
CHAPTER THREE

STATE PREEMPTION OF LOCAL ZONING LAWS AS INTERSECTIONAL CLIMATE POLICY

Since the inception of zoning in the early twentieth century, municipal governments have dominated land use decisionmaking. Cities and towns decide where, what, and how to build, almost entirely without state oversight. This system, which has contributed to the housing crisis Americans face today, goes largely without question.¹

That may soon change. Recently, several states have considered or passed laws that impinge on this area of traditionally local power.² These laws, which have surfaced in both blue and red states, preempt restrictive local zoning regulations in favor of regulations that encourage the development of denser housing. Most typically, these states mandate that any land zoned for single-family housing — the majority of residentially zoned land in the United States³ — allow “middle housing,” typically defined as duplexes, triplexes, and the like.⁴ Advocates of these laws hope that by removing barriers to multifamily housing, developers will build more units of housing at more reasonable prices.⁵

These laws merit attention for their potential to mitigate climate change. Today, transportation accounts for the largest share of America’s emissions; urban sprawl contributes heavily to the problem.⁶ Single-family homes located far from city centers are energy inefficient and, more importantly, force residents to drive longer distances.⁷ Denser zoning reduces greenhouse gas (GHG) emissions on both accounts,⁸ but the climate benefits of encouraging density are not always discussed by those who advocate for density-enhancing measures.

This Chapter identifies recent state attempts to preempt local zoning regulations, situates them within the broader framework of climate

¹ See Kenneth Stahl, *Home Rule and State Preemption of Local Land Use Control*, 50 URB. LAW. 179, 182 (2020) (describing how “many residents have become so accustomed to local control [of zoning] that they perceive it as something akin to a birthright”).

² See *infra* ch. III, section B.1, 1601–05.

³ Emily Badger & Quoc Trung Bui, *Cities Start to Question an American Ideal: A House with a Yard on Every Lot*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html> [<https://perma.cc/MD3W-KCNP>].

⁴ See *infra* ch. III, section B.1, 1601–05.

⁵ See, e.g., Jim Perras, Opinion, “Missing Middle” Can Offer More Housing Choices, CT MIRROR (Sept. 13, 2019), <https://ctmirror.org/category/ct-viewpoints/missing-middle-can-offer-more-housing-choices> [<https://perma.cc/M35E-4C5B>].

⁶ Brian Yudkin et al., *Our Driving Habits Must Be Part of the Climate Conversation*, ROCKY MOUNTAIN INST. (Aug. 24, 2021), <https://rmi.org/our-driving-habits-must-be-part-of-the-climate-conversation> [<https://perma.cc/XEW6-CNN2>].

⁷ See *infra* pp. 1598–99.

⁸ Adie Tomer et al., *We Can't Beat the Climate Crisis Without Rethinking Land Use*, BROOKINGS INST. (May 12, 2021), <https://www.brookings.edu/research/we-cant-beat-the-climate-crisis-without-rethinking-land-use> [<https://perma.cc/9FW-2EJH>].

policymaking, and analyzes whether this type of state preemption is normatively desirable. Section A opens with a short history of U.S. zoning law, explaining how it emerged at the beginning of the twentieth century largely as a response to wealthy homeowners' attempts to isolate themselves from poor people and people of color. In the following decades, restrictive, single-family zoning continued to spread, causing the sprawl, segregation, and unaffordability that characterize the American housing market today. One consequence of this pervasive sprawl is high levels of GHG emissions. This section concludes by summarizing the research regarding the link between zoning and climate, which, while mixed, supports the contention that denser zoning leads to lower rates of vehicle use.

From there, section B describes the recent spate of state zoning legislation in more detail and explains how this legislation, though not always described in climate terms, is ultimately climate policy. In fact, this type of policy, which addresses the multiple overlapping crises of climate change, housing unaffordability, and racial segregation, is exactly what policymakers should advocate for. Not only does this type of “intersectional” climate policy better utilize scarce funding sources, but it may also be more politically palatable across the ideological spectrum, as it could appeal to constituencies who do not prioritize climate change as a policy problem and could motivate actors who do care about climate change, but have yet to devote adequate attention to the problem.

The Chapter ends by addressing arguments against the use of state zoning preemption. Section C contends that state preemption of restrictive local zoning policy is justifiable in ways that preemption of other local prerogatives, such as the regulation of hydraulic fracturing (“fracking”) or antidiscrimination measures, is not. When localities prevent dense housing, they impose externalities on the rest of the state that warrant a centralized response. This is especially true given that, because of collective action dynamics and the nature of local government, municipalities are unlikely to act on the issue themselves. Furthermore, while zoning preemption in itself is unlikely to meaningfully increase housing density, preemption combined with progressive state housing policy is another matter. If they take seriously their responsibility to provide for the general welfare, state governments should do what it takes to provide their populations with livable, sustainable housing.

A. Land Use and Climate

i. A Brief History of U.S. Land Use Law. — Although zoning is now an integral part of municipal policymaking, this wasn't always the case. In 1916, New York City became the first municipality to enact a comprehensive zoning law after New York State passed a law enabling the

City to do so.⁹ Zoning's popularity quickly increased, especially after 1923, when the U.S. Department of Commerce disseminated the Standard State Zoning Enabling Act.¹⁰ The publication, zoning law's "fundamental DNA," provided states with model statutory language they could use to enable municipal zoning.¹¹

Four years later, the Supreme Court vindicated the law's purposes in *Village of Euclid v. Ambler Realty*,¹² which recognized as legitimate a locality's state-delegated right to exclude undesirable uses from certain areas. According to the Court, a state's power to separate different types of uses stemmed from its ability to police public nuisances.¹³ Unfortunately, what uses states considered undesirable hinged largely on the race and socioeconomic status of those undertaking the uses.¹⁴ *Euclid* is filled with barely coded language about the dangers of allowing poor people and people of color into suburban life.¹⁵ Indeed, *Euclid* can be viewed

⁹ Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1081 (1996). Like many zoning ordinances, New York City's emerged because of racist and/or classist concerns. In particular, this ordinance responded to "Fifth Avenue merchants' fears of being overrun by immigrant garment workers." *Id.* at 1082. America's earliest zoning measures appeared a few decades earlier "as an effort to curb the spread of Chinese laundries in Modesto and San Francisco." *Id.*

¹⁰ ADVISORY COMM. ON ZONING, DEP'T OF COM., A STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926) (1922).

¹¹ Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 755, 758 (2020). This authorization was necessary because at the time, states followed Dillon's Rule, which prevented local governments from acting unless the state explicitly delegated the relevant authority. *Id.* at 755. Although fewer states today follow Dillon's Rule, localities in most states still derive their power from the delegation of state authority. JOHN R. NOLON, CHOOSING TO SUCCEED: LAND USE LAW & CLIMATE CONTROL 23 (2021). Even in states where municipalities have been granted home rule authority, or the "right of self-governance in local matters," DAVID J. BARRON ET AL., RAPPAPORT INST. FOR GREATER BOS., DISPELLING THE MYTH OF HOME RULE 1 (2003) (quoting MASS. CONST. art. LXXXIX, § 1), courts frequently interpret this authority narrowly, Stahl, *supra* note 1, at 187 & n.28.

¹² 272 U.S. 365 (1926).

¹³ *See id.* at 388; *see also* Serkin, *supra* note 11, at 757 (noting that the Court concluded zoning "was analogous to an application of nuisance law and therefore was justified as a valid exercise of the state's police power"). The Court's conception of a nuisance was broad and included apartment houses located in single-family neighborhoods. *Euclid*, 272 U.S. at 394–95. In a recent article, Professor Molly Brady traces the historical connection between apartment buildings and nuisance law, finding that it was not until the early twentieth century that courts began to conceive of apartment buildings as nuisances, and that this shift was largely a response to the push for more zoning. *See* Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1663–73 (2021).

¹⁴ *See* Allison Shertzer et al., *Zoning and Segregation in Urban Economic History*, REG'L SCI. & URB. ECON. (forthcoming) (article in press at 5), <https://doi.org/10.1016/j.regsciurbeco.2021.103652> [<https://perma.cc/YK79-G4N2>] (arguing that "racial considerations influenced the earliest zoning ordinances, and that de jure race-blind land use regulations were implemented to a discriminatory effect").

¹⁵ For example, the opinion, written by Justice Sutherland, describes apartment buildings as "mere parasite[s], constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of [a] district." *Euclid*, 272 U.S. at 394. It warns that the coming of apartment buildings into a neighborhood "utterly destroy[s]" the "residential character of [a] neighborhood and its desirability as a place of detached residences." *Id.* In one

as a direct response to the 1917 case *Buchanan v. Warley*,¹⁶ in which the Supreme Court held that the freedom of contract promised by the Fourteenth Amendment prohibited municipalities from barring the sale of property to Black people.¹⁷ *Euclid* ratified the racist zoning policies that localities enacted in response to *Buchanan*'s moratorium on explicitly racial zoning ordinances,¹⁸ policies that localities continue to enact today.¹⁹

The trend toward racialized suburbanization that *Euclid* identified and endorsed continued and gained even more speed after World War II.²⁰ In the 1950s and 1960s, laws like the Federal Aid Highway Act²¹ enabled city dwellers with means to relocate further from their places of work.²² Once the largely white upper and middle classes made it to the suburbs, they enacted land use policies that entrenched sprawl.²³ These policies included single-family zoning mandates and minimum lot-size requirements.²⁴ Frequently, when making zoning decisions, localities concerned themselves primarily with keeping property values high,²⁵ which resulted in exclusionary housing policy by suppressing the total housing supply.²⁶ Importantly, these localities did not themselves face the consequences of their policies, as potential residents simply looked elsewhere for housing.²⁷

Today, the desire for low-density, socioeconomically homogenous neighborhoods continues to dominate U.S. land use policy. Zoning has continued to grow more restrictive into the twenty-first century.²⁸ In most U.S. cities, three-quarters of land is zoned only for single-family

particularly evocative line, the majority implies that constructing apartment buildings in single-family suburbs is akin to placing “a pig in the parlor instead of the barnyard.” *Id.* at 388.

