

WRANGLING WITH URBAN WILDCATTERS: DEFENDING TEXAS MUNICIPAL OIL AND GAS DEVELOPMENT ORDINANCES AGAINST REGULATORY TAKINGS CHALLENGES

INTRODUCTION

Like many states, Texas uses license plates to illustrate state pride and tradition. On a Texas license plate, one finds a silhouetted starry-sky prairie nightscape that depicts a cowboy riding a trotting horse with oil derricks lingering in the background.¹ Oil and gas exploration and development is “one of Texas’s most established industries.”² The 1901 discovery of the Spindletop Field set off an economic boon that continues today with over a million wells drilled in some 68,000 oil and gas fields.³ Moreover, in 2002 Texas led the nation in oil and gas production, supplying approximately one-fifth of all domestically produced crude oil and thirty percent of the natural gas.⁴

Yet oil production has dropped precipitously in recent years, and gas production has plateaued,⁵ compelling extractive industries to develop new mineral resources in previously untapped areas of the state. One such area is the East Newark Field in the Barnett Shale, the United States’ eleventh-largest proven natural gas play,⁶ located within the Dallas–Fort Worth metropolitan area in North Central Texas.⁷

Increasingly, natural gas drilling rigs in the Barnett Shale nightscape are silhouetted not by a prairie, but an urban skyline interlaced with homes, businesses, schools, and churches. Approximately 6500 gas wells on over 4000 permitted locations have been drilled in the Barnett Shale since it was first discovered in 1981.⁸ This gas-play development in such close proximity to neighborhoods and businesses creates unique land use challenges for municipalities. Although oil and gas activities are traditionally regulated by the Railroad Commission of Texas, many cities

1. Tex. Dep’t of Transp., Standard License Plate, http://www.dot.state.tx.us/services/vehicle_titles_and_registration/texas_license_plate.htm (last visited Oct. 18, 2007).

2. TEX. ENERGY INDUS. CLUSTER TEAM ET AL., STATE OF TEXAS ENERGY CLUSTER ASSESSMENT 16 (2005), available at <http://www.texasindustryprofiles.com/PDF/twcClusterReports/TexasEnergyCluster.pdf>.

3. TEX. ENERGY PLANNING COUNCIL, TEXAS ENERGY OVERVIEW 5 (2004), available at <http://www.rrc.state.tx.us/tepc/TexasEnergyOverview.pdf>.

4. *Id.* at 4.

5. *Id.* at 6.

6. *Id.* at 5.

7. Sheila McNulty, *Quest for Oil Goes to Ends of the Earth*, FIN. TIMES (London), Oct. 10, 2006, at 12.

8. R.R. COMM’N OF TEX., NEWARK, EAST (BARNETT SHALE) FIELD DISCOVERY DATE – 10-15-1981 (2007), available at <http://www.rrc.state.tx.us/divisions/og/statistics/fielddata/barnettshale.pdf>.

have enacted their own regulatory ordinances, which often impose more stringent permitting and site location requirements, or entirely prohibit drilling in certain locations.⁹

Some attorneys and legal scholars argue that these ordinances give rise to compensatory takings challenges because they may severely limit or destroy property interests by denying or substantially restricting access to vested mineral rights or leases.¹⁰ The Texas Supreme Court has yet to encounter such a takings challenge. But as wildcatters continue to tread further from the prairie into the well-trodden suburban landscape, the court may soon face the complex issue of whether these ordinances constitute a regulatory taking under either the United States or Texas Constitutions.¹¹

This Note argues that municipalities have many sticks in their regulatory bundle to successfully defend a prudently enacted oil and gas ordinance against both partial and categorical takings claims. Part I briefly describes the natural history and development activities in the Barnett Shale play and details the massive population and land use growth in North Central Texas. Part II is a rudimentary primer on Texas oil and gas law that discusses the rule of capture in Part II.A, the dominance of the mineral estate in Part II.B, the Railroad Commission's regulatory powers in Part II.C, and state preemption doctrine in Part II.D.

Part III tracks the historical common law and statutory evolution of municipal police powers regulating oil and gas exploration and development. Specifically, Part III.A briefly outlines how a municipality's home-rule status vests it with substantial policing authority. Part III.B follows federal and state constitutional case law over the last century, retracing the evolution of jurisprudential thinking that empowered municipalities to regulate oil and gas activities. Part III.C outlines the Town of Flower Mound's 2003 ordinance as an example of a modern oil and gas regulation.

Part IV begins a detailed analysis of federal and state compensatory takings challenges that opponents may raise against a municipal oil and gas ordinance. Part IV.A substantively and procedurally distinguishes state versus federal constitutional challenges. Part IV.B follows the early historical progression of constitutional takings claims raised by extractive industries against municipal and state agencies. Part IV.C delves into modern takings jurisprudence starting with the U.S. Supreme Court's

9. See discussion *infra* Parts II.C, III.C.

10. See discussion *infra* Part IV.D.

11. A "wildcatter" is someone who "drills wells in the hope of finding oil in territory not known to be an oil field." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2615 (1986).

famous *Penn Central Transportation Co. v. New York City* decision.¹² This Part also tracks the development of Texas constitutional takings law that germinated independently of *Penn Central*, but eventually intertwined with *Penn Central* in the Texas Supreme Court's landmark decision in *Mayhew v. Town of Sunnyvale*.¹³ Finally, Part IV.D constructs an argument defending municipal oil and gas ordinances against compensable regulatory takings claims by examining four key areas of takings law: (1) defining the appropriate takings test; (2) aggregating mineral and surface estate interests under the "parcel-as-a-whole" principle; (3) delineating the reach of reasonable investment-backed expectations; and (4) using Texas's background principles of property and nuisance law to defeat categorical takings challenges.

Ultimately, this Note concludes that Texas municipalities can sustain a meaningful defense against regulatory takings challenges irrespective of whether a partial or total deprivation is alleged. Over a century of common law defending local and state control over oil and gas exploration leaves municipalities jurisprudentially well situated to advance ordinances that rein in a new breed of urban wildcatters. Discretion of local regulators, however, is not unbounded; municipalities still must pay substantial deference to state law, which historically gives priority to those who seek their fortune at the bottom of a well.

I. BARNETT SHALE AND URBAN SPRAWL IN NORTH CENTRAL TEXAS

A. *Drilling for Natural Gas in the Barnett Shale*

The Barnett Shale gas play is a massive reservoir of natural gas underlying a substantial portion of southern Oklahoma and North Central Texas.¹⁴ Between 300 and 350 million years ago, during the late

12. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

13. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998).

14. See JAMES W. SCHMOKER ET AL., U.S. GEOLOGICAL SURVEY, U.S. DEP'T OF THE INTERIOR, PRODUCTION CHARACTERISTICS AND RESOURCE ASSESSMENT OF THE BARNETT SHALE CONTINUOUS (UNCONVENTIONAL) GAS ACCUMULATION, FORT WORTH BASIN, TEXAS 9 (1996) ("The area of the accumulation might be as small as 285 [square miles] or as large as 4,200 [square miles]."); Clifford Krauss, *Drilling Boom and Dreams of Riches Go Door-to-Door in Fort Worth*, N.Y. TIMES, Oct. 27, 2006, at C1 ("[The] 5,000-square-mile [Barnett Shale] reservoir is already the second-largest-producing land-based domestic natural gas field after the San Juan Basin in New Mexico and Colorado."); NATALIE GIVENS & HANK ZHAO, REPUBLIC ENERGY, THE BARNETT SHALE: NOT SO SIMPLE AFTER ALL, http://www.republicenergy.com/Articles/Barnett_Shale/Barnett.aspx (last visited Sept. 20, 2007) ("The technological advances made within the last decade have allowed the Barnett Shale (Barnett) to grow from a crazy prospect to being one of the largest onshore natural gas plays within the continental U.S.").

Mississippian period of the Paleozoic era,¹⁵ the retreating Iapetus Ocean Basin, teeming with life, covered present day Texas.¹⁶ This shallow ocean left behind a decaying marine biomass that was eventually subsumed by geologic deposition, which, through thermogenic decomposition,¹⁷ created an “organic-rich siliceous shale.”¹⁸ A recent United States Geological Survey (USGS) assessment estimated that over 26.7 trillion cubic feet of gas is trapped within the Barnett Shale’s black rocks.¹⁹

Stalled domestic gas production, rising demand for clean alternative fuel sources, and the advent of new drilling and production technologies make the Barnett Shale highly attractive to the energy market.²⁰ The Barnett Shale was not discovered until 1981 by Mitchell Energy.²¹ Mitchell drilled most of the sixty-three wells that were drilled in the Barnett Shale between 1981 and 1989.²² As of 2005, over 100 companies have drilled more than 3800 wells, producing in excess of 1.2 billion cubic feet of gas per day.²³ It is estimated that between 2001 and 2005, companies invested over \$3.4 billion in drilling wells (roughly \$900,000 per well) and recouped over \$5.3 billion from gross cumulative gas sales.²⁴ Although the play extends across fourteen Texas counties, the “core area,” also known as the Newark East Field, is the most active production zone and is situated under the highly urbanized Denton, Tarrant, and Wise counties.²⁵

15. 2 THE NEW ENCYCLOPEDIA BRITANNICA 854 (15th ed. 1998).

16. GIVENS & ZHAO, *supra* note 14 (citing JAMES D. HENRY, STRATIGRAPHY OF THE BARNETT SHALE (MISSISSIPPIAN) AND ASSOCIATED REEFS IN THE NORTHERN FORT WORTH BASIN 157–77 (Charles A. Martin ed., 1982)).

17. *See id.* (explaining the geologic background of the Barnett Shale).

18. Richard M. Pollastro et al., *Assessing Undiscovered Resources of the Barnett-Paleozoic Total Petroleum System, Bend Arch-Fort Worth Basin Province, Texas*, in SEARCH AND DISCOVERY, at 14 (Am. Ass’n of Petrol. Geologists, Article No. 10034, 2003), <http://www.searchanddiscovery.com/documents/pollastro/images/article.pdf>.

19. U.S. GEOLOGICAL SURVEY, NATIONAL ASSESSMENT OF OIL AND GAS FACT SHEET: ASSESSMENT OF UNDISCOVERED OIL AND GAS RESOURCES OF THE BEND ARCH-FORT WORTH BASIN PROVINCE OF NORTH-CENTRAL TEXAS AND SOUTHWESTERN OKLAHOMA, 2003, at 1 (2003), available at <http://pubs.usgs.gov/fs/2004/3022/fs-2004-3022.pdf>. An additional 0.5 trillion cubic feet of gas, 98.5 million barrels of oil, and 1.1 billion barrels of natural gas liquids are found in the Bend Arch-Fort Worth Basin, which wholly encompasses the Barnett Shale natural gas play. *Id.*

20. Krauss, *supra* note 14.

21. GIVENS & ZHAO, *supra* note 14. Mitchell Energy was subsequently acquired by Devon Energy in January 2002. *Id.*

22. *Id.*

23. JEFF HAYDEN & DAVE PURSELL, THE BARNETT SHALE: VISITORS GUIDE TO THE HOTTEST GAS PLAY IN THE US 11 (2005), available at <http://www.pickerenergy.com/pdfs/TheBarnettShaleReport.pdf>.

24. John S. Baen, Cost/Benefit Analysis and Ad Valorem Tax Benefits of Oil and Gas Drilling in the DFW Barnett Shale of Urban and Suburban North Texas tbl.5 (unpublished manuscript, on file with the Vermont Law Review).

25. HAYDEN & PURSELL, *supra* note 23, at 11–12.

In 2005, over 100 rigs were drilling in North Central Texas.²⁶ Drill sites must be prepared, which may require clearing and leveling land, constructing access roads, drilling a water supply well, and preparing reserve pits to contain drilling fluids and spoils.²⁷ “Rigging-up” includes erecting a 120-foot lighted mast and installing a rotating system, a circulating system, and a portable power plant (usually consisting of several large diesel engines).²⁸ Once completed, production casings and liners are placed within the well bore, a wellhead is installed, and various separators and tanks are constructed on the surface to capture and treat the incoming “well stream” of oil and gas.²⁹ To improve productivity, operators will periodically stimulate the well through a process called “hydraulic fracturing.”³⁰ This technique involves injecting a “fracturing fluid” into the well under high pressure generated by powerful, portable pumps at the surface in order to wedge open fissures in the rock, which allows gas to flow more easily into the well.³¹ Thus, drilling operations may consume a substantial amount of space, pose contamination risks, and often require episodic periods of heightened activity even years after the well was originally drilled and surrounding properties have developed into neighborhoods or shopping districts.

B. Encroaching Suburbia Transforms the Rural Landscape

North Central Texas has experienced rapid urban and suburban growth, placing a premium on land for development and situating new communities directly in the path of mining companies seeking to exploit the Barnett Shale. North Central Texas has over five million residents and can expect over nine million by 2030.³² This unprecedented projected growth is predicated upon a common belief that the area tends to recover quickly from economic recessions and will remain a regional and international employment destination.³³ The largest cities are reaching build-out,³⁴ pushing new housing and business development farther into surrounding,

26. *Id.* at 11.

27. KATE VAN DYKE, *FUNDAMENTALS OF PETROLEUM* 105 (4th ed. 1997).

28. *See id.* at 85–105 (describing the main systems associated with a rotary drilling rig).

29. *See id.* at 147, 152, 171 (describing equipment installed to complete wells).

30. *See id.* at 162–63 (describing different methods of well stimulation).

31. *Id.*

32. N. CENT. TEX. COUNCIL OF GOV'TS RESEARCH & INFO. SERVS., *NORTH CENTRAL TEXAS 2030 DEMOGRAPHIC FORECAST 4* (2003), available at <http://www.nctcog.org/ris/demographics/forecast/publication.pdf>.

33. *Id.*

34. *See id.* at 15 (reporting that thirteen cities anticipate reaching build-out by 2030).

more agrarian, and less populous counties.³⁵ Although the play extends across fourteen counties, the “core area,” also known as the Newark East Field, is the most active production zone and is generally situated under Wise, Denton, Tarrant, and Dallas counties.³⁶ As centers of major metropolitan cities, Denton, Tarrant, and Dallas counties are highly urbanized and densely populated.³⁷

The converging forces of increased drilling activity and urban expansion are raising land use conflicts previously unknown to North Central Texas.³⁸ New homeowners may purchase property with an existing or abandoned gas well, not realizing a gas operator may enter the property to periodically re-stimulate or reopen the well for production.³⁹ Many residents are concerned about nuisances, like twenty-four-hour drilling disrupting the tranquility of sleepy subdivisions—or something worse, such as a gas well explosion.⁴⁰ Drilling rigs are temporary (operating onsite for approximately ninety days), but infrastructure remains behind, and, in the Barnett Shale, operators must periodically stimulate the wells to keep them economically viable.⁴¹ Thus, conflicting land use issues between gas wells

35. *See id.* at 8 (explaining that the four urban counties will lose a ten-percent share of household population by 2030 with correspondingly strong growth in the surrounding, less populous counties).

36. HAYDEN & PURSELL, *supra* note 23, at 11.

37. *See id.* (projecting that Tarrant County will capture twenty-one percent of new household population with Denton County receiving sixteen percent of “projected household growth during the 30-year forecast period”).

38. Jeff Mosier & Laurie Fox, *Homebuyer, Beware: Gas Well May Be Near*, DALLAS MORNING NEWS, Apr. 27, 2006, at 13A; *see also* Jay Parsons, *Drilling Debate Divides Homeowners: Flower Mound: Some Eager for Payments; Others Cite Safety Fears*, DALLAS MORNING NEWS, Sept. 24, 2006, at B1. “[S]prawl and existing wells are winnowing rural drilling options. Meanwhile, new technology and rising natural gas prices make suburban wells more attractive to drillers.” *Id.*

39. *See, e.g.*, Mosier & Fox, *supra* note 38.

When Pam Staskus moved to North Fort Worth in December, the builder told her that the capped natural gas well just off her front yard had been drilled and shouldn’t cause her trouble. So she was surprised in January when an 18-wheeler, generators, lights and a drilling rig showed up in the middle of the subdivision.

Id.

40. Krauss, *supra* note 14; *see also* Lianne Hart, *The Not-So-Friendly Neighborhood Gas Derricks*, L.A. TIMES, July 5, 2006, at A11. “In April [2006], an explosion at a well site in a southeast Fort Worth neighborhood killed a contractor and forced the evacuation of 500 homes. City and industry officials say that blowouts are rare and that drilling in populated areas is safe and clean.” *Id.*

41. *See* Sheila McNulty, *Quest for Oil Goes to Ends of the Earth*, FINANCIAL TIMES (London), Oct. 10, 2006, at 12 (describing the challenges faced by producers trying to access Barnett Shale deposits); Kent A. Bowker, *Development of the Barnett Shale Play, Fort Worth Basin*, in SEARCH AND DISCOVERY, at 9 (Am. Ass’n of Petrol. Geologists, Article No. 10126, 2007), <http://www.searchanddiscovery.net/documents/2007/07023bowker/images/bowker.pdf> (describing the process of re-stimulating wells).

and other surface development linger even after drilling ceases.

Yet some municipalities see economic prospects in leasing public lands for gas exploration.⁴² Such opportunities, however, must be balanced against competing environmental concerns, particularly the risk of contaminating groundwater.⁴³ As an answer to resolving these competing concerns, many North Central Texas municipalities have enacted ordinances regulating the development of natural gas within their corporate boundaries (and, in some instances, their extraterritorial jurisdictions).⁴⁴ Still, these ordinances do not operate in a vacuum and must conform to Texas common law, which has historically recognized the priority of mineral estate owners to access and consume natural resources, like natural gas, under the time-honored “rule of capture.”

II. PRIMER ON TEXAS OIL AND GAS LAW

A. Recognizing the Rule of Capture

Operatively understood, the rule of capture is a “common law rule of non-liability which states that there is no liability for draining oil and gas beneath a neighbor’s land.”⁴⁵ Its common law lineage reaches back to nineteenth century England and the primordial maxim that first possession

42. See, e.g., Emily Ramshaw, *A Natural Resource for Dallas? Officials See Untapped Revenue in Gas Drilling; Critics See Potential Mess*, DALLAS MORNING NEWS, Sept. 25, 2006, at A1 (“But with natural gas wells each bringing in an estimated \$2 million in royalties to cities across North Texas, city officials say Dallas has a fiscal responsibility to explore its underground resources—before someone else depletes them.”); Elizabeth Souder, *D/FW Lease Pays Off; Airport Gets Higher-Than-Expected Bonus in Gas Deal*, DALLAS MORNING NEWS, Oct. 7, 2006, at D1 (“Dallas/Fort Worth International Airport said Friday it got a check for \$185 million as it completed a deal to allow Chesapeake Energy Corp. [to] drill for natural gas on airport property.”).

