STATUS UPDATE: COUNTY HOME RULE IN KANSAS

*By: Jeffrey Bourdon**

I. INTRODUCTION

Home rule authority allows local governments to pursue certain policies on their own terms.[1] Kansas' county governments are currently granted this power through a statute, but a house resolution—House Concurrent Resolution 5004—tried to grant this power through a constitutional amendment.[2] While states widely grant cities home rule authority through constitutional amendments, they are increasingly granting counties this authority through amendment too.[3]

Kansas tried to join this movement, but the resolution died in committee.[4] Even so, the resolution and its outcome present an opportunity to study how future resolutions might be modified to allow county governments to better respond to their communities.

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[1] *See* KAN. STAT. ANN. § 19-101 (West 2017).

[2] KAN. STAT. ANN. § 19-101a (West 2017); H.R. Con. Res. 5004, 115th Cong. (as proposed by Kan. Cong. Jan. 19, 2017), http://kslegislature.org/li_2018/b2017_18/measures/HCR5004/ [https://perma.cc/7HVH-G7XD].

[3] Kansas LEGISLATIVE RESEARCH DEPARTMENT, *Kansas Legislator Briefing Book: 2015*, http://www.kslegresearch.org/KLRDweb/Publications/2015Briefs/2015/P-1-HomeRule.pdf (showing that Kansas would be the 23rd state to grant constitutional protection to county home rule).

[4] *See* Jon Russell & Aaron Bostrom, *Federalism, Dillon Rule and Home Rule*, AM. CITY CTY. EXCH. (2016), http://www.acce.us/app/uploads/2016/06/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf [https://perma.cc/G2GF-E7ER] ("In recent years, there has been a rise in local governments using what little leverage they have in their states to promote policies that have traditionally been legislated in the state capitals."); H.R. Con. Res. 5004, 115th Cong. (as proposed by Kan. Cong. Jan. 19, 2017), http://kslegislature.org/li_2018/b2017_18/measures/HCR5004/ [https://perma.cc/7HVH-G7XD].

Counties are local governmental units that are created by states.[5] Generally, counties are granted authority by one of two models: Dillon's rule or home rule.[6] Dillon's rule is a negative power grant—local governments may not act unless explicitly authorized to act.[7] Home rule is a positive power grant—local governments may act unless otherwise restricted.[8] Dillon's rule produces a stronger state government at the expense of local government, and home rule is the opposite.[9] But under either model, counties remain subject to state law, which means neither model gives counties legal autonomy.[10]

This paper first places the resolution in context by looking quickly at how home rule developed. Then it asks to what extent the resolution would have granted counties and cities a similar degree of authority.[11] Finally, the paper asks whether the resolution would have succeeded as a policy and if not, how it might be improved.

These questions can be answered in two points. First, the resolution would have granted counties the "same manner" of

[5] KAN. STAT. ANN. § 12-105a (West 2017); City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923) ("In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit.").

[6] *See* Sandra Craig Mckenzie, Home Rule in A Nutshell, 48 U. KAN. L. REV. 1005 (2000).

[7] KANSAS LEGISLATIVE RESEARCH DEPARTMENT, *supra* note 3.

[8] Mckenzie, *supra* note 6, at 1005.

[9] *Id.*

[10] David Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2263 (2003) ("Local governments do not –indeed, cannot – possess anything like local legal autonomy. They may operate within a legal structure that seems committed to securing their right to home rule, but that same structure subjects them to a variety of legal limitations—some clear, others less so. What now passes for home rule, therefore, is not local legal autonomy."); *Cf.* SANDRA M. STEVENSON, ANTIEAU ON LOCAL GOVERNMENT LAW § 21.01 (2d ed. 2009) ("The *power of home rule* is generally understood as synonymous with local autonomy: the freedom of a local unit of government to pursue self-determined goals without interference by its State legislature or other agencies of State government." (original emphasis)).

[11] Memorandum from Jason Long, Senior Assistant Revisor in the Kansas Office of Revisor of Statutes, to Chairman Barker and Members of the House Committee on Federal and State Affairs (Jan. 31, 2017), http://kslegislature.org/li/b2017_18/committees/ctte_h_fed_st_1/documents/testimony/20170131_11.pdf. (saying the resolution game counties the "same manner" of authority as cities).

authority as cities if manner means source.[12] But, if manner means abilities, then the resolution came up short. Counties would have remained subject to the same restrictions imposed on them while cities remained less constrained.

Second, whether the resolution would have succeeded on policy grounds depends what purpose home rule is supposed to advance. If home rule should to allow voters to make decisions on the structure of county governments[13] or protect their abilities to engage in local politics,[14] the policy would have succeeded. But if home rule should increase the substantive abilities of local governments, then the resolution would not have succeeded.[15] Despite this apparent split, it is certainly possible for a future resolution to succeed on both grounds if the resolution removes restrictions, adds language that precisely expands home rule authority, is interpreted under an implied preemption analysis, or a combination of all three.

II. DEVELOPING HOME RULE

A county is a local governmental unit created by state law.[16] Because states could not respond as specifically or immediately to local problems as local governments could, state legislatures granted

[12] *Id*.
[13] James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule"*, 59 ST. JOHN'S L. REV. 713, 713 (1985).
[14] *See* Barron, *supra* note 10, at 2347 ("The grant of home rule initiative is usually thought to reflect the public's desire to empower local governments to respond to problems without having to seek specific state statutory authorization.").
[15] *See id.* at 2276 ("If local governments instead operate within a legal framework that grants them certain substantive powers but denies them others, then perhaps the problem with the current legal structure arises from the substantive ways in which states' delegations and preemptions of local legal authority combine to direct local power – rather than from state law's solicitude for it.") (explaining effective home rule is a mix of state grants and limitations on home rule that "increases local governments' own capacity to promote" local government initiatives).
[16] KAN. STAT. ANN. § 12-105a (West 2017); City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923) ("In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit.").

local governments enough authority to address these issues.[17] By formally recognizing local governments such as counties, states can then regulate them and use them as vehicles for accomplishing state-wide policy goals.[18] In other words, local governments exist to advance a state's political interests.

