

Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine

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I. Introduction

“BIG BOX” RETAIL STORES are emerging as a target of efforts to combat “sprawl”¹ accompanying suburbanization in the United States.² Wal-Mart, Home Depot, and other “category killer” stores,³ it is alleged, are both a product and cause of sprawl. Activists cite a litany of sins for which big box stores are responsible: “strains on infrastructure, pollu-

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1. “Sprawl” can be defined as:

dispersed, low-density, metropolitan area form, where the metropolitan area’s growth occurs principally on the urban periphery and encompasses a multiplicity of local governments. Sprawling urban forms typically are car dependent and include dispersed single family homes and substantial distances between residential, business, and retail areas and alternative transportation options. Sprawl typically also includes a depressed or at least less rapidly developing urban core. Urban sprawl is a pervasive phenomenon in cities that developed after the automobile became the prevalent form of transit for most citizens.

William W. Buzbee, *Sprawl’s Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 509, 510 (2000); Julian C. Juergensmeyer, *Foreword: An Introduction to Urban Sprawl*, 17 GA. ST. U. L. REV. 923, 925 (2001) (offering similar definition of sprawl). The literature on sprawl is growing almost as fast as the perceived problem. For a sampling of the extant literature, see Symposium, *2001 Galivan Conference—Sprawl and Its Enemies*, 34 CONN. L. REV. 511 (2001); Symposium, *Symposium on Urban Sprawl: Local and Comparative Perspectives on Managing Atlanta’s Growth*, 17 GA. ST. U. L. REV. 923 (2001); Symposium, *Sustainable Growth: Evaluating Smart Growth Efforts in the Southeast*, 35 WAKE FOREST L. REV. 509 (2000); Symposium, *Urban Sprawl*, 29 URB. LAW. 159 (1997); William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57 (1999).

2. DOLORES HAYDEN, A FIELD GUIDE TO SPRAWL 24 (2004) (defining a “big box” as “a gigantic, windowless structure, usually of cheap, concrete block construction . . . favored by retail chains, discount buyer clubs, and department stores, require[ing] 75,000 to 250,000 square feet of space on one level. . .”).

3. See *id.* at 30 (describing a “category killer” as “dominat[ing] one part of the retail market, such as building materials, garden plants, drugs, or books. It competes with smaller stores—independent hardware stores, lumberyards, garden centers, pharmacies or bookstores—and in retail jargon, cannibalizes them.”).

tion, traffic congestion, the decline of city centers, the death of small towns, [] the destruction of the landscape[,]”⁴ and the problems associated with abandoned physical structures of big box retailers after they close.⁵ A major concern is the effect that such stores have on existing businesses in the area. Opponents fear that once big box retailers move into an area, local retailers of the same sorts of goods will find it impossible to compete and will go out of business.

Many communities are responding by capping the size of large retail stores. Economic concerns of the large retailers’ would-be local competitors feature prominently in debates over size-capping legislation and are sometimes expressed in the legislation itself. Given that the desire to insulate existing local enterprises from competition—economic protectionism, in other words—motivates much of this legislation, size-cap ordinances, we argue here, invite scrutiny under the dormant Commerce Clause doctrine (DCCD), the judge-made limits on state and local regulation of interstate commerce inferred from the grant of power to Congress over interstate commerce made in Article I, § 8, of the Constitution.⁶

4. Justin Shoemaker, Comment, *The Smalling of America?: Growth Management Statutes and the Dormant Commerce Clause*, 48 DUKE L.J. 891, 892 (1999); see also Juergensmeyer, *supra* note 1, at 924:

[T]he costs of sprawl are both personal and societal—economic and sociological. Personal costs include . . . the expenses of commuting—stress, decreased family time, and alienation from the cultural activities available at the urban core. Societal costs include the financial burdens of providing more than one infrastructure system or expensive extensions of existing infrastructure, increased pollution, and destruction of recreational areas, greenspace, farmland, and environmental ecosystems.

5. Constance Beaumont & Leslie Tucker, *Big-Box Sprawl (And How to Control It)*, MUN. LAW., Mar./Apr. 2002, at 7.

6. U.S. CONST. art. I, § 8. The present campaign against big box retailers recalls past campaigns waged by states against “chain stores” whose national buying power meant they were able to undersell local competitors. States often responded by levying what might now be considered discriminatory taxes against chain stores based on the number of stores open in a particular state. Most challenges brought against such stores were brought not under the DCCD but under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. See generally WILLIAM G. ROSS, THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES, ch. 3 (forthcoming) (summarizing chain store litigation); 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). For contemporary commentary, see generally Samuel J. Becker & Robert A. Hess, *The Chain Store License Tax and the Fourteenth Amendment*, 7 N.C. L. REV. 115 (1929); J. Edward Collins, *Anti-Chain Store Legislation*, 24 CORNELL L.Q. 198 (1938); J. Ross Harrington, *The Chain Store Era and the Law*, 4 NOTRE DAME L. REV. 491 (1929); E.W. Simms, *Trends in Chain Store Legislation*, 29 GEO. L.J. 165 (1940); E.W. Simms, *Again—Chain Stores and the Courts*, 26 VA. L. REV. 151 (1939); Edward W. Simms, *Chain Stores and the Courts*, 17 VA. L. REV. 313 (1931); Hugh E. Willis, *Chain Store Taxation*, 7 IND. L.J. 179 (1931); Note, *Validity of Chain Store License Tax*, 17 IOWA L. REV. 72 (1931); Note, *Constitutionality of Statutes Discriminating Against Chain Stores*, 16 IOWA L. REV. 427 (1931).

This article has two goals. First, we consider the vulnerability of retail store size-cap ordinances to DCCD challenges. Second, since most of the ordinances are facially neutral—that is, they appear to apply regardless whether the large retailers come from out-of-state or not—they offer the opportunity to clarify some of the DCCD’s more difficult branches. While the Supreme Court has repeatedly held that the DCCD subjects to strict scrutiny state or local laws enacted with a discriminatory or protectionist purpose *or* which have discriminatory effects, it has never been explicit *how* one ascertains discriminatory purpose or *which* effects trigger strict scrutiny. Using the retail store size-cap ordinances as a case study, we offer some tentative answers to these vexing doctrinal questions and propose frameworks that we then use to critique the few cases analyzing DCCD challenges to size-cap ordinances.

Part II of this article describes the relationship between recent anti-sprawl initiatives in land-use planning and retail size-capping ordinances. In particular, we discuss the forms which these ordinances take and furnish examples of those supporting our claim that protectionism drives their passage, at least in part. Part III provides a brief overview of the DCCD, and a more thorough discussion of the doctrine’s discriminatory purpose and discriminatory effects cases. We use the extant case law to develop explicit analytical frameworks—something the Supreme Court has not done. Drawing on these frameworks, Part IV then demonstrates how, exactly, size-cap ordinances are vulnerable to DCCD challenges. Part IV also critiques the two cases in which courts have rejected purpose and effect challenges to size-cap ordinances under the DCCD. A brief conclusion follows in Part V, in which we discuss alternatives to size-cap ordinances that might pass constitutional muster. We conclude that many of the nonprotectionist reasons for regulating big box retailers can be addressed in ways that would minimize the likelihood of a successful DCCD challenge.

II. The Anti-Sprawl Movement, Big Box Retailers, and Size-Capping Ordinances

A. Origins of Size-Cap Ordinances

Controlling the development and use of land has been a concern of communities since colonial times.⁷ As cities expanded in the early

7. John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); Edward H. Ziegler, *Urban Sprawl, Growth Management and Sustainable De-*

twentieth century, states allowed local authorities to enact ordinances regulating land use by restricting uses—residential, commercial, industrial—to certain parts of cities.⁸ In 1926, the U.S. Supreme Court in *Village of Euclid v. Amber Realty Co.*⁹ upheld the constitutionality of such zoning ordinances.¹⁰ For much of the rest of the twentieth century, so-called “Euclidean” zoning (as well as zoning that did not follow the *Euclid* model) provided local authorities with the tools needed to regulate land use in their communities. The rapid growth of suburban areas in the late twentieth century, however, created concerns about the loss of open spaces, abandonment of inner cities, and diminution in quality of life for both urban and suburban residents.

As environmentalists, economists, and politicians shifted their focus to the alleged negative effects of sprawl, the “smart-growth” movement was born. Euclidean zoning provided cities with the ability to regulate the type of growth within districts, but cities now needed new tools to regulate the amount of growth to combat the effects of sprawl.¹¹ In fact, as many recent scholars have noted, Euclidean zoning has actually contributed to sprawl because of its focus on “holding down densities and separating different types of uses.”¹²

“Smart growth” ordinances that involve more complex zoning regimes were the result.¹³ These ordinances,¹⁴ which “typically [include] a comprehensive plan to control the ‘rate, amount, type, location and quality of growth,’ ”¹⁵ have become increasingly popular over the past

velopment in the United States: Thoughts on the Sentimental Quest for a New Middle Landscape, 11 VA. J. SOC. POL’Y & L. 26, 45 (2003).

8. Ziegler, *supra* note 7, at 45.

9. 272 U.S. 365 (1926).

10. Ziegler, *supra* note 7, at 46.

11. Candida M. Ruesga, Comment, *The Great Wall of Phoenix?: Urban Growth Boundaries and Arizona’s Affordable Housing Market*, 32 ARIZ. ST. L.J. 1063, 1070 (2000) (“Traditional methods of land use controls, such as zoning, are not effective in slowing or stopping growth and sprawl. The focus has consequently turned to ‘growth management’ or ‘smart growth’ plans.”). For an argument that Euclidian zoning, and other governmental policies, have encouraged and contributed to sprawl, see Michael Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301 (2000); Ziegler, *supra* note 7, at 50.

12. Richard Briffault, *Smart Growth and American Land Use Law*, 21 ST. LOUIS U. PUB. L. REV. 253, 255 (2002); Ziegler, *supra* note 7, at 50 (noting role that Euclidian zoning plays in causing sprawl).

13. Ziegler, *supra* note 7, at 50–51.

14. The definition of “smart growth” is imprecise, but the literature on it has grown with that concerning sprawl in recent years. See, e.g., Symposium, *Managing Growth in the Twenty-first Century: Philosophies, Strategies, Institutions*, 19 VA. ENVTL L.J. 239 (2000).

15. Ruesga, *supra* note 11, at 1070–71 (quoting Daniel L. Mandelker, *Managing Space to Manage Growth*, 23 WM. & MARY ENVTL. L. & POL’Y REV. 801, 804 (1999)).

three decades.¹⁶ Impact fees,¹⁷ urban growth boundaries,¹⁸ and service area boundaries,¹⁹ are also used to limit the rate of growth.

But comprehensive smart growth programs are a complex and expensive method to control growth. To be effective, such programs need to be implemented region-wide,²⁰ and even then desired results are not guaranteed. For example, Florida's growth management system is "among the most sophisticated in the nation,"²¹ but "the quality of growth has not met . . . expectations, the strains on infrastructure have been only marginally reduced and . . . a more complicated, more costly process [has been established which does not provide] the expected corresponding benefits."²² Thus, whether they work is unclear, even in areas where the political will exists to enact them. As an alternative, many cities and counties have chosen to target the most visible symbol of sprawl, the big box retail store,²³ and have attempted to slow its establishment or expansion within a given city or county by enacting

16. Another scholar has defined "smart growth" to include "a range of approaches to contain urban sprawl by using more efficient and compact urban development patterns that preserve open space and protect environmentally sensitive areas." Janice C. Griffith, *The Preservation of Community Green Space: Is Georgia Ready to Combat Sprawl with Smart Growth?* 35 WAKE FOREST L. REV. 563, 568 (2000). Dean Griffith lists "(1) an efficient use of land resources, (2) the full use of urban services, (3) a mix of land uses, (4) transportation options, and (5) the use of detailed, human-scale designs" as smart growth's "foundational principles." *Id.*

17. Impact fees create disincentives to develop by burdening a developer with "costs pressures" if they pursue new development. Briffault, *supra* note 12, at 264. The impact fees ensure that the cost of the development is covered by such fees. *Id.* The "fees are calculated by determining the specific costs that . . . 1,000 square feet of nonresidential development will cause in roads, water/sewer, public buildings (schools and municipal), and other capital infrastructure." Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 137, 151 (1999).

18. Ruesga, *supra* note 11, at 1074. "Urban growth boundaries essentially draw a line around urban centers, beyond which development is severely curtailed." *Id.*

19. *Id.* at 1071-72. Service area boundaries are designated areas that will not have the benefit of the typical city services if developed. *Id.* at 1072.

20. Briffault, *supra* note 12, at 269-70. If not implemented region-wide, local governments will act in their best interest without regard to the region; although the development will be limited in its city, it will merely move to the city next door, thereby creating sprawl that will affect the surrounding cities.

21. Joseph Van Rooy, *The Development of Regional Impact in Florida's Growth Management Scheme: The Changing Role in Regionalism*, 19 J. LAND USE & ENVTL. L. 255, 255 (2004).

22. *Id.* (quoting A LIVEABLE FLORIDA FOR TODAY AND TOMORROW, FLORIDA'S GROWTH MANAGEMENT STUDY COMMISSION FINAL REPORT, STATE OF FLORIDA 13 (2001), <http://www.floridagrowth.org>).

23. See Beaumont & Tucker, *supra* note 5 (in addressing the sprawling effect of Wal-Mart, Beaumont quotes a bumper sticker stating, "I Don't Shop at Sprawl-Marts."); Al Norman, *The Case Against Sprawl* (1999), <http://www.sprawl-busters.com/caseagainstsprawl.htm>. For an early association of large retailers with sprawl, see William E. Roper & Elizabeth Humstone, *Wal-Mart in Vermont—The Case Against Sprawl*, 22 VT. L. REV. 755 (1998).

retail store size-cap ordinances.²⁴ These ordinances simply limit the square footage of retailers, and often grocery stores, to ensure the big box stores will not be able to conform to the size-cap, or even if the store does find a way to conform, it cannot do so without substantial changes²⁵ that reduce its competitive edge.²⁶

Size-cap ordinances are a quick fix; unlike smart-growth programs, size-cap ordinances are simple, inexpensive, and effective in preventing the establishment of large retailers. For public officials attempting to respond to constituents' concerns about sprawl, size-cap ordinances offer a tempting option to satisfy demand for action in areas whose residents are angry about rapid growth. Size-cap ordinances' rapid proliferation is a testament to their popularity. According to the Retail Industry Leaders Association, fifty-two localities in twenty states had passed or proposed size-cap ordinances as of August 2004, with new ordinances proposed each month.

