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INTRODUCTION

The often conflicting relationship between state and local regulation of the environment presents a difficult question for North Carolina as the state explores one of the energy industry’s most controversial practices: hydraulic fracturing. This question is whether and to what extent local governments should have the authority to regulate hydraulic fracturing when the state has enacted a regulatory scheme promoting its use. It is a question rife with political elements relating to the structure of American democracy, but it is one that has often been resolved legally by judges in our nation’s courtrooms.

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1. See James L. Joyce, North Carolina Oil and Gas Update, 19 TEX. WESLEYAN L. REV. 413, 413–14 (2013) (noting that North Carolina is “not traditionally” an oil and gas state, but recent research regarding the state’s shale gas deposits and recent changes in North Carolina law may “make North Carolina a viable destination for shale gas development”).
Moreover, it leaves opponents of hydraulic fracturing in an ironic position: if they continue to favor consolidated federal power over environmental policy, they also become passionate defenders of local government control.\(^2\) In an apparent effort to settle the issue, the North Carolina General Assembly acted in the summer of 2014 to preempt most options for local regulation of hydraulic fracturing.\(^3\)

This Comment contends that the General Assembly succeeded in striking the correct balance, but in a few isolated regards it may have deprived localities of reasonable authority. The larger question of whether and to what extent North Carolina (and its subdivisions, cities and counties) should allow hydraulic fracturing rightfully remains exclusively with the state government, and the state expressly preempts local attempts to restrict the practice. However, local governments may have lost some power to act in areas that have traditionally fallen within their expertise, even as applied to hydraulic fracturing; these powers, such as zoning ordinances and setback requirements, have been utilized effectively according to a balance struck in other, more gas-rich states, most notably in Pennsylvania.

Analysis proceeds in six parts: Part I provides a brief policy overview of hydraulic fracturing, focusing on its development in North Carolina; Part II examines how the question of state and local governance has played out in two resource-rich states, Pennsylvania and Colorado, exploring the legal analysis utilized to draw lessons from the results; Part III addresses the law of local governance in North Carolina, specifically the lack of home rule authority and the law of preemption;\(^4\) Part IV overviews developments in the law of oil and gas regulation in North Carolina, including the most recent steps taken by the North Carolina General Assembly to advance hydraulic fracturing; Part V analyzes how local government regulation of

\(^2\) See, e.g., Adam Garmezy, Balancing Hydraulic Fracturing's Environmental and Economic Impacts: The Need for a Comprehensive Federal Baseline and the Provision of Local Rights, 23 DUKE ENVTL. L. & POL'Y F. 405, 432-33 (2013) (presenting the traditional arguments in favor of strong federal regulation of hydraulic fracturing while preserving the ability of local governments to effectively ban hydraulic fracturing, despite state regulation and promotion).


\(^4\) North Carolina is one of only a few states in the nation that lack home rule authority in either their constitution or statutes; instead, counties and incorporated municipalities in North Carolina depend exclusively on statutory grants of power from the state to act. See infra notes 104-09 and accompanying text. As this Comment discusses later, this puts North Carolina's local governments at a significant, initial legal disadvantage relative to localities in other states that have experienced success regulating hydraulic fracturing. See infra Part III.
hydraulic fracturing might fare in a legal challenge; and finally, Part VI briefly comments on the way forward for North Carolina under the new law, comparing the law to the balance struck by Pennsylvania, which mostly preempts local authority while preserving discrete, traditionally local powers.

I. OVERVIEW OF HYDRAULIC FRACTURING AND RECENT DEVELOPMENTS IN NORTH CAROLINA

A. National Perspective

Although the focus of this Comment is on the legal and policy concerns governing the balance between state and local control—and not on the debate over whether and to what extent North Carolina should frack—a brief background is helpful. This Part will describe the technical process of hydraulic fracturing, briefly discuss the controversial environmental concerns associated with it, and summarize the effect of hydraulic fracturing on the national energy economy.

Hydraulic fracturing, commonly known as "fracking," is a specialized form of drilling used to extract oil and gas deposits that are difficult to reach. Fluid, a mix of mostly water with sand and chemical solvents, is injected into the subsurface in order to fracture the shale in which the deposit is found; these fractures allow for increased flow of the oil or gas, obtaining access to low permeability geological formations. The process involves injecting the fluid at high pressure down a vertical oil or gas well; however, the fractures created by the injection can extend hundreds or thousands of feet horizontally away from the well. The additives to the fluid operate to hold open the fractures and allow horizontal flow of oil or gas. Some of the fluid remains underground in the formation, while some returns to the surface as "flowback" and is typically disposed of.

7. Id.
8. Id.
9. Id.
underground or treated for recycling. Through this process, the increased flow of oil or gas allows extraction of previously inaccessible reserves.

Though it is popularly assumed to be a new technology due to its recently expanded economic potential—and controversial reputation—hydraulic fracturing has been used in the United States since the 1940s. In the late 1990s and 2000s, however, technological advancements utilizing hydraulic fracturing in conjunction with horizontal drilling techniques dramatically expanded access to previously inaccessible domestic natural gas resources. This development in turn offered the potential for an increased role for unconventional drilling, and particularly for natural gas, in supplying America’s energy needs. Heightened political concern regarding both environmental protection and dependence on foreign energy launched a national policy conversation, pitting proponents of natural gas as the key to achieving American energy independence against those skeptical of hydraulic fracturing’s impact on the nation’s water supply and of the long-term production of a fossil fuel.

The dispute over the future of natural gas production remains largely unresolved. The Energy Information Administration estimates that the United States possesses approximately 334 trillion cubic feet of recoverable natural gas. Estimates vary, however, because this number is subject to increase as technological advances expand what is technically recoverable; in fact, the number has risen each year since 2008. The extent to which natural gas offers a path to American energy independence is often misrepresented, and the

10. Id.
11. Id.
13. Id.
15. For an overview of the commonly raised environmental objections to hydraulic fracturing, including those related to both water pollution and carbon emissions, see Garmezy, supra note 2, at 414–23. Garmezy also provides an overview of the potential economic benefits. See id. at 424–27.
17. Id.
purported benefits of such independence remain unclear. It is clear, though, that if current projections hold, natural gas will occupy a prominent place in the future of our energy consumption: projections predict that it will continue to be a vital resource for industrial consumption and residential heating, as well as a viable, cleaner, and less carbon-dioxide-intensive alternative to coal. States such as Pennsylvania that possess vast natural gas resources have already experienced a significant increase in energy production.

