

12-1-2016

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Recommended Citation

Valerie Walker, Notes and Comments, *The Dormant Commerce Clause "Effect": How the Difficulty in Reconciling Exxon and Hunt Has Led to a Circuit Split for Challenges to Laws Affecting National Chains*, 91 Wash. L. Rev. 1895 (2016).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol91/iss4/23>

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THE DORMANT COMMERCE CLAUSE “EFFECT”: HOW THE DIFFICULTY IN RECONCILING *EXXON* AND *HUNT* HAS LED TO A CIRCUIT SPLIT FOR CHALLENGES TO LAWS AFFECTING NATIONAL CHAINS

Valerie Walker*

Abstract: The onslaught of chains such as Wal-Mart and Starbucks has driven some state and local lawmakers to craft regulations prohibiting these types of national chains. In response, several national chains have challenged the constitutionality of such regulations, claiming that they amount to economic protectionism. The dormant Commerce Clause (DCC) doctrine prohibits states from engaging in protectionism directed at commerce from other states. Courts use a two-tiered analysis when considering these types of challenges. The tier-level analysis is important because regulations rarely survive the first tier’s elevated scrutiny. The first tier applies when a state law directly discriminates against interstate commerce, or when its *effect* is to favor in-state economic interests over out-of-state interests.

The Supreme Court reached inconsistent decisions as to whether a regulation has a discriminatory effect, as demonstrated by a careful analysis of *Hunt v. Washington State Apple Advertising Commission* and *Exxon Corporation v. Governor of Maryland*. These two decisions are difficult to reconcile: *Hunt* supports a finding of discriminatory effect where a regulation stripped an out-of-state entity of a competitive advantage it secured through its particular business practice, but *Exxon* indicates that the DCC does not protect particular structures or methods of business. This inconsistency has contributed to a split between courts in the First, Ninth, and Eleventh Circuits. While courts in the First and Ninth Circuits have found that prohibitions affecting chain stores do not produce a discriminatory effect, the Eleventh Circuit has come to the opposite conclusion. This circuit split tracks the tension between *Hunt* and *Exxon*. Potential solutions to this split include eliminating the first tier elevated scrutiny analysis, creating a special exception for national chains, or otherwise clarifying the Supreme Court’s jurisprudence regarding discriminatory effect.

INTRODUCTION

Whether individuals live in places with small town charm, or in urban neighborhoods with distinct personalities, they have probably heard friends and neighbors opine on the subject of national chains. Some people loathe the entry of cookie-cutter franchises that hurt local business, while others are eager to take advantage of businesses with a national reputation. In response to concerns about the negative effects of national chains, some municipalities have sought to prohibit, or otherwise disadvantage, chain businesses.¹ Some businesses have

* With thanks to Professor Lisa Manheim for her feedback, in addition to the dedicated staff of *Washington Law Review*.

challenged these regulations under the dormant Commerce Clause (DCC).²

The DCC prohibits states from engaging in protectionism directed at commerce from other states.³ Courts engage in a two-tiered analysis when considering challenges based on the DCC.⁴ This Note focuses on the first tier of the analysis; in this tier, the court must apply elevated scrutiny when a state law “directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests.”⁵

When determining whether a state law has discriminatory *effect*, the Supreme Court has held that the DCC does not protect “the particular structure or methods of operation in a retail market.”⁶ However, the Supreme Court has also held that a law produced a discriminatory effect when it “stripp[ed]” an out-of-state producer “of the competitive and economic advantages it ha[d] earned for itself,” while the law left in-state producers unaffected.⁷ These two decisions are difficult to reconcile in the context of state laws affecting national chains, and this has contributed to a split between the approaches of the First, Ninth, and Eleventh Circuits.⁸

On one side of the split,⁹ courts in the Eleventh Circuit, relying upon *Hunt v. Washington State Apple Advertising Commission*,¹⁰ applied elevated scrutiny to state laws with size-based and chain-based prohibitions.¹¹ On the other side of the split, courts in the Ninth Circuit,

1. Mark Bobrowski, *The Regulation of Formula Businesses and the Dormant Commerce Clause Doctrine*, 44 URB. LAW. 227, 227 (2012).

2. See, e.g., *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015) (challenging a regulation treating franchises as large businesses such that they faced a faster phase-in of the new minimum wage); *Cachia v. Islamorada*, 542 F.3d 839 (11th Cir. 2008) (challenging a regulation prohibiting formula restaurants).

3. See DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 209–10 (2004).

4. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986).

5. *Id.* at 579.

6. *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978).

7. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 351 (1977).

8. *Infra* section I.C; Part II.

9. The Ninth Circuit noted this split in a footnote in *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 404 n.7 (9th Cir. 2015).

10. 432 U.S. 333 (1977).

11. *Cachia v. Islamorada*, 542 F.3d 839, 843 (11th Cir. 2008) (scrutinizing a size-based regulation); *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 847 (11th Cir. 2008) (scrutinizing a regulation pertaining to “formula retail” establishments, including national chain stores).

relying upon *Exxon Corp. v. Governor of Maryland*,¹² chose not to apply elevated scrutiny to laws affecting national chains, such as prohibitions on retailers wishing to build large establishments,¹³ or laws subjecting franchisees to a steeper schedule of wage increases.¹⁴ As for the First Circuit, it also chose not to apply elevated scrutiny to laws affecting national chains.¹⁵ The inconsistencies of *Exxon* and *Hunt* best explain the tension between these circuit decisions.

This Note examines why the circuits have split over the purported discriminatory effect of laws regulating national chains. Part I explores the background of the DCC, including the Supreme Court’s two-tiered approach to analyzing these kinds of challenges and how the Supreme Court approached the first-tier inquiry in *Hunt* and *Exxon*. Part II covers the different circuit approaches to the first tier inquiry. Part III explains how these circuit approaches derive from the disconnect between *Hunt* and *Exxon* and then explores how best to remedy the circuit split. Overall these three parts work together to explain what is driving the circuit split and how the Supreme Court might clarify this muddled area of the law.

I. THE DORMANT COMMERCE CLAUSE DOCTRINE OPERATES IN TWO TIERS, AND THE FIRST TIER IS MIRED IN CONFUSION

A. *The Dormant Commerce Clause Doctrine Is an Implied Restraint that Courts Have Read into the Constitution*

The Commerce Clause of the United States Constitution gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁶ While the Commerce Clause serves as a grant of federal legislative power, it has also been read to serve as a limit to state legislative power.¹⁷ The term “dormant Commerce Clause” (DCC) refers to the limiting principles implied from the Commerce Clause.¹⁸ The Court has extrapolated the

12. 437 U.S. 117 (1978).

13. *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 991–92 (E.D. Cal. 2006).

14. *Int’l Franchise Ass’n, Inc. v. City of Seattle*, 803 F.3d 389, 397 (9th Cir. 2015).

15. *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 15 (1st Cir. 2007) (concluding that there was insufficient evidence of discriminatory effect).

16. U.S. CONST. art. 1, § 8, cl. 3.

17. *See* COENEN, *supra* note 3, at 209–10.

18. *Id.* Scholars and practitioners refer to the clause as “dormant,” or “negative,” because the principle has been inferred from the text of the Commerce Clause. *See* James L. Buchwalter,

DCC from the text of the Commerce Clause under the premise that “the centralization of commercial regulatory authority in Congress implied judicially enforceable restraints on the states’ regulation of interstate commerce.”¹⁹ As a result of this implied restraint, courts may invalidate state legislation even though “Congress has not affirmatively exercised its commerce power to preempt that legislation.”²⁰

The Court has used the DCC to invalidate state laws that “discriminate against’ or impose an ‘undue burden’ on interstate commerce.”²¹ A classic example of a DCC violation is where a state has imposed tariffs on goods imported into that state from other states.²² DCC violations are less clear, however, when states regulate in facially neutral ways.²³

The Commerce Clause applies not only to states but also to the actions of municipalities.²⁴ Over the last twenty years, a “cadre” of municipalities attempted to restrict “formula” businesses.²⁵ There could be a variety of different motives driving these restrictions. Some municipalities may be concerned that formula businesses will threaten local “mom and pop” establishments²⁶ or that these new businesses will

Annotation, *Construction and Application of Dormant Commerce Clause*, U.S. Const. Art. I, § 8, cl. 3, in 41 A.L.R. FED. 2D 1, § 2 (2009). For an argument that the dormant Commerce Clause should be abandoned, given its lack of textual foundation, see MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 64 (1995). Alternatively, for an explanation of the values driving this doctrine, see COENEN, *supra* note 3, at 211–14.

19. Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 421 (2008).

