrantless arrests on the basis of probable cause. There is a memorandum to Brandeis from his clerk stating that the opinion in Lee could be written to argue that "without a search, there was plainly enough to excite suspicion. The cases show that is sufficient to justify an arrest, and a search following an arrest, of a boat within the U.S., or of an auto." Memorandum from R.G.P. to LDB (Apr. 3, 1927), microformed on BRANDEIS PAPERS, supra note 119, Reel 35. In Carroll, however, Taft made no such argument. He simply blurred the relationship between the search and the arrest.

440. Carroll, 267 U.S. at 169 (McReynolds, J., dissenting). Note that in this rhetorical
The disagreement between Taft and the dissent turned most fundamentally on the generosity with which the Court was willing to interpret legislative revisions of the common law, which McReynolds associated with “ancient” customs believed to mark significant constitutional values. Using an early version of an explicit statement rule, McReynolds plainly understood that his judicial obligation was to conserve these values to the extent possible from the predations of merely positive legislation. Taft,
by contrast, was willing to give prohibition the benefit of every doubt, so as to uphold the forces of law enforcement that were, in his eyes, struggling so valiantly to maintain the legitimacy of the legal order.

To sustain the convictions in *Carroll*, Taft was required to find that the arresting prohibition officers had had probable cause to stop defendants' automobile. Essentially the only evidence of probable cause was that the defendants had offered to sell illegal liquor to the officers, and that three months later these same officers saw the defendants, driving in the same car in which they had offered to sell liquor, traveling from Detroit to Grand Rapids. The officers knew that Detroit was "one of the most active centers for introducing illegally into this countryspirituous liquors for distribution into the interior."\(^{443}\) From this, Taft concluded: "That the officers when they saw the defendants believed that they were carrying liquor we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so."\(^{444}\)

This was, to say the least, a "very loose definition of 'probable cause."\(^{445}\) In dissent McReynolds could only sputter: "Has it come about that merely because a man once agreed to deliver whisky, but did not, he may be arrested whenever thereafter he ventures to drive an automobile on the road to Detroit?"\(^{446}\) To which the answer, according to the political scientist Robert Cushman, was "that it certainly has, and ... most of us are not sensitive enough to feel that such a result violates the requirements either of justice or of common sense."\(^{447}\)

*Carroll* seemed to imply "that a common reputation in the community of being a 'bootlegger' would justify prohibition agents
dwellings and buildings from unreasonable searches." Sterling C. Holloway, Note, *Search and Seizure—The Carroll Case Viewed in the Light of Later Decisions*, 4 Tex. L. Rev. 241, 241 (1926); see Note, *The Exclusion of Evidence Illegally Obtained*, 2 St. John's L. Rev. 196, 201 (1928) ("[Carroll], it is believed, represents the widest departure from the *Weeks* case thus far attempted. Whatever doubts may have been raised by the *Carroll* case were shortly dispelled by Agnello v. United States.").

\(^{443}\) *Carroll*, 267 U.S. at 160.

\(^{444}\) *Id.*

\(^{445}\) Regnier, *supra* note 396, at 645; see Lerner, *supra* note 396, at 987.

\(^{446}\) *Carroll*, 267 U.S. at 174 (McReynolds, J., dissenting).

\(^{447}\) Robert E. Cushman, *Constitutional Law in 1924-1925*, 20 Am. Pol. Sci. Rev. 80, 89 (1926) ("[I]t is submitted that the court's decision is a sensible one if the prohibition law is to be enforced, and does not involve any essential injustice.").
in stopping and searching automobiles driven by persons thus suspected by their neighbors.\footnote{448} It appeared to award "discretionary carte blanche" to prohibition officers to stop and search automobiles,\footnote{449} and it was therefore attacked in the press as placing the highways

in the power of reckless prohibition agents.

A moral bad effect will be to encourage the attitude of mental lawlessness already spreading through the country like a plague.

The further we go with the eighteenth amendment and the Volstead act, the deeper we get into the jungle of danger and lawlessness.\footnote{450}

It is difficult to say, because the historical record is sparse, why liberal justices like Holmes and Brandeis joined Taft's opinion, but the most plausible account is that offered by Zechariah Chafee. Chafee believed that Holmes and Brandeis "probably thought that the wise course for the Court was not to hamper prohibition but to give it almost every chance for effective operation which the government officials wished. Then if the Eighteenth Amendment failed, it would fail because of its inherent defects and not because

\footnote{448} HALL, supra note 428, at 165.

Does the Court fail to distinguish between believing upon a basis of specific facts and merely suspecting upon a basis of general facts? The Volstead Act as differentiated from the ordinary revenue act does not permit seizure or arrest on suspicion. The officers knew not a single specific fact upon which they could base actual belief. It was mere suspicion.... Does [Carroll] mean that the officers had a general license to stop the defendants every time they were on the road? Such a general license would be more atrocious than the use of the general or blanket warrant against which James Otis made his impassioned protest.

\footnote{449} BLACK, supra note 439, at 1088.

\footnote{449} Comment, Search and Seizure: Constitutional Prohibition Applied to Transportation of Contraband Liquor in Automobiles, 13 CAL. L. REV. 351, 352 (1925).

As a practical matter, it is very probable that the power given by this rule to the police may be abused and every automobile stopped, under the theory that the end justifies the means employed. It is obvious that one law should not be broken in order to help enforce another. The probable cause may be "meagre."

\footnote{450} Note, Search and Seizure Without a Warrant, 73 U. PA. L. REV. 413, 418 (1925) (footnotes omitted).

\footnote{450} Press Comment: The More Volstead, the Less Law, WASH. POST, Mar. 9, 1925, at 6 (quoting from the Baltimore Sun).
of judicial hamstringing." Chafee’s speculation is consistent with the commitment of pre-New Deal liberalism to accord enlarged scope to legislative innovation and experimentation.

VII

The great exception to Chafee’s hypothesis is Olmstead v. United States.452 “[t]he last major Supreme Court decision concerning

451. Chafee, supra note 294, at 949. The breathtaking intensity of Brandeis’s commitment to upholding prohibition and federal enforcement authority can perhaps best be seen in United States v. Katz, 271 U.S. 354 (1926), in which the Court was called upon to decide whether section 10 of the Volstead Act, which required persons who manufactured and sold liquor to keep detailed and readily available records, applied only to those authorized by the Volstead Act legally to manufacture and sell liquor (for religious and other purposes); or whether it applied instead to all persons, so that bootleggers who failed to document their sales committed the independent crime of violating section 10 by failing to keep records of their illegal transactions. The latter interpretation would be most far-reaching and unusual. At the oral argument of the case,

Justice Holmes observed that it seemed the prohibition act was designed to permit the use of every weapon by the prosecution, even to the extent of poison and entrapment, in enforcing the law, and also remarked that defense counsel was attributing to the law a sportsman-like character which it did not possess.

Plea To Punish Liquor Buyers Heard by Court, WASH. POST, Mar. 12, 1926, at 4. In the end, in an opinion authored by Stone, the Court interpreted section 10 to apply only to those authorized by the Volstead Act to manufacture and sell liquor:

General terms descriptive of a class of persons made subject to a criminal statute may and should be limited where the literal application of the statute would lead to extreme or absurd results, and where the legislative purpose gathered from the whole Act would be satisfied by a more limited interpretation.

Katz, 271 U.S. at 362. Brandeis alone dissented from this ruling. Id. at 364.

Brandeis would later rely on Carroll for the (very) broad proposition that

[t]here is no limitation upon the right of the sovereign to seize without a warrant vessels registered under its laws, similar to that imposed by the common law and the Constitution upon the arrest of persons and upon the seizure of “papers and effects.” See Carroll v. United States, 267 U.S. 132, 151-53.

Maul v. United States, 274 U.S. 501, 524-25 (1927) (Brandeis, J., concurring). Brandeis had originally been assigned the opinion in Maul, but the Court rejected his far-reaching justification for upholding the Coast Guard’s seizure of a liquor-laden vessel on the high seas. The Court preferred to accept Van Devanter’s rationale that the seizure had been authorized by statute. See Letter from HFS to WVD (May 13, 1927) (Van Devanter Papers); Letter from WHT to LDB (Apr. 5, 1927), microformed on TAFT PAPERS, supra note 9, Reel 290; Letter from WHT to the Justices of the Court (Apr. 22, 1927), microformed on TAFT PAPERS, supra note 9, Reel 291; Letter from WVD to WHT (May-June 1927), microformed on TAFT PAPERS, supra note 9, Reel 292; Letter from WHT to WVD (May 3, 1927), microformed on TAFT PAPERS, supra note 9, Reel 291. The original draft of Brandeis’s opinion may be found in his papers.

452. 277 U.S. 438 (1928).
prohibition enforcement" and "in many ways the most controversial and significant."\textsuperscript{453} \textit{Olmstead} held in 1928 that wiretapping did not constitute a search or seizure under the Fourth Amendment, and that the exclusionary rule would not apply to evidence illegally obtained, as distinct from unconstitutionally obtained.\textsuperscript{454} "Led by Chief Justice Taft ... whose crusade for stricter enforcement of prohibition reached its zenith in this case,"\textsuperscript{455} the Court in \textit{Olmstead} split violently five-to-four, with Taft writing a majority opinion joined by Van Devanter, McReynolds, Sutherland, and Sanford.\textsuperscript{456} Holmes, Brandeis, Butler, and Stone each dissented separately.\textsuperscript{457}

Why would McReynolds and Sutherland, who detested prohibition, join Taft in this controversial decision, and why would Holmes and Brandeis, who had all along supported vigorous prohibition enforcement, dissent? The puzzle deepens because both Holmes and Brandeis had, earlier in the decade, authored opinions that would seem to sustain Taft's position. In \textit{Hester v. United States},\textsuperscript{458} Holmes had held for a unanimous court that the seizure of liquor in plain view in a defendant's open fields after police had trespassed onto a defendant's land did not constitute a search or seizure for purposes of the Fourth Amendment. And in \textit{United States v. Lee}\textsuperscript{459} Brandeis had drawn on \textit{Hester} to hold that the use by the Coast Guard of a searchlight to examine the decks of a ship seized on the high seas did not constitute a search.\textsuperscript{460}

\begin{itemize}
\item \textsuperscript{453} \textit{KYVIG, supra} note 130, at 34.
\item \textsuperscript{454} \textit{Olmstead}, 277 U.S. at 464-69.
\item \textsuperscript{455} \textit{KYVIG, supra} note 130, at 34.
\item \textsuperscript{456} \textit{Olmstead}, 277 U.S. at 455.
\item \textsuperscript{457} \textit{Id.} at 469, 471, 485, 488.
\item \textsuperscript{458} 265 U.S. 57 (1924).
\item \textsuperscript{459} 274 U.S. 559 (1927).
\item \textsuperscript{460} "Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution. Compare \textit{Hester v. United States.}" \textit{Id.} at 563. Ironically, the original draft of Brandeis's opinion in \textit{Lee} had excited some concern over its broad claims about the searchlight. In its original form, Brandeis's opinion had read:
\begin{quote}
The testimony of the boatswain shows that he examined the motor-boat by means of a searchlight. It does not appear that there was any exploration below decks or under hatches.... To pry into the secrets of a motor-boat by means of a searchlight is not prohibited by the Constitution. Compare \textit{Hester v. United States}....
\end{quote}
\textit{BRANDEIS PAPERS, supra} note 119, Reel 32. To this language Van Devanter had explicitly objected: "Please note me as concurring in the result. I am not prepared to accept the full statement as to what may be done with searchlight [sic], nor do I feel sure that it is not
Everything about Olmstead was dramatic and riveting.\textsuperscript{461} The defendant in the case, Roy Olmstead, was in 1920 the youngest and most charismatic lieutenant in the Seattle police department, who quit his day job to develop a huge and sophisticated smuggling operation that imported Canadian liquor into Washington.\textsuperscript{462} Known as the “king of the rumrunners,”\textsuperscript{463} he was a popular hero in Seattle because

\textsuperscript{461} The decision has received excellent book-length treatment. \textit{See} Murp\textit{h}, \textit{supra} note 89.

\textsuperscript{462} Olmstead’s story is well told in Norman H. Cl\textit{ark}, \textit{The Dr\textsuperscript{y} Years: Prohibition and Social Change in Washington 161-78, 218-19} (1965). Clark reports that during his time in prison Olmstead became converted to Christian Science and “to the proposition that liquor is bad for man and society.” \textit{Id.} at 218.

\textsuperscript{463} \textit{Id.} at 161. He was also called in the newspapers “the booze baron,” or ‘the good bootlegger’ who ‘had served a social purpose.’ \textit{Id.} Olmstead’s organization had some fifty employees-salesmen, telephone operators, watchmen, warehousemen, deliverymen, truck drivers, bookkeepers, a lawyer, and even an official fixer, though Olmstead himself remained on intimate terms with some of his old police colleagues. The liquor was brought from England to Vancouver in three small ocean-going freighters which Olmstead chartered. These ships would stay well outside of American territorial waters and would be met by one or more of Olmstead’s three fast motorboats.... The list of customers was long and impressive.... The organization might move as many as 200 cases a day, and gross receipts usually ran between $150,000 and $200,000 a month, with a net profit of about $4,000. With his share of the proceeds Olmstead lived in a huge house which reporters were later to describe as “palatial.”