43. See, e.g., Todd Bensman, *WELL, THAT’S A SURPRISE; Wildcat Oilman, Son Drilling for Gas in Suburban Coppell Strike Neighbors’ Curiosity*, DALLAS MORNING NEWS, Jan. 10, 1997, at A1 (mentioning a state jury verdict against an energy company drilling in the Barnett Shale for polluting local groundwater).

44. See, e.g., DENTON, TEX., DEVELOPMENT CODE subch. 22 § 35.22.1 (2006); FLOWER MOUND, TEX., CODE OF ORDINANCES ch. 34, art. VII § 34-416 (2006); FORT WORTH, TEX., CODE ch. 15, art. II, § 15-30 (2006).

45. JOSEPH SHADE, PRIMER ON THE TEXAS LAW OF OIL AND GAS 5 (3d ed. 2004); see also Bruce M. Kramer & Owen L. Anderson, *The Rule of Capture—An Oil and Gas Perspective*, 35 ENVTL. L. 899, 900 (2005).

Robert E. Hardwicke, a noted oil and gas attorney, gave one of the most straightforward formulations of the rule when he stated, “The owner of a tract of land acquires title to the oil and gas which he produces from wells drilled thereon, though it may be proved that part of such oil or gas migrated from adjoining lands.”

Id. (quoting Robert E. Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas*, 13 TEX. L. REV. 391, 393 (1935)).

or occupancy is the origin of property.⁴⁶ First applied to distinguish ownership of wild animals, or *ferae naturae*, courts grounded the rule of capture on the precept that “fugitive” resources (like foxes and ducks) are disposed as property interests to the private person in actual or constructive (*ratione soli*)⁴⁷ possession.⁴⁸ Many late nineteenth-century American state courts, uncertain as to the precise nature and subterranean movement of underground minerals, treated oil, natural gas, and groundwater as *ferae naturae* and analogously applied the rule of capture to demarcate competing ownership interests.⁴⁹ For instance, the Texas Supreme Court, lamenting

46. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 75 (1985); see also Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1221–22 (1979) (“[T]aking possession of unowned things is the only possible way to acquire ownership of them.”).

47. See JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 33 (5th ed. 2002) (“*Ratione soli* refers to the conventional view that an owner of land has possession—*constructive* possession, that is—of wild animals on the owner’s land; in other words, landowners are regarded as the prior possessors of any animals *ferae naturae* on their land, until the animals take off.”).

48. See, e.g., *Pierson v. Post*, 3 Cai. 175, 177 (N.Y. Sup. Ct. 1805) (“[P]ursuit alone, vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken.”); *Keeble v. Hickeringill*, (1707) 103 Eng. Rep. 1127, 1128 (Q.B.) (holding that “violent or malicious act[s]” committed by one landowner against another, which interferes with the capture and sale of wild fowl, gives rise to an actionable offense). But see *Ghen v. Rich*, 8 F. 159, 162 (D. Mass. 1881) (holding that local custom and exigent circumstances surrounding north Atlantic whaling industry create a property interest to fishermen who do all that is “possible” to recover the whale and not to private parties who take possession of a marked whale carcass found washed ashore).

49. See Rose, *supra* note 46, at 75 (“[A]nalogies to the capture of wild animals show up time and again when courts have to deal on a nonstatutory basis with some ‘fugitive’ resource that is being reduced to property for the first time, such as oil, gas, groundwater, or space on the spectrum of radio frequencies.”) (footnotes omitted); Ana Boswell Schepens, *Prospecting for Oil at the Courthouse: Recovery for Drainage Caused by Secondary Recovery Operations*, 50 ALA. L. REV. 603, 604 (1999) (“During the early stages of oil and gas jurisprudence, courts, unaided by the background of research and study available today, were uncertain of the physical nature of the minerals, and therefore made analogies to matters of which they were certain.” (citing RAYMOND M. MEYERS, LAW OF POOLING AND UNITIZATION § 1.03 (1957))); see also *State v. Ohio Oil Co.*, 49 N.E. 809, 812 (Ind. 1898).

To say that the title to natural gas vests in the owner of the land in or under which it exists to-day, and that to-morrow, having passed into or under the land of an adjoining owner, it thereby becomes his property, is no less absurd, and contrary to all the analogies of the law, than to say that wild animals or fowls, in their fugitive and wandering existence, in passing over the land, become the property of the owner of such land, or that fish, in their passage up or down a stream of water, become the property of each successive owner over whose land the stream passes.

Id. (internal quotation marks omitted); *Kelly v. Ohio Oil Co.*, 49 N.E. 399, 401 (Ohio 1897).

Whatever gets into the well, belongs to the owner of the well, no matter where it came from. . . . [A]nd no one can tell to a certainty from whence the oil, gas, or water which enters the well came, and no legal right as to the same can be established or enforced by an adjoining landowner.

Id.; *Westmoreland & Cambria Natural Gas Co. v. DeWitt*, 18 A. 724, 725 (Pa. 1889) (“Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals

the lack of scientific understanding as to the movement of groundwater, foreclosed as “hopeless” the possibility of developing legal rules effectively managing a natural phenomenon so “secret” and “occult.”⁵⁰

Specifically in Texas, the rule of capture has been relied upon for “lack of better knowledge or a better rule” to provide an effective means for compelling adjacent landowners concerned with depleting mineral resources by offsite drainage to answer such loss by also producing from their own wells.⁵¹ For instance, the Galveston Court of Civil Appeals in 1935 rejected as meritless an action by a landowner suing for damages resulting from the depletion of oil from wells located on an adjacent tract.⁵² The court reasoned that the adjacent drilling activities did not interfere with the landowner’s *own* ability to exploit the underlying oil, which remained untapped, in part, because of contractual difficulties in securing drillers for developing the property.⁵³ Moreover, the Texas Supreme Court had previously adopted a rule in recognizing mineral resources as accountable property interests (e.g., severable and conveyable) even if not reduced to actual possession.⁵⁴ In effect, the court modified the rule of capture as a liability-limiting corollary to the principle of “ownership-in-place,” which clarified ownership (and transferability) of mineral interests, while preserving the historical doctrine permitting unilateral draining of reservoirs common to multiple property owners.⁵⁵

The rule of capture, however, is not an absolute doctrine. Texas courts

ferae naturae.”).

50. *Houston & Tex. Cent. R.R. Co. v. East*, 81 S.W. 279, 280–81 (Tex. 1904).

51. Hardwicke, *supra* note 45, at 404 (citing cases). Although beyond the scope of this Note, such a resource-management philosophy leads inextricably to the problem of creating “consumption externalities,” which encourages resource depletion and can be answered only, in part, by dividing the exhaustible pool by private property interests and allowing the market to sort out demand. Susan Block-Lieb, *Fishing in Muddy Waters: Clarifying the Common Pool Analogy as Applied to the Standard for Commencement of a Bankruptcy Case*, 42 AM. U. L. REV. 337, 369–71 (1993).

52. *Hermann v. Thomas*, 143 S.W. 195, 197 (Tex. Civ. App.-Galveston 1911).

53. *Id.*

54. *See Tex. Co. v. Daugherty*, 176 S.W. 717, 722 (Tex. 1915) (holding that transfer of mineral interests is a property interest conveyance and subject to taxation).

55. Jared C. Bennett, Comment, *Ownership of Transmigratory Minerals, Utah and Zebras: Proof that Oil and Gas Ownership Law Needs Reform*, 21 J. LAND RESOURCES & ENVTL. L. 349, 351 (2001); *see also Stephens County v. Mid-Kan. Oil & Gas Co.*, 254 S.W. 290, 292 (Tex. 1923).

Ultimate injury from the net results of drainage, where proper diligence is used, is altogether too conjectural to form the basis for the denial of a right of property in that which is not only plainly as much realty as any other part of the earth’s contents, but realty of the highest value to mankind and often worth far more than anything else on or beneath the surface within the proprietor’s boundaries.

Id.; *Ryan Consol. Petrol. Corp. v. Pickens*, 285 S.W.2d 201, 206–07 (Tex. 1955) (holding that the Railroad Commission of Texas may regulate the permitting of oil wells to prevent waste, but not confiscation contrary to the long-held judicial acceptance of the rule of capture).

will circumscribe the rule's scope by considering the following causes of action: trespass, negligence, nuisance, waste, violating statutory limitations, and interference with the correlative rights of other property owners.⁵⁶ Moreover, the Texas Supreme Court has held that the legislature can delegate authority by empowering the Railroad Commission of Texas to promulgate spacing rules and regulate the drilling of wells for the purpose of preventing waste.⁵⁷ Since the turn of the twentieth century, Texas courts have continued to assert the priority of the rule of capture subject to reasonable regulation or a countervailing common law claim of injury.⁵⁸ Still, the oil field mythos pervades Texas lore and law, creating a demonstrably firm footing for mineral estate owners to assert predominance over other property rights, even superseding, at times, the community's interest manifested through the powers of local government.

B. Accommodating Mining Interests: Mineral Estate Dominance in Texas

Through the ownership-in-place doctrine, Texas courts constructed a legal hedgerow guiding (if not facilitating) the ability of landowners to sever and convey mineral estates, while simultaneously encouraging the exploitation of economically viable underground reservoirs of oil, gas, and groundwater.⁵⁹ However, vertically severing the estate interests of the same parcel of land creates unique problems, particularly when a mineral estate holder seeks to access or use the surface to develop the underlying reserves. At common law, such conflicts are resolved by recognizing an implied easement to reasonably access and remove minerals and by delineating responsibilities between surface and mineral estate owners.⁶⁰

Such common law rules, however, are predicated on a fundamental truism in Texas: the mineral estate is dominant over the surface. In *Getty Oil Co. v. Jones*, the Texas Supreme Court explicitly recognized an oil or gas interest as the "dominant estate"; however, such dominance is not

56. SHADE, *supra* note 45, at 6.

57. *Brown v. Humble Oil & Ref. Co.*, 83 S.W.2d 935, 944 (Tex. 1935).

58. *See, e.g.*, Dylan O. Drummond et al., *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1, 66–73 (2004) (detailing Texas Supreme Court cases reaffirming the rule of capture as specifically applied to groundwater).

59. *See* Andrew M. Miller, *A Journey Through Mineral Estate Dominance, the Accommodation Doctrine, and Beyond: Why Texas is Ready to Take the Next Step with a Surface Damage Act*, 40 HOUS. L. REV. 461, 466–67 (2003) ("[O]wnership-in-place provides predictability for both legislatures and courts because this theory directly correlates with certain aspects of general property law, such as statutes of fraud, taxation statutes, and recording acts." (citing RICHARD W. HEMINGWAY, *THE LAW OF OIL AND GAS* § 1.3, at 42 (3d ed. 1991))).

60. *See id.* at 467–70 (describing the common law duties under implied easements and responsibilities of surface and mineral estate owners).

absolute, and any rights derived in favor of the mineral estate must be “exercised with due regard for the rights of the owner of the servient estate.”⁶¹ Moreover, implicit in the conveyance, the mineral estate owner holds “a grant of the way, surface, soil, water, gas, and the like essential to the enjoyment of the actual grant of the oil.”⁶² Nevertheless, this “implied easement” is not unqualified and must be established by the mineral estate owner prior to invoking a claim of entry or use of the surface.⁶³ Ultimately the mineral estate owner is obligated to use the surface (or other resources, such as surface water or groundwater) in a reasonable manner for the sole purpose of effectuating the rights held under the mineral lease or conveyance.⁶⁴ The rationale behind recognizing the mineral estate as dominant turns on the notion that “a grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved.”⁶⁵ Although the common law acknowledges the mineral estate’s priority, oil or gas owners or lessees must still contend with statutory limitations and

61. Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971) (citing *e.g.*, Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133 (Tex. 1967)).

62. Guffey v. Stroud, 16 S.W.2d 527, 528 (Tex. Comm’n App. 1929).

63. See Akers v. Stevenson, 54 S.W.3d 880, 882 (Tex. App.-Beaumont 2001), *petition denied without reported opinion*, Mar. 14, 2002.

When a party seeks to establish the existence of an implied easement by grant, he must show that “(1) there was unity of ownership of the dominant and servient estates and that the use was (2) apparent, (3) in existence at the time of the grant, (4) permanent, (5) continuous, and (6) reasonably necessary to the enjoyment of the premises granted.”

Id. (quoting Daniel v. Fox, 917 S.W.2d 106, 110 (Tex. App.-San Antonio 1996), *writ denied without reported opinion*, Nov. 8, 1996).

64. See Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810 (Tex. 1972).

The oil and gas lessee’s estate is the dominant estate and the lessee has an implied grant, absent an express provision for payment, of free use of such part and so much of the premises as is reasonably necessary to effectuate the purposes of the lease, having due regard for the rights of the owner of the surface estate.

Id. (citing *Humble Oil & Ref. Co.*, 420 S.W.2d 133); Chambers-Liberty Counties Navigation Dist. v. Banta, 453 S.W.2d 134, 137 (Tex. 1970).

We hold that in condemnation proceedings wherein the surface and mineral estates are severed and the mineral estate is reserved unto condemnees together with the common law right to use the surface estate, such mineral estate is the dominant estate and condemnees’ common law right to use the surface estate has superiority and priority over any purposes for which condemnor desires to use the surface.

Id. (citing White v. Natural Gas Pipeline Co. of Am., 444 S.W.2d 298 (Tex. 1969)).

65. Tarrant County Water Control & Improvement Dist. No. One v. Haupt, Inc., 854 S.W.2d 909, 911 (Tex. 1993) (quoting Harris v. Currie, 176 S.W.2d 302, 305 (Tex. 1944)). Additionally, the *Harris v. Currie* court stated that “the grant or reservation of minerals carries with it, as a necessary appurtenance thereto, the right to use so much of the surface as may be necessary to enforce and enjoy the mineral estate conveyed or reserved.” *Harris*, 176 S.W.2d at 305.

prohibitions enforced by one of the most powerful agencies in Texas—the Railroad Commission.

C. Regulating Oil and Gas Activities: The Railroad Commission of Texas

In 1890 the Texas Constitution was amended to create the Railroad Commission (Commission),⁶⁶ which was initially granted sweeping powers to regulate rates, operations, terminals, and express companies.⁶⁷ Yet the rise of the federal Interstate Commerce Commission and the U.S. Supreme Court's *Shreveport Rate Cases* decision effectively nullified the Commission's powers.⁶⁸ However, the Commission, as the most developed administrative agency in Texas, was reinvented when the legislature delegated responsibility for regulating the state's rapidly expanding oil and gas industry.⁶⁹ One commentator notes that the Commission became perhaps one of the most powerful administrative agencies in America because of its control over the massive East Texas and Panhandle oil fields, which, at the time, supplied much of the world's petroleum demand.⁷⁰ By 1917 the Texas Constitution was amended again, compelling the legislature to adopt laws curbing overproduction and waste.⁷¹ In 1919, the Commission promulgated the nation's first well-spacing rule, which was subsequently upheld by the Fifth Circuit Court of Appeals and the Texas Supreme Court as a valid exercise of the state's constitutionally reserved police power authority.⁷²

66. Pete M. Schenkkan, *Texas Administrative Law: Trials, Triumphs, and New Challenges*, 7 TEX. TECH ADMIN. L.J. 287, 299 (2006).

67. RANDOLPH B. CAMPBELL, *GONE TO TEXAS: A HISTORY OF THE LONE STAR STATE* 329 (2003). The constitutionality of the Commission's powers were quickly challenged and affirmed by the United States Supreme Court. See *Reagan v. Farmer's Loan & Trust Co.*, 154 U.S. 362, 393–94 (1894) (“[T]here can be no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a commission.”).

68. Schenkkan, *supra* note 66, at 299; see also *Shreveport Rate Cases*, 234 U.S. 342, 354–55 (1914) (upholding the Interstate Commerce Commission's order requiring railroads to cease issuing discriminatory rates between intrastate and interstate travel).

69. Cullen M. Godfrey, *A Brief History of the Oil and Gas Practice in Texas*, 68 TEX. B. J. 812, 813 (2005).

70. Pieter M. Schenkkan, *When and How Should Texas Courts Review Agency Rules?*, 47 BAYLOR L. REV. 989, 1044 (1995).

71. Jared Hall, *Both Eyes Open or One Eye Closed: Does the Reasonable and Prudent Operator Standard Handicap Mineral Lessees in the Prevention of Drainage?*, 7 TEX. TECH ADMIN. L.J. 179, 182 (2006); see also TEX. CONST. art. XVI, § 59(a) (“[T]he preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.”).

72. Hall, *supra* note 71, at 182–83; see also *Oxford Oil Co. v. Atl. Oil & Prod. Co.*, 22 F.2d 597, 599 (5th Cir. 1927) (“It would seem to follow that the Legislature could impose powers and duties

Today, the Commission continues to serve as the state's lead agency regulating oil and gas development.⁷³ The legislature has delegated broad jurisdiction covering common-carrier pipelines and oil and gas wells, including the drilling and operating of those wells.⁷⁴ Such powers include conserving oil and gas reserves by preventing unnecessary waste,⁷⁵ prorating natural gas production,⁷⁶ compelling the pooling of production from a common reservoir,⁷⁷ and requiring the proper construction and abandonment of wells to avoid environmental contamination.⁷⁸ Pursuant to its wide statutory mandate, the Commission has promulgated highly detailed rules regulating all aspects of drilling, completing, producing, and abandoning oil and gas wells.⁷⁹ With the Commission's extensive array of regulatory powers, one can raise the question whether local governments are preempted from imposing an additional layer of compliance obligations.

D. Occupying the Field: State Preemption Doctrine

In rapidly urbanizing areas, oil and gas operators face myriad regulatory hurdles, which may be imposed by both state and sub-state governmental actors. All states, in some fashion, delegate substantial regulatory powers to local governments.⁸⁰ This breeds the potential for conflicting regulatory schemes.⁸¹ Differing regulatory requirements are

upon the Commission in addition to the powers granted to regulate railroads and railroad rates"); *Brown v. Humble Oil & Ref. Co.*, 83 S.W.2d 935, 944 (Tex. 1935) ("[T]he Railroad Commission has the power, under the conservation statutes, to promulgate a spacing rule . . . regulating the drilling of oil wells, and to provide for an exception to the rule to protect vested rights and to prevent waste").

73. See R.R. Comm'n of Tex., About the Oil and Gas Division, <http://www.rrc.state.tx.us/divisions/og/aog.html> (last visited Nov. 22, 2006) ("The Railroad Commission, through its Oil and Gas Division, regulates the exploration, production, and transportation of oil and natural gas in Texas.").

74. TEX. NAT. RES. CODE ANN. § 81.051(a) (Vernon 2003).

75. *Id.* § 85.046.

76. *Id.* § 86.081.

77. *Id.* § 102.011.

78. *Id.* § 89.001.

79. See generally 16 TEX. ADMIN. CODE §§ 3.1–3.106 (2003) (addressing a range of production and environmental concerns, including spacing requirements, source water protection, storage, and permitting).

