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The Long Wave of Prohibition: Alcohol Trade Laws in the US

1. *The Deep Roots of Prohibition*

Federal US law banned "the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United State and all territory subject to the jurisdiction thereof for beverage purposes" from January 16, 1920 when the XVIII Amendment to the US Constitution entered into force, until December 5, 1933, when the repeal of the XVIII Amendment by the XXI Amendment became effective, after ratification by the constitutional convention in Utah.

The implementing legislation of the National Prohibition Act[1] introduced for stern criminal sanctions and granted the Commissioner for Internal Revenue wide police powers: though it is widespread opinion that such legislation was substantially ineffective[2], National Prohibition had deep

[1] Generally known as "Volstead Act", after Republican congressman Andrew Volstead (Stat. 305 – 323, ch. 85). The full title reads as follows "An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to ensure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries". For comprehensive commentary see Blakemore, *National Prohibition: The Volstead Act Annotated and Digest of National and State Prohibition Decisions*, Farmington Hills, 2010 (original edition 1926).

[2] See e.g. Thornton, *Alcohol Prohibition Was a Failure*, Cato Institute, 1991, available at https://www.cato.org/publications/policy-analysis/alcohol-prohibition-was-failure (last access september 2019): "The only beneficiaries of Prohibition were bootleggers, crime bosses, and the forces of big government". See also Thornton, *The Economics of Prohibition*, Salt Lake City, 1991 (available at https://mises-media.s3.amazonaws.com/Economics%20of%20Prohibition_2.pdf - last access September 2019); Miron, *The Effect of Alcohol Prohibition on Alcohol Consumption*, National Bureau of Economic Research,

economic[3] and social consequences.

National Prohibition was not the outcome of sudden moralistic frenzy, or political extravaganza[4]; rather, it was a process that was deeply rooted in the American cultural, political and legal scenario since the early XIX century. Inter alia, that explains why Congress approved the Volstead Act notwithstanding the presidential veto, and why National Prohibition advocacy won the complex battle for ratification of the XVIII Amendment, though, in 1920, the subsequent repeal was far from predictable. Indeed, the Prohibition lobby succeeded in persuading State legislators that voters would have approved their decision to keep the United States forever "dry".

The sixty-nine members of the Cumberland Society for Suppressing Vice and Intemperance founded their association in Maine, as early as 1812. Religious inspiration moved them, in a social context were alcohol abuse was widespread. Their activity focused on fighting excessive consumption of liquors, mostly rum, while they had a more tolerant approach towards wine, being it mentioned in the Scriptures and used in liturgy. The Society viewed alcohol mainly as a personal problem of addiction, and used moral suasion as its principal tool.

The path of National Prohibition started with the progressive shifting from the view of alcohol abuse as a personal problem to that of alcohol consumption as a social problem, and the consequent move from moral suasion towards alcoholics to advocacy for legal intervention against alcohol manufacturing and trading[5]. Historians have highlighted the link between

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[3] Blocker, *Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation*, in *American Journal of Public Health*, 96, 2006, p. 233–243 (available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1470475/ - last access September 2019): "Prohibition wiped out an industry. In 1916, there were 1300 breweries producing full-strength beer in the United States; 10 years later there were none. Over the same period, the number of distilleries was cut by 85% (..). The 318 wineries of 1914 became the 27 of 1925. (..) The number of liquor wholesalers was cut by 96% and the number of legal retailers by 90%. From 1919 to 1929, federal tax revenues from distilled spirits dropped from $365 million to less than $13 million and revenue from fermented liquors from $117 million to virtually nothing". See also Hall, *What are the Policy Lessons of National Alcohol Prohibition in the United States, 1920–1933 ?*, in *Addiction*, 105, 2010, p. 1164.

[4] Sinclair, *Prohibition: The Era of Excess*, Boston, 1962 offers an example of historical reading of National Prohibition as a burst of religion fanaticism and widespread irrationality. Critical views in Aron, Musto, *Temperance and Prohibition in America: A Historical Overview*, in Moore, Gerstein (eds.), *Alcohol and Public Policy: Beyond the Shadow of Prohibition*, Washington D.C., 1981, p. 127 ff.; Tyrrell, *The US Prohibition Experiment: Myths, History and Implications*, in *Addiction*, 92, 1997, p. 1405.

[5] Pegram, *Battling Demon Rum: The Struggle for a Dry America, 1800–1933*, Chicago,

the progressive spreading of the Temperance Movement and the economic, social, ethnical and cultural transformations of the United States in the first quarter of the XIX century. The drinking issue was part of the Protestant -Catholic, urban-rural, middle class – working class, native – immigrant dialectics[6].

In 1826, the foundation in Boston of the American Temperance Society was the starting point of a mass campaign aimed at creating widespread consensus about the socially evil nature of any alcoholic beverage, including wine and beer. Most wine and beer consumers were recently immigrated people; furthermore, German and Eastern European entrepreneurs controlled the brewing industry. These circumstances led the temperance movement to target wine and beer, alongside its traditional enemies: rum, gin and whiskey. The American Temperance Society's campaign was one of the first examples of consensus-building, in order to create political pressure upon legislators.

In 1851, Maine legislators[7] issued the first State law prohibiting the manufacturing and sale of alcoholic beverages within the State; the "Maine law", on the other hand, did not foreclose imports of alcohol nor prohibited ownership or personal consumption of alcoholic beverages. The Maine law was a market regulation, aimed at making alcohol supplies more difficult and costly for consumers by forcing them to buy their drinks from suppliers from other States. As we will see later, it soon became clear that alcohol regulation triggered complex interstate commerce problems.

The Maine law was a successful legal model: between 1852 and 1855 Massachusetts[8], Rhode Island, Vermont, Michigan, New York and

1998 offers a complete analysis of the early days of the Temperance Movement.

[6] See the analysis by Gusfield, *Symbolic Crusade: Status, Politics and the American Temperance Movement*, Urbana, 1963.

[7] The key figure of the Maine Prohibition movement was Neal Dow, member of the Maine House of Representatives, former Mayor of Portland and candidate to the federal presidential elections of 1880 as leader of the Prohibition Party (still existing today: see https://www.prohibitionparty.org/). Born to a Quaker family, Dow devoted his all life and focused his political ambitions on the fight against liquor consumption. The self-biography published in 1898 (when Dow was in his eighties) reports that Dow wished "that a simply told story of the Temperance Movement in Maine may stimulate those who fear God and love their fellow-men to aid in securing the protection of society from the infinite evils resulting from liquor traffic" (Dow, *The Reminiscences of Neal Dow: Recollection of Eighty Years*, Portland, 1898, available online at https://ia802706.us.archive.org/34/items/reminiscencesne02dowgoog/reminiscencesne02dowgoog.pdf - last access september 2019).

[8] The Supreme Court of the State declared a first version of the law unconstitutional. An amended version followed.

Pennsylvania[9] issued similar pieces of legislation[10].

In 1881 Kansas included prohibition on "manufacturing and sale of intoxicating liquors" in its Constitution[11].

