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Title: The Dormant Commerce Clause, Anticompetitive State Regulation, Competition and Consumers

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Abstract:

The purpose of this working paper is to examine anticompetitive state regulations under the dormant Commerce Clause in light of competition policy and consumer welfare. The paper is organized into three sections: (1) introduction of the dormant Commerce Clause and the problem of anticompetitive state regulations; (2) introduction of the state action doctrine as a hurdle for antitrust law to reach such regulations; and (3) argument that the dormant Commerce Clause can be used to regulate such regulations using two recent Ninth Circuit decisions as an example.

Keywords: Dormant Commerce Clause, State Regulation, Antitrust, Competition, Consumer

THE DORMANT COMMERCE CLAUSE, ANTICOMPETITIVE STATE REGULATION, COMPETITION AND CONSUMERS

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I. The Dormant Commerce Clause and the Problem of Anticompetitive State and Local Law

Article I, Section 8, Clause 3 of the United States Constitution reads: "[The Congress shall have Power t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes . . . ." [1] The Supreme Court has long held that the purpose of the Commerce Clause was to create an area of free trade among the several states.[2] The express grant in the Commerce Clause implies a negative converse: states are also prohibited from adopting legislation which discriminates or improperly burdens against interstate commerce. This negative converse is the dormant Commerce Clause. It is a doctrine created by the Supreme Court out of the actual Commerce Clause.[3] "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."[4]

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[1] U.S. CONST. art. VIII, § 3.
[2] PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, VOL. IA 262 (3d ed. 2006) (citing McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944)).
[3] Jennifer L. Larsen, *Discrimination in the Dormant Commerce Clause*, 49 S.D.L. REV. 844, 844 (2004).
[4] THE FEDERALIST NO. 22, 143–45 (C. Rossiter ed. 1961) (A. Hamilton); MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES, IN 2 WRITINGS OF JAMES MADISON 362–63 (G. Hunt ed. 1901). It is analogous to one of the

Those "jealousies and retaliatory measures" still exist today, and they obviously constitute a great danger to the free market and competition, because abusing regulatory power can cause more harm than abusing market power. At issue here are state regulations fundamentally inconsistent with competitive interstate markets, which either discriminate or impermissibly burden against interstate commerce and adversely affect interstate companies. For example, pursuant to California state law, opticians including national optical stores like LensCrafters cannot co-locate with a state-licensed optometrist (which means that they can only sell eyewear but they cannot provide eye care services in their stores in California), while in-state optometrists can offer both eye examination and eyewear sales simultaneously.[5] Consumers value convenience and prefer one-stop shopping – having eye examination and buying glasses at the same time.[6] This consumer preference would put national optical stores at a disadvantage to their in-state competitors.

So under what theories can those companies seek remedies? How would a court rule under each theory balancing competition policy with other public and private interests? In what way can the dormant Commerce Clause play a role in such a situation?

II. Limitation of Antitrust Law: State Action Immunity

When thinking about any suspicious anticompetitive conduct, the first source of remedy that would probably come to almost everyone's mind is antitrust law. However, for the issue of unnecessary and anticompetitive state and local law, antitrust law will face an almost insurmountable hurdle: the state action immunity. Generally, a private agreement limiting competition could be exempt if (1) the state explicitly intended to preempt competition, and (2) the state ensured active

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most important policy of the European Union: the EU single market. *See The EU Single Market*, EUROPEAN COMM'N, http://ec.europa.eu/internal_market/index_en.htm (last visited Oct. 26, 2012).

[5] Nat'l Ass'n of Optometrists & Opticians v. Brown, 567 F.3d 521, 524 (9th Cir. 2009).

