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Fracking in Louisiana: The Missing Process/Land Use Distinction in State Preemption and Opportunities for Local Participation

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Fracking in Louisiana: The Missing Process/Land Use Distinction in State Preemption and Opportunities for Local Participation

*Alex Ritchie**

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INTRODUCTION

Oil and gas development is testing and defining the boundaries of local government authority and autonomy as concerned municipal entities and citizens seek to limit oil and gas operations. Advances in high-volume hydraulic fracturing have increased domestic oil and gas production to historic levels.¹ At the same time, national and international concerns about irreversible man-made global warming have focused on fossil fuel combustion.² National groups opposed to continued reliance on oil and gas as an energy source have found willing partners in many local governments and their citizens, who are anxious about the local implications of drilling and fracking.³ Many citizens and environmental organizations coalesce around local environmental risks such as the potential degradation of ground and surface waters and air quality, seismic activity, and social and economic costs on the local area—including increased truck traffic, road damage, noise, housing shortages, and boom and bust cycles.⁴ Particularly in urban or suburban areas, voters may also perceive drilling and fracking as a threat to property values, aesthetics, and lifestyles.

1. The United States has become the largest producer of petroleum and natural gas in the world, surpassing Russia in natural gas production and Saudi Arabia in oil production. See Adam Sieminski, Presentation, *Oil and Gas Outlook 14* (Oct. 16, 2015), available at http://www.eia.gov/pressroom/presentations/sieminski_10162015.pdf [perma.cc/F2V7-TUD2].

2. See *Climate Change and President Obama's Action Plan*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/climate-change> [perma.cc/2GGM-CMWK] (last visited Dec. 27, 2015) (stating that carbon pollution is the biggest driver of climate change).

3. See, e.g., *Fracking: Community Defense*, NRDC, http://www.nrdc.org/land/fracking-community-defense/?gclid=Cj0KEQiAuremBRCbtr-1qJnKi-4BEiQAh0x08G51a-q4N-5_wpQYvDYFWXlAtXaquuwKRYXZB2PpnUlaAjGB8P8HAQ [perma.cc/72ZB-65D6] (last visited Nov. 17, 2015) (“The Community Fracking Defense Campaign brings the grassroots power of communities facing fracking together with the expertise of NRDC’s policy and legal team.”).

4. For a discussion of various potential environmental risks and recommended regulatory responses, see Hanna J. Wiseman, *Risk and Response in Fracturing Policy*, 84 U. COLO. L. REV. 729 (2013).

Now that fracking has become a topic of wider public interest, at least to the media and the relatively informed public,⁵ local government efforts to control oil and gas operations appear to be a modern phenomenon. These recent efforts are, however, little more than “old wine in new bottles.” The Cities of Winkfield and Oxford, Kansas, adopted municipal oil and gas ordinances in the late 1920s that focused on the prevention of waste and the protection of correlative rights,⁶ and cases that upheld the application of zoning ordinances to oil and gas operations began appearing in the 1930s.⁷

Because neither fracking nor the local regulation of oil and gas operations are particularly new,⁸ what has changed may be a matter of degree. As advances in technology unlock new resources, drilling and completion activities intensify in new areas that are rich in shale resources.⁹

5. Those who study oil and gas issues or work in related fields may be particularly aware of the media coverage, but a 2013 study concluded that the American populace is largely unaware of and undecided about hydraulic fracturing. See Hilary Boudet et al., “Fracking” Controversy and Communication: Using National Survey Data to Understanding Public Perceptions of Hydraulic Fracturing, 65 ENERGY POL’Y 57, 63 (2014), available at <http://dx.doi.org/10.1016/j.enpol.2013.10.017> [perma.cc/Z88X-VQEH].

6. See Bruce M. Kramer, *The State of State and Local Government Relations as It Impacts the Regulation of Oil and Gas Operations: Has the Shale Revolution Really Changed the Rules of the Game?*, 29 J. LAND USE & ENVTL. LAW 69, 71–72 (2013).

7. See, e.g., *Anderson-Kerr, Inc. v. Van Meter*, 19 P.2d 1068, 1074 (Okla. 1933) (“The governing body of the city has a right to regulate the oil industry and the drilling of wells within its corporate limits or to prohibit them from being drilled in certain designated territory.”); *Van Meter v. Westgate Oil Co.*, 32 P.2d 719, 721 (Okla. 1934).

8. Hydraulic fracturing, meaning the use of water to fracture rock formations to produce oil and gas, “was first tested in 1903 and first used commercially in 1948.” Thomas E. Kurth, Michael J. Mazzone, Mary S. Mendoza & Christopher S. Kulander, *American Law and Jurisprudence on Fracing*, at 1, 3, NW. PRITZKER SCH. L. (2012), https://www.law.northwestern.edu/research-faculty/searlecenter/workingpapers/documents/Kulander_2012_Fracing_Paper.pdf [perma.cc/NN88-V7UA]. Horizontal drilling combined with slick-water hydraulic fracturing at sufficient pressure to commercially produce shale and other tight formations began around 1997 in the Barnett Shale, reinvigorating the oil and gas industry. See J. Lanier Yeates & Andrew M. Abrameit, *Current Issues In Oil & Gas Shale Development*, 58 ANN. INST. MIN. L. 146, 146 (2011).

9. See, e.g., *Growth in U.S. Energy Production Outstrips Consumption Growth*, U.S. ENERGY INFO. ADMIN. (Dec. 5, 2012), <http://www.eia.gov/pressroom/releases/press379.cfm> [perma.cc/D8SH-8EFX] (describing growth in oil production from shale and other tight formations (Figure 1) and growth in shale gas production (Figure 3)).

While local governments have historically applied locational restrictions to oil and gas operations under zoning ordinances,¹⁰ those governments now more regularly seek to ban fracking or oil and gas production altogether.¹¹ Many would not normally oppose local ordinances that require the use of a closed loop system or reasonable set-backs.¹² However, a complete ban on hydraulic fracturing is extreme in the sense that it tends to eviscerate the oil and gas interest owner's ability to produce. In recent years, domestic oil and gas production has focused on vast shale source rock and tight formations that can be accessed only using hydraulic fracturing.¹³ As a result, a ban on fracking is a relatively easy way to prohibit all oil and gas production without expressly prohibiting oil and gas production.¹⁴

Furthermore, oil and gas drilling and fracking in Louisiana and elsewhere challenge conservative Republican principles. Conservatism has long promoted state-level governance over federal government power and control.¹⁵ Under related principles, conservatives have advocated for local

10. See Kramer, *supra* note 6, at 73.

11. For a collection of more than 400 local ordinances related to oil and gas operations or fracking, see Mary Grant, *Local Resolutions Against Fracking*, FOOD & WATER WATCH (Sept. 11, 2013), <http://www.foodandwaterwatch.org/insight/local-resolutions-against-fracking/> [perma.cc/3X2S-QCZ6]. The Author has not verified that all of the collected ordinances have actually passed or are in full force and effect.

12. A closed loop system is a system that allows an operator to drill a well without using a reserve pit. Lance Astrella & Reginald Wiemers, *Closed Loop Drilling Systems Can Eliminate Reserve Pit Costs*, OIL & GAS J. (May 27, 1996), <http://www.ogj.com/articles/print/volume-94/issue-22/in-this-issue/production/technology-closed-loop-drilling-systems-can-eliminate-reserve-pit-costs.html> [perma.cc/S6D7-NKU9]. A setback for zoning purposes is a prescribed distance of a structure from the property line or another structure. See *Setback*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/setback> [perma.cc/TMR2-U56C] (last visited Jan. 3, 2016).

13. See Sieminski, *supra* note 1, at 4, 5.

14. David E. Pierce, *Developing a Common Law of Hydraulic Fracturing*, 72 U. PITT. L. REV. 685, 686 (2011). Rather than prohibit fracking altogether, one rather ingenious local regulation prohibited fracking with fluids other than fresh water, which essentially makes advanced high-volume hydraulic fracturing impossible. See SANTA FE CNTY., N.M., ORDINANCE 2008–19, § 11.25.4 (Dec. 10, 2008).

15. See *Republican Party Platform of 1956*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25838> [perma.cc/4KAH-69KY] (last visited Nov. 17, 2015) (“We hold that the strict division of powers and the primary responsibility of State and local governments must be maintained, and that the centralization of powers in the national Government leads to expansion of the mastery of our lives.”); *We The People: A Restoration of Constitutional Government*, GOP,

county and municipal self-governance over state governance.¹⁶ In Louisiana, these local self-governance principles manifest in a home-rule legal tradition.¹⁷ In recent years, however, this small government ideology has been flipped on its head in more conservative states, such as Louisiana and Texas, where urban areas lean Democratic and rural and suburban areas tend to lean Republican, at least in state-wide elections.¹⁸

Modern conservatism not only promotes pushing government down towards the people; it also strongly predicts support for fossil fuel development.¹⁹ In the realm of oil and gas production, one may view the state as more interested in securing jobs and promoting economic activity,²⁰

<https://www.gop.com/platform/we-the-people/> [perma.cc/PHV9-R9CG] (last visited Nov. 17, 2015) (Republican Party Platform).

16. See, e.g., *Platform-Local-Government*, MONT. REPUBLICAN PARTY, <http://www.mtgorp.org/index.php/about/party-platform/212-platform-local-government.html> [perma.cc/N2VC-LM3P] (last visited Nov. 17, 2015) (“The Montana Republican Party supports efforts to return control and authority to local units, as the government closest and most responsive to the people.”).

17. See *infra* Part IV.A.

18. The political makeup of Louisiana is somewhat of an anomaly. Although Independents have made gains, Democrats still controlled about 73% of the precincts in Louisiana in the 2012 presidential election, but 65% of those precincts voted for republican candidate Mitt Romney for President. See Ben Myers, *Louisiana Votes Red Even as Democrats, Republicans Lose Sway*, NOLA.COM (Nov. 4, 2014, 7:15 AM), http://www.nola.com/politics/index.ssf/2014/11/louisiana_voters_register_blue [perma.cc/8X25-XGMR]. As explained by Ed Chervenak, a University of New Orleans political science professor, southern Democrats—primarily white southern Democrats—in Louisiana have tended to remain registered as Democrats even though voting habits have shifted towards the Republican Party since Ronald Reagan first ran for President. *Id.*; see also Wade Goodwyn, *New Texas Governor Adds to Tension Between State, City Governments*, NPR (Jan. 15, 2015, 4:45 PM), <http://www.npr.org/2015/01/15/377526831/new-texas-governor-adds-to-tension-between-state-city-governments> [perma.cc/758H-USFS] (quoting republican Texas Governor Greg Abbot as saying “[t]he truth is, Texas is being California-ized with bag bans, fracking bans, *tree-cutting* bans” and noting “[t]he cries that the new governor’s battle with his cities is the height of Republican hypocrisy – ‘oh, sure, it’s all about local control until the Democrats are the ones in control’”).

19. Hilary Boudet et al., *supra* note 5, at 60.

20. See David B. Spence, *Federalism, Regulatory Lags, and the Political Economy of Energy Production*, 161 U. PA. L. REV. 431, 466–67 (2013) (explaining capture theory, whereby business interests can capture the regulatory process for their own benefit, and that agency capture may be more prevalent at the state level (rather than the federal level) where the political process tends to attract less attention).

and local governments as more responsive to local environmental and social concerns. While not all state governments necessarily under-regulate oil and gas activities, perceptions lead to conflicts when communities view themselves as entitled to a degree of local autonomy over activities such as oil and gas development that conflict with state-wide interests. Part I of this Article discusses the recent dispute over fracking in St. Tammany Parish as a case study illustrating such a conflict.

Across the country, the relationship between state and local jurisdiction over oil and gas drilling and completion is balanced along a spectrum. At one extreme, the state regulates the process of drilling, but the local government regulates land use with an absolute veto power to ban drilling.²¹ At the middle of the spectrum, the state regulates the process of drilling, and the local government has the power to impose traditional zoning districts or to impose setbacks on operations.²² However, in this situation, the local government lacks an outright veto of drilling operations.²³ The state may or may not also provide additional opportunities for local governments to participate in state permitting.²⁴ Further along the spectrum, the state is the final arbiter of both the process of drilling and the location of wells, but the state provides an opportunity for meaningful participation by local governments in the permitting process.²⁵ Finally, at the other end of the spectrum, the state is the final arbiter of both the process of drilling and the location of wells.

As discussed in Part II of this Article, all major producing states, to varying degrees, recognize the distinction between the state's oversight of the drilling process ("process") and local government's oversight of where wells can be placed ("land use"). This distinction allocates control over the process of drilling wells to the state while reserving some control over the siting of wells to local governments. Even the new Texas and Oklahoma

21. New York and Pennsylvania are examples of this extreme. Ironically, both states have express preemption statutes. *See infra* Part II.C.

22. Colorado, New Mexico, Texas, and Oklahoma are examples of this structure, *see infra* Part II, although land use control in Texas and Oklahoma recently has been curtailed by new preemption statutes. *See infra* Part II.A–B. Ohio also probably falls within this category despite an express preemption statute that prohibits local regulation as to the location of wells. *See infra* Part II.C.

23. *See infra* Part II.C for the discussion of recent court decisions in Colorado and New Mexico striking down bans on oil and gas operations.

24. Additional opportunities for local government participation in well permitting decisions provided by Colorado are discussed in Part VI.A, *infra*.

25. This may be the new paradigm for Louisiana if its appellate courts recognize the duties of the Louisiana Department of Natural Resources under Article IX, Section 1 of the Louisiana Constitution. *See infra* Part VI.B.

preemption statutes, which were adopted in the wake of a Denton, Texas fracking ban, leave some land use authority vested in local governments.²⁶ In contrast, Louisiana operates at the far right of the spectrum. Louisiana statutes and court decisions, which are examined in Part III of this Article, deny local governments control over both process and land use decisions in the oil and gas context.²⁷

This lack of any local autonomy over the location of wells in Louisiana arguably conflicts with the conservative ideal of home rule that the drafters of the 1974 Louisiana Constitution envisioned.²⁸ For a short period of time, the Louisiana Supreme Court promised a new era of strong self-government at the local level; however, the court quickly retreated from that promise in favor of deference to the state legislature when state and local interests collide.²⁹ The implication is that, despite its purpose, home rule in Louisiana provides little promise of local self-governance over oil and gas operations. This premise is analyzed in Part IV of this Article.

Despite this lack of local control in Louisiana, Part V of this Article argues as a normative matter that the state should have ultimate authority over well siting decisions due to the nature of oil and gas. In particular, the line between the state interest in process and land use blurs in the oil and gas context. State conservation agencies have a statutory mandate to prevent waste of minerals and protect the correlative rights of landowners that may be compromised by bans or zoning ordinances that prohibit oil and gas operations in particular locations.³⁰ This is not, however, to say that local environmental and other concerns should go unheeded.

Part VI of this Article examines two alternatives that ultimately give the state authority over the location of wells. The first alternative—voluntary compromise—only addresses substantive environmental concerns when the parties feel compelled to negotiate. Even without a legal mandate, however, the oil and gas industry may negotiate restrictions on its operations to preserve or enhance its social license to operate when the risks and costs of compliance are perceived as low. The second alternative is examined in the context of the recent victory by the Town of Abita Springs in its dispute with the state over fracking in St. Tammany Parish.³¹ This alternative recognizes the obligations of the Louisiana Department of Natural Resources (“LDNR”) as a public trustee under the “Natural Resources Article,” Article IX, Section

26. See *infra* Part II.A–B for discussion of the new Texas and Oklahoma preemption statutes.

27. See *infra* Part II.B.

28. LA. CONST. art. VI.

29. See *infra* Part IV.

30. LA. REV. STAT. ANN. § 30:4 (2007 & Supp. 2015).

31. See *infra* Part VI.B.

1 of the 1974 Louisiana Constitution. This provision leaves the final decision for well-location approval to the state while granting local governments and their citizens a substantive voice in the state permitting process to air their environmental and local health and safety concerns.³² Although that type of participation right does not necessarily mandate a particular outcome, the state should be required to analyze and address legitimate local concerns in its findings and conclusions before issuing drilling permits. That participation right is not a panacea for all concerned but somewhat mitigates the loss of autonomy that local governments feel while balancing the need for statewide uniformity and control.

