Springtime for Home Rule over Oil and Gas

BY DANIEL E. KRAMER

This article discusses Colorado SB 19-181, which makes sweeping changes to the regulation of oil and gas extraction operations.

On April 3, 2019, the Colorado General Assembly passed SB 19-181, Protect Public Welfare Oil and Gas Operations (the Act), which makes sweeping revisions to several statutes governing oil and gas extraction operations. The Governor signed the bill into law on April 16, making the Act effective on that date. The changes encompass state agency rulemaking, the process for allowing oil and gas to be exploited without the consent of the mineral rights holder, financial guarantees to ensure the cleanup and reclamation of wells, and the essential mission of the Colorado Oil and Gas Conservation Commission (the Commission). But arguably the most pivotal change was the legislature's placement of the regulation of the surface impacts of oil and gas exploration firmly in the control of local communities, as coequals with the state.

This shift to local control abrogated the Colorado Supreme Court precedent that, in the event of a conflict between state and local laws on oil and gas, the state law prevails and the local law subsides.[1] Now, the state statute itself makes state laws the floor, not the ceiling, for local regulation. The General Assembly has effectively reinstituted a sort of legislative home rule over the subject, bucking the national trend of state legislatures favoring intrastate preemption on oil and gas regulation issues and reversing a decades-long process of eroding local control.

The Court's recent elaborations of Colorado intrastate preemption doctrine may well still hold for other matters,[2] but not for oil and gas.

SB 19-181: Changes in Local Control

In its 2016 decision overturning the City of Longmont's ban on hydraulic fracturing, the

Colorado Supreme Court set forth its test for whether a local oil and gas regulation would pass scrutiny under the existing statutory scheme. Boiled down, the question was whether the local law conflicted with the state law, which, in practical terms, meant whether the local law would materially impede the state's interest in oil and gas production.[3] The Court extended its previous tests to find preemption where it determined that the local restriction upset "exhaustive" and "pervasive" state regulations that implied a state interest in uniform regulation of the subject.[4]

Eliminating Preemption

By passing SB 19-181, the legislature has abrogated those holdings. The Act created new CRS § 34-60-131:

> **34-60-131. No land use preemption.** Local governments . . . have regulatory authority over oil and gas development, including as specified in section 34-60-105(1)(b). A local government's regulations may be more protective or stricter than state requirements.[5]

Now, the statute itself helps define what constitutes a conflict between the state act and local regulations. There is no question that local governments may properly regulate oil and gas. While local ordinances cannot reduce the minimum state standards for protecting health, safety, welfare, and the environment, they now can clearly regulate above and beyond state regulations. This is true regardless of those state regulations' complexity or thoroughness. The heightened local standards will be in harmony with the Act itself and cannot be considered to conflict with it.[6] As preemption is largely a matter of statutory interpretation[7]—putting the state and local laws side by side to determine whether they can coexist[8]—heightened local standards for oil and gas regulation will no longer be preempted by the state law.

Express Local Powers

The bill grants a long list of regulatory powers over oil and gas to local governments, some preexisting and some new:

I. Land use;
II. The location and siting of oil and gas facilities and oil and gas locations . . .;
III. Impacts to public facilities and services;
IV. Water quality and source, noise, vibration, odor, light, dust, air emissions and air quality, land disturbance, reclamation procedures, cultural resources, emergency preparedness and coordination with first responders, security, and traffic and transportation impacts;
V. Financial securities, indemnification, and insurance as appropriate to ensure compliance with the regulations of the local government; and
VI. All other nuisance-type effects of oil and gas development.[9]

Land use controls over oil and gas facilities are an example of a power that previously was within the authority of local government, so long as the controls did not conflict with state statute.[10] On the other hand, controls over local financial securities and noise, for example, had been held to be preempted.[11] Siting of facilities, meanwhile, had been a perennial source of contention without much guidance from the courts. And the phrase "nuisance-type effects" in subparagraph VI is potentially so broad that it is hard to say yet just how much it expands existing powers.[12]

In addition to these enumerated powers, the bill contains a catch-all provision: Local governments may also regulate to "protect and minimize adverse impacts to public health, safety, and welfare and the environment," although this can only be done "to the extent necessary and reasonable."[13]

