AMENDING THE 18TH AMENDMENT

BY HOWARD LEE McBAIN

Obviously, there is no single method of controlling the liquor problem in the United States that is so manifestly promising that all or most reasonable men can be brought to agree upon its wisdom and beneficence. Divergence of views as to what had best be done inheres in the nature of the problem itself. It would have been extraordinary in the extreme had the eleven members of the Wickersham Commission, after studying this many-faceted subject of contention, found themselves in happy harmony in respect of its solution. Inevitably, their report was a compromise both in its conclusions from the evidence and in its proposals for remedy. But whatever its shortcomings in this and other regards and however little it revealed that was not already known or justifiably suspected, it remains the most scientific and nonpartisan study that we have or are likely to get at any near date. It is almost certain to play an important part in the presidential campaign of next year, for despite the longings of all the aspirants to be freed from this politically explosive incubus, the issue of Prohibition can be no more eliminated from that campaign than national Prohibition can be generally enforced. Moreover, it is possible, not to say probable, that it will be more difficult hereafter rather than less difficult to pussyfoot on the issue. The Wickersham Report, if it achieves nothing else, will make the head-hiding erroneously ascribed to the ostrich less available than it has been to the politician.

Regrettably enough, the report is too long for popular consumption. The brief two pages of Conclusions and Recommendations, which was all that many newspapers printed, gave a grossly misleading impression of the report as a whole. For example, the first conclusion was that "the Commission is opposed to the repeal of the Eighteenth Amendment"; and the eleventh declared that *if* it should be decided to revise the Amendment the Commission had agreed upon a proposed phraseology of revision. But only by reading the individual statements of members could it be discovered that two members were in favor of immediate repeal and that four additional members advocated immediate revision. In other words, an absolute majority of the Commission was of the opinion that the time had already arrived for either repealing or amending the Amendment. Moreover, four other members favored revision unless enforcement conditions positively improved "within a reasonable time"—whatever that may mean. Only the chairman himself was equivocal on this point.

II

Now, most people who have given intelligent thought to the subject realize that, unless something be done to the Eighteenth Amendment, little can be legally

done either by Congress or the States to ameliorate the complicated evils of national Prohibition which the Wickersham Report unblinkingly concedes. The number who believe that something should and must be done to the Amendment is apparently steadily increasing. The tide of such opinion has risen amazingly within two years. But among those who hold this view, opinions differ sharply as to whether the Amendment should be wholly repealed or merely revised.

Forthright repeal would restore the *status quo ante*. The several States would be in complete control of liquor control. They could continue or establish State Prohibition, absolute or modified. They could establish State dispensaries or some form of public corporate control with limited purchase permits. They could return to the license system, with or without local option and with or without legalizing the saloon. (Perish the latter thought! Even the politicians profess to be horrified at any possibility of a revival of the bright lights, brass rails, and swinging doors. This being so, the saloon may be readily outlawed in favor of the speakeasy by the simple device of prohibiting the sale of liquor to be consumed upon the premises of sale.)

In the event of repeal, Congress would have no power over liquor except under its powers to tax and to regulate interstate and foreign commerce. The commerce power Congress has used before and would probably use again to assist the States in enforcing their State policies—especially their Prohibition policies.

But there are two main arguments in support of a policy of revising rather than repealing the Eighteenth Amendment. One of these is expediential. States there are, and probably will continue to be, which are politically dry. Would it not be easier to woo such States to permit revision rather than repeal? Would they not sooner be willing to ratify an amendment of the Amendment which, while making it possible for Congress to liberate the wet States wholly or in some degree, would at the same time make it possible to give the dry States assistance by way of Federal officers and Federal courts in enforcing within their borders a policy of absolute or slightly modified Prohibition? Such questions cannot be answered categorically. But it seems reasonable to suppose that a campaign for revision would have larger and earlier chance of success in the dry States if they could be convinced that so far as they themselves are concerned the present state of affairs need not be altered.