I. BACKGROUND: THE FRACKING DISPUTE IN ST. TAMMANY PARISH

A number of residents, along with the local government of St. Tammany Parish, have a problem with oil and gas operations in their neighborhood.³³ On March 31, 2014, Helis Oil & Gas (“Helis”) applied to the Louisiana Office of Conservation (“LOC”), which is part of the Louisiana Department of Natural Resources (“LDNR”), to create a single drilling and production unit in the Tuscaloosa Marine Shale, Reservoir A, in the Lacombe Bayou Field, in St. Tammany Parish.³⁴ On the day before the hearing to consider the unit application, St. Tammany Parish filed suit against the LOC for a declaratory judgment to require the LOC to give primary consideration to St. Tammany zoning ordinances in deciding whether to authorize formation of the drilling and production unit.³⁵ The St. Tammany ordinances, adopted in 2006, zoned the relevant drilling area as residential, thus prohibiting drilling at Helis’s proposed site.³⁶ St. Tammany also prayed for an injunction to prohibit the LOC’s forced pooling proceedings until the LOC corrected enforcement and compliance deficiencies identified in an audit report that the Louisiana Legislative Auditor’s Office prepared. Lastly, St. Tammany Parish requested a declaration that St. Tammany had the option to ban fracking.³⁷

32. LA. CONST. art. IX, § 1.

33. See Robert Rhoden, *Proposed Oil and Gas Drilling Near Mandeville Raises Concerns*, NOLA.COM (Apr. 8, 2014, 12:20 PM), http://www.nola.com/politics/index.ssf/2014/04/proposed_oil_and_gas_drilling.html [perma.cc/YY44-UFJY].

34. *Petition for Declaration and Injunctive Relief, St. Tammany Parish v. Welsh*, No. 631370 (La. Dist. Ct. June 16, 2014).

35. *Id.* ¶ 37.

36. *Id.* ¶ 24.

37. *Id.* ¶ 37.

In response, the State argued that St. Tammany failed to state a cause of action.³⁸ According to the LOC, St. Tammany's zoning ordinances were preempted because the state comprehensively regulates every phase of the oil and gas exploration and production process and because Louisiana statutes expressly preempt a parish's attempt to enforce its zoning ordinances where oil and gas operations are concerned.³⁹

Once Helis established the drilling unit, St. Tammany complained that the LOC violated a mandatory statutory obligation to "consider"⁴⁰ the Parish's zoning ordinances by approving the drilling unit in an area that the Parish designated as not zoned for drilling.⁴¹ The LOC argued that an obligation to consider a master plan did not require the state to deny the unit application just because the Parish prohibited drilling at the site through its zoning ordinances.⁴² Despite the ongoing lawsuit, the LOC issued Helis a permit to drill a 13,000-foot vertical test well.⁴³ On May 13, 2015, District

38. Technically, the LOC made a peremptory exception of no cause of action to dismiss the lawsuit. Memorandum in Support of Conservation's Exceptions to the Plaintiff's Petition for Declaratory and Injunctive Relief at 5, *St. Tammany Parish v. Welsh*, No. 631307 (La. Dist. Ct. July 11, 2014) [hereinafter LOC Response Memorandum]; see also *Montalvo v. Sondes*, 637 So. 2d 127, 131 (La. 1994) (explaining peremptory exception of no cause of action).

39. LOC Response Memorandum, *supra* note 38, at 8–9.

40. Conservation's Amended Exceptions to the Plaintiff's First Supplemental Petition for Declaratory and Injunctive Relief at 9, *St. Tammany Parish v. Welsh*, No. 631307 (La. Dist. Ct. Oct. 1, 2014).

41. First Supplemental Petition for Declaratory and Injunctive Relief at ¶¶ 4, 6, *St. Tammany Parish v. Welsh*, No. 631370 (La. Dist. Ct. Sept. 4, 2014). The Parish relied on Louisiana Revised Statutes section 33:109.1, which states: "Whenever a parish or municipal planning commission has adopted a master plan, state agencies and departments shall consider such adopted master plan before undertaking any activity or action which would affect the adopted elements of the master plan." LA. REV. STAT. ANN. § 33:109.1 (2013) (emphasis added).

42. Conservation's Amended Exceptions to the Plaintiff's First Supplemental Petition for Declaratory and Injunctive Relief, *supra* note 40, at 8–9.

43. The approval was granted with an extensive list of conditions, including restrictions on the water that may be used for fracking, disclosure of fracking chemicals, groundwater monitoring, and the use of closed-loop systems, but most of the conditions relating to fracking appear to be window dressing. The planned well is a test well and commercial production from the Tuscaloosa Marine Shale requires a horizontal interval. If the vertical well shows promise, then Helis must apply for an additional permit to drill and complete the well as a horizontal well before it hydraulically fractures the well. See Sara Pagonos, *State Approves Controversial Drilling Permit in St. Tammany*, NEW ORLEANS ADVOCATE (Dec. 19, 2014, 4:53 PM), <http://www.theneworleansadvocate.com/news/11137125-171/state-approves-controversial-drilling-permit> [perma.cc/Q9YH-8V5U].

Judge William Morvant issued the court's ruling and agreed with the LOC that state law preempts the St. Tammany zoning ordinance, and in an issue of first impression, that the obligation to "consider" a local zoning plan does not require adherence by the state to restrictions in the local zoning plan.⁴⁴ St. Tammany took a suspensive appeal to the Louisiana First Circuit Court of Appeal, allowing the Parish to enforce its zoning ordinance pending appeal.⁴⁵ As of November 5, 2015, the appellate court has not ruled on the appeal, and St. Tammany has placed a "cease and desist" sign at the drilling site.⁴⁶

The Town of Abita Springs filed a related lawsuit on December 1, 2014 in the 22nd Judicial District in Covington, Louisiana.⁴⁷ The court dismissed that lawsuit on April 15, 2015, effectively holding that Abita Springs had no right to enforce St. Tammany Parish's zoning ordinances.⁴⁸ Abita Springs, however, filed a separate lawsuit in the 19th Judicial District, challenging the process by which the LOC issued the drilling permit to Helis.⁴⁹

For local residents, these challenges against fracking in St. Tammany are as much about local autonomy as fear of environmental calamity. Reduced to its legal essence, however, the St. Tammany suit simply is a question of the scope and the breadth of the Louisiana oil and gas preemption statute. The St. Tammany ordinance goes too far under state law by prohibiting the drilling of a well in a particular location, but the Louisiana Supreme Court has not resolved the extent to which local government in Louisiana can regulate oil and gas operations. For example, it is not entirely

44. Judgment at 2, *St. Tammany Parish v. Welsh*, No. 631370 (La. Dist. Ct. May 13, 2015). Specifically, the court held that the state complied with Louisiana Revised Statutes section 33:109.1, which sets forth the obligation to "consider" adopted master plans. See *supra* note 41.

45. Order, *St. Tammany Parish v. Welsh*, No. 631370 (La. Dist. Ct. June 15, 2015).

46. The First Circuit Court of Appeals heard oral argument on November 5, 2015. See Robert Rhoden, *St. Tammany Fracking Fight Heard by Appeals Court in Baton Rouge*, NOLA.COM (Nov. 5, 2015, 3:26 PM), http://www.nola.com/crime/index.ssf/2015/11/st_tammany_fracking_fight_hear.html [perma.cc/BUU4-D5NX]; see also Robert Rhoden, *Fracking Opponents Can't Block St. Tammany Drilling Operation, Judge Rules*, NOLA.COM (Apr. 20, 2015, 11:41 AM), http://www.nola.com/crime/index.ssf/2015/04/fracking_suit_hearing.html [perma.cc/4WMJ-J589].

47. See Robert Rhoden, *Town of Abita Springs Files Its Own Lawsuit in Effort to Block Proposed St. Tammany Fracking*, NOLA.COM (Dec. 2, 2014, 3:27 PM), http://www.nola.com/politics/index.ssf/2014/12/town_of_abita_springs_files_it.html [perma.cc/4F7E-X4SB].

48. Judgment at 1–2, *Town of Abita Springs v. Welsh*, No. 2014-15348 (La. Dist. Ct. May 13, 2015).

49. See *infra* Part VI.B for a discussion of this separate lawsuit.

clear whether reasonable surface restrictions on oil and gas wells, reasonable setbacks from buildings and other structures, or even a complete ban on fracking adopted by a local government might be valid. In part, this Article addresses the extent of this local authority.

II. PREEMPTION STATUTES AND DECISIONS IN MOST STATES PRESERVE AT LEAST SOME LAND USE AUTHORITY

In response to perceived risks of local intrusion on state interests in oil and gas production, the conservative Texas and Oklahoma legislatures recently enacted new preemption statutes. Although these statutes certainly diminish local land use autonomy, they also continue to allow some local authority over siting decisions. In several other producing states, local court decisions have overturned local bans on drilling and fracking, while at the same time recognizing that local governments still have an interest in local land use.

A. *The New Texas Preemption Statute*

Local anxiety over oil and gas development is not limited to Louisiana. Even the oil and gas friendly state of Texas has experienced local conflicts recently, boiling over on November 4, 2014,⁵⁰ when voters in the City of Denton, Texas, approved the first local Texas ordinance that bans and criminalizes hydraulic fracturing.⁵¹ One day later, two lawsuits were filed. The first suit was filed by Jerry Patterson, Commissioner of the Texas General Land Office, alleging that the ban may not be enforced against lands and minerals that the State of Texas owns and that state law preempts the ban.⁵² In the second suit, the Texas Oil and Gas Association alleged that state law preempts the local ordinance, because state law both occupies the entire field of oil and gas regulation and also conflicts with the exclusive

50. See Jim Malewitz, *Dissecting Denton: How a Texas City Banned Fracking*, TEXAS TRIB. (Dec. 15, 2014), available at <http://www.texastribune.org/2014/12/15/dissecting-denton-how-texas-city-banned-fracking/> [perma.cc/UZJ2-336Q].

51. Denton, Tex., Ordinance Providing that Hydraulic Fracturing Operations Are Prohibited in the City (Nov. 4, 2014) (amending DENTON, TEX., CODE OF ORDINANCES ch. 16, art. VII (2014)). The ordinance is quite simple: "It shall be unlawful for any person to engage in hydraulic fracturing within the corporate limits of the City." *Id.* Violation of the ordinance is punishable as a misdemeanor. *Id.*

52. Plaintiff's Original Petition and Application for Permanent Injunction at 4-5, Patterson v. City of Denton, No. D-1-GN-14-004628 (Tex. Dist. Ct. Nov. 5, 2014).

authority of the Texas Railroad Commission (“TRRC”)⁵³ and the Texas Commission on Environmental Quality (“TCEQ”) to regulate hydraulic fracturing.⁵⁴

Largely in response to the Denton fracking ban and the aspirations of other local governments to adopt stricter rules,⁵⁵ the Texas legislature passed H.B. 40, which preempts local governments from regulating most aspects of oil and gas operations.⁵⁶ On May 19, 2015, Texas Governor Greg Abbott signed H.B. 40 into law, effectively ending the Denton dispute.⁵⁷

H.B. 40 is exceptionally broad, prohibiting local governments from enacting or enforcing an ordinance or other measure that “bans, limits, or otherwise regulates an oil and gas operation”⁵⁸ The exception involves an ordinance or measure that (1) regulates only surface activities, including “reasonable setback requirements”; (2) “is commercially reasonable”; (3) “does not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator”; and (4) “is not otherwise preempted by state or federal law.”⁵⁹

A condition in a local ordinance is “commercially reasonable” if the ordinance “would allow a reasonably prudent operator to fully, effectively, and economically exploit, develop, produce, process, and transport oil and gas, as determined based on the objective standard of a reasonably prudent operator”⁶⁰ An ordinance might allow drilling and still be invalid under this commercially reasonable test if compliance costs make operations uneconomical or restrictions impede the production of all recoverable hydrocarbons.⁶¹ As such, the second requirement of commercial

53. The TRRC regulates oil and gas but no longer regulates railroads. *Oil & Gas Division*, R.R. COMM’N TEX. (Jul. 20, 2015, 12:17 PM), <http://www.rrc.state.tx.us/about-us/organization-activities/divisions-of-the-rrc/oil-gas-division/> [perma.cc/D363-JTP7].

54. Original Petition at 8–10, *Tex. Oil & Gas Ass’n v. City of Denton*, No. 14-08933-431 (Tex. Dist. Ct. Nov. 5, 2014).

55. See Mike Lee, *After Denton Frack Ban, the Wrangling Over Drilling Rules Goes On*, ENERGYWIRE (Dec. 8, 2014), <http://www.eenews.net/energywire/2014/12/08/stories/1060010064>.

56. TEX. NAT. RES. CODE ANN. § 81.0523 (West Supp. 2015); see also Marissa Barnett, *Abbott Signs Law to Restrict Local Fracking Regulations*, DALL. MORNING NEWS (May 18, 2015, 11:16 PM), <http://www.dallasnews.com/news/politics/state-politics/20150518-abbott-signs-law-to-restrict-local-fracking-regulations.ece> [perma.cc/55AY-P4RE].

57. Barnett, *supra* note 56.

58. TEX. NAT. RES. CODE ANN. § 81.0523(b).

59. *Id.* § 81.0523(b), (c).

60. *Id.* § 81.0523(a)(1).

61. See *id.* § 81.0523(a)(2).

reasonableness appears to encompass the third requirement for a valid ordinance—that the ordinance “does not effectively prohibit an oil and gas operation.”

Both the second and third requirements employ the “reasonably prudent operator” standard. Courts often apply this standard to determine whether implied covenants imposed on the lessee under an oil and gas lease are commercially reasonable and do not prohibit oil and gas operations.⁶² An oil and gas lease is a relational contract, meaning a contract where the parties have difficulty “reducing important terms of the arrangement to well-defined obligations.”⁶³ In the typical oil and gas lease, the lessee has few, if any, express contractual obligations other than to pay royalties on production. Professors Goetz and Scott posit that parties to a relational contract should define standards of performance in general terms.⁶⁴ Based on the proposals of prominent commentators, courts might have required lessees to act with “best efforts” or as fiduciaries of their lessors.⁶⁵ However, courts have routinely rejected such a high standard.⁶⁶ Courts instead generally interpret the lessee’s obligations using a reasonably prudent operator standard.⁶⁷

62. Although these implied covenants expand and evolve over time, they might be said to include requirements to drill an initial well, to reasonably develop the lease after production, to protect against drainage, to produce and market product, to operate with reasonable care, and to use modern methods of production. *See* *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 567 n.1 (Tex. 1981) (citing R. HEMINGWAY, *THE LAW OF OIL AND GAS* § 8.1 (1971)).

63. Charles J. Goetz & Robert E. Scott, *Principals of Relational Contracts*, 67 VA. L. REV. 1089, 1091 (1981).

64. *Id.* at 1092.

65. PATRICK H. MARTIN & BRUCE M. KRAMER, *WILLIAMS & MEYERS, OIL AND GAS LAW* § 802.1 (2014) [hereinafter *WILLIAMS & MEYERS*] (citing C. Meyers & S. Crafton, *The Covenant of Further Exploration – Thirty Years Later*, 32 ROCKY MTN. MIN. L. INST. 1-1, 1-24 (1986)). An absolute duty to comply with implied covenants may apply in limited circumstances, usually when the lessee has caused the drainage of the property under lease. Alternatively, a few courts have applied a weak good faith standard for implied covenants. The Williams and Meyers treatise concludes that the prudent operator standard is the appropriate standard for implied covenants among these various alternative performance standards. *Id.* § 806.

66. *See, e.g., Rutherford v. Exxon Co., U.S.A.*, 855 F.2d 1141, 1145–46 (5th Cir. 1988); *Amoco Production Co. v. Heimann*, 904 F.2d 1405, 1412 (10th Cir. 1990).

67. *See WILLIAMS & MEYERS, supra* note 65, § 806 n.20 (listing cases); E. KUNTZ, *A TREATISE ON THE LAW OF OIL AND GAS* § 61.3 (1978).

Substantively, the prudent operator standard might be compared to the objective “reasonable man” standard under tort law. The Williams and Meyers oil and gas treatise explains the standard:

Since the standard of conduct is objective, a defendant cannot justify his act or omission on personal grounds or by reference to his peculiar circumstances. It is no excuse that defendant . . . is short of cash, over-committed on drilling programs, has no need for more production, or prefers to spend his money on other things. In short, the question is not what was meet and proper for this defendant to do, given his peculiar circumstances, but what a hypothetical operator acting reasonably would have done, given circumstances generally obtained in the locality.⁶⁸

Thus, the prudent operator standard is a single, objective standard that takes into account external conditions but ignores unique internal facts particular to the lessee.⁶⁹ The authors of H.B. 40 apparently incorporated the prudent operator standard to deter operators’ claims against local governments that they could not comply with local regulations because of their own atypical technical, financial, or other limitations.⁷⁰ Thus, a local ordinance is not preempted if the hypothetical reasonable operator can still effectively and economically produce its oil and gas.

But no matter how commercially reasonable a restriction on fracking or other underground operational activity might be, such restrictions are preempted. The list of required elements of a valid ordinance contains the conjunctive “and,” meaning that a valid local ordinance must be commercially reasonable and must also regulate only surface activity. Thus, the new Texas statute recognizes in absolute terms that the process of drilling and completing a well is entirely within the jurisdiction of the state.