¹⁶ 245 U.S. 60 (1917).

¹⁷ See *id.* at 81; see also RICHARD ROTHSTEIN, *THE COLOR OF LAW* 45 (2017). It should be noted that many cities, especially those in the South, ignored this decision and continued to administer racial zoning laws for decades after. *Id.* at 46–48.

¹⁸ Serkin, *supra* note 11, at 757 (describing *Euclid* as “zoning’s original sin”).

¹⁹ Kimberly Quick, Commentary, *Exclusionary Zoning Continues Racial Segregation’s Ugly Work*, CENTURY FOUND. (Aug. 4, 2017), <https://tcf.org/content/commentary/exclusionary-zoning-continues-racial-segregations-ugly-work> [<https://perma.cc/K4XZ-2QZ5>].

²⁰ Rachel Medina & A. Dan Tarlock, *Addressing Climate Change at the State and Local Level: Using Land Use Controls to Reduce Automobile Emissions*, 2 SUSTAINABILITY 1742, 1745–46 (2010).

²¹ Pub. L. No. 84-627, 70 Stat. 374 (1956).

²² Frug, *supra* note 9, at 1068.

²³ See Gregory H. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. 498, 539 (2020) (describing how land use decisions “create path dependency and cannot easily be reversed”).

²⁴ Medina & Tarlock, *supra* note 20, at 1745–46.

²⁵ One scholar describes this behavior as “[h]omeowner cartelization.” Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 510 (1977).

²⁶ See *id.* at 402.

²⁷ See *id.* at 403.

²⁸ David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1674 (2013).

detached housing.²⁹ This statistic includes cities like Chicago (79% of residential land zoned for detached single-family housing), Seattle (81%), and San Jose (94%).³⁰ The sprawl that restrictive zoning policies engender, combined with a lack of investment in public transit infrastructure,³¹ has fueled America's overreliance on cars, which themselves take up space. Certain cities devote over one-third of their land area to parking lots;³² Des Moines, Iowa, possesses around seven parking spaces per resident.³³ Restrictive policies also exacerbate the country's widespread lack of housing, resulting in the affordability crisis that the United States faces today.³⁴ Nearly half of all renters spend over 30% of their pretax income on housing, and around one-quarter spend over 50%.³⁵ For reference, a "broad consensus" exists that American families should spend no more than 30% of their incomes on housing, lest they be unable to afford other necessities.³⁶

Furthermore, even though the United States no longer permits race-based zoning³⁷ or race-based covenants,³⁸ restrictive zoning has resulted in de facto housing segregation.³⁹ For years, Black tenants faced violence when they attempted to desegregate neighborhoods;⁴⁰ municipalities known as "sundown towns" forbade Black people from living within

²⁹ JENNY SCHUETZ, BROOKINGS INST., TO IMPROVE HOUSING AFFORDABILITY, WE NEED BETTER ALIGNMENT OF ZONING, TAXES, AND SUBSIDIES 2 (2020), https://www.brookings.edu/wp-content/uploads/2019/12/Schuetz_Policy2020_BigIdea_Improving-Housing-Afforability.pdf [<https://perma.cc/J6G6-XBTP>].

³⁰ Badger & Bui, *supra* note 3.

³¹ Shill, *supra* note 23, at 538.

³² *Id.* at 547.

³³ *Id.* at 545.

³⁴ Architect Daniel Parolek describes this phenomenon as the "missing middle housing." DANIEL PAROLEK, MISSING MIDDLE HOUSING 8 (2020).

³⁵ RICHARD D. KAHLBERG, THE CENTURY FOUND., UPDATING THE FAIR HOUSING ACT TO MAKE HOUSING MORE AFFORDABLE (2018), <https://tcf.org/content/report/updating-fair-housing-act-make-housing-affordable> [<https://perma.cc/J44J-2R9L>].

³⁶ Matthew Desmond, *Heavy Is the House: Rent Burden Among the American Urban Poor*, 42 INT'L J. URB. & REG'L RSCH. 160, 160 (2018).

³⁷ See *Buchanan v. Warley*, 245 U.S. 60 (1917).

³⁸ See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

³⁹ See Michelle D. Layser, *How Federal Tax Law Rewards Housing Segregation*, 93 IND. L.J. 915, 916–19 (2018) ("Blacks and Latinos still tend to live in neighborhoods where the majority of residents are people of color." *Id.* at 916.); see also Jonathan T. Rothwell & Douglas S. Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 SOC. SCI. Q. 1123, 1133–34 (2010) (finding that restrictive zoning is significantly and negatively associated with income segregation); Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFFS. REV. 779, 801 (2009) (finding that restrictive zoning is associated with residential segregation).

⁴⁰ Shertzer et al., *supra* note 14 (article in press at 2) ("The historical record is filled with examples of real estate agents colluding with developers, white communities threatening black families, arson and other property damage, and even mob violence.").

their town limits.⁴¹ Even after the Civil Rights Era and passage of the Fair Housing Act,⁴² cities and towns effectively excluded people of color from certain neighborhoods by imposing zoning restrictions that made purchasing a home unaffordable for many people of color.⁴³ Today, municipalities, states, and the federal government perpetuate racial segregation by both engaging in exclusionary zoning and adopting regulations like crime-free housing ordinances, which prohibit or discourage landlords from renting to people who have criminal records and disproportionately target people of color.⁴⁴

While all levels of government contributed to this broken state of affairs, only local governments have traditionally wielded power over zoning, arguably the most immediate cause of unaffordable housing and racial segregation.⁴⁵ When the federal government did try to make land use policy more inclusive and coherent, it quickly failed. In 1973, Congress considered the Land Use Policy and Planning Assistance Act,⁴⁶ which would have offered states money to create more careful processes to determine land use.⁴⁷ Opposed by both states and localities, the bill failed.⁴⁸ This bill was one of several proposed or enacted around the same time that attempted to incentivize regional coordination around land use and development policies by offering grants and loans for projects conducted with “some comprehensive regional review and comment process.”⁴⁹ A few years later, the U.S. Department of Housing and Urban Development (HUD) proposed to withhold federal infrastructure funds from municipalities that would not eliminate exclusionary zoning policies or allow subsidized housing, but President Nixon

⁴¹ Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 183–84 (2019).

⁴² Pub. L. No. 90-284, tits. VIII–IX, 82 Stat. 73, 81–90 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619).

⁴³ See James A. Kushner, *Affordable Housing as Infrastructure in the Time of Global Warming*, 43 URB. LAW. 179, 184 (2010/2011).

⁴⁴ Archer, *supra* note 41, at 175–76; see also Laysner, *supra* note 39, at 919 (analyzing how the federal low-income housing tax credit and the mortgage interest deduction cause housing segregation).

⁴⁵ But see Andrew H. Whittemore, *How the Federal Government Zoned America: The Federal Housing Administration and Zoning*, 39 J. URB. HIST. 620, 625 (2012) (describing how the Federal Housing Administration’s refusal to insure mortgages in nonwhite areas and unzoned areas contributed to the rise in single-family housing).

⁴⁶ S. 268, 93d Cong. (1973).

⁴⁷ *Id.* § 103; see also A. Dan Tarlock, *Land Use Regulation: The Weak Link in Environmental Protection*, 82 WASH. L. REV. 651, 656 (2007).

⁴⁸ Tarlock, *supra* note 47, at 656.

⁴⁹ See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1148 (1996).

quickly shut down the effort.⁵⁰ Since then, the federal government has done little to address the problems associated with exclusionary zoning⁵¹ and has largely discontinued its regional planning initiatives.⁵² And except for certain isolated efforts,⁵³ states have also avoided intervening.

2. *Zoning Law's Climate Impacts.* — Land use decisions undeniably impact the world's climate.⁵⁴ Policies that foster sprawl, loosely defined as development characterized by low population density,⁵⁵ are particularly harmful. Sprawling land patterns increase the distance that people must travel from place to place, like from home to work. These distances increase total vehicle miles traveled (VMT), a key determinant of GHG emissions from transportation.⁵⁶ Dispersed housing also requires the construction of more municipal infrastructure, like streets and sewers,⁵⁷ and encourages the construction of larger houses with correspondingly larger energy demands.⁵⁸ These homes, which are typically detached, lack the energy efficiencies associated with shared walls and

⁵⁰ SOLOMON GREENE & INGRID GOULD ELLEN, URB. INST., *BREAKING BARRIERS, BOOSTING SUPPLY* 5 (2020), https://www.urban.org/sites/default/files/publication/102963/breaking-barriers-boosting-supply_o.pdf [<https://perma.cc/RC2K-4XEM>].

