

## **“DOWN WHERE THE GRASS GROWS”: MUNICIPAL ABORTION POLICIES AFTER *DOBBS***

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*When the Supreme Court’s decision in Dobbs v. Jackson Women’s Health Organization referred future decisions about abortion policies to “elected representatives and the people,” there is no doubt that local governments were included in the designation. In fact, since the 1970s, local governments have been active in pursuing a range of abortion policies in their jurisdictions—both for and against abortion access—that may be in tension with their state governments. Because the ideological orientations of state and local governments often conflict, state preemption is a frequent threat hanging over these local initiatives. There are examples from both sides of the political spectrum, but it is more often conservative state legislatures that act to preempt more progressive policymaking by municipalities. Yet, recent history shows that aggressive preemption by states has not stopped, and will not stop, local governments from weighing in and pursuing policies that reflect local values. Even when local pro-choice policies have no legal effect, they can educate, support organizing, provide moral support, and assuage fear of seeking critical healthcare. On the anti-abortion side, symbolic local policies are often part of a strategic national agenda. The breadth and depth of interest in abortion access after Dobbs provides an occasion for local debates that can engage, energize, and mobilize voters to challenge state preemption practices. If pro-choice advocates lean into democracy and show up “down where the grass grows,” their efforts could have a substantive impact as well.*

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## INTRODUCTION

In *Dobbs v. Jackson Women’s Health Organization*, the Supreme Court’s majority concluded that the Court had overreached when it held in *Roe v. Wade* and *Planned Parenthood v. Casey* that the U.S. Constitution protected a fundamental right to abortion.<sup>1</sup> Jettisoning precedent and rejecting the reasoning of the Supreme Court’s prior decisions, Justice Alito wrote for the *Dobbs* majority that the issue of abortion should now be “returned to the people and their elected representatives.”<sup>2</sup>

The Court’s guidance about next steps in abortion policymaking is vague. The majority removed the federal courts from their long-standing role of reviewing the constitutionality of abortion regulations, but it did not reassign future decision-

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1. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

2. *Dobbs*, 142 S. Ct. at 2279.

making to any particular entity. Still, the opinion does suggest some constraints. Notably, the majority opinion uses the word “and” to specify that following the *Dobbs* decision, both “the people” *and* “their elected representatives” share authority for making abortion decisions.<sup>3</sup>

Selection of a different conjunction—“or”—would have more closely paralleled the wording of the Tenth Amendment, which states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or* to the people.”<sup>4</sup> The use of “and” in *Dobbs* was surely not an accident. The draft opinion leaked earlier in the decision-making process used the same word, which remained unchanged in the final version of the opinion.<sup>5</sup> By selecting “and”—as in, “people *and* their elected representatives”—the Court emphasized the role of government actors in this very personal decision.<sup>6</sup>

What government representatives, then, should be involved in abortion decisions post-*Dobbs*? “Elected representatives” might refer to federal elected officials in Congress, or it could refer to elected officials in state legislatures.<sup>7</sup> “Elected representatives” might also be local officials in counties, cities,

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3. *Id.*

4. U.S. CONST. amend. X (emphasis added). The choice of the word “and” also cuts against a claim that the Court meant to emphasize the role of “the people” by listing them first. Under the Court’s formulation, “the people” are conjunctively tethered to “their elected representatives.” In contrast, while the Tenth Amendment lists “the States” before “the people,” the use of “or” makes clear that their authority is not conjoined.

5. For the initial leaked draft, see Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022, 8:32 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/UBV4-3K35>].

6. *Dobbs*, 142 S. Ct. at 2279. In contrast, the Tenth Amendment’s wording recognizes that state sovereignty and popular sovereignty are “not identical,” and can operate independently. NESTOR DAVIDSON ET AL., NAT’L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 7 n.1 (2020), <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf> [<https://perma.cc/7GXE-FEQC>].

7. On Congressional authority to regulate abortion post-*Dobbs*, see KEVIN J. HICKEY ET AL., CONG. RSCH. SERV., IF12269, REGULATING REPRODUCTIVE HEALTH SERVICES AFTER DOBBS V. JACKSON WOMEN’S HEALTH ORGANIZATION (2023), <https://crsreports.congress.gov/product/pdf/IF/IF12269> [<https://perma.cc/QHB2-7NHP>]. The *Dobbs* decision notes that “[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion.” *Dobbs*, 142 S. Ct. at 2284. Justice Kavanaugh’s *Dobbs* concurrence contemplates involvement of Congress or the states. *Id.* at 2305–06, 2309–10 (Kavanaugh, J., concurring).

and towns—the elected representatives who are closest to “the people.”<sup>8</sup>

However, local governments are subject to state laws. These laws often constrain local regulatory activity and frustrate the efforts of local elected representatives to respond to their constituencies.<sup>9</sup> “Preemption” is the term used to describe this exercise of state power, which is defined as “a legal concept where a higher level of government has the authority to limit, or even eliminate, the power of a lower level of government to regulate a certain issue.”<sup>10</sup>

When threatened with state preemption, local governments have a choice. On one hand, they may frame their policies in relatively modest, discretionary terms, in an attempt to avoid legal challenges or punitive actions by the state.<sup>11</sup> For example, local officials can issue non-binding resolutions or statements that urge prosecutors to deprioritize abortion prosecutions.<sup>12</sup>

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8. State authority includes municipalities, since “[m]unicipal corporations are political subdivisions of the state, created by it and at all times wholly under its legislative control.” *Hunter v. Pittsburgh*, 207 U.S. 161 (1907). *See, e.g.*, Amy Littlefield, *Cities and States Are Acting Fast to Blunt the Impact of Dobbs*, NATION (Dec. 1, 2022), <https://www.thenation.com/article/society/cities-states-abortion-dobbs> [<https://perma.cc/SX94-XZNF>] (describing local initiatives post-*Dobbs*).

9. *See* SPENCER WAGNER ET AL., RESTORING CITY RIGHTS IN AN ERA OF PREEMPTION, NAT’L LEAGUE OF CITIES 5 (2019), <https://www.nlc.org/wp-content/uploads/2019/11/Restoring-City-Rights-in-an-Era-of-PreemptionWeb.pdf> [<https://perma.cc/S5J9-67HX>]; *see also* Nestor Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 957–58 (noting the increase in frequency and breadth of state preemption).

10. FUNDAMENTALS OF PREEMPTION, NATIONAL POLICY & LEGAL ANALYSIS NETWORK 1, <https://publichealthlawcenter.org/sites/default/files/resources/nplans-fundamentals-2010.pdf> [<https://perma.cc/69ZC-ACCK>].

11. Local officials often seek advice of legal counsel to avoid challenges to their actions. *See, e.g.*, McKenna Schueler, *St. Petersburg City Leaders to Consider Abortion Decriminalization Resolution and Donating to Local Abortion Fund*, WMNF (Dec. 2, 2022), <https://www.wmnf.org/st-petersburg-city-leaders-to-consider-abortion-decriminalization-resolution-and-donating-to-local-abortion-fund> [<https://perma.cc/3LJD-EX78>]; Allison Garfield, *Madison and Dane County Push Back on Wisconsin’s 1849 Abortion Ban*, CAP. TIMES (Jul. 7, 2022), [https://captive.com/news/government/madison-and-dane-county-push-back-on-wisconsin-s-1849-abortion-ban/article\\_6975ca32-72d7-597a-b8d3-efc189f93fb0.html](https://captive.com/news/government/madison-and-dane-county-push-back-on-wisconsin-s-1849-abortion-ban/article_6975ca32-72d7-597a-b8d3-efc189f93fb0.html) [<https://perma.cc/Y3BA-9TZD>] (citing discussion of local resolutions with city attorney); Henri Gendreau, *Roanoke City Council Had a Pro-Choice Resolution Drafted. It Never Saw the Light of Day*, ROANOKE RAMBLER (Apr. 11, 2023), <https://www.roanokerambler.com/roanoke-city-council-had-a-pro-choice-resolution-drafted-abortion-dobbs> [<https://perma.cc/L3LT-SLK2>] (explaining that a proposed city council resolution was drafted by the city attorney).

12. *See, e.g.*, AUSTIN CITY COUNCIL, GRACE ACT (2022), <https://services.austintexas.gov/edims/document.cfm?id=387204> [<https://perma.cc/TYT3-VF87>]; *see also* Bekah McNeel, *San Antonio’s ‘Justice*

Alternatively, local governments may be more defiant, enacting ordinances in direct conflict with state laws, which may then be subject to preemption by state-level regulation.<sup>13</sup>

With this backdrop, this Essay examines the phenomenon of local abortion regulations and considers the role of local governments in the abortion policy debate. In Part I, I survey local abortion regulations and policies during three time periods: pre-*Roe*, post-*Roe*, and post-*Dobbs*. These regulatory efforts, which have been thoroughly catalogued in other scholarship,<sup>14</sup> range from local “abortion-free zones” in states with few statewide abortion restrictions to efforts to establish local “abortion sanctuaries” in abortion-restrictive states.<sup>15</sup> This overview, spanning three eras of abortion policy, demonstrates the persistence over many decades of local efforts to set abortion policies within their jurisdictions.<sup>16</sup>

In Part II, I explore a question that has received less scholarly attention in the legal community: “Why?” Why do local governments persist in this exercise when state preemption poses so many hurdles to implementing local abortion policies? Drawing on both social science studies analyzing state preemption and media accounts of community debates, I suggest that policy results are not the appropriate measure of these

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*Charter’ Vote is Another Fight Between State Power and Home Rule*, TEXAS MONTHLY (Apr. 12, 2023), <https://www.texasmonthly.com/news-politics/prop-a-san-antonio-abortion-justice-charter> [<https://perma.cc/H3QP-BV3Y>]. One author has suggested that local governments might focus on providing support for self-managed abortions through local resolutions and allocation of municipal abortion funds. See Abigail Burman, *Abortion Sanctuary Cities: A Local Response to the Criminalization of Self-Managed Abortion*, 108 CALIF. L. REV. 2007, 2045 (2020).

13. See, e.g., Tom Byrne & Quinn Kirkpatrick, *Chancery Court Strikes Down Seaford’s Fetal Remains Ordinance*, DEL. PUB. MEDIA (June 29, 2022, 7:37 PM), <https://www.delawarepublic.org/delaware-headlines/2022-06-29/chancery-court-strikes-down-seafords-fetal-remains-ordinance> [<https://perma.cc/VZ5E-VCN3>] (addressing state preemption of city ordinance on disposal of fetal remains). For a comprehensive discussion of local abortion regulations and preemption, see Kaitlin A. Caruso, *Abortion Localism and Preemption in a Post-Roe Era*, 27 LEWIS & CLARK L. REV. 585 (2023).

14. See Caruso, *supra* note 13; Louis Cholden-Brown, *The Reproductive Rights Charter*, 96 U. DET. MERCY L. REV. 557 (2019); Juliana Bennington, *Intrastate Preemption: A New Frontier in Burdening Choice*, 40 COLUM. J. GENDER AND L. 93 (2020).

15. See, e.g., James Dawson, *Idaho Republicans Threaten to Withhold Cash from Sanctuary Abortion Cities*, BOISE STATE PUB. RADIO NEWS (Jan. 11, 2023, 10:57 AM), <https://www.boisestatepublicradio.org/politics-government/2023-01-11/idaho-republicans-threaten-to-withhold-cash-from-sanctuary-abortion-cities> [<https://perma.cc/X7MQ-K8R5>].

16. See discussion *infra* notes 25–90 and accompanying text.

initiatives' success. Rather, it is important to appreciate the value of allowing "the people" to have their voices heard and their views acted upon by their elected representatives. Local abortion regulations respond both to constituents' desires to have a voice in local governance and to elected officials' desire to signal support for their constituents' views and send a message to state government.<sup>17</sup> Social science studies indicate that state preemption is at its height when states and localities are politically polarized.<sup>18</sup> Given that context, local abortion policies might, in theory, serve to initiate a dialogue between local and state authorities concerning the range of acceptable policy choices.<sup>19</sup> I discuss two theories that have been advanced to frame such dialogues.

In Part III, I address the question of "what?" If local abortion initiatives do not effect policy change, what impacts do these measures ultimately have, if any? Analogous local policies involving immigration sanctuaries suggest that pro-choice expressions on the local level, albeit symbolic, might positively affect constituency wellbeing, help alleviate stress and fear, and support social movement organizing.<sup>20</sup> Anecdotal evidence drawn from media reports concerning local pro-choice policies provides evidence of such outcomes.<sup>21</sup> These effects may not change policy, but they may still serve the interests of local governments and improve the welfare of affected individuals. While research is sparse, it is also possible that anti-abortion ordinances provide some stress relief to those who are committed to opposing abortion access and support interests in anti-abortion movement-building. However, activists' claims of positive impacts usually center on the unborn rather than on

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17. See Lauren Phillips, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2238 (2017) (noting the close connection between local governments and their constituents).