Meanwhile, attempts to resolve related environmental concerns remain largely inconclusive. The primary concern focuses on water contamination, but other potential issues include the use of large quantities of water, greenhouse gas emissions, and seismic disturbance. Generally, the results of such attempts show that while popular characterizations of hydraulic fracturing risks are frequently and dramatically overblown, some concerns do remain. These concerns, however, are difficult to ascertain, and the particular risk levels vary significantly in different geographic regions depending on the geology of that region.

At the federal level, hydraulic fracturing is subject to several of the broad, existing regulatory schemes promulgated under the Clean Air Act and Clean Water Act, which are typically implemented at the state level subject to approval from the Environmental Protection Agency. However, a variety of exemptions from other federal


22. *Id*.

23. 33 U.S.C. § 1313 (2012) (providing for state implementation plans to achieve national water quality standards); 42 U.S.C. § 7410 (2012) (providing for similar state implementation plans to achieve national ambient air quality standards). To the extent that hydraulic fracturing activity impacts a state's ability to achieve these federal standards, the state implementation plans must account for this impact in their regulatory schemes. However, especially regarding the federal water quality standards, there is some doubt as to whether effective federal oversight is possible; judicial interpretation of the scope of the federal government's jurisdiction under the Clean Water Act (defined by
regulatory programs, such as regulations governing disposal of hazardous waste under the Resource Conservation and Recovery Act ("RCRA"), leave the most significant regulation of hydraulic fracturing to the states.\textsuperscript{24} States with major shale gas resources, such as Pennsylvania and Colorado, extensively regulate oil and gas drilling through their respective oil and gas acts and the issuance of regulatory permits.\textsuperscript{25} In response to the economic and environmental developments discussed above, these states attempted to adjust their environmental regulatory schemes to accommodate the new prevalence of hydraulic fracturing operations, both to address environmental concerns and to provide regulatory certainty to a budding and promising new industry.\textsuperscript{26} The most notable example of this trend was Pennsylvania's comprehensive revision to its Oil and Gas Act in 2012.\textsuperscript{27} Faced with a multitude of municipal attempts at regulating hydraulic fracturing, the Pennsylvania state legislature acted to clarify and strongly reinforce language limiting municipal authority to regulate more stringently than the state.\textsuperscript{28} These provisions are examined in more detail below, and thus far Pennsylvania courts have interpreted them to strike a balance preserving some traditional local authority.\textsuperscript{29}

\textsuperscript{24} 42 U.S.C. § 6921(b)(2)(A) (2012) (exempting drilling fluids associated with the production of oil and natural gas from RCRA); see also Garmezy, supra note 2, at 410–12 (providing a brief overview of federal regulation of hydraulic fracturing); Powers, supra note 12, at 940–41 (providing a more thorough discussion of the challenge posed by the \textit{Rapanos} decision to federal regulation of hydraulic fracturing).


\textsuperscript{28} 58 Pa. CONS. STAT. ANN. §§ 3301–09.

\textsuperscript{29} \textit{See infra} Part II.A.
B. Developments in North Carolina

As new as this policy debate is on a national scale, it is especially new to North Carolina. Surveys have shown inconsistent results as to how much recoverable natural gas exists, leading to inconsistent projections regarding when and if hydraulic fracturing will become profitable in the state.\(^3\)

These inconsistent and unclear projections have not prevented substantial movement by the state and by private actors to bring hydraulic fracturing to North Carolina. Over 9,000 acres of property have been leased for mineral extraction in south central North Carolina, where most of the reserves lie underneath the Deep River Basin, centered on Lee County.\(^3\)\(^1\) The General Assembly has also taken significant steps to ensure the state's regulatory scheme is in place. Both hydraulic fracturing and horizontal drilling were illegal in North Carolina until the General Assembly lifted the bans in its 2012 bill, the Clean Energy and Economic Security Act.\(^3\)\(^2\) The bill reconstituted the North Carolina Mining and Energy Commission and directed it to develop most of the substantive rules that will govern hydraulic fracturing in the state.\(^3\)\(^3\) A 2014 act of the General Assembly clarifies the question of local and state governance by expressly preempting most local regulation, preserving only a limited local authority to seek state approval for traditional land-use and zoning regulations as applied to hydraulic fracturing.\(^3\)\(^4\)

Though considerable local activism has contributed to the budding controversy over hydraulic fracturing in North Carolina, few

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33. Id. § 1(b), 2012 N.C. Sess. Laws at 660–63 (codified at N.C. GEN. STAT. § 143B-293.1 to 293.6 (2014)).

local governments have taken binding action, and those actions that have been taken are invalid and acknowledged as symbolic.\(^{35}\) This may be partly the consequence of local governments' uncertainty—and pessimism—regarding the extent of their regulatory authority. For example, Raleigh, the state's capital and second-largest city, and Creedmoor, a nearby town of approximately 4,000 people, have enacted symbolic ordinances banning hydraulic fracturing within their city limits.\(^{36}\) A host of other cities and counties have passed resolutions expressing varying degrees of opposition to hydraulic fracturing within their respective limits or within North Carolina generally.\(^{37}\) A later section of this Comment focuses on whether the state has provided clear guidance to localities hoping to regulate fracturing and what options remain for localities to do so.\(^{38}\)

### II. SIMILAR CONFLICTS IN MORE RESOURCE-RICH STATES

States possessing more economically viable natural gas resources have a more developed body of law on the question of local and state governance. Localities in Pennsylvania and Colorado have had surprising success in litigation, despite existing case law that, while ambiguous, would appear to advantage the state. This Part analyzes how courts in these states have handled this question. The results offer a useful comparison to the circumstances in North Carolina because the legal analysis and policy questions, though distinct in critical ways, broadly resemble each other.

