

Note

THE SMALLING OF AMERICA?: GROWTH MANAGEMENT STATUTES AND THE DORMANT COMMERCE CLAUSE

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*When we start talking about quality of life, they start talking about cheap underwear. And I keep saying, "You cannot buy small-town quality of life at a Wal-Mart; they don't sell it."*¹

INTRODUCTION

In the northwestern corner of the state of Vermont, nestled between the shores of Lake Champlain and the slopes of the Green Mountains, sits the town of St. Albans, recently rated "the 40th Best Small Community in the United States."² The town takes pride in its identity, boasting "picturesque scenery, unique shopping, fine dining, and a wealth of recreational options . . . all wrapped in unspoiled small town charm."³ Like the rest of Vermont, St. Albans has good reason to boast—the state's natural beauty and quaint villages combine to attract well over two million visitors per year.⁴

Yet St. Albans and Vermont are in trouble. The National Trust for Historic Preservation has placed the entire state at the top of its list of "America's Eleven Most Endangered Places."⁵ The source of

1. *60 Minutes: Up Against the Wal-Mart; Citizen Grass-Roots Activists Fight Movement of Wal-Mart Chain into Small-Town Areas* (CBS television broadcast, Sept. 3, 1995) (quoting Al Norman).

2. Mary Garceau & Steve Jennette, *Welcome to the City of St. Albans* (visited March 20, 1999) <<http://www.sover.net/~kstanley/city/index.htm>>.

3. *St. Albans Area Chamber of Commerce* (last modified Dec. 12, 1998) <<http://www.stalbanschamber.com/index.htm>> (ellipsis in original).

4. See Scott Baldauf, *The Call of Vermont's Vivid Autumn Colors*, CHRISTIAN SCI. MONITOR, Oct. 16, 1997, at 3.

5. See Jessica E. Jay, Note, *The "Malling" of Vermont: Can the "Growth Center" Designation Save the Traditional Village from Suburban Sprawl?*, 21 VT. L. REV. 929, 929 (1997).

the danger is the pressure for economic growth in the state, because while growth is generally viewed as a good thing, growth in late-twentieth-century America almost always also means sprawl, and sprawl is a very bad thing indeed. Sprawl has been defined as "low-density development on the edges of cities and towns that is poorly planned, land-consumptive, automobile-dependent [and] designed without regard to its surroundings."⁶ Sprawl brings, among other things, strains on infrastructure, pollution, traffic congestion, the decline of city centers, the death of small towns, and the destruction of the landscape.

In 1970, Vermont became one of the first states to pass a statute designed to manage growth and control sprawl on a statewide level.⁷ Local growth-control ordinances have been an ineffective response to sprawl, which takes place not locally but regionally.⁸ State regulation, because it can respond to growth regionally, is a much more effective way to deal with sprawl.⁹ But the effectiveness of state measures does not alter the possibility that these measures may exceed constitutional limitations on state power. This Note examines whether one of these limitations, the dormant Commerce Clause, was in fact exceeded in a recent application of the Vermont statute to a proposed development in St. Albans.

In 1993, Wal-Mart Stores applied for permission to build a new store in St. Albans.¹⁰ The application was opposed by citizens' groups interested in halting the giant retailer's further expansion into Vermont.¹¹ The dispute was finally resolved by the Vermont Supreme Court in *In re Wal*Mart Stores, Inc.* ("Wal*Mart Stores").¹² The court in that case upheld a ruling by the Vermont Environmental Board, which had denied a development permit to the retailer that would

6. Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183, 185 (1997) (quoting Richard Moe, president of the National Trust for Historic Preservation) (alteration in original).

7. See James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 512-13 (1994).

8. See Marie L. York, *Regions: Blind Isolation or Shared Vision?*, 47 LAND USE L. & ZONING DIG. 3, 3 (1995); Wickersham, *supra* note 7, at 512.

9. See Shelley Ross Saxer, *Local Autonomy or Regionalism?: Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 IND. L. REV. 659, 691 (1997) (noting that state growth control avoids the problems caused by interlocal conflicts).

10. See *In re Wal*Mart Stores, Inc.*, 702 A.2d 397, 400 (Vt. 1997).

11. See *id.*

12. 702 A.2d 397 (Vt. 1997).

have allowed it to construct a store in St. Albans.¹³ Act 250, the state's growth-management statute, instructs the Environmental Board, when deciding whether to approve a proposed development, to consider, among other things, whether the proposed development will adversely affect the "financial capacity" of the region to accommodate growth.¹⁴ Wal-Mart argued that the consideration of "financial capacity" should be limited to the effect the new store would have on the local government's ability to provide services.¹⁵ The Board, reading the term more broadly, considered the effect the store would have on retail competition in the surrounding area.¹⁶ The Board concluded that a Wal-Mart in St. Albans would have a negative effect on its competitors in surrounding towns.¹⁷ Because this effect would result in a decline in property values, and, consequently, a decline in the tax bases of those towns, the Board denied the permit.¹⁸ The Vermont Supreme Court approved the consideration of the effect of a new Wal-Mart on other retailers and affirmed the Board's denial of the development permit.¹⁹

*Wal*Mart Stores* is consistent with other cases involving limitations on development, for courts have historically granted great deference to the efforts of states and localities to manage or control growth.²⁰ However, the use of the police power approved by the Vermont Supreme Court is broader in several ways than that upheld in previous growth-control cases. First, the ground on which the development permit was denied could be used to deny a permit for most, if not all, large commercial developments in Vermont, because any such development is likely to have a negative effect on competitors in surrounding towns. Second, the denial could be effected statewide rather than just locally; because Vermont is one of the few

13. *See id.* at 400.

14. VT. STAT. ANN. tit. 10, § 6086(a)(9)(A) (1997).

15. *See Wal*Mart Stores*, 702 A.2d at 401.

16. *See id.*

17. *See* Michael A. Schneider, Note, *The Vermont Barrier: How Economic Protectionism Kept Wal-Mart Stores, Inc. Out of St. Albans, Vermont*, 20 NOVA L. REV. 919, 941-43 (1996).

18. *See id.* at 945 (noting the acknowledgment by the Environmental Board that the effect of the development on retail competition was a consideration common to its evaluation of all the fiscal criteria listed in the Vermont growth management statute).

19. *See Wal*Mart Stores*, 702 A.2d at 402, 404.

20. *See* Keith R. Denny, Note, *That Old Due Process Magic: Growth Control and the Federal Constitution*, 88 MICH. L. REV. 1245, 1247 (1990).

states with a growth-management statute,²¹ the potential effect of the Environmental Board's broad reading of the "financial capacity" criterion is much larger than it would be in the normal growth-control case.²² Third, although Wal-Mart could presumably reapply, the denial of the development permit is otherwise permanent. One reason courts have been so deferential to growth-control measures in the past is that such measures often affect only the timing of development, not whether the development will occur at all.²³ The consideration of market competition under the fiscal criteria of the Vermont statute, on the other hand, gives the Environmental Board a justification to deny a development *forever* as long as it concludes that the development will have an adverse effect on existing market participants in a region.

The *Wal-Mart Stores* decision is a vivid example of the deference with which courts view the power of states to regulate land use. But by allowing an explicit limitation on market competition that could easily be employed to keep large retailers out of Vermont, the decision implicates a provision which has been an effective limit on state power but which has been invoked only rarely in the land-use context: the Commerce Clause of the Federal Constitution which, in its "dormant" aspect, is supposed to ensure "free access to every market in the Nation."²⁴

21. See Wickersham, *supra* note 7, at 489 (noting that in 1994 only nine states had attempted to assert control over land development).

22. Note, however, that any possible violation of the dormant Commerce Clause is not affected by this factor; local measures and state measures are evaluated in the same manner under the dormant Commerce Clause. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.4 (1951).

23. See, e.g., *Golden v. Planning Bd.*, 285 N.E.2d 291, 304-05 (N.Y. 1972) (upholding a growth control ordinance and concluding that where a town cannot at present provide the services that would be required by substantial growth, there is a rational basis for "phased growth," but emphasizing that the ordinance at issue would prevent development for a maximum of 18 years).

24. *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 539 (1949). The dormant Commerce Clause was used to challenge a growth control ordinance in *Construction Industry Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), and it was suggested by Denny that most growth control ordinances violate the dormant Commerce Clause, see Denny, *supra* note 20, at 1279. Wal-Mart did not invoke the dormant Commerce Clause in its appeal to the Vermont Supreme Court. The rarity with which the Commerce Clause has been used to challenge growth control measures may be due in part to the fact that many measures attempt to place limits on increases in population growth, making other constitutional challenges available in a way they are not when, as here, only commercial growth is excluded. See, e.g., *Associated Home Builders v. City of Livermore*, 557 P.2d 473, 475 (Cal. 1976) (involving a challenge, based partly on the constitutionally protected right to travel, to an ordinance prohibiting the issuance of residential building permits). Parties wishing to challenge growth control ordinances in the past

This Note considers whether a dormant Commerce Clause challenge to the broad interpretation of Act 250's fiscal criteria would succeed. Part I examines the history and form of growth-control measures, first at the local and then at the state level. Act 250 and the traditional deference of courts to growth-control measures are also examined. Part II summarizes the history of the St. Albans dispute and discusses the decision of the Vermont Supreme Court in *In re Wal-Mart Stores*. Part III briefly outlines present dormant Commerce Clause doctrine, the many questions surrounding the doctrine's meaning, and how the doctrine is to be applied. Finally, Part IV applies the doctrine to the Vermont Supreme Court's interpretation of Act 250's fiscal criteria. The Note concludes that while a dormant Commerce Clause challenge to a growth-management statute could succeed in other contexts, such a challenge would be highly unlikely to succeed against the Vermont growth-management statute's fiscal criteria.

I. GROWTH CONTROL MEASURES AT THE STATE AND LOCAL LEVELS

A. Growth Control at the Local Levels

Growth control measures are land-use regulations employed by state and local governments in an attempt to control the rate of economic and population growth within a jurisdiction.²⁵ The first growth-control measures began to appear during the second quarter of the twentieth century, and they have become much more common over the last three decades.²⁶ Local growth-control ordinances are now found in a number of different forms all over the country.²⁷ They are

(ordinances that rarely, if ever, burdened commerce in the way the Vermont measure potentially does) may also have concluded that Commerce Clause challenges were unlikely to succeed. This conclusion would have been reinforced by the dismissive language used by the court in *Petaluma*. See *Petaluma*, 522 F.2d at 909 ("It is well settled that a state regulation validly based on the police power does not impermissibly burden interstate commerce where the regulation neither discriminates against interstate commerce nor operates to disrupt its required uniformity.").

25. See Katherine E. Stone & Philip A. Seymour, *Regulating the Timing of Development: Takings Clause and Substantive Due Process Challenges to Growth Control Regulations*, 24 LOY. L.A. L. REV. 1205, 1207 (1991).

