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ALCOHOL PROHIBITION IN THE NEW MEXICO AND ARIZONA STATE JUDICIARIES AT 100 YEARS: THE DEVELOPMENT OF LAW AND SHAPING OF SOCIETY IN THE SOUTHWEST

Joshua Kastenbergs*

On January 16, 1920, the United States became a “dry” nation, at least as intended by the recently adopted the Eighteenth Amendment to the Constitution and its implementing legislation, the National Prohibition Act. In his comprehensive study on the national alcohol ban, *Last Call the Rise and Fall of Prohibition*, Daniel Okrent asks his readers: “How did a freedom-loving people decide to give up a private right that had been exercised by millions upon millions since the first European colonists arrived in the New World?”¹ This article does not seek to answer Okrent’s broad question, but rather, provide insight into how the state supreme courts of the nation’s two newest contiguous states not only enforced the national and state liquor laws, but also developed and shaped law and society alike in their respective jurisdictions.

In the period preceding and during Prohibition (1900-1933), the New Mexico and Arizona supreme courts borrowed analysis from other state courts of appeal across the country, albeit in an occasionally questionable or opportunistic manner. Their shaping of society included the closure of the saloon, a cultural staple of the western states.² The alcohol ban also cemented a social hierarchy into the status quo. When New Mexico achieved statehood, over forty percent of its residents were Spanish-American, and largely Catholic.³ While there were Catholic temperance movements in the United States, they never approached the zeal of Protestant and anti-immigrant groups who espoused national prohibition and were

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1. DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 3 (2010).

2. See SARA E. QUAY, *WESTWARD EXPANSION* 118 (2002). Quay writes: “The local saloon was the central meeting place for most western towns . . . [a]s a site of socializing, eating, and most important drinking.” *Id.* As anecdotal evidence of the saloon’s centrality in the west, the New Mexico Territorial Supreme Court, in *United States v. Spencer*, reversed a criminal conviction after discovering that a bailiff and judge permitted jurors to begin their morning deliberations in a saloon while consuming whiskey purchased by the bailiff. 1896-NMSC-032, 8 N.M. 667, 47 P. 715. In this decision, the justices noted that while there was no evidence of outside influence on the jurors, if the verdict were allowed to “it might tend to establish a dangerous precedent, and one that might prove harmful to the administration of justice, and a due regard for the rights of trial by jury.” *Id.* ¶ 4.

3. See CORRINE M. MCCONNAUGHY, *THE WOMAN SUFFRAGE MOVEMENT IN AMERICA: A REASSESSMENT 195–205* (2013). Professor McConnaughy points out that Anglo women of means were involved in ensuring statehood and drafting the first constitution. See *id.* The exclusion of Hispanic women from the process of achieving statehood meant that Catholics were also underrepresented. See *id.*

anti-Catholic.⁴ Indeed, the temperance movement in the United States largely began as a Puritan (Protestant) campaign to end the production and consumption of “demon rum.”⁵ In Arizona, suffrage was linked with prohibition and nativism. The dual anti-alcohol and enfranchisement of women campaigns succeeded by the time the state constitution took effect.⁶ However, women in positions of power were largely non-Catholic and white.

Of course, none of the actions of either state supreme court could have likely occurred if not for the United States Supreme Court’s jurisprudence on alcohol. By June of 1920, the Court not only upheld the means by which the Eighteenth Amendment came into force, but also all aspects of the National Prohibition Act.⁷ Moreover, the Court, in four additional respects, enabled a vigorous ban against “intoxicating liquor” to occur in both New Mexico and Arizona, even before 1920. First, the Court upheld Congress’s delegation of authority to the Secretary of War to prevent the distribution of liquor near military bases after the United States declared war on the Imperial German Government in 1917.⁸ The Army established large military training camps in both Arizona and New Mexico to prepare an enormous force to fight in Europe.⁹ And, as there was already a sizeable military presence in both states as a result of continual fighting between competing factions in Mexico and Pancho Villa’s raid into New Mexico, the ban affected commerce in the two states.¹⁰ In 1919 the Court upheld the federal wartime prohibition on alcohol production even though the German government had since collapsed and a successor government signed an armistice ending the war.¹¹

Second, in a series of decisions predating 1913, the Court upheld the authority of state governments to ban the possession, sale, and transport of alcohol.¹² In 1873, the Court sustained an Iowa law which prohibited alcohol sales.¹³ Fourteen years later, in *Mugler v. Kansas* the Court determined that even when the enactment of prohibitory laws negatively impacted private enterprise, the Constitution’s

4. See, e.g., KENNETH C. BARNES, *ANTI-CATHOLICISM IN ARKANSAS: HOW POLITICIANS, THE PRESS, THE KLAN, AND RELIGIOUS LEADERS IMAGINED AN ENEMY, 1910–1960*, at 69–90 (2016); Dierdre M. Moloney, *Combatting “Whiskey’s Work”: The Catholic Temperance Movement in Late Nineteenth-Century America*, 16 U.S. CATH. HISTORIAN 1, 5–6 (1998).

5. See, e.g., TYLER ANBINDER, *NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS AND THE POLITICS OF THE 1850S*, at 43–44 (1992); IAN R. TYRELL, *SOBERING UP: FROM TEMPERANCE TO PROHIBITION IN ANTEBELLUM AMERICA, 1800–1860*, at 298–302 (1979).

6. See HEIDI J. OSSELEAR, *WINNING THEIR PLACE: ARIZONA WOMEN IN POLITICS, 1883–1950*, at 64–65 (2009).

7. See *National Prohibition Cases*, 253 U.S. 350 (1920).

8. See Act of May 18, 1917, Pub. L. No. 65-12, § 13, 40 Stat. 76, 83. This law was upheld in *McKinley v. United States*, 249 U.S. 397, 399 (1919).

9. See DAVID R. WOODWARD, *THE AMERICAN ARMY AND THE FIRST WORLD WAR* 72–74 (2014).

10. *Id.*

11. See *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146 (1919).

12. See, e.g., *Beer Co., v. Massachusetts*, 97 U.S. 25 (1877). In *Beer Co.*, the plaintiff corporation had been granted a state charter to brew and sell malt liquor and beer in 1828. *Id.* at 26. However, the state legislature passed a prohibition law in 1869 and the company sued the state for trammeling its property rights under the Constitution’s Takings Clause. *Id.* The Court determined that the stoppage of future alcohol production was not a taking of the company’s property. *Id.* at 33. See also *Kidd v. Pearson*, 128 U.S. 1 (1888).

13. See *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129 (1873).

Takings Clause did not protect commercial property owners.¹⁴ *Mugler* arose from three Kansas brewers' challenge to a statute which rendered their previously licensed breweries derelict after the state legislature forbade the production of alcohol for any consumptive reason, including export to other states.¹⁵ In 1891, in *In re Rahrer*, the Court upheld a state government's authority to prohibit the sale of alcohol within its borders but determined—or, in the words of Chief Justice Walter Clark of the North Carolina Supreme Court, “hinted”—that it could not, absent federal legislation, prohibit the transport of alcohol into its borders.¹⁶ In 1913, Congress acted “on the Court’s hint” in *Rahrer* and passed such legislation popularly known as the Webb-Kenyon Act.¹⁷

Third, prior to the National Prohibition Act, the Court had, in one sense, already directly blessed the prohibition of alcohol in New Mexico and Arizona. In *United States v. Sandoval*, the Court upheld the power of Congress to criminalize the sale or introduction of liquor on Indian lands located within the states.¹⁸ In 1897, Congress crafted a criminal statute prohibiting the introduction of intoxicating liquor to Indian country, but after New Mexico became a state in 1912, there was a question as to whether this law still applied to the Pueblo Tribe.¹⁹ Using racially demeaning language, the Court upheld the statute based on Congress' authority to regulate commerce with Indian tribes in an opinion penned by Justice Willis Van Devanter.²⁰ Fourth, the Court's decision was an unsurprising reflection of contemporary views on the relationship between Native Americans and alcohol.²¹ In 1904, the Arizona Supreme Court upheld a conviction for the sale of alcohol to a Native American, even though the defendant professed not to know of the buyer's ethnicity.²² In doing

14. 123 U.S. 623, 668–69 (1887).

15. See *id.* at 664. Moreover, the Court assured state governments that prohibitory laws need not take into consideration the past lawful practice of brewers, distillers, and saloon-owners in holding:

It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged.

Id. at 669.

16. 140 U.S. 545, 555 (1891). In this decision, Chief Justice Fuller noted:

No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.

Id. at 562. See also *State v. Cardwell*, 81 S.E. 628, 630 (N.C.1915) (Clark, C.J. concurring) (stating that Congress acted “upon [a] hint”). Three years later, the Court determined that a license requirement for the peddling of all alcohol was within a state's police power. See *Emert v. Missouri*, 156 U.S. 296 (1895).

17. See *Cardwell*, 81 S.E. at 630 (Clark, C.J., concurring).

18. 231 U.S. 28, 48 (1913).

19. *Id.* at 37–38.

20. *Id.* at 49. Van Devanter noted, in relying on the statements of federal agents, that the Pueblo Indians, in comparison to other tribes “although industrially superior, they are intellectually and morally inferior to many of them; and that they are easy victims to the evils and debasing influence of intoxicants.” *Id.* at 41. The law did not apply to New Mexico's non-Indian citizenry, though one could wonder whether a similar finding could be upheld by the Court in regard to gender or ethnicity. See *id.* at 49.

21. See, e.g., DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* 121 (1997)

22. See *United States v. Stofello*, 76 P. 611, 612 (Ariz. 1904).

so, Arizona's justices not only upheld the offense of alcohol sales to Native Americans a strict liability crime, they also placed a duty on the state's residents to determine the ethnicity of prospective buyers.²³

This article is divided into four sections. The first section examines the development of liquor limitation laws in the New Mexico and Arizona territories. The territorial supreme courts differed from the state supreme courts of both states in several regards, but namely—for the purpose of this article—the justices of the territorial courts were presidentially appointed to four-year terms subject to senatorial confirmation.²⁴ The decisions issued by the territorial courts were persuasive on the state supreme courts in the sense that neither Arizona's nor New Mexico's justices decided to overturn prior territorial decisions on alcohol. The second section analyzes Arizona and New Mexico Supreme Court decisions prior to the National Prohibition Act. After achieving statehood, Arizona's constitution and state legislature placed stringent restrictions on alcohol through prohibition. In contrast, New Mexico's voters opted for a "local-option" legal scheme until 1917 when the state constitution was amended to prohibit alcohol.²⁵ From 1912 through 1920, the supreme courts of both states borrowed from other state final courts of appeal to solidify the prohibition laws in effect. This process included several instances of deciding between conflicting decisions, as well as stretching the purpose and intent of other appellate court decisions to meet a desired end.

The third section covers the period of the National Prohibition Act's existence, from 1920 through 1933. During this period, the two state supreme courts continued to incorporate decisions from other state courts of appeal in a manner similar to the second section. However, the supreme courts of both states also operated during a time of significant federal law-enforcement action. Doctrines of preemption, incorporation of laws through "reference," double jeopardy involving prosecutions under federal and state sovereigns, and statutory interpretation were given lasting shape by the two state supreme courts. The fourth and final section concludes the article by examining the influence of the courts during this period as well as an assessment on their choice of case-law methodology.

I. ALCOHOL: EARLY LAWS, DEMOGRAPHICS AND STATEHOOD

In 1906, Congress passed an enabling act which permitted the residents of the Arizona, Oklahoma, and New Mexico Territories to seek statehood.²⁶ However, in passing the act, Congress contemplated that the New Mexico and Arizona Territories would enter the Union as a single state.²⁷ As a result of Arizona's Anglo-

23. *Id.* at 462. Several state supreme courts upheld the prohibition against the sale of alcohol to Indians as well as convictions where the defendant professed not to know the ethnicity of the buyer. *See, e.g.,* *People v. Faust*, 45 P. 261 (Cal. 1896); *State v. Niblett*, 102 P. 229 (Nev. 1909).

24. *See* Act of Feb. 11, 1891, Pub. L. No. 51-131, 26 Stat. 747; Act of Sept. 9, 1850, Pub. L. No. 31-49, § 10, 9 Stat. 446, 449; *See also* John S. Goff, *The Appointment, Tenure and Removal of Territorial Judges: Arizona—A Case Study*, 12 AMER. J. LEGAL HIST. 211, 211–231 (1968).

25. The term "local option" denotes municipality by municipality votes on prohibition. For a fuller definition of local option, *see* Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 182 (2006).

26. *See* Act of June 16, 1906, Pub. L. No. 59-234, 34 Stat. 267.

27. *See id.* § 23.

Protestant population's opposition to joining with New Mexico on the basis that the New Mexico Territory had a larger Hispanic and Catholic population, Oklahoma was the only territory to achieve statehood as a result of this act.²⁸ In 1910, Congress reassessed the single-state provision and legislated a new law permitting separate statehood.²⁹ The 1910 law demanded that a proposed new state, if it were to be accorded statehood by vote, had to guarantee freedom of religion. However, the sale of "intoxicating liquors to Indians" had to be forever prohibited.³⁰

Another interesting feature of the 1910 statehood law was that each state convention's proposed constitution had to separately gain both Congress' and President Taft's approval, even though the Constitution does not require presidential acquiescence to admit new states to the Union.³¹ Taft was to have a lasting influence in the legal operations of both states. Although he supported statehood for both Arizona and New Mexico, he opposed admission for either as long as the proposed state constitutions contained provisions for judicial recall.³² Taft succeeded in having the provisions removed. He believed that the recall of judges not only politicized the judiciary, it removed a significant protection against socialism becoming a national force.³³ Secondly, because he appointed the last of the territorial justices, he remained interested in learning of operation of law in the new states. For instance, upon being informed that Justice Clarence Roberts intended to retire from the New Mexico Supreme Court in 1921, Taft penned to him in lauding the decisions issued

28. See Act of June 20, 1910, Pub. L. No. 61-219, 36 Stat. 557. On Arizona's population's opposition to joint statehood, see DAVID R. BERMAN, *ARIZONA POLITICS AND GOVERNMENT: THE QUEST FOR AUTONOMY, DEMOCRACY, AND DEVELOPMENT* 30 (1998). According to Professor Berman, New Mexico's citizens overwhelmingly favored the joint admission plan but Arizona's opposed joint admission by a vote of five to one. See *id.* at 31.

