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# LOCAL GOVERNMENT OPTIONS IN THE ERA OF STATE PREEMPTION

*Leaders must do more now to preserve the autonomy necessary for representing residents' needs*

*Local governments continue to grow in importance in solving public problems at a time of increased politicization in state and federal governments as well as expanded activism in many local governments. But states are rapidly placing new kinds of limits on local governments' ability to act. What can local government leaders do?*

Local governments have historically faced such challenges as increasing demands for service, limited fiscal resources, and contending with economic forces beyond their control. Still, local governments remain a primary engine of innovative government services and enjoy high levels of resident trust.

In recent years, state legislatures have encroached on the ability of local governments to meet these challenges and have become increasingly intrusive in local affairs. Reports by the National League of Cities (NLC)<sup>1</sup> as well as the Local Government Research Collaborative,<sup>2</sup> a partnership of ICMA, the Alliance for Innovation, and the Center for Urban Innovation at Arizona State University, have found significant changes in state-local relations, including: 1) a sharp increase in the number of states involved with this movement, and 2) an increase in the overall number of limitations placed on local governments by their state legislatures.

What options do local managers and elected officials have as they try to tailor local public services to the needs and preferences of residents? This article provides an overview of this changing environment and highlights

the array of actions available to local governments as they respond to state limitations.

## DILLON'S GHOST

The U.S. Constitution lays out the general two-tiered structure of government in which powers are allocated between the national and the state governments. Yet, it is silent about the powers allocated to local governments. Simply put, there are none. It was not until 1903 that the U.S. Supreme Court formally established an earlier ruling by Iowa State Supreme Court Chief Justice John Dillon as the law of the land, saying:

“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.”<sup>3</sup>

This ruling, known as “Dillon’s Rule” or the “creature of the state” doctrine, remains the basic principle underlying state-local relationships today. The courts determine whether a local government could exercise a power. But this is not the end of the story.

While Dillon’s Rule was emerging, western states were going a different direction. Residents and progressive reform groups began championing a competing doctrine by which local governments would have greater authority to act on their own behalf. This doctrine, referred to as “home rule” or “local autonomy,” asserted that municipalities should have the freedom to implement ordinances and policies in line with local citizen preferences as long as not expressly prohibited by the state constitution or legislature.

So even with an established U.S. Supreme Court position on the issue, the balance between state control and local autonomy has continued to evolve over the past 115 years, with states clustered in “expressly permitted” and “expressly forbidden” categories. Still, the differences were not always clear-cut. A common practice in Dillon’s Rule states, for instance, has been to make exceptions through targeted legislation granting powers to a specific government in response to a request from the local legislative delegation.

## DILLON TODAY AND THE ATTACK ON LOCAL AUTONOMY

Several arguments support both philosophical approaches to local autonomy. The most common argument for greater state control, for instance, is premised on economic development grounds: statewide policy, particularly in terms of regulatory authority, creates a more standardized business environment. Furthermore, as was common in the civil rights era of the late 1960s and 1970s, state governments have intruded on local authority to ensure adherence to state and federal civil rights guidelines.

Proponents of local authority argue that the spate of recent actions by states to take away local control is in response to special interests (e.g., conservative groups like the American Legislative Exchange Council) and industry groups that are exercising influence with legislatures to circumvent local preferences. Telecommunications companies involved in the rollout of 5G cellular infrastructures, for example, have successfully convinced several legislatures to intervene on their behalf over local governments.

Champions of local autonomy argue that local governments need flexibility to experiment with alternative and innovative solutions to service delivery and processes. Local control is a better vehicle for expressing resident preferences. As noted by a recent survey by ALG Research, residents agree that local governments are better able to reflect their community’s values than state government (regardless of party affiliation).<sup>4</sup>

## RECENT RESEARCH RESULTS

Increased legislative actions affecting local authority have garnered attention from both academic and practitioner

researchers. Dr. Lori Riverstone-Newell’s work identified a steady increase in preemption-specific bills across the country from 2011 to 2016.<sup>5</sup> NLC’s 2017 report and 2018 update identified numerous limitations across many policy areas.