Legislatures first granted counties power through a model of authority called Dillon's rule. While not unanimously accepted, Dillon's rule remained the dominant model until home rule began to emerge. On paper, Dillon's rule and home rule have different power bases but they might produce similar results.[19] So what motivates a legislature to choose one over the other? Home rule benefits from its appearance. It appears to be less constricted by state government, which appeals to the American idea of self-government.[20] It might be argued then that not only do states use local governments to advance their own interests but are more likely to be able to use these governments for this purpose when voters think local governments are structured in a way that still answers to them.[21]

A. Historical Development

Local governments recognized by state legislatures include, but are not limited to, city and county governments.[22] These governments

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[17] *See* Barron, *supra* note 10, at 2334 ("Local governments did not naturally incline toward certain policies. Instead, state law structured them to govern in certain ways rather than in others.").

[18] Uma Outka, *Intrastate Preemption in the Shifting Energy Sector*, 86 U. COLO. L. REV. 927, 943–44 (2015).

[19] David Tiger & Karen L. Benedetti, *VIII. Governmental Functions*, 50 MD. L. REV. 1214, 1229 n.62 (1991) ("A county that adopts a home rule charter may achieve a significant degree of political self-determination, and the charter transfers to the home rule county the General Assembly's power to enact many types of county public local laws."). *But see* Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?* 84 N.C. L. REV. 1983, 2023 (2006) (arguing that "[T]he scope of authority actually delegated to North Carolina local governments is probably as broad, perhaps even broader, than the authority local governments have in many home rule states.").

[20] *See* Barron, *supra* note 10, at 2347 ("Home rule provisions, therefore, more than any other feature of the current legal regime, symbolize the degree to which state law seems to reject the preference for local legal powerlessness, a preference rooted in the old state creature conception of local power.").

[21] *See id.* at 2334 ("Local governments did not naturally incline toward certain policies. Instead, state law structured them to govern in certain ways rather than in others.").

[22] KAN. STAT. ANN. § 12-105a (West 2017).

are then enabled by home rule grants to pursue their own interests,[23] which means home rule is, as Judge David Barron writes, "a mix of state law grants of, and limitations on, local power that strongly influences the substantive ways in which local governments may engage with their community."[24]

What is recognized today as home rule grew out of Dillon's rule. While Dillon's rule today is a minority approach, it once operated as a frontier for progressive state legislation.[25] Local government scholar and Iowa Supreme Court Judge John Dillon developed Dillon's rule in the late nineteenth century as a response to the growing concern that as cities and communities continued to grow, states needed effective means to govern this growth.[26] Dillon's rule proposes a model of local government where a state's incorporation of a local government implicitly delegated limited power to the local government to handle its affairs.[27]

As Judge Barron showed in his analysis of the ways in which states established early local governments, state policy goals pursued through local governments have generally reflected how state legislators thought state politics should intervene in the lives of its citizens.[28] But if the business of a local government is to "wisely administer the local affairs of the incorporated community," Dillon's rule seems to limit its own effectiveness by making local governments dependent on legislative action.[29] So states began to adopt an alternative model.[30]

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[23] KAN. STAT. ANN. § 19-101b (West 2017); *see* Barron, *supra* note 10, at 2291–2320 (discussing three different visions of home rule. These visions of home rule primarily derive out of state policy makers' view on how large of a role the government should play in citizens' daily lives. The different versions are: old conservative city, administrative city, and social city).

[24] Barron, *supra* note 10, at 2263.

[25] *Id.* at 2285; *see* Russell & Bostrom, *supra* note 4.

[26] Barron, *supra* note 10, at 2285.

[27] *See id.* at 2285 ("Dillon argued that these 'inherent' local powers existed because 'in many of its more important aspects a modern American city is not so much a miniature State as it is a business corporation, – its business being wisely to administer the local affairs and economically to expend the revenues of the incorporated community.'").

[28] *Id*.

[29] *Id*. at 2285 (citing John F. Dillon, *Commentaries on the Law of Municipal Corporations*, §15, at 34 (4th ed. 1890)).

[30] NAT'L ASS'N OF COUNTIES, COUNTY GOVERNMENT STRUCTURE: A STATE BY STATE REPORT 6 (2009), https://www.ipfw.edu/dotAsset/98216b7d-e66c-4da6-

Early reformers of Dillon's rule took issue with the idea of local governments being creatures of the state and proposed a different model that weighed in favor of local action.[31] The reformers' conception proposed a model that allowed local governments to act unless the state formally prohibited them.[32] This allowed local governments to respond more immediately and creatively to community needs because this model uses less procedural and substantive restraints. In other words, local governments could better serve the state by better serving themselves, and they could better serve themselves when they could do what they wanted.[33]

Besides, changing from Dillion's rule to home rule did not attempt to "free" local governments from state control. Rather, it reconfigured the relationship between the local government and the state.[34] But if reformers aimed to increase the protection for local governments by allowing them to act unless otherwise prohibited, reformers would also seek to protect the source by which the state granted local governments this power. The reformers wanted to make it harder for this power to be repealed, which means that they needed to not only change what the power allowed but the source from where it came.

B. Home Rule Sources

Home rule may be granted through a state statute or constitution.[35] Whether local governments derive their power by statute or constitution affects the awarded government in two ways. First, the source of that governments' power affects how states shape the scope of local authority: granting home rule authority through the state's constitution makes it harder for the power to be repealed.[36] Second,

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a78b-1871b6c1f439.pdf [https://perma.cc/6SSP-M93H] ("County effort to enhance efficiency and meet growing demands for services began to emerge in the 1940s and 1950s.").

[31] Barron, *supra* note 10, at 2335.

[32] Mckenzie, *supra* note 6, at 1006.

