

What's in a name?

A study of Temperance in American History and a Proposal for Redefinition

I. Introduction

If one were to plot the meaning of temperance in America over time, it would look like an hour glass. In its infant stages, temperance had many, loosely connected meanings, before cohering to a single meaning – prohibition – and then splintering into a diversity of meanings again. In the late 18th century, the temperance philosophy was first introduced to the budding nation and attracted a diverse following. Early proponents of temperance identified the movement with moderation in alcohol consumption. Various organizations dedicated to temperance gradually sprung up across the nation – all with different visions for how to achieve their namesake. In the 20th century, the Anti-Saloon League (ASL) with Wayne Wheeler at its helm equated temperance to prohibition, becoming the most successful single-issue party in American history.¹

The years where temperance enjoyed a nationally uniform definition were ultimately short-lived. With the passage of the 21st Amendment and Volstead Act, the states were given the keys to alcohol regulation.² In place of the uniform federal policy that was prohibition, a patchwork of state and local regulations took hold. At the turn of the 21st century, a dispute over Rhode Island's alcohol advertising prohibitions tested the scope of this federalism-inflected

¹ David F. Musto, *Drugs in America: A Documentary History*, 10, New York Univ. Pr. (2002).

² See *infra*, notes 19-31 and accompanying text.

regulatory framework. In *44 Liquormart, Inc. v. Rhode Island*, the Supreme Court blessed the decentralized regulatory framework that remains in place to this day.

The shift in regulatory landscapes – from a national to a more local one – raises important questions about U.S. alcohol regulation. This essay explores the implications of moving from a uniform understanding of temperance at the federal level, to a decentralized format with multiple local definitions of temperance. As we will see, states are generally well positioned to regulate alcohol by themselves. However, the federal government is better positioned to anticipate and respond to public health crises on a national scale. Against this backdrop, I examine how the recent opioid epidemic strains our states-centric regulatory approach. This essay also considers how recent research indicates that alcohol’s danger to public health and safety is underappreciated. Ultimately, I argue that we stand to benefit by adopting a “balanced” understanding of temperance, which gives the federal government a greater role in alcohol regulation. By leveraging the resources and jurisdiction of the federal administration, future health crises can be anticipated and overcome before they materialize.

II. Intemperate Times: The Dramatic Rise and Fall of Temperance as a Socio-political Movement

To identify the relevance of temperance in contemporary times, it is instructive to first trace the term to its origin. For a movement that resulted in two constitutional amendments and countless legal reforms,³ temperance certainly has humble beginnings. Since the early colonial period, alcohol consumption was a common feature of American life. Beer and cider were

³ See *infra*, notes 19-29 and accompanying text.

popular local beverages drunk in households by women and men alike.⁴ Besides these lighter alcohols, the colonists also developed a thirst for stronger spirits. During the colonial period, rum enjoyed great popularity, owing to trade in molasses with England and Jamaica.⁵ Following the Revolutionary War, American whiskey replaced rum as the leading spirit, with local production boosting its supply.⁶ Ordinances easing alcohol sales further facilitated access to intoxicating beverages. With the greater availability of stronger and cheaper alcohol, public scrutiny of alcohol and its adverse effects steadily mounted. In 1784, Dr. Benjamin Rush published *An Inquiry Into the Effects of Ardent Spirits Upon the Human Body and Mind*, studying the adverse effects of alcohol.⁷ Rush's influential work was a full-throated indictment of alcohol's dangers to humans' physical and mental wellbeing.⁸

The founding father's *Inquiry* is also widely credited for the impetus behind the first temperance organization. Five years after its publication, several hundred farmers in Connecticut joined together in opposition of the perceived evils of whiskey.⁹ Proponents of the temperance philosophy targeted alcohol for its social and economic costs: Organizations such as the American Temperance Society and the Woman's Christian Temperance Union campaigned against alcohol, casting it with blame for domestic violence, various health problems, unproductivity, poverty, and violent crime.¹⁰ As saloon culture spread across the U.S., these watering holes were also decried by social reformers as places of vice and sin. In this manner,

⁴ See Tom Jewett, *Spirits of Our Forefathers - Alcohol in the American Colonies*, ARCHIVING EARLY AMERICA (2011), <https://www.varsitytutors.com/earlyamerica/early-america-review/volume-6/alcohol-in-the-american-colonies>.

⁵ Thomas R. Pegram, *Battling Demon Rum: The Struggle for a Dry America, 1800-1933*, 5, Chicago (1998).

⁶ Christina Regelski, U.S. HISTORY SCENE (2015), <http://ushistoryscene.com/article/american-drinking/>.

⁷ Benjamin Rush, *Inquiry into the Effects of Ardent Spirits upon the Human Body and Mind*. Philadelphia: Bartam (1805).

⁸ See *Id.*

⁹ See Jack S. Blocker, *American Temperance Movements: Cycles of Reform*. Boston: Twayne Publishers (1989).

¹⁰ Joe L. Coker, *Liquor in the Land of the Lost Cause: Southern White Evangelicals and the Prohibition Movement*. Lexington, KY: University of Kentucky Press (2007).

the ethos of temperance grew, from its humble beginnings in a Connecticut gathering of farmers, to inspire a diversity of socio-political organizations across the country.

