Do State and Local Regulations that Prohibit Gas Drilling Based on Police and Land Use Powers Violate the Commerce Clause?

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I. Introduction

Many towns in New York State have recently adopted prohibitions barring heavy industry, such as natural gas production, from operating within their borders. [2] These ordinances are based on general land use, zoning, and police powers of the respective jurisdictions. Legislation to adopt a statewide moratorium of hydrofracking in low permeable shales was enacted by the New York State Senate and Assembly in the summer and fall of 2010, [3] and was subsequently vetoed by then Governor Paterson. [4]

Industry commentators have suggested that the enactment of such local or statewide prohibitions violate the Commerce Clause of the United States Constitution. The Commerce Clause is an enumerated power of Congress that enables the federal government to regulate

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[2] Tom Grace, *Springfield, Middlefield ban gas drilling*, THE DAILY STAR. (June 16, 2011), http://thedailystar.com/localnews/x1678756068/Springfield-Middlefield-ban-gas-drilling (last visited June 16, 2011). Tom Grace, *Cherry Valley town bans drilling, fracking*, THE DAILY STAR. (July 16, 2011), http://thedailystar.com/localnews/x1100992273/Cherry-Valley-town-bans-drilling-fracking (last visited July 16, 2011).

[3] Mireya Navarro, *Paterson Weighs Bill to Halt the Issuing of Gas Extraction Permits*, NEW YORK TIMES. (November 30, 2010), http://www.nytimes.com/2010/12/01/nyregion/01fracking.html?hpw=&pagewanted=print (last visited December 1, 2010).

[4] Peter Kiernan, Counsel to the Governor, *Statement*, NEW YORK STATE GOVERNOR PATERSON WEBSITE (December 11, 2011), http://www.ny.gov/governor/press/121110KiernanStmt.html (last visited December 15, 2010).

interstate and foreign commerce. [5] Courts often interpret Commerce Clause challenges through the Supremacy Clause [6] to determine if there is a conflict between state and federal laws. [7]

As the discussion below will show, Congress has expressly granted state and local governments the right to regulate the production of natural gas, [8] but has preempted regulations on the interstate sale and transport of natural gas, [9] and the siting of Liquefied Natural Gas facilities for the importation and exportation of natural gas. [10] As a result we conclude that the bans proposed by the New York State legislature, and the laws enacted by local municipalities, do not violate the Commerce Clause. They do not discriminate against out-of-state residents or businesses as they apply equally to in-state and out-of-state citizens. [11] They are not a form of protectionism, as the intention of the governing bodies is to preserve the health of their citizens and environment, not to favor the state's economic well-being. [12] Such bans on the production of natural gas are a recognized form of regulation, which Congress specified as a power that is to be retained by the states. [13]

II. Congress has the right to regulate gas drilling under the Commerce Clause.

The powers of Congress are enumerated in Section 8 of Article I of the United States Constitution. The third clause, known as the Commerce Clause, delegates to Congress the power "to regulate commerce . . . with foreign nations, and among the several States, and with

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5 U.S. CONST. art. I, § 8, cl. 3.
6 U.S. CONST. art. VI, § 2.
7 Gibbons v. Ogden, 22 U.S. 1, 208, 210, 211 (1824).
8 15 U.S.C. § 717(b) (1938).
9 *Id.*
10 Energy Policy Act of 2005, Pub. L. No. 109-58, § 311, 119 Stat. 594, 685-688 (2005).
11 H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 530-531 (1949).
12 *Id.* at 535.
13 § 717(b).

the Indian tribes." [14] When laws enacted under the Commerce Clause are challenged, the Supreme Court applies a "strict scrutiny" test to statutes that infringe on fundamental liberties, but only a "rational basis" test to statutes that regulate business. [15] Integral to the analysis is the presumption that a law concerning economic interests is constitutional. [16] If there is a conflict between a federal statute and a state or local law, the act of Congress is deemed "the supreme Law of the Land" [17] and preempts the state or local law. [18]