\textit{Murp\textit{h}, \textit{supra} note 89, at 16-17.}
he never corrupted his merchandise. People could trust it. He never allowed his employees to arm themselves, lecturing to them sternly that no amount of money was worth a human life. His business arrangements were conducted with a firm integrity, for he was, in his own way, a moralist. Because Olmstead was so attractive personally and because he scrupulously avoided the sordid behavior of others in the same business—no murder, no narcotics, no rings of prostitution or gambling—many people could not regard him as an authentic criminal.464

Olmstead had been convicted in federal court in 1925 largely on the basis of evidence gathered by wiretaps.465 At the time wiretapping was a misdemeanor under the laws of the State of Washington.466 In 1924 Attorney General Harlan Stone was said to have sent “a directive to the newly formed Federal Bureau of Investigation” which announced, “under the heading 'Unethical Tactics,' that 'Wiretapping ... will not be tolerated.'”467 But this

464. CLARK, supra note 462, at 166.
466. "Every person ... who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line ... shall be guilty of a misdemeanor." Id. at 468 (quoting REMINGTON COMPIL ED STAT. § 2656-18 (1922)). At least twenty-five other states had similar statutes. See id. at 479 n.13 (Brandeis, J., dissenting). Apparently Olmstead knew that he was being wiretapped by federal agents; "a free-lance wire tapper" hired by the prohibition bureau had offered to sell him the transcript of his conversations. CLARK, supra note 462, at 168. But Olmstead "replied that he knew something about the rules of evidence, that such a transcript could never be used in court against him, that wire tapping was against state law, and that [the wire tapper] could go to hell." Id.

467. William S. Fairfield & Charles Clift, The Wiretappers, REPORTER, Vol.7 (Dec. 23, 1952), 8-22, at 10. "For 'many years' prior to 1929" the "FBI's Manual of Rules and Regulations, under the heading 'unethical tactics,' banned wire-tapping and provided for the dismissal of anybody who engaged in it." ALEXANDER CHARNS, CLOAK AND GAVEL: FBI WIRETAPS, BUGS, INFORMERS, AND THE SUPREME COURT 20 (1992). I have been unable to locate an original copy of this directive or manual in Justice Department files, but it is clear that wiretapping was forbidden within the Stone Justice Department. See MURPHY, supra note 89, at 13; WILLIAM ALLEN WHITE, A PURITAN IN BABYLON, THE STORY OF CALVIN COOLIDGE 274 (1938); Richard C. Donnelly, Comments and Caveats on the Wire Tapping Controversy, 63 YALE L.J. 799, 799-800 (1954); Justice Department Bans Wire Tapping; Jackson Acts on Hoover Recommendation, N.Y. TIMES, Mar. 18, 1940, at 1; 86 CONG. REC. app. 1471-72 (1940).

directive would have had no effect on the Treasury Department, where prohibition enforcement was located, so that wire tapping was "the principal method used ... to catch [prohibition] offenders." The upshot was that although wiretapping raised issues of law enforcement that were of general applicability, at the

wrote:

Both the Attorney General and Mr. Hoover say that any illegal methods of getting evidence would result in disciplinary measures against agents using them, Mr. Hoover going so far as saying that they could be fired without a hearing, upon proof that such methods have been used. He referred specifically to tapping telephones, placing dictographs in offices and homes, opening mail without warrants, engaging in provocative work and employing third-degree methods... He furthermore said that the control of expenditures of local offices were so close and in his hands personally, that it would be impossible to put in telephone-tapping devices without his knowing it. He says the Department welcomes any information tending to show that any agent has violated these instructions and that such agents will be dismissed at once. The Attorney General says the same thing, asking us for specific evidence on which to base any further instructions to the men.

Id.

In 1928 Stone's 1924 policy was apparently reaffirmed under Attorney General Sargent. See Wire Tapping in Law Enforcement: Hearings Before the H. Comm. on Expenditures in the Exec. Departments, 71st Cong. 2 (1931) (Statement of William D. Mitchell, Att'y Gen. of the United States); David M. Helfeld, A Study of Justice Department Policies on Wire Tapping, 9 LAW. GUILD REV. 57, 59 (1949). On December 2, 1928, J. Edgar Hoover testified before a Subcommittee of the House Appropriations Committee that "[w]e have a very definite rule in the bureau that any employee engaging in wire tapping will be dismissed from the service of the bureau." Department of Justice Appropriation Bill for 1931: Hearing Before the H. Subcomm. of the H. Comm. on Appropriations, 71st Cong. 63 (1929) (statement of J. Edgar Hoover). Hoover contended that "government agents had 'no ethical right' to tap, even though the Olmstead ruling had given them that right." CHARNES, supra, at 20.

468. LANDYNSKI, supra note 410, at 200 (internal quotation marks omitted). The tension between prohibition enforcement and other forms of law enforcement continued even after the Bureau of Prohibition was transferred to the Justice Department in 1930. On January 19, 1931, Attorney General Mitchell entered a new directive, because "[t]he present condition in the department can not continue. We can not have one bureau in which wire-tapping is allowed and another in which it is prohibited. The same regulations must apply to all." Wire Tapping in Law Enforcement: Hearings Before the H. Comm. on Expenditures in the Exec. Departments, 71st Cong. 2 (1931) (statement of William D. Mitchell, Att'y Gen. of the United States). Essentially Mitchell's new regulations allowed wiretapping if approved by a chief of a bureau in consultation with an assistant attorney general. Id. In 1933, for a single year, Congress added a proviso to an appropriations bill for the Department of Justice to the effect that "no part of this appropriation shall be used for or in connection with 'wire tapping' to produce evidence of violations of the National Prohibition Act, as amended and supplemented." Act of March 1, 1933, ch. 144, 47 Stat. 1381; see Louis Fisher, Congress and the Fourth Amendment, 21 GA. L. REV. 107, 128-29 (1986).
federal level the use of wiretapping was associated almost exclusively with the enforcement of prohibition.469

Olmstead challenged the admissibility of the wiretapping evidence. At first the Taft Court refused to grant a writ of certiorari to review his conviction,470 but it later reversed itself and granted certiorari in a manner that limited "consideration ... to the question whether the use of evidence of private telephone conversations, between the defendants and others, intercepted by means of wire tapping, is a violation of the Fourth and Fifth Amendments and, therefore, not permissible in the federal courts."471 After the grant of certiorari Assistant Attorney General Mabel Walker Willebrandt, who was in charge of prohibition enforcement at the Justice Department, withdrew from the case in protest at what she regarded as the unethical use of wiretapping.472

During the two weeks before the case was argued on February 20, 1928, Brandeis, who was vehement on the question of preserving the integrity of law enforcement practices and who had been the only Justice to vote for certiorari in Olmstead's original petition,473 prepared a memorandum that would eventually become his

469. And of course at the state level wiretapping was prohibited to all law enforcement in about half the states. See supra note 466.

470. Olmstead v. United States, 19 F.2d 842, (9th Cir. 1927), cert. denied, 275 U.S. 557 (1927). According to Stone's docket book, the only Justice who voted for certiorari at that time was Brandeis. Stone Docket Book 343, 84-85.

471. Olmstead, 19 F.2d 842, cert. granted, 276 U.S. 609, 609-10 (1928). Although it is a little uncertain, it seems from Stone's docket book that Van Devanter, Brandeis, Butler, and Stone voted to grant certiorari. Stone Docket Book 343, 84-85. Van Devanter's vote in this regard is puzzling. He might have been considering the national importance of the question, or he might have had the same concerns as those he expressed to Brandeis in United States v. Lee. See supra note 460. Given that Holmes would eventually refuse to reach the Fourth Amendment question, expressing some sympathy for Taft's resolution of the constitutional issue, Holmes's failure to vote for certiorari is not surprising.

472. Mabel Walker Willebrandt, The Inside of prohibition: Chapter 15—An Unusual Prohibition Victory, N.Y. TIMES, Aug. 19, 1929, at 21 ("I certainly approved of apprehending Olmstead ... but didn't approve the way the prohibition agents obtained their evidence. Practically all their testimony consisted of things they overheard on tapped telephone wires. Now, I thoroughly disapprove of the practice of tapping telephone wires. Irrespective of its legality, I believe it a dangerous and unwarrantable policy to follow in enforcing law. Many of the States of the Union have State laws against it.... I indicated to the Solicitor General my unwillingness to argue the case and try to justify the prohibition agents' wire-tapping tactics when I so thoroughly disapproved of them. Consequently, Mr. Mitchell employed distinguished counsel, a man formerly associated with his firm in Minnesota."); see Willebrandt, supra note 89, at 231-37.

473. See supra note 470; infra note 531.
dissent. In its earliest versions, the memorandum began with the argument that courts ought not to admit evidence illegally procured, because courts ought not to grant redress to one who has "unclean hands." This argument, as Brandeis explicitly recognized, was distinct from the constitutional question of whether wiretapping was a search or seizure for purposes of the Fourth and Fifth Amendments. The Court met in conference on February 25, and voted along the lines of its eventual opinion. Taft assigned the opinion to himself.

475. BRANDEIS PAPERS, supra note 119, Reel 36; see Olmstead v. United States, 277 U.S. 438, 483 (1927) (Brandeis, J., dissenting).
476. Brandeis's memorandum began to assume a form roughly similar to that of the published dissent by February 17. On February 23, three days after oral argument, Brandeis circulated the memorandum to Holmes for comment. At that time the memorandum addressed, first, the question of whether a wiretap was a search or seizure for purposes of the Fourth Amendment, and then, second, the question of whether the federal government ought to admit evidence secured by criminal conduct. Holmes replied:

I think this is a fine discourse. I agree with the last point. I still wobble on the illegal search and regretfully but categorically disagree with the notion that the use of the knowledge gained by wiretapping is contra Am. V. I fear that your early stated zeal for privacy carries you too far.

BRANDEIS PAPERS, supra note 119, Reel 36. Alongside the sentence "Can it be that the Constitution affords no protection against such invasions of individual security?", which appears at page 474 of Brandeis's published dissent, Holmes commented, "This would not be invasions of personal liberty in any sense that I can understand. It is the personal liberty of the other fellow that you want to restrict." Alongside the sentence in which Brandeis observed that Boyd "reviewed the history that lay behind the Fourth and Fifth Amendments," Olmstead, 277 U.S. at 474 (Brandeis, J., dissenting), Holmes commented: "My impression was that Wigmore had thrashed the history" set forth in Boyd. When Brandeis wrote, "[t]here is, in essence, no difference between the sealed letter and the private telephone message," Olmstead, 277 U.S. at 475, Holmes noted in the margin, "I think there is a good deal of difference." And when Brandeis said that any use of material obtained through "unjustified" wiretaps in a criminal proceeding "must be deemed a violation of the Fourth Amendment," Olmstead, 277 U.S. at 478, Holmes wrote, "I think this wrong," as he also did next to Brandeis's sentence, "[a]nd the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth." Olmstead, 277 U.S. at 478-79. Holmes's comments are contained in the draft of the memorandum that is located in the Brandeis Papers. BRANDEIS PAPERS, supra note 119, Reel 36.

477. Taft noted that he did not look forward to drafting the opinion "with great pleasure." Letter from WHT to Robert A. Taft (Feb. 26, 1928), microformed on TAFT PAPERS, supra note 9, Reel 299. In truth Taft had just been through a difficult personal situation that, given his increasingly violent feelings about the need for strict law enforcement, see supra note 356, must have made Olmstead an especially trying case. Taft's younger son Charles was at that time a prosecuting attorney for Cincinnati, Taft's home town. During the entire fall and early winter of 1927-28, Charles was involved in a notorious prosecution of George Remus, the "king of the bootleggers," who was on trial for the murder of his estranged wife. Remus had shot his
wife in plain daylight as she was driving to court to divorce him. He was an ex-lawyer who chose to defend himself, pleading temporary insanity because, while he was in prison serving time for prohibition offenses, his wife had cuckolded him with Franklin Dodge, an ace federal prohibition investigator. Remus alleged that Dodge and Remus's wife had become lovers and robbed him of all his assets while he was in prison. See Orville Dwyer, Remus Good or Remus Bad Next Move in Trial Darrow, Landis May be Character Witnesses, CHI. DAILY TRIB., Dec. 6, 1927, at 13; Remus Tells Why He Shot Wife to Death; Had Moral Right To Kill Her, He Says, CHI. DAILY TRIB., Oct. 7, 1927, at 1. During the trial Charles and Remus nearly came to blows on several occasions. When Charles alleged that Remus had been disbarred for reasons other than his prohibition conviction, Remus returned:

"A nice statement to make by the son of the Chief Justice of the United States, if the Court pleases....

He knows that in no court of justice that kind of treatment would be taken for granted. He knows that the only record admissible in this court of law, or any other court of law, not only in this county but in the Supreme Court of which this young man's father is the lord high Chief Justice.

It has been the pleasure of this defendant to appear before that high Chief Justice, but the specimen as given by this offshoot of that great renowned character is pitiful ....

... Five hundred judges and members of the Chicago bar have volunteered to come down here as character witnesses, and just because the son of the Chief Justice in this wonderful United States makes that kind of an assertion—man, if I had you in the corridor I would wreck you physically. I will tell you the truth—"

....

