NO MORE 'CHERRY-PICKING': THE REAL HISTORY OF THE 21ST AMENDMENT'S § 2

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The policy question is clear: state laws that ban out-of-state direct shipping of wine but permit in-state wineries to ship directly hurt consumers and provide little to no off-setting public benefits, such as promoting temperance.[1] The legal question, however, is more opaque. For any other product, such discriminatory laws would be forbidden by the dormant commerce clause, but the issue of whether a state can discriminate in favor of in-state liquor sellers remains unsettled because, as Judge Easterbrook has noted, a state can "control alcohol in ways that it cannot control cheese."[2] The reason for this difference—and hence legal uncertainty—is the confusingly written and frequently misunderstood § 2 of the 21st Amendment.[3] As the Supreme Court again will be faced with interpreting § 2, an analysis of the clause's original meaning is timely.[4]

This note will argue that, as originally intended, § 2 did not permit discrimination. An examination of the legal and legislative landscape that existed behind the ratification of the 21st Amendment

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1. The Federal Trade Commission has released an exhaustive study that concludes that bans on direct wine shipping raise wine prices and reduce consumer choice but do little—if anything—to restrict underage access to alcohol. Since direct shipping, usually via on-line wine sales, only permits consumers to save money on more expensive wines (because of associated shipping costs), minors are unlikely to purchase this way. Also, as there are waiting periods while the product is being shipped, minors looking for alcohol are less likely to purchase, and then wait for, liquors when there are many brick-and-mortar locations that are willing to sell instantly. Finally, many states require an over-21 signature before permitting a wine shipment. FTC Staff Report, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 26–38 (2003). This is especially true when a state forbids out-of-state wineries to direct ship but permits in-state wineries because minors "can become as drunk on local wines [as] on wines of large out-of-state suppliers ...." Dickerson v. Bailey, 87 F. Supp 2d 691, 710 (S.D. Tex. 2000), aff'd, 336 F.3d 388 (5th Cir. 2003).

2. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000).

3. "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

4. *See* Granholm v. Heald, 342 F.3d 517 (6th Cir. 2003), *cert. granted*, 124 S. Ct. 2389 (2004).

demonstrates that while § 2 carved out for the States an expanded "police power zone,"[5] it did not repeal the anti-discrimination principle. This is true despite the proposed deletion of § 3. In fact, the removal of § 3 reinforces this view.

I. INTRODUCTION

A plain text reading of § 2 leaves much to be desired, as the Supreme Court has repeatedly recognized.[6] As a result, the Court has

5. 49 CONG. REC. 707 (1912) (statement of Sen. Kenyon).

6. It is tempting to conclude that as there is no limitation in § 2's text on what laws a state may pass, whatever a state says goes. Early cases in fact took the view that § 2 gave the States plenary power over alcohol. *See, e.g.*, State Bd. Of Equalization of Cal. v. Young's Mkt, 299 U.S. 59 (1936); Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938). The Court however has wisely moved away from this position. For instance, in *State Bd. of Equalization*, the Court stated that "[t]he claim that the statutory provisions and the regulations are void under the equal protection clause may be briefly disposed of. A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth." 299 U.S. at 64. It is unthinkable that laws that violate equal protection norms are insulated from constitutional scrutiny because of § 2; if this were not the case, then a State could pass a law saying that only white people can deliver liquor. In fact, if the Court's 'superseding' argument was taken to its logical extreme, no portion of the Bill of Rights would apply to alcohol. Surely this was not the intention of those that ratified § 2. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (holding that § 2 does not permit violations of the Equal Protection Clause); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (holding that § 2 does not permit laws that violate the Establishment Clause); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (holding that § 2 does not permit laws that violate free speech norms). Some might argue that the plain meaning only suggests that the Commerce Clause was affected. There is an obvious rejoinder to this view: what about the Export-Import Clause? The text does not differentiate between these two clauses, but in *Dept. of Revenue v. James B. Beam Distilling Co.*, the Court stated that "[t]his Court has never so much as intimated that the Twenty-first Amendment has operated to permit what the Export-Import Clause precisely and explicitly forbids." 377 U.S. 341, 344 (1964). See also *id.* at 348 (Black, J. dissenting) ("Surely the Export-Import Clause is no more exalted and no more worthy to be excepted from the Twenty-first Amendment than are the Commerce and Equal Protection Clauses .... The Amendment's language, after all, does not talk about 'foreign' liquors or 'domestic' liquors; it simply speaks of 'liquors' - all liquors, whatever their origin."). There is also another problem with this plain-text view: the text is susceptible to multiple readings. In *Carter v. Virginia*, the question before the Court was whether a state has the power to prohibit the transport of alcohol *through* the state to a neighboring state. 321 U.S. 131 (1944). In his concurrence, Justice Frankfurter advanced a new interpretation of the text:

