

LIQUOR LAWS AND CONSTITUTIONAL CONVENTIONS: A LEGAL HISTORY OF THE TWENTY-FIRST AMENDMENT

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Abstract:

In 1933 America decisively ended its ill-fated experiment in national prohibition by enacting the Twenty-first Amendment. This article tells the tale of America's return to liquor from a legal perspective. It recounts the ebb and flow of the prohibitionist movements in the nineteenth century, the congressional debates over the Twenty-first Amendment, the state laws, popular votes, and constitutional conventions that followed, and the state liquor regulatory systems adopted afterwards. A legal approach to prohibition illuminates intriguing, largely overlooked topics, including the constitutional questions activated by Congress's unprecedented decision to submit the amendment to state conventions rather than legislatures. It is also a window to one of America's most democratic moments.

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INTRODUCTION

In 1933 America decisively ended its thirteen year experiment with national Prohibition. Much has been written about Prohibition's explosive fall from grace. Historians have identified the social, political, and moral forces that shaped the prohibitionist movement in the late 1800s and early 1900s, the popular sentiment that led to widespread civil disobedience in the 1920s, and the fervor for personal liberty that brought the Eighteenth Amendment's downfall. The traditional account reveals a rich history and a captivating story.

This article approaches that history from a *legal* perspective, which focuses on the laws, legal debates, votes, and the politics that ended the Eighteenth Amendment. A legal approach sheds light on largely overlooked aspects of Prohibition. For example, the congressional debates contribute to the simmering questions of federalism that plague American liquor laws today. Also, Congress's decision to submit the Amendment to conventions rather than legislatures – an unprecedented choice – led to an extraordinarily democratic ratification where millions of Americans, including women, registered their votes. Ratification by conventions also raised intriguing constitutional questions that remain unanswered.

Part I supplies a brief history of alcohol regulation in the United States, drawn mostly from secondary sources and newspaper articles at the time. Waves of prohibition sentiment ebbed and flowed in the nineteenth century. In 1851, Maine became the first state to outlaw alcohol entirely.¹ Over the next several years, twelve more states followed suit.² By the mid 1860s, however, partly due to adverse state court decisions, the number of prohibition states dwindled.³ In 1869 states re-mounted the prohibition bandwagon, but by 1904 “only three prohibition states remained.”⁴ Ten years later the pendulum swung again and by 1919 “33 States had adopted or enacted legislation prohibiting to some degree the sale or manufacture of alcoholic beverages.”⁵ That year also saw the ratification of the Eighteenth Amendment, which inaugurated the National Prohibition era.

¹ U.S. Dep't of Commerce, *State Liquor Legislation* 3 (1940).

² *Id.*

³ *Id.* at 5.

⁴ *Id.*

⁵ *Id.* at 6.

Part II turns to the 1933 congressional debates over the Twenty-first Amendment. Some discussion in Congress dealt with Section 2 of the Amendment, which prohibited “[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use there in of intoxicating liquors, in violation of the laws thereof.”⁶ Section 2 was designed to return to the states the power to regulate alcohol within their borders. The larger question, however, was whether Section 2 would authorize state laws that would otherwise violate other constitutional provisions. That question passed beneath the congressional radar. What little discussion there was shows that the Twenty-first Amendment was intended to constitutionalize the Webb-Kenyon Act of 1913, which had allowed dry states to prohibit the importation of alcohol. Congressmen also discussed the mode of ratification. For the first time, Congress chose to submit a constitutional amendment to popular state conventions rather than state legislatures. As I will show, that choice raised constitutional questions that Americans did not answer in 1933.

Part III looks at the aftermath of Congress’s vote on the Twenty-first Amendment. State legislatures passed special laws holding special popular votes and establishing special conventions. Dozens of states held elections for convention delegates, creating robust public debate. The convention delegates abided by the election results, making the conventions themselves mere formalities. The Twenty-first Amendment, therefore, was the most democratically enacted constitutional amendment since the Founding.

Part IV concludes by examining the states’ reactions to the Twenty-first Amendment. Most established strict three-tier distribution and licensing systems designed to separate producers, wholesalers, and retailers. These regulatory regimes still survive today. The state prohibition laws that had dotted the country in 1919, however, did not return. Only three states reenacted bone dry prohibition laws.

I. DEMON RUM 1851-1933: A BRIEF HISTORY OF STATE LIQUOR LAWS

Early America had a schizophrenic relationship with liquor. Newspapers in the late eighteenth and early nineteenth centuries excoriated “demon rum.” A popular poem, printed in the Hartford Gazette in 1794, read in part:

How happy is the man,

⁶ U.S. CONST. amend. XXI.

Who has a quiet home,
Who loves to do what good he can,
And hates the demon rum . . .⁷

Religious leaders, especially Protestants, believed that “intemperance seriously interfered with their soul-saving mission because it destroyed man’s health, impaired his reason, and distracted him from the love of God.”⁸ But Americans by and large did not listen to such appeals. The period from 1800 – 1830 saw more per capita consumption of alcohol “than at any other time in the history of the nation.”⁹ Americans imbibed enormous quantities of alcohol, at breakfast, lunch, dinner, and in between. Babies’ “bottles were laced with rum to keep them ‘pacified’; later, ‘able bodied men, and women, too, for that matter, seldom went more than few hours with a drink.’”¹⁰

America’s love affair with liquor prompted the emergence of a strong, well organized temperance movement, with roots stretching back to the 1600s. At first, temperance advocates implored people to pledge to abstain from liquor.¹¹ When persuasion proved unsuccessful, the temperance movement urged state legislatures to prohibit the manufacture and sale of alcohol. In 1851, Maine became the first state to oblige, outlawing the manufacture and sale of alcoholic beverages, allowing an exception only for medicinal reasons. The Maine law provided a penalty of “ten dollars and the costs of prosecution” for a first offense, “twenty dollars and the costs of prosecution” for a second offense, and between three and six months imprisonment for third and subsequent offenses.¹² Neal Dow, Maine’s unflinching champion of prohibition, declared: “We are gradually contracting the area within which we have the rum traffic enclosed; and, in good time, we will exterminate it all.”¹³ Dow’s prediction was wrong. Though Maine’s experiment with liquor prohibition triggered copycat liquor control statutes in twelve more states, by the late 1850s all state

⁷ *The Happy Man*, Hartford Gazette, Aug. 21, 1794, Vol. 1, Issue 64, p. 4

⁸ DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION* at 6 (2d ed. 2000).

⁹ THOMAS R. PEGRAM, *BATTLING DEMON RUM, THE STRUGGLE FOR A DRY AMERICA 1800-1933*, at 7 (1998).

¹⁰ EDWARD BEHR, *PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA* 7 (1996).

¹¹ See KYVIG, *supra* note 8, at 6.

¹² An Act for the Suppression of Drinking Houses and Tippling Shops, Maine Rev. Stat. Chap. 211 (June 2, 1851).

¹³ *Liquor Law in Maine*, New Hampshire Sentinel, Sept. 25, 1851, Vol. LIII, Issue 39, Page 2.

prohibition statutes, including Maine's, had been repealed or were not enforced.¹⁴

The Civil War distracted the temperance movement for a decade, but by 1869 the dries had regained their momentum. That year saw the formation of the Prohibition Party, and in 1873 the Women's Christian Temperance Union (WCTU) also sprang into being.¹⁵ Decades later, the WCTU would play a leading role in building the Prohibition Amendment into the nation's higher law. But in the late nineteenth century prohibitionists concentrated their efforts locally. States began to re-mount the prohibition bandwagon. By 1890 "sixteen more states – Ohio, Maine, Rhode Island, Michigan, Oregon, Tennessee, Texas, West Virginia, Connecticut, Massachusetts, New Hampshire, North Dakota, South Dakota, Pennsylvania, Washington, and Nebraska – [had] voted on prohibition amendments."¹⁶ In 1895, the Anti-Saloon League was formed, which rapidly became the standard bearer for the prohibitionist cause.

But the rising number of prohibition states encountered a roadblock. Though formally dry, the prohibition states could not prevent alcohol from entering their borders from out-of-state. Because of the dormant Commerce Clause, which prohibits states from interfering with interstate commerce, dry states were powerless to erect legal barriers to the importation of alcohol from out-of-state. If the states were to maintain effective liquor laws, it was up to the federal government to intervene, and so it did.¹⁷ In 1890 Congress passed the Wilson Act, which allowed states to regulate imported liquor "upon arrival" in the state "to the same extent and in the same manner as though such liquids or liquors had been produced" within the state.¹⁸ The evident purpose of the Wilson Act was to allow dry states to police their borders effectively. At the same time, the Wilson Act expressly mandated equal treatment of in-state and out-of-state liquor.

¹⁴ See KYVIG, *supra* note 8, at 6.

¹⁵ *Id.*

¹⁶ PEGRAM, *supra* note 9, at 79.

¹⁷ Congress may modify the prohibitions of the dormant Commerce Clause by ordinary legislation (though it cannot change the scope of the Commerce Clause). Incidentally, this proposition was settled by the Webb Kenyon Act, which the Supreme Court upheld against the charge that the Act unconstitutionally delegated Congress's power over interstate commerce to the states. See *Clark Distilling Co. v. Western Maryland*, 242 U.S. 311 (1917).

¹⁸ An Act To Limit The Effect Of The Regulations Of Commerce Between The Several States And With Foreign Countries In Certain Cases, 26 Stat. 313 (Aug. 8, 1890).

The Supreme Court, however, interpreted the Wilson Act as allowing states to regulate the *resale* of imported alcohol, but not to prohibit the importation of liquor itself.¹⁹ The importation of alcohol for personal use, the Court held, was a constitutional right. In *Vance v. Vandercook*, decided in 1898, the Court confronted a South Carolina regulatory scheme that required all liquor sold in state to pass through a dispensary system run by state officials. The Court upheld the dispensary system against a dormant Commerce Clause challenge, but simultaneously recognized the right of South Carolina citizens to receive direct shipments of alcohol from out-of-state for personal use: “the right of persons in one state to ship liquor into another state to a resident for his own use is derived from the constitution of the United States, and does not rest on the grant of the State law.”²⁰ The dry states could thus prohibit the sale or resale of alcohol within their borders, but still could not prevent liquor from leaking in from other states.

Perhaps because of this difficulty, only three prohibition states remained by 1904. But by 1906 the dry forces, led by the Anti-Saloon League, had gained steam once again. Energized by the infamous Carry Nation’s hatchet attacks on saloons throughout the United States,²¹ prohibitionists pushed anti-liquor measures in states throughout the Union. They took a bottom up approach, focusing first on localities and counties. “By 1906 more than half the counties, 60 percent of incorporated towns and villages, and close to 70 percent of American townships – territory in which almost 35 million Americans (40 percent of the population) resided – had banned saloons.”²² After drying up municipalities, the dry forces moved to the state legislatures. By April 1917, twenty six states, more than ever before, had adopted prohibition in one form or another.²³

¹⁹ The Court adopted this restrictive interpretation perhaps because of the constitutional questions the alternative interpretation would raise. The Court had not yet ruled on whether Congress could delegate its powers over interstate commerce to the states.

²⁰ *Vance v. Vandercook*, 170 U.S. 438, 452-53 (1898).

²¹ PEGRAM, *supra* note 9, at 110-111.

²² PEGRAM, *supra* note 9, at 111.

²³ See Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 5 n.6 (2006). Only thirteen of the twenty-six dry states, however, “had sought to anticipate on a state-wide basis the drastic bone-dry legislation of the Eighteenth Amendment.” See CHARLES MERZ, *THE DRY DECADE* 22 (1931). “The remaining “dry” states allowed the importation and/or manufacture of alcohol for personal use, although some restricted the type of alcohol permitted and many limited the amount that could be imported during any given period.” Post, *supra*, at 5 n.6.