#### A. Pennsylvania

Pennsylvania, sitting above the Marcellus Shale, possesses one of the largest natural gas reserves in the United States.\(^ {39}\) Parts of the state have experienced significant economic revitalization due to hydraulic fracturing, and the state government has actively promoted hydraulic fracturing through legislation.\(^ {40}\) The number of localities


\(^{37}\) Id.

\(^{38}\) See infra Part V.A.

\(^{39}\) See Natural Gas Summary: U.S., supra note 14 (quantifying the natural gas reserves in each U.S. state).

attempting to ban or limit hydraulic fracturing, however, made Pennsylvania one of the first states to test whether and how localities could do so. Appellate rulings on several cases have provided guidance on two essentially distinct questions related to local control: first, whether state law preempts local attempts to regulate hydraulic fracturing; and second, whether forceful attempts by the state to explicitly and completely preempt localities can survive state constitutional scrutiny.

1. Home Rule and Preemption

Pennsylvania is a home rule state, meaning that local governments possess a broad delegation of governing authority and do not require a specific statutory delegation to act on a particular issue. In Pennsylvania, a legislative scheme located across several state statutes preempts local authority on oil and gas drilling, while preserving roles that are traditionally local in nature. Notably, this legislative intent was recognized and enforced by the state’s highest court in two high-profile appellate cases decided on the same day in 2009.

The state’s Oil and Gas Act supersedes any local action “purporting to regulate oil and gas operations,” except those regulations authorized under the Municipal Planning Code and the Flood Plain Management Act. Yet even these authorizing exceptions are significantly limited by the Oil and Gas Act, which prohibits local regulation of the “same features” of oil and gas operations regulated by the state or regulations that “accomplish the same purposes” as the Oil and Gas Act.

44. 58 PA. CONS. STAT. ANN. § 3302 (West 2012).
45. Id.
In two cases, challenges to local ordinances tested the allocation of authority under these laws. In Huntley & Huntley v. Borough Council of Oakmont, the court rejected a preemption challenge to a municipal zoning ordinance restricting drilling to certain zoning districts and providing setback requirements designed to protect local private property and the surrounding environment. More generally, the ordinance was also politically designed to discourage drilling in Oakmont. The court held that a well site's location and setback requirements were not actually a part of the oil and gas "operations" regulated at the state level. Rather, the zoning ordinances served a distinct purpose from the state regulations: local land organization and development, and not the promotion (or from Oakmont's perspective, discouragement) of oil and gas drilling and protection of the environment.

In the second case, Range Resources-Appalachia v. Salem Township, the court struck down a local ordinance that directly regulated several aspects of drilling operations. The court held that the ordinance regulated the same features of oil and gas drilling regulated by the state, and did so for the same purpose. In subsequent cases in both federal and state courts, courts have upheld exercises of zoning authority under Pennsylvania law, while all other attempts to regulate hydraulic fracturing have been struck down.

The Huntley court's express rationale—that the local ordinance serves the purpose of land organization and does not regulate drilling operations—hides some tacit overlap of Oakmont's regulatory purpose with that of the state. That is, the town's action was motivated in part by local concerns regarding environmental protection, a stated purpose of the state Oil and Gas Act. Under a more strict preemption analysis, this overlap in purpose would have led to a different outcome because the regulation aims to "accomplish

46. 964 A.2d 855 (Pa. 2009).
47. Id. at 866.
48. See Wagstaff, supra note 42, at 338.
49. 964 A.2d at 865–66.
50. See id. at 864.
52. Id. at 871.
53. Id. at 877.
55. 58 PA. CONS. STAT. ANN. § 3202 (West 2012).
the same purpose[]" as the state, which has already considered environmental protection among a range of factors in determining how to regulate oil and gas drilling. Therefore the court's attempt to distinguish the two cases on the basis of regulatory purpose strains to survive closer scrutiny.

But a more fundamental structural concern—preserving traditional local authority—may be driving the court's compromise in upholding the local ordinance in Huntley, and it paves a path that can guide the creation of a compromise in other states. In actuality, Huntley and Range Resources-Appalachia are distinguished not by the intent of the towns involved, but instead by the nature and extent of the local powers exercised. Rather than deprive localities of almost all significant authority on the matter, the Huntley court identifies the physical site location of oil and gas production (and other industrial activity) as a traditionally local decision that will remain within the authority of a locality. This case suggests that this local authority will exist even if exercised with intent to limit or discourage drilling within its borders. By contrast, apparently, exercises of authority with this same intent that are not traditionally local in nature will be deemed preempted by the state scheme. Thus, in these two cases the court conveyed, if not articulated, a useful precedential dividing line to evade the difficult preemption inquiry: localities may impact oil and gas drilling, provided that their focus remains on addressing their goals through traditionally local functions, such as zoning.

2. Constitutional Scrutiny of Preemptive Legislation

Independent of this case law, another recent case, Robinson Township v. Commonwealth, declared the strengthened preemption provision of Pennsylvania's Oil and Gas Act void under the state constitution. In 2012, the state legislature, in an attempt to further quash the authority of local governments to regulate hydraulic fracturing, strengthened the Oil and Gas Act's preemption

56. Id. § 3302.
57. See Huntley & Huntley, Inc. v. Borough Council of Oakmont, 964 A.2d 855, 857 (Pa. 2009); Range Res.-Appalachia, 964 A.2d at 871. In both cases, the towns sought to contravene the state's policy promoting hydraulic fracturing and thus exposed themselves to a preemption challenge but only in Huntley did the town confine its efforts to traditionally local functions.
60. Id. at 981–82 (invalidating 58 PA. CONS. STAT. ANN. § 3304(b) (West 2012)).
language. The amended Act established fixed setback distances that could not be increased by localities, a limitation directly aimed at one of the zoning powers upheld in Huntley & Huntley. Most controversially, the revision required localities to authorize drilling as a permitted use in all zoning districts, including residential districts, albeit subject to certain protective restrictions. As with the setback provision, this provision also deprived localities of a power upheld by the court under the previous version of the Act. These revisions allowed for little remaining ambiguity in a preemption analysis, as the state law now prohibits the only means by which localities could traditionally limit the locations where hydraulic fracturing occurred.