29. See BERMAN, *supra* note 28, at 31.

30. See Act of June 20, 1910, Pub. L. No. 61-219, § 2, 36 Stat. 557, 560.

31. See TONI MCCLORY, *UNDERSTANDING THE ARIZONA CONSTITUTION* 20–29 (2d ed. 2010).

32. See DAVID V. HOLTBY, *FORTY-SEVENTH STAR: NEW MEXICO'S STRUGGLE FOR STATEHOOD* 255 (2012). As an example of the importance of judicial recall, several attorneys in Arizona lobbied Taft to permit recall to be a part of the state constitution. For instance, George W. Glowner penned "being a lawyer of nearly a quarter of a century of active practice, I can see the viciousness of some of its provisions, particularly the recall provision. But Mr. President, please allow me to state that it is the judiciary itself is responsible for the attitude the people have." Letter from George W. Glowner to William Howard Taft (Feb. 22, 1911) (copy on file with author).

33. See KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS 192–93* (2009). On Taft's worries on socialism becoming a force, he received correspondence from a California attorney, stating "if Arizona receives your sanction, I expect to see this recall heresy spread from state to state and very quickly its chief objective, viz, the Federal Constitution and the Supreme Court and the nation itself. The march of socialism will find no obstacle in its pathway more serious than a piece of paper once called a Constitution. See letter from Charles Stetson Wheeler to William Howard Taft (Feb. 26, 1911) (copy on file with author). Taft's view of the judiciary as a protection against socialism can be understood through his opponents' criticism of him. In 1905, Eugene Debs, a labor leader who later ran for president as a Socialist Party candidate, claimed in a speech titled *Growth of the Injunction*, that the Judicial Branch had departed from its duty of impartiality and aligned itself with corporations and banks to the detriment of labor. Debs went so far as to call Taft, a former judge on the Court of Appeals for the Sixth Circuit, and future president, a man with "unswerving loyalty to capital and unmitigated contempt for labor." Eugene V. Debs, *Growth of the Injunction*, in *WRITINGS AND SPEECHES OF EUGENE V. DEBS* 167, 169 (1948).

during his tenure, “I am glad to know that in appointing you, I have been vindicated by your becoming Chief Justice of the Court under State authority.”³⁴

Upon entry into the United States, each state established an independent judicial branch. The New Mexico Supreme Court was largely “Old-Guard” Republican in its orientation.³⁵ The term “Old Guard” has been used to characterize Republicans who opposed the newer progressive wing of the party, particularly in terms of government regulation of commerce and industry.³⁶ The progressives espoused foreign intervention to topple corrupt Latin American governments as well as state and federal efforts to root out corruption in city, state, and federal governments. Progressives also promoted tax policies to build infrastructure and ensure worker and consumer safety.³⁷ Nationally, progressives in both parties tended to support prohibition as a means to solve the ills caused by addiction and loss of work.³⁸ New Mexico’s first three justices, Robert Hanna, Frank W. Parker, and Clarence J. Roberts, were Republicans. Parker and Roberts had served on the territorial supreme court.³⁹

A quick biographical comment on each of the justices assists in understanding their views on prohibition and how it shaped their jurisprudence. Hanna was a prominent attorney who considered himself a “progressive,” as well as a prohibitionist.⁴⁰ Parker was a conservative Republican who served from 1912 to 1932, and in the words of one scholar, “was slow to change.” As in the case of Roberts, Taft had a role in promoting Parker to serve on the state supreme court.⁴¹ Parker also had a prominent role in President Wilson nominating Colin Neblett to the United States District Court for the District of New Mexico in 1917.⁴² Roberts began his legal career as a prosecutor in Indiana, became a newspaper owner in Denver, and in 1907 moved to New Mexico where he was elected to the territorial legislature.⁴³ He retired in 1921 and was replaced by a rapid succession of justices. In 1923, Samuel Bratton (D) was elected to fill this seat but he resigned the following year to successfully run for the United States Senate.⁴⁴ In 1922, the state’s democrats captured the state house, a senate seat, and a supreme court justiceship when Howard

34. Letter from William Howard Taft to Clarence Roberts (July 30, 1921) (copy on file with author).

35. See, e.g., Susan A. Roberts, *The Birth of a Partisan Judiciary, 1910-1911*, 5 N.M. L. REV. 1, 3–10 (1975).

36. See, e.g., ARTHUR PAULSON, *REALIGNMENT AND PARTY REVIVAL: UNDERSTANDING AMERICAN ELECTORAL POLITICS AT THE TURN OF THE TWENTY-FIRST CENTURY* 74 (2000).

37. See, e.g., HEATHER COX RICHARDSON, *TO MAKE MEN FREE: A HISTORY OF THE REPUBLICAN PARTY* 140–41 (2014); DANIEL DISALVO, *ENGINES OF CHANGE: PARTY FACTIONS IN AMERICAN POLITICS, 1868–2010*, at 70–71 (2012).

38. See DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION* 7–8 (2d ed. 2000).

39. See Roberts, *supra* note 35, at 9, 13. Richard Hanna was a progressive Republican who later ran for governor as a Democrat. Parker was a conservative Republican who served from 1912 to 1932 and Clarence Roberts was also a conservative Republican, but he served from 1912 through 1921. See *id.* at 6–13.

40. See *id.* at 11–13.

41. Letter from Frank W. Parker to Taft (Nov. 29, 1921) (copy on file with author).

42. Letter from Thomas Gregory to Woodrow Wilson (Jan. 29, 1917) (copy on file with author).

43. See, e.g., Michael J. McGuinness, *Hon. Clarence J. Thomas, 7 THE LAWYER AND BANKER AND SOUTHERN BENCH AND BAR REVIEW* 152–53 (Charles E. George ed., 1914).

44. See Susan A. Roberts, *The Republican Court, 1912-1922*, 5 N.M. L. REV. 14, 14–29 (1975).

Bickley replaced Bratton. Although Bickley was a Democrat, in 1930, President Herbert Hoover considered nominating him to the Supreme Court but selected Owen Roberts instead, at least evidencing Bickley's standing with the national bar.⁴⁵ For the period covered by this article, the justices with longevity and therefore who influenced the course of alcohol enforcement included Roberts, who left the court in 1921, Parker, who died in office in 1932, and Bickley who served on the court until his death in 1947.⁴⁶

Arizona, like New Mexico, had direct elections for selecting its justices.⁴⁷ Interestingly, none of the territorial justices were later elected to the state supreme court. As noted by former Arizona Supreme Court Chief Justice, Rebecca White Berch, Arizona's territorial justices tended to be incompetent and corrupt and this may have been a reason none of them succeeded to the state supreme court.⁴⁸ According to another study, the participants in the state constitutional convention intended for judges to be "accountable to the voters," instead of favoring powerful interests.⁴⁹ Thus, if the population supported prohibition, so, too, would the state's judges. During much of the Prohibition era, the Arizona Supreme Court consisted of Henry D. Ross, Archibald G. McAlister, and Alfred C. Lockwood.⁵⁰ The justices were hardly progressive in terms of voting rights. In 1928, they determined, that the state's Native American population did not possess the right to vote in *Porter v. Hall*.⁵¹ (However, Ross dissented from the opinion based on the fact that as of 1924, Native Americans were citizens of the United States).⁵² While the justices split over rights of indigenous peoples, they would largely show unity on alcohol-based appeals.

Ross, a Democrat, was born in Arkansas in 1861, attended the University of Iowa where he earned a law degree, then moved to Arizona in 1885.⁵³ In addition to serving as district attorney of Yavapai County, he worked as a school teacher.⁵⁴ Lockwood, born in Illinois in 1875, did not have formal legal training prior to

45. See CHRISTINE L. NEMACHECK, STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH 147 (2007).

46. See Roberts, *supra* note 44, at 25–26. Although Bickley was a conservative justice, he liberalized divorce in New Mexico by recognizing the nascent doctrine of a no-fault divorce. See, e.g., J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA 72–75 (1997).

47. See MCCLORY, *supra* note 31, at 147–48.

48. See Rebecca White Berch, *A History of the Arizona Courts*, 3 PHOENIX L. REV. 11, 13 (2011).

49. MCCLORY, *supra* note 31, at 147.

50. See BERMAN, *supra* note 28, at 129–30. It was not until 1947, a decade and half after the Eighteenth Amendment's repeal, that the court was increased in size from three to five justices. See *id.* Although the court consisted of Henry D. Ross, Archibald McAlister and Edward Flanagan at the start of National Prohibition, Flanagan only served for one year on the court and Lockwood replaced him. See, e.g., Letter from Henry D. Ross to Taft (Oct. 28, 1921) (copy on file with author).

51. 271 P. 411, 419 (Ariz. 1928).

52. *Id.* (Ross, J., dissenting).

53. For a biographical sketch on Ross, see *Ross Dies: High Court Loses Dean*, ARIZONA REPUBLIC, Feb. 10, 1945; 1 J.O. CONNORS, WHO'S WHO IN ARIZONA 501–03 (1913); and 3 JAMES H. MCCLINTOCK, ARIZONA: PREHISTORIC—ABORIGINAL PIONEER—MODERN: THE NATION'S YOUNGEST COMMONWEALTH WITHIN A LAND OF ANCIENT CULTURE 72 (1916).

54. CONNORS, *supra* note 53, at 501–03.

immigrating to Arizona in 1893.⁵⁵ For the first two years in the territory he worked as a teacher and read law before being admitted to practice. In 1914, along with justices Cunningham and Baker, Ross successfully lobbied President Woodrow Wilson to appoint Francis Jones, an Arizona prohibitionist and state government official, to the Interstate Commerce Commission.⁵⁶ In 1913 the state governor appointed Lockwood as a trial judge where he developed a reputation for being pro-labor. He ran as a Democrat in his election to the supreme bench.⁵⁷ A democrat, McAlister was originally from South Carolina and moved to the Arizona territory at the turn of the century before becoming a school principal in Florence, Arizona.⁵⁸ He also studied law at night, was elected district attorney, and participated in the statehood convention.⁵⁹ It appears that none of these men had ties to the liquor industry, and were, indeed amenable to prohibition.

a. The New Mexico Territory to Early Statehood

New Mexico's 1910 state constitution guaranteed the right to vote for all males and prevented laws from being imposed that would restrict voting rights based on race, religion, language, color, or the inability to speak.⁶⁰ Moreover, the state constitution recognized that Spanish was one of the state's two languages for the purpose of this right.⁶¹ When the state constitutional convention convened to draft the constitution, thirty-two of the one hundred men involved were listed as "Spanish speakers," meaning their first language was not English and they represented the territory's second most sizeable ethnicity.⁶² In spite of the territory's Catholic population, the prohibition forces assumed that they could influence the convention. The Women's Christian Temperance Union established eight branches in the territory, and together with the Anti-Saloon League, they opposed the draft constitution because it did not enable the state to become wholly dry at once.⁶³ President Taft ignored prohibitionists' opposition to New Mexico's admission and forwarded the constitution, along with a statement of support, to the House of Representatives which gained congressional approval.⁶⁴

Prior to statehood, the territory had limits on the sale and manufacture of alcohol. The New Mexico Territorial Supreme Court, in *Territory v. Digneo*, upheld laws preventing the sale of alcohol to minors without parental consent and disavowed

55. *Id.* at 521.

56. Letter from Henry D. Ross to Woodrow Wilson (Apr. 17, 1920) (copy on file with author). The Arizona Supreme Court was not alone in endorsing Jones to the Court; Senator Ashurst of Arizona did so as well. See letter from Henry F. Ashurst to Wilson (Apr. 16, 1920) (copy on file with author).

57. OSSELEAR, *supra* note 6, at 151.

58. CONNORS, *supra* note 53, at 518.

59. *Id.*

60. N.M. CONST. art. VII, § 3 (1910).

61. *Id.*; see also MAURILLO E. VIGIL, MICHAEL OLSEN & ROY LUJAN, NEW MEXICO: GOVERNMENT AND POLITICS 101 (1990).

62. ROBERT W. LARSEN, NEW MEXICO'S QUEST FOR STATEHOOD 274 (1968).

63. *Id.*

64. *Id.* In 1909 Taft visited Albuquerque, New Mexico and was given a "rather cool reception" by the city's citizens who wanted rapid statehood. Apparently this upset Taft, who then promised his full support. See, e.g., HOWARD BRYAN, ALBUQUERQUE REMEMBERED 179 (2006).

the doctrine of “repeal by implication” in doing so.⁶⁵ In 1854, the territorial legislature outlawed the sale of alcohol to minors without parental consent and affixed a maximum fine of fifty dollars as a penalty.⁶⁶ In 1875 the legislature added as a maximum penalty, a sixty day prison sentence, and in 1901 it enacted a third statute prohibiting the sale of alcohol, cigarettes and cigars to minors without parental consent.⁶⁷ In the 1854 statute, the legislature did not define minor, but under the territorial laws, a minor was considered to be any person under the age of twenty-one, consistent with the national voting laws. However, in the 1875 and 1901 statutes, the legislature defined a minor as a person under the age of eighteen.⁶⁸ When, in 1908, a nineteen-year-old named Florencio Gonzales purchased alcohol without his parent’s consent, a prosecuting attorney charged him with violating the 1854 statute and he appealed on the basis that this law had been impliedly repealed by the territorial legislature in 1875 and again in 1901. The territorial court’s justices, in perhaps evidencing a desire to judicially limit alcohol, determined that 1854 statute remained in effect because the earlier law was neither repugnant to, nor irreconcilable with, the later laws.⁶⁹ In doing so, the court relied on *Frost v. Wienie*, an 1895 Supreme Court decision upholding treaty rights guarantees to the Osage over a later statute enabling homestead settlement on Osage territorial lands.⁷⁰ The disfavoring of repeal by implication by the territorial court in *Digneo* has remained a part of the state’s jurisprudence since.⁷¹

In 1910, the territorial court upheld a law prohibiting saloons within five miles of a sanitarium or within two miles of a military post.⁷² Although the court relied, in large measure, on *Mugler* and other federal courts’ decisions, it also noted that the Tennessee Supreme Court, in *Webster v. State*, had upheld a similar restriction, albeit one relating to the placement of saloons within four miles of schoolhouses.⁷³ The defendants in *Webster* had lawfully opened a saloon prior to the law, but continued to run the saloon after the law took effect and were convicted under the state’s criminal code.⁷⁴ In issuing their ruling, Tennessee’s justices observed “it may work a hardship, and no doubt will, to at once and summarily close up a business theretofore legalized and licensed; but this was a matter addressed to the General Assembly, and not to this court.”⁷⁵ The territorial court, in issuing *Rapp*, also relied on *Whitney v. Township Board of Grand Rapids*, an 1888 Michigan Supreme Court decision upholding a law against selling alcohol within one mile of

65. *Territory v. Digneo*, 1909-NMSC-018, 15 N.M. 157, 103 P. 975.

66. *Id.* ¶ 2, 103 P. at 975 (citing Sec. 1235 C. L. 1897 (1854)).

67. *Id.* (citing to Section 1270, C. L. 1897 and Sec. 1, Ch. 3, L. 1901, respectively).

