**The Balkanization of Oil and Gas Law**
**John Lowe**

Ladies and Gentlemen,

Thanks to Wendy Daboval, and David Pierce for their kind introductions. And thanks to the leadership of the Institute for the opportunity to speak today.

The website for the Deans of Oil and Gas lecture says that the Dean's Lecture is "an opportunity for reflection and comment on a career in oil and gas law." And that's what I want to do with you a bit today. I want to divide my talk, which is going to be about 20 minutes, into two segments. First of all, I want to comment on my personal career as an oil and gas lawyer and the role of educational institutions like the Institute for Energy Law in it. And, second, I want to offer some reflections on how oil and gas law has developed during my time as a lawyer, and later an academic.

Okay, first things first, I am in my 48th year as a practicing lawyer. I've practiced oil and gas law for about 45 years of that period of time. As David said, I grew up in Ohio on a farm, attended public schools, and then got scholarships to Denison University (a small good liberal arts college in eastern Ohio), and Harvard Law School. I never had a course in oil and gas law at Harvard Law School. Harvard did not then, and does not now, regularly offer a course in oil and gas law. And that didn't bother me, quite candidly. I had never seen an oil well and I had little interest in learning about oil and gas law.

I wanted to be a labor lawyer. My father was a labor union officer and I respected the work that he did. I took all of the labor economics courses I could in college. In law school I took all of the labor law courses that I could, as well as labor economics courses at what is now the Kennedy School, and my first job after law school was as a labor lawyer in the newly independent country of Malawi in eastern Africa. The program I worked for there was jointly administered by USAID, the Ford Foundation, and the Maxwell School at Syracuse University. I also taught at the Malawi Polytechnic while I was there, and I enticed my wife, Jackie Lowe, who's seated out in the audience, to come join me. We were married there and have been together 47 years; a long time and a labor of love.

Jackie and I came back to the United States in 1969 and I started to practice law in Columbus, Ohio. I was hired as a labor lawyer, but shortly after I got to the law firm I learned that they really didn't need another labor lawyer. So, I had to figure out – and quickly -- some way to justify my salary. We had debt obligations of all kinds, and were looking forward to starting a family. And here -- I see a lot of younger people in the room -- here is a moral particularly for younger people, but also for old lawyers, and that is, ultimately you've got to figure out a way to pay the bills. And so, I learned oil and gas law from one of the firm's lawyers who had had a course in oil and gas law and I practiced that subject for most of the five years that I lived in Columbus, Ohio.

The law firm splintered during a recession in 1974, and while I still had a job, it wasn't much fun. As I mentioned, I had been a teacher as well as a government officer in Malawi, and so I went to

what the law professors still call the “meat market” in the fall of 1974 and I got a job teaching at the University of Toledo, beginning in January 1975.

Law schools then and now typically let professors teach one course for themselves. So I taught property for the university and offered oil and gas law as my “personal” course. I came to Dallas to attend the Southwestern Legal Foundation’s Short Course in Oil and Gas Law in 1976 to be sure that I understood what I was teaching. That remains the only formal training that I have had in oil and gas law, and it was good training. I’m happy to say that I later was privileged to join the faculty for that course as it went forward. I made my way to Tulsa in 1978, recruited there by Pat Martin, who’s here today -- who was leaving Tulsa to go to LSU-- came to SMU in 1987 as a visitor, was offered the Hutchison Chair, and have been at SMU ever since.

Along the way I learned some more oil and gas law. I did a Nutshell in 1983, which is now in its 6th edition. I did a casebook in 1986 with Gene Kuntz, Owen Anderson, and Ernest Smith, also now in its 6th edition and including now David Pierce and Chris Kulander. And I did an international petroleum transactions book in 1993, now in its 3rd edition with Smith and Anderson, and as well, Bruce Kramer, Gary Conine, John Dzienkowski, and Jacqueline Weaver, all professors whom I met at these meetings.