While the court split as to the basis for the ruling striking down the revisions, the plurality based its holding on an environmental conservation provision in the state constitution, similar to such a provision in the North Carolina Constitution. The Pennsylvania provision declares that the state's citizens possess "a right to clean air, pure water, and to the preservation . . . of the environment," further mandating that the state "shall conserve and maintain [these resources] for the benefit of all the people." In the plurality's view, by enacting the statutory setback requirements and the mandated zoning authorizations, the legislature "failed to properly discharge [its] duties as trustee of the public natural resources."

As in Huntley and Range Resources-Appalachia, a prevailing theme of the court's analysis was the impingement on traditionally local government functions, although in Robinson, the constitutional basis for this analysis was the environmental trustee duty. The court noted that forcibly permitting oil and gas drilling in all zoning districts, including residential districts, renders the state incapable of adequately conserving the environment. Moreover, the court

62. 58 PA. CONS. STAT. ANN. § 3304(b) (West 2012)).
63. See supra notes 46-50 and accompanying text.
64. § 3304(b).
66. Robinson Twp. v. Commonwealth, 83 A.3d 901, 977 (Pa. 2013). Compare PA. CONST. art. I, § 27 (declaring that "public natural resources are the common property of all the people"), with N.C. CONST. art. XIV, § 5 (declaring the policy of the state "to conserve and protect its lands and waters for the benefit of all its citizenry").
67. PA. CONST. art. I, § 27.
68. Robinson Twp., 83 A.3d at 984.
69. Id.
70. Id. at 979.
criticized the statutory setback provision's allowance of waivers as arbitrary and insufficiently protective of the environment.\footnote{Id. at 983.}

At the more complex levels, however, the argument becomes less clear. The court immediately followed its discussion of the environmental trust provision with a thorough discussion of property owner expectations and reliance regarding government action.\footnote{Id. at 979–80.} The radically altered zoning scheme in which oil and gas drilling must be permitted in all districts "alters existing expectations of communities and property owners" by "dispos[ing] of the regulatory structures upon which citizens and communities made significant financial and quality of life decisions."\footnote{Id.} The court returned to this theme in its subsequent discussion of the statutory setback requirements when it held that the statewide standards "marginalize[] participation" by local residents and leaders who typically wield significant influence in zoning proceedings.\footnote{Id. at 984.}

The court based much of its holding on the specific constitutional premise that the state's duty as trustee of the public natural resources requires equitable treatment of the corpus of the trust.\footnote{Id. at 980.} Somewhat oddly, the court concluded that prohibiting local governments from responding to local concerns by enforcing statewide regulations actually causes a disparate impact on different members of the public—the trust beneficiaries.\footnote{Id. at 980–81.} By this rationale, the state's environmental regulations cannot force some citizens to bear a "heavier . . . burden[]" of the use of resources while granting others a greater benefit of enjoyment of conservation.\footnote{Id. at 980.} Ostensibly, the court was concerned that in areas where oil and gas drilling will be more prevalent, the local governments would be unable to intervene to mitigate the disproportionately dispersed effects. However, to a certain extent this concern can never be completely mitigated where gas resources are concentrated in certain parts of the state and not in others, as in Pennsylvania and in North Carolina.\footnote{Id. at 980–81.} To follow the court's principle to its furthest extent would significantly limit the potential production of natural gas in Pennsylvania and other states.

\footnote{Lower 48 States Shale Plays, ENERGY INFO. ADMIN. (May 9, 2011), http://www.eia.gov/oil_gas/rpd/shale_gas.pdf (regarding Pennsylvania); see supra note 30 and accompanying text (regarding North Carolina).}
Perhaps more importantly, rational, informed property owners do not expect uniformity in environmental impacts on all property. Environmental impacts vary dramatically depending on location, one reason why property is ultimately valued differently depending on proximity to drilling locations or other hazards. Allowing an incidentally disparate impact on the environment because of state limitations on local control does not infringe on the expectations of property owners and their surrounding local community, but in some ways fulfills them.

But the court's discussion of another set of local expectations, those of property owners in reliance on certain government action, involves an altogether separate question: whether the state has preserved governing decisions that are traditionally reserved for localities. The court understands that the primary concern is not a vague sense of inequitable enjoyment of the public resource trust, but that residents have deeply relied on previous, lawful local decisions made in exercise of traditionally local governing authority. While at first glance the court may have opened widely a new, powerfully vague avenue for environmental groups to challenge state regulations they deem inadequate, it may be that the court has built on a more predictable theme that relates to its resolution of Huntley & Huntley and Range Resources-Appalachia: the state will not be allowed to encroach on functions traditionally reserved for local governments.

Just as a locality cannot exceed its zoning authority to regulate inconsistent with an existing state scheme, courts in Pennsylvania can utilize this constitutional provision to prevent the state from altering the traditional structure of authority to the detriment of localities and the public trust. The constitutions of other states, including North Carolina, contain similar provisions, and it is this balanced compromise between the roles of local and state governments that is most advantageously appropriated to other states. States should avoid overreaching in their desire to limit local control, and in turn, they can likely avoid the opening of a window for broad challenges to their environmental regulatory schemes.

80. Robinson Twp., 83 A.3d at 979-80.
81. Id. at 980.
82. N.C. CONST. art. XIV, § 5.
B. Colorado

The experience of Colorado is a useful comparison not for the results of its still-outstanding legal challenges but as an illustration of the breadth of political possibilities faced on this contentious issue, including citizen initiatives to amend the state constitution and authorize local governments to prohibit hydraulic fracturing. As a resource-rich state, Colorado faced this issue much sooner than others and apparently resolved it, at least with regard to a municipal ban, in a 1992 case in which the state's highest court struck down a local land use ordinance that effectively prohibited oil and gas drilling. As in Pennsylvania, the recent controversy surrounding hydraulic fracturing in Colorado and the surge in municipal activity has led to renewed uncertainty and discussion of the issues of local control and preemption.

