SENATE.

FRIDAY, *April 23, 1920.*

The Chaplain, Rev. Forrest J. Prettyman, D. D., offered the following prayer:

Almighty God, we lift our hearts to Thee at the beginning of this new day of work, and pray that we may have the joy that comes to us in contemplation of the fact that we are working to accomplish a divine plan. May we enjoy the rich inheritance, the realization of the dreams of our fathers in human government and society, and not only follow the personal pursuit of ideals but work out under the divine guidance a plan that shall last forever. Oh, grant us this joy this day, and companionship with the great Architect of government and life. We ask for Christ's sake. Amen.

The Reading Clerk proceeded to read the Journal of yesterday's proceedings, when on request of Mr. CURTIS, and by unanimous consent, the further reading was dispensed with and the Journal was approved.

ENROLLED BILLS SIGNED.

The VICE PRESIDENT announced his signature to the following enrolled bills, which had previously been signed by the Speaker of the House of Representatives:

S. 806. An act conferring jurisdiction on the Court of Claims to hear, determine, and render judgment in claims of the Iowa Tribe of Indians against the United States; and

S. 2442. An act authorizing and directing the Secretary of the Interior to convey to the trustees of the Yankton Agency Presbyterian Church, by patent in fee, certain land within the Yankton Indian Reservation.

INTERNATIONAL HIGH COMMISSION.

Mr. DILLINGHAM. I am directed by the Committee on the Judiciary, to which was referred the bill (S. 3828) to amend the act approved February 7, 1916, entitled "An act providing for the maintenance of the United States section of the International High Commission," to report the same back to the Senate and ask to be discharged from its further consideration, with the suggestion that it be referred to the Committee on Foreign Relations.

The VICE PRESIDENT. Without objection, that action will be taken.

CLAIM OF JAMES K. HACKETT.

Mr. MOSES, from the Committee on Foreign Relations, to which was referred the bill (S. 1519) making appropriations for expenses incurred under the treaty of Washington, reported it without amendment and submitted a report (No. 545) thereon.

NATIONAL PROHIBITION.

Mr. MOSES. From the Committee on Printing I report an original resolution, and I ask unanimous consent for its immediate consideration.

The VICE PRESIDENT. The Secretary will read the resolution.

The Assistant Secretary read the resolution (S. Res. 352), as follows:

Resolved, That the manuscript entitled, "Appellees' and Appellant's Briefs," in an appeal from the United States district court for the district of New Jersey, in the Supreme Court of the United States, on the validity of the so-called eighteenth amendment; and the briefs in the appeal from the Kentucky, Rhode Island, and Wisconsin district courts to the Supreme Court of the United States, relative to the enforcement of the prohibition amendment, be printed in one volume as a Senate document.

The VICE PRESIDENT. Is there objection to the present consideration of the resolution? The Chair hears none. The question is on agreeing to the resolution. [Putting the question.] The resolution is not agreed to.

Mr. MOSES. Mr. President, the resolution provides for the printing of certain documents for which there is a great demand, and I ask for a division on the question.

On a division, the resolution was rejected.

Mr. BRANDEGEE subsequently said: Mr. President, a day or two ago I had referred to the Committee on Printing a request that the brief in the suit pending in the Supreme Court of the United States, known as No. 788, which is the appellant's brief on the validity of the so-called eighteenth amendment, might be printed. I did this because that suit, in my judgment, involved more as to our form of government and the rights of the States, as distinguished from the rights of the central Government, than any suit that has ever been tried in the Supreme Court, at least since the great questions of the Civil War. The Committee on Printing made a report recommending that that brief and the brief of the Government in that suit be printed as a public document, and also that the brief suggested by the Senator from Texas [Mr. SHEPPARD], the Government brief in that case, be printed; and the Senate rejected the committee's report. I have been assured by several Senators, when I told them that I was about to make this brief a part of my remarks, which probably would extend over quite a period of time, that they did not understand what the report of the committee was; and if they had understood it, they would have made no objection to the printing, but of course that mere statement to me does not change the action of the Senate, and so, with the consent of the Senate, I will read the brief.

Mr. SPENCER. Mr. President——

The PRESIDING OFFICER (Mr. MCNARY in the chair). Does the Senator from Connecticut yield to the Senator from Missouri?

Mr. BRANDEGEE. I yield to the Senator.

Mr. SPENCER. May I ask the Senator whether the printed brief carries out the remarks that he has intended to make upon the subject?

Mr. BRANDEGEE. Why, yes. I intended to read the brief, Mr. President.

Mr. SPENCER. I ask unanimous consent that permission be granted to print the brief without reading.

The PRESIDING OFFICER. If there is no objection, it is so ordered.

Mr. SHEPPARD. Mr. President, I have no objection, providing the briefs of counsel representing the other side can be published also.

Mr. BRANDEGEE. I think it is only fair that both sides of the case should appear in the RECORD; and while I dislike to have the Senator make consent to the printing of my brief contingent upon the printing of his, I certainly shall not object to his request. I think that the people of the country are entitled to the arguments of both sides, which are stated in the briefs much more understandably and at greater length than they were in the arguments of the counsel, necessarily. The arguments of counsel are not printed at all, and they embraced a very short period of time; but, in my opinion, the brief in this suit will be a lesson to the whole people of this country upon the great rival claims as to constitutional law presented by this case.

The PRESIDING OFFICER. If there is no objection, each brief will be printed.

The briefs are as follows:

"SUPREME COURT OF THE UNITED STATES.

"*October Term, 1919, No. 788.*

[Christian Feigenspan, a corporation, plaintiff-appellant, v. Joseph L. Bodine, United States attorney, and Charles V. Duffy, collector of internal revenue, defendants-appellees. Appeal from the United States district court for the district of New Jersey.]

"APPELLANT'S BRIEF ON THE VALIDITY OF THE SO-CALLED EIGHTEENTH AMENDMENT.

"The appeal in the case at bar presents for review a final decree of the United States district court for the district of New Jersey dismissing the plaintiff's bill of complaint and denying its motion for a preliminary injunction.

"It is deemed unnecessary to repeat the statement of facts here. In the following brief the validity of the so-called eighteenth article of amendment to the Constitution of the United States is discussed and the justiciability of the contentions upon that score are considered. In the appellant's separate brief on the construction of the eighteenth amendment and the constitutionality of title 2 of the national prohibition act will be found a full statement of the facts appearing from the bill of complaint and the supporting affidavits.

"The so-called eighteenth amendment reads as follows:

"'SECTION 1. After one year from the ratification of this article the manufacture, sale, 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 is hereby prohibited.

"'SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"'SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.'

"The plaintiff contends that this attempted amendment to the Constitution of the United States is invalid (1) because it constitutes mere legislation, and is, therefore, not authorized by Article V of the Constitution; (2) because it impairs the reserved police or governmental powers of the several States and

their right to local self-government; and (3) because it has not been ratified by three-fourths of the several States, since it has not been submitted to the electorate of the States in which the initiative or the referendum, or both, prevail (assignment of errors Nos. 1–5.) These questions are discussed in points II, III, and IV, respectively. In point I the prior amendments to the Constitution are considered with references to these contentions, and in point V the justiciability of the contentions is maintained.

"I.

"THE PRIOR AMENDMENTS TO THE CONSTITUTION CONSIDERED.

"A.

"An analysis of the prior amendments to the Federal Constitution will show that none of them directly invaded the police powers of the several States or impaired their right to local self-government. The first 10 amendments 'left the authority of the States just where they found it, and added nothing to the already existing powers of the United States.' (United States *v.* Cruikshank, 92 U. S., 542, 552; Spies *v.* Illinois, 123 U. S., 131, 166; Barron *v.* City of Baltimore, 7 Pet., 243, 250; Minn. & St. Louis R. R. *v.* Bombolis, 241 U. S., 211, 217.) They were but express declarations of the intent and effect of the unamended Constitution, and were adopted in order permanently to reassure the people of the States that no encroachments by the Federal Government upon their fundamental rights were being contemplated or authorized. (The preamble to the resolution proposing the first 10 amendments recited (1 Stat., 97) that 'the conventions of a number of the States having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government will best insure the beneficent ends of its institution,' it was accordingly resolved to submit the amendments.) The eleventh amendment merely further restricted the judicial power of the United States; if anything, it added rather than subtracted from the powers of the several States. The twelfth amendment readjusted the procedure of the electoral college; it had no effect upon the States. The thirteenth, fourteenth, and fifteenth amendments are discussed below. The sixteenth amendment merely changed the method by which income taxes might be levied by the Federal Government, but it diminished or affected none of the powers of the States. The seventeenth amendment altered the manner in which United States Senators were thereafter to be chosen, but it did not detract in the slightest from the police powers or the sovereignty of the States.

"Nor did the thirteenth, fourteenth, and fifteenth amendments impair the right of local self-government, when read in the light of their history and primary purpose and correctly understood, as has been frequently held by this court. (Slaughter House Cases, 16 Wall., 36, 68, et seq.; Barbier *v.* Connolly, 113 U. S., 27, 31; Bartemeyer *v.* Iowa, 18 Wall., 129, 138; Civil Rights Cases, 109 U. S., 3, 11; Mugler *v.* Kansas, 123 U. S., 623, 663; In re Kemmler, 136 U. S., 436, 448, 449; In re Rahrer, 140 U. S., 545, 556; Guinn *v.* United States, 238 U. S., 347, 362.) In Barbier *v.* Connolly, supra, the court said that—

"'Neither the [fourteenth] amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations, to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.'

"These three amendments grew out of the War of the Rebellion. The outbreak of that struggle, of course, laid the Federal Government under the duty of exercising its war powers to the utmost so as to suppress the insurrection. In the prosecution of that purpose Federal troops occupied some ,and eventually all, of the rebel territory, and, in the natural conduct of the war, seized all such enemy property as could be used against them. Included among this property were slaves, and as it directly tended to weaken the enemy to set free their slaves, the Federal forces did so. Finally, the President proclaimed their freedom. In so far as that proclamation related to the past, it merely declared an accomplished fact; and in so far as it related to the future, it constituted an order of the commander in chief to his military subordinates to be carried out in all the rebel territory within their power. The institution of slavery thus perished as a consequence of the exercise of the Federal war power. (Slaughter House Cases, 16 Wall., 36, 38; Texas *v.* White, 7 Wall., 700, 728.) This 'war power is not limited to victories in the field and the dispersion of the insurgent forces; it carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.' (Stewart *v.* Kahn, 11 Wall., 493, 507.) To effectuate the Federal war power, to perpetuate its necessary consequences, to prevent the recurrence of any such rebellion, and to remove the very cause thereof, the thirteenth amendment was adopted. It will be observed that its primary purpose and effect were wholly Federal.

"In this manner the compromise effected in the original Constitution, which had attempted to reconcile slavery with the republican form of government and to experiment with bondage in a land dedicated to freedom, finally failed, and it disappeared in the struggle of the Civil War. As a consequence, therefore, of the arbitrament of war, which all must accept, however revolutionary in character, it was settled politically in this country that slavery was inconsistent with any due form of republican government. When, therefore, Congress and the Executive undertook the reconstruction of the seceded States, they required them to set up a truly republican form of government, namely, one in which all men would thereafter be free.

"The termination of the actual struggle of the Civil War left the Federal Government with a constitutional duty to perform in the rebel territory, namely, the duty to restore and guarantee a republican form of government in those States, as required by section 4 of Article IV of the Constitution. (Texas *v.* White, 7 Wall., 700, 727, et seq.) But, as had long been contended and was then fully realized, no government could in fact be free or in truth republican in which the inalienable rights of man were not respected, in which *all* men might not live, be free, and hold their own without arbitrary interference by the Government and upon a footing of substantial equality. (Loan Association *v.* Topeka, 20 Wall., 655, 662; Calder *v.* Bull, 3 Dall., 386, 388; Wilkinson *v.* Leland, 2 Pet., 627, 647, 657.) Equality and justice to all freemen in the rebel States had, therefore, to be established and secured (United States *v.* Cruikshank, 92 U. S., 542, 555), and, to that end, an unambiguous determination had to be made of the status of former slaves, which cases like the Dred Scott case (19 How., 393) had left in confusion. It was for the accomplishment primarily of these Federal ends that the fourteenth and fifteenth amendments were made part of our fundamental law. (Slaughter House Cases, 16 Wall., 36, 70–1, 72–3.) (Senator Howard, who introduced the fourteenth amendment on behalf of the Reconstruction Committee, said (Cong. Globe, 39th Congress, 1st sess., pt. 3, p. 2766): 'Without this principle of equal justice to all men and equal protection under the shield of the law, there is no republican government and none that is really worth maintaining.' And Senator Poland said of the equal-protection clause of the fourteenth amendment (id., pt. 4, p. 2961): 'It is the very spirit and inspiration of our system of government, the absolute foundation upon which it was established. It is essentially declared in the Declaration of Independence and in all the provisions of the Constitution. * * * It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States, and I can not doubt but that every Senator will rejoice in aiding to remove all doubt upon this power of Congress.' Rhode Island in ratifying the Constitution declared (Elliot's Debates, p. 334): 'That there are certain natural rights of which men when they form a social contract can not deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.' In order, therefore, to assure a really republican form of government in every State, it became necessary to establish the essentials of republicanism in each State as an effective Federal right, so that they might be at all times available to the individual in judicial tribunals that were always open and could act promptly for his protection and with a due regard to the practical necessities of the particular case.

"The thirteenth, fourteenth, and fifteenth amendments, consequently, were intended to be corrective, and they added no new restriction upon the essential powers of the several States, to which their membership in a free republican government had not theretofore already subjected them. They merely made express and effective what was formerly implied in the guaranty of a republican form of government, and provided adequate machinery for the enforcement of those implied obligations. As Chief Justice Waite declared in United States *v.* Cruikshank (92 U. S., 542, 554):

"'The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which preceedes it, * * * add anything to the rights which one citizen has under the Constitution against another. *The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power.*

That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty.'

"These amendments were, consequently, germane to the express guaranty of a republican form of government, and the effectuation of that guaranty was their primary purpose and direct effect. They were never intended to disturb the fundamental relation between the States and the Federal Government, nor in the smallest degree 'to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character,' nor to make any 'departure from the structure and spirit of our institutions' (Slaughter House cases, 16 Wall., 36, 67, 78). As emphatically declared in the authority last cited:

"'We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.'

"The conclusion to be deduced from the thirteenth, fourteenth, and fifteenth amendments is that constitutional amendments may be made which are chiefly and primarily intended to effectuate or fortify the guaranty to the States of a republican form of government or some other function already vested in the Federal Government, even if their incidental or secondary effect may be to restrict the liberty of the States and their power in a minor degree. But such amendments furnish no warrant for an amendment like the one now before the court, which directly and substantially invades the essential powers of the several States and is entirely unrelated to any original or fundamentally Federal purpose.

"B.

"The prior amendments were also not open to the objection that they were merely legislation directly affecting the conduct of life of the individual, as is the so-called eighteenth amendment. The thirteenth amendment, despite its superficial resemblance, is not in reality mere legislation. The right of one to hold another in bondage is not, under our system of law, a natural or inherent right. (Indeed, it was judicially held in Massachusetts in 1781 that slavery was contrary to the Massachusetts declaration of rights. Mass. Law Quarterly, Vol. II, pp. 437–444; Somerset *v.* Stewart, 20 State Trials, 1, 82 (1772).) Wherever, therefore, the institution of slavery had a foothold in this country it was by virtue of State laws permitting it to exist. Consequently the thirteenth amendment, although in form a prohibition of slavery, in legal effect amounted to a limitation upon the power of all governments within the United States to legalize and authorize slavery. In other words, it was equivalent to an amendment reading as follows:

"'Neither the United States nor any of the several States shall hereafter have power to make lawful slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted.'

"It is, therefore, apparent that this amendment primarily limits governmental power and is operative upon governments, and only incidentally, if at all, upon individuals. It is not a false-imprisonment statute.

"The so-called eighteenth amendment is, however, quite different in its nature. It deals with a subject matter that does not draw its right to exist from positive law. If there be no positive law within a State one way or the other, anyone may engage in trafficking liquor therein. Therefore, a direct prohibition upon the manufacture and sale of intoxicating liquor is primarily not a limitation upon the powers of government, but upon the rights and conduct of life of the individual. That is to say, it is mere legislation, and not that adjustment and apportionment of governmental powers with which alone a constitution is properly concerned.

"In this respect a constitutional amendment granting to the Government *power* to prohibit intoxicants would be quite different from an attempted amendment itself directly declaring the prohibition of intoxicants. The former would merely add to the powers of government and would, therefore, in this regard at least, be a proper form of constitutional amendment; while the latter in its essence neither would add nor withdraw powers of government, but would be direct legislation. The eighteenth amendment is, therefore, in substance and effect a statute, not a constitutional provision akin to any in the Federal Constitution.

"The distinction to which the foregoing is addressed is no mere formalism. It concerns itself with the vitals of free government. The existence of a *power* of government beyond the reach of the majority to alter does not carry with it any threat of oppression of the majority, because they can at all times control the exercise of that power. If the majority now existing had desired that the power to prohibit intoxicants, for example, should be exercised by Congress and had so worded the amendment, they could have accomplished their will from time to time by calling on their representatives in Congress to act accordingly. If thereafter the majority then existing no longer believed the exercise of the power necessary, they would have had it within their power to regulate and could have procured their congressional representatives to recall what had theretofore been done. But the rule of the majority can not be preserved, if the legislators of to-day can, under the guise or color of amending the Federal Constitution, enact ordinary legislation into the Constitution. If they can provide, not that Congress shall hereafter have *power* to prohibit intoxicants, but directly that intoxicants *are hereby prohibited*, then the policy of the Government, in its immediate relation to and effect upon the life of the individual, permanently passes out of the control of all subsequent majorities and permanently leaves the conduct of the life of all absolutely in the hands of *the minority*, for the rule of individual conduct thus written into the Constitution can not be withdrawn therefrom so long as more than one-third of both Houses of Congress or more than one-fourth of the legislatures of the States refuse their assent.

"Again, provisions affecting slavery and freedom are in their intrinsic nature of the essence of the framework or composition of government. A constitution is not a proper framework of government if it does not make clear, expressly or by implication, who are included within the governing class of the country and what their rights and obligations are. The unamended Constitution gave the powers of government to the freemen, but provided that these should be represented in the Congress, not merely in proportion to their own numbers, but in proportion as well to the number of their slaves (Art. I, sec. 2; see also sec. 9, and Art. IV, sec. 2). The thirteenth amendment, which prevented the Government of any State or of the United States from reestablishing the slavery which the Emancipation Proclamation of January, 1863, had destroyed, therefore operated not only on governments alone, as we have seen, but operated upon them in respect of the essential basis of free government in determining who constituted the free people from whom the Government derived its powers and who were the basis of taxation and representation. This provision, with the fourteenth and fifteenth amendments, dealt therefore with one of the most important subjects of the original Constitution. Together they settled the compromises which appeared in the second section of Article I regarding the apportionment of representatives and direct taxes, and in the provisions of the second section of Article IV regarding the conflict of laws relating to persons held to service in one State escaping into another. (Slaughter House Cases, 16 Wall., 36, 67, 68.) Consequently in this aspect also the thirteenth amendment was not a mere prohibitory law, but an essential provision affecting the composition and framework of our system of government.

"II.

"THE SO-CALLED EIGHTEENTH AMENDMENT WAS NOT WITHIN THE AUTHORITY VESTED IN CONGRESS AND THE LEGISLATURES OF THREE-FOURTHS OF THE STATES BY ARTICLE V OF THE CONSTITUTION, BUT WAS THE UNAUTHORIZED ENACTMENT OF AN ORDINARY LAW UNDER COLOR OF AMENDMENT.

"Article V of the Constitution of the United States provides as follows:

"'The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, 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, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: *Provided*, That no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.'

"The operative part of the alleged eighteenth amendment reads as follows:

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

"'SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.'

"It is apparent that the prohibition contained in this so-called amendment is not what would ordinarily be considered a con-

stitutional provision. It does not relate to the powers or the organization of government. It is itself an exercise of the power of government through an ordinary act of legislation similar to laws passed by the legislatures of many States in the exercise of their police power. It is a command purporting to be issued by sovereign authority regulating the conduct of life by private individuals.

"The power granted in the second section is limited to the enforcement of the prohibition contained in the first section and depends upon it. There is no grant unless the prohibition was a valid exercise of the amending power.

"The following argument is in support of the contention that Congress and three-fourths of the legislatures of the States have no power to enact such a law under color of an alleged constitutional amendment, and that their act is a usurpation of authority. Such contention may be summarized as follows:

"(a) That the authority to amend the Constitution is a continuance of the constitution-making power and as such is a power quite different and altogether distinct from the law-making power under the Constitution.

"(b) That a grant of the one power does not include or imply a grant of the other.

"(c) That the natural and ordinary meaning of the words used in Article V of the Constitution limits the power granted to the function of constitution making as distinguished from ordinary law-making.

"(d) That the purposes of the grant imply the same limitation.

"(e) That other parts of the Constitution—notably Article I—express the same limitation.

"(f) That the existence of authority under Article V to enact ordinary laws regulating the conduct of private citizens under color of amendment, would be so in conflict with the fundamental principles and spirit of the Constitution that such a construction is not permissible.

"It is to be observed that this view is not in the slightest degree affected by the fact that Article V contains express exceptions to the grant of power to amend. The matters expressly excepted would clearly have come within the power granted, if not excepted.

"Our contention is not for a further exception to the power granted; it is that the grant itself does not include the power of ordinary legislation. This is no more affected by the fact that there are express exceptions to the power which was granted than would be the proposition that the grant of the fifth article does not include the judicial power or power to command the Army and Navy.

"1. *The authority to pass such a prohibitory law must be sustained, if at all, as an exercise of a special power granted to Congress and the State legislatures by the terms of Article V of the Constitution. It can not be supported by any idea that the alleged amendment is in any other sense the action of the people of the United States. It has never been submitted to the people of the United States, and they have never acted or had an opportunity to act upon it.*

"The Constitutional Convention of 1787 understood very well the difference between referring a question to the people and referring the same question to the State legislatures for their action. The Articles of Confederation had provided that no alteration should be made in them 'unless such alteration be agreed to in a Congress of the United States and be afterwards confirmed by the legislatures of every State.' Yet, by the resolutions of the convention adopted on the 13th of September, it was resolved 'that the preceding Constitution be laid before the United States in Congress assembled, and that it is the opinion of this convention that it should afterwards be submitted to a convention of delegates chosen in each State by the people thereof under the recommendation of its legislature for their assent and ratification.' (Journal, p. 370.) And Article VII of the Constitution then provided that 'the ratification of the *conventions* of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.'

"This was a clear departure from the terms of the Articles of Confederation governing the Union which the convention was attempting to make more perfect. It was revolutionary in character and it was the result of long consideration and debate.

"The Virginia plan, which was proposed by Mr. Randolph on the 29th of May, 1787, and which formed the basis of consideration by the convention, contained the following clause (Journal, p. 70):

"'*Resolved*, That the amendments which shall be offered to the confederation by the convention ought, at a proper time or times after the approbation of Congress, to be submitted to an assembly or assemblies of representatives recommended by the several legislatures to be expressly chosen by the people to consider and decide thereon.'

"On the 23d of July, this resolution having been agreed to in Committee of the Whole and being under consideration, Mr. Ellsworth moved to substitute a reference to the legislatures of the States for ratification. Upon that motion debate ensued. Apart from the considerations of convenience and the relative probabilities in favor of action in one way or the other, the substantial ground upon which the action finally taken was based, was that a reference to conventions expressly chosen by the people for the purpose of passing upon the Constitution was a reference to the people, and that a reference to the legislatures was not a reference to the people. Madison's notes tell us that (3 Documentary History of United States Constitution, pp. 405, 409, 410):

"'Col. Mason considered a reference of the plan to the authority of the people as one of the most important and essential of the resolutions. The legislatures had no power to ratify. They are the mere creatures of the State constitutions, and can not be greater than their creators, and he knew of no power in any of the constitutions; there was no power in some of them that could be competent to this object. Whither then must we resort? To the people with whom all power remains that has not been given up in the constitutions derived from them. It was of great moment, he observed, that this doctrine should be cherished as the basis of free government.'

"Mr. Gouverneur Morris said:

"'If the confederation is to be pursued, no alteration can be made without the unanimous consent of the legislatures. Legislative alterations not conformable to the Federal compact would clearly not be valid. The judges would consider them as null and void. Whereas in case of an appeal to the people of the United States, the supreme authority, the Federal compact may be altered by a majority of them in like manner as the constitution of a particular State may be altered by a majority of the people of the State.

"'Mr. Madison thought it clear that the legislatures were incompetent to the proposed changes. These changes would make essential inroads on the State constitutions, and it would be a novel and dangerous doctrine that a legislature could change the constitution under which it held its existence. There might indeed be some constitutions within the Union which had given the power to the legislature to concur in alterations of the Federal compact, but there were certainly some which had not; and, in case of these, a ratification must of necessity be obtained from the people. He considered the difference between a system founded on the legislatures only and one founded on the people to be the true difference between a league or treaty and a constitution. The former in point of moral obligation might be as inviolable as the latter. In point of political operation there were two important distinctions in favor of the latter: One, a law violating a treaty ratified by a preexisting law might be respected by the judges as a law, though an unwise and perfidious one; two, a law violating a constitution established by the people themselves would be considered by the judges as null and void.'

"And so the Constitution became the act of the people of the United States instead of the act of the legislatures of the several States. No decision entering into the Constitution of American Government has had more momentous consequences than this, for it is the chief corner stone upon which rests that great line of decisions of this court which have established and confirmed the Nation.

"This distinction was stated by Chief Justice Marshall in McCulloch *v.* Maryland (4 Wheat., 316, 403), in the following language:

"'The convention which framed the Constitution was, indeed, elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretentions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each State, by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress, and by the State legislatures the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several States; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not on that

account cease to be the measures of the people themselves or become the measures of the State governments.

"'From these conventions the Constitution derives its whole authority. The Government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained "in order to form a more perfect Union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the States in their sovereign capacity is implied in calling a convention and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The Constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.'

"And in Cohens *v.* Virginia (6 Wheat., 264, 389), Chief Justice Marshall added:

"'The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or unmake resides only in the whole body of the people; not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.'

"Nor has the reference of proposed amendments to State legislatures under Article V in its practical working proved to be an opportunity for the people of the United States or of the several States to express their will regarding the proposed eighteenth amendment. Not only have the people of the several States had no opportunity to act upon this proposed amendment but they have been denied the opportunity, and the amendment has been ratified in entire disregard of the limitations which the people of a large number of the States have imposed upon their legislatures for the purpose of securing an opportunity to act themselves upon important subjects.

"No legislature of any State is now authorized by the people of the State to make changes in the constitution of the State. The constitutions of 28 States expressly reserve to the people themselves the right to make such changes. (Alabama, Colorado, Missouri, North Carolina, Montana, Arkansas, California, Connecticut, Florida, Indiana, Iowa, Kentucky, Maryland, Maine, Minnesota, Nebraska, Kansas, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, West Virginia, North Dakota, and Wyoming.) The constitutions of 15 States require the action of two successive legislatures even to propose an amendment to their constitutions. (Indiana, Art. XVI, sec. 1; Iowa, Art. X, sec. 1; New Jersey, Art. IX; New York, Art. XIV, sec. 1; Rhode Island, Art. XIII; Virginia, Art. XV, sec. 196; Wisconsin, Art. XII, sec. 1; Massachusetts, Art. IX of amendments; Tennessee, Art. XI, sec. 3; Delaware, Art. IX; Pennsylvania, Art. XVIII, sec. 1; Vermont, Art. XXV, sec. 1 of amendments; Connecticut, Art. XI; Alabama, Art. XVI, sec. 1; North Dakota, Art. XV, sec. 202.)

"The constitutions of 21 States expressly reserve to the people the power to approve or reject at the polls upon referendum any act of the legislature (see infra under point IV), and provide that any act so referred shall take effect only upon an affirmative vote by the people themselves. There can, of course, be no doubt that the Constitution of the United States is a part of every State constitution. Nor can there be any doubt that the prohibitory law now under consideration and called an amendment to the Constitution of the United States diminishes the police power of every State and impairs every State constitution. (State ex rel. Mullen *v.* Howell, 181 Pac., 920, 922, Wash.) There can be no doubt that the referendum provision in the States where it exists is applicable to the enactment of just such a prohibitory law as this on the part of the State legislature. Those who assert the validity of these ratifications do not claim that at the time the so-called eighteenth amendment was proposed it was the will of the people of the United States to be represented in matters of constitutional change by the State legislatures. When the legislatures acted upon the proposal they did so, rightly or wrongly, not because the people of their State chose to speak through them or were in fact represented by them but solely in the alleged exercise of the agency or authority granted the State legislatures by Article V of the Constitution more than a century ago. In some States the action of the State legislature was in express violation of the commands of the people of the State. Thus, in Florida the State constitution prohibits any State legislature from acting upon a proposed amendment of the Constitution of the United States unless the legislature had been elected after the amendment was proposed. (Art. XVI, sec. 19.) Yet a legislature of Florida, one branch of which, at least, was elected in 1916, before the amendment was proposed, ratified the amendment and is counted in the list of ratifying States. And in Missouri the State constitution forbids any legislature from ratifying an amendment of the Constitution of the United States which may in anywise impair the right of local self-government belonging to the people of that State. (Art. II, sec. 3.) Yet the Legislature of Missouri ratified this amendment in direct violation of that command of the people.

"Moreover, in some States the action of the State legislature was directly contrary to recent popular votes. In some States—e. g., Ohio—elections have been held since a ratification, and the popular vote has been against such a law as the legislature had seen fit to enact by ratifying the amendment.

"This general disregard of any right of the people of the States to a voice in this matter is justified only upon the ground that the State legislatures are not legislating or acting at all under their State constitutions, but that they are executing a special power granted to them by Article V of the Constitution of the United States. (Opinion of the Justices, 107 Atl., 673, Sup. Ct., Maine.) The validity of their action in this aspect must, therefore, be determined by examining the terms of that power.

"2. *The document to be amended is the Constitution of the United States. A constitution is a special kind of instrument as certain in its character and definite in its limitations as are any written instruments known to the law. The full expression for which this word stands is 'the constitution of government.'* (See, e. g., The Federalist, No. 33 (Ford's ed.), pp. 260, 263; 2 Elliot's Debates, pp. 126, 128; 4 *id.*, p. 176.)

"'When we talk of a constitution of a State or nation we mean those of its rules or laws which determine the form of its government and the respective rights and duties of the government toward the citizens, and of the citizens toward the government.' (1 Bryce's American Commonwealth, p. 350.)

"'A constitution "is a permanent form of government."' (Story on the Constitution, 5th ed., sec. 352.)

"'A constitution is "that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised."' (Cooley on Constitutional Limitations, 7th ed., p. 4.)

"'By the constitution of a commonwealth is meant primarily its make-up as a political organization; that special adjustment of instrumentalities, powers, and functions by which its form and operation are determined.' (Jameson, 4th ed., sec. 63.)

"'It is the form of government delineated by the mighty hand of the people by which certain first principles of fundamental law are established.' (Vanhorne's Lessee *v.* Dorrance, 2 Dallas 304, 308.)

"'Constitution: A system of fundamental principles, maxims, laws, or rules embodied in written documents or established by prescriptive usage for the government of a nation, State, society, corporation, or association, as the Constitution of the United States, the British constitution, the constitution of the State of New York, the constitution of the social club, etc. In American legal usage the constitution is the organic law of a State or of the Nation, the adoption of which by the people constitutes the political organization as distinguished from the statutes made by the political organization acting under the order of things thus constituted.' (Century Dictionary.)

"'In its modern use *constitution* has been restricted to those rules which concern the political structure of society. If we take the accepted definition of a law as a command imposed by a sovereign on the subject, the constitution would consist of the rules which point out where the sovereign is to be found, the form in which his powers are exercised, and the relations of the different members of the sovereign body to each other where it consists of more persons than one. In every independent political society it is assumed by these definitions there will be found somewhere or other a sovereign, whether that sovereign be a single person or a body of persons, or several bodies of persons. The commands imposed by the sovereign persons or a body on the rest of the society are positive laws properly so called. The sovereign body not only makes laws, but has two other leading functions, viz, those of judicature and administration. Legislation is for the most part performed directly by the sovereign body itself. Judicature and administration for the most part by delegates. The constitution of a society accordingly would show how the sovereign body is composed and what are the relations of its members *inter se*, and how the sovereign functions of legislation, judicature, and administration are exercised.' (Encyclopedia Britannica, 9th ed.)

"'A *constitution* is sometimes defined as the fundamental law of a State, containing the principles upon which the government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confided, and the manner in which it is to be exercised. Perhaps an equally complete and accurate definition would be that body of

rules and maxims in accordance with which the powers of sovereignty are habitually exercised.

"'In a much qualified and very imperfect sense every State may be said to possess a constitution; that is to say, some leading principle has prevailed in the administration of its government, until it has become an understood part of its system, to which obedience is expected and habitually yielded; like the hereditary principle in most monarchies, and the custom of choosing the chieftain by the body of the people, which prevails among some barbarous tribes. But the term *constitutional government* is applied only to those whose fundamental rules or maxims not only locate the sovereign power in individuals or bodies designated or chosen in some prescribed manner, but also define the limits of its exercise so as to protect individual rights, and shield them against the assumption of arbitrary power. The number of these is not great, and the protection they afford to individual rights is far from being uniform.

"'In American constitutional law the word *constitution* is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union or of any of the States, as the absolute rule of action and decision for all departments and officers of the Government, in respect to all the points covered by it, until it shall be changed by the authority which established it, and in opposition to which any act or regulation of any such department or officer, or even of the people themselves, will be altogether void.' (Cooley on Constitutional Limitations, 7th ed., pp. 2, 3.)

"'The primary function of constitutional law is to ascertain the political center of gravity of any given State. It announces in what portion of the whole is to be found "internal sovereignty," "*supremata potesta*," "Staatsgewalt," * * *. In other words, it defines the form of government. * * *

"'The definition of the sovereign power in a State necessarily leads to the consideration of its component parts. * * * With reference to all these questions constitutional law enters into minute detail. It prescribes the order of succession to the throne; or, in a republic, the mode of electing a president. It provides for the continuity of the executive power. It enumerates the "prerogative" of the king, or other chief magistrate. It regulates the composition of the council of State, and of the upper and lower houses of the assembly, when the assembly is thus divided; the mode in which a seat is acquired in the upper house, whether by succession, nomination, election, or tenure of office; the mode of electing the members of the house of representatives; the powers and privileges of the assembly as a whole, and of the individuals who compose it; and the machinery of lawmaking. It deals also with the ministers, their responsibility, and their respective spheres of action; the government offices and their organization; the armed forces of the State, their control and the mode in which they are recruited; the relation, if any, between church and State; the judges and their immunities, their power, if any, of disallowing as unconstitutional the acts of nonsovereign legislative bodies; local self-government; the relations between the mother country and its colonies and dependencies. It describes the portions of the earth's surface over which the sovereignty of the State extends, and defines the persons who are subject to its authority. It comprises, therefore, rules for the ascertainment of nationality, and for regulating the acquisition of a new nationality by "naturalization." It declares the rights of the State over its subjects in respect of their liability to military conscription, to service as jurymen, and otherwise. It declares, on the other hand, the rights of the subjects to be assisted and protected by the State, and of that narrower class of subjects which enjoys full civic right to hold public offices and to elect their representatives to the assembly or parliament of the nation. * * *

"'A constitution has been well defined as "*l'ensemble des institutions et des lois fondamentales, destinées à régler l'action de l'administration et de tous les citoyens.*" (Holland's Jurisprudence, 11th ed., p. 365.)

"'Before proceeding to the task indicated, however, it may be useful to ascertain with precision the distinction between a "constitution" or "fundamental ordinance" and an "ordinary municipal law." Both must be denominated laws, since they are equally "rules of action laid down or prescribed by a superior." (Worcester's Dictionary, in verb.) Ordinary laws are enactments and rules for the government of civil conduct, promulgated by the legislative authority of a State, or deduced from long-established usage. It is an important characteristic of such laws that they are tentatory, occasional, and in the nature of temporary expedients. Fundamental laws, on the other hand, in politics, are expressions of the sovereign will in relation to the structure of the government, the extent and distribution of its powers, the modes and principles of its operation, and the apparatus of checks and balances proper to insure its integrity and continued existence. Fundamental laws are primary, being the commands of the sovereign establishing the governmental machine and the most general rules for its operation. Ordinary laws are secondary, being commands of the sovereign, having reference to the exigencies of time and place, resulting from the ordinary working of the machine. Fundamental laws precede ordinary laws in point of time, and embrace the settled policy of the State. Ordinary laws are the creatures of the sovereign, acting through a body of functionaries existing only by virtue of the fundamental laws, and express, as we have said, the expedient or the right viewed as the expedient under the varying circumstances of time and place.' (Jameson, The Constitutional Convention, sec. 85.)

"Nor was there any misunderstanding among the people who sent the delegates to the convention of 1787 as to what a constitution was. (Madison Works, Vol. IX, p. 383: 'The constitution is a bill of powers.' See also The Federalist, No. 53 (Ford's ed.), pp. 354–355; id., No. 41, p. 260, and No. 45, p. 309.)

"At the very beginning of constitution making in the American States the Legislature of Massachusetts drafted a constitution and sent it to the towns for approval. It was considered in the town of Concord on the 21st of October, 1776, and the town records show that it was—

"'Voted unanimously that the present house of representatives is not a proper body to form a constitution for this State, and voted to choose a committee of five men to make answer to the question proposed by the house of representatives of this State and to give the reasons why the town thinks them not a suitable body for that purpose. * * * And the committee reported the following draft, which, being read several times over for consideration, it then was read resolve by resolve and accepted unanimously in a very full town meeting. The reasons are as follows:

"'*Resolved*, First, that this State being at present destitute of a properly established form of government, it is absolutely necessary that one should be immediately formed and established.

"'*Resolved*, Secondly, that the supreme legislative, either in their proper capacity or in joint committee, are by no means a body proper to form and establish a constitution or form of government, for reasons following, viz: First, because we conceive that constitution in its proper idea intends a system of principles established to secure the subject in the possession of and enjoyment of their rights and privileges against any encroachment of the governing part. Secondly, because the same body that forms a constitution have of consequence a power to alter it. Thirdly, because a constitution alterable by the supreme legislative is no security at all to the subject against the encroachment of the governing part on any or on all their rights and privileges.

"'*Resolved*, Thirdly, that it appears to this town highly expedient that a convention or congress be immediately chosen to form and establish a constitution by the inhabitants of the respective towns in this State being free and 21 years and upward, in proportion as the representatives of this State were formerly chosen; the convention or congress not to consist of a greater number than the house of assembly of this State heretofore might consist of, except that each town and district shall have liberty to send one representative, or otherwise, as shall appear meet to the inhabitants of this State in general.

"'*Resolved*, Fourthly, that when the convention or congress have formed a constitution they adjourn for a short time and publish their proposed constitution for the inspection and remarks of the inhabitants of this State.

"'*Resolved*, Fifthly, that the honorable house of assembly of this State be desired to recommend it to the inhabitants of this State to proceed to choose a convention or congress for the purpose above mentioned as soon as possible.' (Roger Sherman Hoar in The Constitutional Review, April, 1918, p. 97.)

"In the same year the people of western Massachusetts refused to permit the courts to sit until a constitution was established determining the powers of government. The ground of their action was set forth in a petition to the general court by the people of the town of Pittsfield in May, 1776. In this petition they said (Mass. Law Quarterly, May, 1918, p. 334):

"'That since the dissolution of the power of Great Britain over these Colonies they have fallen into a state of nature; that the first step to be taken by a people in such a state for the enjoyment or restoration of civil government among them is the formation of a fundamental constitution as the basis and groundwork of legislation; that the approbation by the majority of the people of this fundamental constitution is absolutely necessary to give life and being to it; that then and not till then is the foundation laid for legislation.

* * * * * * *

"'What is the fundamental constitution of this province? What are the unalienable rights of the people, the power of the rulers, how often to be elected by the people, etc.; have any of these things yet been ascertained? Let it not be said by future posterity that in this great, this noble, this glorious contest we made no provision against tyranny among ourselves.'

"See also McCulloch *v.* Maryland, 4 Wheat., 316, 407; Southern Pac. Co. *v.* Jensen, 244 U. S., 205, 227; Taylor *v.* Governor, 1 Ark., 21, 27; Commonwealth *v.* Collins, 8 Watts (Pa.), 331, 349.

"3. *The instrument framed by the Constitutional Convention of 1787 answered strictly to this conception of the nature of a constitution. It dealt solely with the powers of government.*

"It is needless to recount the familiar story of the Confederation of 1778, the complete failure of the Congress of the Confederation to govern through lack of power, the chaos which had resulted, and the imminent danger that the American experiment in self-government would end in anarchy. The Federalist, No. 15 (Ford's ed.), p. 87 et seq.

"The recommendation of the Annapolis convention of 1786, the act passed by the Confederate Congress on the 21st of February, 1787, recommending to the States to send delegates to the Philadelphia Convention, every act passed by the legislatures of the several States, and the credentials of every delegate to the convention, stated the purpose of the convention and the duties and powers of the delegates in terms addressed solely to such action as should 'render the Federal Constitution adequate to the "exigencies of government and the preservation of the Union."' The first in order of time were the credentials from the State of New Hampshire, and they illustate all the rest. They were as follows:

"'And whereas the limited powers which by the Articles of Confederation are vested in the Congress of the United States have been found far inadequate to the enlarged purposes which they were intended to produce, and whereas Congress hath by repeated and most urgent representations endeavored to awaken these and other States of the Union to a sense of the utterly critical and alarming situation in which they may inevitably be involved unless timely measures be taken to enlarge the powers of Congress that they may be thereby enabled to avert the dangers which threaten our existence as a free and independent people, * * * Be it therefore enacted * * * that John Langdon, etc., be and hereby are appointed commissioners * * * to confer with such deputies as are or may be appointed by the other States for similar purposes, and with them to discuss and decide upon the most effectual means to remedy the defects of our Federal Union and to procure and secure the enlarged purposes which it was intended to effect.'

"Accordingly, the Constitutional Convention that met in Philadelphia performed its proper task. The Constitution which was agreed upon and proposed granted enlarged powers to the Government of the Union. It distributed those powers and directed how they should be exercised. It imposed limitations on the powers granted and upon the powers reserved for the protection of those inalienable rights to secure which governments are instituted. Nowhere in any of the acts preliminary to the convention, or in any action taken by the convention, or in any proposal or argument made in the convention, was there any suggestion that the convention itself should exercise any legislative power of government, or should propose the exercise of such a power in connection with the Constitution by any legislature or convention or people acting upon the Constitution. The sole and exclusive function of the delegates, the convention, and the ratifying bodies, was the formation of a Government adequate to the exercise of all useful power, and never themselves to exercise powers in lieu of or under the Government so formed.

"Therefore, when the Constitution was formed, Justice Patterson could properly say of it:

"'What are legislatures? Creatures of the Constitution. They owe their existence to the Constitution. They derive their power from the Constitution. It is their commission; and therefore all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the people themselves in their original sovereign and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The Constitution fixes limits to the exercise of the legislative authority, and prescribes the orbit within which it must move. In short, the Constitution is the sun of the political system, around which all legislative, executive, and judicial bodies must revolve.' (Vanhorne's Lessee *v.* Dorrance, 2 Dallas, 304, 308.)

"And so, Chief Justice Marshall could say in Marbury *v.* Madison (1 Cranch, 137, 176):

"'That the people have an original right to establish for their future government such principles as in their opinion shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

"'This original and supreme will organizes the Government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

"'The Government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written.'

"It follows, therefore, that the thing to be amended under the terms of Article V of the Constitution of the United States would be the form of government, the distribution of the powers of government, and the regulation of the exercise thereof, which made up 'The Constitution of Civil Government' of the United States.

"4. *The authority to amend granted by Article V is necessarily limited to changes in this grant, distribution and regulation of powers which made up the Constitution, and it did not confer upon the amending authorities or agents the right themselves to exercise the legislative power of government.*

"*The word 'amend' has a necessary relation to some particular thing which is to be amended. The word has no meaning whatever except in relation to that thing. The change for better or worse which is called an amendment must be a change in the particular thing amended.*

"The necessary relation of amendment to the thing to be amended is ordinarily expressed by the rule that amendments must be germane. A legislative body may have power to legislate upon two different subjects and may incorporate its enactments upon both in the same bill or resolution, but the provisions relating to one subject may not be in any sense an amendment to the provisions relating to the other subject. There are, then, two separate exercises of legislative power, neither one depending upon the other.

"The function of an amendment was well stated in an opinion by the attorney general of Pennsylvania rendered in 1883, as follows:

"'To amend a thing, as defined by Webster, is to change it in any way for the better; to remove what is erroneous, superfluous, faulty, and the like, to supply deficiencies, to substitute something in place of what is removed. The word is synonymous with "correct," "reform," "rectify." An amendment, therefore, is a change or alteration for the better, a correction of faults or errors, an improvement, a reformation, an emendation. It necessarily implies something upon which the correction, alteration, improvement, or reformation can operate, something to be reformed, corrected, rectified, altered, or improved. In other words, that which is proposed as an amendment must be germane to or relate to the thing to be amended. In respect to the amendment of a charter of a corporation the amendment must relate to the charter as originally granted, and if it does not correct, improve, reform, rectify, or alter something in the original charter, it is not properly speaking an amendment to that charter.' (In re Pennsylvania Tel. Co., 2 Chester County Rep., 129. See also 2 Morawetz on Corporations (2d ed.), sec. 1096.)

"The rule that amendments must be germane to the thing amended was in force and well understood in the United States when the Constitution was adopted. Thus the Continental Congress had adopted the following rule as early as July 8, 1784:

"'No new motion or proposition shall be admitted under color of amendment as a substitute for the motion or proposition under debate until it is postponed or disagreed to.' (5 Hinds' Precedents, secs. 5753, 5767.)

"The First Congress, under the Constitution, on the 7th of April, 1789, readopted the rule above quoted, omitting the words 'until it is postponed or disagreed to,' and that rule was readopted in the revision of rules on the 3d of March, 1822, without substantial change, so as to read:

"'No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment'; and this rule remains as section 7 of the present House Rule No. 16, as follows:

"'No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment.'

"Hinds' Digest and Manual, published in the second session of the Fifty-ninth Congress, contains at page 326 et seq., an enumeration of propositions offered as amendments to pending bills, but rejected because held not to be germane.

"It is to be observed that the form of this rule, established as far back as 1784, is decisive upon the question now under consideration, for it denies to any motion or proposition on a subject different from that under consideration, the quality of an amendment, and prohibits its admission 'under color of amendment.'

"There is curious and interesting evidence that the framers of the Constitution observed this rule. The reader of the Journal of the Federal Convention will find that on the 10th of September, 1787, the article relating to the amendment of the Constitution was under consideration, and various amendments to the provision were proposed and voted on, when a motion was made 'to postpone the consideration of the amendment in order to take up the following.' Then followed the provision regarding amendment which now appears in Article V of the Constitution. It appears by Madison's Notes (p. 712) that it was Mr. Madison himself who moved this postponement. The same thing occurs scores of times in the proceedings of the convention. The first motion, made on the 30th of May, was of this description. When a provision had been put into such shape that it was considered generally satisfactory, instead of moving it as an amendment or a substitute the motion was to postpone the consideration of whatever was before the convention and to take up the provision as new matter. This is a form of procedure quite unknown to modern parliamentary practice, and it is plain that it resulted from the rule of the Continental Congress above quoted forbidding the admission under color of amendment of matter different from that under consideration until that is 'postponed or disagreed to.' Thus the rule that amendments must be germane was followed by the convention that framed the Constitution and in the adoption of Article V itself. (In the Passenger Cases (7 How., 283, 477) Taney, C. J., said: 'The members of the convention unquestionably used the words they inserted in the Constitution in the same sense in which they used them in their debates.')

"Mr. Madison correctly stated the rule of relation between the amendment and the thing amended in the convention on the 13th day of August, 1787. The subject under consideration was the power of the Senate to amend money bills. Mr. Madison said (Madison's Notes, 3 Documentary History of the Constitution, p. 518):

"'The words amend or alter form an equal source of doubt and altercation. When an obnoxious paragraph shall be sent down from the Senate to the House of Representatives it will be called an origination under the name of an amendment. The Senate may actually couch extraneous matter under that name. In these cases the question will turn on the degree of connection between the matter and object of the bill and the alteration or amendment offered to it. Can there be a more fruitful source of dispute, or a kind of dispute more difficult to be settled? His apprehensions on this point were not conjectural. Disputes had actually flowed from this course in Virginia where the Senate can originate no bill.' Identical views were expressed in the constitutional conventions of the States where it was frequently charged that the proposed constitution was not in any sense an amendment of the Articles of Confederation, but an entirely new creation. (See 3 Elliot's Debates, pp. 61, 614.)

"The same conception of the character of amendments is followed in judicial procedure. The First Congress under the Constitution in the judiciary act of 1789 reproduced the English statute of amendment now appearing in the Revised Statutes, sections 899 to 901 and 954. The amendments authorized all follow strictly the rule of relevancy to the pleading or proceeding to be amended.

"Regarding this kind of amendment this court has said:

"'This power to amend, too, must not be confounded with the power to create. It presupposes an existing record, which is defective by reason of some clerical error or mistake, or the omission of some entry which should have been made during the progress of the case, or by the loss of some document originally filed therein. The difference between creating and amending a record is analogous to that between the construction and repair of a piece of personal property. If a house or vessel, for instance, be burned or otherwise lost, it can only be rebuilt, and the word "repair" is wholly inapplicable to its subsequent reconstruction. The word "repair," as the word "amend," contemplates an existing structure which has become imperfect by reason of the action of the elements or otherwise. In the cases of vessels particularly, this distinction is one which can not be ignored, as it lies at the basis of an important diversity of jurisdiction between the common law and maritime courts. (Gagnon v. United States, 193 U. S., 451, 457.)

"'Nor is a complainant at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment. We apprehend that the true rule on this subject is laid down by the vice chancellor in Verplanck v. The Mercantile Insurance Co. (1 Edwards Ch. R., 46). Under the privilege of amending, a party is not to be permitted to make a new bill. Amendments can only be allowed when the bill is found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, or for putting in issue new matter to meet allegations in the answer. * * * To insert a wholly different case is not properly an amendment, and should not be considered within the rules on that subject.' (Shields v. Barrow, 17 How., 130, 144.)

"The argument in support of article 5 in the Federalist exhibits this same view of the character of an amendment. Mr. Madison said:

"'That useful alterations will be suggested by experience could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable, and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the General and the State Governments to originate the amendment of errors, as they may be pointed out by the experience on one side or on the other.' (The Federalist, No. 43 (Ford's ed.), p. 291.)

"Mr. Hamilton said:

"'In opposition to the probability of subsequent amendments it has been urged that the persons delegated to the administration of the National Government will always be disinclined to yield up any portion of the authority of which they were once possessed. For my own part I acknowledge a thorough conviction that any amendments which may upon mature consideration be thought useful will be applicable to the organization of the Government, not to the mass of its powers; and on this account alone I think there is no weight in the observation just stated.' (The Federalist, No. 85 (Ford's ed.), p. 586.)

"John Marshall said:

"'He tells you that it is an absurdity to adopt before you amend. Is the object of your adoption to mend solely? The objects of your adoption are union, safety against foreign enemies, and a protection against faction—against what has been the destruction of all republics. These impel you to its adoption. If you adopt it, what shall restrain you from amending it, if in trying it, amendments shall be found necessary? The Government is not supported by force, but depending on our free will. When experience shall show us any inconveniences we can then correct it. But, until we have experience on the subject, amendments as well as the Constitution itself are to try. Let us try it and keep our hands free to change it when necessary. If it be necessary to change government, let us change that government which has been found to be defective. The difficulty we find in amending the Confederation will not be found in amending this Constitution. Any amendments in the system before you will not go to a radical change; a plain way is pointed out for the purpose; all will be interested to change it, and therefore all exert themselves in getting the change.' (In the Virginia Convention, 3 Elliot's Debates, 233-234.)

"The distinction between the amendment of a constitution and lawmaking under a constitution was well stated by the Supreme Court of Pennsylvania in passing upon the question whether the amendment provision in the constitution of that State called for submission to the governor of resolutions passed under it. The court said:

"'It is also necessary to bear in mind the character of the work for which it provides. It is constitution making; it is a concentration of all the power of the people in establishing organic law for the Commonwealth, for it is provided by the article that "if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall be a part of the constitution." It is not lawmaking which is a distinct and separate function, but it is a specific exercise of the power of a people to make its constitution.' (Commonwealth v. Griest, 196 Pa. Stat., 396, 404.)

"And the Supreme Court of Maryland has said in a similar case, relating to an amendment of the Maryland constitution, that the amending clause has 'no relation whatever to legislation * * * the two subjects are widely disconnected in location and substance.' (Warfield v. Vandiver, 101 Md., 78.)

"The sound rule has been accurately stated by the Supreme Court of California, as follows:

"'The very term "constitution" implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed.' (Livermore *v.* Waite, 102 Calif., 113, 118, 119.)

"The Supreme Court of Missouri deciding that an ordinary law could not be made an amendment to the constitution by merely going through the forms of amendment said in State ex rel. *v.* Roach (230 Mo., 411, 433, 435):

"'The purpose of constitutional provisions and amendments to the constitution is to prescribe the permanent framework and a uniform system of government and to assign to the different departments thereof their respective powers and duties. * * * The mere calling it an amendment to the constitution, unless the subject matter verifies the correctness of that name, is not binding.'

"*5. It appears, therefore, that both the ordinary and natural meaning of the terms used in Article V, as well as the purpose to be accomplished, limit the authority granted by the article to changes in the system of government; that is, changes in the distribution and regulation of governmental powers.*

"The rule for the construction of the Constitution laid down in Gibbons *v.* Ogden (9 Wheat., 1, 188) is controlling in the construction of Article V, viz:

"'As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it must be understood to have employed words in their natural sense and to have intended what they have said. If from the imperfection of human language there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given—especially when those objects are expressed in the instrument itself—should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor if retained by himself or which can inure solely to the benefit of the grantee, but is an investment of power for the general advantage in the hands of agents selected for that purpose, which power can never be exercised by the people themselves, but must be placed in the hands of agents or lie dormant. We know of no rule for construing the extent of such powers other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.'

"This rule is of universal application. All grants of power are necessarily limited by the nature of the subject matter to which they relate. (Calder *v.* Bull, 3 Dall., 386, 388; Fletcher *v.* Peck, 6 Cranch, 87, 139; Loan Association *v.* Topeka, 20 Wall., 655, 663; Murphy *v.* Ramsey, 114 U. S., 15, 44.) That is what confines the exercise of the judicial power to questions which are in their nature justiciable, and that is what confines the exercise of the taxing power to things which in the nature of our dual government are subject to taxation. (The Collector *v.* Day, 11 Wall., 113, 127.)

"*6. That the power to amend the Constitution does not include the power of independent legislation by the amending agents is clearly indicated by the rulings, both in the National and State courts, that the proceedings of Congress and of the State legislatures are not ordinary legislation, and for that reason the resolutions on the one hand proposing amendments, and on the other ratifying them, do not require to be submitted to the President and to the governors under the general provisions which in terms apply to all bills, orders, resolutions, and votes.* (Hollingsworth *v.* Virginia, 3 Dallas, 378; and the State cases cited, supra.)

