COMMERCE CLAUSE

BROWN-FORMAN DISTILLERS CORP. V. NEW YORK STATE LIQUOR AUTHORITY: STATE LIQUOR PRICE STATUTES UNDER THE COMMERCE CLAUSE.

The commerce clause of the United States Constitution[1] grants Congress the power to regulate interstate commerce. The United States Supreme Court has interpreted this clause to restrict state regulations that interfere with interstate commerce. This corollary doctrine is called the dormant commerce clause.[2] Over the years, state liquor pricing schemes have come under constitutional scrutiny through the dormant commerce clause.[3]

Generally, state liquor pricing statutes attempt to secure for state residents liquor prices comparable to those offered in other states.[4] Thus, these statutes usually require a distiller to offer the lowest price that the distiller offers in other states. Inherently, these statutory schemes have interstate impact.

In *Joseph Seagram & Sons, Inc. v. Hostetter*,[5] the Court addressed this issue in upholding a liquor price statute that required distillers to offer the lowest price that it offered in other states the month before. Recently, in

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1. The commerce clause of the United States Constitution provides: "The Congress shall have Power. . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S.CONST. art. I, § 8.

2. Justice Marshall, in dicta in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209 (1824), was the first to articulate the negative implication theory: the commerce clause, absent congressional action, prevents a state from interfering with interstate commerce. Marshall first used the term "dormant" commerce clause to describe this restriction in Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829). In *Willson*, the Court upheld a Delaware act that authorized the draining of a marshy, navigable creek to protect the health of local residents and the property values of enjoining lands. Although the act would have violated the commerce clause, Marshall observed that since Congress had passed no legislation regarding the waterway, the state's action was not "repugnant to [Congress'] power to regulate commerce in its dormant state." *Id.* at 252. The watershed case in the dormant commerce clause area is Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 317-19 (1851). In *Cooley*, the Court distinguished between local commerce and nationwide commerce in upholding a municipal ordinance requiring ships leaving or entering the Port of Philadelphia to employ local pilots. National interests, the Court stated, required uniform regulations that could only be enacted by Congress. States, on the other hand, were free to regulate commerce local in nature. By recognizing a state's interest in regulating local commerce and by not defining the scope of federal power under the commerce clause, the *Cooley* Court established the basis for modern commerce clause analysis. Professor Tribe commented that in *Cooley*, "the Supreme Court attempted to reconcile all that had gone before in a formulation that laid the groundwork for all that has come since." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-4, at 324 (1978). For a full discussion of the development of the dormant commerce clause, *see generally* L. TRIBE, *supra*, §§ 6-1 to 6-14 (1978).

3. *See infra* notes 29, 39, 42-52 and accompanying text.

4. *See infra* note 11.

5. 384 U.S. 35 (1966). For a discussion of *Seagram*, *see infra* notes 33-40 and accompanying text.

Brown-Forman Distillers Corp. v. New York State Liquor Authority,[6] the Supreme Court revisited this issue in holding that a prospective liquor price affirmation statute violated the dormant commerce clause.[7] However, the Court did not overrule *Seagram*, but left its future in doubt.[8]

In his concurring opinion in *Brown-Forman*, Justice Blackmun noted that the Court's failure to overrule *Seagram* will lead to uncertainty and ultimately to further litigation over the constitutionality of retrospective price affirmation statutes.[9] Since Arizona is the only state that currently has a retrospective price affirmation statute, the *Brown-Forman* decision is a particularly important decision to Arizona.[10]

In the following pages, this Comment will detail the facts of *Brown-Forman*, examine the relevant caselaw, and analyze the impact of the decision on liquor price affirmation statutes.

THE FACTS OF *Brown-Forman*

New York's Alcohol Beverage Control Law (ABC Law)[11] required a producer or distiller selling liquor in New York to file a price schedule with the New York State Liquor Authority (SLA) containing an affirmation that its prices for bottles and cases of liquor sold to wholesalers in New York were no higher than the lowest price at which the liquor would be sold to other wholesalers in the United States during the month covered by the schedule.[12] Brown-Forman markets several brands of liquor that it sells in New York and other states.[13] Since 1978,[14] Brown-Forman had offered a

