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Abortion Localism and Preemption in a Post-Roe Era

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ABORTION LOCALISM AND PREEMPTION IN A POST-*ROE* ERA

by
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In Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court eliminated federal constitutional protections for abortion. Practically, a person's access to abortion has long depended on where they live and where they can travel; that disparity is far worse now. In light of* Dobbs*, some states decisively changed their laws, often decimating abortion access. In other states, however, the law remains unclear; advocates are furiously lobbying and litigating to redefine their states' standards. Amid this upheaval, one element of the new abortion landscape is underappreciated: how localities impact abortion access.*

For decades, local governments have influenced access to abortion in many ways. Because state–local preemption doctrine favors local laws that are stricter than state laws, though, anti-abortion localities have a freer hand to do so. Lately, some states have become more aggressive, even punitive, in preempting local law. That trend is about to collide with the fight over abortion.

*This Article is the first to bring together the history and trends in local abortion policy with intrastate preemption doctrine to fully canvass the post-*Roe *local abortion terrain. It highlights the fact that abortion localism is already with us (and unlikely to disappear) and assesses the benefits and drawbacks of that reality. As states construct the new laws of abortion, this Article offers options and incentives for states, municipalities, and advocates in shaping local abortion policy for the future. Now more than ever, abortion rights will change as women cross borders—the only question is how much they will change at the city line.*

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INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*,[1] the U.S. Supreme Court radically reconfigured the legality of abortion in the United States. In *Dobbs,* the Court overruled *Roe v. Wade*[2] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[3] effectively ending the federal constitutional protection against undue governmental burdens on a pregnant person's[4] ability to access abortion care before the fetus became viable.[5]

This is not the first time that advocates and scholars have contemplated the end of *Roe*.[6] Now, as then, all eyes are turning to the states, assessing what the landscape will look like without the federal Constitution directly constraining states' ability to limit abortion.[7] The broad contours are not hard to see. Within days of the ruling, even before some states' "trigger" laws had taken effect, more than 10 states banned or severely limited abortions.[8] As of April 2023, abortions were

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[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[2] Roe v. Wade, 410 U.S. 113 (1973).

[3] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[4] Not all women can become pregnant, and some people who do not identify as women, including transgender men and gender non-binary people, can. In this Article, I reflect this by using "women" and "pregnant people" relatively interchangeably, but I recognize that the oppression and marginalization, as well as practical challenges, faced by different groups are not fungible.

[5] *Dobbs*, 142 S. Ct. at 2284.

[6] *See, e.g.*, Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189 (2017); Joel K. Goldstein, *Foreword*, 51 ST. LOUIS U. L.J. 607 (2007) (foreword to Richard H. Fallon, Jr., Harv. L. Sch., St. Louis U. Sch. of L. Childress Lecture (2006)); C. Steven Bradford, *What Happens if* Roe *Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87 (1993); Dawn Johnsen & Marcy Wilder, *Will* Roe v. Wade *Survive the Rehnquist Court?*, 13 NOVA L. REV. 457 (1989).

[7] *See, e.g.*, Meryl Chertoff, *After* Dobbs*, State Constitution and Court Roles to Be Amplified in Reproductive Rights Cases*, STATE & LOC. GOV'T L. BLOG (May 6, 2022), https://www.sloglaw.org/post/after-dobbs-state-constitution-and-court-roles-to-be-amplified-in-reproductive-rights-cases; Katherine Jones, *On Account of Sex: How Massachusetts's Equal Rights Amendment Can Protect Choice*, 28 B.U. PUB. INT'L L.J. 53, 56 (2019); Dawn Johnsen, *State Court Protection of Reproductive Rights: The Past, the Perils, and the Promise*, 29 COLUM. J. GENDER & L. 41, 60–61 (2015) (noting that advocates focused on states even when the public had not). Not everyone, however, wished to preserve *Roe*; Robin West has argued, for example, that *Roe*'s negative right against government interference has poorly served women and the full reproductive justice agenda. *See generally* Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009).

[8] Elizabeth Nash & Lauren Cross, *26 States Are Certain or Likely to Ban Abortion Without* Roe*: Here's Which Ones and Why*, GUTTMACHER INST., https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why (Jan. 10, 2023) (noting states with pre-*Roe* bans still on the books and states with near-total bans that were not contingent on state action to activate them following *Roe*'s reversal).

banned almost entirely in 14 states and near-total bans were on hold due to litigation in seven more.[9] This abrupt shift in state law worsens the pre-existing geographical "abortion deserts." It deprives millions of pregnant people (especially women with low incomes, women of color, young people, immigrant women, and people with disabilities) of access to even early-term abortion care[10]—which was already hard, if not impossible, for many of them to access.[11] *Dobbs* only compounds the broader inequalities marginalized people face in the realms of reproductive and parenting autonomy, and further derails any national agenda for broad, meaningful reproductive justice.[12]

The "end" result is hard to see in detail, however, because much is still unclear about the law of abortion in several states. Advocates on all sides are furiously lobbying state legislatures for legislation to further restrict or protect access to abortion

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[9] *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html (Mar. 23, 2023, 8:30 AM); Patricia Mazzei, David W. Chen & Alexandra Glorioso, *DeSantis Signs Six-Week Abortion Ban in Florida*, N.Y. TIMES (April 13, 2023), https://www.nytimes.com/2023/04/13/us/florida-six-week-abortion-ban.html.

[10] It will also burden some people within the LGBTQIA+ community who seek abortion and related reproductive healthcare, including access to assisted reproductive technology. *See* Diana Kasdan & Risa Kaufman, *The Right to Reproductive Autonomy: A 14th Amendment Guarantee*, MS. MAG. (May 24, 2022), https://msmagazine.com/2022/05/24/right-to-abortion-constitution-14th-amendment-freedom/ (noting that lack of access is already a reality for many of these people). *See generally* Ederlina Co, *Abortion Privilege*, 74 RUTGERS U. L. REV. 1 (2021); Vinita Goyal, Isabel H. McLoughlin Brooks & Daniel A. Powers, *Differences in Abortion Rates by Race–Ethnicity After Implementation of a Restrictive Texas Law*, 102 CONTRACEPTION 109, 109 (2020) (finding that "[r]estrictive abortion policies in Texas may disproportionately burden Hispanic women"); Caitlin Myers, Rachel Jones & Ushma Upadhyay, *Predicted Changes in Abortion Access and Incidence in a Post-*Roe *World*, 100 CONTRACEPTION 367 (2019) (predicting that in the year after *Roe* is reversed, at least 90,000 women would be unable to access abortion care); Johnsen, *supra* note 7, at 46.

[11] *See* West, *supra* note 7, at 1402–03; Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 YALE L.J. 1270, 1305–14, 1323–30 (2017) (reviewing KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017)).

[12] *See* Chemerinsky & Goodwin, *supra* note 6, at 1235; MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT 97–98 (2020). For a primer on the reproductive justice movement, see LORETTA J. ROSS, SISTERSONG WOMEN OF COLOR REPROD. HEALTH COLLECTIVE, UNDERSTANDING REPRODUCTIVE JUSTICE 5–6 (May 2006). While this Article focuses closely on abortion access in light of the current upheaval, local engagement affects many areas of importance to the reproductive justice movement. I plan to address the broader relationships between local governments and a more comprehensive conception of reproductive justice in coming works.

care.[13] (Here, abortion-rights advocates are playing catch-up;[14] while some states have passed abortion-protective legislation in recent years,[15] as of August 2021, 1,327 state abortion restrictions had been enacted since *Roe*.[16]) Abortion-rights advocates are litigating to determine which state constitutions independently protect reproductive choices including abortion.[17] In August, a Kansas campaign for a constitutional referendum to overturn a Kansas Supreme Court ruling declaring just that failed.[18] The Kansas effort was followed in defeat by a similar constitutional referendum in Kentucky and a "born alive" regulation in Montana in December.[19] Vermonters, Californians, and Michiganders likewise voted on abortion rights, enshrining reproductive rights in their state constitutions.[20]

State courts also are being called upon to determine the state of the law on abortion where there is ambiguity. For example, a state may have both a pre-*Roe* abortion ban and more recent laws regulating abortion care. Alternatively, a state

[13] Elisabeth Smith, *How States Can and Should Protect Abortion Rights and Access*, MS. MAG. (May 24, 2022), https://msmagazine.com/2022/05/24/state-abortion-rights/.

[14] Heidi Gerbracht, *Why Cities Matter in the Fight for Abortion Rights*, REWIRE (Mar. 1, 2022, 11:30 AM), https://rewirenewsgroup.com/article/2022/03/01/why-cities-matter-in-the-fight-for-abortion-rights/ (noting that anti-abortion advocacy at the state level shows "coordination on a scale that abortion rights organizations can't yet match"); Erin Bernstein, *The Upside of Abortion Disclosure Laws*, 24 STAN. L. & POL'Y REV. 171, 174–75 (2013) (noting that in 2013, "the default position of a legislative body supportive of abortion rights [was] assumed to be silence—or at best, symbolic re-codification of *Roe* as a state statute," but arguing for a more robust agenda).

[15] *See, e.g.*, N.J. STAT. ANN. § 10:7-2 (West 2022) (building on a prior state constitutional ruling); N.Y. PUB. HEALTH LAW § 2599-aa to 2599-bb (McKinney 2022).

[16] Elyssa Spitzer & Nora Ellmann, *State Abortion Legislation in 2021: A Review of Positive and Negative Actions*, CTR. FOR AM. PROGRESS (Sept. 21, 2021), https://www.americanprogress.org/article/state-abortion-legislation-2021/. For a regularly updated compilation of U.S. abortion policies enacted since *Roe*, see *Interactive Map: US Abortion Policies and Access After* Roe, GUTTMACHER INST., https://states.guttmacher.org/policies/ (Mar. 26, 2023).

[17] *See, e.g.*, Becky Jacobs, *Abortions Can Resume in Utah for Now, After Judge Blocks Enforcement of Trigger Law*, SALT LAKE TRIB., https://www.sltrib.com/news/2022/06/27/utahs-planned-parenthood/ (July 8, 2022, 12:22 PM) (discussing a restraining order issued in a state constitutional challenge). *See generally* Johnsen, *supra* note 7, at 48; Alicia Bannon, *The Power of State Courts in Securing Abortion Access: "It's Time to Give Them Center Stage,"* MS. MAG. (Nov. 9, 2021), https://msmagazine.com/2021/11/09/state-courts-constitutions-abortion-access-supreme-court/.

[18] *See* Noah Taborda, *Overturn of* Roe v. Wade *Raises Stakes for Kansas Abortion Rights Battle in August*, KAN. REFLECTOR (May 3, 2022, 4:50 PM), https://kansasreflector.com/2022/05/03/overturn-of-roe-v-wade-raises-stakes-for-kansas-abortion-rights-battle-in-august/ (discussing Hodes & Nauser v. Schmidt, 440 P.3d 461, 502–03 (Kan. 2019)).

[19] *See Abortion on the Ballot*, N.Y. TIMES, https://www.nytimes.com/interactive/2022/11/08/us/elections/results-abortion.html (Dec. 20, 2022).

[20] *Id.*; *see, e.g.*, PR. 5, 2019–2020 Leg., Reg. Sess. (Vt. 2019) (codified as VT. CONST. ch. I, art. 22).

might have a "trigger law"—a restriction on abortion that was unconstitutional under *Roe* and *Casey*, but only took effect when *Roe* was overturned[21]—the impact or effective date of which is disputed.[22] Scholars, too, are contemplating the dizzying legal complexities that will arise from state abortion regulation unconstrained by *Roe* and *Casey*, if each state seeks to apply its own policy preferences as broadly as possible.[23]

Amid all this discussion, one dimension of the post-*Roe* abortion landscape is underappreciated: how local policy impacts abortion access.[24] Although we tend to think about abortion rights mostly as a matter of federal and state law, there is a long, established history of localities regulating access to abortion.[25] Despite that history, prior discussions of the post-*Roe* legal landscape have not centered on local governments.[26] This time, the ground has shifted: local engagement with abortion policy has continued apace, and even accelerated, on both sides.[27]

Two examples give a sense of the recent activity. Notwithstanding *Roe,* residents of Lubbock, Texas, overrode opposition by the mayor and city council and adopted an abortion ban by popular vote in 2020.[28] One of dozens of cities to have

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[21] *See* Matthew Berns, *Trigger Laws*, 97 GEO. L.J. 1639, 1641–42 (2009).

[22] *See, e.g.*, Erik Larson, *Texas Sued by ACLU Over 'Antiquated' Pre-*Roe *Abortion Ban*, BLOOMBERG NEWS (June 27, 2022), https://www.bloomberg.com/news/articles/2022-06-27/aclu-sues-to-block-texas-trigger-law-banning-abortion. *See generally* Richard H. Fallon, Jr., *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*, 51 ST. LOUIS U. L.J., 611, 616 (2007).

[23] *See, e.g.*, David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023); Katherine Florey, Dobbs *and the Civil Dimension of Extraterritorial Abortion Regulation*, N.Y.U. L. REV. (forthcoming 2023) (manuscript at 1) (available at https://ssrn.com/abstract=4172494).

[24] NAT'L INST. FOR REPROD. HEALTH, LOCAL REPRODUCTIVE FREEDOM INDEX, 2021, at 41 (2021) ("With *Roe* weakened or overturned, cities will have an important role to play in helping to ensure that people are able to access safe abortion care."); *see also* Erin Bernstein & Emma Sokoloff-Rubin, *Four Ways Blue Cities in Red States Can Protect Abortion Access Post-*Roe, SLATE (May 13, 2022, 11:26 AM), https://slate.com/news-and-politics/2022/05/red-state-abortion-access-post-roe.html; Yvonne Lindgren, Dobbs v. Jackson Women's Health *and the Post-*Roe *Landscape*, 35 J. AM. ACAD. MATRIMONIAL LAWS. 235, 271–72 (2022).

[25] Holly J. McCammon & Cathryn Beeson-Lynch, *Fighting Words: Pro-Choice Cause Lawyering, Legal-Framing Innovations, and Hostile Political-Legal Contexts*, 46 LAW & SOC. INQUIRY 599, 618 (2021).

[26] In this Article, I refer fairly interchangeably to "local governments," "localities," "municipalities," "cities," and "counties," by which I mean general purpose local governments, unless it is otherwise clear from context.

[27] *See* NAT'L INST. FOR REPROD. HEALTH, *supra* note 24, at 41–42.

[28] Ordinance No. 2021-Initiative 1, Spec. Election of May 1, 2021 (Lubbock, Tex. 2021), https://ci.lubbock.tx.us/departments/city-secretary/home/ordinances-resolutions. Like Texas's Senate Bill 8, the ordinance provides that no public official could be involved in enforcing it until *Roe* was overruled. *Id.* § E; *see* S.B. 8, 87th Leg., Reg. Sess. § 3 (Tex. 2021) (enacted).

adopted such a ban, Lubbock was the first that had an abortion provider within city limits.[29] By contrast, New York City announced in 2019 that it would allocate $250,000 to provide abortion care, including for those who come from out of state seeking care.[30] This divergence is consistent with broader national trends; as Rick Su has noted, "[t]he site of political conflict is increasingly within states and at the local level."[31]

At the same time, state preemption of local laws has also taken on a new—often combative—dimension. Increasingly, state governments aggressively preempt local laws, largely on the grounds of policy disagreement. This preemption can be deregulatory (e.g., ensuring that no locality mandates paid sick leave) or hyper-regulatory (e.g., controlling local bathroom use[32]), but it is policy-based. State preemption of local law is hardly novel, of course. For example, more than 40 states preempt local regulation of firearms or ammunition, some since the 1980s and 1990s.[33] But such policy-based preemption has increased, and has already touched localities trying to support abortion access.[34] Some states are also taking a new, more punitive approach to preemption that penalizes localities (and even local officials) that pursue

[29] Shannon Najmabadi, *Lawsuit to Block Lubbock's Abortion Ban Is Dismissed in Court as the Ordinance Takes Effect*, TEX. TRIB. (June 2, 2021, 11:00 AM), https://www.texastribune.org/2021/06/01/abortion-planned-parenthood-lubbock/; *see also* Richard D. Rosen, *Deterring Pre-Viability Abortions in Texas Through Private Lawsuits*, 54 TEX. TECH L. REV. 115, 116–20 (2021). Some of the local laws are even more aggressive than Texas's state laws, including provisions urging the prosecution of those who donate to abortion funds. *See, e.g.*, Ordinance No. 03-2022, Lindale, Tex. City Council § B(6)(c) (adopted Mar. 24, 2022, Lindale, Tex.), https://library.municode.com/tx/lindale/ordinances/code_of_ordinances?nodeId=1174074 (urging the district attorney to prosecute "individuals and organizations that knowingly pay for another person's abortion in Texas, including abortion funds and abortion-assistance organizations").

[30] Nikita Stewart, *New York City Allocates $250,000 for Abortions, Challenging Conservative States*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/nyregion/abortion-funding-ny.html.

[31] Rick Su, *Intrastate Federalism*, 19 U. PA. J. CONST. L. 191, 205 (2016).

[32] *See, e.g.*, Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 12. The law was later modified substantially. *See* Act of Mar. 30, 2017, sec. 2, § 143-760, 2017 N.C. Sess. Laws 4, 81 (codified as amended at N.C. GEN. STAT. § 143-761 (2022)).

[33] *Fact Sheet: State Firearm Preemption Laws*, EVERYTOWN (Feb. 20, 2018), https://everytownresearch.org/report/fact-sheet-preemption-laws/Everytown. Some states also preempt local firearm *litigation*, as does federal law. Sarah L. Swan, *Preempting Plaintiff Cities*, 45 FORDHAM URB. L.J. 1241, 1253–56 (2018). A number of states also preempted local smoking regulations at roughly the same time (though not all of those laws are still in place). *See id.* at 1247–48; Lauren E. Phillips, Note, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2240–42 (2017); Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS 403, 405 (2017).

[34] *See generally* Juliana Bennington, *Intrastate Preemption: A New Frontier in Burdening Choice*, 40 COLUM. J. GENDER & L. 93 (2020).

certain policies, in order to deter local policy development.[35] With states as the primary regulators of abortion access,[36] local communities will only accelerate their engagement on the issue.[37] We are, therefore, thrusting one of the most contentious issues in American life and politics even more directly into this increasingly fractious environment of state preemption of local law.

Moreover, even without the more aggressive recent trend, state preemption law is not neutral on abortion policy. Ordinary preemption law in many states will often only tolerate local regulations that are more, but not less, restrictive than state law on the same issue. In the abortion context, that means that, absent any specific preemption law, it may be easier for localities who oppose abortion access to regulate accordingly than it is for localities that want to liberalize access. Therefore, abortion rights advocates, in particular, must be cognizant of the practical impact that local regulation, and state preemption law, will have on abortion access.

This Article is the first to bring together the history and current trends in local engagement on abortion with the current state of state–local preemption law to fully canvass the post-*Roe* local abortion landscape in America. It builds on the work of other scholars who have catalogued local abortion and reproductive rights regulation,[38] and those who have argued either that aggressive state preemption poses a threat to local abortion-supportive action,[39] or that local abortion restrictions show

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[35] *See* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2002–07 (2018); Nestor M. Davidson & Richard C. Schragger, *Do Local Governments Really Have Too Much Power? Understanding the National League of Cities' Principles of Home Rule for the 21st Century*, 100 N.C. L. REV. 1385, 1391–93 (2022).

[36] There is much debate about whether and how the federal government can now regulate abortion by statute. *See* Fallon, *supra* note 22, at 621–22, 624–25. However, the states warrant immediate attention, because the most rapid and significant changes have occurred there. *Cf.* Ann Althouse, Response, *Stepping Out of Professor Fallon's Puzzle Box: A Response to "If* Roe *Were Overruled,"* 51 ST. LOUIS U. L.J. 761, 765 (2007) (suggesting that Congress allow time for the debate to play out in the states). And given national political dynamics, it is unlikely that broad federal legislation is imminent.

[37] Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1357–58 (2013) (noting that state-level minorities can implement their policies at the city level, such as by "enacting strict abortion laws"); Su, *supra* note 31, at 270 ("Representing increasingly insular enclaves, localities are likely to continue their competition at the forefront of controversial policy disputes.").

[38] *See, e.g.*, Louis Cholden-Brown, *The Reproductive Rights Charter*, 96 U. DET. MERCY L. REV. 557 (2019); Lindgren, *supra* note 24; *see also* The Weeds, *The Legal Limbo of Abortion Rights*, VOX, at 52:00–54:00 (July 12, 2022) (downloaded using Apple Podcasts) (interview with Michele Goodwin discussing the fact that abortion access may vary by locality, particularly after *Dobbs*).

[39] *See, e.g.*, Bennington, *supra* note 34, at 95, 105–08.

that localities should not regulate abortion.[40] None have yet looked comprehensively, however, at how the structure of state preemption law differently shapes the regulatory options for pro-choice and anti-abortion localities, or at how that dynamic is likely to shape the development of the law of home rule and abortion preemption in the states. Similarly, none have fully digested the potential risks and benefits of local abortion regulation. This Article aims to fill those gaps, and to deepen the growing literature seeking a principled basis for assessing state preemption of local policy choices.

This Article proceeds in four parts. In Part I, I discuss some of the history of local abortion regulation, highlighting some of the many tools that localities have used to further their policy preferences. In Part II, I explore the variety of state preemption doctrines and some recent trends in state–local (intrastate) preemption. In Part III, I consider what local government law means for the abortion fight. I assess how important express preemption is likely to be in the coming state/local regulation of abortion care. I also examine what a policy of allowing localities broad latitude to regulate abortion would look like, and how it relates to the coming wave of local regulation. In Part IV, I consider what the abortion fight will mean for local government law: specifically, how it fits into broader trends in state–local relations, and whether it can offer any insight into the quest for local empowerment and a principled way to constrain state preemption. I then briefly conclude.

I. A RECENT HISTORY OF LOCAL ABORTION REGULATION AND POLICY[41]

Throughout the modern fight over abortion, localities have used their various policy tools to make their voices heard—both to support and oppose access to abortion. Overall, this 50-plus-year history of local abortion policy has been underappreciated, though not completely overlooked,[42] in the legal literature on abortion

[40] *See, e.g.*, Jennifer L. Brinkley, *Sanctuary Cities and Counties for the Unborn: The Use of Resolutions and Ordinances to Restrict Abortion Access*, 41 N. ILL. U. L. REV. 63, 70 (2021).

[41] A full history of local abortion regulation is beyond the scope of this Article and will be revisited in later work. For present purposes, I pick up in the 1960s and 1970s.

[42] *See, e.g.*, MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 9, 49, 70, 76, 132–33 (2015); Brinkley, *supra* note 40, at 86–87; Bennington, *supra* note 34, at 105; Abigail Burman, Note, *Abortion Sanctuary Cities: A Local Response to the Criminalization of Self-Managed Abortion*, 108 CALIF. L. REV. 2007, 2011 (2020); Lindgren, *supra* note 24, at 271–72; Sarah L. Swan, *Running Interference: Local Government, Tortious Interference with Contractual Relations, and the Constitutional Right to Petition*, 36 J. LAND USE & ENV'T L. 57, 63 n.33 (2020); Cholden-Brown, *supra* note 38, at 559–61; Bernstein, *supra* note 14, at 193–94; Elizabeth B. Meyer, *Exclusionary Zoning of Abortion Facilities*, 32 WASH. U. J. URB. & CONTEMP. L. 361 (1987); Dawn Johnsen, *"TRAP"ing* Roe *in Indiana and a Common-Ground Alternative*, 118 YALE L.J. 1356, 1361, 1384 (2009); Bernstein & Sokoloff-Rubin, *supra* note 24.

regulation.[43] It has not, however, gone unnoticed by advocates.[44] This Part offers some examples of this local activity, and a general overview of the kinds of municipal actions and powers localities have deployed over the years to affect abortion access.

When some states began to liberalize their abortion laws in the 1960s and 1970s, localities also jumped in to change the lawfulness of, and access to, abortion care. For example, New York state legalized abortion up to 24 weeks of gestation in 1970, three years before *Roe*.[45] In 1971, following the lead of New York City,[46] the Village of Hempstead adopted a law that required that abortions only be performed in state-licensed and accredited hospitals.[47] In New York City, these regulations made abortion harder to access, particularly for poor women; in Hempstead, they would have effectively ended abortion care in town for everyone.[48] But the New York Court of Appeals stepped in to invalidate Hempstead's local law, not as a matter of women's rights, but because the state had preempted the field of abortion regulation, and no special local conditions justified a disparate local law.[49]

New York City and the Village of Hempstead were far from alone; indeed, several post-*Roe* U.S. Supreme Court cases dealt with municipal restrictions on abortion.[50] Following *Roe*, the city of Akron, Ohio, became a regional center for abortion

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[43] *See, e.g.*, Michael P. O'Shea, Commentary, *Why Firearm Federalism Beats Firearm Localism: A Response to* Firearm Localism, 123 YALE L.J. ONLINE 359, 371–72 (2014) (describing the notion of local regulation of abortion as "anomalous"); B. Jessie Hill, *The Geography of Abortion Rights*, 109 GEO. L.J. 1081, 1084 (2021) (focusing generally on state or national level borders, but referring to cases involving local ordinances, such as *City of Akron*, discussed *infra*).

