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Creatures of Circumstance: Conflicts Over Local Government Regulation of Oil and Gas

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Chapter 11
CREATURES OF CIRCUMSTANCE:
CONFLICTS OVER LOCAL GOVERNMENT
REGULATION OF OIL AND GAS

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§ 11.01 **Introduction**^{*1}

Scholars periodically note the impending upsurge in local oil and gas regulation, offering various reasons for increased local action. Papers written only a few years ago attribute greater local action in the West to population growth, increased urbanization, and increased demand for energy.² Consider, however, more recent phenomena.

First, population migration from more liberal states to more traditionally conservative producing states likely plays a role, as new residents

*Cite as Alex Ritchie, “Creatures of Circumstance: Conflicts over Local Government Regulation of Oil and Gas,” 60 *Rocky Mt. Min. L. Inst.* 11-1 (2014).

¹In developing this chapter, the author is indebted to Bruce M. Kramer, Adjunct Professor and Thompson Visiting Professor, University of Colorado School of Law, Professor Emeritus, Texas Tech University School of Law, and his extensive body of scholarship on the local regulation of oil and gas. See, e.g., Bruce M. Kramer & Patrick H. Martin, *The Law of Pooling and Unitization* § 4.05 (3d ed. 2013); Bruce M. Kramer, “The State of State and Local Governmental 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. L.* 69 (2013) (Kramer: Governmental Relations); Bruce M. Kramer, “Local Land Use Regulation of Oil and Gas Development: Pumpjacks and Preemption,” 56 *La. Mineral L. Inst.* 198 (2009); Bruce M. Kramer, “Local Land Use Regulation of Oil and Gas Development,” *Surface Use for Mineral Development in the New West* 5-1 (Rocky Mt. Min. L. Fdn. 2008) (Kramer: Local Land Use Regulation); Bruce M. Kramer, “Local Land Use Regulation of Extractive Industries: Evolving Judicial and Regulatory Approaches,” 14 *UCLA J. Envtl. L. & Pol’y* 41 (1996) (Kramer: Evolving Judicial Approaches). The author also greatly appreciates the panelists who presented with the author at the 60th Annual Rocky Mountain Mineral Law Institute and reviewed drafts: Matthew Lepore, Director, Colorado Oil & Gas Conservation Commission (COGCC); Terry R. Bossert, Vice President of Legislative & Regulatory Affairs, Range Resources-Appalachia LLC; and Phillip D. Barber, Phillip D. Barber, P.C.

²See Michael J. Wozniak, “Home Court Advantage? Local Governmental Jurisdiction Over Oil and Gas Operations,” 48 *Rocky Mt. Min. L. Inst.* 12-1, 12-3 to 12-7 (2002). See also Jeffrey R. Fiske & Ann E. Lane, “Urbanization of the Oil Patch: What Happens When They Pave Paradise and Put Up a Parking Lot?” 49 *Rocky Mt. Min. L. Inst.* 15-1 (2003) (encroachment of urban areas into oil patch).

bring perspectives opposing drilling activity.³ Second, while the suburbs continue to expand into the oil patch, the oil patch has expanded into the suburbs and urban areas as well. Hydraulic fracturing may be an “old” technology,⁴ but it was little more than a decade ago that Devon Energy (shortly after its acquisition of Mitchell Energy) began large-scale commercial production in the Barnett Shale that kicked off the “shale boom.”⁵ As evinced by the Barnett Shale, operators may produce this prolific new source of production from underneath cities and towns. Third, “fracking” is now commonly accused of dangers ranging from groundwater contamination⁶ to promiscuity and drug addiction.⁷ Negative media reports⁸ and well-organized public awareness campaigns⁹ trumpeting these dangers have strongly influenced local residents and local politics.¹⁰

Surface owners may oppose local mineral development for political reasons or personal predilections for environmental protection, or may simply fulfill their role that forms the basis for modern economic theory—people act with self-interest.¹¹ Average surface owners may support domestic oil and gas production in general, but they may also be deeply and honestly

³See Hilary Boudet et al., “‘Fracking’ controversy and communication: Using national survey data to understand public perceptions of hydraulic fracturing,” 65 *Energy Policy* 57 (2014) (concluding based on survey results that conservative political ideology was a positive predictor of support for hydraulic fracturing and liberal ideology predicted opposition); Alan Greenblatt, “How California Is Turning the Rest of the West Blue,” *Nat’l Pub. Radio* (Aug. 29, 2013) (“Lots of Californians have moved to Denver and its environs, bringing a progressive strain of politics with them and angering more conservative parts of the state . . .”).

⁴The American Petroleum Institute (API) recently celebrated the 65th birthday of hydraulic fracturing. See News Release, Zachary Cikaneck, API, “API: Happy Birthday Hydraulic Fracturing” (Mar. 17, 2014).

⁵See generally Discussion Paper, Zhongmin Wang & Alan Krupnick, “A Retrospective Review of Shale Gas Development in the United States—*What Led to the Boom?*” (Res. for the Future Apr. 2013).

⁶See Kevin Begos, Associated Press, “4 states confirm water pollution from drilling,” *USA Today* (Jan. 5, 2014).

⁷See, e.g., Food & Water Watch, “The Social Costs of Fracking—A Pennsylvania Case Study,” at 3–4 (Sept. 2013) (Social Costs).

⁸For example, *The New York Times* published an entire series on “the risks of natural-gas drilling and efforts to regulate this rapidly growing industry.” See “Drilling Down,” *N.Y. Times*, http://www.nytimes.com/interactive/us/DRILLING_DOWN_SERIES.html.

⁹See, e.g., Marcellus Protest, <http://www.marcellusprotest.org>; Fracking Colorado, <http://frackingcolorado.wordpress.com>.

¹⁰See Social Costs, *supra*, note 7, at 4, 8.

¹¹See Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* I.2.2 (5th ed. 1904).

concerned about the effects of drilling in their neighborhoods. Mineral interest owners may be more concerned with lease revenues and private property rights than externalities, but they simply are outnumbered in the political process. Surface owners and occupants control the vast majority of votes in sub-state unit elections.¹² The “public good” of oil and gas and the “rights of the minor party” mineral interest owners and lessees, now more than ever, face “the superior force of an interested . . . majority.”¹³

In response to the intense public opposition to drilling, local legislatures have enacted all manner of oil and gas ordinances. These may emerge as traditional zoning ordinances that divide the sub-state unit¹⁴ into districts and allow drilling only in specified locations or only by permit,¹⁵ or as performance standards for drilling, such as requirements relating to noise, visual impacts, closed-loop systems, and hours of operations.¹⁶ Alternatively, ordinances may ban outright either hydraulic fracturing specifically or oil and gas operations in general. In a new trend, local voters, unsatisfied with local legislative action, are taking matters into their own hands and forcing ballot initiatives at both the local and state levels.¹⁷

This chapter examines some of the more recent sub-state unit actions to control oil and gas production, the law governing limitations on local power, claims often asserted to challenge that power, and recent court decisions addressing that power in the oil and gas context. It also discusses proposed compromise positions that may or may not be effective.

What will emerge is that courts may act no differently than other political actors. Even though sub-state units may be referred to as creatures

¹²See Alex Ritchie, “On Local Fracking Bans: Policy and Preemption in New Mexico,” 54 *Nat. Resources J.* __ (forthcoming 2014).

¹³James Madison, “The Federalist No. 10,” *Daily Advertiser* (Nov. 22, 1787). The actual quote refers to “an interested and overbearing majority.” While the majority may be overbearing in the sense that it is asserting its will at the local level, the pejorative term “overbearing” implies a certain amount of tyranny or arrogance, demeaning concerns of local citizens.

¹⁴See Kramer: Governmental Relations, *supra* note 1, at 69 n.1. The term “sub-state unit” is used throughout this chapter to describe not only cities and counties but also townships, boroughs, and other local governments under the state.

¹⁵Such permits may be subject to one or more discretionary approvals by sub-state unit administrative agencies. *See id.* at 73.

¹⁶*Id.* at 74.

¹⁷Some commentators have argued that use of initiatives to decide land use questions is inappropriate because voters do not deliberate, are subject to manipulation by special interest groups, and lack the expertise. *See, e.g.,* Marcilynn A. Burke, “The Emperor’s New Clothes: Exposing the Failures of Regulating Land Use Through the Ballot Box,” 84 *Notre Dame L. Rev.* 1453, 1460–61 (2009).

of the state, courts often interpret constitutions and statutes to protect local power.¹⁸ Although courts have traditionally afforded deference to traditional exclusionary zoning efforts,¹⁹ more recently courts have gone further, all but ignoring state statutory mandates that limit local power based on findings that vary from legislative acquiescence, to narrow construction, to violation of state constitutional civil rights that protect the environment.²⁰

§ 11.02 The Recent Surge in Local Oil and Gas Regulation

The local regulation of oil and gas is not a new phenomenon.²¹ But a survey of recent governmental actions, initiatives, and related lawsuits across a number of producing states evinces an upsurge that is destined to expand as proponents of local action move from community to community. Although the author was unable to find a complete and accurate listing of local prohibitions of oil and gas development and hydraulic fracturing, a website hosted by an environmental organization that catalogues local action “against fracking” counts approximately 435 varied ordinances.²² The discussion in this section is by no means comprehensive, but instead surveys some of the more publicized sub-state actions in a number of key states, with the intention of describing a variety of forms of such actions.

¹⁸See Richard Briffault, “Our Localism: Part I—The Structure of Local Government Law,” 90 *Colum. L. Rev.* 1, 112 (1990).

¹⁹The U.S. Supreme Court’s holding in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), cemented judicial deference to zoning actions, with some exceptions. For a discussion of the exceptions, see note 120, *infra*.

²⁰This judicial approach to the protection of local power has been described by Professor Kramer as “reasonably activist” and “creative” in its attempts to avoid preemption. See Kramer: Governmental Relations, *supra* note 1, at 73.

²¹Professor Kramer provides a historical perspective of local regulation. See *id.* at 71–77.

²²These include 19 such ordinances in California, 10 in Colorado, 1 in Connecticut, 1 in the District of Columbia, 2 in Florida, 1 in Hawaii, 7 in Illinois, 1 in Indiana, 1 in Iowa, 4 in Maryland, 1 in Massachusetts, 20 in Michigan, 2 in Minnesota, 36 in New Jersey, 3 in New Mexico, 218 in New York, 27 in North Carolina, 37 in Ohio, 17 in Pennsylvania, 4 in Texas, 1 in Vermont, 10 in Virginia, 4 in West Virginia, 5 in Wisconsin, 1 in Wyoming, and 2 “Indigenous” ordinances. Food & Water Watch, “Local Actions Against Fracking,” <https://www.foodandwaterwatch.org/water/fracking/fracking-action-center/local-action-documents/>. It is unclear what is meant by a local action “against fracking” on the website. Although the website certainly appears to track more than effective bans on oil and gas development or hydraulic fracturing, it also appears to be both over- and under-inclusive. The analysis of the website as to Pennsylvania ordinances was provided to the author by Pittsburgh attorney Blaine Lucas of Babst Calland on June 9, 2014. Whether ultimately over- or under-inclusive, the salient point is that there are now a great number of local oil and gas ordinances that effectively ban oil and gas development.

[1] Colorado

In the western United States, Colorado has become ground zero for the hydraulic fracturing debate.²³ The state's conservative roots and long history of oil and gas development have collided with a new political reality, pushed in part by people moving to the Denver metropolitan area from the West Coast who desire to preserve the landscape that brought them there.²⁴

[a] Longmont Ordinance and Voter-Approved Ban

Local governments in Colorado for years have regulated various aspects of oil and gas operations, but on November 6, 2012, voters in the City of Longmont approved the first outright ban of hydraulic fracturing (Ballot Question 300) in the state.²⁵ The Longmont voter-initiated ban followed the adoption by the Longmont City Council on July 17, 2012, of a controversial new oil and gas ordinance that replaced Longmont's 12-year-old oil and gas regulations.²⁶ Thirteen days after the ordinance was enacted, the Colorado Oil and Gas Conservation Commission (COGCC) filed suit challenging the ordinance (*Longmont I*).²⁷ The COGCC was then joined in October 2012 by the Colorado Oil and Gas Association (COGA) as a plaintiff intervenor.²⁸

In its *Longmont I* complaint, the COGCC alleged preemption of various provisions of the ordinance, including the City's (1) claimed right to impose permit conditions based on the City's determination of the "appropriateness" of multi-well sites and directional and horizontal drilling; (2) absolute prohibition on permits for surface operations and facilities in residential zoning districts; (3) separate chemical disclosure rules;

²³See "Shifting politics fuel fracking debate in Colo.," *EnergyWire* (May 24, 2013).

²⁴See Greenblatt, *supra* note 3; Aldo Svaldi, "Net in-migration to Colorado from other states growing," *Denver Post* (Jan. 15, 2012).

²⁵See BallotPedia, "Longmont City Fracking Ban, Question 300 (November 2012)," [http://ballotpedia.org/Longmont_City_Fracking_Ban,_Question_300_\(November_2012\)](http://ballotpedia.org/Longmont_City_Fracking_Ban,_Question_300_(November_2012)). The ban was passed despite substantial campaign spending against the measure by the oil and gas industry. See Scott Streater, "Colo. city passes fracking ban despite aggressive oil and gas industry campaign," *EnergyWire* (Nov. 7, 2012).

²⁶City of Longmont, Colo., Ordinance No. O-2012-25 (July 17, 2012).

²⁷Complaint for Declaratory Relief, COGCC v. City of Longmont (*Longmont I*), No. 2012CV702 (Colo. Dist. Ct. Boulder Cnty. July 30, 2012).

²⁸See Reply Brief in Support of COGA's Motion to Intervene, *Longmont I*, No. 2012CV702 (Oct. 9, 2012).

(4) discretionary water sampling requirements; and (5) claimed authority to determine whether an operational conflict exists with state law.²⁹

Despite its comprehensive permitting regime, community organizers led by an organization called Our Health, Our Future, Our Longmont³⁰ believed the Longmont ordinance was not sufficiently protective because it left open the possibility of hydraulic fracturing. The group gathered at least 6,609 signatures of registered Longmont voters on a petition requesting a special election to amend the City Charter to ban hydraulic fracturing.³¹

The voter-initiated hydraulic fracturing ban passed and COGA brought yet another suit against Longmont (*Longmont II*),³² subsequently joining the COGCC as a necessary party.³³ The *Longmont I* court then granted a stay of COGCC's and COGA's challenge to Longmont's comprehensive ordinance pending the outcome of the challenge in *Longmont II* to the voter-initiated ban.³⁴

On July 24, 2014, Boulder County District Court Judge D.D. Mallard struck down the Longmont hydraulic fracturing ban based on conflicts with state law.³⁵ Environmental groups appealed this decision to the Colorado Court of Appeals, and the ban remains in place pending the outcome of the appeal.³⁶ Shortly after the ban was struck down, the State agreed to dismiss its challenge in *Longmont I* to Longmont's comprehensive ordinance.³⁷ As of this writing, Longmont has in place both a comprehensive

²⁹Complaint for Declaratory Relief, *supra* note 27, at 8.

³⁰See <http://ourlongmont.org>.

³¹See Longmont, Colo., City Council Resolution No. R-2012-67 (Aug. 28, 2012).

³²See Complaint, COGA v. City of Longmont, No. 2012CV960 (Colo. Dist. Ct. Weld Cnty. Dec. 17, 2012). Venue in the case subsequently was transferred to Boulder County, Colorado. See COGA v. City of Longmont (*Longmont II*), No. 2013CV63 (Colo. Dist. Ct. Boulder Cnty.). See Tony Kindelspire, "Longmont granted change of venue in fracking ban lawsuit," *Longmont Times-Call* (Mar. 11, 2013).

³³Order Re: COGCC Joinder, *Longmont II*, No. 2013CV63 (July 18, 2013) (*nunc pro tunc* July 1, 2013).

³⁴See Joe Rubino, "Longmont, Broomfield, Lafayette spend \$100K defending fracking bans," *Boulder Daily Camera* (May 15, 2014).

³⁵Order Granting Motions for Summary Judgment, *Longmont II*, No. 2013CV63, 2014 WL 3690665 (Colo. Dist. Ct. Boulder Cnty. July 24, 2014) (Longmont Order). See § 11.04[3][b], *infra*.

³⁶See Cathy Proctor, "Longmont, other groups appeal judge's order that tossed city's fracking ban," *Denver Bus. J.* (Sept. 11, 2014).

³⁷See § 11.02[1][c], *infra*.

drilling ordinance and a voter-initiated ban, at least until the resolution of the appeal.

[b] Boulder, Fort Collins, Broomfield, and Lafayette

In November 2013, the City and County of Broomfield³⁸ and the Colorado home-rule cities of Boulder³⁹ and Fort Collins⁴⁰ each imposed five-year oil and gas moratoria. The Broomfield and Fort Collins moratoria are almost identical in language to the Longmont voter-initiated hydraulic fracturing ban, except that the Broomfield and Fort Collins moratoria expire after five years.

Also in November 2013, voters in the City of Lafayette adopted a “community rights ordinance” charter amendment⁴¹ with assistance from the Community Environmental Legal Defense Fund (CELDF).⁴² The ordinance prohibits a corporation from storing or transporting “materials . . . used in or resulting from the extraction of gas or oil” and makes it “unlawful for any corporation . . . to engage in the creation of fossil fuel . . . production and delivery infrastructures . . . that support or facilitate industrial activities related to the extraction of natural gas and oil.”⁴³ It also strips corporations that violate the oil and gas prohibitions of their personhood rights under the U.S. and Colorado Constitutions, declares invalid permits and licenses issued by COGCC that would violate the ordinance, and states that corporations have no power to challenge the ordinance.⁴⁴

³⁸City & Cnty. of Broomfield, Colo., Charter Amend. (adopted Nov. 5, 2013), <http://www.broomfield.org/DocumentCenter/View/5636>. Broomfield adopted comprehensive new oil and gas regulations on September 24, 2013. See City & Cnty. of Broomfield, Colo., Ordinance No. 1986 (Sept. 24, 2013). Obviously, those regulations did not appease proponents of a ban or approximately half of registered voters.

³⁹City of Boulder, Colo., Ordinance No. 7915 (Aug. 20, 2103).

⁴⁰Fort Collins Public Health, Safety and Wellness Act (adopted Nov. 5, 2013).

⁴¹City of Lafayette, Colo., Ballot Question 300 (Nov. 5, 2013) (Lafayette Ballot Question 300).

⁴²See Press Release, CELDF, “Residents in Lafayette, CO, Conclude Petition Drive for a Community Rights City Charter Amendment to Ban Fracking” (July 5, 2013).

⁴³Lafayette Ballot Question 300, *supra* note 41, at § 2.3(i)(2), (3).

⁴⁴*Id.* § 2.3(i)(6), (7), (8). Despite the support of voters, the Lafayette City Council opposed the ordinance when it was proposed, finding that it was simply an effort to use Lafayette to make political statements. See City of Lafayette, Colo., Resolution No. 2013-52 (Oct. 1, 2013).

On December 3, 2013, COGA filed suit, challenging their supposed lack of power under the new Lafayette charter.⁴⁵ On the same day, COGA also sued Fort Collins.⁴⁶ COGA refrained from suing Boulder because of the absence of active wells,⁴⁷ and as of this writing, has not sued Broomfield. Broomfield was forced to litigate its election protocols after its ban passed by only 17 votes.⁴⁸ The election results were upheld on February 27, 2014, leaving in place the Broomfield ban.⁴⁹ In August 2014, after the Longmont ban was struck down in *Longmont II*, both the Lafayette charter amendment and the Fort Collins ordinance were struck down as conflicting with Colorado state law.⁵⁰ With its victories in the Longmont, Lafayette, and Fort Collins cases, industry has a perfect 3-0 record challenging recent voter-initiated bans in Colorado.

As described below, voter initiative proponents planned to extend their efforts from city hall to the state house, but were thwarted, at least for the time being, by a political compromise.⁵¹

[c] Proposed Constitutional Amendment Ballot Initiatives

In 2014, at least five amendments to the Colorado Constitution were submitted by voters to the Secretary of State for the November 2014 ballot that expressly allow local governments to prohibit oil and gas operations,⁵²

⁴⁵Complaint, *COGA v. City of Lafayette, Colo.*, No. 2013CV031746 (Colo. Dist. Ct. Boulder Cnty. Dec. 3, 2013). In response, CELDF has filed a class-action lawsuit on behalf of voters of Lafayette against COGA and the State of Colorado claiming they are violating the citizens' constitutional rights to self-government by enforcing their legal rights. See Press Release, CELDF, "Lafayette, Colorado, Residents File Class Action Lawsuit Against State, Governor, and Colorado Oil and Gas Association: Asks Court to Overturn State Oil and Gas Act and Dismiss Industry Lawsuit Against Lafayette" (June 10, 2014).

⁴⁶Complaint, *COGA v. City of Fort Collins*, No. 2013CV031385 (Colo. Dist. Ct. Larimer Cnty. Dec. 3, 2013).

⁴⁷Ryan Maye Handy, "State oil, gas association sues Fort Collins over fracking moratorium," *Coloradoan* (Dec. 4, 2013).

⁴⁸See Megan Quinn, "Broomfield fracking: Recount finds 5-year ban wins by 20 votes," *Boulder Daily Camera* (Dec. 3, 2013); Peter Marcus, "Drilling away at fracking bans, lawsuits," *The Colo. Statesman* (Dec. 20, 2013). See also Press Release, City of Broomfield, "District Court Sustains Results of Broomfield Election Fracking Question" (Feb. 27, 2014).

⁴⁹See Leslie Jorgensen, "Broomfield Fracking Ban Upheld Despite 'Sloppy' Election," *Colo. Observer* (Feb. 28, 2014).

⁵⁰See § 11.04[3][a], *infra*.

⁵¹See § 11.02[1][c], *infra*.

⁵²See Colo. Sec'y of State, "2013-2104 Initiative Filings, Agendas & Results," Proposed Initiative Nos. 82, 90, 91, 92, 93.

two of which proclaim that such a local law “is not a taking of private property and does not require the payment of just compensation.”⁵³ Several other proposals were submitted that would establish constitutional statewide setbacks of 1,500 to 2,640 feet from buildings.⁵⁴ The most publicized proposal, submitted by the Colorado Community Rights Network, was so broad that it would have allowed local governments to enact ordinances that completely eliminate the rights and powers of corporations and other business entities.⁵⁵

An additional proposal titled “Environmental Rights” would have established the State and local governments as trustees, obligated to conserve Colorado’s environment.⁵⁶ Surely every voter in the state values the protection of the environment? With language reminiscent of the state constitutional amendment that was recently applied by the Pennsylvania Supreme Court to thwart preemption attempts in that state,⁵⁷ such an amendment not only would have allowed sub-state unit control of oil and gas operations; it could also have created liability for the State or sub-state units that chose not to exercise such control.

As the signature deadline approached, two of these ballot measures, a mandatory 2,000-foot setback and the Environmental Rights amendment, both backed by U.S. Congressman Jared Polis, appeared to have sufficient signatures to appear on the November 2014 ballot. In addition, two counter initiatives that looked to move forward onto the ballot would withhold severance tax revenue from communities that prohibited oil and gas production and require a fiscal impact statement for ballot initiatives.

On August 4, 2014, the day signatures for all of the ballot measures were due, Governor John Hickenlooper engineered a grand bargain. Industry and its supporters would withdraw their ballot initiatives. Congressman Polis would ensure the withdrawal of the setback and environmental rights initiatives. The State would drop its lawsuit challenging Longmont’s drilling ordinance in *Longmont I* (recognizing that Longmont’s hydraulic fracturing ban had been overturned in *Longmont II* just a little more than a week earlier). And Governor Hickenlooper would convene an 18-member task force to make recommendations to his administration and the legislature

⁵³*Id.* Nos. 90, 93.

