California Law Review

VOL. VIII MAY, 1920 Number 4

"Concurrent Power" in the Eighteenth Amendment

AMONG the objects for which the Constitution of the United States was ordained and established are "To insure domestic tranquility, ... promote the general welfare and secure the blessings of liberty . . . ." The Eighteenth Amendment is thought by many to be destructive rather than productive of these objects. Reference is had here to its effect upon the relations of the Federal and state governments rather than to the merits of the liquor question.

It may be forcibly argued that this amendment is the most radical provision of law ever enacted by this nation. For while it is true that the change made by the Thirteenth Amendment was radical indeed, the language of the Constitution itself forecast some change of that character. The restriction upon the power of Congress to prohibit, prior to the year 1808, "the migration or importation of such persons as any of the states now existing shall think proper to admit," shows (what we know from history to be the fact) that the slave trade was already strongly opposed and that its limitation was anticipated. Slavery was sure to disappear in time, for it was absolutely indefensible upon moral grounds and the sentiment of the civilized world was against it. So, while the amendments following the Civil War effected lasting and radical changes in the Constitution, they were the natural result of the system they uprooted and which was sure to perish sooner or later if the blessings of liberty sought to be secured by the Constitution were to survive. The Eighteenth Amendment, on the other hand, interferes with individual rights which, at least as exercised in the home, great numbers of the people firmly believe not properly within the purview of governmental control. Moreover, while the unanimous sentiment of the civilized world was against

the evil of slavery which was finally eliminated by the war amendments, the sentiment of the world today, as indicated by the laws of the world, is far from being unanimously in favor of the form of regulation expressed in the Eighteenth Amendment. The war amendments were designed to increase the liberty of the individual. The Eighteenth Amendment is intended to diminish it. Moreover, the amendment departs from the original structure of the Constitution; for the Constitution deals with the organization of the government, with the Congress, the President and the courts; it distributes the powers between the national and the state governments by conferring certain powers on the national government and by imposing certain restrictions on the states; but it has not heretofore laid down rules of conduct for the people. (If it be said that the Thirteenth Amendment does—and, in a sense, this is so—the reason for its adoption is found in the Constitution itself.) But the Eighteenth Amendment introduces into the Constitution the new feature of laying down a rule of conduct for the people.

The war amendments have had results that no one anticipated at the time of their adoption. That these amendments dealt with the problems of, and were primarily intended for the benefit of, the negro is well known, and yet of six hundred and four cases involving the Fourteenth Amendment in which the Supreme Court delivered opinions from 1868 to 1912, only twenty-eight dealt with questions involving the negro race.[1]

How little those who wrote and advocated those amendments, in the stern days following the Civil War, could have realized the long consequences to follow! Out of the Fourteenth Amendment was to come that supervision by the Federal courts of the legislative acts of states, their municipalities, counties and other subdivisions, as well as the decisions of their courts and the acts of their executives, that has aroused more criticism of, and dissatisfaction with, the courts of the nation than all the other provisions of the Constitution combined. The restiveness of the people under the operation of this amendment brought about the clamor, not yet ended, for the recall of judges or of judicial decisions. The attitude of the people demonstrates strikingly how resentful they are of the assumption by the Federal authorities of control of matters of local concern. But the attitude is natural. It must be difficult for any layman but the most intelligent to understand why, when the state of Washington by popular vote, at an election where every

[1] Collins, The Fourteenth Amendment and the States, pp. 46, 47.

voter may express himself, passes a law under the operation of the initiative concerning affairs affecting people of the state only, and not of national concern, the Supreme Court of the United States, by a judgment from which four of the justices dissent, can decree the law to be unenforcible.[2] The war amendments in some form were necessary, but few will contend that, if their results could have been foreseen, they would have been cast in their present form. We have grumbled for half a century about Federal interference in local affairs and our experience has shown the resulting disadvantages; but it seems that there are those who would make a further transfer of power from state to nation and this of a character that will bring the national inquisitor to all men's doors. It is evident that those who have led the fight for the adoption of the amendment either do not realize or do not care what effect it may have in disturbing the finely balanced operation of the state and Federal governments; that in their desire to stamp out the use of liquor, they have felt that the end entirely justifies the means, or, in other words, that such evils or disadvantages as may result from this radical change in our Constitution are overbalanced by the good they think will flow from the prohibitory provisions of the amendment. They have apparently had their minds focused upon the one reform regardless of the serious consequences that may result in other directions. Senator Underwood pointed this out in the course of the debate,[3] saying:

> "The extreme advocate, from the beginning of time, has always been prepared to use the sword to force other men to accept his views of moral questions, regardless of the momentous consequences that may follow his action to the people he desires to serve. The statesman can only attain the ends of good government by laying aside passion and prejudice, with the realization that the accomplishment of high ideals must come through an enlightened public sentiment, carrying with it the acquiescence of the people in the laws that were written for their government."

