

HYDROFRACKING AND HOME RULE: DEFENDING AND
DEFINING AN ANTI-PREEMPTION CANON OF STATUTORY
CONSTRUCTION IN NEW YORK

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Extracting natural gas through hydraulic fracturing of shale provokes bitterly divisive reactions from New Yorkers. Some communities celebrate hydraulic fracturing as a source of clean and cheap energy, jobs, and tax revenue. Others fear its environmental risks of water pollution and despoliation of scenic beauty. While the state population is divided, local constituencies are frequently much more united.¹ Some towns have welcomed hydraulic fracturing into their territory,² while other towns have used zoning law to ban it altogether.³

With such a division of opinion, the regulation of hydraulic

* This article is in substantial part drawn from, and frequently borrows verbatim language from, an *amicus* brief written by the author, signed by nine other law professors, and filed by Susan Kraham as Counsel of Record in the Third Department of the Appellate Division on behalf of ten law professors in the *Dryden* and *Middlefield* litigation. Brief of Vicki Been et al. as Amici Curiae Supporting Respondents, *Norse Energy Corp. USA v. Town of Dryden*, 964 N.Y.S.2d 714 (App. Div. 3d Dep't 2013) (No. 515227). Rather than quote or cite to the *amicus* brief, a practice that would lead to ungainly block quotes, the author simply drew from the text of the *amicus*'s brief, leaving it to the intrepid reader to figure out which parts are verbatim quotations from the brief and which, later supplementary additions. The author thanks the nine other *amici*—Vicki Been, Richard Briffault, Nestor Davidson, Clayton Gillette, John Nollon, Ashira Ostrow, Patricia Salkin, Christopher Serkin, and Stewart Sterk—for their comments on the brief that are also *ipso facto* comments on the parts of this article relying on that brief. The author also thanks Susan Kraham for her review of and comments on the *amicus*'s brief, and for her generosity in agreeing to act as Counsel of Record. Finally, the author acknowledges his gratitude to Heather Lewis, NYU Law Class of 2012, for outstanding research assistance.

¹ See *Current High Volume Horizontal Hydraulic Fracturing Drilling Bans and Moratoria in NY State*, FRACTRACKER, <http://www.fractracker.org/maps/ny-moratoria/> (last visited Apr. 8, 2014).

² See *id.*

³ See, e.g., *Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.S.2d 722, 723 (Sup. Ct. Otsego County 2012), *aff'd*, 964 N.Y.S.2d 431 (App. Div. 3d Dep't 2013), *leave to appeal granted*, 995 N.E.2d 851 (N.Y. 2013); *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458, 461 (Sup. Ct. Tompkins County 2012), *aff'd sub nom. Norse Energy Corp. USA v. Town of Dryden*, 964 N.Y.S.2d 714 (App. Div. 3d Dep't 2013), *leave to appeal granted*, 995 N.E.2d 851 (N.Y. 2013).

fracturing provides an ideal case study of whether municipal home rule can mitigate the costs of deep political disagreement by letting each community go its own way. A single statewide policy might bog down in acrimonious gridlock, but municipal legislators can more easily enact local solutions because their constituents share more consensus on the issue than the citizens of the state as a whole. The benefit of allowing policy disputes to be resolved at the level where there is the highest level of consensus suggests a policy of narrowly construing state statutory preemption whenever state law is ambiguous. As a matter of policy, therefore, one might urge state courts to resolve doubts about state law against preemption and in favor of local power, because preemption defeats municipal efforts to agree to disagree.

But is such a presumption against preemption more than merely a good policy idea: Is it also the law of New York? Even if it is law, is a presumption against preemption specific enough to resolve any real legal disputes?

This article answers both of these questions affirmatively. Article IX, section 3(c) of the New York Constitution requires that the home rule powers of municipalities be “liberally construed.”⁴ Such liberal construction, this article suggests, requires a qualified presumption against preemption: Unless statutory text manifestly and unambiguously supersedes local law, courts should presume that state law does not preempt local laws. This presumption is not irrebuttable: it can be overcome where local laws encroach on some substantial state interest that local residents are likely to ignore.

The controversy over hydraulic fracturing provides a good example of a dispute that this presumption can help resolve. The state legislature has never given any serious thought to whether and what extent local governments should be permitted to zone out hydraulic fracturing operations. Given this inattention, which is reflected in the murky language of the preemption clause of the Oil, Gas, and Solution Mining Law (OGSML),⁵ state law should be deemed to be ambiguous on the question of preemption, and state courts should construe this ambiguity to preserve local power. By so limiting preemption, state courts preserve democratic accountability, ensuring that the local level of government has legal

⁴ N.Y. CONST. art. IX, § 3(c).

⁵ See N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2013).

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powers to address an issue when the state legislature is paralyzed by its greater level of disagreement.

The presumption against preemption defended here can be rebutted: Even ambiguous state laws can preempt local laws where the latter impose external costs on non-residents or disrupt the settled and investment-backed expectations of the local government's own residents.⁶ Local prohibitions of hydraulic fracturing, however, impose neither the external nor the internal cost.⁷ As applied to hydraulic fracturing, the presumption against preemption actually prevents the disruption of the expectations of local property owners who purchased their homes with the expectation that their value would be protected by local zoning laws.⁸ By leaving in place such zoning until it is displaced by some plain state legislative intent to preempt, the presumption against preemption prevents a regulatory vacuum that unconsidered preemption would otherwise inflict at the state level.

I. THE AMBIGUITY OF THE OIL, GAS, AND SOLUTION MINING LAW'S PREEMPTION CLAUSE

Few legal concepts are more ambiguous than the concept of ambiguity itself. Given the likelihood that rival dictionary definitions and canons of construction will conflict with each other, whether a statute's preemption clause plainly applies to a local law will often be a perplexing question. Using the preemption clause of the OGSML as an illustration, this paper urges that a state statute is ambiguous about preemption when the state statute does not squarely confront and resolve a divisive issue that is the subject of the local law. The absence of such a plain legislative resolution can be an indication that the state legislature did not make up its collective mind because of disagreement among the legislature's constituents. In such a case, the judicial inference that state law preempts local laws puts words in the state legislature's collective mouth, attributing a level of consensus to the state legislature that it could not actually achieve. Aside from distorting the meaning of legislation, such judicially invented preemption also defeats one of the benefits of home rule, which is to allow local governments,

⁶ See *infra* Part III.

⁷ See *infra* Part III.A.

⁸ See *infra* Part III.B.

enjoying greater consensus on divisive issues, to make policy when the state legislature is paralyzed by its internal divisions.⁹

The preemption clause of the OGSML provides a good example of how statutory text fails to squarely confront the divisive issue of hydraulic fracturing. The clause, codified at ECL section 23-0303(2), provides that

[t]he provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.¹⁰

Does this language plainly preempt a local zoning law excluding hydraulic fracturing entirely from the jurisdiction of a local government? The question turns on whether such a law “relat[es] to the regulation of the oil, gas and solution mining industries.”¹¹ Taking into consideration the usual sources of authority—text, precedent, canons of construction, and legislative history¹²—this language plainly suggests only that the legislature never gave any serious thought at all to the question of whether local governments can zone out hydraulic fracturing.

Take, first, the prepositional phrase “relating to.” As Justice Scalia has noted, pinning a specific meaning to this phrase through purely textual means is “a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else.”¹³

A broadly literalistic reading of ECL [section] 23-0303(2) could lead to the absurdity of exempting gas and oil drilling operations from every local law—general parking regulations, anti-littering rules, bans on late-night noise—that affect those operations, even if

⁹ See Richard Briffault, *Our Localism: Part I—the Structure of Local Government Law*, 90 COLUM. L. REV. 1, 17–18, 58–59 (1990).