> [As the] constitutional amendment ... should be broadly and colloquially interpreted, [a through transport may], without undue liberty with the English language, be deemed to be for 'delivery' there even though it is consigned for another State. The Twenty-first Amendment prohibits the 'transportation or importation into any State *** of intoxicating liquors, in violation of the laws thereof', not when the liquor is for delivery and use but for 'delivery or use therein.' In other words, liquor need not be intended for consumption in a State to be deemed to be imported into the State and therefore subject to [State] control.

Id. at 140–41. *See also* Duckworth v. Arkansas, 314 U.S. 390, 397–402 (1941) (Jackson, J. concurring). As observed by Justice Frankfurter, a plain meaning reading of the 21st Amendment is confronted with the reality that it is unclear whether the "therein" is intended to apply to "use" *and* "delivery", or "use" *or* "delivery." The text itself says "or"

often tried to reconcile § 2 with the rest of the Constitution.[7] This has been relatively straightforward in matters relating to equal protection and the First Amendment, but controversy has surrounded the relationship of § 2 to the Commerce Clause—and therefore the dormant commerce clause—to the extent that some present members of the Court appear to favor the notion that § 2 *de facto* repealed the Commerce Clause as it relates to alcohol.[8] To support this view, Justice O'Connor in particular has extensively (and incorrectly) cited § 2's history.[9] It is time to set the historical record straight.

II. LEGAL CONTEXT

To understand § 2, one needs to understand the legal and political environment surrounding prohibition. Most importantly, one needs to consider the Court's early views on the states' police power. The desire for prohibition began long before the 18th Amendment was ratified in 1919. In the *License Cases* of 1847, the Supreme Court upheld a state's right to regulate alcohol as being within that state's police power.[10] However, in 1888 the Court held in *Bowman v. Chicago & Northwestern Railway Co.* that because of the dormant

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but if this view was adopted then economic chaos could ensue. It has been observed that if through transports could be prohibited by individual states, then:

> [G]reat inconvenience and hardship could result to interstate liquor commerce .... For example, if Tennessee should prohibit such ... shipments, a glance at the map will suffice to show the long and devious route that would have to be followed in shipping liquor from Kentucky to Alabama. Or, if New Hampshire should pass such a law, Maine would have to receive her liquor imports either through Canada or over the Atlantic, as Maine borders no other state but New Hampshire.

John H. Crabb, *State Power Over Liquor Under the Twenty-first Amendment*, 12 U. DET. L.J. 11, 21 (1948–49). Despite the negative results that would occur if Justice Frankfurter's reading was to be adopted, the fact remains that one reasonable reading of the amendment requires it. This is especially true because the text of the amendment explicitly says "for delivery or use." If the power over transportation through a state is not included, the word "delivery" is superfluous. Also, § 2 opens with "transportation or importation into." If preventing through-traffic is not included, then the word "transportation" also seems superfluous as both "transportation" and "importation" mean simply the ferrying of alcohol into a state. It seems inconceivable that § 2 empowered New Hampshire to hold Maine economically hostage, but an honest plain text reading of § 2 may require it. This suggests that the legislative history should be searched.

7. *See, e.g.*, Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964) ("[T]he Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions ... each must be considered in the light of the other ...."); *see also supra* note 6.

8. *See, e.g*, 324 Liquor Corp. v. Duffy, 479 U.S. 335, 352 (1987) (O'Connor, J., dissenting) (joined by Rehnquist, C.J.); Brown-Forman Distillers Corp. v. NY State Liquor Authority, 476 U.S. 573, 586 (1986) (Stevens, J., dissenting).

9. *324 Liquor Corp.*, 479 U.S. at 352–60.