Colorado, like Pennsylvania, is a form of home rule state in which municipalities reserve authority over matters of local concern and, on matters of mixed state and local concern, can act except where in conflict with state law. In Voss v. Lundvall Brothers, Inc., the court held that regulation of oil and gas drilling was a mixed matter of state and local concern, and while the state’s oil and gas statute did not completely occupy the regulatory field to the exclusion of local action, a ban was in conflict with the clear intent of the state on the matter. This ruling seemed to leave reasonable room for localities to regulate certain aspects of oil and gas drilling. However, the contours of the ruling have not been tested in court, and the statewide regulatory scheme is thorough, with the Colorado Oil and Gas Conservation Commission (“COGCC”) providing for such matters as well as setback requirements. Nonetheless, the explosion of the hydraulic fracturing debate revived the concerns over state and local governance in Colorado as it had in Pennsylvania, and several municipalities have already prohibited hydraulic fracturing, with others lining up to join them. One commentator speculated that the

84. See Polley, supra note 41, at 276. This form of local governance is known as imperium in imperio, Latin for “state within a state.” In this system, the critical inquiry is into the subject matter of the regulation (i.e., oil and gas drilling), determining whether it is of state or local concern, or both. Id.
86. Id. at 1068.
change in political climate in Colorado has been so overwhelmingly toward skepticism of hydraulic fracturing that the state’s courts may be friendlier to home rule of oil and gas drilling than in the past.\textsuperscript{89} Despite this political development and the previous indication from the state high court that local governments have room to enforce some local regulations of oil and gas drilling on matters of local concern, most of the interest seems to be in enacting bans and moratoria.\textsuperscript{90}

Longmont, one of the towns currently facing a challenge by the state,\textsuperscript{91} enacted carefully tailored regulations of oil and gas drilling under its zoning authority.\textsuperscript{92} These regulations appear designed to survive a preemption challenge,\textsuperscript{93} but the town also amended its charter to explicitly ban hydraulic fracturing.\textsuperscript{94} Unlike the approach taken in Pennsylvania, Longmont did not claim the authority to prohibit oil and gas drilling in all zoning districts but, rather, claimed the authority to prohibit a certain technological means of extracting oil and gas—hydraulic fracturing.\textsuperscript{95}

Longmont thus presents an issue of first impression that was not addressed in the Pennsylvania litigation: whether a municipality can ban hydraulic fracturing as a technique while preserving oil and gas drilling generally.\textsuperscript{96} In Pennsylvania, drilling techniques would assuredly be considered part of the “operations” or “industry” of oil and gas drilling, so state regulations would preempt a local ban on the matter.\textsuperscript{97} Yet perhaps Colorado’s unique home rule law provides a basis for local action in mixed matters of state and local concern, and this may allow a chance of success for local governments, especially if the political climate has in fact shifted dramatically.

\textsuperscript{89} Polley, supra note 41, at 277.
\textsuperscript{90} See Regrettable Votes on Colorado Fracking Bans, supra note 88.
\textsuperscript{91} Press Release, Colorado Oil & Gas Ass’n, Colorado Oil & Gas Ass’n’s Statement Regarding Lawsuit, Against Hydraulic Fracturing Bans in Fort Collins and Lafayette, Colorado Oil & Gas Association (Dec. 3, 2013) [hereinafter COGA’s Statement], available at http://www.coga.org/PressReleases/PRCOGASStatementRegardingFtCollins andLafayetteLegalAction.pdf.
\textsuperscript{92} LONGMONT, COLO., ORDINANCE No. 15.04.020.32 (2012).
\textsuperscript{94} CITY OF LONGMONT, COLO., CITY CHARTER art. XVI, § 16.3 (2012), available at http://ourlongmont.org/charter-amendment; Minor, supra note 93, at 105.
\textsuperscript{95} Minor, supra note 93, at 109–10.
\textsuperscript{96} Id. at 110.
\textsuperscript{97} 58 PA. CONS. STAT. ANN. § 3302 (West 2012); supra notes 58–61 and accompanying text.
At the least, the Voss decision may not preclude a ban on a specific technique, and Longmont's ban may not conflict with Colorado's statewide regulatory goals. One commentator argues this position while noting that the COGCC does not specifically and directly regulate hydraulic fracturing in a manner that would be "materially impeded" by the municipal ban. This is a confusing statement for several reasons. First, the COGCC imposes both chemical disclosure requirements and dust control regulations on hydraulic fracturing. These isolated regulations regarding chemical disclosure and dust control address environmental impacts that are unique to hydraulic fracturing, and their existence is likely sufficient to show that Colorado considers regulation of hydraulic fracturing a state matter in part, precluding a ban under Voss. Second, although the COGCC does not have a comprehensive regulatory scheme dedicated specifically to hydraulic fracturing, it would likely deem such a scheme unnecessary because hydraulic fracturing is merely a method of oil and gas drilling, and drilling is obviously extensively regulated by the COGCC. Finally, as ninety-five percent of oil and gas wells in Colorado are hydraulically fractured, the state's interest in hydraulic fracturing is synonymous with its interest in oil and gas drilling. If the lawsuit proceeds, the resulting analysis and ruling will be illustrative to municipalities nationally that are contemplating their options to address hydraulic fracturing; for now, the case remains only evidence of the myriad experimental local tools.

The most recent development in Colorado is a proposal by proponents of local control to amend the state constitution to grant municipalities the ability to regulate or ban oil and gas drilling. While the effort is in the early stages and draft language is not yet available, the stated goals appear to be expansive, hoping to achieve

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100. The COGCC is responsible for "[f]oster[ing] the responsible, balanced development, production, and utilization of the natural resources of oil and gas" in Colorado and therefore regulates all oil and gas drilling, COLO. REV. STAT. § 34-60-102(1)(a)(1) (2014). The COGCC has implemented rules specific to hydraulic fracturing, but they are limited in number and supplemental to existing regulatory schemes. See COGCC Hydraulic Fracturing Rules, COGCC, http://cogcc.state.co.us/Announcements/Hot_Topics/Hydraulic_Fracturing/COGCC%20Hydraulic%20Fracturing%20Rules.htm (last visited Jan. 10, 2015).
101. COGA's Statement, supra note 91.
local regulation of drilling generally, not just hydraulic fracturing. An amendment of this sort and the previously discussed ban on hydraulic fracturing represent additional options for localities in other states to limit or prohibit hydraulic fracturing and demonstrate the plethora of possible challenges that a state seeking to promote drilling may face on an issue dominated by politically charged controversy.