68. *Id.*

69. *Id.* ¶ 7, 103 P. at 976.

70. *Id.* (citing *Frost v. Wienie*, 157 U.S. 46 (1895)).

71. See, e.g., *State v. Smith*, 2004-NMSC-032, ¶ 19, 136 N.M. 372, 98 P.3d 1022; *Dairyland Ins. Co. v. Rose*, 1979-NMSC-021, ¶ 12, 92 N.M. 527, 591 P.2d 281; *Stokes v. N.M. State Bd. of Educ.*, 1951-NMSC-031, ¶ 5, 55 N.M. 213, 230 P.2d 243.

72. *Rapp v. Venable*, 1910-NMSC-041, 15 N.M. 501, 110 P. 834.

73. *Id.* ¶ 13, 110 P. at 836.

74. 82 S.W. 179, 180 (Tenn. 1903).

75. *Id.* at 184.

“Soldiers’ Homes,” a term denoting homes for aging and injured veterans of the nation’s wars.⁷⁶

In *Territory of New Mexico v. Church*, the court, in 1907, held that saloon owners were responsible for the acts of their employees.⁷⁷ The justices partly relied on *Noecker v. People*, an 1879 Illinois Supreme Court decision.⁷⁸ That court decided, in upholding an indictment, that a pharmacist could be criminally liable for an employee’s sale of illicit alcohol, even though the pharmacist instructed the employee not to sell.⁷⁹ The difficulty with relying on *Noecker* in this instance—other than the scant length of the decision and the fact that it upheld an indictment—is that Illinois’s justices held that it was within a jury’s province to determine whether the pharmacist’s order to the employee was merely a statement of intent to follow the law.⁸⁰ Although the use of *Noecker* in this decision may have stretched the intent of that decision, *Church* established the legal doctrine in New Mexico that saloon owners, restaurateurs, and hoteliers could be found criminally liable for their employees’ sale of alcohol to minors.⁸¹

In 1913, in *Territory of New Mexico v. Lynch*, the court reversed a murder conviction based on a trial judge’s refusal to permit a defense counsel to voir dire prospective jurors on their support for prohibition.⁸² The defendant in that case killed a city marshal who entered into the defendant’s home to conduct an authorized search for whiskey.⁸³ Important to this decision was the court’s recognition of a division in society “over a great social and economic question . . . during the throes of the change from a wet to a dry community.”⁸⁴ Here, the justices recognized that the stark division in society between prohibition’s supporters and its defenders may have also divided society along religious and ethnic lines.

76. *Rapp*, 1910-NMSC-041, ¶ 14, 110 P. at 836 (citing *Whitney v. Twp Bd. of Grand Rapids*, 39 N.W. 40 (Mich. 1888)). In recognizing that the enticement of alcohol was detrimental to Civil War veterans, Michigan’s justices first recognized the duty of the state to care for infirm former soldiers who had given their “best blood and vital energies to their county in its time of utmost need and peril,” before concluding:

the maintenance of a saloon at the very door of this institution, with its abundant temptations to excess in the use of liquor, would be not only detrimental to the health and welfare of these old soldiers, but at the same time a standing menace to the good order and necessary discipline which must exist at the Home, or its usefulness and benefit be destroyed.

Whitney, 39 N.W. at 43.

77. 1907-NMSC-025, ¶ 30, 14 N.M. 226, 91 P. 720.

78. *Id.* ¶ 28, 91 P. at 723–24. It should be noted that the territorial justices misstated the name of the decision as *McCutcheon v. Illinois*. In fact, the case name is *Noecker* as attached to the case cite.

79. *Noecker v. People*, 91 Ill. 494, 496–97 (Ill. 1879).

80. *See id.*

81. *See, e.g., State v. Gunter*, 1974-NMCA-132, 87 N.M. 71, 529 P.2d 297.

82. 1913-NMSC-038, 18 N.M. 15, 133 P. 405, *rev’d on other grounds*, *State v. Chamberlain*, 1991-NMSC-094, 112 N.M. 723, 819 P.2d 673.

83. *Id.* ¶ 2, 133 P. at 405–06.

84. *Id.* ¶ 17, 133 P. at 407.

b. Arizona Territory to Early Statehood

As in the case of New Mexico, the Women's Christian Temperance Union and Anti-Saloon League had a strong presence in the Arizona Territory on the eve of statehood. According to Professor David S. Berman, the Women's Christian Temperance Union leaders in Arizona pushed to maximize women's suffrage in the hopes of turning the state dry.⁸⁵ Unlike New Mexico, shortly after admission into the Union, the Arizona legislature tried to impose a literacy test on the voting franchise to exclude Spanish-speaking males from voting even though Congress and Taft had forbidden voting restrictions as a condition of admission.⁸⁶ In this sense, Arizona's temperance forces had not only allied with a nativist core of Anglo-Protestant settlers to restrict minority voting rights, they also linked prohibition with Protestantism.⁸⁷

Professor Sean Beienburg, in his recent book titled *Prohibition, the Constitution, and States Rights*, observed that "Arizona had every reason to be ardently anti-alcohol, which is why it unsurprisingly adopted prohibition soon after statehood."⁸⁸ He noted that Arizona's residents, who were largely "old-stock Americans," opposed joint admission into the union with New Mexico's large Spanish-speaking Catholic population.⁸⁹ Likewise, Professor John D. Leshy commented in his study on Arizona's statehood, that issues on racial equality—or the prevention of it—dominated the statehood convention.⁹⁰ The Arizona Territory had a different Civil War experience than New Mexico. Southerners had briefly commandeered the Arizona Territory for the Confederacy during the early part of the Civil War and had a large influence in the state convention, a half-century later.⁹¹ In 1861, its provisional pro-confederate governor declared that in addition to embracing slavery, the territory would exterminate its Apache population.⁹² This failed after Confederate president Jefferson Davis refused to consider any extermination or removal policy.⁹³ During the statehood convention, anti-miscegenation articles and the prohibition of mixed-race schools were advanced for inclusion into the state constitution.⁹⁴

In 1888, the Arizona Supreme Court upheld an alcohol taxation law that charged liquor dealers \$50 per year but hoteliers and restaurant owners who sold \$10 per year of liquor and doctors who prescribed alcohol paid no taxes at all.⁹⁵ A saloon and billiard hall owner argued that the territorial legislature had violated the

85. See BERMAN, *supra* note 28, at 75.

86. JOHN D. LESHY, *THE ARIZONA STATE CONSTITUTION* 212 (2011).

87. See, e.g., Michael deHaven Newsom, *Some Kind of Religious Freedom: National Prohibition and the Volstead Act's Exemption for the Religious Use of Wine*, 70 BROOKLYN L. REV. 739, 799 (2005).

88. SEAN BEIENBURG, *PROHIBITION, THE CONSTITUTION, AND STATES RIGHTS* 166 (2019).

89. *Id.*

90. John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L. J. 1, 51–52 (2010).

91. RAY C. COLTON, *THE CIVIL WAR IN THE WESTERN TERRITORIES: ARIZONA, COLORADO, NEW MEXICO, AND UTAH* 18 (1959).

92. *Id.* at 122–23.

93. ANDREW E. MAISCH, *THE CIVIL WAR IN ARIZONA: THE STORY OF THE CALIFORNIA VOLUNTEERS, 1861-1865*, at 10–12 (2004).

94. Leshy, *supra* note 90, at 51–52.

95. *Territory v. Connell*, 16 P. 209, 209 (Ariz. 1888).

uniformity of taxes rule.⁹⁶ This rule exists to ensure that the government does not favor a type of commerce by taxing competing commercial interests out of existence.⁹⁷ The Arizona Supreme Court determined that each category of business constituted a separate class and therefore the uniformity rule had not been violated. In doing so, Arizona's justices relied on the Ohio Supreme Court's 1887 decision, *Marmet v. State*.⁹⁸ However, *Marmet* arose as a challenge against differing license rates on horse-drawn wagons, where larger wagons requiring more than a single horse were charged at a higher rate than single-horse carriages, and dairymen paid a lower license fee than boiler-haulers.⁹⁹ Arizona's justices also relied on a Rhode Island Supreme Court decision arising from a challenge to differing sewage tax assessments.¹⁰⁰ The city of Providence charged assessments based on the size of property frontage rather than a property's use and as a result, the owner of an empty lot might pay more than the owner of a fully occupied boardinghouse.¹⁰¹ The Rhode Island Supreme Court recognized the potential unfairness in this scheme but then determined that the legislature had the authority to enact tax schemes, and the sewage taxing scheme did not violate the uniformity requirement.¹⁰² Given Arizona's narrow reading of uniformity in the collection of taxes, at least as it applied to alcohol establishments, the legislature could, in theory, tax saloons out of existence if it chose to do so, and at a minimum evidenced that the justices held a dim view of saloons.

In 1895, the Arizona Supreme Court determined that while there existed a general rule prohibiting jurors in civil and criminal trials to consume alcohol, and that the consumption of alcohol during the trial would presumptively render a juror incompetent, the fact that jurors consumed large quantities of wine the evening before deliberations with the acquiescence of the judge, plaintiff, and defendant, would not justify overturning a verdict.¹⁰³ In another decision, titled *Cluff v. State*, Arizona's Supreme Court upheld the evidentiary doctrine of prior bad acts to prove that a defendant produced or sold alcohol.¹⁰⁴ At the time, the prior bad acts doctrine enabled a prosecutor to use past crimes or instances of immoral conduct to prove that a witness had the knowledge, or the motive, on how to commit a charged crime. But the doctrine was frowned upon as a matter of common law, though apparently not in

96. *Id.*

97. See *LaBelle Iron Works v. United States*, 256 U.S. 377 (1921); *Cummings v. Nat'l Bank*, 101 U.S. 153 (1880).

98. *Connell*, 16 P. at 209–10 (citing *Marmet v. State*, 12 N.E. 463 (1887)).

99. *Marmet*, 12 N.E. at 465.

100. *Connell*, 16 P. at 209. *Connell* has been cited as late as 1966 to enable differing taxations schemes. See, e.g., *State ex rel. Goddard v. Coerver*, 412 P.2d 259 (Ariz. 1966).

101. *Cleveland v. Tripp*, 13 R.I. 50 (1880).

102. *Id.* at 61–62. Rhode Island's justices noted,

We confess that these reasons are not perfectly convincing. But the question is whether, reinforced as they are by so many precedents, they are not sufficient. The first reason is the stronger; for, without doubt, the propriety of any given tax and the modes in which it shall be apportioned and assessed are legislative matters, with which the courts will not interfere unless the legislature has palpably transgressed some limitation of the Constitution.

Id. Rhode Island's Supreme Court further reinforced its acceptance of finding narrow classes under the uniformity doctrine in *Bishop v. Tripp*, 15 R.I. 466 (1887).

103. *Cooper Queen Mining Co. v. Ariz. Prince Copper Co.*, 7 P. 718, 719–20 (Ariz. 1895).

104. 142 P. 644 (Ariz. 1914).

terms of Arizona's liquor prosecutions.¹⁰⁵ In 1913, the justices determined that drunkenness did not constitute a defense against premeditated murder.¹⁰⁶ That year, they also overturned a robbery conviction where the alleged victim was intoxicated at the time his money disappeared, and therefore had no memory of the actual taking.¹⁰⁷ Implied in this ruling was the notion that if a victim of a crime was intoxicated, the victim may have invited the crime to occur, somehow negating the defendant's criminality.

The oddest of the territorial supreme court's decisions originated with a New York hospital and its orphans who were transported from that city to Arizona.¹⁰⁸ The Foundling Hospital of New York City was chartered in New York to care for abandoned children under the age of two.¹⁰⁹ When, in 1904 the hospital received a request from an Arizona-based Catholic priest requesting that the hospital send children to the territory so that the local parishioners could adopt them, the hospital sent forty Caucasian children to the territory.¹¹⁰ It became problematic, apparently, to members of the local white population on discovery that the adults charged with adopting the children were neither Caucasian nor of substantial economic means.¹¹¹ The children were distributed to the adults, until an Anglo citizen allegedly discovered that the children had been exposed to "beer and whiskey," as well as being found in "a filthy condition, covered with vermin, and, with two or three exceptions, ill and nauseated from the effects of coarse Mexican beans, chili, watermelons, and other improper food which had been fed them."¹¹² Several children were seized by the Anglo population. Although the state's justices centered their

105. See, e.g., *Stokes v. People*, 53 N. 164, 175–76 (1973) (the prosecution had cross-examined a defense witness about prior bad acts merely to impeach the defense witness' character); see also, *Clevenger v. State*, 188 Ind. 592, 125 N.E. 41, 45 (1919).

106. *Rodriguez v. Territory*, 125 P. 878 (Ariz. 1912). Rodriguez was upset that his wife had informed him that she intended to dissolve their marriage and in response, he became drunk and shot her. The justices held that the decedent's intentions did not constitute a defense and noted, "[b]arbaric practices in treating the wife as a chattel and brain-storms are not recognized by this court as excuses, under the laws of Arizona, for committing a crime, nor are they recognized in mitigation of the punishment. *Id.* at 179–80.

107. *Reynolds v. State*, 132 P. 434 (Ariz. 1913).

108. *In re New York Foundling Hosp. v. Gatti*, 79 P. 231 (Ariz. 1905).

109. See *id.* at 231. On the creation and purpose of the Foundling Hospital, see LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* 1–3 (1999).

110. *Gatti*, 79 P. at 233. The court noted: "These children were of the Caucasian race, and, as requested by the said priest, chosen from among those in the institution who were fairest and lightest in complexion. They were all children of unusual beauty and attractiveness. Their ages were from 18 months to 5 years." *Id.*

111. *Id.* The court noted:

The evidence establishes, without contradiction, that the persons to whom the children were given, as assigned, both in Clifton and Morenci, were wholly unfit to be intrusted with them; that they were, with possibly one or two exceptions, of the lowest class of half-breed Mexican Indians; that they were impecunious, illiterate, unacquainted with the English language, vicious, and, in several instances, prostitutes and persons of notoriously bad character; that their homes were of the crudest sort, being for the most part built of adobe, with dirt floors and roofs; that many of them had children of their own, whom they were unable properly to support.

Id.