In fact, both the catch-all minimization of adverse impacts and the list of enumerated powers are limited in two other ways: the statutory authorization extends only to the regulation of "surface impacts," rather than pure underground engineering, and the regulations may only be exercised "in a reasonable manner."[14]

Defining "Necessary" and "Reasonable"

The words "necessary" and "reasonable" are not defined and leave much to interpretation. While "necessary" applies only to the catch-all minimization of adverse impacts, the full list is subject to the "reasonable manner" limitation. Where the application of the statute to a particular local regulation may be ambiguous, the courts may consider the words of a Senate sponsor of the legislation before the final legislative vote on the bill:[15]

> [A] question has repeatedly come up about the, quote, "necessary and reasonable"

standard language that we added in the Senate. There have been several requests to further define it, but unfortunately that's proved to be difficult. I will say, though, that it's the sponsors' intent to have that phrase interpreted together, and in the context of, the bill as a whole, which is (1) a clear desire to prioritize health and safety when it comes to oil and gas operations, permitting, and supervision, without consideration of profitability from the state regulatory authority, the COGCC, and (2) an ability for local governments to do the same, and be more protective than the state if they choose. "Necessary and reasonable" is not intended to mean regulatory authorities can only make a land use decision or enact a regulation once all other options are exhausted. Instead, it is meant to be a guardrail against a regulatory or land use decision without reasonable justification. State and local governments should not be able to impose requirements, limitations, or decisions that defy explanation. However, they should be entitled to deference and allowed to use the precautionary principle to determine if a regulation or a land use decision is necessary and reasonable. Each locality's application of "necessary and reasonable" may be different depending on its circumstances, and should be examined on a case-by-case basis.[16]

How strict a local regulation can be while remaining "reasonable" will ultimately be decided by the courts. SB 19-181 did not finally settle the bounds of local authority, and litigation will continue to define the rules of engagement. But SB 19-181 dramatically changed the location of the battlefield, propelling local jurisdictions into a much stronger position. Rather than argue over whether it is interfering with the state's manner of regulation—which the state has the inherent advantage of *defining*—the local government now need only show that its method of regulation is reasonable.

Since local land use decisions already cannot be arbitrary and capricious,[17] "reasonable" may not prove to be a very high bar. A local government could demonstrate reasonableness through rough proportionality,[18] by more or less matching the strictness of the regulation to the severity of the oil and gas operation's potential surface impact. Reasonableness might also be demonstrated by the industry's ability to comply with similar regulations elsewhere, or the general application of similar regulations to other heavy industry. Conversely, unreasonableness probably could not be established based solely on the cost of a regulation to an operator, especially given the Act's removal of cost-effectiveness as a consideration elsewhere.[19]

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In addition to the courts, another new entity could also indirectly weigh in on the reasonableness of a local regulation. The Act creates a process for a local government or operator to request review of a local decision by a technical review board, with members appointed by the Commission director.[20] The board has authority to make a nonbinding report on the impacts of the decision to the recovery of the resource, whether the decision would require unavailable or impracticable technologies, and whether the operator is proposing to use best management practices.[21] While the local government can simply ignore an unfavorable report,[22] nothing in the Act would prevent a report from becoming evidence in a suit challenging the legality of the decision. However, because the reports will cover particular local decisions on particular applications, the reports would presumably receive judicial review only under CRCP 106(a)(4), which allows limited judicial review where a governmental body has exceeded its jurisdiction or abused its discretion.[23] The operator cannot force the technical review until after the decision is made, so the report would not likely be part of the administrative record, and thus not part of the judicial review.[24]

In sum, while courts will ultimately need to interpret "necessary" and "reasonable" on a case-by-case basis to define the outer boundaries of local power, SB 19-181 nevertheless firmly establishes local control, coequal with the state, over the surface impacts of oil and gas exploration. Local communities, through their elected representatives, will now be able to write wide-ranging and strict rules for using land within their jurisdictions, with much less risk of those rules being overturned.

Is There Authority for Local Bans?

