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Noel T. Dowling

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CONCURRENT POWER UNDER THE EIGHTEENTH  
AMENDMENT

BY NOEL T. DOWLING\*

THE term "Concurrent power" occurs for the first time in the federal fundamental law in the second section of the eighteenth amendment:<sup>1</sup> "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation." Though it has been recognized that this amendment marked a new departure in the relationship of the state and federal governments in the enforcement of law, and though the amendment has been before the United States Supreme Court, many of the inferior federal courts, and the courts of almost half the states, there has come from the first-named court no pronouncement of the positive meaning of concurrent power, nor have the other courts, federal and state, disclosed a clear and definite agreement in that regard. In fact a justice<sup>2</sup> of the United States Supreme Court has declared that "it is impossible now to say with fair certainty what construction should be given to the eighteenth amendment," and that "because of the bewilderment which it creates, a multitude of questions will inevitably arise and demand solution" in that court.<sup>4</sup>

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\*Professor of Law, University of Minnesota.

<sup>1</sup>The eighteenth amendment is as follows:

"Sec. 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

(Sec. 3 limits the time within which ratification may be effected and is immaterial here).

The amendment was proposed December 18, 1917, (40 Stat. 1050, 1941); was ratified January 16th, 1919 (Dillon v. Gloss, (1921) 41 S. C. R. 510); and proclaimed by the secretary of state January 29th, 1919.

<sup>2</sup>The term "concurrency" appears three times in the constitution, and the term "concur" twice.

<sup>3</sup>Mr. Justice McReynolds, concurring in the National Prohibition Cases, (1920) 253 U. S. 350, 64 L. Ed. 946, 40 S. C. R. 486.

<sup>4</sup>"A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action. it involves a moral and physical impossibility." Mr. Justice McLean, in the Passenger Cases, (1849) 7 How. (U. S.) 283, 12 L. Ed. 702.

It is the purpose of the writer to try to ascertain, from the reported cases and other contributions on the subject, whether there is any plausible escape from this "bewilderment." The course of the inquiry will involve several stages: first, the presentation of the diverse meanings suggested for "concurrent power;" second, an examination of the judicial usage of "concurrent power" prior to the eighteenth amendment to see whether it had acquired an established meaning; third, an investigation of some phases of the movement resulting in the adoption of the amendment and an inspection of congressional debates and reports to learn whether a definite meaning was intended in its proposal and adoption; and finally, a consideration of the suggested meanings in the light of the recent cases and comment thereon.

In the footnote<sup>5</sup> will be found a table of cases, federal and state, arising under or relating to the enforcement section of the

"Obviously the grant of concurrent jurisdiction may bring up from time to time many and some curious and difficult questions." *Nielson v. Oregon*, (1909) 212 U. S. 315, 53 L. Ed. 528, 29 S. C. R. 383. See footnote 24 as to effect of "concurrent jurisdiction" including "concurrent power."

FEDERAL COURTS. National Prohibition Cases, (June 7, 1920) 253 U. S. 350, 64 L. Ed. 946, 40 S. C. R. 486; *Martin v. U. S.*, (C. C. A. 8th C. Feb. 28, 1921) 271 Fed. 685, Rhg. denied May 12, 1921; *Ex parte Crookshank*, (D. C. Cal., Feb. 3, 1921) 269 Fed. 980; *Feigenspan v. Bodine*, (D. C. N. J. Mar. 9, 1920) 264 Fed. 186; *Ex parte Finnegan*, (D.C.N.Y., Feb. 7, 1921) 270 Fed. 665, *Ex parte Ramsey*, (D.C. Fla., July 17, 1920) 265 Fed. 950; *U. S. v. Bostow*, (D.C. Ala. June 14, 1921) 273 Fed. 535; *U. S. v. Holt*, (D.C. No. Dak., Jan. 3, 1921) 270 Fed. 639; *U. S. v. Peterson*, (D.C. Wash., Oct. 18, 1920) 268 Fed. 864; *U. S. v. Ratagczak*, (D.C.N.D. Ohio. Sept. 15, 1921) 275 Fed. 558; *U. S. v. Regan*, (D. C. N. H., June 3, 1921) 273 Fed. 727; *U. S. v. Viess*, (D.C. Wash., June 1, 1921) 273 Fed. 279; *Woods v. City of Seattle*, (D.C. Wash., Jan. 15, 1921) 270 Fed. 315.

ALABAMA.—*Ewing v. State*, (Ct. of App., Apr. 5, 1921) 90 So. 136, Rhg. granted May 31, 1921; *Powell v. State*, (Ct. of App., Apr. 5, 1921) 90 So. 138; *Ricketts v. State*, (Ct. of App., Apr. 12, 1921) 90 So. 137, Rhg. denied May 31, 1921; *Jones v. State*, (Ct. of App., Apr. 12, 1921) 90 So. 135.

ARKANSAS.—*Alexander v. State*, (May 9, 1921) 148 Ark. 491, 230 S. W. 548.

CALIFORNIA.—*Harris v. Superior Court*, (Dist. Ct. App., Mar. 4, 1921) 196 Pac. 895, Hearing denied by Sup. Ct.; *Ex Parte Volpi* (Dist. Ct. App. June 17, 1921) 199 Pac. 1090; *Ex Parte Kinney*, (Dist. Ct. App. Aug. 20, 1921) 200 Pac. 966; *Carse v. Marsh*, (Sept. 3, 1921) 36 Cal. App. Dec. 73, 10 Cal. Law Rev. 70; *People v. Capelli*, (Dist. Ct. App., Nov. 30, 1921) 203 Pac. 837, Rhg. denied Jan. 26, 1922; *People v. Collins*, (Dist. Ct. App., Dec. 12, 1921) 202 Pac. 344.

CONNECTICUT.—*State v. Ceriani*, (Apr. 20, 1921) 96 Conn. 130, 113 Atl. 316.

FLORIDA.—*Burrows v. Moran*, (May 3, 1921) 89 So. 111; *Wood v. Whitaker*, (May 3, 1921) 89 So. 118; *Hall v. Moran*, (May 13, 1921) 89 So. 104; *Johnson v. State*, (June 4, 1921) 89 So. 114.

GEORGIA.—*Jones v. Hicks*, (Nov. 11, 1920) 104 S. E. 771; *Scroggs v. State*, (Dec. 17, 1920) 105 S. E. 363; *Edwards v. State*, (Dec. 17, 1920) 105 S. E. 363; *Smith v. State*, (Dec. 17, 1920) 105 S. E. 364; *Bryson v. State*,

eighteenth amendment, which have come to the writer's attention up to this date (April 6, 1922). The cases are classified under

Ct. of App., June 17, 1921) 108 S. E. 63; *Barbour v. Benton*, (July 13, 1921) 108 S. E. 61; *Raskin v. Dixon*, (July 14, 1921) 108 S. E. 61; *Neville v. State*, (Oct. 14, 1921) 108 S. E. 802; *Neville v. State*, (Dec. 15, 1921) 110 S. E. 180; *Cooley v. State*, (Jan. 10, 1922) 110 S. E. 449.

INDIANA.—*Palmer v. State*, (Dec. 20, 1921) 133 N. E. 388; *Hess v. State*, (Feb. 1, 1922) 133 N. E. 880.

KENTUCKY.—*Youman v. Commonwealth*, (Jan. 27, 1922) 237 S. W. 6.

LOUISIANA.—*City of Shreveport v. Marx*, (Nov. 3, 1920) 148 La. 31, 86 So. 602; *State v. Green*, (Jan. 3, 1921) 148 La. 376, 86 So. 919; *City of Lake Charles v. Rose*, (Oct. 31, 1921) 89 So. 884; *State v. Boudreaux*, (Jan. 2, 1922) 90 So. 751, *Rehg. denied* Jan. 30, 1922.

MARYLAND.—*Ulman v. State*, (Jan. 13, 1921) 113 Atl. 124.

MASSACHUSETTS.—*Commonwealth v. Nickerson*, (Sept. 17, 1920) 236 Mass. 281, 128 N. E. 273; *Jones v. Cutting*, (Mar. 18, 1921) 130 N. E. 271; *In re Opinion of Justices*, (Nov. 21, 1921) 133 N. E. 453.

MISSISSIPPI.—*Meriweather v. State*, (Mar. 7, 1921) 125 Miss. 435, 87 So. 411; *Kyzar v. State*, (Mar. 7, 1921) 125 Miss. 79, 87 So. 415.

MONTANA.—*State v. District Court*, (Dec. 18, 1920) 58 Mont. 684, 194 Pac. 308.

NEW YORK.—*People v. Foley*, (Oct. 1, 1920) 113 Misc. Rep. 244, 184 N. Y. S. 270; *People v. Mason*, (Jan. 18, 1921) 186 N. Y. S. 215; *People v. Commissioner of Correction*, (April 1921) 115 Misc. Rep. 331, 188 N. Y. S. 46; *People v. Cook*, (May 11, 1921) 197 App. Div. 155, 188 N. Y. S. 291; *People v. Wicka*, (Dec. 1921) 192 N. Y. S. 633.

NORTH CAROLINA.—*State v. Fore*, (Dec. 24, 1920) 180 N. C. 744, 105 S. E. 334; *State v. Muse*, (May 25, 1921) 181 N. C. 506, 107 S. E. 320; *State v. Barksdale*, (June 7, 1921) 181 N. C. 621, 107 S. E. 505; *State v. Campbell*, (Dec. 21, 1921) 188 N. C. 911, 110 S. E. 86.

OREGON.—*State v. Smith*, (July 12, 1921) 199 Pac. 194, *Annotated* 16 A. L. R. 1220.

PENNSYLVANIA.—*Commonwealth v. Vigliotti*, (May 26, 1921) 115 Atl. 20.