18. See discussion *infra* notes 100–122 and accompanying text.

19. See, e.g., Gloria R. Gomez, *Flagstaff Issues Resolution to Support Abortion Access, Asks Lawmakers to Repeal Anti-Abortion Laws*, AZ MIRROR (Mar. 8, 2023, 1:55 PM), <https://www.azmirror.com/2023/03/08/flagstaff-issues-resolution-to-support-abortion-access-asks-lawmakers-to-repeal-anti-abortion-laws> [<https://perma.cc/LJ7N-QCJX>] (Statement of Flagstaff, AZ Vice Mayor, noting that the value of Flagstaff's non-binding pro-choice resolution "lay in letting the legislature know of Flagstaff's dissent.").

20. See discussion *infra* notes 176–201 and accompanying text; see also Burman, *supra* note 12, at 2051–52 (speculating that attention to local abortion policies could contribute to "reimagining" the goals of the pro-choice movement).

21. See *infra* notes 176–201.

activists themselves.<sup>22</sup> Further, the difficulties of enforcing local bans in states where abortion is permitted may undermine whatever effects are sought by anti-abortion activists.<sup>23</sup>

This Essay concludes by returning to the language of the Tenth Amendment as well as the language of *Dobbs*. Both texts leave open a role for local governments as the institutions closest to, and most accountable to, the people. As currently wielded by state legislatures and courts, preemptive measures have usurped the role of local government in many substantive areas.<sup>24</sup> But while critically needed, reforms of state preemption will not resolve local political debates concerning abortion. In the abortion arena, local governments fulfill their constitutional role by giving respectful voice to constituents' concerns, whether or not a local initiative is ultimately preempted by the state. What comes out of this deeply democratic process will depend on who shows up.

## I. LOCAL ABORTION REGULATIONS: VARIATIONS AND LEGAL OUTCOMES PRE-*ROE*, POST-*ROE*, AND POST-*DOBBS*

The locus of abortion regulation in America has shifted from the common law in colonial times through the early 1800s, to the states in the late 1800s, to the federal government with the 1973 decision in *Roe*, and to the “people and their elected representatives” with the 2022 decision in *Dobbs*.<sup>25</sup> It is not clear to what extent local governments adopted their own independent abortion regulations during much of this time. As abortion historian Leslie Reagan observes, it is particularly easy for local policies and legislative actions to be lost to the sands of

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22. See Keila Szpaller, *Manhattan Won't Move Ahead with 'Sanctuary City' Ordinance to Ban Abortion After Public Outcry*, DAILY MONTANAN (Feb. 10, 2023, 6:15 PM), <https://dailymontan.com/2023/02/10/manhattan-wont-move-ahead-with-sanctuary-city-ordinance-to-ban-abortion-after-public-outcry> [https://perma.cc/494G-TSN2] (observing that supporters of anti-choice resolution generally focused on “saving the babies”).

23. Michelle Oberman, *What Will and Won't Happen When Abortion is Banned*, 9 J. LAW & THE BIOSCIENCES 1, 15–17 (2022).

24. States have several methods of preempting local initiatives, including overriding them through state law, using state law to withdraw local authority, or using punitive measures such as funding threats or criminal penalties against local officials who defy the state. 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. AND POL'Y ISSUE BRIEF 1, 3 (Sept. 2017). In this article, I use the phrase “state preemption” as a general term to capture all of these methods.

25. MARY ZIEGLER, *ROE: THE HISTORY OF A NATIONAL OBSESSION* 1–11 (2023).

time.<sup>26</sup> She writes that “[h]istorians can surely locate published state statutes, state appellate and supreme court opinions, and the files for cases appealed to the highest court of each state, but local government documents can vary significantly and be held in a variety of locations.”<sup>27</sup>

It is known, however, that in recent decades, many municipalities made efforts to exercise independence from state policies only to see their efforts preempted when municipal laws were found to conflict with state (or federal) law.<sup>28</sup> For example, harsh immigration policies implemented during the Trump Administration triggered a rise in local government declarations establishing immigration sanctuaries; these local efforts were often usurped by exercise of state or federal preemptive authority in the immigration arena.<sup>29</sup> In recent years, local governments enacted their own minimum wage laws, plastic bag bans, anti-fracking ordinances, food labeling standards, regulations regarding transgender use of bathrooms, and rules on COVID-19 vaccinations, many of which were ultimately preempted by state law.<sup>30</sup> The post-*Dobbs* efforts by local governments to establish their own independent abortion policies are just the latest examples of this broader effort by local governments to adopt practices and regulations that reflect local values, only to be quashed by state government asserting superior authority. The three sections that follow will discuss local abortion regulations before *Roe*, between *Roe* and *Dobbs*, and after *Dobbs*.

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26. LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973* 256 (Univ. of Cal. Press 1997).

27. *Id.*

28. Christopher B. Goodman et al., *State Preemption of Local Laws: Origins and Modern Trends*, 4 PERSPS. ON PUB. MGMT. & GOVERNANCE 146 (2021), <https://doi.org/10.1093/ppmgov/gvaa018> [<https://perma.cc/2FCE-F6RZ>].

29. Mark A. Hall et al., *State Preemption of Local Immigration “Sanctuary” Policies: Legal Considerations*, 111 AM. J. PUB. HEALTH 259 (2021); L. Darnell Weeden, *Local Laws Restricting the Freedom of Undocumented Immigrants as Violations of Equal Protection and Principles of Federal Preemption*, 52 ST. LOUIS L. J. 479, 491–97 (2008) (explaining that the power to regulate immigration has historically and constitutionally been entrusted to the federal government).

30. Hunter Blair et al., *Preempting Progress: State Interference in Local Policymaking Prevents People of Color, Women, and Low-Income Workers from Making Ends Meet in the South*, ECON. POLY INST. (Sept. 30, 2020), <https://www.epi.org/publication/preemption-in-the-south> [<https://perma.cc/DJZ4-3FXW>]; Richard Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1163 (2018).



### A. Local Abortion Regulations Before *Roe v. Wade*

While the history of local abortion regulation is murky, it certainly did not begin with *Dobbs*. Several cases decided in the years just before *Roe* indicate that local governments, particularly in New York, sought to exercise authority in this arena at least since the late 1960s and early 1970s, when state laws expanding abortion access sparked local resistance.

New York State provides the clearest example of local governments resisting a state law expanding abortion. In 1970, the State legalized abortion up to 24 weeks of pregnancy.<sup>31</sup> In response, the town of Orangetown, New York, in Rockland County, enacted a regulation mandating that abortions in the town limits be conducted solely in hospitals as opposed to other medical offices.<sup>32</sup> Because the local regulation clashed with state law, which permitted the procedure outside of hospital settings, the regulation was preempted by state law.<sup>33</sup> The Village of Hempstead, New York, enacted a similar ordinance in 1971, barring abortions conducted in medical offices or clinics other than hospitals.<sup>34</sup> A state court likewise found that this ordinance was preempted by state law (though a similar ordinance remained on the books in Hempstead until it was expunged in 2022).<sup>35</sup> In 1970, New York City also adopted its own restrictions on abortions, in apparent defiance of the new state law.<sup>36</sup>

Though most reported cases involving local abortion ordinances pre-*Roe* arose in New York State, those local governments were not the only ones seeking to circumvent state law. For example, in 1971, Royal Oak, Michigan, voted to bar

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31. Julia Jacobs, *Remembering an Era Before Roe, When New York Had the 'Most Liberal' Abortion Law*, N.Y. TIMES, (July 18, 2018), <https://www.nytimes.com/2018/07/19/us/politics/new-york-abortion-roe-wade-nyt.html> [https://perma.cc/8CST-YAJR]. Other states repealing their abortion restrictions at this time were Alaska, Hawaii, and Washington. Sybil Shainwald, *Reproductive Injustice in the New Millennium*, 20 WM. & MARY J. WOMEN & L. 123, 142 (2013).

32. *Kim v. Orangetown*, 66 Misc. 2d 364, 365 (N.Y. Sup. Ct. 1971).

33. *Id.*

34. *Robin v. Inc. Vil. of Hempstead*, 30 N.Y.2d 347, 348 (N.Y. 1972).

35. Frank Rizzo, *Town Rescinds Abortion Zoning Law*, MANHASSET PRESS (Sept. 16, 2022), <https://manhassetpress.com/town-rescinds-abortion-zoning-law> [https://perma.cc/594T-UQAE].

36. See Arthur F. Dobson, Jr., *New York Abortion Reform and Conflicting Municipal Regulations: A Question of Home Rule*, 20 BUFF. L. REV. 524 (1971) (analyzing New York City abortion ordinances).

advertisements that provided the public with contact information for abortion providers.<sup>37</sup> Although the local ordinance did not regulate abortion directly, it was challenged and struck down as a violation of abortion providers' constitutional First Amendment rights.<sup>38</sup>

### *B. Local Abortion Regulation Between Roe and Dobbs*

Local authorities' attempts to exercise their authority, whether to hinder or to support abortion access, continued after the *Roe* decision in 1973.

Despite *Roe's* articulation of a fundamental, federal abortion right, some local authorities attempted to indirectly limit abortion access.<sup>39</sup> As summarized by Louis Cholden-Brown, local abortion ordinances attempting to impose new restrictions included:

[R]equirements that pregnancy termination certificates include the name and address of the patient receiving the abortion, mandate[s] that abortions be performed in hospitals, required mandatory counseling, waiting periods, parental consent or notification, gestational bans, partial-birth abortion bans, prohibitions on the advertisement of information related to where abortions may be procured, and the sale of abortion-inducing drugs.<sup>40</sup>

When challenged in court, these measures were generally struck down, yet many localities continued to pursue these initiatives.

Local zoning restrictions were frequently employed to frustrate clinic operations. For example, in 1976, the town of Framingham, Massachusetts, amended its zoning laws to prohibit the operation of abortion clinics within the town boundaries.<sup>41</sup> When that amendment was disallowed by the state courts on both equal protection and preemption grounds,

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37. *Exhibit A*, Mitchell Fam. Plan., Inc. v. City of Royal Oak, 335 F. Supp. 738, 744 (E.D. Mich. 1972).

38. *Id.*

39. *Abortions – Regulation by State and Local Municipalities*, 10 CAP. U. L. REV. 925, 925 (1981); *see, e.g.*, Friendship Med. Ctr. v. Chi. Bd. of Health, 367 F. Supp. 594 (N.D. Ill. 1973), *rev'd*, 505 F. 2d 1141 (7th Cir. 1974) (challenging Chicago Board of Health's onerous regulations for abortion facilities).

40. Cholden-Brown, *supra* note 14, at 562–63.

41. Framingham Clinic v. Bd. Of Selectmen, 373 Mass. 279 (1977).

the town tried again in 1979, when the Framingham zoning board attempted to impose special restrictions on an abortion clinic seeking permission to build a new facility.<sup>42</sup> Again, a judge struck down the local ordinance as conflicting with state law.<sup>43</sup> Similarly, in 1977, the city of Cleveland, Ohio enacted a zoning ordinance with the “intent and purpose of zoning out . . . all abortion services from retail districts.”<sup>44</sup> A preliminary injunction was initially denied, but the federal district court later struck down the ordinance as unconstitutional.<sup>45</sup>

Local governments also utilized targeted restrictions on abortion providers, known as “TRAP” laws.<sup>46</sup> For instance, after Planned Parenthood purchased a building in the city of St. Paul, Minnesota in 1976 with the intention of opening a first-trimester abortion clinic, the city council abruptly imposed a six-month moratorium on construction of “separate abortion facilities and other like facilities within the City of St. Paul.”<sup>47</sup> Planned Parenthood challenged the moratorium and obtained a preliminary injunction that was affirmed on appeal.<sup>48</sup>

Likewise, in 1977, the town council of Grand Chute, Wisconsin adopted a local ordinance on the eve of the opening of a new abortion facility that imposed stringent requirements on the facility’s operations.<sup>49</sup> The abortion clinic challenged the regulation and obtained a preliminary injunction, allowing it to open.<sup>50</sup> Finally, Akron, Ohio enacted a restrictive abortion ordinance in 1978, imposing an array of requirements including a mandate that second-trimester abortions within the city be

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42. *Framingham Clinic v. Zoning Bd. of Appeals*, 382 Mass. 283 (1981).

43. *Id.*

44. *W. Side Women’s Serv. v. Cleveland*, 573 F. Supp. 504, 507 (N.D. Ohio 1983).

45. *Id.*; see also *Mahoning Women’s Ctr. v. Hunter*, 444 F. Supp. 12 (N.D. Ohio 1977), *aff’d*, 610 F.2d 456 (6th Cir. 1979) (striking down onerous restrictions on abortion clinics passed by the Youngstown City Council in order to burden new abortion clinic).

46. See Guttmacher Inst., *State Laws and Policies: Targeted Regulation of Abortion Providers* (July 1, 2023), <https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers> [https://perma.cc/C3ZV-XFN5] (describing TRAP laws at the state level).

