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Usurping Democracy and the Attempts to Ban Hydraulic Fracturing

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INTRODUCTION

The United States Constitution guarantees every State, “a Republican Form of Government.”¹ In other words, a system of government in which the people hold sovereign power, not through direct democracy, but through elected representatives who exercise that power.² The founding fathers recognized many of the inherent issues with a direct democracy, including the threat of an impassioned majority imposing its will on the rights of a minority. As stated in the Federalist Papers:

A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.³

Although the founders originally implemented a system of representative democracy in the U.S., direct democracy found a place in the country. Direct democracy in the U.S. had its start with the Progressive political movement in the late 19th and early 20th Centuries, mostly in the western states. At this time, western U.S. territories were seeking statehood. The Progressives were concerned with the large, wealthy

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1. U.S. CONST. art. IV, § 4.

2. *Republican Government*, BLACK’S LAW DICTIONARY (7th ed. 1999).

3. THE FEDERALIST NO. 10 (James Madison).

political machines controlling the democratic process. During the constitutional process for these states, the drafters utilized elements of direct democracy—as opposed to the representative democracy that had dominated the political atmosphere in the late 18th and 19th Centuries—to build the structure of state governments.

These created effective governments by incorporating elements of direct democracy, primarily through populists' passing of legislation, constitutional amendments, and referendums on existing laws and policies. It is not the intent of this article to claim otherwise. As the Progressives realized at the turn of the 19th Century, direct democracy can serve as a useful check on elected officials and the laws they pass. However, it is not proper to use direct democracy as a tool for a vocal minority when that minority's attempts to overrule the majority within the representative system fail.

The Progressives originally used direct democracy in America as a check on inactivity and corruption. While this was the original intent of direct democracy in the U.S, it is neither what drives the utilization of direct democracy today, nor how direct democracy has been used by the anti-oil and gas industry advocates.

This article briefly examines the history of direct democracy, discusses several representative states' legislative and regulatory processes to regulate domestic oil and gas development, including hydraulic fracturing, and analyzes the attempts by anti-oil and gas groups to use direct democracy to usurp the founders' fundamental democratic process. This article also discusses the political efforts to introduce superfluous oil and gas regulation through direct democracy and argues that direct democracy, while a legitimate governmental tool, is inappropriately used by special interest groups to drive an anti-industry agenda. This misuse effectively drives a "common passion" incompatible with personal security or the rights of property—one unfounded in science and at odds with the republic form of government established by our founding fathers.

Colorado is the preeminent example of the use of direct democracy to usurp representational democracy in an effort to implement regulations of the oil and gas industry, including the regulation of hydraulic fracturing. This is illustrated by numerous attempts to implement "local control" of oil and gas development, the litigation over the ballot initiatives and local bans on hydraulic fracturing, and other efforts by members of an anti-oil and gas movement to use processes of direct democracy to usurp representational democracy and to unilaterally overturn the process implemented to regulate oil and gas.

I. STATE AND FEDERAL REGULATION OF HYDRAULIC FRACTURING

The development of oil and gas in the U.S., including hydraulic fracturing, has a long history. During that time, federal, state, and local governments have imposed a multitude of laws, rules, regulations, and have established several administrative agencies dedicated to regulating, permitting, and overseeing oil and gas development—including hydraulic fracturing. This section will provide a brief background on the use of hydraulic fracturing and a summary of some of the various laws, regulations, and rules governing the oil and gas industry.

A. History and Overview of Hydraulic Fracturing

Numerous scientific papers, news articles, and at least two popular books address the history of the hydraulic fracturing process and its development in the U.S.⁴ This brief background on the technology and the surrounding legislative history will not address all of the facts and history behind its development.

Hydraulic fracturing, commonly referred to as “fracing” or “fracking,” is the process of creating small fractures in underground geological formations by injecting fluids and a proppant, such as sand, to allow oil or natural gas to flow into a wellbore, thereby increasing production.⁵ The process was first utilized in the 1940s by Stanolind Oil, and its use expanded domestic oil and gas production in the 1950s.⁶ Use of hydraulic fracturing processes extended into Colorado in the 1970s, where most of the remaining oil and gas formations were not accessible using conventional drilling techniques.⁷

4. See, e.g., GREGORY ZUCKERMAN, *THE FRACKERS: THE OUTRAGEOUS INSIDE STORY OF THE NEW BILLIONAIRE WILDCATTERS* (2013); RUSSELL GOLD, *THE BOOM: HOW FRACKING IGNITED THE AMERICAN ENERGY REVOLUTION AND CHANGED THE WORLD* (2015).

5. COLO. OIL & GAS CONSERVATION COMM’N, *Frequently Asked Questions About Hydraulic Fracturing*, cogcc.state.co.us/Announcements/Hot_Topics/Hydraulic_Fracturing/Frequent_Questions_about_Hydraulic%20Fracturing.pdf [https://perma.cc/2HG8-TJMF] (last visited Mar. 22, 2017).

6. Daniel R. Cahoy, Joel Gehman & Zhen Lei, *Fracking Patents: The Emergence of Patents as Information-Containment Tools in Shale Drilling*, 19 MICH. TELECOMM. TECH. L. REV. 279, 283-284 (2013).

7. COLO. OIL & GAS CONSERVATION COMM’N, *Frequently Asked Questions About Hydraulic Fracturing*, cogcc.state.co.us/Announcements/Hot_Topics/Hydraulic_Fracturing/Frequent_Questions_about_Hydraulic%20Fracturing.pdf [https://perma.cc/CF4E-DES6] (last visited Apr. 16, 2017).

Technological advances in horizontal drilling and hydraulic fracturing have spawned an “American Energy Renaissance.”⁸ According to the Colorado School of Mines Potential Gas Committee, oil and gas resources have increased 27% since 2005 to 2,384 trillion cubic feet (Tcf) annually, with natural gas production up 26% since 2005 to 6.7 Tcf annually.⁹ The U.S. oil and gas industry produced over 3 billion barrels of oil in 2014, and crude oil reserves are estimated to be at their highest levels since 1988.¹⁰ Technological advances in horizontal drilling and hydraulic fracturing are the two most important reasons for these increases in production and reserves.¹¹

B. History of Oil and Gas Regulations in the United States

The claim that oil and gas development—specifically, hydraulic fracturing—is an unregulated practice is contradicted by voluminous federal, state, and local directives and exhaustive permitting requirements.¹² Numerous studies provide evidence that the oil and gas industry is one of the most highly regulated practices in the U.S.¹³ As discussed *infra*, the development, implementation, and enforcement of

8. WESTERN ENERGY ALL., *Industry’s Technological Innovation Is Driving America’s Energy Renaissance*, westernenergyalliance.org/knowledge-center/technology [https://perma.cc/22TB-PXNU] (last visited Mar. 22 2017).

9. *Id.*

10. *Id.*

11. AM. PETROLEUM INST., *Hydraulic Fracturing: Unlocking America’s Natural Gas Resources* (Feb. 2017), api.org/~media/Files/Oil-and-Natural-Gas/Hydraulic-Fracturing-primer/Hydraulic-Fracturing-Primer.pdf [https://perma.cc/R4D4-NGFW].

12. See, e.g., Katherine Toan, *Not Under My Backyard: The Battle Between Colorado and Local Governments Over Hydraulic Fracturing*, 26 COLO. NAT. RES., ENERGY & ENVTL. L. REV. 1, 64 (2015) (“Fracking currently operates within a sixty-year old regulatory system that was designed to maximize production with little regard for environmental or health impacts . . .”).

13. WESTERN ENERGY ALL., *Regulatory*, westernenergyalliance.org/knowledge-center/regulatory [https://perma.cc/72NH-2VZV] (last visited Mar. 22, 2017); Patrick McLaughlin & Oliver Sherouse, *The McLaughlin–Sherouse List: The Ten-Most Regulated Industries of 2014*, George Mason Univ.: Mercatus Center (Jan. 21, 2016), mercatus.org/publication/mclaughlin-sherouse-list-10-most-regulated-industries-2014 [https://perma.cc/NEQ8-52XV] (referencing the RegData database); Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, SMALL BUS. ADMIN. (2010), sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20%28Full%29.pdf [https://perma.cc/W7JA-GJPN]; W. Mark Crain & Nicole V. Crain, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, NAT’L ASS’N OF MFR. (2014), nam.org /Special/Total-Cost-of-Regulation.aspx?utm_source=nam&utm_medium=alias&utm_campaign=CostofRegulation [https://perma.cc/PRA6-N2JR].

state-level regulations, including those imposed as part of a permitting process, is the proper place to address the anti-oil and gas groups' concerns regarding the protection of other resources. This is consistent with the constitutionally guaranteed republic form of government and the nature of the industry.

Hydraulic fracturing is governed by numerous federal, state, and local regulations. For example, at the federal level, the Clean Water Act (CWA) and Safe Drinking Water Act (SDWA) regulate surface discharges, storm water runoff, and underground injection of fluids from drilling sites.¹⁴ Additionally, the Clean Air Act limits air emissions from sources related to drilling and production, and the National Environmental Policy Act (NEPA) requires that exploration and production on federal lands be thoroughly analyzed for environmental impacts. Further, the Endangered Species Act (ESA) ensures protection to threatened and endangered species from impacts due to exploration and production on federal lands.¹⁵ In addition, states are charged with implementing regulations of the Environmental Protection Agency (EPA) with oversight by the agency. Moreover, states can adopt more protective standards if they so choose.