112. *Id.* at 234.

attention on the ethnicity and race of the adoptive parents, they coupled this with the alleged discovery of alcohol in the homes and determined that neither the adoptive parents, nor the Foundling Hospital had a lawful claim to the children under the “best interests of the child” standard, and therefore the children would become a ward of the territory until such time as other, presumably Anglo, parents could be found.¹¹³

II. PRECURSOR TO FEDERAL ENFORCEMENT: THE WEBB-KENYON ACT AND THE SOUTHWEST

Although a national movement had existed for outlawing liquor since the beginning of the United States, it was not until 1913 that Congress undertook a significant step to assist the growing consensus to outlaw the substance. In 1912, an overwhelming majority of the House of Representatives and Senate voted, in what became known by its popular title as the “Webb-Kenyon Act,” to prohibit the interstate shipment of alcohol to states where the possession, sale, manufacture, or distribution of alcohol was already banned.¹¹⁴ President Taft, who later became central to the Court upholding the legal enforcement of prohibition as chief justice, vetoed the act on February 28, 1913, after declaring that it unconstitutionally vested the states with powers solely placed in Congress to regulate interstate commerce.¹¹⁵ However, Congress overrode Taft’s veto by voting 63-21 in the Senate and 249-97 in the House.¹¹⁶ Of New Mexico’s senators, Thomas Catron (R) voted against overriding Taft’s veto while Albert Fall (R)—later to be enmeshed in a scandal and imprisoned for his conduct as President Harding’s Secretary of the Interior—voted to override the veto.¹¹⁷ Both of Arizona’s senators, Henry Ashurst (D) and Marcus

113. *Id.* at 237.

114. Pub. L. No. 62-398, 37 Stat. 699 (1913). The Text of the act read:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the shipment or transportation, in any manner or by any means whatsoever of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State, Territory, or District of the United States, or place noncontiguous to, but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to, but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package, or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to, but subject to the jurisdiction thereof, is hereby prohibited.

Id.

115. See, e.g., MICHAEL J. GERHARDT, *THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY 180–81* (2013); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW-MAKERS 33* (1950).

116. On the House vote to override, see *To Pass Over President’s Veto, S. 4043 (37 Stat. 699, 3/1/1913), A Bill Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases*, GOVTRACK, <https://www.govtrack.us/congress/votes/62-3/h254> [<https://perma.cc/5L76-L5ZK>].

117. On the Senate vote to override, see *To Pass Over the Veto of the President, H.R. 17593, A Bill to Divest Intoxicating Liquors of Their Interstate Commerce Character in Certain Cases*, GOVTRACK, <https://www.govtrack.us/congress/votes/62-3/s379> [<https://perma.cc/V4Z2-KCL2>]. Neither Catron nor Fall appear to be law-abiding men. On Catron, see DAVID CORREIA, *PROPERTIES OF VIOLENCE: LAW AND LAND GRANT STRUGGLE IN NORTHERN NEW MEXICO 47–49* (2013). On Fall and the “Teapot Dome” scandal, see DAVID STRATTON, *TEMPEST OVER TEAPOT DOME: THE STORY OF ALBERT B. FALL 261–301* (1998).

Smith (D), voted to override the veto.¹¹⁸ In the House, Arizona's Carl Hayden (D) voted to override the veto as did New Mexico's Harvey Butler Ferguson (D).¹¹⁹ In 1917, the Court upheld the act against a claim that Congress exceeded its constitutional authority in legislating to the states extraordinary control over interstate commerce.¹²⁰

After it upheld the Webb-Kenyon Act, the Court continued to back state prohibition laws. In 1917, in *Crane v. Campbell*, the Court determined that a state law prohibiting the possession of alcohol for personal use did not violate the Fourteenth Amendment.¹²¹ More importantly, from 1913 onward, a state government, which prohibited alcohol, could rely on federal law enforcement to punish persons who transported liquor into their state. For instance, in 1913, Judge Robert Sharp Bean on the United States District Court for the District of Oregon conceded that while enforcement of the act would produce confusing results, the federal courts had a duty to uphold its enforcement.¹²² And, in 1915, the United States Court of Appeals for the Fourth Circuit upheld the grant of an injunction against a railway company shipping beer from Ohio—a state within the Court of Appeals for the Sixth Circuit's jurisdiction—into West Virginia, which fell under the Fourth Circuit's jurisdiction.¹²³

a. Arizona, 1914: The Constitutional Prohibition of Alcohol

In 1914, Arizona's voters amended their state constitution to prohibit the manufacture, sale, or "any exchange" of intoxicating liquor, wine, and beer.¹²⁴ Two years after its passage, the Arizona Supreme Court determined that the amendment was "absolute and general," as to preclude a defense of ignorance for violators, including a defense based on the ignorance of alcohol content in a substance.¹²⁵ Divided into three sections, the amendment's first section listed the full range of prohibited alcohol-related activities. The first section also contained punitive sanctions for violators including fines and prison sentences ranging from ten days to two years.¹²⁶ The second section placed a duty on the legislature to enact laws for

118. *To Pass Over the Veto of the President*, *supra* note 117.

119. Ferguson had been voted out of office and replaced by Republican George Curry on March 15, 1913, and therefore Curry did not vote.

120. *Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 330–32 (1917).

121. 245 U.S. 304 (1917).

122. *United States ex rel. F. Zimmerman & Co. v. Oregon-Washington R.R. & Navigation Co.*, 210 F. 378, 380–81 (D. Or. 1913).

123. *West Virginia v. Adams Express Co.*, 219 F. 794 (4th Cir. 1915).

124. ARIZ. CONST. art. XXIII, § 1 (repealed 1933).

125. *Troutner v. State*, 154 P. 1048 (1916). The state supreme court cited to *Haynes v. State*, 105 S.W. 251 (1907), to sustain the denial of ignorance as a defense. In both *Troutner* and *Haynes*, the defendants sold a drink that they claimed they did not know contained an intoxicating alcohol content level. The Tennessee Supreme Court acknowledged that Haynes owned a grocery store that sold "phosphate and soda pop," but he also sold cider and the store was located near a schoolhouse. *Id.* Ultimately, Tennessee's justices determined that the offense was a strict liability offense and therefore "ignorance of the fact or state of things contemplated by the statute will not excuse violation." *Id.* at 252.

126. ARIZ. CONST. art. XXIII, § 1. The amendment was divided into three sections. Section I read:
Ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall not be manufactured in or introduced into the state of Arizona under any pretense. Every

enforcing the amendment.¹²⁷ This section would become problematic since the legislature failed to quickly pass implementing law. Finally, the third section established January 1, 1915, as the effective date for prohibition to take effect. Following the governor's signature, the amendment became effective on January 1, 1915.¹²⁸ The amendment was not the final action of state enforcement laws. In 1919, Arizona's legislature enacted a property forfeiture law which permitted the seizure of vehicles used to transport alcohol.¹²⁹ Prior to national prohibition taking effect, the Arizona Supreme Court would go to great lengths to sustain the state amendment.

Arizona's amendment was quickly challenged by a citizen named Louis Gherna, who was convicted of violating it, and on appeal he argued that because the amendment required the legislature to pass further laws to enforce prohibition, it was not self-executing and therefore no crime listed in the amendment could be committed.¹³⁰ In a *per curiam* decision Arizona's justices, in *Gherna v. State*, conceded, that although it would have been helpful for the legislature to have passed additional laws specifying enforcement of the amendment, the amendment itself was enforceable in the state's criminal trials without any further legislative action.¹³¹ The state's justices first addressed the second section of the prohibition amendment and, in utilizing a California Supreme Court decision, *In re Bull's Estate*, determined that the numbering of sections existed for convenience, and not as a means to defeat an entire amendment.¹³² The importance to this issue was that if the sections were numbered in a purposefully inflexible order, the governor would not have constitutionally been able to sign the amendment until the legislature acted. *Bull's Estate* presents a problematic choice of case law because it did not arise from a challenge to a state constitutional provision, but rather against a California property tax law which had omitted a term that resulted in a higher property tax rate on widows than on a stranger who inherited property, thereby disadvantaging widows.¹³³ The California Supreme Court, in *Bull's Estate*, rectified the legislature's misstep in

person who sells, exchanges, gives, barter, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquor of any kind to any person in the state of Arizona, or who manufactures, or introduces into, or attempts to introduce into, the state of Arizona any ardent spirits, ale, beer, wine, or intoxicating liquor of any kind, shall be guilty of a misdemeanor and upon conviction shall be imprisoned for not less than 10 days nor more than 2 years and fined not less than twenty-five dollars and costs nor more than three hundred dollars and costs for each offense.

Id.

127. *Id.* § 2 ("The legislature shall by appropriate legislation provide for the carrying into effect of this amendment.").

128. *Id.* § 3.

129. See, e.g., S. 39, 4th Leg., Reg. Sess. (Ariz. 1919). This law was never tested but appeared in *Navarro v. State*, 256 P. 114 (Ariz. 1927).

130. *Gherna v. State*, 146 P. 494, 496 (Ariz. 1915). Apparently Gherna was a well-known "bootlegger" in Douglas County. See *Gherna Found in Hospital at Douglas*, ARIZ. DAILY STAR, Oct. 20, 1915, at 8. Although not analyzed in this article, Gherna also sought the state supreme court to pass judgment on the ineffectiveness of the amendment. *Gherna*, 146 P. at 499-500. Additionally, the justices utilized Webb-Kenyon to uphold enforcement of the amendment against the argument that the amendment itself was unconstitutional as it infringed on interstate commerce. *Id.* at 499.

131. *Id.* at 498.

132. *Id.* at 497 (citing to *In re Bull's Estate*, 96 P. 366 (1908)).

133. *Bull's Estate*, 96 P. at 366.

printing the code, by assuming legislative intent, and inserted an appropriate term to enforce equality in the state's inheritance and property taxes.¹³⁴

After determining that the amendment's second section amounted to surplus language, Arizona's justices next determined that the amendment was self-executing, a task made easier by the use of *Bull's Estate* for the obvious reason that if the amendment's numbering was a dispositive issue, it would have rendered the self-execution doctrine into a nullity on state prohibition until the legislature further acted. In finding the prohibition amendment self-executing, Arizona's justices turned to *Nowakowski v. State*, a 1911 Oklahoma Court of Criminal Appeals decision.¹³⁵ In a reprise of their use of *Bull's Estate*, Arizona's justices relied on a decision not quite on point to the issue Gherna presented on his appeal. Nowakowski had been convicted of a 1909 law which made it a felony to sell or give alcohol to a minor or "a person of unsound mind."¹³⁶ Oklahoma's constitution made it a misdemeanor to sell, barter, or furnish alcohol to another person, but the penalties under the amendment were less of a liberty deprivation than those under the prior state law.¹³⁷ In opposite of *Gherna*, Nowakowski argued that Oklahoma's constitutional amendment was self-executing and therefore triumphed over the felony law as a matter of preemption.¹³⁸ In deciding Nowakowski's appeal, Oklahoma's justices determined that self-executing constitutional amendments could be further enhanced through legislation and that the constitutional provision on prohibition did not restrict the state legislature's power to further criminalize alcohol.¹³⁹ As a result, the Arizona Supreme Court, in deciding *Gherna*, used an Oklahoma decision for a purpose outside of its holding.

The state supreme court issued its decision on October 13, 1915. One day later, the *Arizona Republic*, Arizona's largest circulating newspaper, placed on its front page a headline which read, "Dry Law Has Sting to It: Supreme Court Decision," and its editorial staff claimed that *Gherna* was "a comprehensive decision."¹⁴⁰ Perhaps, this reflected a desire to have prohibition remain the law of the state rather than a compliment to the state's justices, but at a minimum, the story placed the state's citizenry on notice that there was an enforceable statewide prohibition on alcohol. The importance of *Gherna* to the state was so great that it ran prominently alongside major newspaper headlines of the day, including two stories on the ongoing war in Europe, Pancho Villa's takeover of Guadalajara, and the arrest

134. *Id.*

135. *Gherna*, 146 P. at 498 (citing 116 P. 351, 353 (Okla. Crim. App. 1911)). Unlike Arizona and New Mexico, Oklahoma's constitution contained a prohibition amendment from the start. See H. WAYNE MORGAN & ANNE HODGES MORGAN, OKLAHOMA: A HISTORY 111-112 (1984). Morgan writes that while Oklahoma was "legally dry," prohibition was "a failure from the first." *Id.*

136. *Nowakowski*, 116 P. at 351.

137. *Id.*

138. *Id.* at 352.

139. *Id.* at 354.

140. *Dry Law Has Sting to It: Supreme Court Decision*, ARIZ. REPUBLIC, Feb. 14, 1915, at 1.

in New York City of a suspect involved in the 1910 bombing of the *Los Angeles Times* by alleged socialists.¹⁴¹

Following *Ghera*, the Arizona Supreme Court decided four further challenges to its constitutional amendment. In *Sturgeon v. State*, the court determined that a person who brought a pint of liquor into the state for personal use could not be convicted under the state constitutional amendment.¹⁴² This was because the amendment never specified that personal consumption had been outlawed, such as two other state constitutions had done.¹⁴³ Yet, just as the Supreme Court in *Rahe* hinted that Congress could prohibit the interstate shipment of alcohol, so, too, did the state's justice hint that Arizona's legislature could ban the personal consumption of alcohol.¹⁴⁴ As of 1916, Arizona's legislature had not banned the personal consumption of alcohol and the state's justices, in *Aaron v. State*, overturned a conviction of a defendant who brought whiskey into the state from New Mexico but was denied the ability by the trial judge to advance personal use as a defense.¹⁴⁵ Essentially, the justices determined that if personal use remained permissible, then the transport of alcohol from another state into Arizona for personal use also could not run afoul of the amendment.

In *Brown v. State*, Arizona's justices determined that the term "beer" was fully encompassed within the definition of "intoxicating liquor."¹⁴⁶ As a result, when a brewery attempted to produce a malt-liquor of less than 2 percent alcohol, the brewery remained in violation of the state's prohibition amendment.¹⁴⁷ The facts which gave rise to this appeal began in an indictment against a citizen who sold "Barrette," a malt beverage professing to have less than 2 percent alcohol content.¹⁴⁸ Although it might appear to be self-evident that beer possessed alcohol, the state's justices turned to the Nebraska Supreme Court to prove that beer—or Barrette as used in this case as a subterfuge for beer—was an intoxicating drink.¹⁴⁹ In 1918,

141. *East Prussian Victory Cause of Rejoicing, Germany Wants Unrestricted Food Shipment, Guadalajara is Taken by Villa Troops, After Four Years Dynamite Suspect taken in New York*, ARIZ. REPUBLIC, Feb. 14, 1915, at 1.

142. 154 P. 1050 (Ariz. 1916).

143. *Id.* at 1053–54. The court distinguished Arizona's prohibition amendment from Idaho's law where both the possession and consumption of alcohol was illegal. *Id.* (citing *Ex Parte Crane*, 151 P. 1006 (Idaho 1915)).

144. *Sturgeon*, 154 P. at 1055. The state supreme court, in hinting that it was within the power of the state legislature to prohibit the individual use of alcohol held:

While legislation has been directed to suppress the traffic in liquor, it is apparent that a sale of liquor is in itself harmless; neither can possession hurt anyone—it is the use of it that is deleterious to the individual and society, and thus sanctions prohibiting liquor laws as an exercise of police regulations established by the law-making power for the prevention of intemperance, pauperism and crime.

