WHEN PROHIBITION IS NOT REGULATION: ANALYZING THE COURT'S DECISION IN *WALLACH V. TOWN OF DRYDEN*, 16 N.E.3D 1188 (N.Y. 2014)

Adam J. Loos*

I. INTRODUCTION

It would be natural to think of drug and alcohol abuse, prostitution, sexual assault, lack of affordable housing, and petty theft as symptoms of economic decline. These social problems, however, are the face of the hydraulic fracturing boom in some parts of the United States.[1] Hydraulic fracturing, also called "fracking," has brought prosperity to formerly struggling regions, but it has also brought problems.[2] Drug abuse and the violence accompanying it have been particularly problematic in North Dakota's Bakken shale region.[3] Increased use of hydraulic fracturing has also led to increased concerns about its environmental effects.[4] Concerns about the dangers of hydraulic fracturing have led to bans and proposed bans on fracking in places as diverse as Denton, Texas,[5] and Santa Cruz County, California.[6]

The New York Court of Appeals dealt with a local zoning ordinance prohibiting hydraulic fracturing in *Wallach v. Town of Dryden*.[7] The Town of Dryden enacted an amendment to its zoning ordinance that prohibited all

---

* Adam J. Loos is a third year law student at Southern Illinois University School of Law, expecting his Juris Doctor in May 2016. He would like to thank his faculty advisor, Professor Alice Noble-Allgire, for her edits and feedback during the writing process. He would also like to thank his Casenote Editor, Andrew J. Sheehan for his advice and encouragement. Finally, he would like to thank his wife, Amber, and son, Truman, for their love and support.

1. *See* Tom Haines, *What if Your Small Town Suddenly Got Huge*, ATLANTIC MONTHLY, (Sept. 2014), http://www.theatlantic.com/features/archive/2014/09/what-if-your-small-town-suddenly-got-huge/379536/.
2. Ryan Holeywell, *North Dakota's Oil Boom is a Blessing and a Curse*, GOVERNING (Aug. 2011), http://www.governing.com/topics/energy-env/north-dakotas-oil-boom-blessing-curse.html.
3. Sharon Cohen, *Trying to Combat Growing Drug Trade in Oil Patch*, ASSOCIATED PRESS (Apr. 14, 2014, 3:32 AM), http://bigstory.ap.org/article/trying-combat-growing-drug-trade-oil-patch-1.
4. NAT'L ENERGY TECH. LAB., MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES: AN UPDATE 57 (2013).
5. Clifford Krauss, *In Texas, a Fight Over Fracking*, N.Y. TIMES, Oct. 8, 2014, http://www.nytimes.com/2014/10/09/business/in-texas-a-fight-over-fracking.html.
6. Rory Carroll, *Santa Cruz Becomes First California County to Ban Fracking*, REUTERS, May 20, 2014, 9:19 PM, http://www.reuters.com/article/2014/05/21/california-fracking-idUSL1N0O700J20140521.
7. Wallach v. Town of Dryden, 16 N.E.3d 1188, 1191 (N.Y. 2014).

oil and gas exploration and production.[8] New York state law regulates the oil, gas, and solution mining industry, and the state law contains a supersession clause that preempts local regulation of these industries.[9] The Court of Appeals had to decide whether state law preempted the zoning ordinance, which turned on the question of whether a local zoning ordinance constituted a local regulation of the oil, gas, and solution mining industries.[10] The Court of Appeals held the zoning ordinance was a regulation of land use, rather than a regulation of the oil and gas industry,[11] and that state law did not preempt the zoning ordinance.[12]

The court appropriately adopted a narrow reading of the state supersession clause, which preserved the authority of local governments to regulate land use within their boundaries. This Note examines *Wallach v. Town of Dryden* in light of the risks and benefits of hydraulic fracturing and prior New York statutes and case law. Section II explains the hydraulic fracturing process and its history, and explains the approaches Colorado and Pennsylvania have taken to supersession, as well as the New York statutes and case law relating to municipal authority to regulate land use, and the New York statute regulating the oil and gas industries. Section III explains the facts and legal issues in *Wallach v. Town of Dryden*, and explores the court's reasoning and holding. Finally, Section IV argues the court correctly interpreted precedent in a way that maintained municipal authority to regulate land use, while preserving the legislature's authority to regulate industry, resulting in an appropriate balance of state and local authority that serves public policy. This Note concludes by urging Illinois courts to follow the example set in Wallach v. Town of Dryden when deciding cases challenging local ordinances prohibiting hydraulic fracturing. The ruling in *Wallach v. Town of Dryden* allows local governments to decide whether hydraulic fracturing will be permitted within their boundaries, which preserves an important area of responsibility traditionally exercised by local government.

II. LEGAL BACKGROUND

To place the issues at stake in *Wallach v. Town of Dryden* in the proper context, it is necessary to have a basic understanding of the process of hydraulic fracturing.[13] Preemption of local regulations related to the oil

8. *Id.* at 1191–92.
9. *Id.* at 1191–93.
10. *Id.*
11. *Id.* at 1197.
12. *Id.* at 1191.
13. Meredith A. Wegener, *Drilling Down: New York, Hydraulic Fracturing, and the Dormant Commerce Clause*, 28 BYU J. PUB. L. 351, 355 (2014).

and gas industry have been the subject of litigation in Colorado for over twenty-five years, with two important cases decided on the same day in 1992.[14] The Supreme Court of Pennsylvania addressed preemption of local regulations related to the oil and gas industry in a pair of cases decided in 2009, and broke new ground in a landmark case decided in 2013.[15] New York has also faced challenges to local ordinances relating to extractive industries regulated by state law.[16]

A. Hydraulic Fracturing: Process and History

Hydraulic fracturing involves pumping fracturing fluids, which contain a mixture of water, other chemicals, and sand, at high pressure into an oil or gas well, with the aim of improving the productivity of the well.[17] Drilling companies begin by constructing a well pad, which, in the Marcellus shale region, which stretches from Virginia to New York, typically covers roughly five acres and may contain several wells.[18] When the well pad is finished, tractor-trailers bring in a drilling rig and begin the drilling process, which usually lasts between fifteen and thirty days in the Marcellus region.[19] The vertical sections of wells drilled in the Marcellus region range from 5,000 to 9,000 feet deep.[20] The majority of wells in the Marcellus region also use horizontal drilling,[21] which involves turning the drill ninety degrees at the bottom of the vertical well and extending the well horizontally.[22] The horizontal portions of Marcellus wells extend outward 3,000 to 10,000 feet from the vertical well.[23]

During the drilling process, workers put casings made of steel pipe and cement into both the vertical and horizontal sections of the well, and

---

14. Joel Minor, Note, *Local Government Fracking Regulations: A Colorado Case Study*, 33 STAN. ENVTL. L.J. 61, 95 (2014).
15. *See* Huntley & Huntley, Inc. v. Borough Council of Oakmont, 964 A.2d 855 (Pa. 2009); Range Resources-Appalachia, LLC. v. Salem Twp., 964 A.2d 869 (Pa. 2009); Robinson Twp., v. Commonwealth, 83 A.3d 901 (Pa. 2013).
16. *See* Envirogas, Inc. v. Kiantone, 447 N.Y.S.2d 221 (N.Y. Sup. Ct. 1982); Ne. Mines, Inc., v. State Dep't of Envtl. Conservation, 113 A.D.2d 62 (N.Y. App. Div. 1985); Frew Run Gravel Prod., Inc. v. Carroll, 518 N.E.2d 920 (1987); Gernatt Asphalt Prod., Inc. v. Sardinia, 664 N.E.2d 1226 (1996).
17. Qiang Wang et. al., *Natural Gas from Shale Formation—The Evolution, Evidences and Challenges of Shale Gas Revolution in United States*, 30 RENEWABLE & SUSTAINABLE ENERGY REVS. 1, 5 (2014).
18. NAT'L ENERGY TECH. LAB., *supra* note 4, at 47. The Marcellus shale region is geographically the largest shale region in the United States, and includes the portion of New York where the Town of Dryden is located. *Id.* at 26.
19. *Id.* at 47.
20. *Id.*
21. *Id.*
22. Kathleen Kerner, *Fracturing the Environment?: Exploring Potential Problems Posed by Horizontal Drilling Methods*, 1 U. BALT. J. LAND & DEV. 235, 238 (2012).
23. NAT'L ENERGY TECH. LAB., *supra* note 4, at 47.

secure them to the surface with cement.[24] The casing is used to protect groundwater near the surface.[25] When the casing is in place, the companies begin the process of hydraulic fracturing by detonating explosives "in the casing across from the zone to be hydraulically fractured, perforating the casing and cement."[26] At this point, workers inject the fracturing fluid at high pressure, which causes the rock to fracture and permits the gas to escape the shale and enter the well.[27] Hydraulic fracturing in the Marcellus region usually requires the use of three to six million gallons of water per well, and the process takes place over the course of a few days.[28] In addition to water, fracturing fluid contains sand[29] and a variety of other chemicals, some of which are harmful to human health.[30] Some of the fluid, called "flow-back water," returns to the surface.[31] Other fluid, called "produced water," also reaches the surface.[32]

Hydraulic fracturing began with an experiment conducted by Stanolind Oil in 1947 at the Hugoton gas field in Kansas.[33] Two years later, in 1949, the Halliburton Oil Well Cementing Company received a patent for the technology, and the era of commercial hydraulic fracturing began.[34] The technology continued to advance, with innovation involving the fluids, proppants, and equipment increasing the efficiency of the process.[35] The size of the operations increased as well.[36] In the early period, companies used approximately 750 gallons of fluid, but today companies sometimes use over one million gallons of fluid per fracture.[37]

B. Preemption Outside New York: Colorado and Pennsylvania

Although the Colorado Oil and Gas Conservation Act lacked an express preemption clause, the Supreme Court of Colorado found implied preemption sufficient to prevent local governments from prohibiting oil and

24. *Id.*
25. *Id.*
26. *Id.* at 49.
27. *Id.*
28. *Id.*
29. The sand, called "proppant," is used to prevent the fractures from closing when the flow-back water returns to the surface. *Id.*
30. Wang et. al., *supra* note 17, at 17.
31. NAT'L ENERGY TECH. LAB., *supra* note 4, at 51.
32. *Id.*
33. Carl T. Montgomery & Michael B. Smith, *Hydraulic Fracturing: History of an Enduring Technology*, J. PETROLEUM TECH., Dec. 2010, at 26, 27.
34. *Id.* at 26.
35. *See id.* at 27.
36. *Id.* at 28.
37. *Id.* at 28.