B. *Economic Protectionism in Size-Cap Ordinances*

While many legitimate reasons exist to control sprawl, and even to regulate big box retailers, there is a commonly expressed argument in favor of size-cap ordinances that we argue is not legitimate: the need to protect local merchants against competition from larger retailers whose size and buying power give them an advantage over local retailers. Even proponents of smart-growth initiatives recognize that, as is true of traditional zoning, "smart growth and environmental protection rhetoric in modern zoning codes often may mask some of the worst possible forms of local avarice and self-interest."²⁷ As one San Antonio activist put it in a plea to western America to limit the size of the big box stores, "they leave little oxygen for local retailers to breathe," and limiting their size will "narrow the competitive advantage they have over the little guy."²⁸ Since most, if not all, these retailers come from

24. Beaumont & Tucker, *supra* note 5 at 9, 30.

25. For example, the approximate size of Wal-Mart supercenters is 250,000 square feet, which is equal to almost six acres. *How Big is Too Big?*, <http://www.newrules.org/retail/howbigisbig.html>. In comparison, the average local retailer is approximately 500 to 10,000 square feet. *Id.* The size-capping regulations' limit on the size of retail stores range from 30,000 square feet to 100,000 square feet, thereby ensuring that the small, local retailers are not burdened. *See Store Size Caps*, <http://www.newrules.org/retail/size.html> (citing various cap-sizing regulations).

26. *See infra* Part IV (describing the competitive edge that big box retailers lose as a result of capping its size).

27. Ziegler, *supra* note 7, at 55 (describing remarks by Robert Freilich, "a leading proponent of 'smart growth'").

28. Mike Greenberg, *Big "No" to Some of the Big Boxes Lets Local Economics Thrive*, SAN ANTONIO EXPRESS-NEWS, Apr. 11, 2004.

outside the state, city, or county, this protectionist impulse renders these ordinances vulnerable to a DCCD challenge.

In some cases, the anticompetitive purpose appears in the ordinances itself, usually in its preamble, statement of purpose, or the like. In other cases, evidence of an intent to protect local merchants is expressed by members of city councils, county commissions, or local planning boards who propose the measures. Finally, supporters of ordinances often make clear through testimony, letters, or statements made at public meetings that the protection of local businesses was a, if not *the*, reason for limiting the size of big box retailers. While the examples that follow are not exhaustive of existing or proposed size-cap ordinances, we do think that they are representative.

- Among the four findings in Hood River, Oregon's ordinance limiting commercial buildings to 50,000 square feet are two that mention the need to protect the local economy. Specifically, the ordinance speaks of "diversify[ing] and improv[ing] the economy of the Hood River planning area" and "protect[ing] existing businesses . . . keeping the 'playing field' level."²⁹
- In Oakland, California, one city council member supporting its ordinance restricting the size of stores with food sales to 10,000 square feet avowed that the purpose of the ordinance was to "protect smaller stores."³⁰
- Another California town, Turlock, passed a size-cap ordinance banning stores exceeding 100,000 square feet, to both "reduce traffic congestion" as well as prevent "commercial blight as other stores in the city went under."³¹
- In San Francisco, California, the co-sponsor of a size-cap ordinance, which would limit retail stores to 120,000 square feet, stated that a large retailer "threatens existing jobs and small, neighborhood-serving businesses."³²
- Chestertown, Maryland, rejected Wal-Mart's proposal to build in the city on the basis that such plans were not in accord with the

29. *City of Hood River's Goal 9 Findings*, <http://www.hoodriversfuture.org/misc/goal9.htm> (last visited Sept. 7, 2005).

30. Sprawl-Busters, *City Council Votes to Adopt Zoning that Caps Size of Food Sales*, Oct. 23, 2003, <http://www.sprawl-busters.com/search.php?readstory=1275> (last visited Sept. 7, 2005).

31. Sprawl-Busters, *Wal-Mart Sues Another City Over Superstore Zoning Ordinance*, Feb. 16, 2004, <http://www.sprawl-busters.com/search.php?readstory=1357> (last visited Sept. 7, 2005).

32. KTVU.com, *SF Considers Legislation Banning "Big Box" Stores*, Apr. 20, 2004 (copy on file with authors).

Chestertown comprehensive plan. However, even the attorney representing National Trust, acting as a friend of the court,³³ admitted the protectionist motives behind denying Wal-Mart access to the town, “Wal-Mart wasn’t going to topple any historic structure; it was more a threat to the merchants in the town.”³⁴

- In Homer, Alaska, the Planning Commission’s recommendation to the city council to enact a size-cap ordinance of 20,000 square feet was motivated by residents’ concerns that the big box retailers would cause the locally owned businesses to shut down. The city planner read into the record letters from citizens voicing their support of the ordinance: “box stores have replaced small family-owned businesses across the nation. . . . Local business should thrive and big business needs to stay elsewhere.”³⁵ One citizen supported the passage of the size-cap ordinance “so that all local business can compete and thrive fairly with each other. . . .” Others agreed, stating that a store of 20,000 square feet “would be more competitive with local businesses and the economy.”³⁶
- In Rockville, Maryland, the size-cap ordinance states that “[l]arge establishments are regional in nature and attract shoppers from a wide region which is contrary to the goal of providing a supply of convenience retail activities to serve residents of the . . . local neighborhoods.”³⁷
- In Skaneateles, New York, the city attorney acknowledged that the size-cap ordinance, limiting retail businesses to 45,000 square feet, was enacted to prevent the big box retailers from hurting the locally owned businesses. He stated, “[i]f someone like a Walgreens comes in, they’ll put the little hardware guy out of business and significantly change the character of Skaneateles.”³⁸
- A comprehensive plan in Warwick, New York, that limits the retail businesses to 60,000 square feet explicitly states that the protectionist purpose of the ordinance is to “[s]upport small locally

33. Because Chestertown is home to many historical buildings, the National Trust participated as a friend of the court.

34. John Lang, *Chestertown: Battle of the Big Box*, PRESERVATION, Nov./Dec. 2003.

35. Unapproved Minutes of the Homer Advisory Commission, Apr. 16, 2003, available at <http://planning.ci.homer.ak.us> (under Homer Advisory Planning Commission, go to “Archives,” then to “2003,” then to “Minutes” under April 16) (last visited Sept. 7, 2005).

36. *Id.*

37. See <http://www.newrules.org/retail/rockville.html> (for text of size-capping ordinance, see ROCKVILLE, MD. MUN. CODE, § 8-7-00, available at <http://www.rockville.md.gov/government/citycode.htm> (last visited Sept. 7, 2005)).

38. See <http://www.newrules.org/retail/skan.html> (last visited Sept. 7, 2005).

owned businesses and retail centers which are in character with the Town's largely rural environment. . . ."³⁹

- An ordinance in Arroyo Grande, California, prohibiting retail stores greater than 90,000 square feet if more than 3 percent of sales are dedicated to non-taxable merchandise, contained findings stating that "large retail stores would also negatively impact existing smaller stores . . . making the existing rural, small town shopping centers less viable. . . ." In addition, the findings stated that "[l]arge retail stores . . . compete with existing retail centers in a manner that may have potential adverse impacts on the rural, small town character of the city."⁴⁰
- Enacting an ordinance requiring retail stores larger than 150,000 square feet to apply for a special use permit, River Falls, Wisconsin, stated that the purpose of such restrictions was to "ensure that large-scale retail developments . . . contribute to the unique community character of River Falls . . . and *it's* [sic] *citizens are protected*" (emphasis added).⁴¹
- Opponents of big box development in Franklin, Wisconsin, cited "protection of smaller, community-based retailers" as the reason for enacting a size-cap ordinance that limits retail buildings to 125,000 square feet.⁴²
- Concerned with the impact additional big box stores would have on the community, Cape Cod in 2002 required "[d]evelopments of regional impact," which constituted developments greater than 10,000 square feet, to be subject to special scrutiny. Cape Cod's Regional Impact Plan explained the purpose of such restrictions: "[t]he surplus of retail operations both locally and nationally indicates that over-retailing does not add to the region's economic pie. It ends up hurting *smaller, locally-owned* businesses. . . ."⁴³

As we make clear below, to the extent that size-cap ordinances are enacted for the *purpose* of insulating local retailers from out-of-state

39. WARWICK COMPREHENSIVE PLAN § 3.4, at 62 (Aug. 19, 1999) (describing commercial and industrial development), available at <http://www.greenplan.org/HTMLobj-349/Chapt3.PDF> (last visited Sept. 7, 2005).

40. ARROYO GRANDE, CAL. MUN. CODE, § 16.52.220, available at <http://www.arroyo grande.org> (last visited Sept. 7, 2005) (limiting retail stores to 90,000 square feet).

41. RIVERFALLS, WIS. MUN. CODE, § 17.116.050, available at <http://riverfallstown.com/codeindex.html> (last visited Sept. 7, 2005).

42. Jesse Garza, *Franklin limits size of retail buildings*, JSONLINE, July 13, 2004, <http://www.jsonline.com/news/metro/jul04/243459.asp> (last visited Sept. 14, 2005).

43. Beaumont & Tucker, *supra* note 5, at 9 (emphasis added).

competition, or—where evidence of purpose is nonexistent or ambiguous—where the ordinances primarily *affect* out-of-state economic actors, and not their in-state competitors, these ordinances violate the DCCD.

III. Discriminatory Purposes, Discriminatory Effects, and the DCCD

We begin with a brief overview of the DCCD, followed by a more detailed discussion of the DCCD's prohibition of state and local laws with discriminatory purposes, discriminatory effects, or both. Though the Supreme Court has not explicitly developed analytical frameworks for purpose and effects cases, we construct such frameworks based on a synthesis of the Court's case law.⁴⁴

A. A Brief Overview of the DCCD

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 happened during the Confederation era.⁴⁵ As

44. It is important to describe what, exactly, counts as "discrimination" under the DCCD. Surprisingly, the Court has spent little time on this issue in its cases. One case defines it simply as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994). Some scholars have argued that the Court really only enforces, or should enforce, the DCCD against a more narrow range of state and local laws. *See also* Richard B. Collins, *Justice Scalia and the Elusive Idea of Discrimination Against Interstate Commerce*, 20 N.M. L. REV. 555 (1990) (discussing the concept of discrimination in the Court's tax cases); Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571 (1997); Winkfield F. Twyman, Jr., *Beyond Purpose: Addressing State Discrimination in Interstate Commerce*, 46 S.C. L. REV. 381 (1995); Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 OHIO N.U. L. REV. 29 (2002); *see generally* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) (arguing that the Court only applies the DCCD to state laws that evince a protectionist purpose). Recently Max Stearns has argued that the Court has regarded as "discriminatory," and thus invalid, not merely laws embodying rent seeking, but rather the Court has "target[ed] those state rent-seeking laws that, if sustained, would compromise commerce respecting *other states* either by encouraging them to enact comparably undesirable laws or by undermining a desirable common pro-commerce regime that is already in place." Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1, 13 (2002) (emphasis added). Summarizing, much less resolving, this debate is beyond the scope of this article. For our purposes, we will take the Court at its word and adopt the "differential treatment" definition discussed above.

45. *See generally* BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE (1999 & 2005 Supp.); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (2d ed., 2002); DAN T. COENEN, THE COMMERCE CLAUSE (2004). Despite some claims to the contrary, states *were* discriminating

Justice Robert Jackson put it, in the oft-cited *H.P. Hood & Sons, Inc. v. Du Mond* decision:⁴⁶

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.⁴⁷

In other words, “the peoples of the several states must sink or swim together, and . . . in the long run prosperity and salvation are in union and not division.”⁴⁸

Though the DCCD has, to put it mildly, undergone significant evolution⁴⁹ over the years, its basic framework has been more or less stable for the last several decades. 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.⁵⁰ In addition, a statute may be facially neutral, but nevertheless violate the DCCD because it was passed with an impermissible purpose (i.e., to discriminate against out-of-state commerce, protect local economic interests, or both)⁵¹ or because, regardless of its purpose, its effects discriminate against out-of-state commercial actors.⁵² Only if states or local governments can

against one another’s commerce prior to the drafting and ratification of the Constitution. For examples, see Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 Ky. L.J. __ (forthcoming 2005).

46. 336 U.S. 525 (1949).

47. *Du Mond*, 336 U.S. at 539.

48. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

49. The evolution is succinctly discussed in COENEN, *supra* note 45, at 209–342—a discussion all the more admirable for its combination of sophistication and succinctness.

50. *See, e.g.*, *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978); *see also* *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999) (striking down state law taxing stock at different rates depending on where the corporation was chartered).

51. *See, e.g.*, *Bacchus Imp., Ltd. v. Dias*, 468 U.S. 268, 270 (1984) (“A finding that state legislation constitutes ‘economic protectionism’ may be made on the basis of either discriminatory purpose . . . or discriminatory effect. . . .”); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981); *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 352–53 (1977); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 679 (1981) (Brennan, J., concurring).

52. *See Hunt*, 432 U.S. at 353 (shifting the burden to the state of demonstrating a legitimate purpose for its ban on the use of any but USDA grades on closed containers of apples, where such ban discriminated against Washington apple growers whose state grades were considered superior to those of the USDA and advantaging North Carolina apple growers whose state had no competing grade; the “practical effect” of North Carolina’s ban was to discriminate against Washington-grown apples).

demonstrate a legitimate purpose unrelated to economic protectionism *and* demonstrate that to effectuate that purpose no less discriminatory means are available, will the law be upheld.⁵³

The DCCD's framework is easier to articulate than it is to apply. The Supreme Court has not offered specific instructions for discovering or evaluating 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. Nevertheless, it is possible to extract from those cases some general criteria in both purpose and effects cases and, based on those criteria, to propose a method for adjudicating such claims generally.⁵⁴ We do both in the following subsections. In Part III, we will use these models to demonstrate the vulnerability of many size-cap ordinances to DCCD challenges. We stress discriminatory purpose and effects challenges because we are unaware of size-capping ordinances that make explicit distinctions between in-state and out-of-state retailers.⁵⁵

B. *Facially Neutral Laws with Protectionist Purposes*

Despite the Court's condemnation of both discriminatory or protectionist purpose as well as effect,⁵⁶ "[i]n most cases the Court has as-

53. In fact, in only one case, *Maine v. Taylor*, 477 U.S. 131 (1986), has the Court upheld a facially discriminatory statute; this case involved a ban on the importation of baitfish. The Court was satisfied that there was a legitimate purpose behind the ban—protection of native baitfish population from nonnative parasites—and that no less discriminatory means existed to effectuate that purpose. *Id.* at 147. Dan Coenen calls *Maine v. Taylor* “an exceptional, indeed extraordinary case.” COENEN, *supra* note 45, at 251. Discriminatory statutes may also survive if a state can demonstrate that it is acting not as a market regulator, but as a so-called “market-participant.” This exception, which is inapplicable in the case of retail size-capping ordinances, is well-canvassed in Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989).

