

THE SYNTAX OF THE SIN TAX:

WHY REDEFINING TEMPERANCE WILL PROMOTE DEFENSIBLE ALCOHOL LEGISLATION IN TODAY'S MARKETPLACE

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“It is not possible to make a bad law. If it is bad, it is not a law.”

–Carrie Nation¹

I. INTRODUCTION

Temperance is not dead. Recent social commenters have asserted that the Twenty-First Amendment signaled the death of Prohibition – and thus the temperance movement – as “the great failed social experiment.”² Even noted documentarian Ken Burns stated in an interview about Prohibition that “[t]here’s nothing noble about unintended consequence.”³ But this widespread belief in the demise of temperance is misplaced. The Twenty-First Amendment contains a regulatory provision that allows states to restrict the flow of alcohol within its borders,⁴ and the Supreme Court has held that temperance is a permissible goal for state alcohol regulation.⁵ Because of this, temperance is still alive in American courts.

But the current state of temperance is unwell. Courts have given no precise definition of temperance, and the most recent Supreme Court case on the Twenty-First Amendment has cut against its authority.⁶ To revive temperance’s standing in both the public eye and in the courts, a reliable legal definition is needed that addresses both modern social concerns about alcohol while comporting to changes in technology and commerce that impact its use and distribution.

To that end, this essay synthesizes the history and goals of the temperance movement, Supreme Court jurisprudence, and dictionary definitions to recommend the modern legal definition of temperance be: policies and laws that promote moderation in the use of intoxicating

drink for the purpose of promoting health and safety. Temperance must be the sole goal of any law claiming it, and it must have observable results towards meeting that goal.

Section II of this essay will discuss the history of the temperance movement, the Twenty-First Amendment, and the legal evolution of temperance as a valid state goal. Section III will discuss the proposed definition of temperance, how it would apply to today's alcohol marketplace, and why it is superior to the current definition of temperance. Finally, this essay will consider how this definition would be defended if legally challenged.

II. BACKGROUND

A. *A Brief History of the Temperance Movement*

The temperance movement first gained nationwide traction in the United States following the Civil War.⁷ The movement gained steam as a response to the sudden changes in American life way from an agrarian society towards a much more industrialized nation, causing working-class men to seek alcohol as an escape from the harsh realities of early industrial life.⁸ Even Abraham Lincoln reportedly recognized this upcoming social conflict by saying that “after Reconstruction, the country's next question would be the suppression of legalized liquor.”⁹

During this period, alcohol was perceived as a threat to society largely because it separated the man from his family.¹⁰ Women were either discouraged or forbidden from entering drinking establishments, so “[t]he saloon thereby served to effectively divorce husbands from wives.”¹¹ Critics of this behavior further warned that “alcohol could disintegrate social and family loyalties and that this disintegration would be followed by poverty and crime and a frightful depth of conjugal squalor.”¹²

These critic's concerns were well founded. The death rate due to alcohol was between 4.9–5.8 people per 100,000 in the decade leading up to Prohibition,¹³ much higher than the 1.0–2.6 in the years immediately following the passage of the Eighteenth Amendment.¹⁴ And advocates of the time noted higher incidents of domestic violence, too:¹⁵ “They were “fighting against the rape and battering of victims of all ages.”¹⁶ Due to these concerns, temperance societies were formed across the country, largely organized by women and religious leaders.¹⁷

These societies spread quickly, and the temperance movement rapidly gained steam. So much so that between the end of the Civil War and the dawn of the Nineteenth Century, temperance had become a central issue in the American political discourse.¹⁸

B. *The Twenty-First Amendment*

On January 16, 1919, the New York Times reported that “the American nation was voted dry today by Constitutional Amendment when the Legislature of Nebraska, the home of William Jennings Bryan, one of the foremost champions of prohibition, ratified the proposal.”¹⁹ In January 1919, Congress ratified the Eighteen Amendment, and Prohibition was set to begin on January 16, 1920.²⁰

But Prohibition did not have the desired impact of temperance on America. Soon after Prohibition began, so too did criminal activity. Organized crime developed, and the movement of contraband – with all of the criminal behavior that accompanied it – expanded and flourished throughout the country.²¹ The impact of this criminal activity had the opposite effect: the 1920s are commonly known as the “Roaring Twenties,” not the “Temperate Twenties.”²²

Disillusionment towards the unintended consequences of Prohibition grew, and the national conversation about alcohol temperance continued.²³ Finally, the nation decided the

consequences were greater than the benefits, and the Eighteenth Amendment was repealed by the Twenty-First Amendment in 1933.²⁴ But at the time, the Twenty-First Amendment was not seen as the end of the temperance movement, but only as the end of National Prohibition.²⁵

The Twenty-First Amendment's text shows that the national discussion about temperance was very much alive. Section 2 of this Amendment allows states to regulate the shipment of out-of-state alcohol within its borders. Specifically, this section of the Amendment reads: "The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."²⁶ The debate over the interpretation of this section continues today.

