

## Essay

# THE PRICE OF PROHIBITION

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The standard account of alcohol prohibition in America focuses exclusively on ideology. Specifically, the story goes, vast numbers of citizens were so overcome with Progressive hubris that they set forth on a futile quest to mandate morality by banning the manufacture and sale of liquor. Within a few years, the folly of such moral legislation became transparent. Chastened by their experience, the American people abandoned their "noble experiment" in social engineering.<sup>1</sup>

Public-choice theory offers a different vantage point from which to evaluate this standard account. Public-choice theory, consistent with other economic disciplines, focuses on self-interest—especially pecuniary self-interest—as the driving force behind political behavior and outcomes. Ideology carries little weight in typical public-choice analysis of legislation or regulation.<sup>2</sup> Thus, a traditional public-choice explanation of prohibition and its

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1. See, e.g., RICHARD B. BERNSTEIN & JEROME AGEL, *AMENDING AMERICA* 175 (1993); Norman H. Clark, *Prohibition and Temperance*, in *THE READER'S COMPANION TO AMERICAN HISTORY* 871 (Eric Foner & John A. Garraty eds., 1991); LAWRENCE M. FRIEDMAN, *AMERICAN LAW* 162 (1984). Judge Posner suggests that prohibition was repealed because Congress was unwilling to invest the resources necessary to make it work. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 533 (4th ed. 1992). We argue below, however, that this unwillingness to adequately enforce prohibition is insufficient to explain why the Twenty-first Amendment was ratified. See *infra* text accompanying note 16. FLETCHER DOBYNS, *THE AMAZING STORY OF REPEAL* 349 (1940), attributes the "noble experiment" phrase to Herbert Hoover.

2. See, e.g., ROBERT E. MCCORMICK & ROBERT D. TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY* (1981). The failure of public-choice scholars to account for the role of ideology in determining political outcomes is now being corrected. See generally Symposium, *Empirical Studies of Ideology and Representation in American Politics*, 76 *PUB. CHOICE* 1 (1993) (an entire issue of the journal "Public Choice" devoted to empirical studies of ideology and representation in American politics); see also William R. Dougan & Michael C. Munger, *The Rationality of Ideology*, 32 *J. L. ECON.* 119 (1989); Michael E. DeBow & Dwight R. Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 *TEX. L. REV.* 993 (1988); Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology*

repeal would eschew any reliance on ideological factors. A richer and more robust public-choice approach, however, can incorporate ideology in bringing economics to bear on the question of prohibition.

To put our general point simply, ideology matters to self-interested politicians when ideology matters to their constituents. Insofar as their constituents are willing to pay—in money and votes—for ideological legislation, politicians are willing to supply it. This approach recognizes that politicians protect their seats by seeking contributions and re-election votes in *two* conceptually distinct ways: (1) through taxation or regulation that redistributes wealth from politically ineffective groups to politically influential groups,<sup>3</sup> or (2) through “social” legislation designed not so much to redistribute wealth but, rather, to further ideological causes favored by well-organized interest groups. These two methods of securing votes are largely fungible; and indeed, in certain circumstances, they may well complement each other. If an organized interest group opposes a particular activity on ideological grounds, politicians who reduce that activity (or the appearance of that activity) through taxation or regulation will win the political support of this interest group. At the same time, politicians gain the support of other interest groups who have no ideological qualms with the activity but whose economic interests are served by the tax or regulation.<sup>4</sup> Where the two methods conflict, however, economic theory predicts that politicians will trade off one against the other to maximize re-election chances.

Alcohol prohibition and its subsequent repeal offer a classic historical case of politicians’ conflict between their desire to tax and regulate and their interest in serving well-organized ideological movements. Given that the temperance movement had been pressing for alcohol prohibition since the mid-nineteenth century,<sup>5</sup> why did Congress wait until December 1917 to formally outlaw alcohol?<sup>6</sup> And why did Congress repeal the prohibition amendment just fourteen years after its ratification?<sup>7</sup>

In this Essay, we argue that the federal income tax played a central role, albeit behind the scenes, in the proposal and ratification of both the Eighteenth and the Twenty-first Amendments. The income tax proved a viable alternative to liquor taxation for raising revenue, thus making prohibition possible. To be sure, the ideology of voters and politicians mattered, but Congress could not afford the cost in foregone tax revenue (hence, foregone wealth redistribution) that an ideological vote for prohibition entailed until the income tax demonstrated its revenue-raising potential. The income tax’s revenue prowess reduced the pain of an ideological vote for prohibition to a bearable level by

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in the *Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984); James B. Kau & Paul H. Rubin, *Self-interest, Ideology and Logrolling in Congressional Voting*, 22 J. L. ECON. 365 (1979).

