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I. INTRODUCTION

In Northeast Natural Energy, L.L.C. v. City of Morgantown (Northeast v. Morgantown), the Circuit Court of Monongalia County, West Virginia granted summary judgment for Northeast Natural Energy and Enrout Properties, holding West Virginia state legislation preempted the City of Morgantown’s (the City) municipal ban on hydraulic fracturing (fracing). 1 Local ordinances banning fracting, such as the one adopted by the City of Morgantown, West Virginia’s City Council, 2 are based on municipal home rule provisions in their respective

state’s constitution or statutes. Home rule provisions vest autonomy in local governments, allowing them, in varying degrees, to frame and adopt their own charters and enact ordinances constrained only by their respective state legislation, state constitution, federal laws, and the United States Constitution. If a conflict between state legislation and a local ordinance is irreconcilable, state courts must determine if the home rule provision is preempted.

The issue in this comment is whether state oil and gas laws preempt local communities from regulating fracking within their own boundaries pursuant to municipal home rule provisions in that state’s constitution or statutes. Hundreds of communities across the country have enacted ordinances that attempt to regulate or even ban hydraulic fracturing outright, as the City of Morgantown did. The court in Northeast v. Morgantown narrowly construed the City’s power in favor of state preemption. However, in other states the outcome may be more favorable to those who oppose fracking. This creates a potential problem for natural gas developers that have leased mineral rights and have obtained permission to explore and develop these minerals before an ordinance banning fracking is promulgated. The problem then becomes whether or not the ban will be classified as a compensable constitutional taking, or a valid exercise of a state’s police power.

This comment will briefly summarize, in Section II, the history and nature of the home rule and local concerns with fracking; in Section III, it will discuss the facts, issue, and outcome of Northeast v. Morgantown; and in Section IV, it will analyze the authority granted to local governments in home rule states on which they premise municipal fracking bans, and it will look at the potential outcomes in other municipal home rule states with shale reserves. Finally, this comment will address, in Section V, the ramifications of the uncertainty created by home rule fracking bans, as these bans, if upheld, may constitute a regulatory

3. Constitutional home rule states with major known shale reserves include: Colorado, COLO. CONST. art. XX, §§ 1-6; Illinois, ILL. CONST. art. VII, § 6; Louisiana, LA. CONST. art VI, §§ 4-5; Maryland, MD. CONST. arts. XI-E to XI-F; Michigan, MICH. CONST. art. 7, § 22; Montana, MONT. CONST. art. XI, §§ 5-6; New Jersey, N.J. CONST. art. IV, § 7, ¶ 11; New Mexico, N.M. CONST. art. X, § 6; New York, N.Y. CONST. art. 9, §§ 1-3; North Dakota, N.D. CONST. art. VII, § 6; Ohio, OHIO CONST. art XVIII, §§ 3, 7; Oklahoma, OKLA. CONST. art. XVIII, §§ 3-7; Pennsylvania, PA. CONST. art. IX, § 2; Tennessee, TENN. CONST. art. XI, § 9; Texas, TEX. CONST. art. XI, § 5; Utah, UTAH CONST. art XI, § 5; West Virginia, W. VA. CONST. art VI, § 39(a); and Wyoming, WYO. CONST. art. XIII, § 1.


8. See infra Section IV.A.1.a. (discussing West Virginia’s consistently narrow construction of the powers granted to municipalities by home rule).


10. See supra notes 3 & 4 (listing states with shale reserves).
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taking. Accordingly, due to lack of clarity regarding whether hydraulic fracturing may one day be classified as a nuisance, adversely affected parties have little certainty in their recourse.

II. BACKGROUND

While fracing is not a new technology, it has recently emerged as one of the most promising means of natural gas extraction in the domestic energy market. Immense domestic shale reserves, which were once considered to be too difficult and too costly to reach, are now being developed all over the United States. Jobs, income, and tax revenue raised by fracing are beneficial to the economy. Despite the economic benefits of fracing, some feel the potentially adverse environmental effects of the process outweigh them.

Natural gas extraction is generally governed by state regulation. Emerging environmental concerns have sparked grassroots movements that have led communities to enact local bans on hydraulic fracturing. Local ordinances have recently been enacted in several states banning fracing within municipalities’ corporate limits. As a result, a mineral lessee may find itself with permits issued by state regulatory agencies allowing it to explore and develop, but may be unable to do so due to a municipal fracing ban in the form of an outright ban or zoning regulation.

A. Local Concerns with Fracing

Since fracing is mistakenly perceived in many areas to be a relatively new technology, due to lack of clarity regarding whether hydraulic fracturing may one day be classified as a nuisance, adversely affected parties have little certainty in their recourse.
process of mineral extraction, there are concerns regarding the environmental impacts and risks associated with it. Although current studies are unclear whether fracing poses a real danger for communities located near major shale reserves, bloggers, the media, and environmental groups have expressed concerns for public health, safety, welfare, and the environment. As a result, grassroots movements have emerged in these communities to encourage more stringent regulation, or even outright bans on fracing, such as the one in the City of Morgantown.

The primary environmental concern regarding fracing is the potentially adverse effect on groundwater. In April of 2011, a Marcellus Shale formation natural gas well site in Leroy Township, Bradford County, Pennsylvania “experienced a well head flange failure and uncontrolled [fluid] flow-back” while the well was undergoing hydraulic fracturing. An evaluation of the data collected did “not conclusively indicate[,] but [only] suggest[ed] that the groundwater near [the] site [was] impacted by natural gas activities.” However, the wellhead equipment failure and stormwater controls failure that caused the impact could likely have been prevented by further pressure testing prior to commencing hydraulic fracturing, and stricter permitting of the stormwater controls.

Both the Environmental Protection Agency (EPA) and the U.S. House of Representatives Committee on Energy and Commerce have begun studying fracing’s effects. On December 8, 2011, the EPA released draft findings

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21. NAT’L GRASSROOTS COAL., supra note 16.


23. Id.


concerning groundwater pollution in the Pavillion field of central Wyoming. The EPA began investigating water quality concerns in private drinking water wells near Pavillion. The EPA found the ground water in the aquifer contained compounds likely associated with practices related to gas production, including hydraulic fracturing. However, the EPA did state that in Pavillion, “the [hydraulic] fracturing [was] taking place in and below the drinking water aquifer and in close proximity to drinking water wells — production conditions different from those in many other areas of the country.”

More recently, in December 2012, the EPA released a progress report on its study of the potential impacts of fracking on drinking water. In the report, five case study locations were selected to determine if and how contamination may have occurred.

State regulatory initiatives in home rule states now require varying degrees of disclosure of chemical use in: Arkansas, Colorado, Illinois, Kentucky, Louisiana, Maryland, Michigan, Montana, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, West
Virginia,49 and Wyoming.50 The oil and gas industry has also taken steps to better inform the public with respect to the chemicals used in the fracing process by creating a website that discloses this information.51 However, disclosure is not uniform and is almost never complete due to the proprietary nature of the fluids used.52 Further, despite any efforts to assure the health and safety of local communities, some find it hard to overlook the image of the infamous GasLand flaming faucet.53

Local concerns over air pollution have also been expressed. Namely, there have been concerns that fracing increases the level of benzene54 and ground-level ozone.55 In WildEarth Guardians v. Jackson, litigation arose regarding air pollution.56 As a result, the EPA issued standards to reduce pollutants that may result from fracing in affected localities.57 States also may implement rules approved by the EPA to ensure federal air quality standards are met.58 The oil and gas industry has begun to address this air pollution concern by using vapor recovery units to reduce emission of volatile organic compounds.59

There are also concerns that fracing may induce seismicity.60 Instances of induced seismicity associated with fluid injection are documented.61 However,
it is still unclear as to the magnitude of seismicity induced by the fracking process. Although there is no definitive proof that fracking causes earthquakes, many communities have raised concerns following earthquakes in Arkansas, Ohio, and Oklahoma. In fact, in August of 2012, a case was filed in Arkansas, wherein a landowner alleged fracking to be the culprit.