gas operations within their boundaries.[38] The Supreme Court of Pennsylvania interpreted a previous version of the Commonwealth's Oil and Gas Act as preempting local regulation of oil and gas industry operations, while allowing local governments to regulate land use.[39] The Supreme Court of Pennsylvania held that a revised version of the Oil and Gas Act violated Pennsylvania's Environmental Rights Amendment.[40]

1. Implied Preemption: The Colorado Approach

In 1985, the city of Greeley, Colorado, passed a pair of ordinances that prohibited "the drilling of any well for the purpose of exploration or production of any oil or gas or other hydrocarbons within the corporate limits of the [city]."[41] Lundvall Brothers, Inc., an oil and gas development business with a state permit authorizing drilling within Greeley, challenged the ordinances.[42] Colorado regulates the oil and gas industry under the statewide Oil and Gas Conservation Act, with the purpose of encouraging the development of the state's oil and gas resources, while preventing waste.[43] The Oil and Gas Conservation Act did not contain an express preemption clause.[44] The trial court ruled in favor of Lundvall Brothers, Inc., finding that state law preempted the two Greeley ordinances.[45] The appellate court affirmed.[46]

The issue before the Supreme Court of Colorado was whether the Oil and Gas Conservation Act preempted a home-rule city's total ban on oil and gas drilling within city limits, enacted under its authority to regulate land use.[47] The court used a four-factor analysis to determine whether the state regulations preempted Greeley's ordinances.[48] The court held that three of

38. *See* Voss v. Lundvall Bros., Inc., 830 P.2d 1061 (Colo. 1992); Board of Cnty. Comm'rs. of La Plata Cnty. v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045 (Colo. 1992).
39. *See* Huntley & Huntley, Inc. v. Borough Council of Oakmont, 964 A.2d 855 (Pa. 2009); Range Resources-Appalachia, LLC. v. Salem Twp., 964 A.2d 869 (Pa. 2009).
40. *See* Robinson Twp. v. Commonwealth, 83 A.3d 901 (Pa. 2013).
41. *Voss*, 830 P.2d at 1063.
42. *Id.* at 1062–63.
43. *Id.* at 1065 (quoting COLO. REV STAT. ANN. § 34-60-102(1) (West 1984)).
44. Board of Cnty. Comm'rs. of La Plata Cnty. v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1057 (Colo. 1992). (The Supreme Court of Colorado issued decisions in *Voss* and *Bowen/Edwards* on the same day, and both cases concern preemption under the Oil and Gas Conservation Act.)
45. *Voss*, 830 P.2d at 1063.
46. *Id.* at 1064.
47. *Id.* at 1064.
48. *Id.* at 1067.

> Those four factors are: whether there is a need for statewide uniformity of regulation; whether the municipal regulation has an extraterritorial impact; whether the subject matter is one traditionally governed by state or local government; and whether the Colorado Constitution specifically commits the particular matter to state or local regulation.

Id.

the four factors weighed in favor of preemption, while the fourth factor weighed in favor of allowing limited exercise of local authority.[49] The court held that the Oil and Gas Conservation Act did not completely preempt the land-use regulation authority of home-rule cities, but it did preempt Greeley's ordinances imposing a total ban on oil and gas drilling.[50] The court left some room for exercise of local authority, provided local regulations "do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the state goals of the Oil and Gas Conservation Act."[51]

In 2014, the issue of preemption under the state Oil and Gas Conservation Act arose in the District Court of Colorado in Boulder County.[52] In a 2012 referendum, the voters of the City of Longmont adopted an amendment to the city charter, known as Article XVI, "that bans fracking and the storage and disposal of fracking waste within the City of Longmont."[53] The Colorado Oil and Gas Association challenged the amendment, arguing the court should use an implied preemption analysis to invalidate Longmont's hydraulic fracturing ban.[54] The court refused to find implied preemption, and instead used an "operational conflict analysis" to find an "irreconcilable conflict" between state law and the Longmont fracking ban.[55] The court held that the Colorado Oil and Gas Conservation Act preempts Article XVI, and granted summary judgment to the Colorado Oil and Gas Association.[56] The City of Longmont appealed the district court's decision.[57] The Colorado Oil and Gas Association dropped its lawsuit against the City of Longmont on October 14, 2014.[58]

2. Environmental Rights: The Pennsylvania Approach

In 2009, the Supreme Court of Pennsylvania first confronted the issue of state preemption of local zoning ordinances relating to the oil and gas

---

49. *Id.* at 1067–68.
50. *Id.* at 1062. *See also* Board of Cnty. Comm'rs. of La Plata Cnty. v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1058 (Colo. 1992) (holding that "[T]he Oil and Gas Conservation Act does not expressly preempt any and all aspects of a county's land-use authority over those areas of a county in which oil and gas activities are occurring or are planned.")
51. *Voss*, 830 P.2d at 1068–69.
52. *See* Colo. Oil & Gas Ass'n v. Longmont, 2014 WL 3690665, No. 13CV63, (Colo. Dist. Ct. July 24, 2014) (order granting motion for summary judgment).
53. *Id.* at *2.
54. *Id.* at *8.
55. *Id.* at *9–13.
56. *Id.* at *14.
57. Dan Boyce, *Longmont Takes Fracking Ban Ruling to Higher Court*, INSIDE ENERGY, Aug. 27, 2014, http://insideenergy.org/2014/08/27/longmont-takes-fracking-ban-ruling-to-higher-court/.
58. Karen Antonacci, *COGA Drops Lawsuit over Longmont Drilling Regs*, LONGMONT TIMES-CALL, Oct. 14, 2014, http://www.timescall.com/energy-news/ci_26727724/coga-drops-lawsuit-over-longmont-fracking-ban.

industry in a pair of cases decided on the same day.[59] In *Huntley & Huntley, Inc. v. Borough Council of Oakmont*, the primary issue before the court was whether Pennsylvania's Oil and Gas Act supersedes local zoning ordinances restricting the location of oil and gas wells.[60] The Borough of Oakmont's zoning ordinance allowed extraction of minerals in an R-1 district as a conditional use, with approval subject to conditions imposed by the Borough Council.[61] The Pennsylvania Oil and Gas Act contained a supersession clause preempting "all local ordinances and enactments purporting to regulate oil and gas well operations," as well as local ordinances that "accomplish the same purposes" as the state statute.[62] Huntley & Huntley ("Huntley") applied for a conditional use permit to construct a well on land zoned R-1, and the Borough Council denied the application.[63]

Huntley challenged Oakmont's zoning ordinance, arguing that the Pennsylvania Oil and Gas Act "preempts local zoning ordinances that attempt to regulate the location and operation of natural gas wells."[64] Oakmont argued that the Oil and Gas Act preempted only local ordinances that purport to regulate "the technical features of oil and gas operations," as opposed to zoning ordinances regulating land use.[65] The court held that the Oil and Gas Act only preempts local regulation of oil and gas industry operations, not local zoning ordinances regulating the location of oil and gas wells.[66] Further, the court held that Oakmont's zoning ordinance "serves different purposes from those enumerated in the Oil and Gas Act," and consequently is not preempted.[67] The court cited the "unique expertise of municipal governing bodies to designate where different uses should be permitted" as a policy reason for distinguishing land use regulation from regulation of industry operations.[68]

In *Range Resources Appalachia, LLC. v. Salem Township*, decided the same day as *Huntley*, the Supreme Court of Pennsylvania applied the Oil and Gas Act's supersession clause to a different local ordinance.[69] Salem Township's ordinance regulated certain aspects of oil and gas industry operations at a level "more stringent" than the Oil and Gas Act.[70] The court found that the Salem Township ordinance created a "comprehensive

59. Huntley & Huntley, Inc. v. Borough Council of Oakmont, 964 A.2d 855, 856–57 (Pa. 2009).
60. *Id.* at 860.
61. *Id.* at 857.
62. *Id.* at 858.
63. *Id.* at 857–58.
64. *Id.* at 862.
65. *Id.* at 860–61.
66. *Id.* at 865–66.
67. *Id.* at 866.
68. *Id.*
69. Range Resources-Appalachia, LLC. v. Salem Twp., 964 A.2d 869, 870 (Pa. 2009).
70. *Id.* at 871.

regulatory scheme relative to oil and gas development within the municipality."[71] The court distinguished the expansive Salem Township ordinance from the zoning ordinance at issue in *Huntley*, and held that the Oil and Gas Act preempted the Salem Township ordinance.[72]

In 2012, after the decisions in *Huntley* and *Range Resources-Appalachia*, Pennsylvania enacted Act 13, a sweeping revision of its Oil and Gas Act.[73] Act 13 required municipalities to, among other things, allow "natural gas development and processing, including permission to store wastewater . . . into all existing zoning districts as of right, including residential, agricultural, and commercial" districts.[74] The following month, several municipalities and Pennsylvania residents ("the citizens") filed an action seeking to declare Act 13 unconstitutional.[75] The citizens claimed Act 13 violated several provisions of the Pennsylvania Constitution, including Article I, Section 27, commonly known as the Environmental Rights Amendment.[76] The Environmental Rights Amendment creates a "right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment" and places the Commonwealth in the position of trustee of the "public natural resources," which it must "conserve and maintain" for the benefit of Pennsylvania's citizens.[77]

In a plurality opinion, the Supreme Court of Pennsylvania agreed, holding that the portion of Act 13 requiring oil and gas operations as a permitted use in all zoning districts is "incompatible with the express command of the Environmental Rights Amendment."[78] The plurality also held that other provisions of Act 13 violate the Environmental Rights Amendment's requirement that the Commonwealth act as a "trustee of the public natural resources."[79] A majority of the court found still other provisions of Act 13 unconstitutional on other grounds.[80] One Justice concurred in the result, creating a majority finding Act 13 unconstitutional, but based his decision on violations of substantive due process, rather than the Environmental Rights Amendment.[81] Two justices dissented, arguing that Act 13 did not violate the Pennsylvania Constitution.[82] The holding in the lead opinion offers a more expansive interpretation of the protections

