INTRASTATE PREEMPTION: A NEW FRONTIER IN BURDENING CHOICE

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Abstract

The use of intrastate preemption by states to undo local ordinances enacted to protect reproductive health and access to reproductive services has increased in recent years. State-local conflict is a long-standing aspect of the United States government system; however, these conflicts have become increasingly politicized. Explicit intrastate preemption of localities' protective action is a new strategy states are using to make accessing reproductive care more difficult and adding burdens to the right to choose. This article explores the intrastate preemption trend, possible litigation under traditional preemption jurisprudence, and reproductive specific litigation strategies to combat this form of anti-choice legislation. While litigation against intrastate preemption may be more successful in the reproductive health space as compared to non-public health related local measures experiencing state preemption, this article concludes that advocacy against intrastate preemption legislation is the best strategy to allow localities to protect access.

INTRODUCTION

As you walk down the street in Englewood, New Jersey, you suddenly encounter yelling, proselytizing, and bright vests. You see women[1] in comfortable clothing being ushered into an unmarked door by people in neon vests. Men with signs, women with rosaries, children in strollers, and an overwhelming cacophony follow the women closely. And then the protestors stop at a yellow line painted on the sidewalk. They still yell and

* J.D. 2019, Columbia Law School; M.P.H. 2016, Columbia University. I am grateful to Professor Olatunde Johnson for her invaluable guidance and feedback throughout the writing process.

[1] This article uses the terms "woman" and "women" for clarity and to match the language used by the Supreme Court, but other people, such as transgender men, gender non-conforming people, and gender non-binary people, become pregnant and seek abortions. Intrastate preemption that adversely impacts access to reproductive health care harms all people who can become pregnant.

try to keep the people from entering a health care establishment, but they follow no further.[2]

The sidewalk looked very different last year when a city-created buffer zone, that yellow line, was enjoined.[3] The protestors would follow the women right to the door of the clinic, trying to shove fliers in their hands and yelling at the clinic door and windows. Clinic escorts and patients would have to navigate this chaos and avoid the protestors just to allow access to a constitutionally protected health care procedure: an abortion.

Reproductive health clinics are protected by the federal FACE Act, which criminalizes physically blocking and using intimidation to prevent access to reproductive health care as well as damaging reproductive health care facilities.[4] While the FACE Act can be used to prosecute those blocking access, typically it is local ordinances that make accessing reproductive health care a less jarring experience. The importance of local ordinances in ensuring orderly access cannot be overstated. These ordinances—including buffer and bubble zones, sound ordinances, and zoning requirements—are under attack. Local protective measures, like the Englewood ordinance, are under attack through litigation that focuses on asserting protesters' First Amendment rights.[5] Other attacks come from states trying to keep their localities from instituting protective ordinances.[6] These latter attacks often take the form of intrastate preemptions.

States traditionally used intrastate preemption to ensure uniformity within the state, but intrastate preemption has come to be a means of controlling localities that are acting

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[2] Description drawn from the author's experience as a clinic escort in Englewood, NJ. *See* Wendi Woodland Kent, *Metropolitan Medical Associates – Englewood, NJ*, WENDI WOODLAND KENT, http://wendikentphotography.com/?page_id=931 [https://perma.cc/VB6P-SPQH] (last visited Apr. 26, 2020) (showing photographs from the Englewood clinic prior to court injunctions of the buffer zone); *see also The Take Away: When Healthcare Comes with Harassment: Photographing Abortion Clinic Protests*, WNYC (Jan. 24, 2018), https://www.wnyc.org/story/when-healthcare-comes-harassment-photographing-abortion-clinic-protests/ [https://perma.cc/LV2L-FQF9] (discussing protests in front of health care centers).

[3] *See* Turco v. City of Englewood, 935 F.3d 155 (3d Cir. 2019).

[4] *See* Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (2018) (criminalizing acts that prevent access to reproductive health care and places of worship).

[5] *See Turco*, 935 F.3d. at 160.

[6] *See* MO. REV. STAT. § 188.125 (2017) (preempting political subunits from regulating crisis pregnancy centers).

against the political wishes of state legislators.[7] Federal preemption is created by the Supremacy Clause;[8] intrastate preemption is created by state constitutions or law. While related, they are distinct creatures. Similar to federal preemption, which requires one level of government to yield to the laws of a different level, intrastate preemption is an interaction between two levels of government, but the supremacy is not as clear as in federal preemption.

In a new trend, intrastate preemption is being used to limit progressivism.[9] States' use of explicit intrastate preemption is increasing. Red states are preempting their blue cities due to partisan differences.[10] There has been significant media interest in states' use of intrastate preemption to keep localities from becoming "Sanctuary Cities"—cities which give protections to undocumented immigrants.[11] There has been less media coverage of other uses of intrastate preemption. The many protections created by localities to ensure access to reproductive health services may fail if there is insufficient advocacy to oppose harmful intrastate preemption laws. The lack of advocacy is notable, and troubling, as preemption is rarely challengeable in courts.[12] Further, these attacks are not the only ones facing those trying to guarantee access to reproductive health care. Targeted restrictions on abortion providers, or TRAP laws, have proliferated among the states sometimes resulting in clinic closures.[13] Advocates have fought against these laws in the courts

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[7] *See* Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS 403 (2017).

[8] *See* U.S. CONST. art. VI, cl. 2.

[9] *See* Riverstone-Newell, *supra* note 7.

[10] Emily Badger, *Blue Cities Want to Make Their Own Rules. Red States Won't Let Them*, N.Y. TIMES (July 6, 2017), http://www.nytimes.com/2017/07/06/upshot/blue-cities-want-to-make-their-own-rules-red-states-wont-let-them.html?mcubz=1 [https://perma.cc/GH7L-AK5H].

[11] *See* Manny Fernandez & David Montgomery, *With 'Sanctuary Cities' Ban, Texas Pushes Further Rights*, N.Y. TIMES (May 9, 2017), https://www.nytimes.com/2017/05/09/us/texas-sanctuary-cities-immigration.html [https://perma.cc/V77S-Z986]; Melanie Eversley, *Federal Judge Blocks Texas' Tough 'Sanctuary Cities' Law*, USA TODAY (Aug. 30, 2017), https://www.usatoday.com/story/news/nation/2017/08/30/federal-judge-blocks-texas-tough-sanctuary-cities-law/619168001/ [https://perma.cc/2P6Z-GQGR].

[12] *See* Richard Briffault et al., *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, AM. CONST. SOC'Y FOR L. & POL'Y (Sept. 2017), https://www.acslaw.org/wp-content/uploads/2017/09/ACS_Issue_Brief_-_Preemption_0.pdf [https://perma.cc/FX7B-ANAF].

[13] Ashoka Mukpo, *TRAP Laws Are the Threat to Abortion Rights You Don't Know About*, ACLU (Mar. 3, 2020), https://www.aclu.org/news/reproductive-freedom/trap-laws-are-the-threat-to-abortion-rights-you-dont-know-about/ [https://perma.cc/G2D3-YBF3].

repetitively including challenging nearly identical TRAP laws before the Supreme Court twice in recent years.[14] Fighting to keep clinics open[15] and opposing what are effectively bans on abortion[16] has stretched reproductive health advocates thin. As such, intrastate preemption has not been a priority. Further, some organizations call on reproductive health advocates to not pass supportive ordinances if they are likely to be preempted.[17] While there is merit to this argument, advocates must still fight preemption attempts.

This article explores the use of preemption in the reproductive health context and the unique aspects of local action in this arena that make intrastate preemption challenges viable. Part I outlines the use of intrastate preemption generally and reproductive health-specific preemption efforts. Part II analyzes the traditional means of challenging intrastate preemption: claiming there is no conflict, using home rule defenses, and alleging either improper state legislative process in passing the preemptive law or improper drafting of said law. Part III sets out the unique litigation arguments available to challenge reproductive health intrastate preemption laws. These include the use of historically local powers of zoning and public health protection in ordinances protective of reproductive care access and the need for individualization and tailoring in the creation of buffer zones. Other arguments unique to the reproductive rights field include freedom of expression protections for localities and undue burden claims. This article concludes that litigation to block preemption laws may be successful. It also highlights the need for advocacy efforts to prevent harmful intrastate preemption laws from coming into effect.

I. Intrastate Preemption

States and localities, though dependent on each other, often find themselves in tension. When policy goals at the different levels of government diverge, the state may attempt to use its authority as the superior government to preempt its localities from

[14] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2133 (2020) (plurality opinion) (finding the law at issue nearly identical to the law challenged in *Whole Woman's Health* and holding that it was similarly unconstitutional); *id.* at 2142 (Roberts, C.J., concurring in the judgment) (same); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (holding a TRAP law unconstitutional).

[15] *Id.*

[16] *Bans on Abortion at 6 Weeks*, PLANNED PARENTHOOD ACTION FUND, https://www.plannedparenthoodaction.org/issues/abortion/6-week-bans [https://perma.cc/65JR-8EAS].

[17] *See* NAT'L INST. FOR REPROD. HEALTH, LOCAL REPRODUCTIVE FREEDOM INDEX 90 (2019), available for download at https://localrepro.nirhealth.org/ [https://perma.cc/EZ3V-PN46].

acting counter to the state's will.[18] There is a particular history of intrastate preemption in the public health arena and a growing prevalence of intrastate preemption in the reproductive rights context.

