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# The Questionable Viability of the Des Moines Warranty in Light of *Brown-Forman Corp. v. New York*

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# The Questionable Viability of the Des Moines Warranty in Light of *Brown-Forman Corp. v. New York*\*

The prohibition law, written for weaklings and derelicts, has divided the nation, like Gaul, into three parts—wets, dries, and hypocrites.\*\*

## INTRODUCTION

Since before the foundation of the Republic, the production, marketing, and sale of alcoholic beverages have been the subject of extensive federal and state regulation.<sup>1</sup> With the passage of the eighteenth amendment,<sup>2</sup> the ultimate beverage alcohol control, nationwide prohibition,<sup>3</sup> came into force. However, widespread disenchantment<sup>4</sup> with prohibition led to the twenty-first amend-

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\* Special thanks to Mr. Leon R. "Tim" Timmons, Associate General Counsel of Brown-Forman Corporation, for his assistance in writing this Comment.

\*\* Mrs. Charles H. Sabin, HOME BOOK OF AMERICAN QUOTATIONS 329 (Bohle ed. 1967).

<sup>1</sup> The first control on liquor sales was a Massachusetts Bay Colony law of 1633, which forbade the sale of wine or strong water without the permission of the colony governor or his deputy. The maximum price of beer was fixed at a penny a quart in 1634. The earliest distillery was erected by New York Director William Kieft on Staten Island in 1640. 2 G. THOMANN, COLONIAL LIQUOR LAWS 4-5, 86 (1887).

<sup>2</sup> "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. CONST. amend. XVIII, § 1 (1919, repealed 1933). Prohibition was to remain in force "thirteen years, ten months, eighteen days and a few hours." N.Y. Times, Dec. 5, 1933, at 1, col. 8.

<sup>3</sup> Distillers were still able to produce alcohol for industrial, sacramental, and, for those lucky few with a doctor who would prescribe it, medicinal use. National Prohibition (Volstead) Act 27 U.S.C. §§ 73-85; 16, 27; 17-18 (1919). However, there was a limit on the latter use to one pint in any ten day period to any one patient. See Lambert v. Yellowley, 272 U.S. 581, 584 (1926). Some eleven million bottles of "medicinal" spirits were prescribed annually by physicians. G. FORD, FORD'S ILLUSTRATED GUIDE TO WINES, BEERS, AND SPIRITS 59 (1983).

<sup>4</sup> Prohibition failed for a variety of reasons including a Depression-born need for excise tax revenues, a resurgence of emphasis upon moderation over total abstinence, and widespread violation of the law through illicit importation and distilling, often by organized crime. G. FORD, *supra* note 3, at 59-60. For example, within eleven months of commencing operations following the repeal of prohibition, the Pennsylvania liquor system injected \$1,500,000 into the unemployment relief system of that state. See L. HARRISON & E. LAINE, AFTER REPEAL 137 (1936).

ment,<sup>5</sup> which allowed alcoholic beverages to return to "respectable" American homes and businesses under the control of each state. States were free to decide if alcohol could be produced in or imported into the state,<sup>6</sup> and under what conditions it could be sold to retailers and hence to consumers.<sup>7</sup> Beginning in 1938, numerous states took actions that effectively established uniform wholesale prices for liquor across most of the nation.<sup>8</sup> Eventually thirty-nine states took part in this scheme. Using a variety of formulae, each state required that suppliers affirm that the prices they were charging for particular products were no higher than prices being charged elsewhere in the nation.

All states can be divided into two distinct camps regarding the operation of the alcoholic beverage industry: open states<sup>9</sup> and

<sup>5</sup> The amendment provides in part:

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. 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, §§ 1-2.

<sup>6</sup> This in large part returned the situation to the pre-18th amendment situation with each state deciding if it wanted to be "wet" or "dry." Maine had been dry since 1858, and seventeen other states were to become so by statute or state constitutional amendment through 1915. C. MERZ, *THE DRY DECADE* 307 (1969). Prohibition had been in effect on all military bases since 1901. *See An Act to Increase the Efficiency of the Permanent Military Establishment of the United States (Anti-Canteen Act)*, ch. 192, § 38, 31 Stat. 748, 758 (1901). Many states did not return immediately to "wet" following the passage of the 21st amendment. Oklahoma did not repeal the prohibition clause of the state's original 1907 constitution until April 7, 1959, (OK. CONST. Art. 1, § 7) (1907), repealed by art. 27, 1959), leading to Will Roger's statement that "Oklahomans will vote dry so long as they can stagger to the polls to vote." R. WALKER & S. PATTERSON, *OKLAHOMA GOES WET: THE REPEAL OF PROHIBITION 1* (1960).

<sup>7</sup> No state permits a liquor supplier to sell directly to, or maintain a financial interest in, a retailer. Interview with Leon Timmons, Associate General Counsel, Brown-Forman Corp., Louisville, Kentucky, September 27, 1988 [hereinafter Timmons Interview]. *See, e.g., N.C. GEN. STAT. § 18B-1116(a)* (1987) ("It shall be unlawful for any manufacturer . . . to (2) Have any direct or indirect financial interest in the business of any alcoholic beverage retailer."). Likewise, no representative of a supplier may, in a private capacity, hold an interest in a retailer. *See, e.g., WYO. STAT. § 12-5-401* (1977) ("No industry representative shall hold any interest, stock or ownership directly or indirectly, in any license to sell products of the industry at retail under privileges of a license or permit to sell any beverage or liquor in Wyoming or in any premises so licensed.").

<sup>8</sup> Motion For Leave to File Complaint at 2, *Pennsylvania v. Alabama*, 472 U.S. 1015 (No. 101 Original) (*leave to file complaint denied*) (1985).

<sup>9</sup> The open states are: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota,

control states.<sup>10</sup> In the former, the state licenses commercial wholesalers to make purchases from suppliers and in turn to supply various retailers in the state. However, not all states with commercial wholesale operations require suppliers to conform to affirmation price procedures.<sup>11</sup> Control states, on the other hand, maintain state monopolies upon the importation of some or all alcoholic beverages,<sup>12</sup> acting as the wholesalers, and in most cases the retailers, within that state. All eighteen control states require suppliers to comply with affirmation procedures.

Each state justifies the affirmation requirement on grounds that intrastate consumers thus obtain the benefits of interstate competition.<sup>13</sup> However, the commerce clause<sup>14</sup> forbids any state to control or otherwise interfere with commerce beyond its borders. While the twenty-first amendment<sup>15</sup> allows a state to forbid the importation of alcohol into its borders and to regulate the sale of alcohol within its borders, it does not preempt the commerce clause and allow interference with liquor pricing in other states.

Only in the past three decades have the courts examined the constitutionality of affirmation price requirements. In the first of these cases, *Joseph E. Seagram & Sons, Inc. v. Hostetter*,<sup>16</sup> the

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Tennessee, Texas, and Wisconsin. See DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, SUMMARY OF STATE LAWS & REGULATIONS RELATING TO DISTILLED SPIRITS, 25th ed., 1985, various tables [hereinafter DISCUS SUMMARY]. Open states also are referred to as license states. Timmons Interview, *supra* note 7.

<sup>10</sup> The control states are: Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. In addition, Montgomery county in Maryland is a control jurisdiction. Iowa, Mississippi, Oregon, and Wyoming license private contractors to operate retail outlets with various degrees of state supervision. See DISCUS SUMMARY, *supra* note 9, various tables.

<sup>11</sup> Those which did not as of December 1, 1985 were: Alaska, Arkansas, Colorado, Illinois, Indiana, Kentucky, Missouri, North Dakota, Texas, Wisconsin, and the District of Columbia. See *id.*

<sup>12</sup> A control state is not required to maintain the state monopoly over all categories (liquor, wine, and beer) of alcoholic beverages. Only Utah controls all three categories entirely. Mississippi, New Hampshire, and Ohio control only liquor. Alabama, Idaho, Iowa, Montana, North Carolina, Pennsylvania, Virginia, Washington, West Virginia, and Wyoming control liquor and wine. Maine, Michigan, and Vermont control liquor and high alcohol content wines (14%, 21%, and 16% alcohol, respectively), while Vermont also controls high alcohol content beers (over 6% alcohol). See *id.*

<sup>13</sup> See Brief For Appellant at 24-25, *Brown-Forman Distillers Corp. v. State of New York Liquor Auth.*, 476 U.S. 573 (1986) (No. 84-2030) [hereinafter *Brown-Forman Brief*].

<sup>14</sup> "The Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3:

<sup>15</sup> See *supra* note 5.

<sup>16</sup> 384 U.S. 35 (1966). See *infra* notes 46-55 and accompanying text.