10. 46 U.S. 504. *See also* Mugler v. Kansas, 123 U.S. 623 (1887).

commerce clause, and despite the police power, "a state could not regulate liquor, even as part of a general prohibition, until after importation, when the liquor has been 'mingled with and become a part of the general property of the State.'"[11] This seriously undermined liquor regulation (as out-of-state sellers could disregard local laws) and led to the passage of two congressional acts.

The first was the Wilson Act of 1890; under the Commerce Clause, Congress mandated that state laws should apply to liquor, in its original package, imported from other states "to the same extent as though such ... liquors had been produced in such state."[12] However, in 1898 the Court restricted the scope of the Wilson Act in *Rhodes v. Iowa*, wherein it held, based on the act's language, that "state control commenced only after the liquor reached the consignee in the state, and not at the state line. This narrow construction undermined the Wilson Act so as to permit mail-order commerce in liquor which could circumvent the laws of dry states."[13] Congress then passed the Webb-Kenyon Act of 1913.[14] "This act forbade the transportation of intoxicants into any state where its receipt, possession, sale, or use was prohibited."[15] Less than a decade later, the 18th Amendment was ratified, and in 1933 the 21st Amendment came into being.

The important thing to note about both the Wilson and Webb-Kenyon Acts is that neither permitted discrimination. In *Scott v. Donald*, the Court explicitly held that under the Wilson Act, a "State cannot ... establish a system which, in effect discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."[16] Rather, a state could only prohibit interstate sales under its police power if it also prohibited in-state sales. The police power did not permit discrimination[17] and all the Wilson Act did was to prevent out-of-state sellers from circumventing local liquor restrictions. This also holds true for the Webb-Kenyon

11. Eric T. Freeman, Note, *The Twenty-first Amendment and the Commerce Clause: What Rationale Supports Bacchus Imports?*, 13 HASTINGS CONST. L.Q. 361, 368 (1985-1986) (citing 125 U.S. 465 (1888)); *see also* Leisy v. Hardin, 135 U.S. 100 (1890).

12. 27 U.S.C. § 121 (2001).

13. Crabb, *supra* note 6, at 12–13 (citing 170 U.S. 412 (1898)).

14. 27 U.S.C. § 122 (2001).

15. Crabb, *supra* note 6, at 13.

16. 165 U.S. 58, 100 (1897). *See also id.* at 101 ("[W]hen a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against ... importing [such articles] from other states ...."); Vance v. Vandercook Co., 170 U.S. 438 (1898) (upholding *Donald*).

17. *See, e.g.*, Walling v. Michigan, 116 U.S. 446 (1886) (holding that a state's police power does not permit discrimination).

Act. The Court has correctly stated that it was simply an extension of "that which was done by the Wilson Act."[18] This suggests that discrimination was also not permissible under Webb-Kenyon. In fact, the South Carolina Supreme Court ruled in 1916 that the Webb-Kenyon Act "was not intended to confer and did not confer ... the power to make injurious discriminations against the products of other states which are recognized as subjects of lawful commerce by the law of the state making such discriminations."[19] Thus, at the time § 2 was ratified it was understood that the States could, under the police power and these acts, forbid alcohol sales, but only if the ban was non-discriminatory.

III. RATIFICATION DEBATES

At both the congressional level and the level of the state constitutional conventions, there is very little to suggest that those involved believed that § 2 permitted the states to discriminate. On the other hand, however, there is very explicit evidence that § 2 was primarily concerned with 'constitutionalizing' the pre-18th Amendment liquor acts.[20] As just observed, these acts simply permitted the states to exercise their police power without fear of the Commerce Clause undermining their laws; however, just like the police power they helped support, they did not permit discrimination. As the evidence in favor of § 2 permitting discrimination is little and vague while the evidence in favor of § 2 only permitting the states to

18. Clark Distilling Co. v. W. Maryland. Ry. Co., 242 U.S. 311, 323–24 (1917). *See also* 49 Cong. Rec. 707 (1912) (statement of Sen. Kenyon) ("[The act concerns] the constitutional power of the Federal Government as to local commerce where there is an apparent conflict with the police powers of the States .... Its purpose, and its only purpose, is to remove the impediment existing as to the States in the exercise of their police powers ....").