This new local authority does not necessarily mean that local governments will now be able to entirely ban practices such as drilling or fracking. In advancing the bill in the Senate, one of its sponsors, the majority leader, cast doubt on whether the new local authority could extend to complete bans.[25]

However, the bill contains a potential sleeper provision. The preexisting law on minerals regulation, known colloquially as HB 1041 and

officially as the Areas and Activities of State Interest Act (the AASIA), allowed local governments to regulate mineral resource areas, much as they can regulate water projects.[26] The key difference is that previously, local governments had to seek the Commission's approval to regulate mineral resources. The Act removes that prerequisite.[27] While the bill sections described above sketch the outer bounds of local land use authority, those sections do not seem to limit local government authority under the AASIA. The Act's amendments to the AASIA might even allow a local government to go so far as to prohibit oil and gas activity where it determines that "extraction and exploration would cause significant danger to public health and safety,"[28] the sponsor's words notwithstanding.

Local Enforcement and Implementation

Enforcement mechanisms for local regulations have also been strengthened. Before, local governments could require inspections of oil and gas facilities if the Commission was willing to execute an intergovernmental agreement to that effect.[29] And local governments could not charge fees or fines except in limited circumstances.[30] Now, local power to impose inspections, fees, and penalties has been liberalized and broadened, without much limitation.[31]

While the enactment and enforcement of local regulations will continue to generate headlines, for the most part the Act's effect will play out behind the scenes, in negotiations between local governments and operators over memoranda of understanding covering the specifics of each operator's activity within each jurisdiction. These negotiations take place against the backdrop of the community's regulations and the state of the law. Whereas the industry was once able to use preemption law as leverage to get the deal it wanted, now the lever has a different fulcrum. Negotiating positions, and ultimately the deals that result, will begin to change accordingly.

SB 19-181: Changes at the State Level

SB 19-181's broad changes to the Oil and Gas Conservation Act extend well beyond matters of local authority, making statewide changes by altering the Commission's fundamental purpose and composition.

The Commission's mission has changed from fostering the development of oil and gas to regulating it.[32] And where the Commission previously had only to *consider* concerns for health, safety, welfare, and the environment in making its decisions,[33] now its decisions must be "subject to the protection" of those concerns,[34] effectively making them criteria for approval of state permits and providing a new substantive means of challenging Commission decisions. The Commission is also explicitly authorized to make decisions that keep recoverable resources in the ground as necessary to protect health, safety, welfare, and the environment.[35]

The Commission will shrink from nine voting members to five by July 2020, including a decrease from three to one who must have substantial experience in the industry.[36] The Commission will also be "professionalized," meaning members will be paid as employees and barred from outside employment.[37]

Local prerogatives will factor into the Commission's own processes as well. To receive a state drilling permit, the operator must prove that the local jurisdiction has either approved of the siting of the facility, or does not regulate oil and gas siting at all.[38]

The Act directs the Commission to undertake a series of rulemakings, including to

- regulate oil and gas operations to protect and minimize adverse impacts to public health, safety, welfare, the environment, and wildlife;
- require operators to consider alternative locations in to-be-defined situations, to address the cumulative impacts of oil and gas development;
- conform its regulation of flowlines and shut-in wells to minimize safety and environmental risks;
- revamp financial assurances requirements and address the growing problem of orphan wells;
- revisit engineering requirements to ensure wellbore integrity; and
- introduce new professional certification requirements for the industry.[39]

In the interim, until the new rules specified in the first three bullet points are adopted, the Commission's director can delay approval of a

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drilling permit pursuant to "objective criteria," if the Commission needs to consult with the local government or to determine whether health, safety, welfare, and the environment will be protected.[40] The Air Quality Control Commission will also have to adopt new rules to minimize various emissions, require leak detection and regular inspections, and continuously monitor some facilities' emissions.[41]

The Act removes limits on state permit and filing fees[42] and replaces them with a requirement that fees be sufficient to cover costs.[43]