One of the first Commerce Clause cases to come before the Supreme Court was *Gibbons*. [19] The issue was whether New York State had the right to grant a monopoly to certain steamboat owners within the territorial waters of the state. [20] Gibbons' boats were licensed under an act of Congress, but he was enjoined from traveling from New Jersey to New York under New York State law. [21] After outlining the framework for interpreting the Commerce Clause, Chief Justice Marshall held that 1) commerce includes interstate navigation; [22] 2) Congressional power can extend within a state; [23] and 3) federal law preempts state law when there is a collision between them. [24]

In a 1937 case involving a labor dispute, the Supreme Court upheld the right of Congress to regulate commerce within a state. [25] Chief Justice Hughes reasoned that "[d]iscrimination and coercion to prevent the free exercise of the right of employees to self-organization and

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14 U.S. CONST. art. I, § 8, cl. 3.
15 United States v. Caroline Products, 304 U.S. 144, 152-153 n.4 (1938).
16 Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).
17 U.S. CONST. art. VI, § 2.
18 Gibbons, 22 U.S. at 211.
19 *Id*. at 186-222.
20 *Id*. at 186.
21 *Id*. at 217-218.
22 *Id*. at 189-190, 215.
23 *Id*. at 194-196.
24 *Id*. at 210-211.
25 NLRB v. Jones & Laughlin, 301 U.S. 1, 30-31 (1937).

representation is a proper subject for condemnation by competent legislative authority." [26] To protect the states from a "completely centralized government," he held that in order for Congress to be able to act, the effects on interstate commerce have to be substantial.[27]

Over the years the Supreme Court applied this "substantial affects" standard, and allowed Congress to use the Commerce Clause to regulate a vast range of topics -- even racial discrimination. [28] However, in 1995 the Court limited Congressional power under Commerce Clause for the first time in almost 60 years. [29] The issue was the constitutionality of section 922(q) of the Gun-Free School Zones Act of 1990, which made possession of a firearm within a school zone a federal crime. [30] In reviewing the history of Commerce Clause jurisprudence, the Court listed the three categories of activities that Congress may regulate: (1) "the use of the channels of interstate commerce"; [31] (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; [32] and (3) "activities that substantially affect interstate commerce". [33] Chief Justice Rehnquist noted that the gun law at issue in *Lopez* fell within the third category, but found that "[u]nder the theories that the Government presents in support of *§ 922(q)*, it is difficult to perceive any limitation on federal power . . ." [34] The Court held that the enumerated powers infer limits, and found that Congress had overstepped its authority. [35]

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[26] *Id*. at 33.
[27] *Id*. at 37.
[28] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).
[29] United States v. Lopez, 514 U.S. 549, 552 (1995).
[30] *Id*. at 551.
[31] *Id*. at 558.
[32] *Id*.
[33] *Id*. at 559.
[34] *Id*. at 564.
[35] *Id*. at 567-568.

Five years later, in *Morrison*, the Supreme Court held that the federal civil remedy in the Violence Against Women Act (VAWA) was also unconstitutional under the Commerce Clause. [36] Noting its similarity to *Lopez*, Chief Justice Rehnquist stated that: (1) VAWA regulated crime, not economic activities; (2) criminal law was a traditional power of the states; and (3) the economic impacts of violence against women could not be aggregated to trigger an impact on interstate commerce. [37]

The Court took the opposite position in *Raich*, when it held that the intrastate cultivation and use of medical marijuana could be aggregated to allow Congress to take action entirely within a state under its Commerce Clause powers. [38] Medical marijuana was legal in California, but was contrary to the federal Comprehensive Drug Abuse Prevention and Control Act of 1970. [39] Relying on *Wickard*, [40] Justice Stevens reasoned that if marijuana users across the country were to grow their own medicinal herb, and if the effect of those users was combined, then it could have a substantial impact on interstate commerce. [41] The Supreme Court held that Congress had a rational basis for controlling home-consumed marijuana, and that the federal statute preempted the conflicting state law. [42]

A number of cases involving the Patient Protection and Affordable Care Act are currently working their way through the federal courts. [43] In *Commonwealth ex rel. Cuccinell v. Sebelius*, District Judge Hudson held that the failure to buy health insurance is not an economic

