(253 U. S. 350)

STATE OF RHODE ISLAND v. PALMER, Atty. Gen., et al.

No. 29, Original.

STATE OF NEW JERSEY v. SAME.

No. 30, Original.

DEMPSEY v. BOYNTON, U. S. Atty., et al.

No. 696.

KENTUCKY DISTILLERIES & WAREHOUSE CO. v. GREGORY, U. S. Atty., et al.

No. 752.

CHRISTIAN FEIGENSPAN v. BODINE, U. S. Atty., et al.

No. 788.

SAWYER, U. S. Atty., et al. v. MANITOWOC PRODUCTS CO.

No. 794.

ST. LOUIS BREWING ASS'N v. MOORE, Collector, et al.

No. 837.

(Decided June 7, 1920.)

1. CONSTITUTIONAL LAW ⟸10—RESOLUTION PROPOSING AMENDMENT NEED NOT CONTAIN DECLARATION THAT IT IS REGARDED AS ESSENTIAL.

A joint resolution proposing an amendment to the Constitution need not contain an express declaration that those voting for it regard it as essential; its adoption sufficiently showing that they deem it necessary.

2. CONSTITUTIONAL LAW ⟸10—"TWO-THIRDS VOTE" OF MEMBERS PRESENT CONSTITUTING QUORUM MAY ADOPT RESOLUTION PROPOSING AMENDMENT.

The "two-thirds vote" in each house, which is required in proposing an amendment to the Constitution, is a vote of two-thirds of the members present, assuming the presence of a quorum, and not a vote of two-thirds of the entire membership.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Two-Thirds Vote.]

3. CONSTITUTIONAL LAW ⟸10—REFERENDUM PROVISIONS CANNOT BE APPLIED TO ADOPTION OF AMENDMENT TO FEDERAL CONSTITUTION.

The referendum provisions of state Constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to that Constitution.

4. CONSTITUTIONAL LAW ⟸10—PROHIBITION AMENDMENT WITHIN POWER TO AMEND CONFERRED BY CONSTITUTION.

Const. Amend. 18, prohibiting the manufacture, sale, etc., of intoxicating liquors for beverage purposes, is within the power to amend reserved by article 5.

5. CONSTITUTIONAL LAW ⟸10—PROHIBITION AMENDMENT HELD LAWFULLY PROPOSED AND RATIFIED.

Const. Amend. 18, prohibiting the manufacture, sale, etc., of intoxicating liquors for beverage purposes, has become, by lawful proposal and ratification, a part of the Constitution.

6. INTOXICATING LIQUORS ⟸13 — STATUTES AUTHORIZING WHAT PROHIBITION AMENDMENT PROHIBITS ARE INVALIDATED.

Const. Amend. 18, § 1, prohibiting the manufacture, sale, etc., of intoxicating liquors for beverage purposes, is operative throughout the entire territorial limits of the United States and of its own force invalidates every legislative act of Congress, state Legislatures, or territorial assemblies, authorizing or sanctioning what it prohibits.

7. INTOXICATING LIQUORS ⟸13 — PROHIBITION AMENDMENT ONLY AUTHORIZES STATUTES ENFORCING ITS PROVISIONS.

Const. Amend. 18, § 2, giving Congress and the states concurrent power to enforce such amendment by appropriate legislation, does not authorize Congress or the states to defeat or thwart the prohibition contained in section 1, but only to enforce it by appropriate means.

8. INTOXICATING LIQUORS ⟸13 — CONGRESSIONAL LEGISLATION UNDER PROHIBITION AMENDMENT NEED NOT BE JOINED IN OR SANCTIONED BY STATES; "CONCURRENT POWER."

The words "concurrent power," in Const. Amend. 18, § 2, giving concurrent power to Congress and the states to enforce that amendment, do not mean a joint power or require that legislation thereunder by Congress to be effective, shall be approved or sanctioned by the several states, or any of them.

9. INTOXICATING LIQUORS ⟸13—POWER OF CONGRESS NOT LIMITED TO INTERSTATE TRANSACTIONS.

Const. Amend. 18, § 2, does not divide the power to enforce such amendment between Congress and the states along lines which separate or distinguish foreign and interstate commerce from intrastate affairs, but confides to Congress power territorially coextensive with the prohibition of the first section and embracing manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic.

10. INTOXICATING LIQUORS ⟸13—POWER OF CONGRESS NOT DEPENDENT ON ACTION OF THE STATES.

The power conferred on Congress by Const. Amend. 18, § 2, to enforce the prohibition contained in section 1, is in no wise dependent on, or affected by, action or inaction on the part of the states, or any of them.

11. INTOXICATING LIQUORS ⟸13—CONGRESS MAY PROHIBIT DISPOSAL OF LIQUORS MANUFACTURED PRIOR TO PROHIBITION AMENDMENT.

Under Const. Amend. 18, Congress may prohibit the disposal, for beverage purposes, of

liquors manufactured before such amendment became effective.