6. 106 S. Ct. 2080 (1986).
7. *Brown-Forman*, 106 S. Ct. at 2086.
8. *See infra* notes 86-92 and accompanying text.
9. *Brown-Forman*, 106 S. Ct. at 2088 (Blackmun, J., concurring).
10. ARIZ. REV. STAT. ANN. § 4-253(A) (Supp.1987). *See infra* note 93 for text of statute.
11. N. Y. ALCO. BEV. CONT. § 101-b(3)(d) (McKinney 1967). Twenty other states have price affirmation statutes concerning the lowest price for liquor sold in their state. *Brown-Forman*, 106 S. Ct. at 2083. The time reference for the lowest price provisions differ among these states. For example, Arizona requires the distiller to set a price that is no higher than the lowest price charged *previously* anywhere in the United States. ARIZ. REV. STAT. ANN. § 4-253(A) (Supp.1987). California requires the distiller to set a price that is no higher than the affirmed price which *is* charged anywhere in the United States. *See* CAL. BUS. & PROF. CODE § 23673 (West.1985). *See also* MINN. STAT. § 340.114, subd.3 (Supp.1985) (repealed 1987). As mentioned in the text, New York requires that the affirmed price be no higher than the lowest price which *will be* charged anywhere else in the United States. N.Y. ALCO. BEV. CONT. § 101-b(3)(d) (McKinney 1967). *See also* FLA. STAT. ANN. § 565.15(1) (West Supp. 1985). There are also eighteen "control" states that purchase and sell all distilled spirits to be distibuted and consumed within their borders. These states use a standard contract provision (often referred to as "the Des Moines Warranty") requiring the distiller to warrant that the price charged is no higher than the lowest price offered anywhere else in the country. *See, e.g.*, PA. CONS. STAT. ANN. tit. 47, § 1-104(a) (Purdon 1951).
12. N. Y. ALCO. BEV. CONT. § 101-b(3)(d) (McKinney 1967). The affirmation provisions were recommended by the Moreland Commission. The Commission was appointed by Governor Nelson A. Rockefeller in 1963 to study New York's Alcohol Beverage Control Law and to propose revisions. The Commission concluded that the liquor industry grossly discriminated against New York consumers. *See* Moreland Commission Report No.3, at 3-7 (1963). Legislation to correct the discrimination was subsequently enacted. *See* 1964 N.Y. Laws ch. 531, § 9.
13. *Brown-Forman*, 106 S. Ct. at 2083.
14. The Court's date for the beginning of Brown-Forman's promotional program differs with the date cited in the Appellant's brief. The brief cites 1979 as the first year of the program. *See* Brief for Appellant at 5, Brown-Forman Distillers Corp. v. New York State Liquor Authority, 106 S. Ct. 2080 (1986).

lump-sum promotional allowance to wholesalers in other states. Unlike other lowest price affirmation states, New York prohibited such an allowance.[15] The allowances were not conditioned on the amount of the wholesaler's purchase of Brown-Forman products, but were credited against any amounts due Brown-Forman.[16] The SLA determined that these payments to out-of-state wholesalers lowered the "effective price" of Brown-Forman's products, thereby violating New York's ABC Law.[17] Consequently, the SLA initiated administrative proceedings against Brown-Forman which led to the revocation of its license.[18]

Appealing the SLA ruling in state court, Brown-Forman contended that its failure to reflect the allowances on its affirmed price schedules did not constitute a violation of the statute because the lump-sum allowances were not discounts.[19] In support of this position, Brown-Forman argued that other states did not treat the promotional allowances as discounts.[20] Thus, if New York forced Brown-Forman to lower its New York prices because of the allowances provided in other states, Brown-Forman would violate the price affirmation laws of those other states which required distillers to offer the lowest price they offer in other states, including New York.[21] The enforcement of the SLA ruling would effectively force Brown-Forman to discontinue its promotional allowance program in states where the program was legal.[22]

Coupled with the challenge to the SLA's application of the statute to its lump-sum allowance program, Brown-Forman also challenged the constitutionality of New York's price affirmation statute as a direct impermissible burden on interstate commerce.[23] Brown-Forman asserted that the statute created a monthly nationwide floor for liquor prices.[24] In order for Brown-Forman's prices to dip below this floor, the statute required Brown-Forman

15. *Brown-Forman*, 106 S. Ct. at 2083. In past rulings, the SLA had held that the lump sum allowances were prohibited in New York by the ABC Law. *Id. See* N.Y. ALCO. BEV. CONT. § 101-b(2)(b) (unlawful for any person who sells to wholesalers "to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement of any kind whatsoever, except certain quantity and prompt-payment discounts").

16. *Brown-Forman*, 106 S. Ct. at 2080. The Court stated that Brown-Forman intended that the wholesalers use these allowances for advertising; however, the allowance amount received is not tied to the amount of advertising or the quantity of purchases. The allowance depends on past and future purchases. *Id.* at 2083.

17. *Brown-Forman*, 106 S. Ct at 2084. The pertinent portion of the statute provides: "In determining the lowest price for which any item of liquor sold in any other state . . ., appropriate reductions shall be made to reflect all discounts . . . and all rebates, free goods, allowances . . . given to any such wholesaler or state . . . ." N.Y. ALCO. BEV. CONT. § 101-b(3)(d).

18. *Brown-Forman*, 106 S. Ct at 2083.

19. *In re* Brown-Forman Distillers Corp. v. State Liquor Authority, 64 N.Y.2d 479, 489, 479 N.E.2d. 764, 766 (1985).

20. *Id.*

21. *Id.* The state court noted that approximately 20 states had enacted affirmation statutes modeled after New York's statute. *Id.* at 481, 479 N.E.2d at 764.

22. *Id.*

23. *Id.* With regard to the constitutional challenge, Brown-Forman distinguished this case from a prior challenge to New York's former price affirmation statute. *See* Joseph E. Seagram & Sons, Inc. v. Hostetter, 16 N.Y.2d. 47, 209 N.E.2d 701, *aff'd* 384 U.S. 35 (1966). *See infra* notes 33-40 and accompanying text. In *Seagram*, the New York court mentioned the possibility of a commerce clause challenge but never directly addressed this issue. 64 N.Y.2d. at 486, 479 N.E.2d. at 767.