80. Bruce M. Kramer, *Local Land Use Regulation of Extractive Industries: Evolving Judicial and Regulatory Approaches*, 14 UCLA J. ENVTL. L. & POL'Y 41, 94 (1996).

81. Jan G. Laitos & Elizabeth H. Getches, *Multi-Layered, and Sequential, State and Local Barriers to Extractive Resource Development*, 23 VA. ENVTL. L.J. 1, 14 (2004).

Generally, the state has extensive control over oil and gas development within its borders. In addition, local governments have concurrent jurisdictional authority over land use within their boundaries. This creates the possibility of apparently overlapping authority, where localities wish to regulate and restrict resource extractive development otherwise permitted under state law.

Id. (footnotes omitted).

often the by-product of divergent interests—state energy agencies may be more concerned with enforcing statewide uniform production standards, while municipalities are likely to emphasize local economic and public health issues arising from specific oil and gas development projects.⁸² Such conflicts can be resolved by a state legislature statutorily limiting the jurisdictional influence of a local government.⁸³ Such a heavy-handed approach, however, is rarely invoked.⁸⁴ In Texas, while the legislature has granted substantial powers to the Commission, concurrent municipal oil and gas regulations are “widespread and judicially accepted.”⁸⁵

Since the 1930s, Texas courts have recognized the concurrent authority of municipalities to regulate oil and gas activities alongside the Commission.⁸⁶ For instance, in 1944, the Galveston Court of Civil Appeals, in *Klepak v. Humble Oil & Refining Co.*, directly confronted a preemption challenge raised by a private landowner who, after obtaining a drilling permit from the Commission, was denied a corresponding municipal permit to develop a well within the City’s corporate limits.⁸⁷ The court specifically affirmed the Commission’s statutory obligation to issue permits for the purpose of regulating oil and gas production, yet held that such legislatively delegated power did not subsume existing police powers vested in municipalities to also regulate the same activity.⁸⁸ The Texas court further held under a substantive due process doctrine that the municipality’s ordinance will stand so long as it is not facially “unreasonable, arbitrary, [or] discriminatory.”⁸⁹

Klepak remained unchallenged until 1982, when a private-property owner was convicted and fined for drilling an oil well within the City of

82. *Id.* at 16–17.

83. See Kramer, *supra* note 80, at 95 (“[T]he state has the power to preempt local regulation of the extractive industries through express statutory language.”).

84. *Id.* (citing Perry Pearce, *The Spectrum of Choices: Formulation and Implementation of Regulatory Land Use Decisions Affecting Mineral Development*, in 3 MINERAL DEVELOPMENT AND LAND USE (1995)).

85. *Id.* at 95–96.

86. See, e.g., *Tysco Oil Co. v. R.R. Comm’n (Tysco II)*, 12 F. Supp. 202, 203 (S.D. Tex. 1935) (upholding a municipal regulation governing the spacing of wells within the city limits); *Tysco Oil Co. v. R.R. Comm’n (Tysco I)*, 12 F. Supp. 195, 201 (S.D. Tex. 1935) (upholding the validity of a Railroad Commission order governing the placement of wells within corporate limits based on a finding that they are not “unreasonable, arbitrary, and confiscatory”).

87. *Klepak v. Humble Oil & Ref. Co.*, 177 S.W.2d 215, 216–17 (Tex. Civ. App.–Galveston 1944), *writ of error refused for want of merit without reported opinion*.

88. *Id.* at 218 (citing e.g., *Tysco I*, 12 F. Supp. 195). Specifically, the *Klepak* court noted that the municipalities could exert their police power when “acting for the protection of their citizens and the property within their limits, looking to the preservation of *good government, peace, and order therein*.” *Id.* (emphasis added).

89. *Id.*

Burkburnett without obtaining the required local permit.⁹⁰ Relying on *Klepak*, the Fort Worth Court of Appeals, in *Unger v. State*, squarely rejected the argument that the Commission occupied the field of oil and gas permitting and thus preempted municipalities from promulgating their own regulatory requirements.⁹¹ The *Unger* decision continues as the state's standard preemption doctrine today.⁹² However, defining the scope of this municipal police power and determining when municipalities impermissibly cross into the realm of compensatory taking of private property remains an open question of law.

III. MUNICIPAL POLICE POWERS REGULATING OIL AND GAS DEVELOPMENT

A. *Managing Land Use: Home Rule and Police Powers*

Under Texas law, most municipalities are vested with substantial political and legal autonomy to govern local activities and interests.⁹³ Moreover, this autonomy turns on power vested by the Texas Constitution, not the will of the legislature.⁹⁴ Home-rule municipalities may adopt local charters,⁹⁵ which grant cities “full power of local self-government.”⁹⁶ Such power broadly includes adopting ordinances, laws, and regulations necessary to protect the “interest, welfare, or good order of the municipality

90. *Unger v. State*, 629 S.W.2d 811, 812 (Tex. App.-Fort Worth 1982), *petition for discretionary review refused without reported opinion*, June 2, 1982.

91. *Id.*

92. *See Shelby Operating Co. v. City of Waskom*, 964 S.W.2d 75, 83 (Tex. App.-Texarkana 1997) (“The development of oil and gas within the city limits is clearly an area subject to regulation under the police powers of a municipality.” (citing *Unger*, 629 S.W.2d at 813)), *petition for review denied without reported opinion*, Aug. 25, 1998.

93. *See City of Abilene v. U.S. Envtl. Prot. Agency*, 325 F.3d 657, 664–65 (5th Cir. 2003) (“As home-rule municipalities chartered under the Texas Constitution [Article XI, Section 5], . . . the Cities enjoy a considerable degree of self-governance.” (citing *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998))). Texas statutes distinguish four types of local governance, with a “home-rule” municipality having the most legislative and legal autonomy from the state. *See* TEX. LOC. GOV'T CODE ANN. § 5.001 (Vernon 1999) (Type A General-Law Municipality); *id.* § 5.002 (Type B General-Law Municipality); *id.* § 5.003 (Type C General-Law Municipality); *id.* § 5.004 (Home-Rule Municipality).

94. *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 643 (Tex. 1975). “A home rule city derives its power not from the Legislature but from Article XI, Section 5, of the Texas Constitution. . . . [I]t is necessary to look to the acts of the legislature not for grants of power to such cities but only for limitations on their powers.” *Id.* (quoting *Forwood v. City of Taylor*, 214 S.W.2d 282, 286 (Tex. 1948)); *see also* TEX. CONST. art. XI, § 5 (“The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.”).

95. § 9.001.

96. *Id.* § 51.072(a).

as a body politic.”⁹⁷ These powers are not per se limited by statute; they extend beyond mere preservation of the economic interests of the city.⁹⁸ Additionally, a municipality’s use of its police powers is presumed valid absent a finding that such use is inconsistent with or preempted by state law.⁹⁹ As such, Texas courts recognize home-rule authority as equivalent to the state legislature’s powers; such authority can only be preempted if the Legislature seeks to exert its control with “unmistakable clarity.”¹⁰⁰

Historically courts have espoused the legality of a municipality’s police powers when exercised in an effort to protect the public interest. In 1943, the Texas Supreme Court held that municipal zoning ordinances fall within the police powers of local governments and serve to protect the “public health, morals, safety, and general welfare.”¹⁰¹ Moreover, the court stated that private property usage may be subject to regulation in order to protect the “tranquility” of a “well-ordered community.”¹⁰² Ultimately, the court expressed a public-policy vision that private property is “held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people.”¹⁰³ In effect, federal and Texas courts recognize municipal enforcement powers as presumptively valid so long as they are reasonable and are substantially related to addressing a legitimate public goal.¹⁰⁴ This presumption is a

97. *Id.* § 51.012.

98. *See id.* § 51.001 (“The governing body of a municipality may adopt, publish, amend, or repeal an ordinance, rule, or police regulation that . . . is for the good government, peace, or order of the municipality or for the trade and commerce of the municipality . . .”) (emphasis added).

99. *See id.* § 51.003(b)(4) (upholding the presumption of validity of a municipal ordinance if not inconsistent with or preempted by “a statute of this state or the United States”).

100. *City of Corpus Christi v. Cont’l Bus Sys., Inc.*, 445 S.W.2d 12, 17 (Tex. App.-Austin 1969) (quoting *City of Sweetwater v. Geron*, 380 S.W.2d 550, 552 (Tex. 1964)), *writ of error refused no reversible error*, 453 S.W.2d 470 (Tex. 1970) (per curiam); *see also* *Gates v. City of Dallas*, 704 S.W.2d 737, 738–39 (Tex. 1986) (recognizing a presumption of both broad discretionary powers and immunity when municipalities are exercising *governmental* as opposed to *proprietary* functions, where such presumption is abrogated).

101. *Ellis v. City of W. Univ. Place*, 175 S.W.2d 396, 397–98 (Tex. 1943) (quoting *Lombardo v. City of Dallas*, 73 S.W.2d 475, 481 (Tex. 1934)).

102. *Id.* at 398 (quoting *Chi., Burlington & Quincy Ry. Co. v. Illinois*, 200 U.S. 561, 594 (1906)).

103. *Id.*

104. *See City of Coll. Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex. 1984).

A city may enact reasonable regulations to promote the health, safety, and general welfare of its people. Thus, in order for this ordinance to be a valid exercise of the city’s police power, not constituting a taking, there are two related requirements. First, the regulation must be adopted to accomplish a legitimate goal; it must be “substantially related” to the health, safety, or general welfare of the people. Second, the regulation must be reasonable; it cannot be arbitrary.

Id. (citations omitted); *accord* *Berman v. Parker*, 348 U.S. 26, 33 (1954); *Cannon v. City of Dallas*, 263 S.W.2d 288, 290 (Tex. Civ. App.-El Paso 1953), *writ of error refused no reversible error without*

substantial hurdle, placing an “extraordinary burden” on a party challenging a properly enacted ordinance.¹⁰⁵

Broad consensus exists supporting the importance of home-rule powers in vertically allocating authority between local and state governments.¹⁰⁶ This separation of power preserves a sphere of autonomy around cities to enact local laws to resolve local issues that are generally free from unnecessary state infringement.¹⁰⁷ Respect for this sphere of autonomy facilitates an important and historically prevalent political discourse between decentralized local governments and centrally dominant state powers.¹⁰⁸ Moreover, absent an issue of universal interest to all state citizens, one can convincingly argue that discretionary actions intended to address particular and local concerns should be afforded wide berth by both the legislature and state judiciary.¹⁰⁹ Finally, one commentator, relying on Justice Brandeis’s famous dissent in *New State Ice Co. v. Liebmann*,¹¹⁰ has argued that local governments, like state legislatures, can serve as important “laboratories” for exploring political innovation and reform.¹¹¹

B. Regulating Oil and Gas Development

Both the United States and Texas Supreme Courts have recognized the constitutional prerogative of state and local governments to regulate oil and gas activities within their respective jurisdictional control. Starting in 1900, the U.S. Supreme Court, in *Ohio Oil Co. v. Indiana*, upheld a state law

reported opinion, Dec. 30, 1953.

105. *Hunt v. City of San Antonio*, 462 S.W.2d 536, 539 (Tex. 1971).

106. Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 263 (2000) (citing George D. Vaubel, *Democratic Government and Municipal Home Rule*, 19 STETSON L. REV. 813, 813 (1990)).

107. *Id.* (citing GERALD E. FRUG, LOCAL GOVERNMENT LAW 70 (2d ed. 1994)).

108. See Michael Libonati, *Home Rule: An Essay on Pluralism*, 64 WASH. L. REV. 51, 51 (1989) (“From the perspective of this tradition [of discourse about politics], home rule is concerned with the decentralization of decision-making to give a forum to those whose lives are focused on the parochial—home, family, and neighborhood—and thus to bring government down to where the goats can get at it.”).

109. See George D. Vaubel, *Toward Principles of State Restraint upon the Exercise of Municipal Power in Home Rule*, 24 STETSON L. REV. 417, 487 (1995) (“Municipalities should not be dependent upon the legislature for the authority to act, nor upon excessive court interpretation, including the application of a principle which would foreclose local power that has an unsatisfactory impact outside the territorial jurisdiction.”).

110. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

111. Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 31 (2006).

prohibiting the intentional venting of gas from an oil well.¹¹² Specifically, the Court found the venting of overburden gas for the purposes of extracting oil constituted a form of waste that unnecessarily infringed upon the collateral rights of surrounding landowners to take possession of the oil from the same reservoir.¹¹³ On the other hand, Ohio Oil asserted that the gas, prior to venting, pushed up the oil and was thus technically not wasted.¹¹⁴ Ohio Oil further claimed that mandating gas storage instead of using it as “back pressure” effectively diminished the production ability of the well, making it unprofitable to operate.¹¹⁵ The Court dismissed both claims as simply speaking to the “wisdom” of the regulation and not to Indiana’s constitutional authority to enact the regulation in the first place.¹¹⁶ Twenty years later, the Court applied the *Ohio Oil* holding in *Walls v. Midland Carbon Co.*, asserting that a state “may consider the relation of rights and accommodate their coexistence, and, in the interest of the community, limit one that others may be enjoyed.”¹¹⁷

The U.S. Supreme Court also recognized a similar regulatory prerogative vested in municipalities. In 1933, the Court upheld an Oklahoma City ordinance requiring drillers to hold a \$200,000 bond executed by a bonding or indemnity company prior to drilling a well within the City’s jurisdiction.¹¹⁸ Walter Gant, a mineral lease owner, raised a due process challenge, claiming the ordinance imposed unduly onerous conditions that rendered it “arbitrary and unreasonable.”¹¹⁹ The Court considered such a challenge without merit.¹²⁰ Similar to *Ohio Oil*, the Court merely rejected the argument’s premise, asserting that the challenge turned on the municipality’s wisdom, not authority, to impose a bonding requirement.¹²¹ In refusing to comment on the particularities of the ordinance, the Court rationalized that if the evidence demonstrates “room for fair debate,” the judiciary should not substitute its judgment for that of local officials.¹²² Although scant attention is given to the facts, the Court noted that drillers other than Gant were able to meet the bonding requirements.¹²³ Ultimately, the Court held that the mere fact that an

112. *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 190, 212 (1900).

113. *Id.* at 203.

114. *Id.* at 211.

115. *Id.*

116. *Id.*

117. *Walls v. Midland Carbon Co.*, 254 U.S. 300, 315 (1920).

118. *Gant v. Oklahoma City*, 289 U.S. 98, 101, 103 (1933).

119. *Id.* at 98–99, 101.

120. *Id.* at 101.

121. *Id.* at 102.

122. *Id.* (citing *Zahn v. Bd. of Pub. Works*, 274 U.S. 325, 328 (1927)).

123. *Id.*

ordinance may impose a hardship upon a particular regulated party is insufficient to render it otherwise facially invalid.¹²⁴

The first legal test of a Texas municipality's authority to regulate oil and gas development came in 1935, just two years after the Supreme Court's *Gant* decision.¹²⁵ Tysco Oil Company sought injunctive relief against the City of South Houston and the Railroad Commission in federal district court, challenging both the City's ordinance regulating oil development and the Commission's corresponding special rules governing the South Houston Oil Field.¹²⁶ The district court distinguished the claim against the City and addressed the validity of the local ordinance independent of the Commission's authority to regulate oil field development activities.¹²⁷ In a terse two-page opinion, Judge Kennerly summarily rejected Tysco's assertion that the City's regulations were "arbitrary and unreasonable."¹²⁸ Specifically, the court turned to the U.S. Supreme Court's *Gant* decision to hold that a municipality's police power extends beyond merely protecting the public's health and morals, and reaches the safety and general welfare of the community.¹²⁹

Looking to the facts, the court recognized that South Houston consisted primarily of 4490 relatively small lots owned by approximately 2000 citizens, each of whom, absent regulatory limits, could theoretically drill a well on each parcel.¹³⁰ Beyond question, such circumstances created a dangerous "menace" to life and property through the dangers of "escaping gas, explosions, fire, cratering, etc."¹³¹ Perhaps most importantly, Judge Kennerly noted in dicta that the City even owed a "duty" to its inhabitants and those traveling to and through the city to protect them from the dangers of oil field activities.¹³² Moreover, the court took judicial notice of the fact that Tysco purchased the gas leases after the ordinance was adopted and knew of its "scope and effect."¹³³

In its 1944 *Klepak* decision, the Galveston Civil Appellate Court was

124. *Id.* at 102–03. Moreover, the Court went even further, asserting that the impossibility of compliance would not, on its face, invalidate an otherwise properly enacted statute or ordinance. *Id.*

125. *Tysco I*, 12 F. Supp. 195 (S.D. Tex. 1935).

126. *Id.* at 195–96.

127. *Id.* at 196 n.1. The case against the City of South Houston is addressed in *Tysco II*, 12 F. Supp. 202 (S.D. Tex. 1935).

128. *Tysco II*, 12 F. Supp. at 203.

129. *Id.*

130. *Id.*

131. *Id.*

132. *See id.* ("Clearly the city owed the duty to its inhabitants and to the hundreds of people who daily pass through its limits over the rail and electric roads and the highways to protect them from such a menace.").

133. *Id.*

the first Texas court to consider a challenge against a municipal ordinance regulating the density, spacing, and location of wells.¹³⁴ Henry Klepak, a gas-lease owner, asserted that the ordinance was arbitrary, unreasonable, and enacted in collusion with the Humble Oil and Refining Company, a competitor holding a substantial portion of the mineral rights under the town.¹³⁵ Simply standing upon the jurisprudential shoulders of the *Tysco I* decision, the court brusquely reaffirmed the rule that municipalities may regulate oil and gas activities.¹³⁶ Without inquiry into the rationale behind the ordinance's passage, the court declared the ordinance reasonable, properly passed (two years before Klepak acquired his lease), representative of a legitimate government function, and thus immune from the damage claims arising from Klepak's inability to drill his well.¹³⁷ Again, in 1958, another Texas court endorsed the legitimate authority of a municipality to promulgate an ordinance designed to preserve good order through appropriate economic and safety regulations of oil and gas activities.¹³⁸

The constitutionality of municipal oil and gas regulatory ordinances were not again questioned until the early 1980s when two separate actions were brought against the City of Burkburnett. In the first instance, the Fort Worth Court of Appeals heard a Fourteenth Amendment due process and equal protection challenge brought by Robert Helton, who refused to obtain a drilling permit pursuant to the City's requirements and was subsequently

134. *Klepak v. Humble Oil & Ref. Co.*, 177 S.W.2d 215, 216–17 (Tex. Civ. App.-Galveston 1944), writ refused for want of merit without reported opinion. For a discussion of the *Klepak* facts and holding relative to state preemption doctrine, see *supra* Part II.D.

135. *Klepak*, 177 S.W.2d at 216–17.