Paralleling the string of dry victories in the states was dry political agitation in Congress. As states went dry one by one, they discovered once again the difficulties of preventing bootleggers from shipping liquor from out-of-state. The Supreme Court's restrictive interpretation of the Wilson Act in *Vance v. Vandercook* had recognized a constitutional obligation on states to allow direct shipments of alcohol for personal use, rendering their prohibition laws virtually unenforceable. Congress reacted to dry pressure in 1913 by passing the Webb Kenyon Act, which prohibited the shipment of alcohol into any state in violation of the state's laws.²⁴ In essence, the Webb Kenyon Act was designed to "close the direct shipment loophole"²⁵ left open by the Wilson Act and the *Vance* Court by allowing dry states to forbid imports. During the congressional debates, Senator Stone declared that the Webb-Kenyon Act would "merely put the shipper outside of Missouri or Iowa or Arkansas upon a level, that is upon terms of equality, so far as State law and regulation go, with the shipper within the State."²⁶ Dry states now could add bite to their bark.

In six years, however, Webb-Kenyon became moot. Riding waves of dry sentiment, anti-liquor activists built the Prohibition Amendment into the Constitution in record speed. The Anti-Saloon League drafted proposed language that would forbid the manufacture or sale of intoxicating liquors, which was approved in 1917 by a Senate vote of 65-20 and a House tally of 282-128. The Amendment went then to the state legislatures. Within just thirteen months the requisite number of state legislatures had given their blessing to prohibition. The Amendment gave a one year grace period before the formal ban took effect. And so dawn broke on the new era of federal Prohibition on January 17, 1920.²⁷

What accounts for the prohibitionists' rapid string of victories from 1906-1919? In several ways, World War I played an indispensable role. An influx of beer drinking German immigrants over the past half century had produced an explosion in breweries.²⁸ Beer became commonplace. Americans, especially these new immigrants, migrated inwards to urban areas, bringing their "wet" culture with them. Protestant, churchgoing, liquor-detesting, rural Americans felt their cultural dominance challenged

²⁴ An Act Divesting Intoxicating Liquors Of Their Interstate Character In Certain Cases, 37 Stat. 699 (Mar. 1, 1913).

²⁵ See *Granholm v. Heald*, 544 U.S. 460, 462 (2005).

²⁶ 49 Cong. Rec. 4917 (statement of Sen. Stone) (1913).

²⁷ See PEGRAM, *supra* note 9, at 138.

²⁸ See BEHR, *supra* note 10, at 63-65.

by the new immigrants.²⁹ Antipathy to German-Americans multiplied after the sinking of the *Lusitania* in 1915.³⁰ America's entry into the war on the side of Britain and France, combined with Theodore Roosevelt and Woodrow Wilson's infamous denunciations of "hyphenated Americans," made hostility to German-Americans and their beer drinking culture seem a patriotic duty. Drys "lost no time reminding Americans that the brewing interests were almost all in German hands, and that at some brewers' meetings the very language used was German."³¹

In a perfect storm, other factors coincided to bolster the dry cause. That "[r]aw materials used in the production of beer and spirits were needed for the war effort"³² added another argument to the prohibitionists' arsenal.³³ Indeed, "the production of liquor used up huge quantities of grain, sugar and other foodstuffs needed for the armed forces . . ."³⁴ Meanwhile, industrialization increased the need for safe, sober workers, bringing businessmen over to the dry side. In terms of political strength, the Anti-Saloon League and the WCTU were far better organized and committed than their wet counterparts. In a misunderstanding that fragmented the wets, until almost the last minute breweries and wineries were convinced that their products would be exempted from any ban on alcohol. And importantly, many state legislatures were sharply malapportioned, giving drys in rural areas disproportionate strength over largely urban wets in the ratification fight.³⁵

Perhaps most important to the ultimate triumph of the Eighteenth Amendment, however, was the passage of the federal income tax amendment in 1913. In that year, federal alcohol taxes amounted to \$230.1 million, accounting for an astonishing and indispensable 32.2% of total

²⁹ Robert Post writes that the "roots of prohibition lay in evangelical protestant moralism, so much so that Richard Hofstadter could dismiss it as a 'pseudo-reform' produced by a 'rural evangelical virus' capable of transmuting 'the reforming energies of the country . . . into mere peevishness.'" See POST, *supra* note 23, at 15.

³⁰ PEGRAM, *supra* note 9, at 144.

³¹ BEHR, *supra* note 10, at 67. See also AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 416 (2005) ("Prominent brewers were of German descent, and the war made it easy to stigmatize all things German. (As a rule, Prohibition ran strongest among rural, native-born Americans who looked askance at recent immigrants and urban culture.)").

³² See KENNETH J. MEIER, THE POLITICS OF SIN: DRUGS, ALCOHOL, AND PUBLIC POLICY 138-39 (1994).

³³ See AMAR, *supra* note 31, at 416. ("Since grain and sugar were in short supply, Prohibition could be packaged as a patriotic act as well as a moral policy.")

³⁴ JOHN KOBLER, ARDENT SPIRITS: THE RISE AND FALL OF PROHIBITION 206 (1973).

³⁵ See AMAR, *supra* note 27, at 416.

federal revenues. By 1917, however, the federal government was drawing \$387.3 million from individual and corporate income taxes, or 35% of total revenues. (Alcohol taxes in that year totaled \$284 million). Put simply, with an established income tax base, alcohol taxes were no longer critical to the functioning of the federal government. One of the most important arguments in the wet arsenal had been defanged.³⁶

And so America embarked on its experiment in Prohibition. Every casual student of American history knows the broad outlines of the sad tale of Prohibition in the 1920s and early 1930s. Congress overreached in the beginning by defining “intoxicating liquors” to mean not only distilled spirits, but wine and beer as well.³⁷ Outlawing such popular commodities instantly created a profitable black market. Bootleggers drew from stashes of alcohol in the French islands of St. Pierre and Miquelon.³⁸ “The Bahamas became a privileged halfway house – the Medellin of the Prohibition era.”³⁹ “Rumrunners” consistently outwitted the U.S. Coast Guard, using increasingly sophisticated codes to communicate with shore.⁴⁰ Lacking legal enforcement mechanisms, underground liquor dealers turned to bribery, violence, and coercion. “Major gang wars were fought to establish market control in numerous cities.”⁴¹ Alcohol consumption remained incredibly high: less than two years after the passage of the Eighteenth Amendment, the U.S. government “reckoned that bootlegging had become a one billion dollar business, and a senior official urged the government to take steps to recover \$32 million from bootleggers in excess profits taxes.”⁴²

By the end of the decade Americans had seen enough. The major movements for repeal, including the Association Against the Prohibition Amendment, first gained traction in 1927. In 1929, the “Depression accelerated the swing away from Prohibition.”⁴³ Americans saw their life savings evaporate in the stock market crash of 1929 and could no longer afford to buy illegal alcohol. Millionaires, including Pierre DuPont,

³⁶ See MEIER, at 139-40.

³⁷ Volstead Act, 41 Stat. 305 (1920).

³⁸ BEHR, *supra* note 10, at 130.

³⁹ BEHR, *supra* note 10, at 131.

⁴⁰ The Coast Guard’s Prohibition-era experience in cryptanalysis proved useful during the Second World War.

⁴¹ MEIER, *supra* note 32, at 141.

⁴² BEHR, *supra* note 10, at 147.

⁴³ BEHR, *supra* note 10, at 233.

“claimed that if Britain’s liquor tax system were applied to America, this would ‘permit the total abolition of income tax, both personal and corporate.’”⁴⁴ The U.S. government developed a similar interest in the potential infusion of tax revenue repeal would bring: there was a “growing awareness among economists and business leaders, as well as private citizens, that by banning liquor, the government had, since 1920, cut itself off from extremely valuable tax revenue.”⁴⁵ By early 1933, the country was ready for another constitutional amendment.

II. THE BEGINNING OF THE END: CONGRESSIONAL DEBATES

Prohibition’s repeal, in some sense, was a step backwards in time. The straightforward repeal of federal prohibition itself was rather uncontroversial; over seventy percent of the American public voted in favor of repeal during popular elections in the states. But while drafting the Twenty-first Amendment, the nation faced precisely the issues of yesteryear: what sorts of state alcohol laws were legitimate, and which ones contravened the dormant Commerce Clause? What regulatory role should the federal government play, if any? And a novel question: should Congress require the states to call conventions to ratify the Twenty-first Amendment, thus rejecting the state legislature route for the first time in the nation’s history?

A. *Building Webb-Kenyon Into The Constitution*

For a constitutional provision that has generated many modern disputes, section 2 of the Twenty-first Amendment was remarkably uncontroversial in its own time. Should the Eighteenth Amendment be repealed, supporters of the Twenty-first Amendment substantially agreed that states should keep the authority to stay dry if they so wished. The congressional debates reflected this consensus. Since no one seriously tried to strike section 2 out of the proposed Amendment, the discussions in Congress are limited.

Senator Blaine, the spokesman for the Judiciary Committee, opened the discussion of section 2 by outlining the history of the Wilson and Webb-Kenyon Acts. The Wilson Act, passed in 1890, was designed to allow states to regulate alcohol once it crossed their borders. In *Rhodes v. Iowa*,⁴⁶ (and

⁴⁴ BEHR, *supra* note 10, at 233.

⁴⁵ BEHR, *supra* note 10, at 232.

⁴⁶ 170 U.S. 412 (1898).

Vance v. Vandercook) however, the Supreme Court gave the Act “rather a restricted construction”, allowing state regulation only once the liquor “had actually been delivered to the consignee.” This interpretation meant that states had the power to control the *resale* of imported alcohol, but powerless to restrict the importation of alcohol itself. In practice, this meant that dry states could not prevent wet states from sending alcohol across their borders. In 1913, Congress passed the Webb-Kenyon Act, clarifying that dry states did have the power to prevent the importation of alcohol altogether. President Taft vetoed the Webb-Kenyon Act, arguing that it was an unconstitutional delegation of Congress’s power over interstate commerce to the states. But Congress immediately re-passed the Act with the requisite two-thirds majority. Four years later, in *Clark Distilling v. American Express*,⁴⁷ the Supreme Court sustained the Act against constitutional challenge by a vote of seven to two. The passage of the Repeal Amendment in 1919 rendered the constitutional debates moot. But with the repeal of Prohibition, the issue of how to protect the dry states rose again to the fore.⁴⁸

If section 2 was meant to protect dry states, the Webb-Kenyon Act provided the best model. The language of section 2 thus tracked closely the language of the Webb-Kenyon Act. Senator Blaine said: “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.” Senator Borah expressed his view that the Webb-Kenyon Act needed to be reaffirmed by constitutional amendment: without section 2, “we are turning the dry States over for protection to a law which is still of doubtful constitutionality and which, as it was upheld by a divided court, might very well be held unconstitutional upon a re-presentation of it.”⁴⁹ Senator Wagner agreed: “if the dry States want additional assurance that they will be protected I shall have no objection.”⁵⁰ Congress evidently envisioned a checkerboard of states, some wet and some dry, arising after repeal. If a state chose to remain dry, section 2 would allow it to block the flow of alcohol across its borders.⁵¹ Newspapers at the

⁴⁷ 242 U.S. 311 (1917).

⁴⁸ This paragraph draws from Senator Blaine’s statements at 76 Cong. Rec. 4140-41.

⁴⁹ 76 Cong. Rec. 4170 (statement of Sen. Borah).

⁵⁰ 76 Cong. Rec. 4171 (statement of Sen. Wagner).