24. *In re* Brown-Forman Distillers Corp. v. State Liquor Authority, 64 N.Y. 2d 479, 485, 479 N.E.2d 764, 767 (1985).

to obtain approval from the SLA with no assurance that permission would be given.[25]

The New York Court of Appeals rejected Brown-Forman's challenges to the statute and affirmed the SLA ruling.[26] The court found substantial evidence to support the SLA determination that Brown-Forman's promotional allowance program operated as the functional equivalent of a discount.[27] In response to Brown-Forman's constitutional challenge, the court applied the statutory construction maxim that legislative enactments are presumptively constitutional,[28] and concluded that Brown-Forman failed to meet its burden in challenging the statute.[29]

The United States Supreme Court noted probable jurisdiction to decide the sole issue of whether the New York price affirmation statute, on its face, violated the commerce clause.[30] In a 5-3 decision,[31] the Court reversed the New York Court of Appeals and held that the prospective nature of the price affirmation statute violated the commerce clause by projecting the New York regulation into other states.[32]

THE LAW PRIOR TO *BROWN-FORMAN*

Prior to *Brown-Forman*, the Supreme Court addressed the interstate impact of liquor price affirmation statutes in *Joseph E. Seagram & Sons, Inc. v. Hostetter.*[33] In *Seagram*, the Court upheld New York's former price affirmation statute from commerce and supremacy clause challenges.[34] However,

25. *Id.*

26. *Id.* at 485, 479 N.E.2d. at 770.

27. *In re Brown-Forman*, 64 N.Y.2d 479, 479 N.E.2d 764 (1985). The New York court agreed with the SLA's conclusion that the practical application of the allowance lowered Brown-Forman's price to wholesalers. The SLA asserted that continuation of the allowance depended upon the wholesaler purchasing more liquor from Brown-Forman. Moreover, wholesalers were expected to lower their price in consideration for the allowance, and in fact did. 64 N.Y.2d at 485, 479 N.E.2d at 766.

28. *Id.* at 485, 479 N.E.2d at 767. *See* Montgomery v. Daniels, 38 N.Y.2d 41, 340 N.E.2d 444 (1975); Hotel Dorset Co. v. Trust for Cultural Resources, 46 N.Y.2d 358, 385 N.E.2d 1284 (1978).

29. *In re* Brown-Forman Distillers Corp. v. State Authority, 64 N.Y.2d 479, 479 N.E.2d 764 (1985). In addition to the presumptive validity of the legislation, the court found that the twenty-first amendment dictated such a result. The twenty-first amendment repealed the eighteenth amendment prohibiting the manufacture, sale or transportation of intoxicating liquors in the United States. *See* U.S. CONST. amend. XVIII, § 1 (repealed). The twenty-first amendment gave the states the power to regulate the delivery and use of intoxicating liquors within their borders. *See infra* note 39. Since New York's declared policy was to regulate the manufacture, sale and distribution of alcoholic beverages, the disputed provisions of the statute properly implemented this policy and were constitutionally permitted. 64 N.Y.2d. 479, 485, 479 N.E.2d. 764, 767. *See also* New York State Liq. Auth. v. Bellanca, 452 U.S. 714 (1981); Note, *The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors,* 75 COLUM. L. REV. 1578 (1975); Comment, *State Liquor Affirmation Practices: Constitutional and Antitrust Problems,* 77 DICK. L. REV. 643, 660-67 (1973).

30. Brown-Forman Distillers Corp. v. New York State Liquor Authority, 106 S. Ct. 2080, 2084 (1986).

31. Justice Brennan took no part in the consideration or decision of the case.

32. *Brown-Forman*, 106 S. Ct. at 2087. *See infra* notes 59-73 and accompanying text.

33. 384 U.S. 35 (1966).

34. *Id.* Appellants were distillers, wholesalers and importers of distilled spirits. They previously sought declaratory and injuctive relief against the SLA and the New York Attorney General to prevent the provisions of the statute from taking effect. The state courts refused to grant relief and upheld the constitutionality of the statute. *See* Joseph E. Seagram & Sons v. Hostetter, 45 Misc. 2d 956, 258 N.Y.2d 442 (1965); 23 A.D.2d 933, 259 N.Y.S.2d 644 (1965); 16 N.Y.2d 47, 209 N.E.2d 701 (1965).

this statute differed in its time reference from the statute at issue in *Brown-Forman*. The statute challenged in *Seagram* required a distiller to affirm that its prices during a given month in New York were no higher than the lowest price at which the item had been sold elsewhere during the *previous* month.[35]

In *Seagram*, the appellant argued that the New York statute effectively regulated appellant's business activites in other states.[36] Furthermore, contrary to the underlying intent of the statute, the New York pricing scheme produced higher prices in other states rather than lower prices in New York.[37] The Court disagreed and held that the retrospective price affirmation statute placed no unconstitutional burden on interstate commerce since it gauged the price of liquor in New York by reference to the preceeding month's prices in other states.[38] Thus, the statute only regulated liquor destined for use, distribution or consumption in New York, and did not determine a wholesaler's pricing policies in other states.[39] The Court concluded by stating that any alleged discriminatory effects of the price affirmation statute on Seagram's business outside New York were "largely matters of conjecture."[40]

In limiting its holding to a retrospective price affirmation statute, the *Seagram* Court left unresolved the constitutionality of a prospective price affirmation statute.[41] This issue was partially resolved in *United States Brewers Association, Inc. v. Healy*,[42] a Second Circuit decision summarily affirmed by the Supreme Court. In *Healy*, the Second Circuit held that the beer price affirmation provision of the Connecticut Liquor Control Act violated the commerce clause.[43] Noting that the provision in question had a prospective application, the *Healy* court distinguished the Connecticut stat-

35. 1964 N.Y. Laws ch.531 § 9.

