

NOTE

TWO ROADS DIVERGED: TESLA, INTERRUPTION, AND THE COMMERCE CLAUSE

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I. INTRODUCTION

The electric car revolution has been a long time coming, but now appears to be upon us.¹ As one of the most innovative and popular companies today, Tesla Motors, Inc. (“Tesla”) has produced several industry-altering technologies and sparked a race to manufacture fully electric vehicles.² Elon Musk,³ Tesla’s restless chief executive officer, has steered the company along

* Thank you Mom, Dad, Rosa, Liz, Amy, Sarah, Professor Leonard, and the JOSTL team. Without each of you, none of this would have been possible. Stephen is a 2016 J.D. Candidate at Boston University School of Law.

¹ See John Briggs, *When Will Electric Cars Compete in the Mainstream Market*, GREEN CAR REPORTS (Aug. 4, 2014), http://www.greencarreports.com/news/1093557_when-will-electric-cars-compete-in-the-mainstream-market [<http://perma.cc/E3C5-EXMW>].

² Interview with John C. Briggs, Senior Engineer, Fraunhofer USA, in Boston, Mass. (Nov. 3, 2014). John C. Briggs is a Mechanical Engineer working for the Fraunhofer Center for Manufacturing Innovation at Boston University in Brookline, Massachusetts. Mr. Briggs is also a regular contributor to Green Car Reports, focusing on clean-energy, energy efficiency, and electric cars.

³ Musk’s first company, Zip2, sold for \$307 million to Compaq Computers in 1999. Seth Lubove, *Way Out There*, FORBES (May 12, 2003, 12:00 AM), <http://www.forbes.com/global/2003/0512/054.html> [<http://perma.cc/ZJ9K-WDHU>]. Soon after, Musk helped to sell PayPal in 2002 for \$1.5 billion, of which Musk had an eleven-percent ownership stake as co-founder. *Elon Musk Biography*, ENCYCLOPEDIA OF WORLD BIOGRAPHY, <http://www.notablebiographies.com/news/Li-Ou/Musk-Elon.html> [<http://perma.cc/6MKM-BGKK>]. Musk is currently the CEO and Product Architect of Tesla Motors and the CEO and Chief Designer at Space Exploration Technologies (a space transport service company that designs, launches, and lands rockets. SpaceX is the first private company to send a spacecraft into orbit and is currently working to be the first team to ever land a “reusable launch system”). *About Tesla*, TESLA MOTORS, <http://www.teslamotors.com/about> [<http://perma.cc/JE5K-GU5L>]; Elon Musk, *Elon Musk on Founding SpaceX*, BIGTHINK, <http://bigthink.com/videos/elon-musk-on-founding-spacex> [<http://perma.cc/75U9-3KN3>]. Musk also serves as the chairman of Solar City, America’s largest solar power provider. *Executive Management*, SOLAR CITY, <http://www.solarcity.com/company/team> [<http://perma.cc/NX62-5252>]. Musk has recently

difficult terrains, finding a great deal of success where many others have failed spectacularly.⁴ The pace at which the company pursues “disruptive technologies”⁵ is the primary reason for its success, but a less obvious piece to the Tesla puzzle is its direct-to-consumer sales model. Tesla has upended a century-old model by taking control of its electric vehicle sales directly to a public that is wary about the new technology’s costs and benefits. While a majority of consumers consider the consumer-focused model better in many respects, direct-to-consumer sales have met resistance from traditional manufacturers, dealership owners, and state legislators alike.⁶

For several decades, states have legitimately employed franchise laws against certain coercive practices in order to “compensate for the real or perceived lack of bargaining equality between dealers and their suppliers.”⁷

released plans for a “fifth mode of transportation” (autos, boats, planes, and trains being the first four), called the “Hyperloop.” Musk promises that the Hyperloop will speed 760 miles per hour above ground and under water, bringing travelers between Los Angeles and San Francisco in about thirty minutes. Bruce Upbin, *Hyperloop Is Real: Meet the Startups Selling Supersonic Travel*, FORBES (Mar. 2, 2015, 6:05 AM), <http://www.forbes.com/sites/bruceupbin/2015/02/11/hyperloop-is-real-meet-the-startups-selling-supersonic-travel/#3ccff9a5313c> [<https://perma.cc/Z5Y2-2FQY>].

⁴ Compare Max Chafkin, *A Broken Place: The Spectacular Failure of the Startup That Was Going to Change the World*, FAST COMPANY (Apr. 7, 2014, 6:00 AM), <http://www.fastcompany.com/3028159/a-broken-place-better-place> [<http://perma.cc/99BW-UYQL>] (after nearly \$1 billion in funding, an Israeli company named Better Place, who manufactured electric vehicles and established a network of battery-swap stations within the small country, filed for bankruptcy in relation to issues such as “profligacy, marketing problems, hiring problems, problems with every conceivable part of the business.”), and Nicole Lee, *Tesla Motors Repays Department of Energy Loan Nine Years early*, (May 22, 2013, 5:28 PM), <http://www.engadget.com/2013/05/22/tesla-motors-repaid-doe-loan/> [<http://perma.cc/QNW5-RF8E>] (Tesla Motors repaid a \$451.8 million loan from 2010 in just three years, prior to maturity. The loan was secured under the Advanced Technology Vehicle Manufacturing program, which was signed into law under President George W. Bush in 2008), *with In re Fisker Automotive Holdings, Inc.*, 510 B.R. 55, 56-57 (Bankr. Del. 2014) (Fisker defaulted on a \$168 million loan from Department of Energy. “[Fisker] faced many difficulties that prevented [them] from operating as planned . . . [including] safety recalls related to battery packs.”).

⁵ A disruptive technology is a rare innovation capable of toppling existing industry leaders. This is compared to sustaining technologies, which “have [simply] reinforced established trajectories of product performance improvements.” CLAYTON M. CHRISTENSEN, *THE INNOVATOR’S DILEMMA* 10-15 (HarperBusiness, 2011). Disruptive technologies represent leaps in innovation.

⁶ See Davies-Shawhyde, *infra* at 240.

⁷ Gary W. Leydig, *Survey of State Dealer Laws*, (Oct. 15, 2010) <http://www.leydiglaw.com/userfiles/file/survey%20of%20state%20dealer%20laws.pdf> [<http://perma.cc/2GAK-QA2M>]. “The unique advantage of franchising for the manufacturer lies in the considerable control over the process of distribution he may exercise without exposure to the burdens and responsibilities of an agency relationship.” Friedrich Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1136

Franchise laws typically prevent practices like forcing dealerships to accept unwanted deliveries of cars, canceling or failing to extend franchise agreements without just cause, unreasonably refusing the sale of a franchise to third parties, requiring “line-make”⁸ franchised dealerships to incur unnecessary expenses like having to participate in costly advertising campaigns,⁹ and preventing new dealerships from opening within the same geographic location as an existing dealership of the same make.¹⁰ Yet Tesla maintains that these laws do not apply to it, because the company has never operated a franchised dealership.¹¹ Since Tesla has no contractual franchise obligations, it cannot commit the harms that legislators sought to protect against when adopting franchise laws. Rather than protecting local interests from harmful market behaviors, in the fight over Tesla’s deliberately chosen sales model, franchise laws are being used to protect local jobs and costly franchise networks from competition with Tesla’s direct-to-consumer model.¹² This paper will argue that use of prohibitions against direct-to-consumer automobile sales preventing out-of-state competition based on protectionist local instincts violates the dormant Commerce Clause.

The dormant Commerce Clause is meant to maintain a free national marketplace by preventing local and state laws that favor in-state businesses while harming the national common market.¹³ There are two tests that help determine whether a law legitimately protects a local interest or unreasonably burdens interstate commerce. Under the first test, laws that treat “similarly situated” in-state and out-of-state interests differently for reasons based solely on their domicile are *per se* unconstitutional.¹⁴ This test employs strict scrutiny, but it provides little protection since legislatures will rarely discriminate against out-of-state interests explicitly on the basis of domicile.¹⁵

(1957).

⁸ “‘Line-make’ means a group or series of motor vehicles that have the same brand identification or brand name, based upon the manufacturer’s trademark, trade name, or logo.” COLO. REV. STAT. §12-6-102 (2015). For instance, Herb Chambers Honda in Boston is a line-make franchised dealership of Honda Motor Company.

⁹ COLO. REV. STAT. §12-6-120 (2015). *See also* Leydig, *supra* note 7.

¹⁰ James Surowiecki, *Dealer’s Choice*, THE NEW YORKER (Sept. 4, 2006), <http://www.newyorker.com/magazine/2006/09/04/dealers-choice-2> [<http://perma.cc/7AFN-ZY7A>].

¹¹ *See* Roger M. Quinland, *Has the Traditional Automobile Franchise System Run Out of Gas?*, AMERICAN BAR ASSOCIATION (Summer 2013), http://www.americanbar.org/publications/franchise_lawyer/2013/summer_2013/has_traditional_automobile_franchise_system_run_out_gas.html [<http://perma.cc/QH6W-SWL8>].

¹² *See id.*

¹³ *See, e.g.*, *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949); *see also* *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 350 (1977).

¹⁴ *See, e.g.*, *Oregon Waste Systems, Inc. v. Dept. of Env’tl. Quality of State of Or.*, 511 U.S. 93, 99 (1994).

¹⁵ *See* *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1954).

The second test purports to take a more exacting look at the overall quality of a law in question.¹⁶ Known most commonly as the *Pike Balancing Test* (“Pike Test”), the Supreme Court in *Pike v. Bruce Church* invalidated a protectionist state law, because the law’s burden on interstate commerce outweighed its putative local benefits.¹⁷ Subsequent cases have shown that courts must give great deference to legislatures in examining commercial statutes, but the Pike Test can never be so deferential as mere rational basis scrutiny.¹⁸ Since legislatures can disguise the intent of laws when the second test is too deferential, courts must employ a more searching inquiry under the Pike Test. “[T]he question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”¹⁹ *Pike* does not simply stand for upholding laws that fit into predefined categories of permissible local legislating, but rather invalidates discriminatory laws whether “forthright or ingenious.”²⁰

A. Background: Tesla Leads Electric Vehicle Makers in Innovation

In 1974, an upstate New York car dealer named Bob Beaumont produced the first fully electric vehicle.²¹ The Sebring-Vanguard CitiCar was “a glorified golf cart with aluminum poles holding up a canopy” that produced 3.5 horsepower, averaged about forty miles per charge, and had a top speed of thirty-eight miles per hour.²² For decades, many companies have failed to produce an electric vehicle that could compete with traditional gas-powered cars and gain mass-market adoption.²³

Today, Tesla’s 2015 P85D with the “Ludacris Mode” upgrade boasts 691 horsepower,²⁴ an EPA rated range of 295 miles per charge, a top speed of 155

¹⁶ See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁷ See *infra* text accompanying notes 110-119.

¹⁸ See *Hunt*, 432 U.S. at 350 (“[A] finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry Rather, when such state legislation comes into conflict with the Commerce Clause’s overriding requirement of a national ‘common market,’ we are confronted with the task of effecting an accommodation of the competing national and local interests.”).

¹⁹ *Pike*, 397 U.S. at 142.

²⁰ *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940). “The word ‘ingenious’ in this context indicates a covert *purpose* to discriminate, cleverly dissembled.” Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1238 (1986).

²¹ Anthony Cagle, *Sebring-Vanguard CitiCar*, CAR LUST (Jan. 26, 2010), <http://www.carlustblog.com/2010/01/sebringvanguard-citicar.html> [<http://perma.cc/7U3D-JZST>].

²² *Id.*

²³ See sources cited *supra* note 4.

