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Balkanization in Oil and Gas: How Home Rule Constitutional Provisions Disrupt State Law

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ONE J

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BALKANIZATION IN OIL AND GAS: HOW HOME RULE CONSTITUTIONAL PROVISIONS DISRUPT STATE LAW

DAN RAY*

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I. Introduction

Colorado's Denver-Julesberg Basin, a massive oil and gas play in Northeastern Colorado, is no stranger to controversy. For the past thirty years, litigators, judges, mayors, and counties became accustomed to renditions of the same gladiatorial fight. The old script went something like this: intrepid, environmentally conscious city imposed a moratorium on oil and gas operations.¹ Not to be intimidated by a shrimp, the bold oil and gas industry then moved to enjoin the moratorium on the basis that state law preempted the local law.² In each case, the local government perished by the sword of state law. Despite these outcomes, new local challengers continued to step into the great Colosseum of the Denver-Julesberg Basin – almost certain to crumble under the superior might of the state law. Why then, did counties and cities continue to step into the arena armed only with the seemingly meager slingshot that is local law? Local entities didn't litigate these issues merely to waste resources or appease constituents apprehensive of fracking. Every good underdog clings to some hope that victory is within reach.

For these cities and towns, that hope is Article XX of the Colorado Constitution. Article XX means Colorado is an *imperium in imperio* state.³ *Imperium in imperio*, or an empire within an empire, generally means Colorado grants chartered cities plenary power to regulate matters of local concern.⁴ For much of the early 20th century, the powers conferred to cities were generally respected.⁵ In other words, the slingshot wielded by local entities was, at one point, a formidable bow. However, tides of the courts are subject to change. In the past half century, the courts began to construe local powers under Article XX to be less powerful than originally thought.⁶ This trend continues today. In regionalism debates collateral to the courts' decisions, local entities asserting power under Article XX are sometimes characterized as selfish players wielding power detrimental to the state as a

1. See generally *City of Fort Collins v. Colo. Oil & Gas Ass'n*, 369 P.3d 586 (Colo. 2016); *City of Longmont v. Colo. Oil & Gas Ass'n*, 369 P.3d 573 (Colo. 2016); *Voss v. Lundvall Bros.*, 830 P.2d 1061 (Colo. 1992).

2. See generally *Fort Collins*, 369 P.3d 586; *Longmont*, 369 P.3d 573; *Voss*, 830 P.2d 1061.

3. See Jarit C. Polley, *Uncertainty for the Energy Industry: A Fractured Look at Home Rule*, 34 ENERGY L.J. 261, 276 (2013).

4. John E. Hayes & Kristy M. Hartl, *Home Rule in Colorado: Evolution or Devolution*, 33 COLO. LAW. 61, 61 (2004).

5. *Id.*

6. See *id.*

whole.⁷ The counterargument to these characterizations is that local entities should be free to govern in a manner tailored to the interests of their constituents so long as these local regulations do not conflict with the Constitution or laws of the State.⁸ So, the thrust of this argument, that local regulations restricting the development of oil and gas stand so long as they do not conflict with the Oil and Gas Conservation Act (“OGCA”), propelled local litigants into the colosseum.

Perhaps the General Assembly became weary of the spectacles of the colosseum because in 2019, the General Assembly passed, and the Governor signed into law Senate Bill 19-181 (“The Bill”).⁹ The Bill brings comprehensive reforms to the statutory companion of Article XX and the OGCA. Prior to The Bill, the OGCA directed the Colorado Oil and Gas Conservation Commission (“COGCC”) to act in a manner that “foster[ed]” the industry.¹⁰ Now, the COGCC is tasked with regulating the oil and gas industry “in a manner that protects public health, safety, and welfare, including protection of the environment and wildlife resources.”¹¹ This change in ethos is reflected throughout the newly amended OGCA: greater setbacks are required, forced pooling requirements are more stringent, membership of the COGCC is now more representative of non-industry persons, and the surface use rights of land owners are stronger.¹²

Of all the changes The Bill brings, the most interesting is its treatment of local entities. The Bill amends the statutory companion to Article XX – the Land Use Enabling Act (“LUEA”)¹³. Under the newly amended LUEA, the siting of oil and gas well locations are contemplated as areas of local interest.¹⁴ Significantly, this treatment of wells as areas of local interest grants county and municipal governments more power to regulate land use activities as they relate to oil and gas. This designation carries over into the OGCA which now expressly conditions state approval of drilling permits

7. *See id.* at 62.

8. *See generally* City of St. Louis v. W. Union Tel. Co., 149 U.S. 465 (1893) (noting that certain municipalities are entitled to imperium in imperio treatment).

9. *See* S.B. 19-181, 72nd Gen. Assemb., 1st Reg. Sess. (Colo. 2019); Judith Kohler, *Gov. Jared Polis Ushers in New Era of Drilling Regulation, but are “Oil and Gas Wars” Over?*, THE DENVER POST (Apr. 17, 2019, 2:48 AM), <https://www.denverpost.com/2019/04/16/colorado-oil-gas-bill-signed-gov-jared-polis/>.

10. COLO. REV. STAT. § 34-60-102(I) (prior to April 16, 2019).

11. S.B. 19-181, 72nd Gen. Assemb., 1st Reg. Sess. (Colo. 2019).

12. *Id.*

13. COLO. REV. STAT. §§ 29-20-102 to 107 (2019).

14. *Id.*

on well site locations already approved by local governments.¹⁵ And, in a reversal of the old script, local governments are now authorized to adopt regulations more restrictive than those imposed by the COGCC.¹⁶ The Bill is silent as to whether or not a local government could adopt regulations less restrictive than those imposed by the COGCC.¹⁷

For the regionalism fights in the Denver-Julesburg Colosseum, The Bill clearly forecloses the sort of litigation that became commonplace in the last thirty years. In a sense, The Bill serves as a legislative prosthetic for the Colorado Supreme Court's parsimonious treatment of local law under Article XX. The General Assembly now expressly authorizes, and the COGCC shall recognize, local regulations more restrictive than those imposed by the state. When Governor Polis signed The Bill into law, he hoped it would mark the end of the "oil and gas wars" in Colorado.¹⁸

Governor Polis's hope was misplaced. The newly amended LUEA and OGCA invites a new combatant to the colosseum – Weld County – the largest oil and gas producer in the State.¹⁹ Unlike other local entities who have entered the arena in the past, the constituents of Weld County generally favor the oil industry. Shortly after the passage of The Bill, Weld County designated the development of oil and gas as an area of local interest through the Colorado Areas and Activities of State Interest Act.²⁰ Pursuant to this designation and the authorities conferred to local governments by LUEA and Colorado's home rule county provisions²¹, Weld County developed its own ordinances and the Weld County Oil and Gas Energy Department ("OGED") to exercise Weld County's new siting authorities.²² The COGCC takes issue to the creation of OGED and asserts that while local governments enjoy new authority to regulate oil and gas

15. COLO. REV. STAT. § 34-60-106(1)(f) (2019).

16. COLO. REV. STAT. § 34-60-131 (2019).

17. *See id.*; § 34-60-106(1)(f).

18. Judith Kohler, *Six Months After Colorado's Sweeping Oil and Gas Law Took Effect, Fight Over Path Forward Hasn't Faded*, THE DENVER POST (Oct. 24, 2019, 12:42 PM), <https://www.denverpost.com/2019/10/24/colorado-oil-gas-law-6-months-old-sb-181/>.

19. *Oil and Gas Energy Department*, WELD COUNTY, (2020) https://www.weldgov.com/departments/oil_and_gas_energy.

20. WELD CTY., COLO., CODE ch. 21, art. 1, div. 1, § 21-1-30, https://library.municode.com/co/weld_county/codes/charter_and_county_code?nodeId=CH21ARACSTIN_ARTIAD_RE_DIV1ININGE (last visited Apr. 7, 2020).

21. COLO. REV. STAT. §§ 30-28-101 to 906; WELD CTY., COLO. *supra* note 20.

22. WELD COUNTY *supra* note 19.

under The Bill, this does not divest the COGCC of authority.²³ Weld County argues the newly amended OGCA and LUEA reserve the authority to approve surface locations solely to local governments who have designated oil and gas as an area of local interest.

For now, the COGCC and Weld County are at a truce. The County and COGCC entered into a Memorandum of Understanding by which the two parties will coordinate in a timely manner to review applications for the siting of new oil and gas wells.²⁴ The gates to the colosseum remain open, however, and the rules of the arena are now different. In the future, courts will need to decide to what degree a locally created oil and gas department may exercise control over the industry within its boundaries. Parsed differently, to what extent does state law preempt local law under the new OGCA? The issue, considered through the many perplexing lenses of Colorado preemption case-law, might be realistically resolved in a number of different ways. Part II of this paper looks to the gritty details of Colorado preemption jurisprudence and how the OGCA now fits into this scheme. Colorado is not the only *imperium in imperio* state. Nor is Colorado the only *imperium in imperio* state with a prominent oil and gas presence. Part III looks to the storied jurisprudence of home rule preemption analysis in Oklahoma. In part IV, I argue the COGCC may not have its cake and eat it too – faithful adherence to the acts and case law indicate certain local regulations of oil and gas are not preempted by state law.

II. Colorado Preemption Law

A. Basis of Local Authority: Types of County and City Governments

Article XX of the Colorado Constitution provides that the “charter and the ordinances” of a city or town “shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.”²⁵ Note that Article XX empowers properly chartered

23. Blair Miller, *Colorado Oil and Gas Regulators Tell Weld County the COGCC Maintains Regulatory Authority: Letter Comes After County Oil and Gas Department Formed*, THE DENVER CHANNEL.COM (Jul. 22, 2019, 8:10 PM), <https://www.thedenverchannel.com/news/politics/colorado-oil-and-gas-regulators-tell-weld-county-the-cogcc-maintains-regulatory-authority>.

