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State Rights under the Federal Prohibition Law

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STATE RIGHTS UNDER THE FEDERAL PROHIBITION LAW*

MEMORANDUM IN SUPPORT OF TWO PROPOSITIONS:

1. That the prohibitions of the 18th Amendment do not apply to the states so as to prevent a state from undertaking the manufacture, transportation and sale of intoxicating liquors within its own borders.
2. A state under its reserved police powers has the power to undertake itself the manufacture, transportation and sale of intoxicating liquors, irrespective of its powers to enter into business generally.

While the 18th Amendment is anomalous in form, the Supreme Court has held it to be a proper Constitutional Amendment. It must be construed, therefore, as such, and not as some other anomalous form of compact, legislation or declaration of public policy. Construing it as a Constitutional Amendment, the first question is, why a Constitutional Amendment was necessary to confer on the Federal Government power to prohibit the manufacture, transportation and sale of intoxicating liquors; second, against whom such prohibition was intended to run, in view (a) of the powers conferred on the Federal Government, (b) of the wording of the Amendment itself; and (c) of the circumstances under which the Amendment was enacted.

This memorandum, therefore, will first set out the points in support of Proposition 1; second, the points in support of Proposition 2; third, the results of such a construction of the 18th Amendment; fourth, the authorities supporting Propositions 1 and 2.

Points in Support of Proposition 1

(a) Since the Federal Government has no police powers except those specifically conferred by the Constitution, the

* Editor's Note.—The numerous discussions on the modification of the Volstead Act, and the repeal of the Eighteenth Amendment make the printing of this article a timely one. In the first memorandum, Mr. Finerty presents a new view of the Eighteenth Amendment. His second memorandum is a treatment of Federal Taxation under the plan.

18th Amendment was necessary to confer upon the Federal Government police powers to prohibit the manufacture, transportation and sale of liquor within the several states, as distinguished from the manufacture, transportation and sale of liquor in interstate commerce. As to interstate commerce the Federal Government already had full powers in this respect under the commerce clause of a Constitution, and had exercised them in the Webb-Kenyon law.

While this memorandum is not concerned primarily with the powers, if any, conferred by the 18th Amendment on the states, it is to be noted that the Supreme Court itself has construed the 18th Amendment, so far as the states are concerned, as a reservation rather than a grant of power. As a grant of power it holds it at most to free the states from certain limitations of the commerce clause, presumably those limiting the power of the states to restricted importation of interstate or foreign liquor. In the case of *United States v. Lanza* [1] the Court says:

"To regard the Amendment as the source of power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the Amendment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that, investing the national government with the power of country-wide prohibition, state powers should be excluded."

(b) The very fact that the powers conferred on the Federal Government by the 18th Amendment were police powers, necessarily excludes any implication that any power was conferred against the states themselves, since police powers are those exercised by a sovereign against its subjects or citizens, and since the police powers in question were those theretofore exclusively exercised by the several states against their respective citizens. The 18th Amendment, therefore, merely conferred on the Federal Government concurrent

1 260 U. S. 377, 381, 67 L. Ed. 314, 316, 317 (1922).

power with the several states to prohibit as against the citizens thereof, the manufacture, transportation and sale of intoxicating liquor within those states without conferring on the Federal Government any such powers against the states themselves.

(c) This is corroborated by Section 2 of the Amendment providing:

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

It would be meaningless and absurd to construe Section 2 as conferring concurrent power on a state to endorse the prohibitions of the 18th Amendment against itself. It would be equally absurd to construe this provision for "concurrent power" in the Congress and the several states as conferring on either the power of prohibition over the other. It is to be noted, moreover, that Congress in enacting the Volstead Act, put no such construction on Section 2. The several states are not included in the word "person" as defined in Section 4 (2) of that Act.

