Michigan Law Review

Volume 86 | Issue 1

1987

Liquor Price Affirmation Statutes and the Dormant Commerce Clause

Ward A. Greenberg
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Commercial Law Commons](#), [Constitutional Law Commons](#), [Food and Drug Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Ward A. Greenberg, *Liquor Price Affirmation Statutes and the Dormant Commerce Clause*, 86 MICH. L. REV. 186 (1987).

Available at: <https://repository.law.umich.edu/mlr/vol86/iss1/5>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

Liquor Price Affirmation Statutes and the Dormant Commerce Clause

Long before the days of moonshine and speakeasies, commerce in intoxicating liquors was subject to extensive regulation. With the demise of the Prohibition era, authority over the production, distribution, and consumption of liquor was returned to the states.¹ At the core of this regulatory authority is section two of the twenty-first amendment, which prohibits the importation of liquor into any state "in violation of the laws thereof."²

Many states, interpreting section two broadly, have enacted statutes intended to minimize the prices distillers may charge distributors. These statutes require producers to provide state liquor control agencies with schedules of the prices they intend to charge during each sales period.³ These statutes commonly require distillers to file "price affirmations," or guarantees, concerning prices. "Affirmation statutes" require producers to guarantee that the price filed for each item will be at least as low as the price charged for that item anywhere else in the country during the same specified period. The affirmation may be *prospective*, meaning that the affirmation applies to prices charged concurrently in other states.⁴ Or, it may be *retrospective*, linking the affirmed prices to the prices charged elsewhere the previous month.⁵

The enunciated purpose of these statutes is to secure the benefits of competition in other states for intrastate consumers.⁶ These statutes clearly fall within the ambit of state authority under the twenty-first

1. U.S. CONST. amend. XXI (repealing U.S. CONST. amend. XVIII). Prior to constitutional prohibition, the states had exercised extensive regulation of liquor, including price-setting. *See, e.g., Walling v. Michigan*, 116 U.S. 446 (1886) (Michigan's tax on shipments of liquor into the state held discriminatory). The statutes discussed in this Note represent only a small part of the alcoholic beverage control laws in effect in the various states. State liquor schemes are subject to federal scrutiny at other levels in the production and distribution process. *See, e.g., 324 Liquor Corp. v. Duffy*, 107 S. Ct. 720 (1987) (New York's retail price maintenance scheme invalidated on antitrust grounds); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

2. U.S. CONST. amend. XXI, § 2.

3. *See, e.g., N.Y. ALCO. BEV. CONT. LAW* § 101-b(4) (McKinney 1987) (Each schedule "shall be filed on or before the twenty-fifth day of each month and the prices and discounts set forth therein shall become effective on the first day of the second succeeding calendar month and shall be in effect for such second succeeding calendar month.").

4. *See, e.g., N.Y. ALCO. BEV. CONT. LAW* § 101-b (McKinney 1987); S.C. CODE ANN. § 61-7-100 (Law. Co-op. 1976) (declared unconstitutional in *Brown-Forman Corp. v. South Carolina Alcoholic Beverage Control Commn.*, 643 F. Supp. 943 (D.S.C. 1986)).

5. *See, e.g., ARIZ. REV. STAT. ANN.* § 4-253(A) (Supp. 1986).

6. *See* Brief for Appellant at 24-25, *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 106 S. Ct. 2080 (1986) (No. 84-2030). Extensive state regulation of liquor may have an inflationary effect upon prices, causing disparities between states. *See Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966) (explaining in dicta the aim of affirmation statute to relieve

amendment. However, such a reading seems to violate the commerce clause of the United States Constitution, which forbids any state from regulating commerce taking place beyond its borders.⁷ Reading the two constitutional provisions together, the twenty-first amendment permits the states to prohibit the importation⁸ of alcohol if they so desire,⁹ but the commerce clause seems to forbid the extension of the reach of their alcohol regulations into other states' territories. Affirmation statutes extend the states' regulation in this manner.

The concurrent operation of many states' affirmation provisions is the primary cause of these extraterritorial effects. Within the network of statutes, producers are virtually unable to change any price in one state without multistate regulatory approval. Each affirmation statute requires each producer to certify that its prices are at most equal to the lowest available in any other state. Additionally, prices once scheduled are usually alterable only with regulatory approval.¹⁰ A distiller who decides to raise a price in one state must raise the price everywhere else during the relevant statutory period or risk sanctions, usually fines and loss of license. On the other hand, a distiller who wishes to reduce prices in a given state will be forced to cut them in other states at some point¹¹ or risk censure under the other states' provisions.¹²

The Supreme Court first considered the validity of liquor price affirmation statutes under the dormant commerce clause in 1966. In *Joseph E. Seagram & Sons v. Hostetter*,¹³ the Court considered the pioneering retrospective statute then in effect in New York. After the Court declined to hold this statute unconstitutional, the affirmation issue disappeared from the bench for nearly two decades.

In the years after *Seagram*, many more states adopted the affirmation approach to wholesale liquor price control. Today there exists a virtually "national system of liquor regulation" in this area,¹⁴ with

upward pressure on prices caused by New York's mandatory minimum price maintenance statute).

7. U.S. CONST. art. I, § 8, cl. 3; see also notes 91-95 *infra* and accompanying text (discussing the dormant commerce clause).

8. The terms "importation," "domestic," and "extraterritorial," as used generally in this Note, relate to state borders rather than international frontiers.

9. U.S. CONST. amend. XXI, § 2.

10. These statutes typically permit changes to the schedule only "for good cause shown." See, e.g., MASS. GEN. L. ch. 138, § 25B(d) (1984); N.Y. ALCO. BEV. CONT. LAW § 101-b(3)(a) (McKinney 1987).

11. A distiller must prepare for any price change by coordinating its prices in all of the affirmation states and complying with all of the requirements of each state's affirmation statute. See Part III.B *infra*.

12. For explanation of the mechanics of the statutes and examples of their operation, see Part I.A *infra*.

13. 384 U.S. 35, *rehg. denied*, 384 U.S. 967 (1966).

14. Appellee's Motion to Dismiss or Affirm at 5, *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 106 S. Ct. 2080 (1986) (No. 84-2030).

thirty-nine states having some form of affirmation statute.¹⁵ As the practical effects of this network become more onerous, the issue of these statutes' constitutionality has reemerged. The issue returned to the Supreme Court in 1983, when the Court affirmed without opinion a Second Circuit decision¹⁶ holding unconstitutional Connecticut's prospective affirmation statute.¹⁷ Then, in 1986, the Court rejected New York's prospective affirmation statute in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*.¹⁸ In this action, Brown-Forman challenged the prospective affirmation statute that succeeded the retrospective statute upheld in *Seagram*.¹⁹ The Court concluded that the law violated the commerce clause because it "directly regulated commerce [in other states]."²⁰

While the Supreme Court has thus far found only prospective statutes unconstitutional,²¹ this Note argues that *all* liquor price affirmation statutes violate the commerce clause. The Constitution does not recognize a distinction between retrospective and prospective affirmation statutes. All affirmation statutes place an impermissible burden upon interstate commerce and represent an unconstitutional extraterritorial exercise of state legislative power. Although section two of the twenty-first amendment grants to the states unconstrained authority to control all aspects of traffic in alcoholic beverages within their respective borders, it does not give the states carte blanche to set liquor prices beyond those borders. Therefore, the twenty-first amendment does not rescue affirmation statutes from a commerce clause violation.

Part I of this Note examines the current state of the law in the liquor affirmation area. Part II argues that the twenty-first amendment may not be invoked to justify the extraterritorial impact of these statutes. The amendment does not preempt the commerce clause in

15. See notes 23-27 *infra* and accompanying text; Brief for Appellant at 5 n.4, *Brown-Forman* (No. 84-2030).

16. *United States Brewers Assn. v. Healy*, 464 U.S. 909 (1983), *affg.* 692 F.2d 275 (2d Cir. 1982). This decision, invalidating a prospective affirmation statute on commerce clause grounds, was arguably too fact-specific to be itself dispositive on the prospective statute issue. The Connecticut statute dealt with beer rather than distilled spirits and linked Connecticut prices only with the prices charged in the three adjacent states.

17. CONN. GEN. STAT. ANN. § 30-63b(b) (West Supp. 1987).

18. 106 S. Ct. 2080 (1986).

19. *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, *rehg. denied*, 384 U.S. 967 (1966). New York amended the retrospective statute upheld in *Seagram* in 1967 to make it dependent upon prospective prices. 1967 N.Y. Laws 798 (Governor's bill jacket). It had already seen the constitutional infirmity — an increasing burden on commerce — that a growing affirmation network would present. *Joseph E. Seagram & Sons v. Gazzara*, 610 F. Supp. 673, 675 n.3 (S.D.N.Y. 1985), *revd. per curiam*, 800 F.2d 49 (2d Cir. 1986); see Part III *infra*.

20. *Brown-Forman*, 106 S. Ct. at 2087.

21. In *Brown-Forman* the Court did state in dicta that it did "not necessarily attach constitutional significance to the difference between a prospective statute and [a] retrospective statute." The Court, however, left consideration of the constitutionality of retrospective statutes for another day. *Brown-Forman*, 106 S. Ct. at 2087 n.6.

the liquor area. While it gives the states free rein over liquor internally, it provides no basis for any extraterritorial projection of liquor price regulation. Part III considers the commerce clause analysis of *Brown-Forman* and argues that any interstate effects of these statutes will cause them to violate the commerce clause. This section argues that the prospective-retrospective distinction is constitutionally irrelevant, and demonstrates that all variations on the liquor price affirmation theme have practical effects upon interstate commerce. No distinction based upon the time periods for which the statutes require national price uniformity is constitutionally sound.

