

In Re John Barleycorn: NYCLA's role in the repeal of Prohibition

by K. Jacob Ruppert, Esq.

*Mother's in the kitchen, washing out the jugs;
Sister's in the pantry, bottling the suds;
Father's in the cellar, mixing up the hops;
Johnny's on the porch, watching for the copsⁱ.*

As NYCLA celebrates its 75th year in the landmark Home of Law, it is befitting to remember the Association's work in the years leading up to the move to Vesey Street in 1930. NYCLA and its members had more than just building deadlines to meet; it had to maintain its public policy advocacy role during the extremes of the Roaring '20s and the Great Depression. One national issue through which the major historical events of the early 20th century could be told was Prohibition.

Prohibition was a product of a century-long temperance movement confronting other 20th-century forces such as a burgeoning progressivism, anti-German sentiment (Germany was America's enemy during World War I and many breweries were owned by German immigrants or German Americans) and fervent wartime sacrifice. By the early 1890s, the temperance movement had been galvanized into a lobbying body called the Anti-Saloon League (ASL), which launched a long-term national campaign to demonize the German-American community and win local, then state and then national elections with their candidates. The plan worked so well that by 1913, there were nine states with prohibition statutes and Americans nationwide were identifying themselves politically as either "wet" or "dry."

The ASL's first success at the federal level was in 1913 with the Webb-Kenyon Act that penalized alcohol transportation through dry states. Next came the Lever Food and Fuel Control Act banning the production of distilled spirits for the balance of the war. One year later, the War Prohibition Act was passed, forbidding the manufacture and sale of all intoxicating beverages of more than 2.75 percent alcohol until demobilization from the war.

America did not seem to mind a temporary dry spell for the sake of its doughboys overseas, a character trait the Progressives extrapolated upon, theorizing that the social and economic costs of legal alcohol outweighed one's personal right to drink. Brewers thought otherwise. In a 1917 public address, former Congressman Col. Jacob Ruppert Jr., President of the United States Brewers' Association and his family's Upper East Side brewery, stressed to the country that a personal liberty was a stake and the several states giving in to such an abuse of federalism would "out-Bolshevik Bolshevism!" However, there was no wet political machine to match that of the League. Ultimately, the burden fell upon the moneyed shoulders of the major brewers but, being German American, they were *personae non grata* with legislators. Furthermore, introduction of the federal income tax in 1913 was a crushing blow as this new tax removed the government's reliance on the substantial revenue from beer taxes, which had been the brewers most compelling defense. Women's suffrage and a worsening World War I also conspired against the brewers. Unsurprisingly, the ASL exploited these opportunities with insidious precision. The 18th Amendment banning the manufacture and sale of "intoxicating liquors" flew through Congress and was ratified on January 16, 1919.

One year after the Amendment's ratification came the

National Prohibition Act, a.k.a. the Volstead Act, named after its author, Andrew J. Volstead. This act, *inter alia*, stealthily redefined "intoxicating liquors" as anything more than .5 percent alcohol, not the 2.75 percent to which the country was accustomed during the "war beer" years and 7+ percent or more before that.

Ruppert, represented by good friend and honorary NYCLA member Elihu Root, took up the cause in *Jacob Ruppert vs. Caffey*ⁱⁱ, a last-ditch effort to kill the amendment before enactment. Ruppert claimed that the principal effect of the Volstead Act was to extend wartime measures to peacetime, a power exclusive to the President, not Congress. He further argued that proclaiming 2.25 percent alcohol as "intoxicating" was unscientific and contrary to contemporary notions of hard and soft liquors. The case was dismissed and then appealed directly to the U.S. Supreme Court resulting in a 5-4 decision. Judge Louis Brandeis, writing for the Court, said, "[T]he right of Congress to suppress the liquor traffic is not an implied power but one specifically granted. That power has not ended through the cessation of hostilities."

The New York Times reported on January 6, 1920 that the Ruppert decision "was so sweeping as to give little hope to the 'wets,'" thereby setting the stage for the national Prohibition cases to follow (also argued by Root) that began after the 18th Amendment and the Volstead Act went into effect ten days later.

Once "John Barleycorn"ⁱⁱⁱ was dead, the nation's 1100 breweries began dropping like flies. By Prohibition's end, only about 500 remained. George Ehret, undoubtedly the largest regional brewer, had been on vacation in Germany when World War I broke out. He was prohibited by the Immigration & Naturalization Service from returning (his American citizenship notwithstanding) and fighting the seizure of his brewery by "Alien Property Custodians."