[33] Barron, *supra* note 10, at 2335 (explaining those who wished for more local government power "did not seek home rule to free cities from their states. They sought to situate cities within the state legal structure to enable them to take a lead role in responding to the urban crisis in ways that had previously been foreclosed."); Mckenzie, *supra* note 6, at 1005.

[34] Barron, *supra* note 10, at 2335.

[35] KAN. STAT. ANN. § 19-101a (West 2017); KAN. CONST. art. 12, § 5.

[36] Outka, *supra* note 18, at 944; KANSAS LEGISLATIVE RESEARCH DEPARTMENT, *supra* note 3 ("Because of its constitutional origins, only the voters of Kansas can ultimately repeal city home rule after two-thirds of both houses of the Kansas

the source may affect how courts apply preemption principles when local government and state government actions overlap.[37]

While each source has its own advantages, how local power is structured depends not only on state legislatures, but on popular support too.[38] Constitutional amendments must be approved by the voters of the state, which means the movement away from Dillon's rule shows that people support increasing abilities for local governments.[39] This is also seen by preambles and other amendments to state constitutions that announce a desire to promote self-government.[40] Home rule provisions then reflect how people reject local legal powerlessness in favor of increased self reliance.[41] Unsurprisingly, the trend towards home rule may have its roots in the participation theory of local government.[42] But just because home rule is procedurally more difficult to repeal when it is placed in a state's constitution does not necessarily mean that the power is upgraded in its substantive abilities too.

C. Background on Kansas' County Home Rule Status

Home rule allows a local government to opt out of a state law.[43] The Kansas legislature first granted counties home rule power in

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Legislature have adopted a concurrent resolution calling for amendment or repeal, or a constitutional convention has recommended a change. The Legislature can restrict city home rule powers only by enacting uniform laws that apply in the same way to all cities unless the subject matter is one of the few special areas listed in the Home Rule Amendment, such as taxing powers and debt limitations. By contrast, the Legislature has a much freer hand to restrict or repeal statutory county home rule.").

[37] *Id.*

[38] Steffes v. City of Lawrence, 284 Kan. 380, 386 (2007) ("Because of its appearance in a constitutional amendment, the city Home Rule power is considered to be granted directly by the people.").

[39] *See* Barron, *supra* note 10, at 2347 ("Home rule provisions, therefore, more than any other feature of the current legal regime, symbolize the degree to which state law seems to reject the preference for local legal powerlessness, a preference rooted in the old state creature conception of local power.").

[40] *Id.*

[41] *Id.*

[42] Richard Briffault, *Our Localism: Part II-Localism and Legal Theory*, 90 COLUM. L. REV. 346, 416 (1990) (explaining that participation theory's "basic premise is that local governments are political institutions that decide on public issues in a manner influenced by and accountable to an involved constituency of local residents.").

[43] KAN. CONST. art. 12, § 5; KAN. STAT. ANN. § 19-101a (West 2017).

1974.[44] Initially, Kansas only placed eight restrictions on counties; now, there are 38.[45] These restrictions are statutes that describe circumstances when a county may not opt out of a state law.[46] While it may seem that the dead resolution strayed from Kansas' tendency to impose restrictions on counties, the resolution hardly strayed from tendencies at all. HCR 5004 states in part:

> Counties are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions, except when and as the levying of any tax, excise fee, charge or other exaction is limited or prohibited by enactment of the legislature applicable uniformly to all counties of the same class . . . Counties shall exercise such determination by resolution passed by the governing body with referendums only in such cases as prescribed by the legislature, subject only to enactments of the legislature of statewide concern applicable uniformly to all counties, to other enactments of the legislature applicable uniformly to all counties, to enactments of the legislature applicable uniformly to all counties of the same class limiting or prohibiting the levying of any tax, excise, fee, charge or other exaction and to enactments of the legislature prescribing limits of indebtedness. *All enactments relating to counties now in effect or hereafter enacted and as later amended and until repealed shall govern counties*, except as counties shall exempt themselves by charter resolutions as herein provided for in section (b) (emphasis added).
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> Any county may by charter resolution elect in the manner prescribed in this section that the whole or any part of any enactment of the legislature applying to such county, other than enactments of statewide concern applicable uniformly to all counties, other enactments applicable uniformly to all counties, and enactments prescribing limits of indebtedness, shall not apply to such county . . . a charter resolution is a resolution which exempts a county from the whole or any part of any enactment of the legislature . . . which may provide substitute and additional provisions on the same subject.
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> Powers and authority granted to counties pursuant to this section shall be liberally construed for the purpose of giving to counties the largest measure of self-government.[47]

The resolution does share many similarities to Kansas' city home rule amendment, including: (a) granting constitutional status to each

[44] KAN. STAT. ANN. §§ 19-101–122 (West 2017).
[45] KAN. STAT. ANN. § 19-101a (West 2017).
[46] *See* KAN. STAT. ANN § 19-101a(a)(11) ("Counties may not exempt from or effect changes in the provisions of K.S.A. 19-4601 through 19-4625, and amendments thereto.").
[47] H.R. Con. Res. 5004, 115th Cong. (as proposed by Kan. Cong. Jan. 19, 2017).

level of that government's home rule authority; (b) subjecting each respective local government to state enactments that are uniform with regard to that particular type of government; (c) conditions when and how local governments may opt out of state enactments; (d) directing that powers and authority granted to these governmental units shall be liberally construed for the purpose of giving that local government the largest measure of self-government; and, (e) existing laws regarding the local government remain applicable. [48]

Despite these similarities, the resolution did not give counties the same degree of authority as cities. This should not be surprising. To give cities and counties the same degree of authority could make one of these governments redundant. It seems then that "same manner" means procedural source. With the popular appeal of the appearance of increased power for local governments, because the power would then exist as constitutionally protected, the resolution can be read as a political move rather than a meaningful attempt to advance a policy of home rule to allow counties to become more self-reliant. But this conclusion might be drawn too quickly. Even by increasing the protection for this power, the state tried to signal how important home rule is to for its people. If the resolution had survived, the question once the power is protected becomes then how the power may be expanded to offer counties more substantive abilities.