54. In doing so, we take for granted the categories that the Court has announced and enforced in its DCCD cases. Providing a comprehensive justification for both strands of the DCCD would distract from the central focus of this article: the constitutionality of retail size-cap ordinances. One of us (Denning) hopes to return to address the DCCD's doctrinal puzzles presented by purpose and effects cases in a future work.

55. At the other end of the spectrum, statutes that are neutral on their face, and in their purpose and effects, are subject to a more deferential balancing test in which the local benefits are measured against the burdens on interstate commerce. Only if the burdens of such a law “clearly exceed” the benefits will courts invalidate it. This is the eponymous *Pike*-balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Few laws are invalidated under the DCCD's balancing approach, so, like the facial-discrimination branch of the DCCD, it will not be our focus here. Laws that are invalidated, like the law in *Pike* itself, often include evidence that the balance was tipped by evidence of either discriminatory purpose or effects.

56. See *supra* note 50 and accompanying text. There is a rich literature on the propriety of inquiring into legislative motive to ferret out an impermissible or unconstitutional motive. The arguments pro and con are summarized, with citations to the

sumed this principle rather than applied it.”⁵⁷ Nevertheless, one commentator, writing in 1986, observed that “in practice, the Court has never upheld a regulation identified as discriminatory in purpose during the current era.”⁵⁸ This section reviews the Court’s cases in this area, then constructs a framework for identifying protectionist purposes in state and local laws.

1. THE CASES

a. *Buck v. Kuykendall*⁵⁹

In *Kuykendall*, the Court struck down a provision in a Washington law prohibiting common carriers for hire from operating in the state without first obtaining a certificate permitting such operation.⁶⁰ The certificate could only be obtained after the director of public works certified that “public convenience and necessity require such operation.”⁶¹ When *Buck* was denied a certificate, on the ground that “adequate transportation facilities between Seattle and Portland were already being provided for by means of four connecting auto stage lines,” *Buck* sued.⁶² For the Court, Justice Brandeis found that the “primary purpose” of the Washington law was “not regulation with a view to safety or to conservation of the highways, but the prohibition of competition.”⁶³ Such a prohibition, he continued, was an “obstruct[ion]” of interstate commerce, and was impermissible.⁶⁴

relevant literature, in Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575 (2001). Rarely, if ever, does the literature on legislative purpose focus on the DCCD. Articulating a complete defense of the use of legislative motive or purpose in DCCD cases is beyond the scope of this article; the Court regards protectionist purpose as a sufficient condition for invalidating a state or local law under the DCCD, and that is good enough for us. In any event, we doubt we could improve upon the defense of purpose inquiries in DCCD cases offered by Professor Regan. See Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1110–60 (1986).

57. COENEN, *supra* note 45, at 240.

58. Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1245 (1986); see also Regan, *supra* note 56 (arguing that the DCCD ought to reach protectionism and only protectionism in cases involving the movement of goods, and that eliminating state protectionism was, in fact, what the Court was doing when it applied the DCCD).

59. 267 U.S. 307 (1925).

60. *Buck*, 267 U.S. at 312.

61. *Id.* at 313.

62. *Id.*

63. *Id.* at 315.

64. *Id.* at 316.

b. *H.P. Hood & Sons v. Du Mond*⁶⁵

Attempts to insulate existing economic actors from competition fared no better in *H.P. Hood & Sons v. Du Mond*. New York prohibited milk dealers from purchasing milk from any but licensed producers.⁶⁶ Among the requirements for granting a license to producers was a finding that “the issuance of the license will not tend to a destructive competition in a market already adequately served. . . .”⁶⁷ When *H.P. Hood & Sons* proposed to build a milk receiving plant in New York, the license was denied, in part due to concerns about “destructive competition.” The Court noted that at the required hearing on the license, “milk dealers competing with Hood as buyers in the area . . . complained that Hood . . . had competitive advantages” over them; the Commissioner found that permitting the construction of the plant would disadvantage the existing producers.⁶⁸

Waxing rhapsodic about the virtues of the free trade system the framers had endeavored to establish,⁶⁹ Justice Jackson noted that the Court and the DCCD had acted to prevent backsliding from the framers’ commitment: “This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state. . . .”⁷⁰ Here, Jackson found that the purpose of the denial of the license was to prevent diversion of milk from existing plants, leaving them with excess capacity. “This competition,” Jackson wrote, “[the state] did not approve.”⁷¹ The DCCD, he concluded, took the decision whether to approve or disapprove of competition out of states’ hands.

c. *Bacchus Imports, Ltd. v. Dias*⁷²

Finally, consider a more recent case involving an attempt to favor an in-state industry through relief from a generally applicable excise tax. In order to encourage the production of locally produced alcohol, the State of Hawaii exempted *okolehao* and pineapple wine from the generally applicable excise tax imposed on wholesales of liquor.⁷³ Other

65. 336 U.S. 525 (1949).

66. *Id.* at 527.

67. *Id.* at 527 n.3.

68. *Id.* at 528, 529.

69. *See id.* at 533–35, 538–40; *see also supra* note 46 and accompanying text (quoting Jackson).

70. *H.P. Hood & Sons*, 336 U.S. at 535.

71. *Id.* at 540.

72. 468 U.S. 263 (1984).

73. *Id.* at 265.

liquor wholesalers filed suit, claiming the exemption violated the DCCD; the Court agreed.⁷⁴

Writing for the Court, Justice White noted that impermissible economic protectionism could be demonstrated by proving either discriminatory purpose or effect.⁷⁵ Here, White wrote, “[e]xamination of the State’s purpose . . . is sufficient to demonstrate” why the Court should apply strict scrutiny.⁷⁶ Quoting the Hawaii Supreme Court’s opinion, which summarized the legislature’s purpose, White continued, “we need not guess at the legislature’s motivation, for it is undisputed that the purpose of the exemption was to aid Hawaiian industry.”⁷⁷ In addition to the purpose, the Court noted that discriminatory effects were present, too, because only a specific, locally produced product was entitled to the exemption—all other liquors, especially those from out of state, had to pay the tax.⁷⁸

White also rejected the distinction, offered by the state, that its purpose was not to discriminate against other liquors, but merely to subsidize certain industries (the production of pineapple wine) and aid other struggling industries (the production of *okolehao*).⁷⁹

“If we were to accept that justification,” White wrote, “we would have little occasion ever to find a statute unconstitutionally discriminatory. . . . The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party. . . . [I]t could always be said that there was no intent to impose a burden on one party, but rather the intent was to confer a benefit on the other.”⁸⁰

He concluded that it was “irrelevant . . . that the motivation of the legislature was the desire to aid the makers of the locally produced product rather than to harm the out-of-state producers.”⁸¹

74. The Supreme Court rejected the claims of the state that the Twenty-first Amendment immunized its laws concerning taxation of liquor from DCCD scrutiny. *Id.* at 274–76. The question whether the Twenty-first Amendment disables, to some degree, the DCCD when state regulation of liquor is concerned is currently a matter of some contention. One of us (Denning) has concluded that the DCCD *is* disabled by virtue of the Twenty-first Amendment and that *Bacchus Imports*’ analysis of the issue was incorrect and ought to be overruled. See Brannon P. Denning, *Smokey and the Bandit in Cyberspace: The Dormant Commerce Clause Doctrine, the Twenty-first Amendment, and State Regulation of Internet Alcohol Sales*, 19 CONST. COMMENTARY 297, 327–28, 339–40 (2002) (criticizing *Bacchus Imports*). But see *Granholm v. Heald*, 125 S. Ct. 1885 (2005) (reaffirming *Bacchus Imports*). The case is useful for purposes of this article, however, in demonstrating the Court’s application of the DCCD when improper legislative purpose is involved.

75. *Bacchus Imports*, 468 U.S. at 270.

76. *Id.*

77. *Id.* at 271.

78. *Id.*

79. *Id.* at 272.

80. *Id.* at 273.

81. *Bacchus Imports*, 468 U.S. at 273. In one other case, the Court, while conceding that discriminatory purpose violated the DCCD, declined to find a protectionist purpose present in a Minnesota law banning the retail sale of milk in plastic, nonreturnable,

2. A FRAMEWORK FOR ASCERTAINING DISCRIMINATORY PURPOSE IN DCCD CASES

If the cases involving discriminatory purpose are relatively rare in the Court's DCCD jurisprudence,⁸² the scarcity is probably due to the fact that (1) the Court has clearly stated that an intention to insulate local economic actors from competition falls squarely within the constitutional purpose served by the DCCD (i.e., to prevent such economic self-dealing by states) and (2) the reluctance of states to pass laws that baldly state such an impermissible purpose. Unfortunately, the relative scarcity of such cases means that a court is largely on its own when faced with an allegation of discriminatory purpose when the purpose is not as clearly stated as it was in, say, *Bacchus Imports*. Black letter constitutional law says that such a purpose is illegitimate in the DCCD context but leaves a judge little else to go on to tease out the purpose.

Luckily, judges are not entirely at sea. The Supreme Court has offered some guidance for establishing discriminatory purpose, which lower courts have adapted for use in DCCD cases. After *Washington v. Davis*⁸³ held that disparate impact without evidence of discriminatory intent was insufficient to establish an equal protection violation, the Court offered some guidance on proving discriminatory purpose. "[W]ithout purporting to be exhaustive," the Court summarized "subjects of proper inquiry in determining whether racially discriminatory intent existed": (1) effects on a particular group; (2) the historical background of the decision, "particularly if it reveals a series of official actions taken for invidious purposes"; (3) the "specific sequence of events leading up to the challenged decision"; (4) procedural or sub-

nonrefillable containers, but allowing the sale in nonplastic containers that were similarly nonreturnable and nonrefillable, like paper milk cartons. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 458 (1981). Plaintiffs had argued, and a state district court had agreed, that "the 'actual basis' for the Act 'was to promote the economic interests of certain segments of the local dairy and pulpwood industry at the expense of the economic interests or other segments of the dairy industry and the plastics industry.'" *Id.* at 460. Siding with the state supreme court, the U.S. Supreme Court rejected this argument. *Id.* at 471 n.15. In its discussion of the plaintiffs' equal protection claims, the Court agreed that "the articulated purpose of the Act [environmental protection] is its actual purpose." *Id.* at 463 n.7. The Court reaffirmed this conclusion when it addressed the DCCD arguments. *Id.* at 471 n.15 ("Respondents advance a 'discriminatory purpose' argument, relying on a finding by the District Court that the Act's 'actual basis was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry.' . . . We have already considered and rejected this argument in the equal protection context . . . and do so in this context as well.").

82. More common, perhaps, are the cases in which the Court disclaims an intent to rely exclusively on evidence of discriminatory purpose, but where one nevertheless senses that its presence influenced the ground on which the Court did rest its decision.

83. 426 U.S. 229 (1976).

stantive departures from the “normal . . . sequence” especially if substantive “factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached”; and (5) “[t]he legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.”⁸⁴

Lower courts have employed these criteria in DCCD cases. For example, the Eighth Circuit has approved the use of:

direct and indirect evidence to determine whether a state adopted a statute with a discriminatory purpose. This evidence includes (1) statements by lawmakers; (2) the sequence of events leading up to the statute’s adoption, including irregularities in the procedures used to adopt the law; (3) the State’s consistent pattern of “disparately impacting members of a particular class of persons;” (4) the statute’s historical background, including “any history of discrimination by the [state];” and (5) the statute’s use of highly ineffective means to promote the legitimate interest asserted by the state.⁸⁵

The Fourth Circuit has similarly endorsed:

[s]everal factors . . . as probative of whether a decisionmaking body was motivated by a discriminatory intent, including: (1) evidence of a “consistent pattern” of actions by the decisionmaking body disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decisionmaking body or the jurisdiction it represents; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decision makers on the record or in minutes of their meetings.⁸⁶

Similarly, we think that, at a minimum, plaintiffs should be able to introduce, as evidence of purpose: (1) the historical background of the decision to enact the law; (2) the sequence of events leading up to the passage of a law or ordinance that is suggestive of impermissible protectionism, like the timing of the law or the use of irregular procedures; (3) the legislative or administrative history of the law or ordinance, including statements of purpose appearing on the face of the statute or which are offered in support of the law; and (4) any gap between means

84. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977).

85. *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1065 (8th Cir. 2004) (citations omitted); *see also S.D. Farm Bureau v. Hazeltine*, 340 F.3d 583, 593–95 (8th Cir. 2004) (using direct evidence of discriminatory purpose contained, *inter alia*, in “pro” statement drafted by supporters of referendum and notes from the drafting meetings regarding the referendum itself; also relying on “indirect evidence,” including irregularities in the drafting process, and evidence that means used to pursue asserted motive were recognized as ineffective, as well as lack of concern with less discriminatory means of achieving goal).

86. *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 336 (4th Cir. 2001).

and ends, evidenced by, for example, exemptions that disproportionately benefit existing, in-state commercial interests.

The background and the sequence of an ordinance's enactment are helpful to establish the context in which the bill was being considered. For example, if action was not taken until a city council or a local planning commission was flooded by claims that a proposed retail store would create traffic problems at a given intersection, that is helpful in evaluating what might have been motivating the member of the council or commission. Likewise, if the commission had sprung into action upon receiving complaints from existing businesses that Home Depot (or Wal-Mart, or Petco) would put them out of business, that too is useful to ascertain purpose. Further, if the ordinance was enacted using extraordinary measures, or without the usual debate accompanying local legislation, we believe that should be admissible to show that the council might have been trying to hide something.