Court examined New York's affirmation statute vis-a-vis the commerce clause and found it to be constitutional. Further tests of affirmation statutes did not come until the early 1980's. In 1983, the Court, without comment, affirmed the Second Circuit's ruling in *United States Brewers Association v. Healy*,<sup>17</sup> which declared the Connecticut affirmation statute unconstitutional. Then, in the 1986 decision of *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,<sup>18</sup> the Supreme Court struck down an entire class of affirmation statutes.<sup>19</sup> Subsequently, many such statutes have been attacked individually and struck down.<sup>20</sup> Finally, in *Healy v. Beer Institute*, the Court struck down the amended Connecticut affirmation law and declared *Seagram* "no longer good law."<sup>21</sup>

Part I of this Comment outlines the history and workings of price affirmation requirements with particular emphasis upon the practices used by control states.<sup>22</sup> Part II examines the various decisions prior to *Brown-Forman v. New York* and those that it spawned regarding limits on state action that interfere with interstate commerce and so violate the commerce clause.<sup>23</sup> Part III examines the Des Moines Warranty, affirmation as practiced by the control states, looking to the twenty-first amendment and the state market participant doctrine to see if the Warranty is afforded protections not available to open state affirmation statutes.<sup>24</sup> This Comment concludes that the Supreme Court should, in light of the extraterritorial effects of the Des Moines Warranty on interstate commerce, declare it to be in violation of the commerce clause.<sup>25</sup>

<sup>17</sup> 692 F.2d 275 (2nd Cir. 1982), *aff'd without opinion*, 464 U.S. 909 (1983) [hereinafter *Healy I*]. See *infra* notes 56-60 and accompanying text.

<sup>18</sup> 476 U.S. 573 (1986).

<sup>19</sup> See *infra* notes 63-83 and accompanying text.

<sup>20</sup> See *infra* notes 84-103 and accompanying text.

<sup>21</sup> 491 U.S. \_\_\_\_\_, 109 S. Ct. 2491 (1989) (Scalia, J., concurring in part and concurring in judgment; Rehnquist, C.J., dissenting) [hereinafter *Healy II* (U.S.)]. See *infra* notes 88-95 and accompanying text.

<sup>22</sup> See *infra* notes 26-44 and accompanying text.

<sup>23</sup> See *infra* notes 45-103 and accompanying text.

<sup>24</sup> See *infra* notes 104-51 and accompanying text; see also FLA. STAT. ANN. § 565.15 (West 1986):

Each month, . . . each American source of supply authorized to sell distilled spirits to licensed distributors in Florida shall submit to the division a duly verified affirmation that the net prices charged during the prior month for such distilled spirits . . . were no higher than the lowest net prices . . . charged during the prior month to any distributor in this state, in any other state or the District of Columbia or to any state or state agency which owns and operates retail liquor outlets during the previous month.

<sup>25</sup> See *infra* notes 152-61 and accompanying text.

## I. THE MECHANICS OF AFFIRMATION

In states where affirmation is required, suppliers must submit a policy statement affirming that the prices charged wholesalers for each product shall be no higher than the lowest price charged elsewhere in the nation.<sup>26</sup> Many states also require the filing of a price schedule listing the various products, their respective prices, and the period for which the schedule is effective.<sup>27</sup>

Prior to *Brown-Forman v. New York*,<sup>28</sup> thirty-nine states engaged in alcoholic beverage<sup>29</sup> price affirmation<sup>30</sup> in some form.<sup>31</sup> Of these states, twenty are open states in which commercial operations act as wholesalers between suppliers<sup>32</sup> and retailers. Within these twenty, price affirmation takes three forms: retrospective, prospective, and simultaneous. These forms are distinguishable based upon the timing of the affirmation each supplier is to make.

### A. Open States

Beginning in 1964, the open states, led by New York, sought to control supplier prices to wholesalers by requiring price affir-

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<sup>26</sup> See *infra* notes 33-35 and accompanying text.

<sup>27</sup> A commentator recently stated incorrectly that "[a]ll affirmation statutes begin by requiring producers to file monthly schedules listing the prices they will charge distributors." Note, *Liquor Price Affirmation Statutes and the Dormant Commerce Clause*, 86 MICH. L. REV. 186, 190 (1986). For example, the affirmation statutes of Delaware (DEL. CODE ANN. tit. 4, § 508a (1985)), South Carolina (S.C. CODE ANN. § 61-7-100 (Law. Co-op. (1976))), and Tennessee (TENN. CODE ANN. § 57-3-202(e)(1)-(3) (1980)) do not require the posting of price schedules.

<sup>28</sup> 476 U.S. 573 (1986).

<sup>29</sup> Although technically a "liquor" is a distilled spirit, the term is often used in this Comment synonymously with "alcoholic beverage," as it is this class that is affected most often by affirmation systems. Where necessary, the distinctions between classes of alcoholic beverages (liquor, wine, and beer) are made.

<sup>30</sup> States are often referred to as either affirmation or warranty states. Herein, "affirmation" is meant to refer to the general practice of price control at the supplier to wholesaler (original sale) level. States that engage in this price control are either open or control states. "Warranty" shall refer to the specifics of price control as used by the control states.

<sup>31</sup> Those states were: Arizona, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, and the eighteen control states. See *supra* note 10.

<sup>32</sup> All major liquor suppliers both produce and market their own products as well as market those products produced by foreign or domestic corporations that do not maintain their own distribution networks in the U.S. All importers, distillers, producers of wine, and wholesalers must hold federal permits from the Secretary of the Treasury. 27 U.S.C. § 203 (1926).

mation. These regulations take several paths in determining and defining the period to which the charged prices will be compared.

In retrospective states, the supplier must attest that the price being charged in that month is no higher than that being charged elsewhere in the nation in the previous month.<sup>33</sup> Prospective states require that a supplier attest that the price being charged is no higher than that being charged elsewhere in the month during which the price schedule is effective.<sup>34</sup> Simultaneous affirmation is a subset of prospective affirmation wherein the supplier must attest that the charged price is no higher than that being charged at that moment elsewhere in the nation.<sup>35</sup>

Should a supplier violate an affirmation statute, the state may revoke that supplier's license to sell alcoholic beverages within that state, or the wholesalers involved may seek civil damages.<sup>36</sup>

## B. Control States

Control states, on the other hand, maintain a loose contractual relationship with the various suppliers. States are under no obligation to carry the line of any supplier, and acceptance of any portion of a supplier's line does not obligate the state to purchase any other portion of the line. The contractual relationship is loose

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<sup>33</sup> See, e.g., ARIZ. REV. STAT. ANN. § 4-253(a) (1987) ("There shall be filed . . . an affirmation . . . that the . . . price of spirituous liquor to wholesalers . . . 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.") (emphasis added). Arizona alone retains a retrospective affirmation statute. Comment, *Brown-Forman Distillers Corp. v. New York State Liquor Authority: State Liquor Price Statutes Under the Commerce Clause*, 30 ARIZ. L. REV. 183, 193 (1988). However, this statute is enforced prospectively. Timmons Interview, *supra* note 7.

<sup>34</sup> See, e.g., HAW. REV. STAT. § 281-122 (1985), "No supplier shall sell . . . any item of liquor at a price which is higher than the lowest price at which such item is currently being sold. . . ." (emphasis added). This statute has been repealed by the Hawaii legislature (1988 Haw. Sess. Laws 314 § 1).

<sup>35</sup> See, e.g., CONN. GEN. STAT. ANN. § 30-63b(a) (West 1950) (amended 1984) ("At the time of posting . . . [every supplier] shall file . . . a written affirmation . . . certifying that [the] . . . price . . . will be no higher than the lowest price at which each such item . . . is or will be sold. . . .") (emphasis added). This is also called "current" or "concurrent" affirmation.

<sup>36</sup> See, e.g., CAL. BUS. & PROF. CODE § 23673 (West 1985) ("A violation of this section shall be remediable only by a civil action for damages . . . . A judgement [sic] in any such action rendered against a [supplier] shall be deemed grounds for the suspension or revocation of the violator's license."); ARIZ. REV. STAT. ANN. § 4-253(E) (1987) ("Upon final judgement [sic] that any person has violated any provision of this article, the superintendent may refuse to accept for any period of months not exceeding three calendar months any affirmation required to be filed by such person.").

in that a supplier will file the price schedule on a quarterly basis. This does not obligate the supplier to sell or the state to accept those products in any subsequent quarter.

In 1938, representatives of thirteen of the then seventeen control states met in Des Moines, Iowa, to discuss common concerns.<sup>37</sup> Subsequent to this meeting, all of the control states, including those not present at the Des Moines meeting, adopted a Virginia contract provision requiring that the supplier affirm that the prices being charged to the state would be equal to the lowest being charged in the nation at that time.<sup>38</sup> This became known as the "Des Moines Warranty."<sup>39</sup> The Warranty measures the applicable price as do prospective affirmation statutes,<sup>40</sup> viz., for the quarter during which the posted schedule is effective.<sup>41</sup> Should a supplier or a state discover an error in pricing that violates the Warranty, the contract requires a refund of the difference in charged and allowed prices to the state or states injured.<sup>42</sup> The Liquor Control Board (LCB)<sup>43</sup> in that state may also "de-list" the supplier, stating in effect that while the supplier is licensed to import into the state, the LCB, the only wholesaler within that state, will not purchase

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<sup>37</sup> Brief In Support Of Motion For Leave To File Complaint at 47-48, *Pennsylvania v. Alabama*, 472 U.S. 1015 (No. 101 Original) (*leave to file complaint denied*) (1985) [hereinafter *Pennsylvania Brief*].