I. THE CURRENT STATE OF THE LAW CONCERNING LIQUOR AFFIRMATION STATUTES

A. *The Operation of Affirmation Statutes*

Thirty-nine states have some form of maximum liquor price regulation.²² Of this number, eighteen are so-called "control states" where the state contracts directly with the producers. Such regulations result in state control of virtually all aspects of the liquor industry.²³ These states, in their contracts with producers, often employ a standard provision called the "Des Moines Warranty" which requires distillers and brewers to guarantee that they will charge the lowest prices quoted anywhere else within the United States.²⁴ Twenty-one other states, called "affirmation states,"²⁵ permit producers to set the prices in accordance with particular regulatory provisions.²⁶

22. Brief for Appellant at 5 n.4, *Brown-Forman* (No. 84-2030).

23. These eighteen are Alabama, Idaho, Iowa, Maine, Michigan, Minnesota, Mississippi, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. These states control liquor distribution and sale to varying degrees through state enterprises, receiving the liquor from distillers and then either selling it under license to retailers or running state retail stores. Brief for Appellant at 5 n.4, *Brown-Forman* (No. 84-2030).

24. Brief for Appellant at 5 n.4, *Brown-Forman* (No. 84-2030). These clauses are similar to "most favored nation" clauses in international trade and demand that the distillers sell liquor to the state liquor control commission at the lowest price prevailing in the nation. Such provisions may be impeachable on antitrust grounds. See generally *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 623-24, 637 (1975) (considering the antitrust implications of a most favored nation clause in a labor contract). This Note does not consider control states' liquor laws except to note that they conform to the national framework created by affirmation states. See notes 25-26 *infra*.

25. They are called "affirmation states" to indicate that they control the prices in a private-sector marketplace of independent suppliers and sellers through the use of affirmation statutes. The price effects are similar to those of the control states which control the liquor business in its entirety. See Brief for Appellant at 5 n.4, *Brown-Forman* (No. 84-2030).

26. These states are: Arizona (ARIZ. REV. STAT. ANN. § 4-253(A) (Supp. 1986)); California (CAL. BUS. & PROF. CODE § 23673 (West 1985)); Connecticut (CONN. GEN. STAT. ANN. § 30-63b(a) (West Supp. 1987) (declared unconstitutional in *United States Brewers Assn. v. Healy*, 464 U.S. 909 (1983), *affg.* 692 F.2d 275 (2d Cir. 1982) (see Part II.B.2 *infra*); Delaware (DEL. CODE ANN. tit. 4, § 508(a) (1985)); Florida (FLA. STAT. § 565.15(1) (1985)); Georgia (GA. COMP. R. & REGS. r. 560-2-3-.47 (1982)); Hawaii (HAW. REV. STAT. §§ 281-122, 281-123 (1985)); Kansas (KAN. STAT. ANN. § 41-1101(a) (1986)); Louisiana (LA. REV. STAT. ANN.

All affirmation statutes begin by requiring producers to file monthly schedules listing the prices they will charge distributors in the state during the upcoming month.²⁷ The statutes then diverge into two classes. The sole distinguishing characteristic is the time period for which price comparisons are made. *Prospective* affirmation statutes, like the one held unconstitutional in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,²⁸ provide that every producer selling within the state must append an affirmation to its price schedule. This document affirms that each price quoted is the lowest price that will be available anywhere in the United States during the month the schedule will be in effect.²⁹ *Retrospective* affirmation statutes, in contrast, link each item's scheduled price to the minimum price available anywhere during the *previous* month.³⁰ In other words, while both kinds of statutes require the producer to swear to provide the lowest prices, only prospective statutes fix those prices to out-of-state prices during the effective month. Retrospective statutes require that the filed prices will be no higher than the lowest price charged *during the previous month*.³¹

§ 26:370(b) (West 1975)); Maryland (MD. ANN. CODE art. 2B, § 109(c-1) (1987)); Massachusetts (MASS. GEN. L. ch. 138, § 25C(a) (1986)); Minnesota (MINN. STAT. ANN. § 340A.307(3) (West Supp. 1987)); Nebraska (NEB. REV. STAT. §§ 53-170.02, 53-170.03 (1978)); Nevada (NEV. REV. STAT. § 369.435 (1985)); New Jersey (N.J. ADMIN. CODE tit. 13, § 2-24.5(a)(3) (1980)); New York (N.Y. ALCO. BEV. CONT. LAW § 101-b(3)(d) (McKinney 1987) (declared unconstitutional in *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 106 S. Ct. 2080 (1986)); Oklahoma (OKLA. STAT. ANN. tit. 37, § 536.1 (West Supp. 1987)); Rhode Island (R.I. GEN. LAWS § 3-6-14.1 (1976)); South Carolina (S.C. CODE ANN. § 61-7-100 (Law Co-op. 1976) (declared unconstitutional in *Brown-Forman Corp. v. South Carolina Alcoholic Beverage Control Commn.*, 643 F. Supp. 943 (D.S.C. 1986)); South Dakota (S.D. CODIFIED LAWS ANN. § 35-4-94 (1986)); and Tennessee (TENN. CODE ANN. § 57-3-202(e)(1)-(3) (1980)).

27. See, e.g., MASS. GEN. L. ch. 138, § 25B(a) (Law. Co-op. 1984): "No brand of alcoholic beverages shall be sold within the commonwealth to a wholesaler unless schedules . . . are filed with the commission and are then in effect."

28. 106 S. Ct. 2980 (1986).

29. See, e.g., FLA. STAT. § 565.15(1) (1985); HAW. REV. STAT. §§ 281-122, 281-123 (1985); R.I. GEN. LAWS § 3-6-14.1 (1976).

30. See, e.g., ARIZ. REV. STAT. ANN. 4-253(A) (Supp. 1986); see generally Brief for Plaintiff at 8-9, 12-20, 1a-34a, *Pennsylvania v. Alabama*, 472 U.S. 1015 (1985) (No. 101, orig.).

31. See *Brown-Forman v. South Carolina Alcoholic Beverage Control Commn.*, 643 F. Supp. 943, 947 (D.S.C. 1986).

In the South Carolina case involving *Brown-Forman*, the district court recognized simultaneous statutes as a third category of affirmation statutes. See 643 F. Supp. at 947. The South Carolina court identified the statute at issue in this case, S.C. CODE ANN. § 61-7-100 (Law. Co-op. 1976), as a simultaneous statute. 643 F. Supp. at 947.

Simultaneous statutes, also called "current" (see Appellee's Motion to Dismiss or Affirm at 3 n.4, *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 106 S. Ct. 2080 (1986) (No. 84-2030)) or "concurrent," represent a subdivision of the prospective category. They essentially retain the future-price orientation of their prospective cousins. See S.C. CODE ANN. § 61-7-100 (Law. Co-op. 1976) (requiring distillers to affirm that South Carolina prices are no higher than those charged elsewhere). The difference lies in the distillers' freedom to change prices after the schedule's effective month has begun. Because a simultaneous statute might neither prohibit nor restrict mid-month price changes or schedule revisions, this type of statute places a less restrictive burden on the distillers. Under such a scheme, the filed schedule would be merely advisory, with the affirmation the backbone of the state's price policy. Cf. N.Y. ALCO. BEV.

B. *The Conflicting Case Law*

1. 1966: Seagram Upholds Retrospective Statutes

The Supreme Court, in *Joseph E. Seagram & Sons v. Hostetter*,³² upheld the retrospective statute existing in New York prior to the enactment of the prospective statute invalidated in *Brown-Forman*.³³ This retrospective statute required producers to file monthly price schedules with the State Liquor Authority accompanied by an affirmation that the scheduled bottle and case prices were no higher than the lowest wholesale prices obtainable elsewhere in the United States during the preceding month.³⁴

CONT. LAW § 101-b(3)(a) (McKinney 1987) (the statute the Supreme Court struck down in *Brown-Forman* only permitted mid-month price changes as a matter of discretion of the State Liquor Authority "for good cause shown"). A simultaneous statute may impose an even looser regime; instead of requiring a schedule to be filed, the statute may merely insist upon an affirmation that the prices charged at any moment are at that moment equal to or less than the lowest available. *E.g.*, S.C. CODE ANN. § 61-7-100 (declared unconstitutional by the United States District Court for the District of South Carolina) (producer not required to file a price list or to obtain permission from the South Carolina Alcohol Beverage Control Commission prior to changing prices). As long as the producer selling in South Carolina keeps its prices as low as the lowest price charged anywhere else, the producer remains in compliance with the statute. *Brown-Forman*, 643 F. Supp. at 947. Under a current statute, purchasers are assured that they are paying the lowest price available at the instant of purchase rather than at any other arbitrarily selected comparison point. Appellee's Motion to Dismiss or Affirm at 3 n.4, *Brown-Forman* (No. 84-2030). An amended version of the Connecticut statute declared unconstitutional in *Healy* was upheld at the district court level in September 1987. In *United States Brewers Assn. v. Healy*, 53 Antitrust & Trade Reg. Rep. (BNA) No. 1334, at 525 (D. Conn. Sept. 11, 1987), the court held that the change in the statute, which now permits brewers to change prices in other states during the effective month, no longer violates the commerce clause. The result reached was opposite that in the South Carolina case, with the court finding the statute "not an excessive intrusion on commerce." *United States Brewers Assn. v. Healy*, 53 Antitrust & Trade Reg. Rep. (BNA), No. 1334, at 526.

32. 384 U.S. 35, *rehg. denied*, 384 U.S. 967 (1966).

33. N.Y. ALCO. BEV. CONT. LAW § 101-b (McKinney 1987). This statute, enacted in 1964, gave the state cause to fear that its effects would be overly burdensome on commerce (despite its having been upheld by the Supreme Court), and was duly amended in 1967 to become the prospective statute found unconstitutional in *Brown-Forman*. 1967 N.Y. Laws 798 § 2.

The retrospective statute's original enactment was largely in response to the recommendations of the Moreland Commission on the Alcoholic Beverage Control Law. "The Commission's major findings were that New York consumers suffered from serious price discrimination when compared to liquor consumers in other States and that a severe lack of competition existed in New York," J.A.J. Liquor Store v. New York State Liquor Auth., 64 N.Y.2d 504, 479 N.E.2d 779, 787 (1984), *revd. sub nom.* 324 Liquor Corp. v. Duffy, 107 S. Ct. 720 (1987); see NEW YORK MORELAND COMM. ON THE ALCO. BEV. CONT. LAW REPORT AND RECOMMENDATIONS NOS. 1-3 (1963); E. BREUER, MORELAND ACT INVESTIGATIONS IN NEW YORK: 1907-1965, at 147 (1965) ("[n]either temperance nor respect for law is promoted by the artificially maintained high prices."). See *Joseph E. Seagram & Sons*, 384 U.S. 39, *rehg. denied*, 384 U.S. 967 (1966). The legislature's "ultimate response," *Seagram*, 384 U.S. at 39, to the Commission's report was to enact the retrospective statute as part of a comprehensive restructuring of its alcoholic beverage control law. 1964 N.Y. LAWS 531 § 9.

