Thinking Outside the State: The Dormant Commerce Clause and Its Impact on State Relationship Laws

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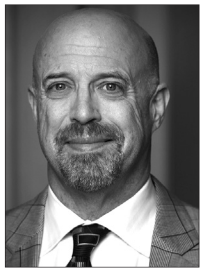

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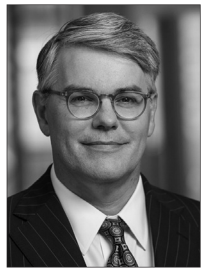

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I. Introduction

Twenty-four states have enacted at least one statute regulating the relationship between franchisors and franchisees (State Relationship Laws).[1] Such laws are intended to protect franchisees because the investments that they make in a specific franchise or product line make them particularly vulnerable to the franchisor. When a franchisee makes an investment in a particular brand by establishing a physical presence in a state for the purpose of conducting local business and servicing local citizens, the scope and application of the State Relationship Law is relatively straightforward.

1. *See generally* Franchise Deskbook: Selected State Laws, Commentary, and Annotations (Bethany L. Appleby, W. Michael Garner & Karen Boring Satterlee eds., Am. Bar Ass'n 3d ed. 2019) (compiling State Relationship Laws with commentary and annotations). Some of these State Relationship Laws are broader in scope, intended to protect long-term relationships that may fall short of a franchise but still impose significant mutual obligations beyond an ordinary vendor-vendee relationship. Although such statutes often label the parties as "dealer" or "distributor" on the one hand and "grantor" or "manufacturer" on the other, in this article, our use of the term "franchisee" includes "dealers" and "distributors," and our use of the term "franchisor" includes "grantors" and "manufacturers."

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But reality is rarely so neat and tidy. What if the franchisee is awarded territory in multiple states? What if some of those states have a relationship law, and others do not? Can a franchise located in a state that has a relationship law apply that law to commercial activities that occur in another state, even if the other state has no relationship law? Do State Relationship Laws have "extraterritorial" reach?

The Commerce Clause, or more specifically, the "dormant" Commerce Clause (DCC) presents a potential constitutional roadblock to extraterritorial application of State Relationship Laws. The DCC prohibits states from enacting or applying laws that discriminate against interstate commerce. Allowing a State Relationship Law to govern commercial activities that occur outside that state arguably discriminates against interstate commerce, and thus, the law's effects must stop at the border of the state that enacted it. Such an analysis, however, is problematically simplistic. Whether a State Relationship Law may *ever* be applied extraterritorially and, if so, in what circumstances, are questions that have taken on new importance in the age of e-commerce, when it is as easy to do business with someone across the country as it is with someone across the street.

In this article, we first examine the framework courts have used to analyze the constitutionality of state economic regulations under the DCC, including State Relationship Laws. Next, we analyze two federal cases that adopt contradictory conclusions on whether a State Relationship Law may be applied extraterritorially without violating the DCC. Finally, because the constitutionality of extraterritorial application of State Relationship Laws is largely an open question, we discuss some of the factors that courts are likely to consider when the issue arises in the future.

II. State Protectionism and the Dormant Commerce Clause

The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[2] Although the Commerce Clause is framed as an affirmative grant of power to Congress, the Supreme Court has long held that the Commerce Clause "also prohibits state laws that unduly restrict interstate commerce."[3] This doctrine is generally known as "the dormant Commerce Clause." Its principal aim is to prevent individual states from adopting protectionist measures to benefit in-state economic interests and actors at the expense of out-of-state economic interests and actors and, in doing so, preserve a national market for goods and services.[4] The DCC has played an important role in the

2. U.S. Const. art. I, § 8, cl. 3.
3. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459 (2019).
4. *See Tenn. Wine*, 139 S. Ct. at 2459; Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580 (1986).

economic history of the United States,[5] and indeed, without it, "we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising."[6] This is especially true given that one of the principal reasons for adopting the Constitution was to prevent the notorious state practice under the Articles of Confederation of obstructing the interstate shipment of goods.[7]

Significantly, not every state law affecting interstate commerce is necessarily forbidden. The Supreme Court has embraced "what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause."[8] The first category of laws involves explicit discrimination against interstate commerce, which is subject to a "virtually *per se* rule of invalidity."[9] The second category of laws do not discriminate on their face between in-state and out-of-state interests, but in practical application, they have a visibly burdensome impact on out-of-state interests.[10] Whether a law falling into this second category violates the DCC depends upon the balance between the burden imposed on interstate commerce and the law's putative local benefits.[11]

Other courts have discussed a third category of state laws. They view the Supreme Court's DCC jurisprudence as primarily concerned with state laws that *discriminate* against interstate commerce as opposed to laws that merely *affect* interstate commerce.[12] According to courts espousing this view, if the law "affect[s] commerce without any reallocation among jurisdictions," that is, they "do not give local firms any competitive advantage over those located elsewhere," then the law does not implicate the DCC *at all*, and the traditional rational basis standard governs the law's constitutionality.[13]

Fashioning persuasive arguments that a State Relationship Law falls into one or another category is a critical first step in determining whether any proposed extraterritorial application of that law would be permissible under the Supreme Court's DCC cases. It is equally critical, then, to understand what characteristics tie laws within a category together and what analysis (if any) a court is required to engage in to determine if the law (or its application) offends the DCC.

5. *See* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. Chi. L. Rev. 1089, 1107 (2000).

6. *Tenn. Wine*, 139 S. Ct. at 2460.

7. *See id.* (collecting historical sources).

8. *Brown-Forman*, 476 U.S. at 578–79.

9. Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

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

11. *Id.*

12. *See*, *e.g.*, Rosenblatt v. City of Santa Monica, 940 F.3d 439, 452 (9th Cir. 2019); Park Pet Shop, Inc. v. City of Chicago, 872 F.3d 495, 501–02 (7th Cir. 2017); Freedom Holdings, Inc. v. Cuomo, 624 F.3d 38, 68 (2d Cir. 2010); Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 75–77 (2d Cir. 1998); United Waste Sys. of Iowa, Inc. v. Wilson, 189 F.3d 762, 768 (8th Cir. 1999); Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1131–32 (7th Cir. 1995).

13. *Nat'l Paint*, 45 F.3d at 1131.

