

2005

Convenience and Lower Prices, But at What Cost? Watching Closely as Discount Superstores Creep Into Manhattan

Kathleen Codey

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

Recommended Citation

Kathleen Codey, *Convenience and Lower Prices, But at What Cost? Watching Closely as Discount Superstores Creep Into Manhattan*, 13 J. L. & Pol'y (2005).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol13/iss1/13>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

**CONVENIENCE AND LOWER PRICES,
BUT AT WHAT COST?:
WATCHING CLOSELY AS DISCOUNT
SUPERSTORES CREEP INTO MANHATTAN**

*Kathleen Codey**

INTRODUCTION

The word “sprawl” evokes images of once rural areas littered with housing developments, strip malls, and winding highways.¹ Located within and between these strip malls and highways lie what retail industry insiders call “big box retailers.”² Big box

* Brooklyn Law School Class of 2005; B.A., Dartmouth College, 2002. For all of the help I received during this process, I would like to thank my family for their love and support, my roommates and friends for making me laugh and keeping me sane, and Dave Weiss for his uncanny ability to sense what I need and make every day more fun than the last.

¹ Edward H. Ziegler, *Urban Sprawl, Growth Management and Sustainable Development in the United States: Thoughts on the Sentimental Quest for a New Middle Landscape*, 11 VA. J. SOC. POL’Y & L. 26, 29 (2003). Geographers and sociologists traditionally define “sprawl” as “low-density suburban and exurban growth that expands in an unlimited and noncontiguous (“leapfrog”) manner outward from the built-up core of a metropolitan area.” *Id.* See also J. Celeste Sakowicz, Note, *Urban Sprawl: Florida’s and Maryland’s Approaches*, 19 J. LAND USE & ENVTL. L. 377, 381 (2004) (describing sprawl as a “land use pattern of sporadic, inconsistent development that occurs away from the center of the metropolis”).

² William E. Roper & Elizabeth Humstone, *Wal-Mart in Vermont—The Case Against Sprawl*, 22 VT. L. REV. 755, 755 (1998); Jonathan Moore Peterson, *Taming the Sprawlmart: Using an Antitrust Arsenal to Further Historic Preservation Goals*, 27 URB. LAW. 333, 335 (1995) (describing how big box retailers are characterized by their “economies of scale, warehouse-type stores, and low prices”). These stores are also criticized as being “shopper-snatchers”

retailers situate themselves in warehouse-type buildings that can occupy between 90,000 and 200,000 square feet.³ These stores either specialize in a single product line or sell a variety of products at discounted prices.⁴ In rural and suburban areas, such stores are surrounded by acres of parking lots that are situated close to major roads and highway interchanges to maximize consumer traffic.⁵ Offering lower prices that draw consumers and revenue incentives that attract state and local governments,⁶ national chain stores position themselves in an attempt to capture a

and “category-killers.” See Jane Holtz Kay, *Ticky-Tacky Big Boxes*, THE NATION, available at <http://www.janeholtzkay.com/Articles/boxes.html> (coining the phrase “shopper-snatchers”); American Studies at Eastern Connecticut University, Shopping Mall Studies, General Terminology (2004), at <http://www.easternct.edu/depts/amerst/MallsTerms.htm> (defining “category killers” as “large national chain store[s] specializing in one line of products, such as hardware and home improvements, office supplies, or toys, that can overwhelm both smaller and more diverse competitors because of its size, variety of merchandise, and prices”).

³ Roper & Humstone, *supra* note 2, at 755. See Constance E. Beaumont & Leslie Tucker, *Big-Box Sprawl (And How to Control It)*, 43 MUN. LAW. 7, 9 (2002) (“The U.S. had only five square feet of retail space per person in 1980; today, that number is 20 square feet.”).

⁴ See American Studies at Eastern Connecticut University, Shopping Mall Studies, General Terminology (2004), at <http://www.easternct.edu/depts/amerst/MallsTerms.htm> (defining “big box” as a “large stand-alone store that specializes in a single line of products” or a “no-frills discount stor[e] that sell[s] in volume”) (last visited Feb. 13, 2005). Common stores that specialize in a single product line include: Home Depot, which sells home improvement items; Best Buy, a discount electronics retailer; and chain drug stores such as CVS or Rite Aid. Discount retailers who diversify their product offerings include Kmart, Wal-Mart, and Target.

⁵ Roper & Humstone, *supra* note 2, at 755.

⁶ Justin Shoemaker, *The Smalling of America?: Growth Management Statutes and the Dormant Commerce Clause*, 48 DUKE L.J. 891, 900 (1999) (highlighting the financial and tax-related benefits to big box development). In communities with lower tax bases, large retailers with even larger profits offer an opportunity for counties and towns to significantly increase their tax revenues. Stephen Kinzer, *Wal-Mart’s Big-City Plans Stall Again*, N.Y. TIMES, May 6, 2004, at A27. The allure of extra tax revenue and the promise of added jobs can be enough for towns to ignore negative characteristics common to this kind of development. *Id.*

MANAGING RETAIL SPRAWL IN MANHATTAN 251

substantial portion of the local market.⁷

But lower prices and new job opportunities are not the only effects these retailers have on communities, regardless of how hard a corporate public relations department tries to persuade residents otherwise.⁸ In rural areas, large-scale retail development spurs waves of secondary development, including new roads, sewage systems, and power stations.⁹ A significant quantity of literature details the deterioration of the picturesque town center in New England in the face of this development.¹⁰ In small northeastern

⁷ Shoemaker, *supra* note 6, at 900 (stating that the economic pressure to allow big box retail development is difficult for towns to resist).

⁸ See Ikea Brochure, "Welcome to Brooklyn . . . Like No Other Place in the World!" (2003) (stating that between 500-600 new "permanent, high-quality jobs" will be created and there will be "tremendous benefits to the community") (on file with author). *But see* Shoemaker, *supra* note 6, at 892 (arguing that "[s]prawl brings, among other things, strains on infrastructure, pollution, traffic congestion, the decline of city centers, the death of small towns, and the destruction of the landscape"); Beaumont & Tucker, *supra* note 3, at 7 ("In the view of many, big-box stores impose hidden costs that don't appear on the price tags of the products they sell: traffic congestion; loss of trees, open space and farmland; displaced small businesses; substitution of jobs that support families with low-paying jobs that don't; air and water pollution; dying downtowns with vacant buildings; abandoned shopping centers; a degraded sense of community; and sprawl.").

⁹ Roper & Humstone, *supra* note 2, at 773 (arguing that this kind of secondary development around retail centers can actually *increase* costs for taxpayers).

¹⁰ See RICHARD V. FRANCAVIGLIA, *MAIN STREET REVISITED: TIME, SPACE, AND IMAGE BUILDING IN SMALL-TOWN AMERICA* (1996) (detailing the effects of sprawl on New England towns and villages). See also David Weiss, *Small Town Identity, Power, and Sprawl: The Local Geopolitics of Wal-Mart Development in Northern Vermont* 26 (2002) (unpublished B.A. honors thesis, Dartmouth College) (on file with the Dartmouth College Library) (detailing two Vermont towns' battles for and against a proposed Wal-Mart); Jessica E. Jay, Note, *The "Malling" of Vermont: Can the "Growth Center" Designation Save the Traditional Village from Suburban Sprawl?*, 21 VT. L. REV. 929 (1997) (describing how Vermont and New England village town centers are at risk from unchecked development by big box retailers); Peterson, *supra* note 2, at 382 (marveling at the fact that the National Trust for Historic Preservation placed the *entire* state of Vermont on its list of endangered places due to the threat it faces from sprawl).

towns, sprawling development is linked to a declining sense of community, as more residents choose to shop on highways than on Main Streets.¹¹ In their quest to beat the competition by offering the lowest prices possible, national retailers such as Wal-Mart often destroy their local competition entirely.¹² Whether located in rural, suburban, or urban areas, national chain stores have an undeniable economic impact on small, independent retailers.¹³ The big box battle is similarly fought in every retail sector and touches every store owner who offers the same goods or services as a big box retailer.¹⁴

Beginning in the 1990s, as the pace of residential and commercial sprawl quickened, towns and private citizens discovered ways to fight back the onslaught of big box development. States passed environmental and growth-control legislation, towns enacted tailored zoning ordinances, and smaller retailers sued national chain stores for violations of state price

¹¹ See Jay, *supra* note 10, for a complete discussion of sprawl's impact on Vermont villages.

¹² See Wal-Mart Stores, About Wal-Mart, The Wal-Mart Culture, Pricing Philosophy [hereinafter Wal-Mart Pricing Philosophy] (outlining Wal-Mart's commitment to beating the prices of competition), at <http://www.walmartstores.com/wmstore/wmstores/HomePage.jsp> (last visited Feb. 14, 2005); See SHARON ZUKIN, POINT OF PURCHASE 28 (2004) [hereinafter POINT OF PURCHASE] (alleging that "[t]he hulking glass boxes of superstores reflect the ghosts of a thousand corner groceries").

¹³ See ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS 23 (Leslie Hollmann ed., American Bar Ass'n 1999) (noting that businesses are not immune to sprawl). In one town, a local hardware store manager commented that "[s]ince Home Depot opened in the Pittsburg (CA) area, the local True Value store, in business since the '30s has disappeared, two local nurseries, a flooring store, and a landscape supply yard is also gone or sold." A Citizen's View of Home Depot: Not in Our Hometown: The Orange Wars, at <http://www.sprawl-busters.com/hometown.html> (1997).

¹⁴ See Glenn Collins, *Decks and the City*, N.Y. TIMES, Sept. 8, 2004, at B1. This article, published two days before the Flatiron location of The Home Depot was to open, features an interview with an independent locksmith regarding his reaction to the grand opening. *Id.* The locksmith expressed concern about his business's chances of survival because The Home Depot has priced its services lower than those of the locksmith. *Id.*

MANAGING RETAIL SPRAWL IN MANHATTAN 253

discrimination laws.¹⁵ Despite these efforts, large, national retailers continue to dominate the marketplace, putting even the most resilient merchants out of business.

Notably, while rural and suburban areas have attempted to blockade further development and mitigate its current effects,¹⁶ urban centers such as Chicago and New York have welcomed this same development with open arms.¹⁷ The Home Depot opened its sixteenth store in New York City on September 10, 2004, and its seventeenth location on December 16, 2004, both to much fanfare.¹⁸ Located in Manhattan's Flatiron and Midtown neighborhoods, the new stores span 83,000 and 108,000 square feet, respectively, and follow Home Depot's "urban neighborhood" store format.¹⁹ Tom Taylor, president of Home Depot's Eastern Division, states that the new stores "will meet a huge untapped demand for home improvement products and services in

¹⁵ See Peterson, *supra* note 2 (describing private federal antitrust litigation, state historical preservation laws, and local zoning plans).

¹⁶ See Jay, *supra* note 10, at 943-54, for a complete discussion of the options available to towns and states wishing to slow the spread of sprawl.

¹⁷ See Press Release, Home Depot, Home Depot Announces its Second Manhattan Store (Sept. 23, 2003), *available at* <http://ir.homedepot.com/ReleaseDetail.cfm?ReleaseID=118589> (stating that the Midtown store will be located at 984 Third Avenue between 58th and 59th Streets). The lower Manhattan location will be 32 West 23rd Street near Fifth Avenue. *Id.* Although the Chicago City Council recently voted against changing city zoning regulations that would allow a second proposed Wal-Mart, the Chicago City Council approved a zoning change in May, 2004 that cleared the way for construction of a Wal-Mart in its West Side neighborhood. *Wal-Mart Halts Chicago Store*, RETAIL MERCHANDISER, Sept. 1, 2004, *at* http://www.retail-merchandiser.com/retailmerchandiser/headlines/article_display.jsp?vnu_content_id=1000622363.

¹⁸ Press Release, Home Depot, The Home Depot to Open First Manhattan Store on Friday (Sept. 9, 2004), *available at* <http://ir.homedepot.com/ReleaseDetail.cfm?PrintPage=yes&ReleaseID=142842>; Press Release, Home Depot, Act II: The Home Depot Takes Center Stage With Second Manhattan Store (Dec. 16, 2004), *available at* <http://ir.homedepot.com/ReleaseDetail.cfm?ReleaseID=150678>.

¹⁹ *Id.* The "urban neighborhood" format means that the store will carry products specifically geared to the urban lifestyle of Manhattan residents. *Id.* The store's stock includes fewer construction materials and more furnishings than a typical suburban store. *Id.*

Manhattan.”²⁰ The “untapped” Manhattan home improvement market to which Taylor refers, however, contains 236 stores within a five-mile radius of the Midtown location; eleven of the stores are located within a one-mile radius of the new location.²¹ Similarly, the five-mile radius of the Flatiron store contains 267 home improvement stores, eleven of which are in a one-mile radius of the Flatiron location.²² If the experiences of independent retailers in suburban and rural areas are any indication, independent hardware and home improvement stores in New York City may soon die a slow financial death that will unalterably change Manhattan’s retail landscape, impact neighborhood character, and harm the city’s economy.²³

This note focuses on the uphill battle that confronts New York City’s small business retailers and residents in the face of a potential overhaul of the city’s retail structure and culture. Given that big box retailers have been eyeing urban areas for years, it is likely that other retailers will follow Home Depot to Manhattan, intensifying and diversifying the impact on the city’s small businesses.²⁴ Part I of this note describes the unique features and

²⁰ *Id.*

²¹ Yellowpages.com, available at <http://www.yellowpages.com> (last visited Oct. 27, 2004). In order to conduct this query, I used a store search by “Distance,” entered the address of the Midtown location, entered the category “hardware” and set the search radius to 5 miles, then 1 mile.

²² Yellowpages.com, available at <http://www.yellowpages.com> (last visited Oct. 27, 2004). In order to conduct this query, I used a store search by “Distance,” entered the address of the Flatiron location, entered the category “hardware” and set the search radius to 5 miles, then 1 mile.

²³ See Kay, *supra*, note 2. Kay writes that superstores “negate planning and drain cities of their very citiness—the complex web of shops, restaurants, and small scale enterprises that support the vitality and diversity of street life and make urban institutions viable.” *Id.*; AL NORMAN, SLAM DUNKING WAL-MART (1999), available at <http://www.sprawl-busters.com/caseagainstsprawl.html> (noting that saturated retail markets deteriorate the economy).

²⁴ Brannon Boswell & Alex McGrath, *We’ll Take Manhattan*, RETAIL TRAFFIC, Vol. 32, May 1, 2003, at 100. Of all urban markets, retailers have been especially hesitant to enter the Manhattan market. *Id.* Retailers often cite high rents, lack of suitable space, logistical problems such as traffic, and NIMBYism (“Not In My Back-yard”) of Manhattan residents as the sources of their reluctance. *Id.* Depending on how well The Home Depot fares in Manhattan,

MANAGING RETAIL SPRAWL IN MANHATTAN 255

attributes of New York City that merit vigorous protection by the mayor, city agencies, and the New York State legislature. Part II discusses the historical underpinnings and present uses of zoning law as a means of controlling land development. Part III examines federal and state efforts to promote environmentally-conscious decision making by federal, state, and regional planners in the evaluation of proposed development projects. Part IV explores the background of federal and state antitrust law and discusses the ways in which state antitrust laws have been used to address the threats to small businesses posed by large national retailers. Part V discusses the limitations of each of the legal options available to New York City in its fight against big box retailers. Finally, with an emphasis on the need for a new statutory scheme in New York State, Part VI outlines the means by which other states have stemmed the tide of retail invasion and suggests that New York City might do the same by passing a stricter antitrust statute. This note concludes that national big box retailers will cause more harm than good to New York City's residents and that their entrance into the urban market should be closely scrutinized.²⁵

I. THE CHANGING RETAIL LANDSCAPE

Manhattan boasts a diverse and vibrant retail sector in which small businesses remain vulnerable to the entrance of additional national chain retailers.²⁶ Although national chain retailing had its start many miles from New York City, industry leaders have established themselves as market-changing forces that impact

however, the retailer may allay fears and attract increased interest from other retailers. *Id.*

²⁵ Arguments in favor of the entrance of Wal-Marts and other big box retailers into local retail markets often focus on the jobs that these stores bring, their convenience, and their ability to offer lower prices for goods. See Diane Cardwell, *Suburban Retailing for the New Brooklyn*, N.Y. TIMES, Apr. 28, 2004, at B1 (describing how some Brooklyn big box retailers "represent long-overdue amenities and convenience, in addition to the promise of jobs").

²⁶ See *infra* Part I.B. (discussing the Manhattan retail landscape and the influx of big box retailers).

communities wherever their stores are built.²⁷ This section profiles the beginnings of “big box” retailing and traces the development of Manhattan’s retail economy through the present time in order to provide context for the potential impact of further retail chain development on the borough of Manhattan.

