8-1-1985

American Motors Sales Corp. v. Peters: Green Light to Territorial Security for Automobile Dealers

Charles Noel Anderson Jr.

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation


Available at: http://scholarship.law.unc.edu/nclr/vol63/iss6/8

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
American Motors Sales Corp. v. Peters: Green Light to Territorial Security for Automobile Dealers

Motor vehicle dealers, through extensive lobbying efforts, have obtained an arsenal of statutory weapons to defend against manufacturers’ abuses of the franchise system. In North Carolina, the dealers’ main weapon is the Motor Vehicle Dealers and Manufacturers Licensing Law, which includes a provision regulating establishment of new franchises in the trade area of an existing franchise that distributes the same line-make of motor vehicles for the manufacturer. In a recent case, American Motors Sales Corp. v. Peters, a manufacturer argued that giving such territorial security to a dealer created a monopoly in violation of the North Carolina Constitution. The North Carolina Supreme Court, however, held the statutory provision constitutional. That finding, along with recent amendments to North Carolina General Statutes section 20-305(5), firmly established North Carolina dealers’ sovereignty within their trade areas—to the detriment of the average car buyer.

James Pennell had maintained a Jeep franchise from American Motors Corporation (AMC) in the North Wilkesboro market area since 1960. Even though Pennell failed for several years to sell the quota that AMC desired, in 1976 AMC granted Pennell a five-year extension on his franchise. In the

1. Automobile dealers possess a great deal of political power in the state legislatures. Macaulay, Law and Society: Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers, and the Legal System, 1965 Wis. L. Rev. 483, 516; Smith, Franchise Regulation: An Economic Analysis of State Restrictions on Automobile Distribution, 25 J. Law & Econ. 125, 154 (1982). “Often several legislators are automobile dealers. Dealers often are active in local and state politics and have close ties with legislators and party leaders. Finally... it costs the legislators little if anything to give benefits to the dealers since the large automobile manufacturers have little influence.” Macaulay, supra, at 522.

2. This arsenal includes licensing of manufacturers and restrictions on manufacturer-dealer relations. Smith, supra note 1, at 133. See infra notes 50-55 and accompanying text (listing various types of provisions found in state statutes); Note, State Motor Vehicle Franchise Legislation: A Survey and Due Process Challenge to Board Composition, 33 Vand. L. Rev. 385 (1980) (tracing the rise of the franchise as the primary automobile distribution device).


4. N.C. Gen. Stat. § 20-305 makes it unlawful for “any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or any representative whatsoever of any of them” to engage in certain enumerated conduct. See infra notes 102-122 and accompanying text.


6. “Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.” N.C. Const. art. I, § 34.


8. Id. at 324, 317 S.E.2d at 360.

9. The court held the statute constitutional both on its face and as applied to the facts. Id.

10. See infra note 123.


The amended version of N.C. Gen. Stat. § 305(5) (1983) specifically limits the size of the area that can be labelled market area. See infra notes 106-109 and accompanying text.


midst of this extension period, AMC granted an additional Jeep franchise in the North Wilkesboro Market Area to Hubert Vickers. Pennell then requested a hearing with the Commissioner of Motor Vehicles pursuant to section 20-305(5). The Commissioner conducted the hearing in March 1981 and ordered that Vickers' franchise "be enjoined, invalided, and revoked" and that AMC "be enjoined from granting Jeep franchises in the North Wilkesboro area without first complying with the procedure set forth in G.S. 20-305(5)." After a series of procedural steps in superior court, AMC and Vickers sought review before the North Carolina Court of Appeals.

On appeal AMC and Vickers raised three principal issues. First, AMC contended the Commissioner did not have the authority to issue an injunction. Second, AMC argued that section 305(5) was unconstitutional on its face because it allowed monopolies. Last, AMC said section 20-305(5) was unconstitutional "as applied in this case because it granted a monopoly to Pennell." The court of appeals held against the petitioners on each issue. The court noted that AMC could give Pennell an exclusive right to sell Jeeps in the North Wilkesboro trade area without violating the antimonopoly section of the North Carolina Constitution; the general assembly was not granting a monopoly by

severely restricts a manufacturer's ability to terminate a dealer, the manufacturer may find it easier to establish a new franchise in the same market area. "Thus, the legislature enacted G.S. 305(5) to prevent the distributor from doing indirectly what G.S. 305(6) prevents him from doing directly." Brief for Respondent at 6-7. See also Forest Home Dodge, Inc. v. Karns, 29 Wis. 2d 78, 138 N.W.2d 214 (1965) (court examined legislative history of a statute similar to N.C. GEN. STAT. § 305(5) (1983) and stated that "it was designed to prevent the manufacturer from accomplishing by new . . . dealerships what the law did not permit to be done directly"); S. MACAULAY, LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS 139 (1966) ("if a dealer could not be cancelled, he could be induced . . . to . . . resign his franchise 'voluntarily' by adding another dealer").
requiring AMC "to do what it could bargain to do if it desires to execute a contract." Judge Martin dissented, pointing out that the Georgia Supreme Court found that a similar statute violated the Georgia Constitution's prohibition against monopolies.

The North Carolina Supreme Court agreed with the court of appeals that section 20-305(5) did not violate the prohibition against monopolies but disagreed with the court of appeals' conclusion that the Commissioner of Motor Vehicles had not issued an injunction. The court reasoned that "many consumers in the North Wilkesboro Market Area may, in fact, be geographically closer to a Jeep dealer other than Pennell." Jeep franchises in contiguous counties, the court noted, could compete with one another for consumers who live near the boundaries of the trade area.

