

Nos. 101585 and 101601

---

IN THE SUPREME COURT OF ILLINOIS

---

GENERAL MOTORS CORPORATION,  
Plaintiff-Appellant,

v.

The STATE of Illinois MOTOR VEHICLE REVIEW BOARD; Terrence M. O'Brien,  
in His Official Capacity as Chairperson of the Illinois Motor Vehicle Review Board;  
North Shore, Inc., d/b/a Muller Pontiac/GMC Mazda; Grossinger Autoplex, Inc.;  
Joe Mitchell Buick/GMC Truck, Inc.; and Castle Buick-Pontiac-GMC, Inc.,  
Defendants-Appellees,

and

LOREN BUICK, INC.,  
Defendant-Appellant.

---

On Appeal from the Appellate Court of Illinois, Fourth District,  
Case No. 4-04-0735, The Honorable Robert W. Cook, Presiding Justice  
On Appeal from the Seventh Circuit Court, Sangamon County, Illinois,  
Case No. 03MR412, The Honorable Robert J. Eggers, Judge

---

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION  
IN SUPPORT OF PLAINTIFF-APPELLANT**

---

ANTHONY SANDERS  
Ill. Bar No. 6284335  
5020 South Lake Shore Drive  
Suite 2402 N  
Chicago, Illinois 60615  
Telephone: (773) 817-6977

DEBORAH J. LA FETRA,  
Cal. Bar No. 148875  
TIMOTHY SANDEFUR,  
Cal. Bar No. 224436  
Pacific Legal Foundation  
3900 Lennane Drive, Suite 200  
Sacramento, California 95834  
Telephone: (916) 419-7111  
Facsimile: (916) 419-7747

Attorneys for Amicus Curiae Pacific Legal Foundation

**TABLE OF CONTENTS AND AUTHORITIES**

	<b>Page</b>
INTRODUCTION AND INTEREST OF AMICUS .....	1
<i>Marshall v. Burger King</i> , No. 100372 (Ill. Sup. Ct.) .....	1
<i>Powers v. Harris</i> , 125 S. Ct. 1638 (2005) .....	1
<i>Meadows v. Odom</i> , No. 05-30450 (5th Cir.) .....	1
<i>Merrifield v. Melton</i> , 388 F. Supp. 2d 1051 (N.D. Cal. 2005) .....	1
SUMMARY OF ARGUMENT .....	1
<i>Church v. State</i> , 164 Ill. 2d 153 (1995) .....	2
<i>People v. Brown</i> , 407 Ill. 565 (1951) .....	2
<i>Schroeder v. Binks</i> , 415 Ill. 192 (1953) .....	2
<i>Exch. Nat’l Bank of Chicago v. Vill. of Skokie</i> , 86 Ill. App. 2d 12 (1967) .....	2
<i>Suburban Ready-Mix Corp. v. Vill. of Wheeling</i> , 25 Ill. 2d 548 (1962) .....	2
<i>Ga. Franchise Practices Comm’n v. Massey-Ferguson, Inc.</i> , 262 S.E.2d 106 (Ga. 1979) .....	2
<i>Future Ford Sales, Inc. v. Pub. Serv. Comm’n</i> , 654 A.2d 837 (Del. 1995) .....	2
Smith, Richard L., <i>Franchise Regulation: An Economic     Analysis of State Restrictions on Automobile Distribution</i> , 25 J. L. & Econ. 125 (1982) .....	2
815 Ill. Comp. Stat. 710/12(c) .....	3
ARGUMENT .....	3
I. THE DUE PROCESS CLAUSE PROHIBITS LAWS THAT BENEFIT ONLY PARTICULAR INTEREST GROUPS, RATHER THAN THE PUBLIC AT LARGE .....	3

	Page
A. “Naked Preferences” Violate the Due Process Clause .....	3
815 Ill. Comp. Stat. 710/4(e)(8) .....	3
<i>Church v. State</i> , 164 Ill. 2d 153 (1995) .....	3
<i>People v. Johnson</i> , 68 Ill. 2d 441 (1977) .....	3
<i>People v. Brown</i> , 407 Ill. 565 (1951) .....	3
<i>Johnson v. Ill. Dep’t of Prof’l Regulation</i> , 308 Ill. App. 3d 508 (1999) .....	3-4
<i>Schroeder v. Binks</i> , 415 Ill. 192 (1953) .....	4
<i>Burden v. Hoover</i> , 7 Ill. App. 2d 296 (1955), <i>overruled on other grounds</i> , 9 Ill. 2d 114 (1956) .....	4
<i>Scully v. Hallihan</i> , 365 Ill. 185 (1937) .....	4
<i>Ga. Franchise Practices Comm’n v. Massey-Ferguson, Inc.</i> , 262 S.E.2d 106 (Ga. 1979) .....	4
Sunstein, Cass R., <i>Naked Preferences and the Constitution</i> , 84 Colum. L. Rev. 1689 (1984) .....	4-5
Gellhorn, Walter, <i>The Abuse of Occupational Licensing</i> , 44 U. Chi. L. Rev. 6 (1976) .....	5
<i>Harding v. People</i> , 160 Ill. 459 (1896) .....	5
<i>Magna Carta</i> (1215) .....	5
Siegan, Bernard, <i>Property Rights from Magna     Carta to the Fourteenth Amendment</i> (2001) .....	5
<i>Metro. Trust Co. v. Jones</i> , 384 Ill. 248 (1943) .....	5
<i>Hurtado v. California</i> , 110 U.S. 516 (1884) .....	6
<i>United States v. Winstar Corp.</i> , 518 U.S. 839 (1996) .....	6

*LC & S, Inc. v. Warren County Area Plan Comm'n*,  
244 F.3d 601 (7th Cir. 2001) ..... 6

*People ex rel. City of Kewanee v. Kewanee Light & Power Co.*,  
262 Ill. 255 (1914) ..... 6

Hayek, Friedrich, *The Constitution of Liberty* (1960) ..... 6

*Citizens' Sav. & Loan Ass'n v. City of Topeka*,  
87 U.S. (20 Wall.) 655 (1874) ..... 6

*Giebelhausen v. Daley*, 407 Ill. 25 (1950) ..... 7

*Marallis v. City of Chicago*, 349 Ill. 422 (1932) ..... 7

*People v. Weiner*, 271 Ill. 74 (1915) ..... 7

*U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) ..... 7

*Romer v. Evans*, 517 U.S. 620 (1996) ..... 7

*Kelo v. New London*, 125 S. Ct. 2655 (2005) ..... 7

B. Private Interests May Not Use the  
Law to Ban Their Own Competition ..... 8

*Church v. State*, 164 Ill. 2d 153 (1995) ..... 8-10

*People v. Johnson*, 68 Ill. 2d 441 (1977) ..... 8-9

*Exch. Nat'l Bank of Chicago v. Vill. of Skokie*,  
86 Ill. App. 2d 12 (1967) ..... 8, 11

*Suburban Ready-Mix Corp. v. Vill. of Wheeling*,  
25 Ill. 2d 548 (1962) ..... 8, 10-11

*New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*,  
439 U.S. 96 (1978) ..... 8

*New State Ice Co. v. Leibmann*, 285 U.S. 262 (1932) ..... 8-9

	Page
815 Ill. Comp. Stat. 710/16 .....	9
<i>Johnson v. Ill. Dep't of Prof'l Regulation</i> , 308 Ill. App. 3d 508 (1999) .....	9
<i>Nebbia v. People of New York</i> , 291 U.S. 502 (1934) .....	9
<i>People v. Brown</i> , 407 Ill. 565 (1951) .....	9
<i>Wall v. Am. Optometric Ass'n, Inc.</i> , 379 F. Supp. 175 (D. Ga.), <i>aff'd</i> , 419 U.S. 888 (1974) .....	9
<i>Am. Motors Sales Corp. v. New Motor Vehicle Bd.</i> , 69 Cal. App. 3d 983 (1977) .....	9
<i>Supreme Court of New Hampshire v. Piper</i> , 470 U.S. 274 (1985) .....	10
<i>Metro. Life Ins. Co. v. Ward</i> , 470 U.S. 869 (1985) .....	10
<i>Smith Setzer &amp; Sons, Inc. v. South Carolina Procurement</i> <i>Review Panel</i> , 20 F.3d 1311 (4th Cir. 1994) .....	10
<i>Craigsmiles v. Giles</i> , 312 F.3d 220 (6th Cir. 2002) .....	11
<i>Gholson v. Engle</i> , 9 Ill. 2d 454 (1956) .....	11
C. The Franchise Act Factors Create Territorial Monopolies for Existing Car Dealers .....	12
Smith, Richard L., <i>Franchise Regulation: An Economic</i> <i>Analysis of State Restrictions on Automobile Distribution</i> , 25 J. L. & Econ. 125 (1982) .....	12
815 Ill. Comp. Stat. 710/12(c) .....	12
<i>Romer v. Evans</i> , 517 U.S. 620 (1996) .....	13
<i>Smith Setzer &amp; Sons, Inc. v. South Carolina Procurement</i> <i>Review Panel</i> , 20 F.3d 1311 (4th Cir. 1994) .....	13

