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Nullification--A Slogan or a Process of Government

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NULLIFICATION—A SLOGAN OR A PROCESS OF GOVERNMENT

"Nullification is the safety valve which helps a self-governing community avoid the alternative between tyranny and revolution."—Arthur Twining Hadley.

I.

In the voluminous literature dealing with prohibition much has been written on the question whether the American people have under their form of government, any feasible alternative strategy that can be constitutionally exercised in the near future to alleviate the present reign of hypocrisy, corruption and oppression. It seems to be the unanimous opinion of students of the problem, that repeal of the Eighteenth Amendment is beyond the realm of possibilities in the near future. If that is so, then any suggestions for a substitute amendment [1] that would involve a repeal of the present amendment, or of an amendment to the Eighteenth Amendment such as is proposed by Col. Anderson [2] of the Wickersham Commission, would be outside the scope of possible remedies, say within the next decade. Let us assume further that the Volstead Act cannot be repealed because of opposition in the United States Senate, where equality of representation for each state exists, and wherein the rural and agricultural elements predominate. Under these circustances, the Hon. James M. Beck [3] has suggested that the best present strategy for the wets would be for the House of Representatives to refuse to appropriate money for enforcement. At the very outside, 218 members and perhaps less than 200 members, could bring this about, because of absentees and non-voters. Mr. Beck says, "No student of

1 Prof. Zechariah Chafee in the *Forum* for January, 1931.
2 The Henry W. Anderson Plan in the *Wickersham Report.*
3 N. Y. Times-Special Feature Article, Jan. 18, 1931, § 9, p. xx.

our constitutional history can question the power of the House of Representatives over the purse of the nation. To this chamber was especially committed the right to initiate all revenue legislation, and its power of disbursement is wholly discretionary and could not be called into question by any judicial body. Its sole responsibility is to the American electorate." He then predicts that "there will be in the Seventy-second Congress at least 130 members who oppose federal prohibition. If the American people will wake up and send seventy more, the *problem of prohibition can be solved* by the speediest and most practicable method and with such ease that many will then wonder why for so long a time they were content to waste hundreds of millions of dollars and sacrifice some thousands of lives to enforce an unenforceable and iniquitous law."

The purpose of this article is to show that the James M. Beck nostrum of nullification will not solve the prohibition problem. His suggestion is only a beginning. As such, it is valuable and necessary. But like so many others who have been fascinated by and who have declared their allegiance to the idea of nullification as the way out of the prohibition muddle, he has failed to realize the potential perils implicit in a negative policy. To Mr. Beck, nullification is nothing more than a slogan albeit one of tremendous propaganda value. It shall be our purpose to show the potentialities of nullification as a process of government.

Suppose Congress would refuse to appropriate money for the prohibition unit, or even suppose that Congress would repeal the Volstead Act and that the wet states would repeal their enforcement statutes, this would not constitute a solution of the problem. It would not even satisfy the wets. Before nullification can be advocated as an effective process of government for solving the prohibition problem, it is incumbent on the adherents to show (1) that it is possible to raise revenue from the liquor traffic and (2) that it is pos-

sible to regulate the traffic without having either the revenue or the regulatory laws declared unconstitutional as in violation of the Eighteenth Amendment that is still in the Constitution and cannot be repealed. If these two things can not be accomplished as long as the sumptuary law remains in the Constitution, then any talk of nullification is futile. An unregulated and a non-revenue producing liquor traffic is unthinkable as a solution of the prohibition problem. We shall attempt to show that both of these conditions can be satisfied in a constitutional manner without authorizing what the Eighteenth Amendment condemns.

II.

Assuming that state and federal enforcement acts are repealed (or that the federal government resorts to indirect nullification by failure to appropriate money for enforcement) can the state and the federal governments constitutionally tax the liquor traffic without authorizing what the Eighteenth Amendment 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 the 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.*[4]

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 government; but they are not the less burdens, and are only submitted to because of necessity. It would be a remarkable proposition, under such circum-

[4] 32 Michigan 406 (1875).

stances, that a thing is sanctioned and countenanced by the government, when this burden which may prove disastrous, is imposed upon it, while on the other hand, it is frowned upon and condemned when the burden 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 approval 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 protection 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 protection 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.[5] So a tax statute is not unconstitutional because it imposes a privilege tax upon a business made unlawful by another statute.[6] 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 to collect the tax imposed from one engaged in such business.[7] 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.[8] 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.[9] From the foregoing authorities, it should be clear that a state can impose a license tax upon a business that is prohibited and the law will not authorize what the Eighteenth Amendment condemns.

