

# Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism

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## I. INTRODUCTION

Public choice theory has long proclaimed that business interests can capture regulatory processes to generate economic rents at the expense of consumers.<sup>1</sup> Such political exploitation may go unnoticed and unchallenged for long time periods because, though the rents are captured by a relatively small number of individuals or firms, the costs are widely diffused over a large number of consumers.<sup>2</sup> The triggering event to expose and mobilize opposition to the regulatory capture may not arise until a new technology seeks to challenge the incumbent technology, thus creating a motivated champion to expose and oppose the regulatory capture and advocate for regulatory liberalization.

That moment has arrived in the automobile industry. Since the 1950s, the distribution of automobiles has been pervasively regulated by a patchwork of state laws promulgated at the insistence of dealers for the ostensible purpose of preventing unfair exploitation by franchising car manufacturers.<sup>3</sup> Among other things, the dealer laws in many states prohibit a manufacturer from opening its own showrooms or service centers—from dealing directly with consumers.<sup>4</sup> At the time these direct distribution prohibitions were enacted, the Big Three auto manufacturers (Ford, General Motors, and Chrysler) completely dominated the U.S. car market, and the dealers argued

1. See, e.g., KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (Charles K. Rowley ed., Liberty Fund 2004) (1962); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

2. James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government*, in *PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS* 3, 11–12 (James D. Gwartney & Richard E. Wagner eds., 1988) (describing “rational ignorance”); MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* 90 (1981) (arguing that concentrated interests are more likely to generate political and lobbying activity by organized groups than when interests are diffuse); Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 367 (1988). See generally Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976).

3. Jessica Higashiyama, *State Automobile Dealer Franchise Laws: Have They Become the Proverbial Snake in the Grass?* 2–4 (Apr. 2009) (unpublished manuscript), <http://ssrn.com/abstract=1394877>.

4. *Id.* at 12.

that they were unable to contractually protect themselves against a franchising manufacturer unfairly undermining its own franchised dealers at retail.<sup>5</sup> Though the U.S. auto market has become considerably more competitive since the direct distribution prohibitions were enacted, hence diminishing any power the manufacturers might have to impose draconian contractual terms, the laws have persisted largely without modification.

The challenge to the status quo has come from the abrupt market entry of a redoubtable technological challenger to the internal combustion status quo. In 2012, Palo Alto, California-based Tesla Motors began selling all-electric vehicles. Tesla, the offspring of entrepreneur Elon Musk—who also created the online payment service PayPal and the space exploration company SpaceX—quickly won accolades for its disruptive technology. Consumer Reports went so far as to call the Tesla Model S the best performing car *of any kind* it had ever tested.<sup>6</sup> Yet Tesla's greatest market entry challenge has not been solving the technological problems of creating a battery that can run for nearly the fuel range of a typical car or the battery swapping and supercharging infrastructure necessary to grant Tesla drivers recharging access comparable to filling stations. Rather, its greatest challenge has been to obtain the legal right to distribute its cars directly to consumers and to provide aftermarket service to Tesla owners. Across the country, the car dealers' lobby—often with the support of the legacy car companies—has invoked either the old dealer laws or obtained legislative extensions of them to block Tesla's progress. Tesla is fighting a multi-state, multi-front battle in state legislatures, regulatory commissions, and courts just for the right to distribute and service its products.

The Tesla story is important on its own terms because of its implications for innovation in the automotive industry, the dissemination of environmentally friendly technologies, and energy independence. But it is also emblematic of a broader problem of economic regulation and frail legal response—the lack of robust legal tools for the courts to tackle protectionist or otherwise anti-consumer regulations designed solely to benefit concentrated economic interests. In the post-*Lochner* era, courts have been reluctant to subject protectionist state regulatory schemes to intrusive judicial review under any legal framework—whether antitrust law, the Dormant Commerce Clause, Substantive Due Process, or Equal Protection. Only recently have a few federal courts begun to show some willingness to invalidate the most egregiously anti-competitive state regulatory schemes as instances of

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5. *Id.* at 1–4.

6. *Videos: Cars*, CONSUMER REPORTS, <http://www.consumerreports.org/cro/video-hub/cars/hybrids—alternative-fuel/tesla-model-s-20132015-quick-drive/14786539001/2366240882001> (last visited Nov. 14, 2015) (“The Tesla Model S electric car is the best performing car ever tested by Consumer Reports.”).

naked economic protectionism that fail even rational basis review.<sup>7</sup> In most such instances, the political process remains the consumer's sole recourse—with the dreary prospects for political relief that public choice theory suggests.

This Article examines the Tesla wars as a case study in state economic protectionism and crony capitalism that lay largely unchallenged for decades until a maverick technology appeared in the market and began radically to disrupt the status quo. It is a case study that bolsters the conventional public choice story of capture and rent extraction, but extends it with further observations about the potential of political capture to injure consumer interests not only statically through higher prices but also dynamically through the protection of incumbent technologies against replacement by new and innovative technologies. And it is a story about the inadequacy of judicial review, in most of its prevailing flavors, to do much about it.

But if the Tesla story highlights the inadequacy of law to address most instances of special interest barrier erection through capture of the political process, it also showcases the potential for a new strand of anti-crony-capitalism politics. The direct distribution battle coincides with other high-profile conflicts between incumbent technologies protected by long-unchallenged laws and new technologies seeking to penetrate the market. Consider, for example, the ongoing battles between the taxi establishment and ride-sharing services Uber and Lyft.<sup>8</sup> The confrontation between incumbent and innovative technologies is shaking up traditional political juxtapositions, such as business versus consumer or free market versus environmentalist, and inspiring strange bedfellow coalitions. Over time, the patterns observed in the Tesla wars could contribute to a fundamental realignment of political coalitions on issues of protectionism and economic regulation.

This Article proceeds as follows. Part II details the anatomy of dealer protectionism, briefly summarizing the history of American dealer franchise laws, introducing Tesla's business model, and recounting the highlights of the Tesla wars to date. Part III analyzes the policy arguments over laws prohibiting direct distribution. It shows that none of the contemporary arguments against direct distribution are remotely sustainable and that laws prohibiting direct distribution can be explained only as capitulation to the dealers' demands for protection from competition. Finally, Part IV considers the law and politics of the Tesla wars. Still treading in the long shadows of *Lochner*, the legal doctrines most related to invalidating purely protectionist laws—antitrust law, the Fourteenth Amendment's Due Process and Equal Protection Clauses, and the Dormant Commerce Clause—are of relatively little help in combating

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7. See generally Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & LIBERTY 1055, 1058 (2014).

8. See, e.g., Melissa Sachs, *On the Road to \$40 Billion, Ridesharing App Uber Hit by Lawsuits, Regulators*, THOMSON REUTERS: KNOWLEDGE EFFECT (Dec. 17, 2014), <http://blog.thomsonreuters.com/index.php/on-the-road-to-40-billion-ridesharing-app-uber-hit-by-lawsuits-regulators>.

economic protectionism. However, confrontation between innovation and establishment may create a new political vocabulary and consciousness and awaken a rising class of younger, technology-intensive voters to an old public choice story.

## II. THE ANATOMY OF DEALER PROTECTIONISM

### A. A BRIEF HISTORY OF DEALER FRANCHISE LAWS

Automotive manufacturer franchising of dealers began in 1898 with a franchise by General Motors to sell steam automobiles.<sup>9</sup> However, for the first few decades of the 20th century, manufacturers employed a wide variety of distribution methods, including dealer franchising, direct distribution through factory-owned stores and traveling salesmen, and distribution through wholesalers, retail department stores, and consignment arrangements.<sup>10</sup> Dealer franchising was not the early predominant model. As automobile consumption intensified, however, the manufacturers found it necessary to move increasingly to a franchise model in order to focus on their core competency in manufacturing and find additional sources of capital to fund their distribution operations.<sup>11</sup>

The dealer-franchise system with which we are accustomed today grew out of intensive lobbying efforts by car dealers from the 1930s to the 1950s in response to perceived abuses of the franchise relationship by car manufacturers.<sup>12</sup> At that time, the car companies were large, powerful, and few in number—the Big Three dominated the market. Dealers were largely “mom and pop” shops, organized on a small scale.<sup>13</sup> Manufacturers were able to secure contracts that imposed draconian terms on the dealers.<sup>14</sup> For example, during the Depression, Henry Ford kept his factories running at “full tilt” and allegedly was able to “force” dealers to buy inventories of Model Ts that they would be unable to sell, under threat of not getting any more

9. Francine Lafontaine & Fiona Scott Morton, *Markets: State Franchise Laws, Dealer Terminations, and the Auto Crisis*, 24 J. ECON. PERSP. 233, 234 (2010).

10. Thomas G. Marx, *The Development of the Franchise Distribution System in the U.S. Automobile Industry*, 59 BUS. HIST. REV. 465, 465–66 (1985); see also Gary Michael Brown, Note, *State Motor Vehicle Franchise Legislation: A Survey and Due Process Challenge to Board Composition*, 33 VAND. L. REV. 385, 387 (1980).

11. Brown, *supra* note 10, at 387.

12. See Higashiyama, *supra* note 3, at 11.

13. See STEWART MACAULAY, LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS 5–12 (1966).

14. See Friedrich Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1155 (1957) (describing automotive franchise contracts as quintessential contracts of adhesion). See generally CHARLES MASON HEWITT, JR., AUTOMOBILE FRANCHISE AGREEMENTS 23–40 (1956); BEDROS PETER PASHIGIAN, THE DISTRIBUTION OF AUTOMOBILES, AN ECONOMIC ANALYSIS OF THE FRANCHISE SYSTEM (1961).

inventory in the future if they refused delivery.<sup>15</sup> According to a 1956 Senate Committee report, franchise agreements of the 1950s typically did not require the manufacturer to supply the dealer with any inventory and allowed the manufacturer to terminate the franchise relationship at will without any showing of cause.<sup>16</sup> Conversely, as with the Ford example, the manufacturers could often force dealerships to accept cars whether the dealer could sell them or not.<sup>17</sup> Thus, the franchise agreements were perceived as shifting risk downward to dealers and reward upwards to the manufacturers.

The dealers made some headway in the courts challenging the franchise agreements as contracts of adhesion.<sup>18</sup> But the relief they ultimately needed was legislative. During the 1930s to 1950s, the dealers pressured Congress to enact a statutory scheme protecting them from the power of the Big Three. They obtained relatively little of what they wanted from the federal government. A 1939 report by the Federal Trade Commission (“FTC”), which had been encouraged by the car dealers, did find some franchising abuses by manufacturers, but one of the report’s headlines was that the use of manufacturer power to squeeze the dealers actually created intensive retail competition to the benefit of consumers.<sup>19</sup> The FTC also turned the tables on the dealers and accused them of various anticompetitive or anti-consumer practices, such as “padding” new car prices, price fixing, and “packing” finance charges—not the news the dealers wanted.<sup>20</sup> Eventually, the dealers secured a modest federal victory with the Automobile Dealers’ Day in Court Act of 1956, which allows dealers to bring a federal suit against a manufacturer who, without good faith, fails to comply with the terms of a franchise agreement or terminates, cancels, or refuses to renew a franchise.<sup>21</sup>

The dealers secured more significant victories in state legislatures. During the same time period, states began to pass statutes governing automotive franchise relations.<sup>22</sup> Today, such laws are on the books in all 50 states.<sup>23</sup> Their terms vary, but they commonly include prohibitions on forcing dealers to accept unwanted cars, protections against termination of franchise

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15. James Surowiecki, *Dealer’s Choice*, NEW YORKER (Sept. 4, 2006), <http://www.newyorker.com/magazine/2006/09/04/dealers-choice-2>.

16. See S. REP. NO. 2073, at 3 (1956).

17. *Id.* at 2.

18. Higashiyama, *supra* note 3, at 4–5.

19. FED. TRADE COMM’N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30 1939, at 24–25 (1939), [https://www.ftc.gov/sites/default/files/documents/reports\\_annual/annual-report-1939/ar1939\\_o.pdf](https://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1939/ar1939_o.pdf).

20. *Id.*

21. 15 U.S.C. § 1222 (2012). See generally *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); Automobile Dealers’ Day in Court Act of 1956, Pub. L. No. 84–1026, 70 Stat. 1125.