Mr. Taft's cheeks were red as he listened. Remus had stamped his way over to the State's Attorney's table and was shaking his fist under Mr. Taft's nose. Remus Near Blows with Prosecutors, N.Y. TIMES, Nov. 19, 1927, at 19; see Orville Dwyer, Judge Warns Remus To Abide by Court Rules, CHI. DAILY TRIB., Nov. 18, 1927, at 8; Remus Tells Jury He Defended Home, N.Y. TIMES, Dec. 20, 1927, at 13 (reporting that Remus declared to the jury that "[t]his defendant ... started in life at $5 a month ... we could not all be born with a golden spoon in our mouths like Charles P. Taft the second"). After deliberating for only thirty minutes, Remus was acquitted on grounds of insanity. Orville Dwyer, Remus Free if Found Sane, CHI. DAILY TRIB., Dec. 21, 1927, at 1. Remus painted himself as a "martyr" to the "awful mistake" of prohibition, Orville Dwyer, Remus Paints Self to Jury as Home Defender, CHI. DAILY TRIB., Dec. 20, 1927, at 12, which in his view had created a corps of corrupt officials like Dodge. He was suffering, as P.H. La Guardia said, of "dementia Volsteadia." La Guardia Believes Remus Is Victim of Dementia Volsteadia, CHI. DAILY TRIB., Oct. 16, 1927, at 3. Dodge was in fact eventually convicted on perjury charges. Dodge, Foe of Remus, Is Given Prison Sentence, CHI. DAILY TRIB., Oct. 27, 1931, at 20. The connection between Taft and his son excited public commentary. See Editorial, Father Taft Must Think Much About Remus Case, NEWARK EVENING NEWS, Nov. 25, 1927.

During the trial William Howard Taft received word that Remus "was looking for a weapon to use it on Charlie." Letter from WHT to Robert A. Taft (Dec. 11, 1927), microformed on TAFT PAPERS, supra note 9, Reel 297. "We seem to be surrounded by bootlegging atmospheres," he wrote his brother Horace. Letter from WHT to Horace D. Taft (Dec. 12, 1927), microformed on TAFT PAPERS, supra note 9, Reel 297. "Remus is a bad man and I rather think a dangerous man. The bootlegging seems to develop an indifference to murder and to make people think that murder can be committed with immunity." Id. The thought that Remus "was seeking a
On March 21, Brandeis circulated to the Court the part of the
memorandum that dealt with the admission of illegally obtained
evidence, together with a note:

In this case, the non-constitutional ground for reversal, which I
suggested, was not discussed at the conference. Several of the
brethren stated that they had not considered it. For this reason
it seems to me appropriate that I should circulate now this
memorandum in which I have stated somewhat fully the reasons
of the view expressed. 478

Sutherland, who had been sick with colitis throughout most of
the fall of 1927, 479 sailed for Europe on May 18 in order to recup

478. BRANDEIS PAPERS, supra note 119, Reel 36. Brandeis wrote to Holmes: "Don't spend
time on this. It is part of what you have already seen. The others have not." To this Holmes
replied, "Count me in." Id. Stone responded to Brandeis's circulation with a short letter:

I quite agree with you that we should lay it down as a rule to be applied in the
federal courts that evidence procured by violations of the criminal law should be
excluded. I would not, however, be inclined to place this result on the analogy
to ratification or to the maxim that equity will not aid one who comes into court
with unclean hands, applicable in the field of private law. I don't think that
those analogies really apply to the acts of government agents.

I would say that the evidence should be placed on broad grounds of public
policy similar, if not identical, to those which have led the court to exclude
evidence procured in violation of constitutional provisions. It seems to me quite
as offensive to policy and morals for the federal government to secure convictions
through its sending its agents into the state and there violating the state law by
its officers [as] to secure convictions through the violation of its own
constitution.

479. Letter from Thomas R. Brown to WHT (Dec. 22, 1927), microformed on TAFT PAPERS,
supra note 9, Reel 297 (stating that Sutherland was suffering from "chronic colitis, associated
with some disturbance in his gastric and pancreatic secretions, and very much affected by the

Letter from WHT to Horace D. Taft, supra. These circumstances could not but affect Taft's
perspective on the prosecution of bootleggers in February 1928.
He left behind a memorandum for Taft concerning his views of the undecided cases. About *Olmstead* he said:

This is the wire tapping case in which there probably will be a vigorous dissent. In a general way my view is that the conversations which were heard as a result of the wire tapping did not relate to a past crime but were part of a crime then being committed. The question is whether there was an unlawful search and seizure; and plainly there was not. Neither papers nor information was surrendered under any form of compulsion. Consequently, the evidence was admissible however we may condemn the manner of obtaining it. I am inclined to think the opinion should squarely meet the proposition that there was probably a violation of the state law which we do not in any way

condition of his nervous apparatus, so that worry, strain and fatigue manifest themselves rather strikingly in this portion of his body*). According to Dr. Brown, Sutherland could start work the first of the year if he can be spared some of the routine wear and tear .... I feel, however, he should have this summer a long holiday, preferably beginning about the middle of May so that he can not only consolidate his gain, but markedly improve his condition so that there may be a complete freedom from his symptoms by the fall.

*Id.*; see also Letter from WHT to Thomas R. Brown (Dec. 26, 1927), *microformed on TAFT PAPERS*, *supra* note 9, Reel 297 (“I can save him some of the usual work, and I shall do it conscientiously.”).

480. Letter from WHT to Robert A. Taft (Apr. 15, 1928), *microformed on TAFT PAPERS*, *supra* note 9, Reel 301 (“Sutherland is going abroad for his health on the 18th of May, and the Court is very anxious to get through.”); see Letter from WHT to GS (May 17, 1928) (Sutherland Papers) (“I have been delighted to see how strong you are now and how much work you have done of the hard kind of opinion writing that consumes thinking energy. I am looking forward with satisfaction to greeting you both in the full bloom of youthful health. And what pleasure you will have in the consciousness that you are not a slave to a lot of opinions the thought of which would continue to cloud your summer. I felicitate you. But don’t try to do too much.... Practice the Italian saying ‘Dolce fier nient.’ I don’t think it is always sweet to do nothing. But under the beautiful Italian skies you can show that some times it applies and add to the sweetness the recurring thought of the hard useful work you have done and leave behind. There is nothing quite so satisfying as that thought. And then know too you carry with you the loving thoughts and hopes of all your colleagues. They are real and sincere and awaken fervor.”); see also Letter from GS to WHT (May 18, 1928), *microformed on TAFT PAPERS*, *supra* note 9, Reel 302 (“That was a very sweet going away letter and Mrs. Sutherland and I appreciate it beyond expression. I shall think of you always as my good Chief for whom my admiration and affection run a close race.”). While in Europe Sutherland wrote Taft occasional letters about his travels. See, e.g., Letter from GS to WHT (July 3, 1928), *microformed on TAFT PAPERS*, *supra* note 9, Reel 303 (“Italy has every appearance of prosperity. Mussolini has done marvelous things. He has made the strike a thing of the past and has almost gotten rid of the beggar and the petty thief—though it is still well to insure your trunks.”).
attempt to excuse. That however is a matter for the state, and the federal courts cannot refuse to receive evidence plainly relevant and material because the state law may have been violated in obtaining it. The point made, that there was an unlawful search and seizure, being negatived, that is the end of the matter so far as we are concerned.\textsuperscript{481}

On May 25 Taft sent a first draft of his opinion to Van Devanter and Sanford, seeking suggestions.\textsuperscript{482} He noted that "I have talked over this case a good deal with Justice Sutherland, and he has left authority with me to consent to what I shall write."\textsuperscript{483} On May 31 Taft sent the draft of his opinion to McReynolds, stressing that "I have adopted all of your suggestions."\textsuperscript{484} Apparently Butler had complained about Brandeis's discussion of questions not encompassed within the narrow grant of certiorari, and Taft asked McReynolds how the majority should respond. Should it abide by the restrictions in the grant of certiorari and leave Brandeis's attack unanswered, or should the majority itself go beyond the limitations in the grant of certiorari and discuss the question of illegally procured evidence?

The question has now arisen whether we ought to allow Brandeis, after consenting to a limitation on the discussion to be had under the certiorari, to introduce the question of the Washington statute and his own ethical view. I think that Pierce Butler thinks we ought not to allow it, but I am rather inclined to let it go as it is. Butler thinks that if we let this in, we ought

\textsuperscript{481} Memorandum from GS to WHT (May 15, 1928) (Sutherland Papers).

\textsuperscript{482} Letter from WHT to Edward Terry Sanford (ETS) (May 25, 1928), \textit{microformed on TAFT PAPERS, supra} note 9, Reel 302; Letter from WHT to WVD (May 25, 1928), \textit{microformed on TAFT PAPERS, supra} note 9, Reel 302.

\textsuperscript{483} Id. On May 30, Taft wrote to McReynolds and Van Devanter asking if Taft could insert this sentence into the opinion: "The Gouled case is an extreme case, was not elaborately considered, and is not to be extended beyond its own facts by implication." Letter from WHT to James Clark McReynolds (JCM) (May 30, 1928), \textit{microformed on TAFT PAPERS, supra} note 9, Reel 302; Letter from WHT to WVD (May 30, 1928), \textit{microformed on TAFT PAPERS, supra} note 9, Reel 302. "I ought to say," Taft added, "that I talked the matter over with Justice Sutherland before he left, and he approved exactly such a reference to the Gouled case." \textit{Id.}

\textsuperscript{484} Letter from WHT to JCM (May 31, 1928), \textit{microformed on TAFT PAPERS, supra} note 9, Reel 302. "[E]xcept," Taft added, "that I left out a part of the written portion of your memorandum, not because I did not approve it, but because it seemed wiser to make it a little shorter." \textit{Id.}
also to take in the discussion on the question whether the evidence of the intercepted conversations was properly admissible under the general rules of evidence. But we did distinctly agree that that should not be taken up, and it was strenuously argued in Conference that the interception of messages was contrary to law. Indeed it was on that ground that Holmes changed his vote. I feel, therefore, that we ought to let it go as it is and not raise the question now as to the limitation of the discussion of certiorari.

Olmstead came down on June 4, the last day of the Term. In his opinion Taft addressed first the constitutional question of the search and seizure. He began with the claim that “[t]he well known

485. Id. Taft invited Van Devanter, McReynolds, and Sanford to his home on Friday, June 1, for a conference to “settle” the question of the limits of the grant of certiorari. Id. Aware of the tension between McReynolds and Brandeis, Taft was a good deal less discrete in venting his exasperation at Brandeis in his letter of May 31 to Sanford:

Pierce Butler wants to confine our discussion in the wire tapping case to the constitutional questions that were specially reserved, and I would be quite content to do that but my recollection is that we did discuss very vigorously in Conference the question whether the fact that Washington had a criminal statute making intercepting of telephone messages a misdemeanor should not prevent the admission of such messages thus overheard. I agree that there was a specific limitation in the certiorari and that Brandeis in writing his first opinion violated the limitation, but as Holmes bases his dissent not on the unconstitutional feature but on the crime, as he calls it, we can not very well throw those two men out. I concede that where we make a limitation we ought to stick to it, and I think anyone would have done so but the lawless member of our Court. Nevertheless, I think we might as well meet the issue as it is, and provide hereafter for making people shiny on their own side.

Letter from WHT to ETS (May 31, 1928), microformed on TAFT PAPERS, supra note 9, Reel 302. Apparently the Friday conference did not produce much change, for on June 1 Taft recirculated his opinion to the whole Court, saying:

I think there is nothing of substance that has been changed, except an added comment on the Gouled case and a more elaborate explanation of the discussion of the question of the alleged unethical conduct of the Government witnesses in intercepting the messages, and the effect of the Washington statute.

Letter from WHT to the Members of the Court (June 1, 1928), microformed on TAFT PAPERS, supra note 9, Reel 302.