¹⁰ ENVTL. CONSERV. LAW § 23-0303(2).

¹¹ *Id.*; see *Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.S.2d 722, 728–29 (Sup. Ct. Ostego County 2012), *aff’d*, 964 N.Y.S.2d 431 (App. Div. 3d Dep’t 2013), *leave to appeal granted*, 995 N.E.2d 851 (N.Y. 2013); *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458, 467 (Sup. Ct. Tompkins County 2012), *aff’d sub nom. Norse Energy Corp. USA v. Town of Dryden*, 964 N.Y.S.2d 714 (App. Div. 3d Dep’t 2013), *leave to appeal granted*, 995 N.E.2d 851 (N.Y. 2013).

¹² See *infra* Part II.

¹³ *Cal. Div. of Labor Standards v. Dillingham Constr., N.A.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) (citing *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)).

the purpose of such laws had nothing whatsoever to do with the extraction of natural resources as such. It is hard to believe that the state legislature intended to work such a revolution in local governmental powers through a fit of ambiguous phrasing like “relating to.”

Short of inferring an absurdly comprehensive immunity for “the oil, gas and solution mining industries” from all local “regulation,” the clause is most naturally read as precluding only those local laws directed at the techniques for extracting oil, gas, and mining from the ground. Such a reading comports with the New York Court of Appeals interpretation of a closely related preemption clause in *Frew Run Gravel Products, Inc. v. Town of Carroll*.¹⁴

Frew Run held that the supersedure clause of the New York Mined Land Reclamation Law, MLRL section 23-2703(2), which provided that “this article shall supersede all other state and local laws relating to the extractive mining industry,”¹⁵ did not preempt the Town of Carroll’s ban on sand and gravel mining in AR2 zoning districts. In reasoning that the Town’s zoning classification did not “relat[e] to the extractive mining industry,” the *Frew Run* court noted that “read[ing] into ECL 23-2703(2) an intent to preempt a town zoning ordinance prohibiting a mining operation in a given zone . . . would drastically curtail the town’s power to adopt zoning regulations”¹⁶ To avoid such “drastic[] curtail[ment]” of towns’ zoning powers, the *Frew Run* court adopted a presumption holding that any interpretation of the Mined Land Reclamation Law “should be avoided” if it would “preclude the town board from deciding whether a mining operation—like other uses covered by a zoning ordinance—should be permitted or prohibited in a particular zoning district.”¹⁷ In adopting this presumption that state regulation of mining does not oust local governments from simultaneously regulating land use, *Frew Run* is consistent with similar presumptions against preemption of zoning law adopted by other states.¹⁸

¹⁴ *Frew Run Gravel Prods., Inc. v. Town of Carroll*, 518 N.E.2d 920 (N.Y. 1987).

¹⁵ New York State Mined Land Reclamation Law, ch. 1043, § 23-2703.2, 1974 N.Y. Laws 1665, 1666.

¹⁶ *Frew Run*, 518 N.E.2d at 923–24.

¹⁷ *Id.*, at 924.

¹⁸ *Id.* at 923–24. On the practice in states other than New York with respect to mining law’s preemption of zoning, see 3 PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* § 18:55 (5th ed. 2013); Jan G. Laitos & Elizabeth H. Getches, *Multi-Layered, and Sequential, State and*

Does *Frew Run* unequivocally indicate that the OGSML intended to preserve local power? Not necessarily: One could endeavor to limit the scope of *Frew Run* by noting that the particular preemption clause construed at issue in the case contained a specific proviso excluding from preemption “local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.”¹⁹ One might attempt to argue that the holding in *Frew Run* somehow depended on the existence of this savings clause. Since this proviso is not present in the analogous clause of the OGSML, one might argue that *Frew Run* is not relevant precedent for construing the OGSML.

One can make respectable textual arguments against such a limit on *Frew Run*, which seems to run against the language of the precedent itself. *Frew Run* relied not on the zoning proviso but instead on the limits inherent in the phrase “relating to the extractive mining industry.”²⁰ Moreover, the zoning proviso in *Frew Run* arguably could not have been the basis for the holding, because the proviso is plausibly limited by the modifier “impose[s] stricter mined land reclamation standards or requirements than those found herein.”²¹ The Town of Carroll’s zoning exclusion had nothing to do with reclamation standards, making the provision inapplicable to its zoning.²²

Rather than dive further down the rabbit hole of trying to decipher such arcane textual minutiae, however, I suggest that the existence of plausible textual arguments in favor and against preemption indicates that the OGSML preemption clause is, at the very least, ambiguous. The indeterminacy of the phrase “relating to” suggests that the state legislature did not give deliberate thought to the question of whether state law would bar municipalities from excluding hydraulic fracturing from their territory. This inference of textual ambiguity is supported by a cursory examination of legislative history. When the OGSML was enacted in 1981, neither the widespread use of hydraulic fracturing

Local Barriers to Extractive Resource Development, 23 VA. ENVTL. L.J. 1, 15 (2004).

¹⁹ N.Y. ENVTL. CONSERV. LAW § 23-2703(2) (McKinney 1984) (amended 1991).

²⁰ *Frew Run*, 518 N.E.2d at 922 (“[W]e cannot interpret the phrase ‘local laws relating to the extractive mining industry’ as including the Town of Carroll Zoning Ordinance. The zoning ordinance relates not to the extractive mining industry but to an entirely different subject matter and purpose . . .”).

²¹ N.Y. ENVTL. CONSERV. LAW § 23-2703(2) (McKinney 1984) (amended 1991).

²² *Frew Run*, 518 N.E.2d at 923–24.

nor its exclusion through local zoning law existed. As a result, the legislative history of the OGSML is silent about municipal zoning powers. Such silence eloquently suggests a complete lack of attention to the issue, because zoning authority is one of the most frequently exercised forms of local power, pervasively affecting virtually every resident of New York. Had the legislature given the matter of zoning any serious thought, then one would expect some mention of the topic to crop up prominently in the debates.

I do not suggest that such legislative silence, by itself, suggests that ECL section 23-0303(2) should be construed to preserve local law. Instead, such silence indicates only that the state law is sufficiently ambiguous to require some further argument in favor of preemption (or lack thereof). How, then, should courts use doctrines of statutory interpretation to manage such ambiguity?

II. THE “LIBERAL CONSTRUCTION” CLAUSE OF ARTICLE IX, SECTION 3(C) AS A MANDATE FOR A PRESUMPTION AGAINST PREEMPTION

The text of the New York Constitution provides an answer to the problem of ambiguous preemption clauses. Article IX, section 3(c) of the New York Constitution provides that “[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed.”²³ This constitutional requirement has also been codified by section 51 of the Municipal Home Rule Law, which provides that home rule powers “shall be liberally construed.”²⁴ These requirements of liberal construction apply to towns’ powers to enact zoning laws, which are derived not only from specific delegations of power contained in the Town Law but also the Municipal Home Rule Law.²⁵

Article IX, section 3(e) can be understood as a repeal of the New York courts’ adherence to “Dillon’s Rule,” a canon of statutory construction invented by Judge John Forrest Dillon, an Iowa jurist, during the nineteenth century²⁶ and invoked by New York courts in

²³ N.Y. CONST. art. IX, § 3(c).

²⁴ N.Y. MUN. HOME RULE LAW § 51 (McKinney 2013).