A. State-Local Relationships and Intrastate Preemption

Recently, there has been a rise in intrastate preemption.[19] Many of these new preemptive laws by state legislative bodies come as a response to local, mostly progressive, policy innovation.[20] Intrastate preemption is the overt or implicit limiting of the powers of local governments through state legislative action or through the state constitution. Intrastate preemption is distinct from federal preemption, which flows from the Supremacy Clause of the United States Constitution.[21] The Federal Constitution does not address intrastate preemption, nor does it articulate any guidance on the relationship between state and local governments.[22] In fact, there is no reference to local governments in the Constitution.[23]

States have plenary power under the Federal Constitution.[24] Localities have no power.[25] The role and legal powers of localities have developed through litigation, legislation, and state constitutional amendments. Localities have functioned both as arms of the state as well as representative democracies working for their local polity. The debate over the power relationship between states and localities is long standing and contentious. To understand intrastate preemption, one must understand the relationship between states and localities from a theoretical, judicial, and functional perspective.

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[18] *See* Riverstone-Newell, *supra* note 7.

[19] NAT'L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 3 (2016) http://nlc.org/sites/default/files/2017-02/NLC%20Preemption%20Report%202017.pdf [https://perma.cc/2GE6-N5PG].

[20] *See* Riverstone-Newell, *supra* note 7.

[21] *See* U.S. CONST. art. VI, cl. 2.

[22] *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 8 (8th ed. 2016).

[23] *Id.*

[24] *See* U.S. CONST. amend. X.

[25] *See* BRIFFAULT & REYNOLDS, *supra* note 22, at 8.

The major role localities play in our lives has been both a source of fear and praise. Theorists have long debated the proper scope of local power. James Madison wrote of the need to be cautious about localities gaining too much power, which would result in fragmentation and the dissolution of the union.[26] Localities, he believed, were more at risk of being captured by ill ideas or "wicked project[s]" than the larger entities of the state and the nation.[27] He preferred to give more power to larger institutions that would better check fragmentation and offer more leaders that are capable.[28] Alexis de Tocqueville later countered this skepticism of small, local government, recognizing that localities are key to our nation.[29] He saw in our decentralized system a way of engaging the polity in local matters of personal relevance and using this political engagement to instill democratic values.[30] He did not view localities as a source of destruction but as a source of solidarity. Both Madison's and Tocqueville's views have echoed into the present.

The Supreme Court has described a locality as "a subordinate unit of government created by the State to carry out delegated government functions"[31] and as "free to tailor local programs to local needs."[32] The Court has also found that states can, and do, create localities in different ways with different powers.[33] The Court has accepted such state-

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[26] *See* THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961) ("[A] rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.").

[27] *Id.*

[28] *See id.*

[29] *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 93, 96 (J.P. Mayer ed., G. Lawrence trans., 12th ed. 1969) (1848) ("But the *political* advantages derived by the Americans from a system of decentralization would make me prefer that to the opposite system . . . . A democracy without provincial institutions has no guarantee against such ills. How can liberty be preserved in great matters among the multitude that has never learned to use it in small ones?").

[30] *See id.* at 96.

[31] Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 363 (2009).

[32] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973).

[33] *See* Nixon v. Mo. Mun. League, 541 U.S. 125, 136 (2004) ("We will presumably get a crazy quilt, of course, as a consequence of state and local political choices . . . .").

created disuniformity.[34] The Court has also found it proper that "the States universally leave much policy and decision making to their governmental subdivisions."[35]

From a functional perspective, the relative competencies of the states and localities should determine their role and relationship. Proponents of strong local control argue that decentralization allows localities to address their unique needs and tailor solutions properly.[36] Such local innovation and experimentation is central to the United States ethos.[37] While state legislators may pass laws of general concern, they "do not attempt to reach those countless matters of local concern," which are left to local governments to resolve in the manner that will best serve the locality.[38] The state-local relationship is comparable to the national-state relationship, with more localized matters left to more local forms of government.[39] In contrast, others argue that states' ability to take a larger perspective makes them the superior government, especially when matters are regional in nature or when externalities exist.[40]

Most states have explicitly given their localities significant policymaking discretion in local policy matters.[41] Currently, more than forty states have some form of home rule protection for their localities.[42] In some states, these protections come from the state's

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[34] *See id.*

[35] Avery v. Midland Cty., 390 U.S. 474, 481 (1968).

[36] *See* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003).

[37] *See id.*

[38] *Avery*, 390 U.S. at 481.

[39] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973).

[40] *See* Richard Briffault, *Our Localism, Part II: Localism and Legal Theory*, 90 COLUM. L. REV. 364, 447–48 (1990).

[41] *See* Laurie Reynolds, *A Role for Local Government Law in Federal-State-Local Disputes*, 43 URB. L. 977, 1006 (2011).

[42] *See* Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1129 (2012) (recording forty-two home-rule states in 2012); Paul A. Diller, *Reorienting Home Rule: Part 2–Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1065 (2017) [hereinafter Diller, *Reorienting Home Rule: Part 2*] ("A clear majority of states have some version of home rule for cities and counties.").

constitution;[43] in other states, home rule is statutorily created;[44] and in at least one state, protection for localities from state interference was created by the state's highest court through its common law powers.[45] There are two main forms of home rule. In imperio home rule, the state grants its localities broad protective and enabling powers—giving localities a "sphere of local immunity."[46] In contrast, legislative home rule solely enables a locality to act and does not broadly protect the locality from the state.[47] Regardless of the type of home rule, local governments generally function with little external supervision.[48] The local governments make policy and manage its implementation, including ensuring sufficient fiscal resources.[49] States have not removed the broad police power delegation from localities.[50] Even when there is no explicit delegation of power, some courts have found localities possess de facto power.[51] In other instances, courts have found local power to be necessary to accomplish the duties that the state has placed on the locality, and therefore a "legally protected interest" of the locality.[52]

In the past, states and courts have attempted to avoid explicit conflict between the state and its localities. States and localities are now regularly confronting each other over

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[43] *See* CAL CONST. art. XI, § 5(a); IOWA CONST. art. III, § 38A.

[44] *See, e.g.*, N.Y. MUN. HOME RULE § 1 et seq. (2018).

[45] *See* State v. Hutchinson, 624 P.2d 1116 (Utah 1980).

[46] GORDON L. CLARK, JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY 7 (1985).

[47] *See* Diller, *Reorienting Home Rule: Part 2*, *supra* note 42, at 1049–51, 1066–72.

[48] *See* Richard Briffault, *Our Localism, Part I: The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 112 (1990) [hereinafter Briffault, *Our Localism, Part I*].

[49] *See id.*

[50] *See id.* at 71.

[51] *See id.* at 114 ("Local power may be tacit or de facto, rather than a product of formal, constitutional arrangement, but it is nevertheless.").

[52] *See id.* ("As a matter of state-local relations, then, there is considerable local autonomy emanating from the states' delegation of fiscal and regulatory authority with both the practice of state legislatures of leaving local governments alone and the tendency of state courts to elevate that practice to the level of a legally protected interest.").

issues from minimum wage to fracking.[53] States are using preemption to block local actions that are against the states' wishes.[54] States have passed laws aimed at blocking minimum wage increases[55] and banning "sanctuary cities."[56] States are increasingly passing laws to bar local action in traditionally local matters—this is the so-called "new preemption."[57] These intrastate preemption efforts have met mixed results in courts.[58] Some courts have required further process prior to considering preemption.[59] Courts have upheld the preemption of local ordinances by previously enacted state laws.[60] Other cases have held preemption improper when the state acted to preempt the locality through responsive legislation after the locality passed an ordinance, only to be reversed by the state supreme court.[61] In some instances, the Supreme Court has found that states taking control of local issues can violate the Equal Protection Clause.[62] In these cases, the state

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[53] *See* Lauren Phillips, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225 (2017).

[54] *See* Joel Rogers, *Foreword: Federalism Bound*, 10 HARV. L. & POL'Y REV. 281, 297 (2016) ("[M]any states, especially among those twenty-two GOP-controlled ones, are using state preemption to block even modest local efforts at constructive reform policy areas in health, environment, civil rights, wage-setting and government reform, among other policy areas."); Badger, *supra* note 10.

[55] *See* Brian Lyman, *New Alabama Law Blocks Cities from Setting Their Own Minimum Wage*, MONTGOMERY ADVERTISER (Feb. 29, 2016), https://www.governing.com/topics/mgmt/tns-alabama-bentley-minimum-wage.html [https://perma.cc/TLZ8-WTUW].

[56] *See* Fernandez & Montgomery, *supra* note 11.

[57] *See generally* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018) (explaining the recent rise of politically motivated intrastate preemption) [hereinafter Briffault, *New Preemption*].

[58] *See* Eversley, *supra* note 11; Lynn Horsley, *Minimum Wage Ruling a Small Win for Missouri Cities Seeking to Raise It*, KAN. CITY STAR (Jan. 18, 2017), http://www.governing.com/topics/politics/tns-minimum-wage-kansas-city.html [https://perma.cc/N7HJ-F37K] (reporting on the Kansas Supreme Court ordering a local minimum wage increase measure to go on the Kansas City ballot, as required by the city charter, prior to the state being able to claim preemption).

[59] *See* City of Kan. City v. Kan. City Bd. of Election Comm'rs, 505 S.W.3d 795 (Mo. 2017) (en banc).