We don’t have the date on which Brandeis circulated his full dissenting opinion to the Court, but we do know that Holmes replied, “I agree on the last ground—I am not quite ready to accept the constitutional one although I agree that the policy established by a law is not to be confined to the words. Gooch v. Oregon Short Line R.R. Co. 258 U.S. 22, 24.” BRANDEIS PAPERS, supra note 119, Reel 36. Conversely, Stone wrote Brandeis, “I am with you in the constitutional point.... I have some doubts about your second ground but will let you know.” Id.; cf. supra note 478.
historical purpose of the Fourth Amendment ... was to prevent the use of governmental force to search a man's house, his person, his papers and his effects; and to prevent their seizure against his will.\textsuperscript{486} The Fourth Amendment, therefore, attached only to "material things—the person, the house, his papers or his effects."\textsuperscript{487} Because the wiretapping in this case did not involve "trespass upon any property of the defendants,"\textsuperscript{488} because the government did not appropriate any thing or effect of the defendants, as for example their letters, the Fourth Amendment "does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants."\textsuperscript{489}

Taft denied that the defendants owned or controlled the "telephone wires reaching to the whole world from the defendant's house or office."\textsuperscript{490}

The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation.\textsuperscript{491}

Congress could of course ban the use of wiretap evidence by statute,\textsuperscript{492} "[b]ut the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment."\textsuperscript{493}

\begin{flushright}
487. \textit{Id}. at 464.
488. \textit{Id}. at 457. The wiretapping occurred because of the insertion of wires "in the streets near the houses." \textit{Id}.
489. \textit{Id}. at 464. The maxim that the Fourth Amendment was "to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty" could not "justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight." \textit{Id}. at 465. In justifying this point, Taft made good use of Holmes's opinion in \textit{Hester} and Brandeis's opinion in \textit{Lee}. See supra text accompanying notes 458-60.
490. \textit{Olmstead}, 277 U.S. at 465. "The intervening wires are not part of his house or office any more than are the highways along which they are stretched." \textit{Id}.
491. \textit{Id}. at 466.
493. \textit{Id}. at 466.
\end{flushright}
Taft's argument deployed two metaphors: appropriation and trespass. Fourth Amendment protection could be triggered by the appropriation—the forceful taking—of some thing. Appropriation was constitutionally suspect because it interfered with a person's control over things that belonged to him. The taking, or seizure, of a person's property without consent was constitutionally worrisome. In *Olmstead* Taft seemed to argue that the eye does not appropriate what it sees, nor does the ear appropriate what it hears. That is the significance of Taft's observation that wiretapping involved "hearing and that only."\(^{494}\)

The second metaphor used by Taft's opinion was that of trespass. Constitutionally cognizable searches and seizures involved trespass—or unlawful entry—into some property owned by a person. Invasion of a property right in order to search was constitutionally worrisome because it violated the exclusive dominion required by property, even if government intrusion did not actually take or seize the property. It is for this reason that Taft repeatedly stressed that the government had never entered the defendants' houses, nor did the defendants own the telephone wires in which the wiretaps were inserted.

Either appropriation or trespass might constitute an independently sufficient ground to justify Fourth Amendment protection. Fourth Amendment protection could be triggered by an appropriation without a trespass, as for example if the government were to inspect mail that is within its own custody.\(^{495}\) Or Fourth Amendment protection could be triggered by a trespass without an appropriation, as for example if government officials were to break into a house and use their eyes to search its contents.\(^{496}\) But in *Olmstead* 's case there was neither appropriation nor trespass; there

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\(^{494}\) *Id.* at 464.

\(^{495}\) *Id.* ("It is plainly within the words of the Amendment to say that the unlawful rifling by a government agent of a sealed letter is a search and seizure of the sender's papers or effects. The letter is a paper, an effect, and in the custody of a Government that forbids carriage except under its protection.").

\(^{496}\) *Silverman v. United States,* 365 U.S. 505, 509-11 (1961) ("Eavesdropping accomplished by means of ... a physical intrusion is beyond the pale of even those decisions in which a closely divided Court has held that eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment rights.... The absence of a physical invasion of the petitioner's premises was ... a vital factor in the Court's decision in *Olmstead.*")
was neither a seizure nor a search.497 This suggests why Sutherland and McReynolds were willing to join Taft’s opinion, because it was constructed entirely in terms of constitutional concepts with which they were sympathetic, like consent and property.498 As his memorandum to Taft indicates, Sutherland imagined the protections of the Fourth Amendment to turn on issues of “compulsion.”499

One could, of course, construct a rationale for excluding the wiretap evidence in Olmstead within the paradigm of appropriation and trespass. That is exactly the basis of Pierce Butler’s dissent.500 Butler argued:

The communications belong to the parties between whom they pass. During their transmission the exclusive use of the wire belongs to the persons served by it. Wire tapping involves interference with the wire while being used. Tapping the wires

497. This is perhaps why Holmes refused to find that wiretapping constituted a search and seizure under the Fourth Amendment. In his dissent he said only that, [w]hile I do not deny it, I am not prepared to say that the penumbras of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them. Gooch v. Oregon Short Line R. R. Co., 255 U. S. 22, 24.

Olmstead, 277 U.S. at 469 (Holmes, J., dissenting); cf. supra text accompanying note 281.

498. That neither Sutherland nor McReynolds conceived the issue in Olmstead as a prohibition question is suggested by Nardone v. United States, 302 U.S. 379 (1937), in which long after prohibition the Court construed chapter 652, section 605 of the Communications Act of 1934, 48 Stat. 1064, 1103 (codified as amended at 47 U.S.C. § 151), which prohibited “any person” from intercepting telephone messages, as applying to federal law enforcement officials. Both Sutherland and McReynolds dissented. Nardone, 302 U.S. at 385-87.

499. See supra text accompanying note 481. Sutherland would later write to Taft that his Olmstead opinion will stand as good law and good sense. My only regret is that Pierce Butler dissented, though he did not go along with Brandeis, which helps some. My secretary sent me a copy of the opinion and I read it with care. It is as clear as crystal and in no way met by the dissenting opinions. To me it seems so entirely obvious that I marvel that the question could be seriously considered from the opposite point of view.

Letter from GS to WHT (Sept. 2, 1928), microformed on Taft Papers, supra note 9, Reel 304.

500. Because “[t]he order allowing the writs of certiorari operated to limit arguments of counsel to the constitutional question,” Butler refused to “participate in the controversy that has arisen here as to whether the evidence is inadmissible because the mode of obtaining it was unethical and a misdemeanor under state law. [He preferred] to say nothing concerning those questions because they are not within the jurisdiction taken by the order.” Olmstead, 277 U.S. at 486 (Butler, J., dissenting).
and listening in by the officers literally constituted a search for evidence.\footnote{501} Butler thus invoked the metaphor of trespass, of unwarranted intrusion into a domain under the rightful control of a person, to justify the conclusion that wiretapping constituted a search triggering Fourth Amendment protection.\footnote{502} Butler could make this move only by using the metaphor of trespass in ways that transcended the strict confines of positive property law.\footnote{503}

In his opinion for the Court, Taft never explained why he did not choose to employ this more expansive notion of trespass.\footnote{504} To justify why the Court restricted the reach of the Fourth Amendment to "the possible practical meaning of houses, persons, papers, and effects,"\footnote{505} he only quoted, cryptically and without elaboration, the crucial premise of his \textit{Carroll} opinion: "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted and in a manner which will

\begin{itemize}
\item \textit{Letter from Frederick Pollock to OWH} (July 2, 1928), \textit{in 2 HOLMES-POLLOCK CORRESPONDENCE, supra} note 294, at 225.
\item In \textit{Silverman v. United States}, 365 U.S. 505 (1961), the Court chose to make exactly this move:
\item Id. at 511 (footnotes omitted).
\item Brandeis later wrote to Frankfurter: "I suppose some reviewer of the wire tapping decision will discern that in favor of property the Constitution is liberally construed—in favor of liberty, strictly." Letter from LDB to Felix Frankfurter (June 15, 1928), \textit{in BRANDEIS-FRANKFURTER LETTERS, supra} note 152, at 333 (footnote omitted).
\item \textit{Olmstead}, 277 U.S. at 465.
\end{itemize}
conserve public interests as well as the interests and rights of individual citizens.\textsuperscript{506}

Taft had written this passage in \textit{Carroll} to reference the practical necessity of warrantless searches of automobiles,\textsuperscript{507} but in \textit{Olmstead} he did not elect publicly to offer an analogous justification for the necessity of wiretapping.\textsuperscript{508} That was left to Sutherland in an opinion a decade later. In a dissent from a decision holding that the Communications Act of 1934\textsuperscript{509} had prohibited all wiretapping by federal law enforcement officials, Sutherland made the utilitarian argument explicit:

\begin{quotation}
The decision just made will necessarily have the effect of enabling the most depraved criminals to further their criminal plans over the telephone, in the secure knowledge that even if these plans involve kidnapping and murder, their telephone conversations can never be intercepted by officers of the law and revealed in court....

....

My abhorrence of the odious practices of the town gossip, the Peeping Tom, and the private eavesdropper is quite as strong as that of my brethren. But to put the sworn officers of the law, engaged in the detection and apprehension of organized gangs of criminals, in the same category, is to lose all sense of proportion.\textsuperscript{510}
\end{quotation}

A difficulty with the framework of appropriation and trespass that underlay Taft's opinion was that it could not explain relevant precedents, even those cited in Taft's opinion. In \textit{Hester v.}

\begin{footnotes}
\footnotetext{506}{\textit{Id.} (quoting Carroll v. United States, 267 U.S. 132, 149 (1925)).}
\footnotetext{507}{\textit{See supra} text accompanying notes 424, 427-30.}
\footnotetext{508}{In his private correspondence, however, Taft was more explicit: The truth is we have to face the problem presented by new inventions. Many of them are most useful to the criminals in their war against society and are at once availed of, and these idealistic gentlemen urge a conclusion which facilitates the crime by their use and furnishes immunity from conviction by seeking to bring its use by government officers within the obstruction of the bill of rights and the 4th amendment.}
\footnotetext{509}{Ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151).}
\footnotetext{510}{Nardone v. United States, 302 U.S. 379, 385, 387 (1937) (Sutherland, J., dissenting). Sutherland's dissent was joined by McReynolds. \textit{Id.} at 387.}
\end{footnotes}
United States,\textsuperscript{511} for example, the Court had held that the Fourth Amendment did not apply to liquor found in a defendant's open fields as a result of an official trespass onto the defendant's land. Holmes had held for the Court that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."\textsuperscript{512} But if it is asked why the Fourth Amendment ignores a trespass onto open fields, but not into a house, the answer cannot be given by the concept of trespass itself. The answer requires instead a theory of what the concept of trespass is meant to protect, which presumably would explain why the word "houses" in the Fourth Amendment ought not to be interpreted to include the open fields that surround a house.

Brandeis's dissent in \textit{Olmstead} would prove to be a profound and generative source of law because it offered just such a theory of the "underlying purpose" of the Fourth Amendment.\textsuperscript{513} "The makers of our Constitution," argued Brandeis, "undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things."\textsuperscript{514} They therefore

sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.\textsuperscript{515}

Brandeis thus attributed to the Fourth Amendment a purpose that nearly four decades previously he had attributed to the common law in his famous and influential article on \textit{The Right to Privacy}:

\textsuperscript{511} 265 U.S. 57 (1924).
\textsuperscript{512} \textit{Id.} at 59.
\textsuperscript{513} \textit{Olmstead} v. United States, 277 U.S. 438, 476 (Brandeis, J., dissenting).
\textsuperscript{514} \textit{Id.} at 478.
\textsuperscript{515} \textit{Id.}
The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled judges to afford the requisite protection, without the interposition of the legislature.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." The question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.\footnote{516. Samuel D. Warren \& Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 195-96 (1890). Compare Brandeis's Olmstead dissent: "Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet." 277 U.S. at 473 (Brandeis, J., dissenting). The connection between Brandeis's Olmstead dissent and his earlier article has been widely noted. See, e.g., Ken Gormley, One Hundred Years of Privacy, 1992 Wis. L. Rev. 1335, 1360-69 (1992); Daniel J. Solove, Conceptualizing Privacy, 90 Cal. L. Rev. 1087, 1099-102 (2002); Silas J. Wasserstrom \& Louis Michael Seidman, The Fourth Amendment as Constitutional Theory, 77 Geo. L.J. 19, 63-66 (1988).}

The reason why the Fourth Amendment protects a house against trespass, but not open fields, is because the purpose of the Fourth Amendment is to protect "the privacy of the individual," and there is no privacy interest in open fields, regardless of ownership.\footnote{517. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("[C]onversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. Cf. Hester v. United States, supra.").} It would take thirty-nine years, but eventually in \textit{Katz v. United States},
States the Court would overrule Olmstead and adopt the theory of Brandeis’s dissent.

We may ask, however, why “the privacy of the individual” should for a liberal like Brandeis, trump the demands of the administrative state. What exactly was the constitutional status of privacy? When post-New Deal liberalism began to theorize the kinds of civil rights and civil liberties that courts could use to circumscribe the discretion of the administrative state, it turned naturally to a theory of democracy, because democracy was necessary to underwrite the legitimacy of the administrative state. That was essentially the approach of the 1938 pivot-point between pre- and post-New Deal liberalism: footnote four of Stone’s opinion in United States v. Carolene Products Co. Ultimately this justification for civil rights and civil liberties traces back to Brandeis’s magnificent concurring opinion in Whitney v. California, in which Brandeis grounded First Amendment rights in the democratic deliberation necessary to legitimate the exercise of state power. But the right to privacy Brandeis invoked in Olmstead could not be explained in this way. Its origins lay in common law values, not in the need to vindicate democracy.

Brandeis’s Olmstead dissent points toward a strand of post-New Deal liberalism that virtually disappeared after 1938 and that did not revive until the 1960s and decisions like Katz. The roots of this form of liberalism lay in the horror with which progressives in the 1920s witnessed the demoralizing and ineffectual efforts of the federal government to enforce prohibition. The fiasco of prohibition enforcement caused many liberals to recognize that the “moral authority of the government does not rest [merely] on its legal right

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519. The Court stated:
   We conclude that the underpinnings of Olmstead ... have been so eroded by our subsequent decisions that the “trespass” doctrine there enunciated can no longer be regarded as controlling. The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a “search and seizure” within the meaning of the Fourth Amendment.
Id. at 353.
to issue commands, but rather also on "the collective conscience of the community in its effort to make for more and better human life." In 1890 in The Right to Privacy, Brandeis had sought to demonstrate how the common law could become an instrument for the expression and formation of that collective conscience. In 1928, under the relentless pressure of prohibition, Brandeis sought to make the Fourth Amendment also an instrument for the expression and formation of that collective conscience. He would in that way pioneer the appeal to social custom and value as a progressive limit to the administrative state.