The second chief argument for revision is based upon an assertion of the desirability of retaining some measure of national control. "Every plan of control", says the Wickersham Commission, "must start from the fundamental fact that the business of producing and distributing alcohol transcends State lines. . . . Since at least a potential national check would be needed even if the subject or some part of it were remitted to State initiative, a constitutional provision is indispensable." In the judgment of the Commission "it is impossible to recede wholly from the Eighteenth Amendment in view of the economic unification of the country, the development of transportation, the industrial conditions of the time, and the general use of machinery in every line of activity."

In this belief the Commission proceeded to formulate a proposed rewording of the Eighteenth Amendment, declaring that "all the Commission agree that if the Amendment is revised it should be made to read substantially as follows:

"Section 1. The Congress shall have power to regulate or to prohibit the manufacture, traffic in or transportation of intoxicating liquors within, the importation thereof into and the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes."

This is the most important and most constructive proposal contained in the report. It is the one proposal around which debate is likely to center as the agitation to do something about this matter proceeds. It is therefore worth close scrutiny.

Now, many amateurs have tried their hands at rewriting the Eighteenth Amendment. Even with a clear notion of the ends to be desired this is no child's task. It must be assumed, however, that after eighteen months of labor this suggested substitute for the troublesome Eighteenth was long pondered and patiently *x*-rayed by a Commission consisting in major part of eminent lawyers and judges. Yet even a competent tyro in constitutional law can see probable legal and practical difficulties ahead for any such substitute—can see also that it might fail to accomplish the very purposes which the Commission presumably had in mind.

III

Manifestly, the most significant thing about this proposal is that the fiat of absolute Prohibition would be lifted out of the Constitution and in its stead Congress would be empowered "to regulate or to prohibit". What would be possible to Congress and the States under this new investment of power? One can but speculate concerning the various plans that might be attempted, and test their probable validity in the light of our constitutional history. Especially pertinent in this connection is the lengthy and complicated judicial history of the commerce clause—that clause which, using the same word "regulate", vests in Congress the power to regulate interstate and foreign commerce.

In speculating on the possibilities that inhere in the Commission's proposal it should be remembered that constitutional provisions are commonly written for the distant as well as the immediate future. In respect of no subject of public control have there been greater oscillations of opinion and experiment from age to age than in the matter of liquor control. A plan of congressional action which may seem quite beyond the range of practical politics today may be well in the forefront ten or twenty years hence.

First of all, then, Congress could, under this proposed new amendment, continue the present policy of nation-wide Prohibition, or, having abandoned it, could return to it at some later time. This is clear so far as the power is concerned, though it is very nearly inconceivable as a matter of immediate policy, for the simple reason that the mere adoption of the amendment by the extraordinary majorities that are necessary would premise a wide sentiment for change. If, however, Congress continued or later restored national Prohibition, the question arises whether the State Prohibition laws would then be valid.

To the layman this may seem a foolish question. It is not foolish in fact. This amendment would vest the power to prohibit in Congress. It would expressly reserve no power to the States. It certainly could be held without undue violence to reason that this investment of power in Congress was exclusive. If the analogy of the courts' interpretation of the commerce power were followed, it would be so held; for a law of Congress regulating any matter pertaining to interstate or foreign commerce operates in effect to annul any

State law on the same subject, whether the State law is in conflict or not. It was precisely a fear of this result that led the framers of the Eighteenth Amendment to confer upon the States "concurrent" power to enforce. But the Wickersham Commission does not believe in concurrent enforcement. Its report says:

> It would seem wise to eliminate the provision for concurrent State and national jurisdiction over enforcement contained in the second section as the Amendment stands. This provision has not accomplished what was expected of it, and there are no signs that it will ever do so. It is anomalous to have two governments concurrently enforcing a general prohibition. Action on the part of the States cannot be compelled. If it comes, it will come voluntarily by State enactment and enforcement of State law. The States can do this without any basis in the Federal Constitution.

While it is certain that the States could do this both before and since the arrival of the Eighteenth Amendment, it is by no means so certain that they could do so under the proposed amendment. At least there is doubt; and the dry States would not contemplate with equanimity doubt upon such a point.