A. The Trend of Big Box Retailing

In 1962, Sam Walton opened the first Wal-Mart store in Arkansas, marking the beginning of a new era in retailing.²⁸ Although Kmart and Target also opened their first outposts that same year, Wal-Mart’s unique corporate philosophies established it as the leader in the discount retailing business.²⁹ Sam Walton expanded his chain of variety stores to compete with the regional discount retailers of the 1960s who were cutting into his market.³⁰ In doing so, he took charge of the retail market by building discount stores that advanced a bargain culture and an emphasis on community.³¹ Together, these stores “ushered in a new order of shopping.”³² Unlike the department stores already in existence, these discount retailers targeted the middle-income shopper and

²⁷ See *infra* Part I.A. (summarizing a study conducted to analyze the economic impact of big box retailers on urban communities). See also *supra* notes 8-14 (describing big box retail impacts on rural communities).

²⁸ See Wal-Mart Stores, About Wal-Mart, The Wal-Mart Culture, The Story of Wal-Mart [hereinafter Story of Wal-Mart] (stating that the first Wal-Mart opened in Rogers, Arkansas in 1962), at <http://www.walmartstores.com/wmstore/wmstores/HomePage.jsp> (last visited Feb. 14, 2005).

²⁹ See *id.* When Wal-Mart went public in 1970 it received the funds to rapidly spread across the nation and establish a toehold over its competitors. *Id.* See also POINT OF PURCHASE, *supra* note 12, at 82 (noting that Sam Walton instituted a unique corporate strategy involving heavy employee oversight, a no-frills corporate policy that applied to employees and store décor, and a heavy-handed management style).

³⁰ See The Story of Wal-Mart, *supra* note 28 (describing how Sam Walton wished to compete with larger regional chain stores).

³¹ POINT OF PURCHASE, *supra* note 12, at 80 (noting that in “Wal-Mart’s mythology . . . a discount store is a space of community as well as of bargain culture”).

³² *Id.*

MANAGING RETAIL SPRAWL IN MANHATTAN 257

offered brand name products at bargain prices in a convenient, one-stop-shopping setting.³³ Wal-Mart currently boasts annual sales of more than a quarter trillion dollars and stands as the world's largest company, employing 1.3 million workers who serve an estimated 100 million customers each week.³⁴

Economists and urban planners have documented the notable impact of large national chain stores on the basic economics of the retail industry and city life generally.³⁵ Stores such as Wal-Mart, Home Depot, Target, and their counterparts sell the same or substantially similar items at consistently low prices.³⁶ In contrast to the product originality heralded by smaller stores, national chain retailers emphasize the quantity of sales and aim to sell the greatest number of items possible in order to generate revenue.³⁷ The mass sale of similar products is enabled by negotiations between large nationwide retailers and suppliers. Through supplier arrangements, large, nationwide retailers can negotiate reduced prices from suppliers and, in turn, can price their inventories at lower amounts

³³ *Id.* at 83-84. "From Woolworth's to Wal-Mart, these stores have encouraged us to think 'low prices—every day' is a universal human right." *Id.* at 84.

³⁴ Andy Serwer et al., *The Waltons: Inside America's Richest Family*, FORTUNE, Nov. 15, 2004, at 86; Wal-Mart Stores, News Center, Facts, Photos, and General Information, Wal-Mart Stores, Inc. at a Glance, at <http://www.walmartstores.com/wmstore/wmstores/HomePage.jsp> (providing statistics for the number of Wal-Mart employees and customers).

³⁵ See Mark Jacobson, *Supersize City: How could it be there are more McDonalds here than anywhere else?*, NEW YORK, May 10, 2004, at 30 (lamenting the influx of national retailers and restaurants into Manhattan); POINT OF PURCHASE, *supra* note 12, at 63 (discussing how big box stores sell things you can get anywhere, but at a lower price).

³⁶ See Sam's Way, at http://www.walmart.com/cservice/aw_samsway.gsp?NavMode=9 (assuring Wal-Mart customers that the company will pass along savings to them, and offer their assortment of products at "Every Day Low Prices").

³⁷ See Wal-Mart Pricing Philosophy, *supra* note 12 (describing Wal-Mart's commitment towards striving for a high volume of sales to make up for discounted prices); POINT OF PURCHASE, *supra* note 12, at 63 (stating that discount stores are "places where you don't shop for something special that you can't find anywhere else: you shop for the lowest prices").

than their smaller, regional competitors.³⁸

Attracted by the lower prices enabled by supplier arrangements, consumers frequently elect to shop at large national chain stores instead of smaller local retailers. By way of example, the consumer who once shopped at the neighborhood hardware store for paint or at the drug store for Tylenol knows that the product will be identical whether purchased from small retailer X or big chain store Y. As a result, the consumer will buy the product where it costs less, usually at chain store Y.³⁹ Similarly, the consumer who once paid a premium for an original piece of clothing may sacrifice his desire for uniqueness for the “right price,” settling instead on an imitation design.⁴⁰ The pricing schemes of national chain retailers affect even the most rooted competitors and frequently drive smaller competitors out of the market.⁴¹

This phenomenon is especially noticeable in the retail clothing industry.⁴² Since the advent of the discount superstore, “retail merchants have been torn between marketing to shoppers’ interest in low prices and to their emotional identification with specific brands.”⁴³ Many retailers have gone out of business, unable to

³⁸ See Anthony Bianco & Wendy Zellner, *Low prices are great. But Wal-Mart’s dominance creates problems—for suppliers, workers, communities and even American culture; Is Wal-Mart Too Powerful?*, BUS. WK., Oct. 6, 2003, at 100, available at 2003 WL 62195858 (“Wal-Mart has relentlessly wrung tens of billions of dollars in cost efficiencies out of the retail supply chain, passing the larger part of the savings along to shoppers as bargain prices.”); Jay, *supra* note 10, at 941 (stating that neighborhood “mom and pop” stores have difficulty matching the price and selection of larger retailers).

³⁹ See Bianco & Zellner, *supra* note 38. Bianco & Zellner describe how Wal-Mart passes along savings to customers and is then rewarded by seeing 135 million shoppers per week shop in its stores. *Id.*

⁴⁰ POINT OF PURCHASE, *supra* note 12, at 63 (noting that discount stores “are places where you don’t shop for something special that you can’t find anywhere else: you shop for the lowest prices”).

⁴¹ See Bianco & Zellner, *supra* note 38. For every Wal-Mart supercenter that opens in the next 5 years, two other supermarkets will close. *Id.*

⁴² See POINT OF PURCHASE, *supra* note 12, at 101.

⁴³ *Id.*

MANAGING RETAIL SPRAWL IN MANHATTAN 259

compete with the low prices of Target and Wal-Mart.⁴⁴ A study commissioned by one Chicago neighborhood facing future “big box” development highlights the economic impact of retail development on local communities.⁴⁵ The study compared the economic impact on the local community of ten local businesses to the impact of an equal number of chain store competitors.⁴⁶ The study concluded that the apparent positive economic impacts of chain stores on the community disappear when a municipality accounts for commonly-ignored factors such as revenue and square footage.⁴⁷ According to the study, for every \$100 that a consumer spends at a chain store, \$43 will remain in the local economy.⁴⁸ By contrast, for every \$100 that a consumer spends at a local business, \$73 will remain in the local economy.⁴⁹ The study concluded that locally-owned businesses offer communities a quantifiable advantage over national competitors in the form of charitable contributions, expenditures on local labor, and additional money circulating in the local economy.⁵⁰

⁴⁴ *Id.*

⁴⁵ See Civic Economics, *The Andersonville Study of Retail Economics 4* (Oct. 2004) [hereinafter *Andersonville Study*] (comparing ten local firms to ten chain stores), available at http://www.newrules.org/retail/news_slug.php?slugid=269. Andersonville is a Chicago neighborhood that is attracting interest from national chain retailers. *Id.* at 2. The Andersonville Development Corporation and Andersonville Chamber of Commerce commissioned the study to assess the economic impact a proposed Borders bookstore would have on the existing downtown businesses. *Id.*

⁴⁶ *Id.* at 2.

⁴⁷ *Id.* at 3.

⁴⁸ *Id.* at 5.

⁴⁹ *Id.*

⁵⁰ *Id.* “That means 70 percent more money circulating in the local economy, which may mean 70 percent more home improvement, 70 percent more in the collection plate, and 70 percent more in taxable transactions to fund city services.” *Id.* See *id.* at 4-5 (describing how once the economic impact studies were adjusted for the size of the stores, the local businesses produced more positive impact than the national chain stores). Additional studies conducted in other communities support these conclusions.

B. New York City

Geographers, city planners, and residents appreciate and extol the virtues of New York City's retail landscape.⁵¹ Stretching over twenty-two square miles, each of Manhattan's neighborhoods has distinct architecture, residents, restaurant offerings, and retail landscapes.⁵² The city's retail offerings play a large part in creating and preserving its culture.⁵³ "The wealth and variety of new shops in New York enable the media to present shopping as one of the city's cultural attractions—an alternative to the suburbanization and standardization that have engulfed the rest of the country."⁵⁴

Manhattan's first distinct retailing district emerged in the late eighteenth century with the 1789 opening of New York City's first department store, A.T. Stewart's Marble Palace.⁵⁵ Originally

⁵¹ See Paul Goldberger, *The Mall of Manhattan*, METROPOLIS MAG., Mar. 2001, available at http://www.metropolismag.com/html/content_0301/nyc.htm (extolling the benefits and advantages to living in Manhattan); New York City & Company, *Shopping* (2004) [hereinafter *New York City Shopping*] (New York City's official tourism website touts the city as a "shopper's paradise," claiming that a shopper can find "anything here from every corner of the globe."), at <http://www.nycvisit.com/shopSearch/index.cfm?pagePkey=1281>.

⁵² NY.com, at <http://www.ny.com/histfacts/statistics.html>.

⁵³ SHARON ZUKIN, *THE CULTURES OF CITIES 187-88* (1995) [hereinafter *CULTURES OF CITIES*]. Zukin devotes an entire chapter of her book to the role that shopping plays in urban centers and notes that among the many effects retail shopping has, it is "one of the modern city's greatest cultural attractions." *Id.* Zukin also writes that central shopping districts and consumption spaces are places where "identities and communities are formed." *Id.* at 190. The author, a Manhattan resident, also vividly describes her shopping rituals and praises Manhattan's shopping opportunities. *Id.* "The variety of goods, the scale of the stores, the easy conversations with farmers and shopkeepers: these are things I love about New York; they make the city's huge size and fast pace bearable." *Id.* at 5. See also Steven Kurutz, *Obsessed!*, N.Y. TIMES, May 2, 2004, §14, at 1 (discussing the grocery store loyalty and the ensuing grocery store "culture" in Manhattan).

⁵⁴ POINT OF PURCHASE, *supra* note 12, at 27.

⁵⁵ Mona Domosh, *Shaping the Commercial City: Retail Districts in Nineteenth-Century New York and Boston*, 80 ANNALS OF THE ASS'N OF AM. GEOGRAPHY 268, 273-74 (New York's retailing district first emerged in 1780); POINT OF PURCHASE, *supra* note 12, at 21 (discussing A.T. Stewart's Marble

MANAGING RETAIL SPRAWL IN MANHATTAN 261

located on the southern tip of Manhattan, the borough's retail district eventually moved uptown by 1920, as most of the big department stores relocated to Midtown to follow their consumer base.⁵⁶ Between 1880 and 1920, the "golden age of department stores," these retailers became the "new theaters of consumption" and helped transform shopping into one of New York City's principal attractions.⁵⁷ In contrast to the national chain stores that presently dominate the marketplace, the city's department stores did not offer their goods at discount prices;⁵⁸ rather, they enticed customers, mainly women, with desired personal services and amenities.⁵⁹ The early department stores influenced Manhattan's cultural development and quickly became surrounded by a diverse array of retailers providing goods other than clothing.⁶⁰ During the next century, smaller retailers spread throughout Manhattan, spurred on by a strong capitalist drive in the marketplace, the faltering of urban department stores in the 1970s, and a strong wave of immigration.⁶¹ Smaller retailers eventually assumed their position as a mainstay of Manhattan's and New York City's culture.⁶²

Palace).

⁵⁶ POINT OF PURCHASE, *supra* note 12, at 116 (stating that B. Altman, Macy's, Lord & Taylor, and Bonwit Teller eventually settled between Thirty-sixth and Forty-fourth Streets); *Id.* at 21 (stating that Saks Fifth Avenue and Bonwit Teller eventually relocated even further north).

⁵⁷ *Id.* at 20.

⁵⁸ *Id.* at 119. Another difference between department stores and big box discount stores relates to the products they sell. *Id.* at 140. Starting in the 1960s, most department stores, with the exception of Sears, eliminated the "hard" goods from their inventory and began to focus solely on clothing and sometimes, furniture. *Id.*

⁵⁹ *Id.* (noting that B. Altman wooed middle-class women shoppers with personal services like hairdressing salons and fur storage and with such amenities as elegant ladies' rooms, restaurants, and post offices).

⁶⁰ *Id.* at 21 (noting that "[f]rom the 1840s, street corners sprouted butcher shops, bakeries, and grocery stores, while more expensive shops for luxury goods clustered in the center").

⁶¹ *Id.* at 24-25 (describing the rise and fall of department stores, and the role of immigrant entrepreneurs in reshaping New York City's retail composition).

⁶² POINT OF PURCHASE, *supra* note 12, at 9 (comparing Manhattan to

In 1996, Manhattan greeted its first national discount retailer.⁶³ Kmart moved that year into two locations, one in the East Village into a building once occupied by the Wanamaker department store, and a second in Midtown in a building attached to Pennsylvania Railroad Station.⁶⁴ Following Kmart's lead, other large, national chain stores, including Best Buy, Staples, Office Depot, and eventually, Home Depot, soon entered the Manhattan retail market. In September 2004, Home Depot opened a new two-story outpost in the Flatiron District of Manhattan, prompting one critic to lament that the borough was becoming homogenized by chain stores and restaurants.⁶⁵

II. ZONING LAW

Zoning law is the oldest and most frequently utilized legal option to control land use development.⁶⁶ Zoning ordinances "dictate the types of uses to which land may be put, the density at which development may happen, the height, size and shape of buildings, and the mix of commercial, residential, public, and other

Philadelphia and noting that all of Manhattan seems like a "downtown" shopping district). *See id.* at 19-20 (describing the factors which contributed to the strengthening of Manhattan's retail culture).

⁶³ Amy Tsao, *Manhattan—Where Discount Retailers Fear to Tread*, BUS. WK. ONLINE, Jan. 23, 2002, available at http://www.businessweek.com/bwdaily/dnflash/jan2002/nf20020123_0412.htm (stating that Kmart moved into its East Village location in 1996).

⁶⁴ *Id.*; POINT OF PURCHASE, *supra* note 12, at 87 (stating that Kmart took over the old Wanamaker department store). Kmart operates its second Manhattan location at 250 West 34th Street. Kmart Store Locator, at <https://mykmart.com/storelocator/storelocator/storelocatorindex.jsp> (last visited Nov. 4, 2004).

⁶⁵ Jacobson, *supra* note 35, at 30.

⁶⁶ RUTHERFORD H. PLATT, *LAND USE AND SOCIETY: GEOGRAPHY, LAW AND PUBLIC POLICY* 215 (Island Press 1996) (explaining that zoning gained its popularity in the 1920s). Zoning gained popularity as the nation's character shifted from rural to urban and communities needed a regulatory measure to control land use. *Id.* Land use zoning is the most widespread technique used to control land use in every major United States city except for Houston, Texas. *Id.* at 216. Zoning is also the broadest available technique since it applies to most uses of private land as well as public. *Id.* at 217.

MANAGING RETAIL SPRAWL IN MANHATTAN 263

land uses in each locality.”⁶⁷ Although it originated in Germany, zoning has become a “quintessentially American institution” due to its enthusiastic adoption by the United States beginning in the seventeenth century.⁶⁸ Land-use zoning owes much of its popularity to the fact that it is the broadest available land control technique.⁶⁹

A. Zoning and the Federal Government

Zoning gained national recognition and government support in 1922, when the U.S. Department of Commerce published a model statute called the Standard State Zoning Enabling Act (SZA).⁷⁰ The SZA empowered and encouraged the legislative bodies of states to, in turn, empower their municipalities to enact zoning regulations for a variety of purposes so long as the resulting regulations were in accordance with a “comprehensive plan.”⁷¹ To provide additional guidance on the meaning of the term “comprehensive plan,” the Department of Commerce issued a second model act in 1928, the Standard City Planning Enabling

⁶⁷ John R. Nolon, *Comprehensive Land Use Planning: Learning How and Where to Grow*, 13 PACE L. REV. 351, 351 (1993).

⁶⁸ PLATT, *supra* note 66, at 215; ALEXANDER GARVIN, *THE AMERICAN CITY: WHAT WORKS, WHAT DOESN'T* 356 (McGraw-Hill 1996). Boston, Massachusetts enacted legislation in 1672 that set regulations for building materials. *Id.* In 1692 the Province of Massachusetts Bay limited certain businesses to particular areas. Nolon, *supra* note 70, at 356. In 1869, an Illinois developer created deed restrictions for housing placement and decoration. *Id.*

⁶⁹ PLATT, *supra* note 66, at 216-17 (noting that zoning can be applied to “to virtually any private use of land and many public uses” and is the most widespread, broadest, and most contentious land use tool). Zoning is considered contentious because it has endured spates of public support, ambivalence, and opposition. *Id.* at 216.