III. LACK OF HOME RULE IN NORTH CAROLINA

This Part examines the North Carolina case law of local government authorization, which governs whether a local government is authorized by statute to act in a particular manner, and the case law of state preemption. As this Part demonstrates, while the case law is often ambiguous, neither body of law advantages local governments, casting further doubt on the extent to which they will be able to regulate hydraulic fracturing after the state implements its regulatory scheme.

North Carolina, unlike Pennsylvania and Colorado, is one of the few states in the country that lack any basis for home rule authority—either constitutional or statutory. This is a distinct disadvantage for North Carolina municipalities relative to those in other states. However, while states lacking home rule are traditionally characterized as Dillon's Rule states—that is, states in which local governing authority is construed strictly and narrowly from specific state authorizations—this characterization may also inaccurately describe North Carolina law. North Carolina municipalities rely on specific authorizations in state statutes to act, but the state has enacted a range of broad authorizations of local governing power, including broad authority in areas relevant to the hydraulic fracturing debate, such as regulation of land use and a general police power to protect the safety, health, and welfare of local communities. More importantly, the state enacted a statute in the 1970s that ostensibly rejected Dillon's Rule of judicial interpretation of local authority: "Provisions . . . of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to

103. Id.
105. Id. at 1985.
106. Id. at 2011-12.
carry them into execution and effect."  This provision, of course, is limited by a requirement that local action "not be contrary to State or federal law or to the public policy of this State."

The difficulty in characterizing local governing authority in North Carolina lies in the inconsistency with which courts have interpreted and applied this statute, occasionally applying a standard resembling Dillon's Rule, despite the clear legislative mandate to the contrary. While the precise explanation of this inconsistency remains elusive, the most recent cases suggest that the current Supreme Court of North Carolina has considered the provision as no more than a rule of statutory construction, rather than an elastic grant of local governing authority. In the 2012 case of *Lanvale Properties, Inc. v. County of Cabarrus*, the court limited the provision's application to cases in which the statute authorizing the specific local action is ambiguous. Where the court decides that it can ascertain the legislature's intent—typically, the intent to occupy a regulatory field or the intent to limit the range of authorized local actions—there is no need to apply the rule of construction to unnecessarily expand local authority.

The court's analysis in *Lanvale* is relevant to any local regulation of hydraulic fracturing because it involved a successful challenge to a county zoning ordinance that encroached on a regulated field and exceeded the state's statutory authorization. Cabarrus County enacted an adequate public facilities ordinance ("APFO") that tied approval of residential land development to the capacity of the county's public schools. The court closely scrutinized North Carolina's county zoning enabling statutes to determine that the plain

108.  *Id.* § 160A-4.
109.  *Id.*
112.  *See*, e.g., *Lanvale Props., Inc. v. Cnty. of Cabarrus*, 366 N.C. 142, 154, 731 S.E.2d 800, 809 (2012) ("The principal flaw in the County's argument is that section 153A-4 is a rule of statutory construction rather than a general directive to give our general zoning statutes the broadest construction possible.").
114.  *Id.* at 155, 731 S.E.2d at 810.
115.  *See* id.
116.  *See id.* at 169, 731 S.E.2d at 818.
117.  *Id.* at 143, 731 S.E.2d at 803.
language of those statutes did not grant express or implied authority to enact the APFO. After reaching this conclusion, the court refused to apply the broad construction provision and struck down the ordinance, holding that a rule of broad construction cannot operate to grant authority that does not fit within the limits set by the legislature. Similarly, in the recent case of King v. Town of Chapel Hill, the court applied the broad construction statute when considering whether a local government’s general police power included the authority to regulate commercial towing activities. In holding that local governments could permissibly require certain signage and notice to citizens but could not impose a fee schedule, the court looked for a “rational relationship” between the local government’s action and the purpose of the police power: to protect health, safety and welfare.

The refusal to apply the broad construction statute in Lanvale is a strained interpretation of the statute’s language. The language, which occurs twice in the statute, once in reference to cities and once in reference to counties, begins with the statement: “It is the policy of the General Assembly that the cities [and counties] of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law.” This hardly reads as only providing a rule of construction in the case of ambiguous statutes; rather, it seems to provide an intentional expansion of local governing authority in order to ensure that such authority, by the “policy” of the state, is “adequate.” Nonetheless, this recent clarification of the broad construction statute in Lanvale, inconsistently applied in the past, likely will weigh against local governments seeking new types of authority in the future.

The possibility of state preemption remains an issue even if a municipality possesses authority for a particular zoning ordinance. Courts will also strike down a zoning ordinance if it regulates a field that the state has intentionally sought to occupy. It was on this basis that the state’s highest court invalidated a county zoning ordinance regulating swine farms. Unlike in Lanvale, the zoning ordinance in Craig v. County of Chatham was not held to be per se invalid for

118. Id. at 155, 731 S.E.2d at 810.
119. Id.
121. Id. at ___, 758 S.E.2d at 371.
122. Id. at ___, 758 S.E.2d at 371.
lack of enabling authority. However, the zoning ordinance regulated several features of swine farms that were already specifically regulated by statute, including setback requirements. The holding was broad, observing that the “General Assembly must have intended that they comprise a ‘complete and integrated regulatory scheme’ on a statewide basis, thus leaving no room for further local regulation.” The court noted the statute’s use of words such as “coordinated,” “cooperative,” and “promote” to conclude that the statute demonstrated a clear intent of the state to occupy the regulatory field. Likewise, in King, the court invalidated Chapel Hill’s ordinance regulating the use of mobile phones while driving for similar reasons. The court observed that the state had enacted a statute governing the use of mobile phones and “repeatedly amended” it to address the same public safety concerns addressed by Chapel Hill. Accordingly, the court held that the state had demonstrated the intent to create a complete, uniform regulatory scheme to the exclusion of local regulation.