[6] *Id.*

supervision of the resulting private restraints.[7] State and local regulations may avoid condemnation or even critical review of the merits of regulations that impose significant anticompetitive effects thanks to this state action doctrine and its federalism predicate.[8]

There are cases where there is no clear explicit intention of preemption, or no clear active supervision, where antitrust law may still try to pierce the "state action" veil. However, admittedly, there remain a number of anticompetitive situations that are indeed state action,[9] and they will be the focus of this article. For example, in the previous "national optical stores versus Californian optometrists" situation, the California legislature passed the ban,[10] which has both explicit intention of restraining competition and active supervision of that restraint. Nonetheless, in such a situation, even if antitrust law cannot apply, important competition issues still exist and cannot be ignored. A petitioning party (most likely a burdened competitor) must find some constitutional basis in order to obtain federal court review. If no constitutional basis for objection exists, probably even the most outrageous exclusionary regulation will be immune from judicial review.[11]

III. One Important Constitutional Basis to Fill in the Gap: the Dormant Commerce Clause

The next important resort would be the dormant Commerce Clause. As previously mentioned, state or local law which improperly burdens or discriminates against interstate commerce is unconstitutional. The dormant Commerce Clause shares with antitrust law the same goal of preserving the free market and free trade by prohibiting states from engaging in differential treatment of in-state and out-of-state market participants.[12] The dormant Commerce Clause and

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[7] Cali. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).
[8] Peter. C. Carstensen, *Controlling Unjustified, Anticompetitive State and Local Regulation: Where is Attorney General "Waldo"?*, 56 ANTITRUST BULL. 771, 775 (2011).
[9] *Id.* at 781.
[10] *Brown*, 567 F.3d at 524.
[11] Carstensen, *supra* note 10, at 781.
[12] Jim Rossi, *Political Bargaining and Judicial Intervention in Constitutional and Antitrust Federalism*, 83 WASH. U. L. REV. 521, 534 (2005).

antitrust law share the same constitutional basis: the Commerce Clause.[13] The dormant Commerce Clause protects interstate markets but not market participants,[14] while antitrust law protects competition but not competitors. By ensuring that interstate competitors could have an equal footing with in-state market participants, the dormant Commerce Clause can help erase unreasonable and unnecessary entry barriers, vitalize interstate market competition, enhance consumer welfare (by broadening consumer choice) and facilitate interstate commerce. And this non-antitrust route may in fact be superior even when antitrust liability can be attached because (1) it forces judges to acknowledge that they, rather than Congress, are doing the balancing; (2) it is likely to lead the courts to a more sensitive consideration of state and federal interests; (3) it poses fewer threats to legitimate state action and to reasonably acting private parties; and (4) sensitivity to the differences between federal antitrust law and the Commerce Clause concerns may serve to keep the antitrust analysis relatively simple while leaving more complex and potentially more egregious situations to Commerce Clause analysis.[15]

However, the dormant Commerce Clause is not a constitutional mandate for competition. It applies in conjunction (and consistent) with competition policy only when a state interferes with interstate market by discriminating against interstate market participants unless the state itself is also a market participant (e.g., some state-owned enterprises).[16] It does not prohibit state government intervention in setting prices, subsidies and taxes, so long as all in-state and out-of-state players are

[13] *See* Gonzales v. Raich, 545 U.S. 1, 16 (2005).
[14] Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127–28 (1978).
[15] AREEDA & HOVENKAMP, *supra* note 4, at 270–71.
[16] Rossi, *supra* note 14, at 534. The Supreme Court stated that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 820 (1976). Interestingly, the state action doctrine seems to recognize a market participant exception as well. As the Supreme Court once stated in dictum that the state action doctrine "does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market." City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 374–75 (1991).

treated the same.[17] Also, while the Clause is not explicit in the text of the Constitution, Congress can always adopt a national policy that preempts or overrides the competitive market between states, and thus overrides the dormant Commerce Clause.[18]

1. The Two-Tier Test

In the limited context where the dormant Commerce Clause does apply, its application has evolved into a two-tier model:

> (1) when a state engages in discriminatory regulatory conduct with respect to interstate commerce, such state laws are subject to stringent scrutiny approaching per se invalidity; (2) even where the state has a legitimate non-protectionist governmental interest and proceeds in a facially neutral fashion, the Court will employ a "balancing" test and will weigh the putative local benefits of the regulation against the burden it places on interstate commerce.[19]