While the basic philosophy of temperance spread quickly through the emerging States, it would take far longer for temperance advocates to coalesce around a coherent, organized political movement.¹¹ Public attention was understandably diverted during the 1860s, as the Civil War ravaged the nation.¹² But during the Reconstruction Era, temperance proponents regained momentum. The movement appealed to a broader cross-section of society than before.¹³ New organizations were founded in the name of temperance, though they differed considerably in how they sought to achieve moderation in alcohol consumption. These organizations ran the gamut from local community gatherings, to academic institutions and construction initiatives. If these organizations were diverse, then so was their track record. The American Temperance University, for example, shuttered its doors only a couple decades after opening.¹⁴ The Woman's Christian Temperance Union, by contrast, erected fountains in several cities that are in continued usage to this day.¹⁵ The temperance movement in the late 19th Century thus gained momentum, but its organization was still scattered and inconsistently successful.

From the turn of the Century into the 1920s, temperance finally came into its own as a political force to be reckoned with. Much has been written on the extraordinary success of the temperance movement during these years. For purposes of this paper, it suffices to emphasize two qualities of the movement. First, it benefited from the support of a broad coalition of

¹¹ See generally Blocker, *supra* note 9.

¹² See David J. Hanson, *Growth of Temperance in America (U.S.)*, (2015), ALCOHOL PROBLEMS AND SOLUTIONS (<https://www.alcoholproblemsandsolutions.org/growth-of-temperance-in-america-u-s-timeline/>)

¹³ See, e.g., Joe L. Coker, *Liquor in the Land of the Lost Cause: Southern White Evangelicals and the Prohibition Movement*. Lexington, KY: University of Kentucky Press (2007).

¹⁴ Paul Batesel, *American Temperance University*, LOST COLLEGES (2012), <http://www.lostcolleges.com/american-temperance-university>.

¹⁵ See Sarah F. Ward, *WCTU Fountains*, WOMAN'S CHRISTIAN TEMPERANCE UNION, <https://www.wctu.org/wctu-fountains.html>.

stakeholders. Bruce Yandle famously dubbed this the “bootlegger and Baptist” phenomenon, emphasizing the alignment of seemingly opposed interests in support of temperance.¹⁶ Besides Baptists and bootleggers, the movement also attracted physicians, women’s rights advocates, and right-wing radicals.¹⁷

The second noteworthy attribute of the temperance movement in the early 1900s is how Wayne Wheeler shrewdly leveraged a diverse group of stakeholders for maximum political effect. In 1893, the Anti-Saloon League (ASL) was founded by Howard Hyde Russell.¹⁸ The ASL became the focal point of temperance, and finally provided the movement with an effective institutional structure. At its helm, Wayne Wheeler stirred together seemingly incompatible interests, like so many ingredients in a recipe. The result was a politically irresistible cocktail with a single, overpowering flavor: prohibition. There is a double irony here. Not only did Wheeler harness such a colorful coalition into one political alliance, but he also reduced their policy agenda to a single, simple goal: the complete prohibition of alcohol in the United States.

With its new organizational structure, broad coalition and tightly focused policy agenda, the temperance movement finally achieved its goal in 1919. The Eighteenth amendment outlawed the “manufacture, sale, or transportation of intoxicating liquors” throughout the U.S.,¹⁹ and the Volstead Act introduced legislative measures for implementation. The consensus view is that prohibition, at least initially, succeeded in significantly reducing alcohol consumption.²⁰ Nonetheless, prohibition ultimately went down in the annals of history as America’s failed

¹⁶ Bruce Yandle, *Bootleggers and Baptists: the education of a regulatory economist*, American Enterprise Institute 7 (3): 12–16 (1983).

¹⁷ *See Id.*

¹⁸ K. Austin Kerr, *Organized for Prohibition: A New History of the Anti-Saloon League*, 14–26, (1985).

¹⁹ U.S. CONST. amend. XVIII.

²⁰ Mark H. Moore, *Actually, Prohibition was a Success*, N.Y. TIMES (Oct. 16, 1989), <http://www.nytimes.com/1989/10/16/opinion/actually-prohibition-was-a-success.html>.

“noble experiment.”²¹ A full discussion of the merits and demerits of prohibition is beyond the scope of this paper, but several observations are important for our analysis of temperance and its relevance today.

The temperance movement led by Wheeler succeeded in its campaign for nationwide prohibition, but its success was ultimately short-lived. From the outset, several factors made the implementation of prohibition challenging. Enforcement of the new alcohol policy was hopelessly understaffed.²² It spawned vast criminal networks that operated in open defiance of the law.²³ Corruption of public officials, particularly in law enforcement, dramatically increased.²⁴ The enactment of prohibition also suffered from loopholes allowing alcoholic beverages with “medicinal benefits” prescribed by physicians.²⁵ Finally, although prohibition seemed an egalitarian ban on alcoholic beverages, it really created a system that discriminated against certain alcoholic beverages at the expense of others.²⁶

Consider how the flawed implementation of prohibition also obscured the meaning of temperance. To that end, it bears repeating what we have observed so far. In the 1800s, groups inspired by Dr. Rush’s *Inquiry* set out to champion temperance. For these early proponents, temperance meant moderation in alcohol consumption. Over the course of the century, myriad

²¹ See Mark Thornton, *Alcohol Prohibition Was a Failure*, CATO Institute Policy Analysis No. 157, (July 17, 1991), <https://www.cato.org/publications/policy-analysis/alcohol-prohibition-was-failure>

²² See *id.*

²³ See, e.g. Dominic Sandbrook, *How Prohibition backfired and gave America an era of gangsters and speakeasies*, *The Guardian* (Aug. 26, 2012), <https://www.theguardian.com/film/2012/aug/26/lawless-prohibition-gangsters-speakeasies>.

