

Current dormant commerce clause doctrine creates an incredible dilemma for state lawmakers. No matter what they do, they are at serious risk of attack under the dormant commerce clause. Here's an example. Suppose a state wants to move its own electricity generators from fossil fuels to renewable energy. For instance, the state might require that utilities get a third of their electricity from wind and solar. There's no question about the state's constitutional authority to do that in terms of in-state electricity producers. The dilemma is what to do about out-of-state generators who sell electricity to the state's utilities.

The first option is to exclude out-of-state renewables, so they don't count toward meeting the utility's renewable quota. This is sure to prompt a challenge from the out-of-state renewable generators, claiming that the state is discriminating against them in favor of the in-state renewables. That's a very serious charge under current doctrine.

Fine then, you say, the state should include the out-of-state solar and wind in the quota. But now the complain morphs into a different form. States aren't permitted to regulate activities in other states. But an electron is an electron, no matter what the power source. So what business does the state have in favoring some out-of-state electricity sources over others — for instance, wind and solar over coal and nuclear? There is case-law strongly condemning extraterrestrial regulation, so the state may have a real battle defending its action.

Another example of this problem involves biofuels. Suppose the state wants to encourage biofuels, so it mandates that fuel wholesalers include a certain percentage of biofuels. The value of biofuels in reducing climate change depends on how they are produced, so the system has to distinguish between different production processes and biofuels. Again, no commerce clause problem in terms of covering biofuels produced in the state. But what about out-of-state biofuels? If they're excluded, of course they'll claim discrimination. But if they're included, they'll complain that the state is assessing their production processes and that this is a form of extraterritorial regulation. Either way, the state is in for a legal fight.

So there you have it. If the state excludes the out-of-state firms, it will be charged with discrimination. But if it includes them, it will be charged with meddling in other states' domains. Either way, it may face a tough fight in court. Yet the state is merely trying to pursue its completely legitimate interest in controlling its own electricity sector.

In this situation, the usual tests for judging state regulations seem to break down,

pointing in opposing directions. In other contexts where rules seem to collide, the Supreme Court has spoken of the need for some “play in the joints.” That seems to be very much true in this situation. Courts need to give states some space to make reasonable choices, realizing that in a national electricity grid, every state action is going to have repercussions outside its borders and someone will always feel mistreated somewhere.