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# Mora County and Denton: Constitutional Challenges to Hydraulic Fracturing Bans

*By Samuel Boxerman, Joel Visser, and Ben Tannen\**

*This article examines the potential constitutional challenges to local ordinances that ban or restrict hydraulic fracturing, focusing on potential takings, substantive due process, equal protection, and dormant Commerce Clause claims. The article also addresses First Amendment and Supremacy Clause challenges to the enforcement provisions of one such ordinance.*

In recent years, some local governments reacted to the dramatic growth in oil and gas development using hydraulic fracturing by enacting ordinances that ban or restrict hydraulic fracturing within their borders. In response, landowners, lessees, and other interested parties have sought to overturn these local restrictions, raising a number of legal challenges. This article examines the potential constitutional challenges to such local ordinances, focusing on potential takings, substantive due process, equal protection, and dormant Commerce Clause claims. This article also addresses First Amendment and Supremacy Clause challenges to the enforcement provisions of one such ordinance. As detailed, while some constitutional challenges—such as takings, dormant Commerce Clause, and enforcement-based claims—have some merit, others appear less likely to succeed. However, these matters are only beginning to work their way through the courts, and it remains to be seen how judges will decide the constitutionality of these restrictions on the use of private property.

## HYDRAULIC FRACTURING

The direct economic benefits to the United States economy from hydraulic fracturing are well known, as upstream oil and gas activities from this technology have led to 1.7 million jobs and a total of \$63 billion in federal and state taxes by the end of 2012.<sup>1</sup> Moreover, the dramatic increase in domestic U.S. oil and gas production has contributed to the worldwide increase in supply—driving down prices of crude oil, strengthening the U.S. dollar, diminishing U.S. reliance on foreign producers, and contributing to pressures on foreign regimes that rely on petroleum-derived energy to sustain their economies.

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<sup>1</sup> IHS Global, *America's Energy Future: The Unconventional Oil and Gas Revolution and the US Economy, Volume 2: State Economic Contributions* (Dec. 2012).

## LEGAL FRAMEWORK

United States production depends to a large degree on the legal framework within each individual state, as historically oil and gas production has been regulated largely at the state level. To date, recognizing the enormous economic value from increased production, most states have allowed hydraulic fracturing to occur subject to increased regulation and permitting requirements. However, often urged on by local and national activists, a number of local governments have enacted ordinances and other laws to restrict hydraulic fracturing within their borders due to alleged environmental and health effects. The restrictions vary from nonbinding municipal resolutions urging states with temporary moratoria to permanently ban hydraulic fracturing<sup>2</sup> on one hand to complete bans on the extraction of oil and natural gas, whether by hydraulic fracturing or conventional means<sup>3</sup> on the other. In addition to complete bans, some local governments have imposed additional requirements for hydraulic fracturing beyond those mandated by state laws and regulations.<sup>4</sup> In total, over 400 local governments in the United States have passed laws or ordinances that restrict or prohibit the use of hydraulic fracturing.<sup>5</sup>

In several cases, proponents of hydraulic fracturing have sued municipalities, arguing that local bans are preempted by state regulation of oil and gas development.<sup>6</sup> More recently, several landowners and leaseholders in New Mexico and Texas have taken a different legal approach to local bans on hydraulic fracturing by filing lawsuits that include federal constitutional claims.

## MORA COUNTY, NEW MEXICO

Two of the earliest complaints alleging constitutional violations addressed Mora County, New Mexico's ordinance 2013-01, the Community Water Rights and Local Self-Governance ordinance, adopted in April 2013. Among other provisions, the

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<sup>2</sup> Durham, N.C., Resolution No. 9813 (Apr. 19, 2012).

<sup>3</sup> § 5.1, Mora Cnty., N.M., Ordinance 2013-01 (Apr. 29, 2013).

<sup>4</sup> *State ex rel. Morrison v. Beck Energy Corp.*, 989 N.E.2d 85, 89 (Ohio Ct. App. 2013), *appeal pending*, No. 2013-0465 (Ohio June 19, 2013) (analyzing various ordinances of Munroe Falls, Ohio, which impose additional requirements on drilling such as drilling permits, conditional zoning certificates, and right-of-way construction permits, among others).

<sup>5</sup> Local Actions against Fracking, FOOD AND WATER WATCH, <http://www.foodandwaterwatch.org/water/fracking/fracking-action-center/local-action-documents/> (last visited November 18, 2014).

<sup>6</sup> See, e.g., *Voss v. Lundvall Bros.*, 830 P.2d 1061 (Colo. 1992) (home-rule city could exercise some local land-use control, but state's interest in efficient development and production of oil and gas preempted total ban); *In re Mark S. Wallach, as Chapter Matter of Wallach v. Town of Dryden*, 992 N.Y.S. 2d 710, 713 (N.Y. 2014) (local ban upheld because state oil and gas statute did "not preempt the home rule authority vested in municipalities to regulate land use"); *State ex rel. Morrison v. Beck Energy Corp.*, 989 N.E.2d 85 (Ohio Ct. App. 2013), *appeal pending*, No. 2013-0465 (Ohio June 19, 2013) (local ordinances "in direct conflict with" state statutory scheme); *N.E. Natural Energy, LLC v. Morgantown*, slip op., CA No. 11-C-411 (W. Va. Cir. Ct. of Monongalia Co. Aug. 12, 2011) (state oil and gas regulations preempted local ban on hydraulic fracturing).