Due to concerns over fracking’s potentially adverse environmental effects, grassroots movements have sought more transparency from natural gas developers or have outright opposed fracking. Many local communities support these movements and their goals. Thus, communities in several states have banned fracking, and other communities have the potential to do so in the future. Municipal home rule may empower some communities to address these local concerns by banning fracking within the geographical area described in the enabling statute or constitutional provision.

B. Municipal Home Rule: A Response to “Dillon’s Rule”

Municipal home rule provisions provide more autonomy to local governments, which was not traditionally granted under “Dillon’s Rule.” In City of Clinton v. Cedar Rapids & M.R.R. Co., Judge John Dillon created what


63. Chris Bury & Eli Brown, Are Arkansas’ Natural Gas Injection Wells Causing Earthquakes?, ABC NEWS.COM (Apr. 21, 2011), http://abcnews.go.com/Technology/hundreds-arkansas-earthquakes-linked-natural-gas-injection-wells/story?id=13431093. It should be noted that the seismic activity in Arkansas occurred near salt-water disposal wells and was not the direct result of fracking. However, salt-water is a common by-product of the fracking process, which is often disposed of by injecting the wastewater back into the earth. Liu & Kaplan, supra note 20.


67. See generally NAT’L GRASSROOTS COAL., supra note 16.

68. The Community Environmental Legal Defense Fund, for example, works with communities, residents, citizens groups, and municipal governments to assert authority in matters regarding the environment. Where We Work, COMMUNITY ENVTL. LEGAL DEF. FUND, http://www.celdf.org/section.php?id=27.

69. For example, over the course of the past two years, more than one hundred communities in the state of Pennsylvania have enacted ordinances to ban, restrict, or regulate the use of fracking. Kris Maher, New Challenges to Gas Drilling: Pennsylvania Foes Seek to Pass Local Bans, but Would They Survive Court Tests?, WALL ST. J., Sept. 12, 2011, at A3.

70. Local attempts to prohibit fracking may one day even utilize private covenants instead of the home rule. See, e.g., Weiden Lake Prop. Owners Ass’n, Inc. v. Klansky, No. 3885/09, 2011 WL 3631955, at *4 (N.Y. Sup. Ct. Aug. 18, 2011) (holding that the restrictive covenant prohibiting drilling for natural gas was a ‘commercial use’ proscribed by the restrictive covenant).

71. City of Clinton v. Cedar Rapids & M.R.R. Co., 24 Iowa 455 (1868), overruled by Berent v. City of Iowa City, 738 N.W.2d 193 (Iowa 2007). Dillon’s Rule provides that municipalities: 1) are only created for public purposes; 2) can only exercise powers expressly granted by law or powers incidental to those expressly
would be known as “Dillon’s Rule” by recognizing state control over municipal government, except as limited by the state or federal constitution. According to Dillon’s Rule, a municipality may only act in accordance with the powers granted to it by the state. The United States Supreme Court in Hunter v. City of Pittsburgh later adopted Dillon’s Rule, and as a result, local governments across the United States were denied what they considered to be the inherent right of self-government.

Dillon’s Rule ultimately created undue state interference and left local governments without power in municipal affairs. As a result, many municipalities sought to reclaim their autonomy from the states. Municipalities did so by lobbying for the enactment of home rule provisions, which would allow them greater self-governance. Today there are as many as forty-eight states with home rule provisions. Municipal home rule states can be divided into three varieties: two types of constitutional home rule states, and statutory home rule states. The two types of constitutional home rule states are the following: states that follow the imperium in imperio model, which grants full police power over municipal issues and immunity from state legislative interference; and states that follow the legislative model, which grants municipalities power to legislate, subject to restriction by state legislation. However, the attainment of municipal autonomy via home rule under these models is often difficult. Other factors are also important in determining the issue of preemption, such as favorable legislative and judicial climate within the state. Finally, some courts in home rule states such as West Virginia continue to adhere to the rule of strict construction from Dillon’s Rule even where the state legislature apparently intended otherwise.

West Virginia, a home rule state, addressed local fracing concerns in Northeast v. Morgantown. Community members in the City of Morgantown raised concerns about the adverse effects of fracing, namely water

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72. DILLON, supra note 71, at 448-51.
73. Id.
76. Id. at 11.
78. Id.
80. JOHN MARTINEZ & MICHAEL LIBONATI, LOCAL GOVERNMENT LAW § 4:1.
81. Briffault, supra note 75 at 10.
82. Municipal Home Rule, supra note 77, at 290.
contamination, in May of 2011. Shortly thereafter a municipal ban on fracing was promulgated based on West Virginia’s municipal home rule.

III. CASE OVERVIEW

In Northeast v. Morgantown, the Circuit Court of Monongalia County, West Virginia addressed the City’s municipal ban of hydraulic fracturing. The ban was based on the municipal home rule charter granted to the City in the West Virginia Constitution. The court ultimately held West Virginia’s interest in oil and gas development preempted the City’s ordinance banning fracing.

A. Facts

Enrout Properties, LLC (Enrout), owned property outside the corporate limits of the City of Morgantown, a community in Monongalia County. Enrout leased the property’s Marcellus Shale mineral rights to Northeast Natural Energy, LLC (Northeast). After acquiring the mineral rights, Northeast applied to the West Virginia Department of Environmental Protection (WVDEP) for well permits to commence development of the property for the extraction of natural gas using horizontal drilling and fracing. In March of 2011, the WVDEP issued well permits to Northeast. The permits allowed Northeast to conduct fracing operations at two well sites on the property. The well sites did not fall within the City’s corporate limits. In May of 2011, the City’s Utility Board questioned the potential environmental impacts of the fracing process on the Monongahela River, which ran through the City. In response, Northeast agreed to provide additional safeguards to appease the City’s Utility Board, and the WVDEP permits were modified accordingly.
In June of 2011, the City passed an ordinance prohibiting fracing within the city limits.\footnote{Id. (citing MORGANTOWN, W. VA., ORDINANCE 721.03 (June 21, 2011)). The ban also extended one mile past the city limits. The Ordinance read as follows: “Drilling a well for the purpose of extracting or storing oil or gas within the limits of the City of Morgantown is prohibited. Fracturing or fracking a well is prohibited within one mile of the corporate limits of the City of Morgantown.” MORGANTOWN, W. VA., ORDINANCE 721.03(a)-(b).} The City’s municipal government based the decision to enact the ordinance on the determination that “drilling for oil and gas is an activity which adversely impacts the environment... and has the potential for adversely affecting health, well-being and safety of persons living and working in and around areas where drilling operations exist.”\footnote{Id. at 5. The court also examined whether Morgantown was preempted from regulating the areas one mile outside those boundaries. Id.}

Shortly thereafter, Northeast commenced a lawsuit against the City in the Circuit Court of Monongalia County, seeking an order enjoining the City from enforcing the ordinance.\footnote{Northeast Natural Energy, L.L.C., Civ. Act. No. 11-C-411, slip op. at 1.} Northeast also sought a declaration that West Virginia state law preempted the ordinance\footnote{W. VA. CODE §§ 22-1-1 to 22-1-17 (2011).} and that the ordinance violated Northeast’s constitutional rights.\footnote{Northeast alleged a regulatory taking of its property. The court did not develop this issue because the outcome of the case was favorable to Northeast, the developer. However, in other cases where the outcome is not favorable to a mineral rights holder or developer, courts will likely address a taking under the Fifth and Fourteenth Amendments to the United States Constitution. See infra Section V.} Enrout intervened and joined Northeast in its claims against the City.\footnote{Id. (citing W. VA. CODE § 8-12-2 (the statutory municipal home rule provision)).} The City contended it was authorized, pursuant to the municipal home rule provided for in the state constitution and legislation, to ban fracing on the basis that fracing was a nuisance.\footnote{Id. at 10, 14.} Northeast and Enrout then filed a motion for summary judgment.\footnote{Id. at 5.}