<sup>38</sup> *Id.* at 48.

<sup>39</sup> See, e.g., Idaho Liquor Vendor's Price Quotations, form PQ-85 ("Prices of merchandise ordered by the Dispensary shall not exceed the lowest prices . . . offered to and paid by any other customer for the same merchandise anywhere in the United States. . . ."); Michigan Department of Commerce Liquor Control Commission Liquor Quotation, form LC-329 ("The prices specified on this Quotation are the lowest base prices offered to any purchaser in open or monopoly states.") [hereinafter *Michigan Quotation Form*]; Wyoming Liquor Commission purchase order ("The Vendor guarantees that Basic Costs . . . at which merchandise is quoted . . . shall not exceed such Basic Costs quoted by the vendor . . . to any purchaser . . . anywhere in the United States of America.").

<sup>40</sup> *Pennsylvania Brief*, *supra* note 37, at 69-70.

<sup>41</sup> Price schedules are filed quarterly and are effective as of February 1, May 1, August 1, and November 1. See, e.g., N.C. ADMIN. CODE tit. 4, r.2.1501 (March 1984).

<sup>42</sup> See, e.g., Michigan Quotation Form ("[A]nd if a lower price is offered or given to any other purchasers the Vendor must refund the difference."); State of Ohio Department of Liquor Control Price Quotation on Spirituous Liquor, form no. 184 ("Should a lower price be offered or given to any purchaser during the period this quotation is effective, the State of Ohio, Department of Liquor Control, will be refunded the difference on all purchases pursuant to this quotation."); see also *Pennsylvania Brief*, *supra* note 37, at 69-70.

<sup>43</sup> Each control state maintains an administrative board to oversee the functioning of the state's wholesale and retail operations. While these boards go by a variety of names, the abbreviation "LCB" denotes a generic state board.



from the supplier, thereby shutting the supplier off from the retail market.<sup>44</sup>

## II. PRICE AFFIRMATION STATUTES AND THE COMMERCE CLAUSE

### A. *Price Affirmation Prior to 1986*

Price affirmation did not come under attack with its widespread enactment in 1938. In fact, with one exception, control state affirmation has remained free from litigation.<sup>45</sup> However, open state affirmation was attacked immediately after it appeared. In 1964, New York passed the first open state affirmation law.<sup>46</sup> Joseph E. Seagram & Sons, Inc., a major supplier, immediately brought suit to enjoin its enforcement and to have it declared unconstitutional. Seagram based its argument against affirmation on four points: 1) it is an illegal burden on interstate commerce; 2) it violates federal antitrust laws; 3) it violates the due process clause of the fourteenth amendment; and 4) it violates the equal protection clause of the fourteenth amendment.<sup>47</sup> Relying on the twenty-first amendment as a bulwark against these arguments, the Court ruled that all of them were meritless.<sup>48</sup>

Relying on *United States v. Frankfort Distilleries*<sup>49</sup> and *Hostetter v. Idlewild Liquor Corp.*,<sup>50</sup> the Court held that a state has

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<sup>44</sup> See, e.g., N.C. ADMIN. CODE tit. 4, r.2.1401 (March 1984) ("Except for special orders, no purchases of any spirituous liquor, fortified or unfortified wine shall be made by any local board other than brands approved for resale in ABC stores by the commission."). The most dramatic case of de-listing to date involved the Joseph E. Seagram Company by Pennsylvania in 1958. Seagram sought to raise their prices, but the Pennsylvania LCB said the planned increases were unreasonable and demanded that Seagram justify them. Upon Seagram's refusal to do so, Pennsylvania de-listed all Seagram products. However, due to consumer demands, the products were returned within six months. See Ober & Weldon, *State Liquor Affirmation Practices: Constitutional and Anti-Trust Problems*, 77 DICK. L. REV. 643, at 648-49 (1972) [hereinafter *Liquor Affirmation Practices*]. However, in most cases, a de-listing is of one particular brand and is not retributive but a statement that there is insufficient demand to justify future orders by the LCB. The state may have a mechanism for ordering non-listed labels for those willing to place special orders. See, e.g., N.C. ADMIN. CODE tit. 4, r.2.1404 (March 1984).

<sup>45</sup> See *infra* notes 61-62 and accompanying text.

<sup>46</sup> 1964 N.Y. Laws Chapter 531. See *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 37-41 (1966). This was a retrospective statute.

<sup>47</sup> *Id.* at 41.

<sup>48</sup> *Id.* at 41-42.

<sup>49</sup> 324 U.S. 293, 299 (1945) ("[The 21st amendment] bestowed upon the states broad regulatory power over the liquor traffic within their territories."). See *infra* note 110.

<sup>50</sup> 377 U.S. 324, 330 (1964) ("[A] State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."). See *infra* note 111.

“wide latitude for regulation”<sup>51</sup> in the field of alcoholic beverages. As the statute in question had not yet come into force due to a series of injunctions, *Seagram* was unable to demonstrate actual interference with interstate commerce.<sup>52</sup> Additionally, the Court pointed to the various control states as a way of affirming the validity of the New York law.<sup>53</sup> The Court focused on the burden of proving compliance with any affirmation requirements, noting that it may be more difficult in control states. However, in doing so, the Court ignored any burden placed on interstate commerce by the Warranty, and by implication, New York’s statute.

Likewise, the Court dismissed the antitrust, equal protection, and due process attacks upon the statute as being without merit.<sup>54</sup> The Court concluded: “Although it is possible that specific future applications of [the affirmation statute] may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face.”<sup>55</sup> The Court would have to wait twenty years before it would deal with those concrete problems.

The situation remained unchanged until 1983, when the Supreme Court affirmed without comment the Second Circuit in finding the Connecticut beer affirmation law unconstitutional as violative of the commerce clause.<sup>56</sup> After distinguishing the prospective Connecticut statute from the retrospective statute approved in *Seagram*,<sup>57</sup> the circuit court commented upon the failings of the *Seagram* decision and its misapplication of precedent, especially the *Baldwin v. G.A.F. Seelig, Inc.*<sup>58</sup> decision.<sup>59</sup> However, the peculiarities of the Connecticut statute limited the applicability of this opinion to the balance of state affirmation laws.<sup>60</sup>

In 1985, the Commonwealth of Pennsylvania attempted to file an original jurisdiction suit in the Supreme Court against all other

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<sup>51</sup> *Seagram*, 384 U.S. at 42.

<sup>52</sup> *Id.* at 41.

<sup>53</sup> *Id.* at 43-45.

<sup>54</sup> *Id.* at 45-51.

<sup>55</sup> *Id.* at 52.

<sup>56</sup> *U.S. Brewers Ass’n v. Healy*, 692 F.2d 275 (2nd Cir. 1982), *aff’d without opinion*, 464 U.S. 909 (1983) [hereinafter *Healy I*].

<sup>57</sup> *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966).

<sup>58</sup> 294 U.S. 511 (1935).

<sup>59</sup> *Healy I*, 692 F.2d at 283-84.

<sup>60</sup> *Id.* at 276. The Connecticut statute tied the minimum beer price to the lowest at which the product in question was sold in any of the three adjoining states of Massachusetts, New York, and Rhode Island.

affirmation states, both open and control, alleging violation of the commerce clause. Pennsylvania maintained:

[T]he national price affirmation system prevents, as intended, the normal operation of the free market and replaces it with a system of state regulation resulting in uniform prices to all wholesalers in all thirty-eight affirmation states.

. . . .

Faced with the extraterritorial impact of each such pricing decision, interstate suppliers forego competition in local markets, thereby restricting the free flow of goods in interstate commerce.<sup>61</sup>

The Supreme Court, without comment, denied Pennsylvania leave to file the complaint.<sup>62</sup>

### B. *Brown-Forman v. New York*

In 1981, Brown-Forman brought suit against the New York Liquor Control Board asserting the unconstitutionality of the New York affirmation statute.<sup>63</sup> Justice Marshall characterized Brown-Forman's argument:

By requiring distillers to affirm that they will make no sales anywhere in the United States at a price lower than the posted price in New York, . . . New York makes it illegal for a distiller to reduce its price in other States during the period that the posted New York price is in effect. Appellant contends that this constitutes direct regulation of interstate commerce.<sup>64</sup>

Additionally, the law was attacked for fostering inconsistent and contradictory obligations on suppliers by interpreting certain promotional allowances in other states that were forbidden in New

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<sup>61</sup> Complaint at 32 and 34, *Pennsylvania v. Alabama*, 472 U.S. 1015 (No. 101 Original) (*leave to file complaint denied*) (1985) [hereinafter *Pennsylvania Complaint*]. An action of lesser scope had been filed earlier with the Court, also of original jurisdiction, and likewise had been denied. See *Pennsylvania v. New York*, 410 U.S. 978 (No. 60 Original) (*leave to file complaint denied*) (1973).

<sup>62</sup> *Pennsylvania v. Alabama*, 472 U.S. 1015 (1985).

