

COMMENT

BRINGING A GUN TO A KNIFE FIGHT: TEXAS H.B. 40 AND LOCAL REGULATION OF OIL AND GAS OPERATIONS*

ABSTRACT

In late 2014, the citizens of Denton, TX voted to pass a complete ban on hydraulic fracturing within the city limits. The following spring, the Texas Legislature passed H.B. 40, which expressly prohibits cities like Denton and other political subdivisions from banning hydraulic fracturing within their jurisdictions. However, H.B. 40 goes well beyond simply prohibiting cities from banning hydraulic fracturing. Rather than being a measured and proportionate response to the Denton ordinance banning hydraulic fracturing, H.B. 40 potentially completely alters Texas cities' powers to regulate the oil and gas industry although Texas cities have exercised these powers for over one hundred years of successful oil and gas exploration.

This Comment explores the legal landscape regarding the regulation of the oil and gas industry before and after the passage of H.B. 40. It discusses the history of the Denton ordinance banning hydraulic fracturing, the legal framework that arguably provided cities authority to pass and enforce such bans, as well as the legal challenges to Denton's ordinance raised by Texas General Land Office and the Texas Oil and Gas Association. Next, this Comment analyzes the immediate and future effects of H.B. 40, concluding that H.B. 40 creates several legal uncertainties which will eventually need to be resolved through extensive litigation or further legislation.

* J.D. Candidate, University of Houston Law Center, 2017. This Comment received the Locke Lord LLP Award for Outstanding Paper in the Area of Energy or Corporate Law. Special thanks to my wife Katie for her love and support during this project and throughout my time in law school.

TABLE OF CONTENTS

I. INTRODUCTION	546
II. THE ORIGINS OF H.B. 40.....	548
A. <i>Motivating Factors Behind the Denton Ordinance</i>	548
B. <i>Home Rule and Lawsuits</i>	550
C. <i>Texas Legislature’s Motivation to Pass H.B. 40</i>	554
1. <i>Maintaining the Economic Status Quo.</i>	555
2. <i>Maintaining the Legal Status Quo.</i>	557
III. THE LEGAL EFFECTS OF H.B. 40	558
A. <i>Immediate Legal Consequences</i>	559
B. <i>Future Consequences</i>	562
1. <i>Refining the Jurisdictional Boundaries</i>	562
2. <i>The Poison Pill: “Commercially Reasonable”</i>	565
IV. CONCLUSION.....	567

I. INTRODUCTION

On November 4, 2014, Denton became the first city in Texas to approve an outright ban on hydraulic fracturing or “fracking” within its city limits.¹ The following spring, the Texas Legislature responded by passing House Bill 40 (H.B. 40) with an overwhelming majority.² By passing H.B. 40 into law, the State of Texas sought to eradicate any existing legal ambiguity concerning whether a city like Denton could regulate an oil and gas operation, including banning certain activities, within its city limits.³ The state response in H.B. 40 was to expressly preempt

1. Jim Malewitz, *Dissecting Denton: How a Texas City Banned Fracking*, TEX. TRIB. (Dec. 15, 2014, 7:25 PM), <http://www.texastribune.org/2014/12/15/dissecting-denton-how-texas-city-baned-fracking> [https://perma.cc/6WP2-YBKL?type=image]. Hydraulic fracturing or “fracking” is an unconventional technique used by the oil and gas industry whereby tiny fissures or fractures are created in rock formations to obtain oil and natural gas production from formations which was once thought to be unobtainable. *What Is Fracking?*, TEX. OIL & GAS ASS’N, <https://www.txoga.org/category/what-is-fracking> [https://perma.cc/ZR87-NZK9].

2. See H.J. of Tex., 84th Leg., R.S. 1718 (2015) (indicating H.B. 40 passed the Texas House of Representatives with a final vote of 125 in favor versus 20 opposed). H.B. 40 is now codified at TEX. NAT. RES. CODE ANN. § 81.0523 (West Supp. 2016); however, this Comment will refer to the law as H.B. 40.

3. See Exclusive Jurisdiction of this State to Regulate Oil and Gas Operations in this State and the Express Preemption of Local Regulations of Those Operations, H.B. 40, 84th Leg., R.S., ch. 30, § 2, 2015 Tex. Gen. Laws 971, 971–72 (codified at TEX. NAT. RES. CODE ANN. § 81.0523 (West Supp. 2016)) (“The legislature recognizes . . . it is in the

local control over every aspect of an “oil and gas operation,” with the exception of limited local control of “aboveground activities” related to oil and gas operations including regulating traffic, noise, and the minimum distance new wells could be placed from residential or public buildings.⁴

To its opponents, H.B. 40 is an overreaction that threatens to upset a long history of balance and cooperation between state and local government in the regulation of the oil and gas industry.⁵ To its proponents, H.B. 40 is an appropriate and necessary measure which simply confirms and clarifies the existing regulatory framework of the oil and gas industry.⁶ The legislative process that led to H.B. 40 and the legal battles that are certain to follow in the wake of the Bill’s passage pit against “two interests Texans hold dear: petroleum and local control.”⁷

This Comment argues that the Texas Legislature’s response to the Denton fracking ban in H.B. 40 is lacking in two regards. First, H.B. 40 will not be the panacea hoped for regarding the regulation of oil and gas operations in Texas.⁸ While H.B. 40 resolved some existing legal ambiguity,⁹ it created several legal uncertainties which will eventually need to be resolved through litigation or further legislation.¹⁰ Further, while claiming to streamline and ease the regulatory burden on oil and gas operators,¹¹ it is clear that ordinances will continue to vary from

interest of this state to explicitly confirm the authority to regulate oil and gas operations in this state.”).

4. NAT. RES. § 81.0523.

5. See Scott Anderson, *What Texas’ Elected Officials Should Know About House Bill 40*, ENVTL. DEF. FUND: TEX. CLEAN AIR MATTERS (Apr. 23, 2015), <http://blogs.edf.org/texascleanairmatters/2015/04/23/what-texas-elected-officials-should-know-about-house-bill-40/> [https://perma.cc/V5P4-HGH4] (proclaiming H.B. 40 would create “a complete restructuring of Texas government that will drastically impact a city’s ability to protect the health, public safety and property of Texans who live in areas with heavy drilling activity”).

6. See *infra* Part II.C.2 (discussing the legal position of opponents to Denton’s fracking ban and the legislative findings of H.B. 40).

7. Malewitz, *Dissecting Denton*, *supra* note 1.

8. See Signature Statement, Office of the Governor Greg Abbott, Governor Abbott Signs HB 40 into Law (May 18, 2015), <http://gov.texas.gov/news/signature/20903> [https://perma.cc/6BUC-DL35] (claiming H.B. 40 will protect private property rights and ensure that Texas avoids “a patchwork quilt of regulations that differ from region to region”).

9. See *infra* Part III.A (concluding that H.B. 40 clearly prohibits cities from banning hydraulic fracturing and significantly limits the historical ability of municipal governments to regulate the oil and gas industry).

10. See *infra* Part III.B (identifying and analyzing the numerous legally ambiguous words and phrases used in H.B. 40).

11. Signature Statement, *supra* note 8.

city to city across the state.¹² Secondly, and perhaps more importantly, the state response in H.B. 40 did not adequately address the concerns that motivated the citizens of Denton to approve a ban on fracking.¹³

Part II of this Comment discusses the circumstances which motivated citizens in Denton to pass a fracking ban, the then-existing legal environment which encouraged the citizens of Denton to pass a fracking ban, and finally it discusses the State's provided reasons to respond legislatively to Denton's fracking ban. Part III analyzes the legal impacts of H.B. 40 on the regulation of the oil and gas industry in Texas, both the immediate legal impact of H.B. 40, and the legal uncertainties created by H.B. 40 which will need to be resolved in the future. Part IV concludes the Comment and discusses possible solutions to the problem.

II. THE ORIGINS OF H.B. 40

In order to fully appreciate the legal impacts of H.B. 40 and critique its effectiveness, it is crucial to understand the factors and circumstances that led to its creation. This Part will first discuss the stated motivations of the citizens of Denton in passing a ban on fracking within the city limits, principally their perceptions of inadequacies in the legal and regulatory system. Next, this Part will examine the legal environment which permitted the City of Denton to enact an ordinance banning fracking. Finally, this Part will layout the Texas Legislature's stated purposes in passing H.B. 40 in response to Denton's fracking ban.

