

The Ghosts of Prohibition: Considering whether the 21st Amendment has fulfilled critical policy objectives

December 5 is Repeal Day.¹ On December 5, 1933, President Franklin D. Roosevelt signed the 21st Amendment ending Prohibition by repealing the 18th Amendment.² In doing so, President Roosevelt famously quipped “What America needs now is a drink.”³ Legend has it that President Roosevelt celebrated the occasion with a dry martini—possibly the first legal alcoholic beverage after Prohibition.⁴

That dry martini has ushered in a complex world of alcoholic beverage law via the 21st Amendment. The intent of the 21st Amendment was generally to return liquor law control to the individual states.⁵ That being said, some control was given to the federal government via the 1935 law, the Federal Alcohol Administration Act (“FAA”).⁶ The FAA oversees the alcoholic beverage sector to safeguard consumers and ensure fair competition.⁷ It maintains industry standards by granting or withdrawing production and sales permits, oversees alcohol labeling and imports to protect consumers, and aims to eliminate unfair trade practices.⁸ In its present form, the Alcohol and Tobacco Tax and Trade Bureau (“TTB”) administers the FAA. The TTB’s mission is to “[collect] taxes that are rightfully due; to protect the consumer of alcohol beverages through compliance programs that are based upon education and enforcement of the industry to ensure an effectively regulated marketplace.”⁹

This delicate balance between general state control with limited federal power has seemingly frustrated the other policy purposes of the 21st Amendment: (i) create an orderly marketplace, (ii) prevent abuse of alcohol, and (iii) protect public health and safety. The reason generally is the fragmented and differing state laws and regulations concerning alcohol.

This paper analyzes whether these policy objectives of the 21st Amendment have been accomplished in 2024. To consider these policy objectives, this paper proceeds in three parts. Part I argues that the 21st Amendment has not created an orderly marketplace due to the fragmentation and sometimes conflicting state laws and regulations making it challenging to do business in the alcohol sector. Part II reviews whether the 21st Amendment has prevented abuse of alcohol and concludes that it has not but argues that new non-alcoholic beverages, activism, and medicine are what will prevent alcohol abuse. Part III concludes that the 21st Amendment has created safer products through the TTB's regulations.

I. The 21st Amendment has not created an orderly marketplace

The 21st Amendment marked a pivotal change in how the U.S. governs alcoholic beverages, transferring the bulk of regulatory authority to the states.¹⁰ This amendment, particularly its second section, explicitly states: "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."¹¹ Essentially, this conferred almost complete control to states over the importation, sale, and distribution of liquor, and how to structure their liquor distribution systems subject to certain Constitutional protections such as the Commerce Clause.¹²

The legislative intent behind the 21st Amendment was a conscious effort to return to the pre-Prohibition era's patchwork of 'dry' and 'wet' states.¹³ However, this attempt at balance and compromise regarding state autonomy in alcohol regulation has led to a complex and varied landscape of laws across the United States.¹⁴

The diverse state regulations under the 21st Amendment creates significant compliance challenges for alcoholic beverage companies.¹⁵ For instance, breweries often have to navigate intricate distribution agreements, where they contract with distributors or wholesalers to

distribute their products through the three-tier system.¹⁶ These agreements must be specifically tailored to each state's laws, as a distribution agreement viable in Pennsylvania might not be legally sound in neighboring New Jersey.¹⁷

Moreover, alcoholic beverage manufacturers often need to partner with different distributors for each state in which they operate.¹⁸ This is further complicated by the fact that distributors might only operate in select counties, parishes, or boroughs within a state.¹⁹ Therefore, a manufacturer seeking to expand beyond its headquarters must forge numerous partnerships with different distributors, each with its own set of challenges and new requirements.²⁰

Legal compliance in this sector is particularly specialized and unique to each state, necessitating that manufacturers often need to seek legal counsel in every state they operate.²¹ This requirement can be exemplified by a distillery in Portsmouth, New Hampshire, considering expansion into Kittery, Maine.²² Despite the geographical proximity of these locations, crossing state lines brings a whole new set of legal challenges and necessitates finding specialized legal counsel in Maine.²³ This requirement can significantly increase legal costs and become a deterrent to expansion, even if the new location is otherwise more cost-effective.²⁴

