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No Home on the Range for Home Rule

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INTRODUCTION

> Twenty three years ago the people of Wyoming voted to give municipalities the right to decide local issues without state approval. Home rule is of vital importance to Wyoming cities and towns and should be lawfully recognized.[1]

The home rule amendment of the Wyoming Constitution was overwhelmingly approved by the voters in 1972.[2] Yet, since its adoption the Wyoming Supreme Court has failed to acknowledge the redistribution of power[3] effected by the home rule provision.[4]

Under Wyoming home rule, cities and towns have the constitutional right to determine their local affairs and government.[5] This is subject to a determination by the legislature that a matter is of such concern that it should be addressed by a statute uniformly applicable to all cities and towns.[6] The Wyoming Supreme Court, for some inexplicable reason, ignores this constitutional requirement, and instead views local

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1. Interview with Governor Jim Geringer, State of Wyoming, in Cheyenne, Wyoming (Feb. 26, 1996).

2. "[T]his section . . . was adopted by vote of the people at the general election held November 7, 1972, and was proclaimed in effect December 12, 1972." WYO. CONST. art. XIII, § 1 annot. Vote totals show 97,026 for home rule and 30,339 votes against home rule. Telephone interview with Jim Mitchell, Elections Officer, Wyoming Secretary of State's Office (Feb. 28, 1996).

3. 56 AM. JUR. 2D *Municipal Corporations* § 128 (1971) (citing Toledo v. Lynch, 102 N.E. 670 (1913)).

4. The Wyoming Supreme Court recently stated, "It is settled that municipal corporations are creatures of the legislature and thereby subject to statutory control." Coulter v. City of Rawlins, 662 P.2d 888, 895 (Wyo. 1993) (citing 2 MCQUILLIN MUN. CORP. § 4.03, at 8 (3d ed. (1970)) [hereinafter MCQUILLIN]. "[M]unicipalities can exercise only those powers which are expressly or impliedly conferred." *Id.* at 895 (citing MCQUILLIN at §§ 10.08 and 10.09, at 755).

5. WYO. CONST. art. XIII, § 1 (b).

6. *Id.* Such actions are "further subject only to statutes prescribing limits of indebtedness." *Id.*

governments as creatures of the state—unable to act without legislative empowerment.[7] This approach of sovereign dominance is contrary to the citizen mandate represented by the home rule amendment. It also places an inordinate amount of control over municipalities in the hands of the legislature. By refusing to recognize home rule, the Wyoming Supreme Court thwarts a basic American doctrine—local federalism.

> Alexis de Tocqueville understood well that participation in local government is a cornerstone of American democracy: It is incontestably true that the love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies . . . . [T]o preserve the ability of citizens to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer, their local problems.[8]

This article first reviews the history of municipal government and home rule. Next, it follows home rule development in Wyoming, and then analyzes the current status of the rule in the state. Finally, specific recommendations are outlined for use by Wyoming municipalities and practitioners.

HISTORY OF HOME RULE

> "Man is by nature an animal intended to live in a polis," Aristotle wrote more than two thousand years ago. Human beings are social and political beings.[9]

The relationship between cities and states has long been a problem.[10] Before the American Revolution, many cities gained autonomy from the British Isles.[11] With the parturition of the nation, this power passed to the states.[12] Curiously, the U.S. Constitution does not mention cities,[13] and

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7. K.N. Energy, Inc. v. City of Casper, 755 P.2d 207, 210 (Wyo. 1988) ("Our rule in Wyoming is unequivocal. Municipalities, being creatures of the state, have no inherent powers but possess only the authority conferred by the legislature.").

8. Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 789-90 (1982) (O'Connor, J., dissenting) (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 181 (H. Reeve trans. 1961)).

9. WILLIAM J. BENNETT, THE MORAL COMPASS 4 (1995) (quoting Aristotle).

10. JAMES W. DRURY, HOME RULE IN KANSAS 1 (1965).

11. *Id.*

12. *Id.*

13. *See generally* U.S. CONST. Federalist No. 39 may shed light on the proper interpretation of city-state relations.

therefore municipal law becomes one of the many undefined doctrines of American law, left to legislative skirmishes and court battles.

Historically, two rules defining the roles of municipal government in relation to the state legislature have developed. Dillon's Rule, the older of the two, and home rule are diametrically opposed.

Dillon's Rule states that a city is a creature of the state and that it holds no inherent right of local self-government.[14] Iowa Supreme Court Justice F. Dillon first stated Dillon's Rule in 1868.[15]

> The true view is this: Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all the municipal corporations in the State, and the *corporation* could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are so to phrase it, mere *tenants at will* of the legislature.[16]

Home rule, the more modern concept, is based on the premise that municipalities should be free to regulate their own municipal affairs without interference from the state.[17] It is based upon the premise that the best government comes from that which is controlled at the most local level. Two forms of home rule exist: constitutional and statutory.[18]

Constitutional home rule, as the name implies, involves enactment of the rule via a state constitutional amendment. Statutory home

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14. *See* DRURY, *supra* note 11, at 2.

15. *See* City of Clinton v. Cedar Rapids & Missouri River R.R., 24 Iowa 455 (1868).

16. *Id.* at 475. "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." 1 COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, 448-50 (5th ed. Boston: Little, Brown and Company 1991).

17. *See* Duane C. Buchholz, *Home Rule: A Solution for Municipal Problems?*, 17 WYO. L.J. 47, 52 (1960).

18. *See* 1 C. DALLAS SANDS, MICHAEL E. LIBONATI AND JOHN MARTINEZ, LOCAL GOVERNMENT LAW, § 4.01 at 4-2 to 4-3 (1994).

rule, the other form, is a less popular alternative as its stability is hampered by an obvious vulnerability to legislative whims.[19] Several variations of the constitutional form exist.[20] The self-executing version is most favorable for municipalities because they are free to exercise home rule without the enacting procedures required with other forms.[21] Wyoming has the self-executing version of home rule.[22]

Home rule may be exercised in four primary areas: structure, function, fiscal, and personnel.[23]

* Structural home rule allows localities to determine their own form of government.

