

ARE THE 2020s TRULY “UNPRECEDENTED” TIMES?: HOW AMERICA’S ALCOHOL
HISTORY CAN INFORM GOVERNMENT HEALTH POLICY DURING THE COVID-19
PANDEMIC

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I. INTRODUCTION

The United States entered 2020 with high hopes but quickly found itself in the throes of a global pandemic, clamoring to stop the spread of a new virus but proving unsuccessful thus far. The word “unprecedented” has been ubiquitously used throughout 2020 and into 2021—but how unprecedented are these times, really? The following essay compares the COVID-19 pandemic to this nation’s alcohol history, revealing several lessons learned that can be applied to government health policy during the COVID-19 pandemic.

This essay will begin with a brief history of Prohibition-era alcohol regulation, followed by an overview of what the regulation of alcohol in the United States has looked like since Prohibition was repealed in 1933. Next, the essay will provide some background related to the COVID-19 pandemic—how it started, what the public health issues are, and where we stand now. The essay will then analyze how alcohol issues are similar to and different from the issues the United States is currently experiencing with the COVID-19 pandemic. Finally, the essay will apply past and present strategies used for alcohol regulation to COVID-19, hypothesizing how those strategies may (or may not) work and offering some recommendations for future COVID-19 health policy.

II. BACKGROUND

A. *A Brief History of Prohibition*

Prohibition began in the United States in 1920 following the ratification of the 18th Amendment to the United States Constitution and the passage of the Volstead Act in 1919.¹ The 18th Amendment made illegal “the manufacture, sale, or transportation of intoxicating liquors

¹ *Prohibition*, HISTORY, <https://www.history.com/topics/roaring-twenties/prohibition> (last updated Jan. 27, 2020).

within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes.”² The unprecedented nature of the 18th Amendment cannot be overstated. As Daniel Okrent notes in his book *Last Call: The Rise and Fall of Prohibition*, the 18th Amendment was preceded by only one other Constitutional amendment that limited the activities of citizens as opposed to the activities of the government: the 13th Amendment, which abolished slavery in the United States.³

Prohibition was a values-based solution to a societal problem. The temperance movement began well before the ratification of the 18th Amendment, particularly among women, who often stayed away from the saloons but were left to bear the consequences of alcohol overuse in the form of broken marriages and families.⁴ As Okrent writes, “A drunken husband and father was sufficient cause for pain, but many rural and small-town women also had to endure the associated ravages born of the early saloon: the wallet emptied into a bottle, the job lost or the farmwork left undone”⁵ In addition to these social issues, Prohibition targeted crime and corruption and aimed in part to reduce the tax burdens created by the United States prison system.⁶ The Anti-Saloon League, founded in 1893, banded forces with other temperance groups such as the Women’s Christian Temperance Union and evangelical Protestants, who viewed alcohol as ungodly, to finally bring the 18th Amendment to fruition.⁷

² U.S. Const. amend. XVII, § I.

³ Daniel Okrent, *Last Call: The Rise and Fall of Prohibition* 3 (2011).

⁴ *Prohibition*, *supra* note 1.

⁵ Okrent, *supra* note 3, at 16.

⁶ Mark Thornton, *Alcohol Prohibition Was a Failure*, CATO (July 17, 1991), <https://www.cato.org/publications/policy-analysis/alcohol-prohibition-was-failure>.

⁷ *Anti-Saloon League*, OSU, <https://prohibition.osu.edu/anti-saloon-league> (last visited Jan. 8, 2021); *see also Prohibition*, *supra* note 1.

While Prohibition legally applied to the entire nation, enforcement of the law was anything but uniform. The rural and small-town areas that were largely responsible for lobbying Prohibition into existence tended toward strict enforcement, while many urban areas turned a blind eye towards illegal alcohol activities.⁸ Bootlegging, speakeasies, and organized crime boomed, and the unregulated manufacturing of alcohol that supplied these activities often proved deadly, due in part to the United States Government's own practice of poisoning industrial alcohol in an attempt to deter such behavior.⁹ On December 5, 1933, after almost fourteen grueling years of no *legal* drink, Prohibition ended with the ratification of the 21st Amendment, which repealed the 18th Amendment and re-conferred upon the States the power to regulate the manufacture, sale, and transportation of alcohol within their respective borders.¹⁰

The general consensus is that the so-called "noble experiment" was a complete and utter failure. While alcohol consumption initially declined,¹¹ it steadily increased thereafter, albeit not to pre-Prohibition levels.¹² Further, the continued demand for alcohol coupled with the need to transport the illicit substance discreetly led to a rise in the production of spirits over beer or wine due to their higher alcohol content, which only increased during Prohibition.¹³ "Most estimates place the potency of Prohibition-era products at 150+ percent of the potency of products produced either before or after Prohibition."¹⁴ While Prohibition's supporters clung to the hope of a new

⁸ *Prohibition*, *supra* note 1.