	Page
<i>Binford v. Boyd</i> , 178 Cal. 458 (1918) .....	13
<i>People ex rel. Barrett v. Thillens</i> , 400 Ill. 224 (1968) .....	13
II. COURTS HAVE AN IMPORTANT ROLE IN ENSURING AGAINST “NAKED PREFERENCES” IN THE LAW .....	14
<i>The Federalist</i> (Clinton Rossiter ed., 1961) .....	14
Buchanan, James & Tullock, Gordon, <i>The Calculus of Consent</i> (Ann Arbor Paperbacks, 1965) (1962) .....	14
McGinnis, John O., <i>The Original Constitution and Its Decline: A Public Choice Perspective</i> , 21 Harv. J.L. & Pub. Pol’y 195 (1997) .....	14-15
<i>Dist. Intown Properties Ltd. P’ship v. Dist. of Columbia</i> , 198 F.3d 874 (D.C. Cir. 1999) .....	14
<i>Washington v. Seattle Sch. Dist. No. 1</i> , 458 U.S. 457 (1982) .....	15
<i>San Antonio Indep. Sch. Dist. v. Rodriguez</i> , 411 U.S. 1 (1973) .....	15
<i>West Virginia State Bd. of Ed. v. Barnette</i> , 319 U.S. 624 (1943) .....	15
<i>Barsky v. Bd. of Regents</i> , 347 U.S. 442 (1954) .....	15
<i>People ex rel. Barrett v. Thillens</i> , 400 Ill. 224 (1968) .....	15-16
<i>Prior of Christchurch Canterbury v. Bendysshe</i> , 93 Selden Society 8 (1503) .....	15-16
<i>Gallo Motor Ctr. Corp. v. Mazda Motor of Am., Inc.</i> , 204 F. Supp. 2d 144 (D. Mass. 2002) .....	16
<i>Yamaha Motor Corp., U.S.A. v. Jim’s Motorcycle, Inc.</i> , 401 F.3d 560 (4th Cir. 2005) .....	16
<i>Benson &amp; Gold Chevrolet, Inc. v. Louisiana Motor Vehicle Comm’n</i> , 403 So. 2d 13 (La. 1981) .....	16

	Page
Anderson, Charles Noel, Jr., <i>American Motors Sales Corp. v. Peters: Green Light to Territorial Security for Automobile Dealers</i> , 63 N.C. L. Rev. 1080 (1985) .....	16-17
Macaulay, Stewart, <i>Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers, and the Legal System</i> , 1965 Wis. L. Rev. 522 .....	17
Forehand, Walter E. & Forehand, John W., <i>Motor Vehicle Dealers and Motor Vehicle Manufacturers: Florida Reacts to Pressures in the Marketplace</i> , 29 Fla. St. U. L. Rev. 1057 (2002) .....	17
Simpson, Steven M., <i>Judicial Abdication and the Rise of Special Interests</i> , 6 Chap. L. Rev. 173 (2003) .....	17
<i>People v. Brown</i> , 407 Ill. 565 (1951) .....	17-18
McCloskey, Robert G., <i>Economic Due Process and the Supreme Court: An Exhumation and Reburial</i> , 1962 Sup. Ct. Rev. 34 .....	18
III. THE FRANCHISE ACT HARMS CONSUMERS .....	18
<i>Ranschburg v. Toan</i> , 709 F.2d 1207 (8th Cir. 1983) .....	19
<i>Metro. Life Ins. Co. v. Ward</i> , 470 U.S. 869 (1985) .....	19
U.S. Const. amend. XIV .....	19
A. The Franchise Act Increases Costs and Deters Job Creation .....	19
Smith, Richard L., <i>Franchise Regulation: An Economic Analysis of State Restrictions on Automobile Distribution</i> , 25 J. L. & Econ. 125 (1982) .....	19-20
Macaulay, Stewart, <i>Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers, and the Legal System</i> , 1965 Wis. L. Rev. 522 .....	20

	Page
Reisman, George, <i>Capitalism: A Treatise on Economics</i> (1996) . . . . .	20
B. Consumers Should Be the Main Concern . . . . .	20
2 Smith, Adam, <i>The Wealth of Nations</i> (R. H. Campbell, et al. eds., 1976) . . . . .	20
Hayek, Friedrich, <i>The Constitution of Liberty</i> (1960) . . . . .	21
Bastiat, Frederic, <i>That Which Is Seen and That Which Is Not Seen</i> (1850) . . . . .	21
Macaulay, Stewart, <i>Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It: Automobile Manufacturers, Their Dealers, and the Legal System</i> , 1965 Wis. L. Rev. 522 . . . . .	21
Smith, Richard L., <i>Franchise Regulation: An Economic Analysis of State Restrictions on Automobile Distribution</i> , 25 J. L. & Econ. 125 (1982) . . . . .	21
<i>Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.</i> , 401 F.3d 560 (4th Cir. 2005) . . . . .	21
Lawson, Gary, <i>Efficiency and Individualism</i> , 42 Duke L.J. 53 (1992) . . . . .	22
Brown, Gary Michael, <i>Note: State Motor Vehicle Franchise Legislation: A Survey and Due Process Challenge to Board Composition</i> , 33 Vand. L. Rev. 385 (1980) . . . . .	22
<i>McDonald Ford Sales, Inc. v. Ford Motor Co.</i> , 418 N.W.2d 716 (Mich. Ct. App. 1987) . . . . .	22
<i>In re Application of Gen. Motors Corp. v. O'Daniel Oldsmobile, Inc.</i> , 439 N.W.2d 453 (Neb. 1989) . . . . .	22
<i>Benson &amp; Gold Chevrolet, Inc. v. Louisiana Motor Vehicle Comm'n</i> , 403 So. 2d 13 (La. 1981) . . . . .	22

*McLaughlin Ford, Inc. v. Ford Motor Co.*,  
473 A.2d 1185 (Conn. 1984) ..... 22

*Metro Communications Co. v. Ameritech Mobile Communications, Inc.*,  
788 F. Supp. 1424 (E.D. Mich. 1992) ..... 23

C. “Imbalance of Bargaining Power” Is Not a Justification  
for Granting Unconstitutional Private Preferences ..... 23

Barnhizer, Daniel D., *Inequality of Bargaining Power*,  
76 U. Colo. L. Rev. 139 (2005) ..... 23

Kennedy, Duncan, *Distributive and Paternalist Motives  
in Contract and Tort Law, with Special Reference to  
Compulsory Terms and Unequal Bargaining Power*,  
41 Md. L. Rev. 563 (1982) ..... 24

Phillips, Michael J., *Toward a Middle Way in the  
Polarized Debate Over Employment At Will*,  
30 Am. Bus. L.J. 441 (1992) ..... 24

Adler, Robert S. & Silverstein, Elliot M., *When David  
Meets Goliath: Dealing With Power Differentials  
in Negotiations*, 5 Harv. Negot. L. Rev. 1 (2000) ..... 24

Smith, Richard L., *Franchise Regulation: An Economic  
Analysis of State Restrictions on Automobile Distribution*,  
25 J. L. & Econ. 125 (1982) ..... 25-26

