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Recommended Citation
Available at: http://repository.law.umich.edu/mlr_fi/vol112/iss1/19

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Applying Administrative Law Principles To Hydraulic Fracturing

Joel M. Pratt*

INTRODUCTION

The practice of hydraulic fracturing—or fracking—has become a major focus of policymakers in recent years. Federal, state, and local regulations on fracking create a confusing web for industry to navigate, and governmental entities often battle with each other for authority to regulate the practice. The fast and widespread growth of fracking in the United States has therefore exacerbated confusion over who will regulate this booming industry, and courts have so far failed to use sensible principles to resolve inconsistencies among federal, state, and local regulations.

When fracking laws conflict, courts traditionally use preemption doctrine—general rules that help judges choose whether state or local laws (or both) should apply in particular situations—to resolve these conflicts. Yet this doctrine has produced confusion and regulatory uncertainty.¹

This Essay advocates a different approach. Because regulators and industry need both legal clarity and the ability to react to new information, courts should apply principles of administrative deference to resolve conflicts between state and local fracking regulations. Administrative deference refers to a set of principles that privileges administrative decision making over judicial discretion in areas of statutory ambiguity. Under these principles, courts weigh expert agency decision making more heavily when the agency has acted reasonably. When faced with a conflict between state and local fracking laws, courts should adopt administrative principles and privilege expert agency regulations rather than engage in an independent judicial inquiry. Part I provides background on fracking and argues that

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states are in the best position to regulate the practice. Part II then explores the difference between preemption doctrine and administrative deference, ultimately concluding that state courts should defer to state agency decisions on fracking regulation.

I. Background on Fracking, Its Risks, and the Law

Simply put, fracking is just what it sounds like: energy extractors blast high volumes of water, mixed with chemicals, at shale formations in order to fracture the shale rock, which stimulates oil and gas production. By producing energy, fracking supports the American economy and promotes energy independence, but these benefits come with risks to the environment. Environmental groups allege that fracking causes pollution, particularly to water sources. These groups are right: by opening up unprecedented sources of natural-gas production and increasing the number of wells in operation, fracking has indeed created more pollution. The standard risks associated with other forms of energy production, such as risks of well blowouts, pipeline explosions, and oil spills, compound these potential harms. Given that the widespread use of fracking is relatively new, however, the scientific and legal communities remain uncertain about its real impact. Regardless of this uncertainty, fracking’s benefits, coupled with its potential risks, demonstrate that a regulatory response is necessary. The federal government cannot reasonably be expected to regulate fracking, however, and local laws fail to do so properly. This leaves state governments, which are democratically responsive and capable of developing the expertise needed to regulate fracking.

A. The Federal Government Does Not and Will Not Regulate Fracking

As it stands, federal law does not regulate fracking because one of the key federal provisions protecting water sources from drilling activity


specifically exempts it. While some members of Congress have introduced the Fracturing Responsibility and Awareness of Chemicals ("FRAC") Act—an amendment to the Safe Drinking Water Act that would pull fracking back into the purview of federal regulators—strong partisan divisions suggest that such an amendment is unlikely to pass. Even if the FRAC Act did pass, however, it would simply set minimum standards for state permitting requirements and would reserve a state’s right to seek primary enforcement power. Therefore, even under the best scenario for proponents of federal regulation, the states would have primary authority to regulate fracking.

B. Local Regulations Are Ineffective and Counterproductive

Citizens, perhaps frustrated by a lack of federal action, have turned to local governments to enact laws that ban fracking. These local laws create uncertainty, waste resources, and make research more difficult. Moreover, many disputes over local laws shift too much authority to state courts.

Local fracking laws also create additional regulatory hurdles that companies must overcome. Because local laws supplement, rather than replace, state regulations, they impose additional burdens on drilling companies. Moreover, a local ordinance may be quickly and quietly passed after a company has already jumped through the bureaucratic hoops at the state level. Such an ordinance, even one that takes a drastic step like banning fracking entirely, could come into effect after a company has already made significant investments in a drilling operation. The burden of these regulations ought to be offset by corollary benefits. That is not the case, however. In fact, these local laws produce even more deleterious effects: they

8. See infra Section II.A.
9. For an example of the issues with local fracking bans and the lawsuits that accompany them, see Wallach v. Town of Dryden, 23 N.Y.3d 728 (2014), a case in which Norse Energy Corporation filed for bankruptcy while litigating against the city’s ban.
stand in the way of information gathering and create harmful economic incentives.

