RECENT U.S. SUPREME COURT DECISION SHOWS THAT THE DORMANT COMMERCE CLAUSE DOES NOT PRECLUDE WISCONSIN FAIR DEALERSHIP LAW DAMAGES FOR SALES BEYOND STATE BORDERS

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INTRODUCTION

Twenty-five years ago, in *Morley-Murphy Co. v. Zenith Electronics Corp.*,[1] the Seventh Circuit warned that courts should not construe the Wisconsin Fair Dealership Law (WFDL) to authorize lost-profits damages arising from sales anticipated outside of Wisconsin, lest doing so raise constitutional concerns under the so-called dormant Commerce Clause.[2] Some commentators and litigants have questioned the basis for this

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1. 142 F.3d 373 (7th Cir. 1998).
2. *See id.* at 379–81.

warning.[3] Even though no state or federal court has ever fully adjudicated the issue, courts have continued to heed the *Morley-Murphy* warning.[4]

The U.S. Supreme Court's recent decision in *National Pork Producers Council v. Ross*[5] should trigger reconsideration of the Seventh Circuit's past suggestion. The *Ross* decision reaffirms the centrality of an antidiscrimination principle to dormant-Commerce Clause doctrine and clarifies that, absent a showing of purposeful discrimination against out-of-state businesses, the dormant Commerce Clause should not prohibit enforcement of the WFDL, even beyond the borders of Wisconsin.[6]

This Essay begins with a brief summary of *Morley-Murphy*'s discussion of applying the WFDL extraterritorially and the limited guidance on the issue from the Wisconsin Supreme Court. Next, it discusses the Third Circuit's approval of extraterritorial reach for New Jersey's franchise law, followed by the Seventh Circuit's analysis in *Morley-Murphy*. Turning to the Supreme Court's most recent ruling on the dormant Commerce Clause, the Essay summarizes the *Ross* decision's analysis of the doctrine. It concludes by revisiting *Morley-Murphy*'s limitation on the reach of the WFDL in light of *Ross*.

I. THE COMMERCE CLAUSE AND STATE DEALERSHIP LAWS

The U.S. Constitution protects interstate commerce by reserving to Congress the authority "[t]o regulate Commerce . . . among the several States."[7] Courts have long understood this not only as an express grant of congressional power but also as an implied limitation on the power of state governments to interfere with interstate commerce, even in areas where

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3. *See, e.g.*, BRIAN E. BUTLER & JEFFREY A. MANDELL, THE WISCONSIN FAIR DEALERSHIP LAW §§ 2.6, 3.3, 11.23 (State Bar of Wisconsin/Pinnacle 5th ed. 2022); Klay A. Baynar, John W. Halpin, Mark M. Leitner & Joseph S. Goode, *Thinking Outside the State: The Dormant Commerce Clause and Its Impact on State Relationship Laws*, 39 FRANCHISE L.J. 515 (2020).

4. *See Generac Corp. v. Caterpillar, Inc.*, 172 F.3d 971, 976 (7th Cir. 1999); *Baldewein Co. v. Tri-Clover, Inc.*, 606 N.W.2d 145, 151 n.6 (Wis. 2000); *Brio Corp. v. Meccano S.N.*, 690 F. Supp. 2d 731, 745 n.5 (E.D. Wis. 2010); *Brava Salon Specialists, LLC v. Swedish Haircare, Inc.*, No. 22-cv-695, 2023 WL 1795512, at *3 (W.D. Wis. Feb. 7, 2023); *Track, Inc. v. ASH N. Am., Inc.*, No. 21-cv-786, 2023 WL 2733679, at *5 (W.D. Wis. Mar. 31, 2023).

5. 143 S. Ct. 1142 (2023).

6. *See, e.g.*, *id.* at 1154 ("[Petitioners] contend that our dormant Commerce Clause cases suggest an additional and almost *per se* rule forbidding enforcement of state laws that have the practical effect of controlling commerce outside the State, even when those laws do not purposely discriminate against out-of-state economic interests. . . . A close look at those cases, however, reveals nothing like the rule petitioners posit. Instead, each typifies the familiar concern with preventing purposeful discrimination against out-of-state economic interests.") (internal quotation marks omitted).