The statute does, however, allow for some local control, including the location of wells.⁷¹ The statute recognizes that local regulations governing “fire and emergency response, traffic, lights, or noise” are the types of surface activities that local governments normally may regulate within the

68. WILLIAMS & MEYERS, *supra* note 65, § 806.

69. See David E. Pierce, *Exploring the Jurisprudential Underpinnings of the Implied Covenant to Market*, 48 ROCKY MTN. MIN. L. INST. § 10.04[3] (2002).

70. H.B. 40 also includes a potential savings clause for certain existing ordinances: “An ordinance or other measure is considered prima facie to be commercially reasonable if the ordinance or other measure has been in effect for at least five years and has allowed the oil and gas operations at issue to continue during that period.” TEX. NAT. RES. CODE ANN. § 81.0523(d) (West Supp. 2015).

71. *Id.* § 81.0523(c)(1).

realm of local control.⁷² Furthermore, courts might permit regulations governing location even in the context of drilling operations, including setbacks and even traditional zoning ordinances that restrict particular uses to certain zones, when the facts and circumstances allow a reasonably prudent operator to access the formation through horizontal drilling and other techniques and to conduct operations “fully, effectively, and economically.”⁷³ Texas has completely preempted the “how” of underground drilling, completion, and other operations, but it still allows Texas municipalities some say over where wells can be drilled and the conduct of surface activities.

B. The New Oklahoma Preemption Statute

Just over a week after Governor Abbott signed the Texas preemption bill, Oklahoma Governor Mary Fallin signed a similar bill.⁷⁴ The Oklahoma bill, however, arguably is even more ambiguous than the Texas bill. Before Governor Fallin signed the new bill into law, Oklahoma expressly allowed “cities and towns governmental corporate powers to prevent oil or gas drilling therein” and “to provide its own rules and regulations with reference to well spacing units or drilling or production”⁷⁵ The new statute allows local governments to adopt reasonable ordinances concerning “road use, traffic, noise and odors” and “reasonable setbacks and fencing requirements for oil and gas well site locations as are reasonably necessary to protect the health, safety and welfare of its citizens. . . .”⁷⁶ Such setbacks may not

72. *Id.*

73. *Id.* § 81.0523(a)(1). Future litigation will determine the objective reasonableness of setbacks, zoning regulations, and other attempts to protect the character of neighborhoods under specific ordinances. By incorporating an objective standard, the statute avoids relitigating particular ordinances as applied to different operators. The statute, however, only establishes objective reasonableness or unreasonableness as of a particular point in time. Regulations that unreasonably impede the operations of a reasonably prudent operator today using existing technology and cost constraints might be reasonable in the future as technology develops and the costs fall. In 2008, Maersk Oil Qatar completed a well with a horizontal length of 35,770 feet (6.77 miles). Dennis Denney, *Continuous Improvement Led to the Longest Horizontal Well*, J. PETROLEUM TECH., Nov. 2009, at 55. If wells with horizontal laterals of such length or longer become commonplace, more onerous zoning and setback limitations might eventually be acceptable.

74. 2015 Okla. Sess. Laws c. 341 (codified at 52 OKLA. STAT. ANN. § 137.1 (Supp. 2015)).

75. 52 OKLA. STAT. ANN. § 137 (2011) (*repealed by* 2015 Okla. Sess. Laws c. 341, § 2).

76. 52 OKLA. STAT. ANN. § 137.1 (Supp. 2015).

“effectively prohibit or ban any oil and gas operations,” including fracking.⁷⁷ The statute then goes on to state that “[a]ll other regulations of oil and gas operations shall be subject to the exclusive jurisdiction of the Corporation Commission.”⁷⁸

The Oklahoma statute, which expressly allows “reasonable setbacks,” does not expressly allow the zoning of oil and gas into industrial or other districts. All local “regulations,” other than those expressly allowed by the statute, are subject to the exclusive jurisdiction of the state, but the statute does not define the words “regulation” or “operation.”⁷⁹ Whether the exclusive jurisdiction of the state is limited to technical operations involving the drilling and completing of wells or whether the term “regulation” also encompasses the location of wells through traditional zoning is yet to be determined.⁸⁰ Certainly, a municipality in Oklahoma could not prohibit drilling because the legislature repealed the former statute that expressly authorized drilling bans.⁸¹ Similar to the new Texas law, future litigation will likely determine whether a municipality might also zone oil and gas into reasonable industrial districts and what might constitute a reasonable setback.⁸² In any event, the statute clearly leaves room for some local authority as to the location of wells.

C. Court Decisions in Other States Recognize the Process/Land Use Distinction

Recent court decisions in other states recognize the distinction between the technical operational aspects of drilling and traditional land use.⁸³ These decisions usually conclude that absolute prohibitions on drilling and production or completion technologies—including hydraulic fracturing—

77. *Id.*

78. *Id.*

79. *Id.*

80. *See infra* note 85 and accompanying text.

81. *See supra* note 75 and accompanying text.

82. *See supra* note 73 and accompanying text; Joe Wertz, *City Officials Reconsider Drilling Ordinances as Anti-Frack Ban Legislation Moves Forward*, NPR (Apr. 30, 2015, 12:48 PM), <https://stateimpact.npr.org/oklahoma/2015/04/30/city-officials-reconsider-oil-and-gas-ordinances-as-anti-frack-ban-legislation-moves-forward/> [perma.cc/F47A-CJSJ] (question of what might be considered reasonable drawing criticism).

83. For a more comprehensive discussion and analysis of the cases discussed in this Part, see generally Alex Ritchie, *Creatures of Circumstance: Conflicts Over Local Government Regulation of Oil and Gas*, 60 ROCKY MTN. MIN. L. INST. 11-1, 11-6 (2015).

frustrate state interests.⁸⁴ The exception to this latter generalization is New York, where the Court of Appeals held that the state legislature did not intend for a statute that supersedes local government “regulation” of oil and gas operations to preempt zoning and land use.⁸⁵ The court explained that zoning and land use are powers within the province of local governments and that courts should protect these powers in deference to home rule authority.⁸⁶ To this court, a complete ban on oil and gas operations is simply a zoning and land use decision that does not conflict with either the language of the preemption statute or the policies of preventing waste and protecting correlative rights in the state oil and gas statutes.⁸⁷

In Pennsylvania, a plurality of four justices of the Pennsylvania Supreme Court completely invalidated two out of three express statutory preemption provisions in the oil and gas conservation statute that the state legislature had adopted.⁸⁸ The plurality held that these preemption statutes

84. In addition to the cases discussed in this Part II.C, see *Northeast Natural Energy, LLC v. City of Morgantown*, No. 11-C-411, 2011 WL 3584376 (W. Va. Cir. Ct. Aug. 12, 2011) (holding that the city lacks authority to enact a fracking ban). For a discussion of this case, see Jesse J. Richardson, Jr., *Local Regulation of Hydraulic Fracturing*, 117 W. VA. L. REV. 593 (2014).

85. In *In re Wallach v. Town of Dryden*, 16 N.E.3d 1188 (N.Y. 2014), the New York Court of Appeals—New York’s highest court—consolidated the cases of *Norse Energy Corp. USA v. Town of Dryden*, 964 N.Y.S.2d 714 (N.Y. App. Div. 2013), and *Cooperstown Holstein Corp. v. Town of Middlefield*, 964 N.Y.S.2d 431 (N.Y. App. Div. 2013). The conclusion in *In re Wallach* was preordained by the court’s decision in *In re Frew Run Gravel Products, Inc. v. Town of Carroll*, 518 N.E.2d 920 (N.Y. 1987), where the court held that an express preemption provision only applied to local laws that purported to regulate the operational aspects of mining. *Id.* at 922. In *In re Wallach*, the court stated that “this incidental control resulting from the municipality’s exercise of its right to regulate land use through zoning is not the type of regulatory enactment relating to the [oil, gas and solution mining industries] which the Legislature could have envisioned as being within the prohibition of the statute.” 16 N.E.3d at 1197 (quoting *Frew Run*, 518 N.E. 2d at 920).

86. 16 N.E.3d at 1197.

87. *Id.* at 1199.

88. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 1000 (Pa. 2013). On February 14, 2012, the Pennsylvania Legislature adopted “Act 13,” a comprehensive statutory framework to regulate oil and gas operations. See 58 PA. CONS. STAT. ANN. §§ 2301 to 3504 (West 2014). Act 13 contained three express preemption provisions. The first, section 3302, supersedes local ordinances “purporting to regulate oil and gas operations,” except those adopted pursuant to the Pennsylvania Municipalities Planning Code and the Flood Plain Management Act. *Id.* § 3302. Section 3302 contains language almost identical to former section 601.602 of the Pennsylvania Oil and Gas Act, which Act 13 repealed, see 58 PA.

violated a fairly unique state constitutional amendment that grants citizens a right to clean air and water and imposes a public trust on the natural resources of the state.⁸⁹ According to the plurality, the offending preemption provisions impeded the ability of local governments to protect their citizens and the environment through the exercise of their land use authority.⁹⁰ Pennsylvania, however, continues to recognize the distinction between process and land use. One express preemption provision survived the decision and continues to supersede the ability of Pennsylvania local governments to regulate the technical operational aspects of drilling and production in a manner that conflicts with state law.⁹¹

In Colorado and New Mexico, industry and state regulatory plaintiffs challenging local bans have been successful in recent court actions.⁹² But

CONS. STAT. ANN. § 601.602 (repealed 2012), and which previously was interpreted as allowing local governments to zone oil and gas operations, but not to regulate the operational aspects of drilling. *See* Huntley & Huntley, Inc. v. Borough Council of Oakmont, 964 A.2d 855, 865 (Pa. 2009). The second express preemption provision, section 3303, expands on section 3302 by declaring that state environmental acts “occupy the entire field of regulation” as it relates to the environmental regulation of oil and gas. 58 PA. CONS. STAT. ANN. § 3303. The third, section 3304, requires that oil and gas development be allowed as a permitted use in any municipal zoning district, and that restrictions on oil and gas development be no greater than those placed on other industrial uses. *Id.* § 3304(b)(3), (5). The plurality in *Robinson Township* struck down sections 3303 and 3304, but allowed section 3302 to stand. *Robinson Twp.*, 83 A.3d at 1000.

89. *Robinson Twp.*, 83 A.3d at 913; *see also* PA. CONST. art. 1, § 27 (“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”).

90. *Robinson Twp.*, 83 A.3d at 978 (“Act 13 thus commands municipalities to ignore their obligations under [the Environmental Rights Amendment] and further directs municipalities to take affirmative actions to undo existing protections of the environment in their localities.”). In contrast, the Louisiana Constitution contains a mandate for the state to protect and conserve the “natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment.” LA. CONST. art. IX, § 1. Unlike the language in the Pennsylvania Constitution, however, the language of this mandate does not purport to create an individual constitutional right in the environment. *Id.*; *see also infra* Part VI.B.

91. *See supra* note 88.

92. *See* Order Granting Motions for Summary Judgment, *Colo. Oil & Gas Ass’n v. City of Longmont*, No. 2013CV63, 2014 WL 3690665 (Colo. Dist. Ct.

these decisions do not upset the distinction between process and land use and the ability of local governments to adopt reasonable zoning restrictions. Neither the Colorado nor the New Mexico conservation statutes contain express preemption provisions, but, in these recent Colorado and New Mexico cases, the courts found preemption based on implied conflicts with state law.

On July 24, 2014, the Boulder County District Court, on summary judgment, struck down a local voter-initiated outright fracking ban that the City of Longmont, Colorado, had adopted.⁹³ The next month, the same court struck down a broader ban on oil and gas extraction and storage that the City of Lafayette, Colorado, had adopted.⁹⁴ Also in August 2014, the Larimer County District Court struck down a fracking ban—similar to the Longmont ban—that the City of Fort Collins, Colorado, had adopted.⁹⁵ Although these courts held that the drilling and fracking bans went too far, none of these cases question the decision in *Board of County Commissioners, La Plata County v. Bowen/Edwards Associates, Inc.*,⁹⁶ where the Colorado Supreme Court held that local governments have distinct interests in land use control that differ from the state interest in regulating the technical operational aspects of production.⁹⁷

On January 19, 2015, the United States District Court for the District of New Mexico struck down a ban from Mora County that was similar to the Lafayette, Colorado ordinance.⁹⁸ In his decision, however, Judge James O. Browning made clear that the New Mexico Oil and Gas Act does not address issues with which local governments are traditionally concerned.⁹⁹ That holding leaves room for the concurrent jurisdiction of state and local governments.

July 24, 2014); *see also* Memorandum Opinion and Order, *SWEPI, LP v. Mora Cnty.*, 81 F. Supp. 3d 1075 (D.N.M. 2015).

93. Order Granting Motions for Summary Judgment, *supra* note 92.

94. *See Boulder District Judge Tosses Lafayette's Fracking Ban*, DENVER POST BUS. (Aug. 27, 2014, 6:13 PM), http://www.denverpost.com/business/ci_26419597/boulder-district-judge-tosses-lafayettes-fracking-ban [perma.cc/A836-FYE2].

95. Order Granting Plaintiff's Motion for Summary Judgment on First Claim for Relief and Denying Defendant's Cross-Motion for Summary Judgment, *Colo. Oil & Gas Ass'n v. City of Fort Collins*, No. 13CV31385 (Colo. Dist. Ct. Aug. 7, 2014).

96. 830 P.2d 1045 (Colo. 1992) (en banc).

97. *Id.* at 1058.

98. *See* Memorandum Opinion and Order, *SWEPI, LP v. Mora Cnty.*, *supra* note 92.

99. 830 P.2d at 1195.

Even in the rare case where a preemption provision purports to expressly cover zoning and land use, courts may be reluctant to extend the provision so far. In the recent case of *State ex rel. Morrison v. Beck Energy Corp.*,¹⁰⁰ the Supreme Court of Ohio had the occasion to interpret Ohio Revised Code section 1509.02, which grants the Ohio Department of Natural Resources the “sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations” within Ohio.¹⁰¹ The statute only preserves to municipalities special powers relating to certain public infrastructure and heavy vehicles operating on their highways.¹⁰² The City of Munroe Falls sought an injunction to require Beck Energy to comply with its ordinances before Beck began drilling operations.¹⁰³ The ordinances imposed the City’s own permitting system replete with conditions, including the requirement for a conditional zoning certificate that could contain whatever conditions the City might choose to impose.¹⁰⁴ To the 4-3 majority, these conditions impermissibly violated Ohio’s express preemption provision.¹⁰⁵

Despite the word “location” in the statute, some members of the court sought to restrict the reach of the holding. Concurring in the judgment only, Justice O’Donnell wrote separately to emphasize that the court’s holding was limited to the Munroe Falls ordinances at issue.¹⁰⁶ For Justice O’Donnell, the case did not present the question of whether the express preemption provision conflicts with traditional land use ordinances that do not impose a separate permitting regime.¹⁰⁷ He argued the word “location” has a meaning in oil and gas law that relates only to the efficient production of oil and gas, a meaning that does not implicate zoning.¹⁰⁸

In dissent, Justice Lazinger, joined by Justices Pfeifer and O’Neill, did not dispute the breadth of the preemption provision but instead relied on the Ohio presumption in favor of home rule.¹⁰⁹ Justice Lazinger argued that more than a preemption statement is necessary to preempt in Ohio. Rather, the general law must actually regulate in the same area as the local law,¹¹⁰

100. 37 N.E.3d 128 (Ohio 2015).

101. 15 OHIO REV. CODE ANN. § 1509.02 (West 2013) (emphasis added).

102. *Id.*

103. *State ex rel. Morrison v. Beck Energy Corp.*, No. 2013-0465, 2015 WL 687475, at *5 (Ohio Feb. 17, 2015).

104. *Id.*

105. *Id.* at *8.

106. *Id.* at *38.

107. *Id.*

108. *Id.* at *43–44.

109. *Id.* at *53–56.

110. *Id.* at *56.

which presumably means in this case that the state must mandate and specify local zoning regulations for oil and gas.

The legislature or the courts in each of the states discussed in this Part, including those states that deem outright bans a violation of important state interests, in varying degrees recognize a role for local governments to exercise authority over the siting of wells under their land use powers. As discussed in Part III, Louisiana is different, vesting the state with virtually complete authority to determine where wells may be sited.

