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DOES THE EIGHTEENTH AMENDMENT PROHIBIT STATE MANUFACTURE AND DISPENSATION?

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IS THE Eighteenth Amendment directed against the states and does it prohibit manufacture and dispensation by the states themselves? This question is suggested and will be discussed solely with reference to the vesting and distribution of powers under the Constitution. The wisdom or lack of it in dealing with the liquor problem by legislative prohibition will not be considered. The writer recognizes that restrictions on the sale of intoxicating liquor are necessary and, where the problem could not otherwise be handled, would vote under local option, as he has voted, to forbid the sale of intoxicating liquor during such period as might seem advisable. He writes neither as an advocate nor as an opponent of prohibition, but as one who believes in the preservation of the powers of the state governments and who has fixed beliefs as to the proper office of a federal constitution.

In this article it will be assumed that the Amendment has been validly adopted. If we proceed on that assumption, it must be accepted as part of the supreme law of the land, binding upon all courts—state and federal—and upon all of the states. That goes to its validity and binding force. Our present inquiry goes, not to its validity and binding force, but to its interpretation.

Section one of the Amendment provides: ". . . . the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territories subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

This section embodies direct, prohibitory legislation. There is *no* delegation of any power to legislate prohibition.

The second section provides that "Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

This section contains a delegation of power to *enforce* the prohibition directly legislated in the first section. The delegation in the second section is to Congress *and* the several states. Had there been any attempt to delegate concurrent power to legislate on prohibition itself, an irreconcilable conflict between the States and Congress would have

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resulted. That was avoided. The prohibition was legislated directly in the first section.

In the interpretation of that direct prohibitory legislation, we should proceed exactly as we do in the interpretation of any statute within the power of a legislature—state or national—to enact. When we enter that field we find a well defined principle of construction established long before the Eighteenth Amendment was framed. It has long been recognized that a statute is not to be deemed applicable to the sovereign unless the purpose to make it so is clearly expressed or necessarily implied from the language used. The sovereign here is the state or the nation, depending upon whether the subject matter lies within the field of sovereignty retained by the states or that field delegated to the federal government. If this rule applies, then the amendment cannot be held to restrict either the national or state government; and, since there has been no delegation of power to the federal government to enact prohibitory legislation, that means that the sates are unhampered except by the restrictions contained in their own constitutions. Any state may, therefore, appropriate constitutional and legislative steps having first been taken, manufacture and dispense.

The rule that a statute does not apply to the sovereign was thus stated in England:

> It is usual for the legislature in acts of restraint which they intend to bind the king, to name him expressly; and if he is not expressly named, it has always been taken heretofore that the legislature intended only to bind the subjects, and to make the act extend to them, and not to the king, for he is favored in all expositions of acts. And because it is not an act without the king's assent, it is to be intended that when the king gives his assent he does not mean to prejudice himself, or to bar himself of his liberty and privilege, but he assents that it shall be a law among his subjects. And so inasmuch as the act is made by the subjects, who, it is to be presumed, would not restrain the king, and also by the king himself, who cannot be presumed to mean to restrain himself, the expositors of acts have heretofore well collected from the intent of them, that the king should be exempted out of the general words of restraint, unless he is expressively named and restrained.[2]

As the power must be recognized to have existed in the individual states prior to the enactment of the Eighteenth Amendment, had they seen fit to exercise it, it is the state which occupies the same position as the king in this matter; and the foregoing quotation might be paraphrased appropriately for its application to the Eighteenth Amendment by substituting for the word "king" the word "state."

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[2] (*Wellion* v. *Berkley,* Plowd. 239 and 240; *Hardcastle on Rules of Construction of Statutory Law,* 180.).

This principle was recognized in England long before the adoption of our federal constitution, and, at a very early date, received recognition in the Supreme Court of the United States. In *Dollar Savings Bank* v. *U. S.*, 19 Wall., 227, at page 239, Justice Strong said:

It is a familiar principle that the king is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect him not in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different states, and practically in the federal courts. It may be considered as settled that so much of the royal prerogatives as belong to the king in his capacity of *parens patriae,* or universal trustee, enters as much into our political state as it does into the principles of the British Constitution.

Some years before that the learned Justice Story, in *U. S.* v. *Hoar,* 2 Mason, 311, had said:

But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases, the reasoning applicable to them applies with very different, and often contrary force to the government itself.