34. N.Y. ALCO. BEV. CONT. LAW § 101-b(3)(d) to (k), *amended by* 1967 N.Y. Laws 798. Sections 101-b(3)(h), (i), (j), and (k) of the 1964 version were not altered when § 101-b(3)(a) was made prospective. Today § 101-b(3)(f) prohibits sales to wholesalers and retailers of brands for which no affirmation has been filed. Section 101-b(3)(g) requires the "lowest price" to reflect all discounts and other allowances to wholesalers and retailers available anywhere, with the excep-

In *Seagram*, wholesalers and importers brought suit against New York officials for injunctive and declaratory relief³⁵ that would prohibit enforcement of the new provision.³⁶ As the statute was not yet in force, the Court was concerned only with the question of whether the statute violated the commerce clause on its face.³⁷ In upholding the statute, the Court concluded that "the mere fact that [it] is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute. As part of its regulatory scheme . . . New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country."³⁸

Although the Court was aware that several prospective statutes and some control states' warranty provisions were already in place,³⁹ it found that the New York statute on its face created no unconstitutional burden on interstate commerce.⁴⁰ The Court held that *Seagram* had failed to show decisively the existence of "[t]he serious discriminatory effects [it had] alleged . . . on [its] business outside New York"; it was "by no means clear . . . that [the provision] must inevitably produce higher prices in other States . . . rather than the lower prices sought for New York."⁴¹ This finding may be explained largely by the fact that the statute was not yet in effect. "It will be time enough to assess the alleged extraterritorial effects . . . when a case arises that clearly presents them."⁴² Therefore the Court found that any possible burdens upon interstate commerce were "largely matters of conjecture."⁴³

The Court distinguished the case from *Baldwin v. G.A.F. Seelig, Inc.*,⁴⁴ a 1935 dormant commerce clause case dealing with New York milk prices. In *Seelig*, the Court held unconstitutional a New York milk pricing provision requiring out-of-state suppliers to adhere to a price floor equivalent to the in-state minimum price.⁴⁵ The Court held this statute to be discriminatory in both purpose and effect.⁴⁶ Looking

tion of state sales taxes and delivery costs. Section 101-b-3(h) and (i) provide for criminal penalties for the filing of false affirmations.

35. As a result of the series of stays granted throughout the pendency of the *Seagram* litigation, the 1964 provisions had not yet come into effect. *Seagram*, 384 U.S. at 41.

36. 1964 N.Y. Laws 531.

37. 384 U.S. at 41.

38. 384 U.S. at 43.

39. 384 U.S. at 43-44.

40. 384 U.S. at 45.

41. 384 U.S. at 43.

42. 384 U.S. at 43.

43. 384 U.S. at 43.

44. 294 U.S. 511 (1935).

45. 1933 N.Y. Laws 158; 1934 N.Y. Laws 126 (New York Milk Control Act).

46. *Seelig*, 294 U.S. at 521-23. New York wanted to protect the Metropolitan Milk District of New York City and its surrounding communities from outside price competition. *Seelig*, 294 U.S. at 519, 522.

to the impact on interstate commerce, the Court found that “[t]he substance of the provision is that . . . there shall be no sale within the state of milk bought outside unless the price paid to the producers was one that would be lawful upon a like transaction within the state.”⁴⁷ By contrast, the Court in the *Seagram* declaratory judgment action found *Seagram* unable to introduce any evidence showing that the affirmation statute, once in force, would affect prices elsewhere.⁴⁸

2. 1983: Healy Rejects Connecticut's Prospective Statute

In *Healy v. United States Brewers Association*,⁴⁹ the Court summarily affirmed a decision of the United States Court of Appeals for the Second Circuit holding unconstitutional the prospective beer affirmation provisions of the Connecticut Liquor Control Act.⁵⁰ These provisions required brewers to affirm that the beer prices they filed would be at least as low as the prices charged in states bordering Connecticut.⁵¹ The district court had granted summary judgment against the brewers, citing *Seagram* for the proposition that affirmation statutes place no undue burden upon interstate commerce.⁵² On appeal, the Second Circuit rejected the lower court's conclusion that the statute attempted only to equalize, rather than to favor, the competitive position of Connecticut beer dealers.⁵³

The Second Circuit in *Healy* based its decision on general dormant commerce clause principles. It began its analysis with a restatement of the *Seelig* proposition that the commerce clause is intended to promote free trade and “liberate the flow of . . . commerce from the provincialism evident in many local regulations.”⁵⁴ The court then considered the balancing process used by the Supreme Court to determine the validity of a state regulation in light of its intended benefits and its detriment to interstate commerce.⁵⁵ The court determined that the burdens of a state regulation on commerce are impermissible if the regulation's purpose or effect is to control activity taking place entirely outside the state. In assessing the out-of-state effects, it is the practical consequences that are relevant. Finally, the court found that the Supreme Court's construction of the twenty-first amendment makes it

47. *Seelig*, 294 U.S. at 519.

48. Compare *Seagram*, 384 U.S. at 43, with *Seelig*, 294 U.S. at 522-24. See also *Brown-Forman*, 106 S. Ct. at 2089 (Stevens, J., dissenting).

49. 464 U.S. 909 (1983), *affg.* 692 F.2d 275 (2d Cir. 1982).

50. CONN. GEN. STAT. ANN. § 30-63a(b), 30-63b(b), 30-63c(b) (West Supp. 1987).

51. CONN. GEN. STAT. ANN. § 30-63(b) (West Supp. 1987).

52. *United States Brewers Assn. v. Healy*, 532 F. Supp. 1312, 1325 (D. Conn.), *revd.*, 692 F.2d 275 (2d Cir. 1982), *affd. mem.*, 464 U.S. 909 (1983).

53. *Healy*, 692 F.2d at 278.

54. 692 F.2d at 278; see *Seelig*, 294 U.S. at 522.

55. 692 F.2d at 279. This balancing test is laid down in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), discussed at notes 117-30 *infra* and accompanying text. See generally Part III *infra*.

an insufficient basis upon which to permit state regulation of the liquor traffic outside each respective state's own territory.

Applying these principles to the Connecticut statute,⁵⁶ the court held simply that the beer affirmation provisions were facially invalid under the commerce clause.⁵⁷ This violation occurred because the "obvious effect" of the law, the setting of a minimum price in the three states bordering Connecticut, was "to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut."⁵⁸ The *Healy* court relied on the retrospective-prospective distinction in refusing to follow the *Seagram* precedent.⁵⁹

While the *Healy* case marshals all of the relevant commerce clause and twenty-first amendment principles, the Second Circuit's decision was based primarily upon the narrow temporal distinction between retrospective and prospective statutes. The *Healy* court's clear commerce clause reasoning, however, leads logically to a decision contrary to *Seagram*.⁶⁰

C. *Brown-Forman and Its Reasoning Should Apply to All Affirmation Statutes*

In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,⁶¹ decided in May 1986, the Supreme Court held that New York's prospective statute (the successor to the retrospective statute upheld in *Seagram*) violated the commerce clause on its face. The 5-3

56. CONN. GEN. STAT. ANN. § 30-63b(b) (West Supp. 1987) provided that each manufacturer or out-of-state shipper must affirm at the time of posting its prices, that the price posted for each item is "no higher than the lowest price at which each such item of beer is sold . . . by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state."

57. *Healy*, 692 F.2d at 282.

58. 692 F.2d at 282.

59. 692 F.2d at 282-83.

60. Of course, as a court of appeals decision may not hold contrary to established Supreme Court precedent, Circuit Judge Kearsse had to distinguish *Seagram* rather than declare it obsolete. However, her commerce clause reasoning itself leads more directly to a distinction of *Seagram* based upon the procedural nature of the action, a suit for declaratory judgment, and the "practical effects" question, than to a distinction based on the temporal foci of the statute.

If the *Healy* situation were compared to *Seagram*, much of the factual distinction would cut the opposite way, supporting the constitutionality of the Connecticut statute. First, the Connecticut statute applied solely to the prices for beer rather than to all alcoholic beverages. CONN. GEN. STAT. ANN. § 30-63b (West Supp. 1987). Second, its geographical coverage was limited: the prices filed were required to be as low as the lowest price charged in only the three states bordering Connecticut. CONN. GEN. STAT. ANN. § 30-63b(b) (West Sup. 1987). Third, its undisputed purpose was to increase the volume of beer purchased by Connecticut residents within the state and thereby increase the state's tax revenues. *United States Brewers Assn. v. Healy*, 532 F. Supp. 1312, 1316-17 (D. Conn. 1982). This raises a separate issue that brings the statute into trouble under the twenty-first amendment, since the intent behind it was most obviously not the promotion of temperance. See notes 67-86 *infra* and accompanying text.

61. 106 S. Ct. 2080 (1986).

majority⁶² held that New York had “‘project[ed] its legislation’ into other States, and directly regulated commerce therein, in violation of *Seelig’s*” prohibition of extraterritorial price-setting⁶³ and the commerce clause.⁶⁴

While the Court expressly limited its holding to prospective statutes such as New York’s,⁶⁵ the reasoning throughout the opinion supports both an overruling of *Seagram* and a finding that retrospective statutes are also unconstitutional. Yet the *Brown-Forman* Court did not consider the continuing validity of *Seagram* and explicitly chose not to pass judgment on retrospective statutes. The Court declined either to overrule *Seagram* or to distinguish it on factual grounds: “[W]e do not necessarily attach constitutional significance to the difference between a prospective statute and the retrospective statute at issue in *Seagram*.”⁶⁶

The issue the Court left open derives from a narrow temporal difference between two nearly identical variations of a single statutory paradigm. The Court’s constitutional reasoning in *Brown-Forman* does not support this minor distinction as a basis for constitutional differentiation. The commerce clause principles enunciated in *Brown-Forman* and its predecessors mandate the invalidation of all price affirmation statutes.