⁷⁰ Nolon, *supra* note 67, at 357. See Standard State Zoning Enabling Act of 1926, available at <http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf> (last visited Feb. 14, 2005).

⁷¹ See Standard State Zoning Enabling Act, § 1 (1926) (empowering local legislative bodies to enact zoning regulations) (last visited Oct. 29, 2004). See also *id.* at §3 (providing that “[s]uch regulations shall be made in accordance with a comprehensive plan”) (last visited Oct. 29, 2004).

Act (SPEA).⁷² All fifty states subsequently enacted some version of the SZEAA; to date, forty-seven of these statutes remain in force.⁷³

In 1926, municipal exercises of zoning power were upheld by the U.S. Supreme Court in *Village of Euclid, Ohio v. Ambler Realty Company*.⁷⁴ In that case, the plaintiff landowner challenged the municipality's zoning ordinance, arguing that its encroachment upon his property violated his federal and state constitutional rights and lowered the value of his land.⁷⁵ The Court upheld the village's zoning ordinance and granted broad constitutional leeway to municipal zoning attempts nationwide, recognizing that the nation's shift towards an urban character required municipal regulation.⁷⁶

Village of Euclid established a deferential standard of review for the zoning decisions of local governments.⁷⁷ The Court

⁷² See Nolon, *supra* note 67, at 359 (discussing the purpose and effects of the Standard City Planning Enabling Act); Standard City Planning Enabling Act of 1928, available at <http://www.planning.org/growingsmart/pdf/CPEnablingAct1928.pdf> (last visited Feb. 13, 2005).

⁷³ Michael Lewyn, *Twenty-First Century Planning and the Constitution*, 74 U. COLO. L. REV. 651, 655-56 (citing Am. Planning Ass'n, *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change* (2002), available at <http://www.planning.org/growingsmart/> (last visited Oct. 29, 2004)).

⁷⁴ 272 U.S. 365 (1926).

⁷⁵ *Vill. of Euclid*, 272 U.S. at 384:

The ordinance is assailed on the grounds that it is in derogation of section 1 of the Fourteenth Amendment to the federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the state of Ohio.

Id.

⁷⁶ *Id.* at 388 (upholding the ordinance). The Court recognized that “[u]ntil recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.” *Id.* at 386-87.

⁷⁷ *Id.* at 388. The majority held that in order to be upheld, zoning ordinances and regulations “must find their justification in some aspect of the

MANAGING RETAIL SPRAWL IN MANHATTAN 265

explained that local zoning ordinances will be upheld as constitutional so long as they are not clearly arbitrary and unreasonable, and bear a substantial relation to “public health, safety, morals, or general welfare.”⁷⁸ The majority noted that as communities continue to grow and develop, they would require “additional restrictions in respect of the use and occupation of private lands in urban communities.”⁷⁹

B. Zoning and Planning Processes in New York City

New York adopted and codified the Standard Zoning Enabling Act in 1913 and authorized its cities, and later its towns and villages, to create plans and zone for specific land use so long as they performed these functions in accordance with a “comprehensive plan.”⁸⁰ New York City derives its power to zone for specific land usage within its borders from this state legislation.⁸¹ Due to the legislation’s emphasis on compliance with a comprehensive plan, land use planning provides the backdrop for municipal zoning actions and guides the decisions made jointly by

police power, asserted for the public welfare.” *Id.* The Court also noted that the issue of an ordinance’s legitimacy “varies with circumstances and conditions.” *Id.* See also Patrick J. Skelley, *Defending the Frontier (Again): Rural Communities, Leap-Frog Development, and Reverse Exclusionary Zoning*, 16 VA. ENVTL. L.J. 273, 276-77 (1997) (describing how local governments benefit from the decision in *Village of Euclid, Ohio v. Ambler Realty Company*).

⁷⁸ *Vill. of Euclid*, 272 U.S. at 395.

⁷⁹ *Id.* at 386-87.

⁸⁰ See N.Y. GEN. CITY LAW § 20(24)-(25) (McKinney 2004) (The legislature enacted this legislation in 1913.); N.Y. TOWN LAW § 261 (McKinney 2004) (the legislature enacted this legislation in 1932); N.Y. VILLAGE LAW § 7-700 (McKinney 2004) (the legislature enacted this statute in 1972). See also N.Y. TOWN LAW § 263; N.Y. VILLAGE LAW § 7-704; N.Y. GEN. CITY LAW § 20(25) (McKinney 2004). These three provisions use the terms “comprehensive plan” and “well-considered plan” interchangeably.

⁸¹ New York City Department of City Planning, Zoning, History of NYC Zoning [hereinafter New York City Zoning History], at <http://www.nyc.gov/html/dcp/html/zone/zonehis.html> (last visited Feb. 14, 2005). Although New York City’s 1916 zoning ordinance was the first in the nation, it subsequently had to tailor itself to state zoning law requirements. *Id.*

the New York City Council and Planning Commission.⁸²

Enacted in 1961, the New York City Zoning Resolution (Resolution) provides the foundation for every city land use decision.⁸³ The Resolution contains a map of the entire city and depicts the uses for which pieces of land are zoned. The text of the Resolution “establishes zoning districts and sets forth the regulations governing land use and development.”⁸⁴ Within the municipal government, the City Planning Commission has the authority to propose and adopt resolutions that amend the text or zoning maps of the Resolution; however, the City Council, the city’s legislative body, retains the exclusive authority to enact or reject these amendments.⁸⁵ Further, the New York City Charter authorizes the City Council to amend or enact regulations on its own accord, provided that the Council considers the potential effects of the regulations on surrounding areas and implements the regulations as part of a comprehensive plan that is drafted by the

⁸² See New York City Zoning History, *supra* note 81 (stating that the Resolution took effect in 1961); NEW YORK, N.Y., ZONING RESOLUTION, art. VII, § 75-00, available at <http://www.nyc.gov/html/dcp/html/zone/zonetext.html> (last visited Feb. 14, 2005) (describing the joint authority of the City Planning Commission and City Council). See also Nolon, *supra* note 67, at 352 (describing how zoning and planning go hand in hand since “[a]s the predicate for zoning, comprehensive planning is a critical public function”).

⁸³ See NEW YORK, N.Y., ZONING RESOLUTION, art. I, § 11-111, available at <http://www.nyc.gov/html/dcp/html/zone/zonetext.html> (last visited Feb. 14, 2004) (decreeing that all new development on unused land shall be in accordance with the regulations of the Resolution); *Id.* at §11-112 (decreeing that all new development on previously developed land shall be in accordance with the regulations of the Resolution).

⁸⁴ New York City Department of City Planning, Zoning, Zoning Text, at <http://www.nyc.gov/html/dcp/html/zone/zonetext.html> (last visited Feb. 14, 2005).

⁸⁵ The procedure for amendments to the Zoning Resolution is as follows: “The City Planning Commission shall adopt resolutions to amend the text of this Resolution or the zoning maps incorporated therein, and the City Council shall act upon such amendments, in accordance with the provisions of the New York City Charter.” NEW YORK, N.Y., ZONING RESOLUTION, art. VII, § 75-00, available at <http://www.nyc.gov/html/dcp/html/zone/zonetext.html> (last visited Feb. 14, 2005).

MANAGING RETAIL SPRAWL IN MANHATTAN 267

City Planning Commission.⁸⁶

Since the 1961 enactment of its Zoning Resolution, New York City has relied on the local zoning ordinance to control the pace and form of development in the metropolis.⁸⁷ By statute, New York City may exercise its zoning discretion with respect to building type, height, and usage, provided that its zoning regulations are “designed to promote the public health, safety, and general welfare.”⁸⁸ New York City’s zoning scheme classifies each piece of land by its use: manufacturing, commercial, and residential.⁸⁹ Development within each of these districts then depends upon the use, bulk, and parking requirements found within the Zoning Resolution.⁹⁰ For instance, any new development on a

⁸⁶ N.Y. GEN. CITY LAW § 20(25) (McKinney 2004). Section 20(25) states that the city may:

regulate and restrict the location of trades and industries and the location of buildings, designed for specified uses, and for said purposes to divide the city into districts and to prescribe for each such district the trades and industries that shall be excluded or subjected to special regulation and the uses for which buildings may not be erected or altered. Such regulations shall be designed to promote the public health, safety and general welfare and shall be made with reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development, in accord with a well considered plan.

Id. Although New York City’s Department of City Planning oversees the planning and land-use processes of New York City, the City Planning Commission is the entity that directly oversees the drafting of amendments to the City Zoning Resolution and administers the provisions of the existing resolution. New York City Department of City Planning, Zoning, About Zoning [hereinafter About New York City Zoning], at <http://www.nyc.gov/html/dcp/html/zone/zonetod.html> (last visited Feb. 14, 2005).

⁸⁷ Nolon, *supra* note 67, at 367. For a broad history of New York City zoning law, see New York City Zoning History, *supra* note 81.

⁸⁸ N.Y. GEN. CITY LAW § 20 (McKinney 2004). Generally, section 20 is a grant of specific powers to New York City government. Sections 24 and 25 specifically relate to the granting of zoning powers given to the city.

⁸⁹ About New York City Zoning, *supra* note 86 (stating that the three types of designation are residential, commercial, and manufacturing).

⁹⁰ *Id.* Stating that:

parcel of land in New York City must comply with the land's use as designated by the 1961 Zoning Resolution.⁹¹ If a developer wishes to construct a building that does not comply with the parcel's designation, he must challenge the ordinance before the Board of Standards and Appeals or the City Planning Commission.⁹² However, if the development does not conflict with the zoning map designation, the developer is entitled to proceed with development "as-of-right" and need only obtain a building permit before commencing construction.⁹³ The privilege of as-of-

Each zoning district regulates permitted uses; the size (bulk) of the building permitted in relation to the size of the lot; the required open space for residential uses on the lot or the maximum amount of building coverage showed on the lot; the number of dwelling units permitted on the lot; the distance between the building and the street; the distance between the building and the lot line; the amount of parking required; and other requirements applicable to specific residential, commercial, or manufacturing activities, including the size and placement of signs.

Id.

⁹¹ NEW YORK, N.Y., ZONING RESOLUTION, art. I, ch. 1, §§11-112, available at <http://www.nyc.gov/html/dcp/html/zone/zonetext.html> (last visited Feb. 14, 2005) (stating that all new uses of land can only be used, constructed or developed in accordance with the Zoning Resolution).

⁹² See NEW YORK, N.Y., ZONING RESOLUTION, art. VII, § 72-01, available at <http://www.nyc.gov/html/dcp/html/zone/zonetext.html> (2004) (granting broad powers to the Board of Standards and Appeals for review of the resolution). See also NEW YORK, N.Y., ZONING RESOLUTION, art. VII, § 74-01, available at <http://www.nyc.gov/html/dcp/html/zone/zonetext.html> (last visited Feb. 14, 2005) (granting power to the City Planning Commission to hear applications for modification of zoning designations). Although dual authority exists, the City Planning Commission must still follow the provisions of the Zoning Resolution when making its decisions. *Id.*

⁹³ About New York City Zoning, *supra* note 86 (defining "as-of-right development"). The Department of City Planning stipulates that:

Most development or use of unimproved land need meet only the provisions of the Zoning Resolution to be granted a building permit as a matter of right. This means that a developer may build a structure "as-of-right" if the Department of Buildings is satisfied that the structure complies with the provisions of the Zoning Resolution and the Building Code. No action is required by the City Planning Commission under such circumstances. The developer simply files plans with the

MANAGING RETAIL SPRAWL IN MANHATTAN 269

right development eliminates the need for input from the City Planning Commission.⁹⁴

C. Zoning as a Tool to Encourage Smart Retail Development

Due to the practical implications of zoning and land use regulations, “they are perhaps the greatest determinative factor of whether a project can be constructed at a given site.”⁹⁵ Since zoning decisions enjoy great judicial deference, municipalities frequently invoke zoning for specific purposes, including fighting unwanted retail development.⁹⁶ To control retail development, a municipality must accomplish two things. First, it must create a comprehensive plan that announces its goal of regulating future development.⁹⁷ Next, it must enact zoning ordinances that implement the plan.⁹⁸ According to *Village of Euclid*, after complying with the above steps, the city can defend its zoning decisions on the grounds that the ordinance was not clearly

Department of Buildings and can begin construction upon issuance of a building permit.

Id.

⁹⁴ *Id.*

⁹⁵ MICHAEL E. CUSACK & JOHN P. STOCKLI, JR., *ZONING AND LAND USE 3* (New York State Bar Association 2003).

⁹⁶ *See supra* notes 69-75 and accompanying text (discussing the judicial deference exhibited towards zoning decisions); Nolon, *supra* note 67, at 353 (noting that since localities are responsible for zoning, they can zone in order to accomplish their own specific objectives); NEW YORK, N.Y., *ZONING RESOLUTION* art. I *available at* <http://www.nyc.gov/html/dcp/html/zone/zonetext.html> (last visited Feb. 14, 2005) (The preamble to the city’s zoning resolution states that “[t]his Resolution is adopted in order to promote and protect public health, safety and general welfare.”). *See also* *Forte v. Borough of Tenafly*, 255 A.2d 804 (N.J. Super. Ct. App. Div. 1969) (considering that the purpose of the town’s zoning decision was to restrict commercial development to specific property as a means of revitalizing the town’s central business district, the court upheld the zoning decision even after Plaintiff purchased land intending to build a supermarket, and the town subsequently rezoned the land for non-commercial use).

⁹⁷ *See* Nolon, *supra* note 67, at 352 (arguing that since a town’s plan can be whatever the town wants it to be, zoning is equally malleable).

⁹⁸ *Id.*

arbitrary or unreasonable and that it was a valid exercise of the municipality's police power.⁹⁹

Municipalities and states have taken different approaches in their attempts to use zoning law as a tool to guard against future "big box" development in their communities. For example, city zoning ordinances may place caps on the square footage of an allowed development, set forth stringent rules regarding parking lots on a given site, or even require the completion of economic impact studies that relate to proposed development.¹⁰⁰ Although these efforts have met with sporadic success, large national retailers have adapted themselves to meet these efforts, even reducing the size of their stores by 1,000 square feet so as to avoid the 100,000 square feet cap imposed by some municipalities.¹⁰¹

III. ENVIRONMENTAL LAW

In recognition of the potential impact of land use development projects on the environment, Congress enacted the National Environmental Policy Act (NEPA) in 1969.¹⁰² NEPA sought to

⁹⁹ *Vill. of Euclid*, 272 U.S. at 395. See *supra* Part II.A.

¹⁰⁰ See *Sprawl-Busters, Victories* (2004), at <http://www.sprawl-busters.com/victoryz.html>. This portion of the Sprawl-Busters website contains links articles documenting successful efforts of communities to block big box retailers. *Id.* In Kansas, one municipality adopted a multi-faceted ordinance that stipulated detailed caps on square footage as well as regulations concerning the parking lot's size and appearance. *Sprawl-Busters, Planners OK Innovative Cap on Floor Size* (Oct. 8, 2004), at <http://www.sprawl-busters.com/search.php?readstory=1502>. In Los Angeles, the City Council issued a preliminary approval vote of a zoning ordinance which would require economic impact studies of any store over 100,000 square feet. *Sprawl-Busters, City Council Takes First Vote on Big Box Impact Ordinance* (Aug. 10, 2004), at <http://www.sprawl-busters.com/search.php?readstory=1499>.

¹⁰¹ Anita French, *Smaller Supercenters in Wal-Mart's Future*, MORNING NEWS, Nov. 11, 2004, available at http://www.nwaonline.net/articles/2004/11/04/wal_-_mart/77wmurban.txt. Wal-Mart calls their 99,000 square foot model the "Urban 99" prototype. *Id.* Although the company insists that the model was developed to fit better into urban areas, an industry analyst believes that the decision was due in part to zoning ordinances blocking stores of more than 100,000 square feet in size. *Id.*

¹⁰² 42 U.S.C. § 4331 (Supp. V. 1964). The statute states:

MANAGING RETAIL SPRAWL IN MANHATTAN 271

encourage the federal government and its agencies to engage in environmentally-sound decision making.¹⁰³ In relevant part, NEPA requires that the policies, regulations, and laws of the nation be interpreted and administered in conjunction with the federal policies outlined in the statute.¹⁰⁴ Specifically, NEPA requires that all federal agencies consider the environmental ramifications of their actions through the adoption of an interdisciplinary approach to decision making and the submission of detailed reports on the potential environmental effects of any proposed action.¹⁰⁵

[I]t is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Id. § 4331(a).

¹⁰³ Todd Gregory Monahan, *Seeking the Spirit of SEQRA From Beneath the Paperwork*, 65 ALB. L. REV. 539, 542 (2001) (discussing how NEPA the commitment of the federal government towards preservation and consideration of the environment).

