General Discussion
STATE OF RHODE ISLAND v. PALMER, 253 U.S. 350 (1920)
NATIONAL PROHIBITION CASES


Van Devanter

Willis Van Devanter, (Associate Justice 1911-37), "announced the conclusions of the Court" in State of Rhode Island v Palmer, 253 U.S. 350 (1920) (hereafter Rhode Island) numerically listing the conclusions of the Court without providing any reasoning for them. This process of no "exposition of reasoning" in the majority opinion was soundly criticized by several of the justices at the time and has rarely been repeated.

The decision simultaneously dealt with seven different cases all presenting different arguments about the validity of the recently ratified 18th Amendment. In order, relevant to an Article V Convention, the Court determined: (1) no declaration of necessity was required of the proposing body in proposing an amendment; (2) two-thirds adoption for proposing an amendment is based on two-thirds of the members present assuming a quorum and not on the full membership of the proposing body; (3) state referendums of state constitutions and statutes may not be applied in the ratification or rejection of a proposed amendment to the Constitution; (4) the regulation of alcoholic beverages (i.e., regulation of commerce) is within the power to amendment reserved by Article V of the Constitution; and (5) the amendment, having been proposed and ratified lawfully, is equal to all other clauses of the Constitution and must be given "effect the same as other provisions of that instrument."

The Court then discussed specific text in the 18th Amendment related to the conflict between the language of Section 1 giving clear authority of enforcement to Congress and Section 2, calling for "concurrent power" between Congress and the several states to "enforce this article by appropriate legislation. The Court determined that "concurrent power to enforce this article by appropriate legislation" does not enable Congress or the several states "to defeat or thwart the prohibition, but only to enforce it by appropriate means."

Further the Court found that "concurrent power do not mean joint power or require that legislation there under by Congress, to be effective, shall be approved or sanctioned by the several states; nor do they mean that the power to enforce is divided between Congress and the several states." The Court concluded, "The power confided to Congress by that section, while not exclusive, is territorially coextensive with prohibition of the first section … and is in no way dependent on or affected by action or inaction on the part of the several states or any of them."

While concurring in the decision Chief Justice White expressed "regret that in a case of this magnitude, affecting as it does an amendment to the Constitution dealing with the powers and duties of the national and state governments, and intimately concerning the welfare of the whole people, the Court has deemed it proper to state only ultimate conclusions without an exposition of the reasoning by which they have been reached."

White

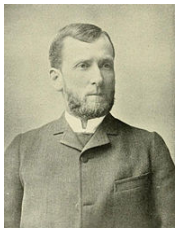
The chief justice expressed concern over the words "concurrent powers" used in the amendment which gave both states and Congress "concurrent" power to enforce this article by appropriate legislation" as he felt the Court's ruling was conflicted saying, "But as the power of both Congress and the states in this instance is given by the Constitution in one and the same provision, I again find myself unable to accept the view urged because it ostensibly accepts the constitutional mandate as to the concurrence of the two powers and proceeds immediately by way of interpretation to destroy it by making one paramount over the other."

The Chief Justice pointed out that while laws by Congress and the states are "not subject to conflict because their exertion is authorized within different areas, that is, by Congress with the field of federal authority, and by the states within the sphere of state, hence leaving the states free within their jurisdiction to determine separately for themselves what, within reasonable limits, is an intoxicating liquor, and to Congress the same right within the sphere of its jurisdiction. But the unsoundness of this more plausible contention seems to me at one exposed by directing attention to the fact that in a case where no state legislation was enacted there would be no prohibition, thus again frustrating the first section by a construction affixed to the second."

Stymied by the Gordian knot created by the conflict between the first and second sections of the amendment, White concluded, "Limiting the concurrent power to enforce given by the second section to the purposes which I have attributed to it, that is, to the subjects appropriate to execute the amendment as defined and sanctioned by Congress, I assume that it will not be denied that the effect of the grant of authority was to confer upon both Congress and the states power to do things which otherwise there would be no right to do. This being true, I submit that no reason exists for saying that a grant of concurrent power to Congress and the states to give effect to, that is, to carry out or enforce, the amendment as defined and sanctioned by Congress, should be interpreted to deprive Congress of the power to create, by definition and sanction, an enforceable amendment."

McReynolds

James Clark McReynolds, (Associate Justice 1914-41, Attorney General 1913-14), was succinct in his concurrence to the point of abstention. The associate justice said, "I do not dissent from the disposition of these causes as ordered by the Court, but confine my concurrence to that. It is impossible now to say with fair certainty what construction should be given to the Eighteen Amendment. Because of the bewilderment which it creates, a multitude of questions will inevitably arise and demand solution here. In the circumstances I prefer to remain free to consider these questions when they arrive."