26. See ERIC DAMIAN KELLY, *MANAGING COMMUNITY GROWTH: POLICIES, TECHNIQUES, AND IMPACTS* 7 (1993).

27. See Denny, *supra* note 20, at 1245 (noting that over 200 growth control ordinances were on the ballot in California during the 1980s and that 70% of the ordinances proposed in a

not in place everywhere, however, and it may be useful at the outset to distinguish between growth control and zoning, which *is* used almost everywhere, in order to emphasize the potential constitutional problems raised by growth-control measures.²⁸

Local governments, which in the twentieth century have borne the primary responsibility for the regulation of land use, have exercised this responsibility mainly through the use of zoning.²⁹ Since the adoption of the first comprehensive zoning ordinance by New York City in 1916,³⁰ every major American city except Houston has adopted a zoning ordinance.³¹ Zoning, as its name implies, is the separation of different land uses into zones or districts “in which only compatible uses are allowed and incompatible uses are excluded.”³² Zoning, however, did not originate as a means of controlling or limiting growth; rather, it was used mainly to separate “undesirable” from “desirable” uses, with “desirable” normally referring to single-family residential dwellings.³³ Zoning ordinances, then, limit *where*,

recent two-and-a-half-year period passed); Susan M. Wachter & Man Cho, *Interjurisdictional Price Effects of Land Use Controls*, 40 WASH. U. J. URB. & CONTEMP. L. 49, 49 (1991) (noting an increase in the number of land-use regulations adopted by local governments).

28. *Cf.* Denny, *supra* note 20, at 1280 (concluding that most growth control ordinances offend a number of federal constitutional provisions).

29. *See* Wickersham, *supra* note 7, at 492.

30. *See* Charles M. Haar, *The Twilight of Land-Use Controls: A Paradigm Shift?*, 30 U. RICH. L. REV. 1011, 1011 (1996).

31. *See* DANIEL R. MANDELKER, LAND USE LAW § 1.01, at 1 (3d ed. 1993). The legitimacy of zoning as a local government's exercise of the police power was upheld by the Supreme Court in the famous case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926), and while zoning ordinances as applied to particular property owners have been successfully challenged in the years since, the holding in *Euclid*, recognizing the authority of local governments to zone, is largely unquestioned. The most famous example of such a challenge is *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), where the Court reversed the denial of an injunction to stop enforcement of a zoning decision that had placed the plaintiff's property in a residential zone. *See id.* at 189; *see also* *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 603 (4th Cir. 1997) (citing *Euclid* and declaring that “[l]and use planning and the adoption of land use restrictions constitute some of the most important functions performed by local government”).

32. MANDELKER, *supra* note 31, § 4.16, at 113-14.

33. *See* ALEXANDRA D. DAWSON, LAND-USE PLANNING AND THE LAW 37 (1982). Indeed, it was the protection of single-family residences and not the control of growth which provided the chief justification for the Supreme Court's approval of the zoning power in *Euclid*. Justice Sutherland, in his majority opinion in that case, wrote:

These reports . . . concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. With

within a locality, a particular type of growth may take place; they do not necessarily limit the *amount* of growth or development within a particular locality at all.³⁴

Growth control ordinances, on the other hand, place explicit limits on the overall rate of development within a locality. Generally, growth-control ordinances are enacted with at least one of two purposes.³⁵ The first is to ensure that development within a jurisdiction does not proceed so quickly that the local government is unable to meet the increased demands on it for public services.³⁶ The second is to delay or prevent unwanted changes in the character of a community.³⁷ Thus, while zoning ordinances may in practice exclude particular entities or persons from a locality, growth-control ordinances, by setting overall limits on development, are specifically designed to do so.

This design may take a number of forms. The most important method of growth control is comprehensive planning.³⁸ Local governments are often required by statute to develop a comprehensive plan and to make all subsequent land-use decisions with reference to, and in accordance with, that plan.³⁹ A comprehensive plan may attempt to limit development by providing for timed growth or by placing restrictions on the development of infrastructure.⁴⁰ Other

particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite . . .

Euclid, 272 U.S. at 394; see also ROBERT R. WRIGHT & MORTON GITELMAN, *CASES AND MATERIALS ON LAND USE* 779 (4th ed. 1991) (pointing out that while the authority of local governments to zone is not usually questioned, the protection of single-family dwelling units and the "strict segregation of uses" endorsed by *Euclid* are now viewed by many as questionable land-use policy).

34. A full discussion of zoning is beyond the scope of this Note, but it should be mentioned that there are limitations on a locality's ability to use a zoning ordinance to exclude undesirable uses or people. See MANDELKER, *supra* note 31, §§ 5.27-.55, at 172-97.

35. See Stone & Seymour, *supra* note 25, at 1207.

36. See *id.*

37. See *id.*

38. See Stanley D. Abrams, *Casenotes and Comments on Local Growth Control Management Concepts*, C750 ALI-ABA 629, 634 (1992); see also *id.* at 631 (listing the various types of growth control measures employed by local governments).

39. See *id.* at 634.

40. See *id.* "Timed growth" provisions do not allow growth until adequate infrastructure exists to support new development. See Jane E. Schukoske, *Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011, 1024 n.76 (1991). Note the basic similarity between this type of measure and an Adequate Public Facilities Ordinance. See *infra* notes 43-44 and accompanying text.

methods of growth control include: forcing developers to pay some of the public costs created by their particular projects; using transferable development rights; setting urban growth boundaries; and placing a moratorium on new development.⁴¹ Growth control schemes may incorporate a number of these and other techniques.⁴²

The local growth-control tool most similar to the Vermont criteria at issue in *Wal-Mart Stores* has been dubbed the Adequate Public Facilities Ordinance, or APFO.⁴³ Unlike a moratorium, an APFO does not flatly prohibit development. Instead, it requires the approval of all new development by a local governmental body, which must determine, on a case-by-case basis, whether the local government has the capacity, or will soon have the capacity, to provide the services that will be required by the development for which a permit is sought.⁴⁴

There are relatively few reported cases addressing challenges to growth-control ordinances, and most involve objections to limitations on residential rather than commercial development.⁴⁵ In the cases that have been decided, courts have shown a high degree of deference to local attempts to control growth.⁴⁶ The classic case is *Golden v. Planning Board*,⁴⁷ in which the New York Court of Appeals upheld against constitutional attack a version of an Adequate Public Facilities Ordinance which had the potential to delay some residential development for as long as eighteen years.⁴⁸ The court, which cautioned that it would “not countenance . . . under any guise . . . community ef-

41. A “transferable development right” is the right to sever the development “right” to a piece of real property located in a restricted growth area and to transfer this right to a site in a transfer area. Development on the second site is allowed despite the fact that this development might otherwise violate zoning or other restrictions. See JESSE DUKEMINIER & WILLIAM KRIER, PROPERTY 1213 (3d ed. 1998). An urban growth boundary marks the line between growth areas, where development is encouraged, and “slow growth” or “conservation” areas, where it is not. Wickersham, *supra* note 7, at 539. Local governments may place moratoria on development in order to give themselves time to provide the public services necessitated by further growth, but a state’s courts will closely examine a locality’s motives for taking this type of action. See Abrams, *supra* note 38, at 641, 644 (noting that New York courts require that a local government show that a moratorium is a “dire necessity”).

42. See Amy C. Brandt, Comment, *Sedona’s Sustainable Growth Ordinance: Testing the Parameters of Dolan v. City of Tigard*, 28 ARIZ. ST. L.J. 1297, 1301 (1996).

43. See Abrams, *supra* note 38, at 635.

44. See VT. STAT. ANN. tit. 10, § 6086(a)(9)(A) (1997); Abrams, *supra* note 38, at 635.

45. See Stone & Seymour, *supra* note 25, at 1208-09.

46. See *id.* at 1209.

47. 285 N.E.2d 291 (N.Y. 1972).

48. See *id.* at 304-05.

forts at immunization or exclusion,”⁴⁹ nevertheless upheld the measure, finding that the purpose pursued by the ordinance was “undisputably laudatory”⁵⁰ and that the restrictions on land, while they might last “as long as a full generation,”⁵¹ were not permanent.⁵² Those challenging the ordinance argued that the community’s real purpose was to avoid its responsibility for absorbing growth, but the court disagreed and declared that the purpose of the measure was to ensure “a balanced cohesive community dedicated to the efficient utilization of land.”⁵³ The court declined to remark on the possibility that when the pressure for growth is strong enough, the latter goal may be impossible to accomplish without simultaneously pursuing the former one.

*Construction Industry Ass’n v. City of Petaluma*⁵⁴ is another leading case involving a challenge to a growth-control measure. The measure at issue in *Petaluma* limited the construction of new housing units in developments of five or more units to a total of 500 per year.⁵⁵ The plaintiffs contended that the measure, which was only effective for a five-year period, violated their rights to substantive due process because it was arbitrary and unreasonable.⁵⁶ They also argued that the purpose of the measure was to exclude people who otherwise would have chosen to move to Petaluma.⁵⁷ The Ninth Circuit Court of Appeals disagreed, holding that the plan was not a violation of substantive due process and declaring that the ordinance was a lawful exercise of the zoning power that had been delegated to the local government by the state.⁵⁸ The court went on to say that if the ordi-

49. *Id.* at 302.

50. *Id.* at 296.

51. *Id.* at 303.

52. *See id.* at 304.

53. *Id.* at 301-02.

54. 522 F.2d 897 (9th Cir. 1975).

55. *See id.* at 901.

56. *See id.* at 900, 905.

57. *See id.* at 902, 905-06.

58. *See id.* at 908-09. The court in *Petaluma* apparently equated the ordinance at issue with a zoning ordinance. *See id.* at 909. It is not immediately evident, however, that the power delegated to localities in zoning enabling statutes necessarily includes the power to enact growth control legislation. The U.S. Supreme Court has also been careless in distinguishing between zoning and growth control, or has viewed the distinction as unimportant. For example, in his dissent in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), Justice Marshall wrote, “local zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance at issue here: *restricting uncontrolled growth*, solving traffic problems, keeping

nance did not serve regional interests, it was up to the state legislature and not the court to intervene.⁵⁹ Courts, it said, are not “super zoning board[s] and should not be called on to mark the point at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests.”⁶⁰

The court in *Petaluma* also dismissed the plaintiffs’ Commerce Clause claim. The court first declared that a state or local measure enacted in pursuit of a legitimate public purpose cannot violate the Commerce Clause when it does not discriminate against interstate commerce or prevent a necessary uniformity of regulation across state lines; it then cursorily concluded that the *Petaluma* ordinance did neither.⁶¹ The Supreme Court denied certiorari in the case, and a clash between growth control and the Commerce Clause was put off until another day.⁶²

B. Growth Control at the State Level

Local attempts to control growth may be ineffective for a number of reasons, the most obvious of which is growth control’s dependence on the political process.⁶³ There are often strong incentives for small towns to accept and even invite development, incentives which can make the passage or effective implementation of a growth-control measure difficult.⁶⁴ A town may receive a substantial financial benefit from a large commercial development in the form of jobs and taxes.⁶⁵ Meanwhile, the costs of development, including population increase and traffic congestion, are typically spread across an entire region.⁶⁶ Political support for a development, then, will often be concentrated in the locality where the development is to take place. Finally, even if a locality can successfully control development within its borders, development may simply move to other localities within

rental costs at a reasonable level, and making the community attractive to families.” *Id.* at 13 (Marshall, J., dissenting) (emphasis added).

59. See *Petaluma*, 522 F.2d at 908.

60. *Id.*

61. See *id.* at 909.

62. See *Construction Indus. Ass’n v. City of Petaluma*, 424 U.S. 934 (1976).

63. See Scott Hadly, *Threat of Suits May Kill Plan to Limit Homes*, L.A. TIMES, Aug. 5, 1994, at B5 (quoting William Fulton, an urban planner, as saying that growth control “gives cities the feeling that they control the ball, but the outcome is not going to be that much different whether or not you have a cap”).