In a very real sense, the Institute for Energy Law and the old Southwestern Legal Foundation, along with the Rocky Mountain Mineral Law Foundation and the Eastern Mineral Law Foundation, now called the Energy and Mineral Law Foundation, have built my career in oil and gas law, because they have given me contact with people – like you in this audience -- who have helped me research, write, and teach. I’m fond of saying that people make institutions, and IEL and its younger siblings have always attracted the very best people in oil and gas law. I met my longtime writing partners: Smith, Anderson, Pierce, and now Kulander, here, at these meetings. I met my writing competitors-- and friends who’ve also been collaborators -- Kramer and Martin and Weaver here at the IEL meetings. And I have met and worked with lots of people who are in this audience and lots of people who would have liked to have been in this audience today, who helped me research, write, and teach.

Yesterday, one of our speakers talked about how academics have to publish or perish. He was right; we really do. And the fact is that a subject like oil and gas is very difficult to approach just as an academic. As an example, there have been a couple of allusions in this institute to the paper I wrote many years ago on farm-out agreements. I could not have done that without the help of people at IEL. I collected a couple of hundred farm out agreements from people at this institute and I then talked to those people over several months trying to figure out what they were trying to do with the contracts that they had drafted.

IEL has made information available to me throughout my career through the people who have worked with IEL—that’s been hugely important. And looking ahead, this organization is now, and the people who make up this organization are now, doing the same thing with younger people. There have been several younger academics at this meeting, Keith Hall, Monica Ehrman, Brett Watts, Chris Kulander, some of them are here today. They’re being assisted by the institution and by the people who make up the institution. There are 25-30 law students at this meeting; they too are being supported directly and indirectly by the institution.

So, while I am proud of the work that I have done over the years, I'm pleased to be able to acknowledge that I wouldn't have been able to do what I have done had there not been a Southwestern Legal Foundation, or an IEL, and the many, many people who have made them work over the years. Thank you to all of you.

Now, I have to figure out how to get my slides up here and try to be profound about the development of oil and gas law.

Remember, I told you at the very beginning that the website indicates one of the functions of this particular lecture is to offer some reflections on the development of the law and that's what I want to do. The topic I chose is The Balkanization of Oil and Gas Law. The term "Balkanize" typically is a geopolitical term. It refers to breaking up states into smaller states that usually don't get along with their neighbors and don't function very well. I'm going to use the term "Balkanization" in my talk to you today in a different context. I'm going to be talking with you about "legal Balkanization." And what I mean by legal Balkanization is the tendency that I have seen over the 45 years of my career as an oil and gas lawyer for judges and legislators around the country to become more comfortable going their own way rather than following the lead of the historically big oil and gas producing states.

When I began thinking about this topic, I thought that legal Balkanization was a negative development, and over the months preceding this talk, I corresponded with some of the other academics because many of us have resisted legal Balkanization. We have thought that the rules that we have seen applied in Texas, Oklahoma, Louisiana, Kansas, and a few other large producing states have worked pretty well, and we have not seen the need for change. But, I will tell you that as I have thought about this over the time I've been thinking about speaking here today, I've become convinced that legal Balkanization is normal and good.

What has happened in my lifetime as an oil and gas lawyer is that judges and legislators, particularly in states with not very much production historically, have become much more confident about applying their own judicial principles and statutory procedures, which in a federal system are not uniform. So, what we've seen is a gradual, broadening of focus from looking at *what is* the law of oil and gas in Texas, Oklahoma, Louisiana and Kansas, to looking to *what ought to be* the law in West Virginia, Ohio, Pennsylvania, other states in the United States. And along with that there's been a parallel willingness of states in the old producing areas, including Texas, to rethink their precedents and sometimes to move from old-fashioned common law principles that really don't make much sense anymore, to new exciting concepts, and sometimes to adopting new rules that don't work very well.