36. *Seagram*, 384 U.S. at 52.

37. *Id.*

38. *Seagram*, 384 U.S. at 35.

39. *Id.* The Court in *Seagram* viewed the twenty-first amendment as bestowing upon the states broad power to regulate liquor traffic within their borders. *Id.* at 42. This reading is based upon the second section of the twenty-first amendment which provides that: "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. With this premise, the *Seagram* Court could rationalize the interstate regulations on liquor that New York imposed on distillers, and increase the appellant's burden to prove the unconstitutionality of the statute.

The Court also cited precedents supporting the proposition that a state has a free hand in regulating liquor that is destined for sale within its own borders. *Seagram*, 384 U.S. at 42. *See, e.g.*, Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) (commerce clause prohibited New York from terminating tax-free liquor sales at New York Airport to customers traveling abroad); Board of Equalization v. Young's Mkt. Co., 299 U.S. 59 (1936) (twenty-first amendment permits a state to impose a license fee for the privilege of importing beer from another state); United States v. Frankfort Distilleries, 324 U.S. 293 (1945) (twenty-first amendment bestowed broad regulatory power upon the states but no power to regulate interstate liquor business outside their boundaries). *See also* Note, *The Twenty-first Amendment versus the Interstate Commerce Clause*, 55 YALE L. J. 815 (1946).

40. *Seagram*, 384 U.S. at 35. Although the Court dismissed Seagram's contention as lacking factual support, the Court stated, "[there] will be time enough to assess the alleged extraterritorial effects of [the statute] when a case arises that clearly presents them." *Id.* at 43.

41. *Id.* at 35.

42. 692 F.2d 275 (2d Cir. 1982), *aff'd*, 464 U.S. 909 (1983).

43. *Id.* CONN. GEN. STAT. § 30-63(b)(1982). The section in dispute states:

ute from the retrospective price affirmation statute in *Seagram*.[44] The court reasoned that since the New York price affirmation statute dealt with out-of-state prices from the previous month, the statute only required New York prices to reflect prior charges.[45] In contrast, the Connecticut statute controlled a brewer's future conduct in other states.[46] Thus, unlike the New York statute, Connecticut's statute restricted an in-state distributor's discretion in choosing prices to charge out-of-state wholesalers.[47]

In analyzing *Seagram*, the Second Circuit in *Healy* found no indication that *Seagram* permitted one state to dictate the liquor prices in another state. This, the *Healy* court noted, was evident by the Supreme Court's reliance on *Baldwin v. G.A.F. Seelig, Inc.*[48] which is often cited by the Court when striking down state statutes that burden out-of-state transactions.[49] Since the *Seagram* Court had relied upon *Seelig*, the *Healy* court asserted that *Seagram* did not permit states to engage in extra-territorial price setting.[50] Thus, the *Healy* court concluded that "there is nothing to be weighed in the balance to sustain" a state liquor price statute that burdens out-of-state transactions.[51] In addition, the *Healy* court distinguished *Seagram* by acknowledging that *Seagram* might well validate a less intrusive Connecticut beer price statute.[52]

> At the time of posting of the bottle . . . every holder of a manufacturer or out of state shippers permit, . . . shall file . . . a written affirmation . . . certifying that . . . [the] price to the wholesalers permittees during the period of posting will be no higher than the lowest price at which such item of beer is sold . . . , at any time during the calendar month covered by such posting.

Id.

44. *Healy*, 692 F.2d at 283.

45. *Id.*

46. *Id.* The Connecticut Legislature amended the Connecticut Liquor Control Act in 1981 by adding the prospective price affirmation provision. Over the years, Connecticut's retail price of beer had been higher than the price in surrounding states. The undisputed purpose of the amendment was to lower the price of beer in Connecticut, and thereby reduce the number of Connecticut residents who travel across the state border to buy cheaper beer in other states. *Id.* at 282 n.13. Although it considered the statute well intended, the Court found that this form of price gauging created a minimum price for beer in Massachusetts, New York and Rhode Island. *Id.*

47. *Id.*

48. 294 U.S. 511 (1935). Seelig was a milk dealer in New York who bought milk from a Vermont company at prices lower than the New York regulated price. In accordance with the New York Milk Control Act, the New York state authorities refused Seelig a license to sell the milk in New York. The Act set a minimum price for milk purchased from producers in New York, and banned the resale of lower priced milk purchased from another state. The Court held that the Act violated the commerce clause by regulating the price to be paid in another state for milk acquired in that state. *Id.* at 520. As Justice Cardozo viewed it, Seelig "may keep his milk or drink it, but sell it he may not." *Id.* at 521.

49. *See, e.g.*, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984)(Hawaii state liquor tax exempting locally produced liquor was not supported by the twenty-first amendment, and violated the commerce clause). The dissent in *Brown-Forman* refers to the *Seelig* case as the "classic illustration of economic provincialism." *Brown-Forman*, 106 S. Ct. at 2090.

50. *Healy*, 692 F.2d at 283.