"The decisions above quoted in the main applied to constitutional amendments which were properly so called, but the decisions were based not upon the particular terms of the amendments but upon the character of the power. In denying to the exercise of the power the quality of ordinary legislation, they necessarily exclude authority to legislate under the power. As Hamilton said in the Federalist, No. 33 (Ford's edition), page 202:

"'What is a power but the ability or faculty of doing a thing? What is the ability to do a thing but the power of employing the means necessary to its execution? What is a legislative power but the power of making laws? What are the means to execute a legislative power but laws?'

"*7. That Article V granted to the donees of the power no authority to exercise legislative powers under the Constitution is conclusively established by Article I of the Constitution.*

"This provides in section 1 that—

"'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives,'

"and the subsequent sections prescribe the manner in which that power shall be exercised.

"This grant of power is exclusive. It admits of no other power of legislation under the Constitution. It necessarily confines the exercise of the power of amendment to its natural and proper function of changing the framework of government and excludes it from the exercise of legislative powers under that government.

"By what authority, then, is a citizen of the State of New Jersey prohibited from carrying on his business? What sovereign issues the command? Is it the Government of the United States? This law is an exercise of police power not granted to the Government of the United States but reserved to the States or the people by the tenth amendment to the Constitution. Is it the State of New Jersey? The law of New Jersey permits the business. Is it the people of the United States? The people of the United States have not acted, except as they acted in the adoption of the original Constitution. Is it the people acting through their agents authorized by the Constitution? The Constitution itself expressly excludes those agents from the exercise of legislative power.

"*8. The exercise of the power of ordinary legislation through the forms of amendment under Article V would be inconsistent with the fundamental principles of the Constitution, because it would prevent the rule of the majority.*

"It would be inconsistent with what Hamilton in the twenty-second number of the Federalist (Ford's ed., p. 135) called—

"'the fundamental maxim of republican government, which requires that the sense of the majority should prevail.'

"Under the American constitutional system as it existed prior to the 16th day of January, 1920, the laws which have controlled the conduct of life and fulfilled the function of government to secure the inalienable rights of the individual in the United States have been always within the control of the majority, subject only to certain universal limitations upon governmental power in favor of individual liberty. Subject to these limitations, the sum total of legislative power under the Constitution was complete. Within the field of the enumerated powers the majority represented in the National Congress was always competent to act. Within the field of the reserved powers of the States the majority in each State was always competent to act, even as to constitutional amendments. In this country of rapid development and growth, of constantly changing conditions, of education and new experience in the science of government, of experiment and change, success and failure in legislation, in every generation, in every Congress, at every stage, the people, who are the source of power, were competent to make their laws answer to their judgment from time to time upon the problems of their day. *This should continue true no matter how much the distribution of power may be changed by constitutional amendment.*

"If, however, Article V be now construed to confer upon the amending authorities the power to pass ordinary laws which would take effect as amendments of the Constitution, then those laws would be withdrawn from the control of the majority, both in the State and in the Nation. From the time such a law is passed it becomes practically irrepealable and unamendable by the majority.

"It can only be repealed or amended by a vote of two-thirds of both Houses of Congress and three-quarters of the States. In future years and in future generations the majority of the people of the United States would be helpless to change that law, for three-quarters of the States must unite in order that any change be made. This requirement has no relation to the will of the majority of States, or to the will of the majority of the citizens of the United States, for the one-quarter of the States refusing their consent to a change might be those of the least population, and the overwhelming majority of the people of the country might desire the change, but, nevertheless, would not be able to bring it about. Under the census of 1910 there were 13 States which altogether contained less than 5 per cent of the population of the United States, whilst 12 States contained 55 per cent of the population and much more of the wealth of the country.

"If a generation ago a law had been passed in the form prescribed by Article V imposing limitations upon the conduct of private life throughout the United States which more than

95 per cent of the people of the United States had now come to regard as unwise and injurious, the 95 per cent would be helpless as against the opposition of the other 5 per cent. If this prohibitory law 'under color of amendment' to the Constitution be a valid exercise of power under Article V, and the people of the United States 5 years, 10 years, 20 years, or more hence come to the conclusion that it was an unwise law, they will then be powerless, for upon that subject the majority will no longer control. Thus the construction claimed by the advocates of the power is that Article V empowers one generation to control all future generations and deprive them of the power of governing themselves according to the will of the majority.

"It is not difficult to conjecture that it was, in fact, for this purpose that the sponsors of the so-called eighteenth amendment determined to pass this law themselves instead of amending the Constitution by adding to the enumerated powers of the General Government the power to regulate the manufacture and sale of intoxicating liquors. The practical difference between the two is that if the present attempt succeed the law will be irrepealable by future majorities. (Cooley on Constitutional Limitations, 7th ed., p. 50.)

"9. *There is an essential difference in respect of the control of the majority between an amendment of the Constitution by a new transfer of power to the National Government and an alleged amendment of the Constitution by the exercise of legislative power on the part of the amending authorities.*

"All legislative bodies are but instruments for the making of laws. Whether the lawmaking power be vested in a National Congress or a State legislature, in one chamber or two, or in the people voting directly under a referendum or initiative, the object is to secure the enactment of such laws as the majority of the people wish to be governed by. That is the object, while the form and method of procedure of the legislative body are but the means.

"Whatever be the Constitution and method of procedure of the body exercising legislative power, all free, self-governing peoples see to it that they themselves are always able to control the exercise of the power in accordance with the will of the majority. There are strong reasons for making the form of government stable, for having the distribution of powers once agreed upon preserved, unless there be general consent to a change, and for having the powers and duties of particular officers and the limitations upon them well understood and determined by interpretation and usage, so long as the forms and methods agreed upon and prescribed still leave to the people themselves the power to say what laws shall govern them, whether they say it through direct vote themselves, or whether they say it by making their representatives responsive to their will by electing those who please them and turning out of office those who displease them. The provisions of Article V, therefore, which make the Constitution and any amendment of the Constitution unchangeable except by the consent of three-quarters of the State legislatures, if confined to the make-up of government, would not be in derogation of the control of a majority over their laws.

"The distinction between the form of government which is embodied in the Constitution, and the legislative product of government which must always be under the control of the majority if free government is to continue, is well illustrated by the development of free government in Great Britain, which, leaving the king in office, more than a generation ago deprived him of the veto power, and which recently, leaving the hereditary House of Lords in office, has deprived that house of the power to prevent the enactment of laws by the Commons, who are always responsive to the popular will.

"If the same limitations upon change, however, are to be applied, not to the form but to the product of government, so that the laws which issue from the governing power are to be permanently beyond the control of the majority, then the essential quality of free self-government will be destroyed. It is unreasonable to impute to the framers of the Constitution and to the conventions which ratified it a purpose to permit any such result by authorizing, under color of an amendment to the Constitution, the enactment of ordinary laws in such manner as to withdraw them from the control of the majority of the people. (This contention is substantiated by much that was said in the various conventions. Thus, for example, Hamilton said in the New York convention (2 Elliot's Debates, p. 364): 'Constitutions should consist only of general provisions: the reason is that they must necessarily be permanent and that they can not calculate for the possible change of things;' and Johnson said in the North Carolina convention (4 id., p. 188): 'Are laws as immutable as constitutions? Can anything be more absurd than assimilating the one to the other? The idea is not warranted by the Constitution, nor consistent with reason.' See also Iredell, 4 id., p. 144.)

"This is emphasized by the interesting circumstance that the clause providing for the passage of a bill over the veto of the President, as originally adopted by the convention of 1787, required a vote of three-quarters of each house, and that this was changed to two-thirds at the very close of the convention upon the avowed ground that to require a three-fourths vote would make it too difficult to repeal bad laws. (Madison's Notes of Sept. 12, 1787, p. 720 et seq.)

"10. *The impression prevailing in many quarters that the kind of legislation under color of amendment which is attempted by the alleged eighteenth amendment is permissible arises from the fact that many States have pursued the practice of including in their State constitutions ordinary legislative provisions.*

"There is, however, a radical difference. Subject to the great limitations which political liberty ever requires to be imposed upon all government, the people of a State can do whatever they please with their constitution, and all State constitutions are made by the people themselves, acting by majority vote. Every State constitution, however, is subject to alteration at will by the majority of the people of the State, so that the inclusion of an ordinary legislative provision in the same instrument which prescribes the form and regulates the powers of the State government does not withdraw any legislation from the control of the majority. It merely substitutes popular legislation for representative legislation. It is merely one form of expressing lack of confidence in the State legislature, and withdraws from them a certain measure of legislative power to be exercised and always controlled by the people. It is, in principle, the precise opposite to the action which is now attempted under Article V of the Constitutiton of the United States.

"The element of negotiation and agreement between the several States in the making of the Constitution involved methods, both in the original making and in the procedure for amendment, wholly inapplicable to the making of ordinary laws, and in this respect is sharply distinguished from constitution making in the States, where a popular majority always makes and alters at will both the constitution and the laws.

"It is indisputable that the Constitution of the United States created a Nation, perpetual and indissoluble, endowed with all the attributes of sovereignty within the field limited in the instrument itself. This instrument received its efficacy not from the State governments but from the people of the several States, and when that grant of power had been made the people of all the thirteen States theretofore united under the confederation became parts of the one people of the United States, constituting the new Nation and subject to the authority of the new Government. (Legal Tender Cases, 12 Wall., 125; Texas *v.* White, 7 Wall., 700, 720, 724; Sturges *v.* Crowninshield, 4 Wheat., 122, 192; McCulloch *v.* Maryland, 4 Wheat., 316, 403.)

"The process, however, by which this result was reached was a process of negotiation between the representatives of the separate States and of consent by the people in the several States. The consents were several and independent as to the people in each State. The new Government acquired no authority over the territory of the inhabitants of any particular State until the people of that State had given their assent. That followed necessarily from the independent sovereignty of each State as it existed on the 17th day of September, 1787. (Gibbons *v.* Ogden, 9 Wheat., 1, 187.) Accordingly, the Constitution provided that—

"'The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.'

"There was no idea of the exercise of any authority or coercion over the people of any State against their will. When New Hampshire on the 21st of June, 1788, became the ninth State ratifying the Constitution, the new Government of the new Nation came into being with no authority over the territory or the people of the remaining four States. The authority of the new Government in each of the other States began when that State gave its consent—in Virginia, June 26, 1788; in New York, July 26, 1788; in Rhode Island, May 29, 1789; and in North Carolina, November 21, 1789.

"The Constitution thus received its vitality, not from the vote of a majority of the people of the United States but from the consents of the people of the several States.

"The result of the process was the formation of an indissoluble Union. The consents given were irrevocable. The bond created was the bond not merely of contract but of allegiance. The method by which this result was obtained was the method not of coercive law, but of free consent. In that process no account whatever was taken of the will of a majority of the people of the United States as such. The sole question was as to the will of the majority of the people in each separate State to grant away a portion of their power within their own territory. The majority in Delaware counted just as much as the

majority in Virginia, because each carried the consent of a State, and the number of individuals had no weight whatever. The same method is continued in the provision for the ratification of amendments, except that while the original provisions proposed by the conventions of 1787 required unanimous consent by all the States, amendments require the consent only of three-fourths. The question is still the same. Will the several States consent to a change in the grant of power to the General Government or in the terms of the grant? In giving or withholding that consent the smallest State in population counts for as much as the greatest. No account whatever is taken of the will of the majority of the people of the United States.

"It is manifest that this process, while perfectly adapted to the purpose of correcting errors in the Constitution of Government, was never intended to be applied and can not be applied to the making of laws for the people of the United States.

"The liberty of citizens of New Jersey within the territory of that State may be controlled by laws enacted directly or indirectly by a majority of the people of that State, or it may be controlled by laws enacted directly or indirectly by a majority of the people of the United States. The distribution of powers in the Constitution determines by which of the two majorities the power of control shall be exercised in every field of possible lawmaking. No construction of the Constitution is permissible which would deliver over the people of any State to the control of a law which is not the command either of a majority of the people of the State or of a majority of the people of the United States. Such an intention would be inconsistent with the essential principles of free self-government, and it can not be imputed to the makers of the Constitution. It can not exist in a government which we boast is a 'Government of the people, by the people, and for the people.'

"11. *A construction of Article V which would give to the agents thereby authorized to amend the Constitution authority themselves to exercise the legislative power of government would be wholly inconsistent with the fundamental character of the National Government as a government of limited powers.*

"If such a power as this exists, then there are three legislative authorities under the Constitution—first, the Congress legislating with the cooperation of the President within the scope of the enumerated powers; secondly, the State legislatures legislating in the several States throughout the field of their reserved powers; and, thirdly, three-fourths of the State legislatures legislating upon the proposal of Congress upon any and all subjects whatever. Inasmuch as the legislative acts of the last-mentioned body, if valid, are to be deemed amendments of the Constitution, they are subject to none of the limitations of the Constitution, according to the defendants. If this present legislation be valid, then the people of the United States in adopting the Constitution created an authority competent, without further reference to them, to pass ex post facto laws and bills of attainder, to impose direct taxes without enumeration, to levy duties on articles exported from any State, to make discriminating regulations of commerce, to grant titles of nobility, to prohibit the free exercise of religion, to deprive of life, liberty, and property without due process of law—all under color of amendment to the Constitution.

"While the first amendment provides that—

"'Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances'—

"we must read instead that—

"'Congress shall make no law respecting the establishment of religion, etc., except with the consent of the legislatures of three-fourths of the States,'

"and three-fourths of the States, according to the estimated population of the United States in the year 1919, may contain much less than one-half of the population of the United States. The point is not that the Constitution may be amended to permit these things; it is that the power now exists to do these things without changing a word of the Constitution if the contention of the Government is now upheld.

"It is no answer to say that such abuses of power are not likely to happen and that all power is liable to abuse. The essential basis of every bill of rights is that abuses are likely to happen when fallible men are invested with the powers of government, and that they can be prevented only by express limitations of the power granted. Can it be supposed that in 1787, when every State was suspicious and jealous of possible combinations against it by other States, the people of any State intended that any governmental authority should have power to legislate without their consent in disregard of all those great limitations upon official power which they deemed so essential?

"The reason asserted by the men of Concord (supra) in 1776 against giving the legislature power to alter the Constitution applies to-day equally against giving ordinary legislative power to the governmental agency authorized to amend the Constitution, '*because a Constitution alterable by the Supreme Legislative is no security at all to the subject against the encroachment of the governing part on any or all their rights and privileges.*'

"This is the most fundamental, vital, and essential separation of powers under the American system. The limitations of the Constitution do not merely protect the States and the National Government against encroachment by each other; they protect all individual citizens against all authority of government in violation of those rules which the people of the United States deem to be essential to their liberty, 'against the encroachment of the governing part on any or all their rights and privileges.' It was to make that protection certain that the demand for the first 10 amendments was so insistent and irresistible. The people of the United States intended that there should be no legislative power in government to override these great rules established for their protection.

"The people of practically every State represented in the convention of 1787 had limited their own governments in their own States, composed of men elected by themselves, by the great rules of the Bill of Rights for the protection of their individual liberties. (See the argument of George Mason in the Virginia convention, 3 Elliot's Debates, pp. 446–447.) Are we now to suppose that they intended to empower the governments of other States to pass laws affecting their liberties without restraint from any of those limitations?

"12. *The power to change a rule imposing a limitation upon legislation is an entirely different thing from authority to disregard that rule while it remains unchanged.* (State ex rel. *v.* Roach, 230 Mo., supra.)

"It is improbable that the legislatures of three-fourths of the States, or of any considerable number of States, would consent to the abrogation of any of the great limitations of the Constitution, first, because every rule of limitation is supported by a variety of interests; and, secondly, because those rules are founded upon general considerations of justice and liberty and right conduct rather than upon the concrete and particular motives involved in a specific measure of legislation. The calendars of our courts are, however, crowded with cases involving attempts on the part of legislative bodies to avoid or evade limitations of the Constitution, which limitations those same bodies would not for a moment think of abrogating. The distinction between being governed by rules of right conduct and governed by the impulses of particular occasions is a vital characteristic of our constitutional system. Constitutional rules are made, principles of action are declared abstractly, dispassionately, free from the impulses and passions and warping influences of particular measures and particular times, in order that the impulses of the moment may not overcome the principles by which a right-minded people desire to be governed. The distinction was bred into the common thought and life of the people of the Colonies by their religion. To impute to the makers of the Constitution an intention to authorize any governmental agency whatever to adopt specific legislative measures in disregard of the general limitations prescribed, without any other change of the limitation than that resulting from the infraction of it, is to ignore the most vital part of the purpose which created a Government of limited powers.

"III.

"ARTICLE V OF THE CONSTITUTION OF THE UNITED STATES DOES NOT AUTHORIZE ANY AMENDMENT WHICH WOULD IMPAIR THE RESERVED POLICE OR GOVERNMENTAL POWERS OF THE SEVERAL STATES AND THEIR RIGHT TO LOCAL SELF-GOVERNMENT.

"Assuming, *arguendo*, that, nothwithstanding the previous arguments, the court shall hold that provisions essentially legislative in their nature and effect may be made the subject of an amendment to the Constitution of the United States, and thereby removed from the legislative power of the Congress and the several States, it is submitted that the so-called eighteenth amendment is, nevertheless, invalid because constituting an attempt to impair the reserved police or governmental power of the several States and their right to local self-government, and because any such amendment would be in conflict with implied limitations. As we have already seen above (see supra, where McCulloch *v.* Maryland, 4 Wheat., 316, 403, and Cohens *v.* Virginia, 6 Wheat., 264, 389, are cited), the Congress in proposing an amendment, and the several State legislatures in ratifying it, are acting solely as nominated agents of the people of the United States under a delegated power as the authorities appointed by the people to amend their Constitution 'whenever two-thirds of both Houses [of the Congress] shall deem it necessary.' But

the language vesting in such agents power to propose and ratify 'amendments to this Constitution' should not be construed as conferring unlimited power to amend and destroy the fundamental basis of the Federal system or dual form of government thereby created.

"There can be no reasonable doubt that it was contemplated by the framers, and is implied in the Constitution itself, that the several States, then existing or thereafter to be created, should be sovereign and autonomous in their spheres of local self-government. Hence any amendment which impairs or tends directly to destroy the right and power of the several States to local self-government should be held void as in conflict with the intent and spirit and implied limitations of the Federal Constitution adopted by the people of the United States. To repeat Chief Justice Marshall's declaration in McCulloch *v.* Maryland (4 Wheat., 403):

"'No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.'

"Half a century later Chief Justice Chase reiterated the same conviction in Texas *v.* White (7 Wall., 700, 725), saying:

"'*The perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States.* * * * We have already had occasion to remark at this term (in Lane County *v.* Oregon, 7 Wall., 71, 76) that "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the States in union, there could be no such political body as the United States." Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.'

"And in the recent case of Hammer *v.* Dagenhart (247 U. S., 251, 275), Mr. Justice Day, speaking for the court, emphasized this fundamental constitutional principle in the following language:

"'The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters intrusted to the Nation by the Federal Constitution.

"'*In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are intrusted the powers of local government.* And to them and to the people the powers not expressly delegated to the National Government are reserved. (Lane County *v.* Oregon, 7 Wall., 71, 76.) *The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the General Government.*' (See to the same effect, Gordon *v.* United States, 117 U. S., 697, 701, 705.)

"The validity of what is known as the eighteenth article of amendment to the Constitution of the United States is challenged upon the ground that it is not authorized by Article V of the Constitution, because it constitutes essentially a fundamental change in violation of the intent and spirit and implied limitations of the Constitution, and that, if enforceable, its provisions, and the reasoning upon which it would be upheld, would impair or tend to destroy the right of the States to local self-government and purposeful separate existence and overthrow the Federal principle upon which the Constitution was based.

"The point now suggested did not arise in connection with any other amendment to the Constitution of the United States, and, consequently, the precise question has not been considered or adjudicated, although controlling principles have been from time to time enunciated. As we have already seen, the prior amendments to the Federal Constitution were clearly, in their intrinsic nature, germane to provisions already contained in the Constitution and in harmony with the purpose and spirit of our system and dual form of government. The courts have therefore had no occasion to declare and define the limitations upon the power to amend the Constitution under Article V.

"The people of the United States who are, of course, the source of all constitutional and political power, may, by the same process which produced the present Constitution and terminated the government created and existing under the Articles of Confederation, make any alteration which they deem proper in their form or system of government. 'The people made the Constitution, and the people can unmake it.' (Cohens *v.* Virginia, 6 Wheat., 264, 389.) If fundamental changes become necessary, a convention may be called on the application of two-thirds of the States for that purpose. The Constitution does not limit the powers of the people of the United States. But it is plainly the measure of the powers of any agents appointed by the people thereunder. Indisputably 'a constitution is the measure of the rights delegated by the people to their governmental agents and not of the rights of the people.' (Rathbone *v.* Wirth, 150 N. Y., 459, 470.) In other words, the people themselves may rescind the 'social compact' (Calder *v.* Bull, 3 Dall., 386, 388) which is embodied in our Federal Constitution and enter into such new compact as they please. It does not, however, by any means follow that the same unrestrained power is vested in their governmental agents; that is, in two-thirds of the Houses of Congress and the legislatures of three-fourths of the States.

"The powers of the people of the United States are limited only by that which they may see fit to agree upon; but the powers of the legislatures of some of the States to impose their will upon the people themselves and the other States, even though the latter be but a minority, must have some limitation. As this court declared in Loan Association *v.* Topeka (20 Wall., 655, 663), 'the theory of our governments * * * is opposed to the deposit of unlimited power anywhere.' It is, therefore, submitted that an amendment tending to impair or destroy the rights of the States to local self-government or to change fundamentally our Federal form of republican government, however carefully such an amendment might provide that the Senate should be duly preserved and the equal suffrage of the several States therein respected, could not be validly and legally made to come to pass against the objection and protest of any State.

"Manifestly, the Constitution of the United States, like every other written instrument, must in many respects depend for its true construction upon plain implications to be derived from its nature and terms, the historical circumstances surrounding its origin, and, above all, the fundamental purposes of its creation. (Calder *v.* Bull, 3 Dall., 386, 388; Veazie Bank *v.* Fenno, 8 Wall., 533, 541; The Collector *v.* Day, 11 Wall., 113, 127; Loan Association *v.* Topeka, 20 Wall., 655, 663; Downes *v.* Bidwell, 182 U. S., 244, 290–291; Murphy *v.* Ramsey, 114 U. S., 15, 44; Rathbone *v.* Wirth, 150 N. Y., 459, 483–484; Matter of Fraser *v.* Brown, 203 N. Y., 136, 143.) And equally plainly these implications must affect and modify each of its terms and provisions, including the amending power granted in Article V. Nothing can, consequently, be made a part of the Constitution by the process of mere amendment by act of governmental agents which is primarily and directly in conflict with its implied limitations or spirit and purposes, or subversive of the Federal form of government it intended permanently to establish. As Chief Justice Chase said in Veazie Bank *v.* Fenno, supra, in reference to the apparently unlimited power of taxation:

"'There are, indeed, certain virtual limitations arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution.'

"In order to test the validity of any proposed amendment to the Constitution of the United States, its essential nature, its primary purpose, and its direct tendency must be analyzed and determined. The adoption and validation of any amendment is, of course, authority for the adoption and validity of all others of a similar nature and purpose and having the same tendency, wherever they may lead; for it is too well settled to require argument that the test of the validity of a power is, not how it is probable that it will be exercised in particular cases, but what can properly be done under it. (Keller *v.* United States, 213 U. S., 138, 148; Colon *v.* Lisk, 153 N. Y., 188, 194.) 'Questions of power do not depend on the degree to which it may be exercised' (Brown *v.* Maryland, 12 Wheat., 419, 439).

"With these propositions in mind, the terms of the so-called eighteenth amendment to the Constitution of the United States should be considered. In section 1 it provides that—

"'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.'

"Quite indisputably this proposed amendment, if valid, would be self-executing (Civil Rights Cases, 109, U. S., 3, 20), and would withdraw from the several States all power and control over the manufacture, sale, and transportation in local or intrastate commerce of intoxicating liquors for beverage purposes—a field heretofore exclusively within their absolute and independent control. (In re Rahrer, 140 U. S., 545, 554–5; Matter of Heff, 197 U. S., 488, 505; South Carolina *v.* United States,

199 U. S., 437, 453–4; State ex rel. Mullen *v.* Howell, 181 Pac. 920, 922 (Wash.).) The plain object and purpose of the amendment are to destroy the police or governmental power of the several States in respect of a large and important subject matter, and to accomplish this substantial diminution of governmental power and local self-government not indirectly or as an incidental consequence of some due regulation or readjustment of the Federal powers bestowed in the original Constitution, but solely and primarily by a direct invasion of the reserved powers of the several States. (The provision for concurrent power in section 2 of the so-called eighteenth amendment does not change the essential nature of the amendment as an impairment of the police power of the several States. Section 1, of its own force, destroys *pro tanto* the police power of the States. Section 2 merely gives the States concurrent power to enforce the *prohibitions* of section 1, but confers upon them no power to alter or destroy those prohibitions. In respect of the latter, therefore, the governmental power of the States has been wiped out if the amendment be valid.)

"If this amendment be valid the principle which it embodies and the tendency which it establishes and legalizes would authorize the most far-reaching and revolutionary alterations in our governmental system. The right to manufacture, sell, and transport in local or intrastate commerce tobacco, condiments, coffee, grain, meat, cotton, or any other products, which three-fourths of the several States at any time deem objectionable, could then unquestionably be prohibited by constitutional amendment. The right of the States to establish and enforce social distinctions between the races and prevent their intermarriage, which a number of our States firmly believe vital to their peace, order, and happiness; the right of the States to regulate any other domestic relation; the right of the States to regulate strikes and lockouts; the right of the States to levy and collect their own taxes for their own purposes; the right of the States to forbid the use of child labor or regulate the hours of labor in the factories within their respective borders; the right of the States to enact employers' liability and workmen's compensation laws for the benefit of their inhabitants—in a word, the entire right of each of the States to regulate the life, conduct, and intrastate affairs and business of its citizens in accordance with its own needs and its own views may all be destroyed by the action of two-thirds of a quorum of both Houses of Congress and the concurrence of the three-fourths of the legislatures of the States, representing, it may be, a minority of the people of the United States.

"It is an inevitable conclusion that, if the so-called eighteenth amendment, which directly deprives the several States of a substantial portion of their respective police powers and revenues, be a constitutional exercise of power, then another amendment may constitutionally sweep away every remaining vestige of the police powers of the State, that is to say, 'the powers of government inherent in every sovereignty to the extent of its dominions, * * * the power to govern men and things within the limits of its dominions' (Taney, C. J., in the License Cases, 5 How., 504, 583. See also Noble State Bank *v.* Haskell, 219 U. S., 104, 111; Sligh *v.* Kirkwood, 237 U. S., 52, 59; and Ives *v.* South Buffalo R. Co., 201 N. Y., 271, 300). (It is immaterial that different amendments suggested from time to time in the past may have resembled the so-called eighteenth amendment in being similar invasions of the police powers of the several States. They were never adopted, and hence could interfere with no right and call for no challenge in court.)

"The case at bar, therefore, resolves itself into this most serious inquiry: May two-thirds of the Houses of Congress and the legislatures of three-fourths of the States validly amend the Constitution of the United States so as to deprive every State of local self-government—that is, of its right to regulate the conduct and welfare of its own citizens? In disposing of this question it should be borne in mind that in many instances neither two-thirds of a quorum of the House of Congress nor three-fourths of the several States may represent even a majority of the people of the country (indeed, there are 12 States of the Union which contain a majority of the population of the country); and it is of equal moment to lay out of mind the fortuitous circumstance that this grave and vital question of constitutional law is presented to the court in a cause which happens to concern liquor.

"In considering this aspect of our contention, it should be distinctly borne in mind that the fundamental reason for the existence of separate, independent, and sovereign States is the power of internal police and local self-government with which they have always been clothed. (Sligh *v.* Kirkwood, 237 U. S., 52, 59; Patterson *v.* Kentucky, 97 U. S., 501, 503; Fertilizer Co. *v.* Hyde Park, id., 659, 667; License Cases, 5 How., 504, 583.) As Mr. Justice Woodbury pointedly remarked in the License Cases (5 How., at p. 628):

"'How can they—that is, the States—be sovereign within their respective spheres without power to regulate all their internal commerce as well as police?'

"The right of a State to have and exercise its police power is the very breath of its being, and without that power it would be a mere name, a mere geographic unit, an empty shell. (Ex parte Rowe, 59 South., 69, 70 (Ala.).) Every other power of a State is directly dependent for vigor and usefulness upon the police power. The right to lay taxes exists only in order to defray the cost involved in exercising the police power; the right to create courts and appoint officials only in order to furnish the necessary machinery for the exercise of that power and the enforcement of its sanctions. In essence, therefore, as in practical effect, the police power of a State is the State itself; with it the State is a potent, sovereign, autonomous, self-governing being; without it the State is nothing but a name. (Stone *v.* Mississippi, 101 U. S., 814, 819–820; N. Y. & N. E. R. R. Co. *v.* Bristol, 151 U. S., 556, 567; South Carolina *v.* United States, 199 U. S., 437, 451; Atlantic Coast Line *v.* Goldsboro, 232 U. S. 548, 558; Hare on American Constitutional Law, Vol. II, p. 766.) As declared in the work last cited:

"'The police power may be justly said to be more general and pervading than any other. It embraces all the operations of society and government; all the constitutional provisions presuppose its existence, and none of them preclude its legitimate exercise. It is impliedly reserved in every public grant.'

"And Judge Cooley in his work on Constitutional Limitations (7th ed., pp. 243, 263) said:

"'The right of local self-government can not be taken away, because all our constitutions assume its continuance as the undoubted right of the people and as inseparable incident to republican government, * * * one which almost seems a part of the very nature of the race to which we belong.'

"There is much familiar historical matter that shows most convincingly the purpose of the framers of the Constitution and the original States which adopted it to establish an indestructible Union composed of indestructible States and a National Government of enumerated and limited powers, together with a series of State governments, sovereign and independent in the spheres of power not delegated to or vested in the Nation, and endowed with the same perpetuity which the Articles of Confederation had asserted for the central Government. Equally clear is the fact that the founders of our form of government intended that it should ever be a true Federal system, constituting a Union of free and independent States, each possessed of distinct and substantial autonomous and self-governing power as to its own people and its own local government and not a single, consolidated, centralized government in which the several States were to be but forms of municipal corporations of the central Government, or less—mere geographical divisions. (The following are but a few illustrations of the manner in which the States were regarded by the leading statesmen who shared in the delicate task of effecting the ratification of the Constitution by the several States: Hamilton in the New York convention, June 21, 1788 (Elliot's Debates, Vol. II, pp. 267–268): 'Were the laws of the Union to new model the internal police of any State, were they to alter or abrogate at a blow the whole of its civil and criminal institutions, were they to penetrate the recesses of domestic life and control in all respects the private conduct of individuals, there might be force in the objection [to the plan of the Constitution], and the same Constitution, which was happily calculated for one State might sacrifice the welfare of another. The blow aimed at the members must give a fatal wound to the head and the destruction of the States must be at once a political suicide. Can the National Government be guilty of this madness?' Oliver Wolcott in the Connecticut convention (Elliot's Debates, Vol. II, p. 202): 'The Constitution effectually secures the States in their several rights. It must secure them for its own sake, for they are the pillars which uphold the general system.' Pierce Butler to Weedon Butler, October 8, 1787 (Farrand's Records, Vol. III, p. 103): 'The powers of the General Government are so defined as not to destroy the sovereignty of the individual States.' Pelatiah Webster, often called 'the father of the Constitution,' in his pamphlet entitled 'The weakness of Brutus exposed' (Philadelphia, 1787): 'It appears, then, very plain that the natural effect and tendency of the supreme power of the Union is to give strength, establishment, and permanency to the internal police and jurisdiction of each of the particular States; not to melt down and destroy, but to support and confirm them all.' Jefferson to Madison, February 8, 1786: 'With respect to everything external, we be one Nation only, firmly hooked together. Internal government is what each State should keep to itself.'

Jefferson to William Johnson in 1823 (Ford's Writings of Jefferson, Vol. VII, p. 296): 'The capital and leading object of the Constitution was to leave with the States all authorities which respected their own citizens only and to transfer to the United States those which respected citizens of foreign or other States.' Jefferson's first inaugural address (Wayland, Political Opinions of Thomas Jefferson, p. 46): 'I deem as essential principles of our Government the support of the State governments in all their rights as the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies; the preservation of the General Government in its whole constitutional vigor as the sheet anchor of our peace at home and safety abroad.' Jefferson to Cartwright, June 5, 1824 (id., pp. 42–46): 'They—that is, the State and Federal Governments—are coordinate departments of one simple, integral whole. To the State governments are reserved all legislation and administration in affairs which concern their citizens only, and to the Federal Government is given whatever concerns foreigners or the citizens of other States, these functions alone being Federal. The one is the domestic, the other the foreign, branch of the same Government, neither having control over the other, but within its own department.' (See to the same effect the Congressional Globe, 38th Cong., 1st sess., p. 2993.) Jefferson to Johnson, January 26, 1811 (Wayland, id.): 'The true barriers of our liberties in this country are our State governments. * * * Seventeen distinct States amalgamated into one as to their foreign concerns, but single and independent as to their internal administration.' Sherman and Ellsworth to the governor of Connecticut, September 26, 1797 (Farrand Records, Vol. III, p. 99): 'Some additional powers are vested in Congress. * * * These powers extend only to matters respecting the common interests of the Union and are specifically defined so that the particular States retain their sovereignty in all other matters.' Marshall, C. J., in Gibbons *v.* Ogden (9 Wheat., 1, 195): 'The genius and character of the whole Government seem to be that its action is to be applied to all the external concerns of the Nation and to those internal concerns which affect the States generally, but not to those which are completely within a particular State which do not affect other States and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government.' Article 1, section 1, of the constitution of Texas, adopted 1876: 'Texas is a free and independent State, subject only to the Constitution of the United States, and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government unimpaired to all the States.' (See also Art. II, sec. 3, of the Constitution of Missouri to the same effect. See also Freund on Police Power, secs. 54 and 68; Cooley on Constitutional Limitations, 7th ed., pp. 65, 243, 261, 263; House *v.* Mayes, 219 U. S., 270, 282; South Carolina *v.* United States, 199 U. S., 437, 448, 454; McCulloch *v.* Maryland, 4 Wheat., 316, 410; In re Rahrer, 140 U. S., 545, 555; Matter of Heff, 197 U. S., 488, 505; Dartmouth College *v.* Woodward, 4 Wheat., 518, 629; Lowenstein *v.* Evans, 69 Fed., 908, 911; Oklahoma, K. & M. I. Ry. Co. *v.* Bowling, 249 Fed., 592, 593–594; Chisholm *v.* Georgia, 2 Dall., 419, 435.)

"Chief Justice Marshall, who was a member of the constitutional convention of the State of Virginia and who participated in a large part of the anxious and difficult labor which led to its adoption therein, has left a clear and emphatic record upon this score. In Dartmouth College *v.* Woodward (4 Wheat. 518, 629), he declared:

"'That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted.'

"Similar doctrine has been announced in a long line of decisions. In Lane County *v.* Oregon (7 Wall., 71, 76) Chief Justice Chase said:

"'Without the States in union there could be no such political body as the United States. * * * In many articles of the Constitution *the necessary existence of the States*, and, within their proper spheres, *the independent authority of the States*, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the National Government are reserved.'

"But who can in reason assert that a State has a 'necessary existence' or any 'independent authority' under the Constitution, if the provisions of Article V permit its governmental powers to be reduced to a mere shadow and its authority over local self-government to nothing substantial? Is the existence of any State 'necessary' or its authority in the least 'independent,' when both subsist but at the sufferance of two-thirds of the Houses of Congress and three-fourths of the legislatures of the States? Can it be doubted that the Constitution would have been rejected if it had been seriously suggested in the State conventions which adopted it that Article V granted unlimited amending power and thus placed the minority of the States in peril of virtual extinction through deprivation of all their substantial powers? No one familiar with our history can for a moment believe that any of the States would have been party to such an agreement. On the contrary, they regarded the amending clause as authorizing merely correctional matters germane to the original instrument. John Marshall in the Virginia constitutional convention said (3 Elliot's Debates, p. 234): 'The difficulty we find in amending the Confederation will not be found in amending this Constitution. Any amendments, in the system before you, will not go to a *radical change;* a plain way is pointed out for the purpose.' Amendments to the Articles of Confederation had to be by unanimous consent of the State legislatures (art. 13), but, as under the Constitution, amendments were possible by the action of fewer than all, it is clear that they could not properly be 'radical changes.' They had, therefore, necessarily to be in harmony with, to be germane to, and 'within the lines of, the original instrument'; otherwise they were not properly amendments at all. (Livermore *v.* Waite, 102 Calif., 113, 118–119. See also Gagnon *v.* United States, 193 U. S., 451, 457. And if the so-called eighteenth amendment would have been regarded as repugnant to the Constitution when the Constitution was adopted—which it is submitted can not be doubted—it is so now, for the meaning and effect of the Constitution must at all times be the same. (Ex parte Bain, 121 U. S., 1, 12; South Carolina *v.* United States, 199 U. S., 437, 448; Story on the Constitution, sec. 1908.)

"It is impossible to reconcile with the decision of this court in Texas *v.* White (7 Wall., 700, 725), quoted above, the contention that the amending power contained in Article V of the Constitution is unlimited and may be exercised by some of the States, so as to take part or all of the police or governmental powers of an objecting State against its will. If that were true, if the so-called eighteenth amendment were valid, then, notwithstanding the solemn pronouncement of this court to the contrary in Texas *v.* White, the States by entering into the Union under the Constitution might suffer 'the loss of distinct and individual existence,' of 'the right of self-government,' and of their 'separate and independent autonomy,' and it can no longer be asserted, as Chief Justice Chase solemnly declared, that 'the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government,' since, under the theory of the defendants, the Constitution, in Article V, carries within itself the power to accomplish the virtual annihilation of the States and their debasement to impotent and all but meaningless geographic designations. The several States could then be constitutionally transmuted into mere municipal corporations of the central Government, or even into less, and the 'indestructible States,' which the court declared that 'the Constitution, in *all* its provisions, looks to' could be practically destroyed as effective governments under 'color of amendment.' How can it be said that 'the Constitution, *in all its provisions*, looks to * * * indestructible States,' when, if the defendants be right, one of those very provisions—namely, Article V—at all times had and has within itself the power to compass their practical destruction?

"A determined attempt was made in the Slaughter House Cases (16 Wall., 36, 77) to secure the approval of this court of an effort to impair the police power of the States under the pretext that that result necessarily followed from the terms and provisions of the fourteenth amendment to the Constitution, but the contentions to that effect were most emphatically repudiated by Mr. Justice Miller, speaking for the court, who said:

"'Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

"'All this and more must follow if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think

proper on all such subjects. * * * The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. *But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and Federal Governments to each other and of both these governments to the people, the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.*

"'We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.'

"See also the reasoning of Mr. Justice Bradley in the Civil Rights cases (109 U. S., 3, 11–15, 19.)

"In Northern Securities Co. *v.* United States (193 U. S., 197, 348), Mr. Justice Harlan, referring to the declarations of Chief Justice Chase in Texas against White, quoted above, said:

"'These doctrines are at the basis of our constitutional Government and can not be disregarded with safety.'

"And the present learned Chief Justice, on behalf of the dissenting justices, also called attention to—

"'The powers of the Federal and State Governments, the general nature of the one and the local character of the other, *which it was the purpose of the Constitution to create and perpetuate*' (id., p. 369).

"It is manifest, however, that if the views of the defendants be now accepted as sound and controlling, these essential underlying doctrines must be at last disregarded and that the Constitution has in fact failed in its purpose to perpetuate the powers of the States over matters of local self-government. In other words, so far as concerns one of its most clearly revealed purposes and intentions, the Constitution has proved a self-destructive instrument, because within Article V lies hidden the means of subverting the most fundamental characteristics of the system of government established by the Constitution.

"In Keller *v.* United States (213 U. S., 138, 148–149), the court held unconstitutional an act of Congress which, under the guise of a regulation of interstate commerce, attempted to interfere with the internal affairs of the States, and Mr. Justice Brewer, speaking for the court, used the following language:

"'If the contention of the Government be sound, whatever may have been done in the past, however little this field of legislation may have been entered upon, the power of Congress is broad enough to take cognizance of all dealings of citizens with aliens. That there is a moral consideration in the special facts of this case, that the act charged is within the scope of the police power, is immaterial, for, as stated, there is in the Constitution no grant to Congress of the police power. And the legislation must stand or fall according to the determination of the question of the power of Congress to control generally dealings of citizens with aliens. In other words, an immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the States, may be taken by Congress away from them. Although Congress has not largely entered into this field of legislation, it may do so if it has the power. *Then we should be brought face to face with such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution.* While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced. (Fairbank *v.* United States, 181 U. S., 283.) To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in Texas *v.* White (7 Wall., 700, 725), that "the Constitution in all its provisions looks to an indestructible Union, composed of indestructible States."'

"(See likewise Hammer *v.* Dagenhart, 247 U. S., 251, 275, cited and quoted from above at pp. 66–67.)

"It will be observed that in both of these cases the indestructibility of the several States, which is implied in the Constitution, and, indeed, their indestructibility, not as mere geographic units, but as actual, autonomous, locally self-governing sovereignties, was deemed determinative for the purpose of restricting the clause of the Constitution granting to the Federal Government without any express limitation the right to regulate and control interstate commerce. Why, then, is not the same implication effectual to limit and qualify another part of the same Constitution, namely, the amending clause contained in Article V? Certainly it would be vain to urge, as does the court in the Hammer case (247 U. S., at p. 275), that 'the maintenance of the authority of the States over matters purely local is * * * essential to the preservation of our institutions' and 'the power of the States to regulate their purely internal affairs * * * inherent and * * * never surrendered to the General Government' if the States held that authority only temporarily and could be deprived of all of it whenever two-thirds of the Houses of Congress and three-fourths of the legislatures of the States saw fit to take advantage of the power conferred in Article V of the Constitution. (See also Kentucky *v.* Dennison, 24 How., 66, 107; Guinn *v.* United States, 238 U. S., 347, 362.)

"The right of the States to continue as effective local governments which is implied in the Constitution has been emphatically recognized and enforced as against an express and practically unqualified power sought to be exercised in conflict therewith in the cases which hold that it is unconstitutional for the Federal Government to attempt to tax the several States or their governmental instrumentalities. (The Collector *v.* Day, 11 Wall., 113, 124, 125, 127; United States *v.* Railroad Co., 17 Wall., 322, 327; Pollock *v.* Farmers' Loan & Trust Co., 157 U. S., 429, 584; South Carolina *v.* United States, 199 U. S., 437, 453.) The ratio decidendi of these authorities is not based upon any express limitation upon the Federal taxing power, for the grant of power is unlimited, but solely upon the 'necessary implication' which arises out of our dual and Federal system of government and 'the great law of self-preservation,' which the States are entitled to invoke against efforts tending to bring about their ultimate destruction. As Mr. Justice Nelson said in The Collector *v.* Day, supra:

"'The General Government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. * * * Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and *the existence of which is so indispensable, that, without them, the General Government itself would disappear from the family of nations,* it would seem to follow, as a reasonable if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government. * * *

"'If the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that Government. *In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government.*'

"If, however, Article V of the Constitution authorizes amendments directly withdrawing police powers from the States, which their necessarily implied right of self-preservation may, nevertheless, not resist, it would be baseless to argue, as did the court in The Collector *v.* Day, that the existence of the States is indispensable under our constitutional system, for the States then would have their being 'only at the mercy of' the Congress and the legislatures of three-fourths of the States.

"Certainly until the present controversy arose no jurist or statesman would have conceived it possible that under our Government the several States of the Union constituted destructible sovereignties. Even during all the bitterness and high feeling preceding the Civil War, the independent sovereignty and indestructibility of the States were not challenged. In 1860 the Republican national convention which nominated Lincoln wrote the following declaration into its platform (Congressional Globe, 38th Cong., 1st sess., p. 2985):

"'*Resolved*, That the maintenance inviolate of the rights of the State, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depends.'

"And in his first inaugural address President Lincoln, referring to this declaration, said:

"'I now reiterate these sentiments. * * * I understand a proposed amendment to the Constitution has passed Congress to the effect that the Federal Government shall never interfere with the domestic institutions of the States, including that of persons held to service. * * * Holding such a provision to now be implied constitutional law, I have no objection to its being made express and irrevocable.'

"The preservation of the State governments was one of the chief concerns of the framers of the Constitution. In numerous instances during the debates in the various constitutional conventions this clearly appears. The following extracts from Elliot's Debates (vol. 2, pp. 304, 309; vol. 4, pp. 53, 58) illustrate the spirit of the conventions:

"'Mr. HAMILTON. The State governments are essentially necessary to the form and spirit of the general system. As long, therefore, as Congress have a full conviction of this necessity, they must, even upon principles purely national, have as firm an attachment to the one as to the other. This conviction can never leave them, unless they become madmen. *While the Constitution continues to be read, its principles known, the States must, by every rational man, be considered as essential, component parts of the Union; and therefore the idea of sacrificing the former to the latter is wholly inadmissible.* * * * The gentlemen are afraid that the State governments will be abolished. But, sir, their existence does not depend upon the laws of the United States. *Congress can no more abolish the State governments than they can dissolve the Union. The whole Constitution is repugnant to it.*

"'Mr. IREDELL. I heartily agree with the gentleman that *if anything in this Constitution tended to annihilation of the State government, instead of exciting the admiration of any man, it ought to excite the resentment and execration. No such wicked intention ought to be suffered. But the gentlemen who formed the Constitution had no such object;* nor do I think there is the least ground for that jealousy. The very existence of the General Government depends on that of the State governments.

"'Mr. DAVIE. Mr. Chairman, a consolidation of the States is said by some gentlemen to have been intended. * * * *If there were any seeds in this Constitution which might, one day, produce a consolidation, it would, sir, with me, be an insuperable objection.* I am so perfectly convinced that so extensive a country as this can never be managed by one consolidated government. The Federal Convention were as well convinced as the Members of this House that the State governments were absolutely necessary to the existence of the Federal Government.'

"Under the contention of the defendants, however, Article V of the Constitution does contain not only the 'seeds,' but the plain means to 'produce a consolidation,' the very outcome which all those responsible for the instrument so strongly denounced as impossible and not intended.

"A scholarly and exceptionally competent historian, George Ticknor Curtis, treating of this subject in his work on the Constitutional History of the United States (Vol. II, pp. 160, 161), expressed himself as follows:

"'The ninth and tenth amendments are in themselves express fundamental provisions, fixing *immutably* the reserved rights of the States. If three-fourths of the States were to undertake to repeal them or to remove them from their place in the foundations of the Union, it would be equivalent to a revolution. There would remain nothing but the dominant force of the three-fourths of the States, and this would soon end in a complete consolidation of the physical force of the Nation, to be followed by a different system of government of a despotic character.

"'It seems to me, therefore, that while it is within the amending power to change the framework of government in some respects, it is not within that power to deprive any State, without its own consent, of any rights of self-government which it did not cede to the United States by the Constitution or which the Constitution did not prohibit it from exercising.'

"It should, moreover, be remembered that the issue now before the court embraces within itself a menace or portend of mischief even more far-reaching than that which is involved in the attack upon the present right of local self-government of the States—the same principle which would uphold the amendment in suit is fraught with menace to the existence of the Federal Government itself. If the power to amend contained in Article V of the Constitution is unlimited, it would support an amendment practically destroying the Federal principle or empowering the States to tax the instrumentalities of the Federal Government, or an amendment to deprive the Congress of essential legislative powers, which might involve the practical extinction of the 'perpetual' and 'more perfect Union' which the people erected! It is inconceivable that both the Nation and the States may to all practical intents have their fundamental characters changed or destroyed whenever it pleases two-thirds of the Houses of Congress and three-fourths of the legislatures of the States, which latter may readily represent only a minority of all the people of the United States. The possibility of any such outcome should condemn any rule that would permit it.

"It is submitted that the establishment and recognition in the Constitution of the two Governments, Federal and State, plainly implies that neither shall be permitted to destroy the other, and that the State power shall not be exerted to overthrow the Federal Government, nor the Federal power to impair the existence of the States. (In his lectures on the Constitution of the United States, Mr. Justice Miller said (pp. 24, 412): 'While the pendulum of public opinion has swung with much force away from the extreme point of State rights doctrine, there may be danger of its reaching an extreme point on the other side. In my opinion, the just and equal observance of the rights of the States and of the General Government, as defined by the present Constitution, is as necessary to the permanent prosperity of our country and to its existence for another century as it has been for the one whose close we are now celebrating. * * * The necessity of the great powers conceded by the Constitution originally to the Federal Government, and the equal necessity of the autonomy of the States and their power to regulate their domestic affairs, remain as the great features of our complex Government.') (South Carolina *v.* United States, 199 U. S., 437, 451, 452.) That, consequently, the States must be preserved, not as mere electoral and administrative districts of a unified and consolidated National Government, but as true local, self-governing sovereignties, inviolate and indestructible members of a dual, and not a consolidated, system of government, and with a permanent and effectual reason for being, namely, the possession of the power and the right to exercise forever the functions of internal, local self-government.

"It is no answer to these contentions to urge that the consequences of destruction herein referred to are not reasonably to be apprehended; that the various governmental authorities must have confidence in each other; and that such mutual confidence will tend to bring about governmental harmony. If we indulge in any such idea, we shall be merely shutting our eyes to ordinary human motives and weaknesses and forget that the struggle for power is the natural law of existence. If once it be decreed that the reserved power of the States may be invaded and that how far the invasion shall proceed is merely a question of policy and discretion, the struggle will never end until the States have been stripped of the last vestige of their substantial powers of local self-government. Usurpation always commences with loud and plausible protestations of good intentions and large promises of moderation and assertions that the encroachment will be limited and go no further. This line of argument, however, was long ago refuted by Chief Justice Marshall in McCulloch *v.* Maryland (4 Wheat., 316, 327, 431). It was there also argued that unlimited hostile power on the part of the States need not be apprehended if the several States and the Nation would only have "confidence" in each other. But Chief Justice Marshall rejected the contention, saying:

"'But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? * * * This, then, is not a case of confidence, and we must consider it as it really is.'

"Perusal of the Constitution itself will show that, as Chief Justice Chase declared in Texas *v.* White, supra (7 Wall., 700, 725), 'The Constitution in all its provisions looks to an indestructible Union, composed of indestructible States.' Every article contains at least one provision specifying some attribute of independent sovereignty as belonging to the several States.

"Section 2 of Article I contemplates an elective State legislature; section 4, a State legislature capable of regulating elections; section 8, a State militia with officers appointed by State authorities, and a State legislature empowered to consent to the sale of State lands to the Federal Government; section 9, a State government with discretion over the migration and importation of persons, and section 10, a State government which, but for the prohibitions in that section, would have power to make treaties, wage war, enact every species of legislation, and lay every conceivable kind of tax. Section 1 of Article II looks to a State and a State legislature able to appoint presidential electors, and section 2 refers to the 'militia

of the several States.' Article III deals with States capable of having controversies with each other and with third parties, of such a nature as to require judicial action, and also deals with States capable of having citizens of their own. Section 1 of Article IV has in view States having public acts, records, and judicial proceedings; section 2, States with systems of criminal justice, laws regulating the rights of persons, executive authorities and citizens possessed of privileges and immunities derived from their respective States; section 3, new States to be taken into 'this Union' in the future, and section 4, States having and maintaining under 'this Union a republican form of government,' with legislative and executive authorities charged with the duty of preserving order and safety within the States. Article VI speaks of State judges administering the law 'in every State,' and of legislative, judicial, and executive State officers.

"The second amendment refers to the militia of a free State; the tenth, to States with reserved powers; the eleventh, to States so sovereign that individuals may not even sue them without their consent; the fourteenth, to citizens of the States, to elective and appointive State officers of every kind and State debts and State moneys; the fifteenth, to the right to vote within the States, and the seventeenth, to elective State legislatures and to executive authority in such States.

"In Article V of the Constitution, State legislatures are specifically referred to as part of the machinery or agencies expressly erected by the Constitution for its amendment. But if the police power can be entirely withdrawn from the States by constitutional amendment, they will thereafter need no legislatures at all, since they may then no longer have anything to legislate about; and the machinery intended by the Constitution to be forever available for amending it might in that event no longer exist, and the Constitution thus thereafter cease to be amendable. The form may then remain but the substance will have vanished.

"Again, Article V in its proviso 'that no State, without its consent, shall be deprived of its equal suffrage in the Senate,' necessarily implies and requires the continued existence of the States, for otherwise their equal suffrage in the Senate could be destroyed with them; and further implies that the States shall at all times exist as bodies capable of consenting—in other words, as autonomous, self-governing sovereignties. The same views are expressed as follows in Tucker's work on the Constitution of the United States (Vol. I, pp. 323–324):

"'The provision which fixed irrevocably the equipollency of each State in the Senate, unless such State surrenders it by its separate consent, is clear evidence that no change in this respect can be made but by a new compact, to which each State, as a distinct factor, must be a party. It proves the continuing and perpetual independence of the State as a primordial political particle, in order to its own protection against the *vox majoritatis*, whether of population or of States. It proves more. If the State was not to be preserved as an equal in sovereignty, despite a difference in population, there is no assignable reason for thus shielding its equality in the Senate against all action but at its own will and at its own consent. * * *

"'From this review it is obvious that, without the continuing existence of States and State governments *de jure* and *de facto*, the Federal Government itself would cease to be. * * *

"'If the States in their full autonomy as independent bodies politic are pulled down the Federal Samson would be destroyed amid their ruins.'

"It is no answer to these contentions to urge that the tenth amendment, which expressly reserves the police powers to the States, is after all but an amendment and as such may be altered like any other provision or amendment. The tenth amendment stands upon its own peculiar ground. It is, in fact, but the expression of matters implied in the original Constitution, and it added no power to the States and subtracted none from the Federal Government. (United States *v.* Cruikshank, 92 U. S., 542, 552; Wilkinson *v.* Leland, 2 Pet., 627, 657; Loan Association *v.* Topeka, 20 Wall., 655, 662–3.) If it did not exist the contentions herein urged would, nevertheless, have the same force and effect, and its amendability is, therefore, to be determined not by the mere fact that it is termed an amendment but by its intrinsic nature. In other words, if the principle which one of the first 10 amendments announces is of the very essence of free republican government or of our dual form of government to such an extent that changing it would be subverting our governmental system, then it is not a proper subject of amendment by means of the agencies provided in Article V of the Constitution. (State *v.* Keith, 63 N. Car., 140, 144; Eason *v.* State, 11 Ark., 481, 491.) Thus, the provision guaranteeing due process of law is plainly so vital to free government that it may not be destroyed, but the provision against self-incrimination or indictment by a grand jury may well be regarded as standing on a different footing.

"The guaranty rendered express by the tenth amendment is of vital obligation and was necessarily recognized and approved by every State when it entered into the Union, which can only remain a true Federal union so long as the several States retain the powers which that amendment expressly reserves. With the subject matter of that amendment substantially altered or destroyed, 'we may remain a free people, but the Union will not be the Union of the Constitution.' (Coyle *v.* Oklahoma, 221 U. S., 559, 580.)

