more drastic legislation destroys all that is urged for congressional supremacy, for necessarily supremacy cannot be transferred from the states to Congress or from Congress to the states as the quantity of alcohol may vary in the prohibited beverage. Section 2 is not quite so flexible to management. I may say, however, that one of the conclusions of the court has limited the range of retaliations. It recognizes "that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement" and declares "that those limits are not transcended by the provisions of the Volstead Act." Of course, necessarily, the same limitations apply to the power of the states as well.

From these premises the deduction seems inevitable that there must be united action between the states and Congress, or, at any rate, concordant and harmonious action; and will not such action promote better the purpose of the amendment—will it not bring to the enforcement of prohibition, the power of

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the states and the power of *Congress, make all the instrumentalities of the states, its courts and officers, agencies of the enforcement, as well as the instrumentalities of the United States, its court and officers, agencies of the enforcement? Will it not bring to the states as well, or preserve to them, a partial autonomy, satisfying, if you will, their prejudices, or better say, their predilections; and it is not too much to say that our dual system of government is based upon them. And this predilection for self-government the Eighteenth Amendment regards and respects, and by doing so sacrifices nothing of, the policy of prohibition.

It is, however, urged that to require such concurrence is to practically nullify the prohibition of the amendment, for without legislation its prohibition would be ineffectual, and that it is impossible to secure the concurrence of Congress and the states in legislation. I cannot assent to the propositions. The conviction of the evils of intemperance—the eager and ardent sentiment that impelled the amendment, will impel its execution through Congress and the states. It may not be in such legislation as the Volstead Act with its ½ of 1 per cent. of alcohol or in such legislation as some of the states have enacted with their 2.75 per cent. of alcohol, but it will be in a law that will be prohibitive of intoxicating liquor for beverage purposes. It may require a little time to achieve, it may require some adjustments, but of its ultimate achievement there can be no doubt. However, whatever the difficulties of achievement in view of the requirement of section 2, it may be answered as this court answered in Wedding v. Meyler, supra:

"The conveniences and inconveniences of concurrent" power by the Congress and the states "are obvious and do not need to be stated. We have nothing to do with them when the law-making power has spoken."

I am, I think, therefore, justified in my dissent. I am alone in the grounds of it, but in the relief of the solitude of my position, I invoke the coincidence of my views

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with *those entertained by the minority membership of the Judiciary Committee of the House of Representatives, and expressed in its report upon the Volstead Act.

Mr. Justice CLARKE dissents. See 253 U. S. 350, 40 Sup. Ct. 588, 64 L. Ed. —.

(253 U. S. 221)

HAWKE v. SMITH, Secretary of State of Ohio.

(Argued April 23, 1920. Decided June 1, 1920.)

No. 582.

1. STATES ⟸4—FEDERAL CONSTITUTION SUPREME LAW OF THE LAND.

The powers specifically conferred on the general government by the Constitution were surrendered by the states, and the Constitution and laws of the United States are the supreme law of the land.

2. CONSTITUTIONAL LAW ⟸10—METHOD OF RATIFYING AMENDMENTS DETERMINABLE BY CONGRESS AND LIMITED TO METHODS SPECIFIED.

Under Const. art. 5, providing for the ratification of proposed amendments by the Legislatures of three-fourths of the states or by conventions in three-fourths thereof, as one or the other mode may be proposed by Congress, the power of determining the method of ratification is conferred upon Congress, and is limited to the two methods specified.

3. CONSTITUTIONAL LAW ⟸10—COURTS OR LEGISLATIVE BODIES CANNOT ALTER METHODS OF RATIFYING AMENDMENTS.

It is not the function of courts or legislative bodies, national or state, to alter the method of ratifying proposed amendments to the federal Constitution, which the Constitution has fixed.

4. CONSTITUTIONAL LAW ⟸10—"LEGISLATURES" EMPOWERED TO RATIFY AMENDMENTS DEFINED.

The word "legislatures," in Const. art. 5, relative to the ratification of the proposed amendments, has the same meaning as when the Constitution was adopted, and means the representative body which makes the laws of the people.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Legislature.]

5. CONSTITUTIONAL LAW ⟸10—RATIFICATION OF AMENDMENT NOT ACT OF "LEGISLATION."

Ratification by a state of a proposed amendment to the federal Constitution is not an act

of "legislation," within the proper sense of the word, but the expression of the assent of the state to the proposed amendment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Legislation.]