C. *Recent History of The Twenty-First Amendment in the Courts*

Judicial interpretation of Section 2 of the Twenty-First Amendment is ongoing. Due to changes in technology, society, and the judicial interpretation of the dormant commerce clause, the forty-eight words of this clause continue to be part of the debate on constitutional interpretation and congressional authority. Three cases are essential for understanding how temperance became a permissible state goal for regulating alcohol, and how that part of Section 2 has evolved: *Idlewild*, *Bacchus*, and *Granholm*.²⁷

Early Supreme Court cases on the Twenty-First Amendment typically gave great deference to a state's ability to disallow out-of-state alcohol.²⁸ However, in 1964, *Hostetter v. Idlewild Bon Voyage Liquor Corp.* began to change how the Court read Section 2 of the Twenty-First Amendment.²⁹ In *Idlewild*, the Court invalidated a New York regulating the sale of alcohol at a duty-free area of the John F. Kennedy Airport.³⁰ For the first time, the Court read limitations to state regulation into Section 2.³¹ Specifically, the Court rejected the notion that the Dormant

Commerce Clause did not apply to Section 2.³² Placing Section 2 under the ambit of the Dormant Commerce Clause was a novel interpretation, and set the table for further interpretation.

Twenty years later, the Court further restricted a state's authority to regulate alcohol in *Bacchus Imports Ltd. v. Dias*.³³ Hawaii had an excise tax law applied only to out-of-state alcohol.³⁴ In response to the law's legal challenge, the state asserted that the law was valid despite its discrimination against out-of-state commerce because Section 2 of the Twenty-First Amendment prioritized state interests when dealing with alcohol.³⁵

The Court disagreed.³⁶ It found the Hawaiian law to be pure economic protectionism, and to allow it to continue would potentially cause market Balkanization.³⁷ Instead, the Court noted that discriminatory laws could only be used to further the core purpose of the Twenty-First Amendment, such as temperance.³⁸

Finally, the most recent Supreme Court case to deal with temperance and the Twenty-First Amendment is *Granholm v. Heald*.³⁹ In *Granholm*, the Court consolidated two cases dealing with direct-shipment wine sale laws in Michigan and New York.⁴⁰ Both states prohibited out-of-state wineries from shipping directly to consumers, unless the out-of-state winery set up a physical location in the state.⁴¹

The Court invalidated both states' direct-shipment laws.⁴² In doing so, stated that all alcohol laws must follow the commerce clause, but a law dealing with alcohol violated the commerce clause could still be saved by the Twenty-First Amendment if the core values of that law aligned with the core values of the Amendment.⁴³ While both states argued their laws were written to protect minors from underage drinking, the Court held that assertion unsupported, as neither state provided objective evidence to substantiate this claim.⁴⁴

The synthesis these cases present two requirements that must be met to promote temperance as a legitimate interest under Section 2 of the Twenty-First Amendment.⁴⁵ First, temperance must be the law's only purpose; and second, the temperance effort must be real and observable.⁴⁶ Additionally, these cases show a plain pattern of the Court moving alcohol sales into the ambit of the commerce clause, and away from the exceptions the Twenty-First Amendment affords.

III. ANALYSIS

Temperance is an outdated word. It has become so deeply associated with alcohol that its use in that context now primarily defines the term.⁴⁷ Temperance as a concept is intertwined with Prohibition, which as noted above, is viewed somewhat less than ideally in public consciousness.⁴⁸ Worse yet, it is notoriously undefined when used by the courts, particularly the Supreme Court.⁴⁹ One scholar found that the best synthesis of the Court's usage of the term was a "means of controlling the 'evils' of alcohol."⁵⁰

But this outdated, poorly-defined concept of temperance need not be the case. Temperance, as a concept, is alive and well in the United States – but it isn't associated with the word.⁵¹ It needs to be redefined to better reflect the modern efforts towards alcohol moderation. Thus, it should be defined as: policies and laws that promote moderation in the use of intoxicating drink for the purpose of promoting health and safety. This definition, an additional framework for legislative preparation, would allow temperance to be applicable in today's marketplace as a useable jurisprudential definition that accurately reflects society's near-unanimous accord for the modern core concepts term.