A. *Category One: Disparate Treatment*

The first category of state statutes that implicate the DCC directly discriminate against interstate commerce. These statutes expressly favor in-state economic interests over out-of-state economic interests. The Supreme Court treats laws falling into this category with severe skepticism. These laws may be sustained on a showing that they are "narrowly tailored" to advance a "legitimate local purpose,"[14] but in practice, these laws are "virtually *per se* invalid."[15]

In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, for example, the Court considered whether New York's Alcoholic Beverage Control Law (ABC Law)[16] violated the DCC.[17] Among other things, the ABC Law prohibited a distiller licensed to do business in New York from selling its products to New York wholesalers except under a monthly price schedule created by the distiller.[18] The schedule had to contain a precise description of each item the distiller intended to sell, along with per-bottle and per-case prices.[19] The law required distillers to file the schedule with the State Liquor Authority, and all sales to any wholesaler in New York during the month covered by the schedule had to be at the specified prices.[20] Additionally, the law required any distiller that filed a price schedule to affirm that "the bottle and case price of liquor to wholesalers set forth in such schedule [was] no higher than the lowest price at which such item of liquor [would] be sold by such [distiller] to any wholesaler anywhere in any other state of the United States . . . ."[21]

Brown-Forman, a Kentucky distiller that sold several brands of liquor nationwide, including in New York, offered "promotional allowances" to its wholesalers (i.e., cash payments) that were credited against any amounts that the wholesaler owed Brown-Forman.[22] Brown-Forman intended for the allowances to be used by the wholesalers for advertising of Brown-Forman products, but it had no enforcement mechanism to ensure that the wholesalers used the promotional allowance for advertising, or even spent the allowance at all.[23] Essentially, the promotional allowances were "unconditional, lump-sum payments" to the wholesalers that purchased Brown-Forman's products.[24]

Brown-Forman offered the promotional allowances to wholesalers in every state, including New York, but the Liquor Authority determined that a

14. *Tenn. Wine*, 139 S. Ct. at 2461; Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008).
15. *Philadelphia*, 437 U.S. at 471.
16. N.Y. Alco. Bev. Cont. Law § 100 *et seq*. (McKinney 1970 & Supp. 1986).
17. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 575 (1986).
18. *Id.*
19. *Id.*
20. *Id.* at 575–76.
21. N.Y. Alco. Bev. Cont. Law § 101-b(3)(d) (McKinney 1970 and Supp. 1986).
22. *Brown-Forman*, 476 U.S. at 576.
23. *Id.* at 576–77.
24. *Id.* at 577.

provision of the ABC Law prohibited such payments.[25] The Liquor Authority also determined that the promotional allowances paid to wholesalers outside New York lowered the effective price of Brown-Forman products to those wholesalers.[26] Because the prices that Brown-Forman charged New York wholesalers were higher than the "effective price" charged to out-of-state wholesalers (in light of the promotional allowances), the Liquor Authority concluded that Brown-Forman violated the ABC Law and moved to revoke Brown-Forman's liquor license.[27] Brown-Forman argued that the ABC Law violated the DCC, and the Supreme Court agreed.

Identifying the problem, the Supreme Court explained that "once a distiller's posted price is in effect in New York, it must seek the approval of the New York State Liquor Authority before it may lower its price for the same item in other States" by paying those out-of-state wholesalers promotional allowances.[28] The Court also observed that "[b]y defining the 'effective price' of liquor differently from other States, New York [had] effectively force[d] [Brown-Forman] to abandon its promotional allowance program in other States in which that program [was] legal" or, alternatively, pressured those other states to alter their own regulatory schemes in order to permit Brown-Forman to lower its New York prices without violating the affirmation laws of those states.[29] The ABC Law, then, "effectively regulate[d] the price at which liquor [was] sold in other States" in violation of the DCC.[30] Accordingly, the Supreme Court struck down the ABC Law as "'simple economic protectionism' that this Court has routinely forbidden."[31]

Although the prohibition against facially discriminatory state statutes has been well-defined for decades, states continue to pass facially discriminatory laws, and the Supreme Court continues to invalidate them. In 2019's *Tennessee Wine and Spirits Retailers Ass'n v. Thomas*, for example, the Court considered a Tennessee law that imposed a durational-residency requirement on persons and companies wishing to operate retail liquor stores in the State.[32] The law required applicants for an initial license authorizing the retail sale of liquor to have resided in Tennessee for the prior two years. One provision precluded the renewal of a license unless the applicant had resided in Tennessee for ten consecutive years.

The Tennessee Alcoholic Beverage Commission, tasked with defending the law, made no argument whatsoever that the law could survive a DCC

25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 583.
29. *Id.* at 583–84. At the time, twenty other states had similar price affirmation laws. *Id.* at 576.
30. *Id.* at 579–80 ("By requiring distillers to affirm that they will make no sales anywhere in the United States at a price lower than the posted price in New York, . . . New York makes it illegal for a distiller to reduce its price in other States during the period that the posted New York price is in effect.").
31. *Id.* at 580 (citing *Philadelphia*, 437 U.S. at 624).
32. *Tenn. Wine*, 139 S. Ct. at 2456; *see also* Tenn. Code Ann. § 57-3-201 *et seq*.

challenge, and instead based its argument entirely upon the Twenty-First Amendment.[33] Even so, the Court *still* spent several paragraphs addressing the DCC problems with the Tennessee law.[34] It held that Tennessee's durational-residency requirement "plainly favors Tennesseans over nonresidents," and, as such, is the type of "protectionist measure[]" that is generally forbidden by the DCC.[35]

B. *Category Two: Disparate Impact and* Pike *Balancing*

The second category of statutes that regularly implicate the DCC, while not facially discriminatory against out-of-state economic interests, nonetheless have some disparate impact on out-of-state interests, usually benefitting in-state interests. As explained later in this section, the constitutionality of these laws under the DCC depends upon the severity of the disparate impact upon out-of-state economic interests when weighed against the local benefits achieved by the law.