71. *Id.* at 875.
72. *Id.* at 876–77.
73. *See* Robinson Twp. v. Commonwealth, 83 A.3d 901, 915 (Pa. 2013).
74. *Id.* at 937.
75. *Id.* at 915–16.
76. *Id.*
77. *Id.* at 948–49 (quoting PA. CONST. art. I, § 27).
78. *Id.* at 981.
79. *Id.* at 984.
80. *Id.* at 1000.
81. *Id.* at 1000–01 (Baer, J., concurring).
82. *Id.* at 1014 (Saylor, J., dissenting).

found in Environmental Rights Amendment than previous Pennsylvania courts have been willing to embrace.[83]

C. The New York Approach: Preemption Prior to *Wallach*

The New York Constitution and various state statutes provide the basis for local authority to regulate land use.[84] Early New York decisions interpreting supersession clauses in statutes regulating extractive industries involved local attempts to regulate industry operations.[85] In later cases, New York courts began distinguishing between local ordinances that purported to regulate industry operations and local ordinances that merely regulated land use.[86]

1. Preemption in New York: Constitutional and Statutory Background

The New York Constitution's ("N.Y. Constitution") "home rule" provision, which provides that local governments may adopt local laws consistent with the state constitution, unless the legislature restricts that power, is the ultimate source of authority for municipal land regulation.[87] New York's Municipal Home Rule Law ("Home Rule Law") gave force to the home rule provision of the N.Y. Constitution by authorizing local governments to adopt local laws not in conflict with the state constitution or state law.[88] The Home Rule Law specifically grants towns the authority to make laws providing for "the protection and enhancement of [their] physical and visual environment," and for "the government, protection, order, conduct, safety, health and well-being of persons or property therein."[89] The New York legislature granted zoning authority to local governments in the Town Law[90] and the Statute of Local Governments.[91] The legislature recognized in the Town Law that the authority to regulate land use is "[a]mong the most important powers and duties granted by the legislature to a town government."[92]

The New York Environmental Conservation Law ("ECL") contains a supersession clause, which supersedes "all local laws or ordinances relating

83. *See id.* at 950.
84. *See* Wallach v. Town of Dryden, 16 N.E.3d 1188, 1194 (N.Y. 2014).
85. *See* Envirogas, Inc. v. Kiantone, 447 N.Y.S.2d 221 (N.Y. Sup. Ct. 1982); Ne. Mines, Inc., v. State Dep't of Envtl. Conservation, 113 A.D.2d 62 (N.Y. App. Div. 1985).
86. *See* Frew Run Gravel Prod., Inc. v. Carroll, 518 N.E.2d 920, (1987); Gernatt Asphalt Prod., Inc. v. Sardinia, 664 N.E.2d 1226 (1996).
87. N.Y. Const. art. IX, § 2, subsec. c, cl. ii.
88. N.Y. MUN. HOME RULE LAW § 10(1)(ii) (McKinney, Westlaw through L.2014).
89. N.Y. MUN. HOME RULE LAW §§ 10(1)(ii)(a)(11)-(12) (McKinney, Westlaw through L.2014).
90. N.Y. TOWN LAW § 261 (McKinney, Westlaw through L.2014).
91. N.Y. STAT. OF LOCAL GOVERNMENTS § 10(6) (McKinney, Westlaw through L.2014).
92. N.Y. TOWN LAW § 272-a(1)(b) (McKinney, Westlaw through L.2014).

to the regulation of the oil, gas and solution mining industries."[93] The ECL expressly exempts "local government jurisdiction over local roads or the rights of local governments under the real property tax law" from supersession.[94] In the ECL's declaration of policy, the legislature announced that it is "in the public interest to regulate the development, production and utilization of natural resources of oil and gas in this state" in order to prevent waste, increase productivity, and protect the rights of landowners and the general public.[95] The Oil, Gas, and Solution Mining Law ("OGSML") and the State Mined Land Reclamation Law ("SMLRL"), at issue in the New York cases discussed below, are found in Article 23 of the ECL.[96]

2. Early Decisions Involved Regulation of Industry Operations

In a 1982 case, *Envirogas, Inc. v. Town of Kiantone*, the New York Supreme Court of Erie County considered the validity of a provision in the Town of Kiantone's zoning ordinance, which required payment of a compliance bond and a permit fee before the construction of any oil or gas well within municipal boundaries.[97] Relying on the supersession clause in the ECL, the court held that state law preempted Kiatone's ordinance, and permanently enjoined its enforcement.[98] The court reasoned that the ECL preempts "any municipal law which purports to regulate gas and oil well drilling operations" unless the local law fits within the narrow exceptions in the ECL that preserve municipal authority over local roads and property taxes.[99] The local ordinance at issue in *Envirogas* appeared to the court to be a regulation of industry operations with the goal of preventing property damage resulting from oil and gas operations.[100] The court enjoined the Kiantone ordinance because supersession clause in the ECL was intended to prevent local regulation of oil and gas industry operations.[101]

In a 1985 case, *Northeast Mines, Inc. v. State Department of Conservation*, the New York Supreme Court, Appellate Division, considered the validity of a provision in the Town of Smithtown's ordinance that prohibited a mining business from removing sand and gravel to the depth authorized by a permit issued by the New York Department of

93. N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney, Westlaw through L.2014).
94. N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney, Westlaw through L.2014).
95. N.Y. ENVTL. CONSERV. LAW § 23-0301 (McKinney, Westlaw through L.2014).
96. N.Y. ENVTL. CONSERV. LAW §§ 23-0101-2727 (McKinney, Westlaw through L.2014).
97. Envirogas, Inc. v. Kiantone, 447 N.Y.S.2d 221, 221-22 (N.Y. Sup. Ct. 1982).
98. *Id.* at 223.
99. *Id.* at 222.
100. *See id.* at 223.
101. *Id.*

Environmental Conservation ("the DEC").[102] The DEC issued the license under the SMLRL, which superseded local laws "relating to the extractive mining industry."[103] The DEC issued a declaratory ruling determining that Smithtown's ordinance was not preempted by the supersession clause in the SMLRL.[104] The mining operator sued, and the court held that the SMLRL's supersession clause preempted Smithtown's ordinance.[105] The court held that *Northeast Mines* was "indistinguishable from" *Envirogas*.[106] A local ordinance limiting the depth of a sand and gravel mine is a regulation of mining industry operations of the type expressly preempted in the SMLRL.[107] The court held that the SMLRL preempted Smithtown's local ordinance and declared the DEC's declaratory ruling invalid.[108]

3. Prelude to Wallach*: Distinguishing Land Use Regulation from Industry Regulation*

In a 1987 case, *Frew Run Gravel Products, Inc. v. Town of Carroll*, the Court of Appeals of New York ("Court of Appeals") developed a three-factor approach to analyzing supersession provisions in state laws.[109] The dispute in *Frew Run* concerned the supersession clause in the SMLRL (the same law at issue in *Northeast Mines*) preempting local laws "relating to the extractive mining industry."[110] The supersession clause specifically excluded from preemption "local zoning ordinances or other local laws which impose stricter mine land reclamation standards or requirements."[111] The local zoning ordinance in the Town of Carroll did not permit sand and gravel operations in its AR-2 district, although such uses were allowed by special permit in at least one other zoning district.[112]

A sand and gravel business sued to prevent enforcement of the ordinance, arguing that state law preempted the local ordinance.[113] To determine whether the supersession clause preempted the zoning ordinance, the Court of Appeals considered (1) the plain meaning of the statutory language, (2) the legislative history of the statute, and (3) the purpose of the

---

102. Ne. Mines, Inc., v. State Dep't of Envtl. Conservation, 494 N.Y.S.2d 914, 915 (N.Y. App. Div. 1985).
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 916.
107. *See id.* at 915–16.
108. *Id.* at 916–17.
109. Frew Run Gravel Prod., Inc. v. Carroll, 518 N.E.2d 920, 922 (1987).
110. *Id.* at 921.
111. *Id.*
112. *Id.*
113. *Id.* at 921–22.

supersession clause within the "statutory scheme."[114] The court held that the supersession clause was not "intended to be broader than necessary to preempt conflicting regulations dealing with mining operations and reclamation of mined lands," and upheld the local government's use of its zoning authority.[115]

In a 1996 case, *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, the Court of Appeals again examined the SMLRL's supersession clause.[116] The Town of Sardinia adopted amendments to its zoning ordinance, "which eliminated mining as a permitted use throughout the Town."[117] A mining operator challenged the amendments, arguing, among other things, "that if the land within a municipality contains extractable minerals, the statute obliges the municipality to permit them to be mined somewhere within the municipality."[118] Applying the reasoning in *Frew Run*, the Court of Appeals held that the SMLRL "does not preempt the Town's authority to determine that mining should not be a permitted use of land within the Town, and to enact amendments to the local zoning ordinance in accordance with that determination."[119]

III. EXPOSITION OF THE CASE

In *Wallach v. Town of Dryden*, The New York Court of Appeals considered whether a state law superseded a local zoning ordinance banning hydraulic fracturing within municipal boundaries.[120] The majority held that the zoning ordinance was not a regulation of the oil and gas industry and, therefore, was not preempted by the supersession clause in the New York Oil, Gas, and Solution Mining Law.[121]

A. Facts and Procedural Posture

The Town of Dryden, a rural community in Tompkins County, New York, is located within the Marcellus Shale region, which contains natural gas trapped within shale deposits located thousands of feet below the surface.[122] It is possible to extract the gas using a combination of horizontal drilling and hydraulic fracturing.[123] In 2006, Norse Energy Corp. USA

114. *Id.* at 922.
115. *Id.* at 923.
116. Gernatt Asphalt Prod., Inc. v. Sardinia, 664 N.E.2d 1226, 1230 (1996).
117. *Id.*
118. *Id.* at 1235.
119. *Id.*
120. Wallach v. Town of Dryden, 16 N.E.3d 1188, 1202–03 (N.Y. 2014).
121. *Id.* at 1191.
122. *Id.* at 1192.
123. *Id.*

sought to explore and develop the region's natural gas resources and, to that end, began acquiring oil and gas leases from Dryden landowners.[124]