64. See Wickersham, *supra* note 7, at 503.

65. See *id.*

66. See *id.*

the same region, perhaps shifting, but not reducing, overall costs and effects.⁶⁷

Suspicion regarding state control over land-use regulation can make it difficult to secure passage of a statewide growth-control measure,⁶⁸ but some states, recognizing the shortcomings of growth control (or lack of control) at the local level, have nevertheless succeeded in enacting some form of growth-management scheme.⁶⁹ As early as 1955, California enacted legislation requiring local governments to develop plans which included certain prescribed elements.⁷⁰ Hawaii took most control of the development process away from its local governments in 1961.⁷¹ What was hailed as a “quiet revolution,” in which states would increasingly remove responsibility for land-use regulation from local governments, began later that decade.⁷² In 1964, the American Law Institute began work on the Model Land Development Code, a model land-use statute that, unlike the Standard Zoning Enabling Act (a model zoning law), included an active role for state governments.⁷³ A few states, including Vermont, passed growth-management statutes in the early 1970s,⁷⁴ and while the “quiet revolution” has yet to occur,⁷⁵ a number of other states (although not a majority) have passed growth-management statutes in the last twenty-five years.⁷⁶

Despite being commonly referred to as “growth management” statutes, these statutes are modeled on local growth-control meas-

67. *See id.* at 510.

68. *See* J. BARRY CULLINGWORTH, *THE POLITICAL CULTURE OF PLANNING: AMERICAN LAND USE PLANNING IN COMPARATIVE PERSPECTIVE* 138 (1993) (noting that suspicion of state control of land use kept Vermont's growth management statute from being implemented effectively).

69. *See* Wickersham, *supra* note 7, at 512 (noting that growth management statutes were passed in Vermont, Florida, and Oregon to “address the persistent problems raised by Euclidean zoning and local control of land use”).

70. *See* Douglas R. Porter, *State Growth Management: The Intergovernmental Experiment*, 13 *PACE L. REV.* 481, 482 n.2 (1993).

71. *See id.*

72. *See* CULLINGWORTH, *supra* note 68, at 133 (quoting FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 1 (1972)).

73. *See* Thomas R. McKeon, Comment, *State Regulation of Subdivisions: Defining the Boundary Between State and Local Land Use Jurisdiction in Vermont, Maine, and Florida*, 19 *B.C. ENVTL. AFF. L. REV.* 385, 389 (1991).

74. *See* Wickersham, *supra* note 7, at 512.

75. *See* CULLINGWORTH, *supra* note 68, at 133.

76. These states include Oregon, Florida, Rhode Island, Maine, New Jersey, Georgia, Washington, and Maryland. *See* Porter, *supra* note 70, at 481.

ures,⁷⁷ and, like their local counterparts, growth-management statutes take widely varying forms.⁷⁸ In addition to the elements that may be found in local measures,⁷⁹ growth-management statutes may mandate: the creation of a statewide plan for development; consistency between state and local plans; and state or regional approval of large developments.⁸⁰

Even though they may potentially place much greater burdens on private interests than local measures, state attempts to control and manage growth are likely to receive an even greater degree of deference from courts than local measures. In the *Golden* case, discussed above, both the majority and the dissenters, who would have invalidated the ordinance, spoke favorably of state and regional planning.⁸¹ The majority opinion noted that “[s]tate-wide or regional control of planning would insure that interests broader than that of the municipality underlie various land-use policies,”⁸² while the dissent suggested that, at the least, “a regional planning mechanism should be devised to create a pluralist suburbia in which each class could find its proper place.”⁸³ The *Golden* case was concerned with whether that town could exclude people rather than businesses, but the favorable language used by the court to describe state land-use planning suggests that courts are likely to give states a wide berth when they use their police power to manage either residential or commercial growth.

C. Growth Control in Vermont

The “premier environmental and land use law” in Vermont is Act 250,⁸⁴ passed by the Vermont legislature in 1970.⁸⁵ The stated

77. See Note, *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127, 1137 (1995).

78. See Porter, *supra* note 70, at 483.

79. See *supra* notes 29-44 and accompanying text.

80. See generally Porter, *supra* note 70, at 483-500 (discussing growth management schemes and their various elements).

81. See *Golden v. Planning Bd.*, 285 N.E.2d 291, 300 (N.Y. 1972); *id.* at 310 (Breitel, J., dissenting).

82. *Id.* at 300.

83. *Id.* at 310 (Breitel, J., dissenting).

84. Richard O. Brooks, *Legal Realism, Norman Williams, and Vermont's Act 250*, 20 VT. L. REV. 699, 699 (1996).

85. See An Act to Create an Environmental Board and District Environmental Commissions (Act 250), 1969 Vt. Acts & Resolves 250 (codified as amended at VT. STAT. ANN. tit. 10, §§ 6001-6108 (1997 & Supp. 1998)).

purpose of Act 250 is to “protect and conserve the lands and the environment of the State and to ensure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests.”⁸⁶ Act 250, which strongly influenced those developing the Model Land Development Code,⁸⁷ has two major features.⁸⁸ The first is the Act’s provision for three statewide plans for development.⁸⁹ While the first two plans, an interim land-capability plan and a capability and development plan, were adopted, the third plan, a comprehensive land-use plan, has never been approved.⁹⁰ The second major feature, which has been put into effect, is the requirement that all large developments be approved by “district environmental commissions.”⁹¹

Generally, Act 250 requires a development permit for industrial or commercial developments of over ten acres, housing projects of ten or more units where each unit is located on fewer than ten acres, and developments above an elevation of 2,500 feet.⁹² Act 250 sets out a long list of criteria to guide the district commissions in making their permit determinations.⁹³ Some of these criteria are environmental,⁹⁴ while others are fiscal, including, for example, whether the development would unreasonably burden the ability of a locality to provide educational services.⁹⁵ Another fiscal criterion requires the commissions to evaluate the “impact” of the proposed development:

86. *Id.* § 1, 1969 Vt. Acts & Resolves 237-38.

87. *See* Wickersham, *supra* note 7, at 512.

88. *See* CULLINGWORTH, *supra* note 68, at 138 (describing the unique features of Act 250, including the development permit system and the preparation of three statewide plans).

89. *See* Act 250, §§ 18, 19, 20, 1969 Vt. Acts & Resolves 245-46 (providing for, respectively, an interim land capability plan, a capability and development plan, and a land-use plan). Section 18 was codified at § 6041 of the Vermont state code and then omitted as obsolete after the provisions were executed. Section 19 is codified as amended at VT. STAT. ANN. tit. 10, § 6042 (1997). Section 20 was codified at § 6043 of the state code and was repealed in 1983.

90. *See* CULLINGWORTH, *supra* note 68, at 138 (stating that the final land-use plan “never emerged”).

91. VT. STAT. ANN. tit. 10, § 6026 (1997).

92. *See* KELLY, *supra* note 26, at 108-09.

93. *See* Jay, *supra* note 5, at 949 & n.139.

94. The commissions must consider whether the development will: result in undue air or water pollution; have access to a sufficient water supply but not unreasonably burden that supply; cause excessive erosion of the land or unreasonable traffic congestion; or have an unreasonably adverse effect on the natural beauty or historic sites of an area. *See* VT. STAT. ANN. tit. 10, § 6086(a) (1997). The commissions also must consider whether a development conforms with the statewide capability and development plan (and, when adopted, the final land-use plan), as well as any existing local or regional plan. *See id.*

95. *See id.* § 6086(a)(6).

[T]he district commission or the board shall take into consideration the growth in population experienced by the town and region in question and whether or not the proposed development would significantly affect their existing and potential financial capacity to reasonably accommodate both the total growth and the rate of growth otherwise expected for the town and region and the total growth and rate of growth which would result from the development if approved.⁹⁶

The commission must find that all of the listed criteria have been satisfied before a project can be approved.⁹⁷ Appeals from the decisions of the district commissions go to the Environmental Board, which was created by Act 250.⁹⁸ Appeals from the decisions of the Environmental Board, in turn, are made to the Vermont Supreme Court.⁹⁹

Despite its rather daunting list of requirements, many now view Act 250 as ineffective at managing growth in Vermont.¹⁰⁰ This ineffectiveness is largely due to the fact that the system created by Act 250 is a "reactive" one, limited to evaluating large developments as they come up for approval.¹⁰¹ The lack of a statewide plan for development means that growth is "managed," if at all, in a piecemeal fashion.¹⁰² Large-scale development cannot be directed or channeled into particular areas; it can only be approved or rejected when the district environmental commissions make their permit decisions.¹⁰³ In addition, it is often possible to structure development so that the ten-acre

96. *Id.* § 6086(a)(9)(A).

97. *See id.* § 6086(d) (stating that the "board shall not approve" a project "unless it satisfies the appropriate requirements of section (a)").

98. *See id.* § 6089.

99. *See id.*

100. *See* CULLINGWORTH, *supra* note 68, at 139 ("In short, as a growth management system, a lot remains to be desired."); Jay, *supra* note 5, at 950 ("Unfortunately, the permit system under Act 250 has not prevented the encroachment of larger scale development in the form of 'box retailers' into Vermont." (citation omitted)). *But see* Wickersham, *supra* note 7, at 518 n.183 (pointing out that while only 2.5% of projects were denied approval from 1970 to 1979, almost all approved projects were subject to modifying conditions).

101. *See* CULLINGWORTH, *supra* note 68, at 139.

102. *See* Jay, *supra* note 5, at 950-51.

103. *See* CULLINGWORTH, *supra* note 68, at 139 (noting that the Act 250 system only "evaluates planning proposals submitted for approval" rather than directing "growth to areas which are considered by planners to be suitable for growth"); Jay, *supra* note 5, at 950 (discussing Act 250's "inability to address cumulative impacts, such as strip development and other elements of sprawl").

threshold is never crossed and review under Act 250 is not triggered.¹⁰⁴

It is, however, impossible for some developments to escape review. Citizens are increasingly concerned about the effects of growth, and development permits, when they are required, will probably only become more difficult to obtain.¹⁰⁵ The criteria used by the district commissions to make permit decisions rely heavily on words like “unreasonably” and “undue” and leave a lot of room for interpretation.¹⁰⁶ Moreover, the large number of criteria give the commissions a number of bases on which to deny a development permit.¹⁰⁷ The commissioners’ large degree of discretion creates the possibility that Act 250 may be used in a manner that encroaches on constitutional protections like the dormant Commerce Clause.

II. WAL*MART STORES AND THE CONSIDERATION OF MARKET COMPETITION

In 1993, Wal-Mart selected a forty-four-acre tract about two miles from downtown St. Albans as the site for a new store.¹⁰⁸ Because the site was larger than ten acres, Wal-Mart was required to obtain a permit for the development,¹⁰⁹ and in September 1993 the company filed its permit application.¹¹⁰ On December 21, 1993, despite opposition from the Franklin/Grand Isle County Citizens for Downtown Preservation (Citizens) and the Vermont Natural Resources Council (VNRC), Wal-Mart was granted a permit by the District Six Environmental Commission.¹¹¹

Citizens and VNRC had been denied party status by the Commission with respect to a number of the Act 250 criteria and were thus unable to contest the permit application under those criteria be-

104. See CULLINGWORTH, *supra* note 68, at 139 (stating that land sales and development may be purposely designed to escape review of the provisions aimed at large-scale developments).

105. The district environmental commissions as well as the Environmental Board are made up of lay citizens. See *id.* at 138.

106. See, e.g., VT. STAT. ANN. tit. 10, § 6086(a) (1997) (stating that permissible development “[w]ill not place an unreasonable burden on the ability of the local governments to provide municipal or governmental services”).