47. *Planned Parenthood of Minnesota v. Citizens for Cmty. Action*, 558 F. 2d 861 (8th Cir. 1977).

48. *Id.*

49. *Fox Valley Reprod. Health Care Ctr. v. Arft*, 446 F. Supp. 1072 (E.D. Wis. 1978).

50. *Id.*; see also *Fox Valley Reprod. Health Care Ctr. v. Arft*, 82 F.R.D. 181 (E.D. Wis. 1979) (denying motions to intervene in the lawsuit).

conducted in a hospital.<sup>51</sup> Abortion clinics and a physician filed a challenge. The case, which was appealed to the U.S. Supreme Court, resulted in a victory for the plaintiffs when the provision was struck down on constitutional grounds.<sup>52</sup>

Although *Roe* provided a rallying cry for anti-abortion activists, not all local responses following *Roe* sought to hinder abortion access. For example, in 1979, Wake County, North Carolina directed county tax revenues toward a fund to support elective abortions for indigent women.<sup>53</sup> The transfers were challenged by a local taxpayer.<sup>54</sup> However, the North Carolina Court of Appeals determined that the county's allocation was consistent with a state law that permitted use of tax funds to address incidents of poverty in the county.<sup>55</sup>

Louis Cholden-Brown catalogued a number of other abortion-supportive local initiatives from this period, including buffer zones aimed at curbing harassment around clinics and actions to “combat misleading practices by pregnancy service centers.”<sup>56</sup> Yet conservative state governments continued to preempt more progressive measures that were deemed too supportive of abortion. For example, when St. Louis enacted a measure barring employers and landlords from discriminating on the basis of “reproductive health decisions and beliefs” in housing and hiring decisions, the Missouri Governor quickly called a special legislative session to override the local ordinance.<sup>57</sup> According to the Governor, the anti-discrimination measure would turn St. Louis into an “abortion sanctuary city.”<sup>58</sup>

Still, most local ordinances during this time were reactions to *Roe* that reflected an anti-abortion orientation. This local resistance to state and federal laws permitting abortion access did not end with the passage of time; instead, it grew to include

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51. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 419–24 (1983) (striking down both informed consent law and waiting period requirement under the *Roe* standard).

52. *Id.*

53. *Stam v. State*, 47 N.C.App. 209 (1980).

54. *Id.*

55. *Id.*

56. Cholden-Brown, *supra* note 14, at 566.

57. Mattie Quinn, *For the Future of Anti-Abortion Laws, Look to Missouri*, GOVERNING (Aug. 16, 2017), <https://www.governing.com/archive/gov-abortion-missouri.html> [<https://perma.cc/R5M2-UH43>]. See also Cholden-Brown, *supra* note 14, at 558.

58. Quinn, *supra* note 57.

counties as well as municipalities, a deliberate and strategic extension of the organized effort to overturn *Roe*.<sup>59</sup> Between 2013 and 2019, at least ten cities used zoning regulations to target abortion clinics and undermine their operations.<sup>60</sup> In 2020, Santa Rosa County in Florida followed counties in Texas and Mississippi by voting to become a “sanctuary for life”—a symbolic designation given that *Roe* was still good law.<sup>61</sup> In 2021, nearly five decades after *Roe*, the Delaware city of Seaford enacted a local regulation imposing costly requirements for burial or cremation of fetal remains, impeding operation of Planned Parenthood’s abortion clinic there.<sup>62</sup> When the Delaware State Attorney General challenged the local law, the trial court concluded that the municipal regulation conflicted with state law and was therefore preempted.<sup>63</sup> But by the time the Delaware judge ruled in June 2022, the abortion landscape had changed dramatically: the U.S. Supreme Court had overturned *Roe*.<sup>64</sup>

### C. Local Abortion Regulation Post-Dobbs

Post-*Dobbs*, local responses have continued to take several forms, ranging from abortion bans to non-binding resolutions supporting abortion access. In the absence of federal abortion protection, however, the number of pro-choice measures has increased as local governments seek to preserve abortion access for their communities.

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59. Jennifer L. Brinkley, *Sanctuary Cities and Counties for the Unborn: The Use of Resolutions and Ordinances to Restrict Abortion Access*, 41 N. ILL. U. L. REV. 63 (2021); Heidi Gerbracht, *Why Cities Matter in the Fight for Abortion Rights*, EQUITY AGENDA (Mar. 8, 2021), <https://equityagenda.org/2022/03/08/why-cities-matter-in-the-fight-for-abortion-rights> [<https://perma.cc/KM8X-KPD5>].

60. Nine examples are listed in Rachel Wells, *Abortion Rights Foes Have Weaponized Zoning Regulations. Here’s How. (Updated)*, REWIRE NEWS GROUP, Apr. 18, 2019, <https://rewirenewsgroup.com/2019/04/18/abortion-rights-foes-have-weaponized-zoning-regulations-heres-how> [<https://perma.cc/2WRD-5FAX>]. A tenth city attempting to enforce such zoning restrictions during this period was Mt. Juliet, Tennessee. See *FemHealth USA v. Mount Juliet*, No. 3:19-cv-00141 (M.D. Tenn. 2020) (enjoining operation of a zoning ordinance designed to restrict FemHealth from providing abortions within the city).

61. Annie Blanks, *Election 2020: Santa Rosa County Becomes First ‘Sanctuary for Life’ County in Florida*, PENSACOLA NEWS J., Nov. 3, 2020, <https://www.pnj.com/story/news/politics/elections/2020/11/03/election-2020-santa-rosa-county-declares-sanctuary-life> [<https://perma.cc/X3N8-FU3E>].

62. Byrne & Kirkpatrick, *supra* note 13.

63. *Id.*

64. Brinkley, *supra* note 59.

In some instances, local, non-binding resolutions reinforce state-level policies permitting broad access to abortion. For instance, on July 20, 2022, just weeks after the *Dobbs* decision, the city council of Worcester, Massachusetts, voted to “affirm its stance for full abortion rights and reproductive equity for all, in opposition to the United States Supreme Court overturning *Roe*.”<sup>65</sup> The city’s statement had no immediate policy impact, since Massachusetts state law secures abortion access.<sup>66</sup>

The city of Seattle has likewise been active in adopting local abortion policies, even though Washington laws already protect abortion access up to viability, and beyond viability if the pregnant person’s life or health is endangered.<sup>67</sup> Acting shortly before *Roe* was overturned, the Seattle City Council issued a resolution urging the federal government to codify *Roe*, and outlined steps to be taken by Seattle to protect reproductive rights.<sup>68</sup> In the months that followed the *Dobbs* decision, the city council contributed \$250,000 of city funds to the Northwest Abortion Access Fund, created a misdemeanor charge applying to individuals who interfered with abortion access, added people receiving abortions to the list of protected classes under local civil rights laws, and barred misleading or false advertising by “crisis pregnancy centers.”<sup>69</sup> In a state where abortion receives strong state law protection,<sup>70</sup> these local measures have not been challenged by the state government.

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65. Kiernan Dunlop, *Worcester City Council Votes to Support Abortion Rights, Draft Ordinance that would Regulate Crisis Pregnancy Centers*, MASSLIVE (Jul. 20, 2022), <https://www.masslive.com/worcester/2022/07/worcester-city-council-votes-to-support-abortion-rights-draft-ordinance-that-would-regulate-crisis-pregnancy-centers.html> [https://perma.cc/DZ7W-WQ6V].

66. Meghan Smith, *Abortion Laws in Massachusetts: What you need to know*, GBH NEWS (Dec. 3, 2021), <https://www.wgbh.org/news/local-news/2021/12/03/abortion-laws-in-massachusetts-what-you-need-to-know> [https://perma.cc/L8QP-GYEG].

67. *State Facts About Abortion: Washington*, GUTTMACHER INST. (June 2022), <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-washington> [https://perma.cc/WQ7F-RW8Q].

68. *Protecting Abortion Access in Seattle*, SEATTLE CITY COUNCIL, <https://www.seattle.gov/council/issues/protecting-abortion-access> [https://perma.cc/53KF-6MR8].

69. *Id.*

70. *See, e.g.,* Melissa Santos, *Washington Enacts Abortion Protections to Counteract Red States*, AXIOS, April 27, 2023, <https://www.axios.com/2023/04/27/abortion-shield-law-washington> [https://perma.cc/F6QJ-JUYF] (describing measures taken by Washington state to further protect abortion access).

Cities in states with more restrictive abortion laws have also been proactive in enacting policies that promote access to abortion. For example, the city council in Austin, Texas passed the Guarding the Right to Abortion Care for Everyone (GRACE) Act.<sup>71</sup> Though styled as an “Act,” the GRACE Act is actually a policy recommendation that does not purport to supersede state law.<sup>72</sup> It states that “the City of Austin formally condemns any action intended to abrogate the fundamental liberties of its people,” and affirms the “right of its residents to make reproductive healthcare decisions, including abortion care.”<sup>73</sup> In addition, the recommendation states that city funds should not be used to “store or catalog any report of an abortion, miscarriage, or other reproductive healthcare act.”<sup>74</sup>

In Georgia, where state law has severely restricted abortion access, the Atlanta City Council passed a resolution days before the *Dobbs* decision discouraging the use of city funds to investigate abortion care.<sup>75</sup> The non-binding resolution also instructs the police department not to prioritize abortion investigations.<sup>76</sup> In August 2022, the city council further voted to donate \$300,000 to Access for Reproductive Care Southeast, an organization providing supportive resources to pregnant people.<sup>77</sup>

In some instances, punitive state measures put considerable pressure on local governments to conform to state preferences. For example, in St. Petersburg, Florida, state legislators threatened to defund city programs when the St. Petersburg

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71. *Grace Act FAQ, CITY OF AUSTIN*, <https://services.austintexas.gov/edims/document.cfm?id=389310> [<https://perma.cc/TX6M-SZWX>].

72. *Id.* According to the FAQs prepared by the city, “[t]here will still be significant legal risk involved in any abortion procedure in Texas – we can only try to mitigate legal risk, not eliminate it completely.” *Id.* at 2.

73. GRACE Act, *supra* note 12, at 3. *See also* Maureen Breslin, *Austin City Council Approves Resolution to Decriminalize Abortion*, THE HILL (July 7, 2022, 4:12 PM), <https://thehill.com/homenews/state-watch/3569270-austin-city-council-approves-resolution-to-decriminalize-abortion> [<https://perma.cc/EC3Q-38QL>].

74. GRACE Act, *supra* note 12, at 3.

75. Atlanta City Council Res. 22-R-3711 (Ga. 2022), [https://atlantacityga.iqm2.com/Citizens/Detail\\_LegiFile.aspx?Frame=&MeetingID=3608&MediaPosition=14209.343&ID=30067&CssClass=](https://atlantacityga.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=&MeetingID=3608&MediaPosition=14209.343&ID=30067&CssClass=) [<https://perma.cc/3A48-XJ48>].

76. *Id.*

77. Kenya Hunter, *City of Atlanta Giving \$300,000 to Abortion Fund*, CAP. B ATLANTA (Aug. 2, 2022, 2:04 PM), <https://atlanta.capitalbnews.org/abortion-fund-atlanta> [<https://perma.cc/8JAN-78QF>].

City Council considered contributing city money to a local abortion fund.<sup>78</sup> Concerned about these consequences, the council rejected the proposed contribution, but the city nevertheless passed a resolution registering its support of “the right to privacy in women’s health care decisions” and discouraging use of city funds to enforce restrictive state laws.<sup>79</sup>

In the abortion-restrictive state of Louisiana, the New Orleans City Council approved a nonbinding resolution discouraging law enforcement from utilizing public funds to enforce the state’s abortion laws.<sup>80</sup> Councilwoman Helena Moreno, who proposed the resolution, argued that the city’s police department has more pressing concerns to attend to than monitoring abortion.<sup>81</sup> Beyond this resolution, the New Orleans District Attorney stated that abortion providers will not be prosecuted and the city’s police superintendent said arrests for violations of the state’s abortion laws will not be made.<sup>82</sup> In retribution for the city’s pro-choice actions, the state’s Bond Commission delayed the funding needed for a critical project to address flooding and sewage treatment in New Orleans.<sup>83</sup>

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78. Colleen Wright, *St. Petersburg City Council Votes Against Paying for Abortion Travel*, TAMPA BAY TIMES (Apr. 6, 2023), <https://www.tampabay.com/news/st-petersburg/2023/04/06/st-petersburg-city-council-votes-against-funding-abortion-travel> [perma.cc/RDE2-M95F].

79. *Id.*

80. New Orleans City Council Res. R-22-310 (La. 2022), [https://cityofno.granicus.com/MetaViewer.php?view\\_id=&event\\_id=23303&meta\\_id=588910](https://cityofno.granicus.com/MetaViewer.php?view_id=&event_id=23303&meta_id=588910) [perma.cc/2NC6-VCRL]; see Aubrey Killion, *New Orleans Council Passes Resolution that Could Prevent City from Enforcing Trigger Laws*, WDSU NEWS (July 7, 2022, 3:34 PM), <https://www.wdsu.com/article/new-orleans-council-abortion-resolution/40534804> [https://perma.cc/2JNE-VBEK].