A. *Motivating Factors Behind the Denton Ordinance*

On November 4, 2014, Denton became the first city in Texas to approve a ban on fracking.¹⁴ An earlier attempt to ban fracking was defeated by a 5-2 vote of the Denton City Council after a contentious eight hour meeting on July 15, 2014.¹⁵ After

12. See *infra* Part III.B.2 (indicating that the use of legally ambiguous terms will lead to fact specific determinations of whether a particular city ordinance will be upheld if challenged, leaving open the possibility for the ordinances of many cities to vary greatly).

13. See *infra* Part II.A (recounting that the citizens of Denton were primarily motivated to pass the fracking ban by frustrations with state and local government to adequately protect their health and safety through their inability to enforce prior existing city ordinances regulating distance between drill sites and residential buildings).

14. Malewitz, *Dissecting Denton*, *supra* note 1.

15. See *Frack Free Denton*, EARTHWORKS, https://www.earthworksaction.org/voices/detail/denton_texas#.VjIF_rerTIU [<https://perma.cc/7NGT-USBD>]; Peggy Heinkel-Wolfe, *Voters to Decide Ban Issue: City Council Rejects Residents' Petition on Fracking Inside*

this initial defeat, the citizens of Denton convincingly voted to enact a ban on fracking using a ballot initiative.¹⁶ The success of the ballot initiative was the result of grassroots efforts,¹⁷ with the help of at least one national environmental group,¹⁸ and against significant industry opposition.¹⁹ The opponents of the ballot initiative, backed by the oil and gas lobby, outspent the proponents by a factor of 10-1, spending over \$700,000 to defeat it.²⁰ The ballot initiative passed in the face of this tremendous industry resistance, proving that the citizens of Denton were extremely motivated to ban fracking.²¹

The proponents of Denton's fracking ban cited many reasons for why they felt the ban was necessary.²² Chief among them was the view that they could not successfully advance their agenda within the permanent governmental system at the state or local level.²³ In January 2013, Denton passed a 1,200 foot setback ordinance which it thought would prevent operators from drilling new wells close to residential buildings.²⁴ However, later that same year a Dallas-based operator began drilling operations within six hundred feet of nearby homes.²⁵ In response, Denton

Denton, DENTON REC.-CHRON. (July 15, 2014, 11:27 PM), <http://www.dentonrc.com/local-news/local-news-headlines/20140715-voters-to-decide-ban-issue.ece?ssimg=1803074> [https://perma.cc/297V-2UCN].

16. Denton's ban on fracking passed by a margin of 59% to 41%. *Frack Free Denton*, *supra* note 15.

17. Frack Free Denton, a local group of concerned citizens, was instrumental in the passage of the ban on fracking. *Id.* Frack Free Denton, a project of the Denton Drilling Awareness Group was organized in February 2014 and is "dedicated to educating the public about the dangers of gas well drilling and its related processes to the public health, the environment, and property values in the city of Denton." *Mission*, FRACK FREE DENTON, <http://frackfreedenton.com/dentondag-mission/> [https://perma.cc/Y58E-MRQT]; *Citizens of Denton, Texas Call for Fracking Ban*, FRACK FREE DENTON (Feb. 18, 2014), <http://frackfreedenton.com/2014/02/citizens-of-denton-texas-call-for-fracking-ban/> [https://perma.cc/LED8-97WF].

18. *Frack Free Denton*, *supra* note 15.

19. Malewitz, *Dissecting Denton*, *supra* note 1.

20. *Id.*

21. *Id.*

22. Amy Martyn, *Denton City Council Says It Must Allow Fracking Near Homes, So Homeowners Turn to Voters*, DALL. OBSERVER, (Feb. 19, 2014, 3:22 PM), <http://www.dallasobserver.com/news/denton-city-council-says-it-must-allow-fracking-near-homes-so-homeowners-turn-to-voters-7115196> [https://perma.cc/K9DX-KGZW].

23. *Id.* One homeowner in Denton, upset about the Texas Railroad Commission permitting a Dallas-based operator to drill new wells 600 feet from homes after the city had passed a 1,200 foot setback early in 2013, proclaimed "[t]he city and the state have repeatedly failed us." *Id.*

24. Jim Malewitz, *Denton Drops Bid for Restraining Order Against Driller*, TEX. TRIB. (Oct. 21, 2013, 5:38 PM), <http://www.texastribune.org/2013/10/21/denton-wants-restraining-order-against-driller/> [https://perma.cc/2E5G-25GA?type=image].

25. *Id.*

filed suit seeking a temporary restraining order and permanent injunction against the operator.²⁶ However, after learning that Denton could not enforce the setback provision as to these permitted wells because the well permits from the Railroad Commission preceded the setback ordinance,²⁷ the city quickly dropped the suit five days later.²⁸ Shortly after, Denton entered into an agreement that allowed the Dallas-based developer to continue its operations on these previously contested sites.²⁹

Many citizens in Denton were frustrated by these events, and they perceived inadequacies in the administrative process at both the state and local level, as well as the judicial system to hear and take action on their behalf.³⁰ In response to these repeated failures of government to prevent drilling within the setback requirements of the local ordinance, a group of frustrated citizens mobilized an effort to obtain enough signatures to place an initiative on the November 2014 ballot, which would completely ban fracking within the city limits.³¹

B. Home Rule and Lawsuits

In November 2014, the legality of Denton's ordinance banning fracking was an unsettled area of law in Texas.³² Since

26. *Id.*; Peggy Heinkel-Wolfe, *City of Denton Sues over Wells*, DENTON REC.-CHRON. (Oct. 21, 2013, 10:55 PM), <http://www.dentonrc.com/local-news/local-news-headlines/20131021-city-of-denton-sues-over-wells.ece> [<https://perma.cc/HDK9-9V7X>].

27. See TEX. LOC. GOV'T CODE ANN. § 245.002 (West 2016) (setting rule that state regulatory agencies will determine eligibility for permits based on the ordinances in place at the time the initial permit application is submitted or a plan for development of real property is first filed with a regulatory agency); Nicole R. Metcalf, *The Fight over Fracking Is Not Yet Done in Texas*, LAW360, (June 5, 2015, 11:16 AM), <http://www.law360.com/articles/663852/the-fight-over-fracking-is-not-yet-done-in-texas> [<https://perma.cc/4TD3-AGJK>] ("The provision is intended to prevent companies, like oil and gas exploration companies, from investing substantial amounts of money in a development site, only to have a city change local permitting requirements in the middle of a project . . .").

28. Malewitz, *Denton Drops Bid for Restraining Order Against Driller*, *supra* note 24; see also *Gas Drilling in Denton Update—The Path Ahead*, KEVIN RODEN: DENTON CITY COUNCIL, DISTRICT ONE (Nov. 25, 2013), <http://rodenfordenton.com/2013/11/gas-drilling-in-denton-update-the-path-ahead/> [<https://perma.cc/KL8P-JFAN>] (explaining how the gas operator was able to drill despite the Denton ordinance restricting drilling within 1,200 feet of protected areas).

29. Martyn, *supra* note 22.

30. See *Citizens of Denton*, *supra* note 17 (quoting one citizen: "We are out of options. The city is allowing fracking to happen right in our backyards[.]").

31. *Fracking Ban Exceeds Signature Requirement to Get on November Ballot, in Face of Government Opposition, Group Continues Signature Drive at Local Events*, FRACK FREE DENTON (Mar. 14, 2014), <http://frackfreedenton.com/2014/03/fracking-ban-exceeds-signature-requirement-to-get-on-november-ballot-in-face-of-government-opposition-group-continues-signature-drive-at-local-events/> [<https://perma.cc/SUX6-4WFJ>].

32. Malewitz, *Dissecting Denton*, *supra* note 1.

Denton's ban on fracking was the first of its kind, the Texas Supreme Court had never directly ruled on whether a municipality could ban fracking.³³ Despite the lack of legal precedent concerning fracking bans, the City of Denton had plausible legal arguments that the adoption and enforcement of the ban was within the scope of its powers.

The Texas Constitution gives certain municipalities, known as "home rule cities,"³⁴ the authority to pass local ordinances provided that "no . . . ordinance . . . shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State."³⁵ In other words, a home-rule city in Texas can exercise its police power to promote the health, safety, or general welfare of the population, unless and until expressly or impliedly prohibited to do so by the Texas Legislature or Texas Constitution.³⁶ This Constitutional grant of power to home-rule cities creates a presumption that an ordinance is valid, and places the burden of proving an ordinance invalid or unconstitutional on the party so asserting.³⁷ In addition, "[i]f the Legislature decides to preempt a subject matter normally within a home-rule city's broad police powers (either expressly or by implication), it must do so with 'unmistakable clarity.'"³⁸ Thus, if a home-rule city passes an ordinance designed to protect the health and safety of its citizens, Texas law presumes it to be valid.³⁹

A party asserting that a city's ordinance is preempted by state law generally has three avenues from which to prove its case: express preemption, field preemption, or conflict

33. *Id.*

34. See *2015 Handbook for Mayors and Councilmembers*, TEX. MUN. LEAGUE 9–10, <http://www.tml.org/p/2015%20Councilmembers%20and%20Mayor%20Handbook%20-%2001.pdf> [<https://perma.cc/P9ZC-HNAP>] (defining home rule cities as those with populations greater than 5,000 which have also adopted home rule charters). Home rule allows citizens at the municipal and county levels to manage their own affairs with little state interference. *Id.* at 10.

