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THE PROHIBITION HANGOVER: WHY WE ARE STILL FEELING THE EFFECTS OF PROHIBITION

Marcia Yablon *

INTRODUCTION

There is a widespread belief that the Twenty-First Amendment did nothing more than repeal Prohibition.[1] Many people also believe that the temperance movement and its influence similarly ended with the ratification of the Twenty-First Amendment.[2] However, as widespread as this belief is, it ignores the continuing importance of section 2 of the Twenty-First Amendment. Section 2 states that "[t]he 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."[3] Despite the relative obscurity of this clause, in the seventy years since the repeal of Prohibition, section 2 has had, and continues to have, a significant impact on the way in which alcohol is produced, sold, and consumed in America. And as such, the influence of the temperance movement and Prohibition continues to be felt.

The far reaching impact of the Twenty-First Amendment can be seen in the influence it has had on issues well beyond simply "the transportation or importation" of alcohol. The Amendment has had an impact on numerous other areas of law such as free speech, interstate commerce, antitrust, and equal protection. Nevertheless, when the Twenty-First Amendment has been employed in these other areas of law, scholars have been quick to criticize such usage. Many critics argue that

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[1] Over and over again journalists and readers refer to Prohibition as a failed experiment and the adoption of the Twenty-First Amendment as signaling its end. *See e.g.*, Anthony Infanti, *Letters to the Editor*, PITTSBURGH POST-GAZETTE, MARCH 15, 2004, at A-10 (stating that "Prohibition was a "failed experiment" that "necessitated two successful Amendments to the Constitution—the 18th to write it in, and the 21st to write it out."). *See also infra* note 4.

[2] Infanti, *supra* note 2, at A-10.

[3] U.S. CONST. amend. XXI, §2.

the courts' use of the Twenty-First Amendment in these areas is inconsistent and unsupportable, but such criticisms are myopic and misinformed. An examination of the history of the temperance movement and the push for Prohibition reveals that the use of the Twenty-First Amendment in these other areas was both intended and desired. By employing the Twenty-First Amendment in these other areas of law, courts are actually honoring the history and intention of Prohibition and therefore, such applications of the Twenty-First Amendment deserve praise rather than criticism.

Over time, the purpose behind the ratification and then repeal of National Prohibition has been forgotten by the majority of Americans. Currently, Prohibition is most often referred to as a "failed experiment" or a "strange aberration" in our country's history.[4] However, although Prohibition was the culmination of the temperance movement's goals, the temperance movement itself was nothing new. This movement had been an important and accepted part of American society since the early Nineteenth Century.[5] Consequently, in 1933, when the Twenty-First Amendment was passed, it was not at all clear that the Amendment's ratification signified the end of the temperance movement. The temperance movement had faced other, nearly as great, setbacks before,[6] and the Twenty-First Amendment was seen only as the end of National Prohibition, not necessarily, or even likely, the end of the temperance movement. As Historian Norman Clark explained, "[r]epeal was by no means the very end; it was not a social fluke or a moral retrogression."[7] Instead, after repeal, there was an enduring struggle for many people "to

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[4] *See e.g.*, Jay Maeder, *Blows Against the Empire Repeal*, DAILY NEWS, May 29, 2000, at 23 (stating that "the great failed social experiment called Prohibition would pass into history"); Mark Sauer, *Anti-war Movement; Protesters say it's Time for the Government to Halt Drug Battles*, SAN DIEGO UNION TRIBUNE, Jan. 16, 2000, at D1 (describing the "the repeal of Prohibition" as evidence that Prohibition had been "an utter failure."); James Conaway, *California's Anti-Spirit Spirit*, THE WASHINGTON POST MAGAZINE, Oct. 11, 1987 at W43 ("Prohibition was a social disgrace and a national disaster lasting for 13 years.").

[5] *See* Norman H. Clark, DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION, 31-33 (1976).

[6] In 1855, thirteen states had "Maine Laws" which prohibited the manufacture and sale of spirits or intoxicating liquors. However with the coming of the Civil War the temperance movement lost much of its force and by the time of the war eight of the thirteen states had gotten rid of these laws. *Id.* at 47-48.

[7] *Id.* at 169.

define how much or how little liquor control was consistent with the circumstances of life in the second half of the twentieth century."[8]

Although National Prohibition ended with the ratification of the Twenty-First Amendment, state and local Prohibition was expected to, and did, continue long after its passage. Similarly, liquor regulation did not conclude with the repeal of the Eighteenth Amendment. Instead, after repeal the country returned to a system of liquor regulation very similar to the system in place immediately before Prohibition. "Although the new system of state alcohol regulation was more uniform in practice and more efficient in enforcement, it nevertheless resembled the basic forms of liquor control practiced at the turn of the century . . . ."[9] Therefore, if the true purpose of repeal was not a rejection of the goals of the temperance movement, but simply an acknowledgement of the failure of Nationwide Prohibition, then in order to evaluate the propriety of the current usage of the Twenty-First Amendment, one needs to examine the concerns about alcohol that were prevalent in the decades leading up to the passage of the Eighteenth Amendment.

This paper will argue that many of the goals of the temperance movement were not repudiated by the repeal of National Prohibition, that section 2 of the Twenty-First Amendment was created to effectuate these temperance goals, and that these goals do and should continue to inform judicial decisions regarding alcohol. This paper will examine three types of cases for which the use of the Twenty-First Amendment is frequently criticized: family activities, nude dancing, and direct shipment, and will attempt to explain how court decisions in these areas reflect the legacy of the temperance movement and continue to address the concerns that precipitated the move for Prohibition in the first place.

I. ALCOHOL AND THE THREAT TO THE FAMILY

A. ALCOHOL AS A CURRENT THREAT TO FAMILY VALUES

The case of *Spudich v. Smarr*[10] demonstrates how a re-examination of the history of the temperance movement can help explain modern judicial decisions involving the Twenty-First Amendment. *Spudich* is a confusing case when analyzed solely under the Court's equal protection jurisprudence, but it makes sense when viewed in light of the history and purpose of alcohol regulation before Prohibition. In *Spudich*, a billiards

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[8] *Id.*

[9] PEGRAM, *supra* note 1, at 186.

[10] 931 F.2d 1278, 1281 (8th Cir. 1991).

hall owner challenged a state law that made it possible for his competitors, amusement facilities offering bowling or soccer, to obtain a liquor license, but barred his establishment from obtaining one. Mr. Spudich argued that this law was an equal protection violation because his establishment was as much an amusement facility as that of his competitors yet the law distinguished between the two in the granting of liquor licenses. The *Spudich* court, however, found no equal protection violation. Instead, the court held that the state had broad authority under the Twenty-First Amendment to regulate alcohol, and it concluded that the state could reasonably have distinguished "family oriented sports facilities" from other "activities which represent a greater threat of disruptive behavior."[11]

At first glance, such an explanation seems rather strained and as a result, many scholars have questioned this type of distinction. Such scholars have been unwilling to accept the "reasonableness" of alcohol regulation based on an establishment's suitability for children and families. As a result, these commentators have frequently looked for other motives, such as protectionism, to explain these types of decisions. One critic referred to the outcome in *Spudich* as "lifestyle bias," and lamented the fact that the equal protection doctrine provides little

[11] *Id.* Historically, billiards halls have posed a greater threat of disruptive behavior than other types of amusement facilities and were frequently equated with the depravities of the saloon (discussed more fully in Section II below). For an example of this comparison between the pool hall and the saloon, see *In re Lundy*, 143 P. 885 (1914), in which the court interprets a Washington state statute defining delinquency as the visitation by minors of "billiard room[s] or pool room[s], or any saloon." *Id.* at 153. According to the Washington State statute interpreted in *Lundy*, both billiards halls and saloons are equally unfit places for children. Similarly, Indiana delinquency laws of the period also specifically included the patronizing of "saloons" or "pool halls" in the state's definition of juvenile delinquency. Lee E. Teitelbaum, *Youth Crime and the Choice Between Rules and Standards*, 1991 BYU L. REV. 362 (1991). *See also* Ill. Laws 1905 §1 at 153. One law review article from the forties disgustedly describes the pool room as the worst sort of place that attracted loafers and loiterers, and a law review article from the thirties states that the pool hall, like the saloon, has "traditionally been considered as subject to stringent regulations by the state, being classified . . . as a 'dangerous,' questionable, or merely tolerated business." William L. Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 596 (1941-42); James W. Mehaffy, *Recent Decisions*, 36 MICH. L. REV. 1404 (1937-38). As these cases, statutes and articles demonstrate, pool halls, at least traditionally, were not the sort of place where you would want to take the kids.

authority to prevent what he believed was an unprincipled intention to "benefit particular businesses over others."[12] Many other commentators have also insinuated that the "family values rhetoric" of alcohol regulation is simply a cover allowing protectionism.[13]

However, *Spudich* is not an isolated case. There are many other instances of the courts drawing this type of distinction between family oriented drinking establishments and other types of places selling alcohol. Another example of such a distinction is the Pennsylvania appellate court's decision in *Boston Concessions Group v. Logan Twp. Bd. of Supervisors*.[14] Like *Spudich*, this case demonstrates the different levels of concern courts have regarding alcohol consumption in family versus non-family establishments. In *Boston Concessions Group*, the appellate court upheld the trial court's reversal of the Township's Board of Supervisors' decision to deny a liquor license to the Boston Concessions Group. The Boston Concessions Group requested the license so that they could sell liquor at Lakemont Park, a family amusement park. The *Boston Concessions Group* court held not only that it is "a general rule [that] a licensed establishment is not ordinarily detrimental to the welfare, health and morals of the inhabitants of a neighborhood,"[15] but also that the granting of the license would actually be beneficial to the patrons of the park.[16]

In reaching this decision, the court distinguished *Boston Concessions Group* from *Commonwealth v. Koehler's Bar, Inc.*,[17] even though the facts of the two cases were extremely similar. The only real difference between the two cases was that *Koehler* did not involve a family establishment. In *Koehler*, the court held that the "welfare, health, peace and morals of the inhabitants of the neighborhood" would be harmed by the granting a local restaurant/bar a liquor license.[18] The *Koehler* court found that community "opinions that this establishment would be

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[12] John M. Faust, Note, *Of Saloons and Social Control: Assessing the Impact of State Liquor Control on Individual Expression,* 80 VA. L. REV. 745, 765 (1994).
[13] Clayton L. Silvernail, Comment: *Smoke, Mirrors and Myopia: How the States Are Able to Pass Unconstitutional Laws Against the Direct Shipping of Wine in Interstate Commerce*, 44 S. TEX. L. REV. 499 n.3 (2003).
[14] 815 A.2d 8 (Pa. Commw. Ct. 2002).
[15] *Id.* at 14.
[16] The park currently permitted patrons to bring their own alcohol to the park and the court believed that a licensed distributor would increase the supervision of alcohol consumption in the park.
[17] 201 A.2d 306 (Pa. Super. Ct. 1964).
[18] *Id.* at 307.

detrimental" were a sufficient basis upon which to deny the license.[19] However, in *Boston Concessions Group*, the court found that almost identical community concerns were an insufficient basis upon which to deny a liquor license.

The *Boston Concessions Group* court distinguished *Koehler* based on the fact that the amusement park already allowed patrons to bring in their own alcohol for private functions held in the pavilion area of the park. However, this explanation for the different outcomes in the two cases is not entirely satisfactory. It does not explain why in *Koehler* the court held "that mere protests or the fact that there are a large number of protestants" can be enough to deny a license[20] while in *Boston Concessions Group*, the court found such protests entirely unpersuasive.[21] In *Boston Concessions Group*, the protestors believed it was the sale of alcohol by the park in the main areas of the park that was concerning, not the alcohol brought to private functions held in secluded areas; nevertheless, the court found it easy to dismiss these concerns.

