

Achieving Success

The 18th Amendment was the perfect poison of good intentions, bad incentives, and unintended consequences. It birthed one of the single most destructive forces in American criminal history: the Mafia.¹ It created a new saloon culture, one that was no less profligate than the last.² It eliminated the temperance movement from political consciousness³ and it did all of this within fifteen years after its passage. But the 21st Amendment was supposed to be the corrective. It was supposed to return the law to the time before Prohibition. But was this truly the purpose of the 21st Amendment? How do we even divine purpose? This essay attempts to reconstruct the purposes of the 21st Amendment, at the time of passage, by analyzing the social, political, and legislative events of the era. After identifying some broad purposes, this essay then measures these purposes against the actual effects of the 21st Amendment. Ultimately concluding, that the 21st Amendment achieved its broad purposes but at some considerable cost.

Social and Political Environment Surrounding the Passage of the 18th Amendment

The Temperance Movement originated in the late 18th and 19th centuries.⁴ It was an organized effort to promote moderation and abstinence in alcohol consumption.⁵ It was a movement largely driven by women who had borne or witness the effects of alcohol consumption on their families and friends.⁶ To the Temperance Movement, alcohol consumption was one of the

¹ MARC MAPPEN, PROHIBITION GANGSTERS (2013)

² *Id.*

³ DAVID KYVIG, REPEALING NATIONAL PROHIBITION (2D ED. 2000)

⁴ The Temperance Movement, <http://libraryguides.nesl.edu/content.php?pid=358326&sid=2934955#periodicals> (last visited Nov. 30th, 2013); Roots of Prohibition, <http://www.pbs.org/kenburns/prohibition/roots-of-prohibition/> (last visited Nov. 30th, 2013)

⁵ *Id.*

⁶ *Id.*

chief causes of the violence, domestic abuse, infidelity, vagrancy, and general moral laxity that had increased dramatically after the Victorian Era.⁷ But since the problem of over consumption of alcohol was global, from its earliest origins the movement took on an international character.⁸ The earliest organizations originated in Ireland in the 1820s, then swept through Scotland, Britain, Norway, and Sweden.⁹ In the United States, the movement would reach its apex through the passage of the 18th Amendment.¹⁰ So what then can be gleaned from the integral role that the Temperance Movement played in the passage of the 18th Amendment? Arguably, the role the Temperance Movement played in the passage of the 18th Amendment suggests that one of the purposes behind the law was to curb alcohol consumption, or at the very least, dramatically change the degree to which it was regulated. By default then, one of the purposes of the 21st Amendment, which repealed the 18th was to allow for the freer consumption of alcohol and/or to change the regulatory structure that the 18th Amendment had put in place. This is all the more evident when we look at one of the biggest supporters of the repeal of Prohibition: the Association Against Prohibition Amendment (AAPA).

The Association Against Prohibition Amendment was a nonpartisan, single-issue organization founded in 1918 by William H. Stayton.¹¹ The group initially took a moderate approach to Prohibition.¹² For a significant amount of time, the organization letterhead bore the slogan, “Beer and Wine NOW: But no Saloons Ever.”¹³ The leaders of the AAPA emphasized that they favored temperance and were “unalterably opposed to the saloon.”¹⁴ AAPA recognized that

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Mappen, *supra* note 1

¹² *Id.*

¹³ DAVID KYVIG, REPEALING NATIONAL PROHIBITION, 58 (2D ED. 2000)

¹⁴ *Id.* at 58

in the early twenties that any call for a repeal of Prohibition had to be coupled with assurances that the association had no desire for the return of the saloon and unrestrained drinking. One of the earliest pushes that the AAPA made for a reform was for modification under the Volstead Act.

By 1922, the AAPA began publicly endorsing modification, which would allow beverages to have 2.75% as opposed to .05% of alcohol in them. The AAPA called on both major political parties to endorse modification in their 1924 platforms, but neither party did.¹⁵ But the failure to get either one of the major parties to support Volstead Modification did have a positive unintended consequence for the AAPA.¹⁶ It drew various antiprohibition groups together like the American Federation of Labor, the Moderation League of New York, and the Constitutional Liberty League of Massachusetts to seek modification.¹⁷ Furthermore, as a united front they were able to get Congress to have a hearing on modification.¹⁸