"It has been suggested that the proceedings in the Federal Constitutional Convention of 1787 afford support for the defendants' construction of Article V of the Constitution (see Madison's Notes, Farrand, vol. 2, pp. 629–631), but investigation will dispel whatever doubt these proceedings may tend to create. It is reported that (id.)—

"'Mr. Sherman expressed his fears that three-fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate. He thought it reasonable that the proviso [in the amending clause of the proposed Constitution] in favor of the States importing slaves should be extended so as to provide that no State should be affected in its internal police or deprived of its equality in the Senate. * * *

"'Mr. Sherman moved, according to his idea above expressed, to annex to the end of the article a further proviso "that no State shall without its consent be affected in its internal police or deprived of its equal suffrage in the Senate."

"'Mr. MADISON. Begin with these special provisos, and every State will insist on them for their boundaries, exports, etc.'

"And thereupon the phrase concerning the internal police of the States was omitted, while the phrase concerning the equal suffrage of the States in the Senate was retained.

"Of course, if the latter provision had been stricken out the equality of the States in the Senate could have been changed whenever two-thirds of the Houses of Congress and three-fourths of the legislatures of the States so desired, because such an equality is not indispensable to a free or republican or federal form of government any more than is equality of representation in the House of Representatives. If Senators were apportioned to the States as are Representatives, neither the essence nor spirit nor the fundamental principles of our Government would be affected. To preserve equality in the Senate, therefore, it was absolutely necessary that the amending clause of the Constitution should be expressly qualified to that effect.

"But the police powers of the States, their right to exist and to be immune from the efforts of some of the other States 'to do things fatal to particular States, as abolishing them altogether,' were clearly implied in the Constitution, as Chief Justice Chase declared in Texas *v.* White (7 Wall., 700, 725). The power of amendment was plainly understood not to apply to them. It was, therefore, quite unnecessary to write these fundamental implications into Article V. As Madison pointed out, if once that course had been entered upon every implication would have had to be counteracted and set out in express terms in the article, and no useful purpose be served, but, on the contrary, the large risk would have been incurred of omitting some that were important. That was what he meant, and all that he meant, when he declared—

"'Begin with these special provisos, and every State will insist on them, for their boundaries, exports, etc.'

"It is reasonably certain that the Constitution would never have been adopted if any responsible member of the Federal Convention had so much as intimated that Article V was intended to authorize the debasement and ultimate destruction of the States at the will of some of them only. Consequently, even if Madison, at the secret sessions of the Federal Convention, had entertained ideas to the contrary, that would be immaterial. The people acted upon the plain meaning of the instrument, and intended no such result as is urged by the defendants in the case at bar; and as the people reasonably read the Constitution, so should it be enforced. (Cooley on Constitutional Limitations, 7th ed., pp. 101–102; Maxwell *v.* Dow, 176 U. S., 581, 601–602; State *v.* St. Louis & S. W. Ry. Co., 197 S. W., 1012, 1013 (Tex.); Alexander *v.* People, 7 Colo., 155, 167.)

"It is, however, perfectly clear that Madison himself believed that the sovereignty of the States was fully protected by the implications apparent upon the face of the Constitution—indeed, that it was inviolable. In No. 43 of the Federalist, which has long been attributed to him, he wrote the following concerning the amending clause of the Constitution (Ford's ed., pp. 291–292):

"'The exception in favor of the equality of suffrage in the Senate was probably meant as a palladium to the *residuary sovereignty of the States, implied and secured by that principle of representation* in one branch of the legislature.'

"And in the thirty-ninth number of the Federalist Madison again described the States under the Constitution (before there was any tenth amendment), as follows (id., p. 251):

"'Its jurisdiction—that is, that of the Federal Government—extends to certain enumerated objects only, and leaves to the several States a residuary and *inviolable sovereignty over all other objects.*'

"IV.

"THE SO-CALLED EIGHTEENTH AMENDMENT HAS NOT BEEN RATIFIED BY THREE-FOURTHS OF THE SEVERAL STATES.

"Article V of the Constitution provides that proposed amendments thereto 'shall be valid to all intents and purposes * * * when ratified by the legislatures of three-fourths of the several States or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress.'

"Congress directed that the so-called eighteenth amendment proposed by it should be ratified by the action of the legislatures of the States, not only providing to that effect in the proposing resolution but expressly declaring in section 3 of the so-called amendment itself that it should be inoperative unless 'ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution,' within seven years. We are not, therefore, concerned with any question of ratification by conventions in the States, but solely with the validity of the alleged ratification of the proposed amendment by the legislatures of the several States.

"Three States—New Jersey, Rhode Island, and Connecticut—have not ratified the amendment. In the remaining States the legislative assemblies, called by various names, have given their approval to the amendment. In 19 of these States, however, the people in their respective State constitutions (the following are references to the apposite constitutional provisions in those States: South Dakota, art. 3, sec. 1, p. 1256; Oregon, art. 4, secs. 1 and 1a, p. 1154; Nevada, art. 19, secs. 1, 2, and 3, p. 899; Montana, art. 5, sec. 1, p. 819; Oklahoma, art. 5, secs. 1–8, p. 1097; Maine, art. 31, secs. 1, 16–20, p. 607; Missouri, art. 4, sec. 57, p. 785; Michigan, art. 5, sec. 1, p. 688; Arkansas, art. 5, sec. 1, p. 93; Colorado, art. 5, sec. 1, p. 195; Arizona, art. 4, sec. 1, p. 58; California, art. 4, sec. 1, p. 123; Ohio, art. 2, secs. 1–1g, p. 1060; Nebraska, art. 3, secs. 1–1d, p. 850; Washington, art. 2, sec. 1, p. 1443; North Dakota, art. 2, sec. 25, p. 1022; Mississippi, art. 4, sec. 33, Hemingway's Annotated Code, 1917, p. 151; Utah, art. 6, sec. 1, p. 1355; Massachusetts, art. 48, subd. 1, of amendments. The constitutions of Maryland, art. 16, p. 652, and New Mexico, art. 4, sec. 1, p. 939, provide only for the referendum and not for the initiative. The argument under this point, however, applies to those States as well as to the others mentioned. The foregoing page references are to Kettleborough on 'State Constitutions,' unless otherwise indicated. The constitutional provisions above referred to will be found in Appendix II to this brief) have reserved to themselves the right to enact practically every kind of legislation—with some minor exceptions—upon their own initiative, and also an equally comprehensive right to require the reference to themselves of almost all the enactments of their several legislative assemblies for rejection or approval at the polls. That is to say, in each of these States the initiative and referendum have left the electors of the State in effectual possession of continuous and permanent lawmaking power, not merely equal, but superior, to that of the houses of the legislative assemblies themselves. It is plain, therefore, that in the jurisdictions where the initiative and referendum prevail—and, indeed, even in the jurisdictions where the referendum alone obtains—the electors of the State are in truth and effect a branch of the legislative power, endowed with at least as much authority as the official legislative assembly itself, and yet in none of these States has there been any attempt to submit the eighteenth amendment to the electors of the State, except in Ohio, where the proposed amendment has been rejected at the polls. (Proceedings looking to a referendum upon the so-called eighteenth amendment have been taken in 12 States, viz., Arkansas, California, Colorado, Maine, Michigan, Missouri, Nebraska, Nevada, New Mexico, Oklahoma, Ohio, and Oregon.)

"A typical illustration of the manner in which the legislative power of the State is apportioned in the jurisdictions above referred to is contained in the following extract from section 1 of article 5 of the constitution of Michigan:

"'The legislative power of the State of Michigan is vested in a senate and house of representatives; but the people reserve to themselves the power to propose legislative measures, resolutions, and laws; to enact or reject the same at the polls independently of the legislature; and to approve or reject at the polls any act passed by the legislature, except acts making appropriations for State institutions and to meet deficiencies in State funds. * * *

"'The second power reserved to the people is the referendum. No act passed by the legislature shall go into effect until 90 days after the final adjournment of the session of the legislature which passed such act, except such acts making appropriations and such acts immediately necessary for the preservation of the public peace, health, or safety, as have been given immediate effect by action of the legislature.

"'Upon presentation to the secretary of state within 90 days after the final adjournment of the legislature of a petition certified to as herein provided, as having been signed by qualified electors equal in number to 5 per cent of the total vote cast for all candidates for governor at the last election at which a governor was elected, asking that any act, section, or part of any act of the legislature be submitted to the electors for approval or rejection, the secretary of state, after canvassing such petition as above required, and [if] the same is found to be signed by the requisite number of electors, shall submit to the electors for approval or rejection such act or section or part of any act at the next succeeding general election; and no such act shall go into effect until and unless approved by a majority of the qualified electors voting thereon.

"'Any act submitted to the people by either initiative or referendum petition and approved by a majority of the votes cast thereon at any election shall take effect 10 days after the date of the official declaration of the vote by the secretary of state. No act initiated or adopted by the people shall be subject to the veto power of the governor.'

"In States having constitutional provisions substantially as above, the legislative power conferred upon and possessed by, the nominal State legislature is hardly more than tentative in character, and the electors of the State are in fact the legislature, or the only department thereof possessed of supreme and ultimate power. With inconsequential exceptions, no permanent legislation can have any force and effect in those States unless the electors thereof are willing to accept it or acquiesce in it, and practically nothing that has their approval can be kept off the statute books if they see fit to call into play their initiative power.

"There can be no doubt of the constitutionality of such a distribution of legislative power within a State. The Constitution does not prescribe any requirement for the internal structure of a State government other than that it shall be republican in form; and, under our system of government, the right to decide what is or is not a republican form of government is exclusively vested in the political branches of the National Government. (Luther *v.* Borden, 7 How., 1; Pacific Telephone Co. *v.* Oregon, 223 U. S., 118; Mountain Timber Co. *v.* Washington, 243 U. S., 219, 234.) Since Representatives and Senators from all the States in question have been duly received and seated in Congress and now constitute a part of it, it is patent that the legislative department of the National Government views those States as possessing republican forms of government; and since the executive department of the National Government is every day having dealings with them as duly constituted States, it must be equally apparent that that department of the Federal Government regards them as organized and functioning in accordance with the requirements of the Federal Constitution.

"So long as a republican form of government is maintained, it is obvious that it is immaterial to the Federal Government how the State arranges or distributes the machinery for its own local government. The right of a State to have whatever means or instrumentalities of local government it deems fit is, indeed, as clear as its right to enact measures of local self-government in accordance with its own peculiar wishes. Both of these powers are wholly reserved to the States in the tenth amendment. (State ex rel. Davis *v.* Hildebrant, 94 Ohio Stat. 154, 161–2, affirmed, 241 U. S. 565.) It is entirely competent—and it always has been—for a State to establish the commission form of government for itself and to vest in such commission all or any of the powers of government, or to provide for a legislature with one, two, three, or even more, houses or branches. It is the right of the people of a State to abolish the legislative assembly entirely and to enact all laws upon their own initiative; or to create a legislative assembly and require that the measures enacted by their representatives or agents shall only be tentatively laws and subject to final approval or rejection by the electorate at the polls. In such a case the electorate of the State is a part of the legislative power and of the legislature of the State in the truest sense, since it alone has general, supreme, and ulti-

mate legislative power. In such a jurisdiction it would be impossible for the legislative assembly to enact a prohibition statute or to repeal one, if the electorate were opposed. The latter alone could say finally and conclusively whether such a condition should prevail in their State as the law.

"These considerations make it imperative to determine whether in referendum and initiative States the legislative assemblies can do an act which necessarily must fundamentally and permanently affect and alter the law and public policy prevailing therein, without any recourse to or respect for the will of the respective electorates. That an amendment to the Federal Constitution affects the law prevailing within the States is too plain to warrant discussion. Article VI of the Constitution itself declares that the Constitution 'shall be the supreme law of the land,' and that 'the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding,' and, in the case of such an amendment as the eighteenth amendment, which is in and of itself mere sumptuary legislation directly aimed at the regulation of the conduct of life by every individual in the country, that aspect of the matter is peculiarly clear. We are thus necessarily led to the inquiry, What is the meaning of the term 'legislatures' in Article V of the Constitution, which requires a proposed constitutional amendment to be 'ratified by the legislatures of three-fourths of the several States'?

"Of course, the Constitution being a written instrument, meaning does not alter, and the word 'legislatures' used therein must now bear the same interpretation that would have been placed thereon by the framers. (Dred Scott *v.* Sandford, 19 How., 393, 426; South Carolina *v.* United States, 199 U. S., 437, 448.) As, however, the Constitution was not made for a day but was intended to embrace within its provisions the entire duration of our national existence, however long that might be (Martin *v.* Hunter's Lessee, 1 Wheat., 304, 326; McCulloch *v.* Maryland, 4 Wheat., 316, 415; Cohens *v.* Virginia, 6 Wheat., 264, 387), it is manifest that, 'as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred' therein (South Carolina *v.* United States, 199 U. S., 437, 448), and that it would certainly not be permissible 'to read into the [Constitution] a nolumus mutare as against the law-making power' of a State. (Noble State Bank *v.* Haskell, 219 U. S., 104, 110.) Yet it is all but inevitable that such a consequence of rigid inadaptability to new conditions should follow, if it be true that the legislatures, which may lawfully act upon proposed constitutional amendments, are only the bicameral legislative assemblies of the States, as the defendants claim. For it is manifest that a State which had deemed it proper to abolish its legislative assembly in its own interest would then be wholly incapacitated from either adopting or rejecting a proposed constitutional amendment which Congress, in its discretion under Article V, had seen fit to direct should be ratified by the legislatures and not by conventions in the several States. An outcome which would leave it within the uncontrollable power of Congress to prevent any State possessed of a lawful and constitutional form of government from having a voice in the decision of what shall be the supreme law of the land is certainly to be deprecated and avoided if possible. That it is possible to avoid any such conclusion is self-evident, since it is only necessary to construe the word 'legislatures' in Article V as not limited exclusively to the formal legislative assemblies of the several States, but as intended to refer to the repository of legislative power therein, whatever that may be and however called, and all the parts thereof.

"Such a construction of the Constitution but carries out its primary intention and is not inconsistent with what the framers may be deemed to have had in contemplation. The word 'legislature' could not have signified a bicameral body to them. They must have known that a legislative assembly of but one house existed, or had shortly before existed, in Connecticut, Rhode Island, and Pennsylvania. (Connecticut did not adopt a constitution until 1818, when for the first time its legislative department became bicameral. At the time of the formulation of the Federal Constitution it was operating under a charter granted in 1662 by Charles II, which it had converted into a constitution by an act of its assembly in October, 1776. (Johnston's Connecticut, ch. 16; Thorpe, Vol. I, p. 531.) Rhode Island did not adopt a constitution until 1842. In 1787 the legislative power was in a single house. (Charter of Rhode Island and Providence Plantation, 1663; Thorpe, Vol. VI, pp. 3211, 3215.) The constitution of Pennsylvania was adopted in September, 1776, and section 2 of its 'plan or frame of government' provided for but a single legislative body. (Thorpe, Vol. V, pp. 3082–3084.) In fact, the New Jersey plan for a Federal constitution provided, according to Madison, for but a single legislative body. (Larned, Vol. V, pp. 3297–3298.) The framers certainly looked upon the people of the States as the source of all governmental power in the several States and upon the legislative assemblies as merely their creatures or agents. (Cohens *v.* Virginia, 6 Wheat., 264, 389.) Indeed, most of the State constitutions of that day were explicit upon that score. (See, for example, Bill of Rights adopted by members of the Virginia House of Burgesses in 1776, sec. 2; constitution of Massachusetts, adopted 1780, arts. 4 and 5 (Thorpe, Vol. III, p. 1890); constitution of New Hampshire, effective 1784, arts. 7 and 8 (Thorpe, Vol. IV, p. 2454); constitution of New York, adopted 1777, art. 1 (Thorpe, Vol. V, p. 2628); constitution of Pennsylvania, adopted 1776, arts. 4 and 14 (Thorpe, Vol. V, pp. 3082–3084); constitution of Maryland, adopted 1776, arts. 1, 4, and 5 of 'declaration of rights' (Thorpe, Vol. III, pp. 1686–1687); constitution of North Carolina, adopted 1776, arts. 1, 2, and 18 of 'declaration of rights.' (Thorpe, Vol. V, pp. 2787–2788); constitution of Georgia, adopted 1777, art. 1 (Thorpe, Vol. II, p. 778). See also Ware *v.* Hylton, 3 Dall., 199, 223.) The founders of our Government could, therefore, have seen no legal impropriety or deterrent in a State creating for itself a legislature of three houses (Was not the council of revision provided for in the New York constitution of 1777 (art. 3, Thorpe, Vol. V, p. 2628), in effect the germ of a third house of the State legislature?) with the electorate constituting practically the third house.

"While, of course, it is improbable that they conceived of the fully developed machinery of the initiative and referendum, as we have them to-day, it is, nevertheless, true that the genesis of both of these legislative processes appears in the early history of our country. In several instances the royal charters granted to the Colonies provided that a legislative body in the Colonies should be empowered to make laws, but that such laws should be subject to be annulled by the source of the charter powers. (Article IV of the Ordinances of Virginia (1621) provided in part: 'That no law or ordinance, made in the said general assembly, shall be or continue in force or validity, unless the same shall be solemnly ratified and confirmed in a general quarter court of said company here in England and so ratified be returned to them under our seal.' The charter to the Massachusetts Colony granted by William and Mary in 1691 provided in part that: 'In case we, our heirs, or successors, shall not within the term of three years after the presenting of such orders, laws, statutes, or ordinances [enacted by the colonial legislature] signify our or their disallowance of the same, then the said orders, laws, statutes, or ordinances shall be and continue in full force and effect.' (Thorpe, Vol. III, p. 1883.) [The capitalization, spelling, and punctuation of the foregoing have been modernized herein.]) Here is clearly the precursor of the referendum. And in some of the early State constitutions the right of the people to assemble and consult together and to instruct their representatives was distinctly asserted. (The constitution of Pennsylvania (1776), art. 14, provided 'that the people have a right to assemble together to consult for their common good, to instruct their representatives,' etc. (Thorpe, Vol. V, pp. 3082–3084.) The constitution of Maryland (1776), art. 5, provided 'that the right of the people to participate in the legislature is the best security of liberty and the foundation of all free government.' (Thorpe, Vol. III, pp. 1686–1687.) The constitution of North Carolina (1776), art. 18, of the 'declaration of rights,' is the same as the Pennsylvania provision quoted above. (Thorpe, Vol. V, pp. 2787–2788.) In August, 1789, the House of Representatives of the First Congress debated the advisability of adding a clause similar to the one in the Pennsylvania constitution to the Constitution of the United States. (Annals of Congress, Gales & Seaton's ed., 733–747.) The proposition to this effect was, however, defeated.) Plainly these provisions foreshadowed the latter-day initiative.

"The founders indisputably realized that the people in the several States had the right and the power to circumscribe the functions of their respective State legislatures so as to subject any action of a legislature to popular vote, and that consequence naturally followed from the conviction, which all of them must have had, that the people of the States were the exclusive source of governmental power in their respective States. (Chisholm *v.* Georgia, 2 Dall., 419, 471; Van Horne's Lessee *v.* Dorrance, 2 Dall., 304, 308.) The New England town-meeting system of government prevailed when the Constitution was adopted, was familiar to virtually every enlightened citizen of the time, and was a perfect illustration of local government conducted under and by direct legislation. (People ex rel. Metropolitan St. Ry. Co. *v.* Tax Com'rs, 174 N. Y., 417, 432; In re Pfahler, 150 Calif., 71.) The makers of the Constitution may perhaps not have been able to envisage in full detail the highly complicated initiative and referendum systems of to-day; but, in the light of what then prevailed, no one can rea-

sonably assert that if those systems had been laid before them they would have declared them at variance with any of the fundamental conceptions of the republican or constitutional system they were creating. The framers had beheld legislatures with but a single house, as in Connecticut, and the prospect of beholding legislatures of three bodies—the third and supreme house of which would be the electorate itself—can not reasonably be declared to have been beyond their ken.

"The Federal Constitution did not define the nature, composition, authority, or function of the 'legislatures' of the States upon whom power was conferred in Article V. The Constitution left the State legislatures precisely where it found them—exclusively under the control of the people of the respective States. When, therefore, the framers used the term 'legislatures' in Article V, they were employing it in its broadest sense to denote the legislative instrumentalities by which the legislative power of a State might be expressed in the several States at any time during the future life of the Nation. The all-pervading purpose was to have the people of the State express their will as to changing the fundamental law of the Nation. It is *their* will that was intended to govern, and they are to express that will through the legislative department of the respective State governments which they have established. (Of course, if Congress provided that ratification should be by conventions in the several States, such specially chosen bodies would have a direct mandate from the people of the States, and thus presumably record their will in the action they took.) But how that department should be constituted, how it should act, when it should act, what conditions should be imposed before its action became effective—all these matters were left by the Constitution to the States to settle according to their pleasure.

There is a body of discriminating and carefully considered authority which supports these views. (State ex rel. Schrader *v.* Polley, 26 S. Dak., 5; State ex rel. Davis *v.* Hildebrant, 94 Oh. St., 154, affirmed, 241 U. S., 565; State ex rel. Mullen *v.* Howell, 181 Pac., 920 (Supreme Court of Washington); State ex rel. Hopkins *v.* Amsbury, district court Lancaster County, Nebr., Morning, judge, Aug. 18, 1919; Hawke *v.* Smith, Supreme Court of Ohio, Sept. 30, 1919, affirming court of common pleas, Franklin County, Dillon, judge, June 19, 1919; Carson *v.* Sullivan, circuit court, Cole County, Mo., Slate, judge, no opinion; article by Everett P. Wheeler, Central Law Journal, May 19, 1919; Law Notes, July, 1919, p. 62.) It would unduly extend the discussion to set forth here adequate extracts from the foregoing authorities; but the pertinent passages of some of them have been printed in Appendix I to this brief. The opinions quoted from are exhaustive, well reasoned, and learned to an exceptional degree.

"It may be urged that the correct construction of the referendum provisions in the States renders them inapplicable to a proposed amendment to the Federal Constitution. Even if that were true—and there is strong authority to the contrary (see, e. g., the cases referred to above)—it is beside the point. The primary question is not whether the State referendum provisions embrace Federal constitutional amendments within their terms, but whether those provisions (either with or without the initiative provisions in the particular State) render the electorate such a part of the legislative body of the State as to constitute them in effect a third house of the 'legislature' of the State within the meaning of Article V of the Constitution, and thus make their assent necessary to due and legal ratification by the State of a proposed amendment to the National Constitution. If the referendum provisions of a given State embrace proposed Federal constitutional amendments, that means that in the State in question there now exists adequate machinery for submitting the matter to the electorate. If, however, such referendum provisions do not in terms apply to proposed Federal constitutional amendments, that merely indicates a present want of due instrumentalities for procuring an expression of the will of the people on the question in hand, and renders it incumbent upon the State to enact such measures as may be requisite toward that end. Inasmuch as section 3 of the proposed amendment allows seven years for ratification by the several States, it is apparent that there is plenty of time for the creation of an orderly procedure in every initiative and referendum State for the purpose of enabling the respective electorates thereof to pronounce their judgment on the proposed Federal constitutional amendment in suit.

"Such cases as Herbring *v.* Brown (190 Pac., 328 (Oreg.)) are not in conflict with these contentions. It was held in the Herbring case that the existing provisions of the Oregon referendum laws were not applicable to a proposed amendment to the Federal Constitution. It was not held, however, that under the initiative and referendum provisions in force in that State the electorate was not the repository of at least as much legislative power as its legislative assembly; in other words, it was not denied that in truth and effect the electorate of Oregon was an essential part of the 'legislature' of the State within the intent and meaning of that term in Article V of the Constitution. No one can reasonably doubt that under the Oregon constitution the electorate of the State retains virtually all the legislative power as its legislative assembly; in other words, it was not denied that in truth and effect the electorate of Oregon was an essential part of the 'legislature' of the State within the intent and meaning of that term in Article V of the Constitution. No one can reasonably doubt that under the Oregon constitution the electorate of the State retains virtually all the legislative power in its own hands. The question herein is whether, under such circumstances, the electorate of the State is not a part of the 'legislature,' whose ratification Article V of the Constitution requires. If it is, its assent must be procured. It may be true, as the Oregon court has held, that the present machinery in the State is not adapted to that purpose. But that merely renders it the duty of the legislature in Oregon to erect adequate statutory processes for the purpose, unless it wishes to remain disabled from acting upon proposed amendments to the Federal Constitution.

"The controlling inquiry, therefore, under this head is as to what constitutes a 'legislature' within the meaning of Article V of the Federal Constitution. It has been asserted that it consists solely of the legislative assembly of the State and that no State can limit the authority of any such representative body. But it is submitted that in those States where the initiative or the referendum or both are in general use, the 'legislature' of the State embraces the electorate as well, since the electorate is indisputably vested with a substantial part of the legislative power of those States. Upon this contention the Oregon case above cited did not pass. Neither has any other authority held to the contrary of our views, except the advisory opinion of the justices in Maine.

"It would surely be illogical to argue, as was done in the court below, that amending the Federal Constitution is not legislating in any sense. The cases ordinarily cited for this proposition hold no such doctrine. All that is intended to be declared in those cases is that 'the general assembly in amending the constitution, does not act in the exercise of its ordinary legislative authority. (State *v.* Cox, 8 Ark., 436, 443; Hollingsworth *v.* Virginia, 3 Dall., 378, 381n.) Amending the Federal Constitution is certainly not ordinary legislation, and, consequently, it does not require many things generally required of the usual legislation, as, for example, the assent or veto of the Executive. But inasmuch as the process goes to the creation of the fundamental law in each State, it is necessarily lawmaking. Precisely because it is a legislative activity—although not ordinary legislation—it has been intrusted exclusively to those branches of the Federal and State Governments whose function it is to formulate the laws. The whole matter has been lucidly discussed in Hawke *v.* Smith, decided in the Supreme Court of Ohio on September 30, 1919, as yet unreported, as follows:

"'The functions conferred in different parts of the Federal Constitution upon the legislatures of the States are manifestly dual in their nature. For example, in the election of United States Senators by the legislatures of the several States, as provided by the Federal Constitution, until the recent amendment, the legislature acted as an electing power. It was not understood to be legislative and in States in which the governor had the veto power over legislation that power did not apply in the matter of electing Senators. The legislature represented the State in a manner similar to that in which the Electoral College represents it in the choice of President. On the other hand, the power conferred upon the legislatures in section 4 of Article I of the Federal Constitution, which confers power on the legislature of each State to prescribe the 'times, places, and manner of holding elections for Senators and Representatives,' is purely legislative, and, as already pointed out, in the exercise of that power all the legislative machinery of the State was called into action in the performance of that State legislative duty.

"It is true, as argued by counsel for plaintiff in error, that under Article V the State participates in an act which amends the Federal Constitution and in that sense performs a Federal function. But it does not follow that by the word 'legislature' in that section a *corpus designatus* is meant. It participates in the making of the fundamental law and its act is legislative in character. The making of the Constitution is the highest function of legislation. That being so, it follows that in the exercise of this legislative function of ratification, the makers of the Federal Constitution contemplated that all of the agencies provided by the State for legislation should be empowered to

act in accordance with the provisions made by the State at the time the action on the ratification should be taken; and that the word 'legislature' in Article V is used in that sense. (The suggestion of the Ohio Supreme Court that the word 'legislature' in Article V of the Constitution may not have the same meaning as the same word in a different context in other portions of the Constitution, is clearly correct. (See, e. g., Texas *v.* White, 7 Wall. 700, 721.) This consideration makes pointless the fact that the 'legislature' referred to in other parts of the Constitution connotes merely the legislative assembly of the State.)

"It has been suggested that this decision is distinguishable because the Ohio constitution expressly provides for referring proposed amendments to the Federal Constitution to the electorate. But no such distinction exists. If the 'legislature' which may ratify a proposed amendment is the legislative assembly alone, if only that body is intended by the word 'legislature' as used in Article V of the Constitution of the United States, then manifestly no action by the State or the Congress can change the force and effect of the Constitution of the United States. It is only because the word 'legislature' in Article V signifies, not solely the legislative assembly of a State, but the repository of legislative power therein, that the provision in the Ohio constitution can have any force and effect whatever.

"The impropriety of permitting the legislative assembly of a State, in which the initiative or referendum prevails, to act upon a proposed amendment to the Federal Constitution to the exclusion of the electorate of the State, is emphasized in the case of such a State as Missouri. By section 3 of Article II of its constitution it is expressly provided as follows:

"'As the preservation of the States and the maintenance of their governments are necessary to an indestructible Union, and were intended to coexist with it, *the legislature is not authorized to adopt, nor will the people of this State ever assent to any amendment or change of the Constitution of the United States which may in anywise impair the right of local self-government belonging to the people of this State.*'

"A clearer prohibition against ratification by the legislative assembly of any such amendment as the eighteenth amendment to the Federal Constitution, it would be difficult to express. Nevertheless, the legislature of Missouri saw fit to give its assent thereto, although it could, of course, not have been unaware of the fact that the 'change of the Constitution of the United States,' which the proposed amendment intended, would clearly 'impair the right of local self-government belonging to the people of the State.' See State ex rel. Mullen *v.* Howell, 181 Pac., 920, 922 (Wash.), quoted in Appendix (I), where the nature of the amendment is discussed.

"In another State, where, however, the referendum and initiative do not obtain, the plain will of the people, as expressed in the fundamental law, was likewise flouted by the legislative assembly. Section 19 of article 16 of the Florida constitution provides that—

"'No convention or legislature of this State shall act upon any amendment of the Constitution of the United States proposed by Congress to the several States, unless such convention or legislature shall have been elected after such amendment is submitted.' (Tennessee has a similar constitutional provision. It appears to have been complied with there.)

"But the Florida Legislature, although only in part elected after the so-called eighteenth amendment was proposed by Congress in December, 1917 (see Florida constitution, art. 3, secs. 2 and 3, and art. 7, sec. 2), nevertheless undertook to ratify the amendment on December 14, 1918, in clear violation and defiance of the constitution of the State.

"It follows from these premises that in 22 States of the Union (exclusive of the three which have not ratified the amendment) there has been only an apparent, but not in fact a valid, ratification of the so-called eighteenth amendment, and that, consequently, it can not yet be deemed to be a part of the Constitution of the United States and enforceable as such by the Congress and the several States.

"V.

"THE FOREGOING CONTENTIONS PRESENT JUSTICIABLE QUESTIONS.

"A.

"In final analysis, the decisive inquiries considered in this brief are whether or not the so-called eighteenth amendment is authorized by the Constitution, and whether or not it has been ratified in accordance with the express requirements of the Constitution. The court is called upon to determine whether there are not two implied limitations upon the right to amend the Constitution, namely, (1) that no amendment shall in its primary and essential nature constitute mere legislation as distinguished from a constitutional provision, and (2) that no amendment shall directly and substantially tend toward the destruction of the right of the several States to local self-government. The court is further called upon to determine whether the amendment has been duly ratified by the requisite number of 'legislatures' of the several States, in view of the fact that it was not submitted to the electorate in the States where the electorate has the initiative, or referendum, or both, in respect of State legislation. In other words, the questions raised call upon the court to construe and enforce *implied and express limitations* of the Constitution upon the power to amend under Article V. This is plainly a judicial function.

"It is argued that the inquiry concerning the invalidity of the so-called eighteenth amendment presents not a judicial, but solely a political question. A consideration of the nature of the plaintiff's contentions, however, should at once disclose that this objection is untenable. The plaintiff's claim is that the so-called amendment and the act of Congress enacted thereunder destroy its valuable business and property, and that they do so without constitutional authority or due process of law, inasmuch as the so-called amendment was adopted in violation of the limitations implied and inherent in Article V of the Constitution. Of course, what is implied in the Constitution is as effectually a part of it as what is expressed therein (Ex parte Yarbrough, 110 U. S., 651, 658); and if the limitations above contended for do in truth inhere in the Constitution and thus qualify and limit Article V, they must be accorded the same force and effect as if they were in express terms contained in that article. The court is, therefore, in the case at bar only called upon to construe Article V of the Constitution and to determine whether the plaintiff's rights have been unconstitutionally invaded. That is an ordinary judicial controversy involving a justiciable question over which the courts clearly have jurisdiction. (United States *v.* Lee, 106 U. S., 196, 208–9; Philadelphia Co. *v.* Stimson, 223 U. S., 605, 619; Koehler & Lange *v.* Hill, 60 Iowa, 543, 623–4; Hammond *v.* Clark, 136 Ga., 313; 12 Corpus Juris, p. 880 and cases cited.)

"It is, of course, plainly the duty of the courts 'to say what the law is.' Marbury *v.* Madison, 1 Cranch, 137, 176; The Federalist, No. 78 (Ford's ed.), p. 521. For that reason it is necessarily their duty to determine the constitutionality of a statute; and, for the same reason, it must be their duty to decide what is in law and in fact a part of the Constitution. Ellingham *v.* Dye, 19 N. E., 1, 21 (Ind.). How else can they know, declare, and enforce only what is the law and nothing else? In Cohens *v.* Virginia, 6 Wheat., 264, 384, Chief Justice Marshall declared that—

"'The judicial power of every well constituted government must be coextensive with the legislative and must be capable of deciding every judicial question which grows out of the Constitution and laws. If any proposition may be considered as a political axiom, this, we think, may be so considered.'

"And in Hollingsworth *v.* Virginia, 3 Dall., 378, 381, 382, this court actually considered and determined whether the eleventh amendment to the Constitution had been validly adopted.

"The argument in opposition to the so-called eighteenth amendment that it tends toward the destruction of the right of the several States to local self-government and distinctive existence does not change the otherwise justiciable nature of the controversy. The authorities sustaining the principle announced and enforced in The Collector *v.* Day (11 Wall., 113) conclusively dispose of this suggestion. That leading case held that a Federal taxing act was invalid because it purported to tax a governmental instrumentality of a State, and the ground of the decision was, not that there was any express constitutional provision to that effect, but solely the 'necessary implication' derived from the Constitution and 'upheld by the great law of self-preservation' (at pp. 125, 127). If the case at bar presents only a political controversy, then The Collector *v.* Day and the well-considered authorities following it were wrongly decided, because in them substantially the same contention as is here put forward was not only entertained as a justiciable question but approved and enforced.

"The case of Georgia *v.* Stanton (6 Wall., 50) does not in any wise conflict with the foregoing contention. It would, indeed, be curious if it did, since the opinion of the court in that case and in the later case of The Collector *v.* Day were both delivered by Mr. Justice Nelson. In Georgia *v.* Stanton the State sued to enjoin the carrying out by the defendants of the so-called 'reconstruction acts,' which Congress had passed after the Civil War in order to establish a republican form of government in the rebel States. The duty to secure to the States a republican form of government and the right to decide what

kind of State government is republican in form are exclusively vested in the political departments of the Federal Government. (Luther *v.* Borden, 7 How., 1; Pacific Telephone Co. *v.* Oregon, 223 U. S., 118; Mountain Timber Co. *v.* Washington, 243 U. S., 219, 234.) The validity of the reconstruction acts was consequently not open to question in the courts; and the defendants in Georgia *v.* Stanton were acting under laws which the legislative department of the Government had a right to pass and the courts no right to review; and the suit was, therefore, one not maintainable, not only as involving a political question but as in effect a suit against the United States itself. (Oregon *v.* Hitchcock, 202 U. S., 60, 68–69.) The present suit is against officers specially charged with the enforcement of an act of Congress which is alleged to be unconstitutional, and which the courts have the right and the power to declare to be unconstitutional. (Philadelphia Co. *v.* Stimson, 223 U. S., 605, 619.)

Nor is there anything novel in the nature of the questions discussed in the preceding points of this brief, for questions quite similar in character have been repeatedly before the courts and have been adjudicated as ordinary justiciable questions. Thus, for example, in Eason *v.* State (11 Ark., 481, 491) and State *v.* Keith (63 N. C., 140, 144) constitutional amendments purporting to nullify essential parts of the bill of rights were held invalid and unauthorized because of the necessary implications deemed by the court to arise out of the constitutions there under consideration operating to forbid amendments of such a nature; and in Knight *v.* Shelton (134 Fed., 423, 426) and Koehler & Lange *v.* Hill (60 Iowa, 543, 603) constitutional amendments were likewise held void by the courts for failure to comply with *express conditions* prescribed in constitutions for their amendment. As stated by a learned court after an exhaustive review of the point (McConaughy *v.* Secretary of State, 106 Minn., 392, 409):

"'The authorities are practically uniform in holding that whether a constitutional amendment has been properly adopted according to the requirements of an existing constitution is a judicial question.'

"The opposite view, as Chief Justice Day pointed out in Koehler & Lange *v.* Hill, supra, in effect amounts to a declaration—

"'That the provisions of the Constitution for its own amendment are simply directory and may be disregarded, with impunity; for it is idle to say that these requirements of the Constitution must be observed, if the departments charged with their observance are the sole judges as to whether or not they have been complied with.'

"See also the reasoning in Bott *v.* Secretary of State, 63 N. J. L., 289, and Oakland Paving Co. *v.* Hilton, 69 Calif., 479.

"It would certainly be vain for a constitution to declare or imply limitations upon the power to amend it, if those limitations could be transgressed at will by the very persons who were intended by the people to be restrained and confined within fixed or prescribed limits. Any such doctrine would empower agents of the Government or of the people to exceed their authority at pleasure. As the authorities cited disclose, the weight of judicial opinion has regarded the question whether an amendment to a State constitution has been duly adopted as involving an ordinary judicial inquiry. It would seem, therefore, necessarily to follow that the same conclusion is a fortiori correct in respect of an amendment to the Federal Constitution. Amendments to the Federal Constitution have so far been solely the work of delegated agents, namely, the Houses of Congress and the legislatures of the States; the people as such have not been consulted. It ought, consequently, to be a justiciable question whether these agents have or have not transcended their limited authority. Where State constitutions are amended the proposed amendment is in every instance submitted to the people to pass upon. In such cases it might be proper to view the limitations upon the power to amend State constitutions merely as directory and to regard the vote of the people as corrective and conclusive; but, nevertheless, as we have seen above, even amendments to State constitutions, directly voted upon by the people of the States, have been held null and void when they conflicted with any of the express or implied constitutional limitations upon the amending power.

"It should further be borne in mind that the question is not whether a *constitution* is valid. A court organized and holding office under a constitution is not to be considered authorized to decide whether that constitution exists. It owes its very existence and whatever authority it has to that constitution; it is sworn to uphold that very instrument; the case which would raise any question of the validity of the constitution could only come before it under the self-same constitution, and, therefore, both the court and the parties should not be heard to repudiate the existence of that constitution. A decree of a court that a constitution was illegal *in toto* might operate to leave no lawfully constituted authority in power and remit the people to a state of anarchy. None of these considerations, which might render wholly political and nonjusticiable the question whether the government and its constitution are lawful, is in any wise operative in the case at bar. The plaintiff is but seeking to uphold and enforce the Constitution of the United States and its limitations and provisions. There is, therefore, no vestige of similarity between such a case as this and those controversies illustrated by authorities like Luther *v.* Borden (7 How., 1), which involves questions essentially political and nonjusticiable in their character.

"An effort was made by counsel in the court below to distinguish the cases which had held void constitutional amendments not adopted in accordance with the procedure prescribed in a State constitution from a case in which it was objected that the attempted amendment was of such a nature as not to be a legitimate or authorized subject of a constitutional amendment. The former was conceded to present a justiciable controversy; the latter, it was contended, did not. The distinction, however, is quite untenable. It exalts requirements of a constitution having to do with matters of mere form over requirements in the same instrument governing the most serious matters of substance. If one essential limitation of a constitution may be regarded as more binding than another, it is manifest that one relating to substance should take precedence over one relating merely to procedure. But the argument in question attempts to reverse this obvious relation, and affords judicial protection to matters of form, while denying any right to the courts to protect even the most momentous requirements of substance. As might be expected, such a contention is without support in authority; and, indeed, as stated above, was ruled to the direct contrary in Eason *v.* State (11 Ark., 481, 491). See, also, Ellingham *v.* Dye (19 N. E., 1, 21), where it was said that—

"'The power to determine and declare the law covers the whole body of the law, fundamental and ordinary; the latter being those laws which apply to particulars and are tentative, occasional, and in the nature of temporary expedients. *Whether legislative action is void for want of power in that body*, or because the constitutional forms or conditions have not been followed or have been violated, may become a judicial question, and upon the courts the inevasible duty to determine it falls. And so the power resides in the courts, and they have, with practical uniformity, exercised the authority to determine the validity of proposal, submission, or ratification of changes in the organic law. Such is the rule in this State.'

"B.

"Equally untenable is the contention that the proclamation of the Acting Secretary of State of the United States, announcing the due ratification of the amendment, has rendered nonjusticiable in the courts the question of the validity and due adoption of the alleged eighteenth amendment.

"The foremost fact to bear in mind in connection with this contention is that the Constitution of the United States does not provide for any finding, determination, or even notice of an amendment by the Secretary of State or any other officer. Article V merely declares that an amendment which has been duly proposed '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.' By the express declaration of the Constitution, therefore, only an amendment which has actually become such in truth and in law is provided for, and not an amendment which some ministerial or legislative officer believes or declares to have validly become a part of the Constitution. Thus, an amendment which had been duly ratified by the legislatures of three-fourths of the States would automatically become part of the Constitution despite the fact that a Secretary of State might refuse to announce it because he erroneously believed the ratifications to be defective for some reason. No court would hesitate to disregard his error of law or fact under the circumstances supposed. Likewise, the action of a Secretary of State in proclaiming that an amendment was in effect, when it had not yet been ratified by the requisite number of States, or when it had not yet been ratified by all the houses of the legislature in the requisite number of States, would have to be regarded as a nullity. Any other result would mean that amendments could be made to the Constitution only if they won the approval of the Secretary of State. Such an interpretation of the fundamental law is plainly erroneous. To refuse an injured party the right to call the action of the Secretary of State into question in the courts would be, to all practical intents and purposes, refusing to uphold the Constitu-

tion and permitting it to be nullified at will by a mere ministerial officer.

"This very amendment and what has been done under it disclose the soundness of this view. The officers of the Federal Government have assumed or declared that the eighteenth amendment became law on January 16, 1919, when the requisite number of States are supposed to have ratified it, and thus became enforceable on January 16, 1920, according to its terms. But, as the court will perceive on reading the proclamation of the Acting Secretary of State, the only date mentioned therein is January 29, 1919. The Secretary does not so much as refer to January 16, 1919, and if his declaration or finding were necessary or could be effective for any purpose, it is plain that this amendment could not be properly regarded as law by anyone prior to January 29, 1919. The reason, however, why no one can logically argue for such an outcome is obvious. It is merely because the Constitution itself in Article V has in mandatory terms provided that an amendment 'shall be valid to all intents and purposes as part of this Constitution,' not when so found or declared by the Secretary of State or anyone else, but solely 'when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress.'

"The Constitution having provided the circumstances under which an amendment shall become effective, of course Congress may not add to or detract from them. Otherwise, Congress would have power to override or nullify the Constitution. It follows that even if there were a statute remitting to the Secretary of State the right conclusively to determine whether a proposed amendment was in force and effect, it would be a mere nullity. But there is in fact no such statute. Section 205 of the Revised Statutes does not even purport to vest any such authority. It merely provides that—

"'Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.'

"Accordingly, the Secretary of State may give notice only when an amendment in fact 'has been adopted according to the provisions of the Constitution,' and not otherwise; and even then may only certify, not that he now finds or declares the amendment to be valid, but only that because theretofore duly adopted, 'the same has become valid,' etc. The Secretary of State, in acting under section 205 of the Revised Statutes, is performing a ministerial and not a judicial function, and if he errs, it must be manifest that his errors, whether of fact or law, are binding on no one and may be corrected by the courts.

"There is an unbroken current of authority which supports these views. (Hawke *v.* Smith, Court of Common Pleas, Franklin County, Dillon, J., June 19, 1919, affirmed by the Ohio Supreme Court, September 30, 1919; McConaughy *v.* Secretary of State, 106 Minn., 392, 408–414; Knight *v.* Shelton, 134 Fed., 423, 438–440; Bott *v.* Secretary of State, 63 N. J. L., 289.) In Hawke *v.* Smith, supra, the court dealt with the precise question herein involved, and held that the proclamation of the Acting Secretary of State 'of course, has no legal force or effect' upon the case. The same view has recently been expressed by District Judge Rudkin in the matter of Dillon, U. S. D. C., N. D., Calif., January 27, 1920, who said:

"'The promulgation of a constitutional amendment under section 205 is no more essential to its validity than is the promulgation of an act of Congress under the preceding section, and the former is no more the beginning of the amendment than the latter is the beginning of the law. For, notwithstanding the requirement for promulgation, it is universally recognized that an act of Congress takes effect and is in force from the date of its passage and approval, and a constitutional amendment is likewise in full force and effect from and after its ratification by the requisite number of States.'

"In the well-considered case of McConaughy *v.* Secretary of State, supra, the court, after an extensive review of the authorities, said:

"'The recent case of Rice *v.* Palmer, 78 Ark., 432, 440, presented the identical question which we have under consideration. In reference to the contention that the Constitution intended to delegate to the Speaker of the House of Representatives the power to determine whether an amendment had been adopted, and that the question was political, and not judicial, the court observed: "This argument has often been made in similar cases to the courts, and it is found in many dissenting opinions, but, with possibly a few exceptions, it is not found in the prevailing opinion."' * * *

"'There can be little doubt that the consensus of judicial opinion is to the effect that it is the absolute duty of the judiciary to determine whether the Constitution has been amended in the manner required by the Constitution, unless a special tribunal has been created to determine the question; and even then many of the courts hold that the tribunal can not be permitted to illegally amend the organic law. There is some authority for the view that *when the Constitution itself* creates a special tribunal, and confides to it the exclusive power to canvass votes and declare the results, and makes the amendment a part of the Constitution as a result of such declaration by proclamation or otherwise, the action of such tribunal is final and conclusive. It may be conceded that this is true when it clearly appears that such was the intention of the people when they adopted the Constitution. The right to provide a special tribunal is not open to question; but it is very certain that the people of Minnesota have not done so.'

"It must, therefore, be manifest that the Constitution of the United States does not make the Secretary of State or any other nonjudicial body a special tribunal to determine whether the Constitution has or has not been amended; and it is equally plain that section 205 of the Revised Statutes does not purport to do so. But even if it did, it would be of no effect; the Constitution can not be validly amended except in compliance with its own provisions, both those expressed and those implied. It is the duty of the courts to say what the Constitution means and requires, and it is elementary that Congress can not derogate from the judicial power and vest judicial duties in nonjudicial officers. If, consequently, Congress had attempted in section 205 to make the Secretary of State the sole judge of the question whether the Constitution had or had not been properly amended, its action would be void. So the court declared in Knight *v.* Shelton, 134 Fed., 423, 439, where the following language was used:

"'In neither of these acts did the legislature attempt to make the decision of the canvassing board conclusive, and for this reason it is unnecessary to determine whether it possessed such power, which, in view of the fact that the constitution established three departments—the legislative, executive, and judicial—and vested all judicial powers in the judicial department, except jurisdiction to determine contests for certain State officers hereinbefore mentioned, is at least doubtful. To hold, in the absence of any express provision in the constitution depriving the judicial department of the State of any of the functions which naturally belong to that department, that the legislature could take away that power would be violative of the spirit which pervades not only the constitution of this State, but that of every other State of this Union. It would, in effect, make that department an inferior, and not a coordinate, branch of the Government. The independence of the courts in unhesitatingly declaring acts in conflict with the constitution void, and thus reviewing the acts of the legislative department of the State, has done more to preserve the blessings of liberty which we now enjoy than any other act of any department of the Government.'

"It is vain to urge that because State ministerial officers have transmitted the alleged ratifications of the eighteenth amendment by their respective States, the validity and legal effect of the action of the States may not be inquired into. What is the 'legislature' of a State under Article V of the Constitution, or a proper amendment thereunder, are Federal questions, the decision of which this court, of course, can not abdicate because a ministerial State officer has attempted to decide them. Moreover, there is no statutory authority conferred upon such an officer by the States or the United States conclusively to pass upon the matter. The considerations above urged in respect of the Secretary of State apply with even greater force to the State functionaries transmitting alleged ratifications.

CONCLUSION.

"It is submitted that the destruction of the liquor traffic, even if desirable in some aspects, at the expense of ultimately subverting our Federal system and local self-government and turning our Constitution into a mere code of statutory enactments, of erecting a constitutional precedent which will afford legal justification for spoliation and the destruction of republican government, and of leaving every natural right, whether of life, liberty, or property, wholly at the mercy of future constitutional amendment, may be too high a price to pay for even the greatest reform, and such a misfortune should not be visited upon the people of the United States because a comparatively small minority of them are incapable of self-restraint in the use of liquor. It may be the duty of government to protect the

comparatively few weak and degenerate among the people, but it can not be its duty to remedy even an admitted evil if such remedy necessarily involves laying the foundation for the possible ultimate overthrow of our Federal system of government.

"It is, therefore, submitted that the alleged eighteenth amendment should be declared to be void, and that the decree of the court below should be reversed and the plaintiff's motion for an injunction *pendente lite* granted.

"ELIHU ROOT,
"WILLIAM D. GUTHRIE,
"ROBERT CRAIN,
"BERNARD HERSHKOPF,
"*Of Counsel for Appellant.*

"WASHINGTON, D. C., *March 29, 1920.*"

"IN THE SUPREME COURT OF THE UNITED STATES.

"*October Term, 1919.*

"[Christian Feigenspan, a corporation, appellant, *v.* Joseph L. Bodine, United States attorney for the district of New Jersey, and Charles V. Duffy, collector of internal revenue, of the fifth district of New Jersey, appellees. No. 788. On appeal from the District Court of the United States for the District of New Jersey.]

"BRIEF FOR THE APPELLEES.

"This is an appeal from a decree of the district court dismissing a bill filed by the appellant to enjoin a United States district attorney and a deputy collector of internal revenue from enforcing against it the provisions of the act of Congress of October 28, 1919 (41 Stat., c. 83, p. 305), known as the Volstead Act, and intended to enforce the eighteenth amendment to the Constitution.

"STATEMENT OF THE CASE.

"The appellant, a New Jersey corporation, for many years has been engaged in the manufacture and sale of beer. It alleges that it has on hand a large quantity of beer, containing not to exceed 2.75 per cent of alcohol, which was lawfully manufactured prior to the passage of the Volstead Act. This beer is alleged to be, in fact, nonintoxicating, and the right is asserted to continue to manufacture it. Indeed, the right is asserted to manufacture and sell intoxicating beer after the war prohibition act shall cease to be in effect, plaintiff contending that the eighteenth amendment is invalid, and that, when the war prohibition act ceases to be in effect Congress will be without authority to prohibit the sale or manufacture of intoxicating beverages within the State of New Jersey. If mistaken in this contention, appellant insists that the Volstead Act, in so far as it prohibits the sale of beer which is not, in fact, intoxicating, and in so far as it destroys the value of lawfully preexisting property, is unconstitutional.

"CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

"The provision of the Constitution relating to amendments is Article V, which is as follows:

"'The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, 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, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: *Provided*, That no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the ninth section of the first article, and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.'

"Section 205 of the Revised Statutes, taken from the act of April 20, 1818, is as follows:

"'Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid to all intents and purposes as a part of the Constitution of the United States.'

"In December, 1917, by a vote of two-thirds of each House, Congress passed a resolution proposing an amendment to the Constitution of the United States as follows (40 Stat., 1050):

"'*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled* (*two-thirds of each House concurring therein*), That the following amendment to the Constitution be, and hereby is, proposed to the States, to become valid as a part of the Constitution when ratified by the legislatures of the several States as provided by the Constitution:

"ARTICLE —.

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

"'SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"'SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.'

"On January 29, 1919, the legislatures of 36 of the States having ratified the amendment thus proposed, the Secretary of State issued his proclamation declaring the same a part of the Constitution. Subsequently, the legislatures of nine other States ratified, leaving only the States of Rhode Island, Connecticut, and New Jersey not ratifying. On October 28, 1919, Congress passed the Volstead Act. Title I of that act was intended to secure a more efficient enforcement of the act known as the war prohibition act, and to this end provided, among other things, that thereafter the term 'intoxicating liquor,' as used in that act, should be deemed to include all beverages of the classes mentioned containing as much as one-half of 1 per cent of alcohol. Title II was to take effect upon the going into effect of the eighteenth amendment, and prohibited the sale, manufacture, and importation of intoxicating liquors for beverage purposes and prescribed penalties to be imposed upon offenders. Section 1 of Title II contains this provision:

"'The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per cent, or more, of alcohol by volume, which are fit for use for beverage purposes: *Provided*, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter, or wine is produced, if it contains less than one-half of 1 per cent of alcohol by volume, and is made as prescribed in section 37 of this title, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe.'

"THE CONTENTIONS OF APPELLANT.

"The bill assails the eighteenth amendment itself, the Volstead Act as a whole, and the section of that act defining intoxicating liquor. The specific contentions are as follows:

"1. The eighteenth amendment is not within the amending power, because it is mere legislation and not a proper amendment of the Constitution.

"2. Article V of the Constitution of the United States does not authorize an amendment which directly, or in principle, tends to impair and destroy the reserved police or governmental powers of the several States and their right to local self-government.

"3. It does not appear that two-thirds of both Houses of Congress deemed the eighteenth amendment necessary.

"4. The eighteenth amendment has not become a part of the Constitution because it has not been ratified by 36 of the States, since in some of the States the ratification of an amendment to the Constitution by the legislature is subject to the referendum features of the State constitution.

"5. The Volstead Act, if otherwise constitutional, is not in effect in New Jersey, because it has not been concurred in by the legislature of that State.

"6. Assuming the eighteenth amendment to be valid, and that Congress has the power without the concurrence of the several States to enact legislation for its enforcement, the definition of intoxicating liquor contained in the Volstead Act is not appropriate enforcement legislation and is unconstitutional.

"7. The Volstead Act, as applied to lawfully acquired preexisting property, is unconstitutional.

"THE CONTENTIONS OF THE GOVERNMENT.

"The Government challenges all of the above contentions and insists:

"1. The first four contentions present questions which are committed by the Constitution to the political branch of the Government for determination and are not justiciable questions.

"2. The eighteenth amendment establishes a fundamental rule of law and confers the power to legislate to enforce it, and

is clearly an amendment within the meaning of Article V of the Constitution.

"3. Article V of the Constitution provides the means by which powers which had previously been reserved to the States or the people thereof may be conferred upon the Federal Government, and confides to the proposing and ratifying bodies named therein the power to determine the nature and wisdom of and the method for adopting any amendment to the Constitution except as in said article otherwise provided.

"4. The passage, by the votes of two-thirds of both Houses, of a resolution proposing an amendment, and reciting that two-thirds of each House concur therein, establishes the fact that two-thirds of both Houses deem such proposal necessary within the meaning of Article V.

"5. The eighteenth amendment has been ratified by the legislatures of three-fourths of the States. In ratifying an amendment to the Federal Constitution the legislature of a State performs a function and exercises a power expressly conferred upon it by the people of the United States through the Constitution of the United States, and this power can not be abrogated, altered, restricted, or conditioned by any provisions of a State law or a State constitution.

"6. The second section of the eighteenth amendment confers upon Congress the power to legislate for the enforcement of section 1. The passage of an appropriate enforcement act by Congress makes the act a law, and no concurrence of the legislature of the State is necessary to render it effective throughout the entire United States.

"7. In order to effectively enforce the prohibition against intoxicating liquors Congress had ample power to adopt the definition contained in the Volstead Act as a means appropriate to such enforcement.