The difference in the two courts' receptivity to liquor license protests can perhaps be better explained by the difference in the types of establishments requesting the license. In *Koehler*, the appellant applicant was requesting a license for a bar[22] whereas the license in *Boston Concessions Group* was for a family amusement park. The court's determination of the "reasonableness" of the community's concerns regarding alcohol sales may be due once again to the difference in the perceived threat between family versus non-family alcohol establishments. The *Boston Concessions Group* court not only believed that selling alcohol in a family amusement park was not detrimental to public health, but it also believed that it was greatly preferable to the existing regulations which allowed patrons to bring their own alcohol for private functions. The court viewed drinking amongst families and in front of children as harmless, while it viewed drinking at private functions and away from these families as much more concerning.

A third example of the courts' tendency to favor family establishments over others in liquor license cases is the Minnesota case

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[19] Id at 307-08.

[20] *Id.* at 307.

[21] *Boston Concessions Group*, 815 A.2d at 10.

[22] Although the bar also served food there was an indication in the opinion that the food service was incidental to the serving of alcohol. In any event, there was no indication that the bar/restaurant was in any respects a family establishment.

Bergmann v. City of Melrose.[23] In *Bergmann*, like in *Spudich*, the plaintiffs claimed that they had been victims of an equal protection violation. They argued that the state's conditioning the issuance of a liquor license on the establishment of a family restaurant violated the Constitution's Equal Protection clause. However, the *Bergman* court disagreed. The court held that a "city may subject businesses conducted on premises where liquor is sold to reasonable regulations and conditions" and that "[i]t may also require license holders to make certain concessions in exchange for their licenses."[24] The court found the city's decision to grant a liquor license to a family restaurant, but to deny it to a liquor-only establishment, was a reasonable distinction that did not violate equal protection.[25] Furthermore, the *Bergman* court agreed with the city that although another liquor-only establishment was undesirable, a family restaurant, including one that sold alcohol, would actually improve the public welfare.[26]

B. THE NINETEENTH CENTURY AND ALCOHOL'S TRHEAT TO THE FAMILY

Although the distinction drawn by the *Spudich* court, and others, between alcohol establishments that threaten the family and those that actually benefit the family seems somewhat counterintuitive today,[27] it

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[23] 420 N.W.2d 663 (Minn. Ct. App. 1988).

[24] *Id.* at 665.

[25] *Id.* at 667.

[26] *Id.*

[27] Today, critics frequently expound on the dangers of allowing alcohol consumption to occur in the presence of families. For example, in an article describing the denial of a liquor permit for a Florida bar that wanted to open up near a family flea market, the author cited the local officials' concern regarding the sale of alcohol in the presence of so many families. The officials were worried about "the dangers of wholesome families passing through the flea market entrance only to be confronted by the sight of rowdy drunks at a bar." As a result, "the zoning board unanimously recommended against allowing the tiki bar." What is even more striking is that the article describes the officials' concern as silly, not because there was no danger in exposing families to alcohol but because the author believed that "nobody running a big flea market catering to the family trade is going to tolerate that kind of an operation on its grounds. If it did, it would quickly lose that trade." Staff, *Bonita zoning officials rightly overturned*, THE NEWS-PRESS (FORT MYERS, FL), AUG. 27, 2003 at 10B. The growing belief that children should not be exposed to adult drinking can also been seen in legislation, such as that proposed a few years ago in Chicago, to bar all children under the age of 21 from bars. The law reflects the idea that "'If the parents are drinking, the kids shouldn't be with them.'"

was a distinction that would not have been foreign to Americans living in the pre-Prohibition era. In addition, not only does this distinction mirror pre-Prohibition concerns, these concerns are still quite relevant today. During this period, alcohol was seen as a serious threat to the family precisely because it was so often consumed away from the family. Saloons were places that men went by themselves, separate from their wives and children. In the Nineteenth Century, women were exceedingly unwelcome in saloons.[28] At this time, a woman's place was in the home, but many men felt most at home in the neighborhood saloon. "The saloon thereby served to effectively divorce husbands from wives" and "pose[d] a serious threat to . . . family values." [29]

This separation caused great anxiety in a society which placed extreme importance on the home and the family.[30] There was a widespread belief that "alcohol could disintegrate social and family loyalties and that this disintegration would be followed by poverty and crime and a frightful depth of conjugal squalor."[31] These fears were especially felt by women, who were expected to protect the home and family, and as a result, women became the driving force behind the push towards Prohibition.[32] "Women were culturally positioned to feel such threats most keenly. The ideals of domesticity already encouraged women to act as moral guardians for their families and to tutor their children in the duties of virtuous citizenship."[33] Nineteenth Century women "had identified drunkenness as an affront to middle-class survival, a threat to the health and harmony of families, and a peril awaiting every boy as he grew to manhood."[34]

Brian Jackson, *Last Call for Family Pubs?*, CHICAGO SUN-TIMES, Sept. 22, 1997, at 6.

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

[29] *Id. See also* Jon M. Kingsdale, *The "Poor Man's Club": Social Functions of the Urban Working-Class Saloon,* 25 AMERICAN QUARTERLY, 472, 486 (1973) ("For married men . . . the saloon was an escape from wife and family.").

[30] The very fact that many American men spent time away from home drinking caused unease in an age that lavished sentimental affection on the ideals of home and family. *See* CLARK, *supra* note 6, at 42-43.

[31] *Id.* at 42.

[32] Prohibition began the women's movement and it wasn't because women believed in their right to vote but that as the "defenders of the home and its purity [they] had the right and obligation to enter the streets." *Id.* at 73.

[33] PEGRAM, *supra* note 1, at 55.

[34] *Id.*

The perceived threat to the family posed by the saloon was further enhanced by the tremendous wave of immigrants from drinking cultures, particularly Irish immigrants, who came to America during this period. Irish families were structured differently than most middle class American families who found this difference extremely disconcerting. These Irish families lived "lives that did not conform to the middle-class model of the family."[35] For example, unlike American women, Irish women "had a long tradition of working outside the home," and therefore they did not fit the "ideology of women's separate spheres and delicate natures."[36] In addition, Irish children frequently worked, and they often earned nearly half their family's income.[37] The common employment of women and children in Irish families contradicted the Nineteenth Century "ideology of domesticity." This "vision of work and home was an idealized, prescriptive account, in which cultural norms about sex and economics infused the way in which the world was being portrayed."[38] This vision purported to describe the world as it was and it therefore "characterize[d] families without the preferred family-market ordering as deviant, abnormal, and personally at fault."[39] The threat posed by these "deviant" families can be seen in the "legal regimes that were created beginning in the Nineteenth Century to regulate failed fathers and the women and children whose status turned on this evaluation of the men who headed or were supposed to head their households."[40] Child protection societies were given "unprecedented

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[35] Tonya Plank, *How Would the Criminal Law Treat Sethe? Reflections of Patriarchy, Child Abuse, and the Uses of Narrative to Re-Imagine* Motherhood, 12 WIS. WOMEN'S L.J. 83, 96n. 62 (1997).

[36] Kenneth W. Mack, *A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925-1960,* 87 CORNELL L. REV. 1405, 1413 n.39 (2002).

> One study of white families in Philadelphia in 1880, for example, discovered that the children of Irish-born men earned between thirty-eight and forty-six percent of their households' total income, while their peers with German-born fathers earned between thirty-three and thirty- five percent, and the children of native-born fathers earned between twenty-eight and thirty-two percent.

Jill E. Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 325 (2002).

[37] Hasday, *supra* note 37, at 325.

[38] *Id.*

[39] *Id.* at 326.

[40] *Id.* at 328.

legal authority to scrutinize . . . targeted families, remove their children, and arrest their parents."[41] Such families were a threat and these "protection societies" were there to force them to become more like middle class American families or dismantle them if they would not.

The temperance movement, with its strong nativist undertones[42] was simply another way of alleviating the perceived threat posed by these "deviant" immigrant families. "In the culture of the Irish ... use of whisky or beer was customary and often a stable part of the diet.[43] The Irish immigrants' acceptance of alcohol was considered one of the main reasons for their poverty,[44] and it was their excessive poverty that made it necessary for Irish women and children to work and therefore violate Victorian family values. In addition, unemployed Irish men helped fuel the increasingly worrisome male drinking culture that was separating men from their families.[45]

One of the main goals of temperance movement was to reverse this trend towards family separation. The temperance movement hoped to revitalize the family, and temperance advocates believed that temperance would help "to support and protect the family, and to return the husband ... to the home."[46] The perceived importance in achieving this goal can be seen in the fact that even though the Nineteenth Century was the height of the separate spheres ideology, which taught that that there were separate spheres for men and women, female temperance advocates believed they were justified in actively attempting to transform the male space of the saloon.[47] These advocates ignored convention and invaded the male saloon, arguing that the only way to "protect their own spaces

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[41] *Id.* at 333.

[42] "If the lowly Irish . . . were the drinkers and the drunkards of the community, then it was more necessary than ever that the aspirant to middle class membership not risk the possibility that he might be classed with the immigrants." JOSEPH R. GUSFELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT, 51 (1966).

[43] *Id.*

[44] *Id.* at 55.

[45] PEGRAM, *supra* note 1, at 33.

[46] Kingsdale, *supra* note 29, at 487.

[47] Richard H. Chused, *Gendered Space*, 42 FLA. L. REV. 125, 131, n.23 (1990). "Over the course of the eighteenth and nineteenth centuries some spaces typically occupied by middle-class men and women became increasingly gendered...[a]s the nineteenth century unfolded, workplaces began splitting off from homes, women became domestically isolated with their children."

from rapacious men was to transform the content of men's spaces. . . ."[48] In pursuit of this goal women tore at the foundation of the separate spheres ideology imposing their sphere of family and the home on the male saloon by invading it with their prayers and protests as they attempted to get men to come directly home after work.[49] These women hoped to break down the separation between men and their families perpetuated by the saloon and start a "new awakening to the values of the home."[50]

The temperance advocates' fear of the saloon and its impact on the family was not unfounded. The saloon was a threat to more than just the idealized vision of the family. The perception that the saloon destroyed families was based on reality. "The nineteenth-century drunkard's reputation as a wife beater, child abuser, and sodden, irresponsible non-provider was not undeserved."[51] "[T]emperance workers . . . who were well aware of the social problems that stemmed from alcohol and drunkenness and their aim was broader than simply regulating moral behavior."[52] They were "fighting against the rape and battering of victims of all ages, against deprivation of needed food, drink, clothing, not to mention respect, kindness, health, independence."[53] The push for Prohibition was in part recognition of the seriousness of these dangers as well as an acknowledgement that earlier legislative measures had been inadequate to deal with the problem.

State legislative attempts to deal with the threat to the family posed by intemperate husbands in terms of both physical and financial harm can be seen in statutes such as New York's "Dram Shop Act,"[54] which "gave to every person injured in person, property, or means of support by any intoxicated person or in consequence of the intoxication of any person a right of action against any person who by selling intoxicating

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[48] *Id.* at 133.
[49] *Id.* at 132.
[50] *Id.*
[51] RUTH BORDIN, WOMAN AND TEMPERANCE: THE QUEST FOR POWER AND LIBERTY, 1873-1900, 3-4 (1981).
[52] Kristen E. Kandt, *Historical essay: In the Name of God; An American Story of Feminism, Racism and Religious Intolerance, the Story of Alma Bridewell White*, 8 AM. U. J. GENDER SOC. POL'Y & L. 753, 792 n.347 (2000).
[53] MARY DALY, PURE LUST 286 (1983).
[54] N.Y. CIV. RTS. L. §16 (1954). The current version of the act is at N.Y. Gen. Oblig. L. § 11-101 (McKinney 2003) but only applies to the unlawful sale of liquor.

liquors has caused the intoxication in whole or in part."[55] In other states, Dram Shop statutes were even more explicit in their concern for families of drunken men. For example, the Alabama Dram Shop Act specifically delineated this right first and foremost as the right of a drunkard's "wife," "child" or "parent."[56] The purpose of dram shop laws was to give the family of the injured drunkard or the family injured by the drunkard a right of action against the saloon keeper who got him drunk.[57] Although such legislation strained the legal definition of proximate cause, the danger that male drinking posed to families was seen as overriding such concerns.[58]

Interestingly, although most temperance advocates spoke out against the evils of alcohol, they did not actually view the primary threat to the family as one caused by alcohol *per se*. Instead, they believed the disintegration of the family was caused the culture of the saloon, which was at least as big a draw as was the actual alcohol being served. The urban working-class saloon was "the poor man's club." It offered men a welcome escape from the harsh realities of their everyday lives. These men had "no access to the well-appointed hotel bars and exclusive clubs that offered recreation to the salaried and professional men."[59] "For men who worked in sweaty often dangerous jobs and lived in crowed, stuffy tenements, the saloon beckoned as a warm, well-lit, pleasant refuge for relaxation and masculine companionships."[60] Inside, men "played cards, read newspapers, discussed politics, sports and theology."[61] Many

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[55] Note, *Torts: Proximate Cause: Statute Establishing Cause Of Action:* Daggett v. Keshner, 40 CORNELL L. Q. 818 (1955).

