

**BEVERAGES AND BALANCE:
LESSONS IN ALCOHOL POLICY AS
APPLIED TO THE COVID-19 PANDEMIC**

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INTRODUCTION

On the eve of the end of Prohibition, President Franklin D. Roosevelt addressed the nation.¹ Roosevelt urged the American people not to abuse the imminent “return of individual freedom,”² expressing his “trust in the good sense of the American people”³ to avoid excessive alcohol consumption “to the detriment of health, morals, and social integrity.”⁴ However, President Roosevelt and the American government did not merely rely on trust.⁵

Rather, the Twenty-First Amendment, in repealing the Eighteenth Amendment, shaped a framework of state-based control over the future of United States alcohol policy.⁶ Today, that framework informs key legal and policy decisions related to alcohol regulation—essentially supplementing the “trust” President Roosevelt placed in the American people.⁷ In 1920, the year that Prohibition began, alcohol was considered by many to be a “moral evil.”⁸ Now, a century later, a new threat has emerged: the novel coronavirus.⁹ Though coronavirus poses more than just a “moral” concern, it is nonetheless a major point of political contention afflicting the American people, much like alcohol in the early Twentieth Century.¹⁰

This Essay argues that federal and state governments should draw upon lessons learned from American alcohol policy to develop more effective public health policies in response to the

¹ Christopher Klein, *The Night Prohibition Ended*, HISTORY (Dec. 5, 2013), <https://www.history.com/news/the-night-prohibition-ended>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See U.S. CONST. amend. XXI.

⁶ *Id.*

⁷ Klein, *supra* note 1.

⁸ Dominic Sandbrook, *How Prohibition Backfired and Gave America an Era of Gangsters and Speakeasies*, THE GUARDIAN (Aug. 25, 2012), <https://www.theguardian.com/film/2012/aug/26/lawless-prohibition-gangsters-speakeasies>.

⁹ Sui-Lee Wee & Donald G. McNeil Jr., *China Identifies New Virus Causing Pneumonialike Illness*, N.Y. TIMES (Jan. 8, 2020), <https://www.nytimes.com/2020/01/08/health/china-pneumonia-outbreak-virus.html>.

¹⁰ See generally Tanya Lewis, *Eight Persistent COVID-19 Myths and Why People Believe Them*, SCIENTIFIC AMERICAN (Oct. 12, 2020), <https://www.scientificamerican.com/article/eight-persistent-covid-19-myths-and-why-people-believe-them/>.

COVID-19 pandemic. Part I describes the history of alcohol policy in this country, from the rise and fall of Prohibition to the ratification of the Twenty-First Amendment and its resulting state-based alcohol policy.¹¹ Part II details the inception of the COVID-19 pandemic, and observes the ways in which federal and state governments have attempted to slow the spread of the disease.¹² Part III examines the effectiveness of government measures thus far, and suggests a more effective strategy for mitigating COVID-19 concerns based on existing American alcohol policy.¹³ Ultimately, Part III explores the constitutional underpinnings of government actions regarding COVID-19 at the state and federal level, and draws comparisons to alcohol policy in an attempt to satisfy competing interests and achieve a balanced outcome.¹⁴

I. HISTORY OF ALCOHOL REGULATION IN THE UNITED STATES

Over the years, policymakers have grappled with how to effectively regulate alcohol consumption in the United States. Both extremes—pure *laissez-faire* treatment of alcohol and complete prohibition of alcohol—have proven to be unsuccessful in practice. Not only must policymakers work to achieve balance between these competing extremes, but they must also consider the proper division of rights and responsibilities between state and federal governments in enacting alcohol-related regulations.¹⁵

A. Prohibition Through the Eighteenth Amendment

Alcohol has been a permanent fixture in American culture and society from the very start.¹⁶ For better or worse, many view alcohol as interwoven into the very fabric of the nation.¹⁷

¹¹ See *infra* Part I.

¹² See *infra* Part II.

¹³ See *infra* Part III.

¹⁴ *Id.*

¹⁵ See U.S. CONST. amend. XXI; see also U.S. CONST. amend. X.

¹⁶ STEVE OLSON AND DEAN R. GERSTEIN, ALCOHOL IN AMERICA: TAKING ACTION TO PREVENT ABUSE (1985).

¹⁷ *Id.*

Prior to the American Revolution, heavy drinking was viewed as common and acceptable.¹⁸ In fact, colonists from Europe held alcohol in such high regard that they lauded its “restorative powers” as a “natural blessing.”¹⁹ While colonists frequently imbibed alcohol at suppers, fairs, and other social events,²⁰ as well as relied heavily on its tax revenue to support their communities,²¹ they fiercely disapproved of drunkenness.²² In the eyes of early Americans, overt drunkenness reflected a personal failing for which the individual was responsible.²³ In the years after the revolution, such a morally-based view of alcohol would, for many, warp into a total rejection of the intoxicant in American society.²⁴

In the mid-nineteenth century, the American Temperance Society and Women’s Christian Temperance League advocated for the “dry movement”—a call for a total ban on alcohol in the United States.²⁵ Congress, undoubtedly influenced by the rallying cries of the Temperance movement, passed a resolution in 1917 calling for a new constitutional amendment which would prohibit alcohol across the country.²⁶ The Temperance movement continued to gain traction, eventually leading to the ratification of the Eighteenth Amendment on January 16, 1919.²⁷

Proponents of Prohibition argued that a complete ban on alcohol would “reduce crime and corruption, solve social problems, reduce the tax burden created by prisons and poorhouses, and improve health and hygiene in America.”²⁸ Such benefits, proponents asserted, would be

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Hilary Parkinson, *Prohibition and the Rise of the American Gangster*, NATIONAL ARCHIVES (Jan. 17, 2012), <https://prologue.blogs.archives.gov/2012/01/17/prohibition-and-the-rise-of-the-american-gangster/>.