New Prohibition advocates came on the scene around the last quarter of XIX century: the Womens' Christian Temperance Union was founded in 1873 and the Anti-Saloon League was established in 1893 in Ohio. Such new movements focused their action against saloons[12], considered as homes of heavy drinking, alongside with macho culture, violence and prostitution. Manufacturers of alcoholic beverages, mostly whiskey distillers, owned and managed most of the saloons.

The fight against saloons led the public opinion of many States, mainly in the South and the West, to see vertical integration between liquor manufactures and distribution as a key element of the social evils connected to massive consumption of alcoholic beverages. Saloon managers were insensitive towards the needs of local communities; they had to report to their head officers, who had sales increases as their only objective[13]. As we will see, this led to long-lasting consequences on federal and State regulations of alcohol trade. Independence of distributors is still a high-rank objective for regulators, long after both the definitive fall of saloons and the

[9] Amended after court decisions stating unconstitutionality of previous versions.

[10] The Maine law model was never successful in circulating in the UK or Central and Southern Europe. On the other hand, in the first quarter of the XX century Iceland, Finland and Norway issued statutory provisions banning alcohol manufacturing and sales. For Iceland, see Gunnlaugsson, Galliher, *Wayward Icelanders: Punishment, Boundary Maintenance, and the Creation of Crime*, Madison, 2000, p. 42 ff.; Gunnlaugsson, *An Extreme Case of Lifestyle Regulation: the Prohibition of Beer in Iceland 1915 – 1989*, in Hellman, Roos, von Wright, *A Welfare Policy Patchwork: Negotiating the Public Good in Times of Transition, Nordic Centre for Welfare*, Helsinki, 2012, p. 259 e ss. For Finland: Wuorinen, *Finland's Prohibition Experiment*, in *The Annals of the American Academy of Political and Social Science*, 163, 1932, p. 216 ff. For Norway: Johansen, *The Norwegian Alcohol Prohibition; A Failure*, in *Journal of Scandinavian Studies in Criminology and Crime Prevention*, 14, 2013, p. 46 ff.

[11] The current Constitution of Kansas, at article 15, par. 10, allows single counties to forbid manufacturing and sale of alcoholic beverages, and still prohibits sale by the drink, though granting counties the power to grant exemptions.

[12] At the beginning of XX century, Carry Nation, a member of the Kansas chapter of the Woman's Christian Temperance Union, began raiding saloons and smashing liquor casks and bottles (first with rocks, later with a hatchet, that led her to name her raids "hatchetations"). Nation gained widespread notoriety and consensus on her battle against saloons, mostly among activists engaged in the struggle for women' rights. Nation's biography in Grace, *Carry A. Nation: Retelling the Life*, Bloomington, 2001.

[13] On the war against saloons, see Austin Kerr, *Organized for Prohibition: A New History of the Anti-Saloon League*, New Haven, 1985; Blocker Jr, *American Temperance Movements: Cycles of Reform*, Boston, 1989, p. 106 ff.

repeal of National Prohibition.

State laws controlling or prohibiting manufacturing and sales of alcoholic beverages, of course, had soon to face the constitutionality check by federal judiciary. In the s.c. *Licence cases*, of 1847[14], the Supreme Court held that State laws aimed at imposing minimum sales quantities (in order to prohibit sales by the drink), or bulk sales, or imposing a permit for alcohol trade were compatible with federal constitutional provisions granting individual freedoms, including freedom of trade. According to the Court, such State laws were expressions of the general police power of the State to prevent vice. The Court, therefore, seemed to endorse the fundamental assumption of the Temperance Movement, i.e. that even moderate consumption of alcoholic drinks is "vice" or, anyway, that there is a link between widespread availability of alcoholic beverages and social evils connected to heavy drinking. On the other hand, on the key issue of the relationship between police powers of the States and the exclusive power of Congress to regulate interstate commerce the Justices' many individual opinions in the *Licence Cases* do not seem to reach a precisely defined position. For sure, the decisions did not void any state law provision banning the sale of alcoholic beverages, including imported items sold in their original packages.

The subsequent decision in *Mugler v. Kansas*, of 1887[15], while, on the one hand, seemed to limit the State powers to regulate alcohol, on the other hand actually granted the States a wide freedom of action. According to the majority of the Court, when a piece of State law aimed at protecting health, morals or security has no actual connection with such aims, the judiciary will have no alternative but to strike it down, as an arbitrary infringement of personal freedoms granted by the Federal Constitution. It is paramount task of the judiciary to grant the effectiveness of the Constitution, when State law wrongfully limits personal freedoms, under the disguise of protection of general interests. On the other hand, such principle, according to the same majority opinion, could not be applied to bans on alcohol consumption, since it was notorious that widespread drinking of alcoholic beverages, even homemade, was a social danger[16]. Finally, the Court allowed Kansas to maintain into force its harsh (tough widely ineffective) legislation, enacted

[14] *The Licence Cases*, 46 US (5 How.) 504 (1847).

[15] *Mugler v. Kansas*, 123 U.S. 623 (1887).

[16] According to the Court in *Mugler*, it cannot be "shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact established by statistics accessible to everyone, that the idleness, disorder, pauperism, and crime existing in the county are, in some degree at least, traceable to this evil".

after the constitutional amendments of 1881.

In his dissenting opinion in *Mugler*, Justice Field pointed at two important issues. First, he revealed, once again, the interstate commerce problem that lied beneath the thin distinction drawn by State laws (including the "Maine law") between "import", which was allowed, and sale of alcohol (that was banned). According to Justice Fields "the right to import" alcoholic beverages in "dry" States, granted by the constitutional commerce clause, implied the right to sell such items[17]; it would have been unreasonable, and against the Federal Constitution, that a State should allow consumption of alcohol only in the case that the liquor was manufactured and sold in another State, and finally imported by the consumer in the "dry" State for personal use[18].

Furthermore, Justice Field raised the issue of proportionality. The substantive due process clause of the XIV Amendment foreclosed States from providing sanctions not proportionate with the public interest task upon which the regulation standed. According to Justice Field, this was the case of the Kansas statutory provision imposing destruction of any item or premises used for illegal manufacturing or sales of alcoholic drinks. Notwithstanding Justice Field's opinion, similar provisions were included in the Volstead Act, more than thirty years later.

Finally, in *Crowley v. Christensen*, of 1890[19], an opinion of the Court drafted by Justice Field himself held that pieces of State legislation limiting or prohibiting sales by the drink of alcoholic beverages were compatible with the federal Constitution, since social problems stemming from excessive alcohol consumption (today we would use the wording "negative externalities") justified statutory limitations, or even complete bans of sales of alcohol to be consumed on the premises. The most careful advocate of the proportionality principle in the Supreme Court, therefore, was so negatively oriented about public drinking to maintain that a complete ban

[17] In Justice Field's words: "I agree to so much of the opinion as asserts that there is nothing in the Constitution or laws of the United States affecting the validity of the act of Kansas prohibiting the sale of intoxicating liquors manufactured in the State, except for the purposes mentioned. But I am not prepared to say that the State can prohibit the manufacture of such liquors within its limits if they are intended for exportation, or forbid their sale within its limits, under proper regulations for the protection of the health and morals of the people, if Congress has authorized their importation, though the act of Kansas is broad enough to include both such manufacture and sale. The right to import an article of merchandise, recognized as such by the commercial world, whether the right be given by act of Congress or by treaty with a foreign country, would seem necessarily to carry the right to sell the article when imported".