[56] ALA. CODE § 6-5-71(a) (2003) The Code states that:

> Every wife, child, parent, or other person who shall be injured in person, property, or means of support by any intoxicated person or in consequence of the intoxication of any person shall have a right of action against any person who shall, by selling, giving, or otherwise disposing of to another, contrary to the provisions of law, any liquors or beverages, cause the intoxication of such person for all damages actually sustained, as well as exemplary damages.

Id.

[57] *See supra* note 56.

[58] The continuing concern between alcohol and the family can be seen in the fact that that many of these dram shop acts, or slight variations of them, are still good law.

[59] PEGRAM, *supra* note 1, at 104.

[60] *Id.*

[61] *Id.*

saloons had "pool tables or pianos [and] occasionally, there was an attached gymnasium, bowling alley or handball court."[62] It was the desire to be a part of this culture that led "the fathers of young children [to] float[] away a week's wages that could have gone to food, clothing, and education," that allowed addiction [to] enslave[] many a man, insulating him from the lifestyle of decency and responsibility," and that lured these men "into a blurred phantasmagoria of whores, drug fiends, pimps, thieves, and gamblers."[63]

The unique threat posed by the saloon, as distinct from alcohol alone, is demonstrated by the relative unconcern with which other types of drinking establishments were viewed in the pre-Prohibition period. Although not as numerous, there were exceptions to the masculine saloon such as ethnic bars, clubs and beer gardens that invited families.[64] These drinking establishments, though by far in the minority, never had the worrisome connotations of the saloon because they were places that encouraged family activity and togetherness.[65]

C. Post-Repeal Concern with Alcohol as a Threat to the Family

The perceived difference in the threat between family friendly alcohol establishments and male dominated saloons did not end with repeal. The continued recognition of this distinction can be seen in post-

[62] *Id.*

[63] CLARK *surpa* note 6, at 2.

[64] PEGRAM *supra* note 1, at 56.

[65] *Id.* "[T]he beer garden provided something which most immigrant-Americans could not get anywhere else—something the Germans called gemutlichkeit." Loosely translated, gemutlichkeit means "a sort of cozy, warm state of being created only by the presence of good friends, close family, a relaxing environment, and, more often than not, plenty of beer." However, "the typical beer garden offered far more than just beer and gemutlichkeit. There was music, dancing, sport and leisure." A visit to the beer garden was an "occasion for the whole family, and one which usually lasted the entire day, from sunup to sundown. Indeed, for the mostly working class throngs who came, the beer garden was an oasis in an otherwise workaday life. As such, it played an important role in the lives of countless immigrants." Carl H. Miller, *The Rise of the Beer Barons* (1999), http://www.beerhistory.com/library/holdings/beerbarons.shtml (last visited March 30, 2006).

Prohibition legislation such as *The Michigan Beer Bill*,[66] passed immediately after the Repeal of Prohibition, which prohibited bars, but permitted the operation of establishments such as beer gardens.[67] Such legislation demonstrates that even after repeal there was a continuing desire to eliminate the drinking culture of the saloon. At the same time, it also shows that this concern did not extend to drinking establishments like beer gardens, which have traditionally been family oriented.[68] The Michigan Beer Bill was passed only to prevent the return of the saloon; it specifically allowed the return of other types of drinking establishments.

The Michigan Beer Bill was not unique. Similar legislation was passed by numerous other states after the repeal of Prohibition and in many instances such statutes remained good law until it was quite certain that the old time saloon could never return. For instance, post-repeal legislation in Texas prohibited 'open saloons,' until 1971. It was only then "that 'liquor by the drink,' was legalized finally by constitutional amendment."[69] Texas legislators appear to have had the same concern as those in Michigan regarding the return of the saloon.[70] Although Texas bars that sold liquor by the drink were banned for decades after repeal, beer parlors[71] were allowed to return almost immediately.[72]

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[66] *See* Thomas H. Walters, Note, *Michigan's New Brewpub License: Regulation of Zymurgy for the Twenty-First Century,* 71 U. DET. MERCY L. REV. 621 ,643 (1994).

[67] *Id.* at 644.

[68] PEGRAM, *supra* note 1, at 105 ("In a class of its own was the German beer garden, which flourished in leafy suburbs and the occasional urban green oasis. For the entry fee. . . a customer was admitted to an extensive landscaped garden with a bandstand and open-air tables to which waiters brought drinks. Some beer gardens could accommodate several thousand visitors; entire families came for music and dinner."); *see also supra* note 65.

[69] Mark Davidson, *"Let's Go Across the Street for a Cold One!": The Harris County Courthouse Square Over the Years,* HOUSTON LAWYER, Mar.-Apr. 1996, at 48.

[70] The almost hysterical concern about the return of the saloon can be seen in some of the more outlandish legislation such as laws which outlawed swinging doors in bars or laws which required that "bar stools be provided for all patrons since it was thought that standing at the bar— a venerable saloon tradition— promoted excessive drinking." Carl Miller, *We got Beer Back,* ALL ABOUT BEER, http://www.allaboutbeer.com/features/216gotbeer.html (last visited March 30, 2006).

[71] Beer parlors do not sell hard liquor and typically tend to sell food. In many ways they are more similar to restaurants than to saloons. Courts frequently

Furthermore, the fact that this was a continuing concern with the saloon rather than liquor, (as opposed to beer), can been seen in the fact that long after repeal many states continued to prohibit "open salons" yet allowed "private clubs" to sell liquor to their guests.[73] The primary concern with liquor continued to be with the manner in which it was sold not the actual sale.

As stated above, in the period before Prohibition there was a widely recognized distinction between saloons which catered to solitary men, and clubs or beer gardens which catered to families. Whereas the saloon was deeply feared and the desire for its elimination was one of the driving forces behind the move for Prohibition, clubs and beer gardens never raised the same concerns. When viewed in light of this history, the seemingly unsupportable distinction made by the Missouri legislature and upheld by the Eighth Circuit in *Spudich* is understandable. Even today, pool halls are rarely family establishments, and many have the same undesirable qualities as the old saloon.[74]

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combine the two terms when describing such locations. *See e.g.*, Aubin v. Kaiser Steel Corp., 185 Cal. App. 2d 658, 660 (1960) ("Ocotillo Gardens, a restaurant and beer parlor located near Desert Center ").

[72] Davidson, *supra* note 69.

[73] *See e.g.*, Swain, *supra* note 29, at 334 n.74 (in Kansas "'private club' arrangements were created to serve liquor to club members and circumvent the prohibition on open saloons" and this arrangement was later sanctioned by the legislature under the Private Club Licensing Act of 1965. "This Act authorized the consumption of alcoholic liquor on the premises of private clubs as consumption 'in a place which the general public has no access,' and placed a minimum membership fee and waiting requirement on private club members." By enacting these requirements the legislature ensured that liquor would be available to those who wanted it but that these clubs would not become saloons.

[74] The continued seediness of pool halls can be gleaned from a quick examination of newspaper articles and criminal case law. The number of criminal incidents that occur in or around pool halls continues to be high. The following are just a small sample of the numerous crimes that have recently occurred within pool halls. *See e.g.*, *One Dead, Two Wounded in Pool Hall Shooting*, WSBTV.com, March 13, 2006, http://www.wsbtv.com/news/7955178/detail.html; *Second Arrest Made in Raleigh Pool Hall Shooting*, WRAL.com, January 10, 2006, http://www.wral.com/news/5971244/detail.html; *Overnight Shooting in Pool Hall Parking Lot*, KRISTV.Com, July 14, 2005, http://www.kristv.com/Global/story.asp?S=3594388. *See also* United States v. Wright, 131 F.3d 1111, 1112 (1997), (a narcotics dealer attempted to escape the police by fleeing into a pool hall); Austin v. Bell, 126 F.3d 843, 845 (1997), (the police uncovered an illegal gambling ring run out of a pool hall, the owners of

Therefore, the court's distinction between family and non-family drinking establishments is justifiable, as is the court's conclusion that pool halls with liquor licenses present concerns not relevant to family establishments that sell alcohol.

II. THE CONNECTION BETWEEN LIQUOR AND SEX

A. THE CURRENT CONTROVERSY OVER SEX AND ALCOHOL

In the recent case of *Sammy's of Mobile v. City of Mobile, Ltd.*,[75] the Eleventh Circuit held that nude dancing and alcohol are an especially dangerous combination that justifies increased state regulation. As a result, the *Sammy's of Mobile* court upheld state laws banning nude dancing in places selling alcohol. Many scholars found the *Sammy's of Mobile* decision outrageous. These critics argued that the police power alone does not satisfactorily justify the regulations[76] at issue in *Sammy's of Mobile.* According to one appalled commentator, "the government did not present one fact to demonstrate that Sammy's of Mobile had a problem with sexual assault, prostitution or any other 'secondary effect of nude dancing' significant enough to justify limiting free speech."[77] Another distraught critic described the decision as blatant "censorship, based on the particular moral taste of the legislature" and "upheld behind a smoke screen of inherently flawed balancing tests."[78] According to this critic, "[b]ecause the reviewing court agreed with the moral position of the legislature, it failed to realize its purpose as an unbiased protector of the Constitution."[79]

The reason there is such controversy over cases like *Sammy's of Mobile* is that there is serious disagreement over whether the Twenty-First Amendment applies to nude dancing regulations. If the Twenty-First Amendment can be applied to nude dancing, then the question of the State's authority to regulate nude dancing and alcohol sales disappears. However, recent Supreme Court decisions seem to indicate

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the pool hall then hired a hit man to kill the deputy sheriff who had arrested him), *and* Quiles v. City of New York, 2003 U.S. Dist. LEXIS 14238, at *3 (S.D.N.Y. Aug. 13, 2003). (the victim was shot dead inside a pool hall).

[75] 140 F.3d 993, 996-97 (11th Cir. 1998).

[76] The regulations required the dancers to wear a G-string and pasties. *Id.* at 999 n.10.

[77] Kevin R. Bruning, Note, *Nudity and Alcohol: Morality Lies in Public Discussion*, 29 STETSON L. REV. 775, 796 (2000).

[78] *Id.* at 776.

[79] *Id.*

that the Twenty-First Amendment cannot be used to regulate nude dancing, although for decades courts had been upholding such regulations based on the power granted to states under the Twenty-First Amendment. As a result, state and federal courts are now struggling over the constitutionality of nude dancing regulations, and those courts that continue to uphold these regulations are frequently criticized, even though such criticisms may be unwarranted. Despite the Court's decision in *44 Liquormart Inc. v. Rhode Island*,[80] discussed below, the history and purpose of the Twenty-First Amendment may justify its continued application in the nude dancing context and bolster the constitutionality of ongoing state efforts to regulate the perceived threat of alcohol and nude dancing.