²⁶ *Id.*

²⁷ U.S. CONST. amend. XVIII.

²⁸ Mark Thornton, *Alcohol Prohibition Was a Failure*, CATO INSTITUTE (July 17, 1991), <https://www.cato.org/publications/policy-analysis/alcohol-prohibition-was-failure>.

achieved through “reducing the quantity of alcohol consumed” by individuals.²⁹ While decreased alcohol consumption might have very well resulted in such societal benefits, one material issue remained: Prohibition did not decrease alcohol consumption.³⁰ In fact, Prohibition did not prohibit personal alcohol consumption at all;³¹ rather, it blocked alcohol sale, manufacture, and production.³²

Prohibition was enforced via the National Prohibition Act, known more commonly as the Volstead Act.³³ The act aimed to prevent the sale, manufacture, and importation—though not the consumption—of alcohol.³⁴ While Prohibition was characterized as a federal mandate, the Volstead Act vested “concurrent power” in Congress and the states to enforce the Eighteenth Amendment.³⁵ And though the Volstead Act proposed broad enforcement mechanisms, it was markedly confusing as to what it actually intended to enforce.³⁶ Under the Act, it was legal to “buy intoxicating liquor on a bona fide medical prescription of a doctor,”³⁷ “keep liquor in any storage area”³⁸ for the exclusive use of family and guests, and “get a permit to move liquor when you change your residence.”³⁹ Conversely, it was illegal to “give or receive a bottle of liquor as a gift”⁴⁰ or “display liquor signs or advertisements on your premises.”⁴¹ The provisions of the Volstead Act gave rise to many questions regarding the precise meaning of certain language like

²⁹ *Id.*

³⁰ *Id.*

³¹ U.S. CONST. amend. XVIII.

³² *Id.*

³³ David J. Hanson, *Volstead Act (National Prohibition Act of 1919)*, ALCOHOL PROBLEMS AND SOLUTIONS (last accessed Jan. 6, 2021), <https://www.alcoholproblemsandsolutions.org/volstead-act-national-prohibition-act-of-1919/>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

“bona fide,” “residence,” and “gift.”⁴² A broad enforcement mechanism proved useless when the actual behavior to be enforced was unclear.

Notably, the strict—and often confusing—mandate of Prohibition resulted in an unregulated alcohol industry in which both production and consumption continued to occur at alarming rates.⁴³ While alcohol consumption initially decreased at the onset of Prohibition,⁴⁴ it increased rapidly throughout the years,⁴⁵ sustained by homemade moonshine and underground speakeasies.⁴⁶ By enacting Prohibition, the American government inexorably preempted itself from regulating the contents of alcohol products.⁴⁷ As such, people began to create and consume unhealthy and dangerous concoctions behind closed doors.⁴⁸ The unmitigated health risks to the American people were devastating: while some people drank “milder” substances like cough medicines with alcohol content,⁴⁹ others imbibed themselves with bootleg beverages developed with pure industrial alcohol and antifreeze.⁵⁰ During this time, some federal officials even poisoned “reputable” alcohol products as a means of scaring off consumers from drinking.⁵¹ In fact, an estimated 10,000 people died during the Prohibition era as a result of consuming toxic

⁴² *Id.*

⁴³ Thornton, *supra* note 28.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Megan Gambino, *During Prohibition, Your Doctor Could Write You a Prescription for Booze*, SMITHSONIAN MAGAZINE (Oct. 7, 2013), <https://www.smithsonianmag.com/history/during-prohibition-your-doctor-could-write-you-prescription-booze-180947940/>.

⁵⁰ Katie Serena, *10,000 People Died Because the Government Poisoned Alcohol During Prohibition*, ATI (Dec. 20, 2017), <https://allthatsinteresting.com/prohibition-government-poisoning>.

⁵¹ Deborah Blum, *The Chemist’s War: The Little-Told Story of How the U.S. Government Poisoned Alcohol During Prohibition with Deadly Consequences*, SLATE (Feb. 19, 2010), <https://slate.com/technology/2010/02/the-little-told-story-of-how-the-u-s-government-poisoned-alcohol-during-prohibition.html>.

beverages.⁵² Those who did not die often faced life-long consequences, like permanent paralysis as a result of drinking homemade “Jamaica Gin.”⁵³

Prohibition also prompted the development of unregulated drinking establishments, which, in turn, often became hotbeds for violent crime.⁵⁴ Just five years into Prohibition, an estimated 30,000 to 100,000 speakeasy clubs were opened in New York City alone.⁵⁵ Speakeasy culture gave rise to organized crime as mob members engaged in “complex bootlegging operations” to supply liquor and beer to the underground drinking establishments.⁵⁶ As the number of speakeasies increased during the Prohibition era, so too did the number of homicides, burglaries, and assaults.⁵⁷ Out of the view of law enforcement, criminals often evaded capture and cycles of violent crime persisted, all while patrons continued to drink smuggled liquor behind closed doors.⁵⁸

Ultimately, in its final years, many Americans demanded the repeal of Prohibition—not because they were desperate to begin drinking again, but because the law, which essentially mandated total abstinence from alcohol, was ineffective in achieving such a lofty goal.⁵⁹ While supporters of the Temperance movement once believed Prohibition would prevent the mental and physical health consequences of alcohol consumption,⁶⁰ it became clear that the “noble experiment” had the opposite effect on the overall health of the nation.⁶¹

⁵² Serena, *supra* note 50.

⁵³ John Parascandola, *The Jamaica Ginger Paralysis Episode of the 1930s*, 34 HERBALGRAM 28 (1995).