In *Pike v. Bruce Church, Inc.*, the Supreme Court established a framework for analyzing whether laws in the second category pass constitutional muster. *Pike* involved the constitutionality of the Arizona Fruit and Vegetable Standardization Act (FVS Act)[36] governing how cantaloupes had to be packed for shipment inside Arizona.[37] With certain exceptions, the FVS Act required that all cantaloupes grown in Arizona "be packed in regular compact arrangement in closed standard containers."[38]

Bruce Church, an established fruit and vegetable grower that did business in both Arizona and California, grew cantaloupes in Parker, Arizona, along the Arizona-California border.[39] Parker cantaloupes were of higher quality than cantaloupes grown in other areas of Arizona.[40] Bruce Church had no fruit packing facilities in Parker, so it transported its cantaloupe harvests in bulk, open loads to its packing facilities located in Blythe, California, thirty-one miles away, for processing, packing, and shipment to nationwide markets.[41] That practice continued until an Arizona official issued an order prohibiting Bruce Church from shipping its cantaloupes out of state unless they were packed in compliance with the FVS Act.[42] Given the quantity of cantaloupes involved and their highly perishable nature, the official's order

33. *See Tenn. Wine*, 139 S. Ct. at 2462.

34. Indeed, this section of the Court's opinion appears to be directed towards members of the Court that have been vocally critical of the Court's DCC jurisprudence rather than the parties to the case before it. *See id.* at 2460.

35. *Id.* at 2459–62.

36. Ariz. Rev. Stat. Ann. § 3-481 *et seq.* (Supp. 1969).

37. Pike v. Bruce Church, Inc., 397 U.S. 137, 138 (1970).

38. Ariz. Rev. Stat. Ann. § 3-503 (Supp. 1969).

39. *Pike*, 397 U.S. at 139.

40. *Id.*

41. *Id.*

42. *Id.*

effectively compelled Bruce Church to build packing facilities around Parker.[43] Bruce Church challenged the order as a violation of the DCC.[44]

Although the FVS Act did not expressly discriminate against interstate actors or activities, the Court nonetheless held that the order violated the DCC. It enunciated a balancing test (now known as *Pike* balancing) for determining when facially neutral laws may violate the DCC: "Where 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."[45] So, assuming that the challenged law serves some "legitimate local purpose," its constitutionality is a matter of degree.[46] The extent to which interstate commerce may be burdened depends upon the nature of the local interest involved and whether that interest could be promoted just as well with some other measure having less impact on interstate activities.[47]

The Court then applied this framework to the FVS Act. First, it examined the local interests that the act was meant to serve. Arizona admitted that its primary purpose in passing the act was "to promote and preserve the reputation of Arizona growers," and the Court recognized that the act arose out of a fear that some growers were shipping inferior or deceptively packaged produce, which tarnished the reputation of Arizona growers.[48] The Court accepted that protecting and enhancing the reputation of growers within Arizona was a legitimate local interest.[49]

The Court then examined the act's burden on interstate commerce. Interestingly, it did not focus on the act's impact on interstate activities writ large, but instead focused on its effect on *Bruce Church*, in particular. The Court pointed out that the practical result of the act's application to the company's Parker operation was to compel Bruce Church to spend about $200,000 to build and operate a facility around Parker.[50]

43. *Id.* at 140.
44. *Id.* at 138.
45. *Id.* at 142.
46. *Id.*
47. *Id.*
48. *Id.* at 142–43.
49. *Id.* at 143. The Court also observed that the act's stated purpose (i.e., preventing the reputation of Arizona produce growers from being tarnished by inferior or deceptively packaged products) was not being served as applied to Bruce Church. It reiterated that the cantaloupes grown by Bruce Church at its Parker location were generally known for being of superior quality. *Id.* at 144. It also pointed out that the cantaloupes themselves are not identified as Arizona cantaloupes, and if packaged in Blythe, would bear the name of the California packer. *Id.* So, Arizona was not complaining because Bruce Church was "putting the good name of Arizona on an inferior or deceptively packaged product," but rather, because Bruce Church "[was] not putting that name on a product that [was] superior and well packaged." *Id.*
50. *Id.* at 144. In 2020 dollars, the packing facilities would have cost Bruce Church approximately $1.4 million. CPI Inflation Calculator, htttp://www.data.bls.gov/cgi-bin/cpicalc.pl (last visited Feb. 19, 2020).

Ultimately, the Court held that Arizona's "tenuous interest" in protecting the reputations of in-state produce growers did not "constitutionally justify" even the "incidental consequence" of requiring Bruce Church to construct and operate "an unneeded $200,000 packing plant in the state."[51] It explained that "[s]uch an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved," but the "minimal at best" interests served by the FVS Act were not compelling enough.[52]

The *Pike* balancing test, like any other factor-balancing test, is a moving target. Courts implementing the *Pike* framework consider a variety of factors in determining whether a state law violates the DCC, including the language and purpose of the statute being challenged, the probable or actual effects of the statute on interstate actors or activities, and the degree of those effects.

In *Minnesota v. Clover Leaf Creamery*, for example, the Supreme Court rejected a constitutional challenge to a Minnesota law governing the raw materials used for milk containers.[53] The law banned the retail sale of milk in plastic, nonreturnable, nonrefillable containers, but it permitted such sale in other nonreturnable, nonrefillable containers such as paperboard milk cartons.[54]

Shortly after it was passed, several industry groups and businesses inside and outside Minnesota filed a lawsuit to enjoin the law, contending that it violated the DCC.[55] All of the plaintiffs had an economic interest in being able to sell milk in plastic containers.[56] They argued that the law was simply an economic protectionist measure designed to benefit Minnesota's pulpwood industry at the expense of the entirely out-of-state plastics industry. Applying *Pike*, the Supreme Court upheld the Minnesota Law.

Like the Arizona statute in *Pike*, Minnesota's law was facially neutral.[57] It regulated milk "evenhandedly" among state actors by prohibiting all milk retailers from selling their products in plastic containers "without regard to whether the milk, the containers, or the sellers are from outside [Minnesota]."[58] Satisfied that it was not dealing with a facially discriminatory statute, the Court explained that the "controlling question" was whether the law's "incidental burden" on interstate commerce was "clearly excessive" in relation to its "putative local benefits."[59]

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51. *Pike*, 397 U.S. at 145.
52. *Id.* at 146. Interestingly, the Court teased local interests that *might* have justified the burden that the FVS Act imposed on interstate activities, specifically highlighting that the act *was not* designed to protect Arizona consumers from contaminated goods or otherwise serve some safety purpose. *Id.* at 143.
53. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 458 (1981).
54. *Id.; see also* Minn. Stat. § 116F.21.
55. *Clover Leaf Creamery*, 449 U.S. at 458.
56. *Id.* at 458 n.1 (challengers of the Minnesota law included a Minnesota company that produced plastic milk containers, a non-Minnesota dairy that sold milk products in Minnesota in plastic containers, and a plastics industry trade association).
57. *Id.* at 471–72.
58. *Id.*
59. *Id.* at 472.