Ruppert survived financially better than most only because his family never trusted the stock market and, most notably, they owned the New York Yankees and Yankee Stadium, which provided baseball fans with their "near beer" (post-war Prohibition beer). Most brewers eked out a living making candy, syrup, ice and soda. Meanwhile, deaths escalated exponentially from both mob violence and poisoning due to back-alley distilling and heimgemacht^{iv}.

Enter the NYCLA Special Committee on the 18th Amendment. After witnessing the consecutive failure of each of the national Prohibition cases, NYCLA passed a resolution "[b]y a thunderous *vive voca* vote" at a special open meeting held on January 25, 1928 at the Astor Hotel (on the corner of Broadway and Vesey Street, a frequently used location for NYCLA open and committee meetings) demanding in part:

[T]hat the Board of Directors of this Association be requested to examine... the abuses that Prohibition and its attempted enforcement have created, as well as to devise and recommend suitable and adequate remedies and to report... to this Association its recommendations and the remedies by it devised.

The proposed resolution contained unequivocal opposition to the 18th Amendment, stating it was "filled with graft and debauchery" and "has deteriorated and demoralized" the law. The resolution was read aloud, accompanied "with frequent applause, and shouts of encouragement or disagreement" by impassioned NYCLA member, John Vernou "Blackjack" Bouvier III, father of the future First Lady, Jacqueline Kennedy Onassis.

i Popular Prohibition limerick credited to an anonymous New York State Rotary Club member.

ii *Jacob Ruppert vs. Caffey*, 251 U.S. 264, 40 S. Ct. 141, 64 L. Ed. 260 (1920).

iii Fictional character personifying pre- and post-Prohibition America based on the English folksong of the same name.

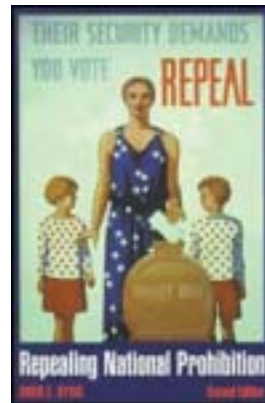
iv German for "homemade;" a popular German term for homemade Prohibition beer of pre-Prohibition potency.

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Please Note: The November issue will feature Part II: NYCLA Attacks the 18th Amendment with *U.S. v. Sprague*.



Henry W. Taft, President of NYCLA (1930 - 1932), who led the Association's efforts to repeal the 18th Amendment, poses with his brother, William H. Taft, former President of the U.S. and Chief Justice of the U.S. Supreme Court (1921 - 1930).



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Part II: NYCLA Attacks the 18th Amendment with U.S. vs. Sprague.

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In 1928, NYCLA's Special Committee on the 18th Amendment was renamed the Special Committee on the Constitutionality of the 18th Amendment and it boasted a stellar list of NYCLA members: former NYS Supreme Court Justice Daniel F. Cohalan; NYU Law School Dean Leslie J. Thompson; New York Port Authority General Counsel and renowned author on commercial arbitration, Julius Henry Cohen; former NYS Assembly Member Robert McC. Marsh; constitutional law litigator Selden Bacon; William H. Hamilton; NYCLA co-founder and ethicist Charles Strauss; and Martin Conboy, who was the U.S. Attorney who prosecuted Mayor Jimmy Walker and gangster Dutch Schultz. By March 1930, after two years of deliberation, the Committee voted 6-1 that the ratification method of the 18th Amendment was unconstitutional, alleging it was illegally ratified in defiance of the 10th Amendment (delegating power to the states) and that their arguments should be put before the U.S. Supreme Court. The Committee's findings were reduced to a pamphlet, authored by Selden Bacon, entitled *The X Amendment, Its Supreme Importance and Its Effect on the XVIII Amendment*. The pamphlet became a popular handout and debate topic in the midtown and downtown legal communities.



Following through on their mission, committee members Bacon, Cohalan, Thompson and Cohen were involved in the test case of *U.S. vs. Sprague*, defending a Coast Guard captain indicted for bootleg trafficking. On December 16, 1930, New Jersey Federal District Judge William Clark shocked pundits when he agreed with the NYCLA *Sprague* counsel, holding that the 18th Amendment was unconstitutional because it was illegally ratified. *The New York Times* reported that: "[J]udge Clark's decision results directly from a movement begun in 1927 by the New York County Lawyers' Association to bring about a clear-cut test of the validity of the Eighteenth Amendment."

