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Ill-Starred Decision Lambert v. Yellowley

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AN ILL-STARRED DECISION—LAMBERT v. YELLOWLEY*

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I

One of the most interesting and perplexing constitutional problems that has been brought into the limelight by the advent of national prohibition is the nature and scope of the respective police powers of the nation and the states under the Eighteenth Amendment. No case decided by the Supreme Court of the United States furnishes a better basis for the discussion than *Lambert v. Yellowley*,[1] decided November 29, 1926.

The Supreme Court, by a five to four[2] decision, held that the provision of the National Prohibition Act[3] that "Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once" is appropriate legislation within the meaning of the Eighteenth Amendment. The pertinent words of the Amendment are: ". . . . the manufacture, sale, transportation importation and exportation of intoxicating liquors. . . . for beverage purposes is hereby prohibited." Certain limitations are inherent in the Amendment: (a) limitations as to relationship: manufacture, sale, importation, exportation, and transportation; (b) limitations as to purpose: for beverage purposes. In prohibiting the use of intoxicating liquor for beverage purposes, it does not prohibit, or delegate the power to prohibit, medicinal, industrial, or sacramental uses. The second section of the Amendment contains two other limitations as to the method of enforcement: (a) by appropriate legislation and (b) by concurrent power.

Before analyzing in detail the decision of the majority it is first necessary to present the statutory provisions relating to the case. Section 7 of the National Prohibition Act[4] provides, "No one but a

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[1]272 U. S. 581, 47 Sup. Ct. 210 (1926).

[2]Decision by Brandeis, J. Sutherland, McReynolds, Butler, and Stone, J.J., dissented. In the district court Judge Knox had held the act unconstitutional in Lambert v. Yellowley, 291 Fed. 640 (S. D. N. Y. 1923). The circuit court of appeals reversed the district court in 4 F. (2d) 915 (C. C. A. 2d, 1924). The same statute had been declared unconstitutional by a federal district court in another case, U. S. v. Freund, 290 Fed. 411 (D. Mont. 1923).

[3]Act of Oct. 28, 1919, c. 85, tit. 2; 41 STAT. 311; 27 U. S. C. A. § 17 (1927).

[4]*Ibid.*

physician holding a permit to prescribe liquor shall issue any prescription for liquor. . . . Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once." Section 2 of the supplemental act of November 23, 1921,[5] provides that "No physician shall prescribe, nor shall any person sell or furnish on any prescription, any vinous liquor that contains more than 24 per centum of alcohol by volume, nor shall anyone prescribe or sell or furnish on any prescription more than one-fourth of one gallon of vinous liquor, or any such vinous or spirituous liquor that contains separately or in the aggregate more than one-half pint of alcohol, for use by any person within any period of ten days." Under these statutes the maximum quantity of spirituous liquor which may be prescribed within any period of ten days to any one person is one pint, but that pint must not contain more than one-half pint of alcohol. Neither of the acts purports to regulate the use for beverage purposes of spirituous liquors lawfully possessed, nor do they prohibit the giving of advice by any person in respect to such use or the quantities to be used. Further, neither of the acts purports to regulate the use of lawfully possessed spirituous liquors for medicinal purposes, otherwise than under physicians prescriptions, nor to regulate the giving of advice in regard to such use, except in the case of physicians' prescriptions.

Secondly, by way of background it should be noted that the American Medical Association, representing the physicians of the United States, is not agreed as to the therapeutic value of intoxicating liquors. At its meeting in 1917 it declared that the use of alcoholic liquor as a therapeutic agent was without "scientific basis" and "should be discouraged", and at its meeting in June 1921 it adopted a resolution saying that "reproach has been brought upon the medical profession by some of its members who have misused the law which permits the prescription of alcohol." But in 1924 at the Chicago meeting the House of Delegates, representing the ninety thousand members of the American Medical Association as its official body, unanimously voted a resolution condemning those portions of the National Prohibition Acts "which interfere with the proper relation between the physician and his patient in prescribing alcohol medicinally."[6] And the same Association filed in the case at bar a brief as amicus curiae vigorously challenging the Act now under review as arbitrary and unreasonable. From this conflicting

[5]Act of Nov. 23, 1921, c. 134, § 2; 42 STAT. 222; 27 U. S. C. A. § 18 (1927).
[6]*Supra* note 1, at 591, 47 Sup. Ct. at 212; (1924) 82 J. A. M. A. 2056.

evidence, it seems fair to conclude with Mr. Justice Sutherland "that the question is of a highly controversial character; and, since it reasonably cannot be doubted that it is a fairly debatable one, the legislative finding, necessarily implicit in the Act, that vinous and spirituous liquors are of medicinal value, must be accepted here."[7]