⁵¹ Robert L. Glicksman, *Climate Change Adaptation: A Collective Action Perspective on Federalism Considerations*, 40 ENV'T L. 1159, 1173 (2010) ("Congress has almost always steered clear of establishing anything that remotely resembles a federal land use regulatory program . . .").

⁵² GREENE & ELLEN, *supra* note 50, at 5 ("HUD has exerted very narrow and limited oversight of local land-use regulations only in a handful of actions enforcing the Fair Housing Act of 1968, and it has done so inconsistently over the years."); Briffault, *supra* note 49, at 1148.

⁵³ Among state initiatives, Massachusetts's 1969 adoption of Chapter 40B is most notable. MASS. GEN. LAWS ch. 40B, §§ 20–23 (2020). This measure allows the state to override decisions made by local Zoning Boards of Appeal under certain conditions, including if less than 10% of a municipality's total housing units are not low- or moderate-income. Ryan Forgione, Note, *A New Approach to Housing: Changing Massachusetts's Chapter 40B from an Incentive to a Mandate*, 53 SUFFOLK U. L. REV. 199, 207 (2020). Although Chapter 40B allows only marginal state intervention into local decisions, it "remains the 'principal vehicle' for creating affordable housing in Massachusetts." *Id.* at 208 (quoting Kara L. Dardeno, Note, *Chapter 40B Should Buy the Farm*, 42 SUFFOLK U. L. REV. 129, 139 (2008)).

⁵⁴ See, e.g., Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669, 710–11 (2010) (highlighting the relationship between sprawl and vehicle use). In addition, a robust literature describes the potential for land use decisions to facilitate resilience in the face of climate change. See, e.g., Sarah J. Adams-Schoen, *Beyond Localism: Harnessing State Adaptation Lawmaking to Facilitate Local Climate Resilience*, 8 MICH. J. ENV'T & ADMIN. L. 185 (2018). This Chapter focuses not on land use policy's adaptive potential but instead on its mitigation potential.

⁵⁵ E.g., ORG. FOR ECON. COOP. & DEV., *RETHINKING URBAN SPRAWL: MOVING TOWARDS SUSTAINABLE CITIES* 5 (2018), <https://www.oecd.org/environment/tools-evaluation/Policy-Highlights-Rethinking-Urban-Sprawl.pdf> [<https://perma.cc/FL5T-Q67M>].

⁵⁶ Grant Glovin, *A Mount Laurel for Climate Change? The Judicial Role in Reducing Greenhouse Gas Emissions from Land Use and Transportation*, 49 ENV'T L. REP. 10,938, 10,938–39 (2019) (describing the climate impacts of sprawl).

⁵⁷ Trisolini, *supra* note 54, at 714.

⁵⁸ NOAH KAZIS, NYU FURMAN CTR., *ENDING EXCLUSIONARY ZONING IN NEW YORK CITY'S SUBURBS* 7–8 (2020), https://furmancenter.org/files/Ending_Exclusionary_Zoning_in_New_York_Citys_Suburbs.pdf [<https://perma.cc/B6AS-X5SH>]; Tomer et al., *supra* note 8.

increased insulation.⁵⁹ One study finds that, for example, households living in detached housing use 54% more energy to heat their homes and 26% more energy to cool their homes than otherwise comparable households living in multifamily units.⁶⁰ Furthermore, sprawling housing patterns reduce the benefits of constructing low-carbon public transport.⁶¹

Research generally finds that relaxing zoning restrictions leads, in the long run, to denser housing.⁶² This finding makes sense intuitively: the demand for housing exceeds supply in many areas,⁶³ and the limiting factor appears to be buildable land,⁶⁴ so permitting more construction should lead to more housing. Many studies look at the effects of zoning restrictions in specific localities; for example, a study of towns in the Boston area finds that as average minimum lot size increases by one-quarter of an acre, housing supply decreases by around 10%.⁶⁵

Today, due in part to widespread sprawl,⁶⁶ transportation accounts for 29% of America's emissions, more than any other sector.⁶⁷ One literature review finds that smart city design can reduce VMT by between

⁵⁹ Tomer et al., *supra* note 8; see also Benjamin Goldstein et al., *The Carbon Footprint of Household Energy Use in the United States*, 117 PROC. NAT'L ACAD. SCI. U.S. 19,122, 19,124–25, 19,128 (2020).

⁶⁰ Reid Ewing & Fang Rong, *The Impact of Urban Form on U.S. Residential Energy Use*, 19 HOUS. POL'Y DEBATE 1, 20 (2008).

⁶¹ Goldstein et al., *supra* note 59, at 19,128.

⁶² See, e.g., Hongwei Dong, *Exploring the Impacts of Zoning and Upzoning on Housing Development: A Quasi-experimental Analysis at the Parcel Level*, J. PLAN. EDUC. & RSCH., 2021, at 1, 11 (finding that upzoning leads to a higher likelihood of development and higher rates of density); Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265, 273 (2009) (finding that as a town increases the minimum average lot size by one acre, the number of new housing permits decline by about 40%); Christina M. Locke et al., *Zoning Effects on Housing Change Vary with Income, Based on a Four-Decade Panel Model After Propensity Score Matching*, 64 LAND USE POL'Y 353, 356–57 (2017) (finding a small but significant effect of relaxing zoning restrictions on housing units built); Michael Manville et al., *Zoning and Affordability: A Reply to Rodríguez-Pose and Storper*, 59 URB. STUD. 36, 40–45 (2020) (critiquing a recent study that found that relaxing zoning regulations would not lead to more housing); Virginia McConnell et al., *Zoning, TDRs and the Density of Development*, 59 J. URB. ECON. 440, 451 (2006) (“[A] 10% increase in the number of permissible lots through zoning would tend to increase the actual number of lots by about 2.5%.”).

⁶³ See JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2021, at 1–2, 9–10 (2021), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_Nations_Housing_2021.pdf [<https://perma.cc/2W24-R6V3>].

⁶⁴ Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply*, in 5 HANDBOOK OF REGIONAL AND URBAN ECONOMICS 1289, 1291–92 (Giles Duranton et al. eds., 2015).

⁶⁵ Edward L. Glaeser et al., *Regulation and the Rise of Housing Prices in Greater Boston 4* (Rappaport Inst. for Greater Bos. & Pioneer Inst. for Pub. Pol'y Rsch., Policy Brief No. 2006-1, 2006).

⁶⁶ Although America still contains a large amount of sprawl, according to one analysis, sprawl peaked in the mid-1990s. Christopher Barrington-Leigh & Adam Millard-Ball, *A Century of Sprawl in the United States*, 112 PROC. NAT'L ACAD. SCI. U.S. 8244, 8244 (2015) (measuring sprawl using street network connectivity).

⁶⁷ Yudkin et al., *supra* note 6. According to one study, if the world is to limit global warming to 1.5°C, the United States must reduce VMT by 20% before the end of the decade. *Id.*

3% and 25%.⁶⁸ A different analysis finds that, compared to denser development, urban sprawl is associated with 20% to 60% more VMT.⁶⁹

Similarly, relaxing zoning restrictions leads to lower home prices. This phenomenon, in which increasing the number of units built decreases the price of surrounding units, is known as the “supply effect.”⁷⁰ Two reviews of several papers investigating the price impact of new market-rate development find that increasing development tends to decrease the price of surrounding properties, albeit not by a large amount.⁷¹ Some of these studies likely underestimate the impact of density on overall housing affordability because they do not address the fact that by increasing the housing supply, new development may cause those in the middle and upper-middle classes to move, potentially opening up opportunities for lower-income buyers and renters outside the development’s immediate vicinity.⁷²

Studies produce mixed results on the impact of upzoning — altering a zoning code to allow more development — on housing density, affordability, and GHG emissions,⁷³ but there is reason to believe that they generally understate the benefits of zoning reform. As Professor Alice Kaswan points out, these studies “generally isolate the impact of individual factors, like density or neighborhood design, without considering the multiple characteristics necessary for compact development to reduce VMT successfully.”⁷⁴ Still, critics are almost certainly right that

⁶⁸ TRANSP. RSCH. BD., DRIVING AND THE BUILT ENVIRONMENT 68 tbl. 3-1 (2009), <https://www.nap.edu/read/12747/chapter/5> [<https://perma.cc/HWU5-3GWG>].

⁶⁹ TODD LITMAN, GLOB. COMM’N ON THE ECON. & CLIMATE, ANALYSIS OF PUBLIC POLICIES THAT UNINTENTIONALLY ENCOURAGE AND SUBSIDIZE URBAN SPRAWL 3 (2015), <https://newclimateeconomy.report/workingpapers/wp-content/uploads/sites/5/2016/04/public-policies-encourage-sprawl-nce-report.pdf> [<https://perma.cc/YN8L-87NW>]; see also DAN HODGE & BENJAMIN FORMAN, GATEWAY CITIES INNOVATION INST., THE PROMISE AND POTENTIAL OF TRANSFORMATIVE TRANSIT-ORIENTED DEVELOPMENT IN GATEWAY CITIES 8 (2018), <https://2gaiael1ifzt2tsfgr2vil6c-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/TTOD-Report.pdf> [<https://perma.cc/35FJ-UZEM>] (finding a 37% to 43% drop in VMT within transit-oriented development areas in Massachusetts).