²⁴ This ranks the P85D sixth on the list of the “Top 10 High Horsepower Sports Cars.” *Top 10 High Horsepower Sports Cars: #6 2015 Tesla Model S*, AUTOBYTEL,

mph,²⁵ and can go from zero to sixty in just 2.8 seconds.²⁶ In 2013, Tesla's Model S sedan received Motor Trend's Car of the Year award,²⁷ was given Consumer Report's highest overall customer satisfaction rating (and again in 2014),²⁸ and gained a five-star safety rating for each of the National Highway Safety Administration's testing categories.²⁹ The Model S "broke" Consumer Report's rating system by achieving the highest ever vehicle rating of 103 of 100.³⁰ In comparison, the Nissan Leaf, one of the most competitive electric vehicles to Tesla on the market in terms of sales, generates only 107 horsepower, has a range of eighty-four miles per charge, tops out at ninety-four mph, and takes 10.2 seconds to get from zero to sixty.³¹ Admittedly, the Leaf is about a third of the price of a Model S;³² however, it is unclear whether the

<http://www.autobytel.com/top-10-cars/high-horsepower-cars/sports-cars/>
[<http://perma.cc/3D4E-XHDL>].

²⁵ Nikki Gordon-Bloomfield, *Five Things to Know About the New Tesla Model S 60D, 85D and P85D Electric Sedans*, TRANSPORT EVOLVED (Oct. 12, 2015), <https://transportevolved.com/2014/10/13/five-things-know-new-tesla-model-s-60d-85d-p85d-electric-sedans/> [<https://perma.cc/J5MN-699E>].

²⁶ TESLA MOTORS, <http://www.teslamotors.com/models> [<https://perma.cc/D2YL-4RWU>].

²⁷ Angus MacKenzie, *2013 Motor Trend Car of the Year: Tesla Model S*, MOTOR TREND (Jan. 2013), http://www.motortrend.com/oftheyear/car/1301_2013_motor_trend_car_of_the_year_tesla_model_s/viewall.html [<http://perma.cc/EQV4-YK7R>].

²⁸ Stephen Edelstein, *Tesla Model S Tops Consumer Reports Customer Satisfaction Index, Again*, GREEN CAR REPORTS (Dec. 4, 2014), http://www.greencarreports.com/news/1095745_tesla-model-s-tops-consumer-reports-customer-satisfaction-index-again [<http://perma.cc/H7TV-43BY>].

²⁹ NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *2014 Tesla Model S HB RWD*, SAFECAR, <http://www.safercar.gov/Vehicle+Shoppers/5-Star+Safety+Ratings/2011-Newer+Vehicles/Vehicle-Detail?vehicleId=8787> [<http://perma.cc/6CTU-2NCJ>].

³⁰ Reviewers called the Model S "a glimpse into the future of the auto industry." Chris Bruce, *Tesla Model S broke Consumer Reports' Rating System*, CONSUMER REPORTS (Aug. 27, 2015 11:30 AM), <http://www.autoblog.com/2015/08/27/tesla-model-s-consumer-reports-video/> [<https://perma.cc/DJL7-2594>]. It is also nearly double the Fisker Karma's (a plug-in hybrid vehicle) rating of 52. *Tesla Model S Review*, CONSUMER REPORTS (July 2013), <http://consumerreports.org/cro/magazine/2013/07/tesla-model-s-review/index.htm> [<http://perma.cc/2JMY-VC9F>].

³¹ *Nissan Leaf*, CAR AND DRIVER, <http://www.caranddriver.com/nissan/leaf> [<http://perma.cc/7HTK-LJV4>]. Compare the Leaf's performance with the Chrysler Town and Country minivan, which has 283 horsepower, a top speed of 119 mph, and gets from zero to sixty in 7.6 seconds. *Chrysler Town & Country*, CAR AND DRIVER, <http://www.caranddriver.com/chrysler/town-country> [<http://perma.cc/N952-7A6U>].

³² Stephen Edelstein, *Electric Car Price Guide: Every 2015-2016 Plug-In Car, With Specs*, GREEN CAR REPORTS (Apr. 10, 2015), http://www.greencarreports.com/news/1080871_electric-car-price-guide-every-2012-2013-plug-in-car-with-specs [<http://perma.cc/TC6A-989G>] (the Nissan Leaf costs \$29,860, while

car industry would have even achieved a success like the Leaf if it were not for Tesla's ability to innovate and drive to act as the technology's ambassador, demonstrated by its decision to publicly release its patents.³³ The decision to use an open source method to quicken the rate of innovation stems from Musk's vision that Tesla's "true competition is not the small trickle of non-Tesla electric cars being produced, but rather the enormous flood of gasoline cars pouring out of the world's factories every day."³⁴

B. Why Tesla's Business Model Helps Sell Cars

Musk believes that Tesla would fail if it were forced into the franchised dealership model.³⁵ As he writes, "[i]n recent years, electric car startups, such as Fisker, Coda, and many others, attempted to use auto dealers and all failed."³⁶ The company maintains that it succeeds at selling electric vehicles in part because its friendly showrooms and knowledgeable staff are better able to educate customers,³⁷ much as Apple Geniuses are better able to fix your iPhone than a poorly trained teenager at a big box store like Radio Shack.

George Blankenship, former vice president of real estate for Apple Computers, designed Tesla's "stylish and inviting" showrooms to mimic the computer company's customer-centric approach.³⁸ Tesla uses small showrooms located in high volume areas such as shopping malls, often containing only one vehicle for display.³⁹ Tesla believes that it must control the way that its customers learn about electric vehicles so that they have positive experiences from start to finish.⁴⁰ Given the slim profit margins

the Tesla Model S can cost between \$75,000 and \$100,000).

³³ See Elon Musk, *All Our Patent are Belong to You*, TESLA MOTORS (June 12, 2014), <http://www.teslamotors.com/blog/all-our-patent-are-belong-you> [<http://perma.cc/VPX9-G8HS>]; Drew Harwell, *Electric-car Rivals Like the 'Tesla Killer' are Exactly What Elon Musk Wants*, THE WASHINGTON POST (Jan. 14, 2015), <http://www.washingtonpost.com/news/business/wp/2015/01/14/electric-car-rivals-like-the-tesla-killer-are-exactly-what-elon-musk-wants/> [<http://perma.cc/3AN2-HSBB>].

³⁴ *Id.*

³⁵ Jim Malewitz & Bobby Blanchard, *Dealers Reach Out, but Tesla Slams the Door*, THE TEXAS TRIBUNE (Feb. 15, 2015), <http://www.texastribune.org/2015/02/18/dealers-tesla-give-us-shot/> [<http://perma.cc/V69Z-UVLJ>].

³⁶ Elon Musk, *To the People of New Jersey*, TESLA MOTORS (March 14, 2014), <http://www.teslamotors.com/blog/people-new-jersey> [<http://perma.cc/4B8N-QYRN>].

³⁷ Brief for Petitioner-Appellant at 5, *Tesla Motors, Inc. v. N.J. Motor Vehicle Comm'n*, (Super. Ct. N.J. May 8, 2014) (No. A-3213-13T2), <http://www.autonews.com/assets/PDF/CA96370917.PDF> [<http://perma.cc/UYC8-FQES>].

³⁸ *Tesla Hires Apple, Gap Veteran to Revolutionize Car Buying Experience*, TESLA MOTORS (July, 8 2010), <http://www.teslamotors.com/blog/tesla-hires-apple-gap-veteran-revolutionize-car-buying-experience> [<http://perma.cc/3TWN-XNVS>].

³⁹ Brief for Petitioner-Appellant, *supra* note 37, at 6.

⁴⁰ See *id.* at 6-7.

required to make the franchise model solvent,⁴¹ a perverse incentive exists for franchised dealerships to sell high volumes of traditional gas-powered vehicles that have lower opportunity costs.⁴² Consumers must be educated about all aspects of electric vehicle ownership, while they understand the performance of gas vehicles with just a few numbers.

Tesla's chosen business model also permits it to reduce the costs associated with predicting consumer tastes. Traditional manufacturers rely on producing large volumes of inventories across several model types and a risky system of predicting constantly changing consumer tastes.⁴³ On the other hand, Tesla's distribution model maintains a lean level of inventory by giving consumers the ability to customize vehicles online before they are purchased and then assembled⁴⁴ at the company's factory in Fremont, CA.⁴⁵ By controlling the customer experience and reducing inventory costs, Tesla believes it has a winning formula for distributing its disruptive technology to consumers while reinvesting profits into disruptive innovations.⁴⁶

C. The Franchise Dilemma: Why Franchised Dealerships Will Not Succeed Alone in Selling the Electric Vehicle

The Innovator's Dilemma, Clayton M. Christensen's extensive study of disruptive and sustaining technologies, finds that established market leaders are no good at introducing new technologies.⁴⁷ Instead, established businesses are best at extending the viable lives of sustaining technologies by making minor improvements with each iteration.⁴⁸ Market leaders require an immediate application of new technologies to mainstream customers and retailers—their “value networks”—rather than looking towards the long-term potential of new and risky technologies.⁴⁹ Established market leaders tend to

⁴¹ Stephanie Mencimer, *Why You Can't Buy a New Car Online*, MOTHER JONES (Feb. 10, 2009, 6:05 AM), <http://www.motherjones.com/politics/2009/02/why-you-cant-buy-new-car-online> [<http://perma.cc/D9LJ-EB7R>] (Dealerships “actually pay about \$2,500 more for a car from the manufacturer than they sell it for.” Instead, they “make their money elsewhere—on repairs and servicing, financing, and other products.”).

⁴² Brief for Petitioner-Appellant, *supra* note 37, at 5.

⁴³ Cf. Ruoshan Tao, *Tesla Created A Custom-Built Supply Chain That Competes with the Best, and So Can You*, TRADEGECKO (Sept. 5, 2014), <https://www.tradegecko.com/blog/tesla-custom-built-supply-chain> [<http://perma.cc/Z3J3-ET46>].

⁴⁴ *Id.*

⁴⁵ *Tesla Factory*, TESLA, <http://www.teslamotors.com/factory> [<http://perma.cc/832M-FJ9G>].

⁴⁶ See Brief for Petitioner-Appellant, *supra* note 37, at 7.

⁴⁷ See CHRISTENSEN, *supra* note 5, at 239.

⁴⁸ See *id.* at 34-35.

⁴⁹ *Id.*

invest most heavily in areas that will yield more certain profits.⁵⁰ Both internal value networks of executives at manufacturing companies seeking to satisfy shareholders and external networks of franchised dealership owners looking to put dinner on the table will resist the risks of investing time and money into developing uncertain technologies and systems.⁵¹

When developers of disruptive technologies in other industries have run into similar adoption problems, they have traditionally sought new value networks that appreciate their technologies for reasons that entrenched networks cannot.⁵² For instance, when Honda introduced its small-sized Supercub 50cc motorbike into North America in 1959, it first followed the tried and trusted method for selling motorcycles through dealerships.⁵³ However, Honda struggled against established leaders like Harley Davidson.⁵⁴ Honda's motorbikes, designed for zipping around congested cities like Tokyo, did not appeal to the traditional American market's desire for large bikes and long distance comforts.⁵⁵ One Saturday, while riding a Supercub through a wooded path in the hills east of Los Angeles to clear his mind, Honda's executive in charge of North America, Kihachiro Kawashima, developed a plan to sell the bike to a new customer base with entirely different priorities: dirt bikers.⁵⁶ Honda targeted these consumers through sporting good stores rather than traditional dealerships and developed its own economics for the disruptive business and sport.⁵⁷ In comparison, when Harley attempted to use its established value-networks to introduce its own line of small-engine bikes, the company failed.⁵⁸ The processes for manufacturing small bikes fell outside Harley's core competencies and customers visiting Harley dealerships were not looking for dirt bikes.⁵⁹ In the end, Harley's foray into small bikes failed and the company turned back to selling large engine bikes.⁶⁰

Six years before the founding of Tesla, Christensen predicted that any successful electric car company would "have as a basic strategic premise the need to find or create new distribution channels" because dealers' economic models for making profits "are powerfully shaped by the mainstream value network."⁶¹ In other words, the franchised dealership model is not

⁵⁰ *See id.* at 48; *see also* Surowiecki, *supra* note 10.