**B. Issue, Rationale & Holding**

The issue in *Northeast v. Morgantown* was whether West Virginia state oil and gas laws preempted the City from regulating fracing within its own boundaries, pursuant to municipal home rule.\footnote{Id. at 10.} The circuit court granted summary judgment for Northeast and Enrout, holding the ordinance as enacted by the City was preempted by state legislation.\footnote{Id. at 5.} In analyzing the issue, the circuit court identified the conflicting local ordinance and state legislation.\footnote{Id. at 5.} The court then searched for inconsistencies between the two.\footnote{Id. at 10.} Finally, the court determined whether the state’s interest provided for exclusive control of
this area of law or if it could be construed to allow the City to impose a ban on fracking.111

The circuit court began its analysis with a narrow construction of municipal corporation powers.112 According to the court, and in accordance with the West Virginia Supreme Court, “[i]f any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied.”113 Furthermore, if municipal and state legislation purport to regulate the same subject matter, and they are inconsistent, the municipal ordinance will be preempted.114

The City argued that because it determined the fracking process to be a nuisance, fracking could be regulated under municipal home rule,115 basing its argument on Sharon Steel Corp. v. City of Fairmont (Sharon Steel).116 In Sharon Steel, the City of Fairmont, West Virginia promulgated an ordinance prohibiting the permanent disposal of hazardous wastes in the city based on the argument that the disposal was a public nuisance.117 The West Virginia Supreme Court of Appeals held that the City of Fairmont had “authority to declare the improper permanent disposal of hazardous wastes [was] a public nuisance under [section 8-12-5(23) of the West Virginia Code], which empowers municipalities ‘[t]o provide for the elimination of hazards to public health and safety.’”118

The court was not persuaded by the City’s argument and stated that specific state legislation must grant the City the power to regulate fracking as a nuisance.119 The court stated that in Sharon Steel the statute at issue “carved out an explicit exception permitting the [C]ity of Fairmont to legislate the permanent disposal of hazardous wastes identified as a nuisance.”120 In the instant case, the court found no such exception in the applicable state law allowing the local regulation of fracking as a nuisance.121 Thus, although the court recognized “the City has an interest in the control of [the] land within [and surrounding] its municipal borders,” state interests in oil and gas development preempted local regulation here because the ordinance was inconsistent with state legislation.122 Furthermore, no exception was carved out for the City or any other municipality by the WVDEP, whose all-inclusive purpose is to regulate the production of oil and gas.123

111. Id. at 6-7. On July 1, 2011, the West Virginia state legislature enacted the Marcellus Gas and Manufacturing Development Act, foreclosing any doubt as to the State’s interest in regulating natural gas extraction. W. VA. CODE § 5b-2h-1 to 5b-2h-2.
113. Id. (alteration in original) (quoting State ex rel. Charleston v. Hutchinson, 176 S.E.2d 691, 696 (W. Va. 1970)).
114. Id. at 7-8 (citing Davidson v. Shoney’s Big Boy Rest., 380 S.E.2d 232, 235 (W. Va. 1989)).
115. Id. at 8.
116. Id.; Sharon Steel Corp. v. City of Fairmont, 334 S.E.2d 616 (W. Va. 1985).
117. Sharon Steel, 334 S.E.2d at 618.
118. Id. at 625 (quoting W. VA. CODE 8-12-5(23)).
120. Id.
121. Id. (citing W. VA. CODE §§ 22-1-1 to 22-1-41).
122. Id. at 8-9.
123. Id. at 9.
IV. ANALYSIS

Many courts in home rule states continue to adhere to the rule of strict construction from Dillon’s Rule.\(^{124}\) West Virginia is one such state.\(^{125}\) Professor Bastress, a leading West Virginia state constitutional scholar, argued the West Virginia Supreme Court has ignored the home rule, continued to “vigorously apply Dillon’s Rule and [continued] to insist that cities have no inherent powers and only such implied powers as are necessary to give effect to [their] express powers.”\(^{126}\)

Perhaps the circuit court in *Northeast v. Morgantown* was consistent with precedent. However, in other states with shale reserves, where broad grants of power are extended to local governments, the outcome may be different. The outcome may depend upon: (A) whether a constitutional home rule state follows (1) the legislative model or (2) the *imperium in imperio* model, or conversely (B) whether it is a statutory home rule state; and (C) whether the individual state ignores the home rule, like West Virginia and (1) strictly construes the powers granted to local governments or (2) broadly construes the powers granted. The legislative and judicial climate in the state will also play a vital role in determining the outcome.\(^{127}\)

One might think that outcomes in fracing ban litigation are predictable to some extent based on the underlying doctrine and construction of home rule provisions in a given state. As this analysis will demonstrate, the taxonomy of home rule type and the deference courts grant municipalities in their construction of the powers granted will not help mineral developers predict their rights to develop shale reserves with hydraulic fracturing.

A. Applicable Law in Constitutional Home Rule States

Natural gas extraction and the powers granted to municipalities under home rule provisions are governed by state and local regulation. Thus, whether a local ordinance such as the one in *Northeast v. Morgantown* is preempted by state regulation, and the extent to which it is preempted, will vary from state to state.

There are two basic types of constitutional home rule states: legislative model and *imperium in imperio*.\(^{128}\) In legislative model states, local governments are granted total authority, but the legislature is authorized to withdraw or limit a municipality’s home rule powers by statute.\(^{129}\) The doctrine of *imperium in imperio* home rule “grants a broad but defined scope of power to

\(^{124}\) Frug, *supra* note 83, at 1062-63, 1112.

\(^{125}\) Robert M. Bastress, Jr., *Localism and the West Virginia Constitution*, 109 W. VA. L. REV. 683 (2007). However, in *Tri-Power Res., Inc. v. City of Carlyle*, the City of Carlyle, a non-home rule municipality, which the court stated was governed by Dillon’s Rule, enacted a zoning ordinance that effectively prohibited oil and gas development within its borders and was upheld. 967 N.E.2d 811, 813, 817 (2012); see also infra Section IV.C.2.a.

\(^{126}\) Bastress, *supra* note 125, at 699.

\(^{127}\) *Municipal Home Rule, supra* note 77, at 290.

\(^{128}\) CHESTER JAMES ANTIEAU, ANTIEAU ON LOCAL GOVERNMENT LAW § 21.01 (Sandra M. Stevenson ed., 2d ed. 2011).

\(^{129}\) Id.
local governments.”\textsuperscript{130} The scope of the *imperium in imperio* home rule power is generally limited to municipal affairs.\textsuperscript{131} However, many constitutional home rule states have unique takes on their versions of home rule, and thus it is difficult to label them as entirely one or the other.\textsuperscript{132} Therefore, it is not easy to distinguish which matters are of state concern and which are of local concern based on the classification of the constitutional home rule state because the line between a legislative model state and an *imperium in imperio* state is often blurred.\textsuperscript{133}

Generally, home rule municipalities are granted authority to protect public health, safety, and welfare.\textsuperscript{134} However, state regulation or state interests in natural gas extraction may preempt a local ordinance banning fracking if an irreconcilable conflict exists between the two.\textsuperscript{135} Thus, courts must first determine if an irreconcilable conflict exists between the local ordinance and state legislation.\textsuperscript{136}

1. Legislative Model States\textsuperscript{137}

To determine whether an irreconcilable conflict between a state statute and local ordinance triggers preemption in legislative model states, courts will look at the following factors: (1) whether an express statutory provision excludes local regulation in a specified area;\textsuperscript{138} (2) whether there is implied preemption of the local regulation;\textsuperscript{139} and (3) whether the pervasiveness of the state regulatory scheme precludes local regulation.\textsuperscript{140}