SOUTH CAROLINA.—*State v. Hartley*, (Apr. 1, 1921) 115 S. C. 524, 106 S. E. 766.

TEXAS.—*Ex parte Gilmore*, (Dec. 1, 1920) 88 Tex. Cr. R. 529, 228 S. W. 199, *Rhg. denied* Feb. 23, 1921; *Franklin v. State*, (Jan. 12, 1921) 88 Tex. Cr. R. 342, 227 S. W. 486; *Banks v. State*, (Jan. 26, 1921) 88 Tex. Cr. R. 380, 227 S. W. 670, *Rhg. denied* Feb. 23, 1921; *Rozier v. State*, (Nov. 9, 1921) 234 S. W. 666, *Rhg. denied* Nov. 30, 1921; *Hardaway v. State*, (Ct. Cr. App. Jan. 4, 1922) 236 S. W. 467; *Russell v. State*, (Mar. 2, 1921) 88 Tex. Cr. 582, 228 S. W. 948; *Thomas v. State*, (Ct. Cr. App. Mar. 9, 1921) 232 S. W. 826, *Rhg. granted* June 22, 1921.

VIRGINIA.—*Allen v. Commonwealth*, (Jan. 20, 1921) 129 Va. 723, 105 S. E. 589; *Lowry v. Commonwealth*, (Jan. 19, 1922) 110 S. E. 256; *Pollard v. Commonwealth*, (Jan. 19, 1922) 110 S. E. 354.

WASHINGTON.—*State v. Turner*, (Mar. 29, 1921) 196 Pac. 638; *State v. Woods*, (June 21, 1921) 198 Pac. 737; *State v. Stephens*, (Aug. 12, 1921) 200 Pac. 310; *State v. Gibbons*, (Jan. 4, 1922) 203 Pac. 390; *State v. Cole*, (Jan. 26, 1922) 203 Pac. 942.

WEST VIRGINIA.—*State v. Knosky*, (Jan. 25, 1921) 87 W. Va. 558, 106 S. E. 642.

#### PERIODICALS

8 California Law Rev. 205; 10 Id. 70; 88 Central Law Journal 31; 90 Id. 397; 91 Id. 1, 205; 92 Id. 46; 19 Columbia Law Rev. 144, 21 Id. 818; 6 Cornell Law Quarterly 443; 33 Harvard Law Rev. 968; 34 Id. 317; 23 Law Notes 200; 25 Id. 126; 13 Maine Law Rev. 121; 18 Mich. Law Rev. 213; 19 Id. 329, 435, 647; 6 Va. Law Register (N.S.) 301; 8 Va. Law. Rev. 133.

federal and state jurisdictions, and the latter are arranged alphabetically according to states. For chronological purposes the date of each decision is given in the parenthesis following the case. The table is not offered as complete, but it contains the results of an attentive and, for the most part, unbroken search of the advance sheets as they have appeared. In addition to the cases, there is included similarly a list of articles, notes and comments in legal periodicals.

### I. SUGGESTED MEANINGS

No less than ten meanings for the term "concurrent power" have been suggested.<sup>6</sup> Some of these meanings vary from others only in slight particulars. Briefly stated, with short descriptive titles, the suggestions are:<sup>7</sup>

1. *Joint Power*: That it is a joint power, and congressional legislation under the amendment to be effective shall be approved or sanctioned by the several states.

2. *Divided Power*: That the power to enforce the amendment is divided between Congress and the several states along the lines which separate and distinguish foreign and interstate commerce from intrastate affairs.

3. *Action Within Different Areas*: That the concurrent powers are to be exerted in different areas (called "historical fields of jurisdiction"), and consequently cannot conflict each with the other.

4. *Substitute Action*: That an equal power is given to Congress and the states, not, however, to be concurrently exercised, but separately exercised, the inactivity of one to be supplied by the activity of the other.

5. *More Drastic Displacing Less Drastic Action*: That Congress and the states may both legislate under the amendment and whatever legislation, congressional or state, "is the most prohibitive, subserves best" and "displaces less restrictive legislation and becomes paramount."

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<sup>6</sup>Examples of definitions from standard dictionaries:

*Century*: Concurring, or acting in conjunction; agreeing in the same act; contributing to the same event or effect; operating with; coincident. Conjoined; joint; concomitant; coordinate; combined.

*Bowyer*: Running together; having the same authority; . . . such and such courts have concurrent jurisdiction,—that is, each has the same jurisdiction.

<sup>7</sup>The sources and discussion of the suggested meanings are dealt with on subsequent pages, see p. 464.

6. *Concurrent Action*: That concurrent action of Congress and the several states is necessary to enforce the prohibition, and that in the absence of such concurrent action no enforcing legislation can exist; congressional legislation not effective unless concurred in by state, and vice versa.

7. *United Action*: That there must be united action between Congress and the states, or at any rate concordant and harmonious action.

8. *United Administrative Action*: That the national and state administrative agencies are united in giving effect to the amendment and the legislation of Congress enacted to make it completely operative; in other words, concurrent power to enforce the amendment as the amendment is "defined and sanctioned" by Congress.

9. *Separate and Independent Action—Congressional Supremacy*: That concurrent action is not necessary, but Congress and the states may act separately and independently, the congressional action to be supreme over the state action in the event of conflict between the two.

10. *Separate and Independent Action*: That the concurrent power may be exerted by Congress or the states independently of each other, the validity of the action of one to be tested under the amendment without regard to the action of the other.

## II. "CONCURRENT POWER" IN JUDICIAL USAGE

Had the term "concurrent power" acquired an established meaning by judicial usage prior to the adoption of the eighteenth amendment? If so, is it to be read into the amendment? To both of these questions an affirmative answer has been given, particularly by the proponents of the ninth suggested meaning. That the term "concurrent power" has appeared again and again in the language of the Supreme Court of the United States is not to be denied, but that it has acquired an established meaning may be questioned.

Perhaps the term "concurrent power" appears more often in cases involving the interstate commerce clause than in any other class of cases. In *Gibbons v. Ogden*,<sup>\*</sup> Mr. Oakley, on behalf of the state of New York, made what is probably the most elaborate argument yet reported on concurrent powers. He undertook to

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<sup>\*</sup>(1824) 9 Wheat. (U. S.) 1, 6 L. Ed. 23.

demonstrate that the power to regulate interstate commerce was concurrent. As examples of concurrent powers he enumerated, among others, the power of taxation which he said was "admitted on all hands to be concurrent," and the power to provide for the punishment of counterfeiting.

Mr. Chief Justice Marshall, in declaring the state law invalid in that famous decision, did not accept the argument so advanced. He said that "when a state proceeds to regulate commerce with foreign nations or among the several states, it is exercising the *very power that is granted to Congress* and is doing the very thing which Congress is authorized to do."

*Cooley v. The Board of Wardens*,<sup>9</sup> however, is relied upon for the view that there is a concurrent power over interstate commerce. The state pilotage laws in question were described by counsel supporting their validity as "local in character and object" and were asserted to be "an essential exercise of one branch of the police power of the state to aid and not to regulate commerce." Elaborating the argument in reference to the police power, counsel referred to it as "inherent or *concurrent*;" again, in reference to the effect of congressional legislation, as "inherent or *co-existent*;" still again, that such laws have been recognized as "justified either by the inherent or *co-existent* power" of the states. While "inherent" was used in each of the three groupings, "concurrent" in the first was replaced by "co-existent" in the others and with no apparent difference in meaning.

Mr. Justice Curtis wrote the majority opinion upholding the pilotage laws as "enacted by virtue of a power residing in the state." He did not use the word "concurrent" in his opinion. "The grant of commercial power to Congress," he wrote, "does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter," and diversities of opinion "have arisen from the different views taken of the nature of this power." And continuing,

"But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. . . . Either absolutely to affirm, or deny, that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them,

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<sup>9</sup>(1851) 12 How. (U. S.) 299, 13 L. Ed. 996.

what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain."<sup>10</sup>

In *Gilman v. Philadelphia*<sup>11</sup> it was said that "the states may exercise concurrent or independent" power in all cases but three: (1) where the power is lodged exclusively in the federal constitution. (2) Where it is given to the United States and prohibited to the states. (3) Where, from the nature and subjects of the power, it must necessarily be exercised by the national government exclusively."

Notwithstanding all this, is it correct to say that there is a concurrent power to regulate interstate commerce? Under the constitution there is but one power on that subject and that power is delegated to Congress. It is submitted that what is usually referred to as concurrent power over interstate commerce is not a concurrent power at all but rather two separate and distinct powers: one federal, i. e., power to regulate interstate commerce, the other state, i. e., police power. The former is exercisable by Congress, *e.g.*, with respect to commodities in interstate commerce, and the latter by the states, *e.g.*, with respect to commodities within their territorial jurisdiction. But obviously a commodity may be, at the same time, within a state's territorial jurisdiction and in interstate commerce. In other words, the *subject matter* is so situated that two powers may be said to converge upon it. If it cannot obey both, it must obey the stronger—which, under the sixth article of the constitution, is the federal law. It is believed that this is in harmony with the distinction drawn in *Cooley v. Board of Wardens* between the nature of the *power* and the *subject matter* upon which it operates, and is supported by the guarded way in which the court, as in *Robbins v. Shelby County Taxing District*,<sup>12</sup> speaks of the "established principle" that the "only way in which commerce between the states can be legiti-

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<sup>10</sup>While several remarks by the court suggest that the states' power was different from, though similar to, and coexisting with, that of Congress, other remarks treat it as an exercise of the same power, and still another declares the pilotage law to be "a regulation of commerce" within the meaning of the commerce clause.

<sup>11</sup>(1866) 3 Wall. (U. S.) 713, 18 L. Ed. 96.

<sup>12</sup>From the context it appears that "concurrent" and "independent" are used as expressing the same idea.

