The (Re) Federalization of Fracking Regulation

Michael Burger
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Federalism Choice

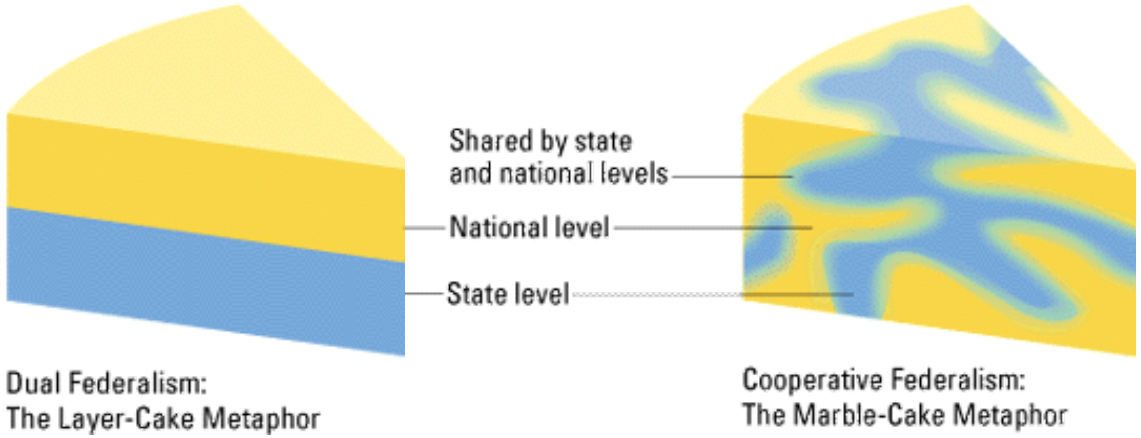
Legislators and regulators have options available to answer the question:

Should regulation of a given activity (e.g., hydraulic fracturing) or impact from an activity (e.g., contamination of groundwater) flow from a global, national, state, or local level?