With respect to the first tier – discrimination, a court will make three inquiries: (1) whether the state law is facially discriminatory; (2) whether it has any discriminatory purpose; and (3) whether it has any discriminatory effect.[20] If the answer to any question is affirmative, the court will apply a strict scrutiny test as a review of a "legitimate local purpose and of the absence of nondiscriminatory alternatives."[21] If all three answers are negative, traditionally the court will continue with the second tier balancing test, but in every dormant Commerce Clause case since 1990, the Supreme Court has analyzed the issue often based on the first tier, and the second tier has not been invoked much by the Court.[22]

Therefore, whether a state regulation is discriminatory is the key in the dormant Commerce Clause analysis. There must be differential treatment of in-state business and *similarly situated* out-of-

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[17] Rossi, *supra* note 14, at 534.
[18] *Id.* For example, the McCarren-Ferguson Act exempts the business of insurance from federal antitrust laws in limited circumstances. The authority on insurance is thus transferred. *See* 15 U.S.C. § 1011. Also, the Federal Power Act gives states implied authority over some interstate elements of electric power. *See* 16 U.S.C. §§ 824–824w.
[19] City of Philadelphia v. New Jersey, 437 U.S. 617, 626–27 (1978).
[20] Amerada Hess Corp. v. Dir., 490 U.S. 66, 75 (1989).
[21] Larsen, *supra* note 5, at 851.
[22] *Id.* at 844.

state competitors, which fits within one of the three types of discrimination.[23] The Court found a city ordinance facially discriminatory when it required all milk sold in the city to be processed at a facility located within five miles of the city, which in essence prevented all out-of-state milk producers from entering into the market of the city.[24] The Court found discriminatory purpose in a state statute prohibiting double-tractor trailers in excess of 65 feet in length from using its highways while providing several exceptions for in-state business, when the state governor had declared that allowing such trailers would benefit only a few in-state companies while greatly advantaging *out-of-state trucking firms and competitors* at the expense of state citizens.[25] The Court also found discrimination in effect in a facially neutral state statute with no discriminatory intent which required both in-state and out-of-state dealers in milk products to pay a monthly premium to a fund, when a separate state statute directed the fund to be distributed monthly only to in-state milk dealers.[26]

2. Competition Policy in the Dormant Commerce Clause Analysis

The dormant Commerce Clause may play an important role in promoting competition policy and preserving market competition. The cases above all involved state statutes or city ordinances, which would probably be immune from antitrust scrutiny because (1) the states clearly intended to interfere with free market competition by burdening interstate market participants, and (2) there probably was active supervision. Conceivably, there are times when public interest requires a state to impose certain restraints on an otherwise free market. However, public interest, especially the

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[23] Gen. Motors Corp. v. Tracy, 519 U.S. 278, 299 (1997).
[24] Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951). The Court discussed this state-built entry barrier and its impact on interstate competition. It said, "[i]n thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce."
[25] Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 665, 677 (1981). The state asserted that the law was designed to serve the safety purpose. *Id.* at 691. However, it was merely a pretext. *Id.* at 692. The law not only discriminated against interstate commerce, but impacted market competition by denying interstate competitors equal access and selfishly benefiting local companies.
[26] W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 191 (1994). The law's "avowed purpose and its undisputed effect are to enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States." *Id.* at 195. Local competitors should try to earn competitive and economic advantages themselves rather than from the state. A state cannot help its local companies compete by burdening market competition. *Id.* at 205.

"public interest" provisions in various regulatory statutes, is often interpreted to include competition policy.[27] The dormant Commerce Clause can act as a shield against outrageous exclusionary state regulations, to ensure that state regulations impeding market competition are necessary to serve public interest which often includes competition policy. Therefore, it is appropriate in dormant commerce cases to include a competition policy analysis.