⁵⁴*Id.* Nos. 85, 86, 87, 88.

⁵⁵*Id.* No. 75.

⁵⁶*Id.* No. 89.

⁵⁷*See* § 11.04[2], *infra*.

as to oil and gas issues, drawing six members each from the environmental community, industry, and civic leadership.⁵⁸

As of this writing, the Longmont, Lafayette, and Fort Collins bans have all been struck down, the ballot initiatives are off the table, and industry in Colorado has been largely spared from oil and gas and hydraulic fracturing bans. The battle, however, between industry and groups opposed to oil and gas development is not over, but just continued into 2015. Amendments similar to the 2014 ballot initiatives in Colorado likely will reappear in subsequent years. Further, the Colorado experience is instructive for other states. Groups supporting these initiatives are likely to advance similar proposals in other states, indicating that the war over local control of oil and gas operations will be fought on two fronts, at both the courthouse and the ballot box.

[2] New Mexico

[a] The Comprehensive Santa Fe County Ordinance

The story of local control in New Mexico begins in Santa Fe. In 2007, Tecton Energy leased mineral rights under Galisteo Basin land.⁵⁹ In response to the public outcry, Santa Fe adopted what is probably the most comprehensive drilling ordinance in the nation.⁶⁰ It is discussed in some detail because of its effectiveness and because the form of the ordinance and its lead author are making their way to other jurisdictions.⁶¹ The ordinance has not been challenged in court. In fact, no operator has even applied for a drilling permit in the county since its enactment.⁶² With the great expense required to apply for a permit and the procedural hurdles to make an as-applied claim, it may never be challenged. It has effectively banned drilling while not actually stating that drilling was banned.

The ordinance is written as a zoning ordinance, and requires proposed oil and gas drilling projects to go through a three-step process for approval:

⁵⁸Lynn Bartels, "Let's make a deal: How Colorado came to a fracking compromise," *Denver Post* (Aug. 23, 2014).

⁵⁹See Phaedra Haywood, "Commissioners Approve Oil-Gas Drilling Moratorium," *Santa Fe New Mexican*, Nov. 28, 2007, at C-1.

⁶⁰Santa Fe Cnty., N.M., Ordinance No. 2008-19 (Dec. 9, 2008) (Santa Fe Ordinance).

⁶¹See, e.g., Kay Matthews, "San Miguel County Ready to Regulate Oil and Gas Development," *La Jicarita* (Sept. 17, 2013) (county working with lead author of the Santa Fe Ordinance).

⁶²Presentation, Stephen C. Ross, Cnty. Att'y, Santa Fe Cnty., N.M., *2nd Annual Conf. on Hydraulic Fracturing* (CLE Int'l Oct. 11, 2013) (stating in response to a question from the audience that no permit applications have been submitted under the ordinance).

(1) an oil and gas overlay zoning district classification must be extended to the land where the oil and gas facility will be constructed; (2) after the application for permit to drill is approved, a special use and development permit with further conditions and requirements for well sites and structures must be applied for; and (3) applications must be filed for building or grading permits and a certificate of completion.⁶³ The overlay zoning district application requires the preparation of eight detailed “studies, plans, reports and assessments,” including a National Environmental Policy Act-type environmental assessment that considers such matters as natural wildlife and vegetation habitats, air and water pollution, and global warming.⁶⁴ At the time of the application, the applicant must pay the County for the cost of consultants (engaged by the County) to perform the studies.⁶⁵

The ordinance sets the maximum well density in the Galisteo Basin at 10% of the number of wells that may be drilled under state rules in “high sensitivity areas,” 30% in “moderate sensitivity areas,” and 40% in “low sensitivity areas,” in each case stating that “fewer or *no*” wells may be authorized.⁶⁶ After completing the overlay application stage, the applicant must enter into one or more development agreements with the County. The development agreements (1) cover the financing of capital facilities and public services (as provided in the ordinance); (2) include the applicant’s proportionate share of the construction and maintenance of roads;⁶⁷ (3) involve plans to fund the public water system’s total projected water supplies (taking into account the applicant project’s existing and planned water use) over a 50-year period;⁶⁸ and (4) consider the project’s impact on the county’s fire, police, and emergency services.⁶⁹

Once operations are commenced, the ordinance requires closed-looped systems; baseline water quality testing, including at least three monitoring wells and samples from all water wells and surface water within three

⁶³Santa Fe Ordinance, *supra* note 60, at § 8.

⁶⁴*Id.* § 5. These include a general and area plan consistency report, an environmental impact report, a fiscal impact assessment, an adequate public facilities and services assessment, a water availability assessment, an emergency service and preparedness report, a traffic impact assessment, and a geohydrologic report. *See id.* § 9.

⁶⁵*Id.* § 9.6(3).

⁶⁶*Id.* § 9.4.4.1.

⁶⁷*Id.* § 9.6.6.5.9.

⁶⁸*Id.* § 9.6.5.3.

⁶⁹*Id.* § 9.6.3.5.

miles of the proposed well site;⁷⁰ annual water sampling to compare to the baseline;⁷¹ conducting operations from 8:00 a.m. to 5:00 p.m. only;⁷² expanded setback requirements;⁷³ and, subject to a minor exception, nothing in the fluid component of hydraulic fracturing material other than fresh water,⁷⁴ making modern high-volume slick-water fracturing impossible.

The drafters of the 110-page (plus exhibits) ordinance carefully considered preemption, using all available room under existing state case law for concurrent local jurisdiction. They addressed the potential of a regulatory taking, stating that each applicant that is denied at the overlay zoning or special use and development permit stage must “exhaust all administrative remedies by applying for a beneficial use and value assessment” that describes the extent of the diminution of use and value of the property, the distinct investment-backed expectations, the availability of transferable development rights, and “any variance or relief necessary to relieve any unconstitutional hardship or regulatory taking created.”⁷⁵ In other words, the ordinance includes a method to avoid litigation if the claimant presents convincing evidence of a takings claim.

[b] The Mora County Ban

On April 29, 2013, the Board of County Commissioners (Commissioners) in Mora County, New Mexico adopted a CELDF “community rights ordinance”⁷⁶ similar to the Lafayette, Colorado charter amendment.⁷⁷ Like the Lafayette amendment, the Mora ordinance bans a corporation from producing oil and gas, extracting water to produce oil and gas, storing or transporting produced water, or creating infrastructure that supports or facilitates oil and gas extraction.⁷⁸ Also similar to the Lafayette ordinance, the Mora ordinance denies personhood rights to corporations under the U.S. and New Mexico Constitutions, and states that corporations should

⁷⁰*Id.* § 11.22.

⁷¹*Id.* § 11.22.3.

⁷²*Id.* § 11.25.2.

⁷³*Id.* § 11.26.

⁷⁴*Id.* § 11.25.4.

⁷⁵*Id.* § 5.

⁷⁶Mora Cnty., N.M., Ordinance No. 2013-01 (Apr. 29, 2013) (Mora Ordinance).

⁷⁷See § 11.02[1][b], *supra*.

⁷⁸Mora Ordinance, *supra* note 76, at §§ 5.1–4.

not be afforded protections under the Commerce or Contracts Clauses of the U.S. Constitution.⁷⁹

The Mora ordinance, however, also denies corporations rights under the First and Fifth Amendments to the U.S. Constitution⁸⁰ and contains rather extreme protective provisions. If the ordinance is overturned, a six-month moratorium automatically goes into effect, during which time the Commissioners must adopt another ordinance banning hydrocarbon extraction.⁸¹ If an attempt is made to preempt or overturn the ordinance, the county must consider measures to expand local control, which “may include” secession from the state or the nation.⁸² And despite that the ordinance was adopted by only two of three Commissioners, repeal of the ordinance requires a unanimous vote of the Commissioners followed by a referendum of two-thirds of the Mora County electorate.⁸³

On November 11, 2013, a group of plaintiffs, including three mineral owners and the Independent Petroleum Association of New Mexico (IPANM) (collectively, IPANM Plaintiffs), filed suit against Mora County challenging the ordinance in federal district court. The plaintiffs alleged violations under the First, Fifth, and Fourteenth Amendments of the U.S. Constitution, and that the ordinance was preempted.⁸⁴ On January 1, 2014, a subsidiary of Shell Oil Company (Shell) followed up with its own suit in federal district court. In addition to the claims made by the IPANM Plaintiffs for declaratory and injunctive relief, Shell alleged violations of the Supremacy and Equal Protection Clauses of the U.S. Constitution, the dormant Commerce Clause of the U.S. Constitution, and that the ordinance effects a taking of property rights under the Fifth and Fourteenth Amendments to the U.S. Constitution, entitling the plaintiff to money damages.⁸⁵

[3] New York

Although local regulation has increased in western states such as Colorado, New Mexico, and even Texas, eastern states such as New York present

⁷⁹*Id.* § 5.5.

⁸⁰*Id.*

⁸¹*Id.* § 8.5

⁸²*Id.* § 11.

⁸³*Id.* § 10.

⁸⁴Complaint for Declaratory & Injunctive Relief, *Vermillion v. Mora Cnty.*, No. 1:13-cv-01095 (D.N.M. Nov. 11, 2013), 2013 WL 6235573.

⁸⁵Complaint for Declaratory & Injunctive Relief & Damages, *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035 (D.N.M. Jan. 10, 2014), 2014 WL 465657.

even greater challenges for operators. According to the anti-fracking website “FracTracker,” 77 municipalities in New York have banned high-volume hydraulic fracturing and 101 more have enacted moratoria.⁸⁶

The bans adopted by the Towns of Dryden and Middlefield, which are considered in the preemption cases discussed below,⁸⁷ are illustrative in their simplicity. The zoning ordinance enacted by Middlefield states that “all oil, gas or solution mining and drilling are prohibited uses.”⁸⁸ Dryden’s ordinance similarly prohibits oil and gas exploration, development or production,⁸⁹ but also purports to invalidate any permit issued by a federal or state government that would violate its prohibitions.⁹⁰

As Dryden and Middlefield continue to litigate, local conflicts in New York have been overshadowed by New York’s rolling statewide de facto moratorium. In 1992, the New York Department of Environmental Conservation (NYDEC) prepared a generic environmental impact statement (GEIS) associated with oil and gas drilling operations under the State Environmental Quality Review Act (SEQR).⁹¹ On July 23, 2008, then Governor David Paterson directed the NYDEC to prepare a supplemental GEIS (SGEIS) to update the 1992 GEIS to address the potential impacts of high-volume hydraulic fracturing (HVHF).⁹² Following issuance of this directive, the NYDEC announced that it would not process any further

⁸⁶FracTracker Alliance, “Current High Volume Horizontal Hydraulic Fracturing Drilling Bans and Moratoria in NY State,” <http://www.fractracker.org/map/ny-moratoria/>. The website also states that in 87 more New York municipalities, there are “movements” for bans or moratoria, although it is not entirely clear how the website counts a “movement.” *See id.*

⁸⁷*See* § 11.04[1][a], *infra*.

⁸⁸Town of Middlefield, N.Y., Local Law No. 1, at art. V.A (June 14, 2011). “Gas, Oil, or Solution Drilling or Mining” is defined in part as “[t]he process of exploration and drilling through wells or subsurface excavations for oil or gas, and extraction, production, transportation, purchase, processing, and storage of oil or gas, including, but not limited to . . .” *Id.* at art. II.B.7.

⁸⁹Town of Dryden, N.Y., “Notice of Adoption of Amendments to Zoning Ordinance,” § 2 (Aug. 3, 2011) (amending article XXI of the Town of Dryden Zoning Ordinance to add a new section 2104).

⁹⁰*Id.*

⁹¹N.Y. Env’tl. Conserv. Law §§ 8-0101 to -0117. *See* NYDEC, “Final Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program” (July 1992). *See also* N.Y. Comp. Codes R. & Regs. tit. 6, § 617.1(c) (“SEQR requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement.”).

⁹²*See* Press Release, Governor of New York, “Governor Paterson Signs Bill Updating Oil and Gas Drilling Law; Pledges Environmental and Public Health Safeguards” (July 23, 2008).

permit applications using horizontal drilling combined with HVHF until the SGEIS was completed, thus beginning the moratorium.

The NYDEC released the draft SGEIS for public review and comment on September 30, 2009.⁹³ More than a year later, on December 13, 2010, Governor Paterson issued an executive order directing the NYDEC to conduct further environmental review and to complete a revised draft SGEIS by June 1, 2011. His executive order also stated that permits would not be issued until completion of a final SGEIS.⁹⁴ Newly elected Governor Andrew Cuomo then continued the Paterson executive order on January 1, 2011.⁹⁵

After four years of study, the SGEIS was further delayed when the NYDEC asked the state health commissioner to assess the NYDEC's analysis of the health effects of HVHF.⁹⁶ Despite a statement by Governor Cuomo in May 2013 that the study would be completed "in the next several weeks," more recent statements indicate his administration is in no hurry to issue the report or to make a decision on whether to lift the moratorium.⁹⁷

Norse Energy Corporation (Norse), a plaintiff in the Dryden preemption case discussed below,⁹⁸ has declared bankruptcy, and the court of appeals has allowed the substitution of the Chapter 7 trustee for the plaintiff.⁹⁹ In addition to the preemption case, the Norse trustee has filed a separate lawsuit alleging that the bankruptcy was caused by the intentional delay of Governor Cuomo and the NYDEC in issuing regulations to govern hydraulic fracturing. The trustee argues it was purely a political decision to continue the moratorium.¹⁰⁰

⁹³See Governor of N.Y., Exec. Order No. 41 (Dec. 13, 2010).

⁹⁴*Id.*

⁹⁵See Governor of N.Y., Exec. Order No. 2 (Jan. 1, 2011).

⁹⁶See Mireya Navarro, "New York State Plans Health Review as It Weighs Gas Drilling," *N.Y. Times* (Sept. 20, 2012).

⁹⁷See Jesse McKinley, "Still Undecided on Fracking, Cuomo Won't Press for Health Study's Release," *N.Y. Times* (Dec. 16, 2013).

⁹⁸See § 11.04[1][a], *infra*.

⁹⁹See *Matter of Wallach v. Town of Dryden*, 4 N.E.3d 363 (N.Y. 2013) (mem.).

¹⁰⁰The Norse trustee has requested (1) a mandamus to compel finalization of the SGEIS process, (2) a declaratory judgment that the NYDEC has acted arbitrarily and capriciously and improperly delegated its responsibilities to the health commissioner, and (3) a declaratory judgment that Governor Cuomo has interfered with the SGEIS process. See Amended Verified Petition & Complaint, *Wallach v. NYDEC*, No. 677013 (N.Y. Sup. Ct. Jan. 3, 2014), 2014 WL 1883213. See also Marlene Kennedy, "Driller Demands Rules on N.Y. Fracking," *Courthouse News Serv.* (Dec. 23, 2013).

A group called the Joint Landowners Coalition of New York, claiming to represent over 70,000 landowners, also has filed suit against the State and Governor Cuomo seeking to compel the NYDEC to complete its review.¹⁰¹ Governor Cuomo could be waiting to make a decision for the completion of yet another election cycle. If the NYDEC finishes its review and lifts the moratorium, the holding by the New York Court of Appeals in the appeal of the Dryden and Middlefield cases¹⁰² in favor of local government power arguably lessens the political fallout, especially considering the number of local bans in place in New York.

[4] Pennsylvania

On November 16, 2010, the City of Pittsburgh, Pennsylvania, became the first sub-state unit in the nation to adopt a CEDLF “community rights” ordinance that banned oil and gas activity.¹⁰³ Since that time, a number of other municipalities in Pennsylvania have adopted local drilling ordinances.¹⁰⁴ In response to the patchwork of local ordinances, on February 14, 2012, the Pennsylvania legislature repealed and replaced Pennsylvania’s Oil and Gas Act of 1984 with a codified statutory framework to regulate oil and gas operations referred to as “Act 13.”¹⁰⁵ As discussed below, portions of Act 13 were struck down by the Pennsylvania Supreme Court on state constitutional grounds, and the court remanded to the commonwealth court to determine whether the remaining valid portions were severable.¹⁰⁶

[5] Texas

Even oil and gas friendly Texas recently has seen local governments respond to citizen concerns over fracking. Municipalities have been particularly active in the Barnett Shale where drilling occurs close to urban and suburban populations surrounding Dallas and Fort Worth. Fort Worth was the first city in Texas to deal directly with highly urbanized shale gas drilling.¹⁰⁷ The City of Fort Worth has a comprehensive 66-page oil and

¹⁰¹Joseph de Avila, “Pro-Fracking Group Sues New York Gov. Cuomo,” *Wall St. J.* (Feb. 14, 2014).

¹⁰²See § 11.04[1][a], *infra*.

¹⁰³City of Pittsburgh, Pa., Ordinance No. 37-2010 (eff. Dec. 1, 2010) (codified at Pittsburgh Code §§ 618.01–.09).

¹⁰⁴Food & Water Watch contains copies of 17 local ordinances in Pennsylvania against hydraulic fracturing. See Food & Water Watch, *supra* note 22.

¹⁰⁵See 2012 Pa. Legis. Serv. Act 2012-13 (H.B. 1950) (Act 13) (codified at 58 Pa. Cons. Stat. Ann. §§ 2301–3504).

¹⁰⁶See § 11.04[2][c], *infra*.

¹⁰⁷See Alex Macon, “Drilling industry evolves in Dallas-Fort Worth area,” *North Texas Daily* (Oct. 27, 2011).

gas ordinance that was consolidated and reenacted in 2009,¹⁰⁸ but it is much more forgiving to industry than the new Dallas ordinance discussed below. The Fort Worth ordinance generally prohibits wells to be drilled within 600 feet of a residence, religious institution, hospital, school or public park, but it also allows for a waiver of the setback requirement from the City Council or from property owners located within the 600-foot radius of the well.¹⁰⁹ A proposal submitted to the City Council in October 2011 to strengthen Fort Worth's ordinance was unanimously rejected.¹¹⁰

On December 11, 2013, by a nine-to-six vote, the Dallas City Council amended its development code to significantly revise its oil and gas drilling and production regulations.¹¹¹ Among many other stringent provisions, the revised ordinance requires a 1,500-foot setback from any "protected use," which may be reduced to 1,000 feet by a vote of two-thirds of the City Council.¹¹² Because of the already extensive development of "protected uses" in Dallas, industry and dissenting council members complained that the new setback requirements, in particular, constituted a virtual ban on drilling.¹¹³ In contrast, supporting council members (and most of the public speakers at the meeting where the ordinance was adopted) voiced concerns for health and safety.¹¹⁴ The City already has been sued, but not

¹⁰⁸City of Fort Worth, Tex., Ordinance No. 18449-02-2009 (Feb. 3, 2009).

¹⁰⁹*Id.* § 15-36.A.

¹¹⁰Mayor and Council Communication No. G-17422. *See Minutes, City of Fort Worth, Tex. Regular City Council Meeting*, at 18 (Oct. 25, 2011).

¹¹¹City of Dallas, Tex., Ordinance No. 29228 (Dec. 11, 2013).

¹¹²*Id.* § 5 (amending Dallas City Code § 51A-4.203(b)(3.2)(F)(ii)).

¹¹³*See* Randy Lee Loftis, "Dallas OKs gas drilling rules that are among nation's tightest," *Dallas Morning News* (Dec. 11, 2013). Council member Kleinman, who opposed the change to the setback requirements, complained:

Our ordinance as was proposed by the Task Force was already one of the strongest and most protective ordinances in this country, but that just wasn't enough. . . . We might as well save a lot of paper and write a one-line ordinance that says there will be no gas drilling in the City of Dallas. That will be a much easier ordinance to have.

Minutes of Dallas, Tex. City Council Meeting, 2:22:34 (Dec. 11, 2013) (Dallas Minutes) (audio recording).

¹¹⁴*See* Loftis, *supra* note 113. Councilmember Caraway, who supported the ordinance, stated:

[T]his has been something on our plate for the last two years plus, and to move nowhere is a disservice to the city and to all citizens. . . . [I]f we were to put this thing off any further we would still have the City of Dallas and all citizens in harm's way

Dallas Minutes, *supra* note 113, at 2:30:18.

to challenge its regulatory authority. The City denied drilling permits to Trinity East Energy (Trinity) to drill on lands that Trinity had leased from the City itself, apparently for \$19 million in lease payments. In addition to its inverse condemnation claim, Trinity claims breach of contract and fraud based on alleged representations made by the then City Manager, Mary Suhm, when Trinity leased the property.¹¹⁵

On July 16, 2014, the City Council of the City of Denton, Texas, which sits atop the Barnett Shale, decided to put a petition on the November 4, 2014, ballot for voters to decide whether to ban hydraulic fracturing in the city. If the ballot initiative is successful, Denton will be the first city in Texas to ban hydraulic fracturing.¹¹⁶

§ 11.03 The Legal Authority of Local Governments to Regulate Oil and Gas and Challenges to That Authority

[1] Source of Local Authority to Regulate Oil and Gas

Cities, counties, townships, boroughs, and other sub-state units may regulate oil and gas development by enacting (1) zoning ordinances under a grant of zoning power or (2) stand-alone oil and gas regulations under a general grant of the police power. Although difficult to define, the police power has been described 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.”¹¹⁷ The source of the zoning power or the general police power depends on both the nature of the sub-state unit and the specific language of the grant. It also depends on whether the sub-state unit has been granted home rule powers or is a general law statutory unit.

The police power and zoning power are related. In many states, zoning has been upheld as an extension of the general police power of sub-state units,¹¹⁸ although most states authorize zoning under separate zoning

¹¹⁵See Nicholas Sakelaris, “Trinity East Energy sues the city of Dallas over breach of contract for denied wells,” *Dallas Bus. J.* (Feb. 13, 2014).

¹¹⁶See Mike Lee, “Texas town’s fracking ban will go to voters,” *EnergyWire* (July 16, 2014).

¹¹⁷Patrick J. Rohan & Eric Damian Kelly, *Zoning & Land Use Controls* § 35.03 (2013). See *Marshall v. Kansas City*, 355 S.W.2d 877, 883 (Mo. 1962); *Stone v. Mississippi*, 101 U.S. 814, 818 (1879) (“It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate.”).

¹¹⁸See, e.g., *Four States Realty Co. v. Baton Rouge*, 309 So. 2d 659 (La. 1975); *Coffee City v. Thompson*, 535 S.W.2d 758 (Tex. Civ. App. 1976); *Forks Twp. Bd. of Supervisors v. George Calantoni & Sons, Inc.*, 297 A.2d 164 (Pa. Commw. Ct. 1972); *Maldini v. Ambro*, 330 N.E.2d 403 (N.Y. 1975); *Hausmann & Johnson, Inc. v. Berea Bd. of Bldg. Code Appeals*, 320 N.E.2d 685 (Ohio Ct. App. 1974).

enabling acts. Colorado, for example, has conferred broad authority on local governments to plan for and regulate the use of land within their respective jurisdictions.¹¹⁹

Zoning enjoys a revered place in constitutional jurisprudence. While a few courts have taken a harder look at cases of exclusionary zoning and absolute prohibitions of lawful activities,¹²⁰ since the 1926 decision in *Village of Euclid v. Ambler Realty Co.*,¹²¹ most courts take a deferential view of zoning regulations. In the first U.S. Supreme Court case upholding local zoning on constitutional grounds, the Court stated that “reserving land for single-family residences preserves the character of neighborhoods,

¹¹⁹See Bd. of Cnty. Comm’rs, La Plata Cnty. v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1056 (Colo. 1992). Colorado has adopted the Local Government Land Use Control Enabling Act of 1974, Colo. Rev. Stat. §§ 29-20-101 to -108, the purpose of which is to “provide broad authority to local governments to plan for and regulate the use of land within their respective jurisdictions,” considering both “orderly development” and “legitimate environmental concerns.” *Id.* § 29-20-102(1). The statute authorizes sub-state units to regulate land use to accomplish multiple purposes, including the lessening of the impact of various uses on the surrounding areas, protecting wildlife, and “[p]reserving areas of historical and archaeological importance.” *Id.* § 29-20-104(1)(c). The County Planning Code, *id.* §§ 30-28-101 to -139, grants counties the authority to adopt zoning resolutions designed to regulate land use, which must promote “health, safety, morals, convenience, order, prosperity, or welfare . . .” *Id.* § 30-28-115(1). Similarly, the Municipal Planning Code, *id.* §§ 31-23-301 to -314, governs zoning by municipalities, providing that zoning must promote health and general welfare and consider the character of the district and its suitability for particular uses and encourage the most appropriate use of land throughout the municipality. *Id.* § 32-23-303(1).