[60] *See* Protect Fayetteville v. City of Fayetteville, 510 S.W.3d 258 (Ark. 2017) (holding a local ordinance expanding nondiscrimination protections to individuals not covered by the state nondiscrimination laws to be preempted by the state nondiscrimination law); State v. City of Tucson, 399 P.3d 663 (Ariz. 2017).

[61] *See* City of Cleveland v. State, 90 N.E.3d 979 (Ohio Ct. App. 2017), *rev'd*, 136 N.E.3d 446 (Ohio 2019).

[62] *See* Romer v. Evans, 517 U.S. 620 (1996); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 474 (1982).

attempted to withdraw powers from localities in ways that burden individuals' constitutional rights, making the Supreme Court willing to become involved in intrastate preemption and ban the state action as irrational.[63]

The red state, blue city phenomenon is increasing due to urbanization and the liberalization of cities.[64] In this dynamic, the locality is liberal-leaning whereas the state government is more conservative. The priorities and political differences between state lawmakers and those at the local level have further led states to act to explicitly conflict with and preempt their localities.[65] Some of the conflict originates from the differing, though overlapping, constituencies they serve. Some localities are passing ordinances aimed at curing what is alleged to be improper inaction by state-level elected officials.[66] The conflict is also ideologically and politically motivated as the lawmakers at the two levels attempt to appeal to their different bases.[67] Most of the local ordinances that states have attempted to preempt have been progressive policies, aligning with the red state, blue city phenomenon.[68] There is also the possibility of intrastate preemption when non-ideologically motivated local ordinances come into conflict with state ideologically-based

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[63] *See* Lawrence Rosenthal, Romer v. Evans *as the Transformation of Local Government Law*, 31 URB. L. 257 (1999).

[64] *See* Badger, *supra* note 10.

[65] *See* Elena Schneider, *The Bathroom Bill that Ate North Carolina*, POLITICO (Mar. 23, 2017), https://www.politico.com/magazine/story/2017/03/the-bathroom-bill-that-ate-north-carolina-214944 [https://perma.cc/VF83-J7BS] (discussing the political reasons behind the so-called "Bathroom Bill"); Alex Samuels, *Here's How the 'Bathroom Bills' in North Carolina and Texas Measure Up*, FORT WORTH STAR-TELEGRAM (Feb. 19, 2017), http://www.star-telegram.com/news/politics-government/state-politics/article133705739.html [https://perma.cc/J53Q-62XG] (quoting Texas Lt. Gov. Dan Patrick stating that the Texas state legislative bill seeking to preempt local LGBT protection is the state's effort to "fight[] back").

[66] *See* Jenni Bergal, *Many Cities Are Creating Policies Apart from Their States*, STATELINE (Jan. 15, 2016), http://www.governing.com/topics/urban/many-cities-are-creating-policies-apart-from-their-states.html [https://perma.cc/6E8S-PN56].

[67] *See* Paul A. Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1138–40 (2007); Paul A. Diller, *Why Do Cities Innovate in Public Health? Implication of Scale and Structures*, 91 WASH. U. L. REV. 1219, 1244 (2014) [hereinafter Diller, *Public Health*]; David A. Graham, *Red State, Blue City*, THE ATLANTIC (Mar. 2017), https://www.theatlantic.com/magazine/archive/2017/03/red-state-blue-city/513857/ [https://perma.cc/V3MD-FANV].

[68] *See* Briffault, *New Preemption*, *supra* note 57, at 1995, 1999–2010 (discussing the wave of local ordinances and responsive preemption laws in minimum wage, sick leave, and fracking in response to states not being willing to pass such laws).

political posturing. As local leaders are generally less ideological,[69] focusing on service delivery and allocation of public goods, they may not be considering the political impacts of their actions.[70] This may result in a preemption battle in which the state is ideologically motivated and the locality is motivated by good government policies and practices.

The local-state political divide is likely to continue as Republicans control more state legislatures than any time post-World War II.[71] The stronghold of the Republican Party is not always due to individual votes, but rather how votes translate into legislative seats given gerrymandering. A North Carolina Republican official proudly lauded his state's redistricting plan as guaranteeing continued victories in the state and House of Representative elections.[72] Such redistricting and gerrymandering have resulted in state legislatures that, in many cases, do not represent the state electorate.[73] While courts have been more willing to restrict redistricting attempts recently,[74] this trend does not negate past redistricting, which has resulted in skewed districts and therefore skewed state legislatures that disadvantage urban areas.[75] By contrast, local elections are frequently non-partisan.[76] The non-partisan character of local governments was a result of progressive-era movements to make local elections more about the issues than about

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[69] *See* PAUL E. PETERSON, CITY LIMITS 183 (1981).

[70] *See id.* at 120–21.

[71] *See* Badger, *supra* note 10.

[72] *See* Sam Levine, *Top Republican Says His State Is a Model for Redistricting. It's One of the Worst Gerrymandered Places in the Country*, HUFFINGTON POST (Jan. 18, 2018), https://www.huffingtonpost.com/entry/tim-moore-republican-gerrymanders_us_5a60d17ae4b01f3bca593b1a [https://perma.cc/6ZKJ-JX8D].

[73] *See* LAURA ROYDEN & MICHAEL LI, BRENNAN CTR. FOR JUSTICE, EXTREME MAPS (2017), https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16_0.pdf [https://perma.cc/72XG-6YAF].

[74] *See* League of Women Voters of Pa. v. Commonwealth, 175 A.3d 282 (Pa. 2018).

[75] *See* Paul A. Diller, *Reorienting Home Rule: Part 1–The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 336–45 (2016). The skewing is often by design but is sometimes unintended. *Id.* at 337–38.

[76] *See* David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J. L. & POL. 419, 421 (2007).

parties.[77] It was also an effort to ensure that one party did not dominate local politics, which was frequently occurring.[78] Due to the schism, intrastate preemption is likely to continue in divided states as localities attempt to advance progressive agendas against the political wishes of state legislators.

B. Health Policy and Reproductive Access and Intrastate Preemption

There has been a long history of state-local conflict over public health initiatives taken by localities. One of the main areas of state-local contention in the health care context has been, and continues to be, tobacco regulation.[79] As of 2010, twenty-seven states preempted localities from passing ordinances that are more restrictive on tobacco products, with twenty-two preempting youth access restrictions.[80] State preemption of its localities from further restricting tobacco is in direct opposition to declared Health and Human Services goals of eliminating intrastate preemption in tobacco regulation.[81] Another example is the 2010 trans fat ban by Cleveland, which Ohio quickly attempted to undermine through a preemption law.[82] The city challenged the state law as violating the home rule provided to localities in the Ohio constitution.[83] The appeals court found in the city's favor and the state declined to appeal, resulting in the trans fat ban going into effect.[84]

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[77] *Id.*

[78] *Id.*

[79] *See, e.g.*, Allied Vending, Inc. v. City of Bowie, 631 A.2d 77 (Md. 1993) (considering implied preemption challenge to two cities' local tobacco vending machine restrictions).

[80] Centers for Disease Control and Prevention, *State Preemption of Local Tobacco Control Policies Restricting Smoking, Advertising, and Youth Access—United States, 2000–2010*, 60:33 MORBIDITY & MORTALITY WKLY. REP. 1117, 1124 (Aug. 26, 2011).

[81] OFF. OF DISEASE PREVENTION & HEALTH PROMOTION, U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTHY PEOPLE 2020, TOBACCO USE OBJECTIVES (2014), https://www.healthypeople.gov/2020/topics-objectives/topic/tobacco-use/objectives [https://perma.cc/9ECY-FR4A] (enumerating the removal of intrastate preemptions as goal TU-16).

[82] Cleveland v. State, 989 N.E.2d 1072, 1075–77 (Ohio Ct. App. 2013).

[83] *Id.* at 1077; *see also* Garcia v. Siffrin Residential Ass'n, 407 N.E.2d 1369, 1377 (Ohio 1980) (holding Section 3, Article XVIII of the Ohio Constitution grants municipalities police powers).

[84] *Cleveland*, 989 N.E.2d at 1075.

1. Reproductive Health and Access Preemptions

There has been an increase in state statutes aimed at restricting access to abortion.[85] 2017 saw 19 states adopt 63 new restrictions on abortion rights and access, the highest in any year since 2013.[86] In 2013, 39 states adopted 141 laws related to reproductive health and rights, of which 70 in 20 states were restrictive.[87]

There has also been an increase in local ordinances protecting reproductive rights, including abortion.[88] This local action is sometimes a response to restrictive state action and sometimes adds to state protections. These local public health laws are at times innovative. In Cook County, Illinois, an ordinance provides for the costs of abortions to be paid by the county for those unable to afford the health service.[89] The laws go beyond the constitutional requirement of not obstructing access so as to create an undue burden.[90] In providing funding, these localities engage in a voluntary act as there is no constitutional right for governmental funding for abortions.[91] While many localities are protecting access, other localities have attempted to impose reproductive restrictions.[92]

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[85] ELIZABETH NASH ET AL., GUTTMACHER INST., POLICY TRENDS IN THE STATES, 2017 (2018), https://www.guttmacher.org/article/2018/01/policy-trends-states-2017 [https://perma.cc/D344-UB2W].