35. TEX. CONST. art. XI, § 5.

36. *Id.* See *2015 Handbook for Mayors and Councilmembers*, *supra* note 34, at 12 ("[H]ome rule cities look to the state to tell them what they are prohibited from doing, rather than for specific grants of authority to undertake particular functions.").

37. See *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 642–43, 649 (Tex. 1975) (finding that the municipality could regulate the price of electricity sold in its limits because their police power was not preempted by any state statute); *Humble Oil & Ref. Co. v. City of Georgetown*, 428 S.W.2d 405, 407 (Tex. Civ. App.—Austin 1968, no writ).

38. *City of Houston v. BCCA Appeal Grp., Inc.*, 485 S.W.3d 444, 453 (Tex. App.—Houston [1st Dist.] 2013), *aff'd in part, rev'd in part*, No. 13-0768, 2016 WL 1719182 (Tex. Apr. 26, 2016) (citing *Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993)).

39. *Id.* at 452–53.

preemption.⁴⁰ Express preemption requires explicit statutory language expressing a clear intent of the state to prohibit local regulation.⁴¹ Field preemption applies if state regulation in a specific subject is so comprehensive that it is clear the state government intended to fully occupy the field.⁴² Conflict preemption applies when, absent express preemption, a local law conflicts with a federal or state law making it impossible for a party to comply with both laws.⁴³

Following the passage of Denton's ballot initiative to ban fracking within its city limits, but before its enactment as a city ordinance, the Texas General Land Office (GLO) and the oil and gas industry took immediate action to challenge the legality of the ban.⁴⁴ The GLO sued the City of Denton first thing the next morning.⁴⁵ In addition, the Texas Oil and Gas Association (TxOGA) independently filed its own suit challenging the local fracking ban.⁴⁶ Both suits alleged that the ordinance was an unconstitutional action by the City of Denton because it was preempted by state law.⁴⁷ Specifically, the GLO suit alleged that the ordinance was unconstitutional for two reasons. First, GLO argued that the ordinance is "preempted because it is inconsistent with the general laws of this State, specifically the Legislature's grant of jurisdiction over oil and gas wells in Texas to the Railroad Commission of Texas," and secondly, that it

40. Bonnie L. Goldstein, *Preemption: Will the Real King Please Rise*, TEX. MUN. CTS. EDUC. CTR., <http://www.tmcce.com/public/files/File/Course%20Materials/FY10/Prosecutors/9.%20Preemption/CM%20-%20Preemption.pdf> [https://perma.cc/7NEE-SFYM]; *BCCA Appeal Grp.*, 485 S.W.3d at 454–56.

41. See, e.g., TEX. ALCO. BEV. CODE ANN. § 1.06 (West 2007) ("Unless otherwise specifically provided by the terms of this code, the manufacture, sale, distribution, transportation, and possession of alcoholic beverages shall be governed exclusively by the provisions of this code."); TEX. NAT. RES. CODE ANN. § 133.085(c) (West 2011) ("The provisions [of the Quarry Safety Act] supersede any other municipal ordinance or county regulation that seeks to accomplish the same ends as set out herein."); see also *BCCA Appeal Grp., Inc. v. City of Houston*, No. 13-0768, 2016 WL 1719182, at *3 (Tex. Apr. 26, 2016) (holding that the "critical inquiry" in determining whether there is express preemption is "whether the Legislature expressed its preemptive intent through clear and unmistakable language").

42. Goldstein, *supra* note 40.

43. *Id.*

44. Malewitz, *Dissecting Denton*, *supra* note 1. The Texas General Land Office, although later to announce its suit to the press, was certain to point out that its lawsuit was first in time, having been filed at 7:51 a.m. *Id.*

45. Plaintiff's Original Petition and Application for Permanent Injunction at 1, *Patterson v. City of Denton*, No. D-1-GN-14-004628 (53d Dist. Ct., Travis Cty., Tex. Nov. 5, 2014) [hereinafter GLO Petition].

46. Original Petition at 1, *Tex. Oil & Gas Ass'n v. City of Denton*, No. 14-08933-431 (431st Dist. Ct., Denton Cty., Tex. Nov. 5, 2014) [hereinafter TxOGA Petition].

47. *Id.*; GLO Petition, *supra* note 45, at 5.

“impairs Commissioner Patterson and the GLO’s right to manage and operate the State’s mineral interests in Denton County, Texas.”⁴⁸

Similarly, the TxOGA suit alleged the ordinance was unconstitutional on three bases: (1) it is “preempted by implication,” (2) it “directly conflicts existing Railroad Commission and TCEQ [Texas Commission on Environmental Quality] regulations,” and (3) “[f]ield preemption applies because the Railroad Commission and the TCEQ have been given authority in the field of oil and gas resource development.”⁴⁹ It is clear from these pleadings that neither the TxOGA nor the GLO thought that the Denton fracking ban was *expressly* preempted by either the Texas Constitution or various statutes, but rather, merely impliedly preempted.⁵⁰

In its answers, the City of Denton made special exceptions to some allegations of the Texas GLO and TxOGA while generally denying all of the other claims.⁵¹ In addition, the City of Denton raised a public nuisance affirmative defense in each of its answers.⁵² The two lawsuits remained active until Denton repealed its ban on fracking and the court issued agreed orders of dismissal in September 2015.⁵³

While the lawsuits were pending, the Texas Legislature passed H.B. 40, which became immediately effective on May 18, 2015.⁵⁴ After passage, the legal landscape shifted dramatically against the City of Denton.⁵⁵ The Texas Legislature had

48. GLO Petition, *supra* note 45, at 5.

49. TxOGA Petition, *supra* note 46, at 7–10.

50. See *supra* notes 44–49 and accompanying text (showing that each plaintiff pleaded several legal theories, none of which included the theory that Denton was *expressly* preempted from passing an ordinance banning fracking).

51. Defendant’s Special Exceptions and Original Answer to Plaintiff’s Original Petition at 1–2, *Tex. Oil & Gas Ass’n v. City of Denton*, No. 14-08933-431 (431st Dist. Ct., Denton Cty., Tex. Dec. 1, 2014) [hereinafter Original Answer to TxOGA]; Motion to Transfer Venue, Special Exceptions and Original Answer of Defendants the City of Denton, Texas at 6–7, *Patterson v. City of Denton*, No. D-1-GN-14-004628 (53d Dist. Ct., Travis Cty., Tex. Dec. 1, 2014) [hereinafter Original Answer to GLO].

52. Original Answer to TxOGA, *supra* note 51, at 2; Original Answer to GLO, *supra* note 51, at 7.

53. Agreed Order of Dismissal at 1–2, *Tex. Oil & Gas Ass’n v. City of Denton*, No. 14-08933-431 (16th Dist. Ct., Denton Cty., Tex. Sept. 4, 2015); Max B. Baker, *State Drops Lawsuit over Denton Fracking Ban*, FORT WORTH STAR-TELEGRAM (Sept. 17, 2015 5:23 PM), <http://www.star-telegram.com/news/business/article35629632.html> [<https://perma.cc/QS52-9ZG6>].

54. TEX. NAT. RES. CODE ANN. § 81.0523 (West Supp. 2016); *House Bill 40*, TEX. TRIB.: TEX. LEGIS. GUIDE (June 1, 2015), <http://txlege.texastribune.org/84/bills/HB40/> [<https://perma.cc/KPH7-2C7X>].