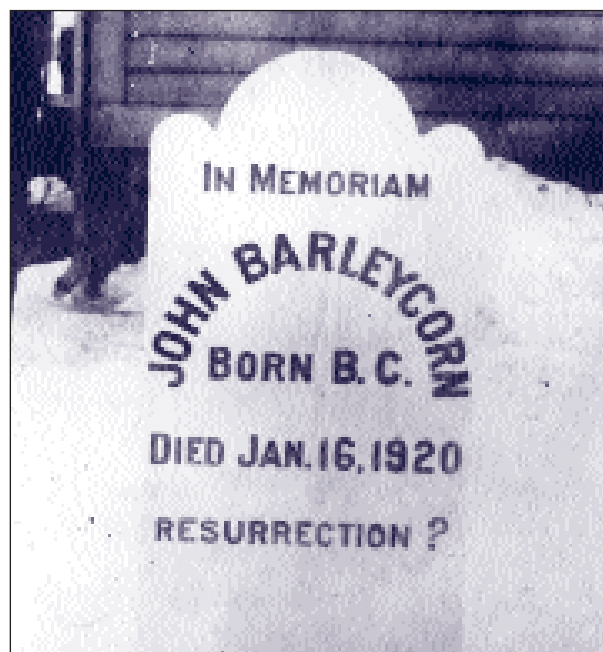
In 1931, the NYCLA Special Committee, standing on the brink of constitutional history, defended the *Sprague* decision before the Supreme Court. In a devastating stroke of the pen, the Court upheld the validity of Prohibition, holding that the Amendment "added nothing to the [Constitution] as originally ratified." The Special Committee returned to NYCLA, collapsing in the upholstered chairs of the second-floor Lounge and brainstorming about what to do next. Meanwhile, breadlines from St. Peter's Church and St. Paul's Chapel were circling the building. Fewer Americans held any hope for repeal, including NYCLA Secretary Terence J. McManus, who said at Christmas 1930 that "supporters of the 'wet' cause are perforce relegated to December 1933 as the earliest moment ... [for] a proposed repealing amendment" He was referring to the upcoming presidential and congressional elections of November 1932 as the political shift necessary for such a change. He was absolutely right.



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Prohibition eclipsed all other issues at the 1932 Democratic National Convention as voters understood that America was in a worsening economic crisis. Unemployment spoke louder than temperance as few could deny that legalizing beer would create thousands of new jobs and bring in desperately needed tax revenues. President Herbert Hoover stubbornly remained loyal to Prohibition in his reelection campaign, despite the damning Wickersham Report proclaiming the profound failure of Prohibition. It quickly became clear that a vote for Franklin D. Roosevelt was a vote for repeal. On November 8, 1932, in one of the greatest Democratic electoral victories in the history of American politics, Roosevelt was elected President and the Democrats held on to Congress. Three months later, after the Congressional seat shuffle, the proposed 21st Amendment was passed and sent to the states for ratification. Christmas came early that year, on December 5, 1933, when Utah became the mandatory 36th state to ratify the 21st Amendment repealing Prohibition. Happy days were here again.

However, for beer brewers and drinkers, Christmas 1933 came even earlier. The new Congress, covering all of its bases, concurrently revised the Volstead Act's definition of "intoxicating liquors" and agreed upon 3.2 percent alcohol as the new maximum. It was not the hearty 6 or 7 percent of pre-Prohibition days but it was a victory nonetheless, and at 12:01 AM on April 7, 1933, brewery whistles around the country heralded the return of beer. Many brewers from New York City, including Jacob Ruppert, sent kegs upon kegs of brew to the White House to celebrate what was dubbed "New Beer's Eve" (with less than half arriving!). For Ruppert, it was delayed justice from his suit 14 years earlier and for brewers, it was the first legal alcohol in 13 years and the only legal alcohol available for the next nine months. After that, the once-familiar kick in alcohol and the high foam on beer returned home for good.



The NYCLA Special Committee on the Constitutionality of the 18th Amendment surely saw the repeal of Prohibition as a fait accompli upon Roosevelt's election. The Committee's determination to raise its voice against legislative encroachment on personal liberties exemplifies NYCLA's mission to maintain the preservation of justice for all, thus sustaining the Association's legacy from one century to the next.

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