\textsuperscript{130.} Id.
\textsuperscript{131.} Kenneth Vanlandingham, Constitutional Home Rule Since the AMA (NLC) Model, 17 WM. & MARY L. REV. 1, 1-2 (1975) [hereinafter Constitutional Home Rule].
\textsuperscript{133.} Municipal Home Rule, supra note 77, at 291.
\textsuperscript{134.} See, e.g., W. VA. CODE § 8-12-5 (44)(2012).
\textsuperscript{136.} id. at 416-17.
\textsuperscript{137.} These states include: Louisiana, Maryland, Michigan, Montana, New Jersey, New Mexico, New York, Pennsylvania, Tennessee, Texas, West Virginia, and Wyoming. See, e.g., Municipal Home Rule, supra note 77, at 284-93 (New York is in dispute according to the author). However, the classification itself is highly controversial. Brieffault & Reynolds, supra note 132. Compare Municipal Home Rule, supra note 77, at 294 and Bastress, supra note 125, at 695-703 (both labeling West Virginia as a legislative model state), with Lynn A. Baker & Daniel B. Rodriguez, Constitutional Home Rule and Judicial Scrutiny, 86 DENV. U. L. REV. 1337, app. at 1421-22 (2009) (labeling West Virginia as an *imperio* state).
\textsuperscript{138.} Ad + Soil, Inc. v. Cnty. Comm’rs of Queen Anne’s Cnty., 513 A.2d 893, 902 (Md. 1986).
\textsuperscript{139.} 5 McQuillen MUN. CORP. § 15:18 (3d ed. 2012) (“Implied preemption occurs when: 1) general law so completely covers the subject as to clearly indicate the matter is exclusively one of state concern; 2) general law partially covers the subject in terms clearly indicating a paramount state concern that will not tolerate further local action; or 3) general law partially covers the subject and the adverse effect of a local ordinance on transient citizens of the state outweighs the possible municipal benefit.”).
\textsuperscript{140.} Generally, state law preempts local law where the local law “deal[s] with an area in which the [State] Legislature has acted with such force that [it shows] an intent by the State to occupy the entire field.” County Council for Montgomery Cnty. v. Montgomery Ass’n, Inc., 333 A.2d 596, 600 (Md. 1975).
a. West Virginia

As was the case in Northeast v. Morgantown, the state legislature’s intention to preempt local legislation may not be directly expressed in an area of law such as the regulation of natural gas extraction. Even if the legislative intent is unclear, a court may still find that the legislation is preempted. The West Virginia court found the statement that “the purpose of the WVDEP is to ‘consolidate environmental regulatory programs in a single state agency, [while also providing] a comprehensive program for the conservation, protection, exploration, development, enjoyment and use of the natural resources of the state of West Virginia,’” impliedly preempted municipal regulation in this subject matter. In Northeast v. Morgantown, the court found the pervasiveness of the state regulatory scheme was sufficient to warrant preemption of the local ban. However, other legislative model home rule states, such as Texas, have taken a different position on a municipality’s authority to regulate oil and gas development.

b. Texas

Texas, like West Virginia, is a constitutional home rule state that has adopted a legislative model. However, unlike West Virginia, Texas courts require the state legislature to expressly preempt the subject matter with unmistakable clarity. Texas courts have long upheld a municipality’s authority to regulate oil and gas development. In Tysco Oil Co. v. Railroad Commission of Texas, the court established that municipalities in Texas have the authority to regulate oil and gas development within their corporate limits. The power to regulate at the municipal level is based on the protection of their citizens and property within the corporation limits, under the municipalities’ police powers. In Trail Enterprises, Inc. v. City of Houston, the City of Houston prohibited oil and gas drilling within its watershed. The court upheld the ordinance as “a valid exercise of the city’s police power,” finding it was reasonably related to the legitimate goal of protecting the water supply from pollution.

The court in West Virginia, a legislative model state, interpreted home rule authority very narrowly and found the local ban on fracking was preempted by state legislation, whereas Texas, another legislative model state, indicated that it may come to a contrary decision if faced with a local fracking ban. As such, the classification as a legislative model state is insufficient to predict whether or not

142. Id. at 6 (quoting W. VA. CODE § 22-1-1(b)(2)-(3) (1994)).
143. Id. at 9.
144. Municipal Home Rule, supra note 77, at 277-78.
145. Dallas Merch.’s & Concessionaire’s Ass’n v. City of Dallas, 852 S.W.2d 489, 490-91 (Tex. 1993).
149. Id. at 635.
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A local fracking ban will be preempted by state legislation. However, states adopting the doctrine of *imperium in imperio* home rule do not appear to be dispositive as to the outcome of these suits either.

2. *Imperium in Imperio* States

Courts in *imperium in imperio* states look to determine if the subject matter is of local or statewide concern. If the subject matter is of local concern, the local ordinance will not be preempted by state legislation. If the area of law is of statewide concern, state legislation preempts the local ordinance. Often, the matter is of both local and statewide concern. In a matter of mixed concern, a local ordinance and state legislation may coexist if they do not conflict. However, a conflict most assuredly arises when a municipality utilizes a local ordinance to ban fracking within the corporation limits in a manner contrary to permits allowing for the development of a mineral interest that have been granted by the state. In this scenario, coexistence may be possible, but is unlikely.

The importance of an issue can lift what traditionally may have been a matter of local self-government to a level that is proper only for state regulation, and thus preempt municipal regulation. Courts look at the following factors to determine whether a local matter will be elevated to a level of statewide concern, such as land-use regulation: (1) the nature of the regulated subject matter and the necessity for exclusive state regulation in achieving the uniformity necessary to serve the state’s purpose or interest; (2) the foreseeability of local interference with the state regulatory scheme if upheld; (3) the impact of the measure on individuals living outside the municipality; (4) historical considerations concerning whether the subject matter has traditionally been governed by state or

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150. These states include: Colorado, Illinois, New York, Ohio, Oklahoma, and Utah. See supra note 137 and accompanying text for an explanation of New York’s label as both a legislative model and *imperium in imperio* state, and a discussion of the difficulty labeling of states generally.

151. See, e.g., Voss v. Lundvall Bros., 830 P.2d 1061, 1062 (Colo. 1992) (the issue in this case was similar to the issue in *Northeast v. Morgantown*: “whether the scope of [a municipality’s] authority as a home rule city to regulate land use within its municipal borders extends to a total ban on the drilling of an oil, gas, or hydrocarbon well within the city limits”).


153. Scadron, supra note 152.

154. Id.

155. For example, the court in *Northeast v. Morgantown* noted that Morgantown had an interest in the control of its land within and surrounding its municipal borders, and West Virginia had an interest in oil and gas development and production throughout the state. Northeast Natural Energy, L.L.C. v. City of Morgantown, Civ. Act. No. 11-C-411, slip op. at 8 (W. Va. Aug. 12, 2011).