136. *Id.* at 218 (citing *Tysco I*, 12 F. Supp. 195 (S.D. Tex. 1935)). The court also cites *Marrs v. City of Oxford*, a highly deferential Eighth Circuit Court of Appeals decision upholding the validity of a municipality to regulate oil and gas development to protect the public safety and welfare. *Marrs v. City of Oxford*, 32 F.2d 134, 139–40 (8th Cir. 1929).

[I]t seems undeniable to us that when work of the kind under consideration is carried on in residential or business sections of a town or city without some limit to the number of wells in a given area, they will necessarily become nuisances of a most aggravated sort to its inhabitants and its business interests. . . . Such a situation calls for some governmental restriction and control.

Id. The *Marrs* court also paid particular attention to the fact that oil and gas drilling is inherently dangerous, entailing a “persistent thought of impending danger from explosion and conflagration because of the highly inflammable nature of the product.” *Id.* at 140.

137. *Klepak*, 177 S.W.2d at 218.

138. See *Mills v. Brown*, 309 S.W.2d 919, 925–26 (Tex. Civ. App.-Amarillo 1958), *rev'd on other grounds*, 316 S.W.2d 720 (Tex. 1958). Again, referencing *Tysco II*, *Gant*, and *Marrs*, the *Mills* court upheld the City of Post's ordinance delineating drilling blocks within the City, as well as local notice and permitting requirements necessary prior to drilling an oil well. *Id.* On appeal, however, the Texas Supreme Court chose not to decide the constitutionality of the Post ordinance but, for the purposes of rendering a decision on other points, assumed that it was constitutionally valid. *Mills v. Brown*, 316 S.W.2d 720, 721 (Tex. 1958).

barred by a court-ordered injunction from proceeding until compliant with the local ordinance.¹³⁹ Helton asserted that the ordinance exceeded the City's policing authorities because it extended beyond regulating drilling activities to altogether proscribing them.¹⁴⁰ Consistent with past jurisprudential disinterest of the topic, the court hurriedly dispatched the complaint as lacking merit.¹⁴¹ Unlike the previous cases, however, the Fort Worth court grounded its decision on the long-recognized municipal powers to promulgate and enforce comprehensive *zoning laws*.¹⁴² By considering an oil and gas ordinance as a zoning law, without comment, the court opened a new line of reasoning supporting municipal authority regulating oil and gas development in a manner similar to other forms of land use restrictions. Finally, the court applied a highly deferential "unreasonable and arbitrary" standard and held that any deprivation resulting from a lawful ordinance enforced pursuant to the legitimate policing authority of a municipality does not constitute a loss of property without due process under the law.¹⁴³

Only a year later, the Fort Worth Court, in its brisk two-page *Unger* decision, simply channeled the *Klepak*, *Tysco I*, and *Helton* holdings in deciding that the City's ordinance was not preempted by state statute, nor was it in conflict with state law, and thus posed no due process or equal protection violation of the Fourteenth Amendment.¹⁴⁴ Moreover, the court stated that the reasonableness of a municipal ordinance is presumed and considered controlling by courts "unless the unreasonableness of the ordinance is fairly free from doubt."¹⁴⁵

139. *Helton v. City of Burkburnett*, 619 S.W.2d 23, 23 (Tex. App.-Fort Worth 1981), *writ refused no reversible error without reported opinion*, Dec. 2, 1981, *appeal dismissed*, 456 U.S. 940 (1982).

140. *See id.* at 24.

[The ordinance] authorizes the City Commissioners to refuse any permit to drill a well "where by reason of such particular location and the character and value of the permanent improvements already erected on or adjacent to the particular location in question, for school, hospital park civic purposes, health reasons, safety reasons, or any of them where the drilling of such wells on such particular location might be injurious or be a disadvantage to the city or it's [sic] inhabitants as a whole or to a substantial number of it's [sic] inhabitants or would not promote orderly growth and development to the city."

Id. (quoting City of Burkburnett, Ordinance No. 375).

141. *Id.*

142. *Id.* (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

143. *Id.* (citing *Zahn v. Bd. of Pub. Works*, 274 U.S. 325, 328 (1927)).

144. *Unger v. State*, 629 S.W.2d 811, 812-13 (Tex. App.-Fort Worth 1982), *petition for discretionary review refused without reported opinion*, June 2, 1982. For a discussion of the *Unger* case facts and holding relative to state preemption doctrine, see *supra* Part II.D.

145. *Id.* at 813 (quoting *Harper v. City of Wichita Falls*, 105 S.W.2d 743, 751 (Tex. Civ. App.-Fort Worth 1937), *writ refused without reported opinion*, May 14, 1937).

The most recent challenge of a municipality's policing authority to regulate oil and gas activities came in 1997. In a procedurally convoluted case, the Texarkana Court of Appeals upheld the City of Waskom's decision denying a drilling permit absent conformity with the City's local ordinance governing, in part, the surface placement of oil wells on private property.¹⁴⁶ In 1945, the Shelby Operating Company acquired a 303-acre mineral lease, which, at the time, was outside the municipal corporate limits.¹⁴⁷ The lease was held contingent upon not placing any wells within 200 feet of a then-existing structure.¹⁴⁸ A portion of the tract was annexed by Waskom in 1981, and the surface interest was subsequently purchased by Aztec Manufacturing-Waskom Partnership in 1986.¹⁴⁹ In 1987, the City passed a local ordinance that prevented the placement of any well within 500 feet of a structure absent consent from the surface estate owner.¹⁵⁰

In 1996, Shelby applied for a drilling permit that proposed placing a well more than 200 but less than 500 feet from Aztec's building.¹⁵¹ Since Aztec declined to give consent for the well placement, the City refused to issue the permit.¹⁵² Presuming the ordinance was valid, the court upheld the permit denial, in part because Shelby, as the challenger, failed to meet its burden of persuasion that the ordinance was not related to the "health and safety of the community."¹⁵³ Upon a motion for rehearing, the court refused to address whether granting the original 1945 lease constituted consent to drill—thus constructively satisfying Waskom's ordinance requiring written authorization from the surface owner—because the issue was not directly raised at trial.¹⁵⁴ The court, however, noted that absent such consideration, and even recognizing the mineral estate's dominance over surface interests, Aztec's refusal to consent must be upheld as a valid application of local law.¹⁵⁵

Ultimately, Texas common law generally favors municipal authority to regulate oil and gas activities. As evidenced above, every direct challenge to a city's police powers has been soundly defeated. Thus, a municipal oil

146. *Shelby Operating Co. v. City of Waskom*, 964 S.W.2d 75, 77–78 (Tex. App.-Texarkana 1997), *petition for review denied without reported opinion*, Aug. 25, 1998.

147. *Id.* at 77.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 78.

152. *Id.*

153. *Id.* at 82. In fact, Shelby made no such showing and instead argued that the burden should be shifted to the City to demonstrate the rational basis between passing the ordinance and protecting the public welfare. *Id.* The court rejected out-of-hand this proposed burden shifting. *Id.*

154. *Id.* at 83 (opinion on rehearing).

155. *Id.*

and gas ordinance should be defensible against a due process or equal protection challenge under either federal or state constitutions if the following four factors are satisfied. First, the local ordinance's regulatory scope does not govern matters preempted by statutory prohibition or fall within the exclusive purview of the Railroad Commission.¹⁵⁶ Second, the ordinance is validly enacted.¹⁵⁷ Third, the ordinance advances a legitimate governmental interest and is reasonably and substantially related to protecting the safety and general welfare of the public-at-large.¹⁵⁸ Finally, the ordinance is not arbitrary, discriminatory, or otherwise unreasonable.¹⁵⁹

C. Town of Flower Mound: Example of a Modern Oil and Gas Ordinance

Many Texas cities recently have adopted local ordinances regulating oil and gas development within their corporate limits.¹⁶⁰ These ordinances typically govern a wide range of land use activities associated with exploring, developing, and producing oil and gas.¹⁶¹ Considered one of the most stringent oil and gas ordinances in Texas,¹⁶² the Town of Flower Mound's oil and gas regulation offers an opportunity to examine the scope of coverage and how a local ordinance converges and diverges with applicable Railroad Commission rules.

156. See *supra* Part II.D.

157. See *supra* Part III.A.

158. See *supra* Part III.A.

159. See *supra* Part III.B, for discussion of the Fort Worth Court of Appeals holdings in *Helton v. City of Burkburnett*, 619 S.W.2d 23 (Tex. App.-Fort Worth 1981), *writ refused no reversible error without reported opinion*, Dec. 2, 1981, *appeal dismissed*, 456 U.S. 940 (1982), and *Unger v. State*, 629 S.W.2d 811 (Tex. App.-Fort Worth 1982), *petition for discretionary review refused without reported opinion*, June 2, 1982.

160. Municipalities that incorporate oil and gas restrictions within applicable subdivision ordinances may also extend their regulatory reach beyond the corporate limits into their extraterritorial jurisdictions. See TEX. LOC. GOV'T CODE ANN. § 212.003 (Vernon Supp. 2006) (authorizing the extension of municipal policing powers regarding the approval of plats and subdivisions of land pursuant to section 212.002). Additionally, municipalities may also regulate oil and gas activities beyond the corporate limits for the purpose of protecting local water resources. See *id.* § 401.002(a) ("A home-rule municipality may prohibit the pollution or degradation of and may police a stream, drain, recharge feature, recharge area, or tributary that may constitute or recharge the source of water supply of any municipality.").

161. See FORT WORTH, TEX., CODE OF ORDINANCES ch. 15, art. II (2007) (gas drilling and production); *infra* notes 165–71, 175–82 and accompanying text.

162. See Kevin Krause, *N. Texas Sweet Spot: Thousands Cashing in on Demand for Natural Gas; As Wells Dot Tarrant, Denton Counties, Some Fear Effects of Drilling*, DALLAS MORNING NEWS, Aug. 17, 2003, at 1A ("Trophy Club and Flower Mound, concerned about reports of blowouts in Wise County, passed ordinances that are among the state's strictest."); Jeff Mosier, *Gas Firm Blames Worker for Blast: Fort Worth Council May Widen Buffers for Homes After Forest Hill Death*, DALLAS MORNING NEWS, Apr. 26, 2006, at 1B ("Among other area cities, Trophy Club and Flower Mound have some of the strictest gas ordinances.").

With a population nearing 66,000, Flower Mound is situated on the northwestern cusp of the Dallas-Fort Worth metropolitan area and occupies the southern portion of the highly coveted Barnett Shale, Newark East Field.¹⁶³ Since the ordinance's adoption in 2003, twenty-two permit applications have been filed.¹⁶⁴ The permitting process covers a wide range of requirements, including, for example, well spacing,¹⁶⁵ equipment use,¹⁶⁶ noise and light abatement,¹⁶⁷ landscaping,¹⁶⁸ emergency response,¹⁶⁹ bonding and insurance,¹⁷⁰ and roadway damage.¹⁷¹

Flower Mound imposes local requirements that greatly exceed minimum state restrictions in one critical area: well spacing. The Railroad Commission's Rule 37 governing statewide spacing of oil and gas wells stipulates that no well can be drilled within 1200 feet of another well on the same tract of land and completed in the same geologic horizon.¹⁷² Additionally, no well can be drilled within 467 feet of a lease line.¹⁷³ However, the Commission has adopted "special field rules" for the Barnett Shale that reduce the lease spacing to only 330 feet with the option of increasing the well-field density from one well per 320 acres to only one well per 20 acres.¹⁷⁴

Flower Mound, on the other hand, imposes far more stringent well-placement requirements. For instance, no well can be drilled within 500 feet of a lease line *or* property, lot, or tract boundary.¹⁷⁵ Since a state-approved gas lease may encompass multiple tracts or parcels, Flower Mound's boundary setbacks can be substantially more limiting than the state's. Additionally, wells cannot be placed within 1000 feet of a

163. Flower Mound, Texas, <http://www.city-data.com/city/Flower-Mound-Texas.html> (last visited Nov. 27, 2006).

164. ENVTL. RES. DIV., TOWN OF FLOWER MOUND, GAS WELL STATUS REPORT (2007), available at http://www.flower-mound.com/env_res/Gas%20Well%20Status%20Report.pdf.

165. FLOWER MOUND, TEX., CODE OF ORDINANCES ch. 34, art. VII, § 34-422(d)(1) (2006) (oil and gas well permit).

166. *Id.* § 34-427 (technical requirements).

167. *Id.* § 34-422(h) (noise restrictions); *Id.* § 34-427(a)(24) (lights).

168. *Id.* § 34-428 (screening, fencing, and gates).

169. *Id.* § 34-421(d)(25) (requiring the filing of an emergency response plan with the Town's Fire Marshall's office).

170. *Id.* § 34-426 (bond, letters of credit, indemnity, and insurance).

171. *Id.* § 34-421(d)(18) (requiring the execution of a road maintenance agreement with the Town prior to permit issuance).

172. 16 TEX. ADMIN. CODE § 3.37(a)(1) (2003).

173. *Id.*

174. R.R. Comm'n of Tex., Field Rules for Field: Newark, East (Barnett Shale), <http://webapps.rrc.state.tx.us/DP/fieldSelectAction.do> (last visited Nov. 27, 2006) (in "Field Query Results" menu select "65280200 09 NEWARK, EAST (BARNETT SHALE)"; then click on "View Field Rules").

175. § 34-422(d)(1)f.

residence¹⁷⁶ or public park,¹⁷⁷ or within 500 feet of a public street or right-of-way.¹⁷⁸

Moreover, exemplifying a local government's prerogative to advance local concerns beyond the purview of statewide consideration, Flower Mound imposes a 500 foot setback requirement from floodplains¹⁷⁹ and designated "Environmentally Sensitive Area[s]."¹⁸⁰ Particularly in reference to environmental issues, Flower Mound further requires pollution-prevention controls, including a prohibition on using open reserve pits,¹⁸¹ which may fail, allowing contaminated drilling fluids to enter ground or surface water resources. Finally, stringent environmental insurance coverage is also required.¹⁸²

Flower Mound is an example of a local government pushing the envelope of municipal police powers. However, viewed in another light, it is merely the latest volley in 100 years of case law defending local control over oil and gas activities in abrogation of the centuries-old "rule of capture," a doctrine pervasive and privileged in Texas common law. At the confluence of these two principles resides a contentious debate pitting property rights against the community's authority to manage the use of land. Whether these oil and gas ordinances can go too far and be used in a way that would require a city to compensate landowners or mineral lessees for the "taking" of private property remains an unanswered constitutional question.¹⁸³

IV. DEFINING THE SCOPE OF MUNICIPAL AUTHORITY: RAISING COMPENSATORY TAKINGS CHALLENGES

A. Distinguishing Federal and State Takings Challenges

Both the United States and Texas Constitutions recognize a prohibition against "taking" private property without fair compensation.¹⁸⁴ Given that

176. *Id.* § 34-422(d)(1)b.

177. *Id.* § 34-422(d)(1)a.

178. *Id.* § 34-422(d)(1)h.

179. *Id.* § 34-420(k).

180. *Id.* § 34-420(n).

181. *Id.* § 34-427(a)(5).

182. *Id.* § 34-426(c)(4).

183. *See City of Austin v. Teague*, 570 S.W.2d 389, 391 (Tex. 1978) (holding that "one's property may not be taken without compensation under some circumstances even in the exercise of the police power" (citing *e.g.*, *DuPuy v. City of Waco*, 396 S.W.2d 103, 107 (Tex. 1965))).

184. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); TEX. CONST. art. I, § 17.

No person's property shall be taken, damaged or destroyed for or applied to

the two Takings Clauses are substantially similar, the Texas Supreme Court has traditionally utilized federal jurisprudence to analyze takings challenges raised solely under the Texas Constitution.¹⁸⁵ Additionally, on at least one occasion, the Texas Supreme Court has assumed (without deciding the issue) “that the state and federal guarantees in respect to land-use constitutional claims are *coextensive*, and we will analyze the [challenging party’s] claims under the more familiar federal standards.”¹⁸⁶

However, while Texas courts may borrow federal Takings Clause jurisprudence to evaluate state takings challenges, a priority distinction still exists between state and federal claims. The general rule requires that an aggrieved property owner pursue to exhaustion any state remedies before holding a case ripe for review under a similar Fifth or Fourteenth Amendment challenge.¹⁸⁷ For instance, in 2004 the Federal District Court for the Western District of Texas dismissed a federal takings claim brought by a local humane society and residents who collectively challenged local laws that promulgated a “deer management program” for trapping and transporting deer and prohibited the feeding of deer on private and public lands.¹⁸⁸ In refusing to hear the case, the district court opined that a federal

public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money

Id.

185. See *City of Austin v. Travis County Landfill Co.*, 73 S.W.3d 234, 236 (Tex. 2002) (applying *United States v. Causby*, 328 U.S. 256 (1946), as precedent when determining whether aircraft overflights constitute an unconstitutional taking of private property under the Texas Constitution); *City of Corpus Christi v. Pub. Util. Comm’n*, 51 S.W.3d 231, 242 (Tex. 2001) (using federal common law to inform the decision as to whether charges by a utility amount to an unconstitutional taking).

186. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932 (Tex. 1998) (emphasis added) (citing *Tilton v. Marshall*, 925 S.W.2d 672, 677 n.6 (Tex. 1996)).

187. See *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985) (“[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.”). The *Williamson County* rule is well established and followed in the 5th Circuit and Texas courts. See *Liberty Mut. Ins. Co. v. Brown*, 380 F.3d 793, 797 (5th Cir. 2004) (applying *Williamson County*); *Maguire Oil Co. v. City of Houston*, 143 F.3d 205, 207 (5th Cir. 1998) (applying *Williamson County*); *Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991) (“[B]efore a takings claim is ripe, the claimant must unsuccessfully seek compensation [from the state].”); *Levatte v. City of Wichita Falls*, 144 S.W.3d 218, 221 (Tex. App.-Fort Worth 2004) (considering the ripeness of a takings claim under the *Williamson County* rule); *Town of Flower Mound v. Stafford Estates Ltd. P’ship*, 71 S.W.3d 18, 48 (Tex. App.-Fort Worth 2002) (“[I]f a state provides an adequate procedure for seeking just compensation, the property owner must show that it has used that procedure and been denied just compensation.” (citing *Suitum v. Tahoe Reg’l Planning Agency* 520 U.S. 725, 734 (1997); *Williamson County*, 473 U.S. at 194–95)), *aff’d*, 135 S.W.3d 620 (Tex. 2004); *Guetersloh v. State*, 930 S.W.2d 284, 287 (Tex. App.-Austin 1996) (considering *Williamson County* rule in determining whether plaintiff’s claim was barred by *res judicata*), *writ denied without reported opinion*, July 31, 1997.