⁹ Matthew Brown, *Fact Check: It's True, U.S. Government Poisoned Some Alcohol During Prohibition*, USA TODAY, <https://www.usatoday.com/story/news/factcheck/2020/06/30/fact-check-u-s-government-poisoned-some-alcohol-during-prohibition/3283701001/> (June 30, 2020).

¹⁰ U.S. Const. amend. XXI, §§ I-II.

¹¹ Some scholars opine that Prohibition merely rode a wave rather than giving rise to one, as "annual per capita consumption and the percentage of annual per capita income spent on alcohol had been steadily falling before Prohibition." Thornton, *supra* note 6.

¹² Thornton, *supra* note 6.

¹³ *Id.*

¹⁴ *Id.* (citing Henry Lee, *How Dry We Were* (1963)).

generation of Americans reared in an alcohol-free society, many young people (particularly college and university students) viewed Prohibition as “an emblem of a suffocating status quo” and were often the very people illegally consuming alcohol.¹⁵

While Prohibition admittedly decreased alcohol consumption in the United States, both during and following its reign, it did so at a cost:

It encouraged criminality and institutionalized hypocrisy. It deprived the government of revenue, stripped the gears of the political system, and imposed profound limitations on individual rights. It fostered a culture of bribery, blackmail, and official corruption. It also maimed and murdered, its excesses apparent in deaths by poison, by the brutality of ill-trained, improperly supervised enforcement officers, and by unfortunate proximity to mob gun battles.¹⁶

However, regulation of alcohol in the United States did not disappear entirely, nor did the federal government’s influence over alcohol regulation. Rather, the immediate regulatory power transitioned from the federal to the state level. In addition, many of today’s alcohol laws find their roots in Prohibition.

B. Post-Prohibition Alcohol Regulation

The 21st Amendment returned control of alcohol regulation to the States.¹⁷ In turn, the States delegated much of this control to local jurisdictions.¹⁸ Ironically, the end of Prohibition actually made obtaining alcohol harder, not easier.¹⁹ Towards the end of Prohibition, alcohol was

¹⁵ Jack S. Blocker, Jr., *Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation*, NAT’L CTR. FOR BIOTECHNOLOGY INFO., <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1470475/> (citing Room Robin, *A “Reverence for Strong Drink”: The Lost Generation and the Elevation of Alcohol in American Culture* (1984)); see, e.g., Claudia Huang, *‘Bring Back with Them Bottled Goods’: A History of Prohibition at Harvard*, THE HARVARD CRIMSON, <https://www.thecrimson.com/article/2017/3/9/prohibition-at-harvard/> (Mar. 9, 2017).

¹⁶ Okrent, *supra* note 3, at 373.

¹⁷ U.S. Const. amend. XXI, §§ I-II.

¹⁸ *Alcohol Laws & Regulations*, AM. ADDICTION CTRS., <https://www.alcohol.org/laws/> (last updated Jan. 16, 2020).

¹⁹ Okrent, *supra* note 3, at 374.

so freely—albeit illegally—available that very little effort was required to obtain it.²⁰ The legal alcohol market and the laws and regulations that accompanied it effectively pushed out the illegal (and more accessible) market for alcohol:

Now there were closing hours and age limits and Sunday blue laws, as well as a collection of geographic proscriptions that kept bars or package stores distant from schools, churches, or hospitals. State licensing requirements forced legal sellers to live by the code, and in many instances statutes created penalties for buyers as well. Just as Prohibition did not prohibit, making drink legal did not make drink entirely available.²¹

Almost 40% of the United States remained dry after Prohibition ended.²²

However, the federal government’s hands have not been totally removed from the pot (or the bottle, as it were). “Even though the federal government has given flexibility to individual states regarding statutes pertaining to the use of alcohol, it does retain the ability to use tax incentives and federal funding to get states to support certain alcohol policies.”²³ The most prevalent example of this political pressure is the Federal Uniform Drinking Age Act of 1984,²⁴ which “[p]rohibits the Secretary of Transportation from approving Federal-aid highway projects in States in which the purchase or public possession of alcoholic beverages by persons less than 21 years of age is lawful.”²⁵ Given that all states presently have a legal drinking age of 21 (with some states offering limited employment- or religious-based exceptions),²⁶ such tax and federal funding incentives appear to be effective proxies for pushing the federal government’s agenda.

²⁰ *Id.*

²¹ *Id.*

²² *Alcohol Laws by State*, FTC, <https://www.consumer.ftc.gov/articles/0388-alcohol-laws-state> (last visited Jan. 8, 2021).