55. See Max B. Baker, *Attorneys: Denton Not the Place to Challenge HB40*, FORT WORTH STAR-TELEGRAM (June 3, 2015, 6:26 PM), <http://www.star-telegram.com/news/business/article35629632.html>.

expressly preempted the ordinance by statute; Denton could no longer raise any legal arguments based on implied preemption.⁵⁶ However, the very need to pass H.B. 40 indicates that prior to its passage, there was at best only an implied preemption of the Denton ordinance and that the Texas Legislature had doubts about the outcome of the litigation.⁵⁷ This fact, coupled with the “unmistakable clarity”⁵⁸ standard of proof, shows that at the time the citizens of Denton passed the ballot initiative banning fracking, there was no clear legal answer as to how a court would rule on the issue of preemption.⁵⁹

C. Texas Legislature’s Motivation to Pass H.B. 40

During the 84th legislative session, the Texas Legislature made it a priority to address the issue of state versus local drilling ordinances.⁶⁰ The Texas Legislature introduced and passed H.B. 40 in direct response to the City of Denton’s ordinance banning fracking.⁶¹ The law, having passed with at least two-thirds vote in each house, became effective immediately on May 18, 2015 after being signed by Governor Greg Abbott.⁶² The Legislature had two primary purposes in passing the law:

.com/news/business/barnett-shale/article23048832.html [https://perma.cc/VGS2-LHYF] (detailing the legal effects of H.B. 40, including the new limits on city’s ability to regulate oil and gas operations); Peggy Heinkel-Wolfe, *Groups Seek to Exit Suits*, DENTON REC.-CHRON., (June 24, 2015, 11:17 PM), <http://www.dentonrc.com/local-news/local-news-headlines/20150624-groups-seek-to-exit-suits.ece> [https://perma.cc/RS3K-GZLZ] (detailing how two groups who had joined the City of Denton as co-defendants sought to exit the lawsuit and persuaded the city council to repeal the ban following the passage of H.B. 40).

56. Heinkel-Wolfe, *Groups Seek to Exit Suits*, *supra* note 55.

57. See *infra* note 63 and accompanying text (indicating the urgency with which the state acted legislatively to unmistakably preempt local regulation of fracking).

58. See *supra* notes 34–39 and accompanying text (examining the presumption of validity of home-rule city ordinances and the need for the Texas Legislature to overcome that presumption with unmistakable clarity).

59. See *supra* notes 54–58 (analyzing the legal environment prior to passage of H.B. 40).

60. Jim Malewitz, *Combating Local Drilling Ordinances*, TEX. TRIB.: TEX. LEGIS. GUIDE-ENERGY (last updated June 12, 2015), <http://txlege.texasribune.org/topics/energy/combating-local-drilling-ordinances/> [https://perma.cc/WL7C-CS6R]. H.B. 40 was one of eleven bills introduced in the 84th Legislative session to address the issue of Denton’s ordinance. *Id.*

61. See *House Bill 40*, TEX. TRIB.: TEX. LEGIS. GUIDE, *supra* note 54 (showing the speed at which H.B. 40 became law in that H.B. 40 was introduced on March 10, 2015, passed by the House on April 20, 2015, passed by the Senate on May 4, 2015, and finally signed into law on May 18, 2015); Malewitz, *Combating Local Drilling Ordinances*, *supra* note 60 (referring to H.B. 40 as the “Denton fracking bill”).

62. Jim Malewitz, *Abbott Signs “Denton Fracking Bill”*, TEX. TRIB. (May 18, 2015, 4:45 PM), <http://www.texasribune.org/2015/05/18/abbott-signs-denton-fracking-bill/> [https://perma.cc/9KUX-DS5F?type=image]; *House Bill 40*, TEX. TRIB.: TEX. LEGIS. GUIDE, *supra* note 54.

(1) maintain the economic status quo of lucrative fracking operations, and (2) maintain the legal status quo by removing any and all legal ambiguity concerning preemption in regards to regulation of the oil and gas industry.⁶³

1. *Maintaining the Economic Status Quo.* The State of Texas, as a whole, enjoys many economic benefits from the oil and gas industry.⁶⁴ According to a major industry trade group, the oil and natural gas industry is the foundation of the state economy, creating high paying jobs and generating revenue, including billions of dollars in taxes and royalties that directly fund our schools, roads, and other public services.⁶⁵ In addition, many modern products and conveniences would be unavailable without the oil and gas industry.⁶⁶ The oil and gas industry also provides gainful employment for many Texans.⁶⁷

Much of this economic prosperity is due to advances in drilling techniques and in particular to the practices of horizontal drilling and hydraulic fracturing or fracking.⁶⁸ Horizontal drilling and fracking have allowed the industry to develop unconventional formations that would be economically untenable without these technologies.⁶⁹ The Denton ordinance banning

63. Exclusive Jurisdiction of this State to Regulate Oil and Gas Operations in this State and the Express Preemption of Local Regulations of Those Operations, H.B. 40, 84th Leg., R.S., ch. 30, § 1, 2015 Tex. Gen. Laws 971, 971 (codified at TEX. NAT. RES. CODE ANN. § 81.0523 (West Supp. 2016)). Section 1 of H.B. 40 states that the “laws and policy of this state have fostered successful development of oil and gas resources in concert with the growth of healthy and economically vibrant communities for over 100 years.” *Id.* It also states that the statutes already in effect “provide effective and environmentally sound regulation of oil and gas operations that is so comprehensive and pervasive that the regulation occupies the field.” *Id.* It concludes that it is in the interest of the state to expressly “preempt the regulation of oil and gas operations by municipalities and other political subdivisions.” *Id.*

64. *Benefits of Oil & Natural Gas*, TEX. OIL & GAS ASS’N, <https://www.txoga.org/category/benefits-of-oil-natural-gas/> [<https://perma.cc/VGU7-VD8T>].

65. *Id.*

66. *See id.* (detailing that plastics, medicines, computers, life-saving devices and more are possible because of the oil and gas industry).

67. *See* Michael Brick, *How Many Jobs in Texas Are Related to Oil, Gas? Go Figure*, HOUS. CHRON. (Sept. 25, 2014, 9:34 PM), <http://www.houstonchronicle.com/business/energy/article/In-Texas-Oil-Boom-Job-Abound-Give-or-Take-5772992.php#photo-6878148> [<https://perma.cc/JV8E-2CTH>] (demonstrating that the oil and gas industry employs many Texans, but determining an exact figure depends on whom you ask); *Benefits of Oil and Natural Gas*, *supra* note 64 (claiming the average pay of an oil and gas employee is \$124,000).

68. *What is Fracking?*, *supra* note 1.

69. *Shale Research & Development*, DEP’T OF ENERGY, <http://energy.gov/fe/science-innovation/oil-gas-research/shale-gas-rd> [<https://perma.cc/C6H8-DN6X>]. Ironically, the technological advances that make production from shale formations possible were pioneered in the Barnett Shale which underlays Denton, Texas. *Shale Story: Barnett*, TEX. OIL & GAS ASS’N, <https://www.txoga.org/shale-story-barnett/> [<https://perma.cc/9KB4->

fracking threatened this economic prosperity. Addressing this ordinance was therefore a priority issue for many in the 84th legislative session.⁷⁰ In addition to preserving the direct economic benefits that the oil and gas industry provides to Texas, many interested parties were also concerned with protecting private property rights—specifically the rights of mineral owners to access and profit from their holdings.⁷¹ In signing the Bill into law, Governor Abbot said it “does a profound job of helping to protect private property rights here in the State of Texas, ensuring those who own their own property will not have the heavy hand of local regulation deprive them of their rights.”⁷² Again, the Denton ordinance banning fracking threatened the economic status quo by threatening the ability of mineral estate owners to fully exploit their interests and therefore needed to be addressed by the Legislature.⁷³ As discussed later, H.B. 40 was quite effective at achieving the stated goal of preserving the economic vitality of the oil and gas industry in Texas.⁷⁴

WCQ5]; see Maria Gallucci, *Fracking Resumes in Denton, Texas, After Governor Outlaws Local Bans on Oil and Gas Drilling*, INT'L BUS. TIMES (June 1, 2015, 2:53 PM), <http://www.ibtimes.com/fracking-resumes-denton-texas-after-governor-outlaws-local-bans-oil-gas-drilling-1947031> [<https://perma.cc/628V-HRB8>] (discussing the extent of the economic boon made possible by fracking).

70. See, e.g., Drew Darby, *Energy, Taxes Priorities in Legislative Session*, SAN ANGELO STANDARD-TIMES (Feb. 21, 2015), http://www.gosanangelo.com/opinion/columnists/drew-darby-energy-taxes-priorities-in-legislative-session_41133886 [<https://perma.cc/L96W-CQYL>] (“It will require legislative action to return to the balance we had a [sic] only a few years ago between the state encouraging recovery of oil and gas beneath our feet and the obligations of cities to ensure safe and orderly development within their jurisdictions.”).

