

# Texas Law Review

## *See Also*

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### Response

#### How Local Is Local?: A Response to Professor David B. Spence's *The Political Economy of Local Vetoes*

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##### I. Introduction

Former House Speaker Tip O'Neill was famously known for his principle: "All Politics is Local."<sup>1</sup> The phrase is often understood to mean that serving your constituents is a politician's key to success. For a politician, what "local" means should be clear: potential voters in the politician's district. In the context of oil and gas exploration, local control can be a bit more varied.

"Local control" could mean state-level regulation versus federal regulation of oil and gas operations. This argument has been made in opposition to proposed federal laws and regulations related to hydraulic fracturing.<sup>2</sup> The other option is to consider whether states should have

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1. THOMAS P. O'NEILL & GARY HYMEL, ALL POLITICS IS LOCAL AND OTHER RULES OF THE GAME (1994).

2. For example, because of concerns that the federal government might seek to usurp state oil and gas authority, the North Dakota legislature authorized \$1 million to fund "litigation and other administrative proceedings involving the United States environmental protection agency's effort to regulate hydraulic fracturing." S. 2371, 62nd Leg., Spec. Sess. § 28 (N.D. 2011), *available at* <http://legis.nd.gov/assembly/62-2011/special-session/sessionlaws/documents/BANKS.pdf#page=mode=bookmarks&CHAPTER579>, *archived at* <http://perma.cc/PWZ2-F7C2>.

control over oil and gas operations or if, instead, local governments (e.g., towns, cities, counties) should have some or complete power to decide whether hydraulic fracturing is allowed within their jurisdictions.

David B. Spence's *The Political Economy of Local Vetoes* considers local vetoes in the context of the latter option.<sup>3</sup> His article considers "which level of government (state or local) is most likely to produce decisions that balance the costs and benefits of shale oil and gas production well."<sup>4</sup> Rather than analyzing the issue through a lens to determine whether hydraulic fracturing for oil and gas should be more or less regulated (or banned), he argues: "[L]ocal decision making over fracking can be welfare enhancing in the long run *if* local governments can capture more of the benefits of production."<sup>5</sup>

Professor Spence correctly states that the shale oil and gas debate provides an example of "an age-old political problem that the law is called upon to solve: the conflict between an intensely held minority viewpoint and a less intense, contrary view held by the majority."<sup>6</sup> In some states, such as Pennsylvania, the majority of people in the state support hydraulic fracturing for oil and gas, while a minority oppose the effort.<sup>7</sup> The minority, though, sometimes resorted to local ordinances that served to limit or effectively ban the practice within the jurisdiction.<sup>8</sup> In other states, it would be conceivable for a majority of the state to oppose oil and gas exploration and production, while a minority, represented by certain localities, might support the process.

This Response suggests the Professor Spence's test for local control is a good one, but adds another factor contributing to local control. As noted above, another way of considering local control over oil and gas operations is to view local control as state-level control. The argument that the key to preserving more localized control is ensuring the continued relatively light federal regulation of oil and gas production is an article unto itself and beyond the potential of this Response. This Response proceeds under the premise, though, that each state should decide whether it wishes to allow its municipalities to exercise oil and gas related vetoes.

With that premise, this Response argues that, as long as states exercise primary control over oil and gas operations, the concept of local control has been preserved: it is a state-by-state decision to decide how local such

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3. David B. Spence, *The Political Economy of Local Vetoes*, 93 TEXAS L. REV. 351 (2014).

4. *Id.* at 352.

5. *Id.* at 354.

6. *Id.* at 413.

7. ERICA BROWN ET AL., PUBLIC OPINION ON FRACKING: PERSPECTIVES FROM MICHIGAN AND PENNSYLVANIA 2 (2013), available at <http://closup.umich.edu/files/ieep-nsee-2012-fall-fracking.pdf>, archived at <http://perma.cc/YLQ2-MYNA>.

