SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 58 | Issue 4 Article 16

2008

Dormant Commerce Clause Limits on the Regulation of Big Boxes and Chain Stores: An Update

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PANEL 3: STATE AND LOCAL EFFORTS TO RESTRICT OR PROHIBIT SELECT CORPORATIONS FROM OPERATING WITHIN THEIR BORDERS

DORMANT COMMERCE CLAUSE LIMITS ON THE REGULATION OF BIG BOXES AND CHAIN STORES: AN UPDATE

Brannon P. Denning[†]

INTRODUCTION

Controlling "sprawl" has become the prime directive for local land use planners. For many, nothing exemplifies sprawl, suburbia, and conformist consumerism quite like big box retailers, such as Wal-Mart. A few years ago, cities and municipalities began to pass "size-cap" ordinances aimed at keeping such stores out of their communities, or at least mitigating their impact by limiting their retail footprint. In addition, some communities—especially those that are tourist destinations, historically significant, or simply have a unique

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atmosphere residents wish to preserve—are taking aim at "formula retail stores," chain stores in other words, sometimes prohibiting them altogether.

A previous article I co-authored pointed out that while there are legitimate reasons to regulate big box retailers and, perhaps, to limit chain stores, many cities were enacting size-cap ordinances to protect existing businesses from competition.[1] The economic protectionism motivating these ordinances rendered them vulnerable to challenge under the dormant Commerce Clause doctrine (DCCD)—the limits on state and local regulation of interstate commerce inferred from the constitutional grant of power over that commerce to Congress.[2] At the time of its writing, the article discussed only two cases—one state, one federal—in which DCCD challenges to local retail restrictions had been challenged; the plaintiffs lost in both.[3] Since that article's appearance, two more cases have been decided; the results were split, with the DCCD claim rejected in one case, but sustained in the other.

This Article revisits the issue in light of these two recent cases. In Part I, I offer a brief synopsis of the land use restrictions at issue, as well as a summary of the DCCD itself. The two cases are described and the reasoning of the courts in both is critiqued in Part II. In Part III, I speculate why even blatantly protectionist ordinances seem to be resistant to DCCD challenges. In doing so, I draw on Richard Schragger's recent work on the role of cities and counties in the American "common market"[4] as well as James Whitman's fascinating contrast between "consumerist" and "producerist" regulation in the U.S. and Europe.[5] A brief conclusion, including speculation on the future of DCCD challenges to land use restrictions, follows.

I. LAND USE RESTRICTIONS ON RETAIL STORES AND THE DORMANT COMMERCE CLAUSE DOCTRINE: AN OVERVIEW

A. Land Use Restrictions on Retail Establishments

While there are a number of ways that local governments use land use controls to curb or restrict growth, including the growth of retail

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[1] Brannon P. Denning & Rachel M. Lary, *Retail Store Size-Cap Ordinances and the Dormant Commerce Clause Doctrine*, 37 URB. LAW. 907 (2005).

[2] *See infra* Part I.B.

[3] Denning & Lary, *supra* note 1, at 942–53 (discussing the cases).

[4] Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091 (2008).

[5] James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 YALE L.J. 340 (2007).

establishments,[6] I am primarily concerned with those that regulate retail stores directly. *Size-cap ordinances* restrict the size of retail establishments, usually by establishing a maximum footprint that retail stores can occupy. Such ordinance usually target so-called "big box" or "category killer" stores, like Wal-Mart, Home Depot, or Best Buy, that are common to suburban areas and are usually constructed as large boxes with large parking lots. More recent big box ordinances eschew simple caps on store size in favor of requiring big box stores to obtain special use permits contingent on companies taking steps to ameliorate aesthetic and environmental concerns said to accompany big box retailing.

Formula retail store ordinances, on the other hand, are not so much aimed at bigness per se, but rather target homogeneity. These ordinances often ban, or at least limit, the establishment of chain stores, or stores whose construction and layout are done according to a uniform, standardized "formula." Think chain restaurants like Chili's or Applebee's, or retailers like the Gap. Communities often ban formula retail stores from particularly unique or historic parts of a town—parts where tourists might not want to see a Starbucks or a Gap, or where the retailer's "formula" would detract from the historic or aesthetic ambiance. The concern is, for example, a Pizza Hut in full trade dress being built in the middle of Historic Williamsburg.

It should be clear from the outset that there are many legitimate uses of land use controls, even of the sort described above. I do not claim that all such ordinances raise constitutional concerns, nor that all should be subject to intense judicial scrutiny. However, evidence exists that economic protectionism motivates a substantial number of these retail restrictions.[7] Many local retailers are anxious to keep big box and formula retail stores out of their communities, fearing the competition those retailers would bring. Such motivations *do* raise constitutional concerns; in particular the DCCD's general injunction against state and local protectionism.

B. DCCD Implications for Retail Land Use Restrictions

The DCCD is a judge-made doctrine rooted in the belief that power over interstate commerce was assigned to Congress by the Constitution largely to restrain states from discriminating against or burdening their neighbors' commerce, as occurred during the

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[6] Patricia E. Salkin, *Municipal Regulation of Formula Businesses: Creating and Protecting Communities*, 58 CASE W. RES. L. REV. 1251 (2008).