Securing specialized legal counsel for each state's unique liquor laws is crucial to avoid legal pitfalls.²⁵ For example, a New Mexico-based licensed importer of Italian wines, looking to ship nationwide, would face a daunting task. Legal fees could range from \$3,000 to \$5,000 or more for experienced liquor law attorneys, and the importer would need to obtain individual wine shipping licenses in almost every state.²⁶ This complex legal and regulatory landscape complicates business expansion and limits consumer choice.²⁷ Moreover, the costs of non-compliance can be severe, including hefty fines or even imprisonment in some cases, making legal compliance not just advisable but essential.²⁸

The complexity of navigating state liquor laws is exacerbated by the fact that many of these laws were written in the 1930s and have seen little to no changes since.²⁹ Some of these outdated laws might even be considered unconstitutional by today's standards.³⁰ For example, under Pennsylvania law, if a natural person or an LLC applies for an importer's license, the individual or every member of the LLC must be a resident of Pennsylvania.³¹ Naturally, this presents a significant hurdle for out-of-state businesses. Consider a New Jersey distillery, formed as a New Jersey LLC, wanting to expand into Pennsylvania. To continue operations and transport alcohol into Pennsylvania, they would require an importer's permit. However, this permit could be denied if even one member of the LLC is a resident of New Jersey.³²

Despite this, the New Jersey distillery could have a legitimate legal challenge under the Dormant Commerce Clause and the Privileges or Immunities Clause of the U.S. Constitution.³³ The Supreme Court has previously ruled that residency requirements related to liquor licenses are unconstitutional.³⁴ Nonetheless, challenging the denial of an importer's permit would involve substantial legal costs.³⁵ This financial burden is particularly onerous for small distilleries, which might not have the resources to fight such legal battles.³⁶ As a result, many small distilleries may choose not to expand into states like Pennsylvania, despite the potential to grow their business and enhance customer choice.³⁷ This situation highlights the additional barriers and financial constraints small alcohol producers face due to the patchwork of antiquated and potentially unconstitutional state liquor laws.³⁸

This fragmented regulatory environment, a direct outcome of the 21st Amendment's grant of wide authority to states, presents a unique set of challenges for the alcoholic beverage industry. The complexities in ensuring compliance across different states not only increase operational costs but also create barriers to market entry. This situation has significant implications for

businesses, affecting everything from strategic planning to day-to-day operations. It also impacts consumers, who may find their choices limited by the intricacies of state-specific regulations.

The 21st Amendment ended Prohibition but led to a complex regulatory landscape for alcoholic beverages, transferring control to individual states. This has resulted in a varied and often convoluted set of laws that businesses and consumers must navigate, making the marketplace far from orderly. The need for strategic planning, partnerships, and specialized legal advice highlights the complexities of alcohol regulation in the U.S. today and the failure to achieve an orderly and uniform marketplace.

II. The 21st Amendment has Generally Not Prevented Abuse of the Product

The 21st Amendment, while reversing Prohibition, hasn't significantly curbed alcohol abuse in America.³⁹ Historical patterns show that American alcohol consumption has always been dynamic.⁴⁰ In the early 1800s, consumption was at its peak, with an average of seven gallons of alcohol per person per year.⁴¹ The Temperance movement, gaining momentum post-Civil War,⁴² led to a decline in alcohol consumption⁴³ due to the passage of laws and teaching Americans about the dangers of alcohol abuse.⁴⁴

Following Prohibition, alcohol consumption in the U.S. has continued to fluctuate.⁴⁵ After its repeal in 1934, consumption rates varied, peaking in the 1980s and then declining due to campaigns against drunk driving and underage drinking.⁴⁶ However, recent trends, particularly during the COVID-19 pandemic, have shown a spike in alcohol use,⁴⁷ fueled by social distancing and the relaxation of state liquor laws, such as the availability of cocktails to go.⁴⁸

Today, alcohol consumption levels are comparable to those in the 1860s, with significant health impacts.⁴⁹ Alcohol remains a leading cause of preventable death in the U.S., claiming

more lives annually than drug overdoses, guns, or car accidents.⁵⁰ Beyond the numerous fatalities, alcohol's broader impact is profound, affecting society through car accidents, increased violence and assault, risky sexual behaviors, job losses, broken families, and the destabilization of children's lives due to parental alcohol dependency.⁵¹