Wulff, Erik B., *A Critical Analysis of the Small Business  
Franchise Act of 1998*, 18-SPG Franchise L.J. 133 (1999) ..... 25

Dunham, Edward Wood, *Enforcing Contract Terms Designed  
to Manage Franchisor Risk*, 19 Franchise L.J. 91 (2000) ..... 26

*Dayan v. McDonald’s Corp.*, 125 Ill. App. 3d 972 (1984) ..... 26

Macaulay, Stewart, *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. 522 ..... 26

Brown, Gary Michael, *Note: State Motor Vehicle Franchise Legislation: A Survey and Due Process Challenge to Board Composition*, 33 Vand. L. Rev. 385 (1980) ..... 26

D. Requiring Entrepreneurs to Prove That Their New Business Is Necessary Imposes an Impossible Burden on Them ..... 26

815 Ill. Comp. Stat. 710/12(c) ..... 26-27

*Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560 (4th Cir. 2005) ..... 26

815 Ill. Comp. Stat. 710/12(c)(1) ..... 27

Hayek, Friedrich, *The Constitution of Liberty* (1960) ..... 27

*New State Ice Co. v. Leibmann*, 285 U.S. 262 (1932) ..... 27, 29

Arkes, Hadley, *The Return of George Sutherland* (1994) ..... 28-29

de Jasay, Anthony, *Justice and Its Surroundings* (2002) ..... 28

*FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993) ..... 28

CONCLUSION ..... 29

*Sanderson v. Culligan Int'l Co.*, 415 F.3d 620 (7th Cir. 2005) ..... 29

*Future Ford Sales, Inc. v. Pub. Serv. Comm'n*, 654 A.2d 837 (Del. 1995) ..... 30

PROOF OF SERVICE ..... 32

## INTRODUCTION AND INTEREST OF AMICUS

Founded in 1973, Pacific Legal Foundation (PLF) provides a voice in the courts for thousands of mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF is headquartered in Sacramento, California, and has offices in Washington, Florida, and Hawaii.

In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation created its Economic Liberty Project. Through that project, the Foundation seeks to protect the free enterprise system from government regulation which excludes entrepreneurial competition to serve the private interests of established businesses. PLF has participated in cases before the Supreme Courts of Illinois, and other states, as well as the United States Courts of Appeals and Supreme Court, in cases involving the burdens that regulations impose on businesses. *See, e.g., Marshall v. Burger King*, No. 100372 (Ill. Sup. Ct.) (pending); *Powers v. Harris*, 125 S. Ct. 1638 (2005); *Meadows v. Odom*, No. 05-30450 (5th Cir.) (pending); *Merrifield v. Melton*, 388 F. Supp. 2d 1051 (N.D. Cal. 2005) (appeal pending).

PLF attorneys are familiar with the legal issues raised by this case and the briefs on the merits filed with this Court. PLF believes that its public policy perspective and litigation experience in support of free enterprise principles will provide a necessary additional viewpoint on the issues presented in this case.

## SUMMARY OF ARGUMENT

The Motor Vehicle Franchise Act violates the Illinois Constitution's Due Process Clause by allowing existing businesses to veto their own competition. Under the Act,

existing car dealerships can protest the creation of any proposed competing franchise, whereupon the state Motor Vehicle Review Board considers a set of factors—many of which are vague and many of which explicitly require the Board to consider the effect that competition will have on existing businesses—when deciding whether or not to allow competition. This Court, however, has repeatedly declared that the Legislature may not allow private trade interests to monopolize entry into a field of business. *See, e.g., Church v. State*, 164 Ill. 2d 153, 165 (1995); *People v. Brown*, 407 Ill. 565, 583 (1951); *Schroeder v. Binks*, 415 Ill. 192, 198 (1953); *Exch. Nat'l Bank of Chicago v. Vill. of Skokie*, 86 Ill. App. 2d 12, 21 (1967); *Suburban Ready-Mix Corp. v. Vill. of Wheeling*, 25 Ill. 2d 548, 550-52 (1962). The Georgia Supreme Court held that a similar act violates the Due Process Clause of its state constitution, *Ga. Franchise Practices Comm'n v. Massey-Ferguson, Inc.*, 262 S.E.2d 106, 107-08 (Ga. 1979), and the Delaware Supreme Court expressed grave reservations about its similar act, because it “was enacted to protect the interests of dealers” instead of “the public welfare.” *Future Ford Sales, Inc. v. Pub. Serv. Comm'n*, 654 A.2d 837, 844 (Del. 1995). This Court should continue to uphold the right of new businesses to enter the marketplace and compete with established companies.

Although laws such as the Franchise Act often are passed in the name of protecting the consuming public, they actually harm the public by raising prices and decreasing the availability of goods and services on the market. *See* Richard L. Smith, *Franchise Regulation: An Economic Analysis of State Restrictions on Automobile Distribution*, 25 J. L. & Econ. 125, 139 (1982). Worst of all, by making it more expensive for manufacturers

to open new franchises, the Franchise Act deters job creation, harming the workers of the State of Illinois.

This Court should hold that those provisions of the Franchise Act which allow existing businesses to bar the establishment of new franchises—and in particular, the protectionist factors that the Motor Vehicle Review Board is directed to consider, 815 Ill. Comp. Stat. 710/12(c)—violate the Due Process Clause of the Illinois Constitution.

## ARGUMENT

### I

#### **THE DUE PROCESS CLAUSE PROHIBITS LAWS THAT BENEFIT ONLY PARTICULAR INTEREST GROUPS, RATHER THAN THE PUBLIC AT LARGE**

##### **A. “Naked Preferences” Violate the Due Process Clause**

The provisions of the Illinois Motor Vehicle Franchise Act which allow existing dealers to veto the establishment of new franchises, 815 Ill. Comp. Stat. 710/4(e)(8), *et seq.*, violate the Due Process Clause of the Illinois Constitution because they use government authority to benefit a particular interest group—established car dealerships—by preventing entrepreneurs from competing with them. *Church*, 164 Ill. 2d at 165 (Legislature may not “grant to members of [a] private . . . industry an unregulated monopoly over entrance into the trade”); *People v. Johnson*, 68 Ill. 2d 441, 450 (1977) (Government may not “confer upon [established businesses the] . . . monopolistic right to . . . control entry into the trade.”); *Brown*, 407 Ill. at 583 (“The legislature conferred a special privilege upon licensed master plumbers, as a class, when it gave to them the arbitrary and exclusive right to determine who shall, or shall not, engage in the vocation.”); *Johnson v. Ill. Dep’t of Prof’l Regulation*, 308

Ill. App. 3d 508, 513 (1999) (same); *Schroeder*, 415 Ill. 192 (same); *Burden v. Hoover*, 7 Ill. App. 2d 296, 299 (1955), *overruled on other grounds*, 9 Ill. 2d 114 (1956) (“While the State may properly require licenses to be obtained for many professions, the license does not create or confer any vested right, monopoly, exclusive privilege, property right, or freedom from competition.”); *Scully v. Hallihan*, 365 Ill. 185, 191 (1937) (“In order for such regulations to be lawfully imposed upon the constitutional rights of the citizen to pursue his trade or business, the act passed under the guise of a measure to protect the public health, comfort, or welfare must have a definite relation to the ends sought to be attained.”). *See also Massey-Ferguson*, 262 S.E.2d at 107-08 (“The clear purpose” of the franchise act was “to permit franchised dealers to restrict competition and create a monopoly in the retail sale of motor vehicles,” thus violating the Due Process Clause of the Georgia Constitution.). The Act harms the public by raising costs and decreasing the goods available on the market, and works only to prevent competition with those businesses that already have franchises.

Due process means not only that people must receive procedural guarantees before their liberty is curtailed, but also that the government may not use its coercive power to serve exclusively private interests. To do so is fundamentally arbitrary—an act of mere legislative will, not governed by reference to the public welfare. What Professor Sunstein has said of the federal Due Process Clause can equally be said of its Illinois counterpart: it is “focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.” Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984). Businesses often try to use government’s regulatory

power to exclude their own competition from the marketplace. *See, e.g.*, Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. Chi. L. Rev. 6, 11 (1976) (noting that occupational licensing has been “eagerly sought” by members of the professions, “always on the purported ground that licensure protects the uninformed public against incompetence or dishonesty, but invariably with the consequence that members of the licensed group become protected against competition from newcomers”). But as Sunstein explains, such legal benefits constitute “naked preferences” which conflict with the principle that “government action [should] result[] from a legitimate effort to promote the public good rather than from a factional takeover.” Sunstein, *supra*, at 1690.