8. Clifford Krauss, *Split Decision by Voters on Local Fracking Bans*, N.Y. TIMES, Nov. 5, 2014, [http://www.nytimes.com/2014/11/06/business/energy-environment/split-decision-by-voters-on-local-fracking-bans-.html?\\_r=0](http://www.nytimes.com/2014/11/06/business/energy-environment/split-decision-by-voters-on-local-fracking-bans-.html?_r=0), archived at <http://perma.cc/YZE7-NMUE>.

control should be permitted. This is critical, because local vetoes, as analyzed by Professor Spence, run in only one direction. That is, local vetoes serve to block hydraulic fracturing in a state where hydraulic fracturing is otherwise allowed. A broader concept of local control might suggest localities should have the full scope of decision-making authority regarding hydraulic fracturing, such that a locality could allow hydraulic fracturing even where a state had generally banned the process. Such a concept might create untenable environmental risks, but regardless, such a proposal is beyond the scope of this Response.

Oil and gas regulation falls generally under the purview of each state.<sup>9</sup> Recent court decisions in New York, Colorado, and Pennsylvania provide good examples of how different states analyze local control, with varying outcomes. This Response considers the decisions in these states without regard to the merits of the substance of the decision. That is, consistent with Professor Spence's mode of analysis, the cases will be analyzed for how they influence the idea of local control, and not how oil and gas operations were (or were not) controlled.<sup>10</sup>

This response concludes that, even though the cases have different results, New York and Colorado have met Professor Spence's ideal: that the "courts . . . resolve [such] conflicts in ways that encourage states and local governments to regulate in ways that weigh both the costs and the benefits of shale oil and gas production fairly and fully."<sup>11</sup> In contrast, Pennsylvania's protection of local vetoes falls short of that ideal.

## II. The Great State Experiment in Local Control

### A. *New York*

Some states have embraced hydraulic fracturing, and others have taken a more cautious, if not outright skittish, approach. The state of New York has taken the view that hydraulic fracturing is a fundamental change to oil and gas extraction and has responded strongly.<sup>12</sup> The New York governor's office determined that close study of the process was needed and placed a moratorium on all hydraulic fracturing.<sup>13</sup> The moratorium delayed

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9. Jacquelyn Pless, *Fracking Update: What States Are Doing To Ensure Safe Natural Gas Extraction*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/energy/fracking-update-what-states-are-doing.aspx>, archived at <http://perma.cc/TN8L-K9KC>.

10. Spence, *supra* note 3, at 352.

11. *Id.* at 413.

12. Joshua P. Fershee, *The Oil and Gas Evolution: Learning From the Hydraulic Fracturing Experiences in North Dakota and West Virginia*, 19 TEX. WESLEYAN L. REV. 23, 31 (2012).

13. STATE OF N.Y., EXECUTIVE ORDER NO. 41: REQUIRING FURTHER ENVIRONMENTAL REVIEW (Dec. 13, 2010), available at <http://www.governor.ny.gov/larchive/paterson/executive-orders/EO41.html>, archived at <http://perma.cc/L69L-PK62> (issued by Governor David Paterson); see also STATE OF N.Y., EXECUTIVE ORDER NO. 2: REVIEW, CONTINUATION AND EXPIRATION OF PRIOR EXECUTIVE ORDERS (Jan. 1, 2011), available at <http://www.governor.ny.gov/executive>

regulations that could allow hydraulic fracturing in New York, and the New York Environmental Conservation Department has indicated that it will not issue such regulations until April 2015.<sup>14</sup>

Further indicating reluctance to support hydraulic fracturing in the state, the New York State Assembly passed a bill in June of 2014 that will not allow “horizontal natural gas or oil drilling or high-volume hydraulic fracturing . . . in the state” for three years from the effective date, at which time the law would be repealed.<sup>15</sup> The Senate declined to pass a similar two-year moratorium bill that the Assembly passed in 2013.<sup>16</sup>

While that legislation was pending, Governor Andrew M. Cuomo announced a ban on fracking in the entire state of New York.<sup>17</sup> The governor enacted the ban after the state department of health issued a report that determined the process of high-volume hydraulic fracturing posed undeterminable public-health risks that warranted a ban until there is adequate science that “provides sufficient information to determine the level of risk to public health” from the process.<sup>18</sup>

Prior to the ban, several localities in New York had moved forward to ban oil and gas production activities, including hydraulic fracturing, in their respective jurisdictions. Despite the state fracking ban, these local ordinances are worth analyzing because the ban could be overturned at any time. If (and likely when) that ban is overturned, local ordinances would again play a role in oil and gas production.<sup>19</sup>

order/2, *archived at* <http://perma.cc/5FRD-S9J9> (order continued by Governor Andrew Cuomo continuing the Executive Order 41).