State-by-state regulation makes sense due to the various regional and state-specific characteristics of oil and gas development activities, including geology, hydrology, climate, population density, and economics. For example, Colorado, the site of much of the anti-industry movement's activity, has the most comprehensive state regulations and oversight in the U.S. Colorado Oil and Gas Conservation Commission (COGCC) Rule 205, enacted in December 2011, requires comprehensive public disclosure of the identity of chemicals used, their concentration, as well as the volume of water used by developers in hydraulic fracturing treatments.¹⁶ In 2013, Colorado approved the most rigorous statewide mandatory groundwater sampling and monitoring rules in the U.S.¹⁷ That same year, Colorado adopted some of the most restrictive setback rules in the nation. These included restrictive rules regarding mandatory lighting

14. DEP'T OF ENERGY, MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES: A PRIMER (Apr. 2009).

15. *Id.* at 38–39.

16. See COLO. OIL & GAS CONSERVATION COMM'N, *200 Series: General Rules*, cogcc.state.co.us/documents/reg/Rules/LATEST/200Series.pdf [<https://perma.cc/69GU-XW2X>] (last visited Mar. 22, 2017) (referencing Rule 205 on access to records).

17. See COLO. OIL & GAS CONSERVATION COMM'N, *Rule 609: Statewide Groundwater Baseline Sampling and Monitoring* (2013), cogcc.state.co.us/COGIS_Help/SampleData.pdf [<https://perma.cc/E9S6-75FP>] (last visited Mar. 22, 2017).

and fugitive dust abatement measures.¹⁸ The COGCC also instituted rulemaking to update the state's Sensitive Wildlife Habitat Maps and Restricted Surface Occupancy Maps to monitor and protect Colorado's wildlife.¹⁹

In 2014, Colorado imposed additional spill reporting requirements, which required disclosure of spills within twenty-four hours to State officials, local governments, and surface landowners.²⁰ Concurrently, the state also passed precedent-setting rules regarding air emissions, including leak detection and repair, storage tank regulations, and expanded applicability of the non-attainment area rules to include the entire state.²¹

In 2015, the COGCC released updated regulations that increased the penalties for violations of COGCC rules and permits that the COGCC could impose. This was done in response to concerns from the public that the COGCC's penalty and fine structure was inadequate.²²

In addition, Colorado requires: notice to landowners and local governments of hydraulic fracturing activities;²³ regulation of well casing and cementing;²⁴ monitoring of pressures during stimulations;²⁵ pit permitting, lining, and monitoring; and secondary containment.²⁶ Further, Colorado imposes on hydraulic fracturing the same rules and regulations

18. See COLO. OIL & GAS CONSERVATION COMM'N, *800 Series Aesthetic and Noise Control Regulations*, <http://cogcc.state.co.us/documents/reg/Rules/LATEST/800Series.pdf> [<https://perma.cc/7DZR-L996>] (last visited Apr. 18, 2017) (referencing specifically Rules 803 and 805.c.).

19. COLO. OIL & GAS CONSERVATION COMM'N, *Rules & Regulations*, cogcc.state.co.us/reg.html#/rules (last visited Mar. 22, 2017) (citing the 1200 Rules Series on Protection of Wildlife Resources, Appendix VII on Restricted Surface Occupancy Maps, and Appendix VIII on Sensitive Wildlife Habitat Maps).

20. COLO. OIL & GAS CONSERVATION COMM'N, *900 Series: Exploration and Production Waste Management*, cogcc.state.co.us/documents/reg/Rules/LATEST/900series.pdf [<https://perma.cc/J3XK-9AC5>] (last visited on Mar. 22, 2017) (referencing Rule 906(b) on the reporting of spills or releases) [hereinafter COGCC 900 Series].

21. See COLO. DEP'T OF PUBLIC HEALTH & ENV'T, *Oil & Gas Air Emissions Requirements*, colorado.gov/pacific/cdphe/summary-oil-and-gas-emissions-requirements [<https://perma.cc/C9K9-YVFK>] (last visited Mar. 22, 2017).

22. COLO. OIL & GAS CONSERVATION COMM'N, *Colorado Oil and Gas Conservation Commission Enforcement Guidance and Penalty Policy* (Jan. 2015), cogcc.state.co.us/documents/reg/Policies/Final%20Enforcement_Guidance%20-%20Jan%202015.pdf [<https://perma.cc/3ZJP-JHL4>].

23. See COLO. OIL & GAS CONSERVATION COMM'N, *300 Series: Drilling, Development, Production and Abandonment*, <https://cogcc.state.co.us/documents/reg/Rules/LATEST/300Series.pdf> [<https://perma.cc/2HAN-D3LG>] (last visited Apr. 16, 2017) (referencing Rule 305.f).

24. *Id.* (referencing Rule 317).

25. *Id.* (referencing Rule 341).

26. COGCC 900 Series, *supra* note 20 (referencing Rules 903–04).

that govern conventional oil and gas development. These regulations specifically address the risks of hydraulic fracturing touted by anti-oil and gas industry advocates, who claim that hydraulic fracturing poses an unacceptable risk to drinking water. Recent studies by the EPA and others have shown no evidence of systematic contamination from fracturing on water supplies.²⁷

Despite widespread public acceptance of domestic oil and gas development and the existence of federal, state, and local laws, regulations, and permitting requirements, hydraulic fracturing is subject to a continuing onslaught of public criticism from a loud and outspoken minority. Currently, every state, with the exception of New York and Maryland, allows oil and gas development utilizing hydraulic fracturing. However, the vocal minority continues to push for a ban on domestic oil and gas development through statewide bans on hydraulic fracturing or by advocating for “local control” to effectuate the same result. Notably, when these groups could not get duly elected representatives of their local, state, and federal government to ban the process and attempts at local control were struck down by a majority of the voters, the anti-industry groups needed a different, unconventional approach.

II. DEMOCRACY AND THE GUARANTEE OF A REPUBLICAN FORM OF GOVERNMENT

Although founded as a republic with numerous checks and balances, elements of direct democracy have worked their way into the political process in the United States. This section briefly discusses the history of democracy prior to and in the U.S., as well as the increase in the utilization of tools of direct democracy across many other nations.

A. *Classic Democracy*

Classic democracy is a system of government in which citizens or some set of the population of a country elect representatives to form a governing body.²⁸ In Greek, democracy literally means “rule of the commoners,” although it is often referred to as “rule of the people” or “rule of the majority.”²⁹ In ancient Greece, select male citizens elected

27. See, e.g., U.S. ENVTL. PROT. AGENCY, HYDRAULIC FRACTURING FOR OIL AND GAS: IMPACTS FROM THE HYDRAULIC FRACTURING WATER CYCLE ON DRINKING WATER RESOURCES IN THE UNITED STATES (FINAL REPORT) (2016).

28. *Democracy*, BLACK’S LAW DICTIONARY (10th ed. 2014).

29. *Democracy*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/democracy?utm_campaign=sd&utm_medium=serp&utm_source=jsonld [<https://perma.cc/E2WS-SQV9>] (last visited Apr. 16, 2017).

representatives to create the republic which governed by majority rule. Under a democracy, the electing population as a whole holds the sovereign power of the government.

In contrast, a republican form of government is one in which officials elected by a democratic process exercise the power on behalf of the sovereign people.³⁰ A republican government formed the basis of the U.S. Constitution and is the form of government that the U.S. eventually adopted.³¹

B. American Democracy and Direct Democracy

The U.S. Constitution guarantees “every state in this Union a Republican Form of Government.”³² The ancient Greeks and Romans considered a republic as a group of elected, governing officials; and thus, the Greek and Roman’s republic excluded any government resembling that of a “monarch.” Given the history of the American Revolutionary War and King George, the founders of the U.S. also excluded any form of government resembling a monarchy.

The republican form of government was reiterated in the Federalist Papers, with the idea that a “chosen body of citizens . . . will be least likely to sacrifice it to temporary or partial considerations.”³³

State and local governments are no different. Every state in the U.S. consist of a governor and legislative body elected by the people of each state. Also, nearly every county, city, and municipality includes a city council, county commission, or other representative entity elected by the citizens of that local government who are chosen to govern that specific unit.

In 1898, South Dakota became the first state to implement direct democracy by creating a mechanism for citizens to draft and place a ballot initiative up for popular vote.³⁴ Twenty-seven states followed suit in allowing some form of direct democracy with Massachusetts becoming the twenty-eighth and final state to adopt a process for ballot initiatives in 1918.³⁵ The direct democracy movement of the late 19th Century and early

30. *Classic Democracy*, BLACK’S LAW DICTIONARY (7th ed. 1999).