Id.

145. 161 P. 881 (Ariz. 1916).

146. 152 P. 578 (Ariz. 1915).

147. *Id.* at 578–79.

148. *Id.*

149. *Id.* at 580 (citing *Luther v. State*, 120 N.W. 125, 126 (Neb. 1909)). The Nebraska Supreme Court held, in passing a moral judgment on their state's law:

Alcoholic beverages are under the ban of the law in some form or other in most civilized countries. They are known to be the cause of crime, destitution and pauperism. Malt liquors used as beverages are known to contain that destructive ingredient. It was

Arizona's justices upheld a conviction of a druggist who prepared a medicinal beverage known as Jamaican Ginger, when the beverage contained a high quantity of alcohol.¹⁵⁰ The fact that the amendment contained no exception for medicine was not considered to render the amendment infirm.¹⁵¹

The brewers and distillers fared poorly. In 1916, the Anti-Saloon League reported that one brewery remained in Arizona but the state's distilleries no longer existed.¹⁵² The League referred to *Ghera* as a "test case," which proved the viability of the amendment.¹⁵³ Ironically, the United States Brewers Association also called *Ghera* a "test case," though it was one that the association had lost.¹⁵⁴ In 1918, the Brewers Association, owing to the large number of German-American brewers and intense wartime propaganda and anti-German hysteria, suffered a significant loss of prestige and political power.¹⁵⁵ The Anti-Saloon League also juxtaposed the amendment against the earlier local-option law which it called "a weak law."¹⁵⁶ Finally, the League claimed, in trying to prove the amendment's success that prior to 1915, there was one saloon for every 175 residents.¹⁵⁷ Of course, after the amendment, no saloon could legally operate.

b. New Mexico: The Rise and Fall of the Local Option and Questionable Judicial Ethics

In 1916, the Anti-Saloon League reported that there were two breweries and three distilleries lawfully operating in New Mexico and that there were 46,571 people living in the state's urban areas (Albuquerque, Santa Fe, and Las Cruces), while 280,730 resided in the rural parts of the state.¹⁵⁸ The League further opined that "New Mexico is ripe for state-wide Prohibition."¹⁵⁹ Unlike Arizona, New Mexico did not vote in favor of state-wide prohibition until after the draft Eighteenth Amendment was introduced in Congress on August 1, 1917. In 1915 when a test vote on prohibition was first introduced, it only garnered 25 percent of the vote.¹⁶⁰ However, two years later, over 70 percent of New Mexico's voters voted in favor of statewide prohibition.¹⁶¹ There were undoubtedly several reasons for the change. According to a 1970 study by James A. Burran, the Republican Party dominated the state's

proved upon the trial of this case that the beverage kept and sold by plaintiff in error contained it. The liquor sold by him was simply an effort to evade the law.

Id.

150. *Cooper v. State*, 172 P. 276 (Ariz. 1918).

151. *Id.*

152. THE ANTI-SALOON YEARBOOK 1917: AN ENCYCLOPEDIA OF FACTS AND FIGURES DEALING WITH THE LIQUOR TRAFFIC AND TEMPERANCE REFORM 78-79 (Ernest Hurst Charrington, ed., 1917).

153. *Id.*

154. U.S. BREWERS ASS'N, REPORT OF THE PROCEEDINGS OF THE FIFTY-FIFTH ANNUAL CONVENTION OF THE UNITED STATES BREWERS' ASSOCIATION 43 (1915).

155. See ANN HAGEDORN, SAVAGE PEACE: HOPE AND FEAR IN AMERICA, 1919, at 53 (2007).

156. THE ANTI-SALOON YEARBOOK 1917, *supra* note 152, at 79.

157. *Id.*

158. *Id.* at 186.

159. *Id.* at 187.

160. James A. Burran, *Prohibition in New Mexico*, 1917, 48 N.M. HIST. REV. 133, 146 (1973).

161. *Id.*

politics. In this group, the “Old Guard” Republicans in the state were initially aloof to prohibition, but the progressives in the party favored it and their political influence grew with the status of their leaders such as former territorial governors Miguel Otero, Herbert Hagerman and George Curry, and Governor Washington Lindsey.¹⁶² Moreover, by 1914, there was a concerted effort to have the Old-Guard join with progressives in both parties on the issue of prohibition. In January of that year, the president of the New Mexico Bar Association penned to Senator (and presidential aspirant) William E. Borah (R-ID), that “a strong effort is being made in this state to get the progressives and the Republicans together.”¹⁶³

Burran’s study also noted that Chief Justice Clarence Roberts actively campaigned for prohibition, though the article did not address the ethical implication of a state supreme court justice doing so.¹⁶⁴ In fact, Roberts sought donations for the prohibition campaign and enlisted Bronson Cutting, the owner of the *Santa Fe New Mexican*, for help.¹⁶⁵ Burran also did not include the fact that Richard P. Hobson, a former Alabama congressman and prohibition leader owned a ranch in New Mexico and helped fund Anti-Saloon League’s prohibition campaign in the state.¹⁶⁶ Although Hobson is largely forgotten today, he received the Medal of Honor for his heroic naval service during the Spanish American War and was a national leader for prohibition.¹⁶⁷ Burran did not note that Hobson and Roberts financially assisted R.E. Farley, the leader of the state chapter of the Anti-Saloon League in financing his ranch against bankruptcy.¹⁶⁸ Their actions could give rise to questions of judicial ethics and the right to an impartial judge.

Another reason beyond prominent leaders endorsing prohibition, for the state’s population to vote in favor of a prohibitory amendment may have rested with the New Mexico Supreme Court’s local option decisions. In 1913, New Mexico’s legislature enacted two prohibition-type laws based on a “local option” principle.

162. *Id.* at 136, 139.

163. Letter from M.E. Hickey to William E. Borah (Jan. 17, 1914) (copy on file with author).

164. Burran, *supra* note 160, at 140.

165. Letter from Francis C. Wilson to Justine Cutting (Oct. 6, 1917) (copy on file with author). This letter states, in pertinent part:

Judge Roberts of the Supreme Court has charge of the fund being raised by those who are making the fight for the amendment and he has asked me to ask Bronson if he would give \$500 for the campaign. I think if Bronson were here, he would do so, but I realize that his not being here makes it impossible to commit him upon the subject. I know that Bronson has always been very liberal in contributing to such matters, although not strictly speaking, a prohibitionist himself, and believes in this measure as one which will benefit the whole state, if it is passed. If you would feel he would do this I would be glad if you would send the check directly to the Hon. Clarence E. Roberts, Associate justice of the Supreme Court, Santa Fe, New Mexico. You might write him a nice little letter, if you feel like it, in Bronson’s behalf.

Id. Interestingly, Cutting’s wife responded with a request that Roberts personally write her a letter to this effect. Letter from Justine Cutting to Francis C. Wilson (Oct. 11, 1917) (copy on file with author).

166. Letter from R.E. Farley to Richard P. Hobson (June 25, 1918) (copy on file with author); Letter from Estancia Saving Bank to Hobson, (Dec. 22, 1921) (copy on file with author). Of interest, Hobson worked with Farley and Governor Lindsey on crafting a law that enabled seizure of law enforcement officers’ private property if the officer were found to have failed to properly police violations of the liquor laws. *See, e.g.*, letter from Farley to Hobson (Mar. 10, 1919) (copy on file with author).

167. *See* OKRENT, *supra* note 1 at 67–70.

168. Letter from R.E. Farley to Richard P. Hobson (May 22, 1922) (copy on file with author).

Because the Court had already determined that local-option regarding alcohol did not violate the United States Constitution, opponents of local option in the state legislature did not have a considerable rights-based argument to defeat the local option laws.¹⁶⁹ The first local option law enabled the voters of municipalities to vote in favor of the sale or manufacture of alcohol.¹⁷⁰ The second local option law permitted the voters in counties to similarly vote on preventing the sale or manufacture of alcohol.¹⁷¹ Both laws required 25 percent of the voters to petition their respective governments for the law to be considered by the general voting population.¹⁷² Additionally, in 1915, the New Mexico Legislature authorized municipal governments to not only control licensing of saloons and liquor sales, but also to prohibit the sale of liquor within city and town limits.¹⁷³

One of the first challenges to New Mexico's local option laws was based on a claim that the state legislature had delegated its law-making authorities to the general population. An ancient Latin maxim, "*delagata potestas non potest delegari*,"—or "no delegated powers can be further delegated"—expressed the rule that when a duty is placed on an official or a body, the duty cannot be delegated to others, including the general population.¹⁷⁴ In *In re Everman*, the state supreme court recognized that early in the nation's history, other state courts of appeal had ruled that the Latin doctrine survived and local option laws abrogated the duties placed on the legislative branch. However, New Mexico's justices noted that all of the states except Tennessee had renounced these earlier decisions.¹⁷⁵ New Mexico's justices also cited to *State ex rel. Maggard v. Pond*, an 1887 Missouri Supreme Court decision in which that court distinguished between a legislature passing a law and then submitting it to the will of the people, from a legislature expressly enabling the populations of municipalities the authority to vote for prohibition on an individual basis.¹⁷⁶ The later of these did not violate the maxim and it was precisely what New Mexico's legislature had done in the local option law of 1913. Unlike the Arizona Supreme Court in *Ghera*, New Mexico's justices in *Everman* cited to other states' judicial decisions which appear to have been on-point to the issue raised.

169. *Ohio ex rel. Lloyd v. Dollison*, 194 U.S. 445, 448–49 (1904). Wayne Wheeler argued on behalf of Ohio before the Court. *Id.* at 446.

170. *Ex Parte Deats*, 1917-NMSC-027, ¶ 1, 22 N.M. 536, 166 P. 913 (citing Chapter 75 of the Session Laws (sections 2940 to 2948, inclusive, Code of 1915)).

171. *Id.* (citing Chapter 78 of the Session Laws (sections 2927 to 2939, inclusive, Code of 1915)).

172. *See, e.g., In re Everman*, 1914-NMSC-016, ¶ 2, 18 N.M. 605, 139 P. 156.

173. *Schwartz v. Town of Gallup*, 1917-NMSC-021, ¶ 12, 22 N.M. 521, 165 P. 345.

174. *See, e.g., Bd. of Liquidation v. City of New Orleans*, 32 La. Ann. 915 (La. 1880), in which the Louisiana Supreme Court determined that the city government as a whole, but not authorized commissioners, could grant electric tramways the right of way through city streets. *Id.* at 917. And in *Williams v. Woods*, 16 Md. 220 (Md. 1860), the Maryland Court of Appeals held that a broker cannot delegate his duties to another without the assent of the represented party who employed the broker.

175. 1914-NMSC-016, ¶ 3, 18 N.M. 605, 139 P. 156. In recognizing earlier the earlier cases, New Mexico's justices cited to *Parker v. Commonwealth*, 6 Pa. 507 (Pa. 1847). Parker's appeal arose from a violation of a "dry county's" laws, and he challenged Pennsylvania's local option laws under the argument that the state legislature had to decide whether to bar the sale of alcohol through its voting or a general vote to amend the state constitution. The Pennsylvania Supreme Court agreed with this argument. *Id.* at 528–29.

176. *State ex rel. Maggard v. Pond*, 6 S.W. 469, 474 (Mo. 1887).

Although the 1913 local option law did give the state's voters a direct choice over prohibition at the local government level, the law resulted in a patchwork of uneven rules across the state. The unincorporated town of Santa Rosa presents an example of the problems the local option law enabled. On August 10, 1914, its voters decided against prohibition, but the state attorney general challenged the results under a claim that the voting had been fraudulently conducted.¹⁷⁷ Initially, a district court granted an injunction against Santa Rosa's clerk, city council, and sheriff from issuing liquor licenses, and against a local saloon from selling its intoxicating beverages, but after taking evidence the trial judge terminated the injunction.¹⁷⁸ The real parties in interest, in the case and on the appeal, however, were Governor William McDonald (D) a pro-prohibitionist, and two Santa Rosa saloon owners.¹⁷⁹ As a result of being mired in motions to strike parties and "bills of exceptions," the issue was not resolved until statewide prohibition took effect.

In another case of conflicting rules and actions, on June 10, 1916, the Gallup board of town trustees—the city's government—enacted ordinances limiting the hours a saloon could operate from between 6:00 am and 12:00 am, and increasing an annual saloon license fee from a \$300 to \$1,500.¹⁸⁰ Gallup's saloon owners claimed that the decision to increase the fee had been conducted in private, and that the fee was an unconstitutional taking by subterfuge.¹⁸¹ Finally, the saloon owners claimed that a provision in the ordinance favored drug store owners who sold alcohol, and this provision was contrary to the laws of the state.¹⁸² In *Schwartz v. Town of Gallup*, a decision authored by Chief Justice Roberts, the court sided with the city government on all parts of the appeal. Although the justices recognized that the fee could have the effect of prohibiting alcohol in the city, because the city government possessed the power to "prohibit altogether the traffic in intoxicating liquors," the saloon owners had not truly been injured by the increased fee.¹⁸³ To make this point the justices cited to *Dennehy v. Chicago*, an 1887 Illinois Supreme Court decision, which upheld Chicago's authority to prohibit the sale of alcohol.¹⁸⁴ In regard to the ordinance favoring drug store owners over saloons, the justices determined that even if this section of the ordinance was unlawful, the rest of the ordinance remained lawful.¹⁸⁵ New Mexico's justices, however, went further than the issue required and added that the town government would have the authority to pass an ordinance prohibiting the use of chairs in a saloon.¹⁸⁶

After the court issued *Schwartz*, Gallup's city government increased wholesale liquor license fees from \$600 to \$3,000, and on October 23, 1917, New Mexico's justices, in upholding this increase on the same basis as *Schwartz* tersely

177. *State ex rel. Baca v. Bd. of Comm'rs*, 1916-NMSC-035, ¶ 1, 21 N.M. 713, 158 P. 642.

178. *Id.*

179. *Id.* ¶¶ 1–2, 158 P. at 714.

180. *Schwartz v. City of Gallup*, 1917-NMSC-021, ¶¶ 1–2, 22 N.M. 521, 165 P. 345.

181. *Id.* ¶¶ 3–4, 165 P. at 523–524.

182. *Id.* ¶ 3, 165 P. at 523.

183. *Id.* ¶ 13, 165 P. at 527.

184. *Id.* ¶ 15, 165 P. at 527–28 (citing *Dennehy v. Chicago*, 12 N.E. 227, 235 (Ill. 1887)).