Without a doubt, the most useful information will come from the legislative history (including statements from supporters and opponents—especially those who are voting on the ordinance) and from the apparent (or actual) operation of the bill itself. If a majority of city council or planning commission members voting to adopt a size-cap ordinance makes a statement about the need to protect existing businesses, we see no reason not to take them at their word. The more difficult problem comes in evaluating the comments of supporters (possibly members of the public) who express impermissible motives in urging passage. We think these, too, should be admissible, especially if no one voting for the measure contradicts or challenges those impermissible motives; however, such statements should carry less weight than those made by legislators.

Finally, we think that if legitimate purposes are behind an ordinance, then the ordinance should not contain particular exemptions of persons or entities that would otherwise be covered by the law. Such exemptions should lead a court to question the legitimacy of the putative purpose, especially (in the DCCD context) if the exemptions manage to carve-out most or all of the local businesses that would otherwise be affected, thus possibly rendering the regulated class merely a proxy for out-of-state commercial actors or goods.

Plaintiffs should not have to bear the burden of showing that protectionism was the *sole* motivation for the passage of the law—such a showing is not required in racial discrimination cases.⁸⁷ We prefer Paul

87. *Arlington Heights*, 429 U.S. at 265–68 (stressing that it did not “require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes.

Brest's suggested "clear and convincing" evidence standard in discriminatory purpose cases.⁸⁸ As long as a plaintiff can show, by clear and convincing evidence, that discriminatory purpose played a positive role in the passage of the law, strict scrutiny will be triggered. Such a standard would prevent courts from striking down legitimate legislation on the basis of a casual or offhand remark from a single source, when it does not appear that others shared the expressed sentiment. It is also important to remember that under strict scrutiny defendants have an opportunity to prove motivation other than economic protectionism, and demonstrate the absence of less discriminatory means to achieve that legitimate end.

Moreover, we reject suggestions that defendants be able to prove that the law would have been passed regardless of the impermissible motive.⁸⁹ This proposal, borrowed from *Mt. Healthy School District Board of Education v. Doyle*,⁹⁰ presents serious practical difficulties for courts and litigants. Chief among them is the fact that neither *Mt. Healthy* nor those favoring this requirement "describe[d] how the government might prove that it would have taken the same action anyway or how a court can decide what might have happened under different circumstances."⁹¹

C. *Facially Neutral Statutes with Discriminatory Effects*

Even if a court is inclined to look for legislative motive, sometimes there simply won't be enough evidence of motive to make an informed judgment. With a facially neutral statute or ordinance, it then becomes necessary to look at how the statute operates in order to determine whether the effects of the statute's operation suggest a violation of the DCCD. Again, we will first review the relevant case law, then propose an analytical model based on criteria stressed by the Court in those cases.

Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."); Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 130-31.

88. Brest, *supra* note 87, at 130 ("The complainant must establish by clear and convincing evidence that [an illicit or suspect] objective played an affirmative role in the decisionmaking process.").

89. See Julian Cyril Zebot, Note, *Awakening a Sleeping Dog: An Examination of the Confusion in Ascertaining Purposeful Discrimination Against Interstate Commerce*, 86 MINN. L. REV. 1063, 1084 (2002) (arguing that defendants be permitted to rebut by proving that a legitimate purpose was the actual reason the law was passed and that law would have passed without the suspect motive).

90. 429 U.S. 274 (1977).

91. CHEMERINSKY, *supra* note 45, at 690.

1. THE CASES

a. *Baldwin v. G.A.F. Seelig, Inc.*⁹²

New York sought to stabilize the price of milk sold in the state by prohibiting the sale of milk by milk dealers who purchased milk from producers at prices below the state minimum price for sales by producers to dealers; the statute's operation included milk purchased outside the state.⁹³ This meant that G.A.F. Seelig could not purchase milk from Vermont at lower prices than those established in New York and sell it in that state. The Court invalidated the law; Justice Cardozo wrote that the DCCD is violated whenever "the avowed purpose of [a law obstructing or burdening interstate commerce], *as well as its natural tendency*, is to suppress or mitigate the consequences of competition between the states."⁹⁴ Later in the opinion, he emphasized that "[n]either the power to tax nor the police power may be used by the state . . . with the *aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.*"⁹⁵ Such restrictions "are an unreasonable clog upon the mobility of commerce" and "set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result."⁹⁶

b. *Dean Milk Co. v. City of Madison*⁹⁷

Madison, Wisconsin, passed an ordinance prohibiting the sale of milk in town if the milk had not been pasteurized within five miles of the city's center.⁹⁸ The effect was to bar milk pasteurized both elsewhere in the state, as well as that processed in Illinois.⁹⁹ The Court accepted that the purpose of the ordinance—ensuring the sanitary regulation of milk offered for sale in the town—was legitimate.¹⁰⁰ However, the

92. 294 U.S. 511 (1935).

93. *Id.* at 519.

94. *Id.* at 522 (emphasis added).

95. *Id.* at 527 (emphasis added).

96. *Id.*

97. 340 U.S. 349 (1951).

98. *Id.* at 350.

99. Another effect was to bar "Grade A" milk from sale in Madison, since the facts indicate that "[a]t the time of trial the Madison milkshed was not one of 'Grade A' quality by the standards recommended by the United States Public Health Service, and no milk labeled 'Grade A' was distributed in Madison." *Id.* at 352. By contrast, the milk that Dean Milk Co. wished to sell was "labeled 'Grade A' under the Chicago ordinance which adopts the rating standards recommended by the United States Public Health Service." *Id.*

100. *Id.* at 353.

Court concluded that the “practical effect” of the ordinance “excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois” for no other reason than its geographic origins.¹⁰¹ If “reasonable nondiscriminatory alternatives,” such as making provision for Madison’s own inspectors to test the imported milk,¹⁰² existed, Madison was obliged to use those to effect its legitimate local purposes.¹⁰³ That it had not done so meant its requirement “erect[ed] an economic barrier protecting a major local industry against competition from without the State” and “plainly discriminate[d] against interstate commerce.”¹⁰⁴

The Court justified its examination of the effects of the ordinance, as opposed to deferring to the legitimate police powers purpose offered by the city, with the following observation: “A . . . view that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods.”¹⁰⁵ It would further invite multiplication, risking the proliferation of trade barriers that the Constitution was intended to prevent.¹⁰⁶

c. *Hunt v. Washington State Apple Advertisers Commission*¹⁰⁷

The State of Washington invested heavily in developing and marketing a grading system for its apples. It succeeded; the Washington grade is recognized in the industry as superior even to that of the federal Department of Agriculture.¹⁰⁸ Washington apples competed with, among others, apples grown in North Carolina. In 1972, the North Carolina Board of Agriculture issued a regulation prohibiting the use of any grade other than the USDA’s grade on closed containers of apples shipped into the state. In addition to preventing the use of Washington’s grade in North Carolina, compliance with the regulation would have imposed substantial unexpected costs on Washington apple growers.¹⁰⁹

101. *Id.* at 354.

102. *See id.* at 354–55 (“If the City of Madison prefers to rely upon its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors.”).

103. *Dean Milk Co.*, 340 U.S. at 354.

104. *Id.*

105. *Id.*

106. *Id.* at 356.

107. 432 U.S. 333 (1977).

108. *Id.* at 336.

109. *Id.* at 337–38.

Unable to persuade the North Carolina board to either revise the rule or exempt Washington apples from its operation, the producers sued, claiming that the rule discriminated against their products.

The Supreme Court agreed, concluding that “the challenged statute has the *practical effect* of . . . discriminating against” Washington’s apples.¹¹⁰ The Court went on to identify the particular ways in which the rule operated to the particular disadvantage of Washington’s apples and to the advantage of their North Carolina competitors:

The first, and most obvious, is the statute’s consequence of raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected. . . . [T]his disparate effect results from the fact that North Carolina apple producers, unlike their Washington competitors, were not forced to alter their marketing practices in order to comply with the statute. . . . [T]he increased costs imposed by the statute would tend to shield the local apple industry from the competition of Washington apple growers and dealers who are already at a competitive disadvantage because of their great distance from the North Carolina market.¹¹¹

Second, the Court found that the statute operated to “strip[] away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system”¹¹² with no effect on North Carolina producers.

Finally, the Court observed that “by prohibiting Washington growers and dealers from marketing apples under their State’s grades, the statute has a leveling effect which insidiously operates to the advantage of local apple producers.”¹¹³ Because Washington had succeeded in developing a superior grading system, it ordinarily would be rewarded in the marketplace. The downgrading effect resulting from the mandated use of the inferior USDA grade, the Court continued, “offers the North Carolina apple industry the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit.”¹¹⁴ At best, the regulation deprived Washington producers of a “market premium”; at worst, “it will have the effect of an embargo against those Washington apples in the superior grades as Washington dealers withhold them from the North Carolina market.”¹¹⁵

Despite the evidence of a protectionist motive behind the legislation,¹¹⁶ the Court relied upon the effects alone in shifting the burden to

110. *Id.* at 350 (emphasis added).

111. *Id.* at 350–51.

112. *Id.* at 351.

113. *Hunt*, 432 U.S. at 351.

114. *Id.* at 352.

115. *Id.*

116. *Id.* (“[W]e need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case. . . .”).

North Carolina to satisfy strict scrutiny.¹¹⁷ The state was unable to do so.

d. *West Lynn Creamery, Inc. v. Healy*¹¹⁸

In *West Lynn Creamery*, the Court struck down a Massachusetts tax on milk sales, the revenue of which was used to fund a subsidy provided to in-state milk producers.¹¹⁹ Though it was written in facially neutral terms, the Court concluded that its effect was similar to “a protective tariff or customs duty, which taxes goods imported from other states, but does not tax similar products produced in state.”¹²⁰ Because all milk dealers were subject to the tax, but only Massachusetts producers received the subsidy, the “undisputed effect [is] to enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States” because whatever taxes paid by Massachusetts farmers were “entirely (indeed more than) offset by the subsidy provided exclusively to Massachusetts dairy farmers.”¹²¹ Thus, by looking at the tax-subsidy program as it actually operated, the Court had little trouble concluding that the program, in its effects, discriminated against interstate commerce.

e. *Exxon and Clover Leaf Creamery*

While it would seem easy, based on the cases discussed above, to extract a few fairly clear factors for use in discriminatory effects cases,¹²² there is a fly in the ointment. A year after *Hunt*, the Supreme Court decided *Exxon Corp. v. Governor of Maryland*,¹²³ whose cryptic language has furnished subsequent courts with a convenient way to avoid striking down state laws in close cases. We describe *Exxon* and its application here, then discuss its implications for a discriminatory effects model.¹²⁴

In response to gasoline shortages of the early 1970s, and the complaints from independent retail stations that oil companies and refineries were favoring their own retail stations over those independent retailers, the Maryland legislature passed a law that restructured the state’s retail gasoline market.¹²⁵ The legislature barred producers or refiners of pe-

117. *Id.* at 353 (“When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interest at stake.”).

118. 512 U.S. 186 (1994).

119. *Id.* at 190–91.

120. *Id.* at 193.

121. *Id.* at 194.

122. See *infra* Part III.C.2.

123. 437 U.S. 117 (1978).

124. See *infra* Part III.C.2.

125. *Exxon*, 437 U.S. at 120.

troleum products from operating retail service stations in Maryland and required that all “voluntary allowances”—which the Court tells us were “temporary price reductions granted by the oil companies to independent dealers who are injured by local competitive price reductions of competing retailers”¹²⁶—be extended to all service stations supplied by the producer or refiner.¹²⁷ At the time, Maryland had no producers or refiners; “[a]ll of the gasoline sold by Exxon in Maryland [was] transported into the State from refineries located elsewhere.”¹²⁸

Exxon, and other producers and refiners who both sold to independent retailers and operated their own retail gasoline stations in the state, filed suit, alleging, among other things, that the Maryland statute violated the DCCD.¹²⁹ The Maryland Supreme Court rejected all of Exxon’s arguments and upheld the statute.¹³⁰ The U.S. Supreme Court affirmed the decision.

Exxon made three DCCD arguments: first, that the Maryland statute discriminated against interstate commerce; second, that it unduly burdened interstate commerce; and finally, it made the intriguing argument that the business of supplying gasoline was essentially national in nature, and not amenable to local regulation.¹³¹

Justice Stevens first noted the lack of facial discrimination in the statute: “the Maryland statute does not discriminate against interstate goods, nor does it favor local producers and refiners.”¹³² In fact, he noted, “Maryland’s entire gasoline supply flows in interstate commerce and since there are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless.”¹³³

But Exxon argued that the effect of the statute was to protect in-state retail gas stations from competition from those owned by out-of-state oil producers and refiners by requiring the latter to divest themselves of retail gasoline stations.¹³⁴ Exxon noted that “the burden of the divestiture requirement falls solely on interstate companies.”¹³⁵ But conceding that point, Stevens replied, “does not lead, either logically or as

126. *Id.* at 122–23.

127. *Id.* at 120–21, 123.

128. *Id.* at 121.

129. *Id.* at 123. *Exxon*, 437 U.S. at 123.

130. *Id.*

131. *Exxon*, 437 U.S. at 125.

132. *Id.*

133. *Id.*

134. *Id.* at 125.

135. *Id.*

a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level.”¹³⁶

Stevens distinguished *Hunt* and *Dean Milk* on the grounds that “the Act creates no barriers whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market.”¹³⁷ Here, he wrote, “in-state independent dealers will have no competitive advantage over out-of-state dealers.”¹³⁸ Simply because the burden of this particular regulation fell on a *subset* of out-of-state retail dealers did not “by itself, establish a claim of discrimination against interstate commerce.”¹³⁹ Only if “the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market,” Stevens added in a footnote, might “the regulation [be found to] have a discriminatory effect on interstate commerce.”¹⁴⁰ Since the regulation did not affect the “relative proportions of local and out-of-state goods sold in Maryland and . . . [and had] no demonstrable effect . . . on the interstate flow of goods,” other discriminatory effects cases¹⁴¹ could be distinguished.¹⁴²

Having disposed of Exxon’s discriminatory effects argument, Stevens turned to the related argument that Maryland’s divestment statute had impermissibly burdened interstate commerce. “[B]ecause of the divestiture requirements,” Exxon argued, “at least three refiners will stop selling in Maryland, and . . . the elimination of company-operated stations will deprive the consumer of certain special services.”¹⁴³ As to the first claim, Stevens responded that because consumers would likely switch from refiner-operated stations to independent stations no burden would result. “[I]nterstate commerce,” he added, “is not subjected to an impermissible burden simply because an otherwise valid regulation causes some businesses to shift from one interstate supplier to another.”¹⁴⁴ As for arguments that in-state consumers themselves were harmed by the regulation, “the Court presumably did not believe that the Commerce Clause was intended to protect one segment of Maryland society against another.”¹⁴⁵

136. *Id.*

137. *Exxon*, 437 U.S. at 126.