²⁵ On local zoning power’s basis in the Municipal Home Rule Law see *Kamhi v. Town of Yorktown*, 547 N.E.2d 346, 351 (N.Y. 1989) (recognizing towns’ power to enact zoning rules pursuant to section 10 of the Municipal Home Rule Law); *Pete Drown, Inc. v. Town Bd. of Ellenburg*, 591 N.Y.S.2d 584, 585 (App. Div. 3d Dep’t 1992) (same).

²⁶ Justice John Forrest Dillon announced his famous rule when sitting on the Iowa Supreme Court in *Clark v. City of Des Moines*, 19 Iowa 199 (1865), holding that Clark,

the early twentieth century to construe municipal powers with stringent narrowness.²⁷ The canon of liberal construction, however, goes beyond merely abolishing Dillon's Rule. The canon also implies that the state statutes' preemption clauses, where ambiguous, be narrowly construed. Local governments' rights, powers, privileges and immunities are defined by those state laws that abrogate such powers just as much as by state laws delegating such powers. As a matter of plain logic, the court cannot liberally construe local power without narrowly construing limits on that power.

While there is little relevant New York precedent construing Article IX, section 3(c), precedents from other states construing analogous liberal construction clauses follow the common-sensical reading of the clause as containing a presumption against preemption. In *Neri Bros. Const. v. Village of Evergreen Park*,²⁸ for

although a bona fide holder in due course, could not recover on bonds issued by Des Moines, because the bonds were issued *ultra vires*. *Id.* at 212–16. In finding that the Des Moines city council lacked power to issue negotiable instruments, Justice Dillon noted that the general power to borrow money did not expressly include such a power. *Id.* at 214. He offered his famous canon for construing the powers of municipal corporations as a way of justifying the inference that a power to issue negotiable instruments should not be inferred from a mere power to borrow money because

[i]t is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

People *ex rel.* Terbush & Powell, Inc. v. Dibble, 189 N.Y.S. 29, 30 (Sup. Ct. Schenectady County 1921) (quoting JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237, at 448–50 (5th ed. 1911)); *Clark*, 19 Iowa at 212. Clark's canon was included in Justice Dillon's 1873 treatise, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, and the canon was widely adopted as "Dillon's Rule" by state courts throughout the late 19th century. See Briffault, *supra* note 9, at 8–11.

²⁷ Invoking Dillon's Rule, courts in New York routinely construed statutes extraordinarily narrowly, holding (for instance) that the state legislative grant of the power to pay wages to city employees did not include the power to pay for such employees' life insurance, *Dibble*, 189 N.Y.S. at 30 (barring the City of Schenectady from purchasing life insurance for city employees), the grant of power to approve or disapprove a streetcar franchise did not include the power to require the streetcar company to relocate train tracks from the center to the side of the street, People *ex rel.* Olean v. W. N.Y. & Pa. Traction Co., 108 N.E. 847, 848 (N.Y. 1915)), and the grant of power to acquire a garbage dump within village limits did not include any power to acquire such a dump outside the village, *Gibson v. Village of Massena*, 178 N.Y.S. 850, 851 (Sup. Ct. St. Lawrence County 1919).

²⁸ *Neri Bros. Constr. v. Village of Evergreen Park*, 841 N.E.2d 148 (Ill. App. Ct. 1st Dist. 2005)

instance, the court held that a village's power to impose liability on persons who released hazardous natural gas as a result of damaging a utility line was not preempted by an Illinois statute making the prevention of damage to utility lines a matter of exclusive state-wide concern.²⁹ The Illinois statute contained a lengthy preemption clause providing that "[t]he regulation of underground utility facilities . . . damage prevention . . . is an exclusive power and function of the State" and that "[a] home rule unit may not regulate under-ground utility facilities . . . damage prevention"³⁰ Despite this explicit language, the *Neri Bros.* court held that the village's ordinance imposing the cost of cleaning up discharge of natural gas on a subcontractor who broke a gas line was not preempted by state law, because the village's law was aimed at a goal different from the purpose of state law—recouping remediation expenses rather than preventing negligent damage to utility lines.³¹ In rejecting preemption of local law, *Neri Bros.* relied on Article VII, section 6(m) of the Illinois Constitution's clause, which provided that the "[p]owers and functions of home rule units shall be construed liberally,"³² a provision that, according to *Neri Bros.*, required that "any limitation on the power of home rule units by the General Assembly must be specific, clear, and unambiguous."³³

The New York courts have not so plainly adopted a presumption against preemption as did the *Neri* court, despite occasional rhetoric about the importance of local control under New York law.³⁴ Such a presumption is, however, completely consistent with state court precedent. In particular, the presumption against preemption does not present any barrier whatsoever to the state legislature deliberately asserting the supremacy of state law over local law: where a state statute *unambiguously* preempts local law the latter must give way to the former.³⁵ The presumption against

²⁹ *Id.* at 153.

³⁰ *Id.* at 151 (quoting 220 ILL. COMP. STAT. 50/14 (2014)).

³¹ *Neri Bros. Constr.*, 841 N.E.2d at 152–53.

³² ILL. CONST. art. VII, § 6(m).

³³ *Neri Bros. Constr.*, 841 N.E.2d at 152.

³⁴ *Baldwin v. City of Buffalo*, 160 N.E.2d 443, 445 (N.Y. 1959) ("The municipality is to be protected in its autonomy against the inroads of evasion." (quoting *In re Elm Street*, 158 N.E. 24, 26 (N.Y. 1927) (Cardozo, J.) (internal quotation marks omitted))); *Roth v. Cuevas*, 603 N.Y.S.2d 962, 966, 967 (Sup. Ct. New York County 1993) (upholding local term limit measure by relying on "liberal construction" clause).

³⁵ *Town of Islip v. Cuomo*, 473 N.E.2d 756, 759 (N.Y. 1984) (explaining Article IX, section 3(e)'s "liberal construction" provision has no application to a state statute unambiguously

preemption merely prevents ambiguous statutory phrases from being transformed into a veto on local policies that the state legislature may never have even considered, let alone disapproved. To this extent, the presumption is consistent with—perhaps even required by—the well-established principle that New York courts will not infer preemption from mere legislative silence.³⁶

The presumption against preemption implied by Article IX, section 3(c) can also be understood and defended as a constitutionalized and more specific version of the more familiar canon against implied repeal. Especially to the extent that state law purports to preempt well-established forms of local legislation, preemption does not merely eliminate local law but also implicitly repeals *state* statutes that delegate regulatory power to local governments. Local zoning laws that are otherwise valid, for instance, are exercises of power delegated by some state statute such as the Town Law or Home Rule Law.³⁷ Preemption of such local laws, therefore, are logically also repeals *pro tanto* of the state statutes authorizing such local legislation. It is, however, a well-established canon of statutory construction that “[r]epeals of earlier statutes by implication are not favored and a statute is not deemed repealed by a later one unless the two are in such conflict that both cannot be given effect.”³⁸ Under this canon, the implied repeal of a state statutory delegation of zoning power should be disfavored unless plainly required by the text or unwritten purpose of the allegedly preemptive state law.³⁹ In fact, New York courts have invoked the idea that repeals by implication are presumptively disfavored to protect local governments’ power from implied

limiting “disposal of solid waste by landfill”).

³⁶ See *People v. Cook*, 312 N.E.2d 452, 457 (N.Y. 1974) (refusing to find that state statutory standard is a ceiling on further local regulation on the ground that, if mere silence in a state statute constituted a veto over local laws, then “the power of local governments to regulate would be illusory,” destroying “the essence of home rule”).