[7] Denning & Lary, *supra* note 1, at 912–16.

Confederation Era. Under contemporary doctrine for non-tax cases,[8] courts apply a two-tiered standard of review. Statutes that make overt distinctions between in-state and out-of-state commerce—a statute prohibiting the importation of a product from another state, for example—are presumed invalid and are almost always invalidated.[9] In addition, a statute may be facially neutral, but nevertheless trigger this strict scrutiny, because it was passed with an impermissible purpose (i.e., to discriminate against out-of-state commerce, protect local economic interests, or both) or because, regardless of its purpose, its effects discriminate against out-of-state commercial actors.[10] Only if states or local governments can demonstrate a legitimate purpose unrelated to economic protectionism *and* demonstrate that to effectuate that purpose no less discriminatory means are available will discriminatory laws be upheld.[11]

For truly non-discriminatory laws alleged nevertheless to burden interstate commerce, the Court applies a deferential balancing test in which the challenger bears the burden of showing that the burdens on interstate commerce "clearly exceed" the "putative local benefits."[12] Laws are rarely struck down under the so-called *Pike* balancing test; therefore, determining whether a law is discriminatory comes close to deciding the outcome of the case under the DCCD.

The DCCD's framework is easier to articulate than it is to apply. The Supreme Court has not offered specific instructions for indentifying or evaluating claims of an allegedly protectionist purpose, nor has it carefully explained which effects count as discriminatory in DCCD cases. Nor has it been entirely consistent in the application of its case law.[13]

Those complications aside, because the DCCD applies to local governments as well as states,[14] proof of discriminatory purpose or discriminatory effects should result in the invalidation of an ordinance. Whatever other legitimate reasons local governments may have for restricting entry of retail establishments into their communities, protection of existing businesses against competition

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[8] Another regime controls the constitutionality of state and local taxes. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). There is some overlap; for example, state and local taxes may not discriminate against interstate commerce. *Id.* at 278.

[9] *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978).

[10] *See, e.g.*, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984) ("A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose . . . or discriminatory effect . . . ." (citations omitted)).

[11] *See, e.g.*, Maine v. Taylor, 477 U.S. 131, 147 (1986).

[12] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[13] For a discussion of some of these problems in the context of size-cap ordinances, see Denning & Lary, *supra* note 1, at 918–37.

[14] *See, e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

from other businesses cannot be one of them. Early challenges, however, were not successful,[15] though the small number of cases (only two as of 2005) made it difficult to draw any firm conclusion from the initial lack of success. As we will see in the next part, DCCD challenges to retail land use controls haven't exactly flooded the courts in the years since, but there are a couple of new cases and the record for DCCD challenges is still decidedly mixed.

II. NEW DEVELOPMENTS

Since I first looked at this issue, courts have decided two new cases in which DCCD challenges were lodged against a size-cap ordinance or a chain store restriction. One was a closely watched challenge by Wal-Mart to a local California law intended to make it difficult for the company to put in a "superstore." In the other case, owners wishing to sell their store to a chain pharmacy were prohibited from doing so by a local ordinance restricting formula retail stores. Wal-Mart lost, while the other sellers won. This part takes a close look at these opinions' handling of the DCCD claims.

A. Wal-Mart Stores, Inc. v. City of Turlock[16]

In 2003, Turlock, California amended its zoning ordinances creating three new classifications of retail uses: discount stores, discount clubs, and discount superstores. While the discount stores and clubs were permitted in certain areas as a conditional use, discount superstores—defined as discount stores containing full-service grocery departments, exceeding 100,000 square feet, and devoting more than 5 percent of their space to non-taxable merchandise—were prohibited in Turlock.[17]

Appended to the ordinance was a preamble stating its purpose. The preamble made numerous references to the economic harm that discount superstores did to existing businesses. It spoke of the desire to "promote and encourage vital neighborhood commercial districts" and found that discount superstores would "negatively impact the vitality and economic viability of the city's neighborhood commercial centers by drawing sales away from traditional supermarkets located in these centers . . . ."[18] The Preamble further stated that such

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[15] Denning & Lary, *supra* note 1, at 942–52 (discussing Great Atlantic & Pacific Tea Co. v. East Hampton, 997 F. Supp. 340 (E.D.N.Y. 1998) and Coronadans Organized for Retail Enhancements v. Coronado, 2003 WL 21363665 (Cal. Ct. App., June 13, 2003)).

[16] 483 F. Supp. 2d 987 (E.D. Cal. 2006).

[17] *Id.* at 991–92.