⁵¹ Debates in the House show that House members also thought of section 2 as a protective shield for dry states. *See, eg.*, 76 Cong. Rec. 4514 (“A majority of . . . [Congress] . . . [will vote] . . . to take the prohibition issue of Congress, and prohibition itself, out of the

time confirm this understanding of the purpose of section 2.⁵²

The harder question was what degree of control the wet states would be allowed to assert over the alcohol traffic. Would states be allowed to discriminate against interstate commerce? Isolated arguments from Senator Blaine seem to point in that direction:

When our Government was organized and the Constitution of the United States adopted, the States surrendered control over and regulation of interstate commerce. 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.⁵³

Later, Senator Blaine also said flatly: “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

Constitution and return it to the States, where it belongs and where it will be safely handled, as previously.”) (statement of Rep. Dyer); 76 Cong. Rec. 4514 (“Each State must determine for itself the type of supervision it wishes over the distribution of liquor.”) (statement of Rep. Celler); 76 Cong. Rec. 4518 (“Section 2 attempts to protect dry States.”) (statement of Rep. Robinson); 76 Cong. Rec. 4519 (“Section 2 prohibits the transportation or importation of intoxicating liquors for delivery or use into any of the several States where the laws of the States prohibit such. This section, it is claimed, will protect the dry States.”) (statement of Rep. Garber); 76 Cong. Rec. 4523 (“If 36 States should act in favor of ratifying this proposed amendment, then, undoubtedly, each and every State in the Union could be just as dry as its own laws make it and as its own courts and juries make it.”) (statement of Rep. McSwain); 76 Cong. Rec. 4526 (“[Section 2] will aid and protect the so-called dry States in permitting them to exclude, if their citizens so wish, all liquor traffic in their domains.”) (statement of Rep. Tierney).

⁵² See, e.g., *Senate Votes Today On Dry Repeal Plan*, WASH. POST, Feb. 16, 1933 at 1 (“There is no question but that there are many members of the House who voted for the Garner naked repeal resolution who would rather vote for a repeal resolution containing some sort of a provision designed to protect dry States from the influx of liquor from those which might be wet.”); *Dry Amendment In Its 14th Year With Battle On: Beer Bill In Committee As Drys Say They Have Just Begun To Fight*, CHRISTIAN SCIENCE MONITOR, Jan. 16, 1933, at 2 (“[A] resolution repealing the Eighteenth Amendment, *but also affording protection to dry states . . .* was approved by a Senate Committee . . .”) (emphasis added); *Repeal Plan Voted By Senate Group; Sales Control Kept: Dry States Protected*, N.Y. TIMES, Jan 6, 1933 at p. 1; Roy Malcolm, *Storms Ahead For The Wets*, L.A. TIMES, Oct. 8, 1932 at A4 (Republican Party would “prevent the flow of liquor from wet into dry States”).

⁵³ 76 Cong. Rec. 4141 (statement of Sen. Blaine).

confines of the States.”⁵⁴

In the House, Rep. McSwain echoed Blaine’s sentiments, contending that Section 2 would return to the states “absolute” power to regulate the liquor traffic:

The proposal voted on to-day gives to every State absolute power to control the manufacture, sale, and transportation of alcoholic and intoxicating beverages. It will be up to the people of every State to say whether or not they will permit any intoxicating beverages to be sold or transported or stored in each such State, and if they, but their State laws, prohibit such manufacture, sale, and transportation within the State, then, such State laws will be supreme on that question, and whiskies can not be shipped into, or transported into such State; and, if laws prohibiting such importation and transportation of intoxicating beverages are violated by common carriers, or by private individuals, then State courts, and State juries must try, and convict, and punish all such violations.⁵⁵

Despite the two statements by Senator Blaine and Representative McSwain, the better (though by no means conclusive) view is that Congress did not intend to bless discrimination against interstate commerce. First, no other Senator echoed Blaine’s “absolute control” sentiments.⁵⁶ Second, Blaine’s comments are arguably consistent with a non-discrimination interpretation. A state might indeed regulate and control interstate commerce in liquor, so long as equal restrictions applied within the state. For example, a licensing system solely for out of state liquor producers would exceed state authority under section 2. But a licensing system that applied to all producers, whether in-state or out-of-state, would be legitimate. Third, surely the “repeal by implication” of federal constitutional provisions should be disfavored. If Congress had meant to remove liquor from the purview of the Commerce Clause, it would have said so explicitly. Most importantly, the language of Section 2 tracked the language of the Webb-Kenyon Act. As I have shown, the Webb Kenyon Act was designed to protect dry states from the importation of liquor from out of state, not to

⁵⁴ 76 Cong. Rec. 4143 (statement of Sen. Blaine) (emphasis added).

⁵⁵ 76 Cong. Rec. 4508 (statement of Rep. McSwain).

⁵⁶ Of course, since debate was so limited, perhaps other senators simply didn’t have a chance to echo Blaine.

authorize discrimination against interstate commerce. No congressman suggested that Section 2 reached further than the Webb-Kenyon Act. Under this non-discrimination interpretation, of course, Section 2's only real bite would be to protect the dry states.⁵⁷

B. The Question Of Federal Control

More time was spent during the Senate debates considering an "amendment to the amendment." The proposed Section 3, which was ultimately not enacted, read: "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." Its purpose, supporters stressed repeatedly, was not to drain power from the states, but merely to allow Congress to prevent the return of the hated saloon. They pointed out that the proposed amendment did not confer plenary power over alcohol on Congress, but only allowed Congress "to regulate or prohibit the sale of intoxicating liquors *to be drunk on the premises where sold.*" "On the premises where sold" meant "saloons." Without Section 3, the saloon could be abolished only by state legislation.

The proposal was immediately under assault. Opponents, including the Association against the Prohibition Amendment, charged that Section 3 would take away the victory of repeal by leaving control of the liquor issue to the federal government. Senator Wagner led the charge: "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."⁵⁸ It did not matter that the power granted by section 3 was limited to the abolishing of saloons. When combined with the Necessary and Proper Clause, "my imagination is not sufficiently fertile to foresee all

⁵⁷ But as this paper will show, few states took advantage of their constitutional right to prohibit alcohol within their borders after the ratification of the Twenty-first Amendment. Almost eighty years later, no state prohibits the sale or use of alcohol. If section 2 really was intended only to preserve the right of dry states to remain dry, then section 2 has become a dead letter. These developments have led courts to twist themselves into contortions when interpreting section 2. Searching for some sort of independent function section 2 might serve, courts of appeals have upheld state alcohol regulations that would normally violate the dormant Commerce Clause. *See, eg., Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006), *cert. denied* 2007 WL 444488 (upholding Virginia laws prohibiting the in-state transportation of more than one gallon of alcohol bought out-of-state).

⁵⁸ 76 Cong. Rec. 4144 (statement of Sen. Wagner).

of the extensions which will be grafted onto section 3.”⁵⁹ By including section 3, Senator Wagner said, “we have expelled the system of national control through the front door of section 1 and readmitted it forthwith through the back door of section 3.”⁶⁰

Objectors also seized on the word “concurrent.” What did it mean? What would happen in cases of conflict between state and federal laws covering the same subject? To Senator Walsh, there was no conflict. If a state were to forego prohibiting the saloon, and the federal government were to prohibit it, a saloon owner could be prosecuted under federal law but not under state law.⁶¹ Senator Brookhart, however, added another twist: “Suppose the State of New York made the saloon legal by affirmative enactment?”⁶² In that case, Walsh had to concede that “[t]he State of New York could not make the saloon legal as against a federal statute. It would be a nullification of a Federal statute.”⁶³ But in that case, what was the meaning of the word “concurrent?”

The debate over the proposed section 3 raged in the public as well. Women’s organizations, including the Women’s Committee for Repeal of the Eighteenth Amendment, pushed for exclusive state control over the alcohol problem. Mrs. Charles Sabin, national chairwoman of the Women’s Organization for National Prohibition Reform, announced that “we would oppose any resolution which leaves the problem of liquor control in the hands of the federal government.”⁶⁴ The American Hotel Association also understandably opposed giving Congress the power to prohibit the “sale of intoxicating liquors to be drunk on the premises where sold”; Arthur L. Race, the Association’s chairman, decried the proposed section 3 as “a constant threat to the establishment of an orderly liquor traffic within individual states” and feared that it would “vitate State liquor codes.”⁶⁵

Motivated by concerns about overly expansive federal regulatory power and the confusion that would result from concurrent federal and state

⁵⁹ 76 Cong. Rec. 4147 (statement of Sen. Wagner). Wagner went through a litany of prohibition era Supreme Court decisions to illustrate how extensive federal power could spring from seemingly terse constitutional provisions.

⁶⁰ 76 Cong. Rec. 4147 (statement of Sen. Wagner).

⁶¹ See 76 Cong. Rec. 4155 (exchange between Sen. Brookhart and Sen. Walsh).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Women Wets Call For Repeal First*, N.Y. TIMES, Nov. 29, 1932, at 2.

⁶⁵ *Hotels To Be Dry While Law Stays: Repeal Bill Criticized*, N.Y. TIMES Jan 19, 1933 at 22.

authority, the Senate rejected Section 3. It might be argued, then, that the rejection of Section 3 showed a congressional intent to remove entirely from the federal government the authority to regulate alcohol. The better view, however, is that Congress only rejected the idea that the federal government should have authority to regulate *intrastate* alcohol transactions. Section 3, after all, was narrowly drafted. It would only have authorized congressional regulation of the saloon. At no point was there a suggestion that the federal government would lose its power to regulate *interstate* commerce in alcohol.

C. Asking The People: Ratification By Convention

Perhaps the most vigorous and interesting debate in the Senate and in the public concerned whether to submit the Twenty-first Amendment to state legislatures or to state conventions. Article V of the Constitution allows constitutional amendments to be ratified either by conventions or by legislatures.

The 1933 interest in conventions apparently originated in an opinion by a maverick federal district court judge in 1930. Citing Charles Beard for the proposition that “a search for ‘the will of the people who made the Constitution’ leads into a Serbonian bog,”⁶⁶ Judge William Clark concluded that the ratification of the Eighteenth Amendment by state legislatures rendered the Amendment invalid. Dodging the explicit language of Article V,⁶⁷ Judge Clark relied on “political thought” and “scientific principles” to conclude that constitutional amendments “designed to transfer to the United States powers heretofore reserved to the states, or, if there are any such, to the people” must be ratified by conventions.⁶⁸ According to Judge Clark: “This follows from the character of such amendments and from the character of the delegates to and deliberations in a constitutional convention, as compared with the corresponding character of the personnel of state Legislatures and their deliberations.”⁶⁹ Judge Clark also pointed out that conventions assembled only for the purpose of acting upon a constitutional amendment are “disturbed by no hope of political gain or fear of political punishment.”⁷⁰ The court accordingly struck down the

⁶⁶ *United States v. Sprague*, 44 F.2d 967, 981 (D.C.N.J. 1930).

⁶⁷ *See* U.S. CONST. art. V

⁶⁸ *Sprague*, 44 F.2d at 981.

⁶⁹ *Sprague*, 44 F.2d at 981.

⁷⁰ *Id.* at 982.

Eighteenth Amendment.⁷¹

Judge Clark anticipated that “[e]ven if this opinion meets with a cold reception in the appellate courts, we hope that it will at least have the effect of focusing the country’s thought upon the neglected method of considering constitutional amendments in conventions.”⁷² He was right on both counts. On direct appeal to the United States Supreme Court, Justice Roberts held that the terms of Article V are unambiguous, leaving no room for Judge Clark’s reliance on political science: “The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition.”⁷³

Judge Clark’s opinion may have been bad constitutional law, but it was good politics.⁷⁴ Joseph Percival Pollard, in 1932, refined Clark’s position, contending that the Framers intended “mere procedural changes in the framework of the federal system” to be ratified by legislatures, “while changes of substance, such as giving new power over citizens to the federal arm, would have to be done in conventions, like the original grants of power to state and nation.”⁷⁵ To the argument that the first ten amendments were undoubtedly “changes of substance” and had been ratified by legislatures, Pollard responded that “[r]atifying these amendments . . . was the merely formal act of ratifying a previous convention-made agreement, and to save time and expense . . .”⁷⁶ Pollard contended (with some truth) that the

⁷¹ The anti-prohibition litigants in *United States v. Sprague* had urged a slightly more plausible theory to declare the Eighteenth Amendment unconstitutional. The Tenth Amendment, they said, when read in conjunction with Article V, requires all constitutional amendments purporting to shift powers from the states or the people to the federal government to be ratified by conventions. But Judge Clark explicitly disclaimed any reliance on the Tenth Amendment.