III. LOUISIANA AT THE EXTREME OF STATE CONTROL

Securing the character of neighborhoods under the zoning power has long been recognized as an essential power of local governments, but under Louisiana law, that power is not unlimited. In the oil and gas context, the zoning power is constrained by an express preemption statute, Louisiana Revised Statutes section 30:28(F).¹¹¹ This Part analyzes the statute in light of existing precedent and in the context of the zoning power, concluding that—despite arguments to the contrary—the language of the statute leaves little room for local authority over either the location of wells or the process of drilling or completing (including fracking) a well. The extent of this balance in favor of the state may appear extreme,¹¹² particularly in light of other states' laws that allow some degree of local autonomy, but to change this balance in deference to the policy underlying zoning would require legislative action.

A. Reserving Land as Justification for Local Control

All of these state–local conflicts with oil and gas production center on the ability of local governments to protect and provide for the welfare of their citizens. The United States Supreme Court has stated that “reserving land for single-family residences preserves the character of neighborhoods, securing ‘zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.’”¹¹³ The

111. LA. REV. STAT. ANN. § 30:28(F) (Supp. 2015).

112. In oral argument on appeal of the St. Tammany case, Judge Guidry apparently asked whether, despite zoning, a well could be drilled on the 50-yard line inside Louisiana State University's Tiger Stadium, and apparently counsel for the state answered that it could. Robert Rhoden, *St. Tammany Fracking Fight Heard by Appeals Court in Baton Rouge*, NOLA.COM (Nov. 5, 2015, 3:26 PM), http://www.nola.com/crime/index.ssf/2015/11/st_tammany_fracking_fight_hear.html [perma.cc/B4CF-SUEP].

113. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732–33 (1995) (quoting *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974)).

need for local governments to provide these zoning sanctuaries has justified judicial deference to local government zoning since the 1926 decision in *Village of Euclid v. Ambler Realty Co.*,¹¹⁴ where the Court referred to undesirable uses as “merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.”¹¹⁵

Parishes and municipalities in Louisiana, as in other states, regulate land use under its police power.¹¹⁶ Zoning is related to the police power, in that the right to prescribe and proscribe land uses under the zoning power derives from the police power.¹¹⁷ One treatise has described the police power as “the exercise of the sovereign right of a government to promote order, safety, health, morals and the general welfare of society within constitutional limits.”¹¹⁸

Before the adoption of the 1974 Louisiana Constitution, local zoning ordinances were authorized under the 1921 Louisiana Constitution. This prior version of the state constitution provided general authority to municipalities to “zone their territory; to create residential, commercial and industrial districts, and to prohibit the establishment of places of business in residential districts.”¹¹⁹ This provision did not restrict legislative power to delegate zoning authority to other political subdivisions, such as parishes,¹²⁰ nor the parish and municipal power to create types of districts, other than the enumerated residential, commercial, and industrial districts.¹²¹

The 1974 Louisiana Constitution explicitly extends an independent grant of authority to all local government subdivisions to adopt zoning and land use regulations, subject only to “uniform procedures established by law.”¹²² Although this authority derives directly from the 1974 Constitution,

114. 272 U.S. 365 (1926).

115. *Id.* at 388.

116. *Palermo Land Co., Inc. v. Planning Comm’n of Calcasieu Parish*, 561 So. 2d 482, 488 (La. 1990).

117. *Four States Realty Co., Inc. v. Baton Rouge*, 309 So. 2d 659, 672 (La. 1975); *see also* *Coffee City v. Thompson*, 535 S.W.2d 758, 766 (Tex. Civ. App. 1976); *Forks Twp. Bd. of Supervisors v. George Calantoni & Sons, Inc.*, 297 A.2d 164, 166 (Pa. Commw. Ct. 1972); *Maldini v. Ambro*, 330 N.E.2d 403, 405 (N.Y. 1975); *Hausmann & Johnson, Inc. v. Berea Bd. of Bldg. Code Appeals*, 320 N.E.2d 685, 688 (Ohio 1974).

118. 6 PATRICK J. ROHAN & ERIC DAMIAN KELLY, *ZONING AND LAND USE CONTROLS* § 35.05 (LexisNexis Mathew Bender 2015).

119. LA. CONST. art. XIV, § 29 (1921).

120. *Plebst v. Barnwell Drilling Co.*, 148 So. 2d 584, 591 (La. 1963).

121. *Folsom Rd. Civic Ass’n v. St. Tammany Parish*, 407 So. 2d 1219, 1223 (La. 1981).

122. LA. CONST. art. VI, § 17 (1974). Zoning ordinances and other laws adopted before 1974 must be constitutional under the 1974 Constitution and must

the Louisiana Supreme Court has not determined whether the state can deny the zoning power to local governments except when necessary to protect a vital state interest. In fact, the court expressly declined to answer the question in *St. Charles Gaming Co., Inc. v. Riverboat Gaming Commission*,¹²³ instead concluding that the state had not denied the zoning power.¹²⁴

Although broad, this express constitutional grant of zoning power is clearly not unlimited. First, the constitution makes clear that local zoning power may not abridge the police power of the state,¹²⁵ meaning that the zoning power may not impinge a state power that is necessary to protect a vital interest of the state as a whole.¹²⁶ The courts, however, have not answered whether the state's interest in oil and gas production is a vital interest or whether the state's preemption of that interest is necessary. Second, local zoning authority is subject to state-mandated procedures.¹²⁷ The Louisiana Supreme Court has held that the "subject to" language requires the state to issue procedures for parish zoning before a parish may zone,¹²⁸ meaning that state-issued procedures are essential. The fact that the court requires the state to authorize zoning implies that the state could deny zoning power by an express general law preemption provision, even to protect an interest that is not necessarily vital. Third, despite the constitutional grant of zoning authority, the state must not exercise that authority in an unreasonable, arbitrary, or capricious manner.¹²⁹

To fulfill the constitutional promise of zoning, the state legislature has enacted zoning enabling acts. For the purposes of "promoting the health, safety, morals, or general welfare of the community," municipalities and most parishes may regulate and restrict the location and use of buildings,

also have been constitutional when enacted under the 1921 Constitution. See LA. CONST. art. XIV, § 18(A); *Azalea Lakes P'ship v. Parish of St. Tammany*, 859 So. 2d 57, 60 (La. Ct. App. 2003).

123. 648 So. 2d 1310, 1318 (La. 1995).

124. *Id.* at 1318, n.7 ("Because we decide here that [the state law] does not deny zoning and land use powers to local governments, we do not need to reach the issue urged by amicus curiae of whether the state legislature is empowered to limit or deny the express constitutional grant of this authority to all local governments by any act less imperative than an exercise of the state's police power necessary to protect the vital interest of the state as a whole.").

125. LA. CONST. art. VI, § 9.

126. See *infra* note 198 and accompanying text.

127. See *Am. Waste & Pollution Control Co. v. St. Martin Parish Police Jury*, 609 So. 2d 201, 204–05 (La. 1992).

128. See *id.*

129. See *City of New Orleans v. Bd. of Dirs. of La. State Museum*, 739 So. 2d 748, 759 (La. 1999).

structures, and land for trade, industry, residence, or other purposes.¹³⁰ This regulatory authority is checked by the judicial review of zoning ordinances and decisions made under those ordinances for abuse of discretion, unreasonable exercise of the police powers, excessive use of the zoning power, or the denial of the right of due process.¹³¹

For zoning purposes, the municipality or parish may divide itself into districts, provided that the regulations of permitted actions are uniform throughout each particular district.¹³² Zoning regulations must be made in accordance with a comprehensive plan and must reasonably consider the character of each district and the suitability for particular uses, encouraging the appropriate use of land throughout the municipality.¹³³ The plan requirement is essential because a single prohibitive industry regulation without a comprehensive plan is invalid.¹³⁴ The plan does not need to be terribly comprehensive in practice, however. The creation of a single district apparently qualifies as a comprehensive plan.¹³⁵

Courts presume all zoning ordinances are valid, and whoever attacks the validity of an ordinance bears the burden of proof.¹³⁶ Further, since the 1923 case of *State ex rel Civello v. City of New Orleans*,¹³⁷ Louisiana courts have not questioned the motivations of the governmental unit in promoting health, safety, and welfare, where concern for the public *could* have been the motivating factor, regardless of whether the concern actually was.¹³⁸

130. LA. REV. STAT. ANN. § 33:4721 (2009) (municipalities); *Id.* § 33:4780.40 (parishes).

131. *Id.* § 33:4721 (municipalities); *Id.* § 33:4780.40 (parishes); *see also* Guenther v. Zoning Appeals Bd., 542 So. 2d 612, 614 (La. Ct. App. 1989).

132. LA. REV. STAT. ANN. § 33:4722 (2009) (municipalities); *Id.* § 33:4780.41 (parishes).

133. *Id.* § 33:4723 (municipalities); *Id.* § 33:4780.42 (parishes).

134. *See* Trail Mining, Inc. v. Vill. of Sun, 619 So. 2d 118, 119 (La. Ct. App. 1993) (ordinance that required 1200 foot setbacks between a gravel pit and a residence held invalid without comprehensive plan). The Village argued that the ordinance was not a zoning ordinance, but a health and safety ordinance. *Id.* Although the Village abandoned this argument, the court nevertheless “confirms” that the ordinance is a zoning ordinance. *Id.*

135. *See* Jameson v. St. Tammany Parish Police Jury, 225 So. 2d 720, 723–24 (La. Ct. App. 1969); LaRussa Enters., Inc. v. Gordon, No. 2012-0896 (La. Ct. App. 2013) (unpublished opinion).

136. Four States Realty Co., Inc. v. Baton Rouge, 309 So. 2d 659, 672 (La. 1975).

137. 97 So. 440 (La. 1923).

138. *See id.* at 443–44 (“It is not necessary, for the validity of the ordinances in question, that we should deem the ordinances justified by considerations of public health, safety, comfort, or the general welfare. It is sufficient that the municipal council could reasonably have had such considerations in mind. If such

This standard is roughly equivalent to the “fairly debatable” standard that the United States Supreme Court has employed since *Euclid* to judge the validity of local ordinances on due process grounds.¹³⁹

In addition to this deferential standard, under express language in the Louisiana statutes, when zoning regulations impose a “higher” standard than “any other statute or local ordinance or regulation,” the higher standard controls.¹⁴⁰ In the context of the statute, the higher standard appears to connote the more restrictive standard, meaning that in the case of a conflict between state law and local law, the more restrictive standard should normally control.¹⁴¹ Accordingly, unless their power is preempted, municipalities have the ability to supplement state regulation with more restrictive standards in their jurisdictions. Although this rule for municipalities in Louisiana Revised Statutes section 33:4729 is unqualified, the corresponding rule for parishes in Louisiana Revised Statutes section 33:4780.49 diverges. The penultimate sentence of Louisiana Revised Statutes section 33:4780.49 states:

However, no local governing authority shall restrict, conflict with, interfere with, or supersede the powers of the state through its agencies to regulate, permit, or enforce environmental laws and regulations nor shall they restrict, conflict with, interfere with, or supersede activities operating in accordance with authorized state or federal permits, laws, or regulations.¹⁴²

considerations could have justified the ordinances, we must assume that they did justify them.”); *see also* Palermo Land Co., Inc. v. Planning Comm’n of Calcasieu Parish, 561 So. 2d 482, 491–92 (La. 1990); Palermo, 561 So. 2d at 491–92 (quoting *State ex rel. Civello* with approval).

139. *See* Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 388 (1926). Professor Bruce Kramer coined the name of the “fairly debatable” test because “the validity of the legislative classification for zoning purposes” need only be “fairly debatable” to survive judicial scrutiny. *See* Bruce M. Kramer, *Local Land Use Regulation of Extractive Industries: Evolving Judicial and Regulatory Approaches*, 14 UCLA J. ENVTL. L & POL’Y 41, 44, 63 (1996).

140. LA. REV. STAT. ANN. § 33:4729 (2009) (municipalities); LA. REV. STAT. ANN. § 33:4780.49 (parishes).

141. The Louisiana statute relating to building codes that political subdivisions adopt is more clear. That statute provides that “[i]f the provisions of a building code adopted by a political subdivision are more stringent than [] state laws . . . the more restrictive standards shall govern within the area under the jurisdiction of the political subdivision.” LA. REV. STAT. ANN. § 33:4773.

142. *Id.* § 33:4780.49.

This “however” language plainly subordinates more restrictive local regulations to activities authorized under state-issued permits, including oil and gas drilling permits and forced pooling orders. As such, municipalities seemingly have greater authority to adopt more restrictive zoning regulations than do parishes.

B. Louisiana Statutes Preempt Land Use Authority

Despite the constitutional and statutory protections afforded to zoning, Louisiana Revised Statutes section 30:28(F) strips municipalities of the power to secure zones and protect the character of neighborhoods in the oil and gas context. That statute provides:

The issuance of the [drilling] permit by the commissioner of conservation shall be sufficient authorization to the holder of the permit to enter upon the property covered by the permit and to drill in search of minerals thereon. No other agency or political subdivision of the state shall have the authority, and they are hereby expressly forbidden, to prohibit or in any way interfere with the drilling of a well or test well in search of minerals by the holder of such a permit.¹⁴³

In 2005, the United States Fifth Circuit Court of Appeals had occasion to interpret this broad grant of power to the state in *Energy Management Corp. v. City of Shreveport* (“*EMC I*”),¹⁴⁴ a case that the LOC extensively relied upon in its briefs in the St. Tammany case.¹⁴⁵ In *EMC I*, the City of Shreveport passed a zoning ordinance that prohibited drilling within 1,000 feet of a lake.¹⁴⁶ The plaintiff, Energy Management Corp., acquired leases to drill in and around the lake and sued the City after the City made clear that it would not issue a variance.¹⁴⁷

For some inexplicable reason, the *EMC I* court stated that no express statutory provision mandated preemption,¹⁴⁸ even though municipalities and parishes are “expressly forbidden” under Louisiana Revised Statutes section 30:28(F) from prohibiting or interfering with the drilling of an oil and gas

143. LA. REV. STAT. ANN. § 30:28(F) (Supp. 2015).

144. 397 F.3d 297 (5th Cir. 2005).

145. LOC Response Memorandum, *supra* note 38, at 8–9.

146. 397 F.3d at 299.

147. *Id.* at 300.

148. *Id.* at 303 (“In this case there is no express provision mandating preemption.”).

well. In apparent reliance on a field preemption analysis,¹⁴⁹ however, the court remanded the case for entry of a declaratory judgment that the local ordinance “is preempted by state law and is invalid to the extent that it purports to prohibit the drilling of oil and gas wells *in an area* within the state of Louisiana”¹⁵⁰

On remand, the district court entered the judgment exactly as written by the Fifth Circuit *EMC 1* court,¹⁵¹ but the plaintiff noted a significant problem with the court’s language.¹⁵² Although the *EMC 1* court struck down municipal restrictions regarding where Energy Management Corp. could drill wells, the court failed to address other costly technical or operational conditions or regulations that local governments might impose that “interfere” with the drilling of a well. On appeal in *Energy Management Corp. v. City of Shreveport* (“*EMC 2*”),¹⁵³ the Fifth Circuit broadened its holding to preempt the local law in its entirety, both as to the location of wells and as to other “activities,” including “every phase” of operations.¹⁵⁴

The Louisiana Supreme Court, however, has never addressed Louisiana Revised Statutes section 30:28(F) in the context of a fracking ban or a reasonable traditional zoning ordinance that divides land uses into districts. The *EMC 1* court quotes the Louisiana Supreme Court that “the authority and responsibility for conserving Louisiana’s oil and gas resources are virtually entirely vested in the [LOC].”¹⁵⁵ This statement in isolation, however, by no means vests authority in the LOC to control reasonable local land use decisions.

149. Field preemption occurs when state law occupies the entire field of regulation, such that there is no room for local regulation. Once a court finds field preemption, the key question becomes how broadly or narrowly the legislature intended to define the “field,” a question left for the judiciary. *See Ritchie, supra* note 83, at 11-70.

150. *EMC 1*, 397 F.3d at 306 (emphasis added).

151. *See Energy Mgmt. Corp. v. City of Shreveport*, CIV. A. 97-2408, 2005 U.S. Dist. LEXIS 43715 (W.D. La. May 5, 2005), *aff’d in part, vacated in part, remanded by Energy Mgmt. Corp. v. City of Shreveport*, 467 F.3d 471 (5th Cir. 2006).

152. *See* 467 F.3d at 475–76.

153. 467 F.3d 471.

154. *Id.* at 478 (citing 397 F.3d at 303).

155. *EMC 1*, 397 F.3d at 303 (quoting *Hunt Oil Co. v. Batchelor*, 644 So. 2d 191, 196–97 (La. 1994)). The authority to conserve oil and gas does not necessarily extend to land use. *See supra* Part II.C. *Batchelor* actually involved a question of the correlative rights of under-produced owners in a gas balancing situation, which clearly is within the statutory authority of the LOC. *See* LA. REV. STAT. ANN. §§ 31:9 to :11 (2000).