²³ *Alcohol Laws & Regulations*, *supra* note 18.

²⁴ 23 U.S.C. § 158.

²⁵ *H.R. 4892 – Uniform Minimum Drinking Act of 1984*, CONGRESS.GOV, <https://www.congress.gov/bill/98th-congress/house-bill/4892> (last visited Jan. 8, 2021).

²⁶ *Alcohol Laws by State*, *supra* note 22.

With their reclaimed regulatory power over alcohol, the majority of States chose to implement a three-tiered system of alcohol regulation. Pre-Prohibition, alcohol producers often owned the establishments that distributed the alcohol they produced.²⁷ These so-called “tied houses” were thought to promote “unfair competition and harmful promotion and consumption of alcohol.”²⁸ The States created the three-tiered system as a means to curb the damaging effects of tied houses.²⁹ The three-tiered system distinguishes between the manufacturers, wholesalers, and retailers of alcohol.³⁰ The consumers purchase alcohol directly from the retailers, who obtain the alcohol from the wholesalers, who buy the alcohol from the ultimate source—the manufacturers.³¹ Most States have crafted their laws so that no one entity is permitted to be involved in more than one tier, “and each tier is regulated and licensed separately.”³²

In addition to regulatory, economic, and commercial benefits, the three-tiered system has seen great success in the form of public health benefits.³³ The three-tiered system creates a system of checks and balances: “As each party must be licensed and accountable for alcoholic products, this prevents tainted alcohol from entering the marketplace.”³⁴ Moreover, the sustained competition protected by the three-tiered system “prevents the marketplace from being dominated by major companies who can use tactics to increase alcohol sales.”³⁵

²⁷ Susannah Skiver Barton, *America’s Alcohol Distribution System Means You Can’t Always Find the Whisky You Want*, WHISKY ADVOCATE (June 29, 2020), <https://www.whiskyadvocate.com/three-tier-system-alcohol-distribution-explainer/>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *The Three-Tier System: A Modern View*, NAT’L ALCOHOL BEVERAGE CONTROL ASSOC. (2015), <https://www.nabca.org/three-tier-system-modern-view-0>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

Seventeen States (and a Maryland locality) have taken the principles of the three-tiered system one step further and “control the sale of distilled spirits and, in some cases, wine and beer through government agencies at the wholesale level.”³⁶ Utah explains its paternalistic motives behind its stature as one of these so-called “control states”: “[Utah] believes that moderation can best be achieved by neither promoting nor encouraging the consumption of alcohol, but rather by controlling it.”³⁷ This explanation is consistent with Utah’s religious demographic, where Mormons make up almost two thirds of the state and abstain from alcohol for religious reasons.³⁸

Utah is but one example of how turning the regulatory power of alcohol back over to the States has resulted in laws tailored to the unique needs and desires of each State and locality. Rooted in basic principles of federalism, this patchwork system takes the pressure off the federal government and places authority into the hands of the governmental entities best suited for it due to their proximity to the people ultimately being regulated.

C. *The COVID-19 Pandemic*

In 2020, the United States—along with the rest of the world—was hit with a new kind of public health crisis that no one saw coming. In December 2019, news stories began developing concerning an outbreak of pneumonia in Wuhan, China.³⁹ Chinese authorities were initially

³⁶ *Control State Directory and Info*, NAT’L ALCOHOL BEVERAGE CONTROL ASSOC., <https://www.nabca.org/control-state-directory-and-info> (last visited Jan. 8, 2021).

³⁷ *Liquor Control States*, UTAH DEP’T OF ALCOHOLIC BEVERAGE CONTROL, <https://abc.utah.gov/about-dabc/liquor-control-states/> (last visited Jan. 8, 2021).

³⁸ Associated Press, *Mormons Now a Minority in Utah’s Biggest County, New Figures Show*, LA TIMES (Dec. 15, 2018), <https://www.latimes.com/nation/nationnow/la-na-utah-salt-lake-mormons-20181215-story.html>; *Why Members of The Church of Jesus Christ of Latter-Day Saints Don’t Drink Alcohol, Tea, and Coffee*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://pacific.churchofjesuschrist.org/why-mormons-dont-drink-alcohol-tea-and-coffee> (last updated Sept. 1, 2018).