In 1924, the first congressional hearings for the modification of the Volstead Act were heard. Yet, even with a sympathetic chairperson, George S. Graham, on the House Committee the antiprohibitionist, including the AAPA failed to get the House to act.¹⁹ This was despite the fact that the AAPA concealed their general distaste for Prohibition and only voiced a desire to increase the permissible amount of alcohol in beverages from .05% to 2.75%. A modest change but one that did not succeed in the House and did not succeed in the Senate two years later.²⁰ However, by 1932 the Democratic Party, which was much more amendable to the idea of repealing Prohibition and who were viewed as less involved and entangled with it, came to power.²¹ Their landslide

¹⁵ *Id.*

¹⁶ *Id.* at 59

¹⁷ *Id.* at 59

¹⁸ *Id.*

¹⁹ *Id.* at 59-60

²⁰ *Id.* at 59-64

²¹ *Id.* at 160

victory, in the mind of the AAPA and other antiprohibitionists groups signaled to them that they had a mandate for change.²² And so, by 1932 the AAPA and other antiprohibitionist groups were taking a much harder stance against Prohibition.²³

The AAPA in 1932 issued its major campaign document, *32 Reasons for Repeal*.²⁴ The forty-page pamphlet insisted first that the federal government's power "should be confined to interstate and international" matters and that the 18th Amendment's conferral of broad police power's to the federal government harmed the delicate balance between state and federal authorities.²⁵ Second, the AAPA argued that Prohibition led to: "extensive corruption, widespread crime, enormous enforcement expenses, and the loss of one billion dollars in annual government revenue."²⁶ While the AAPA distributed its *32 Reasons*, a temperance group that opposed the 18th Amendment the Crusaders were distributing a book called *The New Crusade*. In it, they argued that temperance should be the policy goal of society, but that Prohibition had created a host of problems as great as the evil of mass over consumption of alcohol.²⁷ But the most interesting fact of organizations like the AAPA, The Crusaders, and the Women's Organization for National Prohibition Reform was that by 1932 they were seemingly more concerned about ending federal regulation of alcohol consumption than anything else. They would accept no half-measures.²⁸ The federal government had to exit the field of alcohol regulation. One AAPA director wrote of the 1932 Senate Resolution which proposed a new constitutional amendment ending national prohibition but granting Congress concurrent power with the states to regulate or prohibit saloons,

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 167

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

that "... we have only scotched the snake, and not killed it. Let us never sleep until we have smashed its head and laid it dead on the national highway."²⁹ AAPA President Shouse said himself that "unless and until there is offered a clear cut resolution providing for outright repeal and 18th Amendment and returning unrestricted control over the liquor problem to the different states without an attempt to continued exercise of jurisdiction by the federal government...it were infinitely better that the Eighteenth Amendment Stand." This belief was furthered echoed by Raymon Picartin, secretary of the United Repeal Council who called the Senate resolution "a fraud." So ultimately, when we look at the events leading up to the 21st Amendment there seems to be two purposes, one social, the other political.

As to the social purposes, Prohibition led to corruption and crime. Al Capone, Lucky Luciano and Arnold Rothstein were member of the Prohibition generation.³⁰ So many notorious and murderous gangsters were born during this time that there is even a Wikipedia page with a list of infamous Prohibition gangsters.³¹ It includes over 50 names.³² In fact, during Prohibition the crime rate soared. In Chicago, for example, there was extensive violence between 1923-1926.³³ An estimated 215 criminals died at the hands of rival gangs during this time period, while police killed another 160 gangsters.³⁴ Although, violence did decrease in Chicago towards the latter years of the decade, "by conventional business standards the violence level in bootlegging remained high."³⁵ And New York, despite the efforts of Arnold Rothstein, Lucky Luciano, and

²⁹ *Id.* at 170

³⁰ Mappen *supra* note 1

³¹ Category: Prohibition Gangsters, http://en.wikipedia.org/wiki/Category:Prohibition-era_gangsters (last visited Nov, 30th 2013)

³² *Id.*

³³ DAVID KYVIG, REPEALING NATIONAL PROHIBITION, 27 (2D ED. 2000)

³⁴ *Id.*

³⁵ *Id.*

Frank Costello did not obtain the same level of criminal stability as other major cities.³⁶ Not one criminal was able to amass absolute control over the city and as a result, during Prohibition over 1000 gangland murders occurred in New York City.³⁷ But the effects of Prohibition on crime were more global in scope: every major city was affected and it fundamentally change the federal government's relationship with crime³⁸.