II. INVESTIGATING THE RESOLUTION

If the purpose of home rule is to allow local governments to meaningfully engage in their communities, then the resolution or a resolution similar to it is only a step in the right direction.[49] Accordingly, a method to supplement the procedural protection home rule would enjoy if it were granted through a constitutional amendment should now be considered. This section proposes options Kansas may consider in the future to strengthen county governments' home rule authority. These alternatives include (a) removing the restrictions placed on counties, (b) revising the preemption doctrine, and (c) adding express power grants to supplement home rule statutes. Before concluding, the section examines arguments made for and

[48] KAN. CONST. art. 12, § 5 (home rule provision for cities); H.R. Con. Res. 5004, 115th Cong. (as proposed by Kan. Cong. Jan. 19, 2017).
[49] Barron, *supra* note 10, at 2347.

against the resolution to evaluate what voters recognize as the stakes of this debate.

A. Counties Are Not Granted the Same Manner of Home Rule as Cities

The resolution would not grant counties the same level of substantive authority as cities for two reasons: (a) counties are subject to city ordinances and state law whereas cities are only subject to state law,[50] and (b) the 38 restrictions that bind counties, and which are more confining than the 12 restrictions placed on cities, would have remained in effect despite the status change from statute to constitution.[51]

Some of the limitations placed on counties keep counties from "effect[ing] a change" on specific laws while cities are often free to supplement non-uniform state laws, although only in a way that furthers the law's policy goal.[52] In fact, counties may not "supersede or impair" the home rule power given to cities without the consent of those cities. Accordingly, to say the resolution would have given counties the same manner of authority as cities does not mean substantive abilities, which calls into question whether the resolution would have succeeded as promoting the policy goals of home rule. But might it be beneficial that the resolution does not more aggressively advance home rule powers?

B. Arguments Against Increasing County Power

Before a discussion on how the resolution might have allowed counties to effectively pursue solutions to their problems, and if not, how the resolution might be supplemented, begins it is useful to consider some of the broad arguments typically made for or against local governments:[53]

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[50] KAN. STAT. ANN. § 19-101a(a)(4) (West 2017).
[51] KAN. STAT. ANN. § 12-101 (West 2017); KAN. STAT. ANN. § 12-137 (West 2017); KAN. STAT. ANN. § 12-138c (West 2017); KAN. STAT. ANN. § 12-1,118 (West 2017); KAN. STAT. ANN. § 12-646b (West 2017); KAN. STAT. ANN. § 12-6,121 (West 2017); KAN. STAT. ANN. § 12-3017 (West 2017); KAN. STAT. ANN. § 12-4902 (West 2017); KAN. STAT. ANN. § 12-5001 (West 2017); KAN. STAT. ANN. § 12-5008 (West 2017); KAN. STAT. ANN. § 15-115 (West 2017); KAN. STAT. ANN. § 75-4330 (West 2017); *Cf.* KAN. STAT. ANN. § 19-101a (West 2017).
[52] *See* KAN. STAT. ANN. § 19-101a(a)(11) (West 2017) (emphasis added).
[53] INT'L COUNCIL ON HUMAN RIGHTS, LOCAL RULE: DECENTRALIZATION AND HUMAN RIGHTS 8 (2002), http://www.ichrp.org/files/reports/13/116_report.pdf.

Arguments For Local Governments	**Arguments Against Local Governments**
Promotes democracy because it provides better opportunities for local residents to participate in government decision-making.	Undermines democracy by empowering local elites, beyond the reach or concern of central power.
Increases efficiency in delivering public services – delegation of responsibility avoids bottlenecks and bureaucracy	Worsens delivery of service in the absence of effective controls and oversight of standards
Leads to higher quality of public services, because of local accountability and sensitivity to local needs	Quality of services deteriorates due to lack of capacity and insufficient resources
Enhances social and economic development, which rely on local knowledge	Gains coming from the participation of locals are offset by the risks of increased corruption, and inequalities between regions
Increases transparency, accountability, and the response capacity of government institutions	Promises too much and overloads capacity of local governments
Allows greater political representation for diverse political, ethnic, religious and cultural groups in decision making	Creates new or ignites dormant ethnic, religious rivalries
Increases political stability and national unity by allowing citizens to better control public programs at the local level	Weakens states because it can increase regional inequalities or lead to separatism or undermine national financial governance
Spawning ground for new political ideas, leads to more creative and innovative programs	Gains in creativity are offset by the risk of empowering conservative local elites

These arguments give a background on why some state legislators might be hesitant to increase substantive powers for local governments. Looking specifically at the advantages and

disadvantages of home rule county governments, Michele Timmons advances the following arguments: [54]

Advantages	Disadvantages
A charter confers broad power on the local governmental unit. This power can be used to fill gaps left by state statutes.	Scope and extent of county home rule power are not always clear which results in a case by case analysis.
County offers great flexibility to deal effectively with local needs and desires. This flexibility may increase efficiency in both public service and resource management.	Loss of uniformity among charter units.
Counties are more autonomous. State legislatures do not need to be involved in day to day county operations.	Allow for direct voter involvement in county government.
Makes county government more visible and responsive to the people. Educates the voters of that county about county government.	It may be difficult to adopt, amend and abandon a home rule charter. These processes take time and effort and may place a burden on an already tight government budget.

These tables show that the underlying dispute on whether to grant local governments power involves a judgment on whether local governments are beneficial to the community. While the debate on whether local governments are beneficial to the community, and if so, if they are granted powers that reflect this judgment, underlies the arguments in the following sections, it may be helpful to pause on the argument that local governments are instruments that promote parochial interests. By establishing whether they are, state governments can then determine how much or how little authority to award them in order to also avoid the dangers of localism.