³⁹ Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, NY TIMES (Dec. 28, 2020), <https://www.nytimes.com/article/coronavirus-timeline.html>.

uncertain whether the pneumonia was spreading from human to human but later identified the root cause of the disease as a contagious, novel coronavirus.⁴⁰ In January 2020, China reported its first death from the disease caused by the novel coronavirus, and, days later, the United States confirmed its first case—a man who had recently returned from a trip to Wuhan, China.⁴¹ On January 30, 2020, the World Health Organization declared a global health emergency.⁴²

The United States responded on January 31, 2020: “The Trump administration suspended entry into the United States by any foreign nationals who had traveled to China in the past 14 days, excluding the immediate family members of American citizens or permanent residents.”⁴³ On February 11, 2020, the disease caused by the novel coronavirus was finally given a name: COVID-19, standing for “Coronavirus Disease 2019.”⁴⁴ The United States reported its first COVID-19 death on February 29, 2020; however, scientists later determined via autopsies that a couple early-February 2020 deaths were attributable to COVID-19.⁴⁵

The United States took its next step towards guarding against a possible—and, as we now know, an impending—pandemic on March 15, 2020, when the Centers for Disease Control (CDC) recommended that gatherings of more than 50 people should not take place over the following eight weeks.⁴⁶ This recommendation came as a shock to much of America, as it “included weddings, festivals, parades, concerts, sporting events and conferences.”⁴⁷ At this point,

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*; see also Thomas Fuller & Mike Baker, *Coronavirus Death in California Came Weeks Before First Known U.S. Death*, NY TIMES (May 7, 2020), <https://www.nytimes.com/2020/04/22/us/coronavirus-first-united-states-death.html>.

⁴⁶ Derrick Bryson Taylor, *supra* note 39.

⁴⁷ *Id.*

COVID-19 was starting to infiltrate people’s daily lives. The next day, President Trump took the CDC’s recommendation one step further, discouraging Americans from gathering in groups greater than 10 people.⁴⁸ However, these recommendations did not ward off the looming pandemic as many had hoped. By March 26, 2020, the United States had reported more cases than any other country.⁴⁹ Stay-at home orders, curfews, travel restrictions, and mandatory closures of non-essential businesses were becoming the new normal.⁵⁰

Not only were the number of sick Americans growing exponentially with each passing day, but stay-at-home orders and mandatory closures of non-essential businesses caused the United States economy to fall ill as well. By the start of April 2020—only three months after the United States reported its first case, nearly 10 million Americans had lost their jobs.⁵¹ These job losses resulted in over 5 million Americans losing their health insurance between February and May 2020.⁵²

By May 26, 2020, the number of COVID-19 deaths in the United States surpassed 100,000.⁵³ The summer months were accompanied by case surges in some southern states popular for their beaches, including Florida and South Carolina.⁵⁴ On July 10, 2020, the United States set “a single-day record for the seventh time in 11 days” when it reported 68,000 new cases.⁵⁵ By

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Lawrence O. Gostin & Lindsay F. Wiley, *Governmental Public Health Powers During the COVID-19 Pandemic*, JAMA NETWORK (Apr. 2, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2764283>.

⁵¹ Derrick Bryson Taylor, *supra* note 39.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

September 2020, the United States had lost more than 200,000 people to COVID-19, and the country surpassed 10 million cases in November 2020.⁵⁶

From the beginning, the CDC and other public health officials championed social distancing and regular handwashing as the easiest and most effective precautions for protection against COVID-19 infection.⁵⁷ However, the rapidly evolving situation that was the early stages of the COVID-19 pandemic brought changing and sometimes conflicting recommendations from public health officials, which contributed to public skepticism and criticism. On March 8, 2020, Dr. Anthony Fauci, the director of the National Institute of Allergy and Infectious Diseases at the National Institutes of Health, told the public that there was “no reason to be walking around with a mask.”⁵⁸ He explained:

When you’re in the middle of an outbreak, wearing a mask might make people feel a little bit better and it might even block a droplet, but it’s not providing the perfect protection that people think that it is. And, often, there are unintended consequences—people keep fiddling with the mask and they keep touching their face.⁵⁹

Less than a month later, on April 3, 2020, the CDC updated its guidance on the use of facial coverings, encouraging individuals to wear masks when congregating with non-household members, especially when social distancing could not be maintained.⁶⁰ Dr. Fauci later explained

⁵⁶ *Id.*

⁵⁷ *How to Protect Yourself and Others*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last updated Dec. 31, 2020). *See also Social Distancing*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last updated Nov. 17, 2020) (defining social distancing as “stay[ing] at least 6 feet (about 2 arms’ length) from other people who are not from your household in both indoor and outdoor spaces”).

⁵⁸ Reuters Staff, *Fact Check: Outdated Video of Fauci Saying “There’s No Reason to be Walking Around with a Mask”*, REUTERS (Oct. 8, 2020), <https://www.reuters.com/article/uk-factcheck-fauci-outdated-video-masks/fact-checkoutdated-video-of-fauci-saying-theres-no-reason-to-be-walking-around-with-a-mask-idUSKBN26T2TR>.