107. See *id.* (listing 10 criteria, many with subcriteria, that must be satisfied before a permit may be issued).

108. See Schneider, *supra* note 17, at 929-30.

109. See *id.* at 930.

110. See *In re Wal*Mart Stores, Inc.*, 702 A.2d 397, 400 (Vt. 1997).

111. See Schneider, *supra* note 17, at 930-31.

fore the Commission.¹¹² When the two groups appealed the decision of the Commission to the Environmental Board, however, the Board granted them party status with respect to most of these criteria;¹¹³ the procedural effect of this decision was that the Environmental Board then conducted a de novo review of the development application under many of these Act 250 criteria.¹¹⁴

The Board found that the proposed development complied with all of Act 250's environmental criteria.¹¹⁵ The Board also found, however, that the proposed development did not satisfy the following fiscal criteria: the development's burden to the town's ability to provide educational (Criterion 6) and other governmental (Criterion 7) services; the development's impact on the ability of the town and region to accommodate growth (Criterion 9(A)); and the costs of scattered development in relation to its benefits (Criterion 9(H)).¹¹⁶

The Board first considered the effect that the Wal-Mart would have on market competition under Criterion 9(A), the "impact of growth" criterion.¹¹⁷ The Board found that the development would cause only a minor direct population increase¹¹⁸ but voiced a concern that the Wal-Mart would attract significant secondary growth to St. Albans and noted that Wal-Mart had failed to present evidence detailing the costs and benefits of such growth.¹¹⁹ Because of this failure, the Board judged that Wal-Mart had not sustained its burden of proof with respect to Criterion 9(A) and denied the permit application on that basis.¹²⁰

Although it was unnecessary, the Board went on to consider the application under the other appealed criteria.¹²¹ Because the proposed Wal-Mart was not physically contiguous to an existing settlement, the criterion addressing the costs of scattered development ap-

112. See *id.* at 930.

113. See *id.* at 930-31 (noting that both groups were denied party status on historical sites criterion but were granted party status for the other criteria including waste disposal, wetlands, impact of growth, public investments and facilities, and conformity with local plan).

114. See *id.* at 931 & n.114.

115. See *id.* at 932.

116. See *id.* at 937; see also VT. STAT. ANN. tit. 10, § 6086(a) (1997) (listing the criteria necessary before a permit can be issued).

117. See Schneider, *supra* note 17, at 938.

118. See *id.* at 939 (discussing the Board's findings that all but five employees would be hired from the local labor market and those five employees would bring six children).

119. See *id.*

120. See *id.*

121. See *id.* at 940-45.

plied to it.¹²² Consideration of this criterion includes an analysis of public benefits and costs.¹²³ The Board concluded that the figures submitted by Citizens and VNRC were more credible and thus used those numbers in its analysis.¹²⁴ These figures showed an annual public benefit from the development of \$109,000 and an annual public cost of \$315,000, \$129,000 of which was due to the loss in tax revenue resulting from the increased competition brought by the Wal-Mart.¹²⁵ Working with these numbers, the Board could hardly do anything but deny the permit application.¹²⁶ Wal-Mart failed to present any calculations concerning the public benefits of secondary growth that would occur as a result of the new store.¹²⁷ Had it done so, Wal-Mart might have been able to counter the numbers offered by Citizens or VNRC and might have been able to win approval on this point.¹²⁸

The Board also denied the application under the criteria dealing with the development's impact on schools and local government services.¹²⁹ As with the other criteria, Wal-Mart's failure to present estimates regarding secondary growth prevented the Board from imposing mitigating conditions that might have allowed the development.¹³⁰

One factor common to the Board's decision with respect to each of these criteria was the "competitive effect of [the] project on existing businesses."¹³¹ Justifying its consideration of this factor, the Board stated:

The issue is protection of the tax base. . . . [T]he General Assembly intended that the Board and district commissions consider that part of the economic impact of a development is any reduction in the tax base caused by a proposed development. For example, [one crite-

122. *See id.* at 940.

123. *See id.*

124. *See id.* at 941 & nn.167-69 (noting that the Board questioned the credibility of testimony from RKG Associates, given at the hearing on behalf of Wal-Mart, because of "significant differences" in projections, made by RKG, based on conflicting assumptions regarding three criteria: annual average sales; recapture of residents' purchases currently made out of town; and percentage of total sales to Canadian citizens).

125. *See id.* at 941-42.

126. *See id.* at 942-43.

127. *See id.* at 941.

128. *See id.* at 942-43.

129. *See id.* at 943-44.

130. *See id.* at 943.

131. *Id.* at 937 (quoting Findings of Fact, Conclusions of Law, and Order at 27, *In re Wal-Mart Stores, Inc.* (Vt. Env'tl. Bd. Dec. 23, 1994) (No. 6F0471-EB)).

tion] . . . speak[s] in terms of the “ability” of a local government to provide services, which can only be determined by reference to the available tax base. Similarly, Criterion 9(A) [addressing the impact of growth] speaks of the impact of a project on a town’s “financial capacity.” Also, Criterion 9(H) [addressing the costs of scattered development] refers to a project’s “indirect” costs.¹³²

The Board acknowledged that the effect of the Wal-Mart on market competition, and the consequences to the tax base, underlay its decisions under each of the criteria.¹³³ It was careful to note, however, that its decision had nothing to do with the protection of local businesses:

[W]e wish to make clear that our concern under Act 250’s criteria is exclusively with the economic impact of a proposed development on public, not private entities. A proposed development may have a direct and substantial adverse economic impact on one or more existing businesses; however, that impact on competing private entities is irrelevant to our analysis under Act 250 unless it can also be shown that there is a resultant material adverse economic impact on the ability or capacity of a municipality or other governmental entity to provide public services.¹³⁴

Based on these findings, the Board issued an order voiding Wal-Mart’s land-use permit on December 23, 1994.¹³⁵

Wal-Mart appealed the ruling of the Environmental Board to the Vermont Supreme Court.¹³⁶ The court, which generally gives the Board’s interpretations of Act 250 a presumption of validity,¹³⁷ upheld the decision of the Board in all respects, including the denial of the permit under the different fiscal criteria.¹³⁸ After rejecting Wal-Mart’s contention that the term “growth” in Criterion 9(A), which addresses the “‘financial capacity’ of the town and region to accommodate growth,”¹³⁹ encompassed only population increase and did not

132. *Id.* at 938 (quoting Findings of Fact, Conclusions of Law, and Order at 27, *In re Wal*Mart Stores, Inc.* (Vt. Env’tl. Bd. Dec. 23, 1994) (No. 6F0471-EB))

133. *See id.* at 945.

134. *Id.* at 945 (quoting Findings of Fact, Conclusions of Law, and Order at 29, *In re Wal*Mart Stores, Inc.* (Vt. Env’tl. Bd. Dec. 23, 1994) (No. 6F0471-EB)).

135. *See id.* at 930.

136. *See In re Wal*Mart Stores, Inc.*, 702 A.2d 397, 400 (Vt. 1997).

137. *See* McKeon, *supra* note 73, at 394.

138. *See Wal*Mart Stores*, 702 A.2d at 402-03.

139. VT. STAT. ANN. tit. 10, § 6086(a)(9)(A) (1997).

include economic growth,¹⁴⁰ the court concluded that the consideration of market competition was warranted by the “plain language” of the Criterion.¹⁴¹ The court went on to say that, even in the absence of this language, the consideration of market competition would have been allowable because the Criterion requires the district environmental commissions and the Board to consider the increased costs of education, highway maintenance, fire protection, and other services that will result from the development.¹⁴² Because a municipality’s ability to provide these services depends on its tax base, said the court, a development’s impact on the tax base through the development’s effect on market competition is a relevant factor.¹⁴³ Finally, the court found that the consideration of market competition was also allowable under Criteria 6 and 7, which concern the development’s burden on the town’s ability to provide educational and other governmental services, respectively.¹⁴⁴

Clearly, the denial of a permit to Wal-Mart in this case was largely the retailer’s own fault. Its apparent failure to provide credible or complete data concerning the effect that the construction of a store would have on St. Albans and the surrounding area left the Environmental Board with the unfavorable data provided by Citizens and VNRC. Wal-Mart, by more effectively countering these data, could have given the Board the option of approving the permit with mitigating conditions. It is therefore difficult to argue that one should have much sympathy for the retailer in this case. Nevertheless, *Wal*Mart Stores* effectively demonstrates how broadly courts have construed the police power in the land-use context. If an adverse effect on nothing other than the tax base of surrounding towns (note that there were no environmental concerns over the proposed Wal-Mart) is enough on which to base a permit denial, then commercial developments of more than ten acres could effectively be prohibited within Vermont’s borders. This possibility is enhanced by the large degree of discretion granted to the district environmental commis-

140. See *Wal*Mart Stores*, 702 A.2d at 404 (concluding “that the Legislature intended the word ‘growth’ as used in Criterion 9(A), to apply to economic, as well as population growth”). Wal-Mart argued that the term growth was thus limited under the doctrine of *ejusdem generis*. See *id.* at 403.

141. *Id.* at 403-04.

142. See *id.* at 404-05.

143. See *id.* at 402, 405.

144. See *id.* at 402. The court did not discuss Criterion 9(H), which compares the costs of “scattered” development with its benefits. See VT. STAT. ANN. tit. 10, § 6086(a)(9)(H) (1997).

sions and the Environmental Board. The question, then, is whether the state has exceeded the limits of its power to manage growth.

Such a limit could come from a variety of constitutional and nonconstitutional sources. A plaintiff challenging a growth-control measure could argue, for instance, that a particular measure is an impermissible use of the police power because it is not rationally related to a legitimate public purpose;¹⁴⁵ that it violates other laws, including federal antitrust law;¹⁴⁶ or that it violates one of a number of constitutional protections, such as the Privileges and Immunities Clauses,¹⁴⁷ the right of interstate travel,¹⁴⁸ substantive due process,¹⁴⁹ or the Takings Clause.¹⁵⁰ This Note is limited to evaluating whether the consideration of market competition under Act 250's fiscal criteria, and the possibility that this consideration could be used to keep all large-scale retailers out of Vermont, could be challenged successfully under the dormant Commerce Clause. In the process, it should shed some light on whether a dormant Commerce Clause challenge to a growth-management statute could ever succeed.

III. THE DORMANT COMMERCE CLAUSE

The Constitution grants Congress the power to "regulate commerce . . . among the several states."¹⁵¹ The Supreme Court has long interpreted the Commerce Clause as an implicit limitation on the power of the states to regulate interstate commerce.¹⁵² The Court has explained this interpretation by saying that the real goals of the Framers were the preservation of "free access to every market in the Nation"¹⁵³ and the assurance that "one state in its dealings with an-

145. See, e.g., *Associated Home Builders v. City of Livermore*, 557 P.2d 473, 483 (Cal. 1976) (en banc) (analyzing a land-use restriction ordinance to determine whether "it bears a reasonable relation to the general welfare").

146. But see Jonathan Moore Peterson, Note, *Taming the Sprawl: Using an Antitrust Arsenal to Further Historic Preservation Goals*, 27 URB. LAW. 333, 364-81 (1995) (arguing that local governments have broad ability to exclude or exact concessions from large retailers, particularly through the use of zoning, without violating federal antitrust law).

147. See Denny, *supra* note 20, at 1269.

148. See *id.* at 1275.

149. See, e.g., *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897, 905 (9th Cir. 1975).

150. See Brandt, *supra* note 42, at 1298.

151. U.S. CONST. art. I, § 8, cl. 1.

152. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 208-09 (1824).