188. *Hollywood Park Humane Soc’y v. Town of Hollywood Park*, No. SA-03-CA-1312-XR,

challenge is not ripe until the challenging party seeks and exhausts all compensatory remedies afforded by the state.¹⁸⁹ Moreover, the United States Supreme Court's 2005 decision in *San Remo Hotel, L.P. v. City & County of San Francisco* effectively bars challengers from raising a federal takings claim after a state court renders a dispositive decision.¹⁹⁰

B. Laying an Uncertain Foundation: Early Extractive Industry Takings Claims

Early federal and state takings litigation concerning the constitutional limits of a municipality's power to regulate the activities of extractive industries generally lacked a nuanced analysis distinguishing various theories for relief. Professor Bruce Kramer observed that pre-1950 decisions tended to combine substantive due process, equal protection, and takings analyses in a legal "sausage grinder,"¹⁹¹ which fashioned a constitutional test difficult, if not impossible, to apply to present day controversies. At the turn of the twentieth century, a time of massive industrial expansion, courts relied almost entirely on liberty of contract and substantive due process tests when addressing regulations interfering with private property interests.¹⁹² Even for some years after the Supreme Court's landmark takings case, *Pennsylvania Coal Co. v. Mahon*,¹⁹³ courts continued to avoid Takings Clause analysis in favor of the more well-worn substantive due process rules when resolving disputes over local regulatory authority of extractive industry activities.¹⁹⁴

In *Mahon*, an aggrieved homeowner filed suit to prevent the Pennsylvania Coal Company from mining anthracite coal from under his home for fear of causing the house and surrounding property to subside.¹⁹⁵

2004 U.S. Dist. LEXIS 3957, at *2-*7, *25 (W.D. Tex. Mar. 10, 2004).

189. *See id.* at *8 ("For a federal takings claim to become ripe, the plaintiff is required to seek compensation through the procedures the state has provided unless those procedures are unavailable or inadequate." (citing *Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382, 385 (5th Cir. 2001))).

190. *San Remo Hotel, L.P. v. City & County of S.F., Cal.*, 545 U.S. 323, 347-48 (2005); *see also* Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 254 (2006) ("As a result of *San Remo*, a state court denial of compensation can act simultaneously to ripen, and to bar, any federal court takings claim.").

191. Bruce M. Kramer, *The Pit and the Pendulum: Local Governmental Regulation of Oil and Gas Activities Returns from the Grave*, in 50 SOUTHWEST LEGAL FOUNDATION INSTITUTE ON OIL AND GAS LAW AND TAXATION § 4.01, at 4-1, § 4.02(1), at 4-13 (1999).

192. GEORGE SKOURAS, TAKINGS LAW AND THE SUPREME COURT: JUDICIAL OVERSIGHT OF THE REGULATORY STATE'S ACQUISITION, USE AND CONTROL OF PRIVATE PROPERTY 25 (1998).

193. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

194. *See Kramer, supra* note 191, § 4.02(1), at 4-14 ("[E]ven seven years after *Mahon* the courts apparently did not understand the monumental change it had wrought.").

195. *Mahon*, 260 U.S. at 412.

The challenge was predicated upon a Pennsylvania law prohibiting the removal of coal that might endanger subsidence of any structure used for “human habitation.”¹⁹⁶ Yet, the homeowner had acquired a deed from the company for the surface estate only, which contained an express reservation permitting the removal of underlying coal and a waiver of all claims of damage.¹⁹⁷ Justice Holmes, writing for the Court, considered whether the state law could altogether trump the prior contractual arrangement without constituting a taking of private property.¹⁹⁸ After recognizing that there is an “implied limitation” on the use and enjoyment of property subject to the police powers of the state,¹⁹⁹ Justice Holmes held that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”²⁰⁰ The *Mahon* rule is one of “degree,” not a bright-line standard.²⁰¹ In this instance, the Court found that the state had exceeded its police authority and could not “improve the public condition” without properly paying for it.²⁰² Ultimately, the Court dismissed the idea of advantaging one property owner over another simply because the bargained-for exchange created a danger that could have been otherwise avoided.²⁰³

After *Mahon*, the Supreme Court, nevertheless, continued hearing challenges to oil and gas regulations through a murky lens that blurred the distinctions between substantive due process and takings analyses.²⁰⁴ Merely ten years after *Mahon*, the Court, in *Champlin Refining Co. v. Corporation Commission*, considered a challenge to an Oklahoma crude oil production regulation.²⁰⁵ The action raised Due Process, Equal Protection, and Commerce Clause challenges without mention of *Mahon*.²⁰⁶ The Court upheld the regulatory authority of the law but remanded the case because several provisions were overly vague.²⁰⁷ Similar to pre-*Mahon* cases, the Court concluded that the law was not arbitrary or unreasonable in seeking

196. *Id.* at 412–13.

197. *Id.* at 412.

198. *Id.* at 413.

199. *Id.*

200. *Id.* at 415.

201. *Id.* at 416.

202. *Id.*

203. *See id.* (“So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.”).

204. *See Kramer, supra* note 191, § 4.02(2), at 4-22 to 4-24 (detailing three Supreme Court cases decided in the 1930s on grounds other than *Mahon*).

205. *Champlin Ref. Co. v. Corp. Comm’n*, 286 U.S. 210, 223–24 (1932).

206. *Id.*

207. *Id.* at 240–43.

to avoid resultant waste from overproduction by limiting output to daily market demands.²⁰⁸

In 1937, the Supreme Court heard a case that arose from the Texas Panhandle. In *Thompson v. Consolidated Gas Utility Corp.*, the Court was faced with a challenge brought by natural gas producers charging that the Railroad Commission's limitation of total gas production, as well as its decision to prorate the total gas produced among existing wells, constituted a taking of private property.²⁰⁹ The Court, without mentioning *Mahon*, recognized the intrinsic authority of a state to impose regulatory limitations on the production of natural gas for the public benefit by avoiding waste.²¹⁰ Yet, in this instance, the Court found the producers' activities were not wasteful.²¹¹ Thus, the Commission's limitations served only to take private property via prorating output, which obligated the producers unnecessarily to purchase additional gas from other non-allocated gas reserves.²¹²

In effect, *Mahon* proffered little guidance regarding how courts should balance the governmental interest in regulating oil and gas activities and how they should determine when those regulations unconstitutionally interfere with the private enjoyment of property. As soon as the Supreme Court tendered the *Mahon* takings test, it was relegated to relative obscurity, at least with respect to land use litigation, and would not reemerge until the 1970s.²¹³ Various theories have been advanced to explain the Court's retreat from *Mahon*, including a general consensus that land use litigation should be resolved at the local and state level.²¹⁴ Other theories turn on the belief that during the Great Depression and New Deal era, the Court shifted away from rigorous review of economic activities; or that World War II filled the Court's docket with compensation claims as the government condemned factories and mines to further the war effort.²¹⁵ Finally, the civil rights movement engrossed most of the Court's attention

208. *Id.* at 234.

209. *Thompson v. Consol. Gas Util. Corp.*, 300 U.S. 55, 57–58 (1937).

210. *Id.* at 76–77.

211. *Id.* at 77.

212. *Id.* at 79.

213. SKOURAS, *supra* note 192, at 40. However, the Supreme Court did decide one land use and mining takings challenge before the 1970s. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962) (upholding a local ordinance that prohibited excavation below the water table and requiring water-filled pits to be filled in). Although recognizing *Mahon*, the Court's rationale turned primarily on a pre-*Mahon* case, *Hadachek v. Sebastian*, 239 U.S. 394 (1915), which on substantive due process grounds refused to invalidate a Los Angeles ordinance prohibiting the operation of a brickyard or kiln within specified locations within the City, even though the effect was to substantially reduce the value of the property in question (\$800,000 to \$60,000). *Goldblatt*, 369 U.S. at 594.

214. SKOURAS, *supra* note 192, at 40.

215. *Id.* at 40–41.

in the 1960s.²¹⁶ By the 1970s, however, the emergence of the environmental movement and unprecedented urban expansion would reinvigorate the national land use debate.²¹⁷

In the interim, state and federal circuit courts continued applying ad hoc, pre-*Mahon* sausage-grinder tests to resolve disputes between governmental agencies and the extractive industries. Texas courts, favoring the employment of municipal controls over oil and gas activities, upheld local laws based on a highly deferential reasonableness standard and prudential concern for protecting the public welfare.²¹⁸ Yet Texas was not alone as other states followed a similar judicial philosophy.

For instance, in *Marblehead Land Co. v. City of Los Angeles*, a 1931 case, the Ninth Circuit Court of Appeals addressed a Los Angeles ordinance that prohibited oil-well drilling operations on a property that already had oil-producing wells.²¹⁹ Similar to pre-*Mahon* decisions, the court first recognized the wide discretion entrusted to municipalities to regulate land use activities and, absent a credible challenge to the reasonableness of the regulation, the judiciary's general responsibility not to supplant the municipality's wisdom with its own.²²⁰ Nonetheless, the court bemoaned treating oil exploration as just another form of land use. Unlike traditional land development, mineral estates are geographically circumscribed and generally cannot be captured absent access to the overlying surface property. Often a mineral estate holder does not have the luxury of relocating to a tract of land for which the city would permissibly allow drilling without effectively losing the entirety of the interest.²²¹

Nevertheless, in this particular instance, the court dismissed this concern and was unwilling to second guess the City's intentions to reasonably protect the public from potential fire hazards.²²² Rather, the court asserted that "great weight" should be afforded to the local authority

216. *Id.* at 41.

217. *Id.*

218. *See supra* Part III.B.

219. *Marblehead Land Co. v. City of L.A.*, 47 F.2d 528, 529 (9th Cir. 1931).

220. *Id.* at 532.

221. *See id.*

If there is any difference between the taking of the unearned increment by zoning ordinances and the taking of the inherent value of the soil or its contents, it arises from the fact that it might be deemed unreasonable to prevent a man from developing natural gas upon his property and reasonable to prohibit the erection of gas works, because in the former case gas works can be erected in other suitable zones or districts in the city, while in the case of natural gas it must be reproduced from the land in which it exists.

Id.

222. *Id.* at 533.

most familiar with local issues.²²³ Finally, the court concluded that the right to access the oil did not vest simply because a previous ordinance authorized the drilling of wells and expenditures were made in reliance upon that authorization.²²⁴ Any interests held were subject to changing circumstances; in this case, the increased risk of fire damage to surrounding residential areas that had developed around the oil field after the initial well completions.²²⁵

Back in the Midwest, the Oklahoma Supreme Court, in *Patterson v. Stanolind Oil & Gas Co.*, considered a due process and takings challenge against a state well-spacing law.²²⁶ The court rejected the claim and upheld the law as a legitimate means of preventing waste and protecting the correlative rights of other mineral estate owners drawing from a common reservoir well within the policing authority of the state.²²⁷ Moreover, the court stated that a mineral owner's right to possess oil and gas reserves was not absolute and was always subject to restrictions imposed by the state.²²⁸ The mere fact that the law, on its face, acted to curtail production did not create either a federal due process or takings claim, even if it resulted in the diminution of the property's value.²²⁹

Continuing eastward, in 1966, the Kentucky Court of Appeals addressed a concern similar to the issues raised in *Marblehead*.²³⁰ The City of Calhoun first passed an ordinance forbidding the exploration of oil and gas within its corporate limits and subsequently enacted a general zoning ordinance.²³¹ The Court framed the dispute in this manner:

Assuming the ordinance adopted by the City of Calhoun on August 6, 1957, forbidding the exploration for oil and gas within the corporate boundary of that city to be invalid, does the general zoning ordinance, duly and regularly passed by it on September 3, 1963, prevent drilling for oil and gas in an area classified as R-2 (residential), wherein no commercial operations are permitted?²³²

223. *Id.*

224. *Id.* at 534.

225. *See id.* at 533–34 (“[A] mere change of policy or of legislation, however unfortunate the result may be to appellants, does not justify the courts in declaring void an ordinance exercising legitimate police power.”).

226. *Patterson v. Stanolind Oil & Gas Co.*, 77 P.2d 83, 85 (Okla. 1938).

227. *Id.* at 88.

228. *Id.* at 89.

229. *Id.*

230. *Blancett v. Montgomery*, 398 S.W.2d 877 (Ky. 1966).

231. *Id.* at 878.

232. *Id.*

The court recognized the differences between oil and gas development and surface land use because surface land use activities “may be conducted in another locality with equal profit and advantage.”²³³ Yet the court applied the “reasonableness” standard often used by other jurisdictions for determining whether an aggrieved property owner had suffered a compensable taking.²³⁴ Ultimately, the restrictions promulgated pursuant to a valid zoning ordinance that imposed a hardship on a particular property owner were not sufficient to invalidate the ordinance as being unreasonable or arbitrary.²³⁵ Similar to *Patterson*, the court stated that any diminution of property value resulting from the valid exercise of a municipality’s police power does not constitute a taking of property or otherwise violate equal protection or due process under the law.²³⁶

C. *Modern Takings Jurisprudence: Penn Central, Mayhew, and Beyond*

The U.S. Supreme Court’s ruling in *Penn Central Transportation Co. v. New York City*²³⁷ opened the modern era of takings jurisprudence.²³⁸ Rebuffing the establishment of a rigid constitutional takings test, Justice Brennan, writing for the Court, constructed a rule that relies upon “ad hoc, factual inquiries,” evaluating specific claims based on three factors: (1) “[t]he economic impact of the regulation”; (2) “the extent to which the regulation has interfered with distinct investment-backed expectations”; and (3) “the character of the governmental action.”²³⁹ Additionally, the Court distinguished between governmental interference with property via “physical invasion” versus the effect of a “public program adjusting the benefits and burdens of economic life to promote the common good.”²⁴⁰ Moreover, a regulation that is reasonably related to protecting the public welfare, but creates “substantial individualized harm,” does not, on its face, constitute a taking of private property.²⁴¹ Finally, the Court unequivocally

233. *Id.* at 879.

234. *Id.* at 879–80.

235. *Id.* at 881.

236. *Id.*

237. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

238. Thomas E. Roberts, *Regulatory Takings: Setting Out the Basics and Unveiling the Differences*, in *TAKING SIDES ON TAKINGS ISSUES* § 1.0, at 1, § 1.2, at 7 (Thomas E. Roberts ed., 2002).

239. *Penn Cent.*, 438 U.S. at 124.

240. *Id.*

241. *Id.* at 125–26. The Court discusses *Miller v. Schoene*, 276 U.S. 272 (1928), a case upholding a law empowering a state entomologist to order the destruction of ornamental red cedar trees in order to protect cultivated apple trees from deadly cedar rust, predicated upon recognizing the state’s constitutional prerogative to destroy one class of property without compensation in order to save

stated that a takings analysis turns on consideration of the “parcel as a whole.”²⁴²

Penn Central stands for the proposition that courts should use a “multifactor balancing test” when considering whether a government regulation has reduced, but not eliminated, the economic value of private property.²⁴³ In such instances, the burden of proof lies with the property owner to demonstrate that the private loss sustained outweighs the state’s interest sought to be protected by the regulation.²⁴⁴ On the other hand, the U.S. Supreme Court’s 1992 decision in *Lucas v. South Carolina Coastal Council*²⁴⁵ established a more stringent “categorical” takings rule “where a regulation deprives a property owner of all economically viable use.”²⁴⁶ The *Lucas* test, unlike the *Penn Central* test, shuns a “case-specific inquiry into the public interest advanced in support of the restraint.”²⁴⁷ Instead, Justice Scalia, writing for the majority, created a “presumption that a taking has occurred”²⁴⁸ and shifted the burden of proof to the government to demonstrate that “the regulation does no more to restrict use than what the state courts could do under background principles of property law or the law of private or public nuisance.”²⁴⁹

another, more valuable class. *Penn Cent.*, 438 U.S. at 125–26. The Court also briefly makes reference to *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), and *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), for the proposition that local governments can prohibit otherwise lawful activities that are inconsistent with adjacent land usage and thus pose a potential threat to the public welfare or safety. *Penn Cent.*, 438 U.S. at 126–27.

242. *Penn Cent.*, 438 U.S. at 130–31.

Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole

Id. (internal quotation marks omitted).

243. Roberts, *supra* note 238, § 1.4(b), at 11 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

244. *Id.* (citing *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994)).

245. *Lucas*, 505 U.S. 1003.

246. Roberts, *supra* note 238, § 1.4(a), at 10.

247. *Lucas*, 505 U.S. at 1015.

248. ROBERT MELTZ ET AL., THE TAKINGS ISSUE 141 (1999); *see also Lucas*, 505 U.S. at 1017–18.

Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply adjusting the benefits and burdens of economic life in a manner that secures an average reciprocity of advantage to everyone concerned.

Id. (citations omitted) (internal quotation marks omitted).

249. Roberts, *supra* note 238, § 1.4(a), at 10; *see also Lucas*, 505 U.S. at 1029.

A law or decree with such an effect must, in other words, do no more than

As a testament to the Lone Star State's independence, it was not until 1998 when the *Penn Central* factors were first explicitly applied by the Texas Supreme Court.²⁵⁰ In the interim, Texas courts decided takings challenges using various legal formulas that often relied upon a murky emulsion of state and federal common law. Decided a month after the U.S. Supreme Court handed down its *Penn Central* ruling, the Texas Supreme Court issued its opinion in *City of Austin v. Teague*, a case questioning whether a municipality's use of its permitting powers can constitute a compensatory taking of private property.²⁵¹ In *Teague*, a property owner sought a "water development permit" from the City to develop an eight-and-one-half-acre lot near a highway.²⁵² Although initially granted by the City's staff, the Planning Commission and City Council denied the permit application on three separate occasions, in part, because of pressure exerted by neighboring residents to preserve a "scenic easement" corridor approaching downtown Austin.²⁵³ The City subsequently lost a jury trial and complied with a court order to issue the requested permit but appealed the \$109,939 judgment for taking and damaging the property, asserting that the permit denial was within its legitimate police powers.²⁵⁴

As a threshold issue, the court rejected as unworkable the bright-line distinction between the doctrines of eminent domain and police power. The court rationalized that separating the concepts served only to manifest confusion and conflicting decisions, creating a "sophistic Miltonian Serbonian Bog."²⁵⁵ Instead, the court recognized the interaction of the two doctrines by stating that "one's property may not be taken without compensation under some circumstances even in the exercise of the police power."²⁵⁶ This rule requires a case-by-case analysis as the court lamented

duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or *otherwise*.

Id. (emphasis added). The Court construes "otherwise" in the sense of "litigation absolving the State (or private parties) of liability for the destruction of real and personal property, in cases of actual necessity, to prevent the spreading of a fire or to forestall *other grave threats to the lives and property of others*." *Id.* at 1029 n.16 (emphasis added) (internal quotation marks omitted) (quoting *Bowditch v. Boston*, 101 U.S. 16, 18–19 (1880)).

250. See *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 934–37 (Tex. 1998) (applying *Penn Central* factors to a regulatory takings challenge).

251. *City of Austin v. Teague*, 570 S.W.2d 389, 391 (Tex. 1978).

252. *Id.* at 390.

253. *Id.* at 390–91.