[18] *Id.* at 992.

superstores do not "add any retail services currently not provided within a community" and cause "a direct shift of dollars from existing retailers within a community, primarily from grocery stores" with whom they "compete directly . . . ."[19] Superstores were also alleged to contribute to blight by "affecting the viability of small-scale, pedestrian-friendly neighborhood commercial areas . . . ."[20]

Wal-Mart claimed that the ordinance was passed in response to existing grocery store owners who objected to Wal-Mart's negotiations with the city, which began in 2002, to locate a supercenter in Turlock.[21] Wal-Mart sued the city over the ordinance alleging, among other things, that it violated the DCCD. Specifically, the suit alleged that the ordinance had discriminatory effects on out-of-state businesses and was enacted with a discriminatory purpose. The court rejected both claims.

Citing *Exxon Corp. v. Maryland*,[22] the court noted that the ordinance did not facially discriminate against out-of-state retailers.[23] "There is no constitutional right," the judge noted, "to do business in a retailer's optimally profitable configuration, if the resulting operation burdens environmental, traffic-pattern, economic-viability, and land-use-planning interests of the host municipality."[24] Further, it concluded that Wal-Mart had demonstrated no evidence showing that "doing business in its non-discount superstore formats is more costly or burdensome than the expense of doing business incurred by other discount and grocery retailers in Turlock . . . ."[25]

Specifically, the court held first that the ordinance did not prohibit out-of-state retailers from locating in Turlock.[26] Second, the court was also unmoved by the evidence that, of the three retailers having superstore formats, none was located in California, thus suggesting that the ordinance was crafted to impact *only* out-of-state interests.[27] The judge merely observed that a similar argument was rejected in *Exxon*.[28] Third, the court concluded that "[n]o evidence is offered

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[19] *Id.* at 993.

[20] *Id.*

[21] *Id.* at 994.

[22] 437 U.S. 117 (1978) (holding that law requiring all oil producers and refiners—none of which were located in the state—to divest retail gas stations did not have discriminatory effects on out-of-state interests).

[23] *Wal-Mart Stores*, 483 F. Supp. 2d at 1012 ("This leaves the market open to all local or foreign retailers of all local or foreign products, except in the discount superstore format.").

[24] *Id.*

[25] *Id.*

[26] *Id.* at 1014 ("[N]o company, whether in-state or out-of-state, can establish a discount superstore in Turlock.").

[27] *Id.*

[28] *Id.* Oddly, the court quoted Justice Blackmun's dissent on this point. *Id.*

to show Wal-Mart's national scope and size afford it any less purchasing power to obtain advantageous wholesale prices from in- or out-of-state producers or suppliers of . . . products that are not explained by market forces having nothing to do with the market format in which Wal-Mart operates in a given community."[29] Neither did the ordinance "increase the cost of doing business for out-of-state businesses relative to their local competitors";[30] "downgrade or discriminate against any out-of-state product"; nor "have any effect on the share of local goods compared with out-of-state goods in the local market."[31] The ordinance, the court confidently concluded, did not "discriminate against interstate commerce either facially or in practical effect."[32]

As for the allegation that passage of the ordinance was motivated by a discriminatory purpose, the court claimed that under the DCCD discriminatory purpose was insufficient to support invalidation of a state or local law. The court claimed that "[i]n no Commerce Clause case cited or disclosed by research has a statute or regulation been invalidated solely because of the legislators' alleged discriminatory motives."[33]

The court's conclusion that the statute was evenhanded and had no discriminatory effects left Wal-Mart with only a claim that the burdens on interstate commerce "clearly exceeded" local benefits. The ordinance survived this inquiry easily. The goals asserted, like protecting land-use goals and the environment, were plausible benefits, and, according to the court, there was no evidence "of any measurable burden on interstate commerce."[34]

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[29] *Id.*

[30] *Id.* Elsewhere, the court repeated that "the Ordinance does not impose any extra cost on out-of-state interest" because "merchants are free to operate, in discount and smaller retail formats." *Id.* at 1017.

[31] *Id.* at 1015; *cf.* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977) (invalidating facially-neutral regulation prohibiting the use of state grades on closed containers of apples and holding that the regulation discriminated in its effects by (1) raising costs of doing business on out-of-state, but not in-state, apple growers; (2) stripping the competitive advantage possessed by out-of-state apple growers whose state had a superior grading system that brought premium in apple market; and (3) insidiously leveling the playing field to advantage of in-state growers whose state lacked a state grade). For discussion of *Exxon* and discriminatory effects, see Denning & Lary, *supra* note 1, at 929–32, 933–36.

[32] *Wal-Mart Stores*, 483 F. Supp. 2d at 1017.

[33] *Id.* at 1013.

[34] *Id.* at 1020.

B. Island Silver & Spice, Inc. v. Islamorada[35]

The plaintiffs in *Island Silver & Spice* fared better with their DCCD challenge to a local formula retail ordinance. The Saigers, plaintiffs in the case, had operated a 12,000 square foot retail "tropical department store" for a number of years.[36] In 2002, they decided to close up shop and entered into a contract to sell their property for over $2.5 million to a party who intended to replace Island Silver & Spice with a Walgreens drug store.[37]

Since Walgreens fit the definition of a formula retail store, it was subject to the restrictions placed on such stores by Islamorada's ordinance, which meant that the business could have street level frontage of no greater than 50 linear feet and could not exceed 2,000 square feet of floor area.[38] The restrictions meant that the proposed use was barred.