⁵⁴ See GUSTAVO VAZQUEZ-LOZANO & CHARLES RIVER EDITORS, *THE PROHIBITION ERA IN THE UNITED STATES: THE HISTORY AND LEGACY OF AMERICA’S BAN ON ALCOHOL AND ITS REPEAL* (2017).

⁵⁵ *Id.*

⁵⁶ Parkinson, *supra* note 25.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Thornton, *supra* note 28.

⁶⁰ See Vazquez-Lozano & Charles River Editors, *supra* note 54.

⁶¹ *Id.*

B. Progress through the Twenty-First Amendment

In 1933, the Twenty-First Amendment was ratified by the states,⁶² ending Prohibition by repealing the Eighteenth Amendment.⁶³ The new amendment empowered individual states to control and regulate the sale,⁶⁴ distribution,⁶⁵ and importation of alcohol within the state,⁶⁶ as well as enact statutes regarding who could legally possess alcohol within the state.⁶⁷ As such, the Twenty-First Amendment was instrumental in shifting the primary responsibility of regulation from the federal government to the states.⁶⁸

However, the federal government still retained some power over the regulation of alcohol.⁶⁹ While states reserved the primary means of policy control,⁷⁰ the federal government maintained the ability to encourage state participation in certain alcohol policies through federal funding and tax incentives.⁷¹ For example, a state could only receive designated federal funds if that state chose to adopt the federally-created alcohol policy at issue.⁷² Such incentives were utilized with regard to the National Minimum Drinking Age Act of 1984 (“NMDAA”),⁷³ which set the federal minimum legal drinking age at 21 years old.⁷⁴ If a state refused to opt into the policy, it would face a 10% cut to its federal highway funding.⁷⁵ While every state agreed to

⁶² U.S. CONST. amend. XXI

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ American Addiction Centers, *Alcohol Laws & Regulations*, ALCOHOL.ORG (Jan. 16, 2020), <https://www.alcohol.org/laws/>.

⁷⁰ U.S. CONST. amend. XXI

⁷¹ American Addiction Centers, *supra* note 69.

⁷² *Id.*

⁷³ National Minimum Drinking Age Act, P.L. 98-363 (1984).

⁷⁴ *Id.*

⁷⁵ Denali Tietjen, *Why 21? A Look at Our Nation's Drinking Age*, THE BOSTON GLOBE (July 17, 2014), <https://www.boston.com/culture/health/2014/07/17/why-21-a-look-at-our-nations-drinking-age>

comply with NMDAA,⁷⁶ some individual states, however, imposed conditions and exceptions on the federal mandate—such as allowing minors to consume alcohol in the home under parental supervision.⁷⁷

C. Influences on Modern Day Alcohol Policy

Modern alcohol policy recognizes the health risks that alcohol poses to consumers when overused or abused.⁷⁸ At the same time, it seeks balance by acknowledging the economic importance of a robust alcohol industry.⁷⁹ A primary concern underpinning alcohol policy considerations is the prevalence of binge drinking in the United States.⁸⁰ A study conducted in 2019 showed that 25.8% of American adults participated in binge drinking in the previous month,⁸¹ and that 6.3% participated in “heavy alcohol use”⁸² within the same timeframe.⁸³ In the same study, researchers found that 14.1 million Americans suffered from Alcohol Use Disorder,⁸⁴ which is characterized by an “impaired ability to stop or control alcohol use despite adverse social, occupational, or health consequences.”⁸⁵ Alcohol abuse, however, is not limited to the adult population.⁸⁶ An estimated 414,000 adolescents aged 12 to 17 have Alcohol Use Disorder.⁸⁷ Across age groups, approximately 95,000 Americans die annually from alcohol-related causes.⁸⁸

⁷⁶ *Id.*

⁷⁷ American Addiction Centers, *supra* note 69.

⁷⁸ National Institute on Alcohol Abuse and Alcoholism, *Alcohol Facts and Statistics*, (Oct. 1, 2020), <https://www.niaaa.nih.gov/publications/brochures-and-fact-sheets/alcohol-facts-and-statistics>

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* (defining heavy alcohol use as “binge drinking on five or more days in the past month”).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ National Institute on Alcohol Abuse and Alcoholism, *Alcohol Use Disorder*, (last accessed Jan. 6, 2021), <https://www.niaaa.nih.gov/alcohols-effects-health/alcohol-use-disorder>.

⁸⁶ National Institute on Alcohol Abuse and Alcoholism, *supra* note 78.

⁸⁷ *Id.*

⁸⁸ *Id.*

Alcohol misuse also poses health-related risks in conjunction with intoxicated driving.⁸⁹ In 2016, 10,497 people died in “alcohol-impaired driving crashes,”⁹⁰ accounting for 28% of driving-related deaths that year.⁹¹ 1,233 of those deaths occurred in children ages 14 and younger.⁹² While 1 million people were arrested that year for impaired driving,⁹³ a staggering 111 million people self-reported alcohol-impaired driving.⁹⁴ In response to such statistics, one advocacy group, Mothers Against Drunk Driving (“MADD”), has spent the last few decades lobbying for stronger DUI laws, as well as greater public awareness of existing laws regarding underaged drinking and impaired driving.⁹⁵ At the forefront of its mission, MADD focuses on mitigating the health and safety risks associated with alcohol misuse.⁹⁶

The aforementioned health risks of alcohol consumption also impose an economic burden on the country. In 2010, alcohol misuse cost the United States \$249 million,⁹⁷ three-quarters of which was attributed to costs related to binge drinking.⁹⁸ Modern policymakers, however, must weigh the societal costs of alcohol consumption—both health-related and economic—against the positive economic impact of the sale, distribution, and importation of alcohol products.⁹⁹ The year Prohibition ended, the United States government collected \$258 million in tax revenue from alcohol sales,¹⁰⁰ which helped fund Roosevelt’s New Deal programs in subsequent years.¹⁰¹ Tax

⁸⁹ Centers for Disease Control and Prevention, *Impaired Driving: Get the Facts* (last accessed Jan. 7, 2021), https://www.cdc.gov/transportationsafety/impaired_driving/impaired-driv_factsheet.html.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ American Addiction Centers, *Effectiveness of Mothers Against Drunk Driving*, ALCOHOL.ORG (March 30, 2020), <https://www.alcohol.org/teens/mothers-against-drunk-driving/>.