⁵¹ *See* CHRISTENSEN, *supra* note 5, at 175 (discussing Harley-Davidson's struggle to compete with emerging technologies due to push-back from its dealer network).

⁵² *See id.* at 165-78.

⁵³ *Id.* at 173-175.

⁵⁴ *Id.*

⁵⁵ *See id.* at 173.

⁵⁶ *Id.* at 174.

⁵⁷ *Id.* at 248.

⁵⁸ *Id.* at 175.

⁵⁹ *See id.*

⁶⁰ *Id.* at 176.

⁶¹ *Id.* at 248-249.

economically feasible for disruptive technologies due to entrenched economic decisions that were made a century ago. Both traditional consumer demand and the established economics of franchised dealerships means that the success of electric vehicles hinges on the ability to find early adopters, while defining new economic principles that make sense for electric vehicle sales.⁶² Thus, the dilemma is that the more successful a manufacturer was in the past, the less likely the company will be to stray from its entrenched economics and sustaining technologies.

The direct-to-consumer business model is not simply preferable for Tesla, rather it is necessary. If franchise laws attempt to squeeze the square peg that is Tesla through the round hole that is franchised dealership business, then it is possible the market innovations it has driven will come to a screeching halt. These innovations include projects like Tesla's construction of its "Gigafactory" in Nevada that will create nearly 6,500 jobs,⁶³ as well as its development of driverless vehicle technology that could help prevent 30,000 deaths a year in the United States.⁶⁴ Not to mention there is Musk's ultimate goal of constructing a national clean charging grid and highways full of driverless, zero-emissions vehicles.⁶⁵

⁶² Since the economics of owning an electric vehicle differ greatly from a gas-powered vehicle, such differences must be taken into account when developing a new distribution model. For instance, the cost savings of driving a Tesla Model S rather than the comparable BMW 7 Series for 100,000 miles is \$16,192, depending on the price of gas. Philip Reed, *2013 Tesla Model S: Cost of Gas vs. Electricity*, EDMUNDS, (June 3, 2004) <http://www.edmunds.com/tesla/model-s/2013/long-term-road-test/2013-tesla-model-s-cost-of-gas-vs-electricity.html> [<http://perma.cc/3WFF-8TPU>]. Tesla's Musk recently put this number at \$10,000, as a result of lower gas prices. James Ayre, *Elon Musk: Since Most Tesla Owners Do Save \$10,000 In Gas Costs Over 5 Years*, CLEAN TECHNICA (Apr. 12, 2015), <http://cleantechnica.com/2015/04/12/elon-musk-since-tesla-owners-save-10000-gas-costs-5-years-sticking-advertising-prices-minus-costs/> [<http://perma.cc/5QW6-33KB>].

⁶³ Chris Woodyard, *Nevada, Tesla Announce Huge 'Gigafactory' Deal*, USA TODAY, (Sept. 5, 2014, 12:05 AM), <http://www.usatoday.com/story/money/cars/2014/09/04/tesla-gigafactory-reno/15095411/> [<http://perma.cc/Z4J6-BRFK>].

⁶⁴ Emily Badger, *Elon Musk Says We'll Outlaw Human Drivers in a World of Driverless Cars. Really?*, THE WASHINGTON POST (March 18, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/03/18/should-we-outlaw-human-drivers-in-a-world-of-driverless-cars/> [<http://perma.cc/23GS-45H7>].

⁶⁵ See ASHLEE VANCE, ELON MUSK: TESLA, SPACE X, AND THE QUEST FOR A FANTASTIC FUTURE 15 (2015); Sanjay Solomon, *Watch as We Let a Tesla Model S Take the Wheel*, BOSTON.COM (Nov. 12, 2015, 4:13 PM), <http://www.boston.com/cars/news-and-reviews/2015/11/12/watch-let-tesla-model-take-the-wheel/jA6wZQvy7AnuCAoFcltMCK/story.html> [<https://perma.cc/M4PN-BCGF>] (demonstrating Tesla's new Autopilot program, which allows drivers to take their hands off the wheel on certain highways).

II. LEGISLATION

Fearing that allowing Tesla to sell directly to consumers will lead to the ultimate downfall of franchised dealerships, legislatures have given in to the pressures to use franchise laws to block Tesla direct sales.⁶⁶ As an automobile manufacturer, Tesla faces a complicated patchwork of state legislation that prohibits direct sales, or in some cases prevents the company from even providing test drives and warranties.⁶⁷ Generally, State franchise laws fit into three broad categories: (1) laws that categorically restrict direct sales by manufacturers to consumers or ownership of a dealership by a manufacturer;⁶⁸ (2) laws that restrict manufacturers from selling cars to consumers in direct competition with its own line-make franchised dealerships;⁶⁹ and (3) laws that protect franchised dealerships from specific coercive practices over franchisees other than by preventing direct competition.⁷⁰ The first category is the only one this paper addresses, because the latter two are rationally related to advancing a state's legitimate interest to protect contractual integrity.

The first category—the only one that prohibits Tesla from operating its direct-to-consumer sales model since it does not have franchised dealerships—restricts direct sales in two ways. The most protective version of this law is an outright ban on all direct sales by manufacturers to consumers. These laws exist in at least five states: Texas, Michigan, Arizona, Iowa, and West Virginia.⁷¹ In Michigan for example, a manufacturer may not “[s]ell any new

⁶⁶ Interview with John C. Briggs, *supra* note 2.

⁶⁷ Eric D. Stolze, *A Billion Dollar Franchise Fee? Tesla Motors' Battle for Direct Sales: State Dealer Franchise Law and Politics*, 34 *FRANCHISE L.J.* 293, 293 (2015).

⁶⁸ *See, e.g.*, TEX. OCC. CODE ANN. § 2301.476(c) (West 2012 & Supp. 2014) (“[A] manufacturer or distributor may not directly or indirectly: (1) own an interest in a franchised or nonfranchised dealer or dealership; (2) operate or control a franchised or nonfranchised dealer or dealership; or (3) act in the capacity of a franchised or nonfranchised dealer.”).

⁶⁹ *See, e.g.*, CONN. GEN. STAT. ANN. § 42-133cc(8) (West 2012 & Supp. 2015) (A manufacturer shall not . . . “Unfairly compete with a dealer *in the same line make* operating under an agreement or franchise from such manufacturer or distributor in the relevant market area.”) (emphasis added).

⁷⁰ *See, e.g.*, N.H. REV. STAT. ANN. § 357-C:3 (West 2009 & Supp. 2014) (In New Hampshire, a manufacturer may not “[c]ompete with a motor vehicle dealer operating under an agreement or franchise from such manufacturer or distributor in the relevant market area.”).

⁷¹ Maryalene LaPonsie, *Here's Why You Can't Buy a New Tesla in Motor City*, MONEYTALKS NEWS (July 10, 2015), <http://www.moneytalksnews.com/heres-why-you-cant-buy-new-tesla-motor-city/> [<http://perma.cc/WJ9X-BNPZ>]; Shiraz Ahmed & Amy Wilson, *Tesla's State-by-State Battle with Dealers*, AUTOMOTIVE NEWS (Mar. 1, 2014, 12:01 AM), <http://www.autonews.com/article/20140301/RETAIL/140229855/teslas-state-by-state-battle-with-dealers> [<http://perma.cc/Y9Q6-5DG2>]. Interestingly, Tesla operates galleries in both Texas and Arizona where customers can purchase vehicles on a computer inside of stores. Stores & Galleries Location Search, <http://www.teslamotors.com/findus#/bounds/49.38,-66.94,25.82,->

motor vehicle directly to a retail customer other than through franchised dealers.”⁷² Alternatively, many states purportedly limit direct sales by prohibiting manufacturers from obtaining a license to operate as a dealership.⁷³ In North Carolina, for example, “It is unlawful for any motor vehicle manufacturer . . . [to] own any ownership interest in, operate, or control any motor vehicle dealership.”⁷⁴

Several states, however, have created Tesla carve outs which do not name Tesla explicitly, but singly exempt the company from state franchise laws. For instance, effective July 1, 2015 in Georgia, a “manufacturer [with no] more than five locations” who “manufactures or assembles zero emissions motor vehicles exclusively and has never sold its line make of motor vehicles in this state” and “was selling or otherwise distributing its motor vehicles at an established place of business in this state as of January 1, 2015” will be permitted to sell directly to consumers.⁷⁵ These exemptions are the result of

124.38999999999999,d?search=store&name=United%20States [http://perma.cc/6DWJ-FTX9].

⁷² MICH. COMP. LAWS ANN. § 445.1574 (14)(1)(i) (Supp. 2015).

⁷³ See Ahmed & Wilson, *supra* note 71; LaPonsie, *supra* note 71. Still, it is unclear exactly how and if these laws prohibit Tesla from selling vehicles directly to consumers. For instance, in Arizona and North Carolina, manufacturers are prohibited from obtaining an ownership interest in a new car dealership—and thereby theoretically prohibited from selling vehicles directly to consumers. However, Tesla does own multiple “Galleries” in these states. This is where it starts to get hairy. Tesla claims that it does not sell vehicles at these locations. Even in states like Texas, where sales to consumers are prohibited, enforcement of the laws seem lax. Tesla’s Austin, Texas location writes on its website that “The Gallery does not sell cars, but serves as a place to educate visitors about our electric vehicles.” Tesla Motors, THE DOMAIN, <http://www.simon.com/mall/the-domain/stores/tesla-motors> [https://perma.cc/3EMP-HFAA]. Yet when I called the Gallery to inquire about the purchasing process for a Tesla, an employee ensured me that he would help me purchase a vehicle online at the Gallery location. The employee described it as “purchasing a car on Amazon.” Transactions are deemed to occur in California and the car is initially registered in California as well. They could not provide financing, but would connect me with someone who could. In Massachusetts, the new Tesla dealership at the Prudential Building told me that I could not go on a “test drive,” but that I could go on a “vehicle demonstration,” as the latter is not executed with the intention to sell. In most instances, these Galleries have not been challenged in court to date.

⁷⁴ N.C. GEN. STAT. ANN. § 20-305.2 (2010).

⁷⁵ GA. CODE ANN., § 10-1-664.1 (Supp. 2015). See also Carla Zappi, *Dealership or No Deal: New Jersey’s Ban on Direct Automobile Sales Prohibits Tesla from Selling Without Use of Dealerships*, RUTGERS J.L. & PUB. POL’Y (Sept. 1, 2014), <http://www.rutgerspolicyjournal.org/dealership-or-no-deal-new-jersey%E2%80%99s-ban-direct-automobile-sales-prohibits-tesla-selling-without-use-d> [http://perma.cc/69AP-LY24] (New Jersey legislature almost passed a bill that created a carve out to New Jersey’s direct sales prohibition for only those manufacturers who osell only zero emissions vehicles and have no more than four locations, which would have allowed Tesla to sell directly to consumers.).

intense lobbying by Tesla, but are faulty solutions since these laws limit Tesla's growth by capping the total number of stores the company can operate and prevents future competition from companies like Apple and Google.⁷⁶ Instead, the exemptions appear to be an attempt to appease Tesla lobbyists while protecting franchise dealership sales. This system is unsustainable and complex, but more importantly the fact that legislators are willing to permit some direct-to-consumer sales demonstrates that the laws providing a complete restriction against are truly focused on protecting local jobs rather than preventing the market harms that legislatures claim.