⁵⁹ *Id.*

⁶⁰ *Id.*

that his initial statements were grounded in an attempt to preserve masks and other necessary personal protective equipment for the health care workers who needed them most.⁶¹

Once all public health officials appeared to be on the same page regarding widespread mask usage, some began calling for a national mask mandate, arguing that leaving the decision to require masks up to the state and local governments was not cutting it.⁶² As of December 2020, eleven U.S. states were not mandating masks at the state level: Alaska, Arizona, Florida, Georgia, Idaho, Mississippi, Missouri, Nebraska, Oklahoma, South Dakota, and Tennessee.⁶³ As of January 2021, four of these states—Arizona, Georgia, Oklahoma, and Tennessee—ranked among the ten worst U.S. states in terms of average daily cases, with Arizona topping the charts at number one.⁶⁴

All the while, biopharmaceutical companies were working around the clock to develop a vaccine in the hopes of putting an end to the global pandemic. Once emergency authorization by the Food and Drug Administration of two of these vaccines—those created by Pfizer-BioNTech and Moderna—appeared to be on the horizon, the CDC began developing a plan for the distribution of the vaccines.⁶⁵

In addition to millions of cases and hundreds of thousands of deaths at the hands of COVID-19, another public health crisis was emerging right alongside the pandemic: the mental health of many Americans was plummeting. The CDC website explains:

The [COVID-19] pandemic may be stressful for people. Fear and anxiety about a new disease and what could happen can be overwhelming and cause strong

⁶¹ *Id.*

⁶² Vineet M. Arora, Shikha Jain, Megan L. Ranney, & Helen Burstin, *The Case for a National Universal Masking Mandate*, HEALTH AFFAIRS (Aug. 5, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200804.515241/full/>.

⁶³ Kaia Hubbard, *These States Have COVID-19 Mask Mandates*, U.S. NEWS (Dec. 2, 2020), <https://www.usnews.com/news/best-states/articles/these-are-the-states-with-mask-mandates>.

⁶⁴ *CDC Covid Data Tracker*, CDC, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last visited Jan. 6, 2021).

⁶⁵ Derrick Bryson Taylor, *supra* note 39.

emotions in adults and children. Public health actions, such as social distancing, can make people feel isolated and lonely and can increase stress and anxiety. However, these actions are necessary to reduce the spread of COVID-19.⁶⁶

Pair these feelings of loneliness and isolation with widespread job loss and general feelings of hopelessness, and a new kind of dangerous cocktail is created. In April 2020—only three months after the first case in the United States—“[a] federal emergency hotline for people in emotional distress registered a more than 1,000 percent increase” compared to April 2019.⁶⁷ The nonprofit organization Mental Health America reported in its 2021 report on the state of mental health in America that 2020 saw a huge increase in the number of individuals seeking mental health treatment, with young people struggling the most.⁶⁸ A CDC study revealed that following continued lockdowns and school closures, there was a 31% increase in mental health-related emergency room visits for children between the ages of 12 and 17.⁶⁹

Despite its efforts, the United States ended 2020 with a record-setting December⁷⁰ and entered 2021 with a COVID-19 death toll of over 350,000.⁷¹ These numbers beg the question: What is America doing wrong? And where do we go from here?

⁶⁶ *Coping with Stress*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/managing-stress-anxiety.html> (last updated Dec. 11, 2020).

⁶⁷ William Wan, *The Coronavirus Pandemic is Pushing America into a Mental Health Crisis*, THE WASHINGTON POST (May 4, 2020), <https://www.washingtonpost.com/health/2020/05/04/mental-health-coronavirus/>.

⁶⁸ *COVID-19 and Mental Health: A Growing Crisis*, MENTAL HEALTH AMERICA 2, <https://mhanational.org/sites/default/files/Spotlight%202021%20-%20COVID-19%20and%20Mental%20Health.pdf> (last visited Jan. 8, 2021).

⁶⁹ Derrick Bryson Taylor, *supra* note 39; Rebecca T, Leeb et al., *Mental Health–Related Emergency Department Visits Among Children Aged <18 Years During the COVID-19 Pandemic – United States, January 1–October 17, 2020*, CDC (Nov. 13, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6945a3.htm?s_cid=mm6945a3_w.

⁷⁰ Talal Ansari, *Year Ends with Record-Breaking Month in U.S. for Covid-19*, WALL STREET JOURNAL, <https://www.wsj.com/articles/year-ends-with-record-breaking-month-in-u-s-for-covid-19-11609452047?page=1> (last updated Jan. 1, 2021).

⁷¹ *What to Know*, WALL STREET JOURNAL, <https://www.wsj.com/livecoverage/covid-2021-01-01> (last visited Jan. 8, 2021).