⁷² *Id.* at 967.

⁷³ *United States v. Sprague*, 282 U.S. 716, 731 (1931).

⁷⁴ Fifteen years later, the people of Missouri would build this concept into their state Constitution. See MO. CONST. art. 1, § 4. (“That Missouri is a free and independent state, subject only to the Constitution of the United States; that all proposed amendments to the Constitution of the United States qualifying or affecting the individual liberties of the people or which in any wise may impair the right of local self-government belonging to the people of this state, should be submitted to conventions of the people.”).

⁷⁵ Joseph Percival Pollard, *Wake Up, Supreme Court! The Eighteenth Amendment Violates the Constitution*, LXXXVIII FORUM & CENTURY 4, at 213 (Oct 1932). Pollard called Judge Clark the “savior of the Constitution,” saying that Clark “had the wit and courage to use his judicial position to perform an act of statesmanship and high policy . . .” *Id.*

⁷⁶ *Id.*

ratification of the Prohibition Amendment by malapportioned state legislatures had subverted the will of the people.⁷⁷

Both the Republican and Democratic Party platforms in the 1932 election also called for submitting the Twenty-first Amendment to state conventions.⁷⁸ The official line, promulgated by Democratic Party chairman John J. Raskob, was that state conventions would allow a neutral “referendum” on the prohibition question, thus ostensibly taking “the issue out of politics.”⁷⁹ In a statement of his position published in the *New York Times*, Raskob argued that “prohibition is a social question and should be taken out of politics and out of the hands of politicians.”⁸⁰ In reality, wets were rightly convinced that the repeal Amendment enjoyed widespread popular support. Casting the convention plan as a popular referendum also allowed repeal advocates to portray opponents as anti-democratic. The New Jersey legislature even took steps toward calling a national constitutional convention, apparently believing that Congress might not act.⁸¹

Supporters of the convention plan in the Senate were concerned that special interests could capture the state legislatures. The seven years given by the Amendment for its ratification could allow opponents to buy off state legislators, many of whom had been elected before the repeal issue “became acute.”⁸² Indeed, Senator Bingham argued, “in many States the members of legislatures are elected year after year, and hold a kind of hereditary seat in the legislature . . .” making them unresponsive to public opinion.⁸³ Many of these state legislators had “a record of having voted dry always, that it would be extremely difficult for them to change their votes.”⁸⁴ Senator

⁷⁷ *Id.* (“[I]n Illinois, as in New York, the traditional rivalry between urban wets and rural dries, with an outmoded system of legislative apportionment favoring the rural districts, made it easy for the [Anti-Saloon] League to dictate its dry policy to the wet city of Chicago.”)

⁷⁸ See Republican Party Platform of 1932 (“Such an amendment should be promptly submitted to the States by Congress, to be acted upon by State conventions called for that sole purpose in accordance with Article V of the Constitution and adequately safeguarded so as to be truly representative . . .”); Democratic Party Platform of 1932 (“To effect such repeal we demand that the Congress immediately propose a Constitutional Amendment to truly represent [sic] the conventions in the states called to act solely on that proposal . . .”).

⁷⁹ *Again Asks Home Rule*, N.Y. TIMES, Jan 6, 1932, at 1.

⁸⁰ *Text of Chairman John J. Raskob’s Letter On Home Rule*, N.Y. TIMES, Jan 6, 1932, at 17.

⁸¹ *Map Jersey Action To End Prohibition*, N.Y. TIMES, Jan 10, 1932, at 25.

⁸² 76 Cong. Rec. 4158 (statement of Sen. Robinson).

⁸³ 76 Cong. Rec. 4166 (statement of Sen. Bingham).

⁸⁴ *Id.*

Lewis made his distrust of the state legislatures explicit:

It was that our people in all the States had seen themselves tricked by legislatures. They had watched some, out of corruption, cheat the constituency. They had seen others, in their wild race to other objects of private benefits, exchange one purpose in order to obtain another. The deception had, in different forms, been so practiced upon them that they hastened to adopt some other remedy and some other method than to abide by that from which they had suffered losses and defeats only lately in so many States of the Union.⁸⁵

Moreover, malapportionment in the state legislatures made the future of the repeal Amendment uncertain. The *New York Times* detailed attempts by Kentucky wets to reapportion the badly skewed state legislature before the submission of the Twenty-first Amendment.⁸⁶

Nevertheless, the Judiciary Committee chose, above vigorous dissent, to submit the Amendment to the legislatures. Vigorous discord ensued. When the Twenty-first Amendment was reported to the full Senate, Senator Robinson of Arkansas was incredulous: "I should like to ask the Senator from Wisconsin, who has worked so hard and diligently on the pending joint resolution, why it was that the committee reporting it disregarded the declaration of both political parties in favor of ratification by conventions?"⁸⁷ The Association Against the Prohibition Amendment, which had campaigned since 1919 for the repeal of the Eighteenth Amendment, was likewise infuriated, and even threatened to drop its support for the Twenty-first Amendment.

Senator Blaine, the committee's spokesman, justified the decision on two grounds. First, the "fundamental question involved in this issue is whether or not the eighteenth amendment shall be repealed."⁸⁸ Blaine did not consider the "question of the mode of repeal" to be "the essence of the question at all."⁸⁹ Second, Blaine appealed to economy: "Now, we must face the fact that the convention system is going to be an expensive method

⁸⁵ 76 Cong. Rec. 4159 (statement of Sen. Lewis).

⁸⁶ Robert E. Dundon, *Kentucky Facing Fight On Dry Law*, N.Y. TIMES, Feb. 12, 1933 at 67.

⁸⁷ 76 Cong. Rec. 4139 (statement of Sen. Robinson).

⁸⁸ 76 Cong. Rec. 4139 (statement of Sen. Blaine).

⁸⁹ 76 Cong. Rec. 4139-40 (statement of Sen. Blaine).

for ratification.” In a wet state, where ratification was all but foreordained, it would be senseless and needlessly costly to require state legislatures to establish conventions and call special elections.⁹⁰ This cost problem was all the more acute in a time of economic depression, when the states were strapped for funds.⁹¹

Senator Walsh of Montana added his support to the ratification by legislature plan. He argued that the convention plan would delay ratification of the Twenty-first Amendment for at least two years. The legislatures, after receiving the proposed amendment from Congress, would have to decide “when and where [the conventions] should be called, whether the delegates should be elected by congressional district or by State assembly districts, or by other districts to be created for that express purpose.”⁹² Moreover, in a time of economic depression, the states would be forced to bear the costs of the special elections.⁹³ Walsh suspected that “at least half” of the states would “let [the special election] go over until the next general election and then delegates will be elected without any special additional cost for the election.”⁹⁴ Certainly the legislatures could call special sessions to speed things up, Walsh conceded, but did anyone really think that the requisite thirty-six states would do so?⁹⁵

The U.S. Senate’s distrust of the state legislatures provoked Senator Barkley to ask a novel question: what would happen if the state legislatures refused to call conventions?⁹⁶ What could Congress do about it? The text of Article V illuminated no plain answer, and the ensuing debate highlighted the various possibilities. Walsh took a hard states’ rights view, saying flatly:

⁹⁰ *Id.*

⁹¹ Senator Borah put the point compellingly: “Mr. President, we are confronted now with the fact that millions of our people are starving; the Federal Government is almost ready to go into the hands of a receiver; the States are borrowing money by the millions from the Federal Government; counties, municipalities, subdivisions of government are doing the same thing, and if we provide for submission of this question to conventions, we are about to put upon the backs of the taxpayers of the United States millions of dollars of expense to carry out this simple mandate.” 76 Cong. Rec. 4161 (statement of Sen. Borah).

⁹² 76 Cong. Rec. 4149 (statement of Sen. Walsh).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* Whatever the merits of Walsh’s reasoning, his predictive powers were not impressive. Congress sent the proposed Twenty-first Amendment to the states on February 20, 1933. Within a few months most states had passed laws calling special elections, which were held mostly over the summer of 1933. By December of 1933, a bare ten months later, the Amendment was ratified.

⁹⁶ 76 Cong. Rec. 4150 (statement of Sen. Barkley).

“We could do nothing.”⁹⁷ The people of each state were free, Walsh argued, to “elect a legislature that will call a convention.”⁹⁸ Senator Borah suggested a second option: “if the legislature itself does not provide a method by which a convention may be called, may not the people of the State themselves organize through committees and call conventions without the aid of the legislature? I do not think we can deprive the people of the right to assemble together in a convention if they desire to act upon such a question as this in that way.”⁹⁹

A third view was for Congress to call and prescribe the form of the state conventions directly. This suggestion triggered ire in the House. Representative Celler argued that “by reasonable interpretation the word ‘convention’ as used in Article V of the Constitution precludes and repels the idea that the convention shall be called, elected, organized, or governed by congressional fiat. I incline to the belief that that must and shall be a State matter exclusively.”¹⁰⁰ Representative Garber insisted that “[t]he State legislatures will fix the time and place of holding the conventions, the number of delegates, the apportionment of delegates, the qualifications of delegates, and the voters.”¹⁰¹ Representative McSwain, during a long speech, lambasted the idea of allowing Congress to construct the conventions as “unconstitutional, un-American, undemocratic, and unwise.”¹⁰² Since the state legislatures acted rapidly, Congress never had the opportunity to test its power to prescribe state constitutional conventions directly. An important constitutional question was left for another day—a question that remains unanswered.

The repeal amendment passed the Senate in mid February by a vote of 63-23. It was submitted to the House a few days later, and approved by a tally of 289-121. On February 21, 1933, Secretary of State Henry L. Stimson sent the text of the proposed Twenty-first Amendment to the states, where the final battle of the ratification war would be fought.¹⁰³ The first step of the final phase called for state legislatures to create the machinery

⁹⁷ 76 Cong. Rec. 4150 (statement of Sen. Walsh).

⁹⁸ *Id.*

⁹⁹ 76 Cong. Rec. 4150 (statement of Sen. Borah).

¹⁰⁰ 76 Cong. Rec. 4515 (statement of Rep. Celler).

¹⁰¹ 76 Cong. Rec. 4519 (statement of Rep. Garber).

¹⁰² 76 Cong. Rec. 4524 (statement of Rep. McSwain).

¹⁰³ EDWARD SOMERVILLE BROWN, RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: STATE CONVENTION RECORDS AND LAWS 515 (1938).

for special elections and to pass special laws for the assembling of conventions.¹⁰⁴

III. THE RATIFICATION MACHINERY: STATE LAWS, POPULAR VOTES, AND CONSTITUTIONAL CONVENTIONS

A. *State Laws*

The spring and summer of 1933 saw a flurry of activity as dozens of state legislatures passed laws establishing constitutional conventions. As the states wrote their laws, they had little or no guidance. Proposals in Congress had surfaced for a “general law” to be followed by the state legislatures, but none had passed.¹⁰⁵ And since all twenty previous constitutional amendments had been ratified by legislatures, the states were forced to draft their laws on a blank slate.