Historically, Texas has been the "big dog" of oil and gas production and also of oil and gas law. As a young lawyer in Ohio in the early 1970s, when I went to the Williams & Meyers treatise or the Kuntz treatise or the Dick Hemingway hornbook, which at that time was a brand new publication most of the case citations and most of the analysis were focused on Texas, with secondary attention to Oklahoma, Kansas and Louisiana, and once in a while a reference to New Mexico, Colorado or California -- but that was about it.

Appalachia, where I lived in the early 1970s had lots of old, old precedents, but neither lawyers nor judges in those areas typically thought that those old cases were worth very much. And so, the focus of analysis, the focus of argument when we structured deals, and when we tried to settle disputes, was upon oil and gas law from Texas, Oklahoma, Louisiana, sometimes Kansas, sometimes a few more places. No more. No more. That has changed. You look around, particularly in Appalachia, and you're going to see today, lots of judges and legislators, but again, particularly in Appalachia, who are now willing to say, "this ain't Texas" and this "ain't Oklahoma or Louisiana either" when they are confronted with Texas or other historically big oil and gas producing state's precedents with which they don't agree. They push back.

My favorite recent case illustrating the point is *Stone v. Chesapeake Appalachia*.[1] Stone is a federal district court case from 2013 in which the federal district court for the northern district of West Virginia rejected the argument that the rule of capture as stated in *Coastal Oil and Gas Corp. v. Garza Energy Trust*[2] protects a lessee from liability for hydraulic fracturing that extends across lease lines. The court stated that it did not think that the Supreme Court of Louisiana, the Supreme Court of Appeals, would adopt that rule and the court said, this is a great quotation, the *Garza* case "gives oil and gas operators a blank check to steal from the small landowner." What that case really says is "West Virginia ain't Texas."

Even more recently, just three days ago, in a case called *Harrison v. Cabot Oil & Gas Corp*.,[3] the Pennsylvania Supreme Court rejected the reasoning of courts from Louisiana, Arkansas, Texas, Montana, and Illinois as well as an amicus brief filed by Professor Kramer, to hold in answering a certified question, that in Pennsylvania, the filing of a lawsuit challenging the validity of an oil and gas lease does not, in and of itself repudiate the lease so that the lessee's primary term is extended by operation of equitable principles. The court there said that in order to trigger the doctrine of repudiation and extend the lease, there has to be an "absolute and unequivocal refusal to perform." And filling a lawsuit isn't sufficient to show that.

Now, I'm not admitted to practice either in West Virginia or Pennsylvania and I'm not here to argue either the *Stone* case or the *Harrison* case were wrongly decided, though I have opinions on the subject, but what they clearly do, is to say, "this ain't Texas." They show a lack of deference to the persuasiveness of the precedence and the logic of the courts in the large oil and gas producing states. I'm pretty confident that the result in the *Stone* case and the result in the *Harrison* case would have been different had those cases been presented to courts in Texas or Oklahoma, where I am admitted to practice.

I am admitted to practice in Ohio, however, and another interesting case, *Bilbaran Farm, Inc. v. Bakerwell, Inc.*, 993 N.E.2d 795 (Ohio Ct. App. 2013), is an Ohio case that illustrates that not all of these Balkanizing kinds of decisions are pro-lessor or pro-landowner. The *Bilbaran Farm* case is very much pro-lessee, pro-oil company in that it holds that the implied covenant to develop can be waived by what I've always called an integration clause --the kind of clause in

[1] 2013 WL 2097397 (N.D.W.Va.).
[2] 268 S.W.3d 1 (Tex.2008),
[3] 110 A.3d 178, 186 (Pa. 2015).

an oil and gas lease, or any other kind of contract that says this document is the complete agreement of the parties, there aren't any additional implied or express agreements, this is it.

In the *Bilbaran Farm* case, the appellate court ruled that general waiver language contained in an oil and gas lease disclaimed any implied covenant to develop. And the court cited a long line of Ohio cases that hold that parties to an agreement are bound by the language that they use. Once again, what's the court saying? The court is saying "this ain't Texas." The oil and gas lease in Ohio is just another contract.