III. ANALYSIS

A. *Alcohol Misuse and a Viral Pandemic: How Different Are They, Really?*

Before speculating how the history of alcohol regulation in the United States might be applied to the COVID-19 pandemic, it is important to analogize and distinguish between these two types of public health crises.

In the United States, more than 95,000 deaths per year are attributable to excessive alcohol use.⁷² The CDC reports: “These deaths shorten the lives of those who die by an average of almost 29 years, for a total of 2.8 million years of potential life lost. [Excessive alcohol use] is a leading cause of preventable death in the United States.”⁷³ Indeed, as mentioned above, one of the driving forces behind Prohibition was the desire to eliminate these societal problems and improve the overall health and wellness of America.

A paper published by the NIH identifies three different components that work together to create alcohol-related problems: the alcohol itself, the traits or characteristics of the person consuming the alcohol, and the environment—“the physical, interpersonal, or social milieu surrounding the use of alcohol that either regulates the individual’s exposure to the [alcohol] or mediates the risk that the [alcohol] poses to the individual.”⁷⁴ Another study published by the NIH

⁷² *Alcohol and Public Health*, CDC, <https://www.cdc.gov/alcohol/index.htm> (last visited Jan. 8, 2021).

⁷³ *Deaths from Excessive Alcohol Abuse in the U.S.*, CDC, <https://www.cdc.gov/alcohol/features/excessive-alcohol-deaths.html> (last updated Oct. 1, 2020). The CDC explains further: “More than half of alcohol-attributable deaths are due to health effects from drinking too much over time, such as various types of cancer, liver disease, and heart disease. However, short-term health effects from consuming a large amount of alcohol in a short period of time accounted for most of the years of potential life lost, such as deaths due to poisonings that involved another substance in addition to alcohol (e.g., drug overdoses), suicide, and motor vehicle crashes.” *Id.*

⁷⁴ *A Public Health Perspective on the Prevention of Alcohol Problems*, NAT’L CTR. FOR BIOTECHNOLOGY INFO., <https://www.ncbi.nlm.nih.gov/books/NBK235306/> (last visited Jan. 8, 2021). The paper explains that this third component—the environment—encompasses the legal

studied 781 Michigan drinkers and their reasons for drinking, identifying the two prevailing explanations for drinking as (1) coping with stress and (2) social reasons.⁷⁵ Regarding how these motivations affected the amount of alcohol consumed, the study found:

[T]he interaction between personal motives for drinking alcohol and circumstances relevant to those motives significantly predicted alcohol consumption. People who reported drinking alcohol as a means of coping with stress consumed more alcohol when experiencing stress. People who reported drinking alcohol to be sociable drank more alcohol when their friends frequently consumed alcohol at the social gatherings they attended together. These findings demonstrate the importance of simultaneously considering personal motives for drinking alcohol and the extent to which individuals' life circumstances correspond to these motives for drinking.⁷⁶

The biggest issue with alcohol is that so many people desire to consume it—whether that be to cope with stress or to be more sociable—but are unable or unwilling to do so responsibly, due to their individual characteristics and/or their environment. However, the pandemic differs in that the biggest issue with COVID-19 is one step removed from the contagion itself. Aside from a few college students in Alabama,⁷⁷ Americans do not want to contract COVID-19. Rather, they desire to continue their way of life, which unfortunately includes activities that exponentially increase their likelihood of contracting the virus. This is evident by the post-Thanksgiving surge of cases, attributed to holiday travel and gatherings, despite repeated urges on the part of public health officials to avoid such activities.⁷⁸ These people did not want to contract the virus—they

environment, including “alcoholic beverage control [ABC] laws, laws regarding driving under the influence of alcohol, minimum purchase age laws, zoning.” *Id.*

⁷⁵ Antonia Abbey, Mare Jo Smith, & Richard O. Scott, *The Relationship Between Reasons for Drinking Alcohol and Alcohol Consumption: An Interactional Approach*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (Dec. 1993), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4493891/>.

⁷⁶ *Id.*

⁷⁷ Bill Hutchinson, *Alabama Students Throwing 'COVID Parties' to See Who Gets Infected*, ABC NEWS (July 1, 2020), <https://abcnews.go.com/US/alabama-students-throwing-covid-parties-infected-officials/story?id=71552514>.