A. *Temperance, Hidden in America Today*

Temperance still exists. Despite its negative public connotations, most Americans still wholeheartedly support the non-moralistic principles of temperance. The goals of the early American temperance movement were “to promote health, safety, and Protestant morality” in the context of alcohol consumption.⁵² Subtract Protestant morality from those goals, and temperance is everywhere.

1. *Mothers Against Drunk Driving*

Take Mothers Against Drunk Driving (MADD). Founded in 1980, MADD was founded by Candace Lightner after her daughter was struck and killed by a drunk driver.⁵³ Its goal is to reduce the number of deaths and injuries from drunk driving to zero.⁵⁴ Today, MADD is everywhere: there is at least one office in every state, along with international posts.⁵⁵ It also boasts over three million members, and countless more supporters.⁵⁶

And MADD isn't a controversial organization. Apart from some very isolated protest groups⁵⁷ – none of which were well received by the public⁵⁸ – MADD exists as one of the few unchallenged advocacy. No serious group is advocating for drunk driving, or eliminating drunk driving laws.⁵⁹ In fact, MADD is so successful that it has consistently met its goals early, including a goal in 2000 to reduce the number of alcohol-related fatalities by 20%.⁶⁰

This is because the underlying goals of temperance are uncontroversial. One would be hard-pressed to find an honest social activist who thinks drunk driving is a right reserved for all motorists. And of course that's true: as a society, we implicitly understand that one's ability to freely act ends at the point where it impacts another.⁶¹ John Stuart Mill said it best in his famous aphorism: “my right to swing my fist ends where your nose begins.”⁶²

MADD exists to protect the health and safety of all motorists. It exists uncontroversially, and has so much support in America that it regularly achieves its goals. In fact, absent the early American's temperance movement's aim of 'promoting Protestantism',⁶³ MADD is very much a temperance organization. So because America supports MADD, they support the tangible goals of temperance.

2. *Alcoholics Anonymous*

Alcoholics Anonymous (AA) is also a temperance organization. Founded in 1935 by Bob Smith and Bill Wilson, its initial goal was to "fix drunks."⁶⁴ The organization's famous '12-step program' to treat alcoholism has been used successfully in over 160 countries.⁶⁵ AA boasts successful treatment of over two million alcoholics, and has an American membership of 1.6 million.⁶⁶

AA is also largely uncontroversial. While its methods have been called into question, these challenges deal exclusively with the science behind the '12-step' program.⁶⁷ No respected organization has asserted that alcoholism should not be treated, nor has any organization advocated for alcoholism. In fact, even the idea of such an organization advocating such a position outside of satire is absurd.

And of course advocating for alcoholism would be absurd. Combating alcoholism is a universally accepted and acceptable goal, and it's acceptable entirely because America still believes the non-religious goals of the early temperance movement. AA promotes the health of its members in addressing their alcoholism, and because promoting health was one of the core goals of the early temperance movement was addressing the health concerns of alcohol use, AA is a temperance organization.

3. *Non-Moralistic Temperance is Thriving*

If the assertion that AA and MADD are temperance-based organizations seems basic, it should. Put forth in terms divorced from the moralism of the early movement, no reasonable person disagrees with temperance's goals of promoting health and safety towards alcohol consumption. The issue is that there has been little recognized effort to distance temperance from its moralistic early roots – and this is a problem. Temperance is still a goal recognized by the Supreme Court as a valid end in alcohol regulation, but because the term is so charged with the moralistic history of the early temperance movement and Prohibition, courts are hesitant to apply the term.

A modern approach, coupled with a modern definition, address this problem. The modern approach should be to strip temperance from any moralizing – and thus from its moralistic history – and instead be focused on tangible efforts to promote health and safety. “Policies and laws that promote moderation in the use of intoxicating drink for the purpose of promoting the health and safety” is an uncontroversial goal if framed as an umbrella definition for other successful and accepted organizations like MADD and AA, and allow temperance as a term to re-enter the courts as an observable, permissible goal of state alcohol definition.

B. *Redefining Temperance, Losing Abstinence*

The only direct definition of temperance found at the Supreme Court occurred in a footnote, it only recorded another state's definition, and that definition was only a citation to the dictionary definition.⁶⁸ That definition of temperance was: “moderation in or abstinence from the use of intoxicating drink.”⁶⁹ However, the proposed definition has dropped the term ‘abstinence’ from the definition. This was done intentionally.