"8. The Volstead Act is an exercise of the police power, and whatever hardships may result from the destruction or impairment of the value of property or of beer heretofore lawfully manufactured, it can not be said that there has been such a taking of property or beer as requires compensation, or that the resulting impairment of values is unconstitutional.

"BRIEF.

"In other cases recently heard and still undecided, all the questions involved in this case have been submitted to the court for determination. Some of those cases have presented one question, and some others. The present case, however, has combined in one bill nearly all the questions which have been urged in the other cases. In each case heretofore heard the Government has contented itself with replying to the particular questions raised in that case. While this brief contains a repetition of arguments previously presented, it is thought that it may be helpful to collect in one brief the arguments in support of the Government's contentions on all of these questions and obviate the necessity of referring to separate briefs for some of them.

"I.—Nature and effect of the eighteenth amendment.

"Before taking up appellant's contentions specifically it may be well to examine for a moment in some detail the eighteenth amendment and consider just what it is and what its presence as a part of the Constitution will mean. Unquestionably, speaking in general terms, section 1 establishes a fundamental rule of governmental policy, and section 2 confers power to enforce this rule. It deals generally with the nation-wide subject of intoxicating liquors.

"Prior to the adoption of this amendment the several States had plenary power to deal with the subject of intoxicating liquors within their borders, except in such manner as the same interfered with powers which could be lawfully exercised by Congress. Congress had no power, except as an incident to its war powers, or some other express power, to prohibit either the manufacture, sale, or transportation of intoxicating liquors. Under its taxing power, and for the purpose of insuring the collection of taxes, it did have the right to regulate and impose conditions upon both such manufacture and sale. Under its power to regulate foreign commerce, it probably had the power to prohibit the importation or exportation of intoxicating liquor. Under its power to regulate interstate commerce, it could prohibit the transportation of intoxicating liquors therein. It had exercised this power in aid of the prohibition laws of the several States. By the Webb-Kenyon Act (37 Stat., c. 90, p. 699) it divested intoxicating liquors of their interstate character when intended to be received, possessed, sold, or in any manner used in violation of the law of any State into which they were shipped.

"In holding that act constitutional this court said that 'in view of the nature and character of intoxicants' Congress had the power to forbid their movement in interstate commerce, but that instead of so doing it had simply established a regulation making it impossible for one State to violate the prohibition laws of another through the channels of interstate commerce. The result was that after the passage of the Webb-Kenyon law a State could prohibit the transportation into it of intoxicating liquors from another State when they were to be used in violation of its own laws. (Clark Distilling Co. *v.* Western Maryland Ry. Co., 242 U. S., 311.) In other words, Congress had the power, if it saw fit, to absolutely prohibit the transportation into a State of intoxicating liquors. At the same time the State had the right to prohibit such transportation when the receipt or use of such liquors would be contrary to its own laws. Later, Congress, by the Reed amendment (39 Stat., c. 162, pp. 1058, 1069), imposed its own prohibition by making it unlawful to transport in interstate commerce intoxicating liquors into any State whose laws forbade the manufacture or sale of such liquors for beverage purposes. Thereafter a shipment of liquor into such a State would be a violation both of the Federal law and the State law. Congress, of course, had plenary power to prohibit or regulate the liquor traffic in the District of Columbia and the Territories.

"This was the state of the law when the eighteenth amendment was proposed. The first section simply provides that the manufacture, sale, transportation, importation, or exportation of intoxicating liquor for beverage purposes is prohibited throughout the United States. Standing alone, this merely establishes a fundamental rule of law to which all legislation, either by Congress or the legislatures of the States, shall be subject. It leaves the liquor traffic within a State subject to the police power of that State, but imposes upon the exercise of that power, in regulating the traffic, the condition that manufacture, sale, or transportation for beverage purposes shall not be made lawful. For the suppression of the traffic, the police powers of the States are left untouched.

"The fundamental rule of law thus established imposes a limitation upon the power of Congress to regulate interstate and foreign commerce. This power remains the same that it was before, with the exception that in regulating such commerce Congress has been forbidden to permit the transportation of intoxicating liquors for beverage purposes. The amendment says to Congress: 'You may regulate interstate commerce and foreign commerce as you see fit, except that you must recognize that intoxicating liquors intended for beverage purposes are no longer legitimate articles of interstate or foreign commerce.' In other words, by the Webb-Kenyon Act Congress had divested them of their interstate character in certain cases. The Constitution now makes this divestiture permanent and complete when they are intended for beverage purposes. The Reed amendment had prohibited the transportation of intoxicating liquors into prohibition States. The constitutional prohibition made all the States prohibition States and extended the principle of the Reed amendment to all interstate and foreign commerce.

"Section 1 of the eighteenth amendment may also be said to be a limitation upon the incidental powers which Congress exercises in enforcing its power of taxation. Heretofore it has had the power to tax both the manufacture and sale of intoxicating liquors. In order to secure the payment of taxes levied, it has had the incidental power to regulate and oversee both the manufacture and sale of such liquors. It has, in fact, permitted their manufacture only under governmental supervision. Regardless of the use for which they were intended, it still has the power to tax such liquors if they shall be manufactured; but section 1 of the eighteenth amendment forbids the Government to permit or supervise their manufacture if intended for beverage purposes.

"Section 1 thus confers no power. It effects, rather, a limitation upon powers which had previously been exercised both by Congress and the legislatures of the several States.

"Section 2, however, was intended to make the prohibition effective by legislation to give it activity and by securing the punishment of those who violate it. For this reason it was deemed necessary to confer addditional power upon Congress; but evidently it was not thought proper to curtail the continued exercise by the States of the power they already had to suppress the liquor traffic. A second section was therefore added, to the effect that 'the Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.'

"On the argument of one of the cases recently heard it was stated generally by counsel for the Government that this section could hardly be said to confer power upon the States to legislate for the suppression of the liquor traffic, since they already had plenary power on that subject; that is, it did not confer on the

States any power which they did not previously possess. But making prohibition a national policy and mandate might well have made the enforcement of the amendment solely a matter of Federal power. This section 2, therefore, does confer on the several States the power to enforce this mandate of the Federal law within their borders by such appropriate means as they see fit, while leaving the power of Congress to legislate to carry out its views by Federal statutes throughout the entire United States.

"The effect of section 2, therefore, was to confer upon Congress the same scope of power throughout the Union and territory subject to the United States that the States already had as to their respective areas and to declare that the powers of the two governments should be concurrent and the exercise by one should not interfere with the other.

"It would seem to be a fair summary of the eighteenth amendment as a whole to say that Congress and the several States shall concurrently have the power to deal with the subject of intoxicating beverages, but that the powers of both shall be subject to the limitation that the manufacture, sale, transportation, importation, or exportation of intoxicating liquors *for beverage purposes* shall be unlawful. Taking this fundamental rule as a starting point, each may legislate for the suppression of the traffic in such way as it deems necessary.

"II. Questions committed by the Constitution to the political branch of the Government for determination.

"It is said that the nature of this amendment is such that it is not within the amending power created by Article V of the Constitution. The contention is, first, that it is not in fact an amendment at all, but is merely legislation under the guise of an amendment. In the second place, it is asserted that the rights previously reserved to the States can not be taken away from them in the method provided by Article V for adopting amendments. It is also claimed that the ratification by the legislature is not final in those States whose constitutions provide for a referendum.

"It may be conceded that if there is anything in the Constitution which defines an amendment in such a way as to exclude one of the nature of that now in question or if it can be said that the Constitution of the United States reserves to the people of a State the right to control the legislature in the ratification of an amendment, the court could properly declare the eighteenth amendment invalid for a noncompliance with such restriction. But if the Constitution has not defined an amendment or has left it to the political branch of the Government to determine what amendments are necessary or proper, and if, under a true interpretation of the Constitution, the power to determine when an amendment has been ratified by the requisite number of legislatures, as provided in Article V, belongs to the political branch of the Government, then neither of these questions is justiciable, but both are political.

"The Constitution nowhere refers to the subject of amendments except in Article V. That article does not attempt a definition of the word 'amendment.' It places no limitation upon the character of amendments which may be made, except with respect to the equal suffrage of the States in the Senate and one temporary restriction, to be in effect only until 1808. With these exceptions it is expressly provided that any amendment may be proposed which two-thirds of the Members of both Houses of Congress deem it necessary to propose. In so many words, then, the constitutional test of whether a change shall be made in the Constitution, whether something shall be stricken from it or something added thereto, is whether two-thirds of the Members of both Houses of Congress deem it necessary to propose such amendment. When, in obedience to the Constitution, therefore, Congress has determined that a particular rule of law or of government is the proper subject matter of an amendment, and deems it necessary to propose such an amendment, by what authority can the courts review and reverse the deliberate judgment of Congress? The only limitation upon the power of Congress is that two-thirds of the Members of both Houses shall deem the proposed action necessary. The reviewing authority is the legislatures or conventions of the States. The required concurrence of three-fourths is the check on an improper proposal of the Congress.

"The question upon which the proposal of a particular amendment must depend is clearly, then, purely a question of policy. Authorities need not be cited to show the unbroken rule established by this court that the judgment of Congress on mere matters of policy committed to it is not open to review by the courts. The contrary contention in this case rests alone upon the fallacy that whenever there is a controversy arising out of any provision of the Constitution of the United States its final determination is committed to the judiciary. There is, however, nothing in the Constitution which gives color to so broad a contention. The only express grant of power to the courts is contained in the provision of Article III, that—

"'The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.'

"Section 2 of the same article confines this judicial power to 'cases in law and equity.' The courts are authorized, therefore, only to decide such questions, whether growing out of the Constitution or not, as may properly arise in an actual case, either in law or equity. There is no intimation of an intention to make the judicial power any broader or more extensive than it had theretofore been understood to be. On the contrary, every express provision of the Constitution relating to this power is in the nature of a restriction rather than an enlargement—such as the provision for trial by jury and that criminal trials shall be held in the State where the crime has been committed and the rights secured to the accused by the fifth amendment. It can not be said that at the time the Constitution was adopted there was any feeling that the power to determine constitutional questions arising in the conduct of the Government could not be safely reposed elsewhere than in the courts. On the contrary, there was at that time a strong feeling that too much power in the courts would be a source of danger to the future Republic.

"It is undoubtedly true that the experience of nearly a century and a half has led to greater confidence in the wisdom of having the judiciary determine finally questions of a legal nature arising out of the Constitution. But the framers of the Constitution, impressed with the necessity of retaining as much power as possible in the people and their direct representatives, considered that there were many questions that would arise in the conduct of the Government which should not be committed to the courts, but which should be dealt with through other branches of the Government. Hence there are numerous constitutional questions which the Constitution has expressly committed to some other branch of the Government for decision and others which, this court has held, a fair interpretation of the Constitution likewise commits to other branches of the Government.

"The Constitution, in Artcile IV, section 4, provides that the United States shall guarantee to every State a republican form of government and shall protect each State against invasion and, on application of the legislature or of the executive, against domestic violence. There is no express provision declaring by what authority it shall be determined that a particular form of government is republican. But it is now thoroughly settled that this court can never be called on to determine whether a particular State government is republican in form. The same article also provides that the United States shall protect each of the States against invasion, and 'on application of the legislature, or of the executive (when the legislature can not be convened) against domestic violence.' Early in the history of the country these provisions of the Constitution were brought before this court in a case arising in Rhode Island. There were two governments, each claiming to be the real government of the State, and it was sought to have this court determine which, in fact, was the government of the State. The court, however, said that—

"'as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. * * * And its decision is binding on every other department of the Government, and could not be questioned in a judicial tribunal.' (Luther *v.* Borden, 7 How., 42.)

"It was also held:

"'It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the Federal Government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided

"that the President should determine.' (Id., 42–43.)

"And again:

"'By this act the power of deciding whether the exigency had arisen upon which the Government of the United States is bound to interfere is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act.' (Id., 43.)

"Thus, none of the questions arising out of this article of the Constitution are committed to the courts for decision. And not being so committed, this court itself holds that they must be determined either by Congress or by such agency as Con-

gress may designate for that purpose. If an agency so designated by Congress makes a mistake, the remedy is stated in the case above referred to to be as follows:

"'Undoubtedly, if the President in exercising this power shall fall into error, or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it.' (Id., 45.)

"These rules of law have never been departed from. They have been quite recently reiterated in Pacific Telephone Co. *v.* Oregon (223 U. S., 118). In the cases of State of Mississippi *v.* Johnson (4 Wall., 475) and State of Georgia *v.* Stanton (6 Wall., 50) certain acts of Congress establishing provisional governments for the States of Mississippi and Georgia following the Civil War were assailed upon the ground that their effect was to absolutely destroy the State governments of those States. In both cases, however, it was held that the court could not determine the questions raised, because they were not justiciable but were political and directly within the province of Congress to determine.

"Again, the Constitution prescribes the qualifications which shall be possessed by the Members of Congress but makes each House the judge of the qualifications and election of its own Members. A House of Congress may expel a Member on the ground that he is disqualified, and this conclusively determines that he does not possess the qualifications named in the Constitution. It may refuse to accept a Member for a reason which the Constitution does not make a disqualification. It may decide that one man has been elected a Member when the courts would hold that another has been elected. But no one would say that any court could review its action. The result of such action might be considered to deny a man a right given him by the Constitution, or to deny the people of a district or a State the right to be represented by the man of their choice. But whether there has been such a denial of rights must, of course, be determined by some authority, and that authority the Constitution has declared to be Congress and not the courts.

"Again, the Constitution provides, in effect, that the Congress shall count the votes cast for President and Vice President and determine the result. There is nothing in the Constitution which, in terms, says that this decision by Congress shall be final. But it would be scarcely claimed that the courts could be called on to assume jurisdiction and review that decision. Only once in the history of the country has it happened that there has been a serious controversy over the election of a President. In that instance Congress created a special tribunal, unknown to the Constitution, by which the disputed questions were determined and on whose report Congress announced the result of the election. Whatever doubts may have existed as to the constitutionality of this procedure, it was never supposed that this question was one to be determined by the courts.

"The Constitution contains some very specific provisions as to the manner in which acts of Congress shall be passed. It does not, in terms, say that Congress shall be the judge of whether an act has been passed in accordance with these provisions. In the absence of such a declaration, some might suppose that before a court could interpret an act of Congress it might first be called upon to determine whether the act had been passed in the manner required by the Constitution. But this court has always decided otherwise, holding that Congress was the judge, and that its determination that an act had been passed is final and conclusive. The result is that when an act has been signed by the Speaker of the House, the Presiding Officer of the Senate, approved by the President, and deposited with the Secretary of State there is a final determination that it has been passed in accordance with the Constitution, and the courts can not look to the Journals or other documentary evidence and determine that it was not constitutionally passed, or even that, as signed by the presiding officers and the President, it was not, in fact, the bill that passed. (Field *v.* Clark, 143 U. S., 649, 680; Harwood *v.* Wentworth, 162 U. S., 547, 562; Flint *v.* Stone Tracy Co., 220 U. S., 108, 143.)

"Section 5 of Article I provides that a majority of each House of Congress shall constitute a quorum to do business. Less than a majority, therefore, of either House has no constitutional authority to transact business. Perhaps a majority of all acts passed by either House of Congress are passed without a roll call or a record showing the number of votes cast. It is known to everyone at all familiar with congressional procedure that very often each House proceeds to transact business and enact laws as to which a roll call is not necessary when very much less than a majority of Members are present. Such acts, however, are signed by the presiding officers, approved by the President, and deposited with the Secretary of State.

"In many cases it could doubtless be proved beyond a doubt that a quorum was not present when the act was passed. Yet no one would insist that a court could hear such evidence and from it determine that the act had not been passed as required by the Constitution. The reason is that, whether correctly or erroneously, the question has been decided by the branch of the Government to which, by necessary implication, the Constitution has committed it. Even where there has been a roll call on the passage of a bill, and even if we assume that the court could look to the Journal and, from the recorded roll call, determine that an act duly signed and deposited was not, in fact, passed, there might be a case in which the Journal, in fact, did not record the truth. It might be that enough Members who had voted against the act have been, either by mistake or intention, recorded as voting for it to change the result. In such cases it would be easy to prove by the Members themselves that the record did not speak the truth. No court, however, would receive such evidence, for the reason that Congress, in approving its Journal, has decided that question and its decision is binding on the courts.

"Many other instances could be cited of provision in the Constitution which give rise to questions the determination of which is committed wholly and finally to the political branch of the Government and which can never be the subject of judicial inquiry. When the right to determine a question is not, in express terms, conferred upon the political branch of the Government, there may always be some ground for the contention that it is intended to be left within the jurisdiction of the courts. Even in such cases, however, the jurisdiction does not exist when the right of the political branch is necessarily implied in the Constitution. But when the question is expressly committed to Congress there can scarcely be room for argument. The question of what amendments may be proposed by Congress and ratified by the legislatures of three-fourths of the States clearly falls within the latter class, because the right and power to propose amendments exist, according to the very letter of the Constitution, *whenever two-thirds of both Houses of Congress deem* it necessary to propose them. The proposal, by the required vote, of an amendment is a determination that the necessity exists, and is, therefore, a constitutional exertion of power which the courts are without authority to review. So far, then, as the objections to this amendment based upon its nature are concerned they present, in the strictest sense of the word, questions which are political and not justiciable.

"The question as to whether the ratification of an amendment by a legislature is subject to the referendum feature of a State constitution is not, in express terms, committed to the Congress. In practice, however, the political branch of the Government has always determined when an amendment has been ratified as required by the Constitution, and this court has never reviewed such a decision, although it was once urged to do so. (Myers *v.* Anderson, 238 U. S., 368, 373–374.)

"But, since the Constitution designates the legislatures of the several States as ratifying agents, the question, in the last analysis, is what body in a particular State constitutes the legislature of that State? This, as held in Luther against Borden, supra, is a question which Congress must determine, either acting itself or through such instrumentality as it may designate. If the question in a particular State was as to which of two bodies of representatives, each claiming to be elected, was the real legislature, there could be no doubt that the determination of that question by Congress would be conclusive. If an effort should be made to show that a majority of the members of a legislature in a particular State which had ratified an amendment were disqualified or not elected, no one would contend that this court would assume jurisdiction of the controversy. Likewise the question is political when it is whether the legislature of a State consists of two houses of representatives, or of those two houses plus all the people of the State. The ascertainment by Congress in the manner prescribed by it forecloses the question of whether ratification has been had by the proper body.

"The adoption of the original Constitution was purely a political act. No provision for a judicial ascertainment of the adoption was provided. The adoption of an amendment to that Constitution is equally a political act, and the courts have been given no part in the proceeding by which amendments may be adopted. The political branch of the Government must ascertain and determine when an amendment has been adopted. In this case Congress, by statute, has provided that when an amendment shall be proposed, and when the Secretary of State shall have received official notice that the legislatures of three-fourths of the States have ratified it, he shall, by his proclamation, declare such amendment to be a part of the Constitution. Recognizing that the determination of whether a proposed amendment had

been ratified belonged to the political branch of the Government, Congress has, by law, established this means of determining it. Under the rule laid down in Luther *v.* Borden, supra, the Secretary of State, having been directed to issue his proclamation when he has received official notice of ratification by the legislatures of three-fourths of the States, must necessarily determine what bodies constitute the legislatures of the ratifying States. And as said again in Luther *v.* Borden, supra, if he makes a mistake, that mistake may be corrected by Congress, but not by the courts.

"The Secretary of State received official notice that the legislatures of three-fourths of the States had ratified the eighteenth amendment. He thereupon issued his proclamation as required by the act of Congress. Thereafter Congress itself approved his decision by proceeding to legislate in accordance with the provisions of the new amendment. The political branch of the Government has therefore determined that this amendment is now a part of the Constitution. By what authority can the court call this determination into question?

"Ever since the case of Luther *v.* Borden (7 How., 1, 38–39) it has been the established rule of law that—

"'the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision.'

"In respect to determining questions of policy and adopting or altering constitutions, the American State and Federal Governments are molded upon the same plan. In each the distinction between political and judicial functions is the same. If the courts are to follow the determination by the political branch of the Government on the question as to whether a constitution or amendment has been ratified in the case of *State* constitutions, there would seem to be no reason why the same rule does not apply to amendments to the *Federal* Constitution. This has certainly been the practice with respect to other amendments. The question arose on the adoption of the fourteenth amendment. The Legislatures of New Jersey and Ohio at first ratified, and then, before the requisite number of States had ratified, attempted to withdraw their ratification. Both actions by these legislatures were certified to the Secretary of State. Apparently, he did not feel called upon to determine the effect of the attempt of these two States to withdraw their ratification. He therefore issued a proclamation stating the facts, and concluding with the statement that if the resolutions of the Legislatures of Ohio and New Jersey ratifying the amendment were to be deemed as remaining in full force and effect, notwithstanding the subsequent effort to revoke them, the amendment had become a part of the Constitution. (15 Stat., p. 707.)

"Of course, this proclamation could not be construed as a determination by the Secretary of State, for the political branch of the Government, that the amendment had been adopted, for it expressly left that question open. It does not seem to have occurred to anyone, however, that it was a proper question to be submitted to the courts for determination. It was treated as a reference back to Congress for determination. A few days later, Congress adopted a resolution declaring that the necessary number of States had ratified and that the amendment was effective. Thereupon, the Secretary of State issued another proclamation in accordance with the resolution of Congress. (15 Stat., pp. 708, 709, 710, 711.) Thus, the means previously adopted by the Congress for determining, through the political branch of the Government, whether an amendment had been adopted having failed, Congress itself, as the proper political branch of the Government, acted directly and determined the question.

"It may be true that, in order to determine what is the law, the courts must first determine what is the Constitution in the same sense that they determine what is a law enacted by Congress. In the latter case they, of course, inquire into the power of Congress to pass the act; but when that power is found to exist, no inquiry is made as to whether the particular measure is one which, as a matter of policy or judgment, Congress should have passed. It may be conceded that the same inquiry may be made in the case of a constitutional amendment. But when it is ascertained that there is no constitutional provision which prohibits the proposal of such an amendment, and the action of the political branches shows that it has been adopted in accordance with the procedure provided by the Constitution, the inquiry ends.

"The Constitution provides certain procedure both for the enactment of a statute and the adoption of an amendment to the Constitution. In both cases it is competent for the court to inquire whether this constitutional procedure has been resorted to. But in pursuing this inquiry the court comes to certain questions as to which it must accept, without further inquiry, the decision of the political branch of the Government. Thus, when Congress has decided that a constitutional majority has voted for a particular measure the courts are without power to review that decision. There are several other constitutional requirements as to the procedure under which an act may be passed by Congress. But when an act of Congress is signed by the presiding officers of both Houses, approved by the President, and deposited with the Secretary of State, its passage in a constitutional manner is conclusively established—at least, the courts can not inquire into that question. They can not be called on to determine from the Journals of the Houses or from other documentary evidence whether the statute as signed and deposited was, in fact, passed or that it was passed in the manner required, or even that, as signed, it contained provisions which were not in it when passed.

"In the same way the Constitution provides that an amendment proposed by Congress must be ratified by the legislatures of a given number of States. When an amendment has been, therefore, regularly proposed by Congress, and when the Secretary of State has received official notice that it has been ratified by the required number of legislatures and has proclaimed it to be a part of the Constitution, the political branch of the Government has recognized it as a validly adopted amendment and the courts must follow that decision. They can no more go behind it and undertake to determine for themselves whether the body which ratified it for the people of a particular State was, in fact, the legislature of that State than they can go behind an act regularly signed by the presiding officers of both Houses, approved by the President, and deposited with the Secretary of State, and decide for themselves whether the act, in fact, passed by a constitutional majority, or even whether it was altered after its passage and before being signed. In both cases the court takes the law or amendment as the political branch of the Government has certified it, and the judicial function then is merely one of interpretation and application.

"In other words, the political branch of the Government is the *lawmaking* branch. That branch of the Government makes the statute law. It likewise performs the functions necessary to make that part of the law which, by amendment, is engrafted upon the Constitution. In both cases the courts take the law as it comes from the lawmaking branch. That branch having determined that the eighteenth amendment has been ratified, the courts must accept its decision, and the judicial function is merely one of interpretation and application.

"It is respectfully submitted, therefore, that the contention that, under the constitution of any State, the act of its legislature in ratifying an amendment to the Constitution of the United States is subject to a referendum vote by the people presents no justiciable question.

"III.—The contentions against the validity of the eighteenth amendment are all unsound.

"Regardless of where the authority to decide them is vested, the contentions against the validity of the eighteenth amendment are without merit. The amendment is within the amending power. It was proposed because two-thirds of the Members of Congress deemed it necessary to do so, and has been ratified by the legislatures of three-fourths of the States.

"There is nothing in the nature of the eighteenth amendment which takes it out of the amending power conferred by Article V of the Constitution.

"The argument against the eighteenth amendment based upon its nature seems to be threefold:

"(1) It is not an amendment, but mere legislation.

"(2) If an amendment, it is not germane to anything in the Constitution.

"(3) It confers upon Congress certain powers previously reserved to the States, and this can not be done by an amendment in the manner provided in Article V.

"The eighteenth amendment, establishing a fundamental rule of law, is an amendment within the meaning of Article V.

"It is insisted that the eighteenth amendment is in no proper or constitutional sense an amendment, but that it is mere legislation enacted under the guise of an amendment. The contention is that a constitution, as the word was understood in 1789, is 'the form of government, the distribution of the powers of government, and the regulation of the exercise thereof which make up "the constitution of civil government" of the United States.' In describing what the Constitution did, counsel say:

"'The Constitution which was agreed upon and proposed granted enlarged powers to the Government of the Union. It distributed those powers and directed how they should be exercised. It imposed limitations upon the powers granted and upon the powers reserved for the protection of those inalienable rights to secure which governments are instituted.'

"So far as this particular objection is concerned, it is conceded that a constitutional amendment which merely conferred upon Congress the power to regulate or prohibit the liquor traffic would be an amendment. It is said, however, that because the amendment goes further and declares that the manufacture, sale, and transportation of intoxicating liquors shall be unlawful, it loses its character as an amendment and becomes merely an act of legislation. The second section of the eighteenth amendment, which merely conferred additional powers upon Congress, is not, therefore, subject to this objection. The objection is directed at the prohibition contained in the first section.

"The definition of the Constitution, as insisted on, is faulty, because the office of the Constitution is not only to provide the machinery of government but to establish fundamental rules of law which shall control all the agencies of the Government. But this amendment comes clearly within even the narrow definition suggested, as counsel say the original Constitution granted enlarged powers to the Government and distributed those powers and directed how they should be exercised, and imposed limitations both upon the powers granted to the Federal Government and the powers reserved to the States. In so far as this amendment confers additional powers of legislation upon Congress, it follows in the footsteps of the framers of the Constitution by granting enlarged powers to the Federal Government. In so far as the powers thus granted are taken from the States, it merely operates to change the original distribution of power. True, the first section of the amendment establishes a rule of law by which the liquor traffic for beverage purposes is made unlawful. But, as shown above, the effect of this is merely to place a limitation upon the powers of the States or of Congress to legislate with respect to that traffic. Prior to its adoption, within their respective spheres, Congress and the States had unlimited power over this traffic. The amendment simply says that hereafter all legislation on that subject shall be subject to the limitation that the traffic *for beverage purposes* is unlawful. The amendment, therefore, does nothing except what counsel themselves say the original Constitution did.

"The Constitution and the amendments heretofore adopted are full of rules of law by which the activities of the various agencies of government, both State and Federal, and the rights and duties of persons are fixed or regulated.

"Thus it defines the crime of treason in precisely the same language which might have been employed by Congress for the same purpose if the framers of the Constitution had not decided to legislate on that subject themselves. It adds legislation to the effect that 'no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.' It provides that 'no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attained,' and having itself legislated thus far, empowered Congress 'to declare the punishment of treason.' Here a rule of law governing the conduct of individuals is established. Certain acts are made unlawful and declared to constitute the crime of treason. The Constitution creates the offense and leaves to Congress only the power to fix the punishment, and that only within prescribed limitations. The eighteenth amendment creates another offense and gives Congress the power to fix the punishments. Treason is a crime against the Government. But so is any other violation of a criminal law. Both relate to the conduct of individuals. They differ only in the degree of heinousness. The declaration that 'full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State' establishes a rule of law just as does the first section of the eighteenth amendment. And the provision that 'the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof,' like the second section of the eighteenth amendment, confers the power of legislation to enforce. That 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States' is merely a law which the framers of the Constitution might have empowered Congress to make, but decided to make themselves. The same is true of the provision that persons charged with crime in one State and fleeing into another shall be delivered up and removed to the State having jurisdiction of the crime. The Constitution also contains an explicit provision for the return to the owner of a fugitive slave.

"That the provisions referred to are acts of legislation in the sense that they establish rules of law can not be doubted. They and other provisions constitute a body of laws which the framers of the Constitution deemed of such importance that they should be enacted and placed beyond the control of any branch of the Government. Primarily the idea was that the purpose of the convention was not only to create the necessary machinery for a Government, but to make those fundamental laws which were deemed necessary if the Government in its operation was to serve the desired purpose. Whatever rule of law, therefore, was considered of sufficient importance, whether it related to the conduct of Government or to the conduct of citizens, was put in the Constitution, and, subject to these rules of law, the legislative power of the Government was vested in Congress. The Constitution, then, being an instrument providing the machinery of Government and the fundamental laws by which that Government should be controlled, is subject to amendment either for the purpose of changing the machinery of Government, the distribution of power, or the fundamental rules of law.

"It is difficult to see how any provision which, in accordance with what was done, might, with entire propriety, have been put in the original Constitution, can not now be put there by amendment. In connection with the privisions of the Constitution above referred to, there would have been nothing inappropriate or incongruous in a provision to the effect that the liquor traffic should be unlawful throughout the United States. The Constitution did, in effect, make the importation of slaves lawful for a fixed period, if permitted by any State. It can scarcely be doubted that if the framers of the Constitution had seen fit to insert what was afterwards put into the thirteenth amendment, and thus prohibit slavery, this would have been an entirely appropriate constitutional provision.

"What has been said is but a statement of the ideas that have prevailed in proposing and ratifying all the amendments which have been heretofore adopted. The first amendment is in form a limitation upon the power of Congress, but it establishes as a matter of right and law religious freedom, and the freedom of speech and the press, and makes it the law of the land that people may peaceably assemble and petition the Government for a redress of grievances. Nobody questions, of course, the validity of this amendment, but would it have been any more legislation if it had provided that the doctrines of the Methodist Church shall be the established religion, or that Congress should not abridge the freedom of speech *except in a certain specified class of cases*?

"The second amendment is simply an act of legislation to the effect that the people shall have the right to keep and bear arms. Its nature as an amendment would have been no different if it had provided that the people should not keep and bear arms except under specified conditions.

"The third amendment prohibits, in the time of peace, the quartering of soldiers in any house without the consent of the owner. While this prohibition is effective primarily against the Government, the prohibition of the eighteenth amendment operates practically to prohibit both the Federal and State Governments from legalizing the liquor traffic.

"The fourth amendment secures the people against unreasonable searches and seizures. It is couched in language entirely suitable to a legislative enactment.

"The fifth amendment, prescribing the rights to which an accused in a criminal case shall be entitled, operates, it is true, as a limitation upon the powers of the Government, but at the same time it makes general laws which every individual is entitled to invoke for his protection. The same is true of the sixth amendment.

"The seventh amendment prescribes the cases in which litigants shall be entitled to a trial by jury and makes the rules of the common law controlling in the reexamination by any court of the United States of a fact tried by a jury, precisely as Congress could have done in enacting a statute.

"The eighth amendment prohibits excessive bail, excessive fines, or cruel or unusual punishment. Congress, of course, had the power prior to this amendment to prescribe what bail should be required, what fines imposed, and what punishments inflicted in criminal cases. The effect of this amendment was merely to place a limitation upon that power, just as the effect of section 1 of the eighteenth amendment is to place a limitation upon the power of Congress and the States in dealing with the liquor traffic.

"When we come to the thirteenth amendment we have the exact prototype of the eighteenth amendment. It is that—

"'Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.'

"This is legislation in every sense in which the eighteenth amendment can be said to be legislation. It prohibits slavery or involuntary servitude throughout the United States just as the eighteenth amendment prohibits the liquor traffic. It placed a limitation upon the power of both Congress and the States to legislate on the subject of slavery or involuntary servitude just as the eighteenth amendment places a similar

restriction upon legislation on the subject of intoxicating liquor. It operates, however, just as the eighteenth amendment does, not only as a limitation upon the powers of government but equally as a rule of conduct governing individuals. It was directed primarily at African slavery; but is, by no means, confined to that subject. Any individual who holds any other individual in involuntary servitude violates the prohibition just as persons who sell or transport intoxicating liquors for beverage purposes violate the eighteenth amendment. The thirteenth amendment, like the eighteenth, confers upon Congress the power to legislate for its enforcement. Under this power Congress has enacted the peonage law, under which any individual, anywhere in the United States, who holds another in involuntary servitude is subject to be punished.

"Thus, in framing both the original Constitution and the various amendments thereto, there has always been kept in mind the purpose to include in the fundamental law those rules or principles of law for the conduct of the Government and for controlling the conduct of individuals which were deemed of sufficient importance to put beyond the power of Congress or legislatures to change. The eighteenth amendment is in accord with this purpose. If it is not an amendment, the thirteenth was equally not an amendment. If the liquor traffic can not be prohibited by a constitutional amendment, then slavery has not been prohibited, and the Government of the United States is without power to prohibit it.

"An amendment necessarily operates as a change, either by addition, subtraction, or substitution. If it is made, there is necessarily either something in the instrument amended which was not there before or something has been stricken out. It is said, however, that an amendment in the constitutional sense must be deemed to be for the purpose of correcting something which experience has shown should be corrected. This statement, however, throws but little light on the controversy. If the Constitution needs correction, it is because there is something in it which under existing conditions is not necessary, or because changed conditions have made something necessary which was omitted when it was adopted. An amendment which accomplishes either of these purposes serves to make a correction. It is said, however, that the amendment to be valid must be germane to something already in the Constitution. If this be assumed, as we have before shown, the Congress itself and the ratifying legislatures have been made the judges of whether a proposed amendment is germane, and their decision is final. Moreover, if the proposed amendment is something which might have been inserted in the original draft of the Constitution, although dealing with a subject not then thought necessary to be mentioned, it will be, of course, germane as an amendment.

"Counsel have quoted rules of various assemblies, going back to the time of the adoption of the Constitution, and soon thereafter, providing in effect that a pending motion or bill should not, under the guise of amendment, have substituted for it an entirely new motion or bill or one dealing with an entirely new subject. In other words, it is shown that legislative assemblies have found it necessary to limit the right of amendment to the making of such amendments as deal with matters germane to the subject of the original bill or motion. The inference, however, is against, rather than in favor of, the contention of the appellants. Clearly it is to be inferred that the word 'amendment,' as ordinarily understood, is broad enough to include any sort of alteration or change. For this reason, to secure the orderly consideration of business, legislative bodies find it necessary to limit the kind of amendments that may be considered. The Constitution, however, in providing for amendments imposes no such restriction and the word 'amendment' must be given its ordinary meaning.

"Anything added to a pending bill is, in the ordinary acceptation of the word, an *amendment*. Long ago one of the vices of American legislation came to be the practice of incorporating, by way of amendments, all sorts of unrelated matters in one act. In order to avoid this Congress found it necessary to adopt rules requiring amendments to be germane. And many States adopted constitutional provisions to the effect that no bill shall contain more than one subject; that subject to be stated in the title. In the absence, however, of a constitutional mandate prohibiting certain amendments, when a provision is passed as an amendment it can not be assailed as not germane.

"That Article V provided for the proposal of any amendment, with the two exceptions named, which two-thirds of the Members of both Houses should deem it necessary to propose, was the meaning which the Constitution was understood to have at the time of its adoption and during the period immediately following. This understanding was that any changes which experience should show to be desirable could thus be made in the Constitution. Washington in his first message to Congress, speaking of the subject of constitutional amendments, said:

"'Besides the ordinary objects submitted to your care, it will remain with your judgment to decide how far an exercise of the occasional power delegated by the fifth article of the Constitution is rendered expedient at the present juncture by the nature of objections which have been urged against the system, or by the degree of inquietude which has given birth to them.'

"And referring to the considerations which should control Congress in the matter of proposing amendments, he added:

"'For I assure myself that, whilst you carefully avoid every alteration which might endanger the benefits of a united and effective government or which ought to await the future lessons of experience, a reverence for the characteristic rights of freemen and a regard for the public harmony will sufficiently influence your deliberations on the question how far the former can be more impregnably fortified or the latter be safely and advantageously promoted.' (Washington's Writings, Vol. XII, pp. 4, 5.)

"And in his Farewell Address he said:

"'This Government, the offspring of our own choice, uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and your support. Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true liberty. The basis of our political systems is the right of the people to make and to alter their constitutions of government.' (Id., p. 222.)

"Clearly his idea was that any alterations found necessary by the amending agency would be within the amending power.

"When the first 10 amendments were under consideration in Congress there was extended debate, but throughout all that was said there was no suggestion that there was any limitation upon the character of changes or additions which might be made under the authority of Article V, with the two exceptions named in that article. The prevailing idea was expressed by Mr. Gerry when he said:

"'It is said that the present form of the amendments is contrary to the fifth article. I will not undertake to define the etxent of the word amendment, as it stands in the fifth article; but I suppose if we proposed to change the division of the powers given to the three branches of the Government, and that proposition is accepted and ratified by three-fourths of the State legislatures, it will become as valid, to all intents and purposes, as any part of the Constitution; but if it is the opinion of gentlemen that the original is to be kept sacred, amendments will be of no use and had better be omitted.' (Seaton & Gale's Annals of Congress, Vol. I, p. 712.)

"The fact that the eighteenth amendment confers upon Congress a power which had previously belonged exclusively to the States does not prevent that amendment from being within the amending power conferred by Article V of the Constitution.

"It is next insisted that the eighteenth amendment is invalid because the amending power conferred by Article V can not be invoked to take from a State, without its consent, any of the powers previously reserved to the State by the Constitution. This argument rests upon the assumption that in some way the Constitution has placed what are termed the police powers, or powers of local economy of the State, beyond the reach of the amending power. No language can be found in the Constitution discriminating between amendments which withdraw from the States powers previously reserved to them and other amendments. In the absence of such language it is difficult to see how such a distinction can be inferred when we consider the nature of the Constitution and that which was accomplished by its adoption.

"The reason for forming the Union and adopting the Constitution was the necessity for a General Government which could, in the very nature of things, exercise certain powers of government for the benefit of all the people better than those powers could be exercised by the several States. It was essential that such a government should have the powers necessary to accomplish the purpose of its creation. The powers of sovereignty resting in the people were exercised through the agency of the various State governments. It was necessary in order to create an effective central government that some of the powers theretofore exercised through the State governments should be conferred upon the central government. This could not be accomplished except by a surrender on the part of the people of each State of the right to exercise those powers through the State governments. The Constitution of the United States, when adopted, was the creature not of the State gov-

ernments but of the people of the United States. Its adoption was the result of an agreement between the peoples of the several States, constituting the people of the United States, as to the distribution of the powers of government between the Federal Government and the several State governments. The new government was thus created by drawing on the several States for the necessary powers.

"After the adoption of the Constitution the States remained sovereign States, but they and their people had voluntarily denuded themselves of many of the powers of complete sovereignty. The exercise of some of these powers was, in express terms, denied to the States. Many other powers were taken from the States because they were conferred upon the Federal Government. It was a matter of judgment as to what powers should be left to be exercised by State governments or reserved to the people, and what ought to be conferred upon the Federal Government. It may be assumed that the framers of the Constitution divided the powers of government between the States and the Federal Government in the manner they then believed to be necessary. They recognized, however, that, as time went on, experience might show that the Constitution would be improved by changing the distribution of powers as then made. For this reason they inserted Article V, providing for amendments. One of the chief subjects of consideration at that time was this question of the distribution of power. If it had been intended, therefore, that any of the powers then reserved should never be taken from the States without unanimous consent, language would undoubtedly have been used to express that intent. In the very nature of things almost any amendment that could be adopted would take either from the States or the Federal Government some of the powers belonging to them respectively.

"Under the original Constitution there is nothing to indicate an intention that amendments should be confined to one class. Maifestly the purpose was to provide for the making of amendments of either class, as experience might dictate. It is utterly inconceivable that it should have been intended that an amendment could be adopted which would take away from the Federal Government any of the powers then conferred, but that it should be impossible to amend the Constitution by conferring a power found by experience to be necessary. The people of the various States were secured against hasty amendments or amendments that might injuriously affect the powers of State governments by the provisions of Article V. No amendment could be proposed unless agreed to by two-thirds of the Members of Congress, the Members of both branches of which represented the peoples of the various States, and in one branch of which the representatives of each State had an equal suffrage. With the right of amendment thus hedged about, and with the power in the people of a small minority of the States to prevent any amendment, it was not deemed necessary to place any restrictions upon the amending power, except the two expressly stated, or to place any particular powers of the State governments beyond its reach. As said by Mr. Justice Brewer in Kansas *v.* Colorado (206 U. S., 46, 90):

"'The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted they reserved to themselves all powers not so delegated.'

"Article V makes two exceptions to the amending power, one temporary and one permanent. This enumeration of exceptions, under well-recognized rules of construction, excludes the idea that any other exception was intended. This alone would be a complete answer to the present contention, but the fallacy of the argument is put beyond peradventure when we find that at the time Article V was under consideration in the Constitutional Convention it was twice proposed to insert a provision that no State should without its consent 'be affected in its internal police,' and the proposition was twice rejected by the convention. (Vol. 1, Elliott's Debates, pp. 316–317; and Madison's Papers, pp. 531–532 and 551–552.) Judged, then, both by the language employed and that which was deliberately rejected, it would seem that the true intent of Article V has been accurately stated by a text writer, thus: 'In scope the amending power is now limited as to but one subject, namely, the equal representation of the States in the Senate.' (Willoughby on Constitution, sec. 227.)

"This conclusion is in accord with the practice since the beginning of the Government. That amendments to the Constitution have taken from the States power theretofore considered as relating to their internal affairs and constituting a part of their police powers is perfectly evident. It is true that at the time the Constitution was adopted there was in some quarters a feeling that too much power had been conferred upon the Federal Government or that the powers so conferred would be abused. It was therefore not unnatural that the first 10 amendments, proposed almost immediately after the adoption of the Constitution, should be not for the purpose of enlarging the Federal powers but for either placing restrictions upon them or clearly interpreting them. But when the time came that existing conditions required an extension of the powers of the Federal Government and a greater curtailment of the powers of the States, this end was, without question, accomplished through amendments made in accordance with Article V.

"At the time the Constitution was adopted it can not be doubted that, in those States in which slavery existed, the right to control that institution was a matter of chief concern to their people. Nobody doubted that it was a domestic matter subject to the police powers of the States as they then existed. The purpose to continue State control of it was so determined that Article V was adopted only when a provision was inserted, the effect of which was to preserve the safeguards of this control to the States until 1808 as against any amendment that could be made. Slavery, in fact, was the only matter of local concern which received special attention in the Constitution. But when the time came that the sentiment of the people of the United States demanded that slavery should no longer exist, the desired end was accomplished by the adoption of the thirteenth amendment. It is no answer to say that slavery had already been abolished by the emancipation proclamation of the President. As a war measure, it may be assumed that proclamation did free the slaves which were then held in the States whose people were in arms against the Government. It did not, however, emancipate any slaves, if there were any, held in States which were then loyal to the Union or which were not mentioned in the proclamation. It certainly would not have operated to prevent any form of involuntary servitude which any State might have seen fit to permit after the restoration of the Union. It may be that it would not have been practicable thereafter to reestablish, to any considerable extent, African slavery, but the right of the States to permit involuntary servitude had not been taken away. The thirteenth amendment was necessary to accomplish this, for, as stated above, the prohibition of that amendment is not confined to African slavery but applies to any form of involuntary servitude not penal. Certainly there is no difference between the reserved right of the States to regulate the subject of slavery and the reserved rights of the same States to regulate the liquor traffic. Both are domestic or internal matters in the same sense. An amendment to the Constitution applicable to one is on all fours with an amendment applicable to the other.

"The fourteenth amendment invaded the previously reserved governmental rights of the States with respect to a number of matters, including the right to provide for due process of law or to prescribe unequal protection of the laws. It fettered the States in the power to legislate or act in respect to individual rights of citizens or persons where before it had such power. It divested each State of powers which under the tenth amendment had been reserved to the State.

"When the Constitution was adopted, the right to prescribe who should be voters was exclusively a State matter. The qualifications of voters in the several States differed widely. (Minor *v.* Happersett, 21 Wall., 162, 172.) The fourteenth amendment, as construed by this Court, left each State still in control of the power to say who should be its voters. The fifteenth amendment, however, directly restrains the right of the States to regulate suffrage not only as to national elections but as to strictly internal elections.

"By the thirteenth, fourteenth, and fifteenth amendments it can not be doubted that the police and other powers previously belonging to the States were greatly curtailed. Yet, in each instance, there was no infringement of the rights of the States under the Constitution. By procedure had in accordance with the express authority given by the people, each State acting separately, either by the ratification of the Constitution or by later acceding to it, a change was made by which further power was delegated to the Federal Government. The mandate of the tenth amendment was not violated, but was observed. The only powers of which a State was in this way deprived were powers which are by the Constitution expressly conferred upon the United States. This is true because Article V expressly enacts that an amendment proposed and ratified as therein provided 'shall be valid to all intents and purposes as part of this Constitution.'

"It is respectfully submitted that unless the course previously pursued in securing amendments of the Constitution

can be said to be unconstitutional and void there is no valid objection to the eighteenth amendment upon the ground that it takes from the States any of their reserved powers.

"IV.—No State, by any provision of its laws or its constitution, can make the ratification of an amendment to the Constitution of the United States by its legislature subject to a referendum vote of the people.

"Some of the States whose legislatures ratified the eighteenth amendment have, in their constitutions, referendum features under which the acts of their legislatures are not final until after the lapse of a fixed time, during which, if a petition bearing the required number of names is presented, such acts are to be submitted to a vote of the people for approval or disapproval. In only one of the States (Ohio) is this provision of the Constitution, in express terms, made applicable to the ratification of amendments to the Federal Constitution. In some, the referendum is provided for in language concededly not broad enough to include such an act of ratification. In others, however, it is claimed that, though such amendments are not expressly mentioned, language sufficiently broad to include them has been used. It is not necessary to go into the details of these various State constitutions. It is admitted that the controversy exists with respect to enough of the ratifying States to at least *delay* the ratification of the amendment to a period some months later than the date for which we contend, if the appellant's contention should be sustained. The question, therefore, as to the effect of a State constitutional provision making the ratification of a Federal amendment subject to a referendum vote must now be determined, if not, as hereinabove contended, a question as to which the courts are bound by the decision of the political branch of the Government.

"We insist that appellant's position is unsound. Article V of the Constitution provides that amendments, when proposed, shall become effective when ratified by *the legislatures* of three-fourths of the States, or *by conventions* held in three-fourths of the States, if Congress shall see fit to propose the amendments to such conventions instead of the legislature. No reference is made to a vote of any kind by the people. The only method of ratification mentioned is through representatives assembled either in the legislature or in a convention called for that purpose. In other words, it is clearly contemplated that the action of the State in ratifying shall not be by direct vote of the people, but by their representatives; and the body, or bodies, who shall be recognized as acting for the States are specifically named. The sole part assigned to the people of a particular State in the ratification of an amendment is that they are to elect the representatives who shall be authorized to act for them. If Congress sees fit to propose an amendment to conventions to be called with authority to ratify, the people elect representatives authorized to act for them in that matter. Congress may, however, see fit to make the proposal to those in whom the people have had sufficient confidence to select to represent them in all matters of State legislation. When the people, therefore, elect members of the legislature, they do so with the full knowledge that those representatives will be authorized to act for them not only with respect to State legislation, but also with respect to the ratification of any amendment which Congress may propose to the legislature. Members of the legislature, therefore, are necessarily elected with a view to having them act on any Federal amendment proposed.

"The language used in Article V has been construed to express an explicit intention to exclude direct action of the people from participation in the ratification of an amendment. Thus in Dodge *v.* Woolsey (18 How., 331, 348), speaking of the Constitution, it was said:

"'It is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the Congress of the United States, when two-thirds of both Houses shall propose them; or where the legislatures of two-thirds of the several States shall call a convention for proposing amendments, which, in either case, become valid, to all intents and purposes, as a part of the Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths of them, as one or the other mode of ratification may be proposed by Congress.'

"When the Constitution was adopted there was in every State a representative body to which the term 'legislature' was applicable. There was no misunderstanding or difference of opinion as to what was meant by a legislature. It was this representative lawmaking body in each State. Nothing has occurred since to give the word a different meaning. No State has abolished its representative lawmaking body. In every State in the Union to-day there is just such a body. The States which have adopted the referendum plan have not attempted to abolish their legislatures. Indeed, the very form of the referendum provisions of State constitutions retains the legislature as a separate and distinct body. Usually, these provisions provide that the legislative power of the State shall be vested in a legislature. They then, in effect, retain a veto power in the people by providing that the action of the *legislature* shall not be final, but shall be subject, under certain conditions, to be submitted to a vote of the people for approval or disapproval. Under this system, however, the *legislature*, as a distinct feature of State government, exists and functions precisely as it did at the time the Constitution was adopted. The only difference is that the people have reserved to themselves a means for undoing what the legislature has done. If this means is not resorted to, the action of the *legislature* becomes effective just as it has always done. True, a limitation has been placed upon its power, and, in a sense, it may be said that it is not now invested with all the *legislative power* of the State. This power may be said to be divided between the legislature and the people. From this it is argued that in the referendum States the people are now a part of the legislature.

"This, however, does violence to the very language of the referendum provisions of State constitutions, which, instead of changing *the nature of a legislature*, merely reserves to the people the right to nullify its action. No court, so far as we know, has ever said that, in such States, the people are *a part of the legislature* and, in effect, constitute a third house. To so say would be an anachronism, for a house or a legislature is, in the very essence of the term, a representative body and not a mass meeting. It is a body of men assembled for joint action as representatives and not an election held at the polls in each civil district. The expression that the people constitute a third house of the legislature, if its use is admissible at all, is merely a figurative expression, and merely means that the people, by their votes at the polls, have the power to render ineffective action taken by the legislature. The expression is used in the same sense that we sometimes speak of the trial judge as a thirteenth juror, because, in passing on a motion for a new trial, he considers the evidence previously submitted to the jury. No one means by this, however, that he is really a juror. It simply means that, in his capacity as judge, he must perform, with respect to the evidence in a case, much the same function which a juror performs in originally passing upon it. So it may be said that in the referendum States the people at the polls perform much the same function that the legislature has previously performed in enacting laws. No one, however, intending to speak accurately, would say that in performing this function the people of the State constituted either a legislature or a part of a legislature. The main idea of a legislature is a deliberative body acting collectively and under responsibility to the people. In a referendum the voters act separately, not as a deliberative body, and without any responsibility to any further power.

"So far as a legislature derives its power to act from the people of a State, it is not denied that the people may limit or restrict its powers by an initiative or referendum feature of the constitution, or otherwise as they see fit. But in ratifying an amendment to the Federal Constitution, the several legislatures exercise a power derived from the people of the United States through the Constitution of the United States. It can not be claimed that a State constitution could withhold from the legislature the power to ratify an amendment to the Constitution of the United States and provide that the people alone should pass on it. This power can not be abrogated, restricted, or altered in any way save by the authority of the people of the United States, from whom it was derived. It is wholly beyond the control, in any respect, of the people of a single State.

"The legislatures of the several States draw power, as such bodies, from the Federal Constitution in many instances which the States could not change or modify by local laws or constitutions.

"Prior to the recent amendment, the Senators for each State were to be chosen by the legislatures; the time, places, and manner of holding elections for Senators and Representatives are to be prescribed in each State by the legislature, subject, however, to the control of Congress. 'Each State shall appoint, in such manner as the legislatures thereof may direct,' presidential electors. New States can not be formed by the junction of two or more States, or parts of States, without the sanction of the legislatures of the States concerned. When performing any function above mentioned, the legislature derives its authority not from the constitution of the State but from the Con-

stitution of the United States. The source of this authority is not the people of a single State, but the whole people of the United States. It can be abrogated or modified only by the same authority. And, through the adoption of Article V, the people of the United States have determined that the only means of accomplishing such abrogation or modification shall be the adoption of an amendment to the Federal Constitution. That the result has been to place the legislature, in this respect, beyond any restrictions that can be imposed by the State constitutions and to exclude the people from any direct or immediate agency in making amendments unmistakably follows from what has been quoted above from Dodge *v.* Woolsey.

"In the multiplicity of assaults now being made on the eighteenth amendment it would be surprising to find all the assailants in harmony and not urging conflicting views. It is not strange, therefore, to find in the brief filed in behalf of the State of Rhode Island a clear refutation of the claim that a State constitution may limit the power of a legislature to ratify a Federal amendment. In that brief there is this emphatic disclaimer of any such power in the people of any State:

"'Congress in proposing, and the legislatures in ratifying, an amendment to the Constitution are Federal representatives. They derive all their power and authority from the Constitution. They derive no power from the laws or constitutions of the several States. Congress and the legislatures of the several States were made an amending branch of the Federal Government for the purposes expressed in Article V, and, like other branches of the Federal Government, must find their powers within the Constitution. They act as the representatives of the people of the United States.'

"If this be true, then the people of the several States, having denied themselves direct participation in the adoption of an amendment, and having agreed to act only representatively in that regard, have made the legislatures of the several States, for this purpose, separate and independent agencies of the Federal Government. If, in this regard, the power of the legislature is conferred by the Constitution of the United States, and in no way derived from the States, or, except through that Constitution, from the people of the States, it must be equally true that that power can be curtailed or limited only by the authority from which it was derived—that is, the Constitution of the United States or an amendment thereto.

"As stated above, the legislature is designated by the Constitution, in slightly differing language, to perform the same function in the selection of presidential electors and, before the recent amendment, in the selection of Senators that it performs in ratifying amendments to the Constitution. It is safe to say that, before the adoption of the amendment for the election of United States Senators by the people, it never occurred to anyone that it was within the power of the people of a State to control the legislature in electing a United States Senator by requiring that such election should be subject to a referendum vote. When the sentiment finally prevailed that the people of each State should have the right to control, at the polls, the election of United States Senators, this result was accomplished by the adoption of an amendment to the Constitution. If the same change shall ever be desired with respect to the ratification of Federal amendments, it can be accomplished only in the same way.

"In the case of McPherson *v.* Blacker (146 U. S., 1), this court had occasion to consider the power of the legislature with respect to the appointment of presidential electors, and the judicial and political history of the country touching the matter of presidential electors was exhaustively reviewed. The views expressed by statesmen and writers at the time of the adoption of the Constitution and since were recalled, and, summing up the result, the court quoted with approval from a report made by Senator Morton, as chairman of the Senate Committee on Privileges and Elections, in 1874, in which it was said:

"'The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are Members of Congress, which was the case formerly in many States; and it is, no doubt, competent for the legislature to authorize the governor, or the supreme court of the State, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the States by the Constitution of the United States, and can not be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the State constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.' (Id., p. 34.)