14. Freeman Klopott, *New York Decision on Fracking Regulations Delayed*, BLOOMBERG, (Jan. 29, 2014 2:14 PM), <http://www.bloomberg.com/news/2014-01-29/new-york-decision-on-fracking-regulations-delayed.html>, *archived at* <http://perma.cc/XFG3-7JNZ>.

15. Assemb. B. 5424-B, 2013 Gen. Assemb., Reg. Sess. (N.Y. 2013), *available at* [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A05424&term=2013&Summary=Y&Actions=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A05424&term=2013&Summary=Y&Actions=Y&Text=Y), *archived at* <http://perma.cc/7ZTL-GGR8>.

16. Scott Waldman, *If Democrats Take Majority, Senate Would Take up Fracking Bills*, CAPITAL, (Sept. 25, 2014 5:46 AM), <http://www.capitalnewyork.com/article/albany/2014/09/8553302/if-democrats-take-majority-senate-would-take-fracking-bills>, *archived at* <http://perma.cc/N6J5-FNY6>.

17. Thomas Kaplan, *Citing Health Risks, Cuomo Bans Fracking in New York State*, N.Y. TIMES, Dec. 18, 2014, at A1, <http://www.nytimes.com/2014/12/18/nyregion/cuomo-to-ban-fracking-in-new-york-state-citing-health-risks.html>, *archived at* <http://perma.cc/446U-9X7F>.

18. N.Y. STATE DEP'T OF PUBLIC HEALTH, A PUBLIC HEALTH REVIEW OF HIGH VOLUME HYDRAULIC FRACTURING FOR SHALE GAS DEVELOPMENT 2 (2014), *available at* <http://www.nytimes.com/interactive/2014/12/18/nyregion/new-york-state-fracking-report.html>, *archived at* <http://perma.cc/4GXY-MA8M>.

19. Joshua P. Fershee, *New York's Fracking Failure*, BUS. L. PROF BLOG (Dec. 23, 2014), [http://lawprofessors.typepad.com/business\\_law/2014/12/new-yorks-fracking-failure-.html](http://lawprofessors.typepad.com/business_law/2014/12/new-yorks-fracking-failure-.html), *archived at* <http://perma.cc/GQ6S-PLU7> (“When natural gas prices rebound . . . [t]he economic pressure will be enormous and when the financial potential reaches the point that large and diverse groups in the state see the possibility of significant gain, it’s highly likely the ban will be reversed through legislative or other political action.”).

Not long before the ban, the New York State Court of Appeals determined that local fracking bans were permissible under state law.<sup>20</sup> The towns of Dryden and Middlefield each enacted bans on oil and gas activities that led to court challenges.<sup>21</sup> In Dryden, the town board initially determined that oil and gas activities were not permitted in town because the town ordinances did not allow uses not specifically allowed.<sup>22</sup> The town board later reviewed “a number of relevant scientific studies” and subsequently voted unanimously to specifically restrict oil and gas exploration, extraction, and related storage activities.<sup>23</sup>

Similarly, in Middlefield, the court stated that while the town did not believe its zoning ordinances permitted oil and gas activities in town when two mineral leases were executed in 2007, the town’s board nonetheless conducted “a lengthy and detailed review” of the issues related to natural gas activities.<sup>24</sup> After that review, the town board modified its master plan to adopt zoning rules that prohibited heavy industrial use, including oil and gas operations, in the area.<sup>25</sup>

The question before the court was whether such ordinances were preempted by New York’s Oil, Gas, and Solution Mining Law (OGSML).<sup>26</sup> To determine whether that was the case, the court turned to the New York Constitution’s home-rule provision, Article IX, which provides: “[E]very local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law . . . except to the extent that the legislature shall restrict the adoption of such a local law.”<sup>27</sup> The state legislature put in place the Municipal Home Rule Law to carry out this constitutional provision, allowing local governments to enact laws and ordinances that would protect the health, safety, and property in the respective communities.<sup>28</sup>