²⁴ David J. Hanson, *Corruption During Prohibition of Alcohol in the U.S. in the U.S. was Rampant*, ALCOHOL PROBLEMS AND SOLUTIONS (2016), <https://www.alcoholproblemsandsolutions.org/corruption-during-prohibition-of-alcohol/>.

²⁵ See Megan Gambino, *Take Two Shots of Whiskey and Call Me in the Morning*, *Smithsonian* (Oct. 7, 2013), <https://www.smithsonianmag.com/history/during-prohibition-your-doctor-could-write-you-prescription-booze-180947940/>.

²⁶ For example, the Volstead Act did not cover drinks below 0.5 % alcohol by volume, and allowed “non-intoxicating cider and fruit juices” for domestic consumption. See David E. Kyvig, *Daily Life in the United States, 1920-1939: Decades of Promise and Pain*, Westport, CT: Greenwood Press, 14-21 (2002).

organizations formed that were only loosely connected by the common titular goal of temperance. They took varying approaches to reform, however, ranging from political activism, to establishing academic institutions and erecting drinking fountains. In the early 20th century, Wheeler managed to rally a diverse and colorful constituency behind the ASL. The genius of the ASL's appeal lay in its simplicity, as it equated temperance with just one policy goal: prohibition. The relevance of temperance to U.S. alcohol regulation was at its zenith while it had this nationally uniform meaning. However, the meaning of temperance was blurred by significant flaws in the implementation of prohibition. Thus, alcohol was nominally prohibited, but the enforcement efforts suggested otherwise. Alcohol was still available in ubiquitous speakeasies, and "nonintoxicating cider and fruit juices" poured through the Volstead Act's gaping loopholes.²⁷ Put differently, the implementation of prohibition sent mixed messages to the public and raised questions about what temperance really meant.

The prohibition era policies, then, suffered a resounding defeat, which coincided with the obfuscation of temperance's meaning. Nonetheless, many of the harms that motivated temperance to begin with persisted.²⁸ That is, some level of alcohol regulation was undoubtedly necessary. With prohibition formally repealed, it fell to the states to respond swiftly and set up regulations that filled the void left by prohibition's repeal. As new, decentralized alcohol regulations sprung up in place of national prohibition, one question loomed large: what, if any, relevance did temperance still have in a post-prohibition world?

²⁷ *Id.*

²⁸ See *infra*, notes 44-49 and accompanying text.

III. *Temperance Light: a Diluted Version After Prohibition's Repeal*

With the passage of the 21st Amendment, temperance lost its status as a nationally uniform goal of regulation.²⁹ In place of one definition of temperance at the federal level, multiple decentralized definitions emerged across the nation. This begs the question whether a common definition of temperance at the national level had any relevance to post-prohibition alcohol regulation. Let us attempt, then, to identify the meaning and relevance of temperance to the regulatory frameworks replacing the 18th Amendment and Volstead Act.

The Federal Alcohol Administration Act of 1935 codified a three-tiered approach to alcohol regulation that largely persists to today.³⁰ This framework segregated the market into suppliers (or producers), distributors, and retailers. The immediate concern of congress was to preserve competition in the newly legal liquor market, and to prevent the consolidation of political power in a unified alcohol industry. If the nation was hungover from prohibition, the three-tiered regulation was its aspirin. For their part, the states all followed suit, implementing three-tiered regulation models of their own. Despite the widespread adoption of three-tiered systems, there is considerable diversity across the states. For one, states vary to the degree that they allow for further decentralized alcohol policies at the local level. To that end, there are so-called “dry” counties in the US that entirely prohibit alcohol; others – the “wet” counties – allow alcohol on certain conditions. A further distinction is between “control” and “open” states.³¹ The difference here is that some states issue licenses to private businesses to distribute liquor (open

²⁹ U.S. CONST. amend. XXI.

³⁰ See Daniel Duff, *OLR Research Report 96-R-01274*, Connecticut General Assembly Office of Legislative Research (Oct. 15, 1996), <http://worldcat.org/arcviewer/8/CZL/2014/08/08/H1407508267658/viewer/file2.htm>.