7. U.S. CONST. art. I, § 8, cl. 3.

Congress has not enacted policy.[8] This implied limitation on state action is referred to as the dormant Commerce Clause.[9] Generally, state legislatures have broad power to regulate commerce within their states.[10] However, states exceed that power and their actions are preempted under the dormant Commerce Clause if they regulate in ways that discriminate against interstate commerce or, through facially neutral actions, unduly burden interstate commerce.[11]

One way that many states regulate commerce within their own boundaries is by adoption of franchise or dealership laws, which often limit the grounds upon which a party may terminate or substantially change the terms of a commercial relationship.[12] These laws are divided into two general types: relationship statutes and industry-specific statutes.[13] Statutes governing motor vehicle dealerships, alcohol distribution, and petroleum resellers are the most common forms of industry-specific statutes.[14] By contrast, a relationship statue, like the WFDL, provides extensive protection to a diverse set of commercial arrangements.[15]

The WFDL, in its scope and application, is the broadest dealership law in the United States.[16] Indeed, the statute applies to an "extraordinarily diverse set of business relationships"[17] including alcoholic beverage distributors,[18] lawn and farm implement dealers,[19] forklift resellers,[20] beauty product wholesalers,[21] municipal golf professionals,[22] and virtually

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8. *See, e.g.*, *Ross*, 143 S. Ct. at 1152.

9. *Id.*

10. *Id.* (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824)).

11. *Id.* at 1152–53.

12. *See* Boyd Allan Byers, *Making a Case for Federal Regulation of Franchise Terminations—a Return-of-Equity Approach*, 19 J. CORP. L. 607, 624–27 (1994).

13. *Id.*

14. *See* Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 VAND. L. REV. 1503, 1512, n.29 (1990).

15. Byers, *supra* note 12, at 624–25.

16. *See, e.g.*, Eric Goldberg & Justin Csik, *Unintended Legal and Business Consequences of Termination of a Franchisee*, 34 FRANCHISE L.J. 53, 58 (2014) (noting that the WFDL is "one of the most protective" state franchise statutes).

17. *Ziegler Co. v. Rexnord, Inc.*, 407 N.W.2d 873, 878 (Wis. 1987).

18. *Gen. Beverage Sales Co. v. Duckhorn Portfolio, Inc.*, No. 2021CV001180 (Wis. Cir. Ct. Dane Cnty. May 21, 2021).

19. *Keen Edge Co., Inc. v. Wright Mfg., Inc.*, No. 19-cv-1673, 2020 WL 4926664 (E.D. Wis. Aug. 21, 2020).

20. *Wis. Lift Truck Corp v. Mitsubishi Caterpillar Forklift Am., Inc.*, No. 20-cv-655, 2020 WL 2572806 (E.D. Wis. May 21, 2020).

21. *Brava Salon Specialists, LLC. v. Swedish Haircare, Inc.*, No. 22-cv-695, 2023 WL 1795512 (W.D. Wis. Feb. 7, 2023).

22. *Benson v. City of Madison*, 897 N.W.2d 16 (Wis. 2017).

everything in between.[23] If a protected dealership exists, a grantor may not terminate, cancel, fail to renew, or substantially change the competitive conditions of the dealership without good cause and without providing the dealer proper notice and an opportunity to cure.[24] If a grantor fails to comply with the statute, its dealer may pursue damages, injunctive relief, or both, and a dealer that succeeds in an action is entitled to recoup attorney fees.[25]

The WFDL was enacted to protect Wisconsin businesses and applies only to dealerships "situated in" the state.[26] When such a relationship authorizes the dealer to sell or distribute goods or services in a territory wholly within Wisconsin's borders, there is no dormant-Commerce Clause concern. But matters get more complicated in frequent cases where a dealership situated in Wisconsin authorizes the dealer to sell or distribute foods or services in a territory that exceeds Wisconsin's borders, whether it includes additional states or parts of states, or even extends to the entire nation or continent.