II. THE TWENTY-FIRST AMENDMENT DOES NOT REPEAL THE COMMERCE CLAUSE IN THE LIQUOR REGULATION AREA

The twenty-first amendment does not save affirmation statutes whose effects are felt across state borders. Section two of the twenty-first amendment reserves to the states the unabridged right to regulate or prohibit altogether the importation and distribution of liquor within their territories.⁶⁷ It grants them “virtually complete control over . . .

62. Justice Marshall wrote the opinion of the Court, joined by Chief Justice Burger and Justices Powell and O'Connor. Justice Blackmun joined the majority but would have had the court overrule *Seagram*, the position that this Note adopts. Justice Stevens wrote a dissent and was joined by Justices White and Rehnquist. Justice Brennan did not participate.

63. 106 S. Ct. at 2087 (quoting *Seelig*, 294 U.S. at 522).

64. 106 S. Ct. at 2084.

65. 106 S. Ct. at 2086 (“a ‘prospective’ statute such as Connecticut’s . . . or New York’s . . . regulates out-of-state transactions in violation of the commerce clause”).

66. *Brown-Forman*, 106 S. Ct. at 2087 n.6. The Court continued:

Indeed, one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case. If there is a conflict between today’s decision and the *Seagram* decision, however, there will be time enough to address that conflict should a case arise involving a retrospective statute. Because no such statute is before us now, we need not consider the continuing validity of *Seagram*.

106 S. Ct. at 2087 n.6.

67. Section two of the twenty-first amendment provides: “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 laws thereof, is hereby prohibited.” U.S. CONST. amend. XXI § 2.

how to structure the liquor distribution system.”⁶⁸ It may not, however, be used to justify extraterritorial regulation. “Although [section two] directly qualifies the federal commerce power,”⁶⁹ it “has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries.”⁷⁰ The Supreme Court recently reiterated this principal in *324 Liquor Corp. v. Duffy*.⁷¹ “The court has rejected the view that the twenty-first amendment has somehow operated to ‘repeal’ the commerce clause” in the alcoholic beverage area.⁷²

A. *The History of the Twenty-first Amendment*

No clear consensus is apparent concerning the meaning of the provisions of the twenty-first amendment.⁷³ However, the Supreme Court has studied the conflicting legislative history several times,⁷⁴ affirming each time that the amendment has not “repeal[ed]” the commerce clause in the liquor control area.⁷⁵ The amendment’s sole purpose may have been to enable states desiring to remain dry after Prohibition to do so.⁷⁶ Or, the purpose may have been that proclaimed by Senator

68. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). This proposition has been settled for some time. *See, e.g., Ziffrin v. Reeves*, 308 U.S. 132, 139 (1939) (state regulation of liquor buyers and transportation methods acceptable so long as affecting only in-state shipments); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939) (upholding “retaliatory” Missouri statute prohibiting importation of liquor manufactured in a state that discriminated against Missouri liquors); *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391 (1939) (same); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938) (permissible for state to restrict the types of liquor that could be imported from other states); *State Bd. of Equalization v. Young’s Mkt. Co.*, 299 U.S. 59 (1936) (California may impose a license fee for wholesale importing of beer into the state).

69. *324 Liquor Corp. v. Duffy*, 107 S. Ct. 720 (1987).

70. *United States v. Frankfort Distilleries*, 324 U.S. 293, 299 (1945).

71. 107 S. Ct. 720 (1987).

72. *324 Liquor Corp.*, 107 S. Ct. at 727 (citing *Hostetter v. Idlewild Liquor Corp.* 377 U.S. 324 (1964)).

73. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 262, 274-75.

74. It did so most recently in *324 Liquor Corp.*, 107 S. Ct. at 727 n.10 (“we find no . . . demonstration of Congressional intent” to confer upon the states complete and exclusive control over liquor traffic). *See also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984) (resolution of a conflict between the twenty-first amendment and a state regulation requires a “pragmatic effort to harmonize state and federal powers” within the context of the issues and interests at stake in each case (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. at 109)); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964) (To draw a conclusion that the twenty-first amendment “repeal[ed]” the commerce clause would lead to the “patently bizarre and . . . demonstrably incorrect conclusion” that Congress no longer had regulatory authority over intoxicating liquor); *Nippert v. City of Richmond*, 327 U.S. 416, 424 n.15 (1946) (“even the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the commerce power”).

75. *Hostetter*, 377 U.S. at 331-32; *see California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc.*, 445 U.S. 97, 107 n.10 (1980).

76. Section two incorporated into the federal Constitution two pre-Prohibition federal statutes. These statutes, the Wilson Act of 1890 and the Webb-Kenyon Act of 1913, were enacted primarily to permit dry states to protect their liquor regimes from without. The Webb-Kenyon

Blaine, Senate sponsor of the amendment resolution, "to restore to the States . . . absolute control . . . over interstate commerce affecting intoxicating liquors."⁷⁷

Comments on the history fall into two interpretive schools. The "Federalist" school⁷⁸ sees the amendment's mandate as limited strictly to its words: Let dry states remain dry, with Federal assistance.⁷⁹ The opposite view is taken by the "absolutists," who hold that the amendment is meant to give plenary authority to the States to regulate commerce in intoxicating liquors despite the commerce clause.⁸⁰ This view is losing support.⁸¹ Because the question appears unresolvable without reference to Supreme Court pronouncements, "[t]o draw a conclusion . . . that the Twenty-First Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd

Act's "purpose, and its only purpose, [was] to remove the impediment existing as to the States in the exercise of their police powers regarding the traffic or control of intoxicating liquors within their borders." Remarks of Senator Kenyon, co-sponsor of the Webb-Kenyon Act of 1913, 49 CONG. REC. 707 (1912). The Wilson Act provides in pertinent part that

[a]ll . . . 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 liquors or liquids had been produced in such State or Territory

27 U.S.C. § 121 (1982). The Webb-Kenyon Act prohibits "[t]he shipment or transportation . . . of any . . . intoxicating liquor of any kind from one State, Territory, or District . . . into any other . . . in violation of any law of such State, Territory, or District" 27 U.S.C. § 122 (1982).

The incorporation of these two statutes into the amendment only established an insurance policy for those supporting maintenance of the dry states' right to remain dry. The amendment was enacted only to prohibit any repeal or subsequent modification of the statutory guarantees. See 76 CONG. REC. 4141 (1933) (remarks of Senator Blaine) ("So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line."); Brief of Amicus Curiae The Wine Institute at 27 n.69, *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 106 S. Ct. 2080 (1986) (No. 84-2030). But see 49 CONG. REC. 707 (1912) (remarks of Senator Kenyon) ("Congress has the absolute power to take intoxicating liquors out of interstate commerce"); note 77 *infra*.

77. 76 CONG. REC. 4143 (1933). See 324 *Liquor Corp.*, 107 S. Ct. at 727 n.10 (expressing uncertainty concerning legislative history); see also E. BROWN, RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION (1938).

78. The terms "Federalists" and "absolutists" as applied to the conflicting history of section 2 were used in Case Note, *Federal District Court Exempts Interstate Rail Carrier from State Open Saloon Prohibition*: *National Railroad Passenger Corp. v. Harris*, 6 CREIGHTON L. REV. 249 (1972).

79. See 76 CONG. REC. 4168 (1933) (remarks of Senator Fass) (section 2 was designed "to permit the Federal authority to assist the States that want to be dry to remain dry"); see generally Case Note, *supra* note 78, at 252-55; Note, *The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578, 1580 (1975) ("the amendment was designed to allow federal oversight of alcohol in interstate commerce").

80. See Note, COLUM. L. REV., *supra* note 79, at 1580 (language of section 2 seems unequivocally to support the states' authority, ignoring any federal restrictions or constitutional dictates).

81. But see Case Note, *supra* note 78, at 255. On the "Federalist" - "absolutist" debate, see generally Note, *The Twenty-First Amendment Versus the Interstate Commerce Clause*, 55 YALE L.J. 815 (1946).

oversimplification."⁸²

The Supreme Court's current interpretation of this muddle places limits on states' actions under section two. "Doubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition."⁸³ Rather than attempt to state authoritatively the purpose of the amendment, "[i]n determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the provision rather than the history behind it."⁸⁴ Although the words of the amendment by necessity grant regulatory power beyond the minimum required simply to close the state borders to alcohol importation,⁸⁵ the basic limits of the explicit constitutional grant must be kept in mind.⁸⁶

B. *The Twenty-first Amendment Permits No Extraterritorial Effects of State Liquor Regulation*

The twenty-first amendment is limited to exercises of state authority occurring *wholly* intrastate. The general rule is that a state's exercise of power in the liquor area must fall within the purview of the "core [section two] power" of the twenty-first amendment.⁸⁷ In the absence of a justification based upon this permission "directly to regulate the sale or use of liquor within its borders[,] . . . a conflicting exercise of federal authority may prevail."⁸⁸ This analysis exposes

82. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964).

83. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984). See *South-Central Timber Dev., Inc. v. Wynnike*, 467 U.S. 82 (1984) (commerce clause reflects strong federal procompetition interests); *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (same); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (commerce clause forbids price discrimination based solely on states' borders).

84. *California Retail Liquor Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 (1980). This is an espousal of the Federalist school's interpretation of section two's history. See notes 76-81 *supra* and accompanying text. See also *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 63-64 (1936) (the twenty-first amendment does not preclude the application of federal anti-trust law); *Midcal*, 445 U.S. 97 (1980) (same); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945) (same); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (state cannot impose tax on sealed imported bottles prior to resale within state because of conflict with export-import clause, U.S. CONST. art. I, § 10, cl. 2); *Hostetter v. Idlewild Bon*

85. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939) ("The twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause.").

86. *Midcal*, 445 U.S. at 107.

87. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984). See generally Comment, *State Liquor Affirmation Practices: Constitutional and Antitrust Problems*, 77 DICK. L. REV. 643, 660-67 (1973).