3. MCCORMICK & TOLLISON, *supra* note 2, at 15–27; see also Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988).

4. See generally Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, REGULATION, May–June 1983, at 12 (arguing that politicians voting for prohibitions on Sunday liquor sales receive political support from both Baptists and bootleggers).

5. See MARK THORNTON, *THE ECONOMICS OF PROHIBITION* 39–56 (1991); Clark, *supra* note 1, at 871–72.

6. See BERNSTEIN & AGEL, *supra* note 1, at 174.

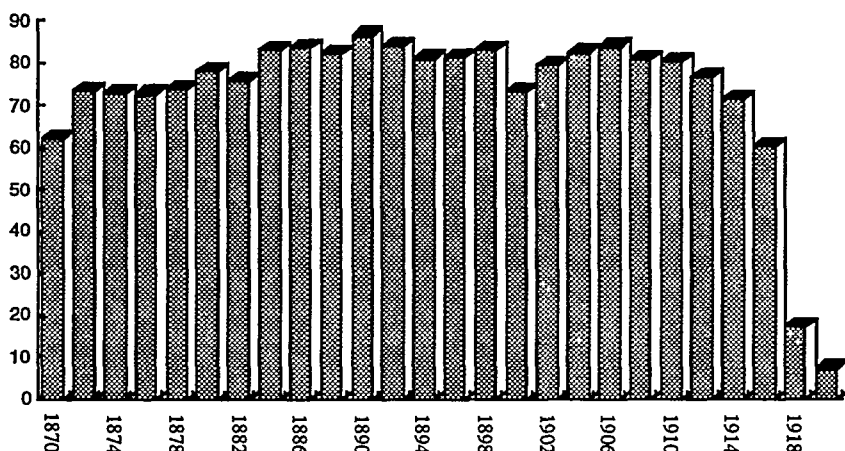
7. *Id.* at 176.

filling in for foregone liquor tax revenues. Fourteen years later, that pain became unbearable: incomes dove precipitously and Congress unexpectedly found itself in need of an alternative revenue source. Thus, the quest for tax revenue—not any change in the nation's moral sense—drove prohibition's repeal.

## I. THE EIGHTEENTH AMENDMENT

Prior to the advent of the modern income tax in 1913,<sup>8</sup> the federal government relied mainly on liquor taxation and customs duties to generate revenues. Data from 1870 on (see Figure 1)<sup>9</sup> show that customs duties and liquor taxes were the main revenue sources for the federal government until America entered World War I. Liquor taxes trailed only customs duties as the largest single source of revenues during the previous half-century, accounting for about a third of federal government revenues during the several decades leading up to W.W.I.<sup>10</sup>

FIGURE 1: CUSTOM & LIQUOR TAXES, PERCENT SHARE OF ALL GOVERNMENT RECEIPTS 1870-1920



During the war, however, government revenues received through income taxation exceeded revenues extracted from any other single source for the first time. Figure 2 shows, for 1910 through 1920, the percentage of total federal government revenues derived from the taxation of incomes and profits.<sup>11</sup> Income taxes went from supplying about 16% of the federal government's revenues in 1916 to supplying double that proportion in 1917. By 1918, as

8. Congress began taxing corporate profits in 1909. See ROY G. BLAKEY & GLADYS C. BLAKEY, *THE FEDERAL INCOME TAX* 22-59 (1940).

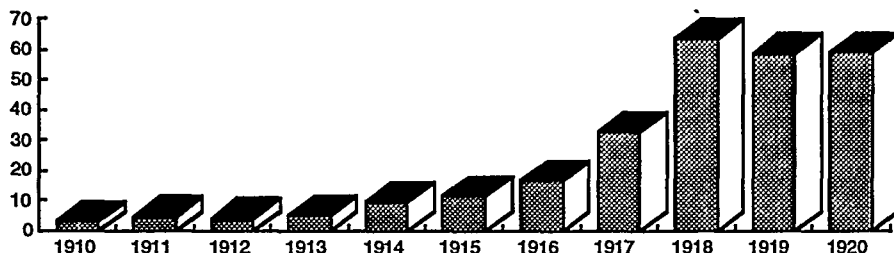
9. The data from which Figure 1 is constructed are from U.S. DEP'T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970* (pt. 2), Series Y 352-57 & Y 358-73 (1975).