"Obviously, when the people were adopting the Constitution it would have been competent for them to clothe the governor, the supreme court, or any other agency of a State with the power to ratify amendments for and in the name of the people of that State. However, they chose to thus designate the legislature. It follows that the action of the legislatures of three-fourths of the States becomes not alone the action of the people of their respective States, singly or together, but that of the people of the States whose legislatures decline to ratify—all of which people constitute the people of the United States as fully as the several States constitute in their Union the United States of America. That this was clearly understood at the time the first 10 amendments were under consideration by Congress is shown by the debates. Among many similar statements, Mr. Gerry said this:

"'The Constitution of the United States was proposed by a convention met at Philadelphia; but, with all its importance, it did not possess as high authority as the President, Senate, and House of Representatives of the Union. For that convention was not convened in consequence of any express will of the people, but an implied one, through their members in the State legislatures. The Constitution derived no authority from the first convention; it was concurred in by conventions of the people, and that concurrence armed it with power and invested it with dignity. Now, the Congress of the United States are expressly authorized by the sovereign and uncontrollable voice of the people to propose amendments whenever two-thirds of both Houses shall think fit. Now, if this is the fact, the propositions of amendment will be found to originate with a higher authority than the original system. The conventions of the States, respectively, have agreed for the people that the State legislatures shall be authorized to decide upon these amendments in the manner of a convention. If these acts of the State legislatures are not good, because they are not specifically instructed by their constituents, neither were the acts calling the first and subsequent conventions.' (Gales and Seaton's Annals of Congress, vol. 1, p. 716.)

"The case of Davis *v.* Ohio (241 U. S., 565) is in no way in conflict with what has been said. It involved that provision of the Constitution that—

"'The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof.'

"If this had been all of the provision, the authority of the legislature would have been as complete as it was in the election of Senators or electors and in the ratifying of amendments. This, however, is not all of the provision. It continues—

"'But the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.'

"It will thus be seen that the ultimate power in this matter is given to Congress, if it chooses to exert such power. The act of Congress in effect prior to 1911 was that the existing districts in a State should continue in force 'until the legislature of such State in the manner herein prescribed shall redistrict such State.' But a new act was passed by Congress in 1911, which provided that the redistricting should be made by a State 'in the manner provided by the laws thereof.' Since Congress had the ultimate power of control, it could itself make the redistricting or require it to be made in such way as it directed. The court therefore held that the language quoted from the act of 1911 was significant. Previously Congress had simply provided that the redistricting should be done by the legislature. But when this act was passed, various States had adopted referendum amendments, and the court was of the opinion that in using the language 'in the manner provided by the laws thereof' Congress had expressed an intention not to leave the matter absolutely to the legislature, but to place it within the legislative power of the State as determined by its own laws. In the absence of any act of Congress on the subject the legislature having been, in the first instance, designated by the Constitution, could have redistricted the State. And if it had been claimed that its action was subject to the referendum of the State constitution, it might have been a good answer to say that it had performed a function devolved upon it by the Constitution of the United States. But the Constitution gave Congress the power to take this matter out of the hands of the legislature. This court merely held that it had done this and by the language used had indicated an intention that the action of the legislature should be subject to all the restrictions which the constitution of the State imposed with respect to the passage of a law.

"V.—The resolution proposing the eighteenth amendment sufficiently showed that two-thirds of the Members of both Houses deemed its proposal necessary.

"The last objection to the validity of the eighteenth amendment is found in the contention that the resolution proposing and reciting that two-thirds of both Houses concurred is insufficient, because, it is insisted, that to comply with Article V, there must be some express declaration or finding by Congress not merely that two-thirds of the Members concurred, but that two-thirds of the Members of both Houses deem the amendment necessary. The argument in support of this highly technical and rather remarkable contention is based principally upon the claim that when the first 10 amendments were being considered by Congress, almost contemporaneously with the adoption of the Constitution, this was the construction put upon Article V by the statesmen of that day who had helped to frame the Constitution, as evidenced by the form used in proposing these first amendments. In making this argument, however, counsel were misled by Gales and Seaton's 'Annals of Congress,' published in 1834. This work (vol. 1, p. 778) published a resolution containing the recital 'having been agreed to by two-thirds of both Houses,' and, at page 779, that the resolution, as reported by a committee and adopted by the House of Representatives, had changed this language so as to read, 'two-thirds of both Houses deeming it necessary,' and that, at volume 1, page 88, it appeared that the resolution had been adopted by the Senate. From this it was assumed that Congress, in proposing the first 10 amendments, had used the language quoted, and for the reason that this was deemed necessary in order to comply with Article V.

"It is conceded that practically all, if not all, of the amendments subsequent to the tenth have been proposed in a resolution using the exact language used in proposing the eighteenth amendment. They say, however, that this doubtless resulted from the fact that when, in 1845, the first volume of the Statutes at Large of the United States was published, by Messrs. Little & Brown, the resolution proposing the first 10 amendments as there published used simply the expression 'two-thirds of both Houses concurring.' Counsel assumed that this was a mistake made by the publishers, and that this mistake led to what they termed 'the loose practice' which has since prevailed in proposing all amendments. The argument is that in this matter the construction placed upon Article V by those who proposed the first 10 amendments should be given controlling weight. The mistake, however, is in the conclusion drawn from what is found in Gales and Seaton's 'Annals of Congress,' and not in the resolution as published in First Statutes at Large, page 97. The original resolution, as adopted by Congress and signed by John Adams, as Vice President, and by the Speaker of the House of Representatives, is on file in the office of the Secretary of State, and a copy of it is printed as an appendix to this brief. It shows that it was correctly published in the First Statutes at Large. The elaborate argument made, therefore, in support of the contention that the form of the resolution thus adopted by a Congress composed in large part of men who were members of the Constitutional Convention ought to be treated as the only proper and constitutional form becomes an argument against the contention that the eighteenth amendment was not properly proposed.

The argument is based upon another fallacy. It is assumed that before an amendment can be proposed two-thirds of the Members of both Houses shall deem it necessary that such an amendment should become a part of the Constitution. Article V does not say this. It says:

"'The Congress, whenever two-thirds of both Houses shall deem *it* necessary, shall propose *amendments* to this Constitution.'

"If it had been intended that two-thirds of the members should deem the *adoption* of the amendment necessary, the language would have been: 'The Congress, whenever two-thirds of both Houses shall deem *them* necessary, shall propose amendments to this Constitution.' What is required is that they shall deem the *proposal* of amendments and not their *adoption* necessary. There may be many reasons why a Member of Congress may honestly deem it necessary to propose an amendment which he himself does not think necessary to be a part of the Constitution. It may be that he represents a constituency which, he is sure, favors and desires such an amendment. It may be that the agitation for an amendment has created such an unsettled condition in the public mind that he deems it necessary to propose an amendment in order that those conditions may be settled.

"Counsel have quoted from the debates in Congress when the eighteenth amendment was pending to show that, for these or similar reasons, Members of Congress voted to propose the amendment, although, as individuals, they were opposed to its adoption. But each Member of Congress is the judge of the reasons which led him to the conclusion that the proposal of a particular amendment is either necessary or unnecessary. The reasons assigned by the Members quoted in the brief do not, therefore, impeach their judgment that it was necessary to propose this amendment. Counsel are fond of appealing to the utterances of distinguished Members of the early Congresses of the United States for a proper interpretation of the Constitution. An examination of the debates in Congress when the first 10 amendments were pending, so far as the reasons leading Members to conclude that the proposal was necessary are concerned, is almost a counterpart of the debates on the eighteenth amendment quoted in the brief. Throughout these debates there was no suggestion that a Member might not, with entire propriety and in entire accord with the Constitution, deem it necessary to propose an amendment the adoption of which he himself did not regard as necessary. Mr. Madison is quoted in Gales and Seaton's 'Annals of Congress' (vol. 1, p. 704), as follows:

"'He would remind gentlemen that there were many who conceived amendments of some kind necessary and proper in themselves; while others who are not so well satisfied of the necessity and propriety may think they are rendered expedient from some other consideration. Is it desirable to keep up a division among the people of the United States on a point in which they consider their most essential rights are concerned? If this is an object worthy the attention of such a numerous part of our constituents, why should we decline taking it into our consideration, and thereby promote that spirit of urbanity and unanimity which the Government itself stands in need of for its more full support?'

"Mr. Clymer is reported, at page 710, as saying:

"'He made this distinction because he did not conceive any of the amendments essential, but as they were solicited by his fellow citizens, and for that reason they were acquiesced in by others, he therefore wished the motion for throwing them into a supplementary form might be carried.'

"The debates are full of similar statements.

"Some of the objections to the validity of the eighteenth amendment which we have previously considered in this brief, if sustained, would invalidate not only that amendment but several others, notably the thirteenth, fourteenth, and fifteenth. The present contention, based upon the theory that the language used by Congress in proposing amendments, from the beginning of the Government, does not comply with the provisions of Article V, will enjoy the distinction, if sustained, of destroying every amendment supposed heretofore to have been adopted and of restoring unaltered to its original form the Constitution as it came from the convention in 1789. This simple result is recognized by counsel, and is met by the suggestion that, since these amendments have never been challenged, they are now a part of the Constitution by prescription. This means that the Constitution may be amended either in the manner provided in Article V or as a result of the fact that, for an indefinite period, a proposed amendment has been supposed to be a part of the Constitution and nobody has challenged its validity.

"It is, of course, true that the people of the United States in adopting the Constitution could ordain that amendments adopted as therein provided should become a part of the Constitution. But we deny that the people of the United States, or of any State, can be bound by any amendment which is not adopted in the manner provided in Article V, no matter how long a time may elapse before some one questions its validity. It may be that, after a long lapse of time, general acquiescence in an amendment may have some weight as indicating the contemporaneous construction of the Constitution. If, however, anything can be established in this connection by anything akin to prescription, it would be that, through the long practice of the Government and the construction of Article V by those dealing with amendments, the propriety of the proposal in the manner adopted with respect to the eighteenth amendment has become the established construction of Article V. But the conclusive answer is that the Congress having, by a two-thirds vote of each House, proposed an amendment, it is indisputable and the highest evidence that they deemed it necessary to make such proposal. Why they reached this conclusion is immaterial. *Res ipsa loquitur.*

"VI.—The Volstead Act, if otherwise constitutional, is effective in the State of New Jersey without the concurrence of the legislature of that State.

"If the eighteenth amendment is a part of the Constitution, it is next insisted that the Volstead Act, even though otherwise constitutional, is not effective in the State of New Jersey, because the legislature of that State has not concurred in it. This

argument is based upon the second section of the amendment, which is that—

"'The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.'

"It is said that, by reason of this section, no law for the enforcement of the eighteenth amendment is valid unless it represents, in some way, the concurrent action of Congress and the legislature of the State. In other words, to be valid, a law must be the act of both Congress and the legislature of the State. The mandate of the amendment is made to read as though it was that the article shall be enforced by legislation in which the Congress and the several States concur.

"There is an express purpose, of course, that Congress shall have power to legislate for the enforcement of the amendment. The only qualification or limitation of the power so conferred is that instead of being exclusive it shall be concurrent with a like power in the several States. It is not required that there shall be joint action by Congress and the States, or that the legislation enacted by the one shall be concurred in by the other. A new rule of fundamental law was introduced into the Constitution. It was deemed necessary to give Congress the power to enforce it. Congress might have been given the exclusive power. The use of the word 'concurrent' conclusively negatives any such purpose.

"The contention of appellant is that concurrent power necessarily means a power in the exercise of which Congress and the States do not act separately and independently, but must act jointly, or, at least, in cooperation and by mutual consent and agreement. If this be correct, then the eighteenth amendment is a much more startling innovation than has heretofore been imagined by its stanchest opponents. In a few instances certain actions by the States are subject to the consent of Congress, but whenever the Constitution intended such a thing it provided it in express terms and did not use the phrase 'concurrent power.' In the matter of the enactment of general laws no such thing has ever been known in the history of this country as laws in the enactment of which both Congress and the legislatures of the several States participate. Each acts for a separate and distinct government, and it is wholly inconsistent with the governmental functions of each to require them to act in concert in the adoption of laws. Each enacts its own laws to be enforced by the courts of its own government, subject, however, to the jurisdiction of the Federal courts to determine whether State legislation conflicts with the Federal Constitution.

"It is true that the word 'concurrent' has various meanings, according to the connection in which it is used. It may undoubtedly be used to indicate that something is to be accomplished by two or more persons acting together. It is equally true that it means in other connections a right which two or more persons, acting separately and apart from each other, may exercise at the same time. It would be idle, however, to go into all the meanings which may attach to this word. In certain connections it has a well fixed and established meaning, which is controlling in this case. When we speak of the concurrent jurisdiction of courts, there is no room for misunderstanding the term. We never understand it to mean a jurisdiction in the exercise of which both of the courts must have a part. Quite to the contrary, it means that the two courts have an equal right to exercise, each acting without the participation of the other, the same jurisdiction.

"It is to be noted that section 2 does not say that *legislation shall be concurrent*, but that the *concurrent power* to legislate shall exist. The concurrent power of the States and Congress to legislate is nothing new. And its meaning has been too long settled, historically and judicially, to now admit of question. The term has acquired a fixed meaning through its frequent use by this court and eminent statesmen and writers in referring to the concurrent power of Congress and the States to legislate. Practically all the powers of government before the Constitution were in the people of the several States. Such powers as were not delegated to the Federal Government remained in the people of the State. Where Congress was given the exclusive power to legislate on a certain subject, the power of the State over that subject was destroyed. If the power of Congress to legislate, however, was not made by the Constitution exclusive, the right of the State to legislate on that subject continued, and the Congress and the States were said to have concurrent power to legislate. There were numerous instances of this kind, and this is the meaning which the term 'concurrent power' in this connection has had from the beginning.

"In the thirty-second number of the Federalist, as quoted in the brief of counsel in Fox *v.* State of Ohio (5 How., 410, 418), it was said:

"'An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts, and whatever power might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to Congress. This exclusive delegation, or rather this alienation of State sovereignty, would only exist in three cases: Where the Constitution in express terms granted an exclusive authority to the Union; where it granted, in one instance, an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant. I use these terms to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean, where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority.'

"Of course, as used here, the expression 'concurrent jurisdiction' can not refer to anything except separate, distinct, and independent action by the States and by Congress, respectively. It is power thus separately exercised by the two Governments that this court has from the beginning described as 'concurrent power.' The court has also kept in mind always the fact that many of the powers conferred upon Congress are similar to those already existing in the State government, and that, unless the intention to make the power of Congress exclusive was expressed or necessarily implied, the power of the State remained, subject only to the constitutional provision that in case of conflict the laws of Congress should be paramount. Thus, in Houston *v.* Moore (5 Wheat., 1, 47), Mr. Justice Story said:

"'The Constitution containing a grant of powers, in many instances, similar to those already existing in the State governments, and some of these being of vital importance also to State authority and State legislation, it is not to be admitted that a mere grant of such powers, in affirmative terms, to Congress does, per se, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the States unless where the Constitution has expressly, in terms, given an exclusive power to Congress or the exercise of a like power is prohibited to the States or there is a direct repugnancy or incompatibility in the exercise of it by the States. The example of the first class is to be found in the exclusive legislation delegated to Congress over places purchased by the consent of the legislature of the State in which the same shall be for forts, arsenals, dockyards, etc.; of the second class, the prohibition of a State to coin money or emit bills of credit; of the third class, as this court have already held, the power to establish a uniform rule of naturalization (Chirac *v.* Chirac, 2 Wheat., 258, 269), and the delegation of admiralty and maritime jurisdiction. (Martin *v.* Hunter, 1 Wheat., 304, 337; and see The Federalist, No. 32.) In all other cases not falling within the classes already mentioned it seems unquestionable that the States retain concurrent authority with Congress not only upon the letter and spirit of the eleventh amendment of the Constitution but upon the soundest principles of general reasoning. There is this reserve, however, that in cases of concurrent authority, where the laws of the States and of the Union are in direct and manifest collision on the same subject, those of the Union, being "the supreme law of the land," are of paramount authority, and the State laws, so far, and so far only, as such incompatibility exists, must necessarily yield.'

"And in the same case, at page 54, it was said:

"'In considering this question it is always to be kept in view that the case is not of a new power granted to Congress where no similar power already existed in the States.'

"Here, in speaking of concurrent power and concurrent authority, it is impossible to say that anything was referred to except authority or power which the States and Congress could each exercise, acting separately and independently. Indeed, it is expressly said that where the granting of power to Congress is in general terms, and the power is not of such a nature as to be necessarily exclusive, it is to be exercised by Congress, with the States retaining a right to exercise it at the same time, subject only to the qualification that, in the case of a direct conflict between State and Federal laws the latter must prevail. It is true what has been quoted above was said in

the course of a dissenting opinion, but it is not in conflict with anything that was said in the opinion of the court and is an accurate statement of the rule which has always been recognized by this court.

In the case of Prigg *v.* Pennsylvania (16 Pet., 536) in considering a State statute, the court said, at page 621:

"'The remaining question is, whether the power of legislation upon this subject is exclusive in the National Government, or concurrent in the States, until it is exercised by Congress.'

"Here the court describes a power which may be exercised by Congress and which may also be exercised independently by the States as a *concurrent power* of the two.

"In Gibbons *v.* Ogden (9 Wheat., 1, 209) the expression 'concurrent power' was used in the sense which we attribute to it when the court said, speaking of the possibility that an act of Congress and an act of the legislature of the State might come into collision, that—

"'Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or in virtue of a power to regulate their domestic trade and police.'

"In Covington, etc., Bridge Co. *v.* Kentucky (154 U. S., 204) the court described the class of Federal and State statutes which may properly be said to have been enacted in the exercise of a concurrent power. It was said, at page 209:

"'The adjudications of this court with respect to the power of the States over the general subject of commerce are divisible into three classes: First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the States can not interfere at all.'

"And at page 211, referring to the second class—that is, those in which the States may act in the absence of legislation by Congress—it was said:

"'Within the *second* class of cases—those of what may be termed concurrent jurisdiction—are embraced laws for the regulation of pilots.'

* * * * * * *

"In the Passenger Cases (7 How., 282, 396), in holding that the power of Congress over the subject of interstate commerce was necessarily exclusive, it was said:

"'A concurrent power in the States to regulate commerce is an anomaly not found in the Constitution. If such power exist, it may be exercised independently of the Federal authority.'

"This was said in connection with the proposition that the power to regulate is necessarily an exclusive power.

"It will thus be seen that in legal nomenclature the concurrent power of the States and of Congress is clearly and unmistakably defined. It simply means the right of each to act with respect to a particular subject matter separately and independently.

"Whether the intention of the Constitution, in conferring legislative power upon Congress, was to make that power exclusive may frequently be the subject of controversy. Undoubtedly the general power of taxation conferred upon Congress is not exclusive. The clearest example of concurrent power in Congress and the States is perhaps to be seen in the power of taxation. Congress may tax incomes. The States, acting separately and independently and for their own purposes, may tax the same incomes. In other words, they have the concurrent power by legislation to impose taxes. The power to coin money, if it depended alone upon the section of the Constitution which confers that power upon the Congress, would likewise not be exclusive. But another provision of the Constitution denies the right to coin money to the States, and thus the power of Congress becomes exclusive. The power to regulate interstate commerce is not declared by the Constitution to be exclusive, nor is it, in terms, prohibited to the States. But the power to *regulate* necessarily includes all that may be done for that purpose. It is incomplete unless it can be exerted to its full extent. This power of Congress, therefore, is of necessity and from its very nature exclusive. In other cases, however, where the concurrent power exists, in whatever way either Congress or the States choose to exert it, it is exerted by each independently of the other.

"From what has been said it is evident that if the eighteenth amendment had simply provided that Congress should have the power to regulate or prohibit the manufacture, sale, and transportation of intoxicating liquors throughout the United States, the power, like that to regulate interstate commerce, would have been exclusive. If the enforcement section had simply conferred power, as the thirteenth amendment did, upon Congress without mentioning the States, it is by no means certain that the States would not still have had the power which they have always had to prohibit the liquor traffic within their borders. Congress was given the power to enforce the thirteenth amendment, and it has enacted a statute prohibiting, throughout the United States, every form of slavery or involuntary servitude. Some of the States already had laws prohibiting slavery. It would hardly be said that these laws were nullified by the adoption of the amendment or that offenders against them could not be punished in the States. And if to-day a State should enact a law making it unlawful for one man to hold in involuntary servitude another, it is difficult to see upon what principle it could be said that such a law would be invalid and could not be enforced in the State courts. Certainly it would not conflict with the thirteenth amendment, and would be a valid law unless it could be said that the exclusive power to legislate on that subject had been given to Congress.

"There is nothing new in the proposition that a single act may be a violation of both State and Federal laws and punishable in the courts of the same Government. Indeed, one of the general provisions of the Revised Statutes under the Title of Crimes is section 5328, as follows:

"'Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.'

"It is an offense against the laws of the United States to pass counterfeit money. (United States *v.* Marigold, 9 How. 559.) It has, nevertheless, been held that a State may make the passing of counterfeit money an offense against its laws and punishable in its courts. (Fox *v.* State of Ohio, 5 How. 410, 432.) It is true, in the case of the passing of counterfeit money, it may be said that the act of Congress is justified by the power of the Government to protect the money coined by it, and that the object of the State legislation is to protect its citizens against fraud. But the fact remains that a single act by the individual is an offense against both laws. This latter fact prevents a conviction or acquittal in the courts of one government from being a bar to a prosecution in the courts of the other. It is possible that the second section of the eighteenth amendment, as it expressly contemplates action by both governments, may be given such a meaning that a prosecution in the courts of one government may be held to bar a prosecution for the same offense in the courts of the other. This, however, is a question which can only be decided when it arises. The present contention is simply that the act of Congress is not valid until concurred in by the State. It is submitted that there is in the authorities no warrant for such a contention.

"It appears that since the eighteenth amendment went into effect the State of New Jersey has passed a prohibition law. It has not seen fit to make this law quite so rigid as the Volstead Act. The New Jersey act prohibits manufacture, sale, or transportation of intoxicating liquors. Congress in adopting the Volstead Act thought that, in order to effectively prohibit intoxicating liquors, it was necessary to prohibit all beverages containing as much as one-half of 1 per cent of alcohol. The Legislature of New Jersey thought the object in view could be accomplished without going so far, and hence confined its prohibition to beverages containing more than 3½ per cent of alcohol. Each is a valid law. The one is to be enforced through the courts of the United States, the other through the courts of the State of New Jersey. A man who sells whisky, for instance, violates both laws. He may be convicted in the courts of either. When he is so convicted in one the question may arise as to whether he can again be prosecuted in the other. On the other hand, if a man sells beer containing 2.75 per cent of alcohol he does not violate the New Jersey law, and therefore can not be prosecuted in the courts of that State. But whether such beer is actually intoxicating or not the Congress has deemed it necessary to include it in the prohibition in order to effectually prohibit intoxicating liquors. The seller of such beer in New Jersey, therefore, is subject to prosecution and punishment in the Federal courts, although not in the State courts.

"There is no actual conflict between the two laws. They both prohibit certain things. The act of Congress prohibits some other things which the State simply has not prohibited. Between these laws, then, it would hardly seem that any question can arise as to whether the one or the other controls—they are both valid laws. If, however, the State of New Jersey should pass a law expressly providing that 2¾ per cent beer should be lawful in that State there would be a conflict between that law and the Volstead Act. In the event of such a conflict it would doubtless be held that the law of New Jersey would be void because in conflict with a valid law of Congress.

"There is a striking analogy between this situation and that brought about by the passage of the Reed amendment. After the enactment of the Webb-Kenyon law many States prohibited

the shipment of liquor to points within their borders and thus created an offense punishable in their own courts. Later, the Reed amendment prohibited the transportation in interstate commerce of liquor for beverage purposes into a dry State. One who shipped liquor into such a State committed an offense against both the State and Federal law and was subject to prosecution in both the State and Federal courts. But the State and Federal prohibitions were not always coextensive. In West Virginia the law permitted one to personally bring in a limited quantity for his own use. But, though not subject to prosecution in the State courts, he could be prosecuted in the Federal court for a violation of the Reed amendment. (United States *v.* Dan Hill, 248 U. S., 420.)

"The debates in Congress at the time the amendment was proposed throw but little light on what was understood by concurrent power. In a recent speech in Congress Chairman Volstead has, however, given such a clear exposition of concurrent power that we venture to print, as an appendix to this brief, his remarks as published in the Appendix to the CONGRESSIONAL RECORD of March 23, 1920.

"It is respectfully submitted that the validity of the Volstead Act does not depend in any sense upon whether it has been concurred in by the State of New Jersey or not.

"*VII.—In order to enforce, with any degree of efficiency, the eighteenth amendment a definition of intoxicating liquor was essential—The definition provided by the Volstead Act includes nothing which Congress could not properly deem necessary to enforce the provisions of the amendment, and is therefore not arbitrary.*

"The specific prohibition of the eighteenth amendment is directed against the manufacture, transportation, importation, or exportation of *intoxicating liquors for beverage purposes*. Both by section 2 of the amendment and by the concluding paragraph of Article I, section 8, of the Constitution, Congress is given the power to enact legislation that may be appropriate to enforce the prohibition.

"Section 3 of Title II of the Volstead Act follows the eighteenth amendment and makes it unlawful to manufacture, transport, import, sell, or export *intoxicating liquors for beverage purposes*.

"Section 1 of Title II of the Volstead Act, as hereinbefore quoted, defines, for the purposes of the act, 'intoxicating liquor.'

"Section 37 provides for regulations under which the beverages mentioned in the proviso to that section may be manufactured and sold, the regulations being designed to prevent the evasions of the prohibitory law through such manufacture and sale.

"The definition above quoted is assailed as being beyond the power of Congress to enact. It is said that the amendment authorizes Congress to prohibit only *intoxicating liquor*, and that a beverage which does not contain largely more than one-half of 1 per cent of alcohol is not *intoxicating*. The contention is that Congress, being empowered only to prohibit intoxicating liquors, can not, by definition, make a beverage intoxicating which is not, in fact, intoxicating within the meaning of the language of the amendment. For this reason it is said that the definition adopted is untruthful and arbitrary, and therefore unconstitutional.

"It is true, of course, that Congress can not extend its powers by giving to the language used in conferring those powers an arbitrary meaning which does not belong to it. But so long as it has the constitutional power to do the thing which it does, it may use the words employed by it for that purpose in any sense which it chooses to give them. In other words, if in order to enforce the eighteenth amendment it has the power to prohibit the sale or manufacture of beverages containing less alcohol than is necessary to render them *per se* intoxicating, it is immaterial whether it provides separately for their prohibition or accomplishes the same thing by including them, for the purposes of the act, in the definition of intoxicating liquor. If, therefore, for any reason it is competent for Congress to prohibit such beverages as a means for securing the enforcement of the prohibition against *intoxicating liquors*, the definition adopted in the Volstead Act can not be successfully assailed.

"It is not denied that legislation, even if apparently an exertion of the police power, may be declared invalid because arbitrary and discriminatory; that such exertion of power may be so arbitrary and discriminatory as to amount to a taking of property; that legislation enacted for the ostensible purpose of putting into execution an express power may be invalid upon the ground that the thing enacted has no reasonable relation to the exertion of such a power; and that the nature of a legislative act is determined by what it, in effect, is and not necessarily by what the legislative body chooses to call it. There is, therefore, no quarrel with the authorities cited by those who assail this act, such as Interstate Commerce Commission *v.* Louisville & Nashville R. R. Co., 227 U. S., 88, 91; Dobbins *v.* Los Angeles, 195 U. S., 223, 241; Adair *v.* United States, 208 U. S., 161; McLean *v.* Arkansas, 211 U. S., 539; Adams *v.* Tanner, 244 U. S., 590; St. Louis, I. M. & S. *v.* Wynne, 224 U. S., 354; Cotting *v.* Kansas City, etc., 183 U. S., 79; Yick Wo *v.* Hopkins, 118 U. S., 356; Galveston, etc., *v.* Texas, 210 U. S., 217; Choctaw, etc., *v.* Harrison, 235 U. S., 292, 298; Western Union *v.* Kansas, 216 U. S., 1, 37; Monongahela *v.* United States, 148 U. S., 312, 327; United States *v.* Dewitt, 9 Wallace, 41, 44; Hodges *v.* United States, 203 U. S., 1; United States *v.* Reese, 92 U. S., 214; James *v.* Bowman, 190 U. S., 127; Civil Rights Cases, 109 U. S., 1. But wherever it can be said that a particular enactment has a reasonable relation to the accomplishment of that which Congress is empowered to do, and Congress has determined that such an enactment is necessary for that purpose, the courts do not inquire into the correctness of the judgment of Congress or the wisdom of the policy adopted by it. In the present case, then, the question is, Does the prohibition of an alcoholic liquor, even though not itself intoxicating, have any reasonable relation to the effective prohibition of intoxicating liquors? If so, there has been conferred upon Congress the express power to enact such a prohibition, and there is no constitutional ground upon which the definition in question can be successfully challenged.

"It is sought to bring the definition above quoted within the authority of the cases just cited, and by applying the rules there applied, to reach the conclusion that this definition is arbitrary, and has no reasonable relation to the enforcement of the eighteenth amendment. It is idle now, however, to speculate as to whether these rules might be construed as justifying the conclusion thus urged. This court has already too clearly defined the extent to which a legislative body may properly go for the purpose of enforcing such a prohibition in the case of both State and Federal legislation.

"Of course, it is conceded that Congress can not, for the purpose of exerting any power which is conferred upon it, legislate so as to abridge any of the privileges or immunities of citizens of the United States. But the right even to own or hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen which can not be abridged. As said by Mr. Justice McReynolds in Crane *v.* Campbell (245 U. S., 304, 308):

"'We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge. A contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase, or transportation of such articles, the only feasible ways of getting them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the State.'

"It had previously been said in the same case:

"'It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guaranties of the fourteenth amendment.' (Id., 307.)

"The right of a State to prohibit the possession of intoxicating liquors was treated, however, as arising from and being implied in the right to prohibit the manufacture, purchase, sale, and transportation. Thus it was said:

"'As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. (Booth *v.* Illinois, 184 U. S., 425; Silz *v.* Hesterberg, 211 U. S., 31; Murphy *v.* California, 225 U. S., 623; and Rast *v.* Van Deman & Lewis Co., 240 U. S., 342, 364.) And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose.' (Id., 307–308.)

"In other words, entirely aside from the question as to whether a State has the independent power to prohibit the *possession* of intoxicating liquors, it has the power to enact such a prohibition if deemed necessary to make effective its prohibition against the *sale and manufacture* of intoxicating liquors. It will be said, however, that that case, in all its aspects, involved only *intoxicating liquors* which were expressly included in the conceded power to prohibit the sale and manu-

facture. It is then argued that, in order to make effective the prohibition of a noxious article, it is incompetent to also prohibit one which is not noxious in itself. This contention, however, was expressly and emphatically rejected in Purity Extract Co. *v.* Lynch (226 U. S., 192). In that case a conviction was sustained for a violation of the prohibitory law of the State of Mississippi, although it was stipulated that the malt beverage in question, which was included within the broad terms of the prohibition, contained no alcohol and was in no sense intoxicating. Speaking of the decision in that case this court, through Mr. Justice Brandeis, said in Ruppert *v.* Caffey, decided January 5, 1920:

"'Purity Extract Co. *v.* Lynch (226 U. S., 192) determined that State legislation of this character is valid and set forth with clearness the constitutional ground upon which it rests: "When a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government." (P. 201.) * * * "It was competent for the Legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited, among other things, the sale of 'malt liquors.' In thus dealing with a class of beverages which in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the endeavor to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds, and fetter the enforcement of the law. A contrary conclusion logically pressed would save the nominal power while preventing its effective exercise." (P. 204.) * * * "The State, within the limits we have stated, must decide upon the measures that are needful for the protection of its people, and having regard to the artifices which are used to promote the sale of intoxicants under the guise of innocent beverages, it would constitute an unwarranted departure from accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved power."' (P. 205.)

"Here again the right of the legislature to prohibit a beverage not itself intoxicating and entirely harmless was not based on any independent right to do so. It was based alone upon the ground that it was necessary to prevent evasions of the law prohibiting intoxicating and harmful beverages. Undoubtedly, then, it is too well established to admit of controversy that a State has ample power to pass a prohibition measure in the exact terms of the Volstead Act. If Congress, therefore, has as broad a power as the States have always had to enforce the prohibition of intoxicating liquors, the provision or definition assailed in this case was a valid exertion of its constitutional power. That Congress, in the exercise of its war powers, has exactly the same power in this regard as the States have in the exercise of their police powers is settled. The war prohibition act of November 21, 1918 (40 Stat., ch. 212, pp. 1045, 1046), prohibited the manufacture or sale of certain beverages. Construing that act, however, this court held that, *by its own terms*, the prohibition was limited to *intoxicating liquor*. (Standard Brewery Co. *v.* United States, decided January 5, 1920.) In Title I of the Volstead Act, passed October 28, 1919, and intended to provide for the better enforcement of the act of November 21, 1918, however, it was provided in section 1 that *thereafter* the language used in the act of November 21, 1918, should be construed so as to include beverages of the class named which might not, in fact, be intoxicating. This was accomplished by the following provision:

"'The words "beer, wine, or other intoxicating malt or vinous liquors" in the war prohibition act shall be hereafter construed to mean any such beverages which contain one-half of 1 per cent or more of alcohol by volume: *Provided*, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter, or wine is produced, if it contains less than one-half of 1 per cent of alcohol by volume, and is made as prescribed in section 37 of Title II of this act, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in or from such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe.'

"By this it will be seen the beverages prohibited by the war prohibition act were defined exactly as intoxicating liquors were defined in Title II of the Volstead Act, intended to enforce the eighteenth amendment. Precisely the same objection was made to the war prohibition act that is now made to the present act. The question was whether Congress, in the exercise of its war powers, could enact so broad a prohibition. This court in Ruppert *v.* Caffey, above, regarded the case as turning upon the question of whether, in the exercise of the war powers, Congress had as ample power over intoxicating liquors as the States had in the exercise of their police powers, and said:

"'If the war power of Congress to effectively prohibit the manufacture and sale of intoxicating liquors in order to promote the Nation's efficiency in men, munitions, and supplies, is as full and complete as the police power of the States to effectively enforce such prohibition in order to promote the health, safety, and morals of the community, it is clear that this provision of the Volstead Act is valid and has rendered immaterial the question whether plaintiff's beer is intoxicating. For the legislation and decisions of the highest courts of nearly all of the States establish that it is deemed impossible to effectively enforce either prohibitory laws or other laws merely regulating the manufacture and sale of intoxicating liquors if liability or inclusion within the law is made to depend upon the issuable fact whether or not a particular liquor made or sold as a beverage is intoxicating. In other words, it clearly appears that a liquor law, to be capable of effective enforcement must, in the opinion of the legislatures and courts of the several States, be made to apply either to all liquors of the species enumerated, like beer, ale, or wine, regardless of the presence or degree of alcoholic content; or if a more general description is used, such as distilled, rectified, spirituous, fermented, malt, or brewed liquors, to all liquors within that general description regardless of alcoholic content; or to such of these liquors as contain a named percentage of alcohol; and often several such standards are combined so that certain specific and generic liquors are altogether forbidden and such other liquors as contain a given percentage of alcohol.'

"And after referring to Purity Extract Co. *v.* Lynch, as quoted above, the court continued:

"'That the Federal Government would, in attempting to enforce a prohibitory law, be confronted with difficulties similar to those encountered by the States is obvious; and both this experience of the States and the need of the Federal Government of legislation defining intoxicating liquors as was done in the Volstead Act was clearly set forth in the reports of the House Committee on the Judiciary in reporting the bill to the Sixty-fifth Congress, third session, Report 1143, February 26, 1919, and to the Sixty-sixth Congress, first session, Report 91, June 30, 1919. Furthermore, recent experience of the military forces had shown the necessity of fixing a definite alcoholic test for the purpose of administering the limited prohibitory law included in the selective-service act of May 18, 1917, chapter 15, section 12, 40 Statutes, 76, 82. And the Attorney General, calling attention specifically to the claim made in respect to the 2.75 per cent beer, had pointed out to Congress that definition of intoxicating liquor by fixed standards was essential to effective enforcement of the prohibition law. It is therefore clear both that Congress might reasonably have considered some legislative definition of intoxicating liquor to be essential to effective enforcement of prohibition and also that the definition provided by the Volstead Act was not an arbitrary one.

"'Plaintiff's argument is equivalent to saying that the war power of Congress to prohibit the manufacture and sale of intoxicating liquors does not extend to the adoption of such means to this end as, in its judgment, are necessary to the effective administration of the law. * * * The police power of a State over the liquor traffic is not limited to the power to prohibit the sale of intoxicating liquors supported by a separate implied power to prohibit kindred nonintoxicating liquors so far as necessary to make the prohibition of intoxicants effective; it is a single broad power to make such laws, by way of prohibition, as may be required to effectively suppress the traffic in intoxicating liquors. Likewise the implied war power over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors but will effectually prevent their sale.'

"It is thus beyond doubt that a State in the exercise of its police power may make such laws, by way of prohibition, as in the judgment of its legislature may be required to effectively suppress the traffic in intoxicating liquors. It is likewise decided that, in the exercise of its war powers, Congress has the same broad power to enact such measures as may be necessary to suppress the same traffic. In both cases it has been expressly held that, if deemed necessary by the legislative body, the means adopted may be the inclusion, in the definition of intoxicating liquors, of beverages containing no alcohol, or containing one-half of 1 per cent alcohol.

"When the national prohibition act was passed Congress had no independent police power over the liquor traffic. It was held, however, that, when necessary to the full and efficient exertion of its war powers, it had precisely the same power over this traffic that the States had. Now, by virtue of the eighteenth amendment, there has been conferred upon it the *express* power to enact such legislation as may be necessary to suppress the traffic in intoxicating liquors throughout the United States, and, to the extent necessary to do this, it is endowed with the police powers which have heretofore been exercised by the States alone. Certainly, if in the exertion of its war powers it had the right, when deemed necessary, to suppress the liquor traffic, and, in order to effectively accomplish that end, had the power to include, in its prohibition, liquors which, though not intoxicating, could be used as a means of evading the law, it can not be doubted that, since it has acquired the express power to prohibit, as a police measure, the liquor traffic, the power to enact legislation deemed necessary to accomplish that result can not be more limited than when it was merely exercising its war powers. In the latter case it was held to have the same power which the State had when legislating to promote the health, safety, and morals of the community.

"The regulation or suppression of the liquor traffic has long been recognized as a legitimate exercise of power to promote the safety, health, and morals of the community. When, therefore, Congress was empowered to suppress the liquor traffic throughout the United States it was in that regard clothed with the same power, acting for the whole country, which the several States had previously exerted acting for themselves. Such measures, therefore, as have been held to be appropriate enforcement measures when adopted by the States must now of necessity be held equally appropriate when enacted by Congress to enforce the eighteenth amendment.

"This rule, as shown above, has been applied when Congress had the power to suppress the liquor traffic only when it deemed such suppression necessary for the proper exertion of its war power. This forecloses any question as to the applicability of the rule when Congress is exerting police powers expressly and directly conferred for the purpose of suppressing the liquor traffic.

"Some question is made, based upon the fact that, under the Volstead Act (41 Stat., ch. 83, pp. 305 et seq.), a beverage made by the process by which beer is made, but containing less than one-half of 1 per cent alcohol, can not be sold at all if called beer, but may, under certain conditions, be sold under other names. As seen above, this identical provision was in the definition which Congress applied to the war prohibition act, and which this court held valid. This would seem to be a conclusive answer. It is, however, difficult to comprehend the force of the argument based on the fact above stated. Certainly it is not a matter of which the brewer can complain. The authorities cited show conclusively that Congress might, if it had seen fit, have prohibited all malt liquors containing as much as one-half of 1 per cent, or, indeed, whether they contained any alcohol or not. If all were, therefore, subject to valid prohibition, no just complaint can be made because Congress did not go as far as it might have gone.

"Obviously Congress recognized that there were a number of beverages, including whisky, brandy, beer, and wine, which, from time immemorial, have been known and understood by the public to be intoxicating liquor. It could be very well said, therefore, that any practical and efficient enforcement of the law would be very greatly impeded if any articles whatever were permitted to be sold under any of these well-known names, and that it was therefore necessary and important to avoid the necessity of showing, in any case, the quantity of alcohol contained in any beverage offered to the public as beer, wine, whisky, or brandy. On the other hand, it seems to have been recognized that there might be conditions under which beverages made by the same process and containing so little alcohol as to be entirely innocuous might be sold without serious interference with the enforcement of the law. Such sales, therefore, were not prohibited provided they were not made under one of the names which the public had so long been accustomed to associate exclusively with intoxicating drinks. If, therefore, the alleged discrimination was one of which those previously engaged in manufacturing beer could complain, instead of being a provision in their favor, as it is, there is ample ground for saying that there was nothing arbitrary in drawing a distinction between an article sold as beer and a somewhat similar article sold under another name.

"Clearly the contention now made against the definition in question has been unmistakably foreclosed by the recent decisions of this court.

"VIII.—The fact that by the passage of the Volstead Act on October 28, 1919, and the going into effect of the second title of that act and the eighteenth amendment on January 16, 1920, the sale of nonintoxicating beer containing as much as one-half of 1 per cent of alcohol was prohibited by the war prohibition act does not render Title II of the Volstead Act invalid, even as to the sale of such beer lawfully manufactured before October 28, 1919.

"Under the heading 'The destruction of lawfully preexisting property is unconstitutional,' an argument is made in support of the contention that Title II of the Volstead Act is invalid in so far as it prohibits the sale of nonintoxicating beer lawfully manufactured before the passage of that act on October 28, 1919. This is upon the theory that the result of that act is to destroy the value of such beer without making compensation.

"It can not now seriously be contended that to the extent that a financial loss results to individuals from the passage of a law in the rightful exercise of the police power there is a taking of property which requires compensation to be made to the owner. The manufacture and sale of liquor where it was once lawful can not be prohibited without a resulting loss to those engaged in the business, but this exercise of the police power is not a taking of property. (Mugler *v.* Kansas, 123 U. S., 623.) This is the clearly established rule both with respect to State and Federal legislation. In Hamliton *v.* Kentucky Distilleries & Warehouse Co., decided by this court December 15, 1919 (251 U. S., 146, 156–157), it was said:

"'If the nature and conditions of a restriction upon the use or disposition of property is such that a State could, under the police power, impose it consistently with the fourteenth amendment without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the fifth amendment without making compensation; * * *.'

"It is not understood that any claim is now asserted that a government enacting prohibition is bound to make compensation to those who thereby become losers. Indeed, the general rule to the contrary seems to be conceded, and the insistence is limited to a claim that with respect to lawfully preexisting property, even assuming that its sale or disposition may be prohibited when deemed necessary to accomplish some object within the legislative power, either compensation must be made for such property or a reasonable time allowed for its disposition after the passage of the act.

"Title II of the Volstead Act was enacted on October 28, 1919, and did not become effective until January 16, 1920. During the intervening time, however, the war prohibition act was in effect and, as amended by Title I of the Volstead Act, it prohibited the sale for beverage purposes in this country of the so-called nonintoxicating beer, the manufacture of which prior to October 28, 1919, had been lawful. It is therefore true that brewers who had on hand on October 28, 1919, a stock of these lawfully manufactured beverages had no opportunity, before the eighteenth amendment went into effect, to dispose of such beverages except for export purposes.

"In the case of Hamilton *v.* Kentucky Distilleries & Warehouse Co., supra, there was a contention that the *war prohibition act* was invalid because its result was to destroy without compensation the value of spirituous liquors previously manufactured. That act, however, did not take effect for seven months after its passage, and the court said:

"'We can not say that seven months and nine days was not a reasonable time within which to dispose of all liquors in bonded warehouses on November 21, 1918.' (Id., p. 158.)

"If the question of whether a reasonable time was allowed was important, Title II of the Volstead Act, which is now involved, allowed from October 28, 1919, to January 16, 1920, in which these nonintoxicating beverages could be disposed of. If this was all, that length of time would certainly be as reasonable in the case of beverages which are commonly manufactured for quick sale as seven months would be in the case of bonded liquors which require a long period of ripening before they are ready for sale. It is doubtless true that in passing the Volstead Act Congress assumed that the war would be terminated and the war prohibition act no longer effective before January 16, 1920, and that, therefore, there would be a period in which these nonintoxicating beverages could be disposed of. As it turned out, however, this was not the case, and there was no interval in which sales could lawfully be made. These circumstances give rise to the present question.

"As against the sale of nonintoxicating beverages manufactured prior to October 28, 1919, then the question is whether the Volstead Act is invalid because no opportunity was given to dispose of such beverages.

"If what has been quoted above from Hamilton *v.* Kentucky Distilleries & Warehouse Co. had been all that the court said, it might be regarded as implying that if the time allowed had not been reasonable there would have been ground for the contention made; but the court added this, after saying that the time allowed could not be regarded as unreasonable:

"'And if, as is suggested, the liquors remaining in bond November 21, 1918, were not yet sufficiently ripened or aged to permit them to be advantageously disposed of within the limited period of seven months and nine days thereafter, the resulting inconvenience to the owner, attributable to the inherent qualities of the property itself, can not be regarded as a taking of property in the constitutional sense.' (Id., p. 158.)

"This contains a clear intimation, if not an express holding, that a prohibition law is valid without regard to whether it takes effect immediately or whether its result is to destroy the value of property lawfully acquired previously.

"The questions suggested, however, were squarely before the court in Ruppert *v.* Caffey, supra. In that case a corporation which had on hand a stock of lawfully manufactured nonintoxicating beverages on October 28, 1919, complained of Title I of the Volstead Act because it went into effect at once, and gave no opportunities to dispose of such beverages. The court said this:

"'Does the fact that Title I of the Volstead Act took effect upon its passage render section 1 invalid as against the plaintiff? Prohibition of the manufacture of malt liquors with alcoholic content of one-half of 1 per cent or more is permissible only because, in the opinion of Congress, the war emergency demands it. If, in its opinion, the particular emergency demands the immediate discontinuance of the traffic, Congress must have the power to require such discontinuance. To limit the power of Congress so that it may require discontinuance only after the lapse of a reasonable time from the passage of the act would seriously restrict it in the exercise of the war powers. Hardship resulting from making an act take effect upon its passage is a frequent incident of permissible legislation; but whether it shall be imposed rests wholly in the discretion of the lawmaking body. That the prohibition of the manufacture of nonintoxicating beer, if permissible at all, may be made to take effect immediately follows necessarily from the principle acted upon in Mugler *v.* Kansas (123 U. S. 623, 669), since the incidents attending the exercise by Congress of the war power to prohibit the liquor traffic are the same as those that attend the State's prohibition under the police power. In the Mugler case, also, the breweries were erected at a time when the State did not forbid the manufacture of malt liquors; and there it was alleged that the prohibition, which became effective almost immediately, would reduce the value of one of the breweries by three-fourths and would render the other of little value. Here, as there, the loss resulting to the plaintiff from inability to use the property for brewery purposes is an incident of the peculiar nature of the property and of the war need which, we must assume, demanded that the discontinuance of use be immediate. Plaintiff can not complain, because a discontinuance later would have caused him a similar loss. This, indeed, appears to be conceded so far as concerns the brewery and appurtenances. The objection on the ground that the prohibition takes effect immediately is confined to the prohibition of the sale of the beer on hand at the time of the passage of the act. But as to that also we can not say that the action of Congress was unreasonable or arbitrary.'

"Thus it was held that that act was not invalid because it took effect immediately, and, it may be added, it is that act at last which deprived the brewers of an opportunity to sell their stock of beverages before the eighteenth amendment went into effect. Moreover, the court expressly held that whether legislation which is otherwise permissible shall take effect so promptly as to result in hardship is wholly in the discretion of the lawmaking power. This is because the losses resulting from such legislation do not constitute a taking of private property. As said in Ruppert *v.* Caffey, supra:

"'Here, as in Hamilton *v.* Kentucky Distilleries & Warehouse Co., supra, there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use.'

"Since, therefore, the validity of an act of this kind is not adversely affected by the fact that it goes into immediate effect, the only question is the power of a Government authorized to enact prohibition legislation to apply the prohibition to liquors acquired before the enactment of the law. In Hamilton v. Kentucky Distilleries & Warehouse Co. this was strongly urged upon the court as one contention that had not been foreclosed by previous decisions, and the court proceeded to foreclose it, saying:

"'The question whether an absolute prohibition of sale could be applied by a State to liquor acquired before the enactment of the prohibitory law has been raised by this court but not answered, because unnecessary to a decision. (Bartemeyer v. Iowa, 18 Wall. 129, 133; Beer Co. v. Massachusetts, 97 U. S. 25, 32-33; Eberle v. Michigan, 232 U. S. 700, 706; Barbour v. Georgia, 249 U. S. 454, 459. See, however, Mugler v. Kansas, supra, pp. 623, 625, 657.) But no reason appears why a State statute which postpones its effective date long enough to enable those engaged in the business to dispose of stocks on hand at the date of its enactment should be obnoxious to the fourteenth amendment, or why such a Federal law should be obnoxious to the fifth amendment. (Id., pp. 157-158.)'

"The court was there dealing with a statute which it held would give a reasonable time, and dealing with such a statute held that the fact that it prohibited the sale of liquor lawfully acquired was of no importance. In Ruppert *v.* Caffey, supra, as above shown, however, the court held with equal distinctness that the question of allowing a reasonable time was equally unimportant. The two decisions necessarily established the proposition that the validity of a permissible prohibition statute is not affected by the fact that it takes immediate effect and prohibits the sale of liquors previously acquired.

"In conclusion, it is respectfully submitted that the decree of the court below is in all respects correct and should be affirmed.

"ALEX. C. KING,
"*Solicitor General.*
"WILLIAM L. FRIERSON,
"*Assistant Attorney General.*

"MARCH, 1920."

"APPENDIX A.

[Congress of the United States, begun and held at the city of New York, on Wednesday, the 4th of March, 1798.]

"The conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the Government, will best insure the benificent ends of its institution:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both Houses concurring),* That the following articles be proposed to the legislatures of the several States, as amendments to the Constitution of the United States, all or any of which articles, when ratified by three-fourths of the said legislatures, to be valid to all intents and purposes, as part of the said Constitution, viz:

"Articles in addition to and amendment of the Constitution of the United States of America proposed by Congress and ratified by the legislatures of the several States, pursuant to the fifth article of the original Constitution.

"Article the first. * * * After the first enumeration required by the first article of the Constitution there shall be one Representative for every 30,000, until the number shall amount to 100, after which the proportion shall be so regulated by Congress that there shall be not less than 100 Representatives nor less than 1 Representative for every 40,000 persons until the number of Representatives shall amount to 200, after which the proportion shall be so regulated by Congress that there shall not be less than 200 Representatives nor more than 1 Representative for every 50,000 persons.

"Article the second. * * * No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened.

"Article the third. * * * Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

"Article the fourth. * * * A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

"Article the fifth. * * * No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

"Article the sixth. * * * The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

"Article the seventh. * * * No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

"Article the eighth. * * * In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

"Article the ninth. * * * In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

"Article the tenth. * * * Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

"Article the eleventh. * * * The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

"Article the twelfth. * * * The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

"FREDERICK AUGUSTUS MUHLENBERG,
"*Speaker of the House of Representatives.*
"JOHN ADAMS,
"*Vice President of the United States and*
"*President of the Senate.*

"Attest:

"JOHN BECKLEY,
"*Clerk of the House of Representatives.*
"SAM. A. OTIS,
"*Secretary of the Senate.*

"[NOTE.—The first two amendments here appearing were not adopted. The 10 following were ratified, and the ratifications were communicated by the President to Congress, from time to time, as the several States notified him of their action. They now stand as the first 10 amendments to the Constitution.]

"APPENDIX B.

"[Remarks of Chairman VOLSTEAD in the House of Representatives (Appendix to the CONGRESSIONAL RECORD of Mar. 23, 1920).]

"CONCURRENT POWER.

"As the CONGRESSIONAL RECORD contains very little, if any, of the story or purpose of the provision contained in the prohibition amendment giving Congress and the several States concurrent power to enforce it, I may be permitted to submit a few observations, as it is a subject on which I have been frequently asked for information. The resolution proposing this amendment originated in the Senate; when it reached the House it was referred to the Committee on the Judiciary, of which I was then a member. It was there discussed among the members, especially among those who favored its adoption. It was, among other things, pointed out that if the amendment should be adopted in the form in which it had passed the Senate its effect might be to repeal or enable Congress to suspend every prohibition statute in the country, and that it ought to be made the duty of the State as well as the National Government to enforce it, as the States have courts and police forces equipped to do that work. Attention was also called to the fact that States and the Federal Government exercised the power to punish the same act, each in its own courts and under its own laws. As this power has usually been spoken of by courts and law writers as concurrent jurisdiction, and as it was sought to confer the like power on Congress and the several States, the phrase 'concurrent power' was adopted as expressing that idea. I do not know who wrote the provision, but I know that was the idea sought to be written into the amendment. Because of this provision many difficulties are predicted, conflicts of all kinds are anticipated. If construed as intended by those who proposed it, there is no occasion for concern. There is very little chance for any conflict.

"The amendment can not be enforced by granting the right to do certain things; it must be enforced by forbidding the things forbidden by the amendment. Any act left unpunished by a State may, nevertheless, be punished by the National Government, if such punishment tends to enforce the amendment, and likewise, to accomplish the same purpose, an act left unpunished by the National Government may be punished by the States. If a State should illegally authorize a person to sell beer containing, say, 2¾ per cent of alcohol, it would not occasion any conflict with the national law prohibiting the sale of beer containing more than one-half of 1 per cent of alcohol. The person so authorized would simply be in the position of one who has to get authority from two masters. It is possible that a conflict might arise if you can imagine that a State could make it the duty of a citizen to sell liquor in violation of the national law, but in that event the law of Congress would be supreme, unless that law was itself in violation of this amendment. There is no reason why the provision of the Constitution making the law of Congress supreme does not apply to legislation under this amendment. The fact that the power of Congress and the States is concurrent does not mean that the power of Congress is not supreme in cases of conflict. The very purpose of the provision making the laws of Congress supreme is to deal with cases of concurrent power, power existing at the same time over the same subject. If the eighteenth amendment had been a part of the Constitution when that instrument was adopted, I venture the opinion that no one would ever have suggested that the rule making the law of Congress supreme would not apply to laws passed under it. The exercise of concurrent power by Congress and the several States is neither new nor unusual; it has been constantly exercised ever since the Government was founded. It is expressly authorized by section 5328 of the Revised Statutes of the United States. This section in some form has been in force since 1825, and has been repeatedly recognized by our courts as valid.

"As to many offenses subject to Federal punishment, the States would have no power to punish if this statute was repealed. This makes the power dependent upon the will of Congress. To avoid such dependence, the provision giving the States power to enforce the amendment was written into it. The object of making the power concurrent was to obviate the rule that where Congress acts under a granted power it has the effect of suspending or annulling State laws on the same subject. It was the intention that the power to enforce should concur in the sense that at the same time and to accomplish the same purpose Congress and the several States might make and enforce laws. The strange contention is sometimes urged that those that proposed and ratified the amendment intended that the law of Congress should not be valid unless the State affected by it concurred in it by agreeing to it. If that is true, it follows as a necessary corollary that the law of a State is not valid unless Congress so concurs in it, and that as there are no such laws liquor is no longer subject to any control. Such a construction would defeat the very purpose of this provision and make the adoption of the amendment not a prohibition but a free-whisky law. The States would not only be helpless as against a hostile Congress, but Congress would likewise be without power. Why not contend that Congress in creating the municipal court for this District intended by the grant of concurrent jurisdiction to the municipal and supreme court of all actions in which the amount in controversy does not exceed $500 that the municipal court must concur in all judgments rendered by the supreme court in suits involving less than that sum to make such judgments valid?