* Functional home rule enables entities to exercise powers of local self-government.

* Fiscal home rule authorizes local governments to determine their revenue sources, set tax rates, borrow funds, and engage in other related actions.

* Home rule regarding personnel matters allows localities to set rules governing employment, the rates of remuneration, the conditions of employment, and collective bargaining, among other factors.[24]

These grants of power are usually limited by general state law.[25] More than forty-eight states provide for some type of home rule to cities.[26] Home rule has evolved into a deeply rooted premise upon which local governments operate.[27]

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19. *See* Buchholz, *supra* note 17, at 57.

20. *See* Buchholz, *supra* note 17, at 52-57.

21. *Id.*

22. There is no need to adopt a local charter, similar to a local constitution, in order for a Wyoming municipality to avail itself of its constitutional local governing authority. WYO. CONST. art. XIII, § 1.

23. U.S. Advisory Commission on Intergovernmental Affairs, STATE LAWS GOVERNING LOCAL GOVERNMENT STRUCTURE AND ADMINISTRATION 5 (Mar. 1993) (citing previous ACIR reports published in 1981 and 1962) [hereinafter USAC].

24. *Id.*

25. *Id.*

26. *Id.* at 20-21 (Table 3). *See also* Appendix 1 for complete list of home rule laws for the United States. Some states have both constitutional and statutory provisions of home rule.

27. *Commentary: Where do the Candidates Stand?*, HARTFORD COURANT, Oct. 16, 1994, at E2 ("Most Americans - not just New Englanders - support home rule."). *See also* Appendix 1.

WYOMING HOME RULE

Kansas: The Origin of Wyoming Home Rule

The Kansas version of home rule captured the attention of the Wyoming Association of Municipalities[28] in the late 1960's.[29] It was considered a superior version of the concept and later served as the model for Wyoming home rule.[30]

Home rule in Kansas provides the legislature with authority over matters of state-wide concern while matters of local concern are placed in the hands of the municipalities.[31] Adoption of home rule in Kansas "dramatically changed the shape of municipal law in Kansas."[32] A look at Kansas case law reveals the scope of its home rule and gives a tangible example of how home rule should have developed in Wyoming.[33]

Three issues are of central importance to application of home rule: 1) conflict between a state statute and a municipal ordinance; 2) uniform application of a state statute; 3) preemptive action, requiring clear, preemptive language, represented in a state statute.

CONFLICT. In *City of Lyons v. Suttle*, the Kansas high court explained how conflicts between state statutes and local ordinances are resolved.

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28. The Wyoming Association of Municipalities (WAM) is a non-profit organization formed in 1967 to develop, obtain and perpetuate responsible democratic local government. WAM has 97 municipal members. In fact, every incorporated city and town in Wyoming is a member of WAM. Telephone interview with Karen Bishop, Secretary Office Assistant, Wyoming Association of Municipalities (Feb. 27, 1996).

29. Interview with Kathleen A. Hunt, General Counsel for the Wyoming Association for Municipalies, in Laramie, Wyo. (Feb. 26, 1996).

30. *Id.*

31. KAN. CONST. art. XII, § 5 (b). Kansas adopted home rule in 1961. Uhl v. Ness City, Kansas, 590 F.2d 839, 842 (Kan. 1979).

32. Michael M. Shultz, *Kansas Annexation Law: The Role of Service Plans*, 40 U. KAN. L.REV. 207, 224 (1991).

33. When a jurisdiction or state adopts a new law or concept, based on laws and concepts from another jurisdiction, it is common to refer to the originating state for guidance in development of case law in the adopting state. *See* Iberlin v. TCI Cablevision of Wyoming, Inc., 855 P.2d 716, 726 (Wyo. 1993) (citing Apodaca v. State, 627 P.2d 1023 (Wyo. 1981)) ("[W]hen the legislature adopts a statute from another jurisdiction, case law in that jurisdiction construing the statute is persuasive authority."); B & W Glass, Inc. v. Weather Shield Mfg., Inc., 829 P.2d 809, 814 (Wyo. 1992) ("Decisions of other courts offer persuasive support when questions of the interpretation of uniform laws arise."); Enberg v. State, 686 P.2d 541, 552 (Wyo. 1984); Matter of Kimball's Estate, 583 P.2d 1274, 1279 (Wyo. 1978); Woodward v. Haney, 564 P.2d 844, 845 (Wyo. 1977); Morad v. Brown, 549 P.2d 312, 314 (Wyo. 1976); Wilson v. Martinez, 301 P.2d 785, 798 (Wyo. 1956) ("[T]he decisions of the courts of [the originating] state are very persuasive when applying statutes which are identical or very similar to those enacted by our own legislature.").

> [T]he fact that the state has enacted legislation on a subject does not necessarily deprive a city of the power to deal with the same subject by ordinance. A municipality may legislate on the same subject so long as the municipal ordinance does not conflict with the state law, and if there is no conflict, both laws may stand.[34]

A test frequently used by the Kansas Supreme Court to determine whether a conflict exists between state and local law is whether the ordinance permits or licenses that which the statute forbids or prohibits that which the statute authorizes.[35] The Kansas court further developed its interpretation of home rule a year later.

> By virtue of the home rule provisions of the Kansas Constitution, cities are not dependent upon the state legislature for their authority to determine their local affairs and government. Cities have power granted directly from the people through the constitution without statutory authorization.[36]

PREEMPTION. When determining whether a state statute has preempted an area of the law, Kansas courts require that such a legislative intent be "clearly manifested by statute."[37] This presumption, favoring municipalities, also appears to be a logical path for the Wyoming home rule interpretation in light of Article 13, Section 1(d) of the Wyoming Constitution, which is patterned after the Kansas provision.