Before Prohibition the nation as a whole had "...4,000 federal convicts, fewer than 3,000 of whom were housed in federal prisons."³⁹ By 1932 the number of federal convicts had increased 561 percent, to 26,589, and the federal prison population had increased 366 percent."⁴⁰ In short, the federal government's penal system went from small and innocuous to pervasive and conspicuous. And the homicide rate in large cities increased dramatically from 5.6. per 100,000 to 10 per 100,000 by the 1920's.⁴¹ With bootlegging and murder came secondary criminal effects. The rate of burglaries, robberies and prostitution all increased over this same period of time.⁴² Unfortunately, not only did Prohibition fail to stem the tide of crime, it was expensive. Government expenditures on crime and alcohol enforcement increased tremendously during Prohibition. Total federal expenditures on criminal institutions increased more than 1,000 percent between 1915 and 1932.⁴³ The annual budget of the Bureau of Prohibition went from 4.4 million to 13.4 million during the 1920's, while the Coast Guard's spending on Prohibition average over \$13 million per

³⁶ Mappen *supra* note 1

³⁷ *Id.*

³⁸ *Id.*

³⁹ Mark Thompson, Cato Institute Policy Analysis No. 157: Alcohol Prohibition Was a Failure, CATO INSTITUTE, Nov. 30th 2013 <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa157.pdf>

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

year.⁴⁴ But Prohibition's secondary effects were not limited to the criminal sphere, they also, unfortunately, had a deleterious effects on American politics and society.

In regards to political and social decay, at the federal level the Bureau of Prohibition, the agency tasked with enforcing the laws prohibiting the consumption of alcohol had to be reorganized to reduce the impact of corruption on its enforcement efforts⁴⁵ while bribery of police officers and the flouting of legal loopholes continued unabated at the local precincts.⁴⁶ During Prohibition, "police officers and Prohibition agents alike were frequently tempted by bribes or the lucrative opportunity to go into bootlegging themselves."⁴⁷ Although, many "stayed honest enough succumbed to the temptation that the stereotype of the corrupt Prohibition agent or local cop undermined public trust in law enforcement for the duration of the era."⁴⁸ But it was not only law enforcement agent's that succumbed to temptation, even the common man became wrapped up in commercial ruses. One of those ruses, was the pharmacy business. One of the biggest loopholes of the Volstead Act, the law that enforced the 18th Amendment's mandate to prohibit "the manufacture, sale and transportation of intoxicating beverages" was that it permitted pharmacists to dispense "whiskey by prescription for any number of ailments, ranging from anxiety to influenza." So in New York alone the number of registered pharmacists tripled.⁴⁹ Pharmacies became dispensaries for the many who wanted alcohol. But another equally notorious provision of the Volstead Act was the exception for religious institutions. Because religious institutions were permitted to consume wine for religious purposes, attendance rose at "churches

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ United Consequences, <http://www.pbs.org/kenburns/prohibition/unintended-consequences/> (last visited Nov. 30th, 2013)

⁴⁸ *Id.*

⁴⁹ *Id.*

and synagogues, and cities saw a large increase in the number of self-professed rabbis who could obtain wine for their congregations.”⁵⁰ So even the church was not safe from legal subterfuge.⁵¹ Ironically then, “the law that was meant to stop Americans from drinking” turned many of them into alcohol procurement specialist.⁵²

So from the brief history of the social and political events leading up to the passage of the 18th Amendment and its repeal by the 21st Amendment, what purposes can be gleaned? Well first, it must be prefaced that attempting to divine purpose is a very difficult endeavor. It is unclear whose purpose should control. Should only the view of notable legislators control or should the views of all legislators present at the time control? Should public opinion control? The problem is intractable and much has been written on whether accurately divining purpose from history is even possible. But with that said, it is probably fair to say that the 21st Amendment had at least two general purposes: as stated earlier the first, was to wrest from the federal government and to give back to the states the power to regulate alcohol and the second, was to alleviate some of the negative social consequences that Prohibition had wrought on America. The rest of this paper is devoted to determining how well the 21st Amendment succeeded in achieving these purposes. To this end, this paper will survey and analyze the Supreme Court’s 21st Amendment jurisprudence and scholarly articles on the immediate social effects of the 21st Amendment.