¹²⁰Courts may look more closely where a particular type of use is completely excluded or prohibited. In the Pennsylvania case of *Exton Quarries, Inc. v. Zoning Board of Adjustment*, 228 A.2d 169 (Pa. 1967), the court required a more substantial relationship to public health and safety where a type of business is completely excluded rather than confined to a particular zone. *Id.* at 179. California also has a number of older cases that struck down local prohibitions on quarrying. See, e.g., *Ex parte Kelso*, 82 P. 241, 242 (Cal. 1905) (“So far as such use of one’s property may be had without injury to others, it is a lawful use, which cannot be absolutely prohibited . . . under the guise of the exercise of the police power.”); *People v. Hawley*, 279 P. 136, 144 (Cal. 1929) (excavation of rock “cannot be prohibited” unless necessary to protect legal rights of others); *Morton v. Superior Court*, 269 P.2d 81 (Cal. Dist. Ct. App. 1954) (quarrying not a nuisance per se and cannot be outlawed altogether). However, in *Consolidated Rock Products Co. v. City of Los Angeles*, 370 P.2d 342 (Cal. 1962), the court distinguished these older cases, finding consistent with *Euclid* that if “reasonable minds may differ” as to the necessity and propriety of the legislative action, the ordinance must stand. *Id.* at 352. See also Kramer: Evolving Judicial Approaches, *supra* note 1, at 60. Finally, Michigan had adopted a rule that zoning ordinances preventing mineral extraction could be challenged by a showing that “no very serious consequences” would result from the extraction. *Silva v. Ada Twp.*, 330 N.W.2d 663, 667 (Mich. 1982). But this “preferred use” test has been overruled as both violating separation of powers (by unduly impeding legislative function) and superseded by state statute. *Kyser v. Kasson Twp.*, 786 N.W.2d 543, 560 (Mich. 2010).

¹²¹272 U.S. 365 (1926).

securing ‘zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.’”¹²² In analogizing to nuisance, 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.”¹²³ Professor Kramer has described the deferential standard from *Euclid* as the “fairly debatable” test,¹²⁴ because “the validity of the legislative classification for zoning purposes” need only be “fairly debatable” to survive judicial scrutiny.¹²⁵

[a] General Law Local Governments as State Creatures

Until the home rule movement, the “Dillon Rule” provided the foundational statement of the state-local relationship. Under this rule, a local government possesses and can exercise only those powers expressly granted, necessarily or fairly implied or incident to the powers expressly granted, or essential to the indispensable purposes of the local government.¹²⁶ For this reason, statutory or “general law” sub-state units may be referred to as “creatures” that may be created or destroyed at the whim of their state government creator.¹²⁷ These general law sub-state units therefore may enact zoning ordinances and other land use controls only pursuant to express or implied delegation of that power under enabling statutes or general constitutional provisions.¹²⁸

[b] Home Rule

In contrast to general law sub-state units, home rule local governments possess broader authority. Home rule powers may be classified as either

¹²²*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)).

¹²³*Euclid*, 272 U.S. at 388.

¹²⁴Kramer: Evolving Judicial Approaches, *supra* note 1, at 44, 63.

¹²⁵*Euclid*, 272 U.S. at 388.

¹²⁶John F. Dillon, *Treatise on the Law of Municipal Corporations* § 237 (1st ed. 1872).

¹²⁷See Kramer: Governmental Relations, *supra* note 1, at 69; *Huntley & Huntley, Inc. v. Borough Council*, 964 A.2d 855, 862 (Pa. 2009) (“Municipalities are creatures of the state and have no inherent powers of their own. Rather, they ‘possess only such powers of government as are expressly granted to them and as are necessary to carry the same into effect.’” (quoting *City of Phila. v. Schweiker*, 858 A.2d 75, 84 (Pa. 2004))).

¹²⁸Rohan & Kelly, *supra* note 117, at § 35.05. See also *State ex rel. Vaughn v. Bd. of Cnty. Comm’rs*, 825 P.2d 1257, 1259 (N.M. Ct. App. 1991) (“We begin with the premise that the power of local government to zone does not derive from common law; rather, such power can only be exercised pursuant to statutory authority and in conformity with a lawfully adopted ordinance.”).

(1) *imperio* or (2) legislative, but the powers of *imperio* home rule units and legislative home rule units are not materially different. Although the classification affects the analysis, both as to the source of the unit's power to regulate and as to whether the legislature or the courts decide the scope of that power, the state may preempt either type of sub-state unit depending on the circumstances.

Imperio (or traditional) home rule is the original form of home rule. It began in 1875 under the Missouri Constitution and applied to the single city of St. Louis.¹²⁹ This original form obtained its name from the Supreme Court, which described St. Louis as an “*imperium in imperio*” (a state within a state).¹³⁰ *Imperio* home rule is an exception to the “creature” theory because these sub-state units govern their affairs without need for a grant of authority from the state legislature. Instead, these units derive their authority from the state constitution and their own charter. California¹³¹ and Colorado¹³² are examples of *imperio* home rule states. The authority of an *imperio* home rule unit extends only to its local affairs, the scope of which may be challenged. The boundaries of local authority in an *imperio* home rule state are left to judicial determination.¹³³

The other form of home rule, legislative home rule, is now more common than the original form of *imperio* home rule. Legislative home rule was introduced in the 1950s by the American Municipal Association with a proposed model state constitutional provision, which was revised in 1968 by the National Municipal League.¹³⁴ A number of states adopted legislative constitutional provisions following the National Municipal League

¹²⁹John Martinez, 1 *Local Government Law* § 4:5 (2013).

¹³⁰*St. Louis v. W. Union Tel. Co.*, 149 U.S. 465, 468 (1893). St. Louis prepared a charter self-appointing its powers. So far as the charter and powers granted to the city did not conflict with the state constitution and laws, and have not been set aside by the state legislature, the powers were vested in the city. *Id.* at 467–68.

¹³¹Cal. Const. art. XI, § 5(a).

¹³²*See* Colo. Const. art. XX, § 6 (the charter is its organic law and extends to all “local and municipal matters”).

¹³³*See* Kenneth Vanlandingham, “Constitutional Municipal Home Rule Since the AMA (NLC) Model,” 17 *Wm. & Mary L. Rev.* 1, 2 (1975).

¹³⁴Nat'l Mun. League, *Model State Constitution* 16 (6th ed. 1963). The description of the evolution from *imperio* to legislative home rule is described in *City of New Orleans v. Board of Commissioners*, 640 So. 2d. 237, 243 (La. 1994).

model, including New Mexico, Montana, and Alaska,¹³⁵ that require the state legislature to deny or prohibit a local government's particular exercise of legislative power in order to override that power.¹³⁶ Under a grant of legislative home rule, the home rule sub-state unit may exercise the police power of the state, except that the legislature may deny local authority by state statute as to most substantive powers and functions.¹³⁷ The goal of this legislative home rule movement was to remove the discretion of the court under the *imperio* home rule model as to what constitutes a matter of "local" concern, and instead vest the state legislature with the decision whether a particular matter should be regulated at a state or local level.¹³⁸ This goal, however, arguably has not been realized. As discussed below, courts in legislative home rule states continue to discern whether state laws are of general applicability and whether local laws impliedly conflict with such general state laws.

[c] The Increase in Local Government Power

Originally intended only for municipalities, at least 32 states now provide home rule power to at least some of their counties,¹³⁹ undermining

¹³⁵N.M. Const. art. X, § 6(D) ("A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter."); Alaska Const. art. X, § 11 ("A home rule borough or city may exercise all legislative powers not prohibited by law or by charter."); Mont. Const. art. XI, § 6 ("A local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter. This grant of self-government powers may be extended to other local government units through optional forms of government provided for in section 3.").

¹³⁶According to the Louisiana Supreme Court, the 1974 home rule amendments to the Louisiana Constitution limit the powers of pre-1974 home rule municipalities only to contrary provisions of the Louisiana Constitution and their own charters, while new home rule cities and parishes are subject to general state law, even if passed after the charter. See *City of New Orleans*, 640 So. 2d at 247. See also G. Roth Kehoe II, "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, 818–19 (1995). Despite this broad interpretation of home rule, however, local governments are completely preempted from regulating oil and gas operations in Louisiana. See § 11.04[3][c], *infra*.

¹³⁷Vanlandingham, *supra* note 133, at 3. Early court decisions interpreting *imperio* home rule have been characterized, consistent with the Dillon Rule, as hostile toward home rule or highly deferential to legislative interventions. See, e.g., *City of New Orleans*, 640 So. 2d at 242–43 (citing *Bishop v. San Jose*, 460 P.2d 137 (Cal. 1969); *Cnty. Sec. v. Seacord*, 15 N.E.2d 179 (N.Y. 1938); *Van Gilder v. City of Madison*, 267 N.W. 25 (Wis. 1936)).

¹³⁸See David J. Barron, "Reclaiming Home Rule," 116 *Harv. L. Rev.* 2255, 2326–27 (2003).

¹³⁹The list of states that authorize county home rule include the producing states of Alaska, Colorado, Kansas, Kentucky, Michigan, Montana, North Dakota, and Oklahoma. For a list of states that authorize municipal and county home rule, see Ballotpedia, "Chartered local government," http://ballotpedia.org/Chartered_local_government. The list is a

the importance of the “creature” theory. Further, most states grant general law statutory counties the zoning power and many states now delegate to cities and counties the police power. Colorado and New Mexico, for example, grant counties both zoning power and the police power.¹⁴⁰ Oklahoma grants counties planning authority, and grants counties with a population of 500,000 or more zoning powers for police power purposes, but does not grant counties blanket police powers.¹⁴¹ Drilling is more certain in rural Texas, where counties lack the ability to zone.¹⁴² The vesting of counties with zoning power and home rule power and the delegation of the police power to both counties and cities has over time increased the regulatory burden on oil and gas operators.¹⁴³ Fewer and fewer drilling locations exist where local land use control must not at least be considered.

bit deceiving, however. In some producing states the grant of home rule power is more limited or requires onerous procedures such that few if any counties have taken advantage of home rule. For example, Colorado has granted counties home rule authority, see Colorado County Home Rule Powers Act, Colo. Rev. Stat. §§ 30-35-101 to -906, but only two counties, Pitkin County and Weld County, have adopted home rule charters (in addition to Denver and Broomfield, which are unique as both cities and counties). Apparently, Adams County is considering the adoption of a charter. See Yesenia Robles, “Adams County considers home-rule charter to govern county,” *Denver Post* (Feb. 17, 2014). New Mexico allows the home rule incorporation of a county that “at the time of the adoption of this amendment, . . . is less than one hundred forty-four square miles in area and has a population of ten thousand or more . . .” N.M. Const. art. X, § 5. Los Alamos County is the only county that qualified under the size and population restrictions. In Oklahoma, counties with a population of less than 550,000 that contain a city with a population of 250,000 or more may adopt a county home rule charter, see Okla. Stat. tit. 19, § 8.2, but to date, no Oklahoma county has adopted such a charter. See *Ballotpedia, supra*.

¹⁴⁰The Colorado legislature has expressly conferred on non-home rule counties the power to protect “health, safety, and welfare,” Colo. Rev. Stat. § 30-11-101(2), and zoning and land use power. See Local Government Land Use Control Enabling Act of 1974, *id.* §§ 29-20-101 to -306. See also *id.* §§ 30-28-101 to -139.

In New Mexico, counties have the same powers as non-home rule municipalities, expressly including the “powers necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants.” N.M. Stat. Ann. § 4-37-1. New Mexico counties also have been expressly granted zoning authority. *Id.* § 3-21-1.

¹⁴¹See Okla. Stat. tit. 19, § 1 (general powers of county, with no mention of health, safety, welfare, morals, etc.); *id.* § 865.51 (planning authority for all counties); *id.* § 868.11 (zoning authority for counties with a population of 500,000 or more in furtherance of health, safety, welfare, morals, etc.).

¹⁴²See Tex. Loc. Gov’t Code Ann. § 231.001 (providing limited power to counties to zone in specific places around certain lakes, historical areas, military areas, and recreation areas, but not general zoning authority).

¹⁴³See Kramer: Local Land Use Regulation, *supra* note 1, at 5-2, 5-3.

[2] Challenges to Local Oil and Gas Regulation

Despite grants of home rule and other powers to sub-state units, all such grants of power are subject to boundaries. Local government regulation of oil and gas may be challenged on a number of grounds, including (1) preemption; (2) regulatory takings claims; (3) substantive due process; and (4) for “community rights” ordinances, section 1983 constitutional claims. Plaintiffs owning undeveloped minerals may also allege the violation of “vested rights” if the plaintiff already has received a drilling permit or filed an application for a drilling permit, depending on the jurisdiction.¹⁴⁴ This section intentionally provides only an introduction to these issues and is meant to familiarize the reader with certain types of challenges that might be brought against sub-state ordinances.

[a] Preemption

Most cases challenging the ability of sub-state units to regulate oil and gas operations or well location now involve claims of preemption. Preemption “establishes a priority between potentially conflicting laws enacted by various levels of government.”¹⁴⁵ Whether the sub-state unit is a home-rule unit or a general law statutory unit is a threshold question, as the preemption analysis differs.

[i] Home Rule Threshold Questions

If the sub-state unit is a home rule unit, the type of home rule as either *imperio* or legislative also affects the analysis. In Colorado, an *imperio* home rule state, whether the disputed matter is of local, state, or mixed

¹⁴⁴“Vested rights” is a legal defense against the deprivation of private property with Fourteenth Amendment underpinnings based on the concept that at some point in the zoning process real property rights acquired by an owner cannot be taken away by regulation. See David G. Heeter, “Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes,” 1971 *Urb. L. Ann.* 63, 65 & n.3 (1971). See generally Karen L. Crocker, Note, “Vested Rights and Zoning: Avoiding All-or-Nothing Results,” 43 *B.C. L. Rev.* 935 (2002). The majority rule adopted in at least 30 states requires both a building permit and substantial expenditures or commitments before the time the sub-state unit changes its zoning law. See John J. Delaney, “Vesting Verities and the Development Chronology: A Gaping Disconnect?” 3 *Wash. U. J.L. & Pol’y* 603, 607, 615 (2000). Minority rules come in a number of variations, such as the more liberal “early vesting” rules adopted by statute in Colorado and Texas. See Colo. Rev. Stat. § 24-68-103 (vested right “deemed established . . . upon the approval, or conditional approval, of a site specific development plan, following notice and public hearing”); Tex. Loc. Gov’t Code Ann. § 245.002(a) (application for permit must be considered solely based on the regulations and ordinances in effect at the time “the original application for permit is filed for review”); *Cont’l Homes of Tex., L.P. v. City of San Antonio*, 275 S.W.3d 9, 21 (Tex. App.—San Antonio 2008) (explaining Texas’s vested rights statute).

¹⁴⁵*Huntley & Huntley, Inc. v. Borough Council*, 964 A.2d 855, 862 (Pa. 2009).

state-local concern determines whether state or local legislation controls.¹⁴⁶ In matters of local concern, the home rule ordinance will prevail over conflicting state statutes. In matters of statewide concern, home rule units are completely without power to act, absent explicit authorization in the state constitution or from the legislature. For these matters, local law is preempted. Mixed state-local matters concern both home rule units and the state. These matters may be regulated by both the home rule ordinance and the state statute, but only to the extent they do not conflict.¹⁴⁷ Accordingly, once the court determines that a matter is of mixed state-local concern, the court will then turn to its conflict analysis.

Unfortunately, there is no specific test to determine whether a matter is of local, state, or mixed concern. Instead, the court decides based on an *ad hoc* consideration of the totality of the circumstances.¹⁴⁸ Factors considered include “the need for statewide uniformity, whether the municipal legislation has an extraterritorial impact, whether the subject matter is traditionally one governed by state or local government, and whether the [state] [c]onstitution specifically identifies that the issue should be regulated by state or local legislation.”¹⁴⁹ A court may also consider other factors such as the need for cooperation between state and local governments and any legislative declaration as to whether the matter is of statewide concern.¹⁵⁰ While matters relating to the structure and organization of government overwhelmingly are held to be matters of local concern,¹⁵¹ “[t]here exists a doubtful or twilight zone separating those matters that are clearly of municipal concern from those that are not.”¹⁵²

In legislative home rule states, the court looks to both the text of the constitutional or statutory provision granting home rule powers and the applicable legislative enactments to resolve preemption questions. In some states, the state constitution provides legislative home rule units with the

¹⁴⁶Boulder Cnty. Apt. Ass’n v. City of Boulder, 97 P.3d 322, 336 (Colo. App. 2004). See also Laurie Reynolds, “Home Rule, Extraterritorial Impact, and the Region,” 86 *Denv. U. L. Rev.* 1271, 1276 (2009).

¹⁴⁷Voss v. Lundvall Bros., Inc., 830 P.2d 1061 (Colo. 1992).

¹⁴⁸See City of Northglenn v. Ibarra, 62 P.3d 151, 155 (Colo. 2003).

¹⁴⁹*Id.* at 156. See also Town of Telluride v. Lot Thirty-Four Venture, LLC, 3 P.3d 30, 37 (Colo. 2000).

¹⁵⁰City of Northglenn, 62 P.3d at 156; Town of Telluride, 3 P.3d at 37.

¹⁵¹See Sandra M. Stevenson, *Antieau on Local Government Law* § 22.06 (2d ed. 2014).

¹⁵²Helmer v. Superior Court, 191 P. 1001, 1003 (Cal. Dist. Ct. App. 1920).

“maximum [power of] local self-government,”¹⁵³ but that power is not unlimited. The grant of home rule power may also provide that the home rule unit may not exercise legislative powers or perform functions that are denied by a “general law.”¹⁵⁴ In that case, the court must first determine whether the potentially conflicting state law is a general law.¹⁵⁵

A “general law” may be described as a law that affects most or many of the inhabitants of the state and operates uniformly throughout the state.¹⁵⁶ Some courts may also require that a general law actually prescribe regulations that address the disputed matter, rather than simply purport to limit the local power to regulate. In Ohio, for example, a law is a general law for purposes of home-rule analysis if it (1) is part of statewide legislation; (2) applies to all parts of the state uniformly; (3) actually contains police, sanitary, or similar regulations (rather than just purporting to limit local power); and (4) prescribes a rule of conduct upon citizens generally.¹⁵⁷ In states that examine the general law question, limits on local control that are not general laws are unconstitutional attempts to limit legislative home-rule powers.¹⁵⁸

[ii] The Preemption Conflict Analysis

When the local law at issue concerns a general law sub-state unit (such as a non-home rule municipality, county, or other general law unit), courts need not answer the home-rule threshold questions, but may proceed in their preemption analysis directly to the question whether local law and state law conflict. In a legislative home rule state, once state law is found to be a general law (or in an *imperio* home rule state, once the law is found to be of mixed state-local concern), most courts then apply the same or

¹⁵³N.M. Const. art. X, § 6(E).

¹⁵⁴*Id.* § 6(D). The Ohio Constitution expressly confers upon home rule municipalities the authority to exercise the power of local self-government. See Ohio Const. art. XVIII, § 3. While the Ohio legislature may not preempt this power, it is limited to matters that relate solely to the government and administration of the internal affairs of the municipality. See *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 896 N.E.2d 967 (Ohio 2008).

¹⁵⁵*Apodaca v. Wilson*, 525 P.2d 876, 882 (N.M. 1974).

¹⁵⁶See *City of Canton v. State*, 766 N.E.2d 963 (Ohio 2002) (setting forth a four-part test for a general law, including whether the statute applies uniformly throughout the state); *State ex rel. Haynes v. Bonem*, 845 P.2d 150, 156 (N.M. 1992) (test is whether the law affects all, most, or many of the inhabitants of the state or only the inhabitants of the municipality).

¹⁵⁷*State ex rel. Morrison v. Beck Energy Corp.*, 989 N.E.2d 85, 93 (Ohio Ct. App. 2013) (citing *Canton*, 766 N.E.2d at 968).

¹⁵⁸*Canton*, 766 N.E.2d at 96.

a similar preemption analysis applied to statutory general law sub-state units such as non-home rule municipalities, counties, and other non-home rule sub-state units.¹⁵⁹

Any of three tests may be applied to find preemption.¹⁶⁰ Local law is preempted if (1) the language of the statute expressly preempts local authority on the subject matter (express preemption), (2) the court determines that the state legislature intended to preempt local authority by completely occupying the field (implied field preemption), or (3) the court finds a conflict between the state law and the local law (implied conflict preemption).¹⁶¹

Where the language of a statute purports to preempt local authority or to grant exclusive authority to a state agency, courts should ask the express preemption question as a matter of statutory construction before ever applying either of the implied conflict tests.¹⁶² If the language does expressly preempt local authority, a court should ascertain the scope of the preemption.

Only if the language of the state statute allows for sub-state regulation should the court then ask whether the local regulation impliedly conflicts with the state regulatory scheme. As to implied conflict preemption, it is often said that a conflict arises when a local ordinance prohibits what a

¹⁵⁹See, e.g., *Smith v. City of Santa Fe*, 133 P.3d 866 (N.M. Ct. App. 2006) (applying “general law” preemption test applicable to counties from *San Pedro Mining Corp. v. Board of County Commissioners of Santa Fe County*, 909 P.2d 754 (N.M. Ct. App. 1995), rather than a separate “home rule” test), *aff’d*, 171 P.3d 300 (N.M. 2007).

¹⁶⁰This three-part analysis mirrors the analysis applied to determine whether federal law preempts state law under the Supremacy Clause, U.S. Const. art. VI, cl. 2:

[Federal] [p]re-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

La. Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 368–69 (1986) (citations omitted).

¹⁶¹*Bd. of Cnty. Comm’rs, La Plata Cnty. v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1056–57 (Colo. 1992) (en banc).

¹⁶²See *Town of Milliken v. Kerr-McGee Oil & Gas Onshore LP*, 2013 COA 72, ¶ 3 (applying express preemption analysis to a provision of Colorado law that prohibits a local government from charging “a tax or fee to conduct inspections or monitoring of oil and gas operations” (quoting Colo. Rev. Stat. § 34-60-106(15))).

state statute or regulation allows or vice versa,¹⁶³ or because the local ordinance frustrates the purpose of a particular state law.¹⁶⁴ This formulation, however, is not as simple as first appears. An operator may have a state issued permit to drill in a particular location, but in many cases, courts allow sub-state units to prohibit drilling in the very location authorized by the permit.¹⁶⁵

Also consider that a court may find that an agency that has promulgated rules or regulations under the disputed state statute is entitled to deference in interpreting its own enabling legislation.¹⁶⁶ For that reason, an agency's involvement in preemption litigation in defense of its authority might influence the outcome. Further, courts may examine with more scrutiny zoning ordinances that ban certain land use activities instead of delineating appropriate districts or zones for those uses or activities.¹⁶⁷

[b] Regulatory Takings

The Fifth Amendment to the U.S. Constitution declares: "nor shall private property be taken for public use, without just compensation."¹⁶⁸ Since 1897, the "takings" prohibition has applied to the states and their sub-state units by virtue of the Fourteenth Amendment to the Constitution.¹⁶⁹ A local ordinance that is not preempted nevertheless may effectuate a taking. That said, not all local regulations, even those that ban an activity outright, constitute takings. Once a taking is found, however, the owner is entitled to "just compensation" based on the fair market value of the property

¹⁶³Ohioans for Concealed Carry, Inc. v. City of Clyde, 896 N.E.2d 967 (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).