[44] *See, e.g.*, Johnsen, *supra* note 42, at 1366–73 (examining advocates' strategy in overcoming county-level restrictions in Indiana).

[45] For an account of the politics and litigation leading to this change, see Richard S. Price & Thomas M. Keck, *Movement Litigation and Unilateral Disarmament: Abortion and the Right to Die*, 40 LAW & SOC. INQUIRY 880, 886–94 (2015).

[46] Arthur F. Dobson, Jr., *New York Abortion Reform and Conflicting Municipal Regulations: A Question of Home Rule*, 20 BUFF. L. REV. 524, 526–27 (1971).

[47] Robin v. Inc. Vill. of Hempstead, 285 N.E.2d 285, 285–86 (N.Y. 1972).

[48] *Id.* Press coverage of New York City's regulations at the time pointed out that many women, "especially the poor, poorly educated, timid, embarrassed, frightened and unaggressive" found that the required hospital abortions under the city's regime were "impossible to obtain." Dobson, *supra* note 46, at 530 (quoting Jane E. Brody, *New Abortion Rules Take Effect, Complicating Confused Picture*, N.Y. TIMES, Oct. 20, 1970, at 1 (city ed.)). This was perceived as directly counter to the state's intent; the state had rejected many of the same limitations that the city imposed. *Id.* at 533.

[49] *Robin*, 285 N.E.2d at 286–87; *see also* Kim v. Town of Orangetown, 321 N.Y.S.2d 724, 729–33 (Sup. Ct. 1971) (finding a similar ordinance to be preempted). New York preemption doctrine has shifted somewhat, the inconsistencies of which are discussed at greater length *infra*.

[50] *See, e.g.*, City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 419 (1983), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (addressing an ordinance that required abortions to be performed in hospitals and required parental consent and a waiting period, among other restrictions); Poelker v. Doe, 432 U.S. 519, 521–25 (1977)

access. In response, the city council adopted an ordinance in 1976 requiring second-trimester abortions to be performed in a hospital,[51] and followed it two years later with a broad ordinance that dramatically limited abortion access, including by requiring: a waiting period, hospital facilities, parents' consent to a minor's abortion, and state-designed "disclosures" required to be read to abortion patients.[52] That ordinance was part of a planned campaign by activists and anti-abortion academics, at least some of whom were turning to incremental regulations to limit abortion access on the ground in the wake of *Roe*.[53] The Akron ordinance built on laws in other states and localities;[54] "one of the first attempts to enact so-called informed consent laws," Akron's was one of several state and local laws that simultaneously imposed many restrictions with the same goal of reducing access to abortion.[55] The ordinance was eventually substantially replicated in 20 states and multiple other cities.[56] Three years later, the Supreme Court called Akron "but one example" of "States and municipalities [adopting] . . . measures seemingly designed to prevent a woman, with the advice of her physician, from exercising her freedom of choice."[57]

Local interest in abortion regulation has not waned. Lubbock, Texas, is just one of more than 60 cities and towns that have declared themselves "sanctuaries for the unborn" and *inter alia* banned or criminalized abortion, or aiding an abortion, within municipal limits.[58] This wave is the product of an explicit advocacy strategy

(unsuccessfully challenging a mayoral directive and public hospital practice of not providing publicly-funded "nontherapeutic" abortions to indigent women at city-owned public hospitals); *see also* Mahoning Women's Ctr. v. Hunter, 610 F.2d 456, 457 (6th Cir. 1979), *vacated*, 447 U.S. 918 (1980) (addressing a fee dispute in a suit challenging detailed regulations in Youngstown, Ohio, on performing abortions).

[51] ZIEGLER, *supra* note 12, at 61.

[52] *Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. at 422–25.

[53] ZIEGLER, *supra* note 12, at 77–79; ZIEGLER, *supra* note 42, at 49–50, 58, 230.

[54] Tracy A. Thomas, *Back to the Future of Regulating Abortion in the First Term*, 29 WIS. J.L. GENDER & SOC'Y 47, 54, 56 (2014); ZIEGLER, *supra* note 42, at 76.

[55] Thomas, *supra* note 54, at 51; ZIEGLER, *supra* note 12, at 80; Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and* Roe v. Wade, 71 WASH. & LEE L. REV. 969, 1004, 1012–14 (2014).

[56] Thomas, *supra* note 54, at 54, 56; ZIEGLER, *supra* note 42, at 76–77.

[57] Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 759 (1986), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[58] Brinkley, *supra* note 40, at 64–66, 84–88 (discussing municipal efforts in Florida, Arizona, Texas, and North Carolina); Cholden-Brown, *supra* note 38, at 562–65; *see, e.g.*, Thomas, *supra* note 54, at 53–58 (discussing a 1978 city council resolution in Akron, Ohio, aimed at restricting abortion access); LINDALE, TEX., CODE tit. XIII, § 132.02 (2022); Dionne Searcey, *The Wall Some Texans Want to Build Against Abortion*, N.Y. TIMES (Mar. 3, 2020), https://www.nytimes.com/2020/03/03/us/politics/texas-abortion-sanctuary-cities.html; *see also Sanctuary Cities for the Unborn (Incorporated Cities)*, SANCTUARY CITIES FOR THE UNBORN, https://sanctuarycitiesfortheunborn.org/incorporated-cities (last visited May 8, 2023) (listing the current "sanctuary for the unborn" cities). These jurisdictions are engaged in a local species of what Michele Goodwin

targeting rural and suburban communities.[59] As the major proponent of that movement explained: "For so long, we have put our hope in our state capitols, in our nation's Capital, when all along we need to be battling these battles on the home front of our cities."[60]

Some of these policies might rightly have been viewed as largely expressive or performative when they were adopted pre-*Dobbs*, given the likelihood that they would be enjoined under *Roe* and *Casey.* However, the pace at which communities are adopting such policies only accelerated in 2022 and beyond, as the local ordinances have a greater chance of being given effect. Thus, while the laws are certainly expressive, they are also now more than that.

Other localities have moved to support abortion access and providers—sometimes also landing before the U.S. Supreme Court.[61] For example, several cities adopted ordinances to regulate some anti-abortion "crisis pregnancy centers" (CPCs) that try to limit abortion access by, for example, deceptively intercepting women seeking care from actual abortion providers.[62] Many of these laws, too, are

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and Meigan Thompson have called "strategic federalism." *See* Michele Goodwin & Meigan Thompson, *In the Shadow of the Court: Strategic Federalism and Reproductive Rights*, 18 GEO. J. GENDER & L. 333, 334 (2017).

[59] *Safe Cities and Counties: Restoring Personhood One Local Community at a Time*, PERSONHOOD ALL., https://personhood.org/safecity/ (last visited May 8, 2023) (describing the "more or less ideal" community to target for a *Roe*-defying "sanctuary" ordinance as "in a rural or small suburban area," and "not currently hav[ing] abortion facility in it."); Brinkley, *supra* note 40, at 78 ("Anti-abortion activists, growing impatient with state legislatures, have begun lobbying city council members and county commissioners."); Audra Jane Heidrichs*, How Anti-Abortion Advocates Are Pushing Local Bans, City by Small City*, GUARDIAN (Nov. 23, 2021, 2:00 PM), https://www.theguardian.com/world/2021/nov/23/anti-abortion-local-bans-ohio ("Bypassing statehouses and targeting smaller towns and cities governed by council has emerged as a successful strategy for anti-abortion advocates in recent years.").

[60] Brinkley, *supra* note 40, at 88 (citing Harmeet Kaur, *Small Towns in Texas Are Declaring Themselves 'Sanctuary Cities for the Unborn,'* CNN (Jan. 25, 2020, 9:53 AM), https://www.cnn.com/2020/01/25/us/sanctuary-cities-for-unborn-anti-abortion-texas-trnd/index.html (quoting Mark Lee Dickson, activist behind the Sanctuaries for the Unborn movement)).

[61] *See, e.g.*, *Urban Initiative*, NAT'L INST. FOR REPROD. HEALTH, https://www.nirhealth.org/what-we-do/signature-initiatives/urban-initiative/ (last visited May 8, 2023); Melissa Batchelor Warnke, *Can Cities Save Our Reproductive Rights from the Grabby Hands of Donald Trump?*, NATION (Nov. 1, 2017), https://www.thenation.com/article/archive/can-cities-save-our-reproductive-rights-from-the-grabby-hands-of-donald-trump/; Gerbracht, *supra* note 14; Bernstein & Sokoloff-Rubin, *supra* note 24. For U.S. Supreme Court cases that have involved local policies facilitating abortion care, see, e.g., Frisby v. Schultz, 487 U.S. 474, 477 (1988) (narrowly construing but upholding a Brookfield, Wisconsin, ordinance adopted in response to anti-abortion picketing which declared it "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield").

[62] Hayley E. Malcolm, Note, *Pregnancy Centers and the Limits of Mandated Disclosure*, 119 COLUM. L. REV. 1133, 1135–36, 1149–58 (2019) (detailing the history of local CPC regulation and criticizing disclosure laws). For a detailed discussion of the Supreme Court's decision striking

coordinated with advocates.[63] The National Institute for Reproductive Health annually scores dozens of the largest U.S. cities on their support for reproductive rights, including abortion, and considers regulation of crisis pregnancy centers, among many reproductive-rights-supportive policies, in evaluating the cities it scores.[64]

Municipalities (or their voters, by initiative) have used many different local policy tools to shape abortion policy.[65] Other commentators have undertaken to comprehensively document how local governments express policy,[66] and how they have engaged on abortion or reproductive justice.[67] I will not repeat those accounts here. Instead, I offer only a general picture of some ways localities have expressed their abortion policies.

In addition to the attempted outright criminal or civil bans on abortion within local borders,[68] localities looking to condemn or limit abortion have used tools like:

- Direct "police power" [69] regulation of abortion, including imposing gestational limits or detailed, costly restrictions on where abortions can be performed and by whom, and imposing record-keeping requirements, waiting periods, counseling requirements, and parental or spousal consent requirements;[70]

down a California state law that built on local regulations of CPCs, see Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 N.Y.U. L. REV. 61, 62–63 (2019).

[63] *Abortion Is a Human Right. Here's What Localities Can Do Right Now to Protect It*, LOC. PROGRESS (June 24, 2022), https://localprogress.org/2022/06/24/abortion-is-still-legal-heres-how-localities-can-prepare-for-the-fights-ahead/.

[64] NAT'L INST. FOR REPROD. HEALTH, *supra* note 24, at 22, 100–06.

[65] Cholden-Brown, *supra* note 38, at 569–75. Ten cities adopted abortion-prohibition ordinances in November 2022, nine of them by citywide vote. *See Sanctuary Cities for the Unborn*, *supra* note 58.

[66] For a taxonomy of local policy action, see Kathleen Morris, *Rebel Cities, Bully States: A New Preemption Doctrine for an Anti-Racist, Pro-Democracy Localism*, 65 HOW. L.J. 225, 241–52 (2021) (describing the primary regulatory and nonregulatory tools of local governments, including contracts, litigation, taxation and spending, eminent domain, divestment, self-management, passive noncompliance, domestic political organizing, international engagement, lobbying, and speech).

[67] *See, e.g.*, Cholden-Brown, *supra* note 38, at 569–75.

[68] *See, e.g.*, ZIEGLER, *supra* note 42, at 9–10 (describing a Washington, D.C., law—adopted by federal statute in 1901—banning abortion except as provided by a licensed practitioner and necessary for the life or health of the pregnant person).

[69] "Police Power" is the "power to make reasonable regulations for the health, safety, morals, and general welfare of the people." DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL JR., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 13 n.b (2001).

[70] *See* Aware Woman Clinic, Inc. v. City of Cocoa Beach, 629 F.2d 1146, 1147 (5th Cir. 1980) (city ordinance provided "for the licensing and regulation of abortion clinics and other 'free

- New civil causes of action against abortion providers, e.g., for emotional distress;[71]
- Zoning and land use restrictions—whether citywide or ad hoc—to keep or push abortion providers out;[72]
- Restrictions on using public funds, property, or facilities to provide or support abortions;[73]

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standing surgical out-patient facilities'"); Friendship Med. Ctr., Ltd. v. Chi. Bd. of Health, 505 F.2d 1141, 1143 (7th Cir. 1974) (discussing Chicago Board of Health regulations that prescribed "in substantial detail conditions, equipment, and procedures that medical facilities offering abortions must comply with, without regard to the trimester of pregnancy involved"); Word v. Poelker, 495 F.2d 1349, 1354 (8th Cir. 1974) (addressing a St. Louis, Missouri, ordinance that required hospital access and parental or spousal consent); Fox Valley Reprod. Health Care Ctr., Inc. v. Arft, 446 F. Supp. 1072, 1037 (E.D. Wis. 1978); Mobile Women's Med. Clinic, Inc. v. Bd. of Comm'rs, 426 F. Supp. 331, app. at 342 (S.D. Ala. 1977) (discussing Mobile, Alabama, ordinance that imposed a 24-hour waiting period and "informed consent" process, admitting privileges requirements, facility specifications, local registration, and record-keeping requirements); Vill. of Oak Lawn v. Marcowitz, 427 N.E.2d 36, 45 (Ill. 1981) (upholding a 24-hour waiting period requirement); W. Side Women's Servs., Inc. v. City of Cleveland, 450 F. Supp. 796, 797 (N.D. Ohio 1978), *aff'd*, 582 F.2d 1281 (6th Cir. 1978) (discussing a Cleveland, Ohio, zoning ordinance that limited clinic locations, and noting comprehensive local abortion licensing and regulation); Mahoning Women's Ctr. v. Hunter, 444 F. Supp. 12, 14 (N.D. Ohio 1977), *aff'd*, 610 F.2d 456 (6th Cir. 1979), *vacated*, 447 U.S. 918 (1980) (finding that regulations in Youngstown, Ohio, were "plenary and encompass[ed] virtually every facet of operation of any facility providing abortion services"); *see also* Cholden-Brown, *supra* note 38, at 570; Johnsen, *supra* note 42, at 1384; Mary Ziegler, *Liberty and the Politics of Balance: The Undue-Burden Test After* Casey/Hellerstedt, 52 HARV. C.R.–C.L. L. REV. 421, 442–43 (2017) (discussing *Cocoa Beach* and *Akron*). States have used similar targeted regulation of abortion provider (TRAP) laws to reduce the number of abortions and clinics. *See* Brinkley, *supra* note 40, at 70, 72; Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After* Whole Woman's Health, 126 YALE L.J. F. 149, 150–53 (2016); Linda Greenhouse & Reva B. Siegel, Casey *and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428, 1444–60 (2016) (focusing on state-level police power TRAP laws).

[71] Brinkley, *supra* note 40, at 86–87 (discussing ordinances in Joaquin and Westbrook, Texas).

[72] Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 332, 337 (5th Cir. Unit B Nov. 1981); Planned Parenthood of N. New England v. City of Manchester, No. Civ. 01-64, 2001 WL 531537, at *7 (D.N.H. Apr. 27, 2001); P.L.S. Partners v. City of Cranston, 696 F. Supp. 788, 790, 796 (D.R.I. 1988); Meyer, *supra* note 42; Cholden-Brown, *supra* note 38, at 567–68; Sarah Holder, *The Subtle Ways Cities Are Restricting Abortion Access*, BLOOMBERG NEWS (June 3, 2019, 5:00 AM), https://www.bloomberg.com/news/articles/2019-06-03/how-zoning-law-is-used-against-abortion-providers.

[73] *See, e.g.*, Poelker v. Doe, 432 U.S. 519, 520 (1977); Nyberg v. City of Virginia, 667 F.2d 754, 755 (8th Cir. 1982) (enjoining the Hospital Commission of the city of Virginia from prohibiting staff doctors from using the only hospital in the area for any abortions except "those required to 'save the life of the mother'"); Cnty. Exec. of Prince George's Cnty. v. Doe, 436 A.2d 459, 460, 464 (Md. 1981) (finding county executive lacked power to limit abortions at all county-

- Limitations on advertising or disseminating information about abortion;[74]
- Limitations on insurance and benefits coverage for abortion for municipal employees or the employees of municipal contractors;[75] and
- Resolutions and other nonbinding declarations condemning abortion.[76]

Of course, many of these efforts were challenged under the federal or state constitutions, or on preemption grounds, and some were enjoined or limited (at least pre-*Dobbs*).[77] Indeed, some of them may have been understood as largely expressive, given the likelihood of litigation and injunction in the era of *Roe* and *Casey*. For present purposes, however, the point is how many strategies (both regulatory and proprietary) localities have used to discourage or restrict residents' abortion access.

On the other side, localities have also taken steps to improve access to reproductive health care, including abortion. As discussed at greater length below, due to preemption concerns, localities generally cannot legalize abortions that state law prohibits (e.g., localities may not allow abortion at 25 weeks if the state prohibits it after 24 weeks). But, like anti-abortion localities, abortion-rights-minded municipalities have used a variety of regulatory and policy tools,[78] including:

- Providing abortions at public facilities;[79]

owned or -operated hospitals to those necessary to save the life of the mother). *See generally* ZIEGLER, *supra* note 42, at 49–50; ZIEGLER, *supra* note 12, at 50–51; Ziegler, *supra* note 70, at 435.

[74] Mitchell Fam. Plan. Inc. v. City of Royal Oak, 335 F. Supp. 738, 740, 744 (E.D. Mich. 1972) (enjoining ordinance that banned "willfully advertis[ing] . . . any means whatever whereby a miscarriage or abortion may be produced or procured, or any information" or offer of services in regard thereto).

[75] Cholden-Brown, *supra* note 38, at 559.

[76] Alison Penn, *Resolution Supporting Unborn Carried by Council*, ROSWELL DAILY REC. (Mar 16, 2019), https://www.rdrnews.com/news/local/resolution-supporting-unborn-carried-by-council/article_95c748a3-a0a6-595c-b7fa-c9915eb433f4.html; Brinkley, *supra* note 40, at 78–84 (discussing resolutions and ordinances restricting abortion access in Illinois, Utah, Texas, and New Mexico).

[77] *See generally* Meyer, *supra* note 42 (discussing some of the early litigation about zoning limitations on abortion access).

[78] Cholden-Brown, *supra* note 38, at 559–61.

[79] Brief of Local Governments as Amici Curiae in Support of Respondents at 1, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) ("Some *Amici* deliver health care services directly (including by performing abortions in city or county facilities), serving as the health care providers of last resort. Other *Amici* focus on more general public health initiatives, such as by providing information and resources."); Burman, *supra* note 42, at 2010–11; Bernstein, *supra* note 14, at 193–94.

- Providing public funding, or affordable leases, to reproductive health care providers;[80]
- Providing funding or logistical support to people in need of abortion care;[81]
- Ensuring municipal employees have insurance coverage for abortion care;[82]
- Regulating protests that impede access to clinics;[83]
- Regulating the anti-abortion "crisis pregnancy centers" that engage in deceptive practices and provide medically inaccurate information about pregnancy and abortion;[84]
- Suing to challenge restrictions on abortion or abortion funding;[85]

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[80] *See, e.g.*, Bennington, *supra* note 34, at 104–05 (discussing a Cook County, Illinois, ordinance that pays abortion costs for people who cannot afford it); Stam v. State, 275 S.E.2d 439, 442 (N.C. 1981) (concluding that a county's policy to pay for "medically unnecessary" abortion care for indigent women out of taxpayer funds was ultra vires). Austin, Texas, leases a clinic site to Planned Parenthood for $1 per year, at least until 2039. However, city representatives assert that abortion care is not provided at that clinic. Chuck Lindell, *Planned Parenthood Clinic to Stay Open*, AUSTIN AM.-STATESMAN (June 13, 2019), https://wwwstatesman.com/story/news/politics/state/2019/06/13/despite-new-law-austin-planned-parenthood-clinic-to-stay-open/4916035007/.

[81] Mary Tuma, *City Council Redirects APD Funds to Abortion Support Access*, AUSTIN CHRON. (Aug. 14, 2020, 11:27 AM), https://www.austinchronicle.com/daily/news/2020-08-14/city-council-redirects-apd-funds-to-abortion-support-access/.

[82] Cholden-Brown, *supra* note 38, at 559–61.

[83] *See, e.g.,* Bruni v. City of Pittsburgh, 941 F.3d 73, 77 (3d Cir. 2019) (upholding a buffer-zone ordinance for health care facilities); NAT'L INST. FOR REPROD. HEALTH, *supra* note 24, at 46–47; Cholden-Brown, *supra* note 38, at 565; *see also* Bennington, *supra* note 34, at 94; Erin B. Bernstein, *Health Privacy in Public Spaces*, 66 ALA. L. REV. 989, 1003–05 (2015) (discussing "bubble" and "buffer" zone laws designed to protect patients seeking access to reproductive healthcare, and the legal challenges they have faced).

[84] Bernstein, *supra* note 14, at 178; NAT'L INST. FOR REPROD. HEALTH, *supra* note 24, at 22; Rachel Wells, *Abortion Rights Foes Have Weaponized Zoning Regulations. Here's How. (Updated)*, REWIRE NEWS GRP. (Apr. 18, 2019, 11:58 AM), https://rewirenewsgroup.com/article/2019/04/18/abortion-rights-foes-have-weaponized-zoning-regulations-heres-how/ (discussing Austin's ordinance, later successfully challenged); Evergreen Ass'n v. City of New York, 740 F.3d 233, 237–38, 241, 253 (2d Cir. 2014) (invalidating parts of New York City's ordinance under the First Amendment).

[85] For example, New York City's Health and Hospitals Corporation was part of a challenge to the Hyde Amendment restrictions on use of federal funds for certain abortions. *See* Harris v. McRae, 448 U.S. 297, 303 (1980).

- Adopting ordinances that prohibit discrimination in housing or employment on the basis of reproductive health decisions;[86] and
- Adopting resolutions and public statements supporting reproductive rights and access to abortion care,[87] including recognition of National Abortion Provider Appreciation Day.[88]

Like anti-abortion local initiatives, many of these efforts have been challenged in court. Some have floundered on First Amendment grounds (particularly those regulating protest or crisis pregnancy centers).[89] Others have been reversed by preemptive state action.[90]

There are thus many ways in which localities have engaged with questions of abortion access. The approaches vary according to the precise powers that a given local entity has under state law and its own chartering documents. They vary by which actor or actors within the local government decided to take action—and particularly, what powers that actor can leverage under state and local law to impact access. Some actions, particularly by anti-abortion localities, directly regulate private conduct (e.g., enacting criminal and civil prohibitions on providing abortion care). Others are more indirect, often leveraging classic tools of local government like land use and public funding to make abortion care more or less accessible, or to impose or mitigate collateral impacts of a person's decision to seek an abortion.[91] Why anti-

[86] Cholden-Brown, *supra* note 38, at 566. A 2017 ordinance in St. Louis, Missouri, triggered state backlash, including a special legislative session to limit it. *Id.* at 558 n.14; *see also* NAT'L INST. FOR REPROD. HEALTH, *supra* note 24, at 22–24.

[87] NAT'L INST. FOR REPROD. HEALTH, *supra* note 24, at 39. In addition, in 1998, one member of the Los Angeles Elected Charter Revision Commissions proposed adding a bill of rights to the city's charter that would have committed the city not to infringe on reproductive autonomy, "except if proven necessary to achieve a compelling objective," but the proposal failed. Cholden-Brown, *supra* note 38, at 572–73 (citing Todd S. Purdum, *Voters to Decide Overhaul of Los Angeles Government*, N.Y. TIMES (Mar. 7, 1999), https://www.nytimes.com/1999/03/07/us/voters-to-decide-overhaul-of-los-angeles-government.html).

[88] NAT'L INST. FOR REPROD. HEALTH, *supra* note 24, at 14 ("Starting in March 2020, Austin, TX; Atlanta, GA; Minneapolis, MN; St. Louis, MO; and St. Paul, MN all issued proclamations in honor of Abortion Provider Appreciation Day . . . celebrating their local abortion providers.").

[89] *See, e.g.*, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2370, 2375, 2378 (2018) (striking down a state crisis pregnancy center regulation); *Evergreen Ass'n*, 740 F.3d at 237-38, 253; Bennington, *supra* note 34, at 94; Bernstein, *supra* note 14, at 206–07.

[90] *See* Bennington, *supra* note 34, at 106 (citing MO. REV. STAT. § 188.125 (2022)).

[91] *Cf.* Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1633, 1642, 1649 (2008) (classifying local immigration-related action as "direct" if it involved the direct enforcement of federal immigration law, "indirect" if it deployed local powers in ways that were explicitly tied to "statuses defined by federal immigration laws" (such as requiring lawful presence in the United States to be eligible to rent an apartment), or "neutral" if it exercised traditional local powers in ways that were facially neutral regarding immigration status, but

abortion localities are more able to directly regulate abortion access, and localities that wish to support access to abortion often must rely on more indirect regulations, is the subject of the next two Parts. For now, suffice it to say that localities have long been active on the issue of abortion; they and their officers have proved quite creative in the deployment of local authority to express their policy positions, and post-*Roe* there is every reason to expect that trend to accelerate.[92]

II. STATE PREEMPTION OF LOCAL LAW

To see why state–local preemption (also called intrastate preemption[93]) will impact access to abortion, it helps to start with a sense of how local powers and state preemption work generally.