Well, an oil and gas lease is at least a very special kind of contract in Texas and many of the other oil and gas producing states. And while states in this region, I think, will enforce specifically drafted waivers of rights or other limitations on the right to sue, such as notice and demand clauses, generally speaking, courts in this region are uncomfortable with those kinds of limitations on implied covenants and kind of wiggle around trying to enforce them. There are lots of examples of this, and one familiar to many people in this group is *Texas Oil and Gas Corp v. Vela.*[4]

The *Vela* case, many of you will recognize as the seminal market value royalty case. But, the Texas Supreme Court, in that case, also held that a notice and demand clause in a lease did not bar a lessor from claiming damages for underpaid royalties that had accrued before the notice was given. The lease, the clause in question in the lease said something like, if the lessor thinks that the lessee hasn't complied with its obligations, the lessor will give the lessee notice and 60 days to rectify the incorrect actions. And it went on to say that the service of the notice, the 60 day notice, shall be precedent to the bringing of any action. The Texas Supreme Court looked at that and said, in the *Vela* case, "that can't be. Provisions of this nature are included in the lease primarily to protect the lessee against a forfeiture for breach." The parties could not have intended -- read in, "whatever the language" -- the parties could not have intended that the lessor would be forever barred from recovering damages. The sentences quoted above apply only to actions to cancel the lease; they don't apply to suits for damages.

Now, again, I'm not here today -- maybe it will be a subject for a law journal article, but I'm not here today -- to try to pick holes in the reasoning of any of these cases, including the *Bilbaran Farm* case, what I want to simply underscore is Ohio ain't Texas anymore, if it ever was. I think that there is a good chance that the *Bilbaran Farm* case would have been decided differently in the state of Texas, and maybe in Louisiana, Kansas, Oklahoma, as well. It's a different world.

Legislators have gotten into the act as well as judges, there's been a spate of new law in the last several years -- new statutory law -- and sometimes that statutory law has addressed issues that we've been a little afraid to touch here in Texas. One of the unclear issues here in Texas is the validity of what we call "allocation wells"—wells that are drilled horizontally across several leases that do not contain pooling clauses. Will those wells hold all of the leases, under which they produce? How do you divide the royalties that are generated by those leases if the wells hold the leases?

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[4] 429 S.W.2d 866 (Tex.1968).

Several writers, including my former student Clif Squibb, who's a member of this organization, have written about what the law ought to be, and I've given you Clif Squibb's Texas Tech Law review citation, it's a good article.[5] What I want to focus on, however, is that the Pennsylvania legislature addressed this very directly. The Pennsylvania legislature said that where an operator has the right to develop multiple contiguous leases separately, the operator may develop those leases jointly by horizontal drilling unless specifically prohibited by a lease.[6] So, you have to opt out, you don't have to opt in with the lease pooling clause, and in determining the royalty allocation, in the absence of any agreement, the production shall be allocated to each lease in proportion that the operator thinks is reasonably appropriate.

So Pennsylvania has addressed specifically by statute a problem we're still messing with in Texas.

What's going on here? Well, I think it's more than pushback from Appalachian judges and legislators against being told how to do things by judges and legislators from big producing states like Texas, Oklahoma, Kansas, and Louisiana. It's more than "this ain't Texas." Quite simply, I think what has happened is that the old solutions don't always work very well. And so, whether we're talking about caselaw, or statutory and regulatory structures the existing systems aren't always ideal, so judges and legislators are looking for something better. And, as I thought about these factors as I prepared to make this speech I realized this isn't anything new.