A total of 41 states, for example, had preempted local authority over ride-sharing services, 28 had preempted local minimum wage actions, 23 had preempted paid leave policy, and another 20 had restricted municipal broadband authority. Rather than waiting for the courts to resolve a challenge to a local power under the traditional Dillon’s Rule approach, states are increasingly restricting local control in advance.

We conducted a review of state actions affecting local government authority, beginning with a pilot review of eight states from 2001 to mid-2017. This review examined all local-related bills enacted into law regardless of the policy focus. We expanded the search to cover all states, but narrowed the focus to only those laws addressing minimum wage policy and telecommunication issues.

We identified 167 laws passed during this period aimed at local government. The vast majority represented a limitation on local governments (72.5 percent) and another sizeable portion imposed additional requirements on local governments (17.4 percent). Only 10.1 percent expanded local autonomy in any way. More striking is the nearly consistent increase in such legislative activity over this period.

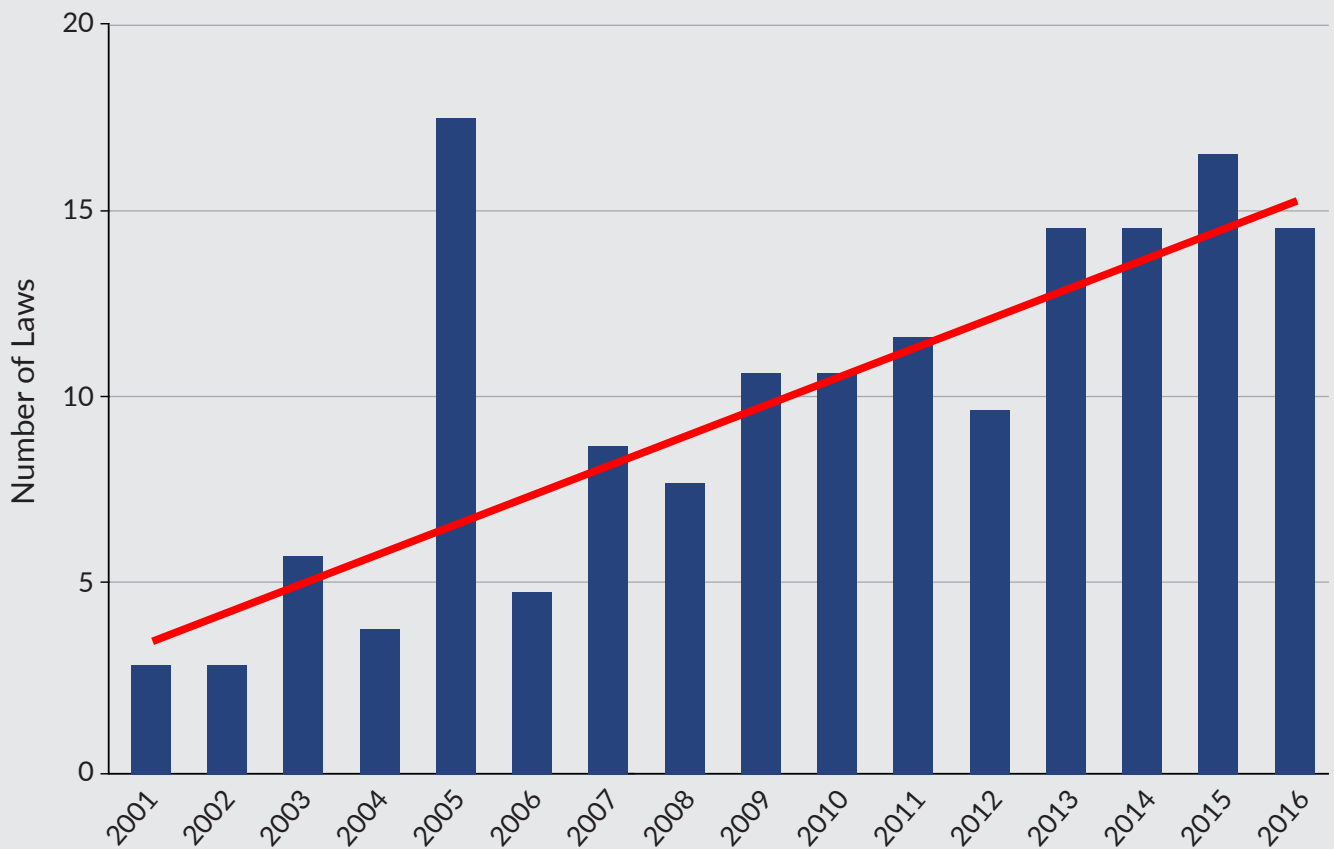
While much of the attention given to the increase in local control limitations has focused on conservative Republican state legislators trying to undermine predominantly liberal Democratic central city governments, our data suggest something different. Rather, there appears to be a greater likelihood of state intervention when one party (Republican *or* Democratic) controls both legislative chambers and the governor’s office in a political “trifecta.”