<sup>63</sup> *Brown-Forman Distillers Corp. v. State Liquor Auth.*, 473 N.Y.S.2d 420, 421-22 (1984). The trial action was commenced when New York accused Brown-Forman of violating the affirmation statute by not adjusting prices to New York wholesalers to account for the promotional allowances made in other states.

<sup>64</sup> *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579-80 (1986) (Blackmun, J., concurring; Stevens, J., dissenting). New York required that, on the 25th of each month, each supplier file a price schedule to be effective for the second succeeding month. The supplier was barred from selling the products at a lower price anywhere else in the nation during that future month.

York as discounts in the base price.<sup>65</sup> New York demanded that prices be adjusted to account for these promotional payments despite the fact they were not tied to specific sales or to purchase requirements upon the wholesaler to whom they were given.<sup>66</sup> Such an adjustment, however, would have placed Brown-Forman in violation of the affirmation statutes of the other states, as they did not view the promotional allowances as discounts that need be taken into account when calculating the floor price.<sup>67</sup>

Brown-Forman lost in both the New York Supreme Court<sup>68</sup> and the New York Court of Appeals.<sup>69</sup> On appeal to the Supreme Court, the lower court decisions were reversed and the statute was struck down as violative of the commerce clause.<sup>70</sup>

The Court identified a two-tier process to test for violations of the commerce clause. The first tier looks at statutes that "directly regulate[] or discriminate[] against interstate commerce . . . [or that] favor in-state economic interests over out-of-state interests."<sup>71</sup> These are per se invalid.<sup>72</sup> The second tier looks at those statutes that are not per se invalid to see if the state's interest is legitimate and if the burden on interstate commerce exceeds the local benefits.<sup>73</sup> Under either level, the "critical consideration is the overall effect of the statute on both local and interstate activity."<sup>74</sup> Brown-Forman did not maintain that the statute was less than evenhanded; all suppliers were treated equally. But this treatment did amount to " 'simple economic protectionism' that th[e] Court has routinely forbidden."<sup>75</sup> In *Baldwin v. G.A.F. Seelig, Inc.*,<sup>76</sup> the Court struck

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<sup>65</sup> *Id.* at 577-78.

<sup>66</sup> *Id.* at 578.

<sup>67</sup> *Id.*

<sup>68</sup> See *supra* note 63.

<sup>69</sup> *Brown-Forman Distillers Corp. v. State Liquor Auth.*, 64 N.Y.2d 479 (1985).

<sup>70</sup> *Brown-Forman v. New York*, 476 U.S. 573 (1986).

<sup>71</sup> *Id.* at 579.

<sup>72</sup> See *infra* notes 112-13 and accompanying text.

<sup>73</sup> *Brown-Forman v. New York*, 476 U.S. at 579. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Arizona sought to compel a cantaloupe grower to pack the fruit in-state because the packaging carried the name of the state where the fruit was packed. By contrast, the name of the state where the fruit was grown was not listed. The cost of moving the packaging facility thirty-one miles was approximately \$200,000. "Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal." *Id.* at 145 (emphasis in original).

<sup>74</sup> *Brown-Forman v. New York*, 476 U.S. at 579.

<sup>75</sup> *Id.* at 580.

<sup>76</sup> 294 U.S. 511. See also *Buck v. Kuykendall*, 267 U.S. 307, 315 (1925) (state action meant to prevent competition in supply of for-hire vehicles used in interstate commerce

down a New York law that specified a minimum wholesale price for milk, and banned from resale in New York foreign milk purchased at a lower price. The Court held that "a State may not 'establish . . . a scale of prices for use in other states, and . . . bar the sale of products . . . unless the scale has been observed.'"<sup>77</sup> The Court then was left to ascertain if the New York affirmation statute did regulate commerce in other states.

The New York statute required that prices be posted each month,<sup>78</sup> in effect allowing changes to those postings only with the approval of the liquor board. Were a supplier to raise or lower its prices in all other affirmation states during a particular posting period, the supplier could not change correspondingly its New York prices without regulatory approval. But were it denied permission to modify its price schedule, the supplier would be in violation of the affirmation requirement. The Court wrote: "Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce."<sup>79</sup> The practical effect of the law was to regulate liquor prices in other states,<sup>80</sup> which directly violates the commerce clause.

New York maintained that the twenty-first amendment protected the affirmation law from commerce clause analysis. However, the Court noted that the twenty-first amendment refers to alcoholic beverages within a state, and New York's law controls alcoholic beverages in other states, thereby exceeding the authority granted by the amendment even if it was completely insulated from the commerce clause.<sup>81</sup> Also, by interfering with the alcoholic bev-

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violates commerce clause); *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 538 (1949) (state prevention of expansion by a corporation on the grounds it would reduce milk supplies in the local market and result in destructive competition burdens interstate commerce); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) (state requirement that utility sell low cost, in-state generated power to state residents or adjust rates for power purchased elsewhere to the same price is protectionist and burdens interstate commerce).

<sup>77</sup> *Brown-Forman v. New York*, 476 U.S. at 580 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935)). See also *DuMond*, 336 U.S. at 532 ("[T]he State may not promote its own economic advantages by curtailment or burdening of interstate commerce.").

<sup>78</sup> *Id.* at 575-76.

<sup>79</sup> *Id.* at 582-83. The Court did not believe the states would be willing to freely allow changes to these schedules, and pointed to New York's refusal to grant *Brown-Forman* such permission as an example.

<sup>80</sup> *Id.* at 583 ("That the ABC Law is addressed only to sales of liquor in New York is irrelevant if the 'practical effect' of the law is to control liquor prices in other States.") (emphasis added).

<sup>81</sup> *Id.* at 584-85.

erage industry in other states, New York invaded the authority granted to other states by the twenty-first amendment.<sup>82</sup>

Justice Blackmun, in a concurring opinion, stated that the Court should take the additional step of overruling *Seagram* directly: "I see no principled distinction that can be drawn for constitutional analysis between New York's current prospective statute and the same State's retroactive statute upheld in *Seagram* . . . . Our failure to overrule *Seagram* now merely preserves uncertainty and will breed or necessitate future litigation."<sup>83</sup>

### C. Price Affirmation After *Brown-Forman v. New York*

Since the *Brown-Forman v. New York* decision, several other open state affirmation laws have been adjudged unconstitutional. In *Brown-Forman Corp. v. South Carolina Alcoholic Beverage Control Commission*,<sup>84</sup> South Carolina's simultaneous affirmation statute was declared unconstitutional. In *Brown-Forman Corp. v. New Mexico Department of Alcoholic Beverage Control*,<sup>85</sup> a similar New Mexico statute was declared unconstitutional. Both decisions relied heavily upon *Brown-Forman v. New York*.<sup>86</sup> Yet another affirmation statute fell in *Brown-Forman Corp. v. Delaware Alcoholic Beverage Control Commission*.<sup>87</sup>

<sup>82</sup> *Id.* at 585.

<sup>83</sup> *Id.* at 586. In a footnote to its opinion, the majority wrote: "[W]e do not necessarily attach constitutional significance to the difference between a prospective statute and the retrospective statute at issue in *Seagram*." *Id.* at 584 n.6. A dissenting opinion written by Justice Stevens and joined by Justices White and Rehnquist argued that the New York statute was permissible under the 21st amendment and *Seagram*, and that actual interference with interstate commerce had not been shown. *Id.* at 586-92. That both retrospective and prospective affirmation policies burden interstate commerce was demonstrated in Pustay & Zardkoochi, *An Economic Analysis of Liquor Price Affirmation Laws: Do They Burden Interstate Commerce?*, 48 LA. L. REV. 649 (1988) [hereinafter *Economic Analysis*]. "[T]he impact of an affirmation law adopted by one state will be transmitted to other states, affecting prices charged in other states in the process. This impact on interstate commerce is inherent in any law that ties prices in one state to prices in another state." *Id.* at 674 (emphasis added).

<sup>84</sup> 643 F. Supp. 943 (D.S.C. 1986).

<sup>85</sup> 672 F. Supp. 1383 (D.N.M. 1987).

<sup>86</sup> *Brown-Forman v. South Carolina*, 643 F. Supp. 943, 948-49 (D.S.C. 1986); *Brown-Forman v. New Mexico*, 672 F. Supp. 1383, 1385 (D.N.M. 1987).

<sup>87</sup> No. 87-20 LON, slip op. (D. Del. Dec. 17, 1987). The Delaware court wrote:

[The Delaware statute] plainly affects Plaintiff's decision to respond to the demographics of local markets. Rather than being able to respond to the demands and needs of a particular market, the Plaintiff is forced towards a uniform national pricing policy. As a result, the citizens of other states may very well lose out on competitive pricing.

*Id.* at 14.

Since *Brown-Forman v. New York*, the Court again has had opportunity to review the issue of price affirmation and again found it in violation of the commerce clause. In *Healy v. Beer Institute*,<sup>88</sup> the Court reexamined the Connecticut affirmation law. The law, originally struck down in *United States Brewers Ass'n v. Healy*,<sup>89</sup> was amended with the intent of correcting its constitutional infirmities;<sup>90</sup> the new law mandated simultaneous affirmation.<sup>91</sup> The district court upheld the amended law,<sup>92</sup> but the circuit court struck it down.<sup>93</sup> On appeal, the Supreme Court affirmed the Second Circuit, using the opportunity to both clarify and expand its original *Brown-Forman* decision.

