

UNCERTAINTY FOR THE ENERGY INDUSTRY: A FRACTURED LOOK AT HOME RULE

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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 fracing, 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

1. *Northeast Natural Energy, L.L.C. v. City of Morgantown*, Civ. Act. No. 11-C-411, slip op. at 10, 2011 WL 3584376 (W. Va. Cir. Ct. Aug. 12, 2011).

2. MORGANTOWN, W. VA., ORDINANCE 721.01-721.04 (June 21, 2011), *invalidated by Northeast Natural Energy, L.L.C.*, Civ. Act. No. 11-C-411.

state's constitution³ or statutes.⁴ 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.⁵ If a conflict between state legislation and a local ordinance is irreconcilable, state courts must determine if the home rule provision is preempted.⁶

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.⁷ The court in *Northeast v. Morgantown* narrowly construed the City's power in favor of state preemption.⁸ 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*;⁹ 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.¹⁰ 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.

4. Statutory home rule states with major known shale reserves include: Arkansas, ARK. CODE ANN. § 14-43-601 (2012); and Kentucky, KY. REV. STAT. ANN. §§ 82.082, 83.410 (West 2012).

5. HOWARD LEE MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* v-viii (1916).

6. *People v. Llewellyn*, 257 N.W.2d 902, 904-06 (Mich. 1977); *California Grocers Ass'n v. City of L.A.*, 254 P.3d 1019, 1023-24 (Cal. 2011).

7. See, e.g., Press Release, Joe Hoff, Keuka Citizens Against Hydrofracking, Moratoria, Bans, and Resolutions: New York, Pennsylvania, and a Sampling of Municipalities and Key Organizations from Varied Locations Opposed to Hydrofrack Drilling [hereinafter *Moratoria, Bans, and Resolutions*], available at <http://marcellusprotest.org/sites/marcellusprotest.org/files/11-8-12BansMoratoriaStatementsRevision.doc> (last updated Nov. 8, 2012).

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

9. *Northeast Natural Energy, L.L.C. v. City of Morgantown*, Civ. Act. No. 11-C-411, 2011 WL 3584376 (W. Va. Cir. Ct. Aug. 12, 2011).

10. See *supra* notes 3 & 4 (listing states with shale reserves).

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.¹¹ 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.¹² Jobs, income, and tax revenue raised by fracing are beneficial to the economy.¹³ Despite the economic benefits of fracing, some feel the potentially adverse environmental effects of the process outweigh them.¹⁴

Natural gas extraction is generally governed by state regulation.¹⁵ Emerging environmental concerns have sparked grassroots movements¹⁶ that have led communities to enact local bans on hydraulic fracturing.¹⁷ Local ordinances have recently been enacted in several states banning fracing within municipalities' corporate limits.¹⁸ 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

11. GROUND WATER PROTECTION COUNCIL & ALL CONSULTING, MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES: A PRIMER 1 (Apr. 2009) [hereinafter SHALE GAS PRIMER], available at http://www.netl.doe.gov/technologies/oil-gas/publications/epereports/shale_gas_primer_2009.pdf (prepared for the U.S. Department of Energy Office of Fossil Energy and the National Energy Technology Laboratory).

12. *Id.* at 16.

13. TIMOTHY CONSIDINE ET AL., PENN STATE, AN EMERGING GIANT: PROSPECTS AND ECONOMIC IMPACTS OF DEVELOPING THE MARCELLUS SHALE NATURAL GAS PLAY 17-19 (2009), available at <http://marcelluscoalition.org/wp-content/uploads/2010/05/EconomicImpactsOfDevelopingMarcellus.pdf>.

14. Robert W. Howarth, Anthony Ingraffea & Terry Engelder, *Natural Gas: Should Fracking Stop?*, 477 NATURE 271-75 (Sept. 15, 2011), available at <http://www.nature.com/nature/journal/v477/n7364/full/477271a.html> (point, counterpoint on environmental risks versus economic benefits). This comment uses the term fracing in a broad sense of the word. Thus the issues associated with fracing which cause concern for municipalities include: site selection and preparation, well construction, horizontal drilling, multi-stage hydraulic fracturing, production, and storage.

15. SHALE GAS PRIMER, *supra* note 11, at ES-2 to ES-3. Although states currently regulate fracing, the Fracturing Responsibility and Awareness of Chemicals Act of 2011 was introduced to provide national standards for fracing. Fracturing Responsibility and Awareness of Chemicals Act of 2011, H.R. 1084, 112th Cong. (2011); Fracturing Responsibility and Awareness of Chemicals Act of 2011, S. 587, 112th Cong. (2011).

16. For a list of some of the grassroots groups that oppose fracing, see NAT'L GRASSROOTS COAL., <http://www.nationalgrassrootscoalition.org/> (last visited Mar. 16, 2013).

17. The Community Environmental Legal Defense Fund, for example, works with communities, residents, citizens groups, and municipal governments to draft many of the local bans on fracing. *Gas Drilling and Fracing*, COMMUNITY ENVTL. LEGAL DEF. FUND, <http://www.celdf.org/-1-95> (last visited Mar. 21, 2013).

18. Moratoria, Bans, and Resolutions, *supra* note 7.

process of mineral extraction,¹⁹ there are concerns regarding the environmental impacts and risks associated with it. Although current studies are unclear whether fracking 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.²⁰ As a result, grassroots movements have emerged in these communities to encourage more stringent regulation, or even outright bans on fracking, such as the one in the City of Morgantown.²¹

The primary environmental concern regarding fracking 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.²² 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.”²³ 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.²⁴

Both the Environmental Protection Agency (EPA) and the U.S. House of Representatives Committee on Energy and Commerce have begun studying fracking’s effects.²⁵ On December 8, 2011, the EPA released draft findings

19. Fracing is now emerging in many areas of the country, but it has been used as a means of mineral extraction since 1947. Carl T. Montgomery & Michael B. Smith, *Hydraulic Fracturing: History of an Enduring Technology*, 62 J. PETROL. TECH. 26, 27 (Dec. 2010), available at <http://www.spe.org/jpt/print/archives/2010/12/10Hydraulic.pdf>.