The law's text expressly set forth the local evil that it was created to address: "The legislature finds that the use of nonreturnable, nonrefillable containers for the packing of milk and other milk products presents a solid waste management problem for the state, promotes energy waste, and depletes natural resources."[60] This legislative finding was based on empirical studies that stressed the need to stop the introduction of the plastic nonreturnable container before it became entrenched in the market.[61]

The Supreme Court dove deep into the weeds of the law, closely analyzing its legislative history and the empirical evidence that the Minnesota legislature considered when it was debated, in order to examine the "putative local benefits" that the law was designed to achieve.[62] The Court agreed with Minnesota that the law served (or, more accurately, could rationally be seen as serving) at least four legitimate local purposes: (1) encouraging the use of environmentally superior containers; (2) reducing the economic dislocation foreseen from the movement toward greater use of environmentally superior containers; (3) conserving energy; and (4) easing the State's solid waste disposal problem.[63]

Shifting to its examination of the law's burden on interstate commerce, the Supreme Court concluded that any such burden was "relatively minor."[64] It observed that milk products would continue to move freely across the Minnesota border and downplayed the "inconvenience" of having to conform to different packaging requirements in Minnesota.[65] The Court acknowledged that within Minnesota, business would shift from manufacturers of plastic containers to producers of paperboard cartons, but it concluded that "there [was] no reason to suspect that the gainers [would] be Minnesota firms, or the losers out-of-state firms."[66] The Court accused the challengers of "exaggerat[ing] the degree of burden on out-of-state interests," pointing out that plastics would continue to be used in the production of other containers and that out-of-state pulpwood producers would presumably absorb some of the business generated by the Minnesota law.[67] Accordingly, the Court held that any burden imposed upon the out-of-state plastics industry was not "'clearly excessive' in light of

60. *Id.* at 459; *see also* Minn. Stat. § 116F.21.

61. *Clover Leaf Creamery*, 449 U.S. at 459. Opponents of the Minnesota law, also presenting empirical evidence, argued that the law would not promote the goals asserted by the law's proponents, but would instead merely increase costs of retail milk products and prolong the use of ecologically undesirable paperboard milk cartons. *Id.* at 459–60.

62. *Id.* at 465–70. The Court's examination of the Minnesota law's purposes was conducted in the section of the opinion addressing the challenger's argument that the law violated the Equal Protection Clause. In conducting its analysis of the law under the DCC, the Court referred back to this section, noting "the obvious factual connection between the rationality analysis under the Equal Protection Clause and the balancing of interests under the Commerce Clause." *Id.* at 470 n.14.

63. *Id.* at 465–70.

64. *Id.* at 472.

65. *Id.*

66. *Id.* at 472–73.

67. *Id.* at 473.

the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems."[68]

C. *Category Three: No Disparate Treatment, No Disparate Impact, No Problem*

Several federal circuits, interpreting *Pike* and its progeny, recognize a third category of state statutes. If the first category encompasses laws involving "disparate treatment," and the second category encompasses laws involving "disparate impacts," this third category encompasses "laws that affect commerce without any reallocation among jurisdictions—that do not give local firms any competitive advantage over those located elsewhere."[69]

Statutes falling into this category are not facially discriminatory, and although they *affect* interstate commerce, they do not *discriminate* against interstate commerce. The focus is on whether the law "*discriminates* against interstate commerce expressly or in practical effect."[70] If it does not, *Pike* balancing is not necessary, and the statute is subject to the rational basis test.[71]

A leading case discussing this "third category" of state statutes is the Seventh Circuit's decision in *National Paint & Coatings Association v. City of Chicago*.[72] In *National Paint*, the Seventh Circuit rejected a challenge to a Chicago city ordinance banning the retail sale of spray paint within city limits.[73] The ordinance was passed to remedy a growing graffiti problem in the city that was not being adequately addressed by criminal prosecutions for vandalism and trespass.[74]

The challengers in *National Paint*, a consortium of Illinois and out-of-state makers, wholesalers, and retailers of spray paint, contended that the ordinance violated the DCC. The challengers and the district court believed that because most of the spray paint sold in Chicago came from outside

68. *Id.* Additionally, the Court held, without analysis, that several alternative statutory schemes suggested by the challengers were either *more* burdensome on commerce than the Minnesota law or were less likely to be effective. *Id.* at 473–74.

69. Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1131 (7th Cir. 1995).

70. *Id.* at 1132 (emphasis added).

71. *Id.* at 1130. Remember that, under *Pike* balancing, it matters whether the local interest at stake could be promoted just as well with less-burdensome means. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). However, under traditional rational basis analysis, a law need not reflect "the least restrictive means of regulation" in order to pass constitutional muster. *Nat'l Paint*, 45 F.3d at 1129. Whether a statute is subject to *Pike* balancing, then, becomes a critical threshold question. As the Seventh Circuit explained, *Pike* balancing "may be impossible to apply without some factual inquiries," *id.* at 1132, but there is "never a role for evidentiary proceedings" under rational basis review. *Id.* at 1127.

72. The proposition that the Commerce Clause requires discrimination against interstate commerce can be traced farther back than the Seventh Circuit's *National Paint* decision. *See, e.g.*, Norfolk S. Corp. v. Oberly, 822 F.2d 388 (3d Cir. 1987). But *National Paint* appears to be the case that is relied upon the most by courts seeking to support that proposition, and it appears to be the first case that determined *Pike* balancing does not even apply to laws fitting into this category. Other circuits have voiced agreement with *National Paint's* proposition that *Pike* balancing does not apply to determine the constitutionality of a statute *solely* because the law has some effect interstate commerce. *See* cases cited *supra* note 13.

73. *Id.* at 1126; *see also* Chicago Municipal Code § 4-132-150. The fine for each violation was $100. *Nat'l Paint*, 45 F.3d at 1126.

74. *Nat'l Paint*, 45 F.3d at 1126.