Dryden regulates land use through a comprehensive plan and a zoning ordinance, the purpose of which is to preserve the character and quality of life of the community.[125] Dryden's zoning ordinance contains a catch-all provision that prohibits all uses other than those specifically permitted.[126] The Town Board decided to clarify the status of oil and gas exploration, extraction, and storage, which were not specifically allowed under the existing zoning ordinance.[127] The Town Board held a public hearing and reviewed relevant scientific literature before unanimously voting in August 2011, to amend the zoning ordinance to specifically prohibit all oil and gas exploration, extraction, and storage within municipal boundaries.[128] The amendment also ostensibly invalidated any oil and gas permit issued by any state or federal agency.[129]

Norse Energy Corp. USA challenged the validity of the zoning amendment in court, arguing that the supersession clause in the state Oil, Gas and Solution Mining Law ("OGSML") preempted local zoning laws that restrict energy production.[130] The trial court granted Dryden's motion for summary judgment and declared the amendment valid, with the exception of the provision that invalidated oil and gas permits issued by state and federal agencies.[131] Norse appealed, and the Appellate Division affirmed.[132] After the action began, Norse filed for bankruptcy, and bankruptcy trustee Mark S. Wallach was substituted as petitioner.[133]

B. The Majority Opinion

The principal issue the Court of Appeals considered in this case is whether municipal zoning ordinances that ban oil and gas production, including hydraulic fracturing, within municipal boundaries are preempted by the supersession clause in the state Oil, Gas and Solution Mining Law.[134] To decide that issue, the court had to consider whether municipal zoning ordinances that ban oil and gas production, including hydraulic fracturing,

---

124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 1193.
131. *Id.*
132. *Id.*
133. *Id.* at 1204 n.1.
134. *Id.* at 1202–03.

within municipal boundaries are regulations of the oil, gas, and solution mining industries.[135]

The Court of Appeals began its analysis by reviewing the constitutional and statutory sources of municipal power to regulate land use, and the extent to which the State may limit this authority.[136] The New York Constitution's "home rule" provision is the foundation of municipal authority to regulate land use.[137] The Municipal Home Rule Law implements the constitutional home rule provision by granting local governments general authority to pass laws.[138] The Town Law and the Statute of Local Governments grant local governments the authority to adopt zoning ordinances "for the purpose of fostering 'the health, safety, morals, or the general welfare of the community.'"[139] Both the legislature and the Court of Appeals have recognized that local regulation of land use is one of the most important and broad powers of local governments.[140] Consequently, the Court of Appeals requires a "clear expression of legislative intent to preempt local control over land use" as a condition to invalidation of a local zoning ordinance on preemption grounds.[141]

The Court of Appeals applied the *Frew Run* factors in its analysis of the supersession clause in the OGSML, examining "(1) the plain language of the supersession clause; (2) the statutory scheme as a whole; and (3) the relevant legislative history."[142] The court held that a natural reading of the plain language of the supersession clause shows that it only preempts local laws that regulate the operations of the oil and gas industry, rather than zoning ordinances that prohibit certain uses within municipal borders.[143] The court also held that the relevant provisions of the OGSML do not suggest that the supersession clause should be interpreted more broadly than necessary to prevent local governments from regulating the oil and gas industry's technical operations.[144] Finally, the court held that the legislative history of the oil and gas law shows that the legislature's principal concern was with preventing business practices that would result in waste, while providing the state the necessary authority to regulate the technical operations of the oil and gas industry.[145] After examining the three factors, the court did not find the necessary "clear expression" of legislative intent

135. *See id.*
136. *Id.* at 1194–95.
137. *Id.* at 1194.
138. *Id.*
139. *Id.* at 1194 (quoting N.Y. TOWN LAW § 261 and N.Y. STAT. OF LOCAL GOVERNMENTS § 10(6)).
140. *Id.* at 1194 (quoting N.Y. TOWN LAW § 272-a(1)(b)).
141. *Id.* at 1194 (quoting Gernatt Asphalt Prod., Inc. v. Sardinia, 664 N.E.2d 1226, 1234 (1996)).
142. *Id.* at 1195 (citing Frew Run Gravel Prod., Inc. v. Carroll, 518 N.E.2d 920, 922 (1987)).
143. *Id.* at 1197.
144. *Id.* at 1199.
145. *Id.* at 1199–1200.

that would result in preemption of municipal zoning laws regulating land use.[146]

The Court of Appeals upheld the Town of Dryden's use of its zoning power, holding that "the supersession clause in the statewide Oil, Gas and Solution Mining Law (OGSML) does not preempt the home rule authority vested in municipalities to regulate land use."[147] Municipal zoning ordinances regulate land use; they do not regulate the operations of the oil and gas industry.[148]

C. The Dissent

Justice Pigott distinguished *Frew Run*, arguing in his dissent that Dryden's zoning ordinance does not merely regulate land use; it uses zoning as a pretext to accomplish a regulation of the oil and gas industries that would otherwise be preempted.[149] The zoning ordinance prohibits the hydraulic fracturing industry throughout the entire town, instead of specifying certain zones in which fracking is prohibited, and, as a result, "go[es] beyond zoning and, instead, regulate[s] those industries," which intrudes upon the exclusive authority of the Department of Environmental Conservation.[150] Justice Pigott argued that the prohibition through the zoning ordinance of all oil and gas activity in Dryden "is, in effect, regulation."[151] Justice Pigott also distinguished *Gernatt Asphalt*, arguing that the Dryden zoning ordinance "do[es] more than simply delineate prohibited uses," although he does not specify precisely what else the ordinance does.[152]

IV. ANALYSIS

The majority in *Wallach* was correct in interpreting precedent to draw a meaningful distinction between regulation of industry and regulation of land use. The legislature's use of the phrase "local laws or ordinances relating to the regulation of the oil, gas and solution mining industries" in the OGSML created the opportunity for courts to apply a broad interpretation of the supersession clause, which would have unnecessarily

146. *Id.* at 1201.
147. *Id.* at 1191.
148. *Id.* at 1197.
149. *Id.* at 1203 (Pigott, J., dissenting) (citing Frew Run Gravel Prod., Inc. v. Carroll, 518 N.E.2d 920, 922–23 (1987).
150. *Id.* at 1203–04 (Pigott, J., dissenting).
151. *Id.* at 1204 (Pigott, J., dissenting).
152. *Id.* at 1204 (Pigott, J., dissenting) (citing Gernatt Asphalt Prod., Inc. v. Sardinia, 664 N.E.2d 1226 (1996)).

restricted the authority of local governments.[153] By adopting a narrow interpretation of the OGSML supersession clause, the court advanced public policy by correctly balancing the division of authority between state and local government. Illinois courts should follow *Wallach* in recognizing the distinction between regulation of industry and regulation of land use, and should uphold local land use regulations that prohibit hydraulic fracturing.

A. The Court Correctly Distinguished Land-Use Regulation from Regulation of Industry Operations

As a result of the decisions in *Frew Run* and *Gernatt Asphalt*, New York had a well-developed doctrine for interpreting supersession clauses when *Wallach* reached the court.[154] New York courts had established that state law preempts local regulation of oil and gas industry operations,[155] but does not, however, supersede local laws that merely regulate land use.[156] This distinction between regulation of the operations of the oil and gas industry and regulation of the locations where the industry is permitted to operate, also recognized in Pennsylvania,[157] is meaningful and provides a reasonable balance between state and local interests. Local governments should have the authority to determine what uses are desirable within their jurisdictions and to prohibit those uses that are undesirable.[158]

The distinction between regulation of industry and regulation of land use can be seen in other jurisdictions and contexts. For example, in a 2013 case, the Supreme Court of California held that the state's medical cannabis laws did not preempt local authority to regulate land use by enacting a total ban on medical cannabis dispensaries.[159] Although one goal of California's medical cannabis laws is to enhance "the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects," local governments retain the authority to regulate land use within their boundaries, "even when such regulation amounts to a total ban on such facilities."[160]

---

153. N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney, Westlaw through L.2014).
154. *See* Frew Run Gravel Prod., Inc. v. Carroll, 518 N.E.2d 920 (1987); Gernatt Asphalt Prod., Inc. v. Sardinia, 664 N.E.2d 1226 (1996).
155. *See* Envirogas, Inc. v. Kiantone, 447 N.Y.S.2d 221 (N.Y. Sup. Ct. 1982); Ne. Mines, Inc., v. State Dep't of Envtl. Conservation, 113 A.D.2d 62 (N.Y. App. Div. 1985).
156. *See Frew Run*, 518 N.E.2d 920 (1987); *Gernatt*, 664 N.E.2d 1226 (1996).
157. Huntley & Huntley, Inc. v. Borough Council of Oakmont, 964 A.2d 855, 864 (Pa. 2009).
158. *See* Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 388 (1926).
159. City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc., 300 P.3d 494, 496 (Cal. 2013).
160. *Id.* at 500, 503.

By applying the precedent set in *Frew Run* and *Gernatt Asphalt*, the court adopted an appropriately narrow reading of the OGSML's supersession clause. Adopting a broader reading of the supersession clause would have produced an absurd result, in which oil and gas operations could have been exempt "from every local law—general parking regulations, anti-littering rules, bans on late-night noise—that affect those operations."[161] Instead, the court properly distinguished between the regulations of industry that were at issue in *Envirogas* and *Northeast Mines* and the regulations of land use that were at issue in *Frew Run*, *Gernatt Asphalt*, and *Wallach*.

B. Public Policy Considerations Weigh Against Preemption of Local Hydraulic Fracturing Bans

Understanding the public policy considerations related to hydraulic fracturing requires a deeper explanation of the potential benefits and risks of fracking. Possible benefits include an increased supply of energy, production of low-cost raw materials for industry, job growth, and, arguably, environmental advantages.[162] Risks associated with hydraulic fracturing include negative environmental consequences, risk of increased seismic activity, and strain on local governments. On balance, the benefits and risks favor allowing local governments the freedom to prohibit hydraulic fracturing in their jurisdictions.

1. The Potential Benefits of Hydraulic Fracturing

Fossil fuels, including coal, oil, and natural gas, remain the dominant source of energy in the United States, and natural gas, abundant in the United States, is an important contributor of supply.[163] Gas is used to generate electricity and is also used in residential and commercial settings as a heating fuel.[164] Natural gas is also important to industry, both as a source of fuel and as a raw material used to create a variety of products.[165] For example, the low price of domestic gas, attributable in large part to the

161. Roderick M. Hills, Jr., *Hydrofracking and Home Rule: Defending and Defining an Anti-Preemption Canon of Statutory Construction in New York*, 77 ALB. L. REV. 647, 650–51 (2014).