Abstinence is another word that is loaded with implicit connotations. Merriam Webster's Dictionary, whose Third Edition gave the above Supreme Court's dicta definition of temperance,⁷⁰ currently defines abstinence as "habitual abstaining from intoxicating beverages, [or] abstention from sexual intercourse."⁷¹ In fact, if one Googles "abstinence," the first five pages⁷² are devoted entirely to sexual abstinence. Only on the last link of the sixth page does one find a link to abstinence as a concept outside of sex, which leads to a food addiction page it refers to abstinence as "avoiding foods that contain sugar, flour or wheat."⁷³

This is far from ideal. If the goal is to create a definition of temperance that is divorced from moralism, using a word that singularly defines a moralistic movement is ill-advised. But even outside of that, the concept of advocating for an alcohol-free position has plenty of negative associations in the temperance movement.

"Teetotalers" was a term used by critics of the early temperance movement as shorthand for "Capital-T Temperance," applied to temperance advocates who demanded total abstinence from alcohol.⁷⁴ Since these early teetotaling advocates were viewed as a part of a religious movement,⁷⁵ then advocating total alcohol abstinence may still has a moralistic attachment to it. If redefining temperance as a term with a measurable goal is to have any chance of success, it must shed all of its prior moralism.

Nothing is sacrificed by dropping abstinence from the proposed definition and leaving only moderation. Having moderation encompass the idea of withholding from alcohol is a permissible use of the word: to again use the Merriam-Webster's dictionary, one definition of "moderation" is "observing reasonable limits;" and in the context of "in moderation" as an idiom, "in a way that is reasonable and not excessive."⁷⁶ In other words, it is entirely permissible

to ‘moderate’ your alcohol intake to zero, as such a moderation would be both reasonable and not excessive.

And this interpretation would likely hold in a court. It is a canon of statutory or linguistic construction that “words are presumed, unless the contrary appears, to be used in their ordinary sense, with the meaning commonly attributed to them.”⁷⁷ This canon bears the use of ‘moderation’ as permissible stand-in for ‘withhold’, as common dictionary definitions bear ‘to withhold’ covered under the ambit of ‘moderation’; and thus, a permissible construction.

This may seem like picking nits, but it is not. Any new definition of temperance needs to include observable goals; but more importantly, it needs to be new. If it is still associated with past use of the term, then it still retains its moralistic underpinning – and unlikely to be utilized by any courts seeking to apply temperance as a permissible state goal for alcohol regulation.

C. *The New Definition of Temperance, Applied*

Temperance can be used as a modern goal for state alcohol regulation. However, previous attempts have failed largely for two reasons: lack of measurable results, and overburdening interstate commerce. The proposed definition of temperance in this essay combats the first reason; it justifies itself with the second.

1. *Providing Measurable Goals*

For the proposed definition to be successful for a state justifying its alcohol restrictions, courts have made it clear that temperance efforts need a plain and observable real-world impact. This is why stripping moralism from the definition of temperance is important: it takes away the discomfort courts appear to have in dealing with intangible moral concepts applied to tangible

effects like interstate commerce. But reviewing what laws haven't worked as temperance justifications instructs what may work in the future.

The concept of temperance as a justification for interstate commerce is found in cases that interpret the text of the Twenty-First Amendment.⁷⁸ To review, the Supreme Court's decisions in *Idlewild*, *Bacchus*, and *Granholm* can be synthesized into two requirements about temperance under the Amendment for be acceptable: first, temperance must be the law's only purpose; and second, the temperance effort must be real and observable.⁷⁹

Lower courts have shown great reluctance to allow a state alcohol law to pass this two-part test. In *Pete's Brewing Co. v. Whitehead*, the court rejected the Missouri's claim that labeling requirements promoted temperance.⁸⁰ The court called Missouri's attempts to rely on temperance "half-hearted," noting "there is absolutely no evidence before the Court regarding how [the Missouri law] promotes moderation, much less abstinence, in alcohol consumption."⁸¹

So too did the court reject claims of temperance in *Loretto Winery v. Gazzara*.⁸² In *Gazzara*, New York argued that a law allowing grocery-store sales of wine, but only for wine made with New York grapes, permissible because it promoted the goal of temperance due to the lower alcohol content of the New York wine.⁸³ The court rejected this assertion, because even if true, it did not justify allowing wine with domestically-grown grapes over out-of-state grapes, if both alcohol quantities were the same.⁸⁴