III. COMMERCE CLAUSE

A. Background

The Commerce Clause provides simply that “Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States.”⁷⁷ While the Commerce Clause itself speaks only of Congressional powers, the Supreme Court “has construed the Commerce Clause as incorporating an implicit restraint on state power even in the absence of congressional action—hence the notion of a ‘dormant’ Commerce Clause.”⁷⁸ The dormant Commerce Clause “denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.”⁷⁹ As such, the Supreme Court has unanimously rejected state laws that are based on the protection of local economic interests.⁸⁰

The dormant Commerce Clause is split into two main lines of cases.⁸¹ Under the first line, a state law that provides for “differential treatment of in-state and out-of-state interests that benefits the former and burdens the latter” for reasons based solely on their domicile is *per se* unconstitutional.⁸² For instance, in

⁷⁶ See James Ayre, *Google's Self-Driving Electric Car Fleet Is Expanding*, CLEAN TECHNICA (May 28, 2015), <http://cleantechnica.com/2015/05/28/googles-self-driving-electric-car-fleet-is-expanding/> [<https://perma.cc/4UHU-LD8V>]; Adrienne LaFrance, *Why Would Apple Make an Electric Car Not a Driverless One?*, THE ATLANTIC (Sept. 22, 2015), <http://www.theatlantic.com/technology/archive/2015/09/why-would-apple-make-an-electric-car-not-a-driverless-one/406645/> [<https://perma.cc/VQ5B-7QQH>].

⁷⁷ U.S. CONST. art. I, § 8, cl. 3.

⁷⁸ 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1030 (3d ed. 2000) (citing *Cooley v. Bd. of Wardens*, 53 U.S. 299, 318 (1851)).

⁷⁹ See *Or. Waste Sys. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 98 (1994).

⁸⁰ *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 532 (1949).

⁸¹ See Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1192 (1998).

⁸² *Or. Waste Sys.*, 511 U.S. at 99; see also *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (holding that a Madison, Wisconsin law prohibiting the distribution of milk pasteurized out-of-state “plainly discriminates against interstate commerce . . . [which it may not] do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate

Granholm v. Heald, the Supreme Court held that both a Michigan law placing an outright ban on direct-to-consumer wine sales by out of state wineries and a New York law requiring out of state wineries to establish a physical in-state presence violated the dormant Commerce Clause, because each law isolated in-state wineries from out-of-state competition.⁸³ The Court found that the constitutional violation of the Michigan law was “obvious,” in that it facially discriminated against similarly situated out-of-state interests.⁸⁴ The Court also held that the New York law violated the Commerce Clause due to its practical effect or purpose of excluding out-of-state wineries from selling directly to consumers, because the law increased the cost of compliance of out-of-state producers that prevented almost 3,000 wineries from selling their products to New York State residents.⁸⁵ Still, the protections of the first line of the dormant Commerce Clause end when legislatures make distinctions between businesses based on factors other than domicile.

Under the second line of cases, “[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld *unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.*”⁸⁶ This second line—known as an “undue burden,” “balancing,” or “Pike Test”—governs facially nondiscriminatory laws that might still have a protectionist purpose or substantial protectionist effects.⁸⁷ State legislators are given great deference when it comes to the wisdom or effectiveness of a statute, but courts have and must prevent states from “engaging in purposeful economic protectionism.”⁸⁸ Since legislatures may affect the same protectionist purpose of laws by regulating different economic levers rather than differentiating on the basis of domicile, the second line of the commerce clause becomes important in enforcing the dormant Commerce Clause’s purpose of a national common marketplace. It is also the test that must be applied to franchise laws, because they do not explicitly differentiate based on domicile.

B. The Purpose of the Dormant Commerce Clause

“[The Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”⁸⁹ Furthering this principle, the Supreme Court has held that the Commerce Clause requires that no state laws

local interests, are available.”).

⁸³ *Granholm v. Heald*, 544 U.S. 460, 473-76 (2005).

⁸⁴ *Id.* at 473.

⁸⁵ *See id.* at 467.

⁸⁶ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (emphasis added).

⁸⁷ *Id.* *See also* *Wyoming v. Oklahoma*, 502 U.S. 437, 455 n.12 (1992); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

⁸⁸ *Regan*, *supra* note 20, at 1092.

⁸⁹ *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

may infringe upon the maintenance of a national common market.⁹⁰ In the absence of conflicting federal legislation, states are free to regulate commerce, so long as they do not violate the overarching restraints Commerce Clause itself.⁹¹ Thus, when “considering proposed legislation, states [may not] act on parochial impulses” to insulate local interests from interstate competition.⁹² The Commerce Clause not only protects businesses from regulations that may exclude them from particular geographic locations, but also promotes free competition to protect consumers from the exploitation of oligopolies.⁹³

C. The Second Line of the Dormant Commerce Clause Cases: The Pike Test

The second line of the dormant Commerce Clause prohibits protectionist laws that regulate evenhandedly—based on characteristics other than domicile—but have incidental burdens that unreasonably interfere with interstate commerce.⁹⁴ This test is important to any dormant Commerce Clause challenge that Tesla may make. The test provides simply that “[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are *only incidental*, [the law] will be upheld *unless* the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”⁹⁵ While courts must give deference to local legislators,⁹⁶ a failure to closely examine laws for a protectionist purpose or substantial effect would strip the Commerce Clause of its original intent, always tipping the scales in favor of upholding protectionist state laws on the basis of only bare claims of advancing legitimate local interests.

Facial discrimination, like that in *Granholm*, will not occur “[s]ave for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods.”⁹⁷ Since legislators can often develop specious justifications for enacting laws with an undisclosed protectionist purpose, courts have the duty to scrutinize a law in question to determine whether it violates the basic tenants of dormant Commerce Clause analysis.⁹⁸ Thus, Supreme Court “cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects.”⁹⁹ When states act to protect legitimate local interests, such as the “safety, health and well-being of local communities,” they are permitted to regulate in ways that may incidentally

⁹⁰ See generally *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

⁹¹ *City of Philadelphia*, 437 U.S. at 623.

⁹² Norman R. Williams, *The Foundations of the American Common Market*, 84 NOTRE DAME L. REV. 409, 414 (2008).

⁹³ *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 539 (1949).

⁹⁴ See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

⁹⁵ *Id.* (emphasis added).

⁹⁶ See e.g., *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 443 (1978).

⁹⁷ *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951).

⁹⁸ *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940).

⁹⁹ *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994).

interfere with free interstate commerce.¹⁰⁰ In fact, such claims are strong presumptions of validity. Even when a law's incidental burdens fall exclusively on out-of-state interests, it might not violate the dormant Commerce Clause.¹⁰¹

Still, the second line of the dormant Commerce Clause strikes down laws that appear to advance a legitimate local interest, but in fact are intended to or have the substantial effect of protecting local economic actors.¹⁰² In the preeminent case, *Pike v. Bruce Church*, the Supreme Court ruled that an Arizona law requiring fruit to be packaged in-state with the purported benefit of restricting the flow of contaminated fruit to consumers outside the state was actually used to protect local jobs and enhance the reputation of the state's produce growers.¹⁰³ While Bruce Church's chosen business practice was to package cantaloupes in a California packing plant only several miles across state lines,¹⁰⁴ the law would have required all packaging to be done at more costly in-state facilities.¹⁰⁵ The Court acknowledged that preventing deceptive packaging practices could be a legitimate area for state legislation in many cases.¹⁰⁶ However, the Court also noted that requiring the packaging of cantaloupe to be performed in-state when it could be done at a lower cost out-of-state was an impermissible burden on interstate commerce since it was conceived on protectionist principles.¹⁰⁷

While Arizona's claim that the law protected consumers' health was clearly a legitimate local concern, the Court found little evidence that the law actually

¹⁰⁰ *Parker v. Brown*, 317 U.S. 341, 362 (1943); *Exxon Corp. v. Gov. of Maryland*, 437 U.S. 117, 127 (1978) (“[I]nterstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation” restrains certain business interests and not others).

¹⁰¹ *See Ford Motor v. Texas Dep’t of Transp.*, 264 F.3d 493, 501 (5th Cir. 2001) (The fact that “the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.”) (quoting *Exxon Corp.*, 437 U.S. at 126).

¹⁰² *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 646 (1982) (holding that it was unconvinced that an Illinois takeover statute requiring businesses with more than ten percent of their stock held by Illinois residents to register with the state substantially enhanced shareholders' position over those protections already offered under federal law); *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 444 (1978) (holding that a law banning 65-foot doubles, while permitting 55-foot singles, did not provide any actual safety benefits after citing several independent safety studies); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951) (determining that a law requiring all milk to be pasteurized within city limits was not actually essential for the protection of local health, despite claims made by the legislature).

¹⁰³ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970).

¹⁰⁴ Brief for Appellee at 4, *Pike*, 397 U.S. 137 (No. 301).

¹⁰⁵ *Pike*, 397 U.S. at 143.

¹⁰⁶ *See id.*

¹⁰⁷ *Id.* at 145.

furthered this interest.¹⁰⁸ Instead, the Court reasoned that the true aim of the law was to enhance the reputation of in-state growers by placing Bruce Church's superior produce into the national market with an Arizona, rather than California, stamp of approval upon its crates.¹⁰⁹ Yet this "[p]reservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits."¹¹⁰ Evidence of burdens on commerce, such as the company being forced to construct a \$200,000 packaging facility in Arizona in order to comply with the law, convinced the Court that the overarching requirement of a national common market exceeded the law's marginal local benefits.¹¹¹

Seven years later in *Hunt v. Washington Apple Growers*, the Supreme Court struck down a North Carolina law that required the exclusive use of USDA labeling on all apples shipped into North Carolina in closed containers.¹¹² Washington apple growers, who had developed a more stringent and nationally recognized grading system, claimed that the law inhibited their ability to exploit the benefits of their superior brand name identifiers.¹¹³ North Carolina claimed that a singular grading system protected the health of consumers by reducing fraud and deceptive packaging.¹¹⁴ Again, the Court acknowledged that the promotion of health and safety was a legitimate area of state legislation, but reaffirmed that this did not end the inquiry under the Pike Test since protectionist purposes can be obscured by "ingenious" lawmaking.¹¹⁵ In fact, evidence showed that the law actually magnified problems of deception "by depriving purchasers of all information concerning . . . quality" and did nothing to protect consumer health.¹¹⁶ Instead, the law aimed to make Washington apples less distinguishable from North Carolina apples, thereby making it more likely that consumers would unknowingly purchase local produce.¹¹⁷

In *Hunt*, the Supreme Court clarified *Pike* by determining that the existence of less discriminatory means of protecting consumers from contaminated apples favored a finding of unconstitutionality.¹¹⁸ The second line of the dormant Commerce Clause is not simply about a national common fruit market. The cases represent the notion that the proper analysis of constitutionality must look at a law's underlying purpose, as evidenced by its

¹⁰⁸ *Id.*

¹⁰⁹ *See id.* at 144–45.

¹¹⁰ *W. Lynn Creamery v. Healy*, 512 U.S. 186, 205 (1994).

¹¹¹ *Pike*, 397 U.S. at 145.

¹¹² *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 337–53 (1977).

¹¹³ *Id.* at 351.

¹¹⁴ *Id.* at 349.

¹¹⁵ *W. Lynn Creamery*, 512 U.S. at 201.

¹¹⁶ *Hunt*, 432 U.S. at 350.

¹¹⁷ *See id.* at 351–2.

¹¹⁸ *Id.* at 354.

substantial effect,¹¹⁹ in order to determine whether a stated purpose is a valid exercise of legislative powers or a specious justification for a more sinister intent.¹²⁰ While there is a presumption of validity when a legislature claims that a law advances some legitimate interest, courts closely examine the legislative history and purpose for enacting a law,¹²¹ whether the facts indicate the furtherance of the legitimate interest, if certain exemptions are made to undermine the presumption of a legitimate purpose,¹²² and whether a less restrictive alternative is available to further the same purpose.¹²³ The Pike Test requires close examination, because complete deference would permit legislators to cloak essentially protectionist laws in the garb of legitimate interests. More importantly, complete deference removes court oversight of state lawmaking and essentially eliminates all dormant Commerce Clause analysis. As Justice Cardozo pronounced, to give too great deference to a state's claimed benefits, "would be to invite a speedy end of our national solidarity."¹²⁴

D. Incidental Burdens on Interstate Commerce: Exxon, Clover Leaf, and Ford

While the dormant Commerce Clause allows courts to strike down laws that burden interstate commerce and have little local benefit, "[t]he fact that the burden of a state regulation falls [exclusively] on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce."¹²⁵ The Supreme Court provides this leniency, because "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people."¹²⁶ Though courts cannot "sit as a 'superlegislature to weigh the wisdom of legislation'"¹²⁷ the question of unconstitutionality must include a searching inquiry into the purpose of a law to prevent protectionist legislation.