138. *Id.*

139. *Id.* (footnote omitted).

140. *Id.* at 126 n.16.

141. *See supra* notes 92–117 and accompanying text.

142. 437 U.S. at 126 n.16.

143. *Id.* at 127.

144. *Id.*

145. BITTKER, *supra* note 45, at 6–44.

At bottom, Stevens wrote, Exxon charged Maryland with interfering with the “natural functioning of the interstate market” through its regulations.¹⁴⁶ But in language often quoted when *Exxon* is cited, he rejected the premise “that the Commerce Clause protects the particular structure or methods of operation in a retail market. . . . [T]he Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.”¹⁴⁷

This cryptic line was later deployed by the Court in *Minnesota v. Clover Leaf Creamery Co.* to dispose of what was, in essence, a discriminatory effects claim that the ban of plastic, but not paperboard, nonrefillable, nonreturnable milk containers violated the DCCD.¹⁴⁸ Though the Court analyzed this claim using *Pike* balancing,¹⁴⁹ respondents claimed that “plastic resin, the raw material used for making plastic nonreturnable milk jugs, is produced entirely by non-Minnesota firms, while pulpwood, used for making paperboard, is a major Minnesota product.”¹⁵⁰ The claim was that “plastic” and “nonplastic” were proxies for in-state and out-of-state economic firms. The Court, however, thought it “clear that respondents exaggerate the degree of burden on out-of-state interests, both because plastics will continue to be used in the production of [other products sold in Minnesota] and because out-of-state pulpwood producers will presumably absorb some of the business generated by the Act.”¹⁵¹ Quoting *Exxon*’s “interstate market not particular interstate firms” language, the Court concluded that “[a] nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominately out-of-state industry to a predominately in-state industry.”¹⁵²

146. 437 U.S. at 127 (quoting *Hughes v. Alexandria Scrap Co.*, 426 U.S. 794, 806 (1976)).

147. 437 U.S. at 127–28. The third argument—that the business of retail gas marketing was a national one not amenable to piecemeal state regulation—which Stevens characterized as “novel,” did not detain the Court for long. *Id.* at 128. “[T]his Court,” Stevens wrote, “has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods.” That not being the case here, the Court did not “find that the Commerce Clause, by its own force, pre-empts the field of retail gas marketing.” *Id.*

148. 449 U.S. at 470–74.

149. *Id.* at 472; *see supra* note 55 and accompanying text. The Court settled on *Pike* balancing because it concluded that the regulation regulated evenhandedly, in contrast to the “statutes discriminating against interstate commerce, which we have consistently struck down.” 449 U.S. at 471–72. Interestingly, the Court lumped *Hunt* in with cases involving facially discriminatory statutes. *Id.* at 472. Of course the regulations in *Hunt* were evenhanded as well.

150. *Clover Leaf Creamery*, 449 U.S. at 473.

151. *Id.*

152. *Id.* at 474.

2. FRAMEWORK FOR ASCERTAINING DISCRIMINATORY EFFECTS IN DCCD CASES

As the cases show, the DCCD is different from the other constitutional law doctrines—racial discrimination under the Fourteenth Amendment, for example—because proof of disparate impact will invalidate state and local laws under the DCCD, regardless of proof of an illicit motive. Herein lies another doctrine question to which the Court has not provided an answer: *which* effects count as “discriminatory” when assessing a discriminatory-effects claim under the DCCD?

The Court’s leading discriminatory-effects cases lend themselves to some generalizations.¹⁵³ The clearest cases involve statutes whose effects *insulate one locality’s*¹⁵⁴ *economic actors from competition by out-of-state economic actors*. Discriminatory effects can take many forms, including, but not limited to: (1) using facially neutral criteria merely as a proxy for geographic origin;¹⁵⁵ (2) effectively barring the import of out-of-state goods, or barring their sale once imported; (3) acting to raise the cost of doing business in a state for out-of-state competitors, which costs are not also borne by in-state actors; (4) stripping competitive advantages from out-of-state competitors; (5) otherwise leveling the playing field to the benefit of in-state economic actors; or (6) subsidizing in-state actors through mechanisms that are funded entirely (or largely) by out-of-state economic actors.

How does *Exxon* affect this model? The answer depends how one reads *Exxon*;¹⁵⁶ and there is more than one possible reading of the case.

153. The entire subject of discriminatory effects in DCCD cases deserves treatment, but such treatment is outside the scope of this article. One of us (Denning) hopes to turn to that subject next.

154. In concluding that the DCCD applies to discrimination or protectionism initiated by *local governments* as well as to that initiated by *states*, we are following the lead of the Supreme Court, which has done so for over a century. *See, e.g.*, *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t Nat’l Res.*, 504 U.S. 353, 363 (1994) (“[T]he fact that the Michigan statute allows individual counties to accept solid waste from out of state [does not] qualify its discriminatory character.”); *Dean Milk*, 340 U.S. at 354 n.4; *Brimmer v. Rebman*, 138 U.S. 78 (1891) (fact that law imposed burdens equally on in-state and out-of-state citizens did not insulate it from review under DCCD). But some have questioned whether there can be any discrimination by localities. *See, e.g.*, *Fort Gratiot*, 504 U.S. at 369–70 (Rehnquist, C.J., dissenting); *Dean Milk*, 340 U.S. at 357–58 (Black, J., dissenting). Articulating why we think that the Court is correct to police such local discrimination must await another article. *See generally* Regan, *supra* note 56, at 1229–30 (explaining why “[a] government cannot validate discrimination against a protected class . . . simply by subjecting some members of the non-protected class to the same burden.”).

155. Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT’s-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1416 (1994).

156. A different question is whether *Exxon* was correctly decided. That question, though important, is beyond the scope of this article.

For Donald Regan, *Exxon* (and *Clover Leaf Creamery*) can be explained on the ground that the Court was satisfied that no protectionist purpose motivated the passage of either statute. Since, according to Professor Regan, the Court is concerned only with smoking out and eliminating protectionist purpose, any law lacking such a purpose will be upheld.¹⁵⁷

Another explanation is that the Court in both cases saw no reason to get involved because of the presence of powerful interests (oil companies in *Exxon*, Minnesota dairies in *Clover Leaf Creamery*) that could be counted on to vigorously oppose any sort of other in-state interest group rent-seeking.¹⁵⁸

A third possibility is that *Exxon* means that discriminatory effects claims can only be brought successfully when the burdens on the out-of-state economic actor are not borne by an in-state competitor, or when the market-share lost as a result of the regulation inures to the benefit of in-state competitors.¹⁵⁹

157. Regan, *supra* note 56, at 1236 (“Stevens says North Carolina discriminated [in *Hunt*] and Maryland does not. There is only one thing he can possibly have in mind, namely, that the North Carolina legislature was motivated by protectionist purpose, while the Maryland legislature was not.”). Dan Coenen has made a similar suggestion: that the Court felt there was a legitimate state interest at stake that could not be effectuated by means other than prohibiting refiner-owned gasoline stations.

Perhaps the key to understanding *Exxon* lies in focusing closely on Maryland’s claimed state interest in countering vertical integration in the gasoline-distribution industry to solve such problems as unfair discrimination against non-vertically-integrated gas stations in allocating products in times of shortage. The point is that if one recognizes that prevention of vertical integration is itself a significant state interest, then further balancing in a case such as *Exxon* is (or at least is all but) unnecessary. Even though the Maryland law disproportionately burdened non-local gas station owners, there was simply no way to avoid that result (given the pre-existing location of refiners and producers) if the practice of vertical integration was to be discontinued.

COENEN, *supra* note 45, at 282 n.81. The possibility is an intriguing one, but raises the question why the Court did not simply apply strict scrutiny, then hold that Maryland had satisfied its requirements?

158. See *Clover Leaf Creamery*, 449 U.S. at 473 & n.17. The Court noted that “[t]he existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse.” *Id.* at 473 n.17. “[T]wo of the three dairies, the sole milk retailer, and the sole milk container producer challenging the statute in this litigation are Minnesota firms.” *Id.* at 473 (footnote omitted). The protection of out-of-state actors unrepresented in the state legislature was once a popular justification for the DCCD. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 83–84 (1980). At the time *Exxon* was decided, one commentator noted that such process-representation protections were hardly needed by Big Oil: “it is difficult to believe that [Exxon and other oil companies’] viewpoint was not represented before the Maryland legislature. Realistically viewed, major oil companies are unlikely candidates for the role of the voiceless out-of-state business.” *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 66, 74 (1978).

159. See also CALVIN MASSEY, 2004 SUPPLEMENT: AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 31–32 (2004); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1056 (3d ed. 2000) (“The Court found no impermissible advantage bestowed on in-state interests because the Maryland statute left in-state and out-of-

We think that the third of these possibilities is the best reading of *Exxon*. While Don Regan's thesis may be correct, the Court has persisted in presenting protectionist purpose and discriminatory effects as alternative bases for invalidating state laws under the DCCD.¹⁶⁰ We presume, as does the Court, that even absent demonstrable protectionist purpose, state laws that operate with a discriminatory effect on interstate commerce or out-of-state commercial actors are invalid. Moreover, the Court, of late, seems to have backed away from the "political process" model of the DCCD, if it ever fully embraced it. It has certainly never specified a representation baseline that could be presumed to protect the interests of out-of-state economic interests.

That leaves the third reading of *Exxon*, which the Court's own language in *Exxon* and its subsequent application of the case seems to endorse. In both *Exxon* and *Clover Leaf Creamery*, the Court focused on the lack of harm to similarly-situated out-of-state entities in upholding the state laws. The Maryland law in *Exxon* may have disadvantaged or discriminated against gas stations owned by oil producers and refiners in favor of independently owned gas stations, owned primarily by in-staters, but it did not keep out-of-state independently owned gas stations from competing with existing stations in Maryland. Nor did it shrink the market for out-of-state goods, leaving a larger share of the market for in-state goods. Similarly, in *Clover Leaf Creamery*, the Court found that any burden on out-of-state plastics producers would be mitigated by opportunities for out-of-state pulpwood producers, while the plastics industry could still make other products for sale in Minnesota.

On the reading of these cases, therefore, it appears that discriminatory effects of the sort described above are invalid if and only if the

state independent gasoline dealers on the same competitive footing.") (footnote omitted); *id.* at 1059 n.1 ("In *Exxon* . . . in-state firms were given no express advantage over competing out-of-state concerns, and because there was no evidence that the regulation had adversely affected the flow of interstate goods and services as such, the statute was within the limits imposed by the dormant Commerce Clause."); COENEN, *supra* note 45, at 281 n.81 ("The majority . . . found no undue burden on interstate commerce and in so doing made much of the fact that the law did not preclude . . . non-producer/non-refiner firms (such as Sears & Roebuck and Pantry Pride) could continue to operate gas stations in Maryland."); Max Stearns writes that "*Exxon* . . . supports the intuition that the dormant Commerce Clause doctrine is concerned more with the undermining of pro-commerce regimes of other states than with securing the efficient allocation of resources that can be compromised through in-state rent seeking." Stearns, *supra* note 44, at 145. He argues that the law in *Exxon*, unlike that in *Hunt*, "did not confer rents that only could have become available as a result of the pro-commerce laws or practices of other states." *Id.* at 144.

160. See *supra* notes 49–52 and accompanying text.

effects benefit in-state economic interests that are direct competitors with their affected out-of-state rivals.¹⁶¹ As we shall show, however, this possible limitation of the DCCD's discriminatory effects prong should not make a difference in the context of retail store size-cap ordinances.

D. *The Mechanics of Strict Scrutiny*

Under the DCCD, proof of protectionist purpose or discriminatory effects will trigger strict scrutiny. We described above how protectionist purpose might be proven, as well as which effects ought to be regarded as discriminatory under the DCCD. In this section, we offer a few words about what, exactly, strict scrutiny means in the DCCD context, and how courts should apply this standard of review.

The DCCD's strict scrutiny standard requires that the state or local government bear the burden of proof on two issues: (1) that the legislation has a legitimate purpose, unrelated to economic protectionism; and (2) no less discriminatory means for its enforcement are available. If either is absent, then the law is invalid. The standard is a difficult one to meet. Less clear, however, is how the test should be applied by courts.

In theory, the test should *not* be "strict in theory, but fatal in fact." Heightened scrutiny—especially in the absence of facial discrimination—should mean a "hard look" from the judiciary, not necessarily reflexive invalidation. At the same time, strict scrutiny should not be an opportunity for state or local governments to offer up *nunc pro tunc* justifications to evade the censure of the DCCD.

When attempting to satisfy the "legitimate interest" portion of strict

161. Though it did not cite *Exxon*, the recent case of *Pharm. Mfg. and Researchers of Am. v. Walsh*, 538 U.S. 644 (2003), tends to support our reading. Maine had instituted a prescription drug benefit program that required "labelers" of prescription drugs to rebate part of their in-state sales to a special fund that reimbursed state pharmacies for selling discounted prescription drugs to program participants. See Brannon P. Denning, *The Maine Rx Prescription Drug Plan and the Dormant Commerce Clause Doctrine: The Case of the Missing Link[age]*, 29 AM. J.L. & MED. 7, 9–10 (2003). PhRMA argued, among other things, that though the tax fell on "labelers" (including in-state pharmacies) only those in-state pharmacies were eligible for the payments for filling discounted prescriptions (plus a "professional fee" for filling each prescription). *Pharm. Mfg.*, 538 U.S. at 669. The combination, PhRMA argued, brought the Maine Rx program squarely within *West Lynn Creamery*. See also Denning, *supra*, at 12–27 (making this argument). Justice Stevens dismissed PhRMA's discriminatory effects argument in a unanimous portion of the opinion. *Pharm. Mfg.*, 538 U.S. at 669–70. Stevens—who also wrote *Exxon*—noted that the subsidy in *West Lynn Creamery* benefited in-state competitors and eliminated the competitive advantage that out-of-state manufacturers possessed. *Id.* at 670. Since there were no Maine drug manufacturers that benefited from the plan, *West Lynn Creamery* was inapposite. *Id.*

scrutiny, the purposes offered should be the *actual* purposes relied upon by the lawmakers, not some *post hoc* justification contrived once litigation was initiated.¹⁶² In so doing, though, local governments should be able to introduce at least the same types of evidence (legislative history, the historical context of the legislation, etc.) that might be introduced to prove that the purpose was actually protectionist. Even if the government can make a case that nonprotectionist interests motivated passage, however, a court is still obliged to ensure that there were no less discriminatory means available that would address those interests.