The court also ruled that section 20-305(5) was constitutional on its face, rejecting petitioners' claim that it created and perpetuated monopolies. The court quoted a 1974 decision in distinguishing horizontal from vertical restraints of trade:

The vertical agreement is one running from the producer down through the distributor to the ultimate retailer. The horizontal agreement is one made between dealers at the same level. The horizontal

---

23. Id. at 688-89, 294 S.E.2d at 767.
26. Peters, 311 N.C. at 322-23, 317 S.E.2d at 355. The court of appeals had sustained the commissioner's order "enjoining" AMC's grant of a franchise to Vicker on grounds that the commissioner had not issued an injunction in violation of the statute but had merely used this language "inartfully." Id. at 322, 317 S.E.2d at 355. The North Carolina Supreme Court held that "insofar as the Commissioner's order revoked . . . the franchise . . . it was within the Commission's statutorily delegated powers. Insofar as the order enjoined future practices of American Motors or Vickers, the order exceed[ed] the Commissioner's authority." Id. at 323, 317 S.E.2d at 360.
27. Id. at 317-18, 317 S.E.2d at 356.
28. Id.
29. Id. The court conceded that prohibiting additional franchises amounts to a restraint of trade. But the restraint of intrabrand trade contemplated by the statute in question is not such as to amount to the creation of a monopoly. While competition may not be as full and free as with multiple AMC Jeep franchises existing in the North Wilkesboro Market Area, it is by no means eliminated. More than a mere adverse effect on competition must arise before a restraint of trade becomes monopolistic.
30. Id. at 317-18, 317 S.E.2d at 357.
31. Petitioners argued:

Certainly, application of G.S. Sec. 20-305(5), in such a fashion as to permit an obviously inefficient dealership to continue operation without competition cannot pass constitutional muster under Article I, Sec. 34 of the State Constitution. Surely, it is not in the public interest and public welfare for a dealership like Pennell Motor Company to operate as a monopoly.

Brief for Petitioner at 8.
agreement is deemed contrary to the public interest because it stifles competition, whereas the vertical agreement is thought to leave to the public the benefit of competition at a given level of the marketing procedure.\textsuperscript{33}

The court concluded that horizontal restraints "impede competition and lead inexorably to increased prices, . . . the evil which the anti-monopoly provision seeks to prevent."\textsuperscript{34} Vertical restraints are not viewed as offensive because they do not prevent competition among dealers.\textsuperscript{35} The court distinguished two earlier decisions,\textsuperscript{36} which had held that certain licensing requirements violated the antimonopoly clause,\textsuperscript{37} as involving horizontal restraints on trade.\textsuperscript{38}

After establishing that the statute was a vertical and thus legitimate restraint on trade, the court discussed the particular policy favoring protection of dealers. The court noted that manufacturers occupy a dominant position when bargaining with their franchisees.\textsuperscript{39} To correct this imbalance, state legislatures have enacted statutes to protect dealers.\textsuperscript{40} The court concluded that this legisla-


To complete the analogy, the court could have discussed Waldron Buick Co. v. General Motors Corp., 254 N.C. 117, 118 S.E.2d 559 (1961). In Waldron, the court held that an exclusive franchise agreement between General Motors and a franchisee did not violate North Carolina's version of the Sherman Act, N.C. GEN. STAT. § 75-1 (1981), as an unreasonable restraint on trade. Waldron, 254 N.C. at 129, 118 S.E.2d at 568.

Automobile manufacturers in several jurisdictions have challenged statutes such as N.C. GEN. STAT. § 305(5) (1983) as violating the antitrust laws. See infra notes 73-76 and accompanying text.

\textsuperscript{34} Peters, 311 N.C. at 318, 317 S.E.2d at 357.

\textsuperscript{35} Id.


\textsuperscript{37} In In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973), the court held that a statute regulating the construction of a private hospital on private property was unconstitutional. Id. at 548, 193 S.E.2d at 733. The court was primarily concerned with containing medical costs. Id. at 549, 193 S.E.2d at 734. In State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949), the court struck down as unconstitutional a licensing statute for photographers. Id. at 772, 51 S.E.2d at 736.

\textsuperscript{38} Peters, 311 N.C. at 320, 317 S.E.2d at 358. See infra note 96 and accompanying text.

\textsuperscript{39} Id. at 319, 317 S.E.2d at 358. This imbalance in bargaining power has been noted often. See, e.g., Kessler, Automobile Dealer Franchises: Vertical Integration by Contract, 66 YALE L.J. 1135, 1140 (1957) ("[O]ften the dealer must comply simply because of economic power of the manufacturer."); Macaulay, supra note 1, at 492-95 (dealer has "relatively little to bargain with"); Smith, supra note 1, at 131-32 (noting that manufacturers have greater bargaining power); Strand & French, The Automobile Dealer Franchise Act: Another Experiment in Federal Class Legislation, 25 GEO. WASH. L. REV. 667, 667-70 (1957) (dealer franchise system described as one in which the manufacturer maintains all control); see also New Motor Vehicle Bd. v. Orrin W. Fox, Co., 439 U.S. 96, 100-01 (1978) (discussing due process aspects of territorial security statutes); Mazda Motors of Am., Inc. v. Southwestern Motors, Inc., 36 N.C. App. 1, 243 S.E.2d 793 (1978) (determining whether termination of franchise agreement violated statute), modified on other grounds, 296 N.C. 359, 250 S.E.2d 250 (1979); infra note 46 (discussing the superior bargaining power of automobile manufacturers).