The court explained: “As a fundamental precept, the Legislature has recognized that the local regulation of land use is ‘[a]mong the most important powers and duties granted . . . to a town government.’”<sup>29</sup> Nonetheless, there are limits. A New York town is not permitted to “enact ordinances that conflict with the State Constitution or any general law,” thus reaffirming the supremacy of state law.<sup>30</sup> Still, the court stated that it would be reluctant to overrule a local land zoning law unless the state law provided

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20. Wallach v. Town of Dryden, 16 N.E.3d 1188, 1201 (N.Y. 2014).

21. *Id.* at 1191.

22. *Id.* at 1192.

23. *Id.*

24. *Id.* at 1204.

25. *Id.*

26. *See id.* at 1194.

27. *Id.* (citing N.Y. CONST. art. IX, § 2[c][ii]).

28. *Id.* at 1204.

29. *Id.* at 1204 (quoting N.Y. TOWN LAW § 272-a [1][b]).

30. *Id.*

a “clear expression of legislative intent to preempt local control over land use.”<sup>31</sup>

In the *Town of Dryden* decision, the court noted the deliberative manner in which both Dryden and Middlefield approached the issue. The town of Dryden reviewed “a number of scientific studies” and held a public hearing before unanimously voting to change the city’s zoning ordinance to ban oil and gas operations.<sup>32</sup> Similarly, Middlefield “undertook a lengthy and detailed review of the issue in 2011.”<sup>33</sup> The town commissioned a study to assess hydraulic fracturing impacts on Middlefield, and the town board held public meetings on the issue before unanimously voting to amend the city’s master plan.<sup>34</sup> The board voted “to adopt a zoning provision classifying a range of heavy industrial uses, including oil, gas and solution mining and drilling, as prohibited uses.”<sup>35</sup>

The New York high court arguably adopted Professor Spence’s mandate that “courts . . . resolve [such] conflicts in ways that encourage states and local governments to regulate in ways that weigh both the costs and the benefits of shale oil and gas production fairly and fully.”<sup>36</sup> The court explains that both towns “engaged in a reasonable exercise of their zoning authority,” stating that the town actively studied the issue before acting to exercise their home rule power in determining that oil and gas operations would permanently harm the “small-town character of their communities.”<sup>37</sup>

Additionally, the court specifically stated that it was not making a policy determination about oil and gas operations and that the case was not about whether hydraulic fracturing is good or bad for the “economy, environment or energy needs of New York.”<sup>38</sup> The court further explains that the decision simply finds that the New York legislature had not removed a city’s ability to use home rule power to restrict oil and gas operations through zoning.<sup>39</sup> However, the court also made clear that the state legislature has the power to eliminate home rule authority in this area, if it so decided.<sup>40</sup>

The New York court thus preserved the power of local vetoes within the current state power-sharing structure, while preserving the power of the state legislature to assess policy issues in this area. The court made clear that the overall value of allowing oil and gas operations was a policy issue that was

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31. *Id.* (quoting *Gernatt Asphalt Prods. v. Town of Sardinia*, 664 N.E.2d 1226, 1234 (N.Y. 1996)).

32. *Id.* at 1192.

33. *Id.* at 1193.

34. *Id.*

35. *Id.*

36. Spence, *supra* note 3, at 413.

37. *Town of Dryden*, 16 N.E.3d at 1202.

38. *Id.*

39. *Id.*

40. *Id.* at 1203 (“There is no dispute that the State Legislature has this right if it chooses to exercise it.”).

not for the courts.<sup>41</sup> This is not to say the court was not indicating some policy preferences in determining that local zoning was not preempted by the suppression clause in the state's OGSMML. The dissent makes clear that another decision was viable.<sup>42</sup> Nonetheless, the court retains a mechanism to ensure the costs and benefits of the hydraulic fracturing are weighed fairly and fully, and arguably even forces such a discussion.