A. Morley-Murphy *Suggested a Limitation on the WFDL's Reach*

Morley-Murphy Co. had a Wisconsin-situated dealership that sold Zenith television sets not only in Wisconsin, but also in Iowa, Minnesota, North Dakota, South Dakota, and Michigan's upper peninsula.[27] When Zenith decided to overhaul its distribution system,[28] Morley-Murphy sued under the WFDL, and the jury awarded damages for Morley-Murphy's out-of-pocket expenses, lost future profits on projected sales from Morley-Murphy's Wisconsin locations, and lost future profits on projected sales from Morley-Murphy's Iowa and Minnesota locations.[29]

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23. *See, e.g.*, *Kelley Supply, Inc. v. Chr. Hansen, Inc.*, 812 N.W.2d 539 (Wis. Ct. App. 2012) (cheese coagulant dealer); *Water Quality Store, LLC v. Dynasty Spas, Inc.*, 89 N.W.2d 595 (Wis. Ct. App. 2010) (water spa reseller); *Rustic Retreats Log Homes, Inc. v. Pioneer Log Homes of Brit. Columbia Inc.*, No. 19-CV-1614, 2020 WL 3415645 (E.D. Wis. June 22, 2020) (custom log home distributor).

24. WIS. STAT. §§ 135.03–.04 (2021–22).

25. WIS. STAT. § 135.06.

26. WIS. STAT. § 135.02(2).

27. *Morley-Murphy Co. v. Zenith Elecs. Corp.*, 142 F.3d 373, 374 (7th Cir. 1998).

28. The *Morley-Murphy* decision exemplifies how powerful the WFDL is. There, Zenith sought to overhaul its distribution system to avoid hemorrhaging profits; it had lost over $320 million across the five years immediately prior to the termination dispute. *Id.* at 375. To turn things around, Zenith sought to end its relationships with its distributors, including Morley-Murphy, and sell directly to retail outlets. *Id.* The Seventh Circuit found that there was a factual issue as to whether Zenith's circumstances qualified as "good cause" that would permit the grantor to terminate the dealership. *Id.*

29. *Id.* at 378.

On appeal, the Seventh Circuit vacated the jury verdict and remanded for further proceedings. In doing so, it asserted that allowing the WFDL to reach beyond the borders of Wisconsin would "raise significant questions under the Commerce Clause."[30] Although the court stated that the dormant Commerce Clause "denies the States the power to unjustifiably discriminates against or burdens the interstate flow of articles of commerce," it made no determination that the WFDL actually discriminates against or burdens interstate commerce.[31] Instead, the court speculated that, were the issue to arise in state courts, the Wisconsin Supreme Court would construe the WFDL not to apply outside of Wisconsin because of the "presumption against extraterritoriality and the troublesome nature of the constitutional questions" that would arise if the WFDL reached into other states.[32] The Seventh Circuit advised that, on remand, Morley-Murphy should not be allowed to "make a claim based on the WFDL" to recover "lost profits arising out of the termination of its out-of-state dealerships."[33]

For its part, the Wisconsin Supreme Court has not addressed the constitutionality of applying the WFDL extraterritorially in multistate dealership cases. In *Baldewein Co. v. Tri-Clover, Inc.*,[34] the Wisconsin Supreme Court answered a certified question from the Seventh Circuit on how courts should determine whether a dealership is "situated in" Wisconsin for purposes of the WFDL.[35] The *Baldewein* Court acknowledged the Seventh Circuit's concern that awarding damages for out-of-state sales would raise significant questions under the Commerce Clause but did not address the constitutional question because it was not directly raised in the certification.[36] No court since has adjudicated the issue.

B. The Third Circuit Found No Commerce Clause Violation in the Extraterritorial Reach of New Jersey's Franchise Law

Four years before the Seventh Circuit issued its *Morley-Murphy* decision, the Third Circuit concluded that the extraterritorial application of New Jersey's franchise law when invoked by a multistate dealer did not

30. *Id.* at 379.

31. *Id.* (quoting *Or. Waste Sys., Inc. v. Dep't of Env't Quality*, 511 U.S. 93, 98, (1994)).

32. *Id.* at 380.

33. *Id.* at 380–81. However, the *Morley-Murphy* litigation apparently settled before any remand proceedings could be held.

34. 606 N.W.2d 145 (Wis. 2000).

35. *Id.*, *answering question certified in* 221 F.3d 1338 (7th Cir. 2000).