"Not only was the amendment with this provision for concurrent power written by the friends of prohibition, but they proposed it by a vote of more than two-thirds of both branches of Congress, and it was also the friends of prohibition who ratified it in the legislatures of the various States. No one can seriously argue that these men meant to perpetrate such a stupendous fraud upon the people of the country as they have done if that is not what they meant. I am sure the people nowhere so understood it. These men have clearly demonstrated by their action that they did not so understand it and had no such intention. Those who proposed the amendment in Congress stood stanchly behind the national prohibition act, though that act makes no provision for any such agreement, and the States that ratified the amendment are proceeding upon the theory that no such agreement is required. Utterly unconscious of any such requirement, many of the legislatures that ratified the amendment passed laws for its enforcement that contained no suggestion of the necessity for such an agreement. As these are the men who were authorized to and did act for the people in adopting this amendment, they must be presumed to have known what was intended, and we have a right to assume that their intention and the language they used to express it squares with their actions."

"APPENDIX C.

"Without encumbering the brief by republishing same, the court is respectfully referred to the following decisions of State supreme courts denying the applicability of the referendum to the adoption of an amendment to the Constitution of the United States:

"The Supreme Court of Maine, replying to questions certified to it according to the constitution of that State by the governor, requesting an opinion on his duty to call an election under a petition for referendum for ratification of the eighteenth amendment, held that the legislature, acting under Article V of the Constitution of the United States, was not subject to a referendum, and that provisions of the Maine constitution did not contemplate one. (In re Opinion of Justices (Maine), 105 Atl. Rep., 673.)

"A similar ruling has been made by the Supreme Court of New Mexico, under the provision of its constitution, on mandamus brought against its secretary of state to compel a referendum election submitting a resolution of the Legislature of New Mexico adopting the eighteenth amendment. (State of New Mexico ex rel. *v.* Martinez (not yet reported).)

"In sustaining a refusal of a mandamus to require the holding of such a referendum election in Oregon, the supreme court held that the constitution of that State for such referendum did not apply to a resolution ratifying an amendment to the Federal Constitution. (Herbring *v.* Brown, 180 Pac. Rep., 328.)

"Similar rulings upon like cases have been made by the Supreme Courts of Arkansas and Colorado. (Whittemore *v.* Terral, Ark. (not yet reported); Prior *v.* Noland, Colo. (not yet reported).)"

BILLS INTRODUCED.

Bills were introduced, read the first time, and, by unanimous consent, the second time, and referred as follows:

By Mr. SMOOT:

A bill (S. 4280) for the relief of Adela White; to the Committee on Military Affairs.

By Mr. HALE:

A bill (S. 4281) granting a pension to William G. Webber (with accompanying papers); to the Committee on Pensions.

By Mr. CALDER:

A bill (S. 4282) to increase the pensions of certain persons who were disabled in the line of duty, and for other purposes; to the Committee on Pensions.

By Mr. KIRBY:

A bill (S. 4283) granting a pension to Mary C. Reeves (with accompanying papers); to the Committee on Pensions.

By Mr. McKELLAR:

A bill (S. 4284) to correct the military record of Alfred Clark; to the Committee on Military Affairs.

DISTRICT OF COLUMBIA APPROPRIATIONS.

Mr. CALDER submitted an amendment authorizing the Commissioners of the District of Columbia to institute and prosecute proceedings in the Supreme Court of the District of Columbia, holding a district court, for the condemnation of land necessary for the extension of Rittenhouse Street east to Sligo Mill Road, etc., intended to be proposed by him to the District of Columbia appropriation bill, which was ordered to lie on the table and be printed.

ACTIVITIES OF THE FOURTH ASSISTANT POSTMASTER GENERAL.

The VICE PRESIDENT. The morning business is closed.

Mr. McCUMBER. Mr. President——

Mr. KING. Will the Senator yield to me for a moment? There is a resolution lying on the table which was reported yesterday, and I ask unanimous consent for its present consideration. I think it will take only a moment. If it causes any debate, I shall withdraw the request. It is merely a resolution asking certain information from the Postmaster General.

Mr. McCUMBER. I yield for that purpose.

The VICE PRESIDENT. The resolution will be read.

The Reading Clerk read the resolution (S. Res. 309) submitted by Mr. KING February 17, 1920, and reported yesterday from the Committee on Post Offices and Post Roads, as follows:

Whereas it has been reported that the Fourth Assistant Postmaster General has circularized hundreds of thousands of agriculturists in the United States, and submitted questionnaires to them relating to divers subjects: Therefore be it

Resolved, That the Postmaster General be, and he is hereby, directed to inform the Senate what authority said Fourth Assistant Postmaster General had for his said action and what appropriation had theretofore been made to cover the expenses of such proceedings upon his part.

The VICE PRESIDENT. The question is on agreeing to the resolution.

The resolution was agreed to.

PENSIONS AND INCREASE OF PENSIONS.

Mr. McCUMBER. I move that the Senate proceed to consideration of House bill 9369, the Fuller pension bill.

The motion was agreed to; and the Senate, as in Committee of the Whole, resumed the consideration of the bill (H. R. 9369) to revise and equalize rates of pension to certain soldiers, sailors, and marines of the Civil War, to certain widows, former widows, dependent parents and children of such soldiers, sailors, and marines, and to certain Army nurses, and granting pensions and increase of pensions in certain cases.

Mr. SMOOT. Mr. President, I suggest the absence of a quorum.

The VICE PRESIDENT. The roll will be called.

The Reading Clerk called the roll, and the following Senators answered to their names:

Brandegee	Harris	McKellar	Smoot
Calder	Harrison	McLean	Spencer
Capper	Henderson	McNary	Sutherland
Chamberlain	Hitchcock	New	Swanson
Comer	Jones, N. Mex.	Nugent	Thomas
Culberson	Jones, Wash.	Overman	Townsend
Curtis	Kellogg	Page	Trammell
Dial	Kendrick	Pittman	Underwood
Dillingham	King	Pomerene	Wadsworth
Fernald	Kirby	Ransdell	Warren
Glass	McCormick	Sheppard	
Gronna	McCumber	Simmons	

Mr. GRONNA. I desire to announce that the senior Senator from Wisconsin [Mr. LA FOLLETTE] is absent due to illness. I ask that this announcement may stand for the day.

Mr. CURTIS. The Senator from South Dakota [Mr. STERLING] and the Senator from Colorado [Mr. PHIPPS] are absent on official business.

Mr. McKELLAR. The Senator from Rhode Island [Mr. GERRY], the Senator from California [Mr. PHELAN], and the Senator from Arizona [Mr. ASHURST] are absent on official business.

The VICE PRESIDENT. Forty-seven Senators have answered to the roll call. The names of the absentees will be called.

The Reading Clerk called the names of the absent Senators, and Mr. REED and Mr. WATSON answered to their names when called.

Mr. BALL, Mr. KEYES, Mr. HALE, Mr. MOSES, Mr. LODGE, Mr. SMITH of South Carolina, and Mr. LENROOT entered the Chamber and answered to their names.

The VICE PRESIDENT. Fifty-seven Senators have answered to the roll call. There is a quorum present.

PAY OF ARMY AND NAVY AND MARINE CORPS.

Mr. PITTMAN. Mr. President, I should like to have the attention of the Senator from New York [Mr. WADSWORTH]. I notice by the morning press that there is a statement to the effect that the Senate conferees on the Army pay bill are to recede from the Senate provision with regard to pay. Is there any foundation for that statement?

Mr. WADSWORTH. No, Mr. President; there is not.

Mr. PITTMAN. I will state the reason why I made the inquiry. I think the Senate conferees should as far as possible know what the attitude of each Senator will be upon the conference report that may be brought into the Senate. I am very heartily in favor of the bill. I think it is absolutely necessary. I believe that the necessity for a stable Army and a stable Navy is far greater than ever before in the history of the country.

I do not agree with some Senators who feel that we can do without those two organizations, but I believe that all of the military legislation which we have recently been considering will be absolutely futile and will accomplish nothing toward the maintenance of the Navy and the Army unless the provisions of the Senate bill with regard to the pay of officers and men is substantially sustained in the conference report. If it is not substantially sustained, I, for one, am going to vote against the conference report, and I will continue to vote against it until there is sufficient pay provided for officers and men to prevent the disintegration of the Navy and the Army. I do not know so much about the conditions in the Army, but I do know with regard to conditions in the Navy, and the information is derived from the testimony of experts before the subcommittee of the Committee on Naval Affairs.

There is no doubt whatever that unless the pay of officers as well as of enlisted men in the Navy is increased in accordance with the provisions of the Senate bill, the Navy personnel will disintegrate. It is now disintegrating at such a rapid rate that the actual operation of our major fleet is threatened. The prevalence of desertion not only amongst the enlisted men but amongst the petty and sometimes the junior officers is startling; and yet the naval officers who testified before our committee

stated they could not in conscience blame these men for deserting if they can not obtain favorable action on their resignations, because the conditions are such that they can not sustain themselves where they have families to support.

On the 20th the Senator from Rhode Island [Mr. GERRY] delivered a convincing speech on this subject. The facts are marshaled and sustained with great force. I wish every Senator and Congressman would read his speech.

I take it that the pay provision is the very essential of the reorganization legislation. The other provisions are an advantage in the reorganization it brings about, but the pay provision is the essential of the whole legislation; and unless the Senate Members of the conference committee succeed in sustaining that provision, then, in my opinion, the whole bill falls; and we might as well vote against the conference report time and time again until that essential provision is sustained.

Mr. WADSWORTH. May I say to the Senator from Nevada that the pay bill is entirely separate from the reorganization bill?

Mr. PITTMAN. Yes.

Mr. WADSWORTH. The bill to which the Senator refers merely affects the pay of the Army and the Navy; it does not affect the reorganization of the Army or the Navy at all. The bill for that purpose is an entirely separate one and is in another conference. However, I am in entire sympathy with the Senator from Nevada. Both the Army and the Navy are in desperate straits, and if something is not done—and something substantial must be done—we shall not have an Army or a Navy worthy of the name.

Mr. PITTMAN. But the Army reorganization bill, in my opinion, will be absolutely inoperative unless the pay bill is passed substantially as the Senate has provided.

Mr. WADSWORTH. Unless that be done, it will, at least, be a most ineffective Army.

Mr. PITTMAN. And I think it would be very unfortunate to pass the Army bill, and allow it to go out of the control of Congress in any form that would be inoperative. It would be better to hold it here for months rather than have that occur. Therefore, as one, I will vote against any conference report on the Army reorganization bill until the provisions of the Senate bill with regard to the pay of the officers and enlisted men are substantially agreed to.

PENSIONS AND INCREASE OF PENSIONS.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (H. R. 9369) to revise and equalize rates of pensions to certain soldiers, sailors, and marines of the Civil War, to certain widows, former widows, dependent parents and children of such soldiers, sailors, and marines, and to certain Army nurses, and granting pensions and increase of pensions in certain cases.

The VICE PRESIDENT. The bill is before the Senate as in Committee of the Whole and open to amendment.

Mr. THOMAS. Mr. President, was the amendment of the Senator from Oregon [Mr. CHAMBERLAIN] voted on yesterday?

The VICE PRESIDENT. It was not presented after the amendment of the Senator from Colorado was defeated.

Mr. THOMAS. I understood that the Senator from Oregon had offered it.

The VICE PRESIDENT. There is a current opinion among Senators that when an amendment has been presented and printed that constitutes offering it to a bill. It does not. An amendment must be formally offered from the floor. The amendment of the Senator from Oregon is not now pending.

Mr. THOMAS. Mr. President, the Senator from Oregon yesterday stated that he had "offered an amendment for the same purpose as the amendment proposed by the Senator from Colorado, but in a different way." It was to strike out the words "during the Civil War," and on page 5971 of the RECORD the proposed amendment appears. My main purpose in taking the floor was to offer to withdraw my amendment in favor of that of the Senator from Oregon.

The VICE PRESIDENT. The amendment of the Senator from Colorado has been voted on and lost.

Mr. THOMAS. Then, Mr. President, inasmuch as that subject is disposed of, my purpose in taking the floor relates to something that has passed. While I am on my feet, however, I wish to submit a word by way of reply to some of the remarks of the Senator from Oregon on yesterday. The Senator then took vigorous exception to my assertion that political influence was behind and stimulated this and similar appropriation measures, and he asserted that he is supporting the bill and will support similar bills as a matter of principle. I accept the Senator's statement absolutely. He always has the courage of his convictions, and does not hesitate to express them, and I know from his statement that in the advocacy of measures like these he is proceeding according to the dictates of his own judgment and his own interpretation of the duty he owes to the public and to his constituents; but I am unable, Mr. President, to recede from the general assertion which I made. I do not think anyone who has paid much attention to the history of pension legislation since the close of the Civil War can come to any other conclusion, for all measures, or practically all measures of this character, have either had their origin with or have been supported by the organization known as the Grand Army of the Republic, whose legislative committee is interested and has for years been interested, with Congress and elsewhere, in the framework, support, and consummation of legislation of this character.

It was, Mr. President, the beneficiaries of this bill speaking through that organization who pledged themselves in 1918 that if the bill then offered was enacted into law it would make no further demands and ask no further favors from Congress. That being the case, and in view of the activities that have been apparent in the elections in the past against the opponents and in behalf of the proponents of pension legislation by those deriving benefits therefrom, it seems to me that it is a bold man, indeed, who can assert that politics is not largely controlling, if not entirely so, in legislation of this sort.

Mr. SMITH of South Carolina. Mr. President, will the Senator yield for a question?

Mr. THOMAS. Yes.

Mr. SMITH of South Carolina. Has the Senator any assurance that the organization known as the Grand Army of the Republic solicited this increase? Perhaps it was a donation on the part of those who had the legislation in hand out of their generosity and kindness.

Mr. THOMAS. Mr. President, I am not a member of the Pension Committee, but if my experience is any guide and my correspondence any aid in answering the question I think I can say without much fear of successful contradiction that the organization is behind this measure and doubtless asked for its consideration.

The Senator from Oregon yesterday made the charge that—

> the men who are opposing such appropriations because it increases their taxation are not the men who have their little farms and homes with small incomes; they are not the men who earn moderate salaries, as we in the Senate do. They are the extremely rich and the men as a rule who profiteered during the civil and other wars, and who now object to large appropriations to pay to these men who saved and preserved the Union their just dues.

Mr. President, I must confess to a little surprise that so learned and careful a debater as the Senator from Oregon generally is should have made that statement. The objection that is made to increased taxation is not confined to any particular class of taxpayers.

They include the rich and the poor, the just and the unjust, the millionaire and the man who receives a comparatively small income from his business. If it were possible to meet a demand of this sort by placing an assessment upon a certain class of society and then utilize for the purpose the funds so acquired, I could perceive some basis for the Senator's assertion; but, of course, no such system of taxation would for a moment stand the test of the courts. No such system of taxation is possible in a Government like ours. No such system of taxation can consist with equality before the law and with justice as we understand it. The fact is that all this talk about placing the burden of taxation upon the profiteer, however well meant, as a polity has and can have no foundation whatever, for taxes in their ultimate are passed on until they ultimately rest upon the shoulders of consumption. With the exception of inheritance taxes and some elements of income tax, that assertion is universally true, and always has been. It becomes a part of the cost of production and distribution; and instead of mulcting those who have in order to enrich those who have not, we merely drug the intelligence and the consciousness of the real taxpayer by a species of legalized robbery through indirection. Therefore the basis of the Senator's attitude, when subjected to the most superficial analysis, necessarily disappears.

Mr. CHAMBERLAIN. Mr. President, may I interrupt the Senator just a moment?

Mr. THOMAS. Certainly.

Mr. CHAMBERLAIN. What was the nature of the tax in Great Britain that fell so heavily upon the men who could pay and the men who ought to have paid to assist in the prosecution of the war that they were finally compelled, as a matter of fact, to dispose of the immense estates, and to put them into circulation, as it were, because of the taxes that were levied upon them? Those taxes did not reach the consumer in the last analysis.

Mr. THOMAS. Mr. President, an enormous tax was placed upon the landholders of Great Britain during the war. In

fact, that tax had appreciated very considerably prior to the war in order to meet the additional expenditures of the British Government after the establishment of old-age and similar pensions. That tax was passed on until it became so large that it could not be passed on. It absorbed all or practically all of the income of these huge estates, in consequence of which the owners have been compelled to sell them; but the men who have purchased them must continue to pay that land tax, and of course they have obtained the title to this property at largely reduced rates because of the increased burden. The British Government, like our own, imposed a heavy excess-profits tax, but that, of course, has been added to the cost of production, or the most of it; and there, as here, a very large percentage has been added to the excess-profits tax, whereby it is used as a basis for increased exactions from the average taxpayer.

Mr. CHAMBERLAIN. Mr. President——

Mr. THOMAS. I yield.

Mr. CHAMBERLAIN. It was my hope that some such tax as that might be imposed in this country that would dissipate the immense landed estates that exist here.

Mr. THOMAS. It can be done.

Mr. CHAMBERLAIN. It ought to be done; and it has had a beneficial effect in the last analysis in Great Britain, where these estates have been entailed for hundreds of years, nobody deriving any benefit from them except the landowners themselves, and imposing burdens upon the tenants. The dissipation of those immense estates, like the original taxes that were imposed under the Napoleonic régime in France, will redound to the benefit of the country itself in the last analysis, and it ought to be done here.

Mr. THOMAS. It can be done, Mr. President.

Mr. CHAMBERLAIN. It may be done.

Mr. THOMAS. It can be done, and it may be done; but whether it is done or not, the fact does not affect the proposition I am asserting. The only tax that can not be transferred, as far as my judgment and my reading have gone, is the inheritance tax, which is a tax upon capital and which is designed, of course, in addition to obtaining revenue, to put a limitation upon these enormous accumulations which are one of the serious menaces to our social and political future. The proposition I am attempting to discuss is not that the tax should not be imposed—that is another proposition—not that great benefit might not ultimately result from it, but it is not an answer to the expenditure of public money here for reasons which at present are not, in my humble judgment, controlling.

The Senator is very much to be commended for his solicitude for the old veterans of the Civil War, who should not want in their old age, and so am I. I yield to no man in my admiration of the Federal soldier. Like the Senator, I spent my youth in the South, and all of my convictions, my inclinations, and my traditions were for the Confederacy; but I long ago recognized the inestimable value to my own section of the country resulting from its defeat and the debt of obligation due to the soldiers of the United States. We have, however, made ample provision, more than ample provision, to see that not one of these men shall want in his old age.

As I stated day before yesterday, soldiers' homes have multiplied in this country. There are thousands of vacant beds there. Our appropriations for their support are constantly increasing. Sanitation, food, everything that money can accomplish for the accommodation and comfort of these men have been freely extended by the Government of the United States. The Senator by this bill proposes to give a horizontal increase to the millionaire and the pauper, to the man who wants and to the man who does not want; to the man who served 90 days, no matter where that service was; and to the man who served four years; to the man who is disabled, and to the man who is not disabled. We are following the most unfortunate precedent in the matter of pensions that was ever set, and which will soon come home to plague us in the so-called bonus bill, by whatever name it may be ultimately known, which the House at present is incubating.

The Senator expresses his desire to do everything, and more, for the last Army of the United States; and that, too, is commendable. I have no doubt that he saw in this morning's dispatches resolutions recently adopted—yesterday adopted, I think—by the American Legion, in which we are warned that we must not abandon the other three projects for their benefit by the acceptance of the bonus system. They say they must have all four, to wit, bonus, land, vocational training, and Federal aid in the shape of loans. So that the Senate in all probability will have ample opportunity in the course of a few days to consider a measure which in its ultimate scope will tax the resources of this country in my judgment beyond the ability of the people to respond. I do not think it ought to be done. However, I shall not discuss that subject until it is presented to the Senate for our consideration.

Mr. President, I thought it was due to myself, in view of the position which I took on day before yesterday upon this bill, to make this very short reply to my friend the Senator from Oregon, whose friendship I esteem beyond words, and for whose convictions I entertain at all times the utmost respect.

Mr. SMITH of South Carolina. Mr. President, as a matter of course I know that these pension bills heretofore have passed in spite of all criticism and opposition; but a new condition confronts us right now, and I want to call the attention of the Senate to that new condition.

I find in this bill, in the first paragraph, that there is a blanket provision of $50 per month for all those who participated in the wars the veterans of which are taken care of in this bill; but I find on page 4 the following language:

> This section shall apply to a former widow of any person who served for 90 days or more in the Army, Navy, or Marine Corps of the United States during the Civil War and was honorably discharged from such service, or who, having so served for less than 90 days, were discharged for or died in service of a disability incurred in the service and in the line of duty, such widow having remarried, either once or more than once after the death of the soldier, sailor, or marine, if it be shown that such subsequent or successive marriage has, or have been dissolved, either by the death of the husband or husbands, or by divorce without fault on the part of the wife; and any such former widow shall be entitled to and be paid a pension at the rate of $30 per month.

Mr. President, there is pending in the House now a measure to grant a bonus to the boys who actually were engaged in warfare for the salvation of this country. We stand aghast at the imposition of the additional tax that will be necessary to meet that temporary bonus.

If our system of pensioning is right, then preeminently those who were actively engaged in service are the ones who should be considered first. If we solemnly enact into law to-day or during this session of Congress a law granting to widows who are the third or fourth removed from their marital relations with men who served pensions at the the rate of $30 per month for the balance of their lives and to the children and grandchildren of those who served in wars that have been over for 50 years, what argument can any man on this floor who votes for it advance against granting to the boys who have just come back from saving the country a pension equal to or exceeding those granted the distantly removed beneficiaries of the veterans of wars that have been fought heretofore? The point I wish to emphasize here is that if we are going to grant pensions to the third and fourth generations of those who fought, to those who had no participation in those wars, it is admitting the principle.

I understand that some of those who were instrumental in framing this legislation have said that these widows are few and old. It does not make any difference, Mr. President, if there was but one; the granting of the pension admits the principle that we have committed ourselves to the granting of a pension to the widow of a soldier regardless of the fact that she has married three or four times or more, or has been divorced, perhaps, without any fault on her part. When you grant her, after all of her subsequent choices of marital relation to other than a soldier, $30 per month, what argument can you use to withhold a pension or bonus to the boy who stood in the mud of the trenches and subjected himself to the unprecedented dangers of modern warfare? There is not a Senator who votes for this measure who can in equity and justice vote against the proposed bonus which is being considered in the House.

It is not a question of the amount involved; it is a question of the principle upon which we have to legislate, and the plea I am making is not on account of the amount involved herein, but owing to the principle which we are extablishing. If our principle, as legislators, with reference to the soldiers, is so profound, so far-reaching, as to take in the beneficiaries or the descendants of those who, by the accident of marriage, have been related to soldiers, what can this country expect to be the burden upon the American people in recognizing that principle for the millions who were engaged in this war?

This bill not only provides for a pension to the old soldiers who were actively engaged, but for anyone who was even in transit going to some isolated point to discharge whatever function it might be at the call of the Government; and not only that, but to the dependents, the widows, and orphans. What will be the burden if we carry that principle out in the coming years for the Army that went abroad and for those who were engaged in the military department at home? It seems to me, Mr. President, that if we are to meet the demands of the boys who have come back from France, we must set a standard right here and now.

I can understand how previous to this war we granted pensions. It was comparatively a small matter in that we were supposed to be legislating for those who, as the years ad-

vanced, would rapidly decrease in numbers. But politics entered, and on account of certain divisions in this country the burden did not fall alike everywhere, and therefore there was an added reason to lay it, perhaps. But it was negligible compared with the condition which now confronts us. If you are going to make this bill the standard of the policy of the Government toward its soldiers returned from Europe, the burden of taxation upon the American people can not be met; and what right have you to discriminate?

In what way can you say that those of the Civil War who preserved the Union are to be considered more than those who participated in the saving of the civilization of the world, America included? That bill to grant a bonus of a paltry sum for a temporary length of time will come over to the Senate. This bill establishes the policy of the Government to grant a pension to everyone directly and indirectly connected with the war, and to their descendants, to the third and fourth generation. I am not complaining of that, and I am not criticizing it.

Mr. McCUMBER. The Senator has so often referred to the granting of pensions to descendants of the first, second, third, and fourth generations, that I am led to ask him if he will point out to me where he finds any justification for that assertion either in laws that have been passed or in laws that in all likelihood will be passed. There never has been such a pension law, and there probably never will be such a pension law.

Mr. SMITH of South Carolina. Mr. President, in reply I want to say that if it does not extend to the third and fourth generations, the late lamented Roosevelt need not despair; there will be no race suicide in this country.

Mr. McCUMBER. That was not the question. I asked the Senator where he found any law as a basis for his reiterated assertion that we are granting pensions to the second and third and fourth generations. There has been no such law, let me tell the Senator, from the very beginning of our pension legislation. The crippled and the infirm, physically or mentally, who were in that condition prior to the age of 16 years, have been placed under the same rules of construction as those governing the granting of pensions to minor children. That is the first generation. It has never gone beyond that in any pension law.

Mr. SMITH of South Carolina. Mr. President, perhaps in saying to the third and fourth generations I was misled in my presentation of the principle applied to a widow four or five or six or seven or eight times removed from her marital relation with the hero of the war.

Mr. SMOOT. The Senator is wrong there, because if there is a second marriage under the law and under the ruling of the Pension Office the widow is not entitled to her pension.

Mr. SMITH of South Carolina. Yes; if her husband is still living.

Mr. SMOOT. If her husband is dead.

Mr. SMITH of South Carolina. No; the Senator is wrong. He has to be living. Here is what the proposed law says. Listen to the wording of it:

> And this section shall apply to a former widow of any person who served for 90 days or more in the Army, Navy, or Marine Corps of the United States during the Civil War and was honorably discharged from such service, or who, having so served for less than 90 days was discharged for or died in service of a disability incurred in the service and in the line of duty, such widow having remarried, either once or more than once after the death of the soldier, sailor, or marine, if it be shown that such subsequent or successive marriage has, or have been dissolved either by the death of the husband or husbands or by divorce without fault on the part of the wife.

Mr. SMOOT. I thought the Senator was speaking of existing law and not the pending bill.

Mr. SMITH of South Carolina. No; I am speaking of the provisions of this bill.

Mr. SMOOT. The Senator is correct as far as this bill is concerned as to remarried widows.

Mr. SMITH of South Carolina. This bill has become more liberal in the face of the splendid condition as to our income and revenue. I suppose it is a contribution to get rid of the burden of prosperity that is upon us. Is that your idea in providing that a widow three or four times removed or divorced shall be the beneficiary of $30 a month after she has had her chance to marry a fortune? I guess a good many of them try that, though I do not know. But when she has had her chance, even whether she got the fortune or did not, if the husband or husbands died she draws $30 a month.

I want to call the attention of the Senator from Utah to the fact, as he knows and I know, that there is face to face with us now a condition that is appalling as to the taxes the people of the country have to meet. Twenty-six billion dollars of bonds are outstanding, the interest on which has to be met. There will be a tremendous added burden perhaps on the American people by indirect taxation of a guaranty to our transportation system. There are other things which are piling up; and now, in addition to those things, we are establishing a policy in our relation to our soldiers of going to the extreme incorporated in this bill. How will the Senator from Utah, or I, or any other who may by any chance vote for this measure, refuse to grant a like measure to the boys who actually fought, who were denied two years in the productive period of their lives, and taken for the service of their country, carried over to Europe, and who did their work so splendidly and came back to pick up the lines of life where they left them?

Mr. SMOOT. That is a fair question which the Senator asks, and I think it ought to be answered, and if the Senator will yield now, I will try to answer his question.

Mr. SMITH of South Carolina. I would be very glad to hear the Senator answer it.

Mr. SMOOT. Mr. President, the Civil War veteran was not treated the same by the Government of the United States as the soldier in the recent war, and I thank God that the soldier in the recent war was not so treated. His pay was $13 per month. He was paid in currency of about 50 cents on the dollar. His family was never taken care of by the appropriation of a single dollar by the Government. When the first pension was granted him, years after the war, it was $6 a month. The total amount that has been paid in pensions up to date is a little less than $5,000,000,000 to all the Civil War veterans, and in a very few years nearly all of them will be in their graves.

Mr. SMITH of South Carolina. But the pension roll, if the Senator will allow me right there, is now 659,000.

Mr. SMOOT. Not for the Civil War, I will say to the Senator.

Mr. SMITH of South Carolina. Practically that.

Mr. SMOOT. I know the Senator wants to be perfectly fair. The pensions for Civil War veterans and all their widows, and all of the Spanish War veterans, and all the Mexican War veterans, and the widows left of the Revolutionary War, amount to $214,000,000. That is all it can possibly amount to, because that is all that has been required the past year. The widows are dying at the rate of about 2,500 a month, and the old soldiers will die at the rate of at least 4,000 a month for the next 12 months, and perhaps more than that.

Mr. SMITH of South Carolina. Let me ask the Senator this question. How many pensioners are on the pension roll to-day as beneficiaries of the Civil War?

Mr. SMOOT. I can tell the Senator in just a moment the exact number.

Mr. SMITH of South Carolina. Both veterans and their dependents.

Mr. SMOOT. Two hundred and seventy-one thousand three hundred and ninety-one survivors, and all other pensioners, 293,000.

Mr. McCUMBER. But the number was 293,000 nearly a year ago.

Mr. SMITH of South Carolina. This memorandum says total Civil War pensioners on the roll June 30, 1919.

Mr. SMOOT. That is nearly a year ago.

Mr. SMITH of South Carolina. Survivors, 271,391; widows, and so forth, 226,952.

Mr. SMOOT. That takes in all the others.

Mr. SMITH of South Carolina. The total is 508,343. That means that there are still on the rolls approximately what I said. I was taking the total. I just glanced at the figures. The number of pensioners on the rolls to-day is 568,343.

Mr. McCUMBER. The Senator must be corrected. That is not the number to-day, but nearly a year ago, and there is quite a little difference.

Mr. SMITH of South Carolina. Have you not added some beneficiaries in the bill that are not covered in this memorandum?

Mr. SMOOT. Only a few have been added on the report of the Committee on Military Affairs by correcting their military records and placing them on the pension rolls.

Mr. SMITH of South Carolina. I do not know anything about the vital statistics connected with this particular business, but it is fair to assume that at least 500,000 will be on the roll that this bill will be called upon to meet.

Mr. SMOOT. I did not think there was any question as to the number. I thought the question of the Senator was as to the amount being paid to them.

Mr. SMITH of South Carolina. Yes.

Mr. SMOOT. And the Senator said it was $655,000,000.

Mr. SMITH of South Carolina. No; I spoke of the number. I said that 659,000 are on the rolls.

Mr. SMOOT. I misunderstood the Senator. Then I will proceed.

When the Congress acted in 1917 in relation to the soldiers of the present war, it provided first that every soldier who

entered that war should have a family allowance; second, they increased his salary from $15 to $30 a month, with a 10 per cent increase for service while on foreign soil; third, they gave him insurance up to $10,000 in case of death at a rate one-sixth of what any private insurance company would give it to that same soldier. By the way, in passing I might say that that has cost the Government of the United States about a billion dollars.

Again, they provided a compensation for those who were killed or disabled greater than any amount that was ever paid to the Civil War veterans. I do not want it understood that I have complained about these provisions taking care of the soldier in the recent war. I was a member of the subcommittee that passed upon all that legislation. But when we compare the advantages and the benefits extended by the Government of the United States to the soldiers of the present war with those extended to the Civil War veterans, it becomes obvious that whatever is done for the Civil War veterans now, in the last few remaining years of their lives, never will place them upon the same footing with the soldiers of the great war. I think the Senator from South Carolina will admit that.

Another thing I want to say is with reference to the care that was taken of the soldier. His health was looked after and he was provided with all the modern conveniences that a soldier could secure anywhere in the world, whereas in the Civil War no one can read history who will not admit that they passed through trials and suffered even more than death itself, nearly from the beginning to the end of the war.

Mr. McCUMBER. They lived for weeks on hard-tack and water, as compared with confectionery under the present system.

Mr. SMITH of South Carolina. Let me call attention to the fact that that was the best the circumstances then would allow. Our soldiers to-day get no more. Civilization had moved up to a higher plane. It provided for the masses of the people antitoxins and sanitary appliances, and, as a matter of course, our soldiers enjoyed an immunity from hardships that their predecessors suffered. But the soldiers of the Civil War got the best the Government could give them at that time, and the soldiers of this war got no more.

But Senators must not forget the fact that we were also new then in the question and in the policy of granting appropriations for patriotic services. We have also advanced along that line. So the demand is going to be not paralleling conditions of the Civil War veterans but taking up the question under conditions existing right now. The Senator says that we insured the soldier. Of course I knew, and we all knew, that that was an effort on the part of the Government to forestall and make impossible the flood tide that seemed to be inevitable in the way of pensions.

Mr. SMOOT. The Senator is perfectly right. Not only was the question of insurance with that in view but the compensation provided for was with that in view, and the allotments and allowances had that very thing in view. When the legislation was up before the Senate I do not remember of a single Senator upon either side of the Chamber who, in defending the provisions, did not say that it was done for the purpose of forever preventing the soldiers of this war from asking for pensions.

Mr. KING. But it has apparently encouraged the demands.

Mr. SMITH of South Carolina. And yet, if the Senator will allow me, the compensation given for the brief period of the war to the soldier's family while he was engaged abroad, if they were dependent, is a mere bagatelle compared to granting a like amount for the lifetime of those who were dependent.

Mr. SMOOT. I will say to the Senator that the family allowances of the soldiers of the present war will amount to many, many times more than the provisions of the bill will pay to the survivors of the Civil War as long as they live.

Mr. SMITH of South Carolina. Yes; but, taking the number of soldiers and persons engaged in this war and comparing it with the number who survived and came out of the Civil War, the Senator does not pretend to say that the amount paid to the dependents aggregates as much as has been paid since we began the pension system?

Mr. SMOOT. No.

Mr. SMITH of South Carolina. Exactly; and that is the point I am making.

Mr. SMOOT. I did not want to carry that inference, and I hope that I did not.

Mr. SMITH of South Carolina. The Senator is drawing a comparison between what this bill will pay and what we temporarily paid, but I am not. What I am arguing is that, though you temporarily supported or contributed to the support of a soldier's family while he was abroad, the Civil War pension roll supports them for a lifetime—that is, contributes to their support. Of course, it does not support them, but it contributes to their support. If that is the policy, we should know it, because these boys could come here and claim that, despite the fact that, they not being killed, their insurance goes on as ordinary life insurance; and in the case of a casualty in civil life they would get just what they would get under ordinary circumstances. Only in the cases of those who were killed the soldiers stood in somewhat of a better relation, perhaps, during this war than in the Civil War, but the temporary contribution to their dependents is not in that class, and should not be compared with the perpetual contribution to the dependents throughout all life.

We have established that as a policy here, and attempted to estop any further pension rolls by our process of insurance. Now, the boys who are carrying that insurance are paying premiums on the insurance. It was granted at a low rate during the war. As I understand, it has been convertible since the war.

The only thing that I am speaking of is that we have gone back to the old policy. We have brought in here an additional $65,000,000 or $75,000,000 and have incorporated into the bill, in my opinion, a ridiculous provision for a widow, having, perhaps, married three or four times and been divorced, getting a pension. If her unfortunate marital attempts have resulted in the death or desertion or divorce of her various husbands, she is still on the pension roll, and so is everyone remotely connected with the war.

One paragraph in the bill reads that if he was en route going to service he shall come under the $50 clause. The argument I am making is that if we establish that policy here we can not deny the boys who are fresh from battle, who have lost two years of their lives in the preparatory and productive part of it, and who are coming back to take up the burden of life with two whole years wiped out and gone, which, like the seed corn, will spell the difference between success and failure. Then we tell them to satisfy themselves with insurance against death and with $30 a month for the time they were in actual service, and they shall be forever thereafter estopped. That is the parallel I am drawing. And mark my prediction: This very bill and those like it are going to be the basis upon which our pension roll will be enlarged beyond the dream of any present to-day.

Mr. SPENCER. Mr. President, may I inquire whether an amendment is in order?

The VICE PRESIDENT. It is in order.

Mr. SPENCER. I offer the following amendment.

The VICE PRESIDENT. The amendment will be stated.

The ASSISTANT SECRETARY. Add after the word "duty," in line 8, page 1, the words "or is now upon the pension rolls as a Civil War veteran," so that it will read:

That every person who served 90 days or more in the Army, Navy, or Marine Corps of the United States during the Civil War and who has been honorably discharged therefrom, or who, having so served less than 90 days, was discharged for a disability incurred in the service and in the line of duty, or is now upon the pension rolls as a Civil War veteran, etc.

The VICE PRESIDENT. The question is on the amendment offered by the Senator from Missouri.

Mr. SPENCER. Mr. President, the purpose of the amendment is to affect a comparatively few persons who did not serve the full 90 days in the Army, but who, by act of Congress from time to time, on account of their valor or services or some exceptional condition relating to them, have been placed upon the pension roll. Evidently pensioners in that category ought to be allowed to participate in the general pension increase proposed for Civil War veterans. That is the purpose of the amendment.

Mr. KING. Will the Senator yield?

Mr. SPENCER. I yield.

Mr. KING. If I understand the scope of the amendment, it would give a pensionable status under this bill to all those individuals who were deserters and against whom the charge of desertion by legislative enactment has been removed and who have been put upon the pension roll; it would permit them to enjoy the benefits of the pending bill.

Mr. SPENCER. The Senator refers to those who are now on the pension roll?

Mr. KING. Yes.

Mr. SPENCER. Undoubtedly, if a man is now on the pension roll, it would; but it would not open the door to a man who is not now on the pension roll.

Mr. McCUMBER. I will say to the Senator from Missouri that the amendment does not put them in; they are in now.

Mr. SPENCER. Yes; they are in now. The Senator from Utah evidently misconceives the purpose of the amendment. It is not to open the door an inch; it does not put upon the pen-

sion roll a man who is not already upon the roll, but it does do a manifest act of justice, for if the general pension is increased, all those who are on the roll ought to participate in that increase.

Mr. KING. Mr. President, then, as I understand, the purpose of the amendment is not merely to protect deserters against whom the charge of desertion has been removed, and who have thereby obtained a pensionable status—for, as I understand the chairman of the committee, those deserters will be benefited under this bill and will also get $50 a month—but it is to cover a different and another class who would not otherwise get this stipend of $600 per year?

Mr. McCUMBER. The Senator from Utah uses the word "deserters." May I say to the Senator that Congress, of course, in passing laws relative to such soldiers, has removed not desertion, but the charge of desertion; Congress has determined by its solemn enactment that those individuals were not deserters. If they were deserters, and Congress, nevertheless, removed the charge of desertion, the fault has been with the Members of Congress who allowed bills of such character to go through.

Mr. KING. Mr. President——

Mr. McCUMBER. Let me state to the Senator what the only purpose of the amendment is, though I think the Senator offering it has made it quite clear.

I think there have been a few cases—there may not have been a dozen—in which the soldier served less than the required 90 days; he may have served 89 days or 75 days; but there was that in his record by reason of which the Pension Committee, and the Congress acting on the recommendation of the committee, considered that he should be placed upon the pension roll, and he was placed upon the pension roll, for some meritorious conduct or for some other reason, although he served less than the 90 days and although he was not injured. There may be a few of those cases—I think there are—but I do not think there are a dozen of them that are upon the pension roll to-day. As the bill now reads, it refers only to those who have served 90 days or more; and the Senator from Missouri wishes it so amended that it will include in its benefits those who have been placed upon the roll who may have served a little less than the 90 days. I myself see no objection to that, Mr. President.

Mr. KING. Mr. President, of course any observations that may be submitted by any Senator—I beg pardon of the Senator from Missouri; I did not want to take him from the floor.

Mr. SPENCER. I yield to the Senator from Utah.

Mr. KING. I shall wait until the Senator concludes.

Mr. SPENCER. I have concluded, unless the Senator from Utah shall suggest some new line of thought, as he frequently does.

[Mr. KING addressed the Senate. See Appendix.]

The PRESIDING OFFICER (Mr. CALDER in the chair). The hour of 2 o'clock having arrived, the Chair lays before the Senate the unfinished business, which will be stated.

The READING CLERK. A bill (H. R. 11892) making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes.

Mr. JONES of Washington. I understand from the Senator from North Dakota [Mr. McCUMBER] that he thinks he can dispose of his bill in a very few minutes. If that is the case I think it would be in the interest of legislation and the saving of time to lay aside the river and harbor bill temporarily. I so ask unanimous consent that it may be temporarily laid aside.

The PRESIDING OFFICER. Is there objection to the request of the Senator from Washington? Hearing none, the river and harbor bill is temporarily laid aside in order that the pending pension bill may be disposed of. The question is on the amendment offered by the junior Senator from Missouri [Mr. SPENCER].

The amendment was agreed to.

Mr. SPENCER. Mr .President, the same amendment ought also to be made after the word "duty," on line 12, page 2, in order to make the bill read correctly.

The PRESIDING OFFICER. The amendment will be stated.

The READING CLERK. On page 2, line 12, after the word "duty," insert the words "or is now upon the pension rolls as a Civil War veteran."

The amendment was agreed to.

Mr. SPENCER. I offer the following amendment and desire to say a word in regard to it.

The PRESIDING OFFICER. The proposed amendment will be read.

The READING CLERK. Add the following as additional sections at the end of the bill:

SEC. 9. That the provisions of the pension act of May 11, 1912, be, and they are hereby, extended to include the officers and enlisted men of the State militia and other organizations of the several States of the Union that participated and cooperated with the military forces of the United States, under the command of United States officers, during the Civil War, and who actually rendered a service of 90 days or more in any of the said military organizations during said war, and who were honorably discharged therefrom or otherwise honorably relieved from duty under the order of proper military authority.

SEC. 10. That the widows, minor children, and dependent parents of those provided for in section 9 of this act shall be entitled to the same pensions as are now provided by law for the widows, minor children, and dependent parents of the soldiers who were in the Regular service during the Civil War.

SEC. 11. That the Secretary of the Interior shall prescribe rules and regulations governing the character of evidence necessary to prove the service herein set forth: *Provided*, That a certificate of the adjutant general of the State to which the military organizations belonged, showing the date of honorable discharge therefrom, shall be accepted in lieu of the honorable discharge required by the provisions of the act referred to in section 9: *Provided further*, That the provisions of this act shall not extend to the case of any person wherein the evidence discloses any fact that would have barred him from an honorable discharge had he been in the military service of the United States.

SEC. 12. That title to pension under this act shall commence from the date of filing application therefor in the Bureau of Pensions after the passage and approval of this act.

Mr. SPENCER. Mr. President, the substance of the amendment has twice passed the House of Representatives and only within the last two or three weeks has been again favorably reported by the committee of the House to the House. It has to do with the militia in several States during the Civil War, mainly in Missouri, but also in Kansas, Kentucky, and a few in Pennsylvania. I think there were none in Ohio. The Senator from Wyoming [Mr. WARREN] suggests to me that there may have been some in Ohio.

The facts of the case are simply these: Missouri, where the larger number of militia were, was a border State. After the Civil War had commenced the presence of the militia in the State was the single element which safeguarded our States in the Union. These militia were enrolled as State troops, but they were called into the service of the United States by the Federal Government. They were officered by United States officers. Their pay, their clothing, and their subsistence came from the Federal Government. They served and fought. They in Missouri were in the Battle of Springfield. They repelled the invasion of Gen. Price into Missouri. They were engaged in a countless number of skirmishes and engagements against guerrilla bands and bushwhackers.

They were in every sense serving the Federal Government. All militia serving in the United States from the days of the Revolution to this day have been recognized and pensioned except the militia incident to the Civil War.

I desire to read a single sentence giving the testimony of Abraham Lincoln in connection with this militia service in Missouri. Writing in response to the demand that Gen. Schofield, who was the commander of the Department of the Missouri, be relieved and that the enrolled Missouri Militia be disbanded——

Mr. CURTIS. May I interrupt the Senator?

Mr. SPENCER. Certainly.

Mr. CURTIS. I simply wish to call attention to the fact that the general pension law applied to the State militia of the Civil War up to the year 1875.

Mr. SPENCER. I was about to refer to that. It is true that its discontinuance was owing to a technical ruling of the department.

When the demand for the relief of Gen. Schofield and the disbanding of the Missouri Militia was called to the attention of the President, Abraham Lincoln, he replied as follows:

Few things have been so gratifying to my anxious feelings as when in June last the local force in Missouri aided Gen. Schofield to so promptly send so large a general force to the relief of Gen. Grant, then investing Vicksburg and menaced from without by Gen. Johnston. Was all this wrong? Should the enrolled militia then have been broken up and Gen. Herron detached from Grant to police Missouri? So far from finding cause to object I confess to a sympathy for whatever relieves our general force in Missouri and allows it to serve elsewhere. I therefore, as at present advised, can not attempt the destruction of the enrolled militia in Missouri. I may add that the force being under the national military control, it is also within the proclamation in regard to the habeas corpus.

A. LINCOLN.

The committee of the House close their report with this sentence:

These old militia soldiers, as have all the other soldiers of the Civil War, have died at such a rapid rate in recent years that it is not believed that the enactment of this bill will increase the pension roll more than from three to four thousand in number, and perhaps not that many; in other words, the amount involved is comparatively nominal in view of the enormous amount of money that is being justly paid for pensions now, and the committee is unanimous in its conviction that this act of simple justice to these old militiamen and their widows ought not to be longer delayed.

Mr. President, this body of men represent in Missouri, as I have no doubt they do in the other States, a company of Americans who volunteered for the defense of their country, and valiantly performed, in the hour of their country's need, every duty required.. They saved Missouri to the Union. They are from every standpoint of justice Civil War veterans of the

Union. It is unfair—it is without reason, that now, in their declining years, when but few of them are left, when their needs are great, they should longer be denied the recognition which ought years ago to have been granted to them.

Mr. WARREN. Mr. President, I rise to oppose the amendment offered by the Senator from Missouri. Of course, the militia is paid in all States, throughout the United States, by special appropriations or otherwise, and their arms, and clothing, and so forth, are furnished by the United States in moderate quantity, and the State militia perform their service within the State where they are recruited; and as militia they are not called to the front, away from home, for long service in fighting the battles of the country, as are those who serve in the Regular and Volunteer service.

The matter is not a new one to me, because for a great many years there have occasionally come before the committees, and especially the Committee on Military Affairs, demands of different natures from different States regarding the militia; perhaps I might say more demands from Pennsylvania than from Missouri. I commenced my service on the Committee on Military Affairs very soon after I came to the Senate. At that time we relied probably more largely upon the venerable Senator from Missouri, Mr. Cockrell, than upon any other Senator or Member of either body of Congress, for knowledge and for wisdom and for advice as to what we should do. And I will say that I never saw a more liberal Senator, in reason, than was that Senator, who served, I believe, as brigadier general or major general in the Confederacy. I remember taking this subject up with him on several occasions, but he was never able to advise the Congress nor the Military Affairs Committee of the Senate that we should put the militia of these States on the same basis as the Volunteer and Regular Army soldiers who served directly in the war.

Of course, if this applies to Missouri—and I admit that Missouri was on the border and received more nearly the shock of battle than most States received—the demands will be just as importunate from other States; from Pennsylvania, where, of course, they were simply enlisted, recorded as to where they would be, and so forth, and that was their service, as we found it to be from evidence that was before us. I do not think they should participate in a service pension of this size. That matter should be treated as being on an entirely different base.

Mr. McCUMBER. Mr. President, from my viewpoint, this is not the time or place to discuss the merits of the proposed amendment. I do not think it belongs to this bill; I do not think that we should take it up at this time.

I have been a member of the Committee on Pensions ever since I have been in the Senate, and during all that time we have been confronted with the perplexing question as to what treatment the State militia, who rendered more or less service in connection with the Army of the United States and who were often engaged in protecting Government arsenals and Government railways, should receive at the hands of Congress. The committee has been charged by my genial friend from Utah [Mr. KING], I think, as being too liberal in the granting of special pensions. It may be that we are open to some criticism from that standpoint, but in all our liberality and during all of these years we have not been able to agree by a majority vote in the committee that we should open wide the door to all of those who rendered service as militia, either when they were under the direction of Federal officers or when they performed exactly the same kind of service and were not under Federal officers. I think that that matter will have to be settled at some time and brought to an end in the Committee on Pensions; but it may be, as the criticism is often urged, that at the rate of speed we are making in that direction the proposed beneficiaries will probably all be dead before we get around to it. That also may be a just criticism; but there are many sides to this question, many angles, and it affects many men connected with the militia of many States; for example, as has been indicated by the Senator from Wyoming [Mr. WARREN], the militia of the great State of Pennsylvania, also the Delaware militiamen, who guarded the du Pont Powder Works during the war. It is a serious question and a complex question as to what we should do with reference to these many and diverse organizations. I do not think, however, we ought to settle that question in a general pension bill of this character; and, therefore, I shall oppose the amendment, even though I might support the view of the Senator from Missouri before the Committee on Pensions.

The PRESIDING OFFICER (Mr. RANSDELL in the chair). The question is on the adoption of the amendment proposed by the junior Senator from Missouri [Mr. SPENCER].

The amendment was rejected.

The PRESIDING OFFICER. The bill is before the Senate as in Committee of the Whole and open to further amendment.

Mr. CHAMBERLAIN. Mr. President, on yesterday I discussed an amendment which had been offered to the bill by the Senator from Colorado [Mr. THOMAS] and an amendment offered by me along the same lines. The amendment of the Senator from Colorado was voted on, but the one I offered was not voted on. I should like now to have my amendment disposed of.

The PRESIDING OFFICER. The amendment proposed by the Senator from Oregon will be stated.

The ASSISTANT SECRETARY. In section 3, on page 2, line 25, after the words "Marine Corps," it is proposed to strike out the words "during the Civil War."

Mr. McCUMBER. Is not that exactly the same amendment that was voted on yesterday?

Mr. CHAMBERLAIN. It is not quite the same amendment. The amendment of the Senator from Colorado affected the Mexican War veterans and the Spanish War veterans, and the amendment which I now propose affects them and members of the Regular Army.

Mr. McCUMBER. I thought the amendment was exactly the same as that offered by the Senator from Colorado.

The PRESIDING OFFICER. The Chair will state to the Senator from North Daktota that he is informed by the Secretary that the amendment now proposed by the Senator from Oregon is not the same as that previously offered by the Senator from Colorado.

Mr. WARREN. Let the amendment again be stated, Mr. President.

The PRESIDING OFFICER. The Secretary will again state the amendment.

The ASSISTANT SECRETARY. On page 2, line 25, after the words "Marine Corps," it is proposed to strike out the words "during the Civil War."

Mr. TOWNSEND. How will it read if amended?

The ASSISTANT SECRETARY. So that, if amended as proposed, it would read:

SEC. 3. That from and after the approval of this act all persons whose names are on the pension roll, and who, while in the service of the United States in the Army, Navy, or Marine Corps, and in the line of duty, shall have lost one hand or one foot or been totally disabled in the same, shall receive a pension at the rate of $60 per month,

The PRESIDING OFFICER. The question is on the adoption of the amendment presented by the senior Senator from Oregon [Mr. CHAMBERLAIN].

The amendment was rejected.

The bill was reported to the Senate as amended, and the amendments were concurred in.

The amendments were ordered to be engrossed, and the bill to be read a third time.

The bill was read the third time.

Mr. KING. Mr. President, I shall not ask for a yea-and-nay vote on the passage of the bill. There are a few Senators who would like to go on record in opposition to this bill, but there is no quorum here. So I shall not ask for a yea-and-nay vote.

The PRESIDING OFFICER. The bill having been read the third time, the question now is, Shall it pass?

The bill was passed.

The title was amended so as to read: "A bill to revise and equalize rates of pension to certain soldiers, sailors, and marines of the Civil War and the War with Mexico, to certain widows, including widows of the War of 1812, former widows, dependent parents, and children of such soldiers, sailors, and marines, and to certain Army nurses, and granting pensions and increase of pensions in certain cases."

RIVER AND HARBOR APPROPRIATIONS.

Mr. JONES of Washington. I ask that the unfinished business may be laid before the Senate and proceeded with.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (H. R. 11892) making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other puposes.

The PRESIDING OFFICER. The pending question is on the amendment offered by the senior Senator from Missouri [Mr. REED].

Mr. SPENCER. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The Secretary will call the roll.

The roll was called, and the following Senators answered to their names:

Brandegee	Curtis	Harris	King
Calder	Dial	Harrison	Kirby
Capper	Dillingham	Jones, Wash.	Lodge
Chamberlain	Glass	Kellogg	McCumber
Culberson	Gronna	Kendrick	McKellar

McNary	Pittman	Smith, S. C.	Underwood
Myers	Pomerene	Smoot	Wadsworth
Nelson	Ransdell	Spencer	Warren
New	Reed	Swanson	Watson
Nugent	Sheppard	Thomas	
Page	Simmons	Townsend	

The PRESIDING OFFICER. Forty-two Senators having answered to their names, there is not a quorum present. The Secretary will call the names of the absent Senators.

The names of the absent Senators were called, and Mr. HALE, Mr. KEYES, and Mr. SUTHERLAND answered to their names when called.

Mr. FRELINGHUYSEN, Mr. FERNALD, Mr. MCCORMICK, Mr. PHELAN, Mr. PHIPPS, and Mr. LENROOT entered the Chamber and answered to their names.

The PRESIDING OFFICER. Fifty-one Senators having answered to their names, there is a quorum present.

Mr. SWANSON. Mr. President, when the Senate adjourned on yesterday it was considering a proposition in connection with Northwest River, Virginia-North Carolina, an amendment which had been adopted. The Senator from Ohio [Mr. POMERENE] asked unanimous consent that the vote whereby that amendment was adopted be reconsidered. At the time I did not know that he would be absent when the matter came into the Senate, and I objected. In his statement he said that possibly he would be absent when the amendment came into the Senate, and consequently he would like to make his statement at that time.

I do not wish the amendment to be passed on without his presence or without hearing all the objections that he desires to urge against its adoption; and I therefore ask unanimous consent that the vote on that amendment be reconsidered, so that the Senator from Ohio can be present at its disposition.

Mr. JONES of Washington. Mr. President, if that can be done with an amendment pending, I have no objection myself.

The PRESIDING OFFICER. It can be done by unanimous consent. Is there objection to the request of the Senator from Virginia? The Chair hears none, and the vote whereby the amendment was agreed to is reconsidered.

Mr. SWANSON. Mr. President, in the address of the Senator from Ohio on yesterday, based on a statement furnished him, he stated that this was not a navigable river; that this amendment was intended merely for drainage purposes; and that only a few people interested in draining the land would be benefited. He did not give himself as the authority for that statement, but he read a statement from Mr. John Seip, of Ohio. I sent a telegram to the parties in Norfolk County who were interested in this amendment, incorporating in it the full statement of Mr. Seip, and telegraphed them to telegraph me an answer to the statement he made, which I have received, and which I ask the Secretary to read.

The PRESIDING OFFICER. In the absence of objection, the Secretary will read as requested.

The Assistant Secretary read as follows:

PORTSMOUTH, VA., *April 22, 1920.*

Senator CLAUDE A. SWANSON,
United States Senate Chamber, Washington, D. C.:

John Seip's statement is misleading. He no doubt refers to that portion of Northwest River on upper profile toward its source, which has never been navigable. Of course this should be paid for by private interests, but your bill is another thing, simply to move bars at and near the mouth of the river, where it is now navigable, to admit deeper-draft boats, and this is badly needed and will not benefit drainage. See House Document No. 198, Sixty-fifth Congress, first session, with the map, which will give you full information as to the depth and character of the river.