The dormant Commerce Clause should work together with competition policy, and courts should keep competition policy in mind when deciding cases concerning the dormant Commerce Clause. It is difficult to define exactly what competition policy is. One possible definition is "the set of policies and laws which ensure that competition in the marketplace is not restricted in such a way as to reduce economic welfare."[28] However, at the minimum, it implies that more competition is better than less, all things being equal, and that within the context of regulation, efforts should be made to promote open and fair competition to the maximum extent compatible with the purposes of the regulation. Competition policy can help courts decide the following issues surrounding the dormant Commerce Clause: (1) whether the in-state and out-of-state players are similarly situated; (2) whether there is discriminatory purpose; (3) whether there is any discriminatory effect; and (4) whether the putative local benefits of the regulation outweigh the burden it places on interstate commerce.

3. Case Reexamination: California State Law on Commercial Optometric Practice

This article will next take a case decided by the Ninth Circuit (with its plaintiffs' petition for a writ of certiorari pending) as an example. The fact pattern was actually mentioned earlier in this

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[27] For example, Wisconsin's antitrust law has a general statement of policy:

> It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature.

Carstensen, *supra* note 10, at 809 (quoting WIS. STAT. § 133.01 (2009-2010)).

[28] MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 30 (2004).

article. Under California state law, opticians including national optical stores like LensCrafters cannot co-locate with a state-licensed optometrist in their stores opened in California (which means that in their stores they can only sell eyewear and cannot provide eye care services), while in-state optometrists can offer both eye examination and eyewear sales simultaneously.[29] It can be assumed that consumers value convenience and prefer one-stop shopping – having eye examination and buying glasses at the same time.[30] This consumer preference would put out-of-state optical stores at a disadvantage to their in-state competitors. The burdened plaintiffs sued the state and prevailed in the district court. However, the Ninth Circuit reversed, finding no discrimination.

The Ninth Circuit failed to consider the issue of the dormant Commerce Clause in light of competition policy where clear competition concerns were involved. It rarely talked about competition. What is more, it did not consider consumer welfare at all. Competition and consumer protection are among the most important and indispensable aspects of interstate commerce. It is not wise to evaluate the effect of a state regulation on interstate commerce without considering its impact on competition and consumers, where the law has disadvantaged interstate competitors by only allowing them to adopt one much less favorable business model, and has left consumers with fewer choices in the relevant market. The Supreme Court always took competition and consumers into consideration when deciding dormant Commerce Clause cases. For example, the Court in *Tracy* quoted Justice Jackson's famous words:

> Our system, fostered by the Commerce Clause, is that . . . every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.[31]

[29] *Brown*, 567 F.3d at 524.
[30] *Id.*
[31] *Tracy*, 519 U.S. at 299–300 (citing H. P. Hood & Sons, Inc. v. Du Mond, 336 U. S. 525, 539 (1949)).

In *Exxon*, the Court noticed that in-state market participants did not obtain any competitive advantage because of the state law.[32] In his dissenting opinion, Justice Blackmun emphasized the fact that the state law would prevent "the majors from enhancing brand recognition and consumer acceptance through retail outlets with company-controlled standards."[33] And as a result, "[t]heir ability directly to monitor consumer preferences and reactions [would] be diminished."[34] In *Dean Milk*, the Court summarized the city ordinance as "an economic barrier protecting a major local industry against *competition* from without the State."[35] In *Kassel*, the Court relied heavily on the evidence showing that the state's real purpose was to avoid providing a competitive advantage for out-of-state competitors.[36] The *West Lynn Creamery* Court made the focus on competition clearer and stronger by declaring that "[p]reservation of local industry by protecting it from *the rigors of interstate competition* is the hallmark of the economic protectionism that the Commerce Clause prohibits."[37]