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36 United States v. Morrison, 529 U.S. 598, 601, 605, 617 (2000).
37 *Id*. at 610, 613, 617.
38 Gonzales v. Raich, 545 U.S. 1, 20 (2005).
39 *Id*. at 5, 12, 14.
40 Wickard v. Filburn, 317 U.S. 111 (1942).
41 Raich 545 U.S. at 17-18, 28.
42 *Id*. at 19, 29.
43 *See, e.g.* Commonwealth ex rel. Cuccinell v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010); Fla. ex rel. Bondi v. U.S. Dep't of Health and Human Services, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011); Goudy-Bachman v. U.S. Dep't of Health & Human Services, 764 F. Supp. 2d 684 (M.D. Pa. Jan. 24, 2011); Liberty Univ. Inc. v.

activity, and that Section 1501 of the Patient Protection and Affordable Care Act, which mandates such purchase, is unconstitutional. [44] "The Court in *Lopez* and *Morrison* constrained the boundaries of *Commerce Clause* jurisdiction to activities truly economic in nature and that had a demonstrable effect on interstate commerce…" [45] He rejected the federal government's argument that the aggregating principle of *Wickard* and *Raich* was applicable. [46] However, in *Thomas More Law Center*, District Judge Steeh held that the failure to buy health insurance is an activity, and that the collective failure to purchase can be aggregated to substantially effect interstate commerce. [47] The ultimate decision will not turn on whether Congress has the right to regulate health care, but whether the "economic activity" requirement, which is integral to Commerce Clause jurisprudence, includes not engaging in commerce.

Thus, over the past seventy-four years, the Supreme Court has consistently held that the Commerce Clause grants Congress expansive powers to regulate activities that have a substantial effect on interstate commerce, even when those activities must be aggregated to show such an impact. For the reasons set forth below, we conclude that Congress has intentionally not authorized the federal government to regulate natural gas extraction, nor preempt states from regulating it.

Geithner, 753 F. Supp. 2d (W.D. Va. Nov. 30, 2010); Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010).

44 Commonwealth ex rel. Cuccinell, 728 F. Supp. at 782.

45 *Id*. at 781.

46 *Id*. at 776-777.

47 Thomas More Law Center, 720 F. Supp. at 893-895.

III. Congress delegated the authority to regulate gas drilling to the states in the Natural Gas Act.

In 1938, Congress enacted the Natural Gas Act (NGA), which authorized the states to regulate the production of natural gas. [48] The statute documents the tension between federal and state power that existed as the modern Commerce Clause jurisprudence was being developed, and resolves that tension through dual authority. [49] The NGA authorizes the Federal Power Commission - now the Federal Energy Regulatory Commission (FERC) - the right to control the transportation and sale of natural gas in the interstate market as a complement to the states' authority to control "the production and gathering of natural gas." [50] Although the Natural Gas Act has been amended over the years, [51] the division of power between the state and federal governments has remained intact. The most recent amendment, which was adopted in the Energy Policy Act of 2005, authorizes FERC to control "the importation or exportation of natural gas in foreign commerce" and the siting of Liquefied Natural Gas facilities, which are vital components of that foreign commerce. [52]

Since this dual regulatory regime was adopted, the Supreme Court has resolved whether certain activities fall under state – or federal – control. In *FPC v. Panhandle Eastern Pipe Line Corporation*, it held that leases are part of production, and therefore under state control, along with drilling, well spacing, gas collection, and local distribution. [53] In *Northern Natural,* it defined production and gathering to include "the physical acts of drawing gas from the earth and preparing it for the first stages of distribution." [54] In *Northwest Central Pipeline*

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48 § 717(b).
49 Federal Power Comm'n v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 512 (1949).
50 Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 506 (1989); § 717, § 1(b).
51 § 717, Credits. (The NGA was amended on Mar. 27, 1954; Oct. 24, 1992; and Aug. 8, 2005.)
52 Energy Policy Act of 2005, §§ 311(a) and 311(c). (This amends § 717b)
53 Panhandle Eastern Pipe Line Co., 337 U.S. at 504-505.
54 Northern Natural Gas Co. v. State Corp. Comm'n of Kansas, 372 U.S. 84, 90 (1963).