(d) *While the 18th Amendment not only confers power but in itself enacts a prohibition, the enactment must be within the limits of the power conferred. Since the powers conferred were police powers the enactment, in spite of its broad terms, must be construed as an enactment against those subject to police powers, i. e., the citizens of the several states, and not against those wielding such powers—the states themselves.* Moreover, it is an established canon of statutory construction that legislation does not apply to a sovereign unless the sovereign be named, and the prohibitions of the 18th Amendment do not expressly name the states. Neither can it be contended that the Congress in proposing the 18th Amendment, or the states in ratifying it, had in mind the manufacture, transportation or sale of intoxicating liquors by a state itself, since no state ever had been, or was then engaged in such manufacture, transporta-

tion and sale.[2] The 18th Amendment in this respect must be construed in the light of the existing evils which it was designed to correct, and which were the evils peculiar to the private manufacture, transportation and sale of intoxicating liquors.

(e) The 18th Amendment cannot be construed as a compact between the United States and the several states against the manufacture, transportation and sale of intoxicating liquors. Waiving the question whether there is Constitutional provision for such a compact, the 18th Amendment lacks the essential element of any compact, that is, consent of all the parties to be affected thereby, Rhode Island and Connecticut having failed to ratify.

(f) The fact that the 18th Amendment not only confers power but enacts a prohibition, constitutes it a limited, rather than a full, conference of police powers on the Federal Government, the powers conferred being limited to those incident to prohibition. To have conferred full police powers on the Federal Government the Amendment should have conferred power on it to *regulate or prohibit* the manufacture, transportation and sale of intoxicating liquors. This point is particularly mentioned because of the tendency to consider the fact that the 18th Amendment not only confers power but enacts a prohibition as in some way enlarging rather than restricting the powers of the Federal Government under it.

Points in Support of Proposition 2

(a) The Supreme Court has held that the states in granting concurrent police powers to the Federal Government have not surrendered their own police powers.[3]

(b) The Supreme Court has also held that a state cannot by contract surrender its own police powers.[4] It is

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2 See comment on the South Carolina Dispensary Cases, *infra*.
3 United States v. Lanza, *op. cit. supra* note 1.
4 Boston Beer Co. v. Massachusetts, 97 U. S. 33, 24 L. Ed. 989 (1878).

doubtful whether such powers could be surrendered even by an express Constitutional Amendment.[5] In any event the 18th Amendment does not purport to surrender them, but merely grants concurrent powers to the Federal Government.

(c) Under its reserved powers a state, irrespective of its power to enter into business generally, would have power in the interests of public health and morals, itself to undertake the manufacture, transportation and sale of intoxicating liquors, within its own borders, since, as shown under Proposition 1, the states have conferred on the Federal Government concurrent power only as against the citizens of the several states to prohibit such manufacture, transportation and sale within those states, and have conferred no such powers against the states themselves.

(d) A state in undertaking such manufacture, transportation and sale might, of course, in any of these respects, act through bona fide agents. It must be conceded that in view of the 18th Amendment, a state even under its reserved police powers, would not have power to confer on a citizen or corporation the right to engage in private manufacture, transportation or sale, or otherwise than as a bona fide agent of the state.

(e) It would seem advisable that should any state undertake itself to manufacture, transport and sell intoxicating liquors, it should in enacting appropriate legislation, recite that it acts in the exercise of its reserve police powers in the interests of the health and morals of its citizens, and to eliminate the public corruption and dangers inherent in Federal Prohibtion.

Results of Construction Contended For

The advantages of the manufacture, transportation and sale of intoxicating liquors by the several states within their own borders, should be obvious whether or not the 18th

[5] See brief of Elihu Root in National Prohibition cases, 253 U. S. 350, 64 L. Ed. 946 (1920).

Amendment is repealed. It will confine such manufacture, transportation and sale within the state lines of those states desiring it. If the Amendment be not repealed the Federal Government would have full authority under it to prevent the transportation of liquor manufactured by one state into any other state. Even were the Amendment repealed it would still be within the power of Congress under the commerce clause to prevent the interstate transportation of such liquor if Congress determined this to be desirable. Indeed if the 18th Amendment is repealed, proponents of repeal propose to give Congress express powers in this respect, if it does not already possess them.