<sup>13</sup>(1887) 120 U. S. 489, 30 L. Ed. 694, 7 S. C. R. 592.

mately affected by the state laws is when" a state makes provision for safety, health, comfort, etc., "by virtue of its police power, and its jurisdiction over persons and property within its limits." State police regulations may "incidentally affect commerce." It is quite a different thing to say the states have concurrent power to regulate interstate commerce.

Other cases also speak in terms of concurrent power. As noted above, the argument on behalf of the state laws in *Gibbons v. Ogden* proceeded largely upon the assumption that the power of taxation was a power admitted on all hands to be concurrent. Mr. Marshall announced a contrary conclusion in that case, namely, that the power to tax is the power which each government possesses, a separate and distinct power indispensable to each, and that when "each government exercises the power of taxation, neither is exercising the power of the other."

In *McCulloch v. Maryland*,<sup>14</sup> speaking more of the exercise than of the nature of the power, Mr. Marshall said:

"That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by 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."

Seventy odd years later, the court, in *Pollock v. Farmers' Loan and Trust Company*,<sup>15</sup> declared that by the constitution the states "gave to the nation the concurrent power to tax persons and property directly." The changing terminology is interesting: separate and distinct powers, "concurrently exercised," "concurrent power." The notion of federal supremacy does not prevail here, yet the term concurrent is applied.

In the matter of bankruptcy, the supreme court,<sup>16</sup> through Mr. Chief Justice Marshall, speaks of "this concurrent power of legislation."<sup>17</sup>

<sup>14</sup>(1819) 4 Wheat. 316, 4 L. Ed. 579.

<sup>15</sup>(1895) 157 U. S. 429, 39 L. Ed. 759, 15 S. C. R. 673; 158 U. S. 601, 39 L. Ed. 1108, 15 S. C. R. 673, 912.

<sup>16</sup>*Sturges v. Crowninshield*, (1819) 4 Wheat. 122, 4 L. Ed. 529.

"It is manifest to us that the explicit words of section 2 vesting 'concurrent power' to enforce prohibition both in Congress and in the states means something more than the 'concurrent power' to which reference is made in *Sturges v. Crowninshield* as existing without express words." *Commonwealth v. Nickerson*, (1920) 236 Mass. 281, 128 N. E. 279.

<sup>17</sup>The control of the election of senators and representatives has been said to involve a concurrent power, with state action yielding to Congressional enactment. *Ex parte Siebold*, (1880) 100 U. S. 371, 25 L. Ed. 717.

Speaking generally on the subject of concurrent power the court had said in *Southern Ry. Co. v. Reid*:<sup>18</sup> "It is well settled that if the state and Congress have a concurrent power, that of the state is superseded when the power of Congress is exercised." And to the same effect Mr. Justice Story, concurring in *Houston v. Moore*:<sup>19</sup>

"In cases of concurrent authority where the laws of the state and of the union are in direct and manifest collision on the same subject, those of the union being 'the supreme law of the land,' are of paramount authority, and the state laws, so far, and so far only, as such incompatibility exists, must necessarily yield."

In all these cases, however, where the court employed the term "concurrent power," this is to be remembered: the court was not defining the term as part of the constitution for the very simple and conclusive reason that the term at that time was not a part of the constitution. The court was using the term descriptively—generally, but not always,<sup>20</sup> as a convenient means of describing a situation where two sovereignties could act in respect of the same subject-matter, but where, under the constitution as it then stood, particularly with reference to the sixth article, the result was that the federal would prevail over state action.<sup>21</sup> At the same time, the court used the term to describe other situations, e. g., taxation, where that result did not follow. Nevertheless, it may be admitted frankly that the element of state subserviency running through most of the decisions where the court speaks in

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The subject-matter here is peculiarly federal: No such offices exist apart from the constitution, and the states had no power in that regard except as it was given to them by the constitution. 22 *Columbia Law Review* 54.

The states in a sense were designated as the agents of the United States to prescribe the "times, places and manner" of holding elections, but by the express terms of the constitution Congress may at any time by law make or alter such regulations. The state's power is subordinate and dependent by the specific language above quoted as to the superior right of Congress to alter the state regulations. Nevertheless, the court called this "concurrent power".

<sup>18</sup>(1912) 222 U. S. 424, 56 L. Ed. 257, 32 S. C. R. 140.

<sup>19</sup>(1820) 5 Wheat. (U. S.) 1, 5 L. Ed. 19.

<sup>20</sup>"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." O. K. Cushing in 8 *Calif. Law Rev.* 205.

<sup>21</sup>"The Supreme Court decisions . . . concerning the supremacy of the federal power have reference to subjects concerning which the power of legislation has been, expressly or by necessary implication, granted to the federal government by the United States constitution, so as to lodge such power in the federal government exclusively when it has taken possession of the field of legislation." *Allen v. Commonwealth* (Va. 1921) 105 S. E. 589.

terms of "concurrent power" furnishes considerable support for the ninth suggested meaning, that, in case of conflict, state law yields to federal law on the same subject.

But there are other cases in which the Supreme Court or its justices have had something to say about the meaning of concurrent power. In the *Passenger Cases*<sup>22</sup> there was no opinion by the court, but on the contrary a group of opinions by those concurring in the judgment and also a group of dissenting opinions. Among the former was Mr. Justice McLean, who declared that: "A concurrent power excludes the idea of a dependent power." This was quoted by Mr. Justice McKenna, dissenting in the *National Prohibition Cases*,<sup>23</sup> who added that "opposing laws are not concurring laws, and to assert the supremacy of one over the other is to assert the exclusiveness of one over the other, not their concomitance."

While, as said above, the court has used the term "concurrent power" descriptively and was not called upon, prior to the eighteenth amendment, to define it as a term of the constitution, there is a group of cases where the court has been compelled to define the term concurrent jurisdiction<sup>24</sup> in written documents and compacts. *Wedding v. Meyler*<sup>25</sup> is one of this group. There the court had before it a provision in the Virginia compact of 1789 that the jurisdiction of the proposed state of Kentucky on the Ohio River should be "concurrent only with the states which may possess the opposite shores of the said river." The Court speaking through Mr. Justice Holmes said:

"Concurrent jurisdiction, properly so called, on rivers, is familiar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase."<sup>26</sup>

<sup>22</sup>(1849) 7 How. 283, 470, 559, 12 L. Ed. 702.

<sup>23</sup>See footnote five for citation.

<sup>24</sup>The difference in terms, concurrent *jurisdiction* instead of concurrent *power*, does not seem to be material.

<sup>25</sup>"Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on, and effect laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judicial and executive—as that possessed by Kentucky over so much of the Ohio River as flows between them." Robertson, C. J., in *Arnold v. Shields*, (1837) 5 Dana (Ky.) 18.

<sup>26</sup>(1904) 192 U. S. 573, 48 L. Ed. 570, 24 S. C. R. 322.

<sup>27</sup>In *Nielson v. Oregon*, (1909) 212 U. S. 315, 53 L. Ed. 528, 29 S. C. R. 383, involving the construction of an act of Congress conferring concurrent jurisdiction upon Oregon and Washington, the court restated and reaffirmed the doctrine of the *Wedding* case, but, pointing out the un-

Finally, *Fox v. Ohio*<sup>27</sup> should be mentioned, not because it specifically decided anything concerning concurrent power but because the matter involved in the case and the reasoning of the court have been referred<sup>28</sup> to as illustrating the congressional intent in inserting "concurrent power" in the eighteenth amendment. The case sustains the validity of a state law punishing the offense of circulating counterfeit coin of the United States. The court treats the offense against the state as distinct from any offense against the United States and the decision generally has been accepted as establishing the proposition that, whatever one might think of the policy of double punishment therefor, the same act may constitute an offense against both the state and the United States and be punishable by each.<sup>29</sup>

From the foregoing considerations, it does not appear that the term "concurrent power" had acquired an established meaning by judicial usage. Consequently there is nothing conclusive from this source to be read into the eighteenth amendment.<sup>30</sup>

### III HISTORY OF THE AMENDMENT

Is a meaning for the term "concurrent power" to be found in the movements resulting in the adoption of the amendment, or in its legislative history?

Police control over traffic in intoxicating liquors (barring such limitations as were made in cases under the original package rule as applied to interstate commerce and other limitations of jurisdiction) was originally in the states and reserved to them under the tenth amendment.<sup>31</sup> The history of the prohibition movement has not disclosed any appreciable desire or willingness on the part

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doubted purpose of the grant, declined to apply the doctrine on the facts of the case then in hand.

<sup>27</sup>(1847) 5 How. (U. S.) 410, 12 L. Ed. 213.

<sup>28</sup>Mr. Webb, in charge of the Resolution proposing the Amendment, called attention to the counterfeiting cases in explaining the effect of, and reasons for, the introduction of the words "concurrent power." See page 463.

<sup>29</sup>See also *Gilbert v. Minnesota*, (1920) 254 U. S. 325, 65 L. Ed. 146, 41, S. C. R. 125, approving the reasoning in *State v. Holm*, (1918) 139 Minn. 267, 166 N. W. 181.

<sup>30</sup>"We are unable to deduce from these decisions a universal definition of 'concurrent,' or one so well settled as to lead to the conviction that it was employed in the Eighteenth Amendment in reliance upon a judicially established meaning." *Commonwealth v. Nickerson*, (1920) 236 Mass., 281, 128 N. E. 279.