10. *Id.*

11. Data from which Figure 2 is constructed are found in BLAKEY & BLAKEY, *supra* note 8, at 591, and U.S. DEP'T OF COMMERCE, *supra* note 9, Series Y 352-57.

Figure 2 shows, the income tax supplied almost two-thirds of the revenue gathered by the federal government.

**FIGURE 2: INCOME & PROFITS TAX RECEIPTS SHARE OF TOTAL GOVERNMENT REVENUES**



Income tax revenues accelerated most dramatically in 1918 (in terms of dollars raised), but the income tax had already demonstrated its prodigious revenue potential by 1917.<sup>12</sup> The volume of 1917 receipts nearly tripled the 1916 level. More importantly, Congress passed in October 1917—two months before it successfully proposed the Eighteenth Amendment—the legislation that would yield 1918's enormous increase in income tax receipts.<sup>13</sup> Congress predicted with considerable accuracy the amount of income tax receipts generated by the War Revenue Act of 1917. Congress believed the Act would raise \$2.5 billion annually; and, indeed, the Act raised more than \$2.3 billion in 1918.<sup>14</sup>

12. Table A reports federal revenues derived from the corporate and individual income taxes compared to revenues derived from customs duties and liquor taxes. By 1918, the income-tax had unambiguously established itself as the dominant and bountiful source of revenue.

*Table A*

| Year | Income-Tax Receipts | Customs Duties & Liquor-Tax Receipts | Sum           | Income-Tax Percent |
|------|---------------------|--------------------------------------|---------------|--------------------|
| 1913 | 35,006,000          | 549,037,000                          | 584,043,000   | 6                  |
| 1914 | 71,381,000          | 518,500,000                          | 589,881,000   | 12                 |
| 1915 | 80,202,000          | 433,736,000                          | 513,938,000   | 16                 |
| 1916 | 124,937,000         | 460,640,000                          | 585,577,000   | 21                 |
| 1917 | 359,681,000         | 509,971,000                          | 869,652,000   | 41                 |
| 1918 | 2,314,006,000       | 623,838,000                          | 2,937,844,000 | 79                 |
| 1919 | 3,018,784,000       | 667,509,000                          | 3,686,293,000 | 82                 |
| 1920 | 3,944,949,000       | 462,774,000                          | 4,407,723,000 | 90                 |

See BLAKEY & BLAKEY, *supra* note 8, at 591; U.S. DEP'T OF COMMERCE, *supra* note 9, Series Y 352-57.

13. BLAKEY & BLAKEY, *supra* note 8, at 130-55. The amendment was ratified on January 29, 1919. See BERNSTEIN & AGEL, *supra* note 1, at 174.

14. BLAKEY & BLAKEY, *supra* note 8, at 153, 579.

By the fall of 1917, Congress saw the income tax as the chief source of federal government revenue.<sup>15</sup> Consequently, the income tax's recognized ability to raise substantial government revenue reduced the cost to Congressmen of voting for prohibition in December 1917: liquor tax revenues lost as a result of prohibition (which went into effect on January 16, 1920) were trivial in comparison with the rapidly growing revenues derived from the individual and corporate income taxes. Thus, politicians had more than ample funds for the wealth redistributions necessary to secure re-election votes and contributions. By lowering the cost of voting for prohibition, the income tax tipped the balance in politicians' cost-benefit calculus in favor of voting dry. The temperance movement's long quest was seemingly brought to a triumphant conclusion.

## II. THE TWENTY-FIRST AMENDMENT

In the immediate post-W.W.I period, Congressmen were finally able to satisfy the prohibitionists' social agenda without unduly hampering their ability to distribute tax revenues and, thus, secure votes. Prohibition's costs increased not long afterward, however, and the Eighteenth Amendment was repealed in 1933. The conventional explanation of the Twenty-first Amendment's ratification emphasizes prohibition's unworkability: prohibition no longer reflected the sentiments of The People, and the federal government did not have the resources necessary to stamp out all alcohol distribution in the face of widespread defiance.<sup>16</sup> While this explanation is plausible, it fails to adequately explain why Congress repealed the Eighteenth Amendment after such a short trial run, particularly in light of the dearth of organized support for repeal during the 1920s.<sup>17</sup> We submit that Congress proposed the Twenty-first Amendment in February 1933, not merely as a faithful agent in response to the wishes of the citizenry at large, nor as a faithful steward avoiding prohibition's high enforcement costs. Rather, in our view, Congress was attempting to overcome a sudden, unexpected, and substantial revenue shortfall that threatened wealth redistribution.<sup>18</sup>