⁹⁶ Mothers Against Drunk Driving, *Our Story* (last accessed Jan. 8, 2021), <https://www.madd.org/about-us/our-story/>.

⁹⁷ National Institute on Alcohol Abuse and Alcoholism, *supra* note 78.

⁹⁸ *Id.*

⁹⁹ See *id.*

¹⁰⁰ Klein, *supra* note 1.

¹⁰¹ *Id.*

revenue from alcohol sales remains a powerful tool in funding important government initiatives.¹⁰² Nevertheless, because states are at the helm of decision-making, each state must assess its own needs and goals in regulating alcohol.¹⁰³ State policymakers must then weigh those goals against the potential negative impacts of excessive alcohol consumption. If done correctly, the result will be effective alcohol policy which takes into consideration all potential benefits and consequences.

II. COVID-19 AND MEASURES TAKEN BY THE GOVERNMENT THUS FAR

A. Inception of the Covid-19 Pandemic

In December 2019, researchers in China identified a new, SARS-like virus.¹⁰⁴ Initially, the researchers were optimistic about the impact of the virus—claiming that there was “no evidence” that it could spread from human to human.¹⁰⁵ However, such optimism was short-lived.¹⁰⁶ SARS-CoV-2, later labeled COVID-19,¹⁰⁷ began to spread quickly across China through clear human to human transmission.¹⁰⁸ On January 11, 2020, the Chinese state media reported the first death from the virus.¹⁰⁹ Within the same month, the World Health Organization declared a global health emergency,¹¹⁰ which, in turn, led to government-mandated lockdowns and travel

¹⁰² See Tax Policy Center, *State and Local Alcohol Tax Revenue*, URBAN INSTITUTE (Apr. 27, 2020), <https://www.taxpolicycenter.org/statistics/state-and-local-alcohol-tax-revenue>.

¹⁰³ See U.S. CONST. amend. XXI.

¹⁰⁴ Wee & McNeil Jr., *supra* note 9.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ World Health Organization, *Naming the Coronavirus Disease (COVID-19) and the Virus That Causes It*, WORLD HEALTH ORGANIZATION (last accessed Mar. 22, 2020), [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it).

¹⁰⁸ Derrick Bryson Taylor, *A Timeline of the Coronavirus*, N.Y. TIMES (Mar. 19, 2020), <https://www.nytimes.com/article/coronavirus-timeline.html>.

¹⁰⁹ *Id.*

¹¹⁰ Wee & McNeil Jr., *supra* note 9.

restrictions around the world.¹¹¹ Presently, the disease has spread to over 190 countries,¹¹² infecting over 47 million people and killing over 1.2 million.¹¹³

The first case of COVID-19 in the United States was confirmed on January 21, 2020 in Washington state.¹¹⁴ The patient, who had recently returned from Wuhan, China, was quarantined in an attempt to contain the virus in the United States—however, coronavirus continued to rapidly spread, extinguishing the already-bleak possibility of containment.¹¹⁵ Unlike countries like Taiwan and New Zealand, which swiftly enacted national lockdowns and mask mandates to cripple the disastrous impact of the coronavirus,¹¹⁶ the United States did not take an immediate centralized approach to addressing the problem.¹¹⁷ In fact, since President Trump disbanded the pandemic response units of both the National Security Council and Department of Homeland Security in 2018,¹¹⁸ the United States federal government found itself woefully unprepared to take a decisive approach against COVID-19.¹¹⁹ While the federal government took some initial steps, such as declaring a public health emergency on February 3, 2020,¹²⁰ and issuing a limited travel ban on March 13, 2020,¹²¹ the United States mostly left coronavirus

¹¹¹ Taylor, *supra* note 108.

¹¹² Center for Systems Science and Engineering, *Coronavirus COVID-19 Global Cases*, JOHNS HOPKINS UNIVERSITY (last accessed Nov. 4, 2020), <https://www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6>.

¹¹³ *Id.*; see also William Wan, Joel Achenbach, Carolyn Y. Johnson & Ben Guarino, *Coronavirus Will Radically Alter the U.S.*, WASH. POST (Mar. 19, 2020), <https://www.washingtonpost.com/health/2020/03/19/coronavirus-projections-us/> (predicting that at worst, the coronavirus may cause 1.1 million deaths in the United States).

¹¹⁴ Center for Systems Science and Engineering, *supra* note 112.

¹¹⁵ *Id.*

¹¹⁶ See Anna Jones, *How did New Zealand Become Covid-19 Free?*, BBC NEWS (July 9, 2020), <https://www.bbc.com/news/world-asia-53274085>; see also Paula Hancocks, *Taiwan Led the World in Closing Down for Covid-19, Now it Wants to do the Same With Opening Back Up*, CNN TRAVEL (Sept. 22, 2020), <https://www.cnn.com/2020/09/21/asia/taiwan-model-coronavirus-hnk-intl/index.html>.

¹¹⁷ Terence Kealey, *The COVID Vaccine Trials & the Role of Government in Public Health*, CATO INSTITUTE (Nov. 18, 2020), <https://www.cato.org/publications/commentary/covid-vaccine-trials-role-government-public-health>

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ AJMC Staff, *A Timeline of COVID-19 Developments in 2020*, AJMC (Jan. 1, 2021), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020>.