88. *Capital Cities*, 467 U.S. at 713 (federal law prohibiting interruption of cable television signal for public information reasons preempts state interest in promoting temperance by eliminating wine advertisements from in-state cable transmission); see *324 Liquor Corp. v. Duffy*, 107 S. Ct. 720 (1987) (the twenty-first amendment does not preclude the application of federal anti-trust law); *Midcal*, 445 U.S. 97 (1980) (same); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945) (same); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (state cannot impose tax on sealed imported bottles prior to resale within state because of conflict with export-import clause, U.S. CONST. art. I, § 10, cl. 2); *Hostetter v. Idlewild Bon*

state regulatory statutes such as affirmation statutes to invalidation if they have as by-products even relatively minor extraterritorial effects. For example, although all intrastate liquor traffic may be controlled, section two does not permit a state to prohibit the shipment of liquor to a national park located within the state.⁸⁹ Nor may states regulate liquor under Customs Department bond that is destined for an international frontier or port within the state.⁹⁰

III. THE COMMERCE CLAUSE PROHIBITS INTERSTATE EFFECTS OF INTRASTATE LIQUOR REGULATION

A. *Affirmation Statutes Are Subject to Dormant Commerce Clause Scrutiny*

Because the twenty-first amendment provides no special protection for affirmation statutes, these statutes must survive commerce clause scrutiny to be constitutional. The commerce clause gives rise to two classes of claims. The first genre of actions concerns the positive grant to Congress of the power to enact legislation concerning interstate commerce. The classic example of this power is the 1824 case of *Gibbons v. Ogden*,⁹¹ in which the Supreme Court held that the commerce clause prohibited New York from controlling steamboat navigation between New York and New Jersey because such navigation was regulated by existing federal law. In such cases, state and federal enactments conflict directly and are settled in favor of the federal legislation. The second genre of cases, the class to which challenges to affirmation statutes belong, is predicated upon the notion that Congress' *inaction* in certain areas that are considered to fall within the ambit of interstate commerce is a positive bar to state legislation in those areas. These cases, employing "dormant commerce clause" analysis, are the progeny of *Cooley v. Board of Wardens*.⁹² That case established that Congress' silence in an area that "admit[s] only of one uniform system, or plan of regulation" does not entitle states to fill the legislative vacuum.⁹³ Rather, individuals are left "to

Voyage Liquor Corp., 377 U.S. 324 (1964) (federal import/export policy prevails over state interest).

89. *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938).

90. *Idlewild Bon Voyage Corp.*, 377 U.S. 324 (1964). *Accord* *Epstein v. Lordi*, 261 F. Supp. 921 (D.N.J. 1966) (New Jersey not permitted to regulate liquor sales to foreign nationals aboard foreign ships in New Jersey harbor), *affd. per curiam*, 389 U.S. 29 (1967); *Amex Warehouse Co. v. Department of Alcoholic Beverage Control*, 224 F. Supp. 546 (S.D. Cal. 1963) (state not permitted to regulate liquor brought into state, stored, then removed to Mexican frontier, all while bonded), *affd. per curiam*, 378 U.S. 124 (1964).

91. 22 U.S. (9 Wheat.) 1 (1824).

92. 53 U.S. (12 How.) 299 (1851).

93. 53 U.S. (12 How.) at 319. *See also* *Southern Pac. Co. v. Arizona*, 325 U.S. 711, 767 (1945) ("the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress," but "the states have not been deemed to have authority to impede . . . those phases of the national commerce which, because of the need of national uni-

their own unrestricted action";⁹⁴ the area is, despite congressional silence, nevertheless still under the exclusive legislative competence of Congress.

Liquor price affirmation statutes are subject to dormant commerce clause analysis. The federal legislature has not spoken upon the issue, but the inequities associated with the interlocking web of inconsistent obligations and the blatant extraterritorial effects of the statutes require their invalidation as impermissible extensions of state regulatory authority into other states.⁹⁵

The Supreme Court in *Brown-Forman* recognized that wholly intrastate maximum price regulations are generally constitutional in the absence of any extraterritorial effects.⁹⁶ Such purely in-state regulation would be quite acceptable in the case of the alcoholic beverage industry; intrastate liquor "price stability has long been considered to be in the interest of temperance and the prevention of chaos in the liquor traffic."⁹⁷ Because of this inherent "public interest," maximum price legislation frequently has been promoted in the liquor industry despite the potential for effects across boundaries. Moreover, in "a variety of cases in areas no more sensitive than that of liquor control," the Supreme Court has upheld state maximum price legislation.⁹⁸

Despite this public interest in liquor regulation, the Court reasoned that the free trade policy of the commerce clause is thwarted when states discriminate against or otherwise burden interstate commerce in

formity, demand that their regulation, *if any*, be prescribed by [Congress].") (citations omitted) (emphasis added).

94. 53 U.S. (12 How.) at 321.

95. Professor Donald Regan analyzes the dormant commerce clause somewhat differently than the Supreme Court has recently done. In two articles (Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986), and Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865 (1987)), he separates movement of goods cases from other commerce clause jurisprudence and concludes in the later piece that extraterritoriality is a separate concern, Regan, *Siamese Essays* at 1873; that balancing is only appropriate in resolving the question of which of inconsistent regulations should apply and not in resolving the extraterritoriality question, *id.* at 1883; and that only protectionist purpose should be relevant in dormant commerce clause analysis, *id.* at 1869. This Note, while recognizing some of the theoretical problems Regan raises, seeks to resolve the affirmation statute issue by extension of the Court's reasoning as enunciated in *Brown-Forman* and its predecessors.

96. *Brown-Forman*, 106 S. Ct. 2080, 2085 (1986).

97. *Laird & Co. v. Cheney*, 196 Kan. 675, 686, 414 P.2d 18, 26 (1966), *appeal dismissed*, 385 U.S. 371 (1966).

98. *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 48, *rehg. denied*, 384 U.S. 967 (1966). This proposition has not been questioned in some time. See *Gold v. DiCarlo*, 235 F. Supp. 817 (S.D.N.Y. 1964), *affd. per curiam*, 380 U.S. 520 (1965) (statute prohibiting resale of entrance tickets at overinflated prices valid); *Townsend v. Yeomans*, 301 U.S. 441 (1937) (Georgia statute fixing maximum charges for handling and selling tobacco withstands commerce clause attack despite fact that nearly all tobacco grown in Georgia is shipped out of the state); *Nebbia v. New York*, 291 U.S. 502 (1934) (maximum price legislation for milk survives despite constitutional attack because the business is "affected with public interest").

liquor.⁹⁹ In *Brown-Forman*, the Court found the New York statute violated the commerce clause, accepting the distiller's argument that New York's statute enabled the state to set a national minimum price for each item sold.¹⁰⁰ "When a brand price [was] posted in New York, [Brown-Forman argued,] that price thereafter [was] thrust upon all sales made by the supplier outside New York as the minimum."¹⁰¹ This occurred because Brown-Forman first had to apply to New York's regulatory agency to lower prices in New York before lowering prices in other states.¹⁰² Such a national minimum price stifles competition in interstate liquor commerce.¹⁰³ The Court held in *Brown-Forman* that while states are free to regulate the prices of liquor within their own boundaries and may seek low prices for their own residents,¹⁰⁴ they may not project their legislation into other states by "regulating the price to be paid" for any commodity in those states.¹⁰⁵

99. See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Epstein v. Lordi*, 261 F. Supp. 921 (D.N.J. 1966), *affd. per curiam*, 389 U.S. 29 (1967).

100. Brief for Appellant at 15, *Brown-Forman* (No. 84-2030). The Supreme Court did not explicitly refer to a national price, but did recognize New York's ability to set prices elsewhere.

101. Brief for Appellant at 15, *Brown-Forman* (No. 84-2030).

102. N.Y. ALCO. BEV. CONT. LAW § 101-b(3)(a) (McKinney 1987).

103. Brief for Appellant at 16, *Brown-Forman* (No. 84-2030).

104. *Brown-Forman*, 106 S. Ct. at 2086.

105. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935). Brown-Forman also argued that New York's law greatly restricted its freedom to set prices in other states. Brief for Appellant at 15, *Brown-Forman* (No. 84-2030). In addition to dictating a virtually national price, New York's statute, as well as those of other states, treated sales incentive programs — called "promotional allowances" in the industry — so as to make price calculation unreasonable. "Promotional allowances" are price inducements distillers can offer to wholesalers. In the area of alcoholic beverage sales, the promotional allowances are heavily regulated by the Federal Bureau of Alcohol, Tobacco and Firearms (BATF) to ensure their compliance with the Federal Alcohol Administration Act, 27 U.S.C. §§ 201-211 (1976). See also *Brown-Forman*, 106 S. Ct. at 2083-84 & nn.3, 4; Jurisdictional Statement at 4, *Brown-Forman* (No. 84-2030).

Although every affirmation or warranty statute necessarily includes a provision setting forth a formula for calculating the prices to file, these provisions vary widely. In New York, all promotional allowances offered in other states were treated as discounts from the prices in those states. N.Y. ALCO. BEV. CONT. LAW § 101-b(3) (McKinney 1987). To determine the out-of-state price to "beat," the distiller had to subtract all of these "discounts" from the out-of-state sale price. N.Y. ALCO. BEV. CONT. LAW § 101-b(3)(g) (1987) (in determining lowest price, "appropriate reductions shall be made to reflect all discounts . . . and all rebates, free goods, allowances and other inducements . . ."). This was not always as easily accomplished as stated. Brown-Forman's promotional allowances were not tied to particular products. Rather, they took the form of general compensation for promotional services furnished to maximize sales of its entire product line. Brief for Appellant at 6 n.5, *Brown-Forman* (No. 84-2030). The statute did not provide a provision for allocating such allowances (in this case, cash; see *Brown-Forman*, 106 S. Ct. at 2083) among the various products the distiller offered. Brief for Appellant at 6 n.5, *Brown-Forman* (No. 84-2030).