Finally, by way of introduction to the case itself, the plaintiff, Dr. Lambert, an eminent New York physician, did not intend to prescribe the use of liquor for beverage purposes. He alleges that it is his opinion, based on experience, observation, and medical study, that the use of spirituous liquors as medicine is, in certain cases, necessary in order to afford relief from known ailments, and that in the use of such liquors as medicine in certain cases, including some now under his observation and subject to his professional advice, it is necessary, in order to afford relief, that more than one pint of such liquor in ten days be used internally, and in certain cases, it is necessary that it be used without delay, notwithstanding that within a preceding period of less than ten days one pint of such liquor has already been used. He further alleges that in prescribing drugs and medicines the determination of the quantity involves a consideration of the physical condition of the patient and their probable effect in each specific case. As the two Acts set out above make a violation a crime, subjecting the offender to fine or imprisonment or both, the plaintiff, Dr. Lambert, seeks to enjoin Yellowley, a prohibition director, from interfering with his acts as a physician in prescribing vinous or spirituous liquors to his patients for medicinal purposes in quantities exceeding the limits fixed by the National Prohibition Acts. Thus the constitutionality of the measures is clearly placed in issue before the Court.

The majority opinion rests chiefly upon *Everard's Breweries v. Day*[8]. This case deals with the constitutionality of a Congressional act prohibiting the prescription of malt liquor for medicinal purposes. Mr. Justice Brandeis in the case at bar said[9], "We have spoken of that case at length because the decision was by a unanimous court and if adhered to disposes of the present case. If Congress may prohibit the manufacture and sale of intoxicating malt liquor for medicinal purposes by way of enforcing the Eighteenth Amendment, it equally and to the same end may restrict the prescription of other intoxicating liquor for medicinal purposes. In point of power there is no difference; if in point of expediency there is a difference, that is a matter which Congress alone may consider."

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[7]*Supra* note 1, at 600, 47 Sup. Ct. at 215.
[8]265 U. S. 545, 44 Sup. Ct. 628 (1924).
[9]*Supra* note 1, at 594, 47 Sup. Ct. at 213.

There are, however, three important distinctions between the *Everard* case and the case at bar that destroy its value as a precedent. (1) The *Everard* case presented the constitutional question from the standpoint of a manufacturer. Whatever incidental right to practice medicine might be said to have been involved was remote. Mr. Justice Holmes in *Quong Wing v. Kirkendall*[10] declared, "Laws frequently are enforced which the court recognizes as possibly or probably invalid, if attacked by a different interest or in a different way." It is well established that "the direct control of medical practice in the States is beyond the power of the Federal Government."[11] In *Linder v. United States*[12] the Court said, "Congress cannot, under the pretext of executing delegated powers, pass laws for the accomplishment of objects not entrusted to the Federal Government." Federal power is delegated and its prescribed limits must not be transcended even though the end seems desirable. Congress cannot directly restrict the professional judgment of the physician or interfere with its free exercise in the treatment of disease. Whatever power exists in that respect belongs to the states exclusively.

(2) In the *Everard* case the court held that the question of the reasonable necessity of the prohibition of malt liquor was in reality a question of fact. It had been so handled. After exhaustive hearings, Congress acting upon a report of one of its committees declared by statute that the prescription of malt liquor should be prohibited because the evidence was overwhelming to the effect that malt liquors had no substantial medicinal value. But the same Congress acting on the report of the same committee permitted physicians to prescribe vinous and spirituous liquors for medicinal purposes. In the *Everard* case the court said[13], "We find, on the whole, no ground for disturbing the determination of Congress on the question of fact as to the reasonable necessity, in the enforcement of the Eighteenth Amendment, of prohibiting prescriptions of intoxicating malt liquors for medicinal purposes." And so here the legislative finding, implicit in the statute now under review, to the contrary effect in respect of vinous and spirituous liquors, likewise should be accepted as controlling, and the *Everard* case rejected as inapplicable.