³⁷ See 1 SALKIN, *supra* note 18, § 2:8; 1 PATRICIA E. SALKIN, *NEW YORK ZONING LAW AND PRACTICE* §§ 2:08, 2:12 (4th ed. 2013).

³⁸ N.Y. STAT. LAW § 391 (McKinney 2013); see also 97 N.Y. JUR. 2D *Statutes* § 78 (2013) (“The implied repeal of statutes is distinctly not favored in the law, and in the absence of an express repeal by the Legislature, there is a presumption that no such repeal was intended.”).

³⁹ See *Emerson College v. City of Boston*, 471 N.E.2d 336, 338 (Mass. 1984); *Fammler v. Bd. of Zoning Appeals*, 4 N.Y.S.2d 760, 761–62 (App. Div. 2d Dep’t 1938) (“Where statutory construction in seeking the intent of the Legislature will have such far-reaching effect as would be the case here, the repeal of workable statutes by implication is not favored.”); 4 SALKIN, *supra* note 18, § 41:13.

preemption.⁴⁰

The canon against implied repeal has not won universal acclaim.⁴¹ In particular, critics complain that courts should not discourage later legislatures from updating earlier legislation.⁴² One can, however, defend the canon (and its constitutionalized version in Article IX, section 3(c)) as a way to prevent the state legislature from deregulating a risk in a fit of absent-mindedness. If a risk has normally been comprehensively controlled by local governments for a very long time, then local citizens may come to rely on such regulation to plan their investments. Local zoning powers in New York are precisely the sorts of deeply entrenched powers that one would expect the state legislature not to repeal lightly. Towns have exercised such zoning power for over eight decades, since the New York legislature delegated zoning authority to them in 1926.⁴³

The tenacious character of towns' zoning authority is not an accident: It is the result of the popularity of local control with local voters who seek power over matters immediately affecting their vital interests—in particular, power over changes in the character of their neighborhood that could affect the value of owner-occupied homes.⁴⁴

State preemption of local control constitutes a radical deregulation of land use and poses the danger of a correspondingly radical disruption of local residents' normal investment-backed expectations. Courts might reasonably pause before inferring that a state legislature intended such a disruptive intervention into local law.

⁴⁰ See *Town of Brookhaven v. N.Y. State Bd. of Equalization & Assessment*, 668 N.E.2d 407, 411–12 (N.Y. 1996); *Hunter v. Warren County Bd. of Supervisors*, 800 N.Y.S.2d 231, 234 (App. Div. 3d Dep't 2005).

⁴¹ See Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 812–13 (1983), for a criticism of the canon as imposing unrealistic expectations on legislatures to review their past legislation.

⁴² See Karen Petroski, Comment, *Rethorizing the Presumption Against Implied Repeals*, 92 CALIF. L. REV. 487 (2004), for a general and critical assessment of the canon with suggestions for its refinement.

⁴³ See Act of Apr. 30, 1926, ch. 714, 1926 N.Y. Laws 1280 (amending Town Law to authorize towns to create zoning districts).

⁴⁴ WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 80–81 (2001); Richard Briffault, *Smart Growth and American Land Use Law*, 21 ST. LOUIS U. PUB. L. REV. 253, 267–68 (2002); Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 295–97 (2011).

Aside from protecting expectations of homeowners, the presumption against preemption also preserves the system of home rule from inadvertent preemption resulting from loose language. Home rule produces systemic benefits for the people of New York, enabling them to make policy locally where they confront intractable statewide disagreements. These systemic benefits, however, are not immediately apparent to legislators preoccupied by the immediate concerns of their constituents. Rather than allow such structural arrangements to be accidentally abolished in the hurry of legislative business, Article IX, section 3(c) requires courts to presume that the state legislature intended to retain the benefits of local democracy unless the legislature plainly deliberated about and qualified home rule powers. Such a “plain statement” rule is used by the federal courts to preserve the benefits of federalism from the inattention of Congress,⁴⁵ and an analogous canon of construction serves a similar function in preserving the structural value of home rule.

III. REBUTTING THE PRESUMPTION AGAINST PREEMPTION BY PROOF OF EXTERNALITIES OR INTERNALITIES

The strength and meaning of any presumption depends on the means by which it is rebutted. Both New York law and sensible policy suggest two ways in which a presumption against preemption should be rebuttable. First, if some local regulation is likely to impose external costs on non-residents, then the usual presumption against preemption would be inappropriate: Even if the state legislature did not say in so many words that the local law ought to be set aside, a court might reasonably infer that the local law constituted the type of burden on non-residents that the state legislature would likely want to discourage.⁴⁶ Second, if a local law itself disrupts the investment-backed expectations of a local resident, then a court might reasonably infer that the disruption of overturning the local law would be outweighed by the need to protect local residents from oppressive local legislation.⁴⁷

⁴⁵ See *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

⁴⁶ See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1160–64 (2007).

⁴⁷ See *Rodgers v. Village of Tarrytown*, 96 N.E.2d 731, 734–35 (N.Y. 1951).

As a convenient shorthand, one can use the term “externalities” to refer to burdens on non-residents by a local law. Less conventionally, I will use the term “internalities” to refer to local law’s disruption of insiders’ reasonable investment-backed expectations. It is important to understand, however, that these terms do not forbid local laws from having any extra-territorial effects on non-residents or any effect on residents living within the regulating municipality. A local law’s extra-territorial costs that are also experienced by the residents of the municipality enacting the law are not a cause for concern: Presumably, the local jurisdiction has sufficient incentive to control the cost in question without judicial oversight. Likewise, a change in local law may disrupt some residents’ expectations (for instance, to develop their land in the future) but also preserve other residents’ expectations (for instance, to preserve the character of their neighborhood): If there were no discriminatory treatment resulting from the change—for instance, if all residents were subject to the same zoning classification—then one would not normally characterize the law that preserved the *status quo* as a disruption of anyone’s reasonable expectations and, therefore, such a law would not qualify as an internality.

The case of hydraulic fracturing provides a useful illustration of how these two limits on externalities and internalities can be evaluated in a specific context. Unlike local zoning that excludes affordable housing, local prohibitions on hydraulic fracturing impose no substantial external costs. Unlike laws that single out landowners for discriminatory zoning or interfere with some established use, such prohibitions also disrupt no settled expectations. The illustration is not, of course, conclusive. It does suggest, however, that the evaluation of whether external burdens or internal abuses exist is not beyond the ken of the judiciary.

A. Does Preemption of Local Bans on Hydraulic Fracturing Protect Non-Residents from External Costs?

Consider, first, the problem of externalities: Why should they qualify the “liberal construction” clause of Article IX, section 3(c)? And why do local laws banning hydraulic fracturing impose no substantial external costs?

Using the idea of external costs to limit the presumption against preemption is required by well-established doctrine in New York: any blanket or irrebuttable presumption against preemption is

indefensible in light of the many cases construing local governments' powers in specific circumstances.⁴⁸ The "liberal construction" clause of Article IX, section 3(c) certainly eliminated Dillon's Rule from New York law.⁴⁹ "Mini-Dillon's Rules," however, persist, calling for a narrow construction of local government power in selected areas. For instance, New York's courts require the state legislature to specify in excruciating detail the rules for local taxation in the text of the state enabling act.⁵⁰ Likewise, state courts have adopted a canon disfavoring local authority to impede free vehicular movement on roads, on the theory that the right to travel is a constitutional prerogative.⁵¹ Both canons are consistent with the idea that local laws posing special risks of expropriation of residents (i.e., local taxation) or special burdens on outsiders (i.e., burdens on inter-local movement) should be carefully monitored by the state legislature.⁵² More generally, state courts have long given the fish eye to local zoning that imposes burdens on the region as a whole by excluding affordable housing for which there is a regional need.⁵³ As Professor Paul Diller has noted, this limit on

⁴⁸ See *infra* notes 50–53 and accompanying text.