Corporation, the Court held that Kansas could regulate the timing and rate of gas lease production. [55] These Supreme Court decisions establish that states can regulate gas drilling without interfering with federal control over the interstate transportation and sales of natural gas.

IV. Congress did not preempt the states from regulating gas drilling in the Energy Policy Act of 2005.

State and local governments can regulate, or ban, commercial activities as long as Congress has not preempted those actions. To make such a determination, the Supreme Court interprets the Supremacy Clause [56] by analyzing the relevant federal statutes to determine whether Congress has regulated an industry under the Commerce Clause with the intention of precluding state and local governments from also regulating it. [57] Congressional preemption can be expressly stated, or implied "from the depth and breadth of a congressional scheme that occupies the legislative field . . . [or implied through] a conflict with a congressional enactment…." [58] Preemption can also be implied if Congress has set a federal objective, and the state or local law impedes the achievement of it. [59]

In *Lorillard*, Massachusetts promulgated regulations on the advertising and sale of cigarettes. [60] The Court reviewed the text and legislative history of the Federal Cigarette Labeling and Advertising Act (FCLAA), and found that Massachusetts' advertising regulations had been expressly preempted by the FCLAA. [61] In *Hines*, the Court held that a Pennsylvania

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55 Northwest Central Pipeline Corp., 489 U.S. at 513, 516.
56 U.S. CONST. art. VI, § 2.
57 Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999).
58 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001).
59 Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
60 Lorillard at 532.
61 *Id*. at 542-543, 548-549.

law requiring all aliens to carry registration cards impeded Congress' goal of establishing a uniform set of rules. The federal Alien Registration Act of 1940 did not require aliens to carry registration cards so it preempted the Pennsylvania law, which required them. [62] More recent cases involve states that enacted immigration laws that were carefully crafted to fit within the comprehensive statutory scheme of federal immigration laws. [63] For example, in *Chamber of Commerce of the United States v. Whiting*, Arizona adopted a law requiring in-state employers to use the federal E-verify system that was part of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). [64] The Chamber of Commerce brought suit, but the Supreme Court held that there was no express preemption in IIRIRA, and because Arizona followed the requirements of the federal statute, preemption could not be implied. [65]

To determine whether Congress has preempted state and local governments from regulating the extraction of natural gas from low permeable shales, the Court will first look to see if Congress has enacted a statute that regulates the industry. [66] It will then review the relevant laws, such as the Natural Gas Act and the Energy Policy Act of 2005 ("Energy Policy Act"), [67] and analyze both the intent of Congress and the structure of the statutes to decide whether they preempt state and local regulations. [68] "As long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain

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62 Hines, 312 U.S. at 72, 74.
63 Chamber of Commerce of the United States v. Whiting, 131 S. Ct. 1968, 1981 (2011).
64 *Id*. at 1975.
65 *Id*. at 1977, 1981, 1985.
66 S. Pac. Co. v. Arizona, 325 U.S. 761, 763 (1945).
67 § 717 *et seq*.; Energy Policy Act of 2005 § 1 *et seq*.
68 Lorillard at 541.

language of the statute." [69] However, if the law is ambiguous, then a review of the legislative history may help reveal its purpose. [70]

The declared purpose of the Energy Policy Act is "[t] o ensure jobs for our future with secure, affordable, and reliable energy." [71] To achieve this goal, the statute authorizes new actions and amends existing acts of Congress to: (1) conserve energy; [72] (2) study existing and potential energy resources within the U.S.; [73] (3) encourage the development of new technologies and technology transfers in energy production; [74] (4) diminish environmental impacts of energy production and use; [75] (5) open federal lands and coastal waters for energy production and transmission; [76] and (6) accomplish a variety of other miscellaneous items, including the establishment of procedural rules and penalties. [77]

There is no text in the Energy Policy Act that explicitly preempts the general rights of state and local governments. The lack of a general preemption is also implied as the statute authorizes two specific preemptions: one for Liquefied Natural Gas (LNG) facilities [78] and the other for interstate electric transmission lines that are in the national interest. [79] The federal government is authorized to site, construct, expand, or operate facilities that would import or

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69 United States v. Ron Pair Enters., 489 U.S. 235, 240-241 (1989).