(3) The third distinction is that Congress never investigated the question of fact as to the reasonableness of the regulation attached to the prescription of vinous and spirituous liquors for medic-

[10]223 U. S. 59, 64, 32 Sup. Ct. 192, 193 (1912).
[11]Linder v. U. S., 268 U. S. 5, 18, 45 Sup. Ct. 446, 449 (1925).
[12]*Ibid.* 17, 45 Sup. Ct. at 449.
[13]*Supra* note 8, at 563, 44 Sup. Ct. at 633.

inal purposes. Mr. Justice Sutherland says[14], "The report of the committee and the hearings will be searched in vain to find any suggestion that the quantity designated by the statute is adequate or that the committee or Congress gave any consideration to that question. The only fact in this record bearing upon that subject is the allegation, under oath, of the appellant that in his professional opinion, based on experience, observation and medical study, more than that quantity, in certain cases, including some under his own observation and advice, is necessary. And, certainly, there is no basis for asserting the contrary in any fact or circumstance to be found outside the record of which this Court can take judicial notice."

The Act in the case at bar recognizes the necessity of vinous and spirituous liquors for medicinal purposes, but prohibits in many cases the efficacy of the remedy. It sets up an absolute maximum of one pint in ten days. There are no exceptions or qualifications. If, on the ninth day, the patient should take a sudden turn for the worse, or an entirely new ailment should intervene, making another prescription essential to prevent death, the doctor must violate either his conscience or the law.

The position of the dissent on this point is convincing. Mr. Justice Sutherland says[15], "The naked question, then, simply comes to this: Conceding these liquors to be valuable medicines, has Congress power, under the constitutional provision prohibiting traffic in intoxicating liquor for beverage purposes, to limit their prescription in good faith, and consequently their necessary use, for medicinal purposes, to a quantity which, under the allegations taken as true, is inadequate for such purposes? To me the answer seems plain. If Congress cannot altogether prohibit the prescription for medicinal use, it cannot limit the prescription to an inadequate quantity, for, obviously, in that case, *to the extent of the inadequacy*, the prohibition is as complete, and the usurpation of power as clear, as though the prohibition were unqualified."

II

The second step in the development of the majority's opinion raises the interesting constitutional question as to the nature of the police power of the federal government under the Eighteenth Amendment. Is it as broad as the police power of the states over intoxicating liquor? Can a decision dealing with the state police power be cited as a controlling precedent for national police power?

[14]*Supra* note 1, at 601, 47 Sup. Ct. at 216.

[15]*Ibid.* 602, 47 Sup. Ct. at 216.

The late Wayne B. Wheeler in his brief filed as amicus curiae in the *Lambert* case pointed out that seven states had absolutely prohibited the prescription of any kind of intoxicating liquor for medicinal purposes; that in three states prescriptions could be made only if the liquor was made unfit for beverage purposes; in fifteen states only alcohol could be prescribed; in three states no more than a specified quantity of intoxicating liquor fit for beverage purposes could be prescribed. He concluded that, since some of the state restrictions which were more stringent than those in the Congressional Act had been upheld by the courts, there was therefore no question as to the validity of the Act in the case at bar.

Is this a valid argument? What are the assumptions on which it is based, and where will it lead if accepted by the courts? This position is well stated by a legal writer[16] substantially as follows: The Eighteenth Amendment conferred permanently upon the federal government the same power to deal with intoxicating liquors which had hitherto been exercised and was still retained by the states as part of their police power. By the permission to exercise concurrent power the state retains unimpaired the inherent police power to restrict the manufacture, sale, and transportation of intoxicating liquors which they had enjoyed before. Since "concurrent" connotes a "like" power, it is this police power of the states which was thereby transferred to the federal government. In short, each state, together with the federal government, exercises the same power to deal with intoxicants which hitherto belonged to the states alone.

What implications inhere in this statement of constitutional theory? (1) It is well established that the Federal Bill of Rights does not constitute a limitation on the powers of the states. It limits only the federal government[17]. Now if the Eighteenth Amendment has transferred to the federal government the same power that the states previously possessed, then the federal power under the Eighteenth Amendment is not limited by the Federal Bill of Rights. Under such a theory Congress can provide for ruthless and barbaric methods of search and seizure, since the Fourth Amendment no longer limits the national government in prohibition matters; it can abolish jury trial and the privilege against self-incrimination and can punish anyone who advocates a repeal of the present prohibition law. (2) But it may be said that the same guarantees are found in state constitutions that are found in the Federal Bill of

[16]Johnson, *Some Constitutional Aspects of Prohibition Enforcement* (1924) 97 CENT. L. J. 113.

[17]Barron v. Baltimore, 7 Pet. 243 (U. S. 1833).

Rights. This is not strictly accurate. An examination of state constitutions will reveal that state bills of rights are not identical. Such being the case, state police power as limited by state constitutional provisions is not identical in the forty-eight commonwealths. It follows from this that if the states transferred to the federal government the power that they previously had, since the power in each state was not identical with that in every other state, then they did not transfer one definite and certain power but several diverse powers, and hence under this theory Congress would with difficulty be able to exercise a uniform power throughout the entire country.