Currently, Republicans have far more trifectas than Democrats so there is more intrusion in local affairs by Republican trifectas. Democratic trifectas also are engaged in these activities, including the state of New York preempting the ability of New York City from imposing a tax on plastic bags. Therefore, this rise in state interference does not appear to be as simple as party politics as much as it is an outcome of political party power in each state.

## IT ISN’T JUST ABOUT PREEMPTION

Current conversations about state interference and limitations of local autonomy focus on preemption. Yet preemption is only one form of interference with local discretion. In our research, we identify three categories of state actions: permissions, restrictions, and requirements.

**FIGURE 1** || State Actions on Local Governments by Year: 2001 to 2016



Note: n=162 (excluding the five cases from early 2017)

There are several specific activities within each category, including preemption.

Figures 2, 3, and 4 illustrate the wide range of tools state governments use to control local activities. Of the 15 states that passed minimum wage legislation from 2001 to 2017, for example, 13 limited local governments' ability to regulate the minimum wage, one placed a requirement on localities, and one passed expanded local authority. Republican trifectas enacted 77 percent of the minimum wage legislation.

Scholars, practitioners, think tanks, and the media have written extensively in recent years highlighting cases in each of these situations. But most of the attention has fallen on restrictive actions. North Carolina initiated its "bathroom bill" (H.B. 2) as a nullification of an ordinance passed by the city of Charlotte. In the legislative language, the state preempted *all* state agencies, including all local jurisdictions and the university system, from passing future workplace legislation deviating from state law.

Penalties are also receiving attention due to some cities' desires to declare themselves "sanctuary cities" and offering a place of safety to immigrants, refugees, and others threatened by deportation. Texas Governor Greg Abbott, for example, signed a law in 2017 to preempt Texas cities from declaring themselves as sanctuary cities, which included language that penalizes police officials who fail to cooperate with federal immigration officials with removal from office, fines, and prison time.

## WHAT'S A CITY TO DO?

Given the encroachment of state governments into the actions of local jurisdictions, local officials face the decision of how best to respond. They can simply do nothing and give in to the state's desires, regardless of how well or poorly the state's actions align with the preferences of a local community. But they have a range of other options.

**FIGURE 2** || Types of State Actions: Permit Local Actions

TYPE OF CONTROL	TYPE OF STATE-LOCAL LEGAL RELATIONSHIP	
	Dillon's Rule States	Home Rule States
<b>Broad or specific authorization</b>	Express powers granted to city in charters or in state law	Broad authorization to all or to designated municipalities plus specific authorization in laws
<b>Limited or targeted authorization</b>	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

**FIGURE 3** || Types of State Actions: Restrict Local Actions

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

**FIGURE 4** || Types of State Actions: Requirements for Local Action

TYPE OF CONTROL	TYPE OF STATE-LOCAL LEGAL RELATIONSHIP	
	Dillon's Rule States	Home Rule States
<b>Requirements</b>	Set standards that all governments must meet	Set standards that all governments must meet
<b>Mandates</b>	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

The NLC report recommends that local officials “choose their preemption battles wisely.” This requires communication with state officials to determine the extent to which there is an opportunity to shape legislation moving forward. Local officials should address the preemption narrative to better frame debate.