\textsuperscript{40} "Currently, every state regulates at least some aspect of the distribution." Smith, supra
tive response to the unequal bargaining power was a "valid exercise of the state's extensive police power;" section 20-305(5) protects the "franchisees from abuses of vertical integration." The Peters court chose not to follow the Georgia Supreme Court, which struck down a similar statute; the court noted that Georgia's constitution not only prohibited monopolies, but also prohibited legislation that would diminish competition. In holding section 20-305(5) constitutional, the North Carolina Supreme Court aligned itself with the majority of other jurisdictions. Abusive tactics employed by automobile manufacturers after World War II resulted in state and federal legislation to protect motor vehicle dealers. In

note 1, at 133. "Of the fifty states, all but five have legislation that focuses directly upon the automobile manufacturer-dealer relationship." Note, supra note 2, at 399.


42. Peters, 311 N.C. at 321, 317 S.E.2d at 359. The introductory paragraph to the Motor Vehicle Dealers and Manufacturers Licensing Law states:

The General Assembly finds and declares that the distribution of motor vehicles in the State of North Carolina vitally affects the general economy of the State and the public interest and public welfare, and in the exercise of its police power, it is necessary to regulate and license motor vehicle manufacturers, distributors, dealers, salesmen, and their representatives doing business in North Carolina, in order to prevent frauds, impositions and other abuses upon its citizens and to protect and preserve the investments and priorities of the citizens of this State.

N.C. GEN. STAT. § 20-285 (1983). If the public interest is so in need of protection, why are dealers the only parties who can object to a manufacturer's actions under N.C. GEN. STAT. § 305(5) (1983)? The court in Tober Motors, Inc. v. Reiter Oldsmobiles, Inc., 376 Mass. 313, 381 N.E.2d 908 (1978), in distinguishing the statute at issue there from that in General GMC Trucks, Inc. v. General Motors Corp., 239 Ga. 373, 237 S.E.2d 194 (1977), stated: "These cases can be distinguished on the ground that the laws seemed to make harm to existing dealers the only relevant criterion for judging the propriety of a new franchise, a feature giving an anti-competitive cast to the statutes." Id. at 324, 381 N.E.2d at 913 (emphasis added). See infra notes 50 & 94 and accompanying text.

43. Peters, 311 N.C. at 321, 317 S.E.2d at 359; see supra notes 24-25 and accompanying text.

44. Peters, 311 N.C. at 321, 317 S.E.2d at 359. The court stated: "We decline to follow Georgia Franchise, noting that the Georgia constitutional provision, unlike its North Carolina counterpart, concerns legislation having 'the effect ... of defeating or lessening competition ...' as well as 'encouraging a monopoly.' Thus, its scope seems considerably more far-reaching into the area of commerce than our anti-monopoly provision." Id.

45. See infra notes 60-61, 66 and accompanying text.


During this period all manufacturers sought to induce dealers to sell more cars. Promotions [for factory representatives] came to those who produced sales, and the more the dealers were pushed, the more they sold. Some dealers flourished. Some quit. Others were cancelled by the factory or pushed into involuntary "voluntary" termination. Id. at 16-19. It has been well-documented that manufacturers abused their superior bargaining power over dealers. See Macaulay, supra note 1, at 495-506; Strand & French, supra note 39, at 668-70. Manufacturers' power over dealers stems from the system of distribution. [The dealer pays for much of the distribution system in the automobile industry, and his money rather than the manufacturer's is tied up in bricks and mortar, and, more importantly, in unsold new automobiles. The selling agreement is drafted by the manufacturer's lawyers in fairly legal language and accepted without change by the dealer. Typically, the manufacturer gets what it wants from its dealers. It often has more applicants who would like to be dealers than it has dealerships available. A dealer is in a
1956 Congress enacted the Automobile Dealers' Day in Court Act, which gave dealers a federal cause of action against manufacturers who did not act in "good faith." The Act did not protect dealers' territorial security, despite lobbying by the National Association of Automobile Dealers for such a provision.

very bad position if his franchise is terminated. Upon termination it is difficult to salvage his large investment because a cancelled dealer has difficulty selling his building, tools, inventory, and good will to another dealer.

Macaulay, supra note 1, at 489-95. Smith proposes an alternative hypothesis:

[F]ranchising is used by the industry because it provides a balance of retail incentives and effective control which is favorable to the manufacturer. This assertion differs from earlier explanations of the use of franchising by the auto industry, most of which regard the franchise system as a mechanism for raising capital quickly. Such explanations are not sufficient since they fail to explain why alternative systems of organization do not arise once the alleged capital shortage problem is solved.

Smith, supra note 1, at 126.


[M]the act provides legal remedies for dealers harmed by the actions of manufacturers which are not in good faith . . . . While a few states had enacted statutes pertaining to regulation of automobile distribution as early as the 1930's and 1940's, most of them did not substantially strengthen the legal rights of dealers. Since the 1956 Dealers' Day in Court Act, state regulation of automobile distributors has undergone significant changes.

Smith, supra note 1, at 132-33.

The Monroney Committee, a subcommittee of the Senate Committee on Interstate and Foreign Commerce, studied automobile distribution. Three of the committee members were closely linked with automobile dealers: Senator Paine was a former dealer; Senator Monroney's college roommate was a General Motors dealer; and Senator Thurmond served in the Army Reserve with the legislative counsel for the National Automobile Dealers' Association. S. MACAULAY, supra note 46, at 62-63.

The bill was amended significantly. For a description of the legislative history of the Act, see Kessler, supra note 39.