Though no common template guided the states, the results showed a remarkable uniformity. The typical state law was fairly detailed, establishing dates for a popular election and a convention, and detailing the number of delegates, their qualifications, the nomination process, compensation, and from where they would be elected. The standard law also prescribed the form and contents of the election ballots (sometimes in graphic form), the chairman of the convention, the administration of the oath of office, the overall organization of the convention, and the certification of the results.¹⁰⁶

There were some important differences. About half the state legislatures anticipated later congressional action to prescribe uniform forms and procedures for the conventions. In that event, most of these states chose to pledge allegiance to the federal law. California’s statute, for

¹⁰⁴ The rest of Section 3 provided that the Amendment “shall be inoperative unless it shall have been ratified . . . within seven years from the date of the submission hereof to the States by the Congress.” U.S. CONST. amend. XXI. As Professor Akhil Amar has noted, the seven years provision “raises intriguing questions and possibilities for twenty-first-century Americans pondering the permutations of permissible constitutional change.” AMAR, *supra* note 31, at 418. A future constitutional amendment might “provide that the amendment would be ‘inoperative’ unless ratified by four-fifths of the states, rather than a mere three quarters.” *Id.* In that way, “future section 3 analogues could, as a practical matter, move America toward a more directly democratic system of amendment.” *Id.*

¹⁰⁵ See BROWN, *supra* note 103, at 515. During the congressional debates, one representative suggested a template.

¹⁰⁶ See, e.g., 1933 Me. Acts 840.

example, read: “If . . . the Congress of the United States prescribes the manner in which such convention shall be constituted . . . all officers of the State who may by the Congress be authorized or directed to take any action to constitute such a convention for this State are hereby authorized and directed to act thereunder and in obedience thereto with the same force and effect as if acting under a statute of this State.”¹⁰⁷

New Mexico, however, set up a potential constitutional confrontation by expressly declaring void any later federal statute purporting to establish uniform convention procedures. The state legislature declared that “[a]ny attempt on the part of Congress in any manner to prescribe how and when the delegates to the convention may be nominated or elected, the date on which said convention shall be held in the several states, the number of delegates required to make a quorum, and the number of affirmative votes necessary to ratify the amendment submitted to such conventions, or any other requirements, shall be null and void in the state of New Mexico . . .”¹⁰⁸ In a further jab at federal authority, New Mexico “authorized and required” state officials “to resist to the utmost any attempt to execute any and all such congressional dictation and usurpation.”¹⁰⁹ The state’s convictions were never tested, and the provision seems to have been repealed sometime afterwards.

Some one third of the state legislatures passed generally applicable laws that would be triggered any time Congress selected the convention method of ratification for any proposed constitutional amendment. A typical provision read: “Whenever the Congress of the United States shall propose an amendment to the Constitution of the United States, and shall propose that it be ratified by conventions in the several states, the governor shall fix by proclamation the date of an election for the purpose of electing the delegates to such convention in this state.”¹¹⁰ Fifteen other states adopted

¹⁰⁷ 1933 Cal. Stat. 842, § 12. Twenty other states followed California’s lead. *See* 1933 Ariz. Sess. Laws 403; 1933 Conn. Acts 835; 38 Del. Laws, ch. 5, § 1 (1933); 1933 Fla. Laws 740; 1933 Idaho Sess. Laws 328; 1933 Ind. Acts 851; 1933 Iowa Acts 1; 1933 Md. Laws 447; 1933 Mont. Laws 458; 1933 Nev. Stat. 252; 1933 Ohio Laws 74; 1933 Pa. Laws 233; 1933 R.I. Pub. Laws 74; 1933 S.D. Sess. Laws 100; 1933 Ten. Pub. Acts 53; 1933 Tex. Gen. Laws 358; 1933 Utah Laws 36; 1933 Vt. Acts & Resolves 118; 1933 Wash. Sess. Laws 697; 1933 Wyo. Sess. Laws 111.

¹⁰⁸ 1933 N.M. Laws 400, § 16.

¹⁰⁹ 1933 N.M. Laws 400, § 16.

¹¹⁰ 1933 Ariz. Sess. Laws 403, § 1. This provision survives in amended form today. *See* Ariz. Rev. Stat. 16-224 (2007) (“When congress proposes an amendment to the Constitution of the United States, and proposes that it be ratified by conventions in the several states, the

similar provisions, most of which are still on the books today.¹¹¹ Twenty-six states, however, passed laws addressing the Twenty-first Amendment only.¹¹²

Nineteen states allowed the governor to call a special popular election by proclamation.¹¹³ California required the Secretary of State to call the election.¹¹⁴ More legislatures fixed specific dates themselves.¹¹⁵ In a testament to the strength of the repeal sentiment, these state laws provided for rapid special elections and quick conventions. Colorado's law, for example, which was passed on August 10, called for an election on September 12 and a convention on September 26.¹¹⁶ Arkansas's March 24 law called for an election on July 18 and a convention on August 1.¹¹⁷ And Illinois' law, which cleared the state legislature on April 28, provided for an

governor shall fix by proclamation the date of an election for the purpose of electing delegates to the convention to be held in this state.”).

¹¹¹ See 38 Del. Laws, ch. 5, § 1 (1933), current version at DEL. CODE ANN. tit. 15, § 7701 (2007); 1933 Fla. Laws 740, § 1, current version at FLA. STAT. § 107.01 (2007); 1933 Idaho Sess. Laws 328, § 1, current version at IDAHO CODE ANN. § 34-2201 (2007); 1933 Ind. Acts 851, § 1, current version at IND. CODE § 3-10-5-1 (2007); 1933 Iowa Acts 1, § 1; 1933 Mo. Laws 233, § 1; 1933 Mont. Laws 458, § 1; 1933 N.M. Laws 400, § 1, current version at N.M. STAT. § 1-18-1 (2007); 1933 Ohio Laws 74, § 1, current version at OHIO REV. CODE ANN. § 3523.01 (2007); 1933 S.D. Sess. Laws 100, § 1, current version at S.D. CODIFIED LAWS § 2-15-1 (2007); 1933 Tex. Gen. Laws 358, § 1; 1933 Utah Laws 36, § 1, current version at UTAH CODE ANN. § 20A-15-101 (2007); 1933 Vt. Acts & Resolves 118, § 294, current version at VT. STAT. ANN. tit. 17, § 1811 (2007); 1933 Wash. Sess. Laws 697, § 1, current version at WASH. REV. CODE § 29A.56.410 (2007); 1933 Wyo. Sess. Laws 111, § 1.

¹¹² See 1933 Ala. Laws 77, § 1; 1933 Ark. Acts 467, § 1; 1933 Cal. Stat. 598, § 1; 1933 Colo. Sess. Laws 51, § 1; 1933 Conn. Acts 835, § 1; 1933 Ill. Laws 12, § 1; 1933 Ky. Acts 22, § 1; 1933 Me. Acts 840, § 1; 1933 Md. Laws 447; 1933 Mass. Acts 161, § 1; 1933 Mich. Pub. Acts 24, § 1; 1933 Minn. Laws 272, § 1; 1933 Neb. Laws 581, § 1; 1933 Nev. Stat. 252, § 1; 1933 N.H. Laws 153, § 1; 1933 N.J. Laws 143, § 1; 1933 N.Y. Laws 525, § 1; 1933 N.C. Sess. Laws 600, § 1; 1933 Or. Laws 845, § 1; 1933 Pa. Laws 233, § 1; 1933 R.I. Pub. Laws 74, § 1; 1933 S.C. Acts 1180, § 1; 1933 Ten. Pub. Acts 53, § 1; 1933 Va. Acts 3, § 1; 1933 W. Va. Acts 78, § 1; 1933 Wis. Sess. Laws 180, § 1.

¹¹³ Those states were Arizona, Connecticut, Delaware, Florida, Idaho, Indiana, Iowa, Massachusetts, Missouri, Montana, Nevada, New Hampshire, New Mexico, Ohio, Rhode Island, Utah, Vermont, Washington, and Wyoming.

¹¹⁴ 1933 Cal. Laws 598.

¹¹⁵ Alabama, Arkansas, Colorado, Illinois, Kentucky, Maine, Maryland, Michigan, Minnesota, Nebraska, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin.

¹¹⁶ 1933 Colo. Sess. Laws 51, § 1-2.

¹¹⁷ 1933 Ark. Acts 467, § 1-2.

election on June 5 and a convention on July 10.¹¹⁸

The states disagreed about whether to elect delegates by county, district, or from the state at large. Presumably because of malapportionment concerns, most states chose the latter method. Ohio, for example, prescribed fifty-two delegates to be elected by a statewide vote.¹¹⁹ Twenty-four other states followed suit.¹²⁰ Only fourteen states chose to elect delegates by district.¹²¹ A few states compromised, electing one slate of delegates by district and the other slate from the state at large. Alabama, for example, prescribed “as many delegates from each county in the State as such county is now entitled to members of the House of Representatives of the Legislature of Alabama . . . There shall also be elected ten delegates from the State at large . . .”¹²²

Petitions, signed by members of the public, were the dominant mode of nominating delegates.¹²³ The number of required signatures ranged widely. In Tennessee, an aspiring delegate needed to get a mere fifteen signatures.¹²⁴ California, Delaware, Idaho, Minnesota, Montana and Utah required 100 names.¹²⁵ Florida, Indiana, and New Mexico chose 500.¹²⁶ Kentucky and Wisconsin chose to require 1,000.¹²⁷ Ohio selected 5,000;¹²⁸ Pennsylvania 10,000.¹²⁹ And New York sat near the top of the heap by requiring 12,000.¹³⁰

Four states adopted more calibrated approaches. Maine required the

¹¹⁸ 1933 Ill. Laws 12, § 1-2.

¹¹⁹ 1933 Ohio Laws 74, § 4.

¹²⁰ Arizona, California, Colorado, Delaware, Florida, Idaho, Illinois, Iowa, Kentucky, Minnesota, Missouri, New Hampshire, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wisconsin.

¹²¹ Arkansas, Indiana, Maine, Massachusetts, Michigan, Montana, Nebraska, Nevada, North Carolina, Oregon, South Dakota, Texas, Washington, and Wyoming.

¹²² 1933 Ala. Laws 77, § 2.

¹²³ Twenty-five states chose this approach: Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Maine, Minnesota, Montana, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, and Wisconsin.

¹²⁴ 1933 Tenn. Laws 53, § 5.

¹²⁵ 1933 Cal. Laws 598, § 5; 1933 Del. Laws 33, § 5; 1933 Idaho Laws 328, § 5; 1933 Minn. Laws 272, § 5; 1933 Mont. Laws 458, § 3; 1933 Utah Laws 36, § 5.

¹²⁶ 1933 Fla. Laws 740, § 4; 1933 Ind. Laws 851, § 5; 1933 N.M. Laws 400, § 6.

¹²⁷ 1933 Ky. Laws 22, § 4; 1933 Wis. Laws 180, § 4.

¹²⁸ 1933 Ohio Laws 74, § 5.

¹²⁹ 1933 Penn. Laws 233, § 5.

¹³⁰ 1933 N.Y. Laws 525, § 3.