31. U.S. CONST. art. IV, § 4.

32. *Id.*

33. THE FEDERALIST NO. 10, at 20–21 (James Madison).

34. THE INITIATIVE AND REFERENDUM INSTITUTE AT THE UNIVERSITY OF SOUTHERN CALIFORNIA, *State I&R*, [iandrinstute.org/states.cfm](https://perma.cc/V2HA-ZKBE) [https://perma.cc/V2HA-ZKBE] (last visited Mar. 22, 2017). The Initiative & Referendum Institute (IRI) at the University of Southern California is an educational organization that indicates it is non-partisan and dedicated to the referendum and initiative process. The IRI also includes a list of the 28 states that have direct democracy processes, either through referendums or ballot initiatives. *Id.*

35. *Id.*

20th Century became a tool of the progressives and populists in their attempts at governmental reform.³⁶ The Progressive Movement feared wealthy political machines that could out-govern the true will of the people.³⁷

The Progressive agenda of combating poverty, progressive taxation, social reforms, and combating industrialization could only be achieved—or so the Progressives thought—without the use of their duly elected officials.³⁸ It was not solely a way to give average citizens a voice against the control of “moneyed groups over elected officials” as some have suggested.³⁹ The Progressives were fighting big money, corruption, privileged wealth, and a check on the new social forces mainly created to solve a problem of a large number of smaller interest groups that individually could not affect the legislature.⁴⁰

Across the U.S., there are now multiple distinct mechanisms that are loosely included within “direct democracy.” Although each state utilizing direct democracy has different specifics, the most important mechanisms to this article are ballot measures.⁴¹ Generally, a “ballot measure” is any voting choice on a ballot that is not a choice to select a candidate for office.⁴² There are two basic categories of ballot measures: (1) ballot initiatives; and (2) referendums.⁴³ Ballot initiatives are generally a citizen-drafted proposed law for voters to approve or disapprove, although some states require legislative approval before the citizen-drafted language reaches the ballot.⁴⁴ If the voters approve of the initiative, it becomes part of that state or local government’s law.⁴⁵ Twenty-four states have some sort of initiative process.⁴⁶

36. See, e.g., DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000).

37. See Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL’Y REV. 11 (1997).

38. See *id.* at 22 (discussing the Progressive movement, its history, and the underlying purposes of direct democracy at the turn of the 19th Century).

39. See, e.g., Jessica A. Levinson, *Taking the Initiative: How to Save Direct Democracy*, 18 LEWIS & CLARK L. REV. 1019 (2014).

40. See Persily, *supra* note 37, at 27, 29.

41. See THE INITIATIVE AND REFERENDUM INSTITUTE AT THE UNIVERSITY OF SOUTHERN CALIFORNIA, *Comparison of Statewide Initiative Processes*, iandrinstitute.org/docs/A_Comparison_of_Statewide_IandR_Processes.pdf [https://perma.cc/9T8A-BEJU] (last visited Mar. 22, 2017) (detailing state-by-state summaries of direct democracy methods) [hereinafter, *Comparison of Statewide Initiative Processes*].

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

A constitutional initiative is a method to directly or indirectly amend a state constitution through citizen-drafted language. A “direct initiative amendment” is a constitutional amendment directly voted on by the eligible voters for approval.⁴⁷ An “indirect initiative amendment” is submitted to the state legislature for review.⁴⁸ If the state legislature approves the proposed constitutional amendment, the constitutional amendment will be placed on the ballot for voter approval. Of the eighteen states that have a constitutional initiative process,⁴⁹ sixteen utilize the direct initiative amendment process and two utilize the indirect initiative amendment process.⁵⁰ Many states also have a similar initiative process to introduce state laws, rather than constitutional amendments.

Referendums are generally described as a process in which, by popular vote, the citizens can approve or reject laws or other amendments to the constitution or laws already approved by the state legislature.⁵¹ Twenty-three states allow referendums in some form.⁵²

Although the Constitution guarantees the right of republican, rather than a direct form of government where elected officials are—in theory—making and enforcing laws, the U.S. Supreme Court declined to determine the constitutionality of state laws authorizing direct democracy.⁵³

Both sides of the argument—those in support of ballot initiatives and direct democracy and those opposed—argue that the process is too greatly influenced by special interests, money, and skewed by a small dissatisfied, vocal few that cannot get the government to listen to their concerns.⁵⁴

C. World-Wide Rise of Populism

Populism is not just on the rise in the U.S., but is resurging across democratic nations as evidenced by the increase of populist parties and leaders across the democratic world—*i.e.*, Marine Le Pen’s Front Nationale in France, Matteo Salvini’s Northern League in Italy, Geert

47. *Id.*

48. *Id.*

49. *Comparison of Statewide Initiative Processes*, *supra* note 41.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Pac. States Tel. Co. v. Oregon*, 223 U.S. 118, 150–51 (1912) (holding that whether a state has a republican form of government is a political question not subject to judicial review).

54. *See, e.g.*, Dina E. Conlin, *The Ballot Initiative in Massachusetts: The Fallacy of Direct Democracy*, 37 SUFFOLK U. L. REV. 1087, 1106 (2004); Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998).

Wilder's Party for Freedom in the Netherlands, Evo Morales in Bolivia.⁵⁵ In Europe, populist parties' average share of the vote in national and European parliamentary elections has more than doubled since the 1960s, from around 5.1% to 13.2%.⁵⁶ In Britain, the United Kingdom (UK) Independence Party, through its populist rhetoric, fueled the calling and eventual approval of the European Union Brexit referendum.⁵⁷

In the 2016 U.S. election, candidates on both sides of the political spectrum drew on populist ideals with great success. Democratic Presidential hopeful Bernie Sanders articulated an anti-big corporation, anti-big bank, and anti-elite rhetoric, consistent with the Populist Party of the 1890s and surpassed all expectations in his bid for the democratic election against Hillary Clinton.⁵⁸ Although drawing from a different political base, Donald Trump's criticism of intellectual elites, scientific experts, and elected officials in part secured him the 2016 U.S. Presidential Election.⁵⁹

Because populism has experienced such a rebirth, the use of populist forms of government, such as the referendum and initiative process, can serve as the tool of an impassioned group to restrict the rights of any minority. For example, direct democracy has been used to strip voting rights from African Americans, prohibit Asians from owning land, and restrict employment of immigrants.⁶⁰ Therefore, the issues of use and misuse of direct democracy and the rise of populism is not restricted solely to the oil and gas industry.

III. ATTEMPTS TO BAN HYDRAULIC FRACTURING AT STATE AND LOCAL LEVELS

For numerous reasons, the federal government has largely left regulation of oil and gas to each state. The federal government's power to regulate activities on private lands and the regulation of natural resource development has been left to each state mainly out of respect for the state's interest in protecting the health, safety, and welfare of its citizens.⁶¹

Largely due to technological advances and increased oil and gas development, a perception began that oil and gas, particularly hydraulic

55. See Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash* (John F. Kennedy Sch. of Gov't, Working Paper No. RWP16-026), papers.ssrn.com/sol3/papers.cfm?abstract_id=2818659 [<https://perma.cc/3B45-HBTV>].

56. *Id.* at 2.

57. *Id.*

58. *Id.* at 5.

59. *Id.*

60. See THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVES, REFERENDUM, AND RECALL* 92-93 (1989).

61. See U.S. CONST. amend. X.

fracturing, was unregulated. With this misperception, the anti-oil and gas movement began pushing for more regulations because of the widespread misinformation that oil and gas development will irreparably harm drinking water and cause widespread public health issues.⁶² Ultimately, this started the push in oil and gas producing states to further regulate oil and gas activity and has even included the use of direct democracy. Examples of attempts to ban oil and gas development across the country highlight the push to utilize direct democracy after failing to achieve prohibitions through the legislative process.

A. Federal Regulation of Hydraulic Fracturing

Federal regulation of hydraulic fracturing on federal and Indian land is a relatively new concept. Several members of Congress have introduced legislation that would amend the Mineral Leasing Act to prohibit lessees from hydraulic fracturing oil and gas wells on public lands.⁶³ This legislation did not make it past the House Subcommittee on Energy and Mineral Resources.⁶⁴ Consequently, no federal environmental legislation currently prohibits hydraulic fracturing; instead, Congress has largely left regulation of the process to the states.

Believing that the congressional exclusion of authority to regulate fracking in the Energy Policy Act of 2005 was limited to the SDWA, the Bureau of Land Management (BLM) published a final rule regulating hydraulic fracturing in March 2015.⁶⁵ BLM's rule sought to provide disclosure to the public of chemicals used in hydraulic fracturing; strengthen regulations related to well-bore integrity; and address issues related to water produced during oil and gas operations.⁶⁶ Numerous states, industry representatives, and the Ute Indian Tribe sued to enjoin the regulation, claiming, amongst other things, that the rule exceeded BLM's statutory jurisdiction and authority.⁶⁷

In June 2016, U.S. District Court Judge Skavdahl set aside the BLM regulations, stating that the regulations exceed the authority granted to the

62. See Katherine Toan, *Not Under My Backyard: The Battle Between Colorado and Local Governments Over Hydraulic Fracturing*, 26 COLO. NAT. RES., ENERGY & ENVTL. L. REV. 1, 66 (2015).