UNIFORMITY. If a state statute is applicable to all municipalities, it is considered uniform in nature. If the state passes a uniform law with preemptory language, a municipality may not legislate in that area.[38] However, if a statute is uniform but lacks preemptory language, a Kansas municipality is free to act, provided it does not create a conflict with the state law.[39]

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34. City Lyons v. Suttle, 498 P.2d 9, 13 (Kan. 1992) (quoting City of Garden City v. Miller, 311 P.2d 306, 311 (Kan. 1957).

35. Junction City v. Lee, 532 P.2d 1292, 1297 (Kan. 1975).

36. Claflin v. Walsh, 509 P.2d 1130, 1131 (Kan. 1973).

37. City of Lenexa v. City of Olathe, 620 P.2d 1153, 1159 (Kan. 1980) ("The general rule is that legislative intent to reserve to state exclusive jurisdiction must be clearly manifested by the statute before it can be held that the state has withdrawn from the cities the power to take action in a certain area.").

38. *See infra* notes 62 and accompanying text.

39. *Id.*

THE DEVELOPMENT OF HOME RULE IN WYOMING

In Wyoming, the legislature meets a total of forty days for its general session every other year.[40] Over the last several decades, such short time-frames hamstrung local lawmaking efforts. It was necessary to seek specific legislative authority for every municipal endeavor. Desired results could be obtained only after the arduous task of convincing legislators the proposed law would benefit their interests.

A municipality had the additional burden of convincing other municipalities that their policies and goals would not be sacrificed by the proposed legislation but, conversely, the legislation would be beneficial to the accomplishment of their own goals. Such efforts required a municipality espousing legislation to lobby both lawmakers and other municipal officials—a painstaking task. Oftentimes, municipalities within the same classification[41] could not agree, making it difficult for the proposing municipality to acquire legislation critical to the management of its local affairs. Consequently, countless hours were squandered by the legislature laboring over special interest bills while the valuable time taken might have been spent on matters of state-wide concern. Often, consensus was not achieved and the proposed legislation was doomed to a two-year wait until the opening of the next legislative window.[42]

This frustration served as the impetus for the Wyoming Association of Municipalities to seek a system which would: 1) grant basic authority to municipalities to govern their own affairs; and 2) respect and preserve the legislature's paramount authority to preempt areas of legitimate state-wide concern.

After months of lobbying efforts by Wyoming municipalities, the legislature agreed to place the question of home rule before the people of Wyoming.[43] In 1972, Wyoming citizens recognized the problems with Dillon's Rule and voted by a three-to-one majority to replace[44] it with the

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40. On odd-numbered years, the Wyoming Legislature meets for forty days or less and on even numbered years it meets for a budget session. WYO. STAT. § 28-1-102 (1977).

41. The Wyoming Constitution provides for the creation of different city classifications. *See* WYO. CONST. art. XIII, § 1(b).

42. "[R]esponsible and responsive operation" of local governments has long been of great importance to citizens. Avery v. Midland County, Texas, 390 U.S. 474, 481 (1968).

43. "A JOINT RESOLUTION proposing an amendment to the Constitution of the State of Wyoming, by amending and re-enacting Section 1, Article 13 thereof relating to municipal corporations and providing for the manner and procedure by which cities and towns of the State of Wyoming may determine and govern their local affairs." Original S. Joint Res. No. 2,715 (1971).

44. *See supra* note 2.

strongest form of home rule—a self-executing constitutional form.[45] In addition to granting direct home rule powers, the provision goes so far as to mandate that the rule "shall be liberally construed for the purpose of giving the largest measure of self government to cities and towns."[46] These aspects of Wyoming home rule in theory provide municipalities with the strongest bulwarks available in the home rule arena.

Wyoming's Unique Situation: An Ignored Constitutional Rule

Frank v. City of Cody,[47] decided in 1977, marks the Wyoming Supreme Court's first interpretation of the Wyoming home rule provision. Unfortunately, it also illustrates the court's ambivalent attitude toward the municipally empowering law.[48] Instead of using home rule as the guiding premise in its legal analysis, the court stated that home rule simply "lends some insight" for legal analysis.[49]

The Wyoming Supreme Court's decision to nullify home rule and its continued recognition of Dillon's Rule became clear in 1978.[50] In *Tri-County Electric Ass'n v. City of Gillette*, the court stated:

> The legislature has practically absolute power over cities and towns, the pure type of municipal corporation, other than as prescribed by *the so-called home rule amendment* to the Wyoming Constitution § 1, Article XIII not applicable here and any other constitutional provision to the contrary. A city or town can only exercise those powers expressly or impliedly conferred by constitution or statute. The legislature is therefore the well-spring of practically all powers here in play.[51]

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45. Interview with Kathleen A. Hunt, *supra* note 29. "[The Wyoming 'home rule'] section was amended by a resolution adopted by the 1971 legislature, ratified by a vote of the people at the general election held November 7,1972, and proclaimed in effect December 12, 1972." Frank v. City of Cody, 572 P.2d 1106 n.11 (Wyo. 1977).

46. WYO. CONST. art. XIII, § 1 (d).

47. 572 P.2d 1106 (Wyo. 1977).

48. New York experiences a similar "judicial restriction" of home rule, but this is countered by the legislature's support of the concept. Timothy P. Whelan, *New York's Open Meeting Law: Revision of the Political Caucus Exemption and its Implications for Local Government*, 60 BROOK. L. REV. 1483, 1516 (1995).