³¹ Nora Maynard, *Buying Liquor: State vs. Private Stores Straight Up Cocktails and Spirits*, KITCHN (Mar. 11, 2011), <https://www.thekitchn.com/buying-liquor-state-vs-private-141292>.

models), while others maintain a state monopoly on the wholesale of alcohol (control models). To make matters even more complicated, some states adopted special carveouts from the three-tier regulation model for certain transactions and beverages. For example, some states allow direct shipment of wine and beer to customers, while others prohibit it.³²

So the repeal of prohibition resulted in the proliferation of decentralized and diverse alcohol regulation frameworks. And this basic model is still in force to date. At first blush, it is hard to see what relevance, if any, a nationally uniform definition of temperance still has to U.S. alcohol regulation. After all, we saw that to some communities temperance means no liquor whatsoever (dry counties), whereas to others it means consumers may place shipment orders directly from their favorite winery. On this view, the notion of a unitary definition of temperance was no longer relevant to the patchwork regulations replacing prohibition.

Prohibition's repeal, then, led to a splintered alcohol regulation across the country, and raised serious doubts whether a national understanding of temperance – and policies based on it – were even possible. At the same time, there was uncertainty over the scope and limits of state power in fashioning state-level regulation. The 21st amendment did grant the states a broad mandate to regulate alcohol, but the contours of this mandate were yet to be tested. Against this backdrop, the Supreme Court heard a case challenging state exercise of regulatory power. Let us next consider the decision, and how it shaped the meaning and relevance of temperance.

³² Heather Morton, Direct Shipment of Alcohol State Statutes, National Conference of State Legislatures (Jan. 1, 2016), <http://www.ncsl.org/research/financial-services-and-commerce/direct-shipment-of-alcohol-state-statutes.aspx>.

IV. *Rhode Island v. Liquormart: the Supreme Court Endorses Federalism*

In *44 Liquormart v. Rhode Island*, a dispute pitting liquor retailers against state regulators, the U.S. Supreme Court heard a challenge to Rhode Island's prohibition of alcohol advertising.³³ Before assessing the import of the decision, a brief discussion of the dispute and procedural history is necessary. In 1956, the Rhode Island legislature passed two statutory prohibitions against advertising alcoholic beverage prices.³⁴ The statutes are thus an example of states developing their own regulatory frameworks after prohibition's repeal. In 1991, plaintiff retailers of alcoholic beverages *44 Liquormart, Inc.* and *Peoples Super Liquor Stores, Inc.* placed an advertisement in a local Rhode Island newspaper. They advertised the low prices of vodka and rum, depicting a large "WOW" beside two bottles and their respective prices. Following an investigation by the Rhode Island Liquor Control Administrator, both companies were fined \$400. Plaintiffs paid their fines, but promptly filed suit in the Rhode Island federal district court challenging the validity of the state's statute.

The gravamen of the plaintiffs' claims was that the challenged laws violated their First Amendment rights to free speech. The legal standard applicable to prohibitions of commercial speech like the advertisements at issue here is essentially a balancing test. Simply put, the reviewing court asks whether the prohibition on speech advances a legitimate state interest. The court then probes whether the speech prohibition is appropriately tailored to the state's interest. If the prohibition of speech is sufficiently narrow – i.e. if it balances with the countervailing First Amendment protection – then the law passes constitutional muster.³⁵

³³ *44 Liquormart v. Rhode Island*, 517 U.S. 484, 489 (1996).

³⁴ *Id.*

³⁵ *44 Liquor Mart v. Racine*, 829 F. Sup. 543, 554 (D.R.I. 1993) (discussing, in particular, the Central Hudson Test).

Therefore, if Rhode Island's regulation of alcohol advertisements was to pass constitutional muster, it needed to advance some legitimate state interest. In his findings of fact, the district Judge noted that the parties "agree that the State has a substantial interest in promoting *temperance* (emphasis added)."³⁶ Though the district court found the state's interest legitimate, it concluded that the prohibition on truthful advertising of prices was not sufficiently narrow to advance that interest. Interestingly, the Judge observed that the state had not offered evidence suggesting an optimal level of consumption, or why the ad would be effective.³⁷ On appeal, the First Circuit reversed the lower court, holding the advertising bans merited a presumption of validity rooted in the 21st Amendment.³⁸

In a decision by Justice Stevens, the Supreme Court reinstated the district court's finding that the laws violated the First Amendment. The decision is of significant legal importance to commercial free speech jurisprudence. More interesting for our purposes, however, is the Court's position on state alcohol regulation. Like the lower courts, the Supreme Court agreed that temperance is a legitimate state interest. However, unlike the district and appeals court, the Supreme Court meaningfully paused in its discussion of temperance as state interest. Consider the following passage from the decision:

The State argues that the price advertising prohibition should nevertheless be upheld because it directly advances the State's substantial interest in promoting temperance, and because it is no more extensive than necessary. Cf. *id.*, at 566. Although there is some confusion as to what Rhode Island means by temperance, we assume that the State asserts an interest in reducing alcohol consumption.³⁹

³⁶ *Id.* at 554.

³⁷ *44 Liquormart v. Rhode Island* at 507 ("In addition, as the District Court noted, the State has not identified what price level would lead to a significant reduction in alcohol consumption, nor has it identified the amount that it believes prices would decrease without the ban.").

³⁸ *Id.* at 494.

³⁹ *Id.* at 504.