¹²¹ *Id.*

restrictions at the discretion of state governments.¹²² The question remains, however, whether such a method of state control can adequately and effectively address the impacts of the COVID-19 pandemic, and further, whether the actions of individual states strike a fair balance between health-related concerns and economic impacts.

B. Existing COVID-19 Policy

For the most part, individual states have taken charge of COVID-19-related public health policy, with varying levels of success. Some states have been highly restrictive in their COVID-19 protocols, enacting large-scale lockdowns with few exceptions.¹²³ Conversely, other states have largely ignored the impact of COVID-19 and have refused to enact many restrictions at all, citing the economic health of the state as a reason to remain open.¹²⁴ As the United States nears the first anniversary of COVID-19's arrival, it has become apparent that extreme approaches on both sides pose substantial drawbacks. As states wrestle with the ongoing issue, alcohol policy may suggest a more balanced approach to effectuating positive public health impacts.

One state which commentators have criticized as too restrictive in response to COVID-19 is California. As scientists developed a greater understanding of the severity and communicability of COVID-19, Governor Gavin Newsom was the first to issue a statewide lockdown in March 2020.¹²⁵ Despite strict restrictions from the start, COVID-19 cases continued to rise in California, resulting in renewed lockdown efforts.¹²⁶ Many locally-owned restaurants,

¹²² *Id.*

¹²³ See Barbara Feder Ostrov, *Now for Some Good News: California Praised for Recent Handling of Pandemic*, CAL MATTERS (Oct. 23, 2020), <https://calmatters.org/health/2020/10/california-praised-recent-handling-pandemic/>.

¹²⁴ See Arian Campo-Flores, *As Covid-19 Surges, Florida Sticks to No Statewide Restrictions*, THE WALL STREET JOURNAL (Nov. 17, 2020), <https://www.wsj.com/articles/as-covid-19-surges-florida-sticks-to-no-statewide-restrictions-1160562542>.

¹²⁵ Ostrov, *supra* note 123.

¹²⁶ Gabrielle Canon, *'People are Desperate': California Shutdown Pushes Businesses to Breaking Point*, THE GUARDIAN (Dec. 14, 2020), <https://www.theguardian.com/us-news/2020/dec/14/people-are-desperate-california-shutdown-pushes-businesses-to-breaking-point>.

deemed “nonessential” by state government orders, were required to shut down indefinitely—forcing thousands entirely out of business.¹²⁷ Although California has continued to pursue strict public health policies, it now has one of the highest coronavirus infection rates per capita in the nation.¹²⁸ In states with strict restrictions, there is a trade-off: such tactics, if enforced properly, may slow the spread of COVID-19, but do so at the expense of the survival of local businesses and the livelihoods of unemployed individuals.¹²⁹

The pendulum swings in the other direction for states like Florida and North Dakota, which many have cited as too lax in the face of COVID-19 concerns. In late December 2020, North Dakota Governor Doug Burgum lifted the curfew on the state’s bars¹³⁰—which have already been open in some capacity since late April 2020.¹³¹ In Florida, Governor Ron DeSantis’s lackadaisical approach to COVID-19—including opening bars, restaurants, and theaters, and amusement parks with no statewide restrictions¹³²—contributed to a 60% increase in hospitalizations in July 2020 and a rate of positive cases more than double that of California.¹³³ Notably, states perceived as too strict—such as California—and states criticized for their *laissez-faire* approach to COVID-19—such as Florida—both continue to experience worsening conditions.

¹²⁷ Rachel Schnalzer, *COVID-19 Devastated California’s Small Businesses. Here are Three that Didn’t Survive*, L.A. TIMES (Oct. 29, 2020), <https://www.latimes.com/business/story/2020-10-29/coronavirus-pandemic-small-business-southern-california>.

¹²⁸ Denise Chow & Joe Murphy, *These Three States Have the Worst Covid Infection Rates of Anywhere in the World*, NBC NEWS (Jan 5, 2021), <https://www.nbcnews.com/science/science-news/these-three-states-have-worst-covid-infection-rates-anywhere-world-n1252861>

¹²⁹ Schnalzer, *supra* note 126.

¹³⁰ Jeremy Turley, *Gov. Burgum Lifts Curfew on North Dakota Bars and Restaurants, but Occupancy Limit Remains*, TWIN CITIES PIONEER PRESS (Dec. 21, 2020) <https://www.twincities.com/2020/12/21/gov-burgum-lifts-curfew-on-north-dakota-bars-restaurants-but-occupancy-limit-remains/>.

¹³¹ Paul Jurgens, *North Dakota Bars, Restaurants, Other Business to be Allowed to Open Friday*, KFGO (Apr. 27, 2020), <https://kfgo.com/2020/04/27/north-dakota-bars-restaurants-other-business-to-be-allowed-to-open-friday/>.

¹³² Arian Campo-Flores, *supra* note 124.

¹³³ German Lopez, *Florida Now Has More Covid-19 Cases Than Any Other State. Here’s What Went Wrong*, VOX (July 17, 2020), <https://www.vox.com/future-perfect/2020/7/17/21324398/florida-coronavirus-covid-cases-deaths-outbreak>.

III. ADDRESSING THE COVID-19 PANDEMIC THROUGH THE LENS OF ALCOHOL POLICY

Modern alcohol policy in the United States aims to offer solutions which strike a balance between health-related and economic factors. Over time, policymakers have found that a *laissez-faire* approach to alcohol policy—which results in unlimited profit for the alcohol industry at the expense of public health and welfare—is ineffective.¹³⁴ Similarly, a too-restrictive approach to alcohol policy stunts the economic and personal liberties of American citizens and corporations,¹³⁵ and is equally ineffective in achieving purported goals, as evidenced by the failure of Prohibition.¹³⁶ Much like alcohol, COVID-19 presents economic and health-related challenges which federal and state governments must grapple with. As such, lessons learned from the nation’s history of alcohol regulation should act as a guiding force in navigating the pandemic on a federal and state level.