48. The statute provides:

An automobile dealer may bring suit against any automobile manufacturer . . . and shall recover the damages by him sustained and the cost of the suit by reason of the failure of said automobile manufacturer . . . to act in good faith in performing . . . with any of the terms or provisions of the franchise, or in terminating, cancelling, or not renewing the franchise with said dealer . . . .


49. The Eisenhower administration opposed a territorial security provision.

William P. Rogers, Deputy Attorney General, wrote Senator O'Mahoney about the Eisenhower Administration's views on . . . the good faith bills. In short, he said that the Administration did not like them. While it had no strong objection to legislation dealing with coercion, it opposed any legislative authorization for "territorial security" . . . because such [provision] would protect franchised dealers at the cost of denying consumers the benefits of competition . . . . These comments were consistent with the antitrust philosophy of the Department of Justice. Conveniently, they also pleased Ford and General Motors whose officers were supporters of the Eisenhower campaign for re-election.

S. MACAULAY, supra note 46, at 62-63.


The bill does not freeze present channels or methods of automobile distribution and would not prohibit a manufacturer from appointing an additional dealer in a community provided that the establishment of the new dealer is not a device by the manufacturer to coerce or intimidate an existing dealer. The committee emphasizes that the bill does not afford the dealer the right to be free from competition from additional franchise dealers. Appointment of added dealers in an area is a normal competitive method for securing better distri-
The state legislative schemes protecting dealers vary widely and may contain, along with legislative findings and declarations, provisions for licensing, provisions for boards and commissions, restrictions on franchise termination, restrictions on franchise establishment, and prohibitions on coercion and price discrimination. The North Carolina General Assembly acted even before Congress in passing “An Act to provide for the licensing of Motor Vehicle Dealers, Salesmen, Manufacturers, Distributors, and Factory Representatives” in May 1955. No provision for territorial security was enacted, however, until 1973.

Automobile manufacturers challenged the legislation protecting dealers on constitutional grounds. The manufacturers tried a number of different legal theories but were largely unsuccessful. Most courts rejected the manufacturers’ argument that such statutes violated the due process clause of the United States Constitution as well as the argument that the statutes represented spe-bution and curtailment of this right would be inconsistent with the antitrust objectives of this legislation.


Many state regulatory schemes begin with a provision setting forth either legislative findings or declarations of public policy. These provisions are included because state legislatures may not use their powers to protect special groups from competition, and legislation that is not “affected with the public interest” is outside the police power of the state. Id. But “one must ask whether the public is actually benefitted by these laws.” Id. at 401, n.106. Justice Stevens answers this question in the negative in his dissent in New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 120 (1978) (Stevens, J., dissenting). See supra note 42; infra notes 94-95 and accompanying text.

50. Note, supra note 2, at 400.

Many state regulatory schemes begin with a provision setting forth either legislative findings or declarations of public policy. These provisions are included because state legislatures may not use their powers to protect special groups from competition, and legislation that is not “affected with the public interest” is outside the police power of the state. Id. But “one must ask whether the public is actually benefitted by these laws.” Id. at 401, n.106. Justice Stevens answers this question in the negative in his dissent in New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 120 (1978) (Stevens, J., dissenting). See supra note 42; infra notes 94-95 and accompanying text.

50. Note, supra note 2, at 400.

51. Id. at 403-05.

52. Id. at 405-08.

53. Id. at 408-10. Wisconsin was the first state to adopt a territorial security provision.

Some representatives of dealer associations have charged that the manufacturers have used and still use another tactic to blunt the effect of the state statutes. If a dealer could not be cancelled, he could be induced . . . to give up and resign his franchise “voluntarily” by adding another franchised dealer selling his make in his area. . . . The Wisconsin Automotive Traders Association reacted to this device by successfully proposing an amendment to the Wisconsin legislation. . . . Dealer associations in other states may push for similar provisions now that it has been declared constitutional by the Supreme Court of Wisconsin; manufacturers view it with horror.

S. MACAULAY, supra note 46, at 139. The Wisconsin Supreme Court upheld this provision against equal protection, interstate commerce, and vagueness challenges in Forest Home Dodge, Inc. v. Karns, 29 Wis. 2d 78, 138 N.W.2d 214 (1965).

55. Note, supra note 2, at 411.


58. Note, supra note 2, at 419.


60. See, e.g., Blenke Brothers Co. v. Ford Motor Co., 203 F. Supp. 670 (N.D. Ind. 1962) (Federal Dealers' Day in Court Act is not arbitrary and is constitutional); Chrysler Corp. v. New Motor Vehicle Bd., 89 Cal. App. 3d 1034, 153 Cal. Rptr. 135 (1979) (presence of dealers on the New Motor Vehicle Board did not deprive manufacturers of an unbiased tribunal); Tober Foreign Motors, Inc.
cial interest legislation and were therefore an improper exercise of the police power.61

The United States Supreme Court, in *New Motor Vehicle Board v. Orrin W. Fox Co.*, 62 recently upheld a California statute similar to section 20-305(5) against various challenges, including an attack based on the due process clause.63 The main issue before the Court was "whether California may, by rule or statute, temporarily delay the establishment or relocation of automobile dealerships pending the Board's adjudication of the protests of existing dealers."64 The Court held that, "[e]ven if the right to franchise had constituted a protected interest when California enacted the Automobile Franchise Act, California's Legislature was still constitutionally empowered to enact a general scheme of business regulation that imposed reasonable restrictions upon the exercise of the right."65 In short, the Court gave a green light to state regulation of franchise areas for automobile dealers.