20. COENEN, *supra* note 3, at 209.

21. *Id.* at 210 (citations omitted); see also ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 430 (4th ed. 2011) (defining the DCC as “the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce”); REDISH, *supra* note 18, at 67 (“[T]he Court, relying on the clause, has invalidated state licensing requirements, train length restrictions, mudguard requirements, truck length prohibitions, and various produce regulations.”).

22. COENEN, *supra* note 3, at 210.

23. See *id.* at 239 (describing facially neutral laws as “ill-defined” and referring to “the contours of this feature of dormant Commerce Clause doctrine” as “under-developed”). For example, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) involved a state program that “stipulated that dealers who bought milk from out-of-state producers for resale in New York could not pay them less than the statutorily specified minimum amount.” *Id.* at 232. Although the Court recognized that the minimum price rule applied uniformly to all milk, whether from in-state or out-of-state, the Court reasoned that this program deprived out-of-state sellers the opportunity to undersell in-state competitors and thus “set up what is equivalent to a rampart of customs duties.” *Baldwin*, 294 U.S. at 527.

24. See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994).

25. Bobrowski, *supra* note 1, at 227.

26. *Id.*

eliminate any “sense of place.”²⁷ Municipalities relying upon tourism to support their local economy might be especially concerned about being reduced into “just another nondescript roadside stop in a nation of strip malls.”²⁸ While these municipalities may have legitimate concerns, the DCC serves as a barrier to municipalities engaging in economic protectionism.²⁹

B. The Dormant Commerce Clause Has Two Tiers

When analyzing DCC claims, the Court uses a “two-tiered approach.”³⁰ The Court frames the first tier in the following way: “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, we have generally struck down the statute without further inquiry.”³¹ When state action does discriminate against interstate commerce, it is subject to a virtual per se rule of invalidity.³² Invalidation of the law is likely, though not inevitable.³³ Courts sometimes refer to this first tier as “elevated scrutiny.”³⁴ Under this first tier analysis, if plaintiffs have met their initial burden of proving discrimination, the government can justify the discrimination by showing the following three things: “(1) the regulations have a legitimate local purpose; (2) the regulations serve this legitimate interest; and (3) adequate nondiscriminatory alternatives are not available.”³⁵

27. *Id.* at 230.

28. *Id.*

29. See COENEN, *supra* note 3, at 209–210 (discussing the DCC as a barrier to states). As previously mentioned, the DCC also limits the actions of municipalities. *Supra* note 24 and accompanying text.

30. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986); see also *Bobrowski*, *supra* note 1, at 244.

31. *Brown-Forman Distillers Corp.*, 476 U.S. at 579.

32. John M. Baker & Mehmet K. Konar-Steenberg, “*Drawn from Local Knowledge . . . And Conformed to Local Wants*”: *Zoning and Incremental Reform of Dormant Commerce Clause Doctrine*, 38 *LOY. U. CHI. L.J.* 1, 5 (2006).

33. See, e.g., *Maine v. Taylor*, 477 U.S. 131, 150 (1986) (upholding a statute that discriminated against interstate commerce).

34. See, e.g., *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 847 (11th Cir. 2008).

35. BRIAN W. BLAESSER, *DISCRETIONARY LAND USE CONTROLS* § 8:71, Westlaw (database updated Aug. 2016) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 353 (1977)).

Consequently, governments rarely overcome this heightened, first tier scrutiny.³⁶

As for the second tier,³⁷ commonly referred to as the “Pike balancing” test,³⁸ the Court frames it in the following way: “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.”³⁹ Because this second tier of analysis is more deferential,⁴⁰ courts are more likely to uphold regulations falling under this category. While courts applying the second tier are unlikely to invalidate a particular regulation, some scholars have noted that it can be difficult to determine which tier applies in a given situation.⁴¹

This Note focuses on the first tier because its application frequently results in the invalidation of laws.⁴² The application of the first tier thus has a dramatic effect on likely case outcomes.⁴³ The factor that drives the distinction between the first and second tier inquiry is whether the particular state regulatory scheme constitutes “discrimination.”⁴⁴ Discrimination means “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”⁴⁵

36. Baker & Konar-Steenberg, *supra* note 32, at 8 (commenting that the strict scrutiny of this tier of the DCC analysis involves “almost per se invalidation” of laws).

37. For a more in-depth understanding of how the second tier has developed, see Catherine Gage O’Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 610–22 (1997).

38. Denning, *supra* note 19, at 417–18.

39. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

40. Baker & Konar-Steenberg, *supra* note 32, at 5.

41. See, e.g., Baker & Konar-Steenberg, *supra* note 32, at 6 (“[I]t is unclear where discrimination leaves off and incidental burdens begin.”).

42. See COENEN, *supra* note 3, at 224. (“In sum, in the dormant Commerce Clause context, judicial scrutiny that is “strict” in theory’ is, for all practical purposes, ‘fatal in fact.’”); O’Grady, *supra* note 37, at 573–74 (“[T]he court asks whether the ordinance in question ‘discriminates’ against interstate commerce. If the answer is yes, the court will apply the strictest scrutiny to the ordinance under a near-fatal rule of ‘virtual per se’ invalidity.”).

43. O’Grady, *supra* note 37, at 574 (“Thus, a court’s threshold determination on the question of interstate discrimination dictates the standard under which the court will review the local regulation. It is essentially an outcome-determinative finding.”).

44. David S. Day, *The “Mature” Rehnquist Court and the Dormant Commerce Clause Doctrine: The Expanded Discrimination Tier*, 52 S.D. L. REV. 1, 2 (2007).

45. O’Grady, *supra* note 37, at 578 (quoting *Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality*, 511 U.S. 98, 99 (1994)).

Courts have characterized three kinds of discrimination: facial discrimination, discriminatory purpose, and discriminatory effect.⁴⁶ Facial discrimination might appear in a state statute that prohibits all businesses from selling out-of-state oranges in that state and permits them to sell only in-state oranges, thereby resulting in differential treatment.⁴⁷ Another example of facial discrimination might be where a state statute allows TV advertising of in-state oranges, but prohibits TV advertising of out-of-state oranges.⁴⁸ With respect to discriminatory purpose, that might exist where there is direct evidence of government officials commenting on a protectionist agenda underlying a facially neutral law.⁴⁹ Regulations that do not qualify as facially discriminatory or as having a discriminatory purpose may still qualify as discriminatory in terms of effect.

This Note analyzes discriminatory effect (as opposed to facial discrimination or discriminatory purpose) because it is the source of a circuit split between the First, Ninth, and Eleventh Circuits: courts in these circuits have come to different conclusions about DCC challenges to laws affecting national chains.⁵⁰

DCC cases dealing with the concept of discriminatory effect “are particularly troublesome,” and they present a challenge for courts attempting to base their judgments on principled reasoning.⁵¹ Because discrimination demarcates the line between the first and second tiers, and discriminatory effect may serve as a claim of last resort by plaintiffs, the concept of discriminatory effect is important for determining the boundary between tiers one and two. While this two-tiered framework may seem organized, interpretive problems have resulted in confusion over which tier should apply in a given case.⁵² The Court has

46. *Id.* at 578; COENEN, *supra* note 3, at 224. Some scholars point out the amorphous distinction between discriminatory purpose and effect. *See, e.g.*, Baker & Konar-Steenberg, *supra* note 32, at 24.

47. *See* O’Grady, *supra* note 37, at 579 (providing an example about regulating fresh produce).

48. *Id.*

49. *See* Int’l Franchise Ass’n, Inc. v. City of Seattle, 803 F.3d 389, 403 (9th Cir. 2015) (indicating that the evidence was too “indirect and limited,” and was not persuasive evidence of the City’s intent to harm franchises).

50. *Id.* at 404 n.7.

51. Denning, *supra* note 19, at 464; *see also* COENEN, *supra* note 3, at 239 (explaining how the contours of discriminatory effect remain “under-developed”); Baker & Konar-Steenberg, *supra* note 32, at 3 (“[T]he ‘discriminatory effects’ prong . . . has resulted in considerable doctrinal ambiguity.”).

52. Baker & Konar-Steenberg, *supra* note 32, at 6; *see also* Denning, *supra* note 19, at 422 (“These rules are easy to recite, but their application is notoriously difficult, resulting in cases with

acknowledged that no “clear line” separates the two tiers, and the murkiness of the discriminatory effect jurisprudence has contributed to this blurring of the tiers.⁵³

C. *First Tier Turmoil: The Tests for Elevated Scrutiny in Hunt and Exxon Demonstrate a Tension Between These Two Cases*

There are two Supreme Court cases in particular that serve as an example of where it is “particularly troublesome . . . to extrapolate principles” concerning what constitutes a discriminatory effect.⁵⁴ In the first case, *Hunt v. Washington State Apple Advertising Commission*, the Court held that a state law produced a discriminatory effect,⁵⁵ but a year later, the Court came to the opposite conclusion in *Exxon Corporation v. Governor of Maryland*, a case with analogous facts. The tension existing between these two cases illustrates the analytical difficulty in this area of the law and, as discussed below, has produced a split among the circuits.