70 Lorillard at 543.

71 Energy Policy Act of 2005, 119 Stat. at 594.

72 Measures regarding conservation and efficiency can be found in the following titles of the Energy Policy Act of 2005: Title I; Title II; Title IV; Title V; Title VII, Subtitles D & E; Title IX; and Title XIII, Subtitle C.

73 Requests for studies can be found in the following titles of the Energy Policy Act of 2005: Title II; Title III; Title IV; Title V; Title VI; Title VII; Title VIII; Title IX; Title XII; Title XV; Title XVI; Title XVIII.

74 Programs for technology development and transfer can be found in the following titles of the Energy Policy Act of 2005: Title II; Title IV; Title V; Title VI; Title VII; Title VIII; Title IX; Title X; Title XV; Title XVI; Title XVII.

75 Requests to diminish environmental impacts can be found in the following titles of the Energy Policy Act of 2005: Title IV; Title V; Title VII; Title VIII; Title IX; Title XIV; Title XV; Title XVI.

76 Authorization to use federal lands and waters can be found in the following titles of the Energy Policy Act of 2005: Title II; Title III, Subtitle F; Title IV, Subtitle D; Title IX; Title XII; Title XVIII.

77 Miscellaneous authorizations can be found in the following titles of the Energy Policy Act of 2005: Title III, § 313; Title VI; Title XI; Title XII; Title XIII; Title XIV.

78 Energy Policy Act of 2005 § 311.

79 *Id.* at § 1221.

export LNG, but it must do so under the National Environmental Policy Act and consult with the affected state(s). [80] The federal government is also authorized to use eminent domain in siting the national interest electric transmission facilities. [81] Normally these decisions would fall under the land use powers of the local government, but the statute grants the federal government the right to preempt local control in these specific instances. "[A]n express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to pre-empt other matters." [82] [83]

The Energy Policy Act appears comprehensive, but it mainly authorizes studies, management plans, and coordination between agencies, institutions and industry. It does not mandate any resource development and does not establish a regime to regulate energy production. Instead the Energy Policy Act supports a wide range of energy sources, [84] without favoring one source of energy over another. An exception to this equanimity can be found in

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[80] *Id.* at § 311(c) and (d).

[81] *Id.* at § 216(e).

[82] Freightliner Corp. v. Myrick, 514 U.S. 280, 288 (1995).

[83] In addition to the two instances noted above, the word "preemption" occurs several times in the Energy Policy Act of 2005. The context tends to be an amendment of an existing federal regulation, such as:

1. Title I – Energy Efficiency.
   The Energy Policy and Conservation Act is amended, and the statute specifies that California has to align its regulations with the new federal requirements. In regards to the regulation of commercial refrigerators and freezers, the statute specifies that any preexisting state and local standards "shall not be preempted until the final rule takes effect."
2. Title III – Oil and Gas.
   In regards to unconventional fuel procurement by the Department of Defense, the statute specifies, "[n]othing in this section preempts or affects any State water law or interstate compact relating to water."
3. Title XII – Electricity.
   The Electric Reliability Organization is authorized to set and enforce standards, but "[n]othing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State . . . ." Nor are the states preempted from obtaining books and records.
4. Title XV – Ethanol and Motor Fuels.
   A number of sections of the Clean Air Act are amended, but states' powers are not preempted as to blended reformulated gasolines and underground storage tanks.

In four of the six sections where the word "preemption" is used, states' rights are specifically preserved.