Localism is criticized for its practical shortfalls despite its abstract appeal.[55] Localism is the use of power for the benefit of those in a

[54] Michele Timmons et. al., *County Home Rule Comes to Minnesota*, 19 WM. MITCHELL L. REV. 811, 818–20 (1993).

[55] Paul Diller, *Intrastate Preemption*, 87 B.U.L. REV. 1113, 1122 (2007) ("[I]t is widely acknowledged that municipalities sometimes use their power more to exclude undesirable persons and land uses than engage in good-faith policy experimentation, often in an attempt to externalize certain social costs on to other

specific location.[56] Greater local power may be practically unworkable because widely distributed local power results in inequality by only offering benefits to a minority of localities at the expense of others.[57] This zero sum result stems from a concern that local governments are used to protect private values, which are only enjoyed by the wealthy.[58] An example of this is a local government's power over land control.[59] Through its power over land control, local governments can determine the kinds of economic activity that can occur in a community.[60] This effect gives credibility to the argument that local governments are actually fragments of larger regional economies that serve the interests of those invested in that economy.[61] But the ability to control what uses the land may be used for has other impacts.

Local governments may also regulate who lives in a community.[62] Because race, class, and income seem to go together in local settlement patterns, a network of fragmented local government could convert social and economic segregation into political segregation.[63] The poor are forced into communities where they remain disorganized and unable to effectively challenge the status quo, allowing a minority of affluent localities to continue to derive benefits at the expense of others. Taken together, local governments, by controlling land uses, may control not only what occurs in a community but who lives in it. In this way, localism may be more of an obstacle to achieving social justice and the development of a public life than a prescription for how to get there; that is, if localism is supposed to enable all rather than a few.[64]

While this paper intentionally avoids answering whether local governments are good or bad, it tries to take the resolution on its terms and follow the suggestions it seems to make. One of these suggestions is that Kansas wants to improve its home rule doctrine. Why else would it propose to elevate this power if the power is not taken

communities."); Richard Briffault, *Our Localism: Part I-- The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1–5 (1990).

[56] *See generally* Briffault, *supra* note 55.

[57] *Id.* at 1.

[58] *Id*. at 1–2.

[59] *Id*.

[60] *Id*. at 3.

[61] *Id*. at 5.

[62] *Id*.

[63] *Id*.

[64] *Id*. at 2.

seriously? Even if it does not immediately expand powers given to local governments, protecting the power may be the first in a series of improvements to come. So if Kansas wants to improve its current home rule doctrine, alternative methods to accomplish this goal exist besides only changing the source of the power. But on the other hand, the resolution does appear to put forward the argument that (a) Kansas does not seriously support county home rule because the amendment does not expand any substantive powers; (b) Kansas should be seeking to limit home rule powers because local governments are largely parochial; and, (c) state legislators do not want country governments to have more power. Why else would the resolution die if not for a belief that country governments are not to be trusted? Why allow cities to deviate from non-uniform laws while requiring that counties not "effect a change" on them? One response might be these restrictions actually allow county governments to better serve their communities. If they had too much power, counties, cities, and the state might compete for agency. Another response could be because this is how the state has always organized it, which suggests it is time to at least consider alternatives.

C. Three Methods to Improve County Home Rule

There are at least three ways to expand counties' home rule power: (a) removing limitations placed on counties;[65] (b) revising the judicial preemption doctrine;[66] and, (c) adding language to home rule grants to clarify how a county may act.[67]

Removing statutes that limit counties' power is the most effective way to supplement a proposition like HCR 5004. This option offers three benefits: (a) increased ability for counties to pursue policy goals; (b) incentivizes relationships between counties, cities, and the state; and, (c) increases the probability that charter resolutions will pass a preemption challenge.[68]

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[65] Barron, *supra* note 10, at 2336 (explaining that by removing limiting statutes, a decentralized framework of state government that better promotes home rule comes into being. This occurs because "a decentralized system can create beneficial opportunities for policy experimentation and generation in one jurisdiction that, once adopted, can shape the preferences of both higher-level institutions and neighboring jurisdictions.").

[66] *See* Diller, *supra* note 55.

[67] *See* Barron, *supra* note 10, at 2364.

[68] *See id*. at 2351–65 ("The risk of invalidation, in other words, itself constrains local legal power.").

Judge Barron argues that removing restrictions placed on local governments is the most effective way to expand local governmental power.[69] His premise is that

> "if local governments operate within a legal framework that grants them certain substantive powers and denies them others, then the problem with the current legal structure may arise from the substantive ways that states' delegations and preemptions of local legal authority combine to direct local power – rather than from state law's solicitude for it."[70]

Judge Barron urges states to reclaim home rule by modifying their already existing grants and limitations in a way that redirects this power towards a framework that allows local governments to more effectively intervene, respond, and monitor developments within their communities.[71] This approach carries several advantages and disadvantages.

The advantage of this method is simplicity. Removing restrictions follows from the idea that local governments may act unless specifically restricted. Removing restrictions supports the argument that the legislature's intent is to broaden home rule, which may help courts construe home rule provisions broadly in preemption challenges. Courts construing home rule provisions broadly helps county commissioners determine whether proposed charter resolutions would be upheld if challenged, *i.e.* is an option being considered even worth considering. But it may be impractical for states to remove all restrictions, especially on counties. To do so could mean counties now perform the same functions as cities, making one of them redundant.

A disadvantage to removing restrictions involves the court's role in interpreting home rule provisions. If all restrictions are removed, courts may interpret home rule provisions for counties to mean that counties may act unless their action is preempted by the city or state. If all restrictions for cities are also removed, then it becomes confusing what each level of government has authority to do. The advantage of

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[69] *Id.* at 2364–65 ("A better approach, therefore, would . . . broaden the scope of home rule initiative power in a more general fashion . . . . [by] dispensing with such limitations and replacing them with general grants of power to exercise all delegable authority would be useful.").
[70] *Id.* at 2276.
[71] *Id.*

removing restrictions then is simplicity, while the disadvantage is that this absence could lead to judicial activism in preemption challenges. This might not be such a problem if preemption challenges did not raise their own concerns.