The term “due process of law” derives from the Magna Carta’s “law of the land” clause. *Harding v. People*, 160 Ill. 459, 464 (1896). That provision prohibited the king from singling out particular individuals or groups for benefits or burdens. *Magna Carta* ¶ 39 (1215) (“No free man shall be . . . deprived of his standing in any other way, nor will we proceed with force against him . . . except . . . by the law of the land.”). Thus, “governmental discretion [would] be limited to preclude dispensing favors to or imposing penalties on persons or groups.” Bernard Siegan, *Property Rights from Magna Carta to the Fourteenth Amendment* 14 (2001).

The Due Process Clause imposes a similar generality requirement, requiring that the Legislature use its power in the service of general public principles, equally applicable to all similar cases, rather than for particular persons in particular instances. *Metro. Trust Co. v. Jones*, 384 Ill. 248, 253 (1943) (Due process “contemplates a general public law, legally enacted, binding upon all members of the community under all circumstances, and not partial

or private laws affecting only the rights of private individuals or classes of individuals.”). *See also Hurtado v. California*, 110 U.S. 516, 535-36 (1884) (“Law . . . must be not a special rule for a particular person or a particular case, but . . . [t]he general law . . . so . . . that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.” (citation and quotation marks omitted)). The generality requirement is an essential part of the rule of law. *See, e.g., United States v. Winstar Corp.*, 518 U.S. 839, 897 (1996); *LC & S, Inc. v. Warren County Area Plan Comm’n*, 244 F.3d 601, 602 (7th Cir. 2001); *see also People ex rel. City of Kewanee v. Kewanee Light & Power Co.*, 262 Ill. 255, 262 (1914). As Nobel-Prize winning economist and lawyer Friedrich Hayek put it, true law is made up of “abstract rules laid down irrespective of their application to us,” which ensure that “we are not subject to another man’s will and are therefore free.” Friedrich Hayek, *The Constitution of Liberty* 153 (1960).

It is because the lawgiver does not know the particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and men do not rule.

*Id.* When a legislative enactment lacks generality and merely employs government power to confer special benefits to particular groups, rather than serving the public welfare, then the enactment is not really a *law*, but merely an arbitrary act of force. *Citizens’ Sav. & Loan Ass’n v. City of Topeka*, 87 U.S. (20 Wall.) 655, 664 (1874). Thus such an enactment deprives people of liberty without due process *of law*.

Although this understanding has come to be called “substantive due process,” that simplistic label obscures the fact that, at some point, substance and procedure are

indistinguishable. The principle at issue is whether a challenged enactment qualifies as a “law” in the sense in which that term is used in the Due Process Clause. Law, by definition, is the opposite of arbitrariness. But when government limits one person’s liberty merely to give a benefit to another person, then the government has exceeded its authority under the Due Process Clause. As this Court put it in *Giebelhausen v. Daley*, 407 Ill. 25 (1950), “Each person subject to the laws has a right that he shall be governed by general, public rules. Laws and regulations entirely arbitrary in their character, singling out particular persons not distinguished from others in the community by any reason applicable to such persons, are not of that class.” *Id.* at 39 (quoting *Marallis v. City of Chicago*, 349 Ill. 422, 427 (1932)). See also *People v. Weiner*, 271 Ill. 74, 81 (1915) (Law restricting upholstery trade only to existing “manufacturers and dealers in pillows . . . mattresses, comforters, and quilts” is unconstitutional.). The U.S. Supreme Court also has explained in several cases that legislative acts which merely seek to benefit some people, or burden others, rather than protecting the general public, are not rationally related to a legitimate state interest. See, e.g., *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533-36 (1973); *Romer v. Evans*, 517 U.S. 620, 632-33 (1996) (“[Legal] classifications [may] not [be] drawn for the purpose of disadvantaging the group burdened by the law.”). See also *Kelo v. New London*, 125 S. Ct. 2655, 2661 (2005) (Government may not use its power solely “for the purpose of conferring a private benefit on a particular private party.”). Such naked preferences violate the Due Process Clause of the Illinois Constitution.

**B. Private Interests May Not Use the Law to Ban Their Own Competition**

Both Illinois and federal courts recognize that due process is offended by laws which simply benefit private economic groups without protecting the public. *See, e.g., Church*, 164 Ill. 2d at 165; *Johnson*, 68 Ill. 2d at 450; *Exch. Nat'l Bank of Chicago*, 86 Ill. App. 2d at 21 (striking down zoning decision which simply protected established business from competition); *Suburban Ready-Mix Corp.*, 25 Ill. 2d at 550-52 (same); *Contra, New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 107 (1978) (upholding California motor vehicle franchise law). This is particularly the case where the law allows existing businesses to veto their own competition for their own private welfare.

In *New State Ice Co. v. Leibmann*, 285 U.S. 262 (1932), the Supreme Court reviewed a regulation similar to the Act challenged here. There, the State of Oklahoma required ice companies to obtain permits from a government commission before they could open for business. This commission, which was made up of representatives of existing businesses, would determine whether a new ice business was “necessary,” which simply invited existing businesses to wield official authority to protect themselves from competition. As the Court explained, “the practical tendency of the restriction” was “to shut out new enterprises, and thus to create and foster monopoly in the hands of existing establishments, against, rather than in the aid of, the interest of the consuming public.” *Id.* at 278. Of course, the Court recognized that the government may regulate businesses so as to protect the public health, safety, and welfare, *id.* at 273-77, but it may not aid “a private corporation” in “prevent[ing] a competitor from entering the business.” *Id.* at 278. There was “no difference in principle

between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business.” *Id.* at 279. Such exploitation of government power for private benefit did not advance a legitimate state interest, and violated the Due Process Clause. *Id.* at 279-80.

It is true that, unlike the review board in *New State Ice*, the Motor Vehicle Review Board is not made up of existing dealers themselves, 815 Ill. Comp. Stat. 710/16, but that does not cure the due process violation, because “[t]he evil here is monopoly power, whether that power is exercised by a single group or by one group in connection with another.” *Ill. Dep’t of Prof’l Regulation*, 308 Ill. App. 3d at 513. Government authority used to benefit private interests is abusive even if done by duly constituted officials.

Although economic regulations today receive greater deference than they did at the time of the *New State Ice* decision, even cases applying greater deference to such regulations hold that “arbitrary or discriminatory” economic regulations would violate due process. *Nebbia v. People of New York*, 291 U.S. 502, 536 (1934).<sup>1</sup> Moreover, this Court and other courts repeatedly have held that government may not restrict entry into a market simply to protect established interests. *Church*, 164 Ill. 2d at 165; *Johnson*, 68 Ill. 2d at 450; *Brown*, 407 Ill. at 583. *See also Wall v. Am. Optometric Ass’n, Inc.*, 379 F. Supp. 175, 189 (D. Ga.), *aff’d*, 419 U.S. 888 (1974) (holding that optometry licensing could not be exploited by existing optometrists for purposes of excluding competition); *Am. Motors Sales Corp. v. New Motor Vehicle Bd.*, 69 Cal. App. 3d 983, 988 (1977) (motor vehicle franchise board

---

<sup>1</sup> Moreover, *Nebbia* and *New State Ice* differed in that the price regulation in *Nebbia* did not restrict entry into the market. *See Nebbia*, 291 U.S. at 542 (McReynolds, J., dissenting).

unconstitutional where board was made up of existing dealerships who had “pecuniary interest” in barring new competition). *See further Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 287 (1985) (state may not use licensing scheme to protect in-state lawyers from competing with out-of-state lawyers); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985) (“promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose”); *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1322 (4th Cir. 1994) (Laws must “advance[] a purpose, beyond . . . naked preference . . . [or] ‘parochial discrimination.’”).