Note how the Supreme Court registers its “confusion” over what temperance means, even as it accepts temperance as the basis for state legislation. On its face, this is striking: the Supreme Court announces an acceptable goal of regulation, while conceding the uncertainty of what that goal really is, and without providing any interpretive guidance. Striking though it may be, it is not especially unusual for the Supreme Court to leave unclear what it is saying. For one, it may not want to commit itself to a certain definition that will subsequently bind it.⁴⁰ For another, the more specific and articulate the wording of an opinion, the harder it is to secure the votes for a majority.⁴¹ And the *44 Liquormart* decision was already splintered with six separate concurrences.⁴²

One way to theorize the outcome, then, is by reference to the practical realities of Supreme Court decisionmaking. However, the more compelling interpretation of the decision is that the Court is tacitly endorsing federalism and deferring to the states here. The opinion makes clear that a major problem with the state regulatory approach was a lack of empirical data supporting its regulatory measure. For example, if a state chooses to regulate alcohol in a way that treads on constitutionally protected turf (as in the *44 Liquormart* case), it better have the empirical backing to support its measure. On this view, the decision provides that temperance is generally a permissible state goal, but the specific meaning given to temperance by state regulations needs to be grounded in scientifically robust conclusions. But as long as this requirement is met, and other legal norms are observed, states have the green light to implement their regulations of choice.

⁴⁰ See Kent C. Olson, *Legal Information: How to Find it, How to Use it*, 295-6, Greenwood (1998).

⁴¹ See Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. TIMES (Nov. 17, 2010), <http://www.nytimes.com/2010/11/18/us/18rulings.html>.

⁴² See *44 Liquormart v. Rhode Island*.

So the *44 Liquormart* opinion can be theorized as an endorsement of federalism in alcohol regulation. It is up to the states, then, to decide what temperance means (i.e. what level of consumption is ideal), and empirically support those decisions. The Supreme Court thereby reinforces the status quo we already observed: a patchwork of state and local regulations, with no uniform meaning of temperance at a federal level. At the same time, the decision does not foreclose a more developed national framework. To be sure, federal laws and rules are already an important source of alcohol regulation, but they are generally only a supplement to states-level alcohol policies.

This begs the question, is the status quo – with multiple, differential meanings of temperance at decentralized levels of government – ideal? The alternative, of course, is greater regulation at the federal level rooted in a nationally uniform interpretation of temperance. In the following Part, I advocate for a middle path between the two extremes, based on a more balanced understanding of temperance. Before suggesting a revised regulatory approach, it is necessary to briefly evaluate the current regulatory framework. In my view, the best way to evaluate the status quo of alcohol regulation is against the public health and safety risks of our times. Let us consider, then, how well alcohol regulations address today’s public health hazards.

V. *Public health and safety: a regulatory perspective*

a. *Traditional Hazards in Contemporary Times*

By and large, the states are well equipped to fashion regulations that alleviate the public health and safety risks of alcohol consumption. Many alcohol regulations in place today are

effective to manage age-old problems of alcohol consumption. As the saying goes, plus ça change, plus c'est la même chose. Recall from Part II above the discussion of the social and economic ills that prompted the temperance movement to begin with.⁴³ Many of the same concerns that motivated social reformers in the 1800s are still relevant today. Pursuant to statistics compiled by the Center for Disease Control (CDC), 88,000 people die annually resulting from excessive alcohol consumption.⁴⁴ Alcohol abuse also increases the incidence of domestic violence,⁴⁵ sexually transmitted diseases,⁴⁶ and unwanted pregnancies.⁴⁷ Alcohol consumption has also been linked to a lengthy list of health issues, from cancer to liver disease.⁴⁸ Besides the cost to human life and wellbeing, it also takes a toll on the economy through lost productivity.⁴⁹

Many of these social ills are identical to or at least reminiscent of Benjamin Rush's complaints from the early days of temperance.⁵⁰ But in addition to this parade of horrors, there are new public health risks from alcohol consumption. For example, driving under the influence has proven a major source of alcohol-related injuries and deaths.⁵¹ It is also a source of consternation for policymakers who have puzzled over how to adapt existing regulatory

⁴³ See *infra* notes 7-14.

⁴⁴ See *Excessive Drinking is Draining the Economy*, CENTERS FOR DISEASE CONTROL AND PREVENTION [hereinafter CDC] (Jan. 12, 2016), <https://www.cdc.gov/features/costsofdrinking/index.html>.

⁴⁵ *Alcohol, Drugs and Crime*, NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE (June 27, 2015), <https://www.ncadd.org/about-addiction/alcohol-drugs-and-crime>.

⁴⁶ Heidi E. Hutton et. al, *The Relationship between Recent Alcohol Use and Sexual Behaviors*, National Center for Biotechnology Information [hereinafter NCBI] (2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2588489/>.

⁴⁷ S.C.M. Roberts et. al, *Alcohol Use Before and During Unwanted Pregnancy*, NCIB (Nov. 1, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4245368/>.

⁴⁸ See, e.g. G. Pöschl & H.K. Seitz, *Alcohol and cancer*, *Alcohol and Alcoholism* 39 (3): 155–65; (May 2004) see also O. Niemelä, *Biomarkers in alcoholism*, *Clinica chimica acta; International Journal of Clinical Chemistry*, 377 (1-2): 39–49 (Feb. 2007).