The 21st Amendment is the only amendment to be ratified by state conventions. The amendment was not ratified by $\frac{3}{4}$ of the state legislatures, which is the usual course, but instead it was ratified by $\frac{3}{4}$ of specially summoned state conventions. This was done for two reasons. The

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

first, was to insulate state legislators from political backlash and the second, was to ensure that the amendment was actually passed.⁵³ But given the fact that the 21st Amendment was a remedial amendment. In that, it was meant to repeal the 18th one would think its language would plainly permit the consumption and transportation of alcohol. However, this is not the case. For a variety of reasons, including the continued sway of the Temperance Movement, the 21st Amendment reads quite differently than what a lay observer may assume it would read. The text of the 21st Amendment states:

SECTION 1.

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2.

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.

SECTION 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.⁵⁴

⁵³ Kyving *supra* note 2, 165-174

⁵⁴ *U.S. Const. amend. XXI*

Most would assume that Section 2 would explicitly state that the transportation and consumption of alcohol is *permitted*. Instead, it reads that the transportation and importation of alcohol is *prohibited* by state law. Initially it seems then, that the 21st Amendment is not a direct appeal of the 18th. However, one of the purposes of the 21st Amendment as identified by this paper and the historical record, was to wrest the control of alcohol consumption from the federal government to the states. The purpose of the 21st Amendment was not to end alcohol regulation for no mainstream antiprohibitionist groups were publicly arguing that position. On the contrary, they were arguing that alcohol could be regulated and that it should be regulated, but only by the proper sovereigns: the states. Yet Section 2 of the 21st Amendment is nonetheless, ambiguous, and it has been the point of contention for every single case that has been decided by the Supreme Court. The Supreme Court has issued four notable decisions on Section 2 of the 21st Amendment. The Supreme Court ruled on section 2 of the 21st Amendment in *State board of Equalization v. Young's Market Co*⁵⁵, *Craig v. Boren*,⁵⁶ *South Dakota v. Dole*,⁵⁷ and *Granholm v Heald*.⁵⁸ Collectively, these cases make up the heart of the Supreme Court's jurisprudence on the 21st Amendment.

The first time the Supreme Court ruled on the 21st Amendment it interpreted Section 2 of the amendment very expansively. In *State Board of Equalization v. Young's Market Co.*, the plaintiffs were beer wholesalers, whose companies were based in California, but imported beer from Wisconsin and Missouri.⁵⁹ Their wholesaler's licenses permitted them to sell beer in California whether it was domestic or imported. The wholesalers, however, did not have an

⁵⁵ *State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59 (U.S. 1936)

⁵⁶ *Craig v. Boren*, 429 U.S. 190 (1976)

⁵⁷ *South Dakota v. Dole*, 483 U.S. 203 (1987)

⁵⁸ *Granholm v. Heald*, 544 U.S. 460 (2005)

⁵⁹ *State Board of Equalization*, 299 U.S. 59

importer license which would have exacted on them a fee of \$500 per year for importing beer and \$750 per year for manufacturing beer.⁶⁰ The plaintiffs argued that the additional importer licensure requirement discriminated against wholesalers who importer beer and thus, violated both the Commerce Clause and the Equal Protection Clause.⁶¹ The court ruled that the discrimination claim had no merit because all companies, both in-state and out-of-state, had to have the additional license in order to import beer. So the state argued that domestic businesses were treated no better than foreign businesses.⁶² If a foreign business had a wholesale operation in California, it would have to obtain a license. Likewise a domestic wholesaler whose principal place of business was in California would have to do the same to comply with the law. The burden was equally applicable to all. However, the court did find that the fee associated with the additional license was unduly onerous and burdened interstate commerce which is something, in the view of the Court that the states formerly could not do. The Court stated that a “fee would be a direct burden on interstate commerce; and the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide.”⁶³ Thus, California did not have the right to burden, what the Constitution meant to facilitate: free trade among the states. However, the Supreme Court found that the 21st Amendment changed the relationship between the states and the federal government as it related to alcohol regulation.⁶⁴ The Supreme Court stated that: “the exaction of a fee for the privilege of importation would not, before the 21st Amendment⁶⁵” be permissible but after the 21st Amendment it was such.⁶⁶ In the words of the Court section 2 “confer[s] upon the