Other statewide changes include the parameters of forced pooling, which is the mechanism by which an operator can effectively obtain a lease, by operation of law, from a nonconsenting mineral interest owner. Previously, any operator could obtain such a statutory lease, but now operators will be subject to a threshold requirement that they already have rights in at least 45% of the interests to be pooled together for the purposes of production.[44] The royalty rate for statutory leases has also increased marginally, from 12.5% to either 13% or 16%, depending on the type of well.[45] As with a drilling permit, the Commission can no longer approve a forced pooling application until the operator proves that the local jurisdiction has either approved of the siting of the facility, or does not regulate oil and gas siting at all.[46]

Broader Implications for Home Rule and Local Control

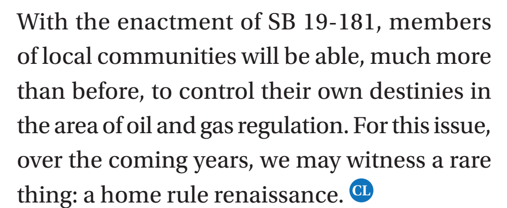
While the changes embedded in SB 19-181 may seem important enough on their own, the evolution of home rule in Colorado puts their significance into high relief. Colorado voters passed the Home Rule Amendment to the Colorado Constitution in a pair of votes in 1902 and 1912,[47] part of a wave of similar Progressive-era reforms around the country. Support for the constitutional amendment was probably due to a confluence of factors, including the general distrust of corrupt state governments, especially "[o]nce state invasion of city authority became a common occurrence" in the late 19th century.[48] Also, philosophies of localism began to pervade the public consciousness, rooted in both the desire of smaller towns to be free of bigger-city influence and the urging of socially minded reformers for the freedom to enact progressive policies on a local level.[49] Noted attorneys and jurists began to extol the "absolute right" of local self-government as "part of the liberty of a community, an expression of community freedom, the heart of our political institutions."[50] But as many commentators have noted, in Colorado and elsewhere, home rule has failed to live up to its hype,[51] as courts have often constrained the ability of home rule cities and towns to experiment in areas where the state has also expressed an interest.

Doctrinally, this traces to the constitutional language that home rule authority extends only to "local and municipal matters."[52] Courts have been inconsistent on whether a matter must be "solely" or "purely" local in nature, or only "predominantly" so, for a home rule municipality to regulate an issue.[53] The problem of how to classify an issue as a "state issue" or a "local issue" was never clearly resolved,[54] and the problem became more complex in 1961 with the advent of a third category: issues of mixed state and local concern.[55] In this zone, when state and local laws conflict, the local laws give way.[56] Given the proliferation of both state and local laws since that development, it should not be surprising that court holdings that matters are of mixed concern, resulting in preemption, have been steadily on the rise.[57] At the same time, state legislatures across the country have increasingly taken the matter into their own hands, expressly preempting local authority on a wide variety of subjects.[58]

There is no doubt that SB 19-181 makes dramatic changes to oil and gas industry regulation on the local level in Colorado. But only time will tell whether SB 19-181 presages Colorado's rejection of the national trend, represents a subtler inflection point, or is a mere blip. It does not change the law of home rule or preemption for any other issue, and does not disturb home rule doctrine regarding oil and gas, which jurisprudence is rooted in the constitution, not statutes. And SB 19-181 is not limited to home rule cities and towns, but applies to counties and statutory municipalities as well.

Nevertheless, given the political dynamics surrounding the failure of home rule to justify local restrictions in the courts,[59] the issue elections over the past seven years,[60] and the candidate campaigns in the 2018 statewide elections,[61] SB 19-181 clearly represents the intent of the people to legislatively enact, for at least one issue,[62] a variant of home rule not based in the constitution. The result is a more muscular, albeit issue-specific, home rule power that echoes the voters' intentions behind the original constitutional enactments.

Conclusion



With the enactment of SB 19-181, members of local communities will be able, much more than before, to control their own destinies in the area of oil and gas regulation. For this issue, over the coming years, we may witness a rare thing: a home rule renaissance. CL

The views and opinions expressed in this article are those of the author and do not reflect the opinions of his employer or anyone else.

Daniel E. Kramer is an assistant city attorney for the City of Longmont. As of July 15, 2019, he will be the Estes Park Town Attorney. He was counsel in *City of Longmont v. Colorado Oil & Gas Association*—dan.kramer@longmontcolorado.gov.