The Ninth Circuit lost this important focus. Its determination of "similarly situated" is problematic from the perspective of competition policy. It held that because opticians and optometrists (or ophthalmologists) have different responsibilities, different purposes and different business structures, they are not the same, and therefore in-state optometrists and national optical companies are not similarly situated.[38] Assuming it is true that opticians and optometrists compete in different markets and thus not similarly situated, it is still difficult to understand why an optician with a state-licensed optometrist on-site and an optometrist also selling eyewear are not similarly situated. Opticians may not be health care providers, but they are not trying to provide eye care themselves. Instead, they are bringing state-licensed optometrists to their stores to perform eye examinations. The national opticians and local optometrists were both in California providing the

[32] *Exxon*, 437 U.S. at 126.
[33] *Id.* at 139.
[34] *Id.* at 139–140.
[35] *Dean Milk*, 340 U.S. 349 at 354 (emphasis added).
[36] *Kassel*, 450 U.S. at 677.
[37] *W. Lynn Creamery*, 512 U.S. at 205 (emphasis added).
[38] *Brown*, 567 F.3d at 527–28.

same goods and services to local consumers until the law in question comes into effect.[39] They are similarly situated. Can this strong similarity be defeated simply by the concern for the integrity of a profession? This article would answer negatively.

Instead, the constitutional "similarly situated" analysis should be analogous to the market definition analysis in antitrust law. In a case like this, consumers should decide whether the in-state and out-of-state competitors are similarly situated. If consumers see the goods and/or services provided by the two are reasonably interchangeable, how can the two not be similarly situated in interstate commerce? It is an evaluation based on the Commerce Clause, so why should the integrity of a profession be given priority over market competition and consumers? Admittedly, market definition analysis might eventually find that national optician stores and in-state optometrists are not in the same market for a variety of reasons.[40] To simplify the problem and further develop the dormant Commerce Clause analysis, this article will assume that LensCrafters and Californian optometrists are competing in the same market – the one-stop eye care and eyewear market.

The Ninth Circuit's dismissal of the discriminatory purpose argument would make even less sense if considered under competition policy. The court found the purpose of the legislation to be to protect the optometry profession in California from being taken over by large business interests, but not any economic protectionism.[41] A state legislature may have a legitimate purpose to protect the optometric profession within the state. But to protect it from being taken over by large business interests may go too far, and probably rested on an unjustifiable presumption that those large

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[39] California has agreed to refrain from shutting down LensCrafters' "co-locate" arrangements only until this constitutional challenge is resolved. Petition for Writ of Certiorari, Nat'l Ass'n of Optometrists & Opticians v. Harris, __ U.S. ___ (No. 12-461).

[40] For example, Wal-Mart was long considered not to be in the grocery market because it was deemed to have a different channel of distribution. But the FTC in the Wal-Mart/Amigo case included Wal-Mart and other "big box retailers" into the traditional supermarket market. *See Letter to Donald Clark Re: Matter # 021-0090*, AM. ANTITRUST INST., 2–3 (Dec. 20, 2002), *available at* http://www.antitrustinstitute.org/files/221.pdf. *See also Exxon*, 437 U.S. at 126–27 (the Court found that, although the law created some hardship on interstate refiners, it did not affect their ability to compete because there was no in-state refiner to compete with them in the same market).

[41] *Id.* at 525.

interstate business interests will not compete on the merits and letting them enter into the market would harm consumers. There is no evidence that optometry is a state-specific profession. Rather, like the legal profession, it can appropriately be national or even international. And commercial interests are part of these professions. Don't in-state optometrists make profits out of their eye care services and sales of eyewear? Would we say that a state can pass a law prohibiting national law firms with more than 100 lawyers from opening an office within the state because it wants its local firms to concentrate on serving local people and business free from worries about being taken over by large commercial interests? Free interstate commerce and market competition may help those professions thrive. Consumers should have the right to choose the products in the market, and the market should decide which products can survive.