In *Exxon Mobil v. Governor of Maryland*, the Supreme Court demonstrated greater deference to state legislators than *Pike* and *Hunt* when it upheld the constitutionality of a Maryland law prohibiting producers from marketing gasoline at the retail level, namely owning gas stations.¹²⁸ The law in *Exxon*

¹¹⁹ See generally Regan, *supra* note 20, at 1094-1108 (distinguishing between "open-ended private interest balancing," "national interest balancing," and "protectionist effect balancing," but concluding the purpose for enacting legislation is what defines it as protectionist, and thus unconstitutional).

¹²⁰ See, e.g., cases cited *supra* note 102.

¹²¹ See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617, 625 (1978).

¹²² See *Raymond Motors Transp. v. Rice*, 434 U.S. 429, 445 (1978).

¹²³ See *Hunt*, 432 U.S. at 354.

¹²⁴ *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

¹²⁵ *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978).

¹²⁶ *City of Philadelphia*, 437 U.S. at 623-24.

¹²⁷ *Exxon*, 437 U.S. at 124 (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)).

¹²⁸ *Id.* at 124-29.

differed from the laws of *Pike* and *Hunt* in that it regulated interests at different levels of a distribution chain rather than similarly situated businesses.¹²⁹ Three large refiners that owned several retail locations in Maryland challenged the law under the dormant Commerce Clause claiming that since there were no in-state producers of gasoline, the effect of the law was to prevent only out-of-state competition at the local retail level.¹³⁰ The economic realities of the energy industry meant that the law prohibited out-of-state producers from entering the in-state retail market, but permitted all in-state retailers to continue operating with less competition.¹³¹

The Court demurred on the grounds that the dormant Commerce Clause does not protect “particular structure[s] or methods of operation in a retail market.”¹³² The law regulated a legitimate local matter with evenhandedness, because it prohibited hypothetical in-state producers from operating in Maryland and indeed permitted out-of-state retailers to enter the state’s retail market.¹³³ The Court was unconcerned with whether the law actually worked in practice, since an even-handed law that prevented oil producers from operating low-cost retail stations relates only to the wisdom of the law and not its constitutionality.¹³⁴ Without citing *Pike*, the Court rested its opinion on two facts: (1) that even if some producers would choose not to supply gasoline to the state as a result of the law, the overall supply of gasoline would not decrease since other producers would fill this void,¹³⁵ and (2) that the law regulated all refiners evenhandedly without regard to their domicile.¹³⁶

Unlike *Granholm*, which distinguished between wine retailers based on domicile, the Maryland law in *Exxon* distinguished between manufacturers and retailers.¹³⁷ The problem with this distinguishing factor is that the effect fell entirely on out-of-state businesses. If courts fail to question the true purpose of potentially protectionist laws, then legislators can achieve protectionist outcomes by manipulating regulations around existing economic realities. The Court’s refusal to consider the intentions behind incidental burdens in its balancing test eschews the requirements of the Pike Test and removes the safeguards against ingenious protectionist laws.

Just after *Exxon*, in *Minnesota v. Clover Leaf Creamery*, the Supreme Court upheld a Minnesota statute that banned the retail sale of plastic milk cartons

¹²⁹ *Id.* at 125-6.

¹³⁰ *Id.* at 125.

¹³¹ *Id.*

¹³² *Id.* at 127.

¹³³ *Id.* at 125-26.

¹³⁴ *Id.* at 128 (“It may be true that the consuming public will be injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but again that argument relates to the wisdom of the statute, not to its burden on commerce.”).

¹³⁵ *Id.* at 127.

¹³⁶ *Id.* at 126-29.

¹³⁷ *Id.* at 125.

while permitting the sale of paperboard ones.¹³⁸ Due to existing economic realities, the law burdened only out-of-state producers who primarily used plastic containers while benefiting in-state producers who used paperboard cartons.¹³⁹ The Supreme Court used *Exxon* to overcome the trial court's findings that the law was intentionally discriminatory and not rationally related to its stated purpose.¹⁴⁰ Since environmental conservation was a purpose that was "at least debatable," the Supreme Court overturned the trial court's finding of fact that the "actual basis . . . was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry."¹⁴¹ The Supreme Court repeated that "[a] nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry."¹⁴² However, in refuting the lower court's finding of fact, the Supreme Court opened a backdoor to sidestep the purpose of the Pike Test.

Justice Stevens—who wrote the majority opinion in *Exxon*—dissented in *Clover Leaf Creamery* writing, "if a state law which purports to promote environmental goals is actually protectionist in design, a virtually automatic rule of invalidity, not a balancing-of-interests test, is applied."¹⁴³ Stevens supported the trial court's finding that

[d]espite the purported policy statement published by the Legislature as its basis for enacting [the ban against plastic milk bottles], the actual basis was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry.¹⁴⁴

Instead, the majority gave complete deference to the legislature's stated benefits, saying that there was no burden on interstate commerce since milk would continue to be sold in Minnesota and that the law regulated evenhandedly by not stating that it differentiated on the basis of domicile.¹⁴⁵ This exception noted by Stevens in *Clover Leaf*, however, should similarly be read as an exception to *Exxon*.

Most directly related to Tesla, in *Ford Motor Company v. Texas Department of Transportation*, the Fifth Circuit held that a Texas law prohibiting Ford from selling used vehicles directly to consumers through an online showroom was

¹³⁸ *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 474 (1981).

¹³⁹ *Id.* at 473.

¹⁴⁰ *Id.* at 474.

¹⁴¹ *Id.* at 460-1.

¹⁴² *Id.* at 474.

¹⁴³ *Id.* at 487 n.13 (Stevens, J., dissenting).

¹⁴⁴ *Id.* at 386 n.12.

¹⁴⁵ *Id.* at 472 (majority opinion).

constitutional under *Exxon*.¹⁴⁶ Again, since no manufacturers were located in Texas, the law’s effect was to prohibit only out-of-state manufacturers from entering the retail market.¹⁴⁷ The court ruled that it was immaterial whether the burdens fell exclusively on out-of-state interests, because the law distinguished between interests at different levels of the economic hierarchy rather than based on domicile.¹⁴⁸ First, even if Ford chose to withdraw from the used car industry in Texas, the supply of used cars would be filled by another manufacturer operating under Texas franchise laws.¹⁴⁹ Second, the Fifth Circuit found it dispositive that the law dealt evenhandedly with all manufacturers, stating “the wide variation in scrutiny under the [first and second line] tests, this initial inquiry is often dispositive of the underlying issue.”¹⁵⁰ In other words, the court erroneously believed that laws could not be held unconstitutional under the Pike Test. Yet unlike Tesla, the laws in question in *Ford* governed the relationship between manufacturers with line-make franchise dealerships in the state.

Both *Clover Leaf Creamery* and *Ford* apply incorrect understandings of *Pike* and *Exxon*, regardless of whether the ultimate outcomes were correct. The possibility that lawmakers can manipulate economic realities in order to further a protectionist purpose directly contradicts the requirements of balance under *Pike*. *Exxon* does not stand for the idea that courts must give complete deference to legislatures, but rather that courts must determine whether a law is reasonably related to its stated purpose or is essentially protectionist. Under great deference to the lawmakers in Maryland, the Supreme Court in *Exxon* found that the law “bears a reasonable relation to the State’s legitimate purpose in controlling the gasoline retail market,”¹⁵¹ not that a law regulating manufacturers could never be protectionist at the retail level. If courts do not probe a state’s claim about a law’s local benefits then, as Justice Stevens identified in his dissent in *Clover Leaf Creamery*, any conceivable burden can never be excessive if the state claims at least some sort of legitimate local benefit.¹⁵² This erroneously¹⁵³ means that states would be allowed to sidestep *Pike* by making tenuous claims to vague, but legitimate local benefits such as the “public interest and welfare of its citizens.”¹⁵⁴

Since state franchise laws distinguish between manufacturers and retailers, the prohibitions against Tesla’s direct-to-consumer sales model are only

¹⁴⁶ *Ford Motor v. Texas Dep’t of Transp.*, 264 F.3d 493, 503 (5th Cir. 2001).

¹⁴⁷ *Id.* at 502.

¹⁴⁸ *Id.*

¹⁴⁹ *See id.* at 503.

¹⁵⁰ *Id.* at 500.

¹⁵¹ *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-125 (1978).

¹⁵² *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 500 (1981) (Stevens, J., dissenting).

¹⁵³ *See cases cited supra* note 102.

¹⁵⁴ *Ford*, 264 F.3d at 500.

incidental. However, if lawmakers had banned all out-of-state car retailers, the law would have been clearly unconstitutional. Achieving that same purpose through different means should not yield different results. In this way, absolute deference would converge the Pike Test with the first line of dormant Commerce Clause cases, because the absence of similarly situated interests would end the question of unconstitutionality. *Pike* itself demonstrates that finding that a law seems to regulate a legitimate area of local concern through evenhanded measures does not end the inquiry into its constitutionality. In this manner, *Pike* and *Exxon* are not inconsistent.

E. The Proper Standard Under Pike and Exxon

Evenhanded regulations of interstate markets are generally valid when laws affect economic interests, but ignoring the economic realities can open the door for protectionist lawmaking. Justice Blackmun, in his dissent in *Exxon*, pointed out that the substantial effect of the Maryland law was to “exclude a class of predominantly out-of-state gasoline retailers while providing protection from competition to a class of nonintegrated retailers that is overwhelmingly composed of local businessmen.”¹⁵⁵ Justice Blackmun noted that less restrictive price controls could serve the same purpose of protecting local retail owners from undue competition with producers in a manner that did not interfere with interstate commerce.¹⁵⁶ In *Ford*, Judge Edith Jones argued in concurrence that courts ought to recognize “that the flow of interstate goods is diminished when barriers to entry totally prevent fair competition by a class of potential distributors.”¹⁵⁷ Judge Jones reasoned that the “local distributors’ price and service incentives become less keenly competitive, prices rise, and overall sales will decline from the free-market equilibrium point.”¹⁵⁸

Incidental burdens on interstate commerce are permissible in the majority of instances under *Exxon*, but under *Pike* the “extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”¹⁵⁹ For instance, it is conceivable that the same law in question in *Exxon*, passed for the avowed purpose¹⁶⁰ of enhancing local economic interests is clearly protectionist and without any legitimate local value under the Pike Test.¹⁶¹ The statute would still not decrease the flow of gasoline into Maryland and would still regulate producers evenhandedly,¹⁶² but likely violates the

¹⁵⁵ *Exxon*, 437 U.S. at 137 (Blackmun, J., concurring in part and dissenting in part).

¹⁵⁶ *Id.* at 144-45.

¹⁵⁷ *Ford*, 264 F.3d at 512 (Jones, J., concurring).

¹⁵⁸ *Id.*

¹⁵⁹ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁶⁰ As opposed to a concealed purpose as the trial court in *Clover Leaf Creamery* found. *Clover Leaf Creamery v. State*, 289 N.W.2d 79, 87 (Minn. 1979).

¹⁶¹ See Regan, *supra* note 20, at 1235.

¹⁶² *Id.*

dormant Commerce Clause since the intent would be to exclude out-of-state competitors. The dormant Commerce Clause “forbids discrimination, whether forthright or ingenious,”¹⁶³ showing that the Supreme Court understands that laws that appear legitimate might still be invalid due to their underlying purpose or substantial effect. Just as the Court expanded its understanding of the concept of protectionist laws to ferret out an unconstitutional burden in *Pike*, so too must it do so when laws exploit existing economic structures to achieve protectionist purposes.

