Fracking in Louisiana: The Missing Process/Land Use Distinction in State Preemption and Opportunities for Local Participation

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B. Local Participation in the Drilling Decision: The Natural Resources Article to the Louisiana Constitution

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INTRODUCTION

Oil and gas development is testing and defining the boundaries of local government authority and autonomy as concerned municipal entities and citizens seek to limit oil and gas operations. Advances in high-volume hydraulic fracturing have increased domestic oil and gas production to historic levels.1 At the same time, national and international concerns about irreversible man-made global warming have focused on fossil fuel combustion.2 National groups opposed to continued reliance on oil and gas as an energy source have found willing partners in many local governments and their citizens, who are anxious about the local implications of drilling and fracking.3 Many citizens and environmental organizations coalesce around local environmental risks such as the potential degradation of ground and surface waters and air quality, seismic activity, and social and economic costs on the local area—including increased truck traffic, road damage, noise, housing shortages, and boom and bust cycles.4 Particularly in urban or suburban areas, voters may also perceive drilling and fracking as a threat to property values, aesthetics, and lifestyles.

1. The United States has become the largest producer of petroleum and natural gas in the world, surpassing Russia in natural gas production and Saudi Arabia in oil production. See Adam Sieminski, Presentation, Oil and Gas Outlook 14 (Oct. 16, 2015), available at http://www.eia.gov/pressroom/presentations/sieminski_10162015.pdf [perma.cc/F2V7-TUD2].


Now that fracking has become a topic of wider public interest, at least to the media and the relatively informed public, local government efforts to control oil and gas operations appear to be a modern phenomenon. These recent efforts are, however, little more than “old wine in new bottles.” The Cities of Winkfield and Oxford, Kansas, adopted municipal oil and gas ordinances in the late 1920s that focused on the prevention of waste and the protection of correlative rights, and cases that upheld the application of zoning ordinances to oil and gas operations began appearing in the 1930s.

Because neither fracking nor the local regulation of oil and gas operations are particularly new, what has changed may be a matter of degree. As advances in technology unlock new resources, drilling and completion activities intensify in new areas that are rich in shale resources.

5. Those who study oil and gas issues or work in related fields may be particularly aware of the media coverage, but a 2013 study concluded that the American populace is largely unaware of and undecided about hydraulic fracturing. See Hilary Boudet et al., “Fracking” Controversy and Communication: Using National Survey Data to Understanding Public Perceptions of Hydraulic Fracturing, 65 ENERGY POL’Y 57, 63 (2014), available at http://dx.doi.org/10.1016/j.enpol.2013.10.017 [perma.cc/Z88X-VQEH].


7. See, e.g., Anderson-Kerr, Inc. v. Van Meter, 19 P.2d 1068, 1074 (Okla. 1933) (“The governing body of the city has a right to regulate the oil industry and the drilling of wells within its corporate limits or to prohibit them from being drilled in certain designated territory.”); Van Meter v. Westgate Oil Co., 32 P.2d 719, 721 (Okla. 1934).


9. See, e.g., Growth in U.S. Energy Production Outstrips Consumption Growth, U.S. ENERGY INFO. ADMIN. (Dec. 5, 2012), http://www.eia.gov/pressroom/releases/press379.cfm [perma.cc/D8SH-8EFX] (describing growth in oil production from shale and other tight formations (Figure 1) and growth in shale gas production (Figure 3)).
While local governments have historically applied locational restrictions to oil and gas operations under zoning ordinances, those governments now more regularly seek to ban fracking or oil and gas production altogether. Many would not normally oppose local ordinances that require the use of a closed loop system or reasonable set-backs. However, a complete ban on hydraulic fracturing is extreme in the sense that it tends to eviscerate the oil and gas interest owner’s ability to produce. In recent years, domestic oil and gas production has focused on vast shale source rock and tight formations that can be accessed only using hydraulic fracturing. As a result, a ban on fracking is a relatively easy way to prohibit all oil and gas production without expressly prohibiting oil and gas production.

Furthermore, oil and gas drilling and fracking in Louisiana and elsewhere challenge conservative Republican principles. Conservatism has long promoted state-level governance over federal government power and control. Under related principles, conservatives have advocated for local

10. See Kramer, supra note 6, at 73.

11. For a collection of more than 400 local ordinances related to oil and gas operations or fracking, see Mary Grant, Local Resolutions Against Fracking, FOOD & WATER WATCH (Sept. 11, 2013), http://www.foodandwaterwatch.org/insight/local-resolutions-against-fracking/ [perma.cc/3X2S-QCZ6]. The Author has not verified that all of the collected ordinances have actually passed or are in full force and effect.


13. See Sieminski, supra note 1, at 4, 5.


15. See Republican Party Platform of 1956, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=25838 [perma.cc/4KAH-69KY] (last visited Nov. 17, 2015) (“We hold that the strict division of powers and the primary responsibility of State and local governments must be maintained, and that the centralization of powers in the national Government leads to expansion of the mastery of our lives.”); We The People: A Restoration of Constitutional Government, GOP,
county and municipal self-governance over state governance. In Louisiana, these local self-governance principles manifest in a home-rule legal tradition. In recent years, however, this small government ideology has been flipped on its head in more conservative states, such as Louisiana and Texas, where urban areas lean Democratic and rural and suburban areas tend to lean Republican, at least in state-wide elections.

Modern conservatism not only promotes pushing government down towards the people; it also strongly predicts support for fossil fuel development. In the realm of oil and gas production, one may view the state as more interested in securing jobs and promoting economic activity,


17. See infra Part IV.A.

18. The political makeup of Louisiana is somewhat of an anomaly. Although Independents have made gains, Democrats still controlled about 73% of the precincts in Louisiana in the 2012 presidential election, but 65% of those precincts voted for republican candidate Mitt Romney for President. See Ben Myers, Louisiana Votes Red Even as Democrats, Republicans Lose Sway, NOLA.COM (Nov. 4, 2014, 7:15 AM), http://www.nola.com/politics/index.ssf/2014/11/louisiana_voters_register_blue [perma.cc/8X25-XGMR]. As explained by Ed Chervenak, a University of New Orleans political science professor, southern Democrats—primarily white southern Democrats—in Louisiana have tended to remain registered as Democrats even though voting habits have shifted towards the Republican Party since Ronald Reagan first ran for President. Id.; see also Wade Goodwyn, New Texas Governor Adds to Tension Between State, City Governments, NPR (Jan. 15, 2015, 4:45 PM), http://www.npr.org/2015/01/15/377526831/new-texas-governor-adds-to-tension-between-state-city-governments [perma.cc/758H-USFS] (quoting republican Texas Governor Greg Abbot as saying “[t]he truth is, Texas is being California-ized with bag bans, fracking bans, tree-cutting bans” and noting “[t]he cries that the new governor’s battle with his cities is the height of Republican hypocrisy – ‘oh, sure, it’s all about local control until the Democrats are the ones in control’”).

19. Hilary Boudet et al., supra note 5, at 60.

20. See David B. Spence, Federalism, Regulatory Lags, and the Political Economy of Energy Production, 161 U. PA. L. REV. 431, 466–67 (2013) (explaining capture theory, whereby business interests can capture the regulatory process for their own benefit, and that agency capture may be more prevalent at the state level (rather than the federal level) where the political process tends to attract less attention).
and local governments as more responsive to local environmental and social concerns. While not all state governments necessarily under-regulate oil and gas activities, perceptions lead to conflicts when communities view themselves as entitled to a degree of local autonomy over activities such as oil and gas development that conflict with state-wide interests. Part I of this Article discusses the recent dispute over fracking in St. Tammany Parish as a case study illustrating such a conflict.

Across the country, the relationship between state and local jurisdiction over oil and gas drilling and completion is balanced along a spectrum. At one extreme, the state regulates the process of drilling, but the local government regulates land use with an absolute veto power to ban drilling. At the middle of the spectrum, the state regulates the process of drilling, and the local government has the power to impose traditional zoning districts or to impose setbacks on operations. However, in this situation, the local government lacks an outright veto of drilling operations. The state may or may not also provide additional opportunities for local governments to participate in state permitting. Further along the spectrum, the state is the final arbiter of both the process of drilling and the location of wells, but the state provides an opportunity for meaningful participation by local governments in the permitting process. Finally, at the other end of the spectrum, the state is the final arbiter of both the process of drilling and the location of wells.

As discussed in Part II of this Article, all major producing states, to varying degrees, recognize the distinction between the state’s oversight of the drilling process (“process”) and local government’s oversight of where wells can be placed (“land use”). This distinction allocates control over the process of drilling wells to the state while reserving some control over the siting of wells to local governments. Even the new Texas and Oklahoma

21. New York and Pennsylvania are examples of this extreme. Ironically, both states have express preemption statutes. See infra Part II.C.
22. Colorado, New Mexico, Texas, and Oklahoma are examples of this structure, see infra Part II, although land use control in Texas and Oklahoma recently has been curtailed by new preemption statutes. See infra Part II.A–B. Ohio also probably falls within this category despite an express preemption statute that prohibits local regulation as to the location of wells. See infra Part II.C.
23. See infra Part II.C for the discussion of recent court decisions in Colorado and New Mexico striking down bans on oil and gas operations.
24. Additional opportunities for local government participation in well permitting decisions provided by Colorado are discussed in Part VI.A, infra.
25. This may be the new paradigm for Louisiana if its appellate courts recognize the duties of the Louisiana Department of Natural Resources under Article IX, Section 1 of the Louisiana Constitution. See infra Part VI.B.
preemption statutes, which were adopted in the wake of a Denton, Texas fracking ban, leave some land use authority vested in local governments.\textsuperscript{26} In contrast, Louisiana operates at the far right of the spectrum. Louisiana statutes and court decisions, which are examined in Part III of this Article, deny local governments control over both process and land use decisions in the oil and gas context.\textsuperscript{27}

This lack of any local autonomy over the location of wells in Louisiana arguably conflicts with the conservative ideal of home rule that the drafters of the 1974 Louisiana Constitution envisioned.\textsuperscript{28} For a short period of time, the Louisiana Supreme Court promised a new era of strong self-government at the local level; however, the court quickly retreated from that promise in favor of deference to the state legislature when state and local interests collide.\textsuperscript{29} The implication is that, despite its purpose, home rule in Louisiana provides little promise of local self-governance over oil and gas operations. This premise is analyzed in Part IV of this Article.

Despite this lack of local control in Louisiana, Part V of this Article argues as a normative matter that the state should have ultimate authority over well siting decisions due to the nature of oil and gas. In particular, the line between the state interest in process and land use blurs in the oil and gas context. State conservation agencies have a statutory mandate to prevent waste of minerals and protect the correlative rights of landowners that may be compromised by bans or zoning ordinances that prohibit oil and gas operations in particular locations.\textsuperscript{30} This is not, however, to say that local environmental and other concerns should go unheeded.

Part VI of this Article examines two alternatives that ultimately give the state authority over the location of wells. The first alternative—voluntary compromise—only addresses substantive environmental concerns when the parties feel compelled to negotiate. Even without a legal mandate, however, the oil and gas industry may negotiate restrictions on its operations to preserve or enhance its social license to operate when the risks and costs of compliance are perceived as low. The second alternative is examined in the context of the recent victory by the Town of Abita Springs in its dispute with the state over fracking in St. Tammany Parish.\textsuperscript{31} This alternative recognizes the obligations of the Louisiana Department of Natural Resources (“LDNR”) as a public trustee under the “Natural Resources Article,” Article IX, Section

\textsuperscript{26} See infra Part II.A–B for discussion of the new Texas and Oklahoma preemption statutes.
\textsuperscript{27} See infra Part II.B.
\textsuperscript{28} L A. CONST. art. VI.
\textsuperscript{29} See infra Part IV.
\textsuperscript{31} See infra Part VI.B.
1 of the 1974 Louisiana Constitution. This provision leaves the final decision for well-location approval to the state while granting local governments and their citizens a substantive voice in the state permitting process to air their environmental and local health and safety concerns. Although that type of participation right does not necessarily mandate a particular outcome, the state should be required to analyze and address legitimate local concerns in its findings and conclusions before issuing drilling permits. That participation right is not a panacea for all concerned but somewhat mitigates the loss of autonomy that local governments feel while balancing the need for statewide uniformity and control.

I. BACKGROUND: THE FRACKING DISPUTE IN ST. TAMMANY PARISH

A number of residents, along with the local government of St. Tammany Parish, have a problem with oil and gas operations in their neighborhood. On March 31, 2014, Helis Oil & Gas (“Helis”) applied to the Louisiana Office of Conservation (“LOC”), which is part of the Louisiana Department of Natural Resources (“LDNR”), to create a single drilling and production unit in the Tuscaloosa Marine Shale, Reservoir A, in the Lacombe Bayou Field, in St. Tammany Parish. On the day before the hearing to consider the unit application, St. Tammany Parish filed suit against the LOC for a declaratory judgment to require the LOC to give primary consideration to St. Tammany zoning ordinances in deciding whether to authorize formation of the drilling and production unit. The St. Tammany ordinances, adopted in 2006, zoned the relevant drilling area as residential, thus prohibiting drilling at Helis’s proposed site. St. Tammany also prayed for an injunction to prohibit the LOC’s forced pooling proceedings until the LOC corrected enforcement and compliance deficiencies identified in an audit report that the Louisiana Legislative Auditor’s Office prepared. Lastly, St. Tammany Parish requested a declaration that St. Tammany had the option to ban fracking.