A state law significantly burdening interstate competitors in the local market cannot be harmonized with the Commerce Clause, unless there is an overriding and fundamental need for it such as health and safety.[42] Even if there is such a need, competition policy would suggest the regulation be tailored so as to achieve the legitimate objective with the minimal reduction in competition.[43] Protecting a profession within the state cannot suffice unless California is able to prove that the health and safety of its citizens will be threatened by letting LensCrafters, for example, have state-licensed optometrists on-site. Admittedly, the profession of optometry has its uniqueness unlike other business and it is in need of certain protection, but these concerns may be

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[42] *Kassel*, 450 U.S. at 671. Regulations that touch upon safety – especially highway safety – are those that "the Court has been most reluctant to invalidate." *Id.* at 670 (citing Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 443 (1978)). A state has wide (though not absolute) authority under its police power to protect its citizens' health and safety. AREEDA & HOVENKAMP, *supra* note 4, at 262.

[43] *See* PETER M GERHART, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES 177 (1979) ("1. Free market competition, protected by the antitrust laws, should continue to be the general organizing principle for our economy. 2. Exceptions from this general principle should only be made where there is compelling evidence of the unworkability of competition or a clearly paramount social purpose. 3. Where such an exception is required, the least anticompetitive method of achieving the regulatory objective should be employed."). *See also* John Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust Cases*, 61 TEX. L. REV. 481, 486 (1982). This is consistent with, if not quite analogous to, the dormant Commerce Clause analysis. Once a court finds discrimination, it will strictly scrutinize the regulation to make sure that there is not less restrictive alternative to achieve the alleged legitimate local purpose. *See supra* notes 22–23 and accompanying text.

better addressed in other ways. It is appropriate for the dormant Commerce Clause to see it as a normal business. And as a result, protecting California's optometric profession may be the same as economic protectionism favoring California businesses. When a court tries to decide whether there is discriminatory purpose, the concern for the integrity of this profession should only be one factor within the totality of circumstances. It cannot override competition policy which is central to the facilitation of interstate commerce.

The Ninth Circuit should have found discriminatory effects from the impact of the law on competition and consumers in California. Because it found that the in-state optometrists and national optical companies were not similarly situated, it did not pursue that discriminatory effect inquiry.[44] The relevant market can be the retail eyewear market in California, where consumer preference for one-stop shopping plays a key role (the relevant market can even be the one-stop eye care and retail eyewear market if the preference is so strong that consumers do not treat separate eye examination and purchase of eyewear as reasonably interchangeable with the one-stop shopping). The market participants include in-state optometrists who also sell eyewear, in-state opticians, and national opticians like LensCrafters. Not being able to co-locate a state-licensed optometrist would be a high (if not absolute) entry barrier and a huge non-reputation-related disadvantage to the national optical companies. Also as a result of this state law, only certain in-state market participants (the state-licensed optometrists) can have the privilege of providing one-stop shopping, while all interstate market participants (the national optical companies) are deprived of the right to offer service that consumers strongly prefer, so that they may not be able to compete effectively.[45] Additionally, consumers are facing fewer choices and may be thus burdened. If they persist in their preference for one-stop shopping, they will have to go to a local market participant. If they prefer

[44] *Brown*, 567 F.3d at 525–28.

[45] It does not affect the discrimination analysis under the dormant Commerce Clause if the burden will also rest on certain in-state market participants in addition to all interstate companies if the benefit will solely go to some other in-state competitors. *Dean Milk*, 340 U.S. at 354 n.4.

the national brands like LensCrafters, they will have to sacrifice the convenience of one-stop shopping. So there are clearly discriminatory effects that hinder free interstate commerce, lessen free market competition and diminish consumer welfare, which are exactly what the dormant Commerce Clause should guard against to fill in the gap left by antitrust law's state action exception.

Once discrimination is found, this California law probably would not survive the heightened scrutiny because there are nondiscriminatory alternatives even assuming that there is a legitimate state interest in protecting the optometric profession. Many states regulate the relationship between the opticians and the optometrists who co-locate, ensuring the health care providers' independence, but they do not prohibit opticians from practicing together with optometrists.[46] There is no apparent reason why California is not able to adopt those less restrictive alternatives.

