

National Prohibition Cases

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National Prohibition Cases - 253 U.S. 350 (1920)

U.S. Supreme Court National Prohibition Cases, 253 U.S. 350 (1920)

National Prohibition Cases

No. 29, 30, Original, and No. 696, 762, 788, 794, 837

Argued March 8, 9, 10, 29, 30, 1920

Decided June 7, 1920

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ORIGINAL, AND APPEALS FROM THE DISTRICT COURTS OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, THE WESTERN DISTRICT

OF KENTUCKY, THE DISTRICT OF NEW JERSEY, THE EASTERN DISTRICT
OF

WISCONSIN, AND THE EASTERN DISTRICT OF MISSOURI

SYLLABUS

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. P. [253 U. S. 386](#) .

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. *Id. Missouri Pacific Ry. Co. v. Kansas*, [248 U. S. 276](#) .

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. *Id. Hawke v. Smith, ante*, [253 U. S. 221](#) .

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 V of the Constitution. *Id.*

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. *Id.*

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, invalidates every legislative act -- whether by Congress, by a state legislature, or by a territorial assembly -- which authorizes or sanctions what the

section prohibits. *Id.*

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The second section of the Amendment -- the one declaring "[t]he 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. P. [253 U. S. 387](#) .

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. *Id.*

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. *Id.*

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. *Id.*

While there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, those limits are not transcended by the provision of the National Prohibition Act (Title II, 1) wherein liquors containing as much as one-half of one percent of alcohol by volume and fit for use for beverage purposes are treated as within that power. *Id. Jacob Ruppert v. Caffey, [251 U. S. 264](#)* .

Nos. 29 and 30, Original, bills dismissed; No. 794, reversed; Nos. 696, 752, 788 (264 F. 186), and 837 affirmed.

The seven cases here given one name for convenient reference involved the validity of the Eighteenth Amendment and of certain general features of the National Prohibition Act designed for its enforcement. They were as follows:

No. 29, Original. *State of Rhode Island v. A. Mitchell Palmer, Attorney General, and Daniel C. Roper, Commissioner of Internal Revenue.* Bill dismissed.

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No. 30, Original. *State of New Jersey v. A. Mitchell Palmer, Attorney General, and Daniel C. Roper, Commissioner of Internal Revenue.* Bill dismissed.

No. 696. *George C. Dempsey v. Thomas J. Boynton, United States Attorney for Massachusetts, and Andrew J. Casey, Acting Collector of Internal Revenue for Massachusetts.* Appeal from the District Court of the United States for the District of Massachusetts. Decree refusing injunction affirmed.

No. 752. *Kentucky Distilleries & Warehouse Company v. W. V. Gregory, District Attorney for the United States for the Western District of Kentucky, and Elwood Hamilton, Collector of Internal Revenue for the Collection District of Kentucky.* Appeal from the District Court of the United States for the Western District of Kentucky. Decree refusing injunction affirmed.

No. 788. *Christian Feigenspan, a corporation v. Joseph L. Bodine, United States Attorney for the District of New Jersey, and Charles V. Dufey, Collector of Internal Revenue of the Fifth District of New Jersey.* Appeal from the District Court of the United States for the District of New Jersey. Decree refusing injunction affirmed.

No. 794. *Hiram A. Sawyer, as United States Attorney for the Eastern District of Wisconsin, Burt Williams, as Collector of Internal Revenue of the Second District of Wisconsin, and Thomas A. Delaney, as Federal Prohibition Enforcement Director for Wisconsin v. Manitowoc Products Company.* Appeal from the District

Court of the United States for the Eastern District of Wisconsin. Decree granting injunction reversed.

No. 837. *St. Louis Brewing Association, a corporation v. George H. Moore, Collector of Internal Revenue of the First District of Missouri, Walter L. Hensley, United States Attorney for the Eastern District of Missouri, and Frank L. Diggs, Prohibition Agent for the First Internal Revenue District of Missouri.* Appeal from the District Court of

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the United States for the Eastern District of Missouri. Decree refusing injunction affirmed.

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MR. JUSTICE VAN DEVANTER announced the conclusions of the Court.

Power to amend the Constitution was reserved by Article V, which reads:

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

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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, 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 bar and in

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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. 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. 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](#) .

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, ante*, [253 U. S. 221](#) .

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 V of the Constitution.

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. 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 invalidates every

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legislative act, whether by Congress, by a state legislature, or by a territorial assembly, which authorizes or sanctions what the section prohibits.

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. 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.

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.

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 II, 1) wherein liquors containing as much as one-half of one percent of alcohol by volume and fit for use for beverage

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purposes are treated as within that power. *Jacob Ruppert v. Caffey*, [251 U. S. 264](#) .