The Court found,

that the Connecticut statute has the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State. Moreover, the practical effect of this affirmation law, in conjunction with the many other beer pricing and affirmation laws . . . is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude.<sup>94</sup>

<sup>88</sup> 491 U.S. \_\_\_\_ , 109 S. Ct. 2491 (1989) (Scalia, J., concurring in part and concurring in judgment; Rehnquist, C.J., dissenting) [hereinafter *Healy II* (U.S.)].

<sup>89</sup> 692 F.2d 275 (1982), *aff'd without opinion*, 464 U.S. 909 (1983) [hereinafter *Healy I*]. See *supra* notes 56-60 and accompanying text.

<sup>90</sup> See *Healy II* (U.S.), 491 U.S. at \_\_\_\_ , 109 S. Ct. at 2495; *Healy v. Beer Institute*, 849 F.2d 753, 755-56 (2d Cir. 1988) [hereinafter *Healy II* (2d Cir.)].

<sup>91</sup> *Healy II* (U.S.), 491 U.S. \_\_\_\_ , 109 S. Ct. at 2495 (1989).

<sup>92</sup> *U.S. Brewers Ass'n v. Healy*, 669 F. Supp. 543 (D. Conn. 1987).

<sup>93</sup> See *Healy II* (2d Cir.), 849 F.2d 753.

<sup>94</sup> *Healy II* (U.S.), 109 S. Ct. at 2500. The Court went on to note that: [t]he short-circuiting of normal pricing decisions based on local market conditions would be carried to a national scale if and when a significant group of States enacted contemporaneous affirmation statutes that linked in-state prices to the lowest price in any State in the country. This kind of potential regional and even national regulation of the pricing mechanism for goods is reserved by the Commerce Clause to the Federal Government and may not be accomplished piecemeal through the extraterritorial reach of individual state statutes.

*Id.* at 2501. The Court also found the law in violation of the commerce clause in that it discriminated against "brewers and shippers of beer engaged in interstate commerce . . . who sell both in Connecticut *and* in at least one border State or out-of-state shippers who sell both in Connecticut *and* in at least one border State." *Id.* The Court ruled that "[t]his discriminatory treatment establishes a substantial disincentive for companies doing business in Connecticut to engage in interstate commerce, essentially penalizing Connecticut brewers if they seek border-state markets and out-of-state shippers if they choose to sell both in Connecticut and in a border State." *Id.* at 2501-2.

In an effort to insure that the issue of price affirmation does not reappear before the Court, the majority wrote:

In the interest of removing any lingering uncertainty about the constitutional validity of affirmation statutes and of avoiding further litigation on the subject of liquor-price affirmation, we recognize today what was all but determined in *Brown-Forman*: to the extent that *Seagram* holds that retrospective affirmation statutes do not facially violate the Commerce Clause, it is no longer good law.<sup>95</sup>

The lone dissent from the general move away from affirmation statutes has come from the Sixth Circuit. Overturning the district court,<sup>96</sup> the appellate bench upheld the validity of the Tennessee simultaneous statute.<sup>97</sup> Departing from the "practical effect" analysis used by the court below as well as by other courts that have examined this issue,<sup>98</sup> the court of appeals focused on the specifics

<sup>95</sup> *Id.* at 2502.

Justice Scalia, in his concurring opinion, held that the Connecticut statute was facially invalid on the basis of discrimination against interstate commerce and "that today's decision requires us to overrule [*Seagram*]," but refrained from "applying the more expansive analysis which finds the law unconstitutional because it regulates or controls beer pricing in the surrounding States . . . since this principle is both dubious and unnecessary to decide the present case." *Id.* at 2503-4.

In a dissenting opinion joined by Justices Stevens and O'Connor, Chief Justice Rehnquist observed: "Neither the parties nor the Court point to any concrete evidence that the Connecticut regulation will have any effect on the beer prices charged in other States, much less a constitutionally impermissible one." *Id.* at 2505. Citing to *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980), *see infra* note 110, and *Craig v. Boren*, 429 U.S. 190 (1976), *see infra* note 109, the Chief Justice wrote: "Even the most restrictive view of the Twenty-First Amendment should validate Connecticut's efforts to obtain from interstate brewers prices for its beer drinkers which are as favorable as the prices which those brewers charge in neighboring States." *Id.* at 2506.

<sup>96</sup> *Brown-Forman Corp. v. Tennessee Alcoholic Beverage Comm'n*, No. 3-86-0926 (M.D. Tenn. June 30, 1987) (available on WESTLAW, 1987 WL 30303). "What is clear to this Court is that the 'practical effect' of Tennessee's affirmation statute . . . is to control the prices of Brown-Forman products in other states. It is clear that if a liquor distiller . . . desires to raise its prices in Tennessee, it must raise its prices first in every other state in which the product is sold. Tennessee's affirmation statute works to deny customers in other states the benefits of a free competitive market." *Id.* at 11.

<sup>97</sup> *Brown-Forman Corp. v. Tennessee Alcoholic Beverage Comm'n*, 860 F.2d 1354 (6th Cir. 1988), *vacated and remanded*, 491 U.S. \_\_\_\_ , 109 S. Ct. 3208 (1989). Subsequently, the Sixth Circuit remanded the case to the district court for reconsideration in light of *Healy II* (U.S.), *Brown-Forman Corp. v. Tennessee Alcoholic Beverage Comm'n*, 883 F.2d 504 (6th Cir. 1989). The original order against the Tennessee Statute was reinstated by the district court. *Brown-Forman Corp. v. Tennessee Alcoholic Beverage Comm'n*, No. 3-86-0926 (M.D. Tenn. Nov. 6, 1989).

<sup>98</sup> *See, e.g., Brown-Forman v. New York*, 476 U.S. at 583; *Healy II* (2nd Cir.), 849 F.2d at 758-59; *Brown-Forman v. South Carolina*, 643 F. Supp. at 949; *Brown-Forman v. New Mexico*, 672 F. Supp. at 1386; *Brown-Forman v. Delaware*, No. 87-30 LON, slip op. at 7.



of the law struck down in *Brown-Forman v. New York*,<sup>99</sup> quantification of market distortions,<sup>100</sup> and the continued viability of *Seagram*.<sup>101</sup> However, the Sixth Circuit's reasoning failed to move the Supreme Court. On appeal, the Court granted certiorari and, clearly indicating the direction in which the ruling should be modified, vacated the judgment and remanded the case to the circuit court for further consideration in light of the Court's recent *Healy II* ruling.<sup>102</sup> Notwithstanding this single exception, the general trend appears to be "that the reasoning of the *Brown-Forman Distillers* opinion has closed the coffin on price affirmation laws and left the burial to the district courts."<sup>103</sup>

<sup>99</sup> See *Brown-Forman v. Tennessee*, 860 F.2d at 1359.

<sup>100</sup> See *id.* at 1358. "The evidence presented by *Brown-Forman* did not quantify the market distortions attributed to the Tennessee statute. In terms of dollars and cents, . . . the practical effect . . . on *Brown-Forman's* bottom line and . . . the pocketbooks of consumers . . . remain[s] unknown." Such an exact finding of market distortions has not been required by the Supreme Court or any other court that has had this issue before it. In fact, it may be impossible to quantify these market distortions.

Price affirmation laws or policies have been utilized for several decades in thirty-nine states. Decoupling the effect of price affirmation empirically requires accurate information in each state about demand, price elasticity of demand, and marginal costs before and after price affirmation was imposed.

We submit this is an enormous, if not impossible, empirical undertaking.

Pustay & Zardkoohi, *supra* note 83, at 672-73 (citation omitted).

<sup>101</sup> See *id.* at 1362 (quoting Regan, *Siamese Essays*, 85 MICH. L. REV. 1865, at 1905) ("[T]he type of retrospective affirmation laws upheld in *Seagram* 'do not violate the extraterritoriality principle.'"). The court failed to recognize that the simultaneous Tennessee statute is more closely related to the prospective statute of *Brown-Forman v. New York* than the retrospective statute of *Seagram*. See *supra* notes 33-35.

<sup>102</sup> See *Brown-Forman Corp. v. Tennessee Alcoholic Beverage Control Comm'n*, 491 U.S. \_\_\_\_\_, 109 S. Ct. 3208 (1989).