While requiring their inclusion in the calculations of prices however, New York greatly restricted the use of these types of incentive programs. N.Y. ALCO. BEV. CONT. LAW § 101-b(2)(b) (1987) (prohibiting "any discount, rebate, free goods, allowance or other inducement of any kind whatsoever . . ." except for certain specified quantity and prompt-payment amounts). The inducements New York permitted are largely those mandated by the BATF to insure compliance with the Federal Alcoholic Administration Act, 27 U.S.C. §§ 201-211 (1976). See 27 U.S.C. § 205(b); Jurisdictional Statement at 4, *Brown-Forman* (No. 84-2030).

Thus, Brown-Forman showed that distillers doing business in New York were required to

Under the commerce clause, states may not base their pricing schemes solely on interstate price differentials.¹⁰⁶ *Seelig* and *Brown-Forman* stand for the proposition that no state may force an out-of-state merchant to "seek regulatory approval in one State before undertaking a transaction in another."¹⁰⁷ The statute in *Brown-Forman* had this effect. Just as the milk producers in *Seelig* were required to pay Vermont farmers the higher New York prices, the New York statute constrained distillers from charging lower prices in other states as long as they continued to offer liquor for sale in New York.

While affirmation statutes are intended less to control other states' prices than to secure the benefits of national competition for in-state consumers, "simple economic protectionism" of the type traditionally proscribed by the commerce clause¹⁰⁸ is not limited to attempts to discriminate against nonlocal merchants. It may also include attempts to give local consumers an advantage over consumers in other states.¹⁰⁹ For example, one state's residents may not be given a preferred right of access to natural resources located within its borders.¹¹⁰ Similarly,

reduce their New York prices to reflect the employment in other states of sales incentives which they were not at liberty to use in New York. New York even required the inclusion of lump-sum cash allowances not tied to any particular brand. This reduced the comparison prices across the distillers' entire product line. See Brief for Appellant at 150, *Brown-Forman* (No. 84-2030).

New York's statutory framework stands as an example of the restrictive type of affirmation scheme. Kansas operates its system in a similar manner, disallowing the promotions but requiring their computation at affirmation time:

[The] price as filed . . . shall be as low as the lowest price for which the item is sold anywhere in any state in the continental United States . . . : *Provided*, That in determining the lowest price for which an item of alcoholic liquor is sold in any such state there shall be taken into consideration all advertising, depletion and promotional allowances and rebates of every kind whatsoever made to purchasers in such state

KAN. STAT. ANN. § 41-1112 (1986); see also *Laird & Co. v. Cheney*, 196 Kan. 675, 414 P.2d 18 (1966), *appeal dismissed*, 385 U.S. 371 (1966).

The promotional allowance problem, which the Supreme Court recognized, *Brown-Forman*, 106 S. Ct. 2080 (1986), forces a distiller to curtail incentive programs in those states in which promotional discounts are legal to account for their illegality elsewhere. Thus, *Brown-Forman* was able to argue successfully that it found itself in a pricing dilemma: it could reduce its New York prices by the extent of all allowances elsewhere, thereby charging less in New York than elsewhere and risking loss of license under other states' statutes; or it could discontinue the promotional allowances offered in other states, effectively raising prices in the rest of the country to comply with New York's statute. *Brown-Forman* argued that the abandonment of promotional allowance programs in other states was the most direct infringement upon interstate commerce. 106 S. Ct. 2086.

While the promotional allowance dilemma added weight to *Brown-Forman's* argument, the Court's holding in *Brown-Forman* was not dependent on these facts. Instead the Court invalidated all prospective statutes similar to New York's. *Brown-Forman*, 106 S. Ct. at 2086.

106. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935) (a state may not "establish a wage scale or a scale of prices for use in other states, and . . . bar the sale of the products, . . . unless the scale has been observed").

107. *Brown-Forman*, 106 S. Ct. at 2086.

108. 106 S. Ct. at 2085 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

109. 106 S. Ct. at 2085; see *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (New Jersey was not permitted to keep Philadelphia's rubbish out of New Jersey landfills while continuing to receive its own residents' effluent).

110. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982).

the New York milk pricing scheme at issue in *Seelig* failed because the statute had the "aim and effect of establishing an economic barrier against competition with the products of another state."¹¹¹ The Court in *Brown-Forman* invoked this principle, finding the New York affirmation statute abhorrent in part because it was designed to convey competitive advantages upon consumers in one state that those consumers would not have had in the absence of the affirmation statute. Such an effect is improper when those advantages are acquired to the detriment of consumers in other states where the markets might favor lower prices.¹¹²

B. *Assessing State Regulations' Validity Under the Commerce Clause: Are the Statutes' "Practical Effects" Interstate?*

In *Brown-Forman*, the Supreme Court outlined the dormant commerce clause test as developed in recent years. Its reasoning as applied in that case is applicable to all affirmation statutes, whether prospective or retrospective.¹¹³ In order to invalidate a statute under the dormant commerce clause, its practical effects must be to burden interstate commerce.¹¹⁴ "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids."¹¹⁵ Therefore, the analysis requires an inquiry into the practical

111. *Seelig*, 294 U.S. at 527 (Vermont milk dealers had to surrender their competitive edge in the New York market).

112. *Brown-Forman*, 106 S. Ct. 2085; see, e.g., *United States Brewers Assn. v. Healy*, 692 F.2d 227, 282 (2d Cir. 1982). For any given month, when a distiller who had filed an affirmation in Connecticut sold beer to a wholesaler in Massachusetts, New York, or Rhode Island, it was forced to surrender any competitive advantage it might have had in the other states and at least match, if not exceed, the Connecticut price. 692 F.2d at 282; CONN. GEN. STAT. ANN. §§ 30-63a(b), 30-63b(b) (West Supp. 1987). States may, however, regulate prices of transactions within their borders even though there is an out-of-state interest involved. In *Schwegmann Bros. Giant Super Mkts. v. Louisiana Milk Commn.*, 365 F. Supp. 1144 (M.D. La. 1973), *affd. mem.*, 416 U.S. 922 (1974), the price of milk sold within Louisiana was held regulable even though the milk originated outside Louisiana. Transactions taking place outside the state, however, were outside Louisiana's regulatory domain. Analogizing to liquor sales, out-of-state distillers selling within a state are subject to the state's normal controls, while those same distillers' transactions taking place wholly outside a state are not permissible objects for that state's regulatory authority. See *Brown-Forman*, 106 S. Ct. 2080; see also *Schwegmann*, 365 F. Supp. at 1156:

There is no constitutional infirmity in a state regulation requiring that purely in-state transactions be governed by the Commission's pricing schedules. This does not constitute a burden on interstate commerce although the product sold within the state and whose selling price is regulated there, originates outside of the state where it is ultimately sold. But we further hold that even though Louisiana has the power and the right to regulate the price at which milk products are sold within the State of Louisiana, it has no power to project its legislation into Tennessee by regulating the price to be paid in that state for milk acquired there.

Cf. Seelig, 294 U.S. at 511.

113. See Part I.2.C. *supra*.

114. *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945); see also *Brown-Forman*, 106 S. Ct. at 2086.

115. *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940).

effects of a statute, regardless of its stated purpose.¹¹⁶ If affirmation statutes have practical effects in other states, they are invalid despite their articulated purposes of lowering prices for intrastate consumers.

The Court uses the practical effects test it enunciated in *Pike v. Bruce Church, Inc.*¹¹⁷ to resolve dormant commerce clause questions. The general rule is: When a state statute "directly regulates or discriminates"¹¹⁸ against interstate commerce, or when its direct effects are to favor in-state interests over out-of-state interests, the statute will usually be struck down without further inquiry.¹¹⁹ When, however, the statute's out-of-state effects are only indirect, and it regulates evenhandedly to effectuate a legitimate local public interest, the statute will generally be permitted to stand unless the burden imposed upon interstate commerce is "clearly excessive in relation to the putative local benefits."¹²⁰

No clear line separates the category of direct regulation, "virtually *per se* illegal"¹²¹ under the commerce clause, and the indirect category subject to the *Pike* balancing approach.¹²² In any case where an arguably legitimate local interest is present, the question becomes one of degree. In the balancing approach that follows,¹²³ the critical consid-

116. See *International Textbook Co. v. Pigg*, 217 U.S. 91, 112 (1910) ("It is the established doctrine of this Court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.").

117. 397 U.S. 137 (1970).

118. *Brown-Forman*, 106 S. Ct. at 2084 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

119. 106 S. Ct. at 2084; see, e.g., *Edgar v. MITE Corp.*, 457 U.S. 624, 640-46 (1982) (Illinois tender offer regulation directly regulated non-Illinois shareholders); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (New Jersey's exclusion of all but its own rubbish from its dumps was direct burden upon interstate commerce); *Shafer v. Farmers' Grain Co.*, 268 U.S. 189 (1925) (striking down a North Dakota statute requiring purchasers of wheat, 90% of which is in interstate commerce, to, among other things, separate and return the dockage, on the ground that it is a direct regulation of interstate grain purchases).

120. *Pike*, 397 U.S. at 142 (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)).

121. See *Pike*, 397 U.S. at 145. Professor Regan calls this language "mildly oxymoronic." Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1134 (1986).

122. *Brown-Forman*, 106 S. Ct. at 2084. See *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978).

123. See *Pike*, 397 U.S. at 142; *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1959). For a view that the Court only resorts to "balancing" in movement-of-goods cases involving a statute enacted with a protectionist purpose, see Regan, *supra* note 121, at 1100 ("Once we have decided a movement-of-goods statute is not protectionist, that is the end of the matter. The statute should be upheld. There is nothing else to consider and no balancing to be done.").