Many courts determining the validity of automobile dealer statutes have considered whether such statutes violate the commerce clause of the United States Constitution.66 The United States Court of Appeals for the Fourth Cir-

v. Reiter Oldsmobile, Inc., 376 Mass. 313, 381 N.E.2d 908 (1978) (statute specific enough for due process); Ford Motor Co. v. Pace, 206 Tenn. 559, 335 S.W.2d 360 (upholding make-up of the board), *appeal dismissed*, 364 U.S. 444 (1960); General Motors Corp. v. Capitol Chevrolet, 645 S.W.2d 250 (Tenn. 1983) (presence of dealers on board does not violate due process).

*But see* American Motors Sales Corp. v. New Motor Vehicle Bd., 69 Cal. App. 3d 983, 138 Cal. Rptr. 594 (1977) (statute requiring that dealers be on the board unconstitutional); Desert Chrysler-Plymouth, Inc. v. Chrysler Corp., 95 Nev. 640, 600 F.2d 1189 (1979) (Nevada statute violates due process "since appellants were able to obtain a de facto injunction simply by the filing of the action"), *cert. denied*, 445 U.S. 964 (1980).


The Georgia Supreme Court believed such provisions exceeded the proper use of police powers. In *General GMC Trucks, Inc. v. General Motors Corp.*, 239 Ga. 373, 377, 237 S.E.2d 194, 197 (1977), the court said, "[W]e view this legislation . . . as purely anti-competitive and thus not 'affected with the public interest' and within the police power of the state." In Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc., 244 Ga. 800, 802, 262 S.E.2d 106, 108 (1979), the court said, "[T]he cited sections violate the due process clause by seeking to regulate an industry not affected with a public interest . . . ."


63. Id. at 104.

64. Id. at 106. The Court also considered whether the statute violated the Sherman Act. *See infra* note 73-75 and accompanying text (describing the Court's handling of the Sherman Act issue).


66. The commerce clause of the United States Constitution grants Congress the power "to regulate commerce . . . among the several states . . . ." U.S. CONST. art. I, § 8. "Thus, when a state regulation conflicts with federal regulations enacted under the commerce clause, the federal
cuit recently held that the Virginia statute providing territorial security did not violate the commerce clause. The court used a three-part test: whether the statute promoted a legitimate local purpose; whether the statute treated interstate and intrastate commerce even-handedly; and whether the burden imposed on commerce was excessive when balanced against the state's interest.

Relying on Orrin, the court held that Virginia's statute promoted a legitimate local purpose. The statute did not discriminate between "manufacturers that produce cars within the state and those that do not." Finally, the court held that the statute did not unduly burden interstate commerce.

Territorial security statutes also have survived antitrust challenges based on the Sherman Act. The antitrust laws are intended to preserve competition. The Supreme Court in Orrin settled—or perhaps circumvented—the Sherman Act question in short order by finding the California dealer statute immune from Sherman Act scrutiny:

The dispositive answer is that the Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the "state action" exemption.


See American Motors Sales Corp. v. Division of Motor Vehicles, 592 F.2d 219 (4th Cir. 1979) (Virginia statute regulating number of new franchises did not violate commerce clause), rev'd 445 F. Supp. 902 (E.D. Va. 1978); Chrysler Corp. v. New Motor Vehicle Board, 89 Cal. App. 3d 1034, 153 Cal. Rptr. 135 (1979) (statute did not violate the commerce clause); Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc., 376 Mass. 313, 381 N.E.2d 908 (1978) (statute valid under the commerce clause); Ford Motor Co. v. Pace, 206 Tenn. 559, 335 S.W.2d 360 (statute constitutional notwithstanding the commerce clause), appeal dismissed, 364 U.S. 444 (1960); Forest Home Dodge, Inc. v. Korns, 29 Wis. 2d 78, 138 N.W.2d 214 (1965) (statute does not violate the commerce clause).

But see General GMC Trucks, Inc. v. General Motors Corp., 239 Ga. 373, 237 S.E.2d 194 (1977) (statute violates commerce clause).

67. VA. CODE § 46.1-547(d) (1980).
68. American Motors Sales Corp. v. Division of Motor Vehicles, 592 F.2d 219, 223 (4th Cir. 1978).
69. Id. at 222. "[A]n important factor in analyzing all such cases attacking state regulation affecting interstate commerce is not only whether as an absolute matter the burden on interstate commerce is substantial but in addition whether the burden imposed on such commerce is discriminating in favor of local concerns." J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 66, at 277.
70. American Motors Sales Corp. v. Division of Motor Vehicles, 592 F.2d 219, 222 (4th Cir. 1978). The court found support for this proposition in a footnote in Orrin, which stated, "For a helpful discussion of the purpose served by such laws—the promotion of fair dealing and protection of small business—see Forest Home Dodge, Inc. . . ." Orrin, 439 U.S. at 102 n.7.
71. American Motors Sales Corp. v. Division of Motor Vehicles, 592 F.2d 219, 223 (4th Cir. 1978).
72. Id. at 224. Note that in General GMC Trucks, Inc. v. General Motors Corp., 239 Ga. 373, 376, 237 S.E.2d 194, 196 (1977), the Georgia Supreme Court stated, "There can be no question but that the regulation limiting the available market for General Motors imposes a burden on interstate commerce."
75. Orrin, 439 U.S. at 109.
The holding that such statutes come under the “state action” exemption complements several cases upholding a manufacturer’s right to contract privately for exclusive dealership arrangements. The statutory schemes establish territorial security analogous to an exclusive dealership arranged by contract. In either case, territorial security may be obtained without violating the Sherman Act.