<sup>103</sup> *Brown-Forman v. New Mexico*, 672 F. Supp. at 1385. The *Brown-Forman* decision referred to is the New York decision. Florida's affirmation statute (FLA. STAT. ANN. § 565.15 (West 1986)) was held facially unconstitutional in *Brown-Forman Corp. v. Bosanko*, No. 87-40321-MP, slip op. (N.D. Fla. Sept. 28, 1989). The Kansas affirmation statute (KAN. STAT. ANN. § 41-1112 (1986)) was "rendered unconstitutional by the United States Supreme Court's action in striking down similar (if not identical) New York law." 86-114 Op. Att'y Gen. at 5 (August 7, 1986). Nebraska's statute, (NEB. REV. STAT. § 53-170.02 (1984)), "[b]ased upon . . . foregoing court decisions . . . is unconstitutional." 87044 Op. Att'y Gen. at 3 (April 2, 1987). New Jersey Alcoholic Beverage Control Bulletin 2447 (October 20, 1986) cited an Attorney General's opinion and stated that the state's affirmation statute (N.J. ADMIN. CODE tit. 13, § 2-24.5(a)(3) (1986)) would no longer be enforced. Maryland administratively had declined to enforce their regulation (03.02.01.13). The Massachusetts Alcoholic Beverage Control Commission, in a press release of September 26, 1986, stated: "Because [MASS. ANN. LAWS ch. 138, § 25D] is virtually identical to the invalidated New York statute, the Commission will . . . no longer enforce those provisions." A private letter from the Rhode Island Liquor Control Administration (August 4, 1986) stated that the state's affirmation statute (R.I. GEN. LAWS § 3-6-14.1 (1987)) is "constitutionally invalid." The Minnesota statute (MINN. STAT. ANN. § 340A.307(3) (West 1972)) was repealed (1987

### III. THE DES MOINES WARRANTY VIS-A-VIS THE COMMERCE CLAUSE

As the coffin closes upon price affirmation statutes, the continued viability of the Des Moines Warranty is called into question. Is the Warranty equally violative of the commerce clause? Is it

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Minn. Laws 311). The Hawaii statute (HAW. REV. STAT. § 281-122 (1985)) was likewise repealed (1987 Haw. Sess. Laws 314).

As of October 1989, the remaining open states with affirmation laws are: Arizona (ARIZ. REV. STAT. ANN. § 4-253 (1987)); California (CAL. BUS. & PROF. CODE § 23673 (West 1985)); Georgia (Rule 560-2-3-.47); Louisiana (LA. REV. STAT. ANN. § 364(G) (West 1989)); Nevada (NEV. REV. STAT. § 369.435 (1987)); Oklahoma (OKLA. STAT. ANN. tit. 37, § 536.1 (West Supp. I 1989)); and South Dakota (S.D. CODIFIED LAWS ANN. § 35-4-95 (1986)).

There also remains the issue of the federal affirmation law, which is entitled the Department of Defense Armed Services Military Club and Package Store Regulation. It provides: "[T]he purchase of all alcoholic beverages for resale at any camp, post, station base or other DOD installation within the United States shall be in such a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other considered factors." 32 C.F.R. § 261.4 (1986). These purchases must be made from "the most competitive source, price and other factors considered." 10 U.S.C. § 2488(a)(1) (1987). Military bases are permitted to purchase liquor from sources, usually suppliers, located outside the state in which the base is situated. In an effort to prevent diversion of this liquor to the state market, diversion which took place as a result of the lower price resulting from the avoidance of the distributor's markup, North Dakota enacted a regulation requiring an identification label "on each individual item that shall be for consumption within the federal enclave exclusively." N.D. ADMIN. CODE § 84-02-01-05(7) (1986). Purchases made from North Dakota distributors were exempt from the labeling requirement. The military bases in North Dakota are not federal jurisdictions. Estimating that the regulation would add \$200,000 to \$250,000 to the cost of liquor purchased each year, the federal government brought suit asserting that the regulation conflicted with the federal law and was therefore invalid by virtue of the supremacy clause. *United States v. North Dakota*, 675 F. Supp. 555 (D.N.D. 1987). At the trial level, acting upon a motion for summary judgment, the court held for the state, ruling that the regulation did not prevent the base facility from seeking the most advantageous price. *Id.* at 557. Additionally, supporting the state's twenty-first amendment right to regulate the alcoholic beverage industry within its borders, the court ruled that:

When the State's significant interest in preventing unlawful diversion of alcoholic beverages into its stream of commerce is measured against the federal government's interest in keeping its costs down, it is clear that the federal government's interest is not of the same stature as the goals defined by the State.

*Id.* at 559.

On appeal to the Eighth Circuit, the trial court was reversed, it having been determined that "the balancing of state and federal interests would lead us to conclude that the State's regulations are pre-empted by federal law." *United States v. North Dakota*, 856 F.2d 1107, at 1112 (8th Cir. 1988), *cert. granted*, 58 U.S.L.W. 3033 (U.S. August 1, 1989) (No. 88-926). While the state has the authority to prevent unlawful diversion of liquor to its stream of commerce, "[s]uch regulation must not extend beyond what is reasonably necessary to protect the State's interest . . ." *Id.* at 1114 (citation omitted). The Supreme Court will be the final arbiter of this dispute.

even fair to compare the two systems in light of the different manners of enactment? Does the twenty-first amendment protect the state monopolies it fostered in a way that affirmation statutes are not protected? These issues are addressed below.

### A. *Affirmation Statutes and the Des Moines Warranty*

On at least two occasions, the courts have indicated that affirmation statutes and the Des Moines Warranty are similar in constitutional posture; that is, the distinction between a statute and an administrative contract requirement is not determinative. First, in the *Seagram* decision, the Court noted that "the regulatory procedure followed by New York is comparable to that practiced by those States . . . in which liquor is sold by the State itself and not by private enterprise."<sup>104</sup> Second, in *Brown-Forman v. South Carolina*,<sup>105</sup> the district court noted the similarities between affirmation statutes and the Des Moines Warranty: "Eighteen states, termed 'control states,' purchase all alcoholic beverages that will be sold within their borders. The control states' purchase agreements with producers of alcoholic beverages contain price warranties that, in effect, are like South Carolina's Affirmation Statute."<sup>106</sup> The court continued: "The common element of these statutes and contract provisions is that all require a producer of alcoholic beverages to affirm that its prices in that state are no higher than in any other state."<sup>107</sup> From these statements it would appear valid to compare price affirmation statutes and the Des Moines Warranty, and to scrutinize the latter under the same test as the former.

### B. *The Twenty-First Amendment*

Whether the twenty-first amendment treats the Des Moines Warranty differently from state affirmation statutes is a bit more difficult to answer. However, it would appear that the twenty-first

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<sup>104</sup> Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 43 (1966).

<sup>105</sup> 643 F. Supp. 943 (D.S.C. 1986).

<sup>106</sup> *Id.* at 947.

<sup>107</sup> *Id.* See also Pennsylvania Brief, *supra* note 37, at 47-48 (Price affirmation statutes and the Warranty are, in effect, identical); Jurisdictional Statement at 14, Healy v. Beer Inst., 491 U.S. \_\_\_\_ , 109 S. Ct. 2491 (1989) ("[A]ffirmation laws are still being enforced or defended in court in seven license states, and it exists in contract requirements in eighteen control states.") (footnotes omitted) [hereinafter Jurisdictional Statement]. In *Economic Analysis*, *supra* note 83, no differentiation was made between the interstate effect of affirmation statutes and the Warranty, nor was one made in *Liquor Affirmation Practices*, *supra* note 144.

amendment will not protect the Des Moines Warranty anymore than it did the various price affirmation statutes. Although early decisions regarding the scope of the twenty-first amendment recognized it as granting "plenary power on the States to regulate the liquor trade within their boundaries,"<sup>108</sup> the Court now sees the amendment as being circumscribed by other provisions of the Constitution.<sup>109</sup> Additionally, the Court has recognized that the liquor industry is not exempt from federal controls based on the commerce clause such as the Sherman Antitrust Act.<sup>110</sup> Rather, the twenty-first amendment is seen as granting to the states the right to dictate what, if any, alcoholic beverages can be imported into the state and who is to be permitted to import and sell those beverages once they arrive in the state where they will be consumed.<sup>111</sup> The twenty-first amendment will protect a state's right to maintain a monopoly upon liquor importation and sale, but that monopoly is not permitted to violate constitutional and statutory provisions to which other monopolies must adhere.

However, it is not enough to say that, whereas the Des Moines Warranty is similar to price affirmation statutes, it must automatically be violative of the commerce clause because the two systems

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<sup>108</sup> 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 352 (O'Connor, J., dissenting) (1987). See, e.g., *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936); *Carter v. Virginia*, 321 U.S. 131 (1944).

<sup>109</sup> See 324 *Liquor*, 479 U.S. at 346. See, e.g., *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (establishment clause); *Craig v. Boren*, 429 U.S. 190, 204-209 (1976) (equal protection clause); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (procedural due process); *Dep't of Revenue v. James Beam Co.*, 377 U.S. 341, 345-46 (1964) (export-import clause); *Bacchus Imports, LTD. v. Dias*, 468 U.S. 263 (1984) (commerce clause).

<sup>110</sup> See, e.g., 324 *Liquor*, 479 U.S. 335 (New York minimum retail price mark-up statute found to violate Sherman Antitrust Act, 15 U.S.C.A. § 1 et. seq (1898)); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (retail price maintenance structure in violation of Sherman Antitrust Act); *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945) (suppliers, wholesalers, and retailers conspiring to fix prices in Colorado violated Sherman Antitrust Act).