B. The Supreme Court and the Constitutionality of Nude Dancing Regulations

The controversy over the constitutionality of using the Twenty-First Amendment to regulate nude dancing began in *California v. La Rue*.[81] In *La Rue*, the Supreme Court upheld state regulations prohibiting nude dancing in establishments licensed to serve alcohol. According to Justice Rehnquist, "the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals."[82] As a result, the *LaRue* court upheld that state's use of the Twenty-First Amendment to regulate nude dancing. Scholars writing on the *La Rue* decision were frequently critical of this holding, arguing that there was no justification for what they believed was a significant infringement of First Amendment rights. Such scholars believed the evidence of rampant illegal sexual behavior[83] that the Court cited to justify its decision was unpersuasive. These critics further argued that even if the allegations of such behavior, including rape and attempted rape, were true, there were better methods of preventing such behavior than infringing on the dancers' free speech rights. For example, one commentator appeared baffled that the Court upheld such regulation when "less restrictive means ... such as the exclusion of already inebriated patrons from the

[80] 517 U.S. 484 (1996).
[81] 409 U.S. 109 (1972).
[82] *Id.* at 114.
[83] *Id.* at 111.

premises," were available.[84] Such critics did not recognize the combination of sex and alcohol as a particularly serious threat.

The Court, however, at least for a time, saw the connection between illicit sexuality and alcohol as obvious and extremely worrisome. After *La Rue*, the Court decided *New York State Liquor Authority v. Bellanca*,[85] in which the Court upheld a ban on nude barroom dancing, stating that its decision was based on the "common sense" notion that "any form of nudity coupled with alcohol in a public place begets undesirable behavior."[86] Lastly, in *City of Newport v. Iacobucci*,[87] the Court once again upheld a municipal ban on nude dancing.[88] The Court reaffirmed *Bellanca* and *LaRue*, stating that "the interest in maintaining order outweighs the interest in free expression by dancing nude."[89]

Although the Supreme Court described the threat of alcohol and sex as one confirmed by "common experience" and "common sense,"[90] many scholars disagreed; however, their criticisms ignored the pre-Prohibition experience dealing with the problems of alcohol and sex. Critics of the *LaRue* line of cases typically disparaged the Court for what they believed was a value judgment that speech in bars deserves less protection than other forms of speech. They also unjustifiably dismissed the argument that such regulations increase public health or safety. One critic asserted that what the Court really meant by "common sense" was the belief that "expression in an environment of alcohol consumption is not sufficiently valuable to merit vigorous constitutional protection."[91] Another commentator criticized *LaRue* and its progeny for holding that the interest in maintaining order and preventing crime outweighs any First Amendment interest in nude dancing and added that "[t]he same logic that allows states to proscribe striptease dancing in bars could also allow the states to ban the reading of politically controversial

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[84] Faust, *supra* note 13, at 751 n.32. (Although it appears not to have registered with this critic, the expulsion of drunk patrons trying to engage in illicit sexual behavior is an extremely ill-advised way of dealing with such behavior and is not truly a viable alternative.)

[85] 452 U.S. 714 (1981).

[86] *Id.* at 718.

[87] 479 U.S. 92 (1986).

[88] *Id.* at 94-95.

[89] *Id.* at 97.

[90] The Court refers to the belief in the danger of combining alcohol and sex as part of the "common experience," California v. LaRue, 409 U.S. 109, 115-16 (1972), or based upon "common sense," Bellanca, 452 U.S. at 718.

[91] Faust, *supra* note 13, at 753.

newspapers in bars."[92] Such criticisms ignore the history and purpose behind the Twenty-First Amendment.

The concerns that motivated the state regulations in *LaRue* were exactly the same concerns that led to the passage of the Eighteenth Amendment in the first place. In *LaRue*, the Court found that customers had "engaged in oral copulation, and . . . had masturbated in public."[93] It also found that "prostitution, rape and attempted rape had taken place in and around the establishments."[94] Similar types of illegal sexual behavior were widespread in pre-Prohibition drinking establishments and it was the desire to put a stop to such behavior that was another major motivating factor behind the temperance movement and Prohibition.

C. The Sexual Atmosphere of the Nineteenth Century Saloon

In the pre-Prohibition period, the saloon had a well established tradition of combining heavy drinking with sexual deviancy. Prohibition was a response not simply to the dangers of drinking, but also to the sexual impropriety that was encouraged in many pre-Prohibition saloons. Temperance advocates believed that the "saloon excite[d] sexual passions which would not have been aroused by drinking under other conditions."[95] In the late Nineteenth Century, "the atmosphere of many urban saloons drifted toward a libidinous haze. It became one of raw masculinity, of muted or blunt sexuality."[96] Attempts to lessen the sexual atmosphere of the saloon frequently resulted in legislation prohibiting women from having any association with saloons. Such statutes both prohibited "the employment of women in any saloon, theater or other place where liquor was sold"[97] and often actually barred women from even entering saloons in order to "protect[] women and enforce[] high morals."[98] Not surprisingly, such regulations actually had

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[92] Lisa Malmer, Comment, *Nude Dancing and the First Amendment*, 59 U. CIN. L. REV. 1275, 1276, 1306 (1991).
[93] *Id.* at 1282.
[94] *Id.*
[95] CLARK, *supra* note 6, at 59.
[96] *Id.* at 61.
[97] Blanche Crozier, *Constitutionality of Discrimination Based on Sex*, 5 B.U. L. REV. 723, 745 (1935).
[98] Heidi C. Paulson, *Ladies Night Discounts: Should We Bar Them or Promote Them?*, 32 B. C. L. REV. 494 (1991).

the opposite effect than what was intended. They simply kept "respectable" women out of the saloon.[99]

As a result, the only women in saloons were prostitutes. Many saloon keepers actually encouraged the presence of prostitutes, others had arrangements with nearby brothels and still others actually became pimps.[100] The connection between alcohol and sex was present in even the most upscale establishments where "[p]aintings of female nudes gave a hint of illicit sexuality to even the best hotel bars."[101] However, it was the low-grade places, with their "curtained 'wine rooms,' upstairs bedrooms and the presence of prostitutes [that] confirmed to worried observers the connection between alcohol and sexual transgression."[102]

The growth of prostitution in the United States paralleled the growth of the saloon.[103] In the pre-Prohibition period prostitution was increasing at alarming rates[104] and in many ways, the push for the Eighteenth Amendment was as much a result of the desire to regulate

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[99] In fact, these regulations were so effective in this respect that belief in the questionable character of women who entered bars persisted long after the repeal of Prohibition. See, for example, the gang rape of a woman in a New Bedford bar and the protests that the accompanied the conviction of the rapists. Protestors argued that a flirtatious woman gets what she deserves, questioning her presence in a bar, stating that "[s]he should have been home in the first place." The protestors argued that victim "did after all enter a barroom, drink and flirt." The community believed that the rapists' punishment should be lessened because the victim visited a bar. Editorial, *The Shame in New Bedford and Dallas; It's Not the Victim Who Should Be Tried for Rape*, N.Y. TIMES, March 28, 1984, at A26.

[100] CLARK, *supra* note 6, at 62.

[101] PEGRAM, *supra* note 1, at 56.

[102] *Id.* During this period, the only women to "frequent saloons openly were prostitutes." As custom became entrenched, any woman who entered a saloon was assumed to be of dubious character." This connection became so engrained that when temperance reformers "tried to enter saloons to record the conditions of drinkers," they were called "whores." Mary Murphy, *Bootlegging Mothers and Drinking Daughters: Gender and Prohibition in Butte Montana*, 46 AMERICAN QUARTERLY, 174, 181 (1994). The belief in the sinful influence of the saloon is further demonstrated by legislation which made it a crime for women to enter saloons and compelled saloon owners to dismantle any accommodations they had made for female patrons. *Id.* at 181-82.

[103] CLARK, *supra* note 6, at 63.

[104] CLARK , *supra* note 6, at 56-57. For instance, in "1902 in Spokane forty salons had 'wineroom' attachments which left rather little to the imagination."

this illicit sexual behavior as it was to regulate alcohol consumption.[105] During the period before National Prohibition, "it was almost impossible to distinguish the anti-saloon movement from the social protest against organized prostitution."[106]

D. NUDE DANCE CLUBS AS THE MODERN DAY SALOON

While the pre-Prohibition concern with the unrestrained and deviant sexuality of the old saloon seems inappropriate in the context of modern day bars, it actually appears quite apt when used in relation to nude dancing establishments. One could argue that in many ways, strip clubs are the contemporary equivalent of the old saloon. These establishments have all the worrisome aspects of the Nineteenth Century saloon and, therefore, the temperance movement's special concern with alcohol and sexuality continues to have extreme relevance in this context. Like the old saloon, the patrons in nude dancing clubs are almost exclusively male, the atmosphere is highly sexualized, excessive drinking is encouraged and prostitution is a frequent occurrence.[107] In addition, the volume of sexually based crimes that occur in these locations is also deeply disturbing.[108] Like the Nineteenth Century temperance advocates, many modern day communities with nude dancing establishments believe that preventing the sale of alcohol in these clubs would reduce the frequency of these crimes. They believe that "the combination of nude dancing and alcoholic inebriation increases to an

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[105] *Id.* at 63.

[106] *Id.* at 64.

[107] For the connection between sex and alcohol in these establishments see, for example, *United States v. Campione* where, for the price of two drinks, patrons could watch the nude dancing and were also presented with the opportunity to "mix", i.e. spend time with the dancers, which frequently included sex. In order to have more privacy with a dancer patrons would go to the booth area, or the back room, where patrons were required to buy a bottle of liquor for between $200.00 and $700.00. 942 F.2d 429, 431 (7th Cir. 1991). The more alcohol they bought, the more "privacy" and opportunities for sexual intercourse they received. *Id.*

[108] *See e.g.*, Grand Faloon Tavern, Inc. v. Wicker, 670 F.2d 943, 945 n.3 (11th Cir. 1982) ("The offenses occurring in and around the Booby Trap included homicide, narcotics, robbery, prostitution, lewdness, larceny, assault, battery, drunk and disorderly, and solicitation. In addition, a police department record of police calls to the Booby Trap included several references to rapes, prostitution by Booby Trap employees, and fights between the tavern's patrons.").

unacceptable level the likelihood of illegal and/or disorderly conduct,"[109] and they point to the high level of sexual assaults that occur in or around nude dancing establishments selling alcohol to support to their argument.[110]

These contemporary arguments regarding nude dancing clubs sound very similar to the anti-saloon arguments made by Nineteenth Century temperance advocates.[111] In addition, there are many other similarities between the saloon and the strip club. Like the saloon, nude dancing clubs also cause great harm to families. This harm is demonstrated by the number of divorce cases involving husbands who frequented these clubs.[112] There are numerous instances of husbands racking up huge debts at strip clubs,[113] and even more disturbing are the cases where these debts led men to assault or even murder their wives.[114]

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[109] Richter v. Dep't of Alcoholic Beverage Control, 559 F.2d 1168, 1173 (9th Cir. 1977).

[110] The connection between alcohol and such crimes can be seen in the case of the Oasis club which was not permitted to sell alcohol and initially complied with the law after receiving a citation for violating it. While the club complied with the law there were no sexual assault incidents but just when the police began to suspect that the club was once again selling alcohol a female dancer at the club claimed that she had been raped by a male patron. State *ex rel.* Woodall v. D&L Co., Inc., No. W1999-00925-COA-R3-CV, 2001 Tenn. App. LEXIS 357, at *5, *11 (Tenn. Ct. App. May 16, 2001).

[111] On the occasion of the opening of a strip club in Shreveport, LA, one woman wrote into the paper: "You women better get your divorce papers ready because the strip club is coming." *Tell the Times,* TIMES (Shreveport, LA), Sept. 21, 2002, at 6D.

[112] *See e.g.*, Beard v. Beard, 49 S.W.3d 40, 63 (Tex. App. 2002) (discovering that her husband had been frequenting strip clubs once a week for years, wife filed for divorce).