⁷⁰ SHANE PHILLIPS ET AL., UNIV. OF CAL., L.A. LEWIS CTR. FOR REG’L POL’Y STUD., RESEARCH ROUNDUP: THE EFFECT OF MARKET-RATE DEVELOPMENT ON NEIGHBORHOOD RENTS 4, 15 (2021).

⁷¹ *Id.*; Arpit Gupta, *The Hyperlocal Effects of Real Estate*, ARPITRAGE (Dec. 6, 2020), <https://arpitrage.substack.com/p/the-hyperlocal-effects-of-real-estate> [<https://perma.cc/X85T-GL8N>].

⁷² See David Schleicher, *Exclusionary Zoning’s Confused Defenders*, 2021 WIS. L. REV. 1315, 1328 n.77.

⁷³ See Yonah Freemark, *Upzoning Chicago: Impacts of a Zoning Reform on Property Values and Housing Construction*, 56 URB. AFFS. REV. 758, 759 (2020); see also Alex Baca & Hannah Lebovits, *No, Zoning Reform Isn’t Magic. But It’s Crucial.*, BLOOMBERG: CITYLAB (Feb. 5, 2019, 1:50 PM), <https://www.bloomberg.com/news/articles/2019-02-05/why-that-new-zoning-study-shouldn-t-deter-yimby> [<https://perma.cc/F8ZV-5V8Q>] (describing how “the efforts of local residents, relationships between politicians and developers, and state-wide policies” all affect development).

⁷⁴ Alice Kaswan, *Climate Change, Consumption, and Cities*, 36 FORDHAM URB. L.J. 253, 263 (2009).

state-level zoning laws alone will not substantially increase housing density or affordability.⁷⁵ For this reason, both housing affordability and climate policy advocates generally recommend state zoning laws as “one strategy among many,”⁷⁶ policies that, while not “magic,” are still “crucial” to the sustainability transition.⁷⁷ Section C briefly discusses further steps that state governments can take to increase density in addition to preemptive zoning reform.

B. State Zoning Preemption as Intersectional Climate Policy

Over the past few years, a growing number of states have passed, or at least considered, land use policies directed at increasing the availability and density of housing.⁷⁸ Most of these policies preempt the ability of localities to limit housing density; examples include laws that forbid localities from enforcing single-family zoning and that cap localities’ ability to impose minimum parking requirements on new housing development. This section describes these measures and explains why they are an especially useful type of climate policy, one that represents the intersectional strategy that should characterize climate initiatives moving forward.

i. State Preemption of Local Zoning Decisionmaking. — Recent state zoning initiatives take several forms, but all preempt local zoning authority to some extent. Some of these laws have already been passed, many have died in committee, and others are currently being debated.

The most aggressive of these laws fully preempt municipalities from prohibiting multifamily housing in areas zoned for single-family housing. Oregon, California, Virginia, and Washington have all proposed or passed this variety of law. Weaker zoning preemption bills bar cities from prohibiting multifamily housing in certain locations, such as near transit stations, permit structures like accessory dwelling units⁷⁹ (ADUs) as of right, or require municipalities to create development plans focused on increasing affordable housing. These proposals have cropped up in Connecticut, Nebraska, Maryland, Utah, and Washington.

⁷⁵ See Sara C. Bronin, *Zoning by a Thousand Cuts: The Prevalence and Nature of Incremental Regulatory Constraints on Housing*, CORNELL J.L. & PUB. POL’Y (forthcoming 2022) (manuscript at 94–95), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3792544 [<https://perma.cc/FTY7-687D>]; see also KAHLBERG, *supra* note 35.

⁷⁶ Kaswan, *supra* note 74, at 266.

⁷⁷ Baca & Lebovits, *supra* note 73.

⁷⁸ One scholar describes this trend as a “not-so-quiet revolution in land use regulation.” John Infranca, *The New State Zoning: Land Use Preemption amid a Housing Crisis*, 60 B.C. L. REV. 823, 829 (2019). This name references the “quiet revolution” in land use regulation that occurred in the 1970s, when states mobilized to address the lack of affordable housing. *Id.* at 828, 836–44. As evidenced by the housing crisis we face today, none of these efforts were particularly successful.

⁷⁹ ADUs, broadly defined, consist of “self-contained units located on the property of a single-family home.” John Infranca, *Housing Changing Households: Regulatory Challenges for Micro-Units and Accessory Dwelling Units*, 25 STAN. L. & POL’Y REV. 53, 54 (2014).

Oregon has passed the most ambitious zoning preemption law to date. In 2019, the state became the first to preempt local zoning policy by passing House Bill 2001.⁸⁰ The law defines “middle housing” — duplexes, triplexes, quadplexes, cottage clusters (detached housing units clustered around a common courtyard), and townhouses — and requires every city of at least 25,000 people and every city within a “metropolitan service district” to allow “[a]ll middle housing types in areas zoned for residential use that allow for the development of detached single-family dwellings” and “a duplex on each lot or parcel zoned for residential use that allows for the development of detached single-family dwellings.”⁸¹ The law also applies to a lesser extent to cities of between 10,000 and 25,000 people that do not fall within a metropolitan service district.⁸²

California, a state with some of the most unaffordable housing, has tried several times to liberalize residential zoning over the past few years, and only recently succeeded. In 2020, for the third year in a row, the California State Senate rejected a bill that would have required cities to allow the development of mid-rise apartment buildings near transit stations and job centers, and quadplexes in most areas zoned for single-family use.⁸³ The bill drew ire from advocates on both the left and right, with some feeling as if the law would unnecessarily impinge upon local control and others concerned that the law did not do enough to address affordability.⁸⁴ However, activists and policymakers persisted, and in 2021, Governor Gavin Newsom belatedly signed into law a bill that eliminates single-family zoning throughout the state by allowing landowners to split their lands and/or convert their homes to duplexes through a prescribed process.⁸⁵ In doing so, the law removes these types of actions from the ambit of the California Environmental

⁸⁰ H.R. 2001, 80th Leg. Assemb., Reg. Sess. (Or. 2019).

⁸¹ *Id.* § 2.

⁸² *Id.*

⁸³ Liam Dillon & Taryn Luna, *California Bill to Dramatically Increase Home Building Fails for the Third Year in a Row*, L.A. TIMES (Jan. 30, 2020, 4:49 PM), <https://www.latimes.com/california/story/2020-01-29/high-profile-california-housing-bill-to-allow-mid-rise-apartments-near-transit-falls-short> [<https://perma.cc/B4SY-RQ88>]; see also Benjamin Schneider, *YIMBYs Defeated as California's Transit Density Bill Stalls*, BLOOMBERG: CITYLAB (Apr. 18, 2018, 12:55 PM), <https://www.bloomberg.com/news/articles/2018-04-18/california-housing-bill-sb-827-dies-an-early-death> [<https://perma.cc/75KD-G8N4>] (describing how a predecessor bill died in committee).

⁸⁴ Lauren Sommer, *Why Sprawl Could Be the Next Big Climate Change Battle*, NPR (Aug. 6, 2020, 9:00 AM), <https://www.npr.org/2020/08/06/812199726/why-sprawl-could-be-the-next-big-climate-change-battle> [<https://perma.cc/Z6WK-AX5H>].

⁸⁵ S. 9, 2020–2021 Leg., Reg. Sess. (Cal. 2021); Henry Grabar, *You Can Kill Single-Family Zoning, But You Can't Kill the Suburbs*, SLATE (Sept. 17, 2021, 5:38 PM), <https://slate.com/business/2021/09/california-sb9-single-family-zoning-duplexes-newsom-housing.html> [<https://perma.cc/L9B3-GXNY>].

Quality Act,⁸⁶ a procedural law that opponents of residential development have co-opted to prevent the creation of affordable and transit-oriented housing.⁸⁷

Also in 2021, the Connecticut legislature introduced three bills that would each, to some extent, preempt local zoning authority. The most ambitious of the three would have required all municipalities to allow multifamily developments with at least four units in at least 50% of lot area served by water and sewer infrastructure and within half of a mile of transit.⁸⁸ Neither that bill, nor a bill that would have required municipalities to develop their fair share of affordable housing,⁸⁹ passed. The legislature did manage to pass the third bill, which requires municipalities to allow accessory apartments as of right on lots zoned for single-family housing, limits how many parking spaces municipalities can require per home, and obligates each municipality to adopt an affordable housing plan that “specif[ies] how the municipality intends to increase the number of affordable housing developments.”⁹⁰

Two traditionally red states, Nebraska and Utah, also managed to pass preemptive zoning policies. In 2020, the Nebraska legislature passed the Municipal Density and Missing Middle Housing Act.⁹¹ The Act requires any city with a population of at least 20,000 to issue biennial reports to the state “detailing its efforts to address the availability of and incentives for affordable housing through its zoning codes.”⁹² The law also requires every city to develop an affordable housing action plan that includes goals for the development of middle housing.⁹³ If a city fails to develop a plan, it must then allow the development of middle housing on land zoned for single-family use.⁹⁴ In a related law, the Middle Income Workforce Housing Investment Act,⁹⁵ the legislature created a state fund to support the development of “workforce housing,” which the law defines as housing with an after-construction appraised

⁸⁶ CAL. PUB. RES. CODE §§ 21,000–21,006.