<sup>31</sup>*South Carolina v. United States*, (1905) 199 U. S. 437, 50 L. Ed. 261, 26 S. C. R. 110; *Commonwealth v. Nickerson*, (1920) 236 Mass. 281, 128, N. E. 273.

of the states to surrender this power. To the contrary, the states were engaged almost continuously in efforts to find ways and devise methods whereby they could strengthen their own power and carry it effectively into execution.<sup>32</sup> In furtherance of these efforts the states applied to Congress for such aid as the general legislature could give them. They secured the Wilson Act,<sup>33</sup> which declared intoxicating liquors to be subject to the state's police power upon arrival in the state, and the Webb-Kenyon Act,<sup>34</sup> the effect of which was declared judicially<sup>35</sup> to divest intoxicating liquors of their interstate character in certain cases so that they fell within a state's jurisdiction as soon as they crossed the state line, notwithstanding the incompleteness of the actual interstate transaction. With these two acts, particularly the latter, on the books and their validity sustained by the Supreme Court, the states were, generally speaking, enabled to get at and control the liquor traffic, even to the extent of prohibiting the introduction of liquors into the states. Power in this respect, however, rested not on solid constitutional grounds but rather on the insubstantial and more or less ephemeral basis of congressional permission. Congress enacted the Webb-Kenyon Act; the same body could repeal it. Sentiment and public opinion were running high; the time was ripe to crystallize it in lasting form. While they were about the business, the states desired to make a thorough-going and permanent job of it. Nothing less than a constitutional amendment would do.<sup>36</sup> The eighteenth amendment followed.

Looking at the matter from the point of view of the states and what they were seeking to do, it may be said that the power which the states exercise in the limitation of traffic in intoxicating liquors is still the power originally possessed and subsequently reserved. In other words, there is no change in either the source<sup>37</sup> or the nature of the states' power. Excepting the re-acquisition of power presently to be noticed, the states in adopting the eighteenth

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<sup>32</sup>For an account of the successive efforts of the states to control the liquor traffic, see 5 MINNESOTA LAW REVIEW 102-110.

<sup>33</sup>26 Stat. 313, Act of August 8, 1890.

<sup>34</sup>37 Stat. 699, Act of March 1st, 1913.

<sup>35</sup>Clark Distilling Co. v. Western Maryland R. R. Co., (1917) 242 U. S. 311, 37 S. C. R. 180, 61 L. Ed. 326.

<sup>36</sup>Mr. Webb in closing the debate on the constitutional amendment in the House, said: "I am filled with unspeakable happiness when I realize that we now have the traffic back to its last trench . . . and I am praying that one more drive will result in ending the business on our shores forever." 56 Cong. Rec. 469.

<sup>37</sup>See page 478.

amendment appeared to have intended only to accept and admit within their own borders the federal government henceforth as a force in controlling the liquor traffic.<sup>38</sup> Nowhere, it should be observed, is there serious consideration of the proposition, much less acquiescence therein, that the states might be ousted or excluded from their own power and jurisdiction by the newly admitted force, the federal government.

It is worth bearing in mind that the amendment gave the federal government no power over intoxicating liquor traffic generally, but only in so far as intoxicating liquors were manufactured, etc., for *beverage purposes*,<sup>39</sup> so that the states' power over all other phases of the traffic—e. g., for sacramental, medicinal and mechanical purposes, is unaffected by the eighteenth amendment.

Not only did the states surrender none of their existing power over the intoxicating liquor traffic, but they reacquired some power previously surrendered. Through the medium of the commerce clause the states originally surrendered, delegated to Congress, their power over interstate and foreign commerce. Under the eighteenth amendment, however, the states are authorized to enforce by appropriate legislation the prohibition against "transportation of intoxicating liquor within, the *importation* thereof into, or the *exportation* thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." That is to say, the commerce clause notwithstanding, the states may now control the transportation, importation and exportation of intoxicating liquors for beverage purposes.<sup>40</sup> Inasmuch as control must be by "appropriate legislation," it would seem that no individual state could legislate on interstate or foreign commerce generally, but would have power only over transportation in and importation into or exportation from that particular state. Even so this establishes constitutionally one phase of the power which the states

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<sup>38</sup>"There was a surrendering by the states of the power to permit the liquor traffic but no diminution of their power to prohibit it." Ex parte Crookshank, (1921) 269 Fed. 980.

<sup>39</sup>The extent of the power conferred upon Congress was vigorously debated in the Senate in relation to the so-called Willis-Campbell Beer Bill. This bill was aimed at prescriptions of beer for *medicinal* purposes. It is now law. Pub. No. 96, 67th Cong. approved Nov. 23, 1921.

<sup>40</sup>There seems to be a kind of quid pro quo effect in the readjustment of enforcing power between Congress and the states. Bearing in mind that the eighteenth amendment is concerned only with intoxicating liquors for beverage purposes, this interchange takes place: the states admit the federal government into the field of intrastate enforcement, and the federal government, popularly speaking, admits the states into the field of interstate and foreign commerce enforcement.

so long endeavored to exercise, namely, to stop the introduction of intoxicating liquors into the state, and which they had been permitted to enjoy under the Webb-Kenyon Act.<sup>41</sup>

Now for the legislative history of the eighteenth amendment or at least of the enforcing section of it.<sup>42</sup>

The enforcing section as embodied in the original resolution was as follows:

"The Congress shall have power to enforce this article by appropriate legislation, and nothing in this article shall deprive the several states of their powers to enact and enforce laws prohibiting the traffic in intoxicating liquors."<sup>43</sup>

As amended and passed by the Senate it read as follows:

"The Congress shall have power to enforce this article by appropriate legislation."<sup>44</sup>

And as further amended and passed by the House and concurred in by the Senate, and as ratified by the states, it read as follows:

<sup>41</sup>It is interesting to observe a state still relying on the Webb-Kenyon Act. *Pollard v. Commonwealth*, (Va. 1922) 110 S. E. 354.

If the amendment includes importation and exportation only in the technical sense applying exclusively to foreign commerce, it might be necessary for the states to rely on the Webb-Kenyon Act in the matter of interstate commerce.

<sup>42</sup>The successive steps in the history of the adoption of the eighteenth amendment from the day of its introduction in the Senate as Senate Joint Resolution 17 to its being proclaimed by the secretary of state are:

April 4th, 1917, S. J. Res. 17 introduced by Senator Sheppard of Texas and referred to the Senate Committee on the Judiciary. 55 Cong. Rec. 197, 198.

June 11th, 1917, reported, with amendments, (Sen. Rep. 52, 65th Cong. 1st Ses.) by the Senate Committee on the Judiciary. 55 Cong. Rec. 3438.

July 30th-August 1st, 1917, debated and, as amended, passed by the Senate. 55 Cong. Rec. 5548-60, 5585-5627, 5636-66. Four unsuccessful attempts had been made during July to raise the resolution for consideration in the Senate and it was not until July 26th that a unanimous consent agreement could be obtained for debate and a vote. 55 Cong. Rec. 5522-24.

August 3d, 1917, referred to the House Committee on the Judiciary. 55 Cong. Rec. 5723.

December 14, 1917, reported, with amendments, (H. Rep. 211, 65th Cong. 2d Ses.), by the House Committee on the Judiciary. 56 Cong. Rec. 337.

December 17, 1917, debated and, as amended, passed by the House. 56 Cong. Rec. 422-470.

December 18, 1917, Senate concurred in House amendment. 56 Cong. Rec. 477-478. Examined and signed by the vice-president, (56 Cong. Rec. 490) and by the speaker of the House. 56 Cong. Rec. 529.

December 19th, 1917, deposited in the Department of State.

January 16, 1919, ratified by the states.

January 29, 1919, proclaimed by the secretary of state.

<sup>43</sup>55 Cong. Rec. 5548.

<sup>44</sup>55 Cong. Rec. 5664. The committee declared (Senate Report 52, 65th Cong. 1st Ses.) that the substance of the proposed amendment had been before every congress since and including the 44th.

"The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."<sup>56</sup>

Taking the meaning of the term "concurrent power" to be in doubt, the familiar doctrine restated in the recent Wisconsin rate case<sup>57</sup> may be invoked: recourse may be had to committee reports and statements by those in charge of the bill to ascertain its proper construction.

The reports of both the Senate and the House make an inadequate presentation of the matter in regard to the effect of the proposed amendment. The burden of the reports is that, the people of the country being so insistent about it, Congress really ought to submit the proposed amendment to them and thus give them an opportunity to vote on the prohibition question.

Without the statement of any reasons therefor the Senate Committee on the Judiciary, to which was referred the original resolution introduced by Senator Sheppard, struck from the enforcing section the words "and nothing in this article shall deprive the several states of their powers to enact and enforce laws prohibiting the traffic in intoxicating liquors," leaving the section to read, "the Congress shall have power to enforce this article by appropriate legislation."<sup>58</sup> The effect of this amendment would seem to be plain. The analogy of the thirteenth, fourteenth and fifteenth amendments, with substantially identical enforcing clauses, would lead to the conclusion that the power would be delegated to Congress—in other words, that the states would be handing over to Congress the problem of suppressing the traffic in intoxicating liquors. True, it was denied on the floor that the amendment would have any such effect and there were extracts in the committee report tending to support that denial. The amendment was passed by the Senate in the form in which it was reported by the committee. Thus the amendment at this stage appeared to involve a surrender of state power to Congress.

But the House declined to accept the amendment as passed by the Senate. Like the Senate committee the House committee disclosed no reasons for their action but merely reported the proposal amended to read "The Congress and the several states shall have concurrent power to enforce this article by appropriate legisla-

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<sup>56</sup>56 Cong. Rec. 477-478.

<sup>57</sup>Railroad Commission of Wisconsin v. Chicago, B. & Q. Ry., 42 S. C. R. 232, (decided February 27, 1922).

<sup>58</sup>Senate Report No. 52, 65 Cong. 1st Ses.

tion."<sup>48</sup> In that form it passed the House, was concurred in by the Senate, and ultimately ratified by the states.

One thing, then, seems clear from the committee reports and action thereon: the amendment does not in and of itself involve surrender of state power.