[86] *Id.*

[87] ELIZABETH NASH ET AL., GUTTMACHER INST., LAWS AFFECTING REPRODUCTIVE HEALTH AND RIGHTS: 2013 STATE POLICY REVIEW (2013), https://www.guttmacher.org/laws-affecting-reproductive-health-and-rights-2013-state-policy-review [https://perma.cc/V3B5-DGHW].

[88] *See* NAT'L INST. FOR REPROD. HEALTH, *supra* note 17, at 2.

[89] *See id.* at 47.

[90] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[91] *See* Harris v. McRae, 448 U.S. 297, 326–27 (1980).

[92] *See* 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 [https://perma.cc/LR8Q-LPAZ] (discussing a defeated local ballot initiative that sought to ban abortions after twenty weeks).

Some state legislatures have responded by preempting local protective ordinances.[93] Ordinances have also been struck down by courts as violating the First Amendment.[94] While the litigation battles around state anti-abortion laws draw much attention, reproductive rights advocates have largely ignored intrastate preemption. This is changing. The 2019 version of the National Institute for Reproductive Health's Local Reproductive Freedom Index now includes a page-long discussion of intrastate preemption, whereas the prior version only mentioned intrastate preemption in passing.[95]

The National Institute for Reproductive Health conducted a review of fifty cities, grading them on their policies around reproductive justice.[96] The report took an expansive view of reproductive justice, surveying policies from access to clinics to gender identity discrimination laws.[97] The report recorded when local action was preempted by state action but did not indicate if the preempting law was supportive or restrictive of reproductive health.

Within the "protecting abortion clinic access" and "funding and [insurance] coverage for reproductive health care" categories, the most directly reproductive health-related categories, there were twenty-eight preempted local ordinances.[98] In the "protecting abortion clinic access" category, states preempted local action regarding clinic safety[99] and anti-discrimination ordinances for employment and housing.[100] There was no preemption of ordinances relating to crisis pregnancy centers and local protections for

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[93] *See, e.g.*, MO. REV. STAT. § 188.125 (2017) (preempting political subunits from regulating crisis pregnancy centers).

[94] *See, e.g.*, Turco v. City of Englewood, No. 2:15-cv-03008, 2017 WL 5479509 (D.N.J. Nov. 14, 2017).

[95] *Compare* NAT'L INST. FOR REPROD. HEALTH, *supra* note 17, at 90, *with* NAT'L INST. FOR REPROD. HEALTH, LOCAL REPRODUCTIVE FREEDOM INDEX (2017), https://www.nirhealth.org/wp-content/uploads/2017/12/NIRH_LRFI_2017_Final.pdf [https://perma.cc/92W5-VHVK] (noting intrastate preemption but not addressing its impact).

[96] NAT'L INST. FOR REPROD. HEALTH, *supra* note 17, at 2.

[97] *Id.*

[98] This article focuses on ordinances that are directly tied to reproductive health and abortion access as opposed to ordinances which more indirectly impact access, such as minimum wages and gender identity discrimination, which have been discussed elsewhere. *See* Phillips, *supra* note 53.

[99] *See* NAT'L INST. FOR REPROD. HEALTH, *supra* note 17, at 88.

[100] *Id.*

clinics and providers.[101] In the "funding and [insurance] coverage for reproductive health care" category, the preempted local ordinances were in the "funding for abortion" and "municipal insurance coverage of abortion" subcategories.[102]

One of the more well-known intrastate preemption laws was passed in the summer of 2017 during a special session of the Missouri state legislature.[103] The media coverage was, in part, because of confusing language that seemed to indicate that birth control use could be a reason to deny employment.[104] The law, passed by Missouri's Republican-controlled General Assembly,[105] was an attempt to preempt the Democrat-controlled[106] City of St. Louis's efforts to curb crisis pregnancy centers.[107] These centers often display the signifiers of a legitimate health clinic, but most give medically inaccurate information, do not employ health professionals, and exist with the explicit purpose of discouraging abortions.[108] The state legislature acted to preempt St. Louis despite Missouri being one of the states with the broadest home rule grants of power to its

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[101] *Id.*

[102] *Id.*

[103] *See Women on Birth Control Could Not Be Barred from Working, According to New Missouri Bill*, NEWSWEEK (June 29, 2017), http://www.newsweek.com/missouri-abortion-sb-5-crisis-pregnancy-centers-630165 [https://perma.cc/4D3H-K3DX]; Kenneth Ballard, *MO SB5 Does NOT Mean Women Can Be Fired or Evicted for Taking Birth Control or Procuring an Abortion*, OBSERVATIONS . . . FROM APARTMENT SOMEWHERE KAN. CITY (June 25, 2017), http://www.kennethballard.com/?p=4193 [https://perma.cc/N7MF-6SHA].

[104] NEWSWEEK, *supra* note 103.

[105] *See Missouri House of Representatives*, BALLOTPEDIA, https://ballotpedia.org/Missouri_House_of_Representatives [https://perma.cc/968X-G6WP] (noting Republican control of the state House and Senate in 2017).

[106] *See* Tim O'Neil, *38 Democrats Crowd St. Louis Primary Ballot for 11 Contested Aldermanic Seats*, ST. LOUIS POST-DISPATCH (Feb. 12, 2017), http://www.stltoday.com/news/local/govt-and-politics/democrats-crowd-st-louis-primary-ballot-for-contested-aldermanic-seats/article_87e75caf-d27b-5c77-b15c-7efbf65ff216.html [https://perma.cc/U26K-GA3E] ("All of the city's aldermen are Democrats.").

[107] *See* MO. REV. STAT. § 188.125 (2017) (preempting political subunits from regulating crisis pregnancy centers).

[108] *See* Joanne D. Rosen, *The Public Health Risks of Crisis Pregnancy Centers*, 44 PERSP. ON SEXUAL & REPROD. HEALTH 201 (2012).

localities[109] and being the first state to pass home rule into its charter in 1875.[110] Laws like the Missouri law act to take power previously within the locality and to keep the locality from regulating specific types of business or health services. Intrastate preemption, such as the Missouri law, acts to undermine voter desires as reflected by the actions of the most local form of elected government.

II. Traditional Preemption Analysis

There are limited means for localities to challenge state preemption. These include arguing that there is no preemption issue, utilizing home rule provisions, and arguing that procedural abnormalities or issues with drafting invalidate the state action. Most cases related to state-local conflict occur in state court, and even when they are removed to federal court because of a federal claim, state law and the state constitution govern the intrastate preemption question.[111]

In 2017, there were a number of cases addressing intrastate preemption explicitly. The Arkansas Supreme Court held that state law preempted local action that aimed to expand discrimination protections for LGBT individuals.[112] The Supreme Court of Ohio held preemption proper under the Ohio Constitution despite a "Home Rule Amendment" to the constitution.[113] Some courts have required further process prior to considering preemption.[114] The Arizona Supreme Court held that a generally applicable state law preempted a local ordinance on destruction of firearms.[115] These cases represent an increase in litigation, which reflects the increase in intrastate preemption and state-local disputes. There are three potential arguments against the preemption laws under

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[109] *See* Reynolds, *supra* note 41, at 1006 (discussing the unique state-local relationship in Missouri).

[110] *See* JON D. RUSSELL & AARON BOSTROM, FEDERALISM, DILLON RULE AND HOME RULE 6 (2016) https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf [https://perma.cc/LTM2-DWXV].

[111] *See* Ill. Rest. Ass'n v. Chicago, 492 F. Supp. 2d 891, 894 (N.D. Ill. 2007), *vacated as moot*, No. 06 C 7014, 2008 WL 8915042 (N.D. Ill. Aug. 7, 2008).

[112] *See* Protect Fayetteville v. City of Fayetteville, 510 S.W.3d 258 (Ark. 2017) (holding an ordinance expanding nondiscrimination protections to individuals not covered by the state nondiscrimination laws to be preempted by the state nondiscrimination law).

[113] *See* City of Cleveland v. State, 136 N.E.3d 446, 478 (Ohio 2019).

[114] *See* Horsley, *supra* note 58.

[115] *See* State v. City of Tucson, 399 P.3d 663 (Ariz. 2017).

traditional state-local jurisprudence: a lack of conflict, home rule, and state constitutional challenges regarding how the state law was passed. This section will explain the traditional arguments and show how they typically favor the state over the locality.

A. Lack of Conflict Arguments

When states and localities are in conflict, the state will likely prevail.[116] As such, the question of whether a conflict exists is often dispositive. If a locality can successfully argue that no conflict exists, then there is no preemption issue.[117] There are many ways state and local action can conflict: outright conflict, express preemption, and implied preemption.[118] Outright conflict occurs when an individual cannot comply with both the local and state requirements at the same time;[119] for instance, if the state places a speed limit, or *maximum*, of 30 miles per hour but the locality has a speed *minimum* of 35 miles per hour. Express preemption occurs when a state law, in plain language, declares that the state has preempted the locality. An example of express preemption is Section 188.125 of the Missouri Revised Statutes discussed above.[120] Implied preemption comes in two main forms—frustration of purpose and occupation of the field. Each state is unique in its application of implied preemption. These preemption types grow out of state law interpretation and common law evolution. Frustration of purpose occurs when local action impedes the state's goal.[121] Occupation of the field happens when the state has acted in such a way as to leave no room for a locality to also regulate within the field.[122] A locality can argue that preemption does not exist by defeating the claims of conflict.

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[116] *See* Briffault, *Our Localism, Part I*, *supra* note 48, at 127–28.