24. Macie May, *COGCC Provides Clarification for Designated Areas of State Special Interest*, LONGMONT OBSERVER (Sept. 10, 2019), <https://longmontobserver.org/featured/cogcc-provides-clarification-for-designated-areas-of-state-special-interest/>.

25. COLO. CONST. art. XX, § 6.

home rule cities. Thus, two species of city exist in Colorado: local and home rule.

The Colorado Supreme Court does not automatically construe Article XX as giving home rule cities and towns unqualified, plenary authority to govern within their boundaries.²⁶ Rather, the court will ask if the regulated issue is “of local, state, or mixed local and statewide concern.”²⁷ For issues of purely local concern, a home rule city has “plenary authority and is not inferior in authority to the Colorado General Assembly.”²⁸ Accordingly, with regards to issues of statewide concern, state laws preempts local laws.²⁹ When an issue is of both state and local concern, state law preempts local laws if the local law operationally conflicts with state law.³⁰ Regulations of statutory cities are not given the same treatment as home rule cities. For preemption analysis of a statutory city law, the courts will see if the statutory city has acted validly under the powers delegated to it. Assuming it has, the court will then turn to see if state law expressly, impliedly, or operationally conflicts with and preempts the local law.³¹

Notably, county governments are not referenced in Article XX. Much like cities, two species of county exist in Colorado: home rule counties and statutory counties.³² Article XIV of the Colorado Constitution empowers counties to provide and exercise “such permissive powers as may be authorized by statute.”³³ Home rule counties are given greater latitude than statutory counties to make regulations within their boundaries.³⁴ Thus, regulations of statutory and home rule counties may be treated differently for purposes of the Colorado Supreme Court’s preemption analysis. For cases involving statutory counties, “the ordinary rules of statutory construction” are applied to “to determine whether a state statute and local ordinance can be construed harmoniously or whether the state statute preempts the local ordinance.”³⁵ When the law of a statutory county conflicts with a specific state law addressing the matter, the court will not

26. *See Ryals v. City of Englewood*, 962 F. Supp. 2d 1236, 1245 (D. Colo. 2013).

27. *City of Commerce City v. State*, 40 P.3d 1273, 1279 (Colo. 2002).

28. *Ryals*, 962 F. Supp. 2d at 1245.

29. *Id.*

30. *Id.*

31. Joel Minor, Note, *Local Government Fracking Regulations: A Colorado Case Study*, 33 STAN. ENVTL. L.J. 61, 94 (2014).

32. *See Colo. Mining Ass’n. v. Bd. of Cty. Comm’rs of Summit County*, 199 P.3d 718, 724 (Colo. 2009).

33. COLO. CONST. art. XIV, § 16.

34. *Id.*; COLO. REV. STAT. §§ 30-35-102 to 201 (2019); *Colo. Mining*, 199 P.3d at 723.

35. *Colo. Mining*, 199 P.3d 718, 724 (Colo. 2009).

look to see if the issue is one of local, state, or mixed concern. Instead, the court will look to see if state law expressly preempts the local law or if the state law is “sufficiently dominant” to override the local interest.³⁶ Moreover, courts will treat county land use authority as presumptively valid but, unlike home rule cities, will constrain the authority of statutory counties to the powers expressly given to them by the General Assembly.³⁷

Only two true home rule counties, Pitkin County and Weld County, exist in Colorado.³⁸ Broomfield County and Denver County are home rule counties to an extent but they differ from true home rule counties due to their unique status and constitutional provisions.³⁹ Because home rule counties are so few, the courts have had little opportunity to determine how preemption analysis would work between home rule county and state law.⁴⁰

One commentator posits the courts will likely use the same analysis used for statutory counties in preemption analysis for home rule counties.⁴¹ The basis for this assertion is that home rule counties, unlike home rule cities, do not possess the same plenary powers.⁴² There is ambiguity on the subject, however, because the Colorado Supreme Court, in dicta, clumped home rule cities and counties within the same preemption analysis framework for purposes of land use authority.⁴³ The Colorado Supreme Court did not expressly define the rationale behind this treatment. Article XIV § 16 makes no mention of preemption.⁴⁴ It instead empowers home rule counties to exercise mandatory and permissive powers “as may be authorized by statute applicable to all home rule counties.”⁴⁵ A likely explanation for this dicta treatment may be that Article XX § 6 provides the County of Denver, but only the County of Denver, with home rule

36. *Id.*

37. Minor, *supra* note 31, at 94.

38. COLO. LEGIS. COUNCIL STAFF, 2013 COLORADO LOCAL GOVERNMENT HANDBOOK 1, 11 (2013), <https://www.colorado.gov/pacific/sites/default/files/13%20Local%20Gov%20Handbook%20for%20posting.pdf>.

39. *Id.*

40. Minor, *supra* note 31, at 95 (“[H]ome rule counties have a more ambiguous legal status than other Colorado local governments.”).

41. *Id.* (speculating that “a court would likely apply the same preemption analysis to a home rule county as a statutory county.”).

42. *Id.*

43. Colo. Mining Ass’n. v. Bd. of Cty. Comm’rs of Summit County, 199 P.3d 718, 723 (Colo. 2009).

44. COLO. CONST. art. XIV, § 16.

45. *Id.*

powers.⁴⁶ The Colorado Constitution plainly does not empower all other home rule counties to the same extent as home rule cities.⁴⁷ Therefore, existing speculation regarding the treatment of home rule counties is likely correct – home rule counties would be treated in the same manner as statutory counties or cities. The effect of this, then, is that even home rule counties, like Weld County, will largely be forced to follow the OGCA and comply with the rules of the COGCC.

Home rule cities, on the other hand, enjoy greater status under Colorado preemption law. After The Bill there is a legitimate question as to whether the COGCC continues to possess full authority over home rule cities that elect to regulate oil and gas in a manner not conforming with the OGCA. In particular, how would the courts treat home rule city ordinances that endeavored to regulate oil and gas outside the confines of state law? The answer to this question is found in the perplexing web of Colorado preemption jurisprudence.

The observations presented herein come with a major caveat. Generally, the home rule doctrine and state preemption produces very unpredictable results.⁴⁸ Unsatisfactorily, this same principle applies for the more niche area of Colorado home rule preemption jurisprudence. State courts possess “a wealth of choices” in addressing conflict preemption.⁴⁹ Mechanistic application of preemption doctrine suggests possible outcomes but no guarantees. Nevertheless, the stakes of home rule preemption litigation are high – especially for the oil and gas industry. Since the Bill became effective, approvals for permits to drill declined by about half.⁵⁰ Without the help of Colorado state government, the best hope for operators to stimulate new drilling may be Colorado preemption doctrine.

46. COLO. CONST. art. XX, § 6.

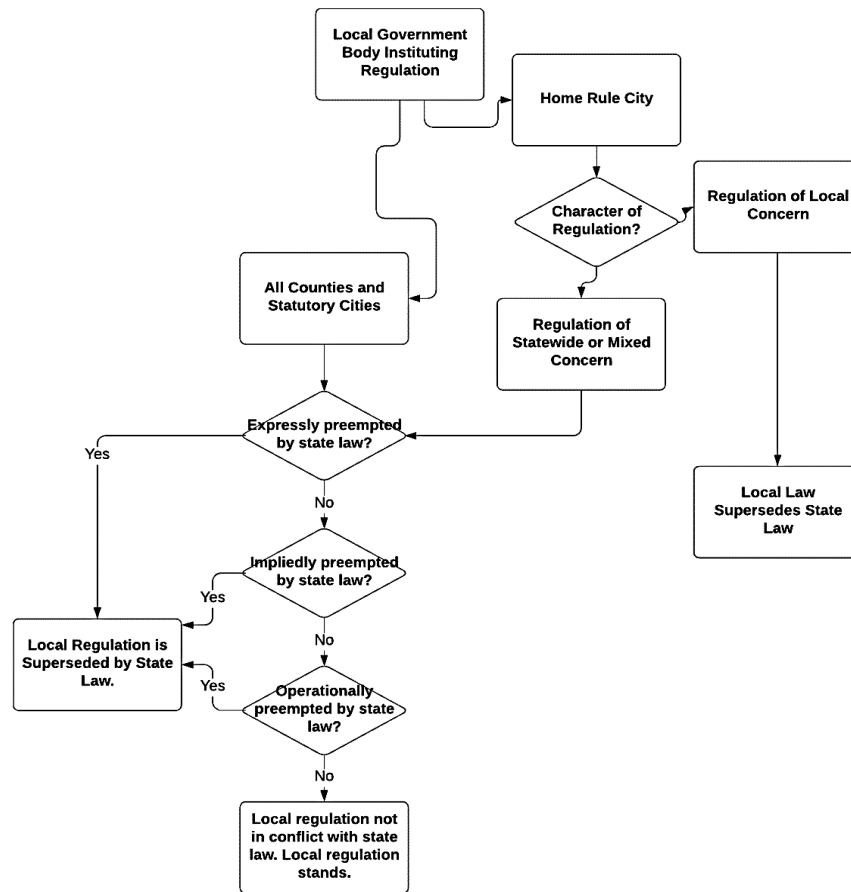
47. Heidi Gorovitz Robertson, *When States' Legislation and Constitutions Collide with Angry Locals: Shale Oil and Gas Development and Its Many Masters*, 41 WM. & MARY ENVTL. L. & POL'Y REV. 55, 135 (2016).

