

Is Dillon Trumping Home Rule? Local Governments and the Rise of State Preemption

David Swindell

Arizona State University

James Svava

University of North Carolina at Chapel Hill

Carl Stenberg

University of North Carolina at Chapel Hill

March 14, 2019



UNC
SCHOOL OF GOVERNMENT

**This
presentation
will explain...**



**The nature of the
debate**

**Our recent
research**

**How local leaders
can situate
themselves**

**Some tools for
local government
action**



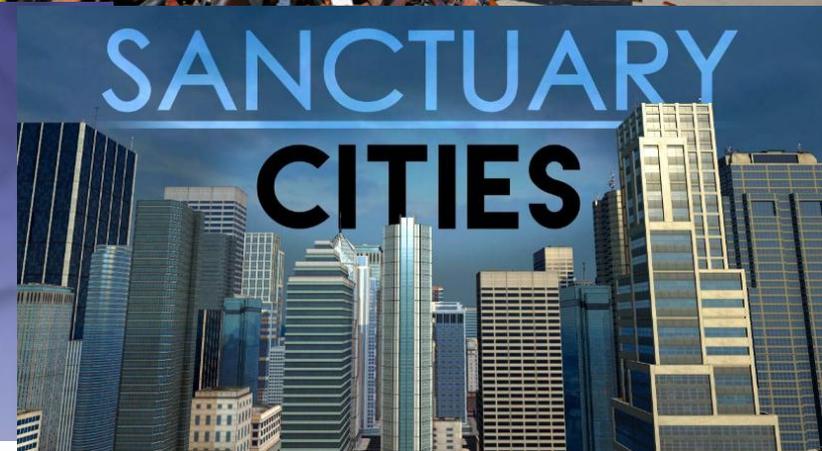
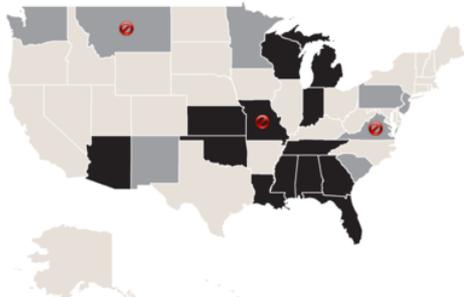
The Attack on Local Autonomy





Paid Sick Days Preemption Bills 2015

- ☐ State with no preemption law or bill
- ☑ State with preemption law
- ⊖ State with preemption law vetoed by the governor but overridden in 2015
- ⊖ State with preemption law and bill in 2015 (gray mouseover)
- ☑ State with preemption bill in 2015
- ⊖ State with preemption bill in 2015 and previous years (orange mouseover)
- ⊖ State with preemption bill vetoed by the governor in 2015



BRING YOUR
BAG.

**NO MORE
PLASTIC BAGS.**



Fundamental Debate: Control

Judge John Dillon



Dillon's Rule stated that the powers of a local government are limited to: "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."



Atkins v. Kansas, 181 U.S. 207 (1903)

Such [municipal] corporations are the creatures – mere political subdivisions – of the state, for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted....They are, in every essential sense, only auxiliaries of the state for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged or altogether withdrawn at the will of the legislature.

Arguments for State Control

- Statewide policy, particularly in terms of the regulation of businesses, creates a better business climate by reducing uncertainty.
- Allows states to grant authority to local governments to be the lead agencies on local scale issues (e.g. planning, zoning) and to experiment with new approaches at minimum risk.
- Provides local officials “cover” for not acting on the desires of the community when what the community wants is bad for the jurisdiction.
- Allows state governments to curb the worst aspects of irresponsible, corrupt, or uncooperative local governments.
- Permits states to protect individual rights that could too easily be trampled by the parochial nature of local communities.
- Facilitates redistributive policies.