20. See, e.g., GASLAND (HBO Documentary Films 2011); Dina Cappiello, *Fracking: EPA Targets Air Pollution From Natural Gas Drilling Boom*, HUFFINGTON POST (July 28, 2011), http://www.huffingtonpost.com/2011/07/28/fracking-epa-air-pollution-natural-gas-drilling_n_912564.html; Timothy Puko, *Fracking Ruled Out as Contributor to East Coast Quake*, PITTSBURGH TRIBUNE-REVIEW (Sept. 6, 2011), http://www.pittsburghlive.com/x/pittsburghtrib/s_755237.html; Alec Liu & Jeremy A. Kaplan, *Earthquakes in Arkansas May Be Man-Made, Experts Warn*, FOXNEWS.COM (Mar. 1, 2011), <http://www.foxnews.com/scitech/2011/03/01/fracking-earthquakes-arkansas-man-experts-warn/>.

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

22. AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, HEALTH CONSULTATION - CHESAPEAKE ATGAS 2H WELL SITE - LEROY HILL RD., LEROY - LEROY TWP., BRADFORD CNTY., PA iii (Nov. 4, 2011), available at <http://www.atsdr.cdc.gov/hac/pha/ChesapeakeATGASWellSite/ChesapeakeATGASWellSiteHC110411Final.pdf>.

23. *Id.*

24. See, e.g., NEW YORK STATE DEP’T OF ENVTL. CONSERVATION, FACT SHEET: WHAT WE LEARNED FROM PENNSYLVANIA (2011), available at http://www.dec.ny.gov/docs/administration_pdf/pafactsheet072011.pdf.

25. U.S. ENVTL. PROT. AGENCY, EPA/600/R-11/122, PLAN TO STUDY THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING ON DRINKING WATER RESOURCES (Nov. 2011), available at http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/upload/hf_study_plan_110211_final_508.pdf; see also U.S. ENVTL. PROT. AGENCY, EVALUATION OF IMPACTS TO UNDERGROUND SOURCES OF DRINKING WATER BY HYDRAULIC FRACTURING OF COALBED METHANE RESERVOIRS STUDY (2004), available at http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_coalbedmethanestudy.cfm; U.S. H.R. COMM. ON ENERGY & COMMERCE, MINORITY STAFF, REPORT ON CHEMICALS USED IN HYDRAULIC FRACTURING (Apr. 2011), available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Hydraulic-Fracturing-Chemicals-2011-4-18.pdf>.

concerning groundwater pollution in the Pavillion field of central Wyoming.²⁶ Three years ago, the EPA began investigating water quality concerns in private drinking water wells near Pavillion.²⁷ The EPA found the ground water in the aquifer contained compounds likely associated with practices related to gas production,²⁸ including hydraulic fracturing.²⁹ However, the EPA did state that in Pavilion, “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.”³⁰ More recently, in December 2012, the EPA released a progress report on its study of the potential impacts of fracing on drinking water.³¹ In the report, five case study locations were selected to determine if and how contamination may have occurred.³²

State regulatory initiatives in home rule states now require varying degrees of disclosure of chemical use in: Arkansas,³³ Colorado,³⁴ Illinois,³⁵ Kentucky,³⁶ Louisiana,³⁷ Maryland,³⁸ Michigan,³⁹ Montana,⁴⁰ New Mexico,⁴¹ New York,⁴² Ohio,⁴³ Oklahoma,⁴⁴ Pennsylvania,⁴⁵ Tennessee,⁴⁶ Texas,⁴⁷ Utah,⁴⁸ West

26. Press Release, U.S. Env'tl. Prot. Agency, EPA Releases Draft Findings of Pavillion, Wyoming Ground Water Investigation for Public Comment and Independent Scientific Review (Dec. 8, 2011), <http://yosemite.epa.gov/opa/admpress.nsf/0/EF35BD26A80D6CE3852579600065C94E> (noting that the draft report would be available for public comment through late January 2012, and a subsequent “[thirty] day peer-review process [would be] led by a panel of independent scientists”).

27. *Id.*

28. *Id.* “EPA’s analysis of samples taken from the Agency’s deep monitoring wells in the aquifer indicates detection of synthetic chemicals, like glycols and alcohols consistent with gas production and hydraulic fracturing fluids, benzene concentrations well above Safe Drinking Water Act standards and high methane levels.” It further found that “[t]he presence of these compounds is consistent with migration from areas of gas production.” *Id.*

29. *Id.*

30. *Id.*

31. U.S. ENVTL. PROT. AGENCY, EPA/601/R-12/011, STUDY OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING ON DRINKING WATER RESOURCES – PROGRESS REPORT (Dec. 2012) [hereinafter EPA PROGRESS REPORT], available at <http://epa.gov/hfstudy/pdfs/hf-report20121214.pdf>. A final draft report is expected in 2014. EPA’s *Study of Hydraulic Fracturing and Its Potential Impact on Drinking Water Resources*, EPA.GOV, <http://www.epa.gov/hfstudy/> (last visited Mar. 30, 2013).

32. EPA PROGRESS REPORT, *supra* note 31, at 3.

33. ARK. OIL & GAS COMM’N GEN. RULES & REGS. B-19 (2013).

34. COL. OIL & GAS CONSERV. COMM’N RULES & REGS. 205 (2012).

35. ILL. ADMIN. CODE tit. 62, § 240.340 (2012).

36. 805 KY. ADMIN. REGS. 1:020 (2012).

37. LA. ADMIN. CODE tit. 43, § 117 (2012).

38. MD. CODE ANN., ENVIR. § 14-104 (LexisNexis 2012).

39. MICH. DEPT. OF ENVTL. QUALITY SUPERVISOR OF WELLS INSTRUMENT NO. 1-2011 (2011).

40. MONT. ADMIN. RRS. 36.22.608, 36.22.1010, 36.22.1015-16, 36.22.1106 (2011).

41. N.M. CODE R. § 19.15.26.13 (LexisNexis 2011).

42. N.Y. ENVTL. CONSERV. LAW §§ 23-0301, 23-0305(8)(f) (McKinney 2013).

43. OHIO ADMIN. CODE 1509.10 (2012).

44. OKLA. ADMIN. CODE § 165:10-3-10 (2012).

45. 25 PA. CODE § 78.122(b) (2011).