R. E. B. STEWART.

Mr. SWANSON. Now I will ask the Secretary to read the amendment on page 5, commencing with line 4, to show that that statement is absolutely true.

The PRESIDING OFFICER. In the absence of objection, the Secretary will read as requested.

The ASSISTANT SECRETARY. The amendment proposed by the committee, on page 5, after line 3, is the following:

Northwest River, Va. and N. C.: With a view to securing a channel 6½ feet deep at mean low water and 50 feet wide on the bottom on the bar at the mouth and over the shoal 2 miles above the mouth.

Mr. SWANSON. Mr. President, I will state that this is a river 29 miles long. At the mouth of it there is a bar. Two miles from that there is another bar which limits navigation to 4 feet. After passing that bar at the mouth the river becomes 10 feet deep. Then another bar is reached, and if that can be passed I think the water is from 10 to 14 feet deep. This is a survey to ascertain what it will cost to cut a channel through these two bars, and I have had these things read to the Senate to show the character of the attacks that are so frequently made—and I desire to acquit the Senator from Ohio—upon these amendments, in this case to show that it is simply a private enterprise for the purpose of draining land.

On this river there is a bar at the mouth, as I say, and then 2 miles above that there is another bar; and I want to read the report of the engineers to show exactly what the situation is:

Northwest River, about 29 miles in length, rises in the Dismal Swamp of Virginia and North Carolina, flows in a southeasterly direction, and empties into Currituck Sound, N. C. Its slope is gentle and its current moderate. The adjacent territory is generally low and much of it swampy. The lower part is of good navigable width, but the upper part is quite narrow and crooked. A bar at the mouth limits the navigable depth to 4 feet. After crossing the bar a depth of 10 feet exists for a distance of 14 miles, except for one shoal 2 miles above the mouth, on which the depth is 6 feet. Above the 14-mile point both width and depth diminish.

The object of this amendment is simply to get a survey, not an appropriation, to ascertain from the Government engineers what it will cost to provide a 6½-foot depth at mean low water and a channel 50 feet wide on these two bars, where the navigation is now limited to 4 feet on account of the two bars.

The statement was made here yesterday, based on this misleading statement furnished to the Senator from Ohio, that this was an effort to drain that entire river of 29 miles at the expense of the Government to give drainage to swamp lands. What is the situation? In 1916 Senator MARTIN got through the Senate a provision for making a report and survey on Northwest River as far as practicable for navigation. The engineers made a report at that time. They did not think any appropriation should be made. That report was made by the local lieutenant colonel, J. B. Jervey, a distinguished officer, a great engineer with a splendid record, and a man of as high character as this Government can furnish. He reported that under those conditions they should not make any improvements, but in his report he made the recommendation which I am about to read, basing his report on the fact that there were two shoals on this river, one at the mouth limiting navigation to 4 feet, and 2 miles above it another shoal, and after you got across these two shoals you would have a depth of 10 to 15 feet in the river. He made a recommendation which is as follows:

It is, therefore, recommended that a survey of the bar at the mouth of Northwest River and of the shoal 2 miles above its mouth be authorized, in order to determine the cost of dredging channel 6½ feet deep at mean low water and 50 feet wide on the bottom at these points.

This amendment is in the exact language, word for word and letter for letter, that the district engineer reported. That report went to the chief of the board. He recommended that no appropriation should be made at that time, but he recommended that a survey should be made to ascertain whether the public interest and the commerce were sufficient to justify a channel between these two shoals, and what the cost was. That recommendation went to the general board. The general board sustained his report in connection with not making any improvements at that time, and said nothing about the survey. Gen. Black transmitted it, and I can see why he neither recommended the improvements nor the survey. During the war Senator Martin, who had charge of this matter and was on the committee, did not think it was proper or necessary to have this survey.

What is this proposition? Here is a river 29 miles long. People call these streams creeks or rivers. It has a large volume of water. It is in a populous section of the country. Boats go there now with a draft of 4 feet. What they ask is to have a channel cut through these two shoals 6½ feet deep, provided that on a survey of the river it is found that there are enough people interested and the cost is not too great.

That is a very different proposition, is it not, from dredging a river 29 miles to drain land? I should like to know how cutting a channel through two shoals 40 or 50 feet broad and 6 feet deep will drain anything. It can not lower the water at all. All that it will do is to take out the mud in the shoal and make it possible for boats drawing 6 feet to navigate the stream.

That is the proposition contained in this amendment. A large portion of the population of the county met in a mass meeting attended by officers of the county, members of the legislature, showing the great public interest, and asked to have a survey made, which had been recommended; and the amendment is in the language of the recommendation of the district engineer, merely asking to have this survey made. It is impossible to get the appropriation until the survey is made. The survey never has been made to find out what it would cost to remove these two shoals. Nobody knows whether it would cost $10,000, $20,000, $30,000, or $5,000, and the engineer recommended it.

There is not at the present time any very large business there. There is some lumber business and some farm business, but you can not have much business with a 4-foot channel. The record shows that the amount of business there was not sufficient to justify the improvement for the 29 miles, but the engi-

neer recommended that a survey should be made to ascertain what it would cost to have these shoals opened and a depth of 6½ feet provided. I do not believe there is in this bill a more reasonable proposition than this—to have this survey made with a view of determining whether the public interest would be subserved by opening up these shoals.

In addition to that, this is a great truck country all through Norfolk County. I do not know to what extent these farms are part of it. I suppose the greatest trucking community in the world is Norfolk County. They are compelled to depend on water transportation. It is nearly impossible to build roads in that country, with its water conditions, without its being almost impracticable on account of the cost. They rely on water transportation. You can not develop that until you get 6 or 6½ feet; and it seems to me that with the length of the river and the number of people interested it is but a reasonable proposition to carry out the recommendation of the local engineer that this survey should be permitted.

I hope, therefore, the Senate will allow the survey to be made to ascertain whether these two shoals, one at the mouth and the other 2 miles above the mouth, should be removed so that a 6½-foot channel can be obtained.

Mr. POMERENE. Mr. President, as I stated on yesterday, the only information I had was that gleaned from the statement which I introduced in the RECORD, as supplemented by some conversation which I had with Mr. Seip.

During the morning I took occasion to investigate the facts somewhat further. I think that when Mr. Seip made the statement that the stream was not at all navigable he overstated the situation a little; but the investigation which I have made demonstrates to my entire satisfaction that it is mighty poor business for the Government of the United States to embark in a proposition of this kind at this time.

The first investigation that was made of this alleged river, so far as I have been able to find out, was in 1890, and the report of the investigation which was made at that time is referred to in one of the later reports. I want to read a paragraph from Document 198, to which the Senator from Virginia [Mr. SWANSON] has referred. I read from page 4:

A preliminary examination of this stream was made in 1891 by Capt. (now Col.) G. J. Fiebeger, in accordance with a provision in the river and harbor act approved September 19, 1890. Capt. Fiebeger's report containing an unfavorable recommendation is printed in the annual report of the Chief of Engineers for 1891, part 2, page 1321.

So far as I have been able, in the short time at my disposal, to investigate this subject, I find that it again claimed the attention of Congress July 26, 1917, when this amendment was proposed and adopted:

From at or near Woodward's Bridge upstream, so flat lighters, etc., may ascend, with a width of channel of not less than 40 feet, as far as the Cornland Causeway Road or beyond that point as far as practicable, and to take into consideration any proposition for the cooperation on the part of local or State interests for the payment of one-half the expense of this project, and to report the possible utility of the whole river, from its mouth to its source, if adequately improved to meet the requirements of its connecting waters, for the national defense.

Evidently, in pursuance of this action by the Congress, this subject was again taken up in the War Department, and a report was made in the Sixty-fifth Congress, at the first session, in this document, No. 198. Under date of June 18, 1917, Brig. Gen. Black made a report, and I read a sentence or two from it:

The district officer states that the improvement of the part of the river above the Norfolk Southern Railroad bridge, 14.1 miles above the mouth, would be expensive and the cost would be out of proportion to the benefits to be derived, but he believes that the lower part of the river is worthy of improvement to the extent of dredging a channel 6½ feet deep at mean low water and 50 feet wide on the bottom, and he recommends a survey to determine the cost of this improvement. The division engineer is of opinion that the improvement of this river is not advisable at the present time.

Again the board says:

This report has been referred, as required by law, to the Board of Engineers for Rivers and Harbors, and attention is invited to its report herewith, dated May 15, 1917. The board states that the commerce on this waterway is not large, that it consists chiefly of floated logs and timber, that existing facilities are fairly adequate for this class of traffic, and that the desired improvement would not result in benefits commensurate with the cost.

Then they concur in this report. Col. Frederic V. Abbot, of the Corps of Engineers, and senior member of the board, under date of May 15, 1917, said this in describing the Northwest River:

The adjacent territory is generally low and much of it swampy. The lower part is of good navigable width, but the upper part is quite narrow and crooked. A bar at the mouth limits the navigable depth to 4 feet. After crossing the bar a depth of 10 feet exists for a distance of 14 miles, except for one shoal 2 miles above the mouth, on which the depth is 6 feet. Above the 14-mile point both width and depth diminish.

The principal traffic now on the river consists of rafts of logs and piling. There is also some barging of logs and occasionally a small boat load of fertilizer or building material. The commerce amounted to 44,051 tons in 1915 and 30,209 tons in nine and one-half months of 1916.

Now, note:

There is no apparent prospects of any material increase.

Then reading further, not reading the entire report:

The district officer believes that any improvement above the Norfolk Southern Railroad bridge would be unduly expensive, but that the commerce is sufficient to justify improvement below that point. He therefore recommends a survey and estimate. The division engineer is of opinion that the locality is not worthy of improvement at this time.

Then he adds:

The commerce on this waterway is not large and it consists chiefly of floated logs and timber. Existing facilities are fairly adequate for this class of traffic. The character of the country adjacent is such that no commercial development, which will tend to create a general commerce of importance, can reasonably be anticipated. It is not believed that the desired improvement would result in benefits commensurate with the cost. In view of these facts the board concurs with the division engineer in the opinion that it is not advisable for the United States to undertake the improvement of Northwest River, Va. and N. C., at this time.

On page 5 there is a repetition of a statement made by Col. Jervey, in which he says with regard to this river:

Occasionally a small boatload of fertilizer or building material is carried as far upstream as the Woodward Bridge.

Col. Judson, whom we know, formerly one of the District Commissioners here, a lieutenant colonel, Corps of Engineers, who was division engineer, said:

In my opinion it is at least doubtful whether the annual benefits to commerce would equal interest upon cost of improvement plus maintenance.

And here is a further statement of the amount of traffic. It is so inconsequentially small that I am a good deal surprised that an enterprise of this kind could be urged at this time.

It is said that there is a good deal of truck raised in that vicinity. There is not any evidence that it is transported on this river. One of these reports refers to the fact that there is a canal running from the Dismal Swamp to some destination down there, on which a good deal of the water traffic is carried; but it is not carried on this river. Then somebody is asked to give an estimate as to the amount which may be for distribution. A letter of the Richmond Cedar Works, under date of January 3, 1917, calls attention to the fact that there will probably be about 900,000 to 1,000,000 feet, Doyle's rule measure, of lumber per month if the improvements are put in. What would that amount to as a matter of traffic in a community?

Now, I want to call attention to the fact that these different reports were made under a river and harbor bill, which suggested that they inquire into the prospect of getting the State or the local authorities to pay a half of the cost. There is not anything here to indicate that they are interested in that part of it, and, in fact, as I shall call to your attention, there has not been anything done so far as getting the local authorities to pay this cost. They say again:

Below we beg to submit the best compilation of products shipped and received for distribution in section contiguous to Northwest River.

It does not say it will go down this river. I do not know how far back contiguity extends. There is one item of 60,000 bushels of corn, another of 25,000 bushels of Irish potatoes, another of 400 barrels of kale, another of 200 barrels of spinach, and a number of items of that kind.

Let me go further into the next report. A subsequent report was made, at the second session of the Sixty-fifth Congress. I read from Document No. 1137 of the House of Representatives, and here again Maj. Gen. Black, under date of May 23, 1918, makes the statement. This is just about two years ago. At that time, after making an investigation, he said—and I read only in part—under date of May 23, 1918:

The principal traffic now on the river consists of rafts of logs and piling, and occasionally a small boatload of fertilizer is carried as far upstream as Woodwards Bridge.

Now note this:

Property owners appear to regard the improvement for drainage of more importance than for navigation. No definite offer of cooperation on the part of local or State interests has been received. In the opinion of the district engineer the improvement of Northwest River above Woodwards Bridge for purposes of navigation would be far too expensive in comparison with the purely local benefits which would be derived therefrom. He believes that the whole river would have no value for the national defense if adequately improved to meet the requirements of its connecting waters, and he reaches the conclusion that the stream is not worthy of improvement by the United States at the present time.

* * * * * * *

After due consideration of the above-mentioned reports, I concur in the views of the district engineer, the division engineer, and the Board of Engineers for Rivers and Harbors, and therefore report that the improvement by the United States of Northwest River, Virginia-North Carolina, is not deemed advisable at the present time.

W. M. BLACK, *Major General.*

Mr. RANSDELL. What is the date?

Mr. POMERENE. It is dated May 23, 1918.

Attached to this is a report by William T. Rossell, brigadier general, United States Army, retired, senior member present, who says under date of April 9, 1918:

It appears that property owners regard the improvement for drainage of more importance than for navigation.

I submit that Mr. Seip was almost right when he made this statement that these people were interested in this subject more as a matter of private enterprise than they were for matters of transportation.

I do not care to take the time of the Senate to read very much further, but there are one or two of the paragraphs here that I wish to read. On page 6 there is this statement:

The portion of the river below the Norfolk Southern bridge is a very usable stream in its present condition, but its navigable depth is limited by the shoals at its mouth, mentioned in the preceding paragraph. Above the Norfolk Southern Railroad bridge the river divides into several channels, and the bends are so numerous and sharp that it is impossible to represent them on a small-scale map. In making the examination, it was possible to navigate a 16-foot launch up to within a half a mile of Bunch Walnut Bridge. A skiff was pushed up practically to the bridge by lifting it over the logs. Above this point it was so obstructed by logs and brush, and the adjacent banks were so swampy, that it was impossible to trace it farther.

On page 7 Peter C. Hains, major general, district engineer, said:

The improvement of Northwest River above Woodwards Bridge for purposes of navigation would be far too expensive to compensate for the benefits that would be derived therefrom, which would be purely local. The contiguous country is now served by the Dismal Swamp Canal—

That is what I referred to a moment ago—

which gives direct water transportation to Norfolk or Elizabeth City. It is therefore believed that this part of the waterway is not worthy of improvement at this time for purposes of navigation. The improvement of the part of the river covered by this report would be of no benefit to commerce unless the part of the river from Woodwards Bridge to the mouth were also improved.

It was determined from this examination that the prime reason that the property owners have in asking the Government to improve the Northwest River above Woodwards Bridge is to improve the drainage of their lands. This is considered a more important feature for present consideration than the question of navigation.

Mr. President, it may be that a few shallow boats may get up there, particularly if this shoal is dug out, but I take it from these three investigations, all of which have been adverse, that the Engineer Department must have information sufficient now to justify them in coming to a conclusion as to whether it is the policy at the present time, in view of many great projects which are pending uncompleted, in great river valleys where they do not have to wait for commerce to grow up, but where the commerce is waiting for the opportunities for transportation. I do not think it is wise to go into a matter of that kind. In these reports from which I have read, though the Congress said in 1917, "Inquire as to whether or not the people in that vicinity are willing to do anything looking toward a participation in the payment of the expense," not one word has been said on that subject.

I think you will find further, in investigation of this report, that nearly all of this land is swampy, with a little timber on either side of it, and there is a question in the minds of the engineers as to whether it should be cut off at once and floated down. One of the engineers makes the statement—I will not take the time to refer to his exact language, but investigation will bear out my statement—that so far as it is necessary to have water transporation for the logs, they have it now, and it is not necessary to deepen the channel for that purpose.

Mr. President, this is a matter of no personal interest to me at all; it came up to me yesterday for the first time; but I think it is projects of this kind that have helped to discredit in some measure the river and harbor bill. I think with the information they have they can tell what the cost is, if that becomes necessary, and in view of the statement that was made that there is not transportation enough there now to pay the interest on the cost plus the cost of maintenance, I can not see why we should go ahead with a proposition of this kind at the present time.

Mr. SWANSON. Mr. President, I have listened to the statement of the Senator from Ohio [Mr. POMERENE], and it is a remarkable statement. It is about as far from the issue in this case as any I ever heard. I tried to make it clear that in 1916 a proposition was before the Senate to improve the river 24 miles and to ascertain whether the commerce was sufficient to justify it and whether the public interest would be justified in doing that. That was reported adversely, as to the upper part of the river. As is said in the telegram which I read here, that would be largely for drainage purposes.

But the very engineers' report that the Senator has read recommended what?—just what this amendment provides for. The amendment proposed is not to improve the river 24 miles, but everything the Senator read would leave the impression in the Senate and elsewhere that the proposition was to improve the river 24 miles. The Senator never departed from that thought. He never read anything except against the proposition to improve the river 24 miles.

What did the engineers recommend in the very report from which the Senator read? They said that the commerce and the public interest did not justify improving the river for 24 miles, but what did they recommend? They said that at the mouth of the river there is a 4-foot bar and that nothing but a boat of 4-foot draft could go over it, and that 2 miles above that there is another bar 6 feet deep and for a 6-foot boat to go over it, it would have to be 6½ feet deep to give half a foot under the bottom of the boat. But the Senator knows full well, if boats are going over there, we can not have any commerce unless it is in a 6-foot boat. A 6½-foot boat can not go farther up there.

Mr. POMERENE. But as preliminary to the boat you must have a river.

Mr. SWANSON. They have a river, and I just want to say that in this case some people have more zeal than knowledge. If they had knowledge they would be all right. What is the Senator's zeal? It is regarding the improvement of the river for 24 miles. What did we ask? We asked exactly what was recommended by the very report from which the Senator read.

We have had a survey of the bar at the mouth of the river, over which the boats go in commerce, and we must make it 2 feet deeper. Two miles above there is another bar, 6 feet deep, and the proposition is to make that a half a foot deeper, so that a 6-foot boat could go over the 6½-foot bar. That is all that is involved there; and yet the Senator comes here and reads a report appearing that this was a proposition to improve 24 miles of river. That has been abandoned, and there is no effort to do that, but the engineers recommended that the commercial conditions were such as to justify a survey to ascertain what it would cost, and when that cost comes in, what then? That the very commerce itself that is already there, if the expense is not too great, may simply cross these two bars.

I would like to have the Senator explain how any drainage can come from crossing two bars. It is not reducing the level of the water at all, but simply taking out a portion of the bar to make the water 6½ feet deep at that point. He talks like this was a drainage proposition. The Senator knows that that can not occur. Why does he talk about drainage?

This is simply the proposition that has been recommended. We did not press the other because the war was on. Commerce is growing there, and that section of the country is developing; there has been a big development, and we are entitled to have the engineers say whether conditions justify digging 2 feet deeper on one bar and on the other bar a half a foot deeper and having an estimate made of the cost, and then to say whether the Government is justified in doing it.

Mr. TOWNSEND. May I ask the Senator a question?

Mr. SWANSON. Certainly.

Mr. TOWNSEND. What particular benefit does the Senator expect to get out of this improvement if he has his way about it and the channel is deepened for 4 miles up from the mouth of the river?

Mr. SWANSON. It is not 4 miles; it is 14 miles. At the mouth of the river there is a bar on which we only get 4 feet of water. When we cross that, for 14 miles we have 10 feet of water, and then another little bar, which is only 6 feet; and this is a proposition for a channel 6½ feet through those two bars; that is all.

Mr. TOWNSEND. Is there commerce along that distance to justify it?

Mr. SWANSON. They have commerce enough there now to justify what this little cost will involve. They make a report as to the extent private interests will contribute in dredging it out.

Mr. TOWNSEND. This is not a case of the camel getting his head under the tent?

Mr. SWANSON. Not at all. The engineers have reported against the river improvement, but they have reported that these two bars, that will cost very little money, justify a survey to see what they would cost. All that is asked is just for these two bars.

Mr. CALDER. Mr. President, coming from a part of the country where improvements of rivers and harbors are essential

to the commerce of the Nation, I am naturally very deeply interested in this measure. I am a member of the Committee on Commerce, which reported the bill, and before voting for the bill in its present form gave much thought and study to the whole subject.

I have always favored river and harbor improvements. I have differentiated between rivers and harbors and creeks and brooks and little streams in some parts of the country that really ought not to be improved. I have always believed that money properly spent in rivers and harbors is a good investment for the United States; and when this bill came from the other House with an authorization for the expenditure of $12,000,000 this year, I felt, with other members of the Committee on Commerce, that the sum was entirely too small to carry on the work essential for the needs of commerce and for the proper development and improvement of our rivers and harbors during the next year.

I know, Mr. President, that there has been a considerable amount of money in the unexpended balances; I know that it was something over $50,000,000 late last year, although the sum was materially reduced early this year, and, as I understand, on February 1 was approximately $30,000,000.

Mr. JONES of Washington. Mr. President——

The PRESIDING OFFICER. Does the Senator from New York yield to the Senator from Washington?

Mr. CALDER. I do.

Mr. JONES of Washington. I might state to the Senator that I have made inquiries in reference to this matter; in fact, we had Col. Taylor before the committee, and he stated that on the 1st of February the fifty-nine or sixty million dollars which was on hand the 1st of November last had been reduced to $36,000,000. It is being reduced at the rate of about $5,000,000 a month, and there is no reason to suppose that the expenditures during the next three or four or five months will be less than they have been during the last three or four or five months. In fact, the last four or five months included the winter months, and we may expect the expenditures, if anything, to be greater during the succeeding months. I wish to call the attention of the Senator to the fact that if the expenditure continues at the rate that it is now proceeding we shall have on hand on the 1st of July about $12,000,000 for all the projects throughout the entire country. If we should appropriate $20,000,000, that would make the total amount available $32,000,000, and at the same rate of expenditure on the 1st of January next we should have only $2,000,000 left to carry on the work of the improvement of rivers and harbors prior to the passage of the next river and harbor bill, which we expect to be by the 4th of next March. That, briefly, shows the present situation.

Mr. SIMMONS. Mr. President——

The PRESIDING OFFICER. Does the Senator from New York yield to the Senator from North Carolina?

Mr. CALDER. I do.

Mr. SIMMONS. Mr. President, if the chairman of the committee will permit me, I should like to supplement the statement which he has made with reference to the amount that will be on hand available for improvement purposes at the time the money appropriated by the pending bill becomes available. It is true, as the Senator from Washington has said, that Col. Taylor, representing the Engineer Department, stated that when the money provided for in this bill became available there would only be between twelve and thirteen million dollars coming over from former appropriations which could be applied for all of the projects which have been approved by Congress and for which appropriations have been made by Congress.

Mr. JONES of Washington. Yes; that is correct.

Mr. SIMMONS. But Col. Taylor also stated that for the items contained in his last estimate of $19,000,000 there would be available from old appropriations when the money in this bill is available only about $7,000,000, so that for the items for which we are appropriating—and although the bill carries a lump sum, it is understood that we are appropriating for the items that were included in Col. Taylor's estimate—for those items there will only be available under old appropriations $7,000,000 when the money provided for in this bill becomes available.

Mr. HARRISON. Mr. President, will the Senator from New York yield?

The PRESIDING OFFICER. Does the Senator from New York yield to the Senator from Mississippi?

Mr. CALDER. I do.

Mr. HARRISON. I am not a member of the Commerce Committee, as are the Senator from North Carolina [Mr. SIMMONS] and the Senator from New York [Mr. CALDER]. The Senator from North Carolina says that the projects which have been recommended by Col. Taylor of the Board of Army Engineers are to be taken care of under the proposed lump-sum appropriation according to the estimate submitted. To which of the estimates does the Senator refer? There have been about three made, I think, by the Board of Engineers. One submitted to the House of Representatives recommended an appropriation of about $43,000,000, as I recall, and another one called for a somewhat smaller amount.

Mr. SIMMONS. If the Senator will pardon me, I was speaking about the revised estimate, which was for $19,000,000.

Mr. HARRISON. Yes; $19,000,000 for improvements and $5,000,000 for maintenance, making $24,000,000 in all.

Mr. SIMMONS. Yes.

Mr. HARRISON. But that eliminates a great many projects that the Board of Army Engineers stated in their report to the House Committee on Rivers and Harbors should be provided for. That is my impression about it.

Mr. SIMMONS. Col. Taylor, as I remember—and the chairman of the committee will correct me if I am in error—stated that the $19,000,000 which he had estimated for certain items contained in the bill was urgently needed, and that with that $19,000,000 the work could be done that the immediate requirements of commerce demanded.

Mr. HARRISON. The Senator said $19,000,000 was actually necessary. As I recall, Col. Taylor recommended $19,000,000 for improvements and $5,000,000 for maintenance, making a total of $24,000,000.

Mr. SIMMONS. I was confining my statement to the work of improvement, for which there was estimated $19,000,000.

Mr. HARRISON. Yes; and then $5,000,000 was estimated for maintenance.

Mr. SIMMONS. Yes.

Mr. JONES of Washington. Will the Senator from New York yield to me?

Mr. CALDER. Yes.

Mr. JONES of Washington. The first estimate, including some supplemental estimates that came down from the engineers, was that $44,000,000, in round numbers, was required for all the projects that had been authorized by Congress, and which had been undertaken. Then, practically upon the statement of fact as made on yesterday by the Senator from Missouri [Mr. REED], as to the attitude of the committee and its desire to hold down the appropriations as low as they could under the policy they believed they ought to follow, the engineer revised his estimates, and, leaving out certain appropriations that he thought could be left out, recommended $22,000,000 for improvements and $5,000,000 for maintenance, or $27,000,000 altogether. That was further revised as to the improvement items, so that the estimate as finally submitted stated that there would be required for improvements $19,000,000 and for maintenance $5,000,000, or a total of $24,000,000 for both.

Now, Mr. President, with reference to the statement which I made a moment ago relative to the money available for all projects all over the country, the Senator from North Carolina [Mr. SIMMONS] is correct, that for the particular projects in this revised list there will probably be available on the 1st of July, when the fiscal year begins, about $7,000,000; but for all the projects of the country which have been authorized, if the rate of expenditure goes on at the same rate that it now is, there will be about $12,000,000 available the 1st of July. If we should add $20,000,000, that will make $32,000,000. If the expenditure continues at the same rate as at present, then by the 1st of January for all projects, not only those on the revised list which were supposed to be taken care of by this bill, but for all other projects, there would be but $2,000,000 available.

Mr. SIMMONS. I think the Senator also ought to make it clear that money appropriated for one project can not be applied to another project.

Mr. JONES of Washington. Yes; money that has been heretofore appropriated for a particular project can not be diverted from that project to others.

Mr. REED. But is not this the case, if the Senator from New York will pardon me——

Mr. CALDER. Certainly.

Mr. REED. That the engineers reported $24,000,000 as a minimum, and then the committee of the House reduced that minimum to $12,000,000, and the Senate committee raised the $12,000,000 to $20,000,000; so that there is a hiatus of $4,000,000 or $4,500,000 between the amount recommended by the Senate committee and the amount recommended by the Board of Engineers?

Now, is not this the situation, that in using the money thus appropriated, the amount being four and a half million dollars short of the minimum appropriation required, the Board of En-

gineers in its discretion as to where the money is most necessary may, if it so desires, fail entirely to use any of the money on certain of the projects which have been heretofore approved? That board can do that if it wants to. Is not that the case?

Mr. JONES of Washington. That is true.

Mr. REED. And is not the board very likely to do that; in fact, is it not almost compelled to do it?

Mr. JONES of Washington. According to their estimates, the board will have to leave out some of the projects even on the revised list. There will have to be some of them left out; there is no question about that.

Mr. REED. So that the Mississippi River is liable to be left without anything except the money that is left over from former appropriations?

Mr. JONES of Washington. While that is possible, I do not think it will happen. The engineers in their revised list estimate $500,000 for the Mississippi River from the mouth of the Ohio to St. Louis; they estimate $1,200,000, I think—either that or $600,000, I am not sure about that, but I think it is $1,200,000—for the Mississippi River from St. Louis to St. Paul and $600,000 for the Missouri River. If we appropriate $20,000,000, the engineers may use—and I think very likely will use—of that amount $500,000 on the Mississippi River between the mouth of the Ohio and St. Louis, $1,200,000, or whatever the amount may be on the revised list, on the Mississippi River up to St. Paul, Minn., and $600,000 on the Missouri.

There is no attempt at concealment about this matter; I wish to be perfectly frank and perfectly fair, and I tried to set it out fully in the report so that everybody will have the facts, but with the $20,000,000 which we propose to appropriate there is not any reason, in my judgment, why the engineers should not use $600,000 on the Missouri River.

They say in their letter to me, in their final conclusion, that by leaving out other items, small items not referred to in their letter, they might get along with $18,000,000, and take care of the Ohio, of Savannah Harbor, I think, and of the other improvements referred to by them, including $1,000,000 on the East River at New York, $2,000,000 for the Delaware, and so on. We have allowed a further sum of $2,000,000, out of which they can take $600,000 for the Missouri and $1,400,000 for some other projects; but, as the Senator has said, they could go through the year without applying money to those projects. Col. Taylor said, however, that they would consider themselves to an extent morally bound to use whatever money we appropriated upon the projects mentioned in their revised list, but that if an emergency should arise in connection with any project outside of those on the list, requiring the expenditure of some money, they would feel justified, of course, in using, and would have the authority to use, some of this money for that purpose, although they would not use any of the money for any project not mentioned on their revised list except in case of emergency demanding it. That, in brief, is the situation, as I understand it.

Mr. REED. Mr. President, of course I do not want to press this matter to interfere with the Senator from New York.

Mr. JONES of Washington. The Senator from New York has the floor.

Mr. REED. But I wish to get it cleared up, and this is, perhaps, as good a time to do so as any other. The report of the minimum amount that the Army engineers were finally—I will not say coerced—induced to bring in in accordance with the plan, which meant, to use common language, cutting to the bone, was $24,500,000. Is that right?

Mr. JONES of Washington. Something like $24,000,000; I do not recall the exact figure.

Mr. REED. That included maintenance?

Mr. JONES of Washington. Yes; that included maintenance.

Mr. REED. That included maintenance of $5,000,000?

Mr. JONES of Washington. Yes.

Mr. REED. The House, with that report before it, cut the appropriation to $12,000,000. That is the amount carried in the bill as it came to the Senate. That is correct, is it not?

Mr. JONES of Washington. Yes.

Mr. REED. Then, the Senate committee took hold of it, and the result was that the Senator in charge of the bill wrote the letter to which I referred yesterday, which proposed a new estimate suggesting certain reductions in the bill. I want to put them into my question, because I desire this question to mean something in the RECORD.

East River and Hell Gate, reduce to $1,000,000—

It had been, I think, $3,000,000.

Mr. JONES of Washington. $3,200,000.

Mr. REED. The next recommendation was:

Shrewsbury River, omit entirely.
Delaware River, reduce to $1,000,000—

What had that estimate been?

Mr. JONES of Washington. Two million dollars.

Mr. REED. The next item was:

Chesapeake and Delaware Canal, omit entirely—

What had that estimate been?

Mr. JONES of Washington. Two million dollars, and the revised estimate was reduced to $1,000,000.

Mr. REED (reading):

Norfolk Harbor, omit entirely.

What had that been?

Mr. JONES of Washington. I think that was either three or four hundred thousand dollars. I will tell the Senator in just a moment.

Mr. CALDER. The original estimate was $1,000,000. The revised estimate was $400,000.

Mr. REED (reading):

Savannah Harbor, omit entirely.

Mr. JONES of Washington. The revised estimate was $300,000.

Mr. REED (reading):

Brunswick Harbor, omit entirely.

Mr. JONES of Washington. Both the original and revised estimates were $200,000.

Mr. REED (reading):

Hillsboro Bay, omit entirely.

Mr. JONES of Washington. The revised estimate in that case was $260,000.

Mr. REED. What was it before?

Mr. JONES of Washington. Four hundred and forty-six thousand five hundred dollars.

Mr. REED (reading):

Southwest Pass, reduce to $600,000.

Mr. JONES of Washington. That, I think, was $1,600,000.

Mr. REED (reading):

Mississippi River——

Mr. JONES of Washington. The Mississippi between the Ohio and the Missouri was $750,000; the revised estimate was $500,000.

Mr. REED. What was the rest of the Misissippi River?

Mr. JONES of Washington. In the case of the Mississippi River to St. Paul, the original estimate was $2,000,000 and the revised estimate was $1,200,000. In the case of the Missouri River, the original estimate was $1,860,000 and the revised estimate $600,000.

Mr. REED. Now, your proposition on those three items which you asked the board to consider was as follows:

Mississippi River, Missouri River to St. Paul.

The Missouri River does not run to St. Paul. It should have read—

Missouri River, and Mississippi River to St. Paul.

That would be the correct language.

Mr. JONES of Washington. It means the Mississippi River to St. Paul; yes. It says: "Mississippi and Missouri Rivers, $1,200,000," and then, "for the Missouri River, $600,000."

Mr. REED. Then, that means the Mississippi River, from St. Louis to St. Paul, $1,200,000, and the Missouri River, $600,000?

Mr. JONES of Washington. Yes.

Mr. REED. Now you propose, in the next item, to omit the Missouri altogether.

Mr. JONES of Washington. That was the suggestion that I said had been made in the committee.

Mr. REED. I am just trying to get the basis of their action. The item for the Mississippi River to St. Paul was to be reduced to $600,000. Then—

Cumberland River below Nashville, omit entirely.

How much was that?

Mr JONES of Washington. The revised estimate was $300,000.

Mr. REED. And what was it before that?

Mr. JONES of Washington. $460,000.

Mr. REED (reading):

Ohio River, locks and dams, omit entirely.

Mr. HARRISON. Mr. President, may I ask the Senator a question?

Mr. REED. Just let me finish this.

Mr. HARRISON. I simply want to know what the Senator from Washington is reading from. I have another estimate here which has a much larger sum than the Senator from Washington has given.

Mr. JONES of Washington. I am reading from a statement prepared by the chairman of the House committee and appearing in the report of the committee, and I will say that Col. Taylor stated that this was substantially correct. It may not

be exactly correct in every item, but he said that it was substantially correct. This was prepared by the chairman of the House committee.

In the case of the Ohio River, the original estimate was $5,000,000 and the revised estimate was $1,000,000.

Mr. REED. I want to get this in somewhat concrete form. Let me pursue this method—I am nearly through—and I will thank the Senator from Mississippi if he will put into the RECORD the figures to which he refers in a moment, after I have concluded these questions.

Mr. HARRISON. I expect to do so. I just wanted to know what estimate it was that the Senator from Washington was reading from.

Mr. REED (reading):

Ohio River, locks and dams, omit entirely.

What was the estimate?

Mr. JONES of Washington. The original estimate was $5,000,000 and the revised estimate $1,000,000.

Mr. REED (reading):

Milwaukee outer harbor, omit entirely.

How much was that?

Mr. JONES of Washington. One hundred and seventy-five thousand dollars.

Mr. REED. Rouge River?

Mr. JONES of Washington. Two hundred and seventy-three thousand dollars, I think. There was no original estimate for the Rouge River. That came down, however, as a supplemental estimate—$273,000.

Mr. REED. It is a little wearisome, but there are not very many people here but just us folks, and let me follow this for a moment. Will the Senator now give me the final revised estimate for the Missouri River?

Mr. JONES of Washington. The revised estimate for the Missouri River was $600,000.

Mr. REED. Now the estimate for the upper Mississippi?

Mr. JONES of Washington. One million two hundred thousand dollars.

Mr. REED. And for the lower Mississippi?

Mr. JONES of Washington. Five hundred thousand dollars.

Mr. REED. That is an aggregate of $2,200,000. Now, the proposition that you made was to reduce that entire amount to $600,000, and——

Mr. JONES of Washington. Oh, no, no! The Senator is mistaken about that, according to my recollection. We did not cut out $500,000 below St. Louis to the Ohio. This is what was proposed:

Mississippi River, Missouri River, to St. Paul, reduce to $600,000.

That was a reduction of $600,000.

Missouri River, omit entirely.

That was a further reduction of $600,000. That would be $1,200,000 reduction.

Mr. REED. Yes.

Mr. JONES of Washington. There was not any proposal or suggestion made to reduce the amount of the revised estimate from St. Louis down to the mouth of the Ohio.

Mr. REED. Now, the engineers reported on these various suggestions, and they said that they could not get along without the money required on all of these projects which you mentioned in your letter, as follows—let me call the attention of the Senator from Minnesota to this. I hope he will stay for a moment.

They said they could not get along without the appropriations for the Delaware River, Norfolk Harbor, Savannah Harbor, Southwest Pass, Cumberland River, and Ohio River. They must have that money. They had asked for a vastly larger sum than they were going to get; but when they came to the remaining item, which includes the upper Mississippi, they say:

The omission of the remaining items will delay the prosecution of important and worthy improvements, but will not have the serious consequences incident to the omission of the items on which the above statements have been made.

It is difficult to predicate the works that would be omitted were the total amount appropriated $18,000,000 or $15,000,000, respectively.

Mr. JONES of Washington. There is one other statement which the Senator might read:

By omitting those items indicated in your letter on which no comment is made herein, and by the omission of work on some of the smaller items of less importance to general commerce, the expenditures could be brought within the limit of $18,000,000.

Mr. REED. Now, I want to ask Senators representing Mississippi River States what they think they are going to get under these circumstances? Here are engineers who report that they have cut the appropriation absolutely to the bone. They have been required to do it by two separate demands. They have omitted all the items they can omit, and finally they are asked if they can not omit some 21 projects. They report that they can not omit certain of those projects at all, the ones whose names I have just read; they must have that money. As to the rest of them, they can not omit them without serious consequences, but they say they are not as serious as would be the consequences if they abandoned the others.

Now, we have cut them to the bone. We make no provision for emergencies. What chance has the Mississippi River under those circumstances? Just about as much chance as a man who owns a ninth mortgage on a stock of goods that has been seized by the sheriff on a first mortgage, a second mortgage, and a third mortgage, each of them for the total value of the entire stock.

I want Senators to know what they are doing here. They are killing, for the time being, the improvement of every one of these enterprises except the ones that have been specifically mentioned by the engineer, because the engineer now charged with the responsibility of carrying on this work has already said to us, "I need more money for these other enterprises." He has already said, "They are more important," and he has emergencies to look after and extra costs and charges to look after; and it is inevitable—almost as inevitable as fate—that, finding his funds running low, he will neglect these great inland streams.

Let me appeal to the Senator from New York, and then I am through—and, of course, I am greatly trenching upon his time, and I hope not too much on his patience. I have voted for and supported every proposition to improve every New York harbor, not because it was a harbor of New York, but because it was a harbor of the United States; and it is just as important to take care of the hinterland as it is to take care of the frontier of a country. Five or seven million dollars more will keep these projects going at a starvation point, and if we do not get that five or seven million dollars more all of these enterprises are liable to be crippled. Some of them are certain to be temporarily assassinated, if you can have such a thing as temporary assassination. They will be killed for the time being. They can be resuscitated. That is narrow business. It is cheap policy. It is a mistake. There will be wiped out in these rivers works that have been erected for many years, and at great expense, simply because the work has not been carried on, and the work already in has not been protected by further work which is necessary.

It seems to me the Senate at least should set a little example on this matter.

I thank the Senator from New York. I very seldom trespass in this way on a man's time.

Mr. CALDER. Mr. President, the remarks of the able Senators who have interpolated their views into my remarks have illuminated the subject, and, I know, have given the Senate and the country much information.

I have a great deal of sympathy with the position of the Senator from Missouri. He insists that it is a mistaken policy of the Government and of Congress to fail to appropriate sufficient money to properly improve our rivers and harbors, and in consideration of the subject in the committee I had the very things in mind the Senator has spoken of. We ought to keep our rivers and harbors, the water tracks of commerce, open for the business of the Nation.

But the committee had a number of things in mind, Mr. President. It had in mind the condition of the Treasury. The House had sent to us a bill appropriating $12,000,000. We could afford to reasonably increase that sum, but unless we gave up the whole policy laid out by the House, appropriating on a lump-sum basis, we could not afford to too largely increase the amount they appropriated.

There are other reasons, perhaps, that have not occurred to some Senators. This year it will cost for river and harbor improvements at least 120 per cent more than it did four or five years ago; so that this appropriation of $20,000,000 will pay for only about $8,000,000 worth of work five years ago. On first impulse that might prompt Senators to suggest that we ought to appropriate twice as much. I could hardly approve of that position if it were taken, because I think this year we are at the peak of high prices. I feel reasonably certain that after this year we can hope for a steadying of the labor market, we can hope for a steadying of the markets in materials that go into improvements on our rivers and harbors, and while this year we can very properly appropriate a sum not less than $20,000,000, next year I think we can fairly and sensibly go back to our old method of appropriating at least $40,000,000.

It is a fact that the sum of $20,000,000, with the unexpended balances, will, perhaps, carry us to about the first of the year, but not much beyond that. But I do believe—and I will say this in answer to the remarks of the chairman of the committee, giving the figures of unexpended balances each month—

that I doubt if it will be possible to get material and labor this summer to do the work laid out. I am engaged in several building operations in New York, and I know that in that city last Monday there was not a bag of cement in the material yards of the city of New York available for delivery for building purposes; and when the awarding of these contracts is actually taken up it will be found, I think, that an appropriation of $20,000,000, together with the unexpended balances, is about what we can fairly expend for this year.

I make this statement as one who is strongly in favor of liberal appropriations for this purpose. I know that the amounts to be awarded for improvements around New York Harbor have been reduced. I have analyzed these sums and the unexpended balances for these improvements, and I am quite convinced that we can carry them on as speedily as they ought to be carried on, in view of the conditions to which I have called attention in the few remarks I have made. But I do think, Mr. President, that in the long run it is a mistake to appropriate money for river and harbor improvements, as we have this year, on the lump-sum basis. It is better to go back to the old method and then have the courage here to refuse to appropriate for rivers and harbors that are unnecessary and where the appropriation of the money is a clear waste, but to appropriate for those where the money is actually needed, whether in the West or in the East or in the North or in the South.

But I wanted to say a word or two about a very necessary improvement in the harbor of New York. Ten years ago Congress authorized an improvement of Jamaica Bay, one of the great bodies of water within the city of New York. At that time the project authorized provided for the dredging of a channel 1,000 feet wide and 18 feet deep. The State of New York and the city of New York were to make certain contributions to the improvement. For various reasons that improvement has been carried on in a very moderate degree, but the demands of the commerce in New York upon our port facilities were so great during the war, and the business has so rapidly increased there, that there has come from that city a great demand for the improvement of this great bay.

Jamaica Bay is situated south of Brooklyn. It is formed by the southerly side of Brooklyn and Rockaway Peninsula and extends along Nassau County on Long Island. It has an area of about 40 square miles. It had a natural channel before this improvement about 10 feet deep. That affords facilities, when properly improved, for taking care of one-third of the commerce of the United States.

In appreciation of the value of the improvement, the Board of Estimate and Apportionment, of the city of New York, during these recent months has provided for the expenditure of $7,500,000 for the building of docks, piers, approaches, and terminals for this improvement, if authorized by Congress. So I have offered an amendment to this bill which provides that this project, authorized in 1910, should be further changed so that we would have a channel about 1,500 feet long, 1,000 feet wide, and 30 feet deep. The Committee on Commerce considered the amendment, and in view of the fact that we have here a lump-sum bill, they refused to approve a change in the project; and we will have to put off this important improvement for another year.

While I have the floor, Mr. President, I want to say just a word or two about the pier and dock and river and harbor improvements in New York. Through that harbor was carried 80 per cent of the war materials that went overseas during the recent World War. Through the harbor also went 60 per cent of the troops who sailed for overseas. I have had occasion to look up the records of the Bureau of Statistics, Department of Commerce, recently, and I find that in the year 1919 the business of New York Harbor, both in the matter of exports and imports, was at least 60 per cent of the total of the country; that in the calendar year 1919, in money value, the exports shipped through the harbor of New York were nearly $1,000,000,000 in excess of the total value of exports of the whole country in any year previous to 1914.

So I think those of us who live in New York can fairly come to Congress and insist that when we do ask for improvements for our harbor we are not presenting to the Congress something for ourselves locally. New York is the metropolis of the Nation. It is a city of which I am sure every Member of this body is justly proud. Of course, those of us who represent the city directly are interested in presenting its claims; but it is the great metropolis of the world to-day, and it seems to me that we can properly ask every consideration for it.

Mr. HARRISON. Will the Senator yield?

Mr. CALDER. Certainly.

Mr. HARRISON. I agree as to the necessity of those improvements in New York. I was interested in what the Senator said touching the value of the dollar now and the value of the dollar a few years ago. If I understood the Senator correctly, he said that the $20,000,000 appropriated now is equivalent to what about $8,000,000 would have been a few years ago.

Mr. CALDER. Yes; about five years ago, I said.

Mr. HARRISON. Then, if the appropriation of $12,000,000 which the House so generously appropriated for the rivers and harbors of the country should prevail in conference, and should be agreed upon by both the Senate and the House, it would be equivalent to about $5,000,000 five years ago, would it not?

Mr. CALDER. The Senator is correct, in my opinion.

Mr. HARRISON. And the appropriations some five years ago for river and harbor work were around approximately $40,000,000, in some instances going higher than $40,000,000, were they not?

Mr. CALDER. Yes; substantially that, as I remember.

Mr. HARRISON. I noticed in the original estimate of the Board of Army Engineers there were certain projects in New York State, which the Senator is so much interested in, and which I, as one Member of the Senate, would be very glad to vote for, because I realize the necessity of appropriations for the maintenance of those harbors. I notice under New York Harbor, under the estimate of $43,000,000 which was proposed by the engineers, for maintenance and improvement of main entrance channel, $200,000; for continuing improvement of Hudson River channel, $500,000; total for that improvement, $700,000. Reading further:

Channel on Flushing Bay, N. Y., $20,000; East River, N. Y., continuing improvement, $3,200,000.

That is approximately $4,000,000, is it not, for New York State as estimated?

Mr. CALDER. I have not figured it out.

Mr. HARRISON. Under this bill, appropriating $20,000,000, New York State would hardly get over $1,500,000, would they, for these improvements?

Mr. CALDER. I think something like that.

Mr. HARRISON. Then, the only way for these harbors and these improvements to be taken care of properly is for the Senate to act and appropriate sufficient money for it, namely, about $4,000,000, is it not?

Mr. CALDER. I would say to the Senator that the figures indicate that there is an unexpended balance of the amount appropriated for the East River of $4,700,000; for the Hudson River channel, about $684,000; and with the sums which are apparently proposed in the revised bill, it would seem to me this would be enough to carry these improvements through for this calendar year. On the East River we would have quite a balance next year.

Mr. HARRISON. Has it not been the case in every river and harbor bill that there was a balance left over? That is always true, is it not?

Mr. CALDER. Yes. I will say to the Senator, Mr. President, that I have not any quarrel with the position he takes; I have not any disagreement with the Senator. But there are many matters involved in this, and, as I said in my remarks a minute ago, it is a question in my mind this year, with these prices at the peak, with material costing 100 per cent more than last year, or at least 80 per cent more than last year, and with labor costing 50 per cent more than last year, for common labor, the kind we use in that sort of work, whether or not it is advisable this year for Congress to appropriate very large sums for these improvements. I am hopeful, and I see some evidence of it, too, that we are just going over the peak of the high prices.

Mr. HARRISON. The Senator does not know when these prices are coming down?

Mr. CALDER. No.

Mr. HARRISON. As a matter of fact, if we should appropriate this year $40,000,000 it would be a very economical bill, would it not, in view of the fact that when the prices were away down we appropriated larger sums than that?

Mr. CALDER. Yes; $40,000,000 would be equal in practical results to an appropriation of only sixteen or eighteen million dollars five years ago.

Mr. HARRISON. As to these amounts carried over, the amount that would be carried over from the 1st of July this year is no greater than the ordinary carrying over of appropriations year by year, is it?

Mr. CALDER. No.

Mr. HARRISON. About the same?

Mr. CALDER. I am not sure about that. I presume so.

Mr. HARRISON. My information is that it is about the same.

Mr. CALDER. I think it can fairly be said that we are spending the money faster now because things cost so much

more. A project that would ordinarily cost a hundred thousand will cost two hundred thousand, perhaps two hundred and fifty thousand with the utmost economy, and we are spending money faster now.

Mr. HARRISON. That is why it seems most strange to some of us, who recognize the great importance of river and harbor improvement, for the Senate to cut down the appropriation from $43,000,000 to $20,000,000, when they admit that the dollar will go only about 40 per cent as far as the dollar went five years ago.

Mr. CALDER. Mr. President, the only answer that can be made to that statement is that just now the Congress might very properly set an example of economy, although I doubt the wisdom of it in these improvements.

Mr. REED. Just now the Senator said "set an example of economy." All along the line or just on rivers? Are we setting any example of economy when we increase the standing Army of the United States three and one-half times what it has ever been under a peace establishment and when we quadruple the personnel of the Navy? We are doing that on the peak prices, and we are doing it at a time when the country is in greater safety than it has been in in the last 50 years. There is not any country in the world that can fight us now. All of them have to come here to get money to live on.

Mr. HARRISON. May I suggest that the same argument that is put forward now by the Senator from New York has been used for the last four years when the river and harbor bill has come before the Senate? We have appropriated lump sums for the last few years, every one of which was inadequate, and there is not a harbor in the United States that has not suffered by reason of the inadequacy of appropriations for improvements.

Mr. CALDER. We did not appropriate a lump sum last year, I will say to the Senator from Mississippi.

Mr. HARRISON. What was the amount appropriated last year?

Mr. CALDER. I am not sure as to the amount, but it was not a lump-sum appropriation, I know.

Mr. HARRISON. I have forgotten just the amount, but it was a very small sum and many projects were left out and the appropriations were cut down very much. My recollection is that for the last few years there have been lump-sum appropriations.

Mr. CALDER. No; I know that last year it was not a lump-sum appropriation.

Mr. HARRISON. What was the amount, may I ask?

Mr. CALDER. My impression is that it was about $25,000,000.

Mr. SPENCER. May I say to the Senator from Mississippi that the actual amount expended is given on page 3 of the report, but the amount of the appropriation, which is made up of many items, is not given. The amount expended is $21,245,177.

Mr. CALDER. I thank the Senator for this information.

Mr. JONES of Washington. I want to say that I agree with what the Senator says with reference to the improvement of the harbor in New York, and I have in times past supported liberal appropriations for that harbor. My recollection is that when the East River channel was really put on as an exception to the rule or policy that was being followed in framing the bill at that time, I supported the appropriation for the East River Channel because of the importance of the commerce of New York to the commerce of the country.

Mr. CALDER. I know the Senator has always followed that course.

Mr. JONES of Washington. I regret that it was not possible under the situation to put on a provision with reference to Jamaica Bay, to which the Senator has referred. The Senator has stated the circumstances controlling that, and he recognizes the situation as well as anybody.

But what I did want to refer to was this: I have had some representatives from New York call attention to the magnificent character of the piers which they have constructed there, and, while I know nothing about it personally, I was impressed with an editorial that I saw in the Scientific American just a short time ago, wherein they criticized very severely the piers of New York City.

I have not the editorial here; I do not think I would put it in the RECORD if I did have it; but I did call it to the attention of the Senator from New York. That criticizes the piers very severely, and if the Senator would like to give us some information with reference to that I would be very glad to have it.

Mr. REED. Mr. President——

Mr. CALDER. I want to answer the question of the Senator from Washington, if the Senator from Missouri will permit me.

Mr. REED. Certainly.

Mr. CALDER. I assume that the Senator from Washington [Mr. JONES] refers to an editorial in the Scientific American of last month. I believe he showed it to me himself. It spoke of some piers being erected on Staten Island, which is within New York City—10 big piers being erected at a cost of something like $6,000,000. The article criticized those piers severely.

I doubted the statements in the editorial and submitted it to the city authorities, and I have a letter from the dock commissioner of the city which goes into the whole matter of those piers. Without reading the letter, Mr. President, I ask permission to incorporate it in the RECORD. It is a full statement of the whole pier system of New York, and I am sure it will be interesting for the Senator from Washington to read, as chairman of the committee, and also other Senators who may wish to inquire about our docks in New York City.

The PRESIDING OFFICER (Mr. MCNARY in the chair). Without objection, permission is granted.

The letter referred to is as follows:

APRIL 5, 1920.

Hon. JOHN F. HYLAN,
Mayor of New York City,
City Hall, New York.

MY DEAR JUDGE: From time to time there have appeared in the public press and various magazines criticisms of the piers being constructed at Stapleton, Staten Island. I have been so busy that time has not permitted me to prepare and issue specific denials.

But, under date of March 24, 1920, I received a letter from Senator CALDER, in which he says:

> Senator JONES has called my attention to an article in the Scientific American, on page 96, of the March 20 issue, in criticism of your Staten Island piers. From your talk with me, it was an entirely different description than the one given in this article. If this is a misrepresentation, you ought to communicate with these people and have them retract it. I wish you would write me what you have done in the matter. An article of this kind appearing in such a publication has a bad effect upon the people here in Washington. We claim to be able to take care of these matters in New York, but according to this editorial when we build piers they are entirely unfit for the purpose for which they are constructed.

Upon receipt of this communication from Senator CALDER I immediately communicated with the Scientific American and requested them to have an engineer go over the plans and specifications of these piers, which up to the present time they have not done.

The article referred to is entitled "Archaic plans for New York City piers," and is so full of misstatements that I have determined to present a fair statement of the facts as they really exist, not so much with a desire to defend any action which the city administration has taken, after months of consultation with steamship interests and deliberation, but in a sense of fairness, so that those in authority in Washington, not being familiar with the conditions as they exist at the port of New York, may not be unduly prejudiced by an article of the character appearing in so reputable a paper as the Scientific American.

It is stated that the new Stapleton piers "will be hampered by the same lack of spaciousness which handicaps the majority of the existing piers in this city."

As an answer to this, let me state, in brief, the layout of the Stapleton piers:

Twelve piers are being laid down, ranging in length from 1,000 feet to 1,160 feet. Eight of these piers will be 125 feet wide with single-story steel freight sheds thereon; two piers will be 130 feet wide with double-decked steel freight sheds thereon; and two of these piers will be 209 feet wide with double-decked steel freight sheds thereon. At present there are in the city of New York approximately 400 commercial piers; that is to say, piers that are given over to the commerce of the port. Of these 400 piers, only 14 are of greater width than the piers of minimum width being constructed at Staten Island and only 1 is wider than the 2 piers of maximum width being constructed at Stapleton. In only one case in the whole port of New York is there any pier with a slip wider than the 300-foot slips adopted as the standard slip at Stapleton. There are 30 piers in the port of New York 125 feet in width or more, and of these 30 piers the average range of pier and slip together is only 396 feet, while the piers at Stapleton, with the half slips apportioned to them, will have a minimum range of pier and slip width of 425 feet and a maximum of 509 feet. This should prove conclusively that the same lack of spaciousness will not exist in the Stapleton development.