19. Brennan v. S. Express Co., 90 S.E. 402, 404 (1916).

20. Many have noted the textual similarities between the Webb-Kenyon Act and § 2. *See, e.g.*, Brannon P. Denning, *Smokey and the Bandit in Cyberspace: The Dormant Commerce Clause, the Twenty-first Amendment, and State Regulation of Internet Alcohol Sales*, 19 CONST. COMMENT. 297, 303–04 n.27 (2002). Removing much of the unnecessary language, the Act reads:

> The shipment or transportation ... of ... any ... liquor ... from one state, Territory, or District of the United States ... into another ... which liquor is intended ... to be received, possessed, sold or ... used either in the original package or otherwise, in violation of any law of such state ... is hereby prohibited.

27 U.S.C. § 122 (2001). In *Craig*, the Court stated "[t]he wording of § 2 ... closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes." 429 U.S. at 205–06. Thus, unless the Court is willing to overturn *Donald* and *Clark Distilling* or this portion of *Craig*, the Court is bound to strike down discriminatory laws regardless of § 2.

exercise their police power is frequent and explicit, the most logical conclusion is that the latter view represents the framers' actual intent.[21]

A. Senate Debate

On February 16, 1933, the United States Senate passed Joint Resolution 211 after several days of debate, a section deletion, and a rejected alternate resolution.[22] It has been noted that:

> The Twenty-first Amendment garnered the requisite two-thirds vote in each house of Congress without raising much substantive debate, probably because most members of Congress saw section one, the simple repeal of constitutional Prohibition, as the bulk of the Amendment's purpose and substance. It seems that sections two and three of the Amendment were seen as being primarily procedural sections, necessary to support and implement section one.[23]

As support for this proposition: "In the Senate, more debate was devoted to a dispute over whether the Amendment should require ratification by state legislatures or by state conventions than was devoted to defining the meaning of section two of the proposal."[24] However, even though more debate was focused on the use of state conventions than on the substantive merits of § 2, there is some record as to what § 2 was intended to mean.

Of the limited sources available, perhaps the most fertile source of legislative intent is found in the words of Senator Blaine of Wisconsin, the amendment's sponsor. In a floor speech introducing and explaining the amendment to the Senate, he stated that the "language used would effectuate the purpose that is obviously designed by section 2."[25] Thereupon he elaborated on the historical interplay between Congress and the Supreme Court as it related to alcohol, and in so doing he referenced the Webb-Kenyon Act and also

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21. This is especially likely because no comments made at any level of the ratification process unambiguously directly related to protectionism; if § 2 was intended to repeal the Commerce Clause—a very significant change in the constitutional scheme—it seems extremely improbable that the issue of protectionism would go entirely unmentioned. Common sense here indicates that this complete and utter silence speaks loudly about what was and was not intended.

22. For discussion of the deleted Joint Resolution 202, see Duncan Baird Douglass, Note, *Constitutional Crossroads: Reconciling the Twenty-first Amendment and the Commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1635–36 (2000).

23. *Id.* at 1631–32.

24. *Id.* at 1632 n.58.

25. 76 Cong. Rec. 4140 (1933).

Clark Distilling Co., the case wherein the Court upheld the constitutionality of Webb-Kenyon, at which point he stated:

> In [*Clark*] there was a divided opinion. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.[26]

This plainly suggests that a narrow interpretation of § 2 is appropriate—one that incorporates Webb-Kenyon (with its anti-discrimination principle firmly intact) into the Constitution and permits each state to exercise its police power without fear of being undermined by out-of-state liquor sellers.

Unfortunately, Blaine made other remarks with potentially contradictory meanings. He stated: "I am willing to grant to the dry States full measure of protection and thus prohibit the wet States from interfering in their internal affairs respecting the control of ... liquors."[27] Moreover, on further questioning, he declared that "[t]he purpose of Section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors ...."[28] With these remarks, Blaine either contradicted himself or employed sloppy language.[29]

The comments of other senators suggest, however, that Blaine was simply being imprecise in his explanation. For instance, in extended remarks, Senator Borah stated that "section 2 ... provides for the protection of the so-called dry States," and argued that without the section, "dry states [must] rely upon the Congress ... to maintain

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26. *Id.* at 4141.