⁷⁸ *Epidemiologists Urge a Cautious Christmas, After Thanksgiving Surge in Some States*, NPR (Dec. 21, 2020), <https://www.npr.org/sections/health->

wanted to see their families and ignore the fact that things are crashing and burning around them. As one medical professional has explained this behavior among many Americans, “Some people are trying to retain a feeling of control by ignoring or defying stay-at-home orders. Other people are oppositional in nature and routinely defy authority. Many more are in denial, especially if they aren’t in hardest-hit areas, aren’t in high-risk groups and/or don’t know anyone with the virus.”⁷⁹

Many saw Prohibition as an encroachment on the personal freedoms Americans hold so dear.⁸⁰ An activity that was once legal was suddenly criminalized across the board with very limited exceptions.⁸¹ People found it difficult to change their mindset and get on board with what many felt was an arbitrary rule, so they broke the laws instead.⁸² After all, drinking alcohol was not akin to murder, theft, or other crimes. In the same vein, COVID-19 policy threatens those very closely guarded ideals of personal freedom that Americans value. Innocent activities such as visiting loved ones, attending a wedding, or going to the grocery store suddenly became viewed as immoral and irresponsible, and that switch has been hard for many Americans to grapple with. To have the government step into people’s personal lives—going so far as to tell them which people and how many of them are allowed into their own homes, what activities they can and cannot attend, and that they must cover their faces in public—feels like a deep violation for so many people. In this way, alcohol regulation and COVID-19 regulation really are not all that

shots/2020/12/21/948809129/epidemiologists-urge-a-cautious-christmas-after-thanksgiving-surge-in-some-state.

⁷⁹ Brianna Wiest, *The Psychological Reason Some People Aren’t Following COVID-19 Quarantine Orders*, FORBES (Apr. 8, 2020), <https://www.forbes.com/sites/briannawiest/2020/04/08/the-psychological-reason-why-some-people-arent-following-covid-19-quarantine-orders/?sh=452ef5a36905>.

⁸⁰ Claire White, *Temperance vs. Individual Liberty*, THE MOB MUSEUM (July 13, 2018), <https://themobmuseum.org/blog/temperance-vs-individual-liberty/>.

⁸¹ *Id.*

⁸² *Id.*

different. The laws must find a way to tackle the public health crisis head-on without offending Americans to the point that their motivation to comply is crowded out.

B. Don't Reinvent the Wheel: Can Past or Present Alcohol Policy be Applied to COVID-19 Regulation?

Looking back and analyzing what went wrong and how the United States could have stifled the pandemic from the beginning is tempting. However, a forward-looking approach is necessary to determine where to go from here. America's immediate COVID-19 goals are clear: slow the spread until we can achieve herd immunity.

1. The Problem with a Prohibition-Like Approach

At the root, the problem with Prohibition was that it was results-focused. We wanted Americans to stop drinking, so we made it illegal. We forced their hands. If we learned anything from Prohibition, it is that people act in their own self-interest and will ultimately do what they want. With lackluster enforcement in many areas, people did not have much to lose by continuing to drink alcohol.

We cannot forget that Prohibition was a *Constitutional amendment*. The Constitution was literally edited to give the federal government the power to regulate alcohol consumption across the board. Outside of the 18th Amendment, the federal government would have had no legal authority to do that. Many Americans disgruntled about the way the COVID-19 pandemic has been handled thus far have called for a national mask mandate, in which the federal government would require every citizen to wear a mask in certain situations.⁸³ However, the federal government likely does not have such authority.

⁸³ Vineet M. Arora et al., *supra* note 62.

While the federal government does have the authority to regulate actions on federal property and in federal facilities, the Commerce Clause limits the federal government’s ability to regulate Americans’ actions elsewhere to situations that affect interstate commerce.⁸⁴ The Public Health Service Act does contain a provision that would allow the Secretary of Health and Human Services to issue regulations “to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.”⁸⁵ However, scholars have opined: “[T]he statute would have to be read very broadly to give the President the authority to require, for example, people to wear a mask while walking outside or traveling on an interstate highway within the confines of their state. . . . Once you go beyond people in federal facilities, you’re really intruding on what the [States are] responsible for.”⁸⁶ In addition, even if the federal government was able to enact a law requiring nationwide mask wearing, Prohibition taught us that such a law is meaningless if not enforced by the States and localities.

Further, just as Prohibition inadvertently gave rise to the creation of speakeasies, where people gathered to illicitly consume alcohol, forbidding certain activities only encourages Americans to be more creative. One example of such creativity is the formation of “learning pods” (also called “pandemic pods” or “micro-schools”) amid widespread school closures. When many schools closed their doors and sent students home to complete their work online, some families got together to hire a teacher or tutor to essentially hold a miniature school for their children.⁸⁷

⁸⁴ Tara Subramaniam, *Fact Check: Can the President Enact a Nationwide Mask Mandate?*, CNN (Nov. 1, 2020), <https://www.cnn.com/2020/11/01/politics/mask-mandate-fact-check/index.html>.

⁸⁵ *Id.*; 42 U.S.C. ch. 6A, §§ 201-291n.

⁸⁶ Tara Subramaniam, *supra* note 84.