In *Church*, 164 Ill. 2d 153, this Court held that the state could not limit entry into the trade of installing private home security systems. The law in that case required any person in the private alarm contracting business to obtain a license, and the Private Detective, Private Alarm, and Private Security Board denied the license application because the Plaintiff lacked the necessary experience. 164 Ill. 2d at 156. This Court found that the statute would have required him to spend three years in training before obtaining such a license, which was an “unreasonable employment requirement[],” and which “grant[ed] to members of the private alarm contracting industry an unregulated monopoly over entrance into the trade.” *Id.* at 165.

The same rule against protectionist legislation applies to land-use decisions, as well. In *Suburban Ready-Mix Corp.*, 25 Ill. 2d 548, this Court found a zoning ordinance unconstitutional where it prevented the establishment of a concrete plant in an area where another concrete plant was already in operation. 25 Ill. 2d at 549. The Court found that the law violated the generality requirement of due process: “the ordinance is not general in its

operation but is unreasonable and tends to create a monopoly . . . . Although in form it is an ordinary zoning restriction, in its operation and effect it excludes from the village all ready-mix concrete plants except that of the Meyer company.” *Id.* at 550. Because the ordinance allowed existing businesses to ban their own competition, it was not “general and uniform in its operation,” but “tend[ed] to create a monopoly.” *Id.* Like the Franchise Act in this case, the zoning law “discriminate[d] in favor of existing [businesses],” *id.* at 552, and was therefore unconstitutional.

In *Exch. Nat’l Bank of Chicago*, the city denied a permit to an entrepreneur to open a combination car wash/gas station/car repair business, even though it had declared similar existing businesses to be within the zoning standards. 86 Ill. App. 2d at 14-15. The city claimed that a new business would cause “an adverse economic effect on other businesses in the area,” *id.* at 20, but the court found that such considerations were not a legitimate concern for regulators. The Constitution does not allow cities to

utilize zoning power in such a way as to protect existing businesses . . . . If an automated car-wash competes more effectively than a hand wash, then the Village is seen to be arguing for the power to legislate economic protection for existing businesses against the normal competitive factors which are basic to our economic system.

*Id.* at 21. See also *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (Law requiring casket sellers to be licensed funeral directors was merely a protectionist law, and “protecting a discrete interest group from economic competition is not a legitimate governmental purpose.”). Accord, *Gholson v. Engle*, 9 Ill. 2d 454, 460 (1956).

**C. The Franchise Act Factors Create Territorial Monopolies for Existing Car Dealers**

Here, the Franchise Act specifically empowers the Motor Vehicle Review Board to protect established businesses against fair competition. *See Smith, supra*, at 139 (describing franchise regulations that “go beyond paternalism to the point of creating monopoly power for the dealers”). When a manufacturer seeks to grant an entrepreneur a franchise so that the entrepreneur can open a new business, the existing car dealers have the opportunity to object so as to preserve their territorial sovereignty, and ensure that they need not lower their prices. Upon receipt of such an objection, the Motor Vehicle Review Board is obliged to consider eleven statutory factors to determine whether to allow a new franchise to open, *see* 815 Ill. Comp. Stat. 710/12(c). But these factors are aimed overwhelmingly at protecting established businesses. This is explicit in the case of factor 10, which requires the Board to consider “the effect of an additional franchise . . . upon the existing motor vehicle dealers of the same line make in the relevant market area.” But it is equally true of other factors. Factor 2, for example, requires the Board to consider “the retail sales and service business transacted by the objecting motor vehicle dealer or dealers . . . during the 5 year period immediately preceding”; factor 3 includes “the investment necessarily made and obligations incurred by the objecting motor vehicle dealer”; factor 4 includes “the permanency of the investment of the objecting motor vehicle dealer.”

These factors simply seek to establish that currently existing businesses “deserve” to be protected from having to compete fairly against newcomers. That is not only an abuse of government power, but it also harms the general public. If the “investment made” by an

existing business is a legitimate reason to bar competition from new businesses, economic innovation will be stifled and the right of entrepreneurs to earn a living will be significantly curtailed, simply to serve the private interests of established businesses. Certainly buggy-whip manufacturers or businesses that sold Betamax VCRs had invested significantly in their businesses, too, but this did not entitle them to a permanent market share at the expense of consumers or innovative competitors. Worse, factor 7 seems explicitly to reject the principle that people have a right to earn a living, by declaring that “good cause [for the Board to allow new businesses] shall not be shown solely by a desire for further market penetration.” In other words, the desire of a manufacturer to succeed economically—by providing the best quality goods and services for customers at the lowest possible prices—or to create jobs, or to provide a good return to shareholders, shall not be considered legitimate reasons to allow competition.

Of course, economic regulations often do confer incidental benefits on particular groups, while serving general public goals. *Romer*, 517 U.S. at 632-33 (citing cases); *Smith Setzer & Sons, Inc.*, 20 F.3d at 1322. But there is an important difference between such extraneous benefits, and cases in which government power is captured by private interest groups or used on their behalf. The power to regulate may be employed

only for the purpose of promoting the general welfare, the interests of the public . . . . It cannot be used to promote private gain or advantage, except so far as the same may also promote the public interest and welfare, and it is the latter, and not the former, effect which . . . warrants its exercise.

*Binford v. Boyd*, 178 Cal. 458, 461 (1918). See also *People ex rel. Barrett v. Thillens*, 400 Ill. 224, 232 (1968) (“[I]t is not within the constitutional authority of the State legislature . . .

to interfere with the rights of the individual to carry on a legitimate business, where no interest of the public safety, welfare or morals is damaged or threatened.”).

## II

### **COURTS HAVE AN IMPORTANT ROLE IN ENSURING AGAINST “NAKED PREFERENCES” IN THE LAW**

Constitutional prohibitions on “naked preferences” are necessary because of the tendency of representative government to fall prey to what the framers called “the mischiefs of faction.” *See The Federalist* No. 10, at 77-78 (James Madison) (Clinton Rossiter ed., 1961). Modern economists refer to this problem as “rent-seeking” or “the public choice problem.” *See, e.g.,* James Buchanan & Gordon Tullock, *The Calculus of Consent* (Ann Arbor Paperbacks, 1965) (1962); John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 Harv. J.L. & Pub. Pol’y 195 (1997).

Simply put, whenever government can give benefits to or impose burdens on individuals or classes within society, interest groups will organize to persuade the government to use that authority to benefit them. Buchanan & Tullock, *supra*, at 286 (“[I]nterest-group activity . . . is a direct function of the ‘profits’ expected from the political process by functional groups . . . .”). Such lobbying is detrimental to important political values. In particular, “[w]hile the resulting proposals are naturally advanced in the name of the public good, many are surely driven by interest-group purposes . . . . Among these proposals, at least some inflict aggregate costs considerably outweighing their aggregate benefits.” *Dist. Intown Properties Ltd. P’ship v. Dist. of Columbia*, 198 F.3d 874, 885 (D.C. Cir. 1999) (Williams, J., concurring).

The rent-seeking problem involves the use of government, not for proper, general goals, but simply to advance the interests of particular groups. McGinnis, *supra*, at 197 (Legislative majorities “use their power to take away resources and opportunities from minorities and redistribute it to themselves.”). Thus rent-seeking parallels the “tyranny of the majority” against which the judiciary stands as the primary protection. The U.S. Supreme Court has long held that the judiciary has a “special role in safeguarding the interests of those groups that are ‘relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’” *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). The Constitution limits the Legislature to ensure that groups do not despoil or exploit individuals or smaller groups under the pretext of public benefits. This principle is true not only with regard to such rights as the freedom of religion, *see, e.g., West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”), but also with regard to the right to earn a living, which Justice Douglas called “the most precious liberty that man possesses.” *Barsky v. Bd. of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).<sup>2</sup> *See also Thillens*, 400 Ill.

---

<sup>2</sup> Probably the earliest case forbidding existing businesses from legally prohibiting their own competition is *Prior of Christchurch Canterbury v. Bendysse*, 93 Selden Society 8 (1503), in which the court explained that

damage alone is not a cause of action. Thus, [where] an innkeeper or other  
(continued...)

at 233 (“[A person’s] labor is his property, entitled to the full and equal protection of the law . . . [and] is also embraced within the constitutional provision guaranteeing to everyone liberty and the pursuit of happiness.” (citation omitted)).