Illinois, this fact alone was enough "to activate the balancing approach of [*Pike*]" which the district court understood "to authorize a comprehensive review of the law's benefits, free of any obligation to accept the legislature's judgment."[75]

This was error, the court said, because "a closer examination" of the cases applying the *Pike* framework revealed that the Supreme Court "has looked for discrimination rather than for baleful effects."[76] Citing *Clover Leaf Creamery* and *Pike* itself, the court explained that *Pike* balancing comes into play only in situations where a potentially neutral state law causes a weak discriminatory effect on interstate commerce.[77] But as a threshold matter, there must first be discrimination. That is, if the law "affect[s] commerce without any reallocation among jurisdictions—that do not give local firms any competitive advantage over those located elsewhere," then the law does not implicate the DCC at all, and "the normal rational-basis standard is the governing rule."[78]

The court ultimately concluded that the ordinance did not discriminate against interstate commerce and, therefore, did not implicate *Pike* balancing. It noted that the loss among spray paint retailers was "felt locally," and there was no evidence in the record suggesting that substitutes for spray paint would come from inside Illinois to a greater degree than spray paint did.[79] In short, there was "[n]o disparate treatment, no disparate impact, no problem under the dormant commerce clause."[80]

III. The DCC and State Relationship Laws

Against these three levels of judicial scrutiny, at least two cases have addressed the potential extraterritorial reach of State Relationship Laws, and with wildly different results. In *Instructional Systems, Inc. v. Computer Curriculum Corp.*, the Third Circuit concluded that the New Jersey Franchise Practices Act (NJ Franchise Act)[81] applied to a multistate dealership agreement

75. *Id.* at 1130.

76. *Id.* (citing Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986), and Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 (1982)).

77. *Id.* at 1131; *Park Pet Shop*, 872 F.3d at 502 ("*Pike* balancing is triggered *only* when the challenged law *discriminates* against interstate commerce in practical application. *Pike* is not the default standard of review for any state or local law that affects interstate commerce.").

78. *Nat'l Paint*, 45 F.3d at 1131. The court observed that "almost every state and local law-indeed, almost every private transaction-affects interstate commerce." *Id.* at 1130. So, "[if] the balancing approach of *Pike* supplied the standard applicable to all laws affecting commerce . . . then judicial review of statutory wisdom after the fashion of *Lochner* would be the norm." *Id.* at 1131; *see also* Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1878 (1987) (commenting that "prohibition [of all state laws that have substantial extraterritorial effects] would invalidate much too much legislation").

79. *Id.* at 1132.

80. *Id.*

81. N.J. Stat. Ann. § 56: 10-1 *et seq.*

without offending the DCC.[82] Computer Curriculum Corp. (CCC) entered into a distribution agreement with Instructional Systems, Inc. (ISI) that covered its computer-based integrated learning system.[83] CCC was a Delaware corporation headquartered in California, and ISI was a New Jersey company.[84] Under their agreement, ISI was CCC's exclusive reseller not only for New Jersey, but also for Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, Vermont, and Washington, D.C.[85] The agreement stated that it would be governed by California law.[86]

As the agreement's expiration date was approaching, CCC decided that it wanted to restrict ISI's territory because it thought ISI was not marketing its products vigorously enough in several states.[87] CCC offered to continue ISI's authority to distribute in New Jersey, New York, and Massachusetts, but it effectively terminated its relationship with ISI in the other states.[88] ISI sued under various provisions of the NJ Franchise Act, requesting, in addition to damages, an injunction preventing CCC from terminating its relationship with ISI in all states covered by the parties' contract.

As a matter of statutory interpretation, whether the NJ Franchise Act had extraterritorial reach was unclear, so the federal court abstained from deciding the issue[89] and obtained an authoritative ruling from the New Jersey Supreme Court that the NJ Franchise Act *did* apply to the *entire* ISI-CCC contract, including the out-of-state relationships.[90] The New Jersey Supreme Court explained that applying the NJ Franchise Act to the parties' contract notwithstanding the contract's choice-of-law provision designating California law as controlling presented "a close question."[91] It reasoned that applying the NJ Franchise Act was appropriate because New Jersey had a strong public policy favoring the protection of its franchisees and, because ISI was located in New Jersey, the majority of its employees resided in New Jersey, the investments related primarily to assets in New Jersey, and the goodwill was developed for CCC by New Jersey residents.[92]

On appeal, the Third Circuit was required to decide whether the NJ Franchise Act violated the DCC insofar as it applied to CCC's termination of its relationship with ISI in states other than New Jersey.[93] CCC conceded that the NJ Franchise Act did not "differentiate between in-state and

82. Instructional Sys., Inc. v. Computer Curriculum Corp., 35 F.3d 813 (3d Cir. 1994) [hereinafter ISI I].
83. *Id*. at 815.
84. *Id*. at 815–16.
85. *Id*. at 816.
86. *Id.*
87. *Id.*
88. *Id.*
89. *See* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941).
90. Instructional Sys., Inc. v. Computer Curriculum Corp., 614 A.2d 124, 135 (N.J. 1992) [hereinafter ISI II].
91. *Id.*
92. *Id.*
93. *ISI I*, 35 F.3d at 816–18.

out-of-state franchisors," but it argued that imposing the NJ Franchise Act upon a multistate contract was nonetheless per se invalid because it had "the practical effect of regulating extraterritorially."[94]

The Third Circuit disagreed. It reasoned that "[i]n traditional contract litigation, courts must apply some state's law to interpret the contract" and that, although a multistate contract may raise difficult choice-of-law issues, "there is nothing untoward about applying one state's law to the entire contract, even if it requires applying that state's law to activities outside the state."[95] The court rejected CCC's attempt to distinguish the NJ Franchise Act from an "ordinary state contract rule" because "[t]he construction of a contract, including the interpretive policies embodied in common law and statutory enactments, is no more or less regulatory than the [NJ Franchise Act], which imposes on franchises governed by New Jersey law certain provisions designed to promote fairness between the parties."[96]

The Third Circuit recognized that New Jersey would not have the "right to apply the [NJ Franchise Act] to any franchise agreement in the country, as long as suit [was] brought in New Jersey,"[97] but, in the case before it, it was *the parties*, not the state of New Jersey, that projected the act outside of New Jersey's borders.[98] The parties, not New Jersey, "contemplated that the franchisee maintain a place of business in New Jersey."[99] The parties, not New Jersey, "bound themselves to an exclusive multistate distribution agreement."[100] Thus, the Third Circuit concluded that the case before it was unlike other DCC cases where "it was the state, operating independently of any parties' contract, which dictated the extraterritorial effect."[101]