[18] This is exactly what happened after Congress issued the Wilson Act: see below.

[19] *Crowley v. Christensen*, 137 U.S. 86 (1890).

on sales by the drink was a proportionate tool in order to prevent people from getting drunk or, even worse, from addiction.

2. *The Progressive Foreclosure of Interstate Commerce of Alcohol: Supreme Court and Congress*

After the above-mentioned decisions by the Supreme Court made clear that State bans on domestic manufacturing and sale of alcoholic beverage from charges of infringement of individual freedoms granted by the Federal Constitution, the only possible challenge for state prohibition laws could come from the protection of interstate commerce provided for by the "commerce clause".

In *Bowman v. Chicago & Northwestern Railway Co.*, of 1888[20], the Supreme Court held that the Iowa statutory provision forbidding common carriers to bring intoxicating liquors into the State from any other State or territory, without first being provided with a certificate, infringed the commerce clause, because it amounted to a regulation of commerce among the States, not sanctioned by Congress.

The decision in *Bowman* led to further consequences in *Leisy v. Hardin*, of 1890[21], when the Supreme Court fully applied the "dormant commerce clause" doctrine to State regulations of alcohol trade among several States. The Court restated the general principle underlying the "dormant commerce clause doctrine": "… inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as congress does not pass any law to regulate it, or allowing the State so to do, it thereby indicates its will that such commerce shall be free and untrammeled".

According to the constitutional interpretation by the Court, States have no power "to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly

[20] *Bowman v. Chicago & Northwestern Railway Co.*, 125 US 465 (1888).

[21] *Leisy v. Hardin*, 135 US (1890). A critical reading of Chief Justice Fuller's opinion in Currie, *The Constitution in the Supreme Court: The Second Century, 1888 – 1986*, Chicago, 1990, p. 32 -33, pointing out that the opinion purportedly ignored, or understated, previous case law holding that States may exercise their police powers notwithstanding any harmful effects on interstate commerce. The reading of the *Licence Cases* and of *Mugler* shows that, at least with reference to bans on alcohol, the position of the Court on the issue was at least nuanced and far from clear.

granted to be exercised by the people of the United States, represented in Congress and its possession by the latter was considered essential to that more perfect Union which the constitution was adopted to create".

Afterwards, the Court tackled the problem of setting the boundaries between the exclusive federal power of regulation of interstate commerce, and the police powers of the States, that according to federal precedents could justify bans on domestic manufacturing and distribution of liquors. According to the Court, alcoholic beverages do not become part of the "common mass of property" subject to regulatory powers of the State, as long as they remain unaltered in their original package[22].

Bowman and *Leisy* undermined State prohibitions on alcohol sales, leaving the door open for massive distribution of imported beverages. Congress immediately sided with "dries", taking hints from Chief Justice Fuller's dictum that: "the responsibility is upon congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action"[23].

In the same 1890 the Wilson Act was enacted[24], stating: "That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise"[25]. States were thus free to ban sales of imported drinks in any form, whether in their original packages or not, since Congress, in the exercise of its normative powers granted by the commerce clause, had excluded alcoholic beverages from freedom of interstate commerce.

Surprisingly, the Supreme Court upheld the act, in the *In Re Rahrer*

[22] In the parallel decision of *Lyng v. Michigan*, 135 US 161 (1890) the Court held that States could not tax imported liquors as long as they remained in their original packages, since States lacked the power to lay any taxes on interstate commerce.

[23] *Leisy v. Hardin*, 135.

[24] "An act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases" August 8, 1890, c. 728, 26 Stat. 313.

[25] See Note, *"Police Powers" under the Wilson Act of 1890*, in *Harvard Law Review*, 19, 1905, p. 53.

decision[26], holding that it did not confer the State any new power[27], but merely divested alcoholic beverages of the character of items of interstate commerce. On the other hand, *In Re Rahrer* left the problem of the legality of imports of alcohol for personal use in "dry" States open.

In its subsequent decisions of *Scott v. Donald*, of 1897[28], and *Vance v. W.A Vandercook*, of 1898[29], the Supreme Court held that South Carolina could not enforce its legislation granting a State monopoly on sales of alcoholic beverages in order to prevent its residents from ordering alcohol supplies from another State, since this would unlawfully discriminate suppliers from other States. Though the State monopoly was not unconstitutional in itself (being it an exertion of police powers of the State), the non-discrimination principle imposed to leave the door open for supplies from other States, directed to specific subjects that had ordered the product for their personal use.

The new decisions made state prohibition laws substantially powerless against "intoxicating liquors" entering "dry" States for personal use[30].

The answer of Congress was not as swift as in the aftermath of *Bowman* and *Leisy*; though it took them some time, congressmen continued to feel the charming appeal of the Temperance Movement culture, and the ongoing electoral consensus about the war on alcohol.

In 1913 the Webb-Kenyon Act was enacted. According to the Act: "The shipment or transportation, in any manner or by any means whatsoever of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State … into any other State … which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package, or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to, but subject to the jurisdiction thereof, is hereby prohibited".

Federal legislature, therefore, suppressed any chance of entering "dry"

[26] *In re Rahrer*, 140 U.S. 545 (1891). See also *Rhodes v. Iowa*, 170 U.S. 412 (1898) which stated that the power of the State did not attach to the "intoxicating liquor" when in course of transit.

[27] According to constitutional interpretation of the commerce clause in *Cooley v. Board of Wardens*, 53 US (12 How.) 299 (1852) such clause banned Congress from granting States powers not compatible with freedom of interstate trade.

[28] *Scott v. Donald*, 165 U.S. 107 (1897).

[29] *Vance v. W. A. Vandercook Co.*, 170 U.S. 438 (1898).

[30] Rutledge, *Religious Overreach at the Supreme Court*, New York, 2018, p. 122 points out that the decisions in *Scott*, *Vance* and *Rhodes* managed to maintain a flourishing trade in alcoholic beverages among the several states, "even in the face of powerful political opposition".

States for alcoholic beverages[31].

In *Clark Distilling Co. v. Western Maryland Ry Co.*, of 1917[32], the Supreme Court confirmed its previous case law, according to which the dormant commerce clause doctrine foreclosed State law provisions prohibiting supplies of alcohol from other states for personal consumption. On the other hand, the Court held that the Webb-Kenyon Act was compatible with the commerce clause, as a legitimate exertion of the power of Congress to regulate commerce of intoxicants. According to the Court, such power necessarily included the lesser power, exercised in the Webb-Kenyon Act, of adapting the regulation to the various local requirements and conditions that may be expressed in the laws of the states.