12. INTOXICATING LIQUORS ⟸13—NATIONAL PROHIBITION ACT IS WITHIN POWERS OF CONGRESS.

The National Prohibition Act, which treats liquors containing one-half of 1 per cent. of alcohol by volume and fit for use for beverage purposes as within the powers of enforcement conferred on Congress by Const. Amend. 18, does not transcend the powers so conferred.

Mr. Justice McKenna and Mr. Justice Clarke dissenting in part.

No. 696: Appeal from the District Court of the United States for the District of Massachusetts.

No. 752: Appeal from the District Court of the United States for the Western District of Kentucky.

No. 788: Appeal from the District Court of the United States for the District of New Jersey.

No. 794: Appeal from the District Court of the United States for the Eastern District of Wisconsin.

No. 837: Appeal from the District Court of the United States for the Eastern District of Missouri.

Original suits by the State of Rhode Island and by the State of New Jersey against A. Mitchell Palmer, Attorney General, and others. Suits dismissed.

Suits by George C. Dempsey against Thomas J. Boynton, as United States Attorney, and others, by the Kentucky Distilleries & Warehouse Company against W. V. Gregory, as United States Attorney, and others, by Christian Feigenspan, a corporation, against Joseph L. Bodine, as United States attorney, and others, by the Manitowoc Products Company against Hiram A. Sawyer, as United States Attorney, and others, and by the St. Louis Brewing Association against George H. Moore, Collector, and others. From a decree in favor of plaintiff in the suit by the Manitowoc Products Company, defendants appeal, and from decrees for the defendants in the other suits, the plaintiffs appeal. Decree in the suit by the Manitowoc Products Company reversed, and decrees in the other suits affirmed.

For opinion below in Christian Feigenspan v. Bodine, see 264 Fed. 186.

See, also, State of Rhode Island v. Palmer, 40 Sup. Ct. 179, 64 L. Ed. ——; State of New Jersey v. Palmer, 252 U. S. 570, 40 Sup. Ct. 345, 64 L. Ed. ——.

No. 29. Argued March 8 and 9, 1920:

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*Mr. Herbert A. Rice, of Providence, R. I., for complainant.

Mr. Solicitor General King and Mr. Assistant Attorney General Frierson, for respondents.

No. 30. Argued March 29, 1920:

Mr. Thomas F. McCran, of Paterson, N. J., for complainant.

Mr. Assistant Attorney General Frierson, for respondents.

No. 696. Argued March 9, 1920:

Mr. Patrick Henry Kelley, of Boston, Mass., for appellant.

Mr. Assistant Attorney General Frierson, for appellees.

No. 752. Argued March 9 and 10, 1920:

Messrs. Levy Mayer, of Chicago, Ill., and William Marshall Bullitt, of Louisville, Ky., for appellant.

Mr. Solicitor General King and Mr. Assistant Attorney General Frierson, for appellees.

No. 788. Argued March 29 and 30, 1920:

Messrs. Elihu Root and William D. Guthrie, both of New York City, for appellant.

Mr. Solicitor General King and Mr. Assistant Attorney General Frierson, for appellees.

No. 794. Argued March 30, 1920:

Mr. Solicitor General King and Mr. Assistant Attorney General Frierson, for appellants.

Mr. Ralph W. Jackman, of Madison, Wis., for appellee.

No. 837. Submitted March 29, 1920:

Messrs. Charles A. Houts, John T. Fitzsimmons, and Edward C. Crow, all of St. Louis, Mo., for appellant.

Mr. Solicitor General King and Mr. Assistant Attorney General Frierson, for appellees.

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*Mr. Justice VAN DEVANTER announced the conclusions of the Court.

Power to amend the Constitution was reserved by article 5, which reads:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the

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Application of the Legisla*tures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

The text of the Eighteenth Amendment, proposed by Congress in 1917 and proclaimed as ratified in 1919 (40 Stat. 1050, 1941), is as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

We here are concerned with seven cases involving the validity of that amendment and of certain general features of the National Prohibition Law, known as the Volstead Act, c. 85, Acts 66th Cong., 1st Sess. (41 Stat. 305), which was adopted to enforce the amendment. The relief sought in each case is an injunction against the execution of that act. Two of the cases—Nos. 29 and 30, original,—were brought in this court, and the others in District Courts. Nos. 696, 752, 788, and 837 are here on appeals from decrees refusing injunctions, and No. 794 from a decree granting an injunction. The cases have been elaborately argued at the

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bar and in *printed briefs; and the arguments have been attentively considered, with the result that we reach and announce the following conclusions on the questions involved:

[1] 1. The adoption by both houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential. None of the resolutions whereby prior amendments were proposed contained such a declaration.

[2] 2. The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent. Missouri Pacific Ry. Co. v. Kansas, 248 U. S. 276, 39 Sup. Ct. 93, 63 L. Ed. 239, 2 A. L. R. 1589.

[3] 3. The referendum provisions of state Constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it. Hawke v. Smith, 253 U. S. 221, 40 Sup. Ct. 495, 64 L. Ed. —, decided June 1, 1920.

[4] 4. The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by article 5 of the Constitution.

[5] 5. That amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.