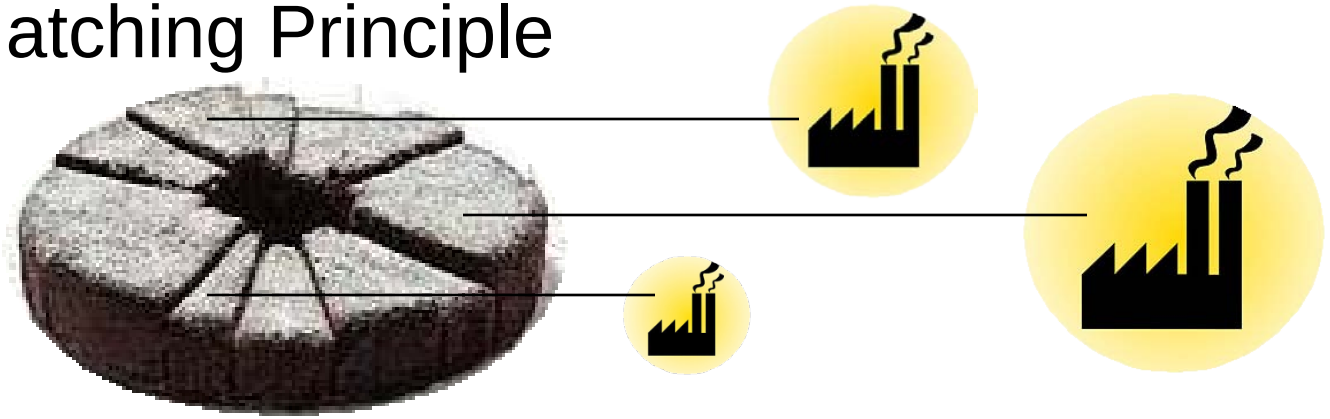
Traditional Responses

Dual Federalism

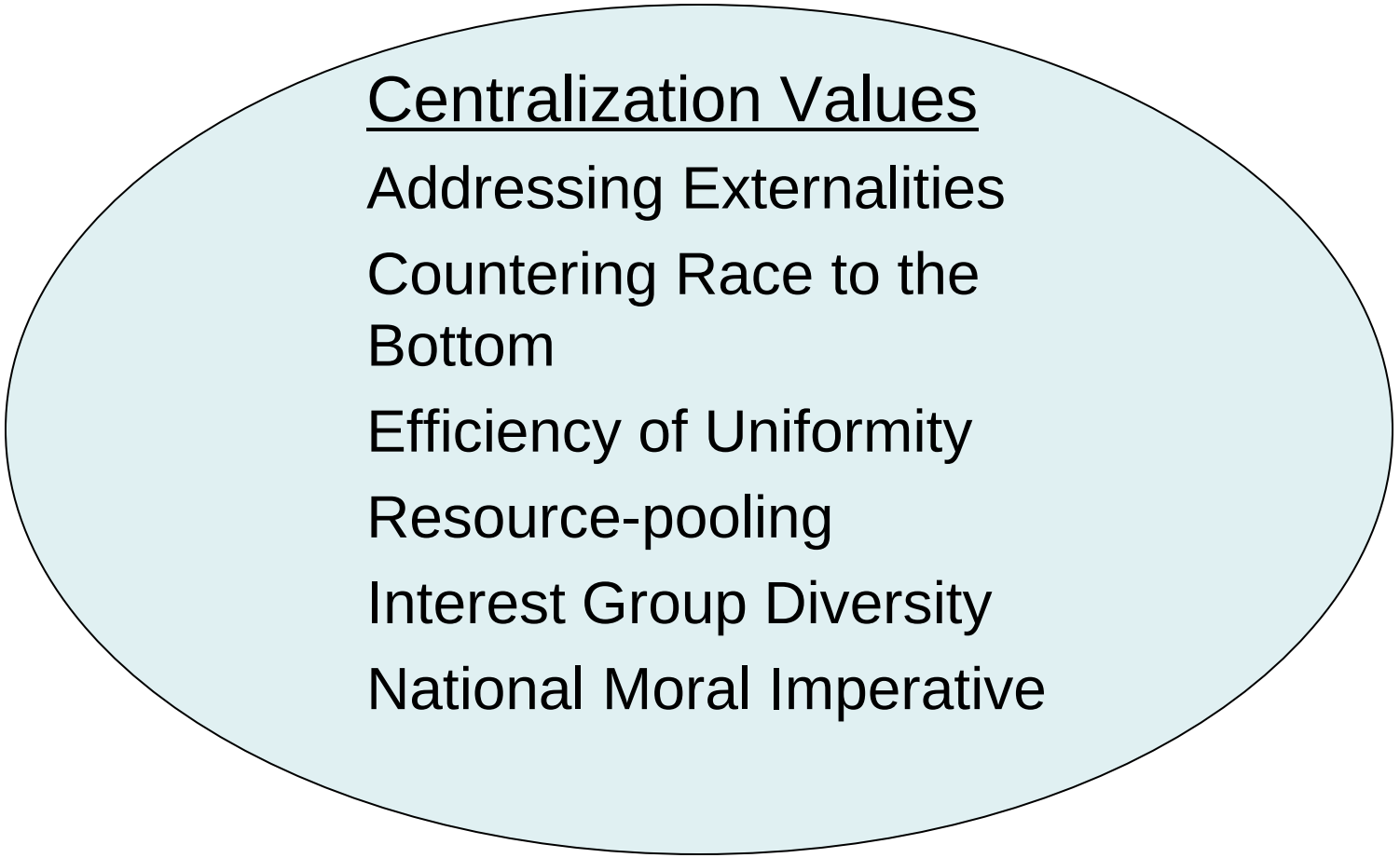
Cooperative Federalism



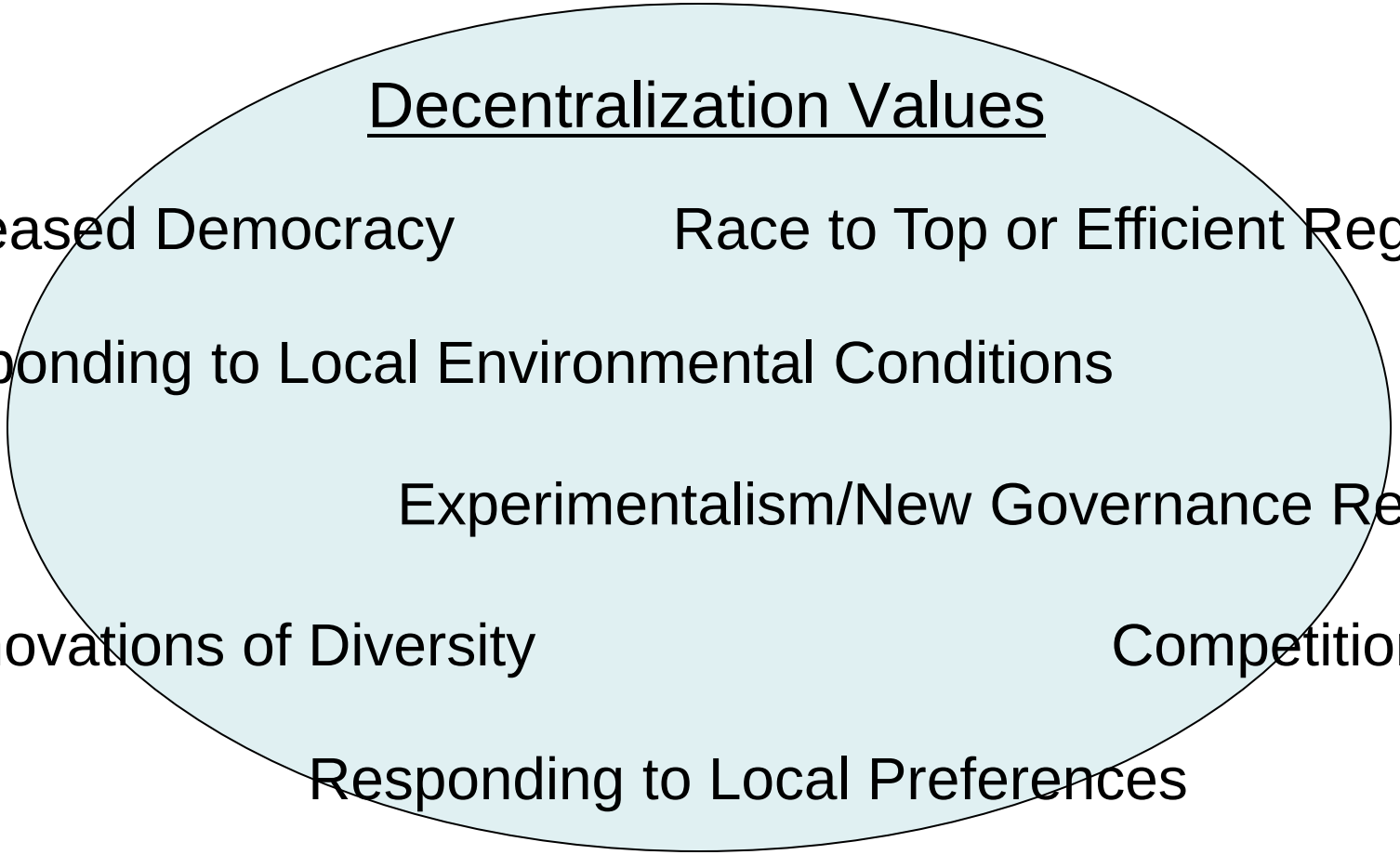
The Matching Principle



Conventional Federalism Choice Analysis



Conventional Federalism Choice Analysis



Arguments for State Regulation of Fracking: Theoretical

Values:

- Local Tailoring: Environmental and Democratic
- States as Labrora[illegible] of Experimentation
- Increased Democracy
- Matching Principle

Arguments for State Regulation of Fracking: Actual

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RESOLUTION TO RETAIN STATE AUTHORITY OVER HYRDRAULIC FRACTURING

WHEREAS, Hydraulic fracturing is a proven technology with a long history of environmentally safe use in the completion of oil and gas wells; *and*

WHEREAS, The oil and gas producing States regulate hydraulic fracturing as a component of their regulatory problems for the drilling, completion, operation, and plugging of oil and gas wells; *and*