Though the Court has used different terminology in different cases, the “no-less-discriminatory-means” prong at least means that if there are alternatives that will address the government’s legitimate concerns as well as those that are discriminatory, then the government is obligated to employ the former. The easiest cases are those in which facially discriminatory laws are challenged. In almost every case, the legitimate interest could be pursued by making the policy an evenhanded one.¹⁶³ Similarly, courts have held that discriminatory effects can be ameliorated by enforcing state laws in a manner that does not end up affecting only or primarily out-of-state interests.

For example, in *Dean Milk*, the city could have pursued its legitimate inspection regime by requiring milk pasteurized in plants located outside the city to be inspected by local officials prior to sale in Madison, as opposed to banning the milk altogether. While it is the regulator that bears the burden to prove the absence of less discriminatory means, challengers should make the case that such means are available, and force the regulators to prove those means do not permit state or local governments to achieve their ends nearly as well as the discriminatory legislation. Similarly, we argue below that even if size-cap regulations in some localities are motivated by something other than simple economic protectionism, those concerns can be addressed through land-use controls that specifically target those concerns, without stripping large retailers’ competitive advantages.¹⁶⁴

IV. How Retail Store Size-Cap Ordinances Are Vulnerable Under the DCCD

Having described the types of size-cap ordinances either in force or proposed, and having used DCCD cases to construct models for dis-

162. *Cf.* *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.”).

163. *But see* *Maine v. Taylor*, 477 U.S. 131 (1986) (concluding that ban on imported bait fish was constitutional because of lack of less discriminatory means to further state interest in preventing parasitic infestation of native fish stocks).

164. *See infra* Part V.

criminatorious purpose and effects cases, this part will analyze the ordinances in light of those models. In addition, we critique the very small number of cases in which DCCD challenges to size-cap ordinances have been heard by courts.

It is worth stressing at this point the significance of the title of this part. We suggest merely that many size-cap ordinances are *vulnerable* under the DCCD—not that they are *per se* invalid. Given the variety of size-cap ordinances, the myriad circumstances under which they were enacted, and the multiplicity of legitimate justifications that might motivate their passage, it would be simplistic to take such an absolutist position.

Moreover, it should be understood that purpose and effects challenges will require the careful development of a quite detailed factual record. It will be the rare size-cap ordinance that could be invalidated (or sustained) on motions for summary judgment. Thus, our assessments here are, of necessity, general and preliminary. Nor have courts had much experience hearing these cases. Our purpose here is not to pronounce the last word on the constitutionality of size-cap ordinances, but rather to (1) highlight the presence of constitutionally suspect conditions under which these ordinances are being passed and (2) offer a clarification of complex doctrinal areas of the DCCD that, if the cases we discuss below are any indication, are not well understood by judges and litigants.

A. *Analyzing Current and Proposed Size-Cap Ordinances*

As noted in Part I, since all the size-cap ordinances of which we are aware are facially neutral, would-be challengers will have to allege either that the ordinances are motivated by a protectionist purpose or result in discriminatory effects to trigger strict scrutiny under the DCCD. Using the models developed in Part II, we consider the vulnerability of size-cap ordinances to purpose and effects challenges in this section.

1. FACTORS EVINCING PRESENCE OF DISCRIMINATORY PURPOSE

Assuming evidence is present that protecting local businesses motivated the passage of the size-cap ordinance, a protectionist purpose claim would be the easier challenge to maintain for potential plaintiffs, given the Court's unequivocal statements that the presence of protectionist purposes is sufficient to trigger strict scrutiny. Elimination of state protectionism is at the core of the DCCD; state laws and local

ordinances passed with the purpose of contravening that principle—whether facially neutral or not—should be invalidated. The difficulty often lies, however, in assembling sufficient evidence to prove to a judge that protectionism motivated the passage of a particular law and—despite the Court’s statements—overcoming judges’ reluctance to inquire into legislative motive when the discriminatory or protectionist purpose is not apparent on the face of the statute. Under the model we propose for evaluating discriminatory purpose claims under the DCCD, size-cap ordinances are vulnerable because at least three factors suggesting a discriminatory or protectionist purpose often accompany their passage: (1) the background of the ordinance’s passage and the sequence of events; (2) the legislative history of the ordinance; and (3) the fit between the putative ends of the ordinance and the means employed.

a. Historic Background and Sequence of Events

Size-cap ordinances are often enacted according to a fairly predictable pattern. A large retailer, like Wal-Mart, applies for a permit to build in a community. In response, complaints are made to local authorities that the presence of the retailer will endanger the viability of existing businesses in the area. In some cases a size-cap ordinance results almost immediately. In other cases, a moratorium on new building permits is passed, a study of the problem is commissioned, and a size-cap ordinance is then recommended and passed, sometimes accompanied by additional changes to the zoning code that prevent the retailer from building on its preferred location.

Whatever the reaction, the pattern by which changes are made to the existing zoning regime suggests, even if it does not prove, that those changes would not have been undertaken but for the permit application from the large retailer. The possibility that the changes are made to keep the large retailer out to protect existing businesses from competition should make courts scrutinize the reasons given for the changes, just as the timing and creation of irregular procedures are relevant in other discrimination contexts. Creating new or different rules for large retailers (or in response to their interest in establishing a presence in a community) ought to give rise to the suspicion that something untoward is behind the changes.

b. Legislative and Administrative History

Suspicion of illicit motives can often be confirmed or dispelled by careful examination of both the language of the ordinance itself as well as the statements made by its supporters—especially if those actually

voting on the measure are vocal about their reasons for supporting a size-cap ordinance. In the case of many ordinances discussed above, protectionist motives are disclosed in the language of the ordinances themselves or voiced by members of the councils, boards, or commissions authorizing them. Often the arguments of the size-capping ordinances' proponents echo the arguments the Court rejected in *Buck v. Kuykendall*¹⁶⁵ and *Du Mond*¹⁶⁶ about the prevention of "destructive competition" being within the police power of state and local governments. Similar arguments about the need to preserve the retail character of a town, or aid local merchants, should meet the fate of Hawaii's "struggling industries" claim the Court rejected in *Bacchus Imports*.¹⁶⁷

c. Gap Between Means and Ends

Another factor that is often indicative of illicit motive is the presence of exceptions to or exemptions from an allegedly neutral law that create gaps between the putative ends of the regulation and the means used to achieve it. For example, a nonprotectionist (and therefore valid) reason for regulating large retailers is the strain that those stores can place on local infrastructure and on the environment: stores can create traffic problems, large asphalt parking lots can lead to runoff that overwhelms municipal storm drainage facilities, etc. One might ask, then, how limiting large retailers to *X* square feet ameliorates those concerns. In other words, why was a particular limit chosen, other than simply to keep the large retailers out. Similarly, some size-cap ordinances exempt "club membership" stores, home improvement stores, or grocery stores.¹⁶⁸ One wonders how those stores, which are often at least as large as a Wal-Mart Supercenter, do not create the same sort of oft-cited problems associated with other large retailers.

2. DISCRIMINATORY EFFECTS OF SIZE-CAP ORDINANCES

Effects claims are often made along with protectionist purpose claims. There is, in fact, a close relationship between the two. The actual operation of a statute can give rise to suspicions about the purpose for which it was enacted, especially if the effects fall largely or exclusively on a constitutionally protected class of persons or activities. The relative

165. 267 U.S. 307 (1925).

166. 336 U.S. 525 (1949).

167. 468 U.S. 263 (1984).

168. See, e.g., MONTGOMERY CO. ORD. § 15-33, available at <http://www.montgomerycountymd.gov/content/council/200ztas/04-04.pdf> (exempting membership stores from amendments to zoning ordinance requiring stores in excess of 120,000 square feet to obtain a special permit).

ease with which facially neutral language can be employed to mask an impermissible purpose, and the ease with which that purpose could go unarticulated, makes examination of effects essential if a constitutional right or limitation is to have any real purchase. The Court has recognized this; and, as we argued in Part III, given clues as to which effects will be most likely to be deemed “discriminatory,” triggering strict scrutiny. Retail store size-cap ordinances, we argue, are vulnerable to a discriminatory effect challenge because of their tendency to (1) strip competitive advantages from out-of-state competitors and (2) to otherwise level the playing field in a way that benefits existing local businesses at the expense of the large retailers.

To understand this argument, it is important to understand why big box stores are, well, big. The size of large retailers’ stores is intimately related to the discounts they are able to offer. Take Wal-Mart as an example.¹⁶⁹ Volume buying enables Wal-Mart to command preferential pricing from its suppliers, the savings of which are passed along to the customer. Moreover, the retailer reduces the margins on each item, relying on volume to make up the difference.¹⁷⁰ In addition, Wal-Mart’s size enables it to offer a wide range of goods and offer variety within the types of goods it sells. Wal-Mart also relies on size and the integration of its supply chain to reduce carrying costs associated with inventory. Again, savings in these areas enable Wal-Mart to survive on the relatively low margins that result from its “everyday low price” sales strategy. Smaller retailers, by contrast, are unable to command the kind of price concessions from suppliers that big box stores can,

169. While Wal-Mart was a pioneer, other retailers—Target, Costco, Home Depot, and Lowe’s—have emulated its approach. *See generally* KENNETH E. STONE, *COMPETING WITH THE RETAIL GIANTS: HOW TO SURVIVE IN THE NEW RETAIL LANDSCAPE* 12–41 (1995) (discussing various discount and membership club retailers, as well as “category killer” retailers like Home Depot).

170. As Robert Slater noted:

Unable to sell its wares without building ever-larger stores and staffing them in ever-greater quantities, Wal-Mart was both capital-intensive and labor-intensive. It did not rely on great margins for many of the products it sold; the Wal-Mart food line especially relied on thin margins. Its secret . . . was figuring how to sell in volume. Willing to make less profit per item, Wal-Mart reduced its margins and thus sold products in greater numbers than its rivals.

ROBERT SLATER, *THE WAL-MART DECADE* 13 (2003). For other general descriptions of Wal-Mart and its business model, *see generally* SANDRA S. VANCE & ROY V. SCOTT, *WAL-MART: A HISTORY OF SAM WALTON’S RETAIL PHENOMENON* (1994); Steven Greenhouse, *Wal-Mart, a Nation Unto Itself*, N.Y. TIMES, Apr. 17, 2004, § B. For a similar description of Home Depot’s approach, *see* CHRIS ROUSH, *INSIDE HOME DEPOT* 11 (1999) (“[Home Depot founder Arthur] Blank spends hours talking about the importance of lower prices. By selling more products than anyone else, Home Depot can lower prices. More volume means lower overhead. It’s a simple, yet classic, tenet of economics Blank is explaining.”).

cannot duplicate the volume selling of large retailers, and thus cannot compete, in terms of price, against large retailers with whom they are in competition. Their small size also renders them unable to offer the variety of goods sold by larger retailers.

Successful implementation of large retailers' strategy, one can assume, requires that individual stores be a certain size to ensure the volume sales that make up for the small profits made on individual items. Further, size is necessary to carry the breadth and depth of goods offered by large retailers. The size of big box stores, thus, facilitates the competitive advantage over smaller stores that large retailers have: lower prices and larger selection of goods.

Just as North Carolina's ban on the use of state grades on closed containers of apples both stripped the competitive advantage accruing to Washington because of its successful development of a superior grading system and, as a result, artificially leveled the playing field in favor of North Carolina apples, size-cap ordinances would benefit small, local businesses by depriving large retailers of the ability to pursue their business model, which requires large stores to house the variety of goods offered and command concessions from suppliers, and facilitate the volume buying necessary to continue price discounts.

B. Size-Cap Ordinances in the Courts: A Critique of Current Cases

We found only two cases in which plaintiffs challenged retail size limitations under the DCCD. Perhaps this is due to the relative novelty of size-cap ordinances; or perhaps large retailers like Wal-Mart can avoid the expense of litigation merely by locating its stores in the next town or county. Both cases provide concrete evidence of similar size-cap ordinances' vulnerability to DCCD challenges. Moreover, the two cases we discuss below nicely illustrate how purpose and effects claims are often misunderstood and the relevant principles of law misapplied by courts. In this subsection, we critique the courts' handling of the DCCD claims and reconsider these cases in light of the models we developed in Part III. Further, we believe future challenges to be in the offing, and thus courts (and litigants) could benefit from using the framework we suggest above.

1. *CORONADANS ORGANIZED FOR RETAIL ENHANCEMENTS v. CORONADO*:¹⁷¹ RESISTANCE TO PROOF OF PROTECTIONIST PURPOSE

Retail property owners challenged a Coronado, California, retail ordinance requiring certain businesses—described as “Formula Retail”—

171. No. D040293, 2003 WL 21363665 (Cal. Ct. App. June 13, 2003) (unpublished).

to (1) obtain a “major special use permit” to open a business or expand more than 500 square feet and (2) restricting the store’s street level frontage to 50 linear feet and its height to two stories.¹⁷² The express purpose of the ordinance was “to regulate the location and operation of formula retail establishments in order to maintain the City’s unique village character, the diversity and vitality of the community’s commercial districts, and the quality of life of Coronado. . . .”¹⁷³

“Formula Retail” stores were defined as “a type of retail sales activity or retail sales establishment (other than a ‘formula fast food restaurant’) which is required by contractual or other arrangement to maintain any of the following: standardized (‘formula’) array of services and/or merchandise, trademark, logo, service mark, symbol, décor, architecture, layout, uniform, or similar standardized feature.”¹⁷⁴

The ordinance also set forth the criteria for granting a major special use permit, which costs at least \$3,000 to process. The planning commission and the city council had to hold public hearings and make four specific findings before awarding the special permit:

(1) the establishment is “compatible with existing surrounding uses, and has been designed and will be operated in a non-obtrusive manner to preserve the community’s character and ambiance”; (2) the establishment is consistent with the General Plan and Local Coastal Program; (3) the establishment “will contribute to an appropriate balance of local, regional or national-based businesses in the community”; and (4) the establishment “will contribute to an appropriate balance of small, medium and large-sized businesses in the community.”¹⁷⁵

Plaintiffs alleged that the ordinance’s intended purpose and its inevitable effects discriminated against interstate commerce.¹⁷⁶ A California trial court disagreed; its decision was upheld by the state court of appeals.