Neither the North Carolina law of home rule nor its lack of law of preemption advantages local governments, providing little reason to embolden those seeking to defend local regulation of hydraulic fracturing when it begins in the state. As these cases illustrate, a local government must enact regulations within the parameters of a specific enabling statute, and in most cases it will have to do so without reliance on broad construction of those parameters. Moreover, if the state enacts a complete and integrated regulatory scheme governing hydraulic fracturing, which it is currently pursuing, localities will likely be precluded from acting without an explicit, specific grant of authority.

IV. OIL AND GAS REGULATION IN NORTH CAROLINA

Through its 2014 bill, the Energy Modernization Act, the North Carolina legislature ostensibly sought to avoid any ambiguity in

126. Id. at 54, 565 S.E.2d at 181.
127. Id. at 49–50, 565 S.E.2d at 178–79.
128. Id. at 50, 565 S.E.2d at 179 (emphasis added).
129. Id. at 48, 565 S.E.2d at 178.
131. Id. at __, 758 S.E.2d at 373.
132. Id. at __, 758 S.E.2d at 373.
the preceding analysis, especially regarding preemption.\textsuperscript{135} The bill expresses the General Assembly's intent to "maintain a uniform system for the management" of oil and gas drilling, specifically hydraulic fracturing, as well as its intent to "place limitations" on regulatory authority "by all units of local government in North Carolina."\textsuperscript{136} The bill expressly invalidates any local ordinance that prohibits or has the effect of prohibiting oil and gas drilling.\textsuperscript{137} Collectively, this language exceeds that which the \textit{Chatham} case requires, as it explicitly preempts local regulation.\textsuperscript{138}

On the margins of this clear state preemption, two local grants of power to cities and towns—the police power and zoning authority—may offer at least some basis for local control, but these grants remain limited by the \textit{Lanvale} analysis and by the new hydraulic fracturing bill. The bill allows local governments to enforce generally applicable land-use and zoning regulations, specifically including setback requirements, with the approval of the Mining and Energy Commission.\textsuperscript{139} The delegation of zoning authority to cities and towns is more concrete and likely the focus of any future legal analysis.\textsuperscript{140} This grant of power states that cities and towns may use zoning ordinances for the purpose of promoting health and safety in the local community, and it lists land use as a proper subject of regulation.\textsuperscript{141} The enabling statute enumerates several permissible purposes for which localities may use zoning ordinances, and while the statute implies that the list is not exhaustive, all of the enumerated purposes address the common theme of efficient land use to address the problems created in densely populated areas.\textsuperscript{142}

The new hydraulic fracturing law presents a nominal gift to local governments in North Carolina in that it clearly envisions the use of zoning ordinances and land-use regulations to regulate oil and gas drilling, resolving any doubt present under a \textit{Lanvale} analysis. The bill "presume[s] to be valid" those regulations that are "generally

\begin{itemize}
  \item \textsuperscript{135} See § 14 (to be codified at N.C. GEN. STAT. § 113-415.1 (2014)).
  \item \textsuperscript{136} § 14(a) (to be codified at N.C. GEN. STAT. § 113-415.1(a) (2014)).
  \item \textsuperscript{137} \textit{Id}.
  \item \textsuperscript{138} See Craig v. Cnty. of Chatham, 356 N.C. 40, 50, 565 S.E.2d 172, 179 (2002); supra notes 124–32 and accompanying text for a discussion of that case.
  \item \textsuperscript{139} Energy Modernization Act § 14(f) (to be codified at N.C. GEN. STAT. § 113-415.1(f) (2014)).
  \item \textsuperscript{140} N.C. GEN. STAT. § 160A-381 (2014).
  \item \textsuperscript{141} \textit{Id}.
  \item \textsuperscript{142} See \textit{id}. These purposes include regulation of the height and overall size of buildings and other structures, the size of yards and courts, the percentage of a lot that may be occupied by a structure, population density, and the location and use of structures and land. \textit{Id}.
\end{itemize}
applicable to development," but it allows the Mining and Energy Commission to review and invalidate them based on a limited set of findings.\textsuperscript{143} The Commission can invalidate a local ordinance only if it finds that: (1) the local ordinance would effectively prohibit hydraulic fracturing; (2) the operator possesses all required state and federal permits or approvals and thus is prevented from drilling only by the local ordinance; (3) local officials and citizens have had the opportunity to participate in the permitting process; and (4) hydraulic fracturing will not pose an unreasonable health and environmental risk to the area, and the operator has made a reasonable effort to avoid foreseeable risk and comply with local ordinances.\textsuperscript{144}

Of the four requirements, the first—that ordinances not effectively prohibit hydraulic fracturing—is exclusively within the control of local governments. Local governments have an incentive not to breach this requirement in order to maintain a valid ordinance. By stopping their regulatory schemes short of an effective ban, they claim a substantial amount of regulatory authority that is unexposed to Mining and Energy Commission review. Therefore, these requirements clarify the reservation of a considerable amount of local governing power, more so than would have been obvious under a strict Lanvale analysis prior to the passage of this law.

A final piece of law that bears mentioning is the conservation provision of the North Carolina Constitution.\textsuperscript{145} Much like Pennsylvania’s comparable provision (which was critical in the previously discussed Robinson Township case\textsuperscript{146}), North Carolina’s provision declares the policy of the state and its political subdivisions to be the conservation and protection of its land and waters for the benefit of the citizenry.\textsuperscript{147} The provision is rarely litigated, and unlike Pennsylvania’s provision that formed the basis for overturning that state’s Oil and Gas Act revisions, North Carolina’s does not grant any express rights to the citizenry or establish a trustee duty for the government to discharge.\textsuperscript{148} However, an overzealous attempt to limit local discretion in protecting the environment may give credence to the argument that the state must, as a part of its own policy of

\begin{footnotes}
\item 143. Energy Modernization Act § 14(f) (to be codified at N.C. GEN. STAT. § 113-415.1(f) (2014)).
\item 144. Id.
\item 145. N.C. CONST. art. XIV, § 5.
\item 146. See supra notes 59–68 and accompanying text.
\item 147. N.C. CONST. art. XIV, § 5.
\item 148. PA. CONST. art. I, § 27; see supra notes 66–68 and accompanying text.
\end{footnotes}
protecting the environment, afford a minimal level of authority to local governments to make sound zoning decisions.