[113] In *Beard*, it was estimated that the husband had spent over $12,600 at strip clubs. *Id.* at 64. Similarly, in Mantle v. Sterry, the husband spent more than $75,000 at strip clubs in the year before the parties divorced. No. 02 AP-286, 2003 Ohio 6058, at ¶29 (Ohio Ct. App. Nov. 13, 2003).

[114] In one case a man strangled his wife to hide debts from nude dancing clubs. *Alabama*, USA TODAY, June 6, 1991, at 8A. In another a man left his wife so he could continue to lavish expensive gifts on a strip club dancer but when she tired of him she devised a plan to murder his wife and frame him for it so his money would go to her. Larry Celona, Eric Lenkowitz & Tracy Connor, *Go-Go Girls Gaga Fantasies: Slay Plot Stripper Told of "Bonnie and Clyde" Goals*, N.Y. POST, Dec. 7, 2001, at 008.

E. Addressing the LaRue Criticisms

The similarities between the saloon and modern nude dancing establishments demonstrate how pre-Prohibition concerns with sex and alcohol may still have important significance today. For example, one of the common criticisms of the *LaRue* line of cases was a slippery slope argument which warned that allowing the Twenty-First Amendment to justify the regulation of nude dancing could easily lead to state regulation of all sorts of speech, from poetry to politics, which occurs in any establishment selling liquor. According to this argument, "[t]he same logic that allows states to proscribe striptease dancing in bars could also allow the states to ban the reading of politically controversial newspapers in bars."[115] However, such arguments ignore the special, historic concern with alcohol and sex; a connection which tends to cast doubt on these slippery slope arguments. When viewed in this context it is easy to see why such regulation would be confined to sexual acts, but not other forms of controversial speech.

In *Reed v. Village of Shorewood*,[116] the Seventh Circuit specifically addressed the question of whether the Twenty-First Amendment could be used to regulate other forms of speech in bars and the court's answer was a resounding "no." The Seventh Circuit reversed the district court's ruling that had upheld the village's ban on live rock music played in bars.[117] The *Village of Shorewood* court found that the Twenty-First Amendment did not justify this restriction on free speech. The court reached this decision despite the fact that there was "uncontested evidence of frequent disturbances at the plaintiffs' bar."[118] The distinction drawn by the *Shorewood* court between the use of the Twenty-First Amendment to regulate sexual speech, but not other kinds of speech, is justified in light of the temperance movement's concern with sex and alcohol. These concerns were incorporated into the Twenty-First Amendment and therefore, states should be able to use this Amendment to regulate sexual speech, but not other forms of speech.

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[115] Malmer, *supra* note 92, at 1306. "The Court could easily extend this reasoning to say that the twenty-first amendment outweighs all first amendment rights in establishments that serve liquor. The power to outlaw liquor altogether does not necessarily imply the power to ignore the first Amendment in establishments serving liquor. So long as the states allow bars to operate, they should not be permitted to violate the first Amendment rights of those who own and patronize them." *Id.*

[116] 704 F.2d 943 (7th Cir. 1983).

[117] *Id.* at 11-13.

[118] *Id.* at 11.

F. THE 44 LIQUORMART DECISION

The history of the temperance movement and the push for Prohibition demonstrates why the Twenty-First Amendment should continue to support nude dancing regulations and why *44 Liquormart* was wrongly decided. In *44 Liquormart*, a case concerning the regulation of commercial speech, the Supreme Court held that the Twenty-First Amendment did not justify nude dancing regulations.[119] The issue in *44 Liquormart* was whether a law prohibiting alcohol price advertisements violated the First Amendment.[120] The *44 Liquormart* Court reaffirmed the outcome in *LaRue,* but held that the Twenty-First Amendment did not outweigh the First Amendment and could not be used to regulate commercial speech. The Court explained that "the Twenty-First Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment."[121] However, the Court also stated that its *44 Liquormart* decision did not affect the outcome in *LaRue* or similar types of cases, because such regulation could be achieved through the state's police power.[122] The Court stated that, "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations. Moreover, in subsequent cases, the Court has recognized that a state's inherent police powers "provide ample authority to restrict the kind of 'bacchanalian revelries' described in the *LaRue* opinion regardless of whether alcoholic beverages are involved."[123]

The holding in *44 Liquormart* was the Court's answer to the criticisms of *LaRue* that the use of the Twenty-First Amendment to regulate nude dancing was the beginning of a slippery slope that could lead to drastic infringements on free speech. The *44 Liquormart* decision made it clear that the Twenty-First Amendment would never become a backdoor method of allowing censorship. However, in its attempts to make sure that the Twenty-First Amendment could not be used to regulate other forms of speech, the *44 Liquormart* court threw the baby out with the bathwater. A look to the history and concerns of the temperance movement would have provided the Court with a way to

[119] 517 US 484 (1996).
[120] *Id.* at 489.
[121] *Id.* at 516.
[122] *Id* at 515.
[123] *Id.* at 515.

draw a principled distinction between nude dancing and other forms of speech and therefore allowed courts to continue using the Twenty-First Amendment to regulate nude dancing.

Commercial speech is very different from nude dancing and there is nothing in the history of the Prohibition movement or repeal that would suggest that temperance advocates were concerned with regulating commercial speech. Although the *44 Liquormart* court stated that the Twenty-First Amendment has no bearing on the First Amendment, given the history and purpose behind the Twenty-First Amendment, there is a strong reason to distinguish between sexual speech and other kinds of speech in the context of alcohol regulation. This is especially true given the fact that despite what the Court said in *44 Liquormart*, it is not at all certain that state police powers are always sufficient to prevent the types of incidents that occurred in *LaRue.*

Although the *44 Liquormart* court stated that the Twenty-First Amendment is not needed to regulate the bacchanalian revelries described in the *LaRue* because the states's police powers alone are sufficient to prevent such behavior, [124] the Court also made it clear that the Twenty-First Amendment may not be used to infringe Freedom of Speech, thus implying it may not be used to regulate nude dancing.[125] As a result, problems arise when the First Amendment and the state police powers come into conflict, and there are numerous cases which refute the *44 Liquormart* court's statement that state police powers will always be sufficient to prevent the unwanted effects of alcohol and nude dancing.

For example, in *Vaughn v. St. Helena Parish Police Jury,*[126] the district court held that the state's police power did not give the state the right to combat the secondary effects of nude dancing and alcohol by prohibiting completely nude dancing in bars. The statute prohibited "the holder of a retail or wholesale dealer license from permitting 'any nude or partially nude person' on the premises," but all this meant was that dancers were required to wear a G-string and pasties. [127] Nonetheless,

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[124] *Id.*

[125] *Id.*

[126] 192 F. Supp. 2d 562 (W.D. L.a. 2001).

[127] *Id.* at 567. The statute defined "nude" as "a person who is less than completely or opaquely covered such as to expose to view that person's genitals and/or pubic region, all of the buttocks area or the female breast area below a point immediately above the top of the areola." *Id.* at 567.

the *Vaughn* court held that such a restriction was overbroad and was therefore an unconstitutional restriction on free speech. As a result, the state was not able to use its police powers to the extent it believed necessary to prevent the harmful effects of nude dancing in drinking establishments.

Similarly, in *G.Q. Gentlemen's Quarters, Inc. v. City of Lake Ozark*,[128] the court was highly unreceptive to the city's argument regarding the harmful "secondary effects" of nude dancing in bars. Although the court stated that "the government's burden . . . is not great" the court found it was not met and that subsequently, the city could not use its police powers to regulate nude dancing.[129] In fact, the level of proof required by the court was actually quite high considering the fact that the Supreme Court has repeatedly implied that it is common sense to conclude that combining alcohol and sex will produce negative effects.[130] However, the *G.Q.* court did not believe this connection was obvious, holding that while "the City claims in its brief on appeal that the purpose of enacting Ordinance No. 99-7 was to combat harmful secondary effects, nothing in the record indicated that this was the governmental purpose of the ordinance."[131] The court wanted significant proof that alcohol and sex produce harmful secondary effects and without it, the court found the statute prohibiting nude dancing unconstitutional. In the absence of such proof, the *GQ* court held that the city's police powers were insufficient to regulate nude dancing.

In *R.V.S., L.L.C. v. City of Rockford*,[132] the Seventh Circuit also demanded significant proof that combining sex and alcohol produces negative effects. The *RVS* court held that there was no basis for the city council to have found that exotic dancing produces harmful secondary effects because "the City Council did not rely on any studies from other towns or conduct any of their own studies regarding the relationship between Exotic Dancing Nightclubs and undesirable 'secondary effects.'"[133] The court reached this conclusion despite minutes from the

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[128] 83 S.W.3d 98 (Mo. Ct. App. 2002).
[129] *Id.* at 102.
[130] *See e.g.*, Ben"s Bar, Inc. v. Village of Somerset, 316 F.3d 702 , 725-26 (7th Cir. 2003); Alameda Books, Inc., 535 U.S. 425, 438-39 (2002); City of Los Angeles v. Alameda Books, 535 U.S. 425, 438-39 (2002); City of Erie v. Pap's A.M., 529 U.S. 277, 296-97 (2000).
[131] 83 S.W.3d 98 at 102.
[132] 361 F.3d 402 (7th Cir.2004).
[133] *Id.* at 405.

city council's meeting revealing the council's concern and experience with the negative secondary effects of nude dancing and alcohol,[134] as well as the testimony of a crime expert showing the connection between nude dancing establishments and secondary effects such as prostitution.[135] Despite such evidence, the court still found that there was not enough evidence of harmful secondary effects to uphold the ordinance under the government's police powers.[136]

Such cases demonstrate that the state police power has not always been considered enough to justify the regulation of nude dancing in bars. This conclusion is further supported by Supreme Court cases like *Lorillard Tobacco Co. v. Reilly*,[137] in which the Court has held that state police powers often do not give states the right to regulate demonstrably dangerous speech. In *Lorillard Tobacco*, the Court held that the state's police powers did not give it the power to regulate smokeless tobacco and cigar advertising in the manner the state believed would best reduce the incidence of childhood and adolescent smoking. The Court reached this conclusion even though it held that the state had "provided ample documentation of the problem with underage use of smokeless tobacco and cigars."[138] Despite this finding, as well as the Court's acknowledgement that "limiting youth exposure to advertising will decrease underage use of smokeless tobacco and cigars,"[139] the Court still held that the regulation violated the First Amendment. What a case like *Lorillard Tobacco* shows is that the state police powers do not clearly allow the regulation of speech that produces harmful effects when such regulation conflicts with the First Amendment. Therefore, the Court's statement in *44 Liquormart,* that the regulations at issue in

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[134] The minutes stated that:

> It is the City's experience that [Exotic Dancing Nightclubs] in a concentrated area or near residential uses attract[ ] prostitution and other problems that are part of this atmosphere. Alderman Mark stated there have been incidents where liquor sales were procured with the intent of establishing dancing clubs. The proposed text Amendments would allow the City more control over the location of these type of clubs to prevent adverse effects on adjoining neighborhoods.

Id. at 405-06.

[135] *Id.* at 407-08.

[136] *Id.* at 412.

[137] 533 U.S. 525 (2001).

[138] *Id.* at 561.

[139] *Id.*

LaRue could have been accomplished through the state's police power, is not nearly as obvious as it first appears.

G. A BETTER SOLUTION

The *44 Liquormart* Court was concerned with the potential use of the Twenty-First Amendment to curb free speech, but in solving one problem the Court created another. By stating that the Twenty-First Amendment did not abridge Freedom of Speech, and thus by implication nude dancing, the Court ignored the history and lessons of the temperance movement which had unquestionably demonstrated the special problems of combining alcohol and sex and the importance of regulating this combination. A possible solution to this dilemma would have been for the *44 Liquormart* Court to hold that although the Twenty-First Amendment does not qualify the First Amendment it does increase the constitutionality of a state using its police power to regulate alcohol and sex. Such a holding would have prevented the Twenty-First Amendment from being used to curb other forms of speech while at the same time insuring that state police powers would be strong enough to curb the secondary effects of combining alcohol and nude dancing.