Mora County ordinance prohibits corporations from engaging in the following actions within the county's boundaries:

- (1) extracting oil or natural gas (Section 5.1);
- (2) extracting water for use in hydrocarbon development (Section 5.2);
- (3) storing wastewater from hydrocarbon development; and
- (4) constructing infrastructure related to hydrocarbon development (Section 5.4).<sup>7</sup>

The ordinance also contains expansive penalty provisions which strip violators of a vast array of Constitutional and statutory rights. For example, Section 5.5 states that corporations that violate the ordinance, or seek to engage in activities it prohibits forfeit both the “rights of ‘persons’” under the federal Constitution and, more specifically, their “rights under the 1st or 5th amendments to the United States Constitution.”<sup>8</sup> Individuals or corporations that violate the ordinance, or seek to engage in prohibited activities, are also prohibited from enforcing “State or federal preemptive law” against the county’s residents (Section 5.6).<sup>9</sup> Further, Section 5.8 states that the New Mexico and federal bills of rights only have preemptive effect when not inconsistent with the ordinance, and Section 5.9 states that state and federal statutes and rules only have preemptive effect if they expressly preempt the county ordinance and provide sufficient health protections.<sup>10</sup>

Two sets of plaintiffs have brought facial challenges to the Mora County ordinance in federal district court, seeking to permanently enjoin enforcement of the ordinance on federal constitutional grounds.<sup>11</sup> On November 11, 2013, several local landowners and a trade association of New Mexico oil and gas producers (the *Vermillion* plaintiffs) challenged the ordinance.<sup>12</sup> The *Vermillion* plaintiffs included substantive due process and First Amendment claims along with a number of non-constitutional challenges to the ban.<sup>13</sup> On November 13, 2014, the *Vermillion* plaintiffs filed a motion for summary judgment, which is still pending.

SWEPI LP, a limited partnership that signed two mineral leases in Mora County in 2010, filed a second complaint on January 10, 2014.<sup>14</sup> In addition to the

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<sup>7</sup> Mora Cnty., N.M., Ordinance 2013-01 (Apr. 29, 2013). This article will focus on constitutional challenges to the moratorium itself, and not to the ordinance’s extensive penalty provisions, which include stripping violators of their First Amendment rights.

<sup>8</sup> Mora Cnty., N.M., Ordinance 2013-01 (Apr. 29, 2013).

<sup>9</sup> Mora Cnty., N.M., Ordinance 2013-01 (Apr. 29, 2013).

<sup>10</sup> Mora Cnty., N.M., Ordinance 2013-01 (Apr. 29, 2013).

<sup>11</sup> Amended Complaint at ¶ 5 (Prayer for Relief), *Vermillion v. Mora Cnty.*, No. 1:13-cv-01095 (D. N.M. 2014); Complaint at ¶ 151, *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035 (D. N.M. 2014).

<sup>12</sup> Amended Complaint, *Vermillion v. Mora Cnty.*, No. 1:13-cv-01095 (D. N.M. 2014).

<sup>13</sup> Amended Complaint at ¶¶ 79, 99, *Vermillion v. Mora Cnty.*, No. 1:13-cv-01095 (D. N.M. 2014).

<sup>14</sup> Complaint at ¶¶ 4, 5, *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035 (D. N.M. 2014).

substantive due process claim, First Amendment claim, and non-constitutional claims raised by the *Vermillion* plaintiffs, SWEPI also asserted the ordinance violated the Fifth Amendment's takings clause, the Fourteenth Amendment's equal protection clause, the dormant Commerce Clause, and the Supremacy Clause.<sup>15</sup> On May 13, 2014, SWEPI filed a motion for partial judgment on the pleadings. On January 19, 2015, the court issued an order holding that certain provisions of the ordinance violated the Supremacy Clause and the First Amendment.<sup>16</sup> The court also held that SWEPI's takings claim was not yet ripe and denied the motion with respect to the substantive due process and equal protection claims.<sup>17</sup> The court did not address the dormant Commerce Clause claim, as it was not raised in the motion on the pleadings. After concluding that the invalid provisions were not severable, the court invalidated the ordinance in its entirety.<sup>18</sup> As of the date of submission of this article, the county had not yet made a decision whether to appeal this ruling.<sup>19</sup>

## DENTON, TEXAS

Likewise, over the past three years the city of Denton, Texas passed a series of ordinances that temporarily prohibited hydraulic fracturing within city borders. The first such ordinance, ordinance No. 2012-024, was enacted on February 7, 2012. It imposed a moratorium on the receipt, processing, and approval of applications for certain permits for natural gas exploration and production, including hydraulic fracturing.<sup>20</sup> This temporary moratorium on hydraulic fracturing was extended several times via ordinances 2012-126, 2012-231, and 2012-368, until it finally expired on January 29, 2013.<sup>21</sup> In May 2014, the Denton city council revived the temporary moratorium through September 9, 2014.<sup>22</sup> The May 2014 moratorium was later extended until January 20, 2015.<sup>23</sup> In the interim, on November 4, 2014,

<sup>15</sup> Complaint at ¶¶ 55, 61, 79, 136, 137, *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035 (D. N.M. 2014).

<sup>16</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 2 (D. N.M. Jan. 19, 2015).

<sup>17</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 2 (D. N.M. Jan. 19, 2015).

<sup>18</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 3 (D. N.M. Jan. 19, 2015).

<sup>19</sup> Ellen M. Gilmer, *Federal Judge Strikes Down N.M. County's Fracking Ban as Unconstitutional*, ENERGYWIRE, Jan. 21, 2015, <http://www.eenews.net/energywire/2015/01/21/stories/1060011991>.

<sup>20</sup> Denton, Tex., Ordinance No. 2012-024 (Feb. 7, 2012). Despite its broad language imposing a moratorium "on the receipt, processing and approval of applications for oil and gas well permits . . . within the corporate limits of the City of Denton," the ordinance goes on to provide an exemption for "applications for permits relating to the drilling of wells, which do not require hydraulic fracturing . . . ." *Id.* at Sec. 1.

<sup>21</sup> § 2, Denton, Tex., Ordinance No. 2012-126 (June 5, 2012); § 4, Denton, Tex., Ordinance No. 2012-231 (Sept. 11, 2012); § 2, Denton, Tex. Ordinance No. 2012-368 (Dec. 18, 2012); § 3, Denton, Tex., Ordinance No. 2013-014 (Jan. 15, 2013).

<sup>22</sup> § 2, Denton, Tex., Ordinance No. 2014-137 (May 6, 2014); § 2, Denton, Tex., Ordinance No. 2014-192 (June 17, 2014).