The court's preemption analysis raises three concerns. A preemption challenge is relevant when it is questionable whether a local government is strictly engaged in local affairs or if its activity has statewide effects. First, courts may interpret matters of local affairs so narrowly that counties are prohibited from taking meaningful action.[72] Second, which follows from the first, by removing restrictions, courts are placed in a position to decide the scope of local power, which places judges in a quasi-legislative position.[73] Third, a court may interpret local affairs so broadly that counties are able to use home rule as a vehicle to enact parochial resolutions.[74] This third concern might figure large in Kansas where the resolution included a provision that county home rule is to be interpreted liberally.[75] Kansas though has recognized this possibility and has limited counties' ability to modify laws to avoid unchecked expansion.[76] Still, while the court's analysis of home rule powers in a preemption challenge may be a disadvantage, courts also offer a benefit in themselves.

Professor Diller proposes that the courts' institutional position places them where they can further local government with greater ease than legislatures.[77] This is because of courts' geographic impartiality, temperament, and relative speed of action.[78] Courts are less likely than legislatures to decide questions concerning the scope of local authority in a manner that favors the jurisdiction over which the judge presides because judges, generally, are less concerned about these preferences

[72] *Id*. at 2347–48 ("The texts of home rule grants contain a variety of ambiguities that state courts are free to interpret. The resulting interpretations may reflect judges' particular political ideologies and their hostility to certain forms of governmental regulation of private property. Alternatively, they might reflect a more general judicial uneasiness with creative local action and a corresponding preference for uniformity. Whatever the explanation, it is clear that, in the hands of many judges, home rule grants turn out to be anything but general grants of local initiatory power.").
[73] *Id.* at 2364.
[74] Diller, *supra* note 55, at 1159.
[75] H.R. Con. Res. 5004, 115th Cong. (as proposed by Kan. Cong. Jan. 19, 2017).
[76] *See generally* KAN. STAT. ANN. § 19-101a(a)(4) (West 2017).
[77] Diller, *supra* note 55, at 1159–68.
[78] *Id*.

than legislative representatives.[79] The judiciary is perceived as being more tempered than the legislature.[80] Finally, while even rushed legislation may only take a number of days to pass, courts may issue temporary remedies in the same amount of time, if not faster.[81] These advantages guide Professor Diller's argument as to why the courts are an effective arena in which to broaden home rule. Additionally, he advances an argument that is based on the courts' effort to advance coherence in the law. Professor Diller encourages courts to adopt a good faith analysis when determining whether an enactment is preempted.[82]

A good faith analysis would occur within an implied preemption test and asks whether a particular action taken by a local government negatively affects other governments.[83] This analysis is targeted at enactments that might on their face purport to solve a local problem but in effect burden other communities. For example, a county resolution that prohibits certain people from living in the county would not pass the good faith analysis because it forces these people on other jurisdictions.[84] Put differently, a proposed resolution would only pass this analysis if it did not (a) permit an action that is otherwise explicitly preempted by state law, and (b) would not burden other communities.

The disadvantages to this approach primarily concern the fitness of the judiciary to engage in such analyses.[85] First, state legislatures must grant local governments power for the government to take lawful action. Second, because the good faith analysis is situated in an implied preemption analysis, a court must first recognize implied preemption. Not all state courts recognize this doctrine.[86] Third, even

[79] *Id.* at 1165.
[80] *See id.* at 1165 ("More significantly, in most of the thirty-eight states that have judicial elections, judges are elected or re-elected to terms substantially longer than those of the average legislator . . . . The relative infrequency with which state high court judges face voters is likely to increase their political insulation.").
[81] *Id.* at 1166–67.
[82] *Id.* at 1170.
[83] *Id.* at 1169–76.
[84] *Id*. at 1173 ("Parochial local ordinances . . . should receive no presumption of validity, because they do little to further home rule's normative value of policy experimentation.").
[85] Barron, *supra* note 10, at 2364.
[86] Water Dist. No. 1 of Johnson Cty. v. City Council of City of Kansas City, 255 Kan. 183, 194 (1994) ("We have consistently rejected the doctrine of implied preemption, reasoning that legislative intent to reserve exclusive jurisdiction must be clear.").

if the court recognizes implied preemption challenges, the good faith analysis asks judges to become quasi-legislators by evaluating the policy outcome of a particular county's resolution. Fourth, even if the good faith analysis is followed, it may produce inconsistent results. This may ultimately decrease the stability of home rule, and therefore discourage local governments from using the solutions it offers. Despite the advantages and disadvantages presented by courts, which in turn affects the strategy to remove restrictions, another alternative exists.

Legislatures can add language to home rule grants that expressly expand counties' home rule powers. The attraction for this option is that if the language is clear, counties might more easily predict whether a charter resolution fits within the scope of the states' home rule authority, which would allow them to avoid being judicially invalidated. The disadvantage to this approach is that home rule under this model could turn into Dillon's rule.

These methods do not have to exist independently and should be employed collectively. But, the first step should be to remove limitations. This step has an additional benefit of offering the legislature a chance to design home rule in a way that allows this power to more aggressively pursue its purpose, if it determines that more rather than less restrictions are needed. Courts can also use the absence of restrictions to guide their preemption analyses.

The most immediate advantage to removing restrictions as the first step in Kansas is that it is the most likely to expand local power. Kansas courts do not recognize implied preemption, which means proposing a change to the courts is impractical.[87] Also, while adding specific grants would increase counties' power, this strategy may ultimately lead courts to interpret the legislature's intension to be that counties may only act where specifically permitted. This would produce results that look like Dillon's rule, which would make home rule less flexible and go against the trend of expanding counties' power.