22. Higashiyama, *supra* note 3, at 13.

23. *Id.* at 11.

agreements, and restrictions on granting additional franchises in a franchised dealer's geographic market area.<sup>24</sup>

The statutory provisions of difficulty to Tesla prohibit a manufacturer from distributing its cars directly to consumers, effectively requiring the manufacturer to deal exclusively through dealers.<sup>25</sup> The legislative concern reflected in these statutes is that if a manufacturer integrated forward into distribution, it might compete unfairly with its own franchised dealers by undercutting them on price.<sup>26</sup> For example, the legislative history of the Michigan statute reveals that the statute was designed to address “the unequal power balance between dealers and manufacturers [that] leaves a great potential for arbitrary and unilateral decisions by manufacturers about contract arrangements”<sup>27</sup> in part by forbidding manufacturers “to compete with franchised dealers by offering the same services.”<sup>28</sup>

What is important to note for present purposes is that the direct distribution prohibitions were expressly justified as part of a package of protections for dealers against the exercise of superior manufacturer bargaining power. Manufacturers were assumed to pursue franchisee relationships—since the Big Three all did—and pure direct distribution was not considered or discussed. Further, contrary to current efforts by the dealers to frame these direct distribution prohibitions as consumer protection measures (discussed in Part III *infra*), there is not a whiff of consumer protection sentiment in these statutes. They were all about protecting *dealers* in franchise relationships from the exigencies of superior manufacturer bargaining power.

#### B. TESLA'S DIRECT DISTRIBUTION STRATEGY

The introduction of new products or technologies that compete against incumbent technologies often requires new methods of distribution. Examples include “new world” wine companies that bypassed the long, multilevel value chains used by the old world companies and distributed their products through tightly controlled full-value distribution chains,<sup>29</sup> and early decisions by Dell and Gateway computers to compete against established personal computer manufacturers by pursuing exclusive built-to-order, direct-

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24. *Id.* at 12.

25. Cynthia Barmore, *Tesla Unplugged: Automobile Franchise Laws and the Threat to the Electric Vehicle Market*, 18 VA. J.L. & TECH. 185, 189 (2014).

26. *Id.* at 202.

27. MICH. H. LEGIS. ANALYSIS SECTION, SECOND ANALYSIS, H.B. 4738, 4740, at 1 (1-26-99), <http://www.legislature.mi.gov/documents/1997-1998/billanalysis/House/pdf/1997-HLA-4738-B.pdf>.

28. MICH. H. LEGIS. ANALYSIS SECTION, H.B. 5072 SYNOPSIS (7-25-77).

29. Christopher A. Bartlett, *Global Wine War 2009: New World Versus Old* 5 (Harvard Bus. Sch., Working Paper No. 9-910-405, 2009).

to-consumer models.<sup>30</sup> There is often an important relationship between product innovation and innovation in distribution. Incumbent technologies often have a grip on established distribution channels through embedded relationships, quasi-exclusive dealing arrangements, and settled customer expectations, which requires proponents of new technologies to locate or create new channels of market access.

When Tesla entered the market, it announced that it would not employ traditional dealer networks but rather open its own showrooms and sell directly to consumers and service their cars in aftermarkets. It explained its decision as necessary to ensuring the acceptance of electric vehicle (“EV”) technology. In a blog post, Elon Musk explained that “[e]xisting franchise dealers have a fundamental conflict of interest between selling gasoline cars, which constitute the vast majority of their business, and selling the new technology of electric cars.”<sup>31</sup> He argued that “[i]t is impossible for [traditional dealers] to explain the advantages of going electric without simultaneously undermining their traditional business. This would leave the electric car without a fair opportunity to make its case to an unfamiliar public.”<sup>32</sup>

A 2014 study conducted by *Consumer Reports* bolsters Musk’s claims.<sup>33</sup> *Consumer Reports* sent 19 secret shoppers to 85 dealerships in 4 states, making anonymous visits to showrooms that stocked at least some electric cars between December 2013 and March 2014.<sup>34</sup> The shoppers asked salespeople a variety of questions concerning electric cars, such as about the availability of “tax breaks and other incentives, vehicle charge time, cost, and options, vehicle range, and battery life and warranty.”<sup>35</sup> While *Consumer Reports* encountered “several” well-informed sales people, most were dismally ignorant about electrical vehicles: “few provided accurate and specific answers about battery life and battery warranties. And many seemed not to have a good understanding of electric-car tax breaks and other incentives or of charging needs and costs.”<sup>36</sup> Thirteen out of the 85 dealers actively discouraged the purchase of an electrical vehicle, and 35 out of the 85 recommended buying

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30. *Case Study: Dell—Distribution and Supply Chain Innovation*, MARS DISCOVERY DISTRICT (Feb. 8, 2011), <http://www.marsdd.com/mars-library/case-study-dell-distribution-and-supply-chain-innovation>; Brian Osborne, *Gateway Moves to 100% Indirect Distribution*, GEEK (July 28, 2008, 2:01 PM), <http://www.geek.com/chips/gateway-moves-to-100-indirect-distribution-576848>.

31. Elon Musk, *The Tesla Approach to Distributing and Servicing Cars*, TESLA: BLOG (Oct. 22, 2012), <http://www.teslamotors.com/blog/tesla-approach-distributing-and-servicing-cars>.

32. *Id.*

33. Eric Evarts, *Dealers Not Always Plugged in About Electric Cars, Consumer Reports’ Study Reveals*, CONSUMER REPORTS (Apr. 22, 2014, 8:00 AM), <http://www.consumerreports.org/cro/news/2014/04/dealers-not-always-plugged-in-about-electric-cars-secret-shopper-study-reveals/index.htm>.

34. *Id.*

35. *Id.*

36. *Id.*



a conventional internal combustion vehicle instead.<sup>37</sup> *Consumer Reports* concluded with some advice for customers interested in EVs: “[D]o your homework and don’t rely on the dealership for education about this intriguing technology.”<sup>38</sup>

It is not hard to understand why established dealers prefer to steer buyers toward internal combustion vehicles even if they carry some electric vehicles in stock. Electric vehicles require considerably less service than do internal combustion vehicles. There are no spark plugs, oil, or filters to change, many software updates are downloaded automatically from the manufacturer, and self-reported diagnostic tools allow for less prophylactic service.<sup>39</sup> Dealers earn considerably higher margins on service than they do on new vehicle sales,<sup>40</sup> so the sale of an EV entails foregoing a lucrative future income stream.

Although most of the recent media coverage has concerned Tesla, other recent new entrants into automotive production have also been impacted by the American distribution system. In 2011, Fisker Automotive, a company based in Finland, introduced a much-hyped electric car that quickly had orders from prominent names in Hollywood and Silicon Valley.<sup>41</sup> The company failed and went into bankruptcy in 2012 after being plagued by production and financing problems.<sup>42</sup> Unlike Tesla, Fisker announced that it would distribute its vehicles conventionally—through independent dealers.<sup>43</sup> But, though independent, the dealers Fisker secured were mostly established dealership networks.<sup>44</sup> Since Fisker sold so few cars before going out of business, there are insufficient data to test whether its dealer distribution

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37. *Id.*

38. *Id.*

39. Mike Buchanan, *Tesla to Continue Transforming the Automotive Industry, This Time with Service*, INSIDE EVS, <http://www.insideevs.com/tesla-to-continue-transforming-the-automotive-industry-this-time-with-service> (last visited Nov. 14, 2015); Nikki Gordon-Bloomfield, *2012 Tesla Model S Servicing: When, Where, How Much*, GREEN CAR REP. (Sept. 11, 2012), [http://www.greencarreports.com/news/1079070\\_2012-tesla-model-s-servicing-when-where-how-much](http://www.greencarreports.com/news/1079070_2012-tesla-model-s-servicing-when-where-how-much).

40. Jim Henry, *The Surprising Ways Car Dealers Make the Most Money off You*, FORBES: AUTOS (Feb. 29, 2012, 3:19 PM), <http://www.forbes.com/sites/jimhenry/2012/02/29/the-surprising-ways-car-dealers-make-the-most-money-off-of-you>.

41. Katie Fehrenbacher, *A Look Under the Hood: Why Electric Car Startup Fisker Crashed and Burned*, GIGAOM (Apr. 17, 2013, 5:29 PM), <https://gigaom.com/2013/04/17/a-look-under-the-hood-why-electric-car-startup-fisker-crashed-and-burned/>; Deepa Seetharaman & Paul Lienert, *Special Report: Bad Karma: How Fisker Burned Through \$1.4 Billion on a ‘Green’ Car*, REUTERS (June 17, 2013, 1:58 AM), <http://www.reuters.com/article/2013/06/17/us-autos-fisker-specialreport-idUSBRE95Go2L20130617>.

42. Seetharaman & Lienert, *supra* note 41.

43. Darryl Siry, *Fisker Makes a Safe Bet on Distribution*, WIRED: GEAR (Nov. 5, 2009, 8:30 AM), <http://www.wired.com/2009/11/fisker-makes-a-safe-bet-on-distribution>.

44. *Fisker Recruits First US Dealers for PHEVs; Appoints First Distributors for Europe*, GREEN CAR CONGRESS (Mar. 26, 2009), <http://www.greencarcongress.com/2009/03/fisker-recruits-first-us-dealers-for-phevs-appoints-first-distributors-for-europe.html>.

model could have been successful. Tesla, however, believes that Fisker failed in part due to its decision to distribute through traditional dealer networks.<sup>45</sup>

Another new entrant into automotive manufacturing offers additional color to the story. Elio, an American start-up company based in Phoenix, Arizona, is in the process of mass-producing a three-wheeled internal combustion vehicle that it says will sell for \$6800 and achieve 84 miles per gallon on the highway.<sup>46</sup> On its website, Elio proclaims that it plans to open its own showrooms and pursue a direct distribution model.<sup>47</sup> Unless Tesla clears the way, Elio will find itself unable to open its own showrooms as it plans in most states, and will have to scramble to find dealers willing to distribute its vehicles.

Even Tesla realizes that it may eventually need to pursue a dual distribution model, with some company-owned stores and some distribution through independent retailers—a strategy similar to that pursued by Apple. At upwards of \$70,000, the first-generation Tesla is an expensive vehicle produced and distributed on a small scale. However, after introducing a small-scale second-generation vehicle (an SUV), Tesla plans to bring out its third-generation vehicle on a much larger scale and at a much lower price with the contribution of a planned battery “gigafactory” being built near Reno, Nevada.<sup>48</sup> Once that happens, Tesla sales may reach a scale where exclusive distribution through company-owned stores may no longer be viable. Musk has hinted that it may need to add franchised dealers down the pike.<sup>49</sup>

### C. THE TESLA WARS

As of this writing, the Tesla Wars are in full motion, so this brief account will serve as a mid-stream introduction rather than a historical retrospective. Still, the two years of skirmishing to date provide an adequate basis to identify the emergence of themes illustrative of the familiar political capture story.

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45. Ben Popper, *Auto Dealers Fire Back at Tesla CEO: 'This Musk Guy, He Wants All the Profits for Himself,'* VERGE (Mar. 19, 2014, 11:13 AM), <http://www.theverge.com/2014/3/19/5525544/new-jersey-auto-dealers-respond-to-teslas-elon-musk> (reporting that Tesla CEO Elon Musk attributed Fisker's failure to its decision to use established dealers).

46. *Say Hello to Elio. The Ultra-High-Mileage, Sleek Two-Seater for an Incredibly Affordable Base Price. Coming Fourth Quarter 2016!*, ELIO MOTORS, <http://www.eliomotors.com> (last visited Nov. 14, 2015).

47. *Are Dealerships Available to Purchase?*, ELIO MOTORS, <https://eliomotors.zendesk.com/hc/en-us/articles/203014734-Are-dealerships-available-to-purchase-> (last visited Nov. 14, 2015) (“Elio Motors will not be selling franchises or dealerships. Our plan is to open 120 company owned retail centers in the top sixty markets in the US.”).

48. Sharon Bernstein, *Tesla's Massive Battery Factory Could Make Nevada the 'Richest Place on Earth Again,'* BUS. INSIDER (Oct. 2, 2014, 3:01 AM), <http://www.businessinsider.com/r-tesla-factory-near-reno-is-bet-old-nevada-will-meet-the-new-2014-10>.

49. Sebastian Blanco, *Elon Musk Hints at Need for Franchised Tesla Dealerships*, AUTOBLOG (Oct. 15, 2014, 5:00 PM), <http://www.autoblog.com/2014/10/15/elon-musk-hints-at-need-for-franchised-tesla-dealerships>.