32. LA. CONST. art. IX, § 1.
35. Id. ¶ 37.
36. Id. ¶ 24.
37. Id. ¶ 37.
In response, the State argued that St. Tammany failed to state a cause of action. According to the LOC, St. Tammany’s zoning ordinances were preempted because the state comprehensively regulates every phase of the oil and gas exploration and production process and because Louisiana statutes expressly preempt a parish’s attempt to enforce its zoning ordinances where oil and gas operations are concerned.

Once Helis established the drilling unit, St. Tammany complained that the LOC violated a mandatory statutory obligation to “consider” the Parish’s zoning ordinances by approving the drilling unit in an area that the Parish designated as not zoned for drilling. The LOC argued that an obligation to consider a master plan did not require the state to deny the unit application just because the Parish prohibited drilling at the site through its zoning ordinances. Despite the ongoing lawsuit, the LOC issued Helis a permit to drill a 13,000-foot vertical test well. On May 13, 2015, District

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39. LOC Response Memorandum, supra note 38, at 8–9.


42. Conservation’s Amended Exceptions to the Plaintiff’s First Supplemental Petition for Declaratory and Injunctive Relief, supra note 40, at 8–9.

43. The approval was granted with an extensive list of conditions, including restrictions on the water that may be used for fracking, disclosure of fracking chemicals, groundwater monitoring, and the use of closed-loop systems, but most of the conditions relating to fracking appear to be window dressing. The planned well is a test well and commercial production from the Tuscaloosa Marine Shale requires a horizontal interval. If the vertical well shows promise, then Helis must apply for an additional permit to drill and complete the well as a horizontal well before it hydraulically fractures the well. See Sara Pagones, State Approves Controversial Drilling Permit in St. Tammany, NEW ORLEANS ADVOCATE (Dec. 19, 2014, 4:53 PM), http://www.theneworleansadvocate.com/news/11137125-171/state-approves-controversial-drilling-permit [perma.cc/Q9YH-8V5U].
Judge William Morvant issued the court’s ruling and agreed with the LOC that state law preempts the St. Tammany zoning ordinance, and in an issue of first impression, that the obligation to “consider” a local zoning plan does not require adherence by the state to restrictions in the local zoning plan.44 St. Tammany took a suspensive appeal to the Louisiana First Circuit Court of Appeal, allowing the Parish to enforce its zoning ordinance pending appeal.45 As of November 5, 2015, the appellate court has not ruled on the appeal, and St. Tammany has placed a “cease and desist” sign at the drilling site.46

The Town of Abita Springs filed a related lawsuit on December 1, 2014 in the 22nd Judicial District in Covington, Louisiana.47 The court dismissed that lawsuit on April 15, 2015, effectively holding that Abita Springs had no right to enforce St. Tammany Parish’s zoning ordinances.48 Abita Springs, however, filed a separate lawsuit in the 19th Judicial District, challenging the process by which the LOC issued the drilling permit to Helis.49

For local residents, these challenges against fracking in St. Tammany are as much about local autonomy as fear of environmental calamity. Reduced to its legal essence, however, the St. Tammany suit simply is a question of the scope and the breadth of the Louisiana oil and gas preemption statute. The St. Tammany ordinance goes too far under state law by prohibiting the drilling of a well in a particular location, but the Louisiana Supreme Court has not resolved the extent to which local government in Louisiana can regulate oil and gas operations. For example, it is not entirely

49. See infra Part VI.B for a discussion of this separate lawsuit.
clear whether reasonable surface restrictions on oil and gas wells, reasonable setbacks from buildings and other structures, or even a complete ban on fracking adopted by a local government might be valid. In part, this Article addresses the extent of this local authority.

II. PREEMPTION STATUTES AND DECISIONS IN MOST STATES PRESERVE AT LEAST SOME LAND USE AUTHORITY

In response to perceived risks of local intrusion on state interests in oil and gas production, the conservative Texas and Oklahoma legislatures recently enacted new preemption statutes. Although these statutes certainly diminish local land use autonomy, they also continue to allow some local authority over siting decisions. In several other producing states, local court decisions have overturned local bans on drilling and fracking, while at the same time recognizing that local governments still have an interest in local land use.

A. The New Texas Preemption Statute

Local anxiety over oil and gas development is not limited to Louisiana. Even the oil and gas friendly state of Texas has experienced local conflicts recently, boiling over on November 4, 2014, when voters in the City of Denton, Texas, approved the first local Texas ordinance that bans and criminalizes hydraulic fracturing. One day later, two lawsuits were filed. The first suit was filed by Jerry Patterson, Commissioner of the Texas General Land Office, alleging that the ban may not be enforced against lands and minerals that the State of Texas owns and that state law preempts the ban. In the second suit, the Texas Oil and Gas Association alleged that state law preempts the local ordinance, because state law both occupies the entire field of oil and gas regulation and also conflicts with the exclusive...


51. Denton, Tex., Ordinance Providing that Hydraulic Fracturing Operations Are Prohibited in the City (Nov. 4, 2014) (amending DENTON, TEX., CODE OF ORDINANCES ch. 16, art. VII (2014)). The ordinance is quite simple: “It shall be unlawful for any person to engage in hydraulic fracturing within the corporate limits of the City.” Id. Violation of the ordinance is punishable as a misdemeanor. Id.

authority of the Texas Railroad Commission (“TRRC”)53 and the Texas Commission on Environmental Quality (“TCEQ”) to regulate hydraulic fracturing.54

Largely in response to the Denton fracking ban and the aspirations of other local governments to adopt stricter rules,55 the Texas legislature passed H.B. 40, which preempts local governments from regulating most aspects of oil and gas operations.56 On May 19, 2015, Texas Governor Greg Abbott signed H.B. 40 into law, effectively ending the Denton dispute.57

H.B. 40 is exceptionally broad, prohibiting local governments from enacting or enforcing an ordinance or other measure that “bans, limits, or otherwise regulates an oil and gas operation . . . .”58 The exception involves an ordinance or measure that (1) regulates only surface activities, including “reasonable setback requirements”; (2) “is commercially reasonable”; (3) “does not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator”; and (4) “is not otherwise preempted by state or federal law.”59

A condition in a local ordinance is “commercially reasonable” if the ordinance “would allow a reasonably prudent operator to fully, effectively, and economically exploit, develop, produce, process, and transport oil and gas, as determined based on the objective standard of a reasonably prudent operator . . . .”60 An ordinance might allow drilling and still be invalid under this commercially reasonable test if compliance costs make operations uneconomical or restrictions impede the production of all recoverable hydrocarbons.61 As such, the second requirement of commercial

57. Barnett, supra note 56.
58. TEX. NAT. RES. CODE ANN. § 81.0523(b).
59. Id. § 81.0523(b), (c).
60. Id. § 81.0523(a)(1).
61. See id. § 81.0523(a)(2).
reasonableness appears to encompass the third requirement for a valid ordinance—that the ordinance “does not effectively prohibit an oil and gas operation.”

Both the second and third requirements employ the “reasonably prudent operator” standard. Courts often apply this standard to determine whether implied covenants imposed on the lessee under an oil and gas lease are commercially reasonable and do not prohibit oil and gas operations. An oil and gas lease is a relational contract, meaning a contract where the parties have difficulty “reducing important terms of the arrangement to well-defined obligations.” In the typical oil and gas lease, the lessee has few, if any, express contractual obligations other than to pay royalties on production. Professors Goetz and Scott posit that parties to a relational contract should define standards of performance in general terms. Based on the proposals of prominent commentators, courts might have required lessees to act with “best efforts” or as fiduciaries of their lessors. However, courts have routinely rejected such a high standard. Courts instead generally interpret the lessee’s obligations using a reasonably prudent operator standard.

62. Although these implied covenants expand and evolve over time, they might be said to include requirements to drill an initial well, to reasonably develop the lease after production, to protect against drainage, to produce and market product, to operate with reasonable care, and to use modern methods of production. See Amoco Prod. Co. v. Alexander, 622 S.W.2d 563, 567 n.1 (Tex. 1981) (citing R. Hemingway, The Law of Oil and Gas § 8.1 (1971)).


64. Id. at 1092.

65. Patrick H. Martin & Bruce M. Kramer, Williams & Meyers, Oil and Gas Law § 802.1 (2014) [hereinafter Williams & Meyers] (citing C. Meyers & S. Crafton, The Covenant of Further Exploration – Thirty Years Later, 32 ROCKY MTN. MIN. L. INST. 1-1, 1-24 (1986)). An absolute duty to comply with implied covenants may apply in limited circumstances, usually when the lessee has caused the drainage of the property under lease. Alternatively, a few courts have applied a weak good faith standard for implied covenants. The Williams and Meyers treatise concludes that the prudent operator standard is the appropriate standard for implied covenants among these various alternative performance standards. Id. § 806.


67. See Williams & Meyers, supra note 65, § 806 n.20 (listing cases); E. Kuntz, A Treatise on the Law of Oil and Gas § 61.3 (1978).
Substantively, the prudent operator standard might be compared to the objective “reasonable man” standard under tort law. The Williams and Meyers oil and gas treatise explains the standard:

Since the standard of conduct is objective, a defendant cannot justify his act or omission on personal grounds or by reference to his peculiar circumstances. It is no excuse that defendant . . . is short of cash, over-committed on drilling programs, has no need for more production, or prefers to spend his money on other things. In short, the question is not what was meet and proper for this defendant to do, given his peculiar circumstances, but what a hypothetical operator acting reasonably would have done, given circumstances generally obtained in the locality.68

Thus, the prudent operator standard is a single, objective standard that takes into account external conditions but ignores unique internal facts particular to the lessee.69 The authors of H.B. 40 apparently incorporated the prudent operator standard to deter operators’ claims against local governments that they could not comply with local regulations because of their own atypical technical, financial, or other limitations.70 Thus, a local ordinance is not preempted if the hypothetical reasonable operator can still effectively and economically produce its oil and gas.

But no matter how commercially reasonable a restriction on fracking or other underground operational activity might be, such restrictions are preempted. The list of required elements of a valid ordinance contains the conjunctive “and,” meaning that a valid local ordinance must be commercially reasonable and must also regulate only surface activity. Thus, the new Texas statute recognizes in absolute terms that the process of drilling and completing a well is entirely within the jurisdiction of the state.

The statute does, however, allow for some local control, including the location of wells.71 The statute recognizes that local regulations governing “fire and emergency response, traffic, lights, or noise” are the types of surface activities that local governments normally may regulate within the

68. WILLIAMS & MEYERS, supra note 65, § 806.
70. H.B. 40 also includes a potential savings clause for certain existing ordinances: “An ordinance or other measure is considered prima facie to be commercially reasonable if the ordinance or other measure has been in effect for at least five years and has allowed the oil and gas operations at issue to continue during that period.” TEX. NAT. RES. CODE ANN. § 81.0523(d) (West Supp. 2015).
71. Id. § 81.0523(c)(1).
realm of local control. Furthermore, courts might permit regulations governing location even in the context of drilling operations, including setbacks and even traditional zoning ordinances that restrict particular uses to certain zones, when the facts and circumstances allow a reasonably prudent operator to access the formation through horizontal drilling and other techniques and to conduct operations “fully, effectively, and economically.”

Texas has completely preempted the “how” of underground drilling, completion, and other operations, but it still allows Texas municipalities some say over where wells can be drilled and the conduct of surface activities.

B. The New Oklahoma Preemption Statute

Just over a week after Governor Abbott signed the Texas preemption bill, Oklahoma Governor Mary Fallin signed a similar bill. The Oklahoma bill, however, arguably is even more ambiguous than the Texas bill. Before Governor Fallin signed the new bill into law, Oklahoma expressly allowed “cities and towns governmental corporate powers to prevent oil or gas drilling therein” and “to provide its own rules and regulations with reference to well spacing units or drilling or production . . . .” The new statute allows local governments to adopt reasonable ordinances concerning “road use, traffic, noise and odors” and “reasonable setbacks and fencing requirements for oil and gas well site locations as are reasonably necessary to protect the health, safety and welfare of its citizens. . . .” Such setbacks may not

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72. Id.
73. Id. § 81.0523(a)(1). Future litigation will determine the objective reasonableness of setbacks, zoning regulations, and other attempts to protect the character of neighborhoods under specific ordinances. By incorporating an objective standard, the statute avoids relitigating particular ordinances as applied to different operators. The statute, however, only establishes objective reasonableness or unreasonableness as of a particular point in time. Regulations that unreasonably impede the operations of a reasonably prudent operator today using existing technology and cost constraints might be reasonable in the future as technology develops and the costs fall. In 2008, Maersk Oil Qatar completed a well with a horizontal length of 35,770 feet (6.77 miles). Dennis Denney, Continuous Improvement Led to the Longest Horizontal Well, J. PETROLEUM TECH., Nov. 2009, at 55. If wells with horizontal laterals of such length or longer become commonplace, more onerous zoning and setback limitations might eventually be acceptable.
74. 2015 Okla. Sess. Laws c. 341 (codified at 52 OKLA. STAT. ANN. § 137.1 (Supp. 2015)).
76. 52 OKLA. STAT. ANN. § 137.1 (Supp. 2015).
“effectively prohibit or ban any oil and gas operations,” including fracking.\textsuperscript{77} The statute then goes on to state that “[a]Il other regulations of oil and gas operations shall be subject to the exclusive jurisdiction of the Corporation Commission.”\textsuperscript{78}

The Oklahoma statute, which expressly allows “reasonable setbacks,” does not expressly allow the zoning of oil and gas into industrial or other districts. All local “regulations,” other than those expressly allowed by the statute, are subject to the exclusive jurisdiction of the state, but the statute does not define the words “regulation” or “operation.”\textsuperscript{79} Whether the exclusive jurisdiction of the state is limited to technical operations involving the drilling and completing of wells or whether the term “regulation” also encompasses the location of wells through traditional zoning is yet to be determined.\textsuperscript{80} Certainly, a municipality in Oklahoma could not prohibit drilling because the legislature repealed the former statute that expressly authorized drilling bans.\textsuperscript{81} Similar to the new Texas law, future litigation will likely determine whether a municipality might also zone oil and gas into reasonable industrial districts and what might constitute a reasonable setback.\textsuperscript{82} In any event, the statute clearly leaves room for some local authority as to the location of wells.