The precedent for deferential scrutiny, set by *Exxon*, allowed legislatures to pass potentially protectionist laws without determining the validity of the claimed legitimate local interest, as evidenced by the Court’s decisions in *Clover Leaf Creamery* and *Ford*.¹⁶⁴ In *Clover Leaf Creamery*, the majority did not address whether even a protectionist purpose would invalidate an otherwise valid law.¹⁶⁵ Instead the Court stated—in opposite to *Pike*’s holding—that given all of the evidence if the valid purpose “is at least debatable” then it should be upheld.¹⁶⁶ In *Ford*, the Fifth Circuit went even further, incorrectly stating that cases balanced under the *Pike Test* are virtually *per se* constitutional.¹⁶⁷ This type of analysis does not comport with *Pike*’s prohibition against laws with the “purpose and design” of protecting local jobs.¹⁶⁸ Instead, courts should “determin[e] whether [a law] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.”¹⁶⁹

Since the degree of the permissible burdens depends upon the local interest furthered,¹⁷⁰ courts must first determine whether the interest in question is legitimate or essentially protectionist. Incidental burdens are low-value in terms of burdens under a dormant Commerce Clause analysis, but still outweigh protectionist local benefits. A presumption of validity arises when laws seem to govern legitimate local concerns evenhandedly, but courts must engage in motive review of legislatures when protectionist instincts are brought into question.¹⁷¹ Courts may not always correctly assess whether a

¹⁶³ *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940).

¹⁶⁴ *See supra* part III.D. (“*Incidental Burdens on Interstate Commerce: Exxon, Clover Leaf, and Ford*”).

¹⁶⁵ *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 488 (1981) (Stevens, J., dissenting) (discussing majority’s failure to properly address lower court’s rulings).

¹⁶⁶ *Id.* at 464 (majority opinion) (citing *U.S. v. Carolene Prod. Co.*, 304 U.S. 144, 154 (1938)).

¹⁶⁷ *See Ford Motor Co. v. Texas Dep’t. of Transp.*, 264 F.3d 493, 499-500 (5th Cir. 2001).

¹⁶⁸ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970).

¹⁶⁹ *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

¹⁷⁰ *Pike*, 397 U.S. at 142.

¹⁷¹ *See generally* Regan, *supra* note 20, at 1143-60 (explaining “motive review” and its

legislature acted with protectionist motives,¹⁷² but deferential rational basis scrutiny ensures that the court will always fail. In aiding this review, protectionist outcomes, limits on the flow of particular interstate goods, legislative history showing protectionist motivations, actual evidence of the law's effectiveness, and the availability of less restrictive means should guide courts to the proper outcome.

F. The Purpose of Franchise Laws: Protecting the Franchisor-Franchisee Relationship

State franchise laws, which have developed through almost a hundred years of franchisor-franchisee relationships, are intended to mitigate the coercive leverage that manufacturers may use over the dealerships they supply.¹⁷³ For instance, during the Great Depression, Henry Ford used dealerships as “a cushion against hard times”¹⁷⁴ to keep his factories working at near full capacity.¹⁷⁵ Despite the fact that dealerships knew that they could not sell every car they purchased from Ford, they feared that they would never see a Model T again if they did not accept the deliveries.¹⁷⁶ Traditional franchise laws regulate these legitimate areas to legislate,¹⁷⁷ because they are “designed to protect franchisees from having to succumb to dictation by manufacturers pressing their own interests in disregard of the health of other elements in the trade and perhaps ultimately of the welfare of the public.”¹⁷⁸ This purpose is supported by the fact that the provisions of most state franchise laws regulate relationships between dealers and their affiliated manufacturers.¹⁷⁹ More importantly, the legislative histories and court interpretations of these laws support the notion that the purpose of franchise laws is indeed to protect dealerships from such coercive practices by their line-make manufacturers.¹⁸⁰

In 1956, Congress, recognizing the “abuse by the manufacturers of their dominant position with respect to their dealers,” passed the Automobile Dealers Day in Court Act (ADDCA).¹⁸¹ The ADDCA imposed a duty of good faith on manufacturers, in response to a determination that contractual

importance).

¹⁷² *Id.* at 1239.

¹⁷³ Surowiecki, *supra* note 10.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See generally *Tober Foreign Motors Inc. v. Reiter Oldsmobile Inc.*, 381 N.E.2d 908 (Mass. 1978) (upholding a Massachusetts franchise law that prevented GM from granting a franchise to Tober Motors in the same “relevant market area” as Reiter Oldsmobile).

¹⁷⁸ *Id.*

¹⁷⁹ See, e.g., IND CODE ANN. § 23-2-2.7-2 (West 2011).

¹⁸⁰ See *infra* text accompanying notes 186-192.

¹⁸¹ H.R. REP. NO. 84-2850 (1956), *reprinted in* 1956 U.S.C.C.A.N. 4596, 4597 [hereinafter *ADDCA Legislative History*].

agreements generally failed to protect dealerships.¹⁸² The definition of “good faith” under the law provides that the term “shall mean the duty of *each party to any franchise [agreement]* . . . to act in a fair and equitable manner *toward each other* so as to guarantee the one party freedom from coercion.”¹⁸³ When passing the ADDCA, Congress expressly restricted these regulations to manufacturers and their line-make dealerships, stating that “the manufacturer is obligated to protect *his* dealer only from coercion by the manufacturer or persons subject to *his* control, and . . . *there is no obligation on the part of the manufacturer to protect the dealer against coercion from other sources.*”¹⁸⁴ In enacting this legislation, Congress meant only to address a single “basic evil—the disparity in bargaining power between the parties to the franchise arrangement.”¹⁸⁵

States have implemented their own franchise laws to clearly define the practices that violate these federally mandated protections. Generally these laws have served the same purpose of protecting franchised dealerships from the coercive practices of affiliated manufacturers who can obtain significant contractual leverage. For instance, the Michigan legislature highlighted the purpose of their state’s franchise law¹⁸⁶ by citing the anomaly of manufacturer-owned “megastores” or “super-sized factory-owned dealerships,” which drew business away from small, family-owned dealerships.¹⁸⁷ The megastores had “put auto dealers at an increasing disadvantage in their dealings with the automobile manufacturers” through various coercive practices and unreasonable price competition.¹⁸⁸ Specifically, the legislation was intended to prevent abusive tactics like “capricious or arbitrary distribution of [a manufacturer’s] products to dealers,” preventing arbitrary changes in ownership of family-owned dealerships, and pricing requirements that cut into franchised dealership profits.¹⁸⁹

Similarly, when courts have upheld state franchise laws, they have consistently done so in recognition of the states’ legitimate interest in

¹⁸² *Id.* at 4600.

¹⁸³ 15 U.S.C. § 1221(e) (2012) (emphasis added).

¹⁸⁴ *ADDCA Legislative History*, *supra* note 181, at 4602 (emphasis added).

¹⁸⁵ *Barney Motor Sales v. Cal Sales*, 178 F.Supp. 172, 173 (S.D. Cal. 1959).

¹⁸⁶ Governor Snyder asserted that this legislative history was not altered by a 2014 amendment to Michigan’s franchise laws, which many claim prevent Tesla from operating in the state. Instead, Snyder says “this is already prohibited under Michigan law.” Letter from Rick Snyder, Gov. Michigan to Michigan House of Representatives (Oct. 21, 2014), <https://www.scribd.com/doc/243859917/Michigan-Gov-Rick-Snyder-signing-letter-for-HB-5606> [<https://perma.cc/N3YH-JUNU>]. In challenging this law, it will be important for Tesla to connect the legislative history of protecting line-make dealerships to the exclusion of a manufacturer that has never operated through this model.

¹⁸⁷ MICHIGAN HOUSE FISCAL BILL ANALYSIS, H.B. 89-4740, Reg. Sess., at 6 (Mich. 1997).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

preserving a sound competitive market and protecting small business owners from unfair bargaining that results from vertical integration.¹⁹⁰ In *Ford*, the Fifth Circuit held that the purpose of Texas's franchise laws are "to prevent vertically integrated companies from taking advantage of their incongruous market position and 'to prevent frauds, unfair practices, discrimination, impositions, and other abuses.'"¹⁹¹ Thus, there is little doubt that these franchise laws serve a legitimate purpose under the Commerce Clause when regulating franchise relationships. Yet because Tesla has never operated a franchised dealership model, applying franchise laws to Tesla cannot further this generally accepted purpose.

G. The Purpose of Franchised Dealerships (Continued): Protecting Consumers

While the primary interest protected through franchise laws is that of the franchisee, proponents of franchise laws claim that they protect consumers as well.¹⁹² Though consumer protection is often mentioned in vague purpose statements of franchise laws,¹⁹³ legislatures typically fail to reference specific consumer rights and market ills.¹⁹⁴ For instance, Texas employs a common statement of purpose in enacting its automobile franchise laws, which provides:

The distribution and sale of new motor vehicles in this State vitally affects the general economy of the State and the public interest and welfare of its citizens. It is the policy of this State and the purpose of this Act to exercise the State's police power to insure a sound system of distributing and selling new motor vehicles through licensing and regulating the manufacturers, distributors, and franchised dealers of those vehicles to provide for compliance with manufacturer's warranties, and to prevent frauds, unfair practices, discrimination, impositions, and other

¹⁹⁰ *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 100-101 (1978) (holding that a "disparity in bargaining power between automobile manufacturers and their dealers prompted Congress and some States to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers."); *Tober Foreign Motors v. Reiter Oldsmobile*, 381 N.E.2d 908, 914 (Mass. 1978) (noting that the ADDC's purpose was an invitation by Congress to states to write legislation to "redress the imbalance of economic power between manufacturer and dealer."); *General Motors Corp. v. State Motor Vehicle Review Bd.*, 836 N.E.2d 903, 914 (Ill. App. Ct. 2005) (interpreting *Orrin W. Fox* to provide legislatures with "the power to subordinate the automobile manufacturer's franchise rights to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices.").

¹⁹¹ *Ford Motor v. Texas Dep't of Transp.*, 264 F.3d 493, 503 (5th Cir. 2001).

¹⁹² See, e.g., cases cited *supra* note 190.

¹⁹³ *Ford Motor*, 264 F.3d at 500.

¹⁹⁴ See e.g., *id* at 498.

abuses of our citizens.¹⁹⁵

These broad statements provide little insight into which citizens and which harms franchise laws are intended to protect, but should be construed generally to protect consumers in areas such as cost, warranty, service, and safety. Thus the legislative history should be consulted to determine which harms the legislatures meant to protect in enacting franchise laws.

Looking at the restrictions against manufacturers selling vehicles directly to consumers though, it is far from clear that the consuming public was considered by legislatures. The legislative history of Michigan's automobile franchise law shows that the legislature actually disregarded concerns that the bill is "anti-consumer" and, according to the former Michigan Deputy State Treasurer for Taxation and Economic Policy, would "would serve to increase vehicle prices, increase vehicle search costs for consumers, reduce services, and reduce the number of vehicles sold."¹⁹⁶ In response to New Jersey's foray¹⁹⁷ into blocking Tesla sales, the Federal Trade Commission warned to no avail that New Jersey's "laws operate as a special protection for . . . dealers—a protection that is likely harming both competition and consumers."¹⁹⁸ In fact, the commissioner of New Jersey's Motor Vehicle Commission (MVC), Raymond Martinez, actually rescinded Tesla's franchise license after the company had operated under state franchise laws for more than two years,¹⁹⁹ despite having originally found that "[the] MVC has carefully reviewed Tesla Motors' New Jersey motor vehicle license application and has consulted with the Division of Law, and has found no violations that could form the basis of license denial or revocation."²⁰⁰ The fact that the MVC allowed Tesla to sell cars directly to consumers for more than two years indicates that New Jersey had little belief that there were any consumer harms associated with Tesla's

¹⁹⁵ *Id.* at 500.

¹⁹⁶ MICHIGAN HOUSE FISCAL BILL ANALYSIS, *supra* note 187, at 7.