A. "Ordinary" Preemption and Home Rule

1. Local Powers and Home Rule

State constitutional and statutory law pervasively shape local government authority; in the prevailing view, local governments largely derive their powers from state law (especially state constitutions).[94] In some states, "Dillon's Rule" limits municipalities to whatever specific powers they are given and those powers are narrowly construed.[95] Most states, however, have some form of "home rule,"[96] meaning the

"tend[ed] to have a disproportionate effect on immigrants, and [were] often enacted and enforced precisely for this reason").

[92] *Cf.* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 100 (2013) (noting that given preemption, "existing urban gun control laws [may] underrepresent . . . the breadth and scope of laws that cities *would* pass if they had the authority"); Susan Frelich Appleton, *Gender, Abortion, and Travel After* Roe*'s End*, 51 ST. LOUIS U. L.J. 655, 663 (2007) (noting the "possibility that *Roe* and subsequent cases have distorted contemporary abortion regulation").

[93] *See* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114 (2007).

[94] Erin Adele Scharff, *Hyper Preemption: A Reordering of the State–Local Relationship?*, 106 GEO. L.J. 1469, 1475–76 (2018). Like others, I "assume[]—without endorsing—the primacy of the state over its political subdivisions." Paul A. Diller, *The Political Process of Preemption*, 54 U. RICH. L. REV. 343, 345 (2020).

[95] Briffault, *supra* note 35, at 2012 (describing Dillon's Rule as a canon of interpretation "that state grants of authority are to be narrowly limited . . . to only those powers expressly granted, necessarily implied in the express grant, or essential for the accomplishment of state-prescribed purposes").

[96] Scharff, *supra* note 94, at 1476. The difference between preemption outcomes in home rule and Dillon's Rule states is easily overstated—regardless of labels, localities' practical authority varies along a wide spectrum. *See id.* at 1475.

constitution or home rule statute gives at least some municipalities fairly broad police power to manage their affairs and regulate for their residents' wellbeing.[97] Often, the locality's voters adopt a charter setting out what powers the locality will have, and how it will be governed, in order to invoke home rule.

Home rule is different in each state that has it,[98] but it can be broken into two rough categories: legislative and *imperio* home rule.[99] Legislative home rule gives localities broad power to initiate legislation, but that legislation may not conflict with state law.[100] This makes it relatively easy for the state legislature to preempt local action by adopting a conflicting law. *Imperio* home rule sometimes allows localities to adopt laws inconsistent with state law. This gives localities more protection from state preemption, but only as to "matters of local concern" or some similar formula—a standard that has never been terribly clear, and is often narrowly construed.[101] Beyond the legislative–*imperio* distinction, some state constitutions give localities more protection in certain areas—like local government structure, employees, or property—but these powers "provide little protection for local power to regulate private behavior."[102] Accordingly, localities will sometimes challenge preempting state legislation as inconsistent with state home rule law.[103] In practice, however, states have wide latitude to preempt, particularly in legislative home rule states.[104]

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[97] Many states have some mix of these (e.g., using Dillon's Rule to construe a home rule grant). *See* Phillips, *supra* note 33, at 2233 (noting that "home rule and Dillon's Rule are not mutually exclusive").

[98] Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 256 (2004) ("130 years after the birth of the home rule concept, its meaning remains controversial, uncertain, and highly variable.").

[99] Matthew J. Parlow, *Healthy Zoning*, 44 FORDHAM URB. L.J. 33, 55 (2017).

[100] Briffault, *supra* note 35, at 2012–13; Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1338–39 (2009); *see, e.g.*, N.J. CONST. art. IV, § 7, para. 11. Even in legislative home rule jurisdictions, however, there are some common exclusions from local power. For example, in numerous states, localities cannot create felonies, impose non-property taxes, or regulate "civil" or "private" law. *See* RICHARD BRIFFAULT, NESTOR DAVIDSON, PAUL A. DILLER, OLATUNDE JOHNSON & RICHARD C. SCHRAGGER, AM. CONST. SOC'Y FOR L. & POL'Y, ISSUE BRIEF: THE TROUBLING TURN IN STATE PREEMPTION: THE ASSAULT ON PROGRESSIVE CITIES AND HOW CITIES CAN RESPOND 3 (2017).

[101] Briffault, *supra* note 35, at 2012–13; Baker & Rodriguez, *supra* note 100, at 1338–39; Diller, *supra* note 93, at 1124–25; *see, e.g.*, Scharff, *supra* note 94, at 1514–15 (citing State *ex rel.* Brnovich v. City of Tuscon, 399 P.3d 663 (Ariz. 2017)) (discussing Arizona law); Bennion v. City & Cnty. of Denver, 504 P.2d 350, 351–52 (Colo. 1972) (discussing *imperio* home rule in Colorado and finding the right to resist arrest a matter of statewide concern).

[102] Briffault, *supra* note 35, at 2013; *see also* Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1380–83 (2020) (describing how various states treat preemption of local governments' structural choices).

[103] Phillips, *supra* note 33, at 2259–61.

[104] *Id.* at 2233–34; *see also* Clayton P. Gillette, *Preemption and Entrenchment of the State/Local Divide* 19 (N.Y.U. L. & Econ. Paper Series, Working Paper No. 20-41, 2020).

There are additional common procedural protections against state interference with localities. For example, in many states, a state legislature may not pass "special laws" (laws that apply only to one municipality or an arbitrarily small group) without some special process, at least unless the matter is one of "statewide concern."[105] Of course, nearly every matter is capable of being characterized as, in some sense, of statewide concern, and so efforts to distinguish between state and local issues are almost necessarily unsatisfying, and may offer little practical protection.[106]

2. Intrastate Preemption

As the analysis above suggests, the question of a locality's ability to adopt a law is closely related to, but not the same as, the state's ability to preempt it. Although preemption standards vary by state, the broad strokes are generally similar.[107] First, state law could explicitly displace local authority (i.e., express preemption). Express preemption cases are about statutory construction: just what did the legislature mean to keep localities from doing?[108]

Absent express preemption, the question is whether preemption should be implied. Implied preemption usually takes one of two forms: field or conflict preemption.[109] In field preemption, a court finds that the state regulation of an issue so fully occupies the field that it appears the state legislature intended to leave no room for local regulation.[110] In conflict preemption, the local law conflicts with a state law, either by making compliance with the state law impossible or by posing an impermissible obstacle to the accomplishment of the state's regulatory goals.[111] A few

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[105] *See, e.g.*, Greater N.Y. Taxi Ass'n v. State, 993 N.E.2d 393, 399–401 (N.Y. 2013). *See generally* Gillette, *supra* note 104, at 24, 28; Diller, *supra* note 93, at 1163–64.

[106] *See* Morris, *supra* note 66, at 256–57; Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 639 (2001); *cf.* Gillette, *supra* note 104, at 54 ("[T]he inherent contestability of the state/local divide argues against ossification of that boundary . . . in favor of subjecting the inquiry . . . to the processes of normal politics."). *But cf.* Baker & Rodriguez, *supra* note 100, at 1369 (suggesting that criticisms of incoherence are insufficiently grounded and suggesting that courts in three *imperio* states perform better than critics suggest at adjudging this line).

[107] Diller, *supra* note 93, at 1141–42. As examples of the somewhat different ways states frame these same ideas of preemption, compare State *ex rel.* City of Alma v. Furnas Cnty. Farms, 667 N.W.2d 512, 521–23 (Neb. 2003), with City of Davenport v. Seymour, 755 N.W.2d 533, 537–39 (Iowa 2008).

[108] *See* Diller, *supra* note 93, at 1115.

[109] *See, e.g.*, DeRuiter v. Twp. of Byron, 949 N.W.2d 91, 96 (Mich. 2020); Overlook Terrace Mgmt. Corp. v. Rent Control Bd. of the Town of W. New York, 366 A.2d 321, 326 (N.J. 1976) (also adding the inquiry of whether the subject matter "reflect[s] a need for uniformity").

[110] Rodriguez, *supra* note 106, at 639–40.

[111] Bennington, *supra* note 34, at 108–09; Diller, *supra* note 93, at 1141; *see, e.g.*, *DeRuiter*, 949 N.W.2d at 96; *Overlook Terrace Mgmt. Corp.*, 366 A.2d at 326.

states have made it harder for state legislatures to preempt local regulation—unusually, for example, Ohio requires preempting state laws to directly regulate the conduct at issue, not just keep localities from doing so.[112] Most states, however, do not offer this kind of protection.

Thus, when a state court asks if a local law or action is valid, it asks whether the locality had the power to take that action in the first place, and then if the act was permissibly preempted by state law.[113] These the two questions often overlap, however—for example, where legislative home rule only empowers localities to pass laws that do not "conflict" with state laws.[114] Although some states treat the requirement that local law not conflict with state law as separate from preemption,[115] others seem to combine them.[116] In either case, the effect and analysis for present purposes are similar, so we ask whether "a city's authority in a particular area has been supplanted by state law."[117] This is how preemption "has become the primary battleground for determining the parameters of local authority in modern home-rule regimes."[118]

A core question in implied preemption cases, and particularly conflict preemption cases, is whether state law should be deemed a regulatory floor above which localities can impose further restrictions.[119] This preemption analysis tends to be pro-regulatory; where a state and city both try to regulate in the same area, if the city is allowed to regulate at all, it may only do so in a way that is more, but not less, stringent or restrictive.[120] Put differently, unless something is a purely local matter

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[112] City of Canton v. State, 766 N.E.2d 963, 967–68 (Ohio 2002); Ohioans for Concealed Carry, Inc. v. City of Clyde, 896 N.E.2d 967, 973–74 (Ohio 2008); *cf.* Diller, *supra* note 93, at 1158 (discussing Illinois's limited preemption doctrine).

[113] Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. U. L. REV. 1271, 1276–77 (2009); Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1342 (1994).

[114] Briffault, *supra* note 35, at 2011 ("State preemption litigation is primarily a struggle over the meaning of 'home rule' . . . .").

[115] *See, e.g.*, DWAGFYS Mfg., Inc. v. City of Topeka, 443 P.3d 1052, 1058–59 (Kan. 2019).

[116] *See, e.g.*, State v. Kuhlman, 729 N.W.2d 577, 580 (Minn. 2007); Garden State Farms, Inc. v. Bay, 390 A.2d 1177, 1182 (N.J. 1978); *see also* Reynolds, *supra* note 113, at 1277 (noting that some courts "blend their analysis of the scope of home rule powers with their assessment whether state law should be deemed preemptive").

[117] Diller, *supra* note 93, at 1114, 1127.

[118] *Id.* at 1127.

[119] Briffault, *supra* note 35, at 2012 (noting that some courts "read local powers generously and avoid finding preemption where there is a plausible argument that the state has not sought to bar local action and that state and local laws can coexist").

[120] *See, e.g.*, RICHARD A. EPSTEIN & MICHAEL S. GREVE, AM. ENTER. FOR PUB. POL'Y RSCH., NO. 25, FEDERAL PREEMPTION: PRINCIPLES AND POLITICS 3 (June 2007) (noting that the modern preemption regime is pro-regulatory); *cf.* Diller, *supra* note 93, at 1152 (noting that "the question

in one of the few *imperio* home rule states or the state has occupied the regulatory field, municipalities generally cannot *allow* what state law clearly prohibits,[121] but often can *prohibit* what state law only implicitly allows.[122]

States vary on the precise contours of this distinction, and often cases from the same state are almost comically inconsistent.[123] One treatise has found "much support in the case law for the proposition that an ordinance which prohibits an act which the statute permits is impliedly preempted," which "significantly undermines the prospect of granting power to localities. . . . However, it is not uncommon that courts blandly invoke the test while arriving at wholly inconsistent results."[124] This rather muddy example from the Kansas Supreme Court is actually among the clearer explanations in the state cases:

> [If an] ordinance permits or licenses that which the statute forbids or prohibits that which the statute authorizes . . . there is conflict, but where both an ordinance and the statute are prohibitory and the only difference is that the ordinance goes further in its prohibition but not counter to the prohibition in the statute, and the city does not attempt to authorize by the ordinance that which the legislature has forbidden, or forbid that which the legislature has expressly authorized, there is no conflict.[125]

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of whether a regulation is more or less stringent is necessarily relative to the subjects or persons regulated," and is hard to determine).

[121] *See* Baker & Rodriguez, *supra* note 100, at 1349–55 (discussing the home rule analysis that courts in three *imperio* home rule states undertake in determining what is of statewide, local, or mixed state and local concern).

[122] *See, e.g.*, Jancyn Mfg. Corp. v. Cnty. of Suffolk, 518 N.E.2d 903, 907 (N.Y. 1987) (rejecting claim that a local law was invalid because it "prohibits what State law would allow," and noting that "[t]his statement of the law is much too broad. If this were the rule, the power of local governments to regulate would be illusory" (quoting N.Y. State Club Ass'n v. City of New York, 505 N.E.2d 915, 920 (N.Y. 1987))). *But cf.* Town of Boaz v. Jenkins, 25 So. 2d 394, 395 (Ala. Ct. App. 1946) (ordinance could not prohibit gambling in private homes where state law prohibited only public gambling). Interestingly, Kansas applies the more permissive standard to city home rule, while applying the harsher standard to counties. *See* David v. Bd. of Comm'rs, 89 P.3d 893 (Kan. 2004). *See generally* Diller, *supra* note 93, at 1142–53 (noting that the "extreme" version of this analysis, which disallows localities from prohibiting anything even impliedly allowed by state law, is "fundamentally flawed," but nonetheless frequently invoked); 5 MCQUILLIN MUNICIPAL CORPORATIONS § 15:18 (3d ed. 2022).

[123] Jay P. Syverson, *The Inconsistent State of Municipal Home Rule in Iowa*, 57 DRAKE L. REV. 263, 309 (2008) (describing the lack of clarity in Iowa regarding municipal ability to impose standards more stringent than state law); Diller, *supra* note 93, at 1142 (noting that this preemption approach "creates tremendous confusion for courts and litigants").

[124] *See* 3 JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 14:4 (2d ed. 2012); *see also* Briffault, *supra* note 98, at 265.

[125] DWAGFYS Mfg., Inc. v. City of Topeka, 443 P.3d 1052, 1059 (Kan. 2019) (quoting Junction City v. Lee, 532 P.2d 1292, 1294 (Kan. 1975)). The Kansas Supreme Court treats the question of conflict with state law as separate from preemption, having disclaimed reliance on the

B. Hyper Preemption

All of what I have described up to now is what we might call "ordinary" preemption—a way to assess whether overlapping state and local regulations can coexist. In recent years, however, a more aggressive version of intrastate preemption has taken hold, particularly (though not exclusively) in Republican-controlled states.[126] Variously called "hyper preemption,"[127] "the new preemption,"[128] or "the preemption crisis,"[129] this trend has states deliberately and sweepingly displacing local regulatory authority and often imposing substantial consequences on localities or local officials in order to deter any action in the preempted area. Put differently, preemption increasingly "has come to be a means of controlling localities that are acting against the political wishes of state legislators."[130] This kind of preemption is prolific and increasing.[131] In fact, it is so pronounced that it is part of what led the National League of Cities to propose a whole new home rule framework to protect local prerogatives.[132]

This trend toward aggressive express preemption has affected many policy areas, including: minimum wages and paid sick and parental leave,[133] sharing and gig-

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doctrine of implied preemption. *Id.* at 1058–59. Kansas's home rule conflict analysis, however, appears virtually indistinguishable from implied conflict preemption as described in other states. *See, e.g.*, City of Corvallis v. Pi Kappa Phi, 428 P.3d 905, 910 (Or. Ct. App. 2018).

[126] Scharff, *supra* note 94, at 1483; Luke Fowler & Stephanie L. Witt, *State Preemption of Local Authority: Explaining Patterns of State Adoption of Preemption Measures*, 49 PUBLIUS 540 (2019) (examining 17 commonly preempted areas and concluding that Hawaii and New York preempted the fewest subjects while Florida, Tennessee, and Wisconsin preempted the most policies, and further identifying political culture, Republican legislative control, and whether states operated under Dillon's Rule or home rule as the factors that most strongly predicted preemption activity. However, this study used a debatable classification of which are the Dillon's Rule states.); DAVID SWINDELL, CARL STENBERG & JAMES SVARA, LOC. GOV'T RSCH. COLLABORATIVE, NAVIGATING THE WATERS BETWEEN LOCAL AUTONOMY AND STATE PREEMPTION 13–14 fig.2 (Oct. 2017) (finding that states with Republican trifectas (i.e., Republicans controlled of both houses of the legislature and the governorship) passed more than twice as much legislation regarding local powers as did Democratic trifecta states).

[127] Scharff, *supra* note 94, at 1473.

[128] Briffault, *supra* note 35, at1997.

[129] Morris, *supra* note 66, at 227–28; *see also* Gillette, *supra* note 104, at 2–3 (describing "penalty preemption").

[130] Bennington, *supra* note 34, at 94–95; *see also* BRIFFAULT ET AL., *supra* note 100, at 5; Riverstone-Newell, *supra* note 33, at 405.

[131] SWINDELL ET AL., *supra* note 126, at 7; Swan, *supra* note 33, at 1243–44; Riverstone-Newell, *supra* note 33, at 406.

[132] NAT'L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 17–18 (2020).

[133] Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 965–66 (2019); Phillips, *supra* note 33, at 2243–44.

economy businesses,[134] pesticides,[135] firearms,[136] hydraulic fracturing ("fracking"),[137] food labeling and other public health measures,[138] local "sanctuary" immigration policies,[139] antidiscrimination protections,[140] plastic bag taxes,[141] sprinkler regulation,[142] and even attempts to remove monuments or rename streets.[143] The adoption and enforcement of these laws is particularly prevalent on highly contentious and politicized issues like immigration and gun control.[144]

These laws often broadly displace local regulation from whole areas—sometimes to micromanage a particular issue (like who uses which bathrooms), and sometimes to "[prevent] any regulation at all."[145] Some such laws preempt several fields in the same legislation, broadly disempowering localities in one fell swoop.[146] Many, though not all, of these laws are strongly deregulatory.[147]

Some laws go even further, seeking to impose personal, civil, or criminal liability on public officials who adopt *or even espouse* preempted policies, or remove from office.[148] Other laws impose stiff fiscal penalties on the city for violating the state's

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[134] Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1172–73 (2018).

[135] *Id.* at 1173.

[136] Davidson, *supra* note 133, at 967.

[137] *Id.*

[138] *Id.* at 966–67; Parlow, *supra* note 99, at 54–56; *see also* MARK TRESKON & BENJAMIN DOCTER, URB. INST., PREEMPTION AND ITS IMPACT ON POLICY RESPONSES TO COVID-19 4–5 (2020) (noting instances of state preemption of local COVID policies).

[139] Davidson, *supra* note 133, at 964.

[140] *Id.* at 964–65.

[141] Swan, *supra* note 33, at 1243.

[142] *Id.*

[143] Briffault, *supra* note 35, at 2002.

[144] *See* Scharff, *supra* note 94, at 1519–20.

[145] Briffault, *supra* note 35, at 1997; Schragger, *supra* note 134, at 1182–83.

[146] Scharff, *supra* note 94, at 1475–76; Riverstone-Newell, *supra* note 33, at 412–33 (citing H.B. 722, 98th Gen. Assemb., Reg. Sess. (Mo. 2015)) (discussing Missouri's 2015 preemption law).

[147] *See* Briffault, *supra* note 35, at 2014.

[148] *See, e.g.*, KY. REV. STAT. ANN. § 65.870(1), (6) (West 2023) (imposing criminal liability for violating state firearm preemption law). *See generally* Scharff, *supra* note 94, at 1498–1502; Briffault, *supra* note 35, at 2002–08; Davidson, *supra* note 133, at 970; Schragger, *supra* note 134, at 1181–82.

view of the law.[149] Finally, some of the laws also limit the locality's ability to effectively challenge the preemption determination, further deterring local policy engagement.[150]

There are some legal defenses to such aggressive preemption laws; they have certainly been challenged, sometimes fairly successfully.[151] But often, these laws are a death knell for local ability to regulate or act in nonregulatory ways in whole areas of the law.[152] Kathleen Morris well described this as the "might-makes-right" approach to preemption.[153]

III. WHAT DOES LOCAL GOVERNMENT LAW MEAN FOR THE ABORTION FIGHT?

In 2020, Juliana Bennington wrote: "Intrastate preemption is a new front in the abortion rights battle."[154] She has never been more right.

It is worth noting again a central conceit—and limitation—of this Article: I focus on states where access to abortion is being largely determined as a matter of state statutory law. Other legal constraints could make this analysis inapplicable. For example, at some later date, protections for abortion rights or medical discretion might be found elsewhere in the federal Constitution;[155] indeed, some litigation has

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[149] *See, e.g.*, IOWA CODE § 27A.9 (2022) (denying state funds for localities that refuse to comply with state immigration law); ARIZ. REV. STAT. ANN. § 41-194.01 (2021), *invalidated in part by* City of Phoenix v. State, No. CV2021-012955, 2021 WL 7279673 (Ariz. Super. Ct. Nov. 3, 2021) (similar, for *any* preempted law). *See generally* Scharff, *supra* note 94, at 1474, 1495–1500; Phillips, *supra* note 33, at 2247–50.

[150] Scharff, *supra* note 94, at 1474–75; Phillips, *supra* note 33, at 2247–48, 2251–55.

[151] BRIFFAULT ET AL., *supra* note 100, at 10–17 (discussing the legal grounds under which localities have raised successful preemption challenges, including challenges on constitutional home rule, special legislation, procedural, and federal constitutional grounds); Riverstone-Newell, *supra* note 33, at 408–11 (discussing state preemption laws targeted at overturning and preempting local fracking regulations); Schragger, *supra* note 134, at 1216–26 (discussing the defenses available to cities in resisting preemption and anti-urban policymaking under federal and state law).

[152] *See. e.g.*, Protect Fayetteville v. City of Fayetteville, 565 S.W.3d 477, 480 (Ark. 2019) (dismissing challenge to preemption law without ruling on the validity of the statute). *See generally* Briffault, *supra* note 35; Bennington, *supra* note 34.

[153] Morris, *supra* note 66, at 256–58.

[154] Bennington, *supra* note 34, at 127.

[155] *See, e.g.*, *The Impact of the Supreme Court's* Dobbs *Decision on Abortion Rights and Access Across the United States: Hearing Before the H. Comm. on Oversight & Reform*, 117th Cong. 9–10 (2022) (statement of Michele Bratcher Goodwin, Professor of L., U.C. Irvine) (making Thirteenth and Fourteenth Amendment arguments); Chemerinsky & Goodwin, *supra* note 6, at 1211–13 (discussing equal protection); Kasdan & Kaufman, *supra* note 10 (making equal protection and a right-to-life based arguments); Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISCOURSE 160, 169–70 (2013); Reva B. Siegel,

already shifted in this direction.[156] There may also be preemptive federal legislation or regulation that supports abortion access, restricts it, or limits how states can regulate abortion.[157] Many state constitutions also have something to say about abortion: several have been found, or now amended, to include rights that protect access to abortion,[158] while several others explicitly do not.[159] Some state constitutions may eventually outright ban abortion. All of these possibilities are being amply discussed elsewhere.[160] It is the rest of the states, operating without such constraints, that I am

Gender and the United States Constitution: Equal Protection, Privacy, and Federalism, *in* THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 306, 323–28 (Beverley Baines & Ruth Rubio-Marin eds., 2005) (discussing the shifting bases for abortion right in prior cases); Reva Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. (forthcoming 2023) (manuscript at 1) (making the equality argument, and noting Justice Samuel Alito's rejection of it in drafting *Dobbs*); Caitlin E. Borgmann, *Abortion Exceptionalism and Undue Burden Preemption*, 71 WASH. & LEE L. REV. 1047, 1056–83 (2014) (cataloging non-*Roe* federal constitutional claims in abortion restriction challenges); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990).

[156] Women's rights groups in Ohio sued to invalidate the city of Lebanon's "sanctuary city for the unborn" abortion ban on May 11, 2022, arguing non-*Roe* related due process and free speech violations. *See* Complaint for Declaratory and Injunctive Relief at 27, Nat'l Ass'n of Soc. Workers v. City of Lebanon, No. 1:22-CV-00258 (S.D. Ohio dismissed May 11, 2022).