48. Jacob Alderdice, Note, *Impending Local Laboratories: Obstacles to Urban Policy Diffusion in Local Government Law*, 7 HARV. L. & POL'Y REV. 459, 464 (2013).

49. Daniel E. Kramer, *Colorado Preemption Law*, 48 COLO. LAW. 38, 43 (Apr. 2019).

50. Catherine Traywick, *Tougher Drilling Rules Can't Stop Colorado's Oil Bonanza*, BLOOMBERG (Feb. 28, 2020, 3:56 PM), <https://www.bloomberg.com/news/articles/2020-02-28/tougher-drilling-rules-can-t-stop-colorado-s-oil-bonanza>.

B. Overview of Colorado Home Rule Preemption



C. Preemption Analysis for Home Rule Cities

Under home rule city preemption analysis, the court will ask if the issue is one of local, statewide, or mixed concern.⁵¹ It is clear home rule city laws supersede a conflicting state statute in matters of local concern.⁵² In matters of statewide or mixed concern, the state law supersedes a conflicting city law.⁵³ The classification of whether an issue is of local or statewide concern

51. *City of Longmont v. Colo. Oil & Gas Ass'n*, 369 P.3d 573, 580 (Colo. 2016).

52. *Id.* at 579.

53. *Id.*

is a legal question.⁵⁴ Four factors are used to classify the nature of the matter: “(1) the need for statewide uniformity of regulation, (2) the extraterritorial impact of the local regulation, (3) whether the state or local governments have traditionally regulated the matter, and (4) whether the Colorado Constitution specifically commits the matter to either state or local regulation.”⁵⁵ The following sections examine each factor under prior case law and changes to the OGCA. Although the OGCA may not have intended to divest the COGCC of regulatory power, the ultimate effect of the OGCA may be that home-rule municipalities are largely free to regulate, or not regulate, the oil and gas industry.

1. Factor One, The Need for Statewide Uniformity

Laws demand statewide uniformity when uniformity is necessary to achieve and maintain state goals and provide “uniform access and expectations of consistency.”⁵⁶ The uniformity factor abhors a messy “patchwork approach” to legislation.⁵⁷ In *Ryals v. City of Englewood*, the City of Englewood – a home rule city – defended the validity of an ordinance making it unlawful for a registered sex offender to establish a residence within two thousand feet of schools, playgrounds, bus stops, pools, recreational trails, and walk-to-school routes.⁵⁸ This ordinance was challenged on the basis that state laws directing the Sex Offender Management Board preempted Englewood’s ordinance. In a certified question of law from the United States Court of Appeals for the Tenth Circuit, The Colorado Supreme Court held the uniformity factor weighed in favor of Englewood. Although the General Assembly characterized state law as comprehensively evaluating the treatment of adult sex offenders, state law was silent with regard to residency requirements of sex offenders.⁵⁹ Furthermore, the language of the statute contemplated some role for local governments suggesting that although the General Assembly intended to effectuate some general uniformity, the statute significantly left “room for difference in the narrower area of residency regulation.”⁶⁰

54. *Id.*

55. *Id.* at 580.

56. *Ryals v. City of Englewood*, 962 F. Supp. 2d 1236, 1245 (D. Colo. 2013) (quoting *City of Northglenn v. Ibrarra*, 62 P.3d 151, 161 (Colo. 2003)).

57. *Id.*

58. *Ryals v. City of Englewood*, 364 P.3d 900, 904 (Colo. 2016).

59. *Id.* at 906–907.

60. *Id.* at 907.

The litigants in *Ryals* settled before the Tenth Circuit could hold on the matter. However, much can be learned from comparing the Colorado Supreme Court's certified answer to the holding of the District Court of Colorado. The Colorado Supreme Court's answer to the certified question differed from the conclusion the District Court of Colorado reached in its consideration of the ordinance.⁶¹ Uniformity would be subverted, the District Court concluded, if the comprehensive, best practices of the Sex Offender Management Board could be disregarded and supplanted by local law.⁶² Whether or not the state law was silent as to residency requirements was apparently not dispositive to the District Court.⁶³ The District Court did not discuss what the Colorado Supreme Court found instructive, that state law contemplated some room for local ordinances.⁶⁴

The differences between the Colorado Supreme Court and District Court's treatment of the uniformity factor are illuminating. Contrary to the District Court's analysis, the Colorado Supreme Court seemed to conclude a desire for uniformity could not be evinced from the silence of state law with regard to residency requirements. Additionally, the Colorado Supreme Court made special note that the statute envisioned room for local governance. Two conclusions can be drawn from this. First, the Colorado Supreme Court will not be quick to construe ambiguities in the state statute as favoring a need for uniformity. Second, the court will consider special powers given to local entities as weighing against a legislative desire for uniformity.

In the context of oil and gas, the Colorado Supreme Court has repeatedly held the OGCA demands uniform treatment of oil and gas throughout the state.⁶⁵ The need for uniformity in oil and gas is twofold: geological formations do not track political boundaries and the correlative rights of mineral owners are protected through the efficient and even recovery of hydrocarbons.⁶⁶ The new OGCA does not change the geological nature of subterranean pools of hydrocarbons but it marks a radical shift from a legislative scheme designed to favor correlative rights to one that defines waste as: "not includ[ing] the nonproduction of oil or gas from a formation

61. *Ryals*, 962 F. Supp. 2d 1236 (D. Colo. 2013).

62. *Ryals*, 962 F. Supp. 2d. at 1246.

63. *Id.*

64. *Id.*

65. See *City of Fort Collins v. Colo. Oil & Gas Ass'n*, 369 P.3d 586, 591 (Colo. 2016); *City of Longmont v. Colo. Oil & Gas Ass'n*, 369 P.3d 573, 580 (Colo. 2016), 369 P.3d 573 (2016); *Voss v. Lundvall Bros.*, 830 P.2d 1061 (Colo. 1992).

66. *Longmont*, 369 P.3d at 580.

if necessary to protect public health, safety, and welfare, the environment, or wildlife resources as determined by the commission.”⁶⁷ This choice of definition consciously chooses to leave mineral interest owners with little recourse should the nonproduction of oil and gas, as a result of local legislation, in one part of the reservoir result in a material depletion of their ability to recover from the reservoir in the future. Furthermore, the General Assembly removed language from the OGCA that formerly directed the COGCC to regulate the “balanced development” of oil and gas.⁶⁸ Correlative rights certainly continue to exist in Colorado but the newly amended OGCA evinces a legislative intent to trade the “balanced” development of geological formations for a scheme less concerned with even development of the reservoir.

Moreover, the General Assembly, through the OGCA and LUEA, invites “patchwork” regulation. The OGCA now mandates that an operator must file an application with the local government for a surface application to drill before a drilling permit will be issued from the state.⁶⁹ And, the OGCA goes on to expressly empower local governments with “regulatory authority over oil and gas development” and authorizes local entities to make regulations that are “more protective or stricter than state requirements.” Notably, the OGCA is silent as to whether or not a local entity may be less protective than state requirements.

The rights of local governments, historically defeated in the arena, are further vindicated by the LUEA which now contemplates the regulation and siting of oil and gas well locations as areas of local interest.⁷⁰ The sum of OGCA and LUEA is a legislative scheme that completely disregards uniformity. Although the OGCA begins with a legislative declaration that the COGCC shall be directed to “regulate the development and production of the natural resources of oil and gas in the State of Colorado,” an inference that this calls for uniformity of regulation is weak. Much like the use of the word “comprehensive” in the Sex Offender statute considered in *Ryals*, this alone will not be enough for the Colorado Supreme Court. By enacting The Bill, the General Assembly divorced the OGCA from its anchor to uniformity – balanced development of the reservoir – and invited a multitude of diverse regulations across the Denver Julesburg. If the Colorado Supreme Court were to revisit uniformity of oil and gas

67. COLO REV. STAT. § 34-60-103 (2019).

68. COLO REV. STAT. § 34-60-102, amended by S.B. 19-181, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019).

69. COLO REV. STAT. § 34-60-106 (2019).

70. COLO. REV. STAT. §§ 29-20-102 to 107 (2019).

regulations using a mechanistic approach, it would likely determine the uniformity factor now weighs in favor of the local entity.

2. Factor Two, Extraterritorial Impact

The need for extraterritorial impact factor in the court's analysis is made evident by the language in Article XX § 6 which limits the scope of local law to the cities themselves.⁷¹ Extraterritorial impact is defined as “a ripple effect that impacts state residents” outside the local entity in a manner that has serious consequences amounting to more than merely incidental or de minimus impacts.⁷² However, the actual application of the extraterritorial impact often cuts against the local entity.⁷³ Despite the rule's cautionary qualification that extraterritorial consequences of a merely incidental nature will not weigh against the local entity, courts will often apply this in a manner that undercuts or redefines the importance of this qualification.⁷⁴

For example, in *City of Northglenn v. Ibrarra*, the Colorado Supreme Court considered the extraterritorial impact of a Northglenn law that limited the placement of juvenile sex offenders in foster homes within Northglenn.⁷⁵ The Colorado Supreme Court held the ordinance possessed an impermissible ripple effect because it would decrease available housing for adolescent sex offenders throughout the state.⁷⁶ Decrease in overall housing in the state for adolescent sex offenders amounted to more than a merely incidental impact.⁷⁷ Ibrarra's characterization of the ordinance as having an extraterritorial impact is therefore instructive in determining how little courts will require to find that an ordinance, while applicable only in the city itself, actually has an extraterritorial nature.