To understand how local regulations impede important research, consider two states' divergent approaches to regulating fracking. On the one hand, there is Texas, a notoriously under regulated state when it comes to fracking.\(^{10}\) The Railroad Commission of Texas's Oil & Gas Division regulates some aspects of the fracking process.\(^{11}\) In addition, Texas gives a great deal of authority to local governments and erects barriers against state rule.\(^{12}\)

Michigan, on the other hand, has much stronger substantive state rules.\(^{13}\) Importantly, Michigan also grants localities much less authority to regulate. Not only does the state give an agency exclusive authority to regulate oil and gas wells\(^{14}\) but a separate law divests local governments of this authority.\(^{15}\) Michigan thus provides a useful comparison to Texas in determining how these two different regulatory structures affect the realities of fracking.

A recent study, which monitored frackers' violations of state law, provides a useful set of data.\(^{16}\) In Texas, the largest percentage of violations involved "[p]ermitting & reporting."\(^{17}\) Notably, Texas reported no violations of its site-maintenance or surface-spill rules.\(^{18}\) Michigan, by contrast, had no violations of "[p]ermitting & reporting" but did report violations of both site-maintenance and surface-spill rules.\(^{19}\)

These data suggest that granting authority to local governments can create a regulatory web that prevents state agencies from discovering substantive problems with fracking. Texas is catching permitting problems but not the more substantial—and worrisome—violations of site-maintenance and surface-spill rules that inevitably attend any fracking operation. Indeed, since it is extremely unlikely that there were none of these violations on the ground in Texas—after all, there were violations in every

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11. 16 T EX. ADMIN. CODE § 3 (2013).
14. Id.
17. Id.
18. Id.
19. Id.
other state studied—the reasonable conclusion is that Texas’s patchwork of local laws makes it considerably more difficult for the state agency to discover violations that pose significant environmental risks. As this example suggests, local rules can shift the focus of both companies and regulators to permitting and bureaucracy rather than safety and the environment. Given that scientific uncertainty remains a major problem for the industry, local rules stand in the way of safer, more environmentally conscious fracking.

Local bans also create undesirable economic incentives that prevent well-informed regulation. Since shale rock does not respect political boundaries, a single drilling can simultaneously fracture shale in a number of different locations, perhaps in different municipal jurisdictions. Any harm to a water supply from this drilling can affect greater geographic areas than single cities, creating situations where one municipality may impose externalities on another. For example, City A may ban fracking, but neighboring City B may incentivize the same practice, pursuing the same gas deposit, which poses the same risks. City A then must live with the environmental impacts from City B’s activity while receiving none of the economic benefits. City A therefore has a strong incentive to pass legislation encouraging industry to drill in its municipality and ignore the environmental risks to City B. City A may even choose to ignore risks to its own municipality, since City B’s decision to incentivize fracking already causes it environmental harm that it cannot prevent.

Nowhere in this set of decisions is there room for expert research and analysis. Instead, localities facing these choices will take one of two actions: (1) they will either ban the practice entirely, due to fear and political pressure; or (2) they will tear down barriers to fracking in order to create jobs and generate tax revenue. In places where fracking is banned, it will be impossible to collect safety-oriented data on fracking. Crucial research in these cities will grind to a halt. And in the localities that do not ban the practice, the incentives militate against strong regulations, particularly if one locality will reap all of the benefits but many will face the environmental

20. See supra note 4 and accompanying text.


22. For an example of how water systems may be interconnected over a large geographic area, see Tanya Foubert, Ground, Surface Water Interconnected: Expert, ROCKY MOUNTAIN OUTLOOK (Aug. 1, 2013, 06:00 AM), http://www.rmontoutlook.com/article/20130801/RMO0801/308019990/ground-surface-water-interconnected-expert.

23. See Local Actions Against Fracking, supra note 7.
consequences. Thus, local governments lack the proper incentives to regulate fracking prudently and intelligently.