⁴⁹ See Christopher Ingraham, *The Hidden Cost of Your Drinking Habit*, WASH. POST (Oct. 16, 2015) https://www.washingtonpost.com/news/wonk/wp/2015/10/16/the-hidden-cost-of-your-drinking-habit/?utm_term=.bc140dbb23e1.

⁵⁰ See *supra*, notes 7-10 and accompanying text.

⁵¹ *Impaired Driving: Get the Facts*, CDC (June 16, 2017), https://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html.

frameworks to accommodate these new health threats. However, even the new challenges to alcohol regulation posed by technological innovations such as widespread traffic in motorized vehicles have proven manageable for state-level regulators.⁵² Many of the public health risks posed by excessive alcohol consumption are therefore familiar, changing only incrementally in pace with technological innovations.

I submit that, by and large, states have developed effective regulatory responses to these public health risks. For example, so-called “sobriety checkpoints” on state highways are effective deterrents to drunk driving.⁵³ Taxation also has a demonstrably positive effect in reducing excessive drinking.⁵⁴ Finally, the liquor licensing systems discussed previously have been effective in limiting alcohol outlet density.⁵⁵ Besides reducing the harms of excessive alcohol consumption, the state regulations have an added benefit. In particular, state-level governance enables experimentation with different policies directed at the same problem. This is what Justice Brandeis once called “laboratories of democracy.”⁵⁶ Other states and localities (as well as the federal government) can thus pick and choose the most attractive features of regulation from a diversity of options.

To the extent the states are an effective source of alcohol regulation, this is also a success for the Supreme Court’s definition of temperance. Recall that the Court noted the term’s ambiguity, and then refrained from providing a meaning in a tacit endorsement of federalism.

⁵² New Jersey was the first state to enact a statute criminalizing driving while intoxicated in 1906. *See* An Act Defining Motor Vehicles and Providing for the Registration of Same, 1906 N.J. Laws ch. 113, §§ 19, 35, p. 177, 186 (April 12, 1906). Since then, all states have adopted similar statutes and updated them over time to counteract the problem of drunk driving.

⁵³ J.C. Fell et. al, *Sobriety Checkpoints: Evidence of Effectiveness is Strong, but Use is Limited*, NCBI (Sept. 2004), <https://www.ncbi.nlm.nih.gov/pubmed/15276922>.

⁵⁴ Randy W. Elder et. al, *The Effectiveness of Tax Policy Interventions for Reducing Excessive Alcohol Consumption and Related Harms*, NCBI (Feb. 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3735171/>.

⁵⁵ Carla A. Campbell et. al, *The Effectiveness of Limiting Alcohol Outlet Density As a Means of Reducing Excessive Alcohol Consumption and Alcohol-Related Harms*, AM. J. PREV. MED. 2009;26(6), 556-560.

⁵⁶ *Ice Co. v. Liebmann*, 285 U.S. 262, 387 (1932).

Therefore, temperance, as defined in *44 Liquormart v. Rhode Island*, is unquestionably relevant to contemporary alcohol regulation in the US. That is not to say, however, that a decentralized approach to alcohol regulation is always preferable. As we already saw, the federal government still has a meaningful – albeit diminished – role in our post-prohibition times. Take, for instance, the National Minimum Drinking Age Act of 1984, which famously imposed the 21 year minimum age for alcoholic beverage purchases nationwide.⁵⁷ And federal agencies like the TTB and FDA perform important functions like regulating purity and advertising of alcohol. Other federal initiatives, however, have failed to gain popular support, or were subsequently repealed (like prohibition). The question for policymakers, then, is when and how the federal government should intervene in our current patchwork of state and local alcohol regulations.

b. A tale of two intoxicants: alcohol and the opioid crisis

As of this writing, alcohol consumption is no longer the hot topic for state regulators. The last crisis involving excessive alcohol consumption dates to 2010, when federal regulators banned Four Loko. The popular-but-dangerous beverage combined caffeine with malt liquor, and was credited for sending college students to emergency rooms across the nation.⁵⁸ Today's public health crisis comes not from a can, but a prescription bottle. Earlier this year, President Trump directed acting Health Secretary Eric Hargan to declare the opioid epidemic a national public health emergency.⁵⁹ Coming from a family of lawyers, and a law student myself, this

⁵⁷ See Dave Bond, *Law Signed to Lift Drinking Age*, reprinted in *Spokesman-Review*. Spokane, Washington, New York Times (July 18, 1984), p. 1.

⁵⁸ See Hit and Run Blog, *Why the Feds Banned Four Loko*, REASON (Dec. 22, 2010), <http://reason.com/blog/2010/12/22/why-the-feds-banned-four-loko>.

⁵⁹ Sui-Lee Wee & Javier C. Hernandez, *Despite Trump's Pleas, China's Online Opioid Bazaar is Booming*, N.Y. TIMES (Nov. 8, 2017), https://www.nytimes.com/2017/11/08/world/asia/china-opioid-trump.html?_r=0.

topic hits especially close to home.⁶⁰ Last year alone, 64,000 Americans died from drug overdoses – a dramatic 22% increase from the preceding year. That figure includes deaths from both illicit street drugs like cocaine and heroin, and prescription medicine like Oxycodone and Fentanyl.⁶¹ As opioid addiction rears its ugly head, it imposes myriad costs on American society and begs a regulatory response.