63. Protect Our Public Lands Act, H.R. 1902, 114th Cong. (2015).

64. *Id.*

65. See Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128–16,222 (Mar. 26, 2015).

66. Wyoming v. U.S. Dep't of Interior, No. 2:15–CV–043–SWS; No. 2:15–CV–041–SWS, 2015 WL 3509415, at *8–9 (D. Wyo. June 21, 2016) (citing 77 Fed. Reg. 27,691 (May 11, 2012)).

67. *Id.* at *11.

agency by Congress.⁶⁸ Specifically, Judge Skavdahl ruled that Congress did not intend to grant authority to federal agencies to regulate fracking, as evidenced by Congress's explicit removal of "the only source of specific federal agency authority over fracking" with the Energy Policy Act of 2005.⁶⁹ The government filed an appeal of Judge Skavdahl's decision on June 24, 2016. That appeal is now pending. Based on the lack of a comprehensive federal regulatory scheme for non-federal lands, the power to regulate hydraulic fracturing is properly vested in the states.

The following section is not intended to be an exclusive list of all of the states' actions, including direct democracy actions affecting hydraulic fracturing. There are many other states that have used both representative democracy and state and local initiatives to attempt to regulate or prohibit hydraulic fracturing.⁷⁰

B. Colorado

The COGCC has regulated oil and gas in the state of Colorado since the passage of the Colorado Oil and Gas Conservation Act (OGCA). The Colorado Supreme Court has concluded that the ultimate authority for oil and gas regulation, including the ability to hydraulically fracture wells, lies with the COGCC under the OGCA.⁷¹

In 2012, the democratically controlled Colorado State Assembly took up proposed legislation that would provide local governments with increased control over oil and gas development and operations.⁷²

68. *Id.* at *12.

69. *Id.* at *11.

70. For example, Maryland has taken steps to ban hydraulic fracturing both locally and at the state level. However, these attempts have not used direct democracy. Maryland's legislature passed a bill in 2015 that placed a moratorium on hydraulic fracturing until October 2017. Local governments have also taken actions to ban hydraulic fracturing. In 2016, Prince George's County voted on an ordinance to prohibit hydraulic fracturing in the County. PRINCE GEORGE'S COUNTY, MARYLAND COUNTY CODE SUBTITLE 27, PART 2, DIV. 4, SUBDIVISION 1, § 27-115(a)(2) (2016), municode.com/library/md/prince_george's_county/codes/code_of_ordinances?nodeId=PTIITH17PULOLAPRGECOMA_SUBTITLE_27ZO_PT2GE_DIV4REAPALZO_SD1US_S27-115PRUS [<https://perma.cc/ZCJ5-2X2G>] (hydraulic fracturing included in prohibited uses of all county zones).

71. *City of Longmont, Colo. v. Colo. Oil & Gas Ass'n*, 369 P.3d 573, 585 (2016) (stating that the Commission's rules and regulations evince state control over numerous aspects of hydraulic fracturing); *City of Fort Collins v. Colo. Oil & Gas Ass'n*, 369 P.3d 586 (2016). *See also* *Colo. Oil & Gas Ass'n v. City of Lafayette*, 2015 Colo. App. LEXIS 828 (Colo. App. May 28, 2015) (affirming district court decision finding that Lafayette did not have authority to negate the authority of the state).

72. Colo. H.R. No. 12-1277, 68th Gen. Assemb., 2d Reg. Sess. (2012).

However, the bill failed to pass the House Committee on Local Government due to preemption concerns.⁷³

Undeterred by the bill's failure, anti-oil and gas groups lobbied for local governments to ban hydraulic fracturing. Ultimately, after local citizens voted on proposed prohibitions against development, several municipalities passed bans and moratoria on the process.⁷⁴ Believing that COGCC regulations and the OGCA preempted these local ordinances, the Colorado Oil and Gas Association sued Longmont and Fort Collins to enjoin the new ordinances.⁷⁵ The Colorado Supreme Court ultimately determined that while there was no express or implied preemption of local regulation, the local bans and moratoria operationally conflicted with existing state law.⁷⁶

After the Colorado Supreme Court ruled that the ballot initiative-driven bans were preempted by state law, Boulder ended its five-year moratorium and instituted one for six months, given the Supreme Court's comparison of the length of the Fort Collins moratorium to a ban.⁷⁷ Two

73. See COLO. HOUSE COMM. ON LOCAL GOV'T LEGISLATIVE SESSION SUMMARY, colorado.gov/pacific/sites/default/files/12LEGISLocalGovernment.pdf (last visited Mar. 22, 2017).

74. See, e.g., LONGMONT, COLORADO HOME-RULE CHARTER ART. XVI (2012) ("It shall hereby be the policy of the City of Longmont that it is prohibited to use hydraulic fracturing to extract oil, gas, or other hydrocarbons within the City of Longmont."), municode.com/library/co/longmont/codes/code_of_ordinances?nodeId=PTICH_ARTXVIILOPUHESAWEAC [<https://perma.cc/A3JJ-5GMD>]; FORT COLLINS, COLORADO CODE § 12-135 (2015) ("The use of hydraulic fracturing to extract oil, gas or other hydrocarbons, and the storage in open pits of solid or liquid wastes and/or flowback created in connection with the hydraulic fracturing process, are prohibited within the City."), municode.com/library/co/fort_collins/codes/municipal_code?nodeId=CH12HEEN_ARTVIIIHYFR [<https://perma.cc/A3JJ-5GMD>]; see also BROOMFIELD, COLORADO HOME-RULE CHARTER CHAPTER XX: PROHIBITION ON HYDRAULIC FRACTURING (2013), municode.com/library/co/broomfield/codes/municipal_code?nodeId=HORUCHBRCO_CHXXPRHYFR [<https://perma.cc/LM4U-NJMN>]; LAFAYETTE, COLORADO HOME-RULE CHARTER § 2.3 (2013) (making it unlawful to engage in the extraction of oil or gas within the City of Lafayette), municode.com/library/co/lafayette/codes/code_of_ordinances?nodeId=CH_CHIIMUPO [<https://perma.cc/85DU-SU6X>]; BOULDER, COLORADO ORDINANCE NO. 7915 (2013) (extending Ordinance No. 7907 imposing a five-year moratorium on hydraulic fracturing), www-static.bouldercolorado.gov/docs/Ordinance_7915_Fracking-1-201308271458.pdf [<https://perma.cc/9VF8-BNP6>].

75. *City of Longmont*, 369 P.3d at 577; *City of Fort Collins*, 369 P.3d at 589.

76. *City of Longmont*, 369 P.3d at 585; *City of Fort Collins*, 369 P.3d at 594.

77. John Fryar, *Boulder County Ends Fracking Moratorium, Imposes Another*, DAILY CAMERA, May 19, 2016, dailycamera.com/news/ci_29914463/boulder-county-ends-one-fracking-moratorium-imposes-another [<https://perma.cc/TB3Z-E8WT>]; *City of Fort Collins*, 369 F.3d at 593–94.

municipalities—Broomfield and Boulder—recently extended their moratoria.⁷⁸

As discussed *infra*, when activists have failed to pass statewide or permanent restrictions on oil and gas development in the State of Colorado, they continually have turned to the ballot initiative process.

C. Ohio

Like Colorado, exclusive authority of oil and gas regulation in Ohio, including operation of oil and gas wells, is granted to the state. In 2004, Ohio enacted House Bill 278, which amended the Ohio Revised Code provisions concerning the Division of Mineral Resources Management.⁷⁹ Specifically, the legislation states that “regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation,” and the provisions are intended to create a “comprehensive plan with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state[.]”⁸⁰ The state has subsequently passed legislation to regulate disclosure of hydraulic fracturing fluids.⁸¹ Similar Colorado, legislation has been introduced—but not passed—that seeks to prohibit hydraulic fracturing.⁸²

After anti-oil and gas industry advocates failed to enact statewide legislation that would stop hydraulic fracturing, several Ohio cities turned to direct democracy in an attempt to spur development during the 2014 election. In Athens, Ohio, voters approved the Athens Community Bill of Rights, which banned hydraulic fracturing within the city limits.⁸³ In so

78. John Fryar, *Boulder County Again Extends Moratorium*, BROOMFIELD ENTERPRISE, Dec. 14, 2016, broomfieldenterprise.com/news/ci_30660234/boulder-county-again-extends-moratorium [https://perma.cc/7DHC-3HJU]; Angela K. Evans, *Broomfield Votes to Adopt Five-Month Moratorium on Oil and Gas Operations*, BOULDER WEEKLY, Dec. 15, 2016, boulderweekly.com/news/broomfield-votes-to-adopt-five-month-moratorium-on-oil-and-gas-operations/ [https://perma.cc/UQ48-4Z8D].

79. Ohio H.B. No. 278, 125th Gen. Assemb. (2004) (effective as of Sept. 16, 2004).

80. *Id.* (codified at OHIO REV. CODE ANN. § 1509.02).

81. *See, e.g.*, Ohio S.B. No. 315, 129th Gen. Assemb. (2012) (requiring disclosure of hydraulic fracturing fluids).

82. Ohio S.B. No. 213, 129th Gen. Assemb. (2011); *see also*, Ohio H.B. No. 345, 129th Gen. Assemb. (2011) (proposing a halt on hydraulic fracturing while its effects are being studied).