In our work, we highlight six additional options. Some of these vary depending on the type of state-local legal arrangement.

These options come with costs and different likelihoods of success. Defying the state legislature is a risky proposition and ties to the importance of the NLC

**FIGURE 5** || Actions Local Governments Can Take in Response

TYPE OF CONTROL	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 ungranted power
Advocacy and voluntary efforts	Raising awareness by local government(s) and through partnerships with nongovernmental organizations to promote preferred policy outcome	

recommendation to choose a preemption battle wisely. Local officials need to understand how likely and in what ways the state will push back.

A local government can also use its own legal powers to test the limits of state control in a particular policy or service area by making a proactive case that it has the authority to act. Being the first government in a state to enter a new policy area does not necessarily mean that it is not permitted. The city of Seattle, Washington, recently passed a municipal income tax, a first in the state, which is under review by the state supreme court to determine if Washington cities have the right to levy such a tax.

Still, challenges can be costly if unsuccessful. In North Carolina since 2011, a judge may award attorneys' fees and court costs to challengers that prevail in suits against local governments if the judge finds that the local government "acted outside the scope of its legal authority."<sup>6</sup>

A more challenging path is to pursue a statewide popular referendum designed to overturn or circumscribe a state intervention. There are three significant challenges to this approach. First, only 26 states have access to this form of direct action. Second, an individual city is rarely equipped to coordinate a statewide campaign on an issue. This means the city will have to partner with others and build a coalition of supporters in other jurisdictions or organizations, which is not a common practice for local officials. Finally, even if a referendum were to succeed, a state legislature can pass new laws to circumvent the intent of the referendum.

A more likely pathway to success is the "workaround." Generally, this option comports with the letter of the law, but it still tries to achieve the desires of the local jurisdiction.

As more states have considered "bathroom bills" similar to North Carolina's, some localities have already implemented various workarounds to the gender issues, replacing group bathrooms with individual bathrooms available to everyone equally.

Local governments have the option to ask their state legislators to introduce legislation on their behalf. This grant of power can be targeted at a single jurisdiction, but more likely would empower action by all cities or counties that joined in the request. This was a common tactic for cities and counties in Dillon's Rule states on issues related to access to such new revenue tools as a county option income tax, certain economic development tools, or other specific powers not normally available to local governments. It typically depended on a willingness of the legislature to adopt a special act supported by the local legislative delegation as a "legislative courtesy." Polarization in legislatures makes such grants unlikely if the party majority in the local delegation is different than the legislative majority. Seeking a local bill today requires negotiation with state officials and signals the local government's interest in entering an area where they do not have clear authority.

Perhaps the option with the greatest general likelihood of success is working with other jurisdictions or organizations to promote local government goals at the statehouse. This closely aligns with NLC's recommendation to address the preemption narrative. Local governments should work with their statewide partners at their state league of municipalities, state association of counties, state chapter of ICMA, or the equivalents of these entities.

These organizations can be useful partners in many ways. For instance, many serve as a watchdog on legislative actions. Further, they can lobby on behalf of local government interests broadly. They can help coordinate a coherent message on pending legislation to state officials on behalf of local governments, sharing lessons from other states.

In this role, they can collaborate on drafting legislation and developing compromise language when necessary to blunt the worst effects of state actions on local governments. They can also help coordinate appeals to local residents and stakeholder groups to help legislators understand the implications of their actions on communities.

The current environment is in flux regarding the balance between state control and local autonomy. States are increasingly interfering in local actions and placing more limits on what local jurisdictions can do, regardless of the preferences of local residents. These actions take many forms, but local officials are not completely unable to respond.

The tools we have identified highlight several options available to local governments and their allies to engage in this challenge to local autonomy. There is evidence to suggest that state legislative activity is not going to slow

any time soon. Local government leaders, therefore, must do more *now* if they want to preserve the autonomy necessary for representing the desires of their residents.



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## ENDNOTES

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