Undaunted, the plaintiffs attempted to salvage the deal by arguing that since the Walgreens would contain a pharmacy, it fell under the "professional services" exemption contained in the ordinance.[39] Initially the Village Council agreed, voting at a public hearing that the exemption applied.[40] About six months later, however, the Council reversed its decision and amended the exception so that it no longer applied to "drug stores and other retail establishments . . . ."[41] After the amendment, the permits were denied, the party purchasing the plaintiffs' land withdrew, and the plaintiffs were stuck with a tropical department store that no one, save formula retail operators, wished to purchase.[42] They sued, alleging the ordinance violated the DCCD.

After articulating the familiar standard of review, the judge concluded that Islamorada's formula retail ordinance failed both tiers.[43] While conceding that the ordinance was facially neutral, the court found that "the ordinance eliminates national retail chain stores because they cannot operate within the strict size constraints imposed by the ordinance."[44] The effect is that "national retail stores" like Walgreens and Publix are kept out of Islamorada, while those constraints do not similarly affect local businesses.[45] "A local retail

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[35] 475 F. Supp. 2d 1281 (S.D. Fla. 2007), *aff'd*, 542 F.3d 844 (11th Cir. 2008).
[36] *Id.* at 1284.
[37] *Id.*
[38] *Id.* (citing Village of Islamorada Code § 30-1264 (2002)).
[39] *Id.* at 1284–85.
[40] *Id.* at 1285.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 1288–90.
[44] *Id.* at 1291.
[45] *Id.*

pharmacy," the court pointed out, "may sell the same products as a Walgreens Drug Store in a 14,000 square foot store, as long as it does not use any standardized features."[46]

Islamorada, moreover, could demonstrate neither a legitimate governmental interest nor the lack of less discriminatory means to justify the discriminatory effects. While Islamorada asserted the ordinance was necessary to preserve its small town feel[47] and relaxed atmosphere from the attendant disruption brought by chain stores, the court felt that the "Village has not demonstrated that it has any small town character to preserve"[48]:

> The Village of Islamorada is not uniquely relaxed or natural, nor is there a pre-dominance of natural conditions and characteristics over human intrusions. The Village is currently bisected by Highway One; a busy thoroughfare fronted by a large number of retail establishments, including well known chain stores such as CVS Pharmacy and Ace Hardware. . . . Thus, any unique character or natural relaxed atmosphere of the Village has already been diminished.[49]

Instead, the judge concluded that the *real* reason for the enactment of the ordinance was "to serve local business interests by preventing competition from national chains."[50] Economic protectionism, not preservation, was the purpose.[51] As in the *Wal-Mart* case, there was evidence that supported this conclusion. For example, though "maintaining a small town atmosphere" was the purpose asserted by the Village's Deputy Manager, the plaintiff testified that another council member told him that the formula retail ordinance had been enacted to keep out a McDonald's.[52]

The Vice-Mayor—no doubt to the distress of Village counsel—testified that the Council "'didn't want none of them darn chain stores

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[46] *Id.*

[47] *Id.* at 1286 (citing testimony of Deputy Village Manager that "the only reason he was aware of for the adoption of the [ordinance] was to keep the small town atmosphere").

[48] *Id.* at 1291.

[49] *Id.* (citation omitted). The CVS Pharmacy's presence in Islamorada was the result of the conversion of an Eckerd's pharmacy, present as a nonconforming use since it predated the ordinance, resulting from the acquisition of Eckerd's by CVS. *Id.* at 1285. The plaintiffs complained about the conversion, but the official in charge of interpreting the Village Code, including the ordinance, "determined that the transition was a continuation of the previous nonconforming use, and therefore allowable under the Village's nonconforming use ordinance . . . ." *Id.* at 1286.

[50] *Id.* at 1291.

[51] *Id.* at 1292 ("Thus, the purpose of the ordinance is economic protectionism, not the legitimate goal of preserving a small town community.").

[52] *Id.* at 1287.

coming to town. . . . So the thought was how do we stop that. We wanted to do something to prevent that.'"[53] He further testified that the professional services exemption referred to "'chain real estate companies, you know, Century, whatever, you know, ReMax or whatever. And there are, . . . law firms that have multiple offices around the state or country.'"[54] Moreover, two of the five council members owned a restaurant and a small grocery store; both were "within the categories protected from chain competition by the Ordinance."[55]

Even assuming that protecting Islamorada's small town feel *did* motivate passage of the ordinance, the judge concluded that it failed its purpose. First, the court noted that chain stores whose establishment predated the ordinance abound in Islamorada.[56] It also pointed out that small chain stores were permitted under the ordinance. Further, existing nonconforming uses—including conversions from one chain to another[57]—were permitted; these "would presumably also affect the Village's character."[58] Finally, "[r]estricting formula retail stores, while allowing other large, non-unique structures, does not preserve a small town character."[59] The Court observed that "large, artificial, or noisy buildings, besides chain stores and restaurants, can still interfere with the Village atmosphere as much as they like."[60]

But the court didn't stop there. It also held the ordinance failed *Pike* balancing. The burden on interstate commerce—here, the failure of the proposed sale of Island Silver & Spice to Walgreens—was significant. The plaintiffs stood to gain $2.5 million on the sale. The judge found the benefits, by contrast, to be "vanishingly small," because, despite Islamorada's assertions, it "does not have a demonstrably unique small village character to preserve. It is a town with no historic district, bisected by a busy thoroughfare fronted by numerous chain stores."[61]

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[53] *Id.* (quoting Village Council member Mark Gregg's statement during the Whiteco–Interra (Walgreens) appeal hearing).