“total number of signatures for the nomination of each candidate or delegate” to “amount in the aggregate to at least two per cent and not more than four per cent of the total vote cast for governor in the election held on the 2nd Monday of September, 1932, in the electoral district or division within which such candidate is to be voted for, provided, however, that each petition must be signed by at least 150 qualified voters.”¹³¹ New Jersey required 25,000 signatures for a delegate-at-large, and for a district delegate, a “petition signed by such registered voters of the county equal to at least one-tenth of the vote cast in the preceding general election for members of the Assembly in such county,” but not more than 10,000 signatures.¹³² North Carolina mandated that each petition be signed by at least two percent of the county’s gubernatorial vote.¹³³ South Dakota also adopted the two percent approach.¹³⁴

Few states expressly bound their delegates to vote in accordance with the election results. Alabama extracted an oath from each delegate “to abide by the result of the referendum in the State on the question of the ratification or rejection of the proposed Twenty-first Amendment . . .”¹³⁵ Arkansas required each delegate to produce “a statement in writing, subscribed and sworn to by the candidate as to whether or not said individual is ‘For repeal of the 18th Amendment’ or ‘Against the Repeal of the 18th Amendment.’”¹³⁶ Most states, however, contented themselves with listing the delegates’ names under ballot headings indicating the delegates’ presumed position on the repeal question.¹³⁷

B. Popular Votes And Constitutional Conventions

The ratification of the Twenty-first Amendment might be called one of the most democratic moments in American history. Over the next eight months forty-three states held popular elections and thirty-eight assembled conventions. Almost all voters in America had the unprecedented opportunity to bless or condemn a federal constitutional amendment

¹³¹ 1933 Me. Laws 840, § 5.

¹³² 1933 N.J. Laws 143, § 5.

¹³³ 1933 N.C. Laws 600, § 7.

¹³⁴ 1933 S.D. Laws 100, § 3.

¹³⁵ 1933 Ala. Sess. Laws 77, § 6.

¹³⁶ 1933 Ark. Laws 527, § 3.

¹³⁷ *See, eg.*, 1933 Cal. Laws 598, § 6. California listed one slate of delegates under the heading: “Against Ratification and Against Repeal” and the other under: “For Ratification and for Repeal.”

directly. Never before had the nation modified the Constitution in process so near to a popular referendum. Millions of women exercised their newly guaranteed right to vote. The constitutional conventions ratified the choices of the people without fail.

The results of the popular elections were staggering. Michigan acted first. The state's law, passed on March 11, provided for an election on the first Monday in April. Eighty seven of Michigan's 100 districts had voted to repeal the state's bone dry prohibition law the previous November,¹³⁸ and the *Los Angeles Times* reported that "opponents of prohibition tonight are predicting a decisive pronouncement in Monday's election in favor of repeal of the Eighteenth Amendment."¹³⁹ They were right. Early returns from Detroit showed an almost ten to one margin in favor of repeal.¹⁴⁰ Since the elections were by district rather than statewide, anti-repeal advocates predicted a strong dry showing in rural areas would threaten the repealists's victory.¹⁴¹ But even Michigan's rural areas went wet by a 2-1 margin. "For the state at large, with six sevenths of the more than 1,000,000 votes tabulated, the total was Wet 754,838; Dry 243,030."¹⁴² The following week's convention would be composed of ninety-nine wet delegates and one dry delegate. The dry delegate, from "rural Barry County," had won his seat by a margin of "236 out of 7062 votes cast."¹⁴³ The repealists were off to a strong start.

Michigan's vote triggered a landslide in other states. Keeping with a Midwest theme, Wisconsin voted the same week. As in Michigan, Wisconsin voters had "repealed the [state] enforcement law four years [earlier] with a referendum vote of 350,337 to 196,402."¹⁴⁴ The Wisconsin legislature had also chosen to elect delegates from the state at large to the

¹³⁸ The popular vote in that contest was 1,022,568 to 475,265 in favor of repeal. *See Approaches November Vote*, N.Y. TIMES, Apr. 4, 1933, at 1.

¹³⁹ *Interest High in Michigan Vote*, L.A. TIMES, Apr. 2, 1933, at 2.

¹⁴⁰ *Repealist Group Leading in Michigan Returns*, L.A. TIMES, Apr. 4, 1933, at 1. ("Latest figures from Detroit, returns from 100 out of 883 districts for seventeen delegates, showed: for repeal, 20,573; against repeal, 2,220.")

¹⁴¹ *Interest High in Michigan Vote*, L.A. TIMES, Apr. 2, 1933, at 2. ("Opponents of repeal, while making no predictions as to the outcome, have expressed belief that the election of delegates by county units will cut materially into the margin repeal proponents have claimed.")

¹⁴² *Michigan Wins Single Vote Against Repeal*, CHRISTIAN SCIENCE MONITOR, Apr. 5, 1933, at 7

¹⁴³ *Michigan Wins Single Vote Against Repeal*, CHRISTIAN SCIENCE MONITOR, Apr. 5, 1933, at 7.

¹⁴⁴ *Dry Concedes Wisconsin Vote*, N.Y. TIMES, Apr. 3, 1933, at 3.

constitutional convention. Disheartened, the Wisconsin chapter of the Anti-Saloon League conceded defeat even before the election.¹⁴⁵ The ensuing landslide went even beyond the hopes of the repealists. The day after votes were cast, newspapers across the nation trumpeted a 4 to 1 Wisconsin repeal margin.¹⁴⁶ Fifteen out of fifteen of the delegates to Wisconsin's constitutional convention later that month would vote to repeal the Eighteenth Amendment.¹⁴⁷

New Jersey, Wyoming, New York, Nevada, Delaware, and Rhode Island voted wet the next month. May 14 saw Wyoming vote in favor of repeal 6 to 1.¹⁴⁸ On May 16, New Jersey followed suit, voting wet by a 6.6 to 1 margin.¹⁴⁹ On May 23, New York contributed a thunderous eighty-eight percent vote for repeal, spurred by a heavy wet forty-one to one vote in New York City.¹⁵⁰ A few days later, Nevada and Delaware rejected the Eighteenth Amendment by similarly overwhelming margins.¹⁵¹ And Rhode Island, which had never ratified the Eighteenth Amendment, completed the May anti-prohibitionist sweep by a tally of more than seven to one.¹⁵²

In June, panicked by the overwhelming repeal tide, prohibitionists launched "the bitterest fight of their history." Anti-repealists convened in Washington, DC in "an atmosphere redolent of furniture polish and strong soap" and predicted that seven of the eight states (all but Illinois) to cast

¹⁴⁵ *Dry Concedes Wisconsin Vote*, N.Y. TIMES, Apr. 3, 1933, at 3. ("All hope for the dry cause in Wisconsin was lost, [the State Superintendent of the Anti-Saloon League] said, when the legislature decided that delegates to the April 25 repeal convention at Madison should be elected on a strictly non-partisan basis and by voters of the State at large.")

¹⁴⁶ *Repealists Win Wisconsin by Sweeping Vote*, CHI. DAILY TRIB., Apr. 6, 1933, at 4. Milwaukee went 12 to 1 for repeal. Green Bay favored ending prohibition by an 11 to 1 margin. "In the deluge Rockland Village, in western La Crosse county, stood out in curious, dry contrast. It voted to retain the eighteenth amendment by a count of 44 to 38." *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Wyoming Vote Gives Big Lead for Repeal*, N.Y. TIMES, May 16, 1933, at 1. Because Wyoming voted by districts, several dozen dry delegates were elected to the convention. *Id.*

¹⁴⁹ *Jersey Dries Get Only Two Delegates*, N.Y. TIMES, May 18, 1933, at 14. All delegates at large in New Jersey were wets, and only two of 162 district delegates were dries. *Id.*

¹⁵⁰ *Drys in State Won Only Six Counties*, N.Y. TIMES, May 25, 1933, at 2. The near complete tally was 1,885,027 to 227,550. The *New York Times* attributed the lopsided vote partially to light turnout in rural areas. *Id.* The complete figures put the wets at over two million popular votes. *State Vote was 88% Wet*, N.Y. TIMES, June 1, 1933, at 12.

¹⁵¹ *Delaware, Nevada Vote Dry Era's End*, CHI. DAILY TRIB., May 28, 1933, at 1.

¹⁵² *Rhode Island Votes 7 to 1 to Ratify Repeal of Dry Law*, CHI. DAILY TRIB., May 2, 1933, at 1. Only one town went dry, by a margin of seventeen votes. *Id.*

June votes would affirm the Eighteenth Amendment.¹⁵³ But despite vigorous dry efforts, all eight June voting states rejected the Eighteenth Amendment. On June 4, Illinois became the ninth state to vote for repeal, racking up majorities of nearly 11 to 1 in wet Chicago.¹⁵⁴ In Indiana, which dries had declared the first real battleground of the Twenty-first Amendment, wets won 2 to 1.¹⁵⁵ Massachusetts, Connecticut, Iowa, New Hampshire, and West Virginia voters voiced their resounding support for the Twenty-first Amendment.¹⁵⁶ Despite a court challenge to the validity of their election,¹⁵⁷ California voters rejected the Eighteenth Amendment on June 27.¹⁵⁸ By the end of June states with a population of over fifty-two million had voted on the repeal question, and the tally stood at sixteen states for repeal, zero against.¹⁵⁹

Three southern states and Oregon voted in July. Prohibitionists had expected a strong showing in the traditionally dry South, but were again disappointed. Alabama and Arkansas voted overwhelmingly wet on July 18.¹⁶⁰ Tennessee became the third southern state to disapprove of Prohibition on July 20, but the scant majority for repeal “gave the dries the satisfaction of the closest fight in any State since repeal voting started.”¹⁶¹ Oregon’s July 21 vote brought the score to twenty states for repeal, zero against.¹⁶² By the end of July, the newly wet states accounted for half the

¹⁵³ *Drys Will Launch Bitterest Crusade*, WASH. POST, June 5, 1933, at 2.

¹⁵⁴ *Repealists Add Illinois to Column*, L.A. TIMES, June 6, 1933, at 1.

¹⁵⁵ *Indiana, Pivot State, Tenth to Vote Repeal*, WASH. POST, June 7, 1933, at 1. The *New York Times* emphasized the significance of the Indiana vote. “No other State has been more insistently or belligerently dry,” the *Times* editorialized. “Where will the prohibitionists find their thirteen States? It is impossible to name them.” *Repeal Rolling On*, N.Y. TIMES, June 8, 1933, at 18.

¹⁵⁶ See *Bay State for Repeal Four to One*, L.A. TIMES, June 14, 1933, at 1; *Repeal Tests Slated Today*, L.A. TIMES, June 20, 1933, at 3; *Iowa Votes for Dry Repeal, New Hampshire, Connecticut Also Wet*, CHI. DAILY TRIB., June 21, 1933, at 1.

¹⁵⁷ See Frederick F. Forbes, *Court Fight Fails California Dries*, N.Y. TIMES, June 4, 1933, at E8.

¹⁵⁸ *Repeal Wins More States, California, West Virginia Join Fourteen*, CHI. DAILY TRIB., June 28, 1933, at 1.

¹⁵⁹ *The Repeal Campaign*, WASH. POST, June 3, 1933, at 6.

¹⁶⁰ *Crucial Vote in South*, N.Y. TIMES, July 19, 1933, at 1. The tally was 3 to 2 in Alabama and Arkansas. See *Alabama, Arkansas Vote Three to Two for Repeal*, ATL. CONST., July 19, 1933, at 1.

¹⁶¹ *Tennessee Votes Wet: Repeal Election Close*, L.A. TIMES, July 21, 1933, at 1. (“With 1892 of the State’s 2172 precincts reported, the vote for repeal was 120,197 against, 110,444 for retention of the Eighteenth Amendment.”) The city of Memphis provided the necessary margin for repeal. *Id.*

¹⁶² *Oregon is 20th State to Join Repeal Parade*, CHI. DAILY TRIB., July 22, 1933, at 1.