36. *Id.* at 151 n.6.

per se violate the dormant Commerce Clause.[37] In *Morley-Murphy*, the Seventh Circuit distinguished and criticized the Third Circuit's conclusion, suggesting that the WFDL's extraterritorial reach would potentially offend the dormant Commerce Clause.[38]

Like *Morley-Murphy*, the *Instructional Systems, Inc. v. Computer Curriculum Corp.*[39] case arose out of the termination of a multistate dealership relationship.[40] Computer Curriculum Corporation (CCC) produced and marketed an integrated learning system used to teach and monitor student progress.[41] Headquartered in New Jersey, Instructional Systems was CCC's exclusive reseller in nine northeastern states and Washington, D.C. under a 1984 contract.[42] The contract also included a choice-of-law provision specifying that California law governed the parties' relationship.[43] In 1989, CCC decided not to renew the dealership contract for the entire territory due to dissatisfaction with Instructional Systems's marketing in some states.[44] Instead, CCC limited Instructional Systems's market territory to three states—New Jersey, New York, and Massachusetts—and opted to distribute its products directly in the rest of what had been Instructional Systems's territory.[45] Instructional Systems filed suit in New Jersey state court, alleging violations of the New Jersey Franchise Practices Act (NJFPA) on the grounds that CCC failed to renew the franchise without good cause and attempted to impose unreasonable performance standards.[46] As a remedy, Instructional Systems sought damages and an injunction that prevented CCC from terminating the relationship.[47]

After CCC removed the dealership case to federal court, key issues of state law were litigated in a state-court declaratory-judgment suit due to federal abstention doctrines.[48] Those issues included: (1) whether New Jersey law governed the contract; (2) whether the 1984 contract constituted a franchise under the NJFPA; and (3) whether the NJFPA

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37. *Instructional Sys., Inc. v. Comput. Curriculum Corp.*, 35 F.3d 813, 827–28 (3d Cir. 1994). The New Jersey Franchise Practices Act, codified at N.J. STAT. ANN. §§ 56:10-1 to -15, is the closest analog in any state to the protections in the WFDL. *See* BUTLER & MANDELL, *supra* note 3, §§ 1.3, 1.5.

38. *See Morley-Murphy Co.*, 142 F.3d at 380–81.

39. 35 F.3d 813.

40. *Id.* at 816.

41. *Id.* at 815.

42. *Id.* at 815–16.

43. *Id.* at 816.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 816–17 (citing *R.R. Comm'n v. Pullman*, 312 U.S. 496 (1941)).

applied to the entire multistate territory.[49] The declaratory-judgment suit worked its way up to the New Jersey Supreme Court, which held that: (1) New Jersey law governed; (2) the 1984 contract was a franchise; and (3) the NJFPA applied to the entire multistate dealership.[50] In its Commerce Clause analysis, the New Jersey Supreme Court concluded that, although New Jersey does not have the power to "regulate commerce that occurs entirely beyond its borders," the "incidental extraterritorial effects" of the NJFPA did not rise to the level of a constitutional violation.[51]

Back in federal court, however, the district court determined that the application of the NJFPA outside of New Jersey was a per se violation of the Commerce Clause.[52] Accordingly, the district court granted summary judgment in favor of CCC on the portion of Instructional Systems's suit that sought to enjoin the termination of the dealership in states outside of New Jersey.[53]

On appeal, the Third Circuit reversed the district court's judgment that the NJFPA was "unconstitutional as applied to activities of New Jersey franchisees outside of New Jersey."[54] The Third Circuit's analysis is illuminating.

First, it recognized that state laws are per se invalid under the dormant Commerce Clause when they "discriminate against interstate commerce."[55] But since the "NJFPA does not differentiate between in-state and out-of-state franchisors, there is no discrimination against interstate commerce."[56] Moreover, the NJFPA applies only when its community-of-interest requirement is satisfied.[57] Here, the parties agreed to a multistate distribution agreement, which "contemplated that the franchisee maintain a place of business in New Jersey."[58] Thus, the agreement between the parties—not the NJFPA operating independently to burden interstate commerce—"project[ed] the New Jersey law outside of New Jersey's borders."[59] Just like traditional contract litigation, the Third Circuit found "nothing untoward about applying one state's law to

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49. *Id.* at 817.

50. *Id.* (citing *Instructional Sys., Inc. v. Comput. Curriculum Corp.*, 614 A.2d 124 (N.J. 1992)).

51. *Id.* at 817–18 (quoting *Instructional Sys., Inc.*, 614 A.2d at 146, 148).