⁸⁷ Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 HASTINGS ENV'T L.J. 21, 21 (2018). Sadly, avowed environmentalists often use laws and regulations designed to protect the environment to block the development of affordable and middle-income housing. Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice,”* 47 AM. U. L. REV. 221, 260 n.179, 271–73 (1997).

⁸⁸ S. 1024, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021).

⁸⁹ H.R. 6611, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021).

⁹⁰ H.R. 6107, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021), 2021 Conn. Legis. Serv. P.A. 21–29 (West). The law does, however, allow municipalities to opt out of several key provisions. *Id.*; Jacqueline Rabe Thomas, *CT Legislators Underwhelmed with Housing Reform Bill that Passes House*, CT MIRROR (May 20, 2021), <https://ctmirror.org/2021/05/20/ct-legislators-underwhelmed-with-housing-reform-bill-that-passes-house> [<https://perma.cc/DYF2-URAC>].

⁹¹ Leg. 866, 106th Leg., 2d Sess. §§ 1–6 (Neb. 2020).

⁹² *Id.* § 4(1).

⁹³ *Id.* § 3(6).

⁹⁴ *Id.* § 5(2).

⁹⁵ *Id.* §§ 11–19.

value between \$125,000 and \$275,000.⁹⁶ Both laws were preceded by a failed bill with stronger density provisions that would have required all cities to allow middle housing on land zoned for single-family use.⁹⁷

The next year, the Utah legislature passed two laws designed to increase affordable zoning. The first creates a small fund to incentivize the development of low-income housing and requires municipalities to create a “long-range general plan . . . for moderate income housing growth.”⁹⁸ The second bars municipalities and counties from prohibiting or overly regulating ADUs and establishes a pilot program that would guarantee loans taken out to finance the construction of ADUs designed for low-income people.⁹⁹

Virginia, Washington, and Maryland have struggled to preempt local zoning decisionmaking. The Virginia General Assembly recently tabled a bill that would have required all localities to allow the development of “middle housing” — “two-family residential unit[s], including duplexes, townhouses, [and] cottages” — on land zoned for single-family use.¹⁰⁰ Because the proposed law would have allowed middle housing on all land zoned for single-family use, not just in larger metropolitan areas, it was even more ambitious than what passed in Oregon. The Virginia bill was introduced alongside several housing measures designed to increase density,¹⁰¹ including one that would have required all localities to allow the development of one ADU per single-family dwelling.¹⁰²

Washington has experienced a protracted battle to pass zoning reform. Over the past few years, the state legislature has considered several preemptive zoning measures, most of which have failed. The first, introduced in 2019,¹⁰³ would have required almost all municipalities to allow ADUs on land zoned for single-family use;¹⁰⁴ the proposal resembled what actually passed in Connecticut. The second, introduced two days later,¹⁰⁵ would have required cities with populations greater than 10,000 to adopt some combination of zoning changes, which could have included authorizing duplexes, triplexes, courtyard apartments, and

⁹⁶ *Id.* § 13(10).

⁹⁷ Leg. 794, 106th Leg., 2d Sess. (Neb. 2020).

⁹⁸ S. 164, 64th Leg., Gen. Sess. § 2 (Utah 2021); *see id.* § 8.

⁹⁹ H.R. 82, 64th Leg., Gen. Sess. §§ 4, 12 (Utah 2021).

¹⁰⁰ H.D. 152, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

¹⁰¹ Kriston Capps, *With New Democratic Majority, Virginia Sees a Push for Denser Housing*, BLOOMBERG: CITYLAB (Dec. 20, 2019, 8:03 AM), <https://www.bloomberg.com/news/articles/2019-12-20/inside-the-virginia-bill-to-allow-denser-housing> [<https://perma.cc/MG8V-CDMT>].

¹⁰² H.D. 151, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

¹⁰³ *Bill Information, SB 5812*, WASH. STATE LEGISLATURE, <https://app.leg.wa.gov/billsummary?Year=2019&BillNumber=5812> [<https://perma.cc/4FGY-6D9N>].

¹⁰⁴ S. 5812, 66th Leg., Reg. Sess. § 3 (Wash. 2019).

¹⁰⁵ *Bill Information, HB 1923*, WASH. STATE LEGISLATURE, <https://app.leg.wa.gov/billsummary?Year=2019&BillNumber=1923> [<https://perma.cc/S6TU-4S6X>].

ADUs in areas zoned for single-family use, or authorizing development of at least fifty residential units per acre in areas located within half a mile of a transit station.¹⁰⁶ The third, introduced in 2020,¹⁰⁷ would have required all cities with a population of at least 15,000 to authorize the development of “[d]uplexes, triplexes, quadplexes, sixplexes, stacked flats, townhouses, and courtyard apartments” in areas zoned for single-family use.¹⁰⁸ The fourth, which did pass in 2021, preempted city ordinances limiting the number of unrelated people who can live together; however, the law does not authorize additional housing construction, and as such, it is relatively weak.¹⁰⁹

Finally, in Maryland, the Planning for Modest Homes Act of 2020¹¹⁰ would have required cities to address the need for affordable housing, defined as workforce housing, low-income housing, and middle housing (itself defined as duplexes, triplexes, quadplexes, cottage clusters, and townhouses).¹¹¹ An earlier version of the bill would have preempted certain local regulations that prevent the development of multifamily housing.¹¹² This bill was part of a set of draft bills, the Homes for All package, which would have also created a fund for public housing and strengthened tenants’ rights.¹¹³

2. *Zoning Preemption as Climate Policy.* — This Chapter is not the first analysis to recognize this trend in state land use law.¹¹⁴ However,

¹⁰⁶ H.R. 1923, 66th Leg., Reg. Sess. § 1 (Wash. 2019).

¹⁰⁷ *Bill Information, SB 6536*, WASH. STATE LEGISLATURE, <https://apps.leg.wa.gov/billsummary?BillNumber=6536&Chamber=Senate&Year=2019> [https://perma.cc/M7XV-7XLK].

¹⁰⁸ S. 6536, 66th Leg., Reg. Sess. § 1(1) (Wash. 2020); H.R. 2780, 66th Leg., Reg. Sess. § 1(1) (Wash. 2020). A later version of the bill weakened the provision to require authorizing that range of housing only within a half mile of transit. Levi Pulkkinen, *Make Way for Duplexes: Washington Bill Would Mostly Ban Single-Family-Only Zoning*, CROSSCUT (Feb. 14, 2020), <https://crosscut.com/growth/2020/02/make-way-duplexes-washington-bill-would-mostly-ban-single-family-only-zoning> [https://perma.cc/8TJK-P8TS].

¹⁰⁹ S. 5235, 67th Leg., Reg. Sess. (Wash. 2021).

¹¹⁰ H.D. 1406, 2020 Leg., 441st Sess. (Md. 2020).

¹¹¹ *Id.*

¹¹² H.D. 1406, 2020 Leg., 441st Sess. (Md. 2020) (as introduced on Feb. 7, 2020).

¹¹³ Kriston Capps, *Denser Housing Is Gaining Traction on America’s East Coast*, BLOOMBERG: CITYLAB (Jan. 3, 2020, 6:00 AM), <https://www.bloomberg.com/news/articles/2020-01-03/maryland-s-ambitious-pitch-for-denser-housing> [https://perma.cc/48KR-LQHA].

¹¹⁴ See Diana Budds, *Will Upzoning Neighborhoods Make Homes More Affordable?*, CURBED (Jan. 30, 2020, 1:00 PM), <https://archive.curbed.com/2020/1/30/2115351/upzoning-definition-affordable-housing-gentrification> [https://perma.cc/A75N-JM4U]; and Sarah Holder & Kriston Capps, *The Push for Denser Zoning Is Here to Stay*, BLOOMBERG: CITYLAB (May 21, 2019, 7:00 AM), <https://www.bloomberg.com/news/articles/2019-05-21/to-tackle-housing-inequality-try-upzoning> [https://perma.cc/2DFB-6JF4], for popular accounts of the trend. As mentioned *supra* note 78, Professor John Infranca gives the trend a scholarly treatment, labeling it the “not-so-quiet revolution” in land use law. His account focuses particularly on new state measures that allow owners of land zoned for single-family housing to develop ADUs. Infranca, *supra* note 78, at 847. Infranca explains that these measures are different from previous state-level land use laws because they “expressly preempt or displace specific elements of local land use regulation” and “tend to streamline local development approval processes, rather than add planning and procedural requirements or

existing scholarship exploring the “New State Zoning” tends to focus primarily — or exclusively — on its implications for affordable housing.¹¹⁵ These academic accounts elide the importance of state land use policy in mitigating climate change. In this way, they mimic the political debates around state preemption laws, some of which similarly deemphasize land use policy’s potential to mitigate the climate crisis. As this section explains, despite the relative lack of discussion about the connection between housing density and climate, these recent state zoning laws function as climate policy.