Portions of the Senate report indicate quite definitely the view that the purpose of the amendment was to have both the federal and state governments using their power at the same time and in the same territory to eradicate the liquor traffic. Thus the Senate report, quoting from an earlier Senate report on the same subject said:

"National law, enacted under an amended constitution, could prohibit importation, could prohibit transportation and sale, and in concurrence with like legislation by the states (the union of the power of the nation and the power of the states), thus securing the entire strength of the whole community, could soon put an end to the traffic."

Again quoting from the same report:

"The timorous, uncertain, and ineffectual efforts of the states should not be relied upon. It is indispensable for the very existence of their police powers, . . . that the powers of society, as a whole, operating in and through the national functions, should re-enforce, protect, and preserve the police powers of the state."

While the force of the argument of the two quotations which are reproduced seems somewhat at variance from the apparent effect of the amendment which the report was supporting, they nevertheless indicate a very clear conviction on the part of the Senate committee that the police power of the states was not being destroyed or surrendered, but that on the other hand it was being protected and preserved, and, through the introduction of the federal enforcing power, was being re-enforced. Hence, there is at least inferential support in the reports for the conclusion that the states' police power over the intoxicating liquor traffic is not even superseded or impaired by the actual exercise by Congress of the power conferred by the amendment.

Statements made on the Senate and House floors by those in charge of the resolution confirm the foregoing conclusions. Thus, even in the Senate, with the enforcing clause as above mentioned, Senator Sheppard, author and proponent of the measure, said:

"As I introduced the joint resolution originally, I will say

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<sup>48</sup>House Report 211, 65 Cong. 2nd Ses.

that the language [and nothing in this article shall deprive the several states of their powers to enact and enforce laws prohibiting the traffic in intoxicating liquors] stricken out by the committee was added by me in order to emphasize and make plain what was really an existing condition. The Judiciary Committee, with practical unanimity, said that the states would not be deprived of the power to enact and enforce laws prohibiting the traffic in intoxicating liquors, and therefore did not deem it advisable to place it in the joint resolution. I trust, therefore, that the amendment will be adopted."<sup>95</sup> . . . "If the liquor traffic is to be eradicated, the aid of the federal government must be invoked. . . . What nation widders want is to stop this superior control by the federal government and compel it to join with the states in eradication of the liquor traffic on equal terms. . . . The nation-wide amendment puts the states in a far more dignified position in regard to the liquor traffic than that they now occupy. At present the power of the states to authorize, control, and regulate is secondary to that of the federal government. The nation-wide amendment clothes the federal government with a jurisdiction and power to prohibit and does not in any way deprive the State of an equal power of prohibition which they already exercise within their respective borders. It deprives both the federal government and the states of the power to authorize the liquor traffic, treating the nation and the states absolutely alike."<sup>96</sup>

In the House, Mr. Webb, Chairman of the Judiciary Committee and in charge of the resolution on the floor, opened the final debate by explaining the purpose and result of his committee's amendments:

"The first amendment adopted in the Judiciary Committee was the new section two. As it passed the Senate it provided that the 'Congress should have power to enforce it by appropriate legislation. Most of the members, including myself, of the Judiciary Committee, both wet and dry, felt that there ought to be a reservation to the state also of power to enforce their prohibition laws. And, therefore, we amended the resolution by providing that the Congress 'and the several states' shall have 'concurrent' power to enforce this article by appropriate legislation. . . I believe, regardless of our division on the dry and wet question, every Member will agree with us that this is a wise and proper amendment. Nobody desires that the federal government shall take away from the various states the right to enforce the prohibition laws of these states."

"I recall the crime of counterfeiting. It is peculiarly a national offense, because it is offensive to the integrity of the national money, and yet nearly all the states have statutes condemning and

<sup>95</sup>55 Cong. Rec. 5640.

<sup>96</sup>55 Cong. Rec. 5652.

punishing counterfeiting. But there the jurisdiction is concurrent. . . We thought it wise to give both the Congress and the several states concurrent power to enforce this article."<sup>51</sup>

During the debate Mr. Webb was interrogated by several members as to the effect of the introduction of the term 'concurrent power' in the amendment. In reply to the inquiry, "Suppose the state of Ohio should by its legislature pass a law or laws for the enforcement of this constitutional amendment. Suppose that law was not in conformance with the regulations as passed by Congress for the enforcement of this same provision of the constitution. Which of the two powers would be supreme?"

He said:

"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."<sup>52</sup>

Mr. Webb went further, on this phase, when he was asked what he thought of the "exercise of power by the one excluding the exercise of power by the other:"

"I do not think the punishment of the offense by the state governments would be followed by the punishment of the same offense by the federal government, or vice versa. . . . But one punishment ought to be sufficient, although the offense may be committed against two sovereignties. Now having concurrent power, I think the federal government can not do it if the state government does it, and vice versa."<sup>53</sup>

To the question, "Suppose there is a conflict . . . between the laws of the state and the laws of the federal government?" Mr. Webb replied:

"There would be none, because there would be no conflict of jurisdiction."<sup>54</sup>

All in all, then, it appears to be the consensus of committee reports and congressional debate, confirmatory of the indications found in the history of the prohibition movement, that the eighteenth amendment was not intended, either by itself or as a result of congressional action in pursuance of it, to destroy, alienate, or impair, but rather to preserve, supplement, and reinforce, the police power of, and its effective exercise by, the states.

#### IV. CONSIDERATION OF SUGGESTED MEANINGS

The first and second suggested meanings were rejected expressly by the United States Supreme Court in the eighth conclu-

<sup>51</sup>56 Cong. Rec. 423-24. See also 56 Cong. Rec. 464 for similar statements by Mr. Graham, floor manager for the opposition in the House.

<sup>52</sup>56 Cong. Rec. 424. <sup>53</sup>Id. <sup>54</sup>Id.

sion of the *National Prohibition Cases*. In fact this double negation represents a large part of what the court said on the meaning of the term "concurrent power."<sup>55</sup> True, Mr. Chief Justice White, Mr. Justice McKenna, and Mr. Justice Clarke, in opinions filed with the conclusions of the court, expressed their individual views on the subject, as will be shown presently. Mr. Justice McReynolds, while concurring in the conclusions of the court, declined to commit himself further as to the meaning of the term.

The separate opinions of Mr. Chief Justice White, Mr. Justice McKenna, and Mr. Justice Clarke, however indicated not alone the construction which they deemed justified, but disclosed their rejection of certain suggested meanings. Thus Mr. White deemed the third meaning unsound. As a matter of fact, this third suggestion, made and supported on behalf of New Jersey does not seem essentially different from the second. The third suggested meaning deals with a division of power between the federal and state governments in "historical fields of jurisdiction," where-

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<sup>55</sup>It will be recalled that in the *National Prohibition Cases* the court did not formulate an opinion but announced only the conclusions. Of the eleven conclusions so announced, five are related to the subject matter of this discussion and are as follows:

6. The first section of the amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act, whether by Congress, by a state Legislature, or by a territorial assembly, which authorizes or sanctions what the section prohibits.

7. The second section of the amendment—the one declaring "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation"—does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means.

8. The words "concurrent power," in that section, do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them.

11. While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (title 2, § 1), wherein liquors containing as much as one-half of 1 per cent, of alcohol by volume and fit for use for beverage purposes are treated as within that power. *Jacob Ruppert v. Caffey*, (1920) 251 U. S. 264, 40 S. C. R. 141, 64 L. Ed. 260."

as the second contemplates a division along the lines which separate interstate and intrastate affairs. Probably both involve the same idea, the opinion of Mr. White being but an elaboration, of the terse conclusions announced by the court. The very idea of separate and distinct fields or areas wherein the federal and state power could come into play, whether the separation be along historical lines or as between interstate and intrastate affairs, seems in conflict with any idea of concurrency under the amendment (unless it be mere concurrence in time, contemporaneous), and it was to be expected that such a construction would be denied.

The fourth and fifth suggested meanings were discussed by Mr. Justice McKenna, and, scant importance being accorded them, they were rejected by him. He does not say specifically by whom these contentions were advanced, though he does suggest that the fifth was one of the "intimations" made by the government. The fourth does not commend itself as having merit for it would, in fact, reduce the business of enforcing the amendment to a kind of shuttle-cock affair. The fifth suggestion, however, while on its face apparently open to the same criticism as just expressed with respect to the fourth, is susceptible of an interpretation not without some weight and perhaps involving some difficulty for the court. Congress declares, as in the Volstead Act,<sup>55\*</sup> that intoxicating liquors shall include beverages containing one-half of one per cent or more of alcohol, and the Supreme Court has sustained that declaration. Three views have been expressed as to the basis of this congressional legislation. First, that in making such a declaration Congress was but writing into the statute the common understanding of what the term "intoxicating" meant in the amendment itself.<sup>56</sup> Second, that the term "intoxicating" not having a definite meaning must be defined in order to give it any effect, and that it is the function of Congress to define it.<sup>57</sup> Third,

<sup>55\*</sup>41 Stat. 305; also referred to herein as the National Prohibition Act.

<sup>56</sup>House Report No. 91, 66th. Cong. 1st Ses., where the committee, reporting the Volstead Bill, referred to numerous state constitutional amendments on prohibition, and declared: "This clearly argues that as this phrase [intoxicating liquor] is understood in those amendments it includes all liquor that contains any alcohol in excess of one-half of one per cent." Similar reference was made to prohibition laws of most of the states, and the statement made: "No one who supported this [eighteenth] amendment had in mind that there could be any question as to the meaning of the term."

See *Ruppert v. Caffey*, (1920) 251 U. S. 264, 64 L. Ed. 260, 40 S. C. R. 141 for a survey of the liquor laws of the states, in the prevailing opinion by Mr. Justice Brandeis.