<sup>23</sup> § 3, Denton, Tex., Ordinance No. 2014-276 (Sept. 9, 2014).



Denton residents voted to make the moratorium on hydraulic fracturing permanent.<sup>24</sup>

On September 11, 2014, a group of property owners sued Denton over this series of temporary moratoria.<sup>25</sup> In their Amended Original Petition and Request for Disclosure, the plaintiffs brought takings and substantive due process claims along with several non-constitutional claims.<sup>26</sup> On October 3, 2014, defendants removed the case to federal court.<sup>27</sup> On October 30, 2014, the plaintiffs filed a motion to remand to state court, which is still pending.<sup>28</sup>

As discussed below, these constitutional claims face varying likelihoods of success—and deal with issues for which the law remains to be developed. The *SWEPI* court's holdings on some of these claims both confirms much of our analysis of the case law and also demonstrates the alternative path courts might take in future cases over such moratoria.

## TAKINGS

The Fifth Amendment Takings Clause specifies, “[N]or shall private property be taken for public use, without just compensation.”<sup>29</sup> Historically, takings claims succeeded only when the government physically condemned or intruded on property.<sup>30</sup> In *Pennsylvania Coal Co. v. Mahon*, however, the Supreme Court expanded the scope of the Takings Clause to include regulatory takings, which occur when a regulation becomes too burdensome.<sup>31</sup> The Court explained that “[t]he general rule at least is, that while property may be regulated to a certain extent, if

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<sup>24</sup> § 2, Denton, Tex., Ordinance No. 2014-218 (July 15, 2014); Jim Malewitz, *Denton Bans Fracking, But Challenges Almost Certain*, TEXAS TRIBUNE, Nov. 5, 2014, <http://www.texastribune.org/2014/11/05/denton-bans-fracking-spurring-bigger-clashes/>. This permanent ban was immediately challenged in court. See Petition, *Texas Oil & Gas Assoc. v. Denton*, No. 14-08933-431 (Denton Cnty. Dist. Ct. Nov. 5, 2014); Complaint, *Jerry Patterson, Commissioner, Texas General Land Office v. City of Denton*, No. D-1-GN-14-004628 (Travis Cnty. Dist. Ct. Nov. 5, 2014). However, this article focuses on a different challenge to the temporary bans, discussed below, since neither of the two lawsuits over the permanent ban involved constitutional challenges, thus making them outside the scope of this article.

<sup>25</sup> Original Petition and Request for Disclosure, In re *Arsenal Minerals and Royalty v. City of Denton*, No. 14-07262-431 (Denton Cnty. Dist. Ct. Sept. 11, 2014).

<sup>26</sup> ¶ 16, Amended Original Petition and Request for Disclosure, In re *Arsenal Minerals and Royalty v. City of Denton*, No. 14-07262-431 (Denton Cnty. Dist. Ct. Sept. 12, 2014).

<sup>27</sup> Defendant's Notice of Removal, In re *Arsenal Minerals and Royalty v. City of Denton*, 4:14-cv-00639 (E.D. Tex. Oct. 3, 2014).

<sup>28</sup> Plaintiffs First Motion to Remand to State Court, In re *Arsenal Minerals and Royalty v. City of Denton*, 4:14-cv-00639 (E.D. Tex. Oct. 30, 2014).

<sup>29</sup> U.S. CONST. Amend. V.

<sup>30</sup> See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 668 (1887).

<sup>31</sup> 260 U.S. 393 (1922).

regulation goes too far it will be recognized as a taking.”<sup>32</sup>

### Ripeness

As a preliminary matter, a claimant must satisfy the prudential ripeness considerations the Supreme Court has established for takings claims.<sup>33</sup> Specifically, in *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, the Supreme Court held that this prudential ripeness test looked at two factors:

- (1) “the government entity charged with implementing the regulations [must] ha[ve] reached a final decision regarding the application of the regulations to the property at issue,” and
- (2) the potential challenger must have sought “compensation through the procedures the State has provided for doing so” or prove that these procedures are unavailable or inadequate.<sup>34</sup>

These threshold requirements can be quite burdensome. For example, to satisfy the first prong, plaintiffs may have to seek variances to establish that a regulation is a final government action.<sup>35</sup> Under the second prong, a plaintiff may have to bring an inverse condemnation action in state court, if state law provides for such a proceeding.<sup>36</sup> Moreover, an argument that state procedures are inadequate is likely to be considered “highly speculative” and insufficient, unless a plaintiff can point to landowners who have failed to receive adequate compensation through those state procedures.<sup>37</sup> Thus, courts have found state procedures inadequate only if they “almost certainly will not justly compensate the claimant.”<sup>38</sup>

### *Lucas Per Se Taking*

On the merits, the Supreme Court has identified two different categories of regulatory takings. The first category, known as a “*Lucas per se*” taking, occurs when a “regulation denies *all* economically beneficial or productive use of land.”<sup>39</sup> The Supreme Court has applied the *Lucas* test strictly. In one case, it held that a regulation that reduced a property’s value by 94 percent, from \$3,315,000 to \$200,000, did not effect a *Lucas per se* taking.<sup>40</sup> The Supreme Court has also imposed a temporal condition on *Lucas* takings, requiring that the owner possess the “proscribed use

<sup>32</sup> 260 U.S. 393, 415 (1922).

<sup>33</sup> *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Env’tl. Prot.*, 560 U.S. 702, 729 (2010).

<sup>34</sup> 473 U.S. 172, 186, 194, 197 (1985).

<sup>35</sup> *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 188 (1985).

<sup>36</sup> *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 196 (1985).

<sup>37</sup> *Carson Harbor Vill., Ltd. v. City of Carson*, 353 F.3d 824, 830 (9th Cir. 2004).

<sup>38</sup> *Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991), *abrogated on other grounds by Stop the Beach Renourishment, Inc. v. Florida Dep’t of Env’tl. Prot.*, 560 U.S. 702, 729 (2010).

<sup>39</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (emphasis added).