81. Marta Jewson, *Council Approves Resolution Against Investigating, Charging Abortions Under Trigger Law*, THE LENS (July 7, 2022), <https://thelensnola.org/2022/07/07/council-approves-resolution-against-investigating-charging-abortions-under-trigger-law> [https://perma.cc/VPM7-WYHE].

82. Greg Hilburn, *New Orleans Police, Prosecutor, City Council Plan to Ignore Louisiana Abortion Ban*, LAFAYETTE DAILY ADVERTISER (July 12, 2022, 12:54 PM), <https://www.theadvertiser.com/story/news/2022/07/11/can-new-orleans-become-island-abortion-access-louisiana> [https://perma.cc/6TZ5-YYEC].

83. Sara Kline, *Abortion Fight Delays Funds for Critical New Orleans Project*, AP (Aug. 19, 2022, 5:53 PM), <https://apnews.com/article/abortion-health-louisiana-new-orleans-baton-rouge> [perma.cc/JL97-V2XH]; Greg LaRose, *Bond Commission Approves \$45M to Finance Once-Debated New Orleans Project*, LA. ILLUMINATOR (Oct. 20, 2022, 1:27 PM), <https://lailluminator.com/briefs/bond-commission-approves-45m-to-finance-once-debated-new-orleans-project> [https://perma.cc/Z48Q-Y24S].



Some local governments are active in developing ordinances designed to restrict abortion access, often acting in coordination with the nationwide Sanctuaries for the Unborn organization.<sup>84</sup> For example, the unincorporated community of Hobbs, New Mexico, near the Texas border, enacted an ordinance in November 2022 with the goal of deterring abortion clinics from operating within the municipality.<sup>85</sup> Hobbs is one of several New Mexico communities that sought to adopt local abortion restrictions despite the fact that New Mexico state law does not impose any restrictions.<sup>86</sup>

Other municipalities in abortion-friendly states have considered similar measures. For instance, the city council of Pueblo, Colorado initially voted to support a proposal for criminal restrictions on use of mailings or other interstate transport in furtherance of abortion.<sup>87</sup> The restrictive proposal was approved at the first reading but was withdrawn after the city's attorney questioned its legality.<sup>88</sup> In response, the state of Colorado enacted legislation to ensure that any such local ordinances would be preempted in the future—a move that may discourage further local organizing along these lines.<sup>89</sup> The state's Reproductive Health Equity Act specifically indicates

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84. Elisha Brown, *Anti-Abortion Legal Strategy Revives Comstock Moral Purity Laws of Late 1800s*, TENN. LOOKOUT (May 1, 2023, 6:01 AM), <https://tennesseelookout.com/2023/05/01/hed-anti-abortion-legal-strategy-revives-comstock-moral-purity-laws-of-late-1800s> [<https://perma.cc/495T-EJ6N>].

85. *Id.*

86. Susan Dunlap, *New Mexico Locales Pass More Anti-Abortion Ordinances than other Pro-Abortion States*, NM POL. REP. (May 15, 2023), <https://nmpoliticalreport.com/2023/05/15/new-mexico-locales-pass-more-anti-abortion-ordinances-than-other-states> [<https://perma.cc/K8EK-NNUS>].

87. John Frank, *Pueblo's Abortion Battle Reverberates Across Colorado and the Nation*, AXIOS DENVER (Dec. 12, 2022), <https://www.axios.com/local/denver/2022/12/12/pueblo-abortion-ordinance-sanctuary-unborn-colorado; Proposed Ordinance Requiring Abortion Providers in Pueblo to Comply with Federal Law>, THE GAZETTE (Dec. 13, 2022), [https://gazette.com/proposed-ordinance-requiring-abortion-providers-in-pueblo-to-comply-with-federal-law/pdf\\_f20caacc-7278-11ed-a4ff-ef0ab566bdd6.html](https://gazette.com/proposed-ordinance-requiring-abortion-providers-in-pueblo-to-comply-with-federal-law/pdf_f20caacc-7278-11ed-a4ff-ef0ab566bdd6.html) [[perma.cc/2U6S-6DWM](https://perma.cc/2U6S-6DWM)].

88. Andrea Chalfin, *Pueblo City Council Tables Anti-Abortion Ordinance Following Controversy around Potential New Abortion Clinic*, KRCC (Dec. 13, 2022, 12:16 PM), <https://www.cpr.org/2022/12/13/pueblo-city-council-tables-anti-abortion-ordinance-following-controversy-around-potential-new-abortion-clinic> [<https://perma.cc/2UPD-9SWM>]; Frank, *supra* note 87.

89. H.B. 22-1279, 73d Gen. Assemb., Reg. Sess. (Colo. 2022); *see, e.g.*, Jamila Michener, *Entrenching Inequity, Eroding Democracy: State Preemption of Local Housing Policy*, 48 J. HEALTH POL., POL'Y & L. 157, 162–63, 175 (2023) (describing difficulties that state preemption poses for organizing on housing rights).

that abortion regulation is a matter of state concern, beyond the regulatory authority of local governments.<sup>90</sup>

## II. EXPLAINING THE PERSISTENCE OF LOCAL ABORTION REGULATIONS

Why do local governments persist in adopting abortion-related measures despite repeated instances of state preemption, like that exercised by the state of Colorado? State preemption is not new; rather, it is a longstanding doctrine that ensures that state law supersedes local laws that conflict with state law or policy. This Part explores two factors that may encourage local governments to persist in legislating in the abortion arena: first, the complexity of preemption doctrine, which fails to offer clear guidance to local governments; and second, the presence of political and social pressure to take action, regardless of whether the action is legally effective.

### A. *Complicated, Variable Doctrine*

Many legal scholars have wrestled with the complexities of state preemption law, particularly in recent years, as aggressive use of preemption by states has increased.<sup>91</sup> The contours of the preemption doctrine vary from state to state and depend to a large extent on individual state constitutions and statutes.<sup>92</sup> Relevant considerations include whether and to what extent the

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90. H.B. 22-1279.

91. See, e.g., Schragger, *supra* note 30; Paul Diller, *Is Enhanced Judicial Review the Antidote to Excessive State Preemption?*, 100 N.C. L. REV. 1469 (2022); Nestor M. Davidson & Richard C. Schragger, *Do Local Governments Really Have Too Much Power? Understanding the National League of Cities 'Principles of Home Rule for the 21st Century'*, 100 N.C. L. REV. 1385 (2022); David Schleicher, *Constitutional Law for NIMBYS: A Review of Principles of Home Rule for the 21st Century by National League of Cities*, 81 OHIO ST. L.J. 883 (2020); Richard Briffault, *The Challenge of the New Preemption*, 70 Stan. L. Rev. 1995 (2018) (observing that in recent years, states have frequently and aggressively preempted local government policies); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 Geo. L.J. 1469 (2018) (same).

92. See CTR. FOR PUB. HEALTH L. RSCH., THE POLICY SURVEILLANCE PROGRAM: A LAWATLAS PROJECT, <https://lawatlas.org/datasets/preemption-project> [perma.cc/W964-FRGQ]. The scope of local authority differs depending on such factors as state constitutional language, state legislative enactments, the size of the municipality, and the subject matter that the local government seeks to regulate. See, e.g., Ill. Road & Transportation Builders Ass'n v. Cook Co., 183 N.E.3d 948 (Ill. 2021); Vazzo v. City of Tampa, 415 F. Supp. 1087 (M.D. Fla. 2019); Bd. Of Elections v. Mostofi, 65 Misc. 3d 876 (N.Y. Sup. Ct. 2019).

state grants local governments the power to regulate under the “home rule” doctrine. A grant of home rule—which is the prevalent framework in most states and particularly in larger cities—gives local governments some autonomy in setting policies.<sup>93</sup> Absent a clear home rule grant, a preemption analysis centers on more specific grants of authority by the state and the extent of any actual conflict between a local regulation and state law or policy.<sup>94</sup> But the nuances are considerable in either situation. Legal experts working under the auspices of the National League of Cities to analyze and update home rule doctrine recently concluded that “[a]ny simple taxonomy is surprisingly difficult to construct given the variation within many states and the often-muddled judicial gloss on constitutional provisions . . . .”<sup>95</sup> In light of these variations, and the lack of a shared definition or understanding of what constitutes preemption, there is little firm doctrinal guidance available to local governments seeking to ensure that their local policy choices are preserved.<sup>96</sup>

The search for a doctrinal fix assumes that more legal clarity and structure will encourage local governments and states to avoid unnecessary conflicts. Under this theory, an updated preemption law that reflects shifts in the urban landscape will lead local governments to avoid treading in areas marked off by state legislation and encourage states to give local governments greater leeway to regulate in areas that are important to their communities.<sup>97</sup> However, as discussed below, even if state preemption law was clear, the political and social factors facing local governments in the area of abortion might encourage, or even demand, that a local government test the legal constraints imposed by state governments. These factors are explored in the following Section.

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93. Alexandra Klass & Rebecca Wilton, *Local Power*, 75 VAND. L. REV. 93, 105 (2022).

94. Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114, 1140–41 (2007).

95. NAT’L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 13 (2020).

96. Christopher B. Goodman et al., *State Preemption of Local Laws: Origins and Modern Trends*, 4 PERSP. ON PUB. MGMT. & GOVERNANCE 146, 146 (2021).

97. See NAT’L LEAGUE OF CITIES, *supra* note 95, at 4 (stressing the need to revise “fundamental legal structure”).

## *B. Political and Social Factors Pushing Local Government Action*

Recent social science studies of state preemption in a range of subject areas suggest that the persistence of local regulation and the increase in state preemption arise from political polarization and power as much as institutional gaps and legal vagaries.<sup>98</sup> As law professor Richard Schragger recently suggested, political analyses of the preemption phenomenon are as important as legal ones.<sup>99</sup>

### 1. Social Science Research on State Preemption

Recent study results are strikingly consistent: political polarization leads to state preemption.

In 2019, Luke Fowler and Stephanie Witt of Boise State University published their study analyzing the frequency with which state preemption statutes were adopted in seventeen different subject matter areas.<sup>100</sup> The subject areas analyzed ranged from firearms (most frequent) to fracking (least frequent).<sup>101</sup> Though the study did not include abortion, its conclusions regarding a host of other controversial issues are relevant to, and suggest the likelihood of similar results in, the abortion context.

Fowler and Witt found that politically conservative states were most likely to invoke preemption.<sup>102</sup> Importantly, they also concluded that “preemption is better explained by political factors than institutional features, which would suggest that recent preemption activity is likely a result of increasing political competition and/or partisan polarization.”<sup>103</sup> These

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98. *But see* Schragger, *supra* note 30, at 1184 (arguing that anti-urbanism reflects federalism’s structural bias against cities).

99. *Id.* at 1216 (concluding that “cities’ central defenses [to preemption] are political”); *see also* Davidson, *supra* note 9, at 1000 (noting that “questions of state/local power are as much political as they are legal”).

100. Luke Fowler & Stephanie L. Witt, *State Preemption of Local Authority: Explaining Patterns of State Adoption of Preemption Measures*, 49 *PUBLIUS: J. FEDERALISM* 540, 545–46 tbl.1 (2019).

101. *Id.*

102. *Id.* at 552; *see also* Amy Liu & Peter Rezk, *Why State and Local Relationships Matter for National Prosperity*, BROOKINGS INSTITUTION (Jan. 2023), <https://www.brookings.edu/essay/why-state-and-local-relationships-matter-to-national-prosperity> [<https://perma.cc/5VLD-64L6>] (according to one study, states with higher levels of preemption tend to be in the South and Midwest).

103. Fowler & Witt, *supra* note 100, at 553.

research results highlight the question of whether reforms of the legal structures of home rule would be a sufficient response to what Schragger has termed “the attack on American cities,” or whether a more fundamental political shift is required.<sup>104</sup>

Patrick Flavin and Gregory Shufeldt sought to answer that question in their empirical analysis of how demographic, political, and institutional factors correlated with state preemption in twenty-one policy areas.<sup>105</sup> Their conclusions were stark. They found that “state governments with unified Republican control, more conservative citizens, a higher percentage of African Americans, and a stronger conservative interest group presence are more likely to preempt local policymaking.”<sup>106</sup> Further, the institutional issues that often preoccupy legal scholars, like the scope of the home rule doctrine, had “little impact on a state’s overall propensity to preempt local policymaking.”<sup>107</sup> In the end, Flavin and Shufeldt concluded, preemption appears to be largely “a political weapon.”<sup>108</sup>

More recently, researchers Christopher Goodman and Megan Hatch conducted a targeted study of local efforts to regulate workers’ rights issues.<sup>109</sup> Unlike prior projects, this study analyzed the relationship between preemption and ideology, rather than partisan affiliation.<sup>110</sup> The scholars found support for their hypothesis that “more ideologically conservative state legislatures will preempt more often, and less

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104. Schragger, *supra* note 30, at 1163. Legal scholarship on preemption is often addressed to courts in recognition of the role that they can play in dictating the scope of the doctrine. *See, e.g.*, Diller, *supra* note 91 (criticizing focus on courts). However, judicial oversight is only one part of the preemption process, which also includes state legislatures and the executive branch.