153. *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 539 (1949).

other [will] not place itself in a position of economic isolation.”¹⁵⁴ The Court apparently believes that Congress, because its attention is demanded on a large range of matters, cannot be expected to monitor such protectionism on its own and that the Court, therefore, must act as a kind of administrative assistant to Congress.¹⁵⁵ The Court’s interpretation has never been without controversy, but this “dormant” aspect of the Commerce Clause, despite continual disagreement over its contours, is now a firmly-entrenched feature of constitutional law.

The Court, which originally interpreted the dormant Commerce Clause as a complete prohibition on state regulation of interstate commerce,¹⁵⁶ soon recognized that, because interstate commerce is inextricably intertwined with nearly every aspect of life, denying the states any power to legislate in the area was an extreme position that could upset the delicate balance of power between the states and the national government.¹⁵⁷ The dormant Commerce Clause now limits state power only when that power is employed to discriminate against or excessively burden interstate commerce.¹⁵⁸ How this limitation is enforced depends on whether the measure at issue is an economic regulation or a tax.¹⁵⁹ Because Act 250 is an economic regulation, only the rules governing this type of measure are examined here.

154. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978) (quoting *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 538 (1949)).

155. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 401-02 (2d ed. 1988).

156. See *Gibbons*, 22 U.S. (9 Wheat.) at 209.

157. See *Thompson Willson et al. v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 251 (1829) (“Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states.”); *Hill v. Florida*, 325 U.S. 538, 547 (1945) (Frankfurter, J., dissenting) (contending that “[i]t was settled early in our constitutional history that the mere fact that Congress has power to regulate commerce among the several States does not exclude State legislation in the exercise of the police power, even though it may affect such commerce” and invoking “regard for the harmonious balance of our federal system, whereby the States may protect local interests despite the dormant Commerce Clause”)

158. See *City of Philadelphia*, 437 U.S. at 624. Note also that the limitations imposed by the courts under the dormant Commerce Clause are not final or conclusive. Congress is free to approve state laws that would otherwise be found to violate the dormant Commerce Clause. See *In re Rahrer*, 140 U.S. 545, 562-65 (1891) (“The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge.”); see also GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 255 (1986) (discussing the *Rahrer* opinion).

159. See Mary LaFrance, *Constitutional Implications of Acquisition-Value Real Property Taxation: Assessing the Burdens on Travel and Commerce*, 1994 UTAH L. REV. 1027, 1087 (1994) (discussing the difference between “the balancing of interests approach traditionally applied in Commerce Clause analysis of state economic regulations” and the different approach used to analyze state taxation schemes).

Present dormant Commerce Clause doctrine employs a two-tiered analysis of state economic regulations.¹⁶⁰ The first question is whether the measure at issue discriminates against interstate commerce.¹⁶¹ “When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests,” the measure is discriminatory.¹⁶² Thus, facially nondiscriminatory measures that nevertheless favor in-state over out-of-state interests fall into the same category as facially discriminatory measures. If a measure is deemed discriminatory, a court will then ask whether the measure was enacted in pursuit of a legitimate public purpose and whether there are no less discriminatory means by which to accomplish that purpose.¹⁶³ Discriminatory measures are usually, though not always, invalidated.¹⁶⁴

If a measure does not discriminate and its effects on interstate commerce are only indirect or incidental, a court examines the state interest being pursued and whether the local benefits are clearly exceeded by the burden the statute places on interstate commerce.¹⁶⁵ If the benefits are clearly exceeded by the burden on commerce, the measure is invalidated.¹⁶⁶ The approach to the second class of statutes, known as *Pike* balancing, was first enunciated by the Supreme Court in *Pike v. Bruce Church, Inc.*¹⁶⁷

Many object to dormant Commerce Clause doctrine not only because its textual and theoretical justifications are tenuous but also because its application is fraught with difficulties.¹⁶⁸ The most obvious

160. See *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986).

161. See *id.*

162. *Id.* at 579.

163. See *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

164. See *infra* note 170 and notes 190-202 and accompanying text.

165. See *Brown-Forman Distillers*, 476 U.S. at 579.

166. See *id.*

167. 397 U.S. 137, 142 (1970) (“Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” (citing *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960))).

168. See, e.g., Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 554 (1995):

We still do not have an adequate theory of the commerce power Not only is our theory self-contradictory . . . , but the particular rules we have developed, and the way we apply them, cannot stand up to reflection about why we have the federal government and what it ought to be able to do.

problem, and the one most crucial to the question posed in this Note, is that it is difficult to determine whether a facially nondiscriminatory measure favors in-state economic interests over out-of-state interests or merely has an indirect, “incidental” effect upon interstate commerce. The Court has acknowledged this difficulty, noting that there is no “clear line” separating the two categories of regulations and that “[i]n either situation the critical consideration is the overall effect of the statute on both local and interstate activity.”¹⁶⁹

The “overall effect” language gives very little guidance about how the discrimination inquiry is to be conducted, yet the inquiry itself has great practical importance. Measures deemed to favor in-state interests are almost always invalidated, while those subjected to *Pike* balancing usually survive.¹⁷⁰ The following discussion first examines how the Court decides whether a measure is discriminatory or merely has an incidental effect on interstate commerce and then turns to how a measure is evaluated once it has been placed in one of these categories.

A. Discriminatory or Incidental Effect

Facially nondiscriminatory measures may discriminate against interstate commerce “in practical effect.”¹⁷¹ Determining whether a measure actually does so, however, is a difficult matter. As noted above, the Supreme Court has said very little about how courts are to make this determination. It does seem clear, though, that a court

That the application of the doctrine has been inconsistent has been recognized by members of the Supreme Court itself. Justice Scalia, writing a separate opinion in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), wrote that the “applications of the doctrine have, not to put too fine a point on the matter, made no sense.” *Id.* at 260 (Scalia, J., concurring in part and dissenting in part).

169. *Brown-Forman Distillers*, 476 U.S. at 579. The Court has also acknowledged that the determination is critical to the outcome of a case: “The *crucial* inquiry, therefore, must be directed to determining whether [the statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.” *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (emphasis added).

170. See Amy M. Petragani, Comment, *The Dormant Commerce Clause: On Its Last Leg*, 57 ALB. L. REV. 1215, 1237 (1994) (noting that from 1986 through 1993, all seven state measures deemed discriminatory by the Supreme Court were invalidated, while three of the four measures to which *Pike* balancing was applied survived).

171. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

must look either to the stated reasons for which the measure was enacted or to where the burdens of a measure actually fall.¹⁷²

If a measure was enacted with the intent to benefit in-state interests at the expense of out-of-state interests, the measure will be found discriminatory and will almost assuredly be invalidated.¹⁷³ In *Middle South Energy, Inc. v. Arkansas Public Service Commission*,¹⁷⁴ for example, the Eighth Circuit Court of Appeals dealt with the attempts of the Arkansas Public Service Commission (APSC) to interfere with the Arkansas Power and Light Company's contracts to purchase nuclear power produced in another state.¹⁷⁵ The APSC argued that the contract did not meet Arkansas's regulatory requirements, but it had previously made clear in arguments before the Securities and Exchange Commission that its real concern was to shift rate increases away from Arkansas citizens to the citizens of other states.¹⁷⁶ Given this evidence of protectionist intent, the court found the commission's actions discriminatory and in violation of the dormant Commerce Clause.¹⁷⁷

Some scholars advocate limiting the discrimination determination exclusively to whether the measure at issue was enacted with protectionist intent.¹⁷⁸ This approach would eliminate the need for a court to assess where the burdens created by a measure fall—a diffi-

172. The framework for the following discussion owes much to Daniel A. Farber and 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), which outlines a number of factors courts might look to when making the discrimination determination.

173. This is exactly what dormant Commerce Clause jurisprudence seeks to prevent. See *Baldwin v. Seelig, Inc.*, 294 U.S. 511, 527 (1935) ("What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation."). If evidence of protectionist intent is absent, a court's inquiry into whether the measure at issue is discriminatory in effect may fairly be thought of as a search for indirect evidence of protectionist intent.

174. 772 F.2d 404 (8th Cir. 1985).

175. See *id.* at 406.

176. See *id.* at 416-17.

177. See *id.* The court cited a Supreme Court case, *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980), for the proposition that a "virtually per se rule of invalidity" applies to protectionist measures. *Middle South Energy*, 772 F.2d at 416.

178. See, e.g., Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092-93 (1986) (arguing that in the "central area" of movement-of-goods cases, the Court "should be concerned only with preventing purposeful protectionism").

cult judgment that courts may be ill-suited to make.¹⁷⁹ Because it so easily results in invalidation, however, evidence of protectionist intent is usually difficult or impossible to find; the body enacting a measure is careful to guard against showing any desire to impede interstate commerce. Moreover, it is not obvious how much evidence is sufficient to show discriminatory intent.¹⁸⁰ When a measure is passed by a state legislature, for example, the statements of a single legislator are probably not enough to taint the measure, but this may often be the only evidence of protectionist intent. Because evidence of protectionist intent is usually absent or limited, a court is normally forced to look for indirect indicators of protectionist intent by analyzing where the burdens of a measure fall.

In performing this inquiry, courts look to see whether the measure at issue employs a classification that is an effective proxy for distinguishing between local and foreign interests;¹⁸¹ whether the measure effectively places an embargo on out-of-state goods;¹⁸² or whether

179. See *id.* at 1147 (arguing in favor of motive review in dormant Commerce Clause cases and contending that balancing does not reflect a “proper underlying prescription for legislative behavior” because the legislature does not need to and cannot balance).

180. See *id.* (noting the “ascertainability” problem which questions whether a court can determine what the legislature’s motive was).

181. See Farber & Hudec, *supra* note 172, at 1416 & n.56. Such a measure stands a good chance of being deemed discriminatory by a court. In *Atlantic Prince, Ltd. v. Jorling*, 710 F. Supp. 893 (E.D.N.Y. 1989), the district court condemned as discriminatory a New York statute that prohibited fishing vessels of over 90 feet in length from fishing in New York waters. See *id.* at 895-96. The measure was found discriminatory because, at the time of the bill’s passage, there was only one fishing boat in New York that was over 90 feet in length, and there was evidence that those who supported the measure were well aware of the fact that it would burden foreign interests almost exclusively. See *id.* at 897. In contrast to *Jorling*, the court in *Davrod Corp. v. Coates*, 971 F.2d 778 (1st Cir. 1992), found that a Massachusetts statute that limited the length of fishing vessels to 90 feet did not discriminate against interstate commerce because there were a number of boats over 90 feet based in Massachusetts. See *id.* at 788. Out-of-state interests, the court said, were not burdened disproportionately. See *id.* at 789. The 90-foot limitation in *Coates* was subjected to *Pike* balancing and was upheld; the same limitation, deemed discriminatory in its particular context, was subjected to stricter scrutiny in *Jorling* and was struck down.

182. See Farber & Hudec, *supra* note 172, at 1416 & n.57. In *Government Suppliers Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992), the Seventh Circuit considered a complex set of Indiana regulations that would have had the practical effect, by drastically raising costs, of keeping trash from other states out of Indiana. See *id.* at 1279. The court determined that the regulations were discriminatory for purposes of dormant Commerce Clause analysis because, in effect, they “erected an economic barrier against the importation of municipal waste.” *Id.* In the course of its decision, the court cautioned that “[d]iscrimination may take the form of ‘raising the costs of doing business’ for out-of state entities, ‘while leaving those of their [in-state] counterparts unaffected.’” *Id.* (quoting *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 351 (1977)).

the measure has the effect of giving in-state interests a competitive advantage over out-of-state interests.¹⁸³ Making any of these determinations, however, requires a court to decide which interests to recognize and what balance of interests is required for a statute to be deemed discriminatory. Untangling all the various interests affected by a measure is a difficult, if not impossible, task, and at present the Supreme Court has not offered any guidance as to how it or other courts are to conduct or limit their inquiry.