¹⁰⁴ 42 U.S.C. § 4332.

¹⁰⁵ *Id.* The statute directs all federal agencies to:

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment; (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations; (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v)

Many states followed in Congress's footsteps and enacted their own environmental review statutes.¹⁰⁶ These state statutes vary in scope and form, but most share NEPA's goal of injecting environmental considerations into each land use decision made at the government level.¹⁰⁷ The state of Vermont, for example, enacted a statute that allows the state to consider the potential *economic* impacts of proposed development under the rubric of *environmental* review.¹⁰⁸ New York has a purely environmental review statute that seeks to achieve similar objectives.¹⁰⁹ State environmental review statutes have frequently been invoked for the purpose of monitoring, controlling, and mitigating the environmental effects of industrialization and development.¹¹⁰ The success of efforts to curb development often rests on the interpretation of these statutes by state courts, especially with regard to the meaning of the term "environment."¹¹¹ This section explores the intersection of federal, state, and city environmental law and the applicability of these statutes to challenges brought

any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

¹⁰⁶ As of 2004, fifteen states and the District of Columbia had their own NEPA-type environment impact review statute. David Sive & Mark A. Chertok, "Little NEPAs" And Their Environmental Impact Assessment Processes, SJ101 ALI-ABA 1013, 1015 (2004).

¹⁰⁷ See 42 U.S.C. § 4331 (Supp. V 1964) (NEPA encourages agencies to incorporate environmental review into their decision-making processes); N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 2004). New York's state counterpart to NEPA encourages environmentally aware policy making. *Id.*

¹⁰⁸ See VT. STAT. ANN. tit. 10, §§ 6001-6092 (2004). See also *infra* Section IIIB for a discussion of Act 250 and cases litigating its provisions.

¹⁰⁹ See *infra* note 161.

¹¹⁰ See James Murphy, *Vermont's Act 250 and the Problem of Sprawl*, 9 ALB. L. ENVTL. OUTLOOK J. 205 (2004) (The author notes that sprawl and related development can have impacts on the environment such as: an increase in air pollution due to increased automobile traffic; destruction of the physical environment; worsened water quality due to runoff; and effects upon groundwater).

¹¹¹ See e.g. *Chinese Staff and Workers Ass'n v. City of New York*, 68 N.Y.2d 359 (1986) (construing the term "environment" broadly, benefiting anti-development advocates).

MANAGING RETAIL SPRAWL IN MANHATTAN 273

against development by large national retailers.

*A. Intersection of New York State and New York City
Environmental Law*

Building on the foundation laid by NEPA, New York enacted the State Environmental Quality Review Act (SEQRA) in 1976.¹¹² In enacting SEQRA, the state legislature sought to establish a consistent statewide policy of incorporating environmental consequences and public participation into the decision-making processes of governmental agencies.¹¹³ The legislature also sought to promote efforts that promised to “prevent or eliminate damage to the environment and enhance human and community resources.”¹¹⁴ SEQRA’s prescriptions are more demanding than those of NEPA, given that the statute requires not only procedural compliance but also substantive compliance.¹¹⁵ The statute

¹¹² N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 2004). In relevant part, SEQRA provides that:

Agencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.

Id. § 8-0109(1).

¹¹³ Monahan, *supra* note 103, at 543 (describing how SEQRA shares similar policy goals with NEPA). See Philip Weinberg, *SEQRA: Effective Weapon—If Used As Directed*, 65 ALB. L. REV. 315 (2001) [hereinafter *Effective Weapon*] (noting that SEQRA has “furnished an absolutely vital fulcrum from which the public can participate in—and if necessary challenge—decisions inflicting environmental impacts on local communities”).

¹¹⁴ N.Y. ENVTL. CONSERV. LAW § 8-0101.

¹¹⁵ See Monahan, *supra* note 103, at 544 (NEPA stipulates that once an agency has procedurally complied with the statute’s requirements, a court may not interject within the decision-making process. However, SEQRA requires not only “environmentally sound decision-making,” but also “the creation of environmentally sound *policy*”) (emphasis added); Kathryn C. Plunkett, Comment, *Local Environmental Impact Review: Integrating Land Use and Environmental Planning Through Local Environmental Impact Reviews*, 20 PACE ENVTL. L. REV. 211, 216 (2002) (“SEQRA goes beyond NEPA and

mandates that state and city agencies and legislative bodies conduct environmental analyses before undertaking any project or activity, or engaging in policy, regulation, or procedure making.¹¹⁶

New York City has adopted SEQRA and extended the application of the statute to its own agencies through the City Environmental Quality Review (CEQR).¹¹⁷ SEQRA and CEQR require that agencies act to “minimize or avoid adverse environmental effects,” and require the preparation of an environmental impact statement (EIS) when an initial review process reveals that a project “may have a significant effect on the environment.”¹¹⁸ An EIS is a detailed statement that must contain a description of the proposed project, the project’s environmental impacts, any adverse environmental effects posed by the development, alternatives to the proposed action, and an evaluation of additional considerations listed within SEQRA.¹¹⁹

Given that the SEQRA review process centers on the evaluation of environmental impacts posed by development projects, judicial interpretation of the word “environment” is critical.¹²⁰ SEQRA defines “environment” as “the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character.”¹²¹

In *Chinese Staff & Workers Ass’n v. City of New York*,¹²² the plaintiff association challenged the sufficiency of the state’s

imposes substantive requirements on agencies.”)

¹¹⁶ N.Y. ENVTL. CONSERV. LAW § 8-0105(4) (defining agency “action”).

¹¹⁷ See City of New York Exec. Order No. 91, CEQR (Aug. 24, 1977) and the current CEQR rules, Rules of the City of New York tit. 62, ch. 5 (1991).

¹¹⁸ See N.Y. ENVTL. CONSERV. LAW § 8-0109(1); *Id.* § 8-0109(2) (setting forth situations that require the preparation of an environmental impact statement).

¹¹⁹ *Id.* § 8-0109(2)(a)-(j).

¹²⁰ See *Chinese Staff and Workers Ass’n v. City of New York*, 68 N.Y.2d 359 (1986).

¹²¹ N.Y. ENVTL. CONSERV. § 8-0105 (6).

¹²² 68 N.Y.2d 359 (1986).

MANAGING RETAIL SPRAWL IN MANHATTAN 275

environmental review model and argued that the City Planning Department's limited interpretation of the term "environment" was contrary to the meaning and purpose of SEQRA and CEQR.¹²³ Specifically, the plaintiff association contested the construction of a high-rise building on an empty lot in Chinatown.¹²⁴ In order to comply with SEQRA regulations, the project's developers had previously submitted an application for a special permit to the city's Department of City Planning and its Department of Environmental Protection.¹²⁵ After reviewing relevant environmental considerations, the agencies granted the development permit without requiring the preparation of a draft EIS.¹²⁶ The plaintiff association challenged the approval of the permit and argued that the city agencies' environmental review was "arbitrary and capricious because of the failure of the lead agencies to consider whether the introduction of luxury housing into the Chinatown community would accelerate the displacement of local low-income residents and businesses or alter the character of the community."¹²⁷

The New York Court of Appeals agreed that a permit should not have been granted without further review.¹²⁸ The court held that when deciding whether to require the preparation of an EIS, a lead agency must consider *all* possible environmental effects, whether physical, social, or economic, in order to comply with SEQRA.¹²⁹ The Court of Appeals noted that although a project might be small in physical scope, it still might have a large impact on the surrounding community.¹³⁰ Under the interpretation set forth in *Chinese Staff*, SEQRA and CEQR require agencies to

¹²³ *Id.* at 365. The City Planning Department argued that since the effects argued by the plaintiffs are not ones that "impinge upon the physical environment in a significant manner," they are outside the scope of the word "environment" as used in SEQRA. *Id.*

¹²⁴ *Id.* at 362.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 363.

¹²⁸ *Id.*

¹²⁹ *Id.* at 366.

¹³⁰ *Id.* at 367.

inspect the possibility that a proposed project will cause the long-term displacement of residents and businesses in determining whether the project will have a significant effect on the environment.¹³¹

B. Environmental Law as a Tool For Smart Retail Development

The broad reach of SEQRA and other environmental review statutes permits environmental advocates to challenge proposed development projects based on their anticipated negative consequences for the environment.¹³² Although SEQRA permits consideration of community or neighborhood character within its environmental analysis, New York courts have stopped short of expressly allowing agencies to consider a project's potential impact on competition.¹³³ The ability to force agency evaluation of a project's impact on competition is a boon to anti-"big box retail"

¹³¹ *Id.* at 368. The court determined that its holding was:

limited to a determination that existing patterns of population concentration, distribution or growth and existing community or neighborhood character are physical conditions such that the regulations adopted by the City of New York pursuant to SEQRA require an agency to consider the potential long-term secondary displacement of residents and businesses in determining whether a proposed project may have a significant effect on the environment.

Id.

¹³² See Monahan, *supra* note 103, at 540-41 (Since SEQRA requires adverse environmental impacts to be assessed earlier on in the process than NEPA, SEQRA has the potential "to be a powerful action-forcing environmental law in New York.").

¹³³ See N.Y. ENVTL. CONSERV. § 8-0105(6); *Chinese Staff*, 68 N.Y.2d at 366 (allowing for consideration of neighborhood and community character); *East Coast Development Co. v. Kay*, 667 N.Y.S.2d 182 (N.Y. Sup. Ct. 1996). In this case, the court determined that the economic effects of a proposed store on the existing downtown retailers *could not* be the sole support for the city planning board's SEQRA-based decision. *Id.* at 184. Although the court ultimately determined that there was additional support for the board's determination, it warned localities not to couch economics-based development decisions in the language of SEQRA. *Id.* at 184-85.

MANAGING RETAIL SPRAWL IN MANHATTAN 277

advocates.¹³⁴ The state of Vermont, placed on the National Trust for Historic Preservation's "endangered list" due to rampant retail development, recognized this opportunity and adopted an aggressive statutory stance against unwanted retail development within its borders.¹³⁵ The state enacted the first version of Act 250¹³⁶ in 1970, creating a growth-management statute that prioritizes community participation in land-use planning decisions, with a particular emphasis on concerns about the environment, including the small business sector.¹³⁷ The statute provides for joint local and state involvement in the permitting process.¹³⁸ A developer seeking an Act 250 development permit must first apply to the appropriate district commission.¹³⁹ The commission then holds evidentiary hearings in which all interested parties, including private citizens, may participate.¹⁴⁰ The board considers testimony and evidence from the hearing as well as the criteria set forth in Act 250 in determining whether to grant the development

¹³⁴ When the environmental review process allows parties to present evidence that proposed development would have a negative economic impact on the community it benefits small business owners. *See infra* notes 139-151 and accompanying text.

¹³⁵ *See* NATIONAL TRUST FOR HISTORIC PRESERVATION, AMERICA'S 11 MOST ENDANGERED HISTORIC PLACES (2004) *available at* <http://www.nationaltrust.org/11most/2004/index.html> (placing the entire state of Vermont on this list for the second time since 1990 due to the "invasion" of Wal-Marts into the state).

¹³⁶ VT. STAT. ANN. tit. 10, §§ 6001-6092 (2004).

¹³⁷ Weiss, *supra* note 10, at 33. Vermont's Act 250 seeks to involve individuals in the land-use planning process through local meetings and evidentiary hearings, creating a shift in the power dynamic of planning. *Id.* at 33-34. In Vermont, the land-use planning process requires attention paid and priority given to the environmental impacts of proposed projects. *Id.* at 42. *See* Sherry Keymer Dreisewerd, *Staving Off the Pillage of the Village: Does In Re Wal-Mart Stores, Inc. Offer Hope to Small Merchants Struggling for Economic Survival Against Box Retailers?* 54 WASH. U. J. URB. & CONTEMP. L. 323, 325 (1998) (noting the extensive capabilities of Act 250 to slow or stop development).

¹³⁸ *Id.* at 330 (describing how Act 250 is unique because it provides for concurrent control by both state and local governments).

¹³⁹ *Id.* at 332.

¹⁴⁰ Murphy, *supra* note 110 (describing the Act 250 review process).

permit.¹⁴¹

In 1997, the Vermont Supreme Court unanimously upheld a decision by the state Environmental Board that denied a state land use permit request by Wal-Mart, Inc.¹⁴² In *In re Wal-Mart*, Wal-Mart sought to build a store two miles from the historic town center of St. Albans, Vermont.¹⁴³ Based on its findings that Wal-Mart's entrance into the St. Albans community would negatively affect the town's tax base and its smaller downtown retailers, the Environmental Board denied Wal-Mart's permit application.¹⁴⁴ The Vermont Supreme Court upheld the decision.¹⁴⁵ The Environmental Board and the Vermont Supreme Court concluded that a project's potential effects on market competition can justify the denial of a development permit within the scope of an environmental impact analysis.¹⁴⁶

Environmental review statutes are an important factor in the realm of retail development, both for opponents and developers.¹⁴⁷

¹⁴¹ *Id.*

¹⁴² See *In re Wal-Mart Stores, Inc.*, 167 Vt. 75 (1997).

¹⁴³ Dreisewerd, *supra* note 137, at 336.

¹⁴⁴ *In re Wal-Mart Stores*, 167 Vt. at 78 (noting that this case is an appeal from a previous denial of a permit by the Environmental Board).

¹⁴⁵ *Id.* at 87. See Dreisewerd, *supra* note 137, at 338 (stating that the Environmental Board decided that the extent to which a proposed development might have a substantial adverse economic impact on existing businesses is a relevant criteria under Act 250); Roper & Humstone, *supra* note 2, at 762. Wal-Mart argued that Act 250 was only concerned with physical and environmental impact, but the Supreme Court found that Criteria 9(A) and 9(H) explicitly require consideration of economic impacts of development. *Id.* Criterion 9(A) requires consideration of the community's financial ability to absorb new development. VT. STAT. ANN. tit. 10, § 6086(a)(9)(A). Criterion 9(H) requires consideration of the costs to the community of the development, including balancing increase to tax base with costs of employment and education. VT. STAT. ANN. tit. 10, § 6086(a)(9)(H).

¹⁴⁶ *In re Wal-Mart Stores*, 167 Vt. at 82 (determining that the Environmental Board properly considered the financial ability and capacity of a town to absorb a development project as a valid consideration under Act 250).

¹⁴⁷ See *Chinese Staff and Workers Ass'n v. City of New York*, 68 N.Y.2d 359 (1986). This case is a good example of anti-development advocate use of SEQRA to block development. *Id.*; Adam L. Wekstein & Geraldine N. Tortorella, *Navigating the Land Use and Zoning Minefield*, 466 PRAC. L. INST.

MANAGING RETAIL SPRAWL IN MANHATTAN 279

SEQRA's consideration of the impact of development projects on neighborhood character and Act 250's emphasis on environmental considerations open the door for future challenges by residents and small business owners who seek to slow or halt the expansion of large national retailers.¹⁴⁸

IV. ANTITRUST LAW

Antitrust law exists as an annex to the traditional areas of law used to challenge retail development. The goal of federal antitrust law is to protect competition.¹⁴⁹ Despite this seemingly simple goal, federal antitrust law targets a variety of corporate behavior.¹⁵⁰ At the federal level, three principal antitrust statutes operate to protect competition: the Sherman Act, Clayton Act, and Federal Trade Commission Act (FTC Act).¹⁵¹ Each of these statutes has a different purpose and plays a different role in federal antitrust litigation.

In 1890, facing a new wave of corporate consolidation in the railroad industry and a variety of corporate combinations,

19 (warning attorneys who practice in land use about the varied ways environmental review statutes impact the practice of land use law).

¹⁴⁸ See *Chinese Staff*, 68 N.Y.2d at 359 (solidifying the validity of considering a proposed action's impact on neighborhood and community character under SEQRA); *In re Wal-Mart*, 167 Vt. at 81 (recognizing that the financial impacts of a retailer's entrance into the local economy is a valid consideration under Act 250).

¹⁴⁹ U.S. DEP'T OF JUST., ANTITRUST ENFORCEMENT AND THE CONSUMER (2004) [hereinafter ANTITRUST ENFORCEMENT AND THE CONSUMER], at http://www.usdoj.gov/atr/public/div_stats/9142.htm (stating that "antitrust laws protect competition").

¹⁵⁰ *Id.* The Sherman Act "outlaws all contracts, combinations and conspiracies that unreasonably restrain interstate and foreign trade," specifically ones that suppress competition with "anticompetitive conduct." *Id.* The Clayton Act prohibits "mergers or acquisitions that are likely to lessen competition." *Id.* The Federal Trade Commission Act "prohibits unfair methods of competition in interstate commerce." *Id.*

¹⁵¹ See William H. Borghesani, Jr. et al, *Food for Thought: The Emergence of Power Buyers and Its Challenge to Competition Analysis*, 4 STAN. J.L. BUS. & FIN. 39, 69 (1999) (noting and naming the three main federal antitrust statutes).