So opioid abuse is the public health crisis of today, but what does it have to do with alcohol regulation? On one level, there is an obvious connection between opioid and alcohol abuse. This is illustrated by the depressant effect mixing alcohol with opioid-based medications has on breathing.⁶² But there is another, subtler nexus between the two. Recent findings by researchers demonstrate that individuals with a history of alcohol abuse are at greater risk to abuse prescription medicines: “Men and women with alcohol use disorders (AUDs) are 18 times more likely to report nonmedical use of prescription drugs than people who don't drink at all, according to researchers at the University of Michigan. Dr. Sean Esteban McCabe and colleagues documented this link in two NIDA-funded studies.”⁶³ Even more alarming, co-administration of alcohol and opioids exacerbate the adverse effects of both, and increases the likelihood of dependence.⁶⁴ Put differently, alcohol abuse increases the likelihood of opioid

⁶⁰ See Eilene Zimmerman, *The Lawyer, the Addict*, N.Y. TIMES (July 15, 2017), <https://www.nytimes.com/2017/07/15/business/lawyers-addiction-mental-health.html> (describing the elevated incidence of substance abuse among lawyers).

⁶¹ Josh Katz, *The First Count of Fentanyl Deaths in 2016*, N.Y. TIMES (Sept. 2, 2017), <https://www.nytimes.com/interactive/2017/09/02/upshot/fentanyl-drug-overdose-deaths.html>.

⁶² *Dangers of Mixing Alcohol and Opiates*, AMERICAN ADDICTION CENTERS (last visited Nov. 26, 2017), <https://americanaddictioncenters.org/alcoholism-treatment/mixing-opiates/>.

⁶³ Elizabeth Ashton, *Alcohol Abuse Makes Prescription Drug Abuse More Likely*, NATIONAL INSTITUTE ON DRUG ABUSE (Mar. 1, 2008), <https://www.drugabuse.gov/news-events/nida-notes/2008/03/alcohol-abuse-makes-prescription-drug-abuse-more-likely>.

⁶⁴ Jeffrey A. Gudin et. al, *Risks, Management, and Monitoring of Combination Opioid, Benzodiazepines, and/or Alcohol Use*, NCBI (Jul. 1, 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4057040/>.

abuse – and once that occurs, the dangers of and dependence on both substances are compounded.

Public resources are already spread thin in response to this crisis. As the New York Times reports, “The explosion in fentanyl deaths and the persistence of widespread opioid addiction have swamped local and state resources. Communities say their budgets are being strained by the additional needs — for increased police and medical care, for widespread naloxone distribution and for a stronger foster care system that can handle the swelling number of neglected or orphaned children.”⁶⁵ So the opioid crisis has left state and local governments scrambling. Unanticipated crises like the opioid epidemic raise important questions for policymakers. Chief among those: what are the lessons to help prevent and respond to similar crises down the line? In my view, the new findings on the role alcohol plays in opioid abuse is a good place to start. And given the flexible definition of temperance the Supreme Court provided, policymakers have the opportunity to adapt and revise their regulatory approach.

VI. *“Balanced” Temperance: Towards more nimble and effective regulation*

New public health crises like the opioid epidemic challenge us to reevaluate alcohol regulation. After all, the latest research – discussed above – suggests alcohol plays a significant role in the drama of opioid abuse. The question, then, is how to revise alcohol regulations to better account for the full scope of health risks posed by alcohol consumption. Before considering desirable revisions, let us briefly recall the regulatory status quo: the framework currently in place consists primarily of state-level and local regulations. These are supplemented

⁶⁵ See Katz, *supra* note 61.

by certain federal laws and regulations – like FDA requirements or the national minimum drinking age – which are generally less restrictive and far-reaching than local regulations. This allocation of responsibility between federation and states is by design: the Supreme Court’s deliberately vague definition of temperance endorsed a states-centric model of regulation. However, we also saw that *44 Liquormart* did not foreclose a more pronounced national regulation of alcohol; it merely established that states are free to decide for themselves what temperance means. In my view, the Supreme Court precedent, combined with the lessons from the opioid epidemic, suggest revising the regulatory framework as follows: states are generally well positioned to regulate alcohol themselves, but when unanticipated crises strain their capabilities, the federal government should pick up the slack.

This regulatory framework would only require a small conceptual change to how we currently define temperance. Specifically, I propose recasting temperance as a regulatory goal that is more balanced between federal and state regulations. This revised version can be thought of as “balanced” temperance. The conception of temperance I propose is both local and national – decentralized and centralized. Balanced temperance would then form the basis of a revised alcohol regulation framework. Consider how this framework might operate in practice. States would still carry the lion’s share of responsibility for regulating alcohol. But the federal government would take a more involved and proactive approach. Certain federal initiatives to combat the opioid epidemic have already borne fruit. President Trump applied diplomatic pressure to China to stem the tide of fentanyl pouring into the country.⁶⁶ And HHS has designated the crisis a national emergency, although without earmarking additional federal

⁶⁶Wee & Hernandez, *supra* note 59 (describing how online vendors of fentanyl products recently removed these from their inventory.).

funds.⁶⁷ In my view, these are commendable steps in the right direction, but they do not go far enough.