Citing a number of cases, the *EMC I* court also states that “[i]n every case which has been brought to our attention involving a challenge to the authority of the LOC, its far-reaching authority has been upheld.”¹⁵⁶ The court, however, fails to mention *City of Baton Rouge v. Hebert*,¹⁵⁷ where the Louisiana First Circuit Court of Appeal determined that adding storage tanks to a drill site impermissibly extended to a non-conforming use under a local zoning ordinance.¹⁵⁸ With little analysis, the *Hebert* court acknowledged that “aspects” of petroleum production were preempted, but the court did “not believe the state’s preemption in this field extends to abridging a municipality’s control over land use within its corporate boundary”¹⁵⁹ This situation is just the type of distinction between process and land use that Professor Kenneth Murchison described as the appropriate dividing line for state and local regulation.¹⁶⁰

Further, the cases that the *EMC I* court cited are relevant, but they are at least somewhat distinguishable. In one cited case, *Rollins Environmental Services of Louisiana, Inc. v. Iberville Parish Police Jury*,¹⁶¹ the police jury of Iberville Parish amended its local ordinance to prohibit the injection and storage of hazardous waste.¹⁶² This practice prevented the plaintiff from operating its industrial residue disposal well that the LOC had already permitted. The court reviewed not only state law but also federal laws such as the Clean Water Act¹⁶³ and the Recourse Conservation and Recovery Act.¹⁶⁴ The court held that, when considered together, federal and state laws preempted the entire field of hazardous waste regulation.¹⁶⁵

In *Palermo Land Co. v. Planning Commission of Calcasieu Parish*,¹⁶⁶ however, the Louisiana Supreme Court distinguished *Rollins*.¹⁶⁷ The court explained that *Rollins* concerned hazardous wastes and *Palermo* concerned non-hazardous wastes.¹⁶⁸ The *Palermo* court further explained that even with respect to hazardous wastes, the legislature had amended the statute to

156. *EMC I*, 397 F.3d at 303.

157. 378 So. 2d 144 (La. Ct. App. 1979).

158. *Id.* at 146.

159. *Id.*

160. See *infra* note 249 and accompanying text. Admittedly, however, *Hebert* did not involve the drilling of a well.

161. 371 So. 2d 1127 (La. 1979).

162. *Id.* at 1129.

163. 33 U.S.C. § 1251 (1972).

164. 42 U.S.C. § 6901 (1976).

165. *Rollins*, 371 So. 2d at 1134.

166. 561 So. 2d 482 (La. 1990).

167. *Id.* at 497 n.15.

168. *Id.*

allow the regulation by both parishes and municipalities of “the initial siting of facilities pursuant to general land use planning, zoning, or solid waste disposal ordinances.”¹⁶⁹ Accordingly, *Palermo* at least raises the question as to whether the Louisiana Supreme Court’s preemption stance in *Rollins* has softened.

Despite these subtle arguments, Louisiana Revised Statutes section 30:28(F) is nonetheless clear and extends broad power to the state government. As the language provides, a local government may not prohibit or interfere with the drilling of a well that the LOC has authorized.¹⁷⁰ When the LOC issues a drilling permit, it authorizes drilling at a particular location. A local government that prohibits drilling in that location, whether through reasonable or unreasonable regulation, violates the express statutory mandate in Louisiana Revised Statutes section 30:28(F). Thus, the preemption statute prohibits not only zoning oil and gas into districts, as St. Tammany attempted to do, but it also prohibits local governments from imposing setbacks. Given the breadth of the express preemption language, the result in *EMC 1* comports with the statutory language.¹⁷¹

In contrast, the *EMC 2* holding—that every phase of oil and gas operations is preempted—does not entirely accord with the preemption language. Consider a fracking ban, which certainly interferes with the process of extracting minerals, particularly from shale. An argument can be made that a fracking ban does not interfere with the drilling of a well if fracking is viewed as a separate well stimulation process. Such an argument, however, would likely fail in a Louisiana court.¹⁷² If the Louisiana Legislature saw fit to preempt the regulation of the location of wells, certainly the courts would preserve traditional state authority over the process by which wells are drilled and completed as they have in other states, including those without an express preemption statute.¹⁷³

IV. LOUISIANA’S HOME RULE AUTHORITY FAILS TO SUPPORT LOCAL REGULATION OF THE LOCATION OF WELLS

Home rule traditions and the attendant philosophy of local autonomy provide a policy basis for a local voice in decisions regarding oil and gas

169. *Id.* (citing LA. REV. STAT. ANN. § 33:1236(31)(a)) (internal quotations omitted).

170. LA. REV. STAT. ANN. § 30:28(F) (2007).

171. The *EMC 1* court concluded that “the process of regulating when *and where* an oil and gas well may be drilled within the state is entirely vested in the LOC.” *EMC 1*, 397 F.3d 297, 304 (5th Cir. 2005) (emphasis added).

172. *See supra* note 143 and accompanying text.

173. *See supra* Part II.C.

operations. In the New York case *Matter of Wallach*, home rule and the importance of land use powers served as the foundational justification for the court's distinction between process and land use, which led to a determination that preemption of "regulation" did not preempt zoning out oil and gas operations.¹⁷⁴ Similarly, based on the opinion of the Louisiana Supreme Court in *City of New Orleans v. Board of Commissioners of the Orleans Levee District*,¹⁷⁵ pre-1974 home rule entities could argue that their home rule powers included the right to regulate oil and gas operations through their zoning and land use powers free of the preemption statute—Louisiana Revised Statutes section 30:28(F). The Louisiana Supreme Court, however, has retreated over time from its decision in *City of New Orleans*.¹⁷⁶ In light of judicial decisions since *City of New Orleans*, the express prohibitions in Louisiana's preemption statute would likely defeat any home rule entities' legal claim of right to regulate the location of wells in Louisiana.

A. The Road to Home Rule in Louisiana

Before Louisiana adopted a new constitution in 1974, Louisiana courts routinely held that "[p]arishes and municipal corporations of [the] state are vested with no powers, and possess no authority, except such as are conferred upon, or delegated to, them by the Constitution and statutes."¹⁷⁷ Political subdivisions were mere "creatures of the state, established by the legislature for the purpose of administering local affairs of government."¹⁷⁸ The lack of significant local authority was partly a product of the 1921 Constitution and partly the result of court marginalization of any authority that the Louisiana Legislature granted. The 1921 Constitution was a heavily detailed document that read more like a set of statutes.¹⁷⁹ Due to its excessive detail, that constitution required frequent amendments to adapt to changing times, changing circumstances, and political whims. After being

174. See *In re Wallach v. Town of Dryden*, 16 N.E.3d 1188, 1194–95 (N.Y. 2014).

175. 640 So. 2d 237, 251 (La. 1994).

176. See, e.g., *City of New Orleans v. Bd. of Dirs. of La. State Museum*, 739 So. 2d 748 (La. 1999).

177. *State v. Jordan*, 20 So. 2d 543, 545 (La. 1944).

178. *Pyle v. City of Shreveport*, 40 So. 2d 235, 238 (1949) (quoting *Edwards v. Town of Ponchatoula*, 34 So. 2d 394, 397 (La. 1948)).

179. See LA. CONST. (1921).

amended 536 times, virtually no one but a few scholars felt the 1921 Constitution was understandable.¹⁸⁰

The original 1921 Constitution contained no home rule provisions, but home rule amendments were added for the cities of Shreveport and New Orleans in 1948 and 1950, respectively, and for the parishes of East Baton Rouge and Jefferson in 1946 and 1956, respectively.¹⁸¹ Two general home rule provisions were added in 1960 and 1968.¹⁸² Despite these home rule amendments, “in operation they did not result in an escape from Dillon’s Rule and local officials continued to trek to the state capital in pursuit of specific statutory authorizations.”¹⁸³

In response to Dillon’s Rule, home rule was developed. Under its original form, referred to as *imperio* or traditional home rule,¹⁸⁴ home rule local governments were granted the authority to govern their local affairs, but they had no authority in state-wide matters.¹⁸⁵ The judiciary continued to define the state–local dichotomy in a case-by-case ad hoc manner.¹⁸⁶

Out of concern for judicial decisions that routinely marginalized local governance, the American Municipal Association introduced a new form of home rule—legislative home rule—in the 1950s, which the National Municipal League revised in 1968.¹⁸⁷ Under this form of home rule, the local government may exercise the entire police power of the state without

180. Mark T. Carleton, *Elitism Sustained: The Louisiana Constitution of 1974*, 54 TUL. L. REV. 560, 563 (1980).

181. Richard Engstrom & Robert K. Whelan, *Louisiana, in HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK* 173, 174 (Dale Krane et al. eds. 2000) [hereinafter, HOME RULE HANDBOOK].

182. *Id.*

183. Richard L. Engstrom & Patrick F. O’Connor, *State Centralization Versus Home Rule: A Note on Ambition Theory’s Powers Proposition*, 30 W. POL. Q. 288, 290 (1977). Dillon’s Rule is a descriptive legal principle that limits the power of local government to those powers that are expressly granted, necessarily or fairly implied or incident to the power expressly granted, or essential to the indispensable purposes of the local government. JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (1872).

184. *See* St. Louis v. West Union Tel. Co., 149 U.S. 465, 468 (1893) (describing *imperio* home rule in St. Louis under a charter appointing its powers as an “imperium in imperio,” or a state within a state).

185. *See, e.g.*, COLO. CONST. art. XX, § 6; CAL. CONST. art. XI, § 5(a).

186. *See* Kenneth Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1, 1–2 (1975).

187. *See* NAT’L MUN. LEAGUE, MODEL STATE CONSTITUTION 16 (6th ed. 1968).

concern about the state–local dichotomy, but the legislature may deny the local government most substantive powers via statute.¹⁸⁸

Led by political conservatives that favored less centralized government and by those with more locally directed political commitments,¹⁸⁹ the delegates of the 1974 Louisiana Constitution sought to strengthen home rule in Louisiana to “end a period of de facto state legislative supremacy over local government.”¹⁹⁰ The new 1974 Constitution created two separate classes of legislative home rule local governments. A local government that had already adopted a home rule charter when the new constitution became effective retained its already-possessed powers to the extent that the powers were consistent with the new constitution. If permitted by its charter, this local government would also possess the powers of other local governments.¹⁹¹

Local governments that adopted a home rule charter after the ratification of the 1974 Constitution were allowed to include in their charter any powers “necessary, requisite, or proper for the management of [their] affairs, *not denied by general law* or inconsistent with this constitution.”¹⁹² Most home rule local governments in Louisiana, including St. Tammany Parish,¹⁹³

188. See Vanlandingham, *supra* note 186, at 3.

189. See Engstrom & O’Connor, *supra* note 183, at 293–94.

190. HOME RULE HANDBOOK, *supra* note 181, at 173.

191. LA. CONST. art. VI, § 4.

192. *Id.* § 5. Non-home rule local governments may exercise the same general powers as post-1974 home rule local governments not denied by general laws or inconsistent with the Constitution, except that a majority of the voting electorate must approve general powers because they have not already incorporated in the home rule charter. See *id.* § 7. As described in R. Gordon Kean, Jr., *Local Government and Home Rule*, 21 LOY. L. REV. 63 (1975), the four categories of local governments under the scheme of Article VI, are: (1) non-home rule local governments operating under state charters, existing general law, or the Lawrason Act, Louisiana Revised Statutes sections 33:321 to :481; (2) non-home rule local governments exercising home rule powers by a vote of electors; (3) local governments that adopt a new home rule charter after the 1974 Constitution; and (4) home rule governments that continue to exist under charters adopted before the 1974 Constitution. *Id.* at 67–68. The Lawrason Act provides that a mayor-board of alderman governs all municipalities, other than those that a special legislative charter or a home rule charter governs. LA. REV. STAT. ANN. § 33:321 (2013).

193. St. Tammany voters approved the parish’s first charter in 1979, but that charter was repealed in 1983, reverting the parish to a regular police jury system. BUREAU OF GOVERNMENTAL RESEARCH, THE ST. TAMMANY PARISH HOME RULE CHARTER: AN ASSESSMENT 4 (May 2002). A new charter was adopted in 1998. *Id.* at 5.

adopted their home rule charter after 1974, and thus fall under the National Municipal League legislative home rule model.

B. Judicial Invigoration of Louisiana Home Rule

In what many commentators considered a landmark decision, Justice James L. Dennis, writing for the *City of New Orleans* majority, found the distinction between pre-1974 and post-1974 home rule governments significant.¹⁹⁴ According to Justice Dennis, not only were pre-1974 home rule governments not limited by the requirement that ordinances be “necessary, requisite or proper for the management of [their] affairs” in contrast to post-1974 home rule government,¹⁹⁵ but they also were not necessarily restrained by inconsistent state “general laws.”¹⁹⁶ To the extent earlier cases found differently, Justice Dennis considered those findings nonessential to their holdings and mere dicta.¹⁹⁷

The rights and powers of these pre-1974 home rule local governments are vast—but not absolute—under article VI, section 9(b) of the 1974 Constitution. That provision provides that “[n]otwithstanding any provision of this Article, the police power of the state shall never be abridged.”¹⁹⁸

194. 640 So. 2d 237, 243–44 (La. 1994).

195. *Id.* at 244 (internal quotations omitted).

196. *Id.* at 247. A state law is a general law, and not a local or special law, if its operation extends to the whole state. *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 17 (La. 2001). In contrast, a local law is a law that operates only in a particular area or locality without the possibility of extending to other localities or areas, and a special law is a law that “operates upon and affects only a fraction of the persons or a portion of the property encompassed by a classification, granting privileges to some while denying them to others.” *Id.* at 18.

197. *City of New Orleans*, 640 So. 2d at 257. In so holding, the court essentially overrules one of its earlier decisions. *Id.* at 247 (“We reject the notion suggested by the lead opinion in *City of New Orleans v. State*, 426 So. 2d 1318, 1320–21 (La. 1983), that Article VI, § 4 of the 1974 Louisiana Constitution adopts by implied reference a 1921 constitutional provision that requires the [local government’s] exercise of its home rule power to yield to any inconsistent general state law.”). The court characterizes *City of New Orleans* as “simply wrong and has been subject to cogent judicial and scholarly criticism.” 640 So. 2d at 255.

198. LA. CONST. art. VI, § 9(B). The principle that the police power of the state shall not be abridged does not need to be stated in the constitution. “[T]he ‘police power’ is the *legislative* authority enjoyed by the states, *i.e.* not constitutionally delegated to the federal government or constitutionally appropriated by the federal Congress, as the residuary sovereigns in our federal system.” *City of Baton Rouge v. Ross*, 654 So. 2d 1311, 1319 n.10 (La. 1995) (emphasis in original). “This corresponds to the ‘general principle of judicial interpretation that, unlike the

Although Justice Dennis viewed this language as ambiguous, he concluded that courts must construe the broad home rule powers granted to pre-1974 home rule local governments in harmony with state laws,¹⁹⁹ which is a difficult task when otherwise valid local ordinances conflict directly with state law.

Pre-1974 home rule local governments have a power of immunity "to act without fear of the supervisory authority of the state government."²⁰⁰ For these home rule entities, the court must first determine whether the local law at issue conflicts with state law. If the local law conflicts, the state law will preempt the local law only if the state law is necessary to protect a vital interest of the state as a whole.²⁰¹ For a state statute to be *necessary*, the proponent must show that the protection of the vital state interest "cannot be achieved through alternate means significantly less detrimental to home rule powers and rights."²⁰²

One might argue that, despite the admonition of Justice Dennis, a pre-1974 home rule government still has no power to regulate oil and gas operations because it had no such powers when the 1974 Constitution was adopted. Section 4 of the 1974 Constitution states that "each local governmental subdivision which has adopted such a home rule charter or plan of government shall retain the powers . . . in effect when this constitution is adopted."²⁰³ The 1974 Constitution post-dated the current version of Louisiana Revised Statutes section 30:28(F), which was adopted in 1959, by 15 years.²⁰⁴ As discussed above, the Fifth Circuit held that Louisiana Revised Statutes section 30:28(F) repudiates local authority to regulate both where oil and gas wells may be located and how they might be drilled.²⁰⁵ Accordingly, pre-1974 home rule governments lacked the power to regulate oil and gas drilling when the 1974 Constitution was adopted, a deprivation that continued unaffected.

City of New Orleans, however, counsels to the contrary. According to Justice Dennis, the test is not whether a pre-1974 local home rule government had the power to regulate when the 1974 Constitution was

federal constitution, a state's constitution's provisions are not grants of power but instead are limitations on the otherwise plenary power of the people of a state *exercised through its legislature.*" *Id.* (quoting *Bd. of Directors of La. Recovery Dist. v. Taxpayers*, 529 So. 2d 384, 387 (La 1988)).