52. *Id.* at 818 (citing *Instructional Sys., Inc. v. Comput. Curriculum Corp.*, 826 F. Supp. 831, 848 (D.N.J. 1993)).

53. *Id.*

54. *Id.* at 828.

55. *Id.* at 824 (quoting *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987)).

56. *Id.*

57. *Id.*

58. *Id.* at 825.

59. *Id.*

the entire contract, even if it requires applying that state's law to activities outside the state."[60]

Second, the Third Circuit concluded that the extraterritorial reach of the NJFPA survives the constitutional balancing test prescribed in *Pike v. Bruce Church, Inc.*,[61] because the law does not discriminate against interstate commerce.[62] A state law that addresses a legitimate local interest and has incidental effects on interstate commerce "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[63] Under Third Circuit precedent, "the *only* incidental burdens on interstate commerce that implicate the commerce clause . . . are those that discriminate against interstate commerce."[64] And because the NJFPA "simply does not differentiate between in-state and out-of-state franchisors," its incidental effects are not facially discriminatory.[65] The Third Circuit therefore concluded that a *Pike* balancing "analysis of the putative local benefits of the NJFPA [was] unnecessary."[66]

C. Morley-Murphy *Distinguished and Criticized* Instructional Systems*, but without Any Compelling Basis*

In *Morley-Murphy*, the Seventh Circuit characterized *Instructional Systems* as a choice-of-law decision that turned on "the parties' own choice" to project the NJFPA extraterritorially.[67] In essence, it read the Third Circuit to say that extraterritorial application of the NJFPA was the foreseeable legal consequence of the parties' own choices to enter into a multistate dealership situated in New Jersey.[68] The Seventh Circuit criticized the Third Circuit's reasoning as "somewhat problematic with respect to the question of party autonomy" and "quite odd."[69] In the Seventh Circuit's telling, although the agreement between CCC and Instructional Systems included a choice-of-law clause that specified California law would apply to all disputes, the Third Circuit's application of the NJFPA frustrated the parties' agreement and meant that they were "not permitted to opt out of a provision of state law," solely because CCC

60. *Id.*
61. 397 U.S. 137 (1970); *Instructional Sys., Inc.*, 35 F.3d at 827.
62. *Instructional Sys., Inc.*, 35 F.3d at 826–27 (quoting *Old Bridge Chems., Inc. v. N.J. Dep't of Env't Prot.*, 965 F.2d 1287, 1295 (3d Cir. 1992)).
63. *Id.* (quoting *Pike*, 397 U.S. at 142).
64. *Id.*
65. *Id.* at 827.
66. *Id.* (internal quotations omitted).
67. *Morley-Murphy Co. v. Zenith Elecs. Corp.*, 142 F.3d 373, 380 (7th Cir. 1998).
68. *See id.* at 380–81.
69. *Id.* at 381.

had conferred a franchise and a multistate dealership on a New Jersey company.[70]

"Whatever the case was in New Jersey," the Seventh Circuit continued, "it is clear that in Wisconsin party autonomy plays no role in the applicability of the WFDL for dealers inside the state."[71] The court went on to recognize that the WFDL expressly prohibits parties from contracting around its strictures.[72] Thus, it said, "[t]here is no way that Zenith and Morley-Murphy could have avoided the WFDL without deciding to forego a contract altogether."[73] "[O]n these facts," the Seventh Circuit concluded, the party-autonomy "approach of *Instructional Systems*" did not support the extraterritorial application of the WFDL to allow Morley-Murphy to recover profits for the "loss of its out-of-state business."[74]

The Seventh Circuit's point is unclear. In reality, there is no appreciable difference between the WFDL and NJFPA prohibitions on contracting around each statute's protections. The WFDL provides that "[t]he effect of this chapter may not be varied by contract or agreement."[75] Likewise, the NJFPA prohibits "requir[ing] a franchisee at time of entering into a franchise arrangement to assent to a release, assignment, novation, waiver or estoppel which would relieve any person from liability imposed by this act."[76] Both statutes include a community-of-interest requirement that limits applicability only to certain dealerships.[77] Thus, under each statute, the parties' decision to enter into a multistate dealership agreement that includes a dealer situated in either Wisconsin or New Jersey will project the state's law outside its borders. In other words, the party-autonomy dynamic in *Instructional Systems* is no different from the circumstances in *Morley-Murphy*, and the Seventh Circuit's effort to distinguish the cases does not withstand scrutiny.