46. TENN. COMP. R. & REGS. 0400-45-06-.05 (2013).

47. TEX. NAT. RES. CODE ANN. § 91.851 (2011).

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,

48. UTAH ADMIN. CODE r. 649-5-2 (2013).

49. W. VA. CODE R. § 35-4-7 (2013).

50. WYO. CODE R. OIL GEN. Ch. 4 § 10 (2013).

51. FRACFOCUS, <http://www.fracfocus.org/> (last visited Mar. 22, 2013).

52. Benjamin Haas, Jim Polson, Phil Kuntz & Ben Elgin, *Fracking Hazards Obscured in Failure to Disclose Wells*, BLOOMBERG (Aug. 14, 2012), <http://www.bloomberg.com/news/2012-08-14/fracking-hazards-obscured-in-failure-to-disclose-wells.html>.

53. GASLAND (HBO Documentary Films 2011). Although GasLand's Mr. Fox attributes the "flaming faucet" to fracing's adverse effects on groundwater, the State of Colorado conducted tests to verify Mr. Fox's findings. The State of Colorado ultimately found Mr. Fox's portrayal of the Colorado incidents to be erroneous. COLO. OIL & GAS CONSERVATION COMM'N, GASLAND CORRECTION DOCUMENT (Oct. 29, 2010), available at <http://cogcc.state.co.us/library/GASLAND%20DOC.pdf>.

54. David Biello, *What the Frack? Natural Gas from Subterranean Shale Promises U.S. Energy Independence—With Environmental Costs*, SCI. AM. (Mar. 30, 2010), <http://www.scientificamerican.com/article.cfm?id=shale-gas-and-hydraulic-fracturing>.

55. Gabriel Nelson, *Could Smog Shroud Marcellus Shale's Natural Gas Boom?*, N.Y. TIMES: GREENWIRE (May 27, 2011), <http://www.nytimes.com/gwire/2011/05/27/27greenwire-could-smog-shroud-the-marcellus-shales-natural-3397.html?pagewanted=all>.

56. *WildEarth Guardians v. Jackson*, Nos. 1:11-cv-0001-CJA-MEH, 11-cv-00743-CMA-MEH, 2011 WL 4485964 (D. Colo. Sept. 27, 2011).

57. Final Rulemaking, Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 77 Fed. Reg. 49,490 (Aug. 16, 2012) (to be codified at 40 C.F.R. pts. 60, 63).

58. 40 C.F.R. § 50.2 (2012).

59. NATURAL GAS SUPPLY ASS'N, COMPETITIVE NATURAL GAS MARKETS SPUR TECHNOLOGY INNOVATIONS FOR BOTH CONSUMERS AND THE ENVIRONMENT, available at <http://www.ngsa.org/assets/Docs/Issues/CompetitiveMarketsSpurInnovations.pdf>.

60. Earth Sciences Div., *Induced Seismicity: Oil & Gas*, LAWRENCE BERKELEY NAT'L LAB., http://esd.lbl.gov/research/projects/induced_seismicity/oil&gas/ (last visited Mar. 22, 2013).

61. See, e.g., Cliff Frohlich et al., *Dallas-Fort Worth Earthquakes Coincident with Activity Associated with Natural Gas Production*, 29 THE LEADING EDGE 270 (Mar. 2010); CRAIG NICHOLSON & ROBERT L. WESSON, U.S. GEOLOGICAL SURVEY BULLETIN 1951: EARTHQUAKE HAZARD ASSOCIATED WITH DEEP WELL INJECTION: A REPORT TO THE U.S. ENVIRONMENTAL PROTECTION AGENCY (1990); CTR. FOR EARTHQUAKE

it is still unclear as to the magnitude of seismicity induced by the fracing process.⁶² Although there is no definitive proof that fracing causes earthquakes, many communities have raised concerns following earthquakes in Arkansas,⁶³ Ohio,⁶⁴ and Oklahoma.⁶⁵ In fact, in August of 2012, a case was filed in Arkansas, wherein a landowner alleged fracing to be the culprit.⁶⁶

Due to concerns over fracing's potentially adverse environmental effects, grassroots movements have sought more transparency from natural gas developers or have outright opposed fracing.⁶⁷ Many local communities support these movements and their goals.⁶⁸ Thus, communities in several states have banned fracing,⁶⁹ and other communities have the potential to do so in the future.⁷⁰ Municipal home rule may empower some communities to address these local concerns by banning fracing 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.*,⁷¹ Judge John Dillon created what

RESEARCH & INFO., CERl PUBLIC STATEMENT ON THE GUY EARTHQUAKE SWARM, <http://www.ceri.memphis.edu/GUY/> (last visited Mar. 22, 2013).

62. AUSTIN HOLLAND, OKLAHOMA GEOLOGICAL SURVEY OPEN-FILE REPORT OF1-2011: EXAMINATION OF POSSIBLY INDUCED SEISMICITY FROM HYDRAULIC FRACTURING IN THE EOLA FIELD, GARVIN COUNTY, OKLAHOMA 1 (Aug. 2011).

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 fracing. However, salt-water is a common by-product of the fracing process, which is often disposed of by injecting the wastewater back into the earth. Liu & Kaplan, *supra* note 20.

64. Julie Carr Smyth, *Ohio: Fracking Waste Tied to Earthquakes*, USA TODAY (Mar. 9, 2012), <http://usatoday30.usatoday.com/money/story/2012-03-09/fracking-gas-drilling-earthquakes/53435232/1>.

65. Pete Spotts, *Earthquakes in Oklahoma? Is 'Fracking' to Blame, or Something Else?*, CHRISTIAN SCIENCE MONITOR (Nov. 8, 2011), <http://www.csmonitor.com/Environment/2011/1108/Earthquakes-in-Oklahoma-Is-fracking-to-blame-or-something-else>.

66. Verdict and Settlement Summary, *Hiser v. XTO Energy, Inc.*, No. 4:11-cv-00517, 2012 WL 6947766 (E.D. Ark. Aug. 29, 2012) (the jury found in favor of the plaintiff in the amount of \$300,000).