71. See, e.g., Aleem Maqbool, *The Texas Town that Banned Fracking (and Lost)*, BBC NEWS (June 16, 2015), <http://www.bbc.com/news/world-us-canada-33140732> [<https://perma.cc/QYS6-B5AQ>] (quoting Todd Staples, President of the Texas Oil and Gas Association: “What was at stake here were the rights of those families, mineral owners, that were being denied access to their property which is protected under the US constitution.”).

72. Ari Phillips, *Texas Governor Signs Bill that Makes Local Fracking Bans Illegal*, THINKPROGRESS (May 19, 2015), <http://thinkprogress.org/climate/2015/05/19/3660369/texas-prohibits-local-fracking-bans/> [<https://perma.cc/55BJ-M24K>].

73. See, e.g., Darby, *supra* note 70 (“[C]ities are confronting fundamental questions related to how their actions will affect property rights and whether their decision can hold up to court scrutiny.”).

74. See Exclusive Jurisdiction of this State to Regulate Oil and Gas Operations in this State and the Express Preemption of Local Regulations of Those Operations, H.B. 40, 84th Leg., R.S., ch. 30, § 1, 2015 Tex. Gen. Laws 971, 971 (codified at TEX. NAT. RES. CODE ANN. § 81.0523 (West Supp. 2016)) (stating that the Bill was passed “in order to continue th[e] prosperity” of the oil and gas industry); *supra* Part II.C (discussing how the Denton ordinance threatened further fracking development, the driving force behind economic growth in the oil and gas industry); *infra* Part III.A (discussing the immediate repeal of the fracking ban by the City of Denton in the wake of H.B. 40).

2. *Maintaining the Legal Status Quo.* In the spring of 2015, the Texas Legislature took the same legal position that the GLO and the TxOGA took regarding the preemption of local ordinances regulating the oil and gas industry: Texas law, in its then-current form, impliedly preempted local ordinances.⁷⁵ However, leaving nothing to chance and wishing to avoid an unfavorable court decision, the Texas Legislature determined that “it is in the interest of this state to explicitly confirm the authority to regulate oil and gas operations in this state.”⁷⁶ The Texas Legislature stated its final intent that “this Act expressly preempt the regulation of oil and gas operations by municipalities and other political subdivisions, which is impliedly preempted by the statutes already in effect.”⁷⁷

One of the legislature’s key concerns in addressing legal ambiguity was the need to protect the oil and gas industry from a “patchwork quilt of regulations across the state.”⁷⁸ The “patchwork quilt” refers to the variety of regulations that oil and gas operators must comply with depending on what city or region of the state they are seeking to operate in.⁷⁹ Thus, this is primarily an efficiency argument: the oil and gas industry should not be slowed down or halted by local regulations and permit requirements.⁸⁰ In addition, many state officials argued that the state is the best level of government for such regulation due to its expertise in the area of oil and gas operations.⁸¹ The final version

75. H.B. 40 § 1; GLO Petition, *supra* note 45, at 4; TxOGA Petition, *supra* note 46, at 1, 8–9.

76. H.B. 40 § 1.

77. *Id.*

78. Max B. Baker, *Grassroots Network Forms to Monitor Fracking Front*, FORT WORTH STAR-TELEGRAM (Oct. 12, 2015, 12:29 PM), <http://www.star-telegram.com/news/business/article38825859.html> [<https://perma.cc/PG49-3YLN>]; see Max B. Baker, *Cities Concerned About State Urban-Drilling Bill*, FORT WORTH STAR-TELEGRAM (Apr. 11, 2015, 5:05 PM), <http://www.star-telegram.com/news/business/barnett-shale/article18289838.html> [<https://perma.cc/L37S-LFZR>] (citing Representative Drew Darby as saying a goal of H.B. 40 is to eliminate the “patchwork” of ordinances that prevent the industry from having regulatory certainty”).

79. Signature Statement, *supra* note 8.

80. *House Bill 40*, TEX. OIL & GAS ASS’N, <https://www.txoga.org/house-bill-40/> [<https://perma.cc/T45R-P5JG>] (“Outright bans on completion techniques, onerous setbacks designed to prohibit drilling, and duplicative regulations have created a patchwork of inconsistent regulations that undermines safe and *efficient* production of oil and natural gas.” (emphasis added)).

81. See, e.g., Candice Bernd, *Since the City of Denton Banned Fracking, Texas GOP Moves to Preempt Local Control*, TRUTHOUT (Mar. 8, 2015), <http://www.truthout.org/news/item/29485-since-the-city-of-denton-banned-fracking-texas-gop-moves-to-preempt-local-control> [<https://perma.cc/C65N-V9KB>] (“I do feel very strongly that air-quality measures and the engineering and scientific issues of oil and gas should be regulated at the state level, where the expertise is[.]”) (quoting Texas Representative Phil King, a Republican from Weatherford); Malewitz, *Combating Local Drilling Ordinances*, *supra*

of H.B. 40 was reached as a compromise between the TxOGA and the Texas Municipal League (TML), an organization that advocates on behalf of cities and city officials, and the major opponent to the original version of the Bill.⁸² TML's acquiescence was secured by adding specific language to the bill that would allow cities to regulate setbacks, truck traffic, and noise levels at drilling sites.⁸³ If this language had added anything of substance to protect the ability of cities to adopt and enforce city ordinances regulating the oil and gas industry, the language would actually defeat any serious attempt to eliminate the "patchwork quilt" of local regulation because each city could adopt its own ordinances, none of which would need to be consistent with any other city's ordinances.⁸⁴

III. THE LEGAL EFFECTS OF H.B. 40

Many legal scholars have written about which level of government is best positioned to make policy regarding the regulation of the oil and gas industry and hydraulic fracturing in particular.⁸⁵ However, now that H.B. 40 is in effect,⁸⁶ that academic debate is largely moot in Texas.⁸⁷ Consequently, this Comment moves beyond that debate and attempts to lay out the likely legal effects of H.B. 40.

note 60 ("Local control's great in a lot of respects, but I'm the expert on oil and gas The city of Denton is not.") (quoting Christi Craddick, Chairwoman of the Texas Railroad Commission).

82. Nicholas Sakelaris, *Compromise Reached on HB 40 that Lets Cities Limit Drilling Setbacks*, DALL. BUS. J., (Apr. 1, 2015, 10:43 AM), <http://www.bizjournals.com/dallas/news/2015/04/01/compromise-reached-on-hb-40-that-lets-cities-limit.html>.

83. *Id.*

84. See *infra* Part III.A (arguing that the language in H.B. 40 expressly granting power to local governments to regulate a small subset of oil and gas operations is in fact an extreme limitation on local government's historical ability to regulate the industry within its borders).

85. See, e.g., David B. Spence, *The Political Economy of Local Vetoes*, 93 TEX. L. REV. 351, 411 (2014) ("Should the last word about where fracking may or may not occur fall to the state or to local governments?"); Hannah J. Wiseman, *Governing Fracking from the Ground Up*, 93 TEX. L. REV. SEE ALSO 29, 36 (2015) ("[A]s academics and courts continue to wrangle over the proper allocation of entitlements, it is important to remember that many local governments currently have very little voice in the bargaining process, and federal, regional, and state regulation does not address many of the impacts they are experiencing."); Joshua P. Fershee, *How Local is Local?: A Response to Professor David B. Spence's The Political Economy of Local Vetoes*, 93 TEX. L. REV. SEE ALSO 61, 62 (2015) (arguing somewhat counterintuitively that "as long as states [and not the federal government] exercise primary control over oil and gas operations, the concept of local control has been preserved").

86. TEX. NAT. RES. CODE ANN. § 81.0523 (West Supp. 2016); *House Bill 40*, TEX. TRIB.: TEX. LEGIS. GUIDE, *supra* note 54.

87. See *infra* Part IV (discussing alternative strategies of balancing power between state and local regulation of the oil and gas industry).

This Part starts with discussing the immediate legal effect H.B. 40 has had on local attempts to regulate the oil and gas industry, including the legal impact on the City of Denton's fracking ban. It next discusses immediate alterations to the balance of power between the state and local governments regarding the regulation of the oil and gas industry. The final portion of this Part discusses the future uncertainty inherent in the choice of language used in H.B. 40.