Congress enacted the Sherman Antitrust Act.¹⁵² The Sherman Act prohibits “every contract, combination, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations.”¹⁵³ In an attempt to further protect competition during the economic surge that preceded the Great Depression, Congress amended the Sherman Act in 1914 to include the Clayton Act.¹⁵⁴ The Clayton Act’s provisions authorize the government to review and regulate mergers and other transactions that may lessen competition or “tend to create a monopoly.”¹⁵⁵ Congress passed the third major statute, the FTC Act, in 1914.¹⁵⁶ With a broader reach than the other statutes, the FTC Act prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”¹⁵⁷

Although not part of the trilogy, a fourth antitrust statute operates specifically to protect small businesses.¹⁵⁸ In 1936, Congress adopted the Robinson-Patman Act (RPA) as a modification of the existing Clayton Act.¹⁵⁹ The RPA reflects congressional concern that the influx and spread of chain stores across the United States would destroy competition because small

¹⁵² 15 U.S.C. § 1 (2004). See Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 6 (2003) (stating that Congress was motivated by the environment of trusts in business when drafting the Sherman Act); George J. Stigler, *The Origin of the Sherman Act*, in *THE POLITICAL ECONOMY OF THE SHERMAN ACT* 32 (E. Thomas Sullivan ed., 1991) (noting that interest in a federal anti-monopoly act arose in the wake of complaints regarding raising railroad rates and “flourishing industrial trusts”).

¹⁵³ 15 U.S.C. § 1.

¹⁵⁴ 15 U.S.C. §§ 12-14, 19, 21, 22 and 27 (2004).

¹⁵⁵ 15 U.S.C. § 18. Additional provisions of the Clayton Act govern a variety of vertical restrictions that may serve to harm competition. See 15 U.S.C.A. § 14; ANTITRUST ENFORCEMENT AND THE CONSUMER., *supra* note 149 (noting that the Clayton Act also “prohibits other business practices that under certain circumstances may harm competition”).

¹⁵⁶ 15 U.S.C. §§ 42-58 (2004).

¹⁵⁷ 15 U.S.C. § 45(a)(1).

¹⁵⁸ See David J. Kates, *Recouping the Losses of Brooke Group*, 73 WASH. U. L.Q. 609, 613 (1995) (noting that the RPA “was designed principally to afford market protection to small businesses”).

¹⁵⁹ 15 U.S.C. §§ 13-13b, 21a (West 2004).

MANAGING RETAIL SPRAWL IN MANHATTAN 281

businesses would be unable to compete with the lower prices of chain stores.¹⁶⁰ The RPA makes it unlawful for “any person engaged in commerce . . . to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.”¹⁶¹ The RPA prohibition against price discrimination thus provides small businesses with a legal means of challenging the practices of large national retailers.¹⁶²

A. Federal Antitrust Litigation

Following the enactment of the Robinson-Patman Act in 1936, plaintiffs were able to successfully challenge predatory pricing structures under the Sherman and Robinson-Patman Acts.¹⁶³ In 1967, the U.S. Supreme Court heard and decided one such challenge in *Utah Pie Co. v. Continental Baking Co.*¹⁶⁴ Based in Salt Lake City, Utah Pie Company brought suit against Continental Baking Company and other similarly-situated baking companies for violations under the Sherman Act and section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.¹⁶⁵ Utah Pie

¹⁶⁰ See Kates, *supra* note 158, at 613.

¹⁶¹ 15 U.S.C. § 13a (2004).

¹⁶² See *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967) (challenging primary line price discrimination under the RPA); *Lepage’s Inc. v. 3M*, 324 F.3d 141 (3rd Cir. 2003) (finding for a plaintiff medium-size office supplies manufacturer who alleged predatory pricing in the form of loyalty rebates issued by 3M to retailers).

¹⁶³ See *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

¹⁶⁴ 386 U.S. 685 (1967).

¹⁶⁵ *Utah Pie*, 386 U.S. at 687. Plaintiffs also charged a conspiracy among the defendants under §§ 1 and 2 of the Sherman Act. *Id.* The relevant language from §2(a) of the Clayton Act provides:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . where the effect of such discrimination may be substantially lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

alleged that the defendants had sold frozen pies in the “Salt Lake Market at prices lower than it sold pies of like grade and quality in other markets considerably closer to its plants” in an effort to destroy competition from the Utah Pie Company in violation of the RPA’s ban on price discrimination.¹⁶⁶ Overturning the lower court, the Supreme Court accepted the plaintiffs’ arguments and gave broad reach to the language of the Clayton and Robinson-Patman Acts.¹⁶⁷ The Court concluded that the Tenth Circuit Court of Appeals had incorrectly decided that the anti-competitive evidence proffered by Utah Pie Company was insufficient to present to a jury.¹⁶⁸ The Court also rejected the defendants’ proffered cost justification defense.¹⁶⁹ The Supreme Court held that the language of predatory intent found in Continental Baking Company memoranda outweighed the company’s defense of cost justification and established evidence sufficient to present to a jury.¹⁷⁰

In 1993, the U.S. Supreme Court decided its first predatory pricing case since *Utah Pie* and exhibited new skepticism toward plaintiffs alleging the existence of below-cost pricing schemes.¹⁷¹ In *Brooke Group v. Brown & Williamson Tobacco*,¹⁷² the plaintiff cigarette manufacturer alleged that the defendant manufacturer’s competitive pricing strategies were designed to suppress the plaintiff’s prices and thus violated section 13(a) of the Robinson-

15 U.S.C. §13(a).

¹⁶⁶ 386 U.S. at 690.

¹⁶⁷ *Id.* at 703. (“We believe that the Act reaches price discrimination that erodes competition as much as it does price discrimination that is intended to have immediate destructive impact.”).

¹⁶⁸ *Id.* at 704.

¹⁶⁹ *Utah Pie*, 386 U.S. at 697-702 (writing in note 14 of its opinion, the Supreme Court rejected the defendants’ argument that Utah Pie’s dominance within the market justified their drastic price cuts).

¹⁷⁰ *Id.* at 696-97.

¹⁷¹ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); Donald J. Boudreaux et al., *The Supreme Court’s Predation Odyssey: From Fruit Pies to Cigarettes*, 4 SUP. CT. ECON. REV. 57 (1995) (noting that the Brooke Group decision demonstrates the court’s “heightened skepticism towards claims of predatory pricing”).

¹⁷² 509 U.S. 209.

MANAGING RETAIL SPRAWL IN MANHATTAN 283

Patman Act.¹⁷³ The Supreme Court found for the defendant manufacturer and implemented a higher evidentiary standard for future predatory pricing plaintiffs.¹⁷⁴ The majority established a two-part test for price discrimination that requires plaintiffs to set forth evidence of below-cost pricing as well as the probability that the competitor will be able to recoup its losses.¹⁷⁵ The Court stated that “[r]ecoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation.”¹⁷⁶ Justice Stevens argued in his dissent, however, that the majority’s pro-consumer rationale was misguided.¹⁷⁷ He asserted that although price cutting is a competitive practice that lowers prices and saves money for consumers, the practice destroys competition and harms consumers once prices fall below the retailer’s cost.¹⁷⁸

¹⁷³ *Id.* at 216 (The plaintiff alleged “illegal price discrimination between Brown & Williamson’s full-priced branded cigarettes and its low-priced generics.”).

¹⁷⁴ *See Kates, supra* note 158, at 628-29; *Brooke Group*, 509 U.S. at 230-31 (admitting that the plaintiff’s theory of defendant’s liability is within the reach of the statute, but depends too much upon a “complex chain of cause and effect” to constitute a violation of the statute). In order to succeed, a plaintiff must show 1) that the defendant set prices below some measure of cost and 2) that the defendant has a “reasonable prospect” or “dangerous probability” of recouping his losses. *Id.* at 223-24. The second element that must be proved by a plaintiff changes depending upon whether the suit is brought under the Sherman or Robinson-Patman Act. The standard under the Robinson-Patman Act is a “reasonable prospect” and the standard under the Sherman Act is a “dangerous probability.” *Id.* at 224.

¹⁷⁵ 509 U.S. at 222-27 (discussing the two prerequisites for recovery for a price discrimination plaintiff). First, a plaintiff must prove that his rival’s challenged prices are below “an appropriate measure of its rival’s costs.” *Id.* at 222. Next, the plaintiff must demonstrate that the rival had a “reasonable prospect” of “recouping its investment in below-cost prices.” *Id.* at 224. The court emphasized the importance of proving recoupment since without it, consumer welfare would be improved since prices had been lowered. *Id.* at 224.

¹⁷⁶ *Id.* at 224.

¹⁷⁷ *Id.* at 256 (Stevens, J., dissenting).

¹⁷⁸ *Id.* (Stevens, J., dissenting).

B. State Antitrust Litigation as a Tool to Protect Small Businesses

Small businesses have had greater success as antitrust plaintiffs in suits brought under state unfair business practices statutes.¹⁷⁹ Although a state statute cannot preempt federal legislation, it can supplement it.¹⁸⁰ As a result, states may proscribe a broader array of behavior and make it easier for plaintiffs to prove violations.¹⁸¹ Many antitrust statutes are modeled after and contain language nearly identical to the Clayton and Sherman Acts.¹⁸² Unlike federal legislation, however, these statutes often include a specific,

¹⁷⁹ See *American Booksellers Assn., Inc. v. Barnes & Noble, Inc.*, 135 F.Supp.2d 1031 (N.D. Cal. 2001) (holding that “secret” discounts received by defendants are actionable under California Unfair Trade Practices Act); *Star Fuel Marts v. Murphy Oil USA*, No. Civ.-02-202-F, 2003 WL 742191 (W.D. Okla. Jan. 29, 2003) (holding that below-cost pricing by defendant gas station was actionable under Oklahoma Unfair Sales Act).

¹⁸⁰ *Wal-Mart Stores v. American Drugs*, 319 Ark. 214, 233-34 (1995) (Niblock, J., dissenting) (citing to the preemption test established by *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984)). The dissent notes that *Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691 (1984), established the controlling test for determining whether federal legislation preempts a state statute. *Id.* The Court in *Capital Cities* evaluated the existence of preemption based on four factors:

[w]hether Congress expressed a clear intent to preempt state law; whether Congress occupies the field so as to leave no room for the states to supplement; whether compliance with both the state and federal laws is impossible; and whether the state law stands as an obstacle to Congress’ objective or purpose.

Wal-Mart Stores, 319 Ark. at 233 (citing *Capital Cities*, 467 U.S. 691).

¹⁸¹ *Wal-Mart Stores*, 319 Ark. at 233. The preemption test in *Capital Cities Cable v. Crisp* allows state statutes to co-exist with federal legislation so long as Congress did not express an intent to preempt state law, the federal legislation leaves no room for the state statute to exist, compliance with both state and federal law is possible, and the state law does not stand as an obstacle to Congress’ objective or purpose. *Capital Cities Cable v. Crisp*, 467 U.S. 691, 699 (1984).

¹⁸² See James R. McCall, *Private Enforcement of Predatory Price Laws Under the California Unlawful Practices Act and the Federal Antitrust Acts*, 28 PAC. L.J. 311 (1997) (comparing the California UPA and counterpart federal legislation and noting that the language of the two are very similar, but the California statute has a broader scope).

MANAGING RETAIL SPRAWL IN MANHATTAN 285

plaintiff-friendly definition of “cost” and proscribe a wide range of predatory pricing behavior.¹⁸³

As noted by legal scholars, a statute’s definition of “cost” or the court’s interpretation of the same concept often determines the fate of an antitrust plaintiff.¹⁸⁴ In federal antitrust litigation, before a plaintiff can proceed, he must first prove that the defendant priced its products below cost.¹⁸⁵ Thus, although cost can be a difficult and expensive concept for a plaintiff to determine, it is essential to below-cost pricing litigation.¹⁸⁶ Federal law and the U.S. Supreme Court, however, have been silent with respect to the definition of “cost.”¹⁸⁷ In practice, the two most common methods used to determine a defendant’s costs are “average variable cost” (AVC) and “average total cost” (ATC).¹⁸⁸ Designed by two law professors, the AVC standard does not account for the fixed costs of the seller and instead divides the total avoidable costs by the number of units produced.¹⁸⁹ In this case, a price above AVC

¹⁸³ See *id.* (stating that the California statute’s definition of “cost” makes it easier for plaintiffs to prevail and that the California statute has a broader scope).

¹⁸⁴ See *Brooke Group*, 509 U.S. at 223 (failing to create a definitive standard for determining “cost”); Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2253 (2000) (noting that plaintiff’s success rate in predatory pricing cases in the era preceding the *Brooke Group* decision depended on what calculation of “cost” a court used). Typically, to an economist, “cost” actually represents the concept of “total costs”, “meaning all costs incurred to produce the item including labor, materials, overhead, or any other type of cost.” McCall, *supra* note 182, at 316.

¹⁸⁵ *Brooke Group*, 209 U.S. at 222.

¹⁸⁶ See Bolton, *supra* note 184, at 2271 (arguing that even though cost is a complicated concept, since 1975 courts have “followed a cost standard in evaluating predatory pricing”).

¹⁸⁷ See *id.* at 2255 (noting that the *Brooke Group* Court did not adopt a specific definition of “cost” for its predatory pricing test).

¹⁸⁸ See McCall, *supra* note 182 at 317-24 for a complete discussion of the different cost concepts.

¹⁸⁹ *Id.* at 318. Professors Phillip Areeda and Donald F. Turner believe that since a seller cannot avoid the fixed costs of production, these should not be included in a calculation of his costs. *Id.* (citing Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 700 (1975)). “Fixed costs are those that do

would be presumptively nonpredatory and one below AVC would be presumptively predatory.¹⁹⁰ The ATC standard, by contrast, divides the total of all costs by the number of units produced.¹⁹¹ By including the fixed costs that the AVC standard omits, the ATC method yields a higher number, making it easier for a plaintiff to point to a product's price and show that it is "below cost."

State antitrust legislation often proves advantageous to plaintiffs, given that it provides a specific definition of cost to assist courts in determining whether defendants are engaged in below-cost pricing.¹⁹² For example, the California Unlawful Practices Act (UPA) and Unfair Competition Act (UCA), and the Arkansas Unfair Practices Act define cost using the average total cost standard.¹⁹³ By defining cost as average total cost, these statutes account for even the manufacturer's fixed costs.¹⁹⁴ The ATC standard for calculating costs results in a higher value than the AVC standard and thus makes it easier for predatory pricing plaintiffs to prove that a manufacturer priced items below cost.¹⁹⁵

In addition to including specific, plaintiff-friendly definitions of cost, state statutes may also proscribe a broader array of corporate behavior.¹⁹⁶ Two comprehensive examples of state antitrust legislation are the Oklahoma Unfair Sales Act and the

not vary with output and typically include management expenses, depreciation, property costs, and other irreducible outlays." Bolton, *supra* note 184, at 316.

¹⁹⁰ Bolton, *supra* note 184, at 318.

¹⁹¹ *Id.* at 316.

¹⁹² CAL. BUS. & PROF. CODE §§ 17000-17101 (West 2004); CAL. BUS. & PROF. CODE §§ 17200-17210 (West 2004); ARK. CODE ANN. §§ 4-75-201 – 217 (b)(1) (Michie 2004).

¹⁹³ CAL. BUS. & PROF. CODE § 17026 (West 2004); CAL. BUS. & PROF. CODE § 17029 (West 2004) (defining manufacturing costs); ARK. CODE ANN. § 4-75-209(b)(1).

¹⁹⁴ *See supra* note 189 for a discussion of fixed costs and their impact on predatory pricing situations.

¹⁹⁵ *See* Bolton, *supra* note 184, at 316 (by defining a company's manufacturing costs expansively, statutes like California's make it easier for plaintiffs to prove a violation by below-cost pricing).

¹⁹⁶ For instance, the Oklahoma Unfair Sales Act and the California UPA both prohibit the use of "loss leaders," a practice that is not prohibited by federal antitrust law. *See infra* notes 197-202.

MANAGING RETAIL SPRAWL IN MANHATTAN 287

California UPA and UCA.¹⁹⁷ Unlike their federal counterparts, the Oklahoma and California statutes have broad provisions prohibiting the use of “loss leaders” in competition and, in turn, create a more favorable legal environment for small business plaintiffs.¹⁹⁸ Each statute provides a similar, specific definition of “loss leader.” The California statute defines “loss leader” as:

any article or product sold at less than cost: (a) Where the purpose is to induce, promote, or encourage the purchase of other merchandise; or (b) Where the effect is a tendency or capacity to mislead or deceive purchasers or prospective purchasers; or (c) Where the effect is to divert trade from or otherwise injure competition.¹⁹⁹

Loss leader provisions target retailers who lure customers into their stores with below-cost prices, destroy favorable competition, and prey on the gullibility of consumers.²⁰⁰ These provisions rest on the premise that a customer who visits a store because of advertised loss leader prices will expect all other items in the store to be similarly priced, although they often are not.²⁰¹ Thus, loss leader pricing projects an overall image to the public that a store contains bargain-priced merchandise, harming smaller competitors who are unable to mimic below-cost pricing.²⁰²

¹⁹⁷ OKLA. STAT. ANN. tit. 15, §§ 598.1-598.11 (West 2004); CAL. BUS. & PROF. CODE §§ 17000-17101 (West 2004); CAL. BUS. & PROF. CODE §§ 17200-17210 (West 2004).