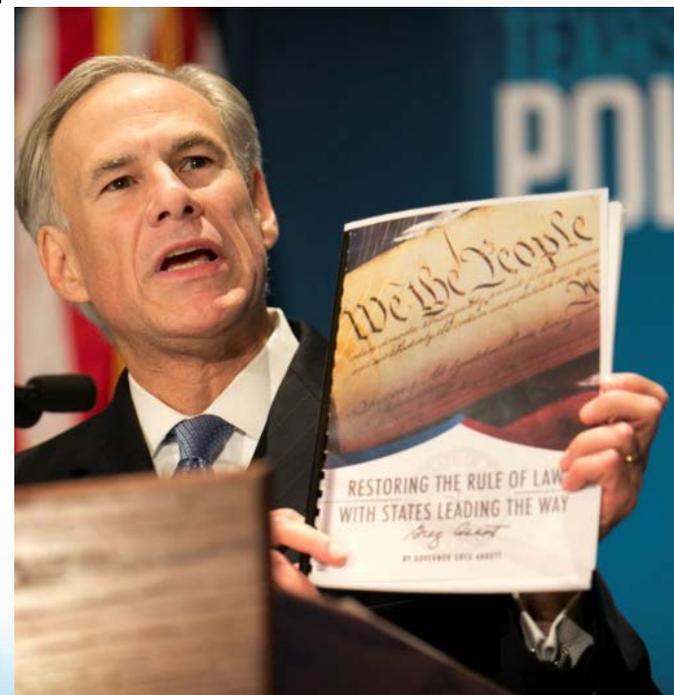
Fundamental Debate: Autonomy



Local autonomy, or Home Rule, means: “the power of local government to act in a ‘purposeful goal-oriented’ fashion, without the need for a specific grant of power and ‘the power of localities to act without fear of the oversight authority of higher tiers of the state.’”

“As opposed to the state having to take multiple rifle-shot approaches at overriding local regulations, I think a broad-based law by the state of Texas that says across the board, the state is going to pre-empt local regulations, is a superior approach.”

Governor Greg Abbott
March 21, 2017



Arguments for Local Autonomy

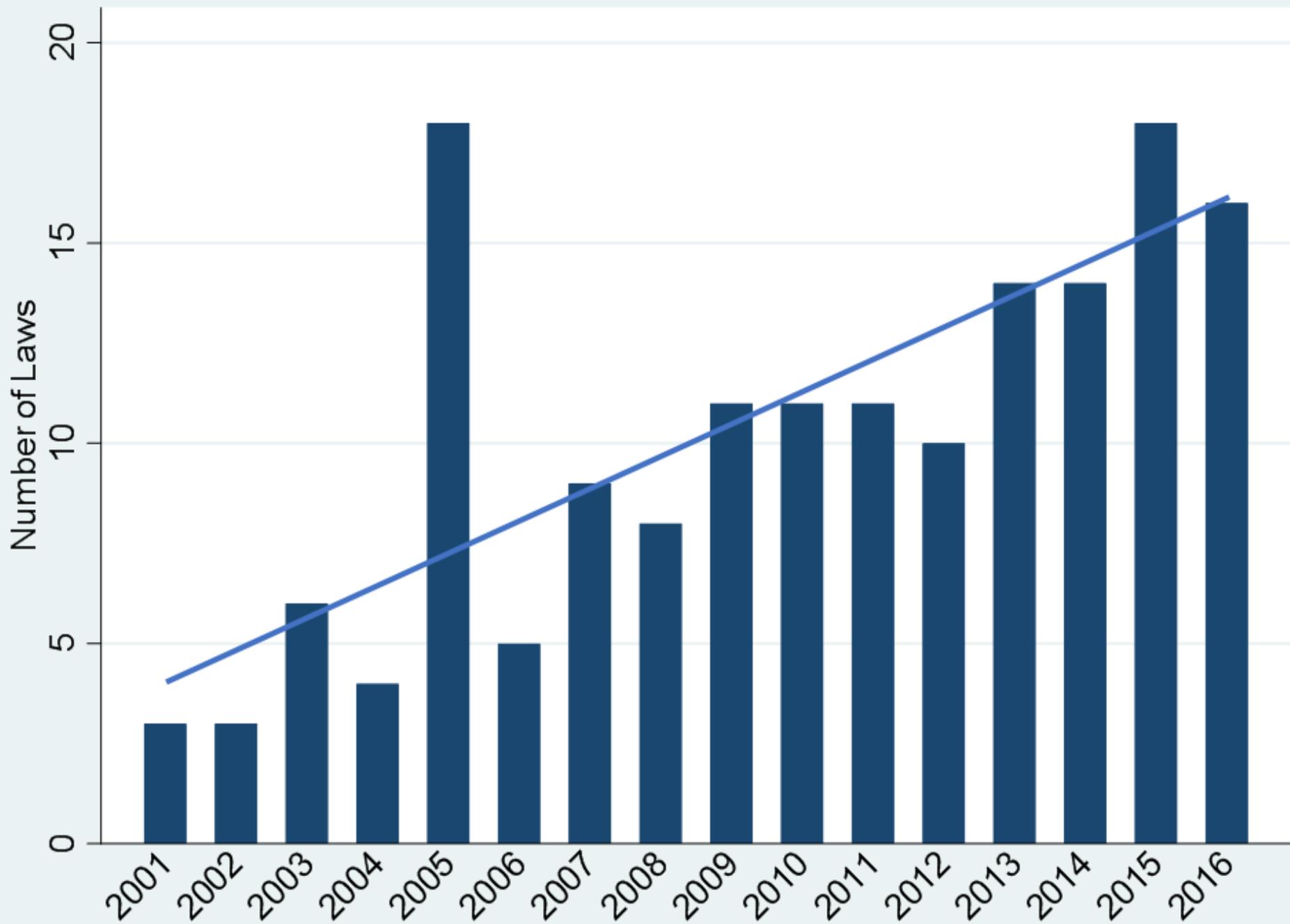
- Local communities should be allowed to vary in order to promote experimentation and strengthen innovation laboratories.
- Empowering local governments to run their own local affairs frees state officials to focus on state-level matters.
- Citizens will be more engaged in local affairs as they can see the effects of their participation.
- Local officials will be more responsive to citizen demands than state officials who are far removed from the community.
- A “one-size-fits-all” state approach fails to recognize that different communities have different needs, values, and priorities.
- **“It’s been touted that they [the legislators] know better than we do. Wrong. Absolutely wrong. We know what’s best for our neighborhoods. We know what’s best for our constituency. We live it every day.” Lake Clarke, FL Town President Pro Tem**