¹⁶⁴See Keith B. Hall, "When Do State Oil and Gas or Mining Statutes Preempt Local Regulations?" 27 *Nat. Resources & Env't* 16 (2013).

¹⁶⁵See Kramer, *Governmental Relations*, *supra* note 1, at 108, 109.

¹⁶⁶See, e.g., *Colo. Mining Ass'n*, 199 P.3d at 726, 731. *But see* Bd. of Cnty. Comm'rs v. COGCC, 81 P.3d 1119, 1125 (Colo. App. 2003) (providing no deference and invalidating COGCC rule that a permit-to-drill is binding as to a conflicting sub-state unit approval process as inconsistent with judicially created operational conflicts test).

¹⁶⁷See *Colo. Mining Ass'n*, 199 P.3d at 730.

¹⁶⁸U.S. Const. amend. V. While the taking of private property for public use requires just compensation, the taking of private property for the purpose of conferring a private benefit is absolutely prohibited. See *Kelo v. City of New London*, 545 U.S. 469, 477-78 (2005).

¹⁶⁹See *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

taken.¹⁷⁰ If the state rescinds the regulation after it is found to work a taking, the government may compensate the claimant for the period the taking was effective.¹⁷¹

A direct appropriation of property clearly is a taking.¹⁷² In contrast, “regulatory takings” claims (also referred to as inverse condemnation actions)¹⁷³ are those based on regulations or land use restrictions enacted by governments under the zoning or police power. The only certain rule in regulatory takings jurisprudence is that a permanent physical invasion by or upon the authority of the government is a taking, no matter how small or insignificant the invasion or the weight of the public purpose.¹⁷⁴ Most sub-state regulation of oil and gas, however, involves neither a direct appropriation nor a physical invasion.

All exercises of the police power, whether by zoning or direct regulation, “take” some rights in the bundle of sticks, but not all exercises of the police power constitute a taking in the constitutional sense.¹⁷⁵ In *Pennsylvania Coal Co. v. Mahon*,¹⁷⁶ Justice Holmes, writing for the Court, gave life to modern regulatory takings jurisprudence, stating that “while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking.”¹⁷⁷ Only four years after the *Pennsylvania Coal* decision, the Supreme Court established the permissibility of zoning in *Euclid*,¹⁷⁸ and then two years later struck down a zoning ordinance on due process

¹⁷⁰See *United States v. 50 Acres of Land*, 469 U.S. 24, 25 n.1 (1984) (“what a willing buyer would pay in cash to a willing seller” (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943))).

¹⁷¹*First English Evangelical Lutheran Church v. Cnty. of L.A.*, 482 U.S. 304, 321–22 (1987).

¹⁷²See *Gibson v. United States*, 166 U.S. 269 (1897). A direct appropriation of property is usually an action for eminent domain brought by or on behalf of the government.

¹⁷³An “inverse condemnation” action is “[a]n action brought by a property owner for compensation from a governmental entity that has taken the owner’s property without bringing formal condemnation proceedings.” *Black’s Law Dictionary* 310 (8th ed. 2004).

¹⁷⁴See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435–40 (1982) (finding a taking by physical invasion).

¹⁷⁵See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (“[A]s long recognized some values are enjoyed under an implied limitation and must yield to the police power.”).

¹⁷⁶260 U.S. 393 (1922).

¹⁷⁷*Id.* at 415 (emphasis added).

¹⁷⁸272 U.S. 365 (1926).

grounds in *Nectow v. City of Cambridge*,¹⁷⁹ without even a reference to *Pennsylvania Coal*.¹⁸⁰ Between those cases and the Supreme Court's next takings decision 46 years later,¹⁸¹ the Court tacitly allowed state judiciaries to erode regulatory takings jurisprudence.

Since it reemerged in 1974, the Supreme Court has spun a complex web of jurisprudence in its attempt to define when regulation *goes too far*,¹⁸² distinguishing but not expressly overruling *Pennsylvania Coal* along the way.¹⁸³ In an effort to assuage private property rights advocates, some states have enacted "takings" statutes, but these statutes offer little relief in the context of local oil and gas regulation.¹⁸⁴ Accordingly, most litigants must rely on the morass of judicial precedent.

¹⁷⁹277 U.S. 183 (1928).

¹⁸⁰In *Nectow*, the court substituted its judgment for that of the City Council to find that a rezoning of plaintiff's property from industrial to residential use did not bear a substantial relation to the public health, safety, morals, or general welfare. *Id.* at 188. The court was influenced by the fact that immediately adjoining lands were devoted to industrial and railroad purposes. *Id.* at 187.

¹⁸¹See *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

¹⁸²Takings jurisprudence routinely is described as in a state of disarray. See, e.g., David L. Callies, "Regulatory Takings and The Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts Are Doing About It," 28 *Stetson L. Rev.* 523, 523 (1999); John A. Humbach, "Evolving Thresholds of Nuisance and the Takings Clause," 18 *Colum. J. Envtl. L.* 1 (1993); James A. Kushner, "Property and Mysticism: The Legality of Exactions as a Condition for Public Development Approval in the Time of the Rehnquist Court," 8 *J. Land Use & Envtl. L.* 53 (1992); Jan G. Laitos, "Takings and Causation," 5 *Wm. & Mary Bill Rts. J.* 359 (1997); Richard J. Lazarus, "Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases," 38 *Wm. & Mary L. Rev.* 1099 (1997); Richard J. Lazarus, "Putting the Correct 'Spin' on Lucas," 45 *Stan. L. Rev.* 1411 (1993).

¹⁸³See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Andrus v. Allard*, 444 U.S. 51 (1979).

¹⁸⁴These statutes do not replace constitutional takings, but add procedures that states must follow to assess potential takings or provide additional statutory claims. Approximately 17 states have takings "assessment" statutes that require agencies to assess whether their actions constitute a taking, including Arizona, Delaware, Idaho, Indiana, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, North Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wyoming. See Lynda J. Oswald, "Property Rights Legislation and the Police Power," 37 *Am. Bus. L.J.* 527, 542 n.61, 542-43 (2000) (citing Harvey M. Jacobs, *State Property Rights Laws: The Impacts of Those Laws on My Land* 7 (1999)). Only four states, including Texas and Louisiana, have state statutes that require compensation for a specific loss in value, *id.* at 544-45, but the Texas and Louisiana statutes foreclose remedies for most sub-state actions that regulate oil and gas. The Louisiana statute only applies to "takings" of agricultural property, see La. Rev. Stat. Ann. § 3:3602, and the Texas statute excludes most municipal actions, county actions taken before September 1, 1997, and various other actions from its coverage, see Tex. Gov't Code Ann. § 2007.003(b)(3), (13), (d).

[i] The Takings Analysis

The regulatory takings analysis begins with two categorical rules. First, since the 1992 decision in *Lucas v. South Carolina Coastal Council*,¹⁸⁵ a taking will be found if the disputed regulation causes a complete loss of economically beneficial or productive use.¹⁸⁶ This is an all-or-nothing rule. Under this categorical rule, “in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with a total loss will recover in full.”¹⁸⁷ As will be discussed below, the denominator in this calculation becomes critically important.¹⁸⁸

Under another categorical rule, an exercise of the police power (including the zoning power) that regulates a “nuisance” is not a taking, even if the regulation causes a complete loss.¹⁸⁹ Since the *Lucas* decision, the applicable legislature (e.g., city council, county commission), may not simply declare that a particular activity is a nuisance by citing potential adverse effects on safety, health, or welfare.¹⁹⁰ Instead, the offending activity must already be prohibited under the state’s “background principles” of common law property and nuisance law. As a result of this formulation, judges, not legislatures, determine what is or is not a nuisance for takings purposes.¹⁹¹

The Colorado case of *Aztec Minerals Corp. v. Romer*¹⁹² illustrates the application of the categorical nuisance exception. In *Aztec*, the State

¹⁸⁵505 U.S. 1003 (1992).

¹⁸⁶*Id.* at 1016. Writing for the majority, Justice Scalia traces the categorical rule to *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), a disingenuous citation because *Agins* cited *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 138 n.36 (1978), for the proposition that the Fifth Amendment is violated when land-use regulation “denies an owner economically viable use of his land.” *Penn Central* did not establish a categorical rule.

¹⁸⁷505 U.S. at 1019 n.8.

¹⁸⁸See § 11.03[2][b][ii], *infra*.

¹⁸⁹See *Mugler v. Kansas*, 123 U.S. 623 (1887) (law upheld prohibiting manufacture of alcoholic beverages); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (law upheld that barred operation of brick mill in residential area).

¹⁹⁰“Since such a justification [by the legislature] can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff.” *Lucas*, 505 U.S. at 1025 n.12.

¹⁹¹The reference of the court to “common law” and “background principles” implies that old common law made by long-dead judges determines what constitutes a “nuisance” under Justice Scalia’s test announced in *Lucas*. In dissent, Justice Blackmun argues that twentieth century judges, and even legislatures, are just as capable of distinguishing harms from benefits, and that nuisance law is a mess. *Id.* at 1054–55 (Blackmun, J., dissenting).

¹⁹²940 P.2d 1025 (Colo. App. 1996).

condemned a mine after the owner's cyanide leaching operation contaminated a nearby creek and settling ponds on the site. The court stated that "[a] landowner cannot reasonably expect to put property to a use that constitutes a nuisance, even if that is the only economically viable use for the property. . . . Such uses were never part of the landowner's 'bundle of rights . . .'"¹⁹³

Whether oil and gas development constitutes a "nuisance" is generally beyond the scope of this chapter, but a concise formulation was set out in *Phillips Petroleum Co. v. Vandergriff*.¹⁹⁴ There the court held that drilling an oil and gas well is not a nuisance *per se*, but that if property is substantially damaged as a result of the drilling, the surface owner may recover for a nuisance in fact.¹⁹⁵ Because the finding of a nuisance is a fact-based, case-by-case inquiry, courts should have difficulty relying on the categorical nuisance exception to allow a sub-state unit to avoid a takings claim in connection with an outright ban on all oil and gas activity.¹⁹⁶

Assuming the regulation causes less than a complete loss of beneficial use and the categorical nuisance exception does not apply, the court may find a partial regulatory taking applying the balancing test announced in *Penn Central Transportation Co. v. New York City*.¹⁹⁷ Under *Penn Central*, a court conducts an essentially *ad hoc*, factual inquiry that balances (1) "the character of the governmental action," (2) "[t]he economic impact of the regulation on the claimant," and (3) "the extent to which the regulation . . . interfered with [the claimant's] distinct investment-backed expectations."¹⁹⁸

As to the first prong, the character of the governmental action, at one time the Court asked whether the government regulation was appropriate

¹⁹³*Id.* at 1031–32 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

¹⁹⁴122 P.2d 1020 (Okla. 1942).

¹⁹⁵*C.f.* *Stanolind Oil & Gas Co. v. Smith*, 290 S.W.2d 696 (Tex. Civ. App. 1956) (nuisance found for voluntary and intentional operation of burning pit that damaged crops by smoke, gas, and fumes).

¹⁹⁶In a case being hailed as a victory against fracking, a Dallas jury recently awarded almost \$3 million in damages to a Texas family, in *Parr v. Aruba Petroleum, Inc.*, No. CC-11-01650-E (Cnty. Ct. at Law No. 5, Dallas Cnty., Tex. Apr. 22, 2014), finding that an operator's oil and gas activity constituted a private nuisance. See Jenny Deam, "Jury awards Texas family nearly \$3 million in fracking case," *L.A. Times* (Apr. 23, 2014).

¹⁹⁷438 U.S. 104 (1978).

¹⁹⁸*Id.* at 124.

to accomplish its purpose,¹⁹⁹ but the Court recently disavowed this logical test.²⁰⁰ Although this prong appears to be the least important,²⁰¹ in most cases involving oil and gas regulation, it likely will favor not finding a taking. All that can be said about the prong is that a taking is more likely when the action tends toward a physical invasion, and less likely when the action “arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”²⁰² While a court may question a sub-state unit’s declaration of a nuisance, it is less likely to question the character of its regulation.

As to the second prong, the economic impact, the court compares the market value of the affected property immediately before the governmental action to the market value immediately after the action.²⁰³ This test may devolve into a battle of experts.²⁰⁴ Although the larger the loss the more likely a taking, a large diminution in value alone will not ordinarily support a *Penn Central* claim.²⁰⁵ Supreme Court precedent “ha[s] long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.”²⁰⁶

The third prong of the *Penn Central* test has been the most scrutinized and least understood. The concept of an investment-backed *expectation* implies that the owner reasonably believed he could develop his property as he intended. Is a purchaser, a successive lessee, or other title holder then

¹⁹⁹*Id.* at 129. In *Penn Central*, the claimant did not dispute that the building restriction was not appropriate to preserve the historical and cultural significance of Grand Central Terminal, the landmark at issue in the case. *Id.*

²⁰⁰See note 259, *infra*, and accompanying text.

²⁰¹See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005) (“Primary among those factors are ‘[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.’” (alteration in original) (quoting *Penn Cent.*, 438 U.S. at 124)).

²⁰²*Penn Cent.*, 438 U.S. at 124. *Accord*, *MHC Fin. Ltd. P’ship v. City of San Rafael*, 714 F.3d 1118, 1128 (9th Cir. 2013).

²⁰³*Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987).

²⁰⁴See, e.g., *Cane Tenn., Inc. v. United States (Cane V)*, 71 Fed. Cl. 432 (2005) (discussing at length expert testimony as to value of timber and coal interests), *aff’d per curiam*, 214 F. App’x 978 (Fed. Cir. 2007) (mem.).

²⁰⁵For examples of cases where large diminutions in value were not takings, see *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 645 (1993) (75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (92.5% diminution); *MHC Financing*, 714 F.3d at 1127 (81% diminution).

²⁰⁶*Concrete Pipe & Prods.*, 508 U.S. at 645.

deemed to have notice of an earlier-enacted restriction and thus barred from claiming a taking? In *Palazzolo v. Rhode Island*,²⁰⁷ a case involving a regulation adopted to preserve coastal wetlands, a close 5-4 Supreme Court found no such categorical rule.²⁰⁸ Practically, however, *Palazzolo* limits most claims by subsequent title holders of property that is already subject to pre-acquisition regulation. In *Palazzolo*, four justices dissented, and a fifth, Justice O'Connor, argued in concurrence that, while not dispositive, acquisition of the property after the enactment of the ordinance certainly informs the degree to which investment-backed expectations were frustrated.²⁰⁹

Even if the sub-state unit enacts its drilling prohibition *after* the oil and gas interest is acquired, the interest owner still may lack reasonable expectations that it can produce its minerals, at least for constitutional purposes. In *Mid Gulf, Inc. v. Bishop*,²¹⁰ the city enacted tough new drilling regulations after an oil and gas lessee applied for a conditional use permit to drill. To the court, the plaintiff “was fully aware when it obtained the leasehold interest that the City *could* regulate drilling in accordance with its police powers”²¹¹ Under this “anything is possible” standard, no investment-backed expectation may be considered reasonable.

Also note that most takings claims that challenge regulations (including zoning and permitting requirements) are not ripe in federal court until the claimant has (1) followed the procedure mandated by the government agency charged with making the final decision (and the agency has made a final decision); and (2) sought compensation through whatever other procedures the state has required, unless such procedures are “unavailable or inadequate.”²¹² In part for this reason, a complex ordinance such as the Santa Fe County ordinance is more difficult to challenge under takings jurisprudence than an outright ban. The Supreme Court did state in *Palazzolo* that “[g]overnment authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid

²⁰⁷533 U.S. 606 (2001).

²⁰⁸*Id.* at 627 (“The State may not put so potent a Hobbesian stick into the Lockean bundle.”).

²⁰⁹*Id.* at 632–33 (O’Connor, J., concurring).

²¹⁰792 F. Supp. 1205 (D. Kan. 1992).

²¹¹*Id.* at 1214 (emphasis added).

²¹²*Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 197 (1985).

a final decision.”²¹³ Such a statement implies that at some point a rolling moratorium or even an especially onerous zoning ordinance may “go too far.”

[ii] The Conceptual Severance Problem

Takings claims in the mineral context may involve a special problem referred to as “conceptual severance.” To comprehend this problem requires an understanding of state property law, because the Supreme Court resorts to state law to define the range of interests that qualify for protection as “property” under the Fifth and Fourteenth Amendments.²¹⁴ Although in various states a mineral interest in oil and gas may either be described as “owned in place” or an “exclusive right to take,” the distinction should make little difference.²¹⁵ Irrespective of the classification, an interest in oil and gas is an interest in land.²¹⁶ The same can be said of an oil and gas lease. The lease “[has] been classified as realty, personalty, chattel real; as corporeal or incorporeal; as fees, profits, or licenses, depending upon the purpose for which the classification is made”²¹⁷ Regardless, an oil and gas lease is an interest in land.²¹⁸

Consider, however, the distinction between the owner of “fee” land (meaning in oil and gas terms, the owner of both the surface estate and the mineral interest) and the owner of the severed mineral interest or lease. Property can be divided into all sorts of segments, and has been for takings purposes. Property may be viewed temporally in the sense that an estate

²¹³*Palazzolo*, 533 U.S. at 621 (citing *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999)). In *Maguire Oil Co. v. City of Houston*, 243 S.W.3d 714 (Tex. App.—Houston [14th Dist.] 2007, review denied), the city that denied a drilling permit to the plaintiff contended that plaintiff had not exhausted its administrative remedies because it did not appeal to the City Council the decision of the Director of Public Works. The court agreed with the plaintiff, holding that the final decision requirement is different than exhaustion of remedies. The Director of Public Works was the relevant decision maker and the ordinance did not provide for an appeal process; thus, an appeal would have been futile. *Id.* at 719–20. Twenty years after the plaintiff’s attempt to drill a natural gas well near Houston (and two trial courts, three trials, and four appeals), it ultimately prevailed on its inverse condemnation claim. See *City of Houston v. Maguire Oil Co.*, 342 S.W.3d 726 (Tex. App.—Houston [14th Dist.] 2011, review denied).

²¹⁴See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011–13 (1984).

²¹⁵1 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law* § 211 (2013).

²¹⁶*Id.* § 212; 1 Eugene O. Kuntz, *A Treatise on the Law of Oil and Gas* § 2.2 (rev. ed. 2013).

²¹⁷Kuntz, *supra* note 216, at § 18.2.

²¹⁸*Id.*

for a term of years has a shorter duration than a fee simple absolute. It may be viewed spatially on the horizontal access, such that a five-acre tract is smaller than a ten-acre tract. It also may be viewed spatially on the vertical axis based on the *ad coelum* doctrine,²¹⁹ such that a mineral interest is less than a “fee” interest in both the surface and minerals.²²⁰

Return to *Pennsylvania Coal*, the case that kicked off modern takings jurisprudence. There, the plaintiff coal company conveyed the surface, but retained the right to remove the coal (i.e., the subjacent support). Writing for the majority, Justice Holmes found a taking in part based on the recognition by Pennsylvania of subjacent support as a separate estate.²²¹ The plaintiff lost this estate when the legislature enacted the Kohler Act, which required the coal estate owner to prevent subsidence by leaving coal pillars in place.²²² In dissent, Justice Brandeis disagreed. He argued that when measuring the loss, the Court should have considered the entire property interest, including the surface, the coal estate, and the support estate.²²³ In other words, Justice Holmes viewed the estates separately (the disaggregate approach), while Justice Brandeis viewed the estates in the aggregate (the aggregate approach).

In addition to “conceptual severance,” this issue has been referred to as the “denominator” problem.²²⁴ In *Lucas*, Scalia highlighted the problem in dicta, when he stated that “this uncertainty regarding the composition of the denominator in our ‘deprivation’ fraction has produced inconsistent pronouncements by the Court.”²²⁵ As discussed above, a *Lucas* categorical taking requires a loss of *all* economically beneficial use. If the denominator is aggregated to include the surface estate, an owner of a fee interest suffers only a partial loss upon the enactment of a ban on oil and gas production. If the denominator includes only the particular estate (the disaggregate approach), then a ban may result in a categorical taking.

²¹⁹*Cuius est solum, eius est usque ad coelum et ad inferos* (“To whomsoever the soil belongs, he owns also to the sky and to the depths.”). See 1 *Coke on Littleton* § 1(4) (1628).

²²⁰For comprehensive treatment of the different ways in which property may be either aggregated or disaggregated, see Steven J. Eagle, *Regulatory Takings* § 7-7 (5th ed. 2013).

²²¹*Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

²²²*Id.* at 412–13.

²²³*Id.* at 419.

²²⁴See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (critical question is determination of the denominator).

²²⁵*Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992). Scalia then sidestepped the problem by turning to the state trial court finding (without exposition) that the plaintiff’s entire “fee simple” interest was lost. *Id.*

Although Justice Holmes won the battle in 1923, Justice Brandeis appears to have won the war. Since *Penn Central* was decided, the Supreme Court consistently aggregates separate estates to avoid a taking. In *Penn Central*, a historic preservation regulation caused the plaintiff to lose the airspace rights to build upward on top of Grand Central Terminal, but the plaintiff continued to own and operate the terminal. The Court stated: “‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”²²⁶ The aggregation of separate estates thus implicates not only the *Lucas* complete loss categorical rule but also the economic loss and investment-backed expectations prongs that are balanced under *Penn Central* when the complete loss categorical rule is inapplicable.

In an even bigger blow to the Justice Holmes disaggregation approach, the Supreme Court in *Keystone Bituminous Coal Ass’n v. DeBenedictis*,²²⁷ decided 65 years after *Pennsylvania Coal*, repudiated entirely the notion that the support estate should be considered separately from the coal estate. *Keystone* involved a facial challenge to the Pennsylvania Subsidence Act, which, like the Kohler Act considered in *Pennsylvania Coal*, targeted subsidence in coal development. As in *Pennsylvania Coal*, the petitioners argued a taking of the coal that was required to be left in place, but in complete contrast to *Pennsylvania Coal*, the Court relied on *Penn Central* to aggregate the coal estate with the support estate, finding plenty of coal left to be mined.²²⁸

Although there is a paucity of case law as to the conceptual severance of oil and gas specifically, holdings that have considered mineral interests, including the few oil and gas cases, imply courts will aggregate whatever vertical, horizontal, or durational interests that may be owned by

²²⁶*Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978). *Penn Central* was an as-applied challenge. The plaintiff in this case was denied the right to build a modern skyscraper on top of the terminal. The Court states that even all of the airspace rights were not lost because the plaintiff could have applied for a more reasonable addition. *Id.* at 136–37. Further, the court found that the issuance to plaintiff of transferable development rights (TDR) mitigated the plaintiff’s loss of a reasonable return on its investment. *Id.* at 137. A TDR allows the holder to develop another parcel (i.e., other than the parcel where development is denied) in a manner that would not otherwise be allowed. See Eagle, *supra* note 220, at § 4-4. Professor Eagle posits that TDRs may be granted either out of fairness considerations or to buy the government’s way out of a takings claim. *Id.* The Santa Fe County Ordinance provides for TDRs as a rather unveiled tool to accomplish the latter. See Santa Fe Ordinance, *supra* note 60, and accompanying text.

²²⁷480 U.S. 470 (1987).