¹⁹⁸ See OKLA. STAT. ANN. tit. 15, § 598.3 (prohibiting use of loss leaders); CAL. BUS. & PROF. CODE § 17044 (prohibiting use of loss leaders). These statutes contrast with the Sherman and Clayton Acts, which do not include loss leader pricing as a proscribed business practice. See *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968 (8th Cir. 1968). In *Hiland*, the District Court found that the plaintiff’s assertion that defendant used loss leader selling tactics was insufficient to assert a successful claim under the Sherman Act. *Id.* The court determined that the purpose of the Sherman Act was to prevent monopolization and that loss leader tactics rarely lead to monopolization in a field. *Id.* at 975.

¹⁹⁹ CAL. BUS. & PROF. CODE § 17030.

²⁰⁰ *Safeway Stores Inc. v. Oklahoma Retail Grocers Ass’n*, 360 U.S. 334, 340 (1959).

²⁰¹ *Id.* at 340.

²⁰² *Star Fuel Marts v. Murphy Oil USA*, No. Civ.-02-202-F, 2003 WL 742191 at *7-*8 (W.D. Okla. Jan. 29, 2003) (noting that a gap in advertised

Plaintiffs have experienced mixed success challenging large national retailers under state unfair practices statutes. In 1995, the Supreme Court of Arkansas decided *Wal-Mart Stores v. American Drugs* and determined that plaintiffs challenging below-cost sales by Wal-Mart did not make their case under the Arkansas Unfair Practices Act.²⁰³ The Arkansas UPA requires a plaintiff to show that below-cost sales were made “for the purpose of injuring competitors and destroying competition.”²⁰⁴ The Arkansas Supreme Court determined that the plaintiffs did not present sufficient evidence from which the court could infer this intent.²⁰⁵ Since the Arkansas statute does not prohibit loss leaders, Wal-Mart’s strategy of selling alternating items below cost for varied periods of time does not violate the statute absent evidence of intent to injure or destroy competition.²⁰⁶

In 2003, a federal district court in Oklahoma issued an injunction in *Star Fuel Marts v. Murphy Oil USA* to enjoin Sam’s Club gasoline stations from selling fuel at prices below cost in violation of the Oklahoma Unfair Sales Act.²⁰⁷ The evidence presented by the plaintiff service stations showed that, for eight months, the Sam’s Club gas stations in question had operated at a

prices between competitors leaves consumers with the image that the higher-priced competitor is “gouging”).

²⁰³ *Wal-Mart Stores v. American Drugs*, 319 Ark. 214, 216 (1995). The two plaintiffs, owners of small pharmacies, alleged that Wal-Mart “was selling individual items below cost for the purpose of injuring competitors and destroying competition in violation of § 4-75-209(a)(1) of the Act.” *Id.* at 216.

²⁰⁴ ARK. STAT. § 4-75-209(a)(1).

²⁰⁵ *Wal-Mart Stores*, 319 Ark. at 220 (noting that “the individual items sold below cost, the frequency of those sales, the duration of those sales, and the extent of such sales are not revealed in the chancery court’s opinion”).

²⁰⁶ *Id.* at 221. The court determined that the circumstantial evidence presented was not enough to establish a violation of the Act in the absence of some legislative action to outlaw the use of loss leaders. *Id.* at 224-25. It is notable that in the wake of this decision, the Arkansas legislature did not take any steps to outlaw the use of loss leaders. ARK. STAT. § 4-75-209.

²⁰⁷ *Star Fuel Marts*, 2003 WL 742191, at *15 (granting entry of a preliminary injunction). The federal district court had jurisdiction over this case because the Oklahoma Unfair Sales Act allows a plaintiff to bring a suit in any court of “equitable jurisdiction.” OKLA. STAT. tit. 15 § 598.5(a). Sam’s Club is a subsidiary of Wal-Mart Stores, Inc. *Star Fuel Marts*, 2003 WL 742191, at *1.

MANAGING RETAIL SPRAWL IN MANHATTAN 289

significant loss.²⁰⁸ Although the Oklahoma Unfair Sales Act requires evidence of a defendant's intent to injure competition, in contrast to the Arkansas Unfair Practices Act, the Oklahoma statute allows a plaintiff to introduce evidence of below-cost sales as "prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition."²⁰⁹ The below-cost pricing constituted prima facie evidence for the plaintiffs, and the defendants' internal management manual discussing the objectives of their plan completed the inference.²¹⁰ The court concluded that the plaintiffs had presented sufficient evidence to support the granting of a preliminary injunction prohibiting Sam's Club gas stations from selling gasoline below cost.²¹¹

C. New York's Statute

New York enacted its current antitrust statute in 1909.²¹² The Donnelly Antitrust Act created a private right of action for any party injured by actions that restrain trade or create monopolistic market conditions.²¹³ The Donnelly Act stipulates that:

[e]very contract, agreement, arrangement or combination whereby . . . [c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby [f]or the purpose of establishing or maintaining any such monopoly . . . is hereby declared to be against public policy, illegal and void.²¹⁴

New York's attorneys general have invoked the Donnelly Act in a variety of situations. For example, the state prevailed in litigation against a dominant software corporation for alleged

²⁰⁸ *Star Fuel Marts*, 2003 WL 742191, at *5 (over eight months, the stations in question operated at a loss of \$250,000).

²⁰⁹ OKLA. STAT. tit. 15 § 598.5(c). *See Star Fuel Marts*, 2003 WL 742191, at *10 (discussing this statutory provision).

²¹⁰ *Id.* at *12.

²¹¹ *Id.* at *15.

²¹² N.Y. GEN. BUS. LAW §§ 340-347 (McKinney 2004).

²¹³ *Id.* § 340.

²¹⁴ *Id.*

monopolization²¹⁵ as well as against two hospitals for inappropriate merger activity within the healthcare industry.²¹⁶ However, the Donnelly Act does not include any provisions similar to those embodied by section 2 of the Sherman Act or the Robinson-Patman Act. Although New York State's antitrust enforcement department is considered among the most active in the country, the department is limited in practical focus and concentrates primarily on monopolistic behavior rather than price discrimination or below-cost pricing schemes.²¹⁷

Beginning in 1964, the New York Attorney General's Office began to garner positive attention for its antitrust prosecutions.²¹⁸ During the last forty years, the New York Attorney General has been involved in a variety of cases brought under the Donnelly Act and, at times, jointly under state and federal legislation.²¹⁹ These

²¹⁵ See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 1999). Even though the case was tried in District Court in Washington, D.C., New York was a named plaintiff in the suit and alleged violations of New York antitrust statutes. *Id.*

²¹⁶ See *New York v. St. Francis Hosp.*, 94 F. Supp. 2d 399 (S.D.N.Y. 2000) (involving allegations that two hospitals were participating in what the court termed a "virtual merger" in violation of the Sherman Act). For an in-depth look at New York antitrust activity and litigation, see Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1019-25 (2001). The Attorney General of the New York State and private citizens and businesses share the power to enforce antitrust statutes. OFFICE OF NEW YORK STATE ATTORNEY GENERAL ELIOT SPITZER, ANTITRUST ENFORCEMENT IN NEW YORK (2004), at <http://www.oag.state.ny.us/business/antitrust.html> (last visited Feb. 14, 2005). The Office of the Attorney General possesses the power to investigate and prosecute violations of both state and federal antitrust law. *Id.*

²¹⁷ See First, *supra* note 216, at 1016 (describing the prosecutions of the New York antitrust bureau).

²¹⁸ See Philip Weinberg, *Office of N.Y. Attorney General Sets Pace for Others Nationwide*, 76- JUN. N.Y. ST. B.J. 10, 11 (2004) (noting that "[b]y 1964, the National Association of Attorneys General was to note that New York was the most active state in the antitrust field"); First, *supra* note 216, at 1016 (describing how New York is "generally considered to have one of the more active state antitrust enforcement agencies").

²¹⁹ See Edward D. Cavanagh, *New York Antitrust Bureau Pursues Mandate to Represent State Interests in Fostering Competitive Environment*, 72-JAN. N.Y. ST. B.J. 38, 38 (2000). Antitrust actions are often brought jointly under the

MANAGING RETAIL SPRAWL IN MANHATTAN 291

prosecutions have focused primarily on investigations of horizontal monopolistic behavior and merger activity.²²⁰ There has been a notable dearth of predatory pricing prosecution, given that the Donnelly Act does not include any language prohibiting below-cost pricing and that New York's state and federal courts have generally construed the provisions of the Act in light of federal antitrust precedent.²²¹ In cases that involve interpretations of the Donnelly Act in light of federal jurisprudence, the New York Court of Appeals has placed the burden of persuasion "on the one who contends that federal decisional law should not be followed."²²² For small business antitrust plaintiffs in New York, this signals a *Brooke Group*-type fate unless the state statute is amended.

V. EVALUATING NEW YORK CITY'S LEGAL REMEDIES FOR BIG BOX DEVELOPMENT

The arrival of The Home Depot in the Flatiron District and in Midtown marks the dawn of a new retail culture in Manhattan.²²³ While this scenario has been documented extensively in the context of suburban and rural areas, it has largely been ignored on

Donnelly Act and federal antitrust statutes because the state law is not as comprehensive or developed as the federal law. *Id.*

²²⁰ Cavanagh, *supra* note 219, at 38 (noting that New York antitrust enforcement "focuses principally on horizontal restraints and mergers"). However, the author also notes that in the past twenty years, "the Antitrust Bureau has been far more willing than federal authorities to prosecute cases involving vertical restraints such as resale price maintenance, supplier-imposed customer and territorial restraints and tying." *Id.*

²²¹ Burton C. Agata, *An Overview of Substantive Law Under the Donnelly Act*, in *ANTITRUST LAW IN NEW YORK STATE* 47, 57 (Robert L. Hubbard & Pamela Jones Harbour eds., 2002) ("Although federal court decisions construing the Sherman Act cannot bind state court construction of the Donnelly Act, state and federal court decisions have emphasized the extent to which Sherman Act cases and doctrines have been adopted by the New York State courts in construing and applying the Donnelly Act.").

²²² *Id.* at 57 (citing *People v. Rattenni*, 81 N.Y.2d 166 (1993)).

²²³ See *POINT OF PURCHASE*, *supra* note 12, at 6 (noting how New York City has changed, with bigger stores opening all the time).

the urban scale.²²⁴ Although many cities envy Manhattan's ability to attract retail development in the age of suburbanization and an automobile-centric shopping culture, city and state administrators should proceed with caution.²²⁵

Manhattan has always been a great *place*—a place where people love to work, live, and visit.²²⁶ With a larger variety of stores and activities than suburbs, city neighborhoods allow residents to form a special sense of place and attachment.²²⁷ Urban residents have the opportunity to browse around the city and encounter people, items, and experiences that are culturally strange, engaging in a “socially heterogeneous” experience.²²⁸ As the city becomes increasingly suburbanized, however, its consumption spaces will become more standardized and homogeneous, and the city will increasingly lose its sense of

²²⁴ Boswell & McGrath, *supra* note 24 (describing how large retailers have generally stayed away from urban markets because of high cost of land). See Karen Bellantoni, *Big-Box Retailers Target Manhattan*, REAL EST. WKLY., Jan. 28, 2004, available at http://www.findarticles.com/p/articles/mi_m3601/is_24_50/ai_113140928 (describing how big box retailers had previously avoided Manhattan due to a scarcity of retail space, the lack of large parking lots, prohibitive retail rents, and the “high cost of labor, real estate taxes and utilities”).

²²⁵ See Sakowicz, *supra* note 1, at 387 (noting that sprawl-type development usually occurs outside of city centers because it is less expensive).

²²⁶ See Deborah C. Roth, *Wish You Were Here: A Cross-Cultural Analysis of Architectural Preservation, Reconstruction, and the Contemporary Built Environment*, 30 SYRACUSE J. INT'L L. & COM. 395, 418-19 (2003). There is a difference between “space” and “place.” *Id.* Space is “indifferent and has no memory attached to it.” *Id.* (citing Barry Curtis, *That Place Where: Some Thoughts on Memory and the City*, in THE UNKNOWN CITY: CONTESTING ARCHITECTURE AND SOCIAL SPACE 55 (Iain Borden et al., eds., 2001)). But place is a “by-product of our subjective relationship to a space via memory and association.” *Id.*

²²⁷ Jeremy R. Meredith, *Sprawl and the New Urbanist Solution*, 89 VA. L. REV. 447, 461 (2003) (citing Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1048-49 (1996)).

²²⁸ Sharon Zukin, *Urban Lifestyles: Diversity and Standardization in Spaces of Consumption*, 35 URB. STUDIES, May 1998, at 825. Zukin also describes her fascination with the variety of experiences that Manhattan's shops and stores offer. POINT OF PURCHASE, *supra* note 12, at 9.

MANAGING RETAIL SPRAWL IN MANHATTAN 293

place.²²⁹ Manhattan's landscape of consumption, while still diverse, has homogenized over time, prompting one newspaper writer to warn that the city is turning into "Anywhere, USA."²³⁰

Faced with a shortage of suitable space, logistical problems such as traffic and supply concerns, and high real estate and operating costs, "big box" retailers traditionally have shied away from Manhattan.²³¹ Until the early 1990s, Manhattan's lack of large discount retailers was unique as compared to the rest of the nation.²³² However, when one looks at the citywide dispersion of Staples and Office Depot and the recent opening of Home Depot, the trend suggests that Manhattan has begun to move toward the national norm.²³³ If Home Depot experiences financial success in Manhattan and the city government remains receptive to further "big box" development, other retailers may follow in Home

²²⁹ Gordon MacLeod et al., *Negotiating the Contemporary City: Introduction*, 40 URB. STUDIES, Aug. 2003, at 1655.

²³⁰ Zukin, *supra* note 228 (writing that the diversity is "often submerged by the increasing standardization of consumption spaces"); Mark Jacobson, *supra* note 35, at 30 (lamenting the influx of national retailers and restaurants into Manhattan and wondering whether Manhattan is turning into "Anywhere, USA"). Not every Manhattan resident is sorry to see big box retailers move into their neighborhoods. See Rita Kramer, *New York's Missing Megastores*, 6 CITY J. (1996), available at http://www.city-journal.org/html/6_4_new_yorks_missing.html (noting that New York has become a "retail backwater" and that the city "sends its own residents elsewhere to do their shopping"). Kramer describes the retailing boom of nearby suburbs and laments that Manhattan residents used to be forced to leave the city to shop at stores like Wal-Mart, Kmart and Home Depot. *Id.* Kramer believes that big stores bestow benefits on the surrounding community and that "if big retailers are allowed to flourish, small businesses don't die; they adapt and take advantage of the wider market." *Id.*

²³¹ See POINT OF PURCHASE, *supra* note 12, at 66 (discussing the high price of land, difficulty of making deliveries, and zoning laws as barriers to entry); Boswell & McGrath, *supra* note 24 (citing Manhattan residents' intense "NIMBYism" as an additional concern for the big box retailers. "NIMBY" stands for "Not In My Backyard" and describes the cultural phenomenon of grass-roots resistance to development with potentially negative local consequences).

²³² POINT OF PURCHASE, *supra* note 12, at 65.

²³³ Tsao, *supra* note 63 (stating that Kmart moved into its East Village location in 1996).

Depot's footsteps and change the city inalterably.²³⁴ Although these retailers continue to woo city officials with promises of job creation and revenue for the city, New York City anti-"big box" advocates have several options for combating this wave of retail development.²³⁵

Traditionally, community advocates have grounded their challenges to this type of retail development in three principal areas of the law—zoning, environmental, and antitrust law.²³⁶ This section will address each of these alternatives, discuss the attributes and drawbacks of each, and ultimately recommend which option is best suited to fighting unwanted retail development in Manhattan.

A. Shortfalls of Zoning Law

Although zoning ordinances provide a means of monitoring and controlling development at the grassroots level and enjoy great deference from New York courts, New York's state zoning law is of limited effectiveness in confronting the challenges of sprawl. The participants in the zoning process, the process itself, the state statutory language and New York City's use of as-of-right development permitting have combined to limit the ability of zoning to curb retail growth.

The ability of zoning regulations to address local needs is notably thwarted by the member structure of New York City's Planning Commission and the attendant rules that govern the zoning process.²³⁷ Because zoning cannot be justified unless it fits

²³⁴ See Bellantoni, *supra* note 224. Bellantoni believes that Manhattan will likely see more big box development as other major retailers enter the market, especially if the delivery service for large and bulky products proves successful. *Id.* Target is eyeing a space as large as 200,000 square feet, Kohl's is looking for 120,000 square feet and Costco is mulling 150,000 square feet. *Id.* Home Depot may be only the beginning.

²³⁵ See *supra* notes 6-8 and accompanying text (describing the promises big box retailers make concerning jobs and revenue).