A. State-Based Control with Limited Exceptions

The Tenth Amendment supports a balance of rights and responsibilities between federal and state governments, stating that all powers “not delegated to the United States” are “reserved to the states” instead.¹³⁷ Such a premise serves as the framework for federalism in the United States.¹³⁸ Under this theory, states are free to act as “laboratories for democracy,” in which they may experiment with different ways of solving problems and learn from one another to determine which solutions work best.¹³⁹ The model of federalism enacted by the Tenth Amendment has effectively allowed states to take a balanced approach to the production, sale, and consumption of intoxicating liquors.¹⁴⁰ Similarly, a state-based approach is likely the best

¹³⁴ Thornton, *supra* note 28.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ U.S. CONST. amend. X.

¹³⁸ *Id.*

¹³⁹ See *New State Ice Co. v. Liebmann*, 28 U.S. 262 (1932).

¹⁴⁰ See U.S. CONST. amend. X; see also U.S. CONST. amend. XXI.

method of addressing COVID-19. However, because the health risks associated with COVID-19 are greater than those associated with alcohol use, greater federal government involvement than is typical may be warranted.

While 95,000 Americans die annually from alcohol-related causes,¹⁴¹ over 361,000 Americans have died of COVID-19 in the past year alone, with death tolls rapidly rising each day.¹⁴² More than 21 million Americans have contracted COVID-19 in varying levels of severity.¹⁴³ Even if an infected individual recovers, the ongoing impacts of coronavirus can be severe and long-lasting.¹⁴⁴ For example, those who recover from coronavirus may face 20-30% decreased lung function for the duration of their lives.¹⁴⁵ Emerging studies indicate long-lasting organ damage in coronavirus survivors as evidenced by spots and patterns present in lung scans.¹⁴⁶ These figures still only indicate what is currently known about the disease—the true extent of the disease’s impacts may not yet be realized given the novelty of the viral strain.¹⁴⁷

Another notable difference between COVID-19 and alcohol consumption is the fact that the health risks of COVID-19 are highly communicable even across state lines—whereas most of the health risks associated with alcohol consumption only affect the individual who chooses to drink.¹⁴⁸ While alcohol misuse and abuse poses a significant health risk to the American people,

¹⁴¹ National Institute on Alcohol Abuse and Alcoholism, *supra* note 78.

¹⁴² Joe Pinsker, *4 Numbers That Make the Pandemic’s Massive Death Toll Sink In*, THE ATLANTIC (Jan. 5, 2021), <https://www.theatlantic.com/family/archive/2021/01/us-covid-19-death-toll/617544/>.

¹⁴³ *CDC COVID Data Tracker*, CDC (last accessed Jan. 8, 2021), https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days.

¹⁴⁴ Bill Bostock, *Those Who Recover From Coronavirus Can Be Left With Reduced Lung Function, Say Doctors*, SCIENCE ALERT (Mar. 14, 2020), <https://www.sciencealert.com/even-those-who-recover-from-corona-can-be-left-gasping-for-breath-afterwards>.

¹⁴⁵ *Id.* (while lung function can be improved with consistent cardiovascular activity, the ultimate impacts of coronavirus infection are still unknown at this time).

¹⁴⁶ *Id.*

¹⁴⁷ *See id.*

¹⁴⁸ National Institute on Alcohol Abuse and Alcoholism, *supra* note 78 (though an exception exists for sober individuals who are maimed or killed as the result of another’s drunk driving).

the health risk posed by COVID-19 rises to an unprecedented level.¹⁴⁹ As such, greater federal involvement in COVID-19 public health policy may be necessary, thus posing a challenge to the existing state-controlled model for addressing the disease.

B. Incentive-Based Federal Mandates

Implementing and enforcing COVID-19 public health policy comes at a major financial cost to governments.¹⁵⁰ Given the unexpected nature of the pandemic, many state governments were sorely unprepared to undertake new public health policy initiatives.¹⁵¹ One way to mitigate the cost of state-based coronavirus response policies is through the federal government offering increased federal funding to states in exchange for greater federal power. Under such a system, states retain primary control of public health policymaking while giving up some power to the federal government in exchange for financial resources.

There are several balanced mandates that the federal government could pursue if given greater policymaking power by the states. While a federally-mandated full national lockdown would likely be too extreme, given the United States' general policy of deferring to the states, a national mask mandate would likely be reasonable, as wearing a mask in public does not pose an undue burden on the economic or personal liberties of state residents.¹⁵² State governments might also defer power to the federal government for COVID-19 testing programs in exchange for financial incentives for state participation. When polled, 61% of Americans expressed the belief that the responsibility to test for COVID-19 should belong to the federal government rather than

¹⁴⁹ Pinsker, *supra* note 143.

¹⁵⁰ See Jim Sergent, Ledyard King, & Michael Collins, *4 Coronavirus Stimulus Packages. \$2.4 Trillion in Funding. See What That Means to the National Debt*, USA TODAY (May 8, 2020), <https://www.usatoday.com/in-depth/news/2020/05/08/national-debt-how-much-could-coronavirus-cost-america/3051559001/>.

¹⁵¹ See Mike Levine, *Governors Were Warned of a Pandemic Years Ago, Told to Stockpile. Why Didn't They Do More?*, ABC NEWS (Apr. 29, 2020), <https://abcnews.go.com/Politics/governors-warned-pandemic-years-ago-told-stockpile-didnt/story?id=70331277>.