McKenna

Clarke

The dissents of associate justices Joseph McKenna, (Associate Justice 1898-1925, U.S. Attorney General 1897-98, Judge, Ninth Circuit Court of Appeals, 1892-1897, member of Congress 1885-92), and John Hessin Clark, (Associate Justice 1916-22), focused on an issue relative to an Article V Convention—the proposition that states and/or Congress have exclusive regulatory or concurrent regulatory powers over the convention. Thus instead of the convention being an independent constitutional body it is a dependent appendage of either the states or Congress or both. Because of this dependence either or both bodies have the right to regulate all operational aspects of the convention despite the fact no such regulatory power is expressed in Article V or permitted by Congress vis-à-vis the states or the states vis-à-vis Congress. Examples of operational control includes delegate selection with no input from the people, pre-determination of convention agenda, appointment of officers, approval of all proposed amendment language and veto of any proposal either directly or by means of refusal to send a proposed amendment for ratification unless first approved by Congress.

In his dissent Justice McKenna discussed "the elemental rule of construction that in the exposition of statutes and constitutions, every word 'is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify or enlarge it,' and there cannot be imposed upon the words 'any recondite meaning or extraordinary gloss.'" McKenna then continued, "And it is the rule of reason as well as of technicality, that if the works so expounded be 'plain and clear, and the sense distinct and perfect arising on them' interpretation has nothing to do."

Justice McKenna then added, "The powers of Congress were not decided to be supreme because they were concurrent with powers in the states, but because of their source, their source being the Constitution of the United States and laws made in pursuance of the Constitution, as against the source of the powers of the states, their source being the Constitution and the laws of the

states, the Constitution and laws of the United States being made by article 6 the supreme law of the land, 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'"

Justice Clarke also took issue with the word "concurrent" and also referred to the interpretation of the Constitution by the Court. The justice wrote, "The eighth, ninth and eleventh paragraphs [referring to the itemized conclusions by Justice Van Devanter] taken together, in effect declare the Volstead Act (41 Stat.305) to be the supreme law of the land-paramount to any state law with which it may conflict in any respect. Such a result, in my judgment, can be arrived at only by reading out the second section of Eighteenth Amendment to the Constitution the word 'concurrent,' as it is used in the grant to Congress and the several states of 'concurrent power to enforce this article by appropriate legislation.' This important word, which the record of Congress shows was introduced, with utmost deliberation, to give accurate expression to a very definite purpose, can be read out of the Constitution only by violating the sound and wise rule of constitutional construction early announced and often applied by this Court-that in expounding the Constitution of the United States no word in it can be rejected as superfluous or unmeaning, but effect must be given to every word to the extent that this is reasonably possible."

Both justices who concurred and dissented pointed out the numeric summation of conclusions gave little information as to the reasoning behind those conclusions, causing more questions rather than answering them. Of course the entire question of "concurrent" powers was finally answered by the passage of the 21st Amendment, repealing the 18th Amendment in its entirety.

The conclusions of the Court regarding any "concurrent" power between Congress and the states do apply to an Article V Convention however. Combined with earlier decisions, it is clear the states do not have "concurrent" power to regulate a convention unless the clear language of Article V or similar language elsewhere in the Constitution so designates. Equally, Congress has no such power unless so designated by text of the Constitution. As was made clear in dissent, the powers of both states and Congress derive from the authority of Constitution, not each other. Finally, if there are such powers the powers must be employed to advance a convention. The principle of obedience to constitutional text was asserted by the Court. As stated before the Court determined that "concurrent power to enforce this article by appropriate legislation" does not enable Congress or the several states "to defeat or thwart the prohibition, but only to enforce it by appropriate means."

Thus, whether by exclusive authority of Congress, concurrent power of the states and Congress or the states alone the language of Article V mandates a convention call, and hence a convention, if the terms of Article V are satisfied. Neither the convention call, the text of Article V or any other text of the Constitution describes a manner or means whereby the states or Congress may

"defeat or thwart" the convention leaving the conclusion that they may only act "to enforce it by appropriate means" consistent with the supreme law of the Constitution. Thus no state or congressional law may conflict with the "supreme law" of the Constitution and be used to "defeat or thwart" either the convention or the approbation of the people through their elected representatives to alter their form of government as the people choose.