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State Climate Superfunds

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Abstract

The harmful effects of climate change have already arrived in cities and states across America, with natural disasters increasing markedly in recent years along with more gradual environmental changes like sea level rise and drought. At this crucial moment for climate policy, however, the federal government seems to be moving away from its commitments to reduce greenhouse gas emissions. This lack of action guarantees that the country will need to adapt to a warming planet by undertaking preventative measures like building sea walls and cooling centers as well as improving our responses to natural disasters.

At present, it is states and ordinary taxpayers who must shoulder the enormous costs of climate adaptation. The status quo thus puts the onus on those least responsible for our current predicament – the young and relatively less well-off – to address the problem. However, a number of state legislators have recently proposed enacting new laws that would require the companies who have most profited from fossil fuel usage to assist in funding climate adaptation projects. Based on prior liability regimes to deal with hazardous waste harms, these "state climate superfunds" could provide essential support for protecting lives, property, and natural resources.

Drawing on historical, economic, and political science literature as well as the author's experiences advising state legislators who hope to create climate superfunds, this article examines these novel proposals and potential constitutional issues with states passing such laws. It argues that the local nature of climate change harms, the historic role states have played in protecting the environment, and the benefits from decentralized policy experimentation provide ample justifications for prioritizing state leadership on climate superfunds. It then details the complex legal questions likely to arise from state climate superfunds, including over the fairness of making fossil fuel companies presently liable for their past activities and the possible burdens on the national economy. While certain constitutional provisions and doctrines could limit state authority to draft these laws in particular ways, the article concludes by describing how states can design climate superfunds to conform with prior legal precedents and reasonably balance the competing values at stake as we adapt to a warmer world.

Keywords: climate change, federalism, environmental law

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