I. *Hunt v. Washington State Apple Advertising Commission Illustrates the Supreme Court’s More Aggressive Interpretation of Elevated Scrutiny*

Hunt involved a challenge to a North Carolina statute that prohibited the use of grading systems other than U.S. grade on closed containers of apples sold in the state.⁵⁶ That statute did not affect North Carolina apple sellers because North Carolina had no grading system in place.⁵⁷ The statute did, however, affect Washington apple sellers.⁵⁸ They challenged the statute because it prohibited them from using a Washington state grading system for apples sold in North Carolina.⁵⁹ In order for Washington sellers to comply with the statute, they could choose one of the following options: obliterate the printed labels on containers shipped to North Carolina, repack apples to be shipped to North Carolina in

similar facts being decided differently, and the different outcomes justified on the basis of tendentious distinctions.”).

53. Justin Shoemake, Note, *The Smalling of America?: Growth Management Statutes and the Dormant Commerce Clause*, 48 DUKE L. J. 891, 913 (1999).

54. Denning, *supra* note 19, at 464; *see also* Shoemake, *supra* note 53, at 926.

55. 432 U.S. 333 (1977).

56. *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 336 (1977).

57. *See id.* at 340.

58. *Id.* at 337.

59. *Id.* The Washington State grades are the equivalent of, or superior to, the U.S. grades. *Id.* at 336.

containers with the U.S. grade, or discontinue the use of preprinted containers entirely.⁶⁰

The Court concluded that this statute had the practical effect of discriminating against sales of Washington apples, and it pointed to three ways in which this discrimination arose.⁶¹ First, the statute raised “the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected.”⁶² Second, the statute had the effect of “stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system.”⁶³ Third, the statute had “a leveling effect which insidiously operate[d] to the advantage of local apple producers.”⁶⁴

Because this statute discriminated against commerce, elevated scrutiny applied, and “the burden f[ell] on the State to justify [the statute] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.”⁶⁵ North Carolina tried to justify the statute on the grounds that it protected their citizens from confusion and deception in the marketing of foodstuffs.⁶⁶ However, the Court struck down the statute because it did very little to serve that state interest,⁶⁷ and nondiscriminatory alternatives were available.⁶⁸

60. *Id.* at 338.

61. *Id.* at 350.

62. *Id.* at 351.

63. *Id.*

64. *Id.*

65. *Id.* at 353.

66. *Id.*

67. The Court stated:

The statute, as already noted, permits the marketing of closed containers of apples under *no* grades at all. Such a result can hardly be thought to eliminate the problems of deception and confusion created by the multiplicity of differing state grades; indeed, it magnifies them by depriving purchasers of all information concerning the quality of the contents of closed apple containers. Moreover, although the statute is ostensibly a consumer protection measure, it directs its primary efforts, not at the consuming public at large, but at apple wholesalers and brokers who are the principal purchasers of closed containers of apples. And those individuals are presumably the most knowledgeable individuals in this area. Since the statute does nothing at all to purify the flow of information at the retail level, it does little to protect consumers against the problems it was designed to eliminate.

Id. at 353–54.

68. *Id.* at 354.

2. *Exxon Corp. v. Governor of Maryland Illustrates the Supreme Court's Less Aggressive Interpretation of Elevated Scrutiny*

Exxon involved a challenge to a Maryland statute that prohibited producers or refiners of petroleum products from operating retail service stations in Maryland.⁶⁹ All of the gasoline sold in Maryland came from out of state because Maryland itself had no producers or refiners.⁷⁰ Therefore, the statute only affected those retail service operators that were from out of state.⁷¹

Exxon argued that the statute had a discriminatory effect by protecting in-state retail gas stations from competition with gas stations owned by out-of-state oil producers and refiners.⁷² While the burden of the statute fell exclusively on out-of-state companies, this was insufficient support for a finding of discriminatory effect.⁷³ The Court distinguished this case from cases in which the Court had found discrimination against interstate commerce, citing *Hunt* and *Dean Milk Co. v. Madison*⁷⁴ as examples.⁷⁵ It explained that the *Exxon* statute did not create any of the following three barriers: the statute did not “prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market.”⁷⁶

The Court further explained that the DCC does not protect “the particular structure or methods of operation in a retail market.”⁷⁷ The DCC “protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.”⁷⁸ Because the Court concluded that the State had a legitimate interest in controlling the gasoline retail market and that there was no burden on interstate commerce, the statute was upheld.⁷⁹

69. *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 117 (1978).

70. *Id.* at 123.

71. *Id.* at 126.

72. *Id.* at 125.

73. *Id.*

74. 340 U.S. 349 (1951) (concerning a regulation that prohibited milk not bottled within five miles of the area).

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

76. *Id.*

77. *Id.* at 127.

78. *Id.* at 127–28.

79. *See id.* at 127.

3. *Hunt and Exxon Are Inconsistent*

The three barriers that the *Exxon* Court identified as absent in *Exxon* and present in *Hunt* do not divide the cases as clearly as the Court describes. With respect to the first barrier, the flow of goods, *Hunt* applied to restrictive business practices, not the actual flow of goods themselves.⁸⁰ *Hunt* and *Exxon* both deal with facially neutral statutes that discriminate against particular business practices, not goods from particular states.⁸¹

As for the second barrier, the added costs that a statute creates for out-of-state dealers, the burden imposed in *Exxon* appears “more severe” than that in *Hunt*, because the *Exxon* statute completely banned refiners and producers from the retail market.⁸² The *Hunt* statute, in contrast, merely banned a method of grading apples,⁸³ a practice that a business could more easily change than its business’s status as a refiner and producer of petroleum products.

The third barrier that the *Exxon* Court contended existed in cases like *Hunt*, but not in *Exxon*, was that the *Hunt* statute distinguished between in-state and out-of-state companies in the retail market.⁸⁴ The argument here is that “the discrimination against the class of out-of-state producers and refiners does not violate the Commerce Clause because the State has not imposed similar discrimination against other out-of-state retailers,” and that this somehow differs from the facts of *Hunt*.⁸⁵ However, the regulation in *Hunt* did not discriminate against *all* out-of-state interests; it only discriminated against a segment of out-of-state interests, namely those producers that failed to conform to the statute’s grade marketing

80. See *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 335 (1977); see also Denning, *supra* note 19, at 466 (“[T]he Court had not required the Washington apple growers to prove that North Carolina’s regulations reduced the interstate flow of apples.”); Shoemaker, *supra* note 53, at 926 (“The North Carolina statute at issue in [*Hunt*] . . . 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.”).

81. See *Hunt*, 432 U.S. at 335–38 (challenging a regulation that pertains to the labeling of apples); *Exxon*, 437 U.S. at 119–20 (challenging a regulation that pertains to the operations of producers and refiners of petroleum products).

82. *Exxon*, 437 U.S. at 148 (Blackmun, J., concurring in part and dissenting in part).

83. *Hunt*, 432 U.S. at 335.

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

85. *Id.* at 145–46 (Blackmun, J., concurring in part and dissenting in part); see also Denning, *supra* note 19, at 466 (“Some of the Court’s claims in *Exxon*, moreover—for example, that the relevant comparison for the effects of the statute was between in-state and out-of-state *independent retail* sellers, as opposed to *all* retailers of gasoline (which would include the refiner-owned gas stations)—seem arbitrary and difficult to defend.”).

requirements.⁸⁶ As Justice Blackmun explained in his dissenting opinion in *Exxon*: “[t]he provision imposed no discrimination on growers from States that employed only the United States Department of Agriculture grading system.”⁸⁷ Thus, in both *Hunt* and *Exxon*, the laws worked against a “single segment of out-of-state” business as opposed to universal discrimination against out-of-state business.⁸⁸ Some scholars contend that *Exxon* was wrongly decided because it failed to properly distinguish *Hunt*.⁸⁹

II. THE NATURE OF THE CIRCUIT SPLIT

While courts in the Eleventh Circuit have concluded that prohibitions affecting chain stores do produce a discriminatory effect,⁹⁰ the Ninth and First Circuits have come to the opposite conclusion.⁹¹ As discussed below, this circuit split tracks the tension between *Hunt* and *Exxon*.