The court then engaged in *Pike* balancing and concluded that applying the NJ Franchise Act to the entire contract did not offend the DCC. It was not swayed by CCC's argument that the act worked as a "straitjacket on its operations" and ultimately harmed consumers by preventing the creation of an efficient product distribution system.[102] Even assuming CCC was correct, the court explained, it was not disputed that the act treated in-state and out-of-state franchisors exactly the same, so "[a]lthough the [act] may burden *commerce*, it creates no incidental burdens on *interstate commerce* for purposes of *Pike* balancing."[103] Because there was no burden on interstate commerce,

94. *Id*. at 824.
95. *Id*. at 825.
96. *Id.*
97. Like other states' relationship laws, the NJ Franchise Act has a "community of interest" requirement that limits the application of the law to situations in which the franchisee has made a significant "capital investment of either goods or services in New Jersey." *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id*. at 826.
102. *Id*. at 827.
103. *Id*. (emphasis added).

the court held that "an analysis of the 'putative local benefits' of the [act was] unnecessary."[104]

Taking a decidedly different analytical route, the Seventh Circuit in *Morley-Murphy Co. v. Zenith Electronics Corp.* made an *Erie*[105] guess and predicted that if the Wisconsin Fair Dealership Law (WFDL)[106] was construed to have extraterritorial reach, it would, "at the very least, raise *significant questions* under the Commerce Clause."[107] Though it did not squarely decide the issue, the Seventh Circuit was, to say the least, skeptical that such a construction of the WFDL would be permissible under the DCC. As a result, for more than twenty years, practitioners have operated under significant doubt about the extraterritorial reach of the WFDL and routinely defer to *Morley-Murphy* as the last word on the subject.

In *Morley-Murphy*, Zenith, a Delaware corporation headquartered in Glenview, Illinois, allegedly violated the WFDL when it decided not to renew its distributorship agreement with Morley-Murphy, a Wisconsin corporation located in in Green Bay.[108] Zenith manufactured consumer electronic products, and Morley-Murphy was one of Zenith's distributors.[109] Zenith's decision not to renew was part of its nationwide strategy to shift from independent distributors to direct marketing.[110] Although Morley-Murphy was a very successful dealer of Zenith products,[111] Zenith itself was in financially dire straits, having reported net operating losses in nine out of the last ten years immediately before the events of the lawsuit.[112] In an effort to right the ship, Zenith put its distribution system under the microscope and concluded that it could reap substantial savings if it converted to a "one-step distribution" system "in which its products would be shipped directly from its factories to the retailers' warehouses."[113] After deciding to restructure its distribution system, Zenith informed Morley-Murphy that its distributorship agreement with Zenith would not be renewed and that it would be terminated as a distributor.[114]

Morley-Murphy sued Zenith alleging that its refusal to renew the distributorship agreement violated the WFDL.[115] When it sued, Morley-Murphy's territory included Wisconsin, Iowa, Minnesota, North Dakota, and South

104. *Id.*
105. Erie R.R. Co. v. Thompkins, 304 U.S. 64 (1938).
106. Wis. Stat. § 135.01 *et seq*.
107. Morley-Murphy Co. v. Zenith Elecs. Corp., 142 F.3d 373, 379 (7th Cir. 1998) (emphasis added).
108. *Id.* at 374. Zenith was a nationwide manufacturer of consumer electronic products. *Id.*
109. *Id.*
110. *Id.*
111. In 1994, Zenith products accounted for fifty-four percent of Morley-Murphy's total business. *Id.*
112. *Id.* at 375. In the prior five years, Zenith lost over $320 million, and in the first half of 1995, right before it ended its relationship with Morley-Murphy, Zenith reported net operating losses of $60.8 million. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 374.

Dakota.[116] The distributorship agreement specified that it was to be governed by Illinois law.[117] At trial, Morley-Murphy was awarded over $1 million in damages "for lost future profits on projected sales from Morley-Murphy's Iowa and Minnesota locations."[118] On appeal, Zenith argued, among other things, that the award of damages for losses attributable to Morley-Murphy's future sales outside of Wisconsin "impose[d] an unconstitutional burden on interstate commerce."[119]

The Seventh Circuit did not directly decide whether the WFDL violated the DCC. Instead, noting that the WFDL was "silent" on the question of its extraterritorial reach and "no Wisconsin court" had considered the issue, the court boldly concluded "that the Wisconsin Supreme Court would construe the WFDL as not applying to Morley-Murphy's sales of Zenith products in Minnesota and Iowa."[120]

Despite concluding that a constitutional analysis was unnecessary given its interpretation of the WFDL, the court nonetheless discussed the Third Circuit's handling of the extraterritoriality issue in *Instructional Systems*, rejecting outright the Third Circuit's approach. First, the Seventh Circuit questioned the Third Circuit's apparent reliance on "party autonomy," that is, the assertion that it was *the parties*, not the State of New Jersey, that had projected the NJ Franchise Act outside of New Jersey's borders: "It appears to us quite odd to speak of party autonomy in a context where the parties are not permitted to opt out of a provision of state law."[121] Because the WFDL provided that its effects "may not be varied by contract or agreement,"[122] the Seventh Circuit reasoned that there was no way for Zenith and Morley-Murphy to avoid the WFDL "without deciding to forego a contract altogether."[123] Second, the Seventh Circuit was concerned that giving a State Relationship Law extraterritorial effect could thwart more relaxed public policies concerning such relationships in other states. If the WFDL were given extraterritorial effect, it explained, "any state that has chosen a policy more *laissez faire* than Wisconsin's would have its choices stymied, because the state that has chosen more regulation could always trump its deregulated neighbor."[124] Accordingly, the Seventh Circuit reversed the portion of the damages award based on Morley-Murphy's lost future profits in Iowa and Minnesota.

116. *Id.*
117. *Id.*
118. *Id.* at 378.
119. *Id.*
120. *Id.* at 380.
121. *Id.* at 381.
122. Wis. Stat. § 135.025(3).
123. *Morley-Murphy*, 142 F.3d at 381.
124. *Id.* at 379.