Coverage of zoning density initiatives frequently — although certainly not always¹¹⁶ — fails to identify those initiatives’ climate benefits. Take, for example, Oregon’s ban on single-family zoning,¹¹⁷ even news outlets that regularly report on climate change and related policy largely failed to discuss the law’s climate benefits.¹¹⁸ One of its sponsors, Representative Julie Fahey, circulated a two-page informational flyer in support of its passage that discussed the urgent need for more housing but failed to mention either climate or the environment.¹¹⁹ The same phenomenon occurred in Connecticut¹²⁰ and Nebraska.¹²¹

additional layers of review.” *Id.* at 875–76. Infranca’s piece focuses exclusively on the implications of land use policy for housing availability and affordability. In contrast, this Chapter identifies state-level land use policies as mechanisms to address the intersecting crises of climate change, housing affordability, and racial segregation.

¹¹⁵ See generally Infranca, *supra* note 78; Stahl, *supra* note 1.

¹¹⁶ In California, measures to increase housing density and affordability are regularly advertised as good for the climate. See, e.g., Anna Caballero & Michael DeLapa, *How to House People and Achieve California’s Climate Goals*, CALMATTERS (Apr. 7, 2021), <https://calmatters.org/commentary/my-turn/2021/04/how-to-house-people-and-achieve-californias-climate-goals> [https://perma.cc/V92Q-Z9BH]; Scott Wiener & Daniel Kammen, Opinion, *Why Housing Policy Is Climate Policy*, N.Y. TIMES (Mar. 25, 2019), <https://www.nytimes.com/2019/03/25/opinion/california-home-prices-climate.html> [https://perma.cc/96CX-SRAB]. The same is true in Connecticut, where one major advocate for zoning reform, Desegregate Connecticut, cites “climate justice” as one of its primary goals. *About Us*, DESEGREGATE CONN., <https://www.desegregatect.org/about> [https://perma.cc/84MQ-P4H2].

¹¹⁷ Laura Bliss, *Oregon’s Single-Family Zoning Ban Was a “Long Time Coming,”* BLOOMBERG: CITYLAB (July 2, 2019, 9:03 AM), <https://www.bloomberg.com/news/articles/2019-07-02/upzoning-rising-oregon-bans-single-family-zoning> [https://perma.cc/UF9T-GVCV].

¹¹⁸ See, e.g., Laurel Wamsley, *Oregon Legislature Votes to Essentially Ban Single-Family Zoning*, NPR (July 1, 2019, 7:03 PM), <https://www.npr.org/2019/07/01/737798440/oregon-legislature-votes-to-essentially-ban-single-family-zoning> [https://perma.cc/TM8V-45WA] (describing the legislation and quoting various Oregon legislators, none of whom discuss climate).

¹¹⁹ Floor Letter, Or. Rep. Julie Fahey, Yes on HB 2001B, With -21 Amendment (June 20, 2019), <https://olis.oregonlegislature.gov/liz/2019R1/Downloads/FloorLetter/2924> [https://perma.cc/SR37-L4AN].

¹²⁰ See Bruce Redham Becker, Opinion, *Zoning and Connecticut’s Future*, CT MIRROR (Feb. 3, 2021), <https://ctmirror.org/category/ct-viewpoints/zoning-and-connecticuts-future> [https://perma.cc/J759-5FYM] (failing to mention climate change or the environment); Perras, *supra* note 5 (same).

¹²¹ See Kriston Capps, *Nebraska’s Battle over Single-Family Homes Is Not Much of a Battle*, BLOOMBERG: CITYLAB (Feb. 12, 2020, 3:58 PM), <https://www.bloomberg.com/news/articles/2020-02-12/what-happens-when-nebraska-argues-about-upzoning> [https://perma.cc/6H2V-NSE7]

State legislatures rarely mentioned climate change when these bills came up for discussion. When Nebraska's bill was presented to the legislature's Urban Affairs Committee, Senator Matt Hansen, the bill's sponsor, discussed neither climate nor the environment, even though the Sierra Club and Green Omaha Coalition both supported the measure.¹²² When a supporter of the bill did raise the issue of transit — the primary means through which density reduces GHG emissions — the supporter simply stated that fewer cars and parking lots would make Omaha “a nice place to live.”¹²³

Regardless of how these recent laws and proposed laws are portrayed, they should undeniably be recognized as climate policy. As described in section A.2, housing density is intimately connected with the GHG emissions that result from transportation and building energy requirements. In fact, the development of state zoning preemption demonstrates the broader truth that if humans are to adequately decarbonize and adapt to the impacts of the worsening climate crisis, there can be no difference between climate-related and non-climate-related policy: every important policy must be enacted with climate in mind. Laws that reduce GHG emissions should also be designed to solve an array of societal problems, such as increasing affordable housing, desegregating neighborhoods, and improving public health.¹²⁴

Not only is this type of policymaking necessary to address the magnitude of the climate crisis, but it may also be more politically palatable. Climate change is a polarizing issue that does not appear first on many people's list of priorities.¹²⁵ Most Republicans might not find climate

(failing to mention climate or the environment); DaLaun Dillard, *The Missing Middle: Omahans Struggling to Find Affordable Single-Family Housing*, KETV OMAHA (Feb. 3, 2020, 12:43 AM), <https://www.ketv.com/article/the-missing-middle-omahans-struggling-to-find-affordable-single-family-housing/30745695> [<https://perma.cc/S92D-LYQG>] (same).

¹²² *Hearing on Leg. 794 Before the Comm. on Urb. Affs.*, 106th Leg., 2d Sess. 44–45 (Neb. 2020), <https://www.nebraskalegislature.gov/FloorDocs/106/PDF/Transcripts/Urban/2020-02-04.pdf> [<https://perma.cc/FV8G-88GJ>] (statement of Sen. Matt Hansen, Member, Comm. on Urb. Affs.).

¹²³ *Id.* at 27 (statement of Patrick Leahy, Nebraska chapter of the American Institute of Architects).

¹²⁴ This “zoning law as climate policy” is a welcome change from the prevailing paradigm of “zoning law as segregation.”

¹²⁵ Sedona Chinn et al., *Politicization and Polarization in Climate Change News Content, 1985–2017*, 42 SCI. COMMUN 112, 120 (2020); *Most Important Problem*, GALLUP, <https://news.gallup.com/poll/1675/most-important-problem.aspx> [<https://perma.cc/6ZTE-WB5X>].

change mitigation a particularly motivating concern,¹²⁶ but almost everyone agrees that housing is too expensive.¹²⁷ Perhaps for this reason, red states like Utah and Nebraska, which rarely consider legislation designed to address climate change, both managed to pass laws advertised as affordable housing measures; the Utah measure was even sponsored by a Republican lawmaker.¹²⁸ In blue states, preemptive measures designed to enhance housing density have similarly received bipartisan support.¹²⁹

Even blue states, where more people ostensibly view climate change as a pressing problem, could benefit from more intersectional — and therefore more widely appealing — climate policy. Democratic politicians claim to care deeply about climate change, but many of their policy choices, especially when it comes to housing, do not reflect that concern. After all, the relatively liberal states of Washington, Virginia, and Maryland each failed to liberalize their zoning laws. Despite Democrats' assertions that climate change is a top priority, according to a 2017 study, only eight states spend more than 1.5% of their operating expenditures on climate mitigation and adaptation,¹³⁰ a low percentage considering climate change's economic and social magnitude. Several of the bluest states and cities possess the most restrictive zoning laws,¹³¹ and recent

¹²⁶ Brian Kennedy & Courtney Johnson, *More Americans See Climate Change as a Priority, But Democrats Are Much More Concerned than Republicans*, PEW RSCH. CTR. (Feb. 28, 2020), <https://www.pewresearch.org/fact-tank/2020/02/28/more-americans-see-climate-change-as-a-priority-but-democrats-are-much-more-concerned-than-republicans> [<https://perma.cc/H2XF-QCGM>] (finding that while almost 80% of Democrats believe that climate change should be a top priority for the President and Congress, only 21% of Republicans agree).

¹²⁷ Michael Hendrix, *Metropolitan Majority: The Survey*, MANHATTAN INST. (Sept. 14, 2021), <https://www.manhattan-institute.org/metropolitan-majority-poll-costs-crime-classrooms> [<https://perma.cc/6WUA-TKDP>] (finding that cost of housing and homelessness are “leading concerns across the 20 fastest-growing metros in America”).

¹²⁸ Tony Semerad, *Major Housing Bill Narrowly Passes Utah Senate*, SALT LAKE TRIB. (Feb. 26, 2020, 4:30 PM), <https://www.sltrib.com/news/2020/02/26/major-housing-bill> [<https://perma.cc/CQV6-NAQ7>] (noting that the Utah bill was sponsored by a Republican).

¹²⁹ See, e.g., Pulkkinen, *supra* note 108 (noting how the Virginia measure was supported by Republicans); Press Release, Off. of Governor Gavin Newsom, Governor Newsom Signs Historic Legislation to Boost California's Housing Supply and Fight the Housing Crisis (Sept. 16, 2021), <https://www.gov.ca.gov/2021/09/16/governor-newsom-signs-historic-legislation-to-boost-californias-housing-supply-and-fight-the-housing-crisis> [<https://perma.cc/C4C3-J5GK>] (noting that California's Senate Bill 9 was bipartisan).

¹³⁰ Elisabeth A. Gilmore & Travis St. Clair, *Budgeting for Climate Change: Obstacles and Opportunities at the US State Level*, 18 CLIMATE POL'Y 729, 737 (2018).