[6] 6. The first section of the amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force in-

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validates every *legislative act, whether by Congress, by a state Legislature, or by a territorial assembly, which authorizes or sanctions what the section prohibits.

[7] 7. The second section of the amendment—the one declaring "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation"—does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means.

[8-10] 8. The words "concurrent power," in that section, do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them.

[11] 10. That power may be exerted against the disposal for beverage purposes of liquors manufactured before the amendment became effective just as it may be against subsequent manufacture for those purposes. In either case it is a constitutional mandate or prohibition that is being enforced.

[12] 11. While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (title 2, § 1), wherein liquors containing as much as one-half of 1 per cent. of alcohol

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by volume and fit for use for beverage *purposes are treated as within that power. Jacob Ruppert v. Caffey, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. —.

Giving effect to these conclusions, we dispose of the cases as follows:

In Nos. 29 and 30, original, the bills are dismissed.

In No. 794, the decree is reversed.

In Nos. 696, 752, 788 and 837, the decrees are affirmed.

Mr. Chief Justice WHITE concurring.

I profoundly regret that in a case of this magnitude, affecting as it does an amendment to the Constitution dealing with the powers and duties of the national and state

governments, and intimately concerning the welfare of the whole people, the court has deemed it proper to state only ultimate conclusions without an exposition of the reasoning by which they have been reached.

I appreciate the difficulties which a solution of the cases involve and the solicitude with which the court has approached them, but it seems to my mind that the greater the perplexities the greater the duty devolving upon me to express the reasons which have led me to the conclusion that the amendment accomplishes and was intended to accomplish the purposes now attributed to it in the propositions concerning that subject which the court has just announced and in which I concur. Primarily in doing this I notice various contentions made concerning the proper construction of the provisions of the amendment which I have been unable to accept, in order that by contrast they may add cogency to the statement of the understanding I have of the amendment.

The amendment, which is reproduced in the announcement for the court, contains three numbered paragraphs or sections, two of which only need be noticed. The first prohibits—

"the manufacture, sale, or transportation of intoxicating liquors within, the importation *389 thereof into, *or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes."

The second is as follows:

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

1. It is contended that the result of these provisions is to require concurrent action of Congress and the states in enforcing the prohibition of the first section and hence that in the absence of such concurrent action by Congress and the states no enforcing legislation can exist, and therefore until this takes place the prohibition of the first section is a dead letter. But in view of the manifest purpose of the first section to apply and make efficacious the prohibition, and of the second to deal with the methods of carrying out that purpose, I cannot accept this interpretation, since it would result simply in declaring that the provisions of the second section, avowedly enacted to provide means for carrying out the first, must be so interpreted as to practically nullify the first.

2. It is said, conceding that the concurrent power given to Congress and to the states does not as a prerequisite exact the concurrent action of both, it nevertheless contemplates the possibility of action by Congress and by the states and makes each action effective, but as under the Constitution the authority of Congress in enforcing the Constitution is paramount, when state legislation and congressional action conflict the state legislation yields to the action of Congress as controlling. But as the power of both Congress and the states in this instance is given by the Constitution in one and the same provision, I again find myself unable to accept the view urged because it ostensibly accepts the constitutional mandate as to the concurrence of the two powers and proceeds immediately by way of interpretation to destroy it by making one paramount over the other.

3. The proposition is that the concurrent *390 powers con*ferred upon Congress and the states are not subject to conflict because their exertion is authorized within different areas, that is, by Congress within the field of federal authority, and by the states within the sphere of state power, hence leaving the states free within their jurisdiction to determine separately for themselves what, within reasonable limits, is an intoxicating liquor, and to Congress the same right within the sphere of its jurisdiction. But the unsoundness of this more plausible contention seems to me at once exposed by directing attention to the fact that in a case where no state legislation was enacted there would be no prohibition, thus again frustrating the first section by a construction affixed to the second. It is no answer to suggest that a regulation by Congress would in such event be operative in such a state, since the basis of the distinction upon which the argument rests is that the concurrent power conferred upon Congress is confined to the area of its jurisdiction and therefore is not operative within a state.

Comprehensively looking at all these contentions, the confusion and contradiction to which they lead, serve in my judgment to make it certain that it cannot possibly be that Congress and the states entered into the great and important business of amending the Constitution in a matter so vitally concerning all the people solely in order to render governmental action impossible, or, if possible, to so define and limit it as to cause it to be productive of no results and to frustrate the obvious intent and general purpose contemplated. It is true indeed that the mere words of the second section tend to these results, but if they be read in the light of the cardinal rule which compels a consideration of the context in view of the situation and the subject with which the amendment dealt and the purpose which it was intended to accomplish, the confusion will be seen to be only apparent.