The Great Depression severely diminished individual and corporate incomes, and income tax revenues correspondingly plunged beginning in 1931. As Table 1<sup>19</sup> shows, in 1932—the year immediately prior to Congress's formal proposal of the Twenty-first Amendment—income tax receipts fell by well over a third from their level in 1931 and to almost half of their 1930 level. In 1933, income tax receipts were less than two-fifths of their 1930 level, and

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15. *Id.* at 130–55; RANDOLPH E. PAUL, *TAXATION IN THE UNITED STATES* 110–22 (1954).

16. *See supra* text at note 1.

17. *See* Clark, *supra* note 1, at 873 (“[B]efore 1930 few people called for outright repeal of the amendment. No amendment had ever been repealed, and it was clear that few Americans were moved to political action yet by the partial successes or failures of the Eighteenth.”).

18. “[T]he repeal movement, which since the early 1920s had been a sullen and hopeless expression of minority discontent, astounded even its most dedicated supporters when it suddenly gained political momentum.” *Id.* at 873.

19. The sources for tables 1 and 2 are: BLAKEY & BLAKEY, *supra* note 8, at 591; U.S. DEP'T OF COMMERCE, *supra* note 9, Series Y 352–57. All dollar figures have been converted by the authors into real (1930) dollars. We used as the basis for our conversion the Consumer Price Index reported in U.S. DEP'T OF COMMERCE (pt. 1), *supra* note 9, Series E 135–66.

were at their lowest level since 1917 (when the income tax brought in just under \$360 million). The income tax stream that had swelled so promisingly during Woodrow Wilson's second presidential term was, during the early 1930s, running dry.

*Table 1*

| Year | Income Tax Receipts<br>(1930 \$) | Percent Change<br>From Previous Year | Percent Change<br>From 1930 |
|------|----------------------------------|--------------------------------------|-----------------------------|
| 1927 | \$2,139,416                      | +14                                  | —                           |
| 1928 | \$2,118,863                      | -1                                   | —                           |
| 1929 | \$2,271,649                      | +7                                   | —                           |
| 1930 | \$2,410,987                      | +6                                   | —                           |
| 1931 | \$2,039,515                      | -15                                  | -15                         |
| 1932 | \$1,291,879                      | -37                                  | -46                         |
| 1933 | \$962,361                        | -26                                  | -60                         |

Table 2 shows the correspondingly severe hit the Great Depression inflicted upon total federal government receipts. In both 1932 and 1933, total federal government receipts were reduced to approximately 60% of their 1930 level. The early years of the Depression greatly constrained Congress's ability to spend, and Congress now felt the fiscal strain caused by inability to tax liquor.<sup>20</sup> The income tax, while an effective revenue raiser during the 1920s, did not suffice in 1933. With revenues plummeting, Congress searched for another source of income to fund its wealth redistributions.

*Table 2*

| Year | Total Government<br>Receipts (1930 \$) | Percent Change From<br>Previous Year | Percent Change From<br>1930 |
|------|--|--------------------------------------|-----------------------------|
| 1927 | \$3,858,456                            | +8                                   | —                           |
| 1928 | \$3,801,490                            | -2                                   | —                           |
| 1929 | \$3,765,732                            | -1                                   | —                           |
| 1930 | \$4,057,884                            | +8                                   | —                           |
| 1931 | \$3,416,181                            | -16                                  | -16                         |
| 1932 | \$2,351,946                            | -31                                  | -42                         |
| 1933 | \$2,573,253                            | +9                                   | -37                         |

That search led the framers of the 1932 Democratic platform to call for repeal of the Eighteenth Amendment in order "to provide therefrom a proper and needed revenue."<sup>21</sup> Jouett Shouse, president of the Association Against the Prohibition Amendment and a powerful figure in the Democratic party, predicted that repeal of the Eighteenth Amendment would generate, at a minimum, an additional one billion dollars in tax revenues.<sup>22</sup> Facing the choice