A second possible policy would be for Congress to repeal the Volstead Act without substitution. This would unquestionably be valid. There is no way that Congress can be compelled to exercise a power conferred by the Constitution. But repeal of the Volstead Act under the new amendment would produce a result wholly different from repeal under the present Amendment. Repeal under the existing Eighteenth would mean that traffic in liquor would be wholly unregulated in the States having no Prohibition law. Nor could these States subject the traffic to control by enacting anything except a Prohibition law, since the policy of Prohibition is rigidly fixed by the Amendment. Under the proposed amendment, however, if Congress simply cleared the Federal statute-books of Prohibition legislation, the States could probably either prohibit or regulate in any manner they chose.

There is ample constitutional precedent for this. For example, the original Constitution empowered Congress to establish uniform bankruptcy laws. For many years Congress failed to exercise this power. Meantime, the whole subject was regulated by State laws. Again, the Supreme Court has declared that when Congress has failed to regulate this or that matter pertaining to interstate commerce the States may regulate, provided the subject of regulation is not one which in the judgment of the court should be uniformly regulated if at all. And although the court declared thirty-one years ago that the regulation of commerce in liquor was a subject requiring uniformity, this pronouncement has certainly been modified by later decisions and is so manifestly contrary to the plain facts that it is not likely to be repeated.

It seems clear then that if under the proposed amendment Congress gaily swept all Federal Prohibition laws into the scrap-heap the result would be precisely the same as if the Eighteenth Amendment had been repealed. The *status quo ante* 1920 would be restored. This is a possibility which apparently never occurred to the Commission, and which probably has not been discovered by many of the wets who are clamoring for repeal or nothing. To the latter it is a possibility not without interest.

A third tack which Congress might but almost certainly would not follow would be to establish some sort of regulatory system—for instance, a dispensary or

limited license system—of uniform and nation-wide application. If this were done, there is not the slightest doubt that a State Prohibition law that ran counter to the congressional system thus established would be invalid. In other words, to vest in Congress the power to regulate without reserving any power to the States would, beyond question, enable Congress to defeat State Prohibition if it elected to do so. Unlikely as such an election would be, the wets could scarcely expect the dry States to assist in preparing such a noose, however remote its possible drawing.

IV

One thing, however, seems beyond dispute: no law of Congress, whether prohibitory or regulatory, which established a uniform liquor policy throughout the country would be satisfactory. Differences in local, State, and sectional attitudes have been the major cause of revolt against national Prohibition. Rebels exist everywhere, but their community proportions vary greatly.

Now, it is certain that some States, perhaps even some that might ratify a revised amendment, will wish to retain Prohibition. It is equally certain that other States will desire to legalize the sale of intoxicating beverages under one or another form of restriction. How could Congress under the proposed rewriting of the Amendment accommodate the national law to the attainment of these variable ends? Two or three possibilities suggest themselves.

Let us consider, then, as a fourth course that Congress might pursue, the enactment of a law offering to the several States two or more options—a choice, let us say, of Prohibition or of State dispensary or of limited license—the standards and conditions in each case to be fixed by Federal law. This would be a wholly novel experiment in Federal legislation and would raise new legal questions. Congressional grants-in-aid to the States for education, road building, maternity assistance and other public purposes over which the national government has no power of control furnish no helpful analogy. A money grant, even when dangled upon a string of conditions, is wholly different from a police law.

One question that would require answer is this: Upon whom would Congress devolve the authority of making a choice of policy—the voters or the State Legislature? There is no precedent for a popular local referendum upon Federal laws and nobody knows whether or not the Supreme Court would permit Congress "to regulate or to prohibit" by a law which offered options to the States. Probably it would; certainly it should. Local options within the States on many matters including liquor control have been common for years. Thus there appears to be no reason why the principle and practise should not be embodied in Federal laws—at least in such a matter as liquor regulation or Prohibition.