Because evaluating where the burdens of a measure fall may be impossible to do completely and accurately, courts probably are much more comfortable deeming a measure discriminatory when there is at least *some* direct evidence of protectionist intent.¹⁸⁴ But an intent requirement, unstated or not, does not mesh with the enunciated purpose of the dormant Commerce Clause, which is to ensure that “our economic unit is the Nation” and that the states do not be-

183. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), is an example of a case where a facially nondiscriminatory statute that granted a competitive advantage to in-state interests was deemed discriminatory and subjected to stricter scrutiny. *See id.* at 350. North Carolina had passed a statute that prohibited all containers of apples sold within the state from bearing any grade “other than the applicable U.S. grade or standard.” N.C. GEN. STAT. § 106-189.1 (1974 Supp.) (repealed 1983). The Washington State Apple Advertising Commission contended that the measure unfairly discriminated against apples grown in Washington, which were subjected to a grading system more stringent than the national one and which bore evidence of this fact on their packaging. *See Hunt*, 432 U.S. at 336-38. The Court found that the measure discriminated against Washington apples both by raising the growers’ costs of doing business in North Carolina (compliance with the new law would have been expensive) and by stripping the growers of the competitive advantage they had gained through Washington’s expensive and stringent grading system. *See id.* at 350-51. The Court went on to invalidate the statute. *See id.* at 354.

Note that it was not only the interests of North Carolina and Washington apple growers that were affected by the statute at issue in *Hunt*. Other out-of-state growers whose apples were sold in North Carolina, assuming their apples had not gained the same reputation for quality as Washington apples, benefited from the statute in the same way that North Carolina growers did. Note also that the statute deprived North Carolina apple consumers of the additional information on the Washington apple containers.

184. Indeed, some such evidence existed in most of the cases cited *supra* notes 181-83. In the *Hunt* case, for example, the Washington State Apple Advertising Commission had applied for an exemption to the North Carolina statute soon after it was passed. *See Hunt*, 432 U.S. at 339. In response, the North Carolina Agriculture Commissioner said that, before granting an exemption, he would “want to have the sentiment from our apple producers *since they were mainly responsible for [the] legislation being passed.*” *Id.* at 352. In the *Jorling* decision, the Court quoted a New York state assemblyman who had supported the measure at issue: “At this time, foreign fleets are preparing to introduce into New York State waters vessels in excess of 90 feet with freezer-processor capabilities. Such vessels will create an imbalance in the state’s fishery and provide foreign fleets with an unfair advantage over the state’s commercial fishing industry.” *Jorling*, 710 F. Supp. at 902. The court in *Coates* specifically noted the lack of similar evidence in that case. *See Coates*, 971 F.2d at 789.

come “separable economic units.”¹⁸⁵ In addition, requiring intent is not the way all courts have applied the doctrine.¹⁸⁶ Justice Stewart appears to have been closer the mark when he stated in *City of Philadelphia v. New Jersey*¹⁸⁷ that “the evil of protectionism can reside in legislative means as well as legislative ends.”¹⁸⁸

Despite the Supreme Court’s lack of guidance on how to conduct it, the discrimination determination is, as has been noted already, crucial to a measure’s ultimate fate.¹⁸⁹ Because the lack of guidance makes it difficult to predict how a particular case would be decided, the analysis offered in this Note contains an unavoidable (but I believe small) element of uncertainty.

B. Measures Deemed Discriminatory

The Supreme Court has said repeatedly that discriminatory measures are “virtually *per se* invalid” under the dormant Commerce Clause.¹⁹⁰ This language is actually too strong, though, for the Court has also ruled that even when discrimination is shown, the measure in question is permissible if the state or local government can show that the measure serves a legitimate local purpose and that the purpose could not be served as well without discriminating against interstate commerce (hardly an insurmountable burden).¹⁹¹ For example, *Maine v. Taylor*¹⁹² involved a statute which prohibited the importation into Maine of any live baitfish.¹⁹³ Clearly discriminatory, the statute was subjected to the test outlined above.¹⁹⁴ The Court found that the Maine statute served the legitimate local purpose of protecting native fisheries from parasites found in fish from other states and that this purpose could not be served as well by nondiscriminatory means, be-

185. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949).

186. In *Bayh*, for example, the court found no direct evidence of protectionist intent but nevertheless deemed the statute discriminatory. *See Bayh*, 975 F.2d at 1279.

187. 437 U.S. 617 (1978).

188. *Id.* at 626.

189. *See supra* note 170.

190. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986); *see also City of Philadelphia*, 437 U.S. at 624 (“[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.”); *Lewis v. BT Inv. Managers*, 447 U.S. 27, 36 (1980) (quoting *City of Philadelphia*).

191. *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

192. 477 U.S. 131 (1986).

193. *See id.* at 137.

194. *See id.* at 138.

cause adequate testing procedures did not exist.¹⁹⁵ The statute was upheld.¹⁹⁶

The decision of the Supreme Court in a case decided long before the development of present doctrine (but analogous to the situation in *Wal-Mart Stores*) also illustrates that a discriminatory measure may be upheld by the Court if the purpose it was enacted to achieve is deemed important enough. In *Breard v. Alexandria*,¹⁹⁷ the Court held that an Alexandria, Louisiana ordinance that prohibited the door-to-door sale of goods did not violate the dormant Commerce Clause.¹⁹⁸ Facially nondiscriminatory, the ordinance nevertheless primarily handicapped national businesses, which, by virtue of the fact that they were not based in Alexandria, were much more likely than local businesses to conduct their sales door-to-door.¹⁹⁹ Additionally, the benefits of the ordinance primarily fell on those businesses' local competitors, most of which did not conduct their sales door-to-door.²⁰⁰ The Court upheld the ordinance, concluding that the measure, regardless of its effect on interstate commerce, was a legitimate exercise of the police power and that "[w]hen there is a reasonable basis for legislation to protect the social . . . welfare of a community, it is not for this Court because of the Commerce Clause to deny the exercise locally of the sovereign power of Louisiana."²⁰¹

The placement of a measure into either the "discriminatory" or "incidental effect" category does not, then, necessarily determine the outcome in a particular case. The burden is certainly heavier on the state when a measure is placed in the "discriminatory" category, however, and it can safely be said that *Maine v. Taylor* is the exception rather than the rule.²⁰²

C. Pike Balancing

If a measure is deemed to have only an incidental effect on interstate commerce, the test used to determine if it nevertheless violates

195. See *id.* at 147, 148.

196. See *id.* at 151-52.

197. 341 U.S. 622 (1951).

198. See *id.* at 641.

199. See Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 138.

200. See *id.*

201. *Breard*, 341 U.S. at 640.

202. See text accompanying notes 169-72.

the dormant Commerce Clause is that first enunciated in *Pike v. Bruce Church, Inc.*²⁰³ The Supreme Court, which refers to the *Pike* test as a balancing approach, has explained the test in the following manner: “When . . . a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.”²⁰⁴

Pike balancing is applied once a state measure has been declared evenhanded rather than discriminatory.²⁰⁵ The Court usually approves measures to which it applies the *Pike* balancing test.²⁰⁶ In *Northwest Central Pipeline Corp. v. State Corporation Commission*,²⁰⁷ the Court upheld a Kansas regulation that permanently canceled producers’ entitlements to extract assigned amounts of gas if those producers delayed production for too long.²⁰⁸ The regulation was challenged by an interstate pipeline corporation that contended that the effect of the statute was either to give Kansas producers a larger share of the market than they would otherwise enjoy or to divert gas from the interstate to the intrastate market.²⁰⁹ Applying *Pike*, the Court ruled that even if the regulation, which was applied evenhandedly, did have these effects, it still did not violate the dormant Commerce Clause because the effects were “not ‘clearly excessive’ in relation to Kansas’ substantial interest in controlling production to prevent waste and protect correlative rights.”²¹⁰

203. 397 U.S. 137, 142 (1970).

204. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

205. *See Pike*, 397 U.S. at 142.

206. *See Farber & Hudec, supra* note 172, at 1415. This is not always the case. Indeed, the statute at issue in *Pike* itself was invalidated under the new approach. *See Pike*, 397 U.S. at 146. *Pike* involved an Arizona law requiring that all cantaloupes grown in that state be packed in containers approved by a supervisor in charge of enforcing the Arizona Fruit and Vegetable Standardization Act. *See id.* at 138. *Pike*, the supervisor, had prevented Bruce Church, Inc. from shipping the uncrated cantaloupes it grew in Arizona to California for packaging. *See id.* In order to comply with *Pike*’s order, Bruce Church would have been forced to build a packaging facility of its own in Arizona, an endeavor that would have cost about \$200,000. *See id.* at 140. The state’s interest, deemed legitimate, was identified as having Bruce Church’s cantaloupes, which were of admittedly high quality, labeled as coming from Arizona. *See id.* at 145. The Court, however, found this interest “tenuous” and declared that statutes which required “business operations to be performed in the home State that could more efficiently be performed elsewhere” were particularly likely to violate the dormant Commerce Clause. *Id.*

207. 489 U.S. 493 (1989).

208. *See id.* at 497, 526.

209. *See id.* at 497.

210. *Id.* at 526.

The Supreme Court often upholds a measure even when the justification offered by the state is much weaker than that in *Northwest Pipeline*.²¹¹ The reluctance of the Court to use *Pike* balancing to invalidate a measure is due in part, no doubt, to the recognition that it requires the Court to “second-guess the empirical judgments of lawmakers concerning the utility of legislation.”²¹² Scholars and judges also recognize this, and many have argued that *Pike* should be limited further or even eliminated from the jurisprudence of the dormant Commerce Clause.²¹³ The Court has not yet seen fit to do either, and *Pike*'s continued authority holds open the possibility, though a remote one, that an evenhanded state economic regulation could be invalidated under the dormant Commerce Clause.

At this point, it is not difficult to see why dormant Commerce Clause doctrine has been called a “conceptual muddle.”²¹⁴ The doctrine itself, however, seems to be a smaller part of the problem than the lack of guidance about how the doctrine is to be applied. The following discussion will nevertheless attempt to predict how a reviewing court would apply the doctrine to the consideration of market competition under Act 250's fiscal criteria.

IV. A DORMANT COMMERCE CLAUSE CHALLENGE TO VERMONT'S CONSIDERATION OF MARKET COMPETITION

Despite the difficulty of predicting the outcome of dormant Commerce Clause cases generally, it can fairly safely be concluded that a dormant Commerce Clause challenge to the consideration of market competition under Act 250's fiscal criteria would not succeed. Part IV of this Note, the organization of which parallels that of Part

211. See Farber & Hudec, *supra* note 172, at 1415 (stating that the balancing test only requires the state to present some evidence of regulatory benefit). In *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), for example, the Court upheld a law that banned the sale of milk in nonreturnable plastic containers but allowed the use of other nonreturnable containers. See *id.* at 474. The Minnesota Supreme Court had found no rational justification for the distinction. See *Clover Leaf Creamery Co. v. State*, 289 N.W.2d 79, 87 (Minn. 1979).

212. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679 (1981) (Brennan, J., concurring).