⁴⁹ See *supra* Part II.

⁵⁰ See, e.g., *Greater Poughkeepsie Library Dist. v. Town of Poughkeepsie*, 618 N.E.2d 127, 130–31 (N.Y. 1993) (narrowly construing power of library district to raise revenue); *Albany Area Builders Ass'n v. Town of Guelderland*, 534 N.Y.S.2d 791, 794 (App. Div. 3d Dep't 1988) (barring tax increment financing without state authorization); *County Sec., Inc. v. Seacord*, 15 N.E.2d 179, 180 (N.Y. 1938) ("The power of taxation, being a State function, the delegation of any part of that power to a subdivision of the State must be made in express terms. It cannot be inferred.").

⁵¹ *People v. Grant*, 117 N.E.2d 542, 543 (N.Y. 1954) ("[S]treets are subject exclusively to regulation and control by the State as sovereign, except to the extent that the Legislature delegates power over them to political subdivisions and municipal corporations. In this context, local governing boards are vested only with such powers as are conferred upon them by statute." (citing *Wells v. Town of Salina*, 119 N.Y. 280, 292 (1890))).

⁵² See generally *Berenson v. Town of New Castle*, 341 N.E.2d 236, 242 (N.Y. 1975) (recognizing a balancing of local and regional interests and needs when considering a zoning ordinance).

⁵³ Because "zoning often has a substantial impact beyond the boundaries of the municipality," the court in examining an ordinance, should take into consideration not only the general welfare of the residents of the zoning township, but should also consider the effect of the ordinance on the neighboring communities. *Id.* at 242. "[A] community may not use its police power to maintain the *status quo* by preventing members of lower and middle socioeconomic groups from establishing residency in the municipality." *Gernatt Asphalt Prods., Inc. v. Town of Sardinia*, 664 N.E.2d 1226, 1235 (N.Y. 1996). A zoning ordinance will be invalidated "if it was enacted with an exclusionary purpose, or it ignores regional needs and has an unjustifiably exclusionary effect." *Robert E. Kurzius, Inc. v. Village of Upper Brookville*, 414 N.E.2d 680, 682 (N.Y. 1980). The total exclusion of multi-family housing in the face of a proven regional need for such housing, therefore, is presumptively prohibited.

“exclusionary zoning” is best understood as a broader limit on all “parochial or exclusionary ordinances” that “impose substantial and tangible social costs on other communities without any sacrifice by the city benefiting from the ordinance.”⁵⁴

One cannot, in short, fit the abstract command of liberal construction contained in Article IX, section 3(c) without allowing for the rebuttal of this presumption upon some showing that a challenged local law falls outside the normal zone of deference protected by Article IX. Put in terms of implicit legislative intent, it makes sense to presume that, in the ordinary case, the state legislature would want to preserve local power. This presumption makes less sense, however, when local governments overreach by inflicting burdens on their neighbors for the sake of their residents.

Do local prohibitions on hydraulic fracturing impose costs on non-residents of the sort sufficient to rebut the presumption against preemption? In the most obvious sense, such prohibitions leave neighboring jurisdictions’ powers completely intact: one town’s prohibition on hydraulic fracturing preserves every other town’s power to encourage the practice. In this sense, local prohibitions on hydraulic fracturing are distinguishable from the sorts of local bans on drilling that courts have found to be implicitly preempted by state law.⁵⁵

One might argue that local prohibitions burden non-residents by impeding their power to enter into commercial relationships with the residents of the regulating local governments. A non-resident driller will be unable to extract and sell natural gas lying

Continental Bldg. Co., v. Town of North Salem, 625 N.Y.S.2d 700, 703 (App. Div. 3d Dep’t 1995).

⁵⁴ Diller, *supra* note 46, at 1160.

⁵⁵ In *Voss v. Lundvall Bros.*, for instance, the Colorado Supreme Court held that Colorado’s regulations of oil and gas drilling preempted the City of Greeley’s total prohibition of oil and gas drilling within city limits based on the specific opinion of the Colorado Oil and Gas Conservation Commission, which urged in an *amicus* brief, that, because “an irregular drilling pattern” could impede extraction of oil or gas from pools underlying Greeley but extending beyond city limits, the City of Greeley’s prohibition would impose a burden on non-residents’ capacity to extract gas and oil from land outside Greeley’s jurisdiction. *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1067, 1069 (Colo. 1992). Given the municipal zoning law’s specific extra-territorial effect on non-residents, the court held the municipal law frustrated the state law’s purpose. *Id.* at 1067–68. The Colorado Oil and Gas Commission’s *amicus* brief identified how municipal law would have effects “extend[ing] beyond the city to land where production is not prohibited by a total drilling ban” and found preemption based on the “extraterritorial effect of the Greeley ordinances” and the state purpose of preserving “Oil and Gas Conservation Commission’s express authority” to protect mineral rights “owners and producers in the common source or pool” extending beyond city limits. *See id.* at 1067, 1069.

underneath a town that prohibits hydraulic fracturing: Why doesn't this burden count as an externality?

The inability of a non-resident driller to lease land or buy gas from a resident landowner is not an externality precisely because the resident landowner is also burdened: the equality of the burden internalizes the cost. Because the prohibiting jurisdiction's own residents forego the opportunity to profit from their own gas, one might argue that this burden is perfectly internalized: the interest of non-residents in buying the right to extract gas is balanced by the interest of residents in selling mineral rights. The latter insures that the former will be protected through the local political process.

Moreover, one must not merely examine the external costs imposed by local law but also compare those costs with the externalities inflicted by preemption: only if a local law's external burdens plausibly exceed the external costs inflicted by preemption does it make sense to say that the former imposes (net) externalities on non-residents. The difficulty with preemption of local zoning is that it eliminates one externality by creating another one that is even more difficult to internalize. Absent local zoning restrictions, the non-resident driller can impose costs on neighbors that the driller has no adequate incentive to take into account. Proximity to a drilling operation can obviously reduce the market value of a residence that zoning restrictions are intended to prevent. Non-zoning remedies for such losses like the common law of nuisance are plainly insufficient to make homeowners whole, at least as such remedies exist in current law.⁵⁶ Even if one reformed the measure of damages traditionally used in nuisance to take into account purely aesthetic losses, one would have to contend with the unwieldiness of the nuisance remedy, which requires large numbers of neighbors to overcome collective action problems in covering the costs of a private nuisance suit. The inadequacies of nuisance law

⁵⁶ Nuisance, for instance, traditionally does not protect landowners from aesthetic harms like loss of a neighborhood's character or loss of light and air. *See, e.g.*, *Blair v. 305–313 East 47th St. Associates*, 474 N.Y.S.2d 353, 355 (Sup. Ct. New York County 1983) (nuisance law provides no easements for light and air); *Dugway, Ltd. v. Fizzinoglia*, 563 N.Y.S.2d 175, 176 (App. Div. 3d Dept. 1990) (holding that "assorted debris and an uninhabitable trailer" that constituted "an eyesore," were an insufficient basis for a claim of private nuisance); 81 N.Y. JUR. 2D *Nuisances* § 17 (2014) ("Things merely disagreeable, however, which simply displease the eye or offend the taste, or shock an oversensitive or fastidious nature, no matter how irritating or unpleasant, are not nuisances.").