105. Patrick Flavin & Gregory Shufeldt, *Explaining State Preemption of Local Laws: Political, Institutional, and Demographic Factors*, 50 PUBLIUS: J. FEDERALISM 280, 282 (2019).

106. *Id.*; *see also* Keith Boeckelman & Jonathan Day, *State Legislation Restricting and Enabling Local Governments in an Era of Preemption*, 53 STATE & LOC. GOV’T. REV. 210, 210–22 (2021) (finding that “Republicans are more likely to support limiting discretion,” particularly on so-called “hot button” issues). The Economic Policy Institute has connected the rise of preemption with racial politics in the United States. Blair et al., *supra* note 30.

107. Flavin & Shufeldt, *supra* note 105, at 282.

108. *Id.*

109. Christopher B. Goodman & Megan E. Hatch, *Why States Preempt City Ordinances: The Case of Workers’ Rights Laws*, 54 PUBLIUS: J. FEDERALISM 1, 1 (2023).

110. *Id.* at 3.

politically unified state governments will preempt less often.”<sup>111</sup> They concluded that their results “appear to conform to the popular narrative of more ideologically conservative state legislatures preempting policies of more ideologically liberal city governments.”<sup>112</sup>

A study conducted by Michael Barber and Adam Dynes confirms that ideology, rather than pure partisanship, is a significant factor in state preemption.<sup>113</sup> Their research, which involved surveys of municipal actors, found that ideological incongruence between cities and states was a major factor in preemption, and that both Democratic and Republican state legislatures preempt city policies.<sup>114</sup> As they noted, “many cities—and especially those that are more liberal than their state—report being preempted by both Democratic- and Republican-controlled state legislatures.”<sup>115</sup> Nevertheless, consistent with other studies, Barber and Dynes found that Republican-controlled state legislatures engage in preemption more often.<sup>116</sup>

The exercise of power and control was a theme that also surfaced in a study of preemption in the context of COVID-19. Mark Treskon and Benny Docter compared COVID-19 responses during the first few months of the pandemic in states with various preemption practices.<sup>117</sup> The authors found that states with historically greater levels of state preemption enacted fewer local, and fewer statewide, policy responses to COVID-19.<sup>118</sup> They concluded that state officials might preempt local authorities not because of a commitment to state-level

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111. *Id.* at 16.

112. *Id.* at 18.

113. Michael Barber & Adam M. Dynes, *City-State Ideological Incongruence and Municipal Preemption*, 67 AM. J. POL. SCI. 119, 133–34 (2023).

114. *Id.* at 120, 124–25, 127, 133.

115. *Id.* at 120.

116. *Id.*

117. MARK TRESKON & BENJAMIN DOCTER, PREEMPTION AND ITS IMPACT ON POLICY RESPONSES TO COVID-19 (Urb. Inst. Ed., 2020) (Treskon and Docter also found that “[i]n states that preempt more laws, municipalities focus less on policies that reflect proactive attempts to respond to the crisis (whether designed to ‘flatten the curve,’ support residents, or regulate business operations) and more on communications and responding to legislation passed at other levels of government.”); *see also* Phillips, *supra* note 17 (discussing negative impacts of state preemption on local innovation and experimentation).

118. TRESKON & DOCTER, *supra* note 117, at 1.

legislating but simply because of a “desire to stop local actions.”<sup>119</sup>

As yet, social science researchers have not examined state preemption in the context of abortion. No wonder, since during the period between *Roe* and *Dobbs*, much abortion-related preemption was federal rather than state.<sup>120</sup> But as described below, anecdotal accounts indicate that, as in other policy arenas, state preemption of local abortion ordinances arises because of ideological divides between local and state jurisdictions.<sup>121</sup> Further, the examples of Austin, Texas and Hobbs, New Mexico noted above indicate that states with both pro-choice and anti-abortion orientations are prepared to preempt local abortion initiatives.<sup>122</sup>

## 2. How Preemption Figures in Local Abortion Debates: Anecdotal Evidence

Given the likelihood that local abortion initiatives that deviate from state policy will be subject to preemption from the state, why do local governments continue to adopt such measures? Just as state preemption appears to be ideologically driven, political power also seems to play a role in local government decisions to pursue abortion regulation. Media accounts suggest that local governments and their constituents on both sides of the abortion issue are well aware of the likelihood of preemption and often proceed in spite of it in order to “mak[e] a statement.”<sup>123</sup>

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119. *Id.* at 8.

120. It also appears that when *Roe* was in place, some states made little effort to police local abortion ordinances since they generally had no practical impact. *See, e.g.,* McNeel, *supra* note 12 (“But [Texas] did not pick fights with the small towns that passed laws prohibiting abortion while it was still protected under *Roe*. . .”).

121. *See infra* notes 123–148 and accompanying text.

122. *See supra* notes 62–65 and 75–83 and accompanying text. On punitive preemption, *see* RICHARD BRIFFAULT & JOSEPH CHAMBERLAIN, PUNITIVE PREEMPTION: AN UNPRECEDENTED ATTACK ON LOCAL DEMOCRACY (LOC. SOLS. SUPPORT CTR., 2018), <https://www.abetterbalance.org/wp-content/uploads/2018/10/Punitive-Preemption-White-Paper-FINAL-8.6.18.pdf> [<https://perma.cc/6Y CZ-ZHUK>].

123. Sarah McCammon, *In New Mexico, Anti-Abortion Activists Take Abortion Restrictions Local*, NAT’L PUB. RADIO (Apr. 29, 2023), <https://www.npr.org/2023/04/29/1172918575/in-new-mexico-anti-abortion-activists-take-abortion-restrictions-local> [<https://perma.cc/MR45-YGRU>] (statement of Sterling Donner, Comm’r, Edgewood Town Gov’t) (quoting Sterling

The debate concerning the proposed Justice Charter in San Antonio, Texas exemplifies this phenomenon. The Charter was a wide-ranging police reform bill that included a restriction on the use of city funds to enforce the state’s abortion ban, and community members lined up on both sides of the issue.<sup>124</sup> Many locals opposed the measure precisely because Texas state laws would not allow it, and in fact, the provision was overwhelmingly rejected in a popular vote in May 2023.<sup>125</sup> Yet, San Antonio residents like William Johnson accepted that the measure was symbolic and supported it nonetheless. Said Johnson, “I hear that it’s inconsistent, portions of it, with state law. . . . To that I say simply, ‘So what?’ Someone needs to lead.”<sup>126</sup>

Activist organizations supporting the Charter saw it as an opportunity for movement building. For example, Planned Parenthood Texas Votes (“PPTV”) supported the Justice Charter even though it focused only on limiting prosecutions and did not address more fundamental issues of abortion access in Texas.<sup>127</sup> PPTV’s goal was to spur public education and mobilization by exposing inconsistencies between state-level approaches and local priorities.<sup>128</sup> According to news reports, PPTV Executive Director Dru Tigner “welcomes all efforts to remind lawmakers that a majority of Texans do not favor a total abortion ban” and “don’t want to see anyone prosecuted for negative pregnancy

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Donner). Cities like Seattle, which enact pro-choice measures that go beyond Washington state’s laws, are able to have a real impact on their constituents while also making a statement.

124. McNeel, *supra* note 12. On local charters, see Nestor Davidson, *Local Constitutions*, 99 TEX. L. REV. 839 (2021).

125. Garret Brnger & David Ibanez, *Prop A Overwhelmingly Defeated in San Antonio*, KSAT (May 7, 2023), <https://www.ksat.com/news/local/2023/05/07/prop-a-overwhelmingly-defeated-in-san-antonio> [<https://perma.cc/WW77-73M8>]. The loss was attributed to the controversial police reforms included in the Charter rather than concern about the elements relating to abortion. Josh Peck, *Prop A ‘Justice Charter’ Defeated in Landslide in San Antonio’s Municipal Election*, TEXAS PUB. RADIO (May 7, 2023, 12:30 AM), <https://www.tpr.org/government-politics/2023-05-06/prop-a-defeated-in-landslide-in-san-antonios-municipal-election> [<https://perma.cc/PS4F-226T>].

126. McNeel, *supra* note 12.

127. *Id.* Even a resolution supporting prosecutorial discretion carries risks of preemptive action. Governor Ron DeSantis of Florida removed an elected district attorney based on his representations that he would not initiate abortion prosecutions. Sarah Matusek, *How Blue – and Red – Cities are Resisting State Abortion Laws*, CHRISTIAN SCI. MONITOR (Aug. 18, 2022), <https://www.csmonitor.com/USA/Justice/2022/0818/How-blue-and-red-cities-are-resisting-state-abortion-laws> [<https://perma.cc/6ZBE-KFCY>].

128. McNeel, *supra* note 12.



outcomes.”<sup>129</sup> Mike Siegel of Ground Game Texas, a progressive organization dedicated to community organizing, highlighted the Justice Charter’s importance for the local pro-choice movement. “I will acknowledge that we are trying something novel,” he said, “For movement-building purposes, we are exploiting the tension between state lawmakers and local populations.”<sup>130</sup>

Those pursuing an anti-abortion agenda also see movement-building opportunities in pushing for local regulations, even in the face of state preemption or costly litigation challenges. For example, when the city of Edgewood, New Mexico, approved a measure to criminalize abortion within its jurisdiction, the New Mexico Attorney General immediately obtained a preliminary injunction from the State Supreme Court.<sup>131</sup> In addition, local pro-choice activists quickly petitioned for a special election, with the goal of repealing the ordinance through a popular vote.<sup>132</sup> But supporters of the ordinance framed their effort as an opportunity to confront the state government. As one supporter said, “It’s time for Edgewood to take a stand for life and stand against the demonic agenda being pushed by the leaders in Santa Fe.”<sup>133</sup> The ordinance was, in the words of one of the Edgewood City Commissioners, “a statement.”<sup>134</sup>

Similar sentiments were expressed by residents of several Nebraska towns supporting local anti-abortion ordinances, despite the prospect of state preemption. According to a community leader in the small village of Paxton, Nebraska, “We in the [Nebraska] Panhandle get shoved around by eastern

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129. *Id.*

130. *Id.* Some have suggested that preemption could have the opposite effect and frustrate organizing efforts by eroding opportunities for democratic input. See Michener, *supra* note 89.

131. McCammon, *supra* note 123.

132. Robert Nott, *Edgewood Petitioners Collect Enough Signatures to Take Anti-Abortion Ordinance to a Vote*, SANTA FE NEW MEXICAN, (May 26, 2023) [https://www.santafenewmexican.com/news/local\\_news/edgewood-petitioners-collect-enough-signatures-to-take-anti-abortion-ordinance-to-a-vote/article\\_86e6a92e-fb0c-11ed-a22a-1b91a822d57f.html](https://www.santafenewmexican.com/news/local_news/edgewood-petitioners-collect-enough-signatures-to-take-anti-abortion-ordinance-to-a-vote/article_86e6a92e-fb0c-11ed-a22a-1b91a822d57f.html) [https://perma.cc/JC2L-SZVM]; WE CALL 4 A RECALL, <https://wecall4arecall.com> [https://perma.cc/A44M-QHVU].

133. McCammon, *supra* note 123 (statement of Lindsey Donner).

134. *Id.* (statement of Sterling Donner). While some small towns have been active in promoting anti-abortion measures, not all small towns adopt anti-abortion positions. See Davis Giangliulo, *How Small Towns are Working to Protect Abortion Rights from State Threats*, BOLTS (Aug. 8, 2022), <https://boltsmag.org/municipal-governments-abortion-protections> [https://perma.cc/UFL5-325G].

Nebraska. Changes that need to take place to protect our country won't come from Washington, and they won't come from Lincoln. Real changes are going to come down here where the grass grows."<sup>135</sup>

Sometimes the prospect of preemption and the futility of local abortion legislation figures directly in the debates over these measures. For example, when a city council member in San Clemente, California proposed an anti-abortion resolution that would surely be preempted by state law, another member of the council argued that “[w]e’re out of our lane on this one” and that the council should be addressing housing issues instead.<sup>136</sup> In Casper, Wyoming, the city council likewise refused to endorse an anti-abortion resolution after the City Attorney pointed out that “the state has already passed a couple of laws that would, in essence, to a large degree, preempt anything the city would do.”<sup>137</sup> Even in politically progressive Vermont, concerns about the authority of municipalities to address abortion access convinced the Brattleboro Select Board to withdraw a pro-choice resolution that would have included allocating funds to support abortion providers.<sup>138</sup> After

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135. Natalia Alamdari, *Six Small Nebraska Towns are Trying to Ban Abortion. Will It Change Anything?*, NEB. PUB. MEDIA (Oct. 1, 2022), <https://nebraskapublicmedia.org/en/news/news-articles/six-small-nebraska-towns-are-trying-to-ban-abortion-will-it-change-anything> [<https://perma.cc/2336-E2JN>].