<sup>111</sup> 324 *Liquor*, 479 U.S. at 346. This is not to say that a state can exert controls over alcoholic beverages passing through the state but not destined for consumption therein beyond reasonable measures to prevent diversion to the state market. See *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (liquors and wines paid for by departing passengers at New York Port Authority but delivered to purchasers at foreign point of destination not controlled by New York liquor control law). See also *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938) (state may not prohibit importation of alcoholic beverages into national park over which the state has ceded exclusive sovereignty to the federal government); *United States v. State Tax Comm'n of Mississippi*, 412 U.S. 363 (1973) (state may not tax or otherwise regulate alcoholic beverages bought by military directly from suppliers for sale on military bases that are exclusive federal jurisdictions).

are not identical in the way they must be analyzed under the commerce clause.

### C. *The State Market Participant Doctrine*

Traditionally, the commerce clause has been read to prevent states from discriminating against foreign interest to the benefit of the residents of that state. This has been held to violate the commerce clause per se. In *City of Philadelphia v. New Jersey*,<sup>112</sup> the Court examined a New Jersey statute that prohibited the shipment of foreign waste into New Jersey's landfills while allowing those landfills to continue to receive waste produced in New Jersey. The Court found that the law violated the commerce clause because it isolated one state in the stream of commerce from a problem shared by all states.<sup>113</sup> The commerce clause is meant to prevent the economic balkanization of the several states. As Justice Cardozo stated, "the peoples of the several states must sink or swim together [because] in the long run prosperity and salvation are in union and not division."<sup>114</sup>

However, the courts have created an exception to this rule in the state market participant doctrine. This doctrine holds that when a state actively participates in, rather than merely regulates, a market, the state takes on the constitutional posture of a private party, thus shielding it from commerce clause scrutiny and allowing the state to discriminate against interstate commerce to the same degree allowed a private party. This doctrine is seen most clearly in *Hughes v. Alexandria Scrap*,<sup>115</sup> *Reeves v. Stake*,<sup>116</sup> and *White v. Massachusetts Council of Construction Employers*.<sup>117</sup>

In *Hughes v. Alexandria Scrap*, the Maryland legislature passed a law offering a bounty on abandoned cars that were brought to processors for reduction into scrap metal and forwarded to steel

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<sup>112</sup> 437 U.S. 617 (1978).

<sup>113</sup> *Id.* at 629.

<sup>114</sup> *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). *See also* *Hughes v. Alexandria Scrap*, 426 U.S. 794, 807 (footnote omitted) (1976) ("The [Commerce] Clause was designed in part to prevent trade barriers that had undermined efforts of the fledgling States to form a cohesive whole following their victory in the Revolution."); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987) ("The principle objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce.").

<sup>115</sup> 426 U.S. 794 (1976).

<sup>116</sup> 447 U.S. 429 (1980).

<sup>117</sup> 460 U.S. 204 (1983).

mills for recycling.<sup>118</sup> A Virginia processor brought suit seeking to have the law declared unconstitutional as a burden on interstate trade and violative of the commerce clause.<sup>119</sup> However, after reciting the per se test outlined in *Philadelphia v. New Jersey*,<sup>120</sup> and the balancing test set forth in *Pike v. Bruce Church, Inc.*,<sup>121</sup> the Court concluded that these did not apply because Maryland was participating in the market rather than regulating it. The Court noted that “Maryland has not sought to prohibit the flow of hulks, nor to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price.”<sup>122</sup> Acknowledging the novelty of this situation, the Court continued:

[U]ntil today the Court has not been asked to hold that the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State.

We do not believe the Commerce Clause was intended to require independent justification for such action.<sup>123</sup>

*Reeves v. Stake* dealt with disposition of the output of a South Dakota cement plant that was owned by the state. In 1978, anticipating a shortage of cement, the state cement commission declared that it would fill orders from South Dakota customers first, and foreign orders would be filled on a first-come, first-served basis.<sup>124</sup> Reeves, a long time Wyoming customer of the plant, was cut off and suffered severe economic losses.<sup>125</sup> He maintained that the restrictions favoring South Dakota customers were protectionist and in violation of the commerce clause.<sup>126</sup> However, the Court

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<sup>118</sup> *Hughes*, 426 U.S. at 801. In-state scrap metal processors could receive a bounty after production of an indemnity agreement from the person who had supplied the car to the processor. Out-of-state processors had stricter documentation requirements. This had the effect of causing more cars to be taken to Maryland processors who could qualify for the bounty more easily and who were therefore more likely to compensate their suppliers.

<sup>119</sup> *Id.* at 801-02.

<sup>120</sup> 437 U.S. 617 (1978).

<sup>121</sup> 397 U.S. 137 (1970).

<sup>122</sup> *Hughes*, 426 U.S. at 806.

<sup>123</sup> *Id.* at 808-09.

<sup>124</sup> *Reeves*, 447 U.S. at 431-33. Built in 1920, the plant was meant to supply the cement needs of state public works projects with the remainder available for commercial purchase by citizens of South Dakota. Within a short time, the plant's production exceeded in-state need, and out-of-state purchasers began to buy from the plant.

<sup>125</sup> *Id.* at 433.

<sup>126</sup> *Id.*

noted "the long recognized right of a trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."<sup>127</sup> Furthermore, "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause."<sup>128</sup>

In *White v. Massachusetts Construction Employers*, the mayor of Boston, Massachusetts, issued an executive order requiring that, in all construction projects funded wholly or partially by the city, one half of the work force had to be bona fide residents of Boston.<sup>129</sup> The Court determined that, in this case, Boston was acting as a market participant in that it expended its own tax revenues and the employees affected were, at least figuratively, employees of the city.<sup>130</sup> The city was seeking employees for city projects, though the various contractors overseeing the construction did the actual hiring. Thus, the city could require that at least one half of the Boston tax revenues used to pay for the projects be returned to Bostonians in the form of wages.

The common element in these cases is that the state has entered a market and is spending its own money while competing with other entities for the goods of that market.<sup>131</sup> Doubtless, a certain number of cars were processed into scrap outside of Maryland, cement was produced elsewhere than the South Dakota plant, and construction workers were hired without the largess of the city of Boston.

#### D. *The Monopoly Exception to the State Market Participant Doctrine*

The potential for using the state market participant doctrine to shield control states from commerce clause scrutiny is obvious.<sup>132</sup>

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<sup>127</sup> *Id.* at 438-39 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

<sup>128</sup> *Id.* at 439.

<sup>129</sup> *White*, 460 U.S. at 205-06.

<sup>130</sup> *Id.* at 211 n.7. Note that this shielding from commerce clause scrutiny did not arise simply as the result of a contractual agreement between the city and the contractors. See *Shell Oil v. City of Santa Monica*, 830 F.2d 1052, 1057 (9th Cir. 1987) (citing to *South-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984)) ("[C]ontractual privity does not insulate a state or local body from Commerce Clause scrutiny.").

<sup>131</sup> Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1193 (1986).

<sup>132</sup> See Jurisdictional Statement, *supra* note 107, at 16. "Moreover, when the state acts

The state is making purchases from commercial entities, viz., liquor suppliers, and is using its own revenues to pay for the products ordered. However, on closer analysis, the protection offered control state monopolies by the state market participant doctrine fails.

The Ninth Circuit has identified an exception to the state market participant doctrine for state controlled monopolies. In *Western Oil & Gas Association v. Cory*,<sup>133</sup> the Ninth Circuit analyzed a California statute that specified manners of calculating rent for tidal lands over which certain oil companies operated pipelines.<sup>134</sup> Various oil producers and processors brought suit to have these rents declared an unconstitutional burden on interstate commerce.<sup>135</sup> The state maintained that its actions were shielded from commerce clause scrutiny because it was participating in the market by renting out those lands, and competing with other property holders for leases.<sup>136</sup> While acknowledging the existence of the state market participant doctrine, citing to *White* and *Reeves*,<sup>137</sup> the court held that the doctrine did not apply in this case.<sup>138</sup> California was not a true market participant as it "owns and controls tide lands and submerged lands in its sovereign capacity."<sup>139</sup> Those seeking to enter the market as lessees cannot "shop around" as there are "no other competitor[s] to which they can go."<sup>140</sup> The court noted that the state commission had a complete monopoly and that the companies involved had no choice but to deal with the state.<sup>141</sup> The court concluded: "This control over the channels of interstate commerce permits the State to erect substantial impediments to the free flow of commerce."<sup>142</sup>

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as a market participant, it is free to favor its own citizens. Affirmation is mandated in the control states. To outlaw an even-handed and narrowly drafted affirmation law in license states, merely because the state is not a market participant, emphasizes form over substance." (citations omitted).

<sup>133</sup> 726 F.2d 1340 (9th Cir. 1984), *aff'd without opinion*, 471 U.S. 81 (1985).

<sup>134</sup> *Id.* at 1341-42. The oil in transit from these pipelines largely was the product of foreign wells, and the majority of it was destined for interstate commerce.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1343.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* While alternatives were available, such as the construction of new pipelines over land not owned by the state, the economic feasibility of those alternatives was insufficient to persuade the court. Although Western Oil could have entirely abandoned the California market, thereby completely avoiding the issue, this is not mentioned as an option.