\textbf{C. Court Decisions in Other States Recognize the Process/Land Use Distinction}

Recent court decisions in other states recognize the distinction between the technical operational aspects of drilling and traditional land use.\textsuperscript{83} These decisions usually conclude that absolute prohibitions on drilling and production or completion technologies—including hydraulic fracturing—

\begin{itemize}
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Id.
\item \textsuperscript{79} Id.
\item \textsuperscript{80} See infra note 85 and accompanying text.
\item \textsuperscript{81} See supra note 75 and accompanying text.
\item \textsuperscript{83} For a more comprehensive discussion and analysis of the cases discussed in this Part, see generally Alex Ritchie, Creatures of Circumstance: Conflicts Over Local Government Regulation of Oil and Gas, 60 ROCKY MTN. MIN. L. INST. 11-1, 11-6 (2015).
\end{itemize}
frustrate state interests.\textsuperscript{84} The exception to this latter generalization is New York, where the Court of Appeals held that the state legislature did not intend for a statute that supersedes local government “regulation” of oil and gas operations to preempt zoning and land use.\textsuperscript{85} The court explained that zoning and land use are powers within the province of local governments and that courts should protect these powers in deference to home rule authority.\textsuperscript{86} To this court, a complete ban on oil and gas operations is simply a zoning and land use decision that does not conflict with either the language of the preemption statute or the policies of preventing waste and protecting correlative rights in the state oil and gas statutes.\textsuperscript{87}

In Pennsylvania, a plurality of four justices of the Pennsylvania Supreme Court completely invalidated two out of three express statutory preemption provisions in the oil and gas conservation statute that the state legislature had adopted.\textsuperscript{88} The plurality held that these preemption statutes

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\item \textsuperscript{84} In addition to the cases discussed in this Part II.C, see \textit{Northeast Natural Energy, LLC v. City of Morgantown}, No. 11-C-411, 2011 WL 3584376 (W. Va. Cir. Ct. Aug. 12, 2011) (holding that the city lacks authority to enact a fracking ban). For a discussion of this case, see Jesse J. Richardson, Jr., \textit{Local Regulation of Hydraulic Fracturing}, 117 W. VA. L. REV. 593 (2014).
\item \textsuperscript{85} In \textit{In re Wallach v. Town of Dryden}, 16 N.E.3d 1188 (N.Y. 2014), the New York Court of Appeals—New York’s highest court—consolidated the cases of \textit{Norse Energy Corp. USA v. Town of Dryden}, 964 N.Y.S.2d 714 (N.Y. App. Div. 2013), and \textit{Cooperstown Holstein Corp. v. Town of Middlefield}, 964 N.Y.S.2d 431 (N.Y. App. Div. 2013). The conclusion in \textit{In re Wallach} was preordained by the court’s decision in \textit{In re Frew Run Gravel Products, Inc. v. Town of Carroll}, 518 N.E.2d 920 (N.Y. 1987), where the court held that an express preemption provision only applied to local laws that purported to regulate the operational aspects of mining. \textit{Id.} at 922. In \textit{In re Wallach}, the court stated that “this incidental control resulting from the municipality’s exercise of its right to regulate land use through zoning is not the type of regulatory enactment relating to the [oil, gas and solution mining industries] which the Legislature could have envisioned as being within the prohibition of the statute.” 16 N.E.3d at 1197 (quoting \textit{Frew Run}, 518 N.E. 2d at 920).
\item \textsuperscript{86} \textit{Id.} at 1197.
\item \textsuperscript{87} \textit{Id.} at 1199.
violated a fairly unique state constitutional amendment that grants citizens a right to clean air and water and imposes a public trust on the natural resources of the state. According to the plurality, the offending preemption provisions impeded the ability of local governments to protect their citizens and the environment through the exercise of their land use authority. Pennsylvania, however, continues to recognize the distinction between process and land use. One express preemption provision survived the decision and continues to supersede the ability of Pennsylvania local governments to regulate the technical operational aspects of drilling and production in a manner that conflicts with state law.

In Colorado and New Mexico, industry and state regulatory plaintiffs challenging local bans have been successful in recent court actions. But

Cons. Stat. Ann. § 601.602 (repealed 2012), and which previously was interpreted as allowing local governments to zone oil and gas operations, but not to regulate the operational aspects of drilling. See Huntley & Huntley, Inc. v. Borough Council of Oakmont, 964 A.2d 855, 865 (Pa. 2009). The second express preemption provision, section 3303, expands on section 3302 by declaring that state environmental acts “occupy the entire field of regulation” as it relates to the environmental regulation of oil and gas. 58 Pa. Cons. Stat. Ann. § 3303. The third, section 3304, requires that oil and gas development be allowed as a permitted use in any municipal zoning district, and that restrictions on oil and gas development be no greater than those placed on other industrial uses. Id. § 3304(b)(3), (5). The plurality in Robinson Township struck down sections 3303 and 3304, but allowed section 3302 to stand. Robinson Twp., 83 A.3d at 1000.

89. See supra note 88.

90. See infra Part VI.B.

91. See supra note 88.

these decisions do not upset the distinction between process and land use and the ability of local governments to adopt reasonable zoning restrictions. Neither the Colorado nor the New Mexico conservation statutes contain express preemption provisions, but, in these recent Colorado and New Mexico cases, the courts found preemption based on implied conflicts with state law.

On July 24, 2014, the Boulder County District Court, on summary judgment, struck down a local voter-initiated outright fracking ban that the City of Longmont, Colorado, had adopted. The next month, the same court struck down a broader ban on oil and gas extraction and storage that the City of Lafayette, Colorado, had adopted. Also in August 2014, the Larimer County District Court struck down a fracking ban—similar to the Longmont ban—that the City of Fort Collins, Colorado, had adopted. Although these courts held that the drilling and fracking bans went too far, none of these cases question the decision in Board of County Commissioners, La Plata County v. Bowen/Edwards Associates, Inc., where the Colorado Supreme Court held that local governments have distinct interests in land use control that differ from the state interest in regulating the technical operational aspects of production.

On January 19, 2015, the United States District Court for the District of New Mexico struck down a ban from Mora County that was similar to the Lafayette, Colorado ordinance. In his decision, however, Judge James O. Browning made clear that the New Mexico Oil and Gas Act does not address issues with which local governments are traditionally concerned. That holding leaves room for the concurrent jurisdiction of state and local governments.

July 24, 2014); see also Memorandum Opinion and Order, SWEPI, LP v. Mora Cnty., 81 F. Supp. 3d 1075 (D.N.M. 2015).
96. 830 P.2d 1045 (Colo. 1992) (en banc).
97. Id. at 1058.
98. See Memorandum Opinion and Order, SWEPI, LP v. Mora Cnty., supra note 92.
99. 830 P.2d at 1195.
Even in the rare case where a preemption provision purports to expressly cover zoning and land use, courts may be reluctant to extend the provision so far. In the recent case of State ex rel. Morrison v. Beck Energy Corp.,\textsuperscript{100} the Supreme Court of Ohio had the occasion to interpret Ohio Revised Code section 1509.02, which grants the Ohio Department of Natural Resources the “sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations” within Ohio.\textsuperscript{101} The statute only preserves to municipalities special powers relating to certain public infrastructure and heavy vehicles operating on their highways.\textsuperscript{102} The City of Munroe Falls sought an injunction to require Beck Energy to comply with its ordinances before Beck began drilling operations.\textsuperscript{103} The ordinances imposed the City’s own permitting system replete with conditions, including the requirement for a conditional zoning certificate that could contain whatever conditions the City might choose to impose.\textsuperscript{104} To the 4-3 majority, these conditions impermissibly violated Ohio’s express preemption provision.\textsuperscript{105}

Despite the word “location” in the statute, some members of the court sought to restrict the reach of the holding. Concurring in the judgment only, Justice O’Donnell wrote separately to emphasize that the court’s holding was limited to the Munroe Falls ordinances at issue.\textsuperscript{106} For Justice O’Donnell, the case did not present the question of whether the express preemption provision conflicts with traditional land use ordinances that do not impose a separate permitting regime.\textsuperscript{107} He argued the word “location” has a meaning in oil and gas law that relates only to the efficient production of oil and gas, a meaning that does not implicate zoning.\textsuperscript{108}

In dissent, Justice Lazinger, joined by Justices Pfeifer and O’Neill, did not dispute the breadth of the preemption provision but instead relied on the Ohio presumption in favor of home rule.\textsuperscript{109} Justice Lazinger argued that more than a preemption statement is necessary to preempt in Ohio. Rather, the general law must actually regulate in the same area as the local law.\textsuperscript{110}

\begin{itemize}
\item \textsuperscript{100} 37 N.E.3d 128 (Ohio 2015).
\item \textsuperscript{101} 15 OHIO REV. CODE ANN. § 1509.02 (West 2013) (emphasis added).
\item \textsuperscript{102} Id.
\item \textsuperscript{104} Id.
\item \textsuperscript{105} Id. at *8.
\item \textsuperscript{106} Id. at *38.
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Id. at *43–44.
\item \textsuperscript{109} Id. at *53–56.
\item \textsuperscript{110} Id. at *56.
\end{itemize}
which presumably means in this case that the state must mandate and specify local zoning regulations for oil and gas.

The legislature or the courts in each of the states discussed in this Part, including those states that deem outright bans a violation of important state interests, in varying degrees recognize a role for local governments to exercise authority over the siting of wells under their land use powers. As discussed in Part III, Louisiana is different, vesting the state with virtually complete authority to determine where wells may be sited.

III. LOUISIANA AT THE EXTREME OF STATE CONTROL

Securing the character of neighborhoods under the zoning power has long been recognized as an essential power of local governments, but under Louisiana law, that power is not unlimited. In the oil and gas context, the zoning power is constrained by an express preemption statute, Louisiana Revised Statutes section 30:28(F). This Part analyzes the statute in light of existing precedent and in the context of the zoning power, concluding that—despite arguments to the contrary—the language of the statute leaves little room for local authority over either the location of wells or the process of drilling or completing (including fracking) a well. The extent of this balance in favor of the state may appear extreme, particularly in light of other states’ laws that allow some degree of local autonomy, but to change this balance in deference to the policy underlying zoning would require legislative action.

A. Reserving Land as Justification for Local Control

All of these state–local conflicts with oil and gas production center on the ability of local governments to protect and provide for the welfare of their citizens. The United States Supreme Court has stated that “reserving land for single-family residences preserves the character of neighborhoods, securing ‘zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.’” The

111. LA. REV. STAT. ANN. § 30:28(F) (Supp. 2015).
112. In oral argument on appeal of the St. Tammany case, Judge Guidry apparently asked whether, despite zoning, a well could be drilled on the 50-yard line inside Louisiana State University’s Tiger Stadium, and apparently counsel for the state answered that it could. Robert Rhoden, St. Tammany Fracking Fight Heard by Appeals Court in Baton Rouge, NOLA.COM (Nov. 5, 2015, 3:26 PM), http://www.nola.com/crime/index.ssf/2015/11/st_tammany_fracking_fight_hear.html [perma.cc/B4CF-SUEP].
need for local governments to provide these zoning sanctuaries has justified judicial deference to local government zoning since the 1926 decision in *Village of Euclid v. Ambler Realty Co.*, where the Court referred to undesirable uses as “merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.”

Parishes and municipalities in Louisiana, as in other states, regulate land use under its police power. Zoning is related to the police power, in that the right to prescribe and proscribed land uses under the zoning power derives from the police power. One treatise has described the police power as “the exercise of the sovereign right of a government to promote order, safety, health, morals and the general welfare of society within constitutional limits.”

Before the adoption of the 1974 Louisiana Constitution, local zoning ordinances were authorized under the 1921 Louisiana Constitution. This prior version of the state constitution provided general authority to municipalities to “zone their territory; to create residential, commercial and industrial districts, and to prohibit the establishment of places of business in residential districts.” This provision did not restrict legislative power to delegate zoning authority to other political subdivisions, such as parishes, nor the parish and municipal power to create types of districts, other than the enumerated residential, commercial, and industrial districts.