83. *See* Laura Arenschield, *Athens Votes to Ban Fracking*, COLUMBUS DISPATCH, Nov. 6, 2014, dispatch.com/content/stories/local/2014/11/05/athens-votes-to-ban-fracking.html [https://perma.cc/23PY-V3U9]; *City of Athens Fracking Ban Initiative, Issue 7*, BALLOTPEdia, ballotpedia.org/City_of_Athens_Fracking_Ban_Initiative [https://perma.cc/6L3V-QDLJ], *Issue 7* (November 2014) (last visited Mar. 22, 2017).

doing, Athens joined several other Ohio cities that had already passed the Community Bill of Rights, beginning in 2012, which also banned hydraulic fracturing within city limits.⁸⁴ Notably, several additional Ohio cities have voted against hydraulic fracturing bans.⁸⁵

In February 2015, the Ohio Supreme Court issued a ruling concerning the ability of municipalities to regulate drilling of oil and gas wells.⁸⁶ Similar to the Colorado Supreme Court's rulings in *Fort Collins* and *Longmont*, the Ohio Supreme Court ruled that a municipal regulation conflicted with Ohio Revised Code § 1509.02.⁸⁷ The Court's determination that § 1509.02 grants exclusive authority to the state to "regulate 'all aspects' of the location, drilling and operation of oil and gas wells,"⁸⁸ meant that "patchwork . . . local . . . regulations"—including local hydraulic fracturing bans—are prohibited.⁸⁹

In conjunction with the Ohio Supreme Court's ruling, legislators recently passed legislation that could prevent communities from trying to ban hydraulic fracturing.⁹⁰ This bill allows ballot initiatives to be removed from the ballot if determined to not be within the scope of the authority of the municipality.⁹¹ The bill was made effective April 6, 2017.⁹²

D. New York

Unlike Colorado and Ohio, hydraulic fracturing in New York has been banned, although not through utilization of direct democracy. Currently, there is no state legislation in New York that bans hydraulic fracturing, although both the New York Assembly and the New York Senate have introduced bills that would permanently ban hydraulic fracturing in the state.⁹³

84. Bob Downing, *Athens is Fifth Ohio Community to Pass Rights-Based Fracking Ban*, AKRON BEACON JOURNAL, Nov. 5, 2014, ohio.com/blogs/drilling/ohio-utica-shale-1.291290/athens-is-fifth-ohio-community-to-pass-rights-based-fracking-ban-1.538281 [https://perma.cc/LXS2-WYYP] (noting that similar bans were passed in Oberlin, Mansfield, Yellow Springs, and Broadview Heights).

85. See Arenschiold, *supra* note 83 (noting that Youngtown, Kent, and Gates Mills voted against fracking bans as well).

86. State ex rel. Morrison v. Beck Energy Corp., 37 N.E.3d 128 (Ohio 2015).

87. *Id.* at 137–38.

88. *Id.* at 137.

89. *Id.* at 140 (O'Donnell concurring); see also Randy Ludlow, *Local Governments Cannot Regulate Fracking, Ohio Supreme Court Rules*, COLUMBUS DISPATCH, Feb. 18, 2015, dispatch.com/content/stories/local/2015/02/17/Supreme-Court-rules-fracking.html.

90. Ohio H.B. No. 463, 131st Gen. Assemb. (2016).

91. *Id.*

92. *Id.*

93. See N.Y. Assembly Bill A4726, 238th Gen. Assemb. (2015) (prohibiting the use of hydraulic fracturing in the extraction of oil and gas; introduced on Feb. 5, 2015); see also N.Y. Senate Bill S883, 238th Gen. Assemb. (2015) (prohibiting the use of hydraulic fracturing in the extraction of oil and gas; introduced on Jan. 7, 2015).

However, in June 2015, the New York Department of Environmental Conservation (NYSDEC) issued a Final Supplemental Generic Environmental Impact Statement (SGEIS), which concluded that “there are potential significant adverse environmental and public health impacts associated with high-volume hydraulic fracturing operations.”⁹⁴ Based on this determination, the NYSDEC established an administrative ban on the hydraulic fracturing process, stating that the Department “will not establish a high-volume hydraulic fracturing permitting program; that no individual or site-specific permit applications for wells using high-volume hydraulic fracturing will be processed; and that high-volume hydraulic fracturing will be prohibited in New York State.”⁹⁵

Additionally, local New York governments have passed numerous municipal bans and moratoria. In June 2014, the New York Court of Appeals analyzed the ability of local governments to ban hydraulic fracturing.⁹⁶ Unlike the Colorado and Ohio Supreme Courts, the New York Court of Appeals ruled that local zoning authority to ban or place a moratorium on hydraulic fracturing is not preempted by the New York Oil, Gas and Solution Mining Law (OGSML), and is therefore permissible.⁹⁷ Like the other states, the high court of New York stated that municipalities are allowed to regulate land use as long as it is not inconsistent with state law.⁹⁸ However, the Court of Appeals noted that the New York statute specifically includes Home Rule Laws that empower local governments to “pass laws both 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.’”⁹⁹ Ultimately, the Court of Appeals ruled that the City of Dryden’s hydraulic fracturing ban is not preempted by state legislation; instead, the OGSML only preempts “local laws that purport to regulate the actual operations of oil and gas activities, not zoning ordinances that restrict or prohibit certain land uses.”¹⁰⁰ Thus, the New York Court of Appeals determined that zoning regulations prohibiting hydraulic fracturing under the New York

94. N.Y. DEP’T ENVTL. CONSERVATION, FINAL SUPPLEMENTAL GENERIC ENVIRONMENTAL IMPACT STATEMENT ON THE OIL, GAS AND SOLUTION MINING REGULATORY PROGRAM: FINDINGS STATEMENT 5 (2015) [hereinafter FINAL SUPPLEMENTAL IMPACT STATEMENT]. For the complete set of final documents, see N.Y. DEP’T ENVTL. CONSERVATION, *High-Volume Hydraulic Fracturing in NYS*, <http://www.dec.ny.gov/energy/75370.html> [<https://perma.cc/55UA-3SND>] (last visited Mar. 22, 2017).

95. FINAL SUPPLEMENTAL IMPACT STATEMENT, *supra* note 94, at 41.

96. *Matter of Wallach v. Town of Dryden*, 23 N.Y.3d 728 (2014).

97. *Id.* at 753 (2014).

98. *Id.* at 742.

99. *Id.*

100. *Id.* at 746.

Home Rule Laws are permissible,¹⁰¹ while Ohio and Colorado determined that the bans are preempted because state legislation specifically allows and regulates the process. Relying on this ruling, more than 180 local municipalities have imposed local moratoria on hydraulic fracturing in New York.¹⁰²

E. Louisiana

Louisiana does not have a statewide ballot initiative or referendum process. However, there are state regulations on oil and gas, including hydraulic fracturing.¹⁰³ In 2010, St. Tammany Parish passed Ordinance No. 10-2408, which rezoned unincorporated areas of the Parish.¹⁰⁴ In 2014, Helis Oil Company proposed a project to drill an oil well—which would be hydraulically fractured—in St. Tammany Parish in the Tuscaloosa Marine Shale.¹⁰⁵

In response to Helis' proposed project, the St. Tammany Parish Council passed several resolutions during its June 5, 2014, Council meeting in an effort to prevent the project from moving forward.¹⁰⁶ Specifically, the Council passed resolutions: (1) requesting that the Louisiana Commissioner of Conservation delay a decision on the issuance of any permits relative to hydraulic fracturing in the Parish; (2) authorizing counsel to file a petition for declaratory judgment and injunctive relief against the Office of Conservation of the Louisiana Department of Natural Resources regarding issuance of oil and gas drilling permits in the Parish; and (3) authorizing counsel to initiate litigation with the Commissioner of Conservation for the Louisiana Department of Natural Resources to

101. *See id.* at 754–55.

102. *See, e.g.*, SYRACUSE REVISED GENERAL ORDINANCES CHAPTER 27, ART. 10(1)(a) (“No person, firm, corporation or other entity shall conduct any Hydrofracking or other exploration for Natural Gas . . . within the territorial boundaries of the City of Syracuse.”); AUBURN COUNCIL RESOLUTION NO. 78 OF 2011: MEMORIALIZING THE GOVERNOR AND STATE LEGISLATURE TO BAN HYDRAULIC FRACTURING FOR THE DEVELOPMENT OF NATURAL GAS WELLS WITHIN THE OWASCO LAKE WATERSHED (June 2, 2011), s3.amazonaws.com/nysbans/NYS/frack_actions_auburnny.pdf [<https://perma.cc/RX5B-YZL9>].

103. *See, e.g.*, LA. ADMIN. CODE tit. XLIII, pt. XIX, § 118 (2016) (hydraulic fracture permit and fluid disclosure requirements); § 307 (pit liner and monitoring requirements); § 109 (regulation of casing and cementing).

104. *St. Tammany Parish Gov't v. Welsh*, 199 So.3d 3, 5 (La. App. 1 Cir. 2016).