The Court excluded that the Act had given way to an inadmissible delegation to the States of the federal power to regulate interstate commerce. According to Chief Justice White's opinion: "The argument as to delegation to the states rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply".

The argument does not seem to answer the fundamental question whether the commerce clause allowed Congress to leave each State free to decide whether to ban imports of liquors from other States, or not. Furthermore, the Court expressly stated that the power of Congress to regulate interstate commerce does not necessarily require uniformity of regulation throughout the United States. This was the outcome of the same interpretation of *Leisy* followed in the *In Re Rahrer* decision, which stressed the passages stating that Congress could remove freedom of interstate commerce of liquors. On the other hand, *Clark* overshadowed the passages of the opinion of the Court in *Leisy* stressing the importance of uniformity in regulation, as a key element of the dormant commerce clause doctrine.

Certainly, the Court in *Clark* was much more favorable to inexpugnable State bans on alcohol than in the previous *Scott* and *Vance* decisions. The line of cases from *Bowman* and *Leisy* to *Clark* shows something more, i.e.

[31] Commentators agreed that the new act was compatible with the commerce clause. See Note, *Constitutionality of Webb-Kenyon Act*, in *Columbia Law Review*, 14, 1914, p. 330; Note (G.E.K.), *The Constitutionality of the Webb-Kenyon Act*, in *Michigan Law Review*, 12, 1914, p. 585; L. Rogers, *State Legislation Under the Webb-Kenyon Act*, in *Harvard Law Review*, 3, 1915, p. 225.

[32] *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917). Comments in Rogers, *The Webb-Kenyon Decision*, in *Virginia Law Review*, 4, 1917, p. 558 ff.

that while the Court was determined to protect interstate commerce against State interferences, it was not willing to oppose congressional choices endorsing State regulations, in the specific area of alcohol trade regulation. At the outcome, the Court left alcohol regulation to federal politics.

3. *Prohibition and Repeal: from the XVIII to the XXI Amendment*

In 1917, when Congress approved the XVIII Amendment, only 13 states completely banned alcohol, and other 23 states had adopted Prohibition, but they allowed residents to import small quantities of liquors (and/or to ferment wine) to a specific monthly amount, for personal use.

The XVIII Amendment was drafted (basically by the Anti-Saloon League) in strict terms, which went far beyond the target of banning the vertical integration scheme typical of saloons[33].

The implementing legislation of the Volstead Act filled the loopholes of the Amendment, by means of even stricter provisions: for example, it defined "intoxicating liquors" to "include alcohol, brandy, whiskey, 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 centum or more of alcohol by volume which are fit for use for beverage purposes"[34]. Such a wide definition of "liquors" was nearly unprecedented in state legislations; on the other hand, according to the interpretation by the Supreme Court[35], the second paragraph of the XVIII Amendment, granting the Federation and States concurrent powers to enforce the article "by appropriate legislation" did not allow States to introduce different substantive rules, but only to set up specific enforcement apparatuses and procedures at State level, alongside federal enforcement.

[33] See Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880–1920*, Chapel Hill, 1995, p. 56 ff.; Rorabaugh, *Reexamining the Prohibition Amendment*, in *Yale Journal of Law and the Humanities*, 8, 1996, p. 285.

[34] In the *National Prohibition Cases*, 253 US 350 (1920) the Supreme Court deemed the National Prohibition, as embodied in the XVIII Amendment, within the power to amend, conferred by art. 5 of the Constitution. Moreover, the Court upheld the strict definition of "liquors" of the Volstead Act, as exertion of the power of enforcement granted by the second paragraph of the Amendment.

[35] *National Prohibition Cases*, supra.

The XVIII Amendment was a radical form of trade regulation[36]. It said nothing about responsibilities of the individual alcohol consumer. With reference to personal use, sec. 33 of the Volstead Act had the following wording: "it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used". The Volstead Act itself did not punish individual consumption (as long as it was "domestic" only) but required the possessor of alcohol to face a heavy burden of proof in order to escape the risk of being treated as an illegal alcohol seller or depositary. Anyway, it was quite unlikely that enforcement authorities would have raided private dwellings, where modest quantities of alcohol were consumed: at the outcome, sec. 33 was practically useless.

Of course, sec. 33 of the Volstead Act, just like its "parent" pieces of State Prohibition legislation, shows an underlying hypocrisy: alcohol consumption, no matter how excessive, could not be a problem, as long as it was hidden behind domestic walls (and as long as taxpayers were not requested to provide sanitary help for alcoholics). Following the Anti-Saloon League doctrine, the evilness of alcohol was linked to "social" consumption, i.e. to public drinking, mostly in places of public depravation, like saloons. Moreover, the League saw immoderate drinking as typical of the poorest groups of population living in underdeveloped rural areas and among urban working class. Those people were easily distinguishable from the owner of a private dwelling "and his family residing in such dwelling and … his bona fide guests when entertained by him therein", whose (presumably moderate) drinking habits sec. 33 of the Volstead Act intended to overlook[37].

[36] "But even though the 18th Amendment went beyond abolishing the saloon—the goal that had provided the basis for unity for the antiliquor movement—and imposed a degree of abstinence that was unfamiliar to residents of most dry territories, the elimination of these loopholes was accepted as a more thorough purifying. For almost 40 years national prohibition had been associated with deliverance; for most Americans, its precise form was best left to league experts to elaborate": Aaron, Musto, *Temperance and Prohibition in America: A Historical Overview*, cit.

[37] In 1923, Senator Edge was very disappointed, when he discovered "that the Volstead Act is fragrantly and openly violated by large numbers of citizens of all classes, who, in their daily lives, are good men; typical Americans who are otherwise loyal to the principles of our institutions" (Edge, *The Non-Effectiveness of the Volstead Act*, in *The Annals of the American Academy of Political and Social Science*, 109, 1923, p. 67).

The problem of effectiveness of the Volstead Act arose very early, mostly with the development of illegal distribution networks of bootlegged liquors managed by criminal gangs in big cities, but also as a consequence of less clamorous infringements such as widespread moonshining, home wine-making[38], small scale smuggling from Canada using station wagons or fishing boats. On the other hand, early advocates for reform did not patronize repeal, or the opposite solution of criminalizing individual consumers; rather, they proposed a raise in the alcohol threshold for a beverage been treated as "intoxicating" from 0,5%, as provided by the Volstead Act, to 3%. Brewing and distribution of most types of beer would thus become legal, except in those States where lower thresholds could have been set by local legislatures[39].