²²⁸*Id.* at 500–01.

the claimant to avoid finding a taking. In *Mid Gulf, Inc. v. Bishop*,²²⁹ for example, the court found the loss of plaintiff's oil and gas leasehold interest was not sufficient to constitute a taking because the plaintiff also owned valuable interests in the surface.²³⁰ In *Eastern Minerals International v. United States*,²³¹ a fascinating and tangled case, the court awarded takings compensation to nonparticipating royalty owners and a coal lessee after the U.S. Department of the Interior declared the area unsuitable for mining.²³² On appeal, however, the court of appeals reversed as to the coal lessee because its lease expired and was not renewed before the government foreclosed mining.²³³ The court highlighted the rule that a normal delay, such as a permitting delay, will not constitute a taking. Even an extraordinary delay, including a moratorium, will not provide the basis for a taking absent a showing of bad faith.²³⁴

In a separate action related to *Eastern Minerals*, the court concluded the "relevant parcel" of the mineral interest lessor included not only the coal mineral interest but also the surface.²³⁵ On appeal, the court even aggregated multiple non-contiguous parcels owned by the mineral lessor. According to the court, separate parcels may be considered a single "relevant parcel" for takings purposes based on whether the developer treats the parcels as a single economic unit, taking into account such factors as contiguity, acquisition dates, the extent that the regulated lands enhance the value of the other lands, "and no doubt many others."²³⁶

Obviously, then, a plaintiff has a better chance of success if it owns a lease, a severed mineral interest, or a royalty interest dependent entirely on production for beneficial use, owns no interest in the surface, and owns no other interests in the area that may be developed or otherwise used in

²²⁹792 F. Supp. 1205 (Kan. 1992).

²³⁰*Id.* at 1214.

²³¹39 Fed. Cl. 621 (1997), *rev'd*, *Wyatt v. United States*, 271 F.3d 1090 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1077 (2002).

²³²*Eastern Minerals*, 39 Fed. Cl. at 631–32.

²³³*Wyatt*, 271 F.3d at 1097.

²³⁴*Id.* See also *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 334–35 (2002) (development moratorium of 32 months did not constitute a per se taking).

²³⁵*Cane Tenn., Inc. v. United States*, 54 Fed. Cl. 100, 112 (2002), *partial summary judgment granted*, 57 Fed. Cl. 115, 121 (2003), *reh'g granted in part, denied in part*, 62 Fed. Cl. 481 (2003).

²³⁶*Cane Tenn.*, 57 Fed. Cl. at 121 (quoting *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (1991)).

a beneficial manner. This was made crystal clear in the Michigan case of *Miller Brothers v. Department of Natural Resources*,²³⁷ where the plaintiff mineral owner was denied the ability to drill in a restricted area. There, the court found a taking, stating, “Plaintiff’s mineral interests . . . had one, and only one, economically viable use: the extraction of any oil or gas that might be found under the land.”²³⁸ However, the court also rejected an argument that directional drilling may have allowed the plaintiff to drill under the restricted area because at least some oil and gas could not be extracted using the method.²³⁹ The court thus cast off the usual aggregation approach.

Finally, consider the aggregation of time. In the temporal realm, courts may examine not only the loss attendant to the regulation but also whether a profit was made *before* the effective time of the regulation. For example, in *Rith Energy, Inc. v. United States*,²⁴⁰ the plaintiff conducted mining operations under federal coal leases in Tennessee. The Department of the Interior suspended the plaintiff’s mining permit after it was unable to develop a satisfactory plan to address acid mine drainage, and the plaintiff alleged a taking. The court found no categorical complete loss, despite its inability to mine in the future, because the plaintiff earned a profit from the mining of coal (over the cost of its lease) *before* the suspension of its permit.²⁴¹

The temporal aspects of takings jurisprudence also played a key role in *City of Houston v. Trail Enterprises, Inc.*,²⁴² where the plaintiffs owned mineral interests in a “control area” around Lake Houston. The City originally protected the control area in a 1965 ordinance that it amended in 1977 to exclude areas within the City limits (and to include the City’s extraterritorial jurisdiction). The City amended the ordinance again in 1997 to include both areas.²⁴³ The court found no taking in a sententious application of the *Penn Central* factors. Specifically, plaintiffs’ relevant investments afforded no reasonable expectation of recovery because they were made after new drilling was prohibited. Otherwise, “a person could entitle him or herself to compensation by obtaining a mineral interest in any property, even

²³⁷513 N.W.2d 217 (Mich. App. 1994).

²³⁸*Id.* at 220.

²³⁹*Id.*

²⁴⁰247 F.3d 1355 (Fed. Cir. 2001).

²⁴¹*Id.* at 1363.

²⁴²377 S.W.3d 873 (Tex App.—Houston [14th Dist.] 2012, review denied).

²⁴³*Id.* at 876–77.

for a nominal sum, where extraction of the minerals was prohibited.”²⁴⁴ Although the plaintiffs failed to adequately argue that they were denied all economically beneficial or productive use of their mineral interests, the court in dicta asserted such a claim also would fail because the plaintiffs had and would continue to receive their share of production from existing wells that predated the 1997 amendment.²⁴⁵ In contrast, in *City of Houston v. Maguire Oil Co.*,²⁴⁶ the same court affirmed a taking in a drawn-out case involving the same ordinance involved in *Trail Enterprises*. In that case, however, the City did not dispute the trial court’s finding that the City caused a taking of the plaintiff’s mineral interest.²⁴⁷ Instead, the City relied on its assertion that the plaintiff actually *had* the right to drill, and its employees were unauthorized to wrongfully deny that right. Even though the ordinance never actually applied to the drill site, the court held that the erroneous enforcement of the ordinance was sufficient to constitute a taking.²⁴⁸

[c] Other Claims

[i] Substantive Due Process

In addition to the Takings Clause, the Fifth Amendment contains another clause pertaining to property. The Due Process Clause provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”²⁴⁹ Although the due process test applied to zoning ordinances and police power regulations has been couched in varying terms, including reasonableness, the test may be analogized to the “rational basis” standard applied to legislative enactments where no “suspect factors,” “fundamental rights,” or “heightened scrutiny” is involved.²⁵⁰ Under a rational basis analysis, courts uphold legislation that is rationally related to a legitimate government purpose.²⁵¹

As described earlier, beginning with *Euclid*, in the early challenges to zoning ordinances courts analyzed claims in terms of substantive due process, asking the “fairly debatable” question and whether ordinances

²⁴⁴*Id.* at 883.

²⁴⁵*Id.* at 877.

²⁴⁶342 S.W.3d 726 (Tex. App.—Houston [14th Dist.] 2011, review denied).

²⁴⁷*Id.* at 738.

²⁴⁸*Id.* at 747.

²⁴⁹U.S. Const. amend. V.

²⁵⁰*See* *Kyser v. Kasson Twp.*, 786 N.W.2d 543, 522 n.2 (Mich. 2010).

²⁵¹*Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

were “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”²⁵² In the earlier cases, a few challenged local oil and gas ordinances were struck down on substantive due process grounds when courts applied the type of “hard look” applied in *Nectow v. City of Cambridge*,²⁵³ but most were upheld, even when takings were alleged.²⁵⁴

Confusion as to the overlap between takings and due process jurisprudence arose from the holding in *Agins v. City of Tiburon*,²⁵⁵ where the Supreme Court stated that government regulation of private property effects a Fifth Amendment taking if the regulation “does not substantially advance legitimate state interests.”²⁵⁶ In announcing this standard, the *Agins* Court cited *Nectow*, which cited *Euclid*, both zoning cases that applied substantive due process standards.²⁵⁷ Despite the link back to *Euclid*, the Court in *Agins* seemingly raised the bar for the validity of an ordinance from “arguably debatable” to “substantially advance.”

In *Lingle v. Chevron U.S.A. Inc.*,²⁵⁸ the Supreme Court disavowed the “substantially advance” test as a type of heightened scrutiny due process standard that has nothing to do with takings jurisprudence. The “substantially advance” test effectively asked whether the regulation accomplished its purpose,²⁵⁹ which the Court found irrelevant for a takings claim. Takings law is concerned with the burden of regulation on property rights, not the validity of the regulation under due process type standards.²⁶⁰

²⁵²Vill. of *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). See § 11.03[1], *supra*. See also Kramer: Local Land Use Regulation, *supra* note 1, at 5-25 to 5-34. Professor Kramer describes the earlier challenges as the “sausage” approach to constitutional law because the early cases tended to blend substantive due process, equal protection, and regulatory takings into a single big sausage. *Id.* at 5-24.

²⁵³277 U.S. 183 (1928). See *supra* note 137. See also *City of N. Muskegon v. Miller*, 227 N.W. 743 (Mich. 1929) (second-guessing the City’s decision to place plaintiff’s land in a residential district); Kramer: Local Land Use Regulation, *supra* note 1, at 5-4 to 5-5.

²⁵⁴See, e.g., *Beveridge v. Harper & Turner Oil Trust*, 35 P.2d 435 (Okla. 1934); *Marblehead Land Co. v. City of L.A.*, 47 F.2d 528 (9th Cir. 1931), *cert. denied*, 284 U.S. 634 (1931); *Blancett v. Montgomery*, 398 S.W.2d 877 (Ky. App. 1966).

²⁵⁵447 U.S. 255 (1980).

²⁵⁶*Id.* at 260.

²⁵⁷*Id.*

²⁵⁸544 U.S. 528 (2005).

²⁵⁹*Id.*

²⁶⁰See *id.* at 542.

After *Lingle*, some courts questioned whether takings jurisprudence effectively subsumed substantive due process in disputes regarding the effect of regulations on property rights,²⁶¹ ending the era of “sausage” jurisprudence.²⁶² Substantive due process in the context of local regulation appears alive,²⁶³ but on life support. More is required to invalidate a regulation under substantive due process than a finding that it failed to substantially advance its purpose. A regulation generally violates substantive due process only if it is considered arbitrary and irrational.²⁶⁴ The arbitrary and irrational standard and the “arguably debatable” standard are high bars for challenging a local oil and gas ordinance enacted under the police power or its subsidiary, the zoning power.

[ii] Section 1983 Constitutional Claims

The basic cause of action for federal court review of alleged sub-state unit violations of federal law, including the U.S. Constitution, is 42 U.S.C. § 1983.²⁶⁵ Section 1983 provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”

Section 1983 is considered in this chapter because community rights ordinances such as the ordinance adopted in Mora County, New Mexico, may purport to strip corporations of their rights under the First and Fifth Amendments to the U.S. Constitution. These community rights ordinances may also prohibit transportation or infrastructure related to the extraction of oil and gas, giving rise to dormant Commerce Clause claims, which also may be brought under section 1983.²⁶⁶

²⁶¹ See *Eagle*, *supra* note 220, at § 7-14(d)(2).

²⁶² See *supra* note 252.

²⁶³ See *Lingle*, 544 U.S. at 548–49 (Kennedy, J., concurring).

²⁶⁴ The Fifth Circuit stated, “[a] zoning decision violates substantive due process only if there is no ‘conceivable rational basis’ under which the government *might* have based its decision.” *Yur-Mar, L.L.C. v. Jefferson Parish Council*, 451 F. App’x 397, 401 (5th Cir. 2011) (emphasis added) (quoting *Shelton v. City of Coll. Station*, 780 F.2d 475, 477 (5th Cir. 1986)).

²⁶⁵ See Erwin Chemerinsky, *Federal Jurisdiction* 482–83 (5th ed. 2007).

²⁶⁶ The dormant Commerce Clause creates a right to participate in interstate commerce without undue interference by individual states, and may be brought under section 1983. See *Dennis v. Higgins*, 498 U.S. 439 (1991); Chemerinsky, *supra* note 265, at 570.

In *Monell v. Department of Social Services of N.Y.C.*,²⁶⁷ the Supreme Court cleared the way for section 1983 liability of local governments and their officials, subject to some exceptions that were later developed. In *Monell*, the Supreme Court overruled its own decision in *Monroe v. Pape*,²⁶⁸ which held that local governments were wholly immune from suit under section 1983. Section 1983 now applies to actions by legislative bodies such as county commissions and city councils.²⁶⁹ It also applies to actions of agencies exercising delegated authority such as municipal zoning boards and boards of adjustment.²⁷⁰ Local governments are not entitled to governmental immunity from section 1983 liability, even when they act in good faith.²⁷¹ In contrast, local legislators themselves have absolute immunity for legislative tasks.²⁷²

§ 11.04 Trends in Preemption Jurisprudence

[1] Avoiding Preemption by Narrow Construction of Legislative Intent to Preempt

As illustrated above, the recent increase in drilling activity prompted by industry technological advances has been accompanied by more local bans and restrictions on drilling activities to appease residents and interest groups. More bans and restrictions have led to more legal claims that state law preempts local law and more judicial opinions deciding such cases. These decisions show that in the absence of clear legislative directives, courts are straining to uphold sub-state bans and drilling restrictions.

In the case of express preemption, courts may construe supposed legislative purposes of statutes rather than the statutory text itself to arrive at what the courts believe to be the appropriate outcome.²⁷³ Where implied field preemption is at issue, courts may define the field as narrowly as possible to allow concurrent jurisdiction. Where implied conflicts between state and local laws are considered, courts may limit conflicts to only those technical operational matters that the applicable state conservation agency clearly regulates.

²⁶⁷436 U.S. 658 (1978).

²⁶⁸365 U.S. 167 (1961).

²⁶⁹*Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).

²⁷⁰*See Monell*, 436 U.S. at 694.

²⁷¹*See Owen v. City of Independence*, 445 U.S. 622, 651 (1980).

²⁷²*See Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

²⁷³Scalia and Garner refer to this practice as purposivism, with a “destructive (and most alluring) feature of . . . manipulability.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 18 (2012).

**[a] Express Preemption Is Not Express
Preemption in New York**

In *Matter of Wallach v. Town of Dryden*,²⁷⁴ the New York Court of Appeals (New York's highest court) consolidated the cases of *Norse Energy Corp. USA v. Town of Dryden*²⁷⁵ and *Cooperstown Holstein Corp. v. Town of Middlefield*²⁷⁶ and decided, in a 5-2 decision, that an express state statute clearly preempting the regulation of oil and gas does not preempt an outright ban or other land use regulation, thus affirming the decisions of the Supreme Court of New York, Appellate Division, in both cases. Both the Town of Dryden and the Town of Middlefield had enacted a zoning ordinance that completely banned activities related to the exploration, production, or storage of natural gas and petroleum.²⁷⁷ At issue was whether the following provision of the Oil, Gas and Solution Mining Law (OGSML)²⁷⁸ preempted the bans: "The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law."²⁷⁹

The court began its analysis by reviewing the home rule provision of the New York Constitution, New York's Municipal Home Rule Law (MHRL), and New York's Town Law. The MHRL empowers sub-state units to protect and enhance their physical and visual environment, and the order, conduct, safety, and health and well-being of its citizens.²⁸⁰ The Town Law, New York's version of the Standard Zoning Enabling Act, grants zoning power to sub-state units and recognizes land use as "[a]mong the most important powers and duties granted . . . to a town government."²⁸¹

The court then turns to its reasoning in *Frew Run Gravel Products, Inc. v. Town of Carroll*,²⁸² which provides the court's analytical framework for examining whether a supersession clause expressly preempts a local

²⁷⁴23 N.Y.3d 728, 16 N.E.3d 1188 (N.Y. 2014).

²⁷⁵964 N.Y.S.2d 714 (App. Div. 2013).

²⁷⁶964 N.Y.S.2d 431 (App. Div. 2013).

²⁷⁷*Wallach*, 23 N.Y.3d at 739.

²⁷⁸N.Y. Envtl. Conserv. Law §§ 23-0301 to -0313.

²⁷⁹*Id.* § 23-0303(2).

²⁸⁰*Wallach*, 23 N.Y.3d at 742 (citing N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(11), (12)).

²⁸¹*Id.* at 743 (alteration in original) (quoting N.Y. Town Law § 272-a(1)(b)).

²⁸²518 N.E.2d 920 (N.Y. 1987).

zoning law, namely (1) the plain language of the statute, (2) the statutory scheme as a whole, and (3) the legislative history.²⁸³ *Frew Run* involved former provisions of the Mined Land Reclamation Law (MLRL), which provided that “this title shall supersede all other state and *local laws relating to the extractive mining industry . . .*”²⁸⁴ In *Frew Run*, the court found that this MLRL supersession language evinced the intent only to preempt local regulations dealing with the *process* of mining, not zoning laws, which do not apparently “relate” to the mining industry.²⁸⁵

The supersession language in the MLRL and the OGSML are similar, except that the MLRL expressly supersedes local laws “relating” to extractive mining, while the OGSML supersedes local laws “relating to the *regulation*” of the oil, gas, and solution mining industry. The *Wallach* court saw no difference between the language in the two statutes, quoting *Frew Run* for its conclusion that the “incidental control resulting from the municipality’s exercise of its right to regulate land use through zoning is not the type of regulatory enactment . . . which the Legislature could have envisioned as being within the prohibition of the statute.”²⁸⁶ In other words, as in *Frew Run*, the legislature simply did not mean what it said. If it wanted to preempt zoning, the legislature could have been more specific, as it had been in enacting statutes related to hazardous waste facilities, community residences, and gaming.²⁸⁷

In analyzing the “plain language,” the court also addressed two arguments made by Norse and Cooperstown Holstein Corporation (CHC) relating to the express exception in the OGSML to the preemption language. First, Norse and CHC argued that the carve-out for local jurisdiction of roads and taxes in the OGSML would be rendered meaningless if the express preemption language was limited to operational aspects of oil and gas development. In rejecting this argument, the court concludes that the regulation of roads and the imposition of taxes can fairly be characterized as operational.²⁸⁸ Second, Norse and CHC argued that the MLRL could be distinguished from the OGSML because the former expressly

²⁸³ See *Wallach*, 23 N.Y.3d at 744.

²⁸⁴ *Id.* (quoting N.Y. Env’tl. Conserv. Law § 23-2703(2) (1987) (subsequently amended)).

²⁸⁵ *Frew Run*, 518 N.E.2d at 923–24 (a construction that would limit a town’s power to adopt zoning regulations should be avoided).

²⁸⁶ *Wallach*, 23 N.Y.3d at 746 (citation omitted) (quoting *Frew Run*, 518 N.E.2d at 922).

²⁸⁷ *Id.* at 748.

²⁸⁸ *Id.*

allows sub-state units to adopt “local zoning ordinances,” but the latter does not.²⁸⁹ Specifically, the carve-out in the MLRL allows “local zoning ordinances or other local laws which impose *stricter mined land reclamation standards or requirements than those [in the MLRL].*”²⁹⁰ In *Frew Run*, the court concluded that this carve-out in the MLRL for “local zoning ordinances” was limited to ordinances related to reclamation, but never answered the question as to why the Legislature needed to carve out zoning ordinances at all if the preemption language was limited to operational matters.²⁹¹ Rather than reconcile this difficulty, the *Wallach* court instead states that the decision in *Frew Run* simply was never based on the carve-out in the MLRL.²⁹²

In both cases, the carve-out in the applicable preemption statute was essentially held to be meaningless to the court’s analysis.²⁹³ Admittedly, the court faithfully applied *Frew Run* in *Wallach*, and would likely have had to overrule *Frew Run* to reach a different result. The *Frew Run* analysis, however, is flawed because it violates the *expressio unius* doctrine of statutory construction.²⁹⁴ If the preemption language in the MLRL has nothing to do with land use, then the legislature had no need to carve out zoning ordinances, even those limited to reclamation. Presumably, zoning that relates to reclamation is not zoning at all (despite the express use of the words “zoning” by the legislature). Again, the legislature did not mean what it actually said.

²⁸⁹ *Id.* at 747 n.4.

²⁹⁰ *Id.* at 745 (emphasis added) (quoting N.Y. Env’tl. Conserv. Law § 23-2703(2) (1987) (subsequently amended)).

²⁹¹ *Frew Run*, 518 N.E.2d at 923.

²⁹² *Wallach*, 23 N.Y.3d at 747 n.4.

²⁹³ *See id.* (“Contrary to the suggestion of Norse and CHC, we did not uphold the town’s zoning restriction in *Frew Run* based on the secondary savings clause—it did not fall within that provision because it was not aimed at reclamation projects. Rather, we held more generally that the preemptive text simply did not encompass the zoning law in the first place. So too with the operative portion of the OGSM’s supersession provision.”).

²⁹⁴ *Expressio unius est exclusio alterius* is Latin for the expression of one thing implies the exclusion of others. *See* Clifton Williams, “Expressio Unius Est Exclusio Alterius,” 15 *Marq. L. Rev.* 191 (1931). In *Lenape Resources, Inc. v. Town of Avon*, No. 1060-2012 (N.Y. Sup. Ct. Livingston Cnty. Mar. 15, 2013) (unpublished), the court dismissed a challenge to a Town of Avon local one-year moratorium because the court felt constrained by *Frew Run*. The court expressed the view, however, that *Frew Run* was flawed for the very reason that it violated the *expressio unius* doctrine. *Lenape*, slip op. at 4. *Lenape* was appealed, but the appeal was dismissed on mootness grounds because the moratorium had expired. *See Lenape Res., Inc. v. Town of Avon*, 2014 N.Y. Slip. Op. 06746, 2014 WL 4942318 (App. Div. Oct. 3, 2014).

After concluding the plain meaning of the statute allows for zoning, the court turns to the second and third prongs of its “express” preemption analysis, analyzing the statutory scheme as a whole and the legislative history. As to legislative history, the court finds little support either way.²⁹⁵ As to the statutory scheme, however, the court looks to what it views as the purpose of the statute: to prevent waste. The court easily finds that “[n]othing in the statute points to the conclusion that a municipality’s decision not to permit drilling equates to waste.”²⁹⁶ Further, the court effectively dismisses the statutory purpose of protecting correlative rights in a footnote.²⁹⁷

In both *Frew Run* and *Wallach*, the court views the issue solely as a matter of express preemption, but largely ignores both the breadth of the preemption language itself and the specificity by which the legislature carved out local jurisdiction over roads and property taxes (or in *Frew Run*, zoning ordinances related to reclamation). Rather, the court focuses on the importance of zoning to home rule municipalities and what it views as the purpose of the statute. By applying what the court views as the purpose of the statutory scheme as a whole, the court effectively narrows the generality of the supersession language.²⁹⁸

Further, the level of generality applied by the court changes depending on the specific statutory language analyzed. The preemption language itself apparently requires a reference to zoning or local land to apply to more than operational matters, which are concerned with the prevention of waste. Zoning is not concerned with the prevention of waste, and therefore clearly is not preempted. But, although the court applies its purpose test to the preemption language itself, it ignores the implications of the test with respect to the carve-out language. Property taxes and the regulation of local roads also have nothing to do with the prevention of waste, and yet they are considered to be operational matters. This enables the court to read the carve-outs as consistent with the preemption language.

[b] Room for Concurrent Jurisdiction in New Mexico

New Mexico lacks an appellate decision as to the preemption of an oil and gas ordinance, but existing case law implies there is much room for

²⁹⁵ *Wallach*, 23 N.Y.3d at 752–53.

²⁹⁶ *Id.* at 750.

²⁹⁷ *Id.* at 751 n.5. This is in stark contrast to the 1992 Colorado Supreme Court decision in *Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992). For a discussion of *Voss*, see § 11.04[3][a], *infra*.