[54] *Id.* (quoting Village Council member Mark Gregg's statement during the Whiteco–Interra (Walgreens) appeal hearing).

[55] *Id.*

[56] *Id.* at 1287 n.14 ("Photographs of numerous 'formula retail' stores were introduced into evidence by Plaintiffs, and demonstrate that U.S. Highway 1 . . . accommodates many of the same chain stores (*e.g.*, CVS, Burger King, Outback Steakhouse, Ace Hardware, Tom Thumb, True Value Hardware) that one might see on major thoroughfares anywhere in America.").

[57] *See supra* note 49.

[58] *Island Silver & Spice*, 475 F. Supp.2d at 1292 (specifically discussing the CVS conversion).

[59] *Id.*

[60] *Id.*

[61] *Id.* at 1293.

C. *Some Observations on* Wal-Mart *and* Island Silver & Spice

In the next part, I take up the question why DCCD challenges to various retail restrictions have been both rare and relatively unsuccessful in the courts. At the risk of getting ahead of myself, the opinions discussed above suggest one reason: judges do not seem to have a good grasp of the DCCD. This is understandable, because, as noted elsewhere, the Supreme Court has not been too helpful in some cases.[62] Even taking that into account, the reasoning of both courts leaves much to be desired.

In the *Wal-Mart* case, for example, the court is correct that the *Exxon* case contains language that makes it difficult to argue that an out-of-state corporate actor is constitutionally entitled to do business in a particular form.[63] However, the court barely mentioned the *Hunt* case, in which, among other things, stripping an out-of-state company of competitive advantages and leveling the playing field in favor of in-state competitors was held to be enough of a discriminatory effect to warrant application of strict scrutiny.[64] If the court is correct, and Wal-Mart presented *no evidence* to that effect, as the court suggested,[65] then that was poor lawyering on Wal-Mart's part, as discriminatory effects claims are, by definition, going to be very fact-specific. Nevertheless, it does seem the court was almost willfully blind to the fact that the *only* entities affected by the anti-superstore ordinance were out-of-state corporations; no California businesses were harmed. The effect of the law fell completely on out-of-state entities.

The evidence of purpose behind the ordinance put forth by Wal-Mart suggests the effects were not coincidental. It seems clear—and the court did not really deny—that a significant purpose behind the ordinance was the protection of existing economic interests in Turlock—specifically local grocery stores whose low margins make them susceptible to price competition from supercenters that also sell groceries.[66] Nor is this the case of a court having to be skeptical whether an unguarded remark of legislation expressing a constitutionally impermissible purpose should be imputed to the legislative body as a whole. The ordinance stated as much *on its face.*

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[62] Denning & Lary, *supra* note 1, at 918.

[63] Exxon Corp. v. Maryland, 437 U.S. 117, 127–28 (1978).

[64] Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 350–51 (1977).

[65] *See* Wal-Mart Stores, Inc. v. City of Turlock, 483 F. Supp. 2d 987, 1012 (E.D. Cal. 2006).

[66] *See id.* at 991–93.

The court sidestepped these inconvenient facts by misstating the law and claiming that *no* DCCD case ever invalidated an ordinance on purpose evidence alone. That is simply not true. The Supreme Court,[67] lower courts,[68] and commentators[69] agree: evidence of *either* discriminatory effects *or* discriminatory purpose is sufficient to trigger the heightened scrutiny of the DCCD. The court also mischaracterized *Bacchus Imports* and ignored other precedents in making its erroneous statement. That the court resisted what quite clearly is the law to avoid having to apply strict scrutiny to the Turlock ordinance, suggests that something other than simply unfamiliarity with the law was at work. I will return to this point below.

In contrast to the *Wal-Mart* case, the judge in *Island Silver & Spice* had no trouble concluding that protectionism was afoot; nor did he doubt that such a purpose was sufficient to invalidate the ordinance. And yet there is something rather breezy about his conclusion that the ordinance had discriminatory effects because *no* chain store (which he assumed were all out-of-state) could operate within the size limits imposed by the ordinance.[70]

Further, his application of strict scrutiny once a prima facie case of discrimination was made out also left something to be desired. For example, he stated flatly that Islamorada had no "small-town" quality to be preserved, citing the facts that U.S. Highway 1 ran through the middle of town, and that chain stores proliferated along that highway.[71] Adopting the judge's position would seem to mean that once retail chain stores made inroads into a community, there could

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[67] *See, e.g.*, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984) ("A finding that state legislation constitutes 'economic protectionism' may be made on the basis of *either discriminatory purpose . . . or* discriminatory effect . . . ." (emphasis added)); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 n.15 (1981); *Hunt*, 432 U.S. at 352–53; Kassel v. Consol. Freightways Corp., 450 U.S. 662, 679 (1981) (Brennan, J., concurring).