Protection against economic competition is a frequent subject of rent-seeking. *Cf. Gallo Motor Ctr. Corp. v. Mazda Motor of Am., Inc.*, 204 F. Supp. 2d 144, 155 (D. Mass. 2002) (“Invariably, when a manufacturer adds a new dealer to a market, the protesting dealer offers evidence of injury to its sales and profits.”). *Yamaha Motor Corp., U.S.A. v. Jim’s Motorcycle, Inc.*, 401 F.3d 560, 573 (4th Cir. 2005) (“If we were to uphold the blanket statewide protection of the [Virginia franchise act] we would be . . . turning Virginia into an island of economic protectionism.”); *Benson & Gold Chevrolet, Inc. v. Louisiana Motor Vehicle Comm’n*, 403 So. 2d 13, 23 (La. 1981) (Franchise Act by which existing car dealerships could block permits for new competition could violate due process because existing businesses “might have a personal interest” in preventing competition).

The Legislature tends to serve the constituency with the greatest economic stake in preventing competition—the existing dealers. Automobile franchise acts are the product of “extensive lobbying efforts,” pursuing the goal of “firmly establish[ing] . . . dealers’ sovereignty within their trade areas—to the detriment of the average car buyer.” Charles

---

<sup>2</sup> (...continued)

victualler comes and dwells next to another [innkeeper] and thereby more of the customers resort to him than to the other, it is a damage to the other but no wrong, for he cannot compel men to buy victuals from him rather than from the other.

*Id.* at 9.

Noel Anderson, Jr., *American Motors Sales Corp. v. Peters: Green Light to Territorial Security for Automobile Dealers*, 63 N.C. L. Rev. 1080, 1080 (1985). See also Stewart Macaulay, *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. 522 (“[I]n many states the dealers’ political power is great . . . [and] it costs the legislators little to give benefits to the dealers since the large automobile manufacturers have little influence.”); Walter E. Forehand & John W. Forehand, *Motor Vehicle Dealers and Motor Vehicle Manufacturers: Florida Reacts to Pressures in the Marketplace*, 29 Fla. St. U. L. Rev. 1057, 1058 (2002) (Franchise acts are “formulated principally by private interests.”). Meanwhile, consumers and entrepreneurs, who lack the concentrated political strength of existing car dealers, cannot protect their interests from legislative manipulation. It is impossible, then, for would-be entrepreneurs or the consuming public to obtain redress through political action or the repeal of special interest legislation. This is why courts often are called upon to ensure that the legislative process does not deny newcomers a right to enter and compete in the market. See Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 Chap. L. Rev. 173, 177 (2003) (“The solution to interest group influence lies not in attempting to resist the natural desire of human beings to influence the political process, much less their right to do so, nor to rely on legislators to resist that influence, but to control the results of that influence . . . . The framers envisioned the courts as a significant check on the power of legislatures.”).

In *Brown*, this Court struck down a complicated plumber’s licensing law which, among other things, required a person to serve as an apprentice before obtaining a license.

407 Ill. at 573. But since plumbers were not required to take on apprentices, “[t]he licensed master plumber is in full and absolute control of the situation,” and wielded a power “which the State cannot lawfully exercise, *i.e.*, the arbitrary denial to a citizen of his inherent and inalienable right to engage in a legitimate activity by his own free will and choice.” *Id.* at 574. By allowing plumbers to have “the arbitrary and exclusive right to determine who shall, or shall not, engage in the vocation,” the licensing law gave plumbers protection against competition, which was unconstitutional. *Id.* at 583. The would-be plumbers lacked the political influence to protect themselves from this exclusionary device. This Court had to protect them. *See also* Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34, 50 (“[T]he scattered individuals who are denied access to an occupation by State-enforced barriers are about as impotent a minority as can be imagined.”).

The Franchise Act is the sort of economic protectionism that economic interest groups use to secure themselves against competition. Entrepreneurs seeking to open car dealerships, job-seekers who could be employed at these dealerships, and the general public which wants more cars at lower prices, can only look to the judiciary to protect them against this unconstitutional use of power.

### III

#### THE FRANCHISE ACT HARMS CONSUMERS

The Franchise Act appears to have been designed to impose a politically devised notion of “fairness” on the marketplace, ensuring that established companies are protected from competition which might result in “unfair” outcomes such as business failure. This

does not absolve the statute of its unconstitutional protectionist aspects. “[I]t is untenable to suggest that a state’s decision to favor one group of recipients over another by itself qualifies as a legitimate state interest. An intent to discriminate is not a legitimate state interest.” *Ranschburg v. Toan*, 709 F.2d 1207, 1211 (8th Cir. 1983). As the U.S. Supreme Court noted in *Ward*, the Fourteenth Amendment prohibits states from “promot[ing] domestic industry” by burdening newcomers to the market:

If we accept the State’s view here, then any discriminatory [economic regulation] would be valid if the State could show it reasonably was intended to benefit domestic business. A discriminatory [regulation] would stand or fall depending primarily on how a State framed its purpose—as benefitting one group or as harming another. This is a distinction without a difference.

470 U.S. at 882. The Franchise Act benefits private parties at the expense of economic growth, harming both the consumers and the workers of Illinois.

#### **A. The Franchise Act Increases Costs and Deters Job Creation**

Protectionist franchise acts increase the costs of automobiles and decrease their availability to the consuming public. Smith, *supra*, conducted a thorough analysis of the impact of automobile franchise regulations between 1954 and 1972, and found a 15.3 percent reduction in the number of new-car dealerships in states which had enacted such laws. 25 J. L. & Econ. at 146. Smith further found an increase of 13.7 percent in the cost of cars in those states. *Id.* at 149. This price increase means that franchise laws essentially “tax” consumers for the benefit of dealers, by forcing consumers to pay higher prices for cars without receiving any increased value. *Id.* at 154. In 1972 alone, franchise acts transferred \$6.7 billion from consumers to dealers. *Id.* at 151. Smith concluded that laws like the Franchise Act “entrench existing automobile dealers. They appear to be protected from the

entry of new dealerships, from discipline by the manufacturer, and from involuntary termination [of the franchise]. The net effect is fewer dealerships and increased market power resulting in higher prices.” *Id.* at 150. This conclusion was supported by Stewart Macaulay, who produced an encyclopedic 201-page law review article on the origin of automobile franchise acts. Macaulay, *supra*, at Part I; Macaulay, *supra*, at Part II. Macaulay pointed out that the year after federal legislation was enacted to protect auto dealer franchises, 1955, the price of cars increased \$117 on average. In 1956, the price increased another \$186. The next year, it increased \$176. *Id.* at 836.

Making it more expensive to open businesses will result in fewer businesses being opened, which means, inevitably, fewer jobs and less economic opportunity. See George Reisman, *Capitalism: A Treatise on Economics* 662 (1996) (“[A]n increase in the cost of employing workers . . . causes unemployment, higher production costs, reduced production, and higher prices.”). By requiring manufacturers to go through an expensive and time-consuming process before they may grant new franchises and create new jobs—or by entirely prohibiting them from doing so at all—the Franchise Act deters economic growth and job creation.

## **B. Consumers Should Be the Main Concern**

One of the most important insights in the science of economics is that “[c]onsumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer.” 2 Adam Smith, *The Wealth of Nations* 660 (R. H. Campbell, et al. eds., 1976). Protecting established businesses from fair competition increases costs to consumers, decreases their freedom of

choice, and, most importantly, harms the ability of new businesses to create jobs and provide economic opportunity to those in need of work. Laws like the Franchise Act can protect the income of existing businesses only by excluding new businesses from opening in the first place; this cost, though unseen, nonetheless is a real cost, imposed on “those who . . . will find employment only in the less highly paid jobs or who will not be employed at all.” Hayek, *supra*, at 270. See also Frederic Bastiat, *That Which Is Seen and That Which Is Not Seen* (1850), available at <http://bastiat.org/en/twisatwins.html> (last visited Feb. 12, 2006) (explaining that the absence of economic growth is one of the frequently unrecognized costs of regulation).

