Texas and a number of other states have passed laws banning what they call "boycotts of fossil fuel companies." More precisely, they ban state investment or contracting with firms that "boycott" fossil fuel companies. Besides being fundamentally misguided and difficult to implement, these blacklist laws are poorly drafted and quite likely unconstitutional. The "fundamentally misguided" part of the previous sentence should be obvious to any reader of this website. The drafting, constitutional, and implementation problems may be less obvious.

Drafting problems.

Let me begin with drafting. The main point is that these new laws are full of ambiguities and define their targets in ways that seem out of sync with the laws' purposes. It's not clear which firms are supposed to go on the state's blacklist. These drafting problems are related to the difficulty of implementing the laws and their constitutional problems.

I'll use the Texas law as an example because the other states' new laws are basically identical. Here's how the Texas law defines the term "boycott":

> (1) "Boycott energy company" means, without an ordinary business purpose, refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations with a company because the company:
>
> "(A) engages in the exploration, production, utilization, transportation, sale, or manufacturing of fossil fuel-based energy and does not commit or pledge to meet environmental standards beyond applicable federal and state law; or
>
> "(B) does business with a company described by Paragraph (A)."

Here is some of the problematic language:

"without an ordinary business purpose" What exactly does that mean? Is this as opposed to a political purpose on the part of the managers? Suppose the purpose is to make investors or employees happy? Is that an ordinary business purpose?

“. . . . because the company engages in the exploration, production, utilization, transportation, sale, or manufacturing of fossil fuel based energy.. . ” Suppose instead that the company refuses to do business with firms with high carbon *emissions*. That’s generally — but not always — going to be firms “utilizing” fossil fuels. Is that covered? Is it OK to boycott a firm because it doesn’t have an acceptable plan to cut its own emissions?

“. . . intended to penalize or inflict economic harm on. . . a company” Consider one of the hundreds of companies that are committed to sourcing their power from renewables, either by self-generation or purchase. This inherently means that they won’t buy fossil-fuel based energy, or at least they’ll buy less of it. But that doesn’t mean their *purpose* is to do so. If I decide to go out for pizza rather than hamburgers, I’m not necessarily “boycotting” hamburger chains. Are these firms “boycotters” or aren’t they?

Note that under a broad reading of the statute, Exxon might have to go on the Texas blacklist. Exxon has a plan to cut stage 2 emissions, meaning emissions from its own goods and electricity providers. That inherently means, however, that it may reduce its purchases from those who fail to cut their emissions, thereby “limiting its transactions” unless the suppliers reduce their own emissions.

“… AND does not commit or pledge to meet environmental standards”. The plain language of the statute is that it’s OK to boycott the fossil fuel industry so long as you don’t condition the boycott on whether they “pledge or commit to” meet environmental standards beyond legal requirements. So it’s ok to simply refuse to deal with *all* fossil fuel companies or fossil fuel generators. It’s also OK to refuse to deal with a firm because it’s not *currently* exceeding legal requirements, as opposed to demanding it take a pledge about its future conduct. Did the drafter really intend this?

“does business with a company described by subparagraph (a)”. (Note: I originally misinterpreted this language, as a commentator pointed out. I’ve revised the discussion accordingly.) It’s not clear what “does business” means here. Suppose, for instance, that the boycotted firm owns shares in a fossil fuel company. Is that “doing business”? It’s a business relationship, but it’s not “doing” business, is it?

Implementation problems.

These drafting glitches are not unrelated to the implementation problems facing the state. There's no central repository of companies that have plans to reduce their purchases of electricity or materials produced with fossil fuels . As NPR reports:

"When the Texas state legislature originally debated its fossil fuel boycott bill, representatives from the State Comptroller's office pointed out an obvious issue: nobody had ever come up with a list of companies like this before. …

"Texas is now learning how hard it is to sort out which financial firms are actually going green. There are no national standards for companies to report their greenhouse gas emissions."

Ironically, Texas is opposed to the SEC's efforts to have firms report their climate-related policies, even though the SEC effort would help Texas create its blacklist. However, even if Texas did know which financial companies have policies relating to fossil fuels, that's really only the beginning of the problem. It would also have to decide whether a firm is cutting out suppliers because they are currently using too many fossil fuels (apparently OK under the statute) or because they won't pledge to reduce their use (apparently verboten). All those firms would then be added to the blacklist.

For example, as a former state pension overseer told NPR, "Let's take Wells Fargo, for instance. If they have any mutual funds or exchange traded funds in their portfolios that prohibit or limit investment in fossil fuels, then that is problematic." Or what about FedEx? FedEx has a plan to cut carbon emissions, including using 30% "alternative fuels" by 2030.

Constitutional defects.

On top of these various drafting and implementation issues, the Texas law has other flaws. For instance, it purports to prohibit anyone from bringing a challenge to any application of the law on any basis, including claims that the state's action violates a federal statute or even the U.S. Constitution. Anyone who has the temerity to make such a challenge must pay the attorney's fees of the other side, even if the state has actually acted illegally. It's very hard to see how this effort to prevent a party from bringing federal claims can be constitutional.

More fundamentally, the statute probably runs afoul of what's called the dormant commerce clause (or DCC), which limits state interference in interstate commerce.

Normally, a state's decisions about who to do business with are exempt from this doctrine, under what's called the "market participant exception."

But it's doubtful that the market participant exception applies here. In *South-Central Timber Development, Inc. v. Wunnicke*, a plurality of the Supreme Court said that "The limit of the market participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market." Only two members of the Court explicitly rejected this conclusion, while two others said they would leave the issue for a lower court to consider.

The plurality had the better side of the argument. Laws such as Texas's invite retaliation. It's not hard to imagine California imposing its own counter-boycott, refusing to invest in or do business with any firm complying with the Texas requirements.

The Texas law may also run afoul of what's called foreign affairs preemption. There are no geographic limits on the conduct that gets a firm on the Texas blacklist. The Texas law apparently applies fully to conduct outside the United States. Thus, European companies that engage in what Texas calls a "fossil fuel boycott" against other European companies cannot do business with Texas.

Moreover, the Texas law seems to apply even if the European firm only demands that its European supplies comply with EU climate laws. Texas provides an exemption for compliance with state or federal law, but no exemption for compliance with foreign laws.

And the U.S. agreed at Glasgow to a pledge to phase down coal use, a pledge that includes European countries among others. Thus, the Texas law, in its applications to foreign firms and foreign transactions, directly intrudes on foreign affairs and in fact is contrary to U.S. foreign policy.

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In short, the Texas law is poorly drafted, poses major implementation challenges, and is quite likely unconstitutional. And of course, destructive to the planet. Except for all that, it's a gem.