<sup>40</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 616, 632 (2001).

interests” as part of the property title *before* enactment of the regulation that allegedly deprived the property of all value.<sup>41</sup>

Further, under a *Lucas per se* takings claim, a court will evaluate the regulation’s effect on “the parcel as a whole.”<sup>42</sup> A plaintiff cannot “divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”<sup>43</sup> Following that direction, some courts have evaluated *Lucas* takings claims by looking at “the value of the parcel as a whole,” assuming that its owners hypothetically possess it in fee simple absolute, even if they do not. For example, in a case alleging a regulatory taking based on a regulation that restricted hunting on claimant’s land, the court held that “the relevant denominator” was “the entire bundle of rights associated with the parcel of land,” not the “right to hunt.”<sup>44</sup> By contrast, other courts may analyze the owners’ actual property interest and determine whether that interest has lost all of its value.<sup>45</sup> How a court interprets this requirement could determine the likelihood that a *Lucas per se* takings claimant will prevail, depending upon the nature of the plaintiff’s ownership interests.

In contrast to owners, limited case law on lease interests suggests that lessees may have a stronger basis to assert a *Lucas* takings claim than landowners, due to the narrower scope of the property rights they possess. Like landowners, lessees can bring takings claims, including claims based on a lease of mineral rights.<sup>46</sup> At least one court has indicated that land use regulation might deny all economic benefit from a lease if the remaining permissible uses render a lessee unable to use its property “in any economically viable way.”<sup>47</sup> In that case, the court found that a town’s denial of a lessee’s application to mine limestone constituted a taking when other available uses of the lease, such as mining sand and gravel, were not profitable.<sup>48</sup>

### ***Penn Central* Taking**

The second type of regulatory taking is a *Penn Central* taking. In *Penn Central*, the

<sup>41</sup> *Lucas v South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992).

<sup>42</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 327 (2002) (“[I]n the analysis of regulatory takings claims . . . we must focus on ‘the parcel as a whole’”). This is the rule for all takings claims, but it is most relevant in the *Lucas* context.

<sup>43</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–131 (1978).

<sup>44</sup> See, e.g., *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1570–71, 1577 (10th Cir. 1995).

<sup>45</sup> *Martin Marietta Materials, Inc. v. City of Carmel*, 2007 U.S. Dist. LEXIS 88922 at \*41 (S.D. Ind. Nov. 28, 2007); cf. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 50001 (1987) (implying that if the support estate, which under state law is “‘the right to remove the strata of coal and earth that undergird the surface or to leave those layers intact to support the surface,’” were truly distinct from the surface or mineral estate, its total elimination might be a taking).

<sup>46</sup> *United States v. Petty Motor Co.*, 327 U.S. 372, 374, 378 (1946); *Bass Enterprises Prod. Co. v. United States*, 381 F.3d 1360, 1361, 1362 (Fed. Cir. 2004) (lessee brought takings claim which court then analyzed on its merits).

<sup>47</sup> *Martin Marietta Materials, Inc. v. City of Carmel*, 2007 U.S. Dist. LEXIS 88922 at \*41 (S.D. Ind. Nov. 28, 2007).

<sup>48</sup> *Martin Marietta Materials, Inc. v. City of Carmel*, 2007 U.S. Dist. LEXIS 88922 at \*41 (S.D. Ind. Nov. 28, 2007).

Supreme Court considered whether a historic preservation law's construction limits constituted a taking.<sup>49</sup> The Court identified three main factors for determining if a taking occurred:

- (1) economic impact of the regulation;
- (2) the regulation's effects on "distinct investment-backed expectations;" and
- (3) "the character of the government action."<sup>50</sup>

The most important factor in the *Penn Central* test is the "distinct investment-backed expectations" prong.<sup>51</sup> The Supreme Court has heard two natural resource extraction cases that illustrate the importance of investment-backed expectations. In *Mahon*, a statute prohibited mining coal in a manner that caused subsidence of certain structures, regardless of the contractual rights negotiated between the owners of the surface and mineral estates.<sup>52</sup> The Court determined that a taking had occurred because "[w]hat makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."<sup>53</sup> In other words, the statute dramatically interfered with the coal company's investment-backed expectations. On the other hand, in a more recent decision involving coal mining regulations designed to prevent subsidence, the Court held that no taking had occurred.<sup>54</sup> The Court found no basis to suggest that the regulation denied petitioners' investment-backed expectations, in part because "petitioners have not claimed, at this stage, that the Act makes it commercially impracticable for them to continue mining."<sup>55</sup>

The second *Penn Central* factor, the economic impact prong, requires a significant interference with economic interests.<sup>56</sup> Unlike with *Lucas* takings, there is no "automatic numerical [percentage] barrier" which must be exceeded for a potential regulatory taking to satisfy the "economic impact" prong of the *Penn Central* test.<sup>57</sup>

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<sup>49</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 107 (1978).

<sup>50</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>51</sup> *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) ("It is to the last of these three factors that we now direct our attention, for we find that the force of this factor is so overwhelming, at least with respect to certain of the data submitted by Monsanto to EPA, that it disposes of the taking question regarding those data"); *Borough of Columbia v. Surface Transp. Bd.*, 342 F.3d 222, 235 (3d Cir. 2003) ("We begin with the element most crucial to this case—the extent to which the regulation has interfered with distinct investment-backed expectations"). See also Carole Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims after Property Transfers*, 36 Conn. L. Rev. 7, 21 (2003).

<sup>52</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412–13 (1922).

<sup>53</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

<sup>54</sup> *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

<sup>55</sup> *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495–96 (1987).

<sup>56</sup> *Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962 (1st Cir. 1993).