Moreover, the Seventh Circuit was incorrect in asserting that, in contrast to *Instructional Systems*, "[t]here is no way that Zenith and Morley-Murphy could have avoided the WFDL without deciding to forego a contract altogether."[78] Had Zenith and Morley-Murphy wanted to avoid extraterritorial application of the WFDL, one option would have been entering into separate contracts for each state (or for groups of states) in which they were working together, possibly limiting the WFDL's

70. *Id.* at 380–81.
71. *Id.* at 381.
72. *Id.* (citing WIS. STAT. § 135.025(3) (1997–98)).
73. *Id.* (citing *Bush v. Nat'l Sch. Studios*, 407 N.W.2d 883, 886–88 (Wis. 1987)).
74. *Id.*
75. WIS. STAT. § 135.025(3) (2021–22).
76. N.J. STAT. ANN. § 56:10-7(a) (West 2022).
77. *See* WIS. STAT. §§ 135.02(1)–(3); N.J. STAT. ANN. § 56:10-4(a).
78. *Morley-Murphy*, 142 F.3d at 381.

applicability only to agreements situated in Wisconsin.[79] In *Morley-Murphy*, as in *Instructional Systems*, the parties' decision to create a unitary, multistate dealership situated in a state protected with a broad franchise statute was the basis for efforts to apply that statute to conduct beyond the state's borders.

In the absence of a cogent basis for distinguishing *Instructional Systems*, the *Morley-Murphy* decision simply disagrees with the Third Circuit on how to apply dormant-Commerce Clause doctrine to the prospect of a state dealership law's extraterritorial impact. Such disagreement is not improper, but it crystallizes the issue here in ways that highlight the relevance of the recent *Ross* decision.

II. Recent Case Law Underscores that *Morley-Murphy*'s Analysis Is Incorrect

A. Ross *Clarifies that Antidiscrimination Is the Touchstone Inquiry under the Dormant Commerce Clause*

In *Ross*, the U.S. Supreme Court affirmed the constitutionality of California Proposition 12, which "forbids the in-state sale of whole pork meat that comes from breeding pigs (or their immediate offspring) that are 'confined in a cruel manner.'"[80] The petitioners in *Ross* based their constitutional challenge on the dormant Commerce Clause.[81] Under the dormant Commerce Clause, "state laws offend the Commerce Clause when they seek to 'build up . . . domestic commerce' through 'burdens upon the industry and business of other States.'"[82] The *Ross* petitioners "alleged that Proposition 12 violates the U.S. Constitution by impermissibly burdening interstate commerce" because the compliance costs will "be initially borne by out-of-state firms."[83]

In rejecting petitioners' claim, the *Ross* majority focused on the "antidiscrimination principle" at the core of dormant-Commerce Clause doctrine. That principle prohibits state laws "designed to benefit in-state interests by burdening out-of-state competitors."[84] Although the petitioners conceded that Proposition 12 does not purposefully

79. *See, e.g.*, *Neff Grp. Distribs., Inc. v. Cognex Corp.*, 642 F. Supp. 3d 173, 176–78 (D. Mass. 2022) (limiting the applicability of the WFDL to the parties' agreement for Wisconsin because separate agreements pertaining to (a) Indiana and (b) Ohio, Pennsylvania, and West Virginia "do not permit business transactions in the State of Wisconsin").

80. *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1150 (2023).

81. *Id.* at 1152.

82. *Id.* (quoting *Guy v. Baltimore*, 100 U.S. 434, 443 (1880)).

83. *Id.* at 1151.

84. *Id.* at 1153 (quoting *Dep't of Rev. of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008)).

discriminate against out-of-state pork producers, they advocated an "almost *per se* rule forbidding enforcement of state laws that have the practical effect of controlling commerce outside the State."[85] The Court flatly rejected this theory, recognizing that "[i]n our interconnected national marketplace, many (maybe most) state laws have the practical effect of controlling extraterritorial behavior;" among those state laws the Court noted were "franchise laws."[86] Moreover, such state laws have been "long understood to represent valid exercises of the states' constitutionally reserved powers."[87]