[157] *See, e.g.*, Ensuring Women's Right to Reproductive Freedom Act, H.R. 8297, 117th Cong.; Freedom to Travel for Health Care Act of 2022, S. 4504, 117th Cong. § 3(b); Alison Durkee, *House Passes Bill that Would Protect Travel Out of State for an Abortion—Here's How*, FORBES (July 15, 2022, 1:59 PM), https://www.forbes.com/sites/alisondurkee/2022/07/15/house-passes-bill-that-would-protect-travel-out-of-state-for-an-abortion-heres-how/?sh=38efe1822a5e. *See generally* Althouse, *supra* note 36; Anthony J. Bellia Jr., Response, *Federalism Doctrines and Abortion Cases: A Response to Professor Fallon*, 51 ST. LOUIS U. L.J. 767, 770, 778–90 (2007); Evan D. Bernick, *Vindicating Cassandra: A Comment on* Dobbs v. Jackson Women's Health Organization, CATO SUP. CT. REV. 2021–2022, at 227, 266. In a challenge to such a federal law, localities will line up on both sides, clothing their intrastate policy fight in the trappings of federalism. *See* Su, *supra* note 31, at 205–10.

[158] *See, e.g.*, Hodes & Nauser v. Schmidt, 440 P.3d 461, 466, 502–03 (Kan. 2019). By referendum, Michigan, Vermont, and California made these constitutional protections explicit in November 2022. *See Abortion on the Ballot*, *supra* note 19. Iowa courts had so held, but then opaquely reversed course in June 2022. Planned Parenthood of the Heartland, Inc. v. Reynolds *ex rel.* State, 975 N.W.2d 710 (Iowa 2022). Where a state constitution protects abortion rights, the state supreme court will set the standard for determining when and how localities can regulate abortion, in addition to the ordinary preemption analysis. *Cf.* Johnsen, *supra* note 7, at 42.

[159] *See, e.g.*, TENN. CONST. art. I, § 36; LA. CONST. art. I, § 20.1; W. VA. CONST. art. VI, § 57; ALA. CONST. art. I, § 36.06. *See generally* Michele Goodwin, *Abortion and the Law in America:* Roe v. Wade *to the Present by Mary Ziegler*, 19 PERSPS. ON POL. 998 (2021) (book review).

[160] *See, e.g.*, Cohen et al., *supra* note 23, at 32, 37–39; Johnsen, *supra* note 7, at 64–65 (cataloging mixed successes in state courts since *Casey*).

focused on. In these states, abortion access is governed by state statutes and regulations—leaving potential room for local action, too. Even under *Roe,* numerous state attorneys general were asked whether state law preempted local abortion regulations.[161] After *Dobbs*, substantial questions of access likely will be determined by just such preemption questions.

To date, some state courts and attorneys general have considered discrete preemption questions, and a few scholars have recognized how important these preemption questions are to practical abortion access, arguing that state preemption threatens local action that supports abortion access,[162] or that local abortion bans prove that localities should not be able to regulate abortion.[163] No one has yet looked systematically, however, at how the structure of state preemption law favors localities that want to restrict abortion, how that dynamic is likely to shape abortion preemption in the states, and the potential upsides and dangers of local abortion regulation. These are the central questions of this Part.

A. Clear-Policy States

Most state governments have fairly clear positions on whether and when abortion should be lawful. As of March 2023, 14 states had banned all abortions or abortions after six weeks (before many women know they are pregnant),[164] and

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[161] *See, e.g.*, Kan. Att'y Gen. Op. No. 90-107, 9 Kan. Reg. 1383 (Sept. 20, 1990) ("Cities may . . . exercise their police power by regulating the performance of abortions through ordinary ordinances since the legislature has not expressly pre-empted the field."); *accord* Kan. Att'y Gen. Op. No. 91-123, 10 Kan. Reg. 1509 (Oct. 17, 1991); Tex. Op. Att'y Gen. No. JM-819 (Oct. 27, 1987), 1987 Tex. AG LEXIS 29, at *14–15 (concluding that the hospital could choose not to provide certain abortions under state law); Va. Att'y Gen. Op. No. 07-029 (July 10, 2007), 2007 Va. AG LEXIS 42, at *9 (finding that the city council had the authority to "enact an ordinance regulating health and safety in abortion clinics"); Fla. Op. Att'y Gen. Op. No. 1985-73 (Sept. 9, 1985), 1985 Fla. AG LEXIS 32, at *8 ("[T]he state has preempted the field of regulating and licensing abortion clinics, and therefore, municipalities are not authorized to adopt an ordinance regulating (other than reasonable zoning ordinances) or banning such clinics."); N.Y. Op. Att'y Gen. (Inf.), 1979 Ops. of the Att'y Gen. 123 (Apr. 6, 1979) (noting that the state had preempted the field of abortion regulation); Me. Att'y Gen. Op. Letter to Gerald P. Conley, 1979 Me. Att'y Gen. Reps. & Ops. (May 18, 1979) ("[M]unicipal authority to enact ordinances appears very broad . . . [and] the limitations . . . do not presently operate to preclude ordinances [regulating abortion through parental consent, disposition of remains, and other restrictions]."); *see also* Ala. Att'y Gen. Op. No. 85-00275 (Inf.), 1999 Q. Rep. of Att'y Gen. (Apr. 1, 1985) (discussing ordinance in Mobile, Alabama, that required parental consent for abortions for minors). Of course, the law of abortion in many of these states has changed substantially since these opinions were issued.

[162] *See, e.g.*, Bennington, *supra* note 34, at 95.

[163] Brinkley, *supra* note 40, at 70.

[164] *Tracking the States Where Abortion Is Now Banned*, *supra* note 9.

seven more have near-total bans that are tied up in court.[165] Most of the remaining 29 states and the District of Columbia have laws that explicitly protect abortion rights at various points in a pregnancy.[166]

Given the salience of abortion, states with clear abortion policy and the governing power to enforce it will be tempted to preempt local government action, or at least uncooperative local action. If states do opt for preemption, it seems likely to stick. While challenges are possible, especially in the strongest home rule states, their overall prospects are dim.[167] This is especially likely because a court could easily find both a valid local interest in regulations concerning health and safety, as well as a valid statewide policy interest in abortion.[168] But the need to engage in express preemption—and more specifically, the risk of not doing so—is not the same for the anti-abortion and abortion-rights states, because of the structure of preemption law.

Say there is no express preemption of local abortion regulation in State A. If a local abortion ordinance is challenged on preemption grounds, the challenge would come down to implied preemption—field or conflict preemption. A court might conclude that State A's regulation of abortion and the practice of medicine is so comprehensive that it occupies the field, as the New York Court of Appeals concluded in 1972, or the Florida Attorney General opined in 1985.[169] If it finds field preemption, the court is likely to equally preempt direct local regulation of abortion, whether it expands or restricts access.[170]

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[165] *Id;* Mazzei et al., *supra* note 9.

[166] *Tracking the States Where Abortion Is Now Banned*, *supra* note 9.

[167] Bennington, *supra* note 34, at 108–16, 126–27 (canvassing potential state-law arguments for local governments to make in resisting state preemption of local abortion policy—including a lack of conflict or express preemption, that the state law is an improper special law, or that local policy is protected by home rule powers or tradition—and finding the prospects generally dim, but variable by state). *See generally* Scharff, *supra* note 94, at 1495–1517 (discussing the processes of challenging local hyper-preemptive state statutes and their limited prospects).

[168] *See* Bennington, *supra* note 34, at 120–26 (describing the approaches courts may employ in deciding mixed questions of state and local interest, and how that relates to local action regarding abortion).

[169] Robin v. Inc. Vill. of Hempstead, 285 N.E.2d 285, 286–87 (N.Y. 1972); Fla. Att'y Gen. Op. No. 85-73, 1985 Fla. Att'y Gen. Ann. Rep. 205, 206 (Sept. 9, 1985); *see also* Framingham Clinic, Inc. v. Bd. of Selectmen, 367 N.E.2d 606, 612–13 (Mass. 1977) (Hennessey, C.J, concurring) (disclaiming the majority's *Roe*-based rationale for invalidating a local bylaw amendment, and instead relying on the argument that a local anti-abortion zoning restriction conflicted with state law that controlled the location of health care facilities).

[170] *Cf.* Wholesale Laundry Bd. of Trade, Inc. v. City of New York, 234 N.Y.S.2d 862, 865 (Sup. Ct. 1962), *aff'd*, 189 N.E.2d 623 (N.Y. 1963) (holding that a local minimum wage law that was higher than the state's minimum wage was preempted).

But the court might not find field preemption, as the Maine Attorney General opined in 1979,[171] or the Kansas Attorney General concluded before the state constitution was held to protect abortion rights.[172] If the field is not preempted, the challenge becomes one of conflict, and the question is whether a municipality may go further than state law. As discussed above, the law of conflict preemption is inconsistent and unpredictable, not only across states, but also within them. Generally, though, where a state has regulated in an area, if local regulation of that issue *is* allowed, it is because the local regulation is more restrictive than the state law. This general pro-regulatory slant operates to favor stricter abortion regulation. It would thus favor localities that wish to restrict abortion access more than State A law does over those localities that would (if they could) expand abortion access beyond the limits of State A law. Anti-abortion localities will have that advantage unless and until State A law dictates either no room for local action at all, or expressly makes room for local action.

If instead State A does explicitly preempt local abortion law, it has a much greater chance of tailoring local action to match its own preferences. Therefore, although cities are not exactly powerless in state lawmaking,[173] State A's temptation to override local preferences will be strong, especially if, as described below, State A is pro-choice.

Note that, in talking about the policy preferences of states, I mean state governments: the combination of legislative and executive power as exercised by state institutions. Except perhaps in states with robust direct democracy,[174] "state" preferences may be quite distinct from the policy preferences of state *residents*. This is especially so in heavily gerrymandered states, as "gerrymandered legislatures lead to legislation that does not accurately represent public views."[175] Neither side of the

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[171] Me. Att'y Gen. Op. Letter to Gerald P. Conley, 1979 Me. Att'y Gen. Reps. & Ops. (May 18, 1979).

[172] Kan. Att'y Gen. Op. No. 90-107, 9 Kan. Reg. 1383 (Sept. 20, 1990). Kansas's state constitution was held to protect abortion rights in 2019. Hodes & Nauser v. Schmidt, 440 P.3d 461, 502–03 (Kan. 2019)).

[173] *See generally* Rodriguez, *supra* note 106, at 654, 659.

[174] Direct democracy has been used to circumvent or mitigate gerrymandered lawmaking on abortion at the state level in the last few years. *See supra* notes 18–20 and accompanying text. However, it also bears noting that local referenda have repeatedly been invoked recently to *restrict* abortion access at the local level. *See supra* note 65.

[175] Diller, *supra* note 94, at 381. Given dismal local electoral participation and how uncompetitive many city council elections are relative to those for citywide office, one might also question how well *local* governments represent local preferences. *See* David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 419–27, 438–45, 463 (2007) (identifying this issue and questioning whether decentralization will improve democratic representation). It is difficult to assess these potential skews against one another, however, particularly in light of the changing partisan dynamics of local politics.

political aisle has an exclusive claim to gerrymandering. Empirically, though, "in recent decades . . . intentional partisan gerrymandering favors Republicans," which in light of the heavy urban–rural sorting of the major political parties, "exacerbates the pre-existing anti-urban bias inherent in" the structure of many state legislatures.[176] It is not surprising, then, that many of the states that are the most heavily gerrymandered to the political right also have been "very active" in preempting local laws—especially those of their big cities.[177] Since urban populations tend to be significantly more diverse and less white than rural residents, this preemptive activity has an undeniable racial dimension as well.[178]

Also, in considering the policies adopted by states, I necessarily over-simplify when I describe states as pro-choice (or abortion-rights) or anti-abortion. Most states, after all, allow abortion in some form, in some circumstances, but also set a (widely varying) gestational limit and impose other limits. Although little turns on the precise categorization of any given state for the broad purposes of this analysis, I roughly group states into "anti-abortion," "abortion-rights," and "gray-area" states. Although these are not intended to be strict categories, we might roughly call states "anti-abortion" if they ban nearly all abortions or impose a gestational limit of 6 weeks. As of April 2023, there were 14 such states (with at least seven more that might join them, subject to litigation).[179] Similarly, we might view states as relatively abortion-rights minded (or pro-choice) if their laws affirmatively protect access to abortion and/or impose a gestational limit that is at or later than viability or 24 weeks. As of April 2023, there were 24 such states.[180] States whose laws are actively in flux (but not because of a recent stringent law that has been enjoined), or whose limitations fall between those two categories, I characterize as gray-area states. These might include North Carolina and Nebraska,[181] though of course facts, law, and political circumstances on the ground are changing rapidly. Gestational limits are not the only state-imposed limits on access to abortion, of course; for example, rules about whether and when state funding or public employee insurance coverage can

[176] Diller, *supra* note 94, at 381; Morris, *supra* note 66, at 234–35; Davidson, *supra* note 133, at 964 ("Following the 2010 census, many state legislative districts were redistricted in ways that locked in partisan advantages—mostly in states with conservative legislatures—further distancing state legislatures from the median state voter as well as from increasingly progressive cities in many states."); Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 136–44 (2017).

[177] Diller, *supra* note 94, at 368. These are not the only explanations for this trend. *See, e.g.*, Riverstone-Newell, *supra* note 33, at 405–06 (noting the impact of concerted lobbying by industry groups on preemption of progressive local policy).

[178] *See* Morris, *supra* note 66, at 233–34.

[179] *Tracking the States Where Abortion Is Now Banned*, *supra* note 9; Mazzei et al., *supra* note 9.

[180] *Tracking the States Where Abortion Is Now Banned*, *supra* note 9.

[181] For the states I classify as anti-abortion, see supra note 179 and accompanying text. *See also Tracking the States Where Abortion Is Now Banned*, *supra* note 9.

be used to provide abortion care also dramatically impact access, and even some states I described above as abortion-rights-minded have some such limitations in place. State policy preferences are, in this regard, a multi-polar spectrum.

1. Anti-Abortion States

Anti-abortion states tend to be conservative and have Republican-controlled governments.[182] It is perhaps not surprising, then, that they overlap with states that have already been actively preempting local policies. Indeed, some states have already preempted municipal regulation of issues related to reproductive health,[183] such as local regulations of crisis pregnancy centers and their practices,[184] ordinances requiring insurance coverage for abortion care,[185] ordinances that prohibit employment or housing discrimination on the basis of reproductive health decisions, and restrictions on the use of any local funds to provide abortion care or support abortion providers.[186] If salient and polarizing issues tend to be what elicit punitive preemption, we should expect that a local policy resisting its state's anti-abortion stance will be met with painful preemption. In the most extreme case, this could take the form of the kind of "nuclear," home-rule-stripping preemption that states like Texas and Florida have already threatened.[187]

But even without express preemption, states with tight restrictions on abortion access face little risk that a local policy can really upend the state's policy aims. Few people would likely argue, particularly in legislative home rule states, that a locality could authorize abortion that is prohibited by state law (for example by extending the gestational limit). Local governments could take steps to undermine *enforcement* of the state policy; for example, a local police chief could decline to allocate resources to enforcing abortion laws (perhaps at the request of the city council),[188] or the city might give money to outside organizations that pay for abortion-related logistics, if

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[182] *See* Mary Ziegler, *The End of* Roe v. Wade, 22 AM. J. BIOETHICS, no. 8, 2022, at 16, 17 (2022) (noting that "the states most closely aligned with the antiabortion movement tend to be the most conservative . . . .").

[183] *See* Bennington, *supra* note 34, at 97 (noting the "particular history of intrastate preemption in the public health arena and a growing prevalence of intrastate preemption in the reproductive rights context").

[184] *See, e.g.*, MO. REV. STAT. § 188.125(2) (2022). This law took effect despite Missouri being one of the stronger home rule states. *See* Bennington, *supra* note 34, at 107–10.

[185] *See, e.g.*, § 188.125(6).

[186] Bennington, *supra* note 34, at 107; Arya Sundaram, *Texas House Advances Bill Banning Cities from Partnering with Planned Parenthood on Any Services*, TEX. TRIB. (May 17, 2019, 9:00 PM), https://www.texastribune.org/2019/05/17/texas-abortion-bill-prevents-cities-partnering-planned-parenthood/.

[187] *See* S.B. 343, 84th Reg. Sess. (Tex. 2015); S.B. 1158, 2017 Reg. Sess. (Fla. 2017); *see also* Scharff, *supra* note 94, at 1502–04 (discussing recent bills proposing "blanket preemption" statutes).

[188] For examples of localities that have recently taken such an approach, see *infra* note 306.

not actual abortions.[189] Further, local district attorneys might refuse to prosecute such cases;[190] however, prosecutors are often in some sense both local and state officials, embedded as they are in the state justice system and with widely varying selection and oversight structures, as evidenced by recent state efforts to discipline or replace prosecutors disinclined to enforce abortion bans.[191]

Such efforts might facilitate individual noncompliance with the state's anti-abortion stance, but they do not substantively rewrite or formally negate the state law, or protect anyone from being penalized by other authorities. Phrased as a matter of local powers, cities and other local officials might be able to use enforcement discretion, spending powers, or government speech to try to limit the impact of state law on local residents, but cannot rely on police powers to substantively change abortion law.[192] Thus, while localities that wish to liberalize abortion access relative to their states' abortion policy are not powerless, they are left with more indirect methods to express and achieve that policy end.

On the other hand, some localities in anti-abortion states will want to restrict abortion even further than their states do. If the state civilly prohibits providing abortions, for example, a county might use its police powers to criminalize it or add liability for the pregnant person. It is not clear that an abortion-restrictive state would want to prohibit this kind of local law; if the state government's constituency is anti-abortion, there may be little cost in allowing further bans. Thus, the state might opt to not preempt these particular local actions, while still restricting the pro-choice cities.

Texas has done precisely this. Texas's 2019 Senate Bill 22, which precluded local governments from contracting with any entity that provides abortions or whose affiliates provide abortions, provides that "[t]his chapter may not be construed to restrict a municipality or county from prohibiting abortion."[193] Similarly,

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[189] *See, e.g.*, Stacy Fernández, *Texas Told Cities They Couldn't Fund Abortion Providers. So Austin Is Funding Abortion Access Instead*, TEX. TRIB., https://www.texastribune.org/2019/09/11/austin-texas-passes-abortion-access-funding-going-around-senate-bill-2/ (Sept. 12, 2019).

[190] *See, e.g.*, Eleanor Klibanoff, *If* Roe v. Wade *Is Overturned, Texas District Attorney Offices Would Become a New Battleground*, TEX. TRIB. (Apr. 21, 2022, 5:00 AM), https://www.texastribune.org/2022/04/21/abortion-texas-lizelle-herrera-prosecutors/ (noting that five Texas District Attorneys had publicly declared that they would not pursue criminal charges for abortion); Bernstein & Sokoloff-Rubin, *supra* note 24.

[191] *See, e.g.*, Fla. Exec. Order No. 22-176 (Exec. Ord. of Suspension), 2022 Bill Text FL E.O. 176 (Aug. 4, 2022); S.B. 8, 112th Gen. Assemb., 3d Extraordinary Sess. (Tenn. 2021), 2021 Tenn. Pub. Acts ch. 5, § 1.

[192] Morris, *supra* note 66, at 243–52 ("Local regulatory acts are more likely to directly disrupt state policy goals than . . . non-regulatory acts," such as enforcement, spending, or contracting powers).

[193] S.B. 22, 86th Leg., Reg. Sess. § 1 (Tex. 2019); Act of June 7, 2019, 2019 Tex. Gen. Laws ch. 501 (codified as amended at TEX. GOV'T CODE ANN. § 2272.003 (West 2021)).

in its 2021 Senate Bill 8 ("SB 8"), Texas declared that *no* statute should be "construed to restrict a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as the laws of this state unless the statute explicitly states [as much]."[194] The Texas Solicitor General cited this latter provision in federal court to argue that the abortion ban in Lubbock, Texas, was not preempted by Texas law.[195] Other states, including Arizona, Alabama, West Virginia, Florida, Ohio and Missouri, have introduced bills that contain the similar provisions (alongside strict substantive restrictions on abortion care).[196]

Pro-choice cities in anti-abortion states may thus face very punitive preemption, even if it isn't terribly necessary to the state's policy goals. And perhaps surprisingly, abortion-rights advocates in these states may find themselves fighting an uphill battle *seeking* complete state preemption of the field of abortion, just to head off a one-way ratchet favoring the most punitive local laws.

2. Abortion-Rights States

Democrat-led states have tended to be less aggressive in preempting local policy, but abortion-rights states will have a particularly strong incentive to preempt local *abortion* policy. These states' laws authorize abortion, though all impose some limits, such as gestational limits or restrictions on who can perform the procedures and under what circumstances.[197] When the structure of implied preemption doctrine favors abortion-restrictive localities, however, that tilt is at odds with the policy preferences of the abortion-rights states.

As in anti-abortion states, a locality wishing to broaden abortion access would likely be preempted from authorizing abortions that state law would prohibit. Instead, even if these localities believe the state's law is too restrictive, they must rely on other, less direct local policy tools to practically support abortion access. These tools include providing abortions at public hospitals, funding abortion care or logistics, or leasing public land to abortion providers.[198] They might also include police power regulation—but regulation of private interference with a person's choice

[194] S.B. 8, 87th Leg., Reg. Sess. § 3 (Tex. 2021) (enacted); Texas Heartbeat Act, sec. 5, § 311.036(b), 2021 Tex. Gen. Laws ch. 62 (codified as amended at TEX. GOV'T CODE ANN. § 311.036(b) (West 2021)).

[195] Attorney General Letter to the Court at 1, Planned Parenthood of Greater Tex. Surgical Health Servs. v. City of Lubbock, 542 F. Supp. 465 (N.D. Tex. 2021) (No. 5:21-CV-114).

[196] Fetal Heartbeat Act, H.B. 4049, 2022 Leg., Reg. Sess. (W. Va. 2022); Florida Heartbeat Act, H.B. 167, 2022 Leg., Reg. Sess. (Fla. 2022); H.B. 480, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); H.B. 2483, 55th Leg., 2d Reg. Sess. (Ariz. 2022); Alabama Heartbeat Act, H.B. 295, 2022 Leg., Reg. Sess. (Ala. 2022); H.B. 1987, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

[197] Burman, *supra* note 42, at 2047.

[198] Sarah Holder, *Cities Mobilize for* Roe *Reversal by Strengthening Abortion Safe Havens*, BLOOMBERG NEWS (May 5, 2022, 4:30 AM), https://www.bloomberg.com/news/articles/2022-05-05/what-cities-are-doing-to-prepare-for-scotus-roe-reversal; Arielle Swernoff, *Memo: How Blue*

to access abortion care (such as by regulating clinic protest,[199] or prohibiting discrimination against people who have had abortions), rather than regulation that changes what abortions are legally available.[200]

Again here, an anti-abortion locality might seek to directly regulate abortion access—narrowing availability through criminal or civil limitations, facility requirements, or zoning restrictions. If state abortion law does not expressly describe its relationship to local laws, a court might find that state abortion regulation constitutes a floor above which localities are free to regulate further, at least up to the point that the local rules pose a major obstacle to the state law's goals.[201] In this way, localities with a policy agenda counter to the state's may have somewhat more room to use police powers to directly regulate abortion access, in addition to leveraging local spending, public hospital policy, speech, and the like. It may be surprising, then, that some explicitly pro-choice states do not clearly address preemption in their abortion statutes.[202] These states face a greater risk that a local law in tension with state abortion-access goals could be allowed to take effect.

Of course, if a locality adopted such a limiting ordinance, advocates or the state could argue that the state had occupied the field or that the local law impermissibly undermined the state's intent to protect abortion access. Such arguments might well prevail (and often should). But they would have to be litigated, with all the accom-

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States and Cities Can Expand Abortion Access, DATA FOR PROGRESS (Dec. 7, 2021), https://www.dataforprogress.org/memos/2021/12/7/how-blue-states-and-cities-can-expand-abortion-access.

[199] Holder, *supra* note 198; Swernoff, *supra* note 198.

[200] This is not to say that such local efforts are not useful; indeed, they are critical to reducing abortion stigma and practical hurdles to abortion access. I merely note that the *kinds* of regulation that pro-choice and anti-abortion localities can use to express their policy positions will be different.

[201] One might argue that any restriction should be considered an obstacle to state law in this context. A court might agree; however, it bears noting both that such arguments are frequently made in preemption litigation and only sometimes succeed, and that anti-abortion policies have been increasingly couched as being for the protection of the pregnant woman, not just the fetus, which may complicate the analysis. *See* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1642–43, 1646–67 (2008).