A. Courts in the Eleventh Circuit Privilege the Reasoning from *Hunt*

Two cases⁹² represent the Eleventh Circuit’s approach to elevated scrutiny in the context of laws affecting national chains: *Cachia v. Islamorada*⁹³ and *Island Silver & Spice, Inc., v. Islamorada*.⁹⁴ These cases demonstrate the Eleventh Circuit’s tendency to privilege the reasoning from *Hunt* over that from *Exxon*.

86. *Exxon*, 437 U.S. at 146 (Blackmun, J., concurring in part and dissenting in part); see also Denning, *supra* note 19, at 466.

87. *Exxon*, 437 U.S. at 146 (Blackmun, J., concurring in part and dissenting in part).

88. *Id.* at 147. In *Hunt*, the segment was out-of-state dealers failing to conform to the marketing requirements (as compared to out-of-state dealers that only used the USDA grading system), and in *Exxon*, the segment was out-of-state retailers that produce and refine gasoline (as compared to out-of-state retailers that do not produce or refine gasoline). See *Hunt*, 432 U.S. at 337; *Exxon*, 437 U.S. 119–20.

89. See, e.g., RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 235, 237 (2014).

90. See *Cachia v. Islamorada*, 542 F.3d 839, 843 (11th Cir. 2008); *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 847 (11th Cir. 2008).

91. *Int’l Franchise Ass’n, Inc. v. City of Seattle*, 803 F.3d 389, 405–06 (9th Cir. 2015); *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 12, 14 (1st Cir. 2007); *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 1020 (E.D. Cal. 2006).

92. These cases were consolidated for oral argument. *Island Silver*, 542 F.3d at 846 n.1.

93. 542 F.3d 839 (11th Cir. 2008).

94. 542 F.3d 844 (11th Cir. 2008).

1. *In Cachia v. Islamorada, the Eleventh Circuit Applied Elevated Scrutiny to an Ordinance Prohibiting “Formula Restaurants”*

Joseph Cachia owned property in Islamorada, and he wanted to sell his property to a corporation for use as a Starbucks.⁹⁵ The Village Council of Islamorada adopted a zoning ordinance that interfered with Cachia’s sale.⁹⁶ The potential buyer backed out of the deal when it learned that the ordinance prohibited it from opening a Starbucks.⁹⁷ Ordinance 02-02 prohibited “formula restaurant[s]” in Islamorada, which the ordinance defined as:

An eating place that is one of a chain or group of three (3) or more *existing* establishments and which satisfies at least two of the following three descriptions: (1) has the same or similar name, tradename, or trademark as others in the chain or group; (2) offers any of the following characteristics in a style which is distinctive to and standardized among the chain or group: i. exterior design or architecture; ii. uniforms, except that a personal identification or simple logo will not render the clothing a uniform; or iii. has a standardized menu; or (3) is a fast food restaurant.⁹⁸

In justifying this ordinance, the Village Council found that formula restaurants threatened the “unique character” of the Village.⁹⁹ Cachia challenged the ordinance on DCC grounds.¹⁰⁰

Although the United States District Court for the Southern District of Florida upheld Islamorada’s ordinance,¹⁰¹ the Eleventh Circuit Court of Appeals held that elevated scrutiny applied to the ordinance.¹⁰² The Eleventh Circuit explained that Cachia’s argument relied on *Hunt*, while Islamorada’s argument relied on *Exxon*.¹⁰³ Islamorada argued that the ordinance should not be subject to elevated scrutiny because the ordinance only targeted a particular structure of business, not all out-of-state businesses.¹⁰⁴ The Eleventh Circuit, while noting that *Exxon*

95. *Cachia*, 542 F.3d at 841.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 843 n.4; *see also* Bobrowski *supra* note 1, at 249.

100. *Cachia*, 542 F.3d at 841.

101. *Id.*

102. *Id.* at 840.

103. *Id.* at 842–43.

104. *Id.*

“rejected the notion ‘that the Commerce Clause protects [a] particular structure or methods of operation in a retail market,’” concluded that “the ordinance’s complete prohibition of chain restaurants sharing certain characteristics *amounts to more* than the regulation of methods of operation.”¹⁰⁵ Thus, the Eleventh Circuit held that elevated scrutiny applied to the ordinance.¹⁰⁶ The Eleventh Circuit remanded the case, however, because the district court did not sufficiently develop a record regarding Islamorada’s justifications for its ordinance and the non-discriminatory alternatives available.¹⁰⁷

The Eleventh Circuit’s attempt to distinguish *Exxon* seems inconsistent given that the statute in *Exxon* also completely prohibited retailers sharing certain characteristics (retailers that produced and refined gasoline). This inconsistency represents why the circuits split when evaluating DCC challenges to laws affecting national chains.

2. *In Island Silver & Spice, Inc. v. Islamorada, the Eleventh Circuit Applied Elevated Scrutiny to an Ordinance Restricting “Formula Retail” Establishments*

A similar case in the Eleventh Circuit, *Island Silver & Spice Inc. v. Islamorada*, closely tracks the reasoning in *Cachia*.¹⁰⁸ Island Silver & Spice, Inc. (Island Silver) owned and operated an independent retail store and wanted to sell property to a developer seeking to establish a Walgreens.¹⁰⁹ Islamorada enacted a zoning ordinance that restricted the construction of “formula retail” establishments, which were defined as:

[a] type of retail sales activity of retail sales establishment . . . that is required by contractual or other arrangement to maintain any of the following: standardized array of services or merchandise, trademark, logo, service mark, symbol, decor, architecture, layout, uniform, or similar standardized feature.

The ordinance limited “formula retail” establishments to 2,000 square feet floor area and street level business frontage of fifty feet or less.¹¹⁰ When Island Silver’s potential buyer learned that it would not be able to

105. *Id.* at 843 (emphasis added).

106. *Id.* at 843–44.

107. *Id.*

108. *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008).

109. *Id.* at 845.

110. *Id.*

develop a Walgreens, it backed out of the sale.¹¹¹ Island Silver challenged the ordinance on DCC grounds.¹¹²

As in *Cachia*, the Eleventh Circuit’s opinion demonstrated the tension between *Hunt* and *Exxon*.¹¹³ The United States District Court for the Southern District of Florida concluded that the ordinance violated the Commerce Clause under either the elevated scrutiny test or the *Pike* balancing test,¹¹⁴ but on appeal, the Eleventh Circuit focused exclusively on the elevated scrutiny test (tier one).¹¹⁵ The Eleventh Circuit recognized that the restriction “effectively prevents the establishment of new formula retail stores.”¹¹⁶ The district court found it irrelevant that a local chain store faces the same restrictions as a national chain because it found no evidence that local chain stores use the standardized features prohibited by the ordinance.¹¹⁷ The district court also neglected to mention *Exxon*.¹¹⁸ The Eleventh Circuit, citing *Exxon*, observed that the mere fact that a burden falls on out-of-state companies does not support a conclusion of discriminatory effect.¹¹⁹ However, with almost no analysis, the Eleventh Circuit concluded that the formula retail provision, like the statute in *Hunt*, produced a discriminatory effect: by restricting chain retailers, the ordinance has the “practical effect” of discriminating against interstate commerce.¹²⁰ Thus, the Eleventh Circuit subjected the ordinance to elevated scrutiny.¹²¹

B. Courts in the Ninth Circuit Privilege the Reasoning from Exxon

While the Eleventh Circuit’s approach privileges *Hunt*, the Ninth and First Circuit privilege *Exxon*. In *International Franchise Ass’n v. City of Seattle* (“*IFA v. City of Seattle*”),¹²² the Ninth Circuit Court of Appeals

111. *Id.* at 845.

112. *Id.* at 845–46.

113. *Id.* at 846–47.

114. *Island Silver & Spice, Inc. v. Islamorada*, 475 F. Supp. 2d 1281, 1290 (S.D. Fl. 2007), *aff’d*, 542 F.3d 844 (11th Cir. 2008).

115. *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 847 (11th Cir. 2008).

116. *Id.* (quoting Evidentiary Stipulation at 7, *Island Silver & Spice, Inc. v. Islamorada*, 475 F. Supp. 2d 1281 (S.D. Fl. 2007) (No. 04-10097)).

117. *Island Silver*, 475 F. Supp. 2d at 1291.

118. *Id.* at 1281–94.

119. *Island Silver*, 542 F.3d at 846.

120. *Id.* at 847.