When we turn to the federal government, we find Mr. Justice Day speaking for a unanimous Supreme Court of the United States in the case of *United States v. Yuginovitch*[10] laying 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

5 State v. Doon and Dimon, R. L. Charlt. 1 (Ga. 1811).
6 State ex rel. Melton v. Rombach, 73 So. 731 (Miss. 1917).
7 Foster v. Speed, 111 S. W. 925 (Tenn. 1908); Brunswick-Balke-Colender Co. v. Mecklenburg County, 107 S. E. 317 (N. C. 1921).
8 State ex rel. English v. Fanning, 96 Neb. 123, 147 N. W. 215 (1914).
9 Henry v. State, 26 Ark. 523 (1871); Burch v. Savannah, 42 Ga. 596 (1871); Pleuler v. State, 10 N. W. 481 (1881).
10 256 U. S. 450 (1920).

a constitutional objection." In *United States v. Sullivan*[11] Mr. Justice Holmes, again speaking for a unanimous court, holds "that gains from illicit traffic in liquor are subject to the income tax." To the bootlegger, the idea of "protection" money is not a novel one. But in addition, the government, under a scheme of constitutional prohibition can say to this member of an outlaw class, "You must also contribute to the support of the federal sleuths who regard you as legitimate prey." The defendant in the *Sullivan* case failed to make out any income tax return and he relied as a defense on the self-incrimination provision of the Fifth Amendment. Mr. Justice Holmes said, "It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime . . . . He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law."[12] In *United States v. One Ford Coupe Automobile*[13] the court held that intoxicating liquor, though made for beverage purposes in violation of the Volstead Act, is subject to tax. The reader should remember that these three decisions were rendered at a time when the National Prohibition Act was in full force and effect. *A fortiori* the Federal government can tax when that act is repealed.

Further, under the doctrine of the *License Tax Cases*[14] Congress, under our hypothetical policy of nullification, would be allowed to lay a license tax on intoxicants even in a state that still embraced the policy of state prohibition on the theory that the federal license did not "convey to the licensee any authority to carry on the licensed business within the state." In this case the court said:

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11 274 U. S. 256 (1926).
12 274 U. S. 259, 263, 264 (1926).
13 272 U. S. 321 (1926).
14 5 Wall. 462 (1866). See also Pervear v. Commonwealth of Mass., 5 Wall. 475 (1866).

"The recognition by the Acts of Congress, of the power and right of the state to tax, control or regulate any business carried on within its limits, is entirely consistent with an intention on the part of Congress to tax such business for national purposes."

The licenses give no authority and are merely receipts for taxes. There is ample authority to avoid the intolerable situation of a non-productive liquor traffic under a policy of nullification.

III.

Professor McBain, in his book "Prohibition Legal and Illegal," [15] maintains that "if Congress failed to provide for national enforcement of national prohibition, and if the wet states failed to adopt prohibition as a state policy, the liquor business in such states would flourish on a scale and under conditions of uncontrol never before tolerated. The old saloon would be as nothing compared with the lawless new saloon. Any conceivable state regulation, short of prohibition itself, would be a violation of the prohibition adamantly prescribed by the Eighteenth Amendment. This would be intolerable .... (The states) *could not merely regulate, for that would be to legalize what is unqualifiedly forbidden.*" If this opinion is correct, nullification as a process of government is a travesty.

It is our contention that if federal and state enforcement acts were repealed, it would be possible for the states, under the police power, to regulate the liquor traffic without authorizing anything that the Eighteenth Amendment condemns. By a system of *negative regulations* the state can penalize what it wants to penalize and in this manner it can control the time and place and occasion of the sale, the quantity and quality of liquor and the persons to whom liquor may be sold. As an example, a state statute providing that liquor shall not be sold to minors and containing a penalty therefor, does not by implication sanction the sale

15 Pp. 38-39.

of liquor to adults. 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," [16] 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 accomodation 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.[17] 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 fundamental principle that will justify the constitutional validity of the proposal we are advocating is contained in a doctrine enunciated by the Supreme Court of the United States in the case of *United States v. Lanza*.[18] The court said:

"To regard the (Eighteenth) Amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter . . . . To be sure, the first section of the Amendment took from the states all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it. Such laws derive their force,