49. 572 P.2d at 1115. "The recent amendment of the Wyoming Constitution, adding § 1, Article XIII, allowing for 'home rule' also lends some insight into the fashion in which we should examine this case." *Id.*

50. Tri-County Elec. Ass'n v. City of Gillette, 584 P.2d 995 (Wyo. 1978).

51. *Id.* at 1005 (emphasis added) (citing City of Buffalo v. Joslyn, 527 P.2d 1106 (Wyo. 1974).

Judge Raper did not explain why he and the court concluded that home rule was not applicable in this case.[52] *Frank* and *Tri-County* are the first in a series of curious cases[53] that lack a full explanation of why home rule is disfavored in the Wyoming Supreme Court despite the presence of constitutional authority.

PRINCIPLES OF HOME RULE IN WYOMING

The basic principles of home rule as intended by Article 13, Section 1, and as have been mandated by the people of Wyoming are as follows: A Wyoming municipality has the following powers, with the exception of specific constitutional prohibitions.[54]

1. *[A Wyoming municipality] has the right to determine its local affairs and government as established by ordinance passed by the governing body.*[55]

Article 13, Section 1 referenced above stands Dillon's Rule on its ear.[56] The people of Wyoming have specifically created the preeminent authority for Wyoming municipalities to govern their own local affairs. Under the old and discarded Dillon's Rule, such preeminent authority resided in the state legislature—a direct conflict with home rule.[57] The succinct difference is that under Dillon's Rule, Wyoming municipalities could not act until given legislative authorization, whereas under Article 13, Section 1 (b), they may determine their local affairs by ordinance, unless preempted by statute.[58] The Wyoming Supreme Court has overlooked the fact that the powers granted to Wyoming municipalities under Article 13, Section 1, have the same source as those granted to the Wyoming Legislature—the people of Wyoming.[59] The

52. *Id.* "Reference to Article 13, Section 1 as the 'so-called' home rule amendment appears derogatory in nature." Interview with Kathleen A. Hunt, *supra* at note 29.

53. *See* Laramie Citizens for Good Gov't v. City of Laramie, 617 P.2d 474, 482-84 (Wyo. 1980); Police Protective Ass'n v. City of Rock Springs, 631 P.2d 433, 435, 439 (Wyo. 1981); Haddenham v. City of Laramie, 648 P.2d 551, 554 (Wyo. 1982); Coulter v. City of Rawlins, 662 P.2d 888, 895, 904 (Wyo. 1983); State Motor Vehicle Division v. Holtz, 674 P.2d 732, 737 (Wyo. 1983); Cheyenne Airport Bd. v. Rogers, 707 P.2d 717, 726 (Wyo. 1985); K.N. Energy, Inc. v. City of Casper, 755 P.2d 207, 212 (Wyo. 1988); Cook v. Zoning Bd. of Adjustment, 776 P.2d 181, 186 (Wyo. 1989); City of Cheyenne v. Reiman Corp., 869 P.2d 125, 130 (Wyo. 1994)(Macy, C.J., concurring and dissenting).

54. WYO. CONST. Art. XIII, § 1. See Appendix 1.

55. WYO. CONST. Art. XIII, § 1(b).

56. Belvins v. Hiebert, 795 P.2d 325, 329 (Kan. 1990) ("[T]he Dillon Rule of municipal law was abolished by home rule.").

57. *Id.*

58. WYO. CONST. Art. XIII § 1.

59. *See supra* note 4 and accompanying text.

constitutional mandate of the people, unless and until ruled unconstitutional by the Supreme Court, is at least equal to the legislature's authority and that granted to the court system. A constitutional home rule provision "effects a redistribution of existing governmental powers."[60]

One of the advantages of constitutional home rule is that, if properly utilized, the legislature is relieved of the burden of passing municipal laws for individual cities. Another advantage of home rule is the flexibility it provides to the legislature. The legislature may, at any time, under Article 13, Section 1, mandate any field of legislation to be a matter of statewide concern by adopting legislation that preempts the field and is uniformly applicable.[61]

Hypothetically the legislature could thus render Article 13, Section 1 useless. In theory it could pass legislation to preempt every law on the books pertaining to cities and towns, by clear and uniform language of preemption.[62] It seems inconceivable that the legislature would take such steps. Not only would it be time consuming, but it would clearly violate the intent and mandate of the people of Wyoming.[63] The courts of Wyoming as well as the legislature should strive to interpret Article 13, Section 1, as intended by its framers.[64]

2. *A municipality may legislate on the same subject as contained in a statute, whether or not the statute is uniformly applicable, if the ordinance does not conflict with the statute and there is no clear language which preempts the field of legislation.*[65]

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60. 56 AM. JUR.2D *Municipal Corporations* § 128, at 186, (1971).

61. *See* City of Wichita v. Basgall, 894 P.2d 876, 879 (Kan. 1995); McCarthy v. City of Leawood, 894 P.2d 836, 844 (Kan. 1995); Moore v. City of Lawrence, 654 P.2d 445, 448-49 (Kan. 1982).

62. *Id.*

63. *See* WYO. CONST. art. XIII, § 1(d).

64. 16 AM. JUR. 2D Constitutional Law § 92 (1979) states:

The fundamental principle of constitutional construction is that effect must be given to the intent of the framers of the organic law and of the people adopting it. This is the Polestar in the construction of constitutions, all other principles of construction are only rules or guides to aid in the determination of the intention of the constitution's framers. A constitutional clause must be construed reasonably to carry out the intention of the framers and should not be construed so as to defeat the obvious intent if another construction equally in accordance with the words and sense may be adopted which will enforce and carry out the intent. The intent of the framers may be shown by implication as well as by express provision. The intent must be gathered from both the letter and spirit of the document, the rule being that a written constitution is to be interpreted in the same spirit in which it was produced. The Court should put itself as nearly as possible in the position of the men who framed the instrument.