254. *Id.*

255. *Id.* at 391 (quoting *Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 105 (1962)).

256. *Id.* at 391–92 (citing *DuPuy v. City of Waco*, 396 S.W.2d 103 (Tex. 1965); *San Antonio River Auth. v. Lewis*, 363 S.W.2d 444 (Tex. 1963); *Brazos River Auth.*, 354 S.W.2d 99).

that “no one test and no single sentence rule . . . can resolve the varying problems that may arise by government’s interference with a property owner’s full exercise of his rights.”²⁵⁷ Instead, the court proffered three separate tests to determine if a municipality’s actions give rise to a compensable takings challenge: (1) “whether the property was rendered wholly useless”; (2) whether “the governmental burden created a disproportionate diminution in economic value or caused a total destruction of the value”; and (3) whether the “government’s action against an economic interest of an owner is for its own advantage.”²⁵⁸ Selecting the last test, the court found that the City withheld the sought-after permit to protect its own interest in preserving a scenic corridor at the expense of allowing private development on private property.²⁵⁹

Sixteen years later, the Texas Supreme Court was still using the *Teague* tests and reviewing takings challenges on an ad hoc basis, emphasizing the importance of specific facts in dispute.²⁶⁰ In *Taub v. City of Deer Park*, decided in 1978, the City of Deer Park began two eminent domain proceedings condemning portions of Henry Taub’s property for street and drainage improvements.²⁶¹ Two years later, Taub sought permission to up-zone his property from single-family residential to multifamily residential, citing a local demand for more housing.²⁶² The Zoning and Planning Commission and City Council denied the request after hearing testimony that new multifamily housing would cause traffic, sewer, and water problems, as well as require new municipal facilities because of insufficient fire, police, and school-related support services.²⁶³ During the condemnation proceedings, Taub’s property was assessed based only on the less profitable single-family residential zoning overlay.²⁶⁴ Consequently, Taub filed suit claiming that his property was taken without proper compensation.²⁶⁵ Taub further claimed that the City’s denial of the zoning change was calculated to serve to its own advantage by lowering the

257. *Id.* at 392.

258. *Id.* at 393 (citations omitted) (internal quotation marks omitted). The first two tests are restatements espoused by U.S. Supreme Court Justice Holmes; each is a factor for measuring the “extent or degree of the burden upon one’s property” by the governmental taking. *Id.* The third factor, on the other hand, is intended to prevent local governments from usurping private property without compensation for the sole purpose of advantaging the municipality’s corporate interests.

259. *Id.* at 394.

260. *Taub v. City of Deer Park*, 882 S.W.2d 824 (Tex. 1994).

261. *Id.* at 825.

262. *Id.* at 825–26.

263. *Id.* at 826.

264. *Id.*

265. *Id.*

property's value during the condemnation proceedings.²⁶⁶

The Texas Supreme Court disagreed and stated that a compensable taking arises only when a *regulatory* action constitutes an “unreasonable interference with the landowner’s right to use and enjoy the property.”²⁶⁷ Although generally citing *Lucas*, *Mahon*, and *Teague*, the “unreasonable interference” test emerged without discussion as a new standard,²⁶⁸ which, when superimposed over the *Teague* tests, effectively liberalized a takings analysis in favor of municipalities.²⁶⁹ The court went even further by contending that the Texas Constitution’s takings clause does not compel municipalities to guarantee the “profitability of every piece of land subject to its authority.”²⁷⁰ Moreover, the burden is on the aggrieved landowner to demonstrate a “sufficiently severe economic impact” to warrant court consideration of a takings claim.²⁷¹ After deciding that the zoning denial was not a taking, the court quickly rejected Taub’s assertion for lack of evidence that the City denied the zoning change to maintain a low property value for the condemnation hearing.²⁷² Ultimately, Taub’s argument that he could not profitably develop the property absent the zoning change was not compelling and certainly failed to demonstrate that the City was acting purely to advance a public interest at the expense of the economic viability of a single property owner.²⁷³

Four years later, the Texas Supreme Court formally introduced federal takings jurisprudence into Taub’s “unreasonable interference” standard in *Mayhew v. Town of Sunnyvale*, a case concerning whether a general-law municipality’s denial of a planned development proposal violated a landowner’s federal and state constitutional rights.²⁷⁴ The Mayhew family,

266. *Id.* at 826–27.

267. *Id.* at 826 (emphasis added) (citing *e.g.*, *City of Austin v. Teague*, 570 S.W.2d 389, 391 (Tex. 1978)).

268. *Id.*

269. See George E. Grimes, Jr., Comment, *Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem*, 27 ST. MARY’S L.J. 557, 577 (1996). “The Texas Supreme Court has elaborated on the *Teague* criteria [I]n *Taub v. City of Deer Park*, the court held that denial of a requested zoning change . . . is not a compensable taking even if the result is that the property cannot be profitably developed.” *Id.* (footnote omitted).

270. *Taub*, 882 S.W.2d at 826.

271. *Id.*

272. *Id.* at 827. The court, however, did recognize that under certain circumstances (a substantial evidentiary showing), a government acting as both a condemner and appraiser of property could create the conflict of interest alleged by Taub. *Id.* (discussing *State v. Biggar*, 873 S.W.2d 11 (Tex. 1994)).

273. *Id.* at 827–28.

274. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 925–26, 935 (Tex. 1998) (holding that the denial of the planned development proposal did not violate landowners’ constitutional rights because the development would “severely impact the ability of the Town to provide adequate municipal

owning almost 1200 acres within Sunnyvale, raised five claims, including two separate regulatory takings challenges (a compensable takings and a “substantial advancement” takings), after the Town refused to accept their plan for a 3600-unit subdivision.²⁷⁵ Before reaching the merits of the case, the court assumed (without deciding the issue) that both federal and state constitutional Takings Clauses were “coextensive” and declared that the claims would be analyzed “under the more familiar federal standards.”²⁷⁶ Additionally, the court stated that a municipality’s zoning decisions are entitled to judicial deference and “courts should not assume the role of a super zoning board.”²⁷⁷

Turning to the facts, the court initially applied the “substantial advancement” test announced in the now-defunct 1980 *Agins v. City of Tiburon* U.S. Supreme Court case.²⁷⁸ The court quickly found that a substantial interest had motivated the Town’s denial of the development plan.²⁷⁹ In particular, guided by *Agins*, the court accepted that the denial was predicated on preserving the overall character and lifestyle of the community, which was endangered by sprawling small-lot residential development.²⁸⁰

The court next turned to *Lucas*, *Taub*, and *Teague* to define the scope of a just compensation takings claim.²⁸¹ After distinguishing between a total takings (one denying all economically viable use of the property) and a

services”).

275. *Id.* at 925, 930.

The Mayhews alleged (1) just compensation takings claims, (2) fails to substantially advance takings claims, (3) substantive due process and due course claims, (4) equal protection claims, and (5) procedural due process and due course claims under the United States Constitution and Texas Constitution regarding the Town’s denial of their planned development application for 3,600 units.

Id. at 930 (internal quotation marks omitted).

276. *Id.* at 932.

277. *Id.* at 933 (citing *e.g.*, *Goss v. City of Little Rock*, 90 F.3d 306, 308 (8th Cir. 1996)).

278. *Id.* at 933–34; *see also* *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (“The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land.”) (citations omitted), *overruled by* *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 545 (2005) (“[W]e conclude that the ‘substantially advances’ formula announced in *Agins* is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation.”). Nevertheless, the U.S. Supreme Court reaffirmed the applicability of the physical occupation, *Penn Central*, *Lucas*, and *Nollan/Dollan* standards. *Lingle*, 544 U.S. at 548.

279. *See Mayhew*, 964 S.W.2d at 934–35 (noting the Town’s legitimate concern for “protecting the community from the ill effects of urbanization”).

280. *See id.* at 935 (commenting on the effect a large development would have on a small town).

281. *See id.* (“A compensable regulatory taking can also occur when governmental agencies impose restrictions that either (1) deny landowners of all economically viable use of their property, or (2) unreasonably interfere with landowners’ rights to use and enjoy their property.” (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–19 & n.8 (1992))).

partial takings, the court stated that determining whether the government has “*unreasonably interfered* with a landowner’s right to use and enjoy property” turns on two factors: first, “the economic impact of the regulation,” and second, “the extent to which the regulation interferes with distinct investment-backed expectations.”²⁸² The economic-impact prong of this two-part test simply “compares the value that has been taken from the property with the value that remains in the property,” without considering “anticipated gains” or “potential future profits.”²⁸³ The investment-backed-expectations prong involves a careful analysis of existing and permitted uses available to the property owner and whether the property owner had knowledge of the existing zoning overlay.²⁸⁴

Ultimately, the Texas high court rejected the invitation to uphold a takings challenge when the economic impact diminishes the property’s value such that it becomes undesirable and difficult for the owner to sell to a hypothetical willing buyer.²⁸⁵ Relying on *Lucas*’s evaluation of whether the regulatory action leaves a property all but “economically idle,”²⁸⁶ the court here found after a de novo review of the factual record that the property, sans the project approval, was still worth approximately \$2.4 million.²⁸⁷ Thus, the denial was not tantamount to a constitutionally prohibited destruction of the property’s value.²⁸⁸

Furthermore, the court held that the Mayhews held no investment-backed expectation to develop the property with an up-zoned density, even though a good portion of the property was purchased prior to the Town’s passage of a zoning ordinance.²⁸⁹ For some time prior to the project proposal, the Mayhew family used the land for ranching and after the zoning ordinance passed, purchased additional land in anticipation of

282. *Id.* (emphasis added) (citing *Lucas*, 505 U.S. at 1019 n.8; *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

283. *Id.* at 935–36 (citing *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987); *Andrus v. Allard*, 444 U.S. 51, 66 (1979)).

284. *Id.* at 936 (citing *Penn Cent.*, 438 U.S. at 136; *Lucas*, 505 U.S. at 1017 n.7; *Pompa Constr. Corp. v. City of Saratoga Springs*, 706 F.2d 418, 424–25 (2d Cir. 1983)).

285. *See id.* at 936–37.

Under substantive law, a regulatory taking occurs when governmental regulations deprive the owner of all economically viable use of the property or totally destroy the property’s value. Some courts have made an alternative pronouncement that a taking occurs when the government does not allow any use of the property that is sufficiently desirable to permit the property owner to sell the property.

Id. (citations omitted).

286. *Id.* at 937 (quoting *Lucas*, 505 U.S. at 1019).

287. *Id.*

288. *Id.*

289. *Id.* at 937–38.

development.²⁹⁰ Yet the entire tract never had the up-zoned classification and thus gave rise to no reasonable expectation that the Mayhews would be allowed to develop it at a higher-than-permitted density.²⁹¹

In 2004, the Texas Supreme Court unequivocally affirmed the use of federal Takings Clause jurisprudence when addressing state constitutional takings challenges. Specifically, Texas courts should “look to federal takings cases for guidance in applying our own constitution.”²⁹² In *Sheffield Development Co. v. City of Glenn Heights*, the court upheld a municipal ordinance that rezoned undeveloped property and found that its application did not constitute a taking, even though the down-zoning of Sheffield’s tract reduced its value by fifty percent.²⁹³ Specifically, the court applied *Agins* and *Penn Central* factors.²⁹⁴ Yet the court also stated that *Penn Central* is not the limit of inquiry and referenced *Agins* and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* for the proposition that courts must weigh competing private and public interests after carefully examining the relevant circumstances and contexts from which the claim arose.²⁹⁵ The court further broadened the scope of inquiry by reaffirming that takings cases must turn on “a fact-sensitive test of reasonableness.”²⁹⁶ Ultimately, *Sheffield* nearly closed the regulatory takings window by granting municipalities substantial latitude to enforce land use regulations, particularly zoning laws, while also encouraging grievances to be directed through vested-rights statutory challenges.²⁹⁷

290. *Id.*

291. *Id.* at 938.

292. *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 674 (Tex. 2004).

293. *Id.* at 667, 679. It is interesting to note that the court distinguished between the issue concerning down-zoning in the present matter versus the up-zoning challenge in *Mayhew*. Specifically, the court intimated that zoning disputes involving maintaining the “*status quo* and preventing [a] landowner from proceeding with an enormous development on land that had long been used solely for agricultural purposes in a small, uniquely rural environment” are more defensible than municipal actions that reduce a property’s development density potential. *Id.* at 679.

294. *Id.* at 672–74. Texas courts have yet to consider *Lingle*’s impact on Texas takings jurisprudence. Elizabeth Drews, *Takings in the Context of Telecommunications and Electric Utility Restructuring in Texas*, 7 TEX. TECH ADMIN. L.J. 241, 250 (2006).

295. *Sheffield Dev. Co.*, 140 S.W.3d at 672 (“The analysis ‘necessarily requires weighing of private and public interests.’” (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980), *overruled by Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005))); *id.* (stating that Takings Clause analysis requires “careful examination and weighing of all relevant circumstances” (quoting *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326 n.23 (2002))).

296. *Id.* at 672–73 (citing *City of Coll. Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984)).

297. See Arthur J. Anderson, *Annual Survey of Texas Law: Zoning and Land Use*, 58 SMU L. REV. 1229, 1235 (2005).

While the court retains the substantial advancement test, the test has been diluted so that virtually all governmental actions will be deemed to advance a

After *Sheffield*, the state of compensable takings jurisprudence in Texas is relatively well developed and, for the most part, consistent with mainstream federal case law. However, the Texas Supreme Court has yet to decide how takings law would be applied in a challenge raised by a mineral estate owner or lessee against a municipal ordinance curtailing or prohibiting access to oil or gas reserves. A smattering of cases offer a glimpse into possible outcomes. Yet, given the historically elevated status of oil and gas exploration in Texas, any test proffered must draw from myriad jurisprudential lineages. The court will need to cobble together the rationales underlying decisions in cases ranging from regulating extractive industries to defining a municipality's legislative and quasi-judicial role in protecting a community's overall property and welfare interests.

D. Defending Municipal Oil and Gas Regulations Against Compensable Takings Challenges

Takings claims arising from curtailed access or total loss of a mineral estate generally follow mainstream takings jurisprudence.²⁹⁸ Modern Texas courts have yet to decide directly a takings challenge raised against a municipal ordinance regulating oil and gas development. Yet a few recent cases offer insight into how a court may analyze such a challenge. Moreover, the common law in Texas has developed a robust formulation of generally applicable takings jurisprudence, which can be superimposed over existing Due Process Clause and police-power case law specific to oil and gas development. As evidenced by the *Mayhew* and *Sheffield* cases, Texas courts track the generally accepted belief that before a regulation constitutes a compensable takings, the government action must impose a severe, if not complete, restriction on the economic viability of the property. This is particularly so in relation to extractive industry activities.²⁹⁹ Yet, four questions must be addressed before constructing a

governmental interest. While the court has made it more difficult to obtain monetary compensation for regulatory takings, it appears to have expressed a preference that developers utilize the vested rights statute to complete a project.

Id.

298. MELTZ ET AL., *supra* note 248, at 407.

299. *Id.* ("The government action's impact on the mine operator must be severe before the takings line is crossed, the state mining cases holding to the general state court view that *all* economically viable use must be eliminated."); *accord* Massimo v. Planning Comm'n of Naugatuck, 564 A.2d 1075, 1080–81 (Conn. Super. Ct. 1989); Miller Bros. v. Dep't of Natural Res., 513 N.W.2d 217, 220 (Mich. Ct. App. 1994); Thompson v. City of Red Wing, 455 N.W.2d 512, 516 (Minn. Ct. App. 1990); see also Timothy J. Dowling, *The Parcel-as-a-Whole Rule and Its Importance in Defending Against Regulatory Takings Challenges*, in TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES § 4.0, at 75, § 4.0, at 75 (Thomas E. Roberts ed., 2002) ("The government generally

viable rule. First, what takings test should be applied? Second, should a mineral estate be aggregated with other property interests when calculating regulatory impact? Third, what is the role of investment-backed expectations? Finally, can a complete regulatory deprivation of a mineral estate avoid a takings challenge as a legitimate nuisance or property law act? The answers for these questions will develop a contextual foundation for courts when parsing through potentially complex claims that raise competing equitable and legal doctrines under property, government, and land use law.

1. Defining the Appropriate Takings Test for Oil and Gas Regulations

The principal question for Texas courts is what test should be applied when municipal ordinances that limit or prohibit oil and gas development are challenged for taking private property without providing just compensation. An unpublished 2002 Houston Court of Appeals decision offers some insight.³⁰⁰ In *Trail Enterprises, Inc. v. City of Houston (Trail II)*, Trail Enterprises, doing business as Wilson Oil Company, held a mineral lease near and beneath Lake Houston, which was subsequently annexed by the City of Houston in 1996.³⁰¹ Prior to the annexation, Houston promulgated an ordinance prohibiting the drilling for minerals in its extraterritorial jurisdiction, which included Wilson's lease, in order to protect Lake Houston's water from potential contamination.³⁰² On summary judgment, Wilson lost a 1995 lawsuit challenging the ordinance as an inverse condemnation because the claim was barred by a statute of limitations.³⁰³ In 1997, the City passed a similar ordinance imposing the same restrictions on the now-annexed land near the lake.³⁰⁴ Again, Wilson filed an inverse condemnation action, among other claims, challenging the new ordinance.³⁰⁵ At trial, Wilson and the City filed cross motions for summary judgment.³⁰⁶ The City's motion was granted and Wilson appealed.³⁰⁷ The Houston Court of Appeals held that there was a material

should prevail in a regulatory takings challenge if it can show that the challenged regulation does not deprive the landowner of all (or virtually all) economically viable use and value of the land.”).

300. *Trail Enters., Inc. v. City of Houston (Trail II)*, No. 14-01-00441-CV, 2002 Tex. App. LEXIS 1872 (Tex. App.-Houston Mar. 14, 2002).

301. *Id.* at *1.

302. *Id.* at *1–*2.

303. *Trail Enters., Inc. v. City of Houston (Trail I)*, 957 S.W.2d 625, 633 (Tex. App.-Houston 1997), *petition for review denied without reported opinion*, July 3, 1998.

304. *Trail II*, 2002 Tex. App. LEXIS 1872, at *3.