Moreover, this amendment brings new responsibilities to the courts and the lawyer. It becomes effective just half a century after the Fifteenth, the last of the war amendments. But the situation as to the enforcement of the respective amendments is very different. The war amendments expressed in the Constitution were the result of the struggle by which the nation freed itself from the stain of

[2] Adams v. Tanner (1916) 244 U. S. 590, 61 L. Ed. 336, 37 Sup. Ct. Rep. 662.
[3] Cong. Record, Vol. 55, p. 5554, July 30, 1917.

slavery. They wrote into the highest law of the land convictions that the people had already asserted by the voice of the cannon on many a battlefield and which they had spent blood and treasure without limit to sustain, and the nation was in no mood to brook opposition to the effective enforcement of the principles they enunciated. The Eighteenth Amendment, on the other hand, comes into effect with the opposition of a very large minority, if not a majority, of the people. It interferes with what very many good people consider their natural rights, and the subject with which it deals makes its successful enforcement in the face of any opposition exceedingly difficult. To the extent that a law is successfully disobeyed or disregarded, to that extent is the law discredited and the power of the government that enacted it brought into disrepute. This is a serious thing in a democracy such as ours. It cultivates that quality of the American spirit:

"That bids him flout the Law he makes
That bids him make the Law he flouts"

and that is a bad quality to cultivate.

With these considerations in mind, let us consider the meaning and effect of section 2 of the amendment, which reads, "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

It is here that opponents of the amendment see the danger they fear and it is here that the proponents of the amendment hope to find the means of compelling their unconverted fellow-countrymen to do their bidding. So the meaning of the provision is certain to be the subject of controversy and its proper interpretation is of the utmost importance.

Of the adoption of the Constitution, Fiske said;

> "Thus, at length, was realized the sublime conception of a nation in which every citizen lives under two complete and well-rounded systems of laws—the state law and the federal law—each with its legislature, its executive and its judiciary, moving one within the other, noiselessly and without friction. It was one of the longest reaches of constructive statesmanship ever known in the world. There never was anything quite like it before, and in Europe it needs much explanation today even for educated statesmen who have never seen its workings. Yet to Americans it has become so much a matter of course that they, too, sometimes need to be told how much it signifies."[4]

If the new amendment is to operate, to use Fiske's expression,

[4] The Critical Period of American History, p. 301.

"noiselessly and without friction," it will do so only as the result of wise and statesmanlike interpretation.

In considering its scope and effect, we have for guides some signposts set by the Constitution itself, as follows:

> "This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[5]
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> ". . . . Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution.[6]
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> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[7]

It may be said, on the one hand, that the Constitution and the laws of the United States made pursuant thereto are the supreme law of the land, and that in all things within its power the nation is supreme and every will, of states as well as individuals, must bow thereto; and such is the law. From this it is argued that, as the amendment has given to Congress power (albeit concurrent with the states) to enforce its provisions, when Congress speaks it voices the supreme law of the land and that state laws in conflict are inoperative. Such, according to the press, seems to be the view of the Commissioner of Internal Revenue, who is charged with much of the responsibility of enforcing the National Prohibition Act. But such argument begs the question; for it assumes that concurrent power may be exclusively Federal power.

On the other hand, it will be contended that the Federal government, being a government of delegated powers, has such power only as is expressly granted by, or necessarily implied from, the terms of the amendment; that interpretation must be against the Federal government and in favor of the states, and hence that the amendment transfers no power to the Federal government to extend its operations within the legal territory of the states' sovereignty; in other words, that it makes it the duty of each government within the limits of its own sovereignty to enforce the provisions of the amendment. That is to say, that the power is

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[5] U. S. Const., Art. VI.
[6] U. S. Const., Art. VI.
[7] U. S. Const., 10th Amdt.

really concurrent as the layman would understand it if he went to Webster—"associate, concomitant, existing at the same time"; or the lawyer if he went to Bouvier—"running together, having the same authority"—thus operating in each sovereignty all the time, not superseded, suspended, or stricken down in one by the act of the other.