65. *See supra* note 61 and accompanying text.

Kansas courts have many times considered whether or not provisions of an ordinance were in conflict with state law, as a primary determination of the validity of an ordinance in home rule cases.[66] It is generally found that where there was no preemptive language and no conflict, then the ordinance should stand, notwithstanding that the state law was uniformly applicable.[67] In so doing the Kansas courts rely on a definition of "conflict" previously espoused in a line of Kansas cases, that a conflict exists when the ordinance prohibits what the statue allows or allows what the statute prohibits.[68]

The question of conflict transcended the question of uniformity since the Kansas courts held that an ordinance not in conflict with a state law was valid even though the state law was uniformly applicable to all municipalities unless the state law contained clear preemptive language.[69] They recognized, however, that the legislature could preempt any further legislation of the municipality on a subject deemed by it to be a matter of state-wide concern; however, it could do so only by the inclusion of clear and uniform preemptive language.[70]

CONFLICT. Fortunately, the Wyoming Supreme Court has given credence to the doctrine of conflict. *In Haddenham v. City of Laramie*,[71] the city council prohibited through ordinance the sale of fireworks within an area adjacent to the city limits. The court responded:

> Even without the authorization contained in [Section] 35-10-205 for cities to ordain further prohibitions or restrictions on the smaller, less powerful, fireworks, Art. 13 Section 1(b) of the Wyoming Constitution empowers cities to place limitations or prohibitions on the smaller, less powerful, fireworks. This because the smaller, less powerful, fireworks were excluded from that prohibited by state legislation and, thus, there is no statute concerning them which is 'uniformly applicable' to all cities and towns.[72]

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66. *See supra* notes 35 and 75 and accompanying text.

67. Junction City v. Lee, 532 P.2d 1292, 1297-99 (Kan. 1975).

68. *See supra* notes 35 and 36 and accompanying text.

69. *See supra* note 62.

70. *See Junction City*, 532 P.2d at 1299. "An intent on the part of the legislature to retain exclusive jurisdiction to legislate in a given area must be clearly shown, and where such an intent cannot be gathered from the statutes themselves, whatever extrinsic evidence there may be of such an intention must be clear and convincing before the power to regulate can be said to have been withdrawn from cities." *Id.* (quoting In Hutchison Humand Relations Comm. v. Midland Credit Management, Inc., 517 P.2d 158 (Kan. 1973).

71. 648 P.2d 551 (Wyo. 1982).

72. *Id.* at 554.

This was another way for the court to say that because nothing in section 35-10-205 prohibited the use of smaller, less powerful fireworks, there was no conflict between the local ordinance and state law. Therefore, the ordinance expressed a valid exercise of home rule.

In this particular instance, it is difficult to see why the court was worried about uniformity. Whether or not uniformly applicable, 1) if there was no conflict between the ordinance and the state law and 2) there was no preempting language, the ordinance was valid by reason of paramount constitutional authority.[73]

In *Cook v Zoning Bd. of Adjustment*,[74] the Wyoming Supreme Court reversed a decision of the lower court upholding a decision of the City of Laramie Zoning Board. The court in a footnote[75] pointed out that a section of the Laramie City Code required the concurring vote of four members to reverse any order of an administrative official. The court noted that the ordinance provided for five zoning board members and went on to state:

> The Wyoming Statute, Wyo. Stat. 15-1-608(c), states: The concurring vote of a majority of the board is necessary to reverse any order, requirement, decision or determination of any administrative official, or to decide in favor of the application on any matter upon which it is required to pass under any ordinance or to effect any variation in the ordinance.
>
> The home rule amendment in Wyoming Constitution. art. 13, § 1(b) specifies: All cities and towns are hereby empowered to determine their local affairs and government as established by ordinance passed by the governing body, subject . . . to statutes uniformly applicable to all cities and towns. Wyo. Stat. § 15-1-608 is a statute "uniformly applicable to all cities and towns." Therefore, a city ordinance cannot require four affirmative votes in contravention of the statutorily designated majority.[76]

The question again arises as to whether the court's analysis should have focused on conflict—not uniformity. Since the ordinance was more restrictive by requiring four votes rather than three to reverse an administrative decision, it was not in conflict with the statute and the court should have upheld the ordinance. Thus, although the court entered into a discus-

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73. WYO. CONST. art. XIII, § 1(b).
74. 776 P.2d 181 (Wyo. 1989).
75. *Id.* at 186 n.6.
76. *Id.*

sion of home rule, it once again seized the opportunity to reiterate its position on Dillon's Rule. The opinion stated that "a court must analyze any pertinent constitutional provision or appropriate statute for the purpose of determining whether express or implied authority has been conferred upon a municipality."[77]

Certainly it is necessary to analyze the provisions of Article 13, Section 1, to determine the authority of municipalities to legislate on a subject. However, if home rule is implemented correctly, the courts would analyze statutes only to determine whether the legislature had preempted the field, not to seek specific statutory authority for municipal actions.