Extraterritorial impact analysis presents an additional wrinkle: the domino effect. After reading a court's discussion of the domino effect, the reader may experience a distinct impression of déjà vu because the boundaries between the uniformity and extraterritorial factors are often blurred. Application of this rule will sometimes revisit a concept already

71. COLO. CONST. art. XX, § 6.

72. *City of Northglenn v. Ibrarra*, 62 P.3d 151, 161 (Colo. 2003).

73. See generally Laurie Reynolds, *Home Rule, Extraterritorial Impact, and The Region*, 86 DENV. U.L. REV. 1271 (2009) (arguing modern extraterritorial impact analysis restricts the scope of home rule powers).

74. *Id.* at 1278.

75. *City of Northglenn v. Ibrarra*, 62 P.3d 151, 153 (Colo. 2003).

76. *Id.* at 161.

77. *Id.* at 161.

considered by the court in the uniformity factor: patchwork regulations.⁷⁸ When the Colorado Supreme Court discussed *Ibrarra* in *Ryals*, the Colorado Supreme Court placed special emphasis on the “domino effects” of the ordinance.⁷⁹ The Colorado Supreme Court noted the ordinance threatened to breed patchwork regulations – an indication the issue may be of statewide or mixed concern.⁸⁰ Under the uniformity analysis, patchwork regulations are indicative of a statewide or mixed issue if the General Assembly evinced some intent to avoid the same. In the extraterritorial analysis however, the intent of the General Assembly does not appear to be as dispositive. Instead, the court will look to see if the nature of the ordinance would be likely to encourage other local entities to adopt similar laws.⁸¹

Consideration of patchwork regulation under both factors is therefore capable of producing confounding results. For purposes of the uniformity test, a local law may be deemed to *permissibly* produce patchwork regulations because the General Assembly did not express a desire to avoid such results. This same law, under the extraterritoriality factor, will almost certainly be treated as *impermissibly* triggering patchwork regulations even though the General Assembly expressed no desire to avoid patchwork regulations. The treatment of patchwork regulations under extraterritorial impact analysis therefore subverts the promise of Article XX § 6 by threatening to foreclose local regulation of a matter even if the State has not expressed an interest in avoiding patchwork regulation of the issue. The rights enumerated to local cities and towns under Article XX § 6 were not granted conditionally on whether or not a local regulation might be followed by other cities. Colorado’s adoption of a home rule scheme reflects a policy choice to hazard patchworks of local regulatory schemes not forbidden, expressly or impliedly, by the General Assembly.

In the oil and gas context, application of the extraterritoriality factor consistently cuts against the local entity.⁸² However, the calculus the Supreme Court of Colorado has employed to reach this conclusion varies. In *Voss v. Lundvall Bros.*, the court held Greeley’s ordinances restricting oil

78. *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 573, 581 (Colo. 2016); Reynolds, *supra* note 73, at 1278.

79. *Ryals v. City of Englewood*, 364 P.3d 900, 907 (Colo. 2016).

80. *Id.*

81. *Id.*

82. *See City of Fort Collins v. Colo. Oil & Gas Ass’n*, 369 P.3d 586, 591 (Colo. 2016); *Longmont*, 369 P.3d at 580; *City of Fort Collins v. Colo. Oil & Gas Ass’n*, 369 P.3d 586, 591 (Colo. 2016); *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1067 (Colo. 1992).

and gas development possessed an impermissible extraterritorial effect because the uneven development of oil and gas along geological formations would result in increased production costs for operators and inequitable distributions of royalty payments to mineral owners in contravention of the OGCA.⁸³ *Voss* therefore relied on an interpretation of relevant state law and the impact the ordinance would have on persons outside city limits. In *City of Longmont v. Colorado Oil and Gas Association*, the Colorado Supreme Court drew from their opinion in *Voss* but added in the domino effect wrinkle of *Ibarra*.⁸⁴ *Longmont* held that the environmentally restrictive ordinance might encourage other cities to follow suit.⁸⁵

Had the Colorado Supreme Court limited their analysis of the extraterritorial impact factor simply by affirming *Voss*, the court would have arrived at the same conclusion – that the ordinance possessed an extraterritorial impact. Yet, critically, *Longmont* introduces a new, almost impossible hurdle for local entities by applying the domino effect wrinkle. For *Longmont*, this additional wrinkle is not dispositive but for other cases it may be significant. If the Colorado Supreme Court considers local regulations of oil and gas reaching beyond the scope of the amended OGCA, the local entity will almost certainly lose on the extraterritoriality factor under the *Longmont* approach. However, if the Colorado Supreme Court returns to its analysis in *Voss*, the local ordinance is less likely to be characterized as pertaining to an issue of mixed or statewide concern because the analysis of the court will be limited to considering the OGCA and consequences of the ordinance to persons outside the local boundaries.

In *Voss* and *Longmont*, the Court held the local ordinance to be in contravention of the OGCA due to its disregard of mineral interest owners. The newly amended OGCA divorces itself from these same concerns by shifting to a legislative scheme more concerned with the protection of health, safety, and the environment than the equitable treatment of mineral interest owners.⁸⁶ This does not mean, however, that new language in the OGCA will not lend itself towards characterization of the ordinance as possessing extraterritorial impacts. Depending on the nature of the local ordinance, the Colorado Supreme Court might view the regulation as jeopardizing “public health, safety, and welfare” of persons and wildlife outside the boundaries of the local entity.⁸⁷ On the other hand, certain local

83. *Voss*, 830 P.2d at 1067.

84. *Longmont*, 369 P.3d at 581.

85. *Id.*

86. COLO REV. STAT. § 34-60-102 to 103 (2019).

87. COLO REV. STAT. § 34-60-102 (2019).

regulations of oil and gas may not be deemed to be of an extraterritorial nature.

To sum this all up, a challenged ordinance regulating oil and gas will likely be treated as possessing an extraterritorial impact if it is viewed under the same lens as *Longmont*. However, if the ordinance is treated in the same vein as the ordinance in *Voss*, the nature of the ordinance and language of the statute will be dispositive. An ordinance yielding results contrary to the safety, health, and environmental aims of the OGCA would almost certainly be deemed as being extraterritorial in nature. However, an ordinance that tracks the language of the OGCA will most likely not have an extraterritorial impact under the *Voss* framework.

3. Factor Three, Traditional Regulation

The third factor in determining whether an issue is of statewide or local concern looks to historical regulation of the issue by state and local authorities.⁸⁸ This analysis is centered around a desire to adequately preserve regulation of the matter by traditional authorities. In *Voss*, the Colorado Supreme Court held that the issue of oil and gas regulation is a matter traditionally governed by state authorities.⁸⁹ In their discussion of the issue, the Colorado Supreme Court concluded that because the General Assembly created the COGCC, issues of Oil and Gas regulation constituted a matter of statewide concern. Later, in *Longmont* and *Fort Collins*, the Colorado Supreme Court revisited their reasoning in *Voss* and concluded the regulation of oil and gas instead constituted a matter traditionally regulated by both state and local authorities.⁹⁰ *Longmont* and *Fort Collins* repudiated *Voss* in this regard because the Colorado Supreme Court recognized the regulation of oil and gas is governed by the COGCC as well as municipalities with zoning authority.⁹¹ So, even before the General Assembly amended the OGCA, the third factor cut both ways. Under the old paradigm, the law recognized regulation of oil and gas as an area of law traditionally regulated by both state and local governments.

The newly amended OGCA “provide[s] broad authority to local governments to plan for and regulate the use of land”.⁹² However, the General Assembly was careful not to express a policy too munificent. Their

88. *Voss*, 830 P.2d at 1067.

89. *Id.* at 1068.

90. *City of Fort Collins v. Colo. Oil & Gas Ass’n*, 369 P.3d 586, 591 (Colo. 2016); *Longmont*, 369 P.3d at 581.

91. *Longmont*, 369 P.3d at 581.

92. COLO REV. STAT. § 29-20-102(1) (2019).

grant to local governments came with a caveat: “nothing in this article shall serve to diminish the planning functions of the state or the duties of the division of planning.”⁹³ Thus, the policy of the new OGCA affirms the traditional status quo and recognizes a system of dual regulation by both local and state governments. There is no reason, then, for the traditional factor analysis in *Longmont* and *Fort Collins* to be disturbed by new legislation. The Colorado Supreme Court concluded, in 2016, that the regulation of oil and gas is a matter of both state and local concern. There is little reason to think that legislative developments disturbed this portion of the analysis in *Longmont* and *Fort Collins*.

4. Factor Four, Colorado Constitution

The final step of Colorado preemption analysis looks to whether the Colorado Constitution commits regulation of the matter to either state or local authorities.⁹⁴ At first glance, this may seem simple enough: the Colorado Constitution either says or doesn't say a matter is reserved for state or local authorities. In reality, the Colorado Supreme Court's analysis of this factor fails to produce clear and bright line results. Confusion on this point is attributed to the “inherent tension” at play “between competing constitutional and statutory provisions.”⁹⁵ On one hand, home rule provisions in Article XX § 6 of the Colorado Constitution grant local authorities with broad land use control.⁹⁶ On the other hand, the OGCA reserves certain powers over oil and gas regulation to the state. Conflict between these competing areas should be resolved in favor of towns and cities because the General Assembly is restricted from legislatively depriving a right contained within the Colorado Constitution.⁹⁷ Despite these constitutional provisions, the Colorado Supreme Court tends to weigh this factor in favor of the state.⁹⁸

Ibrarra and *Voss* provide some explanation as to why this fourth factor is so onerous for local entities. *Ibrarra* noted that while home rule powers in Article XX § 6 are broad, the constitution does not expressly provide for

93. *Id.*

94. *City of Northglenn v. Ibrarra*, 62 P.3d 151, 162 (Colo. 2003).