[68] *See, e.g.*, Cherry Hill Vinyeard, LLC v. Baldacci, 505 F.3d 28, 33 (1st Cir. 2007) (the DCCD "holds that a state regulation that discriminates against interstate commerce on its face, *in purpose, or* in effect is highly suspect and will be sustained only when it promotes a legitimate state interest that cannot be achieved through any reasonable nondiscriminatory alternative" (emphasis added)); Allstate Ins. Co. v. Abbott, 495 F.3d 151, 160 (5th Cir. 2007) ("A statute violates the dormant Commerce Clause where it discriminates against interstate commerce either facially, *by purpose, or* by effect." (emphasis added)).

[69] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 5.3, at 436 (2d ed. 2002) ("[A] law will be found discriminatory either if it facially discriminates against out-of-staters or if it is facially neutral and is deemed to have *discriminatory purpose and/or impact.*"); DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 239–40 (2004) (discussing discriminatory purpose); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-6, at 1066 (3d ed. 2000) ("A finding of protectionism can flow from *either a discriminatory purpose or a protectionist effect.*" (emphasis added)).

[70] *See supra* notes 45–46 and accompanying text.

[71] *See supra* notes 48–49 and accompanying text.

be no attempt either to arrest their proliferation or reclaim whatever was left of the small-town feel. That the relaxed or small-town feel had been "diminished"[72] should not mean that its eradication could not be halted or slowed by otherwise constitutional development controls.

The judge was on somewhat stronger ground, however, to question whether—given the number of chains extant in Islamorada, including a large chain pharmacy—the formula retail store effectuated any legitimate interest the village might have in the least discriminatory manner possible. Why a chain pharmacy posed a particular threat, but chain real estate agencies and law firms did not, is not obvious on its face.[73] The timing of the ordinance, and, in particular, the rather abrupt decision of the council to reverse its earlier decision permitting the sale under the professional services exemption, also raise questions about the sincerity of the Council.

In the end, the judge was probably rightly suspicious of the Council's motives. The circumstantial evidence strongly suggested that the careful crafting of a reasonable "smart-growth" policy was not foremost on the mind of the Islamorada city government.[74]

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[72] *See* text accompanying note 49 *supra*.

[73] *See* Denning & Lary, *supra* note 1, at 924 (discussing, among factors relevant to proof of discriminatory purpose, presence of exceptions in facially-neutral statutes that call into question fit between means and ends).

[74] After this Article was completed, but before it went to press, the Eleventh Circuit unanimously affirmed the district court. It wrote that:

> Islamorada's failure to indicate a legitimate local purpose to justify the ordinance's discriminatory effects is sufficient to support the district court's determination that the formula retail provision is invalid under the Dormant Commerce Clause. . . . It should be noted, however, that Islamorada does not assert that the stated purposes of the ordinance cannot be furthered by reasonable nondiscriminatory alternatives, such as Islamorada's existing land development regulations. . . . Even under the balancing approach advocated by Islamorada, the stipulated facts indicate that the formula retail provision's disproportionate burden on interstate commerce, such as the effective exclusion of interstate formula retailers, clearly outweighs any legitimate local benefits.

Island Silver & Spice, Inc. v. Islamadora, 542 F.3d 844, 848 (11th Cir. 2008) (citations omitted). Similarly, in another case arising from Islamorada's ordinance, the Eleventh Circuit reversed a district court's decision (apparently unreported) in favor of the Village in a suit brought by a local retailer who had hoped to sell his property for conversion into a Starbucks. *See* Cachia v. Islamorada, 542 F.3d 839 (11th Cir. 2008). The court reasoned:

> Under the elevated scrutiny test, the burden is on the local government to show both that the regulation is supported by a legitimate local purpose and that there are no reasonable nondiscriminatory alternatives adequate to serve that purpose. . . . [T]he district court did not fully consider, and could not consider on the record at this stage: 1) whether the ordinance's stated interests constitute a legitimate local purpose; 2) whether the prohibition of formula restaurants adequately serves such purpose; or 3) whether Islamorada could demonstrate the unavailability of nondiscriminatory alternatives, such as zoning ordinances or building codes, to fulfill

III. WHY AREN'T DCCD CLAIMS MORE SUCCESSFUL?

The relative lack of success of DCCD claims—even where powerful evidence of protectionism exists—raises the obvious question, "why?"[75] In this part, I suggest two primary reasons: (1) lower court judges' confusion about the DCCD and its proper application, a confusion aggravated by the DCCD's own confused path in the Supreme Court; and (2) the local nature of the regulations. As I will explain below, local land use regulations are some of the last bastions of "producerist" legislation in the United States. And, as Rich Schragger points out, the fact they are enacted locally, as opposed to at the state level, means that they are likely to receive less judicial (and Supreme Court) scrutiny.