[84] Energy Policy Act of 2005 § 1(b). (The Table of Contents lists many, but not all, of the proposed sources of energy. They include: geothermal, biomass, photovoltaic, wind, oil, gas, coal, nuclear, fuel cells, hydrogen, biodiesel, ethanol, and oxygen fuel.)

the Clean Coal Initiative, which gives priority to projects that reduce "the demand for natural gas if deployed." [85] This preference for coal is rooted in the nation's abundant coal supply and prior policies that favor its use. [86] However, the Court has held that national energy policies, by themselves, are not grounds for preempting state laws. [87]

At first glance, a few sections of the Policy Act appear to promote the use of natural gas, but a closer look reveals that the promotion has significant constraints. For example, the statute includes a section that "may be cited as the 'Oil Shale, Tar Sands, and Other Strategic Unconventional Fuels Act of 2005'." [88] In it Congress declares its policy: "United States oil shale, tar sands, and other unconventional fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports." [89] Immediately after it are two additional policy statements that temper this goal:

> "(2) the development of oil shale, tar sands, and other strategic unconventional fuels, for research and commercial development, should be conducted in an environmentally sound manner, using practices that minimize impacts; and
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> (3) development of those strategic unconventional fuels should occur, with an emphasis on sustainability, to benefit the United States while taking into account affected States and communities." [90]

More significantly, this entire policy statement is located within Subtitle F -- Access to Federal Lands. Therefore Congressional promotion of unconventional fuels is limited to federal territory, and does not extend to state or private lands. [91]

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85 *Id*. at § 402(b)(5)(C)(ii).
86 Commonwealth Edison Co. v. Mont., 453 U.S. 609, 633 (1981).
87 *Id*. at 633-634.
88 Energy Policy Act of 2005 § 369(a).
89 *Id*. § 369(b)(1).
90 *Id*. § 369(b)(2)(3).
91 Recently a Louisiana District Court considered a blanket moratorium issued by the Department of the Interior and the Bureau of Ocean Energy Management, Regulation and Enforcement banning all deep water

Title IX -- Research and Development follows a similar pattern. The goals are:

> "(a) In General.--In order to achieve the purposes of this title, the Secretary shall conduct a balanced set of programs of energy research, development, demonstration, and commercial application with the general goals of--
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> (1) increasing the efficiency of all energy intensive sectors through conservation and improved technologies;
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> (2) promoting diversity of energy supply;
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> (3) decreasing the dependence of the United States on foreign energy supplies;
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> (4) improving the energy security of the United States; and
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> (5) decreasing the environmental impact of energy-related activities." [92]

In this case, the general goal of increasing the energy security of the United States is balanced by the goals of conservation and the reduction of environmental impacts of "energy-related impacts." [93] The stated goals of Title IX apply to all subsequent subtitles. Subtitle J--Ultra-Deepwater and Unconventional Natural Gas and Other Petroleum Resources also appears to promote the development of unconventional gas deposits. [94] However, the scope of authority does not preempt state or local laws as the actions are specifically made subject to applicable law and land use plans. [95] Authorized acts are also subject to "approval of the appropriate Federal or State land management agency or private land owner." [96]

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drilling in the Gulf of Mexico for six months in response to the devastating Deepwater Horizon drilling platform collapse in the Gulf of Mexico. Hornbeck Offshore Services, L.L.C. v. Salazar, 696 F. Supp. 2d 627 (E.D. La. June 22, 2010). Its decision to grant a preliminary injunction, which was affirmed by the Fifth Circuit, did not turn on a commerce clause analysis. However, it did recognize the inherent power of the federal government to regulate resource extraction, at least in international waters, while holding that the blanket moratorium was not supported by the evidence. The court also found that certain emergency regulations issued by the agencies were "substantive" and should not have been imposed without full compliance with mandatory procedures of the federal Administrative Procedure Act. Since then, the moratoria have been lifted and the Interior Department published rules covering the new protective requirements pursuant to the agency's emergency rule-making authority. These actions will blunt the impact of the court's finding once the emergency rule-making process runs its course.

92 Energy Policy Act of 2005 § 902(a).

93 *Id*.

94 *Id*. at §§ 999A-999H.

95 *Id*. at § 999A(c)(1).

96 *Id*. at § 999A(c)(2).