95. Kevin J. Duffy, *Regulating Hydraulic Fracturing Through Land Use: State Preemption Prevails*, 85 U. COLO. L. REV. 817, 846 (2014).

96. Minor, *supra* note 31, at 90.

97. Duffy, *supra* note 95, at 846.

98. *See Ibrarra*, 62 P.3d at 162; *see also Voss v. Lundvall Bros.*, 830 P.2d 1061, 1067 (Colo. 1992).

local regulation over oil and gas.⁹⁹ This silence, therefore, means the fourth factor weighs in favor of the state. Similarly, *Voss* reasoned that local entities enjoyed constitutional power to regulate land-use but this constitutional power yielded to state goals expressed in state legislation.¹⁰⁰

Sometime after *Voss* and *Ibrarra*, in 2008, *Telluride v. San Miguel Valley* signified a change in reasoning for the court.¹⁰¹ Although the Colorado Supreme Court did not expressly overturn *Ibrarra* or *Voss*, the reasoning employed in *Telluride* represents a massive departure in the court's constitutional analysis. In *Voss*, the court limited the scope of Article XX home rule powers to better conform the actions of home-rule municipalities to the mandates of the General Assembly.¹⁰² Corporate challengers to the city of Telluride's home rule authorities patterned their argument from the logic in *Voss*: Article XX should be constrained by acts of the General Assembly, the corporate challenger in *Telluride* contended. *Telluride* rejected this argument, repudiating the logic of *Voss*. Plainly, *Telluride* announced that "the legislature cannot prohibit the exercise of constitutional home rule powers, regardless of the state interests which may be implicated by the exercise of those powers."¹⁰³ So, where the actions of the municipality concern matters of local issues, the legislative acts of the General Assembly are preempted by Article XX and the ordinances of the municipality.

Telluride went one step further. *Ibrarra* announced tiers of importance interpreting Article XX. If Article XX did not explicitly enumerate a municipal power, *Voss* stated, then Article XX could not be said to directly address the matter for purposes of constitutional preemption analysis.¹⁰⁴ The corporate challenger in *Telluride* argued that tiers of condemnation power existed in Article XX – those express and implied.¹⁰⁵ *Telluride* refused this argument too, "we reject the notion that there are two separate echelons of condemnation powers under Article XX".¹⁰⁶ Of course, questions remain as to how this piece of *Telluride* should be interpreted. Does this mean that there are no echelons of implied and express powers in Article XX or did *Telluride* speak only to powers of condemnation

99. *Ibrarra*, 62 P.3d at 162.

100. *Voss*, 830 P.2d at 1068.

101. *See* *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008).

102. *Voss*, 830 P.2d at 1068.

103. *Telluride*, 185 P.3d at 170.

104. *Ibrarra*, 62 P.3d at 162.

105. *Telluride*, 185 P.3d at 170.

106. *Id.*

enumerated in Article XX? Article XX § 6 makes no explicit mention of condemnation powers.¹⁰⁷ This lends credence to the argument that *Telluride* dispelled the notion that any categories of express or implied powers exist in Article XX. So long as the power is deemed to be local through a preemption analysis, it should then be protected by Article XX and is beyond the purview of legislative interference.

Interestingly, however, it would seem that the impacts of *Telluride* have been cabined to the realm of Article XX jurisprudence only as it pertains to condemnation authority. In *Longmont*, the Colorado Supreme Court's discussion of the fourth factor made no mention of *Telluride*.¹⁰⁸ Instead, the Colorado Supreme Court reaffirmed *Voss*. Puzzlingly, the Colorado Supreme Court was reticent to explain why; simply stating the Constitution makes no explicit mention of fracking.¹⁰⁹ Therefore, the fourth factor cannot weigh in favor of either the state or the city.¹¹⁰

Distillation of this fourth factor in preemption jurisprudence produces a schizophrenic framework. First, the General Assembly is prohibited from legislating away powers given to home-rule municipalities regardless of whether or not those powers are expressly enumerated by Article XX. This means little, however, because the fourth factor of preemption analysis permits the judiciary to apply in reasoning what it says is forbidden: look to whether a matter is expressly stated in Article XX. So, if the court applies all four factors and determines a matter is of a local character, the General Assembly is prohibited from legislating away that power regardless of whether the power is expressly listed in Article XX. Nevertheless, a matter of a purportedly local character, not expressly listed in Article XX, is less likely to receive the protection of *Telluride* because the fourth factor is squarely at odds with the basic concept that legislative acts shall not divest municipalities of their constitutional powers.

All of this does not mean that courts should dispense of the fourth factor test altogether. It is still crucial to determine whether or not the Colorado Constitution commits a matter to state or local authority. However, many issues of a local character are not expressly listed by Article XX because Article XX was not intended to serve as a narrow or exhaustive list of local powers.¹¹¹ The fourth factor test should then be modified with a corollary: if the Colorado Constitution is silent as to the governance of the matter, can it

107. COLO. CONST. art. XX, § 6.

108. *See* City of Longmont v. Colo. Oil & Gas Ass'n, 369 P.3d 573 (Colo. 2016).

109. *Id.* at 581.

110. *Id.*

111. COLO. CONST. art. XX, § 6.

be inferred that the issue belongs to the powers broadly enumerated in Article XX § 6? If so, the fourth factor should weigh in favor of the municipality.

Current application of the court's fourth factor test should not, in theory, hinge in anyway on legislative developments of the General Assembly. *Voss*, however, informs that the courts will weigh the fourth factor as cutting neither in favor of the municipality or state if the matter is not expressly listed in Article XX and the General Assembly speaks on the matter. It is likely then that if the Colorado Supreme Court were to readdress the oil and gas preemption analysis in light of amendments to the OGCA, it would not depart from previous holdings. The fourth factor would then weigh neither in favor of the state or the home rule city.

5. Applying all Four Factors

Under the new OGCA, it is now possible for a municipality to enter the colosseum and successfully argue the regulation of oil and gas concerns a purely local matter. If oil and gas is deemed to be a local matter, home rule cities intent on regulating oil and gas in a manner less restrictive than state law will be able to do so. The uniformity factor likely now weights in favor of the local entity. The traditional analysis and constitutional factors will likely continue to cut both ways as they did before the Bill. Lastly, application of the extraterritorial factor will be especially sensitive to the nature of the local ordinance. Before The Bill, courts used the correlative rights of mineral owners and the health of the reservoir as the logical underpinnings to support reasoning that the regulation of oil and gas produced extraterritorial impacts. The Bill now expressly authorizes municipalities to regulate oil and gas in a manner more restrictive than state law. The new OGCA, therefore, prioritizes the health and safety concerns of municipal governments over more traditional concerns regarding extraterritorial impact of oil and gas regulation. When courts reanalyze the extraterritorial impact of oil and gas regulation they will either reason this factor weighs in favor of the local entity or draw on the new language of the OGCA to conclude new extraterritorial impact results from a local oil and gas regulation.

It must be reiterated that Colorado preemption jurisprudence is mercurial.¹¹² While projections taken from a mechanical extrapolation of existing jurisprudence are alluring, they provide little guarantees. If the court characterizes the local regulation as being of a local concern, the

112. See Kramer, *supra* note 49, at 43.

analysis ends. A local entity's law will supersede state law if the matter is characterized as a local concern.¹¹³ It is possible that a court could deem oil and gas to be a local concern and painlessly resolve the dispute in favor of the local entity. If, however, the regulation is characterized as an issue of state or mixed concern, the court is required to determine whether the local regulation is expressly, impliedly, or operationally preempted by state law.¹¹⁴ In previous oil and gas preemption cases, the Colorado Supreme Court held the OGCA did not expressly or impliedly preempt the efforts of local entities to prohibitively regulate matters of mixed state and local concern.¹¹⁵ Instead, the court held local regulations were operationally preempted by state law.¹¹⁶ It is therefore necessary to consider the second, distinct test of Colorado preemption analysis: conflict analysis.

D. Conflict Preemption Analysis

The launching point for preemption analysis of county and statutory city regulations begins with conflict preemption analysis.¹¹⁷ This is also the second, conditional step for home rule city regulations pertaining to matters of statewide or mixed concern.¹¹⁸ There are three ways a local law may be preempted: expressly, operationally, or impliedly.¹¹⁹ Express preemption occurs when the General Assembly expressly preempts the local law.¹²⁰ Implied preemption exists where a state law broadly addresses a particular issue in such a thorough manner that it implicitly preempts local laws.¹²¹ Operational preemption is a peculiar animal. "Mere overlap in subject matter" of state and local law "is not sufficient" to preempt the local law.¹²² For the local law to be operationally preempted, the local law must materially impede or destroy a state interest.¹²³

113. *Longmont*, 369 P.3d at 579.

114. *Id.* at 581.

115. *Longmont*, 369 P.3d at 581; *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1066 (Colo. 1992).

116. *Longmont*, 369 P.3d at 581; *Voss*, 830 P.2d at 1066.

117. *Colo. Mining Ass'n. v. Bd. of Cty. Comm'rs of Summit County*, 199 P.3d 718, 723 (Colo. 2009).

118. *Longmont*, 369 P.3d 573, 581.

119. *Kramer*, *supra* note 49, at 38.