WHEREAS, The reservoirs that produce oil and gas are highly variable geologically and separated geographically across the oil and gas producing States such that State regulatory agencies are best suited by local expertise and experience to effectively regulate hydraulic fracturing; *and*

WHEREAS, State regulatory agencies are the most appropriate regulatory bodies to provide oversight and protection of hydrologically and environmentally sensitive localities as they relate to hydraulic fracturing; *and*

WHEREAS, The regulation of hydraulic fracturing under the Federal Safe Drinking Water Act would add burdensome and unnecessary regulatory requirements to the drilling and completion of oil and gas wells, thereby increasing costs of producing domestic natural gas resources without any ancillary benefit to public health, safety or the environment; *and*

WHEREAS, The increased cost of producing domestic natural gas resources will reduce domestic supplies of natural gas, increase utility prices, and other costs to consumers, reduce tax and royalty revenues for local, State, and federal governments; and increase the nation's dependence on foreign energy imports; *and*

WHEREAS, The Interstate Oil and Gas Compact Commission (IOGCC) conducted a survey of oil and gas producing States, which found that there were no known cases of ground water contamination associated with hydraulic fracturing, and set forth its opposition to federal regulation of hydraulic fracturing under the underground injection control program in Resolution 09.011, dates January 7, 2009, "Urging Congress Not to Remove Exemption of Hydraulic Fracturing from Provisions of the Safe Drinking Water Act;"; *and*

WHEREAS, the states' public utility commissioners represented by The National Association of Regulatory Utility Commissioners adopted a similar resolution in July 2009;

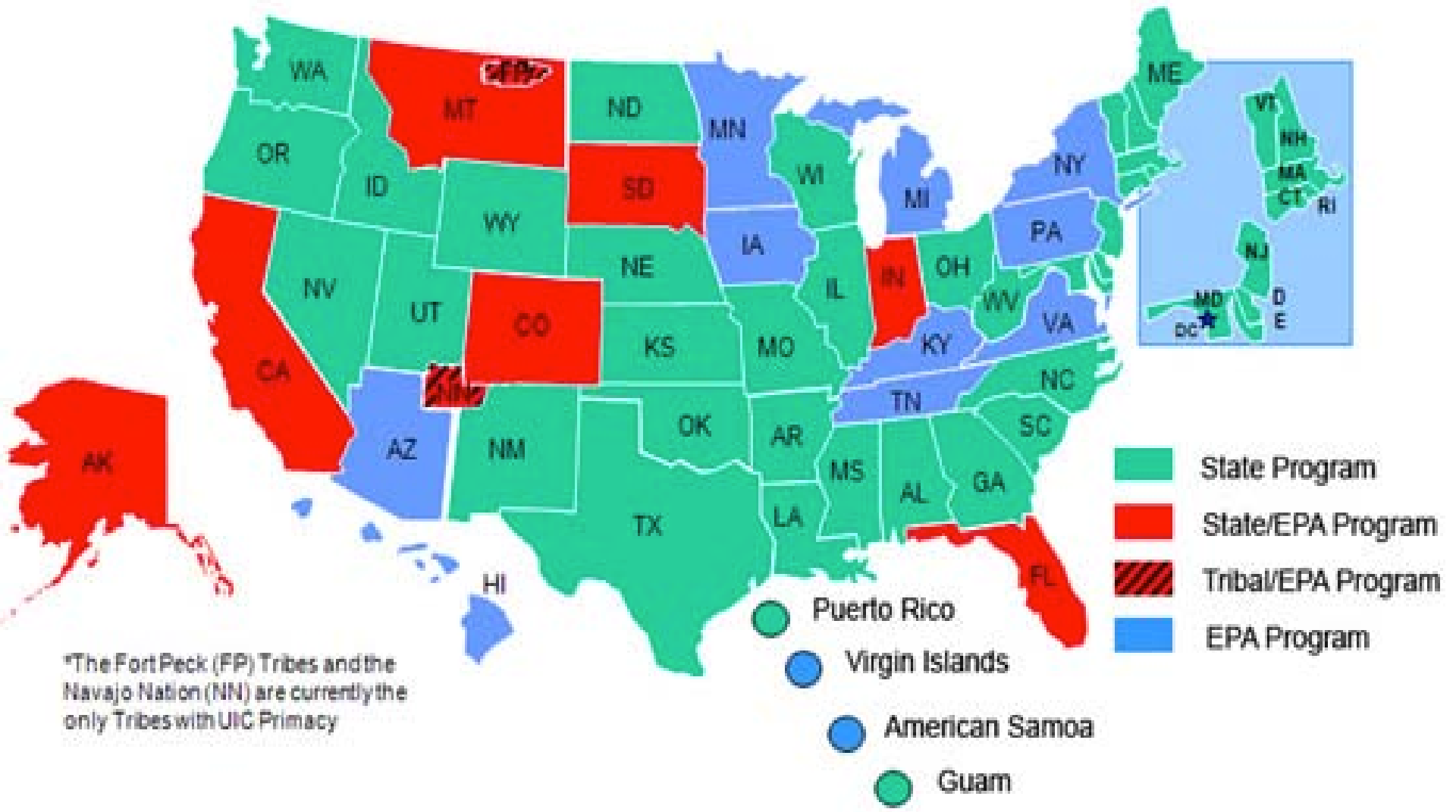
NOW, THEREFORE BE IT RESOLVED, That the American Legislative Exchange Council supports continued jurisdiction of the States to conserve and properly regulate oil and gas production in their unique geological and geographical circumstances.