### 1. A Potpourri of Laws, Compromises, and Gamesmanship

When Tesla hit the market in 2012 and began preparations to open company-owned showrooms and service centers in various states, the car dealers' lobby reacted with alarm and sprang into action.<sup>50</sup> The dealers argued that direct distribution was prohibited under the existing laws and that there should be one set of rules for all car manufacturers. As noted earlier, however, the 50s-era prohibitions on direct distribution by manufacturers were justified on the assertion that manufacturers might unfairly undercut their own franchisees if allowed to open company-owned stores, and the relevant statutes were written with that concern in mind.<sup>51</sup> Tesla and the dealers quickly converged on the defining issue regarding the incumbent statutes—are statutes written to protect dealers against overweening manufacturer power applicable to companies that employ pure direct distribution (i.e., do not use dealers at all)? The results thus far have been a potpourri of inertia-driven stalemates, compromises, and shady gamesmanship by the car dealers.

As with much of the law, inertia is proving to be a powerful force on direct distribution. In some states, Tesla has found sufficient wiggle room in the existing law to open company stores, largely on the argument that the law is inapplicable to pure direct distribution. In such states, for example Missouri and Minnesota, the car dealers have agitated for new legislation that would make the direct distribution ban applicable to pure direct distribution as well, thus far without success.<sup>52</sup> In North Carolina, the car dealers proposed legislation strengthening the existing North Carolina statute to prohibit pure direct distribution, but lost after Tesla took the governor and Speaker of the House for test drives in a Tesla.<sup>53</sup> In Georgia, the car dealers have filed a petition with the Georgia Department of Revenue, arguing Tesla's direct sales model violates Georgia law.<sup>54</sup> As of this writing, Tesla has moved to dismiss the

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50. Throughout this Article, I will refer generally to the "dealers" as a unified and homogenous group. This is not entirely fair, since some dealers have supported Tesla's fight for direct distribution. See Jerry Hirsch, *Why AutoNation CEO Jackson Calls Dealer Fight with Tesla Hypocritical*, L.A. TIMES (Nov. 20, 2014, 1:18 PM), <http://www.latimes.com/business/autos/la-fi-hy-why-autonation-calls-tesla-fight-hypocritical-20141120-story.html>.

51. See *supra* text accompanying notes 3–5.

52. Steve Alexander, *Minnesota Sales of Electric, Gas Cars Collide*, STAR TRIB. (Mar. 13, 2013, 7:13 AM), <http://www.startribune.com/minnesota-sales-of-electric-gas-cars-collide/197706621>; Lindsay Toler, *Tesla Remains Legal in Missouri, Legislature to Reconsider Ban Next Year*, RIVERFRONT TIMES (May 19, 2014, 8:00 AM), <http://www.riverfronttimes.com/newsblog/2014/05/19/tesla-remains-legal-in-missouri-legislature-to-reconsider-ban-next-year>.

53. James Ayre, *Tesla Motors Conquers North Carolina*, CLEANTECHNICA (June 30, 2013), <http://cleantechnica.com/2013/06/30/tesla-motors-conquers-north-carolina>.

54. Urvaksh Karkaria, *Tesla Motors Seeks to Dismiss Georgia Dealers' Petition to Ban Tesla Sales*, ATLANTA BUS. CHRON. (Nov. 11, 2014, 5:04 PM), <http://www.bizjournals.com/atlanta/blog/atlantech/2014/11/tesla-motors-seeks-to-dismiss-georgia-dealers.html>.

petition, arguing that the Georgia law does not apply to pure direct distribution.<sup>55</sup>

In other states, inertia has favored the dealers. In West Virginia<sup>56</sup> and Arizona,<sup>57</sup> for example, Tesla has sought legislation that would permit some direct distribution, but has thus far come up short. In some cases, the existing laws have been interpreted to prohibit almost any marketing activity by Tesla. Under the prevailing interpretation of Texas law, Tesla cannot open dealerships or service centers in the state, but may showcase its cars at galleries in malls.<sup>58</sup> Tesla employees in the galleries—we dare not call them salespeople—can show the cars and discuss their technology, but may not even quote a price.<sup>59</sup> In September of 2014, the Iowa Department of Transportation ordered Tesla to halt its plans for three days of test drives in the state, stating that Tesla could not operate in the state except through franchised dealers.<sup>60</sup> Tesla owners in Minnesota reacted by driving into Iowa to showcase their cars to prospective buyers.<sup>61</sup>

In a number of states, Tesla and the car dealers have reached agreements on compromise legislation allowing Tesla a fixed number of stores in the state: New Jersey (four dealerships),<sup>62</sup> Ohio (three dealerships),<sup>63</sup> and Pennsylvania (five dealerships).<sup>64</sup> The exemption statutes are typically limited to electric vehicle companies or companies that use pure direct distribution in order to prevent traditional car companies from taking advantage and opening

55. *Id.*

56. Laura Reston, *Tesla Not Gaining Much Traction in W.Va.*, CHARLESTON GAZETTE-MAIL (Aug. 10, 2013), <http://www.wvgazette.com/News/201308090064> (reporting that Tesla faces substantial obstacles to legislation allowing it to sell direct to consumers in West Virginia).

57. Mike Sunnucks, *Tesla Bill on Auto Sales Dead at Arizona Legislature*, PHX. BUS. J. (Apr. 11, 2014, 1:33 PM), <http://www.bizjournals.com/phoenix/news/2014/04/11/tesla-bill-on-auto-sales-dead-at-arizona.html>.

58. Kathleen Burke, *Tesla Sets Up Shop in Dallas—Minus Test-Drives and Sales*, AUTOMOTIVE NEWS (June 19, 2014, 4:12 PM), <http://www.autonews.com/article/20140619/RETAIL07/140619836/tesla-sets-up-shop-in-dallas—minus-test-drives-and-sales>.

59. *Id.*

60. Joel Aschbrenner, *Tesla Test Drives Hit Roadblock in Iowa*, USA TODAY (Sept. 25, 2014, 4:44 PM), <http://www.usatoday.com/story/money/cars/2014/09/24/tesla-test-drives-cut-short-in-iowa/16183133>.

61. John Voelcker, *Minnesota Tesla Owners Show Banned Model S to Iowa Electric-Car Shoppers*, GREEN CAR REP. (Oct. 27, 2014), [http://www.greencarreports.com/news/1095124\\_minnesota-tesla-owners-show-banned-model-s-to-iowa-electric-car-shoppers](http://www.greencarreports.com/news/1095124_minnesota-tesla-owners-show-banned-model-s-to-iowa-electric-car-shoppers).

62. Mike Ramsey, *New Jersey Assembly Passes Bill Allowing Tesla Sales: Legislation Still Needs Approval by Senate and Governor*, WALL STREET J. (June 17, 2014, 12:16 PM), <http://www.wsj.com/articles/new-jersey-assembly-passes-bill-allowing-tesla-sales-1403021781>.

63. Jackie Borchardt, *Ohio Senate OKs Compromise to Allow 3 Tesla Motors Stores in Ohio*, CLEVELAND.COM (Apr. 1, 2014, 4:11 PM), [http://www.cleveland.com/open/index.ssf/2014/04/ohio\\_senate\\_oks\\_compromise\\_to.html](http://www.cleveland.com/open/index.ssf/2014/04/ohio_senate_oks_compromise_to.html).

64. John Beltz Snyder, *Tesla Gets Legal Go-Ahead to Sell EVs in Pennsylvania*, AUTOBLOG (Aug. 11, 2014, 6:29 PM), <http://www.autoblog.com/2014/08/11/tesla-gets-legal-go-ahead-to-sell-evs-in-pennsylvania>.

company-owned stores. The Washington compromise legislation goes further and makes a one-time Tesla exception.<sup>65</sup> It provides that a manufacturer that had an existing dealer license as of January 1, 2014 and distributed only vehicles of its own brand and did not distribute at all through franchised dealers may distribute directly in Washington.<sup>66</sup> This effectively means that other future new market entrants will be prohibited from pursuing direct distribution unless they can cut their own legislative deals.<sup>67</sup>

With some exceptions, both Tesla and the car dealers seem reluctant to take their battles to court, preferring to play smaller stakes games before legislatures and regulatory commissions. Both sides appear to be concerned about the widespread precedential and “winner takes all” effects that judicial decisions might have. Although Tesla has publicly argued that direct distribution bans are unconstitutional,<sup>68</sup> it has not filed a lawsuit challenging their constitutionality. The dealers have brought some legal challenges, but have thus far lost in court on judicial interpretations of the relevant statutes, favoring Tesla’s arguments that the statutes should not be read to apply to pure direct distribution.

The dealers’ weaknesses in court seem to have motivated them to pursue legislative protection even more vigorously and, in some cases, nefariously. Judicial outcomes in New York and Massachusetts, as well as legislative action in Michigan in 2014, showcase these strategic interactions. The principal legal thorn in the dealers’ side has been standing to sue, which often entails a shallow analysis of the underlying substantive issue.<sup>69</sup> In New York and Massachusetts, the courts dismissed the dealers’ challenges to Tesla’s opening of showrooms in those states, finding that the laws intended to protect dealers in franchise relationships did not entitle the dealers to bring lawsuits against

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65. Andrew Thurlow, *Washington Governor Signs Tesla Compromise Bill*, AUTOMOTIVE NEWS (Apr. 8, 2014, 6:09 PM), <http://www.autonews.com/article/20140408/RETAIL07/140409837/washington-governor-signs-tesla-compromise-bill>.

66. WASH. REV. CODE § 46.96.185(1)(g)(vii) (2014) (exempting “[a] manufacturer that held a vehicle dealer license in this state on January 1, 2014, to own, operate, or control a new motor vehicle dealership that sells new vehicles that are only of that manufacturer’s makes or lines and that are not sold new by a licensed independent franchise dealer, or to own, operate, or control or contract with companies that provide finance, leasing, or service for vehicles that are of that manufacturer’s makes or lines”).

67. In another compromise, the Virginia Department of Motor Vehicles allowed Tesla to apply for a single dealership license. Jonathan O’Connell, *Tesla Eyes First Va. Dealership on Tyco Road in Tysons*, WASH. POST (May 30, 2014), <http://www.washingtonpost.com/news/digger/wp/2014/05/30/tesla-eyes-first-va-dealership-on-tyco-road-in-tysons>.

68. Tiffany Kaiser, *Tesla CEO Elon Musk Willing to Take Auto Dealer Fight to Federal Level*, DAILYTECH (Apr. 16, 2013, 12:13 PM), <http://www.dailytech.com/Tesla+CEO+Elon+Musk+Willing+to+Take+Auto+Dealer+Fight+to+Federal+Level/article30353.htm>.

69. See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 228–29 (1988).

a company that was not using dealers at all.<sup>70</sup> In New York, the dealers—wisely, in hindsight—decided not to appeal the trial court’s decision. In Massachusetts, the dealers appealed to the Massachusetts Supreme Court, and soon regretted it.

On September 15, 2014, the Massachusetts Supreme Court affirmed the dismissal of the dealers’ complaint on standing grounds. But although technically only decided on standing, the court’s opinion made clear that it doubted whether the direct distribution petition in the 1970 Massachusetts statute applied to pure direct distribution at all. It noted that the direct distribution prohibition had been included in what was described at the time as a “Dealers’ Bill of Rights” that was meant only to protect dealers in franchise relationships.<sup>71</sup> The court cast doubt on whether a manufacturer that owned its own stores was even operating a “dealership” within the meaning of the law.<sup>72</sup> It took from the legislative history of the most recent amendments to the Massachusetts statute an understanding that the dealer franchise statutes were “intended and understood only to prohibit manufacturer-owned dealerships when, unlike Tesla, the manufacturer already had an affiliated dealer or dealers in Massachusetts.”<sup>73</sup>

A wave of panic spread across the dealers’ lobby around the country. One of the most prestigious state supreme courts had ruled that their strongest bulwark against Tesla—the existing dealer protection laws—did not apply to pure direct distribution. If other states followed suit, that would put legislative inertia squarely on Tesla’s side. The burden would be on the dealers to pass new statutes prohibiting pure direct distribution, which they had already failed to achieve in states like Missouri, Minnesota, and North Carolina.<sup>74</sup> What they had been unable to achieve openly, they would have to achieve through stealth.

The dealers’ opportunity arrived soon. In Michigan—home of the Big Three and hence naturally precarious territory for Tesla—Tesla had been cautiously planning to enter the market. The existing statute was ambiguous as to pure direct distribution. It provided that a car manufacturer could not “[s]ell any new motor vehicle directly to a retail customer other than through its franchised dealers.”<sup>75</sup> That little possessive “its” was potentially critical to the meaning of the statute. The statute assumed that a manufacturer had franchised dealers. Under a plausible reading, a manufacturer like Tesla that did not have franchised dealers at all would not be covered and therefore

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70. See *Mass. State Auto. Dealers Ass’n, Inc. v. Tesla Motors MA, Inc.*, 15 N.E.3d 1152, 1157 (Mass. 2014); *Greater N.Y. Auto. Dealers Ass’n v. Dept. of Motor Vehicles*, 969 N.Y.S.2d 721, 882 (N.Y. Sup. Ct. 2013).