²³⁶ See Part II.C; III.B; and IV.B (discussing the zoning, environmental, and antitrust law options respectively).

²³⁷ See Nolon, *supra* 67, at 351-52 ("Zoning is a key method by which society encourages the development of jobs and housing, protects natural

MANAGING RETAIL SPRAWL IN MANHATTAN 295

into a comprehensive plan, zoning ordinances fall within the authority of the New York City Planning Commission.²³⁸ The Planning Commission is comprised of thirteen members of the public.²³⁹ The Mayor appoints seven members, each of the five Borough Presidents appoints one, and the Public Advocate appoints the last.²⁴⁰ Since commission members are not publicly elected and are subject to little oversight, the ordinances that emerge from the planning process may reflect the specific interests of members rather than the general welfare of the community.²⁴¹

resources and the environment, and defines the character of its communities.”). *But see* Amy Widman, *Replacing Politics with Democracy: A Proposal for Community Planning in New York City and Beyond*, 11 J.L. & POL’Y 135, 149 (2002) (arguing that New York City’s planning process “suffers from a lack of inclusive public participation”).

²³⁸ See CITY OF NEW YORK, NEW YORK CITY CHARTER § 197-c. This section creates and describes the “Uniform Land Use Review Procedure.” *Id.* Under this section, the Commission reviews applications submitted that fall within several categories stated in § 197-c (a) and either certify the application or recommend that it be revised. *Id.* §197-c (c).

²³⁹ New York City Department of City Planning, About Us - Commission Information (2004), at <http://www.nyc.gov/html/dcp/html/about/plancom.html>.

²⁴⁰ *Id.* The five boroughs of New York City are Brooklyn, Manhattan, Staten Island, Queens, and the Bronx. The Public Advocate is an elected official who serves as a go-between for City residents and their government. Public Advocate for the City of New York, About the Public Advocate, at <http://www.pubadvocate.nyc.gov/about.shtml>.

²⁴¹ Platt, *supra* note 66, at 251. See Widman, *supra* note 237, at 150 (advocating for greater public participation in the New York City planning process and asserting that the city planning process “suffers from an overall lack of emphasis on inclusive public participation”); Nolon, *supra* note 67, at 360 (noting that since “a planning board is comprised of appointed, rather than elected, members, the pressure of the electorate is felt less in its deliberations”); Tom Angotti, “*As-of-Right*” *Development: An Invitation to Ethical Breaches?*, GothamGazette.com (2003), at <http://www.gothamgazette.com/article/landuse/20030619/12/430>. In this article, the author highlights the shortfalls of the zoning process in New York City. *Id.* Additionally, the author speaks to allegations of impropriety within the City Planning Department. *Id.* During discussions regarding a proposed Home Depot store in Brooklyn, a former city planner alleges that “[w]hile participating in meetings with the project developers, their attorneys, and City Planning staff, [she] witnessed [her] own staff utilize the zoning code to assist the developers in designing an as-of-right project in order to avoid community engagement.” *Id.*

Zoning in the state of New York generally has “evolved into a flexible, if unpredictable, method of land use regulation.”²⁴² Although the language of the state’s zoning requirements appears specific, state courts have given broad construction to the statute’s words.²⁴³ Thus, the judicial climate that surrounds zoning-related litigation is decidedly deferential to cities and their zoning boards.²⁴⁴ As a result, New York City has met with little difficulty in crafting zoning ordinances that meet the standard of New York state judicial review.²⁴⁵ So long as a zoning ordinance is drafted with a larger, comprehensive plan in mind, it will be upheld in state court.²⁴⁶ Indeed, zoning ordinances enjoy such great judicial deference that it is difficult to successfully challenge development decisions that occur in accordance with city and state zoning prescriptions.²⁴⁷ This can result in development that complies with zoning regulations, but does not necessarily benefit members of the community.

Advocates also criticize zoning as a “piecemeal” approach to land use.²⁴⁸ Once land is zoned for a specific use and an investor purchases that land for development consistent with the designated

²⁴² Nolon, *supra* note 67, at 370.

²⁴³ See *id.* at 371-73 for a discussion of the various ways courts have interpreted the meaning of New York state zoning regulations.

²⁴⁴ See *Dur-Bar Realty Co. v. City of Utica*, 57 A.D.2d 51 (4th Dep’t. 1977); *Town of Bedford v. Vill. of Mount Kisco*, 33 N.Y.2d 178 (1973) (standing for the proposition that as long as a town has zoned in accordance with a “comprehensive plan,” the ordinance will be upheld). Additionally, it is important to note that when a plaintiff challenges an existing zoning ordinance, he carries the heavy burden of proving non-conformance with a comprehensive plan. See Nolon, *supra* note 67, at 402-3.

²⁴⁵ See *supra* note 86 for text of the N.Y. GEN. CITY LAW §20(25) requiring land use decisions to be in accordance with a “well considered plan.” *Id.*

²⁴⁶ See Nolon, *supra* note 67, at 393 (noting how “compliance with a comprehensive plan will save even the most burdensome land regulations” from being invalidated).

²⁴⁷ See Part II.A (discussing the judicial deference exhibited towards zoning decisions made in accordance with a plan).

²⁴⁸ See Shoemaker, *supra* note 6, at 904 (noting that opposition to Vermont’s Act 250, a zoning and land use statute, focuses on the statute’s reactionary stance and piecemeal solutions).

MANAGING RETAIL SPRAWL IN MANHATTAN 297

use, it is difficult for a zoning board to block the proposed development project.²⁴⁹ In New York City, land is frequently designated for “as-of-right development,” which permits development without any review by the Planning Commission.²⁵⁰ To commence construction on a project, a developer in this situation need only secure a building permit.²⁵¹ This lot-by-lot approach, including the granting of automatic development rights, fails to properly account for the impact of development projects on the surrounding community.²⁵² What appears sufficient on a building permit application may mask potential economic impacts on area retailers.²⁵³ As a result, as-of-right development “often frustrates efforts by communities to influence the design of new projects in a way that makes them compatible with existing development and the community’s visions for the future of the neighborhood.”²⁵⁴

B. Shortfalls of Environmental Approach

In tandem with zoning challenges, community advocates also may employ environmental law to combat the adverse effects of

²⁴⁹ This is termed “as-of-right development.” For a discussion, *see supra* note 121 and accompanying text.

²⁵⁰ *See* New York City Department of City Planning, Zoning, About Zoning – Terms and Procedures, at <http://www.nyc.gov/html/dcp/html/zone/zonetod.html> (defining “as-of-right development”) (last visited Feb. 14, 2005).

²⁵¹ *Id.*

²⁵² *See* Angotti, *supra* note 241 (noting the drawbacks to as-of-right development).

²⁵³ *Id.*

²⁵⁴ *Id.* The author points to the 2003 resignation of a professional planner assigned to the Brooklyn Office of City Planning as evidence that the as-of-right development process raises ethical concerns. *Id.* The planner alleged that the planning staff “utilize[d] the zoning code to assist the developers in designing an as-of-right project in order to avoid community engagement.” *Id.* Angotti asserts that as-of-right zoning leaves too many decisions to be made behind closed doors. *Id.* For additional concern about close ties between city administrative officials and private developers see Charles V. Bagli, *For City Official and Developer, Close Ties Mean Close Scrutiny*, N.Y. TIMES, Nov. 19, 2004, at A1 (describing the problems inherent when former business executives move into the public sector and are in a position to exhibit favoritism).

proposed development projects. New York's environmental review statute, SEQRA, seeks to incorporate environmental consequences into the decision-making processes of government bodies.²⁵⁵ Acting in tandem, SEQRA and CEQR require that state and city agencies conduct environmental analyses before undertaking any project, activity, or policy-making exercise.²⁵⁶ Despite favorable SEQRA precedent in New York, however, environmental law is a limited vehicle for anti-development litigation against future Home Depots or Wal-Marts.²⁵⁷

The SEQRA and CEQR notably emphasize compliance with the review procedures they outline.²⁵⁸ This focus on procedural rather than substantive compliance has caused environmentalists to claim that SEQRA has lost its "environmentalist spirit"²⁵⁹ and that its processes have become too time consuming and expensive, and have compelled permit applicants to evade or circumvent the statute.²⁶⁰ Further eroding the force of the statute, some courts have become satisfied with mere procedural compliance with SEQRA and have come to overlook consideration of whether the statute's substantive goals have been realized.²⁶¹

²⁵⁵ Monahan, *supra* note 103, at 543 (describing goals of SEQRA).

²⁵⁶ N.Y. ENVTL. CONSERV. LAW § 8-0105(4) (describing which agency actions trigger environmental analysis).

²⁵⁷ *See Chinese Staff and Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 368 (1986). This case serves as favorable precedent for those wishing to challenge big box retail development since it allows the impact on community character and businesses to be included in the term "environment." *Id.*

²⁵⁸ *See Effective Weapon, supra* note 113, at 316 (describing how courts became sticklers for making sure that applicants followed SEQRA procedures).

²⁵⁹ *See generally* Monahan, *supra* note 103, at 542. Environmentalists criticize SEQRA's emphasis that applicants meet procedural requirements, arguing that the legislation has lost sight of what it is meant to achieve. *Id.*

²⁶⁰ *Id.* at 575 (describing how SEQRA falls short because it does not account for the economic or temporal realities of the EIS process). Applicants know that they potentially will be subjected to a time-consuming, expensive, and unwieldy process and thus try to evade the process when possible. *Id.* at 574-75. *See e.g., Citizens Against Retail Sprawl ex rel. Ciancio v. Giza*, 280 A.D.2d 234, 238 (2001). SEQRA requires agencies to meet all procedural statutory requirements. This is a time-consuming endeavor and may dissuade agencies from undertaking SEQRA review. *Id.*

²⁶¹ Monahan, *supra* note 103, at 541-42. *See Effective Weapon, supra* note

MANAGING RETAIL SPRAWL IN MANHATTAN 299

Critics also note a weakness in SEQRA's reliance on a "lead agency" to conduct and oversee the environmental review.²⁶² As one commentator writes, "the designation of the lead agency is vital to whether genuine SEQRA compliance will occur" since some agencies may be more willing to shrug off their responsibilities than others.²⁶³ By handing over so much responsibility to one agency, SEQRA fails to ensure that each project's environmental issues receive equal depth of review.

New York's existing statutes are insufficient to combat the influx of "big box" retailers within the city's borders.²⁶⁴ If developers are able to circumvent environmental conservation legislation, then there is little to stop city agencies from granting building permits and approving zoning changes. Although an environmental approach allows challengers to a project to come forward *before* development, obstacles such as extreme judicial deference and confusion over which governmental body will become the lead agency still exist and act as barriers to fully unlocking the "conservationist potential" of SEQRA.²⁶⁵

C. Shortfalls of Antitrust Law

Despite the applicability of the Sherman, Clayton, and Robinson-Patman Acts to the prosecution of predatory pricing

113, at 316 (discussing the disadvantage to emphasizing procedural compliance). As long as agencies follow the procedures of SEQRA, "courts are reluctant to interfere with the actual determinations governments make." *Id.*

²⁶² See *Effective Weapon*, *supra* note 113, at 321-22.

²⁶³ *Id.* at 321.

²⁶⁴ See *In re Wal-Mart Stores, Inc.*, 702 A.2d 397 (Vt. 1997) (discussing Vermont's SEQRA-like Statute "Act 250," which allows zoning boards to give significant weight to financial and economic effects of proposed development). Wal-Mart argued that the state environmental board should not have considered Wal-Mart's impact on the surrounding retail market. *Id.* The Vermont Supreme Court disagreed. *Id.* It is important to note that along with SEQRA, NEPA has its critics as well, with many urging that the statute has lost its teeth. See Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333 (2004) (evaluating ways that NEPA falls short and advocating solutions to make it stronger).

²⁶⁵ Monahan, *supra* note 103, at 576. See *Effective Weapon*, *supra* note 113, at 316-18.

schemes used by national chain stores, courts and federal agencies have not been receptive to these challenges since the 1960s.²⁶⁶ This era of federal suspicion has not helped New York small business plaintiffs who strive to remain in business a mile from a Wal-Mart or Target store. Although some states have expressly provided small business owners with statutory protection from large competitors who engage in below-cost pricing, New York has yet to embrace this approach.²⁶⁷ The combination of federal skepticism toward predatory pricing plaintiffs and insufficient state protection renders New York City's small business owners vulnerable in the face of "big box" development.

Economists have noted a shift from the "populist era of predatory pricing enforcement"²⁶⁸ during the Great Depression to the current antitrust prosecution strategy, which is markedly less aggressive and favors larger companies and lower prices for consumers.²⁶⁹ In *Brooke Group*, the U.S. Supreme Court set forth a

²⁶⁶ See Bolton, *supra* note 184, at 2250 (noting that during the early years of the RPA, enforcement of federal antitrust statutes protected small firms from price-cutting by large sellers). See also Boudreaux, *supra* note 171, at 57 (stating that since *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967) there had not been a predatory pricing case until *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)).

²⁶⁷ For a successful state regime, see *supra* notes 207-211 (discussing successful state unfair practices litigation for below-cost sales in Oklahoma). See *infra* Part IV.C. for a discussion of how New York's current antitrust statute is insufficient for the small business plaintiff.

²⁶⁸ Bolton, *supra* note 184, at 2250.

²⁶⁹ See Robert Pitofsky, *Antitrust at the Turn of the 21st Century: A View From the Middle*, 76 ST. JOHN'S L. REV. 583, 586 (2002) ("Antitrust in the United States is now primarily, though not exclusively, designed to protect the welfare of consumers."); See also David Close, "Don't Fear the Reaper": *Why Transferable Assets and Avoidable Costs Should Not Resurrect Predatory Pricing*, 88 IOWA L. REV. 433, 435 (2003) (explaining that the Supreme Court decision in *Brooke Group* has hobbled plaintiffs seeking to bring suits under federal antitrust legislation since); See also McCall, *supra* note 182, at 315. The Warren Court from 1953 to 1969 expansively interpreted federal antitrust legislation in favor of plaintiffs. This era ended in 1980. *Id.* Federal agencies have had a difficult time determining when to prosecute and when to let market forces take their course. Close, *supra*, at 440; Pitofsky, *supra*, at 584-85 (describing the evolution of federal antitrust enforcement over different

MANAGING RETAIL SPRAWL IN MANHATTAN 301

higher evidentiary standard for predatory pricing cases and required the plaintiffs to make an extensive two-part showing to prove the existence of price discrimination under section 13(a) of the Robinson-Patman Act.²⁷⁰ Unfortunately, the philosophy behind the *Brooke Group* decision lives on. Since the *Brooke Group* decision, private plaintiffs have had limited success in court because of “(1) exacting proof and pleading requirements, spurred by the Supreme Court’s open invitation to dismiss predatory pricing cases by summary means; (2) skepticism that predation can ever be a plausible business strategy; [and] . . . (3) judicial neglect of modern strategic theories of predatory pricing.”²⁷¹ However, many economists support the *Brooke Group* decision and argue that courts should take a hands-off approach to regulating market conditions at the risk of extinguishing competitive pricing altogether.²⁷² Under this rationale, predatory pricing is considered “a successful and fully rational business strategy.”²⁷³ This view, however, fails to acknowledge the dangers of predatory pricing once competitors are able to force rivals from the marketplace.²⁷⁴ By compelling a rival’s exit from the market or precluding a retailer’s entrance into the market, a predatory retailer can raise prices and reduce innovation and product variety without consequence.²⁷⁵

Despite evidence that predatory pricing may be used as an

presidential administrations).

²⁷⁰ *Brooke Group v. Brown & Williamson Tobacco*, 509 U.S. 209, 222-27 (1993).

²⁷¹ Bolton, *supra* note 184, at 2259. *See also* Peterson, *supra* note 2, at 352 (“The Supreme Court’s ruling in *Brooke Group* may have signaled the eventual demise of predatory pricing claims.”).

²⁷² Boudreaux, *supra* note 171, at 58-59.

²⁷³ Bolton, *supra* note 184, at 2241.

²⁷⁴ *See id.* at 2242.

²⁷⁵ *See id.* at 2243 (stating that “the anticompetitive effects of predatory pricing are higher prices and reduced output—including reduced innovation”); Roy Beth Kelley, *Wal-Mart Stores, Inc. v. American Drugs, Inc.*; *Drawing the Line Between Predatory and Competitive Pricing*, 50 ARK. L. REV. 103, 125 (1997) (conceding that although loss leader pricing can be good for consumers because it brings lower prices, a retailer can engage in this practice and then raise prices and eventually harm consumers).

instrument of economic abuse, some argue that courts and economists have failed to sufficiently recognize the dangers of below-cost pricing or protect small business entrepreneurs from predatory tactics of larger competitors.²⁷⁶ The federal concept of predatory pricing balances the anti-competitive harm of an action against its pro-competitive impact in order to determine whether the action violates a federal statute.²⁷⁷ Courts and agencies, however, have faced difficulties in interpreting federal antitrust law in a manner that preserves a fair balance between competitors, competition, and consumers.²⁷⁸ Courts often engage in only a brief analysis of pricing practices, and enforcement agencies feel pressure from economists to support pro-big business policies that enhance market efficiency.²⁷⁹ These forces combine to create an uncertain environment for small-business antitrust plaintiffs.²⁸⁰

²⁷⁶ Bolton, *supra* note 184, at 2241.