6. CONSTITUTIONAL LAW ⟸10—POWER TO RATIFY AMENDMENTS DERIVED FROM CONSTITUTION.

While the power of a state Legislature to legislate in the enactment of laws for the state is derived from the people of the state, the power to ratify a proposed amendment to the federal Constitution has its source in such Constitution.

7. CONSTITUTIONAL LAW ⟸10—STATE CANNOT PROVIDE REFERENDUM ON RATIFICATION OF AMENDMENT TO FEDERAL CONSTITUTION.

A state has no authority to provide for the submission to a referendum under the state Constitution of the ratification of a proposed amendment to the federal Constitution, as is attempted by the amendment of 1918 to the Constitution of Ohio.

In Error to the Supreme Court of the State of Ohio.

Suit by George S. Hawke against Harvey C. Smith, as Secretary of State of Ohio. A judgment sustaining a demurrer to the petition was affirmed by the Court of Appeals and Supreme Court of Ohio (126 N. E. 400), and plaintiff brings error. Reversed and remanded.

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*Mr. J. Frank Hanly, of Indianapolis, Ind., for plaintiff in error.

Mr. Lawrence Maxwell, of Cincinnati, Ohio, for defendant in error.

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*Mr. Justice DAY delivered the opinion of the Court.

Plaintiff in error (plaintiff below) filed a petition for an injunction in the court of common pleas of Franklin county, Ohio, seeking to enjoin the secretary of state of Ohio from spending the public money in preparing and printing forms of ballot for submission of a referendum to the electors of that state on the question of the ratification which the General Assembly had made of the proposed Eighteenth Amendment to the federal Constitution. A demurrer to the petition was sustained in the court of common pleas. Its judgment was affirmed by the Court of Appeals of Franklin County, which judgment was affirmed by the Supreme Court of Ohio, and the case was brought here.

A joint resolution proposing to the states this amendment to the Constitution of the United States was adopted on the 3d day of December, 1917. 40 Stat. 1050. The amendment prohibits the manufacture, sale or

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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. The several states were given concurrent power to enforce the amendment by appropriate legislation. The resolution provided that the amendment should be inoperative unless ratified as an amendment of the Constitution by the Legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission thereof to the states. The Senate and House of Representatives of the state of Ohio adopted a resolution ratifying the proposed amendment by the General Assembly of the state of Ohio, and ordered that certified copies of the joint resolution of ratification be forwarded by the Governor to the Secretary of State at Washington and to the presiding officer of each House of Congress. This resolution was adopted on January 7, 1919; on January 27, 1919, the Governor of Ohio complied with the resolution. On January 29, 1919, the Secretary of State of the United States proclaimed the ratification of the amendment, naming 36 states as having ratified the same, among them the state of Ohio.

The question for our consideration is: Whether the provision of the Ohio Constitution, adopted at the general election, November, 1918, extending the referendum to the ratification by the General Assembly of proposed amendments to the federal Constitution is in conflict with article 5 of the Constitution of the United States. The amendment of 1918 provides:

"The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States."

Article 5 of the federal Constitution provides:

"The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose

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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 one thousand eight hundred and eight 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."

[1] The Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of the

people of the United States. McCulloch v. Maryland, 4 Wheat. 316, 402, 4 L. Ed. 579. The states surrendered to the general government the powers specifically conferred upon the nation, and the Constitution and the laws of the United States are the supreme law of the land.

The framers of the Constitution realized that it might in the progress of time and the development of new conditions require changes, and they intended to provide an orderly manner in which these could be accomplished; to that end they adopted the fifth article.

This article makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on application of the Legislatures of two-thirds of the states; thus securing deliberation and consideration before any change can be proposed. The proposed change can only become effective by the ratification of the Legislatures of three-fourths of the states, or by conventions in a like number of states. The method of ratification is left to the choice of Congress. Both methods of ratification, by Legislatures

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or conventions, call for *action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people.

[2, 3] The fifth article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by action of the Legislatures of three-fourths of the states, or conventions in a like number of states. Dodge v. Woolsey, 18 How. 331, 348, 15 L. Ed. 401. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

All of the amendments to the Constitution have been submitted with a requirement for legislative ratification; by this method all of them have been adopted.