Together, my review of the earlier DCCD challenges, and of the opinions in *Wal-Mart* and *Island Silver & Spice*, suggest that federal judges do not completely understand the DCCD's framework or its application to land use regimes—especially where the laws at issue are facially neutral. Specifically, courts routinely resist the notion that

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> the same needs. . . . The complaint adequately states a claim for relief, and further proceedings are necessary to develop a record upon which these issues may be properly considered by the district court.

542 F.3d at 843–44 (citations omitted). In both cases the court of appeals agreed that the effect of the law was to exclude out-of-state businesses from the area. *See Island Silver & Spice*, 542 F.3d at 846–47 ("[T]he ordinance's effective elimination of all new interstate chain retailers has the 'practical effect of . . . discriminating against' interstate commerce. . . . The formula retail provision is therefore subject to elevated scrutiny." (citation omitted)); *Cachia*, 542 F.3d at 843 ("[T]he ordinance's complete prohibition of chain restaurants sharing certain characteristics amounts to more than the regulation of methods of operation, and serves to exclude national chain restaurants from competition in the local market. While the ordinance does not facially discriminate between in-state and out-of-state interests, its prohibition of restaurants operating under the same name, trademark, menu, or style is not evenhanded in effect, and disproportionately targets restaurants operating in interstate commerce. . . . The ordinance's prohibition therefore imposes more than an indirect burden on interstate restaurant operations, and has the practical effect of discriminating against interstate commerce. Accordingly, the elevated scrutiny test applies." (citation omitted)).

[75] When I first looked at this subject four years ago, I frankly assumed that the few cases I found at the time would be followed by numerous others, given the growing popularity of size-cap ordinances. That courts have not been flooded with such claims is probably due to the ease with which retailers can simply move into another, less restrictive area—one, perhaps, eager for the tax revenue and job creation occasioned by the retailer's location there. Exit options open to retailers, and the possibility of playing counties and municipalities against one another, has brought forth calls for regional, even statewide, planning. For an overview on statewide and regional smart growth initiatives, see Patricia E. Salkin, *Squaring the Circle on Sprawl: What More Can We Do? Progress Towards Sustainable Land Use in the States*, 16 WIDENER L.J. 787 (2007). For a skeptical take on limitations on suburban growth, see Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 MICH. L. REV. 277 (2007). Ironically, to the extent that such restrictions become centralized, the likelihood rises that courts will drop their deference and become more inclined to apply the DCCD. *See infra* note 90 and accompanying text.

proof of protectionist purpose, standing alone, is sufficient to warrant invalidation of a zoning ordinance; further, judges often dismiss evidence of discriminatory effects as well. In many cases, judges assume that *Exxon* stands for the proposition that state and local governments have near-complete control over the form in which corporations can do business within their jurisdiction. As long as laws are facially neutral, judges will not apply strict scrutiny, even if the burdens fall only on out-of-state entities. And *Pike* balancing, the courts correctly intuit, is not much of a constraint on state or local governments.

To be fair, a good deal of the confusion is understandable, given the Court's lack of interest in clarifying important aspects of the DCCD.[76] How to reconcile *Hunt* and *Exxon*, for example, is something the Court has never taken up, to the frustration of many a federal court judge and commentator. On the other hand, failing to cite black letter law correctly, as the judge in *Wal-Mart* did, where doing so would have resulted in the application of strict scrutiny, suggests that something other than ignorance of the law might be at work.

In a recent article, James Q. Whitman proffered a distinction helpful to characterizing differences between American and European attitudes towards commerce. Whitman posited that Europeans were inclined towards "producerist" regulations focusing "on the rights of actors on the supply side of the market—on the rights of producers . . . ."[77] Americans, by contrast, "tend to emphasize the right of consumers to buy goods and services at competitive prices, or the right of consumers to warranties of quality and safety."[78] While consumer protection laws that do the latter pose few threats to the interests of producers, a regulatory attitude informed by the former—by solicitude for consumers' economic interests—do "represent[] a true menace to the producerist outlook . . . ."[79]

While Whitman was interested primarily in how these differences played out when American consumerist-oriented businesses, like Wal-Mart, ran into European producerist regulations, such as those governing store hours or prices at which goods could be sold,[80] the

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[76] *See* Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417 (2008) (diagnosing the current and historic ills of the DCCD and prescribing solutions).

[77] Whitman, *supra* note 5, at 345.

[78] *Id.* at 346.

[79] *Id.* at 347.