In support of their discriminatory purpose argument, plaintiffs attempted to introduce evidence of the “legislative history [of the ordinance], which consisted primarily of transcripts of numerous city council and planning commission meetings,”¹⁷⁷ purporting to show that the true purpose was economic protectionism.¹⁷⁸ Plaintiffs also cited lan-

172. *Coronodans*, 2003 WL 21363665, at *1.

173. *Id.*

174. *Id.*

175. *Id.*

176. The appeals court rejected the argument that the ordinance was facially discriminatory because it defined formula retail businesses to include those using trademarks or service marks. The ordinance, the court stressed, was “evenhanded”; it did not “impose different regulations on interstate as opposed to intrastate businesses, nor does it distinguish between those businesses that are locally owned and those that are owned by out-of-state interests.” *Id.* at *3.

177. *Id.* at *2.

178. *See id.* at *5.

guage from the ordinance itself. One paragraph of the ordinance mentioned the need to protect the “village atmosphere” of Coronado by, *inter alia*, diversifying the retail base by blending “smaller, medium, and larger sized businesses and by [blending] local, regional, and national-based businesses, which [would provide] diverse and unique retail businesses for residents and visitors. . . .”¹⁷⁹ If formula retail stores were not carefully monitored, the ordinance continued, they would likely “frustrate” the plan of preserving that commercial diversity by “skew[ing] the mix of businesses towards national retailers in lieu of local or regional retailers” and limiting or eliminating “business establishment opportunities for smaller or medium sized businesses, many of which tend to be non-traditional or unique. . . .”¹⁸⁰

The trial court, however, refused to admit the legislative history, claiming that “lawmakers’ subjective motivations for enacting the Ordinance were irrelevant and inadmissible.”¹⁸¹ The court of appeals agreed, stating that “[f]ederal courts have generally held that evidence of a lawmaker’s allegedly discriminatory motivations are not relevant to establishing a commerce clause violation.”¹⁸² The court added that even were it to consider the legislative history, the most that plaintiffs could muster were “various comments by city council members expressing a desire to protect smaller ‘mom and pop’ stores and to ensure these stores remain viable businesses”¹⁸³ or a “few isolated comments made by city council and planning commission members refer[red] to the need to protect ‘locally-owned businesses’ from being replaced by ‘national-based chains.’”¹⁸⁴ According to the court, “it is not a violation of the commerce clause to treat large and small businesses differently if the rule applies equally to interstate and intrastate businesses and does not favor businesses owned by in-state interests.”¹⁸⁵ Taken in context, the court added, the statements “do not suggest a *primary purpose* of the permit requirement and size limitations was to treat out-of-state entities differently from local businesses.”¹⁸⁶

Similarly, the court found no evidence of discriminatory purpose in the preamble to the ordinance itself, merely the purpose to “provide for an economically viable and diverse commercial area that is consistent with the ambiance of the city. . . .”¹⁸⁷ Promoting “a diversity of retail

179. *Id.* at *4 (internal quotation marks omitted).

180. *Id.* at *4, *5 n.2.

181. *Id.*

182. *Coronadans*, 2003 WL 21363665, at *4.

183. *Id.* at *6.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at *5.

activity to prevent the city's business district from being taken over exclusively by generic chain stores," the court explained, "is not a discriminatory purpose under the commerce clause."¹⁸⁸ Moreover, "[t]hese declared purposes of the Ordinance are not discriminatory under the commerce clause because they treat interstate businesses the same as they treat intrastate or local businesses."¹⁸⁹ There was no evidence that "these smaller stores are necessarily owned by local individuals or that they do not engage in interstate commerce."¹⁹⁰

The California appeals court made a number of errors in its analysis of the discriminatory purpose claim. First, the court, on scant authority,¹⁹¹ upheld the exclusion of the ordinance's legislative history when members of the city council evinced a need to protect local stores from competition with national chains. As discussed above, federal courts of appeals have endorsed the use of this sort of legislative history to support a protectionist purpose claim, as has the U.S. Supreme Court in racial discrimination cases. The court offered no argument why legislative history in general was unreliable, or why this history in particular was unhelpful. Judging from the court's own summary of it, there are hints from those voting on the measure—as opposed to statements from

188. *Coronadians*, 2003 WL 21363665, at *5 (emphasis added).

189. *Id.*

190. *Id.* at *6.

191. The California court cited four cases for this proposition. *Id.* at *5 (citing *Clover Leaf Creamery*, 449 U.S. at 463 n.7; *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 403 (3d Cir. 1987); *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 133 F.R.D. 531, 537–39 (S.D. Ind. 1990); *Burbank-Glendale-Pasadena Airport Auth. v. Burbank*, 64 Cal. App. 4th 1217, 1226 (Cal. Ct. App. 1998)). These cases either do not support the finding of irrelevance of motive or misstate the law. (1) In *Clover Leaf Creamery*, for example, the Supreme Court did not hold evidence of motive irrelevant or inadmissible—in fact, it reaffirmed that the presence of discriminatory purpose was sufficient to invalidate a statute under the DCCD. 449 U.S. at 471 n.15 (“A court may find that a state law constitutes economic protectionism on proof of either discriminatory effect . . . or discriminatory purpose” (citations omitted)). The *Clover Leaf* court apparently rejected the evidence proffered to prove discriminatory purpose as insufficient. *Id.* at 463 n.7 (rejecting evidence of discriminatory purpose in context of an equal protection argument). (2) The Third Circuit in *Oberly*, like the Court in *Clover Leaf Creamery*, simply held that the plaintiffs did not show sufficient evidence that the stated purpose of the act was not the “real” purpose, as opposed to holding that evidence of motive was irrelevant or inadmissible. (3) The Indiana district court in *Government Suppliers* simply ignored the Court's own formulation of its DCCD standards when the judge wrote that “[d]espite the occasional Supreme Court references to such motive, no opinion has yet held that such evidence is relevant, let alone dispositive. If used at all, such evidence appears to be only considered as part of parenthetical digressions.” 133 F.R.D. at 539. (4) The California appeals court, too, misstated the law in *Burbank-Glendale-Pasadena Airport Authority* when it wrote: “In rare instances, the constitution may forbid legislators to act with a specific motive or intent. The commerce clause, however, is not such a provision. To the contrary, the discrimination it prohibits is measured by the economic impact of a local regulation, not the evil motives of local legislators.” 64 Cal. App. 4th at 1224.

members of the public, whose views may not have been endorsed by members of the council—that protected local businesses from competition motivating the ordinance’s passage.

Second, the court’s dismissal of the legislation history it held to be irrelevant presumed that there is a *de minimis* exception to the DCCD. Whether or not protectionism was the primary purpose, if it was a purpose for the statute’s passage, the ordinance itself should be subjected to strict scrutiny. The Supreme Court has rejected arguments that a little discrimination or a little protectionism is acceptable.¹⁹²

Third, the court’s treatment of the ordinance’s preamble recalls the State of Hawaii’s argument that the purpose behind its exemption of the locally produced liquor in *Bacchus Imports* was to benefit a struggling industry, not to discriminate against out-of-state goods or their producers. The Court correctly rejected that argument, noting that it could always be employed to defeat a DCCD claim. Here the California appeals court’s focus on the asserted aims of preventing a take-over of downtown Coronado by generic chain stores and providing for economic viability and commercial diversity is similarly misdirected. Those may be laudable goals, but they could also be mere euphemisms for impermissible discrimination. If the ordinance effectively operates to confer those benefits by forcing out or raising costs to out-of-state retailers, they are impermissible, regardless of the benevolent intentions.

Finally, the court’s observation that the ordinance’s purposes cannot be discriminatory because it treats interstate and local businesses “the same,” as well as its comment about the lack of evidence that small stores are either owned by locals or do not also engage in interstate commerce are irrelevant to the question of constitutionality under the DCCD. Evenhandedness might prevent a finding of *facial* discrimination, but it does not resolve questions about discriminatory purpose or effects. In fact, terming the ordinance “evenhanded,” as opposed to describing it merely as “facially neutral,” assumes the matter in question. Simply because *some* in-state economic interests are affected, moreover, does not insulate a state or local interest from DCCD scrutiny.

The court’s mention of the store’s ownership and participation in interstate commerce is difficult to understand. The DCCD focuses on the extent to which a state or local government’s regulation discriminates against, burdens, or targets out-of-state commercial activity, not

192. See, e.g., *Camps Newfound/Owatonna v. Harrison*, 520 U.S. 564, 581 n.15 (1997); *Or. Waste Sys., Inc. v. Dep’t Env’tl. Qual.*, 511 U.S. 93, 100 n.4 (1994); COENEN, *supra* note 45, at 248.

how much the local interests are *benefited*. It does not matter for the purpose test whether Coronado's efforts to hinder the establishment of formula retail stores was ineffective or missed their mark. If it undertook the formula retail ordinance to protect extant local businesses in Coronado, the DCCD requires that it satisfy strict scrutiny.

Looking at the evidence offered by the plaintiffs in light of the framework outlined above for analyzing discriminatory purpose claims, we find several of these factors—especially the timing of ordinance and its legislative history—present. These factors should have raised suspicions about the purpose behind the ordinance.

a. Timing and Irregular Procedures

According to the plaintiffs' brief, Coronado's efforts began following the arrival of a Petco, a national pet supply retailer, and concern that, if not regulated, Coronado would be inundated with national chains, like Rite-Aid, Blockbuster, and Home Depot.¹⁹³ The city council began casting about for ways to discourage large, national chains from locating in Coronado. It settled upon the requirement that formula retailers obtain a "major special use permit" prior to opening. That permit, moreover, not only cost more than ordinary permits,¹⁹⁴ but also required specific findings by both the planning commission *and* the city council after public hearings are held.

b. Legislative History

Establishment of the special procedures alone sheds little light on the purpose behind the ordinance, other than to strongly suggest that Coronado wished to make it more difficult for formula retail stores to open there. But the legislative history included in the court of appeal's opinion suggests that the city sought to protect local merchants from competition by out-of-state chains, to exclude out-of-state chains, or both. One portion of the preamble, for example, mentioned the danger of "unregulated and unmonitored establishment of additional formula re-

193. Opening Brief for Appellant at 6, *Coronadans Organized for Retail Enhancement v. City of Coronado*, No. D040293, 2003 WL 21363665 (Cal. Ct. App. 2003) (copy on file with authors) [hereinafter Appellant's Opening Brief].

194. According to the plaintiffs, formula retail applicants have to pay an "itemized fee" for processing the application:

"Itemized fees" are for services that vary greatly in processing time from one application to another. "Itemized fees" require a deposit in the indicated amount, rather than a fixed, standardized fee. The standard fee for a [major special use permit] is \$2,365 and the estimated processing time is 6–8 weeks. The "itemized fee" (i.e., deposit) for "formula retail" [major special use permits] is \$3,000, and the estimated processing time is greater than that for a standard [major special use permit].

Id. at 3–4.

tail uses’”: that it would “unduly limit or eliminate business establishment opportunities for smaller or medium sized businesses . . . and unduly skew the mix of businesses toward national retailers in lieu of local or regional retailers.”¹⁹⁵ According to the court, city council members “express[ed] a desire to protect smaller ‘mom and pop’ stores and to ensure these stores remain viable businesses.”¹⁹⁶ Other council and planning commission members were said to have referred to “the need to protect ‘locally owned businesses’ from being replaced by ‘nationally-based chains.’”¹⁹⁷

Since the court took pains to emphasize (erroneously) the irrelevance of the legislative history, its opinion spent little time assaying the evidence of protectionist purpose. The evidence the court mentioned came both on the face of the ordinance, as well as from the mouths of the persons who were responsible for enacting the ordinance, tending to support the idea that protectionism was on the minds of some Coronado civic leaders and that the formula retail ordinance was designed to make it more difficult for those businesses (as opposed to smaller, presumably local ones) to open. The plaintiffs’ brief, which quoted extensively from the minutes of city council meetings at which the formula retail ordinance was discussed, confirms this suspicion.¹⁹⁸ The thrust of the city council’s debate over the ordinance was concern that national chains would put small, locally owned retailers out of business and that the city should prevent that from happening.¹⁹⁹

The combination of factors and the strength of the evidence—particularly the legislative history—lead us to conclude that Coronado passed its Retail Formula ordinance primarily, if not exclusively, for the purpose of protecting its local merchants from national retail competition. The DCCD requires, upon such a showing of protectionist purpose, the application of strict scrutiny. At a minimum, instead of dismissing the legislative history as “irrelevant,” the court should have required the city to rebut the appearance of protectionist purpose and demonstrate that the formula ordinance was the least restrictive means to achieve Coronado’s legitimate (i.e., nonprotectionist) ends.

195. 2003 WL 21363665, at *5 n.2 (Cal. Ct. App. June 13, 2003).

196. *Id.* at *6.

197. *Id.*

198. Appellant’s Opening Brief, *supra* note 193.

199. *Id.* at 6–13.

2. THE PROBLEM OF DISCRIMINATORY EFFECTS: *GREAT ATLANTIC & PACIFIC TEA COMPANY v. EAST HAMPTON*²⁰⁰

Following A & P's filing of an application for approval to construct a 34,000 square foot supermarket in East Hampton, Long Island, the town board imposed a moratorium on the granting of site plan approvals for stores in excess of 20,000 square feet. Six months later, the board passed its "Superstore Law," which prohibited the construction of a retail store in excess of 10,000 square feet or a supermarket in excess of 25,000 square feet.²⁰¹ A & P alleged, among other claims, that the Superstore Law violated the DCCD by discriminating against A & P both in its purpose and in its effects. The district judge rejected the claim, writing:

On the facts alleged, plaintiff fails to state a claim under the dormant Commerce Clause because the pleaded facts do not establish a nexus between the challenged regulation and interstate commerce. The Superstore Law may well be intended to favor small retailers over large retailers and, in that sense, be a form of economic protectionism. But that preference does not implicate interstate commerce where both intrastate and out-of-state large retailers are equally affected. Nor does the mere fact that A & P sells goods that originate from outside of New York State, even considered in the light most favorable to plaintiff, suggest that the Superstore Law, even incidentally, burdens interstate commerce. Plaintiff does not allege any fact tending to suggest that the Superstore Law has the effect of favoring New York goods over those from out-of-state.²⁰²

200. 997 F. Supp. 340 (E.D.N.Y. 1998).