105. Robert Rhoden, *Proposed Oil and Gas Drilling Near Mandeville Raises Concerns*, TIMES-PICAYUNE, Apr. 8, 2014, nola.com/politics/index.ssf/2014/04/proposed_oil_and_gas_drilling.html [<https://perma.cc/RX7E-B978>].

106. *See* ST. TAMMANY PARISH GOV'T, MINUTES OF ST. TAMMANY PARISH COUNCIL MEETING (June 5, 2014), stpgov.org/council-agendas/item/download/244_b2accb5d2fad7ca3b81c477460058688 [<https://perma.cc/MY78-LDWV>].

determine the Parish's zoning authority in conjunction with the state's authority to regulate oil and gas exploration in the Parish.¹⁰⁷

The Commissioner of the Office of Conservation approved the project and issued a permit to Helis on December 19, 2014.¹⁰⁸ The Parish filed suit seeking declaratory relief that the Parish zoning designation rendered the land use allowed with the permit illegal.¹⁰⁹ The trial court granted summary judgment in favor of Helis and the Commissioner because it found that state law expressly preempted the zoning ordinances.¹¹⁰ The Court of Appeal affirmed the trial court's decision, noting that "a political subdivision is 'hereby expressly forbidden . . . to prohibit or in any way interfere with the drilling of a well . . . by the holder of . . . a [duly-authorized] permit,' which clearly and manifestly evinces the legislative intent to expressly preempt that area of the law."¹¹¹

F. Florida

Like New York, Florida's efforts to ban hydraulic fracturing have not utilized the direct democracy process. Instead, legislators have introduced several bills seeking to prohibit the activity.¹¹² These bills specifically sought to prohibit well stimulation treatments in the state and its adjacent waters; but, both died in Committees.¹¹³ Notably, Senate Bill 166 was refiled after failing to make it out of Committee during the previous session.¹¹⁴ Supporters of the oil and gas industry have responded by trying to pass legislation ensuring state authority over oil and gas regulations.¹¹⁵ The legislation was passed in the House, but ultimately the proposals failed to make it out of Senate Committees.¹¹⁶

107. *Id.* at 9–11.

108. *Welsh*, 199 So.3d at 5.

109. *Id.*

110. *Id.* at 6.

111. *Id.* at 10.

112. *See* Fla. S.B. 166, 24th Leg., Reg. Sess. (2016) (filed on Aug. 24, 2015 and died in committee on Mar. 11, 2016); Fla. H.B. 169, 24th Leg., Reg. Sess. (2015) (filed on Jan. 5, 2015 and died in committee on Apr. 28, 2015).

113. *See* Fla. S.B. 166, *supra* note 112; Fla. H.B. 169, *supra* note 112.

114. Fla. S.B. 166, 24th Leg., Reg. Sess. (2015) (filed Dec. 2, 2014 and died in committee on May 1, 2015); *see also* Fla. H.B. 1205, 24th Leg., Reg. Sess. (2015) (proposing regulations of well stimulation; filed Mar. 1, 2015 and died on calendar on May 1, 2015); Julie, Dermansky, *Battle to Keep Florida Frack-Free Heats Up*, DESMOG (Oct. 31, 2015), desmogblog.com/2015/10/31/battle-keep-florida-frack-free-heating [<https://perma.cc/8CDT-GNQV>].

115. Fla. H.B. 191, 24th Leg., Reg. Sess. (2016) (filed on Sept. 17, 2015 and died in committee on Mar. 11, 2016); Fla. S.B. 318, 24th Leg., Reg. Sess. (2015) (filed Sept. 17, 2015 and died in appropriations on Mar. 11, 2016).

116. *See* Fla. H.B. 191, *supra* note 115; Fla. S.B. 318, *supra* note 115.

As state efforts to ban hydraulic fracturing have failed, some municipalities have taken action to ban the process. For example, the City Council of Bonita Springs unanimously amended the city's Land Development Code on July 15, 2015, to prohibit hydraulic fracturing.¹¹⁷ Other municipalities have also banned hydraulic fracturing or are considering bans.¹¹⁸

G. California

California is well known for utilizing direct democracy, having led the nation in numerous reform efforts using ballot initiatives.¹¹⁹ California's strong tendency to use ballot initiatives has included hydraulic fracturing regulation and attempts to prohibit it.

In 2014, the California Senate attempted to pass legislation that would "prohibit all well stimulation treatments."¹²⁰ This bill failed to pass the Senate.¹²¹ However, there is a state regulatory process that regulates hydraulic fracturing, but without a statewide prohibition, numerous local governments have attempted to ban hydraulic fracturing both through city councils and through voter-initiative proposals.¹²²

117. BONITA SPRINGS, FLORIDA LAND DEVELOPMENT CODE § 4-1380(c)(3) (2015) ("No person or entity may engage in any oil and gas exploration or production that utilizes well stimulation within the corporate boundaries of the City of Bonita Springs."); *see also* CITY OF BONITA SPRINGS, FLORIDA, CITY COUNCIL MINUTES (July 15, 2015), cityofbonitasprings.org/wp-content/uploads/2015/08/07-15-15-City-Council-Minutes.pdf [<https://perma.cc/LVA9-7352>].

118. Victoria Bekiempis, *Florida City Bans Fracking*, NEWSWEEK, July 15, 2015, newsweek.com/florida-city-bans-fracking-do-not-run-embargo-embargo-embargo-untilsomething-353047 [<https://perma.cc/RQD7-NE3L>] (noting that Coconut Creek, Florida passed a ban); Bill Smith, *Estero Will Take Up Fracking Ban in November*, NEWS-PRESS.COM (October 28, 2015, 3:10 PM), newspress.com/story/news/local/estero/2015/10/28/estero-take-up-fracking-ban-november/74733818/ [<https://perma.cc/FPC4-Q2LT>].

119. *History of Initiative and Referendum in California*, BALLOTPEDIA, ballotpedia.org/History_of_Initiative_and_Referendum_in_California (last visited Mar. 22, 2017); *see also* CAL. SEC'Y OF STATE, *Initiative Totals by Summary Year 1912–2016*, elections.cdn.sos.ca.gov/ballot-measures/pdf/initiative-totals-summary-year.pdf [<https://perma.cc/DZ35-KACD>] (last visited March 22, 2017).

120. Cal. S.B. 1132, 2013–2014 Reg. Sess. (2014) (introduced Feb. 20, 2014 and passage refused after third reading on May 29, 2014).

121. CAL. LEG. INFO., S.B. 1132 OIL AND GAS: WELL STIMULATION TREATMENTS BILL HISTORY (2014), leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201320140SB1132 [<https://perma.cc/N6GM-TU62>].

122. Examples include: San Benito, Mendocino, Santa Barbara County, Monterey County, Alameda County, Beverley Hills City Council, and so on.

In the November 2014 election, voters in two counties—San Benito and Mendocino—approved measures to prohibit hydraulic fracturing.¹²³ Meanwhile, Santa Barbara County voters chose not to ban hydraulic fracturing.¹²⁴ In the 2016 election, Monterey County passed Measure Z, which amended the County General Plan to prohibit the use of land for hydraulic fracturing treatments, prevent waste water injections and disallow new wells in the county.¹²⁵ In July 2016, the Alameda County Board of Supervisors voted to prohibit hydraulic fracturing in the county.¹²⁶

Two lawsuits have been filed against Monterey County challenging Measure Z.¹²⁷ These lawsuits allege that California state law preempts Measure Z and that the prohibition violates vested rights and constitutes a taking of property.¹²⁸ While the suits are pending, the ban on hydraulic

123. MENDOCINO COUNTY, CALIFORNIA ORDINANCE TITLE 8, § 8.05.030(a) (2014), municode.com/library/ca/mendocino_county/codes/code_of_ordinances?nodeId=MECOCO_TIT8PUHESAWE_CH8.05COBIRIMES_S8.05.010DE [<https://perma.cc/MPD6-VYFL>] (“It shall be unlawful for any government, corporation or natural person to engage in the unconventional extraction of hydrocarbons within Mendocino County.”); SAN BENITO COUNTY, CALIFORNIA CODE § 19.21.031 (2014), <http://www.amlegal.com/?s=san+benito> [<https://perma.cc/K83N-SSNM>] (provision entitled “Protect Our Water and Health: Ban Fracking Initiative”). The San Benito Code mentions the provision for banning fracking in § 19.21.032 as § 19.21.031, but § 19.21.031 still says “reserved.”

124. COUNTY OF SANTA BARBARA ELECTIONS, *Santa Barbara County Consolidated General Election November 4, 2014 Certified Results*, http://sbcvote.com/Elect/Resources/Results11_2014/results-1.htm [<https://perma.cc/R67X-AAXC>] (Measure P2014 failed).

125. COUNTY OF MONTEREY ELECTIONS, *County of Monterey Presidential General Election Results of November 8, 2016*, montereycountyelections.us/Election%20Result.htm [<https://perma.cc/JA48-NH7P>] (Measure Z passed). See also *Monterey County, California, Ban on Oil and Gas Drilling, Measure Z (November 2016)*, BALLOTEDIA, [ballotpedia.org/Monterey_County,_California,_Ban_on_Oil_and_Gas_Drilling,_Measure_Z_\(November_2016\)](http://ballotpedia.org/Monterey_County,_California,_Ban_on_Oil_and_Gas_Drilling,_Measure_Z_(November_2016)) (last visited Mar. 22, 2017).