The 1974 Louisiana Constitution explicitly extends an independent grant of authority to all local government subdivisions to adopt zoning and land use regulations, subject only to “uniform procedures established by law.” Although this authority derives directly from the 1974 Constitution,
the Louisiana Supreme Court has not determined whether the state can deny the zoning power to local governments except when necessary to protect a vital state interest. In fact, the court expressly declined to answer the question in *St. Charles Gaming Co., Inc. v. Riverboat Gaming Commission*, 123 instead concluding that the state had not denied the zoning power.124

Although broad, this express constitutional grant of zoning power is clearly not unlimited. First, the constitution makes clear that local zoning power may not abridge the police power of the state,125 meaning that the zoning power may not impinge a state power that is necessary to protect a vital interest of the state as a whole.126 The courts, however, have not answered whether the state’s interest in oil and gas production is a vital interest or whether the state’s preemption of that interest is necessary. Second, local zoning authority is subject to state-mandated procedures.127 The Louisiana Supreme Court has held that the “subject to” language requires the state to issue procedures for parish zoning before a parish may zone,128 meaning that state-issued procedures are essential. The fact that the court requires the state to authorize zoning implies that the state could deny zoning power by an express general law preemption provision, even to protect an interest that is not necessarily vital. Third, despite the constitutional grant of zoning authority, the state must not exercise that authority in an unreasonable, arbitrary, or capricious manner.129

To fulfill the constitutional promise of zoning, the state legislature has enacted zoning enabling acts. For the purposes of “promoting the health, safety, morals, or general welfare of the community,” municipalities and most parishes may regulate and restrict the location and use of buildings,
structures, and land for trade, industry, residence, or other purposes. This regulatory authority is checked by the judicial review of zoning ordinances and decisions made under those ordinances for abuse of discretion, unreasonable exercise of the police powers, excessive use of the zoning power, or the denial of the right of due process.

For zoning purposes, the municipality or parish may divide itself into districts, provided that the regulations of permitted actions are uniform throughout each particular district. Zoning regulations must be made in accordance with a comprehensive plan and must reasonably consider the character of each district and the suitability for particular uses, encouraging the appropriate use of land throughout the municipality. The plan requirement is essential because a single prohibitive industry regulation without a comprehensive plan is invalid. The plan does not need to be terribly comprehensive in practice, however. The creation of a single district apparently qualifies as a comprehensive plan.

Courts presume all zoning ordinances are valid, and whoever attacks the validity of an ordinance bears the burden of proof. Further, since the 1923 case of *State ex rel Civello v. City of New Orleans*, Louisiana courts have not questioned the motivations of the governmental unit in promoting health, safety, and welfare, where concern for the public could have been the motivating factor, regardless of whether the concern actually was.

130. LA. REV. STAT. ANN. § 33:4721 (2009) (municipalities); Id. § 33:4780.40 (parishes).
131. Id. § 33:4721 (municipalities); Id. § 33:4780.40 (parishes); see also Guenther v. Zoning Appeals Bd., 542 So. 2d 612, 614 (La. Ct. App. 1989).
132. LA. REV. STAT. ANN. § 33:4722 (2009) (municipalities); Id. § 33:4780.41 (parishes).
133. Id. § 33:4723 (municipalities); Id. § 33:4780.42 (parishes).
134. See Trail Mining, Inc. v. Vill. of Sun, 619 So. 2d 118, 119 (La. Ct. App. 1993) (ordinance that required 1200 foot setbacks between a gravel pit and a residence held invalid without comprehensive plan). The Village argued that the ordinance was not a zoning ordinance, but a health and safety ordinance. Id. Although the Village abandoned this argument, the court nevertheless “confirms” that the ordinance is a zoning ordinance. Id.
137. 97 So. 440 (La. 1923).
138. See id. at 443–44 (“It is not necessary, for the validity of the ordinances in question, that we should deem the ordinances justified by considerations of public health, safety, comfort, or the general welfare. It is sufficient that the municipal council could reasonably have had such considerations in mind. If such
This standard is roughly equivalent to the “fairly debatable” standard that the United States Supreme Court has employed since Euclid to judge the validity of local ordinances on due process grounds.\(^{139}\)

In addition to this deferential standard, under express language in the Louisiana statutes, when zoning regulations impose a “higher” standard than “any other statute or local ordinance or regulation,” the higher standard controls.\(^ {140}\) In the context of the statute, the higher standard appears to connote the more restrictive standard, meaning that in the case of a conflict between state law and local law, the more restrictive standard should normally control.\(^ {141}\) Accordingly, unless their power is preempted, municipalities have the ability to supplement state regulation with more restrictive standards in their jurisdictions. Although this rule for municipalities in Louisiana Revised Statutes section 33:4729 is unqualified, the corresponding rule for parishes in Louisiana Revised Statutes section 33:4780.49 diverges. The penultimate sentence of Louisiana Revised Statutes section 33:4780.49 states:

> However, no local governing authority shall restrict, conflict with, interfere with, or supersede the powers of the state through its agencies to regulate, permit, or enforce environmental laws and regulations nor shall they restrict, conflict with, interfere with, or supersede activities operating in accordance with authorized state or federal permits, laws, or regulations.\(^ {142}\)

\(^{139}\) See Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 388 (1926). Professor Bruce Kramer coined the name of the “fairly debatable” test because “the validity of the legislative classification for zoning purposes” need only be “fairly debatable” to survive judicial scrutiny. See Bruce M. Kramer, Local Land Use Regulation of Extractive Industries: Evolving Judicial and Regulatory Approaches, 14 UCLA J. ENVTL. L & POL’Y 41, 44, 63 (1996).

\(^{140}\) LA. REV. STAT. ANN. § 33:4729 (2009) (municipalities); LA. REV. STAT. ANN. § 33:4780.49 (parishes).

\(^{141}\) The Louisiana statute relating to building codes that political subdivisions adopt is more clear. That statute provides that “[i]f the provisions of a building code adopted by a political subdivision are more stringent than [] state laws . . . the more restrictive standards shall govern within the area under the jurisdiction of the political subdivision.” LA. REV. STAT. ANN. § 33:4773.

\(^{142}\) Id. § 33:4780.49.
This “however” language plainly subordinates more restrictive local regulations to activities authorized under state-issued permits, including oil and gas drilling permits and forced pooling orders. As such, municipalities seemingly have greater authority to adopt more restrictive zoning regulations than do parishes.

B. Louisiana Statutes Preempt Land Use Authority

Despite the constitutional and statutory protections afforded to zoning, Louisiana Revised Statutes section 30:28(F) strips municipalities of the power to secure zones and protect the character of neighborhoods in the oil and gas context. That statute provides:

The issuance of the [drilling] permit by the commissioner of conservation shall be sufficient authorization to the holder of the permit to enter upon the property covered by the permit and to drill in search of minerals thereon. No other agency or political subdivision of the state shall have the authority, and they are hereby expressly forbidden, to prohibit or in any way interfere with the drilling of a well or test well in search of minerals by the holder of such a permit.\(^{143}\)

In 2005, the United States Fifth Circuit Court of Appeals had occasion to interpret this broad grant of power to the state in Energy Management Corp. v. City of Shreveport (“EMC 1”),\(^{144}\) a case that the LOC extensively relied upon in its briefs in the St. Tammany case.\(^{145}\) In EMC 1, the City of Shreveport passed a zoning ordinance that prohibited drilling within 1,000 feet of a lake.\(^{146}\) The plaintiff, Energy Management Corp., acquired leases to drill in and around the lake and sued the City after the City made clear that it would not issue a variance.\(^{147}\)

For some inexplicable reason, the EMC 1 court stated that no express statutory provision mandated preemption,\(^{148}\) even though municipalities and parishes are “expressly forbidden” under Louisiana Revised Statutes section 30:28(F) from prohibiting or interfering with the drilling of an oil and gas

\(^{143}\) LA. REV. STAT. ANN. § 30:28(F) (Supp. 2015).
\(^{144}\) 397 F.3d 297 (5th Cir. 2005).
\(^{145}\) LOC Response Memorandum, supra note 38, at 8–9.
\(^{146}\) 397 F.3d at 299.
\(^{147}\) Id. at 300.
\(^{148}\) Id. at 303 (“In this case there is no express provision mandating pre-emption.”).
well. In apparent reliance on a field preemption analysis, however, the court remanded the case for entry of a declaratory judgment that the local ordinance “is preempted by state law and is invalid to the extent that it purports to prohibit the drilling of oil and gas wells in an area within the state of Louisiana . . . .”

On remand, the district court entered the judgment exactly as written by the Fifth Circuit EMC 1 court, but the plaintiff noted a significant problem with the court’s language. Although the EMC 1 court struck down municipal restrictions regarding where Energy Management Corp. could drill wells, the court failed to address other costly technical or operational conditions or regulations that local governments might impose that “interfere” with the drilling of a well. On appeal in Energy Management Corp. v. City of Shreveport (“EMC 2”), the Fifth Circuit broadened its holding to preempt the local law in its entirety, both as to the location of wells and as to other “activities,” including “every phase” of operations.

The Louisiana Supreme Court, however, has never addressed Louisiana Revised Statutes section 30:28(F) in the context of a fracking ban or a reasonable traditional zoning ordinance that divides land uses into districts. The EMC 1 court quotes the Louisiana Supreme Court that “the authority and responsibility for conserving Louisiana’s oil and gas resources are virtually entirely vested in the [LOC].” This statement in isolation, however, by no means vests authority in the LOC to control reasonable local land use decisions.

149. Field preemption occurs when state law occupies the entire field of regulation, such that there is no room for local regulation. Once a court finds field preemption, the key question becomes how broadly or narrowly the legislature intended to define the “field,” a question left for the judiciary. See Ritchie, supra note 83, at 11-70.

150. EMC 1, 397 F.3d at 306 (emphasis added).


152. See 467 F.3d at 475–76.

153. 467 F.3d 471.

154. Id. at 478 (citing 397 F.3d at 303).

155. EMC 1, 397 F.3d at 303 (quoting Hunt Oil Co. v. Batchelor, 644 So. 2d 191, 196–97 (La. 1994)). The authority to conserve oil and gas does not necessarily extend to land use. See supra Part II.C. Batchelor actually involved a question of the correlative rights of under-produced owners in a gas balancing situation, which clearly is within the statutory authority of the LOC. See LA. REV. STAT. ANN. §§ 31:9 to :11 (2000).
Citing a number of cases, the EMC 1 court also states that “[i]n every case which has been brought to our attention involving a challenge to the authority of the LOC, its far-reaching authority has been upheld.”\textsuperscript{156} The court, however, fails to mention \textit{City of Baton Rouge v. Hebert},\textsuperscript{157} where the Louisiana First Circuit Court of Appeal determined that adding storage tanks to a drill site impermissibly extended to a non-conforming use under a local zoning ordinance.\textsuperscript{158} With little analysis, the \textit{Hebert} court acknowledged that “aspects” of petroleum production were preempted, but the court did “not believe the state’s preemption in this field extends to abridging a municipality’s control over land use within its corporate boundary . . . .”\textsuperscript{159} This situation is just the type of distinction between process and land use that Professor Kenneth Murchison described as the appropriate dividing line for state and local regulation.\textsuperscript{160}

Further, the cases that the EMC 1 court cited are relevant, but they are at least somewhat distinguishable. In one cited case, \textit{Rollins Environmental Services of Louisiana, Inc. v. Iberville Parish Police Jury},\textsuperscript{161} the police jury of Iberville Parish amended its local ordinance to prohibit the injection and storage of hazardous waste.\textsuperscript{162} This practice prevented the plaintiff from operating its industrial residue disposal well that the LOC had already permitted. The court reviewed not only state law but also federal laws such as the Clean Water Act\textsuperscript{163} and the Recourse Conservation and Recovery Act.\textsuperscript{164} The court held that, when considered together, federal and state laws preempted the entire field of hazardous waste regulation.\textsuperscript{165}

In \textit{Palermo Land Co. v. Planning Commission of Calcasieu Parish},\textsuperscript{166} however, the Louisiana Supreme Court distinguished \textit{Rollins}.\textsuperscript{167} The court explained that \textit{Rollins} concerned hazardous wastes and \textit{Palermo} concerned non-hazardous wastes.\textsuperscript{168} The \textit{Palermo} court further explained that even with respect to hazardous wastes, the legislature had amended the statute to

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156. EMC 1, 397 F.3d at 303. \\
158. \textit{Id.} at 146. \\
159. \textit{Id.} \\
160. \textit{See infra} note 249 and accompanying text. Admittedly, however, \textit{Hebert} did not involve the drilling of a well. \\
161. 371 So. 2d 1127 (La. 1979). \\
162. \textit{Id.} at 1129. \\
165. \textit{Rollins}, 371 So. 2d at 1134. \\
166. 561 So. 2d 482 (La. 1990). \\
167. \textit{Id.} at 497 n.15. \\
168. \textit{Id.} \\
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allow the regulation by both parishes and municipalities of “the initial siting of facilities pursuant to general land use planning, zoning, or solid waste disposal ordinances.” Accordingly, Palermo at least raises the question as to whether the Louisiana Supreme Court’s preemption stance in Rollins has softened.

Despite these subtle arguments, Louisiana Revised Statutes section 30:28(F) is nonetheless clear and extends broad power to the state government. As the language provides, a local government may not prohibit or interfere with the drilling of a well that the LOC has authorized. When the LOC issues a drilling permit, it authorizes drilling at a particular location. A local government that prohibits drilling in that location, whether through reasonable or unreasonable regulation, violates the express statutory mandate in Louisiana Revised Statutes section 30:28(F). Thus, the preemption statute prohibits not only zoning oil and gas into districts, as St. Tammany attempted to do, but it also prohibits local governments from imposing setbacks. Given the breadth of the express preemption language, the result in EMC 1 comports with the statutory language.