71. *Mass. State Auto. Dealers Ass’n*, 15 N.E.3d at 1155–56.

72. *Id.* at 1157.

73. *Id.* at 1162.

74. See *supra* notes 52–61 and accompanying text.

75. MICH. COMP. LAWS § 445.1574(1)(i) (2013).

could open its own showrooms and service centers. Although the Michigan statute was differently worded than Massachusetts' statute, the Michigan provision was also in a dealer's bill of rights provision. The Michigan dealers fretted that, though differently worded, the Michigan statute might receive a similar interpretation to the Massachusetts statute.

On October 1, 2014, an automotive dealer franchise bill that had been pending since May of 2014 came to the floor of the Michigan senate.<sup>76</sup> The bill provided for an amendment to the auto franchise statute, but it only addressed titling fees and had nothing to do with direct distribution. When the bill came to the floor, a senator who reportedly received campaign contributions from the auto dealers and whose wife worked for a lobbying group that represented the auto dealers introduced a floor amendment making a few seemingly modest changes to the bill.<sup>77</sup> One was to strike the word "its" from the statute. Suddenly, instead of saying that a manufacturer had to distribute only through "its" franchised dealers, the statute said that a manufacturer had to distribute through franchised dealers. No longer could Tesla argue that the current law applied only to manufacturers with franchise relationships.

The amended bill passed both houses of the Legislature with a single dissenting vote.<sup>78</sup> As the bill went to the Governor's desk, Tesla found out about it and began to lobby for a veto; it became apparent that few of the legislators who had voted nearly unanimously for the bill understood that it was aimed at Tesla. There was some other linguistic clean-up language in other parts of the bill, so most legislators apparently assumed striking the "its" was an insignificant technical change. The chair of the Democratic caucus later was quoted as saying that the Democratic members of the Legislature had no idea the floor amendment was aimed at Tesla.<sup>79</sup> Meanwhile, the bill's sponsors engaged in some amazing logical jujitsu, simultaneously arguing that the bill was not actually anti-Tesla since the existing statute already applied to

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76. H.B. 5606, 2014 Leg., Reg. Sess. (Mich. 2014), <http://www.legislature.mi.gov/documents/2013-2014/billengrossed/House/pdf/2014-HEBS-5606.pdf>.

77. Stephen Edelstein, *Michigan Car Dealers Slip One over on Tesla, Ban Direct Sales: Updated*, GREEN CAR REP. (Oct. 16, 2014), [http://www.greencarreports.com/news/1094966\\_michigan-car-dealers-slip-one-over-on-tesla-ban-direct-sales](http://www.greencarreports.com/news/1094966_michigan-car-dealers-slip-one-over-on-tesla-ban-direct-sales).

78. See S. 97-70, Reg. Sess., at 1781-82 (Mich. 2014), [http://www.legislature.mi.gov/\(S\(zlwptu3wqznkcqywkf2y5gv\)\)/documents/2013-2014/Journal/Senate/pdf/2014-SJ-10-02-070.pdf](http://www.legislature.mi.gov/(S(zlwptu3wqznkcqywkf2y5gv))/documents/2013-2014/Journal/Senate/pdf/2014-SJ-10-02-070.pdf); H.R. 97-73, Reg. Sess., at 1879-80 (Mich. 2014), [http://www.legislature.mi.gov/\(S\(zlwptu3wqznkcqywkf2y5gv\)\)/documents/2013-2014/Journal/House/pdf/2014-HJ-10-02-073.pdf](http://www.legislature.mi.gov/(S(zlwptu3wqznkcqywkf2y5gv))/documents/2013-2014/Journal/House/pdf/2014-HJ-10-02-073.pdf).

79. Vince Bond Jr., *Anti-Tesla Bill Reaches Michigan Governor's Desk*, AUTOMOTIVE NEWS (Oct. 15, 2014, 12:50 PM), <http://www.autonews.com/article/20141015/RETAIL07/141019925/anti-tesla-bill-reaches-michigan-governors-desk>.

direct distribution and urged the governor to sign the bill to ensure that the law “applies to all manufacturers.”<sup>80</sup>

Rick Snyder, the governor of Michigan, used to be the CEO of Gateway Computers, which distributed its products only directly to consumers,<sup>81</sup> so he certainly understood the issue. But, in the middle of a tight re-election campaign, he was in a difficult position. He did not want to veto unanimous bi-partisan legislation or upset the dealers and Big Three on the eve of the election. In order to obtain cover, Snyder asked the Michigan Attorney General for an opinion as to whether the existing law already prohibited pure direct distribution. Without citing any legal authority resolving the issue or acknowledging that it was at minimum contestable, the Attorney General’s chief legal counsel replied that it did.<sup>82</sup> Snyder then signed the bill, explaining that it was not anti-Tesla after all since Tesla was already prohibited from direct distribution.<sup>83</sup> It was as if a runner kneecapped a competitor, won the race, and then claimed that he would have won anyway since he was faster.

No one was fooled by Snyder’s explanation that the bill was not anti-Tesla. Scores of news media headlines across the country riffed on some variation of “Michigan bans Tesla.”<sup>84</sup> The Information Technology & Innovation Foundation named Michigan one of four winners of its annual

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80. Greg Gardner, *Michigan Weighs Whether to Bar Tesla*, USA TODAY (Oct. 19, 2014, 5:00 AM), <http://www.usatoday.com/story/money/cars/2014/10/19/michigan-tesla/17544663>.

81. See *supra* note 30 and accompanying text.

82. Letter from Rick Snyder, Governor, State of Mich., to Mich. House of Representatives & Mich. Senate (Oct. 21, 2014), [http://www.michigan.gov/documents/snyder/HB\\_5606\\_Signing\\_Letter\\_472039\\_7.pdf](http://www.michigan.gov/documents/snyder/HB_5606_Signing_Letter_472039_7.pdf).

83. In his signing statement, Snyder offered an explanation for the deletion of the word “its” that can only be fairly characterized as ludicrous: “This change would appear merely to allow manufacturers who do not have their own franchised dealers to sell through another manufacturer’s [sic] network of franchised dealers.” *Id.* The suggestion that the problem being solved was that, say, Chevrolet would want to sell Corvettes through Ford dealers, is too preposterous to take seriously.

84. See, e.g., Greg Gardner, *Gov. Snyder Signs Bill Banning Direct Tesla Sales*, DETROIT FREE PRESS (Oct. 22, 2014, 11:22 AM), <http://www.freep.com/story/money/cars/general-motors/2014/10/17/michigan-verge-banning-tesla-stores/17386251>; Jeff Gilbert, *Governor Snyder Signs Michigan Tesla Ban*, CBS DETROIT (Oct. 21, 2014, 3:29 PM), <http://detroit.cbslocal.com/2014/10/21/governor-signs-michigan-tesla-ban>; Chris Isidore, *Tesla Blocked from Selling in Michigan*, CNN MONEY (Oct. 21, 2014, 3:42 PM), <http://money.cnn.com/2014/10/21/news/companies/tesla-michigan>; Micheline Maynard, *Michigan to Tesla Motors: You’re Not Welcome*, FORBES (Oct. 21, 2014, 1:33 PM), <http://www.forbes.com/sites/michelinemaynard/2014/10/21/michigan-to-tesla-motors-youre-not-welcome>; Lucy Nicholson, *Michigan Becomes Fifth U.S. State to Thwart Direct Tesla Car Sales*, REUTERS (Oct. 21, 2014, 5:40 PM), <http://www.reuters.com/article/2014/10/21/us-tesla-motors-michigan-idUSKCN0IA2MR20141021>; Robert Sorokanich, *GM Supports Anti-Tesla Bill in MI, Snyder Signs into Law*, ROAD & TRACK (Oct. 21, 2014, 10:45 AM), <http://www.roadandtrack.com/car-culture/videos/a6309/michigan-governor-snyder-signs-gm-backed-anti-tesla-bill-into-law>.



“Luddite Award” based on the new legislation.<sup>85</sup> Even the *Wall Street Journal*, Snyder’s usual bosom buddy, issued an editorial chastising the Governor for signing protectionist anti-Tesla legislation.<sup>86</sup>

The Tesla wars continue. As of this writing, pro-Tesla bills are under consideration in Michigan and Texas, and more will be on the table in 2015. Thus far, neither side has been able to move the needle in state legislatures except through compromise or (as in Michigan) stealth. The state regulatory commissions have tended to favor the dealers and the courts Tesla.

## 2. The Big Three’s Cautious Waiting Game

With the National Automobile Dealers Association and state dealer associations doing the heavy lifting, the Big Three domestic automobile companies have not had to take the lead in opposing Tesla’s innovative distribution model. Nonetheless, two out of the three—General Motors and Ford—have supported the dealers in blocking direct distribution, with GM taking the more aggressive position.<sup>87</sup> (To my knowledge, Chrysler has stayed silent.) GM and Ford have explained their position as simply seeking equal treatment for all car manufacturers.<sup>88</sup> While that argument is plausible, the story is somewhat more complex.

The legacy car companies’ incentives with respect to direct distribution are mixed. On the one hand, especially with Internet-enabled marketing reducing some of the transactions costs of distribution, the legacy companies would probably benefit from doing some direct distribution of their own. In 1999, Ford dipped its toes into the water. It set up a website to re-sell used Fords that had been previously leased, used as service vehicles, or rented out by national car rental companies.<sup>89</sup> Interested customers could place a \$300

85. Robert Sorokanich, *Gov. Snyder’s Anti-Tesla Law Wins Michigan the “Luddite Award”*, CAR & DRIVER (Jan. 8, 2015, 10:23 AM), <http://blog.caranddriver.com/gov-snyders-anti-tesla-laws-wins-michigan-the-luddite-award>.

86. *Rick Snyder Drives off the Road: Michigan’s Pro-Market Governor Embraces the Car Dealer Cartel*, WALL STREET J. (Oct. 24, 2014, 7:18 PM), [www.wsj.com/articles/rick-snyder-drives-off-the-road-1414192688](http://www.wsj.com/articles/rick-snyder-drives-off-the-road-1414192688).

87. Justin Lloyd-Miller, *Tesla’s Public Appeal Falls Short as Michigan Bans Direct Sales*, CHEAT SHEET: AUTOS (Oct. 22, 2014), <http://www.cheatsheet.com/automobiles/teslas-public-appeal-falls-short-as-michigan-bans-direct-sales.html/?a=viewall> (“We applaud Gov. Snyder’s action of signing HB 5606. The bill will provide a level playing field for all automobile manufacturers selling vehicles in Michigan . . .” (quoting Ford)); Jared Meyer, *‘Anti-Tesla Bill’ Means Economic Loss for Michigan*, TOWNHALL (Oct. 25, 2014), <http://townhall.com/columnists/jaredmeyer/2014/10/25/antitesla-bill-equals-an-economic-loss-for-michigan-n1909263/page/full> (reporting that both GM and Ford supported the Michigan bill); David Shepardson, *GM Backs Anti-Tesla Michigan Bill*, DETROIT NEWS (Oct. 21, 2014, 12:22 PM), <http://www.detroitnews.com/story/business/autos/general-motors/2014/10/21/tesla-bill-michigan/17662581> (“We believe that House Bill 5606 will help ensure that all automotive manufacturers follow the same rules to operate in the State of Michigan; therefore, we encourage Governor Snyder to sign it . . .” (quoting GM)).

88. See *supra* note 87.

89. *Ford Motor Co. v. Tex. Dep’t of Transp.*, 264 F.3d 493, 499 (5th Cir. 2001).

refundable deposit and then inspect the car after it was delivered to a participating dealer.<sup>90</sup> If the customer opted to purchase the vehicle at the Ford-determined “no-haggle price,” Ford would receive payment from the customer and then transfer the title through the dealer, which was paid a fee for its service.<sup>91</sup> This model did not cut out the dealers entirely, but provoked sufficient consternation among the dealers that the Texas Department of Transportation shut it down under the Texas dealer franchise law.<sup>92</sup> As will be discussed further in Part IV, Ford mounted and lost Equal Protection and Dormant Commerce Clause challenges. Its experiment with direct distribution ended.

