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Edwin C. Goddard

University of Michigan Law School

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THE REAL SIGNIFICANCE OF THE PROPOSED MICHIGAN BEER AND WINE AMENDMENT.

DISCUSSION of proposed prohibitory amendments to Constitutions, State or Federal, are usually regarded as part of the wet and dry fight in which lawyers are interested only as citizens. Before the recent Cleveland Meeting of the American Bar Association the bar of the country was circularized by a protest, signed by a number of very well known lawyers, urging the bar to take action against putting into the fundamental law, the Constitution, such matters as the regulation of what the people shall drink. These lawyers presented their case at the Cleveland meeting and vigorously attempted to induce the American Bar Association to go on record against such amendments. The effort failed, possibly because it was felt that the American Bar Association had not hitherto exhibited any such concern over this tendency, already noticeable for years, to cumber State Constitutions, with matters that should properly be left to legislation, as exhibited, for example, in such constitution monstrosities as the Constitution of Oklahoma. It would be hard to explain to the public how the control of the liquor traffic by constitutional amendment had so suddenly aroused the patriotic zeal of the bar in opposition, especially in view of the fat fees the traffic had paid in the past, and was now proposing to pay, to individual lawyers. But whatever may be said about the propriety of such action by such a body, there can be no doubt of the right of every lawyer as an individual and a citizen to oppose as vigorously as he will such uses of a constitution. Much can be urged on both sides. Indeed there are many good reasons for the claim that we in this country have done to death the use of written constitutions, and even that the States would be much better off without any. The liberties of person and property are fully safeguarded by the Federal Constitution, and it is more than possible, as some have suggested, that statute law, which can be, and usually is, more carefully drawn and considered than constitutional amendments, would answer every state purpose. Constitutions and amendments thereto, certainly when presented through the Initiative, are rigid and one-sided things. They cannot be modified in conference where all sides can be heard, but must be accepted or rejected in the very form in which they are presented. Statutes, whatever their other infirmities, are not subject to these. Even permanence, which

is supposed to be one characteristic of constitutions, is now in states having the Initiative rather with the statutes.

As against the contention that regulation of eating and drinking should be kept out of a constitution, and especially the Federal Constitution, is the argument that the drink problem is not local, that it affects the whole country, that it can be adequately dealt with only by Federal action applying to all the states, and that such action is possible only by amending the Constitution of the United States. The rum runners over the borders of the Michigan State line have been, and still are, furnishing strong support for this argument. All these questions are proper for discussion and all lawful agitation. Lawyers, naturally and properly enough, rather more than other citizens except makers and dispensers of liquors, are interested in laws for their regulation and control.

But all citizens should be deeply interested, and lawyers more than all others, in a method of attack on Amendment XVIII to the Constitution of the United States, which is just now in operation in Michigan, *i. e.*, the proposal to put into the Michigan Constitution an amendment squarely antagonistic to the 18th Amendment. Some have seen the conflict, few seem to have realized its significance. The vote very likely will have been taken before this article will be read, and any discussion in a legal journal would be out of place if it were merely a question of wet or dry, of morals or wise policy. But the issue presents such a threat to the peace, and even the existence of the Union, that it deserves wide notice, whatever be the outcome of the vote in Michigan, for this is a drive, full steam ahead, on the road to civil strife and disunion, the same road that once led the country to the most frightful war the world had then known, in order that the Nation might be preserved. This raises no question of wet or dry, of moderate drinking or total abstinence, but of good citizenship and of loyalty to the flag, for seen in its frightful mien this is Nullification over again, and Secession was a bare thirty years beyond Nullification. Article VI. of the Constitution of the United States reads:—

“This Constitution, and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.”

Article V. of the same Constitution reads:—

“The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Consti-

tution * * * which * * * shall be valid to all intents and purposes as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States * * * ”

On January 7th last the Supreme Court decided that “two-thirds of both houses” means a vote of “two-thirds of a quorum of each body.” On August 1, 1917, the United States Senate by a vote of 65 to 20, and on December 17, 1917, the House by a vote of 282 to 128, proposed to the States the so-called Prohibition Amendment, and the Legislatures of 45 states have ratified it, Rhode Island, Connecticut and New Jersey alone having thus far failed to do so. When three-fourths of the States had notified their action, the Assistant Secretary of State, in January last, officially announced that the proposed amendment had become part of the Constitution of the United States as Amendment XVIII. It is now “the supreme law of the land.” It is no longer a question of the wisdom of adopting such a provision as part of our Constitution. It has been adopted already. Some lawyers are arguing that it is unconstitutional. This they have a right to do, either in the public print, or for clients in the courts. The Supreme Court will finally settle that question. But meantime it is the supreme law of the land, to become effective in January, 1920.¹