The Wyoming Supreme Court addressed the question of conflict in the case of *Laramie Citizens for Good Government v. City of Laramie*.[78] The City of Laramie formed a non-profit corporation to purchase a ranch from bond proceeds in order to obtain valuable water rights.[79] Then the corporation would lease the ranch to the city, utilizing the lease payments to amortize the payment of the bond issue.[80] The court said:

> Legislation by cities and towns must not conflict with statutes uniformly applicable to cities and towns, and it must be subordinate and subservient to such statutes. Each enactment must be measured in its own right to determine if it pertains to a "local affair" and if it is "subject to" statutes uniformly applicable.[81]

PREEMPTION. The court recognized that ordinances cannot be in conflict with statutes which contain clear and uniform preemptive language, and found that the ordinance in question in *Laramie Citizens for Good Government* was in conflict with Wyoming Statutes 15-7-101(a) and 15-7-102(b). The finding of the court that the statutes were uniformly applicable is understandable, but its consideration of Article 13, Section 1 in this regard is questionable. Section 15-7-101(a) states: "In addition to all other powers provided by law, any city or town may make public improvements, for which bonds may be issued to the contractor or be sold as provided in this chapter."[82]

The statutory provision does not contain any clear language which would preempt the authority of municipalities to legislate with respect to

77. Cook, 776 P.2d at 186.
78. 617 P.2d 474 (Wyo. 1980).
79. *Id.* at 476.
80. *Id.*
81. *Id.* at 483.
82. WYO. STAT. § 15-7-101(a) (1977).

the improvements enumerated in Title 15, Chapter 7 of the Wyoming Statutes. Indeed, that section specifically provides that the powers therein are cumulative and in addition to all other powers provided by law. Had the legislature intended to preempt the field of legislation with respect to public improvements, it could have and should have included a clear and precise intention to preempt the field.[83]

The issue then was whether the plan adopted by the Laramie City Council was in conflict with the provisions of Chapter 7.[84] Since the provisions of that chapter are permissive rather than restrictive, it is arguable that such a plan was not in conflict with those provisions; and should have been upheld, notwithstanding the fact that the provisions of the chapter were of uniform application to all cities and towns of Wyoming.[85]

3. *A municipality may opt out of, or modify a statute which is not uniformly applicable, by charter ordinance, even though the statute is in conflict with the ordinance.*[86]

Other than giving the boot to Professor Dillon's Rule of Law, the charter ordinance provisions of Article 13, Section 1(c) are the most meaningful in terms of self government. Simply put, if an ordinance is in conflict with a state law uniformly applicable to all municipalities, then the municipality can go no further in terms of self government. If, however, a conflict exists between an ordinance and a statute not uniformly applicable, then the municipality can determine by charter ordinance that it will no longer be governed by the state law; or in the alternative, it may by charter ordinance amend or delete provisions of the state law which are unacceptable to the municipality and which would eliminate the conflict.

Perhaps it should be reiterated that to reserve an area of law to itself, the legislature must use preemptive language in a uniformly applicable law.[87] Therefore, it seems logical that a municipality may not exempt itself, or modify the provisions of any state statute containing such preemptive language—even in the absence of statutory/ordinance conflict.

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83. *See* Garten Enterprises, Inc.v Kansas City, 549 P.2d 864 (Kan. 1976). "Legislative intent to reserve to the state exclusive jurisdiction to regulate an area must be clearly manifested by statute before it can be held that the state has withdrawn from the cities the power to regulate in the field." *Id.* at 867. *See also* City of Beloit v. Lamborn, 321 P.2d 177 (Kan. 1958).

84. *Laramie Citizens for Good Gov't*, 617 P.2d at 483.

85. *Id.* at 484.

86. WYO. CONST. art. XIII, § 1(c).

87. *See* WYO CONST. art XIII, § 1.

Home Rule Application in Wyoming

An example of the utilization of a charter ordinance occurred when the legislature adopted a law providing that a special permit be issued to serve beer at the University of Wyoming Student Union, located within the corporate limits of the City of Laramie.[88] The law gave administrative and enforcement powers relative to the permit to the University of Wyoming Board of Trustees.[89] The Laramie City Council took exception to being divested of permitting authority and drafted an ordinance modifying the statute and revesting the power in itself.[90] Since the law applied only to the University of Wyoming, it was obviously not uniform in its application. Although it is arguable that the legislature intended to preempt the field of alcoholic beverages,[91] it was not so considered by the city. Therefore, the city council adopted a charter ordinance, amending the state law.[92] As a result, self government was appropriately applied. The charter ordinance is still in effect.[93]

Illustrating the lack of understanding of home rule by the Wyoming Legislature is its attempt to reiterate the provisions of Article 13, Section 1, expressly authorizing Wyoming towns to adopt a charter ordinance altering election matters.[94] It is disputable whether the first sentence of Wyoming Statute section 22-23-101 constitutes a sufficient preemptive statement.[95] However, a more appropriate approach might have been to eliminate this statement, in which case the law would have been subject to revision by charter ordinance, without the specific authorization stated in the statute.

UNIFORMITY. The Wyoming Supreme Court apparently does not feel constrained to analyze carefully the phrase "uniformly applicable" in Article 13, Section 1(b) consistent with the underlying intent of the framers.[96] Instead, it is inclined to hold that if a statute is uniformly appli-

88. *See* WYO. STAT. § 12-4-501 (1986) and WYO. STAT. § 5.08.650, City of Laramie Ordinances. LARAMIE, WY., CHARTER ORDINANCE 1 (1975) and LARAMIE, WY., CHARTER ORDINANCE 3 (1986).

89. *Id.*

90. *Id.*

91. WYO. STAT. § 12-4-101(a) (1992) ("Incorporated cities, towns and counties within Wyoming shall license and regulate or prohibit the retail sale of alcoholic and malt beverages under this title.").

92. LARAMIE, WY., CHARTER ORDINANCES 1 and 3, *supra* note 89.

93. *Id.*

94. *See* WYO. STAT. § 22-23-202 (1992).

95. "Unless otherwise specifically provided, a municipal election shall be governed by laws regulating statewide elections." WYO. STAT. § 22-23-101 (1992).

96. WYO. CONST. art XIII, § 1(b).

cable, then a municipality may not legislate in that field. The court passes over the question of conflict.[97] Kansas authorities would hold that a municipality may indeed legislate in the same field as a uniform law, as long as there is no preemptive language in the state statute and the ordinance does not conflict with the statute.[98]

It appears obvious that any statutory language intended to be uniform as to all municipalities should be clear. When Article 13, Section 1 requires that laws of uniform application must include all municipalities, it must be interpreted precisely in that light.