IV. Practical Considerations

What are the bench and bar to make of all this? For one, a State Relationship Law probably does not fall into the first category of potentially offensive laws. Relationship laws are typically triggered by in-state rather than out-of-state commercial activity, and most such laws attempt to regulate the contractual relationship between the parties "evenhandedly" without regard to whether the parties or the product come from within or without the state.[125]

That leaves categories two and three, and the consequences of characterizing extraterritorial application of a State Relationship Law as falling into one category or the other are profound. If the law is viewed as falling into the second category (i.e., the law is facially neutral but extraterritorial application imposes incidental burdens on interstate commerce), extraterritorial application of that law may or may not offend the DCC after *Pike* balancing. That process is familiar and has played out many times over the years in courts across the country. But if the law is viewed as falling into the third category (i.e., extraterritorial application *affects* but does not *discriminate* against interstate commerce), then the law need only pass the rational basis test.

As the cases make clear, determining whether extraterritorial application of a State Relationship Law discriminates against interstate commerce, and, if so, to what extent, involves fact questions.[126] The following considerations are likely to be important in determining whether extraterritorial application of a State Relationship Law ought to be characterized as falling into category two or category three. These considerations are also likely to be important in the *Pike* balancing analysis if the State Relationship Law falls into category two.

A. *Statutory Interpretation—Franchise/Dealership Is the Contract*

State Relationship Laws define the subject relationship (e.g., "franchise" or "dealership") with reference to the contract or agreement that created the relationship.[127] The laws protect investments in franchise and dealership relationships made in the home state, and the citizenship of the parties is generally irrelevant.[128]

So, if a franchisee is awarded a franchise that includes territory in multiple states, can applying one State Relationship Law to the entire agreement be said to be applying that law extraterritorially in a way that discriminates

125. *See generally* Appleby, Garner & Satterlee, *supra* note 1 (collecting state laws, commentary, and annotations); *see also* Gravquick A/S v. Trimble Navigation Int'l Ltd., 323 F.3d 1219, 1224 (9th Cir. 2003); *ISI I*, 35 F.3d at 827.

126. *See Nat'l Paint*, 45 F.3d at 1132 (noting that "*Pike* may be impossible to apply without some factual inquiries. . .").

127. *See* Appleby, Garner & Satterlee, *supra* note 1.

128. *See ISI I*, 35 F.3d at 827; Baldewein Co. v. Tri-Clover, Inc., 606 N.W.2d 145, 153 (Wis. 2000). *See generally* Appleby, Garner & Satterlee, *supra* note 1.

against interstate commerce? The answer likely depends on the specific facts of the case. For example, in *Morley-Murphy*, the dealer's right to serve Minnesota and Iowa "arose from what the court (and the parties) referred to as 'out-of-state dealerships' managed on a day-to-day basis from facilities in Minneapolis and Des Moines, respectively."[129] Even though only one "dealership" (as that term is defined by the WFDL) was really at issue in *Morley-Murphy*, the practical demarcation between in-state and out-of-state economic activity was "unusually clear."[130]

We contend that the analysis would have been different if Morley-Murphy had serviced Minnesota and Iowa, along with Wisconsin, *exclusively* from its Wisconsin headquarters. After all, it is hard to understand what exactly would have been "extraterritorial" about applying the WFDL to Morley-Murphy's entire (and singular) multistate dealership agreement had it been servicing multiple states exclusively through its Wisconsin headquarters based on a contract negotiated and executed between the parties. "Extraterritorial" application of a State Relationship Law under these circumstances might not even be considered discriminatory against interstate commerce, but, even if it were, the extraterritorial effect would be weak and incidental.[131]

Moreover, the Wisconsin Supreme Court opinion in *Baldewein Co. v. Tri-Clover, Inc.*, issued after *Morley-Murphy*, casts significant doubt on the accuracy of the Seventh Circuit's *Erie* guess as to how the Wisconsin Supreme Court would interpret the WFDL under these circumstances.[132] Given that State Relationship Laws generally define those relationships similarly to the WFDL (i.e., the "franchise" is part and parcel of the contract that creates it), the interpretive principles followed by the Wisconsin Supreme Court could be equally applicable across the country.

Ironically, *Baldewein* came to the Wisconsin Supreme Court on certification from the Seventh Circuit to interpret the WFDL requirement that the dealership be "situated in" Wisconsin.[133] Before setting forth the factors that determine whether a dealership is "situated in" Wisconsin, the court probed the WFDL's legislative history, noting that the Wisconsin legislature rejected a proposal to define "dealership" as "a contract . . . by which *a person in this state* is granted the right to sell or distributed goods" and instead focused on the definition of "dealer," amending it to include only "dealership[s] situated in" Wisconsin.[134] The court emphasized that, under the WFDL, it is the "dealership," not necessarily the "dealer," that must be "situated in" Wisconsin.[135] Because a "dealership" under the WFDL is the "contract or agreement" establishing a particular commercial relationship between the parties,

129. Michael A. Bowen et al., The Wisconsin Fair Dealership Law § 2.6 (4th ed. 2012).
130. *Id.*
131. *See Nat'l Paint*, 45 F.3d at 1131.
132. *See Baldewein*, 606 N.W.2d at 153.
133. *Id.* at 148.
134. *Id.* at 148–51.
135. *Id.* at 150.

"the focus of the analysis must be on whether the business relationship at issue can be said to be situated in" Wisconsin.[136]

In light of *Baldewein*, it appears that *Morley-Murphy*'s *Erie* guess was wrong. As a matter of statutory interpretation, if the "dealership" is the contract, then what Morley-Murphy had with Zenith was a single, multistate dealership agreement. That is, there was no statutory basis for treating each territory contained in the parties' agreement as if it established a separate and distinct "dealership" under the WFDL. Under these circumstances (and especially if Morley-Murphy had served Minnesota and Iowa exclusively from its Wisconsin headquarters), applying the WFDL to the entire multistate agreement would not project the WFDL outside of Wisconsin. It would constitute a routine application of the WFDL to a single dealership "situated in" Wisconsin, even if that Wisconsin dealership serviced territories outside Wisconsin.