Coordinating Editor: Mary Elizabeth Geiger, megeiger@garfieldhecht.com

NOTES

1. *City of Longmont v. Colo. Oil & Gas Ass'n*, 369 P.3d 573, 579 (Colo. 2016).

2. *See generally* Kramer, "Colorado Preemption Law: The Evolving Meaning of 'Conflict,'" 48 *Colo. Law.* 38 (Apr. 2019). The article went to print as the General Assembly deliberated on SB 19-181. With this Act now the centerpiece of oil and gas preemption law, readers might consider these April and July articles as before and after photos.

3. *City of Longmont*, 369 P.3d at 583. While this might sound like a factual inquiry, the Supreme Court recently held this to be a facial matter of "assess[ing] the interplay between the state and local regulatory schemes." *Id. See also Colo. Oil & Gas Conservation Comm'n v. Martinez*, 433 P.3d 22, 32 (Colo. 2019) (while environmental protection was part of the Commission's interest, it was not a "condition precedent" to oil and gas development; instead, the Commission's principal objective was to ensure production proceeded economically).

4. *City of Longmont*, 369 P.3d at 584–85.

5. SB 19-181, § 17. The caption refers to "land use" preemption, but the body of the section prevents preemption of all local regulations that are stricter or more protective than the state's. *See* SB 19-181, § 4, amending CRS § 29-20-104(1)(h) (referenced by CRS § 34-60-105(1)(b) and containing the list of express local powers, of which land use is only the first. SB 19-181, § 11.). *See also People v. Rieger*, 436 P.3d 610, 613 (holding that the word "including" in a statute "denotes that the examples listed are not exhaustive or exclusive").

6. *Colo. Min. Ass'n v. Bd. of Cty. Comm'rs of Summit Cty.*, 199 P.3d 718, 730 (Colo. 2009) ("[L]ocal land use regulations could be consistent with the Oil and Gas Conservation Act if the local and state regulations could be harmonized.").

7. "Express and implied preemption are primarily matters of statutory interpretation." *City of Longmont*, 369 P.3d at 582 (internal quotation marks omitted). Even the more context-dependent operational conflict species of preemption was sensitive to interpretation of the statute and administrative regulations. *See id.* at 584–85.

8. *Id.* at 583 (Analysis of whether a conflict exists "requires us to assess the interplay between the state and local regulatory schemes. In virtually all cases, this analysis will involve a facial evaluation of the respective statutory and regulatory schemes . . . ."); *id.* at 582 (local oil and gas ordinance can "coexist" with a state statute absent a conflict).

9. SB 19-181, § 4.

10. *City of Longmont*, 369 P.3d at 583–84.

11. *Bd. of Cty. Comm'rs of Gunnison Cty. v. BDS Int'l, LLC*, 159 P.3d 773, 779 (Colo.App. 2006) (financial requirements); *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758, 765 (Colo.App. 2002) (noise). *See also* SB 19-181, § 5 (removing a prohibition on counties regulating oil and gas noise).

12. Even for the word "nuisance" itself, "[i]t is not practicable to give other than a general definition." *Black's Law Dictionary*, Nuisance (10th ed. Thomson Reuters 2014) (quoting Joyce and Joyce, *Treatise on the Law Governing Nuisances* 22 (Matthew Bender & Co. 1906)).

13. SB 19-181, § 4.

14. *Id.*

15. *Union Pac. R. Co. v. Martin*, 209 P.3d 185, 188 (Colo. 2009). *See People v. Zapotocky*, 869 P.2d 1234, 1238 (Colo. 1994) (using sponsor's statements as an interpretive aide because, "if the intended scope of the statutory language is unclear, a court may apply other rules of statutory construction and look to pertinent legislative history").

16. Statement of Sen. Foote at 1:13:08, http://coloradoga.granicus.com/MediaPlayer.php?view_id=42&clip_id=13895.

17. CRCP 106(a)(4); *Ross v. Fire and Police Pension Ass'n*, 713 P.2d 1304, 1309 (Colo. 1986) ("'No competent evidence' [under CRCP 106(a)(4)] means that the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.").