136. *San Clemente City Council Votes to Pull Abortion Ban from Next Meeting*, ABC 7 EYEWITNESS NEWS (Aug. 6, 2022), <https://abc7.com/los-angeles-mike-feuer-prohibit-misinformation> [<https://perma.cc/D4QP-8X87>]. See also McCammon, *supra* note 123 (statement of Laura Aston) (“Abortion access is not currently illegal in the state of New Mexico, so I’m not understanding why the commission of a very small town is taking the time and the resources to try to make it illegal.”); Andrew Schneider, *Harris County Commissioners Court Passes Measures Supporting Abortion, Contraception Access*, HOUSTON PUB. MEDIA (June 28, 2022), <https://www.houstonpublicmedia.org/articles/news/politics/2022/06/28/427893/harris-county-democratic-leaders-move-to-protect-womens-access-to-abortion-and-contraception> [<https://perma.cc/73MT-VUY4>].

137. Mary Staurer, *Casper City Council Won’t Pursue Anti-Abortion Resolution*, CASPER STAR TRIBUNE (Aug. 30, 2023), [https://trib.com/news/local/casper/casper-city-council-wont-pursue-anti-abortion-resolution/article\\_8657b3cc-0ad4-11ee-a209-83ee41fccf8.html](https://trib.com/news/local/casper/casper-city-council-wont-pursue-anti-abortion-resolution/article_8657b3cc-0ad4-11ee-a209-83ee41fccf8.html) [<https://perma.cc/WPL2-97MH>]; see also Lacey Latch, *Flagstaff City Council Considering Resolution in Support of Abortion Rights*, AZ CENT. (March 7, 2023), <https://www.azcentral.com/story/news/local/arizona/2023/03/01/abortion-rights-resolution-flagstaff-city-council-reproductive-rights> [<https://perma.cc/W3CU-DM35>] (reporting on comments from local residents in Flagstaff criticizing city council for taking up abortion issue instead of “infrastructure, flood mitigation, etc.”).

138. Kevin O’Connor, *Brattleboro Selectboard Drops Local Abortion Resolution in Favor of State Constitutional Amendment*, VTDIGGER (Aug. 3, 2022),

consulting with the town attorney, one councilmember remarked, “We do not have the authority and I would not want to pretend that we do. . . .”<sup>139</sup> Instead, Select Board members pledged to focus their efforts on supporting a state constitutional amendment to protect abortion access.<sup>140</sup>

Some community residents would prefer that city councils turn their attention away from abortion because of heightened concerns about privacy and safety. For example, Laura Molinar, co-director of Sueños Sin Fronteras, a reproductive-health collective in Texas that serves undocumented people, expressed apprehension about the impacts of a local reproductive rights ordinance on her clients.<sup>141</sup> “There’s a lot of fear,” she said, and a local law “might threaten the autonomy of the families we work with if there’s more hypervigilance from the state.”<sup>142</sup> In addition, the conversations about abortion within the community can be difficult and uncomfortable. As one former councilmember testified in Fort Collins, Colorado, “I recognize that it would be easier to not broach this topic.”<sup>143</sup> But, she added, “I applaud you for doing so, because it’s necessary, and because your voices as leaders in our community matter.”<sup>144</sup>

Notably, supporters of local anti-abortion measures are sometimes acting as part of larger networks promoting these ordinances.<sup>145</sup> On the state level, the conservative think-tank American Legislative Exchange Council (ALEC) is a source of model legislation and strategic advice around state preemption, building on work that it has done with conservative state legislators for many decades.<sup>146</sup> On the community level, many

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<https://vt.digger.org/2022/08/03/brattleboro-selectboard-drops-local-abortion-resolution-in-favor-of-state-constitutional-amendment> [https://perma.cc/N67E-MNE8].

139. *Id.*

140. *Id.*

141. McNeel, *supra* note 12.

142. *Id.*

143. Jacy Marmaduke, *Fort Collins City Council Adopts Resolution Supporting Abortion Access*, COLORADOAN (July 6, 2022), <https://www.coloradoan.com/story/news/2022/07/06/fort-collins-city-council-adopts-resolution-supporting-abortion-access> [https://perma.cc/7AEP-RC6E].

144. *Id.*

145. See, e.g., Gaby Goldstein & LiJia Gong, *Republicans are Systematically Blocking Cities’ Ability to Protect Abortion*, NEW REPUBLIC (June 20, 2023), <https://newrepublic.com/article/173776/republicans-blocking-cities-ability-protect-abortion-preemption> [https://perma.cc/DWX7-8MCG].

146. See Henry Grabar, *The Shackling of the American City*, SLATE (Sept. 9, 2016, 5:53 AM), <https://slate.com/business/2016/09/how-alec-acce-and-pre>

municipalities have interacted with Mark Lee Dickson, an anti-abortion activist from Texas who “criss-crosses the country, spreading abortion bans from town to town.”<sup>147</sup> ALEC and Dickson are both using local ordinances to pursue a more comprehensive, longer-term anti-abortion agenda.<sup>148</sup> Dickson was deeply engaged in supporting the local ordinance in Hobbs, New Mexico, mentioned above, as well as similar ordinances based on the same model.<sup>149</sup>

The Hobbs ordinance invokes the federal Comstock Act, a law enacted by the U.S. Congress in 1873 in an effort to deter and punish immoral behavior.<sup>150</sup> Named for the nineteenth century anti-vice crusader Anthony Comstock, the Act prohibits the manufacture, sale, advertisement, or use of the U.S. mails to distribute “any obscene . . . [literature or images] or other article of indecent or immoral nature, or any article or medicine for the prevention of conception, or for causing abortion.”<sup>151</sup> In the 20<sup>th</sup> century, with wider acceptance of contraception and abortion and a series of court decisions that narrowed the scope of the law to include only on actions with illegal intent, the Comstock Act fell into disuse.<sup>152</sup> However, the federal law was never repealed.<sup>153</sup>

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emptions-lawsare-gutting-the-powers-of-american-cities.html

[<https://perma.cc/R3S8-6DAF>]; Molly Jackman, *ALEC's Influence over Lawmaking in State Legislatures*, BROOKINGS (Dec. 6, 2013), <https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures> [<https://perma.cc/Z7ZM-MPHR>]; Goldstein & Gong, *supra* note 145.

147. Alamdari, *supra* note 135; *see also* Cecilia Nowell, *How a Pastor Is Trying to Revive a 150-Year-Old US Law to Ban Abortion*, GUARDIAN (Mar. 9, 2023, 5:00 AM), <https://www.theguardian.com/world/2023/mar/09/pastor-push-national-abortion-ban-sanctuary-cities-for-the-unborn> [<https://perma.cc/H3AR-JAH2>].

148. Alamdari, *supra* note 135.

149. *See, e.g.*, Brad Brooks, *New Mexico City Passes Ordinance to Block Abortion Clinics from Operating*, REUTERS (Nov. 8, 2022, 3:05 AM), <https://www.reuters.com/world/us/new-mexico-city-passes-ordinance-block-abortion-clinics-operating-2022-11-08> [<https://perma.cc/3EWA-GLYS>].

150. Comstock Act, ch. 258, 17 Stat. 598, 598 (1873) (“An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use.”) (current version at 18 U.S.C. § 1461).

151. Priscilla J. Smith, *Contraceptive Comstockery: Reasoning from Immorality to Illness in the Twenty-First Century*, 47 CONN. L. REV. 971, 978, 981 nn.4546, 983 (2015) (quoting Cong. Globe, 42d Cong., 3d Sess. 1436 (1873)).

152. *Id.* at 986–87.

153. Brown, *supra* note 84; *see also* Christopher H. Schroeder, *Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions*, 46 Op. O.L.C. (Dec. 23, 2022) (providing an in-depth analysis of legal developments involving the Comstock Act).

Incorporating the Comstock Act, the Hobbs ordinance provides:

It shall be unlawful for any person or licensed abortion clinic within the municipal boundaries of the City, or any employee or agent of an abortion clinic licensed by the City, to violate 18 U.S.C. § 1461 by using the mails for the mailing, carriage in the mails, or delivery of: (1) Any article or thing designed, adapted or intended for producing abortion.<sup>154</sup>

In defense of the ordinance, supporters argued that Hobbs is a “sanctuary city for the unborn,” and that the Hobbs ordinance is simply enforcing federal law.<sup>155</sup> However, the New Mexico Attorney General challenged the ordinance based on a state law that prohibits localities from inhibiting access to reproductive health care.<sup>156</sup> Supporters of the Hobbs ordinance hope that the question of municipal authority to enforce the Comstock Act will eventually reach the U.S. Supreme Court, where a victory could open more opportunities for local ordinances.<sup>157</sup>

Meanwhile, another New Mexico city near the Texas border, Eunice, brought a lawsuit challenging the New Mexico state law that bans local abortion restrictions.<sup>158</sup> Taking a page from

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154. Hobbs, N.M., Ordinance 1147 (Nov. 7, 2022).

155. Alanna Vagianos, *The Architect of Texas’ Radical Abortion Law Has His Sights Set on a New State*, HUFFPOST (Oct. 27, 2022, 10:51 AM), [https://www.huffpost.com/entry/mark-lee-dickson-abortion-new-mexico\\_n\\_6359a701e4b0cf522df4787c](https://www.huffpost.com/entry/mark-lee-dickson-abortion-new-mexico_n_6359a701e4b0cf522df4787c) [https://perma.cc/FZNG-ZUM6]; Caitlin Dewey, *Activists Aim for Supreme Court with Local Abortion Bans in Blue States*, STATELINE (Feb. 27, 2023, 12:00 AM), <https://stateline.org/2023/02/27/activists-aim-for-supreme-court-with-local-abortion-bans-in-blue-states> [https://perma.cc/FTQ5-FP3P].

156. Associated Press, *Hobbs Passes Ordinance to Block Abortion Clinics*, LAS CRUCES SUN NEWS (Nov. 8, 2022, 1:24 PM), <https://www.lcsun-news.com/story/news/local/new-mexico/2022/11/08/hobbs-new-mexico-passes-ordinance-to-block-abortion-clinics/69630930007> [https://perma.cc/D7HH-JFET]. This challenge will be heard by the New Mexico Supreme Court in December 2023. Associated Press, *New Mexico will Hear Oral Arguments on Local Abortion-Ban Ordinances*, ABC NEWS (Aug. 29, 2023), <https://abcnews.go.com/Health/wireStory/new-mexico-supreme-court-hear-oral-arguments-local-102661451> [https://perma.cc/9TKY-87UM].

157. Dewey, *supra* note 155; Alice Fordham, *Edgewood Passes Ordinance Restricting Abortion Access, Despite Legal Concerns*, SOURCE NM (Apr. 28, 2023, 4:05 AM), <https://sourcennm.com/2023/04/28/edgewood-passes-ordinance-restricting-abortion-access-despite-legal-concerns> [https://perma.cc/J7E3-UHQQ].

158. Elise Kaplan, *A Small Southeastern New Mexico City Passed an Ordinance Restricting Abortion Access. Now it’s Suing the AG, Gov.*, ALBUQUERQUE J. (June 7, 2023), <https://www.abqjournal.com/2591584/eunice-new-mexico-city-passed-an>

Hobbs, the city of Eunice invokes federal supremacy to contend that the state law itself violates the federal Comstock Act.<sup>159</sup> From the perspective of Mark Lee Dickson and his fellow anti-abortion activists, state preemption at this stage would be a positive development, serving as a vehicle for reaching the U.S. Supreme Court, with the opportunity to vindicate their strategy for securing local abortion restrictions.

### C. *Are Constructive State-Local Dialogues Possible?*

Like states within the federal system, local governments have the potential to serve as “laboratories of democracy,” acting as test sites for different policy approaches.<sup>160</sup> There are times when states have taken advantage of the opportunity to pilot an approach in a local context before determining whether to scale it up statewide. Marijuana legalization is an example where some states experimented with phase-ins at the county or city level that allowed communities to test the policy impacts of different approaches.<sup>161</sup> Similarly, some states permit local variations in gun regulation with no automatic state preemption of such variations.<sup>162</sup>

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ordinance-restricting-abortion-access-now-its-suing-the-attorney-general-governor.html [https://perma.cc/B9S9-JMUZ]; see also Morgan Lee, *Small New Mexico City Challenges State Abortion-Rights Law*, AP NEWS (Apr. 19, 2023, 7:06 PM), <https://apnews.com/article/abortion-ban-eunice-states-7297d6b7b54d0203aa02c99fd1587153> [https://perma.cc/8QBM-JUS2] (showing that Eunice also adopted an anti-abortion ordinance based on the same model); *supra* notes 147–49 and accompanying text (showing that several small towns in Nebraska have also adopted local ordinances based on the Comstock Act using the strategy being promoted by anti-abortion activist Michael Dickson).