This language of Justice Story was quoted with approval by the Supreme Court in *Stanley* v. *Schwalby,* 147 U. S., 508.

There will be no attempt here to collect the authorities on this subject. The principle is commonly recognized and frequently applied by both state and federal courts in many different situations. Read *People* v. *Herkimer,* 4 Cowen, 345; 15 Am. Dec. 379, with excellent note; *United States* v. *Bell Telephone* Co., 159 U. S. 549; *State* v. *Milwaukee,* 145 Wis. 131, *Annotated Cases* 1912A, 1212 and note; *Milwaukee* v. *McGregor,* 140 Wis. 35; *25 Ruling Case Law* (Statutes, Sections 31 to 33) 783 to 785; 36 Cyc. 1171.

The writer has not overlooked the exception under which it has been declared that the doctrine does not apply to statutes made for the public good, the advancement of religion and justice and the prevention of injury and wrong. A consideration of the evil against which the

Amendment was directed will, it is believed, make it clear that the exception does not come into play.

In an article recently published in a magazine of nation-wide circulation, covering an interview with Senator Sheppard, the author of the Eighteenth Amendment, it is said that he and his associates were enemies, not of drinkers, but of the liquor traffic, the saloon, the brewer and the distiller, and that with deliberate purpose the amendment was so framed as not to probibit either purchase or use. If these statements are correct, then they go to support the proposition that the amendment was aimed at the abuses of private traffic. To eliminate those abuses the private traffic was wiped out by a prohibition directed against it. The accomplishment of the original purpose does not require holding the amendment applicable to the states themselves. The amendment does not proceed on the assumption that the moderate use of intoxicating liquor is harmful. Everyone recognizes that excessive use is harmful to the individual. Unrestricted private traffic, in which quantity production and use had become the dominant aim, necessarily resulted in excessive use and certain attendant abuses. It was against these that the amendment was aimed. None of these should attend upon state manufacture and dispensation.

In a federal constitution, we expect to find political rather than economic provisions; and it should be assumed that the Amendment was introduced for a political purpose. It does not in terms prohibit the use or consumption of intoxicating liquor. Prohibition of use would not present a question with a political aspect. It does proceed on the assumption that the private business had become dangerous to the body politic. It is from that viewpoint that it presents a question with a political aspect. That was the view of the great mass of those who favored the adoption of the amendment. Its advocates charged that the liquor interests had become drunk with power. The alleged abuse of power called forth a drastic remedy. As power passes, the warning should attend it.

There are certain other principles of construction which are to be taken into consideration. The prohibition is clearly in derogation of common law. It contemplates enforcement by penalty. The thing prohibited is not wrong in itself (*malum in se*). In legal contemplation, it is wrong only because prohibited (*malum prohibitum*). Such laws are to be given a strict construction. In determining the meaning to be ascribed thereto the inquiry is not merely what may the authors have had in mind but whether they have expressed their condemnation in language which will admit of no restricted meaning. The interpreter of the law which is thus written goes no farther than the language employed, in the face of the most antagnostic interprepation, requires

him to go. In passing, it may also be observed that the inquiry is not what the particular group who originated and procured the adoption of the Amendment had in mind, but, judging from the language used, in the light of established rules of construction, what Congress and the State legislatures, who adopted and approved it, had in mind.

A comparison of the Eighteenth Amendment with the first eight amendments and a consideration of the construction adopted in respect thereto will be found persuasive and, as it seems to the writer, well night conclusive. In the first eight amendments we find a series of prohibitions against governmental acts. Thus we find prohibitions against the infringement of "the right of the people to keep and bear arms" (Amendment 2), against the quartering of soldiers in private homes without the consent of the owner (Amendment 3), against unreasonable searches and seizures (Amendment 4), against holding for capital or infamous crimes except on presentment or indictment of a grand jury, against placing twice in jeopardy, against compelling the accused in a criminal case to be a witness against himself, against depriving of life, liberty or property without due process of law, against the taking of property for public use without just compensation (Amendment 5), against criminal prosecutions in which the rights of the accused are not properly safeguarded (Amendment 6), and against excessive bail, excessive fines, and cruel and unusual punishments (Amendment 8.) Except for the first and possibly the Seventh Amendments, the language is general, and, on its face, quite as applicable to the states as to the national government. Yet, under the leadership of Chief Justice Marshall, the great exponent of federalism, they were construed as containing limitations only on the federal government.