The piers erected by Gen. Goethals at the Army base are but 150 feet wide, and the intervening slips are only 250 feet. The 125-foot piers at Stapleton can be widened at any time to 175 feet by adding 25 feet on each side, and this will only reduce the slips to the same width as the recently constructed Army base piers.

The Scientific American article also states:

No provision is made for running freight cars either alongside the ships or into the sheds.

Ten of the piers have provision for a double-track railroad with two crossovers each through the center of the piers, and on two of the piers a double-track railroad with two crossovers on the pier will be installed on each side of the pier.

The article further states:

The proposed docks are not provided with the modern, labor-saving, freight-handling equipment which is to be found in the modern piers at rival ports such as Philadelphia, Montreal, and Halifax, and at the leading European ports like Liverpool, London, etc.

It must be stated that the city of New York, as far as its port is concerned, is sui generis. An inspection of the map will readily show that the port of New York is a series of isolated islands, with navigable streams of more than the average width separating them and the State of New Jersey. All of the main-line railroads, with the exception of two, have their terminals on the west bank of the Hudson, and in the absence of a comprehensive connecting belt-line railroad the lighterage system as developed by physical conditions constitutes the substitute. These same conditions do not exist at the ports enumerated by the Scientific American, and as all of the proposed Staten Island piers were leased for the accommodation of vessels operating to and from the ports mentioned in the Scientific American's article, it is probably assumed that the practical steamship people, in indicating their requirements, were fully cognizant of the conditions of handling freight existing at the ports mentioned, as well as other ports of the world, and chose the type of structure for their particular character of business as demanded by the conditions existing in the port of New York.

To this end, eight lessees, including the International Mercantile Marine Co. and the French Line, have chosen a 1-story shed structure on a pier 125 feet wide; two have chosen 2-story shed structures on piers 130 feet wide; and two have chosen 2-story shed structures on a pier 209 feet wide, with double-track railroad on either side and gantry cranes, besides the two truck elevators on each of the latter two piers, with a capacity of 20 tons each, together with the necessary truck scales and railroad scales. In other words, the two larger type piers at Staten Island will, in every sense, be far superior to anything that exists at any port in the world, and this department would have recommended gladly the construction of all the piers on the same general plan if it had been possible to lease them, but as the piers are being "built to order" to suit the requirements of the respective tenants we have been limited by the expression of their choice as to their individual needs.

It might, however, be well to call attention to the fact that taking the 1-story shed piers, 125 feet wide, as type No. 1 at 100 per cent, the 2-story shed on the 130-foot pier will cost relatively 152 per cent, and the 2-story shed on the 209-foot pier will cost relatively 210 per cent. Moreover, the 12 piers at Stapleton, combining, as they do, three distinct types of structures and all operated under similar conditions, will settle forever the type of structure that will be found to be most economically advantageous for the business of the port of New York, at least where there is rail-head connection. All of these piers will be equipped with such tractors, trailers, and ship cargo devices as may be deemed necessary for the conduct of their business by the respective lessees themselves.

The Scientific American article also states that "the other ports have displayed intelligence, vision, and foresight in providing means of access for motor vehicles as well as for the sorting and storing of the cargoes of modern steamers."

To the ordinary reader this would indicate that motor vehicles could not drive on those piers. This is so obviously false that the only answer to be given is that motor vehicles can and will drive on these piers, and in this respect it may be stated that the Stapleton piers will add 26,000 lineal feet of side wharfage and a floor area of 2,250,000 square feet of deck space.

At a conference recently held at the office of the dock commissioner representatives of all the railroads entering the port of New York were present, and a plan is now being formulated in connection with these railroad experts to devise and lay out an intelligent, coordinate system of track facilities, so that there can be no doubt that with tracks on all of the 12 piers and with an intelligent system of feed lines behind the piers the criticism of the Scientific American about railroad facilities is absolutely a misstatement of facts and would indicate that the writer of the article had not only never seen the plans but had not taken the trouble to inform himself of the facts, relying on the continued misstatements that have appeared in the public press as a part of what I believe to have been a misguided propaganda conducted by private interests for selfish purposes.

The Scientific American article also states that "the typical New York pier is a long and relatively narrow structure," and so forth, and calls attention to the fact that the marginal street outside the piers in the typical New York pier is crowded with teams, sometimes three and four deep, and so forth.

The writer of that article has apparently confused or rather taken as his standard the congested conditions existing on the lower North River, Manhattan, water front. This condition has been recognized by the present commissioner of docks, and on March 18, 1920, after many months of careful consideration of the subject, presented to the commissioners of the sinking fund of the city of New York, the duly authorized authority to pass on such matters, a new plan, which when completed will modernize the lower North River water front, and which, in the opinion of the writer, is the particular portion of the water front selected by all of the critics of the port of New York to condemn the entire port as a whole. In this proposed modernization it is intended to remove 32 existing piers, laid out and constructed substantially on a plan portraying conditions of 50 years ago, and build in place of these piers 18 new piers, 7 of which will be 150 feet wide, 9 of which will be 125 feet wide, and 2 of which will be 100 feet wide.

This improvement when completed will add more than 50 per cent to the available deck surface on the piers, which 50 per cent is equivalent to more than 70 per cent of the marginal street area adjacent to them. The commissioner of docks has realized that a proper selection of pier width, slip width, and street area is the proper solution of the "archaic" conditions existing on the lower North River water front, and if the energies of the Scientific American could be devoted to promoting this improvement, it would really be acting in a constructive way for the great good not alone of the city's and State's but of the Nation's commerce.

The Scientific American article also states that the Staten Island development has met with the "practically universal condemnation of the engineers, the shipping experts, and the technical press of the city."

I deny this.

It has met with the condemnation of an organization known as the Society of Terminal Engineers, who, at a meeting attended by a very small number of its members, passed a resolution to that effect. At the same time, one of the engineers most active in that organization was supervising the construction of a pier adjoining the Staten Island development, by no means more modern than the piers at Stapleton, projected by the city. But among the shipping experts must be classified the lessees of the Stapleton piers themselves; and again, at a meeting held October 8, 1919, the committee on harbor, docks, and terminals of the Merchants' Association of New York City adopted the following resolution:

This committee has intimate knowledge through long experience of the methods now in use for handling cargoes upon the piers in this city and the reasons for and utility of such methods. The cargoes reaching the city are extremely divers in character. The packages vary widely in size and weight and are usually not adapted, therefore, to mechanical handling, which is suitable principally to packages of standard size or to cargoes of a uniform character. Most of the cargoes reaching New York are not suitable for direct rail reshipment, but must be warehoused, rehandled, and reassembled prior to reshipment. Few of the steamship companies find that lines of rails upon their piers present any advantage either in the cost or convenience of handling, but that, on the contrary, such rails are usually a direct obstruction.

The committee, therefore, does not concur in the proposition that in the construction of new piers they should be of such type as to provide either for rails or for mechanical handling, for the reason that if such general policy were adopted it would require piers of heavier structure than at present, involve a material increase in the costs, and substantially interfere with tidal currents. It is the opinion of the committee that the city should, however, in advance of the construction of piers, make leases therefor whenever possible and should thereafter construct piers of such nature and fitted with such mechanical appliances for handling as may be desired by the lessees.

The Scientific American article further states that "the officials of the dock department have deliberately flouted the judgment of the men who have made a study of port facilities."

This is not borne out by fact. Public hearings were held in the office of the dock commissioner before and after the plans were drawn and no suggestion was ever made by the Society of Terminal Engineers. At these meetings were represented the steamship interests and agents of concerns selling mechanical equipment.

The writer offered to lease to the Material Handling Machinery Manufacturers' Association a pier, to be constructed in accordance with the advice of their own engineers, equipped with every modern, labor-saving, freight-handling device, which pier they might let out on daily wharfage for the purpose of demonstrating their facilities to the whole world, but they declined, and urged that the city ought to do the experimenting with its own money, irrespective of the wishes and desires of

the tenants who had applied for and subsequently leased these piers on a basis of 7½ per cent of the cost of acquiring the land and constructing the improvement.

The article calls attention to the fine, modern docks in France that so greatly facilitated the rushing of supplies to our Army; but were not 90 per cent of these supplies shipped and did not our valiant soldiers sail from these same "archaic" piers in the port of New York? And while the piers in France were given over entirely for military purposes, let me add that the piers in New York accommodated our normal commercial activities in addition to meeting the war-time demand.

In the sense of fairness, and in accordance with the expressed policy of the Scientific American "to record accurately and lucidly the latest scientific news of the day," I am still hopeful that the management of the Scientific American will avail themselves of my invitation to go over the plans of the Stapleton development and to hear from those in authority the reasons for each and every step that has been taken, so that from a sense of local pride the Scientific American, a New York publication founded 75 years ago, can and will publish an article representing the facts as they exist, so that no prejudice to the interests of the great port of New York at a time when all should combine to keep the supremacy preeminent may be suffered from the publication of such a misleading article as appeared in the issue of March 20, 1920.

Yours, very truly,

MURRAY HULBERT,
Commissioner of Docks.

Mr. CALDER. Mr. President, in connection with the building of docks in New York City, I wish to say that the city of New York has expended, out of its own treasury, over $350,000,000 to improve the dock facilities of the city. The city of New York owns practically all the water front; it owns all the water front on the Island of Manhattan and most of the water front in Brooklyn and the Queens, and to-day in the city of New York, except Jamaica Bay, there is not a particle of city-owned property available for the improvement of our docks, and thereby the extension of our commerce, excepting only that part of our park system which fronts on the rivers and the bay.

I know of nothing more important for the great metropolis of the Nation to-day than the improvement of this very same Jamaica Bay proposition to which I have referred. In the next river and harbor bill I shall submit an amendment to incorporate this project, unless it is provided in the House before the bill comes to the Senate. I know that if I offered it here at this time, in view of the attitude of the other members of the Committee on Commerce, it would fail of consideration, but next year I shall offer it.

I ask unanimous consent to insert in the RECORD a letter from the governor of New York in connection with the improvement of Jamaica Bay.

The PRESIDING OFFICER. If there is no objection, permission is granted.

The letter is as follows:

STATE OF NEW YORK,
EXECUTIVE CHAMBER,
Albany, April 7, 1920.

Hon. WILLIAM M. CALDER,
United States Senate, Washington, D. C.

DEAR SIR: In connection with the passage of the act of Congress approved June 24, 1910, and to the end that the city of New York might cooperate with the Federal Government in the creation of a new harbor in and about Jamaica Bay, including the making of channels, basins, slips, and other necessary adjuncts intended for the advancement of the commercial interests of the city, State, and Nation, the State of New York has, by chapter 568 of the Laws of 1909, granted to the city of New York such right, title, and interest as the State of New York had in and to the land under water in Jamaica Bay and Rockaway Inlet.

It is apparent that to create a harbor in Jamaica Bay for the accommodation of ocean-going vessels, there must be a greater depth than 18 feet. That this was contemplated is manifest by reference to the report of Col. Knight, who submitted estimates for the construction and maintenance of a 30-foot channel, with the suggestion that a channel only 18 feet deep be provided and extended to 30 feet when commercial necessity required.

With the improvements which the city of New York now has under way, practically all of the water front, except Park property, accessible to deep-draft vessels, has been or is being utilized, and it is quite natural that the city of New York—until a sufficient channel has been provided through Hell Gate—should turn toward the improvement of Jamaica Bay.

I most earnestly urge you to use every effort possible to secure authorization in the pending river and harbor bill to make the unexpended balance available toward a 30-foot channel through Rockaway Inlet up to Mill Basin, in order that the lands granted by the State, without compensation, may be utilized for the purposes intended.

Yours, very truly, ALFRED E. SMITH.

Mr. REED. Will the Senator from New York permit me, in order to clear up a little confusion about the record, to say that I have before me the river and harbor bill of last year. The Senator is correct in his statement that the appropriation was not a lump sum, but was an appropriation for specific items. But I call attention to the fact that that bill, which was passed on March 2, 1919, when we were just emerging from the war, carried $33,378,664. The bill that we passed in the very midst of the war, when the war was at its height, in the month of July, 1918, when we did not know yet what the result would be, except as every American citizen knew in his American heart that of course we were going to win—that is the way he felt and consequently that is the way he believed—appropriated $23,771,900.

By the way, the argument on both those bills was that prices were very high, but they were going to go down right soon, and also the argument on the bill which was passed in July, 1918, when we were in the midst of the Great War and straining every resource and using every man that we could and all the materials we could for the war.

The war is past. Two years have gone by since we cut to the bone in the midst of the war, and it is now proposed to go to a still lower point, to appropriate a little over one-half of the money we did six months after the war was over, and we are still talking about high prices. Does not the Senator think that it is a niggardly and mistaken policy—I will cut out the word "niggardly." Is it not a mistaken policy?

Mr. CALDER. Mr. President, I voted in the Committee on Commerce to increase the appropriation for this purpose from $12,000,000 to $20,000,000, because I believed the appropriation of $12,000,000 was a mistaken policy. Perhaps the Senator is right; possibly we might have given a little bit more; but it seemed to me and to others that in voting a 50 per cent increase in the House appropriation we were doing about all we could hope to bring about at this session of Congress.

Mr. REED. That is to say, we were not voting what we thought we ought to do, but because the House started at a ridiculous sum, based on no estimate of an engineer living or dead, that we were to fail in doing our duty here.

Mr. CALDER. Oh, no; not at all. I merely seek to show that the appropriation thought proper by the committee was considerably greater than provided in the House bill.

Mr. REED. Is it not about time that the Senate should quit trailing the House absolutely?

Mr. CALDER. When we increase an appropriation 50 per cent we are not trailing the House. It is a decided increase over the House estimate.

Mr. REED. Suppose the House estimated nothing?

Mr. CALDER. I never would have agreed to that.

Mr. REED. An increase of 50 per cent there would not have amounted to much. They just the same as appropriated nothing.

Mr. CALDER. Oh, no; I do not think that.

Mr. REED. Twelve million dollars is the equivalent of nothing on these harbors.

Mr. President, I want to say just a word, and then I will yield the floor. We hear about high prices and stopping public improvements of this character because of high prices. The Senator knows that the congestion in New York harbor during the war cost this country probably ten times the entire amount it would have cost to have made these improvements that are asked. I think the Senator certainly will agree with me in that statement.

Mr. CALDER. There is no doubt about it. If we had our rivers and harbors properly improved, we could have saved half a billion dollars.

Mr. REED. Yes; you could have saved half a billion dollars and nobody knows how much more.

Mr. Garfield stopped the manufacturing in this country in every mill east of the Ohio River for 14 days, and turned out of employment for that 14 days many millions of men and women, with a complete economic loss of their time. He closed the churches on Sunday and the moving pictures on Monday. The economic loss to the country from that one closing period has been estimated by reliable economists as running into the billions of dollars; and his sole charge was because the railroads were unable to handle the freight and that that congestion began at New York Harbor, and the congestion at New York Harbor is partially, at least, accounted for by the inade-

quacy of the harbor, which Congress ought to have removed long ago. It tells the story of this kind of economy.

The Senator from Ohio [Mr. POMERENE] knows that a few years ago his State suffered by flood, and that the economic losses of a single one of those floods would have harnessed those streams and taken care of them for the future. But a cheesparing and contemptible policy of saving a few cents had been pursued and projects had been half completed and the floods came and the waters fell and the country suffered.

Now, just one further thought in regard to high prices. I have been waiting for the effects of high prices for a good long time. I have seen every kind of experiment tried known to modern human ingenuity, but there is not any one of them that has not been tried off and on in the world's history for 2,000 years, and there has never been one of them proven anything but a disastrous mistake in all that long stretch of the centuries. We have tried to do it by law. When you pass a law that no man shall sell a horse for more than $150 you increase the price of every horse in the country, because everybody knows that horses are scarce and everybody who has one holds on to it.

I do not intend to follow that argument. I simply throw out the suggestion. The last experiment we had is for the Department of Justice to be chasing around the country making speeches to societies of ladies of all degrees of age, telling them to buy cheap things when there are no cheap things to buy; telling them how they can wear calico dresses and the men how they can wear overalls; and the sole result has been to put up the price of calico and overalls. It is not only foolish, but it is idiotic. It is a performance that is worthy of the best effort of the most finely organized lunatic asylum ever located upon this earth. It has just as much effect in reducing prices as a rain prayer meeting such as they used to have in drought times out in Kansas had on the weather.

Mr. JONES of Washington. Mr. President, does not the Senator from Missouri think that it really has a worse effect? As he suggested a while ago, the people who are buying and wearing overalls, and who really do not have to do so, are simply increasing the price of the overalls for men who have to have them to work in.

Mr. REED. The Senator did not quite get my sentence. I said that so far as reducing the prices was concerned it had that effect.

Mr. JONES of Washington. I agree with the Senator absolutely.

Mr. REED. By disturbing economic conditions you can put up prices, but I have never known of an instance whereby by disturbing economic conditions you could succeed in putting down prices.

We have every kind of foolish movement going on. We propose to regulate rents. Now, what is the trouble with the rent problem? The real trouble with the rent problem is that for about five years we almost entirely quit building houses in this country; but babies continued to be born, boys and girls continued to get married, new homes were necessary, and in a little while all the empty houses were taken up. Formerly there had always been a few more houses than there were tenants; the owners of houses were bidding against each other for tenants, and that kept rents down. Then we came to a period when population increased, but houses no longer increased. When all the houses were filled, the landlords said, "I can sell the occupancy of my house each month for more money"; and when he raised the rent the tenant had to pay because he had no other house to which to go.

What is the remedy? More houses. How are you going to get more houses? Is anybody, except a picturesque variety of idiot of some kind, going to build a house when he knows that some fellow who never owned a house in his life is going to fix the rent on that house after he has built it? Of course, he will not do so. The only houses that are being built are being put up by those men who are bold enough to feel that they can escape these conditions.

If, however, you will let things alone and rents become profitable, in a very short time the people will rush into the house-building business and you will have a surplus of houses. The minute you have got 5 per cent of surplusage of houses in the community, rents go down; when the landlord proposes to raise the rent, the tenant moves; and when the landlord will not reasonably reduce the rent the tenant moves. The man who has a vacant house wants to rent it, he bids for tenants.

The trouble with high prices—and I have wandered a little from what I wanted to say—is the gap between production and consumption. That was made by withdrawing 25,000,000 men from the constructive and productive vocations of the world and putting them on the field of war. You have got to fill that gap; and until you do fill that gap, labor will be very high, rents will be very high, provisions will be very high. The minute you have created more than the people need, all these things will drop and you will get down to a different level. How long is that going to take? Are we going to delay the public business of the country until that occurs? Who will say when it will occur? Why, sir, a moment's consideration will convince any sensible man that it will not occur for a long time, unless there comes some great world financial or industrial catastrophe that destroys business and we go through a panic and get down to a sort of starvation basis. We all hope to escape that.

Proceeding along natural lines, what must we confront; what do we confront?

First, the enormous shortage in the world of the commodities that are necessary; second, an inflation of money in the world which in itself has reduced the purchasing power of the dollar from 50 cents in this country to a much larger percentage in other countries. In the days of William J. Bryan, when he proposed the free and unlimited coinage of silver, we had $17.50 per capita circulating in this country. It was said that if there was free coinage of silver there would be from thirty to thirty-five dollars per capita; that that would make a 50-cent dollar; and that that was repudiation and dishonesty. I have not seen the figures for six weeks, but six weeks ago we had in circulation in this country $55.60 per capita. It is no wonder that the purchasing power of the dollar has decreased.

If you go to other countries, you will find a much more startling condition. In France every dollar of specie has long since gone into hiding, and they have a paper circulation of over $125 per capita. In England, where an 80 per cent and frequently a 100 per cent gold reserve used to be kept back of English bank notes, and generally back of English currency, that reserve dropped until a short while back it did not exceed 20 per cent, which means not a decrease in the amount of gold and silver they possess, but an increase of the amount of paper they have out. England has complained bitterly of the exchange rate between this country and herself, but the exchange rates exactly follow the difference in the actual values of the money. The same difference exists between the value of the English pound sterling and the value of French money, and of German money, and of Russian money, and Italian money, that is found to exist between the American dollar and the British pound sterling; that is, I do not mean the same in amount, but there is a corresponding and similar difference between the further depreciated money of other countries and the money of England, which is next to ours in soundness.

Now, with the money of the world in that condition, it must necessarily follow that apparent prices will be high until that money can be gradually drawn in, and for this inflated currency there shall be substituted a stable and a sound money in the countries of the world. How many years will it take? How long will it take? For my part, I do not propose to give my consent that the business of the United States shall stand still because we have to pay a particular price to-day when no man can guarantee that price will not go higher to-morrow. We might as well face these conditions as they are. The truth of the matter is, the world has moved up to a higher standard of prices. It is my opinion that we will stay at that standard. Perhaps we will go back to some extent, but never to the old values; and the man who looks for a $1-a-bushel wheat in the future is looking for something that in my judgment is not going to happen; the man who expects to hire an individual to work with a pick and a shovel on a railroad for 80 or 90 cents a day is looking for something that he will never see again in this country; and, in part, this is not altogether lacking in the quality of blessing.

The difficulty is that during the period of readjustment certain of the people get "pinched" because they have not been able to readjust themselves to meet conditions.

Now, I beg Senators that they will not throttle public improvements because dollars are cheap to-day. The same policy would lead to no improvement in anything in the country, and that would mean stagnation; it would mean a further gap between production and consumption; and it would mean in the end further hardships for what we ordinarily call, for want of a better name, the common people; that is, the people who have to depend upon their wages and their salaries and their very small incomes for sustenance.

Mr. BRANDEGEE. Mr. President, I desire to make a parliamentary inquiry. I ask what amendment is now pending?

The PRESIDING OFFICER. The Chair will state to the Senator from Connecticut that the pending amendment is that of the committee on line 4, page 5, the item relating to the Northwest River.

Mr. SIMMONS. I understand that the Senator from Virginia [Mr. SWANSON] desires the amendment acted upon to-night.

Mr. JONES of Washington. I was going to suggest that I know the Senator from Virginia is anxious to get away, and I think the Senator from Ohio is also anxious to leave. While I do not wish to encourage their going away, I suggest, as this amendment has come back for reconsideration, that we dispose of it, and then debate can proceed on the question as to the amount to be appropriated by this bill. I merely make that suggestion.

The PRESIDING OFFICER. The question is on the adoption of the committee amendment at the top of page 5, line 4, providing for a survey of Northwest River, Va. [Putting the question.] By the sound the "ayes" seem to have it.

Mr. POMERENE. I ask for a division.

On a division, the amendment was agreed to.

Mr. SIMMONS. Mr. President, a few days ago I offered an amendment on page 9 of the bill. Col. Taylor, of the Engineer Department, has suggested to me that the amendment be framed in different language. I have submitted the reformed language to the Senator from Washington, the chairman of the committee, and he does not object to it; and I should like to ask that the action of the Senate on that amendment be reconsidered. It is found at the end of line 4, page 9. The amendment reads:

Trent River, from New Bern to Trenton, N. C.: With a view to a channel depth of 12 feet to Pollocksville and 8 feet to Trenton.

I ask unanimous consent to reconsider the action of the Senate on that amendment.

The PRESIDING OFFICER. Is there any objection? The Chair hears none.

Mr. SIMMONS. I now offer the amendment which I send to the desk.

Mr. KING. Mr. President, I will ask the Senator what change it makes?

Mr. SIMMONS. It just connects the Neuse River with the Trent.

The PRESIDING OFFICER. The amendment will be stated.

The ASSISTANT SECRETARY. In lieu of the amendment offered and adopted regarding the Trent River, N. C., it is proposed to insert the following:

Neuse and Trent Rivers, N. C.: With a view to securing a channel depth of 12 feet in Neuse River up to New Bern; thence a depth of 12 feet in Trent River up to Pollocksville and 8 feet up to Trenton.

The PRESIDING OFFICER. The question is upon the amendment offered by the Senator from North Carolina.

The amendment was agreed to.

Mr. SPENCER. Mr. President, the pending bill has to do, according to its terms, with the preservation and maintenance of existing river and harbor works and the prosecution of such projects heretofore authorized as may be desirable in the interests of commerce and navigation. This has to do with the entire inland river and harbor waterway situation of the country. I understand that my colleague, the distinguished senior Senator from Missouri [Mr. REED], has introduced an amendment by which the amount of $20,000,000, which the committee has recommended, is increased to $27,000,000. May I ask the Chair whether that amount is correct, as to whether the pending amendment does increase the committee amendment from $20,000,000 to $27,000,000?

The PRESIDING OFFICER. That is the pending question.

Mr. SPENCER. I support that amendment increasing the appropriation from $20,000,000 to $27,000,000.

The question of transportation is not a mere abstract proposition in this country for some rate expert to consider and to solve. It is a vital, pressing, essential part of our national welfare.

Mr. Walter S. Dickey, of Missouri, a man many of the years of whose life have been given to the subject of the waterways, said not long ago in a paper which he prepared at the request of the Chamber of Commerce of the United States, "that 'moving things,' 'freighting,' next to subsistence itself, is the world's greatest enterprise," and when we have to do with the subject of transportation in these United States we are dealing with one of the fundamental elements of national welfare.

The disparity between the appropriations that we make—eight or nine hundred million dollars for the Army, between four and five hundred million dollars for the Navy, $105,000,000 for the legislative, executive, and judicial departments of the Government, $462,000,000 for the post offices, $214,000,000 for pensions—I do not say that any one of those is unnecessary, but I do say that the disparity between those amounts and $32,000,000 for agriculture and $20,000,000 for the inland waterways and harbors of these United States is ridiculous.

We are dependent upon the harbors and the waterways of this Nation. If we neglect their improvement, it is not an evidence of economy; it is an illustration of gross and unreasonable extravagance. We make a plan that will take care of a great inland waterway. We made such a plan in 1910, when, after a careful engineering examination of the projects of the Missouri and the Mississippi, Congress determined that they would expend $20,000,000 upon the Missouri River from Kansas City to the Mississippi, and that they would expend it at the rate of $2,000,000 a year, and that they would secure a permanent 6-foot channel from Kansas City to the Mississippi. That project had back of it the judgment and the skill of the Engineering Department of the Government. It was feasible. It would have accomplished its plan. Upon the strength of it residents of Kansas City invested a million dollars in steel barges and ran them upon the Missouri River and down the Mississippi; and for six months of every year during the nine years of their operation the barges were a success, except when the channel choked and sand bars formed, and the failure of the Government to do its part made inland water navigation upon that great river impossible, for instead of expending $2,000,000 a year, as Congress agreed that they would do, the expenditures of the years from 1910 to 1920 have aggregated only $8,000,000, and have been thrown in here and thrown in there, so that the resultant of all the appropriations has not been a deepened and established channel but only temporary improvement now and then, which, with the spring freshets and the change of channel, are largely lost year by year.

That is not economy—this is extravagance, and when we come to deal in this bill with the problem of transportation, I am pleading for an economical determination of the problem—that we spend enough money to insure that what we spend it for shall be completed and made permanent.

The commercial, industrial, and agricultural stability of our country directly depends upon transportation.

We are no stronger as a Nation than is our ability to provide and operate and coordinate the carriage of people and material.

Of what use are the great harvests of grain in the West and Middle West or the cotton crop of the South or the coal and mineral and oil of the country or the products of manufacturing industries without the ability to carry them to the places where they are needed?

They are, without the facilities of bringing them to market and to consumer, mere local dumps of commodities that have comparatively no value.

The factor that makes a nation strong in peace as well as in war is the ability to transport the things or the men that are needed to the place where the necessity for them exists.

This fundamental truth—too often neglected—lies at the very foundation of national prosperity.

It is the reason why 1 out of every 10 of our population is directly dependent for their living upon the wage or the salary incident to transportation agencies.

It is the question that affects the comfort and usefulness of every individual and regulates the quantity and quality and price of practically everything the individual eats or wears or uses.

What may be called primary transportation is not merely a question of local concern—it is a matter of national interest.

We are concerned as a people with the road from every farm to the highway, and from every separate mine and manufacturing plant to the highway or waterway, and from every home to the place of business or to the mart of trade.

It is a slogan worth repeating: "A hard road from every farm to the highway, and a broad highway to every city and town."

The direct loss from inadequate and inefficient primary transportation facilities is enough in itself to carry and eventually to pay the national debt. It is beyond computation in dollars and cents.

If every man had accessible transportation between home and place of business and place of trade; if every farmer could reach the highway, irrespective of weather, on roads capable of at all times carrying loads, and on these highways reach town or city, railroad or waterway, at any time of the year and any state of the weather, it would at once add 25 per cent to the wealth of the Nation.

When we pass from primary transportation to what may be called through transportation, and that includes both intrastate and interstate transportation, we have precisely the same general proposition, and that is the necessity of adequate economical carrying facilities of everything that is produced on farm or at the mine or in the factory from the place of production to the place of consumption, with the auxiliary problems of distribution.

In all of these questions the two main requirements are adequacy of facilities and reasonableness of cost, and the two great methods of such transportation are railway and waterway.

Railroads and waterways can not and must not be antagonistic; both are indispensable. The former are public utilities privately owned, but in the very nature of the case must be governmentally controlled. The latter are both governmentally owned and controlled, and the relation between these two great methods of transportation must be one of harmony, coordination, and cooperation.

This will be entirely voluntary if men are wise and recognize that in the last analysis the welfare of the people is the dominant factor to be considered in all transportation.

But if such cooperation and coordination is not voluntary, it will be compulsory by the people's mandate, for the people can be relied upon to see to it that the two mighty agencies of carriage—the one of which they own, i. e., waterways, and the other of which they control, i. e., the railroads—shall not unfairly compete against each other to the ultimate loss of the consumer.

Railroads, of course, run where man puts them. Waterways are in fixed valleys. The feeders of the permanent waterway routes are the man-built railroads. Every long haul that can be arranged by water is at approximately one-third the cost of the equivalent haul by rail, and, so far as such waterway transportation is available, every reason of economy suggests its use.

It is axiomatic to say that the railroads themselves can not carry the tonnage of the country. Again and again their inability has been demonstrated.

There are those here who vividly remember in the fall of 1906 and 1907 when grain lay for weeks in the open fields and at or near railroad stations in Missouri, Kansas, Arkansas, and Nebraska, waiting in vain for cars for transportation, and with a loss to the Nation difficult to compute.

This same situation is not unfamiliar, quite apart from any war emergency, in every section of our country.

E. H. Harriman, once speaking for a transcontinental line, gave it as his opinion that it would be worth the many billions it would cost to practically double the standard gauge of the railroad, so that the carrying capacity of the roads might be correspondingly increased, because the ability of the railroads of the country with their present gauge had about reached their maximum efficiency, and the products of mills and mines and farms can not be transported with any degree of promptness and efficiency. This means both immediate loss and decreased production, for neither mill nor mine nor farm will expand its products if uncertain of access to the markets when and where they are needed.

James J. Hill expressed substantially the same opinion, as follows:

> With traffic increasing at the rate of nearly 12 per cent per annum, the situation has become intolerable. The process—

Referring to the carrying capacity of the railroads—

> has reached a practical limit. Merely to accommodate existing traffic I assume that we would need to build 75,000 miles of new track, costing, with terminals, $5,500,000,000. A 15-foot canal or channel from St. Louis to New Orleans would go further to relieve the entire Middle West or Southwest than any other work that could be undertaken. With such a depth of water a single powerful towboat equipped with barges would carry from 30 to 40 trainloads.

If the railroad facilities are inadequate now, as we know they are, how increasingly great will that inadequacy multiply in the years of expanding trade and production that are immediately before us?

Increase as you may railroads, hard-surface roads, trolley lines, aerial traffic, you still have an immense quantity of material wealth to be transported, which loses its value in proportion as transportation is inadequate, and which is already far in excess of every land or air method of carriage in existence.

This brings us to the very subject we are met to consider.

Waterways are the natural method of transportation. They were in use before railroads were dreamed of. They are capable of development almost without limit.

They possess the advantage of gravity on the down trip.

Take the map of the United States and note the great waterway connections of the middle country: (a) St. Paul to New Orleans by way of the Mississippi; (b) Kansas City to the Gulf by way of the Missouri and the Mississippi; (c) Pittsburgh to the Gulf by way of the Ohio and the Mississippi; (d) Chicago to the Gulf through canal and the Illinois River.

These are illustrations of the possibility of the great Mississippi Valley, that valley which comprises approximately 2,000,000 square miles of fertile territory and which has been aptly described as "the greatest habitable estate in the world." It is ten times as great as France or Germany and is capable itself of practically accommodating and caring for the population of the world. It has been called the "Nation's bread basket," and potentially it is the greatest producer of freight of any equal area on earth. Nearly one-half of the productive area of our country and more than one-half of the rural population of the United States are within its borders. It contains three-fourths of America's improved farm lands, both in acreage and in value, and produces nearly one-half of all the Nation's lumber and more than one-half of the Nation's wool, and from 60 to 80 per cent of the Nation's live stock, cereals, bituminous coal, petroleum, and iron ore.

All this production must be transported, and much of it must be transported to the sea. If we had not been accustomed to the unreasonable fact it would be ridiculous to even think of carrying this great load of produce which is destined for the seacoast slowly and laboriously up the heavy grade of the Appalachian or Allegheny Mountains in order to reach a seaport, when by far the larger part of the tonnage could be made to practically slide by its own weight down the river to the seacoast at the Gulf.

This Nation has comparatively no raw material on our seacoast; grain, coal, lumber, ore, and oil must be carried to the factory and thence to the sea.

The rivers are the channels of trade for this purpose which God has made. There is no need of eminent domain to condemn at great cost the right of way. It is already there. It needs to have the channel deepened and protected to afford for nine months in the year in every place and for all year in many places a constant thoroughfare of limitless capacity.

It is a problem for the Nation and not for the individual, because the use of waterways can not, in the very nature of the case, be confined to any one company, individual, or association.

The people own the waterways, and a monopoly of the use of this highway is inconceivable.

If Congress were to grant to a private corporation the exclusive use, for example, of the Mississippi, it would be entirely practicable for such private corporation to dredge and preserve the channel of the river, and the financial return to such a corporation from its monopoly would be enormous, but it would be treason to the national welfare to allow such a monopoly, because the people own the waterways and because its use as a great national estate of immeasurable value is precisely the reason why the Nation, and the Nation alone, has both the privilege and the profit and the duty of improving and maintaining these national transportation facilities.

Private capital can not be expected to improve a waterway for the joint use of those who have no investment in its development any more than private capital can be expected to purchase a right of way and build a railroad for others to use as freely as those who have made its use possible.

The Nation must improve the waterways. The Nation must use them. The Nation must control them. The Nation will profit, for the gain from an adequate waterway transportation is distributed among every family who uses food or fuel or utensils of iron or steel and garments of cotton or wool.

Among the great blessings that have come to our country from the war—for there have accrued to us as a Nation great gains as well as great losses—we have developed:

(a) The recognition as never before that nothing is impossible for the American people to accomplish; that no task is beyond our resource and efficiency.

A nation that can, with practical unanimity, enroll 24,000,000 of its manhood, to say nothing of hundreds of thousands of volunteers, for war, the one matter about which we knew least and hated worst, and develop in a night an Army that proved to the world its superiority over trained veterans of autocracies who had made militarism the rule of their life for half a century, is a nation that can approach with confidence any problem that confronts it.

We have destroyed for at least a generation to come the possibility of world domination by military forces. We now have the duty as well as the opportunity of so building our national structure as to secure for ourselves the greatest capacity for world service in supplying out of our inexhaustible resources the needs of the nations of the world.

(b) We have learned the lesson of cooperation that national greatness is worth individual effort and individual sacrifice if necessary; that everything and anything that spells strength or glory or progress to our country is a call to every man to consider and to help.

No question, political or industrial, commercial or agricultural, will ever again be viewed by this country in the same light as it was before the war.

What we have done has solidified the Nation, changed indifference into intelligent interest, and substituted activity for lethargy.

Men have worked as they never thought they could work. Men have given of time and money as they never thought it was possible for them to do.

The reality of actual accomplishment concerning the great inland waterways of the Nation which we are planning and discussing to-day is bound to come, and what we are now framing is but the beginning of a far greater national waterway development.

There are those who see and see clearly through the difficulties of to-day a vision of a great overflowing waterway from Pennsylvania and Minnesota and Illinois and Missouri and through every intervening State, with a channel so deep and a bank so safe that upon its broad bosom is carried to the sea the products of the great agricultural and mineral basin of this country. It is lined on either side with mills and factories, producing food and clothing and manufactures from nature's raw materials, and these products are in turn increasing the mighty traffic upon America's improved inland waterway.

I quote the prophetic words of the first President of these United States, the great Father of this Republic, who rocked this country in the cradle of its national infancy, and who saw as no other man its needs and its possibilities:

> I could not help taking a more contemplative and extensive view of the vast inland navigation of these United States and could not but be struck with the immense diffusion and importance of it; and with the goodness of that Providence which has dealt his favors to us with so profuse a hand. Would to God we may have wisdom enough to improve them.

Mr. McCUMBER. Mr. President, I do not understand that the Senator from Washington [Mr. JONES] desires to proceed further this afternoon with the pending bill, and I would like to have a brief executive session.

Mr. JONES of Washington. I understand that the Senator from Utah [Mr. KING] would like to take just a few minutes.

Mr. KING. Will the Senator from North Dakota yield?

Mr. McCUMBER. Certainly.

Mr. KING. Mr. President, I am compelled to be absent from the Senate to-morrow owing to an engagement which calls me from the city. I have an amendment to the pending bill, which is in the nature of a substitute. I was very anxious to present it to the Senate and to submit some reasons for its adoption. I sincerely hope that the pending measure will not be disposed of before Monday morning, as I shall return by that time, but if the bill makes such progress to-morrow the chairman of the committee has very courteously agreed to present the substitute which I have submitted and invite the attention of the Senate to its provisions, and I shall ask him to have a vote upon the substitute.

PRESIDENTIAL APPROVAL.

A message from the President of the United States, by Mr. Swem, one of his clerks, announced that the President had on this day approved and signed the joint resolution (S. J. Res. 180) authorizing the Secretary of War to turn over to agricultural fertilizer distributors or users a supply of nitrate of soda.

THE ARMENIAN REPUBLIC.

Mr. KING. Mr. President, I desire to say just a few words upon the subject of Armenia. I believe the time has come when the executive department of the Government, by appropriate action, should recognize the Armenian Republic, if not de jure, at least de facto.

The Armenian Republic, as it is now constituted, has an area of about 25,000 to 30,000 square miles and a population of more than 2,000,000. This, of course, does not include that portion of the historic territory of Armenia which is within what was known as Turkish Armenia, but that portion of Armenia which has been within the Turkish territory belongs economically and ethnologically and in every way to Russian Armenia.

As soon as the peace negotiations have been completed and the peace treaty between the allied Governments and their enemies has been carried into execution it is to be hoped that Turkish Armenia shall be united to what is now known as Russian Armenia and that there shall be constituted a strong and progressive and independent government.

The present Government of Armenia, or the Republic of Armenia, is functioning as a national organism. It has its legislative and executive and judicial departments and branches.

It has its schools and all the indicia of progress and of civilization. A great number of the powers of the earth have recognized that Government and are treating with it as an independent government.

I repeat, it is time that our Government should recognize the Republic of Armenia, and I sincerely hope that the executive arm of our Government will see its way clear to speedily accord recognition to the Republic of Armenia.

Some time ago I offered resolutions, three in number, dealing with this question, and with the Turkish question. The one offered on March 10, 1920, contains a resolution—

> That it is the sense of the Senate that the Government of the United States recognize the independence of Armenia under the Government of the Armenian Republic, having its seat at Erivan, in Russian Armenia.

And further—

> That it is the sense of the Senate that the allied powers and the United States forthwith furnish to the Armenian Republic adequate arms, munitions, equipage, and military stores to enable the Armenian Republic to raise and maintain an army for the defense of the liberty and independence of Armenia, the protection of the Armenian people, and the recovery and occupation of the territories from which the Armenians have been driven by the Turks.

Mr. President, it is a very tragic page in the history of our days which records the atrocities and assassinations and murders committed by the Turks upon the Armenian people. I do not know what the allied Governments will do in finally dealing with this problem. Unfortunately, we are given the impression that it is the intention of the allied Governments to maintain the Turks in Europe, to maintain Constantinople as a Turkish city under Turkish domination and control, and compel the Armenian people to submit to Turkish misrule. It looks as though it were the purpose of the allied Governments to compel that part of the Armenian people who reside in what is known as Turkish Armenia to submit longer to the control of the Ottoman Turks.

This procedure, Mr. President, in my opinion, is very unfortunate and very unjust. It is a denial of the right of the Armenian people, which can not commend itself to the judgment or the conscience of the Christian and civilized nations of the world. I hope it is not too late for the allied Governments to accord justice to the Armenian people, to give to them their historic territory, and permit them to erect a government that will take its place among the progressive and intelligent nations of the earth.

EXECUTIVE SESSION.

Mr. JONES of Washington. I move that the Senate proceed to the consideration of executive business.

The motion was agreed to, and the Senate proceeded to the consideration of executive business. After five minutes spent in executive session the doors were reopened.

RECESS.

Mr. JONES of Washington. I move that the Senate take a recess until 12 o'clock noon to-morrow.

The motion was agreed to; and (at 5 o'clock and 20 minutes p. m.) the Senate took a recess until to-morrow, Saturday, April 24, 1920, at 12 o'clock meridian.

NOMINATIONS.

Executive nominations received by the Senate April 23, 1920.

ASSISTANT COMMISSIONER OF MEDIATION AND CONCILIATION.

Whitehead Kluttz, of North Carolina, to be assistant commissioner of mediation and conciliation vice G. Wallace W. Hanger, resigned.

SUPREME COURT OF THE PHILIPPINE ISLANDS.

Ignacio Villamor, of the Philippine Islands, to be associate justice of the Supreme Court of the Philippine Islands, provided for in the act of Congress approved August 29, 1916, entitled "An act to declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for those islands," vice Florentino Torres, resigned.

PUBLIC HEALTH SERVICE.

Dr. Leo W. Tucker to be assistant surgeon in the Public Health Service, to take effect from date of oath.

Dr. Erward B. Faget to be assistant surgeon in the Public Health Service, to take effect from date of oath.

COMMISSIONER OF IMMIGRATION.

James L. Hughes, of Pennsylvania, to be commissioner of immigration at the port of Philadelphia, Pa.

UNITED STATES CIRCUIT JUDGE.

Nathan P. Bryan, of Jacksonville, Fla., to be United States circuit judge, fifth judicial circuit, vice Robert Lynn Batts, resigned.

UNITED STATES ATTORNEYS.

Dennis B. Lucey, of Utica, N. Y., to be United States attorney, northern district of New York. A reappointment, his term having expired.

Stephen T. Lockwood, of Buffalo, N. Y., to be United States attorney, western district of New York. A reappointment, his term having expired.

UNITED STATES MARSHAL.

Samuel W. Randolph, of Milwaukee, Wis., to be United States marshal, eastern district of Wisconsin. A reappointment, his term having expired.

PROMOTIONS IN THE ARMY.

CORPS OF ENGINEERS.

To be captains.

First Lieut. Hans Kramer, Corps of Engineers, from September 28, 1919.

First Lieut. Albert G. Matthews, Corps of Engineers, from October 1, 1919.

To be first lieutenants.

Second Lieut. Wilson G. Saville, Corps of Engineers, from May 21, 1919.

Second Lieut. Mark M. Boatner, jr., Corps of Engineers, from May 22, 1919.

Second Lieut. David A. D. Ogden, Corps of Engineers, from May 25, 1919.

Second Lieut. Frederick A. Platte, Corps of Engineers, from May 25, 1919.

Second Lieut. Karl B. Schilling, Corps of Engineers, from June 3, 1919.

Second Lieut. John H. Elleman, Corps of Engineers, from June 13, 1919.

Second Lieut. Elmer E. Barnes, Corps of Engineers, from June 13, 1919.

Second Lieut. William W. Wanamaker, Corps of Engineers, from June 25, 1919.

Second Lieut. Beverly C. Snow, Corps of Engineers, from June 25, 1919.

Second Lieut. Richard Lee, Corps of Engineers, from July 2, 1919.

Second Lieut. Howard L. Peckham, Corps of Engineers, from July 10, 1919.

Second Lieut. John S. Niles, Corps of Engineers, from July 12, 1919.

Second Lieut. Charles R. Bathurst, Corps of Engineers, from July 13, 1919.

Second Lieut. Wendell P. Trower, Corps of Engineers, from July 16, 1919.

Second Lieut. Robert G. Lovett, Corps of Engineers, from July 17, 1919.

Second Lieut. Cornman L. Hahn, Corps of Engineers, from July 22, 1919.

Second Lieut. Edwin P. Lock, jr., Corps of Engineers, from July 23, 1919.

Second Lieut. Morris W. Giliand, Corps of Engineers, from August 1, 1919.

Second Lieut. David T. Johnson, Corps of Engineers, from August 2, 1919.

Second Lieut. Edwin G. Shrader, Corps of Engineers, from August 2, 1919.

Second Lieut. Randolph P. Williams, Corps of Engineers, from August 2, 1919.

Second Lieut. Otto Praeger, jr., Corps of Engineers, from August 5, 1919.

Second Lieut. Allison Miller, Corps of Engineers, from August 9, 1919.

Second Lieut. Newell L. Hemenway, Corps of Engineers, from August 12, 1919.

Second Lieut. Archie T. Colwell, Corps of Engineers, from August 16, 1919.

Second Lieut. Arthur J. Sheridan, Corps of Engineers, from August 20, 1919.

Second Lieut. James G. Christiansen, Corps of Engineers, from August 22, 1919.

Second Lieut. Benjamin F. Chadwick, Corps of Engineers, from August 23, 1919.

Second Lieut. Charles D. Jewell, Corps of Engineers, from August 24, 1919.

Second Lieut. Heath Twichell, Corps of Engineers, from August 24, 1919.

Second Lieut. Joseph J. Twitty, Corps of Engineers, from August 27, 1919.

Second Lieut. Robert E. York, Corps of Engineers, from August 28, 1919.

Second Lieut. Chester K. Harding, Corps of Engineers, from September 5, 1919.

Second Lieut. William V. Hesp, Corps of Engineers, from September 10, 1919.

Second Lieut. William C. Bennett, jr., Corps of Engineers, from September 10, 1919.

Second Lieut. Claude H. Chorpening, Corps of Engineers, from September 14, 1919.

Second Lieut. Frank O. Bowman, Corps of Engineers, from September 15, 1919.

Second Lieut. James P. Jervey, jr., Corps of Engineers, from September 19, 1919.

Second Lieut. Joseph S. Gorlinski, Corps of Engineers, from September 20, 1919.

Second Lieut. George S. Witters, Corps of Engineers, from September 21, 1919.

Second Lieut. Albert Riani, Corps of Engineers, from September 21, 1919.

Second Lieut. Orville E. Walsh, Corps of Engineers, from September 21, 1919.

Second Lieut. Harvey D. Dana, Corps of Engineers, from September 23, 1919.

Second Lieut. Peter P. Goerz, Corps of Engineers, from September 23, 1919.

CHAPLAINS.

To be chaplains, with the rank of captain from March 3, 1920, after seven years' service.

Chaplain Alva J. Brasted, Infantry.

Chaplain William A. Aiken, Infantry.

Chaplain Ernest W. Wood, Coast Artillery Corps.

CAVALRY ARM.

Capt. Charles G. Harvey, Cavalry, to be major from April 13, 1920.

INFANTRY.

Lieut. Col. John F. Madden, Infantry, to be colonel from April 15, 1920.

Maj. Paul Giddings, Infantry, to be lieutenant colonel from April 15, 1920.

To be majors.

Capt. William H. Patterson, Infantry (Quartermaster Corps), from April 15, 1920.

Capt. Elliott M. Norton, Infantry, from April 15, 1920.

PORTO RICO REGIMENT OF INFANTRY.

First Lieut. Enrique de Orbeta, Porto Rico Regiment of Infantry, to be captain from April 11, 1920.

Second Lieut. Antonio A. Vazquez, Porto Rico Regiment of Infantry, to be first lieutenant from April 11, 1920.

APPOINTMENTS AND PROMOTIONS IN THE NAVY.

Capt. Nathan C. Twining to be a rear admiral in the Navy, for temporary service, from the 14th day of April, 1920.

Capt. Thomas P. Magruder, an additional number in grade, to be a rear admiral in the Navy, for temporary service, from the 14th day of April, 1920.

The following-named lieutenants to be lieutenant commanders in the Navy from the 1st day of July, 1919:

Richard S. Edwards and

Ernest D. McWhorter.

Ensign Sidney W. Kirtland to be a lieutenant (junior grade) in the Navy from the 3d day of June, 1919.

The following-named machinists to be chief machinists in the Navy from the 29th day of December, 1919:

Norman McL. McDonald,

Henry A. Reynolds, and

Henry H. Beck.

Machinist Sofus K. Sorenson to be a chief machinist in the Navy from the 8th day of January, 1920.

The following-named gunners to be chief gunners in the Navy from the 16th day of January, 1920:

Anthony Prastka,

William F. Schlegel,

William H. Stephenson,

Joseph O. Johnson,

Lee W. Drisco, and

Arthur E. Rice.

Asst. Surg. Russell J. Trout to be passed assistant surgeon in the Navy, with the rank of lieutenant, from the 30th day of July, 1918.

The following-named assistant surgeons to be passed assistant surgeons in the Navy, with the rank of lieutenant, from the 30th day of July, 1919:

Franklin F. Murdoch,

Ogden D. King,

Charles F. Glenn,
Louis H. Williams,
George P. Shields, and
Park M. Barrett.

Pay Inspector George G. Seibels to be a pay director in the Navy, with the rank of captain, from the 23d day of February, 1920.

Passed Assistant Paymaster Duette W. Rose to be a paymaster in the Navy, with the rank of lieutenant commander, from the 7th day of December, 1919.

Pay Clerk Leonard A. Klauer to be a chief pay clerk in the Navy, from the 25th day of July, 1919.

Lieut. (junior grade) Renwick J. Hartung (retired) to be a lieutenant on the retired list of the Navy, from the 24th day of February, 1920.

Brig. Gen. (temporary) Wendell C. Neville to be a brigadier general in the Marine Corps (subject to examination required by law) from the 28th day of March, 1920.

Brig. Gen. Wendell C. Neville to be a major general in the Marine Corps, for temporary service, from the 28th day of March, 1920.

CONFIRMATIONS.

Executive nominations confirmed by the Senate April 23, 1920.

UNITED STATES CIRCUIT JUDGE.

Nathan P. Bryan to be United States circuit judge for the fifth judicial circuit.

CHIEF JUSTICE OF THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

Victorino Mapa to be chief justice of the Supreme Court of the Philippine Islands.

COLLECTOR OF INTERNAL REVENUE.

William E. Byerly to be collector of internal revenue for the district of North Dakota.

COMMISSIONER OF EDUCATION FOR PORTO RICO.

Paul G. Miller to be commissioner of education for Porto Rico.

POSTMASTERS.

COLORADO.

Hattie S. Carruthers, Estes Park.

IDAHO.

Charles J. Simmons, Grangeville.
Robert W. Molloy, Orofino.

MARYLAND.

Hessie E. Nowlin, Fort Washington.
Charles M. Newman, Mount Rainier.
Charles A. Whittle, jr., Odenton.
Donald E. Clark, Silver Spring.

NEW YORK.

Patrick T. Quigley, Auburn.
William W. Gettys, Champlain.
Lewis H. Cole, Cuba.
L. Frank Little, Endicott.
Mary A. Blazina, Harrison.
John F. Brennen, Hudson.
Catharine A. Cashman, Roslyn Heights.

NORTH DAKOTA.

Paul M. Bell, Elgin.
Jacob H. Isaak, Goldenvalley.
John E. Nelson, Litchville.
John E. Young, Marion.
Hugh Roan, Portal.
Henry Branderhorst, Ray.
Michael Coyne, Starkweather.
Andrew M. Hewson, Wimbledon.

PENNSYLVANIA.

Stanley M. Williams, Hop Bottom.
David F. Barr, Watsontown.

WITHDRAWAL.

Executive nomination withdrawn from the Senate April 23, 1920.

PROMOTION IN THE NAVY.

Asst. Surg. Russell J. Trout to be a passed assistant surgeon in the Navy, with the rank of lieutenant, from the 30th day of July, 1918.

HOUSE OF REPRESENTATIVES.

FRIDAY, *April 23, 1920.*

The House met at 12 o'clock noon.

The Chaplain, Rev. Henry N. Couden, D. D., offered the following prayer:

O Thou Infinite Spirit, Father of all souls, in whom we live and breathe and dwell, aspiring high, even to the throne of Thy divinity, help us to realize that it is deeds not creeds which make for righteousness in the soul.

"Every tub stands on its own bottom." To live honestly, purely, justly, with Thee and our fellow men, is the crucial test for the individual and the Nation. Hasten the day, we beseech Thee, when man's inhumanity to man shall be swallowed up in brotherly love.

"Love never faileth: but whether there be prophecies, they shall fail; whether there be tongues, they shall cease; whether there be knowledge, it shall vanish away.

"For we know in part, and we prophesy in part.

"But when that which is perfect is come, then that which is in part shall be done away.

"When I was a child, I spake as a child, I understood as a child, I thought as a child; but when I became a man, I put away childish things.

"For now we see through a glass darkly; but then face to face: now I know in part; but then shall I know even as also I am known.

"And now abideth faith, hope, love, these three; but the greatest of these is love."

Amen.

The Journal of the proceedings of yesterday was read and approved.

MESSAGE FROM THE PRESIDENT OF THE UNITED STATES.

A message from the President of the United States, by Mr. Swem, one of his secretaries, announced that the President had approved and signed bills and joint resolution of the following titles:

On April 17, 1920:

H. R. 1791. An act for the relief of O. W. Lindsley;

H. R. 6291. An act for the relief of E. Willard; and

H. J. Res. 222. Joint resolution authorizing the Secretary of War to dispose of surplus dental outfits.

On April 19, 1920:

H. R. 6025. An act to amend the act entitled "An act to establish a code of law for the District of Columbia, approved March 3, 1901," and the acts amendatory thereof and supplementary thereto.

On April 20, 1920:

H. R. 9065. An act to amend certain sections of the Federal farm-loan act, approved July 17, 1916.

On April 21, 1920:

H. R. 795. An act for the relief of Arthur Wendle Englert;

H. R. 11877. An act granting the consent of Congress to Madison and Rankin Counties, in the State of Mississippi, to construct a bridge across the Pearl River between Madison and Rankin Counties; and

H. R. 12889. An act granting the consent of Congress to the city of Youngstown, Ohio, to construct a bridge across the Mahoning River, at or near Division Street, in the city of Youngstown, Ohio.

On April 23, 1920:

H. R. 12260. An act to amend section 600 of the act approved September 8, 1916, entitled "An act to increase the revenue, and for other purposes."

SEATING ARRANGEMENTS IN THE HOUSE.

Mr. POU. Mr. Speaker, I ask unanimous consent to address the House for five minutes.

The SPEAKER. The gentleman from North Carolina asks unanimous consent to address the House for five minutes. Is there objection? [After a pause.] The Chair hears none.

Mr. POU. Mr. Speaker, I desire to discuss for a minute or so the question of order in the House of Representatives. I believe we all will admit that the order that is maintained in the House when we are transacting business at times is not creditable to a great deliberative body. I was a Member of this House in the days when each Member had his private desk, and I believe that a good deal of the confusion is due to the fact that we have no desks. A Member comes in and takes his seat; he can not write; he has not a place for stationery; and he has got to listen or talk. Now, if the talk is not very entertaining, a good