### *B. Colorado*

Colorado courts have so far taken a different tack, finding that local bans on hydraulic fracturing create an “irreconcilable conflict” between “the state interest in production, prevention of waste and protection of correlative rights” and local interests in banning hydraulic fracturing.<sup>43</sup> The key case in this area is *Colorado Oil and Gas Association v. City of Longmont*, in which city voters chose to amend the city charter to ban hydraulic fracturing and related activities in the City of Longmont.<sup>44</sup> The city defended the action based on its home rule and land use powers.<sup>45</sup>

Colorado's Supreme Court had previously held that the state Oil and Gas Conservation Act did not expressly preempt all local land use authority in areas with oil and gas operations.<sup>46</sup> Instead, there is a range of possibilities. Although there may be areas where implied preemption exists, the Colorado Supreme Court explained:

The state's interest in oil and gas activities is not so patently dominant over a county's interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory scheme.<sup>47</sup>

The *Bowen/Edwards* court explained that where “operational conflicts” exist, county regulations are required to give way to the state interest.<sup>48</sup> For example, the court stated that technical country regulations that place conditions on well pumping or drilling could create operation conflicts that

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41. *Id.* at 1202 (“These are major policy decisions for the coordinate branches of government to resolve.”).

42. *Town of Dryden*, 16 N.E.3d at 1203 (Piggot, J., dissenting).

43. *Colo. Oil & Gas Ass'n v. City of Longmont*, No. 13CV63, 2014 WL 3690665, at \*16 (Colo. Dist. Ct. July 24, 2014) (order granting motions for summary judgment).

44. *Id.* at \*2.

45. *Id.*

46. *Bd. of Cnty. Comm'rs, La Plata Cnty. v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1058 (Colo. 1992).

47. *Id.*

48. *Id.* at 60.

would require county regulations to “yield to the state interest.”<sup>49</sup> A subsequent court further explained that land use control could be exercised by localities where the local control did not frustrate the intent of the state oil and gas laws and could be harmonized with those laws.<sup>50</sup> However, a “total ban” on oil and gas operations can impede the interests of the state.<sup>51</sup>

In *City of Longmont*, then, the court considered whether the city’s oil and gas operations ban created an operational conflict that required the court to invalidate the ban.<sup>52</sup> The court determined that there were real local interests, as well as state interests, in the case, and not merely issues of local concern, as the city argued.<sup>53</sup> Ultimately, the court determined that it was impossible to harmonize the hydraulic fracturing ban and the state oil and gas law in a way that could balance the state and local interests.<sup>54</sup> The two interests, the court said, “present mutually exclusive positions.”<sup>55</sup>

The court was sympathetic to the idea that some cases supporting preemption and explaining the state oil and gas law goals “may have been developed at a time when public policy strongly favored the development of mineral resources.”<sup>56</sup> Still, the court noted, those seeking to maintain the ban “are essentially asking this Court to establish a public policy that favors protection from health, safety, and environmental risks over the development of mineral resources. Whether public policy *should* be changed in that manner is a question for the legislature or a different court.”<sup>57</sup>

### C. Pennsylvania

The Pennsylvania Supreme Court decided *Robinson Township v. Commonwealth* in December 2013.<sup>58</sup> The decision addressed several constitutional challenges to Act 13, a law the state assembly passed to stop an outbreak of local ordinances restricting the use of hydraulic fracturing in the state. In response to these local vetoes, the Pennsylvania legislature passed Act 13 to revise the state’s Oil and Gas Act,<sup>59</sup> which preempted local governments from restricting oil and gas operations.

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49. Voss v. Lundvall Bros., 830 P.2d 1061, 1069 (Colo. 1992).

50. *Id.*

51. See Colo. Oil & Gas Ass’n v. City of Longmont, No. 13CV63, 2014 WL 3690665, at \*14 (Colo. Dist. Ct. July 24, 2014).

52. *Id.*

53. See *id.* at \*14–15 (“The operational conflict in this case is obvious.”).

54. *Id.* at \*16.

55. *Id.*

56. *Id.* at \*13.