[202] *See, e.g.*, CONN. GEN. STAT. § 19a-602 (2021); HAW. REV. STAT. § 453-16 (2022); ME. STAT. tit. 22, § 1598 (2023); MD. CODE ANN., HEATH–GEN. § 20-209 (LexisNexis 2022); NEV. REV. STAT. § 442.250 (2021). Some of these statutes provide that "the state" may not interfere with the right to choose abortion; these likely cover localities, but could be clearer. *See, e.g.*, HAW. REV. STAT. § 453-16(c) (2022); MD. CODE ANN., HEATH–GEN. § 20-209(b) (LexisNexis 2022); *see also* MD. CODE ANN., GEN. PROVISIONS § 1-115(b) (LexisNexis 2022); MD. CODE ANN., HEATH–GEN. § 1-101(l) (LexisNexis 2022) (defining "state" in a way that does not include municipalities); ME. STAT. tit. 1, §§ 7, 72(21) (2023) (defining "state" without referring to municipalities, but providing that the state is "divided into counties, districts, towns, plantations and unorganized territory").

panying risks and costs, and the outcome may depend on the vagaries of state conflict preemption doctrine. Moreover, as Nestor Davidson recently observed, "there is certainly reason to be skeptical that, to the extent that city/state conflicts in the current environment reflect partisan polarization, state courts are necessarily … immune from those currents, especially given that many states have elected judiciaries."[203] Even apart from polarization, it is difficult even for judges to extract their views on the merits fully from a structural analysis like preemption.[204] If they are attending to the issue, therefore, the incentive will be strong for abortion-rights-minded state legislators and advocates to expressly preempt local abortion policy.

If they do preempt, they might try a tailored approach, like New Jersey's 2022 Freedom of Reproductive Choice Act, which provides:

> Any law, rule, regulation, ordinance, or order . . . that is determined to have the effect of limiting the [state] constitutional right to freedom of reproductive choice and that does not conform with the provisions and the express or implied purposes of this act, shall be deemed invalid and shall have no force or effect.[205]

Laws in some other states similarly prohibit government restrictions on abortion access. Washington provides that "[t]he state may not deny or interfere with a pregnant individual's right to choose to have an abortion prior to viability of the fetus, or to protect the pregnant individual's life or health," defining "state" to include municipalities.[206] California's law has similar provisions, and the state recently constitutionalized the protections by referendum.[207] Colorado's law provides that localities may not "[d]eny, restrict, interfere with, or discriminate against" a person's exercise of their fundamental right to reproductive choice "in the regulation or provision of benefits, facilities, services, or information," noting that its law may not "be construed to authorize a public entity [including a local government] to burden

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[203] Davidson, *supra* note 133, at 998; *see also* Johnsen, *supra* note 7, at 46–47, 78–80.

[204] Nestor M. Davidson, *Vertical Learning: On Baker and Rodriguez's "Constitutional Home Rule and Judicial Scrutiny,"* 86 DENV. U. L. REV. 1425, 1430 (2009).

[205] N.J. STAT. ANN. § 10:7-2 (West 2022). These statutes create primarily negative rights—rights against state interference—and not guarantees of abortion access. Full discussion of that impact exceeds the scope of this Article, but relates back to broader conceptions of reproductive justice. *See* West, *supra* note 7, at 1431–32.

[206] WASH. REV. CODE § 9.02.110 (2022); WASH. REV. CODE § 9.02.170(8) (2022) (as affirmed by Act of Mar. 17, 2022, 2022 Wash. Sess. Laws 441). The recent amendment to the law also prohibits penalizing someone for their pregnancy outcome, or for helping a pregnant person exercise their reproductive rights. Act of Mar. 17, 2022, 2022 Wash. Sess. Laws 441, 443 (codified as amended at WASH. REV. CODE § 9.02.120 (2022)).

[207] CAL. HEALTH & SAFETY CODE §§ 123464(c), 123466 (West 2022); Senate Constitutional Amendment No. 10, 2022 Cal. Stat. ch. 97 (codified as CAL. CONST. art. I, § 1.1. (2022)). *See generally* LEGIS. ANALYST'S OFF., PROPOSITION 1: CONSTITUTIONAL RIGHT TO REPRODUCTIVE FREEDOM. LEGISLATIVE CONSTITUTIONAL AMENDMENT (Cal. 2022).

an individual's fundamental rights relating to reproductive health care."[208] Vermont and Michigan's new constitutional provisions are a bit more precise than New Jersey's law, requiring abortion denials, burdens, and/or restrictions to be justified by "a compelling State interest achieved by the least restrictive means."[209]

These laws clearly curtail some local anti-abortion action, shaping the space for local action to favor the state's own policy preferences. But preemption to *preserve* a right rather than allow further restriction is more complicated, as these laws show. What kind of state action denies or limits a person's right to choose? Does the application of a facially abortion-neutral law count? Can a small locality exclude abortion from its borders, so long as abortion care is available nearby?[210] These questions are far from impossible to resolve, but they recall the uncertainties of constitutional abortion litigation under *Roe* and then *Casey* and the varying interpretations of strict scrutiny. Necessary though this kind of broad language may be, wherever there is play in the joints of preemption law, there is room for local policy dissent.

A particularly determined state, or one with particularly recalcitrant localities, might try to prohibit *any* local regulation that affects abortion access at all. This, too, creates problems of interpretation. For example, do abortion providers get a pass from otherwise-applicable licensing and zoning laws? Moreover, it is very hard to eliminate municipal abortion-related action altogether, as the variety of local anti-abortion activity listed in Part II makes clear. Some abortion-rights states may eventually go in search of a "bigger stick," and find themselves in the unfamiliar position of resorting to punitive preemption like their more conservative counterparts.

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[208] COLO. REV. STAT. §§ 25-6-404(1)(a) to -405(2) (2023); *id.* § 24-10-103(5) (defining "public entity" broadly to include "any county, city and county, municipality . . . and every other kind of district, agency, instrumentality, or political subdivision thereof"). Connecticut preempted using public resources to help another state impose criminal or civil liability for abortion seekers, providers, or helpers. CONN. GEN. STAT. § 54-155a (2023).

[209] PR. 5, 2019–2020 Leg., Reg. Sess. (Vt. 2019) (codified as VT. CONST. ch. I, art. 22); MICH. CONST. art. I, § 28(1) (added pursuant to Prop. 22-3, approved Nov. 8, 2022).

[210] *See generally* Sarah L. Swan, *Constitutional Off-Loading at the City Limits*, 135 HARV. L. REV. 831 (2022). *Cf.* P.L.S. Partners v. City of Cranston, 696 F. Supp. 788, 796 (D.R.I. 1988) (in a federal constitutional analysis, noting that "[i]t simply does not do to say . . . that rights are not burdened if they may be exercised elsewhere"); *accord* Framingham Clinic, Inc. v. Bd. of Selectmen, 367 N.E.2d 606, 611 (Mass. 1977); *see also* Meyer, *supra* note 42, at 368 (arguing that "no significant interference occurs if a city excludes abortion clinics from one area of town, but permits them to operate a few blocks away," but noting contrary case law).

Indeed, this has arguably already begun. At least partly in response to the local abortion bans adopted in Hobbs and Clovis,[211] New Mexico adopted the Reproductive and Gender-Affirming Health Care Freedom Act in March 2023.[212] The Act prohibits local governments from discriminating on the basis of reproductive health care decisions and bars them from "directly or indirectly, deny[ing], restrict[ing] or interfere[ing] with a person's ability to access or provide reproductive health care," including abortion care.[213] The final law also authorizes the Attorney General, district attorneys, and private citizens to litigate and seek civil penalties against localities that violate the act, and private litigants may also seek punitive damages.[214] As finally adopted, the Act is more restrained than some punitive preemption laws discussed above; as originally introduced, however, it authorized the state to seek punititve damages from localities and appeared to allow enforcement actions to be brought against individuals.[215]

In sum, in states that have a clearly articulated a policy preference on abortion access and have the state-level political will to enforce that preference, politicians and advocates will have strong incentives to pursue express preemption. I do not argue that preemption in this area (or any area) should only be possible through express preemption. Some have made that case,[216] and others have raised reasonable critiques.[217] Instead, I merely point out that devolving control of abortion regulation to the states makes express preemption (or at least express partial preemption) especially likely, as states as diverse as Texas and New Jersey have shown. Abortion-rights advocates in particular, considering what local policy engagement should look like in the post-*Roe* world,[218] must be prepared to closely monitor and actively engage on the issue of express preemption as state regulation of abortion care continues to evolve, lest they find themselves at the wrong end of a one-way preemption ratchet.

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[211] *See* Caitlin Dewey, *Activists Aim for Supreme Court With Local Abortion Bans in Blue States*, STATELINE (Feb. 27, 2023) https://stateline.org/2023/02/27/activists-aim-for-supreme-court-with-local-abortion-bans-in-blue-states/.

[212] Press Release, Michelle Lujan Grisham, Governor, State of New Mexico, Governor Signs House Bill 7, Reproductive and Gender-Affirming Health Care Act (Mar. 16, 2023), https://www.governor.state.nm.us/2023/03/16/governor-signs-house-bill-7-reproductive-and-gender-affirming-health-care-act/.

[213] Reproductive and Gender-Affirming Health Care Freedom Act, H.B. 7, 56th Leg., Reg. Sess. §§ 1–3 (N.M. 2023) (enacted).

[214] *Id.* §§ 4–5.

[215] *Compare id.* §§ 4–5 (as introduced on Jan. 25, 2023), *with id.* §§ 4–5 (enacted).

[216] *See, e.g.*, Briffault, *supra* note 98, at 264–65; NAT'L LEAGUE OF CITIES, *supra* note 132, 53–61.

[217] *See, e.g.*, Diller, *supra* note 93, at 1158–68.

[218] Bernstein & Sokoloff-Rubin, *supra* note 24.

B. Gray-Area States

Not all states, however, have clear laws reflecting the states' current political commitment on abortion. Here, the law governing abortion post-*Dobbs* may be unclear or conflicting—for example, there may be state medical practice standards governing abortion care, state policies providing some access, and also a pre-*Roe* broad abortion ban that was never repealed.[219] In states with unclear or mixed laws, harmonization is needed,[220] and the state legislature, courts, or both are being called on to provide it. Some of these states have municipalities on both sides of the abortion debate. Until now, intrastate disputes about abortion policy could be channeled into disputes about, *inter alia*, the federal Constitution. Now, those disputes will come to rest squarely on state and local law.

Of course, in these states, both sides will lobby and litigate hard for state-level adoption of their own preferred outcome. But unless and until such outcomes are settled, states without a comprehensive regulatory scheme for abortion are at particular risk of a court finding that there is room for local regulation, too. As described above, this pro-regulatory tilt in intrastate preemption doctrine favors localities that seek to restrict abortion access more than state law does (at least up to the point the court thinks the local law will frustrate state law). Anti-abortion localities have more room to use their police power to substantively edit the lawfulness of abortion, while cities that *would* want to liberalize abortion access beyond what the state allows must rely on more indirect policy tools like speech and spending.

Thus, just as in the clear-policy states, abortion-rights advocates in gray-area states have particular reason to invest in clearly defining the role that localities can play in regulating access to abortion. They might follow examples like New Jersey and Texas that try to only allow local action that tracks the state's policy preferences. But what if state law was shaped the other way—in *favor* of broad local regulatory powers and thus, local variation?

I pause to make explicit some of my own normative reservations. The idea of localities determining access to abortion is unsettling. For those like myself who favor abortion rights, the idea of having a pregnant person's chance at equality and right to bodily autonomy go from constitutionally protected one day to contestable at every county line the next is deeply troubling. Particularly in the context of local majorities stripping away what were until very recently constitutionally protected rights, disproportionately relied on by systemically disadvantaged individuals, I find it hard to cheer for unchecked local majoritarianism. It evokes the concerns about

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[219] Fallon, *supra* note 22, at 612, 614–16.

[220] *See* Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 902–03 (1993) (describing as ambiguous any state that "regulates abortion to some degree but does not expressly declare in the remaining cases whether the failure to regulate rests on a right to choose," or states that are merely indifferent or have failed to regulate).

the tyranny of the majority that have echoed from the founding to the present day, and longstanding critiques of federalism and (especially) localism as facilitating parochialism and bigotry.[221]

But as a nation, "we adopt a decentralized solution only when our national norm is to tolerate shortfalls."[222] And a decentralized solution is precisely what the Court mandated in *Dobbs*. The bare fact is that, absent federal constitutional protection, these rights *are* at the will of the electorate—whether it is a state constitutional referendum or a local city council vote. They will vary, even more dramatically than they do now, at the border lines; the only question is *which* borders.

1. The Case for Abortion Localism

With that in mind, let us consider what it would look like to defer broad regulatory authority over abortion to the local level (what I will call "abortion localism"). It could happen in several ways, but at bottom, it would require state law to make explicit space for some localities to ensure broad abortion access within their jurisdictions, and for others to substantially restrict or prohibit it. There is precedent for this approach. Many states have express "local option" laws that allow for a jurisdiction to determine whether, when, and how alcohol may be sold within the jurisdiction.[223] (Indeed, alcohol, like abortion, has gone from state and local regulation to a federal constitutional standard, and then back to express state/local control.[224]) Moreover, some states' adult-use cannabis legislation tracks similar lines; for example, a state may legalize cannabis sales for adult recreational use, but allow localities to partially "opt out" by prohibiting marijuana dispensaries within their borders.[225] Some states appear to allow localities to opt out of having even medical

[221] *See, e.g.*, Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV 346, 435–47 (1990).

[222] Heather K. Gerken, *Distinguished Scholar in Residence Lecture: A User's Guide to Progressive Federalism*, 45 HOFSTRA L. REV. 1087, 1095 (2017).

[223] *See, e.g.*, TEX. ALCO. BEV. CODE ANN. § 251.725 (West 2021); *see also* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 453 (1992) ("The [reversal of *Roe*] would leave a state-by-state patchwork quilt of reproductive autonomy, if not, as in the regulation of alcohol before and after Prohibition, a pattern in which regulations differ from county to county.").

[224] *See* Guido Calabresi & Eric S. Fish, *Federalism and Moral Disagreement*, 101 MINN. L. REV. 1, 21–22 (2016) (recounting the history of alcohol regulation).

[225] *See, e.g.*, N.Y. CANNABIS LAW § 131 (McKinney 2022); ME. STAT. tit. 28-B, § 402 (2022). *See generally* Joseph T. Kelley III & Jason Klein, *Get on the Ban Wagon: Local Cannabis Opt Outs*, N.J. LAW., Oct. 2018, at 44, 44–47; Robert A. Mikos, *Marijuana Localism*, 65 CASE W. RSRV. L. REV. 719, 722–23, 765–66 (2015) (noting that as of 2015, "[m]ost marijuana legalization states have simply failed to address local authority when crafting their marijuana laws," leaving the issue to be resolved by litigation).

cannabis grown, processed, or distributed in their jurisdictions.[226] Analogously, a state might set a default that allows abortion, but allows individual jurisdictions to further limit or even prohibit it locally.[227]

Why would a state consider creating a space for opposing local abortion policies? For some of the same reasons we think about decentralizing other decisions, many of which parallel the federalism literature.[228] For some other reasons, too, that are more particular to the abortion context (and particularly appealing for abortion-rights advocates). Before *Dobbs*, this question —of any upside to subnational variation in abortion policy—might have been viewed as too rosy, or as undermining *Roe*.[229] Now, however, it is a necessary part of clear-eyed choices about abortion law as it will be lived by Americans going forward.

a. Decentralization as Conflict Management

First, states may use decentralization as a strategy to diffuse or manage conflict and make it possible for deeply opposed ideologies to coexist in the broader pluralist society.[230] State officials might take this approach as a considered strategy to devolve

[226] *See, e.g.*, MISS. CODE ANN. § 41-137-57(1) (2022); *see* Slates C. Veazey, Erin D. Saltaformaggio, Jason Fortenberry & Elizabeth M. Boone, *Assessing the Playing Field After Mississippi's Medical Cannabis Opt-Out Deadline Expires*, NAT'L L. REV. (May 5, 2022), https://www.natlawreview.com/article/assessing-playing-field-after-mississippi-s-medical-cannabis-opt-out-deadline; Kelley & Klein, *supra* note 225, at 46 (discussing Michigan law).

[227] Alternatively, the state could prohibit abortion except where a locality authorizes it. This default is important—statewide access outcomes would be very different depending on whether prohibition or authorization required proactive local action. *Cf.* Kelley & Klein, *supra* note 225, at 46 (noting that Michigan's opt-in structure for medical marijuana had produced limited participation). Either way, however, the idea is the same: to deliberately make space for local determination of access to abortion.

[228] Phillips, *supra* note 33, at 2238–39; *see also* Rodriguez, *supra* note 106, at 633–35 (characterizing the core arguments in the localism movement); Briffault, *supra* note 113, at 1312–16 (reciting normative justifications for federalism and noting their significant congruence with localism).

[229] Althouse, *supra* note 36, at 762.

[230] *See* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1310–17 (2005) (arguing for the importance of pluralism as an American constitutional value, and criticizing the Court's decision in *Roe* for failing to account for the importance of keeping the stakes of deeply contentious issues like abortion from escalating to the point that they threaten the system).

decision making to localities,[231] or, less charitably, to duck responsibility for a difficult issue.[232] Either way, by forgoing the opportunity to impose a statewide policy that will make some residents happy and some furious, states could devolve the policy choice and, in theory, make more people at least somewhat happy with the law they live under.

As Joshua Sellers and Erin Scharff have argued, in a pluralistic society wrestling with a divisive issue such as access to abortion, "[a]llowing local governments to make their own choices may reduce the number of political losers by allowing people to, at least on issues decided at the local level, sort themselves according to their preferences" (at least to the extent that they have a meaningful choice of where to live).[233] That sorting both flows from, and reinforces, varied local policies; people who have the means to do so will often live in places that align with their worldview, and in turn will support imposing that worldview on their community.[234] By accommodating rather than trying to resolve deep disagreements over abortion, a state might allow different communities to impose local regimes that align with their moral and policy preferences and de-escalate the winner-take-all abortion fight.[235]

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[231] *But cf.* Stahl, *supra* note 176, at 165–66 (arguing that decentralization is insufficient to manage rural–urban conflict, and "may in fact be making it worse"); Fowler & Witt, *supra* note 126, at 544 (suggesting that "when there is a high degree of urban–rural conflict, state legislatures may need to create regulatory consistency as a compromise between the two sides").

[232] *Cf.* Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 86–88 (2014) (discussing variation and spillovers primarily in the interstate context).

[233] Sellers & Scharff, *supra* note 102, at 1401. While Sellers and Scharff concede that Tiboutian models of sorting "elide many complexities of residential choice," they highlight that "there are costs to uniform policies when preferences are heterogeneous." *Id.* They also note, however, that local policy variation on divisive issues is particularly appealing where the local conduct is rights expanding. *Id.* at 1418. This is not true of all local abortion regulation. *See also* Scharff, *supra* note 94, at 1491–92.

[234] Su, *supra* note 31, at 202 ("These two role[s] of local governments—as institutional units for intrastate sorting, and as policy outlets for local differentiation—are mutually reinforcing."). Note, however, that the so-called "'big sort' in which Democrats and Republicans have self-segregated into communities of the like-minded" is the product of many factors beyond local governance. *See* Stahl, *supra* note 176, at 149–50.

[235] *See* Briffault, *supra* note 35, at 1998–99, 2027; *cf.* Blocher, *supra* note 92, at 106 (arguing that, in the context of firearms regulation where "the underlying conflict is largely about values . . . there is no way to resolve such a conflict by appealing to empirics," and so constitutional law should take account of historical local variation).

b. Decentralization as a Driver of Local Engagement

The ability to adopt differential policy on an issue that is highly salient to many voters could also strengthen public engagement with their local government, if residents come to see localities as possible sites of meaningful change.[236] This view seems particularly appealing (though less likely to be implemented) where a state government is heavily gerrymandered; if state policies poorly correlate with the state population's preferences, residents could turn to local government for meaningful policy improvement.[237] Low levels of voter engagement in local politics do not afford much reason for optimism broadly, but the high salience of abortion, and the level of local engagement relating to abortion access that went on even under *Roe* and *Casey*, suggest that local abortion policy might be the exception to low public engagement. Paul Diller has highlighted some structural reasons local governments are more likely to be nimble and responsive to their communities, particularly on public health issues,[238] making abortion a potentially appealing case for this kind of virtuous circle for driving local engagement.

c. Experimentation and Local Expertise

Some amount of local control could also allow abortion policy the benefit of not just local nimbleness, but also local experience in both formulating a policy and refining it over time. For example, a locality that provides health care of last resort may be better able to understand the social and fiscal impacts of a radical change in abortion law, and may also be better situated to have the policy conversation in a more fact-based way.[239] Or, a locality that imposed tight restrictions on abortion but then saw an increase in emergency room visits by individuals attempting to self-induce an abortion in an unsafe way might be more willing to revisit their policy.[240] Localities that impose strict limits on abortion might also learn the importance of abortion care to their communities if they can see the number of their residents who

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[236] *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1067–73 (1980); Scharff, *supra* note 94, at 1491; Briffault, *supra* note 98, at 258; Phillips, *supra* note 33, at 2238–39; *cf.* Mary L. Bonauto, *Equality and the Impossible—State Constitutions and Marriage*, 68 RUTGERS U. L. REV. 1481, 1490 (2016) (in the context of local LGBTQ+ antidiscrimination ordinances, noting that "[i]t feels rotten to be voted on, but on the positive side, referenda require continued political organizing, public education, and grassroots and grasstops mobilization").

[237] *See generally* Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219 (2014).

[238] *Id.* at 1222.

[239] *Cf.* Briffault, *supra* note 35, at 2020 (arguing that with "their major responsibility for public health and hospitals, especially for low-income residents, cities and counties may be more aware of the costs of" public health issues like guns, food access, and pesticides—all areas where states have preempted local action.) Notably, however, the two sides increasingly cannot agree on what counts as a fact, or as science. ZIEGLER, *supra* note 12, at 6, 77, 93.

[240] I do not suggest that all self-induced abortions will be unsafe, just that desperation and misinformation may lead to some unsafe attempts.

rely on the availability of abortion in other communities.[241] At least theoretically, local variation in abortion policy would allow for policy experimentation that could produce relevant data for the ongoing state- and federal-level policy debates about access to abortion care.[242] Of course, given the deep moral and ideological commitments on both sides, one might fairly question whether such evidence is likely to truly change hearts and minds, or whether it will simply harden the divides.[243]

To be clear, both sides of the abortion issue have dedicated national movements. Localities are not designing their abortion policies from scratch; they adopt and adapt policies used by other jurisdictions on their "team,"[244] just like the city of Akron did. But even this is local experimentation and iterative learning of a sort—learning from the legal and political missteps, as well as the policy consequences, in other jurisdictions. At least one "sanctuary city for the unborn" in Ohio, for instance, recently repealed its ordinance after major public backlash;[245] that will be baked into the consideration of future localities that consider joining the movement.

d. Local Stability

Another potential appeal of abortion localism is the relative political stability of localities compared to some states. Given that local political majorities can be more stable than statewide majorities, if the state politics of abortion are closely divided, local policy may be more stable. Relative local stability could enable abortion providers to make long-term investments in facilities and staff without worrying about a radical policy shift each election cycle.[246] Of course, that stability is not universal, as the Ohio example above proves. On the whole, however, localities

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[241] *Cf.* Heather K. Gerken & James T. Dawson, *Living Under Someone Else's Law*, 36 DEMOCRACY J., 42, 47–49 (2015).

[242] *See* Bernstein, *supra* note 14, at 178 ("If states supportive of abortion rights enact abortion-supportive disclosure laws, there would at least be an opportunity for scholars and advocates in the legal and public health fields to compare the public health outcomes of different types of disclosure regimes."); *cf.* Diller, *supra* note 93, at 1128–29; Briffault, *supra* note 35, at 2026–27.

[243] *See* Eskridge, *supra* note 230, at 1298–1300; *cf.* Florey, *supra* note 23 (manuscript at 79) (making a similar point in the context of interstate abortion regulation issues); Blocher, *supra* note 92, at 103–07.

[244] *Cf.* Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1720 (2017) (noting that "there aren't fifty independent laboratories these days; there are two. One is red, one is blue, and they are composed of highly networked national interest groups running their battles through any state (or local) system where they have political leverage," with policies spreading widely and quickly to like-minded jurisdictions "well before the final results are in").

[245] *2nd Ohio City that Voted to Criminalize Abortion Repeals Ban*, AP NEWS (Dec. 14, 2021), https://apnews.com/article/abortion-health-religion-ohio- 747763e6bef67bab90babc3b8c2154f7.

[246] *See* Scharff, *supra* note 94, at 1490 ("Political entrenchment at the local level . . . [is] harder to undo. Yes, New York City has had both Republican and Democratic mayors, but its political representation in the state house and city council seem to be fixed.").

might offer more areas of geographic stability regarding abortion policy than a whiplash of changing state politics would.

Decentralizing abortion policy would also put inertia on the side of local regulation. There will be strong forces pushing abortion onto the agendas of central governments, as described in greater detail below. Once in place, though, a decentralized institutional arrangement can be sticky, and may make it harder (for good or ill) to fully centralize the policy later,[247] particularly where the central government is closely divided on the issue.

e. Regional Access and Spillover Effects

Perhaps most important for abortion-rights advocates, a policy of local variation could provide better regional access than an alternative statewide policy might. While localism is often rightly criticized as reinforcing inequalities,[248] a turn to localism in the abortion context might instead reduce the most severe effects of anti-abortion policies on economically or socially disadvantaged pregnant people.