In the first place, it is indisputable, as I *391 have stated, *that the first section imposes a general prohibition which it was the purpose to make universally and uniformly operative and efficacious. In the second place, as the prohibition did not define the intoxicating beverages which it prohibited, in the absence of anything to the contrary, it clearly, from the very fact of its adoption, cast upon Congress the duty, not only of defining the prohibited beverages, but also of enacting such

regulations and sanctions as were essential to make them operative when defined. In the third place, when the second section is considered with these truths in mind it becomes clear that it simply manifests a like purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the amendment to the dual system of government existing under the Constitution. In other words, dealing with the new prohibition created by the Constitution, operating throughout the length and breadth of the United States, without reference to state lines or the distinctions between state and federal power, and contemplating the exercise by Congress of the duty cast upon it to make the prohibition efficacious, it was sought by the second section to unite national and state administrative agencies in giving effect to the amendment and the legislation of Congress enacted to make it completely operative.

Mark the relation of the text to this view, since the power which it gives to state and nation is, not to construct or perfect or cause the amendment to be completely operative, but as already made completely operative, to enforce it. Observe also the words of the grant which confines the concurrent power given to legislation appropriate to the purpose of enforcement.

I take it that if the second section of the article did not exist no one would gainsay that the first section in and of itself granted the power and imposed the duty upon Congress to legislate to the end that by definition and sanction the amendment would become

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fully operative. This being *true it would follow, if the contentions under consideration were sustained, that the second section gave the states the power to nullify the first section, since a refusal of a state to define and sanction would again result in no amendment to be enforced in such refusing state.

Limiting the concurrent power to enforce given by the second section to the purposes which I have attributed to it, that is, to the subjects appropriate to execute the amendment as defined and sanctioned by Congress, I assume that it will not be denied that the effect of the grant of authority was to confer upon both Congress and the states power to do things which otherwise there would be no right to do. This being true, I submit that no reason exists for saying that a grant of concurrent power to Congress and the states to give effect to, that is, to carry out or enforce, the amendment as defined and sanctioned by Congress, should be interpreted to deprive Congress of the power to create, by definition and sanction, an enforceable amendment.

Mr. Justice McREYNOLDS concurring.

I do not dissent from the disposition of these causes as ordered by the court, but confine my concurrence to that. It is impossible now to say with fair certainty what construction should be given to the Eighteenth Amendment. Because of the bewilderment which it creates, a multitude of questions will inevitably arise and demand solution here. In the circumstances I prefer to remain free to consider these questions when they arrive.

Mr. Justice McKENNA, dissenting.

This case is concerned with the Eighteenth Amendment of the Constitution of the United States, its validity and construction. In order to have it, and its scope in attention, I quote it:

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*"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

The court in applying it has dismissed certain of the bills, reversed the decree in one, and affirmed the decrees in four others. I am unable to agree with the judgment reversing No. 794 and affirming Nos. 752, 696, 788, and 837.

I am, however, at a loss how or to what extent to express the grounds for this action. The court declares conclusions only, without giving any reasons for them. The instance may be wise—establishing a precedent now, hereafter wisely to be imitated. It will undoubtedly decrease the literature of the court if it does not increase its lucidity. However, reasons for the conclusions have been omitted, and my comment upon them may come from a misunderstanding of them, their present import and ultimate purpose and force.

There are, however, clear declarations that the Eighteenth Amendment is part of the Constitution of the United States, made so in observance of the prescribed constitutional procedure, and has become part of the Constitution of the United States, to be respected and given effect like other provisions of that instrument. With these conclusions I agree.

Conclusions 4, 5, and 6 seem to assert the undisputed. I neither assent to them or dissent from them except so far as I shall presently express.

Conclusion 7 seems an unnecessary declaration. It may, however, be considered as supplementary to some other declaration.

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My only comment is that I know of no *intimation in the case that section 2 in conferring concurrent power on Congress and the states to enforce the prohibition of the first section, conferred a power to defeat or obstruct prohibition. Of course, the power was conferred as a means to enforce the prohibition and was made concurrent to engage the resources and instrumentalities of the nation and the states. The power was conferred for use, not for abuse.

Conclusions 8 and 9, as I view them, are

complements of each other, and express, with a certain verbal detail, the power of Congress and the states over the liquor traffic, using the word in its comprehensive sense as including the production of liquor, its transportation within the states, its exportation from them, and its importation into them. In a word, give power over the liquor business from producer to consumer, prescribe the quality of latter's beverage. Certain determining elements are expressed. It is said that the words "concurrent power" of section 2 do not mean joint power in Congress and the states, nor the approval by the states of congressional legislation, nor its dependency upon state action or inaction.

I cannot confidently measure the force of the declarations or the deductions that are, or can be made from them. They seem to be regarded as sufficient to impel the conclusion that the Volstead Act is legal legislation and operative throughout the United States. But are there no opposing considerations, no conditions upon its operation? And what of conflicts, and there are conflicts, and more there may be, between it and state legislation? The conclusions of the court do not answer the questions and yet they are submitted for decision; and their importance appeals for judgment upon them. It is to be remembered states are litigants as well as private citizens, the former presenting the rights of the states, the latter seeking protection against the asserted aggression of the act in controversy. And there is opposing state

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legislation, why not a deci*sion upon it? Is it on account of the nature of the actions being civil and in equity, the proper forum being a criminal court investigating a criminal charge? There should be some way to avert the necessity or odium of either.