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 fracing. 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 fracing 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.⁷² According to Dillon’s Rule, a municipality may only act in accordance with the powers granted to it by the state.⁷³ The United States Supreme Court in *Hunter v. City of Pittsburgh* later adopted Dillon’s Rule,⁷⁴ and as a result, local governments across the United States were denied what they considered to be the inherent right of self-government.⁷⁵

Dillon’s Rule ultimately created undue state interference and left local governments without power in municipal affairs.⁷⁶ As a result, many municipalities sought to reclaim their autonomy from the states.⁷⁷ Municipalities did so by lobbying for the enactment of home rule provisions, which would allow them greater self-governance.⁷⁸ Today there are as many as forty-eight states with home rule provisions.⁷⁹ Municipal home rule states can be divided into three varieties: two types of constitutional home rule states, and statutory home rule states.⁸⁰ 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.⁸¹ 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.⁸² 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.⁸³

West Virginia, a home rule state, addressed local fracking concerns in *Northeast v. Morgantown*.⁸⁴ Community members in the City of Morgantown raised concerns about the adverse effects of fracking, namely water

granted; and 3) are always subject to legislative control. Dillon’s Rule further provides for strict construction in the interpretation of powers granted to municipalities. *Id.* at 475; accord JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448-53 (5th ed. 1911).

72. DILLON, *supra* note 71, at 448-51.

73. *Id.*

74. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907).

75. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 85 (1990).

76. *Id.* at 11.

77. Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968) [hereinafter *Municipal Home Rule*].

78. *Id.*

79. RICHARD BRIFFAULT & LAURIE REYNOLDS, STATE AND LOCAL GOVERNMENT LAW 268 (6th ed. 2004).

80. 1 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.

83. Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1115-16 (1980).

84. *Northeast Natural Energy, L.L.C. v. City of Morgantown*, Civ. Act. No. 11-C-411, 2011 WL 3584376 (W. Va. Aug. 12, 2011).

contamination, in May of 2011.⁸⁵ Shortly thereafter a municipal ban on fracking was promulgated based on West Virginia's municipal home rule.⁸⁶

III. CASE OVERVIEW

In *Northeast v. Morgantown*, the Circuit Court of Monongalia County, West Virginia addressed the City's municipal ban of hydraulic fracturing.⁸⁷ The ban was based on the municipal home rule charter granted to the City in the West Virginia Constitution.⁸⁸ The court ultimately held West Virginia's interest in oil and gas development preempted the City's ordinance banning fracking.⁸⁹

A. *Facts*

Enrout Properties, LLC (Enrout), owned property outside the corporate limits of the City of Morgantown, a community in Monongalia County.⁹⁰ Enrout leased the property's Marcellus Shale⁹¹ mineral rights to Northeast Natural Energy, LLC (Northeast).⁹² 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 fracking.⁹³ In March of 2011, the WVDEP issued well permits to Northeast.⁹⁴ The permits allowed Northeast to conduct fracking operations at two well sites on the property.⁹⁵ The well sites did not fall within the City's corporate limits.⁹⁶ In May of 2011, the City's Utility Board questioned the potential environmental impacts of the fracking process on the Monongahela River, which ran through the City.⁹⁷ In response, Northeast agreed to provide additional safeguards to appease the City's Utility Board, and the WVDEP permits were modified accordingly.⁹⁸

85. *Morgantown Passes Fracking Ban*, METRONews (June 8, 2011), <http://web.archive.org/web/20110716071418/http://www.wvmetronews.com/news.cfm?func=displayfullstory&storyid=45955>.

86. *Id.*

87. *Northeast Natural Energy, L.L.C.*, Civ. Act. No. 11-C-411; MORGANTOWN, W. VA., ORDINANCE 721.01-721.04 (June 21, 2011).

88. W. VA. CONST. art VI, § 39(a). West Virginia is a legislative model home rule state, as opposed to an *imperium in imperio* home rule state. For further discussion of this topic, see *infra* Sections IV.A. to IV.B.

89. *Northeast Natural Energy, L.L.C.*, Civ. Act. No. 11-C-411, slip op. at 9-10.

90. *Id.* at 2.

91. "Marcellus Shale is a sedimentary rock formation deposited in the Appalachian Mountains [that] contains significant amounts of natural gas." *Id.* at 3 n.3 (citing WILLIAM M. KAPPEL & DANIEL J. SOEDER, U.S. DEP'T OF THE INTERIOR, U.S. GEOLOGICAL SURVEY, WATER RESOURCES AND NATURAL GAS PRODUCTION FROM THE MARCELLUS SHALE, FACT SHEET 2009-3032 (May 2009), available at <http://pubs.usgs.gov/fs/2009/3032/pdf/FS2009-3032.pdf>).

92. *Id.* at 2-3.

93. *Id.* at 3.

94. *Id.*

95. *Id.*

96. *Northeast Natural Energy, L.L.C.*, Civ. Act. No. 11-C-411, slip op. at 3.

97. *Id.*

98. *Id.*

In June of 2011, the City passed an ordinance prohibiting fracking within the city limits.⁹⁹ 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."¹⁰⁰

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.¹⁰¹ Northeast also sought a declaration that West Virginia state law preempted the ordinance¹⁰² and that the ordinance violated Northeast's constitutional rights.¹⁰³ Enrout intervened and joined Northeast in its claims against the City.¹⁰⁴ The City contended it was authorized, pursuant to the municipal home rule provided for in the state constitution and legislation, to ban fracking on the basis that fracking was a nuisance.¹⁰⁵ Northeast and Enrout then filed a motion for summary judgment.¹⁰⁶

B. Issue, Rationale & Holding

The issue in *Northeast v. Morgantown* was whether West Virginia state oil and gas laws preempted the City from regulating fracking within its own boundaries, pursuant to municipal home rule.¹⁰⁷ The circuit court granted summary judgment for Northeast and Enrout, holding the ordinance as enacted by the City was preempted by state legislation.¹⁰⁸ In analyzing the issue, the circuit court identified the conflicting local ordinance and state legislation.¹⁰⁹ The court then searched for inconsistencies between the two.¹¹⁰ Finally, the court determined whether the state's interest provided for exclusive control of

99. *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).

100. MORGANTOWN, W. VA., ORDINANCE 721.01(a) (June 21, 2011).

101. *Northeast Natural Energy, L.L.C.*, Civ. Act. No. 11-C-411, slip op. at 1.

102. W. VA. CODE §§ 22-1-1 to 22-1-17 (2011).

103. *Northeast Natural Energy, L.L.C.*, Civ. Act. No. 11-C-411, slip op. at 1. 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.

104. *Northeast Natural Energy, L.L.C.*, Civ. Act. No. 11-C-411, slip op. at 2.

105. *Id.* (citing W. VA. CODE § 8-12-2 (the statutory municipal home rule provision)).

106. *Id.* at 10, 14.