*Dickerson v. Bailey*⁸⁵ also highlights the failure that comes with asserting temperance without an observable goal. In *Dickerson*, the court struck down a Texas law that restricted the sale of out-of-state wine manufacturers straight to the consumer.⁸⁶ The court rejected the assertion that temperance was the goal of the law because, "Texas residents can become as drunk on local wines or on wines of large out-of-state suppliers."⁸⁷

This is a sampling of the cases where courts have failed to find temperance as a valid state goal.⁸⁸ Admittedly, partially the claims of tolerance by the states asserting them failed because of what appears to be kitchen-sink arguments; however, the far more significant reason for failure was because the states didn't show an observable, measurable impact that these laws could have on tolerance. Consider: all fifty states have DUI laws, and all of those states set the impairment level at .08% Blood Alcohol Content (BAC).⁸⁹ But in some states, those with a commercial driver's license have tougher BAC laws imposed on them, as low as .04% BAC.⁹⁰ These are the drivers transporting alcohol across state lines; thus, these laws burden interstate commerce – yet none of these laws have been successfully challenged. The reason is simple: they pass the two-part test above. These laws solely promote temperance – and on what are usually larger vehicles –and they have observable effects.

So, the framework this essay's proposed definition creates is simple, and can be readily applied. The proposed definition of temperance deals solely with health and safety through alcohol moderation, and those goals can be observed in legislation if the law in question tackles temperance head-on, and explains what sort of observable impacts the legislation should show. This is a straightforward definition, with what should be a straightforward justification. Any law claiming temperance should have this justification written into it when the law is being enacted to improve the chances of it being upheld in the event of a legal challenge.

2. *The Evolving Twenty-First Amendment Jurisprudence Aids an Evolving Temperance Definition*

The decisions in *Granholm* and *Bacchus* support changing the definition of temperance. These decisions move the goalposts on alcohol as inside the scope of the dormant commerce

clause and not outside of it, almost certainly an interpretation of the Amendment that the drafters did not intend.⁹¹ But apart from concerns about constitutional interpretation,⁹² the recognition of a changing society helps the argument towards redefining temperance.

In *Granholm*, the court noted that changes in technology influence how interstate shipment of wine should be assessed.⁹³ Critically, the court stated:

“It is therefore understandable that the framers of the Twenty-first Amendment and the Webb-Kenyon Act would have wanted to free States to discriminate between in-state and out-of-state wholesalers and retailers, especially in the absence of the modern technological improvements and federal enforcement mechanisms that the Court argues now make regulating liquor easier.”⁹⁴

In other words, today’s technology would have changed how the drafters structured the Twenty-First Amendment.

This is great news. If modern technology can impact how the Supreme Court reads the Constitution, then modern society can impact how we define words. And if we accept that temperance as a modern concept is alive and well,⁹⁵ then we can redefine it to reflect its current place in society. Here, that means temperance as the promotion of health and safety towards alcohol use, stripped of its moralistic overtones. Any challenges towards this modern definition can be justified by the modern judicial interpretation of the constitutional amendment it derives its authority from.

IV. CONCLUSION

Temperance is not dead, it is simply outdated. Society still promotes the core goals of temperance, but has shied away from the term because of its historical and moralistic

connotations. The Supreme Court also recognizes temperance as a permissible goal, but lower courts have also avoided the word due to a lack of clarity in defining it in the modern world.

Both of these issues are addressed with an updated definition that applies to today's alcohol marketplace. By shedding the outdated connotations that link temperance to its early goals of promoting Protestant values, a definition of temperance appears that is in-line with what American already support: increasing the safety of their communities, and improving the health of those around them.

And by adding a framework under this definition that encourages legislators to craft laws that address these concerns in direct and measurable ways, courts will be more willing to apply temperance as a permissible goal in state regulation when those laws are challenged. This would be a major win for temperance advocates, because it takes a currently ambiguous term of art that the Supreme Court has recognized as Constitutionally important and redefines it on solid ground. And since the Court has shown a willingness to recast the meaning of the Twenty-First Amendment in a modern light, this is not an unreasonable goal.

To keep temperance relevant in today's world, and to protect the modern goals of temperance in the courts, it should be redefined as: policies and laws that promote moderation in the use of intoxicating drink for the purpose of promoting health and safety.

¹ CARRY AMELIA NATION, *THE USE AND NEED OF THE LIFE OF CARRY A. NATION* 254 (1909).