Before considering in detail the charges above made against the proposed Michigan amendment, it seems best at this point to barely notice some interesting questions already raised by attacks of certain labor unions upon the 18th Amendment. The press reports the use, by certain labor organizations, of such slogans as “No Beer, No Work,” “No Beer, No Bonds,” “No Beer, No Coal,” and it is said strikes have been threatened to coerce the United States Supreme Court to declare the Amendment unconstitutional. Such threats against law are not confined to the present issue, or to Labor unions, they concern us here only because they are part of a kind of agitation that led the Secretary of the Central Labor Union of New York, if he is correctly reported, to suggest that it would be satisfactory to labor if the New York Legislature would interpret the Amendment as permitting the sale of light wines and beer. One suggestion was that the Legislature should hold that beer with 2% of alcohol was not “intoxicating liquor” within the meaning of the Amendment. The second section of the Amendment gives Con-

¹ The doctrine that within the limits of the Constitution Federal laws control all State laws and constitutions has so long been clearly recognized that it is hardly needful even to refer to such cases as *McCulloch v. Maryland*, 4 Wheat. 316, *Gibbons v. Ogden*, 9 Wheat. 1, *Cohen v. Virginia*, 6 Wheat. 264, and the long line of cases following.

gress and the several States "concurrent power to enforce this article by appropriate legislation." How this will work is very uncertain. It would seem too clear for argument that some light wines and beers are "intoxicating liquors", and are therefore inhibited. It also seems clear that the alcoholic content might be so slight that the liquors could not be intoxicating. Only the courts can determine the rules which shall fix the line of division. It can hardly be unlawful under the concurrent power given in the amendment for legislatures, in good faith, by enacting laws, to test out the meaning of "intoxicating liquors." It would very surely be unlawful for legislatures to attempt to permit the sale of liquors clearly intoxicating. Here are some very nice legal questions.

We have never before had any provision in the Constitution with this express concurrent power of State and Nation. But there has been a sphere within which it has been lawful for the States to act on matters over which Congress has the power to assume exclusive control, notably on interstate commerce. And we have decisions defining the limits of State and Federal legislation.² Moreover in the attempt of the Southern States to avoid giving the ballot to the colored citizens we have a situation as to the XVth amendment in some respects very like, and in some very unlike, what might happen here as to the XVIIIth. That is to say, the Southern States have found a way, by statutes and constitutional provisions which have passed the scrutiny of the Supreme Court, to practically prevent the uneducated colored citizen from voting. They did this by a series of experimental laws. These laws did not profess to set at naught the XVth Amendment, but on the contrary were carefully framed so as to accomplish the result desired and yet to avoid conflict and secure the approval of the Supreme Court. There can be no legal or constitutional objection to a similar testing process as to the XVIIIth Amendment.³

² See, for example, such cases as *Savage v. Jones*, 225 U. S. 501, *McPherson v. Secretary of State*, 92 Mich. 377, *Adams Express Co. v. Croninger*, 226 U. S. 491, *Ré Rahrer*, 140 U. S. 545, *Minnesota Rate Cases*, 230 U. S. 352.

³ Most of these laws were declared unconstitutional by the United States Supreme Court. The point is that they were avowed to be constitutional, and were submitted to the courts in the constitutional way and on elaborate arguments to show that they were not in conflict with the Fifteenth Amendment. Not one of them was flatly contradictory in terms, as is the proposed Michigan Amendment. For an elaborate argument to show that the State statute was not in conflict see *Cofield v. Farrell*, 38 Okl. 608; also *Atwater v. Hassett*, 27 Okl. 292. The following are among the interesting decisions of the Supreme Court disposing of these questions: *United States v. Reese*, 92 U. S. 214, *United States v. Cruikshank*, 92 U. S. 542, *Williams v. Mississippi*, 170 U. S. 214, *James v. Bowman*, 190 U. S. 127, *Guinn v. United States*, 238 U. S. 347, *Muers v. Anderson*, 238 U. S. 368.

However it is no such process as this that is proposed in Michigan. Parallel columns will make this very plain.