As a fallback theory that was more modest than their request for a bright-line rule, the petitioners urged the court to find Proposition 12 unconstitutional under the *Pike* balancing test by finding the "burden imposed on interstate commerce . . . clearly excessive in relation to the putative local benefits."[88] In rejecting this theory, the *Ross* Court turned again to antidiscrimination principles, which it held provide the guiding framework for *Pike* balancing because the "presence or absence of discrimination in practice" is decisive.[89] The Court explained that "no clear line separates the *Pike* line of cases from our core antidiscrimination precedents," clarifying that "the *Pike* line [of cases] serves as an important reminder that a law's practical effects may also disclose the presence of a discriminatory purpose."[90] But the petitioners "nowhere suggest[ed] that an examination of Proposition 12's practical effects in operation would disclose purposeful discrimination against out-of-state businesses."[91] In effect, Proposition 12 imposes "the same burdens on in-state pork producers that it imposes on out-of-state ones."[92] Accordingly, the Court was unwilling to apply *Pike* balancing to declare the law unconstitutional.[93]

The *Ross* majority ends with a warning that "extreme caution is warranted before a court deploys implied authority"—under the dormant Commerce Clause—to strike down laws adopted "against the backdrop of congressional silence."[94] "[O]nly 'where the infraction is clear'" should

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85. *Id.* at 1154 (internal quotation marks omitted).
86. *Id.* at 1156.
87. *Id.*
88. *Id.* at 1157.
89. *Id.* at 1158.
90. *Id.* at 1157 (cleaned up).
91. *Id.* at 1158.
92. *Id.* at 1153.
93. A plurality of the Court had additional observations about *Pike* balancing, *see id.* at 1159–64, but this Essay focuses only on portions of the opinion that garnered majority support.
94. *Id.* at 1165.

courts prevent enforcement of "a democratically adopted state law in the name of the dormant Commerce Clause."[95]

B. The Antidiscrimination Principle Makes Clear that the WFDL Can Apply to Wisconsin Dealerships Even beyond Wisconsin's Borders

The rationale of the *Ross* decision makes clear that the Seventh Circuit's suggestion in *Morley-Murphy* was wrong as a matter of law: allowing the WFDL to reach outside of Wisconsin in protecting the entirety of multistate dealership relationships that are situated in Wisconsin does not offend the dormant Commerce Clause. This follows from *Ross* because the WFDL does not discriminate, purposefully or even incidentally, against out-of-state businesses. In contrast, by focusing its analysis on the fact that the NJFPA does not discriminate against interstate commerce, the Third Circuit rightly concluded that the extraterritorial reach of that statute does not violate the Commerce Clause.[96]

For the dormant Commerce Clause to preclude application of the WFDL beyond the borders of Wisconsin, the antidiscrimination principle requires establishing a discriminatory purpose "designed to benefit in-state interests by burdening out-of-state competitors."[97] While the WFDL, especially as applied to multistate dealership relationships, has the potential to affect commerce outside of Wisconsin, that is not its purpose. The law applies equally to a Wisconsin-situated dealership that reaches one small part of Wisconsin, the whole of Wisconsin, or territory including Wisconsin and some areas beyond the state's borders. The law similarly has potential application to Wisconsin-situated dealerships where both dealer and grantor are Wisconsin businesses, where the dealer is a Wisconsin business but the grantor is not, and even where the grantor is a Wisconsin business but the dealer is not. The WFDL exists "[t]o protect dealers against unfair treatment by grantors, who inherently have superior economic power and superior bargaining power in the negotiation of dealerships."[98] But nothing in the statute seeks to advantage Wisconsin businesses specifically.

Since the WFDL is not discriminatory on its face, a challenge to extraterritorial enforcement would need to establish that the law's practical effects "disclose purposeful discrimination against out-of-state businesses."[99] Even before *Morley-Murphy*, the Seventh Circuit had articulated a nearly identical standard for dormant-Commerce Clause

95. *Id.* (quoting *Conway v. Taylor's Ex'r*, 66 U.S. 603, 634 (1862)).

96. *Instructional Sys., Inc. v. Comput. Curriculum Corp.*, 35 F.3d 813, 824–27 (3d Cir. 1994).

97. *Ross*, 143 S. Ct. at 1150.