But if the legacy car companies have some interest in direct distribution, they also can use legal barriers to direct distribution to slow the advent of rival technologies on the market. As discussed in the previous section, new technologies often require new distribution methods. It follows that incumbent technologies can slow the competitive onset of new technologies by securing the enactment of laws requiring distribution through conventional methods. Even though some of those distribution methods might be advantageous to the incumbents also, shutting off those distribution methods may provide a net gain to the incumbents if it disadvantages new entrants more than it disadvantages the incumbents.<sup>93</sup> To the extent that the legacy companies view Tesla and other EV entrants as dangerous, competitive threats, supporting bans on direct distribution may be an effective tactic to slow Tesla’s market penetration.

A letter from GM to Ohio Governor John Kasich exemplifies the tensions in the legacy companies’ position.<sup>94</sup> GM wrote Kasich to oppose the ultimately successful legislative bill that allowed Tesla to establish three dealerships in the state.<sup>95</sup> GM stressed its economic contributions to the state of Ohio and its opposition to “unique, favorable protection” for Tesla.<sup>96</sup> It pointed out the “highly competitive” nature of the car market and asserted that “Tesla would gain a distinct competitive advantage by avoiding restrictions that all other auto manufacturers face in Ohio.”<sup>97</sup>

Reading between the lines, GM effectively argued that direct distribution is more efficient than dealer distribution and, hence, that a company able to

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90. *Id.*

91. *Id.*

92. *Id.*

93. See Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 YALE L.J. 209, 275–76 (1986).

94. Letter from Selim Bingol, Senior Vice President, Glob. Commc’ns. & Pub. Policy, Gen. Motors, to John Kasich, Governor of Ohio (Mar. 5, 2014) [hereinafter *Kasich Letter*], <http://insideevs.com/general-motors-sends-anti-tesla-letter-ohio-governor>.

95. See *supra* note 63 and accompanying text.

96. *Kasich Letter*, *supra* note 94.

97. *Id.*

distribute directly obtains a competitive advantage over its rivals. But if that is so, it is hard to understand the conclusion that follows in GM's letter—that direct distribution should be *prohibited* for everyone. If direct distribution is a more efficient means of distribution, the logical implication is that it should be *allowed* for everyone.

For now, GM's political calculation seems to be a combination of a fear of being outflanked by Tesla and an unwillingness to anger its dealers by entering the fray on the side of direct distribution. Additionally, GM realizes that the amount of political capital necessary to reverse the decades-old direct distribution bans in their entirety is considerably greater than that necessary to achieve small-bore exemptions for a new entrant. But as Tesla or other EV makers gain traction in the longer run, there may reach a tipping point where some amount of direct distribution appears inevitable and the legacy companies begin to demand the same rights for themselves.

Another tipping point may occur as Tesla reaches a larger scale. As Tesla gains wider market acceptance, it will likely find that the small number of dealerships allotted to it in the compromise statutes do not suffice. Further, it may become economically prohibitive to run a full-scale distribution network on its own. As noted earlier, Elon Musk has publicly acknowledged that Tesla may eventually need to move to a dual distribution model, as Apple has now.<sup>98</sup> Expanding the number of dealerships and moving to dual distribution would require a new round of legislative action, since the existing compromise laws are generally written with caps and only apply to manufacturers pursuing pure direct distribution. If and when Tesla enters its second generation as a company and must fight its second round in state legislatures, it may find itself in the company of a wider coalition of manufacturers, including some of the legacy American companies and Asian or German companies.

The current set of legislative compromises, political alliances, and outcomes is inherently unstable. In the longer run, there will likely be an even more aggressive confrontation between the dealers and a wider coalition of automobile manufacturers.<sup>99</sup>

### III. POLICY ARGUMENTS

#### A. VERTICAL INTEGRATION: GENERAL CONSIDERATIONS

In the context of liberalizing antitrust rules concerning vertical restraints, the Supreme Court has remarked that restrictive antitrust rules have sometimes induced firms “to integrate forward into distribution,” cutting out franchisees or independent distributors altogether.<sup>100</sup> As Ronald Coase observed in *The Nature of the Firm: Influence*, whether a firm decides to perform

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98. See *supra* note 49 and accompanying text.

99. Preemptive federal legislation is another possibility, although the fact that there are many dealers in every Congressional district may make it difficult to pass significant reform legislation.

100. *State Oil Co. v. Khan*, 522 U.S. 3, 16–17 (1997).

any particular commercial function, such as distribution, in house or to buy that service on the market, is a function of the respective transactions costs of the two choices.<sup>101</sup> Firms have many reasons for preferring direct distribution. Vertical integration into distribution may minimize transactions costs<sup>102</sup> and protect against free-riding by rival manufacturers.<sup>103</sup> Some manufacturers that distribute primarily through independent retailers retain some factory-owned stores in order to set a benchmark for evaluating franchisees' performance and testing new products or distribution methods. Manufacturers may also be concerned about the exercise of market power by retailers, which could lead to double marginalization, in which each successive link in a vertical chain of firms with market power sets prices above marginal costs in a way that reduces the profits of the manufacturer and reduces consumer welfare.<sup>104</sup> As noted earlier with respect to Tesla specifically, a manufacturer may be concerned that the retailer will make insufficient investments in the promotion of the manufacturer's brand.<sup>105</sup>

There are also many reasons for a manufacturer to prefer franchised or independent distribution of its products under certain market circumstances. Distributing through dealers allows the manufacturer to lower its costs, by having other firms absorb the predominant share of the distribution costs, and focus on its core competencies in manufacturing.<sup>106</sup> Dealers may also have superior local market knowledge or expertise in distribution.<sup>107</sup> And to the extent that dealers are carrying multiple brands in a single store or distribution system, franchising (or dealer distribution) may allow the manufacturer to achieve economies of scale or scope.<sup>108</sup>

There is no a priori reason to expect that either integration forward into distribution or distribution through dealers will be a preferable strategy for a firm as a general matter. Nor is there any general reason for the law to favor one form or the other. Under most market circumstances, competition and the profit-maximization incentive will push manufacturers to choose the most efficient distribution method—whether pure direct distribution, pure dealer distribution, or some mixed model. The question is whether there is anything

101. R.H. Coase, *The Nature of the Firm: Influence*, 4 J.L. ECON. & ORG. 33, 39 (1988).

102. OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 84 (1975).

103. Henry N. Butler & Barry D. Baysinger, *Vertical Restraints of Trade as Contractual Integration: A Synthesis of Relational Contracting Theory, Transaction-Cost Economics, and Organization Theory*, 32 EMORY L.J. 1009, 1084 (1983).

104. JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* 169–203 (1988).

105. See *supra* text accompanying notes 33–37.

106. See generally ROGER D. BLAIR & FRANCINE LAFONTAINE, *THE ECONOMICS OF FRANCHISING* 1 (2005).

107. *Id.* at 1–2.

108. F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 541–42 (3d ed. 1990).

unique about car distribution that would justify mandating a particular form of distribution.

B. *THE DEALERS' FRAIL ARGUMENTS FOR PROHIBITING PURE DIRECT DISTRIBUTION*

The dealers have presented a variety of arguments in public debate for restrictions on direct distribution. Some of their arguments are simply paeans to the virtues of the dealer franchise system, reasons that manufacturers should embrace dealer distribution. I do not consider such arguments here since they are not responsive to the issue actually raised by *prohibitions* on direct distribution. Surely there are economic benefits to franchising or independent distribution, and one would expect to see some manufacturers continue to embrace franchising or dual distribution in an unregulated market. If the dealers are correct that franchised distribution is more efficient, any manufacturer foolishly choosing a different strategy will be punished in the market and soon repent. The only relevant question is whether manufacturers should be *prohibited* from opening their own showrooms and service centers.

As noted earlier, the dealer franchise statutes passed in the 1950s were explicitly styled as dealer protection laws and justified as protecting dealers from the superior bargaining power of manufacturers.<sup>109</sup> Since, as the Massachusetts Supreme Court held, pure direct distribution does not impact these concerns, the dealers have attempted to reframe these prohibitions as “consumer protection” measures.<sup>110</sup> The dealers’ efforts to transform these dealer protection statutes into consumer protection statutes are remarkably unpersuasive.

1. Breaking the Manufacturer’s “Retail Monopoly”

The dealers usually lead with, and lean most heavily on, the argument that distribution through dealers is necessary to reduce prices to consumers. A conventional form of this argument goes like this: Unless required to distribute through dealers, manufacturers enjoy a monopoly over the distribution of cars in their own brand. Manufacturers will exploit this market power to raise retail prices above competitive levels. With multiple dealers distributing the manufacturer’s product, consumers will obtain lower prices

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109. See *supra* Part II.A.

110. See Chris Kardish, *Automaker Tesla Takes Fight to North Carolina*, ASSOCIATED PRESS (May 25, 2013, 12:34 PM), [http://www.apnewsarchive.com/2013/Automaker\\_Tesla\\_takes\\_fight\\_to\\_North\\_Carolina/id-c2c186809b1c49e8bd01484f9a2257f9](http://www.apnewsarchive.com/2013/Automaker_Tesla_takes_fight_to_North_Carolina/id-c2c186809b1c49e8bd01484f9a2257f9) (“‘It’s a consumer protection,’ said Bob Glaser, president of the [North Carolina Automobile Dealers Association].”); see also Aschbrenner, *supra* note 59 (noting that Bruce Anderson, president of the Iowa Automobile Dealers Association, called licensing a “consumer protection” measure).

through intra-brand competition.<sup>111</sup> This argument is counter to economic theory, empirical evidence, and the dealers' own admissions.

First, the argument contravenes economic principles by assuming that a manufacturer will attempt to extract a retail monopoly mark-up over and above the profit-maximizing wholesale price. A manufacturer's price, whether at wholesale or retail, will reflect the full exercise of the manufacturer's market power, if any.<sup>112</sup> If the manufacturer embeds its market-power premium in its wholesale price, it cannot increase its profits by adding an additional retail mark-up.<sup>113</sup> Such a mark-up would decrease its profits because demand at retail would necessarily be elastic, hence the manufacturer would see a decline in demand for its product. As the Supreme Court recognized in the vertical restraints context, the interests of consumers and of manufacturers are aligned on the question of retailer market power—neither favor it.<sup>114</sup>

Indeed, if anything, vertical integration by manufacturers should result in a lowering of retail prices, even if there are no efficiencies or cost savings to vertical integration. If both the manufacturer and the retailers in its brand have some degree of market power, then distribution through dealers could

111. See, e.g., Jeff Cobb, *Why Auto Dealer Associations Oppose Tesla*, HYBRIDCARS (May 21, 2013), <http://www.hybridcars.com/why-auto-dealer-associations-oppose-tesla> (“Now to me fewer dealers drives the price up. . . . The price doesn’t go down when they have fewer outlets. And when they talk about the manufacturer being able to save more selling direct, there’s nothing that says they pass that along to the customer.” (quoting Bill Wolters, President, Texas Auto Dealers Association)); Jonathan Collegio, Reply to Dan Miller, *Should Tesla (and Other Auto Manufacturers) Be Able to Sell Cars Directly to Consumers?*, OUR ENERGY POLICY (Oct. 27, 2014, 9:09 PM), <http://www.ourenergypolicy.org/should-tesla-and-other-auto-manufacturers-be-able-to-sell-cars-directly-to-consumers/#comments> (noting that car companies “would not have the same set of incentives to keep costs down that dealers have, because they would not have competitors within the same brand. (E.g. two Chevy stores owned by GM can’t really compete with each other in the same way as two business owners with skin in the game)”); Michael Martinez & Michael Wayland, *Snyder Weighs Pulling Plug on Direct Tesla Sales*, DETROIT NEWS (Oct. 16, 2014, 1:16 PM), <http://www.detroitnews.com/story/business/autos/2014/10/16/tesla-faces-direct-sales-ban-michigan/17359253> (“For consumers buying a new car today, the fierce competition between local dealers in any given market drives down prices both in and across brands. . . . If a factory owned all of its stores, it could set prices and buyers would lose virtually all bargaining power.” (quoting Charles Cyrill, spokesman for the National Automobile Dealers Association)); *Tesla Business Model in N.J. ‘Unlawful’: Appleton*, BLOOMBERG BUS., <http://www.bloomberg.com/news/videos/b/53f689ff-ac01-4dff-b2c6-12c927679073> (last visited Nov. 14, 2015) [hereinafter *Market Makers*] (James Appleton, President, New Jersey Coalition of Automotive Retailers, appearing on Bloomberg Television “Market Makers” on March 12, 2014, and asserting that a manufacturer has a “monopoly” in retail distribution).

112. SCHERER & ROSS, *supra* note 108, at 541–42 (explaining that an upstream monopolist would prefer to sell to a downstream competitive firm); see also Michael L. Katz, *Vertical Contractual Relations*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 655, 665 (Richard Schmalensee & Robert D. Willig eds., 1989).

113. PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES* 489 (5th ed. 1997) (“The power already possessed by the . . . monopolist to control the price and output . . . effectively controls the price and output of independent [downstream firms].”).

114. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 896 (2007).

result in double marginalization, as discussed above.<sup>115</sup> Conversely, vertical integration by the manufacturer would create an incentive to lower retail prices.<sup>116</sup>

A second reason to doubt the dealers' argument is empirical. In 2009, the United States Justice Department published a competition advocacy paper by its Economic Analysis Group that analyzed the effects of state bans on direct distribution.<sup>117</sup> Relying on an earlier study by Goldman Sachs, the report found that direct distribution could save consumers on average \$2225 or about 8.6% per vehicle.<sup>118</sup> These savings arose from improvements in matching supply with customer demand, lower inventory, fewer dealerships, lower sales commissions, and lower shipping costs.<sup>119</sup> I am unaware of any empirical evidence suggesting that distribution through dealers lowers prices to consumers.

Finally, it is quite apparent that the dealers do not believe that mandatory distribution through franchisees results in higher prices. For one, it contravenes their longstanding assertion that manufacturers should not be allowed to compete against their own franchisees because they would undercut them on price. Moreover, the dealers' private legal strategies against Tesla depend on a showing that Tesla would undermine them on price. In Massachusetts, for example, the dealers found themselves in a battle over standing. They argued that they had suffered injury because direct distribution by Tesla would lead to "inequitable pricing," to their detriment.<sup>120</sup> Of course, "inequitable" has to mean "too low," otherwise the dealers would not have suffered cognizable injury.<sup>121</sup>

115. See *supra* notes 104–05, 110–13, and accompanying text.

116. A study of Spanish auto distribution market, where direct distribution is permitted, found that vertically integrated sales outlets have considerably lower profitability than franchised dealership. See Benito Arruñada et al., *Contractual Allocation of Decision Rights and Incentives: The Case of Automobile Distribution*, 17 J.L. ECON. & ORG. 257, 275 (2001).

117. GERALD R. BODISCH, ECON. ANALYSIS GRP., ECONOMIC EFFECTS OF STATE BANS ON DIRECT MANUFACTURER SALES TO CAR BUYERS (2009), <http://www.justice.gov/sites/default/files/atr/legacy/2009/05/28/246374.pdf>.

118. *Id.* at 4. There is a question as to how much of these marginal costs savings would be passed on to consumers. Under standard economic assumptions, consumers would receive at least half of the savings even if the manufacturer were a monopolist. See generally Jeremy I. Bulow & Paul Pfleiderer, Comment, *A Note on the Effect of Cost Changes on Prices*, 91 J. POL. ECON. 182 (1983). In a competitive market—which the automotive market is today—they would receive the substantial majority of the marginal cost savings.

119. BODISCH, *supra* note 117, at 4.

120. *Mass. State Auto. Dealers Ass'n, Inc. v. Tesla Motors MA, Inc.*, 15 N.E.3d 1152, 1159 (Mass. 2014); see also *Greater N.Y. Auto. Dealers Ass'n v. Dep't of Motor Vehicles*, 969 N.Y.S.2d 721, 878 (N.Y. Sup. Ct. 2013) (discussing dealers' claims that they will suffer "competitive economic injury" from direct distribution by Tesla).

121. *Matsushita Elec. Indus. Co., LTD v. Zenith Radio Corp.*, 475 U.S. 574, 582–83 (1986) (explaining that competitors lack standing to challenge prices that are allegedly too high, since any such prices help rather than hurt competitors).

In arguing that direct distribution increases consumer prices, the dealers have cited Tesla's one-price, no-haggle policies as harmful to consumers' interests.<sup>122</sup> Whether no-haggle policies are, as a general matter, good or bad for consumers is uncertain,<sup>123</sup> but that has little to do with whether permitting direct distribution is good for consumers. As noted, a manufacturer cannot increase its profits by marking up retail prices to reflect a retail market power premium and direct distribution can create process efficiencies, lower marginal costs of distribution, and eliminate double marginalization regardless of whether the manufacturer allows or prohibits retail haggling.

The consumer price reduction theory is farcical. It is possible that retail distribution through independent dealers could lower prices to consumers, but only if the dealers were more efficient at retail distribution than the manufacturer. But, in that case, the manufacturer would have every incentive to distribute through dealers, which would increase its wholesale sales (which would still embed the full market-power premium) and hence its profits. Regulation is not necessary to prevent the exploitation of market power in this context. To the contrary, it has the effect of denying manufacturers and consumers a more efficient means of distribution.

## 2. Assuring Adequate Levels of After-Market Service

A second "consumer welfare" argument offered by the dealers is that dealer distribution is necessary to ensure that customers receive adequate levels of service.<sup>124</sup> But there is no reason to think that manufacturers like Tesla have any incentive to offer subpar service through their company-owned stores. Car manufacturers make multi-billion-dollar investments to create new car technologies and brands, investments they cannot recoup without creating long-term customer loyalty. In the case of EV technology, these

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122. Peter Valdes-Dapena, *Tesla's Fight with America's Car Dealers*, CNN MONEY (May 20, 2013, 3:04 PM), <http://money.cnn.com/2013/05/20/autos/tesla-car-dealers>.

123. See Xiaohua Zeng et al., *The Competitive Implications of a "No-Haggle" Pricing Policy: The Access Toyota Case 23-24* (Sept. 9, 2008) (unpublished manuscript), <http://rady.ucsd.edu/faculty/seminars/2008/papers/weinburg.pdf> (finding in an empirical study of no-haggle policy by Toyota that the consumer welfare effects could not be conclusively determined); Preyas S. Desai & Devavrat Purohit, "Let Me Talk to My Manager": *Haggling in a Competitive Environment*, 23 *MARKETING SCI.* 219, 219-22 (2004).

124. Daniel O'Connor, *Tesla, the Auto Dealers and New Jersey: Playing the Consumer Protection Card*, DISCO (Mar. 11, 2014), <http://www.project-disco.org/competition/031114-tesla-the-auto-dealers-and-new-jersey-playing-the-consumer-protection-card> ("David Hyatt, VP of Public Affairs for the National Automobile Dealers Association, echoed a similar talking point when he said, 'the franchise dealer network promotes public safety and instills confidence in the consumer that there will be a place to go when help is needed.'"); *id.* ("Bob Glaser, head of the North Carolina Dealers Association, made a similar argument in discussing his association's push for even more restrictive legislation that would ban all Internet car sales from the manufacturer to North Carolina residents: 'It's a consumer protection [issue] . . . and why we say that a dealer who has invested a significant amount of capital in a community is more committed to taking care of that area's customers.'" (alteration in original)).



incentives are particularly acute, since Tesla not only has to create new EV technologies, but is investing heavily to develop supercharging and battery-swap infrastructures necessary for broad deployment of its cars.<sup>125</sup> Without creating brand loyalty, including through adequate levels of after-market service, it cannot hope to recoup these sunk investments.

Ironically, it is the direct distribution prohibitions themselves that are impairing Tesla's ability to provide after-market customer service. Since the statutory prohibitions typically apply not only to car sales but also to after-market service, Tesla is prohibited from opening service centers in many states. Customers in those states can still buy Tesla vehicles off a truck from Tesla or by traveling to other states, but they cannot access Tesla service in their home state.

The dealers have argued that dealer distribution ensures that there will be someone available to service the cars if a manufacturer goes bankrupt, as happened with Fisker.<sup>126</sup> This argument is also unfounded. For one, it assumes that the likely failure rate of car manufacturers is higher than that of car dealers, which seems counterintuitive. Second, it assumes that the availability of post-market service depends upon the presence of franchised dealers. A franchised dealer of a defunct manufacturer will only continue providing service in a particular brand if servicing that brand with customers paying out of pocket remains profitable. If it does, then there is no reason that only a franchised dealer would offer service. As noted earlier, Fisker announced a dealer distribution model.<sup>127</sup> After its bankruptcy, many owners were left orphaned without adequate service through dealers, at which point a company called Hybrid Support Solutions came along and began offering Fisker owners annual support packages for \$4000.<sup>128</sup> With respect to Fisker—a dealer franchise company—the companies rescuing orphaned buyers have reportedly not been dealers, but other third parties looking to make a profit.<sup>129</sup> There is no reason to think that mandating distribution through dealers will protect customers in after-markets.

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125. Don Sherman, *Tesla Across America: How Elon Musk Is Building an EV Infrastructure*, CAR & DRIVER (Oct. 2013), <http://www.caranddriver.com/features/how-tesla-and-elon-musk-are-building-an-ev-infrastructure-feature>.

126. See Valdes-Dapena, *supra* note 122.

127. See *supra* text accompanying notes 41–44.

128. Antony Ingram, *Orphaned Fisker Owners Offered \$4K/Year Service Contract by . . . Whom?*, GREEN CAR REP. (May 30, 2013), [http://www.greencarreports.com/news/1084484\\_orphaned-fisker-owners-offered-4k-year-service-contract-by-whom](http://www.greencarreports.com/news/1084484_orphaned-fisker-owners-offered-4k-year-service-contract-by-whom).

129. Patrick George, *Used Fisker Karmas Are Selling for 50 % off MSRP*, JALOPNIK (May 17, 2013, 10:02 AM), <http://jalopnik.com/used-fisker-karmas-are-selling-for-50-off-msrp-508187464> (reporting that many Fisker owners felt stranded by Fisker's bankruptcy, but that third parties might step up to provide service).

### 3. Complying with State Regulatory Requirements

The dealers have also argued, without much elaboration, that automobile distribution is pervasively regulated and that dealer distribution is necessary in order to ensure compliance with state regulatory requirements, such as titling, registration, lemon law protection, and the like.<sup>130</sup> To be sure, automobile distribution is pervasively regulated, but it hardly follows from that observation that distribution must be mandated to occur through dealers.

The implicit structure of the dealers' argument must be that dealers have a higher regulatory compliance rate than manufacturers. I am unaware of any support for that assumption. If anything, the average regulatory compliance rate might be higher with company-owned stores than with independent franchises. According to the Consumer Federation of America and Better Business Bureau, consumers complain about car dealerships more than any other business in the United States.<sup>131</sup> Empirical evidence shows that larger scale firms enjoy economies of scale in achieving regulatory compliance, which suggests that smaller scale firms, including smaller dealerships, might be more prone to regulatory non-compliance than large-scale manufacturers.<sup>132</sup>

There is no reason to believe that car manufacturers would be less compliant on average than dealers if allowed to engage in direct distribution. Further, if it turned out that company-owned stores were *more* compliant with state regulatory requirements than independent dealerships, the logical implication of the dealers' argument would be that dealer distribution should be prohibited and direct distribution mandated.<sup>133</sup> Presumably, this is not an argument that the dealers would be interested in exploring to its logical conclusions.

### 4. Ensuring Vehicle Safety

The dealers have argued that prohibiting direct distribution promotes vehicle safety because dealers have greater incentives than do manufacturers

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130. See, e.g., Jonathan Collegio, Reply to OurEnergyPolicy.org, *Should Tesla (and Other Auto Manufacturers) Be Able to Sell Cars Directly to Consumers?*, OUREENERGYPOLICY.ORG (Oct. 27, 2014, 3:23 PM), <http://www.ourenergypolicy.org/should-tesla-and-other-auto-manufacturers-be-able-to-sell-cars-directly-to-consumers/#comments>; see also Aschbrenner, *supra* note 59.

131. See *Nation's Top Ten Consumer Complaints*, CONSUMER FED'N AM. (Jul. 31, 2013), <http://www.consumerfed.org/news/696>; *Consumer Complaint Surveys*, CONSUMERS FOR AUTO RELIABILITY & SAFETY (2014), <http://www.carconsumers.org/surveys.htm>.

132. WILLIAM A. BROCK & DAVID S. EVANS, *THE ECONOMICS OF SMALL BUSINESSES: THEIR ROLE AND REGULATION IN THE U.S. ECONOMY* 65 (1986); JACK FAUCETT ASSOCS., *ECONOMIES OF SCALE IN REGULATORY COMPLIANCE: EVIDENCE OF THE DIFFERENTIAL IMPACTS OF REGULATION BY FIRM SIZE* 1 (1984).