A case in point is *Police Protective Ass'n v. City of Rock Springs*,[99] in which the City of Rock Springs opted to repeal its ordinance establishing a paid police department.[100] The court stated:

> Article 13, § 1 of the Wyoming Constitution, giving "home rule" to cities and towns, exempts "statutes uniformly applicable to all cities and towns" from the authorization given to cities and towns to "determine their *local* affairs and government." Section 15-5-101, et seq. are statutes which are exempt from this provision. They apply to all cities and towns having a population of over 4,000.[101]

By way of *obiter dictum* the Wyoming Supreme Court in *Laramie Citizens For Good Government v. City of Laramie*,[102] stated:

> The Municipal Budget Act and §§ 15-7-101(a) and 15-7-102(b) . . . are statutes uniformly applicable to all cities and towns, and Art. 13, § 1, Wyoming Constitution, does not provide an exemption from compliance, and Art. 13, § 1, Wyoming Constitution, does not provide an exemption from compliance with them.[103]

The Municipal Budget Act, now succeeded by the Uniform Municipal Fiscal Procedures Act,[104] then applied to all cities and towns over 4,000 in population.[105]

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97. Police Protective Ass'n v. City of Rock Springs, 631 P.2d 433 (Wyo. 1981).
98. *See supra* note 61 and accompanying text.
99. 631 P.2d 433 (Wyo. 1981).
100. *Id.*
101. *Id.* at 439.
102. 617 P.2d 474 (Wyo. 1980).
103. *Id.* at 483.
104. *See* WYO. STAT. §§ 16-4-101 to 16-4-601 (1990 and Supp. 1995).
105. *Id.*

It is questionable whether the court would have considered these statutes uniformly applicable, had the court resorted to Kansas authority as support for its position. Proportionately, there are very few cities in Wyoming that are over 4,000 in population.[106] It is difficult to understand how such statutes could be of uniform application throughout the state.

ANALYSIS TEMPLATE FOR MUNICIPALITIES

> [T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere.[107]

When a municipality is determining how to react to a particular problem which may involve home rule, the following should be considered:

1. Are the state statutes silent with respect to the subject of the proposed ordinance?

If so, then the municipality is free to legislate with respect to matters the governing body deems to be of local concern.[108] Certainly the legislature can usurp the authority of the municipality under Article 13, Section 1, by including in a statute language which expresses a clear intent to preempt the field of legislation, whether the subject is state-wide or local in nature.[109] However, the legislature should be guided by the principle that it is common for matters of state-wide concern and local concern to coexist.[110]

2. Has the subject of the proposed ordinance been preempted by the legislature by clear, precise language included in the statute?

If so, municipalities cannot legislate with respect to the subject matter, irrespective of whether the ordinance and the statute are in con-

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106. There were only 17 cities in Wyoming with populations over 4,000 in 1990. Telephone interview with Neville Tuft, Business Development Officer, Wyoming Department of Commerce, Division of Economic and Community Development, in Cheyenne, Wyo. (Feb. 27, 1996).

107. James Madison, The Federalist No. 39 (New Amer. Lib. Ed. 1961).

108. "Local self-government is broadest in 'home rule' municipalities, which can be almost entirely free from legislative control in local matters." City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 435 n.15 (1978).

109. "An intent on the part of the legislature to retain exclusive jurisdiction to legislate in a given area must be clearly shown, and where such an intent cannot be gathered from the statutes themselves, whatever extrinsic evidence there may be of such an intention must be clear and convincing before the power to regulate can be said to have been withdrawn from cities." *Junction City*, 532 P.2d at 1299.

110. "In *Garden City v. Miller*, 311 P.2d 306, this court pointed out that the fact the state has enacted legislation on a subject does not necessarily deprive a city of the power to deal with the same subject." *Id.* at 1298.

flict, nor can it exempt itself from the statute by charter ordinance, since such a designation indicates that the legislature considers the matter to be one of state-wide concern and has preempted the field.[111] Of course, any clear and precise preemptive language must of necessity be uniform in its application.

3. Is there a statute covering the subject of the proposed ordinance and of uniform application, but which does not include clear, precise and preemptive language?

Then it must be determined if there a conflict between the proposed ordinance and the existing statute on the same subject. If there is no conflict, the municipality is free to legislate on the subject, notwithstanding that the statute may be of uniform application. If it is determined that the proposed ordinance would conflict with the state statute then the state statute must be followed.

4. Is there a conflict between the ordinance and a non-uniform state statute?

If a conflict exists the municipality may opt out of the state law by the adoption of a charter ordinance, by following the provisions of Article 13, Section 1(c).

CONCLUSION

> A regime of freedom should receive its lifeblood from the self-government of local institutions. When democracy, driven by some of its baser tendencies, suppresses such autonomies, it is only devouring itself . . . [I]f the central government's representative runs the city and the province, . . . you can no longer speak of democracy.[112]

The Wyoming Supreme Court should not ignore or misconstrue the clear meaning of a constitutional provision.[113] Wyoming citizens followed

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111. "[A] home-rule city has authority to do whatever is not specifically prohibited by the State." City of Lockhart v. United States, 460 U.S. 125, 127 (1983).

112. FERC v. Mississippi, 456 U.S. 742, 790 n.28 (1982) (O'Connor, J., concurring in part and dissenting in part) (quoting I. Silone, THE SCHOOL FOR DICTATORS 119 (W. Weaver trans. 1963)).