Additional measures must be taken, specifically in federal alcohol regulation, to promote public health and safety. A regulatory approach centered on balanced temperance starts with more funding and research. For instance, there is an urgent need for more research into alcohol's manifold effects on the human body and psyche.⁶⁸ One can only wonder whether the crisis would be less severe if we had known sooner how patients with histories of alcoholism were at greater risk of opioid abuse. After all, doctors now recommend careful monitoring protocols for patients with alcohol abuse histories when prescribing opioid medications.⁶⁹

The federal government is also well positioned to curtail efforts by the alcohol industry to undermine regulation. There is troublesome evidence of the alcohol industry attempting to influence policymaking on a global scale.⁷⁰ Liquor lobbies thus advocate against higher taxes on alcoholic beverages.⁷¹ But they also shape the public perception of alcohol and its health risks in subtler ways. Indeed, one study finds that “(t)he alcohol industry makes claims to governments that contradict and obfuscate science in an attempt to influence marketing regulations and prevent more stringent controls on products.”⁷² Therefore, the first priority for federal policymakers should be to incentivize more – and more objective – research. This will serve to

⁶⁷ Chris McGreal, *Trump Declares Health Emergency Over Opioids but No New Funds to Help*, THE GUARDIAN (Oct. 26, 2017), <https://www.theguardian.com/us-news/2017/oct/26/trump-opioids-crisis-health-emergency-funds>.

⁶⁸ See Joshu Gowin, *Your Brain on Alcohol*, PSYCHOLOGY TODAY (June 18 2010), <https://www.psychologytoday.com/blog/you-illuminated/201006/your-brain-alcohol>.

⁶⁹ See Gudin et. al, *supra* note 64.

⁷⁰ Emily Savell et. al, *How does the Alcohol Industry Attempt to Influence Marketing Regulations? A systematic Review*, NCBI (Aug. 27, 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4681589/>.

⁷¹ Elaine S. Povich, *Liquor Lobby Fights Off Tax Increases On Alcohol*, THE PEW CHARITABLE TRUSTS (Oct. 3, 2013), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/10/03/liquor-lobby-fights-off-tax-increases-on-alcohol>.

⁷² See Melissa Davey, *Alcohol Industry Subverting Science to Prevent Greater Regulation, Study Finds*, THE GUARDIAN (Jan. 31, 2017), <https://www.theguardian.com/australia-news/2017/feb/01/alcohol-industry-subverting-science-to-prevent-greater-regulation-study-finds>.

educate the public, medical professionals and social reformers on the full scope of risks posed by alcohol. It might also form the basis for federal remedies and sanctions in cases of misconduct. Consider the decision in *United States v. Philip Morris*, finding the big tobacco companies to have defrauded and misled the public, and ordering them to disseminate corrective information.⁷³ It is conceivable that the alcoholic beverage suppliers will eventually have their own day in court, and be ordered to convey the full risks of their products.

VII. Conclusion

The precise contours of a regulatory framework built around balanced temperance have to be developed over time. There are already several federal agencies that, at least in theory, can positively influence alcohol regulatory policy. The FDA, HHS, and TTB, all have jurisdiction to pitch in. And they certainly play an important role in protecting the public from the risks of alcohol consumption. But federal agencies also have their limits. They are vulnerable to capture by industry interests. And changing administrations make a steady regulatory course difficult to chart. Therefore, I submit that balanced temperance requires a multi-faceted approach to regulation that starts with a stronger emphasis on research. As this essay shows, we are just beginning to appreciate the full scope of health and safety risks posed by alcohol. More research is necessary to educate policymakers on the full risk profile of alcohol. This will also shed light on the extent to which the alcohol industry skews our understanding of alcohol's dangers and resists regulatory efforts.

⁷³ See Sapna Maheshwari, *Why Tobacco Companies are Paying to Tell You Smoking Kills*, N.Y. TIMES (Nov. 24, 2017); *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 722 (D.D.C. 2006).

A clear definition of temperance at the federal level, then, is not just relevant but indeed necessary for effective U.S. alcohol regulation. This essay proposes a more balanced understanding of temperance, where states retain leeway to fashion their own regulatory policies, but the federal government plays a greater role. The options for federal policymaking are significant: legislation can delegate greater authority to the agencies tasked with identifying and preventing alcohol-related harms; more funds can be earmarked for state regulators; the administration can exert diplomatic pressure to encourage the cooperation of trade partners; and many more. Federal policymakers thus have the resources and jurisdiction that states lack to nimbly respond to health epidemics, while leaving the basic structure of state-level regulation intact. The right combination of policy tools must be developed over time, but effective federal policy requires a bedrock of scientifically robust information. In closing, I submit the academic community can lead the charge to energize research into alcohol's full risk profile, educating the public and preempting health crises before they materialize.