201. *Id.* at 345.

202. *Id.* at 351. Though the record did not include the extensive legislative history surrounding its adoption, there is some evidence, under our model, that the Superstore Law enacted by East Hampton was motivated by a protectionist purpose. The circumstantial evidence regarding both the time the law was enacted and the changes it made to East Hampton's zoning laws, suggests that A & P was to be kept out. For example, the court noted that before the passage of the Superstore Law, retailers could operate as a matter of right in the "Neighborhood Business zones," like that in which A & P had acquired its parcel of land. 997 F. Supp. at 344. In fact, the parcel that A & P had acquired bore "structures and facilities that, for many years, were used as and in connection with a Gertz department store and, later, a Stern's department store." *Id.* The prior zoning law did not, moreover, "limit the size of buildings used for retail stores" nor did it specify supermarkets as separate uses and define retail stores on the basis of floor area or building sizes. *Id.* After A & P applied to build a nearly 34,000 square foot facility with a "15,000 square foot cellar," the Superstore Law resulted. *Id.* at 344-45. The court summarized the effects:

The Superstore Law prohibits the establishment of superstores and supermarkets except in the Central Business zoning district. Moreover, even within the Central Business district, a building used for a superstore may not have a gross floor area greater than 15,000 square feet, and a building used as a supermarket may not have a gross floor area greater than 25,000 square feet. Consequently, because A & P's proposed supermarket exceeds 25,000 feet, it cannot be established in either the Central Business or Neighborhood Business zones. Under the terms of the Superstore Law, A & P would be barred from establishing even a 10,000 square foot super-

The district court's analysis, which was unencumbered by any citation to the relevant DCCD cases, made several errors.

First, the judge claimed that A & P failed to "establish a nexus between the challenged regulation and interstate commerce."²⁰³ Later, the judge wrote that "the mere fact that A & P sells goods that originate from outside New York State . . . [does not] suggest that the Superstore Law, even incidentally, burdens interstate commerce."²⁰⁴ The Great Atlantic and Pacific Tea Co. is an out-of-state corporation with international operations generating billions in annual revenue.²⁰⁵ A & P was prohibited, by the Superstore Law, from establishing business operations in East Hampton. At the very least, the Superstore Law presented an obstacle to the movement of interstate commerce as far as A & P is concerned. If the court's language suggests that the Superstore Law does not "affect interstate commerce" such that the DCCD is implicated, then it demonstrated a fundamental misunderstanding of the Supreme Court's Commerce Clause jurisprudence, the DCCD, or both.

Second, the district court conceded that the Superstore Law constituted "a form of economic protectionism" by preferring small retailers to large ones, but argued that as long as "intrastate and out-of-state large retailers are equally affected," there is no DCCD problem.²⁰⁶ This

market at the Montauk Highway site [where it had acquired the aforementioned parcel].

Id. at 345.

Here, it seems that A & P might have argued (using our model) that both the timing and provisions of the Superstore Law, combined with the gap between means and ends, constituted evidence of a protectionist purpose. The Superstore Law came only after the expiration of a moratorium designed to prevent A & P from going ahead with its plans. 997 F. Supp. at 345. Further, one wonders how the Town Board settled on the 10,000 and 25,000 square foot limit. Since it had A & P's application, it knew how large the store was going to be, so setting the limit below that amount would obviously frustrate A & P's efforts. But one also wonders how large existing supermarkets and retailers were in East Hampton. One might expect that the numbers were arrived at only after it was clear that existing retailers would not be affected. In addition, unlike Coronado, there is little in the opinion about why East Hampton decided to limit the stores, or limit the size to the degree it did. The lack of articulated reasons again suggests a gap between the end (which is largely unarticulated) and its Superstore Law. The silence invites the inference that the law was designed primarily to keep A & P (and similar large retailers) out of East Hampton. Since we lack good legislative history about the Superstore Law we decided to use it to test our effects factors.

203. *Id.* at 351.

204. *Id.*

205. The Great Atlantic and Pacific Tea Co., which owns A & P, is an international business with headquarters in New Jersey, whose sales in the third quarter of 2004 were \$ 2.52 billion. Annual sales, according to its website, are around \$11 billion per year. Aptea.com, *The Great Atlantic & Pacific Tea Co., Inc. Announces Results for First Quarter 2005* (July 22, 2005), http://www.aptea.com/pr_072205.asp (last visited Sept. 7, 2005).

206. *Great Atlantic & Pacific Tea Co.*, 997 F. Supp. at 351.

argument is doubly flawed. It ignores the possibility that “small retailers” and “large retailers” are simply proxies for “local” and “out-of-state” retailers, respectively. Moreover, the judge assumed that the relevant class for which the ordinance must operate evenhandedly is the class of “large retailers.” There were no large retailers in East Hampton before A & P announced plans to move in, only smaller retailers with whom A & P would compete. If the DCCD permits this sort of atomization of the concept of “competitor,” then a discriminatory effects claim would be nearly impossible to make.

Third, the court noted the lack of “any fact tending to suggest that the Superstore Law has the effect of favoring New York goods over those from out-of-state.”²⁰⁷ But such a showing is not required under the DCCD. The relevant inquiry was whether East Hampton’s Superstore Law discriminated against out-of-state retailers, like A & P, by effectively protecting local retailers from competition.

The district judge who dismissed A & P’s DCCD claim against East Hampton did so without discussing any of the Supreme Court’s major discriminatory effects cases. Had the court looked at those cases, or at the salient discriminatory effects that we have gleaned from those cases,²⁰⁸ the judge would have applied strict scrutiny to the Superstore Law. The effects of East Hampton’s Superstore Law tended to fall largely or exclusively on out-of-state economic actors in a way that insulated local businesses from competition in ways that the Supreme Court has found to violate the DCCD.

The Superstore Law potentially strips A & P of competitive advantages that it possessed over its local competitors. Supermarkets like A & P offer a wide variety of goods, and purchase those goods in sufficient quantities that they can demand significant discounts which they pass along to their customers. Forcing A & P to pare down the size of its store presumably means it might offer fewer choices than it otherwise would have, and might even reduce the price savings for its customers. Moreover, since it is likely the case that existing local markets fall well below the size-cap limit set by the town board, and were probably unable to command the supplier discounts of a large, international chain, A & P’s local competitors will be unaffected by the Superstore Law’s strictures.

This fact, in turn, suggests that the Superstore Law levels the playing field, as the Court in *Hunt* put it, “invidiously” to the local stores’

207. *Id.*

208. *See supra* Part III.C.2.

benefit. By stripping A & P's competitive advantage that it otherwise might have possessed, local markets may find themselves more able to compete because the effects of the ordinance cause A & P not to be able to offer the variety of goods at the prices it might have if it were able to build the store it originally envisioned.

Finally, one might say that laws like the Superstore Law makes A & P, or any other large retailer, bear costs—including those brought on by changes to the design of what are usually standardized stores or by staffing, inventory, or supply costs increased by diminution of store size—that A & P's local competitors will not have to bear. An analogy here might be to the costs that Washington apple growers would have incurred to reprint closed containers to bring them in compliance with North Carolina's ban on the use of state-approved grades.²⁰⁹

• • •

Would *Exxon* apply to bar a finding of discriminatory effects in either of the two cases we discuss here? On our reading of *Exxon*, it should not. First, the large and small retailers pitted against each other in both cases are competitors. Only if a court were to hold that the large retailers are merely a subset of possible out-of-state retailers, and that because out-of-state retailers under the size-caps (or, in the case of Coronado's ordinance, other than "formula" retailers) could still locate their businesses there would *Exxon* possibly bar a finding of discriminatory effects. But we argue that *Exxon* cannot be given that reading unless it was the Court's intention to eviscerate all discriminatory effects claims.

Moreover, the *Exxon* opinion itself mentions raising the costs to competitors that those in-state do not bear. It also mentioned that if the out-of-state share of the market shrinks and the in-state market grows, that too might support a finding of discriminatory effects. Here—though it would require some proof—A & P on the one hand, or the businesses affected by Coronado's ordinance on the other, might be able to project sales in the area and demonstrate how that, but for the ordinances, they would be competing in the market for a share of the sales that went to local businesses. Or they might show how much *more* commercial activity might have resulted but for the ordinances. That evidence might, in turn, be strengthened by proof that fear of competition or loss of market share motivated the initiation or support of size-capping legislation by business-owners, the local government, or both.

Despite the challenges *Exxon* poses for judges or litigants trying to derive and apply operative rules from the discriminatory effects cases,

209. See *supra* Part III.C.1.c.

one thing is clear: the case should not be invoked as a talisman to avoid analysis. If it is not clear that the ordinances discussed above were purposefully aimed at out-of-state retailers, they seemed written largely to operate against those retailers. Demonstration of actual operation should then at least raise the suspicion that an impermissible purpose is at work. Under the DCCD, the way principles that have constitutional salience—like those of free trade and anti-discrimination—are protected is through the application of strict scrutiny. It is possible, appearances to the contrary, that there were benign purposes motivating these two statutes. It is also possible that no other means existed to realize those ends than the formula retail and Superstore ordinances that Coronado and East Hampton enacted. If so, then the cities should be put to their proof. Courts should not, however, simply dismiss all DCCD claims simply because the ordinances were “evenhanded” or with an uncritical citation to *Exxon*.

V. Conclusion: Curbing Sprawl Without Countenancing Protectionism

Economic protectionism is not the only motivation for the regulation of big box stores; big box retailers can impose costs on communities in which they locate. Despite the skepticism we express about the purposes of the size-cap ordinances we reviewed in Part II, and our criticism of courts’ treatment of DCCD challenges to them in Part IV, we do not mean to minimize the real (and legitimate) land-use concerns of municipalities. Large retail structures may create traffic problems. The runoff from large parking lots may overwhelm local storm sewer systems, causing flooding. The construction of big box stores may have adverse environmental effects, either due to the structure itself or the increased traffic around the store. Localities may have legitimate aesthetic concerns, ranging from the initial design to concerns about blight following a big box structure’s abandonment. Certain concerns local governments may have may even warrant limiting store sizes. Not every retail store regulation—or even every size-cap ordinance—is unconstitutional.

Despite the legitimacy of some municipalities’ concerns about big box retailers’ impacts, the size-cap approach—easy and immediately satisfying though it may be—disregards other approaches that do not affect the nature of the stores’ business models while still addressing legitimate local concerns. Evidence exists that municipalities are capable of developing less discriminatory approaches to combating the negative effects of big box retailers through means other than arbitrarily limiting the size of big box retailers.

For example, concerned over the negative effects from big box retailers abandoning their stores, Buckingham Township, Pennsylvania, enacted an ordinance requiring big box developers to deposit money into an escrow account to cover demolition costs if the store is later vacated by the retailer.²¹⁰ Following Pennsylvania's lead, Wauwatosa, Wisconsin, proposed a big box ordinance requiring big box retailers to deposit money into an escrow account rather than limiting the size of the retail buildings.²¹¹ In addition to regulating the negative effects of big box retailers abandoning their buildings, Wauwatosa's proposed big box ordinance addresses aesthetic and environmental concerns by "impose[ing] higher standards on everything from building design and storm water management to parking and landscaping" without limiting the size of retail stores.²¹² Cities have also developed other creative, less discriminatory means for coping with a big box retailer's negative impact. Peachtree City, Georgia, requires that contracts between landlords and big box tenants provide that big box tenants will not prevent the landlord from leasing to another tenant if the big box retailer vacates the building.²¹³ Evanston, Wyoming, requires big box retailers to assist the city in finding a new tenant if the big box retailer vacates its premises.²¹⁴

To the extent that municipalities are pursuing legitimate land use goals, we would expect to see more regulations like those cited above, which seem to us to be "less discriminatory alternatives" to size-cap ordinances, which are a comparatively blunt regulatory tool. Unfortunately, many more size-capping ordinances seem to seek limits on the size of large retail stores to enable locally owned businesses to survive in the face of fierce competition,²¹⁵ or address their legitimate purposes

210. BUCKINGHAM TWP., PA. ORD. 98-02, §5 (1998); Beaumont & Tucker, *supra* note 5, at 9.

211. Annysa Johnson, *Tosa Wants to Put a Lid on Big-Boxes; Developers Expected to Ante Up; Abandoned Stores Would Be Razed*, MILWAUKEE J. SENTINEL, Jan. 4, 2005, at A1, available at 2005 WL 58994280.

212. *Id.*

213. PEACHTREE CITY, GA. CODE, ZONING, art. X, app. A., §1006 General Commercial District (1994); Beaumont & Tucker, *supra* note 5, at 9.

214. EVANSTON, WYO. RESOLUTION 01-09 (2001); Beaumont & Tucker, *supra* note 5, at 9.

215. Recent newspaper articles have described the success of campaigns sponsored by small businesses to buy local and otherwise improve small stores' competitiveness vis-à-vis Wal-Mart and other big box stores. See, e.g., Brett Barrouquere, *Cities Set Off Chain Reaction*, JOURNAL-GAZETTE (Ft. Wayne, Ind.), Mar. 30, 2005, available at 2005 WLNR 5109818 (describing the success of the "Keep Louisville Weird" campaign; noting that "campaigns and small-business alliances are using the effort to stay in competition with large retail chains such as Wal-Mart, Target, and the recently merged Kmart and Sears"); Michael Lau, *Standing Up to Wal-Mart, and Winning*, CALGARY HERALD, Jan. 15, 2005, available at 2005 WLNR 611656 (describing efforts of small Alberta shops to compete with large retailers).

without consideration of less discriminatory alternatives. Because size-capping ordinances have provided a vehicle to enact regulations with the intent or effect of protecting the locally owned businesses, we argue that—when evidence of discriminatory purpose or effects exists—the courts should apply strict scrutiny to ensure that the purposes animating the DCCD are enforced.

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