133. See generally NELSON LICHTENSTEIN, UNIV. OF CAL., SANTA BARBARA, *TWO CHEERS FOR VERTICAL INTEGRATION: CORPORATE GOVERNANCE IN A WORLD OF GLOBAL SUPPLY CHAINS* (2014), <http://f.hypotheses.org/wp-content/blogs.dir/989/files/2014/03/Lichtenstein-2.pdf>.

to pursue safety recalls.<sup>134</sup> Dealer lobbyists point to recent scandals involving GM's failure to issue timely safety recalls, leading to a number of deaths, as a reason that the manufacturers cannot be trusted on recalls.<sup>135</sup> But, inconveniently for the dealers, the GM recall failures all occurred in the context of franchised distribution. So if the dealership model is supposed to serve as a guarantor of vehicle safety, then the GM recall failures are failures of the dealership model, not reasons to require it.

Whether a manufacturer distributes directly or through dealers has nothing to do with the incidence or servicing of recalls. Dealers do not make recall decisions. Under federal law, the obligation to report vehicle safety defects to the National Highway Traffic Safety Administration ("NHTSA") rests solely on the manufacturer.<sup>136</sup> The submitting manufacturer then proposes a remedial program, which is reviewed for approval by the NHTSA.<sup>137</sup> When manufacturers fail to implement recalls requested by NHTSA, the agency may issue an administrative order requiring a recall.<sup>138</sup> This entire process is run by the manufacturers and the NHTSA without dealer involvement.

The dealers have also argued that, once a recall is issued, the dealers have a greater incentive to see it performed than do the manufacturers, since the manufacturer is paying the dealer to perform the service.<sup>139</sup> But this argument assumes that, having issued an NHTSA-mandated recall, a manufacturer-owned service center will refuse to perform the service when customers request it. That would be a flagrant and easily detectable violation of federal law, and there is no reason to think it would be a systematic problem.

##### 5. Dealers as Uniquely Virtuous Local Citizens

A final argument advanced by the car dealers is more faithful to the spirit of the original dealer protection laws insofar as it admits that the laws protect the dealers from manufacturer competition. But this protectionism is justified on the ostensible grounds that the dealers are unique bastions of virtue in local communities because they pump in tax revenues, employ people, make large philanthropic contributions, and preserve small business values.<sup>140</sup> It is hard to take these arguments seriously.

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134. *Get the Facts: The Benefits of Franchised New Car Dealers*, NAT'L AUTOMOBILE DEALERS ASS'N, <http://www.nada.org/GetTheFacts> (last visited Nov. 14, 2015) (arguing that dealers "[t]ake the side of consumers in warranty and safety recalls").

135. *Market Makers*, *supra* note 111.

136. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., SAFETY RECALL COMPENDIUM 4 (n.d.), <http://www-odi.nhtsa.dot.gov/cars/problems/recalls/documents/recompendium.pdf>.

137. *Id.* at 7.

138. *Id.* at 15.

139. *Market Makers*, *supra* note 111.

140. John O'Dell, *Why Tesla Should Stop Fighting Auto Dealers*, CNN (Mar. 18, 2014, 6:08 PM), <http://www.cnn.com/2014/03/18/opinion/odell-tesla-new-jersey> (opining that "car dealerships are important corporate citizens, pumping into the national economy hundreds of millions of sales-

First, to the extent that manufacturer-owned stores displaced dealer-owned stores, the effects would be tax neutral. Internet direct sales models not involving a physical presence by the seller in the state may reduce state and local sales tax revenues, but the issue in question is not pure Internet sales but rather opening brick and mortar stores and service centers in the states. Any such stores would remit the same real estate, sales, franchise fee, and other state and local taxes as independent dealers. If anything, since Tesla can and does already conduct Internet sales, adding a physical store in the state might increase state and local tax revenues.

The argument that direct distribution would lower local employment rates by cutting out a sales force is also off the mark. Tesla already engages in direct distribution and Internet sales, but is prohibited from opening stores and service centers in many states. If it opened those stores and service centers, it would need to hire a local workforce to run them. To the extent that the dealers' argument is that Tesla would run its stores and service centers in a more streamlined way than dealers do and hence employ a smaller sales force, they are effectively arguing for mandating a less efficient means of distribution. It seems *prima facie* undesirable to mandate dealer distribution just to protect inefficient distribution models that create needless jobs.

The point about local philanthropic giving is also fishy. According to the dealers' own self-survey, fewer than half of the dealers donated more than \$25,000 to non-profit organizations or charitable causes in 2013.<sup>141</sup> Is the rate of charitable contribution greater on average for car dealerships than for other industry sectors? I know of no evidence that it is. Even if it were, it would be inefficient to subsidize charitable organizations by granting a particular industry a protected position against competition on the hopes that it would share with charities some of the monopoly profits it extracted from consumers. It would be far more efficient for the states simply to levy a general tax on consumers and redistribute the proceeds to worthy causes.

Finally, the picture of car dealers as "mom and pop" shops, or to quote Justice Peckham's famous aphorism "small dealers and worthy men,"<sup>142</sup> is increasingly misguided. Although small dealerships remain, particularly in rural areas where manufacturers are unlikely to open company-owned stores anyway, automotive retailing in suburban and urban areas has become big business. Many dealers are part of large groups comprising many different

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tax dollars, tens of millions of dollars in charitable contributions and billions of dollars in paychecks"); Popper, *supra* note 45 ("[Tesla] wanted to go direct, which means no sales force. That's cutting out a lot of people." (quoting a car dealer)).

141. *Auto Dealers Increase Charitable Giving, Focus on Local Communities*, ALLY (Oct. 13, 2014), <https://media.ally.com/2014-10-13-Auto-dealers-increase-charitable-giving-focus-on-local-communities>.

142. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897) ("Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings.")

dealerships. For example, in 2012, the 33 largest dealer groups in the country each had revenues in excess of \$1 billion, with the two largest groups showing revenues of about \$15.7 and \$13.2 billion respectively, and an average of nearly 23 dealerships in the group.<sup>143</sup> The ten largest car dealer networks in America have combined revenues of over \$80 billion, which puts them at roughly the GDP of the entire country of Croatia.<sup>144</sup> The 100th largest dealer group's annual revenues still exceed \$300 million.<sup>145</sup> Even putting aside the impact of large group ownership, individual dealership revenues averaged \$6.1 million in 2013, with a net pre-tax profit of over \$1 million.<sup>146</sup> The economies of scale from this organization of capital may help the dealers meet the heavy regulatory burden under which they ostensibly labor, but it surely disqualifies any argument that dealers should be favored as small businesses as a general matter.<sup>147</sup>

#### IV. THE LAW AND POLITICS OF THE TESLA WARS

##### A. LOCHNER'S *LONG SHADOW* AND *THE FRAILTY OF JUDICIAL REVIEW*

Stripped of their frail efforts to transform unequivocal dealer protection laws into consumer protection provisions, and unable to rely on the original unequal bargaining power argument since pure direct distribution involves no manufacturer-dealer contract, the dealers are exposed as nakedly seeking protection from competition. One need not fault the dealers for promoting the original franchise protection statutes to understand their current resistance to direct distribution as another chapter in the long story of crony capitalism. Dealer distribution is deeply engrained as the model, a habit of mind for manufacturers, consumers, and dealers alike. Never mind that the economic conditions of the market and relevant technologies have completely shifted over the last half century. The dealers see direct distribution as a mortal threat and the existing laws as their property, their constitutional charter.

There is little doubt that the use of dealer franchise laws to block pure direct distribution is naked protectionism from competition for the benefit of car dealers. I will take it for granted that such a use of law should be curtailed. But it is a long step from that realization to obtaining relief from the judiciary. In the post-*Lochner* world, judges are shy about policing even blatant crony capitalism because assuming that role would often involve them in making

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143. WARDSAUTO DEALER BUS., WARDSAUTO: MEGA DEALER 100, at 22–25 (2013), [http://wardsauto.com/site-files/wardsauto.com/files/uploads/2013/04/UsaDeo2\\_2013.pdf](http://wardsauto.com/site-files/wardsauto.com/files/uploads/2013/04/UsaDeo2_2013.pdf).

144. *Id.*; *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> (last visited Nov. 14, 2015).

145. WARDSAUTO DEALER BUS., *supra* note 143, at 24–25.

146. NADA, NADADATA: ANNUAL FINANCIAL PROFILE OF AMERICA'S FRANCHISED NEW-CAR DEALERSHIPS 3 (2014), <https://www.nada.org/workarea/DownloadAsset.aspx?id=21474839497>.

147. *See supra* Part III.B.3.

socio-economic judgments that would usurp the will of the democratically accountable branches of government. The doors of judicial relief are ajar, but barely.

Antitrust law would seem an obvious instrument, but it is unavailable because of the *Parker* state action doctrine, which permits states to enact even nakedly anticompetitive legislation so long as the anticompetitive policy is clearly and affirmatively expressed as state policy and actively supervised by the state.<sup>148</sup> The *Parker* doctrine arose immediately in the wake of the Supreme Court's rejection of *Lochner*ism and reflected a resolve by the Court not to reinstate economic substantive due process under the mantle of the federal antitrust laws.<sup>149</sup>

That leaves constitutional doctrines, in particular the Dormant or Negative Commerce Clause and Equal Protection under the Fourteenth Amendment. As noted earlier, Ford lost both challenges to Texas' direct distribution ban in the Fifth Circuit.<sup>150</sup> Dormant Commerce Clause challenges can succeed either by demonstrating unjustified discrimination against out-of-state commerce or that "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."<sup>151</sup> The Fifth Circuit court reasoned that there was no discrimination against interstate commerce, since all car manufacturers, wherever domiciled, were similarly prohibited from engaging in direct distribution.<sup>152</sup> It also rejected Ford's balancing-test argument, finding that even if direct distribution would produce efficiencies for the benefit of consumers, a statute that curtailed efficiencies did not impose "a constitutional burden."<sup>153</sup> The state's asserted justifications for prohibiting direct distribution—"to prevent vertically integrated companies from taking advantage of their incongruous market position and 'to prevent frauds, unfair practices, discrimination, impositions, and other abuses of our

148. *Parker v. Brown*, 317 U.S. 341, 352 (1943); see also *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102-04 (1980).

149. See Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 500 (1987) ("Having only just determined not to use the Constitution in that manner, the Court was not about to resurrect *Lochner* in the garb of the Sherman Act."); Paul R. Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328, 330-34 (1975) (explaining the Court's decision in *Parker* through the lens of anti-*Lochner* sentiment).

150. See *supra* notes 89-92 and accompanying text.

151. *Hughes v. Oklahoma*, 441 U.S. 322, 331 (1979) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1031, 1057 (3d ed. 2000).

152. *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 502 (5th Cir. 2001) ("It is irrelevant [under the Texas statute] whether Ford, as a manufacturer, is domiciled in Texas or Michigan. In either circumstance, it is similarly prohibited from engaging in retail automobile sales in Texas."). The Fifth Circuit relied heavily on the Supreme Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), which upheld a Maryland statute prohibiting oil producers or refiners from operating retail service stations in the state. See *id.* at 500-01.

153. *Id.* at 503.

citizens”—were legitimate interests supporting the statute’s constitutionality.<sup>154</sup> The court rejected Ford’s Equal Protection Clause challenge for the same reason, finding that the direct sales prohibition bore “a reasonable relationship to the State’s legitimate purpose in controlling the [automobile] retail market.”<sup>155</sup>

Despite the *Ford* precedent, there are glimmers of hope for a challenge to bans on pure direct distribution. None of the unfair bargaining power arguments that have proven successful in upholding dealer protection laws<sup>156</sup> have any purchase as to manufacturers that avoid dealers altogether. And should the mantra of “frauds, unfair practices, discrimination, impositions, and other abuses [of our] citizens”<sup>157</sup> require affirmative proof as opposed to mumbo-jumbo assertion, the dealers will find themselves in constitutional trouble for all of the reasons explored in Part III.

The success of any such challenge hinges on the current valence of the judiciary’s post-*Lochner* resolution not to kick the tires on a state’s purported justifications for nakedly protectionist regulations. There is little hope for meaningful judicial review if the courts refuse to invalidate a protectionist law on rational basis grounds “if there is any conceivable state of facts which would support it,” whether or not that actual state of facts exists, has been asserted by the state, or has support in the record.<sup>158</sup> But if the courts demand more—actual empirical support, even if contestable, and logical consistency—then the direct distribution bans will be susceptible to challenge.

In the last decade, the federal appellate courts have begun to require more than boilerplate assertion from states defending statutes that seem, at first blush, nakedly protectionist. For example, the Fourth Circuit invoked the Negative Commerce Clause in striking down a Virginia statute granting motorcycle dealers protest rights whenever a franchising manufacturer opened a new dealership in the Commonwealth, even outside the dealers’ geographic market area.<sup>159</sup> The purpose of the statute was plainly to grant dealers the power to exact concessions from manufacturers, but the Commonwealth tried to justify it as preventing dealer “oversaturation.”<sup>160</sup> Although paying lip service to the general principle that courts should rarely cast doubt on “a statute’s putative benefits,” the court nonetheless pushed

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154. *Id.*

155. *Id.* at 510 (alteration in original).