¹⁹⁷ Only one year after a New Jersey Motor Vehicle Commission decision preventing Tesla from selling directly to consumers, the state legislature passed a bill that carved out an exception specifically for Tesla. Jonathan Randles, *Auto Dealers, Brokers, Franchises, Importers*, HOUSE FISCAL AGENCY, <http://www.legislature.mi.gov/documents/1997-1998/billanalysis/House/htm/1997-HLA-4738-B.htm> [<https://perma.cc/QW44-KENM>].

¹⁹⁸ Memorandum from the Office of Policy Planning, F.T.C. at 1 (May 16, 2014), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-new-jersey-general-assembly-regarding-assembly-bills-2986-3096-3041-3216-which/140516nj-autoadvocacy.pdf [<http://perma.cc/3ESD-JS32>]. *See also* Marina Lao, Debbie Feinstein & Francine Lafontaine, *Direct-to-consumer Auto Sales: It's Not Just About Tesla*, FEDERAL TRADE COMMISSION (May 11, 2015), <https://www.ftc.gov/news-events/blogs/competition-matters/2015/05/direct-consumer-auto-sales-its-not-just-about-tesla> [<https://perma.cc/5CG2-TS5C>].

¹⁹⁹ Christopher DeMorro, *Tesla Hits Back Hard in New Jersey Lawsuit Brief*, GAS2 (Oct. 1, 2014), <http://gas2.org/2014/10/01/tesla-hits-back-hard-in-new-jersey-lawsuit-brief/> [<http://perma.cc/9C7J-WEA6>].

²⁰⁰ *Id.*

sales model. Further, even the National Automobile Dealers Association (NADA) has come out in support of laws that prevent manufacturers from selling directly to consumers based not on pro-consumer grounds, but rather on the impermissible claim,²⁰¹ that they “create well-paying local jobs and generate significant tax revenue[s] that have a huge impact on local economies.”²⁰²

Still yet, personal vendettas appear to motivate other legislators. West Virginia Senate President, Nissan dealership owner, and Tesla opponent, Bill Cole, said the following when discussing his state’s recent ban on Tesla direct sales,²⁰³

Nissan makes [my dealership] put public charging stations outside our dealerships. So I’ve sold a couple of Leafs, and nobody uses [the charging stations]. But [there is] a guy who bought a Tesla that pulls up to my dealership every day and plugs right in because his office is close. I’m sorry—my electricity isn’t free. But he doesn’t have any problem pulling his Tesla into my Nissan store and laughing and leaving it on charge.²⁰⁴

Lastly, franchise laws have been the products of lobbying by manufacturers and franchised dealerships rather than by consumer protection advocates.²⁰⁵

²⁰¹ See e.g., *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 205 (1994) (rejecting the state’s claim that preserving the local dairy industry, creating jobs, and preventing an economic collapse are the “hallmark[s] of the economic protectionism that the Commerce Clause prohibits.”).

²⁰² Don Sniogowski, *NADA Weighs in on Why America Needs Franchise Laws*, BLUE MAU MAU (July 30, 2014, 12:04 AM), http://www.bluemaumau.org/14044/nada_weighs_why_america_needs_franchise_laws [<http://perma.cc/93LY-73BG>].

²⁰³ It should be noted that Cole recused himself from the vote on SB 453. Roll Call Seq. No. 0048, *also* S.B. 453, 82d Leg., Reg. Sess. (W. Va. 2015), <http://www.legis.state.wv.us/legisdocs/2015/RS/votes/senate/03-14-0048.pdf> [<http://perma.cc/4WW8-HBXL>]. Yet his influence on the vote should be inquired into when determining the legislative history of the vote.

²⁰⁴ Ben Popper, *Tesla Sales Banned by West Virginia Whose Senate President is Also an Auto Dealer*, THE VERGE (Apr. 3, 2015, 1:05 PM), <http://www.theverge.com/2015/4/3/8340433/west-virginia-ban-block-tesla-sales> [<http://perma.cc/V9BK-83VZ>].

²⁰⁵ See e.g., Tiffany Kaiser, *Tesla Motors Still Looking to Win Against Dealerships, But Auto Dealers Have Lobbying Cash*, DAILY TECH (Nov. 29, 2013, 12:47 PM), <http://www.dailytech.com/Tesla+Motors+Still+Looking+to+Win+Against+Dealerships+But+Auto+Dealers+have+Lobbying+Cash/article33844.htm> [<http://perma.cc/C868-3GTN>] (Between 2003 and 2012, auto dealers spent \$86.8 million on state elections and \$53.7 million on federal campaigns); Daniel Malloy, Jim Galloway & Greg Bluestein, *Car Dealers Prepare to do Battle with Tesla at the State Capitol*, AJC.COM (Jan. 6, 2015), http://politics.blog.ajc.com/2015/01/06/car-dealers-prepare-to-do-battle-with-tesla-at-the-state-capitol/#__federated=1 [<http://perma.cc/3NMQ-C8FU>] (The Georgia Automobile Dealers Association has given more than \$600,000 in recent years to strengthen state

After Missouri granted Tesla a license to sell vehicles to consumers in Missouri, the state's automobile dealer association met with legislators to persuade them to pass new legislation to prevent the competition.²⁰⁶ Dealers also backed similar legislation in Ohio and New York.²⁰⁷ NADA itself contributed more than \$3.2 million in lobbying during the 2014 election cycle.²⁰⁸ Dealers also hold significant clout, because they accounted for fifteen percent of all United States retail activity in 2012, generating hundreds of millions of dollars in tax revenue for local governments.²⁰⁹ Dealers spent \$86.8 million on contributions to state elections and \$57 million on contributions to federal elections since 2003.²¹⁰ Though Tesla's lobbying activities have certainly increased significantly in recent years, Tesla spent only \$500,000 in both state and federal elections during the same period.²¹¹ Given the incentives legislatures have for passing protectionist laws, the clear disregard for warnings that laws would hurt consumers, a general intent to regulate the relationship between manufacturers and line-make dealerships, and large paper trails indicating dealership influence, claims that franchise laws further local consumer benefits when applied to Tesla are structurally weak.

Despite legislators themselves, NADA has made a better faith effort to claim a number of specific local benefits derived from the franchise business model;²¹² still these are post-hoc claims and not entirely accurate. First, NADA claims that franchised dealerships can react more quickly to local economies

franchise laws); David Noland, *Tesla Underground: Texas Franchise Rules Make Model S Owners Skirt the Law*, GREEN CAR REPORTS (Oct. 22, 2013), http://www.greencarreports.com/news/1087815_tesla-underground-texas-franchise-rules-make-model-s-owners-skirt-the-law [<http://perma.cc/3RSY-32HJ>] (In 2012, franchises in Florida contributed about \$2.5 million in elections, including more than \$1 million by two elderly billionaire car dealers, Tom Friedkin and Red McCombs).

²⁰⁶ Rachael Herndon, *DOR Permit for Tesla Incites Legislative Response*, THE MISSOURI TIMES (May 12, 2014), <http://themissouritimes.com/10240/dor-permit-tesla-incites-legislative-response/> [<http://perma.cc/BN7J-8RE9>].

²⁰⁷ See Alan Ohnsman & Mark Niquette, *Tesla's Direct-Sales Push Raises Auto-Dealers' Hackles*, BLOOMBERGBUSINESS (Mar. 10, 2014, 4:25 PM), <http://www.bloomberg.com/news/articles/2014-03-10/tesla-s-direct-sales-push-raises-auto-dealers-hackles> [<http://perma.cc/847B-B2HY>].

²⁰⁸ *National Auto Dealers Association*, OPENSECRETS.ORG, <http://www.opensecrets.org/orgs/summary.php?cycle=2014&id=D000000080> [<http://perma.cc/X3SF-LZ2N>] (these amounts ranked NADA 65 out of 16,872 in campaign contributions and 160 out of 4,070 in lobbying).

²⁰⁹ See Ohnsman & Niquette, *supra* note 207.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See Maryann Keller & Kenneth Elias, *Consumer Benefits of the Dealer Franchise System*, NAT'L AUTO. DEALERS ASS'N 5 (May 27, 2014), <https://www.nada.org/WorkArea/DownloadAsset.aspx?id=21474838844> [<https://perma.cc/NMD6-Z4TG>].

and offer new vehicles at a price that the local market will support.²¹³ Second, NADA points out that dealers have offered loans for new cars at a consistently lower rate than commercial banks, allowing consumers to save on their purchases.²¹⁴ Third, the group says that dealerships drive down prices for repairs and allow consumers to quickly have recall work performed on their vehicles.²¹⁵ Fourth, franchised dealers are also local businesses that advocate to automakers on behalf of customers, because dealers benefit from the continued satisfaction of customers.²¹⁶ Finally, NADA asserts that dealers offer consumers a way to trade-in old cars and purchase new cars in a manner that automakers could not.²¹⁷

While protection of these local benefits appears legitimate, though goes undiscussed during the legislative process, franchise laws as applied to Tesla are not rationally related to the furtherance of these goals when you look at empirical evidence. While franchise dealerships might provide local market-driven prices, a Goldman Sachs analysis of the franchised dealership model estimates that a direct-to-consumer sales model would cut about \$2,225 from the price of an average vehicle otherwise costing \$26,000.²¹⁸ If vehicle prices are lower across the board, then it is likely that the majority of consumers will still save more than under the franchised dealership model. Second, though dealers are able to provide lower loan rates to car buyers than traditional lenders,²¹⁹ Tesla has also reacted to market conditions by offering lower interest leases as demand softened amid low gas prices in early 2015.²²⁰ Further, the company is able to pass along its savings from its sales model to customers in other ways like lower maintenance costs and of course gas, environmental, and public health savings.²²¹ Third, Tesla is the top rated service provider according to Consumer Reports and the only manufacturer to outrank independent service providers.²²² The company offers over-the-air

²¹³ *Id.* at 13-14.

²¹⁴ *Id.* at 16.

²¹⁵ *Id.* at 18-20.

²¹⁶ *Id.*

²¹⁷ *Id.* at 21-24.

²¹⁸ Gerald R. Bodisch, *Economic Effects of State Bans on Direct Manufacturer Sales to Car Buyers*, ECONOMIC ANALYSIS GROUP COMPETITION ADVOCACY PAPER (May 2009), http://www.justice.gov/atr/public/eag/246374.htm#N_11 [<http://perma.cc/X5MU-CAPH>].

²¹⁹ Keller & Elias, *supra* note 212, at 16.

²²⁰ John D. Stoll & Mike Ramsey, *Tesla Advances Toward Lofty Sales Goal*, WALL STREET JOURNAL (April 4, 2015), <http://www.wsj.com/articles/tesla-says-it-delivered-10-030-vehicles-in-first-quarter-1428067522> [<http://perma.cc/PQ3Z-CWJZ>].

²²¹ Justin Loiseau, *Pump vs. Plug: Do You Really Save Money Driving an Electric Car?*, DAILYFINANCE (Jun. 24, 2013, 4:00 PM), <http://www.dailyfinance.com/2013/06/24/gas-vs-electric-cars-cost-comparison/> [<http://perma.cc/2EYH-NPMA>].

²²² *Independent vs. Dealer Shops for Car Repair*, CONSUMERREPORTS.ORG (Jan. 22, 2015, 6:00 AM), <http://www.consumerreports.org/cro/magazine/2015/03/best-places-to-get-your-car-repaired/index.htm> [<http://perma.cc/NU86-KNXF>].

system updates²²³ for various computer issues and provides a free valet service for traditional maintenance requirements.²²⁴ Through the valet service, a trailer will come to a Tesla owner's door, drop off a rental vehicle, and return their Tesla in working order.²²⁵ NADA's assertion that consumers need franchised dealerships to provide maintenance is unfounded, as dealership associated garages are consistently rated lower than independent garages in terms of overall satisfaction, price, quality, courteousness of staff, and work being completed when promised.²²⁶ Lastly, the fact is that the majority of car buyers do not like their car buying experience in dealerships and would presumably prefer the option of direct purchase.²²⁷

Finally, numerous recently enacted exemptions to franchise laws provide Tesla alone with an opportunity to sell a limited number of vehicles directly to consumers.²²⁸ This signals that legislatures do not necessarily believe that

²²³ Including an over-the-air software update that has allowed drivers to activate "autopilot," Tesla's hands free, self-driving technology. *Your Autopilot Has Arrived*, TESLA MOTORS (Oct. 14, 2015), <http://www.teslamotors.com/blog/your-autopilot-has-arrived> [<https://perma.cc/P3G7-MD3N>].