THE SUPREME LAW OF THE
LAND:—

“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 a concurrent power to enforce this article by appropriate legislation.”

Sec. 3—This section provides that it must be ratified within seven years.

PROPOSED MICHIGAN LAW:—

“Sec. 12—It shall be forever lawful in this State to import, transport, manufacture, use, buy, sell, keep for sale, give away, barter or furnish every kind of Cider, Wines, Beer, Ale and Porter and to possess the same in a private residence. So much of Section 11, Article XVI of this constitution as prohibits the manufacture, sale, keeping for sale, giving away, bartering or furnishing of vinous, malt, brewed or fermented liquors, is hereby repealed. The Legislature by general laws shall reasonably license the manufacture of, and shall reasonably license and regulate the sale and keeping for sale of vinous, malt, brewed or fermented liquors; Provided, however, that the electors of each city, village or township forever shall have the right to prohibit the manufacture, sale or keeping for sale of vinous, malt, brewed, or fermented liquors within such city, village or township.”

Here is open defiance, not by individuals, but by a State. Michigan is in the United States and “subject to the jurisdiction thereof”, but her electors are asked to put into her fundamental law that it “shall be forever lawful” to do what the supreme law of the land says is “prohibited,” and therefore forever unlawful. Individual citizens have opposed the XVIIIth Amendment as unwise and been quite within their rights. Brewers and others are said to have raised a billion-dollar-fund to fight it. Their leading attorney has an-

nounced that they will fight it in every possible way. If he means every lawful way they are still within their rights. If he proposes to carry the matter to the Supreme Court and try to establish that the Amendment, or any part of it, is unconstitutional, it is his and their undoubted right to do so. If they, by petition and agitation try to secure its repeal the right of petition is theirs under our laws and constitution. But if they are behind this move to get a State to adopt a positive, defiant law ordaining that whatever may be the law elsewhere in the United States, in Michigan this part of the Constitution shall be null, then their method of attack is unlawful and very much worse. This is Nullification improved upon, nullification, not by resolution of a legislature as in the Virginia and Kentucky Resolutions of 1797-1799, not by convention of delegates as in the infamous, misguided Hartford Convention of 1814, not by a representative Convention, as in the Convention of the People of South Carolina of 1832-1833, but by solemn vote of the whole electorate of the State, to put this defiance, not into resolution, not into laws which may be easily repealed, but into the fundamental law, the constitution, which abides.

The vice of this proposal lies in the fact that it calls upon the *State* to pass upon the *National laws*. History shows not merely the danger of this, but the fact that it is an attack upon the Union, and leads straight to civil strife, and menaces the life of the Nation. A brief notice of four significant movements, which we now see were really continuous and one, will make plain whither we are bound if we enter this road. Each of the four, except the last, was intended to be harmless to the Union, indeed the actors insisted they were trying to save it, but each was surely preparing the way for the next and all the rest. The Secession of 1860 was the full harvest which could have been escaped only by killing the seed in embryo in 1797.

In the last days of its power under John Adams the Federalist party, in terror for the safety of the country under the Republicans and Jefferson, passed the Alien and Sedition laws. They aroused a storm of protest. No less a man than Madison in Virginia, and Jefferson for Kentucky, drafted resolutions declaring the obnoxious laws unconstitutional. This they, as citizens, had a perfect right to do. But they made the fatal error of presenting them for adoption by the Legislatures of those States, and sought to get other states to take like action. The Constitution, they said, was a compact to which the States were parties, and if the limits of the Constitution were passed *the State* was in duty bound to arrest the progress of the evil. None of the other States responded favorably, Jefferson

soon came into office, and the matter was dropped—for the time. But the fatal seed had been planted—the States were to pass upon the acts and laws of the Nation. It did not then appear that harm had been done. How false was this appearance, time was to prove.