In contrast, the EMC 2 holding—that every phase of oil and gas operations is preempted—does not entirely accord with the preemption language. Consider a fracking ban, which certainly interferes with the process of extracting minerals, particularly from shale. An argument can be made that a fracking ban does not interfere with the drilling of a well if fracking is viewed as a separate well stimulation process. Such an argument, however, would likely fail in a Louisiana court. If the Louisiana Legislature saw fit to preempt the regulation of the location of wells, certainly the courts would preserve traditional state authority over the process by which wells are drilled and completed as they have in other states, including those without an express preemption statute.

IV. LOUISIANA’S HOME RULE AUTHORITY FAILS TO SUPPORT LOCAL REGULATION OF THE LOCATION OF WELLS

Home rule traditions and the attendant philosophy of local autonomy provide a policy basis for a local voice in decisions regarding oil and gas

169. Id. (citing LA. REV. STAT. ANN. § 33:1236(31)(a)) (internal quotations omitted).


171. The EMC 1 court concluded that “the process of regulating when and where an oil and gas well may be drilled within the state is entirely vested in the LOC.” EMC 1, 397 F.3d 297, 304 (5th Cir. 2005) (emphasis added).

172. See supra note 143 and accompanying text.

173. See supra Part II.C.
operations. In the New York case *Matter of Wallach*, home rule and the importance of land use powers served as the foundational justification for the court’s distinction between process and land use, which led to a determination that preemption of “regulation” did not preempt zoning out oil and gas operations. 174 Similarly, based on the opinion of the Louisiana Supreme Court in *City of New Orleans v. Board of Commissioners of the Orleans Levee District*, 175 pre-1974 home rule entities could argue that their home rule powers included the right to regulate oil and gas operations through their zoning and land use powers free of the preemption statute—Louisiana Revised Statutes section 30:28(F). The Louisiana Supreme Court, however, has retreated over time from its decision in *City of New Orleans*. 176 In light of judicial decisions since *City of New Orleans*, the express prohibitions in Louisiana’s preemption statute would likely defeat any home rule entities’ legal claim of right to regulate the location of wells in Louisiana.

A. The Road to Home Rule in Louisiana

Before Louisiana adopted a new constitution in 1974, Louisiana courts routinely held that “[p]arishes and municipal corporations of [the] state are vested with no powers, and possess no authority, except such as are conferred upon, or delegated to, them by the Constitution and statutes.” 177 Political subdivisions were mere “creatures of the state, established by the legislature for the purpose of administering local affairs of government.” 178 The lack of significant local authority was partly a product of the 1921 Constitution and partly the result of court marginalization of any authority that the Louisiana Legislature granted. The 1921 Constitution was a heavily detailed document that read more like a set of statutes. 179 Due to its excessive detail, that constitution required frequent amendments to adapt to changing times, changing circumstances, and political whims. After being

175. 640 So. 2d 237, 251 (La. 1994).
179. *See LA. CONST. (1921).*
amended 536 times, virtually no one but a few scholars felt the 1921 Constitution was understandable.180

The original 1921 Constitution contained no home rule provisions, but home rule amendments were added for the cities of Shreveport and New Orleans in 1948 and 1950, respectively, and for the parishes of East Baton Rouge and Jefferson in 1946 and 1956, respectively.181 Two general home rule provisions were added in 1960 and 1968.182 Despite these home rule amendments, “in operation they did not result in an escape from Dillon’s Rule and local officials continued to trek to the state capital in pursuit of specific statutory authorizations.”183

In response to Dillon’s Rule, home rule was developed. Under its original form, referred to as imperio or traditional home rule,184 home rule local governments were granted the authority to govern their local affairs, but they had no authority in state-wide matters.185 The judiciary continued to define the state–local dichotomy in a case-by-case ad hoc manner.186

Out of concern for judicial decisions that routinely marginalized local governance, the American Municipal Association introduced a new form of home rule—legislative home rule—in the 1950s, which the National Municipal League revised in 1968.187 Under this form of home rule, the local government may exercise the entire police power of the state without

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182. Id.
183. Richard L. Engstrom & Patrick F. O’Connor, State Centralization Versus Home Rule: A Note on Ambition Theory’s Powers Proposition, 30 W. Pol. Q. 288, 290 (1977). Dillon’s Rule is a descriptive legal principle that limits the power of local government to those powers that are expressly granted, necessarily or fairly implied or incident to the power expressly granted, or essential to the indispensable purposes of the local government. JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (1872).
184. See St. Louis v. West Union Tel. Co., 149 U.S. 465, 468 (1893) (describing imperio home rule in St. Louis under a charter appointing its powers as an “imperium in imperio,” or a state within a state).
185. See, e.g., COLO. CONST. art. XX, § 6; CAL. CONST. art. XI, § 5(a).
concern about the state–local dichotomy, but the legislature may deny the local government most substantive powers via statute.\textsuperscript{188}

Led by political conservatives that favored less centralized government and by those with more locally directed political commitments,\textsuperscript{189} the delegates of the 1974 Louisiana Constitution sought to strengthen home rule in Louisiana to “end a period of de facto state legislative supremacy over local government.”\textsuperscript{190} The new 1974 Constitution created two separate classes of legislative home rule local governments. A local government that had already adopted a home rule charter when the new constitution became effective retained its already-possessed powers to the extent that the powers were consistent with the new constitution. If permitted by its charter, this local government would also possess the powers of other local governments.\textsuperscript{191}

Local governments that adopted a home rule charter after the ratification of the 1974 Constitution were allowed to include in their charter any powers “necessary, requisite, or proper for the management of [their] affairs, not denied by general law or inconsistent with this constitution.”\textsuperscript{192} Most home rule local governments in Louisiana, including St. Tammany Parish,\textsuperscript{193}

\begin{itemize}
  \item[188.] See Vanlandingham, supra note 186, at 3.
  \item[189.] See Engstrom & O’Connor, supra note 183, at 293–94.
  \item[190.] Home Rule Handbook, supra note 181, at 173.
  \item[191.] La. Const. art. VI, § 4.
  \item[192.] Id. § 5. Non-home rule local governments may exercise the same general powers as post-1974 home rule local governments not denied by general laws or inconsistent with the Constitution, except that a majority of the voting electorate must approve general powers because they have not already incorporated in the home rule charter. See id. § 7. As described in R. Gordon Kean, Jr., Local Government and Home Rule, 21 Loy. L. Rev. 63 (1975), the four categories of local governments under the scheme of Article VI, are: (1) non-home rule local governments operating under state charters, existing general law, or the Lawrason Act, Louisiana Revised Statutes sections 33:321 to :481; (2) non-home rule local governments exercising home rule powers by a vote of electors; (3) local governments that adopt a new home rule charter after the 1974 Constitution; and (4) home rule governments that continue to exist under charters adopted before the 1974 Constitution. Id. at 67–68. The Lawrason Act provides that a mayor-board of alderman governs all municipalities, other than those that a special legislative charter or a home rule charter governs. La. Rev. Stat. Ann. § 33:321 (2013).
  \item[193.] St. Tammany voters approved the parish’s first charter in 1979, but that charter was repealed in 1983, reverting the parish to a regular police jury system. Bureau of Governmental Research, The St. Tammany Parish Home Rule Charter: An Assessment 4 (May 2002). A new charter was adopted in 1998. Id. at 5.
\end{itemize}
adopted their home rule charter after 1974, and thus fall under the National Municipal League legislative home rule model.

B. Judicial Invigoration of Louisiana Home Rule

In what many commentators considered a landmark decision, Justice James L. Dennis, writing for the City of New Orleans majority, found the distinction between pre-1974 and post-1974 home rule governments significant. According to Justice Dennis, not only were pre-1974 home rule governments not limited by the requirement that ordinances be “necessary, requisite or proper for the management of [their] affairs” in contrast to post-1974 home rule government, but they also were not necessarily restrained by inconsistent state “general laws.” To the extent earlier cases found differently, Justice Dennis considered those findings nonessential to their holdings and mere dicta.

The rights and powers of these pre-1974 home rule local governments are vast—but not absolute—under article VI, section 9(b) of the 1974 Constitution. That provision provides that “[n]otwithstanding any provision of this Article, the police power of the state shall never be abridged.”

195. Id. at 244 (internal quotations omitted).
196. Id. at 247. A state law is a general law, and not a local or special law, if its operation extends to the whole state. Morial v. Smith & Wesson Corp., 785 So. 2d 1, 17 (La. 2001). In contrast, a local law is a law that operates only in a particular area or locality without the possibility of extending to other localities or areas, and a special law is a law that “operates upon and affects only a fraction of the persons or a portion of the property encompassed by a classification, granting privileges to some while denying them to others.” Id. at 18.
197. City of New Orleans, 640 So. 2d at 257. In so holding, the court essentially overrules one of its earlier decisions. Id. at 247 (“We reject the notion suggested by the lead opinion in City of New Orleans v. State, 426 So. 2d 1318, 1320–21 (La. 1983), that Article VI, § 4 of the 1974 Louisiana Constitution adopts by implied reference a 1921 constitutional provision that requires the [local government’s] exercise of its home rule power to yield to any inconsistent general state law.”). The court characterizes City of New Orleans as “simply wrong and has been subject to cogent judicial and scholarly criticism.” 640 So. 2d at 255.
198. LA. CONST. art. VI, § 9(B). The principle that the police power of the state shall not be abridged does not need to be stated in the constitution. “[T]he ‘police power’ is the legislative authority enjoyed by the states, i.e. not constitutionally delegated to the federal government or constitutionally appropriated by the federal Congress, as the residuary sovereigns in our federal system.” City of Baton Rouge v. Ross, 654 So. 2d 1311, 1319 n.10 (La. 1995) (emphasis in original). “This corresponds to the ‘general principle of judicial interpretation that, unlike the
Although Justice Dennis viewed this language as ambiguous, he concluded that courts must construe the broad home rule powers granted to pre-1974 home rule local governments in harmony with state laws, which is a difficult task when otherwise valid local ordinances conflict directly with state law.

Pre-1974 home rule local governments have a power of immunity “to act without fear of the supervisory authority of the state government.” For these home rule entities, the court must first determine whether the local law at issue conflicts with state law. If the local law conflicts, the state law will preempt the local law only if the state law is necessary to protect a vital interest of the state as a whole. For a state statute to be necessary, the proponent must show that the protection of the vital state interest “cannot be achieved through alternate means significantly less detrimental to home rule powers and rights.”

One might argue that, despite the admonition of Justice Dennis, a pre-1974 home rule government still has no power to regulate oil and gas operations because it had no such powers when the 1974 Constitution was adopted. Section 4 of the 1974 Constitution states that “each local governmental subdivision which has adopted such a home rule charter or plan of government shall retain the powers . . . in effect when this constitution is adopted.” The 1974 Constitution post-dated the current version of Louisiana Revised Statutes section 30:28(F), which was adopted in 1959, by 15 years. As discussed above, the Fifth Circuit held that Louisiana Revised Statutes section 30:28(F) repudiates local authority to regulate both where oil and gas wells may be located and how they might be drilled. Accordingly, pre-1974 home rule governments lacked the power to regulate oil and gas drilling when the 1974 Constitution was adopted, a deprivation that continued unaffected.

City of New Orleans, however, counsels to the contrary. According to Justice Dennis, the test is not whether a pre-1974 local home rule government had the power to regulate when the 1974 Constitution was

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federal constitution, a state’s constitution’s provisions are not grants of power but instead are limitations on the otherwise plenary power of the people of a state exercised through its legislature.” Id. (quoting Bd. of Directors of La. Recovery Dist. v. Taxpayers, 529 So. 2d 384, 387 (La 1988)).

199. City of New Orleans, 640 So. 2d at 252.
200. Id. at 242.
201. Id. at 252.
202. Id.
203. LA CONST. art. VI, § 4 (emphasis added).
205. See supra Part III.B.
adopted, because “the drafters and ratifiers intended to emancipate and continue in effect the preexisting home rule charters free of the conditions and restraints that had been placed upon them by the 1921 Constitution.”

According to Justice Dennis, only the terms of the 1974 Constitution limit the powers of preexisting home rule governments set forth in their charters, including any amendments to those charters adopted in accordance with those charters. After City of New Orleans, the 1974 Constitution allows such local governments to regulate in areas of state-wide concern so long as conflicting state laws are not “necessary” to protect the “vital” interests of the state as a whole.

Under these principles, courts, rather than the legislature, must determine when a state interest is relatively vital or relatively nonessential along a spectrum, giving liberal deference to pre-1974 home rule power. In the case of City of New Orleans itself, Justice Dennis concluded that the state’s interest in allowing the Orleans Levy District to construct, maintain, and operate a marina on state land at South Shore Harbor was not sufficient to prevent the City from enforcing violations of its zoning ordinances and the Levy District’s building codes. Based solely on City of New Orleans, a pre-1974 home rule local government might credibly argue that it has the power to regulate the location of wells despite the express preemption provision.