If this latter position be sound, it is obvious that much of the ground for criticism of the amendment will be removed, and the law it lays down will be enforced throughout the country as rapidly and effectively as public sentiment will permit. It is the sworn duty of state as well as Federal officers to support the Constitution. The people of the states are the same as the people of the nation and there is no presumption that the states will disregard the mandate of the Federal Constitution.

Under such interpretation the Federal government will prohibit the transportation of intoxicating liquor in interstate commerce, or by any Federal agency, such as the post office, as well as its importation into or exportation from the country, and will extend the prohibitory provisions of the law to all territory subject to its jurisdiction; while to each state will be left the matter of dealing with the manufacture, sale and transportation within its own borders. No doubt there will be different opinions in different parts of the country as to a proper definition of "intoxicating liquors," and if allowed expression under the interpretation here suggested this will result in lack of uniformity of state legislation; some states will permit the production and sale of light wines or beer, and a greater percentage of alcohol may be permitted in light wines and beer in some states than in others. Advocates of complete Federal control assert that such lack of uniformity will seriously interfere with the enforcement of the law, because they believe it will be comparatively easy for the unconverted and thirsty residents of extreme enforcement states to smuggle in supplies manufactured in neighboring states of less stringent laws. But lack of uniformity is not necessarily a reason for denying power to the states, and it is likely to be more than balanced by the more ready obedience that will be yielded to the written statutes enacted under the mandate of the Constitution, but in conformity with the views of the people in the individual states; while smuggling, as transportation from one state to another, will, in any event, be under the control of the Federal government.

That such an interpretation of the amendment would make for the perfect co-operation of the Federal and state governments of

which Fiske spoke cannot be denied. That such co-operation is of paramount importance in the life of the nation must be apparent upon the slightest thought. Every right or power transferred from the states to the Federal government weakens the states, leaves the people of a given community less responsible for the laws that govern them and to that extent must have a debilitating effect upon the development of effective self-government. If the power claimed for the Federal government be not essentially national in its character, nothing but the clearest language should be held to make it paramount. But it is far from clear that the language of the amendment has that effect. The expression "concurrent power" occurs frequently in the opinions of courts and judges dealing with the powers of Congress and the states; but it is often loosely used and not always in the same sense. It has no fixed legal meaning. Here, for the first time, it appears in the Constitution. It has been used in the cases to describe two very different kinds of power, one of which can be exercised by both governments at the same time, while the other cannot. In one case each government possesses and may exercise its power concurrently with the exercise of the same power by the other. Of this kind is the taxing power as described in McCulloch v. Maryland,[8] or the powers of the respective governments concerning the militia discussed in Houston v. Moore.[9] It is clear that such power is really concurrent in that both governments have it and can exercise it at the same time without any friction or interference, one with the other. The two powers operate together, concurrently. The other case is very different, for there the exercise of the power by the Federal government supersedes or suspends the power of the states. Such is the kind of "concurrent power" considered in Sturges v. Crowninshield,[10] discussing the power to enact bankruptcy laws. Here the two powers cannot operate concurrently. It is submitted that only in the former case are the powers really concurrent. It may be suggested that even in the latter case the power is concurrent and that its exercise only is prevented; but a power that cannot be exercised is useless, and may be worse that useless because of the irritation arising from posessing it without the right to use it.

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[8] (1819) 4 Wheat. 316, 4 L. Ed. 579.
[9] (1820) 5 Wheat. 1, 5 L. Ed. 19.
[10] (1819) 4 Wheat. 122, 4 L. Ed. 529.

Mr. Justice McLean, in Prigg v. The Commonwealth of Pennsylvania,[11] said:

> "How a power exercised by one sovereignty can be called concurrent, which may be abrogated by another, I cannot comprehend; concurrent power, from its nature, I had supposed must be equal. If the federal government by legislating on the subject annuls all state legislation on the same subject, it must follow that the power is in the federal government and not in the state. Taxation is a power common to a state and the general government and it is exercised by each independently of the other; and this must be the character of all concurrent powers.
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> "The powers which belong to a state are exercised independently. In its sphere of sovereignty it stands on an equality with the federal government and is not subject to its control. It would be as dangerous as humiliating to the rights of a state to hold that its legislative powers were exercised to any extent and under any circumstances subject to the paramount action of Congress. Such a doctrine would lead to serious and dangerous conflicts of power."

That the language of the amendment does not transfer complete and paramount power to the Federal government is too clear for argument. The language of the war amendments would have done so; but it was not used here. As already noted, the words "concurrent power" have been given different meanings by courts and judges. The ordinary meaning is not consistent with the power of the Federal government to override that of the states. This ordinary meaning has been used and recognized by the courts. It follows, therefore, that such meaning must be attributed to the words here; and in view of the well-known principles of the relationship between the states and the nation, none but the most convincing reasons can allow any other interpretation.