¹³¹ See Randy Shaw, *Will Progressives End Racist Zoning?*, BEYOND CHRON (June 16, 2020), <https://beyondchron.org/will-white-people-protesting-racial-injustice-also-end-racist-zoning> [<https://perma.cc/8V5M-NW2Q>].

research finds that, across every demographic, including political identification, people prefer single-family housing.¹³² By linking climate policy with other public priorities, advocates can appeal to voters who might otherwise be hesitant to use scarce resources on a contested policy problem, engaging in a type of “fusion politics” to achieve common goals.¹³³

Progressive advocates have already come around to this realization. The Green New Deal, a federal resolution introduced by Representative Alexandria Ocasio-Cortez and Senator Edward Markey,¹³⁴ recognizes that “the United States is currently experiencing several related crises” and calls for the federal government to decarbonize the economy in a manner that guarantees jobs with livable wages and provides for universal health care.¹³⁵ The Sunrise Movement, which organizes around the Green New Deal, similarly emphasizes that climate policy must be intersectional and all-encompassing.¹³⁶ Academics have also jumped on board.¹³⁷ State legislatures should continue to exploit the synergies between climate change and the housing affordability crisis to enact laws that can win broad-based support.

C. Should States Preempt?

Several arguments against state preemption of local policymaking complicate this account. Municipalities usually implement zoning policy on their own. Many people take issue with state preemption of local policy, a phenomenon that has occurred frequently as of late. Taking away the power of cities to control zoning decisions does away with an

¹³² Jessica Trounstone, Research Note, *You Won't Be My Neighbor: Opposition to High Density Development*, URB. AFFS. REV. ONLINEFIRST 1, 2, 4 (2021), <https://journals.sagepub.com/doi/pdf/10.1177/10780874211065776> [<https://perma.cc/SQ4Q-9WVV>].

¹³³ The minister and activist Reverend William J. Barber II uses this term to refer to political activities that unite disparate coalitions — here, people who care about climate change and people who care about affordable housing. Richard D. Kahlenberg, Opinion, *The “New Redlining” Is Deciding Who Lives in Your Neighborhood*, N.Y. TIMES (Apr. 19, 2021), <https://www.nytimes.com/2021/04/19/opinion/biden-zoning-social-justice.html> [<https://perma.cc/CV64-QWQH>].

¹³⁴ Lisa Friedman, *What Is the Green New Deal? A Climate Proposal, Explained*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/climate/green-new-deal-questions-answers.html> [<https://perma.cc/3PSK-WS46>].

¹³⁵ H.R. Res. 109, 116th Cong. (2019).

¹³⁶ See WINNING THE GREEN NEW DEAL (Varshini Prakash & Guido Girgenti eds., 2020); see also Jonas J. Monast, *The Ends and Means of Decarbonization: The Green New Deal in Context*, 50 ENV'T L. 21, 24, 26 (2020) (“Proponents of the most expansive iterations of a [Green New Deal] argue that it is not possible to separate justice and economic considerations from environmental policy, and that politics and equity require addressing the economic impacts of climate policy as part of a comprehensive decarbonization effort.” *Id.* at 24.).

¹³⁷ See, e.g., Jonas J. Monast & Sarah K. Adair, *A Triple Bottom Line for Electric Utility Regulation: Aligning State-Level Energy, Environmental, and Consumer Protection Goals*, 38 COLUM. J. ENV'T L. 1, 4 (2013).

important form of direct democracy that is particularly close to the people, and risks diluting the power of racial minorities and undermining local autonomy.¹³⁸ Preventing localities from developing their own housing policy may also stifle beneficial innovation.¹³⁹

Furthermore, from a policy-preference perspective, advocates on the left may not want to set a precedent of state preemption: liberal cities must more frequently fight off the efforts of more conservative state governments to preempt their policies than the inverse.¹⁴⁰ Structural arrangements account for this reality. Importantly, the success of Republican gerrymandering efforts has made it all but impossible for Democrats to secure majorities in certain state legislatures.¹⁴¹ But as Professor Jonathan Rodden observes, partisan gerrymandering explains only part of the problem.¹⁴² Americans' personal geographic choices also matter for state legislature composition. While Republicans are usually dispersed relatively evenly through suburban and rural areas, Democrats tend to cluster in dense city centers.¹⁴³ Thus, even were Democrats to somehow win back enough power to redistrict, state legislatures would still likely be more conservative than most city dwellers might prefer.

Indeed, there is good reason to worry about state preemption of local prerogatives. In an influential essay, Professor Richard Briffault identifies a "new and aggressive form of state preemption of local government action."¹⁴⁴ Recently, state governments have thwarted attempts by more liberal cities to enact progressive local policy. In the environmental sphere, states have preempted municipalities from regulating or banning fracking, the process by which natural gas or oil is extracted from the earth by pumping high-pressure fluid down a hole drilled in

¹³⁸ Richard Briffault, Essay, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2009, 2018 (2018).

¹³⁹ Archer, *supra* note 41, at 181 ("[L]ocal governments have historically broken new ground in public health, education, sanitation, and infrastructure development.")

¹⁴⁰ See, e.g., Nestor M. Davidson, Essay, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 958–59, 964 (2019) (describing the "double-edged sword of localism," *id.* at 958); Mary Bottari & Brendan Fischer, *The ALEC-Backed War on Local Democracy*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/the-alec-backed-war-on-lo_b_6061142 [<https://perma.cc/G5DG-GTWC>] (describing conservative efforts to preempt progressive municipal-level policy).

¹⁴¹ Sam Levine, *Republicans Poised to Rig the Next Election by Gerrymandering Electoral Maps*, THE GUARDIAN (July 27, 2021, 5:00 AM), <https://www.theguardian.com/us-news/2021/jul/27/gerrymandering-republicans-electoral-maps-political-heist> [<https://perma.cc/NSC7-TXUG>]. Today, 61% of state legislatures are Republican-controlled. *State Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 1, 2022), <https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx> [<https://perma.cc/KFP5-JV2V>].

¹⁴² JONATHAN RODDEN, WHY CITIES LOSE 166–67 (2019).

¹⁴³ Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 241 (2013).

¹⁴⁴ Briffault, *supra* note 138, at 1997.

the ground.¹⁴⁵ Fracking has both health and environmental effects, including groundwater and drinking water contamination and air pollution; to combat these problems, many of which particularly burden local communities, a range of localities have regulated or banned the practice.¹⁴⁶ Some states, including Pennsylvania, New York, West Virginia, Ohio, Texas, and Colorado, have each, to some extent, attempted to preempt the ability of municipalities to regulate or ban fracking.¹⁴⁷ States have also blocked cities from imposing restrictions on the use of plastic bags¹⁴⁸ or requiring homeowners and landlords to report on their energy usage.¹⁴⁹

Beyond environmental policy, states have recently preempted a host of progressive local ordinances. According to a survey by the National League of Cities, over half of all states prohibit cities from establishing their own minimum-wage standards.¹⁵⁰ Granted, some of these states did not explicitly preempt cities from taking action on the minimum wage and simply never delegated this power to municipalities.¹⁵¹ But other states did actively thwart attempts by cities to raise the minimum wage.¹⁵² States have also preempted city action relating to paid leave, antidiscrimination protections, and municipal broadband.¹⁵³

More specifically applicable to this Chapter, Professors Christopher Serkin and Richard Schragger have warned against state preemption of local zoning power. Serkin explains that municipal zoning restrictions protect the expectations of residents by regulating the pace at which neighborhood change occurs; zoning restrictions also allocate the costs of new development to newcomers.¹⁵⁴ Schragger takes a different tack, writing against state preemption because it has previously failed to make

¹⁴⁵ *The Process of Unconventional Natural Gas Production*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/uog/process-unconventional-natural-gas-production> [<https://perma.cc/5YHT-XGAR>].

¹⁴⁶ Shaun A. Goho, Commentary, *Municipalities and Hydraulic Fracturing: Trends in State Preemption*, 64 PLAN. & ENV'T L., July 2012, at 4; Hannah J. Wiseman, Response, *Governing Fracking from the Ground Up*, 93 TEX. L. REV. 29, 39 (2015) (citing fracking regulations in Arlington and Fort Worth, Texas, and Sante Fe County, New Mexico).

¹⁴⁷ Goho, *supra* note 146, at 5–8.

¹⁴⁸ Henry Grabar, *Phoenix Has Beef with Arizona*, SLATE (Sept. 19, 2016, 4:16 PM), <https://slate.com/business/2016/09/phoenix-mayor-greg-stanton-is-fed-up-with-arizona-pre-empting-his-citys-laws.html> [<https://perma.cc/K2HL-MXYE>]; Jesse McKinley, *Cuomo Blocks New York City Plastic Bag Law*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/nyregion/cuomo-blocks-new-york-city-plastic-bag-law.html> [<https://perma.cc/6ZUP-TTPA>].

¹⁴⁹ Grabar, *supra* note 148.

¹⁵⁰ NICOLE DUPUIS ET AL., NAT'L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 6 (2018), <https://www.nlc.org/wp-content/uploads/2017/02/NLC-SML-Preemption-Report-2017-pages.pdf> [<https://perma.cc/8AL8-76J3>].

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 4.