The Embargo Act and the War of 1812 ruined the shipping and infant manufactures of New England. Great bitterness was aroused, and finally the Legislatures of Massachusetts, Connecticut and Rhode Island, and certain counties in New Hampshire and Vermont, sent delegates to the notorious Hartford Convention in 1814. They sat behind closed doors, were sworn to secrecy, and it has never been known just what went on inside. The convention has been regarded as treasonable, probably unjustly so. The delegates were for the most part men of unimpeachable private character, indeed most of them were lawyers, and they acted as special pleaders for the interests of their clients. It is the only instance that occurs to the writer in which a body of lawyers has allowed itself to get into a compromising attitude toward the country. Every man of them there wrecked his public career. The present situation offers the bar another opportunity to get itself so written down in history. It may be this in part that made the American Bar Association shy of going on record at the Cleveland meeting, though the proposal then was essentially different in form from that of the Hartford Convention. The Convention finally adopted a report, which furnishes the only authentic information by which its work can be judged. They had the Virginia and Kentucky conception of the right of the States to take action against Federal acts contrary to the Constitution, and repeated some of the ideas and expressions found in the Virginia and Kentucky Resolutions of '98. Peace with England put a quietus on these efforts before there was an actual clash between State and Nation, but the seed of secession planted in the political soil in '98 was growing a noxious weed in 1814. "The claim that the States had a right to pass upon the constitutionality of a law of Congress now seems ridiculous. It is clear that the Supreme Court is the proper authority to do this," says a recent writer. To make it seem ridiculous was to cost hundreds of thousands of lives, millions of treasure, in a fratricidal war that left the South with a bitterness that for a generation made it, in feeling, not a part of our country.

As was to be expected, the next appearance of this dangerous doctrine was far more virulent. The tariff laws of 1828-32 were regarded by South Carolina as destructive of her prosperity. They were violently attacked as unconstitutional. In the fierce contest, which stopped just short of bloodshed, the leading figures were Cal-

houn and Hayne, Jackson and Webster, all lawyers. Calhoun, a man of singular purity of character, and great, if narrow, intellectual ability, had developed the doctrine of nullification, but Hayne was the protagonist for this doctrine in the most dramatic debate ever staged in the United States Senate. As Hayne made his great speech Calhoun sat opposite and approved the doctrine that a State could declare any act of Congress null and void if it seemed to be unconstitutional. It was the "good old doctrine of '98; the doctrine of the celebrated Virginia Resolution of that year and of Madison's report of '99, that the powers of the Federal Government result from the compact to which the States are parties." Each state acting for itself was a final judge of the extent of the power delegated to the general government.

The speech made a tremendous impression. It seemed unanswerable, in its history and its logic. The friends of the Union were in despair. Was there a man for the occasion? There was. The next day was the most dramatic in the life of Daniel Webster, as in the Senate he opposed to this compact of a league of petty states, the doctrine that the Nation was a Union which could not be dissolved, a living, breathing, sentient organism. It cannot endure unless its own judgment is final on its laws. The States have no more authority to arrest the laws of the Nation than the Nation those left to the States. Any other principle leads directly to civil commotion and disunion. Every Northern school boy learned the closing words of that thrilling speech: "Liberty and Union; now and forever; one and inseparable." But the Southern boy declaimed the speech of Hayne, and Webster's prophecy of civil commotion and disunion was fulfilled beyond his dreams in 1860.

Secession was the sure fruit of the Kentucky and Virginia Resolutions, of the Hartford Convention, of South Carolina Nullification, of other outbreaks by the States of Pennsylvania and Georgia and Alabama. A turn in politics saved the Nation in 1798, peace with England in 1814, and Jackson's firm stand after Webster's masterly speech in 1833. Webster pointed out that any act of a State to nullify a law of the United States is unconstitutional and a "direct usurpation of the just powers of the government and of the equal rights of the other States; a plain violation of the Constitution and a proceeding essentially revolutionary in its character and tendency." Jackson surprised the nullifiers by his unexpected toast: "Our Federal Union—It Must be Preserved." He sent to South Carolina the message: "If a single drop of blood shall be shed there in opposition to the laws of the United States, I will hang the first

man I can lay my hand on engaged in such treasonable conduct, upon the first tree I can reach." He issued a notable proclamation against Nullification. After Clay by his compromise tariff measure had given South Carolina a chance, which was embraced, to gracefully retreat by repealing the nullification ordinances, Jackson wrote: "The Ordinance and all the laws under it are repealed. So ends the evil and disgraceful conduct of Calhoun, McDuffie and their co-nullifiers. They will only be remembered to be held up to scorn by everyone who loves freedom, our glorious constitution, and a government of laws."