27. *Id.*

28. *Id.* at 4143. Blaine also stated: "This proposal is restoring to the States, in effect, the right to regulate commerce respecting a single commodity - namely, intoxicating liquor. In other words, the State is not surrendering any power that it possesses, but rather by reason of this provision, in effect, acquires powers that it has not at this time." *Id.* at 4141. This also has been seen as evidence that the Commerce Clause was being repealed. *See* Denning, *supra* note 20, at 305. However, it seems just as likely, if not more so, that this statement simply means a restoration to the pre-18th Amendment relationship with the exception that the relationship would be permanently enshrined in the Constitution thereby reducing the need to rely on Congress—a new power. *See* Part IV, *infra*.

29. In *Bacchus Imports v. Diaz*, the Court took the first position: "Senator Blaine, the Senate sponsor of the Amendment resolution, appears to have espoused varying interpretations. In reporting the view of the Senate Judiciary Committee, he said that the purpose of § 2 was 'to restore to the States ... absolute control in effect over interstate commerce affecting intoxicating liquors.' .... On the other hand, he also expressed a narrower view: 'So to assure the so-called dry States against the importation of intoxicating liquors into those states, it is proposed to write permanently into the Constitution a prohibition along that line.'" 468 U.S. 263, 274–75 (1984).

indefinitely the Webb-Kenyon law."[30] Recounting the dormant commerce clause history, he observed that this history made him "rather uneasy about leaving the Webb-Kenyon Act to the protection of the Supreme Court of the United States."[31] Section 2 therefore would "incorporat[e Webb-Kenyon] permanently in the Constitution of the United States."[32] Likewise Senator Fess said: "In other words, the second section of the joint resolution ... is designed to permit the Federal authority to assist the States that want to be dry to remain dry."[33] These statements make explicit that §2 simply incorporated Webb-Kenyon permanently in the Constitution.

In contrast, statements supporting a contrary interpretation of § 2 are much less explicit. For instance, Senator Swanson declared: "[I]t is left entirely to the States to determine in what manner intoxicating liquors shall be sold or used and to what places such liquors may be transported. Is that established definitely under section 2 of the proposed amendment?"[34] To which Senator Robinson of Arkansas replied by quoting the Section—calling it "perfectly plain"—and saying it "leaves to the States the power of regulation."[35] When compared with the explicitness of the "constitutionalizing Webb-Kenyon" rhetoric, such statements appear likely to be merely nonspecific phrasings and not an endorsement of a profound alteration of the constitutional scheme.[36]

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30. 76 Cong. Rec. 4170 (1933).

31. *Id.* at 4171.

32. *Id.* at 4172.

33. *Id.* at 4168.

34. *Id.* at 4225.

35. *Id.*

36. As Justice O'Connor relied heavily on statements from Justice Black in her *324 Liquor Corp.* dissent, it should be noted that at the time of this § 2 debate, Justice Black was Senator Black. 479 U.S. at 353. Though on the Senate floor, Black did not explicitly express the opinion that § 2 repealed the Commerce Clause, in *Hostetter* he dissented, saying that was what the Senate intended. 377 U.S. 336–38. There is an obvious response to this: first, though it is interesting that a senator became a justice, that does not mean that his vote *as a senator* should count more than the other senators, and the statements of these other senators on the whole do not support the overly expansive view advocated by Black. Second, in that same *Hostetter* dissent, Black cited approvingly those early cases that held that § 2 superseded even the Equal Protection Clause. *Id.* at 335–36. Relatedly, he also supported the idea that the plain text should be enough and only investigated the legislative history after the Court backed away from the plenary power view of § 2. *Id.* at 335. Outside of a few comments made by overzealous state delegates, *see infra* note 52, there is no support whatsoever in the entire legislative history for a view of § 2 whereby the States could enact laws in violation of equal protection norms. Thus it seems that Black's view is either extremely idiosyncratic or that in the interests of supporting the Court's earlier line of cases based solely on the text of § 2, he employed a selective memory of the ratification process. Either way, his opinion is not supported by the historical record.

B. House Debate

The House's legislative history is even sparser than the Senate's as there was an abbreviated debate format employed.[37] This limited history is especially noticeable as it relates to § 2—very little discussion was directed towards it at all. One of the few times § 2 was mentioned was when Congressman Robinson prefaced his floor remarks by summarizing the proposed amendment, stating: "Section 2 attempts to protect dry states."[38] In another instance, Congressman Garber attacked § 2 on the grounds that it would not be effective for those dry states that wished to remain dry because "[b]ootletting from the wet States into the dry States will be increased tenfold."[39] Clearly neither of these statements implicates protectionism.