Regan does not believe that the Court actually "balances" even in those cases in which it professes to. He argues that the Court should continue to avoid balancing in movement-of-goods cases. *Id.* at 1099. Regan noted that the Court in *Brown-Forman* ran together its anti-protectionism and anti-extraterritorialism considerations. He finds "no hint of balancing" in *Brown-Forman*. *Id.* at 1268-69. The running together of the two analyses is just what this Note argues has happened to the *Pike* two-tier test: in all cases, the Court will scrutinize the practical extra-territorial effects; see note 95 *supra*.

erations are the overall effects of the statute on both local and interstate activities.¹²⁴ The balancing process is a “pragmatic effort to harmonize state and federal powers.”¹²⁵

A statute directly repugnant to the commerce clause came to the Court's attention in *Edgar v. MITE Corp.*¹²⁶ In that case, the Court struck down an Illinois corporate takeover regulation because of its sweeping extraterritorial effect.¹²⁷ By finding it a direct affront to interstate commerce rather than an indirect regulation, the Court avoided having to concern itself with the purpose of the regulation.¹²⁸ Similarly, the Court found the purpose behind New York's regulation in *Brown-Forman* — be it promotion of temperance or promotion of intrastate competition — to be irrelevant in its analysis. Although New York's avowed goal was to prevent price discrimination among retailers,¹²⁹ the Court held that New York's prohibition of mid-month price changes, coupled with the regulatory agency's discretion over changes upon a showing of good cause, gave New York inappropriate power over interstate pricing.¹³⁰ The statute's practical effects flew in the face of the commerce clause policy of unfettered interstate commerce.¹³¹

Continuing its assessment of the burden on interstate commerce, the Court noted that the spread of affirmation statutes since *Seagram* compounded the extraterritorial effects of the New York statute. The Court found that the alleged extraterritorial effects were *not* simply

124. See *Pike*, 397 U.S. at 142; cf. *Brown-Forman*, 106 S. Ct. at 2085-86.

125. *California Retail Liquor Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980), cited with approval in *324 Liquor Corp. v. Duffy*, 107 S. Ct. 720, 727 (1987).

126. 457 U.S. 624 (1982).

127. *MITE*, 457 U.S. 624, 642-43 (1982). The regulation at issue required tender offerors pursuing statutorily defined Illinois-related targets to meet certain requirements in the interest of shareholder protection. The offeror was required to give 20 days' notice before any tender offer became effective. The regulation also required the offeror to disclose the terms of the proposed takeover. The offeror was forbidden to communicate with the target corporation's shareholders during the statutory time, although the target could disseminate information at will. Only 27% of the shareholders of the target in this litigation were residents of Illinois. *MITE*, 457 U.S. at 642.

128. *MITE*, 457 U.S. at 642-43. The Court's holding in *MITE* is derived primarily from older cases which later became the basis for the direct regulation prong of the *Pike* test. See, e.g., *Shafer v. Farmers' Grain Co.*, 268 U.S. 186, 199 (1925) (“a state statute which by its necessary operation directly interferes with or burdens such commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted”).

129. See N.Y. ALCO. BEV. CONT. LAW §§ 101-b(1), b(2)(a) (McKinney 1987).

130. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 106 S. Ct. 2080, 2086 n.5, 2087 (1986).

131. Although the Court held that New York's statute directly regulated commerce, *Brown-Forman*, 106 S. Ct. at 2085-86, the “pragmatic effort to harmonize” formulation of *Midcal* as applied in *Brown-Forman* essentially collapses the distinction between direct and indirect regulation. The Court subjects the statute to the same scrutiny for both categories. See *324 Liquor Corp. v. Duffy*, 107 S. Ct. 720, 727 (1987); Regan, *supra* note 121.

"matters of conjecture" as they had been in *Seagram*.¹³² "[T]he proliferation of state affirmation laws following this Court's decision in *Seagram* has greatly multiplied the likelihood that a seller will be subjected to inconsistent obligations in different States."¹³³ Despite this language, though, the Court expressly declined to overrule *Seagram*.¹³⁴

A primary factor leading to "inconsistent obligations in different states" was the New York statute's prohibition of mid-month price alterations by dealers except upon a "good cause" demonstration to the state liquor authority.¹³⁵ This restriction was important to the Court's reasoning that the statute imposed a direct burden on interstate commerce.¹³⁶ When a statutory scheme exists in which no such requirement is present, it is unclear whether distillers are free to alter their prices at any time so long as they remain as low as any offered elsewhere.

The courts could strike down such a "concurrent" statutory setup¹³⁷ as invalid *per se* under the direct burdens tier of the *Pike* anal-

132. *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 43, *rehg. denied*, 383 U.S. 967 (1986).

133. *Brown-Forman*, 106 S. Ct. at 2087. The language "subjected to inconsistent obligations in different States" is reminiscent of the "mudflap" case, a classic of movement-of-goods commerce clause jurisprudence, *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959). In *Bibb*, the Court struck down an Illinois statute that required a "contoured" type of rear-fender mud guard meeting certain specifications to be installed on all trucks and trailers operated on Illinois highways. The statute, enacted in the interests of safety, subjected truckers to inconsistent obligations in different states: At the Illinois border, trucking concerns were required to replace the standard mudflaps acceptable elsewhere with mudflaps meeting Illinois' specifications before proceeding. This was a potentially lengthy procedure, but it was necessary to remain in compliance with both the Illinois and the virtually universal standard mudflap specifications. *Bibb*, 359 U.S. at 524-27. The Court, in a very straightforward opinion, balanced the state's police interest in promulgating safety regulations with the commerce clause's policy of uninhibited movement of goods. The latter won out. *Bibb*, 359 U.S. at 530.

Affirmation statutes are not as simple a matter as the transportation regulation at issue in *Bibb*. Although the situations are somewhat analogous, in that both necessitate a weighing of one state's interests with the goal of unfettered national commercial traffic, the affirmation statutes present a more invidious case. In the mudflap-type case, the statute's effect is not to prescribe conduct occurring wholly out-of-state, but simply to impose a "great burden of delay and inconvenience on those . . . entering or crossing [the regulating state's] territory." *Bibb*, 359 U.S. at 529-30. No Illinois law in *Bibb* required contoured mudflaps on trucks in any other state. The question was simply one of comparing police power with free commerce. *Bibb*, 359 U.S. at 529-30.

In affirmation cases, however, the legislature of each affirmation state is projecting its regulatory competence into other states, declaring that in order to sell in state *A*, distillers must set prices in all other states that are at least equal to those posted in State *A*. The regulatory projection becomes even more onerous in the cases of states that impose varied calculi for distillers to use in determining the "effective prices" their goods carry in each state. See, e.g., *Brown-Forman*, 106 S. Ct. at 2087. It is this regulation of transactions in other states that necessitates the different scrutiny applied to affirmation statutes under the *Pike* regime.

134. 106 S. Ct. at 2087 n.6; see notes 48-50 *supra* and accompanying text.

135. N.Y. ALCO. BEV. CONT. LAW § 101-b(3)(a) (McKinney 1987).

136. 106 S. Ct. at 2087.

137. This is the statutory scheme struck down in South Carolina, see *Brown-Forman v. South Carolina Alcoholic Beverage Control Commn.*, 643 F. Supp. 943 (D.S.C. 1986) (holding

ysis. However, since the direct/indirect line is not clear, the courts could also apply *Pike's* second-tier balancing test as explicated in *Brown-Forman*.¹³⁸ This is demonstrated in Justice Marshall's majority opinion, which goes somewhat further than simply finding New York's statute facially burdensome on commerce. In arriving at the decision that the affirmation provision violated the commerce clause on its face, the Court moved into the second tier of the *Pike* test and "centered its inquiry on whether the 'practical effect' " of the law was to regulate out-of-state transactions.¹³⁹ Applying this test in the context of a concurrent statute, the Court would most likely balance the local interest (low prices for the state's consumers) against the practical out-of-state impact (a uniform national price, even if alterable at the distiller's whim).¹⁴⁰

C. Affirmation Statutes' Practical Out-of-State Effects Invalidate Them Under the Commerce Clause

Because they are subject to numerous affirmation statutes, multi-state producers are unable to set prices freely throughout the nation.¹⁴¹ To compete in any one state with any prospect of retaining market share against single-state producers, interstate distillers must be willing to reduce their prices across the nation, potentially shouldering excessive losses.¹⁴² Because of this effect, which the Supreme Court arguably recognized in *Brown-Forman* (as distinct from the burdensome results deriving from the New York statute in particular), liquor price affirmation statutes are intrinsically extraterritorial in their practical effects.

When the *Pike* practical effects test, as developed through *Brown-Forman*, is applied to liquor price affirmation statutes generally, the balance hangs heavily in favor of striking them down as a class. "[T]he putative local benefits"¹⁴³ — avoidance of price discrimination against in-state consumers¹⁴⁴ — are easily outweighed by the "clearly

unconstitutional S.C. CODE ANN. § 61-7-100 (Law. Co-op. 1976)), but accepted most recently in Connecticut, see note 31 *supra* and accompanying text.

138. See notes 117-25 *supra* and accompanying text.

139. *Brown-Forman*, 643 F. Supp. at 949. The muddled nature of the demarcation between direct and indirect burdens for *Pike* balancing purposes clouds the holding of *Brown-Forman* and supports the South Carolina district court's conclusion.

140. See Part III.C *infra*.

141. Brief for Appellant at 17, *Brown-Forman v. New York State Liquor Auth.*, 106 S. Ct. 2080 (1986) (No. 84-2030).

142. Brief for Appellant at 17, *Brown-Forman* (No. 84-2030).

143. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

144. See, e.g., ARIZ. REV. STAT. ANN. § 4-251 to 4-252 (Supp. 1986) (entitled "Article 4. Discrimination in Supplying Spirituous Liquors"); MASS. GEN. L. ch. 138, § 25D (1984) (entitled "Price Discrimination Against Massachusetts Consumers Prohibited"); MINN. STAT. ANN. § 340A.307 (West Supp. 1987) (entitled "Unlawful discrimination").

excessive"¹⁴⁵ burdens on interstate commerce¹⁴⁶ in all cases. The statutes' practical extraterritorial effects are present regardless of whether any individual statute is prospective, retrospective, or simultaneous.¹⁴⁷ A distiller's price, once posted in one affirmation or control state, becomes the effective minimum in fifty states. Because of the large number of states with affirmation or warranty provisions, each of which requires the lowest price available, that low price guaranteed in one state becomes the price ceiling for all states. Thus there is a fifty-state minimum price that is also the maximum price allowed in the thirty-eight affirmation and warranty states.¹⁴⁸ Several hypotheticals should help to illustrate the great burden this situation places on interstate commerce.