This solution would avoid the current situation in which post-*Liquormart* courts are struggling to justify nude dancing regulations under inadequate police powers. In *Sammy's of Mobile*, the Eleventh Circuit relied on the *44 Liquormart* decision to support its holding that such regulation was constitutional under the state's general police powers. However, in *Sammy's of Mobile*, the court is quite clearly struggling with the idea that the police power alone justifies such regulation. For the dissent, such a conclusion is impossible. The dissent argued that without the Twenty-First Amendment justification the rational of *LaRue* is "eviscerated."[140] The majority disagreed, but their desire to rely on the Twenty-First Amendment can be seen in the fact that although they are careful not to base their ruling on the Twenty-First Amendment, they do very clearly base their decision on the presence of alcohol.[141] Although the court explicitly denies using the Twenty-First Amendment in its decision one gets the strong suspicion that the court believes it should be.

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[140] 140 F.3d 993, 996 (11th Cir. 1998).

[141] For example, the court points out that it is not banning all nude dancing, only "nude dancing where liquor is sold." *Id.* at 998.

The difficulties faced by the *Sammy's of Mobile* court stem from the *44 Liquormart* Court's disavowal of the Twenty-First Amendment's applicability to nude dancing regulation. Such difficulties could have been alleviated if the Court had looked towards the historic regulation of alcohol and sex, and held instead that this history, which is recognized in the Twenty-First Amendment, justifies increased state power to regulate alcohol and sex. Such a decision would have put an end to the idea that the Twenty-First Amendment trumps the First Amendment, but would not have ended the use of the Twenty-First Amendment to justify nude dancing regulations.

III. STATE REGULATION OF ALCOHOL AND DIRECT SHIPMENT LAWS

A. The Controversy over Direct Shipment Bans

Decades after the repeal of Prohibition and the adoption of the Twenty-First Amendment it is not wildly surprising that many people question the use of the Twenty-First Amendment to regulate billiards halls and nude dancing establishments. Nonetheless, what is surprising is the fact that the most vigorous Twenty-First Amendment debate concerns states' rights to regulate alcohol in general. It would appear that if Section 2 of the Twenty-First Amendment has any meaning, it is that states have the right to regulate the production, importation and sale of alcohol within their boarders. However, the Supreme Court's recent decision in *Granholm v. Heald*,[142] demonstrates that even this once unquestioned right is now under attack.

B. The Granholm Decision

The *Granholm* decision rewrites the history of Prohibition in this country in order to make alcohol regulation fit with modern day mores rather than recognizing and effectuating the original purpose behind the Twenty-First Amendment. Although laws should reflect the values of those they regulate, it is the job of Congress and not the courts to make changes to out of date laws, especially when the law at issue is a constitutional amendment.

Granholm concerned the right of states to make different regulations with regard to in-state and out-of-state wineries. The regulations at issue permitted in-state wineries to sell directly to consumers, but prohibited out-of-state wineries from doing the same. There were two different state

[142] 125 S.Ct. 1885 (2005).

regulations at issue in the *Granholm* case. The first was the Michigan regulation scheme, which required that wines shipped by out-of-state wineries, but not in-state wineries, pass through an in-state wholesaler and retailer before reaching consumers. The second was the New York scheme which differed slightly in that it did not ban direct shipments altogether but rather required out-of- state wineries to establish a distribution operation in New York before they were permitted to ship directly to consumers. While it is true that both these regulatory schemes imposed additional costs on out-of-state wineries that were not imposed on in-state producers, the *Granholm* Court was wrong in finding that this disparate treatment is not permitted under the Twenty-First Amendment.

According to the *Granholm* Court, both sets of regulations violated the Commerce Clause because they mandated "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[143] The Court then considered whether such differential treatment was nevertheless permissible under the Twenty-First Amendment and found that the Twenty-First Amendment did not provide an exception. To reach this conclusion the Court relied on the history of the Twenty-First Amendment and direct shipment. However, the Court's decision misinterprets and misunderstands this history.

In 1890, the Wilson Act[144] was passed to allow states to regulate the importation of alcohol into their state. The Wilson Act permitted states to regulate imported alcohol to the same extent that they regulated domestic liquor.[145] Nevertheless, although the Wilson Act permitted states to regulate alcohol importation, it did not permit states to ban the importation of liquor. This loophole was closed by the Webb-Kenyon Act, which divested liquor of its interstate characteristics and thus permitted states to ban direct shipments altogether.[146] Ironically, although the *Granholm* Court found that the Commerce Clause makes direct shipment laws unconstitutional, in the pre-Prohibition period, temperance advocates used the Commerce Clause to convince Congress

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[143] *Granholm*, 125 S.Ct. at 1895.
[144] Wilson Act, 27 USC §121 (1890).
[145] *Id.*
[146] An Act Divesting intoxicating liquors of their interstate character in certain cases, (Webb-Kenyon Act), 27 U.S.C. §122 (1913).

and the Court that direct shipment regulation was constitutional.[147] It was "the growing comfort among progressives with use of the Commerce Clause [that] led Congress to pass the Webb-Kenyon Act in 1913. The Act completely removed 'liquor from the category of interstate goods, thereby eliminating the commerce clause as an impediment to state alcohol laws.'"[148]

Relying on this history, New York and Michigan argued that the Webb-Kenyon Act removed any barrier to discriminatory state liquor regulation. The *Granholm* Court, however, disagreed and determined that the Webb-Kenyon Act only permitted such bans when they were on the same terms as those applying to in-state producers.[149] The wording of section two of the Twenty-First amendment closely follows that of the Webb-Kenyon Act. Thus, the Court concluded that if the Webb-Kenyon Act prohibited such differential treatment then the Twenty-First Amendment must also prohibit differential treatment.[150] However, even assuming the Court correctly interpreted the scope of the Webb-Kenyon Act, the history of alcohol regulation in that intervening period between the passage of that Act and the repeal of Prohibition calls the Court's conclusion regarding the scope of the Twenty-First amendment into question.

The Webb-Kenyon Act was passed before the instigation of national Prohibition. At this point, the proponents of national Prohibition had not yet won over popular sentiment nor had their message infiltrated the country's political and legal institutions. As the *Granholm* opinion recognizes,[151] in the period leading up to Prohibition, when the

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[147] W. J. Rorabaugh , *Reexamining the Prohibition Amendment*, 8 YALE J.L. & HUMAN. 285, 291 (1996) ("At the same time progressives pursued an expansion of federal power using the Constitution's Commerce Clause.") (book review).

[148] Matthew J. Patterson, Note, *A Brewing Debate: Alcohol Direct Shipment Laws and the Twenty-First Amendment*, 2002 U ILL. L. REV. 761, 767 (2002).

[149] *Granholm*, 125 S.Ct. at 1901-02 ("The Wilson Act reaffirmed and the Webb-Kenyon Act did not displace, the Court's line of Commerce Clause cases striking down state laws that discriminated against liquor produced out of state.").

[150] *Id.* at 1902 ("The wording of §2 of the Twenty-First Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers clear intention of constitutionalizing this Commerce clause framework established under those statutes.").

[151] *Id.* at 1898. ("In a series of cases before ratification of the Eighteenth Amendment the Court, relying on the Commerce Clause, invalidated a number of state liquor regulations.").

popularity of the Prohibition movement was growing rapidly, the Supreme Court's decisions were noticeably and decidedly inhospitable to the movement.[152] During this period, the Court repeatedly struck down state attempts to ban direct shipments and only barely upheld the constitutionality of the Webb-Kenyon Act.[153] Consequently, the purpose and meaning of the Webb-Kenyon Act, which almost failed to pass,[154] cannot be compared with the purpose and scope of the Twenty-First Amendment which was passed after the success of the Prohibition movement and years of National Prohibition.

The Webb-Kenyon Act was passed at a time when Prohibitionists were still fighting to simply close off loopholes to state wide Prohibition—such as direct shipment. The Web-Kenyon Act was certainly important to the Prohibition movement but it was only one of many steps that ultimately led to National Prohibition. Conversely, the Twenty-First Amendment was ratified after the passage of National Prohibition and it had the entire weight and achievements of that movement behind it. In addition, it is important to note that despite our modern day conceptions about the temperance movement and the "failure" of Prohibition,[155] repeal was in fact not seen as a failure of the temperance movement.[156] Rather, it was simply a recognition that national Prohibition did not work and that alcohol regulation decisions should be left to the states. In fact, if repeal meant anything, it was that

[152] In 1898, the Supreme Court held in *Rhodes v. Iowa,* 170 U.S. 412 (1898), that a dry state could not interfere with alcohol that was 'in transit.' This meant that a state could not seize liquor as a common carrier crossed the state line and that therefore a state could not prevent alcohol from entering its borders. The same year, the Court declared in *Vance v. W.A. Vandercook Co,.* 170 U.S. 438, (1898), that a state could not stop the interstate shipment of liquor for personal use. In 1905, in *American Express v. Iowa,* 196 U.S. 133 (1905), the Court further protected interstate shippers by extending federal protection to the point where the liquor actually reached the consignee. "These rulings resulted in an open liquor trade in dry areas. Express companies received liquor on behalf of fictitious consignees and then sold it to anyone who put in a claim." Rorabaugh, *supra* note 148, at 291.

[153] *See* Clark Distilling Co. v. W. Maryland R. Co., 242 U.S. 311, (1917) (upholding by a divided court the constitutionality of the Webb-Kenyon Act).

[154] *Id. See also, Granholm* 125 S.Ct. at 1900 (stating that the Act was only passed after Congress overrode a presidential veto based on the Attorney General's recommendation that the Act was unconstitutional).

[155] Infanti, *supra* note 2.

[156] CLARK, *supra* notes 6, at 169.

temperance goals were best served by local and state regulations as opposed to federal regulations.

Prohibition had been an effort to centralize and federalize the regulation of liquor but until Prohibition, temperance objectives had always been served through local regulations.[157] It was the Progressive movement which pushed for National Prohibition. Progressives "encouraged the growth and centralization of government power and had that power applied to issues of labor, health, and liquor."[158] In the alcohol context, centralized regulation did not work and repeal was simply recognition of this fact; it was not a rejection of temperance goals. When the Twenty-First Amendment was passed there was still widespread temperance sentiment and many states wanted to remain dry or at least retain the possibility of becoming dry again in the future.[159] Section two of the Twenty-First Amendment was passed to ensure that states would continue to have this option. It was passed to ensure that states had the legal tools necessary to continue to fully effectuate their temperance goals.

With this history in mind, section two of the Twenty-First Amendment, which gives states the power to regulate alcohol, must be

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[157] *See e.g.*, Dram Shop Act, ch. 64, 1885 Kan. Terr. Stat. 322-24 (codified as amended at 1868 Kan. Gen. Stat., ch. 35, 1-15). The Dram Shop Act of 1855 authorized localities to accept or reject the legalization of retail outlets and saloons. 1, 1855 Kan. Terr. Stat. at 322. In communities that opted to permit liquor sales, applicants for licenses were required to submit petitions to the local government which had been signed with approval by a majority of the registered male voters in the jurisdiction. The Legislature also forbade liquor sales on the Sabbath and to Indians and slaves. See also Indians Act, ch. 84, 1855 Kan. Terr. Stat. 417-19 (codified as amended at 1868 Kan. Gen. Stat. ch. 50, 1-5). Swain, *supra* note 29, at 345n.13.

[158] Susan L. Martin, *Wine Wars-Direct Shipment of Wine: The Twenty-First Amendment, the Commerce Clause and Consumer Rights*, 38 AM BUS L.J. 1,11 (2000).