²⁹⁸ See Scalia & Garner, *supra* note 273, at 19.

concurrent jurisdiction of state and local governments. The New Mexico Attorney General's office authored an advisory letter in 1986²⁹⁹ concluding that county regulation was preempted by the New Mexico Oil and Gas Act.³⁰⁰ That letter, however, has little analysis and predates more current judicial precedent such as *San Pedro Mining Corp. v. Board of County Commissioners of Santa Fe County*.³⁰¹

In *San Pedro*, Santa Fe County enacted a comprehensive land development code that included extensive permit requirements for mines.³⁰² The plaintiff began to operate its mine, and the county ordered it to cease for lack of a permit. In response, the plaintiff brought suit.³⁰³ The district court ordered administrative proceedings in the county, which determined that the plaintiff required a mine permit.³⁰⁴ On appeal, the district court held that the New Mexico Mining Act (Mining Act)³⁰⁵ preempted the county's regulatory authority, but that the County nevertheless maintained residual zoning power, including the right to require a permit and to impose conditions on the grant of the permit.³⁰⁶

On appeal from the district court, the New Mexico Court of Appeals first announced the traditional three-part analysis that a local ordinance may be preempted either expressly, by intent of the State to occupy the entire field, or by an implied conflict between the state statute and the ordinance.³⁰⁷ The court declined to determine whether the County's power was a zoning power or a general police power, but held that no preemption had occurred.³⁰⁸ Specifically, it held that the County had the power to regulate much more than just the location of mining activities.³⁰⁹

²⁹⁹Office of the N.M. Att'y Gen., Advisory Letter 86-2, 1986 N.M. Op. Att'y Gen. 515 (Jan. 8, 1986).

³⁰⁰N.M. Stat. Ann. §§ 70-2-1 to -38. See also Kramer & Martin, *supra* note 1, at § 4.05[2][b][viii] (discussing advisory letter and New Mexico trend toward concurrent jurisdiction).

³⁰¹909 P.2d 754 (N.M. Ct. App. 1995).

³⁰²*Id.* at 757.

³⁰³*Id.*

³⁰⁴*Id.* at 757-58.

³⁰⁵N.M. Stat. Ann. §§ 69-36-1 to -20.

³⁰⁶*San Pedro*, 909 P.2d at 758.

³⁰⁷*Id.* at 758-60. See *Rancho Lobo, Ltd. v. Devargas*, 303 F.3d 1195, 1201 (10th Cir. 2002) (succinctly summarizing the test set forth in *San Pedro*).

³⁰⁸*San Pedro*, 909 P.2d at 758.

³⁰⁹*Id.*

Section 69-36-4 of the Mining Act provided (and continues to provide) that “[a]fter the effective date of the New Mexico Mining Act and until the commission adopts regulations necessary to carry out the provisions of the New Mexico Mining Act, county mining laws or ordinances shall apply to mining within their jurisdictions in New Mexico.”³¹⁰ San Pedro Mining Corporation argued this provision meant that once regulations were adopted, county ordinances no longer applied. The court of appeals disagreed, finding the Mining Act ambiguous and holding that no express preemption occurred, while comparing the Mining Act to clear and unambiguous statutory language preempting local control over pesticides.³¹¹

As to implied preemption, the court declined to examine specific provisions of the ordinance because the plaintiff argued only for the preemption of the entire ordinance. The court stated in dicta that to the extent specific provisions of the ordinance actually conflicted with the Mining Act or underlying regulations, the ordinance would be preempted. But, according to the court, the state statute did not address matters that traditionally concern local governments, including “possible nuisances . . . , compatibility of the [activity] with the use made of surrounding lands, . . . and the effect of the . . . activity on surrounding property values.”³¹²

The U.S. Court of Appeals for the Tenth Circuit subsequently extended *San Pedro* to its limits in *Rancho Lobo, Ltd. v. Devargas*.³¹³ The plaintiff in *Rancho Lobo* was granted a permit from the Forestry Division to harvest trees under New Mexico’s Forest Conservation Act.³¹⁴ Rio Arriba County then informed the plaintiff that it must apply for a timber harvest permit under a county ordinance. Rather than seek the county permit, the plaintiff challenged the ordinance on its face as preempted under state law.³¹⁵ The ordinance prohibited clear-cutting without a variance, whereas clear-cutting was allowed under the Forest Conservation Act.³¹⁶ The district court found that the state statute expressly preempted the county ordinance,³¹⁷ but the Tenth Circuit disagreed, straining doctrine to allow the local ordinance to stand.

³¹⁰*Id.* at 759 (quoting N.M. Stat. Ann. § 69-36-4(B)).

³¹¹*Id.* (citing N.M. Stat. Ann. § 76-4-9.1).

³¹²*Id.*

³¹³303 F.3d 1195 (10th Cir. 2002), *cert. denied*, 538 U.S. 906 (2003).

³¹⁴N.M. Stat. Ann. §§ 68-2-1 to -25.

³¹⁵*Rancho Lobo*, 303 F.3d at 1199–1200.

³¹⁶*Id.* at 1200.

³¹⁷*Id.*

Express preemption was not at issue because the Forest Conservation Act did not expressly prohibit local government regulation. Field preemption was a possibility because of the comprehensive nature of the state law. Nevertheless, the court took field preemption off the table, finding it was bound by *San Pedro* to find concurrent jurisdiction.³¹⁸ Turning to implied preemption by conflict, the court defined the scope of the state statute as narrowly as possible, rendering almost meaningless the test that a local ordinance may not prohibit that which a state statute allows. Just because the Forest Conservation Act itself allowed clear-cutting did not preclude local governments from banning the practice.³¹⁹

[c] Conflict Preemption (Usually) Limited to Operational Conflicts in Colorado

In Colorado, implied conflict preemption is usually limited to technical operational conflicts.³²⁰ In the 1992 case of *Board of County Commissioners, La Plata County v. Bowen/Edwards Associates, Inc.*,³²¹ the Colorado Supreme Court considered whether the Colorado Oil and Gas Conservation Act (Colorado O&G Act)³²² preempted the regulation by the County of oil and gas development under the County's land use code.³²³ The County specified various categories of facilities with specific application permit requirements subject to the approval of either the County Planning Commission or the Board of County Commissioners.³²⁴

The court first concluded that the Colorado O&G Act did not expressly preempt the county ordinance. Given the distinct interests between the County (land use control) and the State (oil and gas development), express preemption must be unequivocal.³²⁵ The court also concluded that the Colorado O&G Act showed no implied intent to occupy the entire field. While the Colorado O&G Act shows the State's interest in uniform regulation of the technical operational aspects of production, there was no intent in the

³¹⁸*Id.* at 1203–04.

³¹⁹*Id.* at 1206.

³²⁰The word “usually” is used because, as discussed below, the Colorado Supreme Court has recognized that a ban on oil and gas operations conflicts with state law because the local law frustrates the state statutory scheme, creating a conflict with a significant state interest. See § 11.04[3][a], *infra*.

³²¹830 P.2d 1045 (Colo. 1992) (en banc).

³²²Colo. Rev. Stat. §§ 34-60-101 to -130.

³²³*Bowen/Edwards*, 830 P.2d at 1056–57.

³²⁴*Id.* at 1050.

³²⁵*Id.* at 1057.

statute to preempt *all* aspects of a county's authority to regulate land use just because the land is a source of production.³²⁶ The court then turned to implied conflict preemption, narrowly reading the court of appeals' 1988 holding in *Oborne v. Board of County Commissioners of Douglas County*³²⁷ as applying solely to specific technical operational conflicts.³²⁸ The court thus remanded the case to the court of appeals to direct the district court to conduct further fact-finding on a provision-by-provision basis.³²⁹

The court did state, however, that technical conditions on the drilling or pumping of wells where no conditions were imposed under state law would be a conflict, as would safety regulations or land restoration requirements that conflict with state law requirements.³³⁰ Under Colorado law, the General Assembly could with more specific language preempt a broader sphere of county zoning actions than technical operational conflicts, but the COGCC has no such independent power.³³¹

In the 2002 case of *Town of Frederick v. North American Resources Co.*,³³² the Colorado Court of Appeals applied *Bowen/Edwards*. The defendant,

³²⁶*Id.* at 1058.

³²⁷764 P.2d 397 (Colo. App. 1988). The Supreme Court of Colorado has spoken as to the meaning of *Oborne*, but one could read the court of appeals holding more broadly. In *Oborne*, the Colorado Court of Appeals considered the denial of a special use permit for an oil and gas drilling operation by Douglas County. *Id.* at 399. The court discussed that the county regulation was concerned with water contamination, fire danger, reclamation, and security for plugging and abandonment, all subjects which were covered by the Colorado O&G Act. *Id.* at 401. But, the court also stated that the implied conflict analysis becomes irrelevant when the state has preempted the field, buttressing its conclusion with the recent amendment to the Colorado O&G Act to grant the COGCC the additional authority to regulate "the health, safety, and welfare of the general public." *Id.* at 402 (quoting Colo. Rev. Stat. § 34-60-106(11)). Douglas County actually conceded in light of the amendment that any authority it may have had to deny the permit request had been eliminated. *Id.* The description of *Oborne* in *Bowen/Edwards* belies that the court of appeals relied on an implied preemption of the entire field analysis. Maybe one could describe the "field" in *Oborne* narrowly as the technical operational aspects of oil and gas development, including aspects relating to health, safety, and welfare, but even that characterization is unsatisfactory given that the *Bowen/Edwards* court remanded the case to the trial court to examine specific operational conflicts.

³²⁸*Bowen/Edwards*, 830 P.2d at 1060.

³²⁹*Id.* at 1060 n.7.

³³⁰*Id.* at 1060.

³³¹See *Bd. of Cnty. Comm'rs v. COGCC*, 81 P.3d 1119, 1125 (Colo. App. 2003) (COGCC Rule 303(a), providing that a state-issued permit to drill shall "be binding with respect to any conflicting local governmental permit or land use approval process," is invalid on its face as expanding the operational conflict standard from *Bowen/Edwards*).

³³²60 P.3d 758 (Colo. App. 2002).

North American Resources Company (NARCO), drilled a well after receiving a permit from COGCC, but did not comply with the Town's requirement for a special use permit. The trial court enjoined NARCO until it complied with the local zoning ordinance, but also invalidated the Town's setback, noise abatement, and visual impact requirements as impliedly preempted by operational conflict.³³³ The trial court also found preemption where the Town ordinance gave the Town the authority to directly assess penalties for violations of COGCC rules.³³⁴ The court of appeals affirmed.³³⁵

NARCO conceded that requirements to obtain building permits for above-ground structures, maintain access roads, and submit emergency response and fire protection plans were valid local land use concerns.³³⁶ But it also argued that the ability of the Town to attach conditions to a special use permit frustrated the State's interests. The court disagreed because the Town had no discretion not to approve a permit or to attach conditions beyond those specifically set out in the ordinance.³³⁷ This conclusion may have been different if NARCO had applied for a permit and was denied or extensive conditions were attached. Further, in reaching its holding, the court noted that COGCC promulgated extensive regulations dealing with oil and gas operations after the General Assembly amended the Colorado O&G Act. The changes did not occupy the entire field of oil and gas regulation, but the additional regulations might give rise to additional areas of operational conflict.³³⁸

³³³*Id.* at 765.

³³⁴*Id.* The Colorado O&G Act authorizes "any person or party in interest adversely affected" to sue to enjoin violations of COGCC rules if the COGCC has failed to do so. Colo. Rev. Stat. § 34-60-114. But it also requires notification in writing to COGCC and a request that COGCC sue first. The town's ordinance was preempted by operational conflict because it did not include the notice requirement. *Town of Frederick*, 60 P.3d at 765. The court did not state whether including the notice requirement would cure the conflict.

³³⁵*Town of Frederick*, 60 P.3d at 767. In affirming the trial court, the court of appeals considered legislation adopted by the General Assembly in 1996 that added the following language to the Colorado O&G Act: "Nothing in this subsection (15) shall affect the ability of a local government to charge a reasonable and nondiscriminatory fee for inspection and monitoring for road damage and *compliance with local fire codes, land use permit conditions, and local building codes.*" Colo. Rev. Stat. § 34-60-106(15) (emphasis added). This language further supported the conclusion that the General Assembly did not intend to preempt local regulation of oil and gas operations. *Town of Frederick*, 60 P.3d at 763.

³³⁶*Town of Frederick*, 60 P.3d at 766.

³³⁷*Id.*

³³⁸*Id.* at 763.

What constitutes an operational conflict obviously depends on the view of the court and will vary from case to case. While COGCC has no independent power to preempt all local regulation, it may create operational conflicts when it expands its rules. More extensive state-level regulations may be more burdensome to industry, but *Town of Frederick* teaches that the extent of this statewide regulatory burden affects the likelihood of an operational conflict.

[2] **Avoiding Preemption by Constitutional Mandate to Protect the Environment in Pennsylvania**

In the most unique of preemption cases, the Pennsylvania Supreme Court recently rejected notions of the sub-state unit as a creature of the state, finding preemption illegal under the state constitution. The Pennsylvania case is not technically a preemption case, but it highlights the lengths to which courts may go to protect the environment and the character of local communities.

[a] **Background—*Huntley and Range Resources***

As discussed above, Act 13 was adopted by the Pennsylvania legislature in February 2012, in part to preempt local ordinances. Section 3302 of Act 13 expressly supersedes local ordinances “purporting to regulate oil and gas operations regulated by Chapter 32 (relating to development),” except those adopted pursuant to the Pennsylvania Municipalities Planning Code (MPC) and the Flood Plain Management Act (FPMA). It further provides that even those local ordinances adopted under the MPC (i.e., zoning or subdivision and land development ordinances) or the FPMA (pertaining to floodplains) may not “impose conditions, requirements or limitations on the same features of oil and gas operations” that are regulated under chapter 32 of Act 13.³³⁹ Section 3303 of Act 13 expands on the preemption language in section 3302 by declaring that state environmental acts “occupy the entire field of regulation,” and that the Commonwealth “preempts and supersedes the local regulation of oil and gas operations.”³⁴⁰ In addition to the restrictions in sections 3302 and 3303, 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 by municipalities be no greater than those placed on other industrial uses.³⁴¹

³³⁹58 Pa. Cons. Stat. § 3302. Section 3302 mirrors section 601.602 of the Pennsylvania Oil and Gas Act (Pennsylvania O&G Act), which was repealed by Act 13. See 58 Pa. Stat. § 601.602 (repealed by Act of Feb. 14, 2012, 2012 Pa. Laws 87, No. 13, § 3(2)).

³⁴⁰58 Pa. Cons. Stat. § 3303.

³⁴¹*Id.* § 3304(b)(3), (5).

The specificity in section 3304 preempting zoning as to the location of wells is a response to *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*.³⁴² There, the Supreme Court of Pennsylvania considered whether the Pennsylvania Oil and Gas Act (Pennsylvania O&G Act) prohibited the Borough Council from regulating the location of a gas well under its MPC zoning power. The legislature amended the Pennsylvania O&G Act in 1992 to broaden its express preemption provision (with language that is substantially similar to section 3302 of Act 13).³⁴³ After first recognizing that sub-state units are creatures of the state,³⁴⁴ the court found that the borough zoning ordinance did not “impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by the [Pennsylvania O&G Act], or accomplish the same purposes as set forth in the [Pennsylvania O&G Act],” activities that were preempted.³⁴⁵

The court first held that the Pennsylvania O&G Act regulates the manner of operations of oil and gas wells, while the borough ordinance concerned the location of wells, regardless that the local ordinance might preclude oil and gas drilling in certain zones.³⁴⁶ The court then highlighted the difference in the purposes between the state law and the local ordinance. Although both were concerned with protecting public health and safety, zoning ordinances are focused on preserving the character of residential neighborhoods and encouraging beneficial and compatible land uses.³⁴⁷

On the same day, the court in *Range Resources–Appalachia, LLC v. Salem Township*³⁴⁸ struck down a municipal ordinance based on both express preemption and principles of conflict preemption.³⁴⁹ In contrast to the ordinance in *Huntley*, the Salem ordinance was not concerned with

³⁴²964 A.2d 855 (Pa. 2009).

³⁴³Section 601.602 of the Pennsylvania O&G Act provided in relevant part: “No ordinances or enactments adopted pursuant to the [MPC and FPMA] shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act.” 58 Pa. Stat. § 601.602 (repealed by Act of Feb. 14, 2012, 2012 Pa. Laws 87, No. 13, § 3(2)).

³⁴⁴*Huntley*, 964 A.2d at 862.

³⁴⁵*Id.* at 863 (internal quotation marks omitted) (quoting 58 Pa. Stat. § 601.602).

³⁴⁶*Id.* at 864.

³⁴⁷*Id.* at 865.

³⁴⁸964 A.2d 869 (Pa. 2009).

³⁴⁹*Id.* at 877.

controlling the location of wells under zoning principles, but was directed at oil and gas operations by establishing permitting procedures such as bonding requirements, plugging, and site restoration, and the imposition of costs to restore streets.³⁵⁰ Further, even after compliance with the permitting procedure, issuance of a permit was at the discretion of the Board of Supervisors at a public meeting.³⁵¹

After *Huntley* and *Range Resources*, it was clear that the state could preempt ordinances that sought to control the *operation* of oil and gas wells. More broadly, *Huntley* also implied that the creator state could potentially preempt sub-state unit zoning ordinances as to the *location* of wells, if state legislation was drafted precisely enough.

[b] The Commonwealth Court Holding in *Robinson Township*

The notion that the state creator could preempt local government control over well location was first turned on its head when section 3304 of Act 13 was invalidated by the commonwealth court in *Robinson Township v. Commonwealth of Pennsylvania*.³⁵² The petitioners alleged, and the respondents agreed, that Act 13 required local governments to modify their zoning ordinances.³⁵³ This, the commonwealth court held, violated substantive due process because it eviscerated the ability of sub-state units to control incompatible uses and protect neighboring property owners.³⁵⁴ In other words, Act 13 did not protect the ability of sub-state units to keep the “pig” out of the “parlor” that the U.S. Supreme Court originally protected in *Euclid*.³⁵⁵

Although finding a substantive due process violation, the commonwealth court considered and rejected the argument that section 3304 denied sub-state units the ability to meet their obligations to protect the state’s natural

³⁵⁰ *Id.* at 875.

³⁵¹ *Id.* at 876.

³⁵² 52 A.3d 463, 494 (Pa. Commw. Ct. 2012), *aff’d in part, rev’d in part, vacated in part, remanded in part*, 83 A.3d 901 (Pa. 2013). The commonwealth court also held that section 3215(b)(4) of Act 13 was unconstitutional. Per the court, the absence of standards for the granting of waivers to well setback requirements was an impermissible delegation to the Pennsylvania Department of Environmental Protection (PADEP) of legislative authority under the Pennsylvania Constitution. 52 A.3d at 493–94.

³⁵³ 52 A.3d at 469.

³⁵⁴ *Id.* at 485.

³⁵⁵ *Id.* at 484.

resources under article 1, section 27 of the Pennsylvania Constitution (Environmental Rights Amendment),³⁵⁶ which provides in part:

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.³⁵⁷

As viewed by the commonwealth court, the state creator had, with the tool of preemption, relieved the creature sub-state units of their responsibilities to consider environmental concerns under the Environmental Rights Amendment.

[c] The Supreme Court Holding in *Robinson Township*

In what is already regarded as a seminal environmental law holding,³⁵⁸ a plurality of three justices of the Pennsylvania Supreme Court wholeheartedly disagreed on state constitutional grounds.³⁵⁹ The cross-appellants (referred to by the plurality as the “citizens”) did not dispute that the General Assembly had the power to preempt local laws or even to remove their zoning power entirely.³⁶⁰ But the citizens argued that so long as zoning power is granted, local governments must ensure that the use of property does not cause harm to neighboring property rights or interests and that zoning protects health and welfare.³⁶¹ Rather than view the case as a zoning matter, however, the court viewed the dispute as an “asserted vindication of citizens’ rights to quality of life on their properties and in their hometowns” under the state’s Environmental Rights Amendment.³⁶²

³⁵⁶*Id.* at 488–89. The commonwealth court previously had held that in addition to the state, sub-state units are also trustees of the state’s natural resources. *Comty. Coll. of Del. Cnty. v. Fox*, 342 A.2d 468 (Pa. Commw. Ct. 1975).

³⁵⁷Pa. Const. art 1, § 27.

³⁵⁸*See, e.g.*, John Dernbach, “The Pennsylvania Supreme Court’s Robinson Township Decision: A Step Back for Marcellus Shale, a Step Forward for Environmental Rights and the Public Trust,” *Widener Env’tl Law Ctr. Blog* (Dec. 21, 2013).

³⁵⁹*Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013). Justice Todd and Justice McCaffery joined Chief Justice Castille in striking down sections 3215(b)(4), 3215(d), 3303, and 3304 based on the Environmental Rights Amendment. *Id.* at 1000. Justice Baer in concurrence would strike down the same sections, but instead based on substantive due process grounds. *Id.* at 1000–01 (Baer, J., concurring). Justice Saylor and Justice Eakin dissented. *Id.* at 1014 (Saylor, J. dissenting); *id.* at 1016 (Eakin, J., dissenting).

³⁶⁰*Id.* at 936.

³⁶¹*Id.*

³⁶²*Id.* at 942 (citing Pa. Const. art. 1, § 27).

To the plurality, the declared “right” of the citizens in the first clause of the Environmental Rights Amendment to clean air and pure water is the type of individual right on par with political rights “inherent in man’s nature and preserved rather than created by the Pennsylvania Constitution.”³⁶³ The second and third clauses of the Environmental Rights Amendment describe the state’s public trust duties over its public natural resources. The court defined these resources to include not only public lands but also “resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna”³⁶⁴

After discussion of general principles applicable to trusts and trustees, the court held that the Commonwealth has two distinct obligations as trustee. One of those duties (characterized as the second obligation) is to act affirmatively to enact environmental protections. According to the court, because it has enacted environmental protection statutes, “the General Assembly has not shied from this duty”³⁶⁵ The other duty (characterized as the first obligation) is to refrain from “permitting or encouraging the degradation, diminution, or depletion of public natural resources” either through direct state action or the failure to constrain the actions of private parties.³⁶⁶ In respect of this duty, Act 13 was held to degrade the corpus of the trust.³⁶⁷

Further, both the state and sub-state units have the obligation as guardians to protect the public trust. Act 13 violates the Environmental Rights Amendment, not only because it encourages development at the expense of the environment but also because it forces sub-state units to violate the Amendment.³⁶⁸ According to the court, “constitutional commands regarding municipalities’ obligations and duties to their citizens cannot be abrogated by statute.”³⁶⁹ The state may create or destroy sub-state units, but once created, they must be allowed to protect their citizens from environmental harms.

³⁶³ *Id.* at 948.

³⁶⁴ *Id.* at 955.

³⁶⁵ *Id.* at 958.

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 980.

³⁶⁸ *Id.* 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.”).

³⁶⁹ *Id.* at 977.

In addition to sections 3303 and 3304, the court also enjoined sections 3215(b)(4), and 3215(d) as violating the Environmental Rights Amendment.³⁷⁰ Section 3215(b) contains setback requirements for wells from streams, springs, bodies of water, and wetlands.³⁷¹ Clause (b)(4), however, states that the Pennsylvania Department of Environmental Protection (PADEP) “shall” waive the setbacks if the operator submits a plan “identifying additional measures, facilities or practices to be employed . . . necessary to protect the waters of [the] Commonwealth.”³⁷² If granted, the waiver “shall include additional terms and conditions required by the department necessary to protect the waters of [the] Commonwealth.”³⁷³ The court found that the standard of “necessary” protection was inadequate, lacking “identifiable and readily-enforceable environmental standards.”³⁷⁴ It also found the remainder of section 3215(b) unseverable.³⁷⁵ The result is that Pennsylvania law no longer contains setbacks from water bodies and wetlands.³⁷⁶

Under section 3215(d), the PADEP may (but is not required) to consider comments of a municipality in making a determination on a well permit, but section 3215(d) then expressly denies municipalities the right to appeal the PADEP’s permitting decision.³⁷⁷ Because it marginalized local participation, section 3215(d) also was struck down.³⁷⁸ The court then remanded to the commonwealth court to determine whether any remaining provisions of Act 13 or the Act in its entirety might be invalid under severability principles.³⁷⁹ The court, however, did not remand for fact-finding any question as to the balancing of environmental harms and economic

³⁷⁰*Id.* at 1000.

³⁷¹58 Pa. Cons. Stat. § 3215(b).