¹⁵² Scot Lehigh, *On Freedom, Face Masks, and Government*, THE BOSTON GLOBE (May 7, 2020), <https://www.bostonglobe.com/2020/05/07/opinion/freedom-face-masks-government/>.

the states.¹⁵³ As such, the American people would likely embrace a framework where the federal government retained power over testing, supplemented by a state agreement to comply with such testing programs.¹⁵⁴

Similarly, states appear willing to give greater power to the federal government in regard to vaccine production and distribution.¹⁵⁵ So far, seven state governors have urged the federal government to start distributing coronavirus vaccine doses held by U.S. Department of Health and Human Services.¹⁵⁶ There is a general consensus that if the federal government foots the bill associated with producing and distributing the vaccine, state governments will develop programs and policies for administering it, thus maintaining an effective balance between the levels of government and taking tangible steps toward eradicating COVID-19.

Such a tradeoff would align closely with the Twenty-First Amendment's framework for balance between state and federal governments in regard to alcohol policy: the federal government may propose a policy attached to an incentive,¹⁵⁷ but a state need not be required to opt in¹⁵⁸—opting out simply means losing the available incentive.¹⁵⁹ Much like NMDAA establishing a federal minimum drinking age which every state opted into, if the federal government offered sufficiently lucrative financial incentives in exchange for more policymaking power, there is a high probability that every state would conform to the proposed

¹⁵³ Pew Research Center, *Most Americans Say Federal Government Has Primary Responsibility for COVID-19 Testing* (May 12, 2020), <https://www.pewresearch.org/politics/2020/05/12/most-americans-say-federal-government-has-primary-responsibility-for-covid-19-testing/>.

¹⁵⁴ *Id.*

¹⁵⁵ Mitchell Armentrout, *Pritzker to Feds: Break Loose with Reserve Coronavirus Vaccine Doses Now*, CHICAGO SUN TIMES (Jan. 7, 2021), <https://chicago.suntimes.com/coronavirus/2021/1/7/22219681/pritzker-vaccine-federal-government-shipment-doses-illinois-coronavirus>.

¹⁵⁶ *Id.*

¹⁵⁷ U.S. CONST. amend. XXI.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

federal policy.¹⁶⁰ Potentially attractive incentives include federal funding for state unemployment and hospital systems, both of which are severely overburdened across the country.¹⁶¹

C. Promoting Health Literacy

State governments should also promote health literacy in residents, using it as a tool against the further spread of COVID-19. Health education forms the basis of the “trust” that President Roosevelt vested in Americans¹⁶²—it empowers the people to make healthy, well-informed choices about risky behavior on an individual level—thus striking a balance between government intervention and personal liberty.¹⁶³ For example, alcohol education in the United States has grown rapidly in recent decades.¹⁶⁴ Now, many college campuses require students to participate in alcohol-education courses,¹⁶⁵ which, rather than promoting alcohol abstinence, aim to instill healthy drinking habits.¹⁶⁶ Researchers have found that alcohol education programs significantly reduce the risk of alcohol misuse in students who participated in such courses as compared to students who did not.¹⁶⁷

A major downfall of the country’s existing COVID-19 response—both federally and across the states—is a lack of clear educational programming as related to personal health and safety. Initially, many Americans were confused regarding the World Health Organization’s mask guidelines, which stated that masks were “insufficient” without the addition of other

¹⁶⁰ See generally National Minimum Drinking Age Act, *supra* note 73 (however, the pandemic is an uncertain and unprecedented occurrence, so it is impossible to know for sure if all states would opt in to such a policy).

¹⁶¹ See generally Robinson Meyer & Alexis C. Madrigal, *The U.S. Has Passed the Hospital Breaking Point*, THE ATLANTIC (Dec. 4, 2020), <https://www.theatlantic.com/health/archive/2020/12/the-worst-case-scenario-is-happening-hospitals-are-overwhelmed/617301/>.

¹⁶² Thornton, *supra* note 28.

¹⁶³ *Id.*

¹⁶⁴ Melissa H. Stigler, Emily Neusel, & Cheryl L. Perry, *School-Based Programs to Prevent and Reduce Alcohol Use Among Youth*, 34 ALCOHOL RESEARCH & HEALTH 157 (2011).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

protective measures.¹⁶⁸ While the guidelines meant that mask-wearing should be supplemented by hand washing and social distancing, many Americans took the opportunity to spread misinformation to the detriment of public health.¹⁶⁹ Relatedly, political vitriol and rampant conspiracy theories have divided the nation, leading many citizens to wrongly believe that COVID-19 tests are fraudulent and that vaccines are poisonous.¹⁷⁰ Governments must address these patently false beliefs with intensive, scientifically-backed education efforts, otherwise dissenting citizens will likely ignore any other meaningful protocols to slow the spread of COVID-19. Organizations like MADD, which aim to educate the American public about the dangers of intoxicated driving, may serve as a model for the creation of similar organizations focused on the public health risks COVID-19.¹⁷¹ Such organizations at the state level could engage in education and awareness campaigns for best practices to mitigate coronavirus health risks on a personal basis.

D. Enforcement

Enforcement of COVID-19 protocols can also be improved through lessons learned from American alcohol regulation. While Temperance supporters made strong theoretical arguments for the value of Prohibition,¹⁷² the mandate failed in a practical sense because of an inability to effectively enforce it.¹⁷³ Similarly, even balanced and calculated public health policies in response to COVID-19 will fail if not properly monitored and enforced.