² Jay Maeder, *Blows Against the Empire Repeal*, DAILY NEWS, May 29, 2000, at 23; *see also*

Kevin A. Sabet, *Prohibition's real lessons for drug policy*, L.A. TIMES (Oct. 5, 2011)

(“Prohibition — America's notoriously ‘failed social experiment’”), available at

<http://articles.latimes.com/2011/oct/05/opinion/la-oe-sabet-prohibition-20111005>; Wayne Hall,

What are the policy lessons of National Alcohol Prohibition in the United States, 1920-1933?

SOC’Y FOR THE STUDY OF ADDICTION, 105, 1164 (“‘Everyone knows’ that national alcohol

prohibition (NP) in the United States between 1920 and 1933 was a quix-otic [sic] and failed

social experiment.”).

³ *Q&A With Ken Burns About His Prohibition Documentary*, IMBIBE MAG. (Sept. 27, 2011),

available at <http://imbibemagazine.com/qa-with-ken-burns/>.

⁴ *See* U.S. Const. amend. XXI, § 2.

⁵ *See infra* notes 27–46 and accompanying text.

⁶ *See infra* notes 39–46 and accompanying text.

⁷ Sidney J. Spaeth, *The Twenty-First Amendment and State Control Over Intoxicating Liquor:*

Accommodating the Federal Interest, 79 CAL. L. REV. 161, 169 (1991).

⁸ *Id.*

⁹ *Id.*, *citing* NORMAN H. CLARK, *DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN*

PROHIBITION 50 (1976).

¹⁰ Marcia Yablon, *The Prohibition Hangover: Why We Are Still Feeling The Effects Of*

Prohibition, 13 VA. J. SOC. POL'Y & L. 552, 559 (2006).

¹¹ Kevin Wendell Swain, *Note: Liquor By the Book In Kansas: The Ghost of Temperance Past*, 35 WASHBURN L.J. 322, 324 (1996).

¹² Yablon, *supra* note 10, at 553, *quoting* NORMAN H. CLARK, *DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION* 42 (1976).

¹³ UNITED STATES DEPARTMENT OF COMMERCE, *SURVEY OF CURRENT BUSINESS*, NO. 35 (July, 1924), available at <https://bea.gov/scb/pdf/1924/0724cont.pdf>.

¹⁴ *Id.*

¹⁵ *See generally* Erin M. Masson, *The Woman's Christian Temperance Union, 1874-1898: Combatting Domestic Violence*, 3 WM. & MARY J. OF WOMEN & L. 163 (noting various prominent temperance advocates, and their focus on the overlap between domestic violence and alcohol consumption).

¹⁶ MARY DALY, *PURE LUST* 286 (1983).

¹⁷ Spaeth, *supra* note 7, at 168; W. J. Rorabaugh, *Reexamining the Prohibition Amendment*, 8 YALE J.L. & HUMAN. 285, 288 (1996).

¹⁸ Daniel Glynn, *Comment: Granholm's Ends Do Not Justify The Means: The Twenty-First Amendment's Temperance Goals Trump Free-Market Idealism*, 8 J.L. ECON. & POL'Y 113, 118 (2011).

¹⁹ Henry S. Cohn & Ethan Davis, *Article: Stopping the Wind that Blows and the Rivers that Run: Connecticut and Rhode Island Reject the Prohibition Amendment*, 27 QUINNIPIAC L. REV. 327, 327 (2009)(*quoting* *Nation Voted Dry; 38 States Adopt the Amendment*, N.Y. TIMES (Jan. 17, 1919) at 1.).

²⁰ AMENDMENT TO THE CONSTITUTION OF 1919, 40 Stat. 1941–42.

²¹ Emily Greene Owens, *Are Underground Markets Really More Violent? Evidence from Early 20th Century America*, AM LAW ECON REV 13:1 (2011).

²² *Id.*

²³ See *Id.* (noting that Prohibition was even a major issue in the presidential campaign of 1928.)

²⁴ *Id.*

²⁵ Yablon, *supra* note 10, at 553.

²⁶ U.S. Const. amend. XXI, § 2.

²⁷ *Granholm v. Heald*, 544 U.S. 460 (2005); *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

²⁸ See also *Joseph Finch & Co. v. McKittrick*, 305 U.S. 395, 398 (1939); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 404 (1938); *State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59, 62-64 (1936); *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 62 (1936).

²⁹ *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

³⁰ *Id.* at 333–334.