57. *Id.*

58. *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013). For a more detailed description of the case and an analysis of potential impacts, see Joshua P. Fershee, *Facts, Fiction, and Perception in Hydraulic Fracturing: Illuminating Act 13 and Robinson Township v. Commonwealth of Pennsylvania*, 116 W. VA. L. REV. 819 (2014).

59. See 58 PA. CONS. STAT. §§ 2301–3504 (2014) (*repealing* 58 PA. STAT. ANN. §§ 601.101–.605 (2012)).



The court's four-to-two decision rejected almost every Commonwealth argument in favor of Act 13 and upheld the decision below finding the statewide zoning regime unconstitutional.<sup>60</sup> There was no majority rationale as to the constitutional limit on legislative authority. Three Justices determined that the Commonwealth had a constitutional obligation under the state constitution's Environmental Rights Amendment (Section 27), which was enacted in 1971.<sup>61</sup> This plurality opinion decided that Section 27 justified overriding the statewide zoning provisions preempting local action.<sup>62</sup> Justice Baer authored a separate concurrence, agreeing in the outcome but deciding the statewide preemptive zoning plan of Act 13 violated substantive due process.<sup>63</sup>

Section 27 states:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.<sup>64</sup>

The plurality's 162-page opinion stated that the government has an obligation to avoid "unduly infringing or violating" a constitutional right and that such constitutional obligations bind all levels of government concurrently.<sup>65</sup> The Commonwealth could thus not take away local authority that allowed localities to fulfill their constitutional obligations.<sup>66</sup> As I have detailed elsewhere, the plurality rendered several factual findings to support the determination that Act 13 represented an unconstitutional modification to existing oil and gas law.<sup>67</sup> The opinion finds that the detrimental impact hydraulic fracturing would have on the environment necessitated the outcome.<sup>68</sup>

The "unquestionable harms" inherent in hydraulic fracturing, the plurality decided, warranted overruling Act 13's provisions creating a statewide environmental oil and gas regulatory plan, allowing oil and gas operations in every zoning district, and granting authority to the

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60. *Robinson Twp.*, 83 A.3d at 999–1000 (plurality opinion).

61. *Id.* at 1000.

62. *Id.* at 913.

63. *Id.* at 1007 (Baer, J., concurring).

64. PA. CONST. art. I, § 27.

65. *Robinson Twp.*, 83 A.3d at 952 (plurality opinion).

66. *Id.* at 977.

67. Fershee, *supra* note 58, at 833.

68. *Robinson Twp.*, 83 A.3d at 976 (plurality opinion).

Commonwealth's Department of Environmental Protection to waive statutory water setbacks.<sup>69</sup>

The dissenters disagreed and argued that the majority had substituted the court's own policy judgment, which judgment was properly to be exercised by the General Assembly.<sup>70</sup> The dissenters further asserted that the majority decision vested powers to municipalities that were not guaranteed by the Pennsylvania constitution: "[N]othing in our Constitution confers upon municipalities a vested entitlement in their delegated authority to manage land use or the right to dictate the manner in which the General Assembly administers the Commonwealth's fiduciary obligation to the citizenry at large relative to the environment."<sup>71</sup>

Finally, the dissent questioned the unsupported factual determinations the majority used to justify the decision. As Justice Saylor explained:

Consistent with the overarching review standards and the separation-of-powers principle, we are to take the Legislature at its word when it said that it intended to "[p]ermit optimal development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, environment and property of Pennsylvania citizens," 58 Pa.C.S. §3202, at the very least, in the absence of some compelling proof to the contrary.<sup>72</sup>

In assessing this decision through Professor Spence's test, it is these unsupported factual determinations that the Pennsylvania high court used to uphold a right to local vetoes that require focus.

I have argued previously that the Pennsylvania Supreme Court process in this case was incorrect.<sup>73</sup> Again, it is not that the result of the case is that local governments can regulate oil and gas operation in Pennsylvania that is objectionable. It is that the plurality decision fails to demonstrate, as Professor Spence would require, that the court "weigh[ed] both the costs and the benefits of shale oil and gas production fairly and fully."<sup>74</sup> To the contrary, the court determined that the costs of hydraulic fracturing regulation necessarily outweigh the benefits, without any additional fact gathering or analysis.<sup>75</sup>

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69. *Id.* at 978, 981–83.