158. Id. at 906.

local governments;\textsuperscript{160} and (5) whether the state constitution specifically commits the particular matter to state or local regulation.\textsuperscript{161}

a. Colorado

The State of Colorado is an \textit{imperium in imperio} state.\textsuperscript{162} In \textit{Voss v. Lundvall Bros.}, the Supreme Court of Colorado looked at the issue of whether Colorado’s Oil and Gas Conservation Act preempted a home rule municipality’s ordinance banning the drilling of oil and gas wells within its municipal borders.\textsuperscript{163} The court found “that the exercise of zoning authority for the purpose of controlling land use within a home-rule city’s municipal borders is a matter of local concern.”\textsuperscript{164} However, the court found the ordinance to be a conflicting matter of local and statewide concern.\textsuperscript{165} The court then stated that “nothing in the [Colorado] Oil and Gas Conservation Act manifests a legislative intent to expressly or impliedly preempt all aspects of a local government’s land-use authority over land that might be subject to oil and gas development and operations within the boundaries of a local government.”\textsuperscript{166}

The court’s analysis looked at four of the aforementioned factors in determining whether the statewide interest would preempt the local interest.\textsuperscript{167} The court held that “the state’s interest in efficient oil and gas development and production throughout the state . . . [was] sufficiently dominant to override a home-rule city’s imposition of a total ban on the drilling of any oil, gas, or hydrocarbon wells within the city limits.”\textsuperscript{168}

Under the ruling in \textit{Voss}, it appears Colorado foreclosed the possibility of municipal fracking bans nearly twenty years ago. However, the political climate in Colorado has changed since the \textit{GasLand} flaming faucet.\textsuperscript{169} As a result of the current political climate in Colorado, the State conducted tests to verify the findings in \textit{GasLand} and ultimately found the documentary’s portrayal of the Colorado incidents to be erroneous.\textsuperscript{170}

Despite those findings, the cities of Longmont and Fort Collins have both recently entered into the spotlight by banning fracking. In the summer of 2012,
the City of Longmont passed an ordinance, restricting operators within the city limits.\textsuperscript{171} Shortly thereafter, the Colorado Oil and Gas Conservation Commission filed suit against the city.\textsuperscript{172} In November of 2012, the City of Longmont banned hydraulic fracturing\textsuperscript{173} and, as a result, was sued by the Colorado Oil & Gas Association.\textsuperscript{174} In 2013, Fort Collins passed an ordinance banning fracturing within its city limits.\textsuperscript{175} Although this question seemed to have been decided in \textit{Voss}, perhaps the post-\textit{GasLand} climate in Colorado will change its courts’ minds regarding home rule in these pending cases.

b. Oklahoma

In Oklahoma, another \textit{imperium in imperio} state, the issue appeared to have been resolved until recently. In \textit{Beveridge v. Harper & Turner Oil Trust}, the Supreme Court of Oklahoma held that “the power of municipalities to restrict the use of property within their limits as conferred by legislative enactment is, when properly and reasonably exercised, authorized under the police power.”\textsuperscript{176} Further, “[t]hrough the power to zone, a municipality may prohibit the exploration for and production of oil and gas in designated urban areas when reasonably necessary to promote the public health, safety, or general welfare.”\textsuperscript{177}

In \textit{Clouser v. City of Norman}, the court stated that the “legislation by which the restrictions are imposed must not be unreasonable or arbitrary, or constitute an unequal exercise of the power.”\textsuperscript{178} The court ultimately found that if the area of land affected by the ordinance (1) is densely populated, (2) could affect other areas, or (3) could affect the future development of the city, the ordinance would have reasonable relation to the public health, safety, morals, or general welfare.\textsuperscript{179} However, the ordinance in question did not meet any of the factors and therefore was found to be unreasonable and arbitrary and was consequently held to be invalid.\textsuperscript{180}

More recently, the Oklahoma Corporation Commission (the Commission) addressed a similar issue in \textit{I-MAC Petroleum Services, Inc.}, where a question arose regarding how an application to the Commission for a disposal well was affected by a stricter municipal ordinance.\textsuperscript{181} Vian, Oklahoma, the municipality involved, was not a home rule municipality. As such, Vian arguably should have less authority for self-government than a home rule municipality. On

\textsuperscript{171} \textit{CITY OF LONGMONT, COLO., ORDINANCE 2012-25} (July 17, 2012).
\textsuperscript{173} \textit{CITY OF LONGMONT, COLO., R-2012-67} (Nov. 6, 2012).
\textsuperscript{175} \textit{CITY OF FORT COLLINS, COLO., ORDINANCE 2013-32} (Mar. 5, 2013).
\textsuperscript{177} \textit{Id.}
\textsuperscript{178} \textit{Clouser v. City of Norman}, 393 P.2d 827, 830 (Okla. 1964).
\textsuperscript{179} \textit{Id.} at 829.
\textsuperscript{180} \textit{Id.}
request from the Commission, an administrative law judge opined that although it could not rule on the issue of state preemption, the Commission’s authority to issue permits for drilling wells was concurrent with the authority granted to municipalities to implement rules and regulations enacted to provide for the welfare of its inhabitants; therefore, while Vian’s ordinance did not affect the Commission’s approval of the permit, the entity would have to separately comply with Vian’s additional requirements. Assuming that Oklahoma courts would give deference to the administrative law judge’s recommendations, it stands to reason that a home rule municipality’s authority to ban fracing might also be upheld if it had reasonable relation to the public health, safety, morals, or general welfare. The fact that a municipal fracing ban might be upheld also demonstrates that the mere classification as an imperium in imperio state is insufficient to predict whether or not a local fracing ban will be preempted by state legislation.

In summary, neither variation of constitutional home rule, legislative model nor imperium in imperio, sheds any light on the issue of state preemption of local fracing bans. Whereas a court in West Virginia, a legislative model state held municipal fracing bans to be preempted by state legislation, courts in Texas, another legislative model state, indicate these types of bans will be upheld. Further, courts in Colorado, an imperium in imperio state, have indicated that state law will preempt home rule municipal ordinances banning fracing, contrary to courts in Oklahoma, which have indicated that these bans may be upheld. Although courts in statutory home rule states have yet to rule on the issue, it is probably safe to say that their results will be just as unpredictable.

B. Applicable Law in Statutory Home Rule States

Two states with statutory home rule provisions coincide with major shale plays—Arkansas and Kentucky. Courts in these two states analyze conflicts between local and state legislation much like legislative model states. However, unlike legislative model states, which grant authority to municipalities in their respective state constitutions, these home rule states grant authority by statute.

184. The Administrative Law Judge’s Report references an Oklahoma Attorney General Opinion which cites Oklahoma Supreme Court case law to support the conclusion that “exclusive jurisdiction conferred [to the Commission] does not rescind the police powers of the city . . . [nor does it] deprive the cities of their rights to impose restrictions on drilling activities within city limits.” Id. at 3 (citing Okla. Att’y Gen. Op. No. 06-12, 2006 WL 1098278). The ALJ’s report was appealed by the city and the appeal was heard by the Commission’s Oil and Gas Appellate Referee, but I-MAC withdrew its well application prior to the issuance of any further reports and the application was dismissed without prejudice. Order Dismissing Cause, I-MAC Petroleum Services, Inc., Okla. Corp. Comm’n, Cause PD No. 200900255 (June 22, 2010).
186. 1 JOHN MARTINEZ & MICHAEL LIBONATI, LOCAL GOVERNMENT LAW § 4:1 (citing OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW 97 (1982)).
1. Arkansas

The Arkansas Constitution states that “[n]o municipal corporation shall be authorized to pass any laws contrary to the general laws of the state.”\(^\text{187}\) Further, the Arkansas Supreme Court has found the state “legislature possesses plenary power over . . . municipalities.”\(^\text{188}\) However, the Arkansas Home Rule Act states “[a] municipality is authorized to perform any function and exercise full legislative power in any and all matters of [any] nature pertaining to its municipal affairs.”\(^\text{189}\)

Following a series of seismic events, known as the Guy-Greenbrier Earthquake Swarm, the Arkansas Oil and Gas Commission (the Commission) asserted its authority, placing a moratorium on any new or additional disposal wells near the affected fault.\(^\text{190}\) Disposal wells are not fracing wells; nonetheless, the Commission’s actions display its intent to regulate disposal wells following perceived seismic events. It thus stands to reason that despite a favorable legislative and judicial climate, any attempt to ban fracing at the local level in Arkansas would likely be overturned due to state preemption of the field.