At the outcome, the fundamental flaw of the National Prohibition, as embodied in the XVIII Amendment and exacerbated in the Volstead Act, was not its negative attitude towards alcohol, generally speaking. National Prohibition was flawed because it averted the power of going "dry" (and to decide how much "dry" to go) from local communities, represented by States legislatures. In its case law, the Supreme Court tried to highlight that, while residents in a State had the right to protect themselves against the evils of alcohol consumption (i.e. against negative externalities), their choice for dryness could not produce itself excessive negative externalities in the face of manufacturers and distributors located in different States. This was the meaning of Supreme Court's protection of interstate commerce of alcohol, in the teeth of State Prohibition legislations and the Wilson Act itself. The defense by the Court of out-of-State alcohol purchases by residents in a "dry" State for personal consumption, in the *Scott* and *Vance* decisions, set the ultimate frontier for State Prohibition. Congress, inspired by the Anti-Saloon League and its widespread consensus, decided to step beyond, at first with the Webb-Kenyon Act, and then, at federal level, with the XVIII Amendment and the Volstead Act.

Claims for personal right/freedom to drink were not the main issue in the pathway that led to repeal. The cause of freedom to drink did not find any really influent advocates, ever since the *Licence cases*, and even after National Prohibition had proven a chance for big crime, and a source of

[38] Levine, Reinarman, *From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, in *Milbank Quarterly*, 69, 1991, p. 461, p. 472 report that after the few years of National Prohibition there was a boom of wine-grape industry in California, mostly thanks to supplies directed to home winemakers. Most of them were Italian immigrants who sometimes sold their homemade products on small scale.

[39] See once again the paper by Senator Edge, *The Non-Effectiveness of the Volstead Act*, cit.

constantly raising costs of useless enforcement. Rather, after the Wall Street crash of 1929, extremely high expenses for Prohibition enforcement at federal and state level became unsustainable in front of perplexities raised by inability to counter power criminal organizations.

At the same time, it was clear that taxes and excises on alcohol trade could have been an important source of public revenue, and that a newly developed domestic alcohol business could help economic recovery against the Great Depression. Moreover, National Prohibition had lost support from powerful groups of influence, including tycoons like J.D. Rockefeller (who, in 1932, publicly admitted that endorsement to National Prohibition had been a mistake[40]). National Prohibition had completely missed the target of ensuring an ordered society and efficient working force for industrial groups; on the contrary, thanks to its ineffectiveness, during the Great Depression it had become a key factor in pushing people towards a general disrespect for the law and the institutions, named "lawlessness".

The motion inserted in the platform of the Republican party at the National Convention held in Chicago in June 1932, endorsed by Rockefeller, pointed the way to be followed: "should the Eighteenth Amendment be repealed, the Republican party pledges its influence and authority to secure the adoption of such measures for the control of the liquor traffic by the several States as will promote temperance, effectively abolish the saloon, whether open or concealed, and bring the liquor traffic itself, when not prohibited, under complete public supervision and control".

An economic[41] and a legal study[42] (funded by J.D. Rockefeller),

[40] In a letter published in the New York Times of June7, 1032, Rockefeller urged representatives of both Republican and Democratic parties to include motions for repeal of the XVIII Amendment in their platforms. Rockefeller remembers he had been "a teetotaler in principle" for his whole life, and had granted very generous financial support to the Anti-Saloon League. Nevertheless, repeal was necessary, since "the speakeasy has replaced the saloon (..) not only twofold, but threefold", "many of our best citizens, piqued at what they regarded as an infringement of their private rights, have openly and unabashed disregarded the Eighteenth Amendment (..) as an inevitable result, respect for all law has been greatly lessened" (accounts of the position of Rockefeller and various other stakeholders in Levine, *The Birth of American Alcohol Control: Prohibition, the Power Elite and the Problem of Lawlessness*, in *Contemporary Drug Problems*, 1985, p. 63 ff.; Kyvig, *Repealing National Prohibition*, II ed., Kent, 2000, p. 152 ff.).

[41] Warburton, *The Economic Results of Prohibition*, New York, 1932. Figures in the study are actually open to manifold interpretation. Though they apparently show a decline in alcohol consumption, on the other hand the decline does not appear to be constant, but is mainly focused in the first period of National Prohibition. Moreover, consumption of wine seemed to increase.

[42] Fosdick, Scott, *Toward Liquor Control*, New York, 1933 (reprint by the Center for Alcohol Policy, 2011). The basic policy recommendation of the study was that states had

provided the conceptual background. The key point was that though the need to eradicate lawlessness, "at all costs – even if it means a temporary increase in the consumption of alcohol" imposed repeal, on the other hand "while Prohibition was a failure in the sense that government authorities failed to suppress the emergence of a vigorous illegal supply network, there is nevertheless strong evidence to suggest that the 'noble experiment' was an instructive failure".

The crucial lesson was that "law enforcement during this period was effective enough to raise alcohol prices and reduce the ease of availability"[43]. Of course, these aims are opposite to the usual task of antitrust legislation and consumer protection regulation; the purpose of the proposal was to limit accessibility of alcoholic beverages to those wealthy enough to pay high prices, and determined enough to overcome any regulatory barrier that State legislatures could fancy.

The wording of the second paragraph of the XXI Amendment closely resembles that of the Webb-Kenyon Act: "the transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof, is hereby prohibited". The (restored) empowerment of States to issue laws governing "transportation and importation" of liquors from other States was set alongside the police power of the same States to ban/regulate domestic manufacturing and sales, and with the power of Congress to regulate alcohol as an item of interstate commerce which, of course, was not extinguished by the XXI Amendment.

None of these powers remained silent after repeal of National Prohibition. Already in 1940, seven years after Repeal, a legal advisor of the federal agency charged with liquor control could proudly report that: "The liquor industry is the most thoroughly regulated and carefully supervised of all industries. As time passes new ideas for making the control and supervision even more effective are being translated into federal, State and local laws and regulations"[44].

On the other hand, the same study informs that "about 12,000 moonshine stills are seized and destroyed each year. During the fiscal year ended June 30, 1940, 18,056 persons were convicted of liquor law violations.

to be empowered with liquor control. The basic models for state regulations were a state monopoly of retail stores for the distribution of strong liquor, to be sold in their package, or a system of permits for alcohol sales.

[43] Fosdick, Scott, *Toward Liquor Control*, cit.

[44] O'Neill, *Federal Activity in Alcoholic Beverages Control*, in *Law and Contemporary Problems*, 4, 1940, p. 570 ff., 571.

In the fiscal year 1939, 42 percent of all federal prisoners committed to the penitentiary were liquor law violators"[45].

4. *The Current Statutory Framework*

The federal regulation of alcohol trade is currently provided by the Federal Alcohol Administration Act, of 1935. A federal agency (Alcohol and Tobacco Tax and Trade Bureau - TTB, part of the Department of the Treasury) is charged of enforcement.

The act of 1935 followed the decision of the Supreme Court in the *Schechter* case[46], which declared the National Industrial Recovery Act (NIRA) unconstitutional, since it unlawfully delegated federal power to regulate commerce to Codes of fair competition adopted by industry committees and approved by presidential decree.