³¹ *Id.*

³² *Id.*

³³ *Bacchus Imps. v. Dias*, 468 U.S. 263 (1984).

³⁴ *Id.* at 265.

³⁵ *Id.* at 275–276.

³⁶ *Id.* at 276.

³⁷ *Id.*

³⁸ *Id.*; see also John Foust, *Note: State Power to Regulate Alcohol under the Twenty-First Amendment: The Constitutional Implications of the Twenty-First Amendment Enforcement Act*,

41 B.C. L. REV. 659, 684 (“Although nowhere in Bacchus does the Court explicitly state what the central purpose or core power of the Amendment is, the language implies that the only legitimate purpose would be “temperance” or other means of controlling the “evils” of alcohol.”).

³⁹ Granholm v. Heald, 544 U.S. 460, 460 (2005).

⁴⁰ *Id.* at 471.

⁴¹ *Id.* at 470.

⁴² *Id.* at 476.

⁴³ *Id.* at 484–486.

⁴⁴ *Id.* at 489–490.

⁴⁵ Foust, *supra* note 38, at 686–687.

⁴⁶ *Id.*

⁴⁷ Compare the 1828 Webster’s Dictionary definition of the term, which does not mention alcohol: “Patience; calmness; sedateness; moderation of passion[,]” *Temperance, Webster’s Dictionary* (1828), with modern versions, which all mention its use in terms of alcohol consumption. See also *Temperance, Merriam-Webster Online Dictionary* (November 28, 2017) (“moderation in or abstinence from the use of alcoholic beverages”); *Temperance, Oxford Dictionary* (11th ed. 2008) (“Abstinence from alcoholic drink”).

⁴⁸ See *supra* note 2 and accompanying text.

⁴⁹ In the fifteen cases the Supreme Court has heard that deal with the concept of temperance as a valid state goal, only one has referenced a definition of temperance – and only in a footnote, and only to note a state’s definition of the term, which was only a restatement of a dictionary definition. See 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 490 n.4 (1996) (“Webster’s Third

New International Dictionary (1961) defines 'temperance' as 'moderation in or abstinence from the use of intoxicating drink.'")

⁵⁰ Foust, *supra* note 38, at 684.

⁵¹ See *infra* notes 54–59 and accompanying text.

⁵² Owens, *supra* note 21, at (2): 433

⁵³ *Saving Lives, Serving People*, MOTHERS AGAINST DRUNK DRIVING (last accessed Nov. 29, 2017), available at <https://www.madd.org/history/>.

⁵⁴ *Our Story*, MOTHERS AGAINST DRUNK DRIVING (last accessed Nov. 29, 2017), available at <https://www.madd.org/about-us/our-story/>.

⁵⁵ *Local Offices*, MOTHERS AGAINST DRUNK DRIVING (last accessed Nov. 29, 2017), available at <https://www.madd.org/local-offices/>.

⁵⁶ Wendy J. Hamilton, *Mothers Against Drunk Driving—MADD in the USA*, INJURY PREVENTION 90–91 (2000), available at <http://injuryprevention.bmj.com/content/injuryprev/6/2/90.full.pdf>.

⁵⁷ Tom McCaffery, *Controversial New Group: Drunk Drivers Against Mothers*, HUFFINGTON PO. (June 6, 2009), available at https://www.huffingtonpost.com/tom-mccaffrey/controversial-new-group-d_b_205894.html; *see also* *GetMADD*, GETMADD (last accessed Nov. 28, 2017), available at <http://www.getmadd.com/>.

⁵⁸ *Id.*

⁵⁹ *But see* Radley Balko, *Abolish Drunk Driving Laws*, REASON.COM (Oct. 11, 2010), available at <http://reason.com/archives/2010/10/11/abolish-drunk-driving-laws> (asserting that drunk driving laws cause more drinking fatalities)

⁶⁰ *Mothers Against Drunk Driving*, ACTIVIST FACTS (last accessed Nov. 29, 2017), available at <https://www.activistfacts.com/organizations/17-mothers-against-drunk-driving/>.

⁶¹ See generally Marci A. Hamilton, *Foundations Of Church Autonomy: Article: Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 B.Y.U. L. REV. 1099, 1104–1110 (2004) (discussing the no harm doctrine).

⁶² See JOHN STUART MILL, ON LIBERTY (1859).

⁶³ Owens, *supra* note 21, at (2): 433.