162. *See* NAT'L ENERGY TECH. LAB., *supra* note 4, at 6–10.

163. *Id.* at 6. Gas currently provides 27% of the United States' energy supply, and current estimates of technically-recoverable gas suggest the United States has a nearly 100-year supply at current production levels. Shale gas contributes nearly a quarter of the estimated volume of recoverable natural gas, and hydraulic fracturing is a major factor contributing to the economic viability of shale gas production.

164. *Id.* at 7. In fact, natural gas is increasingly important as a source of electric power, as "natural gas has become the fuel of choice for most new power plants."

165. *Id.*

growth in shale gas production made possible by hydraulic fracturing, has provided a competitive advantage to the United States chemical industry.[166] The plastic and fertilizer industries also use natural gas as a raw material, and a variety of industries use natural gas as an important source of fuel, including pulp and paper processing, food processing, and metals refining.[167]

The economic benefits of hydraulic fracturing extend beyond its value as an energy source and a raw material used in industry.[168] A study commissioned by a gas industry trade association estimated that unconventional gas production created around 826,000 jobs in gas-producing states in 2010, and it projected that total will rise to almost 1.2 million jobs by 2015.[169] That study also estimated that unconventional gas production resulted in almost $34 billion in tax payments to governments at all levels in 2010.[170] The study projected that annual tax revenues from unconventional gas production would reach $50 billion in 2015, and it projected a cumulative total of almost $1.5 trillion after 25 years.[171]

The increased use of natural gas made possible by hydraulic fracturing may also have environmental benefits.[172] Natural gas is relatively clean burning, and "emits approximately half the carbon dioxide (CO_2) of coal along with lower levels of other air pollutants."[173] According to the International Energy Agency (IEA), carbon dioxide emissions caused by combustion of fossil fuels decreased by 7.7% in the United States between 2006 and 2011, a reduction due in part to the replacement of coal-fired power plants with plants using natural gas.[174] The United States' carbon dioxide emissions from fossil fuels in 2012 fell 3.7% from 2011 levels, with increased use of natural gas instead of coal again playing a key role in the decrease.[175] Natural gas can also play a supporting role in the shift toward renewable energy, including solar and wind power.[176] Production of renewable energy can be limited by adverse weather conditions, and natural

166. Wang et. al., *supra* note 17, at 15. U.S. chemical companies use ethane, which is derived from natural gas, to produce ethylene, which has numerous uses in the chemical industry. Foreign competitors, on the other hand, use naphtha, a more expensive material derived from oil, to produce ethylene. Consequently, the low price of natural gas has conferred a very large price advantage on the U.S. chemical industry. *Id.* at 16.

167. NAT'L ENERGY TECH. LAB., *supra* note 4, at 7.

168. Wang et. al., *supra* note 17, at 14.

169. MOHSEN BONAKDARPOUR & JOHN W. LARSON, IHS, THE ECONOMIC AND EMPLOYMENT CONTRIBUTIONS OF UNCONVENTIONAL GAS DEVELOPMENT IN STATE ECONOMIES 3 (2012).

170. *Id.* at 5.

171. *Id.*

172. NAT'L ENERGY TECH. LAB., *supra* note 4, at 8–9.

173. *Id.* at 8.

174. Wang et. al., *supra* note 17, at 2.

175. *Id.* at 11.

176. NAT'L ENERGY TECH. LAB., *supra* note 4, at 9.

gas can be used as a standby fuel to supplement renewables when necessary.[177]

2. The Risks of Hydraulic Fracturing

There are reasons for concern about the possible environmental consequences of shale gas produced through hydraulic fracturing.[178] Although burning natural gas emits much less carbon dioxide than coal, gas' total contribution to climate change is unclear, in part because of methane emissions occurring during gas production.[179] It is difficult to quantify the climate effects of methane emitted during gas production, in part, because accurate measurements of methane lost during gas production do not exist.[180] One study estimated the total greenhouse gas contribution of shale gas as "at least 20% greater than and perhaps more than twice as great as that for coal when expressed per quantity of energy available during combustion."[181] Such a large contribution of greenhouse gasses would undermine the argument that natural gas is better for the stability of the climate than coal.[182]

The potential that production of shale gas using hydraulic fracturing could contaminate both groundwater and surface water has caused great public concern.[183] Fracturing fluid is mostly water, but other chemicals make up 0.5% to 2% of the fluid, and because of the large volume of fluid injected during hydraulic fracturing, the total amount of chemicals injected into the ground can be quite high.[184] A great variety of chemicals are used in fracturing fluid, and at least 650 of them are either known or potential carcinogens.[185] The produced water, which comes out of the well with the gas, can contain chemicals including "benzene, toluene, ethylbenzene, and xylene (known as the 'BTEX' chemicals); radioactive materials; hydrogen sulfide; arsenic; and mercury."[186] These chemicals can contaminate

177. *Id.*
178. Joseph A. Dammel et. al., *A Tale of Two Technologies: Hydraulic Fracturing and Geologic Carbon Sequestration*, 45 ENVTL. SCI. & TECH. 5075, 5075 (2011).
179. NAT'L ENERGY TECH. LAB., *supra* note 4, at 63.
180. *Id.* The climate effects of methane are complex. Methane is a more powerful greenhouse gas than carbon dioxide. *Id.* Methane, however, remains in the atmosphere only one tenth as long as carbon dioxide. Wang et. al., *supra* note 17, at 18.
181. Robert W. Howarth et. al., *Methane and the Greenhouse-Gas Footprint of Natural Gas from Shale Formations*, 2 CLIMATIC CHANGE 679, 687 (2011).
182. *Id.*
183. NAT'L ENERGY TECH. LAB., *supra* note 4, at 60.
184. Wang et. al., *supra* note 17, at 17. Perhaps as much as "hundreds of thousands of gallons."
185. *Id.*
186. Amy Mall et. al., NAT'L RES. DEF. COUNCIL, DRILLING DOWN: PROTECTING WESTERN COMMUNITIES FROM THE HEALTH AND ENVIRONMENTAL EFFECTS OF OIL AND GAS PRODUCTION 5-6 (2007).

groundwater or migrate into drinking water,[187] which can happen through natural fractures and faults, or as a result of improper drilling and casing practices.[188] There are also risks to surface water, which can be contaminated both by sediment that runs off sites cleared for well pads,[189] and by spills of the produced water that returns to the surface.[190]

There is evidence of a correlation between hydraulic fracturing and earthquakes, especially the practice of injecting wastewater produced during hydraulic fracturing into deep wells.[191] For example, Oklahoma, which averaged about two earthquakes of 3.0 magnitude or greater per year between 1978 and 2008, experienced 109 earthquakes of at least 3.0 magnitude in 2013.[192] In 2014, Oklahoma had already experienced 145 earthquakes of at least 3.0 magnitude by May 2, 2014.[193] The United States Geological Survey considers wastewater injection a contributing factor to the increase in earthquakes.[194] The largest earthquake in Oklahoma history (the November 5, 2011, 5.6 magnitude Prague earthquake) appears to have been triggered by a smaller 5.0 earthquake that was itself triggered by fluid injection.[195] Because many variables may contribute to hydraulic fracturing related earthquakes, it is difficult to explain why hydraulic fracturing contributes to an increase in earthquakes in some areas and not in others.[196]

3. The Disproportionate Burdens Borne by Local Governments Weigh Against Preemption

The financial benefits of hydraulic fracturing accrue mostly to state and federal governments, while local governments and citizens absorb the burdens.[197] Severance taxes generated by oil and gas operations flow primarily to state and federal governments.[198] The benefits of higher wages

187. Dammel et. al., *supra* note 178, at 5075.
188. NAT'L ENERGY TECH. LAB., *supra* note 4, at 60–61.
189. *Id.* at 58.
190. Wang et. al., *supra* note 17, at 17.
191. NAT'L ENERGY TECH. LAB., *supra* note 4, at 62.
192. Adrienne LaFrance, *Man-Made Earthquakes are Changing the Seismic Landscape*, ATLANTIC MONTHLY (Aug. 8, 2014, 11:02 AM), http://www.theatlantic.com/technology/archive/2014/08/man-made-earthquakes-are-altering-the-geologic-landscape/372243/.
193. *Record Number of Oklahoma Tremors Raises Possibility of Damaging Earthquakes*, U.S. GEOLOGICAL SURV., Oct. 22, 2013, 1:07 PM, http://earthquake.usgs.gov/regional/ceus/products/newsrelease_05022014.php (last updated May 2, 2014).
194. *Id.*
195. *Id.*
196. LaFrance, *supra* note 192.
197. Frank Shafroth, *Fracking's Financial Losers: Local Governments*, GOVERNING, Sept. 2014, http://www.governing.com/columns/public-money/gov-frackings-financial-losers.html.
198. *Id.*

and lower unemployment are felt across the economy, including in states where hydraulic fracturing is not taking place.[199]

Hydraulic fracturing places great strain on local governments, which face increased traffic, declining property values, and increased crime.[200] Local officials have expressed frustration at the damage done to local roads by the large trucks used to carry equipment and supplies used in hydraulic fracturing.[201] Local citizens suffer increased fatalities from car accidents due to the high volume of truck traffic in areas where drilling occurs.[202] The problems associated with hydraulic fracturing can depress property values, resulting in decreased property tax revenue, which local governments are not always able to offset.[203] Although hydraulic fracturing does increase the number of highly paid jobs, local residents typically do not receive the best of these jobs.[204] The presence of highly paid hydraulic fracturing workers can drive up the price local residents must pay for goods and services.[205] A sudden influx of workers also drives up the price of housing.[206] Meanwhile, air pollution and noise associated with hydraulic fracturing operations affect people living near wells.[207] Increased use of hydraulic fracturing is placing local water supplies under stress in some regions.[208] In addition to the strain on the volume of water available, lax state regulation and inconsistent enforcement can result in pollution of local water supplies.[209]

In view of these negative effects on local communities, local governments should have the authority to prohibit hydraulic fracturing within their jurisdictions. Local governments are best able to respond