⁶⁰ *Id.* at 60-61

⁶¹ *Id.* at 60-61

⁶² *Id.* at 60-63

⁶³ *Id.* at 62

⁶⁴ *Id.* at 60-63

⁶⁵ *Id.* at 62

⁶⁶ *Id.* at 62

State the power to forbid all importations which do not comply with the conditions which it prescribes.”⁶⁷ But the Court’s language in the latter part of the opinion suggest a power broader than merely the ability to forbid importation of beer that does not comply with state regulatory standards⁶⁸ Instead, its language suggests that the states have a near absolute right to regulate alcohol, in any manner within their borders. The courts asked rhetorically, “⁶⁹

Can it be doubted that a State might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?....⁷⁰

These questions presume that the 21st Amendment gave the states an unqualified power over alcohol policy. For this reason, the Supreme Court in its later decisions would retreat from the broad language of this decision. It would not hold fast to the idea that a state could create a discriminatory liquor monopoly or exact heavy punitive fees merely to favor in-state businesses over out-of-state businesses. Nonetheless, the legacy of *State Board of Equalization* rest with its broad holding which gave the state powers that they could not properly bear. The Supreme Court would begin to recognize this in its next decision *Craig v. Boren*.

The next significant ruling on the 21st Amendment by the Supreme Court came in *Craig v. Boren*⁷¹ where the Court found that statutes prohibiting the sale of ‘nonintoxicating’ 3.2% beer to males under the age of 21 and to females under the age of 18 constitutes a denial to males 18-20

⁶⁷ *Id.* at 62

⁶⁸ *Id.* at 60-63

⁶⁹ *Id.* at 60-63

⁷⁰ *Id.* at 63

⁷¹ *Craig*, 429 U.S. 190

years of age equal protection of the laws.⁷² However, what is most significant about this case is not the ruling, but instead, how it defines the relationship between the 21st Amendment, the Commerce Clause, and the Equal Protection clause. The majority opinion stated that the 21st Amendment did not affect the normal judicial analysis under the Equal Protection Clause or Fourteenth Amendment.⁷³ A state, even with powers that the 21st Amendment has granted it, cannot discriminate against protected classes in its regulation of alcohol, nor could it deny any person by virtue of its law due process.⁷⁴ The court stated that

.... the Amendment primarily created an exception to the normal operation of the Commerce Clause. (Internal citations omitted). Even here, however, the Twenty-first Amendment does not *pro tanto* repeal the Commerce Clause, but merely requires that each provision be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.⁷⁵ (Internal citations omitted)

In other words, the 21st Amendment did create an exception to the Commerce Clause, but it did not completely supersede it.⁷⁶ A court must consider the general import, purpose, and precedent of the Commerce Clause when deciding a case that implicates both the Commerce Clause and the 21st Amendment.⁷⁷ This differs from the *State Bd. of Equalization v. Young's Market Co.* in that the court does not assume that the 21st Amendment gives the states absolute power to decide alcohol policy within its borders. The 21st Amendment instead has to be read in light of the other constitutional provisions. In fact, the court held in *Craig v. Boren* that the “the

⁷² *Id.* at 205

⁷³ *Id.* at 206-208

⁷⁴ *Id.* at 206-208

⁷⁵ *Id.* at 206

⁷⁶ *Id.* at 206

⁷⁷ *Id.* at 206.

relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful.” This more measured analysis of the 21st Amendment is exemplified in the Supreme Court’s two most recent decision on the 21st Amendment *South Dakota v. Dole* and *Granholm v. Heald*.

In the former case, South Dakota law permitted persons who were 19 years or older to purchase alcohol.⁷⁸ However, Congress had passed a statute 23 U.S.C.S. § 158⁷⁹ allowing for the reduction of federal highway funds otherwise allocable to a state if the state had a minimum drinking age below 21.⁸⁰ The State of South Dakota desired a declaratory judgment stating that § 158 violated Congress’s spending power and violated the 21st Amendment of the United States Constitution.⁸¹ The court ruled that the offer of conditional funding from the federal government is not coercive and does not infringe on a state’s sovereignty.⁸² Furthermore, the court held that the 21st Amendment cannot act as an independent bar to the spending powers granted to the federal government by Article I, section 8, clause 1 of the Constitution.⁸³ This greater narrowing of the scope of the 21st Amendment would continue in the Court’s most recent Supreme Court decision.