Additionally, a significant portion of the United States population struggles with Alcohol Use Disorder (“AUD”), characterized by a problematic pattern of alcohol use leading to significant impairment or distress.⁵² This disorder, which includes a spectrum of drinking behaviors sometimes referred to as alcoholism, highlights the ongoing challenge of alcohol abuse in contemporary society.⁵³

Reverting to Prohibition doesn't seem to be an effective solution for curbing alcohol abuse. Data indicates that alcohol consumption did not significantly decrease during Prohibition. This trend is echoed in modern times where "dry" areas do not necessarily correlate with lower drinking rates.⁵⁴ For instance, in 2023, Ocean City, New Jersey, a dry town, had a higher rate of binge drinking (23.3%) than the state average (18.6%) and the national average (19.8%).⁵⁵ Moreover, a significant percentage (31.7%) of driving deaths in the county involved alcohol, higher than the state average of 22.8%.⁵⁶

Similarly, federal policies like the National Minimum Drinking Age Act of 1984, which incentivized states through federal highway funds, to set the legal drinking age at 21,⁵⁷ have had mixed results in reducing teenage alcohol abuse.⁵⁸ Various studies challenge the effectiveness of raising the drinking age in the long term.⁵⁹ Miron and Tetelbaum's research indicates that the lifesaving effect of this law was neither significant nor lasting, especially in states that adopted the law under federal coercion.⁶⁰ Furthermore, their findings suggest that the higher drinking age

had minimal impact on teen drinking and potentially shifted traffic deaths from the 18-20 age group to the 21-24 age group, rather than reducing them overall.⁶¹

Government taxation on alcohol, intended as a deterrent to alcohol abuse, hasn't been as effective as hoped.⁶² However, taxes have not kept pace with inflation and rising beverage costs, diminishing their impact on consumption levels meaning alcohol is in fact cheaper today.⁶³

In contrast, it appears that activism, innovation in products, and emerging technologies may be more effective in addressing alcohol abuse.

Organizations like Mothers Against Drunk Driving (“MADD”), founded after a tragic event involving founder Candace Lightner's daughter, have had a significant impact.⁶⁴ MADD's efforts in raising awareness about drunk driving and advocating for stricter legal limits on blood alcohol concentration have contributed to a notable decrease in drunk driving fatalities.⁶⁵

This trend is also extrapolated to Americans drinking less.⁶⁶ In 2022, sixty percent of Americans say they drink down from sixty-five percent in 2019.⁶⁷ In particular, this trend is especially evident in younger Americans.⁶⁸ 62% of adults under age 35 say they drink, down from 72% two decades ago.⁶⁹ Young adults are also drinking less frequently, less likely to drink to excess.⁷⁰ Commentators have postulated various reasons for this. These range from increased cannabis use,⁷¹ or the increased availability of non-alcoholic beverages such as non-alcoholic beers and unique products like adaptogens and nootropics.⁷² All these factors seem to point towards more consumer availability to enjoy new consumer products.

One final factor likely contributing to the decrease in younger Americans' alcohol consumption is increased awareness about the negative health effects of alcohol. Gallup's latest

update on Americans' drinking habits, found a marked increase from earlier readings in Americans' belief that even moderate drinking is bad for one's health.⁷³

Moreover, medicine is getting better at treating alcohol use disorder. There are now more FDA-approved medications for treating AUD, including disulfiram, naltrexone, and acamprosate.⁷⁴ Disulfiram, causes adverse reactions when alcohol is consumed.⁷⁵ Naltrexone, available in pill and injectable forms, blocks the effects of alcohol and opioids.⁷⁶ Acamprosate, taken three times daily, works by restoring the brain's chemical balance to reduce cravings.⁷⁷ Off-label drugs like topiramate and Ozempic also show potential in reducing alcohol cravings.⁷⁸

However, the effectiveness of these treatments is dependent on consistent use, and they are not widely utilized.⁷⁹ But they remain vastly underused; while 14.1 million adults experienced AUD in the US in 2019, only 223,000 will ever be prescribed existing medications.⁸⁰ The reasons for this vary; some patients don't want to take a drug to treat their addiction,⁸¹ health care professionals lack awareness and training in treating AUD,⁸² and the ongoing stigma surrounding the disease makes it difficult for sufferers to seek help.⁸³

This is beginning to change as medical professionals are rethinking AUD. In the last decade, the medical community has come to recognize AUD as a disease that (like all others) needs medical treatment through a range of interventions.⁸⁴ With new treatments coming out every day, hope exists that in the years to come more and more people will receive the care they need.