51. *Id.* at 284.

52. *Id.*

ANALYSIS OF THE *BROWN-FORMAN* DECISION

Commerce Clause Challenges: The Practical v. Incidental Effect on Interstate Commerce

The Supreme Court has developed two levels of review for commerce clause challenges to state economic regulations.[53] The first tier concerns state statutes which directly regulate or discriminate against interstate commerce.[54] Such statutes are deemed per se invalid without further inquiry into their objective or the extent of their burden on interstate commerce.[55] Thus, if the "practical effect" of certain state legislation is the regulation of conduct in another state, then the legislation violates the commerce clause.[56]

If a state statute has only an incidental effect on interstate commerce and regulates evenhandedly, the Court will apply the second tier, a more traditional test of balancing the state interest involved against the burden of the statute on interstate commerce.[57] In *Brown-Forman*, the Court acknowledged the lack of a clear boundary separating the two-tiers but noted that at both levels it would examine the overall effect of the state statute on both local and interstate activity.[58]

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53. *Brown-Forman*, 106 S. Ct at 2084. For a discussion of the development of these two tiers *see* Note, *The Market Participant Test in Dormant Commerce Clause Analysis—Protecting Protectionism ?*, 1985 DUKE L.J. 697 (1985). Various commentators, seeking a more coherent test for dormant commerce clause review, have criticized the present balancing test that the Court purports to apply to national and local interests. *See, e.g.*, Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125; Maltz, *How Much Regulation Is Too Much - An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47 (1981); Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982).

54. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). *Philadelphia* involved a New Jersey statute that prohibited importing waste which originated outside the state. In holding that this statute violated the commerce clause, the Court stated that: " . . . where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." *Id.* at 624. The Court cited cases in support of this test. *See, e.g.*, H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 537-538 (1949) (in violation of the commerce clause, New York denied an out-of-state milk distributor a license to operate additional facilities in New York).

55. *Brown-Forman*, 106 S. Ct. at 2084.

56. *Id.* "Forcing a merchant to seek regulatory approval in one state before undertaking a transaction in another directly regulates interstate commerce." *Id.* at 2086. *See* Edgar v. Mite Corp., 457 U.S. 624, 642 (1982) (plurality opinion) (Illinois statute that regulated tender offers for corporations interfered with rights of non-Illinois shareholders to sell to non-Illinois buyer).

57. The leading precedent for the commerce clause balancing test is Pike v. Bruce Church Inc., 397 U.S. 137 (1970). *Pike* involved an Arizona act prohibiting growers from transporting cantaloupe out of Arizona unless the fruit was packaged in standard containers in Arizona. In striking down the Act, the Court stated: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id* at 142. *See also* Southern Pac. Co. v. Arizona *ex. rel.* Sullivan, 325 U.S. 761, 768-69 (1945) (national interest outweighed state interest in adopting safety regulation limiting number of cars on a train); Raymond Motor Transp. Inc. v. Rice, 434 U.S. 429, 444 (1978) (state regulation restricting length of trucks on interstate highways had only speculative contribution to state highway safety, but had substantial burden on interstate commerce).

One commentator considered the Court's analysis under the *Pike* balancing test to be superficial. *See* Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1285 (1986) ("But since 1970 superficial balancing talk has come into its own, mainly because citation of *Pike v. Bruce Church, Inc.* has become boilerplate in dormant commerce clause opinions.").

58. *Brown-Forman*, 106 S. Ct. at 2084. *See Raymond*, 434 U.S. at 440-441 (". . .experience teaches that no single conceptual approach identifies all of the factors that may bear on a particular case.").

Applying its two-tier analysis to the New York price affirmation statute in *Brown-Forman,* the Court recognized the statute's evenhanded treatment of distillers. Nevertheless, it applied the per se rule of invalidity in deciding the constitutionality of the New York ABC Law.[59] In support of this determination, the Court asserted that the ABC Law prevented a distiller from reducing its out-of-state prices during the period that the New York posted price was in effect.[60] The Court dismissed the SLA's argument that since the effects of the statute were activated only by sales of liquor within New York state, there was no commerce clause infraction.[61] Instead, the Court emphasized the "practical effect" of the statute which was to control liquor prices in other states.[62] The Court considered such control evident from the statutory requirement that, after the posted price went into effect, the distiller needed approval from the SLA before lowering its price for the same item in another state.[63]

As further support for applying the per se rule, the Court cited the effect of the statute on consumers in other states.[64] The Court viewed the statute as promoting "economic protectionism."[65] The Supreme Court uses the term "economic protectionism" to describe attempts by states to restrict interstate commerce to protect the economic interests of their own residents.[66] In *Brown-Forman,* the Court agreed that a state may seek lower prices for its residents.[67] However, the Court noted that a state may not attempt to give local consumers an advantage over consumers in other states without committing economic protectionism.[68] According to the Court, the statutory approval requirement for lowering out-of-state prices effectively disadvantaged consumers and producers in other states by forcing them to surrender any competitive advantage they may have over New York produ-

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

60. *Id.*

61. *Id.*

62. *Id. See* South. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. at 775 ("the practical effect of such regulation is to control train operation beyond the boundaries of the state. . . .").