<sup>57</sup>House Report No. 1143, 65th. Cong. 3rd. Ses. House Report No. 91,

that irrespective of whether liquor with the specified content is or is not intoxicating, Congress may exercise an incidental control over it if necessary effectually to enforce the amendment as to liquors actually intoxicating.\* The difficulty involved in the fifth suggested meaning arises in connection with the second view just stated. Notwithstanding the contention that it is a congressional function to define the terms of the constitution, it is safe to say that the Supreme Court, while admitting to Congress a reasonable latitude in that field, is not bound by any definition ascribed to a term by Congress. The ultimate decision as to the meaning of the constitution rests with the Supreme Court, though as a matter of fact the court may be influenced strongly by the judgment of Congress in arriving at a conclusion as to what the constitution does mean. Now, if the court, even when guided by the declarations of Congress or otherwise, has reached the conclusion that liquor containing one-half of one per cent of alcohol is intoxicating, it would seem that a term of the constitution has been defined, that the court has concluded a question of fact. If the court sustains laws prescribing a decreasing alcoholic content, the meaning of the word "intoxicating" in the eighteenth amendment is being restricted gradually to a more drastic definition. In this sense it may be said that the more drastic tends to displace the less drastic.

The sixth suggested meaning was rejected by Mr. Chief Justice White as practically nullifying the amendment, but accepted by Mr. Justice Clarke as an appropriate interpretation. This suggestion, notwithstanding its distinct phraseology, seems to be not unlike the first suggestion, which, as seen above, was rejected by the court in the *National Prohibition Cases*. Evidently Mr. Clarke treats it as similar to the first for in one place he speaks of concurrent power as being a joint power, and he dissents from that conclusion which rejects the joint power suggestion.

The seventh suggested meaning was offered by Mr. Justice McKenna as a proper construction to be put upon the amendment. When one seeks to analyze this proposal of "united action," by Congress and the states, which must be at once harmonious and

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66th. Cong. 1st Ses. Concurring opinion of the Chief Justice in the National Prohibition Cases. See also, the opinion of Chief Justice White in *Clark Distilling Co. v. Maryland Ry.*, (1917) 242 U. S. 311, 61 L. Ed. 376, 37 S. C. R. 180.

\*House Report No. 1143, 65th. Cong. 3rd. Ses. House Report No. 91, 66th. Cong. 1st Ses. See also, eleventh conclusion in footnote 55 and case there cited.

concordant, he finds himself with more terms to define than the amendment itself contains, and terms at that not less difficult, perhaps, to reduce to concrete meanings. There is, however, some similarity between this view and the concurrent action of the sixth proposal and the joint power of the first proposal, and presumably something of that nature was in Mr. Justice McKenna's mind, for he spent considerable effort in combating the argument of the Chief Justice that to require concurrent action is in effect to nullify the amendment. Mr. McKenna did not consider that it would have any nullifying effect.<sup>59</sup>

Mr. Chief Justice White also stated what he conceived to be the true construction of the amendment. In substance his construction is the eighth suggested meaning. Where Mr. Justice McKenna suggested united action between Congress and the states, the Chief Justice proposed united *administrative* action. The distinction to Mr. White was sharp and controlling. It rested upon a doctrine which has appeared before in Mr. White's reasoning,<sup>60</sup> namely, that Congress has the power to define the terms of the constitution. The doctrine as applied here works out much in this way: The constitution prohibits the sale, manufacture, etc., for beverage purposes of intoxicating liquors, and it is the function of Congress to define the constitution; it is then, a congressional affair to say what is and what is not intoxicating; moreover, it is for Congress to provide the substantive rules for making the amendment completely operative; and *thereafter* it is competent for the states to step in and through their administrative agencies assist in enforcing the amendment as so "defined and sanctioned" by Congress. This view, to say the least of it, minimizes the power of the state over the liquor traffic and would seem to reduce the state to a condition of helplessness in the event (improbable but not impossible) Congress did not define or give its sanction to the amendment. It runs counter to what, according to the history of the times and the record of congressional consideration, the states were seeking to obtain.<sup>61</sup>

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<sup>59</sup>See 19 Mich. Law Rev. 329 for discussion of Mr. Justice McKenna's view.

<sup>60</sup>Particularly in *Clark Distilling Co. v. Maryland Ry.*, (1917) 242 U. S. 311, 61 L. Ed. 376, 37 S. C. R. 180.

<sup>61</sup>Mr. White's view apparently has been accepted by a California court (*Carse v. Marsh*, (1921) 36 Cal. App. Dec. 73 see 10 Calif. Law Rev. 70). It is cited approvingly by the Connecticut court (*State v. Ceriani*, (1921) 96 Conn. 130, 113 Atl. 316) but seems to be rejected by the Montana court (*State v. Dist. Ct.* (1920) 58 Mont. 684, 194 Pac. 308).

The two remaining suggested meanings, the ninth and tenth, are the ones most frequently encountered. In fact, they, together with the first, constitute, according to some authorities,<sup>52</sup> the only plausible interpretations of the term "concurrent power." Of these it already has been seen that the first was rejected by the Supreme Court in the *National Prohibition Cases*. While neither of the others has yet received the approval or disapproval of the Supreme Court, both have been subjected to the most exhaustive examination and discussion by other courts, both state and federal. This is especially true of the state courts, and for a plain reason: the state courts, called upon to interpret and apply local prohibition laws, necessarily must decide whether and to what extent the local laws are affected by the eighteenth amendment and congressional legislation in pursuance of it.

State courts have been challenged at the very outset on jurisdictional grounds: first, no jurisdiction at all over the subject-matter, power in that regard being delegated to Congress; second, no operative jurisdiction over the subject-matter, the concurrent field already having been occupied by Congress; third, no operative jurisdiction of the particular offense, the local law on that point being in conflict with and superseded by the federal statute. Practical, if, indeed, not actual, unanimity has characterized the state courts' reply that the first contention is unsustainable, and substantial accord exists in saying that the states are not ousted by the mere entrance of Congress into the field. The contention that state law is superseded by federal law in case of a conflict<sup>53</sup> has furnished a predominating theme for many, if not most, of the decisions. It will be observed that this is the substance of the ninth suggested meaning.

The first state to deal with the question was Massachusetts in the case of *Commonwealth v. Nickerson*.<sup>54</sup> The law of that state, existing prior<sup>55</sup> to the ratification of the amendment, prohibited, except in accordance with license provisions, the sale of intoxicating liquors, which were defined as containing more than one per cent of alcohol. Defendant sold whisky containing 47 per cent

<sup>52</sup>State v. Ceriani, (Conn. 1921) 113 Atl. 316; see also Jones v. Hicks, (1920) 150 Ga. 657, 104 S. E. 771; 33 Harv. Law Rev. 968.

<sup>53</sup>By "conflict" is meant such a direct and manifest conflict that both the federal and state law cannot stand together.

<sup>54</sup>(1920) 236 Mass. 287, 128 N. E. 273.

<sup>55</sup>The cases in which the point is discussed agree with *Commonwealth v. Nickerson* that state laws antecedently existing as well as subsequently enacted may be "appropriate" under the eighteenth amendment.

of alcohol. When put on trial, defendant offered no evidence and claimed no authority, either state or federal, for the sale. Conviction below was appealed to the supreme court and affirmed. The "single question," according to the court, was whether the state statute "prohibiting such sales without a license and providing penalty for the violation thereof is valid and enforceable since the adoption of the eighteenth amendment . . . and the enactment of the national prohibition law." This question the court answered in the affirmative, holding it to be "plain that since the enactment of the eighteenth amendment the provisions of this chapter [Mass. Law] so far as they authorize under any circumstances whatsoever sales of intoxicating liquor for beverage are inoperative." The license features were held separable from the remainder of the act, and were eliminated as contrary to the amendment. The remainder of the state law was prohibitory in character and appropriate under the amendment. To quote from the opinion of Mr. Chief Justice Rugg:

"We are of opinion that the word 'concurrent' in this connection means a power continuously existing for efficacious ends to be exerted in support of the main object of the amendment and making contribution to the same general aim according to the needs of the state, even though Congress also has exerted the power reposed in it by the amendment by enacting enforcing legislation operative throughout the extent of its territory. Legislation by the states need not be identical with that of Congress. It cannot authorize that which is forbidden by Congress. But the states need not denounce every act committed within their boundaries which is included within the inhibition of the Volstead Act, nor provide the same penalties therefor. It is conceivable also that a state may forbid under penalty acts not prohibited by the act of Congress. The concurrent power of the states may differ in means adopted provided it is directed to the enforcement of the amendment. Legislation by the several states appropriately designed to enforce the absolute prohibition declared by the eighteenth amendment is not void or inoperative simply because Congress, in performance of the duty cast upon it by that amendment, has defined and prohibited beverages and has established regulations and penalties concerning them. State statutes, rationally adapted to putting into execution the inexorable mandate against the sale of intoxicating liquors for beverage contained in section 1 of the amendment by different definitions,

regulations and penalties from those contained in the Volstead Act and not in conflict with the terms of the Volstead Act, but in harmony therewith, are valid."

The concluding words of the extract just quoted indicate what the court elsewhere expressly declared, that state legislation in conflict with congressional legislation must yield to the latter.

This is easily the leading case among state decisions. It is referred to by practically all other state courts and frequently by federal courts. Its doctrine is accepted by the great majority of them, and in a few instances the courts frankly quote from this opinion in preference to an independent expression of their own views. The doctrine has been approved in the *Harvard Law Review*<sup>66</sup> and in the *Michigan Law Review*.<sup>67</sup> In short, from the cases and other material now at hand the preponderating opinion is that while the states and Congress may legislate at the same time on the subject of prohibition, state law falls before that of Congress in case of conflict. The ninth suggestion, according to this strong array of opinion, contains the correct interpretation of the eighteenth amendment. A contention in accord with this view, it should be added, was urged in the *National Prohibition Cases*, though it was not acceptable to Mr. Chief Justice White, to Mr. Justice McKenna, or to Mr. Justice Clarke.