But after a State had adopted one of the options thus offered, another question would raise its head: Who would enforce the law within the State? It would, of course, be a law of Congress and clearly therefore subject to enforcement by Federal officers through Federal courts. But would the States be competent also to enforce it and, if competent, could they be obligated to do so? Certainly State and local officers could voluntarily assist the Federal enforcing officers. Possibly also Congress could empower State officers and State courts to aid in enforcement. But to empower is one thing and to impose a duty is another. It is certain that under

the power "to regulate or to prohibit" Congress could not lay an obligation upon State officers to enforce or compel State courts to take jurisdiction. That would violate a fundamental principle of our federalism.

Presumably, however, at least some of the States—perhaps many of them—having chosen one of the plans offered by Congress, would wish to enact for enforcement in their State courts a State law in conformity with the plan adopted. They might, indeed, wish to add to the plan, just as some of the States now have in their Prohibition laws features not embodied in the Volstead Act. Would they be constitutionally competent to pass laws of this character?

The only light we have upon this question is the already mentioned rule about the commerce power of Congress. When that august body exercises its power to regulate commerce, State laws must make a quick exit, whether or not they are awry with what Congress has prescribed. There is, however, a considerable difference between regulating such a ramifying thing as commerce and regulating such a subject as liquor control. It is possible—even probable—that the Supreme Court would find a way, by whatever illogic, to say that "to regulate" applied to liquor does not mean the same as "to regulate" applied to commerce. This would be relatively easy as compared with some other intellectual acrobatics which the court has in times past performed. But until it had spoken, there would be at least sufficient doubt to give Congress pause.

A fifth plan to be considered would be for Congress to impose certain minimum requirements, to the end, for example, of preventing a return of the saloon, and to confer upon the States the power to enact regulatory or prohibitory laws in supplement of the congressional act. But the probability is that the courts would hold this to be an unconstitutional delegation of the power granted to Congress by the new amendment. That would not be regulating or prohibiting; it would be devolving those powers upon the States. While, as has been said, there are precedents for the States exercising certain national powers not actually exercised by Congress, there is no precedent for an express congressional delegation of congressional power to the States. In the Clark Distilling Company case, in which the Webb-Kenyon Act was sustained in 1917, the Supreme Court was at pains to declare that this law of Congress which prohibited interstate shipments of liquor into Prohibition States "in violation of the law" of any State was not a delegation to the States of the power to regulate interstate commerce. And the implication was clear that Congress could not so delegate its power.

V

But, as Chief Justice Marshall said as far back as 1824, "although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject." There are early and late precedents for this. The very first Congress adopted the laws of the States relating to pilots. The criminal codes of the States have been adopted for enforcement in the Federal courts in certain circumstances. For example, a Prohibition officer, if accused of crime committed in connection with his official duties, may be tried in a Federal court, but the criminal law that applies is the State law. In the Webb-Kenyon Act Congress in effect adopted the State Prohibition laws.

A final plan to be considered, therefore,

would be for Congress to prescribe such uniform minimum requirements as it deemed advisable and to adopt the regulatory or prohibitory laws of the States as Federal laws. The validity of such a scheme would depend upon a ruling by the courts to the effect that the investment in Congress of the power to regulate or prohibit was not exclusive unless Congress chose to make it so. In other words, it would have to be held that the new amendment did not prevent the States from regulating or prohibiting, provided their statutes did not positively conflict with Federal requirements. Otherwise, there would be no valid State laws for Congress to adopt.

This would doubtless be the most satisfactory method that Congress could devise for the exercise of its power to regulate or prohibit. It would enable Congress to establish a national minimum, subject to which the States might establish varying policies. It would likewise enable Congress to protect the policy of one State from being infringed upon by that of some other State and to extend the aid of Federal officers and the Federal courts in enforcing the different State policies which Congress would by adoption make its own.