107. *Id.* at 5. The court also examined whether Morgantown was preempted from regulating the areas one mile outside those boundaries. *Id.*

108. *Id.* at 10.

109. *Id.* at 5.

110. *Northeast Natural Energy, L.L.C.*, Civ. Act. No. 11-C-411, slip op. at 6.

this area of law or if it could be construed to allow the City to impose a ban on fracing.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 fracing process to be a nuisance, fracing 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 fracing 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 fracing 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.

112. *Northeast Natural Energy, L.L.C.*, Civ. Act. No. 11-C-411, slip op. at 7.

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)).

119. *Northeast Natural Energy, L.L.C.*, Civ. Act. No. 11-C-411, slip op. at 8 (citing *Sharon Steel*, 334 S.E.2d at 624).

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 fracking 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.”¹³⁰ The scope of the *imperium in imperio* home rule power is generally limited to municipal affairs.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.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.¹³³

Generally, home rule municipalities are granted authority to protect public health, safety, and welfare.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.¹³⁵ Thus, courts must first determine if an irreconcilable conflict exists between the local ordinance and state legislation.¹³⁶

1. Legislative Model States¹³⁷

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;¹³⁸ (2) whether there is implied preemption of the local regulation;¹³⁹ and (3) whether the pervasiveness of the state regulatory scheme precludes local regulation.¹⁴⁰

130. *Id.*

131. Kenneth Vanlandingham, *Constitutional Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1, 1-2 (1975) [hereinafter *Constitutional Home Rule*].

132. RICHARD BRIFFAULT & LAURIE REYNOLDS, *STATE AND LOCAL GOVERNMENT LAW* 282-85 (6th ed. 2004).

133. *Municipal Home Rule*, *supra* note 77, at 291.

134. *See, e.g.*, W. VA. CODE § 8-12-5 (44) (2012).

135. *See, e.g.*, *City of Colorado Springs v. Indus. Comm'n*, 749 P.2d 412, 416 (Colo. 1988).

136. *Id.* at 416-17.

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. BRIFFAULT & 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).

138. *Ad + Soil, Inc. v. Cnty. Comm'rs of Queen Anne's Cnty.*, 513 A.2d 893, 902 (Md. 1986).

139. 5 MCQUILLIN 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.”).

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.¹⁴¹ 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.¹⁴² In *Northeast v. Morgantown*, the court found the pervasiveness of the state regulatory scheme was sufficient to warrant preemption of the local ban.¹⁴³ 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.¹⁴⁴ However, unlike West Virginia, Texas courts require the state legislature to expressly preempt the subject matter with unmistakable clarity.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷ In *Trail Enterprises, Inc. v. City of Houston*, the City of Houston prohibited oil and gas drilling within its watershed.¹⁴⁸ 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.¹⁴⁹

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

141. See generally *Northeast Natural Energy, L.L.C. v. City of Morgantown*, Civ. Act. No. 11-C-411, 2011 WL 3584376 (W. Va. Cir. Ct. Aug. 12, 2011).

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).

146. *Tysco Oil Co. v. R.R. Comm'n of Tex.*, 12 F. Supp. 195, 200-01 (S.D. Tex. 1935).

147. *Klepak v. Humble Oil & Ref. Co.*, 177 S.W.2d 215, 218 (Tex. App. 1944) (citing *Tysco Oil Co.*, 12 F. Supp. 195).

148. *Trail Enterprises, Inc. v. City of Houston*, 957 S.W.2d 625, 628 (Tex. App. 1997).

149. *Id.* at 635.

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 States¹⁵⁰

Courts in *imperium in imperio* states look to determine if the subject matter is of local or statewide concern.¹⁵¹ If the subject matter is of local concern, the local ordinance will not be preempted by state legislation.¹⁵² If the area of law is of statewide concern, state legislation preempts the local ordinance.¹⁵³ Often, the matter is of both local and statewide concern.¹⁵⁴ In a matter of mixed concern, a local ordinance and state legislation may coexist if they do not conflict.¹⁵⁵ 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.¹⁵⁶ 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;¹⁵⁷ (2) the foreseeability of local interference with the state regulatory scheme if upheld;¹⁵⁸ (3) the impact of the measure on individuals living outside the municipality;¹⁵⁹ (4) historical considerations concerning whether the subject matter has traditionally been governed by state or

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").

152. *Scadron v. City of Des Plaines*, 606 N.E.2d 1154, 1159 (Ill. 1992).

153. *Id.*

154. 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).

155. *Dempsey v. City & County of Denver*, 649 P.2d 726, 727 (Colo. Ct. App. 1982).

156. See, e.g., *City of Columbus v. State Emp't Relations Bd.*, 505 N.E.2d 651, 658 (Ohio Comm. Pl. 1985); *City of Amsterdam v. Helsby*, 332 N.E.2d 290, 292 (N.Y. App. 1975); *Fraternal Order of Police Lodge No. 165 v. City of Choctaw*, 933 P.2d 261, 267 (Okla. 1996).

157. *People v. Llewellyn*, 257 N.W.2d 902, 905 (Mich. 1977).

158. *Id.* at 906.

159. *Town of Telluride v. Lot Thirty-Four Venture*, 3 P.3d 30, 37 (Colo. 2000) (citing *City & Cnty. of Denver v. State*, 788 P.2d 764, 767 (Colo. 1990)).

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

a. Colorado

The State of Colorado is an *imperium in imperio* state.¹⁶² In *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.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."¹⁶⁴ However, the court found the ordinance to be a conflicting matter of local and statewide concern.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."¹⁶⁶

The court's analysis looked at four of the aforementioned factors in determining whether the statewide interest would preempt the local interest.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."¹⁶⁸

Under the ruling in *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 *GasLand* flaming faucet.¹⁶⁹ As a result of the current political climate in Colorado, the State conducted tests to verify the findings in *GasLand* and ultimately found the documentary's portrayal of the Colorado incidents to be erroneous.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,

160. *Id.*

161. *Id.*

162. *Constitutional Home Rule*, *supra* note 131, at 27.

163. *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1062 (Colo. 1992).

164. *Id.* at 1064 (citing *Nat'l Adver. Co. v. Dep't of Highways*, 751 P.2d 632, 635 (Colo. 1988); *VFW Post 4264 v. City of Steamboat Springs*, 575 P.2d at 840 (Colo. 1978); *City of Greeley v. Ells, Jr.*, 527 P.2d 538, 541 (Colo. 1974); *Roosevelt v. City of Englewood*, 492 P.2d 65, 70 (Colo. 1971)).