However, during the debate—but after the vote—one member of the House made remarks similar to some of those in the Senate. Congressman McSwain said: "The proposal voted on to-day gives to every State absolute power to control the manufacture, sale, and transportation of alcoholic and intoxicating beverages ... State laws will be supreme."[40] It is possible that McSwain was contending that § 2 repealed the Commerce Clause, but it is also possible that he was simply observing that the federal government would no longer have any police power over alcohol.

There is, however, a statement from one member of the House that is much more explicit concerning what the effect of the ratification of § 2 would be. Congressman Lea said:

> The proposal to prohibit importations to the States in violation of their laws is illogical .... It is theoretically unsound to propose that each State in the country shall have the right to compel the Federal Government, without any discretion of Congress, to support whatever statutory liquor laws the State legislatures see fit to write, however unwise or improvident. It is for the legislature of the Federal Government, not the legislature of a single State, to determine under what circumstances the Federal Government shall assume the unusual responsibility of enforcing State laws. Under this color of constitutional sanction, a State might pass a law to interfere with legitimate interstate shipments .... without the approval and even against the will of Congress.[41]

He went on to say: "That proposal, on principle, is the extreme of

37. 76 Cong. Rec. 4508 (1933).
38. *Id.* at 4518.
39. *Id.* at 4519.
40. *Id.* at 4523–24.
41. 76 Cong. Rec. 2776 (1933).

State rights."[42]

Though Justice O'Connor has mentioned this statement of Congressman Lea,[43] and it might be read to suggest that the Commerce Clause was being *de facto* repealed, it also illustrates the difficulties of using legislative history. First, Lea made the statement during an appropriations bill discussion (before the full Senate even considered the proposed amendment). Thus, presumably there was no prepared congressman present to argue against or correct Lea's position.[44] Second, as Lea obviously wanted some federal authority to remain,[45] it is possible that he was overstating the consequences of § 2 so as to construe the amendment to mean something that it did not in fact mean so that others would not vote for it. Finally, it is unclear whether by laws enacted to interfere with "legitimate interstate shipments" he meant protectionist laws or if he simply meant through-shipment laws (or both).[46] Even if Lea honestly held the "extreme rights" view, however, he was not in the majority.

C. State Ratifying Conventions

In his compilation of the reports from the state conventions, Everett Somerville Brown observed that "[p]erhaps the most outstanding feature of the repeal conventions is their lack of a truly deliberative character."[47] Most states selected a slate of delegates already pledged to one position.[48] This lack of debate has greatly reduced the amount of substantive discussion of the amendment's character. While all states—with the exception of South Carolina—that left a paper trail of their deliberations mentioned the ills of prohibition, very few touched on the details of the actual proposed constitutional provisions aside from the repeal of the 18th Amendment in § 1.[49]

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42. *Id.*

43. *324 Liquor Corp.*, 479 U.S. at 353–54.

44. *See* 76 Cong. Rec. 2774 (1933).

45. *Id.* at 2776 ("Congress ... should not be handicapped by an inflexible rule of the Constitution.").

46. *See supra* note 7.

47. EVERETT SOMERVILLE BROWN, RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES; STATE CONVENTION RECORDS AND LAWS 5 (1938).

48. *Id.* at 6 ("Aside from the South Carolina convention, which was composed of delegates opposed to repeal, who voted against the ratification of the proposed amendment, the delegates favoring repeal were overwhelmingly in the majority. In only six of the thirty-eight states which ratified the Twenty-first Amendment were votes registered in the conventions against repeal and in five of these the vote was almost negligible.").