A. *Immediate Legal Consequences*

The most apparent immediate legal consequence of the passage of H.B. 40 is the removal of any legal ambiguity concerning whether a local political subdivision can maintain a ban on hydraulic fracturing within its area of control.⁸⁸ As discussed earlier, at the time the citizens of Denton passed a referendum banning hydraulic fracturing, it was uncertain whether such a ban was legal.⁸⁹ H.B. 40 states “[a]n oil and gas operation is subject to the exclusive jurisdiction of this state,” and “a municipality . . . may not enact or enforce an ordinance . . . that bans, limits, or otherwise regulates an oil and gas operation,” subject to limited exceptions.⁹⁰ H.B. 40 defines “oil and gas operation” to include, among other activities, “hydraulic fracture stimulation.”⁹¹ This language made it clear that the Texas Legislature intended to remove any legal uncertainty by expressly preempting a municipality's ability to ban hydraulic fracturing.⁹²

The City of Denton, at least, understood that its ordinance banning hydraulic fracturing was no longer legally defensible or enforceable after the passage of H.B. 40.⁹³ The Denton City Council repealed the ordinance “because it had been rendered unenforceable by House Bill 40,” and to avoid expensive litigation costs.⁹⁴ There can be little doubt that this was the intended

88. See NAT. RES. § 81.0523(b) (expressly preempting a city from passing or enforcing a ban on fracking, inter alia activities).

89. See *supra* Part II.B (discussing the legal uncertainty surrounding state law preemption of local oil and gas ordinances).

90. NAT. RES. § 81.0523(b).

91. NAT. RES. § 81.0523(a)(2).

92. Anderson, *supra* note 5.

93. Max B. Baker, *Denton City Council Repeals Fracking Ban*, FORT WORTH STAR-TELEGRAM (June 16, 2015, 11:10 AM), <http://www.star-telegram.com/news/business/barnett-shale/article24627469.html> [<https://perma.cc/HSH4-4ZBY>].

94. *Id.*; Public Responses to Citizen Questions from 06-02-2015 City Council Meeting, City of Denton, <http://www.cityofdenton.com/home/showdocument?id=23542> [<https://perma.cc/M72S-N7NV>].

outcome of this legislation, as H.B. 40 was popularly known as the “Denton fracking bill.”⁹⁵

In addition to expressly prohibiting a city from banning hydraulic fracturing, H.B. 40 also expressly grants municipalities the authority to pass and enforce ordinances regulating limited activities incidental to oil and gas operations and meeting specific statutory criteria.⁹⁶ Specifically, H.B. 40 expressly grants the power to enact ordinances regulating “only aboveground activity related to an oil and gas operation,” so long as it is “commercially reasonable,” “does not effectively prohibit an . . . operation conducted by a reasonably prudent operator,” and “is not otherwise preempted.”⁹⁷

Parties on all sides of this issue have argued the practical legal effects of this express grant of statutory authority to regulate these activities.⁹⁸ Proponents of the legislation argue that the inclusion of this express grant of regulatory authority proves that H.B. 40 is a balanced approach that gives cities powers they did not possess before.⁹⁹ When signing the Bill into law, Governor Greg Abbott said “HB40 strikes a meaningful and correct balance between local control and preserving the state’s authority to ensure that regulations are even-handed and do not hamper job creation.”¹⁰⁰ State Representative Drew Darby, chairman of the House Energy Resources Committee that wrote H.B. 40, boasted: “We did some great things for the city It set into statute what they have the power to control on the ground as long as it is reasonable. Before they had assumed those rights, but they were never in writing.”¹⁰¹ Similarly, the TxOGA proclaimed that “House bill 40 provides cities with authority to reasonably regulate aboveground activity related to oil and natural gas operations like setbacks from other structures, traffic and noise.”¹⁰²

However, many opponents of H.B. 40 argue that it actually restricts local control over the regulation of the oil and gas industry, rather than granting the cities authority to regulate.¹⁰³ Dr. Anne Epstein, Chairman of the Board of Health for the City of Lubbock, exclaimed, “I think it is possible that people who

95. Baker, *Grassroots Network Forms to Monitor Fracking Front*, *supra* note 78.

96. NAT. RES. § 81.0523(c).

97. *Id.*

98. *See infra* notes 99–112 and accompanying text.

99. Baker, *Grassroots Network Forms to Monitor Fracking Front*, *supra* note 78.

100. *Id.*

101. *Id.*

102. *House Bill 40*, TEX. OIL & GAS ASS’N, *supra* note 80.

103. Baker, *Grassroots Network Forms to Monitor Fracking Front*, *supra* note 78.

didn't think they had an opinion about fracking are angry about the challenge to local control.”¹⁰⁴ Scott Anderson of the Environmental Defense Fund wrote, prior to the Bill's passage, that H.B. 40 would create “a complete restructuring of Texas government that will drastically impact a city's ability to protect the health, public safety and property of Texans who live in areas with heavy drilling activity.”¹⁰⁵

Most neutral legal observers agree that H.B. 40 limits the authority of home-rule cities to regulate oil and gas operations.¹⁰⁶ Prior to H.B. 40's passage, municipalities exercised authority to regulate oil and gas operations using the power granted by Article XI, Section 5 of the Texas Constitution as well as Section 92.007 of the Texas Natural Resources Code.¹⁰⁷ The Texas Constitution allows home-rule cities to exercise their police power to promote the health, safety, or general welfare of the population, unless and until expressly or impliedly prohibited from doing so by the Texas Legislature or Texas Constitution.¹⁰⁸ In addition to this constitutional grant of power, Section 92.007 of the Texas Natural Resources Code recognizes the “authority of a home-rule city to regulate exploration and development of mineral interests within its boundaries.”¹⁰⁹ Prior to the passage of H.B. 40, home-rule cities used this authority extensively to regulate the oil and gas operations within their boundaries.¹¹⁰ Thus, as most legal observers have concluded, the real and immediate impact of H.B. 40 is to restrict home-rule cities that seek to regulate oil and gas operations.¹¹¹ Thus, what was sold as an express grant of power to local governments is in reality a

104. *Id.*

105. Anderson, *supra* note 5.

106. See Austin Mercer, Weldon Woodall & Elizabeth Cromwell, *Hot Topics Impacting the Oil and Gas Industry*, STRASBURGER ATTORNEYS AT LAW, http://www.strasburger.com/wp-content/uploads/2015/10/2015_ALFA_International_Oil_Gas_and_Energy_Annual_Meeting-Hot-Topics.pdf [<https://perma.cc/CX4U-ZYRT>] (“Undoubtedly then, the key impact of H.B. 40 is that it affords Texas municipalities with far less ‘home rule’ authority than they enjoyed in the past.”); John McFarland, *Will Cities Lose Their Power to Regulate Urban Drilling?*, OIL AND GAS LAW BLOG (Apr. 14, 2015), <http://www.oilandgaslawyerblog.com/2015/04/will-cities-lose-their-power-to-regulate-urban-drilling.html> [<https://perma.cc/644J-UVZY>] (“The bill would greatly limit cities’ ability to regulate drilling.”); Mark C. Rodriguez & Brock Skelley, *House Bill 40: The Texas Legislature’s Response to Denton’s Fracking Ban*, VINSON & ELKINS (July 29, 2015), <http://www.velaw.com/Insights/House-Bill-40--The-Texas-Legislature-s-Response-to-Denton-s-Fracking-Ban/> [<https://perma.cc/N7FA-P7WM>].

107. Mercer, Woodall & Cromwell, *supra* note 106.

108. TEX. CONST. art. XI, § 5.

109. TEX. NAT. RES. CODE ANN. § 92.007 (West 2011).

110. See Anderson, *supra* note 5 (emphasizing that more than three hundred Texas cities’ ordinances are threatened).

111. Rodriguez & Skelley, *supra* note 106.

limitation on the exercise of historically accepted power to regulate oil and gas operations by local governments.¹¹²

B. Future Consequences

While H.B. 40 clearly removed any legal ambiguity regarding a municipality's ability to enforce an absolute ban on hydraulic fracturing and limited the ability of municipal governments to regulate other "oil and gas operations,"¹¹³ it is less clear just how far these new limitations on local control extend.¹¹⁴ Although H.B. 40 was popularly called the "Denton fracking bill," the scope of the Bill went well beyond a direct legislative response to the Denton ordinance banning fracking.¹¹⁵ As noted by at least one legal observer, Texas simply could have passed legislation that would have prevented cities from banning fracking within their boundaries.¹¹⁶ As it stands, the Bill's language includes many legally ambiguous terms which will likely lead to future litigation to resolve their meaning and clarify the extent of the limitations on local regulation of the oil and gas industry.¹¹⁷

1. *Refining the Jurisdictional Boundaries.* H.B. 40 states that an "oil and gas operation" is subject to the exclusive

112. See *supra* notes 98–111 and accompanying text (listing the sources of power from which cities have historically regulated the oil and gas industry in Texas); *supra* Part II.B (analyzing the presumption of validity of city ordinances and the high burden of proof required to overturn an ordinance).