165. *Id.* at 1066.

166. *Id.*

167. The four factors were: (1) whether there is a need for statewide uniformity of regulation; (2) whether the municipal regulation has an extraterritorial impact; (3) whether the subject matter is one traditionally governed by state or local government; and (4) whether the Colorado Constitution specifically commits the particular matter to state or local regulation. *Id.* at 1067-68 (citing *City & Cnty. of Denver v. Colorado*, 788 P.2d 764, 768 (Colo. 1990)).

168. *Id.* at 1068.

169. *GASLAND* (HBO Documentary Films 2011).

170. COLO. OIL & GAS CONSERVATION COMM'N, *GASLAND CORRECTION DOCUMENT* (Oct. 29, 2010), available at <http://cogcc.state.co.us/library/GASLAND%20DOC.pdf>.

the City of Longmont passed an ordinance, restricting operators within the city limits.¹⁷¹ Shortly thereafter, the Colorado Oil and Gas Conservation Commission filed suit against the city.¹⁷² In November of 2012, the City of Longmont banned hydraulic fracturing¹⁷³ and, as a result, was sued by the Colorado Oil & Gas Association.¹⁷⁴ In 2013, Fort Collins passed an ordinance banning fracking within its city limits.¹⁷⁵ Although this question seemed to have been decided in *Voss*, perhaps the post-*GasLand* climate in Colorado will change its courts' minds regarding home rule in these pending cases.

b. Oklahoma

In Oklahoma, another *imperium in imperio* state, the issue appeared to have been resolved until recently. In *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.”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.”¹⁷⁷

In *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.”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.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.¹⁸⁰

More recently, the Oklahoma Corporation Commission (the Commission) addressed a similar issue in *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.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

171. CITY OF LONGMONT, COLO., ORDINANCE 2012-25 (July 17, 2012).

172. Colorado Oil & Gas Conservation Comm'n v. City of Longmont, No. 2012-cv-702 (Colo. Dist. Ct. Boulder Cnty. July 30, 2012).

173. CITY OF LONGMONT, COLO., R-2012-67 (Nov. 6, 2012).

174. Colorado Oil & Gas Ass'n v. City of Longmont, No. 2012-cv-960 (Colo. Dist. Ct. Weld Cnty. Dec. 17, 2012).

175. CITY OF FORT COLLINS, COLO., ORDINANCE 2013-32 (Mar. 5, 2013).

176. *Beveridge v. Harper & Turner Oil Trust*, 35 P.2d 435, 436 (Okla. 1934), *overruled on other grounds*, *Oklahoma City v. Harris*, 126 P.2d 988 (Okla. 1942).

177. *Id.*

178. *Clouser v. City of Norman*, 393 P.2d 827, 830 (Okla. 1964).

179. *Id.* at 829.

180. *Id.*

181. Supplemental Report of the Administrative Law Judge, *I-MAC Petroleum Services, Inc.*, Okla. Corp. Comm'n, Cause PD No. 200900255-O/T (Mar. 3, 2010).

request from the Commission,¹⁸² 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.¹⁸³ Assuming that Oklahoma courts would give deference to the administrative law judge's recommendations,¹⁸⁴ it stands to reason that a home rule municipality's authority to ban fracking might also be upheld if it had reasonable relation to the public health, safety, morals, or general welfare.¹⁸⁵ The fact that a municipal fracking 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 fracking 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 fracking bans. Whereas a court in West Virginia, a legislative model state held municipal fracking 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 fracking, 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.¹⁸⁶

182. Order Remanding Cause, *I-MAC Petroleum Services, Inc.*, Okla. Corp. Comm'n, Cause PD No. 200900255-O/T (Jan. 22, 2010).

183. Supplemental Report of the Administrative Law Judge, *supra* note 181, at 3.

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).

185. *Clouser v. City of Norman*, 393 P.2d 827, 829 (Okla. 1964); *Beveridge v. Harper & Turner Oil Trust*, 35 P.2d 435, 436 (Okla. 1934), *overruled on other grounds*, *Oklahoma City v. Harris*, 126 P.2d 988 (Okla. 1942).

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.”¹⁸⁷ Further, the Arkansas Supreme Court has found the state “legislature possesses plenary power over . . . municipalities.”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.”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.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.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.”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.”¹⁹³ The Kentucky Court’s approach has been more akin to courts in states that operate under a legislative model analysis.¹⁹⁴ Furthermore, state legislation appears to prevent local governments from regulating oil and gas development.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.

187. ARK. CONST. art. XII, § 4.

188. *Nahlen v. Woods*, 504 S.W.2d 749, 751 (Ark. 1974).

189. ARK. CODE ANN. § 14-43-602 (2011).

190. Request for Immediate Moratorium, Ark. Oil & Gas Comm’n, Order No. 180A-2-2011-07 (Aug. 2, 2011).

191. S.B. 256, 1994 Gen. Assemb., Reg. Sess. (Ky. 1994); 1994 Ky. Acts. 168.

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 Rule¹⁹⁶

Each state takes a different stance on the actual autonomy granted to municipalities.¹⁹⁷ 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.”¹⁹⁸ 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].”¹⁹⁹ Furthermore, the Illinois state constitution states that the “[p]owers and functions of home rule units shall be construed liberally.”²⁰⁰ 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 States²⁰¹

Northeast v. Morgantown suggests that in states like West Virginia, municipal ordinances purporting to ban fracking enacted pursuant to home rule, are likely face an uphill battle. However, Oklahoma, a state that construes municipal home rule powers strictly,²⁰² seems to indicate it would uphold a municipal fracking ban.²⁰³ New York and Pennsylvania are also home rule states that follow a rule of strict construction.²⁰⁴ Like West Virginia and Oklahoma, they also seem to take opposing views regarding state preemption of municipal fracking 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.

197. See generally F. J. Macchiarola, *Local Government Home Rule and the Judiciary*, 48 J. URB. L. 335 (1971).

198. *Northeast Natural Energy, L.L.C. v. City of Morgantown*, Civ. Act. No. 11-C-411, slip op. at 7, 2011 WL 3584376 (W. Va. Cir. Ct. Aug. 12, 2011) (citing *West Virginia ex rel. Charleston v. Hutchinson*, 176 S.E.2d 691, 696 (W. Va. 1970)).