B. *Subject and Severity of the Discriminatory Effect*

Another factor worth considering is the severity of the alleged discriminatory effect on a particular out-of-state actor if a State Relationship Law is applied extraterritorially. For example, the Supreme Court stated unequivocally in *Exxon Corp. v. Governor of Maryland* that the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."[137] But just eight years earlier in *Pike*, the Court was clearly concerned with the specific effect that the FVS Act had on Bruce Church *in particular*: "While the order issued under the [act] does not impose such rigidity on an entire industry, *it does impose just such a straitjacket on the appellee company with respect to the allocation of its interstate resources*."[138] Importantly, the *Exxon* Court was not applying *Pike* balancing, so it could be that focusing on the effects of a statute and its application upon the particular parties before the court is a proper factor to consider under *Pike* balancing.[139]

In *Morley-Murphy*, the Seventh Circuit posed a hypothetical to illustrate why it believed extraterritorial application of the WFDL would be inappropriate. Suppose, it said, that the Iowa legislature decided to enact a dealership law stating that dealership terminations had to be for "good cause," or, if not supported by good cause, the termination occurs two years after notice of termination is given to the dealer.[140] The Iowa legislature might think that such a law balanced legitimate franchisee and dealer interests against manufacturer and supplier interests in a better way than the "absolute"

136. *Id.*

137. Exxon Corp v. Governor of Maryland, 437 U.S. 117, 127–28 (1978); *see also* Pharms. Research & Mfrs. of Am v. Concannon, 249 F.3d 66, 83–84 (1st Cir. 2001).

138. Pike v. Bruce Church, Inc., 397 U.S. 137, 146 (1970) (emphasis added).

139. *See id.* ("Such an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved.").

140. Morley-Murphy Co. v. Zenith Elecs. Corp., 142 F.3d 373, 379 (7th Cir. 1998).

Wisconsin approach (i.e., "good cause" or bust).[141] The court then wondered what a grantor is to do "if a Wisconsin distributor has been serving the Iowa market" but "wishes to close shop in Iowa (assuming that good cause cannot be shown)."[142] If the WFDL applied "extraterritorially," then Iowa public policy would be thwarted because "the Wisconsin distributor cannot be phased out over the two-year period that Iowa has chosen."[143] From this, the Seventh Circuit concluded broadly that "any state that has chosen a policy more *laissez faire* than Wisconsin's would have its choices stymied, because the state that has chosen more regulation could always trump its deregulated neighbor."[144]

The *Morley-Murphy* hypothetical requires several leaps of logic based on a very specific set of facts, but there are lessons here for the practitioner. First, it assumes that the "Wisconsin distributor" has a physical presence in Iowa. Morley-Murphy did, in fact, have actual brick-and-mortar locations in Minneapolis and Des Moines to service its territory in Minnesota and Iowa,[145] and the Seventh Circuit's conclusion makes far less sense if all of Morley-Murphy's territory was managed and serviced *exclusively* from its Wisconsin headquarters. Second, the court's hypothetical assumes that the WFDL would protect a "Wisconsin distributor" based solely on its identity as a "Wisconsin" company (as was Morley-Murphy). The hypothetical fails to recognize that companies hailing from *any* state can be a "Wisconsin distributor" under the WFDL, which protects dealers that make the requisite investments *in* Wisconsin even if the dealer is not *from* Wisconsin. Finally, the hypothetical appears not to have considered whether the converse of its hypothetical is also true, in which case the force of its argument would be neutralized.

In other words, if it is permissible in *Pike* balancing to consider the effect of a law on a particular out-of-state actor weighed against the law's putative local benefits, is it not also permissible to examine how the *failure* to apply a law "extraterritorially" could undermine the law's local benefits? Suppose that the dealer in the Seventh Circuit's hypothetical is a California company headquartered in California, but it has a major distribution center in Wisconsin. The dealer services Iowa and other states in the northern Midwest exclusively from its Wisconsin hub and has no physical presence in Iowa at all. Suppose further that the dealer derives a significant portion of its revenue from Iowa sales serviced by the Wisconsin distribution center, enough that its continued existence would be jeopardized if it lost the Iowa territory.

If, under those circumstances, the grantor decided to terminate the dealer's Iowa territory without cause, any and all *Wisconsin-based investments* made for the purpose of serving the Iowa territory are destroyed. That is,

141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. Bowen, *supra* note 129, § 2.6.

the grantor's decision to terminate the Iowa territory will have a significant impact on commerce *in Wisconsin* unless the WFDL can prevent that termination. If the revenue coming in from Iowa was significant enough, the dealer might be forced to significantly scale down its Wisconsin operations or even to close up shop in Wisconsin completely. By allowing the more *laissez faire* approach to control, Iowa could potentially stymie Wisconsin's legislative choice to protect Wisconsin investments in dealership relationships by conditioning termination of the relationship on a showing of good cause.

Thus, focusing on the immediate consequences of extraterritorial application (or not) of a State Relationship Law under the circumstances of any particular case may tip the *Pike* balancing scales in one direction or another.

C. *Party Autonomy*

Finally, although *Morley-Murphy* derided the Third Circuit's decision in *Instructional Systems* and its reliance on "party autonomy" given that the WFDL specifies that it cannot be avoided by contract or agreement, it is nonetheless worth considering whether and how parties might anticipate extraterritorial effects of State Relationship Laws when negotiating their agreements. Remember that, generally speaking, franchises are defined by the contract or agreement granting them. So, one way to anticipate extraterritorial effects of a State Relationship Law might be to avoid single, multistate contracts. Franchisors could also add in a requirement to maintain a physical presence in the territory that is being awarded (as in *Morley-Murphy*) or otherwise define which investments are made to service which jurisdictions. Franchisors are less likely to be affected by the extraterritorial reach of any particular State Relationship Law if the contract creating the franchise does not include multiple states or otherwise makes it easy to determine what investments were made for the purposes of serving particular jurisdictions. In the Seventh Circuit's *Morley-Murphy* hypothetical, the grantor could terminate the Iowa dealership without implicating the WFDL because the Iowa dealership and Wisconsin dealership would be, according to both statutory definition and the express language of the individual agreements, separate and distinct dealerships.

V. Conclusion

Although the past several decades have produced a significant body of case law applying the DCC, it is still unclear how courts will treat proposed "extraterritorial" applications of State Relationship Laws. If a court is required to engage in *Pike* balancing, the result becomes even more difficult to predict. And, because no State Relationship Law facially discriminates against interstate commerce, the specific facts at issue in any dispute over extraterritorial application will be decisive. Given the dearth of federal appellate cases that have directly dealt with the issue, there is no reason to believe that the Supreme Court will weigh in to clear the fog any time soon, not even to decide whether *Pike* balancing is the appropriate legal standard for evaluating these laws. Thus, amidst much uncertainty, the framework and considerations set forth in this article are intended to offer some degree of guidance to the bench and bar if they are faced with the issue of extraterritorial application of a State Relationship Law.