[117] *See* Wallach v. Town of Dryden, 23 N.Y.3d 728 (2014).

[118] *See* Goodell v. Humboldt Cty., 575 N.W.2d 486 (Iowa 1998) (explaining and applying the preemption conflict types); BRIFFAULT & REYNOLDS, *supra* note 22, at 465–69.

[119] *See* BRIFFAULT & REYNOLDS, *supra* note 22, at 465–67; *see, e.g.*, Miller v. Fabius Twp. Bd., 114 N.W.2d 205, 207–08 (Mich. 1962) ("It has been held that in determining whether the provisions of a municipal ordinance conflict with a statute covering the same subject, the test is whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits." (citation omitted)).

[120] *See* MO. REV. STAT. § 188.125 (2017) ("A political subdivision of this state is preempted from . . . ."); *see also supra* text accompanying notes 103–10.

[121] *See, e.g.*, Cty. of Northglenn v. Ibarra, 62 P.3d 151 (Colo. 2003) (finding frustration of purpose when a local ordinance would undermine the state foster care system).

[122] *See, e.g.*, Allied Vending, Inc. v. City of Bowie, 631 A.2d 77, 86–87 (Md. 1993) (finding occupation of the field of tobacco regulation given the longevity and extent of state lawmaking in the field).

They can argue the there is no frustration of purpose,[123] no occupation of the field,[124] or that the scopes of the state and local laws are different such that they are not in conflict even when there appears to be outright conflict, express preemption, or implied preemption.[125]

In applying these laws to Section 188.125(2),[126] the state would argue that the state law expressly preempts the localities from regulating "alternatives to abortion." The state could also argue that there has been sufficient state action in the area of abortion regulations that the state has occupied the field and implicitly preempted the localities from regulating. Depending on the local action at issue, the state may raise outright conflict if the local ordinances and the state law give directly competing directions to citizens. Similarly, the state would argue that the locality frustrates the state's purpose if the local action would make achieving the state's purpose more difficult or impossible.

Localities can defend their action by asserting that no conflict exists. The localities would argue that they are simply exercising their zoning and public health powers without regard to the entity the regulations impact. The localities would state they are ensuring their citizens are protected from false advertising and have access to health centers and safe buildings. They would further argue the incidental infringement of an ordinance on the state's legislative intent to protect alternatives to abortion entities is not sufficient to create an implied preemption issue through either the frustration of purpose or occupation of the field jurisprudence. Under this local argument, the state and the

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[123] *See, e.g.*, City of Riverside v. Inland Empire Patient Health & Wellness Ctr., Inc., 300 P.3d 494, 511 (Cal. 2013) (finding no frustration of purpose when a locality banned medical marijuana dispensaries when the state only permitted, but did not mandate, dispensaries).

[124] *See, e.g.*, Cincinnati Bell Tele. Co. v. City of Cincinnati, 693 N.E.2d 212 (Ohio 1998) (finding the state had not done enough to occupy the field such that there was implied preemption).

[125] *See, e.g.*, DJL Rest. Corp. v. City of New York, 749 N.E.2d 186 (N.Y. 2001) (holding that the state law and the local ordinance have different "realm[s] of governance" and local laws that "incidentally infringe" on state fields are not preempted).

[126] MO. REV. STAT. § 188.125(2) (2017) reads:

> A political subdivision of this state is preempted from enacting, adopting, maintaining, or enforcing any order, ordinance, rule, regulation, policy, or other similar measure that prohibits, restricts, limits, controls, directs, interferes with, or otherwise adversely affects an alternatives to abortion agency or its officers', agents', employees', or volunteers' operations or speech including, but not limited to, counseling, referrals, or education of, advertising or information to, or other communications with, clients, patients, other persons, or the public.

localities are doing two different things—the state is protecting alternatives to abortion entities, while the localities are zoning and regulating public health. Finally, localities can argue that they are within the exception in Missouri's Section 188.125(3).[127] The law explicitly declares that it does not affect the locality's power to zone and regulate land use, so long as the local regulation is uniform. Localities could argue that they are uniformly acting to regulate all faux-health care organizations by applying the same zoning requirements to crisis pregnancy centers as they do to doctor's offices. In effect, the localities are being uniform but, likely, not in a way the state would like.

The possibility of preemption turns largely on how willing the court is to find a conflict.[128] However, states will likely prevail absent clear compatibility or lack of conflict.[129]

B. Home Rule Based Arguments

The success of challenges to intrastate preemption through home rule is highly state dependent and not a reliable means of challenging state attacks on reproductive protection enacted by localities. In home rule states such arguments can be very strong.

Home rule gives localities protection from state interference based on support for "municipal liberty."[130] First articulated by Judge Cooley of Michigan, home rule is the "absolute right" of citizens to a local government that "the state cannot take . . . away."[131] The main alternative to home rule is Dillon's Rule. Judge Dillon argued that localities are

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[127] MO. REV. STAT. § 188.125(3) (2017) reads:

> Nothing in subsection 2 of this section shall preclude or preempt a political subdivision of this state from exercising its lawful authority to regulate zoning or land use or to enforce a building or fire code regulation; provided that, such political subdivision treats an alternatives to abortion agency in the same manner as a similarly situated agency and that such authority is not used to circumvent the intent of subsection 2 of this section.

[128] *Compare* Allied Vending, Inc. v. City of Bowie, 631 A.2d 77 (Md. 1993) (finding field occupation and giving deference to the state), *with DJL Rest. Corp.*, 749 N.E.2d 186 (finding no field occupation in a searching attempt to distinguish the scope of action of the state law from that of the local regulation).

[129] *See* Briffault, *Our Localism, Part I*, *supra* note 48, at 127–28 (noting that in most head-to-head battles with states, localities lose).

[130] People ex rel. Leroy v. Hurlbut, 24 Mich. 44, 108 (1871).

[131] *Id.*

subservient to their states as the states create and give power to the localities.[132] As such, states are able to alter their localities' power as they wish.[133] The Supreme Court adopted a Dillon's Rule-like understanding of localities in *Hunter v. City of Pittsburgh*.[134] The Court found that the "state is supreme," even over its citizens, in its ability to alter or destroy localities.[135] The absolutist view has softened in the literature and in Supreme Court jurisprudence.[136] However, some still support the absolutist Dillon's Rule view. Clayton Gillette argues that local governments should have their power limited, as they are prone to being captured by special interests.[137] He advocates for a return to the Dillon's Rule that held states supreme against localities in all matters.[138]

Many now argue that local self-determination, especially for cities, should be valued and not undermined.[139] Under this view, local government is at the core of local

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[132] *See* Clinton v. Cedar Rapids & M. R. R. Co., 24 Iowa 455, 475 (1868) ("Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right . . . .").

[133] *See id.*

[134] *See* Hunter v. Pittsburgh, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.").

[135] *Id.* at 178–79 ("The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.").

[136] *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 474 (1982); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973); Avery v. Midland Cty., 390 U.S. 474, 481 (1968).

[137] *See* Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government?*, 67 CHI.-KENT L. REV. 959, 960–61 (1991).

[138] *See id.*

[139] *See* Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1159–61 (1996).

autonomy and allows the polity to be engaged in their government.[140] As Kathleen Morris states, localities are not only arms of the state but "also act as units of representative democracy."[141] The Supreme Court views localities as polities, as shown by the requirement that local elections abide by the one-person-one-vote requirement[142] established in *Reynolds v. Sims*.[143]

When considering a dispute between states and their localities, how the state structures its relationship with its localities is paramount.[144] A bright-line, nationally applicable standard for intrastate preemption is not possible in our federal system, as the states do not have uniform internal governmental structures.[145] State courts have tried to lessen the preemption issues by creating a presumption against preemption and seeking to avoid a direct conflict in which preemption would be controlling.[146] Courts also, when possible, rely on state constitutional protections of home rule.[147] Similarly, state legislatures often avoid direct conflicts with localities.[148] Some states have mandated that acts which affect local powers "must operate uniformly upon all municipalities."[149] Such a generality requirement seeks to ensure that state legislatures do not act to harm one specific locality.

Many states constitutionalize the power relationship between the state and its localities in the form of home rule. The state constitutional provisions delegate power to

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[140] *See id.*

[141] Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 1, 34 (2012).

[142] *See* Avery v. Midland Cty., 390 U.S. 474, 509 (1968).

[143] *See* Reynolds v. Sims, 377 U.S. 533 (1964).

[144] *See* Reynolds, *supra* note 41.

[145] *See* Briffault, *Our Localism, Part I*, *supra* note 48, at 123–24.

[146] *See id.* at 127–28; *supra* Part II.A.

[147] *See* Briffault, *Our Localism, Part I*, *supra* note 48, at 128 ("Some courts have relied on other provisions of state constitutions to invalidate state laws that intrude on local autonomy, particularly in areas of traditional local control such as land use.").

[148] *See id.* at 128–29.

[149] *See, e.g.*, Garcia v. Siffrin Residential Ass'n, 407 N.E.2d 1369, 1377–79 (Ohio 1980); OKLA. CONST. art. V, § 46 (prohibiting local and special laws on the certain subjects).

local units of government and, in the case of imperio home rule, make the localities "immune from legislative interference" with these powers.[150] Home rule arrangements allow local governments to retain their role as major sources of government regulation in the day-to-day lives of citizens, at least in the protected arenas.[151]

Under a home rule analysis, preemption is based on the state constitution, state statutes, and how the state judiciary views the role of localities within the state. In a state like Missouri, which has strong home rule protections,[152] a home rule lawsuit may be successful. In other states, especially Dillon's Rule states, a claim for home rule will not be possible.