113. See *supra* Part III.A (discussing how H.B. 40 expressly preempts any city ordinance banning fracking and further limits the scope of cities to regulate the oil and gas industry below historical levels).

114. See News Release, Baker Botts, Denton Litigation Relating to Hydraulic Fracturing Ban Resolved (Sept. 16, 2015), <http://www.bakerbotts.com/news/2015/09/denton-litigation-relating-to-hydraulic-fracturing> [<https://perma.cc/BND3-2WM7>] (indicating that the dismissal of the Texas Oil and Gas Association lawsuit against the City of Denton "focused narrowly on the two ordinances in the case," leaving open the possibility to challenge other municipal ordinances in the future).

115. See John McFarland, *Texas Legislature – Bills of Interest to Mineral Owners*, OIL AND GAS LAW. BLOG (June 3, 2015), <http://www.oilandgaslawyerblog.com/2015/06/texas-legislature-bills-of-interest-to-mineral-owners.html> [<https://perma.cc/Q43G-96NP>] ("[M]any cities, along with the Environmental Defense Fund, testified against the bill as an unnecessary intrusion on local control.").

116. See *id.* ("A bill introduced by Senator Burton, SB 770, which simply prohibited cities from banning hydraulic fracturing, seemed to me to be a more logical response to Denton's ban, but it never got a hearing.").

117. See *id.* ("[T]he bill leaves a lot of room for operators to challenge ordinances they consider objectionable. Determining what is 'commercially reasonable' is an invitation to litigation."); Metcalf, *supra* note 27 (advising energy company lawyers to "be on high alert for litigation and any other legislative measures that are very likely on the horizon for H.B. 40").

jurisdiction of this state.¹¹⁸ Thus, determining what is included in the definition of “oil and gas operation” is the threshold jurisdictional issue that must be settled.¹¹⁹ If an activity is an “oil and gas operation,” then clearly it would fall under the “exclusive jurisdiction” of Texas, and a local municipality would not be able to regulate the activity unless the city was able to do so through the limited exceptions.¹²⁰ If, however, an activity is not an “oil and gas operation,” then H.B. 40 would be inapplicable and the municipality would be able to regulate such activity under its home-rule authority.¹²¹ Thus, how a court interprets “oil and gas operation” as defined in the statute will clarify the statute’s ultimate scope and applicability.¹²²

H.B. 40 defines “oil and gas operation” broadly as “an activity associated with the exploration, development, production, processing, and transportation of oil and gas, including drilling, hydraulic fracture stimulation, completion, maintenance, reworking, recompletion, disposal, plugging and abandonment, secondary and tertiary recovery, and remediation activities.”¹²³ “[A]ssociated with” is the critical phrase in the statutory definition of “oil and gas operation,” which significantly broadens its scope.¹²⁴ Proponents of the oil and gas industry and proponents of strong local ordinances both believe this definition is broad enough to strike down at least some existing city ordinances.¹²⁵

Assuming a court considers a regulated activity an “oil and gas operation” under the initial jurisdictional test, the question

118. TEX. NAT. RES. CODE ANN. § 81.0523(b) (West Supp. 2016).

119. See McFarland, *supra* note 115 (describing H.B. 40’s requirements for permissible regulation of the oil and gas industry).

120. NAT. RES. § 81.0523(a)–(c).

121. See *supra* Part II.B (elaborating on home rule cities’ expansive power to regulate activities within their borders).

122. See Metcalf, *supra* note 27 (commenting on the potential for a very expansive interpretation of “oil and gas operation”).

123. NAT. RES. § 81.0523(a)(1).

124. See Metcalf, *supra* note 27 (noting that the statutory definition of “oil and gas operation” is “broadly defined”).

125. See *Oil and Gas Regulation: H.B. 40 Updates*, TEX. MUN. LEAGUE, <http://www.tml.org/HB-40-updates> [<https://perma.cc/6HX8-E9CH>] (“Make no mistake: The bill isn’t perfect. Some areas of regulation, especially those related to subsurface activity, may be preempted. . . . But here’s the essential point: *better than 80% of what most cities regulate under current ordinances is protected.*”); *House Bill 40*, TEX. OIL & GAS ASS’N, *supra* note 80 (“Recently, municipal regulations have begun to erode the state’s preeminent role in regulating oil and natural gas development. Outright bans on completion techniques, onerous setbacks designed to prohibit drilling, and duplicative regulations have created a patchwork of inconsistent regulations that undermines safe and efficient production of oil and natural gas.”).

remains as to which types of “oil and gas operations” are able to be regulated by municipal ordinances under the limited exception clause of H.B. 40.¹²⁶ The bill attempts to alleviate some of the worst fears of strong proponents of local ordinances by creating an express exception for municipalities to regulate certain “oil and gas operations.”¹²⁷ H.B. 40 lays out four criteria, all of which must be satisfied, for a city to have authority to regulate an “oil and gas operation.”¹²⁸ Specifically, H.B. 40 expressly grants the power to enact ordinances regulating “only aboveground activity” related to an oil and gas operation so long as it is “commercially reasonable,” “does not effectively prohibit an . . . operation conducted by a reasonably prudent operator,” and is not “otherwise preempted.”¹²⁹

However, supporters of local ordinances doubt the efficacy of this express exception and believe it will still allow the oil and gas industry to overturn ordinances that have been in place for years.¹³⁰ In order to qualify for an exception, a city ordinance would need to meet each of the four statutory requirements of H.B. 40.¹³¹ Thus a court would likely strike down a challenged ordinance if it failed any part of the four-part test.¹³²

Of particular concern to the Environmental Defense Fund (“EDF”) is the fact that the bill expressly preempts any regulation of below-ground activity and only creates exceptions for the regulation of an “aboveground activity.”¹³³ For example, the EDF notes that H.B. 40 completely preempts ordinances with “[r]equirements for installation, maintenance and activation of subsurface shut off valves that control well flow in the event of catastrophic damage at the surface from hurricanes.”¹³⁴ City officials from Fort Worth also express concern about the continued legality of portions of their fourteen-year-old ordinance.¹³⁵

126. NAT. RES. § 81.0523(c).

127. *Id.*

128. *See id.* (using “and” rather than “or” to qualify the exception).

129. *Id.*

130. *See* Anderson, *supra* note 5 (“HB 40 will tear down a long-standing tradition of shared authority between the state and cities.”).

131. *Id.*

132. *Id.*

133. McFarland, *supra* note 115.

134. *Railroad Commission Petitioned to Replace Local Oil and Gas Rules Threatened by House Bill 40*, ENVTL. DEF. FUND (Apr. 7, 2015), <https://www.edf.org/media/railroad-commission-petitioned-replace-local-oil-and-gas-rules-threatened-house-bill-40> [<https://perma.cc/66UH-LPNS>].

135. *See* Baker, *Cities Concerned About State Urban-Drilling Bill*, *supra* note 78 (“For example, rules banning saltwater injection wells and governing the placement of

2. *The Poison Pill: “Commercially Reasonable.”* Another major area of concern for local regulation proponents is the requirement that regulations be “commercially reasonable.”¹³⁶ H.B. 40 defines “commercially reasonable” as “a condition that would allow a reasonably prudent operator to fully, effectively, and economically exploit, develop, produce, process, and transport oil and gas, as determined based on the objective standard of a reasonably prudent operator and not on an individualized assessment of an actual operator’s capacity to act.”¹³⁷ As written, the definition of “commercially reasonable” will likely create factual disputes that will need to be resolved by a finder of fact based on the circumstances surrounding each city’s ordinance.¹³⁸ Representative Darby recognized this litigious eventuality.¹³⁹ While imploring “both parties not to rush to the courthouse,” he indicated that lawmakers “intentionally left [the definition] flexible to allow for negotiations about what is best for a particular community.”¹⁴⁰

The terms “effectively” and “economically” in the definition of “commercially reasonable” are likely to be linchpins of future litigation.¹⁴¹ Whether an ordinance allows for the “economical” or “effective” development of oil and gas depends on a number of factors including the development and availability of technology, the market price of oil and gas, and the geography and geology of the target mineral formation, to name but a few.¹⁴²

Proponents of H.B. 40 cite to the bill’s “safe harbor”¹⁴³ clause as evidence of a narrowly tailored bill reached by legislative compromise.¹⁴⁴ However, this “safe harbor” provision will likely

wastewater pipelines might not survive, they say.”).

136. See Metcalf, *supra* note 27.

137. TEX. NAT. RES. CODE ANN. § 81.0523(a)(1) (West Supp. 2016).

138. See *Oil and Gas Regulation: H.B. 40 Updates*, *supra* note 125 (noting that the TML will not provide a model ordinance “because each city’s needs and wants are unique, and also because the commercial reasonableness of various ordinance provisions will vary by geography and the level of drilling activity”).