70. *Id.* at 1010 (Saylor, J., dissenting).

71. *Id.* at 1012.

72. *Id.* at 1013.

73. Fershee, *supra* note 58, at 862.

74. Spence, *supra* note 3, at 413.

75. Fershee, *supra* note 58, at 834; Jesse J. Richardson, Jr., *Local Regulation of Hydraulic Fracturing*, 117 W. VA. L. REV. 593, 618 (2014) (stating that Justice Saylor's dissent in *Robinson Township* "characterized the plurality as 'hypothesizing' about the negative impacts of Act 13 on the environment, while ignoring the detailed requirements of Act 13").

To begin, the plurality states: “By any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction.”<sup>76</sup> This is a broad and conclusory statement that is not supported by any facts. This Response, though, is not arguing that the opinion was wrong or right on the merits. Instead, the point here is that one cannot fairly and fully assess costs and benefits when one has not gathered information about costs and benefits.

Again, the Commonwealth’s constitutional mandate under Section 27 provides: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”<sup>77</sup> This mandate cannot be carried forth without considering the entire context in which any proposed action is occurring. The status quo must be compared to the available options. In this circumstance, this means considering what is happening without hydraulic fracturing or whether other resources will step in as an alternative if natural gas production stops. The state must assess whether the potential harms from hydraulic fracturing might reduce environmental harms that would occur from the extraction of other resources in the state.<sup>78</sup>

The merits of that review are irrelevant here, though. The court could have considered the potential environmental benefits of shifting to natural gas (via increased gas production), and still decided that the risks outweigh the benefits. The concern here is that the court failed to conduct a proper balancing test, though the court seems to concede some level of a balancing test is necessary.<sup>79</sup> If so, there must be some consideration about where natural gas fits in the state’s energy mix and how that might impact the environment, taking into account extraction processes for natural gas and competing resources.

The court did discuss the role of coal briefly in the opinion, but that discussion cuts against the court’s conclusion. That is, the court is critical of the state’s history of coal exploration and exploitation, arguing that Act 13’s facilitation of hydraulic fracturing could lead to similar negative environmental impacts.<sup>80</sup> The plurality opinion, without stating it, seems to believe that Section 27 has made coal clean, but that hydraulic fracturing is

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76. *Robinson Twp.*, 83 A.3d at 976 (plurality opinion).

77. PA. CONST. art. I, § 27.

78. *See Fershee*, *supra* note 58, at 841.

79. *Robinson Twp.*, 83 A.3d at 940 (plurality opinion). *But see id.* at 1015–16 (Eakin, J., dissenting) (arguing that the balancing test was the legislature’s role and not the job of the judiciary).

80. *See id.* at 965 (plurality opinion).

somehow operating outside those standards.<sup>81</sup> In making these claims, the court chooses to compare hydraulic fracturing for natural gas with early levels of coal production, but one cannot fairly compare coal and natural gas processes without comparing the current state of each industry.

Coal extraction is significantly less environmentally harmful than it was fifty or seventy-five years ago, but the process remains messy and requires heavy equipment to move massive amounts of earth.<sup>82</sup> Longwall mining and mountaintop-removal strip mining remain massive undertakings that move tons of earth.<sup>83</sup> As such, the court should have at least addressed the reality that, in the near term, it is not a question of whether to pursue natural gas or not to pursue natural gas. The question is really whether we will choose to pursue natural gas or coal.

The Pennsylvania Supreme Court may have reached the right conclusion when it reinstated local veto power. The way in which the court's plurality did so, though, failed to provide a full range of analysis and discussion, which means the court failed to encourage the state government and local governments to engage in the kind of balanced analysis necessary to weigh the costs and benefits of pursuing oil and gas operations in choosing their regulatory regime. To the extent the legislature had already conducted an analysis, the concurrence and the dissents would have given the political process the opportunity to run its course, which is likely to have provided another chance to maximize outcomes via bargaining.<sup>84</sup>

### III. Conclusion

Professor Spence argues that upholding local vetoes is more likely “to provoke productive bargaining than preempting” local vetoes.<sup>85</sup> This is likely correct, although the level of what constitutes “local” is subject to interpretation. As noted above, one could consider the overall state-by-state oil and gas regulatory regime local in nature, as compared to a federal system of regulation. In the other direction, local vetoes could conceivably go to a smaller scale than counties or cities, to districts, neighborhoods, or housing developments.