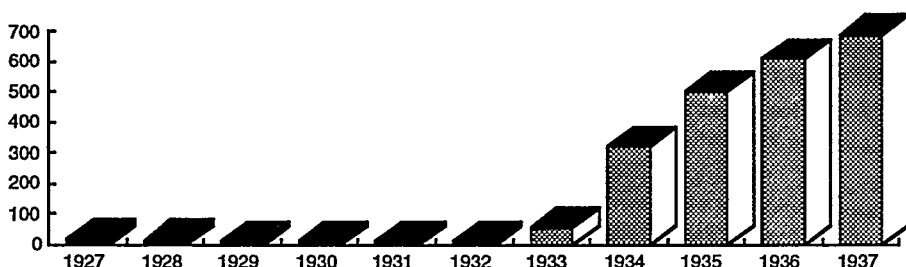
20. At the time, economist Clark Warburton estimated that the Eighteenth Amendment had cost the federal government, *in toto*, no less than \$326 million and possibly as much as \$1.7 billion by 1931. CLARK WARBURTON, *THE ECONOMIC RESULTS OF PROHIBITION* 250 (1932). This cost was surely not lost on Congress.

21. MARK H. LEFF, *THE LIMITS OF SYMBOLIC REFORM: THE NEW DEAL AND TAXATION, 1933-1939*, at 31 (1984) (quoting DONALD B. JOHNSON & KIRK H. PORTER, *NATIONAL PARTY PLATFORMS 1840-1972*, at 332 (1973)).

22. *Id.* at 32; see also DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION, 175-77* (1979).

between taking corrective action to fill the revenue shortfall caused by lower income tax receipts or drastically curbing spending, Congress chose the former course. A prominent House leader in the fight for successful Congressional proposal of the Twenty-first Amendment admitted in 1934 that "if we [anti-prohibitionists] had not had the opportunity of using that argument, that repeal meant needed revenue for our Government, we would not have had repeal for at least ten years."<sup>23</sup> As Figure 3 shows, the Twenty-first Amendment did indeed generate the anticipated higher liquor tax revenues.<sup>24</sup> As a percentage of federal government revenues, liquor taxes jumped from 2% in 1933 to 9% in 1934 to 13% by 1936.

FIGURE 3: LIQUOR TAX RECEIPTS 1927-1937, IN MILLIONS OF DOLLARS



Liquor taxation was not a perfect substitute for income taxation; liquor taxes following repeal did not fully compensate for lost income tax revenues.<sup>25</sup> Nevertheless, liquor taxation promised a sizable additional revenue stream to Congress, facing desperate times, to help cushion the spectacular decline in revenues caused by the Great Depression.

Congress had allies in this cause. Among the interest groups who supported the Twenty-first Amendment's ratification were organized labor in alliance with wealthy industrialists (such as Pierre and Irene DuPont). Labor leaders and the very wealthy hoped that higher liquor taxes would reverse or restrain the expansion of income taxation.<sup>26</sup>

In 1933, these interest-group demands were less costly for Congress to satisfy (compared to just a few years earlier) because, as shown in Table 1, the Depression substantially reduced the income tax's importance as a revenue raiser. Congress sacrificed less by reducing the rates of an income tax that raised only \$2 billion annually compared with lowering the rates of an income tax that just a few years earlier raised double that amount.

23. See LEFF, *supra* note 19, at 31-32.

24. The data used to construct Figure 3 were derived from U.S. DEP'T OF COMMERCE, *supra* note 7, SERIES Y 358-73.

25. If liquor taxation were a perfect substitute for income taxation, Congress may well have never successfully proposed the Eighteenth Amendment.

26. See DOBYNS, *supra* note 1, at 122-32. For evidence of organized-labor's support of ratification of the Twenty-first Amendment, see *Repeal Would Cause Large Income Tax Cut*, 23 AM. FED'N LAB. WKLY. NEWS SERVICE 1 (June 3, 1933).