¹⁶⁸ Aileen Lai-yam Chan, CC Leung, TH Lam, & KK Cheng, *To Wear or Not to Wear: WHO's Confusing Guidance on Masks in the Covid-19 Pandemic*, BMJ OPINION (March 11, 2020), <https://blogs.bmj.com/bmj/2020/03/11/whos-confusing-guidance-masks-covid-19-epidemic/>.

¹⁶⁹ *Id.*

¹⁷⁰ Lewis, *supra* note 10.

¹⁷¹ See Mothers Against Drunk Driving, *supra* note 96.

¹⁷² Jack S. Blocker, Jr., *Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation*, 96 AM. J. PUBLIC HEALTH 233 (2006).

¹⁷³ *Id.*

Commentators have equated the failure of Prohibition to the failure of excessive restrictions on tobacco, trading, abortion, and gambling.¹⁷⁴ Those commentators would likely argue that overly burdensome and controlling COVID-19 public health policy will inevitably result in similar failure. An important lesson imparted by Prohibition applies: an undesired action will not stop merely because it is illegal.¹⁷⁵

While states like California have attempted to limit the spread of COVID-19 through strict lockdowns, such lockdowns do not pass muster if state governments are unable to effectively enforce them.¹⁷⁶ The continuously increasing COVID-19 rates in the state indicate issues with enforcement mechanisms, similar in many ways to the increasing rates of alcohol production and consumption that went unchecked during Prohibition. In Chicago, Mayor Lori Lightfoot enacted a two-week mandatory quarantine for visitors arriving from designated states, prescribing fines of up to \$7,000 for non-compliance.¹⁷⁷ While promising in theory, there was no concrete mechanism for enforcing the city’s emergency travel order.¹⁷⁸ Officials stated that they would not track every traveler entering the city, instead opting to rely on individuals to “do the right thing” by complying.¹⁷⁹

While it is admirable for governments to instill trust in constituents to do the right thing, trust on its own is ineffective. Although Prohibition may have appeared effective on paper, its unenforceability gave rise to bootlegging operations and crime-ridden speakeasies.¹⁸⁰ Similarly, highly restrictive COVID-19 policies across the country—unsupported by clear methods of

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See Canon, *supra* note 126.

¹⁷⁷ NBC Chicago, *How Will Chicago Enforce New Quarantine Restriction for Travelers?*, (July 3, 2020), <https://www.nbcchicago.com/news/local/how-will-chicago-enforce-new-quarantine-restriction-for-travelers/2299530/>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Thornton, *supra* note 28.

enforcement—have resulted in individuals blatantly ignoring such policies. Consequences include secret gatherings in private homes linked to extraordinary rates of new coronavirus cases.¹⁸¹ Massive house parties being held in Chicago, Los Angeles, and Las Vegas are eerily reminiscent of the speakeasies of the Prohibition era—despite a total ban, gatherings continued to happen behind closed doors.¹⁸² At this point, complete eradication of the COVID-19 in the United States is unlikely. However, with the vaccine on the horizon, the need for harsh restrictions may soon dissipate.¹⁸³ In the meantime, states must develop balanced policies bolstered by effective enforcement mechanisms. Without strong enforcement mechanisms, even the strictest COVID-19 policies will fail to slow the spread of the disease.

CONCLUSION

When Prohibition was repealed in the United States, President Roosevelt expressed his trust in the American people to consume alcohol responsibly¹⁸⁴—however, such trust did not stand on its own.¹⁸⁵ Instead, it was backed by state-based alcohol regulation as prescribed by the Twenty-First Amendment.¹⁸⁶ Over the years, each state has taken a different approach to developing alcohol policy informed by state-specific objectives.¹⁸⁷ Every state, however, has informed its decisions on the basis on economic and health-related factors which impact

¹⁸¹ ABC7 Chicago, *2 More Chicago Parties Busted on Near North Side for COVID-19 Violations*, (Dec. 22, 2020), <https://abc7chicago.com/chicago-covid-parties-illegal-party-busted/8992088/>.

¹⁸² See *id.*, see also Gabrielle Canon, *Los Angeles Deputies Arrest 158 People in Raid on Underground House Party*, THE GUARDIAN (Dec. 8, 2020), <https://www.theguardian.com/us-news/2020/dec/08/los-angeles-underground-house-party-arrests-covid-19>; see also Sasha Loftis, *West Valley Neighborhood Fed Up With Illegal House Parties, Ask for More Action from Authorities*, 8NEWSNOW (Aug. 14, 2020), <https://www.8newsnow.com/news/local-news/west-valley-neighborhood-fed-up-with-illegal-house-parties-ask-for-more-action-from-authorities/>.

¹⁸³ See Korin Miller, *Here's When You Can Expect to Get the COVID-19 Vaccine, According to Doctors*, PREVENTION (Dec 30, 2020), <https://www.prevention.com/health/a34701430/covid-19-vaccine-distribution-release-date/>.

¹⁸⁴ Klein, *supra* note 1.

¹⁸⁵ See U.S. CONST. amend. XXI.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

residents. Relatedly, in developing alcohol policy, governments have sought a balance between federal and state powers and interests.¹⁸⁸

One hundred years after enacting Prohibition through the Eighteenth Amendment, the United States now faces the threat of a globally devastating pandemic.¹⁸⁹ Though alcohol and the virus are different in many ways, they are similar in that both are matters of pressing national concern requiring government response and intervention.¹⁹⁰ By effectively balancing federal and state interests, allowing limited incentive-based federal mandates, and promoting greater health literacy in the American people—all tenets of successful alcohol policy applicable to COVID-19 concerns—the United States will position itself to effectively slow the spread of COVID-19 in the months and years to come.

¹⁸⁸ See U.S. CONST. amend. XXI.

¹⁸⁹ See Center for Systems Science and Engineering, *supra* note 112.

¹⁹⁰ See Thornton, *supra* note 28.