This idea may be counterintuitive. After all, policies that reinforce local autonomy and encourage communities to sort themselves by their "policy preferences" often just reinforce existing privileges. In the abortion context, this looks *inter alia* like people with resources being most able to move to a community that matches their beliefs, while also being most able to travel to get care if they need it and it is not available at home. Localities with a higher proportion of poor and marginalized residents might recognize the importance of their residents having access to abortion care close to home, but if they do not, their constituents will struggle to travel far to obtain care.

When considering the impact abortion localism might have on overall abortion access, though, we must consider the very concrete spatial dimensions of inequality in abortion access.[249] Even before *Dobbs*, the United States was beset with abortion deserts.[250] Most abortion providers were in relatively metropolitan areas, and met-

[247] *See* Gerken, *supra* note 244, at 1711.

[248] Davidson, *supra* note 133, at 977.

[249] *See* Hill, *supra* note 43, at 1091; Lisa R. Pruitt, *Toward a Feminist Theory of the Rural*, 2007 UTAH L. REV. 421, 458–83 (2007) (highlighting the particular challenges and hardships of rural women seeking abortions—particularly if they are poor—and courts' inadequate response).

[250] Brinkley, *supra* note 40, at 76 ("A 2017 study found twenty-seven U.S. cities where people had to travel more than 100 miles to access abortion services." (citing Alice F. Cartwright, Mihiri Karunaratne, Jill Barr-Walker, Nicole E. Johns & Ushma D. Upadhyay, *Identifying National Availability of Abortion Care and Distance from Major US Cities: Systematic Online Search*, 20 J. MED. INTERNET RSCH. 186 (2018))); *see* Alvin Chang, Andrew Witherspoon & Jessica Glenza, *Abortion Deserts: America's New Geography of Access to Care – Mapped*, GUARDIAN (June 4, 2022, 2:01 PM), https://www.theguardian.com/world/2022/may/05/abortion-deserts-clinics-access-closed-map.

ropolitan areas (particularly in coastal states) are more likely to support liberal abortion policies, though certainly not all do.[251] Allowing localities to implement their policy preferences on abortion, therefore, it is unlikely to improve access for many people, particularly low-income and rural people, relative to the pre-*Dobbs* status quo.[252]

But that status quo was based on federal constitutional protections that no longer exist. Now, any statewide uniform policy on abortion in a closely-divided state must accommodate a wider set of views on abortion regulation, including those that used to be federally unconstitutional. As a result, a new statewide uniform policy would likely be substantively more conservative than, say, the state's biggest city would prefer.[253] In fact, a policy adopted by the state legislature will often be more conservative than even the population as a whole would prefer, given *inter alia* the rightward-skew of partisan gerrymandering in many states.[254]

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[251] Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER, L. & JUST. 76, 92 (2015); Diller, *supra* note 237, at 1263–64 (discussing other public health regulation and noting that "concentrated political liberalism gives city officials more policy space on the left of the spectrum than that enjoyed by their counterparts at the state [level]," including in public health); *see also* NAT'L INST. FOR REPROD. HEALTH, *supra* note 24, at 5, 8 (noting that the cities that scored highest on their broad-ranging index tended to "be significantly large and located in relatively progressive states on the coasts," and that generally reproductive health centers are located in more metropolitan areas); Johnsen, *supra* note 42, at 1365 (noting that in 2009, "95% of Indiana counties, including nine metropolitan areas lack[ed] any abortion provider").

[252] Pruitt & Vanegas, *supra* note 251, at 80 ("Women who are both rural and poor suffer the greatest impact from [laws restricting abortion care and clinic closures] because those women are without the economic resources that would permit them to traverse the very substantial distances—sometimes hundreds of miles—to reach an abortion provider."); *see also* Burman, *supra* note 42, at 2017 (discussing hurdles for low-income people, and particularly people of color).

[253] Stahl, *supra* note 176, at 154 (noting that "Republican state legislators, who answer almost exclusively to rural residents, are motivated to enact policies that reflect their rural constituents'" preferences and policy positions). My point is obviously a generalization; how appealing a local vs. statewide standard is to advocates will depend on the overall access landscape produced by each option. *Cf.* Diller, *supra* note 94, at 400 (explaining that advocates pushing for policy change at the local level "may be willing to sacrifice local autonomy in a particular sphere in exchange for a state standard that is higher than the pre-existing floor but lower than what they were capable of achieving from the most-friendly city council").

[254] *See, e.g.*, Jane Mayer, *State Legislatures Are Torching Democracy*, NEW YORKER MAG. (Aug. 6, 2022), https://www.newyorker.com/magazine/2022/08/15/state-legislatures-are-torching-democracy (discussing the gulf between popular preference and state law on abortion in Ohio). *See generally* Bennington, *supra* note 34, at 102–03 (discussing the role of population distribution and the Republican skew of many state-level election maps in the widening state–local ideological divide); Diller, *supra* note 94, at 359–60 (noting that "[t]he evidence suggests that many states—especially populous states containing large cities—were gerrymandered in a pro-Republican direction after 2000 and 2010"). Thus, it is of course less likely that these states would make the choice to devolve much regulatory power to localities to regulate abortion. The issue of the

If, instead, a state devolved meaningful authority to regulate abortion to the local level, the decision of even one locality to support abortion access could, practically, provide abortion access to an entire region. Therefore, while abortion localism may not improve access over the pre-*Dobbs* baseline (and may indeed still produce a worsening of abortion deserts), it might nonetheless provide for better regional access than a uniform statewide policy could, meaning that fewer people would have to travel hundreds of miles to seek care.[255]

Of course, the spillover effect of a locality's policy on its neighbors is usually given as a reason *not* to decentralize power.[256] Indeed, local government law has evolved ways to limit localities' ability to impose certain spillover effects on their neighbors, such as the requirement that local regulation in some home rule states only relate to local affairs, the prohibition in some states against local regulation of "private" or "civil" law, and the latitude that states often have to preempt, particularly in "matters of statewide concern."[257] Indeed, many states explicitly consider extraterritorial impact when evaluating the lawfulness of local action under home

improbability of broad, express discretion to regulate abortion being delegated by the states is addressed at greater length in *infra* Section III(b)(ii)(2).

[255] *Cf.* Myers et al., *supra* note 10, at 372 (showing that a state ban's effect on the abortion rate is highly spatially contingent); Fernanda Santos, *Albuquerque Voters Defeat Anti-Abortion Measure*, N.Y. TIMES (Nov. 20, 2013), http://www.nytimes.com/2013/11/20/us/albuquerque-voters-defeat-anti-abortion-referendum.html (discussing the impact a local referendum banning abortion after 20 weeks would have, as women statewide traveled to the city to obtain abortions); Cholden-Brown, *supra* note 38, at 558–59 (noting that local government-level abortion involvement "reflected recognition by both reproductive rights proponents and antagonists that cities affected the lives not only of municipal denizens, but many more, irrespective of their place of residence, as the predominant provider given the limited availability of reproductive health services in rural and suburban communities"). Of course, this will not be lost on anti-abortion advocates, and therefore they are only likely to accept such an approach when they also believe that there is a state-level political deadlock that cannot benefit them.

[256] Morris, *supra* note 66, at 260 (describing minimizing externalities as one of the "most powerful" animators of current preemption doctrine); Gillette, *supra* note 104, at 6–8; Mikos, *supra* note 225, at 724; Briffault, *supra* note 98, at 260–61, 264 (describing externalities as one of "what ought to be home rule's two principal limits," and arguing that "[l]ocal action should be rejected if the regulation has cross-border consequences"); Davidson, *supra* note 133, at 977; Richard Briffault, Town of Telluride v. San Miguel Valley Corp.*: Extraterritoriality and Local Autonomy*, 86 DENV. U. L. REV. 1311, 1312 (2009) ("External effects cannot be avoided, yet the fact that nonresidents who do not participate in local elections . . . are directly affected by local government actions challenges the local self-government ideal that drives the quest for local autonomy.").

[257] *See* Baker & Rodriguez, *supra* note 100, at 1353 (discussing the importance of extraterritorial impacts in determining what is of state or local concern in the home rule analyses of three *imperio* states); *cf.* Gerken & Holtzblatt, *supra* note 232, at 73–78 (describing federal constitutional doctrines, such as the dormant commerce clause, that shape and limit interstate spillovers).

rule or preemption frameworks, regardless of home rule type.[258] While an express delegation of authority from the state to regulate abortion might overcome these limitations, the point is that a norm against externalities is baked into much of local government law. But as Heather Gerken and Ari Holtzblatt have observed, while the idea of changing policy in one jurisdiction to impose change on a broader scale "may not be a normatively attractive strategy," it may be "a politically irresistible one."[259]

If spillovers are unappealing, they certainly are not rare. They are "near-universal" in our system, and most are left alone, including by courts.[260] As Laurie Reynolds has argued, trying "to insist that local governments operate in a way that affects nothing beyond their own borders . . . is a futile attempt to change the reality of the regions in which most home rule units exist."[261] It is worth noting, moreover, that many states sign up for similar externalities when they adopt alcohol or cannabis local-choice laws. Those local-option laws likewise have cross-jurisdictional impacts; permissive localities do not absorb the full impact of their choices to allow the intoxicants, and "dry" neighboring towns cannot fully enforce their policy of excluding them, because both people and substances can travel.[262] Even though these regimes thus allow what Mark Rosen has called "travel evasion"[263] of their requirements, many states have decentralized regulation in one or both areas. In Rosen's terms, these states have adopted "soft" policy pluralism, or what Seth Kreimer has called "territorialism"; localities can adopt various policies as they wish, "but they can make sure that their citizens abide by their policies only when their

[258] Reynolds, *supra* note 113, at 1277–91 (describing how various courts define and consider extraterritorial impact, how it functions differently in *imperio* and legislative home rule states, and arguing that it should not be considered);+ *cf.* Michelle Wilde Anderson, *Between State and Local: A Response to Professor Reynolds*, 86 DENV. U. L. REV. 1303 (2009) (offering a proposal for fixing, rather than eliminating, the doctrine of extraterritorial effects).

[259] Gerken & Holtzblatt, *supra* note 232, at 91(discussing state law as "backdoor national policymaking").

[260] *Id.* at 62. Gerken and Holtzblatt argue that spillover effects of this sort have underappreciated benefits alongside their well-established downsides. Interestingly, many of these benefits are in tension with the de-escalatory and stability-seeking rationales set forth thus far, and so will be discussed at greater length below.

[261] Reynolds, *supra* note 113, at 1295 .

[262] Mikos, *supra* note 225, at 724, 737.

[263] Mark D. Rosen, Response, *"Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, 51 ST. LOUIS U. L.J. 713, 744–47 (2007) [hereinafter Rosen, *"Hard" or "Soft" Pluralism*]; *see also* Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 883–86 (2002) [hereinafter Rosen, *Extraterritoriality*] (discussing state extraterritorial regulation).

citizens are physically located within [their] . . . borders"[264]—and sometimes, when substances can be transported, not even very effectively then.

Is abortion different? With alcohol (and to some extent with cannabis), regulation went from a federal ban to being handled largely by the states. When states adopted local-option laws, accordingly, they were moving a former *prohibition* to a more permissive state policy. The state, having adopted a policy of legalization and liberalization, may simply have cared little about preserving the actual power for localities to fully exclude the intoxicant from their borders ("hard pluralism"[265]), as opposed to diffusing enough local opposition to get the new policy passed.[266] In the abortion context, the state's incentives may differ. Coming from a baseline of *Roe* and *Casey*, a local-option approach to abortion regulation may yield *more* restrictions. It simply may or may not be true that the state government is willing to accept the effect of pro-individual-choice spillovers in the abortion context the way that they do for alcohol and cannabis; it will depend on the overall tenor of the state policy debate on abortion in ways that are too fine grained to meaningfully address here. It is at least arguable, however, that the spillover effects of local abortion regulation are not dramatically more problematic than those the states have willingly taken on in regulating some intoxicants.

2. The Case Against Abortion Localism

So, is an explicit policy of broad local control over abortion regulation the single, ideal solution to addressing abortion access nationwide? Of course not. Despite the appeal described above, this kind of robust, express devolution of abortion policymaking remains unlikely, and fraught.

a. Improbability

To start, explicit delegation of broad-ranging local prerogatives to regulate abortion seems quite unlikely. There are very few states where that kind of delegation is even conceivable, given many states' clear stances on abortion. Indeed, the states where abortion localism might allow the overall abortion policy to more closely match the populace's preferences seem particularly *unlikely* to adopt a localist

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[264] Rosen, *"Hard" or "Soft" Pluralism*, *supra* note 263, at 746–47; Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 1012–13 (2002).

[265] Rosen, *"Hard" or "Soft" Pluralism*, *supra* note 263, at 746–47.

[266] *Cf. id.* at 748 (noting that arguments that soft pluralism will support individual liberty must be grounded in either "substantive opposition to" the local law, or "libertarian desire to minimize government regulation in general"). In addition, it is worth noting that public consensus on the lawfulness of adult cannabis use has changed relatively quickly and pervasively, which may reduce the likelihood of long-term conflict in ways that it is at least not obvious would be the case for abortion. *Cf.* Florey, *supra* note 23 (manuscript at 65–70) (discussing *inter*state conflicts, spillovers, and convergence regarding cannabis and alcohol).

approach—particularly in the subset of anti-abortion states which are heavily gerrymandered and active in preempting local policies.[267]

Moreover, this kind of devolution seems unlikely to be adopted without localities flexing their political muscle to pursue it,[268] and not every locality will want that responsibility. Many do, as Part II shows, but this hardly represents all of the thousands of general-purpose local governments in the United States. Some chief executives and city councils will prefer the highly contentious issue of abortion to be the state's problem, and that preference may not track partisan lines. Without a united front, localities wield less power, and are even less able to protect their interests and preferences in the lawmaking process.[269]

Finally, to put abortion localism in place, all sides would have to accept a much broader range of laws than they might get at a statewide level—from publicly-funded abortion as late as state law permits, to near-total bans and liability for pregnant women. Of course, the state law setting up a local option should put some minimum protections in place (e.g., it might prohibit criminalizing abortion), but the narrower the policy range within which localities would have discretion to set policy, the less likely there would be agreement on both sides to pursue the local-option law in the first place.

b. Statewide Uniformity

Access to healthcare (or, from the anti-abortion perspective, prohibitions on killing) seems so fundamental to human flourishing as to be a classic case for statewide uniformity. Asked about a 2013 Albuquerque, New Mexico, initiative to limit abortions after 20 weeks, no less an authority than Gerald Frug dismissed the idea of local abortion regulation, saying that "[c]ities generally need specific statutory authority to do something like this . . . [a]nd they're completely unlikely to have it. Most states agree that this is not a local issue, and that's the end of it."[270] As

[267] *Compare* Diller, *supra* note 94, at 364 (identifying Florida, Michigan, Ohio, North Carolina, and Wisconsin as heavily gerrymandered and active in local preemption), *with Interactive Map: US Abortion Policies and Access After* Roe, *supra* note 16 (classifying abortion law in Florida, Ohio, North Carolina, and Wisconsin as "restrictive," and Michigan as somewhat less so). Based on Michigan's pre-*Roe* abortion ban, the Guttmacher Institute classified Michigan as "certain or likely to ban abortion" in 2021. Nash & Cross, *supra* note 8. It is therefore particularly interesting that Michigan's population took to direct democracy, through state constitutional amendment, to protect reproductive rights in November 2022. MICH. CONST. art. I, § 28(1) (added pursuant to Prop. 22-3, approved Nov. 8, 2022).

[268] For a description of local governments' power and political protections in state legislative lawmaking, see Rodriguez, *supra* note 106, at 654–65.

[269] *Id.* at 655, 659–61.

[270] Amelia Thomson-Deveaux, *20-Week Abortion Bans: Coming to a City Near You?*, AM. PROSPECT (Nov. 18, 2013), https://prospect.org/power/20-week-abortion-bans-coming-city-near-you/ (quoting Professor Gerald Frug discussing an Albuquerque ballot initiative that later failed at the ballot box).

Frug put it, "[y]ou can argue that something like the minimum wage is a local issue, especially in cities, where the cost of living is higher. . . . But abortion? Why would the women of Albuquerque need a different abortion law than women in rural New Mexico? I don't think anyone could successfully make that argument."[271]

Indeed, the previous Parts suggest that most of the reasons to consider robust delegation of regulatory authority over abortion to localities are either pragmatic political calculations or reflect the advantages of decentralization generally. There is little about abortion care as a concept, other than its sheer contentiousness, that seems to speak in favor of localizing its regulation.[272] Deciding to localize abortion regulation is, in this way, to treat abortion more as a political problem to be solved than a question of human health.

There are also practical arguments for statewide uniformity. Although public health regulation in general has long been a core area of local activity, as discussed at greater length below, many localities do not regulate most medical care, procedures, or standards in significant detail.[273] The expertise to support adopting fact-based abortion regulation may vary greatly locality to locality, depending on the capacity of the local health department or the presence or absence of a municipal hospital.

If localities have broad authority to regulate abortion, they might do so in myriad different ways, which will impose substantial compliance costs.[274] Some might allow abortion, but only in the first trimester, or only with certain qualifying medical conditions, or only with a waiting period or spousal notice. Some might impose hospital affiliation requirements that conflict with local hospital policies, or the only local hospital might be in an anti-abortion jurisdiction. Providers would face particular compliance challenges in this era of telemedicine and medication abortions (which might allow a woman to take at least one of two medications typically prescribed to end a pregnancy at home).

Finally, some aspects of abortion regulation—such as state funding for abortions, whether private insurance is required to cover them, or professional standards governing the practice of medicine—would still presumably be regulated on a statewide basis. Accordingly, some of these state laws may have to be configured to

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[271] *Id.*

[272] *Cf.* Diller, *supra* note 237, at 1222 (noting that innovative local public health regulations challenge the "notion that there is any inherent difference between 'local' subjects best addressed by cities and 'nonlocal' subjects best addressed by higher levels of government").

[273] For example, compare N.Y.C, N.Y., HEALTH CODE tit. IV, § 181.21(b) (2023) (requiring consent for direct oral suction as part of a circumcision), with Aware Woman Clinic, Inc. v. City of Cocoa Beach, 629 F.2d 1146, 1147 (5th Cir. 1980) (noting that, while the ordinance purported to regulate freestanding surgical centers, it in fact only applied to the local abortion clinic).

[274] *See* Briffault, *supra* note 98, at 261.

take into account the permissibility of varying local regulations. In short, local delegation would require substantial, delicate re-tooling of multiple areas of state law.

c. Spillovers and Stability

Spillovers may make abortion localism politically unlikely. In theory, abortion localism would allow different jurisdictions to live under their own preferred regimes. However, the same spillover effects that could make a local-option approach to abortion regulation appealing to pro-choice cities could make it unappealing to anti-abortion advocates. After all, abortion opponents may view localism as rendering any part of the state pro-choice in which a pregnant person can access a legal abortion close to home, even if they have to leave town.[275]

Even if a state adopts a policy of abortion localism, spillover effects might also undermine some of the potential upsides to local abortion regulation. The fact that one locality's policy choice might undermine the effectiveness of its neighbor's choice on the same issue is often a reason given for centralizing regulation, with the idea that people should have a say in the policies that affect them.[276] Gerken and Holtzblatt have noted that spillovers generate friction between neighboring jurisdictions and will push the issue back to a centralized authority for resolution, through compromise or otherwise.[277] Even if the friction and negotiation that spillovers generate will sometimes be productive for democratic society as a whole, it might threaten the hope to use decentralization to reduce the temperature on a highly salient political debate or to offer stable local outcomes.

The friction will not just come from the ability of one abortion-rights locality to undermine its neighbor's abortion ban, either. Some will resent and resist other communities living by different standards, particularly on an issue like abortion that

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[275] *Cf.* Mark Lee Dickson, *Outlawing Abortion at the Local Level in a Post-*Roe *Texas*, TEX. SCORECARD (May 27, 2022), https://texasscorecard.com/commentary/dickson-outlawing-abortion-at-the-local-level-in-a-post-roe-texas/ (Dickinson, the leader of the Sanctuary City for the Unborn movement, characterizing the leaked *Dobbs* opinion as "pro-choice" because it gave states choices); Mikos, *supra* note 225, at 724, 737, 747 (noting that "[l]ocalism could potentially reduce overall satisfaction with government policy if people care about the marijuana policies adopted by other communities," which they are likely to do because people and marijuana can cross local borders, undermining local prohibitions, and because views on marijuana are moral stances for some).

[276] *See* sources cited *supra* note 256. *But cf.* Reynolds, *supra* note 113, at 1293–1302 (arguing that extraterritorial impacts are not a helpful or valid consideration for state courts).

[277] Gerken & Holtzblatt, *supra* note 232, at 91–93, 96. Gerken and Holtzblatt are sanguine about some benefits to the friction spillovers can generate, but only where the extremity of the positions each jurisdiction can take are backstopped "by a baseline of individual rights protections." *Id.* at 107. Abortion is obviously not an individual right everywhere, making abortion localism a questionable case for productive friction from spillovers, particularly because the burdens of restrictive policies will be borne by some of the most marginalized and vulnerable members of society. *See also* Calabresi & Fish, *supra* note 224, at 2 (discussing both the centrifugal and centripetal forces at play when decentralization is used as a strategy to manage moral disagreement).

is often perceived as a zero-sum moral, political, and cultural contest.[278] As Guido Calabresi and Eric Fish have observed, "[l]ocalism is wonderful when it lets one live by one's own (correct) beliefs, but not when it lets others live by their own (wrong-headed) ones."[279] This problem is hardly limited to local governments, but the "ideological externalities" of having to live close to a city with the opposite policy will rankle some residents. It could worsen inter-local polarization, increase ideological sorting of residents, and eventually undermine the stability of local variation as a political solution.[280] If a "stable pluralist system requires instability among the contending social groups," then the kind of Tiboutian sorting by ideological preference that local policies on polarizing issues like abortion can reinforce could actually undermine the goals of stable pluralism,[281] at least at the level of the local community.

This challenge to long-term stability is particularly marked given the importance of organized advocacy groups on all sides of the abortion debate.[282] Their incentives are largely to continue pressing for their policy preference in any level and venue—local, state, or federal, statutory or constitutional, legislative or judicial—where they believe they can win, and they often have little vested interest in stability that does not fully vindicate their policy goals.[283] As one local official put it, "[p]eople like to talk about local control and they're all for it unless they have a substantive

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[278] *See* Stahl, *supra* note 176, at 158 ("The social and geographic distance between urban and rural areas has caused cultural conflict to become increasingly uncompromising, with each side seeing issues related to . . . abortion, and civil rights . . . [as] zero-sum contests in which either urban or rural culture will decisively win out over the other."); Ziegler, *supra* note 182, at 19 ("[T]he antiabortion movement did not simply want each state to have the power to ban abortion; the movement described its cause as a fight for human rights. . . . [I]t was unacceptable for abortion to be legal in any state.").

[279] Calabresi & Fish, *supra* note 224, at 2; *cf.* Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481, 517–18 (2004) ("The abortion debate persists in this country today in part because, regardless of whether abortion is regulated at the state or national level, many citizens cannot feel fully at home in a nation in which the opposing side's values are ever permitted to prevail.").

[280] Diller, *supra* note 93, at 1171–72; Gerken & Holtzblatt, *supra* note 232, at 80, 91–93 (discussing "psychic," "cultural," and "political" spillovers); Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1392, 1397–1404 (1997) (assessing ideological externalities and responses and noting that naked animosity is not normally credited as a valid externality); Swan, *supra* note 210, at 868–69 (noting that local policy variation could worsen polarization, though imposed but controversial uniformity poses many of the same risks).

[281] Eskridge, *supra* note 230, at 1297–98, 1326–27.

[282] ZIEGLER, *supra* note 12, at 210–12.

[283] Schragger, *supra* note 134, at 1226–27; Gerken, *supra* note 244, at 1713; *cf.* Diller, *supra* note 93, at 1133 ("[I]nterest groups seek relief from the local laws they dislike by turning to the courts, rather than—or in addition to—pursuing other options . . . . includ[ing] lobbying the local government that enacted the disliked dordinance to repeal it, or lobbying the state legislature for an express preemption provision supplanting the disliked ordinance."); Price & Keck, *supra* note 45, at 902–04 (assessing the variety of approaches used to advocate on both sides of abortion regulation debates).

policy preference they care more about and then local control gets thrown to the sidelines."[284] This is not to say that this is normatively bad—just that it should give us pause about how effective decentralization will be at reducing conflict and providing stable results on issues like abortion that are highly salient and split heavily on political and urban–rural lines.[285]

d. Inter-Jurisdictional Challenges

As others have rightly pointed out, leaving abortion regulation to the states creates astonishing complexities and conflicts of state and federal law.[286] States are already jockeying to regulate abortion-related conduct outside their borders (among other inter-jurisdictional puzzles).[287] At least one anti-abortion state is considering punishing or imposing liability for abortions outside its borders,[288] while pro-choice states try to protect abortion patients and providers from such extraterritorial laws.[289] These interstate fights will play out over years and many venues, such as

[284] Briffault, *supra* note 35, at 2026 (citing Josh Goodman, *Republican Legislatures Move to Preempt Local Government*, STATELINE (Mar. 19, 2012), https://stateline.org/2012/03/19/republican-legislatures-move-to-preempt-local-government/ (quoting Steve Mulroy, member of the Shelby County Board of Commissioners in Tennessee)).