I cannot pause to enumerate the contentions in the case. Some of them present a question of joint action in Congress and the states, either collectively with all or severally with each. Others assert spheres of the powers, involving no collision, it is said, the powers of Congress and the states being supreme and exclusive within the spheres of their exercise—called by counsel "historical fields of jurisdiction." I submit again, they should have consideration and decision.

The government has felt and exhibited the necessity of such consideration and decision. It knows the conflicts that exist or impend. It desires to be able to meet them, silence them and bring the repose that will come from a distinct declaration and delimitation of the power of Congress and the states. The court, however, thinks otherwise and I pass to the question in the case. It is a simple one, it involves the meaning of a few English words—in what sense they shall be taken, whether in their ordinary sense, or have put upon them an unusual sense.

Recurring to the first section of the amendment, it will be seen to be a restriction upon state and congressional power, and the deduction from it is that neither the states nor Congress can enact legislation that contravenes its prohibition. And there is no room for controversy as to its requirement. Its prohibition of "intoxicating liquors" "for beverage purposes" is absolute. And, as accessory to that prohibition, is the further prohibition of their manufacture, sale or transportation within or their importation into or exportation "from the United States." Its prohibition, therefore, is national, and considered alone, the means of its enforcement might be such as Congress, the agency of

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national power might *prescribe. But it does not stand alone. Section 2 associates Congress and the states in power to enforce it. Its words are:

"The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

What, then, is meant by the words "concurrent power"? Do they mean united action, or separate and independent action, and, if the actions differ (there is no practical problem unless they differ), shall that of Congress be supreme?

The government answers that the words mean separate and independent action, and, in case of conflict, that of Congress is supreme, and asserts besides, that the answer is sustained by historical and legal precedents.[1] I contest the assertions and oppose to them the common usage of our language,

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and the definitions of our lexicons, *general and legal.[2] Some of the definitions assign to

[1] The following is the contention of the government which we give to accurately represent it: "It is true that the word 'concurrent' has various meanings, according to the connection in which it is used. It may undoubtedly be used to indicate that something is to be accomplished by two or more persons acting together. It is equally true that it means, in other connections, a right which two or more persons, acting separately and apart from each other, may exercise at the same time. It would be idle, however, to go into all the meanings which may attach to this word. In certain connections, it has a well-fixed and established meaning, which is controlled in this case."

And again: "It is to be noted that section 2 does not say that legislation shall be concurrent, but that concurrent power to legislate shall exist. The concurrent power of the states and Congress to legislate is nothing new. And its meaning has been too long settled, historically and judicially, to now admit of question. The term has acquired a fixed meaning through its frequent use by this court and eminent statesmen and writers in referring to the concurrent power of Congress and the states to legislate."

And after citing cases, the government says: "It will thus be seen that in legal nomenclature the concurrent power of the states and of Congress is clearly and unmistakably defined. It simply means the right of each to act with respect to a particular subject-matter separately and independently."

[2] Definitions of the dictionaries are as follows: The Century: "Concurrent: * * * 2. Concurring; acting in conjunction; agreeing in the same act; contributing to the same event or effect; operat-

the words "concurrent power" action in conjunction, contribution of effort, certainly harmony of action, not antagonism. Opposing laws are not concurring laws, and to assert the supremacy of one over the other is to assert the exclusiveness of one over the other, not their concomitance. Such is the result of the government's contention. It does not satisfy the definitions, or the requirement of section 2—"a concurrent power excludes the idea of a dependent power." Mr. Justice McLean in the Passenger Cases, 7 How. 283, 399, 12 L. Ed. 702.

Other definitions assign to the words "existing or happening at the same time," "concurring together," "coexistent." These definitions are, as the others are, inconsistent with the government's contention. If coexistence of the power of legislation is given to Congress and the states by section 2, it is given to be coexistently exercised. It is to be remembered that the Eighteenth Amendment was intended to deal with a condition, not a theory, and one demanding something more than exhortation and precept. The habits of a people were to be changed, large business interests were to be disturbed, and it was considered that the change and disturbance could only be effected by punitive and repressive legislation, and it was naturally thought that legislation enacted by "the Congress and the several states," by its concurrence would better enforce prohibition and avail for its enforcement the two great

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divisions of our governmental system, *the nation and the states, with their influences and instrumentalities.

From my standpoint, the exposition of the case is concluded by the definition of the words of section 2. There are, however, confirming considerations; and militating considerations are urged. Among the confirming considerations are the cases of Wedding v. Meyler, 192 U. S. 573, 24 Sup. Ct. 322, 48 L. Ed. 570, 66 L. R. A. 833, and Nielsen v. Oregon, 212 U. S. 315, 29 Sup. Ct. 383, 53 L. Ed. 528, in which "concurrent jurisdiction" was given respectively to Kentucky and Indiana over the Ohio river by the Virginia Compact, and respectively to Washington and Oregon over the Columbia river by act of Congress. And it was decided that it conferred equality of powers, "legislative, judicial and executive," and that neither state could override the legislation of the other. Other courts have given like definitions. 2 Words and Phrases Judicially Defined, p. 1391 et seq.; Bouvier's Dictionary, vol. 1, page 579. Analogy of the word "concurrent" in private instruments may also be invoked.