305. *Id.*

306. *Id.*

307. *Id.*

dispute of fact regarding the inverse condemnation claim and remanded the case.³⁰⁸

Specifically, the court found that there was a material dispute—presented via conflicting affidavits from each party’s experts—as to whether the regulations permit or proscribe physically locating a well on the property and, even if a well could be drilled, whether Wilson could extract gas in an “economically feasible manner.”³⁰⁹ In reaching this conclusion, the court first stated that the *Mayhew* rule is the applicable test for determining whether a compensable regulatory taking has occurred.³¹⁰ Thus, Wilson’s mineral interests would be taken if the City imposed restrictions “that: (1) do not substantially advance legitimate state interests; or (2) either (a) deny property owners all economically viable use of their property, or (b) unreasonably interfere with property owners’ rights to use and enjoy their property.”³¹¹ Additionally, the court cited *Mayhew* for the proposition that unreasonable interference is determined by analyzing the “economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations.”³¹² Moreover, the court appropriates two other significant evaluative criteria presented in *Mayhew*. First, a regulation’s economic impact compares the value taken with the value remaining on the property, excluding “anticipated gains or potential future profits.”³¹³ Second, permitted and existing uses on the property constitute the “primary expectations” of a property owner when considering investment-backed expectations.³¹⁴

As a non-reported appellate court case, *Trail II* is not controlling, and beyond announcing the *Mayhew* test’s applicability to municipal oil and gas regulations, does not actually walk through a takings analysis. Yet, for a number of reasons, *Trail II* offers a commonsense approach easily adaptable for use by the Texas Supreme Court. First, the *Mayhew* test is the leading case for answering state-based compensatory takings challenges. Additionally, the test embraces both state and federal precedent, creating a framework from which courts can tailor responses to the specific facts of each case, while also respecting the need for uniformity in decision-making among Texas courts. Oil and gas development, however, is substantially different from other types of land use, and, consequently, questions of

308. *Id.* at *9–*11.

309. *Id.*

310. *Id.* at *7.

311. *Id.* (citing *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933, 935 (Tex. 1998)).

312. *Id.* (internal quotation marks omitted) (citing *Mayhew*, 964 S.W.2d at 935).

313. *Id.* at *7 n.5 (citing *Mayhew*, 964 S.W.2d at 936).

314. *Id.* (citing *Mayhew*, 964 S.W.2d at 936).

applicable property interests and investment-backed expectations must still be considered.

2. Aggregating Mineral and Surface Estate Interests Under the Parcel-as-a-Whole Principle

Unlike a traditional surface development project, oil and gas activity moves through both horizontal and vertical property interests, often entailing multiple estate claims if the mineral resources have been severed from the surface or held by third parties through a leasehold.³¹⁵ A key question is whether a mineral estate should be aggregated with the surface estate when evaluating the impact a municipal oil and gas ordinance has on curtailing or prohibiting production. This is particularly important given Texas's long history of protecting the ability of landowners, within reasonable limits, to exploit and sever mineral resources underlying their property.³¹⁶ In a circumstance where a property owner holds the entire surface and mineral estate, an aggregation of both interests would likely preclude a takings challenge to a municipal ordinance that prohibited drilling a gas well, but still allowed an economically viable use of the surface for other land use development. Thus, a disaggregation paradigm would treat the mineral estate as essentially lost to the owner and could be utilized to sustain a partial or *Lucas* categorical takings challenge.³¹⁷

315. Cf. James S. Burling, *Private Property Rights and the Environment After Palazzolo*, 30 B.C. ENVTL. AFF. L. REV. 1, 51 (2002) ("Whether it be the subdivision of large estates, the creation of leasehold interests for a limited duration of time, or the independent sale of mineral rights, severance is an essential core of Anglo-American conceptions of property.").

316. See *Imperial Am. Res. Fund, Inc. v. R.R. Comm'n*, 557 S.W.2d 280, 286 (Tex. 1977).

The basic right of every landowner or lessee to a fair and reasonable chance to recover the oil and gas under his property was recognized . . . with exceptions to spacing rules being proper when the applicants discharge their burden of proof that the exceptions are necessary to prevent waste or confiscation of property.

Id. (citations omitted); *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 561 (Tex. 1948) ("In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land." (citing *e.g.*, *Lemar v. Garner*, 50 S.W.2d 769 (Tex. 1932))); *Marrs v. R.R. Comm'n*, 177 S.W.2d 941, 948 (Tex. 1944) ("Every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation." (citing *e.g.*, *Gulf Land Co. v. Atl. Ref. Co.*, 131 S.W.2d 73 (Tex. 1939))); *R.D. Oil Co. v. R.R. Comm'n*, 849 S.W.2d 871, 875 (Tex. App.-Austin 1993) ("The right of an entity to conduct oil and gas activities in the state is not an absolute right, but a qualified right subject to reasonable restriction by the state.").

317. See Burling, *supra* note 315, at 15 ("If only a portion of the beneficial or productive use of the parcel of property is completely destroyed, or if only a distinct severable property interest (such as a mineral right) is completely destroyed, then a court may find that there is a 'partial taking.'"). Yet, even the categorical takings analysis in *Lucas* is not absolute and will excuse a regulatory intrusion if predicated on well-established "background principles" that would otherwise prevent the questioned land use activity. See DOUGLAS T. KENDALL ET AL., *TAKINGS LITIGATION HANDBOOK: DEFENDING*

Since *Penn Central*, the U.S. Supreme Court “repeatedly has held that the relevant parcel to be examined is not the affected portion of the property but the entire parcel, or what the Court calls the parcel as a whole.”³¹⁸ Relying on prior Supreme Court cases restricting development of air rights, subjacent property interests, and lateral property development, the *Penn Central* Court stated:

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole³¹⁹

And only a year later, the Court again asserted that a takings challenge is to be evaluated in reference to the “entirety” of the property interest.³²⁰ Moreover, the U.S. Supreme Court “emphatically reaffirmed the parcel-as-a-whole rule as applied to both physical and conceptual severance”³²¹ in *Keystone Bituminous Coal Ass’n v. DeBenedictis*.³²²

In *Keystone*, an association of bituminous coal mine operators filed suit seeking to enjoin enforcement of a Pennsylvania law requiring operators to leave a certain amount of coal behind in order to prevent subsidence and damage to above-ground structures (like homes and churches).³²³ Distinguishing *Mahon*, the Court found that the law did not make it impossible to continue profitably mining coal and that there was not “undue

TAKINGS CHALLENGES TO LAND USE REGULATIONS 24 (2000) (“[L]ower courts since *Lucas* generally have been quite receptive to defenses based on background principles, applying the definition broadly to embrace preexisting federal, state, and local statutes, common law doctrines such as public trust and custom, and state and local nuisance laws.”).

318. Dowling, *supra* note 299, § 4.2(a), at 76. Although often repeated, the Court has, at times, given different weight to the parcel-as-a-whole principle, and there continues to be confusion as to how it is applied by lower courts. See Burling, *supra* note 315, at 47–64 (discussing in detail the lack of consistent use of the parcel-as-a-whole principle between jurisdictions, particularly at the state level); Lise Johnson, Note, *After Tahoe Sierra, One Thing Is Clearer: There Is Still a Fundamental Lack of Clarity*, 46 ARIZ. L. REV. 353, 363–69 (2004) (chronicling Supreme Court shaping of the parcel-as-a-whole principle from *Penn Central* through *Tahoe Sierra*).

319. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978).

320. *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979). “[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking, because the aggregate must be viewed in its entirety.” *Id.* (internal quotation marks omitted).

321. Dowling, *supra* note 299, § 4.2(a), at 77.

322. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987).

323. *Id.* at 476–78.

interference” with the coal operators’ “investment-backed expectations.”³²⁴ Relying on *Penn Central* and *Andrus v. Allard*,³²⁵ the Court rejected the mine operators’ assertion that the “support estate” (coal left in place to avoid subsidence) should be conceptually separated from the mineral estate, in particular because the support estate’s value is limited to enhancing either the surface or mineral estate owner, depending on who holds the interest.³²⁶ In a move to avoid fashioning a rule that would unnecessarily frustrate routine land use regulation, the Court stated that “our takings jurisprudence forecloses reliance on . . . legalistic distinctions within a bundle of property rights.”³²⁷

The Texas Supreme Court has not explicitly adopted the parcel-as-a-whole principle within a regulatory takings context. However, in *City of Austin v. Capitol Livestock Auction Co.*, an eminent domain case, the court recognized the relationship between a taken tract and a remainder tract when calculating damages so long as “there is unity of use and unity of ownership.”³²⁸ In *Taub v. City of Deer Park*, the court again considered eminent domain damages in terms of comparing taken versus remaining property interests.³²⁹ Additionally, the Fort Worth Court of Appeals, in *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, the court referenced *Penn Central* and *Keystone* for the proposition that a regulatory takings challenge must be considered on the merits of the “property as a whole.”³³⁰ On appeal, the Texas Supreme Court quickly dismissed *Penn Central* as the appropriate regulatory takings test in favor of the standard set forth by the U.S. Supreme Court in *Dolan v. City of Tigard*,³³¹ a case challenging a municipality’s conditioning a permit approval upon a greenway dedication.³³² Yet, even in *Dolan*, the Court evaluated a regulatory takings based on the entire property, not just the excised portion.³³³

324. *Id.* at 485.

325. *Andrus*, 444 U.S. 51.

326. *Keystone Bituminous Coal Ass’n*, 480 U.S. at 500–01.

327. *Id.* at 500; *see also* Dowling, *supra* note 299, § 4.2(a), at 78 (“*Keystone* reflects the Court’s strong reluctance to fashion rules of takings liability that would call into question routine land use controls.”).

328. *City of Austin v. Capitol Livestock Auction Co.*, 453 S.W.2d 461, 463 (Tex. 1970) (citing *e.g.*, *Tex.-N.M. Pipeline Co. v. Linebery*, 326 S.W.2d 733, 739 (Tex. Civ. App. 1959)).

329. *Taub v. City of Deer Park*, 882 S.W.2d 824, 827 (Tex. 1994).

330. *Town of Flower Mound v. Stafford Estates Ltd. P’ship*, 71 S.W.3d 18, 44 (Tex. App.-Fort Worth 2002), *aff’d*, 135 S.W.3d 620 (Tex. 2004).

331. *Town of Flower Mound v. Stafford Estates Ltd. P’ship*, 135 S.W.3d 620, 630–31 (Tex. 2004).

332. *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994).

333. *Id.* at 385 n.6; *see also* *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1577 n.18 (10th Cir.

Although the parcel-as-a-whole principle remains unsettled in Texas jurisprudence, particularly in relation to oil and gas activities, the Texas Supreme Court, in light of its *Sheffield* and *Stafford Estates* holdings, will probably continue to follow the U.S. Supreme Court's lead. However, *Keystone* is not conclusive on the issue of distinguishing between surface and mineral estates, particularly when owned by different property interest holders. The distinction is key when a court decides whether to apply a *Penn Central* or a *Lucas* standard to a municipal regulation that prevents a mineral estate holder from recovering oil or gas. However, given Texas's long history of recognizing mineral estates as subject to reasonable policing authority, state courts may also employ a liberalized property definition, similar to eminent domain cases, in order to rebuff claims that a mineral estate interest has been undermined by a municipality's actions. Moreover, at least one federal district court has gone so far as to claim that even a compensable takings challenge raised against a municipality's oil and gas regulation by a company holding only a mineral lease will be considered coextensively with the surface estate owned entirely by another entity.³³⁴ Although an extreme position, it is one consistent with Justice Brandeis's dissent in *Mahon*, where he lamented the policy of segregating property values in lieu of considering the entire property.³³⁵

3. Limiting the Reach of Reasonable Investment-Backed Expectations

The third question that must be addressed concerns framing the role investment-backed expectations have in determining whether a municipal oil and gas ordinance can constitute a compensable taking. An investment-backed expectation is an "amorphous" concept originally developed within inverse condemnation law³³⁶ and introduced by the U.S. Supreme Court in *Penn Central* an effort to formulate a takings rule based more on "justice and fairness" than a static "set formula."³³⁷ The investment-backed-

1995) ("[W]hen considering the economically beneficial use test, *Dolan* clearly indicated that test must be viewed in light of defendant's entire property.").

334. *Mid Gulf, Inc. v. Bishop*, 792 F. Supp. 1205, 1214 (D. Kan. 1992) (noting that owner of an oil and gas leasehold interest was not denied "all economic value of the property" when prohibited from drilling because the surface interest owned by a country club remained "economically viable"), *dismissed on later proceeding*, 1992 U.S. Dist. LEXIS 14127 (D. Kan. Aug. 11, 1992).

335. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting) ("If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land.").

336. MELTZ ET. AL., *supra* note 248, at 134 (citing Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1233 (1967)).

337. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978) (quoting

expectation factor precludes a taking challenge premised simply on the grounds that a government's regulatory action prevents a property owner from exploiting *any* desired property interest.³³⁸

Courts frequently use the investment-backed-expectation factor as a means of gauging the extent to which a property owner has notice of regulatory limitations or has acted in reliance on the presence (or absence) of such regulations when acquiring a property for a particular development scheme.³³⁹ The U.S. Supreme Court has generally adopted the idea that a property owner's expectations are limited by foreseeable regulatory controls, particularly when there is actual or constructive notice.³⁴⁰ However, such limitations do not grant unfettered immunity to municipalities seeking to avoid takings claims by asserting that a regulation was in place prior to a property owner holding a vested right in a particular property interest. The Court's decision in *Palazzolo v. Rhode Island* effectively preempts municipalities from using enacted laws as an

Armstrong v. United States, 364 U.S. 40, 49 (1960)). However, it should be noted that legal scholars differ as to whether such reliance on "fairness" enhances or detracts from clarifying regulatory taking claims and legitimacy of governmental interference with property development. Compare Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 1018 (2000) ("In essence, however, 'investment-backed expectations' is not really concerned with 'investment' at all; it is concerned with fairness and reliance." (citing STEVEN J. EAGLE, REGULATORY TAKINGS § 64-(c)(2)(iii) (1996))), and Joseph LaRusso, "Paying for the Change": First English Evangelical Lutheran Church of Glendale v. County of Los Angeles and the Calculation of Interim Damages for Regulatory Takings, 17 B.C. ENVTL. AFF. L. REV. 551, 582 (1990) ("A regulation that is fair guarantees that individuals who have traded in reliance upon the market values represented by previous levels of restrictions on use will not suffer, according to Justice Brennan's formulation, too severe an interference with their distinct investment-backed expectations."), with Barton H. Thompson, Jr., *The Allure of Consequential Fit*, 51 ALA. L. REV. 1261, 1287 (2000) ("A fairness rationale requires a court to second guess Congress' own fairness determinations, placing a court in the worst institutional posture."), and Johnson, *supra* note 318, at 375 ("In deciding whether a regulation has gone 'too far,' effectively depriving a property owner of some or all of her interests in her property, courts are clothing their subjective opinions of fairness and justice in a seemingly objective analytical shell.").

338. *Penn Cent.*, 438 U.S. at 130.

339. See Rebecca Rogers, Note, *Interest, Principal, and Conceptual Severance*, 46 B.C. L. REV. 863, 888-89 (2005).

A modern interpretation of distinct or reasonable investment-backed expectations involves the amount of notice afforded the property owner (less protection is provided for those in highly regulated industries, and more protection is provided for retroactive regulations) and any reasonable reliance the owner had on the absence of the regulation.

Id. (citing *E. Enters. v. Apfel*, 524 U.S. 498, 532-36 (1998)).

340. See Daniel R. Mandelker, *The Notice Rule in Investment-Backed Expectations*, in *TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES* § 2.0, at 21, § 2.1(b)-(c), at 24-26 (Thomas E. Roberts ed., 2002) (discussing the Court's infusion of foreseeability in *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984), and the notice rule as articulated in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)).

impenetrable shield to defend against compensable takings liability.³⁴¹ Yet the investment-backed-expectations factor remains a powerful resource to municipalities for establishing a historical context in which to define the scope of regulatory impact by simply asking “whether a landowner ‘should have expected’ the property interest limitations at issue.”³⁴²

In Texas, post-*Mayhew* courts evaluate a regulation’s impact on private property by first determining whether the taking is complete or partial.³⁴³ A compensable taking of a partial interest occurs when the government’s action unreasonably interferes with the property owner’s use and enjoyment of the property.³⁴⁴ Unreasonable interference is the product of two different factors: (1) the economic impact of the regulation; and (2) interference with the property owner’s investment-backed expectations.³⁴⁵ The *Mayhew* court placed great emphasis on the existing regulations and historical usage in determining whether a governmental action interferes with a landowner’s reasonable investment-backed expectations.³⁴⁶

A similar reliance on historical use and traditional regulatory oversight has been applied to government regulation of the Texas oil and gas industry. In *Trail I*, the Houston Court of Appeals reiterated that exploring and developing oil and gas resources is not an absolute right and is subject to reasonable regulation by the state or municipality, even if such generally applicable regulations impose a disproportionate impact on a few entities.³⁴⁷ Moreover, the court reaffirmed the general principle that all property “is held subject to the valid exercise of the police power, and a municipality is not required to compensate a landowner for losses resulting therefrom.”³⁴⁸

As discussed above, Texas extractive industries have been subject to regulations and limitations by the state and local municipalities as far back

341. *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001); see also Mandelker, *supra* note 340, § 2.4(b), at 36 (“[After *Palazzolo* it] is now clear that a municipality cannot adopt a land use regulation and argue that its adoption prior to a purchase of title defeats a takings claim.”).

342. Jesse Williams, Comment, *Regulating Multinational Polluters in a Post-NAFTA Trade Regime: The Lessons of Metalclad v. Mexico and the Case for a “Takings” Standard*, 8 UCLA J. INT’L L. & FOREIGN AFF. 473, 489 (2003).

343. See *supra* Part IV.D.1.

344. See *supra* Part IV.D.1.

345. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998).

346. See *id.* at 937–38 (discussing the rural character of the area, enacted zoning regulations that proscribed high density development, and the *Mayhew*’s family use of the property for ranching purposes as key factors in concluding that the *Mayhew*’s held no reasonable investment-backed expectations to develop a 3600 unit subdivision that would essentially quadruple the town’s population).

347. *Trail I*, 957 S.W.2d 625, 635 (Tex. App.-Houston 1997), *petition for review denied without reported opinion*, July 3, 1998.

348. *Id.* at 630 (citing *e.g.*, *City of Coll. Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984)).

as the early twentieth century.³⁴⁹ In particular, local well spacing, zoning restrictions, and other provisions designed to protect the safety and welfare of the general public have consistently been upheld as a valid exercise of police powers. Thus, there is little doubt that a landowner or mineral estate lessee should have actual or constructive knowledge that drilling wells and producing oil and gas within populated communities likely entails compliance with strict regulatory requirements.³⁵⁰ Or, perhaps more importantly, even if such local laws are not on the books at the time the mineral interest ripened, there still is a reasonable and foreseeable expectation that such regulations could be promulgated in the future.

Additionally, Texas courts have historically evaluated regulatory takings claims by scrutinizing the facts particular to each case. Certainly there are far more regulatory limitations placed on the oil and gas industry today than there were at the turn of the twentieth century. However, the mere accumulation of regulations and the proliferation of local controls imposed because of increased drilling activity near population centers should not be dispositive for accepting a takings claim on its face. In 2001, the Colorado Supreme Court reviewed an inverse condemnation claim raised by a sand and gravel company that challenged county-imposed land use restrictions.³⁵¹ In remanding the case the court instructed the trial court to limit an investment-backed-expectation query to the specific impact imposed on the property versus “the *accumulated* state and federal regulations of the past several decades that have arisen from both a growing population and an increased awareness of the environmental consequences of industry.”³⁵² There exists a general understanding that, even absent restrictive ordinances at the time an oil or gas interest vests, extractive industry activities are subject to increasingly stringent regulations, particularly as the risks to surrounding residential and commercial properties grow.