As there are often few abortion clinics in each state,[153] arguments that state legislation is needed as the clinic services women beyond the localities' borders may be persuasive. If such a state interest exists, the overarching state interest will likely defeat the local home rule protections. Notably, the Supreme Court has found that states have a legitimate interest in "promot[ing] respect for life, including life of the unborn."[154]

Finally, if the state's home rule provisions are constitutionalized, citizens can pursue a state constitutional amendment to exempt abortion from home rule protections. This method is unlikely to succeed because state constitutional amendments almost universally require voter input.[155] Since many of the localities enacting protective reproductive rights

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[150] Avery v. Midland Cty., 390 U.S. 474, 481 (1968).

[151] *See id.* ("In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens.").

[152] *See* RUSSELL & BOSTROM, *supra* note 110, at 6; Reynolds, *supra* note 41, at 1006 (discussing the unique state-local relationship in Missouri).

[153] *See* Allison McCann, *Seven States Have Only One Remaining Abortion Clinic*, VICE NEWS (May 23, 2017), https://news.vice.com/en_us/article/paz4bv/last-clinics-seven-states-one-abortion-clinic-left [https://perma.cc/D4LT-3CQ2] (listing seven states, all Republican-controlled, with only one clinic, including Missouri); Anna North, *Abortion Clinics Are Closing in Rural America. So Are Maternity Wards.*, VOX (Sept. 7, 2017), https://www.vox.com/policy-and-politics/2017/9/7/16262182/kentucky-clinic-abortion-maternity [https://perma.cc/R86Q-HF9M].

[154] Gonzales v. Carhart, 550 U.S. 124, 158 (2007).

[155] Jennie Drage Bowser, *Constitutions: Amend with Care*, NCSL (Sept. 1, 2015), https://www.ncsl.org/research/elections-and-campaigns/constitution-amend-with-care.aspx [https://perma.cc/22K8-9DNT].

ordinances are doing so because their state will not, it is unlikely that a majority of the state voters will approve a constitutional amendment that will protect something their elected officials will not.

C. State Constitution Procedural Challenges

Localities' final traditional form of defense against preemption are procedural state constitutional claims.[156] Procedural challenges are predicated on the state legislature drafting the legislation in an improper way. These procedural errors include laws which improperly target one locality though special legislation.[157] Singling out one locality may violate the special legislation bans in state constitutions. If a state acts to limit local powers, the restriction "must operate uniformly upon all municipalities."[158] If a state law specifies one locality or requires localities fall within a closed or irrational classification for the law to apply,[159] it violates the ban on special legislation. However, states can target localities through special bills if there is a matter of broad state interest uniquely situated in the locality.[160] The narrow allowance for special bills counters the restriction on special legislation. States that both seek to restrict reproductive health access and have only one abortion clinic may argue that intrastate preemption of the locality with the clinic is appropriate because abortion is an area of interest to the state as confirmed by *Gonzales v. Carhart*.[161] While this may be true, targeting measures at localities, rather than at providers, is still suspect under the special legislation restrictions in most states' constitutions.[162] Further, if the state creates an open classification or does not limit the municipalities on which the law operates, the fact that only some municipalities are impacted does not inherently raise special legislation concern.[163] A state law that applies

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[156] *See* Briffault et al., *supra* note 12, at 12–13; Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39, 48 n.38 (2014) (listing Missouri as a state where intrastate preemption can be challenged based on procedural issues).

[157] *See* BRIFFAULT & REYNOLDS, *supra* note 22, at 299–318; *see generally* Schutz, *supra* note 156.

[158] Garcia v. Siffrin Residential Ass'n, 407 N.E.2d 1369, 1379 (Ohio 1980).

[159] *See* Town of Secaucus v. Hudson Cty. Bd. of Taxation, 628 A.2d 288, 297 (N.J. 1993).

[160] *See* Town of Emerald Isle v. State, 360 S.E.2d 756, 763 (N.C. 1987).

[161] Gonzales v. Carhart, 550 U.S. 124, 158 (2007).

[162] *See* BRIFFAULT & REYNOLDS, *supra* note 22, at 299.

[163] *See* Schutz, *supra* note 156, at 71.

to all localities with abortion clinics or crisis pregnancy centers would be an open, rational classification for a state to place when regulating reproductive health and therefore likely legal even under the special legislation bans.

Process challenges are rare as following the established process and carefully drafting statutes typically avoids allegations of process defects, including special legislation.

III. Unique Analysis for Reproductive Health Related Preemption

Intrastate preemption in the reproductive health and access context offers unique arguments for protecting localities from state intervention that harms access. These include arguments in favor of localities' imbued and historical powers in the zoning and public health areas. They also include claims of freedom of expression for localities to speak out against the false medical information given in crisis pregnancy centers. Finally, intrastate preemption may raise undue burden concerns.

A. Unique Attributes of Reproductive Health Preemption: Zoning and Public Health

While localities lose most state-local conflicts,[164] in most states, local government operates in some arenas with limited "external legislative, administrative or judicial supervision."[165] In these arenas, localities have extensive latitude.[166] Most reproductive health-related local action utilizes local zoning or public health powers. Zoning and public health are two such areas where localities historically have latitude and benefit from home rule protections. As such, the locality may prevail over the state even if a conflict exists.[167] Reproductive- and abortion-related intrastate preemption is more challengeable under home rule principles than other forms of intrastate preemption.

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[164] Briffault, *Our Localism, Part I*, *supra* note 48, at 127–28.

[165] *Id.* at 112.

[166] *See id.*

[167] *See id.* at 113.

1. Zoning and Public Health

Localities' health care involvement includes zoning and regulating for public health objectives.[168] Both are also independently often left to localities to address.

One of the functions states have entrusted to local government is land use regulation and zoning.[169] Land use and zoning have been recognized as an inherently local issue since the earliest zoning cases.[170] Land use control is a police power that "aims directly to secure and promote the public welfare . . . ."[171] Zoning is a form of land use control by local governments.[172] Land use regulation is "the most important local regulatory power."[173] Public health policy, and protective reproductive access action specifically, frequently use localities' land use and zoning powers to achieve the desired access protection.[174] This use suggests that challenges to intrastate preemption may be stronger if the state law interferes in the inherently local power of zoning, which may receive more home rule protection.

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[168] *See* AM. PUB. HEALTH ASS'N, IMPROVING HEALTH THROUGH TRANSPORTATION AND LAND-USE POLICIES (2009), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/31/08/21/improving-health-through-transportation-and-land-use-policies [https://perma.cc/8H32-BG44]; NAT'L ASS'N OF LOC. BDS. OF HEALTH, LAND USE PLANNING FOR PUBLIC HEALTH: THE ROLE OF LOCAL BOARDS OF HEALTH IN COMMUNITY DESIGN AND DEVELOPMENT 9 (2006), https://www.cdc.gov/healthyplaces/publications/landusenalboh.pdf [https://perma.cc/BZX3-S9YT].

[169] *See* Michelle Wilde Anderson, *Sprawl's Shephard: The Rural County*, 100 CAL. L. REV. 365 (2012) (critiquing the role counties have played in land use regulation).

[170] *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("[T]he question whether the power exists to forbid the erection of a building of a particular kind or for a particular use . . . is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.").

[171] *See* Garcia v. Siffrin Residential Ass'n, 407 N.E.2d 1369, 1377 (Ohio 1980) ("[Z]oning power aims directly to secure and promote the public welfare, and it does so by restraint and compulsion. Upon analysis of their function and purpose, we conclude that zoning ordinances are an exercise of the police power granted to municipalities by Section 3, Article XVIII of the Ohio Constitution." (citation omitted) (internal quotation marks omitted)).

[172] *See id.* at 1379 ("Local comprehensive zoning plans have long been held to be a valid exercise of governmental planning and control of land use for the benefit of public health, safety, morals, and general welfare.").

[173] Briffault, *Our Localism, Part I*, *supra* note 48, at 115.

[174] *See* AM. PUB. HEALTH ASS'N, *supra* note 168; NAT'L ASS'N LOC. BDS. HEALTH, *supra* note 168.

Counties and localities are also integral in public health and health care provisions,[175] such as providing hospital services.[176] Congress and the federal courts recognize the centrality of localities in health care and public health.[177] Courts have stated that police-power-based "regulation of 'health, safety, and welfare' of a locality is squarely within the scope of local affairs."[178] While police power is central to local action generally, public health presents an especially compelling case for local regulation.[179] Cities began the field of public health and continue to be the innovative leaders in the field.[180] One notable example of innovation by localities in public health is in menu labeling. New York City started the practice, and after surviving a lawsuit seeking to block the ordinance as preempted by federal law, it has spread to other localities and five states as of 2010.[181] Trans fat regulation is another example—one in which the local measure survived intrastate preemption.[182]

Public health and zoning often merge. For example, many localities are left mostly to their own devices for issues pertaining to sanitation and food handling.[183] Both public health initiatives are furthered by zoning which keeps restaurants far from dumps and ensures clean water by regulating locations of farms and factories. Zoning also protects individuals from infectious disease by reducing crowding.