²²⁴ Gabe Shenhar, *Consumer Reports' Tesla Model S Has More Than its Share of Problems*, CONSUMERREPORTS.ORG (Aug. 12, 2014), <http://www.consumerreports.org/cro/news/2014/08/consumer-reports-tesla-model-s-has-more-than-its-share-of-problems/index.htm> [<http://perma.cc/7ZWH-J8CT>]; Elon Musk, *Creating the World's Best Service and Warranty Program*, TESLA (Apr. 26, 2013), <http://www.teslamotors.com/blog/creating-world's-best-service-and-warranty-program-0> [<http://perma.cc/ZWV3-N2KM>].

²²⁵ Shenhar, *supra* note 224.

²²⁶ *Independent vs. Dealer Shops for Car Repair*, CONSUMERREPORTS.ORG (Jan. 22, 2015, 6:00 AM), <http://www.consumerreports.org/cro/magazine/2015/03/best-places-to-get-your-car-repaired/index.htm> [<http://perma.cc/NU86-KNXF>].

²²⁷ Car buyers rate the courtesy of salespeople at franchised dealerships only thirty-six percent positive, give "fairness of the price paid" a thirty-nine, and "ease of coming to an agreement on final price" a forty-two. Eric Cahill, Jamie Davies-Shawhyde, & Thomas S. Turrentine, *New Car Dealers and Retail Innovation in California's Plug-in Electric Vehicle Market*, 8 (Univ. of Cal. Davis Inst. Of Transp. Studies, Working Paper UCD-ITS-WP-14-04, Oct. 2014). Consumers also rate their overall experience purchasing a Tesla vehicle more than twenty-two percent more positive than purchasing an electric vehicle from a traditional dealership. This is because there is a wide knowledge gap between salespeople at dealerships and at retail stores like Tesla's showrooms. *Id.* at 11, 13. Moreover, Tesla significantly cuts down on time spent negotiating deals, waiting to start paperwork, signing paperwork, and the wait time to begin the delivery process. *Id.* at 10.

²²⁸ See, e.g. Matt Friedman, *Tesla Recharged: Christie Signs Law to Restart Electric Sales in N.J.*, NJ.COM (Mar. 18, 2015, 5:59 PM), http://blog.nj.com/politics_impact/print.html?entry=/2015/03/tesla_recharged_christie_signs_law_to_restart_elec.html [<http://perma.cc/93RX-F9WU>] ("Although the law does not refer specifically to Tesla, it only applies to zero emission vehicle manufactures that were licensed by the New Jersey Motor Vehicle Commission on or prior to Jan. 1, 2014. *Tesla is the only company that fits the bill.*") (emphasis added).

franchise laws further the legitimate protections for consumers. In *Raymond Motors Transportation v. Rice*, the Supreme Court stated that local exemptions to a statute banning all 55-foot long trucks weakened the claimed benefit of improving highway safety, because they still permitted the action they attempted to claim was unsafe at the same time.²²⁹ Indeed, the Supreme Court has held that the combination of actual evidence showing a law does not further its stated purpose and the presence of exemptions is sufficient to rebut a state's assertion that their stated purpose is in line with their actual intent.²³⁰

H. Applying Pike and Exxon to Franchise Laws

State franchise laws fall under the *Exxon* line of cases of the second line of the dormant Commerce Clause, because, while purporting to regulate manufacturers, the laws' incidental burdens on interstate commerce affect the retail level. *Exxon's* first reasoning for upholding regulations prohibiting manufacturers from entering retail markets is that even if some producers withdraw from the retail business then the state's supply of goods would not be reduced.²³¹ This reasoning cannot not apply to Tesla, because unlike gasoline in *Exxon*, used fossil-fuel burning vehicles in *Ford*, or milk bottles in *Clover Leaf Creamery*, industry leading electric vehicles are not fungible.²³² Traditional manufacturers, who do not invest heavily into innovative technologies, will not bring about the green car revolution at the same pace or with the same success.²³³ Even if traditional manufactures are eventually able to completely change their value propositions, a great deal of evidence shows that the intent of legislatures in applying a complete bar on direct-to-consumer sales is related to protectionist purposes, not consumer protection.²³⁴ While appearing to govern evenhandedly, the franchise laws have adapted to target Tesla's sales model. Franchised dealership owners and large manufacturers who argue that Tesla needs to play on an even playing field are unconcerned with the tenuous consumer benefits dealerships might bring and more concerned with protecting the value of a distribution system that would be nearly impossible to unwind while maintaining profitability. Legislatures that initially claimed to be acting to protect the contractual relationship between manufacturers and line-make franchised dealers now argue that the consumer is the reason for the legislation.²³⁵ However, actual evidence shows that consumers want the direct-to-consumer model and that legislators are acting under the heavy influence of political and economic pressures.²³⁶

²²⁹ *Raymond Motors Transp. v. Rice*, 434 U.S. 429, 429-30 (1978).

²³⁰ *Id.* at 445.

²³¹ *Exxon Corp. v. Gov. of Maryland*, 437 U.S. 117, 127 (1978).

²³² *See supra* text accompanying notes 21-34.

²³³ *Id.*

²³⁴ *See supra* text accompanying notes 203-211.

²³⁵ *See supra* text accompanying notes 192-202.

²³⁶ *See supra* text accompanying notes 210, 222-225.

The Supreme Court has held that when the purpose of a law is essentially protectionist, courts should consider the availability of nondiscriminatory alternatives.²³⁷ While franchise laws ostensibly protect consumers from market harms, these laws misdirect their primary efforts at the relationship between franchised dealers and manufacturers, rather than between sellers and consumers.²³⁸ The protection of consumers against market harms is perfectly valid, but laws that purposefully limit competition under the guise of protecting local interests are quintessential examples of unconstitutionally protectionist laws.

IV. A ROAD WORTH TAKING

In May of 2015, four months into Texas' legislative session, millions of dollars spent on dozens of lobbyists, and intense arguing between Musk and local franchisees, there has been no change in the state's franchise laws.²³⁹ An extremely costly push to carve out an exemption for Tesla failed, meaning that any allowances for Tesla's direct sales model will have to wait two years, until state legislature holds its next regular session.²⁴⁰ Dealers in states across the country argue for Tesla to play within the established rules,²⁴¹ and that the notion that the entrenched system does protect consumers seems to at least be debatable.²⁴² However, a significant amount of evidence raises the question of whether franchise laws are simply used to protect local franchise owners.

Unlike the two roads presented to the protagonist in Robert Frost's poem, *The Road Not Taken*, the courts can consciously choose an outcome by deciding which path to take. The decisions will have a much broader impact than simply allowing Tesla to sell directly to consumers. States continue to reject Tesla's direct-to-consumer sales model, as well as other Internet based industries. Laws limiting the ability of companies like Home Way, Air BNB,²⁴³ Uber²⁴⁴ and others could be affected by this ruling in the future.

²³⁷ See *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 353-54 (1977).

²³⁸ Cf. *id.* at 353.

²³⁹ See Jim Malewitz & Ryan McCrimmon, *End of The Road for Tesla, Ride-for-Hire Bills*, THE TEXAS TRIBUNE (May 14, 2015), <http://www.texastribune.org/2015/05/14/end-road-tesla-uber-bills/> [<http://perma.cc/3Y7A-2562>].

²⁴⁰ Dante D'Orazio, *Tesla Loses Fight with Dealers to Sell its Cars in Texas*, THE VERGE (May 31, 2015, 3:13 PM), <http://www.theverge.com/2015/5/31/8694673/tesla-loses-fight-to-sell-cars-in-texas> [<http://perma.cc/ET66-Z5FJ>].

²⁴¹ See Malewitz & McCrimmon, *supra* note 239.

²⁴² See Ohnsman & Niquette, *supra* note 207.

²⁴³ A San Francisco law prohibiting non-residents from renting their San Francisco homes, while permitting residents to rent for no more than 30 days, may actually be facially discriminatory under the dormant Commerce Clause. See Ryan Lawler, *HomeAway Sues San Francisco to Block So-Called 'Airbnb Law,'* TECHCRUNCH (Nov. 3, 2014), <http://techcrunch.com/2014/11/03/homeaway-sf-lawsuit/> [<http://perma.cc/X693-5MV9>]. However, the court should also use the Pike Test to ensure that the burdens on homeowners

Along one road courts may apply an incorrect interpretation of *Exxon* that calls for absolute deference. Along the alternative path, courts must look to the purposes asserted by legislatures to determine whether excluding an innovative leader like Tesla furthers any legitimate goals. Both paths are well worn and the consequences well understood. Rational basis scrutiny “invites us to cup our hands over our eyes and then imagine if there could be anything right with the statute.”²⁴⁵ When a law limits the ability of any company to operate in a true national common marketplace as required under the Commerce Clause, courts cannot turn a blind eye. While the Supreme Court in *Exxon* recognized a state’s right to govern local aspects such as certain business structures,²⁴⁶ the presumption must still operate under *Pike*’s searching inquiry into potentially protectionist instincts. In order to make these determinations courts cannot only look at discrimination between similarly situated interests, but must also invalidate laws that have great incidental burdens when they do not further any legitimate local interest.

Clearing a path for Tesla to continue its pursuit of a commercially viable, zero-emissions vehicle is a laudable goal that comports with our notions of free enterprise under the Constitution’s Commerce Clause. Protecting local dealerships while slowing the development of an important American industry challenges our understanding of a national free market. While Tesla, franchised dealerships, traditional manufacturers, and legislators must work together to limit the costs to local economies and consumers as direct-to-consumer models are adopted, less restrictive means are certainly conceivable. In questioning the intentions of franchise laws prohibiting manufacturers from selling cars directly to consumers, courts can distinguish between protectionist laws and laws sincerely aimed at furthering a legitimate local interest.²⁴⁷ In this way, courts have a vital role to play in the pace of electric vehicle adoption, the future of the American car industry, and the preservation of the national

are imposed to further some legitimate goal, rather than protect hotel owners from competition.

²⁴⁴ Uber is meeting local resistance under laws classifying them as a transportation company, like cab or limo companies, despite the fact that Uber does not actually own any vehicles itself. New legislation might burden the company’s expansion by regulating it “in terms of the insurance they carry, the structure of their fares, the background screening of their drivers, and the condition of their vehicles.” Christine Lagorio-Chafkin, *Resistance is Futile*, INC. MAGAZINE (Aug. 2013), <http://www.inc.com/magazine/201307/christine-lagorio/uber-the-car-service-explosive-growth.html> [<http://perma.cc/6Z2M-42LX>]. Perhaps local laws do protect legitimate local interests, but legislative claims should still be tested.

²⁴⁵ *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring).

²⁴⁶ *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128 (1978).

²⁴⁷ See Regan, *supra* note 20, at 1239 (It is apparent that the Supreme Court has applied the Pike Test to root out protectionist purposes, though they do not admit it. In fact, “in *Exxon* it is clearer than in almost any other case that the Court was looking at purpose.”).

common market as technology-driven companies continue to disrupt long-held marketplace conventions. Should the Court uphold protectionist laws the pace of innovation will be slowed, in which case we may look back and say, “*And that has made all the difference.*”²⁴⁸

²⁴⁸ Robert Frost, *The Road Not Taken*, 35 QUALITY PROGRESS 33 (2002).