185. *Id.* ¶ 19, 165 P. at 529. The court noted that the drug-store part of the ordinance had been repealed by the time of their decision making the matter moot. *Id.*

186. *Id.* ¶¶ 20–21, 165 P. at 529–30.

noted, in *Stalick v. Town of Gallup*, that while “useful occupations” could only be taxed or licensed to a degree that enabled a government to regulate the occupation, “a business which is a constant menace to the public welfare may be licensed and taxed without any constitutional restraint.”¹⁸⁷ The justices added that “the liquor business is in the latter class.”¹⁸⁸ In finding support for their commentary on the nature of liquor, the justices cited to an 1896 New York Court of Appeals decision in which that court determined that exorbitant liquor license fees were permissible to discourage the commercial liquor trade.¹⁸⁹

One could conclude that given the New Mexico Supreme Court’s suggestive comments in *Schwartz*, the population was on notice that the justices would fully respect a state constitutional amendment outlawing alcohol for any purpose. On November 6, 1917, New Mexico’s voters approved of a constitutional amendment by a margin of over 16,000 voters.¹⁹⁰ Prohibition, as captured under Article XXIII of the New Mexico Constitution prohibited the manufacture, sale, gift, and trade of alcohol across the state. It did not prohibit the personal use or possession of alcohol.¹⁹¹ Divided into two sections, the first section enabled the production of consumable alcohol for “medicinal, mechanical, or scientific purposes only,” and also contained an exemption for “sacramental wine.”¹⁹² The second section set penalties for violators with fines ranging between \$50 and \$1,000 and jail sentences between thirty days and six months.¹⁹³ Second-time offenders could be fined between \$100 and \$1,000 and jailed for up to one year.¹⁹⁴ In essence, the amendment placed alcohol crimes, to include second time offenders, into the misdemeanor, rather than felony, category.

New Mexico’s justices evidenced a sympathy for business owners affected by the amendment. For instance, in *State ex rel. Martinez v. Holloman*, the state supreme court granted a stay to a saloon owner who had been ordered to dispose of his liquor stock or transport it out of state.¹⁹⁵ In *Town of Gallup v. Gallup Cold Storage Co.*, an appeal involving a municipal government’s attempts to recover unpaid liquor license fees, the Court sided with saloon owners in determining that the fees were not a tax but a payment for the privilege of conducting a business and since the legislature had never enacted a means to recover unpaid fees, the municipality was without the means to do so through the state’s debt laws.¹⁹⁶ New Mexico’s justices appear to have harbored a greater sympathy for saloon owners, brewers, and distillers than their Arizona counterparts.

187. 1917-NMSC-068, ¶ 4, 23 N.M. 405, 168 P. 707.

188. *Id.*

189. *Id.* (citing *People ex rel. Einsfeld v. Murray*, 44 N.E. 146 (NY 1896)). The New Mexico Supreme Court was not the only state court to cite to *Einsfeld*. In 1909, the Oklahoma Supreme Court in *Arie v. State*, 100 P. 23, 25 (Okla. 1909), cited the decision to sustain prohibition.

190. Burran, *supra* note 160, at 141–42.

191. See, e.g., CHARLES E. SMITH, THE NEW MEXICO STATE CONSTITUTION 207 (2011).

192. N.M. CONST. art. XXIII, § 1.

193. N.M. CONST. art. XXIII, § 2.

194. *Id.*

195. 1918-NMSC-138, ¶ 8, 25 N.M. 117, 177 P. 741.

196. 1920-NMSC-052, ¶ 3, 26 N.M. 253, 191 P. 465.

III. NATIONAL PROHIBITION AND THE OPERATION OF STATE LAW

Once the National Prohibition Act came into force, it supplanted many of the states' enforcement mechanisms as the primary means for prosecuting the manufacture, trade, and transport of intoxicating liquor.¹⁹⁷ The federal act, however, was not the last prohibition measure Congress passed. Concerned with a rise in medical prescriptions for alcohol, in 1921, Congress passed the Willis-Campbell Act, prohibiting doctors from prescribing beer to patients as well as liquor which exceeded a 24 percent alcohol content.¹⁹⁸ In 1924, the Court in *James Everard's Breweries v. Day*, upheld the Willis Campbell Act and New Mexico Attorney General Milton Helmick joined with the United States Solicitor General Beck and Deputy Attorney General Mabel Willebrant in arguing for the constitutionality of the act.¹⁹⁹ Arizona's attorney general may have supported the federal government but neither his nor the governor's name appeared on Solicitor General Beck's brief. The Court upheld Willis-Campbell once more in 1926, though this time neither state attorney general participated and the American Medical Association protested the law in an amicus brief.²⁰⁰ Moreover, Justices George Sutherland, James McReynolds, Pierce Butler, and Harlan Stone dissented on the basis that only the states could regulate the medical profession, or for that matter, any profession.²⁰¹

With the passage of the Eighteenth Amendment and the National Prohibition Act, alcohol prosecutions occurred in the federal courts of both states and an increase of the Anti-Saloon League's political power extended into the states, beyond the state legislatures. Its leader, Wayne Wheeler, influenced President Harding's federal judicial nominations as evidenced in the appointment of Fred Clinton Jacobs to the United States District Court for Arizona. Jacobs was a prohibitionist and Wheeler supported him in a letter to Attorney General Harry Daugherty and President Warren G. Harding, even though Jacobs had recently divorced—divorce, in this era being antithetical to puritan values.²⁰² Divorce, in this era was deemed antithetical to puritan values. Jacobs's appointment can be juxtaposed against Wheeler's conduct in regard to a federal judicial vacancy in Colorado. There, Wheeler convinced Harding and Daugherty to withdraw the nomination of Walter Dixon. Colorado's senators, Lawrence Phipps (R) and Samuel Nicholson (R) had advanced Dixon's nomination.²⁰³ The Anti-Saloon League claimed Dixon's appointment would "be a calamity to the cause of prohibition, who

197. See, e.g., *People v. Lowell*, 230 N.W. 202 (Mich. 1931); *Cooley v. State*, 110 S.E. 449 (Ga. 1922); *State v. Fore*, 105 S.E. 334 (N.C. 1922); *Lenski V. O'Brien*, 232 S.W. 235 (Mo. App. Ct. 1921); *State v. Smith*, 199 P. 194 (Ore. 1921).

198. KYVIG, *supra* note 38, at 31.

199. 265 U.S. 545, 553 (1924).

200. *Lambert v. Yellowley*, 272 U.S. 581, 599 (1926).

201. *Id.* at 597 (Sutherland, J., dissenting).

202. Letter from Harry Daugherty to Warren G. Harding (Feb. 28, 1923) (copy on file with author); Letter from Fred Clinton Jacobs to Ralph Cameron, United States Senator to Arizona (Feb. 27, 1923) (copy on file with author).

203. Letter from Lawrence Phipps to Warren G. Harding (Nov. 17, 1921) (copy on file with author); Letter from Phipps to Harding (Nov. 18, 1921) (copy on file with author).

would side with those who attack the Eighteenth Amendment.”²⁰⁴ Harding paid heed to Wheeler and withdrew Dixon from consideration.²⁰⁵ Montana provides another example of the League’s power. Wheeler opposed the appointment of Fred Gibson to the U.S. District Court for Montana on the basis that Gibson defended “bootleggers.”²⁰⁶ Harding withdrew the nomination, but he died before he could nominate another person.²⁰⁷ In 1923, Harding nominated Orie Leon Phillips to the United States District Court of New Mexico without opposition from the League.²⁰⁸ Phillips would serve on the district court until 1929 and then ascended to the Court of Appeals for the Tenth Circuit, though he did not rule on any significant liquor cases.²⁰⁹

In spite of the abundance of federal prosecutions, and as in the case of their pre-1920 decisions, between 1920 and 1933, the Arizona and New Mexico Supreme Courts issued over a dozen decisions involving alcohol, though many of these arose from challenges to the quantum of evidence to prove guilt.²¹⁰ There were, to be sure, unusual decisions issued by the supreme courts of both states. In 1922, the New Mexico Supreme Court determined that a public official who obtained illicit alcohol but refused to pay the seller was immune from having his wages garnished.²¹¹ The basis for New Mexico’s justices’ refusal to support garnishment was not because of the illegality of the sale, but rather, that the officer had purchased the alcohol in his official capacity in 1915 and the law did not authorize wage garnishment of state and public employee wages.²¹² In Arizona, the state supreme court determined that a decedent’s estate could not recover in a wrongful death suit arising from a vehicle accident when the decedent was a passenger who furnished the negligent driver with “intoxicating liquor,” thereby violating the state’s prohibition laws.²¹³ Arizona’s

204. Letter from Harry Daugherty to Warren G Harding (Nov. 21, 1921) (copy on file with author); Letter from Anti-Saloon League to Harry Daugherty (Nov. 13, 1921) (copy on file with author).

205. Letter from Warren G. Harding to Lawrence Phipps (Jan. 14, 1922) (copy on file with author).

206. Letter from Wayne Wheeler to Warren G. Harding (Feb. 20, 1923) (copy on file with author); Letter from Harding to Thomas J. Walsh (March 3, 1923) (copy on file with author); Letter from Wheeler to Harding, (May 4, 1923) (copy on file with author).

207. After Harding’s death, President Calvin Coolidge appointed Charles Nelson Pray to the bench. See CONG. REC. 17,358 (1963).

208. See *Phillips, Orie Leon Biography*, Federal Judicial Center, <https://www.fjc.gov/history/judges/phillips-orie-leon> [https://perma.cc/8QBW-7JBT].

209. *Id.*

210. For New Mexico see, e.g., *State v. Sutton*, 1933-NMSC-016, 37 N.M. 193, 20 P.2d 288 (possession of mash containing alcohol content sufficient to sustain conviction for manufacture of alcohol); *State v. Reese*, 1932-NMSC-001, 36 N.M. 28, 7 P.2d 295 (testimony by layperson with some experience with alcohol permissible to identify alcohol); *State v. Asper*, 1930-NMSC-098, 35 N.M. 203, 292 P. 225 (While marital coercion might constitute a defense to sale of alcohol to a minor when done in the presence of husband, the jury verdict will be sustained); *State v. Bell*, 1930-NMSC-071, 35 N.M. 96, 290 P. 739 (location of still on personal property enough to sustain conviction for manufacture); *State v. Chambers*, 1929-NMSC-055, 34 N.M. 208, 279 P. 562 (possession of thirty empty whiskey bottles sufficient to prove possession); *State v. Brigance*, 1926-NMSC-032, 31 N.M. 436, 246 P. 897 (the effect of intoxication on premeditation, and requirement for judicial instruction to jury).

211. *Rivera v. Rosenwald*, 1922-NMSC-030, 28 N.M. 88, 206 P. 509.

212. *Id.* ¶ 4, 206 P. at 89–90.

213. *Franco v. Vakares*, 277 P. 812 (Ariz. 1929).

justices applied a “joint enterprise” doctrine to bar this type of tort suit rather than enable a contributory negligence theory to apply.²¹⁴

Although both states’ populations initially supported prohibition, the midst of the Great Depression, a national shift to repeal the Eighteenth Amendment took place.²¹⁵ The United States had become something other than what prohibition’s advocates had hoped for. A sizeable part of the population flaunted convention, if not the law.²¹⁶ In New Mexico, a prohibition agent’s murder remained unsolved, though it garnered national attention throughout the second half of 1930.²¹⁷ Bootlegging and speakeasies were located throughout both states.²¹⁸

As a test of the national mood, on March 21, 1933 President Franklin Roosevelt signed the Cullen-Harrison Act into law, thereby enabling the national sale of beer with less than 3.2 percent alcohol content.²¹⁹ Perhaps evidencing a national exhaustion with Prohibition, Congress barely debated this bill before its passage by the wide margin of 316–97 in the House and by 43–30 in the Senate with 21 not voting.²²⁰ New Mexico’s representative, Dennis Chavez (D), voted in favor of the law while Arizona’s representative Isabella Greenway (D) did not cast a vote.²²¹ New Mexico’s senator, Sam Bratton (D) voted against the law while Bronson Cutting (R), did not cast a vote.²²² Both of Arizona’s senators, Carl Hayden (D) and Henry Ashurst (D), voted in favor of the act.²²³

a. Arizona: Limited Substantive Law after the National Prohibition Act’s Passage

One of the Arizona Supreme Court’s early decisions arose from a challenge based on double jeopardy. In 1926, in *Henderson v. State*, the court was confronted with an appeal from a state conviction for the possession of intoxicating liquor, but the defendant had also been convicted in federal court for transporting the same intoxicating liquor.²²⁴ However, this decision arose prior to *Palko v. Connecticut*, in which the Court determined that a state criminal trial and a federal criminal trial represented the independent will of two sovereigns and a defendant could be

214. *Id.* at 813–14.

215. *See*, OKRENT, *supra* note 1, at 329–33.

216. *See, e.g.*, KATHLEEN MORGAN DROWNE, SPIRITS OF DEFIANCE: NATIONAL PROHIBITION AND JAZZ AGE LITERATURE, 129–64 (2005).

217. *See, e.g.*, CHUCK HORNUNG & B. LEE CHARLTON, TRAIL OF SHADOWS: THE UNSOLVED MURDERS OF PROHIBITION AGENTS DALE KEARNEY AND RAY SUTTON, 1–12 (2019).

218. ED SIPOS, BREWING ARIZONA: A CENTURY OF BEER IN THE GRAND CANYON STATE, 92–97 (2013).

219. Act of Mar. 22, 1933, ch. 4, 48 Stat. 16 (1933). For the basis of the act, *see* MARTHA H. SWAIN, PAT HARRISON: THE NEW DEAL YEARS, 41–42 (1978); and BRUCE KRAIG, THE OXFORD ENCYCLOPEDIA OF FOOD AND DRINK IN AMERICA, VOL I, 144 (2013).

220. To Pass H.R. 33418 (P.L. 3), Providing Revenue by the Taxation of Certain Nonintoxicating Liquor, and for Other Purposes, GOVTRACK, <https://www.govtrack.us/congress/votes/73-1/h4> [<https://perma.cc/WCG8-HX46>].