159. Kaplan, *supra* note 158; see also Curtis Segarra, *City of Eunice, New Mexico Sues Governor over New Abortion-Related Bill*, KRQE (Apr. 20, 2023, 1:17 PM), <https://www.krqe.com/news/politics-government/city-of-eunice-new-mexico-sues-governor-over-new-abortion-related-bill> [https://perma.cc/483D-AYQD].

160. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (articulating the idea of states as “laboratories of democracy”); Alan Ehrenhalt, *How Cities Became the New Laboratories of Democracy*, GOVERNING (Sept. 18, 2018), <https://www.governing.com/archive/gov-urban-power.html> [https://perma.cc/Z65Z-ZEUD] (explaining how, with their increasing economic and political power, cities have been identified as the new “laboratories of democracy”).

161. Denise D. Payán et al., *County-Level Recreational Marijuana Policies and Local Policy Changes in Colorado and Washington State (2012-2019)*, 99 MILBANK Q. 1132, 1133–34 (2021); see also *Marijuana*, MAHB, <https://www.mahb.org/marijuana> [https://perma.cc/8ZXR-GTFQ] (describing permissible local variations in Massachusetts).

162. *Preemption of Local Laws*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws->

In his article exploring “preference-based federalism,” Marquan Robertson posits that abortion policy might be developed, tested, and refined in the same way, arguing that policy decisions should be placed as close to the people as possible.<sup>163</sup> In dispassionate terms, Robertson describes the benefits to be had from “experiments” such as Texas’s so-called bounty law, which provides monetary rewards to private citizens who assist in the state’s enforcement of abortion restrictions by reporting suspected abortion participants.<sup>164</sup> The U.S. Supreme Court permitted the Texas law to go into effect a few months before its *Dobbs* decision.<sup>165</sup> Writing about the bounty law, Robertson states:

Whether or not that method was constitutionally sound or permissible is mainly irrelevant. Texas will have effectively accomplished another experiment to explore the boundaries of abortion regulation in a finite space with people that care intensely about it. There is value in Texas’s experiment because it provides another data point in the overall abortion regulatory framework. It also informs other states that might decide to adopt the same experiment or alter the experiment to reflect what their citizens desire.<sup>166</sup>

This sounds like a fine approach for testing local variations in the regulation of plastic shopping bags, but when the stakes involve significantly diminished access to critical health care for a large percentage of the population, characterizing the bounty program as an additional data point seems out of touch with the real consequences of the abortion debate.<sup>167</sup> Robertson’s description of the “experiment” makes clear why baseline

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policies/preemption-of-local-laws [<https://perma.cc/7R42-MTYX>] (“In Connecticut, Hawaii, Massachusetts, New Jersey, and New York, there are no state laws expressly preempting local authority to regulate firearms or ammunition.”).

163. Marquan Robertson, *Preference-Based Federalism*, 54 ST. MARY’S L.J. 805, 833–34 (2023).

164. *Id.*

165. *Whole Women’s Health v. Jackson*, 595 U.S. 30 (2021) (ruling in opinion issued September 1, 2021).

166. Robertson, *supra* note 163.

167. Alan Feuer, *The Texas Abortion Law Creates a Kind of Bounty Hunter. Here’s How it Works*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/09/10/us/politics/texas-abortion-law-facts.html> [<https://perma.cc/A7BD-VEJJ>].

parameters, whether from the state, the federal government, or even international human rights law, are critical.<sup>168</sup>

Instead of sanctioning wide-ranging experimentation in the abortion arena, an alternative paradigm might be to view the give-and-take between local and state level policymakers as a dialogue. Catherine Powell coined the term “dialogic federalism” to describe the back-and-forth between subnational governments (states, cities) and the federal government concerning human rights commitments and foreign affairs.<sup>169</sup> As she explains, dozens of subnational U.S. governments have endorsed the U.N.’s Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) or otherwise adopted human rights norms.<sup>170</sup> These local declarations are not legally enforceable but set a tone for local governments’ approach to policymaking and initiate a dialogue with the federal actors who are able to steer the United States towards a formal, legal commitment to CEDAW.<sup>171</sup> This federal-state-local dialogue does not directly challenge the federalism hierarchy, but it recognizes that subnational governments should have a voice in setting national policies.<sup>172</sup> In response to inputs from local actors, the federal government has increased its engagement with subnational governments in the treaty review process, soliciting input and engaging local representatives during the reviews themselves.<sup>173</sup> And there are other examples of such federal-state-local dialogues trickling up to result in broader policy changes, such as the development of the Family

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168. Concern about such human experiments gave rise to the Nuremberg Code after World War II. See Evelyne Shuster, *Fifty Years Later: The Significance of the Nuremberg Code*, 337 N. ENG. J. MED. 1436, 1436 (1997).

169. Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 249–54 (2001).

170. *Id.* at 245–46; see, e.g., HUM. RTS. CITIES ALL., <https://humanrightscities.wixsite.com/hrca> [<https://perma.cc/87LX-UW67>] (some have declared themselves to be “human rights cities”).

171. See generally Powell, *supra* note 169.

172. *Id.* at 293.

173. See Risa Kaufman & JoAnn Kamuf Ward, *The Local Turn in U.S. Human Rights: Introduction to the Special Symposium Issue*, 49 COLUM. HUM. RTS. L. REV. 1, 5 n.12 (2017); see also Anthony Pipa & Max Bouchet, *Partnership Among Cities, States, and the Federal Government: Creating an Office of Subnational Diplomacy at the US Department of State*, BROOKINGS (Feb. 17, 2021), <https://www.brookings.edu/research/partnership-among-cities-states-and-the-federal-government-creating-an-office-of-subnational-diplomacy-at-the-us-department-of-state> [<https://perma.cc/74YS-GWAF>].



and Medical Leave Act, which was preceded by the enactment of nearly forty state and municipal versions of family and medical leave laws.<sup>174</sup>

This dialogic approach is only workable when the governmental entities that are involved perceive a benefit to engaging in, and staying with, a dialogue.<sup>175</sup> In the human rights arena, subnational governments engage because they hope to influence federal policy; in turn, the federal government hopes to maintain its control of foreign relations by giving ambitious subnational governments a voice on these issues.<sup>176</sup>

In the abortion arena, ideological polarization and the concentration of preemption power in state governments makes the mutual benefit of a dialogic approach involving local governments less clear. States are unwilling to relinquish their recently reacquired power over the abortion issue; indeed, chuckles ensued in the legislative chamber when one anti-abortion Kansas legislator introduced a bill that would have allowed local cities and counties in the state to set their own abortion policies.<sup>177</sup>

Polarization is also entrenched at the local level. Sterling Donner, the city council chair in Eunice, New Mexico, offered a typical anti-choice stance: “It’s time to fight. It’s time to rise up and to fight for not just our rights but the rights of these unborn children that don’t ever have a chance.”<sup>178</sup> On the other side are statements like that from New Orleans city councilman J.P. Morell, in support of the city’s pro-choice resolution: “We are at war.”<sup>179</sup>

Post-*Dobbs*, there has been little appetite for compromise in state legislatures or in local councils.<sup>180</sup> To the extent that states have adopted more moderated positions on abortion, it has come

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174. E.g., Megan Sholar, *The History of Family Leave Policies in the United States*, *THE AMER. HISTORIAN* (2016), <https://www.oah.org/tah/november-3/the-history-of-family-leave-policies-in-the-united-states> [https://perma.cc/4F9M-EHLJ].

175. See, e.g., Jean Poitras & Robert Bowen, *A Framework for Understanding Consensus-Building Initiation*, 18 *NEGOTIATION J.* 211, 212 (2002), (observing that “getting parties to the table” is a critical challenge for practitioners).

176. See, e.g., Pipa & Bouchet, *supra* note 173.

177. Rachel Mipro, *Proposed Kansas Bill Would Turn Abortion Control Over to Cities and Counties*, *KAN. REFLECTOR* (Jan. 23, 2023, 12:03 PM), <https://kansasreflector.com/2023/01/23/proposed-kansas-abortion-bill-would-ban-condoms-iuds-at-the-county-and-city-level> [https://perma.cc/6GVR-PBAN].

178. McCammon, *supra* note 123.

179. Killion, *supra* note 80.

180. See Wright, *supra* note 78.

about through judicial opinions and popular referenda, not legislative dialogue.<sup>181</sup> Compromise in local councils has taken the form of silence on abortion.<sup>182</sup>

This status quo underscores the conclusions drawn by social scientists who have examined this issue—that the power dynamics between local governments and states must fundamentally shift before progress can be made on preemption issues. For example, the National League of Cities model suggests establishing a presumption against state preemption.<sup>183</sup> Yet because states’ preemption practices are embedded within that same power structure and subject to the same dynamics, they are unlikely to change without some external impetus or fundamental shift in the political terrain.

Judicial review along the lines recently suggested by municipal law scholars—for example, judicial review of the operation of the presumption against preemption—might provoke such a shift, yet even these scholars acknowledge the role of politics in setting the parameters.<sup>184</sup> In the end, then, voter mobilization and engagement is a necessary component of an effective response to “the attack on cities.”<sup>185</sup> The mayor of Madison, Wisconsin, Satya Rhodes-Conway, recognized this in her comments a few weeks after the *Dobbs* decision, expressing frustration over the constant threat of preemption from the state government.<sup>186</sup> She observed, “At the end of the day, . . . if people want things to change in Congress, in the state Legislature, they need to register, they need to vote, they need to organize around these elections. I know it’s frustrating, I know it feels like we always call for that, but I really do think that’s where the hope lies to make a difference.”<sup>187</sup>

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181. *Oklahoma Call for Reproductive Justice v. State*, 531 P.3d 117, 123 (Ok. 2023) (enjoining portions of state statute banning abortion); Mitch Smith & Katie Glueck, *Kansas Votes to Preserve Abortion Rights Protections in its Constitution*, N.Y. TIMES (Aug. 2, 2022), <https://www.nytimes.com/2022/08/02/us/kansas-abortion-rights-vote.html> [<https://perma.cc/NNZ6-4BP9>] (upholding state constitutional protection for abortion despite legislative efforts to limit access to the procedure).

182. See, e.g., Staurer, *supra* note 137.

183. Davidson & Schragger, *supra* note 91, at 1397.

184. See generally Diller, *supra* note 91 (describing NLC proposals for judicial oversight of preemption); Schragger, *supra* note 30 (describing political context of state preemption); NAT’L LEAGUE OF CITIES, *supra* note 95, at 56, 61, 66 (Proposed opportunities for judicial review are set out in the National League of Cities model.)

185. Schragger, *supra* note 30, at 1231.

186. Garfield, *supra* note 11.

187. *Id.*

### III. GIVEN THE SPECTER OF PREEMPTION, WHAT IS THE IMPACT OF LOCAL ABORTION INITIATIVES?

The prospect or reality of state preemption certainly undercuts the policy impacts of local abortion ordinances and resolutions.<sup>188</sup> However, these local measures are not without effect, and some important impacts flow simply from the signal sent by a local government's public stance. Local measures may, for instance, provide policy transparency that can help residents make decisions about their futures, and may provide reassurance that local leaders are responsive to constituents.

Some research indicates that people are already taking reproductive rights laws into account in making decisions about where to live and work.<sup>189</sup> A 2019 study reported that partisan sorting was occurring at the county level, with people more likely to move to places where they would find co-partisans.<sup>190</sup> Variations in abortion law seems to be an additional factor in such decisions. According to one recent report, “[m]ore than two in five working adults who say they’re concerned about losing abortion options for themselves or a family member are open to relocate to another state if they could keep their current job and pay.”<sup>191</sup> For people contemplating a move, a local resolution or ordinance might moderate concerns about the consequences of state abortion restrictions or signal the presence of co-partisans, even if the local ordinance is at odds with state law.

Uprooting a family or changing jobs in order to ensure access to reproductive health care is a major decision, but for young people who are applying to college or making other life choices involving a move, the availability of abortion may loom large. One survey indicated that nearly three-fourths of enrolled students say that

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188. See, e.g., Justin Garcia, *Tampa City Council Passes Abortion Resolution but Councilwoman Says it Doesn't Go Far Enough*, TAMPA BAY NEWS (Aug. 19, 2022, 3:45 PM), <https://www.ctampa.com/news/tampa-city-council-passes-abortion-resolution-but-councilwoman-says-it-doesnt-go-far-enough> [https://perma.cc/7R9P-9QUN] (it may also influence the content of local resolutions).

189. Matthew Boyle & Jo Constantz, *Nearly Half of Working Adults Say They're Open to Relocating to Abortion-Friendly States*, BLOOMBERG (July 19, 2022, 7:00 AM MDT), <https://www.bloomberg.com/news/articles/2022-07-19/reality-bites-for-workers-looking-to-abortion-friendly-states> [https://perma.cc/VW7F-CHAF].