63. *Brown-Forman,* 106 S. Ct. at 2087. The dissent argued that the purpose behind the New York statute was to provide lower prices for New York consumers and that consistent with this intent, the SLA had in the past offered approval for discounts in New York equal to the discounts offered in other states. *See* Joseph E. Seagram & Sons, Inc. v. Gazzara, 610 F. Supp. 673, 678 n.5 (S.D.N.Y. 1985). Further, unlike the statute in *Healy,* § 101-b(3)(a) of the New York Alcohol Beverage Control Act provided that a distiller could reduce its affirmed price in other states with a showing of "good cause" for the action. *See* N.Y. ALCO. BEV. CONT. § 101-b(3)(a). The dissent admonished the majority for not presuming, as it had in the past, administrative flexibility on the part of the SLA. In support of this argument, the dissent cited Joseph E. Seagram & Sons, Inc. v. Gazzara, 610 F. Supp. 673 (1985). *Gazzara* also involved a challenge to New York's price affirmation statute, but was upheld on the premise that the SLA would show wisdom in the exercise of their power: "[W]e cannot presume that state authorities will not exercise their discretion in a manner that avoids conflict with federal law." *Id.* at 678.

64. *Brown-Forman,* 106 S. Ct. at 2085.

65. *Id.* at 2087.

66. *Id.* at 2085.

67. *Id.*

68. *Id.* at 2085. *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 528 (1935); Schwegmann Bros. Giant Super Mkts. v. Louisiana Milk Comm'n, 365 F. Supp.1144 (M.D. La. 1973), *aff'd,* 416 U.S. 922 (1974) (Louisiana Milk Commission could not require payment of Louisiana minimum prices by Tennessee seller who sold milk to Louisiana buyer in Tennessee but delivered in Louisiana); New England Power Co. v. New Hampshire, 455 U.S. 331, 338 (1982) (state may not grant its residents greater access to state's natural resources than it grants out of state consumers).

cers and consumers.[69]

With the growth of state liquor price affirmation statutes after the *Seagram* decision, the *Brown-Forman* Court also found a greater chance of conflicting requirements between state statutes.[70] The Court noted that the "effective price" standard of the ABC Law clearly demonstrated this point.[71] By defining "discount" differently than other states, New York forced Brown-Forman to abandon its promotional allowance program in states where it was legal.[72] Contrary to the dissent, the majority would not presume flexibility in the application of the New York statute and concluded that since the statute regulated out-of-state transactions, it failed to pass the per se rule of invalidity.[73]

Prospective v. Retrospective Statutes

In *Brown-Forman*, the Court supported its holding by comparing the New York price affirmation statute with the statute struck down in *Healy*.[74] In *Healy*, the Connecticut statute, like the New York statute, required prices to be posted at the beginning of each month and proscribed deviations from those prices during that month.[75] But more importantly, both statutes had prospective price affirmation requirements mandating that distillers affirm that they would not make sales outside their respective states at a price lower than that month's posted price.[76]

In accepting the analysis of *Healy* on prospective statutes, the Court in *Brown-Forman* did distinguish between a prospective statute and a retrospective statute such as the price affirmation statute in *Seagram*.[77] However, the Court stated that, as in *Seagram*, the primary concern was whether the statute in question regulated out-of-state transactions.[78] Thus, while the Court in *Seagram* found the interstate effects of that statute incidental, the same could not be said for the statute in *Brown-Forman*. The *Brown-Forman* Court found that the New York statute made it impossible for a distiller or distributor to lower its price in another state in response to market

69. *Brown-Forman*, 106 S. Ct. at 2087. Brown-Forman argued that since other states mandated adherence to the lowest sales price offered in the country, but allowed the promotional allowance, Brown-Forman's wholesale price in other states would have to be reduced by the same amount required by its New York price affirmation statute. This in return would cause the distiller to lower New York's price again. The result would be a downward spiraling effect in prices that would lead to a discontinuance of the allowance program in other states. *See Brown-Forman*, 64 N.Y.2d at 482, 479 N.E.2d at 769.

70. *See supra* text accompanying notes 19-22.

71. *Id.*

72. *See supra* note 15.

73. *Brown-Forman*, 106 S. Ct. at 2080 (1986). "It is not at all counter-intuitive, as the dissent maintains . . . to assume that the [New York] Liquor Authority would not permit appellant to reduce its New York price after the posted price has taken effect." *Id.* at 2087.

74. *Id* at 2086.

75. *Id.*

76. *Id.*

77. *Brown-Forman*, 106 S. Ct. at 2087. The dissent contended that *Seagram* should not be distinguished from this case since Brown-Forman failed to provide any evidence that the statute had, in fact, affected the price of its products in other states. *Id.* at 2091. However, since the majority limited its jurisdiction to decide only if the statute was, on its face, unconstitutional there is no need to offer evidence of how the statute is actually "applied."