Although cases like this one often are described in emotionally loaded terms depicting a clash of big business versus the little guy—see Macaulay, *supra*, at 516-22 (describing emotional rhetoric about “villain[ous] . . . giant corporation[s] with wealth and power” that fuel franchise acts); Smith, *supra*, at 125 (same)—or politically biased invocations of the “deference” due to economic regulations, the fact is that private interest legislation like the Franchise Act ultimately hurts consumers and job seekers most of all. When the burden of opening a new franchise is severe, car manufacturers will go elsewhere to sell their cars, harming the working people of Illinois. See *Yamaha*, 401 F.3d at 571-72 (noting that Yamaha and Harley-Davidson had foregone any attempt to open new dealerships in Virginia due to franchise act).

When determining questions of public interest, the proper perspective, both from the standpoint of economics and from the principles of due process, is that expanding the options available to consumers and encouraging greater productivity by producers is always to be

preferred to some vague, politically defined notion of a “fair” marketplace. See Gary Lawson, *Efficiency and Individualism*, 42 Duke L.J. 53, 81, 93-94 (1992) (“[T]here is an infinite number of coherent ‘welfare’ standards that can be applied to a social entity . . . [but the goal of] social wealth maximization avoids the methodological problems of interpersonal comparisons while maintaining a real-world domain of application.”). Unfortunately, while motor vehicle franchise limitations often are cloaked in language of public benefit, they are really devices for existing businesses to preserve their “fair share” of the trade. See Gary Michael Brown, *Note: State Motor Vehicle Franchise Legislation: A Survey and Due Process Challenge to Board Composition*, 33 Vand. L. Rev. 385, 408 n.142 (1980) (noting that some franchise laws require that the public’s needs be given “due consideration,” and concluding, “if the legislation is truly in the public interest, should this not be the *primary* consideration?”).

The consumer is benefitted by more competition, not less. *McDonald Ford Sales, Inc. v. Ford Motor Co.*, 418 N.W.2d 716, 718 (Mich. Ct. App. 1987) (“[I]ncreased competition, both interbrand and intrabrand, would help assure better prices and higher quality service for the public.”); *In re Application of Gen. Motors Corp. v. O’Daniel Oldsmobile, Inc.*, 439 N.W.2d 453, 458-59 (Neb. 1989) (“Generally speaking, when competition is increased, lower prices and better service are a result of this increased competition.”); *Benson & Gold*, 403 So. 2d at 21-22 (public interest not served by keeping every dealer secure from financial loss through fair competition); *McLaughlin Ford, Inc. v. Ford Motor Co.*, 473 A.2d 1185, 1192 (Conn. 1984), (“The injury McLaughlin will suffer is a loss of sales due to an increase in competition . . . . This type of injury has traditionally

been considered insignificant when compared to the benefit to consumers and for that reason statutes and common law permit only limited restriction of methods of competition.”). While further competition might have the “unfair” result that an existing dealership will fail, or will have to work harder to compete, this is vastly preferable to a rule which tries to divvy up the market for cars in a way that is politically or socially desirable by some ineffable standard of “fairness.” *Metro Communications Co. v. Ameritech Mobile Communications, Inc.*, 788 F. Supp. 1424, 1433 n.16 (E.D. Mich. 1992) (“If the Court were to hold that the instant [franchise] contracts contain an implied restriction on competition, it would be placed in the unenviable position of having to delineate for the parties the boundaries of ‘fair’ competition—that which guarantees to Plaintiffs the fruits of their contracts—and ‘unfair’ competition—that which deprives Plaintiffs of the fruits of their contracts.”).

**C. “Imbalance of Bargaining Power” Is Not a Justification for Granting Unconstitutional Private Preferences**

Usually, laws like the Franchise Acts are enacted in response to a perceived “imbalance of bargaining power” between existing franchisees and manufacturers which allegedly puts franchisees at the mercy of manufacturers—an imbalance which is said to require legislative interference to be made “fair.” But this rationale does not justify depriving would-be entrepreneurs of the opportunity to open new franchises. The theory of “unequal bargaining power” is essentially meaningless, because all bargains are, in some way, unequal. Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. Colo. L. Rev. 139, 240 (2005) (“Bargaining power disparities will always exist.”). Thus the term is an excuse, designed to disguise the rent-seeking nature of enactments which deprive one group of liberty or property

so as to benefit another group. *See generally* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563 (1982).

The comparative wealth of the parties to a contract, for example, which routinely is seen as a defining indicator of unequal bargaining position, actually is not dispositive, and perhaps not even indicative, of a need for legislative intervention. What is relevant is not whether one party is large and another small, but whether the parties acted on the basis of free will. *Cf.* Michael J. Phillips, *Toward a Middle Way in the Polarized Debate Over Employment At Will*, 30 Am. Bus. L.J. 441, 461 (1992) (noting that the imbalance of bargaining power rests on untenable assumptions: “that the absence of genuine bargaining over a contract term implies that the party offering the term imposed it through superior power . . . [and] that superior size of itself creates [superior bargaining power]”). Even where one party is “big” and another “small,” a contract is still freely entered into if the parties adopt it knowingly and voluntarily. Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing With Power Differentials in Negotiations*, 5 Harv. Negot. L. Rev. 1, 31-32 (2000). More importantly, the relevant consideration in determining whether the contract was abusive or not is not whether the parties were unequal before signing, but whether each party ended up in a better position as a result of signing.

Moreover, the premise that automobile retailers are at the mercy of manufacturers ignores important countervailing forces. For example, in the absence of regulation to the contrary, a dealer who could veto new competition in his territory would be in a position to exploit the manufacturer, because he would “always choose to sell fewer vehicles (and also

different vehicles) than the manufacturer would like,” so as to raise prices and appeal to the broadest possible customer base. Smith, *supra*, at 129. Also, because franchises are not granted at market rates, but are granted to dealers at below market rates, it would be in the dealer’s interest to skimp on customer service in ways that would harm the manufacturer’s reputation. *Id.* Most importantly, although the specter of a manufacturer terminating a dealer’s franchise is often mentioned in discussions of franchise acts, there have been “no academic studies . . . published supporting the notion of widespread abuses in franchising,” Erik B. Wulff, *A Critical Analysis of the Small Business Franchise Act of 1998*, 18-SPG Franchise L.J. 133, 169 n.3 (1999), and there is no indication that manufacturers have any incentive to cancel franchises abusively. On the contrary, “a manufacturer who is perceived as unjust in his treatment of a dealership will suffer a loss of confidence that would tend to reduce the value of future franchises and would encourage existing franchises to take steps to minimize losses in the event of similar treatment . . . includ[ing] depreciating the franchise, liquidating inventories, and giving poor service . . . [which] would work only to the detriment of the manufacturer.” Smith, *supra*, at 130. Basic economics renders it extremely unlikely that manufacturers will appropriate a franchisee’s investment via arbitrary treatment. *Id.* at 139.

Finally, even if franchisors were tempted to abuse their power, there is no reason that parties cannot take protective measures in their contracts. Parties entering into franchise contracts can ensure their security through private arrangements, before spending money on the creation of a physical plant or other investments: they can agree to certain franchise territories, or to notice requirements, or to other measures to protect a dealer’s economic

security. Edward Wood Dunham, *Enforcing Contract Terms Designed to Manage Franchisor Risk*, 19 Franchise L.J. 91 (2000) (“All prudent franchisors try to use standard contract terms to achieve some measure of predictability and control in the resolution of disputes with franchisees.”). In addition, courts routinely infer a good faith requirement in franchise contracts, which also protects dealers from unfair practices. *See, e.g., Dayan v. McDonald’s Corp.*, 125 Ill. App. 3d 972, 991 (1984).

In reality, laws such as the Franchise Act at issue here are best seen, not as the product of a concern for the rights of businesses or consumers, but as a response to concentrated lobbying by dealers who want to protect their market share against possible competition. *See Macaulay, supra*, at 845 (noting that franchise acts were passed by Legislatures “act[ing] as rubber stamps approving [laws] offered by the lobbyists”); Brown, *supra*, at 408 (Franchise acts are exercises in “economic protectionism.”). The consequence of such acts has been to “revers[e] the traditional balance of power in many instances, putting manufacturers at a great disadvantage.” *Id.* at 437.