The 21st Amendment, aimed at ending Prohibition, has not effectively curbed alcohol abuse, with consumption rates fluctuating over time. Despite various government efforts like taxation and the National Minimum Drinking Age Act, alcohol remains a leading cause of preventable death in the U.S. However, recent trends show a decline in consumption, particularly

among younger Americans, attributed to factors like increased health awareness and the availability of non-alcoholic alternatives. Moreover, advancements in medical treatments for AUD, including medications show promise in addressing alcohol abuse. These developments, alongside continued activism and awareness campaigns, suggest that a multi-faceted approach involving new products, medicine, and community efforts may be more effective in reducing alcohol abuse than legislative measures alone.

III. The 21st Amendment has Protected Public Health and Safety

The 21st Amendment, which ended Prohibition, significantly shaped the public health and safety landscape regarding alcoholic beverages in the United States. This amendment's impact becomes particularly evident when contrasted with the Prohibition era, a time marked by the broad prohibition of the sale and manufacture of alcohol and consequential rise in organized crime and bootlegging.⁸⁵ These unintended outcomes of Prohibition highlight the critical role of government regulation in ensuring public health and safety.⁸⁶ The lack of oversight during this period led to the use of hazardous ingredients and methods in alcohol production, often resulting in severe health consequences.⁸⁷

Post-Prohibition, the federal government, particularly through the TTB, has been instrumental in safeguarding public health with respect to alcoholic beverages.⁸⁸ This is achieved through various regulatory mechanisms, including formula approval,⁸⁹ Certificate of Label Approval (“COLA”),⁹⁰ and ongoing market oversight.⁹¹

The formula approval process is a crucial step for manufacturers looking to market their alcohol products in the United States.⁹² This process involves a comprehensive analysis of the product’s composition, ensuring compliance with FDA standards for human consumption and the

safety of ingredients used.⁹³ This scrutiny by the TTB is essential for detecting any unconventional methods or ingredients, thereby guaranteeing the safety and quality of alcoholic products.⁹⁴

Once formula approval is obtained, manufacturers must apply for a COLA, which serves as a vital guide for consumers about the contents of an alcoholic beverage product.⁹⁵ The COLA process involves a thorough review of the label to ensure it complies with specific guidelines and to prevent common errors.⁹⁶ This includes verifying that the label's brand name, alcohol content, and class/type designation are all visible simultaneously on the same side of the container.⁹⁷ The label must also include the producer's name and address, a health warning statement as mandated by the Alcoholic Beverage Labeling Act of 1988, and other necessary disclosures such as the country of origin for imported spirits, and disclosure regarding the presence of certain ingredients like sulfites.⁹⁸

In addition to these requirements, federal regulations also govern labels by prohibiting health-related statements that are untrue or create a misleading impression⁹⁹. These include general health-related statements, specific health claims, and health-related directional statements.¹⁰⁰ The TTB evaluates these statements on a case-by-case basis, often requiring disclaimers or qualifying statements to dispel any misleading impressions.¹⁰¹

The TTB also conducts post-market surveillance through the Alcohol Beverage Sampling Program (“ABSP”), where products are randomly selected 450 from retail shelves for compliance checks.¹⁰² This program is instrumental in ensuring ongoing compliance with alcohol content declarations and label accuracy.¹⁰³ The TTB’s approach to compliance is measured, providing guidance for minor infractions while imposing fines or other consequences for serious or repeated violations.¹⁰⁴

Through these regulatory processes, the TTB effectively guards against public health risks associated with alcoholic beverage consumption.¹⁰⁵ The emphasis on accurate labeling, ingredient safety, and formula compliance ensures that consumers are well-informed and protected from potential health hazards.¹⁰⁶ The TTB's role in regulating alcoholic beverages is not just about maintaining legal and safety standards; it is also about fostering trust and transparency in an industry that directly impacts public health.¹⁰⁷