199. *City of New Orleans*, 640 So. 2d at 252.

200. *Id.* at 242.

201. *Id.* at 252.

202. *Id.*

203. LA. CONST. art. VI, § 4 (emphasis added).

204. See Act. No. 66, § 1, 1959 La. Acts 204.

205. See *supra* Part III.B.

adopted, because “the drafters and ratifiers intended to emancipate and continue in effect the preexisting home rule charters free of the conditions and restraints that had been placed upon them by the 1921 Constitution.”²⁰⁶ According to Justice Dennis, only the terms of the 1974 Constitution limit the powers of preexisting home rule governments set forth in their charters, including any amendments to those charters adopted in accordance with those charters.²⁰⁷ After *City of New Orleans*, the 1974 Constitution allows such local governments to regulate in areas of state-wide concern so long as conflicting state laws are not “necessary” to protect the “vital” interests of the state as a whole.²⁰⁸

Under these principles, courts, rather than the legislature, must determine when a state interest is relatively vital or relatively nonessential along a spectrum, giving liberal deference to pre-1974 home rule power. In the case of *City of New Orleans* itself, Justice Dennis concluded that the state’s interest in allowing the Orleans Levy District to construct, maintain, and operate a marina on state land at South Shore Harbor was not sufficient to prevent the City from enforcing violations of its zoning ordinances and the Levy District’s building codes.²⁰⁹ Based solely on *City of New Orleans*, a pre-1974 home rule local government might credibly argue that it has the power to regulate the location of wells despite the express preemption provision.

C. Judicial Re-marginalization of Louisiana Home Rule

Despite Justice Dennis’s persuasive rhetoric, home rule was not freed from the shackles of Dillon’s Rule as some predicted.²¹⁰ Later precedent interpreting *City of New Orleans* often reverts to a standard more tolerant of conflicting state legislation, finding preemption based on state interests that

206. *City of New Orleans*, 640 So. 2d at 245.

207. *Id.* at 245–46.

208. The 1974 Louisiana Constitution contains other exceptions that prohibit localities from providing for the punishment of a felony, enacting ordinances governing private relationships, reducing the compensation of an elected official, and establishing or affecting courts. LA. CONST. art. VI, §§ 9(A)(1)–(2), 12, 25. The *City of New Orleans* court also recognized that local ordinances may not be applied in an unreasonable, arbitrary, or discriminatory manner. 640 So. 2d at 255.

209. 640 So. 2d at 254.

210. See generally Gerald S. Janoff, Comment, *City of New Orleans v. Board of Commissioners: The Louisiana Supreme Court Frees New Orleans from the Shackles of Dillon’s Rule*, 69 TUL. L. REV. 809 (1995).

arguably are less than necessary to protect state interests that may be less than vital.²¹¹

For example, in the post-*City of New Orleans* case, *Morial v. Smith & Wesson Corp.*,²¹² the Louisiana Supreme Court sustained a state law that prohibited local governments from suing a slew of gun manufacturers for damages related to the sale of firearms.²¹³ Rather than asking whether the state interest was “vital” or whether the state legislation was “necessary” in light of available alternatives, the court asked the rather deferential question of whether the state law represented a reasonable and valid exercise of the police power.²¹⁴ The *Smith & Wesson* court concluded that statewide regulation of the firearms industry “tends” towards preserving public safety and welfare.²¹⁵ In his dissent, Chief Justice Calogero argued that, not only did the state law fail to even attempt to prevent an evil or preserve public health or welfare, but the law also harmed public welfare by restricting the public’s right to recover damages for injury.²¹⁶

Later, in *New Orleans Campaign for a Living Wage v. City of New Orleans*,²¹⁷ the Louisiana Supreme Court found that a Louisiana statute that prohibited a local governmental subdivision from establishing a minimum wage preempted a minimum wage amendment to the City of New Orleans’ charter.²¹⁸ The majority opinion, written by Justice Kimball, diverged widely from the principles that Justice Dennis laid down in *City of New Orleans*. First, Justice Kimball stated that the Louisiana Constitution does not differentiate between pre-1974 and post-1974 home rule charters on the issue of the abridgement of the state’s police power.²¹⁹ Second, Justice Kimball stated that the relevant test should ask whether the legislature’s exercise of the police power was *reasonable*, giving great weight to the legislature’s determination and refusing to substitute the court’s opinion for the opinion of the legislature.²²⁰ Chief Justice Calogero, in concurrence, would have struck down the local law as violating the prohibition against

211. See, e.g., *City of Baton Rouge v. Ross*, 654 So. 2d 1311, 1318–19 (La. 1995).

212. 785 So. 2d 1 (La. 2001). For a detailed discussion of *Morial*, see Eric Womack, Comment, *A Revolution in Local Government Law: Recognizing the Home Rule Implications of Municipality Suits Against Gun Manufacturers*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 255 (2001).

213. 785 So. 2d at 19.

214. *Id.* at 15.

215. *Id.* at 16.

216. *Id.* at 21.

217. 825 So. 2d 1098 (La. 2002).

218. *Id.* at 1108.

219. *Id.* at 1105.

220. *Id.*

regulation of private relationships,²²¹ and Justice Johnson, in dissent, would have allowed the local law to stand.²²² Both of these two justices, however, recognized that the majority marginalized any distinction between pre-1974 and post-1974 home rule local governments.²²³

The reasonableness test as used to measure the state's power to preempt local government under the "nonabridgement" clause of the 1974 Constitution actually originated 10 years before Justice Dennis formulated the necessary and vital test in *City of New Orleans*. In *Francis v. Morial*,²²⁴ the Louisiana Supreme Court considered a state statute that required the two cities and a parish to choose members of the Louisiana aviation board.²²⁵ The *Francis* court stated that it would sustain state legislation against conflicting local law if the operation of the state law "*tends in some degree to prevent an offense or evil or otherwise to preserve public health, morals, safety or welfare . . .*"²²⁶ The state law nevertheless was struck down in that case largely because that law affected the governance of the home rule city, which is a direct affront to the concept of home rule power.²²⁷

The judiciary continues to be suspicious of state laws that abridge the governance or structure of home rule local governments.²²⁸ In the realm of zoning and police power regulation, however, Louisiana courts have afforded state laws considerable deference despite *City of New Orleans*.²²⁹

221. *Id.* at 1108–09 (Calogero, J., concurring in the decree, dissenting from the majority's reasons).

222. *Id.* at 1124–25 (Johnson, J., dissenting).

223. *See id.* at 1110 (Calogero, J., concurring in the decree but dissenting from the majority's reasons) ("Similarly, the judiciary in deciding whether a local government's legislation abridges the state's police power must do more than merely rely on the legislature's pronouncement that a matter is true 'statewide' concern To accept such a statement at face value would effectively place pre-1974 home rule charter cities on the same constitutional footing as post-1974 cities, insofar as the legislature's ability to override local legislation by simply passing an inconsistent 'general' law."); *id.* at 1123–24 (Johnson, J., dissenting) ("The questions we must resolve are these: Does [the state statute] protect a vital or compelling state interest? If so, can that state interest be achieved through less drastic alternatives?").

224. 455 So. 2d 1168 (La. 1984).

225. *Id.* at 1170.

226. *Id.* at 1172–73 (emphasis added).

227. *See id.* at 1174.

228. The 1974 Constitution states that a home rule charter shall provide "the structure and organization, powers, and functions" of the local government. LA. CONST. art. VI, § 5(E).

229. *See, e.g., City of New Orleans v. Bd. of Dirs. of the La. State Museum*, 739 So. 2d 748 (La. 1999) (holding that Vieux Carre Commission of New Orleans

The state law could favor a particular industry to the alleged detriment of public welfare and safety, as in the case of *Smith & Wesson*, or the state law could simply conflict with local laws.

In a few cases since *City of New Orleans*, however, Louisiana courts have protected local power in the face of potentially conflicting state statutes.²³⁰ For example, in *St. Charles Gaming Co., Inc. v. Riverboat Gaming Commission*,²³¹ decided a year after *City of New Orleans*, the Louisiana Supreme Court held that a zoning ordinance that restricted riverboat gaming activity was not invalid on its face.²³² The State Riverboat Gaming Commission issued a permit to the plaintiff to conduct gambling operations at a specific site on the batture²³³ and sued the parish council to enjoin the parish from enforcing its zoning ordinance.²³⁴ In effect, the court recognized the distinction between process and land use. It distinguished between gambling, which is regulated by the legislature, and zoning, which is a valid activity of the local government that was not denied by the state legislature.²³⁵

As noted above, the Louisiana Constitution states that it protects local governments from state legislative action except by general state laws that deny local authority, rather than merely conflict with local law.²³⁶ In the context of oil and gas production, Louisiana Revised Statutes section 30:28(F) denies local authority with respect to permitted oil and gas wells.²³⁷

acted unreasonably in requiring state to comply with permit procedures); *Merritt McDonald Constr., Inc. v. Parish of E. Baton Rouge*, 742 So. 2d 564 (La. Ct. App. 1999) (striking down contractor licensure requirements of home rule parish as conflicting with state licensure requirements).

230. See, e.g., *City of New Orleans v. Bd. of Dir. of the La. State Museum*, 709 So. 2d 1008 (La. Ct. App. 1998), *vacated by* 739 So. 2d 748. The Court of Appeal required the state to comply with the city's permitting procedure, but the Supreme Court reversed, finding that the city abridged the state's police power. 739 So. 2d at 758.

231. 648 So. 2d 1310 (La. 1995).

232. *Id.* at 1312.

233. A "batture" is "[s]oil, stone, or other material that builds under water and may or may not break the surface." BLACK'S LAW DICTIONARY 173 (9th ed. 2009).

234. *St. Charles Gaming*, 648 So. 2d at 1312.

235. *Id.* at 1317.

236. *City of New Orleans v. Bd. of Comm'rs of the Orleans Levee Dist.*, 640 So. 2d 237, 248 (La. 1994).

237. "No other agency or political subdivision of the state shall have the authority, and they are hereby expressly forbidden, to prohibit or in any way interfere with the drilling of a well or test well in search of minerals by the holder of such a permit." LA. REV. STAT. ANN. § 30:28(F) (2007).

Louisiana Revised Statutes section 33:4780.49 also denies the local authority of parishes, but not municipalities, over activities authorized under state or federal permits.²³⁸ Local governments might argue, based on the distinction between process and land use, that the purpose of the preemption statute relates only to the technical operations of oil and gas wells and that zoning ordinances do not implicate those operations. To succeed based on such an argument would require a strong presumption in favor of local authority. However, such a presumption appears to have eroded somewhat since *City of New Orleans*. The *Francis* standard asks little more than whether a conflicting state law is a general law. Although this is the test applicable to most legislative home rule local governments, it hardly sets Louisiana apart as a home rule innovator.

V. PROCESS AND LAND USE OVERLAP IN THE OIL AND GAS CONTEXT

The ideal level of local autonomy over the location of oil and gas wells has been the subject of scholarly interest. For example, in a recent article, Professor David Spence cogently argued that allowing local governments to veto fracking or drilling may result in more optimal utility and reach the most efficient outcome, but only “if local governments can capture more of the benefits of production” in the form of impact or other fees or additional taxes.²³⁹ Although costs and benefits of production usually are shared state-wide, thus favoring state-level preemption, Professor Spence argues that to maximize collective utility, one should take into account not just the preferences of state residents in the aggregate, but also the *intensity* of preferences, which may be stronger at the local level.²⁴⁰

In response to Professor Spence, Professor Fershee makes perhaps the most important point in the debate: that states do retain the ability to decide whether local governments may ban fracking or drilling by preemption and that courts should and usually do respect those policy choices.²⁴¹ Even when a state legislature acts to preempt local government actions, however, the legislature must be very clear. At least in the context of fracking, courts recently have tended to protect local power in the absence of legislative

238. “[N]o [parish] shall . . . restrict, conflict with, interfere with, or supersede activities operating in accordance with authorized state or federal permits, laws, or regulations.” LA. REV. STAT. ANN. § 33:4780.49 (2009).

239. David B. Spence, *The Political Economy of Local Vetoes*, 93 TEX. L. REV. 351, 353 (2014).

240. *Id.* at 412.

241. Joshua P. Fershee, *How Local is Local?: A Response to Professor David B. Spence’s The Political Economy of Local Vetoes*, 93 TEXAS L. REV. 61, 62–63 (2015).

clarity, particularly in their recognition of the distinction between process and land use.²⁴²

There are a number of arguments, however, why the state, rather than the local government, should be the ultimate decision maker as to when and where drilling should occur.²⁴³ For example, local governments may be more subject to interest group pressure than state governments, which must take into account a broader range of interests. Local governments may also fail to account for the interests of underrepresented mineral owners. This problem arises in part because surface owners, renters, and other non-mineral owning residents—the large majority of voters to whom local politicians must be responsive—realize very little of the economic benefits of production in their neighborhood.²⁴⁴ Local bans create free-rider problems,²⁴⁵ particularly in states where oil and gas operations generate the majority of revenues and other economic benefits that are distributed more evenly throughout the state. In contrast, local governments bear the vast majority of externality costs²⁴⁶ from truck traffic, noise, boom and bust cycles, etc.²⁴⁷ These governments may benefit economically from local employment and local taxes, but a large portion of the economic benefits generated in a local government jurisdiction that allows oil and gas production often flows to residents of other sub-state entities.²⁴⁸

Perhaps most persuasive, however, is that process and land use overlap in the oil and gas context, meaning that *where* oil and gas is produced also implicates how and whether oil and gas will be produced and whether it will be fairly allocated.

Scholars and courts generally recognize the distinction between land use as a local interest and process as a state interest. For example, Louisiana State University Law Professor Kenneth Murchison has advised against preemption where the purpose of state regulation is to govern processes and practices, rather than the type of comprehensive planning that is the subject

242. See Ritchie, *supra* note 83; see generally Kramer, *supra* note 6.

243. See Alex Ritchie, *On Local Fracking Bans: Policy and Preemption in New Mexico*, 54 NAT. RESOURCES J. 255, 299 (2014).

244. *Id.* at 297–98.

245. Free-rider problems arise when market participants enjoy the benefits associated with a public good without having to pay their fair share for the good. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 109 (1988).

246. An externality may be described as a cost or benefit that is not internalized by the applicable actor, in this case the oil and gas industry. NICHOLAS A. ASHFORD & CHARLES C. CALDART, *ENVIRONMENTAL LAW, POLICY, AND ECONOMICS: RECLAIMING THE ENVIRONMENTAL AGENDA* 132 (2008).

247. Ritchie, *supra* note 243, at 282–83.

248. *Id.* at 285–87.

of sound zoning practices.²⁴⁹ In the *Palermo* case, the local government down-zoned the land of the defendants—who intended to sell their parcels for a solid waste landfill—from heavy industrial to light industrial, which prohibited the intended use for the land and precluded its sale.²⁵⁰ The defendants pointed to state environmental regulation, but the court found no provisions that expressly preempted the local zoning regulation. In fact, Louisiana Department of Environmental Quality (“LDEQ”) regulations required that the proposed use could not violate local land use requirements as a precondition to obtaining a solid waste disposal permit.²⁵¹ The *Palermo* court then discussed whether the Louisiana statutory scheme impliedly preempted the local regulation, finding that the focus of the Office of Solid and Hazardous Waste was to regulate “solid waste disposal practices,” not zoning.²⁵² In other words, the practice of solid waste disposal was a process appropriately regulated by the state, not land use.

The dividing line under the law, however, is not so precise where oil and gas wells are concerned. In the implied preemption context, it is often stated that a local law is preempted when the state law allows something the local law prohibits, and vice versa.²⁵³ The language of this test, however, provides only a theoretical degree of certainty. A drilling permit is an authorization to drill in a particular location, and a local zoning ordinance may prohibit drilling in that very same location. Jurisdictions without an express preemption provision—and at least one jurisdiction with an express preemption provision²⁵⁴—allow this direct conflict under the rationale that the purpose of local land use is very different from the purpose of state conservation statutes.

Courts routinely distinguish between the purpose of state conservation statutes and the purpose of local land use ordinances. Land use concerns the preservation of the character of neighborhoods and furthers the comprehensive plans of the local government.²⁵⁵ By contrast, state conservation statutes are focused primarily on the prevention of waste of

249. Kenneth M. Murchison, *Local Government Law*, 52 LA. L. REV. 541, 552 (1992).

250. *Palermo Land Co. v. Planning Comm’n of Calcasieu Parish*, 561 So. 2d 482, 484 (La. 1990).

251. *Id.* at 498 (citing LA. ADMIN. CODE tit. 33, pt. 6, § 1107(B)(1)).