113. The Wyoming Supreme Court is "required to apply the 'fundamental principle of constitutional interpretation that each and every clause within [the Wyoming] constitution has been inserted for a useful purpose.'" Johnson v. Hearing Examiner's Office, 838 P.2d 158, 164 (Wyo. 1992) (quoting Day v. Nelson, 485 N.W.2d 583, 585-86 (Neb. 1992)). In general, the court is required to interpret the constitution in light of the author's intent (*e.g.*, framers or voters). Worthington v. State of Wyoming, 598 P.2d 796, 811 (Wyo. 1979) (Rose, J., dissenting opinion).

the proper procedures to amend the constitution in 1972. "Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. In establishing [representative] bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature."[114]

The court has a responsibility to follow the people's mandate[115] and further, to construe home rule application "liberally."[116] Wyoming case law should reflect a similar pattern to the Kansas Supreme Court's interpretation.[117] Instead, the Wyoming high court has refused to give credence to the home rule amendment.[118] When the judiciary abandons its responsibility to the constitutional directive, representative government can only continue within a short and inevitably terminative time span.[119]

The home rule amendment is valid and enforceable. The Wyoming Supreme Court is bound to respect and follow the law contained in the Wyoming Constitution in an unbiased manner. Instead, the court has decided to emasculate Article 13, Section 1, by using it in a so-called manner. Adoption of home rule should have abrogated Dillon's Rule. Instead the ghost of Dillon's Rule continues to haunt effective home rule in Wyoming.

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114. City of Eastlake v. Forest City Enter., Inc, 426 U.S. 668, 672 (1976) (citing Hunter v. Erickson, 393 U.S. 385, 392 (1969)). "The reservation of such power . . . is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.'" Felix v. Milliken, 463 F. Supp. 1360 (E.D. Mich. 1978) (citation omitted).

115. The Wyoming Supreme Court has a primary obligation "to support, obey and defend the Constitutions of the United States and of the state of Wyoming. " Johnson v. Hearing Examiner's Office, 838 P.2d at 167. (citing WYO. CONST. art. VI, § 20 (1977) (oath of office)).

116. *See* WYO. CONST. art. XIII, § 1(d).

117. *See supra* note 33 and accompanying text.

118. *See supra* note 4 and accompanying text.

119. *Johnson*, 838 P.2d at 168.

Appendix 1

Home Rule Statutes and Constitutional Provisions Within the United States

By 1975, home rule had been authorized by constitution or statute in forty-seven states. Judigh A. Stoll, *Home Rule and the Sherman Act After Boulder: cities Between A Rock and a Hard Place*, 49 BROOK L. REV. 259, 299, n.24 (1983). Forty states have constitutional home rule provisions, and approximately half of those states have adopted such provisions since 1953. *Id.*

Constitutional Provisions: *Alaska*: ALASKA CONST. art. X; *Arizona*: ARIZ. CONST. art. XIII, §§ 2-3; *California*: CAL. CONST. art. XI, §§ 3, 5-7; *Colorado*: COLO. CONST. art. X; *Connecticut*: CONN. CONST. art. X; *Florida*: FLA. CONST. art. VIII, §§ 1(g), 2(b); *Georgia*: GA. CONST. art. XV; *Hawaii*: HAWAII CONST. art. VII, § 2; *Idaho*: IDAHO CONST. art. XII, § 2; *Illinois*: ILL. CONST. art. VII, § 6; *Iowa*: IOWA CONST. art. III, § 40; *Kansas*: KAN. CONST. art. XII, § 5; *Kentucky*: KY. CONST. § 156B (adopted in 1994); *Louisiana*: LA. CONST. art. VI; *Maine*: ME. CONST. art. VIII-A; *Maryland*: MD. CONST. arts. XI-A, XI-E, XI-F; *Massachusetts*: MASS. CONST. amend. II; *Michigan*: MICH. CONST. art. VII, §§ 2, 22; *Minnesota*: MINN. CONST. art. XI, § 3; *Missouri*: MO. CONST. art. VI, §§ 18(a)-(s), 19-19(a); *Montana*: MONT. CONST. art. XI, §§ 5-6; *Nebraska*: NEB. CONST. art. XI, §§ 2-5; *Nevada*: NEV. CONST. art. VIII, § 8; *New Hampshire*: N.H. CONST. pt. I, art. XXXIX; *New Mexico*: N.M. CONST. art. X, § 6; *New York*: N.Y. CONST. art. IX; *North Dakota*: N.D. CONST. art. VI, § 130; *Ohio*: OHIO CONST. art. XVIII; *Oklahoma*: OKLA. CONST. art. XVIII, §§ 3-4; *Oregon*: OR. CONST. art. XI, § 2; *Pennsylvania*: PA. CONST. art. IX, § 2; *Rhode Island*: R.I. CONST. amend. XXVIII; *South Carolina*: S.C. CONST. art. VIII, § 11; *South Dakota*: S.D. CONST. art. IX, § 2; *Tennessee*: TENN. CONST. art. XI, § 9; *Texas*: TEX. CONST. art. XI, § 5; *Utah* UTAH CONST. art. XI, § 5; *Virginia*: VA. CONST. art VII, § 2; *Washington*: WASH. CONST. art. XI, §§ 10-11; *West Virginia*: W. VA. CONST. art. VI, § 39(a); *Wisconsin*: WIS. CONST. art. XI, § 3; *Wyoming*: WYO. CONST. art. XIII, § 1.

Statutory Provisions: *Arkansas*: ARK. CODE ANN. §§ 14-43-601, 14-43-602, 14-69-208 (Michie 1987); *Delaware*: DEL. CODE ANN. tit. 22 § 802 (1995); *District of Columbia*: D.C. CODE ANN. § 1-121 et seq. (1978); *Indiana*: IND. STAT. ANN. 36-1-3 et seq.; *New Jersey*: N.J. STAT. ANN. §§ 40:48-1 et seq., 40:49-27 (1991); *North Carolina*: N.C. GEN. STAT. § 153A-121 (1991).

Non Home Rule States: *Alabama*; *Vermont*.