126. ALAMEDA COUNTY, CALIFORNIA MUNICIPAL CODE TITLE 17, CHAPTER 17.06, § 17.06.110 (2016), municode.com/library/ca/alameda_county/codes/code_of_ordinances?nodeId=TIT17ZO_CH17.06ADI_17.06.100HITEOIGAOPF [<https://perma.cc/F5PS-S87V>] (prohibiting high-intensity oil and gas operations, including use of hydraulic fracturing for well stimulation).

127. Caitlin Conrad, *Two Oil Companies Suing Monterey County Over Measure Z*, KSBW8 (Dec. 16, 2016), ksbw.com/article/two-oil-companies-suing-monterey-county-over-measure-z/8506187 [<https://perma.cc/HXT4-FTFC>]; Bree Zender & Greta Mart, *Oil Companies Sue Monterey County Over Measure Z*, KCBX News (December 15, 2016), kcbx.org/post/oil-companies-sue-monterey-county-over-measure-z [<https://perma.cc/VL2M-29AF>].

128. Caitlin Conrad, *Big Oil Files Suit Against Monterey County Over Measure Z*, KSBW8 (Dec 16, 2016), ksbw.com/article/big-oil-files-suit-against-monterey-county-over-measure-z/8506033 [<https://perma.cc/8UKB-2KE4>].

fracturing will go forward, but the prohibition on new oil and gas wells is blocked.¹²⁹

In addition to bans using direct democracy, several California cities have also voted to prohibit hydraulic fracturing. The Beverly Hills City Council voted on May 6, 2014 to ban hydraulic fracturing within the city.¹³⁰ In addition, Los Angeles and Santa Cruz have adopted moratoria on the practice.¹³¹

H. Texas

In 2014, voters in Denton, Texas, approved a ballot proposition that prohibited hydraulic fracturing within city limits.¹³² The next day, the Texas Oil and Gas Association and the Texas General Land Office brought suits against Denton challenging the ban.¹³³ The suits alleged that the ban

129. Roberto M. Robledo, *Monterey County Sued Over Measure Z*, THE SALINAS CALIFORNIAN (Dec. 14, 2016), thecalifornian.com/story/news/2016/12/14/monterey-county-sued-over-measure-z/95451866/ [<https://perma.cc/58UJ-X5UP>].

130. BEVERLY HILLS, CALIFORNIA CITY CODE TITLE 10, § 10-5-324 (2014), sterlingcodifiers.com/codebook/index.php?book_id=466 [<https://perma.cc/MB3P-ZH3A>] (“[I]t shall be unlawful to use or cause to be used any land within the city for the purpose of conducting or enabling hydraulic fracturing . . .”).

131. Carol Linnitt, *Los Angeles Becomes Largest City to Approve Fracking Moratorium*, DESMOG (Feb. 28, 2014), desmogblog.com/2014/02/28/los-angeles-becomes-largest-city-approve-fracking-moratorium [<https://perma.cc/KS6X-3HXC>]; Rory Carroll, *Santa Cruz Becomes First California County to Ban Fracking*, REUTERS, May 20, 2014, reuters.com/article/california-fracking-idUSL1N00700J20140521 [<https://perma.cc/DB6E-26WW>]; David R. Baker, *To Fight Fracking Bans, Oil Firms Heavily Outspend Environmentalists*, SF GATE, Nov. 2, 2014, sfgate.com/politics/article/To-fight-fracking-bans-oil-firms-heavily-5864369.php [<https://perma.cc/DFK6-RCLS>].

132. CITY OF DENTON GOV'T, *City of Denton City Council Minutes* (Nov. 18, 2014), denton-tx.granicus.com/DocumentViewer.php?file=denton-tx_1634b95e1d9407f168b47b7e5f654226.pdf&view=1 [<https://perma.cc/9X9F-DCXU>] (council unanimously voted to approved Ordinance No. 2014-397, which prohibits hydraulic fracturing). See also Peggy Heinkel-Wolfe, *Fracking Banned*, DENTON RECORD CHRONICLE, Nov. 5, 2014, dentonrc.com/local-news/local-news-headlines/20141105-fracking-banned.ece [<https://perma.cc/4QQ6-HYP5>]; *City of Denton Fracking Ban Initiative (November 2014)*, BALLOTEDIA, [https://ballotpedia.org/City_of_Denton_Fracking_Ban_Initiative_\(November_2014\)](https://ballotpedia.org/City_of_Denton_Fracking_Ban_Initiative_(November_2014)) [<https://perma.cc/BL5W-9WUP>] (November 2014) (last visited Mar. 22, 2017).

133. *Patterson v. City of Denton, Tex.*, Cause No. D-1-GN-14-004628 (Dist. Ct. Travis Cty., Nov. 5, 2014); *Tex. Oil & Gas Ass'n v. City of Denton*, Cause No. 14-08933-431 (Dist. Ct. Denton Cty., Nov. 5, 2014). See also Peggy Heinkel-Wolfe, *Denton Sued Over Fracking Ban Ordinance*, DENTON RECORD-CHRONICLE, Nov. 5, 2014, dentonrc.com/local-news/local-news-headlines/20141105-denton-sued-over-fracking-ban-ordinance.ece [<https://perma.cc/8AWZ-ULSX>].

was preempted by state law; was arbitrary, capricious, and unreasonable; and was inapplicable to state-owned lands.¹³⁴

In response to the Denton ban, the Texas legislature passed House Bill 40 on May 4, 2015, and the Governor signed the bill into law on May 18, 2015.¹³⁵ House Bill 40 ensured exclusive jurisdiction to the state to regulate oil and gas operations and expressly preempt local regulations—including bans on hydraulic fracturing.¹³⁶ On June 16, 2015, the Denton City Council officially repealed the ban after House Bill 40 rendered the ordinance unenforceable.¹³⁷

IV. ANTI-OIL AND GAS GROUPS ATTEMPTS TO CIRCUMVENT REPRESENTATIONAL DEMOCRACY: COLORADO AS THE EXAMPLE

When anti-industry groups failed to have their elected officials ban hydraulic fracturing, they attempted to circumvent the process. Colorado provides the bellwether example of using direct democracy to attempt to further regulate or even prohibit hydraulic fracturing.

Groups have attempted to use the direct voting process to amend state constitutions, create laws, and dictate policy at the state level. The same process has been used for ballot initiatives at the county and local levels. However, the use of these ballot initiatives tends to contradict the underlying purposes of direct democracy existing since the late 1800s and early 1900s. Direct democracy was not originally intended to create a mechanism for a vocal minority to overrule the elected officials, but merely as a process that the populous could propose measures when the legislature refused to act.¹³⁸

Natural resource extraction built Colorado. The first oil well drilled west of the Mississippi River was in Florence, Colorado in the 1860s, approximately forty miles southwest of Colorado Springs.¹³⁹ Since that time, the oil and gas industry has become a vital contributor to the Colorado economy. In 2014, Colorado's upstream and midstream

134. *Patterson*, Cause No. D-1-GN-14-004628 at *4-5; *Texas Oil & Gas Ass'n*, Cause No. 14-08933-431 at *10-11.

135. Tex. H.B. 40, 84th Leg., Reg. Sess. (2015).

136. *Id.*

137. CITY OF DENTON GOV'T, *City of Denton City Council Minutes* (June 16, 2015), denton-tx.granicus.com/DocumentViewer.php?file=denton-tx_33b709690fe3f3d2ac8314293178fb16.pdf&view=1 [<https://perma.cc/H6ES-DPL5>]. See also Max B. Baker, *Denton City Council Repeals Fracking Ban*, STAR-TELEGRAM, June 16, 2015, <http://www.star-telegram.com/news/business/barnett-shale/article24627469.html> [<https://perma.cc/5PS4-7P3P>].

138. See Persily, *supra* note 37, at 41-42.

139. COLO. OIL & GAS ASS'N, *History Of The Second Oldest Oilfield In The United States* (2012), coga.org/wp-content/uploads/2016/08/History-of-Florence-Field.pdf [<https://perma.cc/UB5L-9HKP>].

industry—drilling, extraction, support activities, pipeline construction and transportation—recorded \$15.8 billion in production value, and accounted for over 38,000 jobs with an average annual wage in excess of \$105,000.¹⁴⁰ The upstream and midstream industry contributed nearly \$4.1 billion in employee income to Colorado households and nearly \$1.2 billion in public revenue streams.¹⁴¹

This growing economy, partially driven by the oil and gas industry's productivity, has caused a huge population expansion, including areas with active oil and gas development.¹⁴² Partially due to lack of public understanding of the nature of mineral rights, several communities have exhibited frustration at discovering their new homes, schools, and playgrounds are in proximity to active oil and gas developments. Many new residents, in connection with well-funded anti-industry groups and in contrast to Colorado's rich history in natural resource development, view oil and gas development in their newly developed communities as a threat. Thus, anti-industry groups have made every effort at the legislative, judicial, and ballot-initiative levels to eliminate the industry from the state.