Those cases are examples of the elemental rule of construction that in the exposition of statutes and constitutions, every word "is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify or enlarge it," and there cannot be imposed upon the words "any recondite meaning or any extraordinary gloss." 1 Story, Const. § 451; Lake County v. Rollins, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060. And it is the rule of reason as well as of technicality, that if the words so expounded be "plain and clear, and the sense distinct and perfect arising on them" interpretation has nothing to do. This can be asserted of section 2. Its words express no "double sense," and should be accepted in their single sense. It has not yet been erected into a legal maxim of constitutional construction, that words were made to conceal thoughts. Besides, when we depart from the words, ambiguity comes. There are

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as many solutions *as there are minds considering the section, and out of the conflict, I had almost said chaos, one despairs of finding an undisputed meaning. It may be said that the court, realizing this, by a declaration of conclusions only, has escaped the expression of antithetical views and considered it better not to blaze the trails, though it was believed that they all led to the same destination.

If it be conceded, however, that to the words "concurrent power" may be ascribed the meaning for which the government contends, it certainly cannot be asserted that such is their ordinary meaning, and I might leave section 2, and the presumptions that support it, to resist the precedents adduced by the government. I go farther, however, and deny the precedents. The Federalist and certain cases are cited as such. There is ready explanation of both, and neither supports the government's contention. The dual system of government contemplated by the Union encountered controversies, fears, and jealousies that had to be settled or appeased to achieve union, and the Federalist in good and timely sense explained to what extent the "alienation of state sovereignty" would be necessary to "national sovereignty," constituted by the "consolidation of the states," and the powers that would be surrendered, and those that would be retained. And the explanation composed the controversies and allayed the fears of the states that their local powers of government would not be displaced by the dominance of a centralized control. And this court after union had been achieved, fulfilled the assurances of the explanation and adopted its distribution of powers, designating them as follows: (1) Powers that were exclusive in the states—reserved to them; (2) powers that were exclusive in Congress, conferred upon it; (3) powers that were not exclusive in either, and hence said to be "concurrent." And it was

ing with; coincident. 3. Conjoint; joint; concomitant; coordinate; combined. * * * That which concurs; a joint or contributory thing." Webster's first definition is the same as that of the Century. The second is as follows: "Joint; associate; concomitant; existing or happening at the same time."

decided that, when exercised by Congress, they were supreme—"the authority of the
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states then retires" to inaction. *To understand them, it must be especially observed that their emphasis was, as the fundamental principle of the new government was, that it had no powers that were not conferred upon it, and that all other powers were reserved to the states. And this necessarily must not be absent from our minds, whether construing old provisions of the Constitution or amendments to it or laws passed under the amendments.

The government nevertheless contends that the decisions (they need not be cited) constitute precedents for its construction of section 2 of the Eighteenth Amendment. In other words, the government contends (or must so contend for its reasoning must bear the test of the generalization) that it was decided that in all cases where the powers of Congress are concurrent with those of the states, they are supreme as incident to concurrence. The contention is not tenable; it overlooks the determining consideration. The powers of Congress were not decided to be supreme because they were concurrent with powers in the states, but because of their source, their source being the Constitution of the United States and the laws made in pursuance of the Constitution, as against the source of the powers of the states, their source being the Constitution and laws of the states, the Constitution and laws of the United States being made by article 6 the supreme law of the land, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." McCulloch v. Maryland, 4 Wheat. 316, 426, 4 L. Ed. 579.

This has example in other powers of sovereignty that the states and Congress possess. In McCulloch v. Maryland, at pages 425, 430 of 4 Wheat. (4 L. Ed. 579), Chief Justice Marshall said that the power of taxation retained by the states was not abridged by the granting of a similar power to the government of the Union, and that it was to be concurrently exercised, and these truths, it was added, had never been denied, and that there was no "clashing sovereignty" from incompatibility of right. And, neces-
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sarily, a con*currence of power in the states and Congress excludes the idea of supremacy in either. Therefore, neither principle nor precedent sustains the contention that section 2 by giving concurrent power to Congress and the states, gave Congress supreme power over the states. I repeat the declaration of Mr. Justice McLean:

"A concurrent power excludes the idea of a dependent power."

It is, however, suggested (not by the government) that if Congress is not supreme upon the considerations urged by the government, it is made supreme by article 6 of the Constitution. The article is not applicable. It is not a declaration of the supremacy of one provision of the Constitution or laws of the United States over another, but of the supremacy of the Constitution and laws of the United States over the Constitutions and laws of the states. Gibbons v. Ogden, 9 Wheat. 1, 209, 6 L. Ed. 23, 211; Sec. 1838 et seq.; 2 Story, Const., 5th Ed.