U.S. population.¹⁶³

August saw another wet landslide. Prohibitionists conceded Arizona before voting began, failing to nominate a single dry delegate.¹⁶⁴ Arizona dries were forced to “write in” their candidates.¹⁶⁵ On August 19 Missouri voted against the Eighteenth Amendment by a 4 to 1 margin, with even “formerly dry strongholds” in the Ozarks “rolling up wet majorities.”¹⁶⁶ Several days later Texas recorded a massive pro-repeal majority. Wets began talking of repeal by Christmas.¹⁶⁷ Dries mistakenly predicted a “surprise” in Washington; the state went wet by a 3 to 1 margin.¹⁶⁸ By the end of August, 24 states had expressed their preference for repeal. Dry leaders, shell shocked by the strength of the repeal sentiment, blamed political and economic “coercion” from the federal government for the loss of five formerly dry strongholds.¹⁶⁹ The Republican Party was stricken with internal strife as leaders blamed one another for the wet landslide.¹⁷⁰

By September the result was foreordained. Though the Anti-Saloon League promised in each state left to vote “an aggressive and uncompromising campaign of organization and agitation to defeat repeal and record the largest vote possible against it,”¹⁷¹ wets continued to record victories. The next four weeks saw seven more states add to the repeal slate. In the Northeast, Vermont and Maine (the nation’s first dry state) rejected the Eighteenth Amendment 2 to 1.¹⁷² In the West, Colorado, Idaho, and

Oregon voters simultaneously repealed their state’s dry law. *Id.*

¹⁶³ Arthur Evans, *Voting Lineup Points to Repeal About Dec. 6th*, CHI. DAILY TRIB., July 23, 1933, at 8.

¹⁶⁴ *Arizona Votes Repeal Today; No Dry Ticket*, CHI. DAILY TRIB., Aug. 8, 1933, at 2.

¹⁶⁵ *Id.* Arizona went wet by a margin of 3 to 1. See *Arizona Wets Ahead, 3 to 1, In Repeal Vote*, WASH. POST, Aug. 9, 1933, at 1.

¹⁶⁶ *Missouri Votes Wet; 4 to 1*, CHI. DAILY TRIB., Aug. 20, 1933, at 1.

¹⁶⁷ *Texas Results Spur Wet Hope*, L.A. TIMES, Aug. 28, 1933, at 3.

¹⁶⁸ *Repeal is Close in Washington: Wets Forecast 2-1 Win as Dry Forces Forecast Surprise in Vote*, WASH. POST, Aug. 29, 1933, at 3.

¹⁶⁹ *Dries to Defeat Repeal, Says McBride Here*, CHI. DAILY TRIB., Aug. 31, 1933, at 5. “Dr. McBride blamed the sweeping victories thus far rolled up by the wets in all the states voting to ratify the repeal amendment upon ‘political coercion on the part of the administration, which has sought to make this an economic rather than a moral question.’”

¹⁷⁰ *Koenig Ridicules Mellen’s Attack: Republican Leader Says Foe Blames Him for National Democratic Landslide*, N.Y. TIMES, Sept. 14, 1933, at 27.

¹⁷¹ *Dry Conference Adopts Plan to Fight Repeal: Will Invade All 24 States Remaining to Vote*, CHI. DAILY TRIB., Sept. 1, 1933, at 10.

¹⁷² *Vermont Votes, 2 to 1, Against Prohibition*, CHRISTIAN SCIENCE MONITOR, Sept. 6, 1933, at 3; *Maine Wet After 82 Years*, CHI. DAILY TRIB., Sept. 12, 1933, at 1.

New Mexico voted wet by similarly large margins.¹⁷³ Maryland and Minnesota followed suit.¹⁷⁴ By the end of September, drys had yet to boast a single victory. Wets began talking of the possibility of unanimous ratification.¹⁷⁵

Virginia voted wet in a tidal wave on October 3, and drys finally began facing the reality of repeal.¹⁷⁶ With only four more states necessary to guarantee repeal, a Virginia dry leader “issued a statement, saying that the ‘situation as it is developing nationally is deplorable.’ Terming the liquor traffic ‘one of the arch criminals of all time,’ he said that ‘no nation is safe from its ravages until it is outlawed.’”¹⁷⁷ The drys’ appeals were to no avail, as the wets completed a clean sweep. “Though Florida prohibitionists . . . made final appeals through churches for a heavy vote . . . against repeal,”¹⁷⁸ that state voted for repeal 4 to 1 on October 10.¹⁷⁹ Finally, on November 7, Utah, Ohio, and Pennsylvania sealed the fate of the Eighteenth Amendment.¹⁸⁰ Only two states, North Carolina and South Carolina, went dry.¹⁸¹ An overwhelming majority of Americans, in an extraordinarily democratic set of popular elections, had completed an astounding and unprecedented reversal of a constitutional amendment.

Marching in lockstep with the voting over the summer and fall of 1933 were the state conventions. In many cases, the conventions occurred only a few days after vote tallies had been completed. Michigan, for example, earned the double honor of being the first state to vote wet and the first to ratify the Twenty-first Amendment by holding its convention a mere week after the popular vote.¹⁸² Most other states ratified a few weeks or months later.

The conventions served only to rubber-stamp the results of the popular vote. No deep deliberations occurred. In part, this was due to the

¹⁷³ *Drys Concede Defeats In Three More States*, CHI. DAILY TRIB., Sept. 14, 1933, at 13.

¹⁷⁴ *Id.*; *Minnesota Joins March*, WASH. POST, Sept. 14, 1933, at 2.

¹⁷⁵ *Will Repeal Be Unanimous?*, N.Y. TIMES, Sept. 7, 1933, at 20.

¹⁷⁶ *Virginians Vote Wet*, L.A. TIMES, Oct. 4, 1933, at 1.

¹⁷⁷ *Id.*

¹⁷⁸ *Florida Drys Plead Cause From Pulpits*, WASH. POST, Oct. 9, 1933, at 12.

¹⁷⁹ *Repealists Carry Florida, 33d State*, N.Y. TIMES, Oct. 11, 1933, at 1.

¹⁸⁰ *Repeal Winning Thirty-Sixth State*, L.A. TIMES, Nov. 8, 1933, at 1.

¹⁸¹ *Both Carolinas Are Won By Drys*, N.Y. TIMES, Nov. 8, 1933, at 1. Since North Carolina did not hold a constitutional convention, the conventional tally counts only South Carolina as recording a dry vote. North Carolina, however, voted dry by a substantially higher margin (around 100,000 votes) than South Carolina (around 3,000 votes).

¹⁸² See 1933 Mich. Laws 24, § 8.

overwhelming victories of the repealists; few dry delegates attended the conventions. A speaker at the Virginia convention noted that “conventions ordinarily are deliberative bodies, but no deliberation is necessary where the people have spoken in plain and decisive manner on a public question, fully understood by every intelligent voter.”¹⁸³ The lack of debate troubled Americans in Maine, who asked the state Supreme Judicial Court to issue an advisory opinion answering the question: “Must a convention assembling in a state to pass upon an amendment to the Constitution of the United States and submitted by vote of the Congress to the action of conventions in the several states be a deliberative convention?” The Maine court concluded that “[a] convention is a body or assembly representative of all the people of the state. The convention must be free to exercise the essential and characteristic function of rational deliberation.” The Alabama Supreme Court took the opposite view.¹⁸⁴

Despite the debate in the courts, only the Indiana convention came close to a truly deliberative convention. In that state, the dry delegates argued that the Depression had gotten the better of Americans’ judgment: “The vote . . . has been taken in a time of dire economic distress when the governments of state and nation have been searching for every possible revenue, when men and women have been trying to find relief from acute conditions of unemployment and from business and industrial stagnation”¹⁸⁵ The dissenters rejected the Twenty-first Amendment because it “provides absolutely no guaranty against the return of the saloon relinquishes the right of the Federal Government to control the traffic at the very time when all other forms of industry are coming under national control . . . [and] implies legalization of liquor advertising by press, billboard, radio and screen.”¹⁸⁶ Wet delegates made their own arguments.¹⁸⁷

Some conventions opened with a prayer.¹⁸⁸ Usually, the governor of

¹⁸³ Va. Const. Conv. (statement of Pres. Goolrick), *in* BROWN, *supra* note 103, at 439.

¹⁸⁴ See Everett S. Brown, *The Ratification of the Twenty-first Amendment*, 29 AM. POLI. SCI. REV. 1005, 1014 (1935).

¹⁸⁵ Ind. Const. Conv. (statement of Jesse E. Eschbach), *in* BROWN, *supra* note 103, at 144.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 141-44.

¹⁸⁸ See, *eg.*, Rhode Island Const. Conv. (statement of Rev. Peter E. Blessing), *in* BROWN, *supra* note 103, at 359-60; Utah Const. Conv. (statement of Dr. Elmer I. Goshen), *in* BROWN, *supra* note 103, at 394-95 (“Almighty God, surrounded by the wonders of Thy works and the glories of Thy universe, of which we have been made a part, may we have grateful hearts, a reverent attitude and understanding minds as representatives of a sovereign state engaged in the protection of our sister states.”).

the state or a wet luminary would then address the delegates.¹⁸⁹ The speeches often rehashed the miserable history of Prohibition as well as the personal liberty the Twenty-first Amendment would restore.¹⁹⁰ The delegates would then vote on a chairman and perhaps an honorary chairman of the convention.¹⁹¹ Afterwards, a roll call vote would be taken, and the results transmitted to the United States Secretary of State.¹⁹² The process was usually exceptionally brief. The entire transcript of one state's ratification proceedings spans only a page and a half.¹⁹³ Another time, a delegate short circuited what could have been a needlessly protracted ratification process.¹⁹⁴ Aside from a few speeches, little discussion of the Amendment's purposes occurred during the conventions.

Still, isolated statements in the convention speeches illuminate some views on the new role of the states in liquor control. Governor Wilbur L. Cross of Connecticut said that Section 2 of the Amendment would restore "to the several States of the Union full control within their borders of the manufacture and sale of alcoholic liquors."¹⁹⁵ The Delaware Convention wished "to go on record . . . in so ratifying a resolution 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."¹⁹⁶ And the Governor of Missouri urged the passage of laws so "that the people may be protected from the evils of hard liquor."¹⁹⁷ No speaker at any convention, however, spoke precisely about the scope of the states' powers under Section 2 of the Twenty-first Amendment.

What accounts for such a rapid change in public opinion on a social

¹⁸⁹ See, e.g., Ohio Const. Conv. (statement of Gov. White), in BROWN, *supra* note 103, at 322; Ind. Const. Conv. (statement of Lt. Gov.).

¹⁹⁰ See, e.g., N.J. Const. Conv. (statement of Emerson L. Richards), in BROWN, *supra* note 103, at 280-81 ("Laws governing the people have no place in [the Constitution] . . . [T]he evils brought about by the Eighteenth Amendment were too many to recite here . . .").

¹⁹¹ See, e.g., N.Y. Const. Conv., in BROWN, *supra* note 103, at 301.

¹⁹² See, e.g., Ohio Const. Conv. (statement of Sen. Bulkley), in BROWN, *supra* note 103, at 332-33.

¹⁹³ See N.M. Const. Conv., in BROWN, *supra* note 103, at 290-91.

¹⁹⁴ See Mass. Const. Conv. (statement of Charles F. Ely), in BROWN, *supra* note 103, at 211 ("I do not see why we cannot simply vote, and call it a day. It is a long way from Westfield down here, and we had breakfast quite early. We all know for what we were elected, and I don't believe but what Mr. Cook can count the ballots correctly, and I don't see why we cannot vote without a lot of committees.")

¹⁹⁵ Conn. Const. Conv. (statement of Gov. Cross), in BROWN, *supra* note 103, at 60.

¹⁹⁶ Del Const. Conv. in BROWN, *supra* note 104, at 66.

