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Recommended Citation

Roger Williams University School of Law, "Newsroom: Burger on Fracking and Federalism" (2013). *Life of the Law School (1993-)*. 186.

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Newsroom

Burger on Fracking and Federalism

Professor Michael Burger argues that fracking's interstate and national implications and its profound impact on rural America weigh in favor of federal regulation.

From the University of Pennsylvania Law Review: "Fracking and Federalism Choice" by Michael

Burger, Associate Professor, Roger Williams University School of Law.



In response to "Federalism, Regulatory Lags, and the Political Economy of Energy Production" by David B. Spence

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To date, fracking discourse has focused on whether environmental protections under existing laws ought to be strengthened and whether the exemptions to the Safe Drinking Water Act (SDWA), the Resource Conservation and Recovery Act (RCRA), and the Emergency Planning & Community Right-to-Know Act (EPCRA) ought to be revoked. In Professor Spence's view, Congress should not create a new federal-state permitting system based on the principles of cooperative federalism, nor should the EPA organize and implement its existing authority to set up a one-stop shop for fracking permits. At the same time, Professor Spence concludes that there may be a role for federal regulation of specific aspects of fracking operations that are known to cause interstate environmental harm, and that further risk assessments and scientific studies may reveal a need for a stronger federal role in other areas, as well.



In this Response, I offer a set of constructive challenges to Professor Spence's Article. In Part I, I argue that fracking's federalism-choice question has already been answered, and that but for the outdated and under-justified exemptions mentioned above, fracking is already under the jurisdiction of federal regulators. In Part II, I conduct an alternative federalism-choice analysis that adds to Professor Spence's analysis in three ways. First, I balance his analysis by examining rationales commonly used to justify decentralization, rather than federalization, of environmental law. Second, I argue that given the fast-paced growth in drilling activity across the country, fracking's environmental impacts should be analyzed with regard to their cumulative effects. When so viewed, it is clear that fracking gives rise to interstate, and even national, problems that must be addressed accordingly. Third, I argue that widespread impacts on rural America weigh in favor of federal regulation.

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