<sup>57</sup> *Cienega Gardens v. United States*, 331 F.3d 1319, 1340 (Fed. Cir. 2003) (quoting *Yancey v.*

Thus, in *Yancey*, the court held that a taking had occurred when government-imposed quarantine reduced the value of the plaintiff's healthy turkey breeding stock by 77 percent.<sup>58</sup>

The final *Penn Central* prong, the “character of the government action,” relates to the fact that “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”<sup>59</sup> Permissible government programs which nonetheless negatively affect economic interests have included taxation programs<sup>60</sup> and federal insurance for and regulation of multiemployer pension plans.<sup>61</sup>

### New Mexico Litigation—SWEPI

SWEPI brought facial takings challenges to the Mora County ordinance under both *Lucas* and *Penn Central*.<sup>62</sup> In its January 2015 order, the court held that SWEPI's takings claim was not ripe because SWEPI had failed to seek compensation under New Mexico law before bringing its claim.<sup>63</sup> However, there is a circuit split on whether the ripeness test applies to facial challenges, and courts in other circuits may not reach the same decision that a takings challenge is unripe under these circumstances.<sup>64</sup>

However, if the court had proceeded to the merits of the takings issue, it would have found that SWEPI had both strong *Lucas* and *Penn Central* claims. With respect to its *Lucas* claims, SWEPI's entire property interest is its lease of mineral rights. Since the Mora County ordinance's blanket prohibition on oil and gas development likely would make it impossible for SWEPI to raise any revenue from the lease, it seems to deny SWEPI all economically beneficial use of its property interest.<sup>65</sup> In fact, when assessing SWEPI's standing to bring the takings claim, the court found that “[t]he

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*United States*, 915 F.2d 1534, 1539, 1541 (Fed. Cir. 1990)).

<sup>58</sup> *Yancey v. United States*, 915 F.2d 1534, 1541 (Fed. Cir. 1990).

<sup>59</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>60</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>61</sup> *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 225 (1986).

<sup>62</sup> Complaint at ¶¶ 136, 137, *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035 (D. N.M. 2014).

<sup>63</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 114 (D. N.M. Jan. 19, 2015).

<sup>64</sup> Compare *Peters v. Vill. of Clifton*, 498 F.3d 727, 732 (7th Cir. 2007) (post-*Lingle* case holding that “[s]imilarly, the Supreme Court has held that many facial challenges to legislative action authorizing a taking can be litigated immediately in federal court”); *Holliday Amusement Co. of Charleston v. S. Carolina*, 493 F.3d 404, 407 (4th Cir. 2007) (post-*Lingle* case holding that “[w]e recognize, of course, that the state procedures requirement does not apply to facial challenges to the validity of a state regulation”) with *Alto Eldorado P’ship v. Cnty. of Santa Fe*, 634 F.3d 1170, 1177 (10th Cir. 2011) (“[A] plaintiff mounting a challenge to a regulation alleging a taking without just compensation is required to meet the second Williamson County requirement”).

<sup>65</sup> *Martin Marietta Materials, Inc. v. City of Carmel*, 2007 U.S. Dist. LEXIS 88922 at \*41 (S.D. Ind. Nov. 28, 2007).

Ordinance effectively destroys all economic value that SWEPI, LP has in its leases.”<sup>66</sup> However, if a court were to evaluate “the parcel as a whole” instead of focusing solely on the leasehold interest, it would likely be more challenging for a plaintiff such as SWEPI to demonstrate that there is no economically beneficial use of the property.<sup>67</sup>

Regarding its *Penn Central* claim, SWEPI signed mineral leases “for the purpose of exploring for and producing hydrocarbons from said land.”<sup>68</sup> The ordinance’s prohibitions on all forms of oil and gas exploration thus denied the company’s reasonable investment-backed expectation at the time the lease was signed of using its leaseholds for oil and gas development.<sup>69</sup> Moreover, at least one of the remaining *Penn Central* factors points in SWEPI’s favor. Even if the court had found that Mora County’s ordinance did not deprive SWEPI of all economically beneficial use of its leased property, the ordinance certainly imposed a “significant” economic burden on SWEPI by depriving it of the ability to develop the most valuable mineral resources on the lease. Given the court’s ruling on the substantive due process and equal protection clause claims, the court would have likely concluded under the third *Penn Central* factor that the ordinance is intended to promote the common good because hydraulic fracturing poses risks to public health and welfare. Even so, a balancing of the three factors would likely favor SWEPI.

### City of Denton Litigation

Because the plaintiffs’ petition provides fewer details about their property interests and did not specify expressly in their complaint whether they were making a *Lucas* or *Penn Central* claim, their claim is more difficult to evaluate at this juncture.<sup>70</sup> However, in general, the analysis of the Denton plaintiffs’ claims would be similar to that of SWEPI, although the Denton plaintiffs may face more obstacles than SWEPI. As property owners, the Denton plaintiffs’ property rights are broader than the SWEPI plaintiffs’ rights as lessees to extract oil and gas, potentially making it more difficult to demonstrate the loss of all beneficial use under *Lucas* or a sufficiently large economic impact under *Penn Central*. This could be particularly true if the plaintiffs own both the mineral and surface estates in fee simple absolute and can potentially earn some income through surface development. For plaintiffs who only own mineral rights, the viability of their claim may depend on how broadly the courts apply the “parcel as a whole” requirement and whether there are other valuable minerals present at the properties.

<sup>66</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 102 (D. N.M. Jan. 19, 2015).

<sup>67</sup> SWEPI does not appear to face any timing issues related to its claim because it became a lessee in 2010, three years before Mora County adopted the ordinance. Complaint at ¶¶ 4, 37, *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035 (D. N.M. 2014); see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992).

<sup>68</sup> Complaint at ¶ 4, *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035 (D. N.M. 2014).

<sup>69</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>70</sup> The Amended Original Petition states that “[t]he plaintiffs own property within the extra-territorial jurisdiction, abutting the extra-territorial-jurisdiction or within the City Limits of Denton, Texas.” § 3, Amended Original Petition and Request for Disclosure, *In re Arsenal Minerals and Royalty v. City of Denton*, No. 14-07262-431 (Denton Cnty. Dist. Ct. Sept. 12, 2014).