213. See, e.g., *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1131-32 (7th Cir. 1995) (suggesting that *Pike* balancing should be applied only to laws that impact interstate commerce more heavily than local commerce); Regan, *supra* note 178, at 1143, 1208-09 (advocating only motive review under the dormant Commerce Clause and concluding that the Supreme Court, despite what its doctrine says, rarely balances in any dormant Commerce Clause case).

214. Tushnet, *supra* note 199, at 125.

III, attempts to demonstrate why. Section IV.A examines whether a court would deem the fiscal criteria, as interpreted by the Vermont Supreme Court, to discriminate against interstate commerce. Section IV.B discusses the probable outcome of a challenge to the interpretation, assuming that a court would find the interpretation discriminatory. Section IV.C discusses the probable outcome if the interpretation were subjected to *Pike* balancing.

A. Discriminatory or Incidental Effect

Act 250's fiscal criteria, and the expansive interpretation of them approved by the Vermont Supreme Court, are not facially discriminatory. However, Wal-Mart, if it made a dormant Commerce Clause challenge, would argue that the consideration of market competition is discriminatory in practical effect. As the following discussion should make clear, such an argument has little chance of success.

First, Wal-Mart is highly unlikely to be able to offer direct evidence that the consideration of market competition under Act 250's fiscal criteria is based on an intent to protect in-state interests at the expense of out-of-state interests. The Vermont Supreme Court was careful, as the Environmental Board had been at an earlier stage of the dispute, to emphasize that the consideration of market competition was relevant only because of the effect that competition can have on property values, and, hence, local tax bases.²¹⁵

The difficulty, if not the impossibility, of the task that Wal-Mart would face here is due to the fact that it would really be challenging not Act 250 itself but the interpretation of that Act by the Environmental Board and the Vermont Supreme Court, neither of which is likely to offer offhand, unwise indications of its discriminatory intent (assuming for the moment that such intent exists). Direct evidence of discriminatory intent seems much more likely to be found when a legislative enactment is being challenged and the record of the process leading to enactment can be examined. Even then, however, the pickings are likely to be slim, and it is unclear how much direct evidence of discriminatory intent would be required before a measure would be invalidated on that basis alone.²¹⁶ In order to put forward a

215. See *In re Wal-Mart Stores, Inc.*, 702 A.2d 397, 401 (Vt. 1997); *supra* note 134 and accompanying text.

216. In *Maine v. Taylor* the Court noted the following statement in a paper produced by the Maine Department of Inland Fisheries and Wildlife opposing the repeal of the ban on baitfish importation: "[W]e can't help asking why we should spend our money in Arkansas when it is

successful dormant Commerce Clause challenge to the interpretation, Wal-Mart would have to demonstrate intent indirectly, by showing that the interpretation has a discriminatory impact on out-of-state interests. This would require Wal-Mart, and the reviewing court, to dive into the murky waters of assessing burdens.

It is likely, as well as advisable, that a court reviewing the expansive interpretation of the fiscal criteria would limit its assessment of where the burdens fall to the interpretation's effect on in-state and out-of-state retailers. As with any measure, there are myriad other interests affected by the interpretation. Consumers are the most obvious. Large-scale retailers can provide goods at lower prices than smaller retailers, and Vermont consumers will be denied this benefit if Act 250 is implemented to exclude Wal-Mart and others. Owners of property in the developed portions of Vermont towns are also affected; they are likely to see an increase in the value of their property as the retailers located in those developed portions are protected from competition by Act 250.

But the fact that a measure impacts a wide range of interests does not mean that all those interests should, or can, be taken into account when making the discrimination determination. Indeed, doing so would render the determination meaningless by making it impossible to find a measure discriminatory. This is so because even a measure enacted to benefit in-state interests will also almost always burden other in-state interests (as well as benefit some out-of-state interests).²¹⁷ Because some limit must be placed on the inquiry, and in the absence of any guidance from the courts on how to do so, the following discussion will assume that a court would look only at the effect the consideration of market competition would have on in-state and out-of-state retailers.

Wal-Mart would basically argue that the consideration of market competition, in combination with the ten-acre "trigger" for Act 250, operates effectively to prevent large retailers from building stores in Vermont. Assume for the purposes of argument that there are no retailers within the state who would require a development of over ten

far better spent at home? . . . There is also the possibility that such an industry could develop a lucrative export market in neighboring states." *Maine v. Taylor*, 477 U.S. 131, 149 (1986) (alteration in original) (quoting *United States v. Taylor*, 752 F.2d 757, 760 (1st Cir. 1985)). The Court agreed with the magistrate judge that these statements did not convert "the Maine statute into an economic protectionism measure." *Id.* at 149-50.

217. As explained above, Vermont consumers who would be denied the right to purchase goods at lower prices are burdened if large-scale retailers are kept out of Vermont.

acres on which to build a store. Wal-Mart could then argue that, within the retail market, the criteria and the interpretation of those criteria approved by the Vermont Supreme Court burden out-of-state interests exclusively. Moreover, the limitation on market competition benefits all those with an existing interest in commercial developments in Vermont by ensuring that those developments will not have to compete with newer, larger developments if such competition would mean a decline in the fortunes of existing developments (and a consequent decline in the tax base). In short, Wal-Mart would argue that the Vermont measure, whatever its avowed purpose, too conveniently favors in-state, existing businesses over out-of-state businesses.

Wal-Mart might attempt to characterize the Act 250 criteria as an effective “embargo” on large-scale retail stores, which are virtually all out-of-state entities, given the lack of any large-scale retailers in Vermont. The court in *Government Suppliers Consolidating Services, Inc. v. Bayh*²¹⁸ ruled that Indiana could not use measures to effectively place an embargo on out-of-state trash.²¹⁹ A crucial element of the Indiana measures is missing from the Vermont criteria, however. The Indiana measures worked against out-of-state trash and treated Indiana trash preferentially.²²⁰ The Vermont interpretation works against out-of-state interests who wish to build large commercial developments but does not differentiate between out-of-state and in-state interests. It merely happens to be the case that the in-state “trash” does not exist. The Vermont criteria, then, work not as an embargo but as a complete prohibition of a certain type of good. Wal-Mart’s situation is not analogous to that of the plaintiff in *Government Suppliers*.

It would also be difficult for Wal-Mart to characterize the consideration of market competition under the fiscal criteria as a proxy characteristic meant to exclude all out-of-state interests. The only possible characteristic on which such a claim could be based is the ten-acre minimum for developments requiring a permit. This requirement, then, would be analogous to the limitation on ninety-foot boats in *Atlantic Prince, Ltd. v. Jorling*,²²¹ where the court found the limit discriminatory because there was only one in-state boat that ex-

218. 975 F.2d 1267 (7th Cir. 1992).

219. See *id.* at 1279.

220. See *id.*

221. 710 F. Supp. 893 (E.D.N.Y. 1989).

ceeded the limitation.²²² The ten-acre requirement, though, applies not only to commercial developments but to industrial and certain residential developments as well. It is therefore somewhat wanting as a proxy characteristic, because it is, to say the least, doubtful that no one in Vermont will ever be interested in building a ten-acre commercial, industrial, or residential development.²²³

A court may be more likely to find a measure discriminatory if it grants in-state businesses a competitive advantage over out-of-state businesses. Thus, Wal-Mart might be able to liken its position to that of the Washington apple industry in *Hunt*. In that case in-state apple producers were in competition with Washington apple producers.²²⁴ None of the in-state producers used a grading system as stringent as that used in Washington, however, and so none of them were burdened by the requirement that apples not be labeled with any grade other than the U.S. standard.²²⁵ Similarly, in Vermont, there are in-state commercial businesses who are potential competitors, at least, with out-of-state interests who wish to build developments of over ten acres.²²⁶ If Wal-Mart could show that no in-state retailers are likely to require more than ten acres on which to build a store, then it may be able to draw a successful analogy to *Hunt*. In both cases, the fact that out-of-state interests are burdened benefits in-state interests (as well as out-of-state interests who do not fall under either measure's ambit).²²⁷

222. See *id.* at 896-97.

223. One might argue here that the fiscal criteria cannot be discriminatory because they do not burden all out-of-state retailers who might wish to locate in Vermont. Out-of-state interests who wish to build developments of less than ten acres are not burdened at all by the criteria, for they do not have to obtain a permit in order to build. But the fact that a measure does not burden all out-of-state interests in a regulated market does not mean that the measure does not discriminate. The statute invalidated in *Jorling* is a good example; while all ninety-foot vessels (except one) fishing in New York waters were out-of-state vessels, it was assuredly not the case that all out-of-state vessels fishing in New York waters were ninety feet long or longer. The statute undoubtedly benefited out-of-state vessels of less than ninety feet just as much as it did in-state vessels. In the *Hunt* case, there were almost assuredly other states where apples that were eventually sold in North Carolina were grown, and which did not compete well with the Washington apples. Apple growers in these states would have benefited from the North Carolina statute just as much as North Carolina apple growers. Yet the statutes in both *Jorling* and *Hunt* were deemed discriminatory and then invalidated. See *Jorling*, 710 F. Supp. at 895-96, 903; *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 354 (1977).

224. See *Hunt*, 432 U.S. at 337.

225. See *id.* at 351.

226. See KELLY, *supra* note 26, at 108-09.

227. The distinction between the "proxy characteristic" and "competitive advantage" arguments is not immediately apparent. Both arguments depend on the assumptions, first, that

Wal-Mart's best argument, then, appears to be not that Vermont is using an embargo or proxy characteristic to exclude out-of-state retailers, but that it is stripping those retailers of their competitive advantage by forcing them to do business in a different way. This argument, however, is highly unlikely to succeed. First, the Court is less likely to find discriminatory a measure that, like Act 250, effectively regulates a way of doing business rather than one which regulates the flow of goods. In *Exxon Corp. v. Governor of Maryland*,²²⁸ the Court heard a dormant Commerce Clause challenge to a Maryland statute that prohibited producers or refiners of petroleum products from operating service stations within the state of Maryland.²²⁹ There were no producer-refiners in Maryland who could have been adversely affected by the statute; all were outside the state.²³⁰ The Court concluded that the statute was not discriminatory because it did not treat in-state and out-of-state companies differently.²³¹ The fact that the burden of the statute happened to fall exclusively on out-of-state interests did not lead, "either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level."²³² Emphasizing that the statute placed no burden on out-of-state independent dealers (as distinguished from out-of-state producer-refiners), the Court declared that the dormant Commerce Clause was not meant to protect "the particular structure or methods of operation in a retail market."²³³ The Maryland statute, it said, did not "prohibit the flow of interstate goods, place added

only out-of-state interests are burdened by a measure, and, second, that in-state interests benefit as a result. The difference between the two is more one of nuance than of substance. The proxy characteristic argument more strongly suggests discriminatory intent and could probably only succeed where a characteristic appears to have been chosen to discriminate against out-of-state interests. The ten-acre requirement of the Vermont measure applies too broadly to be called a proxy for discriminating against large, out-of-state retailers. See *supra* note 223 and accompanying text. The competitive advantage argument, on the other hand, appears to place more emphasis on the effect of the measure and does not require the same degree of precision. Any argument that depends even slightly on legislative intent will increase the risk that the reviewing court will look at the stated purpose of the measure (or action) at this stage of the inquiry. Because the stated reason for the denial of the permit is undoubtedly legitimate, see *infra* notes 240-45 and accompanying text, Wal-Mart should avoid any argument that depends, even implicitly, on intent and focus instead on the effect of the action taken here. Because of its emphasis on effect, the competitive advantage argument is the stronger argument for Wal-Mart.