Mr. Justice Brandeis in speaking for the majority of the Court in *Lambert v. Yellowley* undoubtedly recognized the absurdity of the theory,[18] but several places in the argument he skirts dangerously near an acceptance of it. In reading the decision one expects all along that the learned judge will finally commit himself and definitely declare that the police power of the national government over intoxicating liquors is the same as the police power of the states. But he is too wary for that. The result is that he expounds a theory which is so indefinite that, coming from a court of last resort, it is actually dangerous.

At this point we desire to indicate the two places in the argument where Mr. Justice Brandeis comes perilously near an acceptance of the theory. He declares[19], "The Federal Government in enforcing prohibition is confronted with difficulties similar to those encountered by the States", and again, "When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based on the fact that such exercise may be attended by some or all of the incidents which attend the exercise by a State of its police power." The latter portion of the statement is a paraphrase from the case of *Hamilton v. Kentucky Distilleries and Warehouse Co.*[20], a prohibition decision, handed down by Mr. Justice Brandeis before the Eighteenth Amendment and based on the war power. In this earlier case he was challenged by the same problem and flirted with it in the same evasive manner.

Two excerpts from that decision will suffice to reveal his attitude. (1) "That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But

[18]One federal district court swallowed the theory whole without perhaps realizing its dangerous implications. *Ex parte* Crookshank, 269 Fed. 980 (S. D. Calif. 1921).

[19]*Supra* note 1, at 594, 596, 47 Sup. Ct. at 213, 214.

[20]251 U. S. 146, 40 Sup. Ct. 106 (1919).

it is none the less true that when the United States exerts any of the powers *conferred*[21] upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose."[21a] The weasel word here is the word "conferred". Does it mean by express provision, or does it mean by implication? If it means the latter, must the validity of the implication be determined by some test other than the test of state police power?

(2) Another illustration of arguing in a circle is found in the following statement from the same case:[22] "If the nature and conditions of a restriction upon the use or disposition of property is such that a State could, under the police power, impose it consistently with the Fourteenth Amendment without making compensation, then the United States may for a *permitted purpose*[22a] impose a like restriction consistently with the Fifth Amendment without making compensation." What is a "permitted purpose"? Is the test to be furnished by an application of state police power doctrine, or is it to be determined by some independent test? Mr. Justice Brandeis does not enlighten us.

III

The *Lambert* case also raises in a striking manner the further query, Are there limitations on the doctrine of implied powers? The fact should never be forgotten that the state police power is reserved, undefined, and residual, while the basis of federal police power is delegated, enumerated, and circumscribed. While it is difficult to formulate the limitations[23] on the national police power, it is believed that the three principles following must be adhered to in order to have a valid exercise thereof.

(1) Congress must use an enumerated power. There must always be a constitutional peg as a basis for the implication. It is not necessary that the implied power be traced to some single express provision. It is sufficient if the implication can be drawn from two or more express provisions considered cumulatively. This is known as a "resulting power".[24] But this is to be distinguished from a general,

[21]Italics are the writer's. [21a]*Supra* note 20, at 156, 40 Sup. Ct. at 108.

[22]*Ibid.* [22a]Italics are the writer's.

[23]The best treatment of the nature and scope of national police power will be found in a series of articles by Robert E. Cushman in (1919) 3 MINN. L. REV. 289, 381, 452 and (1920) 4 MINN. L. REV. 247, 402.

[24]Examples of resulting powers are: the power to issue legal tender or notes, Julliard v. Greenman, 110 U. S. 421, 4 Sup. Ct. 122 (1884); the power to exclude

inherent, unenumerated power. The Constitution merely confers on Congress the right to exercise powers incidental to enumerated powers, if necessary and proper; any other theory would strip the states of all their powers, for if each implied incidental power breeds new powers by added implication, there is no point at which the process can be halted, and the result must in time be one consolidated government in place of our present federal system[25].

(2) The second limitation on the national police power is that there must be a real relevancy between the regulation attempted and the constitutional peg (or pegs) upon which it is hung, and (3) the third is that the act must not infringe upon other express constitutional limitations, especially the Bill of Rights.