[4] The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by "legislatures"? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning. Article 1, section 2, prescribes the qualifications of electors of Congressmen as those "requisite for electors of the most numerous branch of the state Legislature." Article 1, section 3, provided that Senators shall be chosen in each state by the Legislature thereof, and this was the method of choosing senators until the adoption of the Seventeenth Amend-

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ment, which made *provision for the election of Senators by vote of the people, the electors to have the qualifications requisite for electors of the most numerous branch of the state Legislature. That Congress and the states understood that this election by the people was entirely distinct from legislative action is shown by the provision of the amendment giving the Legislature of any state the power to authorize the executive to make temporary appointments until the people shall fill the vacancies by election. It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment. In article 4 the United States is required to protect every state against domestic violence upon application of the Legislature, or of the executive when the Legislature cannot be convened. Article 6 requires the members of the several Legislatures to be bound by oath, or affirmation, to support the Constitution of the United States. By article 1, section 8, Congress is given exclusive jurisdiction over all places purchased by the consent of the Legislature of the state in which the same shall be. Article 4, section 3, provides that no new states shall be carved out of old states without the consent of the Legislatures of the states concerned.

There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the states. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. The members of the House of Representatives were required to be chosen by the people of the several states. Article 1, section 2.

The Constitution of Ohio in its present

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form, although *making provision for a referendum, vests the legislative power primarily in a General Assembly, consisting of a Senate and House of Representatives. Article 2, section 1, provides:

"The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives, but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the Constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided."

[5] The argument to support the power of the state to require the approval by the people of the state of the ratification of amendments to the federal Constitution through the medium of a referendum rests upon the proposition that the federal Constitution requires ratification by the legislative action of the states through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this—ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.

At an early day this court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over the adoption of the Eleventh Amendment. Hollingsworth et al. v. Virginia, 3 Dall. 378, 1 L. Ed. 644. In that case it was contended that the amendment had not been proposed in the manner provided in the Constitution as an inspection of the original roll showed that it had never been submitted to the President for his approval in accordance with article 1, section 7, of the Constitution. The Attorney General answered that the case of amendments is a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of the Constitution investing *230 *the President with a qualified negative on the acts and resolutions of Congress. In a footnote to this argument of the Attorney General, Justice Chase said:

"There can, surely, be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendments to the Constitution."

The court by a unanimous judgment held that the amendment was constitutionally adopted.

[6] It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the federal Constitution has its source in the federal Constitution. The act of ratification by the state derives its authority from the federal Constitution to which the state and its people have alike assented.

This view of the amendment is confirmed in the history of its adoption found in 2 Watson on the Constitution, 1301 et seq. Any other view might lead to endless confusion in the manner of ratification of federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several states.

But it is said this view runs counter to the decision of this court in Davis v. Hildebrant, 241 U. S. 565, 36 S. Ct. 708, 60 L. Ed. 1172. But that case is inapposite. It dealt with article 1 section 4, of the Constitution, which provides that the times, places, and manners of holding elections for Senators and Representatives in each state shall be determined by the respective Legislatures thereof, but that Congress may at any time make or alter such regulations, except as to the place for choosing Senators. As shown in the opinion in that case, Congress had itself recognized the referendum as part of the legislative authority of the state for the purpose stated. It was held, affirming the judgment of the Supreme Court of Ohio, that the referendum provision of the state Constitution, when applied to a law redistricting the state with a *231 *view to representation in Congress, was not unconstitutional. Article 1, section 4, plainly gives authority to the state to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.

[7] It follows that the court erred in holding that the state had authority to require the submission of the ratification to a referendum under the state Constitution, and its judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

(253 U. S. 231)

HAWKE v. SMITH, Secretary of State of Ohio.

(Argued April 23, 1920. Decided June 1, 1920.)

No. 601.

In Error to the Supreme Court of the State of Ohio.

Suit by George S. Hawke against Harvey C. Smith, as Secretary of State of Ohio. To review an adverse judgment of the Supreme Court of Ohio (127 N. E. 924), plaintiff brings error. Reversed.

Messrs. J. Frank Hanly, of Indianapolis, Ind., George S. Hawke, of Cincinnati, Ohio, and Arthur Hellen, of Washington, D. C. (Messrs. Charles B. Smith, of Cincinnati, Ohio, and James Bingham and Reinster A. Bingham, both of Indianapolis, Ind., of counsel), for plaintiff in error.

*232 *Messrs. John G. Price, Atty. Gen., and B. W. Gearheart, of Columbus, Ohio (Judson Harmon and Lawrence Maxwell, both of Cincinnati, Ohio, of counsel), for defendant in error.

Messrs. Shippen Lewis, William Draper Lewis, and George Wharton Pepper, all of Philadelphia, Pa., amici curiæ.

Mr. Justice DAY delivered the opinion of the Court.

This case presents the same question as that already decided in No. 582, 253 U. S. 221, 40 Sup. Ct. 495, 64 L. Ed. —; the only difference