V. LOCAL REGULATION OF HYDRAULIC FRACTURING IN NORTH CAROLINA

North Carolina is in the early stages of learning how to regulate hydraulic fracturing, and that is most true at the local level, where the only action taken since the state began the process has been a pair of bans.149 State law now expressly preempts these bans, but the recent statute may preserve the authority of local governments to enact a more limited zoning ordinance.

A. Limited Zoning Ordinances

The form of local hydraulic fracturing regulation most likely to survive a challenge is a limited zoning ordinance of the sort that was upheld in the Pennsylvania case *Huntley & Huntley*,150 though even this type of ordinance faces an uphill battle in North Carolina. In that case, Oakmont’s ordinance denied oil and gas drilling as a permitted use in some zoning districts and provided setback requirements.151 The court upheld the ordinance because it regulated aspects of drilling that were not a part of oil and gas drilling “operations,” the subject of the state’s regulations, and because the town regulated these aspects, at least in part, for the local purpose of promoting efficient land use, as opposed to the state purpose of protecting the environment.152 But, unlike Pennsylvania, North Carolina is not a home rule state, and its municipalities do not possess an inherent authority to enact zoning ordinances.153 However, North Carolina has specifically enabled zoning ordinances for purposes that resemble those upheld in Pennsylvania, particularly efficient use of land.154 Moreover, the new hydraulic fracturing law specifically envisions this type of regulation of oil and gas drilling,155 providing a legal basis for towns to restrict drilling to certain zoning districts and to impose setback requirements.

149. See supra notes 35–39 and accompanying text.
150. 964 A.2d 855 (Pa. 2009); see supra notes 46–50 and accompanying text.
152. Id. at 864–65.
153. See supra notes 104–09 and accompanying text.
A setback requirement is likely uncontroversial due to its express mention in the law. The case of a local government attempting to exclude hydraulic fracturing from certain zoning districts, and essentially corner it into others, would be more difficult for two reasons. First, some questions would arise as to whether this application of a zoning ordinance is truly "general," as required by the law. Second, this is perhaps as close as a local government could come to an effective ban. Recall that in Oakmont, Pennsylvania, the local government restricted drilling to certain districts apparently to discourage drilling generally in the town. In North Carolina, whether the local ordinance constituted an effective ban—and thus triggered the possibility of invalidation by the Mining and Energy Commission—would depend on the scope of the ordinance, the feasibility of compliance, and the remaining viability of oil and gas drilling in the locality.

B. Effective Bans

North Carolina's most recent legislative act expressly prohibits effective bans. Even the favored tactic of Longmont, Colorado is also almost assuredly illegal in North Carolina. Longmont used its home rule authority to prohibit hydraulic fracturing as a drilling technique, while refraining from a futile attempt to prohibit oil and gas drilling generally. A similar tactic lacks the necessary foundation in North Carolina law. Colorado grants municipalities local authority over matters of local concern; oil and gas drilling is considered a mixed matter of state and local concern. On such matters, local governments can act in areas in which the state has chosen not to, provided the act is consistent with the regulatory scheme. Local governments in North Carolina lack this power, and there is no grant of power for local governments to regulate hydraulic fracturing generally. Moreover, unlike Colorado, the North
Carolina legislature has declared its specific intent to promote hydraulic fracturing, not merely oil and gas drilling generally.164

VI. THE WAY FORWARD

As the compromise reached by Pennsylvania courts illustrates, there is no need to trample the traditional zoning authority of local governments in order to accomplish the North Carolina General Assembly’s policy of promoting hydraulic fracturing. Hydraulic fracturing, of course, affects a range of issues that are within this realm of needs to which local government expertly responds, such as urban development and land use. These issues, which do not touch the larger questions of energy public policy, should rightly remain within the purview of local governments. Local governments should possess the same authority to regulate the location of oil and gas drilling as they do other industrial and commercial activity—not to regulate for the purposes of environmental protection but for the purpose of efficient, effective land use and community welfare.165

Currently, local governments in North Carolina face a great deal of uncertainty regarding the extent to which they possess this authority due to: the lack of home rule; vague zoning enabling statutes; the inconsistent standard of judicial review of local authority under those statutes; and, most recently, the future prospect of Mining and Energy Commission review. One author has made compelling suggestions for reforming North Carolina’s law of home rule generally.166 More specifically regarding the issue of hydraulic fracturing, the legislature has provided the framework to allow a compromise similar to Pennsylvania by preserving traditional local ordinance authority.167 The new law specifically allows setback requirements and zoning restrictions, subject to approval by the Mining and Energy Commission.168 Whether the law in North Carolina embraces this balance in practice will depend on how the Mining and Energy Commission exercises its role within this framework provided by the legislature.

165. See supra note 107 and accompanying text.
166. See Bluestein, supra note 104, at 2023–28.
168. Id.
CONCLUSION

North Carolina’s 2014 Energy Modernization Act largely resolves the question of to what extent local governments can regulate hydraulic fracturing. It leaves most authority to the state, expressly preempting most local attempts to restrict the practice. However, it preserves a limited authority for local governments to enforce generally applicable ordinances. In implementing this provision, the Mining and Energy Commission should follow the compromise model presented by the Pennsylvania Supreme Court in resolving similar questions in that state. By this model, municipalities reserve authority to act in ways that serve traditionally local governing functions, such as organizing land use and development, but cannot contravene the energy policy of the state by effectively prohibiting or discouraging authorized activity. If successful, the legislature will have transitioned the state into hydraulic fracturing in a manner that allows for regulation addressing safety and health concerns while avoiding costly uncertainty and litigation.

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169. See supra notes 134–38 and accompanying text.
170. See supra notes 139–42 and accompanying text.
171. See supra notes 66–82 and accompanying text.
172. See supra notes 66–82 and accompanying text.

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