[159] For example, in Florida, national Prohibition repeal was "stirred more by appeals to state sovereignty and economic hardship than to objections to enforcement practices, [and] did not end the dry era in Florida." David E. Kyvig, *John J. Guthrie Jr., Keepers of the Spirits: The Judicial Response to Prohibition Enforcement in Florida, 1885-1935*, 42 AM. J. LEGAL HIST. 456, 457 (1998) (book review). In fact, after the repeal of National Prohibition "the state supreme court ruled that previously existing local option had been reinstated, ironically providing a more effective prohibition of alcohol for communities that wished it." *Id.*

read much more expansively than the similar provisions of the Webb-Kenyon Act. Based on this significant historical difference, the purpose and scope of the Webb-Kenyon Act cannot be considered to accurately reflect the purpose and scope of the Twenty-First Amendment. Nevertheless, despite the questionable usefulness of pre-Prohibition history and case law to an understanding of the Twenty-First Amendment, the *Granholm* Court nonetheless chose to base its interpretation of section two primarily on this information. In fact, the Court specifically chose not to consider the cases concerning the Twenty-First Amendment which were decided immediately after its passage. The *Granholm* Court chose to disregard these cases despite the obvious fact that such cases would be the most likely to accurately reflect contemporary understandings of the Amendment's scope and purpose.

For example, in *State Board. of Equalization of California. v. Young's Market Co.,* [160] the Court rejected the plaintiff's argument that it should "construe the [Twenty-First A]mendment as saying, in effect: The state may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its boarders [sic]; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms."[161] According to the *Young's Market* Court, such a holding would "involve not a construction of the Amendment but a rewriting of it." [162] The *Granholm* Court makes an unconvincing attempt to distinguish *Young's Market* by stating that "[i]t is unclear whether the broad language in *Young's Market* was unnecessary"[163] and by stating that "[s]ome of the cases decided soon after the ratification of the Twenty-First amendment did not take account of [Prohibition] history."[164]

The Court's explanation for ignoring such cases is unconvincing. It is hard to imagine that a court that had just lived through the history of Prohibition and repeal would not take it into account when interpreting the Twenty-First Amendment. The entire country knew this history intimately; therefore, the Court would have had no need to recite it in its decision. It is axiomatic that cases decided immediately after the enactment of an amendment are the mostly likely to accurately reflect

[160] 299 U.S. 59, 62 (1936).
[161] *Id.*
[162] *Id.*
[163] Granhom v. Heald, 125 S.Ct. 1885, 1903 (2005).
[164] *Id.* at 1902.

the correct understanding of that amendment's purpose. Nevertheless, although the *Granholm* Court recognized that the cases immediately after the ratification of the Twenty-First Amendment "reaffirmed the States' broad powers under § 2"[165] the Court downplays and attempts to distinguishes these cases, relying instead on later cases that better support the Court's view that such discrimination is unconstitutional.[166]

While it is true that both the Michigan and New York regulation schemes required different regulations for in-state and out-of-state wineries this distinction is permissible under the Twenty-First Amendment. Section two was enacted to ensure that states would have the ability to effectuate their citizens' temperance goals; even to the extent that such regulations would otherwise violate the Commerce Clause. States do not need to require of their in-state wineries the additional regulations they impose on out-of-state wineries because in-state wineries are already regulated by that state. As a result, in-state wineries are significantly more likely to respect and abide by that state's alcohol regulations than out-of-state wineries.[167] Specifically, the greatest threat posed by permitting direct shipments by out-of-state wineries is the possibility that such wineries will not respect the wishes of this country's numerous dry counties to remain dry. If pre-Prohibition history is any indication, this is a well founded fear and it is very likely that the temperance wishes of dry counties will not be respected by out-of-state wineries.[168]

C. *Historical Concerns with Direct Shipment*

In the pre-Prohibition period, one of the greatest bars to statewide temperance had been the importation of alcohol from other states. Many states had problems enforcing temperance and such "enforcement generally failed, at least in part because of liquor shipped across state lines."[169] The lack of effective direct shipment laws was one of the major issues spurring the drive for National Prohibition.[170]

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[165] *Id.* at 1903.
[166] *Id.* at 1890 (citing cases such as 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Bacchus Imps, Ltd. v. Dias, 468 U.S. 273 (1984); Capital Cities Cable, Inc., v. Crisp, 467 U.S. 691 (1984)).
[167] *See infra* Part III.C-D.
[168] *See infra* Part III.C-D.
[169] Rorabaugh, *supra* note 148, at 288-89.
[170] *Id.* at 291.

"Prohibitionists concluded that dry areas would only be safe when the whole country was dry."[171]

When the Twenty-First Amendment was passed, it repealed Prohibition but it was still intended to encourage and facilitate temperance. The Amendment achieved this objective by assuring that states would have the ability to regulate the importation of alcohol within their boarders, which the pre-Prohibition period had shown was a crucial part of any state temperance plan.[172] "Both proponents and opponents of repeal agreed that the power to regulate alcohol rightly belonged to the states"[173] and they "made sure to eliminate a provision from an early version of Twenty-First Amendment that empowered both the federal and state governments to regulate "saloons."[174] "Both wet and dry senators objected noting this provision, would undermine the key purpose of the amendment to return control over liquor regulation to the states."[175] When the Twenty-First Amendment was passed, "Senator Blaine, the Senate sponsor of the Amendment resolution said that its purpose was 'to assure the so-called dry States against the importation of intoxicating liquor into those States.'"[176] He further stated that the Twenty-First Amendment would "'restore to the states . . . absolute control . . . over interstate commerce affecting intoxicating liquors.'"[177] Senator Blaine believed section two of the Amendment would provide a constitutional safeguard for states that wished to continue their temperance goals.[178] However, the *Granholm* Court's decision threatens to undermine this safeguard.

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[171] *Id.* at 289.

[172] Brannon P. Denning, *Time to Sober Up: The Constitution Does Let States Stop Cross-Border Alcohol Sales*, LEGAL TIMES, Feb. 23, 2004 at 58 ("When enthusiasm for Prohibition waned, state concerns about their ability to control the alcohol trade re-emerged.").

[173] *Id.*

[174] *Id.* ("With that important change, the 'drys' were assured that the dormant commerce clause doctrine would not be revived to strike down state regulatory efforts; the 'wets,' too, were provided with constitutional assurances that dry forces could not use federal power to re-establish some form of Prohibition in the future."). *Id.*

[175] *Id.*

[176] Martin, *supra* note 159, at 14 (quoting 76 CONG. REC. 4141 (1933) (remarks of Sen. Blaine)).

[177] 76 CONG. REC. 4143 (1933) (remarks of Sen. Blaine), *quoted in* Martin, *supra* note 157 at 14.

[178] *Id.* at 4141 (1933).

D. DRY COUNTIES AND THE CONTINUED TEMPERANCE THREAT

A state has a variety of means to ensure that its in-state wineries comply with its alcohol regulations; the incentive for out-of-state wineries to comply is significantly less. While in-state wineries could lose their license and hence their entire business for violating the state's alcohol regulations the threats a state can make to an out-of-state winery for non-compliance are comparatively minimal. A small out-of-state winery that violates another state's alcohol regulations is both unlikely to be caught as well as unlikely to face prosecution. Therefore, it is the small out-of-state winery which presents the biggest threat to state temperance goals.

Large wineries are not the issue in the direct shipment debate. An out-of-state winery that does substantial business in a particular state has incentives to comply with state regulations. Such wineries did not have significant difficulties complying with the types of regulations struck down by the *Granholm* court because they were large enough, and well known enough such that the state's direct shipment regulations did not significantly affect their ability to do business within the state.[179] The wineries that were most affected by direct shipment regulations were the small wineries that did not make many sales within a particular state and were thus financially prohibited from selling in that state due to the state's direct shipment regulations.[180] Thus, it is these small wineries which present the greatest temperance threat. Even with many direct shipment laws now declared unconstitutional it is still unlikely that direct shipments from small wineries will increase to such an extent that these wineries will now have sufficient incentive to make sure they abide by a state's other alcohol regulations.

The threat of non-compliance with such state regulations is significant because more than seventy years after the repeal of Prohibition, many areas of the country still prefer to remain dry.[181] At

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[179] Granholm v. Heald, 125 S.Ct. 1885, 1892 (2005) (describing the direct shipment issue as one of "small wineries." The Court stated that "[t]he increasing winery-to-wholesaler ratio means that many small wineries do not produce enough wine or have sufficient consumer demand for their wine to make it economic for wholesalers to carry their products . . . . This has lead many small wineries to rely on direct shipping to reach new markets.").

[180] *Id.*

[181] This is very important given the frequent argument that direct shipment laws can serve no temperance purpose if they do not also ban intra-state shipments of alcohol. According to this argument, unless a state also bans intra-state

the time of repeal, many states decided to remain dry and there was the very real possibility that additional states might join them in the future. In the period before National Prohibition states frequently fluctuated back and forth between being wet or dry,[182] and although it has been decades since the last state-wide Prohibition legislation was repealed, this does not mean that the temperance purpose of direct shipment bans are no longer relevant. However, what the lack of fully dry states does mean is that although there is still a significant desire for alcohol regulations, the ability of these regulations to effectuate temperance goals is in many ways more difficult. While it is unlikely that entire states will become dry again, hundreds of counties throughout the country continue to remain dry and for these areas, direct shipment bans continue to serve a temperance purpose.[183]

In fact, it is because there are no longer any dry states that direct shipment regulations are perhaps more necessary now than any time

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shipments, direct shipment bans cannot possibly serve temperance goals. However, temperance purposes are served by direct shipment bans even if states allowed the in-state shipment of alcohol. It is not about the availability of alcohol within that state, but the way in which that alcohol and its availability are regulated. Martin, *supra* note 159, at 21 & n. 146 (arguing that there can be no temperance purpose when "residents can become as drunk on local wines . . . as those . . . kept out of state by . . . statute." (citing Dickerson v. Bailey, 87 F. Supp. 2d 691, 710 (S.D. Tex. 2000)); Vijay Shanker, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 377 (1999) (arguing that direct shipment laws are unconstitutional because "federal courts have increasingly required state laws regulating alcohol to be passed with the intent of furthering the core Amendment purpose: temperance"); John Foust, Note, *State Power to Regulate Alcohol Under the Twenty-First Amendment: The Constitutional Implications of the Twenty-First Amendment Enforcement Act*, 41 B.C. L. REV. 659, 691-92 (arguing that "direct shipment laws . . . are not realistically designed to promote temperance.").

[182] *See supra* note 7.

[183] For example, out of the 75 counties that comprise Arkansas, 43 are dry. Kenneth Heard, *Private Clubs Puncture State's Wet, Dry Divide*, ARK. DEMOCRAT-GAZETTE, March 14, 2004, *available at* LEXIS. Similarly, "26 of Alabama's 67 counties have a total ban on alcohol sales," William Brand, *Untouchable Pale Ale Memorable*, OAKLAND TRIB., Jan. 14, 2004, *available at* 2004 WLNR 17072242, there are 51 dry counties in Texas, Cameron Siewert, *J.J. Sedelmaier Production, Inc. Presents . . . : How Dry I Am! Or: What's a Girl Gotta Do to Get a Drink in this Place*, TEX. MONTHLY, Dec. 1, 2003, *available at* 2003 WLNR 8850073, and "almost half of Oklahoma's 77 counties remain dry," *Half of Oklahoma Counties Still 'Dry,'* MODERN BREWERY AGE, Jan. 5, 2004, *available at* LEXIS.

since repeal. Modern state alcohol regulations must be considered with regard to effectuating local, rather than state- wide temperance goals. The regulations struck down by the *Granholm* Court were examples of regulations geared towards enabling temperance goals in the modern landscape of dry counties as opposed to the older model of dry states. Such regulations were better able to ensure that alcohol was still available to those communities that want it and unavailable in those communities where it was unwanted.