Thus, Congress did not express or imply an intention to preempt state and local governments in regards to the extraction of natural gas in the text of the Energy Policy Act. Since there is no ambiguity as to the intent of Congress, there is no need to look beyond the text of the statute. [97] The law does not establish a broad scheme that "occupies the legislative field." [98] Nor does it regulate the production of natural gas, so there can be no conflict with state and local laws that do regulate it. [99] The Energy Policy Act was enacted in order for the United States to have access to "secure, affordable, and reliable energy." [100] However Congress repeatedly balanced that objective with the need for conservation and environmental protection. [101] In addition, the Court has held that national policy, by itself, is not preemptive. [102] State and local regulations enacted with the goal of protecting public health and the environment would not impede federal objectives since environmental protection is part of the purpose of the statute. [103] Therefore, there is no express or implied preemption in the Energy Policy Act to preclude state and local governments from regulating gas drilling on state and private lands.

V. State and local governments enjoy broad powers to protect the health and safety of their citizens.

Modern Commerce Clause jurisprudence recognizes that there are limits to the federal government, particularly when it intrudes upon the traditional powers of state and local governments. In *NLRB*, the Supreme Court noted the importance of maintaining our dual

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97 Ron Pair Enters., 489 U.S. at 240-241.
98 Lorillard, 533 U.S. at 541.
99 *Id.*
100 Energy Policy Act of 2005, 119 Stat. at 594.
101 *See, e.g.*, Energy Policy Act of 2005 §§ 369(b)(2)(3) and § 902(a).
102 Commonwealth Edison Co., 453 U.S. at 633-634.
103 Hines, 312 U.S. at 67.

system of government, even as it granted Congress authority to regulate labor disputes within a state. [104] In *Lopez*, it found that general police powers have been retained by the states, [105] and in *Lorillard* it held that "[s]tates remain free to enact generally applicable zoning regulations." [106] "This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law." [107]

It is well established that states "retain[] broad regulatory authority to protect the health and safety of … [their] citizens and the integrity of … [their] natural resources." [108] In *Taylor*, the owner of a fishing business in Maine was indicted for buying live out-of-state baitfish, which violated state law. [109] The importation of live baitfish had been banned in Maine because it was suspected of threatening Maine's wild fish and ecosystems. [110] The Court held that "Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible." [111]

As part of its decision in *Taylor*, the Court also held that Maine's ban on the importation of live bait fish did not violate the Commerce Clause, even though it may have benefited in-state bait businesses, and had a discriminatory impact on out-of-state businesses. [112] "The limitation imposed by the *Commerce Clause* on state regulatory power 'is by no means absolute,' and

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104 NLRB, 301 U.S. at 37.
105 Lopez, 514 U.S. at 567. Engle, 456 U.S. at 128.
106 Lorillard, 533 U.S. at 550.
107 H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949).
108 Maine v. Taylor, 477 U.S. 131, 151 (1986).
109 *Id*. at 132.
110 *Id*. at 141.
111 *Id*. at 148.
112 *Id*. at 138, 140, 147-148.

'the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected.'" [113]

In a similar pattern, the regulation of land use is a traditional power of local municipalities that has not been preempted by the federal government. [114] A proposal to adopt national land use laws was defeated by Congress in 1974 "because it was regarded as an assault on the independent authority of the states….." [115] In New York, the power to regulate land use has been delegated to local municipalities, and is guaranteed by the state constitution. [116]

The Supreme Court upheld zoning regulations that protect residential communities in its landmark case, *Euclid v. Amber Realty*. [117] The village of Euclid had a rural character, but was situated near Cleveland, and had two railroads running through it. [118] To protect its residents from an industrial onslaught, the village passed a comprehensive zoning ordinance that included seven uses, one of which was an outright prohibition. [119] The Court held that the village had the authority to pass this law because it "bears a rational relation to the health and safety of the community." [120] Therefore local governments can enact comprehensive zoning ordinances to protect their residents, and the environment in which they live.

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113 *Id*. at 138, *quoting* Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 36 (1980).
114 John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 367 (2002).
115 *Id*.
116 N.Y.S. CONST. art. IX.
117 Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
118 *Id*. at 379.
119 *Id*. at 379-381, 389.
120 *Id*. at 391, 397.

VI. Conclusion

State and local regulations that prohibit gas drilling based on police and land use powers do not violate the Commerce Clause because they are not discriminatory to out-of-state residents and have not been prempted by any acts of Congress.