While removing limitations places courts in a trickier position when determining what constitutes a local affair rather than a state affair, legislative language that describes how county home rule is to be interpreted broadly solves this problem. It instructs courts to lean more towards considering a resolution a local affair, and this increases

[87] *Id*.

the chance that the resolution will be upheld. This too is an example of the effect of combining two strategies, removing restrictions and adding language. Lastly, despite some limitations being removed, this does not remove counties from state authority. Counties remain subject to state laws and also remain subject to city ordinances. While removing restrictions may produce doubt among counties as to whether a resolution would be upheld, this uncertainty may very well produce positive results. As the current restriction states, "the home rule power conferred on cities to determine their local affairs and government shall not be superseded or impaired *without the consent* of the governing body of each city within a county which may be affected."[88] To avoid invalidation, counties are incentivized to work with cities, which could strengthen community relationships. But even without language in a home rule grant that counties may not impede cities, counties would still be incentivized to work with cities because cities may be able to enact ordinances counties cannot due to the court's approach toward their preemption analyses or counties' available funding.

Having examined methods that may be used to further the policy behind HCR 5004, this paper will now turn to arguments that were advanced towards and against the resolution. The purpose of this is to understand what voters understand its impact to be which might in turn help explain why the resolution died.

D. HCR 5004

Supporters of HCR 5004 argue counties should be equal to cities.[89] While Kansas' amendment for cities and resolution for counties reads

[88] KAN. STAT. ANN. § 19-101a(a)(4) (West 2017).

[89] Letter from Kansas Association of Counties to Kansas' Chairman and Members of the House Federal and State Affair Committee (Jan. 31, 2017), http://kslegislature.org/li/b2017_18/committees/ctte_h_fed_st_1/documents/testimony/20170131_03.pdf [https://perma.cc/Z5Q2-5VW8] ("The original list of limitations has grown to 39 situations in which counties cannot use their home-rule authority. This shrinks the marketplace of ideas and limits a county's ability to creatively answer the needs and demands of the community. The amendment in HCR 5004 would reset the restrictions so local leaders can respond to the unique needs in their communities . . . . By enacting constitutional home rule, counties can join cities as better problem solvers to improve local government in Kansas."); Letter from Ron Highland, House Representative, to Kansas' Chairman and Members of the House Federal and State Affair Committee (Jan. 29, 2017), http://kslegislature.org/li/b2017_18/committees/ctte_h_fed_st_1/documents/testimony/20170131_04.pdf [https://perma.cc/P7T6-AJ4X] ("The counties argue that as a matter of fairness

similarly, cities have a greater degree of power because they are not subject to the same limitations as counties. For example, cities may supplement non-uniform state law where counties may be unable to modify or effect such change. In *Steffes v. City of Lawrence*, the City Commission for the City of Lawrence passed an ordinance that prohibited smoking in public places.[90] This ordinance supplemented a state law, KAN. STAT. ANN. § 21-4010, that allowed people in charge of public places, such as the city commissioners, to designate specific smoking areas.[91] The court upheld the ordinance because § 21-4010 was non-uniform, and the ordinance furthered the purpose of that statute.[92] Put differently, the city controlled the means by which it could accomplish the purpose of the statute.[93]

Resolution supporters desire outcomes like *Steffes* to apply to counties too, rather than following precedent established in *Blevins v. Hiebert*.[94] In *Blevins*, a county adopted a charter resolution to issue general obligation bonds to fund a local highway construction project rather than issuing these bonds pursuant to a state statute, which authorized the same action for the same purpose.[95] Because this statute, though non-uniform,[96] determined how counties could finance

they have the same jurisdictional authority as that offered to municipalities within the Kansas Constitution. It is further argued that this issue is a matter of fairness. The counties currently argue that while they have jurisdictional powers granted through current statutes, they would prefer the stability of constitutional protection."); Letter from Clancy Holeman, Riley Cty. Comm'r., to Kansas' Chairman and Members of the House Federal and State Affairs Committee (Jan. 31, 2017), http://kslegislature.org/li/b2017_18/committees/ctte_h_fed_st_1/documents/testimony/20170131_05.pdf [https://perma.cc/6948-M8CE] ("All this request does is make consistent the legislature's grant of authority for limited self-government to both cities and counties. Home rule for both cities and counties should be grounded in our constitution.").

[90] Steffes v. City of Lawrence, 284 Kan. 380 (2007).

[91] KAN. STAT. ANN. § 21-4010b (West 2017).

[92] *Steffes*, 284 Kan. at 387.

[93] *Id.* ("[T]he legislature has invited cities to regulate smoking in public places to the maximum extent possible.").

[94] Blevins v. Hiebert, 247 Kan. 1, 1 (1990).

[95] *Id.* at 12 ("Since the purpose of K.S.A. 68-580 is to authorize the issuance of general obligation bonds for financing construction of an arterial highway, the use of a different name or failure to designate the highway a 'primary arterial highway,' though optional, does not alter the applicability of the statute.").

[96] *Id.* at 11–12 ("The Arterial Highway Act applies to all Kansas cities and counties-not uniformly, but it is the state law. Municipalities have no right to overrule it except as authorized by the constitution and K.S.A. 19-101a.").

a highway construction project, the court held that state law preempted the charter resolution.[97] The court invalidated the county's use of a charter resolution because state law already directed counties on how to do this.

Unlike *Steffes*, where the city supplemented a state law by enforcing stronger restrictions, *Blevins* shows how counties may be unable to opt out of non-uniform laws, which weakens the power granted under home rule.[98] But even if supporters argue that counties should be treated the same as cities, counties may not be in an improved position when it comes to courts interpreting county home rule provisions. Cities are not guaranteed free passage.

Courts have applied the same rationale used in *Blevins* to cases involving cities.[99] In *Moore v. City of Lawrence*, the city of Lawrence opted out of an optionally followed state statute dealing with city planning and subdivision regulations.[100] The court held state law preempted the city's ordinance because the city could only determine whether it elected to follow the state statute.[101] Once the city opted out of the statute, it became subject to uniformly applicable law.[102] Even though the city had power to opt out of a state statute, once the city exercised this ability, it became obliged to follow a predetermined plan.[103] Cities then might appear to have greater liberty to decide their own courses, but this might be a quickly drawn conclusion. As *City of Lawrence* shows, precedent regarding city home rule is not drastically more flexible than that for counties. But it still allows cities the ability to supplement laws whereas counties cannot even entertain the possibility.