⁶⁴ ALCOHOLICS ANONYMOUS WORLD SERVICES, *ALCOHOLICS ANONYMOUS: THE STORY OF HOW MANY THOUSANDS OF MEN AND WOMEN HAVE RECOVERED FROM ALCOHOLISM*, 4TH ED (New York, NY: Alcoholics Anonymous World Services, Inc., 2001).

⁶⁵ Michael Gross, *Alcoholics Anonymous: Still Sober After 75 Years*, AM. J. PUB. HEALTH, (Dec. 2010), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2978172/>.

⁶⁶ *Id.*

⁶⁷ Gabrielle Glaser, *The Irrationality of Alcoholics Anonymous*, THE ATLANTIC (Apr. 2016), available at <https://www.theatlantic.com/magazine/archive/2015/04/the-irrationality-of-alcoholics-anonymous/386255/>; Lee Ann Kaskutas, *Alcoholics Anonymous Effectiveness: Faith Meets Science*, J. ADDICT DIS. (Sept. 18, 2009), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2746426/>.

⁶⁸ See *supra* note 49 and accompanying text.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Abstinence*, *Mirriam-Webster Online Dictionary* (November 28, 2017).

⁷² Not counting the links to the dictionary definitions, which all contain references to sexual abstinence.

⁷³ *Abstinence*, FOOD ADDICTS ANON. (last accessed Nov. 30, 2017), available at <http://www.foodaddictsanonymous.org/abstinence>.

⁷⁴ RAYMOND CALKINS, *SUBSTITUTES FOR THE SALOON*, 305 (2d rev. ed., 1919).

⁷⁵ Erin M. Masson, *Essay: The Woman's Christian Temperance Union, 1874-1898: Combatting Domestic Violence*, 3 WM. & MARY J. OF WOMEN & L. 163, 164 (noting the public perception of “temperance supporters as tee- totaling moral zealots”).

⁷⁶ *Temperance*, *Miriam-Webster Online Dictionary* (November 28, 2017).

⁷⁷ *Caminetti v. United States*, 242 U.S. 470, 482 (1917).

⁷⁸ See *supra* notes 27–46 and accompanying text.

⁷⁹ Foust, *supra* note 38, at 686-687.

⁸⁰ *Pete's Brewing Co. v. Whitehead*, 19 F. Supp. 2d 1004, 1017–1020 (W.D. Mo. 1998).

⁸¹ *Id.* at 1018.

⁸² *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 861 (S.D.N.Y. 1985)

⁸³ *Id.* at 863

⁸⁴ *Id.*

⁸⁵ *Dickerson v. Bailey*, 87 F. Supp. 2d 691, 710 (S.D. Tex. 2000)

⁸⁶ *Id.* at 693–694.

⁸⁷ *Id.* at 710 (S.D. Tex. 2000).

⁸⁸ See also *Bridenbaugh v. O'Bannon*, 78 F. Supp. 2d 828, 837 (N.D. Ind. 1999) (invalidating an Indiana direct-to-consumer shipment law that failed to promote temperance); *Quality Brands v. Barry*, 715 F. Supp. 1138, 1138, 1143 (D.D.C. 1989) (invalidating a District of Columbia law

requiring alcoholic beverage sellers to store beverages within its jurisdiction because it did not promote temperance).

⁸⁹ *DUI & DWI*, DMV.ORG (last accessed Nov. 30, 2017), available at <https://www.dmv.org/automotive-law/dui.php>.

⁹⁰ *Id.*

⁹¹ Harris Danow, *Recent Development: History Turned "Sideways": Granholm V. Heald And The Twenty-First Amendment*, 23 CARDOZO ARTS & ENT LJ 761, 772 (2006) (Noting that Justice Black, who participated in the passage of the Twenty-First Amendment as a senator, wrote in his dissenting opinion of *Idlewild* that the holding made "inroads upon the powers given the States by the Twenty-first Amendment. Ironically, it was against just this kind of judicial encroachment that Senators were complaining when they . . . paved the way for the Amendment's adoption.").

⁹² For an excellent critique of the Supreme Court's interpretation of the Twenty-First Amendment, see Clayton Silvernail, *Smoke, Mirrors and Myopia: How the States Are Able to Pass Unconstitutional Laws Against the Direct Shipping of Wine in Interstate Commerce*, 44 S. TEX. L. REV. 499, 545–548 (2003).

⁹³ *Granholm v. Heald*, 544 U.S. 460, 524 (2005).

⁹⁴ *Id.*

⁹⁵ See *supra* notes 53–67 and accompanying text.