C. Judicial Re-marginalization of Louisiana Home Rule

Despite Justice Dennis’s persuasive rhetoric, home rule was not freed from the shackles of Dillon’s Rule as some predicted. Later precedent interpreting City of New Orleans often reverts to a standard more tolerant of conflicting state legislation, finding preemption based on state interests that

206. City of New Orleans, 640 So. 2d at 245.
207. Id. at 245–46.
208. The 1974 Louisiana Constitution contains other exceptions that prohibit localities from providing for the punishment of a felony, enacting ordinances governing private relationships, reducing the compensation of an elected official, and establishing or affecting courts. L.A. CONST. art. VI, §§ 9(A)(1)–(2), 12, 25. The City of New Orleans court also recognized that local ordinances may not be applied in an unreasonable, arbitrary, or discriminatory manner. 640 So. 2d at 255.
arguably are less than necessary to protect state interests that may be less than vital.\textsuperscript{211}

For example, in the post-	extit{City of New Orleans} case, \textit{Morial v. Smith & Wesson Corp.},\textsuperscript{212} the Louisiana Supreme Court sustained a state law that prohibited local governments from suing a slew of gun manufacturers for damages related to the sale of firearms.\textsuperscript{213} Rather than asking whether the state interest was “vital” or whether the state legislation was “necessary” in light of available alternatives, the court asked the rather deferential question of whether the state law represented a reasonable and valid exercise of the police power.\textsuperscript{214} The \textit{Smith & Wesson} court concluded that statewide regulation of the firearms industry “tends” towards preserving public safety and welfare.\textsuperscript{215} In his dissent, Chief Justice Calogero argued that, not only did the state law fail to even attempt to prevent an evil or preserve public health or welfare, but the law also harmed public welfare by restricting the public’s right to recover damages for injury.\textsuperscript{216}

Later, in \textit{New Orleans Campaign for a Living Wage v. City of New Orleans},\textsuperscript{217} the Louisiana Supreme Court found that a Louisiana statute that prohibited a local governmental subdivision from establishing a minimum wage preempted a minimum wage amendment to the City of New Orleans’ charter.\textsuperscript{218} The majority opinion, written by Justice Kimball, diverged widely from the principles that Justice Dennis laid down in \textit{City of New Orleans}. First, Justice Kimball stated that the Louisiana Constitution does not differentiate between pre-1974 and post-1974 home rule charters on the issue of the abridgement of the state’s police power.\textsuperscript{219} Second, Justice Kimball stated that the relevant test should ask whether the legislature’s exercise of the police power was \textit{reasonable}, giving great weight to the legislature’s determination and refusing to substitute the court’s opinion for the opinion of the legislature.\textsuperscript{220} Chief Justice Calogero, in concurrence, would have struck down the local law as violating the prohibition against

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\textsuperscript{211} See, e.g., City of Baton Rouge v. Ross, 654 So. 2d 1311, 1318–19 (La. 1995).
\textsuperscript{213} 785 So. 2d at 19.
\textsuperscript{214} \textit{Id.} at 15.
\textsuperscript{215} \textit{Id.} at 16.
\textsuperscript{216} \textit{Id.} at 21.
\textsuperscript{217} 825 So. 2d 1098 (La. 2002).
\textsuperscript{218} \textit{Id.} at 1108.
\textsuperscript{219} \textit{Id.} at 1105.
\textsuperscript{220} \textit{Id.}.
\end{flushright}
regulation of private relationships,\textsuperscript{221} and Justice Johnson, in dissent, would have allowed the local law to stand.\textsuperscript{222} Both of these two justices, however, recognized that the majority marginalized any distinction between pre-1974 and post-1974 home rule local governments.\textsuperscript{223}

The reasonableness test as used to measure the state’s power to preempt local government under the “nonabridgement” clause of the 1974 Constitution actually originated 10 years before Justice Dennis formulated the necessary and vital test in \textit{City of New Orleans}. In \textit{Francis v. Morial},\textsuperscript{224} the Louisiana Supreme Court considered a state statute that required the two cities and a parish to choose members of the Louisiana aviation board.\textsuperscript{225} The \textit{Francis} court stated that it would sustain state legislation against conflicting local law if the operation of the state law “tends in some degree to prevent an offense or evil or otherwise to preserve public health, morals, safety or welfare . . . .”\textsuperscript{226} The state law nevertheless was struck down in that case largely because that law affected the governance of the home rule city, which is a direct affront to the concept of home rule power.\textsuperscript{227}

The judiciary continues to be suspicious of state laws that abridge the governance or structure of home rule local governments.\textsuperscript{228} In the realm of zoning and police power regulation, however, Louisiana courts have afforded state laws considerable deference despite \textit{City of New Orleans}.\textsuperscript{229}

\begin{itemize}
  \item \textsuperscript{221} \textit{Id.} at 1108–09 (Calogero, J., concurring in the decree, dissenting from the majority’s reasons).
  \item \textsuperscript{222} \textit{Id.} at 1124–25 (Johnson, J., dissenting).
  \item \textsuperscript{223} \textit{See id.} at 1110 (Calogero, J., concurring in the decree but dissenting from the majority’s reasons) (“Similarly, the judiciary in deciding whether a local government’s legislation abridges the state’s police power must do more than merely rely on the legislature’s pronouncement that a matter is true ‘statewide’ concern . . . . To accept such a statement at face value would effectively place pre–1974 home rule charter cities on the same constitutional footing as post–1974 cities, insofar as the legislature’s ability to override local legislation by simply passing an inconsistent ‘general’ law.”); \textit{id.} at 1123–24 (Johnson, J., dissenting) (“The questions we must resolve are these: Does [the state statute] protect a vital or compelling state interest? If so, can that state interest be achieved through less drastic alternatives?”).
  \item \textsuperscript{224} 455 So. 2d 1168 (La. 1984).
  \item \textsuperscript{225} \textit{Id.} at 1170.
  \item \textsuperscript{226} \textit{Id.} at 1172–73 (emphasis added).
  \item \textsuperscript{227} \textit{See id.} at 1174.
  \item \textsuperscript{228} The 1974 Constitution states that a home rule charter shall provide “the structure and organization, powers, and functions” of the local government. \textit{La. Const.} art. VI, § 5(E).
  \item \textsuperscript{229} \textit{See}, e.g., \textit{City of New Orleans} v. \textit{Bd. of Dirs. of the La. State Museum}, 739 So. 2d 748 (La. 1999) (holding that Vieux Carre Commission of New Orleans
The state law could favor a particular industry to the alleged detriment of public welfare and safety, as in the case of Smith & Wesson, or the state law could simply conflict with local laws.

In a few cases since City of New Orleans, however, Louisiana courts have protected local power in the face of potentially conflicting state statutes.230 For example, in St. Charles Gaming Co., Inc. v. Riverboat Gaming Commission,231 decided a year after City of New Orleans, the Louisiana Supreme Court held that a zoning ordinance that restricted riverboat gaming activity was not invalid on its face.232 The State Riverboat Gaming Commission issued a permit to the plaintiff to conduct gambling operations at a specific site on the batture233 and sued the parish council to enjoin the parish from enforcing its zoning ordinance.234 In effect, the court recognized the distinction between process and land use. It distinguished between gambling, which is regulated by the legislature, and zoning, which is a valid activity of the local government that was not denied by the state legislature.235

As noted above, the Louisiana Constitution states that it protects local governments from state legislative action except by general state laws that deny local authority, rather than merely conflict with local law.236 In the context of oil and gas production, Louisiana Revised Statutes section 30:28(F) denies local authority with respect to permitted oil and gas wells.237

acted unreasonably in requiring state to comply with permit procedures); Merritt McDonald Constr., Inc. v. Parish of E. Baton Rouge, 742 So. 2d 564 (La. Ct. App. 1999) (striking down contractor licensure requirements of home rule parish as conflicting with state licensure requirements).

230. See, e.g., City of New Orleans v. Bd. of Dirs. of the La. State Museum, 709 So. 2d 1008 (La. Ct. App. 1998), vacated by 739 So. 2d 748. The Court of Appeal required the state to comply with the city’s permitting procedure, but the Supreme Court reversed, finding that the city abridged the state’s police power. 739 So. 2d at 758.

231. 648 So. 2d 1310 (La. 1995).

232. Id. at 1312.

233. A “batture” is “[s]oil, stone, or other material that builds under water and may or may not break the surface.” BLACK’S LAW DICTIONARY 173 (9th ed. 2009).

234. St. Charles Gaming, 648 So. 2d at 1312.

235. Id. at 1317.


237. “No other agency or political subdivision of the state shall have the authority, and they are hereby expressly forbidden, to prohibit or in any way interfere with the drilling of a well or test well in search of minerals by the holder of such a permit.” LA. REV. STAT. ANN. § 30:28(F) (2007).
Louisiana Revised Statutes section 33:4780.49 also denies the local authority of parishes, but not municipalities, over activities authorized under state or federal permits. Local governments might argue, based on the distinction between process and land use, that the purpose of the preemption statute relates only to the technical operations of oil and gas wells and that zoning ordinances do not implicate those operations. To succeed based on such an argument would require a strong presumption in favor of local authority. However, such a presumption appears to have eroded somewhat since City of New Orleans. The Francis standard asks little more than whether a conflicting state law is a general law. Although this is the test applicable to most legislative home rule local governments, it hardly sets Louisiana apart as a home rule innovator.

V. PROCESS AND LAND USE OVERLAP IN THE OIL AND GAS CONTEXT

The ideal level of local autonomy over the location of oil and gas wells has been the subject of scholarly interest. For example, in a recent article, Professor David Spence cogently argued that allowing local governments to veto fracking or drilling may result in more optimal utility and reach the most efficient outcome, but only “if local governments can capture more of the benefits of production” in the form of impact or other fees or additional taxes. Although costs and benefits of production usually are shared state-wide, thus favoring state-level preemption, Professor Spence argues that to maximize collective utility, one should take into account not just the preferences of state residents in the aggregate, but also the intensity of preferences, which may be stronger at the local level.

In response to Professor Spence, Professor Fershee makes perhaps the most important point in the debate: that states do retain the ability to decide whether local governments may ban fracking or drilling by preemption and that courts should and usually do respect those policy choices. Even when a state legislature acts to preempt local government actions, however, the legislature must be very clear. At least in the context of fracking, courts recently have tended to protect local power in the absence of legislative

238. “[N]o [parish] shall . . . restrict, conflict with, interfere with, or supersede activities operating in accordance with authorized state or federal permits, laws, or regulations.” LA. REV. STAT. ANN. § 33:4780.49 (2009).
240. Id. at 412.
clarity, particularly in their recognition of the distinction between process and land use. 242

There are a number of arguments, however, why the state, rather than the local government, should be the ultimate decision maker as to when and where drilling should occur. 243 For example, local governments may be more subject to interest group pressure than state governments, which must take into account a broader range of interests. Local governments may also fail to account for the interests of underrepresented mineral owners. This problem arises in part because surface owners, renters, and other non-mineral owning residents—the large majority of voters to whom local politicians must be responsive—realize very little of the economic benefits of production in their neighborhood. 244 Local bans create free-rider problems, 245 particularly in states where oil and gas operations generate the majority of revenues and other economic benefits that are distributed more evenly throughout the state. In contrast, local governments bear the vast majority of externality costs 246 from truck traffic, noise, boom and bust cycles, etc. 247 These governments may benefit economically from local employment and local taxes, but a large portion of the economic benefits generated in a local government jurisdiction that allows oil and gas production often flows to residents of other sub-state entities. 248

Perhaps most persuasive, however, is that process and land use overlap in the oil and gas context, meaning that where oil and gas is produced also implicates how and whether oil and gas will be produced and whether it will be fairly allocated.

Scholars and courts generally recognize the distinction between land use as a local interest and process as a state interest. For example, Louisiana State University Law Professor Kenneth Murchison has advised against preemption where the purpose of state regulation is to govern processes and practices, rather than the type of comprehensive planning that is the subject

242. See Ritchie, supra note 83; see generally Kramer, supra note 6.


244. Id. at 297–98.

245. Free-rider problems arise when market participants enjoy the benefits associated with a public good without having to pay their fair share for the good. See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 109 (1988).

246. An externality may be described as a cost or benefit that is not internalized by the applicable actor, in this case the oil and gas industry. NICHOLAS A. ASHFORD & CHARLES C. CALDART, ENVIRONMENTAL LAW, POLICY, AND ECONOMICS: RECLAIMING THE ENVIRONMENTAL AGENDA 132 (2008).


248. Id. at 285–87.
of sound zoning practices. In the Palermo case, the local government down-zoned the land of the defendants—who intended to sell their parcels for a solid waste landfill—from heavy industrial to light industrial, which prohibited the intended use for the land and precluded its sale. The defendants pointed to state environmental regulation, but the court found no provisions that expressly preempted the local zoning regulation. In fact, Louisiana Department of Environmental Quality (“LDEQ”) regulations required that the proposed use could not violate local land use requirements as a precondition to obtaining a solid waste disposal permit. The Palermo court then discussed whether the Louisiana statutory scheme impliedly preempted the local regulation, finding that the focus of the Office of Solid and Hazardous Waste was to regulate “solid waste disposal practices,” not zoning. In other words, the practice of solid waste disposal was a process appropriately regulated by the state, not land use.

The dividing line under the law, however, is not so precise where oil and gas wells are concerned. In the implied preemption context, it is often stated that a local law is preempted when the state law allows something the local law prohibits, and vice versa. The language of this test, however, provides only a theoretical degree of certainty. A drilling permit is an authorization to drill in a particular location, and a local zoning ordinance may prohibit drilling in that very same location. Jurisdictions without an express preemption provision—and at least one jurisdiction with an express preemption provision—allow this direct conflict under the rationale that the purpose of local land use is very different from the purpose of state conservation statutes.