121. *Id.*

122. 803 F.3d 389 (9th Cir. 2015), *cert. denied*, __ U.S. __, 136 S. Ct. 1838 (2016).

considered a DCC challenge.¹²³ In remarking on a circuit split on this area in the law, the Ninth Circuit pointed to *Wal-Mart Stores, Inc. v. City of Turlock*¹²⁴ as evidence of the Ninth Circuit's approach, and to *Wine & Spirits Retailers, Inc. v. Rhode Island*¹²⁵ as evidence of the First Circuit's approach.¹²⁶

1. *In Wal-Mart Stores, Inc. v. City of Turlock, a District Court in the Ninth Circuit Did Not Apply Elevated Scrutiny to an Ordinance Prohibiting "Discount Superstores"*

Wal-Mart purchased the land for a prospective Supercenter, and following lobbying by local retailers, the City of Turlock enacted an ordinance that would undermine Wal-Mart's plan.¹²⁷ The Turlock City Council enacted a land use ordinance amending the City's Zoning Code to prohibit "Discount Superstores," defined as follows:

a store that is similar to a "Discount Store" . . . with the exception that [it] also contain[s] a full-service grocery department under the same roof that shares entrances and exits with the discount store area. Such retail stores exceed 100,000 square feet of gross floor area and devote at least five percent (5%) of the total sales floor area to the sale of non-taxable merchandise. . . . These stores usually offer a variety of customer services, centralized cashing, and a wide range of products. They typically maintain long store hours seven (7) days a week. The stores are often the only ones on the site, but they can also be found in mutual operation with a related or unrelated garden center or service station. Discount superstores are also sometimes found as separate parcels within a retail complex with their own dedicated parking.¹²⁸

123. *Id.* at 397–98.

124. 483 F. Supp. 2d 987 (E.D. Cal. 2006).

125. 481 F.3d 1 (1st Cir. 2007).

126. *Island Silver*, 803 F.3d at 404 n.7.

127. *Wal-Mart Stores*, 483 F. Supp. 2d at 994.

128. *Id.* at 991–92; Definition of "Discount Stores":

[S]tores with off-street parking that usually offer a variety of customer services, centralized cashing, and a wide range of products. ['Discount Stores'] usually maintain long store hours seven (7) days a week. The stores are often the only ones on the site, but they can also be found in mutual operation with a related or unrelated garden center or service station. Discount stores are also sometimes found as separate parcels within a retail complex with their own dedicated parking.

Id. at 991.

This ordinance prohibited the creation of a Wal-Mart Supercenter in the City of Turlock.¹²⁹ In response, Wal-Mart challenged the ordinance on DCC grounds.¹³⁰

The United States District Court for the Eastern District of California presented a thorough argument on the subject of elevated scrutiny. The district court explored three main points during this discussion.¹³¹ First, the district court addressed *Exxon*.¹³² The district court concluded that the Turlock ordinance was analogous to the Maryland statute in *Exxon* because the ordinance did not discriminate against interstate commerce; it discriminated against a particular business structure that some interstate businesses use.¹³³ The market remains “open to all local or foreign retailers of all local or foreign products, except in the discount superstore format.”¹³⁴ Noting that Wal-Mart relied upon *Hunt*, the district court explained that “*Exxon* distinguished *Hunt* on the grounds that, in *Hunt*, ‘the challenged state statute raised the cost of doing business for out-of-state dealers’ in relation to those from within the state.”¹³⁵ Because the plaintiffs provided no evidence that the Turlock ordinance raised the cost of doing business in a similar manner, the district court concluded that the ordinance was not discriminatory.¹³⁶

The second area of discussion that the district court highlighted was the distinction between discriminatory intention and effect.¹³⁷ The district court noted that no Commerce Clause case it researched resulted in the invalidation of a regulation for the legislators’ alleged discriminatory motives alone.¹³⁸

With respect to the third area of discussion, the district court evaluated Wal-Mart’s specific arguments of how practical effect manifested in the instant case.¹³⁹ While Wal-Mart argued that the ordinance discriminated only against out-of-state companies, the district court disagreed because the ordinance prohibits both in-state *and* out-of-

129. *Id.* at 992.

130. *Id.* at 994.

131. *Id.* at 1011–17 (listing headings for “Exxon,” “Intention versus Effect,” and “Practical Effect”).

132. *Id.* at 1011–12.

133. *Id.* at 1012.

134. *Id.*

135. *Id.* (quoting *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978)).

136. *Id.*

137. *Id.* at 1012–13.

138. *Id.*

139. *Id.* at 1013–17.

state companies from establishing discount stores.¹⁴⁰ Wal-Mart also argued that the ordinance had a disparate impact on out-of-state companies, but the district court rejected this, noting that the *Exxon* Court rejected a similar argument.¹⁴¹

Another argument that Wal-Mart raised was that the ordinance discriminated against goods in interstate commerce because Wal-Mart Supercenters stock more out-of-state goods than other retail formats.¹⁴² The district court explained, however, that the ordinance does not pertain to out-of-state goods; it “does not limit WalMart’s choice of producers, processors, or suppliers.”¹⁴³ Lastly, the district court addressed Wal-Mart’s argument that the ordinance increased costs for out-of-state operators.¹⁴⁴ The district court directed attention to the fact that Wal-Mart could operate in other formats.¹⁴⁵ Therefore, the ordinance did not necessarily increase costs for out-of-state operators.¹⁴⁶ As a result, the court did not apply elevated scrutiny.¹⁴⁷

2. *In IFA v. City of Seattle, the Ninth Circuit Did Not Apply Elevated Scrutiny to an Ordinance That Established a Faster Phase-In of the Minimum Wage for Franchisees*

A more recent case out of the Ninth Circuit, *IFA v. City of Seattle*, demonstrated a similar reluctance to apply elevated scrutiny to laws affecting national chains.¹⁴⁸ The Seattle City Council adopted a minimum wage ordinance and established two different phase-in schedules under the ordinance.¹⁴⁹ Under the ordinance, large businesses have a faster phase-in, while smaller businesses have a slower phase-in.¹⁵⁰ Importantly, the ordinance classified franchisees as large employers, subjected to the faster phase-in of the minimum wage.¹⁵¹ In response to this ordinance, the International Franchise Association (IFA)

140. *Id.* at 1014.

141. *Id.*

142. *Id.* at 1015.

143. *Id.* at 1016.

144. *Id.* 1016–17.

145. *Id.* at 1017.

146. *Id.* at 1016–17.

147. *Id.* at 1017.

148. 803 F.3d 389 (9th Cir. 2015), *cert. denied*, __ U.S. __, 136 S. Ct. 1838 (2016).

149. *Id.* at 397–98.

150. *Id.*

151. *Id.* at 398.

sued the City of Seattle, “seeking a preliminary injunction that would require Seattle to classify certain franchisees as small employers.”¹⁵² IFA alleged that the ordinance violated the DCC.¹⁵³

The district court denied IFA’s motion for a preliminary injunction, and the Ninth Circuit Court of Appeals merely reviewed this denial for abuse of discretion, while reviewing “the underlying legal principles de novo.”¹⁵⁴ The Ninth Circuit concluded that the district court did not abuse its discretion, nor did it employ an improper legal standard.¹⁵⁵ IFA argued that the increased labor costs for the franchisees “rigg[ed] the playing field,”¹⁵⁶ as occurred in *Hunt* and the Eleventh Circuit cases, but the district court faulted IFA for failing to present any hard evidence on this point.¹⁵⁷ In determining whether the ordinance produced any discriminatory effects, the district court evaluated several criteria: including the “mix of goods test,” presence of competitive disadvantages, increased costs creating barriers to entry, and raised labor costs that would impact interstate commerce.¹⁵⁸ Ultimately, the district court concluded “that there [was] no evidence demonstrating whether the Ordinance [would] have an impact on interstate commerce.”¹⁵⁹ Upon review, the Ninth Circuit remarked that “[w]e lack Supreme Court authority assessing whether a regulation affecting franchises ipso facto has the effect of discriminating against interstate commerce.”¹⁶⁰ The Ninth Circuit observed that the ordinance appeared to burden only in-state franchisees, “not the wheels of interstate commerce” itself.¹⁶¹

3. *In Wine and Spirits Retailers, Inc. v. Rhode Island, the First Circuit Did Not Apply Elevated Scrutiny to a Statute Prohibiting Franchise Liquor Stores*

In *IFA v. City of Seattle*, the Ninth Circuit Court of Appeals noted that the First Circuit’s approach to DCC challenges diverged from the

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 405–07.

156. *IFA v. City of Seattle*, 97 F. Supp. 3d 1256, 1275–76 (W.D. Wash. 2015), *aff’d*, 803 F.3d 389 (9th Cir. 2015).

157. *Id.*

158. *IFA*, 803 F.3d at 405.

159. *IFA*, 97 F. Supp. 3d at 1276.