Moreover, it should be possible in the manufacture, transportation and sale of intoxicating liquors by a state, to avoid the evils heretofore incident to private manufacture, transportation and sale, and it should eliminate the public corruption inherent in any attempt at total Prohibition through the Federal Government. While probably there would be some attempt at illicit importation from a state engaged in such manufacture into a state forbidding it, such illicit importation would be comparatively easy to control by the cooperation of the two states concerned and the Federal Government. In short it would restore to the several states the right to regulate their purely internal affairs in this respect, leaving those states desiring such manufacture, transportation and sale, the right to engage in it, while still affording Federal protection to those states opposed to it.

Perhaps one of the strongest arguments in favor of this construction is that such manufacture, transportation and sale by a state within a state would not be subject to Federal taxation, but would constitute an important source of state revenue.

Finally, should one or more states act upon this construction of the 18th Amendment and engage in such manufacture, transportation and sale, it would seem, in view of the

present state of public opinion, that the probability of a serious attempt at Federal interference should be remote. Even were it attempted it is not clear how it could practicably be undertaken. Neither is it unreasonable to hope that since the Supreme Court has never passed on this question, it would not be unaffected by the change in public psychology, and under the construction contended for, might well restrain such Federal interference.

Notes on Court Decisions

The powers conferred by the Federal Government by the 18th Amendment are police powers.[6]

Curiously enough the Supreme Court, in construing the 18th Amendment, has not, so far as determinable, exactly defined the nature of the powers conferred by the Amendment on the Federal Government. In the *National Prohibition Cases*,[7] *Vigilotti v. Pennsylvania*[8] and *United States v. Lanza*[9] the Court was chiefly concerned with the construction of the second section of the 18th Amendment conferring concurrent powers on the United States and the several states. In all these decisions, particularly the *Lanza* and *Vigilotti* cases, the Court expressly recognized that the pro-prohibition powers of the states were police powers. It follows although the Court did not so expressly hold, that the concurrent powers conferred on the United States, must be police powers.

The statement in the *Lanza* case[10] that "the first section of the Amendment took from the states all power to authorize acts falling within its prohibition," and general statements to the same effect in the other cases, do not militate against the construction contended for, since the Supreme

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6 United States v. Cohen, 268 Fed. 420 (D. C. Mo. 1920); Ex Parte Crookshank, 269 Fed. 980 (D. C. Cal. 1921), app. dismissed, 267 U. S. 664, 66 L. Ed. 424 (1921).

7 253 U. S. 350, 64 L. Ed. 946 (1920).

8 258 U. S. 403, 66 L. Ed. 686 (1922).

9 *Op. cit. supra* note 1.

10 *Op. cit. supra* note 1, at p. 381.

Court has not defined what are "acts falling within its prohibition." As has already been noted, the prohibitions of the 18th Amendment cannot go beyond the powers conferred on the Federal Government, and those powers being police powers, are powers inherently exercisable against citizens of states, and not against the states themselves.

In the preparation of this memorandum counsel has not attempted to examine all of the innumerable cases in which the Supreme Court has passed on the Volstead Act as distinguished from the 18th Amendment. Whether in any of those cases the Supreme Court has more closely defined the nature of the powers conferred on the Federal Government by the 18th Amendment, is, therefore, impossible to say. An examination of the more important of these cases discloses no such definition. Furthermore it is confidently believed that the Supreme Court could not define the powers conferred on the Federal Government as other than police powers, and that the Supreme Court at least has never undertaken to say that such powers are exercisable against a state, as distinguished from citizens of a state.

MEMORANDUM

The excise powers of the Federal Government would not extend to the manufacture, transportation and sale of liquor by a state within its own boundaries so long as the 18th Amendment is not repealed.

In the previous memorandum to the effect that the prohibitions of the 18th Amendment do not apply to the states so as to forbid them to manufacture, transport and sell liquor within their own borders, the opinion was expressed that such manufacture, transportation and sale would be free from Federal taxation. The objection has been made that this opinion is in conflict with the decision of the Supreme Court of the United States in the South Carolina Dispensary Cases.[11] It is submitted that, on the contrary, the doctrine

11 State of South Carolina v. United States, 199 U. S. 437, 50 L. Ed. 261 (1905).

of the South Carolina Cases would not be applicable to a state undertaking the manufacture, transportation and sale of liquor so long as the prohibitions of the 18th Amendment against private manufacture, transportation and sale remain unrepealed.