2. Kentucky

Kentucky amended its state constitution in 1994 to include a municipal home rule provision.\(^\text{191}\) Much like legislative model states, Kentucky’s constitution provides that “cities may exercise any power and perform any function within their boundaries that is in furtherance of a public purpose of a city and not in conflict with a constitutional provision or statute.”\(^\text{192}\) The statutory home rule provision in Kentucky states “[a] power or function is in conflict with a statute if it is expressly prohibited by a statute or there is a comprehensive scheme of legislation on the same general subject.”\(^\text{193}\) The Kentucky Court’s approach has been more akin to courts in states that operate under a legislative model analysis.\(^\text{194}\) Furthermore, state legislation appears to prevent local governments from regulating oil and gas development.\(^\text{195}\) Therefore, while a definitive prediction cannot be made about how the Kentucky courts might rule on a local fracing ban, one would likely be preempted by a comprehensive state legislative scheme regulating oil and gas development.

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187. ARK. CONST. art. XII, § 4.
192. KY. CONST. § 156b (1994).
193. KY. REV. STAT. ANN. § 82.082 (West 2011).
194. Kentucky Law Survey: State and Local Government, 28 N. KY. L. REV. 274, 314-15 (2001) (discussing that despite Kentucky’s constitutionalization of home rule, Kentucky courts continue to treat the issue as if it were a statutory state that utilizes a legislative model analysis). The analysis for legislative model states is discussed supra in Section IV.A.1.
195. KY. REV. STAT. ANN. § 353.500(2) (West 2011) (“The General Assembly finds that governmental responsibility for regulating all aspects of oil and gas exploration, production, development, gathering, and transmission rests with state government.”).
C. State Construction of Home Rule

Each state takes a different stance on the actual autonomy granted to municipalities. Although home rule provisions may grant what facially seem to be broad powers, if the legislature appears to be silent, it is ultimately left to the courts to decide whether an ordinance will prevail. Northeast v. Morgantown illustrates a strict construction of the home rule: “[i]f any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied.” In contrast, the Illinois state constitution states that “a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt [except as limited by that section].” Furthermore, the Illinois state constitution states that the “[p]owers and functions of home rule units shall be construed liberally.” However, as was the case with the taxonomy of the home rule provision, the following discussion will show that a state’s construction of home rule authority is not determinative of the outcome either.

1. Strict Construction States

Northeast v. Morgantown suggests that in states like West Virginia, municipal ordinances purporting to ban fracing enacted pursuant to home rule, are likely face an uphill battle. However, Oklahoma, a state that construes municipal home rule powers strictly, seems to indicate it would uphold a municipal fracing ban. New York and Pennsylvania are also home rule states that follow a rule of strict construction. Like West Virginia and Oklahoma, they also seem to take opposing views regarding state preemption of municipal fracing bans.

196. Many state courts issue conflicting decisions and tend to rule by a blend of broad and strict construction. Thus, it is difficult to definitively classify these states as either broadly or strictly construing home rule.


199. ILL. CONST. art. VII, § 6(a).

200. Id. § 6(m); see also Scadron v. City of Des Plaines, 606 N.E.2d 1154, 1158 (Ill. 1992) (stating that ILL. CONST. art. VII, § 6(a) “was written with the intention that home rule units be given the broadest powers possible”).


202. Id.

203. See supra Section IV.A.2.B.

204. Richardson, Jr. et al., supra note 201.
a. New York

New York, which typically construes home rule narrowly, is a hotbed for municipal bans on fracking. Tensions are running high in communities across the state. A moratorium on fracking was enacted by the State of New York in late 2010. The New York State Assembly recently proposed extending the moratorium, most likely until 2015.

In September of 2011, a case was filed in Tompkins County, New York challenging a local ban on fracking. The court was asked to determine “whether a local municipality may use its power [to enact a zoning ordinance] to regulate land use to prohibit exploration for, and production of oil and natural gas [using hydraulic fracturing].” The court ruled in the affirmative, granting summary judgment in favor of the municipality. The court held the zoning ordinance in question was not preempted by the New York Oil, Gas and Solution Mining Law (OGSML). The court reasoned that the state legislation did not preempt the local ordinance because the OGSML “[did] not contain a clear expression of legislative intent to preempt local zoning authority.” On the contrary, the OGSML solely purported to preempt local legislation “relating to the regulation of the oil, gas and solution mining industries.” Furthermore, the court stated that because the ordinance could be harmonized with statutes granting zoning power to municipal authorities a local government could

205. New York, like West Virginia purports to broadly construe its home rule. The New York State Constitution provides that “[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed.” N.Y. CONST. art. 9, § 3(c). However, “[s]trict interpretation or broad, the [State’s high] court read[s] New York’s constitution so as to assure State dominance.” GERALD BENJAMIN & CHARLES BRECHER, THE TWO NEW YORKS: STATE-CITY RELATIONS IN THE CHANGING FEDERAL SYSTEM 146 (1988).


211. Id. at 461.

212. Id. at 474.

213. Id. (discussing N.Y. ENVTL. CONSERV. LAW art. 23 (McKinney 2011)). The court relied heavily on two prior decisions in which municipalities were held to have the authority to amend their respective zoning ordinances to eliminate mining. Id. at 466-73 (discussing Frew Run Gravel Prods., Inc. v. Town of Carroll, 518 N.E.2d 920 (N.Y. 1987); Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226 (N.Y. 1996)).

214. Id. at 470.

215. Id. at 467.
exercise its power to regulate land use to determine where within its borders gas drilling could take place.\textsuperscript{216}

Thus, a New York court took the contrary position to that taken by the court in Northeast \textit{v. Morgantown}. Building on the above analysis regarding New York and West Virginia, perhaps a look at Pennsylvania, a third strict construction state in the Marcellus shale region, would shed more light on the issue of state preemption.

b. Pennsylvania

Pennsylvania is a legislative model state that construes home rule strictly.\textsuperscript{217} In 2009, the Pennsylvania Supreme Court held, in accordance with the aforementioned New York decision,\textsuperscript{218} that local zoning ordinances are not preempted by state oil and gas legislation (especially when the ordinance prohibits a gas well within a residential district).\textsuperscript{219} That same year, the state’s Supreme Court analyzed an ordinance regulating oil and gas development that overlapped with, and was more stringent than, the Pennsylvania Oil and Gas Act.\textsuperscript{220} The Court held the ordinance was “an attempt by the [City] to enact a comprehensive regulatory scheme relative to oil and gas development within the municipality,” and therefore was preempted.\textsuperscript{221} Further, in \textit{Penneco Oil Co. v. County of Fayette}, a Pennsylvania appellate court held another zoning regulation prohibiting gas drilling near an airport was not preempted, as it “reflect[ed] traditional zoning regulations that identif[ied] which uses [were] permitted in different areas of the locality.”\textsuperscript{222}

In summary, both New York and Pennsylvania are being closely watched by the industry due to their location in the Marcellus and Utica shale regions, and due to the number of local bans enacted within their borders.\textsuperscript{223} West Virginia is a strict construction state and the state court held that Morgantown’s ban on fracking was preempted by state legislation.\textsuperscript{224} Oklahoma and New York are also traditionally strict construction states, and their courts have recently indicated that local fracking bans might or would be upheld.\textsuperscript{225} Texas has traditionally construed home rule authority strictly,\textsuperscript{226} but seemed to take a
broader position in *Trail Enterprises, Inc. v. City of Houston*. In that case, a Texas court upheld a municipal ordinance banning oil and gas production under the police power. Just as classification as a legislative model, *imperium in imperio*, or statutory home rule state was not sufficient to predict the outcome of a preemption claim, classification as a traditionally strict construction state is not likely dispositive of the outcome either. Judging from these previous analyses, classification as a broad construction state will also likely provide an unpredictable outcome.