Beginning in 1934, effective income tax rates did in fact decline for all tax-paying groups with net incomes of \$20,000 or less.<sup>27</sup> Although the typical income earner paid no taxes on his or her annual income during the 1930s,<sup>28</sup> a significant number of unionized workers earned incomes high enough to be subject to federal income tax liability. For example, the median unionized worker in the building trades (of which there were nearly a half-million) earned an annual income in excess of \$2,000 during all of the 1930s.<sup>29</sup> Thus, many of these workers (depending on the number of exemptions) were subject to federal income tax liability for each year of this decade.<sup>30</sup> Workers with incomes between \$2,000 and \$3,000 annually, and with a single exemption, saw their effective tax rate fall from 2% in 1933 to 1.6% for the years 1934 through 1939.<sup>31</sup>

On the whole, then, income tax rates for persons owing taxes fell for all but the top earners.<sup>32</sup> Thus, while the DuPonts and their peers failed to win lower income tax rates as a consequence of prohibition's repeal, the great majority of tax-paying Americans (including large numbers of unionized workers) had their income tax burden eased.<sup>33</sup>

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27. See U.S. DEP'T OF COMMERCE, *supra* note 9, Series Y 412-39.

28. Mean family net income in 1935-1936 was \$1,784. *Id.*, Series G 306-18. This table has no separate listing for average family income during the years 1930-1934; we report here the figure for 1935-1936 because it closely enough approximates the average-income figures for 1932 through 1934, the years most relevant for Congressional decision-making regarding income-tax policy vis-à-vis the Twenty-first Amendment.

The typical income earner during the 1930s escaped all federal income taxes. Indeed, an average worker earning less than \$2,000 and having a single exemption enjoyed an effective federal income tax rate of 0% from the beginning of the modern income tax until 1940. *Id.*, Series Y 412-39.

29. INTERNATIONAL LABOUR OFFICE, YEAR-BOOK OF LABOUR STATISTICS (tols. VIII & XIII (1939)). Table VIII gives figures for the number of hours actually worked by American workers during the 1930s; part 2 of table XIII reports, for each year from 1929 through 1938, hourly union wage rates for workers in the building trades, printing and publishing, food, and transportation. Multiplying these union wage rates by the number of hours worked per week, then multiplying this weekly figure by 52, yields annual incomes in excess of \$2,000 for the 439,000 workers in the unionized building trades, and for most of the 96,000 workers in printing and publishing. Although not all unionized workers earned incomes high enough to be taxed—and, hence, these workers arguably were at best indifferent about shifting the tax burden from income earners to alcohol consumers—apparently a substantial contingent of union workers were amply enough perturbed at their tax burdens to prompt the A.F.L. to favor repeal of the Eighteenth Amendment on the grounds that repeal would reduce the income-tax burden weighing on union members. See *Repeal Would Cause Large Income Tax Cut*, *supra* note 26.

30. See U.S. DEP'T OF COMMERCE, *supra* note 9, Series Y 412-39.

31. *Id.*, Series Y 412-39. It should be remembered that the income tax at this time was still a relatively novel method of raising revenue, and that most workers (as reported above) paid no income taxes. Thus, even though effective income-tax rates on union workers were minuscule by today's standards, it is quite plausible that the psychological bite of this tax felt much sharper to unionized workers in the early 1930s than it came to feel after World War II. This point is further bolstered by the more than three-fold increase in the initial marginal tax rate from 1 1/8% in 1931 to 4% in 1932. See U.S. DEP'T OF COMMERCE, *supra* note 9, tbl. VIII, at 1095.

32. Available statistics show that only the top 13.7% of income earners earned \$10,000 or more in 1935-1936. No finer break down is reported. U.S. DEP'T OF COMMERCE, *supra* note 9, Series G 283-96. But because average income-tax rates were reduced for all people earning net incomes of \$20,000 or less, the percentage of income earners paying higher effective tax rates beginning in 1934 was surely very small.

33. This conclusion assumes that the income-tax burden is measured by the rate of taxation. If, however, the reduced tax rates caused lower and middle-class Americans to pay



We do not assert that tax considerations were the only force behind the repeal of prohibition. Increased general sentiment across the nation favoring repeal no doubt helped grease the political wheel that carried the Twenty-first Amendment through to ratification. It is no coincidence, however, that Congress first acted to repeal the Eighteenth Amendment only after the severe revenue-reduction shock administered by the Great Depression. General sentiment favoring a change in the law, even when combined with widespread disregard of the law, seldom spurs politicians into action. For a current example, consider the fact that laws against fornication and adultery remain on the books in several states. These laws are no longer enforced; they are flouted everywhere.<sup>34</sup> It is plausible that a majority of Americans today would, if asked, favor repeal of these statutes. Nevertheless, many such statutes remain official law while large numbers of people violate these statutes with impunity. These laws remain on the books because insufficient organized pressure exists to repeal an unenforced law.