160. *IFA*, 803 F.3d at 404 (“Nor has the Supreme Court addressed whether franchises are instrumentalities of interstate commerce that cannot be subjected to disparate regulatory burdens.”).

161. *Id.* at 406.

Eleventh Circuit's approach with respect to laws affecting national chains.¹⁶² The Ninth Circuit cited *Wine & Spirits Retailers, Inc. v. Rhode Island* as evidence of this split.¹⁶³

Since 1933, "Rhode Island had barred chain-store organizations from holding Class A liquor licenses," and Rhode Island later expanded that prohibition by more specifically defining chain-stores to include franchise-type arrangements.¹⁶⁴ Rhode Island's legislation effectively prohibited chain-stores and franchises from engaging in the retail sale of alcoholic beverages. Moreover, in determining whether an entity is a chain-store organization, the statute included in the definition "chains in which one or more stores are located outside of the state."¹⁶⁵ In response, a liquor franchisor challenged the statute on DCC grounds, contending that the statute produced a discriminatory effect.¹⁶⁶

The First Circuit Court of Appeals affirmed the district court's determination that the statute had no such effect.¹⁶⁷ The First Circuit explained that the plaintiffs have the burden of persuasion and plaintiffs produced no evidence of discriminatory effect: "There is, for example, no evidence of any carve-out or other device that would enable in-state entities to evade the challenged restrictions, nor is there any hint of a home-field advantage in connection with the State's enforcement of the restrictions. The absence of any such evidence is telling."¹⁶⁸ Unlike the Eleventh Circuit, which viewed prohibition of franchises, in and of itself, as evidence of discriminatory effect, the First Circuit required evidence supporting the notion that this prohibition truly discriminated against interstate commerce.¹⁶⁹ The First Circuit's more searching standard for discriminatory effect aligns with the Ninth Circuit's approach.

162. *Id.* at 404 n.7.

163. *Id.*

164. *Wine and Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 5 (1st Cir. 2007).

165. *Id.* at 12 (quoting R.I. GEN. LAWS § 3-5-11(a)).

166. *Id.* at 10.

167. *Id.* at 14.

168. *Id.* at 14.

169. *Id.* at 14–15.

III. THE REASON FOR THE SPLIT AND PROPOSED RESOLUTIONS

A. *The First, Ninth, and Eleventh Circuits Adopted Two Different Approaches to Regulations Restricting Chains Because of Different Concerns and Different Interpretations of Exxon and Hunt.*

There are two factors driving this split between the circuits. First, the Eleventh Circuit concluded that the *prohibition* of interstate chains was especially problematic,¹⁷⁰ whereas the Ninth and First Circuits have not expressed this same concern.

Second, these circuits adopted different approaches because they disagree about how to interpret *Hunt* and *Exxon*. This confusion is inevitable given the Supreme Court’s inconsistent jurisprudence. There are several possible solutions to this confusion, and all of them require the Supreme Court to clarify this muddled area of the law.

1. *The Eleventh Circuit Is More Concerned with the Prohibitive Nature of Regulations*

The Eleventh Circuit applied elevated scrutiny because it was concerned with Islamorada’s ability to prohibit formula restaurants and to effectively prohibit formula retail establishments.¹⁷¹ The Eleventh Circuit’s holding in *Cachia* states that the elevated scrutiny test applied “because the ordinance’s complete prohibition of chain restaurants sharing certain characteristics disproportionately targeted restaurants operating in interstate commerce.”¹⁷² The Eleventh Circuit’s reasoning for applying elevated scrutiny in *Island Silver* also focused on the complete prohibition of interstate chains.¹⁷³

Faced with distinguishing the *Exxon* case, the Eleventh Circuit concluded in *Cachia* that such a prohibition on interstate chains amounts to more than the “regulation of methods of operation” at stake in

170. See *Cachia v. Islamorada*, 542 F.3d 839, 843 (11th Cir. 2008) (“the ordinance’s complete prohibition of chain restaurants sharing certain characteristics amounts to more than the regulation of methods of operation . . .”).

171. *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 847–48 (11th Cir. 2008). The regulation effectively prohibited formula retail establishments because the size requirements could not accommodate nationally and regionally branded formula retail stores. *Id.* at 846.

172. *Cachia*, 542 F.3d at 839.

173. *Island Silver*, 542 F.3d at 846–47 (“[T]he ordinance’s effective elimination of all new interstate chain retailers has the ‘practical effect of . . . discriminating against’ interstate commerce.” (quoting *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 350 (1977))).

Exxon.¹⁷⁴ Similarly, in *Island Silver* the Eleventh Circuit cited *Exxon* without actually distinguishing it.¹⁷⁵ The Eleventh Circuit cited *Exxon* for the following proposition: “the fact that the burden of a regulation falls onto a subset of out-state-interests ‘does not, by itself, establish a claim of discrimination’”¹⁷⁶ Nevertheless, the Eleventh Circuit summarily concluded that the prohibition of chains was subject to elevated scrutiny.¹⁷⁷

It makes little sense for the Eleventh Circuit to emphasize prohibition as a means of distinguishing *Exxon* because *Exxon* involved its own sort of prohibition; the statute at issue in *Exxon* prohibited producers or refiners of petroleum products from operating retail service stations in Maryland.¹⁷⁸ Because all of the producers and refiners were out-of-state companies, this statute shielded in-state retail stations.¹⁷⁹ The Eleventh Circuit does not address this discrepancy.

The lack of depth on this point is probably due to the Eleventh Circuit’s reliance on *Hunt*. The Eleventh Circuit explained that the *Hunt* Court found discriminatory effect where a regulation raised the cost of doing business in one state market for an out-of-state dealer.¹⁸⁰ The Eleventh Circuit further explained that the *Exxon* Court distinguished *Hunt* as a case where in-state companies had a competitive advantage over out-of-state companies.¹⁸¹ The Eleventh Circuit reasoned that prohibiting one type of business is more discriminatory than raising the costs of that business and doing so results in a competitive advantage for in-state companies.¹⁸²

While the Eleventh Circuit found the prohibition of chains discriminatory, the *Wal-Mart* district court and First Circuit were less

174. *Cachia*, 542 F.3d at 843.

175. *Island Silver*, 542 F.3d at 846–47.

176. *Id.* at 846 (quoting *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978)).

177. *Id.* at 846–47. In *Island Silver*, the Eleventh Circuit only spent one paragraph (206 words) on its conclusion that that the formula retail provision should be subject to elevated scrutiny. *Id.* Compare this limited discussion of whether first-tier scrutiny applies with the lengthy discussions in *Wal-Mart*, *IFA*, and *Wine Retailers*.

178. *See Exxon*, 437 U.S. at 148 (1978) (Blackmun, J., concurring in part and dissenting in part) (“Here, the statute *bans* the refiners and producers from the retail market altogether”).

179. *See supra* notes 70–72 and accompanying text.

180. *Cachia*, 542 F.3d at 842.

181. *Id.* at 843.

182. *Id.* at 842. (“In the instant case, the ordinance’s formula retail provision does not simply raise the costs of operating a formula restaurant in Islamorada, but entirely prohibits such restaurants from opening.”)

concerned with such prohibitions.¹⁸³ The *Wal-Mart* case is analogous to the *Island Silver* case because the regulation applied to both local and out-of-state stores, but no local stores used this business structure.¹⁸⁴ The *Island Silver* court thought that this effective elimination of new chain retailers warranted elevated scrutiny.¹⁸⁵ The *Wal-Mart* district court, on the other hand, concluded that the neutral application of the regulation cut against elevated scrutiny; the court reiterated the following principle from *Exxon*: the DCC does not protect retail formats.¹⁸⁶ Thus, the *Wal-Mart* district court’s reasoning reflects its assumption that *Exxon* dealt with a regulatory structure just as prohibitory as the regulations at issue. Because those prohibitions were neutral and based on business operations, the *Wal-Mart* district court found no discriminatory effect.¹⁸⁷

As for the First Circuit, it was similarly unconcerned with the “prohibition on franchise and chain-store arrangements.”¹⁸⁸ The First Circuit concentrated on the language in *Exxon* stating “that a state regulation that burdens some interstate firms ‘does not, by itself, establish a claim of discrimination against interstate commerce.’”¹⁸⁹ The First Circuit concluded the regulation did not produce a discriminatory effect because the plaintiffs had insufficient evidence of discrimination.¹⁹⁰

These cases from the First, Ninth, and Eleventh Circuits illustrate that one of the factors driving the circuit split is what sort of significance the prohibitory nature of a regulation should have for the DCC analysis. The First and Ninth Circuit cases demonstrate a lack of concern about the prohibitory regulation of franchises. Meanwhile, the Eleventh Circuit cases show a much stronger concern about these sorts of regulations.

