February 1934

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THE CONSTITUTIONALITY OF AN IMMEDIATE LIQUOR CONTROL PROGRAM FOR WEST VIRGINIA*

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There is a general opinion to the effect that nothing constructive can be done in West Virginia with regard to the liquor traffic until the prohibition amendment is removed from the West Virginia Constitution.

Article six, section 46 of the West Virginia Constitution adopted by the people at the general election of 1912 provides:

"On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, porter, ale, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this State; Provided, however, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the Legislature may prescribe. The Legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

Article fourteen, section 2 of the West Virginia Constitution deals with the amending process and provides that the amendment shall be first adopted by the two houses of the legislature by a two thirds vote and then submitted to the people at the next general election, and if a majority of the votes are in favor of the amendment, it shall be in force from the time of such popular ratification.

From the above sections of the West Virginia Constitution it is clear that the state prohibition amendment cannot be repealed prior to the November, 1934, election.

The purpose of this article is to discuss the query: what can be done in the interim? The people of West Virginia have voted to repeal the Eighteenth Amendment. Must the state government have its hands tied for almost a year before it can carry out the popular mandate? Confronted with this apparent obstacle,

* The interim scheme of liquor control suggested in this article has been approved by the Kentucky Liquor Control Committee for Kentucky, a state whose liquor situation is substantially like that of West Virginia.

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many people have been fascinated by, and have declared their allegiance to, the idea of nullification as the way out of the prohibition muddle. But merely to repeal the state enforcement act would leave an unregulated and a non-revenue producing liquor traffic, and that would be unthinkable as a solution of the liquor problem. The nullificationists have toyed with the idea as a slogan, but have failed to realize the potential perils implicit in a negative policy. They have not thought the problem through.

It shall be our purpose to show the potentialities of nullification as a process of government in West Virginia during the interim until the prohibition amendment can be removed from the state constitution. Before nullification can be advocated as an effective process of government for solving the prohibition problem, it is incumbent on its adherents to show (1) that it is possible to raise revenue from the liquor traffic, and (2) that it is possible to regulate the traffic without having either the revenue or the regulatory laws declared unconstitutional as in violation of article six, section 46, which is still in the West Virginia Constitution, and cannot be repealed until November, 1934.

(1) Can the State of West Virginia constitutionally tax the liquor traffic without authorizing what article six, section 46 of the state constitution condemns?

Three contentions have been advanced against such a proceeding: (1) that by taxing the business the government recognizes its lawful character and sanctions its existence, (2) that taxation and protection are reciprocal, and (3) that for the government to participate in profits of an illegal business would constitute the acceptance of tainted money. Insofar as a state government is concerned, every one of these contentions was repudiated in a well-reasoned case decided by the Supreme Court of Michigan in 1875. One of the greatest jurists that this country has produced, Thomas M. Cooley, spoke for a unanimous court in the case of Youngblood v. Sexton.¹

As to the first contention, Judge Cooley replied that taxes are not favors; they are burdens. They are necessary, it is true, to the existence of the government; but they are not the less burdens, and are only submitted to because of necessity. It would be a remarkable proposition, under such circumstances, that a thing is sanctioned and countenanced by the government, when this burden, which may prove disastrous is imposed upon it, while on

¹ 32 Mich. 406 (1875).
the other hand, it is frowned upon and condemned when the bur-
den is withheld. It is safe to predict that if such were the legal
doctrine, any citizen would prefer to be visited with the untaxed
frowns of government rather than with those testimonials of ap-
proval which are represented by the demands of the tax gatherer.
It is the usual practice for states to exempt educational and
charitable institutions from taxes. If the argument advanced is
valid, we do not see why the state should not have evidenced its
approbation of educational and charitable institutions by taking
special care that they should feel its burdens, while at the same
time it stigmatized other things which were regarded as immoral
and pernicious, by refusing to permit them to appear on the tax
list. A tax roll would thus become an honor roll. Further, the
taxation of a thing may be and often is, when police purposes
are had in view, a means of expressing disapproval instead of
approbation of what is taxed.

The second contention contains a transparent fallacy. If the
tax upon any particular thing was the consideration for the pro-
tection given to the owner in respect to it, the contention might
have some validity. But the maxim of reciprocity in taxation has
no such meaning. No government ever undertakes to tax all that
it protects. If a government were to levy only poll taxes, it would
not be on the idea that it was to protect only the persons of its
citizens, leaving their property to rapine and plunder. On the
other hand, if a state taxed only real property, it would be a
fanciful suggestion that real property was entitled to special pro-
tection in consequence. As to the third contention, if this is
tainted money, the state, to be consistent, ought to decline to
receive fines for criminal offenses with the same emphasis that it
would refuse to collect a tax from an obnoxious business.