120. *Id.*

121. *Id.*

122. *Ray v. City & County of Denver*, 121 P.2d 886, 888 (Colo. 1942).

123. *Bd. of Cty. Comm'rs v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1059 (Colo. 1992).

The Colorado Supreme Court has consistently held express and implied preemption are not at play when considering preemption analysis in the context of oil and gas preemption.¹²⁴ Given the nature of changes to the OGCA – granting more control to local entities – it seems unlikely the new OGCA will be held to expressly or impliedly preempt local ordinances regulating oil and gas.¹²⁵ However, this does not mean that the OGCA could be further amended to expressly preempt certain local oil and gas regulations. Weld County’s attempt to wrest power from the hands of the COGCC and assume all authority over the siting of oil and gas wells prompted some lawmakers to reconsider the language of the OGCA. On January 15, 2020, lawmakers introduced HB 20-1126.¹²⁶ HB 20-1126 offered to amend language in the OGCA regarding the siting of oil and gas wells. As the OGCA and LUEA are currently written, only applicable local entities possess the authority to approve or deny permits for surface well locations.¹²⁷ HB 20-1126 threatened to qualify this power by stating all surface well location permits are subject to approval by the director of the COGCC.¹²⁸ If HB 20-1126 became law, it would expressly foreclose Weld County’s ambitions to act as the sole authority for approval of surface location permits. Given current trends in Colorado politics, it seemed probable HB 20-1126 would become law. Surprisingly, however, on March 2, 2020, the House Committee on Energy and Environment postponed the bill indefinitely.¹²⁹

The short-lived existence of HB 20-1126 underscores just how easily the state could divest oil and gas regulatory powers from statutory entities and home rule counties through express preemption. Dissimilarly, home rule cities are relatively more immune to threats of express preemption. In *Telluride*, the Colorado Supreme Court invalidated a land use statute as it impermissibly deprived the home rule city of home rule powers conferred by Article XX.¹³⁰

124. *City of Fort Collins v. Colo. Oil & Gas Ass’n*, 369 P.3d 586, 592 (Colo. 2016); *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 573, 583 (Colo. 2016); *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1066 (Colo. 1992); *Bowen/Edwards Assocs.*, 830 P.2d 1045 (Colo. 1992).

125. See COLO REV. STAT. § 24-65.1-101 (2019); COLO REV. STAT. § 34-60-131 (2019).

126. H.B. 20-1126, 72nd Gen. Assemb., 2nd Reg. Sess. (Colo. 2020).

127. COLO REV. STAT. § 29-20-104 (2019).

128. H.B. 20-1126, 72nd Gen. Assemb., 2nd Reg. Sess. (Colo. 2020).

129. COLO. GEN. ASSEMB., LOCAL CONTROL APPROVALS OIL AND GAS APPLICATIONS, <https://leg.colorado.gov/bills/hb20-1126> (last visited Apr. 7, 2020).

130. *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 169 (Colo. 2008).

Implied preemption exists when the scope of the statute demonstrates a legislative intent of the state to “completely occupy a field to the exclusion of all other regulation.”¹³¹ The term implied generally inspires thoughts of clever litigators who manage to conjure up novel purposes for a statute. The threshold for implied preemption is higher than the term suggests. Indeed, “mere overlap in subject matter is not sufficient to void a local ordinance.”¹³² In *Bowen/Edwards*, the court rejected an invitation to construe the OGCA as impliedly preempting local regulatory efforts.¹³³ As the newest iteration of the OGCA contemplates even more local regulatory involvement, it is not plausible to think the Colorado Supreme Court would disturb the reasoning of *Bowen/Edwards*.

In the home rule battles of the Denver Julesberg, operational preemption is most often responsible for ending the local regulation.¹³⁴ An operational conflict is implicated when the local regulation “materially impede[s] or destroy[s] a state interest.” In *Fort Collins*, the city instituted a lengthy moratorium on fracking.¹³⁵ This moratorium infringed on the clear interest of the state in promoting efficient, responsible, and uniform development of oil and gas resources.¹³⁶ For similar reasons, the moratorium in *Longmont* also failed to survive an operational preemption analysis.¹³⁷

Fort Collins placed emphasis on the state’s interest in promoting responsible and balanced development of oil and gas.¹³⁸ Since *Fort Collins*, the terms responsible and balanced have been stricken.¹³⁹ Now, oil and gas pools are intended to produce “up to [a] maximum efficient rate of production, subject to the protection of public health, safety, and welfare, the environment, and wildlife resources.”¹⁴⁰ So, moratoriums that were once considered operationally preempted by state law are now in harmony.

131. Bd. of Cty. Comm’rs v. Bowen/Edwards Assocs., 830 P.2d 1045, 1058 (Colo. 1992).

132. Colo. Mining Ass’n. v. Bd. of Cty. Comm’rs of Summit County, 199 P.3d 718, 724 (Colo. 2009).

133. *Bowen/Edwards*, 830 P.2d 1045, 1059.

134. See *City of Fort Collins v. Colo. Oil & Gas Ass’n*, 369 P.3d 586 (Colo. 2016); *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 573 (Colo. 2016); 60 P.3d 758; *Voss v. Lundvall Bros.*, 830 P.2d 1061 (Colo. 1992).

135. *Fort Collins*, 369 P.3d at 589.

136. *Id.* at 593.

137. *Longmont*, 369 P.3d at 585.

138. *Fort Collins*, 369 P.3d at 593.

139. COLO. REV. STAT. § 34-60-102(I), amended by S.B. 19-181, 72d Gen. Assemb., 1st Reg. Sess. (Colo 2019).

140. COLO. REV. STAT. § 34-60-102(b) (2019).

In *Ryals*, the Colorado Supreme Court answered a certified question from the Tenth Circuit as to whether a city ordinance was preempted by state law.¹⁴¹ The Colorado Supreme Court reasoned residency restrictions imposed on sex offenders were a matter of mixed state and local concern.¹⁴² Nevertheless, the court went on, the ordinance was not in operational conflict with state law.¹⁴³ To begin, nothing in Colorado's state sex offender scheme "prevents home-rule cities from banning sex offenders from residing within city limits."¹⁴⁴ The challenger to the ordinance grasped at a state provision requiring state officers to approve sex offenders' new residences.¹⁴⁵ This state provision, the challenger asserted, qualified as a conflict between state law and the ordinance.¹⁴⁶

Finding an operational conflict, however, is not a game of statutory 'Where's Waldo'. *Ryals* explains that merely pointing out a state law on the matter is not sufficient to conclude operational preemption. Real friction, not fictional friction, must exist. *Ryals* points out that the friction here is fictional: "[s]tate approval of a sex offender's application does not imply that a city must approve it. On the contrary, state approval is but one prerequisite to relocating...[t]hus, state law on the subject of sex offender registry recognizes that local ordinances play an important role in determining residency."¹⁴⁷ The ordinance in *Ryals* does not defeat the purpose of state law nor does it grind against operation of state law, it merely serves to locally supplement an area of state law.

Operational or conflict preemption is no 'Where's Waldo' exercise but it is not nearly as rigorous as the meandering test of matter characterization for home rule cities. The test is straight forward: does the home rule city's law authorize what state law forbids, or prohibit what is authorized?¹⁴⁸ Clearly, then, any effort taken by a county or statutory city to defeat state regulations would be operationally preempted. However, local entities may have room to creatively and exclusively exercise authority as it pertains to surface location permitting and land disturbance issues. Under the OGCA, local entities are granted the authority to plan for and regulate the location

141. *Ryals v. City of Englewood*, 364 P.3d 900, 903 (Colo. 2016).

142. *Id.* at 908.

143. *Id.* at 909.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *City of Commerce City v. State*, 40 P.3d 1273, 1284 (Colo. 2002).

and siting of oil and gas wells.¹⁴⁹ Nevertheless, pursuant to Weld County's Memorandum of Understanding with the COGCC, Weld County agreed to cede surface permitting authority to the COGCC.¹⁵⁰ Weld County has not flourished as a result of the Bill or the Memorandum of Understanding. Permit approvals are down by over 50% since the Bill became effective and, as a result, Weld County will lose out on millions in tax revenue.¹⁵¹

So, why would Weld County agree to this Memorandum of Understanding? While Weld County now possesses the sole power to approve surface permits to drill, the COGCC retained the power to approve permits to drill. Therefore, an operator seeking to drill in Weld County would still be required to obtain approval from the County for the surface location of the well and the State for the actual drilling of the well. Thus, operators and Weld County are still required to go through the State in order to bring a well to completion. Furthermore, as evidenced by the introduction and tabling of HB 20-1126, it would not be terribly difficult for the General Assembly to simply amend the OGCA and essentially codify the terms of the Memorandum of Understanding. So, Weld County can try and expedite surface permitting for operators but this means very little if the COGCC does not promptly respond to applications for permits to drill.

III. Oklahoma

Oklahoma, like Colorado, is an *imperium in imperio* state.¹⁵² Oklahoma and Colorado share similar constitutional DNA as Article XVIII of the Oklahoma Constitution provides a basis for home rule municipal authority.¹⁵³ Under Article XVIII, "a city charter supersedes conflicting state law on matters of purely municipal concern."¹⁵⁴ So, like Colorado, an Oklahoma home rule city may enact ordinances that supersede state law

149. COLO. REV. STAT. § 29-20-104.

150. COLO. OIL AND GAS CONSERVATION COMM'N, COGCC ESTABLISHES PERMITTING PROTOCOL FOR 1041 AREAS DESIGNATED OF STATE SPECIAL INTEREST FOR OIL AND GAS DEVELOPMENT (Sept. 4, 2019).