It is impossible to say whether or not the Commission had some such plan in mind. In discussing what the revised amendment should make possible it says:

> (1) The revision should be such as to do away with the absolute rigidity of the amendment as it stands. It should give scope for trying out further plans honestly with some margin for adjustment to local situations and the settled views of particular communities. It should admit of different modes or types of Prohibition, or control in different localities in case Congress approves. It should aim at keeping control in the nation, and committing details and initiative to the States. (2) It should be such as to conserve the benefits of the present situation by national and State repression of saloons and open drinking-places and yet permit, where demanded by public opinion, an honest, general or local control of manufacture or importation and distribution, consistent with the minimum demand which otherwise, in very many localities at least, will tend to bring about a regime of nullification or defiance of law.

This is all very general. It does not get down to the brass tacks of what Congress and the States might or might not be able to do under the amendment. Surely the Commission does not mean that Congress should specifically and individually approve every mode of Prohibition or control that might be established in each of the forty-eight States. This would be a curious method of exercising its power to regulate or prohibit. Moreover, a deal more than "details" will have to be left to the States if we are to have what the situation clearly demands—namely, policies varying from State to State all the way from unqualified Prohibition to legalized sale.

But the point of principal interest and importance in what has been said above is that there are in this proposed amendment possibilities that have apparently not been fully canvassed and legal doubts that ought not to be tossed into the lap of the courts. The proposal has not been thoroughly thought through. The present Amendment has presented a sufficiency of tough legal questions. In revising it we should endeavor, if possible, to guard against an even worse muddle of vexatious law.

STUNTS

BY JOEL SAYRE

You wasn't raised in this town, was you? I thought not from the way you talk. You're from down South, ain't you? Atlanta? I figured you was from somewheres down there from the way you talk. Lots of you newspaper boys is from out of town: come driftin' in here and stay awhile and then goes somewheres else.

Before you come here there was Eddie Butler. He come here from Buffalo. And before him there was Frank Ford. He was from Marietta. And before him there was Silk O'Loughlin. He was from New York.

What a star that Silk was! Always fulla hell and a great clog dancer. Geez, he was better than B. F. Keith's Vaudeville. He had one great stunt where he give an imitation of a train. He'd start to scrapin' his feet slow and he'd yell: "All aboard for that big excursion!" and then he'd let out a long whistle, and kind of pump his arms like they was drivin' rods, and his feet goin' faster and faster, and it'd sound jest like a big 6-8 wheeler gettin' up steam. Honest to God, it was so natcherl you could shut your eyes and pretty near smell smoke.

Silk certainly was a star.

Sometimes he'd put on this excursion act in the squad-room at night when they was changin' the trick and everybody liked to died. Even the Chief himself'd come down to watch sometimes.

He had another great stunt where he'd imitate a drum with his feet and him whistlin' "Stars and Stripes Forever" at the same time. If you wasn't lookin' you'd swear it was a parade comin' down the street. He was better than B. F. Keith's Vaudeville, that Silk.

Well, Silk, he was from New York. His real name was Frank O'Loughlin, but they called him Silk after the empire.

Yes, I guess you newspaper boys drift around a lot. Anyways, all I ever knowed here at headquarters was drifters.

Now you take cops, they ain't so restless. Most of us is generly pretty near always home-town boys and we stay on the force all our life. You take me now. First-grade detective on the inspector's staff ain't sech a bad job. I got my own home and we got a Ford sedan and a radio and a Victorola with about all the new records that comes out and most of them red seal classics. Yeah, I ain't so bad off as you might think, and I ain't figgerin' on doin' much driftin' yet awhile.

I and the wife is great music lovers, aspesh'ly me. It mebbe sounds kind of sappy, but all my life I've wanted to be an actor or a musician. I always wanted to be able to dance like Silk or sing like this here John McCormick or Eddie Cantor or some of them. All my life I been crazy about anybody that could do any kind of a stunt like Silk O'Loughlin. Yeah, and the nearest I ever come to it was playin' the cymbals in the Woodmen's band. And it ain't so easy as it looks, neither, at that.

But I was tellin' you about how I always been nuts about anybody that could do some kind of goddam stunt . . . Geez,