²⁷⁷ Borghesani, *supra* note 151, at 76 (noting that this concept is termed “rule of reason” analysis).

²⁷⁸ See Close, *supra* note 269, at 440 (stating that judges and policy makers are plagued by the desire to strike a balance between the interest in prohibiting anticompetitive predatory practices and preserving low prices); Pitofsky, *supra* note 269, at 586, 588 (asserting that predatory pricing usually benefits consumers because the practice lowers prices).

²⁷⁹ See Borghesani, *supra* note 269, at 81. When a court sees that consumer prices have dropped because of the actions the plaintiff complains of, the analysis usually stops there, but fails to account for long-term market effects. *Id.* If lower prices drive competitors from the market, consumers will be later harmed by a narrowed variety of goods and retailers who sell them. *Id.* Also, agencies face pressure from economists who fear forsaking efficiency in the name of predatory pricing prosecution. See *Morgan v. Ponder*, 892 F.2d 1355, 1358 (8th Cir. 1989) (noting that “[a] firm that cuts its prices is not necessarily engaging in predatory pricing. It may simply be responding to new competition, or to a downturn in market demand”); Bolton, *supra* note 184, at 2241 (noting that the consensus view in modern economics is that predatory pricing “can be a successful and fully rational business strategy”); Boudreaux, *supra* note 171, at 63. Since investigation into and prosecution of potential predatory pricing schemes costs time and money, economists feel that the determination should be left to market forces for the sake of efficiency. *Id.*

²⁸⁰ The Supreme Court has taken a favorable position towards big business, state legislatures have enacted antitrust statutes that range in coverage, and policymakers are split on the effectiveness of antitrust legislation. See Kelley, *supra* note 275, at 121 (discussing opposing economic theories). See also

MANAGING RETAIL SPRAWL IN MANHATTAN 303

The greatest obstacle facing New York antitrust plaintiffs remains the absence of a state unfair business statute comparable to those of California or Oklahoma.²⁸¹ To achieve an even playing field with retailers of all sizes, New York's business community deserves a broad-reaching state antitrust statute that protects competition *and* competitors.²⁸² These two objectives are not mutually exclusive, despite the *Brooke Group* court's assertion that antitrust law is intended to protect competition not competitors.²⁸³ In fact, frequently "individual competitors must be protected in the interest of preserving competition."²⁸⁴ A New York statute that prohibits loss leader selling and predatory pricing would serve the interests of New York's market and simultaneously protect its participants.

VI. NEW YORK CITY'S BEST BET: RE-DRAFT THE STATE ANTITRUST STATUTE

As unique enterprises, small retail and service-oriented stores have both economic and cultural importance to New York City's economy.²⁸⁵ Although the bright signs and billboards of retail behemoths often overshadow the contributions of the city's small businesses, "a vibrant small business sector, despite its ills and

Peterson, *supra* note 2, at 354 (commenting that judges have become suspicious of antitrust plaintiffs' ulterior motives).

²⁸¹ OKLA. STAT. ANN. tit. 15, §§ 598.1-598.11 (West 2004); CAL. BUS. & PROF. CODE §§ 17000-17101 (West 2004); CAL. BUS. & PROF. CODE §§ 17200-17210 (West 2004).

²⁸² See Louis B. Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076, 1076-77 (1979) (stating that goals of justice and antitrust laws sometimes demand protection of competitors as well as competition).

²⁸³ See *Brooke Group*, 509 U.S. at 220 (emphasizing that by its terms, the RPA only outlaws price discrimination when it threatens to injure *competition*, not when it might injure competitors).

²⁸⁴ Schwartz, *supra* note 282, at 1077.

²⁸⁵ Blake D. Morant, *The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses*, 7 J. SMALL & EMERGING BUS. L. 233, 240-41 (2003).

pitfalls, becomes a key determinant of a healthy economy.”²⁸⁶ In order to enhance New York City’s financial vibrancy, the city’s small business sector should be preserved and encouraged to grow. To best accomplish this goal, the New York state legislature should re-draft New York’s existing antitrust statute to better suit the interests of small retailers and consumers.

A. Proposed Expansion of New York’s Antitrust Statute

Despite economists’ concerns regarding the feasibility of state involvement in antitrust litigation,²⁸⁷ state antitrust statutes have assumed a unique role within antitrust litigation.²⁸⁸ However, difficulties with jurisdictional issues, questions of allowable damages, and enforcement complications between states and federal agencies have dissuaded states from passing their own prominent antitrust legislation.²⁸⁹ This trend is distressing, given that state-level antitrust legislation is critical to the welfare of both consumers and small businesses.²⁹⁰ Unlike federal antitrust litigation, “most state antitrust enforcement focuses on cases with particular localized impact on consumers, whether they are brought by a single state alone or on a multistate basis.”²⁹¹ The protection of New York City’s consumers and small retailers requires strong state-level antitrust legislation and enforcement. Although New York has antitrust legislation on the books, it presently lacks the strength to adequately protect what makes New York City

²⁸⁶ *Id.* at 244.

²⁸⁷ Prominent judicial commentator and economist Richard Posner has called for states to cease involvement in antitrust litigation and has recommended that states repeal their antitrust legislation. *See* Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940-42 (2001).

²⁸⁸ State antitrust prosecution differs from federal prosecution because the state statutes are broader in their proscriptions and employ a specific definition of “cost.” *See supra* Part I.V.B.

²⁸⁹ First, *supra* note 216, at 1033-40.

²⁹⁰ *See id.* at 1019 (state antitrust legislation is better able to address local concerns than federal).

²⁹¹ *Id.*

MANAGING RETAIL SPRAWL IN MANHATTAN 305

unique.²⁹²

The New York Antitrust Bureau states that the goal of New York antitrust legislation is to “ensure that industry is competitive, with a number of manufacturers or distributors of a product or service, all striving to attract customers.”²⁹³ Although New York’s antitrust legislation aims to protect both competition and consumers, the statute is not strong enough to enable the Bureau to fully accomplish its goals of protecting and ensuring a free market economy.²⁹⁴ The Donnelly Act’s failure to prohibit loss leaders effectively handcuffs the Antitrust Bureau and prevents the agency from sufficiently protecting the interests of New York’s small businesses from encroaching “big box” retailers.²⁹⁵

The New York State legislature should follow the lead of California and Oklahoma in entering the sphere of localized, aggressive antitrust enforcement.²⁹⁶ Through state antitrust enforcement, states may distance themselves from federal antitrust policies and adopt a more lenient threshold for plaintiffs.²⁹⁷ So long as a state statute does not preempt federal law, its scope may be broader than that of federal legislation.²⁹⁸

New York may want to model its new antitrust legislation on

²⁹² California, Florida, Illinois, Wisconsin, and Texas are considered to have expansive antitrust legislation. First, *supra* note 216, at 1016. First also recognizes that despite other states having stronger legislation than New York, there are still many states that have passed *weaker* antitrust legislation than that of New York. *Id.*

²⁹³ Office of New York State Attorney General Eliot Spitzer, Antitrust Enforcement in New York (2004), at <http://www.oag.state.ny.us/business/antitrust.html>.

²⁹⁴ *See id.* (stating that the antitrust laws are “aimed at protecting consumers’ purchasing power and saving jobs and businesses, all at the same time”).

²⁹⁵ N.Y. GEN. BUS. LAW §§ 340-347 (McKinney 2004).

²⁹⁶ OKLA. STAT. ANN. tit. 15, §§ 598.1-598.11 (West 2004); CAL. BUS. & PROF. CODE §§ 17000-17101 (West 2004); CAL. BUS. & PROF. CODE §§ 17200-17210 (West 2004).

²⁹⁷ *See* First, *supra* note 216, at 1037 (describing how, for better or worse, the paths of state and federal litigation often diverge); Peterson, *supra* note 2, at 358 (states may make it easier for plaintiffs to demonstrate predatory intent).

²⁹⁸ *See supra* note 180 and accompanying text.

the unfair practices legislation of California, which is even more comprehensive than the Oklahoma statute.²⁹⁹ The state's two major antitrust statutes, the Unlawful Practices Act (UPA)³⁰⁰ and the Unfair Competition Act (UCA),³⁰¹ aim to protect both consumers and businesses.³⁰² California's statutory antitrust prohibitions enjoy the broadest possible application.³⁰³ The statutes proscribe a wider range of activities than the federal statutes and employ a specific, plaintiff-friendly definition of "cost."³⁰⁴ For the purpose of determining whether a seller is pricing below cost, the California UPA employs the seller's "average total cost" (ATC).³⁰⁵ By including all possible business expenses of the seller in the calculation, the average total cost for a product increases. The UPA thus makes it easier for a plaintiff to prove that a seller sold goods below cost.³⁰⁶

California offers a second advantage to plaintiffs bringing suit under the California UPA for predatory, below-cost pricing. Section 17071 of the UPA stipulates that proof of a below-cost sale plus "proof of the injurious effect of such acts is presumptive

²⁹⁹ California has two state statutes prohibiting unfair business practices, while Oklahoma has one. OKLA. STAT. ANN. tit. 15, §§ 598.1-598.11 (West 2004); CAL. BUS. & PROF. CODE §§ 17000-17101 (West 2004); CAL. BUS. & PROF. CODE §§ 17200-17210 (West 2004).

³⁰⁰ CAL. BUS. & PROF. CODE §§ 17000-17101 (West 2004).

³⁰¹ *Id.* §§ 17200-17210 (West 2004).

³⁰² See STATE OF CAL. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT IN CALIFORNIA (2004), at <http://ag.ca.gov/antitrust/publications/antitrust.pdf> (noting that its antitrust enforcement helps both consumers and businesses).

³⁰³ See McCall, *supra* note 182, at 312.

³⁰⁴ See *id.* at 311-12. For example, the California Unfair Pricing Act specifically prohibits the use of loss leaders by retailers. *Id.* This is a notable omission from federal antitrust legislation, and one that hurts federal small business antitrust plaintiffs. *Id.*

³⁰⁵ *Id.* at 316. Section 17026 of the UPA sets forth its definition of "cost." CAL. BUS. & PROF. CODE § 17026 (West 2004). For a complete discussion of average total cost and other variations, see *supra* Part I.V.B.

³⁰⁶ McCall, *supra* note 182, at 316. A California state court decided that as long as the cost formula is related to legislative intent to prevent monopolistic behavior, the California UPA may set forth a different standard than the federal antitrust statutes. See *Turnbull & Turnbull v. ARA Transp., Inc.*, 219 Cal. App. 3d 811 (1990).

MANAGING RETAIL SPRAWL IN MANHATTAN 307

evidence of the purpose or intent to injure competitors or destroy competition.”³⁰⁷ This rebuttable presumption eases the burden of proof for the plaintiff, while allowing the defendant to rebut the presumption by showing that the below-cost pricing was due to good faith mistake.³⁰⁸

The greatest advantage a California antitrust plaintiff enjoys over a New York plaintiff stems from California UPA section 17044, which defines and prohibits the use of loss leaders in product pricing.³⁰⁹ Section 17030 defines a loss leader as “an item sold at less than cost where: (a) the purpose of the seller is to induce the purchase of other merchandise, or (b) the effect is a tendency to deceive purchasers, or (c) the effect is to divert trade from or injure competitors.”³¹⁰ Because large national retailers often establish dominance within a market by below-cost, loss leader pricing, a revision to the New York antitrust legislation that adopts California’s prohibition on loss leader pricing would benefit potential plaintiffs.³¹¹ With an expanded New York antitrust statute, a small business owner could press the Attorney General to bring suit against retailers such as Home Depot, Kmart, and Wal-Mart to preserve fair competition and the integrity of New York City’s retail market.³¹²

New York Governor George Pataki and Attorney General Eliot Spitzer must recognize the need for stronger state-level antitrust legislation within New York. Existing federal antitrust statutes and New York’s Donnelly Act are insufficient to protect small businesses. The weaknesses of New York’s antitrust regime are

³⁰⁷ CAL. BUS. & PROF. CODE § 17071 (West 2004).

³⁰⁸ McCall, *supra* note 182, at 333.

³⁰⁹ CAL. BUS. & PROF. CODE § 17044 (West 2004).

³¹⁰ McCall, *supra* note 182, at 337 (citing CAL. BUS. & PROF. CODE § 17030 (West 2004)).

³¹¹ See Bianco & Zellner, *supra* note 38 (discussing the market dominance of Wal-Mart and its retail tactics).

³¹² If New York were to model its statute after those of California or Oklahoma and prohibit loss leader, small business plaintiffs may be able to obtain injunctions against big box retailers for below-cost pricing like those in *Star Fuel Marts*. *Star Fuel Marts v. Murphy Oil USA*, No. Civ.-02-202-F, 2003 WL 742191 (W.D. Okla. Jan. 29, 2003). For a complete discussion of *Star Fuel Marts*, see *supra* notes 214-18 and accompanying text.

amplified by the pro-big business orientation of the state and federal judiciary following the Supreme Court's decision in *Brooke Group*.³¹³ Although the Federal Trade Commission and U.S. Department of Justice have jurisdiction to prosecute alleged violations of federal antitrust legislation, state antitrust enforcement offers unique advantages.³¹⁴ States understand their local conditions and have the opportunity to bring suits as a public entity against violators of the statutes.³¹⁵ Thus, states can better tailor their antitrust legislation to suit the needs of local markets and can selectively enforce the legislation when necessary in order to better benefit the public good.³¹⁶

CONCLUSION

Over the past one hundred years, American antitrust litigation has developed into an intricate, multi-tiered system.³¹⁷ Applications of federal and state statutes have varied in type and scope. The federal predatory pricing plaintiff faces serious judicial obstacles, but states are in a distinct position to provide relief.³¹⁸ The nation now has a legal and institutional framework that provides states with "the jurisdiction and the capacity to prosecute

³¹³ 509 U.S. 209 (1993).

³¹⁴ First, *supra* note 216, at 1004 (discussing the jurisdiction of the Federal Trade Commission and Department of Justice); *Id.* at 1040 (noting the unique public policy perspective that states bring to antitrust enforcement).

³¹⁵ *Id.* at 1040. See Cavanagh, *supra* note 219, at 41-42. Cavanagh believes that "where state interests are pre-eminent, prosecutions by the state are more likely to be effective" at protecting consumers' interests for two reasons. *Id.* at 41. First, "state officials are closer to the action than federal officials and would normally be advanced than their federal counterparts on the learning curve." *Id.* Second, "state involvement from the outset is likely to be more efficient, since federal enforcers are apt to enlist significant state resources in any event." *Id.* at 42.

³¹⁶ It is essential to note that state antitrust enforcement has its opponents. See Posner, *supra* note 287, at 925.

³¹⁷ See *supra* Part I.V. for a discussion of the intersection among the various federal and state antitrust statutes and their different proscriptions.

³¹⁸ See Peterson, *supra* note 2, at 341 (relating how courts fear that plaintiffs may use federal antitrust legislation for improper ends).

MANAGING RETAIL SPRAWL IN MANHATTAN 309

violations of both federal and state antitrust law.”³¹⁹ Zoning and environmental law options do not offer the same advantages as the adoption of a strong, specific antitrust statute.³²⁰ New York’s legislature should take advantage of opportunities to fortify the state’s antitrust regime and protect the state’s small business sector while preserving New York City’s character.

The phenomenon of sprawl is no longer exclusive to rural areas. Although it is traditionally a concern of suburbs and rural areas, one land use and environmental attorney notes that “the loss of neighborhood character and open space are consistent problems faced by New York City” following the entrance of big box retailers.³²¹ Manhattan is known for its wide variety of small shops and businesses.³²² However, as big box retailers enter New York City’s market, Manhattan grows closer to losing the unique retail landscape that residents and historians have come to treasure. Each time a big box store opens its doors, more Manhattanites are tempted to embrace the convenience that such a store offers—a result that will homogenize the borough and permanently change its feel. Although one big box store does not signal the end of Manhattan as we know it, one on each block just might.

³¹⁹ First, *supra* note 216, at 1040.

³²⁰ See *infra* Parts V(A) and V(B) for a discussion of the shortfalls of zoning and environmental law in protecting communities against big box retail development.

³²¹ Christopher Rizzo, *Protecting the Environment at the Local Level: New York City’s Special District Approach*, 13 *FORDHAM ENVTL. L.J.* 225, 228 (2002).

³²² POINT OF PURCHASE, *supra* note 12, at 65. Until the time that discount superstores came to Manhattan, “shopping in the city’s residential neighborhoods was an intensely personal experience. You shopped for each item in a small, specialized, independently owned store, whose owner usually had a story, and hearing that story was part of the experience of both living in the neighborhood and shopping there.” *Id.*