Arguments for Federal Regulation of Fracking: Theoretical

Cooperative Federalism Regime Under the SDWA Answers All of the Relevant Theoretical Pro-Decentralization Arguments:

- State Primacy
- The Experiment Can Continue:
  - -No Ceiling Preemption
  - -Regulatory Gaps Will be filled
- The SDWA Reflects Pre-Existing Federalism Choices on Scale:
  - -Interstate Impacts
  - -National Concern about Drinking Water
- Rapid Spread of Fracking Creates New Concerns:
  - -Cumulative Impacts
  - -Impacts on Rural America

State Primacy



State Primacy

States Regulating Oil and Gas (Class II) UIC Wells Under SDWA Section 1425

Alabama	Louisiana	Oklahoma
Alaska	Mississippi	Oregon
Arkansas	Missouri	South Dakota
California	Montana	Texas
Colorado	Nebraska	Utah
Illinois	New Mexico	West Virginia
Indiana	North Dakota	Wyoming
Kansas	Ohio	

Source: CRS Report, adopted from information from EPA

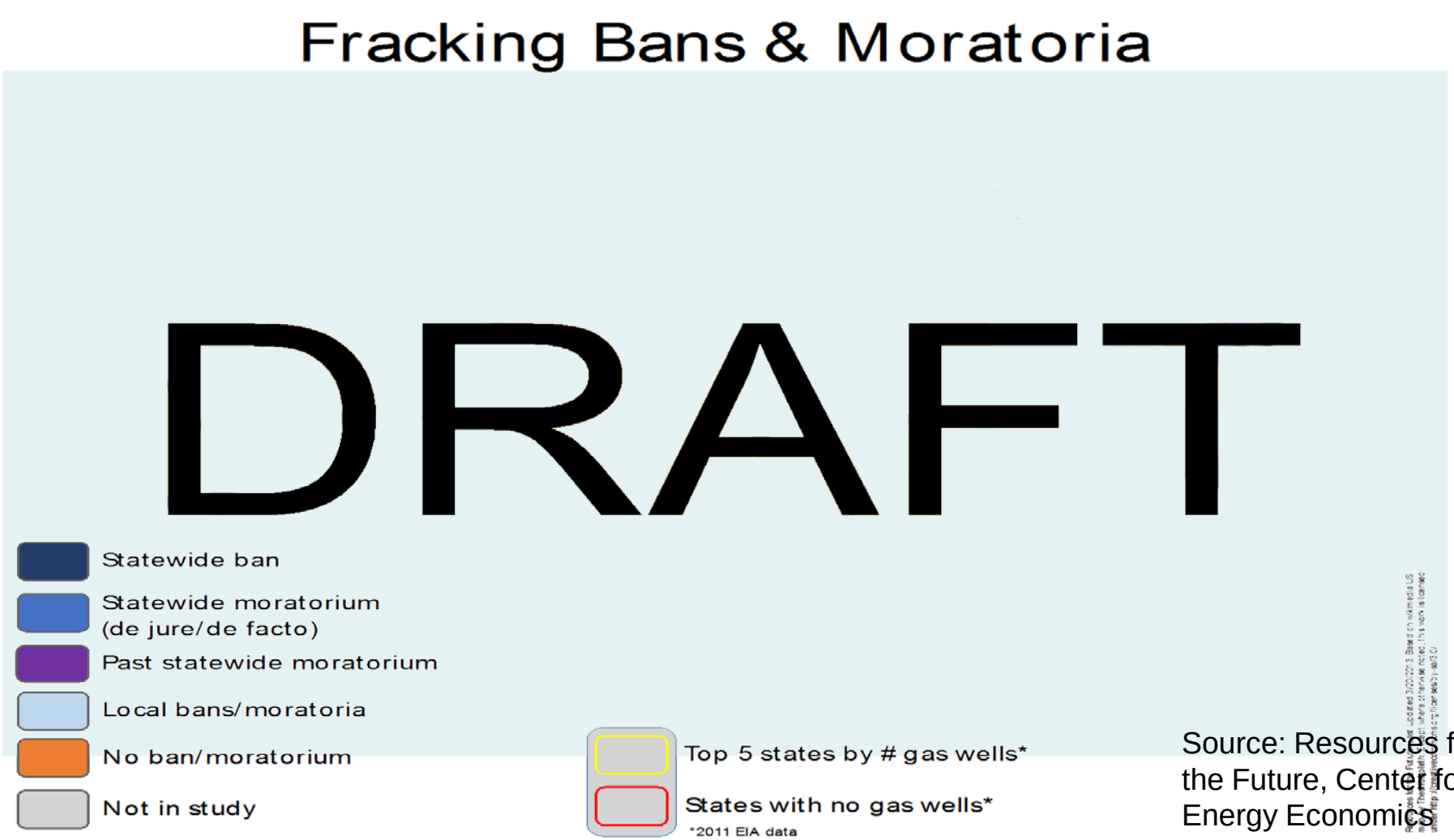
State Primacy

States where EPA Implements the UIC Class II Program

Shale Gas Producing States	Others
Pennsylvania	Arizona
New York	District of Columbia
Michigan	Florida
Kentucky	Hawaii
Tennessee	Iowa
Virginia	Minnesota
	Multiple tribes, few territories