252. 561 So. 2d at 498 (quoting LA. REV. STAT. ANN. § 30:2152 (2000)).

253. *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 896 N.E.2d 967, 971 (Ohio 2008); *Huntley & Huntley, Inc. v. Borough Council*, 964 A.2d 855, 862 (Pa. 2009); *Colo. Mining Ass’n v. Bd. of Cnty. Comm’rs*, 199 P.3d 718, 725 (Colo. 2009).

254. *See supra* note 85 and accompanying text.

255. *See supra* Part III.A.

oil and gas and the protection of correlative rights. Unfortunately, however, these purposes overlap in the oil and gas context in a way that justifies a degree of state preemptive power over local restrictions on the location of wells.

“Waste” of oil and gas is defined to include physical waste and economic waste. Physical waste may result from inefficient use of reservoir energy or excessive production rates. Economic waste may result from drilling more wells than are required or when oil or gas is sold at too low a price.²⁵⁶ By contrast, “correlative rights” is a term that describes acceptable standards of conduct for operations in a common source of supply, recognizing that actions of one producer have an effect on the rights of others.²⁵⁷ In Louisiana, correlative rights of a mineral owner include the opportunity to produce a fair share of the common reservoir, and the right to utilize natural reservoir energy.²⁵⁸ Correlative rights also prohibit a person operating in a common reservoir from intentionally or negligently depriving another owner in the common reservoir of his rights or negligently causing him harm.²⁵⁹

The conservation agency may protect these correlative rights using any number of tools, including the allocation of allowable production in a common pool,²⁶⁰ and the establishment of drilling units in a manner that allows a producer to produce no more than his just and equitable share of the pool.²⁶¹ Although the primary duty of the conservation agency is to prevent waste to promote the full and efficient development of the state’s mineral resources,²⁶² the agency also has the power and duty to protect

256. PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS, *MANUAL OF OIL AND GAS TERMS* 1133 (13th ed. 2012). Some states, including Louisiana, define waste only by reference to physical waste. *See* LA. REV. STAT. ANN. § 30:3 (2007) (“‘Waste’, in addition to its ordinary meanings, means ‘physical waste’ as that term is generally understood in the oil and gas industry.”).

257. *See* Eugene E. Kuntz, *Correlative Rights of Parties Owning Interest in a Common Source of Supply of Oil or Gas*, 17 *INST. OIL & GAS LAW & TAX’N* 217, 224–25 (1966).

258. *See* LA. REV. STAT. ANN. § 31:9 & cmt. (2000).

259. LA. REV. STAT. ANN. § 31:10.

260. *See* LA. REV. STAT. ANN. § 30:11.

261. *See* LA. REV. STAT. ANN. § 30:9(A). The conservation agency’s power to establish drilling units to protect the source of the supply for the common owners is a constitutional exercise of the state’s police powers. *See* *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 209–11 (1899); *Hunter Co. v. McHugh*, 11 So. 2d 495, 506 (La. 1942).

262. *See* LA. REV. STAT. ANN. §§ 30:2 to :4; *Exxon Corp. v. Thompson*, 564 So. 2d 387, 394 (La. Ct. App. 1990). The duty to protect correlative rights is addressed differently in different state conservation statutes. For example, in

correlative rights, and more generally, to make any reasonable rule, regulation, or order necessary to administer and enforce the conservation law.²⁶³

In *Matter of Wallach*, the New York Court of Appeals in part based its decision to allow local oil and gas bans on the distinction between the purposes under state conservation law of waste prevention and correlative rights protection and the local purposes of zoning and land use.²⁶⁴ The court states that “[t]he [oil and gas law’s] overriding concern with preventing waste is limited to inefficient or improper drilling activities that result in the unnecessary waste of natural resources. Nothing in the statute points to the conclusion that a municipality’s decision not to permit drilling equates to waste.”²⁶⁵ Thus, according to the New York Court of Appeals, oil and gas that is still in the ground is not wasted, at least under the statutory meaning of the conservation laws. With little elaboration, the court similarly concluded that correlative rights are not implicated by the inability of an owner within a jurisdiction to drill at all.²⁶⁶ Drilling bans, however, cause waste and implicate correlative rights, particularly because of the extraterritorial effects.

As the Colorado Supreme Court observed in *Voss v. Lundvall Brothers, Inc.*,²⁶⁷ a municipal ban may increase the cost of drilling when the pool of oil or gas may be accessed only from outside the jurisdiction, which results in economic waste.²⁶⁸ A ban may also result in physical waste. Drilling permits are issued by the state at locations intended to maximize production. If oil and gas is only produced outside the jurisdiction that bans production, it may be produced in an inefficient pattern or significant oil and gas might be left in the ground. The *Voss* court recognized that a ban also prevents owners inside the jurisdiction of the local government from producing their equitable share of oil and gas from the pool.²⁶⁹ When a pool is located both inside and outside the particular local government that bans production, the

Colorado, the definition of “waste” includes abuse of correlative rights. See COLO. REV. STAT. § 34-60-103(13)(c) (2006). In New York, the purpose of the conservation law expressly includes both the prevention of waste and the full protection of correlative rights. See N.Y. ENVTL. CONSERV. LAW § 23-0301 (McKinney 2007).

263. LA. REV. STAT. ANN. § 30:4(C) (2007 & Supp. 2015).

264. *In re Wallach v. Town of Dryden*, 16 N.E.3d 1188, 1201–02 (N.Y. 2014).

265. *Id.* at 1196.

266. *Id.* at 1200 n.5.

267. 830 P.2d 1061 (Colo. 1992).

268. *Id.* at 1067.

269. *Id.* at 1068.

owner located outside the jurisdiction may drain the entire pool under the rule of capture.²⁷⁰

The applicable remedy under the rule of capture is for the owner to drill his or her own well to offset the drainage from the property.²⁷¹ That remedy, however, is unavailable to the owner located inside the jurisdiction of the local government where drilling is banned, frustrating the rule that is the foundation of oil and gas law.²⁷² The owner within the jurisdiction is thus denied the opportunity to produce its fair and equitable share or any share at all. In other words, the owner is denied its correlative rights in direct contravention of conservation statutes.²⁷³

Relying on *Voss*, other Colorado courts have reached the same conclusion. In the summer of 2014, the Boulder District Court²⁷⁴ and the Larimer County District Court²⁷⁵ each recognized that a municipal ban on fracking causes waste and impairs correlative rights. The United States District Court for the District of New Mexico, in striking down the Mora County, New Mexico, oil and gas production and storage ban, also found

270. See *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 13 (Tex. 2008) (“[The] rule [of capture] gives a mineral rights owner title to the oil and gas produced from a lawful well bottomed on the property, even if the oil and gas flowed to the well from beneath another owner’s tract.”).

271. *Id.* at 14.

272. See *id.* at 14 n.41 (“[T]he owner of the adjoining tract from which the oil is migrating can protect himself by drilling offset wells. This equal right to drill has always supported the constitutionality of the rule of capture. Take it away and the reason for the rule fails, leaving a result not only unjust but one inconsistent with the fundamental concept of ownership of oil and gas in place as a part of the realty.” (quoting *Ryan Consol. Petrol. Corp. v. Pickens*, 285 S.W.2d 201, 210 (Tex. 1955) (Wilson, J., dissenting))).

273. See *Ritchie*, *supra* note 243, at 310–11.

274. See *Order Granting Motion for Summary Judgment at 9*, *Colo. Oil & Gas Ass’n v. City of Lafayette*, 2014 WL 7666285 (Colo. Dist. Ct. 2014) (No. 13CV31746) [hereinafter *Lafayette Order*]; *Order Granting Motions for Summary Judgment at 13*, *Colo. Oil & Gas Ass’n v. City of Longmont*, 2014 WL 3690665 (Colo. Dist. Ct. 2014) (No. 13CV63) [hereinafter *Longmont Order*]. Interestingly, correlative rights were impaired in Longmont because a unit was formed that included acreage inside and outside Longmont, but the oil and gas company was not allowed to frack the portion of the well inside Longmont. Under state law, owners of mineral interests were thus allocated proceeds from the production of the well based on their percentage ownership of the unit but were not actually contributing acreage to the well. *Longmont Order*, *supra*, at 13.

275. *Order Granting Plaintiff’s Motion for Summary Judgment on First Claim for Relief and Denying Defendant’s Cross-Motion of Summary Judgment at 5–6*, *Colo. Oil & Gas Ass’n v. City of Ft. Collins*, 2014 WL 7666284 (Colo. Dist. Ct. 2014) (No. 13CV31385) [hereinafter *Ft. Collins Order*].

that such a ban frustrates the state conservation law purposes of waste prevention and correlative rights protection, as well as the overall statutory scheme regulating oil and gas.²⁷⁶ Interestingly, all of these courts also recognized that the state statutory scheme left room for reasonable zoning and land use restrictions.

Arguably, any zoning or other restrictions on where wells might be located may impair correlative rights or result in waste. Even a traditional zoning pattern that separates uses into districts may prohibit drilling at the most efficient and effective location for production or deny one or more owners their just and equitable share of production. Louisiana Revised Statutes section 30:28(F) and the *EMC I* court's interpretation of that statute address that reality.

VI. COMPROMISE AND PARTICIPATION AS ALTERNATIVES TO LOCAL CONTROL

As argued above, policy should vest the state with the ultimate decision-making authority as to the where and how wells are drilled and completed. Local governments and their citizenry, however, should have their legitimate concerns heard and considered, even in circumstances where all such concerns cannot be addressed to their satisfaction. Industry itself may give voice to at least some local concerns through direct negotiation and compromise or more passively by not legally challenging reasonable local regulations. At the state level, local citizens are given a voice when the LOC considers their concerns in balancing environmental costs and benefits along with economic, social, and other factors in making permitting decisions. Although the state might be unresponsive to such environmental considerations in the absence of a mandate, the Louisiana Constitution arguably provides such a mandate. This Part discusses these opportunities for a local voice in the absence of local control.

A. Cooperative Governance or Compromise

Some commentators have called for cooperation between local governments and industry or between state and local governments in the siting and permitting of wells.²⁷⁷ Cooperation implies working together

276. *SWEPI, LP v. Mora Cnty.*, No. CIV 14-0035 JB/SCY, 2015 WL 365923, at *102-03 (D.N.M. Jan. 19, 2015).

277. See John R. Nolan & Steven E. Gavin, *Hydrofracking: State Preemption, Local Power, and Cooperative Governance*, 63 CASE W. RES. L. REV. 995, 1036-39 (2013). Professor Nolan and his former student argue that state agencies could assist communities by providing technical assistance. They also describe a system

towards an end,²⁷⁸ which will usually prove difficult between oil and gas companies that want to drill at efficient locations and communities that want to ban oil and gas drilling entirely. Cooperation in such circumstances might be better termed “mutually beneficial compromise.”

To achieve compromise, both parties must feel at least some pressure to negotiate. Compromise may be more difficult in Louisiana than in other oil-and-gas-producing states because of the preeminent authority of the LOC to regulate both process and location under *EMC 1* and *EMC 2*. Even so, at least some local regulation may co-exist with state regulation, even in a state such as Louisiana with a strong express preemption provision. One can expect oil and gas companies to voluntarily comply with reasonable restrictions to avoid jeopardizing their social license to operate in the community.²⁷⁹ In this respect, cooperation in Louisiana by the state and industry with local governments to craft reasonable local regulation is not impossible.

Former Caddo Parish Attorney Charles C. Grubb explains the story of how Caddo Parish regulated oil and gas operations in the face of increased drilling in the Haynesville Shale.²⁸⁰ After considering Louisiana’s preemption statute, Caddo Parish decided to take an expansive view of its regulatory authority while avoiding regulations that proscribe well locations or that regulate the process of drilling, stimulating, or completing a well—referred to as “down-hole” regulation.²⁸¹ Instead, Caddo Parish regulates matters such as site access, dust, vibration, lighting, exhaust fumes, signage, use of public water supplies, discharges, aesthetics, operating hours, noise, and road usage.²⁸²

In crafting its oil and gas ordinances, Caddo Parish involved industry in discussions. In the view of Caddo Parish, industry would not risk confrontation with communities to challenge reasonable regulations that the

in New York relating to the siting of major electric generating facilities that provides for preemption of local control but allows for local input. *Id.* at 1038.

278. See BLACK’S LAW DICTIONARY 384 (9th ed. 2009).

279. See Kieren Moffat & Airong Zhang, *The Paths to Social License to Operate: An Integrative Model Explaining Community Acceptance of Mining*, 39 RESOURCES POL’Y 61, 61 (2014).

280. Charles C. Grubb, *Getting Ahead of Drilling Companies in the Haynesville Shale, The Caddo Parish, Louisiana, Experience*, in BEYOND THE FRACKING WARS: A GUIDE FOR LAWYERS, PUBLIC OFFICIALS, PLANNERS, AND CITIZENS 213, 213–20 (Erica L. Powers & Beth E. Kinne eds., 2013).

281. *Id.* at 215–17.

282. See, e.g., CADDO PARISH, LA., POLICE JURY CODE OF ORDINANCES §§ 34-1 to 34-55 (2009) (oil, gas, and hydrocarbon wells); *id.* §§ 26-155 to 26-162 (commercial vehicle enforcement); *id.* §§ 32-160 to 32-166 (noise).

public supports.²⁸³ Grubb also reported that the LDNR and the Commissioner of Conservation worked cooperatively with the Parish.²⁸⁴ Due to these efforts, Grubb reports that the citizens of Caddo Parish have enjoyed the economic benefits attendant with Haynesville Shale production without significant harm to the environment.²⁸⁵

Bossier Parish,²⁸⁶ the City of Bossier,²⁸⁷ DeSoto Parish,²⁸⁸ the City of Shreveport,²⁸⁹ and probably many other local governments in Louisiana all regulate certain aspects of oil and gas operations either directly or indirectly through local ordinances.²⁹⁰ One can expect the trend of locally regulating oil and gas operations in the Haynesville Shale, which began in 2009, to spread to the Tuscaloosa Marine Shale area as that area is further developed.²⁹¹

Further, the state should be willing to voluntarily appease local governments to some extent when officials believe they can avoid the political risk of local opposition while also limiting the impact on their authority. For example, in Colorado, local government frustration led to Colorado Governor John Hickenlooper's creation of an oil and gas task force to address concerns of local governments. The task force submitted nine proposals to the Governor, two of which require legislation, and the remainder of which can be implemented by agency regulation.²⁹² One

283. Grubb, *supra* note 280, at 217.

284. *Id.* at 222.

285. *Id.* at 223.

286. *See, e.g.*, BOSSIER PARISH, LA., POLICE JURY CODE OF ORDINANCES § 94-10 (2013) (commercial vehicle enforcement); *id.* §§ 46-34 to 46-41 (noise).

287. *See, e.g.*, BOSSIER CITY, LA., CODE OF ORDINANCES §§ 46-141 to 46-147 (2009) (gas and other hydrocarbon well operations).

288. *See, e.g.*, DESOTO PARISH, LA., POLICE JURY CODE OF ORDINANCES § 78-9 (2010) (requiring the repair of excess damage to roads by motor vehicles, including for the drilling of oil or gas wells).

289. *See, e.g.*, SHREVEPORT, LA., CODE OF ORDINANCES §§ 251-1 to 25-31 (2009) (oil, gas, and other hydrocarbon well operations); *id.* § 25-29 (noise).

290. *See* Jerry N. Jones, *Local Regulation in Louisiana's Haynesville Shale*, BRADLEY, MURCHISON, KELLY, & SHEA LLC, <http://www.bradleyfirm.com/files/shale.pps> [perma.cc/RKB6-N8EL] (last visited Nov. 17, 2015).

291. As of February 22, 2015, the Tuscaloosa Marine Shale contained only 37 active wells. *See Tuscaloosa Marine Shale Map*, LA. DEP'T NATURAL RES., <http://dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=909> [perma.cc/4PDS-NPSZ] (last visited Nov. 15, 2015).

292. *See* Mark Jaffe, *Colorado Oil, Gas Task Force Sends 9 Measures on to Governor's Desk*, DENVER POST (Feb. 24, 2015), http://www.denverpost.com/business/ci_27592566/colorado-oil-gas-task-force-sends-9-measures [perma.cc/7JKW-XVNI].

proposal limits the impact of large-scale operations on multi-well drilling pads and gives local governments the right to negotiate the location of such sites.²⁹³ Another proposal requires oil and gas companies to provide forward-looking information about their development plans to local governments to facilitate local land use planning.²⁹⁴ Other proposals add inspection staff, require a study of oil and gas vehicle traffic, and create a statewide information clearinghouse.²⁹⁵ Overall, the proposals give local governments more of a consulting role and even more of a right to participate in the planning process, but leave final permitting decisions to the state.²⁹⁶

B. Local Participation in the Drilling Decision: The Natural Resources Article to the Louisiana Constitution

In addition to the challenges brought against the state and Helis with respect to the proposed well in St. Tammany Parish,²⁹⁷ Abita Springs brought suit against the LOC, arguing that the LOC failed to adequately address article IX, section 1 of the 1974 Louisiana Constitution—the Natural Resources Article²⁹⁸—in its findings and decision to grant a drilling

293. KEYSTONE CENTER, COLORADO OIL AND GAS TASK FORCE FINAL REPORT 5 (2015), available at <http://dnr.state.co.us/OGTASKFORCE/Pages/home.aspx> [perma.cc/8FCM-6QAD].