---

199. *See* BONAKDARPOUR & LARSON, *supra* note 169, at 5–7.
200. Shafroth, *supra* note 197.
201. Jim Efstathiou Jr., *Taxpayers Pay as Fracking Trucks Overwhelm Rural Cow Paths*, BLOOMBERG BUSINESSWEEK (May 15, 2012), http://www.businessweek.com/news/2012-05-15/taxpayers-pay-as-fracking-trucks-overwhelm-rural-cow-paths.
202. Kevin Begos & Jonathan Fahey, *AP IMPACT: Deadly Side Effect to Fracking Boom*, ASSOCIATED PRESS May 5, 2014, 11:26 AM, http://bigstory.ap.org/article/ap-impact-deadly-side-effect-fracking-boom-0.
203. Shafroth, *supra* note 197.
204. Minor, *supra* note 14, at 78.
205. *See* Maya Rao, *Searching for the Good Life in the Bakken Oil Fields*, ATLANTIC MONTHLY, Sept. 2014, http://www.theatlantic.com/features/archive/2014/09/searching-for-the-good-life-in-the-bakken-oil-fields/380677/.
206. *See* Haines, *supra* note 1.
207. Mark Gillispie, *High Pollution Levels Found Near Ohio Gas Wells*, S.F. CHRONICLE, Oct. 21, 2014, http://www.sfgate.com/news/science/article/High-pollution-levels-found-near-Ohio-gas-wells-5837302.php.
208. Felicity Barringer, *Spread of Hydrofracking Could Strain Water Resources in West, Study Finds*, N.Y. TIMES, May 2, 2013, http://www.nytimes.com/2013/05/02/science/earth/hydrofracking-could-strain-western-water-resources-study-finds.html.
209. Andrew Casler, *What N.Y. Can Learn from P.A.'s Fracking Problems*, ITHACA JOURNAL, Aug. 11, 2014, http://www.ithacajournal.com/story/news/local/2014/08/08/pa-fracking-failures-teach-newyork/13795841/.

effectively to the problems facing their citizens.[210] Some jurisdictions have placed a higher priority on the "statewide interest in the efficient development and production of oil and gas resources" than the local government interest in solving local problems.[211] Other jurisdictions have sought to balance the two interests.[212] Courts should recognize that "economic development cannot take place at the expense of an unreasonable degradation of the environment."[213] Local governments are most familiar with local circumstances and are in the best position to decide what land uses will be permitted within their boundaries.[214]

The court's decision in *Wallach* leaves intact the state's sole authority to regulate the "safety, technical and operational aspects of oil and gas activities" in New York.[215] This avoids creation of an inefficient system of local regulation of industry practices, which the *Wallach* court cited as a major purpose of the OGSML.[216] At the same time, allowing local governments to prohibit hydraulic fracturing preserves local authority to regulate land use, which New York recognizes as "[a]mong the most important powers and duties granted . . . to a town government."[217] This approach strikes an appropriate balance by providing oil and gas businesses with consistent regulations that apply in all communities that welcome hydraulic fracturing, while allowing other communities to avoid the harms associated with hydraulic fracturing.

C. Illinois Courts Should Uphold Home Rule Land Use Regulations that Prohibit Fracking

A portion of Illinois lies atop the New Albany shale formation, and oil and gas companies have begun to use hydraulic fracturing in Illinois.[218] The Illinois General Assembly passed, and then-Governor Pat Quinn signed, the Hydraulic Fracturing Regulatory Act ("HFRA") in 2013.[219] Although the HFRA does not contain an explicit provision preempting the authority of home rule units to regulate hydraulic fracturing, it does contain

---

210. Rachel A. Kitze, Note, *Moving Past Preemption: Enhancing the Power of Local Governments over Hydraulic Fracturing*, 98 MINN. L. REV. 385, 395 (2013).
211. Voss v. Lundvall Bros., Inc., 830 P.2d 1061, 1062 (Colo. 1992).
212. *See* Huntley & Huntley, Inc. v. Borough Council of Oakmont, 964 A.2d 855 (Pa. 2009).
213. Robinson Twp. v. Commonwealth, 83 A.3d 901, 954 (Pa. 2013).
214. *See* Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 388 (1926).
215. Wallach v. Town of Dryden, 16 N.E.3d 1188, 1199, 1202-03 (N.Y. 2014).
216. *Id.* at 1199.
217. *Id.* at 1194 (quoting N.Y. TOWN LAW § 272-a(1)(b)).
218. NAT'L ENERGY TECH. LAB., *supra* note 4, at 31–32.
219. Julie Wernau, *Gov. Quinn Signs Bill to Regulate Fracking*, CHI. TRIB., June 17, 2013, http://articles.chicagotribune.com/2013-06-17/business/chi-quinn-fracking-bill-20130617_1_fracking-fracturing-our-environment-many-environmental-advocates.

provisions that could tempt a court to find implied preemption.[220] Courts in Illinois are generally unwilling to use implied preemption to limit the authority of home rule units.[221] Illinois courts have, however, limited the scope of home rule authority in the absence of a specific statutory provision limiting the power of home rule units.[222] Like Pennsylvania, Illinois has constitutional provisions protecting environmental rights, but the Illinois provisions are unlikely to create an obstacle to state preemption of home rule authority.[223]

1. Fracking in Illinois: The Illinois Hydraulic Fracturing Regulatory Act

Settlers first discovered natural gas in the Illinois New Albany shale formation in 1853 and, although oil and gas production peaked in the 1990s, there are still about 32,000 vertical wells producing oil and gas in the formation.[224] A petroleum industry analysis in the early-1980s indicated that hydraulic fracturing might be necessary to fully exploit the resources locked in the New Albany shale formation, but cited high expense as an obstacle.[225] The New Albany shale formation is similar in age and composition to North Dakota's Bakken formation,[226] which became one of the top oil-producing regions in the United States.[227] One well in

220. *See* Hydraulic Fracturing Regulatory Act, Ill. Pub. Act 098-0022, 2013 Ill. Laws 22 (codified at 225 ILL. COMP. STAT. 732).

221. Village of Bolingbrook v. Citizens Util. Co. of Ill., 632 N.E.2d 1000, 1003 (Ill. 1994) ("The courts of this State have consistently refused to find implied preemption of home rule powers."); Palm v. 2800 Lake Shore Drive Condo. Ass'n, 2013 IL 110505, ¶ 43–44, 988 N.E.2d 75, 85 (holding that the legislature has the almost exclusive responsibility to determine whether to preempt home rule authority, and must do so specifically).

222. Commonwealth Edison Co. v. City of Warrenville, 680 N.E.2d 465, 470–71 (Ill. 1997) (holding that a state statute preempts an ordinance regulating public utilities enacted by a home rule unit, even absent an express statutory provision indicating preemption); City of Chicago v. StubHub, Inc., 2011 IL 111127, ¶ 25, 979 N.E.2d 844, 852 (holding that Illinois courts may limit home rule authority where the state has traditionally had an exclusive regulatory role and a vital state interest is present).

223. *Compare* PA. CONST. art. 1, § 27 (providing extensive environmental rights to the people and making the Commonwealth the trustee of the public resources), *with* ILL. CONST. art. XI, §§ 1-2 (providing that the public policy of the State is to maintain a healthful environment and granting each person the right to the same). "The decision to affirm the people's environmental rights in a Declaration or Bill of Rights, alongside political rights, is relatively rare in American constitutional law. . . . Illinois, unlike Pennsylvania, expressly require[s] further legislative action to vindicate the rights of the people." Robinson Twp. v. Commonwealth, 83 A.3d 901, 962 (Pa. 2013).

224. Dan Sharp, *Four Bakken-like Plays Emerging Across the Nation's Midsection*, BISMARCK TRIB., Sept. 11, 2014, http://bismarcktribune.com/bakken/breakout/four-bakken-like-plays-emerging-across-the-nation-s-midsection/article_8d75c61c-39c8-11e4-98bf-af0a259878c1.html.

225. Robert M. Cluff & Donald R. Dickinson, *Natural Gas Potential of the New Albany Shale Group (Devonian-Mississippian) in Southeastern Illinois*, 22 SOC'Y PETROLEUM ENGINEERS J. 291, 299–300 (1982).

226. Sharp, *supra* note 224.

227. Holeywell, *supra* note 2.

southeastern Illinois produced oil at an initial rate of 204 barrels per day with the assistance of hydraulic fracturing, comparable to the production from the Eagle Ford shale formation in Texas.[228] Companies have rushed to lease mineral rights, and the price per acre has increased dramatically.[229]

Citing the need to provide jobs and protect natural resources, then-Governor Pat Quinn signed the HFRA on June 17, 2013.[230] The HFRA provides that the Illinois Department of Natural Resources ("the Department") "shall have the primary authority to administer the provisions of this Act," with other state agencies assisting as required.[231] The HFRA prohibits drilling, deepening, or converting a horizontal well where hydraulic fracturing is planned or occurring without first obtaining a permit from the Department.[232] If the proposed well site is within the limits of a city, village, or incorporated town, the applicant must submit "a certified copy of the official consent for the hydraulic fracturing operations to occur from the municipal authorities where the well site is proposed to be located," and "no permit shall be issued unless consent is secured."[233] The HFRA does not require official consent from a county as a condition for issuing a permit, but it provides that "the county board of a county to be affected under a proposed permit" may file written objections to the application and request a public hearing before the Department.[234] Compliance with the HFRA, however, "does not relieve responsibility for compliance with the Illinois Oil and Gas Act . . . and other applicable federal, State, and local laws."[235]

Hydraulic fracturing is controversial in Illinois, with some environmental groups collaborating with legislators drafting the HFRA, and others opposing the legislation.[236] Before the HFRA became law, several local governments in the southern part of Illinois formally supported a two-

228. Julie Wernau, *Fracking Could Lead to State Oil Boom*, CHI. TRIB., June 2, 2013, http://articles.chicagotribune.com/2013-06-02/business/ct-biz-0602-fracking-passes-20130602_1_fracking-fluid-high-volume-hydraulic-fracturing-oil-and-gas (The company reported it "pumped 10,000 gallons of acid, 569,000 pounds of sand and 640,157 gallons of water into the White County well.").

229. Keith Schaefer, *Illinois Basin's New Albany Shale: The Next Big U.S. Horizontal Oil Play?*, OIL AND GAS INV. BULL., Sept. 23, 2013, http://oilandgas-investments.com/2013/oil-and-gas-financial/illinois-new-albany-shale-oil/ ("What we also know is that *enormous* tracts of land have been leased over the past couple of years in the basin and we know that prices per acre have already at least quintupled over that time.").