## FIRST AMENDMENT

The First Amendment states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”<sup>71</sup> The First Amendment was incorporated into the Fourteenth Amendment and applies to state and local governments. The Supreme Court has also recognized that corporations have First Amendment rights.<sup>72</sup>

One of the overarching goals of the Supreme Court’s First Amendment jurisprudence is to ensure that laws targeting First Amendment rights are narrowly drafted, since “[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”<sup>73</sup> Courts evaluate the “precision of regulation” under the overbreadth doctrine and must strike down a law in a facial challenge if the law “sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected.”<sup>74</sup> In *Broadrick v. Oklahoma*, the Court asserted that “statutes attempting to restrict or burden the exercise of First Amendment rights must be *narrowly* drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other *compelling* needs of society.”<sup>75</sup>

While most overbreadth cases address laws which limit the exercise of specific First Amendment rights, one Supreme Court case addressed a regulation that denied all First Amendment rights. In *Board of Airport Commissioners v. Jews for Jesus, Inc.*, the Supreme Court analyzed a Los Angeles International Airport resolution which declared that “the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity . . . .”<sup>76</sup> The Court found this case to be an easy one, noting that “by prohibiting *all* protected expression, [the resolution] purports to create a virtual ‘First Amendment Free Zone’. . . . [N]o conceivable governmental interest would justify such an absolute prohibition of speech.”<sup>77</sup>

<sup>71</sup> U.S. CONST., Amend. I.

<sup>72</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

<sup>73</sup> *NAACP v. Button*, 371 U.S. 415, 438 (1963).

<sup>74</sup> *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123 (1992).

<sup>75</sup> *Broadrick v. Oklahoma*, 413 U.S. 601, 611–12 (1973) (holding that a state law which limits civil servants’ political activities, such as by preventing them from soliciting contributions for candidates in elections, is not overbroad).

<sup>76</sup> 482 U.S. 569, 570–71 (1987).

<sup>77</sup> *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 574–75 (1987); *see also Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1396 (D.C. Cir. 1990) (Williams, J., concurring) (asserting that Washington Metropolitan Transit Authority regulations requiring a permit for all “free speech activities” in the above-ground areas of station should be struck down as an absolute prohibition on First Amendment activity); *Fernandes v. Limmer*, 663 F.2d 619, 633 (5th Cir. Unit A Dec. 1981) (holding that ordinance prohibiting charitable organizations from distributing literature within the

The plaintiffs in *Vermillion* and in *SWEPI* each brought First Amendment challenges to Section 5.5 of the Mora County ordinance, since the ordinance would strip away the First Amendment rights of the corporate plaintiffs in each case.<sup>78</sup> The plaintiffs allege that Section 5.5 is overbroad because it attempts to take away all of the First Amendment rights of corporate plaintiffs.<sup>79</sup> The plaintiffs believe that there can be “no governmental interest so compelling as to justify the denial of Plaintiff’s rights as guaranteed by the First Amendment . . . .”<sup>80</sup>

The court in *SWEPI* agreed with the plaintiff and determined that the Mora County ordinance was overbroad under *Jews for Jesus*. The court noted that Section 5.5 “states that corporations that violate, or seek to violate, the Ordinance have no First Amendment Rights.”<sup>81</sup> It then noted that by filing suit to overturn the ordinance, *SWEPI* was both violating the ordinance and exercising its First Amendment rights at the same time.<sup>82</sup> The court concluded that a law that banned such actions was “illogical” and that “‘no conceivable governmental interest would justify’ ” it.<sup>83</sup>

## PREEMPTION/SUPREMACY CLAUSE

It is well established that under the Supremacy Clause of the U.S. Constitution (Article VI), a “state law that conflicts with federal law is ‘without effect,’ ” or invalidated due to conflict preemption.<sup>84</sup> The Supreme Court’s “interpretation . . . is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States.”<sup>85</sup> Thus, state or local laws that conflict with federal law as interpreted by the Supreme Court violate the Supremacy Clause.

In its complaint, *SWEPI* has argued that Section 5.5 of Mora County’s Ordinance, which strips corporations violating the Ordinance of “the rights of ‘persons’ afforded by the United States . . . Constitution,” is preempted by federal law.<sup>86</sup> According to *SWEPI*, corporations have constitutional rights under the Equal Protection Clause, the Contracts Clause, the Commerce Clause, and other provisions, and, therefore, a

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terminals at Dallas-Fort Worth Airport without a permit was overbroad because it “forbid . . . absolutely the exercise of speech and religious liberties within the terminal buildings”).

<sup>78</sup> Amended Complaint at ¶ 94, *Vermillion v. Mora Cnty.*, No. 1:13-cv-01095 (D. N.M. 2014); Complaint at ¶¶ 124, 125, *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035 (D. N.M. 2014).

<sup>79</sup> Amended Complaint at ¶ 98, *Vermillion v. Mora Cnty.*, No. 1:13-cv-01095 (D. N.M. 2014).

<sup>80</sup> Amended Complaint at ¶ 99, *Vermillion v. Mora Cnty.*, No. 1:13-cv-01095 (D. N.M. 2014).

<sup>81</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 163 (D. N.M. Jan. 19, 2015).

<sup>82</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 163 (D. N.M. Jan. 19, 2015).

<sup>83</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 163 (D. N.M. Jan. 19, 2015) (quoting *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987)).

<sup>84</sup> *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992).

<sup>85</sup> *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

<sup>86</sup> Complaint at ¶¶ 41, 53–55, *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035 (D. N.M. 2014).



local law seeking to limit those rights violates the Supremacy Clause.<sup>87</sup>

In its January 2015 decision, the court struck down Sections 5.6, 5.8, and 5.9 of the ordinance, in addition to Section 5.5 as requested by SWEPI, as preempted by federal law.<sup>88</sup> The court did not go into detail on the federal constitutional rights upon which SWEPI alleged that the ordinance infringed; rather, it focused more broadly on the Supremacy Clause's overarching purpose. In holding Section 5.5's ban on First Amendment rights of corporations unconstitutional, the court noted that the Supreme Court had determined that corporations have First Amendment rights.<sup>89</sup> It then found that "Mora County lacks the authority to nullify constitutional rights . . . Section 5.5, accordingly, violates the Supremacy Clause."<sup>90</sup> Likewise, the court held that Section 5.6's ban on the use of federal preemptive law to challenge the ordinance, Section 5.8's limits on the preemptive effects of the state and federal bills of rights, and Section 5.9's limits on the preemptive effects of state and federal statutes and regulations all "contradict[] federal law" and thus are preempted by the Supremacy Clause.<sup>91</sup> The court observed, "If a county could declare under what conditions federal law preempted its laws, federal law would not be preemptive at all."<sup>92</sup>