The Code Authorities of the alcoholic beverages industries, which included both manufacturers and distributors, had approved six Codes of fair competition before *Schechter*, covering issues as diverse as consumer information and protection against misleading advertising, commercial bribery, consignment and conditional sales, independence of distributors from vertical integration with manufacturers, limitation of production and imports to the quantities necessary to meet consumer demand, price control/maintenance. In other words, the Code Authorities, under the protection of NIRA and with approval by President F.D. Roosevelt, had designed markets for alcoholic beverages with high administrative barriers to entry, controls on prices, warranty of high margins for resellers and protection from attempts of vertical integration of distributorship by manufacturers (of course, in order to prevent the comeback of infamous saloons).

Most of such provisions, excluding those aimed at limitations of production and price fixing-maintenance, were transplanted from the Codes of fair competition to the federal act of 1935.

A federal permit is required for production of alcoholic beverages (excluding beer), their importation and resale at wholesale. Distribution is regulated by prohibition of "unfair trade practices" of sec. 205 of the act, that bans "exclusive outlet", "tied house", "commercial bribery" and "consignment sales". Such regulation clearly reflects the survival of the

[45] O'Neill, *Federal Activity in Alcoholic Beverages Control,* cit., p. 571.
[46] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

Anti-Saloon League culture, opposing any influence of manufacturers on the management of alcohol sales outlet. Saloons were the evil, and fostering strong independent retailers, even better if owned and managed by locals, was the cure[47].

"Exclusive outlet" prohibition bans any purchase obligations on retailers: alcoholic beverages have to be purchased by retailers by single transactions, with exclusion of any obligation of future purchases, or of purchasing minimum or fixed quantities. "Tied house" prohibition prevents manufacturers and wholesalers from any attempts to gain control over retailers. Sec. 205(b) of the act lists seven hypotheses of prohibited means that may be used to limit the retailers' independence, which include supplies of equipment, services or other things of value, crediting the retailer for advertising or display service, granting the retailer credit "for a period in excess of the credit usual and customary in the industry as ascertained in TTB regulations". TTB is empowered to provide regulatory exceptions[48], for reasons of public health, or based on "the quantity and value of articles involved, established trade customs non contrary to the public interest and the purposes of the subsection"[49].

"Commercial bribery" prohibition bans manufacturers and wholesalers from grating benefits to employees of other subjects in the distribution chain, in order to induce them to purchase their products. Finally, "consignment sales" provisions bans "arrangements wherein the trade buyer is under no obligation to pay for distilled spirits, wine, or malt beverages until they are sold by the trade buyer"[50], exception made for specific hypotheses defined by the TTB regulations for returns or exchanges of items "for ordinary and

[47] See e.g. Jurkiewicz, Painter, *Why We Regulate Alcohol the Way We Do*, in Jurkiewicz, Painter (eds.), *Social and Economic Control of Alcohol: The 21st Amendment in the 21st Century*, Boca Raton, 2008, p. 1 ff., p. 7.

[48] Regulation by TTB can be found at Title 27, Chapter I, of the Code of Federal Regulations (27 CFR Chapter I). The updated text is available on the TTB's website (https://www.ttb.gov/other/regulations last access september 2019). Current alcohol regulations are made of 31 parts. Part 6, devoted to the prohibition of "tied house" and its exceptions, includes 153 sections.

[49] The Federal Alcohol Administration Act is a piece of federal legislation regulating interstate and foreign commerce. Therefore, its provisions can be applied only when the case at stake has an impact on interstate or foreign commerce. According to case law, such requirement is easily met. It may be sufficient that the liquor was manufactured abroad, or that even a single foreign or out-of-state subject is involved in the supply chain: see *Fedway Associates, Inc. v. United States Treasury, Bureau of Alcohol, Tobacco and Firearms*, 976 F.2d 1416 (D.C. Cir. 1992).

[50] Par. 22. 1 of part 11 of TTB regulations.

usual commercial reasons".

The "unfair trade practices" provisions of the Federal Alcohol Administration Act clearly have protection of retailers' independence as their main goal; they foreclose practices, like exclusive outlets or supply of equipment/services from manufacturers to distributors, cooperation between manufacturers-wholesalers and retailers in advertising etc. that would raise no problem under general antitrust rules, or would be justified because of their beneficial effects towards consumers. Furthermore, nothing grants that the eventual added value arising from retailers' independence will be somehow shared with consumers. The TTB interpreted the statutory element of capability of an unfair trade practice to exclude "in whole or in part, distilled spirits wine or malt beverages sold or offered for sale by others in interstate or foreign commerce" as aimed not at fostering competition in itself, but as an express reference to retailers' independence. There is no exclusionary effect as long as retailers are empowered to decide which liquors to sell (or not to sell) and at which prices[51].

Retailers are thus free to raise prices as much as possible, with almost no chance for manufacturers or distributors to impose high standards of quality of distribution services. Moreover, while vertical integration is foreclosed, only general antitrust provisions may limit consolidation at retail level; this leads to the creation of strong networks of retail outlets, that need no legal protection against undue influence by manufacturers.

At the outcome, generally speaking, federal regulation of alcohol trade looks, more or less, like an antitrust nightmare.

State rules stand alongside such regulation. After repeal, over half the States decided to shift the decision about being "dry", "wet" or "moist" at local level (counties, towns). In Kansas, Tennessee and Mississippi localities have to take active steps if they want to allow the sale of alcohol; other States do not consent local prohibition. Almost everywhere there are regulations on alcohol sales, by the bottle or by the drink, for on premises or off premises consumption, to be ordered with or without food. Some localities (termed "moist") allow sales of wine and beer, but ban spirits, or prohibit sale by the drink, though allowing sale by the bottle (or in multi-bottle packages, as in the case of beer) for home consumption.

All States actually enacted regulations of alcohol distribution. Eighteen States established public monopolies on supplies and distribution of alcoholic beverages. Most States, besides articulated series of permits and transparency obligations required to practically anyone involved in the alcohol business,

[51] See TTB Regulations 27 CFR 6.151, 10.51, 10. 53, 10.54

adopted the s.c. "three tier system"[52]. Such system imposes a wholesale tier (often locally owned and managed) to stand between producers and retailers. Once again, the ratio is to prevent direct ownership/management of outlets of alcoholic beverages by wine, beer or spirits manufacturers. Wholesalers, acting as State-mandated middlemen, are the funnel to reach consumers: of course, they will prefer products that assure higher remunerations. Some States even grant minimum margins to wholesalers by law, and/or require an administrative permit before a manufacturer may terminate his business relationship with a retailer.

At the outcome, State laws protect wholesalers against manufacturers, while federal law protects retailers against manufacturers and wholesalers: apparently, no one protects consumers against rent-seeking policies, which, anyway, benefit federal and State Treasuries, thanks to higher revenues and higher taxes and excises from alcohol.