A similar situation arose in *Shell Oil v. City of Santa Monica*,<sup>143</sup> in which the city attempted to alter the formula for setting rents for pipelines under city-owned property. Santa Monica, California, argued that it was selling a commodity (easements) and competing with other parties in supplying Shell Oil's needs.<sup>144</sup> However, following *Western Oil*, the court concluded that Santa Monica was not a market participant due to its monopolistic control of the channels of interstate commerce.<sup>145</sup>

Drawing the line between state regulation and state market participation is an exercise full of pitfalls. The Supreme Court has not enumerated a test for making this distinction.<sup>146</sup> However, it appears clear that when a state holds a monopoly position in a market, the state need not engage in the usual burdens of proprietorship,<sup>147</sup> and so should not be looked upon as a participant. The state's decisions and actions are binding upon all within the state's jurisdiction, which is the very essence of regulation.<sup>148</sup> In both *Western Oil* and *Shell*, the market is entirely dependent upon the whim of state action. By contrast, in true market participant cases, the market is not dependent upon the actions of the state.<sup>149</sup>

This exception to the state market participant doctrine is directly applicable to the monopoly maintained by control states over the alcoholic beverage industry. In each case, the monopoly has constitutional underpinnings: state sovereignty in the tenth amend-

<sup>143</sup> 830 F.2d 1052 (9th Cir. 1987).

<sup>144</sup> *Id.* at 1057 ("The city controls easements in the area beneath city streets, a commodity with value that it may sell to Shell. The city thus competes with other entities that also might supply Shell's needs.").

<sup>145</sup> *Id.* at 1057-58.

<sup>146</sup> See Comment, *A Proposed Model of the Sovereign/Proprietary Distinction*, 133 U. PA. L. REV. 661, 661-64 (1985) [hereinafter *Proposed Model*]. "The Supreme Court's use of the sovereign/proprietary distinction has been ad hoc and confusing." *Id.* at 664 (footnote omitted).

<sup>147</sup> See *supra* note 128 and accompanying text.

<sup>148</sup> See *Proposed Model*, *supra* note 146, at 680 ("[I]f everyone within the jurisdiction of the governmental entity must comply with the regulation or engage in the transaction the governmental action is coercive.").

<sup>149</sup> See *id.* ("[I]f individuals have a *genuine* choice about whether to engage in the governmental transaction, the government is not acting coercively.") (emphasis added); see also Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1127 (1980).

When a state prescribes a general rule of private conduct with respect to purchasing, selling, or employment, it affects the market in a way that is often distinguishable in practice if not in principle from the way it affects the market when it acts pursuant to a self-imposed rule of conduct as a purchaser, seller, or employer.

ment and the "tacit postulates"<sup>150</sup> of the Constitution, and the state liquor monopoly in the twenty-first amendment. In each case, the commercial operation has no choice but to deal with the monopoly-holding state if it seeks to deal with the market within that state.<sup>151</sup> The state is not a participant in the market; the state may decide how to operate without regard to market forces, which is antithetical to the central concern of an entity participating in a market. Without the defense of the state market participant doctrine, the state's actions must bear the scrutiny of the commerce clause. The liquor pricing policies of the control states must not interfere with interstate commerce.

### CONCLUSION

#### THE COMMERCE CLAUSE AND THE DES MOINES WARRANTY

The Court in *Reeves* noted that when a state enters the marketplace as a participant, its activities are "burdened with the same restrictions imposed on private market participants."<sup>152</sup> But when there is no choice for private market participants but to do business on the terms of the state, the state is not a market participant and is bound by the constraints of the commerce clause.<sup>153</sup> In market participant cases, private parties have the option of not dealing with the state. Coercive action, on the other hand, requires private parties to conform to state requirements if they seek to participate in the market at all.<sup>154</sup> Maryland did not require that all Maryland registered cars be processed in-state, South Dakota firms were free to look elsewhere for supplies of cement, and Boston contractors were under no obligation to bid on or accept city contracts. The Des Moines Warranty, on the other hand, is coercive because suppliers are barred absolutely from the state market if they do

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<sup>150</sup> See *Nevada v. Hall*, 440 U.S. 410, 433 (Rehnquist, J., dissenting) (1979) ("Any document—particularly a constitution—is built on certain postulates or assumptions . . . . The tacit postulates yielded by that ordering are as much engrained in the fabric of the document as its express provisions.").

<sup>151</sup> See *Proposed Model*, *supra* note 146, at 680 ("The most coercive governmental activities are those . . . to which no alternative is available.").

<sup>152</sup> *Reeves v. Stake*, 447 U.S. 429, 439 (1980).

<sup>153</sup> See *supra* notes 134-50 and accompanying text.

<sup>154</sup> See *supra* notes 140-50; see also *South-Cent. Timber Dev. v. Wunnicke*, 467 U.S. 82, 95-96 (1984) ("[*Reeves*] strongly endorse[d] the right of a State to deal with whomever it chooses when it participates in the market, [but] it did not . . . sanction the imposition of any terms that the State might desire.").

not comply with its provisions.<sup>155</sup> For this reason, the actions of the state are not shielded from commerce clause scrutiny by the state market participant doctrine. The purpose of the Warranty is to obtain for residents of the control states the benefits of interstate competition.<sup>156</sup> This is a protective activity meant to bypass the local market and its controls on prices. Such protective actions have been struck down when they interfere with interstate commerce.<sup>157</sup> The Warranty seeks to prevent the natural price controls imposed by market forces from taking place by requiring a de facto national price floor. State affirmation statutes that acted to create such a price floor were found to violate the commerce clause in *Brown-Forman v. New York*<sup>158</sup> and subsequent cases.<sup>159</sup> The Des Moines Warranty likewise creates a price floor and in doing so violates the commerce clause.

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<sup>155</sup> In *Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340 (9th Cir. 1984), *aff'd without opinion*, 471 U.S. 81 (1985), and *Shell Oil v. City of Santa Monica*, 830 F.2d 1052 (9th Cir. 1987), the Ninth Circuit noted that while there were alternatives available to dealing with the state, they were not reasonable and did not bring the state within market participant protection. *Western Oil*, 726 F.2d at 1343, *Shell Oil*, 830 F.2d at 1057-58. The 21st amendment precludes the existence of any alternative means of reaching the state alcoholic beverage market. The Warranty, therefore, must be further removed than the state actions in *Western Oil* and *Shell Oil* from market participant doctrine protection.

<sup>156</sup> See *supra* note 13 and accompanying text.

<sup>157</sup> See *supra* note 76 and accompanying text.

<sup>158</sup> *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986).

<sup>159</sup> See *supra* notes 63-103 and accompanying text. Notably, the Wyoming Warranty presents the same potential for conflicting regulations as did the New York law struck down in *Brown-Forman v. New York*. See *supra* notes 66-67. The Wyoming Liquor Commission (WLC) purchase order contains a provision requiring that the Commission be offered the same allowances and discounts that are offered to other purchasers. It then provides:

If and when the vendor offers to the Commission a special cash or commodity allowance, post-off or discount from the quoted price, upon conditions unacceptable to the Commission by reason of the Commission's policy and/or regulation, then and in that event, the vendor shall not be relieved from the aforesaid guarantee if and when the sales of the same brands offered to the Commission are sold or offered by the vendor upon the same unacceptable conditions to any purchaser, dealer, agent or agency anywhere in the United States of America.

The WLC can burden effectively the supplier's freedom to use a competitive discount or other marketing program outside Wyoming by refusing to allow it in Wyoming. Should the supplier use the program in another state, the WLC would view the program as a reduction in the floor price and demand an equal price. The supplier would find itself in a Hobson's choice of terminating the program of which Wyoming disapproves or lowering the price to the WLC and in so doing violating all other affirmations and warranties. Similar language appears on the Mississippi State Tax Commission—Alcoholic Beverage Control Division Standard Quotation and Specification Form at ¶ 6.

Unfortunately, the Court was unwilling to use the opportunity presented by *Healy II*<sup>160</sup> to declare all affirmation practices, whether statutory or contractual, unconstitutional.<sup>161</sup> As a result, the liquor trade in the eighteen control states shall remain constrained by protectionist regulations that violate the commerce clause. The possibility of additional states moving to the control group will remain open, a not entirely radical idea in this age of neo-prohibition, thereby exacerbating the restraint of interstate commerce. The time is well past due for a suit to settle the constitutionality of the Des Moines Warranty.

*Thomas E. Rutledge*

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<sup>160</sup> *Healy v. Beer Inst.*, 491 U.S. \_\_\_\_ , 109 S. Ct. 2491 (1989) [hereinafter *Healy II* (U.S.)].

<sup>161</sup> The Commonwealth of Pennsylvania, in an Amicus Curiae brief filed regarding *Healy II* (U.S.), suggested to the Court that its decision extend to include all affirmation regardless of form. See Pennsylvania Amicus Curiae Brief at 9, *Healy v. Beer Inst.*, 491 U.S. \_\_\_\_ , 109 S. Ct. 2491 (1989) (“It is essential . . . that the Court’s consideration of this matter embrace not just affirmation *statutes*, but all affirmation practices.”) (emphasis in original).