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[175] *See* NAT'L ASS'N OF COUNTIES, WHY COUNTIES MATTER! 3, https://www.iowacounties.org/wp-content/uploads/2014/12/IowaCountiesMatter.pdf [https://perma.cc/H7RP-TMJ4].

[176] *Id.*

[177] *See* N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 661 (1995) ("[N]othing in the language of [the Employee Retirement Income Security Act of 1974 (ERISA)] or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern.").

[178] Lynn A. Bake & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1356 (2009).

[179] *See* BRIFFAULT & REYNOLDS, *supra* note 22, at 13.

[180] *See* Diller, *Public Health*, *supra* note 67.

[181] *See id.* at 1239.

[182] *See* Cleveland v. State, 989 N.E.2d 1072 (Ohio Ct. App. 2013).

[183] Kathy L. McCarty et al., *Major Components and Themes of Local Public Health Laws in Select U.S. Jurisdictions*, 124 PUB. HEALTH REP. 458, 459 (2009).

Many states do not challenge the primacy of localities in public health and zoning. Many grant the localities control over public health.[184] These grants tend to be in broad, general terms.[185] Consequently, the case that preemption is improper may be stronger for local action to protect public health than in other areas and even stronger when it involves zoning to further a public health cause.

2. Necessary Individuation

Local-level lawmaking and regulation is best in some instances to ensure proper tailoring of laws to needs. For example, individuation to ensure proper tailoring is required for buffer zones, which are protective areas around sensitive locations.[186] Statewide buffer zones have been unsuccessful.[187] The statewide laws have not survived the strict scrutiny review's narrow tailoring requirement.[188] Strict scrutiny applies to buffer zone laws and ordinances as they are limits on where and when people can speak, associate, and express their views—First Amendment-protected actions.[189]

States can tailor solutions to localities through special bills if the state interest is uniquely situated in that locality.[190] However, in the case of buffer zones, such tailoring will not be possible for many states with multiple clinics in multiple localities. Local-level tailoring is preferable to ensure local geography is considered. While a state with one provider in one locality may be able to pass special legislation to create a buffer zone, as there is likely broad state interest in the clinic, the action will still be suspect under the special legislation restrictions in most states' constitutions.[191] Given the Court-

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[184] *See* Josephine Gittler, *Controlling Resurgent Tuberculosis: Public Health Agencies, Public Policy, and Law*, 19 J. HEALTH POL. POL'Y & L. 107, 108 (1994) ("[I]t is customary for [state governments] to delegate [their broad public health regulatory powers] to local governments." (citation omitted)).

[185] *See* Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 104–05 (1999) ("Grants of power to health officials and local governments tended to be made in broad terms.").

[186] *See* McCullen v. Coakley, 573 U.S. 464, 490–94 (2014).

[187] *See id.*

[188] *Id.*

[189] *Id.*

[190] *See* Emerald Isle v. State, 360 S.E.2d 756, 763 (N.C. 1987); *see also supra* Part II.C.

[191] *See* BRIFFAULT & REYNOLDS, *supra* note 22, at 299.

required individualization of buffer zones and the fact that buffer zones combine the traditional local government functions of zoning and public health protection, there is a strong prudential argument that local-level action in buffer zones and other areas where public health and zoning interact should not be preempted by state legislation.

3. Unique Arguments Applied

The state-local conflict analysis always starts by confirming that both the state and the locality can act in the way they did.[192] Next, the fact finder must determine if a conflict exists and if there is an attempt by the state to preempt the locality.[193] The last step of the analysis is to ascertain if the state has the power to preempt the locality.[194] The unique attributes of localities' engagement in zoning and public health may change the outcome of the last step, if reached. The state's power to preempt the locality will depend on the form of home rule the state has.[195] As explored below, the unique characteristics of local action in the reproductive health sphere—zoning and public health-based regulations—will only aid preempted localities in imperio home rule states.

a. Imperio Home Rule States

Imperio home rule states, like Missouri,[196] are the most protective of local power.[197] While these protections may not exist every time a locality acts, the heightened protections do exist when the locality acts in an exclusively local matter or a matter of mixed state and local scope.[198] If the matter is of exclusively local concern, such as local

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[192] *See id.* at 494–95; *supra* Part II.C (explaining restraints on state action and procedural requirements for state lawmaking); *supra* Part I.A.

[193] *See* BRIFFAULT & REYNOLDS, *supra* note 22, at 495; *supra* Part II.A (explaining the types of conflict and analyzing the potential conflicts in MO. REV. STAT. § 188.125 (2017)).

[194] *See* BRIFFAULT & REYNOLDS, *supra* note 22, at 495–96.

[195] *See id.* at 346–51, 495–96.

[196] *See* St. Louis v. W. Union Tel. Co., 149 U.S. 465, 468 (1893) (stating that the locality is like a government within a government or "imperium in imperio").

[197] *See* Diller, *Reorienting Home Rule: Part 2*, *supra* note 42, at 1060–72.

[198] *See id.* at 1049–50.

election regulation, then the locality will prevail.[199] The locality may also prevail if the power invoked by the locality comes from the constitution, but the state is attempting to use a state statute to preempt the locality.[200] When the matter is of mixed state and local concern, different courts have addressed the issue in different ways. Some have opted for a balancing test,[201] while others have used a categorical approach, only allowing localities to prevail if the issue is of local concern at its core.[202] Courts will generally look at the extraterritorial impact of a local ordinance in determining if the local action survives preemption in matters of mixed state and local concern.[203] In most imperio home rule states, the nature of the local interest, the nature of the state interest, and the extraterritorial effects, including uniformity, will all be considered.[204] If the state constitution has addressed the matter, that may be decisive.[205] Finally, if it is a matter traditionally handled by the locality, that may also be decisive.[206] Matters are rarely, if ever, of exclusively state interest.

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[199] *See, e.g.*, Johnson v. Bradley, 841 P.2d 990 (Cal. 1992) (permitting Los Angeles to limit campaign contributions and create a public funding mechanism for local election as it is an issue of local governance which has, traditionally, been left to the localities).

[200] *See, e.g.*, Town of Telluride v. San Miguel Valley Corp., 185 P.3d 161 (Colo. 2008) (finding that the state cannot use legislation to undo a power explicitly granted in the state constitution to the localities and not addressing if the matter was of state, local, or mixed concern).

[201] *See, e.g.*, Fraternal Order of Police, Colo. Lodge #27 v. City & Cty. of Denver, 926 P.2d 582 (Colo. 1996) (holding, after applying a balancing test, that the locality prevails as the training of peace officers is a local matter and there are no disuniformity concerns).

[202] *See, e.g.*, City of LaGrande v. Pub. Emp. Ret. Bd., 576 P.2d 1204, 1225–26 (Or. 1978) (holding preemption is proper as the conflict does not surround the "structure and procedure of local government," but rather is about a general law and its application to local employees, so the superior government should prevail).

[203] *See, e.g.*, Cty. of Northglenn v. Ibarra, 62 P.3d 151 (Colo. 2003) (considering the external impact of localities excluding certain foster children from their borders).

[204] *See Fraternal Order of Police, Colo. Lodge #27*, 926 P.2d 582.

[205] *See Town of Telluride*, 185 P.3d 161.

[206] *See* Johnson v. Bradley, 841 P.2d 990 (Cal. 1992).

In the case of reproductive rights, there is no doubt that there is a state interest.[207] However, there is also a local interest in zoning and protecting public health and safety.[208] There are potential extraterritorial effects if the locality hosts the only provider in the state. However, if there is only one provider, this would go against concerns about disuniformity. Further, other localities would not experience the extraterritorial impacts as with nuisance issues.[209] Rather, the local action will affect individuals, through changing their access to services. The citizens of the locality that acted have democratic recourse if they dislike a decision. Courts have been unfriendly to non-residents who raise concerns about the extraterritorial impacts of local decisions, especially if the impact to non-residents concerns access to services.[210] There is likely no state constitutional statement on these matters, though many home rule states do give their localities zoning and police powers. Further, localities traditionally regulate zoning and public health.[211] The local-level regulation also speaks to the accepted importance that zoning and, when used, buffer zones be individualized to the locality.[212] There is a strong case for the locality to prevail in an imperio home rule state. This will be dependent, however, on the weight the courts give to the state interest and the court's determination of if the regulation is in fact the type traditionally undertaken at the local, rather than the state, level.

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[207] *See* Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 372 (1997) ("[G]overnment interests [include]: protecting a woman's freedom to seek pregnancy-related services, ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting the medical privacy of patients whose psychological and physical well-being were threatened as they were held 'captive' by medical circumstance."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869–79 (1992) (explaining that states have an interest in fetal potential that increases as the pregnancy progresses).

[208] *See supra* Part III.A.1–2.

[209] *See* Vill. of Barrington Hills v. Vill. of Hoffman Estates, 410 N.E.2d 37 (Ill. 1980) (finding standing for a locality that would lose property tax revenues and have to hire more police due to a neighboring locality's open-air theater).

[210] *See* Bakies v. City of Perrysburg, 843 N.E.3d 1182 (Ohio 2006) (holding that a locality can condition the provision of water and sewage services on non-residents signing a consent to annexation); Sloan v. City of Conway, 555 S.E.2d 684 (S.C. 2001) (allowing a locality to increase rates as it wishes to non-residents as there is no duty to provide them services). *But see* City of Texarkana v. Wiggins, 246 S.W.2d 622 (Tex. 1952) (holding that as the neighboring locality was supplying services in a public authority-like way and had a monopoly, non-residents could sue over disparate pricing not based on delivery cost differences).