The writer recognizes the argument which may be made to the effect that these are rather *limitations* on powers expressly delegated, but uses the term *"prohibitions"* advisedly having in mind that they are impliedly so designated in the Tenth Amendment, which provides that the "powers not delegated to the United States by the Constitution, nor *prohibited* by it to the states, are reserved to the State respectively, or to the people."

In *Barron* v. *Baltimore,* 7 Peters, (32 U. S.) 243, the Supreme Court held that the provision in the Fifth Amendment against the taking of private property without just compensation was intended solely as a limitation on the exercise of power by the government of the United States, and was not applicable to the legislation of the states. Chief Justice Marshall, writing the opinion of the court, said:

The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a con

stitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes. [Writer's italics]

Much stronger reasons might be urged for holding the first eight amendments applicable to the states than can be urged for holding the Eighteenth Amendment so applicable. All of the limitations found in the first eight amendments were limitations on governmental powers. They were expressed in general language, and, with the exceptions above noted, language quite as applicable to the states as to the national government, yet the Supreme Court of the United States, recognizing that the federal government was not a government of the individual states, restricted that language in its effect so as not to make it applicable to the states. The prohibition with which we now deal is couched in general language. It is in the appropriate language for legislation restricting individual activities. It is not couched in language appropriate to place a limitation on governmental activity. It is a piece of direct legislation and should be assumed to have been intended to regulate and direct the rights and acts of the citizens. Its purpose was to destroy a private traffic, and, we are often told, without making either use or purchase unlawful. The accomplishment of that purpose does not require interpreting the amendment as containing a limitation on what the states themselves may do.

State dispensation is not new. It was involved in the case of *South Carolina* v. *U. S.*, 199 U. S., 437, which came before the Supreme Court a little over twenty years ago. It is employed in several of the Canadian provinces. There is nothing extraordinary in the suggestion that it may be resorted to again. There is no purpose here to discuss the desirability of state dispensation. Neither is there any purpose to discuss the limitations found in the several state constitutions. The only question discussed here is whether state manufacture and dispensation is prohibited by the Eighteenth Amendment. It has been suggested that this argument is foreclosed by the decision in the South Carolina case. The answer is that the Supreme Court was there considering the power to tax, a power which had been delegated to the federal government. The effect of the decision was that the states, having delegated the power to tax, could not defeat the power by indi-

rection. The Eighteenth Amendment contains no delegation of power to prohibit. It carries its own prohibition. That prohibition, read in the light of long accepted rules of construction, is a prohibition directed only against the individual citizens. It is not a prohibition directed against the states themselves. To paraphrase from the opinion of Chief Justice Marshall, above quoted, it was framed for the government of the people, and not for the government of the states.

How may the question be raised? The writer believes that if any state were to provide for the manufacture and dispensation of intoxicating liquor at a given place, it could be raised by a suit for a permanent injunction, the proper forum for which suit would be the Supreme Court of the United States in the exercise of its original jurisdiction.

In many states, amendments of their constitutions might be necessary. Such amendments may be adopted by a majority of the voters acting in the manner provided for in the respective state constitutions. There is a marked difference between amendments of state constitutions and amendments of the federal constitution, where the majority rule cannot operate. That, in itself, emphasizes the care with which amendments to the federal constitution should be dealt. It would require but little ingenuity to frame an amendment in as few words as the first section of the Eighteenth Amendment which, without naming them, would, in effect, wipe out the states as governmental entities. If the correctness of the position here taken be conceded, and yet no state will undertake such manufacture and dispensation, that would indicate that public sentiment does not demand that prohibition be rejected as the proper method of dealing with the liquor problem.

In an article recently published, it was suggested that even though the amendment be applicable to the states, the Volstead Act, as now framed, is not. If that be true, then there is another way that the question might arise. Assume that the Volstead Act were amended so as to provide for the punishment of a state by fine. We might then imagine the Attorney General of the United States seeking to prosecute a state in the United States Supreme Court; and we might there find an attempt to answer the challenge of a statesman of a generation ago in the British House of Commons, "You cannot indict a nation." Can you indict a State?