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”).

201. The following states interpret the home rule strictly in accordance with Dillon’s Rule: Kentucky, Louisiana (for municipalities chartered prior to 1974), Maryland, Michigan, New York, Oklahoma, Pennsylvania, Texas, and Wyoming. Jesse J. Richardson, Jr., Megan Zimmerman Gough & Robert Puentes, *Is Home Rule the Answer? Clarifying the Influence of Dillon’s Rule on Growth Management*, app. A (Jan. 2003) (Discussion Paper prepared for The Brookings Inst. Ctr. on Urban and Metro. Policy).

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,²⁰⁵ is a hotbed for municipal bans on fracking.²⁰⁶ Tensions are running high in communities across the state.²⁰⁷ A moratorium on fracking was enacted by the State of New York in late 2010.²⁰⁸ The New York State Assembly recently proposed extending the moratorium, most likely until 2015.²⁰⁹

In September of 2011, a case was filed in Tompkins County, New York challenging a local ban on fracking.²¹⁰ 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].”²¹¹ The court ruled in the affirmative, granting summary judgment in favor of the municipality.²¹² The court held the zoning ordinance in question was not preempted by the New York Oil, Gas and Solution Mining Law (OGSML).²¹³ 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.”²¹⁴ On the contrary, the OGSML solely purported to preempt local legislation “relating to the regulation of the oil, gas and solution mining industries.”²¹⁵ 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).

206. Currently there are over fifty municipalities in the State of New York that ban fracking. *Current High Volume Horizontal Hydraulic Fracturing Drilling Bans and Moratoria in NY State*, FRACTRACKER (Mar. 16, 2013) [hereinafter *Drilling Bans in NY*], <http://www.fractracker.org/maps/ny-moratoria/>.

207. Peter Applebome, *Drilling Debate in Cooperstown, N.Y., Is Personal*, N.Y. TIMES (Oct. 29, 2011), http://www.nytimes.com/2011/10/30/nyregion/in-cooperstowns-fight-over-gas-drilling-civility-is-fading.html?_r=1.

208. David A. Paterson, Governor of the State of New York, Exec. Order No. 41 (Dec. 13, 2010) (Requiring Further Environmental Review of High-Volume Hydraulic Fracturing in the Marcellus Shale).

209. A.B. 01770, 2013-2014 Gen. Assemb., Reg. Sess. (N.Y. 2013). This bill proposes to extend the statewide moratorium on fracking until 120 days after the issuance of the EPA’s hydraulic fracturing study and results which are to be released in 2014. Press Release, U.S. Env’t. Prot. Agency, EPA Releases Update on Ongoing Hydraulic Fracturing Study (Dec. 21, 2012), <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/4af0024955d936ef85257adb0058aa29!OpenDocument>.

210. *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458 (Sup. Ct. 2012).

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.²¹⁶

Thus, a New York court took the contrary position to that taken by the court in *Northeast 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.²¹⁷ In 2009, the Pennsylvania Supreme Court held, in accordance with the aforementioned New York decision,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).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.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.²²¹ Further, in *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."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.²²³ West Virginia is a strict construction state and the state court held that Morgantown's ban on fracking was preempted by state legislation.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.²²⁵ Texas has traditionally construed home rule authority strictly,²²⁶ but seemed to take a

216. *Id.* at 471.

217. Richardson, Jr., et al., *supra* note 201, at app. A.

218. *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458 (Sup. Ct. 2012).

219. *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 964 A.2d 855 (Pa. 2009).

220. *Range Res. Appalachia, L.L.C. v. Salem Twp.*, 964 A.2d 869 (Pa. 2009).

221. *Id.* at 875.

222. *Penneco Oil Co. v. Cnty. of Fayette*, 4 A.3d 722, 733 (Pa. Commw. Ct. 2010).

223. Currently there are over fifty municipalities in the State of New York that ban fracking or have placed a moratorium on it. *Drilling Bans in NY*, *supra* note 206.

224. *Northeast Natural Energy, L.L.C. v. City of Morgantown*, Civ. Act. No. 11-C-411, 2011 WL 3584376 (W. Va. Cir. Ct. Aug. 12, 2011).

225. *I-MAC Petroleum Services, Inc., Okla. Corp. Comm'n*, Cause PD 200900255-O/T (June 24, 2010); *Anschutz Exploration Corp. v. Town of Dryden & Town of Dryden Town Bd.*, 940 N.Y.S.2d 458 (Sup. Ct. 2012).

226. Richardson, Jr., et al., *supra* note 201, at app. A.

broader position in *Trail Enterprises, Inc. v. City of Houston*.²²⁷ In that case, a Texas court upheld a municipal ordinance banning oil and gas production under the police power.²²⁸ 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 States²²⁹

a. Illinois

In Illinois, a broad construction state, a recent judicial decision has shed some light on the issue of municipal fracking bans within the state.²³⁰ In *Tri-Power Resources, Inc. v. City of Carlyle*, the City of Carlyle, a non-home rule municipality,²³¹ annexed land to which the plaintiff, Tri-Power Resources, Inc., had previously acquired the mineral lease and permits to develop.²³² Shortly after annexing the land, the City of Carlyle enacted an ordinance classifying it as residential.²³³ Pursuant to the City's zoning code, classification as residential precluded (and effectively prohibited) oil and gas development within Carlyle's municipal limits.²³⁴ Plaintiff alleged in count III²³⁵ of its complaint that the City was not authorized to prohibit drilling of an oil or gas well within its municipal limits.²³⁶

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

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.

230. *Tri-Power Res., Inc. v. City of Carlyle*, 967 N.E.2d 811 (Ill. App. 2012).

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.

236. *Tri-Power*, 967 N.E.2d at 812.

within its municipal limits.”²³⁷ 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.²³⁸ However, legislation in the State of Illinois²³⁹ gave “the City the power to prohibit the operation of . . . oil or gas well[s] within its municipal limits.”²⁴⁰ 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.”²⁴¹ Furthermore, the same state legislation “precludes a finding that the legislature intended the [state statutes] to have preemptive effect,”²⁴² and to hold otherwise would be to “ignore the legislature’s plain language and ‘read conditions into the statute[s] that are not there.’”²⁴³ 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.²⁴⁴ In *Energy Management Corp. v. City of Shreveport*,²⁴⁵ Shreveport, a home rule municipality,²⁴⁶ enacted an ordinance prohibiting oil and gas development within 1,000 feet of a lake.²⁴⁷ 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 [C]ity 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.²⁴⁸

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

237. *Id.* at 813.