2. Broad Construction States

a. Illinois

In Illinois, a broad construction state, a recent judicial decision has shed some light on the issue of municipal fracing bans within the state. In *Tri-Power Resources, Inc. v. City of Carlyle*, the City of Carlyle, a non-home rule municipality, annexed land to which the plaintiff, Tri-Power Resources, Inc., had previously acquired the mineral lease and permits to develop. Shortly after annexing the land, the City of Carlyle enacted an ordinance classifying it as residential. Pursuant to the City’s zoning code, classification as residential precluded (and effectively prohibited) oil and gas development within Carlyle’s municipal limits. Plaintiff alleged in count III of its complaint that the City was not authorized to prohibit drilling of an oil or gas well within its municipal limits.

The Illinois appellate court granted plaintiff’s certified question regarding count III relating to “whether a non-home-rule unit such as the City [of Carlyle] has the authority to prohibit or bar the drilling or operation of an oil or gas well

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227. *Trail Enterprises, Inc. v. City of Houston*, 957 S.W.2d 625 (Tex. App. 1997); *see also supra* Section IV.A.1.b.
228. *Id.* at 635.
229. The following states interpret the home rule broadly: Arkansas, Colorado (however, Colorado has found in favor of state preemption in the case of oil and gas regulation), Illinois, Louisiana (for municipalities chartered after 1974), Montana, Ohio, New Jersey, Tennessee, and Utah. *Richardson, Jr., et al.*, *supra* note 201, at app. A.
231. The City of Carlyle did not enjoy the privileges of home rule due to the fact that it did not meet the required number of inhabitants, 25,000, and had “not elected by referendum to become a home rule unit of government.” *Id.* at 813. As such, it was to be treated judicially as governed by Dillon’s Rule. *Id.*
232. *Id.* at 812.
233. *Id.*
234. *Id.* The court stated that although the City’s zoning code does not expressly prohibit the drilling or operation of an oil or gas well within its municipal limits . . . the activity is precluded by exclusion [because] the City’s zoning code does not list the drilling or operation of an oil or gas well, and all “unlisted” uses are “deemed prohibited.” *Id.* at 813.
235. Counts I & II alleged a compensable constitutional taking under the Fifth and Fourteenth Amendments of the United States Constitution. *Id.* at 812. This issue will be addressed *infra* in Section V.
within its municipal limits.” Arguably, the City of Carlyle would not have the authority to regulate oil and gas development as a non-home rule unit governed by Dillon’s Rule because this authority is generally reserved for the state. However, legislation in the State of Illinois gave “the City the power to prohibit the operation of . . . oil or gas well[s] within its municipal limits.” According to the court, the City’s “power to give . . . permission [granted under state legislation] necessarily entails the power to deny the same . . . within its municipal limits.” Furthermore, the same state legislation “precludes a finding that the legislature intended the [state statutes] to have preemptive effect,” and to hold otherwise would be to “ignore the legislature’s plain language and ‘read conditions into the statute[s] that are not there.’” Therefore, if a non-home rule municipality, such as the City of Carlyle, is granted authority to prohibit oil and gas development within its boundaries, home rule municipalities in Illinois enjoy the same authority.

b. Louisiana

Louisiana is a legislative model state that also construes home rule authority broadly. In Energy Management Corp. v. City of Shreveport, Shreveport, a home rule municipality, enacted an ordinance prohibiting oil and gas development within 1,000 feet of a lake. The City acted pursuant to its home rule charter, which provided the City could make all necessary regulations to protect the water supply of the [City] from pollution and other damage, and to exercise full and unlimited police power over the bed and waters of [the lake] and for a distance of five thousand feet . . . and to pass any and all rules, regulations and ordinances deemed to be necessary for these purposes.

Despite the grant of authority from the State of Louisiana, which purports to interpret the home rule broadly, the court held that the City was preempted and...
precluded by Louisiana’s comprehensive regulation of such activities and the statutory prohibition of local regulation of drilling operations. 249

In summary, Illinois may prove that broad interpretation states will likely uphold local fracing bans. However, Louisiana, another state which broadly interprets the home rule, did not. Colorado, like Louisiana, interprets the home rule powers granted to municipalities broadly, and a local ban was preempted, 250 but recent municipal bans will test Colorado’s position. 251 This suggests that the broad construction of municipal home rule powers, just like the strict construction of these powers, may not indicate how a state will decide on whether a home rule fracing ban will be upheld.

Furthermore, Sections IV.A. and IV.B. also suggest that neither constitutional home rule states (namely legislative model and imperium in imperio) nor statutory home rule states shed any light on the issue. This creates uncertainty for communities within these states, mineral rights holders, and the oil and gas industry. As the outcome of a state preemption claim involving a municipal fracing ban is uncertain, so are the ramifications for both sides.

V. RAMIFICATIONS FOR THE OIL & GAS INDUSTRY – TAKINGS WITHOUT COMPENSATION

Mineral rights holders and oil and gas developers cannot proceed with certainty in many states due to municipal fracing bans. If bans are upheld, it is likely that holders of mineral rights and oil and gas developers will be unable to make use of mineral leases, creating negative economic ramifications not only for them, but also for local communities. In these scenarios, the oil and gas industry may feel inclined to bring regulatory taking claims under the Fifth and Fourteenth Amendments of the United States Constitution when a municipal ordinance banning fracing is upheld. This issue is briefly addressed in recent New York and Colorado cases. 252

In Pennsylvania Coal Co. v. Mahon, the United States Supreme Court recognized government regulation of private property, such as a municipality’s ban of fracing, may in some instances be so onerous as to rise to the level of an appropriation, compensable under the Fifth Amendment. 253 The Fifth Amendment to the United States Constitution provides that “[n]o person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.” 254

249. Energy Mgmt. Corp., 397 F.3d at 302-03. The court based its holding on: (1) the clearly pervasive nature of the statute, (2) the desire for state uniformity reflected in the statute, and (3) the danger of conflict between state and local law addressed in the statute. Id. at 303-04.

250. Voss v. Lundvall Bros., 830 P.2d 1061, 1062 (Colo. 1992) (holding that the state Oil and Gas Conservation Act preempted a home rule city from enacting a land-use ordinance that imposed a total ban on drilling of any oil, gas, or hydrocarbon wells within the city).


254. U.S. CONST. amend. V.
Furthermore, the Fourteenth Amendment to the United States Constitution provides that:

[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.255

In a recent New York case, Cooperstown Holstein Corp. v. Town of Middlefield, the court faced one such negative economic ramification.256 Much like Anschutz,257 the issue in Cooperstown was whether the Town of Middlefield’s zoning law258 and the resulting ban on hydraulic fracturing were void as preempted by state legislation.259 The court ultimately came to the same decision as the Anschutz court, upholding the municipal ordinance.260 However, the decision in Cooperstown is not as important as the argument set forth by the plaintiff, Cooperstown Holstein Corporation. The plaintiff’s complaint impliedly alleged a taking when it stated the ban “frustrat[ed] the purposes of plaintiff’s [l]eases and den[ied] plaintiff the economic benefits of the [l]eases including the right to market its minerals including oil and natural gas.”261 Thus, the City’s enforcement of the zoning law prohibiting hydraulic fracturing within its boundaries may have unreasonably interfered with plaintiff’s right to use and enjoy its mineral estate, in contravention of the Fifth and Fourteenth Amendments of the United States Constitution. However, this taking was not analyzed by the court, as plaintiff did not specifically ask the court to address the issue.262

The facts in Cooperstown provide an example of the potential ramifications of municipal fracturing bans because they evoke the seminal New York takings case, Penn Central Transportation Co. v. City of New York (Penn Central).263 Penn Central laid out three factors to determine whether a taking has occurred: first, the economic impact of the regulation on the claimant; second, the extent to which the regulation has interfered with distinct investment backed expectations; and third, the character of the government action.264 However, according to Penn Central, a taking is not as readily found when the “interference arises from