228. 437 U.S. 117 (1978).

229. See *id.* at 119-20.

230. See *id.* at 125.

231. See *id.*

232. *Id.*

233. *Id.* at 127.

costs upon them, or distinguish between in-state and out-of-state companies in the retail market.”²³⁴

Exxon is difficult to reconcile with *Hunt*. The North Carolina statute at issue in the latter case similarly did not prohibit the flow of interstate goods or distinguish between in-state and out-of-state goods in the retail market. It, like the measure at issue in *Exxon*, was a regulation of how business was done. Yet the Court found the North Carolina statute discriminatory. Why? The major distinction between the two cases seems to be that in *Hunt*, the Court found the statute ineffective at serving its avowed public purpose.²³⁵ The two cases thus suggest that the Court, when it makes its discrimination determination, may consider more than just the discriminatory intent or effect of a measure (even though, according to the doctrine, how well a measure serves its purpose is not to be taken into account until after the discrimination determination has been made).

The implication for Wal-Mart’s argument is not encouraging, because the reviewing court would surely conclude that Act 250’s fiscal criteria, and the consideration of market competition under them, do serve a legitimate local purpose.²³⁶ The reviewing court, then, would be likely to rule that the broad interpretation of the criteria does not discriminate against interstate commerce. This does not bode well for Wal-Mart’s case. In deciding that the Maryland statute at issue in *Exxon* did not violate the dormant Commerce Clause, the Supreme Court declared: “It may be true that the consuming public will be injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce.”²³⁷

B. If Deemed Discriminatory

If the Vermont criteria and their interpretation were, despite the foregoing discussion, deemed discriminatory, then the reviewing court, according to the doctrine, would evaluate whether the criteria serve a legitimate local purpose and whether the purpose could be served as well through less discriminatory means.²³⁸ The stated purpose of Act 250 is to ensure that the lands of Vermont are not used in

234. *Id.* at 126.

235. *See* *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 353-54 (1977).

236. *See infra* notes 238-46 and accompanying text.

237. *Exxon Corp.*, 437 U.S. at 128.

238. *See* *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

a manner detrimental to the public welfare.²³⁹ The narrower justification offered by the Environmental Board for the consideration of market competition is the protection of the property tax bases of Vermont towns, and the criteria and their interpretation should be examined for how well they serve this purpose.²⁴⁰

Protecting the tax base has been recognized as an exercise of the police power rationally related to promoting the public welfare.²⁴¹ The validity of this purpose has also been recognized in the land-use context.²⁴² In *Texas Manufactured Housing Association v. City of Nederland*,²⁴³ the Fifth Circuit Court of Appeals wrote: "Maintenance of property values has long been recognized as a legitimate objective of local land-use regulation."²⁴⁴ The court then cited to a Texas Supreme Court case, *City of Brookside Village v. Comeau*,²⁴⁵ which upheld a local ordinance restricting the placement of mobile homes to certain areas because the ordinance worked to preserve property values.²⁴⁶

Wal-Mart would argue that the preservation of property values and the protection of local governments against "financial loss" should not be accomplished by inflicting a direct financial loss on another party. But the fact that the government is inflicting a financial loss on Wal-Mart (or, more accurately, denying a financial gain) does not affect the legitimacy of Vermont's purpose and, therefore, should not affect the Court's evaluation of the Vermont criteria under the dormant Commerce Clause, if it deems those criteria discriminatory. The purpose for the consideration of market competition under the

239. See Act of Apr. 4, 1970, No. 250, § 1, 1970 Vt. Acts & Resolves 237.

240. See *supra* note 133 and accompanying text.

241. See *Colorado Manufactured Hous. Ass'n v. City of Salida*, 977 F. Supp. 1080, 1089 (D. Colo. 1997). The case cited by the Vermont Supreme Court in *Wal-Mart Stores* is not the strongest support for this proposition when applied to the land-use context; *People v. Kohrig*, 498 N.E.2d 1158 (Ill. 1986), concerned the legitimacy of the Illinois seat belt law, one justification for which was that it would reduce the public costs associated with traffic accidents. See *id.* at 1166.

242. See, e.g., *CMH Mfg., Inc. v. Catawba County*, 994 F. Supp. 697, 711 (W.D.N.C. 1998) ("Addressing citizen concerns over . . . falling property values (actual or perceived) is clearly a legitimate government interest."); *Colorado Manufactured*, 977 F. Supp. at 1085 ("Local governments are empowered to respond appropriately to perceived needs relating to government functions, e.g. stability within the community and property values.").

243. 101 F.3d 1095 (5th Cir. 1996).

244. *Id.* at 1104 n.10.

245. 633 S.W.2d 790 (Tex. 1982).

246. See *id.* at 794. The Supreme Court denied certiorari in the *Comeau* case. See *Comeau v. City of Brookside Village*, 459 U.S. 1087 (1982).

Act 250 criteria, as put forward by the Environmental Board and as approved by the Vermont Supreme Court, is legitimate.

Wal-Mart would then have to argue that this purpose could be accomplished through less discriminatory means. The only potentially discriminatory element of the statute is the fact that only developments larger than ten acres require approval under Act 250. Wal-Mart could very sensibly contend that "strip" development, or a series of smaller developments lining a road, increase traffic congestion and pollution and destroy just as much of the landscape as larger developments, yet strip development is allowed to continue unimpeded under Act 250, while larger developments (and large retailers) can be effectively excluded. But one of the purposes of the law, as discussed above, is the protection of property values (and consequently the tax base), and large developments are much more likely than small developments to drain customers and business from other areas. Moreover, it is sensible for there to be some minimum below which permission under Act 250 would not be required; the state should be allowed to accomplish its goals without placing too onerous an administrative burden on itself or other parties. Finally, even if Wal-Mart wins this argument, it loses, because the only way to make Act 250 and its interpretation here less discriminatory but still accomplish the goals of the statute is to lower the permission threshold, not to exempt large retailers from the permission requirement.

There may be other situations in which a growth-management statute unnecessarily excludes out-of-state interests and benefits in-state interests in the same market. But Act 250's fiscal criteria, and the expansive interpretation of them, do not do so and would survive dormant Commerce Clause review even if they were deemed discriminatory.

C. Pike Balancing

If a court concludes that a measure does not discriminate against interstate commerce, it then moves on, under *Pike v. Bruce Church*, to determine whether the purpose of the measure at issue is legitimate and "whether the burden on interstate commerce clearly exceeds the local benefits."²⁴⁷ As discussed above, the purpose of Act 250's fiscal criteria would undoubtedly be deemed legitimate. *Pike*

247. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

balancing is a more nuanced, more expansive inquiry than the test for discriminatory measures and explicitly allows a court to consider the *nature* of the public interest being served by a measure.²⁴⁸ Under the test for discriminatory measures, courts are to consider the more limited questions of whether the measure serves a legitimate public purpose and whether that purpose could be served as well using other, less discriminatory means.²⁴⁹

The expanded inquiry contemplated under *Pike* balancing does not mean, however, that the scrutiny under *Pike* is stricter than that applied when a measure is deemed discriminatory. The “clearly excessive” requirement precludes this possibility, as does the fact that discriminatory measures, by virtue of the fact that they *are* discriminatory, are regarded with greater suspicion.

Wal-Mart, in order to satisfy the “clearly excessive” standard, must contend that the purpose being served by the fiscal criteria—the protection of the financial condition of local governments—does not justify the burden to interstate commerce imposed by such a direct limit on market competition. Courts are likely to be wary when it appears that competition is being suppressed. In *H.P. Hood & Sons, Inc. v. Du Mond*,²⁵⁰ a case decided before the development of the two-tiered approach to dormant Commerce Clause questions, the Supreme Court addressed New York’s denial of H.P. Hood & Sons’ application for a license to expand its milk distribution facilities in the state.²⁵¹ New York contended both that farmers in the area were already adequately served by existing facilities and that unregulated competition would reduce the milk received at existing plants.²⁵² The Court, while recognizing that regulation of the dairy industry was connected to the public health and welfare, struck down the denial, stating: “[T]he state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competi-

248. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Court stated:

If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the *nature* of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. (emphasis added).

249. See *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

250. 336 U.S. 525 (1949).

251. See *id.* at 526.

252. See *id.* at 528-29.

tion.”²⁵³ Wal-Mart would argue that limiting the market is especially unsavory when it is not the public health or safety at stake but the public pocketbook.

Yet it seems clear here that competition is being suppressed, if at all, not to benefit private local interests (as appeared to be the case in *Hood*) but to further the stated and legitimate purpose of the fiscal criteria. Additionally, unlike the measure at issue in *Hood*, the fiscal criteria do not impede or limit the flow of goods, but merely regulate the way in which business is conducted.²⁵⁴ The fact that they have the effect of limiting competition does not, then, by itself make the burden to interstate commerce excessive.

Wal-Mart would thus be forced to argue that the burden to itself (and to other large retailers who might potentially do business in Vermont) is excessively large when compared with the amount of money local governments might lose if the new store were constructed. But a burden to Wal-Mart is not the same thing as a burden to interstate commerce, and preventing an entity from doing business in a certain way is not the same thing as preventing it from doing business at all. It seems highly unlikely that a court, when the balance is struck, would find that any burden to interstate commerce from the indirect limitations imposed by Act 250's fiscal criteria and their interpretation clearly exceeds the numerous (and not purely financial) local benefits flowing from a careful application of those criteria.

It is in fact difficult to imagine a situation in which a growth-management statute, without being discriminatory, would be so ineffective at accomplishing its purpose, and so burdensome to interstate commerce, that it would be invalidated by a court under the balancing test of *Pike*. Any dormant Commerce Clause review of a growth-management statute would have to take into account not only a state's interest in protecting the property tax bases of its local governments but also its very legitimate, and very weighty, interest in ensuring that its lands are used in a manner that is beneficial, in tangible and intangible ways, to the people of the state.

CONCLUSION

Dormant Commerce Clause doctrine is, perhaps unavoidably, very confused. Despite this fact, however, it is safe to say that a dor-

253. *Id.* at 538.

254. *See supra* notes 251-53 and accompanying text.

mant Commerce Clause challenge to the fiscal criterion of Vermont's Act 250 and to the consideration under them of market competition would, and should, fail.²⁵⁵ Growth control and growth-management measures are attempts to address the myriad problems associated with development in late-twentieth-century America. Such problems are not limited to the demise of small towns but also include, traffic congestion, pollution, the decline of city centers, strains on infrastructure, and a declining sense of community. These problems are certainly not exclusively the result of unrestrained commercial growth but have a lot to do as well with the American view of property rights, the pervasive use of zoning, the tax system and the incentives it creates, and a host of other factors. State and local governments are unable to address all of these causes, but they are able to address, in some fashion, their effects. Growth control measures are one attempt to do so, and while they must not violate the Constitution, it would be unfortunate if that Constitution, including the dormant Commerce Clause, were interpreted to excessively limit the already limited powers of state and local governments to address the problems those governments will increasingly be forced to confront.

255. As for Wal-Mart, it has very little to worry about. Along with other developers, it is protected by its ability to garner local support (because, as noted, the benefits of development are often concentrated while the costs are scattered) and influence over the local political process that leads to the enactment of most growth control measures in the first place (at present, only nine states have growth management statutes, *see supra* note 21). St. Albans itself supported the construction of a Wal-Mart, and there is little doubt that the giant retailer will continue to have a steady supply of towns all too willing to welcome it into their "neighborhoods."