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 thereof into,

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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 powers conferred

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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 have stated,

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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 fully operative. This being

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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 Mc REYNOLDS 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 Mc KENNA, 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. My only comment is that I know of no

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intimation in the case that 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 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 legislation, why not a decision

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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 requirements. 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 national power, might

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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. [[Footnote 1](#)] I contest the assertions, and oppose to them the common usage of our language, and the definitions of our lexicons,

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general and legal. [[Footnote 2](#)] Some of the definitions assign to 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 2 -- "a concurrent power excludes the idea of a dependent power." Mr. Justice McLean, in the [Passenger Cases](#), 7 How. 283, [48 U. S. 399](#) .

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 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 divisions of our governmental system,

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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 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](#) , and *Nielsen v. Oregon*, [212 U. S. 315](#) , 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, p. 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](#) . 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 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 as many solutions

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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 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 decided that, when exercised by Congress, they were supreme -- "the authority of the states then retires" to inaction.

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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 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 VI 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, [17 U. S. 426](#) .

This has example in other powers of sovereignty that the states and Congress possess. In *McCulloch v. Maryland* at pages [17 U. S. 425](#) , [17 U. S. 430](#) , 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, necessarily, a concurrence

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of power in the states and Congress excludes the idea of supremacy in either. Therefore, neither principle nor precedent sustains the contention that 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 VI 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, [22 U. S. 209](#) , [22 U. S. 211](#) ; 2 Story, Const., 5th ed., 1838 *et seq.*

The Eighteenth Amendment is part of the Constitution of the United States, therefore of as high sanction as Article VI. There seems to be a denial of this based on Article V. 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 VI, as if Article V 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 V, either alone or in conjunction with Article VI? 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 to the

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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 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 immediately

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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 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 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 there 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 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 2, makes some concessions to the states. They are, however, not very tangible to measurement. They seem to yield a power of legislation to the states

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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? [[Footnote 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 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 2, suggests a modification of its contention that, in case of conflict between state legislation and congressional

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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 1 is a command to prohibition, and that the purpose of 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 percent 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](#) , and *Ruppert v. Caffey*, [251 U. S. 264](#) . Of course, this concession of the 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 the states and the power of

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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 1/2 of 1 percent of alcohol, or in such legislation as some of the states have enacted with their 2.75 percent 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 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 lawmaking 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 with

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

[[Footnote 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."

[[Footnote 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; operating with; coincident. 3. Conjoint; joint; concomitant; coordinate; combined.** That which concurs; a joint of 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."

[[Footnote 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.

MR. JUSTICE CLARKE (dissenting).

I concur in the first seven paragraphs and in the tenth paragraph of the announced "Conclusions" of the Court, but I dissent from the remaining three paragraphs.

The eighth, ninth and eleventh paragraphs, taken together, in effect declare the Volstead Act to be the supreme law of the land -- paramount to any state law with which it may conflict in any respect.

Such a result, in my judgment, can be arrived at only by reading out of the second section of the Eighteenth Amendment to the Constitution the word "concurrent," as it is used in the grant to Congress and the several states of "concurrent power to enforce this article by appropriate legislation." This important word, which the record of Congress shows was introduced, with utmost deliberation, to give accurate expression to a very definite purpose, can be read out of the Constitution only by violating the sound and wise rule of constitutional construction early announced and often applied by this Court -- that, in expounding the Constitution of the United States, no word in it can be rejected as superfluous or unmeaning, but effect must be given to every word to the extent that this is reasonably possible.

This rule was first announced in 1824 in [*Gibbons v. Ogden*](#), 9 Wheat. 1; it was applied with emphasis in 1840 in [*Holmes v. Jennison*](#), 14 Pet. 540, [39 U. S. 570](#), and in the recent case of *Knowlton v. Moore*, [178 U. S. 41](#). It is referred to as an elementary canon of constitutional construction.

The authoritative dictionaries, general and law, and the decided cases agree that "concurrent" means "joint and equal authority," "running together, having the same authority," and therefore the grant of concurrent power to the Congress and the states should give to each equal, the same,

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authority to enforce the Amendment by appropriate legislation. But the conclusions of the Court from which I dissent, by rendering the Volstead Act of Congress paramount to state laws, necessarily deprive the states of all power to enact legislation in conflict with it, and construe the Amendment precisely as if the word "concurrent" were not in it. The power of Congress is rendered as supreme as if the grant to enforce the Amendment had been to it alone, as it is in the Thirteenth,

Fourteenth, and Fifteenth Amendments and as it was in one proposed form of the Eighteenth Amendment which was rejected by Congress. Cong.Rec. July 30, 1917, p. 5548, and December 17, 1917, p. 469.