221. *Id.*

222. To Pass H.R. 3341, GOVTRACK, <https://www.govtrack.us/congress/votes/73-1/s11> [<https://perma.cc/HND7-Z2WH>].

223. *Id.*

224. 30 Ariz. 113, 244 P. 1020 (1926).

prosecuted for the same course of conduct in each.²²⁵ Arizona's justices were able to rely on *United States v. Lanza*, a 1922 decision authored by Chief Justice Taft in which the Court determined that the Eighteenth Amendment's language encouraged both federal and state enforcement.²²⁶

As in the case of New Mexico, Arizona's municipalities were vested with a general authority to enact ordinances and regulations that supplemented the federal and state laws. However, in regard to liquor traffic enforcement on Arizona's state highways, in 1931 the Arizona Supreme Court determined that the state legislature, whether by intent or mistake, had preempted the authority of municipalities to enforce local liquor codes.²²⁷ Two years earlier, in *Hasten v. State*, the court determined that the state law on driving under the influence of alcohol did not mean that the prosecution had to prove that a motor vehicle operator drove in an unsafe condition such as speeding, but rather, a prosecutor had only to prove that the driver was impaired because of the consumption intoxicating liquor.²²⁸ This, in effect, created a strict liability crime based on consumption rather than performance. Although from a modern vantage point Arizona's justices provided an obvious answer, they were confronted by the fact that in 1922 the California Court of Appeals found that a similarly drafted statute meant that not every driver who was under the influence of alcohol was guilty of operating a vehicle in violation of state law.²²⁹ California was not alone in requiring a prosecutor to prove not only that a motorist consumed alcohol, but also that the motorist operated a vehicle in an unsafe manner so as to endanger the public.²³⁰ Arizona's justices instead adopted a New Jersey Court of Errors and Appeals standard set in *State v. Rodgers*, a 1917 decision in which that court determined that even in instances where a motorist appeared to safely drive a vehicle, as long as there was sufficient evidence to prove the motorist had consumed a degree of alcohol that could impair his abilities, this was enough of a quantum of proof to sustain a conviction.²³¹

In spite of the state's pronounced support for prohibition, the court made it clear that prosecutorial appeals to emotion or bias were intolerable in *Britt v. State* in 1923.²³² The decision arose from the prosecution of a barber who allegedly sold whiskey in addition to cutting hair. The prosecutor's conduct led to the court determining that the defendant's right to a fair trial had been undermined. In response to a prosecutor's question as to why the officer arrested the defendant, the officer

225. 302 U.S. 319 (1937).

226. 260 U.S. 377, 384–85 (1922).

227. *Clayton v. State*, 38 Ariz. 466, 297 P. 1037 (1931).

228. *Hasten v. State*, 35 Ariz. 427, 280 P. 670 (1929).

229. *Id.* (citing *People v. Dingle*, 56 Cal. Ct. App. 445 (1922)). In this instance, however, the appellate court determined that Dingle's visible condition, which included slurred speech, a staggering walk, and boisterous language, and the fact that a witness testified he "zig-zagged his vehicle" was sufficient to sustain a conviction. *Id.* at 459.

230. See e.g. *Owens v. Commonwealth*, 147 Va. 624, 136 S.E. 765 (1927).

231. *Hasten*, 35 Ariz. 427, 430 (citing *State v. Rodgers*, 91 N.J.L. 212 (N.J. Ct App 1917)). It is noteworthy that in this decision, New Jersey's justices determined that operating a motor vehicle was more than a public nuisance and, in interpreting the relevant state statute, it constituted a danger to the public. *Id.* at 215.

232. 25 Ariz. 419, 218 P. 981 (1923).

testified that “he had good cause to believe in the defendant’s guilt.”²³³ Arizona’s justices determined that a police officer could not testify as to his belief of a defendant’s guilt.²³⁴ The second issue arose as a result of the prosecutor’s closing argument in which he claimed to the jury that the defendant and defense counsel knew of the defendant’s guilt just as the jury would conclude.²³⁵ Although the Supreme Court would not, until 1935, in *Berger v. United States*, state with clarity that a prosecutor had a duty to refrain from unfair methods to secure a conviction, Arizona’s justices had imposed a duty on prosecutors to ensure that no convictions were obtained “contrary to law.”²³⁶

Outside of criminal trials, national prohibition also brought commercial law challenges to the state supreme court. In *Veytia v. Alvarez*, the court concluded that a contract signed in Arizona for the sale of alcohol in Mexico was enforceable in the Arizona courts.²³⁷ Arizona’s justices expressed that although the sale, use, and possession of intoxicating liquor in the United States was illegal, it was not elsewhere and added that if the court were to allow the United States citizen to benefit from non-compliance with a foreign contract, “[it] would be difficult to justify such a position with other nations. . . . unless we are to consider ourselves the self-appointed censor of the morals of the world.”²³⁸ Two years after deciding *Veytia*, the state’s justices reaffirmed, in *Cerveceria Cuauhtemoc v. Sonora Bank & Trust Co.*, that contracts for alcohol—in this case, beer,—that were signed in Arizona for the purchase of liquor in Mexico were enforceable in the state’s courts.²³⁹ To hold otherwise, the court concluded, would turn Arizona into “an asylum for dishonest debtors.”²⁴⁰

At the end of 1921, Thomas Campbell, Arizona’s governor, reported to the Anti-Saloon League that since the Eighteenth Amendment took effect, “bootlegging flourished in the State of Arizona to a greater extent than before the enactment of the

233. *Id.* at 421.

234. *Id.*

235. *Id.* at 424. The court noted the prosecutor stated, “I know the defendant is a bootlegger; the defendant knows he is a bootlegger, and defendant’s counsel knows that I know that the defendant is a bootlegger.” *Id.*

236. *Id.* at 426. The Arizona Supreme Court incorporated the following phrase from the Arkansas Supreme Court in *Holder v. State*, 58 Ark. 473 (AR 1894):

The prosecuting attorney is a public officer, ‘acting in a quasi-judicial capacity.’ It is his duty to use all fair, honorable, reasonable and lawful means to secure the conviction of the guilty who are or may be indicted in the courts of his judicial circuit. He should see that they have a fair and impartial trial, and avoid convictions contrary to law. Nothing should tempt him to appeal to prejudices, to pervert the testimony, or make statements to the jury which, whether true or not, have not been proved. The desire for success should never induce him to endeavor to obtain a verdict by arguments based on anything except the evidence in the case and the conclusions legitimately deducible from the law applicable to the same. To convict and punish a person through the influence of prejudice and caprice is as pernicious in its consequences as the escape of a guilty man. The forms of law should never be prostituted to such a purpose.

Id. at 481.

237. 30 Ariz. 316, 247 P. 117 (1926).

238. *Id.* at 329–30.

239. 33 Ariz. 220, 263 P. 626 (1928).

240. *Id.* at 223.

Volstead Act.”²⁴¹ Campbell pointed to the ease by which alcohol could be transported from Mexico, a statement perhaps ironic in light of *Vetiya* and *Cervecería Cuauhtemoc*. Yet, he did not want to retreat from prohibition and concluded that it had “improved the condition, both moral and material, of the people of Arizona.”²⁴² In 1933, Arizonans voted not only to abolish national prohibition, but also renounced their state prohibition amendment.²⁴³

b. New Mexico: A Worrisome Adoption of the National Prohibition Act into State Law

Although national prohibition came into force on January 16, 1920, and New Mexico’s legislature had voted in favor of the Eighteenth Amendment in 1919, it took until 1923 for the state legislature to enact a state law as an analog to the Volstead Act. Given the state constitution’s prohibition statute, this might not have been necessary, but the legislature decided to do so. Notably, there are no published appellate decisions for liquor violations under Article XXIII of the state constitution. The 1923 state analog to the Volstead Act, titled “Chapter 118,” contained three substantive sections along with a number of other sections. The first section applied the penal provisions of the National Prohibition Act to the state law, established the jurisdiction of state courts over the national act, and charged law enforcement officers with the duty of enforcing the national act’s mandate.²⁴⁴ The second section incorporated all “acts or omissions prohibited or declared unlawful” under the Eighteenth Amendment to be unlawful under state law.²⁴⁵

The third section made state enforcement of the National Prohibition Act concurrent with federal law such that if Congress repealed the national act or added new crimes to it, the state law would follow suit without state legislative action.²⁴⁶ This section proved problematic because it enabled state enforcement of future federal laws without knowing in advance what those laws might be. Two other sections bear mention. One section permitted the seizure and confiscation of vehicles taking part in illicit liquor trafficking.²⁴⁷ Another section permitted municipalities to enact more austere penalties and prohibitions than contained in the federal law.²⁴⁸ Although Chapter 118 appears comprehensive, it was directly copied from the 1921

241. THE ANTI-SALOON YEARBOOK, 1921: AN ENCYCLOPEDIA OF FACTS AND FIGURES DEALING WITH THE LIQUOR TRAFFIC AND TEMPERANCE REFORM 139–40 (Ernest Hurst Charrington, ed., 1921).

242. *Id.*

243. KYVIG, *supra* note 38, at 168.

244. N.M. CONST. art. XXIII, § 1 reads:

New Mexico hereby recognizes the requirements of the Eighteenth Amendment to the Constitution of the United States for its concurrent enforcement by the Congress and the several states. To that end, the penal provisions of the National Prohibition Act are hereby adopted as the law of this state; and the courts of this state are hereby vested with the jurisdiction, and the duty is hereby imposed upon all prosecuting attorneys, sheriffs, grand juries, magistrates, and peace officers in the state, to enforce the same.

Id.

245. *Id.* § 2.

246. *Id.* § 3.

247. *Id.* § 4.

248. *Id.* § 6.

California Penal Code, and this factor, to New Mexico's justices, later became an important aspect of enforcing the law.²⁴⁹

The first Chapter 118 appeal to come before the New Mexico Supreme Court arose from a challenge to the state's complete adoption of the National Prohibition Act into state law. In 1924 in *State v. Armstrong*, the court determined that the incorporation of federal law into the state's criminal code did not violate the constitutional principle of notice.²⁵⁰ There is an importance to *Armstrong* beyond its holding. Although in issuing *Armstrong*, the New Mexico Supreme Court appeared to embrace the "reference statute" doctrine to sustain the state's paramount prohibition law, there is a note at the bottom of the decision in which two of the three justices claimed to harbor reservations about the doctrine. Chief Justice Parker and Justice Clarence Botts commended Justice Tomlinson Fort for authoring the decision, but then added they "expressed grave doubts as to its correctness."²⁵¹

Neither the appellant, Carl Armstrong who had been convicted for operating an illegal still, nor the state's justices, cited to *United States v. Hudson and Goodwin*. In 1812, the Court in *Hudson* determined that in order for a federal court to have jurisdiction over a crime, the crime must be enumerated and a penalty affixed to it.²⁵² *Hudson* also made it clear that in order for a crime to be enforceable, the general public must be placed on notice not only of the prohibited conduct, but also of its penalties.²⁵³ While *Hudson & Goodwin* applied to the federal government, in 1852 the New Mexico Territorial Supreme Court, in *Bray v. United States*, incorporated it into the territory's criminal laws, and in 1913, in *Ex parte De vore*, the New Mexico Supreme Court applied it to state law.²⁵⁴ Armstrong could have validly argued that because the state legislature had failed to proscribe an independent sentence in the state statute, the statute itself was void.

Armstrong instead claimed that both the Volstead Act and the state law violated New Mexico's constitution, specifically because Chapter 118 "embraced more than one subject."²⁵⁵ Under the laws of the state, a bill was only permitted to contain a single subject and the purpose of this rule was to prevent an interested party from fooling the state legislature into enacting a law with hidden purposes.²⁵⁶ The justices quickly dispensed with Armstrong's challenge against the constitutionality of the state prohibition law and noted that the California Supreme Court had already upheld a similar law.²⁵⁷ This much was correct. In *Ex Parte Burke*, California's justices, in a very brief opinion, determined that its state legislature possessed the

249. See *State v. Armstrong*, 1924-NMSC-089, ¶ 3, 31 N.M. 220, 243 P. 334.

250. See generally *id.*, 243 P. at 334-35.

251. *Id.* ¶ 103, 243 P. at 346; see Roberts, *supra* note 44, at 41.

252. 11 U.S. (7 Cranch) 32 (1812).

253. See Gary D. Rowe, *The Sound of Silence: United States v. Hudson & Goodwin, the Jeffersonian Ascendancy and the Abolition of Federal Common Law Crimes*, 101 YALE L. J. 946-48 (1992).

254. 1913-NMSC-072, ¶ 19, 18 N.M. 246, 136 P. 47.

255. *Armstrong*, 1924-NMSC-089, ¶ 1, 243 P. at 334.

256. See e.g. *State v. Ingalls*, 1913-NMSC-068, 18 N.M. 211, 135 P. 1177; *Sun Mutual Ins. Co. v. Mayor of New York*, 8 N.Y. 241 (N.Y. 1853). The New Mexico Supreme Court cited to *Sun Mutual* for the proposition that the constitutional provision served to safeguard the public's understanding the law. *Armstrong*, 1924-NMSC-089, ¶ 13, 243 P. at 336.

257. *Armstrong*, 1924-NMSC-089, ¶ 3, 243 P. at 334 (citing to *In re Application of Burke*, 190 Cal. 326, 212 P. 193 (1923)).

authority under both the state and federal constitution to adopt a federal law as its own.²⁵⁸ Yet, California's justices recognized the difficulty their state's statute presented to the public in terms of the potential adoption of future prohibitions without the state legislature first acting, but then noted that this particular concern did not specifically apply to Burke's appeal.²⁵⁹

A full reading of *Burke* evidences that the California Supreme Court's determination was hardly dispositive to the challenge Armstrong raised, namely that the New Mexico statute violated the state constitution's prohibition against two objects contained in a single statute. Indeed, *Burke* simply upholds the doctrine of incorporation by reference (or more popularly titles as the "reference statute" doctrine).²⁶⁰ Perhaps, for this reason, New Mexico's justices then turned to the laws of other states, first noting that the Nevada Supreme Court overturned their state prohibition law which likewise mimicked California's, in *Ex Parte Mantell*.²⁶¹ In that decision, Nevada's justices determined that when its state legislature placed the National Prohibition Act into the state's law, the legislature had essentially created a law which served two purposes and this failed to inform Nevada's citizens precisely what the state law prohibited as well as who it covered, and therefore violated the state constitution.²⁶²

Although the Nevada Supreme Court had overturned their state's prohibition act, New Mexico's justices focused more on the rationale of preventing a dual-purpose law rather than on the issue of notice. First, the justices reviewed the historic basis for singular purpose laws, centering on *Savanah v. State*, an 1848 Georgia Supreme Court decision arising from a massive land fraud that benefitted a small number of Anglos at the expense of the state's Native Americans as well as poorer white Georgians.²⁶³ Prior to that decision, the Georgia legislature had passed a bill with a title not pertinent to the sale of lands to four companies headed by some of the state's prominent politicians, and after this discovery, the state's constitution was amended to require honesty in the titling of bills.²⁶⁴ Although integrity in the titling of statutes is of paramount importance and it was part of the challenge before

258. *Burke*, 190 Cal., at 327–28.

259. *Id.* at 328.

260. *Id.*

261. *Armstrong*, 1924-NMSC-089, ¶¶ 3–4, 243 P. at 334–35 (citing *Ex parte Mantell*, 216 P. 509 (Nev. 1923)).