Navigating the State Control-Local Autonomy Minefield: Where We Are Today

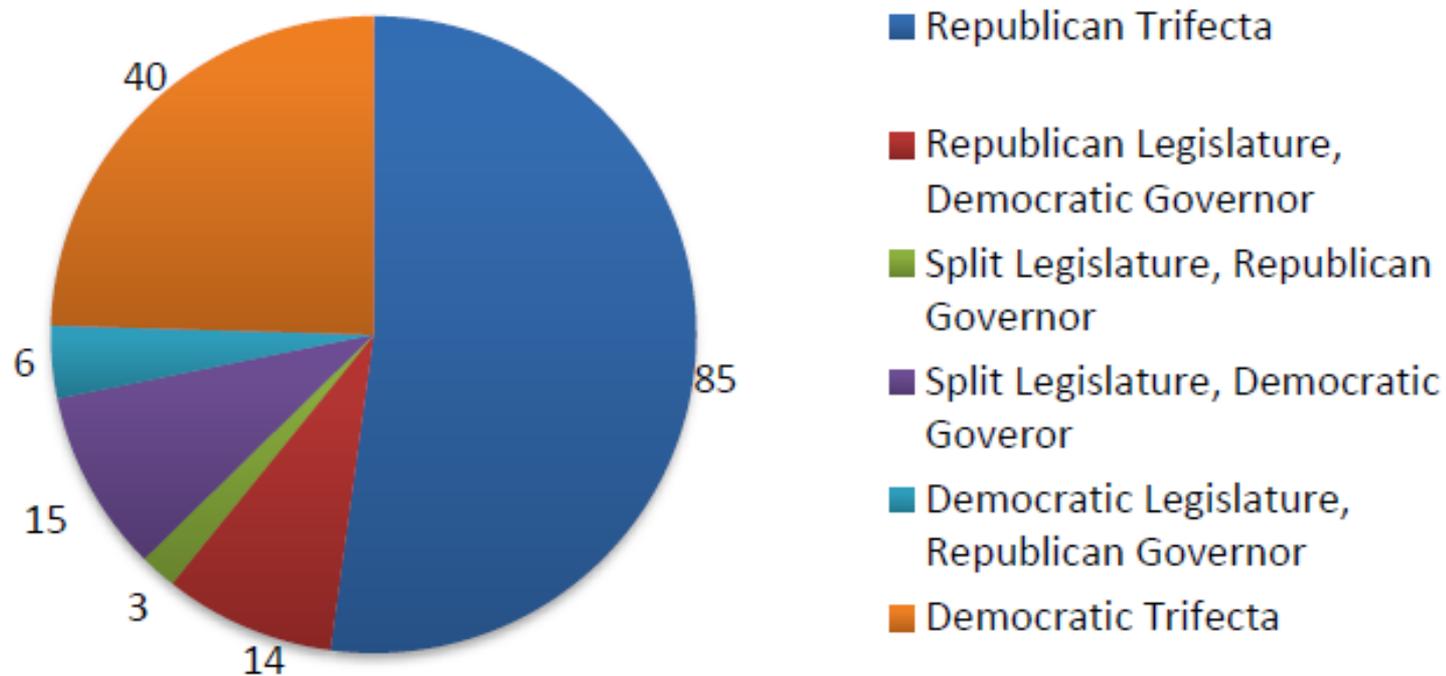
- Research has found a steady increase in bills interfering with local autonomy across the country since 2011.
- The 2018 survey by the National League of Cities found: 41 states preempted ride sharing, 28 preempted minimum wage, and 23 preempted paid leave policy; 20 states restricted municipal broadband authority.