are, indeed, in large part why zoning was adopted.⁵⁷

Outside of nuisance law, the OGSML provides no substitute for zoning's protection of neighbors' quiet enjoyment.⁵⁸ In place of the usual array of restrictions on the siting of industrial uses in residential or other areas sensitive to noise, traffic, high population densities, or aesthetic incompatibility, the OGSML merely has a spacing requirement barring wells from being drilled closer than 100 feet to any "inhabited structure" (i.e., a home) or 150 feet from a "public building."⁵⁹

These spacing requirements are patently insufficient for the protection of the character of the community from traffic, noise, glare, odor, or aesthetic incompatibility, or other threats to community character against which zoning law traditionally protects. Indeed, the OGSML on its face is not concerned with community character at all: The purpose of the spacing requirements is manifestly the personal safety, not the quiet enjoyment, of pre-existing structures' inhabitants. One hundred and fifty feet may protect inhabitants from cracked foundations and collapsing equipment, but such minimal distance will not create any meaningful buffer against noise, glare, blocked views, and general aesthetic incompatibility from siting a towering drill and accompanying truck traffic, waste pits, compressor stations, and the like next door to a quaint bed-and-breakfast in a rural hamlet or single-family home in a quiet residential suburb.

By contrast with the imperfect state common-law and non-existent state statutory remedies available for insuring that drillers take into account the burdens that they impose on neighbors, local government law provides a multitude of mechanisms for insuring that neighbors will take into account the interests of non-resident

⁵⁷ See, e.g., Alfred Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834, 841 (1924) ("The need for zoning arises from the utter inadequacy of the law of nuisances to cope with the problems of municipal growth.").

⁵⁸ *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458, 470 (Sup. Ct. Tompkins County 2012), *aff'd sub nom.*, *Norse Energy Corp. USA v. Town of Dryden*, 964 N.Y.S.2d 714 (App. Div. 3d Dep't 2013), *leave to appeal granted*, 995 N.E.2d 851 (N.Y. 2013) ("None of the provisions of the OGSML address traditional land use concerns, such as traffic, noise or industry suitability for a particular community or neighborhood.").

⁵⁹ N.Y. COMP. CODES R. & REGS. tit. 6, § 553.2 (2013). New York's current proposed regulations for hydrofracking provide for larger setbacks from the boundary lines of spacing units, dwellings, places of assembly, and certain water resources. See *Revised Proposed Express Terms 6 NYCRR Parts 550 through 556 and 560*, N.Y. ST. DEP'T ENVTL. CONSERVATION, <http://www.dec.ny.gov/regulations/87420.html> (last visited Apr. 9, 2014).

drillers in extracting such gas.

Unlike low- and moderate-income housing, industrial uses generally generate economic benefits for the residents of a local government, including fiscal benefits from increased property tax yields, royalties and lease payments for local landowners, indirect economic benefits for local retailers from sales to oil and gas workers, and jobs for local residents.⁶⁰ Moreover, the zoning process allows industrial enterprises to offer assurances and conditions safeguarding local property values from burdens on quiet enjoyment, thereby muting local opposition to the proposed industrial use.⁶¹ If the market value of the gas extracted exceeds the costs of mitigating the damage to neighboring property values from the extraction process, then the oil and gas enterprises will presumably be able to pay for conditions mitigating such damage and thereby reducing neighbors' opposition—for instance, exclusion from districts containing sensitive land uses, larger setbacks, berms, noise limits, traffic limits, and other conditions on special permits or variances designed to advance traditional zoning concerns. If the gas drilling enterprise is unable to pay its way by offering such nuisance-mitigating conditions, then this inability is itself an indication that the value of the gas is exceeded by the real costs of extracting it.⁶²

These economic incentives insure that local governments will not

⁶⁰ Concerning the extraction of gas through hydraulic fracturing, for instance, the Department of Environmental Conservation's Supplemental Generic Environmental Impact Statement predicts that "[c]onstruction and operation of the new natural gas wells are expected to increase employment, earnings, and economic output throughout the state." N.Y. DEP'T OF ENVTL. CONSERVATION, REVISED DRAFT SUPPLEMENTAL GENERIC ENVIRONMENTAL IMPACT STATEMENT 6-211 (2011), http://www.dec.ny.gov/docs/materials_minerals_pdf/rdsgeisch6a0911.pdf. The new employees and contractors attracted by well construction would also produce indirect benefits for local merchants and retailers, "[a]s the new construction and operations workers spend a portion of their payroll in the local area." *Id.* at 6-214. Likewise, the industrial development required by hydraulic fracturing would increase the property tax receipts of the local governments in which such wells are sited, and such "increase in ad valorem property taxes would have a significant positive impact on the finances of local government entities." *Id.* at 6-262.

⁶¹ WILLIAM A. FISCHEL, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 82–96 (1985) (describing bargaining between town and pulp mill over conditions necessary to mitigate nuisance costs of latter); N.Y. TOWN LAW § 267-b(4) (McKinney 2013) (describing power of zoning board of appeals to impose "reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property"); *See generally id.* §274-b (describing special permit process by which towns can mitigate detrimental effect of land uses).

⁶² *See FISCHEL, supra* note 61, at 125–49.

uniformly and single-mindedly exclude an industrial use for which there is a regional need, because that regional need will be reflected in the amount that the industrial user will bestow on local voters in the form of lease payments, royalties, wages, and property taxes in exchange for the right to drill. By excluding an industrial use, local officials and their constituents forego these considerable economic benefits, surrendering them to competing local governments that are less sensitive to the environmental impacts or more eager for local economic development.⁶³ Unsurprisingly, over forty municipalities in the heart of the Marcellus Shale have adopted resolutions favorable to the development of natural gas through hydraulic fracturing.⁶⁴

The incentive of local governments to host industrial uses distinguishes the exclusion of such uses from the exclusion of low-income housing. Each local government has incentives to exclude low-income multi-family structures to avoid the fiscal costs of hosting land uses that generate higher expenditures than revenues, but the net effect of such ‘NIMBYism’ can be a regional shortfall in housing.⁶⁵ By contrast, local governments have material incentives to welcome industrial uses that they can balance against the local costs of such uses. Perhaps intuiting this basic distinction, state courts have never been as suspicious of the exclusion of industrial uses as they have been of exclusion of affordable housing.⁶⁶ The

⁶³ See Vicki Been, “Exit” As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 478–83 (1991) (describing incentives of local governments to reduce burdens on land development in exchange for economic benefits conferred by such development).

⁶⁴ *Current High Volume Horizontal Hydraulic Fracturing Drilling Bans and Moratoria in NY State*, *supra* note 1.

⁶⁵ *S. Burlington Cnty. NAACP v. Mt. Laurel Twp.*, 336 A.2d 713, 719–20 (N.J. 1975) (describing fiscal incentives to exclude affordable housing through zoning); FISCHER, *supra* note 61, at 293–315 (summarizing literature on voters’ incentives to exclude low- and moderate-income housing because it generates low property tax revenue but high expenditures for schools); Richard Briffault, *Surveying Law and Borders: The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1125–26 (1996); Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397, 1410–16 (2012).