The Eighteenth Amendment is part of the Constitution of the United States, therefore of as high sanction as article 6. There seems to be a denial of this, based on article 5. That article provides that the amendments proposed by either of the ways there expressed "shall be valid to all intents and purposes as part of this Constitution." Some undefinable power is attributed to this in connection with article 6, as if article 5 limits in some way, or defeats, an amendment to the Constitution inconsistent with a previously existing provision. Of course, the immediate answer is that an amendment is made to change a previously existing provision. What other purpose could an amendment have and it would be nullified by the mythical power attributed to article 5, either alone or in conjunction with article 6? A contention that ascribes such power to those articles is untenable. The Eighteenth Amendment is part of the Constitution and as potent as any other part of it. Section 2, therefore, is a new provision of power, power
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to the *states as well as to Congress, and it is a contradiction to say that a power constitutionally concurrent in Congress and the states, in some way becomes constitutionally subordinate in the states to Congress.

If it be said that the states got no power over prohibition that they did not have before, it cannot be said that it was not preserved to them by the amendment, notwithstanding the policy of prohibition was made national, and besides, there was a gift of power to Congress that it did not have before, a gift of a right to be exercised within state lines, but with the limitation or condition that the powers of the states should remain with the states and be participated in by Congress only in concurrence with the states, and thereby preserved from abuse by either, or exercise to the detriment to prohibition. There was, however, a power given to the states, a power over importations. This power was subject to concurrence with Congress and had the same safeguards.

This construction of section 2 is enforced by other considerations. If the supremacy of Congress had been intended it would have been directly declared as in the Thirteenth, Fourteenth and Fifteenth Amendments. And such was the condition when the amendment left the Senate. The precedent of preceding amendments was followed, there was a single declaration of jurisdiction in Congress.

Section 2 was amended in the House upon recommendation of the Judiciary Committee and the provision giving concurrent power to Congress and to the states was necessarily estimated and intended to be additive of something. The government's contention makes it practically an addition of nothing but words, in fact denuding it of function, making it a gift of impotence, not one of power to be exercised independently of Congress or concurrently with Congress, or, indeed, at all. Of this there can be no contradiction, for what power is assigned to the states to legislate if the legislation be im-

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mediately *superseded—indeed, as this case shows, is possibly forestalled and precluded by the power exercised in the Volstead Act. And meaningless is the difference the government suggests between concurrent power and concurrent legislation. A power is given to be exercised, and we are cast into helpless and groping bewilderment in trying to think of it apart from its exercise or the effect of its exercise. The addition to section 2 was a conscious adaptation of means to the purpose. It changed the relation between the states and the national government. The lines of exclusive power in one or the other were removed, and equality and community of powers substituted.

There is a suggestion, not made by the government, though assisting its contention, that section 2 was a gift of equal power to Congress and to the states, not, however, to be concurrently exercised, but to be separately exercised; conferred and to be exercised is the suggestion, to guard against neglect in either Congress or the states, the inactivity of the one being supplied by the activity of the other. But here again we encounter the word "concurrent" and its inexorable requirement of coincident or united action, not alternative or emergent action to safeguard against the delinquency of Congress or the states. If, however, such neglect was to be apprehended, it is strange that the framers of section 2, with the whole vocabulary of the language to draw upon, selected words that expressed the opposite of what the framers meant. In other words, expressed concurrent action instead of substitute action. I cannot assent. I believe they meant what they said and that they must be taken at their word.

The government with some consciousness that its contention requires indulgence or excuse, but at any rate in recognition of the insufficiency of its contention to satisfy the words of section 2, makes some concessions to the states. They are, however, not very tangible to measurement. They seem to

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yield a power of legislation to the states *and a power of jurisdiction to their courts, but almost at the very instant of concession, the power and jurisdiction are declared to be without effect.

I am not, therefore, disposed to regard the concessions seriously. They confuse—"make not light, but darkness, visible." Of what use is a concession of power to the states to enact laws which cannot be enforced? Of what use a concession of jurisdiction to the courts of the states when their judgments cannot be executed, indeed the very law upon which it is exercised may be declared void in an antagonistic jurisdiction exerted in execution of an antagonistic power?[3] And equally worthless is the analogy that the government assays between the power of the national government and the power of the states to criminally punish violations of their respective sovereignties, as, for instance, in counterfeiting cases. In such cases the exercises of sovereignty are not in antagonism. Each is inherently possessed and independently exercised, and can be enforced no matter what the other sovereignty may do or abstain from doing. On the other hand, under the government's construction of section 2, the legislation of Congress is supreme and exclusive. Whatever the states may do is abortive of effect.