190. Xi Liu et al., *Migrations and Political Polarization in the U.S.: An Analysis of the County-Level Migration Network*, PLOS ONE (Nov. 22, 2019), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0225405#abstract0> [https://perma.cc/2EVH-EGYB].

191. Boyle & Constantz, *supra* note 189.

their decision to remain at a particular institution of higher education is at least somewhat affected by the state's reproductive health laws.<sup>192</sup> In the same survey, 60 percent of unenrolled adults reported that a state's reproductive health laws would influence their college choice.<sup>193</sup> Of these respondents, majorities of Republicans, Democrats, women, and men in the survey all favored less restrictive abortion laws and would presumably choose college locations with fewer restrictions.<sup>194</sup>

Though abortion access is a state issue, local abortion ordinances may play a role in students' decisions. For example, senior Li de Jong, attending Ithaca College in New York, reported that the abortion sanctuary declaration adopted by the city of Ithaca made her feel "more secure," even though abortion is protected at the state level in New York.<sup>195</sup> Hailing from Texas, de Jong explained that "[g]oing from a state where my female autonomy isn't really valued to a city that is so accepting and forward and will advocate for it is just very nice."<sup>196</sup>

In the analogous context of immigration law and policy, where local governments often strain against state and federal laws, researchers found that the local sanctuary laws had positive impacts for affected communities despite the specter of preemption. For example, one study concluded that "stronger sanctuary policies . . . may help to address fear and encourage greater trust and immigrant integration, at least at the local level."<sup>197</sup> Another study found that local sanctuary policies, while limited, helped immigrants feel safer in routine police encounters in the community.<sup>198</sup>

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192. Stephanie Marken & Zach Hrynowski, *Reproductive Health Laws Factor into Many College Decisions*, GALLUP (Apr. 20, 2023), <https://news.gallup.com/poll/474365/reproductive-health-laws-factor-college-decisions.aspx> [<https://perma.cc/65QW-HK5S>]; see also Currie Engel, *Abortion Bans are Causing Students to Radically Rethink Their College Plans*, WOMEN'S HEALTH (June 22, 2023), <https://www.womenshealthmag.com/life/a44202684/abortion-bans-impact-students-college-decision> [<https://perma.cc/44SB-4JRN>].

193. Marken & Hrynowski, *supra* note 192.

194. *Id.*

195. Lorien Tyne, *City of Ithaca Protects Abortion Access with Sanctuary Law*, THE ITHACAN (Sept. 7, 2022), <https://theithacan.org/news/city-of-ithaca-protects-abortion-access-with-sanctuary-law> [<https://perma.cc/WQ4R-EP5T>].

196. *Id.*

197. Martha F. Davis, *The Limits of Local Sanctuary Initiatives for Immigrants*, 690 THE ANNALS AMER. ACAD. POLI. & SOC. SCI. 100, 111 (2020).

198. Lilli Mann-Jackson et al., *State Preemption of Municipal Laws and Policies that Protect Immigrant Communities: Impact on Latina Health and Well-Being in*

Local abortion resolutions providing guidance on law enforcement priorities may likewise have a tangible impact that goes beyond symbolism. For example, the Madison, Wisconsin City Council passed a resolution authorizing the city police chief to “consider the need to protect the physical, psychological and socioeconomic well-being of pregnant people and their care providers” in setting law enforcement priorities.<sup>199</sup> The resolution also authorized changes in how the local police handle and deescalate reports of state abortion law violations.<sup>200</sup> According to the Madison city attorney, the police chief already had discretion to take these actions, but the resolution gave the chief “more comfort that it’s a policy that would not be opposed by the council.”<sup>201</sup> A lawyer representing the local Planned Parenthood agreed that the action had real impact: “Saying out loud that we don’t want law enforcement resources or district attorney office resources being used to investigate or prosecute people who may be seeking abortion care, post-abortion care, post-miscarriage services, is meaningful.”<sup>202</sup>

In the immigration context, sanctuary policies also had an impact on public health, as local residents were less afraid to keep medical appointments.<sup>203</sup> Similar effects might be anticipated in communities that have signaled their support of abortion rights. In fact, one Dallas city councilman, Adam Bazaldua, framed his support for Dallas’s local pro-choice ordinance in terms of public health, stating that “[i]t’s our job as local leaders to preserve quality of life for residents and access to health care.”<sup>204</sup> Local abortion ordinances can also play an important

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*North Carolina*, 59 INQUIRY 1 (2022), <https://doi.org/10.1177/00469580221087884> [<https://perma.cc/M9HF-6H6U>].

199. Garfield, *supra* note 11; *see also* Latch, *supra* note 137 (similar resolutions have been considered in Tucson, Flagstaff, and Phoenix, Arizona).

200. Garfield, *supra* note 11.

201. *Id.*

202. *Id.*; *cf.* Anthony Greenfield et al., *Climate Emergencies in Australian Local Governments: From Symbolic Act to Disrupting the Status Quo?*, 10 CLIMATE 1, 13 (2022), <https://doi.org/10.3390/cli10030038> [<https://perma.cc/K2A6-R8PY>] (discussion of the impacts of local declarations concerning climate change which found that “declarations were organizationally significant, generating a new level of accountability for local government”).

203. Mann-Jackson et al., *supra* note 198.

204. Mary Kekatos, *Dallas City Council Committee Passes Resolution to Limit Impact of Texas Abortion Law*, ABC NEWS (Aug. 3, 2022, 1:31 PM), <https://abcnews.go.com/Health/dallas-city-council-committee-passes-resolution-limit-impact/story> [<https://perma.cc/G9KL-RE9G>]; *cf.* Paul Wedding, *Dallas City Council Passes Resolution Limiting Abortion Investigations*, WFAA (Aug. 10, 2022,

role in destigmatizing the need for reproductive health care. Speaking in Denton, Texas, which passed an early pro-choice resolution, one supporter suggested that a local ordinance would make people feel safer if they needed to search for out-of-state abortion services.<sup>205</sup> Johanna Grossman, a Texas law professor, noted the value in providing some nominal support to abortion providers.<sup>206</sup>

The immigration example may also be instructive in thinking about the impacts of more restrictive policies that are imposed on, or adopted by, local governments. In local jurisdictions where immigration sanctuary policies were blocked and harsh immigration policies were implemented, municipalities found that they had limited ability to address “various determinants of health such as freedom of movement, receipt of a range of social services, and criminal justice.”<sup>207</sup> One impact of harsh immigration laws was an increase in mental health issues among Latinx youth.<sup>208</sup> Abortion opponents count successes based on “bab[ies] saved,”<sup>209</sup> and preliminary data from Texas indicates an increase in birthrates following the passage of state-level abortion restrictions.<sup>210</sup> But local anti-abortion ordinances and declarations (as opposed to statewide laws) have minimal impacts on birthrates because they are generally enacted in

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4:33 PM), <https://www.wfaa.com/article/news/local/dallas-city-council-passes-resolution-limiting-abortion-investigations> [<https://perma.cc/GNB4-N5SH>] (in August 2022, the Dallas City Council adopted the GRACE Act to deprioritize abortion investigations in the city, a measure based on San Antonio’s initiative).

205. Isabella Volmert, *Denton’s Resolution to Deprioritize Abortion Seen as a Symbolic First Step*, THE DALL. MORNING NEWS (July 1, 2022, 8:00 AM), <https://www.dallasnews.com/news/2022/07/01/dentons-resolution-to-de-prioritize-abortion-laws-seen-as-a-symbolic-first-step> [<https://perma.cc/26QH-EYAB>].

206. *Id.*; but see Eleanor Klibanoff, *Local Efforts to Decriminalize Abortion in Texas Likely Won’t Help Clinics Stay Open*, TEX. TRIBUNE (June 25, 2022, 5:00 PM), <https://www.texastribune.org/2022/06/25/abortion-roe-wade-local-decriminalize> [<https://perma.cc/D3CU-GS6K>] (declarations “can serve to reduce fear among health care providers and people seeking abortion-inducing medication outside the traditional health care system”).

207. Mark A. Hall, et al., *State Preemption of Local Immigration ‘Sanctuary’ Policies: Legal Considerations*, 111 AM. J. PUB. HEALTH 259, 259 (2021).

208. Brenda Eskenazi et al., *Association of Perceived Immigration Policy Vulnerability with Mental and Physical Health among US-born Latino Adolescents in California*, 173 JAMA PEDIATRICS 744, 757 (2019).

209. Eleanor Klibanoff, *Nearly 10,000 More Babies Born in Nine Months Under Texas’ Restrictive Abortion Law, Study Finds*, TEX. TRIBUNE (June 30, 2023, 10:00 AM), <https://www.texastribune.org/2023/06/30/texas-abortion-johns-hopkins-study> [<https://perma.cc/FJM3-G3FL>].

210. Suzanne O. Bell et al., *Texas’ 2021 Ban on Abortion in Early Pregnancy and Changes in Live Births*, 330 JAMA 281 (2023).

smaller communities that have no abortion providers.<sup>211</sup> Rather, research on abortion restrictions has revealed increases in poverty and stress among affected individuals in restrictive states, along with dire health complications.<sup>212</sup> Whether these impacts result from restrictive state laws or from local initiatives, it is communities and individuals that bear the burden of these social and health consequences.

Local resolutions and ordinances will not change the underlying state laws, but they can help highlight the impacts of restrictions and shift the policy focus toward alleviating the harmful impacts of these restrictions on pregnant people. They also serve as a vehicle for mobilizing local residents, as activists learned in San Antonio with the Justice Charter.<sup>213</sup> Though local abortion sanctuaries, like immigration sanctuaries, are largely symbolic, evidence suggests that their impacts on affected communities and vulnerable populations are small but real.

## CONCLUSION

Many believe that *Dobbs* was wrongly decided, and that abortion is the sort of fundamental right that should be insulated from street-level politics. But when the *Dobbs* majority designated “elected representatives and the people” as custodians of abortion policy henceforth, there is no doubt that local governments were included in the designation. Those who assert that local governments should stand on the sidelines of

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211. See, e.g., Dunlap, *supra* note 86 (noting that New Mexico county which passed an anti-abortion ordinance has no abortion providers); see also, e.g., Natalie Alamdari, *Abortion Ban Fails in Small Nebraska Town; Others Pass, Some Narrowly*, FLATWATER FREE PRESS (Nov. 14, 2022), <https://flatwaterfreepress.org/abortion-ban-fails-in-small-nebraska-town-others-pass-some-narrowly> [<https://perma.cc/U9LG-ZWZL>] (noting that Nebraska towns enacting restrictive ordinances are “hundreds of miles away” from any abortion provider).

212. LAUREN HOFFMAN ET AL., STATE ABORTION BANS WILL HARM WOMEN AND FAMILIES’ ECONOMIC SECURITY ACROSS THE U.S. (2022), <https://www.americanprogress.org/article/state-abortion-bans-will-harm-women-and-families-economic-security-across-the-us> [<https://perma.cc/D7R8-YJAP>].

213. Cf., e.g., William Melhado, *Texas Anti-Abortion Protesters Set Sights on New Mexico, Where the Procedure is Still Protected*, TEX. TRIB. (Aug. 10, 2022, 5:00 AM), <https://www.texastribune.org/2022/08/10/texas-abortion-sanctuary-city-new-mexico> [<https://perma.cc/G3S7-7WDY>]. In towns like Eunice, residents are well-aware that some of the impetus for anti-choice measures has come from outside of the community.

the current, post-*Dobbs* abortion debate fail to appreciate the critical role of local governments in the democratic process that is now the province of abortion law and policy. As Emily Francis, the mayor pro tem of Fort Collins, Colorado, noted when her city debated a pro-choice resolution, “When the Supreme Court said that this is up to the states, it became a city issue as well, because our state leaders look to their city representatives for what their constituents are thinking.”<sup>214</sup>

There is broad recognition among scholars that the power dynamic between state and local governments is out of balance, and that state preemption has too often been used as a weapon to bring local governments into line with the majorities in state legislatures. As described above, thoughtful experts working under the auspices of the National League of Cities developed a new set of model principles to govern these relationships that would give more flexibility and autonomy to local governments. Others have suggested alternative, more dialogic frameworks for thinking about these governance relationships. Certainly, instead of preemptively quashing local initiatives, state legislators and other state actors would do well to consider and respond to the messages local governments are sending—about community-wide feelings of alienation, about individuals experiencing fear and stress, and about local priorities. Yet in our polarized political climate, there is little incentive for state governments to respond when they can instead flex their power to simply shut down local efforts that are in tension with state law. At the same time, recent history shows that aggressive preemption by states has not stopped, and will not stop, local governments from weighing in and pursuing policies that reflect local values.

In the end, the best way out of this cycle is to meet politics with politics, and to lean into democracy. After *Dobbs*, the breadth and depth of interest in abortion access provides an opportunity for local debates that can engage, energize, and mobilize voters to challenge state preemption practices. Hard conversations are already happening in local town halls and city council hearings around the country. This is a good thing for democracy. In the long run, it may be a good thing for abortion rights.

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214. Marmaduke, *supra* note 143.