Brandeis’s posture in Olmstead was structurally analogous to the judicial conservatism of Sutherland in Adkins v. Children’s Hospital, or Butler in Jay Burns Baking Co. v. Bryan, or McReynolds in Pierce v. Society of Sisters. No less than they, Brandeis in Olmstead sought to appeal to fundamental social norms as a ground from which judges could discipline positive law. The distinction between Brandeis and his three conservative colleagues lay not so much in the form of judicial authority to which each laid claim, as in the content of the social values that each sought to enforce. Brandeis aspired to identify and define values that could not be encompassed by traditional ideals of autonomy, consent, and property. In the context of the Fourth Amendment, Brandeis feared that "[t]he progress of science" would furnish "the Government with means of espionage" that were hitherto unimaginable. The conservative wing of the Taft Court, by contrast, was

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523. Id. at 166.
524. Particularly noteworthy in this regard is that by 1926 Brandeis had come to stress the limits of the mala prohibited, as distinguished from the mala in se. It seems to me we were rather presumptuous in brushing away the distinction—another bit of really shallow rationalization; that there is, moreover, an essential difference between a crime and a delict; & that there are few acts or omissions which ought to be treated as crimes which do not arouse righteous indignation. For these some other solution should be found than existing penalties.
Letter from LDB to Felix Frankfurter (July 2, 1926), in BRANDEIS-FRANKFURTER LETTERS, supra note 152, at 245-46 (footnotes omitted).
525. 261 U.S. 525 (1923).
526. 264 U.S. 504 (1924).
527. 268 U.S. 510 (1925). For a discussion of the relationship between these cases and fundamental social values, see generally Post, Defending the Lifeworld, supra note 290.
528. Olmstead v. United States, 277 U.S. 438, 474 (Brandeis, J., dissenting). Recall in this context that The Right to Privacy was also a massive (and successful) effort to transform the
primarily concerned with the potential of "new inventions" to become a "Frankenstein" that would generate innovative and threatening forms of criminal activity.\footnote{529}{

Brandeis did not explain why he chose to invoke the value of privacy to limit the administrative state in the context of wiretapping rather than of warrantless searches of automobiles. From a biographical perspective the explanation would no doubt lie in the violent, almost visceral disgust that Brandeis felt at the "espionage"\footnote{530}{ of wiretapping.\footnote{531}{

The question of which social values common law so that it might protect traditional values against new threats posed by "r[e]cent inventions and business methods." Warren & Brandeis, supra note 516, at 195.

529. See supra note 508; infra note 560.

530. "As a means of espionage, write of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping." Olmstead, 277 U.S. at 476 (Brandeis, J., dissenting). Many years later, in debates on the banning of wiretapping in the context of prohibition enforcement, Brandeis's dissent in Olmstead would be quoted in Congress in support of a statutory ban on the "despicable system of espionage under the wire-tapping practice." 76 CONG. REC. 2691 (1933) (statement of Rep. Charles John Schafer); see Act of March 1, 1933, ch. 144, 47 Stat. 1381; 76 CONG. REC. 2693 (1933) (statement of Rep. George Holden Tinkham) (referring to the "flaming language" of Brandeis's Olmstead dissent, "the language of the spirit of America against espionage").

531. In 1920 Brandeis had written Frankfurter:

I told Charles Merz the other day that the N[ew] R[epublic] ought to take up a continuous campaign against espionage ....

... [I]t seems to me important that the attack on espionage be not confined to industrial espionage. That is merely one bad application of a practice. The fundamental objection to espionage is (1) that espionage demoralizes every human being who participates in or uses the results of espionage; (2) that it takes sweetness & confidence out of life; (3) that it takes away the special manly qualities of honor & generosity which were marked in Americans.

It is like the tipping system an import from Continental Europe & the Near East only a thousand times worse.... [T]he immorality, the ungentlemanliness, should be made the keynote, & not the industrial wrong or infringement of liberty as in the Red Campaign.

It is unAmerican. It is nasty. It is nauseating.

Letter from LDB to Felix Frankfurter (Nov. 26, 1920), in BRANDEIS-FRANKFURTER LETTERS, supra note 152, at 48 (footnotes omitted). Several years later Brandeis urged the New Republic's Herbert Croly to "struggle to uproot the detective system root and branch—in government and in industry." Letter from LDB to Felix Frankfurter (Mar. 15, 1924), in BRANDEIS-FRANKFURTER LETTERS, supra note 152, at 161. Brandeis proclaimed: "Let him vow to strive without ceasing until the system is driven out or his own death release him. If the detective system lives, our ideals cannot survive. If I were dictator, I should abolish the system today without reserve, in every department of life and take all chances." Id. (footnote omitted). In 1927 Brandeis was still seeking to instigate a "needed investigation of the government prostitutes—sometimes called spies, and euphemistically known as detectives, inspectors, special agents & intelligence officers." Letter from LDB to Felix Frankfurter (Feb. 4, 1927), in BRANDEIS-FRANKFURTER LETTERS, supra note 152, at 272. In 1928, upon learning
should be so fundamental as to warrant constitutional protection would of course ultimately prove to be a central problem of post-New Deal liberal constitutionalism. Brandeis's *Olmstead* dissent neither anticipates nor contributes to that question. But its demonstration that a progressive jurisprudence could root itself in social norms and speak from their authority did point the way toward forms of communitarian liberalism that would ultimately flower in decisions like *Katz* and *Griswold v. Connecticut*.

VIII

During the 1920s the trope of lawlessness was highly volatile and unstable. It applied not merely to those who defied prohibition, but also, with great vehemence, to prohibition officials who broke the law in their efforts to enforce it. By the end of the decade it was commonplace to remark on "the curious lawlessness which

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of Frankfurter's plan to conduct a survey of the effectiveness of the criminal law in Boston, Brandeis wrote:

I suggest that, as an incident of the current survey, special care be taken to ascertain and record:

(a) The character (ethical) of the evidence through which it is sought to obtain a conviction—e.g. to what extent it is of the character held legal in *Bureau* v *McDowell* 256 U.S. 465, & the many cases where fed crimes were prosecuted in U.S. courts with evidence illegally procured by state officials.

....

I have grave doubt whether we shall ever be able to effect more than superficial betterment unless we undertake to deal fundamentally with the intangibles; and succeed in infusing a sense (A) of the dignity of the law among a free, self-governing people and (B) of the solemnity of the function of administering justice. Among the essentials is that the government must, in its methods, & means, & instruments, be ever the gentleman. Also we must recognize the fallacy ... that the main function of Courts is to settle controversies. This view seems to me a bit of that finite 19th century wisdom of the Militarians which has brought so much evil as well as good. There are times of ease & prosperity when the pressing danger is somnolence rather than litigiousness.

Letter from LDB to Felix Frankfurter (July 2, 1926), in BRANDEIS-FRANKFURTER LETTERS, *supra* note 152, at 245 (footnote omitted). Stone was also inclined to stress the necessity of government acting "in a gentlemanly way." *See infra* note 551.

532. *See*, e.g., Post, *supra* note 13, at 85-111.

prohibition breeds in its official bosom." Prohibition was said to have created "a new crime, unusual in America ... it is the crime of official lawlessness." [T]he disregard of law by enforcement officials has been increasing alarmingly in recent months in an effort to prevent the illegal sale of alcoholic liquors. It was said that

homes and places of business are invaded by officials without search warrants or with warrants improperly issued and served. Property is seized or destroyed without warrant of law. Persons are assaulted on the barest suspicion of guilt or are arrested and booked at police headquarters for "investigation"—a charge for which there exists no lawful authority. ... Suspects are held incommunicado from relatives and lawyers. The "third degree" is familiar to all.

537. Id. at 316. It should be noted that in an opinion by Butler, with Sutherland and Sanford dissenting, the Taft Court came down hard on corrupt prohibition officials. See Donnelley v. United States, 276 U.S. 505 (1928). According to Stone's docket book, the case was voted on three times in conference. Originally Holmes was assigned to write an opinion for Sutherland, Brandeis, McReynolds, and Sanford reversing the conviction of the prohibition agent, but eventually Butler persuaded the Court to hold that the Volstead Act made it a crime for prohibition agents intentionally to fail to report the illegal transportation of liquor. In Zhang Sung Wan v. United States, 286 U.S. 1, 14-17 (1924), the Taft Court, in an unanimous opinion by Brandeis, found that the use of the "third degree" rendered a confession involuntary and hence inadmissible. On the day of the argument, Taft wrote his wife that he had just submitted an important ... murder case. One Chinaman is charged with killing three others at an educational mission here in Washington and the question we have to decide is whether the method by which his confession was secured was such that it ought not to have been admitted in evidence. There are several members of the Court perhaps a majority thinking the confession should not have been admitted. ... If the confession goes out it is doubtful whether he could be convicted a second time. There has been unreasonable delay in the trial. The murder was committed in 1919. I am inclined to think that the defendant was guilty.

Letter from WHT to Helen Taft (Apr. 8, 1924), microformed on TAFT PAPERS, supra note 9, Reel 28. Butler's docket book shows that at conference McKenna, Van Devanter, and Sutherland had originally voted to admit the confession. Taft wrote Brandeis about his opinion, "I concur. I think this case as you conclusively show is so exceptional that it can not return to plague us in other cases where confessions are most useful evidence." Holmes wrote, "Yes siree. I suppose you are right not to show disgust or wrath. I don't know whether I could have held in." McReynolds, who had equivocated in conference, wrote, "I shall not oppose." Sutherland said, "This is well done. I voted the other way but probably shall acquiesce." Van
On the floor of the Senate "[f]ederal officers involved in dry-law killings and other attacks were scathingly arraigned by Senators Copeland of New York, Hawes of Missouri and Tydings of Maryland." If prohibitionists charged those who disobeyed the

Devanter returned, "I shall assent." BRANDEIS PAPERS, supra note 119.

About the "third degree" Brandeis later wrote Frankfurter, "[o]ur police practices—and the attitude of most prosecutors & the bar thereto carry us back to the age of torture on the continent." Letter from LDB to Felix Frankfurter (Nov. 4, 1928), in BRANDEIS-FRANKFURTER LETTERS, supra note 152, at 350. Brandeis believed that "few tasks in connection with the Criminal Law are so important as a thorough enquiry into, & exposition of, the practices of the police in connection not only with 3rd degree, but generally re the interrogation of persons arrested." Letter from LDB to Felix Frankfurter (Sept. 28, 1927), in BRANDEIS-FRANKFURTER LETTERS, supra note 152, at 308-09. On reaction to Ziang Sung Wan, see, for example, Justice Brandeis, The Third Degree, 40 NEW REPUBLIC 272 (1924); Zechariah Chafee, Jr., Compulsory Confessions, 40 NEW REPUBLIC 266, 267 (1924) ("The Supreme Court's opinion forcibly proves the need of a thorough-going investigation of the extent to which the 'third degree' prevails in American cities, and a careful consideration of the circumstances under which interrogation of the accused by government officials should be permitted, if at all."); Editorial, Torture Is Again Condemned, N.Y. TIMES, Oct. 15, 1924, at 22 ("There will be general approval—which Supreme Court decisions do not always get—with the decision in which the Justices this week condemned a conviction for murder based on a confession obtained by what they call duress."). The Nation strongly affirmed the Court's opinion:

In a decision which ought to strike at the roots of police terrorism the United States Supreme Court has just granted Ziang Sung Wan a new trial, on the ground that the alleged confession was extorted.... It is time that something was done to make police officials remember that they too are required to obey the law. Doubtless it is true, as they allege, that some valid confessions are extorted by the third degree; doubtless the inquisitors of the middle ages, too, could point to some honest successes of their methods. But the defense is not justification.

Editorial, Unto the Least of These, 119 NATION 459, 459 (Oct. 29, 1924). The Outlook opined:

Here is a clearer decision from a higher authority than has appeared before holding the "third degree" to be in violation not merely of American statute law but of the whole spirit of Anglo-Saxon judicature. It ought to have the effect of ending definitely and for all time this barbaric practice. But unaided it will not.

Editorial, Police Take Notice, 138 OUTLOOK 318, 319 (Oct. 29, 1924). Concern with the "third degree" became so great that the Wickersham Commission decided to devote an entire volume to the subject. See NAT'L COMMN ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931).