Courts routinely distinguish between the purpose of state conservation statutes and the purpose of local land use ordinances. Land use concerns the preservation of the character of neighborhoods and furthers the comprehensive plans of the local government. By contrast, state conservation statutes are focused primarily on the prevention of waste of

251. Id. at 498 (citing LA. ADMIN. CODE tit. 33, pt. 6, § 1107(B)(1)).
252. 561 So. 2d at 498 (quoting LA. REV. STAT. ANN. § 30:2152 (2000)).
254. See supra note 85 and accompanying text.
255. See supra Part III.A.
oil and gas and the protection of correlative rights. Unfortunately, however, these purposes overlap in the oil and gas context in a way that justifies a degree of state preemptive power over local restrictions on the location of wells.

“Waste” of oil and gas is defined to include physical waste and economic waste. Physical waste may result from inefficient use of reservoir energy or excessive production rates. Economic waste may result from drilling more wells than are required or when oil or gas is sold at too low a price.256 By contrast, “correlative rights” is a term that describes acceptable standards of conduct for operations in a common source of supply, recognizing that actions of one producer have an effect on the rights of others.257 In Louisiana, correlative rights of a mineral owner include the opportunity to produce a fair share of the common reservoir, and the right to utilize natural reservoir energy.258 Correlative rights also prohibit a person operating in a common reservoir from intentionally or negligently depriving another owner in the common reservoir of his rights or negligently causing him harm.259

The conservation agency may protect these correlative rights using any number of tools, including the allocation of allowable production in a common pool,260 and the establishment of drilling units in a manner that allows a producer to produce no more than his just and equitable share of the pool.261 Although the primary duty of the conservation agency is to prevent waste to promote the full and efficient development of the state’s mineral resources,262 the agency also has the power and duty to protect

256. PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS, MANUAL OF OIL AND GAS TERMS 1133 (13th ed. 2012). Some states, including Louisiana, define waste only by reference to physical waste. See LA. REV. STAT. ANN. § 30:3 (2007) (“‘Waste’, in addition to its ordinary meanings, means ‘physical waste’ as that term is generally understood in the oil and gas industry.”).


259. LA. REV. STAT. ANN. § 31:10.

260. See LA. REV. STAT. ANN. § 30:11.

261. See LA. REV. STAT. ANN. § 30:9(A). The conservation agency’s power to establish drilling units to protect the source of the supply for the common owners is a constitutional exercise of the state’s police powers. See Ohio Oil Co. v. Indiana, 177 U.S. 190, 209–11 (1899); Hunter Co. v. McHugh, 11 So. 2d 495, 506 (La. 1942).

262. See LA. REV. STAT. ANN. §§ 30:2 to :4; Exxon Corp. v. Thompson, 564 So. 2d 387, 394 (La. Ct. App. 1990). The duty to protect correlative rights is addressed differently in different state conservation statutes. For example, in
correlative rights, and more generally, to make any reasonable rule, regulation, or order necessary to administer and enforce the conservation law.  

In Matter of Wallach, the New York Court of Appeals in part based its decision to allow local oil and gas bans on the distinction between the purposes under state conservation law of waste prevention and correlative rights protection and the local purposes of zoning and land use. The court states that “[t]he [oil and gas law’s] overriding concern with preventing waste is limited to inefficient or improper drilling activities that result in the unnecessary waste of natural resources. Nothing in the statute points to the conclusion that a municipality’s decision not to permit drilling equates to waste.” Thus, according to the New York Court of Appeals, oil and gas that is still in the ground is not wasted, at least under the statutory meaning of the conservation laws. With little elaboration, the court similarly concluded that correlative rights are not implicated by the inability of an owner within a jurisdiction to drill at all. Drilling bans, however, cause waste and implicate correlative rights, particularly because of the extraterritorial effects.

As the Colorado Supreme Court observed in Voss v. Lundvall Brothers, Inc., a municipal ban may increase the cost of drilling when the pool of oil or gas may be accessed only from outside the jurisdiction, which results in economic waste. A ban may also result in physical waste. Drilling permits are issued by the state at locations intended to maximize production. If oil and gas is only produced outside the jurisdiction that bans production, it may be produced in an inefficient pattern or significant oil and gas might be left in the ground. The Voss court recognized that a ban also prevents owners inside the jurisdiction of the local government from producing their equitable share of oil and gas from the pool. When a pool is located both inside and outside the particular local government that bans production, the

Colorado, the definition of “waste” includes abuse of correlative rights. See COLO. REV. STAT. § 34-60-103(13)(c) (2006). In New York, the purpose of the conservation law expressly includes both the prevention of waste and the full protection of correlative rights. See N.Y. ENVTL. CONSERV. LAW § 23-0301 (McKinney 2007).

265. Id. at 1196.
266. Id. at 1200 n.5.
268. Id. at 1067.
269. Id. at 1068.
owner located outside the jurisdiction may drain the entire pool under the rule of capture.270

The applicable remedy under the rule of capture is for the owner to drill his or her own well to offset the drainage from the property.271 That remedy, however, is unavailable to the owner located inside the jurisdiction of the local government where drilling is banned, frustrating the rule that is the foundation of oil and gas law.272 The owner within the jurisdiction is thus denied the opportunity to produce its fair and equitable share or any share at all. In other words, the owner is denied its correlative rights in direct contravention of conservation statutes.273

Relying on Voss, other Colorado courts have reached the same conclusion. In the summer of 2014, the Boulder District Court274 and the Larimer County District Court275 each recognized that a municipal ban on fracking causes waste and impairs correlative rights. The United States District Court for the District of New Mexico, in striking down the Mora County, New Mexico, oil and gas production and storage ban, also found

270. See Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 13 (Tex. 2008) ("[T]he rule [of capture] gives a mineral rights owner title to the oil and gas produced from a lawful well bottomed on the property, even if the oil and gas flowed to the well from beneath another owner’s tract.").
271. Id. at 14.
272. See id. at 14 n.41 ("[T]he owner of the adjoining tract from which the oil is migrating can protect himself by drilling offset wells. This equal right to drill has always supported the constitutionality of the rule of capture. Take it away and the reason for the rule fails, leaving a result not only unjust but one inconsistent with the fundamental concept of ownership of oil and gas in place as a part of the realty.” (quoting Ryan Consol. Petrol. Corp. v. Pickens, 285 S.W.2d 201, 210 (Tex. 1955) (Wilson, J., dissenting))).
273. See Ritchie, supra note 243, at 310–11.
274. See Order Granting Motion for Summary Judgment at 9, Colo. Oil & Gas Ass’n v. City of Lafayette, 2014 WL 7666285 (Colo. Dist. Ct. 2014) (No. 13CV31746) [hereinafter Lafayette Order]; Order Granting Motions for Summary Judgment at 13, Colo. Oil & Gas Ass’n v. City of Longmont, 2014 WL 3690665 (Colo. Dist. Ct. 2014) (No. 13CV63) [hereinafter Longmont Order]. Interestingly, correlative rights were impaired in Longmont because a unit was formed that included acreage inside and outside Longmont, but the oil and gas company was not allowed to frack the portion of the well inside Longmont. Under state law, owners of mineral interests were thus allocated proceeds from the production of the well based on their percentage ownership of the unit but were not actually contributing acreage to the well. Longmont Order, supra, at 13.
that such a ban frustrates the state conservation law purposes of waste prevention and correlative rights protection, as well as the overall statutory scheme regulating oil and gas.\textsuperscript{276} Interestingly, all of these courts also recognized that the state statutory scheme left room for reasonable zoning and land use restrictions.

Arguably, any zoning or other restrictions on where wells might be located may impair correlative rights or result in waste. Even a traditional zoning pattern that separates uses into districts may prohibit drilling at the most efficient and effective location for production or deny one or more owners their just and equitable share of production. Louisiana Revised Statutes section 30:28(F) and the \textit{EMC 1} court’s interpretation of that statute address that reality.

\textbf{VI. COMPROMISE AND PARTICIPATION AS ALTERNATIVES TO LOCAL CONTROL}

As argued above, policy should vest the state with the ultimate decision-making authority as to the where and how wells are drilled and completed. Local governments and their citizenry, however, should have their legitimate concerns heard and considered, even in circumstances where all such concerns cannot be addressed to their satisfaction. Industry itself may give voice to at least some local concerns through direct negotiation and compromise or more passively by not legally challenging reasonable local regulations. At the state level, local citizens are given a voice when the LOC considers their concerns in balancing environmental costs and benefits along with economic, social, and other factors in making permitting decisions. Although the state might be unresponsive to such environmental considerations in the absence of a mandate, the Louisiana Constitution arguably provides such a mandate. This Part discusses these opportunities for a local voice in the absence of local control.

\textit{A. Cooperative Governance or Compromise}

Some commentators have called for cooperation between local governments and industry or between state and local governments in the siting and permitting of wells.\textsuperscript{277} Cooperation implies working together


\textsuperscript{277} \textit{See} John R. Nolan & Steven E. Gavin, \textit{Hydrofracking: State Preemption, Local Power, and Cooperative Governance}, 63 \textit{Case W. Res. L. Rev.} 995, 1036–39 (2013). Professor Nolan and his former student argue that state agencies could assist communities by providing technical assistance. They also describe a system
towards an end, which will usually prove difficult between oil and gas companies that want to drill at efficient locations and communities that want to ban oil and gas drilling entirely. Cooperation in such circumstances might be better termed “mutually beneficial compromise.”

To achieve compromise, both parties must feel at least some pressure to negotiate. Compromise may be more difficult in Louisiana than in other oil- and-gas-producing states because of the preeminent authority of the LOC to regulate both process and location under EMC 1 and EMC 2. Even so, at least some local regulation may co-exist with state regulation, even in a state such as Louisiana with a strong express preemption provision. One can expect oil and gas companies to voluntarily comply with reasonable restrictions to avoid jeopardizing their social license to operate in the community. In this respect, cooperation in Louisiana by the state and industry with local governments to craft reasonable local regulation is not impossible.

Former Caddo Parish Attorney Charles C. Grubb explains the story of how Caddo Parish regulated oil and gas operations in the face of increased drilling in the Haynesville Shale. After considering Louisiana’s preemption statute, Caddo Parish decided to take an expansive view of its regulatory authority while avoiding regulations that proscribe well locations or that regulate the process of drilling, stimulating, or completing a well—referred to as “down-hole” regulation. Instead, Caddo Parish regulates matters such as site access, dust, vibration, lighting, exhaust fumes, signage, use of public water supplies, discharges, aesthetics, operating hours, noise, and road usage.

In crafting its oil and gas ordinances, Caddo Parish involved industry in discussions. In the view of Caddo Parish, industry would not risk confrontation with communities to challenge reasonable regulations that the...

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278. See BLACK’S LAW DICTIONARY 384 (9th ed. 2009).
281. Id. at 215–17.
282. See, e.g., CADDI PARISH, LA., POLICE JURY CODE OF ORDINANCES §§ 34-1 to 34-55 (2009) (oil, gas, and hydrocarbon wells); id. §§ 26-155 to 26-162 (commercial vehicle enforcement); id. §§ 32-160 to 32-166 (noise).
public supports. Grubb also reported that the LDNR and the Commissioner of Conservation worked cooperatively with the Parish. Due to these efforts, Grubb reports that the citizens of Caddo Parish have enjoyed the economic benefits attendant with Haynesville Shale production without significant harm to the environment.

Bossier Parish, the City of Bossier, DeSoto Parish, the City of Shreveport, and probably many other local governments in Louisiana all regulate certain aspects of oil and gas operations either directly or indirectly through local ordinances. One can expect the trend of locally regulating oil and gas operations in the Haynesville Shale, which began in 2009, to spread to the Tuscaloosa Marine Shale area as that area is further developed.

Further, the state should be willing to voluntarily appease local governments to some extent when officials believe they can avoid the political risk of local opposition while also limiting the impact on their authority. For example, in Colorado, local government frustration led to Colorado Governor John Hickenlooper’s creation of an oil and gas task force to address concerns of local governments. The task force submitted nine proposals to the Governor, two of which require legislation, and the remainder of which can be implemented by agency regulation.