49. However, there is some discussion that may refer to § 2 which should be mentioned. In Delaware, the Convention adopted a resolution saying that it ratified the

III. THE NEVER ENACTED § 3 DOES NOT CHANGE THE CONTINUED EXISTENCE OF THE NON-DISCRIMINATION PRINCIPLE

In her *324 Liquor Corp.* dissent, Justice O'Connor relied greatly on the debate over, and deletion of, § 3, to support a broad interpretation of § 2:

> [B]y removing even the limited grant of authority to Congress contained in § 3, the Senate made manifest its intent to prevent any federal interference with state attempts to regulate the liquor trade. It is difficult to believe that the Senators would have anticipated that a federal statute enacted under the commerce power could ever override the State's power to regulate the liquor trade.[50]

However, when one reads the congressional record, this position seems less than sure. The fairest reading of the record illustrates that § 3 was deleted to ensure that the federal government would not be able to re-implement prohibition. This suggests that a § 3 analysis should be conducted whenever a constitutional challenge under § 1 is raised. However, it does not suggest that § 2 permits discrimination. The question addressed by § 3 is whether the federal government can

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amendment so as to "abolish Federal Prohibition and return to the States their former power to control the manufacture, transportation and sale of alcoholic liquors within their own borders." *Id.* at 66. This suggests a return to pre-18th Amendment relationship. In Kentucky, a delegate spoke of "rightfully restor[ing] to the several states ... a basic principle of local self-government" and another Kentucky delegate spoke of the 18th Amendment as the "violation of the fundamental spirit of the Constitution" because it lessened self-governance; this also suggests that the convention's focus was primarily on removing the 18th Amendment, and not on going back to pre-Commerce Clause times. *Id.* at 172–74. In Maryland, a delegate spoke of how, just as it was unfair for dry states to force their views on wet states, it would be unfair for wet states to force their view on dry states. *Id.* at 199. In New Jersey, the Chairman of the Convention stated: "One mistake we will not make - the fanaticism of the drys must not be answered by a counter intolerance of the wets." *Id.* at 281. These remarks suggest that § 2 was understood as allowing dry states to remain dry. However, from Florida, there is some indication that perhaps an expansive view is correct. One delegate stated to "loud applause" that "[n]o amendment since the twelfth, that Congress has proposed, has bettered the Constitution; on the contrary, every one that has been made has injured it." *Id.* at 71. Thus, presumably, at least some delegates in Florida envisioned a broad view of the amendment—but even this could be seen as merely a repudiation of the 18th Amendment and not the Commerce Clause. In Virginia, the convention closed with these words:

> [R]epresenting as I do the county in which is located the homes of George Mason and George Washington, and my adjoining county embracing the home of Robert E. Lee, and my other adjoining county in which are situated the battlefields of Manassas - I say this Convention for the first time declares the will of the people of Virginia, that they are a sovereign State and are fit and able to govern themselves, free from the interference of the people of the other States or of the people of the United States.

Id. at 450. One possible interpretation of this 'sovereign' rhetoric is the federal government was intended to have no control over Virginia as it relates to alcohol, and the references to the Civil War augment this view. However, it seems unlikely that the majority of the States shared this sentiment!

50. 479 U.S. at 356.

employ a police power contrary to the will of the states. It does not concern itself with non-police power protectionism.

The text of the deleted section read: "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold."[51] Senator Blaine stated to the Senate upon offering this section: "The purpose ... is to give Congress the power to prevent the restoration of the saloon."[52] Senator Wagner of New York, a senator against prohibition, immediately objected to this section in that "concurrent" would not work because federal law would prevail in those instances where conflict between the two sets of law existed.[53] This would allow the federal government to "expel[] the system of national control through the front door of section 1 and readmit[] it forthwith through the back door of section 3."[54] As he observed:

> Anyone familiar with the history of constitutional interpretation can entertain no doubt that this apparently limited power can be extended to boundaries now undreamed of and unsuspected by those who tender this joint resolution ....
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> ....
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> I confess ... that my imagination is not sufficiently fertile to foresee all of the extensions which will be grafted onto section 3 should it ever be incorporated into the Constitution.
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> ....
>
> If Congress may regulate the sale of intoxicating liquors where they are to be drunk on premises where sold, then we shall probably see Congress attempt to declare during what hours such premises may be open, where they shall be located, how they shall be operated, the sex and age of the purchasers, the price at which the beverages are to be sold ... Congress will probably arrogate to itself the power to regulate beverages which are in fact nonintoxicating.[55]

Thus, unless § 3 was removed, "[t]he inevitable consequence ... [would] be that the liquor question [would] continue to bedevil national politics."[56]

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51. 76 Cong. Rec. 4141 (1933).