First, the affirmation network frustrates its own objects when a control state is involved.¹⁴⁹ If the alcohol control agency in New Hampshire, a control (state-owned distribution) state, wished to negotiate down prices charged it by a distiller, affirmation would thwart the agency's objective. The agency's attempt to secure a lower price in New Hampshire would fail despite the fact that the agency's action would be consistent with the purpose behind most affirmation statutes, the goal of lower prices for the state's consumers.¹⁵⁰ It might make sense economically for the agency to negotiate prices from a volume

145. *Pike*, 397 U.S. at 142.

146. See Brief for Appellant at 17, *Brown-Forman* (no. 84-2030). The Distillers Somerset Group Inc. offers evidence of this burden in its brief as amicus curiae in *Brown-Forman*. Brief of The Distillers Somerset Group, Inc. as Amicus Curiae [hereinafter Somerset Brief], *Brown-Forman* (No. 84-2030). At the time it filed its brief, one of its products, Johnnie Walker Black Scotch Whisky, enjoyed a far stronger competitive position in New York than in California, where the national leader Chivas Regal dominated. Affirmation laws (New York's, N.Y. ALCO. BEV. CONT. LAW § 101-b (McKinney 1987) and California's, CAL. BUS. & PROF. CODE § 23673 (West 1985)) as well as the general national network prevented Somerset from challenging Chivas Regal in California, since to do so would have forced economically disastrous price cuts in New York. Somerset Brief at 2, 5, *Brown-Forman* (No. 84-2030). (Although *Brown-Forman* struck down New York's statute, this situation still applies whenever an affirmation state is involved.)

The statutes prevent distillers from responding to differing market conditions throughout the country, including disparate consumer preferences due to climate and demographics. Brief of the Distilled Spirits Council of the United States, Inc. as Amicus Curiae at 2-3, *Brown-Forman* (No. 84-2030); Somerset Brief at 5, *Brown-Forman* (No. 84-2030).

147. Brief of the U.S. Brewers Assn., Inc. et al. as Amici Curiae in Support of Appellant at 6-8, *Brown-Forman* (No. 84-2030).

148. Each state says that its price must be as low as that offered anywhere else at some specified point in time. The national floor equals the affirmation state ceiling without regard to the temporal differences between the statutes.

149. This hypothetical also applies when the "purest" concurrent statute — one like South Carolina's, consisting of a lowest-price provision only, with no price scheduling required — is involved. In such states, a very large in-state distributor effectively takes the place of the state control board. See, e.g., S.C. CODE ANN. § 61-7-100 (Law. Co-op. 1976 (declared unconstitutional in *Brown-Forman v. South Carolina Alcoholic Beverage Control Commn.*, 643 F. Supp. 943 (D.S.C. 1986)); MINN. STAT. ANN. § 340A.307(3) (West Supp. 1987) (prohibiting "contemporaneous" sales anywhere else at a lower price).

150. E.g. N.Y. ALCO. BEV. CONT. LAW § 101-b (McKinney 1987).

manufacturer, given the low costs of doing business inherent in the control or majority distributorship context. However, the distiller will not be likely to comply with the agency's request, since to do so would place a potentially large economic burden upon its operations elsewhere. Were the distiller to accept the lower price in New Hampshire, it would find itself in violation of other states' affirmation laws. Its action in New Hampshire would entail equivalent price reductions in every other affirmation and control state in which it does business, without regard to the commercial realities in those states. Therefore, the distiller would not be likely to assent to a lower price in New Hampshire.

In another hypothetical, this time involving both prospective and retrospective states, the statutes' burdensome effects are again apparent. Affirmation provisions make it impossible for distillers to respond to market pressures and set their prices in one state without forcing them to alter their pricing policies in other states.¹⁵¹ Assume that a distiller sells Brand *X* both in New Mexico, a prospective state,¹⁵² and in Arizona, a retrospective state¹⁵³ during January. Assume further that the distiller desires to raise the price of Brand *X* in New Mexico on February 1. In order to satisfy New Mexico's requirement, the distiller would also have to raise the price it charges for Brand *X* in Arizona on February 1, in order to insure that New Mexico's prospective statute is not violated by the sale of Brand *X* at a lower price in Arizona during February. By raising the price in Arizona on February 1, however, the distiller finds itself in violation of Arizona's retrospective statute because the price to be charged in Arizona in February now exceeds the price that was in effect in New Mexico during January. The only alternative open to this hypothetical distiller is to have determined in December that, in response to market conditions extant only in New Mexico, it would increase the price of Brand *X* across the nation on February 1. To comply with the retrospective statute in Arizona, the distiller would have had to have discontinued all sales of Brand *X* in Arizona (and any other retrospective state) during January. This burden — amounting to a prohibition on sales in those states — is certainly an excessive burden under the *Pike/Brown-Forman* line of reasoning discussed in Part III.A.

151. This hypothetical is drawn from *Joseph E. Seagram & Sons v. Gazzara*, 610 F. Supp. 673, 675 n.3. (S.D.N.Y. 1985), *revd. per curiam*, 800 F.2d 49 (2d Cir. 1986). For the legislative history behind New York's change from a retrospective to a prospective statutory structure, see 1967 N.Y. Laws 798 (Governor's bill jacket); Somerset Brief at 17-18, *Brown-Forman* (No. 84-2030).

152. N.M. STAT. ANN. § 60-8A-15 (1987) (distiller must affirm that the New Mexico price is "no greater than the lowest price at which the item . . . is sold . . . to any wholesaler anywhere . . . or to any state or state agency . . .").

153. ARIZ. REV. STAT. ANN. § 4-253 (Supp. 1986) (requiring affirmation that price will be at least as low as "the lowest price at which such item of liquor was sold . . . to any wholesaler anywhere . . ." (emphasis added)).

Were the facts in this hypothetical reversed, and the exigencies of competition demanded a price increase for Brand *X* in a retrospective state such as Arizona, the producer would be required to cease sales of Brand *X* in all other states for all of January before introducing its higher price in Arizona. In short, it is an excessive burden for producers to comply with prospective and retrospective statutes simultaneously.

In a third hypothetical state of affairs in which only simultaneous statutes are involved, the specter of one-month discontinuations of sales would be eliminated. However, the statutes are still unable to pass constitutional muster because of the inconsistent treatment of distiller's posted prices and changes of those prices.¹⁵⁴ Suppose that the hypothetical distiller posts January prices of Brand *X* both in Minnesota, which permits mid-month price changes at will,¹⁵⁵ and in Massachusetts, which requires "good cause shown" for any schedule amendments.¹⁵⁶ If the producer alters the price for Brand *X* in Minnesota, but cannot get regulatory approval in Massachusetts for the lower price,¹⁵⁷ the distiller will be in violation of Massachusetts' affirmation provision since Brand *X* is now available more cheaply in Minnesota. To remain in compliance with Massachusetts' statute, the distiller will have to refrain until the next month from lowering its price in Minnesota unless the liquor agency in Massachusetts, exercising its statutory discretion, permits the price reduction. In this scenario, Massachusetts' statute is unconstitutional.¹⁵⁸ "The protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency."¹⁵⁹

Finally, consider a hypothetical involving the determination of the effective prices in each state. The varying treatments accorded promotional allowances complicate the issue yet further. If a price reduction in Minnesota, which allows any and all discounts for quantity,¹⁶⁰ were considered a volume discount in other states, the distiller would be

154. Of course, the burden of a nationally uniform price obtains throughout these hypotheticals and in the national affirmation network as a whole. See note 146 *supra*.

155. MINN. STAT. ANN. § 340A.307(3) (West Supp. 1987) ("Contemporaneous" price comparison requirement indicates an ability to amend posted prices while a schedule is in effect.). See also DEL. CODE ANN. tit. 4, §§ 508(f) & (g) (1985) (distiller may amend filed price to conform to statutory requirement).

156. MASS. GEN. L. ch. 138, § 25D(c) (1984).

157. A finding that a state agency would be likely to grant the distiller his price-change request is insufficient to relieve such a "good cause" provision from constitutional disfavor. *Brown-Forman*, 106 S. Ct. 2080, 2086 n.5 (1986) ("New York simply may not force appellant to seek regulatory approval from New York before it can reduce its prices in another State").

158. So is Minnesota's, but not quite as directly; representative of the least burdensome statutory variation, its indirect burdens are primarily those demonstrated by the evidence at note 146 *supra*.

159. *Brown-Forman*, 106 S. Ct. at 2086 n.5.

160. MINN. STAT. ANN. § 340A.312(2) (West Supp. 1987) (permits volume discounts for lots of up to 300 one-liter bottles).

forced to reduce the price posted in all of those affirmation states such as New York that restrict discounts for quantity.¹⁶¹ This results in artificially low prices in those states which restrict or prohibit sales incentives. "By defining the 'effective price' of liquor differently from other States, [a State] can effectively force [a distiller] to abandon its promotional allowance program in States in which that program is legal, or force those other States to alter their own regulatory schemes" to conform.¹⁶²

IV. CONCLUSION

In the twenty years since *Seagram*, the extraterritorial effects of liquor price affirmation statutes have ceased being "matters of conjecture."¹⁶³ Instead, the interlocking national affirmation system causes producers of alcoholic beverages to establish a uniform national price for each item they sell without regard to local conditions. The states' imposition of significant and onerous burdens on interstate commerce through these statutes is not protected by the states' power under the twenty-first amendment to regulate liquor. The demonstrable extraterritorial effects of these statutes are sufficient to invalidate them under contemporary commerce clause jurisprudence. Thus, Justice Blackmun was correct when he pushed for the overruling of *Seagram* in *Brown-Forman*.¹⁶⁴ *Seagram*, decided before the overlapping and contradictory statutes had proliferated, is, in Justice Blackmun's words, "now a relic of the past."¹⁶⁵

— Ward A. Greenberg

161. N.Y. ALCO. BEV. CONT. LAW § 101-b(2)(b) (McKinney 1987) (specifies the amounts of any quantity discount).

162. *Brown-Forman*, 106 S. Ct. at 2087.

163. *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 43, *rehg. denied*, 384 U.S. 967 (1966).

164. 106 S. Ct. at 2088 (Blackmun, J., concurring); *see note 62 supra*.

165. 106 S. Ct. at 2088 (Blackmun, J., concurring).