284. Id. at 222.
285. Id. at 223.
286. See, e.g., BOSSIER PARISH, LA., POLICE JURY CODE OF ORDINANCES § 94-10 (2013) (commercial vehicle enforcement); id. §§ 46-34 to 46-41 (noise).
288. See, e.g., DESOTO PARISH, LA., POLICE JURY CODE OF ORDINANCES § 78-9 (2010) (requiring the repair of excess damage to roads by motor vehicles, including for the drilling of oil or gas wells).
289. See, e.g., SHREVEPORT, LA., CODE OF ORDINANCES §§ 251-1 to 25-31 (2009) (oil, gas, and other hydrocarbon well operations); id. § 25-29 (noise).
proposal limits the impact of large-scale operations on multi-well drilling pads and gives local governments the right to negotiate the location of such sites.293 Another proposal requires oil and gas companies to provide forward-looking information about their development plans to local governments to facilitate local land use planning.294 Other proposals add inspection staff, require a study of oil and gas vehicle traffic, and create a statewide information clearinghouse.295 Overall, the proposals give local governments more of a consulting role and even more of a right to participate in the planning process, but leave final permitting decisions to the state.296

B. Local Participation in the Drilling Decision: The Natural Resources Article to the Louisiana Constitution

In addition to the challenges brought against the state and Helis with respect to the proposed well in St. Tammany Parish,297 Abita Springs brought suit against the LOC, arguing that the LOC failed to adequately address article IX, section 1 of the 1974 Louisiana Constitution—the Natural Resources Article298—in its findings and decision to grant a drilling

293. KEYSSTON CENTER, COLORADO OIL AND GAS TASK FORCE FINAL REPORT 5 (2015), available at http://dnr.state.co.us/OGTASKFORCE/Pages/home.aspx [perma.cc/8FCM-6QAD].
294. Id. at 9.
295. See id. at 12, 16, 17.
296. Colorado’s willingness to work with local governments, however, has not been a panacea for environmental activists. The Governor created the task force as a political compromise to ward off amendments to the Colorado Constitution that would have overturned court preemption decisions and allowed local governments the right to ban oil and gas production. See Lynn Bartels, Let’s Make a Deal: How Colorado Came to a Fracking Compromise, D ENVER POST (Aug. 23, 2014), http://www.denverpost.com/election2014/ci_26394883/lets-make-deal-how-colorado-came-fracking-compromise [perma.cc/8ZQV-J7C3]. Environmental activists are not happy with the proposals, and have vowed to go back to the ballot initiative process if local governments are not given the right to ban oil and gas production in their communities. See Dan Boyce, Task Force Proposes Fracking Rules to Colorado Governor, N PR (Feb. 27, 2015), http://www.npr.org/2015/02/27/389454418/task-force-proposes-fracking-rules-to-colorado-governor [perma.cc/YT4G-66TW].
297. See supra Part I.
298. The Natural Resources Article states: “The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature
permit to Helis. On August 10, 2015, District Judge Timothy Kelley ruled for Abita Springs, vacating the drilling permit and remanding to the LOC to specifically address dangers associated with the existence of a fault line near the drilling site, a cost benefit analysis, and an alternative site analysis. If the recent victory of Abita Springs in the 19th Judicial District Court stands, that decision will be a significant development for local communities. The decision appears to mitigate the harsh implications for local governments of total preemption under EMC 1 and EMC 2.

In *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*, the Louisiana Supreme Court held that this Natural Resources Article imposes a duty on the legislature and on all state government agencies to protect the environment. But the environment is not considered in isolation of other important public policies. The court stated that the “insofar as possible” language created a rule of reasonableness that requires agencies to balance economic, social, and other factors along with environmental costs and benefits. To conduct this balancing, an agency must actually analyze adverse environmental impacts in advance, before granting a permit, to determine that those impacts “have been minimized or avoided as much as possible consistently with the public welfare.”

shall enact laws to implement this policy.” L.A. CONST. art. IX, § 1 (emphasis added). The public trust concept in the 1974 Louisiana Constitution was continued from the 1921 Louisiana Constitution, which provided: “The natural resources of the State shall be protected, conserved and replenished.” L.A. CONST. art. VI, § 1 (1921).


301. 452 So. 2d 1152 (La. 1984).

302. *Id.* at 1156. The Natural Resources Article does not expressly refer to government agencies but does expressly obligate the legislature. As such, the *Save Ourselves* court could have reasonably decided that the Natural Resources Article only obligates the legislature to enact affirmative environmental protection legislation, an obligation it has met by enactment *inter alia* of the Environmental Affairs Act, No. 449, 1979 La. Acts 1256, which was amended and renamed the Environmental Quality Act in 1983. Act No. 97, 1983 La. Acts 270; L.A. REV. STAT. ANN. §§ 30:2001 to :2588 (2000). Instead, however, the court held that the Natural Resources article was a self-effectuating mandate that imposes a trust duty of environmental protection on all state agencies.

303. *Save Ourselves*, 452 So. 2d at 1156–57.
The Louisiana First Circuit Court of Appeal in *Blackett v. Louisiana Department of Environmental Quality* summarized the factors—known as the “IT Factors”—that agencies bestowed with the public trust duty must specifically consider.304 The same court then refined the factors again in *In the Matter of Rubicon, Inc.*305 Under the IT Factors, findings of fact and reasons for decisions must show whether:

1) [T]he potential and real adverse environmental effects of the proposed project have been avoided to the maximum extent possible; 2) a cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the project demonstrate that the latter outweighs the former; and 3) there are alternative projects or alternative sites or mitigating measures which would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits to the extent applicable.306

*Save Ourselves* indicates that the LDEQ is “the primary public trustee of natural resources and the environment in protecting [the public] from hazardous waste pollution . . . .”307 All Louisiana appellate decisions that have considered the Natural Resources Article have involved attacks against decisions of the LDEQ, primarily in disputes involving waste disposal facilities.308 To better ensure compliance with Louisiana Supreme Court and Louisiana First Circuit holdings, in 1996 the legislature enacted Louisiana Revised Statutes section 30:2018. The statute requires an applicant for a permit from LDEQ for hazardous wastes, solid wastes, water pollutants, or air emissions to submit an environmental assessment document that addresses the IT Factors verbatim from *In re Rubicon.*309 If requested, the LDEQ must conduct a public hearing on the environmental assessment.310

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306. *Id.* at 483.
307. *Save Ourselves*, 452 So. 2d at 1157.
310. *Id.* at § 30:2018(C).
Applications for “minor” sources of air emissions, hazardous or solid wastes, or water discharges are not subject to the statute, although the statute states that “[n]othing in this Section shall relieve permit applicants or the department from the public trustee requirements” in the Natural Resources Article or Save Ourselves.311

Appellate decisions have focused on the LDEQ as the “primary protector” agency, but in its case against the LOC, Abita Springs cited several district court decisions that required the LDNR to consider the IT Factors.312 The decision of Judge Kelly, however, appears to be the first decision relating to a drilling permit that the LOC issued. The LOC chose not to make the interesting argument that the IT Factors are wholly inapplicable to decisions of the LDNR. The LOC could have argued, for example, that by enacting Louisiana Revised Statutes section 30:2018, the legislature determined that the LDEQ is the agency responsible for enforcing the Save Ourselves requirements. Further, the LOC could have contended that, by not enacting similar provisions applicable to the LDNR, the legislature inferred that LDNR permitting actions are not the type of actions that have possible environmental impacts significant enough to warrant imposition of the IT Factors.313 The LOC did argue that mineral development is different than a waste or saltwater disposal facility. Its position, however, was essentially that the LOC had no choice but to permit the well because drilling may occur only where minerals are located, and the right to explore for and produce minerals is something Louisiana “takes very seriously.”314 Thus, under the LOC’s argument, perfunctory conclusions satisfy the IT Factor analysis in the case of a drilling permit.315

The LOC took much more evidence in the Abita Springs case as to potential environmental harms than it normally takes because the parties

311. Id. at § 30:2018(E), (H). Minor sources are defined by LDEQ rules. Id. at (G).
313. The LOC did state in the order itself that the IT Factors were not applicable to drilling permits. La. Office of Conservation, Order No. 1577-1, 9 (Dec. 19, 2014) [hereinafter Drilling Permit Order].
314. Memorandum in Opposition to Appellant’s Petition for Judicial Review at 14–15, Town of Abita Springs v. Welsh, No. 637209 (La. Dist. Ct. July 17, 2015) [hereinafter LOC Opposition Memo]. The LOC also argued, inter alia, that the Natural Resources Article does not require that the LOC spell out obvious conclusions that should be inferred from the findings in the LOC’s drilling permit order. Id. at 15, 17.
315. See id. at 13 (“Conservation did not believe that the law required it to explain the obvious: Louisiana law establishing mineral rights and common sense as to where these minerals are located.”).
presented significant evidence in testimony at the hearing to consider the Helis permit and in comments, including an expert report from a consultant that the Town hired.³¹⁶ If courts hold the LOC and its permit applicants to the same standard as the LDEQ and its applicants under Save Ourselves, one may wonder whether the LOC persistently violated the Natural Resources Article in other cases that lacked much evidence of potential environmental risks. Consider that to support its position that fracking beneath the Southern Hills Aquifer in St. Tammany Parish is safe, the LOC noted that oil and gas companies had already drilled 73 oil and gas wells in St. Tammany Parish, 124 oil and gas wells into the Tuscaloosa Marine Shale, and over 27,000 hydraulically fractured wells in Louisiana.³¹⁷ Presumably, these permitted wells did not receive the same scrutiny as the Helis well.

Now that the IT Factors have been applied to a drilling permit, local governments may have a new avenue to voice their concerns in permitting actions that present complex environmental problems, but they must be prepared. They must engage counsel and experts, request a hearing, raise their issues at the hearing and in comments, and bring legal action to challenge decisions for which they disagree. And for a number of reasons, Save Ourselves and its progeny do not promise that courts will examine potential environmental impacts in all cases where a decision of the LOC may have a negative impact on the human environment.³¹⁸

First, courts do not need to assess and balance environmental impacts under the Natural Resources Article unless parties raised them on the record of the administrative proceeding. The Louisiana First Circuit has held that an agency only needs to conduct the IT Factor analysis in “contested case[s] involving complex issues.”³¹⁹ Second, even though a court may force an agency to better document its findings as to its cost-benefit analysis or its consideration of alternatives, courts may be reluctant to require the agency to conduct additional hearings or take additional evidence.³²⁰

Third, like reviews conducted by the federal government under the National Environmental Policy Act ("NEPA"),³²¹ the courts applying the

316. See Drilling Permit Order, supra note 313, at 4–8.
317. LOC Opposition Memo, supra note 314, at 16.
320. See, e.g., Oral Reasons to Vacate Helis Permit, supra note 300, at 5.
321. See Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 228 (1980) (stating NEPA requires no more than that the agency consider the environmental consequences of its decision).
Natural Resources Article appear more concerned with documentation and disclosure than with the substantive permitting decision that the agency made. Unlike NEPA, the Natural Resources Article contains a substantive standard that requires an agency to make decisions that protect the environment, at least insofar as possible. But when one factors the balancing aspect of Save Ourselves together with the discretion afforded the agency, the outcome of any decision-making process may be largely predetermined. This is not to say, however, that challenges cannot result in positive substantive environmental mitigation. Due to community outrage and the challenges by St. Tammany Parish and the Town of Abita Springs to the Helis drilling permit, Helis voluntarily proposed extensive mitigation measures for its well that the LOC incorporated into the permit. In its reexamination of the Helis permit after remand by the district court, the LOC could decide to impose additional mitigation measures to support its permitting decision and to avoid further appeals.

Fourth, the IT Factors provide little guidance to both agencies and interested persons as to the level of detail required of reviews and findings by administrative agencies. Further, the courts have given agencies mixed messages. In one case, the First Circuit said that the agency complies with its public trustee duty only by “detailing its reasoning . . . .” In an earlier case, however, the same court said that an order is not invalid if its findings and reasons are “implicit in the record” or “self-evident,” which supports the LOC position in the Abita Springs case. In this sense, the legislature should consider its obligation to “enact laws to implement” the article by developing more detailed standards to guide the agency decision-making process.

Finally, many local governments may object to the siting of wells but may be hesitant to incur the costs to participate in the permitting process until a local government or citizens’ group wins an appeal to one of the state appellate courts. The LOC argued in the Abita Springs case that the Natural Resources Article has little to no application to the LOC because of the “obvious” facts that the technology is proven and minerals must be produced where they are located. In the Abita Springs case, the LOC may choose to simply comply with Judge Kelley’s order instead of appealing, and then argue again in future cases in reliance on the jurisprudence constante

322. See, e.g., In re Rubicon, 670 So. 2d at 483 (remanding case to agency for the issuance of findings to support exemption from disposal restrictions).
323. See Drilling Permit Order, supra note 313, at 12–14.
324. In re Rubicon, 670 So. 2d at 482.
326. See supra note 18 and accompanying text.
CONCLUSION

Even strong home rule must yield to significant state interests that create real conflicts. State interests in uniformity, the prevention of waste, the protection of correlative rights, and implications to the rule of capture make limitations on local authority to regulate oil and gas operations necessary. But the spirit of the movement that led to home rule suggests that local governments should have a meaningful voice in matters that impact their local communities. A meaningful local voice not only requires a procedural right to raise concerns, but also requires the state to listen and acknowledge those concerns and to address reasonable concerns when appropriate. Certainly, the state should not be obligated to address all local concerns in a substantive manner before issuing a permit. The state would not be overly burdened, however, by transparently conveying to the public how the state addresses local concerns that it decides to address and its reasons for not addressing other concerns that have been raised, particularly when at least some local concerns may be addressed in a balanced manner that preserves the state’s interest in the production of its resources.

327. “In Louisiana, courts are not bound by the doctrine of stare decisis, but there is a recognition in this State of the doctrine of jurisprudence constante. Unlike stare decisis, this latter doctrine does not contemplate adherence to a principle of law announced and applied on a single occasion in the past.” Doerr v. Mobil Oil Corp., 774 So. 2d 119, 128 (La. 2000) (quoting Johnson v. St. Paul Mercury Ins. Co., 236 So. 2d 216, 218 (La. 1970), overruled on other grounds by Jagers v. Royal Indem. Co., 276 So. 2d 309, 312 (La. 1973)). “Under the civilian tradition, while a single decision is not binding on our courts, when a series of decisions form a ‘constant stream of uniform and homogenous rulings having the same reasoning,’ jurisprudence constante applies and operates with ‘considerable persuasive authority.’” Id. (quoting James L. Dennis, Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent, 54 LA. L. REV. 1, 15 (1993)). This doctrine of jurisprudence constante may encourage relitigation until a “constant stream” of legal decisions forecloses a particular argument. FRANK L. MARAIST, CIVIL PROCEDURE–SPECIAL PROCEEDINGS § 4.1, in 1A LOUISIANA CIVIL LAW TREATISE 50–51 (2005).