[80] *See, e.g.*, *id.* at 371–83 (discussing tendency of European countries to regulate retail pricing by regulating prices of goods and prohibiting, inter alia, the use of loss leaders to stimulate consumption); *id.* at 383–94 (discussing store closing hours, square foot limitations,

distinction is relevant to the current discussion. Local retail store regulations, especially size-cap ordinances, are ultimately concerned with the interests of producers, rather than consumers. Their recent popularity marks a notable exception to the American hostility to laws limiting consumer choice in favor of permitting "stores offering a wide range of goods and open for maximally long hours."[81] To the extent that the laws reflect a desire to protect small existing business owners from outside competition, such a motive is, under a producerist regime, a "feature," not a "bug."[82]

But protectionism is protectionism under the DCCD, right? Not exactly, argues Richard Schragger, who notes that *local* governments are able to accomplish ends forbidden to *states* by doctrines like the DCCD through the use of exclusionary zoning.[83] Schragger writes:

> Two points emerge from an examination of the interlocal free trade regime. First, local governments, unlike states, use land use regulations to control the flow of persons, goods, and capital across local lines. Second, despite their often protectionist purposes and effects, the Court tends to allow local governments to do so. Taken together, these two features constitute important qualifications to the presumption of intermunicipal openness. . . . [Cities] cannot use tariffs, engage in currency manipulations, or adopt restrictive immigration policies, but they can and do use land use as a means of regulating their borders and, to a lesser or greater extent, their internal economies.[84]

Schragger believes that the difficulties presented by the lack of any coherent theory for the DCCD, for example, are magnified when the

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and licensing requirements in Europe).

[81] *Id.* at 384.

[82] *See id.* at 387. For example, in both Germany and France we still find considerable law protecting small shopkeepers. The protection of small shopkeepers against big retailers was a recurrent theme of early-twentieth-century economic life. Anti-chain-store legislation was widespread everywhere in the first part of the twentieth century. As big retailers like Woolworth's and its imitators appeared, countries all over the industrialized world, including the United States, introduced measures intended to protect their small competitors. For an historical perspective on the U.S. experience with chain-store legislation, see Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940*, 90 IOWA L. REV. 1011 (2005).

[83] Schragger, *supra* note 4, at 1133 ("What thus emerges is a picture of the American common market that appears to be more forgiving of local than state restrictions on the mobility of persons, goods, and capital.").

[84] *Id.* at 1108; *see also id.* at 1120 ("When protectionist or anti-competitive efforts are mediated through local land use statutes, the Court tends to tolerate them.").

mixed-grill of theories used to justify the DCCD are employed at the local level.[85] He notes that "[t]he problem is that courts do not have a theory of the American common market that is attuned to the appropriate scale. Thus, the leading substantive justifications for a robust interjurisdictional mobility . . . are inconsistently applied at the local level."[86] (Of course, to those who fear widespread DCCD challenge to local land use ordinances, judicial acquiescence in this area is applauded.[87])

Whatever the reason—doctrinal disarray, judicial ignorance of or indifference to the law, or justifiable concern that legitimate local purposes not be overridden by courts—the lack of a robust application of the DCCD's principles to restrictive retail ordinances as evidenced by the cases discussed here supplies evidence supporting Schragger's observations. Whether this is a situation to be celebrated as recognizing important contextual differences[88] or deplored as the disregard of important constitutional values (a view to which I tend), the case law suggests that it is a fact of life.

CONCLUSION: THE FUTURE OF DCCD CHALLENGES TO LAND USE RESTRICTIONS

Local retail restrictions enacted to protect existing businesses are an anomaly in America's consumerist regulatory landscape, which is primarily geared to deliver to consumers the greatest number of goods and services possible at competitive prices. They are an echo of an earlier, producerist-oriented economy—still quite common in Europe—that places the interests of existing businesses and the communities in which they reside ahead of those of customers. Certainly at the state level, the DCCD functions as a fairly robust check on producerist-oriented legislation that slides over into simple economic protectionism.

Despite sometimes ample evidence of protectionist motivation, however, plaintiffs subject to local land use restrictions on retail establishments have been no more successful in mounting DCCD challenges to those ordinances than when I first wrote on this subject in 2005. It is possible that the lack of success will cause future litigants to seek grounds other than the DCCD for invalidating these

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[85] *Id.* at 1143–62. For an attempt to remedy this, see Denning, *supra* note 76.

[86] *See* Schragger, *supra* note 4, at 1143–44.

[87] *See, e.g.*, John M. Baker & Mehmet K. Konar-Steenburg, *"Drawn from Local Knowledge . . . And Conformed to Local Wants": Zoning and Incremental Reform of Dormant Commerce Clause Doctrine*, 38 LOY. U. CHI. L.J. 1, 3 (2006) (arguing that courts should not apply the discriminatory effects prong of the DCCD in zoning cases).

[88] *See id.*

ordinances, much as the lack of judicial success in mounting DCCD challenges to state and local investment incentives for corporations has caused subsequent plaintiffs to abandon such challenges.[89]

On the other hand, if easy exit options enable retailers to simply move to the next town or county, then pressure may build for restrictions to be enacted at the regional or state level.[90] If this happens, judicial reluctance to invalidate this common species of local protectionism will likely disappear, and DCCD challenges might then be more successful.

[89] *See* Morgan L. Holcomb & Nicholas Allen Smith, *The Post-*Cuno *Litigation Landscape*, 58 CASE W. RES. L. REV. 1157 (2008).

[90] *See, e.g.*, Kris Hudson, *States Target Big-Box Stores*, WALL ST. J., June 29, 2007, at A8.