Given manufacturers’ general lack of success in challenging these statutes, the court’s decision in Peters is not surprising. In fact, it is consistent with decisions in other jurisdictions. Manufacturers have been so unsuccessful in challenging dealer franchise statutes on federal constitutional and antitrust grounds that AMC had little choice in Peters but to challenge section 20-305(5) on the grounds that it violated the antimonopoly provision of the North Carolina Constitution. Orrin prevented any due process or Sherman Act challenges, and the decision of the United States Court of Appeals for the Fourth Circuit upholding a similar Virginia statute suggested that a commerce clause claim would not be successful. The argument that the general assembly exceeded its police powers was unattractive because the introductory paragraph to the Motor Vehicle Dealers and Manufacturers Licensing Law affirmatively declares a public interest in regulating the relationship, and Mazda Motors v. Southwestern Motors had indicated that the courts probably would not ignore the general assembly’s declaration of public interest.

AMC’s argument that the statute violated the antimonopolies clause was the only avenue unresolved by a court of authority. The supreme courts of Georgia and Tennessee had reached contrary conclusions on whether the dealer statutes sanctioned unconstitutional monopolies. In Georgia Franchise Practices


Courts generally state that exclusive arrangements create “a monopoly only in the manufacturer’s brand of a product, and not in the product itself.” Annot., 9 L. Ed. 2d 1235, 1237 (1963). See generally Aycock, supra note 33, at 237-38 (describing the exclusive selling arrangement); Note, supra note 33 (discussing vertical territorial restrictions); 9 N.C. INDEX 3D Monopolies § 2.2 (1977) (auto manufacturer may execute contracts giving dealers exclusive rights); 54 AM. JUR. 2d Monopolies § 74 (1971) (vertical restrictions as to sales territories are not per se violations of the Sherman Act).

H. BROWN, FRANCHISING REALITIES AND REMEDIES 311 (2d ed. 1978) states:

Where the franchisor is only in a vertical position with its franchisees, the present rule appears to be that, in the absence of other anticompetitive practices, a franchisor may grant its dealers exclusive territories for products or services which are in free and open competition with those of a similar kind.

77. See supra notes 63-65 and accompanying text.

78. See supra notes 67-72 and accompanying text.

79. N.C. GEN STAT. § 20-285 (1983); see supra note 42.


81. “Additionally, the presumption is that the judgment of the General Assembly is correct and constitutional, and a statute will not be declared unconstitutional unless the conclusion is so clear that no reasonable doubt can arise.” Id. at 7, 243 S.E.2d at 798; see also supra note 61 and accompanying text (citing cases upholding similar statutes in the face of police power challenges).
v. Massey-Ferguson, the Georgia Supreme Court held that certain sections of the Georgia Franchise Practices Act violated a provision of the Georgia Constitution "declaring illegal all contracts and agreements that may have the effect or be intended to have the effect to defeat or lessen competition, or to encourage monopoly." The Tennessee Supreme Court reached the opposite conclusion in General Motors Corp. v. Capital Chevrolet Co., holding that the territorial security statute did not violate the state constitutional prohibition against monopolies. Armed with little better than that split in decisions, AMC brought the state constitutional issue before the North Carolina Supreme Court.

In holding section 20-305(5) to be constitutional on its face, the court focused on three points. First, the court determined that the statute represented a "valid exercise of the state's extensive police power . . . ." Second, the court distinguished between impermissible horizontal and permissible vertical restraints on trade. The court characterized section 20-305(5) as a vertical restraint, whereas the cases relied on by AMC involved illegal horizontal restraints. "Vertical restraints," the court said, "do not in and of themselves, result in monopolies." Last, the court emphasized the public policy in favor of regulating the establishment of new franchises.

Justice Stevens, dissenting in Orrin, noted a weakness in the determination that dealer monopoly statutes are a valid exercise of the state's police power:

The conclusion that there is no state policy against new dealerships is further confirmed by the statutory limitation on the persons who have standing to object to a proposed new opening. Most significantly, no public agency has any independent right to initiate an objection, to

---

82. 244 Ga. 800, 262 S.E.2d 106 (1979).
84. Georgia Franchise Practices, 244 Ga. at 801, 262 S.E.2d at 107.
85. 645 S.W.2d 230 (Tenn. 1983).
86. TENN. CODE ANN. § 55-17-114(c)(17) (Supp. 1983):
   (c) [The commission may deny an application for a license or revoke or suspend the license of a manufacturer . . . who:

   . . . . .
   (17) Has competed with a dealer in the same line-make operating under an agreement or franchise from a manufacturer or distributor in the relevant market area.

   This provision is similar to N.C. GEN. STAT. § 20-305(5) (1983). See infra note 116.
87. Capital Chevrolet Co., 645 S.W.2d at 238. The Tennessee Supreme Court stated: "We find no merit whatever in the suggestion of General Motors that the statutes in question purport to create a monopoly and do not consider that the matter warrants extended discussion." Id.

   The Tennessee Constitution states, "Monopolies are contrary to the genius of a free state."
   TENN. CONST. art. I, § 22.
88. See supra note 20 and accompanying text.
89. Peters, 311 N.C. at 320, 317 S.E.2d at 358. See supra note 41 and accompanying text.
90. See infra notes 32-36 and accompanying text.
93. See infra notes 39-42 and accompanying text.
schedule a hearing, or to prohibit such a charge. Nor does any member of the consuming public have standing to complain.\footnote{94} The majority in \textit{Orrin}, however, was not impressed with this argument,\footnote{95} and the North Carolina court did not consider it. Nonetheless, it is contradictory to declare that the public needs protection by way of the state's police power, but to deny the consuming public standing to complain.