In *Granholm v. Heald*, the court held that the 21st Amendment does not overrule the Dormant Commerce Clause with respect to alcohol sales.⁸⁴ The court deemed it constitutionally impermissible for states to treat in-state wineries differently than out-of-state wineries. Instead, consistent with the Dormant Commerce Clause, states cannot impermissibly burden or

⁷⁸ *Dole*, 483 at 205

⁷⁹ 23 U.S.C.S. § 158

⁸⁰ *Dole*, 483 at 205-206

⁸¹ *Id.* at 205-206

⁸² *Id.* at 206-208

⁸³ *Id.* at 206-208

⁸⁴ *Granholm*, 544 U.S. at 472-474

discriminate between in-state and out-state liquor businesses.⁸⁵ In order to treat, in-state and out-of-state liquor businesses differently there must be “legitimate concerns” and not merely “state protectionism” motivating the discriminatory regulation or law.⁸⁶ In short, with *Granholm*, the Court put to rest the idea that the 21st Amendment permitted discrimination in alcohol sales. *Granholm*, completely broke from the Supreme Court’s earlier decisions that gave states sole power to regulate alcohol. It reaffirmed the fact that the 21st Amendment has to be read in light of the other relevant constitutional provisions. The question then arises, where does these series of cases leave the 21st Amendment as it relates to the goal of wresting the power to regulate alcohol from the federal government? This paper contends that it places it at an appropriate position of balance.

No constitutional amendment is without limits. The right to bear arms does not give a man the right to bring an antitank rocket launcher (bazooka) to a sporting event, nor does it allow a movie theatre patron to falsely yell “fire” where there is none. On the contrary, with rights there often are duties, and at the very least, there are always regulations. With its earlier decisions the Supreme Court failed to recognize this fact. They construed the 21st Amendment as a broad remedial right without restriction. In *State Board of Equalization* for example, the Court asks rhetorically “may [a state]... not subject the foreign article [alcohol] to a heavy importation fee?” As if it were a foregone conclusion that a state could do such a thing despite the commands of the Commerce Clause. But with time, the Supreme Court began to strike a more appropriate balance between the powers conferred to the states by the 21st Amendment and the other constitutional amendments that predated it. The Supreme Court later decisions recognize that the 21st

⁸⁵ *Id.*

⁸⁶ *Id.*

Amendment was passed largely to give the state's power, almost exclusive power to regulate the sale of alcohol, but that this power still had to be understood in light of all the other relevant constitutional provisions. There is no internal constitutional supremacy clause. No constitutional provision is supposed to trump another unless it was passed with the express purpose of repealing another provision. And true, the 21st Amendment did supersede the amendment it repealed, the 18th, but it did not supersede the Commerce Clause, the Equal Protection Clause and the Due Process Clause. Initially, the Supreme Court seemed to suggest that this was the case. The Court failed to give the other constitutional amendments their proper deference. However, this changed. The Supreme Court still recognized the 21st Amendment for what it was, a broad remedial grant to the states to regulate alcohol, but it did not do so at the expense of free and fair interstate commerce. In this way, the Supreme Court has allowed the 21st Amendment to achieve one of its intended purposes: free commerce with decentralized regulation.

As to the second purpose of the 21st Amendment, alleviating the negative society wide consequences of the over consumption of alcohol, this is a far harder question to answer. But in determining the success of the 21st Amendment in achieving this goal, it is probably best to look to crime and health statistics. As to the former, however, it is very difficult to make any well-founded causative or correlative connection between crime and alcohol regulation. Crime is such a varied social phenomenon that the effect alcohol regulation has had on the crime rate cannot be easily bracketed off. For that reason, the following analysis is not going to focus on crime statistics other than to reiterate that alcohol related crime rose sharply during Prohibition and then leveled off a bit towards the latter years of the era. But crime was still remarkably high for the times. Furthermore, health and consumption statistics are by themselves a good proxy for determining whether the repeal of prohibition had positive social effects.