³⁷²*Robinson Twp.*, 83 A.3d at 973 (quoting 58 Pa. Cons. Stat. § 3215(b)(4)).

³⁷³*Id.* (quoting 58 Pa. Cons. Stat. § 3215(b)(4)).

³⁷⁴*Id.* at 983.

³⁷⁵*Id.* at 999.

³⁷⁶Governor Tom Corbett has urged drillers to voluntarily comply with the stricken setback requirements. See Matt Fair, “Pa. Gov. Urges Drillers to Abide by Axed Fracking Rules,” *Law360* (Jan. 6, 2014).

³⁷⁷58 Pa. Cons. Stat. § 3215(d).

³⁷⁸*Robinson Twp.*, 83 A.3d at 984. Note that Colorado rules allow local government participation in permitting decisions. See § 11.05[2], *infra*.

³⁷⁹*Robinson Twp.*, 83 A.3d at 999.

benefits relative to shale gas development.³⁸⁰ Instead, the court adopted the citizens' conclusions that the "optimal" accommodation of industry under Act 13 "unquestionably has and will have a lasting, and undeniably detrimental, impact" on surface and ground water and other aspects of the natural environment that make up the public trust.³⁸¹

Justice Eakin in dissent was particularly concerned with the speculative judicial fact-finding undertaken by the plurality as to the harms of oil and gas development on the environment.³⁸² For both Justice Eakin and Justice Saylor, allowing the court to substitute its judgment for that of the General Assembly violated the very idea of separation of powers.³⁸³ The dissent of Justice Saylor also found the plurality's opinion to be very much an affront to the creature theory, finding "much force in the notion that, since municipalities are creatures of the sovereign and entirely dependent upon the will of the state for their very existence, they have no authority or duty to challenge the state's alteration of their delegated powers."³⁸⁴

[d] On Remand in the Commonwealth Court

On remand in *Robinson Township v. Commonwealth* (*Robinson Twp. II*),³⁸⁵ the commonwealth court gutted most of what remained of chapter 33 of Act 13, invalidating sections 3305, 3306, 3307, 3308, and 3309(a).³⁸⁶ Sections 3305 through 3309 generally provide for review and invalidation by the Pennsylvania Public Utility Commission (PUC) and the commonwealth court of local ordinances that violate either (1) the MPC; (2) chapter 32 (relating to operations); or (3) chapter 33 (relating to preemption of local ordinances), and related remedies.³⁸⁷ Although two of the three preemption provisions (sections 3303 and 3304) in chapter 33 were struck down,

³⁸⁰The general counsel for Pennsylvania Governor Tom Corbett filed a motion with the Pennsylvania Supreme Court for the issue of balancing as to the environmental harms of shale gas development to be sent back to the commonwealth court for evidentiary hearings. See Matt Fair, "Pa. Gov. Wants Landmark Fracking Ruling Reconsidered," *Law360* (Jan. 2, 2014).

³⁸¹*Robinson Twp.*, 83 A.3d at 975.

³⁸²*Id.* at 1015 n.2 ("We can speculate about which transport will be better or worse, but we have held no hearings, taken no evidence. My speculations are just that, but they are the same type of speculation that girds the lead opinion's broad language and cross-appellants' parade of horrors.")

³⁸³*Id.* at 1013.

³⁸⁴*Id.* at 1014.

³⁸⁵96 A.3d 1104 (Pa. Commw. Ct. 2014).

³⁸⁶*Id.* at 1122.

³⁸⁷58 Pa. Cons. Stat. §§ 3305–3309.

most of section 3302 remains, as does chapter 32 (relating to the “how,” not the “where” of oil and gas operations) and the MPC. Why then were the remedial provisions invalidated if other operative requirements remain to be enforced? The majority reasons that the “statutory scheme cannot be implemented,”³⁸⁸ but as Judges Brobson and McCullough argued in dissent, there is no reason the remedial provisions should not be severable.³⁸⁹

The court also invalidated the last sentence of section 3302, which provides that “[t]he Commonwealth, by this section, preempts and supersedes the regulation of oil and gas operations *as provided in this chapter*.”³⁹⁰ It reasoned that the only operative and substantive provisions, sections 3303 and 3304, were struck down, so nothing remained in chapter 33 to preempt and supersede state law. But the court did not invalidate the remainder of section 3302,³⁹¹ which itself preempts the “how” of oil and gas operations. It is perplexing how the majority reads section 3302 out of the statute while at the same time finds that all but its last sentence remains valid. The court enjoins the application and enforcement of section 3302 as it relates to all of chapter 33, but section 3302 *is* in chapter 33, so it is not exactly clear what the court means. As Judges Brobson and McCullough understand the majority opinion, all but the last sentence of section 3302 remains enforceable.³⁹²

[e] Implications of *Robinson Township*

A number of conclusions may be drawn from the Pennsylvania Supreme Court holding. First, according to the court, before the legislature acts, the Environmental Rights Amendment now “requires each branch of

³⁸⁸*Robinson Twp. II*, 96 A.3d at 1122.

³⁸⁹*Id.* at 1124 (Brobson, J., dissenting in part); *id.* at 1126 (McCullough, J., concurring in part, dissenting in part).

³⁹⁰*Id.* at 1120 (quoting 58 Pa. Cons. Stat. § 3302). The only difference between the language in section 3302 and section 602 of the previous Pennsylvania O&G Act, 58 Pa. Stat. § 601.602 (repealed by Act of Feb. 14, 2012, Pa. Laws No. 87, No. 13, § 3(2)), considered in *Huntley*, is that section 3302 supersedes the regulation of oil and gas operations “as provided in this chapter,” and section 602 supersedes the regulation of oil and gas operations “as herein defined.” Without adequate explanation, the court found this distinction significant, see *Robinson Twp. II*, 96 A.3d at 1121 n.27, even though section 3302 (which still preempts the “how” of oil and gas operations) itself contains supersession language. In dissent, Judge Brobson also argues that the majority disregards section 4 of Act 13, where the legislature explained that any changes in the language of section 3302 from section 602 were conforming stylistic changes only. *Id.* at 1123 n.1.

³⁹¹See *id.* at 1119 (severing the last sentence from “the remaining valid provisions” of section 3302).

³⁹²See *id.* at 1123 (Brobson, J., dissenting in part); *id.* at 1126 (McCullough, J., concurring in part, dissenting in part).

government to consider *in advance* of proceeding the environmental effect of *any* proposed action on the constitutionally protected features.”³⁹³ At the federal level, the National Environmental Policy Act of 1969 (NEPA)³⁹⁴ requires the preparation of environmental impact statements for major federal actions.³⁹⁵ Similarly, environmental studies are required at the state level in New York under the New York State Environmental Quality Review Act (SEQR)³⁹⁶ and in California under the California Environmental Quality Act (CEQA).³⁹⁷ Those Acts contain detailed requirements, underlying regulations, and significant guidance. In contrast, the judge-made environmental review now required in Pennsylvania contains no meaningful standards,³⁹⁸ and is arguably broader in that it applies to any proposed action that affects the natural environment in trust.

Second, so long as environmental reviews are completed as required, NEPA would still allow a project to proceed, even if such a project would cause environmental harm. Such is not the case in Pennsylvania. After *Robinson Township*, no decision of the Pennsylvania General Assembly that promotes development will be immune from judicial oversight. Any government decision to roll back environmental protections likely will be suspect, including those that the government determines on *ex post* analysis unduly restrict development to the economic detriment of the state.³⁹⁹ The General Assembly may satisfy its duty to protect the public trust of the natural resources “by enacting legislation that adequately restrains actions of private parties likely to cause harm to protected aspects of our environment.”⁴⁰⁰ But when legislation is enacted that promotes, rather than constrains, development, the State “must exercise its police powers to foster sustainable development in a manner that respects the reserved rights

³⁹³*Robinson Twp.*, 83 A.3d at 952 (emphasis added).

³⁹⁴42 U.S.C. §§ 4321–4347.

³⁹⁵*See id.* § 4332(C).

³⁹⁶N.Y. Env'tl. Conserv. Law §§ 8-0101 to -0117. *See supra* note 91.

³⁹⁷*See* Cal. Pub. Res. Code §§ 21000–21189.3.

³⁹⁸*See* Paul K. Stockman & Erin N. Fischer, “The Harmful Effects of Robinson Township v. Commonwealth,” *Law360* (Jan. 6, 2014).

³⁹⁹The court states that the trust’s directions “do not require a freeze of the existing public natural resource stock,” and would allow “legitimate development,” but only with the “evident goal of promoting sustainable development.” *Robinson Twp.*, 83 A.3d at 958. The line between permissible and impermissible development obviously is unclear, but at a minimum seems to require the state, “so far as feasible, to avoid or minimize any harm to [trust resources].” *Id.* (citing *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709, 727–29 (Cal. 1983)).

⁴⁰⁰*Id.* at 979.

of the people to a clean, healthy, and esthetically-pleasing environment.”⁴⁰¹ In this sense, the Environmental Rights Amendment appears to act like a one-way ratchet.⁴⁰² Only more protective legislation will be permitted.

Third, regardless of their status as creatures of the state, sub-state units may now act under a strong form precautionary principle to prevent impairment of the local environment unimpeded by state-wide interests.⁴⁰³ The Environmental Rights Amendment “would permit not only reactive but also *anticipatory* protection of the environment for the benefit of current and future generations.”⁴⁰⁴ Once sub-state units have been created, the General Assembly cannot strip these units of the right to protect their citizens or frustrate these citizens’ expectations concerning the environment.⁴⁰⁵ More broadly, sub-state units not only have a right but also an obligation, concurrent with the obligation of the State, to protect the environment.⁴⁰⁶ Clearly, sub-state units that do not carefully consider environmental impacts in oil and gas zoning actions will be subject to suit under the Environmental Rights Amendment.⁴⁰⁷ Sub-state units could also be subject to suit for not acting in an anticipatory manner by enacting more restrictive zoning ordinances, or even bans, in environmentally sensitive locations.⁴⁰⁸

⁴⁰¹ *Id.* at 981.

⁴⁰² This one-way ratchet effect was articulated to the author in an email from Professor Bruce Kramer on January 1, 2014.

⁴⁰³ The strong precautionary principle requires regulation when an activity poses a serious threat to human health or the environment even though the nature or extent of the threat is not fully understood. The principle also switches the burden to the proponent of the activity to show that the activity should be allowed. See Noah M. Sachs, “Rescuing the Strong Precautionary Principle from Its Critics,” 11 *U. Ill. L. Rev.* 1285, 1288 (2011).

⁴⁰⁴ *Robinson Twp.*, 83 A.3d at 963 (emphasis added).

⁴⁰⁵ See *id.* at 977–78.

⁴⁰⁶ See *id.*

⁴⁰⁷ In a recent decision, the Court of Common Pleas of Lycoming County, Pennsylvania, struck down a conditional use permit granted by Fairfield Township to an oil and gas operator based on a petition of local residents, finding under *Robinson Township* that the Township “has a substantial and immediate interest in protecting the environment and the quality of life within its borders” that “is a constitutional charge that must be respected by all levels of government.” *Gorsline v. Fairfield Twp.*, No. 14-000130, slip op. at 25 (Pa. Ct. of Common Pleas Lycoming Cnty. Aug. 29, 2014) (citing *Robinson Twp.*, 83 A.3d at 919–20, 952).

⁴⁰⁸ Application of the strong form of the precautionary principle can actually be seen in the holding of the court itself. The plurality did not base its decision on any factual showing of the environmental harm attendant to hydraulic fracturing. Rather, the plurality found on its own that “the exploitation of the Marcellus Shale Formation will produce a

Fourth, the plurality disregards the fact that oil and gas must be produced where it is located, which necessarily involves disproportionate burdens. The plurality struck down the statewide permitting of oil and gas as a matter of right in part as “incapable of conserving or maintaining the constitutionally-protected aspects of the public environment and of a certain quality of life.”⁴⁰⁹ But it also based its holding on its concern that “some properties and communities will carry much heavier environmental and habitability burdens than others” as inconsistent with the obligation of the State to act for the benefit of “all of the people.”⁴¹⁰ Even in an area where landowners generally support shale gas development, after *Robinson Township* should the concerns of a few surface owners prevail because such surface owners are disproportionately affected compared to surface owners, in say, Pittsburgh? If sub-state units must, in accordance with their Environmental Rights Amendment duties, always act to control such disproportionate burdens, will places remain to drill in Pennsylvania?

Fifth, consider what the court did not do. Neither the supreme court nor the commonwealth court on remand invalidated section 3302 of Act 13. Under section 3302, a local ordinance still may not purport to regulate oil and gas activity outside the confines of the MPC and the FPMA, without even getting into the features and purpose analysis in *Huntley*. And even when a sub-state unit complies with the MPC or FPMA, consistent with *Huntley*, sub-state units still may not regulate the manner of oil and gas operations, even though they may prescribe the location of wells.⁴¹¹ In addition to the dissents in *Robinson Twp. II*, supporting this conclusion is a recent opinion in *ION Geophysical Corp. v. Hempfield Township*,⁴¹² where the U.S. District Court for the Western District of Pennsylvania granted a preliminary injunction to a seismic operator against a township that refused to allow seismic testing on township roads. Concluding that the operator demonstrated a likelihood of success on the merits, the court found that section 3302 preempted the Township from banning seismic

detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction.” *Robinson Twp.*, 83 A.3d at 976. One could view the court as simply antagonistic to oil and gas development, see Stockman & Fischer, *supra* note 398, but the court’s broad language not only empowers local governments to control development in furtherance of environmental protection but also actually demands that they do so.

⁴⁰⁹*Robinson Twp.*, 83 A.3d at 979.

⁴¹⁰*Id.* at 980. See also Dernbach, *supra* note 358.

⁴¹¹See § 11.04[2][a], *supra*.

⁴¹²No. 14-410, 2014 WL 1405397 (W.D. Pa. Apr. 10, 2014).

testing in its jurisdiction.⁴¹³ As section 3302 was allowed to stand, Pennsylvania sub-state units may only satisfy their trust obligations under the Environmental Rights Amendment by regulating the location of wells, not through oil and gas operational performance standards that presumably still conflict with state law under *Huntley*.

Finally, when rewriting Act 13 (or starting from scratch) it appears the state legislature must not only allow sub-state units to control development at the local level but must also give local governments a seat at the table in state-level permitting decisions. By striking down section 3215(d), the court requires the State to account for local conditions so as not to cause a disparate impact on trust beneficiaries.⁴¹⁴ It would also seem to demand that local governments have a right to appeal permitting decisions.⁴¹⁵

[3] Some Limitations on Local Control

Despite the predilection of some courts to avoid preemption, some courts may be more critical of a complete ban than of traditional zoning or health and safety regulations. While a ban may not present discrete operational conflicts, it frustrates the overall purposes of oil and gas conservation statutes to efficiently produce oil and gas.

[a] A Complete Ban Frustrates Regulatory Scheme in Colorado

In the 1992 case of *Voss v. Lundvall Bros., Inc.*,⁴¹⁶ the Colorado Supreme Court considered whether a complete ban on oil and gas exploration and production in the home-rule City of Greeley was preempted by the Colorado Oil and Gas Conservation Act (Colorado O&G Act).⁴¹⁷ The court began by noting that zoning authority to control land use within a

⁴¹³*Id.* at *9. According to the court, the *Robinson Township* case has no effect on Pennsylvania's existing oil and gas laws that were either enacted before Act 13 or not at issue in the case. *Id.* at *7. In another recent case, the commonwealth court refused to address whether townships may regulate seismic operations by mandating the execution of "seismic agreements" or prohibit seismic operations by administrative decree. *Seitel Data, Ltd. v. Ctr. Twp.*, 92 A.3d 851 (Pa. Commw. Ct. 2014). While section 3306 of Act 13 grants jurisdiction to the commonwealth court in an action brought by a party aggrieved by the enactment or enforcement of a local ordinance that violates the preemption provisions in section 3302, the court concluded that it lacked jurisdiction because the township defendants had not actually enacted ordinances. Accordingly, the court transferred the actions to the court of common pleas. *Id.* at 864.

⁴¹⁴*Robinson Twp.*, 83 A.3d at 984.

⁴¹⁵The court refers to the lack of a right to appeal as a "remarkable provision." *Id.* at 973.

⁴¹⁶830 P.2d 1061 (Colo. 1992).

⁴¹⁷Colo. Rev. Stat. §§ 34-60-101 to -130.

home-rule city's borders is a matter of local concern.⁴¹⁸ Further, nothing in the Colorado O&G Act showed any intent of the legislature to preempt all aspects of land use authority.⁴¹⁹ The court then turned to the multi-factor test for matters of mixed state and local concern. The need for statewide uniformity favored the state, as a complete ban on drilling could cause waste and affect correlative rights in a pool that extends beyond the city borders.⁴²⁰ Similarly, the ban caused extraterritorial economic effects by limiting production to the portion of a common pool that is outside the border of the city. The regulation of oil and gas also was found to be a matter traditionally subject to state rather than local control.⁴²¹

Does *Voss* provide grounds independent from technical operational conflicts to overturn a local law? It seems to. Courts may confuse this conflicts analysis with an implied field preemption analysis, but the Colorado courts have been careful to state that Colorado state law does not occupy the entire field of oil and gas regulation. Although *Bowen/Edwards* and *Voss* were issued on the same day, they contain very different analytical approaches to the question of conflict preemption. *Voss* focuses on the regulatory scheme as a whole in the case of a complete ban, while *Bowen/Edwards* examined technical operational conflicts when the local ordinance seeks to control, rather than ban, all operations.

On August 27, 2014, Boulder County District Court Judge D.D. Mallard struck down the City of Lafayette, Colorado ban on new oil and gas extraction activities on summary judgment.⁴²² Rather than simply rely on *Voss*, Judge Mallard somewhat mixed together the operational conflicts analysis from *Bowen/Edwards* and the regulatory scheme conflict analysis from *Voss*, finding that the Lafayette ban irreconcilably conflicted with state law, and permanently enjoining the entire Lafayette charter amendment.⁴²³ The court never addressed the provisions of the charter amendment that sought to strip corporations of their constitutional rights of personhood. Arguably, it had no reason to do so because only corporations that violated the prohibitions on oil and gas activity were stripped of such rights.

⁴¹⁸ *Voss*, 803 P.2d at 1064.

⁴¹⁹ *Id.* at 1066.

⁴²⁰ *Id.* at 1067.

⁴²¹ *Id.* at 1068.

⁴²² Order Granting Motion for Summary Judgment, *COGA v. City of Lafayette*, No. 13CV31746 (Colo. Dist. Ct. Boulder Cnty. Aug. 27, 2014).

⁴²³ *Id.* at 11–12.

Although the court never so stated, the provisions infringing constitutional rights could not reasonably be severed from the impermissible ban.

[b] Whether a Ban on Hydraulic Fracturing Is Preempted in Colorado

A complete ban on oil and gas operations was struck down in *Voss*,⁴²⁴ but two trial courts in Colorado recently went further, holding that a ban on hydraulic fracturing also impermissibly conflicts with state law. On July 24, 2014, Boulder County District Court Judge D.D. Mallard struck down the voter-initiated ban adopted by the City of Longmont,⁴²⁵ and on August 7, 2014, Larimer County Judge Gregory Lammons struck down the five-year moratorium adopted by Fort Collins,⁴²⁶ in each case granting plaintiff's motion for summary judgment.

Both courts found a technical operational conflict between the local and state laws.⁴²⁷ Judge Mallard stated, "The operational conflict in this case is obvious. The [COGCC] permits hydraulic fracturing and Longmont prohibits it."⁴²⁸ Judge Lammons, however, was more careful with his language, stating that the Fort Collins ban prohibits what state law "expressly *authorizes* the [COGCC] to permit."⁴²⁹ On appeal, the defendants will likely argue, as they did before the trial courts, that while COGCC has the authority, it does not actually directly regulate the technical operational aspects of hydraulic fracturing.⁴³⁰

⁴²⁴See § 11.04[3][a], *supra*.

⁴²⁵Longmont Order, *supra* note 35. See also Citizen Intervenors' Notice of Appeal, *Longmont II*, No. 2013CV63 (Colo. Dist. Ct. Boulder Cnty. Sept. 10, 2014).

⁴²⁶Order Granting Plaintiff's Motion for Summary Judgment on First Claim for Relief and Denying Defendant's Cross-Motion for Summary Judgment, *COGA v. City of Fort Collins*, No. 13CV31385 (Colo. Dist. Ct. Larimer Cnty. Aug. 7, 2014) (Fort Collins Order).

⁴²⁷Longmont Order, *supra* note 35, at 13; Fort Collins Order, *supra* note 426, at 8. Both courts also considered whether "implied preemption" provides a separate ground to preempt the local ordinance, with Judge Lammons finding implied preemption and Judge Mallard declining. Longmont Order, *supra* note 35, at 11; Fort Collins Order, *supra* note 426, at 7. As discussed above, "implied preemption" by reason of the frustration of a significant state interest seems to present independent grounds under *Voss* to invalidate a local law, separate and apart from either implied field preemption or technical operational conflicts. See § 11.04[3][a], *supra*. Both courts seemed to have some difficulty reconciling *Voss* and *Bowen/Edwards*.

⁴²⁸Longmont Order, *supra* note 35, at 14.

⁴²⁹Fort Collins Order, *supra* note 426, at 8.

⁴³⁰Note also that the Fort Collins ordinance is a moratorium, not a permanent ban. Judge Lammons considered the distinction without a difference, but also noted that no Colorado appellate court has addressed the distinction in the preemption context. *Id.* at 4.

Recent Colorado Supreme Court precedent informs the analysis. In *Colorado Mining Ass'n v. Board of County Commissioners of Summit County*,⁴³¹ the court considered Summit County's ban on toxic or acidic chemicals such as cyanide in mining heap leaching and vat leaching operations. The Mined Land Reclamation Board (Board) characterized the County's ordinance as a reclamation standard, and the court agreed, granting deference to the agency's interpretation of its own enabling statute.⁴³² The court referred to *Voss* for the proposition that if a home rule city could not ban what a state agency may authorize, then certainly a county could not,⁴³³ despite language in the mining statute that specifically required mining operators to comply with local land use requirements.⁴³⁴ Thus, the ordinance was preempted as contrary to the goals of the mining law and to the General Assembly's decision to authorize mining using the controversial chemical.⁴³⁵ In a quote instructive to the hydraulic fracturing debate, the court stated:

A patchwork of county-level bans on certain mining extraction methods would inhibit what the General Assembly has recognized as a necessary activity and would impede the orderly development of Colorado's mineral resources. It would prohibit the recovery of minerals in areas where operations using cyanide or other chemicals for mineral extraction can be conducted in an environmentally protective manner.⁴³⁶

There are some distinctions, however, between hydraulic fracturing and heap leaching. Colorado statutes authorize the regulation by COGCC of drilling operations, including the shooting and treatment of wells, under a number of statutory provisions for purposes that include the protection of the health, safety, and welfare of the general public in the conduct of oil

⁴³¹199 P.3d 718 (Colo. 2009).

⁴³²*Id.* at 726. The dissent characterized the Summit County ordinance as simply the lawful exercise by the County of its land use authority, expressing the County's conclusion that heap leaching was an inappropriate use of land in all zoning districts in the county. *Id.* at 739 (Martinez, J., dissenting).

⁴³³*Id.* at 730.

⁴³⁴*See id.* at 728 ("Any mining operator subject to this article shall also be subject to zoning and land use authority and regulation by political subdivisions as provided by law." (quoting Colo. Rev. Stat. § 34-32-109(6))).

⁴³⁵*Id.* at 730-31.