The current implementation of the TTB's regulatory system, while effective in certain areas, does not fully realize its potential in ensuring uniform safety and quality standards across all alcoholic beverage sales. One notable limitation is the differential application of the Certificate of Label Approval (“COLA”) requirements. While formula approval is mandatory for beverages sold both interstate and intrastate, COLA requirements are only mandated for beverages sold interstate.¹⁰⁸ This creates a regulatory gap, as beverages sold exclusively in taprooms are not uniformly subject to COLA unless individual states require it. The variation in state requirements leads to inconsistencies in labeling standards; for instance, some states require a COLA and others do not.¹⁰⁹

Furthermore, the Alcohol Beverage Sampling Program (“ABSP”) run by the TTB reveals another limitation in the scope of enforcement.¹¹⁰ Given the vast array of alcoholic beverages available on the market, the sampling of only 450 products for compliance seems relatively insignificant.¹¹¹ This minuscule sample size, compared to the millions of different alcoholic products available for sale, indicates a gap in comprehensive oversight.¹¹² The underlying issue appears to stem from the TTB's enforcement capacity, which is likely constrained by funding limitations.¹¹³ This results in a narrower scope of enforcement and potentially leaves a large segment of the market unsupervised for compliance with safety and labeling standards.¹¹⁴

To address these challenges and enhance the effectiveness of its regulatory system, the TTB could benefit from expanded funding and resources. This would enable a more extensive application of COLA requirements to a broader range of products and increase the scope of the ABSP, ensuring a more comprehensive coverage of the market. Enhanced funding could strengthen the TTB's capacity to enforce compliance across all types of alcoholic beverages, thereby better protecting consumer interests and public health. Such improvements would bring the TTB's regulatory system closer to realizing its full potential in overseeing the alcoholic beverage industry.

The 21st Amendment, by ending Prohibition, not only brought back the legal production and sale of alcohol but also allowed for federal oversight through entities like the TTB. This shift marked a crucial step in ensuring the safety and quality of alcoholic beverages, underscoring the vital role of government regulation in protecting public health. The transition from the unregulated and dangerous practices of the Prohibition era to the stringent safety standards enforced today highlights the importance of regulatory bodies in maintaining public health standards in the alcohol industry. However, these practices could be amplified such as expanding the ABSP and ensuring COLAs for all alcoholic beverages.

IV. Conclusion

In conclusion, the 21st Amendment's attempt to create a regulated and orderly alcohol market has faced challenges due to diverse state laws, failing to prevent alcohol abuse or fully protect public health and safety. However, advancements in non-alcoholic beverages, activism, and medical treatments for AUD present new avenues for addressing these issues. The mixed legacy of the 21st Amendment underscores the complexity of alcohol regulation and the ongoing struggle to balance individual freedom with societal well-being.

End Notes

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⁷ See Ikejiri, *supra* note 6 609-10.

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¹⁴ Matthew J. Patterson, *A Brewing Debate: Alcohol Direct Shipment Laws and the Twenty-First Amendment*, 2002 U. ILL. L. REV. 761, 765 (2002) (“Predictably, regulations on alcohol varied dramatically from state to state, a reflection of the diverse nature of the states.”); Tucker, *supra* note 13 at 87 (“To this day, state alcohol laws remain widely varied.”).

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https://www.inquirer.com/philly/opinion/editorials/20160721_Commentary__Outdated_liquor_laws_are_a_hangover_from_Prohibition.html (“Many of these regulations come from the adoption of the 21st Amendment in 1933... our lawmakers should ensure that Prohibition officially ends in Pennsylvania, only 80-plus years late.”)

³⁰ E.g., 47 Pa. Stat. Ann. § 4-410(d) (requiring Pennsylvania residency to hold an importer's permit)

³¹ *Id.*

³² See, *id.*

³³ *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 581 (1997) (holding a state law that facially discriminates against out-of-state commerce is *per se* unconstitutional).

³⁴ *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019) (holding Tennessee's two-year durational-residency requirement for retail liquor store applicants violated the Dormant Commerce Clause).

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