18. *Cf. Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 693–94 (Colo. 2001) ("Because a service fee is designed to defray the cost of a particular governmental service, the amount of the fee must be reasonably related to the overall cost of the service. Mathematical exactitude is not required, however, and the particular mode adopted by the governmental entity in assessing the fee is generally a matter of legislative discretion." (emphasis added) (citation omitted)); *id.* at 695 ("No precise mathematical calculation is required for the rough proportionality test, but the governmental entity must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (internal quotation marks omitted)).

19. SB 19-181, § 12, CRS § 34-60-106(2)(d); § 10, CRS § 34-60-104.5(3)(b)(II).

20. SB 19-181, § 4, CRS § 29-2-104(1)(i); § 10, CRS § 34-60-104.5(3).

21. SB 19-181 § 10, CRS § 34-60-104.5(3)(b).

22. SB 19-181, § 4, CRS § 29-20-104(3)(b).

23. "C.R.C.P. 106(a)(4) is the exclusive remedy for reviewing quasi-judicial decisions." *JJR 1, LLC v. Mt. Crested Butte*, 160 P.3d 365, 369 (Colo.App. 2007).

24. CRCP 106(a)(4)(I) ("Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer."). While the period to seek judicial review under Rule 106(a)(4) is tolled until the technical report comes out, the local government would have already made its decision based on the record in front of it at the time. *See* SB 19-181, § 4, CRS § 29-20-104(3)(c).

25. *See, e.g.*, statement of Sen. Fenberg at 1:10:19, http://coloradoga.granicus.com/MediaPlayer.php?view_id=42&clip_id=13895.

26. CRS § 24-65.1-201(1)(a).

27. SB 19-181, §§ 1 to 2.

28. CRS § 24 65.1-202(1)(a). Weld County has also expressed interest in using AASIA powers, apparently in an attempt to preempt the updated state laws. Weld County News Release, "Process begins to officially designate unincorporated Weld County as an oil and gas local-control county" (May 1, 2019). As one county commissioner put it, "We believe that 181 gives us the power of pre-emption over the state on land-use powers. If it pre-empts the state one way, it pre-empts the state the other way." "In 'new era' of oil and gas regulation, Colorado communities waste no time writing own rules," *Denv. Post* (May 6, 2019), www.denverpost.com/2019/05/06/colorado-oil-and-gas-local-regulations-181. It is unclear what authority, in either SB 19-181 or the AASIA, could allow a local government to supplant a more protective state standard. *See* SB 19-181, § 17, CRS § 34-60-131 (allowing local regulations to be more protective or stricter than the state's).

29. CRS § 34-60-106(15).

30. *Id.*; *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758, 765–66 (Colo.App. 2002).

31. SB 19-181 § 4, CRS § 29-20-104(2).

32. SB 19-181, § 6, CRS § 34-60-102(1)(a)(I).

33. *See Martinez*, 433 P.3d at 32.

34. SB 19-181, § 6, CRS § 34-60-102(1)(b).

35. SB 19-181, § 7, CRS § 34-60-103(11)(b), (12)(b), (13)(b); § 12, CRS § 34-60-106(2.5)(b).

36. SB 19-181, § 9, CRS § 34-60-104.3(2)(a). The makeup of the Commission will also change in the interim, with the replacement of two slots reserved for industry members with technical experts. SB 19-181, § 8, CRS § 34-60-104(2)(a)(I).

37. SB 19-181, § 9, CRS § 34-60-104.3(2)(b).

38. SB 19-181, § 12, CRS § 34-60-106(1)(f)(I)(A). *See also* COGCC Operator Guidance, SB 19-181: Hearings and Permitting Groups at 3 (Apr. 19, 2019). However, the COGCC director indicated at a public meeting on May 15, 2019 that he may revisit whether a final determination by the local government will be necessary in circumstances where the local government requests concurrent state and local review.

39. SB 19-181, § 12, CRS § 34-60-106(11)(c), (13), (18)–(20).

40. SB 19-181, § 12, CRS § 34-60-106(1)(f)(III). During the debate on the bill, this provision was characterized by some as a moratorium.