The fundamental basis of Mr. Justice Brewer's conclusion that the operation of the South Carolina State Dispensaries must be held subject to the excise powers of the Federal Government, was an appeal to the "rule of necessity." Mr. Justice Brewer argued that otherwise a state by forbidding private operation of those types of business subject to the Federal excise powers, and by arrogating to itself the exclusive right to engage in such types of business, could entirely defeat the excise powers of the Federal Government. The dissenting opinion of Mr. Justice White, concurred in by Justices Peckham and McKenna, would seem to demonstrate the fallacy of Mr. Justice Brewer's theory. However this may be, the reasons underlying Mr. Justice Brewer's conclusion could have no application to the manufacture, transportation and sale of liquor by a state within its own boundaries so long as the 18th Amendment remains in effect. While that Amendment remains effective, private manufacture, transportation and sale of liquor is forbidden not by state, but by Federal law. A state, therefore, in undertaking such manufacture, transportation and sale, would not be invading private business, since under the 18th Amendment private manufacture, transportation and sale of liquor is indisputably forbidden. Neither would it, under the guise of the exercise of its police powers, be depriving the Federal Government of excise revenue which it could otherwise obtain. Furthermore, a state in such manufacture, transportation and sale would act only in its strictly governmental character. Mr. Justice Brewer's own opinion recognizes that when so acting the excise powers of the Federal Government do not extend to the agencies through which a state may

act, as distinguished from state agencies "which are used by the state in the carrying on of an ordinary private business." Mr. Justice Brewer says:

"These decisions . . . indicate that the thought has been that the exemption of state agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the state in the carrying out of an ordinary private business."

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"It is reasonable to hold that, while the former [the Federal Government] may do nothing by taxation in any form to prevent the full discharge by the latter [a state] of its governmental functions, yet, whenever a state engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the nation."

Under Mr. Justice Brewer's opinion, therefore, there is an obvious distinction between the agencies of a state engaged in a private business in which, under Federal law, private parties may lawfully engage, and the agencies of a state engaged in a business in which, under Federal law, private parties are forbidden to engage. In the first instance there is at least color of reason for the application of Mr. Justice Brewer's "rule of necessity"; in the second there is none. In the first there is the possibility, however improbable, that the states could entirely defeat the excise powers of the Federal Government by themselves forbidding private operation of certain forms of business, and themselves undertaking the operation thereof. In the second the Federal Government having itself forbidden private operation, the states could not permit it, and by themselves engaging in such operations under their police powers, they would not deprive the Federal Government of any excise revenue which the Federal Government could otherwise obtain. In other words, there is a clear and undeniable distinction between a state engaging in the manufacture, transportation and sale of liquor, the private manufacture, transportation and sale of which is forbidden by the Federal Constitution, and a state undertaking itself to forbid the private manufacture

and sale of tobacco, oleomargarine, and other objects of internal revenue taxation which, under Federal law, are still the subject of private manufacture and sale. Should a state undertake to forbid the private manufacture and sale of oleomargarine, tobacco, etc., and itself undertake such manufacture and sale, it would, under Mr. Justice Brewer's opinion, remain subject to the Federal excise powers. Just as clearly, under that opinion, the manufacture, transportation and sale of liquor by a state would not be subject to the excise powers of the Federal Government so long as the private manufacture, transportation and sale continues to be prohibited by the 18th Amendment. Further, a state undertaking such manufacture, transportation and sale during the existence of the 18th Amendment would not be subject to the Federal excise powers even should that Amendment be repealed.

In this connection, it may further be remarked that there is no question of the right of a state to make affirmative, as well as negative use of its police powers. In other words a state may, under those powers, engage in the manufacture, transportation and sale of liquor, as well as prohibit private engagement therein.[12]

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[12] See Vance v. Vanderhook Co., 170 U. S. 438, 447, 448 (1898), in which, as noted in Mr. Justice Brewer's opinion, the authority of the State of South Carolina to engage in the purchase and sale of liquor under its police powers was specifically upheld.