## DORMANT COMMERCE CLAUSE

The Commerce Clause states, "The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."<sup>93</sup> In a doctrine known as the dormant Commerce Clause, the Supreme Court has read the Commerce Clause to prohibit state regulation of interstate commerce in two circumstances.<sup>94</sup> First, state or local laws which affirmatively discriminate against interstate commerce "in favor of local business or investment," either facially or in their effects, are "*per se* invalid, save in a narrow class of cases in which the [local government] can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest."<sup>95</sup>

Second, under the *Pike* test, when a state or local law in furtherance of "a legitimate local public interest" does not discriminate against interstate commerce but still burdens it somehow, the Court will presume the law is constitutional "unless the burden imposed on such commerce is clearly excessive in relation to the putative local

<sup>87</sup> Complaint at ¶¶ 41, 53–55, *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035 (D. N.M. 2014).

<sup>88</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 130 (D. N.M. Jan. 19, 2015).

<sup>89</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 131–32 (D. N.M. Jan. 19, 2015).

<sup>90</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 132 (D. N.M. Jan. 19, 2015).

<sup>91</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 132, 133 (D. N.M. Jan. 19, 2015).

<sup>92</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 133 (D. N.M. Jan. 19, 2015).

<sup>93</sup> U.S. CONST., Art. I § VIII, cl. 3.

<sup>94</sup> See *Quill Corp. v. N. Dakota*, 504 U.S. 298, 309 (1992).

<sup>95</sup> *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 392 (1994).

benefits.”<sup>96</sup> The Court has recognized environmental benefits as legitimate “local benefits” in the *Pike* context, upholding a law banning the sale of milk in single-use plastic containers based on the assertion that doing so would promote conservation and reduce waste disposal.<sup>97</sup> Indeed, the Court has held that, in the dormant Commerce Clause context, “[t]hose who would challenge such bona fide safety regulations must overcome a ‘strong presumption of validity.’”<sup>98</sup> At the same time, however, “the mere ‘incantation of a purpose to promote public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose may nevertheless further that purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause.’”<sup>99</sup> Frequently, additional evidence is needed to assess both the protection afforded by a regulation and its effect on interstate commerce.

SWEPI claims that the Mora County ordinance fails the *Pike* test. According to SWEPI, the ordinance substantially burdens interstate commerce by “curb[ing] the supply of natural gas and other hydrocarbons” and “does not provide any local benefit” because New Mexico state law already regulates the environmental effects of hydrocarbon production.<sup>100</sup> It remains to be seen how this type of legal challenge will fare in federal court, as the *Pike* test will require the plaintiffs to develop fact and expert testimony establishing the significant burdens on interstate commerce and discounting the county’s bases for the ordinance. The analysis may be further complicated because a court should also consider the degree of protection afforded by state regulations that would apply in the absence of a local ban. Interested parties should watch this litigation.

## SUBSTANTIVE DUE PROCESS

The Due Process Clause prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law . . . .”<sup>101</sup> In addition to protecting against procedural violations, the Due Process Clause has a substantive component that “bar[s] certain government actions regardless of the fairness of the procedures used to implement them.”<sup>102</sup> When a law regulates “fundamental rights,” courts analyze it under a strict scrutiny standard, which means such laws fail unless they are “justified . . . by a ‘compelling state interest,’ and . . . [are] narrowly drawn to express only the legitimate state interests at stake.”<sup>103</sup> Rights which the Court has

<sup>96</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>97</sup> *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981).

<sup>98</sup> *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981).

<sup>99</sup> *Blue Circle Cement Co. v. Bd. of Cnty. Comm’rs*, 27 F.3d 1499, 1512 (10th Cir. 1994) (quoting *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981)).

<sup>100</sup> Complaint at ¶¶ 75–76, *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035 (D. N.M. 2014).

<sup>101</sup> U.S. CONST., Amend XIV § 1.

<sup>102</sup> *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

<sup>103</sup> *Roe v. Wade*, 410 U.S. 113, 155 (1973) (citations omitted).

deemed “fundamental” include, for example, the right to privacy,<sup>104</sup> the right to marriage,<sup>105</sup> and parental rights.<sup>106</sup> On the other hand, courts are deferential to legislative bodies when analyzing the validity of laws which do not regulate fundamental rights. In such cases, courts apply a rational basis test, under which a court must uphold a law as long as it is rationally related to a legitimate state interest.<sup>107</sup>

Each of the Mora County complaints assert substantive due process claims, arguing the county ordinance has deprived stakeholders of property rights in their mineral estates (*Vermillion* plaintiffs)<sup>108</sup> and in oil and gas leases (SWEPI).<sup>109</sup> The plaintiffs claim these property interests are fundamental rights, and that the ordinance must be analyzed under the strict scrutiny standard.<sup>110</sup> The *Vermillion* plaintiffs also allege the county’s ordinance is not actually intended to protect surface and groundwater and thus does not serve a compelling state interest,<sup>111</sup> and that it is not narrowly tailored to its goal, since it imposes draconian punishments, such as the loss of First Amendment rights.<sup>112</sup> Alternatively, both the *Vermillion* and SWEPI plaintiffs allege the ordinance fails the rational basis review standard,<sup>113</sup> asserting that eliminating First Amendment and other constitutional rights as punishment for violating the ordinance is not rationally related to the interest of protecting water sources.<sup>114</sup> The Denton plaintiffs make the general claim that “[t]he invocation of the ‘due process’ clause is appropriate in this matter.”<sup>115</sup>

However unfair it may seem, it appears unlikely that a court would hold these property interests to be protected fundamental rights, as the Supreme Court’s modern substantive due process jurisprudence has only recognized individual liberties as fundamental rights. Indeed, the assertion that property rights are fundamental rights resembles the jurisprudence from the early 20th century, in which the Supreme Court

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<sup>104</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

<sup>105</sup> *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

<sup>106</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

<sup>107</sup> *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955).