[211] *See supra* Part III.A.1–2.

[212] *See supra* Part III.A.3.

In imperio home rule states, there is a colorable claim that the locality should prevail over the state if the two are in a conflict over local zoning and public health ordinances that impact abortion access.

b. Legislative Home Rule States

In legislative home rule states, also known as National Municipal League states because they follow the model established and promoted by the National Municipal League starting in 1968,[213] the state will usually win.[214] This is because in legislative home rule states, the locality can act "unless and until" the state legislature preempts it by general law.[215] Localities in these states have no shield against the state—no home rule immunity.[216] As such, even the special attributes of zoning and public health will not save the locality in a conflict with the state. The court may strain to avoid a conflict between state and local action if it feels the issue is uniquely local such as a city voting or governance issue.[217]

c. Dillon's Rule States

Under Dillon's Rule, the state can always preempt its localities. This is because the locality has only the powers the state "expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable."[218] The state can limit the locality as it wishes.[219] The local ordinance or action will never survive adverse state action, if done properly,[220] regardless of why the locality acted.

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[213] *See* City of New Orleans v. Bd. of Comm'rs of the Orleans Levee Dist., 640 So.2d 237, 242–43 (La. 1994) (describing the history of the evolution of the National Municipal League model of home rule).

[214] *See* BRIFFAULT & REYNOLDS, *supra* note 22, at 350.

[215] *Id.* at 348.

[216] *See id.*

[217] *See supra* Part II.A; *see, e.g.*, State ex rel. Haynes v. Bonem, 845 P.2d 150 (N.M. 1992).

[218] Marble Techs., Inc. v. City of Hampton, 690 S.E.2d 84, 88 (Va. 2010).

[219] *See id.*

[220] *See supra* Part II.C.

B. Locality Freedom of Expression

The Court has found that a government "has the right to 'speak for itself.'"[221] This right presumably extends to localities as subunits of government. Further, governments may compel private actors to display the government-endorsed message at their own expense.[222] Localities could argue that in making explicit their belief that crisis pregnancy centers are not legitimate health care providers through mandating signage, the localities are exercising their right to freedom of expression. However, the Supreme Court recently ruled that mandating such speech violated crisis pregnancy centers' First Amendment rights as incorporated to the state by the Fourteenth Amendment.[223] A freedom of expression-based argument may also be used by localities attempting to undermine access to abortion. The Court has held that governments have a legitimate interest in "promot[ing] respect for life, including life of the unborn."[224] A locality could therefore argue that its right to freedom of expression protects its ability to mandate signage and literature against abortion. Given the ruling in *National Institute of Family & Life Advocates* as compared to the ruling in *Gonzales,* it is likely a freedom of expression argument will be more fruitful for those trying to block, rather than promote, access to abortion.

C. Localities Avenging Citizens' Individual Rights

In some instances, the Supreme Court has found that states taking control of local issues can violate the Equal Protection Clause.[225] In these cases, the state attempted to withdraw powers from localities in ways that burden individuals' constitutional rights.[226] The Court was willing, in these cases, to prohibit such preemptions.[227] In *Romer v. Evans*, a state constitutional amendment that preempted local anti-discrimination ordinances was

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[221] Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) (citation omitted).

[222] *See id.*

[223] Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

[224] Gonzales v. Carhart, 550 U.S. 124, 158 (2007).

[225] *See* Romer v. Evans, 517 U.S. 620 (1996); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 474 (1982).

[226] *See Romer*, 517 U.S. at 632.

[227] *See* Rosenthal, *supra* note 63.

held unconstitutional, as it was based on animus against a class of individuals.[228] This was held not to be a legitimate state interest even under rational basis review.[229] Individuals as well as localities which had protective ordinances brought the case.[230] In the abortion rights context, the federal and some state constitutions confer rights that localities can avenge in a *Romer*-like fashion.

Women have a federal constitutional right to have an abortion that cannot be unduly burdened by state action.[231] Intrastate preemption may be an undue burden under the *Casey*/*Whole Woman's Health* standard.[232] In *Whole Woman's Health*, the Supreme Court confirmed that the undue burden standard from *Casey* is still the proper test for abortion regulation cases.[233] The Court also clarified in *Whole Woman's Health* that the burdens of the challenged law are to be evaluated in light of the alleged benefits of the law.[234] States do not need to enable access; rather they cannot unduly burden access.[235] As *Roe* and its progeny base the right to access to abortion on the Fourteenth Amendment,[236] state action is required before the undue burden analysis can be invoked. Intrastate preemption could be the state action.

For a preemption law to be in violation of the undue burden requirement, state preemption of the locality would have to harm access to abortion services. If this occurs,

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[228] *See Romer*, 517 U.S. at 632.

[229] *Id.*

[230] *See id.* at 625.

[231] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016); Roe v. Wade, 410 U.S. 113 (1973);.

[232] *See Whole Woman's Health*, 136 S. Ct. at 2300; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876–79 (1992).

[233] *See Whole Woman's Health*, 136 S. Ct. at 2309–14.

[234] *Id.* In *June Medical*, the plurality opinion contents that *Whole Woman's Health* reaffirmed and applied the *Casey* standard. 140 S. Ct. 2103, 2112, 2133 (2020) (plurality opinion). The concurring and dissenting Justices allege that the balancing in the *Whole Woman's Health* decision was unfaithful to the *Casey* standard. *Id.* at 2136 (Roberts, C.J., concurring in the judgment); *id.* at 2154 (Alito, J., dissenting). This disagreement on the standard to use in evaluating abortion regulations will undoubtably come before the Court for clarification.

[235] *See* Harris v. McRae, 448 U.S. 297 (1980).

[236] *See Roe*, 410 U.S. at 153.

localities will likely have standing to challenge the state law, as the state action is depriving the locality of their home rule powers. However, if the law invokes undue burden concerns under the abortion jurisprudence, that state-local preemption battle will likely give way to the constitutional question. There would be no benefit to making a preemption claim, other than ensuring the locality can be a party even absent *parens patriae* standing.

Intrastate preemption language, within a larger state law that regulates abortion access, may be helpful in defeating the state claim that the law's intention is to protect the health of the woman. In *Whole Woman's Health*, the Court found that the state's claim that the law would protect the health of women was unfounded.[237] Litigants bringing undue burden cases can use intrastate preemption to show that the state's claims that the legislation is enacted to protect the health of women is pretextual if the legislation preempts buffer zones or other local action that would not endanger the health of the women. Preemption may therefore help to show that the legislation is not to further the state's legitimate interest in health but rather to limit access.

In addition to federal constitutional challenges, the state constitution may also give citizens rights. The most common affirmative right that state constitutions bestow is the right to education for its minor residents.[238] A third of state constitutions recognize a right to health or health care.[239] Localities can invoke these state constitutional clauses and amendments. Courts have held these state constitutional provisions to protect the right to abortion, striking down laws that would restrict access to the medical procedure.[240] Localities could invoke their state constitution, similar to how the locality in *Romer* invoked the Fourteenth Amendment to protect the rights of its citizens.

CONCLUSION

State legislatures are increasingly using intrastate preemption to block progressive localities. As many states attempt to burden the right to choose through TRAP laws,

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[237] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2311–13 (2016).

[238] *See* Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915 (2016) (explaining the origin of the states as the exclusive unit of government granting a constitutional right to education and discussing the shortcomings in fulfilling this right).

[239] *See* Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1347–66 (2010).

[240] *See id.* at 1386–88.

localities have stepped in to protect reproductive rights. Reproductive health advocates must protect this local effort. Litigation to challenge intrastate preemption that seeks to undo local protections for reproductive health has not yet occurred. Should it occur, there are aspects of local action to protect abortion access that may make the localities' claims of improper intrastate preemption stronger than the claims in other intrastate preemption litigation. These include the recognized and protected, historical and practical centrality of localities in zoning and public health. Further, the tailoring required for buffer zones makes localities the most appropriate level of government to act.

Litigation to contest intrastate preemption is rare and may fail even given the unique attributes of local action to protect reproductive health access. Advocacy prior to the passage of the law that restricts localities is the best means of protecting localities from intrastate preemption. Preemption laws are becoming more explicit about their purpose, using explicit words such as "preempt" rather than preempting implicitly.[241] The new, more explicit drafting allows the state-local conflicts to be clear prior to the act's passage, which should ex-ante aid advocacy efforts. The advocacy effort may find support in traditional opposition, including local government proponents such as the National League of Cities, the American Legislative Exchange Council, and the Tea Party.[242] These factions may be happy to see preemption language removed from laws hoping that localities will act to restrict access rather than extend access.

The impact intrastate preemption can have on abortion access should not be underestimated. As anti-choice states have faced court opposition to TRAP laws, they are looking for new strategies to restrict access and make access to reproductive health services traumatic for those seeking care. Intrastate preemption allows the states to ensure that localities do not undermine these efforts. Intrastate preemption is a new front in the abortion rights battle.

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[241] *See* MO. REV. STAT. § 188.125 (2017).

[242] The rhetoric of these groups includes the idea that government should be local and small, so opposing intrastate preemption aligns with their goals.