538. Glass Charges President "Submerges" Prohibition; Senate Clash on Killings, N.Y. TIMES, June 20, 1929, at 1; see Dry Agents' Bullets Make Big Casualty List of U.S. Citizens, CHI. DAILY TRIB., Sept. 25, 1927, at 6; Senate Rebels at Dry Slaughter; Blocks Hoover Plan To Help Enforcement; Copeland Asks Law To Stop Killings, CHI. DAILY TRIB., June 20, 1929, at 1; James W. Wadsworth, Jr., The Death Toll of Enforcement, 229 N. AM. REV. 257, 257, 261-62 (1930); Oswald Garrison Villard, Official Lawlessness: The Third Degree and the Crime Wave, 155 HARPER'S MAG. 605, 605 (1927) ("[T]he most dangerous criminals we have in America are the officials who in growing number openly disregard or violate the laws."). The Wickersham Commission dryly remarked on "the attempt to enforce the National Prohibition Act as something on another plane from the law generally; an assumption that it was of paramount
Eighteenth Amendment with lawlessness, the epithet was returned with interest by those who were appalled by “the utter disregard for law and personal rights which has become the almost invariable accompaniment of the efforts on the part of our enforcement officers to compel compliance” with prohibition. 539 “[N]othing,” it was said, “breeds disrespect for all law so much as its violation by those charged with upholding it.” 540

Apart from the question of whether wiretapping was a search and seizure under the Fourth Amendment, Olmstead contained a second issue, which was not constitutional, and which had been specifically excluded by the limited grant of certiorari. It was the issue, however, that from the very beginning most concerned Brandeis, 541 and that had roused Holmes to a dissenting opinion. 542 It was the issue of official lawlessness, and the question was whether federal courts ought to admit evidence procured in violation of the law. Wiretapping was a misdemeanor under Washington law, and so the evidence that had convicted Olmstead was secured through what was, literally, a crime. In a short but pungent opinion, Holmes argued that the Court was not “bound” by any “body of precedents,” 543 and that therefore it had “to choose, and for my part I think it a less evil that some criminals should escape than that the

importance and that constitutional guarantees and legal limitations on agencies of law enforcement and on administration must yield to the exigencies or convenience of enforcing it.” Nat’l Comm’n on Law Observance and Enforcement, supra note 537, at 81-82.

Some advocates of the law have constantly urged and are still urging disregard or abrogation of the guarantees of liberty and of sanctity of the home which had been deemed fundamental in our policy.... High-handed methods, shootings and killings, even where justified, alienated thoughtful citizens, believers in law and order. Unfortunate public expressions by advocates of the law, approving killings and promiscuous shootings and lawless raids and seizures and deprecating the constitutional guarantees involved, aggravated this effect. Pressure for lawless enforcement, encouragement of bad methods and agencies of obtaining evidence, and crude methods of investigation and seizure on the part of incompetent or badly chosen agents started a current of adverse public opinion in many parts of the land.

Id. at 82.

540. Haines, supra note 536, at 318.
541. See supra text accompanying notes 473-76.
542. See supra text accompanying note 485, infra note 547.
Government should play an ignoble part.\textsuperscript{544} Breaking the law by wiretapping was a “dirty business”\textsuperscript{545} and federal courts ought not “to allow such iniquities to succeed.”\textsuperscript{546}

Brandeis made the same point, although more elaborately and to more brilliant rhetorical effect.\textsuperscript{547} He argued that by ratifying the crimes of its agents the government and its judiciary had itself

\textsuperscript{544} \textit{Olmstead}, 277 U.S. at 470 (Holmes, J., dissenting).

\textsuperscript{545} \textit{Id}. Holmes’s law clerk, Arthur E. Sutherland, recalls: “I sat in the courtroom and heard the old man read his dissent. His words and voice and manner were disdainful. It seemed as though he were obliged to hold something unpleasant in his hands. I can still hear his careful voice speaking of ‘this dirty business’. “ David M. O’Brien, \textit{Sutherland’s Recollections of Justice Holmes}, in \textit{YEARBOOK 1988}, at 18, 25 (Supreme Court Historical Soc’y ed., 1988).

\textsuperscript{546} \textit{Olmstead}, 277 U.S. at 470 (Holmes, J., dissenting). “[I]t makes no difference,” Holmes argued, that in this case wire tapping is made a crime by the law of the State, not by the law of the United States. It is true that a State cannot make rules of evidence for Courts of the United States, but the State has authority over the conduct in question, and I hardly think that the United States would appear to greater advantage when paying for an odious crime against State law than when inciting to the disregard of its own. I am aware of the often repeated statement that in a criminal proceeding the Court will not take notice of the manner in which papers offered in evidence have been obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by \textit{Weeks v. United States}, 232 U. S. 383 and the cases that have followed it.

\textit{Id}. at 470-71.

Holmes’s stance infuriated Taft, who regarded it as nasty. See \textit{infra} note 547. Van Devanter would later send Taft a clipping from the \textit{Baltimore Evening Sun} praising Holmes, with an angry, snide note that exactly identified the division between pre-New Deal conservatism and liberalism:

It seems strange to see one who believes and often says that the Constitution does not stand in the way of experiments which have the approval of a dominant sentiment, and who has no abiding moral principles, characterized as a protector of the imperiled minority and as unalterably adhering to high moral principles.

Letter from WVD to WHT (June 20, 1928), \textit{microformed on TAFT PAPERS, supra} note 9, Reel 302.

\textsuperscript{547} Taft later wrote his brother:

Holmes has written the nastiest opinion in dissent and Brandeis is fuller of eloquence and idealism…. The truth is that Holmes voted the other way till Brandeis got after him and induced him to change on the ground that the state law in Washington forbade wiretapping. Holmes in his opinion really admits that the 4th Amendment does not cover wiretapping. If it does not, then the law is all against his conclusion on which he rests his case but he is a law unto himself if Brandeis says yes.

Letter from WHT to Horace D. Taft (June 12, 1928), \textit{microformed on TAFT PAPERS, supra} note 9, Reel 302.
become "a lawbreaker," \textsuperscript{548} and that federal courts should use the doctrine of clean hands to protect themselves from this danger. \textsuperscript{549} The court ought to exclude such evidence "in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination." \textsuperscript{550} He concluded with an eloquent peroration that precisely evoked the widespread popular anxiety about official lawlessness and that deftly turned on Taft the Chief Justice's often stated conviction that prohibition should be enforced to maintain the rule of law:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. \textsuperscript{551}

\textsuperscript{548} Olmstead, 277 U.S. at 483 (Brandeis, J., dissenting).
\textsuperscript{549} Id. at 483-84.
\textsuperscript{550} Id. at 484.
\textsuperscript{551} Id. at 485. Stone concurred in the opinions of Holmes and Brandeis, but wrote separately to argue that the grant of certiorari could not restrain the Court from considering the question of the admissibility of the evidence, which was fairly presented by the record on appeal. \textit{Id.} at 488 (Stone, J., dissenting). In his last days as Attorney General, after his nomination to the Court had been confirmed by the Senate, Stone had written to Frankfurter that he had reorganized the Bureau of Investigation of the Justice Department to impress upon agents of the Bureau that the real problem of law enforcement is in trying to obtain the cooperation and sympathy of the public and that they cannot hope to get such cooperation until they themselves merit the respect of the public. The Agents of the Bureau of Investigation have been impressed with the fact ... that they must not be guilty of violations of law in gathering evidence upon violations of law, for the respect to which they are entitled as law enforcement officers can only be obtained by their strictly observing the rights of citizens and the law of the land.

Letter from HFS to Felix Frankfurter (Feb. 9, 1925) (Stone Papers). Stone was
If Taft was concerned that defiance of prohibition would lead to "anarchy,"\textsuperscript{552} Brandeis would expose the real roots of legal legitimacy. If Taft worried about the growth of a "contemptuous attitude toward law,"\textsuperscript{553} Brandeis would elaborate the foundations of "a government of law." If Taft insisted that "intelligent and well-to-do people" exemplify respect and obedience to law,\textsuperscript{554} Brandeis would explain whose "example" really mattered. For Brandeis, and perhaps also for Holmes, these questions did not involve the forms of deference appropriately required by the administrative state; they turned instead on the necessity of maintaining the rule of law that legitimated the administrative state itself.

Taft was rhetoricallydefenseless in the face of this remarkable assault. He could in his opinion only argue that the Court "must apply in the case at bar" the common law rule in effect in the State of Washington in 1889, the year when Washington was admitted to the Union.\textsuperscript{555} This common law rule, Taft asserted, was that "the

\footnotesize{firmly of the opinion that officials of the Department of Justice can more effectively perform their duties by acting the part of gentlemen than by resorting to tactics of a different character. The work of gathering evidence and of conducting litigation should be done in a gentlemanly way. Agents of the Bureau of Investigation in the past may have been inclined to place emphasis on the end rather than on the means.}

\textit{Id.}; see Letter from HFS to Roger Baldwin (Jan. 20, 1925) (American Civil Liberties Union Archives: The Roger Baldwin Years: 1917-1950, Vols. 271-272) ("I am coming around to the view that law administration would be immensely [sic] improved in the United States not only by strict obedience to law by all law enforcement officers, but by insistence that the United States and its law enforcement officials should play the roll [sic] of gentlemen in the difficult task of law administration.").

\textsuperscript{552} See supra note 323 and accompanying text.

\textsuperscript{553} See supra text accompanying note 326.

\textsuperscript{554} See supra notes 325-26 and accompanying text.

\textsuperscript{555} \textit{Olmstead}, 277 U.S. at 468. Taft's appeal to the common law was in truth fundamentally ambiguous, because the nature of the law that determined the admission of evidence in federal criminal prosecutions was at the time utterly unclear. In 1851 the Court had held that evidentiary rules in federal criminal prosecutions were to be determined by the law in effect in the state of prosecution in 1789. \textit{United States v. Reid}, 53 U.S. (12 How.) 361, 362-63 (1851). In 1892, in \textit{Logan v. United States}, 144 U.S. 263, 303 (1892), the Court applied the logic of \textit{Reid} to rule that federal courts should in criminal trials apply the law of evidence in effect in the state of prosecution as of the date of the state's admission to the Union. This approach produced increasingly intolerable results as the law of evidence evolved. By 1918, therefore, the Court in \textit{Rosen v. United States}, 245 U.S. 467 (1918), was prepared to invoke "the light of general authority and of sound reason," explicitly to discard "the dead-hand of the common-law rule of 1789." \textit{Rosen} fashioned its own rule of evidence that reflected "the conviction of our time." \textit{Id.} at 470-71; see \textit{Greer v. United States}, 245 U.S. 559, 561 (1918).}
admissibility of evidence is not affected by the illegality of the means by which it was obtained."\textsuperscript{556} Although Taft did not seek

Two years later, however, the Court without explanation returned to the regime of Reid. See Jin Fuey Moy v. United States, 254 U.S. 188, 195 (1920). The upshot was that at the time of Olmstead the law of evidence for federal criminal trials was in a state of utter "perplexity." W. Barton Leach, State Law of Evidence in the Federal Courts, 43 Harv. L. Rev. 554, 565 (1930).

In Olmstead, Taft chose to ignore Rosen and to follow Logan, holding that the Olmstead trial should be governed by the evidentiary law of Washington in effect in 1889, the year of Washington's admission to the Union:

While a Territory, the English common law prevailed in Washington and thus continued after her admission in 1889. The rules of evidence in criminal cases in courts of the United States sitting there, consequently are those of the common law. United States v. Reid, 12 How. 361, 363, 366; Logan v. United States, 144 U.S. 263, 301; Rosen v. United States, 245 U.S. 467... Robinson v. United States 292 Fed. 683, 685.

The common law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained.

Olmstead, 277 U.S. at 466-67; see Leach, supra, at 564-65. In 1944, Rule 26 of the Federal Rules of Criminal Procedure definitively overruled this approach, on the ground that since all Federal crimes are statutory and all criminal prosecutions in the Federal courts are based on acts of Congress, uniform rules of evidence appear desirable if not essential in criminal cases, as otherwise the same facts under differing rules of evidence may lead to a conviction in one district and to an acquittal in another.

FED. R. CRIM. P. 26, Notes to the Rules of Criminal Procedure for the District Courts of the United States, reprinted in 7 Drafting History of the Federal Rules of Criminal Procedure 225, 260 (Madeleine J. Wilken & Nicholas Triffin eds., 1991) (citations omitted). The approach of Rule 26 was based on the Court's decisions in Funk v. United States, 290 U.S. 371, 379 (1933), and Wolfe v. United States, 291 U.S. 7, 12 (1934), which had held that rules of evidence in criminal cases should be determined "by common law principles as interpreted and applied by the federal courts in the light of reason and experience." Id.

Taft's use of Logan allowed him to ignore the inconvenient fact that Washington law at the time of the Olmstead trial was to the effect that "it is beneath the dignity of the state and contrary to public policy for the state to use for its own profit evidence that has been obtained in violation of the law." State v. Buckley, 258 P. 1030, 1031 (Wash. 1927); see State v. Gibbons, 203 P. 390, 396 (Wash. 1922). It also allowed Taft to avoid the problem of determining what the actual common law rule might have been in 1928, which would have required Taft to confront the trend of common law decisions upholding the exclusionary rule. See supra note 394. Oddly, neither Holmes nor Brandeis challenged Taft's choice of law in their dissent.

556. Olmstead, 277 U.S. at 467. In his private correspondence Taft elaborated the point:

Holmes says the misdemeanor of the State of Washington is a crime but he does not realize or consider that the admissibility of evidence in the Federal Courts is determined not by a statute but by the common law. More than this—a large majority of the states' Supreme Courts refuse to follow the Weeks' case decided by our Court as to the admissibility of evidence secured by violation of the 4th amendment. Chief Judge Cardozo speaking for the Court of Appeals of New York writes an opinion showing that 31 State Supreme Courts are against it and only fourteen for it. They have had in New York a case decided by their Appellate
explicitly or elaborately to justify this rule, he did intimate its underlying utilitarian calculation in favor of law enforcement:

A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it. 557

The upshot was that in the name of upholding the sanctity of the legal order, Taft and the Court had been maneuvered into ratifying official lawbreaking. 558 And in the name of suppressing those who

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division following the same principle in which the evidence of the police man who listened in by wiretapping was held to be admissible although the law of New York forbids wire tapping as a misdemeanor. Letter from WHT to Horace D. Taft (June 12, 1928), microformed on TAFT PAPERS, supra note 9, Reel 302. This explanation, however, is in tension with the choice of law rule actually adopted by Taft in the Olmstead opinion itself, which required Taft to apply the common law rule in effect in 1889, see supra note 556, and the explanation also suggests that Taft was himself simply unaware of changes in the common law that had occurred by 1928. See supra note 394.