255. U.S. CONST. amend. XIV.
257. Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458 (Sup. Ct. 2012); see also supra Section IV.C.1.a. for a discussion of this case.
258. Middlefield, N.Y., A Local Law Repealing the Town of Middlefield Zoning Ordinance and Adopting the Town of Middlefield Zoning Law (June 28, 2011).
260. Id. at 730. Specifically, the court held: (1) that the supersession clause in New York State Environmental Conservation Law § 23-0303 did not serve to preempt a local municipality from enacting land use regulation within the confines of its geographical jurisdiction, and (2) that local municipalities are permitted to permit or prohibit oil, gas, and solution mining or drilling in conformity with constitutional and statutory authority. Id. at 728-30.
262. Id. at 4, 7.
264. Id. at 124.
some public program adjusting the benefits and burdens of economic life to promote the common good." 265 Finally, in another case the Court cautioned the Penn Central factors should only be used as guideposts, not per se rules, in determining whether just compensation is required. 266

Plaintiff in Cooperstown, a holder of mineral rights, leased to a developer all of the oil and gas in the premises together with the right to explore, develop, produce, measure, and market production from the premises. 267 After the developer leased the minerals, the City enacted an ordinance repealing an existing zoning ordinance and enacted a new local law prohibiting oil, gas, or solution mining or drilling. 268 First, there was likely an economic impact of the regulation on plaintiff as it leased its mineral rights in order to develop oil and gas on the land. Plaintiff made this clear in its complaint when it stated the ban "frustrat[ed] the purposes of plaintiff's [l]eases and den[ied] plaintiff the economic benefits of the [[l]eases including the right to market its minerals including oil and natural gas." 269 Second, the regulation likely interfered with distinct investment backed expectations, as the lessee, a developer, contracted to lease the premises from plaintiff with the expectations of exploring, developing, producing, measuring, and marketing the oil and gas in the land.

Addressing the third Penn Central factor, the character of the government action, will be a challenge for holders of mineral rights and developers. The Supreme Court has stated that "the nature of the State's interest in the regulation was a critical factor in determining whether a taking had occurred, and thus whether compensation was required." 270 As applied to the facts, the City's ordinance purported to protect and promote public health and safety of the Town of Middlefield and its citizens by protecting surface and ground water resources and sustaining the viability of farmland. 271 To this end, the City acted to protect itself and its citizens under the premise that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." 272 The Court further held the Takings Clause did not transform that principle to one that requires compensation whenever the City asserts its power to protect the community from injurious use of property. 273

So, the issue essentially becomes 'Is the process of hydraulic fracturing an injurious use of property, such that it rises to the level of a nuisance?' If it is, as the City claimed, 274 then the instability associated with home rule states is then

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265. Id.
268. Id. at 2-4.
269. Id. at 4.
273. Id. at 664.
274. See e.g., Middlefield, N.Y., Resolution #10 of 2010, available at http://documents.foodandwaterwatch.org/doc/ Frack_Actions_MiddlefieldNY.pdf (where the Town of Middlefield states that
coupled with the possibility mineral owners and developers will not be compensated for the regulatory takings that result from municipal fracing bans. Ultimately, the determination that governmental action constitutes a taking “necessarily requires a weighing of private and public interests.”

Generally, a public nuisance is an unreasonable interference with a right common to all members of the general public, collective in nature, and not like the individual right. As nuisance is a common law tort, it is governed by the law of the state in which the fracing ban was created. As applied to the facts in Cooperstown, the nuisance issue would be governed by the common law of the State of New York. In Copart Industries, Inc. v. Consolidated Edison Co. of New York, the New York Court of Appeals established that:

[A] public . . . nuisance consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons.

In State of New York v. Schenectady Chemicals, Inc., the New York Appellate Division Court held “the seepage of chemical wastes into a public water supply constitutes a public nuisance.” Furthermore, “contamination of groundwater or public water with noxious chemicals is a substantial interference with a common right of the public . . ., [especially] where the business activity produces harm directly attributable to it, or where the harm . . . is inextricably intertwined with defendant’s commercial activity.” Thus, the City in Cooperstown should be able to defend against a takings argument if it is able to prove that it enacted its ordinance to abate a public nuisance caused by fracing.

Proving public nuisance will require evidence of fracing’s direct environmental impacts, such as groundwater contamination. In early 2012, the Energy Institute at the University of Texas at Austin released a report addressing many issues of local concern about these possible impacts. It found that:

[There is at present little or no evidence of groundwater contamination from hydraulic fracturing of shales at normal depths. No evidence of chemicals from hydraulic fracturing fluid has been found in aquifers as a result of fracing operations. [Furthermore], it appears that the risk of such chemical additives is

“known cases of ‘fracking fluid’ contamination of groundwater exist in Northern Pennsylvania;” that “analysts have found at least 63 different compounds in ‘fracking fluid’ and of these, about three quarters have one or more toxic chemicals known as neurotoxins;” that “operations of gas drilling companies . . . results in contaminants entering the atmosphere, thereby polluting the air that sustains plants and animals;” that the Town “ha[s] concern that [its] water supply and air consumed by [it] are at risk by [hydraulic fracturing], resulting in safety and health risks to [its] citizens.”

greater from surface spills of undiluted chemicals than from actual fracturing activities.\textsuperscript{281}

However, despite the EPA’s preliminary findings of chemicals “consistent with” fracturing in ground water,\textsuperscript{282} its final report will not be issued until 2014.\textsuperscript{283} Thus, the University of Texas study remains uncontested, and the public still has no definitive statement as to whether hydraulic fracturing is an injurious use of property that rises to the level of a nuisance.

Both sides of this issue face great uncertainty because neither side knows which way courts in their respective state will rule on the issue of preemption. As a result, the oil and gas industry may suffer negative economic ramifications if their interests are rendered worthless by local ordinances. Mineral rights holders and developers may seek compensation under a regulatory takings claim. However, these claims will be tough to prove as there is not enough information right now to demonstrate whether or not hydraulic fracturing is an injurious use of property that rises to the level of a nuisance.

\section*{VI. CONCLUSION}

Over the course of the last decade, fracturing has emerged as one of the most promising means of natural gas extraction in the domestic energy market. Emerging environmental concerns have sparked grassroots movements as well as led communities to ban hydraulic fracturing at a local level. These local bans are often based on municipal home rule, which vests autonomy in local governments.\textsuperscript{284} Furthermore, these bans allow municipalities, in varying degrees, to frame and adopt their own charters and enact ordinances constrained only by their respective state legislation, state constitution, federal laws, and the United States Constitution.\textsuperscript{285}

It is difficult to discern the outcome of challenges to local fracturing bans solely from an analysis of the home rule itself. Local fracturing bans are unique in each municipality, and state courts take different positions in deciding whether or not they will be preempted by state law, creating great uncertainty for the oil and gas industry. A state’s classification as an \textit{imperium in imperio}, legislative model, or statutory model of municipal home rule sheds no light on the issue. Nor does its broad or strict interpretation of the home rule appear to be determinative. Ultimately, it may be the legislative and judicial climate in each state that decides the future of its local fracturing ban.

\textsuperscript{281} \textit{Id.} at 22.


\textsuperscript{284} MCBAIN, \textit{supra} note 5, at v-viii.

\textsuperscript{285} \textit{Id.}
Uncertainty should be a cause for concern in the oil and gas industry. If local bans are upheld, mineral rights holders and oil and gas developers will likely be unable to make use of mineral leases, creating negative ramifications not only for them, but also for local communities. One possible negative impact is a constitutional taking, which will be difficult to prove until 2014 when the EPA weighs in on the issue, as fracking’s effects on the environment are still highly disputed. Due to the lack of clarity as to whether the process of hydraulic fracturing is actually an injurious use of property that rises to the level of a nuisance, these local ordinances have been enacted to err on the side of caution. Moreover, it is this lack of clarity that may prevent mineral rights holders and oil and gas developers from successfully alleging a constitutional taking under the Fifth and Fourteenth Amendments.

Jarit C. Polley*