238. *Id.*

239. 225 ILL. COMP. STAT. 725/13 (“Where an application is made to drill or deepen an oil or gas well within the limits of any city, village or incorporated town, the application shall so state, and be accompanied with a certified copy of the official consent of the municipal authorities for said well to be drilled, and no permit shall be issued unless consent is secured and filed with the application.”); 65 ILL. COMP. STAT. 5/11-56-1 (“The corporate authorities of each municipality may grant permits to mine oil or gas, under such restrictions as will protect public and private property and insure proper remuneration for such grants.”).

240. *Tri-Power*, 967 N.E.2d at 816.

241. *Id.*

242. *Id.*

243. *Id.* (quoting *Rosewood Care Ctr., Inc. v. Caterpillar, Inc.*, 877 N.E.2d 1091, 1096 (Ill. 2007)).

244. Louisiana interprets the home rule broadly for municipalities chartered after 1974. Richardson, Jr., et al., *supra* note 201, at app. A.

245. *Energy Mgmt. Corp. v. City of Shreveport*, 397 F.3d 297 (5th Cir. 2005).

246. The City of Shreveport adopted the home rule charter in 1978. *Id.* at 299-300.

247. *Id.* at 299.

248. *Id.* at 299-300 (quoting SHREVEPORT, LA., CITY CHARTER, § 2.03(v) (1978)).

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).

251. *Colorado Oil & Gas Conservation Comm'n v. City of Longmont*, No. 2012-cv-702 (Colo. Dist. Ct. Boulder Cnty. July 30, 2012); *Colorado Oil & Gas Ass'n v. City of Longmont*, No. 2012-cv-960 (Colo. Dist. Ct. Weld Cnty. Dec. 17, 2012).

252. *Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.S.2d 722 (Sup. Ct. 2012); *Colorado Oil & Gas Ass'n v. City of Longmont*, No. 2012-cv-960 (Colo. Dist. Ct. Weld Cnty. Dec. 17, 2012).

253. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

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 fracing 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.

256. *Cooperstown Holstein Corp.*, 943 N.Y.S.2d 722.

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).

259. *Cooperstown*, 943 N.Y.S.2d at 723-24.

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.

261. Complaint at 4, *Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.S.2d 722 (Sup. Ct. 2012) (Index No. 2011-0902, RJ1 No. 2011-0499-M) [hereinafter *Cooperstown Complaint*].

262. *Id.* at 4, 7.

263. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

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[ie]d 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

265. *Id.*

266. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 327 n.23 (2002) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001)).

267. *Cooperstown Complaint*, *supra* note 261, at 2.

268. *Id.* at 2-4.

269. *Id.* at 4.

270. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 488 (1987) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922)).

271. *Middlefield, N.Y., A Local Law Repealing the Town of Middlefield Zoning Ordinance and Adopting the Town of Middlefield Zoning Law § 2, art. I, C.* (June 28, 2011).

272. *Mugler v. Kansas*, 123 U.S. 623, 665 (1887).

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 fracking bans. Ultimately, the determination that governmental action constitutes a taking “necessarily requires a weighing of private and public interests.”²⁷⁵

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.²⁷⁶ As nuisance is a common law tort, it is governed by the law of the state in which the fracking 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.²⁷⁷

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.”²⁷⁸ 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.”²⁷⁹ 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 fracking.

Proving public nuisance will require evidence of fracking’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.²⁸⁰ It found that:

[T]here 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 fracturing 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.”).

275. *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980), *abrogated by* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

276. RESTATEMENT (SECOND) OF TORTS § 821B (1979).

277. *Copart Indus., Inc. v. Consol. Edison Co. of N.Y.*, 362 N.E.2d 968, 971 (N.Y. 1977).

278. *State of New York v. Schenectady Chems., Inc.*, 479 N.Y.S.2d 1010, 1013 (App. Div. 1984).

279. *In re Nassau Cnty. Consol. MTBE (Methyl Tertiary Butyl Ether) Prods. Liab. Litig.*, 918 N.Y.S.2d 399 (Sup. Ct. 2010).

280. ENERGY INST. AT THE UNIV. OF TEX. AT AUSTIN, FACT-BASED REGULATION FOR ENVIRONMENTAL PROTECTION IN SHALE GAS DEVELOPMENT (Feb. 2012), *available at* [http://www.velaw.com/UploadedFiles/VEsite/Resources/ei_shale_gas_reg_summary1202\[1\].pdf](http://www.velaw.com/UploadedFiles/VEsite/Resources/ei_shale_gas_reg_summary1202[1].pdf).

greater from surface spills of undiluted chemicals than from actual fracturing activities.²⁸¹

However, despite the EPA's preliminary findings of chemicals "consistent with" fracing in ground water,²⁸² its final report will not be issued until 2014.²⁸³ 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.

VI. CONCLUSION

Over the course of the last decade, fracing 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.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.²⁸⁵

It is difficult to discern the outcome of challenges to local fracing bans solely from an analysis of the home rule itself. Local fracing 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 *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 fracing ban.

281. *Id.* at 22.

282. *See supra* note 25 (citing relevant EPA draft plans and reports); *see also* Press Release, U.S. Env'tl. Prot. Agency, EPA Releases Draft Findings of Pavillion, Wyoming Ground Water Investigation for Public Comment and Independent Scientific Review (Dec. 8, 2011), <http://yosemite.epa.gov/opa/admpress.nsf/0/EF35BD26A80D6CE385257960065C94E>; Press Release, *supra* note 26 (finding "synthetic chemicals, like glycols and alcohols consistent with gas production and hydraulic fracturing fluids, benzene concentrations well above Safe Drinking Water Act standards and high methane levels" near Pavilion, Wyoming).

283. Press Release, U.S. Env'tl. Prot. Agency, EPA Releases Update on Ongoing Hydraulic Fracturing Study (Dec. 21, 2012), <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/4af0024955d936ef85257adb0058aa29!OpenDocument>.

284. MCBAIN, *supra* note 5, at v-viii.

285. *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.

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