41. SB 19-181, § 3.

42. SB 19-181, § 12, CRS § 34-60-106(7)(a).

43. SB 19-181, § 12, CRS § 34-60-106(7)(b).

44. SB 19-181, § 14, CRS § 34-60-116(3)(b)(I).

45. SB 19-181, § 14, CRS § 34-60-116(7)(c).

46. SB 19-181, § 14, CRS § 34-60-116(1)(b). *See also supra* note 38.

47. Hayes and Hartl, "Home Rule in Colorado: Evolution or Devolution," 33 *Colo. Law.* 61 (Jan. 2004). For more background on the home rule amendment, *see* Broadwell, "Municipal Home Rule in the 1990s," 28 *Colo. Law.* 95 (Sept. 1999); McCullough, "A Primer on Municipal Home Rule in Colorado," 18 *Colo. Law.* 443 (Mar. 1989); Bueche, A History of Home Rule (Colo. Municipal League Nov. 2009); Colo. Municipal League, Home Rule Handbook (2017).

48. Frug, "The City as a Legal Concept," 93 *Harv. L. Rev.* 1059, 1115–16 (1980); Barron, "Reclaiming Home Rule," 116 *Harv. L. Rev.* 2255, 2293 (2003). *See also* Fox, "Home Rule in an Era of Local Environmental Innovation," 44 *Ecology L.Q.* 575, 588–89 (2017) ("Home rule was also designed to combat the dangers of state control that had been evidenced in targeted special legislation, which interfered with appropriate city governance.") (citing Frug and Barron, *City Bound: How States Stifle Urban Innovation* 37 (Cornell Univ. Press 2008)).

49. Barron, *supra* note 48 at 2292–320.

50. Frug, *supra* note 48 at 1113–14 (quoting *People ex rel. Le Roy v. Hurlbut*, 24 *Mich.* 44, 93 (1871); Eaton, "The Right to Local Self-Government" (pts. 1–3), 13 *Harv. L. Rev.* 441, 570, 638 (1900), (pts. 4–5), 14 *Harv. L. Rev.* 20, 116 (1900); McQuillin, *The Law of Municipal Corporations*, vol. 1, § 268 Rise and Progress of Municipal Institutions at 679 (2d ed. Callaghan

and Company 1928)).

51. *See, e.g.*, Frug, *supra* note 48 at 1117 (Home rule "has not successfully created an area of local autonomy protected from state control."); Baker and Rodriguez, "Constitutional Home Rule and Judicial Scrutiny," 86 *Denv. U. L. Rev.* 1337, 1342 (2009) ("While constitutional home rule on paper points to a delineated realm of local sovereignty, the record of home rule in the state courts in this regard is more mixed.").

52. Colo. Const. art. XX, § 6.

53. *Compare, e.g.*, *Webb v. City of Black Hawk*, 295 P.3d 480, 486 (Colo. 2013) ("solely" and "purely") *with City and Cty. of Denver v. State*, 788 P.2d 764, 767 (Colo. 1990) ("In fact, there may exist a relatively minor state interest in the matter at issue but we characterize the matter as local to express our conclusion that, in the context of our constitutional scheme, the local regulation must prevail. Thus, even though the state may be able to suggest a plausible interest in regulating a matter to the exclusion of a home rule municipality, such an interest may be insufficient to characterize the matter as being even of 'mixed' state and local concern.").

54. Frug, *supra* note 48 at 1117 ("[T]he courts have grappled with determining what matters are of 'state concern' and what matters are 'purely local' in nature."). *See also City and Cty. of Denver*, 788 P.2d at 767–68 ("Those affairs which are municipal, mixed or of statewide concern often imperceptibly merge. . . . We have not developed a particular test which could resolve in every case the issue of whether a particular matter is 'local,' 'state,' or 'mixed.' Instead, we have made these determinations on an ad hoc basis, taking into consideration the facts of each case.").

55. *Woolverton v. City and Cty. of Denver*, 361 P.2d 982, 985–90 (Colo. 1961), *overruled*, 484 P.2d 1204.

56. *City of Aurora v. Martin*, 507 P.2d 868, 869–70 (Colo. 1973).