78. *Id.* at 2086.

conditions while a higher posted price was in effect in New York.[79]

The Court in *Brown-Forman* concluded by finding that the prospective New York price affirmation statute violated the commerce clause. The Court limited its holding to the prospective statute before it.[80] By narrowing its decision, the Court refused to attach constitutional significance to the difference between a prospective and retrospective statute.[81] Thus, *Brown-Forman* does not address the continued constitutionality of a retrospective price affirmation statute.[82] Instead, it explicitly left this question unresolved.[83]

Impact of Brown-Forman

The decision in *Brown-Forman* adopted the Second Circuit's opinion in *Healy*.[84] States will no longer be allowed to gear their alcohol pricing policies prospectively.[85] *Brown-Forman*, however, does not overturn *Seagram*.[86] Retrospective price affirmation provisions are still constitutionally valid after *Brown-Forman*. The Court's opinion does suggest, however, that *Seagram* could be overruled if the Court is presented with a case challenging a retrospective price affirmation statute.[87]

In a footnote accompanying the majority opinion, the Court stated that if the *Brown-Forman* decision conflicts with the *Seagram* decision, that conflict will have to be resolved by a case presenting a challenge to a retrospective price affirmation statute.[88] In his concurrence, Justice Blackmun rebuked the Court for its failure to address and overrule *Seagram*.[89] Blackmun asserted that no distinction should be made between a retrospective and a prospective price affirmation statute.[90] Rather, Blackmun contended, both pricing schemes violate the commerce clause by regulating out-of-state transactions.[91] By failing to overrule *Seagram*, Blackmun concluded that

79. *Id.* at 2087.

80. *Id.* at 2087 n.6.

81. *Id.* In footnote 6, the Court stated that it would wait to address the constitutionality of a retrospective price affirmation statute. It goes on to state: "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." *Id.* at 2087 n.6. The significance of a Supreme Court footnote should not be underestimated. *See, e.g.*, United States v. Caroline Prod. Co., 304 U.S. 144, 152 n.4 (1938). The Court cleared the path for more litigation in this area by suggesting this possible argument in its opinion.

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

83. *Id.*

84. *Id.*

85. *Id.*

86. Footnote 6 of the Court's opinion preserves *Seagram*, but it also limits the precedential value of *Seagram*. *Id.* at 2087 n.6.

87. *See supra* note 81.

88. *Brown-Forman*, 106 S. Ct. at 2087 n. 6.

89. *Id.* at 2088.(Blackmun, J., concurring).

90. *Id.*

91. Blackmun, however, failed to explain how a retrospective price affirmation statute violated the commerce clause. In analyzing the two types of statutes, it is clear how the prospective statute effects interstate commerce. The prospective aspect of the statute dictates a New York distiller to sell at the price he is offering in other states. Thus, as in *Brown-Forman*, a New York distiller could not offer a discount in other states without violating the New York statute.

By contrast, a retrospective statute requires distiller to sell at a price he offered in other states during the prior month. In this respect, the retrospective price affirmation statute acts as an arbitrary price gauging mechanism, no different than one in which a state simply declares that a particu-

the Court "preserves uncertainty" in this area of the law and "breeds" further litigation.[92]

Arizona, the only state that still has a retrospective price affirmation statute, will inevitably face commerce clause challenges when enforcing the statute.[93] If the Court can suggest that a retrospective statute might have the same interstate impact as the New York prospective statute, it should have come to that conclusion in *Brown-Forman*. Instead, by limiting its holding to prospective statutes, the Court in *Brown-Forman* leaves Arizona courts to enforce the Arizona statute with the knowledge that their rulings may be constitutionally challenged.

Brown-Forman also represents a willingness by the Court to apply the per se rule of invalidity test to a state statute which would avoid any form of a balancing test. The intent behind the New York price affirmation statute was to provide lower prices for New York residents by introducing out-of-state competition.[94] By contrast, the purpose behind the New York Milk Control Act in *Seelig* was to protect New York producers from out-of-state competition.[95] Although the Court acknowledged that its main consideration was the overall effect of the statute,[96] the New York price affirmation statute presented a countervailing local interest that was not evident in other cases in which the Court applied the per se rule of invalidity test.[97] Nevertheless, the Court did not consider applying a balancing test to this statute.

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lar price will be the minimum price of liquor for that month. Thus, the retrospective statute would have no interstate effect since it acts as a neutral price mechanism, rather than a nation-wide price floor.

One possible theory that Blackmun may have considered is that the retrospective price affirmation statute dictates a New York distiller's future conduct in other states by requiring a distiller, who sells liquor at a higher price in New York, to first raise his prices in other states in the prior month. If this was the interstate effect that convinced Blackmun that *Seagram* should be overruled, it is a rather incidental effect; especially in comparison to the effect that a prospective price affirmation statute has on a distiller's conduct in other states. As a result such an effect should be subjected to the balancing test of the two-tier test rather than a per se rule of invalidity.

92. *Id.* Regardless of how one views the effects of these two types of statutes, Blackmun's point that the Court's decision will create more litigation in this area is a sound one. By deciding not to address *Seagram*, but implying that it may be overruled in the future, New York and states with prospective price affirmation statutes will be leery towards readoption of the retrospective price format.

93. ARIZ. REV. STAT. ANN. § 4-253(A) (Supp. 1987), provides:

> There shall be filed in connection with . . . an affirmation duly verified by the supplier that the bottle and case price of spiritous liquor to wholesalers set forth in the schedule is no higher than the lowest price at which such item of liquor was sold by the supplier . . . to any wholesaler anywhere in any other state of the United States . . . .

Id.

94. *Brown-Forman*, 106 S.Ct. at 2090 (Stevens, J., dissenting). Whether the intent behind the New York ABC Law was to introduce out-of-state competition is questionable. Rather, it appears that the intent behind the statute was to prevent consumers in other states from having a competitive advantage over New York consumers. Couched in the latter fashion, the ABC Law violates the per se rule of invalidity test.