First, “by 1830, the average American over 15 years old consumed nearly seven gallons of pure alcohol a year – three times as much as we drink today”⁸⁷ but during the initial implementation of Prohibition a dramatic decrease in alcohol consumption occurred.⁸⁸ Alcohol consumption at the beginning of Prohibition fell 30% from its pre-Prohibition days.⁸⁹ However, during the next several years alcohol consumption would reach 60-70% of the pre-Prohibition era. Once Prohibition was repealed, alcohol consumption would remain at the same levels as it was towards the end of Prohibition, but in the decades that followed alcohol consumption would reach its pre-Prohibition levels.⁹⁰ When we look at the amount of alcohol consumed per person per gallon this is confirmed. Between the years 1916-1918 the average person of drinking age consumed 21.63 gallons per year of alcoholic beverages.⁹¹ In 1934, the year after Prohibition was repealed the number was 13.58, which is a significant decrease. But within a decade that number had increase to 25.22 and by 1983 that number had reached as high as 30.47.⁹² It should be noted, however, that it took 40 years for the number to reach that level.⁹³ But in all, as far as the goal of decreasing alcohol consumption, Prohibition only partially succeeded but that does not mean that it did not more fully succeed in alleviating some of the other negative health consequences of alcohol consumption.

In fact, Prohibition seems to have had a very positive effect on the health of the American community. For example, “Cirrhosis (liver disease) death rates for men were 29.5 per 100,000 in 1911 but only 10.7 in 1929 and admissions to state mental hospitals for alcoholic psychosis

⁸⁷ Roots of Prohibition, <http://www.pbs.org/kenburns/prohibition/roots-of-prohibition/>

⁸⁸ Jeffrey A. Miron & Jeffrey Zwiebel, Alcohol Consumption During Prohibition, NATIONAL BUREAU OF ECONOMIC RESEARCH (Apr. 1991) *available at* http://www.nber.org/papers/w3675.pdf?new_window=1

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Apparent Consumption of Alcohol, <http://prohibition.osu.edu/brewing/consumption> (last visited Dec. 1, 2013)

⁹² *Id.*

⁹³ *Id.*

declined from 10.1 per 100,000 in 1919 to 4.7 in 1928”⁹⁴ And as for as, “arrests for public drunkenness and disorderly conduct”⁹⁵ “they declined 50 percent between 1916 and 1922.”⁹⁶ However, as of 2005, 13.5 per 100,000 males have liver cirrhosis and 5.48% of males have alcohol related disorders.⁹⁷ So Prohibition did have some immediate positive public health effects⁹⁸ but some of those positive effects have been mitigated by the general increase in alcohol consumption. Thus to some extent, Prohibition can be seen as a public health success. It may not have lived up to the aspirations of some prohibitionist who believed it was a cure all for all of society’s ills but it did improve the general public health of the community. This alone, does not make the 21st Amendment a failure because it repealed Prohibition. For in the long run Prohibition was untenable and positive health effects could not and did not last. Moreover, they came at the high cost of increase crime and diminished respect for the law.

Conclusion

The first part of this paper combed the historical record to identify broad purposes animating the 21st Amendment. Two purposes were identified. The first, the decentralization of alcohol regulation, was deemed an eventual success. The second, alleviating the social effects of intemperance, was not a clear success because public health was probably in a better state during Prohibition. The question then is whether the 21st Amendment as a whole is a success. Did it achieve its intended purposes to a further enough extent to be labeled a success? The short answer

⁹⁴ Mark H. Moore Editorial, Actually, Prohibition Was a Success, N.Y. Times, October 16, 1989 *available at* <http://www.nytimes.com/1989/10/16/opinion/actually-prohibition-was-a-success.html>

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ World Health Organization, http://www.who.int/substance_abuse/publications/global_alcohol_report/profiles/usa.pdf (last visited Dec. 1, 2013)

⁹⁸ *Id.*

is yes. The first goal was achieved, while the second was so aspirational and broad that a failure to meet it is not damning. In fact, having such a salutary goal (that of alleviating the negative social effects of Prohibition while allowing for the freer consumption of alcohol) is a small achievement in itself. As such, the 21st Amendment is a success. It repealed a good-spirited, but misguided law and gave the states the power to regulate a mostly local issue. Ultimately, before the passage of the 21st Amendment the federal government was not within its proper limits. The federal government was regulating a mostly local issue with police powers completely unenvisioned by the Founders. However, the 21st Amendment changed this, it recalibrated the constitutional balance in an important area of commerce, and it had the positive derivative effect of reducing alcohol related crimes. This makes the 21st Amendment more than just the law that brought back alcohol; it makes it a law worthy of veneration.