5. *Interstate Commerce Strikes Back*

In 2005 the Supreme Court, in *Granholm v. Heald*[53], decided that State laws of New York and Michigan could not allow direct sales from in-state wineries to consumer, while banning such sales (via web) from out-of-state wineries. According to the Court, the constitutional prohibition of discrimination from the States against interstate commerce survived both the Webb-Kenyon Act and the second paragraph of the XXI Amendment. The decision was the outcome of a underground trading warfare among the States that used the XXI Amendment and the public policy concerns under State regulations as weapons to foster protectionist policies[54]

The Court in *Granholm* openly departs from a line of previous statements, dating back to the early years after Repeal, in which the Court

[52] See Lawson, *The Future of the 'Three-Tiered System' as a Control of Marketing Alcoholic Beverages*, in Jurkiewicz, Painter, *Social and Economic Control of Alcohol: The 21st Amendment in the 21st Century*, cit., p. 31 ff.; Cagann, Van Duzer, *75 Years After Prohibition: the Regulatory Hangover Remains*, in *Business L. Today*, 18, 2009, p. 44 ff.

[53] *Granholm v. Heald*, 544 U.S. 460 (2005).

[54] Reference can be made to Lucas, *A New Approach to the Wine Wars: Reconciling the Twenty-First Amendment With the Commerce Clause*, in *UCLA Law Review*, 52, 2005, p. 899; Melzer, *A Vintage Conflict Uncorked: The 21st Amendment, the Commerce Clause, and the Full-Ripened Fight Over Interstate Wine and Liquor Sales*, in *University of Pennsylvania Journal of Constitutional Law*, 7, 2004, p. 279.

had assured that after the XXI Amendment there were no loopholes left for liquor being shipped from out of State into "dry" areas, i.e. exactly the situation that the Webb-Kenyon Act had tried to eliminate[55]. On the other hand, the decision gave the utmost importance to more recent case law, stating that in exerting their regulatory powers on alcohol national legislators could not provide worse treatment for imported products. The reference precedent was *Bacchus Imports Ltd. v. Dias*, of 1984[56], which had struck down a piece of legislation from Hawaii providing tax exemption for a specific locally manufactured alcoholic beverage.

The Court added that there is no proportionality between foreclosure of direct sales from out-of-state wineries and public interest needs of the State (as it was clear, since the state at stake allowed direct sales from domestic wineries).

Of course, the States parties to the controversy, in their briefs, raised the issue of safeguarding the "three-tier-system" against direct sales from out-of-state manufacturers of alcoholic beverages: it is clear that opening sources of alcohol from other States via web may divert consumers from traditional distribution channels, governed by state regulations. The answer by the Court in *Granholm* is that though States may ban alcohol sales or imports in their territory, or thet may assume direct control of alcohol distribution, or impose specific distribution systems (such as the "three tier"), "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of State the same as its domestic equivalent"[57]. In other words, the "three-tier- system" may be safe as long as the State bans direct sales from its domestic alcohol manufacturers and from their out-of-state competitors.

In *Granholm* there were two dissents, by Justices Stevens and Thomas. Both of them quoted Justice Brandeis' opinion of the Court in *Young's Market*, and fear that the new reading of the XXI Amendment may disempower the Webb-Kenyon Act, leading to widespread disregard for State regulations of alcohol trade thanks to massive distribution of wine,

[55] *State Bd. Of Equalization of Cal. v. Young's Market Co.*, 299 US 59 (1936); *Mahoney v. J. Triner Corp*., 304 US 401 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 US 391 (1939); *J.S. Finch & Co. v. McKittrick*, 305 US 395 (1939). Such line of cases was criticized by scholars, who pointed out that the Supreme Court was empowering States to erect tariff barriers, through discrimination favoring domestic liquors: Wiser, R.F Arledge, *Does the Repeal Empower a State to Erect Tariff Barriers and Disregard the Equal Protection Clause in Legislating on Intoxicating Liquors in Interstate Commerce ?*, in *George Washington Law Review*, 7, 1939, p. 402.

[56] *Bacchus Imports Ltd. v. Dias*, 468 US 263 (1984). The opinion of the Court in *Granholm* cites also *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 US 573 (1986) and *Healy v. Beer Institute*, 491 US 324 (1989).

[57] *Granholm v. Heald*, 544 U.S. 460 (2005), 475.

beer and spirits via web.

Justice Stevens clearly writes that "Today many Americans, particularly those members of the younger generations who make policy decisions, regard alcohol as an ordinary article of commerce, subject to substantially the same market and legal controls as other consumer products. That was definitely not the view of the generations that made policy in 1919 when the Eighteenth Amendment was ratified or in 1933 when it was repealed by the Twenty-first Amendment. On the contrary, the moral condemnation of the use of alcohol as a beverage represented not merely the convictions of our religious leaders, but the views of a sufficiently large majority of the population to warrant the rare exercise of the power to amend the Constitution on two occasions".

The Court in *Granholm* was called to draw legal consequences from an ongoing cultural turnover: though it was not as radical as in past decisions prior to the XVIII Amendment, the Court began setting boundaries on the States' regulatory powers, in the name of freedom of interstate commerce, once again.

After *Granholm*, it became clear that the pendulum between State regulation of alcohol and freedom of interstate commerce had started to swing again[58], and that the "three-tier" system would have been next to be targeted, provisional reassurances from the Court notwithstanding[59]. Last June 26, 2019 the Supreme Court issued its decision in *Tennessee Wine and Spirits Retailers Assn' v. Thomas*, stating that the law of Tennessee providing residency duration requirements for retail liquor store license applicants infringes the commerce clause, and is not covered by the second paragraph of the XXI Amendment. The Supreme Court upheld the reasoning of the Court of Appeals for the Sixth Circuit[60], according to which the principle in *Granholm* applied not only to manufacturers, but to distributors as well. Once again, following *Granholm*, the Supreme Court explained that the Amendment of 1933 aimed at restoring the federal-States balance of regulating power on

[58] Fearing possible consequences of *Granholm*, the alcohol wholesalers lobby supported a congressional bill, allowing State lawmakers to introduce discrimination against direct sales from out-of-state suppliers, when such rules protect "a legitimate local purpose that cannot be adequately served by reasonable non discriminatory alternatives" (see the news report by White, *Wholesale Robbery in Liquor Sales*, in *The New York Times*, April 3, 2011).

[59] See Banner, Granholm v. Heald: *A Case of Wine and a Prohibition Hangover*, in *Cato Supreme Court Review*, 2005, p. 263 ff.; Durkin, *What Does* Granholm v. Heald *Mean for the Future of the Twenty-First Amendment, the Three-Tier System and Efficient Alcohol Distribution?*, in *Washington & Lee Law Review*, 63, 2006, p. 1095; Roberts, *US Wine Regulation: Responding to Pressures and Trends in a Global Food System*, in Albisinni (ed.), *Le regole del vino. Diritto internazionale, comunitario, nazionale*, Milano, 2008, p. 175 ff.

[60] *Byrd v. Tennessee Wine and Spirits Retailers Ass'n* (6th cir.) 259 F.Supp.3d 785 (2018).

alcohol preexisting the XVII Amendment and that according to case law prior to the XXI Amendment States could not legitimately discriminate between domestic and imported alcoholic beverages.

Significantly, the Supreme Court deemed the residency duration requirement inconsistent with protection of public interest in control of alcohol consumption, which can be better served by means of other solutions, respectful of the non-discrimination requirement[61].