That the interpretation here suggested is not only permissible, but entirely reasonable, is clearly shown by what was said by Chief Justice Marshall in McCulloch v. Maryland,[12] where, dealing with the power of taxation, he said:

> "That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments, are truths which have never been denied. . . ."

This gives the precise meaning of concurrent power here suggested; a meaning which leaves the full power operative in each

[11] (1842) 16 Pet. 539, 662-663, 10 L. Ed. 1060, 1106-1107.
[12] (1819) 4 Wheat. 316, 425, 4 L. Ed. 579, 606.

sovereignty just as the interpretation of the amendment here suggested would leave the full power operative in each sovereignty without conflict.

That interpretation leading to such result is highly desirable is convincingly demonstrated by the Chief Justice in the same opinion, in language that could easily be paraphrased to suit the question here:

> "If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve."[13]

The "clashing sovereignty" mentioned by Chief Justice Marshall will, of course, result here under an interpretation that will permit the enforcing acts of Congress to be paramount to state laws in intrastate affairs. This was recognized in the debates in Congress. Mr. Webb in the House, who favored the amendment, said in response to a question as to which of the two powers would be supreme:

> "The one getting jurisdiction first, because both powers would be supreme, and one supreme power would have no right to take the case away from another supreme power. . . . Both would be supreme and it would only be a question as to who got the offender first."[14]

Could there be a clearer illustration of what the Chief Justice called "interfering powers"?

Mr. Graham, in the House, who opposed the amendment, said:

> "This will not raise the question that came into being, for instance, under the bankruptcy law; for while the state may legislate on questions of bankruptcy, for instance, up to the

[13] (1819) 4 Wheat. 316, 429-30, 4 L. Ed. 607.
[14] Cong. Record, Vol. 56, p. 424, Dec. 17, 1917.

> time that Congress acts, but when Congress acts the supremacy of the United States' enactment has to be acknowledged throughout all the states, but here you have two entities, struggling one with the other, and it leads to illimitable and immeasurable confusion. It can do nothing else."[15]

Certainly, if under fair interpretation, the courts can be relieved, as the Chief Justice said they ought to be, from such results, such interpretation should be followed. That such interpretation is permissible seems obvious; but is it not demanded? As already noted, the expression "concurrent power" is by this amendment for the first time brought into the Constitution. While reference to cases shows the words have been used in different senses (for example, on the one hand, the power of taxation "to be concurrently exercised by the two governments" as described in McCulloch v. Maryland, supra, where each sovereignty was left free to exercise its power unimpaired; and, on the other hand, the so-called "concurrent power" dealt with in Sturges v. Crowninshield, supra, where the power of the states was suspended by the exercise of that of the Federal government), as a matter of fact, the latter power is not concurrent, because the two powers, that of the state and that of the nation, cannot operate at the same time. This was shown by Mr. Justice Daniels in his concurring opinion in Prigg v. The Commonwealth of Pennsylvania, supra, where he said:

> "There is a class of powers originally vested in the states, which by the theory of the federal government have been transferred to the latter; powers which the constitution of itself does not execute, and which Congress may or may not enforce either in whole or in part, according to its views of policy or necessity; or as it may find them for the time beneficially executed or otherwise under the state authorities. These are not properly concurrent, but may be denominated dormant powers in the federal government; . . . ."[16]

It must, therefore, be admitted that a power that can be exercised at the same time by the state and Federal governments within their respective sovereignties, is a concurrent power. The Constitution by the amendment lays upon all, nation, state and people, the duty of obeying the new law; but the power of enforcing it has not been and cannot be taken away from the states unless the terms of the grant or the nature of the power conferred upon the Federal government demand it. Measured by

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[15] Cong. Record, Vol. 56, p. 464, Dec. 17, 1917.
[16] (1842) 16 Pet. 539, 652, 10 L. Ed. 1060, 1102-3.

this test, it seems that the states retain the power within their territorial limits to enforce in their own way the provisions of the Eighteenth Amendment. Under the mandate of the Eighteenth Amendment, the traffic in intoxicating liquors is destined to be abolished. If this can be done under an interpretation which will at once preserve the advantages resulting from that long reach of constructive statesmanship described by Fiske and avoid the clashing sovereignty and interfering powers mentioned by John Marshall, legal principles and political experience both indicate such to be the proper course. *O. K. Cushing.*

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