But while the courts, with at least a majority of voices, have declared the foregoing to be the true construction of the amendment, it is rare, indeed, for them to render an actual decision to that effect. *Commonwealth v. Nickerson* did not so decide, for the state law, minus the license features which were held to violate the amendment, was sustained and a conviction thereunder affirmed.<sup>68</sup> An inspection of the cases cited in footnote five will disclose that in several a similar question was raised as to the validity of license provisions in state laws. Such provisions uniformly have been declared to be invalid. A statement of the il-

<sup>66</sup>33 Harv. Law. Rev. 968.

<sup>67</sup>19 Mich. Law Rev. 329, 435.

<sup>68</sup>The court draws a distinction between provisions of the law violating the amendment and those conflicting with the act of Congress. After holding that the license features violated the amendment, the court, referring to certain other provisions of the state law, said: "Of course the implied authority conferred . . . to sell liquor containing alcohol in excess of one-half of one per cent and less than one per cent inferable from the failure to prohibit such sales is no longer operative in view of the *Volstead Act*." No question under those provisions was before the court.

lustrative cases of this group is given in the footnote.<sup>69</sup> From this it appears that none of them squarely supports the ninth suggestion. Even if the laws in question there were actually held to be invalid the decision might be rested also on the ground that there was a conflict with the amendment, as in *Commonwealth v. Nickerson*. This is the better ground, for the sixth conclusion in the *National Prohibition Cases*<sup>70</sup> declares that the amendment "of its own force" invalidates all laws which authorize what the amendment prohibits. License laws for intoxicating liquors for beverage purposes certainly fall in this class.

A group of Florida decisions<sup>71</sup> have held state laws, or parts thereof, invalid for reasons not met with elsewhere. The state law prohibited the possession of intoxicating liquors, even in pri-

<sup>69</sup>State v. Ceriana, (1921) 96 Conn. 130, 113 Atl. 316. Statute prohibited sale of liquor containing any percentage of alcohol, without license. Defendant, with application on file for license, sold liquor containing more than one-half of one per cent. Conviction affirmed. "Amendment supplemented by the National Act" forbids sale of liquors containing one-half of one per cent. or more, says the court, and hence invalidates state laws purporting to authorize such sale. License provisions separable, and remainder of act valid.

State v. Green, (1921) 148 La. 376, 919. Statute prohibited sale of intoxicating liquors without license. Held unconstitutional, in that by implying the right to obtain a license it is "absolutely violative of the amendment." No discussion of separability of license provisions. In this respect it seems to stand alone among the state cases.

Jones v. Cutting, (Mass. 1921) 130 N. E. 271. Statute (redefining intoxicating liquors) contained provisions for authorizing sale of liquors containing not more than two and three-fourths per cent. of alcohol and for submitting the question whether licenses should be issued. Petition for mandamus to compel town selectmen to ignore provisions for submitting vote. Petition dismissed: "mere vote will violate no provision of the eighteenth amendment or of the Volstead Act." Discussion of state statute being "void" or "suspended" because in conflict with act of congress unnecessary to decision.

People v. Mason, (N. Y. 1921) 186 N. Y. S. 215. Statute prohibited sale of liquors containing two and three-fourths per cent. or less alcohol unless certificate secured. Defendant, indicted for selling liquors without certificate, demurs. Overruled. Court expressly declares it unnecessary to decide whether statute violates eighteenth amendment because it can be held, at least insofar as the permissive features are concerned, inoperative for conflicting with the National Prohibition Act. (Statute authorized sale of liquors with higher alcoholic content than specified in act of congress.) Permissive features separable, remainder of act valid. This is only case found by the writer where court rests decision squarely on theory of conflict with congressional legislation. It is to be noted, however, that the permissive features of the statute are held separable from remainder, and that, whether such permissive features were operative or inoperative, defendant had not complied with them. Consequently it does not seem necessary for the court to pass upon their effect.

<sup>70</sup>See footnote 55 for text of the conclusion.

<sup>71</sup>Hall v. Moran, (Fla. 1921) 89 So. 104; Johnson v. State, (Fla. 1921) 89 So. 114.

vate homes, in excess of specified quantities. The Volstead Act expressly excepts possession of liquors in private dwellings for personal use, and no limit on quantity is imposed. Thus the state law prohibited what the federal law permits. This was held invalid. The court was doubtful whether the decision could be rested on the doctrine of conflict with federal law but apparently was sure that the provision in question was void under the fourteenth amendment. The basis of the decision on this point is: congressional permission makes it a privilege and immunity of federal citizens to possess intoxicating liquors under the conditions specified in the Volstead Act, and under the fourteenth amendment the states cannot make or enforce a law abridging those privilege or immunities.

Assuming for the instant that a fatal conflict may exist between state and federal prohibition laws, the courts are agreed that certain circumstances do not present such a conflict. Thus, state laws need not necessarily conform to the federal, different phases of the evil may be aimed at, and with differing methods and degrees of punishment. The Massachusetts law sustained in *Commonwealth v. Nickerson* differed from the Volstead Act not only in the definition of intoxicating liquors but also in the penalties imposed. There the court said that "the amendment does not require that the exercise of the power by Congress and by the states shall be coterminous; coextensive and coincident." Occasionally it is said that the states cannot permit what Congress prohibits.<sup>23</sup> And Florida holds that a state cannot prohibit what Congress permits.

In the absence of any decisive material on the subject, and yet in the presence of so many acceptances of the doctrine involved, the inquiry naturally arises: what *would* constitute such a conflict between state and federal laws? Probably the illustration first occurring to any one would be the situation where Congress defines intoxicating liquors as including beverages containing one-half of one per cent or more of alcohol and a state defines it as containing, say, two and three-fourths per cent. The Act of Congress is valid and the only question is as to the state act. Now a state may legislate on the subject of prohibition or not just as it sees fit. The eighteenth amendment is not mandatory on the states as to affirmative legislation. They are stayed by the amend-

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<sup>23</sup>See, for example, *Ex parte Crookshank*, (1921) 269 Fed. Rep. 980.

ment from permitting the sale, etc., of intoxicating liquors for beverage purposes. It would seem, however, that the state could make its penalties fall wherever the state chooses,—that is, that the state may say, “whatever other jurisdictions may do on the subject, we will not set our criminal machinery in motion against any person unless he deals in liquors containing two and three-fourths per cent or more of alcohol.”<sup>73</sup> State laws to this effect have been sustained. In fact, as pointed out above, the Massachusetts law sustained in *Commonwealth v. Nickerson* defined intoxicating liquors as those containing a higher alcoholic content than that prescribed in the Volstead Act.

The question goes still further: *can* there be, under the eighteenth amendment, a conflict between state and federal laws? It is not without significance that in the period since the amendment became effective and with an extensive and explicit National Prohibition Act and with state prohibition statutes as diverse and detailed as could well be imagined, no state law has been held invalid solely because it conflicted with the congressional law.<sup>74</sup> No fatal conflict yet has been brought to light from this prolific source of possibilities. Mr. Webb, in charge of the resolution on the floor of the House, explaining the term concurrent power, specifically declared it to be his judgment that there could be no conflict<sup>75</sup> between state and federal laws. Several of the courts, while accepting the theory of the subordination of the state law if it conflicts with federal, have expressed doubts as to what circumstances would produce such a conflict.<sup>76</sup> The writer has not examined the cases in a specific quest for information on this phase of the subject, but a reading of all the cases cited in footnote five leaves in his mind the general impression that the later decisions evince a growing scepticism about conflicts and at least disclose that the courts are paying less attention to the possibility that they may occur. It appears to be of decreasing importance.

Before leaving this aspect of the general subject, it may be inquired whether two laws, both in harmony with a fundamental standard, can conflict with each other? That is to say, if a state

<sup>73</sup>People v. Commissioner, (1920) 115 Misc. Rep. 331, 188 N. Y. S. 46.

<sup>74</sup>A New York decision alone purports to rest on that ground. But see footnote 69.

<sup>75</sup>See page 464.

<sup>76</sup>Ex parte Gilmore, (1920) 88 Tex. Cr. R. 529, 228 S. W. 199. See also Youman v. Commonwealth, (Ky. 1922) 237 S. W. 6.

law conforms to the limit on state action set by the eighteenth amendment and the federal law is within the measure of the power delegated to the Congress in that amendment, in what respect can they conflict? The writer is not prepared to say a conflict is impossible, but he is not yet convinced that it does exist. To him it seems that in discussing the effects of such conflicts, the courts are dealing with a contingency which, even if possible, has not assumed any substantial importance in the cases so far decided; and that what has actually happened in the disposition of these cases is that the courts have examined the state legislation to see whether it is "appropriate" under, is reasonably designed to effectuate the purpose of, the eighteenth amendment." If that observation is justified, it points to the conclusion that the real test of the validity of the state law is the eighteenth amendment. If it conforms to that amendment it is valid; if it does not it is invalid. From the point of view of the state's power, then, congressional action would be of no controlling consequence.

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"In a way, it is rather natural that the courts should speak in terms of *conflict* between state and federal laws and of the *supremacy* of the latter. The constitution itself and more than one hundred years of litigation as to the respective jurisdictions of the states and the federal government necessarily had made these words a part of the judicial vocabulary. It came to be more or less self-evident that if a state law conflicted with a federal, of course the former went down. The sixth article of the constitution so declared.

"Having regard only to the words of the eighteenth amendment the Congress and the several states are placed upon an equality as to the legislative power. It is only when the amendment is placed in its context with other parts of the Constitution that the supremacy of the act of Congress if in direct conflict with state legislation becomes manifest." *Commonwealth v. Nickerson*, (1920) 236 Mass. 281, 128 N. E. 279.

