

## Automated Vehicle Regs And The Dormant Commerce Clause

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In light of rapid technological developments, the greatest remaining hindrance to the proliferation of self-driving vehicles is regulatory uncertainty. Federal regulators have not enacted comprehensive safety standards for automated vehicles (AVs), offering only nonbinding guidance and leaving regulation primarily to local authorities.

Local regulations often differ, creating a messy patchwork of regulatory inconsistencies. To the extent local regulations restrict the use of AVs out of an unfounded fear of automation, they may impose a burden on interstate commerce that runs afoul of the dormant commerce clause doctrine.



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### The State of Play: Local Regulation of AVs

Ten states — Arizona, California, Florida, Louisiana, Massachusetts, Michigan, Nevada, North Dakota, Tennessee and Utah — and the District of Columbia have enacted laws or issued executive orders regulating the testing or operation of AVs. An additional twelve states proposed such legislation in 2016.

Notwithstanding calls for federal legislation, Congress has failed to act and the National Highway Traffic Safety Administration has issued only nonbinding guidance.[1] This regulatory mosaic renders an autonomous, cross-country road trip impossible for the foreseeable future.

The starkest conflict between regulatory regimes exists in the majority of states that have not enacted legislation expressly addressing AVs. In many of these states, longstanding laws and regulations likely preclude the operation of AVs entirely.

For example, New York law states “no person shall operate a motor vehicle without having at least one hand ... on the steering mechanism.”[2] Other states, such as Ohio, have statutes prohibiting any person from operating a vehicle “without being in reasonable control of the vehicle.”[3]

Conflicts also exist among states that expressly permit the operation of AVs. For example, statutes passed in 2016 in Florida, Michigan and one county in California allow AVs to be used without an operator inside the vehicle.[4] The California legislation also authorizes the limited testing of AVs that are not equipped with human controls, such as a steering wheel and brake pedal.

In contrast, most states that have enacted AV legislation expressly require a human operator and human controls. For example, Nevada law states “a human operator must be seated in a position which allows

the human operator to take immediate manual control of the autonomous vehicle.”[5]

Similarly, the District of Columbia requires “a driver seated in the control seat of the vehicle” and “a manual override feature that allows a driver to assume control.”[6]

### **Dormant Commerce Clause and Highway Safety**

The dormant commerce clause is a judicially created doctrine with a pedigree intertwined with automobile safety regulations. Between 1959 and 1981, the U.S. Supreme Court decided a trilogy of cases that considered the constitutionality of regulations on commercial trucking.[7] In each of those cases, the regulation was invalidated because it unconstitutionally burdened interstate commerce.

In *Bibb*, the seminal case in the trilogy, trucking companies challenged an Illinois statute requiring curved mud flaps. The statute conflicted with the prevailing convention of using straight mud flaps, which were required in Arkansas.

Recognizing that local safety measures “carry a strong presumption of validity,” the high court stated that such measures will only be disturbed when “the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it.”[8]

The evidence in that case suggested that curved mudguards generated no material safety benefits. Meanwhile, the Illinois statute imposed significant burdens on the trucking industry, including the inability to use the same mudguards in Illinois and Arkansas. Finding that the burdens on interstate commerce outweighed the safety benefits, the Supreme Court invalidated the law as inconsistent with the dormant commerce clause doctrine.

The doctrine’s applicability to highway safety standards was further elucidated in *Raymond Motor and Rice*. In those cases, the trucking industry challenged state laws restricting the length and number of trailers carried by commercial trucks.

Although the statutes did not prohibit an act that was required in other states, as in *Bibb*, the regulations nonetheless prohibited the use of certain trailer configurations that were commonly used and legal in adjacent states. In support of the regulations, the state authorities argued that longer trailer configurations created safety risks.

The trucking companies, however, submitted extensive evidence and statistical studies demonstrating that the prohibited configurations were at least as safe as, if not safer than, other configurations permitted under the laws. In light of this evidence, the high court found that the purported safety benefits were unfounded, and struck down the laws.

These cases suggest that, although highway safety regulations are presumed valid, due to the significant effect such regulations have on interstate commerce, they are not immune from scrutiny. Such regulations will be struck down if they impose a burden on commerce and they are not founded in serious and supported safety concerns.

### **Application of the Doctrine to AV Regulation**

Given the provenance of the dormant commerce clause doctrine, its application to AV regulations is a

logical extension.

Recent studies suggest that AV technology holds the promise to ameliorate — and potentially eliminate — the scourge of driving-related deaths in the United States. In 2015 alone, more than 35,000 people died on U.S. roadways, and 94 percent of crashes were tied to human error.[9]

A recent study commissioned by Google suggests that AVs result in fewer and less severe accidents than conventional vehicles.[10] Public testing by other industry participants, such as Tesla and Uber, lend support to this conclusion. As technology continues to advance, that safety record is likely to improve.

The majority of states that have promulgated AV-specific legislation have done so in an effort to attract the AV industry and its concomitant tax base, resulting in relatively permissive regulatory frameworks. On the other hand, the shrinking number of states that have not passed AV legislation, implicitly restricting the use of AVs, have been at least partially motivated by a fear of the automated future.

As a growing number of states move from doubters to believers, the laggards risk scrutiny under the dormant commerce clause. To the extent restrictions on AVs are motivated by a fear of automation, that fear is rebutted by the growing body of literature suggesting that, although imperfect, AV technology is safer than human operation, and only becoming safer with time.

Such restrictions impose a significant burden on interstate commerce, effectively prohibiting automated traffic from crossing state lines. There is a legitimate argument, therefore, that AV restrictions impose costs to commerce, without yielding any attendant safety benefits.

Of course, federal regulators could short-circuit this debate by preempting the state-by-state patchwork with federal legislation. But in the face of congressional inactivity, the dormant commerce clause may be a tool in obtaining a semblance of nationwide uniformity.

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[1] See “Federal Automated Vehicles Policy, “U.S. Dep’t of Trans. & Nat’l Highway Traffic Safety Admin. (Sept. 2016), available at <https://icsw.nhtsa.gov/nhtsa/av/>.

[2] N.Y. Vehicle & Traffic Law § 1226. An assembly bill introduced in 2016 would repeal this requirement when “driving technology is engaged to perform the steering function.” See N.Y. S7879 (2016).

[3] Ohio Rev. Code § 4511.202.

[4] See Florida H.B. 7027 (2016) (repealing Fla. Uniform Traffic Control Law § 316.86(1)); Mich. Vehicle Code §§ 257.2b, 257.665 (2016); Cal. Vehicle Code § 38755 (2016).

[5] Nev. Rev. Stat. § 482A.070.

[6] D.C. Code § 50-2352.

[7] *Bibb v. Navajo Freight Lines Inc.*, 359 U.S. 520 (1959); *Raymond Motor Transp. Inc. v. Rice*, 434 U.S. 429 (1978); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

[8] 359 U.S. at 523–24 (citing *Southern Pacific Co. v. State of Arizona*, 325 U.S. 761, 783 (1945)).

[9] See Traffic Safety Facts Crash Stats., Report No. DOT HS 812 115, Nat’l Highway Traffic Safety Admin., available at <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812115>.

[10] Blanco, M., et al., “Automated Vehicle Crash Rate Comparison Using Naturalistic Data,” Virginia Tech Transportation Institute (2016), available at <http://www.vtti.vt.edu/featured/?p=422>" <http://www.vtti.vt.edu/featured/?p=422>.