As early as 1811, a Georgia court construing a state statute,
that imposed a tax of $1,000 on a faro table used for the purpose
of gambling in every different county in which it was so used, held
that the use of the faro table for the purpose of gambling is not
rendered lawful by the tax imposed on the instrument. So a tax
statute is not unconstitutional because it imposes a privilege tax
upon a business made unlawful by another statute. So it has
been held that the fact that a business was prohibited, and license
could not be obtained authorizing it, was no defense to an action

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3 State v. Doon and Dimond, R. M. Charlt. 1 (Ga. 1811).
4 State ex rel. Melton v. Rombach, 112 Miss. 737, 72 So. 731 (1917).
to collect the tax imposed from one engaged in such business. It is well settled that a tax may be imposed for purposes of revenue or under the police power for purposes of regulation or prohibition. If it is used for purposes of prohibition, it constitutes a penalty for carrying on the prohibited business. Liquor license fees, in the days before the Volstead Act, were almost unanimously held to be not a tax, but an exercise of the police power because regulation was the predominant purpose of the fees.  

The federal cases are in accord with these state cases. In the case of United States v. Yuginovitch, Mr. Justice Day, speaking for a unanimous Supreme Court of the United States, lays down the proposition that "Congress, under the taxing power, may tax any intoxicating liquors, notwithstanding their production is prohibited; and the fact that it does so for a moral end as well as to raise revenue, is not a constitutional objection." In United States v. Sullivan, Mr. Justice Holmes, again speaking for a unanimous court, holds that "gains from illegal traffic in liquor are subject to the income tax." Further, under the doctrine of the License Tax Cases, the Supreme Court of the United States said that the imposition of the license tax on intoxicants did not convey to the licensee any authority to carry on the licensed business within the state. The licenses give no authority, but are merely receipts for taxes. From the foregoing authorities, it should be clear that West Virginia can impose a tax upon a business that is prohibited and the law will not authorize what Article 6, Section 46 of the West Virginia Constitution condemns. There is thus ample authority to avoid the intolerable situation of a non-revenue producing liquor traffic under a policy of nullification.

(2) Can the State of West Virginia constitutionally regulate the liquor traffic without authorizing what Article 6, Section 46 of the State Constitution condemns? It has been contended that "any conceivable state regulation, short of prohibition itself, would be a violation of the prohibition adamantly prescribed by the state constitution . . . . The states could not merely regulate, for that would be to legalize what is unqualifiedly prohibited." If this

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4 Foster v. Speed, 120 Tenn. 470, 111 S. W. 925 (1908).
5 State ex rel. English v. Fanning, 96 Neb. 128, 147 N. W. 215 (1914).
7 266 U. S. 450, 41 S. Ct. 551 (1921).
8 274 U. S. 259, 47 S. Ct. 607 (1927).
9 5 Wall. 462 (1866). See also Pervear v. Commonwealth of Mass., 5 Wall. 475 (1866).
10 McBain, Prohibition Legal and Illegal 38-39.
opinion is correct, nullification as a process of government is a travesty.

It is our contention that by a system of NEGATIVE REGULATIONS the state can penalize what it wants to penalize and in this manner it can control the time, place, and occasion of the sale, the quantity and quality of liquor sold, and the persons to whom liquor may be sold. Suppose the state enforcement act is repealed and a state statute is passed, providing that liquor shall not be sold to minors and containing a penalty therefore. This statute does not, by implication, authorize a sale of liquor to adults. Or suppose an anti-Sunday selling law is passed, containing penalties. That law does not, by implication, sanction a sale on week days. The writer is indebted to Mr. Clarence Darrow for the idea of negative regulation. The proposal has been submitted to two of the outstanding scholars in the field of constitutional law, Professors Felix Frankfurter and Thomas Reed Powell, of the Harvard Law School, and both declare that the scheme is within the scope of constitutional possibilities.

We desire at this point to introduce the arguments in favor of the proposal. (1) By way of introduction it is necessary to distinguish between "regulation" and "prohibition." Professor Freund in his work on The Police Power\(^{11}\) says, "By prohibition is understood that legislative policy which renders illegal some entire sphere of business or action, and not merely some particular mode or form of it, or merely its exercise at a particular time or in a particular place, so that it would still be possible to engage in the same pursuit by an accommodation to legal requirements. With reference to any particular subject matter therefore, partial prohibition constitutes regulation." As an example, to prohibit the use of grain for distillation into liquor is upon this principle mere regulation as far as the owner of the grain is concerned.\(^{12}\) Let it be understood that the plan we are advocating can only be characterized as "regulation" under the above distinction. So much by way of introduction.