⁴³⁶*Id.* at 731 (citation omitted).

and gas operations.⁴³⁷ In furtherance of the statute, COGCC rules regulate certain aspects of hydraulic fracturing, including fluid disclosure and groundwater monitoring.⁴³⁸ In contrast, the General Assembly has more specifically considered and authorized heap leaching mining operations through specialized application, permit, and inspection procedures.⁴³⁹

While Colorado statutes are broad enough to cover hydraulic fracturing operations, and COGCC rules regulate certain aspects of the process, unlike heap leaching, the General Assembly has not imposed specific requirements for permitting and approval of fracturing treatment and arguably never expressly authorized the practice. This, however, is too thin a slice to justify a different outcome. Just as heap leaching was characterized in *Summit County* as one part of a reclamation standard, hydraulic fracturing should be characterized as simply one aspect of drilling operations, both of which are heavily regulated under their respective statutes and agency rules.

[c] Field (or Express) Preemption in Louisiana

In the rare case where the court finds implied field preemption, it does not purport to rely on the express preemption language in the state statutes. Field preemption is rare, and may be confused by the court. When a court finds that the legislature intended to preempt the field, the court then must define the scope of the field, and the definition can be important. Consider *Energy Management Corp. v. City of Shreveport*,⁴⁴⁰ where the court struggled with its own definition of the field preempted. The City of Shreveport passed an ordinance that prohibited drilling within 1,000 feet of a lake. Energy Management Corp. (EMC) acquired leases to drill in and around the lake, and sued after the City made clear it would not issue a variance. Even though EMC had not applied for a drilling permit from the

⁴³⁷ Colo. Rev. Stat. § 34-60-106(11)(a)(II). More broadly, COGCC has the authority to regulate not just the “drilling, producing, and plugging of wells” but also “all other operations for the production of oil or gas.” *Id.* § 34-60-106(2)(a). COGCC also has the authority to regulate the “shooting and chemical treatment of wells,” *id.* § 34-60-106(2)(b), and to “prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations,” *id.* § 34-60-106(2)(d).

⁴³⁸ See, e.g., COGCC Rules 205A (hydraulic fracturing chemical disclosure), 316(C) (notice of intent to conduct hydraulic fracturing treatment), 317 (general drilling rules), 318A.e.(4) (groundwater baseline sampling and monitoring for Greater Wattenberg Area), 324A (pollution), 337 (spill/release report), 609 (statewide groundwater baseline sampling and monitoring).

⁴³⁹ See Colo. Rev. Stat. §§ 34-32-103(3.5), (4.9), -112.5, -116.5.

⁴⁴⁰ 397 F.3d 297 (5th Cir. 2005).

Louisiana Office of Conservation (LOC), the court found standing to challenge the ordinance based on the devaluation of EMC's mineral interest.⁴⁴¹

The Louisiana law at issue provides, with respect to a drilling permit issued by the LOC, that “[n]o 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.”⁴⁴² Although this language on its face expressly preempts local control, inextricably the Fifth Circuit said otherwise.⁴⁴³

Rather than rely simply on the words of the statute,⁴⁴⁴ the court examined the purpose behind the statute like the *Wallach* court in New York. The court nevertheless concluded both the *when* and the *where* of drilling an oil or gas well were within the exclusive jurisdiction of the LOC.⁴⁴⁵ The court then remanded the case to the district court for entry of a declaratory judgment that the 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”⁴⁴⁶ On remand, the district court entered the declaratory judgment language exactly as written by the Fifth Circuit.⁴⁴⁷

But were the court's instructions to the district court sufficient to preempt the entire field? In other words, even if a local government may not prohibit drilling, may it still impose costly technical requirements and conditions? EMC appreciated this problem with the Fifth Circuit's language, so it appealed once again. On appeal, the Fifth Circuit realized how narrowly its holding might be interpreted, and sent it back to the district court again, this time to explicitly state that the local ordinance was preempted

⁴⁴¹ *Id.* at 302.

⁴⁴² La. Rev. Stat. Ann. § 30:28(F).

⁴⁴³ See *Energy Mgmt.*, 397 F.3d at 303 (“In this case there is no express provision mandating pre-emption.”).

⁴⁴⁴ See *Kramer*, Governmental Relations, *supra* note 1, at 86 (other considerations are not relevant when the legislature has spoken).

⁴⁴⁵ *Energy Mgmt.*, 397 F.3d at 304.

⁴⁴⁶ *Id.* at 306 (emphasis added).

⁴⁴⁷ See *Energy Mgmt. Corp. v. City of Shreveport*, No. 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* 467 F.3d 471 (5th Cir. 2006).

in its entirety, including not just the when and where, but also “activities” and “every phase” of operations.⁴⁴⁸

[4] Whether Local Governments May Regulate Drilling in Ohio

Ohio will soon have new precedent from its highest court as to whether a home-rule municipality may enact zoning restrictions that cover oil and gas production since the enactment of amendments in 2004 to chapter 1509 of the Ohio Revised Code, the state’s statutory provisions governing oil and gas conservation and regulation.⁴⁴⁹ The Ohio Supreme Court recently heard oral argument on appeal from the court of appeals in *State ex rel. Morrison v. Beck Energy Corp.*⁴⁵⁰

Beck Energy Corp. (Beck) obtained a permit to drill in Munroe Falls, Ohio, from the Ohio Department of Natural Resources (ODNR). The City of Munroe Falls then issued a stop work order and filed a complaint in the Ohio Court of Common Pleas, complaining that Beck failed to comply with the City’s zoning ordinances.⁴⁵¹ The ordinances contained no bans or severe restrictions, but required compliance with zoning restrictions, such as obtaining a conditional zoning certificate, a zoning certificate, appearance at a public hearing, approval by the planning commission, payment of fees and a bond, and right-of-way construction permits.⁴⁵²

The court of appeals analyzed the home-rule question under a three-step test set out in *Ohioans for Concealed Carry, Inc. v. City of Clyde*.⁴⁵³ The first step asks whether the ordinance is an exercise of local self-government or an exercise of local police power.⁴⁵⁴ An exercise of local self-government is absolutely protected by Ohio constitutional home-rule power, while an exercise of the police power is subject to further scrutiny.⁴⁵⁵ If the ordinance is an exercise of the police power, the second step asks whether the

⁴⁴⁸*Energy Mgmt. Corp. v. City of Shreveport*, 467 F.3d 471, 478 (5th Cir. 2006), *remanded*, No. CIV A 97-2408, 2006 WL 3230777 (W.D. La. Nov. 6, 2006).

⁴⁴⁹Ohio Rev. Code Ann. §§ 1509.01–.99.

⁴⁵⁰989 N.E.2d 85 (Ohio Ct. App. 2013), *appeal granted*, 989 N.E.2d 70 (Ohio 2013).

⁴⁵¹989 N.E.2d at 88.

⁴⁵²*Id.* at 89.

⁴⁵³896 N.E.2d 967 (Ohio 2008).

⁴⁵⁴*Beck Energy*, 989 N.E.2d at 92.

⁴⁵⁵*Id.* at 92–93.

law is a general law. The court of appeals easily found that chapter 1509 is a general law based on unambiguous precedent.⁴⁵⁶

The court then turned to the third step in the analysis, whether there is a conflict between state and local law, which occurs when an ordinance prohibits that which the state statute permits, or vice versa.⁴⁵⁷ Arguably, however, such a conflict analysis should not have been performed. Chapter 1509 provides in relevant part:

The division has sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state [T]his chapter and rules adopted under it constitute a comprehensive plan with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state Nothing in this section affects the authority granted to . . . local authorities [to regulate the use of streets]⁴⁵⁸

The statute appears to expressly preempt all aspects of the regulation of oil and gas in the state, other than the carve-out for the use of streets. The court had no need to conduct an implied conflict analysis of each separate requirement in the local ordinance. It may seem like a distinction without a difference, as the court ultimately decides the extent of express preemption, and in the absence of express preemption, decides whether a conflict exists. By applying a conflict analysis, however, the court implies that municipalities may still regulate in a manner that does not conflict, but the court provides no guidance as to where such lines might be drawn.⁴⁵⁹ In this case, the court concluded that the municipality may regulate rights-of-way (based on the carve-out) and may require a public hearing, but may not require a zoning certificate or approval, a permit application, or a performance bond.⁴⁶⁰

On appeal, the Ohio Supreme Court could apply an even narrower construction of the State's exclusive authority. During oral argument of *Beck Energy*, supreme court Justices Paul Pfeifer (who also dissented in *Clyde*) and William O'Neil showed their skepticism that the State should have the

⁴⁵⁶*Id.* at 96–97 (citing *Smith Family Trust v. Hudson Bd. of Zoning & Bldg. Appeals*, 2009-Ohio-2557, 2009 WL 1539065 (Ohio Ct. App. June 3, 2009)).

⁴⁵⁷*Id.* at 93.

⁴⁵⁸Ohio Rev. Code Ann. § 1509.02. Specifically, section 1509.02 preserves the authority of municipalities under section 723.01, which in turn grants municipalities the special power to regulate the use of streets.

⁴⁵⁹See Kramer, *Governmental Relations*, *supra* note 1, at 89 (Court used “ad hoc ‘operational conflicts’ analysis that creates substantial uncertainty about the validity of almost any type of sub-state unit regulatory program.”).

⁴⁶⁰State *ex rel. Morrison v. Beck Energy Corp.*, 989 N.E.2d 85, 97–99 (Ohio Ct. App. 2013).

sole authority to determine drilling locations.⁴⁶¹ The state statute at issue in *Beck Energy*, Ohio Rev. Code Ann. ch. 1509, appears comprehensive in that it governs setbacks not only from boundaries of tracts, drilling units, and other wells; it also regulates distances from occupied dwellings⁴⁶² and allows (but does not require) the Chief of the ODNR Division of Oil and Gas Resources Management to specify minimum distances from streets, roadways, bodies of water, zoning districts, and building structures.⁴⁶³ The City of Munroe Falls ordinance seems to conflict with these state location rules because the City may prohibit the drilling of a well in a location allowed under state law.⁴⁶⁴

Location for one purpose, however, is not necessarily location for another purpose. Much like the *Wallach* court in New York, the Ohio Supreme Court might well conclude that the state scheme that covers the “location” of wells was adopted for purposes of conservation of oil and gas, and does not prohibit local regulation of well location for traditional health and safety purposes. Such a holding would align with the dissent of former Chief Justice Thomas Moyer in *Clyde*, who was concerned with the “severe blow to the underlying principles of local self-government.”⁴⁶⁵ Further, unlike the ordinance at issue in *Clyde*,⁴⁶⁶ the Munroe Falls ordinance in *Beck Energy* does not absolutely prohibit an activity that is permitted under

⁴⁶¹See Randy Ludlow, “High court to decide: Is fracking subject to local rules?” *The Columbus Dispatch* (Feb. 27, 2014).

⁴⁶²Ohio Rev. Code Ann. § 1509.021.

⁴⁶³*Id.* § 1509.23(A)(2).

⁴⁶⁴For example, the city ordinance allows the municipality the discretion to deny a permit to drill if it finds an undue hazard considering such special features “as topographical conditions, nature of occupancy and proximity of buildings . . . , and such other matters as the Municipality shall deem relevant to the application.” Codified Ordinances of Munroe Falls, Ohio § 1329.09.

⁴⁶⁵*Ohioans for Concealed Carry, Inc. v. City of Clyde*, 896 N.E.2d 967, 977 n.2 (Ohio 2008).

⁴⁶⁶*Clyde* concerned a state statute that provided a right for license holders to carry a concealed handgun anywhere in the state, subject to a few express exceptions for private property owners and private employers, who could prohibit concealed handguns. *Id.* at 968. Shortly after the state statute was enacted, the City of Clyde passed an ordinance that prohibited handguns in city parks. *Id.* In striking down the city ordinance, the supreme court found in its general law analysis that the General Assembly expressed a need for uniformity in a comprehensive legislative enactment that created a right to carry a concealed handgun if the carrier obtained a state-issued permit. *Id.* at 974. The conflict analysis applied by the court was simple; the city ordinance prohibited an act (carrying a gun in a city park) that was expressly permitted under state law. *Id.* at 975.

the state statute. It does, however, require a permit as a condition to drill and in some cases requires consent of neighboring owners.⁴⁶⁷

Despite the possibility of such a narrow construction of the state's exclusive authority, the Munroe Falls ordinance not only violates the express language in chapter 1509 but also appears contrary to the intent of the General Assembly. Before 2004, Ohio law expressly allowed sub-state units to enact and enforce health and safety standards for the drilling and exploration of oil and gas.⁴⁶⁸ In *Newbury Township Board of Township Trustees v. Lomak Petroleum (Ohio), Inc.*,⁴⁶⁹ the Ohio Supreme Court acknowledged that "health and safety standards" allowed under prior law included the division of a township into zoning districts, as long as the zoning was based on considerations of health and safety.⁴⁷⁰ Effective in 2004, however, the General Assembly repealed section 1509.39,⁴⁷¹ and along with it "all statutory authority of local governments to regulate oil and gas exploration and operation as well as limitations on that authority."⁴⁷² The legislature must have intended its 2004 repeal of sub-state authority to include zoning authority as to the location of wells, because the Ohio Supreme Court held under *Newbury Township* that such authority derives from the express authority in former section 1509.39 as to health and safety standards—authority that has been repealed.

§ 11.05 State Alternatives to Local Government Conflicts?

Rather than become embroiled in litigation, state agencies may seek alternative arrangements with local governments or encourage local governments to work more cooperatively with operators. This section describes a few of these alternatives at work in Colorado.

[1] Memoranda of Understanding

An approach gaining traction in Colorado, and a method of local government control favored by the COGCC, is an agreement called a "memorandum of understanding" (MOU) between drillers and local governments. MOUs have the potential benefit of stricter controls while avoiding

⁴⁶⁷ See Codified Ordinances of Munroe Falls, Ohio § 1329.08. The 200-foot building setback under the Munroe Falls ordinance appears consistent with state setback requirements. See *id.* § 1329.07.

⁴⁶⁸ Ohio Rev. Code Ann. § 1509.39 (repealed 2003).

⁴⁶⁹ 583 N.E.2d 302 (Ohio 1992).

⁴⁷⁰ *Id.* at 305–06.

⁴⁷¹ H.R. 278 § 2, 125th Gen. Assemb., Reg. Sess. (Ohio 2004).

⁴⁷² Final Analysis at 1, Ohio Leg. Serv. Comm'n, H.R. 278, 125th Gen. Assemb., Reg. Sess. (Ohio 2004).

litigation at the cost of the local taxpayer. It is important to Colorado sub-state units that have entered into MOUs that best management practices (BMP) agreed to by the operator are incorporated into the COGCC drilling permit as “conditions of approval,” becoming subject to COGCC inspection and enforcement jurisdiction. For this to work, a sub-state unit that is a party to an MOU must verify that the operator has included the BMPs in its application for permit to drill (APD) filed with the state. To actually respond to community concerns, however, the BMPs in MOUs must contain more than purely aspirational practices.

Erie, Colorado, for example, entered into MOUs with Encana Oil & Gas (USA) Inc. (Encana)⁴⁷³ and an Anadarko subsidiary⁴⁷⁴ while a temporary moratorium was in effect. When the moratorium expired amidst controversy, the MOUs became effective.⁴⁷⁵ The Encana and Anadarko MOUs require the inclusion of certain BMPs in APDs submitted by the operator to COGCC, creating enforceable permit conditions at the state level.⁴⁷⁶ But while these BMPs may be enforceable, they are drafted as rather soft obligations. For example, drillers are required to maximize setbacks from occupied buildings and residences only “to the extent feasible and practicable, as determined by [the operator].”⁴⁷⁷ A number of mitigation plans are required to be provided, but only “for informational purposes,” which the operator “may revise from time to time during operations.”⁴⁷⁸ The requirement to use closed-loop systems similarly is limited to “minimize” (but presumably not to eliminate) the need for pits.⁴⁷⁹

On April 30, 2013, Arapahoe County added substantive MOU standards to its Land Development Code.⁴⁸⁰ The code now includes a procedure that allows an operator to obtain an expedited fast-track local “administrative use by special review” rather than a more comprehensive review that requires county commission approval, if the operator executes an MOU

⁴⁷³MOU between Town of Erie, Colo. and Encana Oil & Gas (USA) Inc. (Aug. 28, 2012) (Encana MOU).

⁴⁷⁴MOU between Town of Erie, Colo. and Kerr-McGee Oil & Gas Onshore LP (Aug. 28, 2012) (Anadarko MOU).

⁴⁷⁵See John Aguilar, “Erie passes regulations on oil, gas drillers,” *Boulder Daily Camera* (Aug. 28, 2012) (mayor and trustees praise agreements as imposing some of the strictest requirements in the country while protestors urge leaders to stop drilling in Erie).

⁴⁷⁶Encana MOU, *supra* note 473, at § 3; Anadarko MOU, *supra* note 474, at § 3.

⁴⁷⁷Encana MOU, *supra* note 473, at app. A; Anadarko MOU, *supra* note 474, at app. A.

⁴⁷⁸Encana MOU, *supra* note 473, at app. A; Anadarko MOU, *supra* note 474, at app. A.

⁴⁷⁹Encana MOU, *supra* note 473, at app. A; Anadarko MOU, *supra* note 474, at app. A.

⁴⁸⁰Arapahoe Cnty., Colo., Land Development Code §§ 12-1901 to -1913.

acceptable to the County.⁴⁸¹ Although the form of “acceptable” agreement was not incorporated into the Land Development Code, a form MOU was presented to and approved by the City Council.⁴⁸² The form expresses a preference for closed-loop systems but does not prohibit pits, although pits for the storage of other than fresh or brine water require separate approval.⁴⁸³ The form MOU also contains requirements for baseline testing of water wells within a half-mile radius of a new oil and gas facility, spill reporting, emergency response plans, erosion control, and limitations on the use of roads.⁴⁸⁴ Similar to the Erie MOUs, many of these BMPs are required to be included in state-issued drilling permits.⁴⁸⁵

In contrast to the more cooperative MOU structure, Commerce City, Colorado, requires operators to execute an “extraction agreement” before the City will issue an oil and gas permit.⁴⁸⁶ Interestingly, the form of extraction agreement contains many of the same restrictions that were challenged by COGCC in *Longmont I*, such as a discretionary determination of “appropriateness” of multi-well sites and horizontal drilling techniques and increased setback requirements.⁴⁸⁷ The form contains other requirements, such as hours of operation, noise, and water quality monitoring, that COGCC could argue operationally conflict with COGCC rules.⁴⁸⁸ While it seems to make little difference whether a requirement is contained in a form agreement that a municipality demands to be executed or in the text of the ordinance itself, to date industry has not challenged Commerce City’s regulations. While Commerce City has framed its requirements in a different manner than the challenged Longmont ordinance, the substance is much the same. If the Longmont ordinance is ever invalidated,

⁴⁸¹ See *id.* § 12-1902 (use by administrative review); *id.* § 13-900 (use by special review). See also Carlos Illescas, “Arapahoe County OKs agreement to expedite fracking applications,” *Denver Post* (Apr. 30, 2013).

⁴⁸² See Minutes of the Arapahoe Cnty. Bd. of Cnty. Comm’rs at 10 (Apr. 30, 2013).

⁴⁸³ See Arapahoe Cnty., Colo., Oil & Gas Memorandum of Understanding and Land Development Code Amendment at 2-15 (Apr. 22, 2013).

⁴⁸⁴ *Id.* at exhibit A.

⁴⁸⁵ *Id.* § 19.

⁴⁸⁶ See Commerce City, Colo., Land Development Code § 21-5266(4)(g) (“Every Operator shall enter into an Extraction Agreement . . . with the City prior to the issuance of an Oil and Gas Permit.”).

⁴⁸⁷ Commerce City, Colo., Extraction Agreement §§ 5.4, .5, <http://www.c3gov.com/DocumentCenter/View/3594>.

⁴⁸⁸ *Id.* §§ 5.8, .9, .11.

the provisions of Commerce City's extraction agreement may be of suspect validity, regardless of its form as a mandatory agreement.

[2] Local Government Designee and Liaison Programs

Colorado has included within its rules a local governmental designee (LGD) program to foster local government involvement in permitting decisions.⁴⁸⁹ LGDs are given an opportunity to consult with the operators and COGCC on issues such as the location of proposed well sites, mitigation measures, and BMPs during the comment period for well permits. LGDs may also require operators to attend meetings with building and surface owners before an application for APD is submitted.⁴⁹⁰ On the state side, COGCC has established local government liaisons (LGL) to provide training classes, attend local public meetings, and assist local governments in answering questions from citizens.⁴⁹¹

COGCC may also enter into MOUs directly with local governments. On May 6, 2013, for example, COGCC approved the MOU entered into by the City of Greeley, Colorado and the Colorado Department of Natural Resources.⁴⁹² Although the agreement does little more than recite COGCC rules and understood delineations between state and local authority, it does represent an olive branch, "memorializ[ing] the Parties' intent to work together on regulatory matters related to oil and gas operations in the City."⁴⁹³

§ 11.06 Conclusion

Many states have left local government power over oil and gas operations relatively unchecked.⁴⁹⁴ While state legislatures may be more willing than

⁴⁸⁹ An LGD is defined simply as the local government office designated to receive documents that must be filed with the LGD under COGCC rules. See COGCC Rule 100.

⁴⁹⁰ See *id.* Rule 306.e.(1). The meeting requirements apply to building owners within a "buffer zone" within 1,000 feet of a building unit, *id.* Rule 303.b.(3)(J), and certain other owners that are required to receive an "oil and gas location assessment notice" or a "buffer zone notice," *id.* Rule 305.c.(1), (2).

⁴⁹¹ See COGCC, *LGD Newsletter* (Fall 2013).

⁴⁹² See Record of Proceedings of the COGCC at 12, 25 (May 6, 2013), http://cogcc.state.co.us/Hearings/Minutes/2013/201305_Minutes.pdf.

⁴⁹³ *Id.* at 1.

⁴⁹⁴ In contrast, the North Carolina legislature recently passed, and Governor Pat McCrory signed, the Energy Modernization Act (EMA), N.C. Sess. Laws 2014-4 (S.B. 786). Although the press focused on the fact that the law criminalizes certain chemical disclosure in violation of the EMA, see Mike Lee, "N.C. governor signs fracking bill that criminalizes chemical disclosure," *E&E Publishing, LLC* (June 5, 2014), the law contains incredibly broad provisions to preempt local authority, including those regulating land use, and gives the state Mining and Energy Commission the authority to determine whether ordinances have

local governments to balance the positives against the negatives of oil and gas production,⁴⁹⁵ they are political actors as well. Even though the public appears to be split on their perceptions of natural gas development,⁴⁹⁶ legislators will often hesitate to strip local governments of control, leaving on the statutory books unclear or incomplete demarcations between state and local authority.⁴⁹⁷ The uncertainties inevitably lead to litigation, where courts engage in judicial line-drawing that in other than the clearest cases spawns more unanswered questions. The judicial response will often be unsatisfactory to oil and gas plaintiffs. Even in states where legislatures have attempted to limit local power, the courts appear to have strengthened their efforts to protect that power.

been preempted under the terms of the Act. *See* EMA § 13 (codified at N.C. Gen. Stat. § 113-415.1). It appears to the author that the new section 113-415.1 contains potentially conflicting provisions that may eventually be subject to litigation.

⁴⁹⁵*See* Ritchie, *supra* note 12.

⁴⁹⁶The public also appears to lack knowledge. The University of Texas and the Pew Research Center have conducted polls that show much of the public is unaware of hydraulic fracturing and that those who have heard of it are divided roughly equally as to whether they oppose or support the practice. *See* The University of Texas at Austin Energy Poll, <http://www.utenergypoll.com>; Pew Research Ctr., “Energy: Key Data Points” (Jan. 27, 2014), <http://www.pewresearch.org/key-data-points/energy-key-data-points/>.

⁴⁹⁷*See* Briffault, *supra* note 18, at 113 (state legislatures are reluctant to supersede local land use regulations consistent with local exclusion of unwanted uses).