57. *See, e.g.*, *City of Longmont*, 369 P.3d at 581; *City of Fort Collins v. Colo. Oil & Gas Ass'n*, 369 P.3d 586, 591 (Colo. 2016); *Ryals v. City of Englewood*, 364 P.3d 900, 908–09 (Colo. 2016); *Webb*, 295 P.3d at 492; *MDC Holdings, Inc. v. Town of Parker*, 223 P.3d 710, 720 (Colo. 2010); *City of Commerce City v. State*, 40 P.3d 1273 (Colo. 2002); *City and Cty. of Denver v. Qwest Corp.*, 18 P.3d 748, 751 (Colo. 2001); *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 39 (Colo. 2000).

58. *See generally* Briffault, "The Challenge of the New Preemption," 70 *Stan. L. Rev.* 1995, 1997 (June 2018) ("This decade has witnessed the emergence and rapid spread of a new and aggressive form of state preemption of local government action. . . . [T]he real action today is the *new preemption*: sweeping state laws that clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of local problems.") (emphasis in original); Scharff, "Hyper Preemption: A Reordering of the State–Local Relationship?" 106 *Georgetown L.J.* 1469, 1471, 1473 (2018) ("In recent years, state legislators have sought to limit local policymaking by passing increasingly broad state preemption statutes. . . . This new brand of preemption statutes, which I call 'hyper preemption,' seeks not just to curtail local government policy authority over a specific subject, but to broadly discourage local governments from exercising policy authority in the first place."); Schragger, "The Attack on American Cities," 96 *Tex. L. Rev.* 1163, 1164 (May 2018) ("American cities are under attack. The last few years have witnessed an explosion of preemptive state legislation challenging and overriding municipal ordinances across a wide range of policy areas."). These scholars have emphasized the apparent "partnership between the private interests that seek to avoid local regulation and legislators at the state level, exemplified by organizations such as the American Legislative Exchange Council (ALEC)." *Id.* at 1170. *See also* Briffault at 1997; Scharff at 1484 ("[M]any of these preemption ordinances are drafted by the American Legislative Exchange Council (ALEC), a business- backed think tank for conservative lawmakers that provides model legislation.").

59. *See, e.g.*, *City of Longmont*, 369 P.3d at 581; *City of Fort Collins*, 369 P.3d at 591; *Colo. Oil & Gas Ass'n v. City of Thornton*, Case No. 2017CV31640 (Adams Cty. Dist. Ct. Apr. 24, 2018); *Colo. Oil & Gas Ass'n v. City and Cty. of Broomfield*, Case No. 2014CV30232 (Broomfield Cnty. Dist. Ct. June 3, 2016); *Colo. Oil & Gas Ass'n v. City of Lafayette*, Case No. 13CV31746 (Boulder Cty. Dist. Ct. Aug. 27, 2014).

60. "All four Colorado oil, gas ballot measures withdrawn as promised," *Denv. Post* (Aug. 5, 2014), www.denverpost.com/2014/08/05/all-four-colorado-oil-gas-ballot-measures-withdrawn-as-promised; Aguilar, "Prop 112 fails as voters say no to larger setbacks for oil and gas," *Denv. Post* (Nov. 6, 2018), www.denverpost.com/2018/11/06/colorado-proposition-112-results.

61. Aguilar, "'Let's get real, guys': Oil and gas rules front and center for Colorado lawmakers following Prop 112's defeat," *Denv. Post* (Nov. 12, 2018), www.denverpost.com/2018/11/12/oil-gas-setback-legislature-regulation-prop-112.

62. This approach has already begun to spread to other spheres of regulation. The General Assembly followed up with an act allowing local governments to establish a local minimum wage, HB 19-1210. It also considered, but did not adopt, a bill allowing local governments to control residential rents, SB 19-225. The Colorado Supreme Court had previously held rent control to be a matter of mixed state and local concern. *Town of Telluride*, 3 P.3d at 39. And while there was no case on point, a local minimum wage previously "probably would not be viable" based on home rule, given the prior express preemption in state statute. Dalmat, "Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws under Home Rule," 39 *Colum. J.L. & Soc. Probs.* 93, 113 (2005).

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