⁶⁶ See *Bd. of Cnty. Comm’rs v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1058, 1060–61 (Colo. 1992) (“The state’s interest in oil and gas activities is not so patently dominant over a county’s interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes.”); *Gernatt Asphalt Prods. v. Town of Sardinia*, 664 N.E.2d 1226, 1235 (N.Y. 1996) (“A municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole.”).

former does not present the risk of external costs giving rise to collective action problems among municipalities posed by the latter.

In short, if avoidance of external costs is a goal plausibly attributed to state law, then it makes little sense to suspend the presumption against preemption where local prohibition of hydraulic fracturing is concerned.

B. Does Preemption Protect a State Interest in Respecting Reasonable Investment-Backed Expectations?

Consider protection of settled expectations as another reason to preserve the presumption against preemption. Why should courts regard such protection as a reason to suspend the presumption against preemption? And why do local bans on hydraulic fracturing impose little risk to such expectations?

One of the most deeply rooted traditions in American politics is suspicion of local governments' expropriating investments made in reliance on implicit or express assurances that such investments would be respected.⁶⁷ The risk of such expropriation is most famously expounded by James Madison in *Federalist No. 10*, when he argues that smaller jurisdictions with more homogenous populations are more prone to what he calls "faction," meaning "a number of citizens . . . united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."⁶⁸ Majority "factions" are more likely in smaller jurisdictions simply because it is easier to assemble a majority on *any* issue, just or unjust, when the group is smaller and therefore is more likely to share "[a] common passion or interest."⁶⁹ The chief advantage of municipal home rule is, in short, also a disadvantage when the majority directs its attention to expropriation of a minority's property.

New York courts' efforts to limit municipal home rule powers

⁶⁷ John N. Drobak, *Credible Commitment in the United States: Structural and Substantive Limits on the Avoidance of Public Debt*, in *THE FRONTIERS OF NEW INSTITUTIONAL ECONOMICS 1* (John N. Drobak & John V.C. Nye eds., 1997).

⁶⁸ *THE FEDERALIST NO. 10* (James Madison).

⁶⁹ *Id.*

have, from the very beginning of municipal home rule, been focused on protecting investors' expectations against municipal innovations that are effectively expropriations. Until 1923, the New York Constitution contained no guarantee that New York's municipalities would enjoy any power to initiate new policies without specific prior state legislative permission.⁷⁰ The political movement to promote such home rule was generated by reformers seeking to promote municipal ownership of privately owned urban utilities like gas and electrical plants, telephone services, and streetcars.⁷¹ Despite success in electing John Francis Hylan on a ticket for municipal control of public transit,⁷² supporters of municipal ownership were stymied by the courts' narrow construction of New York City's statutory home rule powers. Regardless of the apparently generous grant of power conferred on the City by the 1913 Municipal Home Rule Law,⁷³ both the trial court and the appellate division held that

⁷⁰ See N.Y. CONST. art. XII, § 2 (1894) (illustrating that the state constitution's first protection of "home rule" took the form of an 1894 provision giving mayors a "suspensory veto" over state laws that singled out the "property, affairs, or government" of their particular city for discriminatory treatment). *But see* 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1986–87 (1916) (arguing that the veto was an exceptionally weak protection for "home rule," as it could be overruled by the state legislature's enacting a special law in two separate legislative sessions); 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, MAY 8, 1894 TO SEPT. 29, 1894, at 232 (1900) (discussing how home rule was ineffective in preventing New York City's 1898 annexation of Brooklyn). In any case, such a veto, although styled as a form of "home rule," actually gave municipalities no power whatsoever to initiate policies of their own. The 1894 amendment, therefore, left Dillon's Rule firmly in place.

⁷¹ See ROBERT F. WESSER, CHARLES EVANS HUGHES: POLITICS AND REFORM IN NEW YORK 1905–1910, at 77–90 (1967) (describing the Hearst-Hughes campaign for Governor and centrality of municipal ownership to that campaign: led by newspaper magnate William Randolph Hearst, the Municipal Ownership League called for immediate public ownership of all natural monopolies, with Hearst coming close to winning the gubernatorial election of 1906 and the mayoral elections for New York City (1905 and 1909) on a platform of municipal ownership).

⁷² With Hearst's and Tammany Hall's joint support (an unusual alliance at the time), Mayor John Francis Hylan was elected in 1918 on a platform of tightly controlling New York City's private subway franchises—in particular, guaranteeing the 5-cent fare for subway service. See MICHAEL W. BROOKS, SUBWAY CITY: RIDING THE TRAINS, READING NEW YORK 90–105 (1997) (describing Hylan's alliance with Hearst in favor the 5-cent fare); BRIAN J. CUDAHY, UNDER THE SIDEWALKS OF NEW YORK: THE STORY OF THE GREATEST SUBWAY SYSTEM IN THE WORLD 85–86, 91–92 (1988) (illustrating Hylan's alliance with Hearst and his attacks on the Rapid Transit Company and Brooklyn Rapid transit).

⁷³ Section 19 of the Home Rule Law provided that:

Every city is granted power to regulate, manage and control its property and local affairs and is granted all the rights, privileges and jurisdiction necessary and proper for carrying such power into execution. No enumeration of powers in this or any other law shall operate to restrict the meaning of this general grant of power, or to exclude other powers comprehended within this general grant.

it did not authorize New York City to run a municipally owned bus service.⁷⁴ Even after the New York Constitution was amended in 1924 to provide for an arguably broader level of home rule authority, a unanimous Court of Appeals denied the City the power to run a bus service in *Browne v. City of New York*.⁷⁵

Behind these early limits on municipal home rule lurked the idea that, if the City could operate a public bus or subway line, then the City would undermine the investments of private franchisees that had entered into franchise agreements with the City to provide such services. Fears of undermining those investments were at the heart of opposition to Hylan's campaign to create a city-owned subway,⁷⁶ and they were echoed in the appellate division's assertion that the Home Rule Law had to be read with a gloss limiting power to compete with private businesses: "[N]o implication can be drawn of a grant of power to cities in the state," stated the court, "to assume those activities *which according to our conception of government founded on the principle of individualism, is left to private enterprise*."⁷⁷ Judge Cardozo, writing for a unanimous court in *Browne*, was more circumspect about the benefits of "individualism," but he was no less emphatic that a special canon of narrow construction was appropriate when municipalities claimed novel powers: "A wide gap intervenes between the power of a municipality to determine the extent to which others may do

Act of April 10, 1913, ch. 247, §19, 1913 N.Y. Laws 436, 436. Section 20 of the statute supplemented this general grant with twenty-three specific types of power to supplement this general grant, ranging from the very general power "[t]o maintain order, enforce the laws, protect property and preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto." *Id.* § 20(13). To the more specific power "[t]o create a municipal civil service." *Id.* § 20(18). But section 19 expressly stated that the "enumeration of powers in this or any other law" should not be construed "to restrict the meaning of this general grant of power" in section 19. *Id.* § 19.

⁷⁴ *Brooklyn City R.R. Co. v. Whalen*, 182 N.Y.S. 283, 285 (App. Div. 2d Dep't), *aff'd* 128 N.E. 215 (N.Y. 1920); *Brooklyn City R.R. Co. v. Whalen*, 181 N.Y.S. 208, 210 (Sup. Ct. Kings County), *aff'd*, 182 N.Y.S. 283 (App. Div. 2d Dep't 1920), *aff'd*, 128 N.E. 215 (N.Y. 1920).

⁷⁵ *Browne v. City of New York*, 149 N.E. 211, 220 (N.Y. 1925) (Cardozo, J.).