230. Wernau, *supra* note 219.

231. Hydraulic Fracturing Regulatory Act, 225 ILL. COMP. STAT. 732/1-10 (2014).

232. 225 ILL. COMP. STAT. 732/1-30 (2014).

233. 225 ILL. COMP. STAT. 732/1-35(c) (2014).

234. 225 ILL. COMP. STAT. 732/1-50 (2014).

235. 225 ILL. COMP. STAT. 732/1-120 (2014). The Illinois Oil and Gas Act has a provision nearly identical to the one in the HFRA requiring consent of any city, village, or incorporated town before a permit may be issued. Oil and Gas Act, 225 ILL. COMP. STAT. 725/13 (2014).

236. Wernau, *supra* note 219.

year moratorium on hydraulic fracturing in Illinois.[237] Voters in Johnson County, Illinois, rejected a nonbinding referendum intended to pressure the county board to adopt a county-wide ban on hydraulic fracturing.[238] Alto Pass, an Illinois village located outside the New Albany shale formation, passed a local ban on hydraulic fracturing within its boundaries, citing concerns about possible water contamination.[239] The City of Carbondale, Illinois, prohibits hydraulic fracturing within its zoning jurisdiction, including from wells located outside the city's zoning jurisdiction.[240] Carlyle, Illinois, has a zoning ordinance that prohibits within particular zoning districts all uses not specifically listed as permitted or special uses within that district.[241] Hydraulic fracturing is not a permitted or special use in any Carlyle zoning district.[242]

2. The Scope of Home Rule Authority in Illinois

The 1970 Illinois Constitution provides home rule units the authority to "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

---

237. D.W. Norris, *Jackson Backs Two-Year Pause on Fracking*, SOUTHERN ILLINOISAN, Aug. 24, 2012, http://thesouthern.com/news/local/jackson-backs-two-year-pause-on-fracking/article_d740016e-ed9d-11e1-a51f-0019bb2963f4.html; D.W. Norris, *Fracking Moratorium Finds Friendly Audience in Carbondale*, SOUTHERN ILLINOISAN, Oct. 31, 2012, http://thesouthern.com/news/local/fracking-moratorium-finds-friendly-audience-in-carbondale/article_80c6b5d6-2316-11e2-8a96-0019bb2963f4.html; D.W. Norris, *City Council Supports Fracking Moratorium*, SOUTHERN ILLINOISAN, Mar. 13, 2013, http://thesouthern.com/news/local/city-council-supports-fracking-moratorium/article_e7dc2976-8b9a-11e2-9f1e-0019bb2963f4.html; Stephen Rickerl, *Johnson County Passes Fracking Moratorium*, SOUTHERN ILLINOISAN, May, 21, 2013, http://thesouthern.com/news/local/johnson-county-passes-fracking-moratorium/article_ea032d1e-c1d0-11e2-8a02-0019bb2963f4.html.

238. Jim Suhr, *Johnson County Voters Reject Fracking Ban Measure*, ST. J.-REG., Mar. 19, 2014, 9:14 AM, http://www.sj-r.com/article/20140319/NEWS/140319308?template=printart.

239. Nick Mariano, *Alto Pass Bans Fracking*, SOUTHERN ILLINOISAN, Dec. 15, 2012, http://thesouthern.com/news/local/alto-pass-board-bans-fracking/article_800a2a3e-467e-11e2-bbce-0019bb2963f4.html.

240. CARBONDALE, ILL., REV. CODE tit. 15, ch. 2, § 28 (2014) (listing resource extraction, "with the exception of hydraulic fracturing," as a special use in agricultural districts, and as not permitted in any other residential district). Carbondale's zoning ordinance provides that "all uses not expressly permitted as a permitted use, an accessory use, or a special use . . . are prohibited." *Id.* § 3.1(A). Carbondale explicitly forbids hydraulic fracturing in residential districts, including the agricultural district. *Id.* ch. 2, §28, n.1 ("Hydraulic fracturing (fracking) shall not enter or infringe upon the city of Carbondale's zoning jurisdiction from a location outside of the zoning jurisdiction."). Carbondale also prohibits hydraulic fracturing in nonresidential districts. *Id.* § 29 (listing resource extraction, "except hydraulic fracturing," as a special use in the light industrial and general industrial districts). Carbondale specifically excludes hydraulic fracturing from nonresidential districts, using the same language used for residential zones. *Id.* n.6.

241. CARLYLE, ILL. REV. CODE ch. 40, art. 3, § 4 (2014).

242. *Id.* art. 4, §§ 4–5, 10–11, 17–18, 24–25, 35–36, 42–43, 47–48, 55–56, 61.

license; to tax; and to incur debt."[243] Unique among the states, Illinois does not recognize implied preemption.[244] Home rule units exercise power concurrently with the state unless the legislature specifically declares the state's exercise of authority to be exclusive by a three-fifths vote of both houses of the legislature.[245] The Illinois Statute on Statutes provides that no law denies or limits the authority of home rule units unless there is express language that "specifically sets forth in what manner and to what extent it is a limitation or denial of the power or function of a home rule unit."[246] The Illinois Constitution provides that home rule authority must be construed liberally.[247] The breadth of home rule authority in Illinois is sweeping; unless limited by the General Assembly, home rule units have the same powers as the state government.[248]

Illinois courts have traditionally used a three-part test to review exercises of home rule authority.[249] First, the reviewing court determined whether the exercise of home rule authority pertained to local government and affairs and, if so, whether the legislature preempted home rule powers in that area.[250] If the exercise of home rule authority did pertain to local government and affairs, and the legislature had not expressly preempted it, the reviewing court "determined 'the proper relationship' between the local legislation and the state statute."[251] Recently, however, the Illinois Supreme Court has modified its approach, recognizing that municipalities may exercise home rule authority where "a subject pertains to local government and affairs, and the legislature has not expressly preempted home rule."[252] Illinois courts do not recognize implied preemption, and usually refuse "to apply a free-wheeling preemption rule to the exercise of home rule power."[253] In keeping with the broad reach of home rule in Illinois and the lack of an implied preemption rule, the Illinois Supreme Court has upheld a wide variety of exercises of home rule authority.[254]

---

243. ILL. CONST. art. VII, §6(a).
244. Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1141, 1157–58 (2007).
245. ILL. CONST. art. VII, §§ 6(h)-(i).
246. Statute on Statutes, 5 ILL. COMP. STAT. 70/7 (2014).
247. ILL. CONST. art. VII, § 6(m).
248. City of Evanston v. Create, Inc., 421 N.E.2d 196, 202 (Ill. 1981) ("Under this grant of power the home rule unit possesses the same power as the State except where those powers are specifically limited by express legislative action under sections 6(g) and 6(h) of article VII.").
249. Palm v. 2800 Lake Shore Drive Condo. Ass'n, 2013 IL 110505, ¶ 35, 988 N.E.2d 75, 82.
250. *Id.*
251. *Id.* (quoting Schillerstrom Homes, Inc. v. City of Naperville, 762 N.E.2d 494, 499 (Ill. 2001).
252. City of Chicago v. StubHub, Inc., 2011 IL 111127, ¶ 22 n.2, 979 N.E.2d 844, 851.
253. Kalodimos v. Village of Morton Grove, 470 N.E.2d 266, 274 (Ill. 1984).
254. *See* Stryker v. Village of Oak Park, 343 N.E.2d 919, 923 (Ill. 1976) (upholding an ordinance concerning appointments of officers fire and police departments in conflict with the Municipal Code); City of Evanston v. Create, Inc., 421 N.E.2d 196, 203 (Ill. 1981) (upholding an ordinance imposing conditions on residential lease agreements between landlords and tenants); *Kalodimos*, 470 N.E.2d at 277 (upholding an ordinance prohibiting possession of handguns within municipal

Despite refusing to adopt an implied preemption doctrine, the Illinois Supreme Court has sometimes invalidated exercises of home rule authority even in the absence of a specific statutory preemption provision.[255] In such cases, the court has concluded that the challenged exercise of home rule authority did not pertain to local government and affairs, as required by § 6 of the Illinois Constitution.[256] The court has invalidated exercises of home rule authority absent express statutory preemption in cases where the subject "is purely a problem of statewide concern."[257] Notably, the court has repeatedly overturned exercises of home rule authority that purport to assert "any control over or permit the imposition of a burden on the judicial system."[258] In other cases, the court has used the concept of "extraterritorial impact" to invalidate exercises of home rule authority.[259]

---

boundaries unless rendered permanently inoperative); Scadron v. City of Des Plaines, 606 N.E.2d 1154, 1167 (Ill. 1992) (upholding an ordinance prohibiting highway billboards); Village of Bolingbrook v. Citizens Util. Co. of Ill., 632 N.E.2d 1000, 1004 (Ill. 1994) (upholding application of an ordinance prohibiting unlawful discharge of waste to utility company despite the existence of a comprehensive state Public Utilities Act); City of Chicago v. Roman, 705 N.E.2d 81, 90 (Ill. 1998) (upholding an ordinance mandating a minimum sentence of ninety days imprisonment for assault against an elderly person); *Palm*, 2013 IL 110505, ¶ 58, 988 N.E.2d at 87 (upholding an ordinance allowing condominium owners access to association financial records).

255. *E.g.*, Ampersand, Inc. v. Finley, 338 N.E.2d 15, 18–19 (Ill. 1975) (holding that an ordinance requiring payment of a small law library fee by each party at the time of filing the first pleading in civil cases did not pertain to local government and affairs, and was thus preempted).

256. *Id.*; ILL. CONST. art. VII, § 6(a).

257. Commonwealth Edison Co., v. City of Warrenville, 680 N.E.2d 465, 470 (Ill. 1997) (holding a home rule unit's use of zoning power to prevent construction of an electrical transmission line was preempted despite the absence of an express preemption provision in the state Public Utilities Act); *accord* People *ex rel.* Lignoul v. City of Chicago, 368 N.E.2d 100, 105 (Ill. 1977) (holding a home rule unit's ordinance authorizing branch banking was preempted despite the absence of an express preemption provision in the Illinois Banking Act, based in part on constitutional provision permitting branch banking only after approval by a three-fifths majority of both houses of the legislature); City of Chicago v. StubHub, Inc., 2011 IL 111127, ¶ 36–44, 979 N.E.2d 844, 855–57 (holding a home rule unit's ordinance establishing a tax on sale of tickets in internet actions was preempted despite the absence of an express preemption provision in the state Ticket Sale and Resale Act). *But cf.* Village of Bolingbrook v. Citizens Util. Co. of Ill., 632 N.E.2d 1000, 1004 (Ill. 1994) (holding the existence of a comprehensive state Public Utilities Act did not preempt home rule unit's application of an ordinance prohibiting discharge of waste to utility company).