⁸⁷ Jim Sergent, *Learning Pods Help Kids Bridge Social Divide*, USA TODAY (Sept. 22, 2020), <https://www.usatoday.com/in-depth/news/2020/09/10/learning-pods-what-they-and-how-set-one-up/3435956001/>.

While these pods typically bring together a smaller number of people than a traditional schoolroom, multiple households are still mixing amid recommendations not to. Further, low-income families often do not have the resources to place their children in a learning pod⁸⁸—the same way low-income families were unable to get alcohol during Prohibition, while wealthier Americans saw no real change in their day-to-day lives. While these school closures were State and local—not national—decisions, this evidence still sheds lights on some of the issues with modeling COVID-19 regulation after Prohibition.

2. Leave it to the States, But Give Them a “Nudge”

Since the repeal of Prohibition, the States have been free to experiment with their own laws and efforts to curb harmful drinking. One way some states have done this is by applying principles of behavioral economics, seeking to curb people’s desire to drink as opposed to telling them they cannot drink. In their 2009 book *Nudge: Improving Decisions About Health, Wealth, and Happiness*, Richard Thaler and Cass Sunstein consider alcohol abuse among college students and attribute it in part to a behavioral economic theory called the availability heuristic.⁸⁹ When falling prey to availability bias, people “assess the likelihood of risks by asking how readily examples come to mind.”⁹⁰ Thaler and Sunstein explain that “[c]ollege students are influenced by their beliefs about what other college students do, and hence alcohol abuse will inevitably increase if students have an exaggerated sense of how much other students are drinking.”⁹¹ They highlight a

⁸⁸ Wyatte Grantham-Philips, *As School Starts Online, Parents Need to Study up on ‘Pandemic Pods’ – and What They Mean for Equity*, USA TODAY (July 26, 2020), <https://www.usatoday.com/story/news/education/2020/07/26/pandemic-pods-childcare-homeschool-school-inequality/5485353002/>.

⁸⁹ Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* 68 (2009).

⁹⁰ *Id.* at 24-25.

⁹¹ *Id.* at 68-69.

Montana educational campaign that underscores the fact that a large majority of Montana citizens do not drink alcohol, and over 80% of Montana college students have four or fewer alcoholic drinks per week.⁹²

Rather than outright banning alcohol or advising people not to drink, Montana has attempted to “nudge” its citizens by informing them of the actual numbers that ultimately play a role in their decision whether or not and how much alcohol to consume. The availability bias is present in the COVID-19 pandemic as well. In October 2020, a cognitive psychologist explained: “To know someone who has died, statistically speaking you would have to know around 1,500 people. Most people don’t have that large of a social circle. So people are underestimating the chances of being exposed to the virus.”⁹³ An approach similar to Montana’s alcohol education campaign could prove successful in nudging Americans to comply with public health recommendations during the pandemic. Montana is yet another example of what we have learned through our nation’s experience with alcohol regulation: the States and localities often come up with more tailored and creative solutions for their own people, and they can adapt more quickly than the federal government when it comes to enacting laws and regulations.

With the repeal of the 18th Amendment, the federal government still maintained the ability to use federal funding and tax incentives to encourage (but not force) States to enact certain laws. Just as States and localities can nudge their citizens, so too can the federal government nudge the States. As discussed above, these federal funding and tax incentives have proven successful, evidenced by the Federal Uniform Drinking Age Act of 1984. The federal government could take

⁹² *Id.* at 69.

⁹³ Carolyn Johnson, *How Cognitive Biases & Heuristics Can Perpetuate COVID Denial*, UX COLLECTIVE (Oct. 22, 2020), <https://uxdesign.cc/how-cognitive-biases-heuristics-can-encourage-covid-denial-cd806fd167ff>.

the same approach with COVID-19 regulation. For example, “states that mandate masks could receive financial incentives to promote masking policy and messaging to encourage mask wearing.”⁹⁴ As States likely have a greater interest in enforcing their own laws, nudging states rather than forcing their hands will likely prove to be a more effective solution to the COVID-19 problem, as it has been for controlling alcohol use among Americans.

IV. CONCLUSION

While the COVID-19 pandemic is certainly unprecedented in the United States, we do not have to reinvent the wheel when it comes to COVID-19 regulation. As we have learned from this country’s alcohol history, State regulation often proves more effective and more adaptable, and leaving such decisions up to the States and their localities does not mean the federal government keeps its nose out completely. Just as the federal government continues to nudge alcohol control in the United States, so too can it nudge compliance with COVID-19 recommendations from public health officials. While this approach may not be the panacea many Americans are looking for, it could carry the United States through to see the end of this pandemic—at which point we will all undoubtedly raise our glasses.

⁹⁴ Vineet M. Arora et al., *supra* note 62.