(2) The states, under the police power, may select and choose the evils that they want to punish. The sanction of a law passed in the exercise of the police power is usually a penalty, and the violation of the law constitutes technically a misdemeanor or a crime.\(^{13}\) A state may classify with reference to an evil to be

\(^{11}\) P. 52.
\(^{12}\) Ingram v. State, 39 Ala. 247 (1864).
\(^{13}\) Freund, Police Power (1904) 21.
prevented. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience." Mr. Justice Holmes has said, "The State 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.'" The presumption is that the legislature acted with knowledge of the facts and conditions. It has been held that 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."

An illustration will aid in making clear the proposition we are defending. The state of Montana repealed its state prohibition law. But in another section of the Code there is still on the statute books a law providing for a penalty for the sale of liquor to minors. Does anyone doubt that a violator of that law does not commit an offense against the state for which he can be punished? Does anyone contend that such a law sanctions or authorizes the sale of liquor to adults? That law constitutes a typical illustration of what we designate as a NEGATIVE regulation under a system of state nullification. If that law is valid, is it not within the constitutional competency of a state under the police power to make selling of liquor on Sunday an offense? And if that can be done, why is it not possible to provide for a general regulation of the time, place and manner of sale, the quality and quantity of liquor sold, and the place of consumption? The state can attack the evil piece-meal. It can prohibit what it wants to prohibit and provide punishment for that. Each separate section constitutes a prohibition, but viewing the problem as a whole, the policy could be characterized as NEGATIVE regulation. It would not require extraordinary adroitness in drafting such legislation to keep from drifting into the position in which the state would be positively legalizing that which the state constitution condemns. Professor Freund, the great authority on the police power, has said, "The police power has dealt with and deals with evils as public sentiment requires, and that other evils of a different kind, affecting different interests and having different con-

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2 Cooley, CONSTITUTIONAL LIMITATIONS, (8th ed. 1927) 813.
4 Cooley, CONSTITUTIONAL LIMITATIONS, op. cit. supra n. 14, at 372, n. 1, for list of cases.
6 MONT. REV. CODE (Supp. 1923-27) p. 1074, § 11043.3.
7 Ibid. § 11043.1.
sequences are not drawn within the range of legislation or that they are regulated or restrained in a different manner and treated with greater severity or leniency, is not deemed sufficient to invalidate a measure otherwise legitimate, confining itself to some particular danger. The effect of such a policy will mean that where public sentiment in a state allows it, all persons who are not within the prescribed classes will be enabled to procure palatable liquor under the circumstances and conditions permitted by the state law.

In considering this proposal the following propositions should be kept in mind: (1) the state constitutional amendment is not self-executing and contains no penalties; (2) the legislature is not legally obligated to exercise to the hilt the power which is conferred by the amendment; (3) there are three alternatives before the legislature of West Virginia at the coming session (while the state prohibition amendment is still in the state constitution).

(a) Leave the prohibition enforcement act on the statute books and through its non-enforcement play into the hands of the bootleggers and racketeers. This course can only breed a further disrespect for law and will lead to chaos. Further it will not provide an adequate revenue from the liquor traffic. The strict enforcement of the state enforcement act is outside the scope of practical possibilities because of the change in public sentiment in West Virginia as evidenced by the vote on the repeal of the Eighteenth Amendment.

(b) Repeal the state enforcement act and fail to enact any constructive legislation to take its place. This is unthinkable as a solution of the prohibition problem because it will leave a non-regulated and a non-revenue producing liquor traffic.

(c) The sensible way out is to repeal the state enforcement act and to enact constructive legislation (1) regulating the traffic through a system of NEGATIVE REGULATIONS and (2) taxing the traffic, and draft the legislation in such a manner that neither the regulatory nor the taxation statutes will authorize anything that the state constitutional prohibition amendment condemns. Granting that this can only be characterized as nullification, it represents the only sane way out of the prohibition muddle in the interim.

In conclusion, it should be emphasized that nullification as ordinarily understood, is simply a slogan, a method of attack, a strategic maneuver. The wets, who in desperation are advocating

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it, have not thought the problem through. As ordinarily understood it would lead to an intolerable situation. If nullification comes to pass, it should be as a PROCESS OF GOVERNMENT permitting public opinion expressed through the legislature to regulate and tax the liquor traffic as best suits its interests. The plan we have outlined affords the people of West Virginia during the period until the prohibition amendment can be removed from the state constitution an opportunity to experiment with reference to the regulation and taxation of the liquor traffic. It is intolerable to think that the people should have their hands tied for this period, simply because of the cumbersome procedure of the amending process. If the legislature of West Virginia will take advantage of the plan outlined above, we have the right to expect that a sane and efficient policy with reference to the liquor traffic will be in force before the date of the repeal of the state constitutional amendment, and such a policy should be made an integral part of a sensible and adequate tax system for the commonwealth in the future.