262. *Ex parte Mantell*, 216 P. at 509, 511. The Nevada Supreme Court held [i]s there anything in the title in question to enable the people or the legislators to grasp the purpose and scope of the bill without reference to any other document? We think not. The so-called title merely declares that it is an act to make the 'provisions' of an act of Congress the law of the State of Nevada.

Id. at 510. Nevada's justices quipped, "[i]f the 'National Prohibition Act' can be a subject of legislation, why might not our Legislature pass an act entitled 'An act providing for the enactment into law of House Bill No. 5000, as passed by the Congress of the United States'?" *Id.*

263. *Armstrong*, 1924-NMSC-089, ¶ 12, 243 P. at 335 (citing *Savanah v. State*, 4 Ga. 26 (1847)). The Court noted that the reason for the limitation dated to 1789 where the Georgia Supreme Court confronted a challenge to a bill that purported, by its title, to pay state militia, but in reality, permitted the sale of territorial lands at discount prices to favored persons. *Id.* On the land fraud, see Jane Elsmere, *The Notorious Yazoo Land Fraud Case*, 51 GA. HIST. Q., 425 (1967).

264. Elsmere, *supra* note 263, at 425–26.

the Nevada Supreme Court, it was not a part of Armstrong's challenge against his conviction.

Rather, Armstrong argued that in referencing the National Prohibition Act, New Mexico's legislature failed to place the public on notice as to the singular aim of the law. That is, there was an unresolved question as to whether the law simply recognized the federal act or banned alcohol in New Mexico. The justices turned to "reference statute" doctrine to answer the issue.²⁶⁵ They reasoned that since the state legislature had already endorsed prohibition, the referencing of the National Prohibition Act into Chapter 118 did not create a statute with two objects, but rather, a statute with a singular aim, the prohibition of intoxicating liquor in the state.²⁶⁶

For the first time in the state's legal history, the court recognized the "reference statute" doctrine and in an effort to explain its efficacy, the justices turned to *Phoenix Assurance Co. v. Fire Dep't of Montgomery*, an 1897 Alabama Supreme Court decision.²⁶⁷ However, that decision arose from an altogether different type of reference. In 1870, the Alabama legislature passed a law establishing a fire department fund for the city of Mobile and placing a fee on fire insurance companies to help fund the city's fire department. In 1872, the legislature enacted a similar law for the city of Montgomery, but instead of clearly and independently listing the fee in the 1872 law, the law simply referenced the same conditions as the 1870 law.²⁶⁸ In upholding the fee assessments in Montgomery, Alabama's supreme court determined that the second law clearly incorporated the first law by its specific reference to it.²⁶⁹ New Mexico's justices also pointed to several other state supreme courts which had likewise relied on the reference doctrine, though in all of these cases, the doctrine applied to one state law referencing another.²⁷⁰

While New Mexico's justices realized that there was a difference in referencing a federal statute into state law, they found it important that the Eighteenth Amendment stated "[t]he Congress and the several states shall have concurrent power to enforce this article by appropriate legislation." And, because Congress had clearly defined the punitive terms in the National Prohibition Act, the public was notified as to a consistent law between the federal and state jurisdictions. As a result, *Armstrong* would not have his conviction overturned. Perhaps because of the visible doubts expressed by the pro-prohibition chief justice and one other justice who signed onto the majority, it took until 2018 for another court to cite to *Armstrong*, and this occurred in the Oklahoma Supreme Court.²⁷¹

265. *Armstrong*, 1924-NMSC-089, ¶ 42, 243 P. at 339.

266. *See id.* ¶¶ 38–39, 243 P. at 338.

267. *Id.* ¶ 43, 243 P. at 339 (citing *Phx. Assurance Co. of London v. Fire Dep't*, 23 So. 843 (Ala. 1898)).

268. *Phx. Assurance Co. of London*, 23 So. at 844.

269. *Id.* at 847.

270. *Armstrong*, 1924-NMSC-089, ¶¶ 46–47, 243 P. at 339 (citing to State *ex rel.* Linthicum v. Board of Comm'rs, 94 N.E. 716 (Ind. 1911); *Van Pelt v. Hilliard*, 78 So. 693, (Fla. 1918); *Evans v. Ill. Sur. Co.*, 131 N.E. 262 (Ill. 1921); *Zeman v. Dolan*, 116 N.E. 642 (Ill. 1917); *Vallejo & N. R.R. Co. v. Reed Orchard Co.*, 147 P. 238 (Cal. 1915); *People ex rel. Cant v. Crossley*, 103 N.E. 537 (Ill. 1913); *Santee Mills v. Query*, 115 S.E. 202 (S.C. 1922); *State ex rel. Miller v. Leich*, 78 N.E. 189 (Ind. 1906)).

271. *CompSource Mut. Ins. Co. v. State ex rel. Okla. Tax Comm'n*, 2018 OK 54, ¶ 21 n. 31, 435 P.3d 90.

Armstrong, of course, was not the last New Mexico decision to arise from prohibition. In the 1927 decision *State v. Miller*, a convicted motorist challenged New Mexico's motor vehicle laws as unconstitutional because it criminalized driving while intoxicated under the state's general automobile code.²⁷² While the state's justices conceded that the offense was listed alongside of rules on lights, brakes, and turn-signals, legislating a felony under the general statute was constitutionally permissible.²⁷³ Two years later, the court, in upholding the law against a challenge based on "repeal by implication," noted that the prosecution needed only to prove that the defendant operated a vehicle while in an intoxicated condition regardless of whether the defendant had driven safely.²⁷⁴

As earlier noted, in 1933, Congress passed a national law permitting the manufacture and sale of 3.2 percent alcohol beer. In 1927, the state legislature prohibited the sale of beer.²⁷⁵ After the passage of the Cullen-Harrison Act, E.E. Hamm was indicted for the sale of beer that was lawfully within the federal act, but not lawful under the 1927 state law.²⁷⁶ In *State v. Hamm*, the New Mexico Supreme Court noted that neither the 1927 state law nor New Mexico's twenty-third constitutional amendment specified a proscribed level of alcohol for beer.²⁷⁷ Indeed, as the justices pointed out, it was not until 1929 that the state legislature determined that beer with an alcohol content of more than 1 percent was an intoxicating beverage.²⁷⁸ In upholding New Mexico's law, the court recognized that while it was true that Congress and Roosevelt had determined that 3.2 percent beer could not be considered intoxicating, this recognition did not triumph over the state legislature's determination in opposite.²⁷⁹ As a result, for the sale of beer to begin in New Mexico, the state legislature and governor would have to affirmatively act.

In contrast to Governor Campbell's assessment of crime in Arizona, in 1921, New Mexico's governor, Merritt C. Mechem informed the Anti-Saloon League that the state police assiduously enforced prohibition and that it benefitted the poorer citizens in the state.²⁸⁰ Mechem, like Campbell, recognized that alcohol smuggling occurred between Mexico and New Mexico, but noted that he was hopeful this would cease once the Harding administration reestablished diplomatic relations with Mexico.²⁸¹ And, finally, Mechem claimed that prohibition had grown in popularity.²⁸² Mechem's comment on the trans-border liquor trade underscored the amount and means of alcohol being brought into New Mexico. In 1927, prohibition

272. 1927-NMSC-045, 33 N.M. 200; 263 P. 510.

273. *Id.* ¶¶ 15, 21, 263 P. at 513–14.

274. *See State v. Tinsley*, 1929-NMSC-085, ¶¶ 8–9, 34 N.M. 458, 283 P. 907.

275. N.M. STAT. ANN. § 72-101 (repealed 1939).

276. *State v. Hamm*, 1933-NMSC-067, ¶ 1, 37 N.M. 437, 24 P.2d 282.

277. *Id.* ¶¶ 9–10, 24 P.2d at 283.

278. *Id.* ¶ 10, 24 P.2d at 283.

279. *Id.* ¶ 13, 24 P. at 284.

280. THE ANTI-SALOON YEARBOOK, *supra* note 152, at 244.

281. *See id.*

282. *Id.*

agents and sheriffs shot down an airplane carrying illicit tequila into the state and thousands of gallons of liquor were brought across each year.²⁸³

Mechem's observation on prohibition's popularity proved to be a false prediction. By 1932, the Anti-Saloon League in New Mexico was out of money and there was a paucity of donors. Its director, George Hammond corresponded with the League's Ohio-based headquarters that there were few viable candidates who "had sympathy with our cause."²⁸⁴ After the national election, the state chapter was bankrupt.²⁸⁵ On September 22, 1933, Hammond reported "the election is over and as you know, it went overwhelmingly wet," adding "the churches and the people of the state have almost absolutely quit supporting the cause."²⁸⁶ Within two months, New Mexico's voters decided to abolish national prohibition.²⁸⁷

IV. CONCLUSION

Just as Prohibition left an indelible mark on American society, from reducing the annual consumption of alcohol, to increasing communities suffering from political corruption and a rise in crime, the supreme courts of Arizona and New Mexico also left a permanent mark on the law of the two states. One of the clearest examples of the permanency of the change is in the states' driving laws. In 1967, the Arizona Supreme Court reaffirmed the principle that in a driving under the influence prosecution, the prosecutor only had to prove that the driver's control of the vehicle was "to the slightest degree affected by his consumption of the intoxicant."²⁸⁸ Following their cite to *Hasten*, Arizona's justices noted "we take judicial notice of the terrible toll taken, both in personal injuries and property damage, by drivers who mix alcohol and gasoline, and we conclude that the test is as sound today as it was thirty-eight years ago when it was first enunciated."²⁸⁹ The New Mexico Supreme Court has likewise held that the prosecution does not have to prove harm or erratic driving, but rather, that the defendant was merely intoxicated.²⁹⁰

In 1953, in *Hudson v. Kelly*, the Arizona Supreme Court referenced *Gherna*, making a general holding of that decision valid.²⁹¹ The decision arose from the state purchasing tires and then refusing to pay the commercial seller because the purchase occurred contrary to a new law.²⁹² The seller claimed the new law was unconstitutional as it embraced more than one subject and that, at best, the new law

283. ELVIS E. FLEMING, TREASURES OF HISTORY IV: HISTORICAL EVENTS OF CHAVES COUNTY, NEW MEXICO 141-44 (2003).

284. Letter from George M. Hammond to H.B. Sowers, (Feb. 26, 1932) (copy on file with author). On October 15, 1932, Hammond wrote to Sowers, "I do not want you to think for one moment that we are thinking of quitting or that our labors are in vain. The work had been so neglected that we had to start over again and build the Anti-Saloon League back into the confidence of the people. Letter from Hammond to Sowers (Oct. 15, 1932) (copy on file with author).

285. Letter from Hammond to Sowers (Aug. 2, 1933) (copy on file with author).

286. Letter from Hammond to Sowers (Sep. 22, 1933) (copy on file with author).

287. See KYVIG, *supra* note 38, at 179.

288. *Noland v. Wootan*, 427 P.2d 143, 144 (Ariz. 1967).

289. *Id.*

290. See *State v. Johnson*, 2001-NMSC-001, ¶ 14, 130 N.M. 6, 15 P.3d 1233.

291. 263 P.2d 362, 364-65 (Ariz. 1953) (citing *Gherna v. State*, 146 P. 494 (Ariz. 1915)).

292. *Id.* at 363.

repealed the prior state purchasing laws only by the scantest implication.²⁹³ In siding the seller, Arizona's justices cited to *Ghera* for the proposition that a court declaring a law null had to be rare and conducted with "delicacy."²⁹⁴ But in this instance, the tire seller surpassed the *Ghera* threshold where a generation earlier hundreds of the state's consumers of "intoxicating liquor" had failed. In 1982, the Arizona Supreme Court upheld the doctrine of parallel prosecutions between the state and federal government and cited to *Henderson* for the proposition that it had been permissible to do so.²⁹⁵ In 1967, in *State v. Enriquez*, Arizona's justices cited to *Britt*, to reaffirm the ethics canon that a prosecutor may only secure a conviction by lawful means and without asking the jury to conjecture about the evidence that had not been presented.²⁹⁶

Of the New Mexico Supreme Court decisions that have survived to the present, *In re Everman* appears to have had a lasting effect on the law though it has been modified. A liquor license remains a privilege rather than a right, as the justices articulated in *Everman*. However, in 1983 the court determined that the denial of a license could only become permanent after an applicant was afforded administrative due process to contest the denial or revocation.²⁹⁷ So too does the influence of *Schwartz v. Gallup* survive, at least for the proposition that if a part of an ordinance is invalid under the law, the remainder of the ordinance is presumed valid.²⁹⁸ In a broad sense, the effect of prohibition on New Mexico's motor vehicle laws led to the legislature and state law enforcement pursuing a vigorous program to prevent intoxicated persons from driving under the influence through deterrent and punitive measures.²⁹⁹ The New Mexico Supreme Court, in *State v. Bullcoming*, determined that blood alcohol results generated by a machine were business records, but the Supreme Court overturned the decision based on a violation of the Confrontation Clause.³⁰⁰

These are a few of the aspects, developed during prohibition, which have become embedded in the current laws of the nation's two newest contiguous states. Of course, laws respecting the public's safety and morals have developed in other areas. But prohibition was unique in the sense that it made illegal an activity popular amongst the nation's residents, only to be renounced within two decades of its imposition. Prohibition also served as a legal means to both de-stratify society of ethnicity and religion, while imposing the morals of a nationally majoritarian faith and world view on the diverse populace of both states. But prohibition's supporters ultimately failed to convince religious and ethnic minorities, as well as significant

293. *Id.*

294. *Id.* at 364–65 (quoting *Ghera v. State*, 146 P. 494, 501 (Ariz. 1915)).

295. *State v. Poland*, 645 P.2d 784, 791 (Ariz. 1982) (citing *Henderson v. State*, 244 P. 1020 (Ariz. 1926)).

296. 430 P.2d 422, 425 (Ariz. 1967) (citing *Britt v. State*, 218 P. 981 (Ariz. 1923)).

297. *Chronis v. State*, 1983-NMSC-081, ¶¶ 17–19, 100 N.M. 342, 670 P.2d 953.

298. *See Bradbury & Stamm Constr. Co. v. Bureau of Revenue*, 1962-NMSC-078, ¶ 7, 70 N.M. 226, 372 P.2d 808.

299. *See, e.g., State v. Gurule*, 2011-NMCA-042, 149 N.M. 599, 252 P.3d 823; *State v. Harrison*, 1992-NMCA-139, 115 N.M. 73, 846 P.2d 1082.

300. 2010-NMSC-007, 147 N.M. 487, 226 P.3d 1, *rev'd sub nom.* *Bullcoming v. New Mexico*, 564 U.S. 647 (2011).

numbers of majorities, to become puritan in their lives and abandon their own identities.