151. Joe St. George, *Decreasing Oil and Gas Permits Impacting Weld County Businesses, Local Governments*, FOX DEN. (Dec. 9, 2019, 6:56 PM), <https://kdvr.com/news/problem-solvers/decreasing-oil-and-gas-permits-impacting-weld-county-businesses-local-governments/>.

152. Polley, *supra* note 3, at 278.

153. OKLA. CONST. art. XVIII, § 3; State *ex rel.* Trimble v. City of Moore, 818 P.2d 889, 898 (Okla. 1991).

154. *Moore*, 818 P.2d 889, 898 (Okla. 1991).

when those laws pertain to a purely municipal concern. The similarities continue. Since 1934 and for years thereafter, a number of Oklahoma litigants invoked Article XVIII authority in an attempt to hoist local law above state law and curb oil and gas development.¹⁵⁵ Moreover, the Oklahoma Legislature, like the Colorado General Assembly, recently felt compelled by oil and gas home rule litigation to legislate on the issue.¹⁵⁶

Dive deeper into the Oklahoma and Colorado home rule sagas, however, and dissimilarities begin to appear. The guiding case in Oklahoma for home rule preemption in the context of oil and gas is a 1934 Oklahoma Supreme Court Case, *Beveridge v. Harper & Turner Oil Trust*.¹⁵⁷ There, the Oklahoma Supreme Court held that a local ordinance may validly restrict an otherwise lawful oil and gas operation if the local ordinance circumscribes a private property use that is “inconsistent with the promotion of the public health, safety, morals, or general welfare of the community.” In *Beveridge*, four factors are relevant: character of improvements on the property; proximity to other improved property; the possible and probable effect of oil development on the area as it is now situated; and its probable effect on the future growth and development of the city.¹⁵⁸ The Oklahoma test, therefore, does not engage in the same characterization factors as Colorado. Instead, Oklahoma courts will look to factors relevant to the location of the operations, the purpose of the restriction, and the characteristics of the locale.¹⁵⁹ Arguably, administration of this simpler Oklahoma test produces more favorable results for local entities than the Colorado test. For instance, *Beveridge* held that zoning prohibitions on the development of oil and gas in Oklahoma City were valid.¹⁶⁰

Since 1934, however, a number of legal developments eroded hope that *Beveridge* would serve as an environmental sword against oil and gas

155. See *Clouser v. City of Norman*, 393 P.2d 827 (Okla. 1964); *Beveridge v. Harper & Turner Oil Trust*, 35 P.2d 435 (Okla. 1934) (overruled on other grounds); Supplemental Report of the Administrative Law Judge, *I-MAC Petroleum Services, Inc.*, Okla. Corp. Comm’n, Cause PD No. 200900255-O/T (Mar. 3, 2010).

156. OKLA. STAT. tit. 52, § 137.1 (2015).

157. See *Beveridge*, 35 P.2d 435.

158. *Id.* at 440.

159. *Id.* at 440.

160. Compare *Beveridge*, 35 P.2d 435 (holding the special nature of municipal area justified zoning restrictions on drilling), with *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1066 (Colo. 1992) (holding wider state interests and effects of ordinance could not yield to municipal regulation), and *City of Fort Collins v. Colo. Oil & Gas Ass’n*, 369 P.3d 586 (Colo. 2016) (same).

development in municipalities. Three decades after *Beveridge*, the Oklahoma Supreme Court revisited the issue in *Clouser*.¹⁶¹ In *Clouser*, the city of Norman zoned plaintiff lessor's acreage to restrict oil and gas development on the premises.¹⁶² The Oklahoma Supreme Court held that this was an impermissible exercise of local power as the factors implicated in *Beveridge* were not present in *Clouser*.¹⁶³ Unlike the valid Oklahoma City zoning prohibition on drilling, the Norman prohibition was arbitrary, *Clouser* reasoned, because the prohibition extended to an area not densely populated.¹⁶⁴ Moreover, the area was generally unimproved and, furthermore, oil and gas development "could not affect other areas nor could it affect the future development of the city."¹⁶⁵ *Clouser's* succinct application of the *Beveridge* factors severely limited the potential scope and punch *Beveridge* may have possessed when it was first decided.

Many decades after *Beveridge* and *Clouser*, in 2015, the Oklahoma Legislature directly addressed the issue of oil and gas regulation by local entities.¹⁶⁶ Title 52 § 137.1 authorizes a local entity to establish reasonable setbacks and fencing requirements but expressly prohibits a local entity from "effectively prohibit[ing] or ban[ning] any oil and gas operations."¹⁶⁷ Moreover, §137.1 provides, "all other regulations of oil and gas operations shall be subject to the exclusive jurisdiction of the [Oklahoma] Corporation Commission".¹⁶⁸ The effect of §137.1 is succinctly described by the legislative history of the law. An Oklahoma Committee Report on the bill, later codified as §137.1, describes it as "prohibiting regulation by local entities."¹⁶⁹ Shortly after the passage of §137.1, the Oklahoma Attorney General issued an opinion on the effect of the bill. The regulation of oil and gas is a statewide concern, the opinion explained, because the oil and gas industry is crucial to the Oklahoma economy and concerns a great number of Oklahomans across the state.¹⁷⁰ As the regulation of oil and gas is now designated as an issue of statewide concern, the effect of §137.1 is to

161. *Clouser*, 393 P.2d 827.

162. *Id.* at 828.

163. *Id.* at 830.

164. *Id.*

165. *Id.*

166. OKLA. STAT. tit. 52, § 137.1 (2015).

167. *Id.*

168. *Id.*

169. SB 80-9, 55th Legis., 1st Reg. Sess. (Okla. 2015).

170. Okla. Att'y General Op. No. 2015-12, 2015 WL 7873263 (Nov. 30, 2015).

preempt prohibitive local regulation of both chartered and non-chartered cities.¹⁷¹

So, while the Colorado General Assembly vested local entities with more authority to prohibitively regulate the oil and gas industry, the Oklahoma Legislature expressly preempted local entities from effectively banning the production of oil and gas. The comparison of the Colorado and Oklahoma approaches sheds light on the proper place of federalism and home rule in the context of oil and gas regulation.

From an industry perspective, legislative developments in Oklahoma are a huge win. The Oklahoma Legislature shut the door to the sort of litigation the Colorado Supreme Court entertained in the past three decades. Conversely, legislative developments in Colorado restrain the industry with a myriad of new regulations. No doubt, the new OGCA is a win for environmentalists in Colorado. At first glance, the take-away from these two cases may suggest that the implementation of home rule regulation favors environmentalist movements and impedes the oil industry.

This conclusion, however, is reductive. First, it isn't entirely appropriate to characterize the novel versions of the LUEA or the OGCA as pro-home rule or federalist. More accurately, the amended OGCA endeavors to empower local entities only to act more prohibitively than what is mandated by the state.¹⁷² Second, the authorities delegated to local entities in Colorado are still subject to drilling permitting approval through the COGCC.¹⁷³ Crucially, the amended OGCA changed the composition of the COGCC directors from individuals experienced in the industry to a majority of individuals with little industry experience.¹⁷⁴ The COGCC is now comprised of individuals concerned less with the industry and more with health, safety, and the environment. Perhaps, partially as a result of this change, the number of approved permits in Colorado has slowed drastically.¹⁷⁵

Practically speaking, Colorado is using the façade of federalism to strangle the oil industry pursuant to the General Assembly's objective of diminishing industry in the state. The façade of federalism underlying The Bill was necessary due to statewide voter sentiment regarding oil and

171. *Id.*

172. COLO. REV. STAT. § 34-60-131 (2019) (“A local government’s regulations may be more protective or stricter than state requirements.”).

173. COLO. REV. STAT. § 34-60-106(18)(a) (2019).

174. COLO. REV. STAT. § 34-60-104(2)(a)(I) (2019).

175. See David R. Little & Diana S. Prulhiere, *Colorado*, 5 OIL & GAS, NAT. RES. & ENERGY J. 117 (2019).

gas.¹⁷⁶ Legislators couldn't risk implementing an act transparently hostile to the industry as Colorado voters soundly defeated an anti-oil and gas proposition in 2018.¹⁷⁷ The solution, then, was to try and utilize home rule provisions in conjunction with COGCC changes to completely foreclose oil and gas development in many counties and slow it in others. A true federalist solution should serve the local needs of each community. The Bill certainly does not do that.

Conversely, the Oklahoma Legislature acted very transparently. In no uncertain terms, §137.1 directs the state to dominate the regulation of oil and gas.¹⁷⁸ Consistent with widespread trends across the country to reduce local powers, §137.1 reduces the significance of Article XVIII powers. In Colorado, such an act might be deemed unconstitutional under *Telluride* as it may impermissibly divest local authorities of their constitutional powers.¹⁷⁹ Today, §137.1 represents a great legislative victory for the industry.

In years to come, however, the industry may come to regret the violence §137.1 has done to Article XVIII. If §137.1 is not considered unconstitutional, what would stop the Oklahoma Legislature from implementing statewide bans of oil and gas in the future? To many in Oklahoma today, the prospect of such a dramatic change in state legislative tides may seem unfathomable. Keep in mind, however, that the prospect of anti-industry legislation in Colorado was not on the horizon in the 1980s. As appealing as §137.1 may be today for the industry, it may, in the future, be seen as a Faustian bargain.