It is highly unlikely that US law will treat alcohol, in the forthcoming years, as an ordinary article of trade, or that it will revert to ordinary antitrust laws to protect consumer interests by mean of efficient competition on the relevant markets. This would involve a complete cultural change, dismantling of majestic bureaucracies and removal of long-established privileges on the markets.

Memories of the Temperance Movement are slowly fading away, under pressure of cultural changes towards alcohol and its problems, on the one hand, and of technological advances, on the other. Nonetheless, the culture of temperance survived changes inducted by the general diffusion of radio and television, since the Forties and Fifties (absolutely high expenditures in advertising by brewers and distillers notwithstanding), strong claims for higher moral freedom in the Sixties and Seventies, as well as the hedonistic culture and aggressive laissez-faire of "reaganomics" in the Eighties. Is it likely that e-commerce of alcoholic beverages may sign its death sentence?

6. *Remarks on Alcohol Trade Regulation in the EU*

The EU Court of Justice was called many times to assess the compatibility with principles of the Treaties granting free movement of goods and non-discrimination of Member States regulation of alcoholic beverages, from the Northern monopolies on sales[62] to laws imposing requirements for specific

[61] According to the opinion of the Court: "The residency requirement is poorly designed for such a purpose, and the State could better serve the goal without discriminating against nonresidents by, e.g., limiting both the number of retail licenses and the amount of alcohol that may be sold to an individual, mandating more extensive training for managers and employees, or monitoring retailer practices and taking action against those who violate the law".

[62] Reference goes to Scandinavian legislations that can be considered "descendants" of the rules enacted at the end of XIX century, following the example of the "Maine law". In their study on solutions for liquor control after Repeal, Fosdick and Scott (see *supra*) mentioned such experiences as possible patterns to be followed by the states: some US states actually adopted the northern European solution of state monopolies. Therefore, a legal transplant from the US

alcoholic items, such as the German legislation of liquors, or the "law of purity" of beer.

The Court constantly held (ever since the historical "Cassis de Dijon" case[63]) that State regulations of alcohol have to stand upon specific public interest tasks listed by the Treaty, pass the proportionality test, and avoid any unjustified discrimination against foreign manufacturers or products.

For example, in the *Franzén* decision[64] the Court upheld the Swedish monopoly on alcohol sales under EU law insofar as it was based on criteria which are independent of the origin of the products, non-discriminatory and not liable to put imported products at a disadvantage; on the other hand, the Swedish law requiring suppliers of the State monopoly to get a license subject to specific requirement, according to the EU Court, disadvantaged foreign alcohol manufacturers, which had to bear higher costs than their Swedish competitors. The public interest task of protecting public health could be achieved by means of less restrictive measures.

In the subsequent *Rosengren* decision, of 2007[65] the Court of Justice of the EU held that a national ban on imports of alcohol by private persons for individual consumption amounts to an unjustified quantitative restriction on importations, notwithstanding the legality, under EU law, of the State monopoly on alcohol sales established by the same legislation. According to the EU Court, the prohibition on individual imports is unsuitable to limit alcohol consumption, on the one hand, and disproportionate to the objective of protecting young people from excessive drinking, on the other.

With reference to regulation of alcohol distribution networks, European law generally reverts to general antitrust law for competition assessment of such matters as exclusive purchase agreements (usually providing benefits for resellers, such as supplies of equipment), or vertical integration between manufacturers and resellers. There is no sector-specific regulation, nor any particular concern that control or influence over retailers by manufacturers may lead to particular socially undesirable outcomes, provided that enough choice for consumers in the relevant markets is granted.

The pillars of the European Court's reasoning in *Franzén* and *Rosengren* do not differ much from those of the Supreme Court in *Granholm* and *Tennessee Wine and Spirits Retailers' Ass'n*, but apparent similarities disguise

to northern Europe was followed by another legal transplant in the opposite direction.

[63] ECJ, 20 February 1979, case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*. See also ECJ, 12 March 1987, case 178/84, *Commission of the European Communities v Federal Republic of Germany*.

[64] ECJ, 23 October 1997, case C-189/95, *Criminal Proceedings against Harry Franzén*.

[65] ECJ, 5 June 2007, case c- 170/04, *Rosengren et a. v. Riksåklagaren.*

big differences. Alcohol trade regulations in EU member States are not backed by any EU constitutional provision like the XXI Amendment: therefore, it is much harder for EU member States, than for States in the US, to disguise their protectionist policies under the safeguard of local public interests. Most of all, temperance culture was never much of a success in Europe[66].

7. *Conclusions: Alcohol Trade Regulation as a Cultural Issue*

An overview of the legal history and of the current situation of alcohol trade regulation in the US, and a quick comparison with the EU experience, show the paramount importance of cultural issues. When mind-altering ("intoxicating") substances are at stake, the line between what is socially admitted and what is socially condemned anticipates the distinction between legal and illegal.

There would have been no National or local Prohibition, in the US, without the sheer ability of the Temperance Movement and the Anti-Saloon League to build wide consensus among the electoral body, and population as a whole.

Cultural patterns draw the line not only between legal and illegal products, but also between acceptable and inacceptable ways of consuming. This refers not only to controls on quantities, or age-limits, or features of each substance (like alcoholic grade), but also to places of consumption (private or public, saloons or high-class lounge bars, restaurant or taverns) social features of people drinking together (bourgeoisie or working class, a restricted group of selected guests or a disordered crowd), and so on.

Nowadays, like in early 20th century, litigation on interstate commerce and State alcohol regulation, as seen above, shows underlying cultural tensions, pushed by social and economic/technological changes. National Prohibition prevailed, after the Wilson Act and the Webb-Kenyon Act, thanks to political choices backed by strong popular consensus on the culture of temperance. It is foreseeable, after *Granholm* and *Tennessee Wine and Spirits Retailers' Ass'n*, that federal Courts will push protection of interstate commerce against discriminatory regulations by States as far as the wording of the XXI Amendment allows. Further changes aimed at containing State regulations, when discrimination is not at stake and/or at making federal

[66] Exception made for the above-mentioned northern countries.

regulation more efficiency-oriented may not be forthcoming.

Though it is generally agreed that National Prohibition was a mistake, and that its fundamental flaw was averting choices on alcohol manufacturing and sales from local communities (if not from individuals: the XXI Amendment does not go so far), its basic schemes and enforcement techniques offered the reference pattern for subsequent federal statutes against the traffic of illegal drugs. Such legislation even made steps forward, by criminalizing, for decades, personal use of prohibited substances. A never ending debate keeps going on about which positive or negative lessons National Prohibition should teach with reference to the war on drugs, or to boundaries setting between legal and illegal substances.

It is sometimes argued that legal systems evolve by trial and errors: at least in some cases (and regulation of mind-altering substances may be an example), errors cannot be precisely separated from accomplishments. Success and failures commingle and facts keep pushing the law back in the ever changing melting pot of sensibilities, identities, interests named "culture", despite the efforts of public decision-makers.