349. *See supra* Part III.B.

350. The Texas Supreme Court has stated that private businesses are charged with constructive notice if the information is available through public records. *See Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981) (“A person is charged with constructive notice of the actual knowledge that could have been acquired by examining public records.”). Additionally, constructive knowledge of ordinances is presumed if a business resides within or has dealings with a municipality. *Bd. of Adjustment v. Nelson*, 577 S.W.2d 783, 786 (Tex. Civ. App.-San Antonio 1979), *writ of error refused no reversible error*, 584 S.W.2d 701 (Tex. 1979).

351. *Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm’rs*, 38 P.3d 59, 61 (Colo. 2001).

352. *Id.* at 66 (emphasis added).

4. Defeating Categorical Takings Challenges Using Texas's Background Principles of Property and Nuisance Law

The final question concerns whether a municipal oil and gas ordinance that entirely prohibits drilling wells and consequently denies all access to a mineral estate constitutes a categorical taking. The U.S. Supreme Court, in *Lucas v. South Carolina Coastal Council*, announced the general rule that “[a] statute regulating the uses that can be made of property *effects a taking if it denies an owner economically viable use of his land.*”³⁵³ Moreover, the *Lucas* Court greatly narrowed the ability of municipalities to premise a takings on the legitimate exercise of its police power, which while not dispositive, serves as a key factor in defending against a *Penn Central* partial takings claim.³⁵⁴ However, the Court did identify two exceptions where the restrictions imposed are well rooted in the (1) “background principles of the State’s law of property” or (2) “[law of] nuisance already placed upon land ownership.”³⁵⁵ Justice Scalia, writing for the majority, substantially qualified these exceptions premised upon the belief that property-related and nuisance-abatement actions could already be brought into the courts independent of a takings challenge.³⁵⁶ Yet even then, Justice Scalia opined that such government regulatory actions, particularly when destroying all property value, need to turn on resolving serious risk, such as preventing the spread of fire or “otherwise” forestalling “grave threats to the lives and property of others.”³⁵⁷

Background principles of state property law can be generally defined as “firmly embedded and long-established principles of property law, clearly and unambiguously recognized and universally acknowledged by the citizens of the state in which they are claimed.”³⁵⁸ Statutory laws,

353. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.6 (1992) (internal quotation marks omitted) (quoting *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 495 (1987)).

354. *Id.* at 1026. “*A fortiori* the legislature’s recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed.” *Id.*

355. *Id.* at 1029.

356. *See id.*

A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Id.

357. *Id.* at 1029 n.16 (citing *Bowditch v. Boston*, 101 U.S. 16, 18–19 (1880)).

358. David L. Callies & J. David Breemer, *Background Principles: Custom, Public Trust, and Preexisting Statutes as Exceptions to Regulatory Takings*, in *TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES* § 6.0, at 125, § 6.0, at 152 (Thomas E. Roberts ed., 2002).

particularly when codifying historically utilized common law property principles, fall within the scope of *Lucas*'s narrow exception.³⁵⁹ Even recent legislative enactments may qualify as a background principle that could be used to trump a cognizable property interest and deflate a compensatory takings challenge.³⁶⁰ Yet the pendulum can swing too far, emboldening local legislators with the power to “eradicate private property interests by the mere adoption of restrictive land-use regulations.”³⁶¹ State constitutional provisions, however, particularly ones related to the conservation of natural resources, can serve as background principles and thus a threshold to barring a categorical takings.³⁶² Perhaps most importantly, whether in common law, state constitutions, or codified laws, background principles of property change over time, which is permissible under *Lucas*.³⁶³

For almost a century, the Texas Constitution has empowered the legislature to enact laws to conserve the state's natural resources, including

359. See Timothy J. Dowling, *On History, Takings Jurisprudence, and Palazzolo: A Reply to James Burling*, 30 B.C. ENVTL. AFF. L. REV. 65, 77 (2002) (“*Lucas* provides strong support for the argument that the background-principles defense extends beyond common law nuisance, and lower courts have been quite expansive in their application of the defense to statutes, regulations, and non-nuisance common-law doctrines.” (citing KENDALL ET AL., *supra* note 317, at 130–143)).

360. See Patrick Parenteau, *Unreasonable Expectations: Why Palazzolo Has No Right to Turn a Silk Purse into a Sow's Ear*, 30 B.C. ENVTL. AFF. L. REV. 101, 116 (2002).

In his majority opinion in *Palazzolo v. Rhode Island*, Justice Kennedy noted that background principles are not confined to common law doctrines, and specifically reserved the question on remand of whether Rhode Island's coastal protection statutes could be considered background principles: “We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here.”

Id. (quoting *Palazzolo v. Rhode Island*, 503 U.S. 606, 629 (2001)).

361. R.S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449, 526 (2001). Radford and Breemer specifically critiqued the Texas Supreme Court's *Mayhew* decision, asserting that the Texas court elevated a local zoning ordinance to the status of a background principle to defeat a regulatory takings challenge; yet two years later the same ordinance was struck down by a federal district court after finding the regulation was a racist attempt to prevent minorities from moving into the Town of Sunnyvale. *Id.* at 523–26.

362. See Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 359–60 (2005) (detailing various state constitutional provisions protecting natural resources and discussing how such provisions can constitute background principles within a categorical-takings context).

363. See John D. Leshy, *A Conversation About Takings and Water Rights*, 83 TEX. L. REV. 1985, 2016 (2005). “The content and application of background principles built into property rights can change over time. As Justice Scalia wrote for the Court in the *Lucas* decision, ‘changed circumstances or new knowledge may make what was previously permissible no longer so.’” *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992)).

oil and gas.³⁶⁴ Moreover, Texas common law has repeatedly upheld the limiting of a private mineral property interest against a municipality's police authority to regulate oil and gas development so as to protect the public safety and welfare.³⁶⁵ As such, a compelling argument can be made that municipal oil and gas ordinances are the present day extension of a well-rooted historical constitutional and common law background principle of property law. And thus a city can legitimately and reasonably enforce such ordinances without triggering a *Lucas*-type categorical takings claim should a mineral interest holder be denied the right to drill a well within the city's jurisdiction.

The second *Lucas* exception relates to background principles of state nuisance law. Unlike the background principles of property law analysis, the *Lucas* Court recognized that state nuisance laws are an evolving jurisprudential body adapting to new knowledge and changing conditions.³⁶⁶ Specifically, the Court relied extensively upon the Restatement (Second) of Torts in defining a nuisance and equating a "total taking" injury with a similar mode of analysis.³⁶⁷ The Restatement defines nuisance broadly, recognizing that states individually craft the scope of nuisance law coverage, and compliance with statutory law is a key element in determining whether a public nuisance exists.³⁶⁸

At the federal level, courts have consistently recognized regulatory controls and prohibitions imposed against extractive-industry activities, particularly related to mining, as meeting the background-principles requirement.³⁶⁹ For instance, the U.S. Supreme Court, in *Hodel v. Indiana*, upheld the Surface Mining Control and Reclamation Act of 1977 against Commerce Clause and Tenth Amendment challenges.³⁷⁰ Specifically the Court found that the Act's "prohibition against mining near churches, schools, parks, public buildings, and occupied dwellings [was] plainly

364. TEX. CONST. art. XVI, § 59(a) ("[T]he preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.").

365. See *supra* Part III.B.

366. *Lucas*, 505 U.S. at 1031; see also Glenn P. Sugameli, *Threshold Statutory and Common Law Background Principles of Property and Nuisance Law Define If There Is a Protected Property Interest*, in TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES § 7.0, at 163, § 7.8, at 173 (Thomas E. Roberts ed., 2002) ("Thus, because nuisance law is continuously evolving, *Lucas* can negate compensation when new regulations prohibit uses that were not barred by background principles at the time a parcel was purchased.").

367. *Lucas*, 505 U.S. at 1030–31 (citing RESTATEMENT (SECOND) OF TORTS §§ 826–827, 828, 830–831 (1979)).

368. Sugameli, *supra* note 366, § 7.9, at 174.

369. *Id.* § 7.9, at 176.

370. *Hodel v. Indiana*, 452 U.S. 314, 314, 336 (1981).

directed toward ensuring that surface coal mining does not endanger life and property in coal mining communities.”³⁷¹ Moreover, the Court stated that the production of coal should “not be at the expense of agriculture, the environment, or public health and safety.”³⁷²

Perhaps the leading compensable takings case governing an extractive industry activity is *Keystone Bituminous Coal Ass’n v. DeBenedictis*.³⁷³ In *Keystone*, the U.S. Supreme Court reaffirmed “that the nature of the State’s action is critical in takings analysis,”³⁷⁴ and positively cited *Mugler v. Kansas* for the proposition that governments should not be burdened with a reciprocal obligation to compensate a property owner for enforcing laws preventing the “noxious” use of property to the detriment of the public at large.³⁷⁵ Additionally, the Court explicitly acknowledged that Pennsylvania, through its regulatory statute, was “acting to protect the public interest in health, the environment, and the fiscal integrity of the area,” and the fact “[t]hat private individuals erred in taking a risk cannot estop the Commonwealth from exercising its *police power to abate activity akin to a public nuisance*.”³⁷⁶

Similarly, Texas courts have long recognized municipal authority to govern the exploration and development of oil and gas reserves, particularly when necessary to protect a community from dangerous public nuisances akin to Justice Scalia’s *Lucas* admonishment about preventing the spread of fire or forestalling “grave threats to the lives and property of others.”³⁷⁷ In 1935, the Federal District Court for the Southern District of Texas, in *Tysco II*, held that drilling activity on small lots in close proximity to residences and businesses constituted a dangerous “menace” because of the risk of “escaping gas, explosions, fire, cratering, etc.”³⁷⁸ In 1944, the Galveston Court of Civil Appeals, in *Klepak v. Humble Oil & Refining Co.*, upheld a municipal oil and gas ordinance as a legitimate government responsibility to look after the “preservation of good government, peace, and order.”³⁷⁹

371. *Id.* at 329.

372. *Id.*

373. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987). For a discussion of *Keystone*’s facts, see *supra* Part IV.D.2.

374. *Id.* at 488.

375. *Id.* at 489 (citing *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887)). Specifically, the *Mugler* Court considered “noxious” activities to generally include those activities that are “*injurious to the health, morals, or safety of the community*.” *Mugler*, 123 U.S. at 668 (emphasis added).

376. *Keystone*, 480 U.S. at 488 (emphasis added).

377. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992).

378. *Tysco II*, 12 F. Supp. 202, 203 (S.D. Tex. 1935).

379. *Klepak v. Humble Oil & Ref. Co.*, 177 S.W.2d 215, 218 (Tex. Civ. App.-Galveston 1944), *writ refused for want of merit without reported opinion*.

Moreover, the *Klepak* court positively cited *Marrs v. City of Oxford*,³⁸⁰ a 1929 Eighth Circuit Court of Appeals decision, which recognized that the presence of wells may “become a nuisance” causing “annoyance from unsightly structures, disquieting noises of machinery, the immediate and constant presence of numbers of workmen and the persistent thought of impending danger from explosion and conflagration because of the highly inflammable nature of the product.”³⁸¹ In 1958, the Amarillo Court of Civil Appeals, in *Mills v. Brown*, upheld a local ordinance that was promulgated in the interest of protecting the “health and welfare of its citizens.”³⁸² Although the Texas Supreme Court reversed the decision on other grounds, the court, without deciding the issue, did assume that the ordinance was constitutional.³⁸³

Modern courts have also continued to uphold municipal oil and gas ordinances as a legitimate means of protecting the public welfare from the danger of oil and gas activities. In 1981, the Fort Worth Court of Appeals, in *Helton v. City of Burkburnett*, upheld a local ordinance that empowered city commissioners to deny a drilling permit if it was believed that a “particular location might be injurious or be a disadvantage to the city or its inhabitants as a whole or to a substantial number of its inhabitants or would not promote orderly growth and development to the city.”³⁸⁴ In 1997, the Houston Court of Appeals, in *Trail I*, upheld the City of Houston’s oil and gas ordinance as legitimately related to protecting the City’s water supply from the potential risk of contamination from oil and gas exploration near and underneath Lake Houston.³⁸⁵

As evidenced above, nearly a hundred years of Texas common law jurisprudence supports municipal authority to regulate oil and gas activities to avoid exposing communities to potentially dangerous nuisances. Although the Texas Supreme Court has not directly ruled on this issue, there is more than sufficient lower court authority to assert that such regulations constitute a well-rooted background principle of state nuisance law. As such, a municipality should be able to defend against even a categorical takings challenge if the oil and gas ordinance was promulgated

380. *Id.* (citing *Marrs v. City of Oxford*, 32 F.2d 134 (8th Cir. 1929)).

381. *Marrs*, 32 F.2d at 139–40.

382. *Mills v. Brown*, 309 S.W.2d 919, 920, 926 (Tex. Civ. App.-Amarillo 1958), *rev’d on other grounds*, 316 S.W.2d 720 (Tex. 1958).

383. *Mills v. Brown*, 316 S.W.2d 720, 721 (Tex. 1958).

384. *Helton v. City of Burkburnett*, 619 S.W.2d 23, 24 (Tex. App.-Fort Worth 1981) (quoting *City of Burkburnett*, Ordinance No. 375), *writ refused no reversible error without reported opinion*, Dec. 2, 1981, *appeal dismissed*, 456 U.S. 940 (1982).

385. *Trail I*, 957 S.W.2d 625, 635 (Tex. App.-Houston 1997), *petition for review denied without reported opinion*, July 3, 1998.

to address serious and injurious risks to the community. These risks can include public safety, environmental protection (like protecting water quality), and potentially even concerns related to nonconformity with existing zoning or comprehensive-plan ordinances.

CONCLUSION

In North Central Texas two things are certain—communities will continue growing, and companies will continue drilling. This creates a conflict among interests, the resolution of which will most likely fall upon the shoulders of municipalities. Distilled to the core issue, drilling rigs, collection and condensation tanks, pipelines, and periodic well-stimulation activities are atypical land uses when situated in close proximity to neighborhoods, schools, hospitals, and retail business districts. Concerns range from zoning issues, public safety, and environmental protection, to maintaining publicly owned infrastructure. An oil and gas ordinance is one way of balancing the competing interests of mineral owners and lessees seeking to capture a resource that is rightfully theirs and the interests of the community at large wanting to live and work within the confines of a safe, prosperous, and well-managed city.

As corn is king in Iowa, oil and gas have historically reigned supreme in Texas. The common law recognizes the mineral estate's dominance, and courts typically loathe placing restrictions on private landowners who strive to capture and benefit from underlying reservoirs. Yet, within a few short years of the 1901 Spindletop gusher in East Texas, the legislature and courts imposed limitations—first to conserve precious reserves by avoiding wasteful production, and later to protect the servient surface estate and the public's safety and welfare. While the Railroad Commission was retasked as the state's lead regulatory agency, municipalities also began invoking their own police powers to limit oil and gas development to further the interests of their local constituencies.

Modern federal and Texas takings law tends to favor reasonably imposed land use restrictions that advance legitimate, non-self-serving government interests. On balance, Texas courts consider takings claims on an ad hoc, case-specific basis that focuses on whether a local law unreasonably interferes with private property interests. Yet the courts have consistently recognized and affirmed a municipality's use of its vested police powers to curtail, and at times prohibit, well-drilling activities when doing so protects public safety and good order. Recent state cases have explicitly appropriated federal constitutional takings jurisprudence. Thus, future court decisions are likely to rely on *Penn Central* and *Lucas* as much

as (if not more than) *Teague* and *Mayhew*.

The Texas Supreme Court has yet to confront directly a compensable takings challenge raised against a municipal oil and gas ordinance. However, there exists a substantial record of federal and state persuasive authority to guide the court's analysis. First, *Mayhew* is now the generally accepted regulatory takings rule, and it draws heavily upon federal jurisprudential doctrines. As such, it should be applied to an oil-and-gas-specific takings claim. *Mayhew* offers deference to municipal decisionmaking and an emphasis on whether an ordinance's effect imposes an unreasonable interference with a private property owner's investment-backed expectations. Moreover, *Mayhew* broadly defines the affected property interest.

Second, similar to federal common law, Texas courts generally adopt the parcel-as-a-whole principle. This is highly advantageous for municipalities because courts should construe the affected interest based on the widest possible extrapolation of the vested property rights held at the time of the alleged taking. Thus, a property owner holding both surface and mineral estates who is prevented from drilling a gas well will probably not prevail on a *Lucas*-type categorical takings claim if the surface estate is unaffected and remains economically viable. Vertical and horizontal aggregation of the mineral estate also serves to paint a more complete picture of a property owner's overall economic expectations, which is critical when evaluating *Penn Central*-type partial takings challenges.

Third, Texas courts place great importance on dissecting a property owner's investment-backed expectations when deciding whether a compensable regulatory taking has occurred. In particular, such expectations turn on a number of factors, including whether the lost interest vested prior to or after the enactment of the restricting land use law. Even when a regulation is promulgated after the property interest vests, courts usually will still look to the principles of "foreseeability" and "notice" in considering the takings challenge. Texas extractive industries have long been regulated by both state and local governments. It is imminently foreseeable that oil and gas extraction near populated areas will be subject to additional precautions superimposed over existing Railroad Commission requirements.

Finally, municipalities can raise a strong defense against a total takings claim pursuant to the *Lucas* background principles of state property and nuisance law exceptions. Texas common law has tempered the rule of capture, limiting oil and gas production to prevent waste and protect public safety. Owning a mineral estate interest (either freehold or via lease arrangement) is not an absolute property right. As such, reasonable

municipal restrictions, even including prohibitions, do not destroy a vested right already possessed by the interest holder. Additionally, both common and statutory law have historically limited mineral estate interests to prevent nuisances related to oil and gas development, particularly when addressing the risk of fire, explosion, and noxious gas emissions.

Ultimately, municipalities can raise numerous defenses against a compensatory takings challenge. Yet, each claim is scrutinized by the courts, and a “reasonableness” standard can cut both ways. Thus, in enacting oil and gas ordinances, whether under police or zoning powers, municipalities should carefully characterize and factually identify the risks sought to be mitigated and craft rules to specifically address those risks without unnecessarily impinging upon otherwise permissible—and economically encouraged—mineral resource development.

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* Citations to Texas cases follow the conventions detailed in THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass’n. et al. eds., 18th ed. 2005) and not the TEXAS RULES OF FORM (Texas Law Review ed., 11th ed. 2006).

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