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[97] *See id.* at 11–14.

[98] *See id.* (suggesting that cases such as *Steffes* should be determined by looking at police powers, which the court claims are governed by a different statute. Although, *Steffes*, which was decided later than *Blevins*, relied on a home rule analysis rather than police power analysis).

[99] *Id.* (Reasoning that because a statute governed the same course of action the local government aimed to pursue through home rule powers, a local government must follow the statute rather than its home rule power).

[100] Moore v. City of Lawrence, 232 Kan. 353 (1982).

[101] *Id.* at 363.

[102] *Id.* at 357 ("While the application of the statutes may be optional, it is clear that once a city chooses to adopt this method the legislature intended for the statutes controlling the planning commission procedure to be binding.").

[103] *Id.*

Despite precedent suggesting counties may not gain access to completely county friendly decisions even if county home rule mirrored city home rule, supporters of home rule would still endorse HCR 5004 because of the additional procedural protection it offers.

Opponents argue that the resolution would lead to non-uniform regulations, which may create undesirable consequences such as economic instability.[104] Opponents include those who are affected by uniform guidelines such as large industries.[105] But opponents of the resolution or ones similar to it can find comfort in Kansas' tendency to add restrictions to county home rule rather than removing them and as indicated above its refusal to recognize implied preemption. Even though the resolution would have made it harder for the legislature to remove county home rule, a mere status change from a statute to constitutional amendment would not have much of a substantive effect.

Organized industries vocally opposed the resolution and can be anticipated to oppose future propositions like it. In a letter from the Kansas Pork Association to the Kansas House, the Association stated it opposed the amendment "because we don't want the next emerging industry to be stifled by the potential for a different set of rules in each county."[106] While the Association may have been rightly concerned about HCR 5004, regulations already protecting it from counties

[104] Letter from Kansas Livestock Association Kansas' Chairman and Members of the House Federal and State Affairs Committee (Jan. 31, 2017), http://kslegislature.org/li/b2017_18/committees/ctte_h_fed_st_1/documents/testimony/20170131_08.pdf [https://perma.cc/WB6U-4CTR] ("KLA [Kansas Livestock Association] opposes HCR 5004 as it . . . . [w]ould remove a necessary check on local power . . . . HCR 5004 would remove that restriction. This is especially concerning to agriculture that has specific restrictions on counties in KS.A. 19-101a(a)(27) concerning, among other things, corporate farming laws and water pollution control permits. While the loss of these restrictions may not seem consequential, it could devastate production agriculture.").

[105] Letter from Kansas Pork Association, Kansas' Chairman and Members of the House Federal and State Affairs Committee (Jan. 31, 2017), http://kslegislature.org/li/b2017_18/committees/ctte_h_fed_st_1/documents/testimony/20170131_09.pdf [https://perma.cc/NLK8-26CN] ("We oppose HCR 5004 – because we don't want the next emerging industry to be stifled by the potential for a different set of rules in each county."); *see* Diller, *supra* note 55, at 1136.

[106] Letter from Kansas Pork Association, Kansas' Chairman and Members of the House Federal and State Affairs Committee (Jan. 31, 2017), http://kslegislature.org/li/b2017_18/committees/ctte_h_fed_st_1/documents/testimony/20170131_09.pdf [https://perma.cc/NLK8-26CN].

enacting non-uniform regulations already exist, and these regulations would have carried into the amendment.[107] But the Association's concern may have its base in the ability for a county to elect whether to allow specific land uses in that county.[108] While the swine industry is already established, its opposition to the amendment shows how large, organized industries recognize the amount of power county governments have over their operations and also highlights their assumption that local governments are not to be trusted.

Kansas' approach to county home rule might give convincing credibility to the argument that it is more of a "phantom" power than a meaningful instrument for communities.[109] This raises the repeated question of why it had even been proposed. Home rule rhetoric is popular with voters, [110] and legislators can make the move from statute to amendment without putting much at stake. [111] Based on the text of the resolution, the apparent attitude that county governments are not to be trusted, and fact that none of the methods for supplementing home rule authority have been pursued, it should not be surprising that the resolution died. A future resolution that does not further empower county governments should also not be understood as promoting the policy of home rule beyond a procedural advance.

III. CONCLUSION

Even though home rule is not local autonomy, it does grants local governments the opportunity to meaningfully engage in their communities. While home rule may be used for the advantage of some at the sake of others, the restrictions Kansas currently places on counties demonstrates the legislature's skepticism towards local power.

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[107] KAN. STAT. ANN. § 19-101a(a)(27) (West 2017).
[108] *Id*.
[109] Barron, *supra* note 10, at 2263.
[110] Sheryll Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1988 (2000) (explaining that American society expresses a "strong cultural preference for local powers . . . .").
[111] *Id.*; Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 644 (1964) ("As a political symbol 'home rule' is generally understood to be synonymous with local autonomy, the freedom of a local unit of government to pursue self-determined goals without interference by the legislature or other agencies of state government.").

This might explain why the legislature continues to add restrictions rather than decrease them. But these restrictions these restrictions also show the legislature's concern about disrupting a strict hierarchy of authority in which counties are structurally and substantively subordinate to other levels of government. This subordinate status may ease the fears of those concerned that Kansas might allow counties to adopt charter resolutions that deviate from state-wide uniform regulations which affect large industries. Even though the resolution would not have granted counties any more substantive ability than they already have, opponents of the resolution may be timely in raising their concern. The national trend to give as much protection as possible to county home rule indicates that Kansas might soon revisit the substantive restrictions placed on counties in an effort to expand local governmental power. And when the legislature does, it should consider combining the techniques presented here in a way that best enables county governments to respond to their communities.