⁷⁶ New York City had entered into a franchise agreement—the so-called "dual contracts"—with private subway lines in 1913. See *Mayor Hylan Held Responsible for New York's Subway Ills*, 65 *ELECTRIC RAILWAY J.* 253, 253 (1925). The City's running parallel lines for lower fares would obviously undermine the value of the investment. *Id.* Hylan's and Hearst's political enemies accused them of conspiring to destroy the private lines in part through competition from a city-owned line. *Id.* Governor Al Smith, Hylan's bitter enemy, appointed Justice McAvoy to chair a commission charged with investigating the City's treatment of the private subway lines. *Id.*

⁷⁷ *Whalen*, 182 N.Y.S. at 286 (emphasis added).

business in its streets,” he stated, “and the power, hitherto ungranted, to do business for itself.”⁷⁸

In sum, New York courts have narrowly construed early home rule powers at their inception by citing the special dangers posed by novel exercises of home rule power to investments by private enterprise.⁷⁹ In particular, Judge Cardozo emphasized the novelty of the power claimed by New York City: “In this State, even if not elsewhere, municipal transportation upon a scale so extensive without supervision or restriction is a notable innovation,” he observed, noting that “[t]he colorless words chosen [in the 1924 Home Rule Amendment] were singularly inept if they were intended to express approval of a departure so momentous.”⁸⁰

Do local bans on hydraulic fracturing constitute such a novel invasion of the private sphere, threatening to entrepreneurs’ investment-backed expectations? The question invites an exploration of the doctrine of regulatory takings that is beyond the scope of this article. A superficial consideration of the takings question, however, suggests that the landowner or lessee might show that a ban on hydraulic fracturing “took” property without just compensation if they demonstrated that the natural gas lying below the land constituted a distinct property interest the economically beneficial use of which could not be destroyed by a zoning law.⁸¹ Such a “*Lucas* claim”⁸² does not look promising in light of courts’ general unwillingness conceptually to sever pieces of a physically contiguous parcel and treat each piece as a distinct denominator against which a total takings should be measured.⁸³ The landowner or lessee might also show that state or local law created a reasonable investment-backed expectation that they would be able to realize some return from their investment in land for the extraction of natural gas. Again, the claim seems implausible where the landowner or lessee was not entitled under state law to

⁷⁸ *Browne*, 149 N.E. at 220.

⁷⁹ *See, e.g., Whalen*, 182 N.Y.S. at 286.

⁸⁰ *Browne*, 149 N.E. at 219.

⁸¹ Patrick C. McGinley, *Regulatory Takings in the Shale Gas Patch*, 19 PENN ST. ENVTL. L. REV. 193, 196, 217–20 (2011) (applying regulatory taking analysis to issues associated with laws governing hydraulic fracturing and describing how “constitutional takings principles can, in limited circumstances and at the margins, limit shale gas regulation”).

⁸² Named, of course, for *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁸³ *See Machipongo Land & Coal Co. v. Dep’t of Env’tl. Prot.*, 799 A.2d 751, 766–68 (Pa. 2002) (rejecting the vertical severance of the surface estate from the mineral estate after reviewing case law).

receive a permit to extract the natural gas at the time that they made their investment: even in those states that do not require any substantial investment in reliance on existing law in order to obtain a vested right, state due process doctrine universally requires the landowner to apply for a building permit in reliance on the law in force at the time of the application.⁸⁴ It seems improbable that the U.S. Supreme Court's *Penn Central* test requires anything less: if neither state nor local law ever gave any assurance that a landowner would be able to extract a mineral from a piece of land, then it is difficult to see why investment in such extraction constitutes an "expectation" rather than hopeful speculation.

Even if one assumes that landowners and lessees have some legitimate interest in realizing a return on natural gas, such an interest must be balanced against the neighbors' rival interest in protecting their investment in homes and businesses free from the effects of a nearby drilling operation. It is a truism that no individual landowner has any vested right to the continuation of zoning that courts will protect as a matter of constitutional law.⁸⁵ But it is an equal and opposite truism of the doctrine against so-called "spot zoning" that the arbitrary elimination of zoning restrictions for the exclusive benefit of some landowners can deprive other neighboring landowners of property without due process of law.⁸⁶ One court has gone so far as to hold that the selective elimination of zoning through a state-wide law barring the local prohibition on the extraction of gas constituted a deprivation of right to quiet enjoyment of property without due process of law.⁸⁷

One need not go so far as to conclude that the preemption of local prohibitions on hydraulic fracturing would constitute a form of "spot zoning" or otherwise deprive neighbors of due process of law. Like the rival claim that the local prohibition itself deprives landowners of a distinct investment-backed property interest, such arguments are likely a stretch. The critical question is whether, for the purposes of statutory interpretation, courts should regard local prohibitions on hydraulic fracturing as such a novel invasion of a

⁸⁴ See, e.g., *Valley View Indus. Park v. Redmond*, 733 P.2d 182, 191–92 (Wash. 1987) (en banc).

⁸⁵ See, e.g., *McKinney v. High Point*, 79 S.E.2d 730, 734 (N.C. 1954).

⁸⁶ See, e.g., *Rodgers v. Tarrytown*, 96 N.E.2d 731, 734 (N.Y. 1951).

⁸⁷ *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 485 (Pa. Commw. Ct. 2012), *aff'd on other grounds*, 83 A.3d 901 (Pa. 2013).

settled expectation that the usual presumption against preemption should be suspended. Given the existence of legitimate expectations to property on either side of this question, such a conclusion seems far-fetched. Because local zoning is such an entrenched political practice, the expectations associated with zoning tend to be particularly strong. Landowners purchase their housing with the expectation that their existing uses will be protected from new uses that could undermine the value of the former. In Professor William Fischel's words, "even though resident homeowners have no vested right to zoning, they appear to have a reliable political entitlement to the status quo in land use."⁸⁸ Preemption eliminates that expectation, while protecting a rival expectation. Absent any principled argument that one expectation to be free from new zoning laws is more reasonable than the rival expectation to preserve the status quo character of the neighborhood, it is difficult to see why settled expectations present good reason not to adhere to the default presumption against preemption.

IV. CONCLUSION

The point of the foregoing analysis is not merely to defend the idea that local bans on hydraulic fracturing ought not to be preempted. The point is also to think about preemption more generally, using principles that cut across different statutes, in order to promote serious legislative deliberation about the powers of local government in New York. The question of preemption always requires an examination of a specific statute's particular words. In this sense, there is nothing general to be said about the question: the answer to the question of preemption will vary with the different wording of each statute. In a second sense, however, Article IX, section 3(c) of the New York Constitution requires courts to think about preemption in a more general way, by asking whether a statute's text is sufficiently plain to indicate genuine state legislative deliberation about whether to displace local law. This constitutionally required presumption against preemption requires an understanding of ambiguity sufficient to trigger the presumption and an understanding of the sorts of considerations sufficient to rebut that presumption once ambiguity is found.

⁸⁸ FISCHEL, *supra* note 61, at 36.

These general issues cannot be answered by minute parsing of a specific statute's particular words: once those words have been determined to be ambiguous, the court must, of necessity, look outside the text to more general principles about how New York ought to be governed. Those principles include the ideas that (1) local constituencies should enjoy broad powers of self-government where the state legislature cannot reach a consensus about an issue but that (2) such powers can be suspended where used to burden non-residents' interests or residents' reasonable, settled expectations. These are abstract ideas, but, as general as they are, the example of hydraulic fracturing suggests that, at least some of the time, they have sufficient resolving power to decide particular cases.