The \textit{Peters} court's analysis is also weak in that, to distinguish the two cases relied on by AMC, the court had to rely on antitrust law. The cases could have been distinguished more easily from \textit{Peters}: both involved statutes enacted \textit{in excess} of the legislature's police power.\footnote{96} Since the court established that section 20-305(5) was a valid exercise of police power, these cases were not persuasive. Furthermore, in each of these cases, the discussion of the antimonopolies clause was merely tangential to the outcome.

The most troubling weakness in the court's analysis is that, in emphasizing the public policy in favor of regulating the establishment of new franchises,\footnote{97} the court failed to note the public policy arguments \textit{against} such statutory protection of dealers. There is evidence that territorial protection results in "a large wealth transfer from consumers to dealers and a reduction in the volume of new-vehicle sales."\footnote{98} Furthermore, "[i]n growing markets this restriction will lead to substantial increases in the market power of existing dealers."\footnote{99} It also can be argued that protection for existing dealers comes at the expense of future dealers.\footnote{100} New dealers must make significant capital investments in the early stages of the franchise.\footnote{101} If actual operation of franchises is delayed a long time, new investors will be discouraged from entering the industry, because few can afford to tie up large amounts of capital awaiting administrative action. Clearly, some public policy arguments cut against legislated territorial restraints on automobile franchises. Even if these arguments were not strong enough to mandate a

\footnote{96} In \textit{In re Certificate of Need for Aston Park Hosp., Inc.}, 282 N.C. 542, 551, 193 S.E.2d 729, 735 (1973), the court said of the police power: "[w]e find no such reasonable relation between the denial of the right of a person, association or corporation to construct and operate upon his or its own property, with his or its own funds, an adequately staffed and equipped hospital and the promotion of public health." In \textit{State v. Ballance}, 229 N.C. 764, 770, 51 S.E.2d 731, 735 (1949), the court said: "[t]herefore, a statute which prevents any person from engaging in any legitimate business, occupation, or trade cannot be sustained as a valid exercise of the police power unless the promotion or protection of the public health, morals, order, or safety, or the general welfare makes it reasonably necessary."  
\footnote{97} \textit{See supra} notes 39-42 and accompanying text.  
\footnote{98} Smith, \textit{supra} note 1, at 154.  
\footnote{99} Smith, \textit{supra} note 1, at 138.  
\footnote{100} Justice Stevens stated in his \textit{Orrin} dissent:  
\footnote{101} By the same token, the legislative judgment that manufacturers have greater bargaining power than dealers and may have sometimes used it abusively by threatening to overload dealers' markets with intrabrand competition does not provide a justification for a statutory procedure that deprives all manufacturers and all new dealers of their liberty and property without due process. \textit{Orrin}, 439 U.S. 96, 116 n.4 (Stevens, J., dissenting).  
\footnote{101} Brown \& Conwill, \textit{Automobile Manufacturer-Dealer Legislation}, \textit{57} \textit{COLUM. L. REV.} 219, 387 (1957).
different conclusion, they should have been mentioned to indicate possible limits to the territorial protections that the court would accept.

The *Peters* court upheld section 20-305(5), giving automobile dealers a commanding position with respect to both manufacturers and consumers. In 1983 the general assembly amended section 20-305(5) to increase the dealers' already superior position. The significant additions are: (1) a definition of the relevant market area; (2) an increase in the time limits for administrative hearings; (3) a provision regulating the relocation of existing dealers; and (4) a listing of standards to be considered in deciding whether a new franchise is justified. The net effect of these changes, along with the North Carolina Supreme Court's holding that the concept of statutory territorial security is constitutional on its face, exacerbates problems for the consumer.

As originally enacted, section 20-305(5) regulated a manufacturer's efforts to "grant an additional franchise for a particular line-make of motor vehicle in a trade area already served by a dealer or dealers in that line-make . . . ." "Trade area" was defined simply as "those areas specified in the franchise agreement or determined by the Motor Vehicle Dealers' Advisory Board." Section 20-305(5) as amended uses the term "relevant market area," which is defined as an area within a ten, fifteen, or twenty mile radius of the existing dealer; the distance of the radius is to be determined by the population of that area. The population criterion, however, is vague, and one could argue that a twenty mile radius is too protective of dealers in rural areas. Nevertheless, considering that the trade area in *Peters* included an area larger than the statute's twenty mile radius area, the court can be expected to uphold this portion of the statute.

The most disturbing change in section 20-305(5) is the new time frame for administrative procedures under the Act. Section 20-305(5) requires a manufacturer to notify existing dealers and the Commissioner of plans to establish a new dealership in the relevant market area. Existing dealers in the same line-make then have thirty days in which to file a protest with the Commissioner. "The Commissioner must conduct the hearing and render his final determination . . . no later than 180 days after a protest is filed." Thus, an existing dealer effectively can block the establishment of a new dealership for up to 210

---

104. Id. § 20-305(5) (1978).
105. Id.
106. Id. § 20-305(5) (1983).
107. Id. § 20-286(13)(b).
108. One problem is readily identifiable: For a dealership near a state boundary, does the population count include census tracts outside the state?
110. As originally enacted, the only time requirement was that an existing dealer file a complaint with the Commissioner within 30 days of receiving notice from the franchisor that a new dealership was planned. Act of March 16, 1973, ch. 88, § 2, 1973 N.C. Sess. Laws 68, 68.
112. Id.
113. Id. § 20-305(5)(c) (1983).
days—arguably an excessive waiting period.\textsuperscript{115}

The amended version of section 20-305(5) also regulates the relocation of an existing dealer in the relevant market area of another existing dealer of the same line-make. The original statute regulated only the granting of “an additional franchise for a particular line-make . . . .”\textsuperscript{116} The new provision will discourage dealers from relocating, even though population shifts and neighborhood changes might make such a change beneficial.\textsuperscript{117} This reluctance to relocate could affect consumers adversely because they might have to return to decaying neighborhoods after the sale to have their autos serviced.