If, by any chance, the dormant Commerce Clause analysis has to reach the "improper burden" tier, competition policy will still be helpful in finding and balancing any significant burden versus local benefits. When the LensCrafters case went to the Ninth Circuit for the second time on the issue of the second tier analysis, the court found no significant burden, stating that the dormant Commerce Clause did not protect a particular business structure or method of operation.[47] It is true that it would be too far for the dormant Commerce Clause to reach every single business model, but the court lost the big picture of interstate commerce. The Commerce Clause protects free interstate commerce, which includes free market competition. The dormant Commerce Clause protects free interstate commerce from unfair state interference from states, so it must also protect free market competition if a state's differential treatment of in-state and out-of-state business interests harms competition in the relevant market. It may be true, as the Ninth Circuit held, that a shift in market

[46] *See e.g.*, FLA. STAT. §484.006(2) (2010). The district court also found that the state would fail here. *See* Nat'l Ass'n of Optometrists & Opticians v. Lockyer, 463 F. Supp. 2d 1116, 1132–38 (E.D. Cal. 2006). *See also* Petition for Writ of Certiorari, *supra* note 39, at 5, 7.
[47] Nat'l Ass'n of Optometrists & Opticians v. Harris, 682 F. 3d 1144, 1151 (9th Cir. 2012).

share and profits, a shift in supply, or a shift in income cannot justify a dispositive burden,[48] but a totality of these factors, in addition to (and more importantly) the serious impact on interstate competition and consumer welfare may.

The Ninth Circuit misread the Supreme Court's *Exxon* opinion by almost completely ignoring competition issues and consumer welfare when evaluating the burden on interstate commerce. The law at issue in *Exxon* is a Maryland statute providing that a producer or refiner of petroleum products (1) cannot operate any retail service station within the State, and (2) must extend all "voluntary allowances" uniformly to all service stations it supplies.[49] In that case the Supreme Court said that "if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed."[50] But it said that when it was deciding whether the Maryland statute should be preempted by the Robinson-Patman Act or federal competition policy, not whether the statute violated the dormant Commerce Clause.[51] The plaintiffs in the current case are not alleging that the California statute was in conflict with federal antitrust laws or federal competition policy, instead, they are alleging that the statute has burdened interstate commerce and thereby violated the dormant Commerce Clause.

Impact on competition itself may not be conclusive on the issue of the dormant Commerce Clause, but it is an important factor which should not be ignored during the two-tier analysis. When deciding the dormant Commerce Clause issue, the Court in *Exxon* did consider the law's impact on competition. It noticed that although the law created some hardship on interstate refiners, it did not affect their ability to compete because there was no in-state refiner to compete with them. There were in-state independent dealers and they competed with interstate dealers in Maryland, but the law did not apply to any of them at all. The law prohibited the vertical integration of refiners and dealers

[48] *Id.* at 1151–54.
[49] *Exxon*, 437 U.S. at 119–120.
[50] *Id.* at 133.
[51] *Harris*, 682 F.3d 1144, at 1151–54.

universally. The Court found no affected flow of goods, increased costs of rivals, or competitive advantage obtained by in-state competitors, and held that the fact that the burden of a state regulation fell on some interstate companies did not, by itself, establish a claim of discrimination against or impermissible burden on interstate commerce.[52] In contrast, the Ninth Circuit lost sight of competition. It was correct in noting, consistent with *Exxon*, that the fact that the burden of a state regulation fell on some interstate companies was not enough.[53] However, it did not notice that the law here is not a universal ban – it does not prohibit in-state optometrists from selling eyewear. This is the competitive advantage obtained by these in-state competitors. The advantage becomes more powerful because of the consumer preference for one-stop shopping, while in *Exxon*, there was no evidence of consumer preference for Exxon retail stations because the company was also a refiner. As a result there cannot be effective competition (to win consumers) in the current case. This is a significant burden (even assuming no discrimination) on interstate competition, but not only interstate competitors. And the burden on interstate competition is significant enough to be considered an impermissible burden on interstate commerce.