Let's unpack what this bargain entails. In sum, if the industry sticks with §137.1, they gain the sword of state law and lose the shield of home rule constitutional provisions. Through §137.1, the industry tethers its future existence in Oklahoma to the State Legislature. So long as the state legislature remains favorable to the industry, the industry continues to exist. This is a big bet for the industry but, given the current political climate in Oklahoma, probably safe one.

Home rule provisions in both Colorado and Oklahoma should be faithfully defended by the courts. The growing rift between environmentalist urban areas and rural areas reliant on the oil industries can

176. Greg Avery, *Voters Reject Oil Well Setbacks as Colorado's Proposition 112 Defeated*, DENVER BUS. JOURNAL (Nov. 6, 2018, 10:50 PM), <https://www.bizjournals.com/denver/news/2018/11/06/colorado-prop-112-defeated.html>.

177. *Id.*

178. OKLA. STAT. tit. 52 § 137.1 (2019).

179. *See Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008).

be reconciled through true principles of federalism. Neither the amended OGCA nor the provisions of §137.1 strike this balance. On one end, urbanites in Denver and Boulder have deprived the people of Weld County of economic prosperity. If Boulderites wish to restrict the oil and gas industry in their own backyard, that is their prerogative. It is not their place to halt oil development in Weld County and diminish an industry that has provided generations of Coloradans with jobs and opportunities. Similarly, §137.1 divests larger urban areas from regulating oil and gas in a manner appropriate for a more populated region. The unintended consequence of §137.1 may be to galvanize metropolitan Oklahomans against the industry and deprive municipalities from making responsible, local regulations. The solution to this problem is in the constitutions of both states: enact legislation consistent with home rule provisions to give cities and counties wide-ranging autonomy to regulate these issues.

IV. Conclusion

Today and for the past thirty years, the oil and gas preemption litigation in Colorado exemplifies a growing rift among Coloradans. Since the 1970s, oil and gas has been and continues to be an important part of the state economy.¹⁸⁰ Not all of Colorado relies on oil and gas, however. As of 2014, 96% of oil production originated from five counties.¹⁸¹ Many Coloradans, most outside of producing counties, see oil and gas as an antiquated and harmful industry.¹⁸² From 2000 to 2018, Colorado has gained over a million residents.¹⁸³ With this growth, Colorado's economy is becoming more diversified and the oil and gas industry is now one of many industries in a broader economic profile.¹⁸⁴ The ultimate result is that legislators and voters are pushing to change the oil and gas industry in

180. BUS. RES. DIV., COLORADO OIL AND GAS INDUSTRY: UPDATED ASSESSMENT OF COLORADO OIL AND GAS PRICES, at 5 (Aug. 2015), https://www.colorado.edu/business/sites/default/files/attached-files/colorado_oil_and_gas_update_-_prices_082015.pdf.

181. *Id.* at 3.

182. *See generally*, BUS. RES. DIV., *supra* note 180, at 4; Jon Murray, *Proposition 112 Election Map: Anti-Fracking Measure Failed in Most Counties with Heavy Oil and Gas Drilling*, THE DENVER POST (Nov. 8, 2018, 2:15 PM), <https://www.denverpost.com/2018/11/08/colorado-proposition-112-election-fracking-county-map/>.

183. *Population Totals for Colorado and Sub-State Regions*, COLO. DEP'T OF LOCAL AFF., <https://demography.dola.colorado.gov/population/population-totals-colorado-substate/#population-totals-for-colorado-and-sub-state-regions> (last visited Apr. 7, 2020).

184. *Industries*, COLO. OFF. OF. ECON. DEV. & INT'L TRADE, <https://choosecolorado.com/key-industries/> (last visited Apr. 7, 2020).

Colorado – even if it means oil and gas producing counties are casualties to stricter regulations.

As of 2019, Colorado produced an average of 514,000 barrels of oil per day.¹⁸⁵ In ad valorem taxes alone, the industry produces, on average, 350 million in taxes annually.¹⁸⁶ Colorado voters, too, seem to recognize the importance of the industry. In 2018, Colorado voters defeated Proposition 112, an initiative designed to increase oil and gas setbacks to 2,500 feet from things as ubiquitous as “irrigation canals” and as vague as “vulnerable areas designated by state or a local government.”¹⁸⁷ While SB 19-181 is vexing for the industry, Proposition 112 posed a much more menacing threat to oil and gas development in Colorado.

For proponents of the oil and gas industry in Colorado, the future is uncertain. The newly amended OGCA brings a new host of regulatory hurdles to tackle. Regulatory challenges are not novel for the oil and gas industry. In the past nine years, Colorado enacted fifteen different oil and gas rulemakings.¹⁸⁸ Nevertheless, the long string of new regulations do not satisfy many political groups in Colorado. Colorado Rising, an environmentalist group, is currently gathering steam to introduce six new ballot initiatives contemplating the regulation of oil and gas.¹⁸⁹ Five of these ballot proposals are “replicas or close cousins” of the defeated Proposition 112.¹⁹⁰ Employees and beneficiaries of the Colorado oil and gas industry are caught playing a costly game of whack-a-mole. In order to defeat Proposition 112, key Colorado producers donated more than 30 million dollars.¹⁹¹ No matter how well the industry lobbies in an election

185. Traywick, *supra* note 50.

186. *COGA Fact Sheets*, COLO. OIL & GAS ASS'N, <https://www.coga.org/factsheets/community-impact> (last visited Apr. 7, 2020).

187. *Colorado Proposition 112, Minimum Distance Requirements for New Oil, Gas, and Fracking Projects Initiative (2018)*, BALLOTPEDIA, [https://ballotpedia.org/Colorado_Proposition_112_Minimum_Distance_Requirements_for_New_Oil_Gas_and_Fracking_Projects_Initiative_\(2018\)](https://ballotpedia.org/Colorado_Proposition_112_Minimum_Distance_Requirements_for_New_Oil_Gas_and_Fracking_Projects_Initiative_(2018)).

188. *COGA Fact Sheet: Regulatory Timeline*, COLO. OIL & GAS ASS'N (Oct. 4, 2019), <https://www.coga.org/factsheets/regulatory-timeline>.

189. Sam Brasch, *Despite Prop 112's Loss, Colorado's Fracking Foes are Back with 6 New Ballot Measures*, COLO. PUB. RADIO NEWS (Jan. 7, 2020), <https://www.cpr.org/2020/01/07/despite-prop-112s-loss-colorados-fracking-foes-are-back-with-6-new-ballot-measures/>.

190. *Id.*

191. Julie Turkewitz & Clifford Krauss, *In Colorado, a Bitter Battle Over Oil, Gas and the Environment Comes to a Head*, N.Y. TIMES (Oct. 23, 2018), <https://www.nytimes.com/2018/10/23/us/colorado-fracking-proposition-112.html>.

cycle, it seems certain anti-industry proponents will be back the next cycle to ask Colorado voters whether the industry needs to be limited.

A strong argument exists that the regulation of oil and gas is now a purely local issue. The state has certainly not relinquished all power over the regulation of oil and gas but the new OGCA is so local friendly that it may tip the scales of a preemption analysis in favor of home rule entities and permit a court to characterize regulation as a matter of purely local concern. It is now probable that all four factors of operational preemption analysis: uniformity, extraterritorial impact, traditional regulation, and constitutional treatment tend to weigh more in favor of home rule municipalities than the state. If the Colorado Supreme Court taps into the same analytical vein as *Telluride*, the courts will almost certainly divest the COGCC of some authority and cede home rule cities with the power to regulate oil and gas.

When the General Assembly amended the OGCA, it did so under the guise that it would afford local entities more control but only so long as that control was used in a manner more restrictive than state law mandated.¹⁹² Presumably, the intent of the OGCA was to resolve the sort of municipal litigation seen in the past. More realistically, the amended OGCA forces operators to contend with a balkanized landscape of state, city, and county regulations.

Counties, both home rule and statutory, are largely at the mercy of state law. Pro industry home-rule municipalities may be able to find some optimism in the OGCA, however. New language in the OGCA may enable home rule municipalities to govern oil and gas in a more industry friendly manner than the state. Mechanical contours of preemption law can only guide exploration of this issue so far – a key component of this area of jurisprudence hinges on broad judicial discretion.¹⁹³ Given the growing rift between regions in Colorado, it seems most appropriate to reserve the issue of oil and gas regulation to federalism and permit home-rule cities to govern in accordance with the Colorado Constitution.

In a passionate dissent in *Community Communications*, Justice Rehnquist applauded the home rule movement as a key component of federalism.¹⁹⁴ The Colorado home rule city of Boulder lost that case. Boulder contended that it should, as a sovereign, enjoy the benefit of the

192. COLO. REV. STAT. § 34-60-131.

193. See Kramer, *supra* note 49, at 43.

194. Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 70 (1982) (Rehnquist, J., dissenting).

state action exemption from liability of the Sherman Act.¹⁹⁵ Justice Rehnquist lamented, perhaps too hyperbolically, “the decision today effectively destroys the ‘home rule’ movement in this country, through which local governments have obtained, not without persistent state opposition, a limited autonomy over matters of local concern.”¹⁹⁶ This characterization of the fight was accurate but the prediction was not. Home rule rights are certainly not dead. In fact, constitutional home rule provisions remain as an important tool of federalism in *imperium in imperio* states. The DJ Basin is calling, again, for combatants. Crucially, home rule preemption litigation may now be restored as a promising weapon for local entities. I like to think that Justice Rehnquist would be pleasantly surprised to see home rule entities prepared to enter the fray to vindicate federalism and the home rule movement.

195. *Id.* at 52.

196. *Id.* at 71.