183. The city in *IFA* regulated rather than prohibited franchises. *IFA v. City of Seattle*, 803 F.3d 389, 397–98 (9th Cir. 2015) (regulation concerned increasing the minimum wage), *cert. denied*, ___ U.S. ___, 136 S. Ct. 1838 (2016).

184. *See* *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 846 (11th Cir. 2008); *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 1012, 1017 (E.D. Cal. 2006).

185. *Island Silver*, 542 F.3d at 846–47.

186. *Wal-Mart Stores*, 483 F. Supp. 2d at 1014 (citing *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978)).

187. *Id.* at 1013–14.

188. *Wine and Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 14 (1st Cir. 2007).

189. *Id.* at 14–15.

190. *Id.*

2. *The First, Ninth, and Eleventh Circuits Disagree Regarding How to Interpret Exxon and Hunt*

The second cause of the circuit split relates to the tension between *Exxon* and *Hunt* and each Court's decision regarding which of the two precedents to privilege. Recall that the *Exxon* Court identified three barriers absent from *Exxon* but present in other discriminatory effects cases such as *Hunt*: restricting the flow of goods, adding costs for out-of-state dealers, and distinguishing between in-state and out-of-state companies in the retail market.¹⁹¹ The last two barriers are discussed by courts in the Eleventh and Ninth Circuits. The First Circuit did not discuss these barriers and instead focused on similarities to *Exxon*. The underlying irreconcilability of *Exxon* and *Hunt* plagues each of these approaches.

a. *The Eleventh Circuit's Explanation of How Exxon Distinguished Hunt Demonstrates the Difficulty in Distinguishing These Two Cases*

The Eleventh Circuit explained that *Exxon* distinguished *Hunt* on the basis that *Exxon* did not involve in-state companies having a competitive advantage over out-of-state companies, whereas *Hunt* did involve this in-state advantage.¹⁹² The problem with this approach is that the *Exxon* Court was referring to the lack of competitive advantage between in-state independent dealers and out-of-state independent dealers.¹⁹³ Putting this in terms of the *Cachia* and *Island Silver* cases, there would be no competitive advantage between local non-formula businesses and out-of-state non-formula businesses. Thus, the *Exxon* Court's flawed attempt to distinguish *Hunt* has led the Eleventh Circuit to follow the same confusing path. A major source of the confusion is the vague way in which the *Exxon* Court states "in-state independent dealers will have no competitive advantage over out-of-state dealers."¹⁹⁴ The *Exxon* Court should have compared independent in-state dealers with independent out-of-state dealers. And the *Exxon* Court should have stated "in-state

191. See *supra* sections I.C.2–3.

192. *Cachia v. Islamorada*, 542 F.3d 839, 843 (11th Cir. 2008) ("*Exxon* found that, where in-state companies would 'have no competitive advantage over out-of-state [companies],' the elevated scrutiny approach used in *Hunt* did not apply."). This distinguishing corresponds with the third barrier described in *Exxon*. See *supra* sections I.C.2–3.

193. Independent dealers are retailer dealers that do not operate as refiners or producers of oil. *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978).

194. *Id.*

independent dealers will have no competitive advantage over out-of-state *independent* dealers.”¹⁹⁵ This statement would be more accurate, but it would also demonstrate the difficulty in distinguishing *Hunt* because that statement applies to *Hunt* as well; the *Hunt* statute provided no competitive advantage for in-state grade-complying apple sellers over out-of-state grade-complying apple sellers.¹⁹⁶

b. *The Ninth Circuit’s Explanation of How Exxon Distinguished Hunt Also Demonstrates the Difficulty in Distinguishing These Two Cases*

The *Wal-Mart* district court in the Ninth Circuit explained that *Exxon* distinguished *Hunt* on the grounds that, in *Hunt*, “‘the challenged state statute raised the cost of doing business for out-of-state dealers’ in relation to those from within the state, and ‘in various other ways, favored the in-state dealer in the local market.’”¹⁹⁷ The *Wal-Mart* district court found that the ordinance was more analogous to *Exxon* than *Hunt* because *Wal-Mart* provided no evidence that doing business in a non-discount superstore format costs more than doing business in a different format.¹⁹⁸ It seems that the *Wal-Mart* district court started by looking at the alleged increased costs to the out-of-state dealers as opposed to the benefit to the in-state dealers. Finding no increased costs, it concluded that there was no discriminatory effect.¹⁹⁹

The problem with *Exxon*’s distinguishing of *Hunt* is that the challenged statute in *Hunt* did not actually raise the cost of doing business for all out-of-state dealers; the law only hurt *a segment* of out-of-state business, and the law applied to local businesses, just as the *Exxon* law did.²⁰⁰ Moreover, the costs that those out-of-state businesses would face appear even higher in *Exxon*. Prohibiting a given out-of-state dealer from using a particular grade to mark fruit seems less burdensome than prohibiting a given out-of-state dealer from being a producer and refiner of oil. The former condition, as seen in *Hunt*, raised the costs of

195. *See id.*

196. *See Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 337 (1977) (the statute regulated the grading system and did not distinguish between in-state and out-of-state sellers).

197. *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 1012 (E.D. Cal. 2006) (citing *Exxon*, 437 U.S. at 126). This distinguishing corresponds with the second barrier discussed in *Exxon*. *See supra* sections I.C.2–3.

198. *Id.*

199. *Id.* at 1017.

200. *Exxon*, 437 U.S. at 146–47 (Blackmun, J., concurring in part and dissenting in part); *see also* Denning, *supra* note 19, at 466.

out-of-state dealers that wanted to sell fruit using a particular grade.²⁰¹ The latter condition, as seen in *Exxon*, would require that out-of-state business give up an entire separate business: the refining and production of oil.²⁰²

Analogizing this to the *Wal-Mart* case, the challenged regulation only hurt a segment of out-of-state business,²⁰³ just like the regulations in *Exxon* and *Hunt*. Given that *Exxon* and *Hunt* are not as different as the Supreme Court states, it is difficult to discern how the *Wal-Mart* court should have applied this precedent.

As for the Ninth Circuit's *IFA* case, the regulation there was not prohibitory in nature, but the case indicates how the Ninth Circuit engages in a DCC analysis of franchises generally. The court looked more broadly at the very principle of drawing a distinction between franchises and non-franchises. It noted that there was insufficient evidence to demonstrate that franchises "are so interstate in character relative to non-franchises" such that distinctions between them would constitute interference with interstate commerce.²⁰⁴ The court ultimately concluded that there was no discriminatory effect because "in-state franchisees are burdened, not the wheels of interstate commerce."²⁰⁵ This reflects *Exxon*'s proposition that a burden on some interstate firms "does not, by itself, establish a claim of discrimination against interstate commerce."²⁰⁶ There is something essentially different about burdening individual firms and burdening interstate commerce, but the Ninth Circuit did not elaborate on that difference.

c. The First Circuit's Approach Focused on Exxon

Compared to the Ninth and Eleventh Circuits, the First Circuit did not delve as deeply into the issue of what constitutes burden. The First

201. See *Hunt*, 432 U.S. at 351 (explaining that the statute raised "the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected.").

202. See *Exxon*, 437 U.S. at 119 (The statute provided "that a producer or refiner of petroleum products . . . may not operate any retail service station within the State . . .").

203. The regulation in *Wal-Mart* prohibited those out-of-state businesses that chose to operate in a "Discount Superstore," format; the regulation applied to both in-state and out-of-state businesses. *Wal-Mart*, 483 F. Supp. 2d at 1012.

204. *IFA v. City of Seattle*, 803 F.3d 389, 402 (9th Cir. 2015) ("IFA failed to demonstrate that Seattle franchisees are out-of-state entities or that franchises are so interstate in character relative to non-franchises that a distinction drawn on this basis interferes with interstate commerce."), *cert. denied*, ___ U.S. ___, 136 S. Ct. 1838 (2016).

205. *Id.* at 406.

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

Circuit heavily relied on *Exxon* for the proposition that a burden on some interstate firms “does not, by itself, establish a claim of discrimination against interstate commerce.”²⁰⁷ The First Circuit also relied on *Exxon*’s statement that the DCC does not protect particular business structures or methods of operation.²⁰⁸ Because the First Circuit never addressed the arguments in *Hunt*, it did not fall into the trap of trying to reconcile the two cases.

