

## Federal–State Jurisdiction I: Pick Your Metaphor

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*Cats and dogs, gridlock, peaceful coexistence, parallel play,  
lamb lying with lion, hand in glove, pas de deux.*

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Those are some metaphors for federal–state jurisdictional relations, in ascending order of effectiveness. The next five essays sort through our jurisdictional experiences, seeking to explain successes and failures. This first essay sets the context. Our regulated industries are multistate industries serving local markets. Simultaneous federal and state roles are unavoidable, each necessary to the other’s success. Why does this interdependence produce so much irritability? Understanding the reasons will assist improvement.

### **No Escape: When Regulated Industries Are Interstate, Federal State Simultaneity Is Unavoidable.**

Until the 1980s, state regulation and effective regulation often coincided, because infrastructural assets, corporate boundaries, business activities, and relevant markets were primarily intrastate. No longer. Electric and gas consumers depend on production from distant states, brought by multistate transmission lines and pipelines; their consumption pollutes the air and water in other states. Local water users benefit from (and pay for) national water quality standards. Local phone callers depend on a national market of providers who use an interstate telecommunications infrastructure.

*“Interstate” is not a burden to bear; it is an opportunity to exploit.* In this interstate context, “effective regulation” is no longer synonymous with “exclusively state regulation.” I once heard a state commissioner assert, “If we are not for preserving state regulation, what are we for?” He had it wrong. The mission is not to preserve jurisdiction, but to make it effective. Jurisdictional effectiveness requires roles defined rationally, aimed at a single purpose: to induce regulated industries to perform at their best. To produce performance, regulatory responsibility should align with industry activity.

A focus on industry performance, rather than on jurisdictional gains and losses, helps avoid a related error: isolating one regulatory action from another, attacking in one context while enjoying a reverse inequity in another. These inconsistencies exist outside regulation: decrying “Hollywood” but enjoying its movies; deriding “New York” but tuning in to Letterman and Leno; complaining of federal “subsidies” while driving on the interstate; the skinhead whose favorite food is burritos. (Skinhead source is essayist [Richard Rodriguez, McNeil Lehrer Newshour, Nov. 2, 1995.](#)) And it happens within

regulation: complaining of the Northwest's control of low cost hydro while baking its salmon; downplaying the broadband deficit in rural America while roasting its corn.

There can be no principled disagreement with the reality of "interstate." Then why is "federal state tension" the norm? Why is "federal state cooperation" emphasized so often, like Shakespeare's Queen who "doth protest too much"? (*Hamlet*, Act 3 Scene 2)

## **Why Does the Interdependency Produce So Much Irritability?**

Simultaneous federal and state presences are inevitable, but permanent irritability and tension are not. The relationships shift, depending on the issue and the facts. Four examples follow.

**1. When national and in state interests clash.** Consider the siting of electric transmission and gas pipelines, where the nation's interest in efficient transactions and reliable supply conflicts with state interests in preserving natural resources and aesthetics.

The tension is natural: It is hard for a state to weigh its wishes against the nation's needs objectively, and it is hard for a distant federal regulator to value local passion fully. The tension is unavoidable, but we could drop the expressions of shock and dismay. Over 200 years ago the people approved a Constitution whose Commerce Clause sought to convert the continent from 13 colonial economies into one commercial unity. Subsequent Supreme Court decisions have reminded state legislatures that the Commerce Clause prohibits a state as regulator from hoarding its resources (including its land, scenic, and environmental resources) to the detriment of other states. See *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (invalidating New Jersey's ban on imports of out of state garbage; "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected").

**2. When the federal-versus-state issue is, at bottom, a state-versus-state issue.** There seems no end to state-versus-state cost allocation battles, resolved finally at FERC, with the winner praising the "nobility of the federal neutral," and the loser attacking the "arrogant federal preemptor." It reminds me of my seventh-grade math teacher, Mrs. Fitzpatrick, who once said, "I know how you kids talk about grades: If it's a 'B' or above, it's 'Look what I got!' But if it's 'C' or below, it's 'Look what she gave me.'"

**3. When the federal agency makes decisions that raise costs for state jurisdictional customers.** EPA sets water-quality standards, FERC approves transmission "adders," FCC approves a cost increasing universal service modification: These decisions might benefit the nation in the long term, but they raise costs for local customers in the short term. The political distance of decisionmaker from affected people is the source of the tension, but may also be the strength of the solution (since political distance increases political insulation, enabling the decisionmaker to "do the right thing").

**4. When the federal and state agencies differ over the role of regulation.** Here the two levels of government differ not over their role, but over regulation's role. We see this most often

in disputes over “deregulation.” (For a discussion of this term’s deficiencies, see essays, "Competition versus Regulation: Have We Achieved Conversational Clarity? I and II") States often criticize FERC and the FCC for these agencies’ view that competition is sufficient to support a reduction in regulatory presence. This is not a dispute over state federal jurisdiction; it is a difference over regulatory outlook and technique, and for some, regulatory conscientiousness.

But when the anger is high enough, the disagreement over policy sours into one over trustworthiness and turf. Former FERC Chairman Pat Wood sought to introduce regional transmission policies and regional organized markets. His goals were to rationalize infrastructure investment, diversify customer choices, increase market accountability, and reduce long-run costs. Plenty of people, based on their economic positions, had predictable reasons to support or oppose him. That’s regulation. What devalued the debate was the hyperbole, as when one state commissioner, perhaps unaware of the unfortunate historical overtones, accused Wood of coercing states into a “forced march.”

## **Conclusion**

Our regulated industries perform many services, some near the customer, some distant; some local, some multistate. Regulation’s purpose is to induce high-quality performance. The allocation of regulatory roles requires us to ask: What specific actions we do want from our regulated industries? What regulatory agencies are best positioned to produce that performance? Effectiveness over turf, substance over emotion: Those are the emphases most likely to ensure success.