Our Initial Research

- Reviewed state legislative actions in eight pilot states covering any issue involving a limitation or expansion of local authority from 2001 to mid-2017.
- Examined the legislative actions of the remaining states but with a more limited focus on two specific policy areas: minimum wage policy and telecommunication issues.
- Identified 167 laws enacted by 27 states, covering a wide range of economic, social, health, and environmental policy areas.
- Vast majority (70%) limited local authority and another 18% imposed additional requirements on localities; only 11% expanded local autonomy in any way. Nearly consistent increase in such legislative activity over the period examined.
- Example: of the 15 states that passed minimum wage legislation, 13 limited local ability to regulate the minimum wage, 1 placed a requirement on localities, and 1 expanded local authority. Republican trifectas enacted 77% of the minimum wage legislation.



State Actions by Party Control



A Framework for Assessing Local Government Autonomy



**Nature of the actions states
and local governments take
varies by legal structure**

- 1. Permit local action**
- 2. Restrict local action**
- 3. Require local action**

Types of State Actions: Permit Local Actions

| Type of Permission | Type of State-Local Legal Relationship | |
|--|--|--|
| | Dillon's Rule States | Home Rule States |
| Broad or specific authorization | Express powers granted to city in charters or in state law | Broad authorization to all or to designated municipalities plus specific authorization in laws |
| Limited or targeted authorization | Local bill to grant power to a specific city (<i>if local legislation is allowed</i>) or group of cities | Use classification to permit some cities to act |

Types of State Actions: Restrict Local Actions

| Type of Restriction | Type of State-Local Legal Relationship | |
|--|---|---|
| | Dillon's Rule States | Home Rule States |
| Omission | Fail or refuse to grant express power | Fail to include in general authorization |
| Targeted restriction | Intervention in single jurisdiction <i>(if local legislation allowed)</i> | Use classification to prevent some cities from acting |
| Nullification | Nullify local policy/program/practice that is not expressly granted or fairly implied | Nullify local policy/program/practice in conflict with state laws |
| Prohibition | Forbid local action that is not consistent with state law | Forbid local action that is not consistent with state law |
| Penalize | Sanctions imposed for specified actions | Sanctions imposed for specified actions |
| Preempt the authority of local government to act in specified areas | Preemption | Preemption |

Types of State Actions: Require Local Action

| Type of Requirement | Type of State-Local Legal Relationship | |
|---------------------|---|---|
| | Dillon's Rule States | Home Rule States |
| Requirements | Set standards that all governments must meet | Set standards that all governments must meet |
| Mandates | Require all governments to act (e.g., unfunded mandate) or comply with requirements | Require all governments to act (e.g., unfunded mandate) or comply with requirements |

Examples of Preemptions, Restrictions & Non-Preemptions: New York State



New York State Examples

| Type | Preemption | Restriction | Non-Preemption |
|---------|--|---|--|
| Example | Home Sharing (Airbnb) | Plastic Bag Restrictions | Firearms and Ammunition |
| Result | <p>In 2016, New York state imposed restrictions on short-term home sharing. This preempted a 2010 NYC law that prohibited short term (less than 30 days) rentals unless the owner was also present. However, the NYC law was difficult to enforce.</p> | <p>In 2016, the NYC City Council approved a 5-cent fee on plastic bags. But the Governor and Republican-controlled Senate blocked the fee before implemented in 2017. Cuomo convened a task force to examine the issue.</p> | <p>New York State gives broad discretion to local action on gun rights, leaving municipalities power under home rule as long as it does not conflict with state law.</p> |

What Can Local Governments Do in the Era of State Preemption?



Actions Local Governments Can Take in Response

| Type of Action | Type of State-Local Legal Relationship | |
|--------------------------------------|--|---|
| | Dillon's Rule States | Home Rule States |
| Defiance | Resist preemptions and limitations | |
| Use legal powers and test the limits | Locally initiated legal action within granted powers | Locally initiated legal action within broad powers. Take advantage of home rule option if available |
| Referendum | Change state policies | |
| "Workaround" | Find method that complies with or circumvents restrictions | Find method that is consistent with state law |
| Request additional powers | Seek specific authorization from legislature for all local governments or request targeted local bill to permit action | Seek broad legislative authorization for all cities concerning previously <u>ungranted power</u> |
| Advocacy and voluntary efforts | Raising awareness by local government(s) and through partnerships with nongovernmental organizations to promote preferred policy outcome | |

For More Information

Alliance for Innovation, **2017 BIG Ideas** White Paper

<https://discover.transformgov.org/documents/2017-big-ideas-summary>