139. Baker, *Grassroots Network Forms to Monitor Fracking Front*, *supra* note 78.

140. *Id.*

141. See Metcalf, *supra* note 27 (citing the fear of some people that the “commercially reasonable” standard will give the oil and gas industry a new power to strike down ordinances by claiming that they impede the economic feasibility of operations, including long standing ordinances).

142. See Anderson, *supra* note 5 (arguing that industry lawyers could challenge existing ordinances based on market conditions or increased cost of compliance).

143. See TEX. NAT. RES. CODE ANN. § 81.0523(d) (West Supp. 2016) (“An ordinance or other measure is considered prima facie to be commercially reasonable if the ordinance or other measure has been in effect for at least five years and has allowed the oil and gas operations at issue to continue during that period.”).

144. See Jim Malewitz, *House Committee Passes Compromise on Drilling Rules*, TEX.

be found to provide little protection to municipalities in Texas for at least two reasons.¹⁴⁵ First, the statute clearly states that meeting the two requirements to qualify for the “safe harbor” is only prima facie evidence of commercial reasonability.¹⁴⁶ This provides only a presumption of commercial reasonability; a party challenging an ordinance could present evidence that under current economic conditions, the ordinance is now commercially unreasonable, exposing it to the risk of being overturned.¹⁴⁷ Additionally, this so-called “safe harbor” provision clearly only applies to the “commercially reasonable” test.¹⁴⁸ In order for a city to regulate an “oil and gas operation” under H.B. 40, its proposed regulation must pass all four mandatory parts of the test to receive an exception to the general rule of state preemption.¹⁴⁹ Thus, a long-standing city ordinance that qualifies for the “safe harbor” provision under the “commercially reasonable” test yet impermissibly regulates an underground activity would still be struck down as a violation of H.B. 40.¹⁵⁰

Despite H.B. 40’s obvious shortcomings, the TML, with minimal reservations, agreed to not offer any amendments to the Bill in its final form.¹⁵¹ The TML considers the final definition of “commercially reasonable” to be a legislative victory reached by compromise with the TxOGA.¹⁵² The TML particularly approves

TRIB. (Mar. 30, 2015, 6:23 PM), <http://www.texastribune.org/2015/03/30/house-committee-passes-compromise-drilling-rules/> [<https://perma.cc/8X3Q-FAYU?type=image>] (stating that the bill includes a provision labeled a “safe harbor” by Representative Drew Darby which would protect any ordinances that have not met a legal challenge in the past five years).

145. See Anderson, *supra* note 5 (“It does not apply to the other three tests, and it does not automatically mean such ordinances are enforceable.”) (emphasis in original).

146. NAT. RES. § 81.0523(d).

147. See Anderson, *supra* note 5 (“Industry lawyers can still challenge ordinances based on changing market conditions or costs of compliance.”).

148. NAT. RES. § 81.0523(d); see Anderson, *supra* note 5 (“[T]his so-called ‘safe-harbor’ doesn’t protect ordinances from the rest of the mandatory tests, whatsoever.”).

149. NAT. RES. § 81.0523(c) (listing the mandatory requirements of any proposed regulation of an oil and gas operation by local government).

150. See Anderson, *supra* note 5 (agreeing that the “safe harbor” only applies to the “commercially reasonable” test and not the other three mandatory tests).

151. See Malewitz, *House Committee Passes Compromise on Drilling Rules*, *supra* note 144 (“It’s a lot better[.] . . . There’s a couple of things we’re not 100 percent happy with, but it’s much better[.]”) (quoting Bennett Sandlin, executive director of the TML).

152. See *Oil and Gas Regulation: H.B. 40 Updates*, *supra* note 125 (“The final version of the bill . . . includes a much better definition of ‘commercially reasonable,’ one of the tests an ordinance must meet to be valid under the bill.”). Prior to the modifications, the TML was strongly opposed to H.B. 40. *Oil and Gas Industry Goes Nuclear Against Homeowners*, TEX. MUN. LEAGUE, http://www.tml.org/legis_updates/oil-and-gas-industry-goes-nuclear-against-homeowners [<https://perma.cc/N54W-TJDD>] (“The League suspected that the industry would not be satisfied with legislation prohibiting fracking bans, like

of the language, finding that it creates an objective standard rather than a subjective standard for a particular oil and gas operator.¹⁵³

As discussed in this Part, H.B. 40 includes many ambiguous words and phrases that lend themselves well to future disputes and litigation. Although an improvement over the original version of the Bill, the current law threatens to eventually ruin a long history of cooperation between the oil and gas industry and local regulators. As of the time of this writing, there are no pending lawsuits directly challenging the enforcement of any city ordinance regulating an “oil and gas operation” using an H.B. 40 legal theory.¹⁵⁴ However, the lack of lawsuits at this time may have more to do with economic conditions rather than potential for conflict created by H.B. 40 itself.¹⁵⁵ Further, there has not been widespread evidence of cities proactively overturning or rewriting their ordinances in response to H.B. 40, although this is probably due to the lack of litigation and judicial clarification on the scope of H.B. 40.¹⁵⁶ However, this will not likely be the case for long.¹⁵⁷

IV. CONCLUSION

H.B. 40, which expressly preempts local control of “oil and gas operations,” is now the law in Texas.¹⁵⁸ It was hastily written in response to a local ordinance in Denton that banned fracking.¹⁵⁹ H.B. 40 is an overreaction by the state government;

the one that voters approved in Denton. And now it’s clear they have gotten greedy and see an opportunity to pursue a ‘scorched earth’ strategy to wipe out nearly every city regulation.”).

153. See *Oil and Gas Regulation: H.B. 40 Updates*, *supra* note 125 (determining that an objective standard of judging an operator’s conduct was one of four significant improvements in the final version of the bill).

154. See *id.* (listing a lawsuit filed against the City of Rockdale, but noting that the lawsuit is based on a city ordinance that was in place prior to Rockdale’s recent overhaul of its oil and gas ordinance following enactment of H.B. 40). The lawsuit makes no mention of H.B. 40 or the new city ordinance. See Plaintiff’s Original Complaint, *McKinney v. City of Rockdale*, No. 6:15-cv-00335 (W.D. Tex., Nov. 19, 2015).

155. See *U.S. Crude Oil and Natural Gas Rotary Rigs in Operation*, U.S. ENERGY INFO. ADMIN. https://www.eia.gov/dnav/ng/hist/e_ertrr0_xr0_nus_cm.htm [https://perma.cc/28YM-JZBQ] (demonstrating the prolific fall in the number of oil rigs currently in service indicating a decrease in permit applications and thus potential conflict with local ordinances).

156. See *Oil and Gas Regulation: H.B. 40 Updates*, *supra* note 125 (citing a lack of litigation and recommending that cities take a cautious approach to amending any existing city ordinances).

157. See *Metcalf*, *supra* note 27.

158. See *Malewitz, Abbott Signs “Denton Fracking Bill”*, *supra* note 62.

159. See *id.*

while it resolves some legal uncertainties,¹⁶⁰ it creates many additional legal uncertainties which will likely require extensive litigation to resolve.¹⁶¹ Rather than allowing the judicial system to resolve the legality of the ban¹⁶² or responding proportionately by simply passing a law that prohibits cities from banning fracking,¹⁶³ the Texas Legislature passed and the Texas Governor signed a bill which is likely to permanently alter the balance of power between local and state government concerning the regulation of the oil and gas industry in Texas.¹⁶⁴

Jeff Lam

160. See *supra* Part III.A (discussing the express preemption of any local attempt to ban fracking or otherwise pass regulations that effectively prohibit oil and gas operations).

161. See *supra* Part III.B (discussing the failure of H.B. 40 to clarify where state authority ceases and local authority begins through the use of purposefully ambiguous words which will need to be resolved through litigation or other means).

162. See *Oil and Gas Regulation: H.B. 40 Updates*, *supra* note 125 (showing that the Texas Legislature passed H.B. 40 during pending litigation challenging the legality of Denton's ordinance banning fracking, resulting in the ultimate dismissal of both law suits).

163. See *supra* note 115 and accompanying text (indicating that the Texas Legislature, encouraged by the oil and gas industry, bypassed opportunities for a proportional response and opted instead for the nuclear option against local regulation of industry).

164. See *supra* Part III.B (questioning the continued viability of the numerous city ordinances less extreme than an outright ban on fracking, in light of the legally ambiguous and seemingly industry friendly terms used in H.B. 40).