Finally, section 20-305(5) as amended provides a list, which is not exclusive,\textsuperscript{118} of criteria to be used in “determining whether good cause has been established for not entering into or relocating an additional . . . dealer for the same line-make . . . .”\textsuperscript{119} The original act required only “reasonable evidence that after the grant of the new franchise, the market will not support all of the dealerships in that line-make in the trade area.”\textsuperscript{120} Several of the listed criteria encompass the effect of a new franchise on consumers\textsuperscript{121} and thus, this addition is a welcome change. The final criterion is “[t]he effect on the relocating dealer of a denial of its relocation into the relevant market area.”\textsuperscript{122} This provision, if considered carefully, might alleviate the negative effects of the new provision regulating relocation and dispel some of the reluctance to relocate that the new regulation could engender.

The net result of the amendment of section 20-305(5) is to entrench further the existing dealers, at the expense of the consuming public and prospective franchisees. Consumers will pay higher prices for new automobiles and receive less service than desired after purchase.\textsuperscript{123} The entrenched dealers now have no

\textsuperscript{114} Furthermore, any party to the hearing “shall have a right of review of the decision in a court of competent jurisdiction pursuant to Chapter 105A of the General Statutes.” N.C. GEN. STAT. § 20-305(5)(d) (1983). Thus, a protesting dealer could block establishment of a new dealership for far longer than 210 days.

\textsuperscript{115} The Court in \textit{Orrin} faced a similar statute. The California statute has a time frame of 90 days; however, a 90 day extension can be granted on a showing of good cause. CAL. VEH. CODE § 3066 (West Supp. 1978). The Court did not discuss the possibility that 180 days was an excessive waiting period for the new dealership.

\textsuperscript{116} Act of March 16, 1973, ch. 88, § 2, 1973 N.C. Sess. Laws 68, 68-69. The amended version regulates manufacturers “establishing an additional new motor vehicle dealer or relocating an existing new motor vehicle dealer into a relevant market area where the same line make is then represented.” N.C. GEN. STAT. § 20-305(5) (1983).

\textsuperscript{117} \textit{See} S. MACAULAY, supra note 45, at 172:

[As] the population of a city moves to the suburbs, . . . some older dealerships lose their customers and find themselves in undesirable locations. The solution is obvious and expensive: move the location of the dealership and build new facilities.

\textit{Id.}

\textsuperscript{118} N.C. GEN. STAT. § 20-305(5)(b) (1983).

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Id.} § 20-305(5) (1978).

\textsuperscript{121} The statute’s consumer-oriented criteria include the following: “effect on the consuming public”; “whether it is injurious or beneficial to the public welfare for an additional new motor vehicle dealer to be established”; “[w]hether . . . dealers . . . are providing adequate competition and convenient customer care”; and “[w]hether the relocated franchise . . . would increase competition in a manner such as to be in the long-term public interest.” \textit{Id.} § 20-305(5)(b)(3-6) (1983).

\textsuperscript{122} \textit{Id.} § 20-305(5)(b)(7) (1983).

\textsuperscript{123} One writer stated, “Automobile consumers are not an organized interest group, and they
motivation to offer competitive prices within their line-make or to provide quality service after sales. It is ironic that the purported justification for these adverse effects on consumers is to protect "the investments and priorities of the citizens of this State." 124

The North Carolina Supreme Court correctly answered the constitutional questions before it in American Motors Sales Corp. v. Peters. 125 The court's decision, along with the recent United States Supreme Court decision in New Motor Vehicle Board v. Orrin W. Fox Co., 126 and the decision of the United States Court of Appeals for the Fourth Circuit in American Motors Sales Corp. v. Division of Motor Vehicles, 127 firmly establishes that statutes providing existing dealers with territorial security will be upheld, at least against challenges that the statutes violate antimonopoly clauses, the due process clause, the commerce clause, or federal antitrust legislation. Although the court correctly held section 20-305(5) constitutional, the court should have discussed the statute's adverse effect on consumers. By discussing only the manufacturers' disproportionate bargaining power, 128 the court failed to counter the dealers' erroneous assertion that such legislation is unqualifiedly for the public good. So far, consumers of new automobiles have not organized themselves politically 129 and have failed to object loudly enough to prevent legislation that benefits dealers at the expense of the buying public. Peters proves that relief cannot come from the courts; if consumers want healthy competition to determine new automobile prices and the quality of service after the sale, they should target section 20-305(5) for repeal. 130

CHARLES NOEL ANDERSON, JR.

could be the ones to pay the price of some types of accommodation between dealers and manufacturers in the form of higher prices, poorer products, and less reliable service." S. MACAULAY, supra note 46, at 181. A Raleigh, North Carolina, newspaper editor sounded the same concern:

The prime effect of [the] bill would be to entrench dealers and even extend their trade areas. Anybody who believes this will work to the benefit of the average car buyer should be checked for missing sparkplugs. The so-called model law of the National Automobile Dealers Association should be junked.


127. 592 F.2d 219 (4th Cir. 1978). See supra notes 67-72 and accompanying text.
128. See supra notes 97-101 and accompanying text.
129. "As to why consumers have tacitly permitted themselves to be taxed for the benefit of dealers, the answer must lie in the cost of learning about the transfer, and then organizing an effective political coalition to deal with it." Smith, supra note 1, at 154.