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78. *See id.* at 961 (discussing the negative impacts of coal mining and how that process has improved over time).

82. *See* J. Thomas Lane, *Fire in the Hole to Longwall Shears: Old Law Applied to New Technology and Other Longwall Mining Issues*, 96 W. VA. L. REV. 577, 583 (1994) (explaining that longwall mining became a more mechanized process starting in the 1980s).

83. *See* Patrick C. McGinley, *Collateral Damage: Turning a Blind Eye to Environmental and Social Injustice in the Coalfields*, 19 J. ENVTL. & SUSTAINABILITY L. 305, 372–73 (2013).

84. *See* Spence, *supra* note 3, at 394 (“Coase demonstrated that, under certain conditions, bargaining between the parties will produce an efficient solution and that the initial distribution of rights (for example, to develop or to stop development) does not matter.”).

85. *Id.* at 396.

Eventually some line has to be drawn, and whether it is at the state level, the county level, the city level (or somewhere else), the key to maximizing the effectiveness of oil and gas regulation is keeping control local enough that conflicts are resolved “in ways that encourage states and local governments to regulate in ways that weigh both the costs and the benefits of shale oil and gas production fairly and fully.”<sup>86</sup>

For some states, like Colorado, that will mean restricting most, if not all, local regulation of oil and gas operations. For others, like New York and Pennsylvania, that will mean allowing localities broad and diverse control over operations in their jurisdictions. However, even these outcomes are not equal. New York and Colorado represent examples of court decisions that facilitate state-level policy discussions of what is the best way to regulate oil and gas operations. Pennsylvania’s decision has, instead, led to a high-court decree of policy priorities as related to hydraulic fracturing.

Communities that do not want hydraulic fracturing in their area often fight anything to do with oil and gas operations. However, a ban on (or regular rejection of) facilities that serve the oil and gas industry can increase the risks that motivate the community to support a ban in the first place. For example, refusing to site a wastewater treatment plant to deal with flow-back water from a hydraulic-fracturing operation could increase the likelihood of riskier methods of wastewater disposal.

Professor Spence argues that allowing local vetoes (meaning county and city vetoes) may do a better job of taking preference intensity into account “because locals experience the effects of fracking most intensely and profoundly and so care more about the issue.”<sup>87</sup> He concedes, though, that local governments may overregulate because they are so close to the costs of hydraulic fracturing, which could create exaggerated short-run risk aversion.<sup>88</sup> He suggests that such concerns will likely mellow over time, as risks are better understood.<sup>89</sup>

Professor Spence may be right about that, though the status quo bias concerns he discusses<sup>90</sup> also suggest that areas supporting hydraulic fracturing are likely to continue to do so, and those that oppose it are likely to maintain that view.<sup>91</sup> As such, this Response argues that as long as state-level regulation is the primary basis for oil and gas regulation, Professor Spence’s overarching rule that state and local governments pursue regulations seeking to balance the costs and the benefits of shale oil and gas

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86. *Id.* at 413.

87. *Id.* at 412.

88. *Id.*

89. *Id.* at 392–93.

90. *Id.* at 396.

91. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 7–8 (2008) (stating that the term “status quo bias” is “a fancy name for inertia”).

production “fairly and fully” is a foundation for good regulation.<sup>92</sup> In this sense, local (meaning state or smaller subdivisions) vetoes are critical, but how “local” the vetoes are is less important.

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92. This is true because it can force bargaining, even though it must be conceded that whatever policy is adopted as the default policy, the ultimate policy is likely to be similar to the default. *See id.* at 8 (“If private companies or public officials think that one policy produces better outcomes, they can greatly influence the outcome by choosing it as the default.”).