557. Olmstead, 277 U.S. at 468. Holmes would later take exception to this formulation of the question:
The C. J. who wrote the prevailing opinion, perhaps as a rhetorical device to obscure the difficulty, perhaps merely because he did not note the difference, which perhaps I should have emphasized more, spoke of the objection to the evidence as based on its being obtained by "unethical" means (horrid phrase), although he adds & by a misdemeanor under the laws of Washington. I said that the State of Washington had made it a crime and that the Government could not put itself in the position of offering to pay for a crime in order to get evidence of another crime. Brandeis wrote much more elaborately, but I didn't agree with all that he said. I should not have printed what I wrote, however, if he has not asked me to.

Letter from OWH to Frederick Pollock (June 20, 1928), in 2 HOLMES-POLLOCK CORRESPONDENCE, supra note 294, at 222. Apparently Taft's utilitarian calculus has proved convincing to later generations, because in the absence of an explicit statutory exclusionary rule the acquisition of evidence through the violation of criminal law (as distinct from through the violation of the Fourteenth Amendment) has not been thought to warrant exclusion. See, e.g., United States v. Thompson, 936 F.2d 1249 (11th Cir. 1991), cert. denied, 502 U.S. 1075 (1992). I am grateful to Daniel Solove for this reference.

558. The position clearly made Taft uncomfortable and defensive:
would defy the law of prohibition, they had been forced to condone a practice that was forbidden to FBI officers as "unethical" and that was at the federal level associated almost entirely with prohibition enforcement. Taft could complain that it was "bizarre" to interpret Olmstead as reflecting "an interest in convicting bootleggers," because

Of course one does not like to be held up as one who favors the worst morals but we have to put up with such attacks in our efforts to follow the old time common law recognized by all authorities English and American that if evidence is pertinent it is admissible however obtained. Cardozo argues that this view is the proper one in defense of society. We have hard enough time to convict without presenting immunity to ... criminals. I shall continue to be worried by attacks from all the academic lawyers who write college law journals but I suppose it is not a basis for impeachment. We pointed out that Congress can change the rule if it sees fit. It will be of interest to see whether Congress will do it. Here it may be that the prohibitionists in Congress will oppose such legislation not because of their sensitiveness as to the scope of the 4th Amendment but just because they are in favor of convicting bootleggers. Indeed many of the opposing views are and will be due to that issue solely.

Letter from WHT to Horace D. Taft (June 12, 1928), microformed on TAFT PAPERS, supra note 9, Reel 302. Taft was particularly exercised at the "outcry" in the "New York papers," whose "feeling about bootleggers and prohibition is so strong" that they didn't "seem to realize that this decision is exactly in accord with the law of their state defended as it is more broadly even in an attack on the Weeks case by another Jew Cardozo and by the Appellate Division case cited in the last page of the opinion." Letter from WHT to WVD (June 13, 1928) (Van Devanter Papers).

559. See Frown on Wire-Tapping, N.Y. TIMES, June 7, 1928, at 29 ("Attorney General Sargent has instructed agents of the Department of Justice not to resort to this measure for running down criminals and Commissioner Doran has discouraged its use by prohibition agents.... Although wire-tapping is legal, it is not ethical," the Department of Justice holds.).

560. Taft would persistently resist the effort to categorize Olmstead as a prohibition opinion. He wrote to his brother:

It has an element of humor for me that the public seems to be affected by the fact that it is against the bootleggers and assumes that it was that which carried the day. Of course that had nothing to do with the conclusion. The telephone might just as well have been used to carry on a conspiracy to rob, to murder, to commit treason.

Letter from WHT to Horace D. Taft (June 12, 1928), microformed on TAFT PAPERS, supra note 9, Reel 302. He wrote to Van Devanter that

I suppose you have seen the criticisms of my opinion and our decision in the wire tapping case. We'll have to stand it of course, without answer or demur.... It can't be gotten out of the heads of the public that it is a decision on the Prohibition law. I doubt if the indignation of critics would be so great if it were a conspiracy to murder that was carried on that way.

Letter from WHT to WVD (June 12, 1928) (Van Devanter Papers). Van Devanter replied: I have seen many of the public comments on the wire-tapping decision and have observed, as you have, that some of the comments treat the decision as though it was peculiar to prohibition cases. Had the decision related to evidence in a case involving a scheme to defraud the United States or to corrupt some of
its officers the press and public would have given it undivided approval. The real nature of the question and of the decision will gradually come to be appreciated and understood. As with any important constitutional decision it must be judged by its working through a period of time and not by its accidental application in a similar case. No doubt other cases will be arising in which the principle will have application to other kinds of crime and in other surroundings. When this happens the vision of those who are talking about it now will expand to a larger range and views will be readjusted accordingly. I am quite content to leave the outcome to experience. A man named Lowman or something like that who was once Lieutenant Governor of New York and is now an Assistant Secretary of the Treasury or in some other position of prominence in the prohibition administration, gave out an interview—am told it is authentic—to the effect that in the enforcement of the prohibition law “the practice of wire-tapping will be followed whereevver deemed expedient.” This is an unfortunate statement made at an inappropriate time. For other reasons I have come to think that Lowman is quite unfit for his job. More than half the agitation about prohibition is due to the actions and declarations of incompetents in places of authority. A wise man in such a place would talk little, would work hard and endeavor to exercise a wide supervision and devote himself to securing results which will speak for themselves.

Letter from WVD to WHT (June 15, 1928) (Van Devanter Papers). “Time and experience will demonstrate that the decision is right,” Van Devanter wrote Taft:

Part of the opposition comes from men who look on the decision as merely relating to the detection of liquor transactions. Another part look on it as likely to interfere with socialistic and communistic efforts. The publication called “The Nation” has come to be distinctly socialistic and in its last issue it published an ugly criticism of the decision on its first page.... From beginning to end it lends itself to tearing down, not building up. Every communist in the country and every sympathizer with communism naturally will be against the decision, and so will those who call themselves reformers but in truth are infected with communism. We do not have to go far to see that this is so.

Letter from WVD to WHT (June 16, 1928) (Van Devanter Papers).

Taft replied:

I hope with you that consideration of the question will justify our conclusion in the minds of fair men who understand the exact issue. I anticipate that there will be an immediate effort by legislation to negative the effect of the decision but I am hoping that a discussion will clarify the real issue. I have no objection to a provision that no evidence secured by wire tapping or intercepting messages over telephone systems shall be admissible in courts of the United States in the trial of criminal cases provided that the act shall not apply in any indictment for treason, murder, anarchy, robbery, conspiracy against the United States where there is evidence tending to show that the telephone is being used to promote such treason, murder, anarchy, robbery or conspiracy. I am not troubled about the liquor law. That can take care of itself but in the crimes above mentioned and others society would be at the mercy of the most dangerous criminals if they could use the telephone to carry on such crimes and be immune from using the telephone to discover or offset its use for such criminal purpose. Otherwise such immunity would be making the telephone a Frankenstein.

Letter from WHT to WVD (June 22, 1928) (Van Devanter Papers). Van Devanter promptly
“the men who voted with the majority and carried the case included men who have in a good many instances taken a view of the law which would be regarded as anti-prohibition, like Sutherland, Butler and McReynolds, and the other side includes Holmes and Brandeis, who have been voting to sustain the 18th Amendment vigorously in many cases.”

But the Court was nevertheless in an impossible position, and it made Taft bitter.

It was all but inevitable that Olmstead would be read as an opinion carrying “still further the process of creating a governmental bureaucracy equipped with almost unlimited powers of espionage for the purpose of attempting to enforce Prohibition.”

The Court was said to be “bewitched by Prohibition,” and

wrote back to Taft:

I seriously doubt the propriety of making any concessions respecting the need for legislation restraining the use of evidence of the kind considered in the wire-tapping cases. To my mind there is no need for such legislation; nor is there any sound basis for making a legislative distinction in this regard between different classes of crime. The agitation which followed the decision will gradually exhaust itself and the decision will come to be accepted as sound in principle and needed in practice.

Letter from WVD to WHT (June 25, 1928), microformed on TAFT PAPERS, supra note 9, Reel 302.

561. Letter from WHT to M.S. Sherman (July 11, 1928), microformed on TAFT PAPERS, supra note 9, Reel 303.

562. Taft complained to his brother that the Olmstead dissenters abused us as encouragers of criminals in receiving the evidence of the wiretapping as proper. Brandeis was especially severe in his strictures on our lack of dignity and morality and I have no doubt he will find a good many followers. It is rather trying to have to be held up as immoral by one who is full of tricks all the time. But he can become full of eloquent denunciation without great effort.... His cliques in the law school contingent will sound his praises and point the finger of scorn at us, but if they think we are going to be frightened in our effort to stand by the law and give the public a chance to punish criminals, they are mistaken, even though we are condemned for lack of high ideals.... Stone has become entirely subservient to Holmes and Brandeis—I am very much disappointed in him. I urged Coolidge to appoint him but he hungered for the applause of the law school professors and the admirers of Holmes. If Holmes' dissents in constitutional cases had been followed, we should have had no constitution.... Holmes has very little knowledge of governmental principles.

Letter from WHT to Horace D. Taft (June 8, 1928), microformed on TAFT PAPERS, supra note 9, Reel 302.


Olmstead was blasted as “the Dred Scott decision of prohibition.”\textsuperscript{566} Most damaging, however, was the perception, hammered home by Olmstead, that prohibition could be imposed on a recalcitrant population only by such “detestable” practices as the “dirty business” of wiretapping.\textsuperscript{566} The impression left by Olmstead was that “the heaviest load which prohibition has to carry is the shocking lawlessness that has been employed to enforce it.”\textsuperscript{567}

IX

In essence, the Court in Olmstead opted for law enforcement over the rule of law. The decision was received as confirming the view that the positive law of prohibition would be sustained by all means necessary. Attempting to explain the demise of prohibition, the historian David Kyvig has observed that “[d]uring the 1920s the Supreme Court did more than either Congress or the president to define the manner in which national prohibition would be enforced.”\textsuperscript{568} Kyvig argues that decisions like Olmstead, Lanza, Carroll, and Lambert created “[t]he image of a government prepared to engage in more aggressive and intrusive policing practices than ever before in order to enforce” prohibition.\textsuperscript{569} These cases confirmed the “disenchanted” perception “that government, unable to cope with lawbreakers by using traditional police methods, was assuming new powers in order to accomplish its task.”\textsuperscript{570}

Taft’s efforts to lead the Court relentlessly to sustain prohibition thus had the paradoxical effect of accentuating the disparity between the positive law of prohibition and traditional values. This

\textsuperscript{565} A New Dred Scott Decision, 149 Outlook 293, 293 (1928). Even the Anti-Saloon League refused unequivocally to support the decision. See Dr. Nicholson Backs Dry Wire-Tapping, N.Y. Times, June 24, 1928, at N3 (“The Anti-Saloon League ‘deplores’ the recent Supreme Court decision legalizing ‘wire-tapping’ in Prohibition cases, if the ruling is to apply to the Prohibition law only, according to Dr. S. E. Nicholson, National Secretary and State Superintendent of the dry organization.... It is feared by the dry forces that prohibition will fall into ‘disrepute’ and suffer ‘irreparable harm’ if the American public concludes that “universal snooping” is favored for enforcing the Eighteenth Amendment.”).

\textsuperscript{566} With the Editor: Judge-Made Law, Barron’s Weekly, June 11, 1928, at 11.

\textsuperscript{567} Editorial, 126 Nation 679, 679 (1928). For Van Devanter’s attack on this article, see supra note 560.

\textsuperscript{568} Kyvig, supra note 130, at 32.

\textsuperscript{569} Id. at 35.

\textsuperscript{570} Id.
disparity was most acute in the context of law enforcement, in which Americans increasingly concluded that the "experience of the last decade has shown that if we keep nationwide prohibition we shall continue to have with it summary haltings of automobiles at night, regulation of non-intoxicants, wire tapping, invasions of the home, and indiscriminate fatal shootings. These are the price we pay for prohibition."\textsuperscript{571} And, increasingly, Americans concluded, as did Zechariah Chafee, that "the price is too high."\textsuperscript{572}

The Taft Court exposed and sharpened the administrative teeth necessary to sustain the noble experiment, and in that way contributed to the growing national sense that prohibition was simply not worth the costs of its enforcement. Taft had been right in the years before 1918. A sumptuary law that was out of touch with the conscience of the community, and that was obeyed only as a result of an escalating spiral of repressive enforcement, was simply not sustainable. The Constitution could retain authority only if it was regarded as legitimate, and legitimacy did not lie merely in the procedures of Article V. The failure of prohibition demonstrated that the positive law of the Constitution must also be answerable to the people and to their beliefs.