After finding a significant burden, a court should continue to identify and weigh the benefits the law may confer (the Ninth Circuit refused to assess the benefits because it found no discrimination or significant burden).[54] The Maryland statute in *Exxon* was designed to address the problem that producers and refiners were favoring company-operated stations in the allocation of gasoline and that this would eventually decrease the competitiveness of the retail market.[55] In other words, it would benefit market competition. On the other hand, the California statue in the current case may only benefit in-state optometrists (by giving them a monopoly over one-stop shopping) and the optometric profession in the state (the latter one may not even be true).

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[52] *Exxon*, 437 U.S. at 126–27.
[53] *Harris*, 682 F.3d 1144, at 1151–54.
[54] *Id.* at 1155.
[55] *Exxon*, 437 U.S. at 124.

The benefits proposed by California may not outweigh the burden. Admittedly, local businesses need some protection. It is also true that people should respect democracy, but not merely market theory. For example, many people believe that the expansion of Wal-Mart may drive local mom and pop stores out of business.[56] Wal-Mart may have to accept many local regulations against it in order to enter a market.[57] However, it is still doubtful whether a state can go so far as California does to the interstate opticians. It will deprive LensCrafters and other national optical stores of a much more favorable business model, and one of LensCrafters' biggest comparative advantage is efficiency.[58] Moreover, the Court has made it clear that "[w]hether a State is attempting to 'enhance thriving and substantial business enterprises" or to 'subsidize . . . financially troubled' ones is irrelevant to Commerce Clause analysis."[59] Thus, whether in-state optometrists are financially burdened or may be driven out of business because they do not possess economies of scale is irrelevant. The only relevant possible benefit left is the independence of the profession. However, if the court accepts this optometry exception, can other local doctors, local law firms or local accounting firms also ask for special protection? Justice Cardozo warned against crafting exceptions to the dormant Commerce Clause:

> Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. [60]

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[56] Russell S. Sobel & Andrea M. Dean, *Has Wal-Mart Buried Mom and Pop?: The Impact of Wal-Mart on Self Employment and Small Establishments in the United States*, *available at* http://www.be.wvu.edu/div/econ/work/pdf_files/06-05.pdf.
[57] *See* Ylan Q.Mui, *When Wal-Mart Moves In, Neighborhood Businesses Suffer. Right?*, WASHINGTON POST, July 23, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/06/22/AR2008062201717.html.
[58] *See On-Site Lab*, LENSCRAFTERS, http://www.lenscrafters.com/lc-us/eyecare/lab (last visited Oct. 31, 2012) (introducing LensCrafer's well-known "glasses in about an hour" service).
[59] *W. Lynn Creamery*, 512 U.S. at 205 (citing Bacchus Imports, Ltd. v. Dias, 468 U. S., 263, 272 (1984)).
[60] Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

It is hard to imagine that there could be benefits to competition, local consumers, or any other local public interest.[61] Although the question of a balancing test is "one of degree,"[62] it is very likely that in this case the burden is "clearly excessive"[63] in relation to the local benefits.

IV. Conclusion

The dormant Commerce Clause prohibits a state from discriminating or improperly burdening free interstate commerce. It can play an important backup role in maintaining vigorous market competition because at times certain anticompetitive state actions are immune from antitrust scrutiny. When evaluating claims under the dormant Commerce Clause involving competition issues, a court should carefully draw its conclusion in light of interstate market competition and consumer welfare. This is the most consistent way to maintain the spirit of the dormant Commerce Clause implied in the United States Constitution. As Justice Cardozo stated with "his characteristic eloquence,"[64] "[t]he Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[65]

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[61] In fact, an early FTC investigation showed plenty of evidence to the contrary. *See* 54 Fed. Reg. 10305.
[62] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
[63] *Id.*
[64] *W. Lynn Creamery*, 512 U.S. at 205.
[65] *Baldwin*, 294 U.S. at 523.