B. *What to Do: Solutions and Moving Forward*

There are a few possible solutions that the Supreme Court could undertake to clarify this muddled area of the law. Some of these solutions are more viable than others. First, the Court could eliminate the DCC’s first tier of scrutiny in its entirety. Second, the Court could carve out a special exception for franchises, rendering DCC first tier scrutiny unnecessary. Third, the Court could clarify *Hunt* and *Exxon*, either by overruling or re-interpreting one or both of the cases.

1. *Eliminate the First Tier of Scrutiny*

One solution is to eliminate the DCC’s first tier of scrutiny.²⁰⁹ Much of the confusion surrounding this circuit split on the DCC’s application goes to the failings of the first tier. By eliminating this tier of scrutiny, courts could avoid the question of whether a regulation is “discriminatory,” and thereby avoid the question of whether a regulation constitutes facial discrimination, discriminatory purpose, or discriminatory effect. Instead of analyzing cases with so-called discriminatory effect under the first tier, the Supreme Court could analyze all such cases under the second tier, using the balancing test. If the alleged discriminatory effects are harmful, then this deferential standard should not overly encumber courts.²¹⁰

207. *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 14–15 (1st Cir. 2007) (quoting *Exxon*, 437 U.S. at 126).

208. *Id.* at 15–16.

209. An alternative solution would be to eliminate the DCC doctrine altogether. Justices Antonin Scalia and Clarence Thomas had long advocated for the court to reject this doctrine, and Justice Scalia recently referred to the DCC as a “judicial fraud.” *Comptroller of the Treasury of Md. v. Wynne*, ___ U.S. ___, 135 S. Ct. 1787, 1806 (2015). While this cutting of the Gordian knot may be tempting, this Note explores tensions implicated by one prong of one tier of the DCC analysis, so discussion of the elimination of the entire DCC is beyond its scope.

210. *See Kassel v. Consol. Freightway*, 450 U.S. 662, 678–79 (1981) (applying balancing test and invalidating state law where the slight benefit to the state was outweighed by the federal interest in promoting commerce).

For example, if the Court analyzed *Hunt* under the second tier, the statute still might have been invalidated. Recall, the second tier considers whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.²¹¹ While states have a legitimate interest in "protecting their citizens from confusion and deception in the marketing of foodstuffs,"²¹² the *Hunt* statute provided few local benefits. The statute permitted marketing apples under the USDA grades or no grades at all, but it prohibited marketing apples using grades that were superior to their USDA counterparts.²¹³ *Hunt* is certainly a close case, but it could be invalidated under the second tier given the minimal local benefits and high burden.

There is a risk that by relying only upon second tier scrutiny, the courts may uphold some protectionist measures. The second tier of scrutiny is more deferential than the first tier.²¹⁴ Eliminating the first tier would communicate that the second tier acts as a sufficient barrier to protectionist regulations. The extent to which the second tier provides sufficient protection depends upon how concerned one is about the dangers of protectionist measures. Ultimately, it is difficult to judge how effectively the second tier invalidates protectionist measures because "there is no clear line' separating the categories identified in its [DCC] taxonomy."²¹⁵ If this is the case, then eliminating one tier creates little increase in the risk of protectionist regulations surviving the DCC analysis.

2. *Carve Out an Exception for Franchises*

Another solution is to create a special exception for franchises. The Ninth Circuit noted that the Supreme Court had not addressed "whether franchises are instrumentalities of interstate commerce that cannot be subjected to disparate regulatory burdens."²¹⁶ The Supreme Court could conclude that a franchise is akin to an interstate road—that it constitutes an instrumentality of interstate commerce.²¹⁷

211. *See supra* section I.B.

212. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 353 (1977).

213. *Id.* at 336–37.

214. *See supra* section I.B.

215. *Baker & Konar-Steenberg, supra* note 32, at 6 (quoting *Brown Foreman-Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

216. *IFA v. City of Seattle*, 803 F.3d 389, 404 (9th Cir. 2015), *cert. denied*, ___ U.S. ___, 136 S. Ct. 1838 (2016).

217. *See Alstate Const. Co. v. Durkin*, 345 U.S. 13, 16 (1953) (referring to precedent stating that "interstate roads and railroads are indispensable 'instrumentalities' in the carriage of persons and

This seems like an unlikely path for the Court to take because a particular franchise store or restaurant does not necessarily serve to connect goods and persons across state lines; some franchises may use goods from other states or employ people from out-of-state, but so do non-franchise operations. Moreover, establishing a special carve out for franchises would resolve the application of the DCC to franchises, but it would fail to resolve the underlying tension between *Exxon* and *Hunt*.

3. *Overrule or Re-interpret Exxon or Hunt*

If the Supreme Court chooses to retain first tier analysis of discriminatory effect claims and to apply it to franchises, then the Court must clarify whether to follow the *Exxon* or *Hunt* approach going forward. The Supreme Court could overrule *Exxon* or *Hunt* to the extent that one does not align with the other. *Exxon* and *Hunt* are inconsistent because the *Hunt* Court found discriminatory effect where a state regulation burdened some interstate firms,²¹⁸ and the *Exxon* Court concluded that this, by itself, did not establish a claim of discrimination against interstate commerce.²¹⁹

The question is: what did the *Hunt* Court find to bolster its conclusion that the regulation at issue produced a discriminatory effect? The Supreme Court puts forward three differences between the regulation in *Exxon* versus a regulation such as the one in *Hunt*: “it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market.”²²⁰ As previously discussed,²²¹ these differences are not so obvious, and they arguably do not distinguish the two cases much at all. Ultimately, the decision as to whether *Exxon* or *Hunt* was wrongly decided will depend upon the degree to which the Court is concerned about the dangers of protectionism.

goods that move in interstate commerce”); see also 29 C.F.R. § 776.29 (2016) (“Instrumentalities and channels which serve as the media for the movement of goods and persons in interstate commerce or for interstate communications include railroads, highways, city streets; telephone, gas, electric and pipe line systems; radio and television broadcasting facilities; rivers, canals and other waterways; airports; railroad, bus, truck or steamship terminals; freight depots, bridges, ferries, bays, harbors, docks, wharves, piers; ships, vehicles and aircraft which are regularly used in interstate commerce.”).

218. See *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 350–51 (1977).

219. See *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 125–28 (1978).

220. *Id.* at 126.

221. See *supra* section I.C.

One solution less drastic than overruling *Exxon* or *Hunt* would be to simply re-interpret, or re-read, one of the cases. For example, in *Minnesota v. Clover Leaf Creamery Co.*,²²² the Supreme Court characterized *Hunt* as having been decided on evidence of discriminatory purpose rather than discriminatory effect.²²³ If courts accept this interpretation of *Hunt*, or if the Supreme Court explicitly endorses this interpretation, then perhaps the Eleventh Circuit should reverse course and turn to *Exxon* for guidance on finding discriminatory effect. Alternatively, the Supreme Court could re-interpret *Exxon* so as to cabin it to its facts. The Supreme Court could explain that the alleged discrimination in *Exxon* was not significant enough to warrant first tier treatment.

1. *There Are Advantages and Disadvantages to the Three Solutions*

Each of these approaches has advantages and disadvantages. Eliminating the first tier of scrutiny, the first approach, has the advantage of making a clean break from the murky jurisprudence surrounding the differences between facial discrimination, discriminatory intent, and discriminatory effect. On the other hand, eliminating the first tier of scrutiny would leave potentially discriminatory regulations subject only to a balancing test. As a result, more protectionist regulations might slip through the cracks.²²⁴ Turning to the second approach, a carve out for franchises has the advantage of creating a clear rule for DCC challenges in franchise cases; however, this approach fails to address the tension between *Exxon* and *Hunt* that produced the circuit split. The third approach, overruling or re-interpreting *Exxon* and *Hunt*, tasks the Supreme Court with resolving this underlying tension between *Exxon* and *Hunt*, either by overruling or re-interpreting one of the cases. Given the Supreme Court's general adherence to the "rule of stare decisis,"²²⁵ re-interpretation seems more likely. As to which case the Supreme Court should re-interpret, that is beyond the scope of this Note. Privileging *Exxon* would make discriminatory effect claims more difficult to win, and privileging *Hunt* would have the opposite effect.

222. 449 U.S. 456 (1981).

223. Baker & Konar-Steenberg, *supra* note 32, at 7.

224. See *supra* notes 30–41 and accompanying text.

225. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (emphasis omitted).

CONCLUSION

Ultimately, this Note calls for the Supreme Court to consider this DCC issue and resolve the split. The irreconcilability of *Hunt* and *Exxon* has led to divergent approaches to the regulation of franchises. The Court’s lackluster attempt to distinguish *Hunt* and *Exxon* has lured some circuits down a convoluted path; the Court should provide the clear direction that judges, cities, and franchisees need.