In the hundreds of dry counties throughout the country, residents are strongly opposed to the sale of alcohol and continue to fight hard to keep their communities dry. Many of these communities feel real frustration at attempts to get around their county's dry laws.[184] Dry counties wishing to remain dry are often aided by strong state regulations, which closely regulate the sale of alcohol. Allowing direct shipments into these states would also undermine such regulation and also weaken the protection dry counties currently have from alcohol sold in nearby wet counties. In addition to the hundreds of dry counties, many more communities are somewhere in between, boasting varying degrees of wetness.[185] Allowing direct shipments would undermine these communities' efforts to remain dry.

For example, in Texas, state regulations prevent state producers of wine from mailing their products directly to consumers. Instead, these producers must ship the wine to the buyer's closest package store. Such stores are not located in dry counties and therefore in-state shipments of

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[184] "'It's a constant battle,' Stacy said. 'They are always looking for a way to get around the will of the people. Seventy percent voted this county dry. It is a constant battle. We are opposed to alcohol in any shape, form or fashion - especially in a dry county.' Kenneth Heard, *Jonesboro Liquor Battle Shaping Up Restaurateur Seeking Alcohol Permit Faces Opposition in Dry County*, ARK. DEMOCRAT-GAZETTE, Feb. 4, 2004, *available at* LEXIS.

[185] For instance, in North Carolina:

> Sometimes local rules say only bars and restaurants can serve alcohol, and others allow grocers and convenience stores to sell it, too . . . . [and l]ocal rules may allow some or all of the following: mixed drinks, beer to be drunk at a bar, beer to be taken home, wine and 'fortified wine' such as port or sherry. The only package liquor comes from ABC stores, authorized by state law but run by local governments.

Ellen Sung, *Micro, N.C., Can't Manage to Fend Off Beer Sales*, NEWS AND OBSERVER, March 4, 2004, at A1.

alcohol do not undermine these communities' temperance choices. Although out-of-state wine producers could be subject to the same requirement there is, as described above, a much greater likelihood of non-compliance. Local wine producers, who are regulated by the state and sell primarily within the state, have a very strong incentive not to violate the state's liquor laws.[186] However, out-of-state producers do not have the same incentives to comply. If out-of-state producers are allowed to ship directly to consumers, the number of producers that the state would have to monitor to ensure compliance with local option laws would multiply by the thousands. States do not have the time or resources to devote to this kind of enforcement[187] and as a result, there would be an extremely high incentive for out-of-state producers to ignore the desires of dry counties and ship to them regardless of local option laws. Both the likelihood, as well as the penalties, of getting caught would be much lower for out-of-state producers.

History has shown that direct shipments severely undermine state temperance efforts and they are similarly likely to erode counties' temperance efforts for the same reason. The Twenty-First Amendment was enacted to help prevent local temperance efforts from being undermined after the repeal of Prohibition and many parts of the country still need this protection from direct shipments. The fact that the Supreme Court no longer recognizes this need may say more about a change in those who advocate temperance than a change in the need for temperance protections.

E. The New Temperance Advocates

In his work on the symbolic meaning of Prohibition, Joseph Gusfeld describes the temperance movement as the "efforts of urban, native Americans to consolidate their middle-class status through a sharpened distinction between the native, middle class life style and those of the

[186] Interview with Richard Haak, Owner, Haak Vineyards, in San Antonio, Tex., (May 4, 2004), stating that even after the Fifth Circuit's decision striking down direct shipment regulations he will not ship out of state until he gets permission from either the Supreme Court or the state legislature.

[187] The lack of resources spent on enforcement can be seen in the fact that the last case to prosecute someone for selling alcohol in a dry area in the state of Texas was in 1973, but even in that case the judgment was eventually reversed. Rose v. State, 499 S.W.2d 12 (Tx. Crim. App. 1973)(reversing conviction because sentence was void for indefiniteness)

immigrant and the marginal laborer or farmer."[188] According to Gusfeld the temperance movement was a battle over whose morals would define the country. In the pre-Prohibition period, the temperance reformers defined "abstinence as a symbol of respectability,"[189] these "advocates assumed that the drinkers should be converted to the modes of middle-class, respectable citizens."[190] In addition, not only did the temperance advocates believe temperance was an admirable personal choice, but they asserted that such beliefs were "dominant in society and worthwhile for others to copy."[191]

However, after the repeal of Prohibition the composition of abstainers changed. "[A]bstinence today is most frequent in the lower-middle and lower class."[192] The abstainer has lost his "place of legitimacy in the middle class and dominance in society."[193] The moderate drinker has become the "new standard and those from whom he defects [abstainers] are now the aberrant followers of a past doctrine."[194] Since Prohibition there as been a dramatic role reversal in terms of the meaning of drinking in this country and this change is exemplified by the direct shipment debate. The direct shipment controversy reveals the continuing desire of middle and upper middle class Americans to assert their views regarding drinking on the lower classes.

This desire is apparent in the many newspaper articles concerning direct shipment, which heap condescension and ridicule on those who might support direct shipment bans. For example, the intro to one article on direct shipment begins "Every year thousands of eonophiles . . ."[195] The article then pauses to condescendingly describe the term for those readers who may not understand such "sophisticated language;" presumably those who are not eonophiles themselves.[196] Another direct shipment article begins by asking its readers, "Dying to get a bottle of Chardonnay or cabernet from that little winery you visited on your last

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[188] GUSFELD, *supra* note 43, at 36-37.
[189] *Id.* at 50, 59.
[190] *Id.* at 82.
[191] *Id.*
[192] *Id.* at 138.
[193] *Id.*
[194] *Id.* at 136.
[195] Blake Devorak, *Let the Wine Flow Like Water*, CONSUMERS' RESEARCH MAGAZINE, Aug. 1, 2003.
[196] *Id.*

vacation?"[197] One can only imagine what the author would think of people who have never taken a vacation to a winery, let alone do not believe in drinking wine. A third article on alcohol regulation describes the recent lifting of a seventy-two year liquor ban in Rockport, Massachusetts.[198] In the article, a local inn keeper granted one of the first liquor licenses flippantly dismisses "naysayers," saying that the legalization of alcohol will "make Rockport better."[199]

In addition to the implied condescension towards non-drinkers, the authors of these articles express unabashed moral indignation at being subjected to direct shipment laws. For example, one author first referred to wine as "a necessary of life" and then expressed his outrage that it is "easier to buy Viagra, ammunition, and bootleg music online than it is to buy a bottle of out-of-state merlot."[200] Another article ridiculed an Alcohol Beverage Control spokesman for his presumption in thinking that state liquor stores could adequately satisfy consumer demand for wine variety.[201] These articles also frequently use the terms "ridiculous,"[202] "absurd"[203] and "archaic"[204] when discussing direct shipment laws.

Such articles demonstrate that once again middle class values regarding alcohol are being touted as the only acceptable ones, except now it is the non-drinker who is the object of scorn and considered in need of reform. Nonetheless, the fact that section two of the Twenty-First Amendment is no longer aligned with middle class beliefs regarding alcohol is not a reason for disregarding it. Section two still provides protection for those who value temperance, which is why it was

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[197] Clint Bolick, *Uncork the Bottleneck for Arizona's Wine Lovers,* THE ARIZONA REPUBLIC, Oct. 20, 2003 at 9B.

[198] *Seaside Town Lifts Liquor Ban*, The BostonChannel.com, *at* http://www.thebostonchannel.com/news/4711914/detail.html (July 12, 2005).

[199] *Id.*

[200] Tony Mauro, *Interstate Wine Sales Start to Flow,* USA TODAY, Dec. 16 2002 at 15A.

[201] Elisabeth Frater, *Virginia Vintner Takes on New York Courts; Virginia Direct Shipping Law Ruled Unconstitutional,* 84 WINES AND VINES 128, Jan. 1, 2003.

[202] Fred LeBrun, *Don't Let Sour Grapes Spoil Harvest*, THE TIMES UNION, March 9, 2004, at B1.

[203] Kristin Eddy, *Grape vs. Government; Varying State Laws Confuse the Task of Buying Wine Online*, CHICAGO TRIBUNE, Dec. 18, 2002, at 7.

[204] Daniel Howes, *Archaic Law That Bans Wine Shipments Sounds Like Sour Grapes*, THE DETROIT NEWS, Nov 21, 2003, at 1B.

originally enacted. Therefore, when considering the constitutionality of direct shipment bans from both a historical as well as a modern day temperance stand point, the decision is wrong. There is still a desire for temperance in this country and the right of states to protect the temperance values of their communities is one that is guaranteed by the Twenty-First Amendment.

The *Granholm* decision ignores the fact that many communities still desire alcohol regulation and that the schemes struck down by the Court were both constitutional and helped protect communities' temperance wishes. Enforcing alcohol regulations has always been difficult, but it is much easier for a state to regulate its own alcohol producers than out-of-state producers. Consequently, in-state wineries do not present the threat to state temperance goals posed by out-of-state wineries and thus, the direct shipment regulations imposed by Michigan and New York were completely in keeping with the purpose and scope of the Twenty-First Amendment. These regulations ensured that states could effect the temperance goals of their citizens by regulating alcohol consumption within their borders.

CONCLUSION

Although there is a widespread belief that the repeal of Prohibition ended the influence of the temperance movement, such views are misinformed. The reasons for repeal were myriad, but for the most part they were not based on the belief that temperance objectives were objectionable. Although many people still believed in and desired temperance, National Prohibition had demonstrated that it could not be achieved by the federal government without creating more problems than it solved. "Widespread bootlegging and racketeering, together with a popular perception that these crimes were inadequately and inconsistently enforced, were important issues in the debate over repeal"[205] Prohibition had shown that federal enforcement could not work but the repeal of Prohibition did not represent a rejection of temperance. In the period following the repeal of Prohibition, alcohol consumption in the country was at the lowest levels it had ever been[206] and many states remained completely dry long after repeal. Oklahoma

[205] Kevin W. Swain, Note, *Liquor by the Book In Kansas: The Ghost of Temperance Past*, 35 Washburn L.J. 322, 331 (1996).
[206] CLARK, *supra* note 6, at 146.

did not repeal its statewide Prohibition until 1959[207] and Mississippi remained dry until 1966.[208]

In the end, the strongest reason for repeal was economic.[209] By the time of repeal, America was deeply entrenched in the throes of the Depression and there was a desperate need for more jobs and more taxes. Many people believed that resuming the manufacture of beer would help put idle men back to work. In addition, other people argued that a liquor tax could help end the Depression, suggesting that such a tax "would be sufficient to pay off the debt of the United States ...in a little less than fifteen years."[210] As a result, in 1933 National Prohibition was repealed, but the effects of the temperance movement continue to be felt.

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[207] *Thomas E. Rutledge, Comment:* Comment: The Questionable Viability of the Des Moines Warranty in Light of *Brown-Forman Corp. v. New York*, 78 KY. L.J. 209, 235 n.6 (1990).

[208] John Dinan, *The State Constitutional Tradition and the Formation of Virtuous Citizens*, 72 TEMPLE L. REV. 619, 670 n.320 (1999).

[209] CLARK, *supra* note 6, at 200. *See also* Brendon T. Ishikawa, *The Stealth Amendment: The Impending Ratification and Repeal of a Federal Budget Amendment*, 35 TULSA L.J. 353, 378-79 (2000), explaining that:

> With the worsening of the economic plight of millions, support for Prohibition 'sank with breathtaking speed.' Over and over again, opponents argued that Prohibition effectively worsened the Depression because the vast profits of the illicit liquor and bootlegging industry escaped taxation. Some asserted that the national debt could would [sic] have been paid off prior to the Depression if Prohibition had not eliminated a major source of national revenues. References to the national debt harkened back to President Hoover's dogged determination to raise taxes and curb governmental spending even as the economy's vigor eroded. The Prohibition Amendment's repeal raised the possibility that the new source of governmental funds could ease the widespread economic hardships. 'The return of beer raised the often-expressed hope that repeal would help solve the depression.' When Americans voted for delegates to the ratifying conventions, they voted overwhelmingly for the return of alcohol as well as the return of a large source of federal funds.

[210] CLARK, *supra* note 6, at 200.