In 1933, five years after \textit{Olmstead}, Americans ratified the Twenty-first Amendment, which repealed the Eighteenth.\textsuperscript{573} In that way they acted to reconnect the positive law of the Constitution to their actual convictions.

\begin{flushright}
\textsuperscript{571} Chafee, \textit{supra} note 294, at 949.
\textsuperscript{572} Id.
\textsuperscript{573} U.S. CONST. amend. XXI, § 1.
\end{flushright}
APPENDIX

Figure A: Percentage of Cases in Which a Justice Joins or Authors an Opinion for the Court

- Percentage of decisions in which a Justice joins or authors an opinion for the court in prohibition-related cases, 1921-1929 Terms
- Percentage of decisions in which a Justice joins or authors an opinion for the Court in all cases, 1921-1929 Terms
Figure B: Percentage Likelihood that a Justice Will Join or Author an Opinion for the Court in Prohibition Cases as Distinct from All Cases
### Table 1
National Prohibition Laws Before 1920

<table>
<thead>
<tr>
<th>Name</th>
<th>Date Enacted</th>
<th>Regulation</th>
<th>Substance Regulated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Webb-Kenyon Act</td>
<td>March 1, 1913</td>
<td>Prohibited importation of liquor into a state for purposes unlawful in that state</td>
<td>&quot;Intoxicating liquor&quot;</td>
</tr>
<tr>
<td>Reed Amendment</td>
<td>March 3, 1917</td>
<td>Prohibited importation of liquor into a state under whose laws manufacture or sale of intoxicating beverages was illegal</td>
<td>&quot;Intoxicating liquors&quot;</td>
</tr>
<tr>
<td>Military Prohibition</td>
<td>May 18, 1917</td>
<td>Prohibited sale of liquor to soldiers in uniform</td>
<td>&quot;Any intoxicating liquor&quot;</td>
</tr>
<tr>
<td>Lever Act</td>
<td>August 10, 1917</td>
<td>Prohibited use of food materials in production of distilled spirits for beverage purposes</td>
<td>&quot;Food materials&quot; for production of &quot;distilled spirits&quot;</td>
</tr>
<tr>
<td>Presidential Proclamation</td>
<td>December 8, 1917</td>
<td>Prohibited production of malt liquor except ale or porter</td>
<td>&quot;Malt liquor except ale and porter&quot; containing more than 2.75% alcohol by weight</td>
</tr>
</tbody>
</table>

575. Reed Amendment, ch. 162, § 5, 39 Stat. 1058, 1069 (1917). The Reed Amendment represented a significant step in the nationalization of alcohol regulation, as it prohibited the importation of liquor into any state that proscribed its sale or manufacture, even if state law did not itself prohibit importation:
   Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be ... fined not more than $1,000 or imprisoned not more than six months, or both; and for any subsequent offense shall be imprisoned not more than one year.

Id.
<table>
<thead>
<tr>
<th>Presidential Proclamation (pursuant to Lever Act)(^{579})</th>
<th>September 16, 1918</th>
<th>Prohibited production of all malt liquors for beverage purposes</th>
<th>“Malt liquors, including near beer, for beverage purposes,” whether containing alcohol or not</th>
</tr>
</thead>
<tbody>
<tr>
<td>War-Time Prohibition Act(^{580})</td>
<td>November 21, 1918</td>
<td>Prohibited sale of distilled spirits and sale or manufacture of wine and beer for beverage purposes</td>
<td>“Distilled spirits” and “beer wine, or other intoxicating malt of vinous liquor”</td>
</tr>
<tr>
<td>National Prohibition (Volstead) Act(^{581})</td>
<td>October 28, 1919</td>
<td>Prohibited manufacture, sale, transportation, or possession of liquor</td>
<td>Beverages &gt; 0.5% alcohol (^{582})</td>
</tr>
</tbody>
</table>

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579. Proclamation of Sept. 16, 1918, 40 Stat. 1848, 1848-49
582. That is, all beverages containing more than 0.5% alcohol.
Table 2
States with Statewide Prohibition Regimes in 1918

<table>
<thead>
<tr>
<th>State</th>
<th>Activities Prohibited</th>
<th>Substances Prohibited</th>
<th>Notable Exceptions for Personal, Noncommercial Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Manufacture, sale, importation, possession of more than limited quantities</td>
<td>Beverages &gt; 0.5% alcohol</td>
<td>Allowed social serving of liquor in private homes and personal importation of two quarts distilled spirits or two gallons of wine or five gallons of beer every fifteen days</td>
</tr>
<tr>
<td>Arizona</td>
<td>Manufacture, sale, importation, possession of liquor one has had imported</td>
<td>&quot;Intoxicating liquors of any kind&quot;</td>
<td></td>
</tr>
<tr>
<td>Arkansas</td>
<td>Manufacture, sale, importation</td>
<td>&quot;Any alcoholic, vinous, malt, spirituous or fermented liquors&quot;</td>
<td></td>
</tr>
</tbody>
</table>

583. This table is constructed from the compilation of laws in FEDERAL AND STATE LAWS RELATING TO INTOXICATING LIQUOR (Wayne B. Wheeler ed., 2d ed. 1918).

584. To facilitate comparison, this table has endeavored to fashion standardized categories of activities from the many different terms used in different state laws. For example, while many statutes prohibit both "sale" and "storage for sale," for purposes of this table, both prohibitions are subsumed under "sale."

585. This column excludes narrow categories of permissible activities so widespread as to be of minimal comparative significance, for example, use of liquor for medicinal purposes and use of wine for sacramental purposes.
<table>
<thead>
<tr>
<th>State</th>
<th>Activity Type</th>
<th>Conditions</th>
<th>Importation Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colorado</td>
<td>Manufacture, sale</td>
<td>&quot;Any intoxicating liquors&quot;</td>
<td>Allowed importation by permit of limited quantities for home use</td>
</tr>
<tr>
<td>Georgia</td>
<td>Manufacture, sale</td>
<td>Beverages &gt; 0.5% alcohol</td>
<td>Allowed social service of liquor in private homes</td>
</tr>
<tr>
<td>Indiana</td>
<td>Manufacture, sale</td>
<td>Beverages &gt; 0.5% alcohol</td>
<td>Allowed personal manufacture of wine or cider for personal use and social service of liquor in private homes</td>
</tr>
<tr>
<td>Iowa</td>
<td>Manufacture, sale</td>
<td>&quot;All intoxicating liquor whatever&quot;</td>
<td>Did not prohibit personal importation for personal use</td>
</tr>
<tr>
<td>Kansas</td>
<td>Manufacture, sale, possession</td>
<td>&quot;Any intoxicating liquors&quot;</td>
<td></td>
</tr>
<tr>
<td>Maine</td>
<td>Manufacture for sale, sale</td>
<td>Any intoxicating liquor as beverage</td>
<td>Did not prohibit personal importation for personal use</td>
</tr>
<tr>
<td>Michigan</td>
<td>Manufacture, sale</td>
<td>Any beverage with intoxicating qualities</td>
<td>Did not prohibit personal importation for personal use</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Manufacture, sale, importation, possession</td>
<td>Any intoxicating liquor</td>
<td>Allowed manufacture of homemade wine for household use</td>
</tr>
<tr>
<td>Montana</td>
<td>Manufacture, sale, importation</td>
<td>Beverages &gt; 2% alcohol</td>
<td>Did not prohibit personal importation for personal use</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Manufacture, sale, importation, purchase</td>
<td>Beverages &gt; 0.5% alcohol</td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Activity Description</td>
<td>Maximum Alcohol Content</td>
<td>Notes</td>
</tr>
<tr>
<td>---------------</td>
<td>----------------------------------------------------------------------------------------</td>
<td>--------------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Manufacture, sale by other than state and local agents (and then only for medical,</td>
<td>Beverages &gt; 1% alcohol</td>
<td>Allowed social service of liquor in private homes; did not prohibit</td>
</tr>
<tr>
<td></td>
<td>sacramental, mechanical, or scientific purposes)</td>
<td></td>
<td>personal importation for personal use</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Manufacture for sale, sale, importation for sale</td>
<td>Any liquor containing</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>alcohol</td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td>Manufacture, sale, importation</td>
<td>All liquors producing</td>
<td>Allowed wine and cider to be manufactured and sold at place of</td>
</tr>
<tr>
<td></td>
<td></td>
<td>intoxication</td>
<td>manufacture; allowed personal importation of one quart of liquor</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>for personal use every fifteen days</td>
</tr>
<tr>
<td>North Dakota</td>
<td>Manufacture, sale, importation</td>
<td>Any spirituous, malt,</td>
<td>Did not prohibit personal importation for personal use</td>
</tr>
<tr>
<td></td>
<td></td>
<td>vinous, fermented, or</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>other intoxicating liquor</td>
<td></td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Manufacture, sale, importation, and possession of more than limited quantities</td>
<td>Beverages &gt; 0.5% alcohol</td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td>Manufacture, sale, importation, and possession</td>
<td>Beverages &gt; 0.5% alcohol</td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Legal Activity</td>
<td>Legal Outcome</td>
<td></td>
</tr>
<tr>
<td>-----------------</td>
<td>-------------------------------------</td>
<td>----------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>South Carolina</td>
<td>Manufacture, sale, importation, possession</td>
<td>All liquors producing intoxication</td>
<td></td>
</tr>
<tr>
<td>South Dakota</td>
<td>Manufacture, sale, importation</td>
<td>Any beverage with alcohol</td>
<td></td>
</tr>
<tr>
<td>Tennessee</td>
<td>Manufacture for sale, sale, importation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Texas</td>
<td>Manufacture, sale, importation</td>
<td>All liquors producing intoxication Did not prohibit personal importation for personal use</td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td>Manufacture, sale, importation, possession</td>
<td>Beverages &gt; 0.5% alcohol</td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>Manufacture, sale, importation</td>
<td>Beverages &gt; 0.5% alcohol Allowed personal manufacture of wine or cider for personal use; allowed personal importation of one quart of distilled spirits or three gallons of beer or one gallon of wine every thirty days by any nonminor, nonstudent male</td>
<td></td>
</tr>
<tr>
<td>Washington</td>
<td>Manufacture, sale, importation, distribution, and possession of more than limited quantities</td>
<td>Any liquor containing alcohol Allowed social service of liquor in private homes</td>
<td></td>
</tr>
<tr>
<td>West Virginia</td>
<td>Manufacture, sale</td>
<td>Beverages &gt; 0.5% alcohol</td>
<td>Allowed personal manufacture of wine and cider for personal use; allowed personal importation for personal use of one quart of liquor every thirty days</td>
</tr>
</tbody>
</table>
### Table 3
States Without Statewide Prohibition Regimes in 1918

<table>
<thead>
<tr>
<th>State</th>
<th>Type of Regulation</th>
<th>Activities that May Be Regulated</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>Local option</td>
<td>Sale and public distribution only (social service in one's own home protected)</td>
</tr>
<tr>
<td>Connecticut</td>
<td>County license</td>
<td>Sale only</td>
</tr>
<tr>
<td>Delaware</td>
<td>District option</td>
<td>Sale and importation only (personal importation in limited amount permitted)</td>
</tr>
<tr>
<td>Florida</td>
<td>County option</td>
<td>Manufacture, sale, importation (home manufacture of wine for home consumption and personal importation in limited amounts permitted)</td>
</tr>
<tr>
<td>Idaho</td>
<td>District option</td>
<td>Manufacture, sale, importation, possession (manufacture and transportation for sale outside prohibition district permitted)</td>
</tr>
<tr>
<td>Illinois</td>
<td>Local option</td>
<td>Sale only</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Local option</td>
<td>Sale (personal importation for personal use explicitly protected)</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Local option</td>
<td>Sale (personal importation for personal use explicitly protected)</td>
</tr>
<tr>
<td>Maryland</td>
<td>County option</td>
<td>Sale (importation limited in several counties)</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Local license</td>
<td>Sale only</td>
</tr>
<tr>
<td>Minnesota</td>
<td>County option</td>
<td>Sale only</td>
</tr>
<tr>
<td>Missouri</td>
<td>License system</td>
<td>Sale only</td>
</tr>
</tbody>
</table>


587. Like Table 2 supra, this table has endeavored to fashion standardized categories of activities from the many different terms used in different state laws.
<table>
<thead>
<tr>
<th>State</th>
<th>Type</th>
<th>Regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nevada</td>
<td>Statewide prohibition of sales to a “minor or imbecile” or known habitual drunkard</td>
<td>No broad categories of regulation</td>
</tr>
<tr>
<td>New York</td>
<td>Local option</td>
<td>Manufacture, sale, importation, possession (manufacture and transportation for sale outside prohibition district permitted)</td>
</tr>
<tr>
<td>Ohio</td>
<td>Local option</td>
<td>Sale only</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>License system</td>
<td>Sale only</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Local license</td>
<td>Manufacture or sale (manufacture for sale outside prohibition locality permitted)</td>
</tr>
<tr>
<td>Vermont</td>
<td>Local license</td>
<td>Sale only</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Local option</td>
<td>Sale only</td>
</tr>
<tr>
<td>Wyoming</td>
<td>County license</td>
<td>Sale only</td>
</tr>
</tbody>
</table>