Such a construction should not be given the Amendment if it can reasonably be avoided, as it very clearly may be, I think, with a resultant giving of a large and beneficent effect to the grant, as it is written. Giving to the word "concurrent" its usual and authoritative meaning would result in congressional legislation under this grant of power being effective within the boundaries of any state only when concurred in by action of Congress and of such state, which, however, could readily be accomplished by the approval by either of the legislation of the other or by the adoption of identical legislation by both. Such legislation would be concurrent in fact and in law, and could be enforced by the courts and officers of either the nation or the state, thereby insuring a more general and satisfactory observance of it than could possibly be obtained by the federal authorities alone. It would, to a great extent, relieve Congress of the burden, and the general government of the odium, to be derived from the antagonism which would certainly spring from enforcing within states federal laws which must touch the daily life of the people very intimately and often very irritatingly.

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Such cooperation in legislation is not unfamiliar to our Constitution or in our practical experience.

By 10 of Article I of the Constitution of the United States, the states are deprived of power to do many things without the consent of Congress, and that consent has frequently been given, especially to contracts and agreements between states, which without it would be unconstitutional and void. The Wilson Act of 1890, the Webb-Kenyon Act of 1913, and the Reed Amendment of 1917 are familiar examples of cooperative legislation on the subject of intoxicating liquors. Other instances could readily be supplied. When to this we add that the Volstead Act is obviously in very large part a compilation from the prohibition codes of various states, and is supposed to contain what is best in each of them, there is every

reason to believe that, if concurrent legislation were insisted upon, the act would be promptly approved by the legislatures of many of the states, and would thereby become the concurrent law of the state and nation throughout a large part of the Union.

Under this construction, which I think should be given the Amendment, there would be large scope also for its operation even in states which might refuse to concur in congressional legislation for its enforcement. In my judgment, the law in such a state would be as if no special grant of concurrent power for the enforcement of the first section had been made in the second section, but, nevertheless, the first section, prohibiting the manufacture, sale, transportation, importation, or exportation of intoxicating liquors for beverage purposes would be the supreme law of the land within the nonconcurring states, and they would be powerless to license, tax, or otherwise recognize as lawful anything violating that section, so that any state law in form attempting such recognition would be unconstitutional and void. Congress would have full power under the interstate commerce clause,

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and it would be its duty, to prevent the movement of such liquor for beverage purposes into or out of such a state, and the plenary police power over the subject, so firmly established in the states before the Eighteenth Amendment was adopted, would continue for use in the restricted field which the first section of the Amendment leaves unoccupied -- and the presumption must always be indulged that a state will observe, and not defy, the requirements of the national Constitution.

Doubtless such a construction as I am proposing would not satisfy the views of extreme advocates of prohibition or of its opponents, but, in my judgment, it is required by the salutary rule of constitutional construction referred to, the importance of which cannot be overstated. It is intended to prevent courts from rewriting the Constitution in a form in which judges think it should have been written, instead of giving effect to the language actually used in it, and very

certainly departures from it will return to plague the authors of them. It does not require the eye of a seer to see contention at the bar of this Court against liberal paramount congressional definition of intoxicating liquors as strenuous and determined as that which we have witnessed over the strict definition of the Volstead Act.

With respect to the eleventh conclusion of the Court, it is enough to say that it approves as valid a definition of liquor as intoxicating which is expressly admitted not to be intoxicating in each of the cases in which it is considered. This is deemed warranted, I suppose, as legislation appropriate to the enforcement of the first section, and precedent is found for it in prohibition legislation by states. But I cannot agree that the prohibition of the manufacture, sale, etc., of intoxicating liquors in the first section of the Eighteenth Amendment gives that plenary power over the subject which the legislatures of the states derive from the people or which may be derived from the war powers

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of the Constitution. Believing, as I do, that the scope of the first section cannot constitutionally be enlarged by the language contained in the second section, I dissent from this conclusion of the Court.

In the [*Slaughterhouse Cases*](#), 16 Wall 36, and other cases, this Court was urged to give a construction to the Fourteenth Amendment which would have radically changed the whole constitutional theory of the relations of our state and federal governments by transferring to the general government that police power, through the exercise of which the people of the various states theretofore regulated their local affairs in conformity with the widely differing standards of life, of conduct and of duty which must necessarily prevail in a country of so great extent as ours, with its varieties of climate, of industry, and of habits of the people. But this Court, resisting the pressure of the passing hour, maintained the integrity of state control over local affairs to the extent that it had not been deliberately and clearly surrendered to the general government, in a number of decisions which came to command the confidence even of the generation active when they were rendered

and which have been regarded by our succeeding generation as sound and wise and highly fortunate for our country.

The cases now before us seem to me to again present questions of like character to, and of not less importance than, those which were presented in those great cases, and I regret profoundly that I cannot share in the disposition which the majority of my associates think should be made of them.

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