Up until the most recent election in Colorado, citizens had two options to utilize direct democracy to circumvent the legislative process—the initiative and the referendum process. Under Article V, § 1(1) of the Colorado Constitution, the legislative power of the state is vested in the elected legislative body, but “the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly”

Through an initiative, the citizens can either enact a new law or directly amend the Colorado Constitution.¹⁴³ Until 2016, the standard for enacting legislation, which could be modified by the legislature, and the Constitution, which could not be easily modified or overruled by the legislature, were the same. This meant that the vast majority of citizen initiatives were constitutional amendments.

Unsatisfied with the failure to pass legislation in 2012, anti-industry individuals proceeded to attempt implementation of statewide bans using direct democracy. In the 2014 election, opponents of hydraulic fracturing

140. UNIV. OF COLO. LEEDS SCH. OF BUSINESS RESEARCH DIV., *Oil and Gas Industry Economic and Fiscal Contributions in Colorado by County* (2014), coga.org/wp-content/uploads/2015/12/COGA-2014-OG-Economic-Impact-Study.pdf [https://perma.cc/YDL3-RCPT] [hereinafter COGA Study].

141. *Id.*

142. See, e.g., Sharon Dunn, *Weld County Tops State in Population Growth, Ranks No. 4 in Nation*, GREELEY TRIBUNE, Mar. 24, 2017, greeleytribune.com/news/business/weld-tops-state-in-population-growth-hits-no-4-in-nation/ [https://perma.cc/5UBZ-4Q2V].

143. COLO. CONST., art. V, § 1(2), (3); COLO. REV. STAT. §§ 1-40-101 to -135 (2010).

sought to put numerous constitutional initiatives on the ballot. Two initiatives that met the signature requirement, which would have placed them on the ballot, were particularly threatening to the industry. The first, Initiative #88, sought to establish a 2,000-ft. setback for new oil and gas wells from occupied structures, essentially an attempt to re-write the COGCC's setback regulations.¹⁴⁴ The second initiative, Initiative #89, sought to allow more restrictive local regulations to supersede existing state regulations.¹⁴⁵ Ultimately, opponents and supporters of these initiatives and competing pro-industry ballot initiatives came to an agreement to keep the proposals from being placed on the ballot.¹⁴⁶ A compromise orchestrated by Governor Hickenlooper formed a nineteen-person Oil and Gas Task Force with representatives inside and outside the industry. The Oil and Gas Task Force was charged with crafting recommendations on potential new oil and gas related legislation to address the anti-industry groups and local governments' concerns.¹⁴⁷ In turn, proponents of the competing ballot initiatives agreed to withdraw all industry-related proposed ballot initiatives for the 2014 election.¹⁴⁸

Although the Oil and Gas Task Force submitted nine recommendations on new legislations, anti-industry groups were unsatisfied with their compromise.¹⁴⁹ Despite the earlier negotiations and the extensive investment made in the Oil and Gas Task Force, and failure of their legislative efforts, the anti-industry groups again attempted to effectuate their policy goals through direct democracy. Two new amendments to the

144. See COLO. TITLE SETTING BD., In the Matter of the Title, and Ballot Title, and Submission Clause for Proposed Initiative 2013–2014 #88 (2014), <http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2013-2014/88Rehearing.pdf> [<https://perma.cc/N734-MKWF>]; see also Court Order, In the Matter of the Title, and Ballot Title, and Submission Clause for Proposed Initiative 2013–2014 #88 (Colo. 2014) (No. 2014–SA–125), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/initiatives/2013-14/14SA125/Final%20order.pdf [<https://perma.cc/7H9A-QYDS>] (affirming the actions of the title board).

145. *In re* Title, Ballot Title, & Submission Clause for 2013–2014 #89, 328 P.3d 172 (Colo. 2014).

146. *Colorado Ballot Initiatives 88, 89 Pulled Today*, OIL & GAS 360 (Aug. 4, 2014), <http://www.oilandgas360.com/colorado-ballot-initiatives-88-89-pulled-today/> [<https://perma.cc/AL57-5Q7E>] (last visited Mar. 22, 2017).

147. Mark Jaffe, *Hickenlooper Names Task Force to Defuse Drilling Land-Use Conflicts*, DENVER POST, Sept. 8, 2014, denverpost.com/2014/09/08/hickenlooper-names-task-force-to-defuse-drilling-land-use-conflicts/ [<https://perma.cc/7MWN-P9T4>].

148. *Id.*

149. Cathy Proctor, *Hickenlooper's Oil and Gas Task Force Advances 9 Recommendations*, DENVER BUS. J., Feb. 25, 2015, http://www.bizjournals.com/denver/blog/earth_to_power/2015/02/hickenloopers-oil-and-gas-task-force-advances-9.html [<https://perma.cc/YJ9S-2Y8D>].

Constitution were proposed during the 2016 election. The first, Initiative #75, sought to authorize local governments to prohibit or limit oil and gas development and allow more restrictive local regulations to supersede existing state regulations.¹⁵⁰ The second, Initiative #78, sought to establish an even more restrictive 2,500-ft. setback for new oil and gas development facilities and allow local governments to establish larger setbacks.¹⁵¹ If enacted, this 2,500-ft. setback would have effectively ended oil and gas production in Colorado.¹⁵² Ultimately, neither initiative received sufficient signatures to be placed on the 2016 Ballot.¹⁵³ Thus, these direct democracy efforts failed.

However, in 2016, Colorado took a huge step forward in preventing special interest groups, such as anti-oil and gas industry organizations, from utilizing the direct democracy process, not as the safety valve for which it intended, but as the main tool driving individual political agendas. On November 8, 2016, Colorado citizens passed Proposition 71, popularly referred to as the “Raise the Bar” amendment, which made it harder to amend Colorado’s State Constitution through citizen initiatives.¹⁵⁴ For constitutional amendments only, Proposition 71 raised the standard both in terms of the signatures required to get a constitutional amendment on the ballot for a vote, and the vote required to pass that amendment.¹⁵⁵ However, the relatively low burden remains in place for legislative initiatives, which still leaves the industry vulnerable to attack by special

150. Elizabeth Titus & Hogan Lovells, *Update on Proposed Anti-Oil and Gas Ballot Initiatives*, COLO. OIL & GAS ASS’N, <http://www.coga.org/ogballotinitiatives/> [<https://perma.cc/AC84-L7N5>] (last visited Mar. 22, 2017) (focusing on Measure 2015-2016 #75); Court Order, In the Matter of the Title, and Ballot Title, and Submission Clause for Proposed Initiative 2015–2016 #75 (Colo. 2016) (No. 2016–SA–70), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/initiatives/2015-16/16SA70/4-14-16%20court%20order.pdf [<https://perma.cc/U92E-733S>].

151. See Titus & Lovells, *supra* note 150 (focusing on Measure 2015-2016 #78); Court Order, In the Matter of the Title, and Ballot Title, and Submission Clause for Proposed Initiative 2015–2016 #78 (Colo. 2016) (No. 2016–SA–71), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/initiatives/2015-16/16SA71/4-14-16%20court%20order.pdf [<https://perma.cc/8DYT-2MUT>].

152. See COGA Study, *supra* note 140.

153. Jeff Todd, *Empty Petition Boxes Put Anti-Fracking Initiatives In Doubt* (Aug. 9, 2016), CBS DENVER, denver.cbslocal.com/2016/08/09/empty-petition-boxes-anti-fracking-initiatives-doubt/ [<https://perma.cc/JMT8-8G4C>].

154. Kevin Simpson, *Amendment 71: Coloradans approve making constitution harder to amend*, DENV. POST, Nov. 8, 2016, <http://www.denverpost.com/2016/11/08/colorado-amendment-71-constitutional-amendments-election-results/> [<https://perma.cc/Y6V6-SFE5>].

155. *Id.*

interest groups, depending on the makeup of the legislature after any given election cycle.

CONCLUSION

After anti-industry groups failed to achieve their agenda through the courts and their elected officials, they turned their focus to the direct voter and election process in an attempt to effectuate a change in policy and regulation of the oil and gas industry. Although Colorado voters made it more difficult for special interests groups to manipulate the Colorado Constitution, it can be expected that special interest groups, including anti-industry groups, will continue utilizing direct democracy as an end-run-around the legislative and legal process.

As many have suggested, the ballot initiative crowd has become more energized, active, and indeed professional, when it comes to their attempts to circumvent the fundamental democratic process.¹⁵⁶ One cannot walk down the 16th Street Mall in downtown Denver during election season, without being approached by a ballot initiative operative seeking signatures or financial contribution for their cause.

Although the United States Supreme Court has refused to reject the ballot initiative process, labeling it a “political question,” the very nature of the direct democracy and the attempt to use the ballot process to overturn legislative actions and judicial decisions regarding regulation of oil and gas is nothing more than a ploy by small and vocal environmental activists to attempt to circumvent the fundamentals of a republican government established by the U.S. Constitution.

156. Bruce E. Cain & Roger G. Noll, *Institutional Causes of California's Budget Problem*, 2 CAL. J. OF POL. AND POL'Y 3 (2010).