52. *Id.* The entire congressional debate is littered with anti-saloon sentiment. *See, e.g.*, *id.* at 4512 (statement of Mr. Sabath).

53. *Id.* at 4143.

54. *Id.* at 4147.

55. *Id.*

56. *Id.* at 4145.

Though this is interesting, and is probably a fair critique of congressional power usurpation, it is hard to see how it directly relates to idea that § 2 repeals the Commerce Clause. While it is obvious that if § 3 had been ratified the federal government would have had more power over alcohol (by exercising its police power by actually prohibiting sales in some instances), why does it follow *a priori* that its rejection means that the dormant commerce clause's anti-discrimination principle was also eliminated? The deletion of § 3 in conjunction with § 2 firmly gives the police power alone to the states, but that does not mean that it also gives power to the states to violate the unrelated dormant commerce clause's antidiscrimination principle. This § 3 argument would be very relevant if Congress was to pass a law whereby it had to exercise a police power (which power was understood to belong solely to the states), but it says nothing about whether § 2 empowers a state to enact protectionist measures as that concerns an entirely separate constitutional provision.

Indeed, Senator Wagner, extensively quoted by Justice O'Connor,[57] illustrated this point:

> [T]he pending joint resolution tendered to the Senate and the country is called a proposal to repeal the eighteenth amendment, and because artfully it employs the word "repeal" in its first section, it pretends to restore to the States responsibility for their local liquor problems. But I submit that the pending resolution does not in fact repeal the inherently false philosophy of the eighteenth amendment. It does not correct the central error of national prohibition. It does not restore to the States responsibility for their local liquor problems. It does not withdraw the Federal Government from the field of local police regulation into which it has trespassed ....
>
> ....
>
> [The question is] how to restore the constitutional balance of power and authority in our Federal system which has been upset by national prohibition. That equilibrium which prior to the eighteenth amendment was one of the functional marvels of our system of government is not restored by the pending resolution.[58]

Wagner seemed to be saying that he was opposed to § 3 because it did not "restore" the Constitution to its pre-18th Amendment form as it pertained to alcohol. The "balance of power" had been "upset by national prohibition" and therefore Wagner opposed the possibility

57. *324 Liquor Corp.*, 479 U.S. at 355.
58. 76 Cong. Rec. 4144 (1933).

via § 3 that prohibition could come back by granting the federal government a police power. This does not indicate that he envisioned turning the clock back to 1789.

Another source incorrectly relied upon by Justice O'Connor is Senator Blaine's § 3 comments. He said:

> [M]y own personal viewpoint upon section 3 is that it is contrary to section 2 .... The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States. The State under section 2 may enact certain laws on intoxicating liquors, and section 2 at once gives such laws effect. Thus the States are granted larger powers in effect and are given greater protection, while under section 3 the proposal is to take away from the States the powers that the States would have in the absence of the eighteenth amendment.[59]

Thus Blaine, like Wagner, opposed § 3 because he also saw it as a way to get around § 1. Blaine wanted to ensure that the States would not be deprived of the (police) powers they possessed "in the absence of the eighteenth amendment." As this note has shown, while those police powers were extensive, they did not permit discrimination.

IV. CONCLUSION

Unfettered interstate commerce is one of the primary reasons for the American union.[60] Common sense dictates that if this fundamental component of the Constitution were being altered, there would be unambiguous declarations explaining that alteration. The context of and debate over § 2 present no such declarations. Though it is possible to 'cherry-pick' a few statements to support the proposition that § 2 permits discrimination, on the whole the history does not support it. Indeed, the strongest statements that do exist suggest the opposite: that § 2 constitutionalized the Webb-Kenyon Act and its anti-discrimination component. When one considers the Court's early police power jurisprudence, the Wilson and Webb-Kenyon Acts, and the legislative debate (especially the absolute silence about protectionism), it is plain that the anti-discrimination principle was intended to survive § 2. To paraphrase Senator Borah, let us hope that there is no need to be uneasy about leaving this important principle to

59. 479 U.S. at 354–55 (quoting 76 Cong. Rec. 4143 (1933)).

60. *See, e.g.*, Gibbons v. Ogden, 22 U.S. 1, 231 (1824) (Johnson, J., concurring) ("If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious ... restraints.").

the protection of the Supreme Court of the United States.