The Eighteenth Amendment is specifically aimed at intoxicating liquor for beverage purposes. Note how the Court in the *Lambert* case tries to blur the distinction between beverage and medicinal uses in the following quotation[26]: "High medical authority being in conflict as to the medicinal value of spirituous and vinous liquors *taken as a beverage*[26a], it would, indeed, be strange if Congress lacked the power to determine that the necessities of the liquor problem require a limitation of permissible prescriptions, as by keeping the quantity that may be prescribed within limits which will minimize the temptation to resort to prescriptions as pretexts for obtaining liquor for beverage purposes." It is submitted that the words "taken as a beverage" are misleading. If the court meant "taken internally", why not say so? The physicians of the country were not asked by any Congressional investigating committee concerning their views as to the "medicinal value of intoxicating liquor taken as a beverage". How then does the Court know that "high medical authority is in conflict" on this question?

In 1800, Thomas Jefferson, in protesting against a Congressional act to incorporate a company to work copper mines in New Jersey, said[27], "Ships are necessary for defense. Copper is necessary for ships. Mines are necessary for copper. A company is necessary to work the mines, and who can doubt this reasoning who has ever played at 'This is the house that Jack built'? Under such a process of filiation of necessities, the sweeping clause makes clean work."

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aliens, Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016 (1893); the exercise of the right of eminent domain, Kohl v. U. S., 91 U. S. 367 (1875).

[25]See McCulloch v. Maryland, 4 Wheat. 316, 411 (1819); 1 FORD, JEFFERSON (1892) 44; 3 HAMILTON'S WORKS (Lodge's ed. 1885) 192; 1 CONG. DEBATES 1899; 22 ANNALS OF CONG. 212.

[26]*Supra* note 1, at 597, 47 Sup. Ct. at 214.

[26a]Italics are the writer's.

[27]10 WRITINGS OF THOMAS JEFFERSON (Bergh's ed. 1907) 165.

Strange to relate, our Congress and Supreme Court have accepted this very philosophy in the prohibition cases. In the *Lambert* case Congress has gone far beyond the beverage class. The *Lambert* doctrine works as follows: A is ill; he is to be deprived of needed medicine in order to prevent B from quenching his thirst. Because some medicinal alcohol may get into beverage channels, the federal politician and the reformer and the judge attempt to elbow the competent physician from the bedside of his bona fide patient.

Following the same line of reasoning, the Supreme Court in the *Selzman* case,[28] which is cited with approval in the case at bar, holds that Congress has power to prevent or regulate the sale of denatured alcohol which is not usable as a beverage. Here Congress invades the field of industrial alcohol to protect "the ignorance of some" and "the cravings and hardihood of others" and to frustrate the "fraud and cupidity of still others". The Federal Oil Conservation Board has reported that the total amount of petroleum in known fields in the United States would at the present rate of consumption last for only six years.[29] At present there are three possible substitutes for gasoline: shale oil, methanol, and ordinary alcohol. Experts agree that the latter is the most efficient and practicable. Congress and the Supreme Court in their endeavor to make prohibition effective may cripple the industrial and defensive power of the nation.

If Congress can go outside the beverage class, it can also go outside the intoxicating class. It can prohibit the manufacture of cider and fruit juices. If it can prohibit something which through natural processes of fermentation may ultimately become intoxicating, it can also regulate and prohibit non-intoxicating beverages that look like intoxicating liquor. It may be properly mentioned as a *reductio ad absurdum* that water looks like gin!

If in order to enforce the prohibition of intoxicating liquors effectively, Congress can prohibit the sale of non-intoxicating beverages, then why may not a second implied power[30] engender a third, under which Congress may forbid the planting of barley or hops and the manufacture of barrels or kegs? The mischievous consequences of such reasoning were long ago pointed out in *Kidd v. Pearson*[31], where in reply to a suggestion that under the expressly granted power to regulate commerce Congress might control related matters,

[28]Selzman v. U. S., 268 U. S. 466, 45 Sup. Ct. 574 (1925).

[29](1926) 48 NEW REPUBLIC 82.

[30]See dissent in Ruppert v. Caffey, 251 U. S. 264, 40 Sup. Ct. 141 (1920) by McReynolds, J. Van Devanter, Day, and Clark, J.J., also dissented.

[31]128 U. S. 1, 21, 9 Sup. Ct. 6, 10 (1888).

it was said, "The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market?"

In these post-Volsteadian days, insofar as the "noble experiment" is concerned, both Congress and the Supreme Court have laid on the shelf the old-fashioned but thoroughly sound John Marshall doctrine of implied powers. In the glorious drive toward the great objective, they have accepted the philosophy of "this is the house that Jack built". The game may be intriguing to the players, but sooner or later the spectators will challenge their government by asking an embarrassing question, Shall there be two constitutions, one for prohibition and one for all other matters whatsoever? Does it require a seer to predict what the ultimate answer will be?