<sup>108</sup> Amended Complaint at ¶¶ 64–67, *Vermillion v. Mora Cnty.*, No. 1:13-cv-01095 (D. N.M. 2014).

<sup>109</sup> Complaint at ¶ 92, *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035 (D. N.M. 2014).

<sup>110</sup> Amended Complaint at ¶ 58, *Vermillion v. Mora Cnty.*, No. 1:13-cv-01095 (D. N.M. 2014); Complaint at ¶ 91, *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035 (D. N.M. 2014).

<sup>111</sup> Amended Complaint at ¶ 68, *Vermillion v. Mora Cnty.*, No. 1:13-cv-01095 (D. N.M. 2014).

<sup>112</sup> Amended Complaint at ¶ 69, *Vermillion v. Mora Cnty.*, No. 1:13-cv-01095 (D. N.M. 2014).

<sup>113</sup> Amended Complaint at ¶ 72, *Vermillion v. Mora Cnty.*, No. 1:13-cv-01095 (D. N.M. 2014); Complaint at ¶ 97, *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035 (D. N.M. 2014).

<sup>114</sup> Amended Complaint at ¶ 72, *Vermillion v. Mora Cnty.*, No. 1:13-cv-01095 (D. N.M. 2014).

<sup>115</sup> ¶ 16, Amended Original Petition and Request for Disclosure, *In re Arsenal Minerals and Royalty v. City of Denton*, No. 14-07262-431 (Denton Cnty. Dist. Ct. Sept. 12, 2014).

used contractual and economic rights to invalidate public welfare legislation.<sup>116</sup> Most laws survive rational basis review, and the ordinances are unlikely to be different given the health and welfare assertions underlying the ordinances. At least the *SWEPI* court agrees with this analysis. In its January 2015 order, the court held that the Mora County ordinance did “not implicate a fundamental right” and was “subject to a rational basis review.”<sup>117</sup> The court then denied *SWEPI*’s motion, concluding that the county could have a variety of “legitimate” reasons for banning corporations from drilling, such as the fact that practically speaking, they are the only entities with enough resources to drill and that they are able to avoid liability for environmental harm through bankruptcy.<sup>118</sup>

## EQUAL PROTECTION

The Equal Protection Clause states, “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>119</sup> The Supreme Court has interpreted the Clause as “essentially a direction that all persons similarly situated should be treated alike.”<sup>120</sup> Laws that discriminate based upon suspect classes, including “race, alienage, or national origin,” are analyzed under the strict scrutiny standard.<sup>121</sup> Otherwise, as when a fundamental right is not present for a substantive due process analysis, rational basis review is applied to a law alleged to unconstitutionally discriminate based upon classifications.<sup>122</sup>

Occasionally, the Court has applied a “heightened rationale basis” standard. In such cases, the Court has held that a law which classified was invalid due to the fact that mere “animus” towards a party which was not a member of a suspect class nevertheless was not a legitimate basis for a law. Thus, the Court has struck down food stamp distribution laws which discriminated against “hippies”<sup>123</sup> and upheld an as-applied challenge to a zoning ordinance which required a special use permit for homes for the mentally disabled.<sup>124</sup>

*SWEPI* first alleges that the Mora County ordinance’s provisions deny it equal protection of the laws by treating corporations differently than other persons, as Section 5.1 prohibits corporations, but not natural persons or unincorporated associations, from engaging in oil and gas development.<sup>125</sup> In its January 2015 order,

<sup>116</sup> *Lochner v. New York*, 198 U.S. 45, 64 (1905) (striking down a maximum hours law based on the freedom to contract).

<sup>117</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 140 (D. N.M. Jan. 19, 2015).

<sup>118</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 143, 145 (D. N.M. Jan. 19, 2015).

<sup>119</sup> U.S. CONST., Amend XIV § 1.

<sup>120</sup> *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

<sup>121</sup> *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

<sup>122</sup> *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

<sup>123</sup> *U. S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

<sup>124</sup> *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985).

<sup>125</sup> Complaint at ¶ 61, *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035 (D. N.M. 2014).

however, the court found that the ordinance could satisfy the rational basis test since “[c]orporations engage in more hydrocarbon extraction activities than individuals.”<sup>126</sup> Likewise, the court rejected SWEPI’s second claim that the ordinance was based on an illegal animus towards corporations, since the county “did not enact the Ordinance based solely on an unlawful animus.”<sup>127</sup> The court noted that it had not found a case which had invalidated a law because it was based on animus towards corporations, and that that doctrine typically applied, outside of *Moreno* and *Cleburne*, only in limited circumstances.<sup>128</sup>

## CONCLUSION

The constitutionality of local ordinances restricting the use of hydraulic fracturing will be tested in pending lawsuits, with the most promising claims under the Fifth Amendment Takings Clause and the dormant Commerce Clause. The other claims asserting violations of due process and equal protection are less promising, as was recently reinforced by the District of New Mexico’s January 2015 decision in the *SWEPI* case, given that courts are likely to apply a rational basis review that favors local government actions. Likewise, individual moratoria can be challenged based on constitutional issues specific to those moratoria, as demonstrated by the successful First Amendment and Supremacy Clause challenges to the Mora County ordinance.

One thing, however, seems certain. As more localities adopt moratoria or other restrictions on hydraulic fracturing, whether by resolution or by ballot, proponents of hydraulic fracturing will be able to test the theories described in this article, and other constitutional law challenges not yet contemplated, in the courts.

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<sup>126</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 149 (D. N.M. Jan. 19, 2015).

<sup>127</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 155 (D. N.M. Jan. 19, 2015).

<sup>128</sup> *SWEPI LP v. Mora Cnty.*, No. 1:14-cv-00035, slip op. at 156 (D. N.M. Jan. 19, 2015).