The government seeking relief from the perturbation of mind and opinions produced by departure from the words of section 2, suggests a modification of its contention, that in case of conflict between state legis-

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lation and congres*sional legislation, that of Congress would prevail, by intimating that if state legislation be more drastic than congressional legislation, it might prevail, and in support of the suggestion, urges that section 1 is a command to prohibition, and that the purpose of section 2 is to enforce the command, and whatever legislation is the most prohibitive subserves best the command, displaces less restrictive legislation and becomes paramount. If a state, therefore, should define an intoxicating beverage to be one that has less than one-half of 1 per cent. of alcohol, it would supersede the Volstead Act and a state might even keep its legislation supreme by forestalling congressional retaliation by prohibiting all artificial beverages of themselves innocuous, the prohibition being accessory to the main purpose of power; adducing Purity Extract Co. v. Lynch, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184, and Ruppert v. Caffey, 251 U. S. 264, 40 Sup. Ct. 141. Of course this concession of the

[3] The government feels the inconsistency of its concessions and recessions. It asserts at one instant that the legislation of the states may be enforced in their courts, but in the next instant asserts that the conviction or acquittal of an offender there will not bar his prosecution in the federal courts for the same act as a violation of the federal law. From this situation the government hopes that there will be rescue by giving the Eighteenth Amendment "such meaning that a prosecution in the courts of one government may be held to bar a prosecution for the same offence in the courts of the other." The government considers, however, the question is not now presented.

more drastic legislation destroys all that is urged for congressional supremacy, for necessarily supremacy cannot be transferred from the states to Congress or from Congress to the states as the quantity of alcohol may vary in the prohibited beverage. Section 2 is not quite so flexible to management. I may say, however, that one of the conclusions of the court has limited the range of retaliations. It recognizes "that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement" and declares "that those limits are not transcended by the provisions of the Volstead Act." Of course, necessarily, the same limitations apply to the power of the states as well.

From these premises the deduction seems inevitable that there must be united action between the states and Congress, or, at any rate, concordant and harmonious action; and will not such action promote better the purpose of the amendment—will it not bring to the enforcement of prohibition, the power of

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the states and the power of *Congress, make all the instrumentalities of the states, its courts and officers, agencies of the enforcement, as well as the instrumentalities of the United States, its court and officers, agencies of the enforcement? Will it not bring to the states as well, or preserve to them, a partial autonomy, satisfying, if you will, their prejudices, or better say, their predilections; and it is not too much to say that our dual system of government is based upon them. And this predilection for self-government the Eighteenth Amendment regards and respects, and by doing so sacrifices nothing of, the policy of prohibition.

It is, however, urged that to require such concurrence is to practically nullify the prohibition of the amendment, for without legislation its prohibition would be ineffectual, and that it is impossible to secure the concurrence of Congress and the states in legislation. I cannot assent to the propositions. The conviction of the evils of intemperance—the eager and ardent sentiment that impelled the amendment, will impel its execution through Congress and the states. It may not be in such legislation as the Volstead Act with its ½ of 1 per cent. of alcohol or in such legislation as some of the states have enacted with their 2.75 per cent. of alcohol, but it will be in a law that will be prohibitive of intoxicating liquor for beverage purposes. It may require a little time to achieve, it may require some adjustments, but of its ultimate achievement there can be no doubt. However, whatever the difficulties of achievement in view of the requirement of section 2, it may be answered as this court answered in Wedding v. Meyler, supra:

"The conveniences and inconveniences of concurrent" power by the Congress and the states "are obvious and do not need to be stated. We have nothing to do with them when the law-making power has spoken."

I am, I think, therefore, justified in my dissent. I am alone in the grounds of it, but in the relief of the solitude of my position, I invoke the coincidence of my views

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with *those entertained by the minority membership of the Judiciary Committee of the House of Representatives, and expressed in its report upon the Volstead Act.

Mr. Justice CLARKE dissents. See 253 U. S. 350, 40 Sup. Ct. 588, 64 L. Ed. —.

(253 U. S. 221)

HAWKE v. SMITH, Secretary of State of Ohio.

(Argued April 23, 1920. Decided June 1, 1920.)

No. 582.

1. STATES ⟸4—FEDERAL CONSTITUTION SUPREME LAW OF THE LAND.

The powers specifically conferred on the general government by the Constitution were surrendered by the states, and the Constitution and laws of the United States are the supreme law of the land.

2. CONSTITUTIONAL LAW ⟸10—METHOD OF RATIFYING AMENDMENTS DETERMINABLE BY CONGRESS AND LIMITED TO METHODS SPECIFIED.

Under Const. art. 5, providing for the ratification of proposed amendments by the Legislatures of three-fourths of the states or by conventions in three-fourths thereof, as one or the other mode may be proposed by Congress, the power of determining the method of ratification is conferred upon Congress, and is limited to the two methods specified.

3. CONSTITUTIONAL LAW ⟸10—COURTS OR LEGISLATIVE BODIES CANNOT ALTER METHODS OF RATIFYING AMENDMENTS.

It is not the function of courts or legislative bodies, national or state, to alter the method of ratifying proposed amendments to the federal Constitution, which the Constitution has fixed.

4. CONSTITUTIONAL LAW ⟸10—"LEGISLATURES" EMPOWERED TO RATIFY AMENDMENTS DEFINED.

The word "legislatures," in Const. art. 5, relative to the ratification of the proposed amendments, has the same meaning as when the Constitution was adopted, and means the representative body which makes the laws of the people.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Legislature.]

5. CONSTITUTIONAL LAW ⟸10—RATIFICATION OF AMENDMENT NOT ACT OF "LEGISLATION."

Ratification by a state of a proposed amendment to the federal Constitution is not an act