[285] Stahl, *supra* note 176, at 170–71.

[286] *See, e.g.*, Fallon, *supra* note 22, at 614–16; Brilmayer, *supra* note 220, at 902–03 (discussing the choice of law challenges of state regulation of abortion, including efforts to regulate extraterritorial conduct); Bradford, *supra* note 6, at 95–167 (assessing constitutional limits on states' power to criminalize out-of-state abortions); Joseph W. Dellapenna, *Abortion Across State Lines*, 2008 BYU L. REV. 1651, 1654–55, 1682–1702 (2008) (arguing that "states can apply their laws to their citizens when they travel out of the state in an effort to avoid abortion restrictions"). *See generally* Cohen et al., *supra* note 23; Rosen, *Extraterritoriality*, *supra* note 263.

[287] Tierney Sneed, *Can Red States Regulate Abortions Performed Outside Their Borders? A Post-*Roe *Landscape Would Test Just That*, CNN, https://www.cnn.com/2022/04/23/politics/abortion-out-of-state-legislation/index.html (May 3, 2022, 10:58 AM). *See generally* Cohen et al., *supra* note 23.

[288] *See, e.g.*, S.B. 1202, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022). Most recently, Idaho enacted a law prohibiting the "trafficking" of minors to obtain an abortion without parental consent, and the law specifically disallows any affirmative defense that the abortion provider is located out of state. Abortion Trafficking Act, H.B. 242, 67th Leg., 1st Reg. Sess. (Idaho 2023) (enacted). How this law will fare in the courts, and play out at the interstate level, remains to be seen. *See* David W. Chen, *Idaho Bans Out-of-State Abortions for Minors Without Parent's Consent*, N.Y. TIMES (Apr. 5, 2023), https://www.nytimes.com/2023/04/05/us/idaho-out-of-state-abortions-minors-ban.html.

[289] *See, e.g.*, Veronica Stracqualursi & Paul LeBlanc, *Connecticut Governor Signs Law Protecting Abortion Seekers and Providers from Out-of-State Lawsuits*, CNN (May 5, 2022, 6:01 PM), https://www.cnn.com/2022/05/05/politics/connecticut-abortion-protection-law-out-of-state-lawsuits/index.html; *see* Diego A. Zambrano, Mariah Mastrodimos & Sergio Valente, *The Full Faith & Credit Clause and the Puzzle of Abortion Laws*, N.Y.U. L. REV. (forthcoming 2023) (manuscript at 4) (available at https://ssrn.com/abstract=4238007); Florey, *supra* note 23 (manuscript at 52–53).

federal constitutional suits, choice-of-law battles, and requests to the federal government to preempt some states' laws or otherwise punish opposing states.[290]

Allowing local variation would replicate and exacerbate many of those challenges.[291] Could localities prohibit their residents from getting abortions anywhere in the state?[292] What about doctors and nurses who live in an anti-abortion jurisdiction but perform services in one where it is lawful? Or those who prescribe a medication abortion via telemedicine from a jurisdiction where abortion is prohibited for a patient who lives, and will take the medications, in an abortion-rights jurisdiction? Can an anti-abortion jurisdiction create a civil cause of action against a provider who performed the procedure where it was lawful?

As described above, many states have built doctrines into local government law that seek to limit or mitigate spillovers, like requirements that local regulation be about local matters, be specifically authorized by the state, or steer clear of civil or private law. The state could override these limitations with a specific delegation of regulatory authority; after all, relations between municipalities are largely a function of state law. But then the state legislature would be obliged to provide some guidance on these inter-local impacts and conflicts,[293] and legislators would be hotly lobbied at every turn. Remaining silent and punting the issue to the state courts to sort out—a tried-and-true legislative technique—here would be reckless, and in any event, the losers in court would doubtless be back to lobby the legislature in the future. Thus, although the legislature might hope to buy some measure of peace by

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[290] *See supra* note 286. *See generally* Gerken & Holtzblatt, *supra* note 232; Alan Howard, Response, *Fundamental Rights Versus Fundamental Wrongs: What Does the U.S. Constitution Say About State Regulation of Out-of-State Abortions?*, 51 ST. LOUIS U. L.J. 797, 802–13 (2007) (surveying possible federal constitutional challenges to state extraterritorial regulation of abortion); Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1144 (2010) (arguing generally that while "the Constitution imposes some limitations on state extraterritorial powers . . . most limitations are sub-constitutional and are best (ultimately) chosen by the political branches rather than courts"); Florey, *supra* note 23 (manuscript at 7–47); Rosen, *"Hard" or "Soft" Pluralism*, *supra* note 263, at 731–40.

[291] Cohen et al., *supra* note 23, at 27–52.

[292] Allowing localities do to so might in a certain sense maximize the political heterogeneity among localities, and thus the traditionally recited advantages of local control. *Cf.* Rosen, *Extraterritoriality*, *supra* note 263, at 883 (discussing a similar dynamic in state extraterritorial regulation). Notably, however, many states have adopted somewhat softer versions of local policy pluralism in other controversial areas, including alcohol and cannabis sales, in favor of greater liberalization or individual freedom. *See supra* notes 225–26 and accompanying text.

[293] Briffault, *supra* note 98, at 261 ("The states have the opportunity and the responsibility to write rules of the road that protect home rule localities from each other."); *cf.* Christopher Serkin, *Inter-Local Externalities: Further Thoughts on Richard Briffault's "Extraterritoriality and Local Autonomy,"* 86 DENV. U. L. REV. 1329, 1335 (2009) (noting that localities pervasively impose externalities on one another, and states do not always, or do not always need to, get involved to resolve them).

devolving abortion regulation, it would hardly be extracting itself from the abortion debate.[294]

3. So What, and What Now?

As Frug suggested, an explicit state law localizing abortion regulation is counterintuitive. It also seems unlikely, and it would be challenging and complex if adopted. So why even ponder it?

Because, in short, even though clear delegation to localities of broad power to regulate abortion seems unlikely, we already have a good deal of abortion localism—or at least local policy variation that affects abortion access. And it is not going away. If you look at maps of abortion care providers pre-*Dobbs*, providers were already concentrated in urban areas and largely absent elsewhere.[295] Part of this, of course, is care providers' tendency to locate where there are enough patients. But some of it, doubtless, is the history of local government action described in Part II—i.e., the many localities using whatever powers they can to support or curtail abortion access within their borders. Even under *Roe* and *Casey*, localities meaningfully affected the practical accessibility of abortion. Now, they are even less constrained.

As suggested in Part II, what form local action to shape abortion access takes will vary; it will vary by the locality's policy preferences and how well (or poorly) they match their state's, by the home rule and other powers of the municipality, by whether the locality is a healthcare provider,[296] and by the state preemption landscape. It will also vary by which local actor or official is motivated to affect abortion access, and what local powers that actor has at their disposal. Localities and local officials have powers to act both independently and to implement state policy: as healthcare provider, prosecuting attorney, zoning and building code regulator, funding source, business license provider. In each of those roles, a window of local discretion opens, and localities may use it to support or resist the policy aims of the

[294] In setting limits on local abortion regulation, a state legislature need not decide precisely the same questions that it would in setting statewide abortion standards. *Cf.* Bellia, *supra* note 157, at 778 (discussing the "abortion-dependent" and "non-abortion-dependent" issues and standards that the Supreme Court will still have to decide after reversing *Roe*). However, in regulating local authority to regulate abortion, state legislatures will have to make *some* normative judgments about the substantive and geographic scope of local power over abortion care, which will be contentious and normatively inflected. *Cf. id.* at 770, 778. *But cf.* Howard, *supra* note 290, at 799 (arguing that controlling extraterritorial applications of state abortion laws need not require abortion-specific analysis).

[295] *See* Chang et al., *supra* note 250 (mapping how abortion deserts will grow following *Dobbs*). Note that these data generally include clinics and reproductive health centers, but may not include all private providers who provide abortion care.

[296] *See, e.g.*, Coe v. Cnty. of Cook, 162 F.3d 491, 493 (7th Cir. 1998) (describing Cook County Hospital, a care provider of last resort, and its abortion policy); Bernstein, *supra* note 14, at 193–94 nn.127 & 131 (describing in detail the public health systems of the City and County of San Francisco and New York City).

state.[297] Think again of cannabis legalization: even where state law did not grant a "local option," a number of cities gave themselves one, using their various police and administrative powers to dissent from a state policy with which they disagreed, triggering litigation.[298] What follows is only a brief sketch of possible options, which more than anything highlights the vulnerability of local action, and particularly pro-choice local action, to state preemption.

a. Pro-Choice City, Pro-Choice State.

Reproductive-justice-minded localities can use both policy and financial tools to maximize abortion access within the framework set by the state. Nearly all of these tools, however, we might call indirect regulation—they will affect access to abortion care, but they do not make the provision or receipt of any given abortion lawful or unlawful. Consider some possibilities: the locality might be an abortion provider, and liberally interpret state abortion law;[299] it might allow abortion providers to use public health facilities;[300] it might fund abortion care, for its own residents and for those from other localities and states;[301] it might prohibit the use of public funds to support investigations or litigation to penalize abortion providers or recipients;[302] it might adopt police-power regulations to limit the harassment of abortion patients and providers, address some of the misinformation and deceptive practices of crisis pregnancy centers, or prohibit discrimination on the basis of reproductive choices including abortion;[303] and of course, it might lobby to expand state abortion protections.

Much of this is already happening. In 2022, New York City adopted a package of local laws designed to improve abortion access and protect patients and providers,

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[297] Gerken, *supra* note 37, at 1364–66, 1371–75 (noting that, in the context of federal policy implementation, cooperative localism and *uncooperative* localism are both key features of our governing framework, and potential sources of authority for local minorities).

[298] Su, *supra* note 31, at 217–20.

[299] LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 150 (2012) (noting that within a year of abortion liberalization in New York in 1970, "164,000 legal abortions were performed in New York City. Nearly one-quarter took place in the city's municipal hospitals." (quoting Plaintiff–Appellant's Brief at 1, Byrn v. N.Y.C. Health & Hosp. Corp., 286 N.E.2d 887 (N.Y. 1972))).

[300] Bernstein & Sokoloff-Rubin, *supra* note 24.

[301] *Id.*

[302] *See, e.g.*, N.Y.C, N.Y., ADMIN. CODE tit. X, § 10-184(b) (2023).

[303] These efforts would of course face constitutional challenges, just as regulations relating to clinic protection and crisis pregnancy centers already have. *See, e.g.*, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2370, 2375 (2018) (striking down a state crisis pregnancy center regulation); McCullen v. Coakley, 573 U.S. 464 (2014) (striking down state law creating zone of protection from protest around clinics).

which included many of the protections described above.[304] The package also included particularly novel efforts, such as the creation of a private cause of action against a person who commences a civil action in any state to impose liability on someone for providing, receiving, or aiding in abortion care that was lawfully provided in the city.[305]

b. Pro-Choice City, Anti-Abortion State

These entities, too, can use a variety of policy and financial tools to support access to abortion, but will similarly be confined to more indirect forms of regulation. Such localities may support suits to establish whether the state constitution offers any protection for pregnant people or medical providers. As has already happened in many cities in 2022, local prosecutors may decline to prosecute abortion cases, and local mayors and police chiefs may decline to allocate resources to investigate them (sometimes at the request of the city council).[306] If the locality is a healthcare provider, it can provide abortion services, liberally interpreting state law where possible (e.g., in deciding when a pregnancy threatens the life or health of the pregnant person).[307] The city may limit the amount of information that its officials gather on individuals who may have self-induced an abortion,[308] and/or increase

[304] N.Y.C., N.Y., ADMIN. CODE tit. XVII, § 199.2.1(b) (2023) (prohibiting medical providers from reporting identifying information of abortion recipients); *id.* § 184.1(a)–(b) (providing that medical abortions are to be free of cost for patients at facilities fun by the City's Department of Health, and providing counseling for patients in some circumstances); *id.* tit. X, § 184(b) (prohibiting detention of abortion recipients and identification of recipients to other agencies or states); *id.* tit. III, § 119.6(b) (implementing requirements for public education about abortion, including a requirement to identify facilities that falsely advertise abortion services).

[305] *Id.* tit. XVII, § 2101.

[306] Bernstein & Sokoloff-Rubin, *supra* note 24. The city of Austin, Texas, adopted a package of abortion-access policies, including a city council resolution encouraging local noncooperation with anti-abortion enforcement efforts and requesting the de-prioritization of any such investigations. City Council Res. 20220721-002 (Austin, Tex. July 22, 2022), https://services.austintexas.gov/edims/document.cfm?id=389094. The city further enacted various ordinances adopting anti-discrimination protections. *See, e.g.*, AUSTIN, TEX., CODE tit. 5, ch. 5, § 5-2-4(A) (2023) (anti-discrimination in public accommodations); *id.* § 5-3-4(A)–(B) (anti-discrimination in employment). Other pro-choice cities in anti-abortion states have adopted similar resolutions. *See, e.g.*, City Council Res. 22-R-3711 (Atlanta, Ga. June 21, 2022), https://atlantacityga.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=&MeetingID=3608&MediaPosition=14209.343&ID=30067&CssClass; City Council Res. No. 22-1275 (Denton, Tex. June 28, 2022), https://denton-tx.legistar.com/LegislationDetail.aspx?ID=5708779&GUID=5149B007-7826-4325-A89C-F0584414A495; City Council Res. No. R-22-310 (New Orleans, La. July 7, 2022), https://cityofno.granicus.com/MetaViewer.php?view_id=&clip_id=4131&meta_id=589512; City Council Res. No. 143X-2022 (Columbus, Ohio July 27, 2022). https://columbus.legistar.com/LegislationDetail.aspx?ID=5736794&GUID=0C070B10-3606-467E-AFF6-3CF2592D8EF4&Options=ID%7cText%7c&Search=abortion&FullText=1.

[307] Bernstein & Sokoloff-Rubin, *supra* note 24.

[308] Burman, *supra* note 42, at 2039–44.

documentation for patients who experience miscarriages to protect them from later investigation.[309] More risk-tolerant localities might choose to provide factual information about the legal gray areas of self-managed medication abortion.[310] They may try to provide insurance coverage for (possibly out-of-state) abortion care for municipal employees,[311] and the employees of municipal contractors.[312] They might "zone out" a crisis pregnancy center seeking zoning relief,[313] or treat them as medical care providers under the zoning and building codes if they provide pregnancy tests or ultrasounds.

One final and particularly intriguing possibility for this group is for a city to use money not sourced through state appropriations to support abortion access. For example, St. Louis, Missouri, allocated federal American Rescue Plan funding to build a reproductive equity fund to pay for abortion-related logistics.[314] The state Attorney General sued the city, and the litigation now involves fights about both federal–state and state–local preemption.[315] If St. Louis can effectively resist the state's efforts to control how it uses these federal funds, this strategy could prove irresistible elsewhere.

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[309] Bernstein & Sokoloff-Rubin, *supra* note 24.

[310] Burman, *supra* note 42, at 2032–39.

[311] *See* City Council Res. 20220721-004 (Austin, Tex. July 21, 2022), https://services.austintexas.gov/edims/document.cfm?id=389096.

[312] *See* Nicole Narea, *How Blue Cities in Red States Are Resisting Abortion Bans*, VOX (June 29, 2022, 5:10 PM), https://www.vox.com/policy-and-politics/2022/6/29/23188737/abortion-bans-austin-cincinnati-phoenix-tucson-raleigh (discussing a city initiative in Cincinnati, Ohio, to repeal an ordinance that prohibits the city health plan from covering abortions). That said, NIRH reports that more than 30 of the 50 biggest U.S. cities are already preempted from municipal insurance coverage for abortion care. NAT'L INST. FOR REPROD. HEALTH, *supra* note 24, at 100.

[313] *See, e.g.*, Jeff Parrott, *South Bend Mayor Pete Buttigieg Vetoes Anti-Abortion Group's Rezoning*, S. BEND TRIB. (Apr. 27, 2018, 5:00 PM), https://www.southbendtribune.com/story/news/local/2018/04/27/south-bend-mayor-pete-buttigieg-vetoes-anti-abortion-groups-rezoning/46350661/ (rejecting zoning application that would have put a CPC next to an abortion provider).

[314] Ashley Winters, *Reproductive Equity Fund Bill Is Signed by STL Mayor and Missouri Attorney General Files to Block It*, ST. LOUIS AM., https://www.stlamerican.com/news/local_news/reproductive-equity-fund-bill-is-signed-by-stl-mayor-and-missouri-attorney-general-files-to/article_82f0158a-096d-11ed-ac7e-4732613b1107.html (July 28, 2022).

[315] *Missouri Attorney General Eric Schmitt Files Suit Against the City of St. Louis to Halt Taxpayer-Funded Abortions*, ERIC SCMITT: MO. ATT'Y GEN. OFF. (July 21, 2022), https://web.archive.org/web/20220721200838/https://ago.mo.gov/home/news/2022/07/21/missouri-attorney-general-eric-schmitt-files-suit-against-the-city-of-st.-louis-to-halt-taxpayer-funded-abortions; Jason Hancock, *St. Louis Argues Missouri Attorney General Can't Sue City Over Abortion Access Funding*, MO. INDEP. (Aug. 18, 2022, 4:33 PM), https://www.kcur.org/politics-elections-and-government/2022-08-18/st-louis-argues-missouri-attorney-general-cant-sue-city-over-abortion-access-funding.

c. Anti-Abortion City, Pro-Choice State

Anti-abortion localities are likely to have a more robust set of both direct- and indirect-regulation options to instantiate their policy preferences. If there is no state preemption in place, such a municipality might seek to impose substantive police power restrictions, such as waiting periods, parental consent requirements, or medically unnecessary ultrasounds, or try to force abortion care providers to provide anti-abortion information to their patients. It might try to ban abortion within city limits, defending the law on local autonomy grounds,[316] or on the basis that abortion care is available nearby and so the local law does not meaningfully impede access. If that is too great a risk under the state preemption scheme, it might try to "zone out" whatever category of medical facility an abortion provider is classified as, or simply deny individual zoning relief requests as they come up to limit the number of new abortion providers. Anti-abortion localities that are healthcare providers may set local hospital policy as restrictively as possible within the confines of state law. If public employee benefits are not comprehensively regulated by state law, a city may seek to preclude coverage for abortion care for municipal employees, or the employees of municipal contractors.

This, too, is already happening. Eight communities in Nebraska—which allows abortion up to 22 weeks of pregnancy[317]—have now joined the "sanctuary cities for the unborn" movement, including five in November 2022.[318] Similarly, New Mexico recently repealed a pre-*Roe* abortion statute,[319] and has relatively limited restrictions on lawful abortion. Since the *Dobbs* decision, several communities in rural New Mexico, particularly those near the Texas border, have taken anti-abortion actions of varying strengths. Otero County adopted a questionably binding local resolution declaring itself a "Sanctuary for Life."[320] Hobbs, the seventh biggest city in New Mexico,[321] adopted a business-licensing scheme that, *inter alia*, purports to enforce a federal law banning interstate transportation of "obscene matters" including "any drug, medicine, article or thing . . . intended for producing abortion"

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[316] Indeed, proponents of local abortion bans are explicitly targeting anti-abortion localities in pro-choice states, evidently as part of a strategy to return the issue of abortion bans to the U.S. Supreme Court. *See* Caitlin Dewey, *supra* note 211.

[317] NEB. REV. STAT. § 28-3,106 (2022) (prohibiting abortion, with certain exceptions, on any fetus later than 20 weeks "postfertilization" which, by conventional calculation methods, is roughly 22 weeks pregnant).

[318] *Sanctuary Cities for the Unborn*, *supra* note 58.

[319] *See* S.B. 10, 55th Leg., 1st Sess. (N.M. 2021).

[320] Bd. of Cnty. Comm'rs Res. No. 111-09 (Otero Cnty., N.M. July 14, 2022), https://static.texastribune.org/media/files/36abbb78c0778c70f9f5cd9a9d759e89/Otero%20County%20Sanctuary%20for%20Life%20Resolution.pdf.

[321] *City and Town Population Totals: 2020–2021*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/popest/2020s-total-cities-and-towns.html (Jan. 25, 2023) (under "Incorporated Places: 2020 to 21", select "New Mexico").

by non-hospital abortion providers.[322] By claiming to enforce "higher" federal criminal prohibitions, Hobbs presumably hopes to insure against preemption by its more pro-choice state, similar to St. Louis's strategy. In 2023, two other cities in New Mexico have adopted similar ordinances, with the mayor of one noting, given the city's proximity to Texas, that he did not want his community to become an "abortion destination."[323] In response to this flurry of activity, New Mexico recently has adopted a law preempting local restrictions on abortion and other reproductive (and gender-affirming) healthcare.[324]

d. Anti-Abortion City, Anti-Abortion State

These localities may have the freest hand of any (absent preemptive state law). They may refuse to let public money or facilities be used to perform even the few abortions that state law would permit (e.g., in cases of rape or incest or threat to the woman's life). They might ban abortion more stringently than the state (say, from conception instead of at six weeks), and apply the ban within their borders and to their residents who travel elsewhere for care. They may criminalize abortion, if state law allows localities to create new criminal offenses. They might create a cause of action against the abortion provider, or even the person seeking an abortion, if state law allows local laws to create a civil cause of action or a new tort. They may publicly fund crisis pregnancy centers, as many already do.

e. In Sum

Of course, each of these localities might engage in public speech and lobbying. They will speak out publicly, through officials and resolutions. They will lobby the state to adopt or approximate their preferred policy. Given First Amendment concerns and the state analogs of the Speech and Debate Clause, some of this conduct may be the only non-pre-emptible course of local action (though some states will try).

Not all of these approaches are legally sound, or wise.[325] But nearly all are vulnerable to state preemption, particularly to express preemption. Accordingly, given the high salience and polarization of abortion, these strategies may not provide long-lasting victories to localities seeking to resist their states' policies. On the other hand,

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[322] *See* 18 U.S.C. § 1462; Ordinance No. 1147, Hobbs, N.M. City Council (adopted Nov. 7, 2022, Hobbs, N.M.) (to be codified at HOBBS, N.M., CODE §§ 5.52.010–5.52.090).

[323] *Sanctuary Cities for the Unborn*, *supra* note 58 (Clovis and Eunice, NM); E.N.M. News, *Proposed Anti-Abortion Law Still Tabled in Clovis*, ALBUQUERQUE J. (Dec. 5, 2022, 10:39 PM), https://www.abqjournal.com/2555529/proposed-antiabortion-law-still-tabled-in-clovis-ex-citys-mayor-br.html.

[324] *See supra* notes 211–15 and accompanying text.

[325] *See* David S. Cohen, Greer Donley & Rachel Rebouché, *Rethinking Strategy After* Dobbs, 75 STAN. L. REV. ONLINE 1, 9–13 (2022) (arguing that abortion advocates should embrace a variety of strategies, winning and losing, as the pro-life advocates have, and expect good faith internal disagreement over strategy).

some of these local tactics are quite subtle, and may be difficult for the state to effectively police. Thus, absent perhaps some *extremely* punitive or "nuclear" preemption,[326] there will almost always be some interstitial power or discretion with which a sufficiently motivated locality can affect abortion access.[327]

If we accept that some local efforts at influencing abortion access are likely to be a permanent feature of abortion regulation post-*Dobbs*, the question on all sides becomes what to do with it. Local authority to act is fundamentally a question of state law, constantly negotiated and re-negotiated in every hall of state power.[328] Either the state legislature or the state courts will be asked to do that work of sorting out local power in the field of abortion. As I have shown above, without specific consideration of local regulation of abortion access, that sorting out may well tilt in favor of anti-abortion localities. If abortion-rights advocates, in particular, do not take the possibility of local action into account when negotiating the post-*Roe* state of abortion law, they are gambling. They are betting that a court will find that the state occupied the regulatory field, or will accept that a more restrictive local law fatally conflicts with state law that allows abortion. Even among those states where the law explicitly shapes local policymaking on abortion by preempting at least some local laws, none have adequately taken account of the upsides and downsides I outlined above, and particularly of inter-jurisdictional challenges that may arise. They deal only implicitly, if at all, with the fundamental questions of spillover and extraterritorial regulation that are bound to arise when local policies vary.

Active consideration of what deliberate local variation could look like, on the other hand, opens up a different, more precise and better-informed conversation about the allocation of power in this arena. As one commentator noted in 2019, "it is the actions of our 90,000 local governments that determine how all of us [will] experience this fundamental right and its continued viability . . . in a potential post-*Roe* world."[329] That role, now more than ever, warrants deliberate policy consideration.