Economics explains this fact. Repealing statutes has its costs. These costs might be very low when a statute forbids widely practiced behavior generally regarded as harmless to society. But the benefits of repealing these statutes are nonexistent. Such statutes remain on the books by default, bothering few, if any, people.<sup>35</sup>

Of course, it can be argued that there was popular pressure for repeal of the Eighteenth Amendment precisely because there were efforts to enforce prohibition. But it is doubtful that prohibition was enforced with sufficient vigor to impede seriously the ability of ordinary citizens to drink alcohol.<sup>36</sup> Even if people felt that prohibition unduly hindered their alcohol consumption, Congress could accommodate such popular sentiment by not allocating resources for enforcement, much as the states today choose not to enforce existing laws against fornication and adultery. But this option would have done nothing for Congress's ability to redistribute wealth. Without first legalizing alcohol, Congress could not easily collect tax revenues from liquor production and sales. Openly collecting taxes on freely traded liquor without repealing the Eighteenth Amendment would have too blatantly flouted the Constitution. Such

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larger absolute amounts of taxes (which is possible if the lower tax rates generated sufficiently increased incomes), these Americans' tax burden might be said to have increased. We merely point out this possibility; it is an empirical question whether or not lower and middle-class Americans paid greater amounts of income taxes following prohibition's repeal than before. A related empirical issue is the effect of prohibition's repeal on the proportion of total income-tax revenue paid by lower and middle-class Americans compared to the proportion of income-tax revenue paid by the wealthy. Note also that the liquor tax is regressive, falling most heavily on individuals with lower and middle incomes. See LEFF, *supra* note 21.

34. See RICHARD A. POSNER, *SEX AND REASON* 260-61, 309 (1992).

35. It is interesting to note, however, that not all statutes that appear to be fully unenforced are truly unenforced. An example is the Connecticut statute struck down in *Griswold v. Connecticut*, 381 U.S. 479 (1965), which, contrary to Robert Bork's claim, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 95-96 (1990), did, in fact, have at least one negative consequence. The statute's presence on the books effectively prohibited birth-control clinics from operating in the state. See POSNER, *supra* note 34, at 205. Thus, there was indeed some benefit to getting rid of this statute. We refrain, however, from taking a position on whether the means used to get rid of this statute—appeal to the courts—was proper or better relative to legislative repeal.

36. See POSNER, *supra* note 1; DOBYNS, *supra* note 1, at 265-368; Clark, *supra* note 1, at 872-73.

action by Congress would have been perceived as excessive and unnecessary, given that repeal was possible.

### III. CONCLUSION

As the cliché has it, money is the mother's milk of politics. Social agendas are likely to be given short shrift if they deprive Congress of the means to finance wealth redistributions. Desire for revenue drives politicians like no other motive. The evidence supports our contention that popular sentiment for repeal was less important in propelling the Twenty-first Amendment than was Congress's desire for increased revenues combined with interest-group pressures for lower income tax rates.

Our analysis of prohibition and its repeal has certain implications for current policy debates. Foes of the government's national war on drugs frequently couch their arguments in the futility of trying to proscribe the consensual sale and consumption of drugs: this is, of course, the conventional explanation for prohibition's repeal. But our analysis and common experience suggest that Congress is unlikely to repeal the drug laws simply because they do not achieve their publicly stated goal. Failure is by no means fatal to a social program when the government is running the show. As a strategic matter, we suggest that opponents of drug prohibition highlight the revenues that Congress could extract from a legalized trade in drugs. If our analysis is correct, money, not second thoughts about the war on drugs, will be the motive if and when Congress rethinks its policy.<sup>37</sup>

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37. Tax revenues may not today be sufficient incentive. Law-enforcement officials now earn impressive sums of money through civil-forfeiture laws allowing them to keep assets seized from drug dealers. Any attempt to legalize narcotics would likely meet with strong opposition from law-enforcement officials who have a rather large financial stake in keeping narcotics illegal. Forty-nine states have civil-forfeiture provisions. *See* U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 142 (1990). Federal law permits the Drug Enforcement Agency to share proceeds collected from forfeitures with local law-enforcement authorities, and federal proceeds go to the Justice Department rather than to the Treasury. 21 U.S.C. §§ 853(i)(4), 881(e) (1984).