C. States: The Proper Fracking Police

Across the country, the states generally have primary responsibility to regulate fracking, and their authority to do so should be protected. One significant advantage that a state enjoys over its constituent localities is that a state—due to its larger size—has more resources. For example, states can consult fracking experts on the practice's risks. This is crucial: because regulatory uncertainty is a serious problem for fracking companies, expertise ought to drive decision making, not the whims of a fearful local population. Drawing on its comparatively vast array of resources, an expert state agency can promulgate comprehensive safety regulations that reflect its informed determinations about the proper locations for drilling in a safe and efficient manner. No longer will the locality most willing to risk environmental harm dictate where drilling occurs.

State-level control also has a distinct advantage over federal regulation. State experts can tailor rules for each state's particular geological reality. Because state legislatures and agencies are more familiar with a state's geographic landscape and the needs of its constituents, they can better research and understand local industry and environmental concerns than the federal government. Fracking in particular makes this advantage apparent: fracking's environmental problems demand that legislatures are familiar with local landscapes in order to create effective legislation—legislation that actually considers the land's specific characteristics in balancing environmental and industry concerns. For example, Colorado's approach to protecting mountain streams will no doubt be different from Michigan's rules protecting the Great Lakes. Because state regulators better understand the nuances of their own geographic territory, they can better tailor regulations to account for on-the-ground problems.


26. See supra Section I.B for an explanation of why local governments have the wrong incentives to regulate fracking properly.
II. The Administrative Deference Principle Accords States Their Proper Role in Fracking Regulation

The principle of administrative deference yields a better solution than preemption doctrine to competing local and state fracking regulations. In particular, when judges apply preemption doctrine, they follow general conflict-of-law principles and often reach confusing and unpredictable results. Administrative deference, by contrast, recognizes and implements tested principles of administrative law and therefore offers predictability to litigants and lawmakers. Section II.A explores in more depth the inadequacies of the preemption doctrine. Section II.B then argues that administrative law provides a better set of principles for resolving conflicts between state and local laws.

A. Preemption Doctrine Inadequately Arbitrates State–Local Disputes

State and local preemption cases relating to fracking regulations place the burden on state courts to determine whether state or local regulations apply. Preemption doctrines instruct that, when state courts are making this determination, they should tend to favor coregulation whenever possible, even in states with strong, effective state regulations.27 Under the preemption analysis, then, judges confronted with state–local regulatory clashes often hold in favor of coregulation rather than issuing sweeping rulings that preclude future local regulation. 28 These rulings allow judges to avoid making decisions that have unintended consequences or that would require reversing long-standing precedent. The consequence of such a system is that every local ordinance may end up in court, and it then becomes a judicial

27. See, e.g., Voss v. Lundvall Bros., 830 P.2d 1061 (Colo. 1992) (setting out Colorado’s three-part preemption doctrine, which defers to local rules except when the issue is only of statewide importance); Addison Twp. v. Gout, 460 N.W.2d 215, 216 (Mich. 1990) (holding that the state’s “exclusive jurisdiction . . . does not extend to all aspects of the [oil and gas] production process’’); City of Beaumont v. Fall, 291 S.W. 202, 206 (Tex. 1927) (“Of course, a general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached.”).

28. See Voss, 830 P.2d at 1068 (holding that, although the Colorado state government has a sufficiently strong interest in regulation that overrides certain complete drilling bans, some aspects of oil and gas drilling can be coregulated by state and local governments); see also Colo. Oil & Gas Ass’n v. City of Longmont, No. 13CV63 (Colo. Dist. Ct. Boulder Cnty. July 24, 2014) (addressing Voss and complex Colorado precedent on preemption and ultimately holding that state law preempts Longmont’s fracking ban).
task to pick and choose among regulations. Judges are not oil and gas experts, however, and they lack the democratic accountability of legislators and governors. The current system has provided state judges tremendous but ultimately unwarranted authority to regulate the fracking industry.

In this crucial way, preemption doctrine is inadequate to adjudicate conflicts between state and local laws. The general conflict-of-law principles that judges rely on in using the preemption doctrine fail to address the vast differences between states and localities in terms of resources and access to expertise. Moreover, these principles do not actually constrain judicial discretion. Given the extremely divisive nature of environmental regulation, the courts should make decisions with in reasonable doctrinal constraints because such decisions would better serve both environmental and industry needs.