16 P 52.
17 Ingram v. State, 39 Ala. 247, 84 Am. Dec. 782 (1864).
18 260 U. S. 377, 381-382 (1922).

as do all new ones consistent with it, not from this Amendment, but from power originally belonging to the states, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution." [19]

Two implications of vital significance to the validity of our proposal can be drawn from the doctrine of this case. (A) Since the states do not derive their power to legislate concerning intoxicating liquor from the Eighteenth Amendment, then it follows that there is no constitutional duty upon the states to adopt a policy of *state* prohibition.[20] (B) Since the source of the states' power over intoxicating liquor is the police power, there is no constitutional obligation on the part of the states to exercise their legislative power to the hilt and in such a manner that it will be coextensive with the drastic sumptuary legislation comprising the first article of the Eighteenth Amendment.

(3) 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.[21] A state may classify with reference to an evil to be prevented. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience.[22] 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." [23]

The presumption is that the legislature acted with knowledge of the facts and conditions.[24] It has been held that the states "need not denounce every act committed within their

19 The court said that the restriction referred to was "chiefly the commerce clause."

20 See McBAIN, PROHIBITION LEGAL AND ILLEGAL, pp. 29, 30, 31, 32, 34, 35.

21 FREUND'S POLICE POWER, p. 21.

22 2 COOLEY'S CONSTITUTIONAL LIMITATIONS, (8th ed.), p. 813.

23 Patsone v. Pennsylvania, 232 U. S. 138 (1913).

24 1 COOLEY, CONSTITUTIONAL LIMITATIONS, (8th ed.), p. 372, note 1 for list of cases.

boundaries which is included within the inhibition of the Volstead Act, nor provide the same penalities therefor." [25]

An illustration will aid in making clear the proposition we are defending. The state of Montana repealed its state prohibition law.[26] 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.[27] Does any one doubt that a violator of that law does not commit an offense against the state for which he can be punished? Does any one 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, it is 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 free from drifting into the position in which the state would be positively legalizing that which the Eighteenth Amendment 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 consequences are not drawn within the range of legislation or that they are regulated or restrained in a different

25 Commonwealth v. Nickerson, 236 Mass. 281, 128 N. E. 273 (1920).
26 Rev. Code of Mont., Supp. 1923-27, § 11048.3, p. 1072.
27 Rev. Code of Mont., *op. cit. supra* note 26, at § 11048.1.

manner and treated with greater severity or leniency, is not deemed sufficient to invalidate a measure otherwise legitimate, confining itself to some particular danger." [28]

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. We are assuming here that the federal enforcement act has been repealed. Of course if the Volstead Act still remains on the books, even though Congress fails to appropriate money for its enforcement, many of these pleasures may constitute offenses under that act, and the violator may pay the penalty because of the zeal of some law enforcement patriot. And finally it is comforting to remember that the Eighteenth Amendment contains no penalties and is not self-enforcing.

It should be noted further that under a policy of nullification (1) liquor manufacturers and dealers will not be permitted to incorporate; and (2) contracts for the sale of alcoholic beverages will not be enforcible in either state or federal courts as long as the Eighteenth Amendment remains in the Constitution. The absence of corporate and credit facilities for the liquor traffic will constitute a distinct social advantage. We need fear no repetition of the sinister machinations of the "Liquor Trust" in politics. Under the new regime, the liquor business will be in the hands of small producers and retailers and under circumstances wherein the forces of competition will prevail as to quality and price. Further the business will be limited to "cash and carry" or "collect on delivery." [29]

IV.

In conclusion, it should be emphasized that nullification as ordinarily understood is simply a slogan, a method of at-

28 FREUND, *op. cit. supra* note 21, at p. 740.

29 See MANION, "What Will Become of Prohibition?" 6 NOTRE DAME L. (1931) 332.

tack, a strategic maneuver. The wets, who in desperation are advocating 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 in each state to regulate and tax the liquor traffic as best suits its interests. The revenue possibilities will encourage doubtful states to fall into line. It may be that the Anderson Plan, endorsed by several members of the Wickersham Commission, will constitute a better permanent solution of the problem. But it should not be forgotten that that plan will require an amendment to the Eighteenth Amendment. That one feature removes that proposal from the category of a present practicable way out of the prohibition muddle. The plan we have outlined affords the American people the opportunity within the next decade of enjoying the "pursuit of happiness" vouchsafed to us by our forebears.

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