98. WIS. STAT. § 135.025(2)(b) (2021–22).

99. *Ross*, 143 S. Ct. at 1158.

analyses: "Unless the law discriminates against interstate commerce expressly or in practical effect, there is no reason to require special justification."[100]

Neither in *Morley-Murphy* nor at any time since has the Seventh Circuit or any other court determined that the WFDL purposefully discriminates. In *Morley-Murphy*, the Seventh Circuit suggested that the WFDL could not reach outside of Wisconsin solely on the basis of a presumption against extraterritoriality and a desire to steer clear of any potential issues under the Commerce Clause.[101] The Seventh Circuit correctly stated that the Commerce Clause protects against "adversely affect[ing] interstate commerce by subjecting activities to inconsistent regulations."[102] The court then hypothesized that the risk of inconsistent regulations would arise if the WFDL were construed to apply extraterritorially.[103] But in its analysis, the Seventh Circuit never considered discriminatory effect, nor did it cite the *Pike* balancing test that then and now determines whether a state law oversteps in its effect on commerce in other states. It distinguished the Third Circuit's decision in *Instructional Systems*, but not in a compelling way that addressed that court's Commerce Clause analysis. *Morley-Murphy*'s dicta is, therefore, best understood as having applied a version of the "almost *per se*" rule expressly rejected by the Supreme Court in *Ross*. In light of "our interconnected national marketplace," *Ross* disavowed invalidating state laws based on such a presumption.[104]

Moreover, although *Morley-Murphy* concerned the recovery of damages from outside of the state, the *Ross* decision makes plain that there is no constitutional concern with the issuance of extraterritorial injunctive relief under the WFDL. Despite the constitutional issues raised with respect to damages, recent case law has revealed that whether injunctive relief should issue beyond Wisconsin's borders turns on how the territory is delineated. Where a dealership operates pursuant to a written agreement that spells out the territory covered under the agreement, courts have been willing to extend injunctive relief across the dealer's entire territory, so

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100. *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995).

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

102. *Id.* (quoting *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987)). *See also Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989) ("[T]he practical effect of the statute must be evaluated . . . also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.").

103. *Morley-Murphy*, 142 F.3d at 379.

104. *Ross*, 143 S. Ct. at 1156.

long as the dealer otherwise qualifies for protection under the WFDL.[105] But where the parties operate from an oral agreement, courts have been more wary of extending injunctive relief under the WFDL to the dealer's operations in other states.[106] Some have even cited the Commerce Clause as a basis for caution.[107] The *Ross* decision resolves this distinction and would allow courts—regardless of the form of the parties' agreement—to issue extraterritorial injunctive relief without running afoul of the Commerce Clause.[108]

CONCLUSION

Declining to enforce the WFDL based on *Morley-Murphy*'s suggestion does not constitute the "extreme caution" that the Supreme Court has repeatedly warned is necessary before striking down a law under dormant-Commerce Clause authority.[109] At the very least, the WFDL deserves a dormant-Commerce Clause analysis guided by the antidiscrimination principle, perhaps under the *Pike* balancing test if a plaintiff can show discriminatory effect against out-of-state businesses. But as long as a Commerce Clause infraction is not clearly established, courts should turn away from *Morley-Murphy*'s suggestion and allow dealers the opportunity to argue for enforcement of the WFDL as it is written, including to recover lost-profits damages arising from sales anticipated beyond the borders of Wisconsin. Anything else flies in the face of binding precedent.

105. *See, e.g.*, *Brava Salon Specialists, LLC v. Swedish Haircare, Inc.*, No. 22-cv-695, 2023 WL 1795512, at *6 (W.D. Wis. Feb. 7, 2023); *Rustic Retreats Log Homes, Inc. v. Pioneer Log Homes of Brit. Columbia Inc.*, No. 19-cv-1614, 2020 WL 3415645, at *10 (E.D. Wis. June 22, 2020).

106. *See, e.g.*, *Keen Edge Co., Inc. v. Wright Mfg., Inc.*, No. 19-cv-1673, 2020 WL 4926664 (E.D. Wis. Aug. 21, 2020).

107. *See Brava Salon Specialists*, 2023 WL 1795512, at *6.

108. While the issuance of extraterritorial injunctive relief would not raise constitutional concerns, as indicated above, it seems likely that where multiple contracts exist, a court could find that not all of the agreements were "situated in" Wisconsin. *See supra* note 79 and accompanying text.

109. *See Ross*, 143 S. Ct. at 1165 (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997)).