In the North that was true, but in the South the doctrine grew, and Calhoun and Hayne and their teachings were revered and worshipped for yet a generation. Then they reached full fruitage, and the harvest was reaped in 1860-65 at the cost of rivers of blood, and of mountains of treasure, leaving a bitter and divided people, and a prostrate South. Will the State of Michigan, as a loyal member of the Union, plant such a seed again? That is proposed. The State, as a state, is considering writing into her constitution a nullification of the Constitution of the United States. *As a State*, she is passing on the wisdom, or the validity, or the constitutionality of *the Federal Law*. Under our dual form of government those questions must be raised in other ways if we are to survive as a nation. It is interesting to notice that Lincoln, another lawyer, as he prepared to lead the Nation through the awful war already at hand, prepared his great first inaugural by locking himself in a little room over a Springfield store, with only the Constitution of the United States, Andrew Jackson's proclamation against Nullification, and Webster's reply to Hayne as his companions.

And now in 1919, amid the greatest unrest the world has ever seen, there is an impatience with the restraints of law and order. Bolshevism and its kindred isms, more or less virulent, are stirring in many minds against conditions that are not liked. The pricelessness of freedom and opportunity under the safeguards of a respected and revered Constitution is forgotten in the presence of temporary irritation, and intelligent voters are likely to express their feelings at the poles without a thought of the effect on the fundamental law of the land. Other voters, not a few, care for none of these things. They can be reached by no appeal. Many of them have foreign names, and foreign feelings, and are unwilling to live in sympathy with American ways and institutions. Some have lived in the United States for generations and should be, but are not, thoroughly American. On the other hand, there are others of undoubted loyalty, many with foreign sounding names but with true American

hearts, who simply do not realize what is involved. They think they merely record their feelings and convictions as to the prohibition of intoxicants, or as to dry and bone dry legislation, so-called. They take an opportunity to protest against laws they wholly or partly disapprove. Were it not for the form in which the question is presented they would be quite within their rights. But coming as an act of the State of Michigan in opposition to the Federal law, this law cannot receive the approval of a true American.

Great men in 1797, 1814, 1830, and even in 1860, may be excused for failing to see the consequences of such a conflict between the State and the Nation. History makes them so plain to the man of today that he can have no excuse. The most salutary and righteous State law must not set itself up in plain opposition to, or in adverse judgment upon, the most outrageous Federal law. No one has a right to say this one proposed act will do no harm.⁴ Madison by the Virginia Resolution did not mean to weaken the great Constitution he had so great a part in framing, and in his old age he pitifully tried to explain away the words he had sent out and could not call back. He was mercifully spared a view of their final result to the country he loved. Not even Calhoun meant to countenance secession, but argued for nullification within the Constitution, to save not to destroy it. The thing was impossible. It was, as Webster said, essentially revolutionary in its character and tendency.

Michigan is invited to become the South Carolina of the Nullification of the 18th Amendment, not merely to declare that it shall be forever lawful in Michigan to do what that Amendment makes unlawful in every state and territory of the Union, but to nullify the second section of the Amendment, by saying that the Legislature of Michigan shall not have the power which the Federal law says the States, concurrently with Congress, shall have. On the other hand the Michigan law says the Legislature "shall" legislate to permit what the Federal law says "is hereby prohibited." If her electors bury this proposal under an avalanche of Noes, Michigan may be able to end this sort of attack. If the reverse should occur, this is the first only of a long series of such attacks. Attention has been called to the proposal in New York that the Legislature legalize the sale of light wines and beer. Other proposals

⁴"It is to be remembered that praiseworthy objects cannot be rightfully attained by a violation of law. Every effort to fritter away the plain language of the constitution, by way of construction or otherwise, even to secure a desirable end, is nothing less than an insidious attempt to undermine the fundamental law of the state, and hence, to that extent, destructive of good government, besides being vicious in its tendencies." *State v. Cunningham*, 82 Wis. 39, per Cassoday, J.

of State action in opposition to the laws of the Nation will not be long delayed, unless loyalty and patriotism triumph over every other consideration.⁵

For those who think the XVIIIth Amendment unjust or unwise, as South Carolina thought the tariff laws destructive and unconstitutional, there are lawful and constitutional ways of trying to alter it, or limit its operation. These any citizen, or group of citizens, may resort to and be loyal. But this method of arraying State against Nation is unlawful, unconstitutional, disloyal. In its tendency and spirit it is treasonable.

EDWIN C. GODDARD.

Ann Arbor, Michigan.

⁵ Since the above was written a resolution has been introduced into the General Assembly of Rhode Island urging the Attorney-General of the State to take steps to secure an immediate ruling by the United States Supreme Court on the constitutionality of the action of Congress in proposing the amendment to the states.