258. *Ampersand*, 338 N.E.2d at 18; City of Carbondale v. Yehling, 451 N.E.2d 837, 840 (Ill. 1983) (holding that a home rule unit's ordinance "purport[ing] to define the notice procedures of the courts, duties of parties in court, and specific remedies available in court proceedings" did not pertain to its government and affairs).

259. Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. U. L. REV. 1271, 1288-89 (2009); *accord* City of Carbondale v. Van Natta, 338 N.E.2d 19, 23 (Ill. 1975) ("[A] municipality does not have extraterritorial zoning authority under its home-rule powers."); City of Des Plaines v. Chi. N.W. Ry. Co., 357 N.E.2d 433, 436 (Ill. 1976) (holding that a home rule unit's ordinance regulating noise pollution had extraterritorial effect and thus exceeded home rule authority because it regulated noise that may not have originated within the municipality); Commercial Nat'l Bank of Chicago v. City of Chicago, 432 N.E.2d 227, 242–43 (Ill. 1982) (holding that home rule unit's ordinance imposing a tax on services purchased in the city had extraterritorial effect and exceeded its home rule authority); People *ex rel.* Bernardi v. City of Highland Park, 520 N.E.2d 316, 324 (Ill. 1988) (holding home rule unit's attempt to avoid

3. Illinois Courts Should Uphold Home Rule Prohibitions on Hydraulic Fracturing

Because the HFRA explicitly requires the consent of municipal authorities as a condition for issuing a permit for any well located within a city, village, or incorporated town, it is clear that municipal prohibitions on hydraulic fracturing wells within municipal boundaries are permitted under Illinois law. Indeed, even a non-home rule municipality has the statutory authority to prohibit hydraulic fracturing wells within its boundaries.[260] By providing that county boards may object to proposed permits and request a public hearing before the Department issues a permit, it is equally clear that non-home rule counties may not prohibit hydraulic fracturing within their boundaries. Two questions remain unanswered. The first, whether a home rule county could prohibit hydraulic fracturing wells within its boundaries, is relatively insignificant, as heavily urbanized Cook County is the only home rule county in Illinois.[261] The second unanswered question, whether a home rule municipality may prohibit hydraulic fracturing occurring on land within its boundaries where the well is located outside its jurisdiction, may become significant.

The City of Carbondale's zoning ordinance provides that "[h]ydraulic fracturing (fracking) shall not enter or infringe upon the city of Carbondale's zoning jurisdiction from a location outside of the zoning jurisdiction."[262] Carbondale exercises extraterritorial zoning authority within one and a half miles of its boundaries as permitted by state statute.[263]

---

compliance with the state Prevailing Wage Act had extraterritorial effect and was outside its home rule authority).

260. *See* Tri-Power Res., Inc. v. City of Carlyle, 2012 IL App (5th) 110075, ¶ 25, 967 N.E.2d 811, 817 ("[W]e answer the certified question in the affirmative and hold that a non-home-rule unit of government may prohibit the drilling or operation of an oil or gas well within its municipal limits."). Although the court in *Tri-Power* was interpreting the Oil and Gas Act, the HFRA contains nearly identical language. *Compare* Illinois Oil and Gas Act, 225 ILL. COMP. STAT. 725/13 (2014) (requiring a "certified copy of the official consent of the municipal authorities" as a condition for issuing a drilling permit for a location within the boundaries of "any city village or incorporated town"), *with* Hydraulic Fracturing Regulatory Act, 225 ILL. COMP. STAT. 732/1-35(c) (requiring a "certified copy of the official consent for the hydraulic fracturing operations to occur from the municipal authorities" as a condition for issuing a permit for a well site located within the boundaries of "any city, village, or incorporated town"). "[S]tatutes which relate to the same subject are deemed to be *in pari materia* and should be construed together." *Tri-Power*, 2012 IL App (5th) 110075, ¶ 19, 967 N.E.2d at 816 (quoting People v. Wade, 760 N.E.2d 491, 494 (Ill. App. Ct. 2001). "The power to give 'official consent' or permission necessarily entails the power to deny the same, and pursuant to section 13 of the Act, a municipality can therefore block the Department's issuance of a permit to operate an oil or gas well within its municipal limits." *Id.* at ¶ 22, 967 N.E.2d at 816.

261. Ann M. Lousin, *Where Are We At? The Illinois Constitution After Forty-Five Years*, 48 J. MARSHALL L. REV. 1, 5 (2014).

262. CARBONDALE, ILL., REV. CODE tit. 15, ch. 2, § 28 n.1 (2014); *id.* at § 29 n.6.

263. *Id.* ch. 1, § 6; 65 ILL. COMP. STAT. 5/11-13-1 (2014).

In *City of Des Plaines v. Chicago North West Railway Co.*, the Illinois Supreme Court held that a home rule unit exceeded its authority when it passed an ordinance designed to regulate noise pollution, regardless of whether the noise "originated within that municipality."[264] In *City of Carbondale v. Van Natta*, the court held that the framers of the 1970 Illinois Constitution did not intend "to confer extraterritorial sovereign or governmental powers directly on home-rule units," instead intending that the legislature grant home rule units any extraterritorial powers they may exercise.[265] Arguably, these cases support preempting the extraterritorial, or at least the extra-jurisdictional, reach of Carbondale's prohibition on hydraulic fracturing. In view of the unique local burdens hydraulic fracturing can impose, and the traditional role local governments have played in regulating land use, Illinois courts should uphold such extraterritorial exercises of home rule authority.

Consider the following hypothetical. Imagine a home rule municipality has both an ordinance prohibiting leaf burning within corporate limits and an ordinance prohibiting activities that generate air pollution, including smoke, within corporate limits. Now imagine that a landowner outside the corporate limits burns leaves on her property, and the smoke drifts within the boundaries of the municipality. Applying the rule in *Des Plaines*, the municipality likely could not punish the landowner, because the smoke did not originate within the municipality. Imagine instead that the landowner's leaf fire spread from her property and consumed leaves on neighboring property within the municipal boundaries. Here, the municipality likely could punish the landowner for burning leaves within the corporate limits. The distinction is the location of the activity. In the first example, an activity occurring outside municipal boundaries creates effects within the municipality's jurisdiction. In the second example, an activity begun on land outside corporate limits spreads to land within municipal boundaries. Hydraulic fracturing resembles the second example because operators can fracture land within corporate limits, even though the well site is outside municipal boundaries.

Courts would not have to overrule *Des Plaines* to recognize this distinction. In *Des Plaines*, the prohibited noise pollution could be generated on land outside the municipal boundaries, and then spread through the air to affect people within the corporate limits. A court could distinguish *Des Plaines* by recognizing the difference between sounds that travel through the air and fracturing fluid that travels through the land. Indeed, Illinois courts have already distinguished *Des Plaines* in noise

264. *City of Des Plaines*, 357 N.E.2d at 435–36.

265. City of Carbondale v. Van Natta, 338 N.E.2d 19, 21 (Ill. 1975).

pollution cases.[266] Although the distinguishing courts recognized that the challenged ordinances did not extend beyond municipal boundaries, they also recognized that noise pollution is a matter of both local and statewide concern.[267] The risks of hydraulic fracturing, particularly the risk of water pollution, are also of both local and statewide concern. Drinking water is typically supplied locally, and protecting local water supplies from pollution is surely a "matter pertaining to [local] government and affairs, including . . . the public health."[268] Consequently, Illinois courts should follow the decision in *Wallach v. Town of Dryden* and recognize the distinction between regulation of land use and regulation of the hydraulic fracturing industry. This suggests that Illinois courts should uphold home rule prohibitions on fracking, including those that prohibit fracturing land within municipal boundaries from wells located outside the corporate limits. To do otherwise would be to "improperly ignore[] the court's duty to uphold local regulation" in the absence of express statutory preemption.[269]

V. CONCLUSION

The New York Court of Appeals was correct in its holding that a municipal ordinance prohibiting hydraulic fracturing within municipal boundaries was a regulation of land use, not a regulation of the oil and gas industry, and was therefore not subject to preemption under the OGSML's supersession clause. There is a meaningful difference between the regulation of the operations of an industry and a zoning ordinance regulating the use of land within a municipality, even when the zoning ordinance completely prohibits certain industrial uses. A zoning ordinance that merely prohibits the use of land for hydraulic fracturing does not intrude on the state's authority to regulate industry.

Public policy considerations require weighing the risks and benefits of hydraulic fracturing. A proper analysis of the risks and benefits leads to the conclusion that the state and federal governments receive a disproportionate share of the benefits, while local governments and citizens must shoulder a disproportionate share of the burdens. Consequently, public policy weighs against state preemption of local zoning ordinances prohibiting hydraulic fracturing. A balanced approach to the regulation of hydraulic fracturing

266. *See* Village of Caseyville v. Cunningham, 484 N.E.2d 499, 501 (Ill. App. Ct. 1985) ("We cannot find that loud mufflers, squealing tires or barking dogs are of such statewide concern."); Village of Sugar Grove v. Rich, 808 N.E.2d 525, 532 (Ill. App. Ct. 2004) ("Trains, by their very nature, are transient instruments of intrastate and interstate commerce.").

267. *See Caseyville*, 484 N.E.2d at 501; *Sugar Grove*, 808 N.E.2d at 531–32.

268. ILL. CONST. art. VII, § 6(a).

269. Reynolds, *supra* note 259, at 1289.

preserves the authority of state governments to regulate the operations of the oil and gas industry, while protecting the authority of local governments to decide what uses will be permitted within their jurisdictions. The New York Court of Appeals' decision to narrowly interpret the OGSML's supersession clause is consistent with precedent, advances public policy, and correctly balances state and local authority. Illinois courts should follow the decision in *Wallach v. Town of Dryden* and uphold local prohibitions on hydraulic fracturing enacted by home rule units.