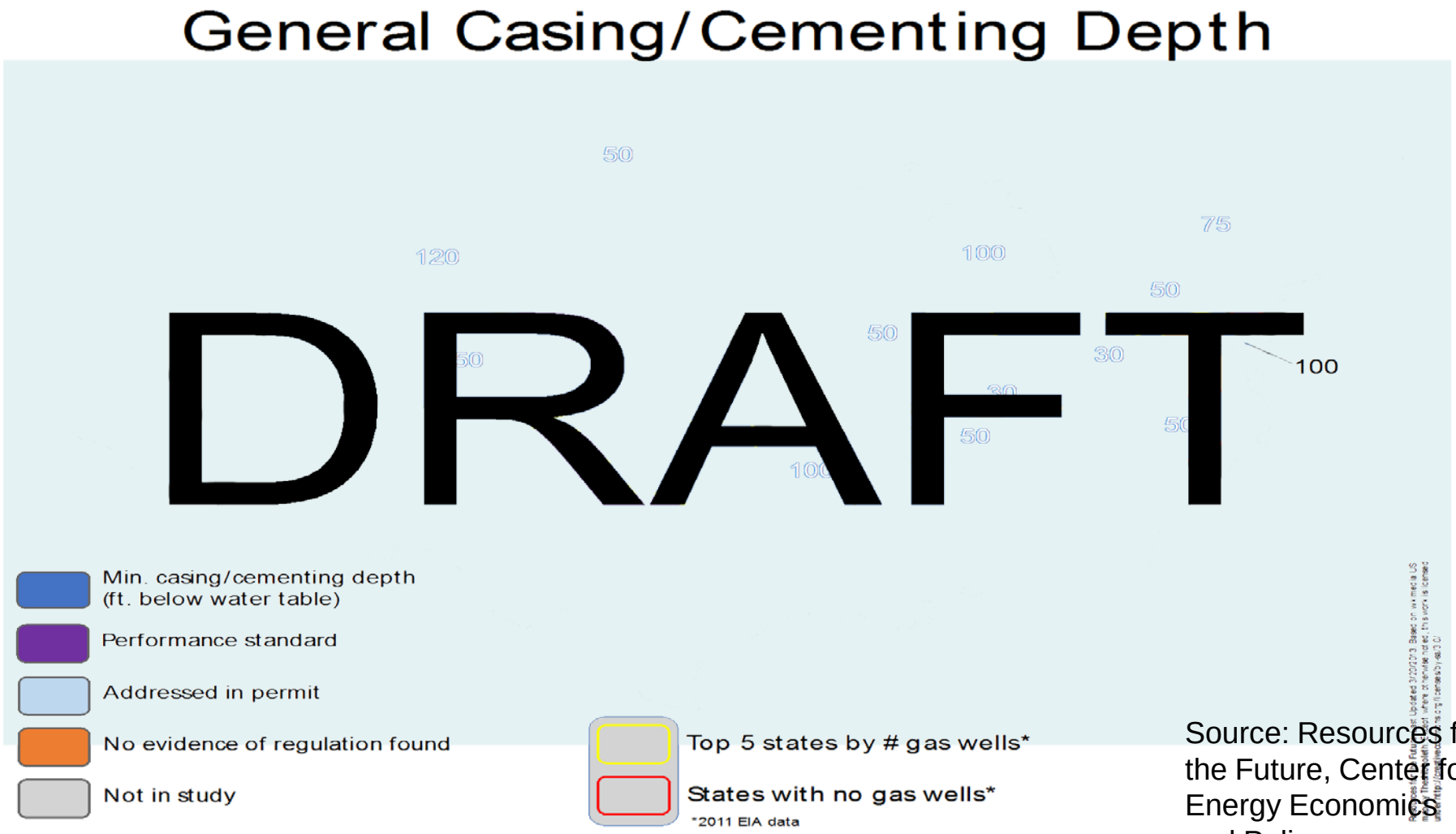
Source: CRS Report adapted from information from EPA