B. Administrative Deference Better Resolves State–Local Disputes

Administrative law provides a better set of principles to resolve conflicts between state and local laws. In applying the administrative-deference principle, courts should first determine whether the agency has the authority to make the decision it made. Second, courts should determine whether the exercise of that authority was reasonable.

The landmark case enunciating this principle and process is *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* In that case, the Supreme Court instructed federal courts to accord deference to an agency’s interpretation of law. The Court adopted this model in part because it found that expert agencies, which are tasked with administering complex statutes, are in a better position than courts to interpret those statutes. These specialized agencies have a particular subject-matter expertise, and they are often staffed by expert bureaucrats, not generalist judges. Recognizing their agencies’ expertise, many states have adopted some form of judicial

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29. For a cogent explanation of how a few state courts have dealt with state–local conflicts in fracking regulations, see Keith B. Hall, *Recent Developments in Hydraulic Fracturing Regulation and Litigation*, 29 J. LAND USE & ENVT. L. (forthcoming 2014).

30. Even in states where state judges face elections, such elections are less partisan and politicized, and judges rarely lose their seats. Larry Aspin, *Judicial Retention Election Trends 1964-2006*, 90 JUDICATURE 208, 210 (2007) (“In only 56 of the 6,306 judicial retention elections were judges not retained.”).


32. Id. at 865.
deference to agency decisions, often asking whether an agency’s exercise of authority was reasonable.33

If a state legislature has delegated to an agency the task of regulating fracking, then local governments and state courts should defer to the agency’s authority to regulate. If a challenge is brought against a law that bans or severely restricts fracking, the courts should defer to the state agency’s judgment about fracking in that particular locality. After all, agencies are best equipped quickly to respond to changed circumstances because they are not bound by the same onerous procedures as legislatures. Moreover, in the face of uncertainty, agencies can conduct research on complex issues and change rules accordingly as new information becomes available. Given these advantages, state courts should adopt the *Chevron* principle and defer to state agencies’ decisions when those decisions are not capricious or beyond the agency’s statutory authority.

There are two distinct advantages to applying this administrative law principle in the energy-development context. First, under this principle, state governments and energy-industry players can expect more certainty from state courts, which allows governments and industry to plan accordingly and allocate their resources more efficiently. Litigants will also benefit from this certainty, as they can expect the courts to rule in favor of state administrative rules.

Second, administrative deference can help channel citizen and municipal concerns through the state administrative process. Instead of fighting court battles over whether state law should trump local law, citizens and municipalities can work through the administrative system to craft, refine, and apply rules in light of new technologies, safety innovations, and increasing awareness of the long-term effects of fracking. The statewide impacts of fracking—for example, its potential to harm water sources—are important enough to merit statewide regulation. Implementing robust notice-and-comment rulemaking procedures on a statewide basis can give individuals ample opportunity to participate in the rulemaking process. State courts can still step in if the agency promulgates arbitrary rules or makes decisions outside the scope of its authority. Otherwise, state courts should respect agencies’ relative expertise and accord the proper deference.

It should be noted that the administrative-deference principle does allow localities to play a role in cases where the state utterly fails to regulate. Opponents of an administrative-deference regime might argue that industry-dominated states would be able to regulate weakly—or not at all. In this scenario, courts, deferring to state agency authority, would be forced to

throw out local laws designed to fill significant gaps. Not so. In order to receive administrative deference from courts, state agencies must actually conduct research and promulgate rules in the first place; if agencies fail to do so, there are no rules to which courts can defer. Administrative deference preserves a role for local governments to regulate when the state fails. This doctrine is therefore flexible enough to accommodate local needs while still promoting uniformity and expertise when the state does regulate.

CONCLUSION

Fracking is a risky process that has generated considerable publicity and fear. It has also prompted many regulatory efforts. While preemption doctrine has guided the fight between states and localities over fracking regulation, this doctrine has failed to limit courts’ discretion. Courts should therefore abandon preemption doctrine and look instead to principles of administrative deference to resolve disputes between state and local governments. By adopting these principles, courts will facilitate better regulations, increased certainty, and decisions based on expert evaluations of emerging facts.