The mind is not altogether satisfied with the assertion that the sixth article controls the interpretation of the eighteenth amendment. If the eighteenth amendment were concerned with the distribution of powers along the lines of the original constitution such an assertion might be more convincing. But the eighteenth amendment is concerned with a distribution—or perhaps it would be more accurate to say an exercise—of powers not known to, at least not mentioned in, the constitution. It is a novelty in the federal constitution. The better view would seem to be that, being later in time, the eighteenth amendment modifies earlier provisions of the constitution in so far as it departs from the prior plan of the constitution. Under that view and assuming a conflict possible, the rule of federal supremacy under the sixth article is not applicable in respect of prohibition laws under the eighteenth amendment. Such is the position in *State v. Dist. Court*, (1920) 58 Mont. 684, 194 Pac. 308. A few other courts supporting the tenth suggested meaning have shown a tendency in the same direction, though none of them has expressed so definite a view in that regard as the one just cited.

This view, of course, is opposed by the courts which accept the "conflict-supremacy" doctrine.

Less than two months after the decision in *Commonwealth v. Nickerson*, the Georgia court was called upon to determine the validity of the state prohibition law. This was the case of *Jones v. Hicks*,<sup>78</sup> next to the *Nickerson Case* cited more frequently than any other state decision so far rendered on the subject. The court speaking through Mr. Justice Gilbert, announced its conclusion as follows:

"We reject the view that the legislation of Congress will supersede and abrogate the laws of the state which are appropriate for the enforcement of the amendment. We conclude that the power of Congress and of the state is equal and may be exercised by the several states for the purpose of enforcement concurrently within their legitimate constitutional spheres."<sup>79</sup>

Thus the tenth suggested meaning comes to the forefront in judicial consideration.

In the argument, the Georgia court remarked that "'concurrent power' does not mean 'concurrent legislation,' and concurrent 'power' to enforce is quite a different thing from 'concurrent enforcement,'" while the Montana court<sup>80</sup> points out that "the authority of the states is not to enforce the Acts of Congress, but to enforce the amendment itself." "Independent, equal, and complete power," in each sovereignty is the way the Florida court<sup>81</sup> describes the effect of the amendment, while Indiana<sup>82</sup> does "not perceive anything in this amendment which can operate to repeal or affect a state statute forbidding traffic in intoxicating liquors," and Virginia<sup>83</sup> declares the "federal government is powerless to interfere under the eighteenth amendment" with state legislation.<sup>84</sup>

<sup>78</sup>(1920) 104 S. E. 771.

<sup>79</sup>Georgia's affirmation of equal and independent power is hardly to be explained on the mere ground of a survival of the doctrine of states' rights. One of the peculiar developments of the prohibition struggle, particularly insofar as the adoption of the eighteenth amendment was concerned, has been the new line-up of forces for the preservation of state sovereignty. Thus, in the National Prohibition Cases, on behalf of New Jersey and Rhode Island, as well as others, there was advanced the doctrine of an "indestructible Union, composed of indestructible states." On the ground that the amendment would "usurp" the police powers of the states, Senator Warren opposed the submission of the amendment (55 Cong. Rec. 5652); Senator Lodge thought it was a "long step on a dangerous path when we take this police power from the states," (55 Cong. Rec. 5587); and the late Senator Penrose, opposing the amendment, not only thought "the doctrine of state rights . . . is more important today than at any other time in the history of the country" but actually quoted from Thomas Jefferson to support his position (55 Cong. Rec. 5637).

<sup>80</sup>State v. Dist. Court, (1920) 58 Mont. 684, 194 Pac. 308.

<sup>81</sup>Wood v. Whitaker (Fla. 1921) 89 So. 118.

<sup>82</sup>Palmer v. State, (Ind. 1921) 133 N. E. 388.

Unfortunately for the supporters of the tenth suggested meaning, the foregoing statements are subject to the same criticism levelled at the language of the courts in support of the ninth suggested meaning: not all of it is necessary to the decisions.

This tenth suggestion, however, has actual support, not only in recent cases but also in a well recognized doctrine of long standing. Pleas of former jeopardy have compelled decisions on the question whether trial in a state court for violating state prohibition laws bars another trial in federal courts for violating federal prohibition laws, or vice versa. So far the writer has found six such decisions, five federal and one state. Of these, four (all federal) disallowed the plea. One state court and one federal court held contra.<sup>55</sup> The most recent of these cases, disallowing the plea, puts the decision squarely on the ground that the "doctrine of independent sovereignties and separate offenses is applicable to violations by the same act of both the state and national prohibition laws."<sup>56</sup> And the court thinks this is a construction of concurrent power logically to be deduced from the eighth

<sup>55</sup>Allen v. Commonwealth, (Va. 1921) 105 S. E. 589.

<sup>56</sup>"The proposed amendment simply gives authority to both the state and federal government to enact laws to carry out the purpose of the amendment. The state already had that power under what is known as the police power but the federal government did not have such power. This amendment confers the same authority on both state and federal government, to prohibit the liquor traffic. It did not take away from the state its power to prohibit the traffic, it simply made clear that both the state and federal government had this power." Wayne B. Wheeler, in 88 Central Law Journal 31.

<sup>57</sup>Disallowing the plea: United States v. Holt, (1921) 270 Fed. 639; United States v. Bostow, (1921) 273 Fed. 535; United States v. Regan, (1921) 273 Fed. 727; United States v. Ratagczak, (1921) 275 Fed. 558. See also strong dictum in Cooley v. State, (Ga. 1922) 110 S. E. 449 and Allen v. Commonwealth, (Va. 1921) 105 S. E. 589. Allowing the plea: United States v. Peterson, (1920) 268 Fed. 864 (plea sustained as to former state trials but not as to *municipal*); State v. Smith, (Ore. 1921) 199 Pac. 194, annotated in 16 A. L. R. 1220. See also dictum in Burrows v. Moran, (Fla. 1921) 89 So. 111.

<sup>58</sup>"True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. . . . So, too, if one passes counterfeited coin of the United States within a state, it may be an offence against the United States and the state: the United States, because it discredits the coin; and the state, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both." United States v. Cruikshank, (1876) 92 U. S. 542, 23 L. Ed. 588.

Could there be municipal punishment in addition to state and federal? See discussion in State v. Lee, (1882) 29 Minn. 445, and City of Virginia v. Erickson, (1918) 141 Minn. 21, 168 N. W. 821.

and ninth propositions declared by the Supreme Court in the *National Prohibition Cases*.

Back of these cases lies the question as to the source of the power exercised by the federal and state governments. If they derive their power from the same source, only one punishment is permissible; but if from different sources, more than one punishment may be inflicted.<sup>87</sup> Of course there can be no doubt as to the source of federal power: It comes through the eighteenth amendment. In respect of state power, however, two opinions exist.<sup>88</sup> One, that in adopting the amendment the states surrendered all their power over the traffic in intoxicating liquors for beverage purposes and received back, through the amendment, a grant like that made to Congress; hence, that there is a common source. The other, that the states never surrendered but merely limited the power which admittedly was theirs prior to the amendment; hence, that there are distinct sources. Of these opinions, the latter appears more in accord with the reason and purpose of the amendment and is supported by the weight of authority.<sup>89</sup>

To sum up: There does not appear to have been any definite meaning attached to the term "concurrent power" in judicial usage prior to the eighteenth amendment and consequently no meaning from that source can be imported in to the amendment; in adopting the amendment the states have not surrendered their power over intoxicating liquors except that they may no longer permit the sale, etc., for beverage purposes; the purpose of the amendment was to bring additional forces into play by admitting the federal government into the field of intrastate enforcement but with no willingness on the part of the states to be excluded from that field by the advent of the federal government; state and federal laws being required to be in harmony with the amendment, a conflict between them seems remote if not impossible; if a conflict does, or can, exist there is fair ground for saying that the amendment modifies the sixth article so as to remove the necessity for federal supremacy; the doctrine of separate and independent sovereignties, particularly as illustrated in the coun-

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<sup>87</sup>21 Columbia Law Review 818, discussing *United States v. Regan*, (1921) 273 Fed. 727. See particularly *Grafton v. United States*, (1907) 206 U. S. 333, 51 L. Ed. 1084, 27 S. C. R. 749.

<sup>88</sup>See 10 California Law Rev. 70 for alignment of cases. 34 Harv. Law Rev. 317.

<sup>89</sup>See above, footnote 85; 16 A. L. R. 1220; 21 Colum. Law Rev. 818; 19 Mich. Law Rev. 647; 8 Va. Law Rev. 133.

terfeiting cases, appears to furnish a solution in accord, first, with long established principles, second, with the purposes of the states in adopting the amendment, third, with the specifically declared intent of the Congress in changing the form of the proposed amendment, and, fourth, with the weight of authority.

The eighteenth amendment is at once the measure of federal power and a limit on state power. If Congress acts within that measure its action is constitutional; for, in the language of the court in the *National Prohibition Cases*, congressional power "is in no wise dependent on or affected by action or inaction on the part of the several states or any of them." Under the doctrine of separate and independent sovereignties, if a state acts within the limit set by the amendment its action would be constitutional and in no wise dependent on or affected by action or inaction on the part of Congress. The amendment marks the limit of state action. It furnishes a sufficient test for state laws. It ought to furnish the only test.\* It is submitted, therefore, that the constitutionality and operation of state statutes reasonably adapted to effectuate the prohibition of the amendment should be determined, as a matter of law,<sup>†</sup> without regard to what Congress may or may not do.

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\*"The amendment contemplates independent legislation, both on the part of Congress and the several states; and the constitutionality of a state statute must be determined alone by a resort to the provisions of the amendment." *State v. Hartley*, (1921) 115 S. C. 524, 106 S. E. 766.

†Insofar as congressional action may throw light on the meaning of any term in the amendment it will be important, not because such action *as law* limits state action but because as a determination of fact entitled to great respect it assists the court in ascertaining what the limit is which the amendment itself imposes. See pp. 466-7.