Fracking and Regulatory Experimentation



Source: Resources for the Future, Center for Energy Economics and Policy

Fracking and Regulatory Diversity



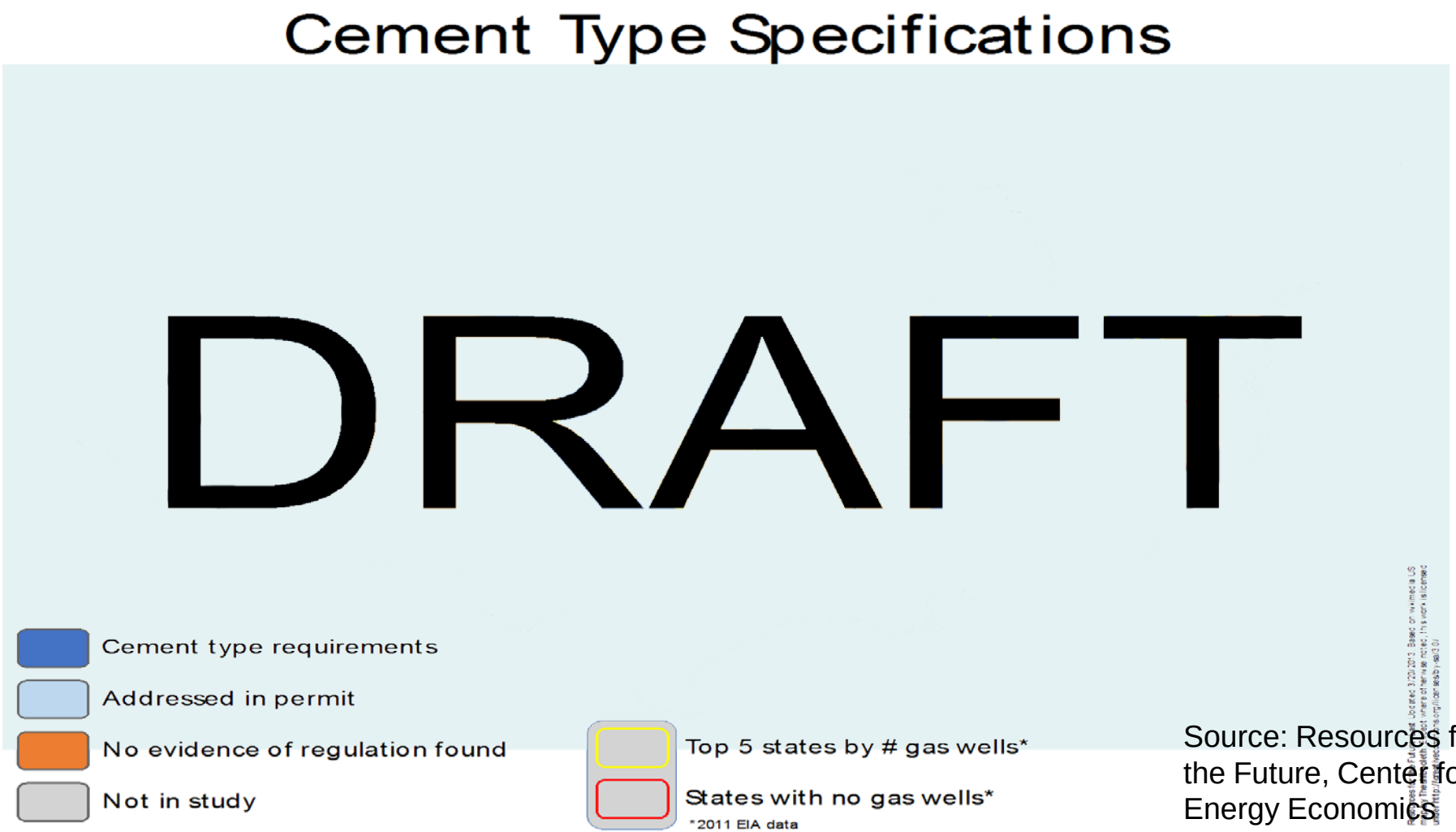
Source: Resources for the Future, Center for Energy Economics and Policy

Fracking and Regulatory Gaps

Setback Restrictions: Water Supplies

Source: Resources for the Future, Center for Energy Economics and Policy

Fracking and Regulatory Gaps



Source: Resources for the Future, Center for Energy Economics and Policy

Existing Federalism Choices

History: SDWA resulted from

- Increasing national concern associated with incidents of waterborne illness
- Publication of *Community Water Supply Study*
- Publication of reports documenting risk of exposure to carcinogens in drinking water.

Legislative History: "The purpose of the legislation is to assure that water supply systems serving the public meet minimum national standards for protection of public health." H.R.Rep.No.93-1185

New Concerns

- Cumulative Impacts
- Rural Impacts

Arguments for Federal Regulation of Fracking: Actual

- Fracking is "underground injection"
  - *LEAF v. EPA*, 118 F.3d 1467 (11th Cir. 1997); *LEAF v. EPA*, 276 F.3d 1253 (11th Cir. 2001)
  - FRAC Act of 2009
  - *CBD v. California DOGGR*, complaint filed in Alameda County, Jan. 24, 2013

Arguments for Federal Regulation of Fracking: Actual

- EPA Draft UIC Permitting Guidance for Hydraulic Fracturing using Diesel Fuel
- EPA drafting Proposed Rule to Amend Effluent Limitation Guidelines for Discharges of Wastewater from HF
- EPA Air Emissions Standard for Oil & Gas E&P
- Petition to Require Toxicity Testing and Reporting under TSCA
- Petition to Regulate Wastewater under RCRA
- Petition to Regulate Disclosure under the TRI

In Short…

- Regulation of hydraulic fracturing properly falls under existing cooperative federalism regimes
- But for unjustified legislative and regulatory exemptions there would be far less controversy
- Ongoing study should be thought of as relating to whether hydraulic fracturing "endangers" drinking water supplies under the SDWA, *not* whether the federal or state governments should regulate

Contact Information

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