IV. WHAT DOES THE ABORTION FIGHT MEAN FOR LOCAL GOVERNMENT LAW?

We have up to now talked about what local government law, and particularly preemption law, might mean in the fight over access to abortion care. I now turn

[326] "Nuclear" or "blanket" preemption effectively reinstates strict Dillon's Rule—localities cannot adopt policy without express state permission. *See* Scharff, *supra* note 94, at 1502–04 (discussing recent bills proposing "blanket preemption" statutes); Briffault, *supra* note 35, at 1997.

[327] *Cf.* Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.–C.L. L. REV. 1, 42 (2012) (noting that localities operationalize the constitution, e.g., when public hospitals "determine whether patients are entitled to abortions").

[328] Briffault, *supra* note 35, at 2021.

[329] Cholden-Brown, *supra* note 38, at 577.

briefly to the other side of the coin: what will the fight over abortion regulation mean for local government law?

A. Not Much?

On one view, probably nothing too dramatic. After all, local authority and autonomy are constantly negotiated and contested. Abortion could be just one of many areas in which the question of state–local power sharing is worked out ad hoc, on the politics of the particular issue and not on any unified theory of decentralized governance. On this view, the practical question is not who *should* decide, but who *can*, and what will it take to convince them?[330] As Diller put it, "[i]ntrastate preemption is best understood less as a matter of abstract logic and more as one weapon among many used by interest groups to oppose local policies they dislike."[331] The preemption fight over local abortion regulation is just one more example of this strategic centralization or decentralization,[332] and of the incentive for each side to pursue policy at whatever level it can win[333] at each stage of a long-fought battle.[334]

Moreover, given the rising trend of state preemption of local policy choices, particularly on the political right, abortion preemption may simply be one manifestation of an already well-developed trend away from local empowerment. That trend may be troubling in its tension with Americans' espoused commitment to the virtues of local empowerment and control (often voiced in praise of federalism),[335] and with the goals (if not effects) of prior home rule movements.[336] But distrust of cities and municipal power are also "enduring feature[s] of American federalism,"[337] and in any event, this trend is the current reality in many places. In this light, the fight over local abortion policy may test whether decentralizing works to stably accommodate profound disagreements and show the risks of decentralizing individual rights, but

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[330] Davidson, *supra* note 133, at 959 (noting that "[i]t is perfectly consistent [for advocates] to support or reject local autonomy in the service of any particular outcome," but exploring the harder project of identifying a localism principle that cuts across issue areas without furthering oppression and parochialism).

[331] Diller, *supra* note 93, at 1133.

[332] Scharff, *supra* note 94, at 1480–81.

[333] *Id.* at 1486–87.

[334] *Id.* at 1489.

[335] Briffault, *supra* note 35, at 2019 ("[T]he new preemption is . . . in deep tension with the values the Court has invoked to give federalism normative force."); *see also* Christine Kwon & Marissa Roy, *Local Action, National Impact: Standing Up for Sanctuary Cities*, 127 YALE L.J.F. 715, 716, 718–19 (2018) ("[T]he norms that justify states' rights apply just as well—if not better—to cities.").

[336] Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & C.R. L. REV. 371, 383–84 (2008); Schragger, *supra* note 134, at 1186–95.

[337] Schragger, *supra* note 134, at 1184.

it will not particularly change the already-fraught landscape of local government law.

B. Enough to Be Worried

On the other hand, some possible impacts both on local government doctrine and theory might give us pause.

1. Expanding Hyper Preemption

First, these preemption fights may reverse the politics of the current hyper-preemption trend. As noted above, preempting local action just to reverse local policy has never been the exclusive provenance of the political right,[338] but Republican-controlled states have furnished much of the recent spike in explicit preemption, particularly the punitive kind.[339] But localities are not necessarily progressive, and states are not necessarily conservative; as Richard Briffault has noted, "[a] sharp turn of the political wheel could change the 'valence' of the preemption issue."[340] The question of abortion access could effect just that kind of inversion and bring more blue states into the hyper-preemption game.[341]

To date, the states that have been particularly aggressive on local policy preemption include many that are aggressively anti-abortion. Thus, pro-choice cities in these states should brace for harsh restrictions. Indeed, any sense of local resistance to state abortion policy could pour fuel on the fire in states like Texas and Florida that have been considering "nuclear preemption"—i.e., broad-based legislation to strip localities of nearly all regulatory power.[342]

As described above, however, it may be more important for abortion-rights states than for anti-abortion states to tightly limit the local role in abortion policy, lest the pro-regulatory tilt of state preemption law favor the localities that wish to restrict abortion. Abortion may thus become one of the issues (like zoning and land use, particularly as they affect housing policy[343]) that pushes left-leaning states more into the habit of aggressive local preemption.

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[338] *E.g.*, 28 R.I. GEN. LAWS § 28-12-25 (2023) (preempting local minimum wage laws); *New Mexico Blocks Right-to-Work Ordinances*, AP NEWS (March 27, 2019), https://apnews.com/article/23d19d56b72541b2a151aa0cddc9396c; Jesse McKinley, *Cuomo Blocks New York City Plastic Bag Law*, N.Y. TIMES (Feb. 14, 2017), https://www.nytimes.com/2017/02/14/nyregion/cuomo-blocks-new-york-city-plastic-bag-law.html. *See generally* Scharff, *supra* note 94, at 1480–81.

[339] Scharff, *supra* note 94, at 1481–82.

[340] Briffault, *supra* note 35, at 2026–27; *see also* Scharff, *supra* note 94, at 1487.

[341] Abortion is not, of course, the only issue that may have this push toward punitive interactions. *See, e.g.*, Morris, *supra* note 66, at 249–50 (discussing the Washington State Attorney General's threat to local officials with liability for refusing to enforce state gun laws).

[342] *See supra* note 187 and accompanying text.

[343] *See generally* John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 829–30, 848–70, 884–86 (2019) (advocating for "bold new forms"

Pervasive preemption threatens the ideals of home rule. Thus, even if you agree with the state's policy, there are reasons to be wary of aggressive preemption.[344] Spreading the trend of aggressive preemption to the political left would further the wave of local disempowerment that is already so pronounced[345] that it prompted the National League of Cities to suggest a wholesale reworking of home rule law to combat it.[346]

The contentious issue of abortion also threatens to drag the federal government more firmly into the state–local hyper-preemption dynamic. As described above, both Hobbs, New Mexico, and St. Louis, Missouri, have sought to evade their respective states' abortion policies by appealing to federal law: St. Louis by using federal funds to support abortion access for city residents, and Hobbs by seeking to push providers out of the city by enforcing a federal criminal obscenity statute through local law.[347] Both examples clearly remind us that, although states dominate local government law, local governments still operate in a dynamic, three-tiered governance system that includes the federal government,[348] even after the Supreme Court eliminated federal constitutional protection for abortion access. This three-level dynamic can be particularly contentious on divisive issues; we have seen fights arise over the federal government's ability to empower localities particularly in contentious areas such as local enforcement of federal immigration law,[349] and municipal provision of telecom or broadband services.[350] There is no reason to expect it to be any less contentious in the abortion context, particularly given that the federal

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of state intervention in land use policy for housing, including preemption, and documenting preemption efforts); Jake Blumgart, *The Bad Things that Happen When States Tell Cities What to Do*, GOVERNING (June 14, 2022), https://www.governing.com/now/the-bad-things-that-happen-when-states-tell-cities-what-to-do (interviewing Richard Schragger, who expressed skepticism about the "strong movement" toward preempting local land-use regulation and zoning).

[344] Scharff, *supra* note 94, at 1520–21.

[345] NICOLE DUPUIS, TREVOR LANGAN, CHRISTIANA MCFARLAND, ANGELINA PANETTIERI & BROOKS RAINWATER, NAT'L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 3 (2018 update).

[346] NAT'L LEAGUE OF CITIES, *supra* note 132, at 17–18.

[347] *See supra* notes 314–15, 322 and accompanying text.

[348] *See generally* Nestor M. Davidson, *Cooperative Localism: Federal–Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 960–61 (2007); Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1203, 1210 (1999).

[349] *See, e.g.*, Ocean Cnty. Bd. of Comm'rs v. Att'y Gen., 8 F.4th 176, 178 (3d Cir. 2021) (rejecting preemption challenge to state policy limiting local law enforcement's cooperation with federal immigration authorities).

[350] *See, e.g.*, Nixon v. Mo. Mun. League, 541 U.S. 125 (2004) (telecom); Tennessee v. Fed. Commc'ns Comm'n, 832 F.3d 597 (6th Cir. 2016) (broadband).

government is already highlighting potential preemption conflicts with the states over abortion.[351]

2. Undermining Local Authority Over Public Health

Abortion is not just an issue of individual rights; it is also a matter of public health—long a core area of local activity and power.[352] The more state preemption of local abortion regulation spreads, the more risk there is of collateral damage to this longstanding, crucial local capacity that has already been weakened in some states by battles over how to fight COVID-19.[353]

Put simply, "local governments are often the body responsible for public health."[354] Localities have a long history of quarantine and similar regulation to control the spread of disease,[355] and handle issues of "nuisance . . . sanitation, water quality, food quality, [and] air quality (including smoking regulations)."[356] In fact, even the robust local power over land use and zoning[357] may have grown in part from the local public health powers, allowing municipalities to separate land uses that might cause illness or other health risks.[358] States also have a strong hand in public health regulation, of course. But often, the implementation of state policy is handled largely by sub-state governments.[359] In numerous states, local boards of health or other local authorities have substantial independent or quasi-independent regulatory power as well. Even weak local public health bodies provide valuable information and resources to support the health of their communities.[360]

State preemption of local abortion policy could undermine some of these important powers. Some localities will rely on their public health authority in order to regulate abortion and abortion-related conduct. If they do so, depending on how a

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[351] *See, e.g.*, Letter from Xavier Becerra, Sec'y of Health & Hum. Servs., to Health Care Providers (July 11, 2022), https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf.

[352] *See* Baker & Rodriguez, *supra* note 100, at 1356–57.

[353] *See* Lauren Weber & Anna Maria Barry-Jester, *Over Half of States Have Rolled Back Public Health Powers in Pandemic*, KAISER HEALTH NEWS (Sept. 15, 2021), https://khn.org/news/article/over-half-of-states-have-rolled-back-public-health-powers-in-pandemic/.

[354] Bernstein, *supra* note 83, at 1015–17.

[355] *See, e.g.*, Susan Wade Peabody, Dissertation, *Historical Study of Legislation Regarding Public Health in the States of New York and Massachusetts*, 6 J. INFECTIOUS DISEASES (SUPP. 4) 1, 3–36 (1909) (cataloging early state and local public health powers in New York).

[356] Diane E. Hoffmann & Virginia Rowthorn, *Building Public Health Law Capacity at the Local Level*, 36 J.L., MED. & ETHICS (SPECIAL SUPP.) 6, 8 (2008).

[357] *See* Baker & Rodriguez, *supra* note 100, at 1357 (noting that "the core idea of local control over land use has become a deeply embedded norm").

[358] Bernstein, *supra* note 83, at 1015–17.

[359] Hoffman & Rowthorn, *supra* note 356, at 8; Diller, *supra* note 237, at 1282.

[360] *See* Brief of Local Governments as Amici Curiae in Support of Respondents, *supra* note 79, at 1 (describing the reproductive-health-related public health activities of amici cities).

preemptive law is phrased, or how a state court defines a preempted field, localities might suddenly have less say in a policy area in which they have been regulators, service providers, and often innovators.[361] Abortion preemption risks displacing localities from broader issues of public health regulation, or exacerbating the restrictions on local public health authorities that grew from the political battles over how to fight the COVID-19 pandemic.[362]

3. Making Local Empowerment Harder

Even if a state does not go to preemptive extremes to control local abortion regulation, the acute salience of abortion and possible controversy over local abortion policy may make it harder to adopt home rule reforms that devolve more autonomy to localities. Partnering with several leading local government scholars, the National League of Cities recently designed a new home rule regime to better insulate localities from state interference.[363] The proposal would require greater scrutiny of preemption efforts, and would ban preemption that excluded local laws without replacing them with statewide standards.[364] For most people, it is difficult to assess such a proposal without focusing on its impact on any given policy area.[365] Given the extreme salience and polarization of abortion policy, it is hard to imagine that diverse local abortion regulation would not erode support for local empowerment generally.

The exception, perhaps, would be if a state's policy on abortion is but one instance of the state being egregiously out of step with public preferences. In such an extreme case, the salience of abortion policy could actually push (or help push) state residents to break the stranglehold of state legislative gerrymandering by decentralizing more authority to localities. But whether such action is plausible, particularly at scale, remains to be seen.

4. Complicating Accounts of Local Autonomy

Fights over local abortion policy do not just complicate the doctrine and practice of local government law. They also challenge the theory of local governance and efforts to find non-issue-specific ways to distinguish appropriate from problematic state preemption, or to shape local government law to capture its benefits while limiting exclusion and discrimination.

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[361] *See generally* Diller, *supra* note 237; Parlow, *supra* note 99, at 36 (describing regulatory and zoning-based public health initiatives).

[362] *See* Weber & Barry-Jester, *supra* note 353.

[363] *See* NAT'L LEAGUE OF CITIES, *supra* note 132.

[364] *Id.* at 53–56.

[365] Baker & Rodriguez, *supra* note 100, at 1348 ("How we evaluate and assess . . . home rule doctrine is bound up with our views about the substantive regulations involved."); Scharff, *supra* note 94, at 1473.

a. The Role of Externalities

For example, as discussed above, one argument for when local regulation is inappropriate is when a policy imposes externalities on other localities. Local variations in abortion regulation arguably create that kind of spillover—indeed that is precisely why it might appeal to abortion-rights advocates. But if the state seeks to intervene in local abortion regulation on the ground that localities should not impose these kinds of spillovers, we ought to take a harder look. That stance may be easy to reconcile with the state's preemption of local firearm regulation, for example, but hard to square with state laws that allow for alcohol or cannabis localism, the pervasiveness of local land-use control, or myriad other ways localities are empowered to create just those effects. Although it is certainly not incumbent on issue advocates to adopt a coherent theory of local government empowerment,[366] one might hope that governments could articulate which externalities will, or will not, justify preemption.

When will moral or emotional externalities count? It is nearly as difficult to identify an abstract answer to that question as to the broader question of when to decentralize authority—our answers to where policy should lie invariably implicate our normative preferences. One practical, if not theoretically satisfying, answer is the one I suggested above in considering alcohol and cannabis localism: states regulate only those externalities that point in the opposite direction of the state's own policy preferences, even if those state preferences are not strong enough to result in a uniform statewide rule. As a theoretical approach to local governance, however, this is only marginally more satisfying than a state outright preempting any policy with which it disagrees.

Another, perhaps more appealing, response might be that externalities in the form of discomfort about living near a place that adopts a policy with which one disagrees are not an acceptable basis for state intervention if that disagreement is grounded in unlawful or culturally unacceptable animus, rather than a reasonable, non-subjugative disagreement.[367] But if, as in the case of abortion, it is up to the state to determine what constitutes a legitimate or animus-based disagreement, it is hard to distinguish this approach in practice from the policy-preference explanation that I offer above.

b. Normative Accounts

Externalities are far from the only reason given for state displacement of local regulation, however.[368] Much energy in the literature is currently devoted to finding principled ways to sort appropriate from inappropriate preemption more broadly. Abortion localism makes none of these attempts easier, and in fact, makes most

[366] Davidson, *supra* note 133, at 978 n.91.

[367] Gillette, *supra* note 104, at 7–8.

[368] *Id.* at 6–7.

more complicated. Abortion's status as an autonomy and equality interest and a former-right-that-now-isn't-a-right-everywhere tests how contested and emerging rights interact with the structure of government to generate policy and political discourse.[369]

Davidson recently advocated an explicitly normative approach to questions of local power and preemption, based on the consistency of local law with fundamental state rights and norms.[370] Under his approach, state courts should look to the "normative commitments states have made" within their other positive laws to assess whether a particular local action is consistent with state law.[371] This is a broader inquiry than the standard conflict analysis; the norms he focuses on appear in the individual rights protected by the state constitution and in the rule that state power (even when delegated to localities) must serve the state's "general welfare."[372] Thus, he suggests, local immigration sanctuary laws could be defended as furthering state constitutional commitments to equality and inclusion. On the other hand, "local exclusionary immigration policies, whether they formally violate federal or state equal protection clauses" or not, could be challenged on the ground that they run counter to those equality commitments and the state's general welfare by "targeting disfavored minorities subordinated in the political process."[373] On the whole, though such an approach would tend to support more equity-minded local laws, Davidson acknowledges that this is not automatically so.[374]

Abortion may be a particularly tough case for this explicitly normative (but not issue-specific) approach to progressive localism. By the spring of 2022, 11 state high courts had announced state constitutional protection for abortion rights, and by mid-summer, litigation was pending in many others.[375] However, several state constitutions are explicit about *not* protecting a right to abortion, and some specifically reserve the right of the state legislature to regulate it.[376] In these states, Davidson's

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[369] *See* Gerken, *supra* note 244, at 1718.

[370] *See* Davidson, *supra* note 133, at 960–61.

[371] *Id.* at 984, 986.

[372] *Id.* at 990. The commitment to individual rights and the general welfare is in the text of some state constitutions. *See, e.g.*, ME. CONST. pmbl. (describing the constitution's purpose as "to establish justice . . . promote our common welfare, and secure to ourselves and our posterity the blessings of liberty . . . .").

[373] Davidson, *supra* note 133, at 996.

[374] *Id.* at 984, 997.

[375] CTR. FOR REPROD. RTS., STATE CONSTITUTIONS AND ABORTION RIGHTS 2–3 (2022).

[376] *See, e.g.*, TENN. CONST. art. I, § 36 ("Nothing in this Constitution secures or protects a right to abortion. The people retain the right through their elected state representatives . . . to enact, amend, or repeal statutes regarding abortion . . . ."); LA. CONST. art. I, § 20.1 ("To protect human life, nothing in this constitution shall be construed to secure or protect a right to abortion . . . ."); W. VA. CONST. art. VI, § 57 ("Nothing in this Constitution secures or protects

approach may work well. But in the remainder of states, abortion presents a particularly acute problem of competing norms: one side arguing from equality and fundamental liberty for the pregnant person,[377] the other side from a constitutional commitment to life on behalf of the fetus,[378] and both arguing that their position supports statewide general welfare on policy grounds.[379] And if there is much space for local abortion regulation, the value to the state seems to be less that it substantively promotes a particular value and more that it (might, temporarily) de-escalate powerful political and moral conflict.[380] At the very least, abortion shows the seriousness of Davidson's concession that "the policies at stake" in his framework "can be indeterminate" and deeply contested.[381]

Kathleen Morris and Clayton Gillette have both taken Davidson's encouragement to derive limits on local government and state preemption from the state constitutions themselves. Each, however, derives their own prime normative value: favoring "good constitutional democracy" for Morris,[382] and for Gillette, opposing legislative entrenchment of state control over issues which are debatably local in nature.[383] Morris advocates scrapping current preemption doctrine in favor of a presumption of local authority coupled with preemption standards that vary not by issue but by the type of action the locality takes (and how closely tied it is to local democratic governance).[384] Under Morris's regime, it would be harder for a state to

a right to abortion . . . ."). In 2022, both Kansas and Kentucky rejected referenda to add similar provisions to their state constitutions. *See Abortion on the Ballot*, *supra* note 19.

[377] ZIEGLER, *supra* note 12, at 33–37; Amy Myrick & Tamar Eisen, *Building Protections for Reproductive Autonomy in State Constitutions*, MS. MAG. (May 24, 2022), https://msmagazine.com/2022/05/24/state-constitution-courts-abortion-rights/ (observing that "[g]iven that sex stereotypes . . . and discrimination against disfavored groups undergird abortion restrictions, it is plain to many that the right to decide whether to continue a pregnancy is essential for equality"); Co, *supra* note 10, at 45–53 (emphasizing that equality must include equality *within* the group that seeks access to abortion).

[378] ZIEGLER, *supra* note 12, at 33–37; *see also* Davidson, *supra* note 133, at 997 ("[A]rguing for devolution in normative terms may leave the jurisprudence open to other values, such as free speech, religious liberty, or due process, that can rise to the surface.").

[379] *See* ZIEGLER, *supra* note 12, at 2 (noting that over time, the abortion debate "increasingly turned not only on rights-based trumps but also on claims about the policy costs and benefits of abortion for women, families, and the larger society").

[380] Davidson, *supra* note 133, at 984 (discussing the risks of, *inter alia*, "enmeshing courts in what in many instances are essentially policy battles between disparate levels of government with misaligned views").

[381] *Id.* at 984, 996–98.

[382] Morris, *supra* note 66, at 254.

[383] Gillette, *supra* note 104, at 66 (arguing for, *inter alia*, a prohibition on the "use of dominant political power to alter decision making structures in a manner that entrenches the state/local divide . . . .").

[384] Morris, *supra* note 66, at 253–55.

preempt local spending or contracting choices that affect abortion access than it would be to preempt local police power regulations.[385] Gillette's approach, by contrast, would primarily preclude punitive preemption, but leave most preemption that operates in the realm of ordinary politics alone.[386]

Morris's and Gillette's approaches each provide a tie-breaking value distilled from state constitutions to avoid the deadlock issue with Davidson's approach. But the issue of abortion regulations shows some limits in each of their approaches, as well. Morris would almost certainly guarantee a place for local abortion policy. However, by giving greater preemption protection to non-regulatory (proprietary) action, she would channel local activity on this hotly polarized issue in that direction, and away from more direct, potentially more impactful policies reliant on local police powers. This may narrow the range of local abortion policies and thus reduce some of the starkest conflicts over abortion policy in a way that could benefit pluralism and the stability of interlocal variation.[387] But at the same time, it may undercut the strongest version of local experimentation and dissent. In this way, Morris seems to advocate a soft version of the kind of deterrence of local policymaking that Gillette is wary of. Gillette's approach, for its part, shows how much of preemption and the state–local division of power must be left to the ordinary political process to find a limiting principle little contorted by an issue as dynamic and contentious as local abortion regulation.

In sum, when *Dobbs* gave states a free hand to regulate abortion, it further complicated efforts to identify coherent principles by which to decentralize regulatory authority or implement major local-decentralization initiatives. It poured fuel on the fire of recent state–local antagonism, potentially spreading it to new states and broader policy issues. Broadside preemption, in turn, threatens local home rule principles, at least up to the point that state overreach elicits a pro-local response from voters—which, given our polarized politics, seems a very far point indeed.

CONCLUSION

Dobbs worked a revolution in the ability of pregnant people nationwide to access critical abortion care, particularly among those who are already marginalized or

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[385] *Id.* at 255. This approach would seem at first glance to level the playing field between pro-choice and anti-abortion localities by nudging all municipalities to use their proprietary rather than police powers when regulating a controversial area of both state and local interest. But on closer examination, it will perpetuate some of the pro-regulatory tilt that favors restrictive localities. After all, a preemption analysis (under whatever standard) only comes into play when a court concludes that there is at least a potential conflict between state and local law. And it is the state's approach to deciding *when* state and local law conflict that gives anti-abortion localities the edge.

[386] Gillette, *supra* note 104, at 75–76.

[387] *See* Eskridge, *supra* note 230, at 1317–18.

vulnerable. Removing the federal constitutional constraint of *Roe* and *Casey*, *Dobbs* gave states enormous latitude to regulate abortion. The impacts have been immediate and profound.

As is so often the case, state action invites local action. *Dobbs* has accelerated a longstanding tradition of creative municipal regulation of access to abortion care. Unfettered by *Roe* and *Casey*, localities and local officials will use all the tools at their disposal—including police power regulations, funding, land use rules, public hospitals, implementation of state or federal programs, and public pronouncements—to implement their preferred policy on abortion access.

The structure of intrastate preemption law, however, favors the localities that want to restrict abortion. Absent clear guidance on the scope of permissible local action, anti-abortion policies—particularly police power regulations—are more likely to withstand preemption scrutiny than corresponding liberalizing local policies would be. That leaves pro-choice and anti-abortion municipal officials with significantly different regulatory tools to use. Since silence on local involvement is not policy neutral, it is more important than ever for policymakers to consider explicitly the role that localities should play in regulating access to abortion.

Some states have already begun to explicitly shape municipal abortion regulation, and many more are likely to join in. But even those that have tried do not take full account of the inter-jurisdictional challenges that local variation of abortion policy will create. Much of both state and local law of abortion will be worked out in the rough and tumble of politics with a good dash of polarization and moral reasoning. A clear vision of local engagement is essential to working out any legal framework for abortion, however centralized it is intended to be, and this Article has taken a first pass at laying out that framework.

The edifice of local government law is unlikely to emerge from this battle unscathed. Local abortion regulation complicates the notion that the existence vel non of externalities from local policy necessitate centralization and preemption. It obliges us instead to engage in a more fine-grained consideration of *which* externalities states regulate, why, and how the issue of externalities fits into a broader calculus of when states can and should displace local policymaking. It also makes it harder to identify, and especially to implement, a better, more coherent and normative theoretical framework for state preemption of local action.