156. *See, e.g.*, *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (upholding dealer franchise laws intended to protect dealers from the superior bargaining power of manufacturers).

157. *See, e.g.*, ARK. MOTOR VEHICLE COMM’N, SYNOPSIS (n.d.), [http://www.amvc.arkansas.gov/pdf/amvc\\_sum.pdf](http://www.amvc.arkansas.gov/pdf/amvc_sum.pdf).

158. *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 509 (1937); *see also* *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955).

159. *Yamaha Motor Corp., U.S.A. v. Jim’s Motorcycle, Inc.*, 401 F.3d 560 (4th Cir. 2005).

160. *Id.* at 570–71.

back sharply on the “putative benefits,” finding them ill-served by the statute.<sup>161</sup>

Other courts have shown similar teeth—what Judge Ginsburg has called “rational basis with economic bite”—in invalidating protectionist legislation under the Equal Protection Clause.<sup>162</sup> The two leading cases both involve state restrictions that essentially granted funeral homes protection from competition in casket sales.<sup>163</sup> If the question were whether such protectionism could have some *conceivable* rational basis other than naked transfers of wealth,<sup>164</sup> the answer would have to be yes. Yet, in striking down those statutes, the Fifth and Sixth Circuits demanded more than the conceivable. Against a backdrop principle that “protecting a discrete interest group from economic competition is not a legitimate governmental purpose,”<sup>165</sup> the courts scrutinized the states’ asserted purposes for empirical support and logical consistency and, finding those qualities wanting, invalidated the statutes. The “protecting a discrete interest group from economic competition” principle is not your grandfather’s rational basis review.<sup>166</sup> It articulates a distinct and testable limit on the exercise of the state’s police powers that requires more justification by the state than invitations to armchair imagination.

If this principle crystallizes as a distinct mode of constitutional analysis, the restrictions on pure direct distribution should be in serious trouble. A broad coalition of 72 distinguished economists and law professors recently penned an open letter calling the direct distribution ban “protectionism for auto dealers, pure and simple.”<sup>167</sup> If that claim is correct, as argued in Part III, the direct distribution bans would fail rational basis scrutiny under the Equal Protection Clause.

Still, *Lochner’s* shadow looms large, and the model federal judge resists a return to the days of economic substantive due process. Soberly assessing the odds, Tesla has thus far shied away from provoking a constitutional challenge. For now, its stronger hand lies in the court of popular opinion and state legislatures.

161. *Id.*

162. See generally Menashi & Ginsburg, *supra* note 7.

163. *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Craigsmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

164. Cf. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1695–96 (1984) (defining naked transfers of wealth as government resource redistribution absent justification by an articulated public value).

165. *Craigsmiles*, 312 F.3d at 224; see also *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (“We conclude that mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review.”).

166. *Craigsmiles*, 312 F.3d at 224.

167. Letter from Int’l Ctr. for Law & Econs. to Chris Christie, Governor of N.J. 1 (Mar. 26, 2014), [http://www.laweconcenter.org/images/articles/tesla\\_letter\\_icle.pdf](http://www.laweconcenter.org/images/articles/tesla_letter_icle.pdf).



B. A NEW ANTI-PROTECTIONIST POLITICS?

In conventional public choice theoretic terms, economic special interests are able to capture the political process and extract rents because of collective action problems: the concentrated benefits to the special interests induce the expenditure of political resources up to the value of the rents, whereas the diffuse nature of the harm to consumers, taxpayers, or other wide social groups impede mobilization of an effective response.<sup>168</sup> The history of direct distribution regulation reflects this pattern. The Big Three gave up on waging any kind of serious fight against dealer protectionism decades ago, and since then, the car industry as a whole has largely acquiesced. Although consumers bear the brunt of the protectionism, the consumer interest is too fragmented and dispersed to be easily mobilized. It has taken entry by a well-capitalized firm wielding a new technology and with sufficient disincentives to acquiesce in the industry's longstanding settlement to break open a fight with the dealers.

The political dynamics of the Tesla wars make for strange bedfellows. The car dealers lean overwhelmingly Republican,<sup>169</sup> which may help to explain their considerable leverage in Republican-dominated state legislatures. On principle, however, dealer protectionism sits uneasily in the Republican stable. The Tesla wars have seen Republican Governors like Chris Christie, Rick Perry, and Rick Snyder chided for anti-free-market policies by news sources such as the *National Review*<sup>170</sup> and the *Wall Street Journal*.<sup>171</sup> Meanwhile, sensing the opportunity to bolster his free-market credentials, another potential 2016 Republican Presidential nominee, Florida Senator Marco Rubio, took to CNBC to blast New Jersey's anti-Tesla measures.<sup>172</sup>

The pro-direct distribution themes resonate with the economic libertarianism of the right, but also with consumer protection and environmentalist themes usually associated with the left. The senior staff

168. See *supra* text accompanying notes 1–2.

169. Josh Barro, *Republicans Are Only Sometimes the Party of Uber*, N.Y. TIMES (Nov. 8, 2014), [http://www.nytimes.com/2014/11/09/upshot/republicans-are-only-sometimes-the-party-of-uber.html?\\_r=0&abt=0002&abg=1](http://www.nytimes.com/2014/11/09/upshot/republicans-are-only-sometimes-the-party-of-uber.html?_r=0&abt=0002&abg=1); Nate Silver, *News Flash: Car Dealers Are Republicans (It's Called a Control Group, People)*, FIVETHIRTYEIGHT: POL. (May 27, 2009, 10:50 PM), <http://fivethirtyeight.com/features/news-flash-car-dealers-are-republicans>.

170. Jim Geraghty, *Rick Perry on the Effort to Turn Texas Blue*, NAT'L REV.: CORNER (Mar. 7, 2014, 1:44 PM), <http://www.nationalreview.com/corner/372877/rick-perry-effort-turn-texas-blue-jim-geraghty>.

171. *Rick Snyder Drives Off the Road: Michigan's Pro-Market Governor Embraces the Car Dealer Cartel*, WALL STREET J. (Oct. 24, 2014, 7:18 PM), <http://www.wsj.com/articles/rick-snyder-drives-off-the-road-1414192688>; see also Matt Friedman, *Christie Says Tesla Criticism Is 'Complete Crap'*, NJ.COM (July 16, 2014, 3:43 PM), [http://www.nj.com/politics/index.ssf/2014/07/christie\\_calls\\_tesla\\_criticism\\_complete\\_crap.html](http://www.nj.com/politics/index.ssf/2014/07/christie_calls_tesla_criticism_complete_crap.html) (“I don't like the law either. I didn't vote for it. I didn't sign it. But I don't get to just ignore the laws I don't like.” (quoting Governor Chris Christie)).

172. Jeff Morganteen, *Sen Rubio: Allow Tesla to Sell Direct to Consumers*, CNBC (Mar. 25, 2014, 9:18 AM), <http://www.cnbc.com/id/101522333>.

leadership of the Obama FTC have come out publicly in support of direct distribution on pro-consumer grounds.<sup>173</sup> A wide range of academics from across the political spectrum have signed pro-Tesla open letters advocating direct distribution.<sup>174</sup> Meanwhile, an unusual coalition of free market, environmentalist, pro-consumer, and pro-technology groups, including such strange bedfellows as the Institute for Justice, Americans for Prosperity, Environment America, the Sierra Club, Consumer Action, and the Consumer Federation of America, have joined an open letter calling on states to allow direct distribution of automobiles.<sup>175</sup>

The Tesla wars offer an opportunity to re-introduce and re-explain the problematics of economic protectionism and special interest capture, particularly to those of the environmentally conscious, “on demand,” and technology-savvy younger generations accustomed to being able to buy anything over the Internet. The issue’s pan-ideological appeal provides opportunity for politicians of any stripe to burnish their credentials across traditional partisan lines: conservative Republicans can invoke dealer protection as evidence that violation of free market principles interferes with carbon emission reduction and harms consumers’ pocketbooks; liberal Democrats can explain how enhanced competition can create positive environmental, technological, and consumer welfare effects. Despite its political perils,<sup>176</sup> direct distribution is sitting on a silver platter, waiting for opportunistic paladins on either side of the political spectrum.

Public choice theory has long been suspected of serving as a covert anti-regulatory tool of the right.<sup>177</sup> The Tesla wars offer an opportunity to retell

173. Andy Gavil, Debbie Feinstein & Marty Gaynor, *Who Decides How Consumers Shop?*, FED. TRADE COMMISSION (Apr. 24, 2014, 11:00 AM), <http://www.ftc.gov/news-events/blogs/competition-matters/2014/04/who-decides-how-consumers-should-shop>.

174. See *supra* note 167 and accompanying text.

175. Letter from Am. Antitrust Inst. et al. to State Government Leaders (Feb. 16, 2015), <http://www2.itif.org/2015-tesla-big-tent-letter.pdf>; see also Dana Hull, *Koch Brothers, Sierra Club Join Tesla in Fight with Dealers*, BLOOMBERG BUS. (Feb. 17, 2015, 10:14 AM), <http://www.bloomberg.com/news/articles/2015-02-17/koch-brothers-sierra-club-join-tesla-in-fight-with-dealers>.

176. Apart from statements by the independent FTC, the Obama administration has thus far declined to weigh in. In response to a pro-Tesla petition, the Obama White House issued a tepid statement observing that “regulating auto sales are issues that have traditionally sat with lawmakers at the state level.” Dan Utech, *Response to We the People Petition on Tesla Motors*, WHITE HOUSE (July 11, 2014), <https://petitions.whitehouse.gov/response/response-we-people-petition-tesla-motors>.

177. See, e.g., Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 884 (1991) (“Conservatives who are suspicious of government have found in public choice a congenial catalogue of political misdemeanors . . .”); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 204 (1988) (offering a critical perspective on “right-wing public choice literature”); Simon Lazarus, *Stripping the Gears of National Government: Justice Stevens’s Stand Against Judicial Subversion of Progressive Law and Lawmaking*, 106 NW. U. L. REV. 769, 776–77 (2012) (referring to “conservative academics’ jaundiced ‘public choice theory’ perspective on modern democratic pluralist institutions”); Mark V. Tushnet, *Does Constitutional Theory Matter?: A Comment*, 65 TEX. L. REV. 777, 782–83 n.15 (1987) (“The entire literature

the story: long-entrenched technologies and interests rely on the inertial pull of decades-old regulatory captures to subvert the emergence of new technologies capable of vastly improving consumer welfare, putting clean cars on the streets, and reducing carbon emissions and dependence on foreign oil. Consumers and voters are slow to understand and react because of informational asymmetries and the diffuse and non-obvious nature of their injury. Courts are reluctant to second-guess the legislative decisions on constitutional grounds, fearing a return to an era of judicial activism on socio-economic matters. Until motivated coalitions of public interest groups mobilize to fight back, crony capitalism will continue to exert a strong inertial force.

## V. CONCLUSION

In the familiar Schumpeterian story, brutal industrial contest between old and new technologies is the “essential fact” about capitalist economic organization:<sup>178</sup> that incumbent technologies will resist the new entrants by erecting and bolstering legal and regulatory entry barriers should be assumed, and that they will often be successful in at least slowing the new technology’s expected momentum. The current alliance of manufacturers and dealers of internal combustion vehicles against the onslaught of EVs is hardly the first such instance in the history of the American transportation industry. For example, in the 1920s, the American Horse Association mobilized to block the spread of internal combustion technologies by lobbying for laws against heavy trucks on public roads and granting horses special legal status in urban areas.<sup>179</sup>

The Tesla wars are important for the issues directly at stake—the proliferation of EV technology and all of its associated implications for the environment, energy policy, and automotive innovation. They are also significant as a contemporary, sharply definable, and ideologically mixed paradigm of special interest capture and crony capitalism.

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on public choice can be seen to support a right-wing version of representation-reinforcing review . . . .”); cf. D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029, 1031 (2011) (reviewing MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009)) (arguing that the view of public choice theory as a right-wing tool is misguided while pointing to a number of left-leaning scholars who employ public choice analysis).

178. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 83 (2d ed. 1942).

179. Alan L. Olmstead & Paul W. Rhode, *The Agricultural Mechanization Controversy of the Interwar Years*, 68 AGRIC. HIST. SOC’Y 35, 40–41 (1994).