¹⁹⁷ Mo. Const. Conv. (statement of Gov. Park), in BROWN, *supra* note 103, at 251-52.

experiment that had been widely supported just fourteen years earlier? The conventional answer is that Prohibition had been a practical failure. Much evidence supports this view.¹⁹⁸ Mentioned less often, however, is the impact of the Great Depression on the fortunes of the wets. The economic crisis of the late '20s and early '30s eviscerated the nation's income tax base. By 1932 and 1933, the federal treasury had bottomed out. Total receipts in those two years totaled about \$1.9 billion and \$2 billion, or less than one third of federal receipts in 1920.¹⁹⁹ Due to the New Deal, federal deficits, at about \$2.6 billion, were at their highest level in over a decade.²⁰⁰ As a result, new levies had to be imposed. The taxation of alcohol, which had been a massive source of federal revenue before Prohibition, was to millions of distressed Americans a suitable replacement for billions of upcoming direct taxes. Moreover, repealists were convinced that a rejuvenated liquor industry would offer jobs to many of the millions of unemployed.

Newspapers at the time were ablaze with discussion of liquor tax revenue possibilities. Before Congress acted on the Twenty-first Amendment, the Association Against the Prohibition Amendment stressed the value of alcohol taxes: "Favorable action by this Congress will enable the next Congress to lift from the shoulders of the people the new billion-dollar tax burden which is now about to be put on us."²⁰¹ In December 1932 the chairwoman of the Women's Organization for National Prohibition Reform made the same argument: "The legalization and taxation of light wines and beers alone would do more to balance the budget than all the nuisance taxes that have been proposed . . . Why should we not collect a revenue of more than \$300,000,000 from an industry that can bear it, and to that extent relieve the business man who is fighting for his financial life against the present economic condition?"²⁰² The federal Budget Director estimated that "in normal times, beer revenue will reach \$200,000,000 and revenue from liquors from \$250,000,000 to \$300,000,000."²⁰³ Drys who would otherwise have voted wet were said "to be supporting repeal on economic grounds, believing that with the return of liquor, Federal, State,

¹⁹⁸ See, e.g., Post, *supra* note 23.

¹⁹⁹ See Historical Tables, Office of Management & Budget 25, available at <http://www.whitehouse.gov/omb/budget/fy2004/pdf/hist.pdf> (last visited Oct. 8, 2007).

²⁰⁰ *Id.*

²⁰¹ *House Votes Today on Liquor Control*, WASH. POST, Mar. 14, 1932, at 2.

²⁰² *Women Urge Haste in Legalizing Beer*, N.Y. TIMES, Dec. 8, 1932, at 44.

²⁰³ *Repeal in 1933 in Prospect*, WALL ST. J., June 22, 1933, at 12.

and local taxes will greatly be reduced.”²⁰⁴

IV. PICKING UP THE PIECES: LIQUOR LAWS AFTER REPEAL

After repealing the Eighteenth Amendment, states moved quickly to create or adjust their own liquor laws. The twin goals were to prevent liquor abuse and to stuff state treasuries with badly needed liquor tax revenues. By 1940 eighteen states had adopted monopoly systems, allowing only state run liquor stores to sell distilled spirits, beer, or wine.²⁰⁵ “Twenty-Seven states provide[d] for control through licensing only . . .” And “three States, while authorizing light wines, or beer, . . . retained the major portion of their prohibition laws.”²⁰⁶

Most states adopted licensing systems designed to raise revenue. South Carolina (which, ironically, had been the only state to affirm via convention its commitment to the Eighteenth Amendment) enacted a typical licensing law. A State Tax Commission would oversee administration and enforcement. Distillers, bottlers, and warehousemen faced stringent regulations. They were required to get a \$2,000 license from the Tax Commission and pay another \$2,000 bond before opening for business. They were prohibited from operating more than one “plant” in each county. And they could sell only to wholesalers. Wholesalers, in turn, faced a \$2,000 license fee and a \$2,000 bond for hard liquor, and a \$200 permit for malt beverages under 5% alcohol. Finally, brewers were required to pay a \$100 license fee in order to produce beer with an alcohol content of 5% or lower.²⁰⁷ Twenty-two other states and the District of Columbia adopted similar licensing schemes.²⁰⁸

Other states established full or partial monopoly systems. The

²⁰⁴ *Drys Disturbed, But Fighting On*, N.Y. TIMES, June 20, 1933, at 15.

²⁰⁵ Those states were Alabama, Idaho, Iowa, Maine, Maryland, Michigan, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. See U.S. Dep’t of Commerce, State Liquor Legislation 21 (1940).

²⁰⁶ U.S. Dep’t of Commerce, State Liquor Legislation 21 (1940).

²⁰⁷ See Federal Alcohol Control Administration, Summary of State Laws Relating to the Production and Wholesaling of Alcoholic Beverages: As of August 15, 1935, at 105 (1937) [hereinafter FACA].

²⁰⁸ Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Rhode Island, and South Dakota. See FACA, *supra* note 207.

typical monopoly system functioned via a system of state run stores supplied by licensed manufacturers. The state would establish a liquor control board with the authority to issue rules and regulations, “[e]xclusive power to import, purchase for resale, alcohol, spirits and wine, establish stores and special distributors, lease buildings, issue licenses for manufacture, sale and purchase.” Profits from state run were deposited into the state treasury.²⁰⁹ About seventeen states adopted variations on this basic system.²¹⁰

Three states chose to stay dry. Why did more states not choose this route? After all, twenty-six states had enacted dry laws by April 1917. Why did the nation not return to the pre-Prohibition patchwork of wet and dry states? Several forces played important roles. First, the state dry laws of 1917 and 1918 bore little resemblance to the drastic bone dry prohibition of the Eighteenth Amendment and the Volstead Act. In 1918 only eleven states – Arizona, Arkansas, Kansas, Nebraska, New Mexico, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, and Utah – banned without exception the manufacture, sale, and transportation of intoxicating liquors.²¹¹ The laws of the rest of the dry states were riddled with exceptions. Georgia allowed “social service of liquor in private homes.”²¹² Twelve others allowed the importation of liquor from out of state for “personal use” (although some of these twelve restricted the amounts).²¹³ Others allowed the personal manufacture of liquor.²¹⁴ As Robert Post notes, the modest character of these laws generated widespread public acceptance.²¹⁵ It was not until the Reed Amendment of 1917,²¹⁶ which forbade the importation of alcohol into dry states, the Eighteenth Amendment, and the Volstead Act, that the nation became bone dry.²¹⁷ And it was the radical centralizing approach of the Eighteenth Amendment, not the more reserved stance of the various state prohibition laws of 1917 that

²⁰⁹ See FACA, *supra* note 207, at 24-25.

²¹⁰ Idaho, Iowa, Maine, Maryland, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. See FACA, *supra* note 207.

²¹¹ Post, *supra* note 23, at 177-81 tbl. 2.

²¹² *Id.* at 178.

²¹³ *Id.* at 177-81.

²¹⁴ *Id.*

²¹⁵ *Id.* at 6 n.6.

²¹⁶ 39 Stat. 1058.

²¹⁷ *Id.*

triggered widespread public resentment and disobedience.²¹⁸ After Prohibition's repeal, most of America embraced modest, pre-Eighteenth Amendment liquor regulations.

Second, states were strapped for tax revenue. As state after state voted to ratify the Twenty-first Amendment, state leaders began discussing the possibility of filling their coffers with taxes on liquor. By August 1933, the governor of Iowa had already "announced a [legislative] session to consider liquor control, tax revision, and governmental reorganization."²¹⁹ Wets in Kansas complained that prohibition was costing the state \$5,000,000 per year.²²⁰ In mid August, New York, anticipating a wet Christmas, passed a slate of liquor taxes that would go into effect when Prohibition met its end.²²¹ The state also passed a slew of heavy licensing fees, including a \$15,000 annual fee for distillers.²²² A few days later, Virginia passed its own set of taxes.²²³

Third, many state legislatures had been reapportioned, giving wets political strength more proportionate to their numbers. Reapportionment activities in Congress and the states had been at a standstill from 1910 to 1930. In state legislatures, dries were represented far in excess of their numbers. In 1930, however, Congress was substantially reapportioned, and the states, most of which had state constitutions requiring reapportionment after each federal census, were as well.²²⁴ Many newly elected state legislators hailed from urban, wet-friendly areas.

²¹⁸ See Post, *supra* note 23, at 51. ("Those who attacked national prohibition essentially argued that federal police legislation was antidemocratic. Positive law could transform custom, but only if positive law was backed by democratic legitimacy.")

²¹⁹ *Half of States Plan Tax Acts as Dry Repeal Appears Near*, WASH. POST, Aug. 7, 1933, at 2.

²²⁰ *Repeal Vote Analyzed*, WASH. POST., Aug. 17, 1933, at 6.

²²¹ *State Liquor Tax Voted By Senate*, N.Y. TIMES, Aug. 18, 1933, at 6. ("At the same time the Senate approved a separate tax measure to go into effect simultaneously and imposing a levy of \$1.50 a gallon whiskey, 15 cents a gallon on still wines and 40 cents on sparkling wines. The vote on this bill was 44 to 1.")

²²² *Liquor Taxes*, N.Y. TIMES, Aug. 19, 1933, at 10.

²²³ *Liquor Control Vote Bill Given Virginia Senate*, WASH. POST, Aug. 23, 1933, at 9.

²²⁴ For a discussion of congressional malapportionment during Prohibition, see CHARLES W. EAGLES, *DEMOCRACY DELAYED: CONGRESSIONAL REAPPORTIONMENT AND URBAN-RURAL CONFLICT IN THE 1920S* (1990). See also David O. Walter, *Reapportionment of State Legislative Districts* (thesis) 1 (1941).

CONCLUSION

A legal history of the Twenty-first Amendment resurrects many issues and questions that may reoccur in the future. A future Congress, proposing a constitutional amendment, may reexamine Article V's option of ratification by convention. If so, Judge Clark's endorsement of the convention method in *United States v. Sprague* for constitutional amendments directly modifying the rights of the people, even if not supportable in a constitutional sense, may yet prove politically influential. If Congress does choose to submit a new constitutional amendment to conventions, it will confront precisely the questions that bedeviled the legislators of 1933: does Congress have the power to prescribe directly the form and procedures of state constitutional conventions? If a state legislature failed to act, could the people of a state call an "extra-legal" constitutional convention? Although this issue did not generate a confrontation in the early 1930s, it has explosive potential, especially if several state legislatures, captured by special interests, refused to call a convention on an otherwise popular constitutional amendment. Recall New Mexico's 1933 law, which promised "to resist to the utmost any attempt to execute any and all such congressional dictation and usurpation."²²⁵

The legal history of the Twenty-first Amendment also sheds light on the post-repeal powers of the states to regulate liquor – an issue that arises often nowadays.²²⁶ To be sure, the isolated statements in the 1933 Congressional Record, the popular debates, and the constitutional conventions say little about the purposes of Section 2. But a broader approach sweeps in the statutory predecessors to Section 2: the Wilson Act and the Webb-Kenyon Act. When added to the history of state dry laws in the late nineteenth and early twentieth centuries, the Webb-Kenyon story makes clear that the framers of the Twenty-first Amendment did not intend to endorse discrimination against interstate commerce. Section 2 was to be interpreted in light of other constitutional provisions.

Most importantly, examining the legal history of the Twenty-first Amendment is a window to one of America's most democratic moments.

²²⁵ 1933 N.M. Laws 400, § 16.

²²⁶ See *Granholm v. Heald*, 544 U.S. 460 (2005) (holding that Section 2 does not allow states to discriminate against interstate commerce); *Craig v. Boren*, 429 U.S. 190 (1976) (same regarding the Equal Protection Clause); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (same regarding the Due Process Clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (same regarding the Establishment Clause).

Avoiding the possibility “that self-dealing state legislatures might thwart needed reforms,”²²⁷ America chose the convention route. Dozens of state legislatures passed laws providing for dozens of popular votes on a constitutional amendment for the first time since the Founding. The conventions rubber-stamped the choice of the people. The Eighteenth Amendment restricted the personal liberty of the people; it was fittingly repealed by the people.

²²⁷ See AMAR, *supra* note 31, at 290.