

Federalism and the Climate Change Problem: The Limits of Local Action

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Federalism Now

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- Local Land Use / Zoning Restrictions
 - Anti-fracking ordinances/initiatives
 - Oil and gas land use prohibitions
 - Disapproval of fossil fuel processing facilities
- Police Power Public Health and Safety
 - Bulk coal handling / other prohibitions
- Product Restrictions / Prohibitions
 - Environmental sustainability criteria
 - Prohibitions on products / certification requirements
 - Disclosure / labeling

- “Dormant” Commerce Clause
- Supremacy Clause (Preemption)
- Fifth Amendment (Taking)
- Fourteenth Amendment (Equal Protection, Substantive Due Process, Privileges and Immunities, etc.)

Question: Does a local ordinance banning the handling and storage of bulk coal violate the dormant Commerce Clause?



- First tier (per se invalid)
 - Does it discriminate against out-of-state interests on its face, in its intent, or in its effect OR directly regulate/affect transactions in other states or beyond state borders?
 - If so, does it serve legitimate a local interest that could not be served by non-discriminatory/less restrictive means?
- Second tier (generally upheld):
 - Is there a substantial burden on interstate commerce?
 - If so, is the burden clearly excessive in relation to putative local benefit (or are benefits illusory)?

Question: Is refusal to grant permit for refinery expansion to accommodate rail transport of oil preempted by federal rail law?



Interstate Commerce Commission Termination Act: “. . . the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.”



Case Study 3: Anti-Fracking

Question: Is local voter initiative banning fracking and underground injection of oil wastewater preempted by Safe Drinking Water Act, Resource Conservation and Recovery Act, or other federal environmental law?



- Field: Did Congress intend to comprehensively occupy the field?
- Conflict/Impossibility: Does compliance with local law conflict with federal law?
- Obstacle: Does compliance with law frustrate congressional intent?
- Non-preemption (or savings) clause: What role does it play?