#### **D. Requiring Entrepreneurs to Prove That Their New Business Is Necessary Imposes an Impossible Burden on Them**

The factors which the Act requires the Board to consider when deciding whether to grant newcomers the ability to compete in the marketplace include several factors that are not economically meaningful, but instead are vague terms allowing established businesses to protect their market position. *See* 815 Ill. Comp. Stat. 710/12(c). *Cf. Yamaha Motor Corp.*, 401 F.3d at 566 (finding factors in Virginia franchise law “‘highly subjective’ and ‘remarkably vague’”). Factor 6, for example, invites the Board to speculate “whether the

objecting motor vehicle dealer . . . [is] providing adequate competition and convenient consumer care.” Factor 7 states: “whether the objecting motor vehicle dealer . . . [can] reasonably provide for the needs of the customer.” Factor 5 requires the Board to determine “whether it is beneficial or injurious to the public welfare for an additional franchise . . . to be established,” and factor 8, somewhat redundantly, inquires “whether the establishment of an additional franchise . . . would be in the public interest.” In other words, the law imposes an unsatisfiable burden on entrepreneurs that they prove their businesses are necessary or desirable before opening them. 815 Ill. Comp. Stat. 710/12(c).

It simply is not possible for a bureaucratic agency to determine whether a new business is “necessary” or “whether the establishment of such additional franchise . . . is warranted by economic and marketing conditions *including anticipated future changes.*” 815 Ill. Comp. Stat. 710/12(c)(1) (emphasis added). The only way to make such a “need” determination is to try it in practice by opening the new business. Parties act in the market on tacit knowledge that often is difficult to express. Limiting the freedom of entrepreneurs to enter the market to cases in which they can articulate a “good reason” for doing so curtails the experimentation and innovation on which a free market thrives. *See generally* Hayek, *supra*, at 29-32 (“Freedom granted only when it is known beforehand that its effects will be beneficial is not freedom . . . . It is because we do not know how individuals will use their freedom that it is so important. If it were otherwise, the results of freedom could also be achieved by the majority’s deciding what should be done by the individuals.”).

Professor Hadley Arkes puts the issue more clearly in an analogy explaining the Supreme Court’s decision in *New State Ice*. In the 1960s, he writes, his home town of

Amherst, Massachusetts had only one bookstore, which “tried to appeal to a general audience of readers.” Hadley Arkes, *The Return of George Sutherland* 51 (1994). Several years later a new, more specialized bookstore opened, and then another. Finally there were six specialized stores, including one which “focused on matters of religion and the occult . . . . [T]he serious question arose again: just how would a town of this middling size . . . support four, five, or even six establishments?” *Id.* at 52. Established businesses began to fear that they would “decline,” so they proposed limiting the opportunities of newcomers to the marketplace. “The burden of proof could be assigned to the people who would open a new business and threaten to unsettle the existing market, say, for books.” *Id.*

But it is impossible for entrepreneurs to prove the “necessity” of a new business. Often businesses succeed or fail on the basis of inarticulable consumer desire, or “a hunch that a new establishment could do a better job with a better product.” *Id.* And it is “hard to see . . . just what evidence would controvert the claim that the commerce in [books or] ice, in any town or city, was already adequately covered by the firm already on the scene.” *Id.* at 54. Determining whether a new bookstore, or ice producer, is “necessary” would require bureaucrats “to know exactly the volume of business that could ever be cultivated for ice [or books] under any conditions, now or in the life of the plant.” *Id.* at 57.<sup>3</sup> Such information

---

<sup>3</sup> Worse, as philosopher Anthony de Jasay explains, requiring a person to prove that she ought to be free to act before doing so is a “needle in the haystack type of task,” because “there is an indefinitely large number of potential objectors having a potentially infinite number of objections” to a person’s acting. Anthony de Jasay, *Justice and Its Surroundings* 150 (2002). Thus, “[t]aken literally, the presumption that every act may be harmful and hurt some interest would freeze everything into total mobility.” *Id.* Cf. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., dissenting) (“Judicial  
(continued...)”)

was impossible to obtain with regard to ice in 1932, and it is impossible to obtain with regard to car sales in Illinois in 2006. Moreover, the reaction of consumers to a new business is impossible to determine *ex ante*. “[E]ven if a second business cannot be sustained, the new business may succeed precisely because it offers a better product with better service.” *Id.* at 55. Businesses often succeed for reasons that consumers themselves find difficult to explain: location, the friendliness of the staff, the cleanliness of the building—any number of factors will matter. Yet these cannot be determined by bureaucratic fiat. Laws such as the Franchise Act, or the ice company law in *New State Ice*, limit the freedom of entrepreneurs so as to protect existing businesses from failure, and in the process “deprive [people] . . . of the benefits and the vibrancy brought by . . . new businesses. And so, while we lament the failures, we would probably find it unthinkable that the government should put in place the[se] kinds of regulations . . . which would bar people from engaging in new ventures.” *Id.* at 53.

## CONCLUSION

As Judge Easterbrook put it in a case involving the Sherman Act, the laws “favor competition of all kinds, whether or not some other producer thinks the competition ‘fair.’ Much competition is unfair, or at least ungentlemanly; it is designed to take sales away from one’s rivals. There is no obligation to be kindly or cooperative toward other producers.” *Sanderson v. Culligan Int’l Co.*, 415 F.3d 620, 623 (7th Cir. 2005).

---

<sup>3</sup> (...continued)  
review under the ‘conceivable set of facts’ test is tantamount to no review at all.”).

The Illinois Constitution does not allow favoritism of particular interest groups, but only the protection of the general populace of consumers. Protecting the private interests of producers results in vagueness and unconstitutional favoritism. In *Future Ford Sales*, 654 A.2d 837, the Delaware Supreme Court recognized this when interpreting that state's Franchise Act. The court was troubled by the fact that although "the public welfare is the basis for all regulation under the state's police power," the Franchise Act "was enacted to protect the interests of dealers" instead. *Id.* at 844. It therefore limited the state's discretion in barring competition. "A mere increase in competition," the court declared, "will not suffice [to bar new competitors from the market] since the Act is not intended to confer monopoly status to existing dealers." *Id.* This Court should follow that lead.

Enactments like the Franchise Act simply benefit businesses with effective lobbyists against the people of a democratic state. But the Illinois Due Process Clause prohibits private-interest legislation. The judgment of the Illinois Appellate Court should therefore be *reversed*.

DATED: February 28, 2006.

Respectfully submitted,

ANTHONY SANDERS  
DEBORAH J. LA FETRA  
TIMOTHY SANDEFUR

By \_\_\_\_\_  
ANTHONY SANDERS

ANTHONY SANDERS  
5020 South Lake Shore Drive  
Suite 2402 N  
Chicago, Illinois 60615  
Telephone: (773) 817-6977

DEBORAH J. LA FETRA  
TIMOTHY SANDEFUR  
Pacific Legal Foundation  
3900 Lennane Drive, Suite 200  
Sacramento, California 95834  
Telephone: (916) 419-7111  
Facsimile: (916) 419-7747

Attorneys for Amicus Curiae  
PACIFIC LEGAL FOUNDATION

## PROOF OF SERVICE

Anthony Sanders, one of the attorneys for Amicus Curiae Pacific Legal Foundation, certifies that the original and twenty (20) copies of the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT were mailed to the Supreme Court of Illinois, Springfield, Illinois, and three (3) copies of the same were mailed to the following persons at the addresses shown by enclosing same in an envelope addressed to them and depositing same in a United States mailbox at Chicago, Illinois, on the 28th day of February, 2006.

EDWARD R. GOWER  
Hinshaw & Culbertson  
400 South Ninth Street  
Suite 200  
Springfield, IL 62701

JOHN SCHMIDT  
Office of the Attorney General  
100 West Randolph Street  
12th Floor  
Chicago, IL 60601

THOMAS H. WILSON  
Sorling, Northrup, Hanna, Cullen & Cochran, Ltd.  
Suite Eight Hundred  
Illinois Building  
607 East Adams Street  
P.O. Box 5131  
Springfield, IL 62705

---

ANTHONY SANDERS