294. *Id.* at 9.

295. *See id.* at 12, 16, 17.

296. Colorado's willingness to work with local governments, however, has not been a panacea for environmental activists. The Governor created the task force as a political compromise to ward off amendments to the Colorado Constitution that would have overturned court preemption decisions and allowed local governments the right to ban oil and gas production. *See* Lynn Bartels, *Let's Make a Deal: How Colorado Came to a Fracking Compromise*, DENVER POST (Aug. 23, 2014), http://www.denverpost.com/election2014/ci_26394883/lets-make-deal-how-colorado-came-fracking-compromise [perma.cc/8ZQV-J7C3]. Environmental activists are not happy with the proposals, and have vowed to go back to the ballot initiative process if local governments are not given the right to ban oil and gas production in their communities. *See* Dan Boyce, *Task Force Proposes Fracking Rules to Colorado Governor*, NPR (Feb. 27, 2015), <http://www.npr.org/2015/02/27/389454418/task-force-proposes-fracking-rules-to-colorado-governor> [perma.cc/YT4G-66TW].

297. *See supra* Part I.

298. The Natural Resources Article states: "The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished *insofar as possible* and consistent with the health, safety, and welfare of the people. The legislature

permit to Helis.²⁹⁹ On August 10, 2015, District Judge Timothy Kelley ruled for Abita Springs, vacating the drilling permit and remanding to the LOC to specifically address dangers associated with the existence of a fault line near the drilling site, a cost benefit analysis, and an alternative site analysis.³⁰⁰ If the recent victory of Abita Springs in the 19th Judicial District Court stands, that decision will be a significant development for local communities. The decision appears to mitigate the harsh implications for local governments of total preemption under *EMC 1* and *EMC 2*.

In *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*,³⁰¹ the Louisiana Supreme Court held that this Natural Resources Article imposes a duty on the legislature and on all state government agencies to protect the environment.³⁰² But the environment is not considered in isolation of other important public policies. The court stated that the “insofar as possible” language created a rule of reasonableness that requires agencies to balance economic, social, and other factors along with environmental costs and benefits. To conduct this balancing, an agency must actually analyze adverse environmental impacts in advance, before granting a permit, to determine that those impacts “have been minimized or avoided as much as possible consistently with the public welfare.”³⁰³

shall enact laws to implement this policy.” LA. CONST. art. IX, § 1 (emphasis added). The public trust concept in the 1974 Louisiana Constitution was continued from the 1921 Louisiana Constitution, which provided: “The natural resources of the State shall be protected, conserved and replenished.” LA. CONST. art. VI, § 1 (1921).

299. Petitioner’s Brief in Support of Judicial Review at 12, *Town of Abita Springs v. Welsh*, No. 637209 (La. Dist. Ct. Aug. 4, 2015).

300. Oral Reasons for Judgment on Exceptions Filed on Behalf of Town of Abita Springs for Judicial Review, Objections to Administrative Record Filed on Behalf of Town of Abita Springs, and Oral Argument, *Town of Abita Springs v. Welsh*, No. 637209 (La. Dist. Ct. Aug. 4, 2015) (on file with author) [hereinafter *Oral Reasons to Vacate Helis Permit*].

301. 452 So. 2d 1152 (La. 1984).

302. *Id.* at 1156. The Natural Resources Article does not expressly refer to government agencies but does expressly obligate the legislature. As such, the *Save Ourselves* court could have reasonably decided that the Natural Resources Article only obligates the legislature to enact affirmative environmental protection legislation, an obligation it has met by enactment *inter alia* of the Environmental Affairs Act, No. 449, 1979 La. Acts 1256, which was amended and renamed the Environmental Quality Act in 1983. Act No. 97, 1983 La. Acts 270; LA. REV. STAT. ANN. §§ 30:2001 to :2588 (2000). Instead, however, the court held that the Natural Resources article was a self-effectuating mandate that imposes a trust duty of environmental protection on all state agencies.

303. *Save Ourselves*, 452 So. 2d at 1156–57.

The Louisiana First Circuit Court of Appeal in *Blackett v. Louisiana Department of Environmental Quality* summarized the factors—known as the “IT Factors”—that agencies bestowed with the public trust duty must specifically consider.³⁰⁴ The same court then refined the factors again in *In the Matter of Rubicon, Inc.*³⁰⁵ Under the IT Factors, findings of fact and reasons for decisions must show whether:

- 1) [T]he potential and real adverse environmental effects of the proposed project have been avoided to the maximum extent possible; 2) a cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the project demonstrate that the latter outweighs the former; and 3) there are alternative projects or alternative sites or mitigating measures which would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits to the extent applicable.³⁰⁶

Save Ourselves indicates that the LDEQ is “the primary public trustee of natural resources and the environment in protecting [the public] from hazardous waste pollution”³⁰⁷ All Louisiana appellate decisions that have considered the Natural Resources Article have involved attacks against decisions of the LDEQ, primarily in disputes involving waste disposal facilities.³⁰⁸ To better ensure compliance with Louisiana Supreme Court and Louisiana First Circuit holdings, in 1996 the legislature enacted Louisiana Revised Statutes section 30:2018. The statute requires an applicant for a permit from LDEQ for hazardous wastes, solid wastes, water pollutants, or air emissions to submit an environmental assessment document that addresses the IT Factors verbatim from *In re Rubicon*.³⁰⁹ If requested, the LDEQ must conduct a public hearing on the environmental assessment.³¹⁰

304. 506 So. 2d 749, 753–54 (La. Ct. App. 1987).

305. 670 So. 2d 475 (La. Ct. App. 1996).

306. *Id.* at 483.

307. *Save Ourselves*, 452 So. 2d at 1157.

308. *See, e.g., Save Ourselves*, 452 So. 2d 1152 (hazardous waste disposal facility); *Blackett*, 506 So. 2d 749 (solid waste disposal facility); *In re Rubicon*, 670 So. 2d 475 (deep well injection hazardous waste disposal); *see also In re Browning-Ferris Indus. Petit Bois Landfill*, 657 So. 2d 633 (La. Ct. App. 1995) (solid waste disposal facility); *In re Shreveport Sanitary & Indus. Landfill*, 521 So. 2d 710 (La. Ct. App. 1988) (sanitary landfill); *Citizens Against Multi-Chem v. Dep’t Env’tl. Quality*, 145 So. 3d 471 (La. Ct. App. 2014) (chemical distribution facility).

309. LA. REV. STAT. ANN. § 30:2018(A)–(B) (2000).

310. *Id.* at § 30:2018(C).

Applications for “minor” sources of air emissions, hazardous or solid wastes, or water discharges are not subject to the statute, although the statute states that “[n]othing in this Section shall relieve permit applicants or the department from the public trustee requirements” in the Natural Resources Article or *Save Ourselves*.³¹¹

Appellate decisions have focused on the LDEQ as the “primary protector” agency, but in its case against the LOC, Abita Springs cited several district court decisions that required the LDNR to consider the IT Factors.³¹² The decision of Judge Kelly, however, appears to be the first decision relating to a drilling permit that the LOC issued. The LOC chose not to make the interesting argument that the IT Factors are wholly inapplicable to decisions of the LDNR. The LOC could have argued, for example, that by enacting Louisiana Revised Statutes section 30:2018, the legislature determined that the LDEQ is the agency responsible for enforcing the *Save Ourselves* requirements. Further, the LOC could have contended that, by not enacting similar provisions applicable to the LDNR, the legislature inferred that LDNR permitting actions are not the type of actions that have possible environmental impacts significant enough to warrant imposition of the IT Factors.³¹³ The LOC did argue that mineral development is different than a waste or saltwater disposal facility. Its position, however, was essentially that the LOC had no choice but to permit the well because drilling may occur only where minerals are located, and the right to explore for and produce minerals is something Louisiana “takes very seriously.”³¹⁴ Thus, under the LOC’s argument, perfunctory conclusions satisfy the IT Factor analysis in the case of a drilling permit.³¹⁵

The LOC took much more evidence in the Abita Springs case as to potential environmental harms than it normally takes because the parties

311. *Id.* at § 30:2018(E), (H). Minor sources are defined by LDEQ rules. *Id.* at (G).

312. Petitioner’s Brief in Support of Judicial Review at 13–14, *Town of Abita Springs v. Welsh*, No. 637209 (La. Dist. Ct. Aug. 4, 2015). *Abita Springs* cited no cases relating to the granting of a drilling permit.

313. The LOC did state in the order itself that the IT Factors were not applicable to drilling permits. La. Office of Conservation, Order No. 1577-1, 9 (Dec. 19, 2014) [hereinafter *Drilling Permit Order*].

314. Memorandum in Opposition to Appellant’s Petition for Judicial Review at 14–15, *Town of Abita Springs v. Welsh*, No. 637209 (La. Dist. Ct. July 17, 2015) [hereinafter *LOC Opposition Memo*]. The LOC also argued, *inter alia*, that the Natural Resources Article does not require that the LOC spell out obvious conclusions that should be inferred from the findings in the LOC’s drilling permit order. *Id.* at 15, 17.

315. *See id.* at 13 (“Conservation did not believe that the law required it to explain the obvious: Louisiana law establishing mineral rights and common sense as to where these minerals are located.”).

presented significant evidence in testimony at the hearing to consider the Helis permit and in comments, including an expert report from a consultant that the Town hired.³¹⁶ If courts hold the LOC and its permit applicants to the same standard as the LDEQ and its applicants under *Save Ourselves*, one may wonder whether the LOC persistently violated the Natural Resources Article in other cases that lacked much evidence of potential environmental risks. Consider that to support its position that fracking beneath the Southern Hills Aquifer in St. Tammany Parish is safe, the LOC noted that oil and gas companies had already drilled 73 oil and gas wells in St. Tammany Parish, 124 oil and gas wells into the Tuscaloosa Marine Shale, and over 27,000 hydraulically fractured wells in Louisiana.³¹⁷ Presumably, these permitted wells did not receive the same scrutiny as the Helis well.

Now that the IT Factors have been applied to a drilling permit, local governments may have a new avenue to voice their concerns in permitting actions that present complex environmental problems, but they must be prepared. They must engage counsel and experts, request a hearing, raise their issues at the hearing and in comments, and bring legal action to challenge decisions for which they disagree. And for a number of reasons, *Save Ourselves* and its progeny do not promise that courts will examine potential environmental impacts in all cases where a decision of the LOC may have a negative impact on the human environment.³¹⁸

First, courts do not need to assess and balance environmental impacts under the Natural Resources Article unless parties raised them on the record of the administrative proceeding. The Louisiana First Circuit has held that an agency only needs to conduct the IT Factor analysis in “contested case[s] involving complex issues.”³¹⁹ Second, even though a court may force an agency to better document its findings as to its cost-benefit analysis or its consideration of alternatives, courts may be reluctant to require the agency to conduct additional hearings or take additional evidence.³²⁰

Third, like reviews conducted by the federal government under the National Environmental Policy Act (“NEPA”),³²¹ the courts applying the

316. See Drilling Permit Order, *supra* note 313, at 4–8.

317. LOC Opposition Memo, *supra* note 314, at 16.

318. See also 40 C.F.R. § 1501.4 (2014); *cf.* Nat’l Env’tl. Pol’y Act, 42 U.S.C. § 4332(C) (2012).

319. *In re Rubicon, Inc.*, 670 So. 2d 475, 486 (La. Ct. App. 1996) (Fogg, J., dissenting). This limitation no longer applies to LDEQ major source permitting actions. See *supra* note 308 and accompanying text.

320. See, e.g., Oral Reasons to Vacate Helis Permit, *supra* note 300, at 5.

321. See *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 228 (1980) (stating NEPA requires no more than that the agency consider the environmental consequences of its decision).

Natural Resources Article appear more concerned with documentation and disclosure than with the substantive permitting decision that the agency made.³²² Unlike NEPA, the Natural Resources Article contains a substantive standard that requires an agency to make decisions that protect the environment, at least insofar as possible. But when one factors the balancing aspect of *Save Ourselves* together with the discretion afforded the agency, the outcome of any decision-making process may be largely predetermined. This is not to say, however, that challenges cannot result in positive substantive environmental mitigation. Due to community outrage and the challenges by St. Tammany Parish and the Town of Abita Springs to the Helis drilling permit, Helis voluntarily proposed extensive mitigation measures for its well that the LOC incorporated into the permit.³²³ In its reexamination of the Helis permit after remand by the district court, the LOC could decide to impose additional mitigation measures to support its permitting decision and to avoid further appeals.

Fourth, the IT Factors provide little guidance to both agencies and interested persons as to the level of detail required of reviews and findings by administrative agencies. Further, the courts have given agencies mixed messages. In one case, the First Circuit said that the agency complies with its public trustee duty only by “detailing its reasoning . . .”³²⁴ In an earlier case, however, the same court said that an order is not invalid if its findings and reasons are “implicit in the record” or “self-evident,” which supports the LOC position in the Abita Springs case.³²⁵ In this sense, the legislature should consider its obligation to “enact laws to implement” the article by developing more detailed standards to guide the agency decision-making process.

Finally, many local governments may object to the siting of wells but may be hesitant to incur the costs to participate in the permitting process until a local government or citizens’ group wins an appeal to one of the state appellate courts. The LOC argued in the Abita Springs case that the Natural Resources Article has little to no application to the LOC because of the “obvious” facts that the technology is proven and minerals must be produced where they are located.³²⁶ In the Abita Springs case, the LOC may choose to simply comply with Judge Kelley’s order instead of appealing, and then argue again in future cases in reliance on the *jurisprudence constante*

322. See, e.g., *In re Rubicon*, 670 So. 2d at 483 (remanding case to agency for the issuance of findings to support exemption from disposal restrictions).

323. See *Drilling Permit Order*, *supra* note 313, at 12–14.

324. *In re Rubicon*, 670 So. 2d at 482.

325. *Blackett v. La. Dep’t of Env’tl. Quality*, 506 So. 2d 749, 755 (La. Ct. App. 1987).

326. See *supra* note 18 and accompanying text.

doctrine that the LOC has little or no duties under the Natural Resources Article.³²⁷

CONCLUSION

Even strong home rule must yield to significant state interests that create real conflicts. State interests in uniformity, the prevention of waste, the protection of correlative rights, and implications to the rule of capture make limitations on local authority to regulate oil and gas operations necessary. But the spirit of the movement that led to home rule suggests that local governments should have a meaningful voice in matters that impact their local communities. A meaningful local voice not only requires a procedural right to raise concerns, but also requires the state to listen and acknowledge those concerns and to address reasonable concerns when appropriate. Certainly, the state should not be obligated to address all local concerns in a substantive manner before issuing a permit. The state would not be overly burdened, however, by transparently conveying to the public how the state addresses local concerns that it decides to address and its reasons for not addressing other concerns that have been raised, particularly when at least some local concerns may be addressed in a balanced manner that preserves the state's interest in the production of its resources.

327. "In Louisiana, courts are not bound by the doctrine of *stare decisis*, but there is a recognition in this State of the doctrine of *jurisprudence constante*. Unlike *stare decisis*, this latter doctrine does not contemplate adherence to a principle of law announced and applied on a single occasion in the past." Doerr v. Mobil Oil Corp., 774 So. 2d 119, 128 (La. 2000) (quoting Johnson v. St. Paul Mercury Ins. Co., 236 So. 2d 216, 218 (La. 1970), *overruled on other grounds by* Jagers v. Royal. Indem. Co., 276 So. 2d 309, 312 (La. 1973)). "Under the civilian tradition, while a single decision is not binding on our courts, when a series of decisions form a 'constant stream of uniform and homogenous rulings having the same reasoning,' *jurisprudence constante* applies and operates with 'considerable persuasive authority.'" *Id.* (quoting James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 15 (1993)). This doctrine of *jurisprudence constante* may encourage relitigation until a "constant stream" of legal decisions forecloses a particular argument. FRANK L. MARAIST, CIVIL PROCEDURE—SPECIAL PROCEEDINGS § 4.1, *in* 1A LOUISIANA CIVIL LAW TREATISE 50–51 (2005).