When I started teaching back in the mid-1970s, we began to see well analyzed and provocative decisions from the North Dakota Supreme Court, which didn't have much case law on oil and gas, but had a strong populist culture. And just a couple of weeks ago, I talked with my class -- several members of which are here today -- about *Hunt v. Kerbaugh*,[7] the 1979 North Dakota case in which the North Dakota Supreme Court followed Texas precedent in recognizing an implied right of surface use on the part of a mineral lessee, as well as recognizing the accommodation doctrine to that implied easement, but questioned whether the right of reasonable use that the lessee had should be free. It suggested that a mineral lessee, perhaps, ought to be liable in damages for interference with surface uses. It's very logical, but it wasn't the common law rule. The North Dakota Supreme Court was "stepping out" from the common

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[5] Clifton A. Squibb, *The Age of Allocation: the End of Pooling as We Know It?,* 45 TEXAS TECH L. REV. 929 (2013).

[6] The Pennsylvania Oil and Gas Lease Act, 58 Pa.C.S. § 34.1 states that

> Where an operator has the right to develop multiple contiguous leases separately, the operator may develop those leases jointly by horizontal drilling unless expressly prohibited by a lease. In determining the royalty where multiple contiguous leases are developed, in the absence of an agreement by all affected royalty owners, the production shall be allocated to each lease in such proportion as the operator reasonably determines to be attributable to each lease.
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> The statute was upheld in *EQT Production Co. v. Opatkiewicz*, C. D. No. GD-13-013489 (Allegheny Cty. Ct. of C.P. April/8/2014).

[7] 283 N.W.2d 131 (N.D.1979).

law in *Hunt v. Kerbaugh* and very quickly the North Dakota legislature took the issue away from the court by passing the first of the surface damages acts, as we now call them. Several states now have surface damages acts; not here in Texas, however.

But, the phenomena I'm describing has occurred here in Texas, as well. *Moser v. US Steel*[8] is a 1984 case that I've talked about at these annual institutes a couple of times. It was a test for determining what is a "mineral," when that term is used in a mineral reservation or a mineral deed. In the *Moser* case, the Texas Supreme Court abandoned the surface damages test, and embraced something called the "ordinary and natural meaning" test. What I want everybody to think about is, that was not a straightforward application of the common law -- that was a "step out" by the Texas Supreme Court.

And so was *Coastal v. Garza*, the case that I mentioned at the very beginning in this speech. Whatever *Coastal v. Garza* may mean--- however it may eventually be applied by the Texas Supreme Court -- it is something more than a straightforward application of old common law principles.

So, what I've called in this monologue the Balkanization of oil and gas law, is I suggest to you, really, another term for the ordinary development of the common law. It is a way of thinking about what Roscoe Pound described, much more eloquently, nearly a hundred years ago, when he analogized to the common law development to a building that must be "continually, repaired, restored, rebuilt and added to" to meet the changing needs of society.[9] As I like to tell my students, in a little bit different formulation, the job of the Texas Supreme Court, or the Oklahoma Supreme Court, or the Kansas Supreme Court or whatever court you want to name, is not to apply thousand-year-old common law principles blindly. It's to make a system that works today and in the future in whatever state that court sits.

But, what I want you also to think about is that when legislators and judges do their jobs they inevitably Balkanize the law because what may work well in Texas may not work well in Ohio, and vice versa. And that Balkanization process makes it harder for oil and gas lawyers to practice competently because I think I know Texas law, I think I know Oklahoma law, but I'm beginning to think that I don't understand Ohio law, though I practiced there and I'm still admitted there. And finally, consider if you will, that this process of Balkanization, the development of the common law system, makes institutions like this one, and the involvement of people like us in those institutions all the more important; somebody has to educate lawyers, industry people, judges, and legislators about the nuances of changes in the law. And occasionally the analysis of speakers and writers at these meetings persuades judges and legislators to act.

So, once again, I thank this organization for the opportunity to speak today. More importantly, I thank the Institute for Energy Law and the people who have made it work over the years for the support they've given to me, to others like me, and to the development of oil and gas law. And finally, I thank IEL and the people in this room and others who work with the organization for the

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[8] 676 S.W.2d 99 (Tex.1984).

[9] Roscoe Pound, INTERPRETATIONS OF LEGAL HISTORY 21 (1923).

support they will give to the next generation of academics and lawyers.  Thank you all for your attention.