95. *Id. See supra* note 48 and accompanying text.

96. *Id.* at 2084. *See supra* text accompanying notes 53-58.

97. The New York price affirmation statute in *Brown-Forman* presented a countervailing interest, the state's power to regulate liquor under the twenty-first amendment, that was not evident in other cases where the Court applied the per se test. *See* Bacchus Imports, Ltd. v.A Dias, 468 U.S. 263, 270 (1984) ("Examination of the state's purpose in this case is sufficient to demonstrate the state's lack of entitlement to a more flexible approach permitting inquiry into the balance between local benefits and the burden on interstate commerce."); South-Central Timber Dev. v. Wunnicke, 467 U.S. 82, 100 (1984) ("Because of the protectionist nature of Alaska's local-processing require-

Brown-Forman could portend a more expansive per se prong in the Court's two tier approach to commerce clause cases.

CONCLUSION

In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, the United States Supreme Court held that the New York ABC Law, with its prospective liquor price affirmation provision, violated, on its face, the commerce clause. Applying its two-tier analysis for commerce clause cases, the Court held that the statute directly regulated interstate commerce by favoring in-state economic interests over out-of-state interests. The Court suggested that retrospective price affirmation statutes may no longer be constitutionally permissible under the commerce clause. Instead, it left this question to be resolved by a later case challenging a retrospective statute.

Brown-Forman may prove to be detrimental for Arizona, the only state that still has a retrospective price affirmation statute. The opinion encourages distillers and distributors to challenge the statute when non-compliance proceedings are instigated against them. The Court's failure to reevaluate *Seagram* in the *Brown-Forman* opinion creates an uncertain future for Arizona's liquor statute.

Brown-Forman also adds to the confusion surrounding the Court's two-tier approach to commerce clause cases. The case could represent a more expansive per se invalid tier. More importantly, the decision provides no guidance to state legislatures regarding what consitutes an impermissible out-of-state burden.

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ment and the burden on commerce resulting therefrom, we conclude that it falls within the rule of virtual per se invalidity . . . .").

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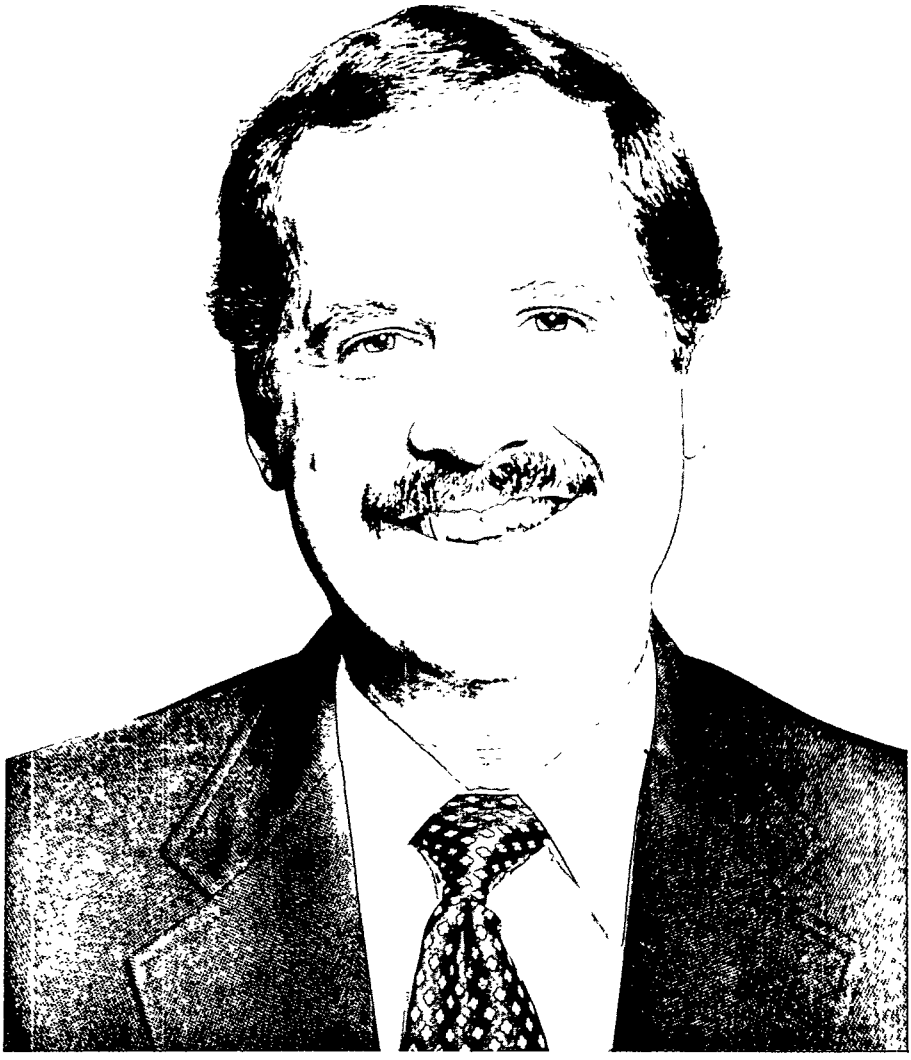

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