¹⁵⁴ Serkin, *supra* note 11, at 752–53.

housing more affordable, it has a fundamentally free-market orientation, and it does not get at the core cause of housing segregation.¹⁵⁵ As he points out, Houston proves problematic for those advocating for zoning deregulation;¹⁵⁶ although the city employs little land use regulation, its extensive sprawl is characterized by single-family homes and a lot of driving.¹⁵⁷ Why, Schragger asks, should we advocate for zoning-preemptive policies if the result will be a country full of Houstons?

These critiques merit attention. The idea that strong state preemption favors conservative policymaking is particularly worrisome for those concerned about climate change. The best response to this problem is likely that state preemption of municipal law should be used sparingly and only under certain conditions or for certain types of policy problems. Advocates may want to reserve preemption, as Professor Paul Diller proposes, for when it is “the product of a credibly majoritarian lawmaking process.”¹⁵⁸ Or advocates might reserve preemption for problems with negative statewide effects,¹⁵⁹ problems that, because of collective action dynamics, a municipality will not address on its own. In other words, statewide preemption may be desirable when individual municipalities make decisions that impose costs on other municipalities, costs that the acting municipalities have no reason to internalize and for which voluntary regional cooperation is therefore infeasible.

Zoning appears to satisfy these requirements. First, it possesses statewide spillover effects; even ignoring its impact on climate,¹⁶⁰ the less housing one town offers, the more others will need to provide to satisfy the population’s housing needs. Motivated cities can — and

¹⁵⁵ Richard C. Schragger, *The Perils of Land Use Deregulation*, 170 U. PA. L. REV. 125, 128–32 (2021).

¹⁵⁶ *Id.* at 159.

¹⁵⁷ Hilary Ybarra, *How Urban or Suburban Is Sprawling Houston?*, URB. EDGE (Sept. 21, 2017), <https://kinder.rice.edu/2017/09/21/how-urban-or-suburban-is-sprawling-houston> [https://perma.cc/YH7P-GQSL].

¹⁵⁸ Paul A. Diller, *The Political Process of Preemption*, 54 U. RICH. L. REV. 343, 346 (2020).

¹⁵⁹ Professor Nestor Davidson justifies state preemption of local law by appealing to the normative provisions that appear in state constitutions, such as individual rights and general welfare. Davidson, *supra* note 140, at 986–93. He explains that a locality’s exercise of power delegated to it by the state must “reflect consequences that affect the state as a whole.” *Id.* at 991. When localities “offend” a state-held value, states are justified in stepping in to limit the “externalities that can be produced by local parochialism.” *Id.* at 992. Davidson notes that the New Jersey Supreme Court’s landmark decision in *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), drew on the state constitutional constraint to legislate for the general welfare and the importance of housing to individual existence to require municipalities to take on their fair share of regional housing needs. Davidson, *supra* note 140, at 993–94.

¹⁶⁰ Climate change, of course, is the ultimate collective action problem. Paul G. Harris, *Collective Action on Climate Change: The Logic of Regime Failure*, 47 NAT. RES. J. 195, 196 (2007).

do — pass ordinances designed to increase housing density.¹⁶¹ But big cities need surrounding suburbs to ease their housing burden. One of the reasons why cities like Boston are so expensive is because their suburbs do not take their fair share of the metropolitan population.¹⁶²

Second, it is unlikely that individual municipalities will be motivated to change the status quo. The zoning actions of one town are unlikely to produce enough additional housing to meaningfully lower either housing costs or GHG emissions. This collective action problem is worsened by the fact that the constituents who are lucky enough to own single-family housing are unlikely to vote against their own perceived interests to increase the supply of housing in their communities.¹⁶³ These “homevoters,” who are overrepresented in local governments,¹⁶⁴ tend to oppose any action that might endanger home values, such as the construction of multifamily housing.¹⁶⁵ Zoning is therefore different from other policy areas in which a municipality’s voters feel at least some of the costs of their actions, such as when residents of a town that permits fracking experience noxious smells and water contamination.¹⁶⁶

When municipalities will not internalize the negative consequences of their decisions or face coordination problems, states can intervene. Municipalities can engage in zoning only because their state governments enable them to.¹⁶⁷ If they abuse that privilege by preventing the construction of enough housing to accommodate the state’s population or by promoting sprawling land use that leads to GHG-emitting travel, states should assert their prerogative and responsibility to provide for the general welfare.¹⁶⁸ This assertion comports with subsidiarity, the

¹⁶¹ See, e.g., Erick Trickey, *How Minneapolis Freed Itself from the Stranglehold of Single-Family Homes*, POLITICO (July 11, 2019), <https://www.politico.com/magazine/story/2019/07/11/housing-crisis-single-family-homes-policy-227265> [<https://perma.cc/5LRM-MTGS>].

¹⁶² See Glaeser et al., *supra* note 65, at 2.

¹⁶³ See Briffault, *supra* note 49, at 1147–50 (explaining why individual municipalities are unlikely to see the benefits of giving up local control over land use regulations).

¹⁶⁴ David Schleicher, *Constitutional Law for NIMBYs: A Review of “Principles of Home Rule for the 21st Century” by the National League of Cities*, 81 OHIO ST. L.J. 883, 911 (2020); *see id.* at 888. These voters are also “richer, whiter, and more likely to own homes than the general population.” *Id.* The unrepresentativeness of local government, combined with its problem of “shockingly low” voter turnout, *id.* at 911, poses problems for defenders of municipal autonomy who cite to the more low-to-the-ground, democratic nature of local lawmaking. *See id.* at 910–11.

¹⁶⁵ Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293, 346 (2019). Homevoters try to obstruct zoning reform at the state level as well, but at least there, their presence is diluted by a more diverse constituency, and the policymaking process provides them with less access. *Id.* at 347–48.

¹⁶⁶ *See generally* ELIZA GRISWOLD, AMITY AND PROSPERITY (2018). Relatedly, municipalities that allow fracking also experience the benefits of doing so, like increased employment and tax revenue. This is not a situation in which a municipality experiences only the costs of a decision and the state only the benefits, in which case we might be more hesitant to allow preemption.

¹⁶⁷ *See* John R. Nolon & Steven E. Gavin, *Hydrofracking: State Preemption, Local Power, and Cooperative Governance*, 63 CASE W. RES. L. REV. 995, 999 (2013).

¹⁶⁸ *See* Davidson, *supra* note 140, at 961, 990–92.

“notion that action should be taken at the lowest level of government at which particular objectives can adequately be achieved.”¹⁶⁹

In response to the critiques articulated by Serkin and Schragger, Professor David Schleicher offers several convincing counterarguments.¹⁷⁰ Yes, Serkin is right that zoning protects resident expectations, but there is a strong normative case to be made that protecting the expectations of upper- and upper-middle-class suburbanites should not dictate zoning policy, as it has for the past century.¹⁷¹ Schragger’s arguments are less normatively questionable, but they mostly take issue with state zoning preemption as insufficient to solve the problem of housing affordability — for example, we do not need more Houstons — instead of arguing against zoning reform’s underlying goals. That is fair; deregulatory zoning alone will not meaningfully reduce GHG emissions or increase housing affordability. But Schragger’s critique arguably makes the case for more, not less, state action on housing.

States possess a variety of tools, potentially more than any other level of government, which they can use to promote dense, affordable housing. They could subsidize affordable housing¹⁷² or institute rent controls. They could change how local schools are funded or impose high taxes on land.¹⁷³ They could establish regional governments to coordinate local decisionmaking within certain metropolitan areas, giving populous cities a say in the zoning choices of surrounding towns and maybe even access to a portion of town revenues.¹⁷⁴ They could enact minimum zoning mandates, refusing, for example, to allow new single-family development in certain areas close to transportation or business centers.¹⁷⁵ They could establish damages remedies against municipalities with exclusionary policies.¹⁷⁶ They could even pass state constitutional amendments that recognize affordable housing as a right, which could facilitate challenges to exclusionary zoning policies.¹⁷⁷ No, liberalized

¹⁶⁹ Briffault, *supra* note 49, at 1165 n.217 (quoting George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 338 (1994)).

¹⁷⁰ See generally Schleicher, *supra* note 164.

¹⁷¹ See *id.* at 890.

¹⁷² Cf. SCHUETZ, *supra* note 29, at 4 (discussing federal housing subsidies).

¹⁷³ See *id.* at 3 (describing how a land value tax, which charges a higher tax rate on land and a lower tax rate on structures, can encourage density).

¹⁷⁴ See Briffault, *supra* note 49, at 1164–71.

¹⁷⁵ See JOSHUA D. GOTTLIEB, HOW MINIMUM ZONING MANDATES CAN IMPROVE HOUSING MARKETS AND EXPAND OPPORTUNITY 3 (2018), <http://users.nber.org/~jdgottl/MinimumZoningMandates.pdf> [<https://perma.cc/Z8G6-GZWQ>].

¹⁷⁶ See Ellickson, *supra* note 25, at 436–37.

¹⁷⁷ See generally Note, *Addressing Modern Challenges to Affordable Housing in Land Use Law: Recognizing Affordable Housing as a Right*, 135 HARV. L. REV. 1104 (2022).

zoning alone will not accomplish much — but that is not what progressive advocates and scholars of zoning policy are asking for.¹⁷⁸ On the other hand, liberalized zoning, plus a suite of other progressive housing measures, could make a difference. As such, states are perfectly within their rights to withdraw some of the zoning discretion that localities currently possess, discretion that, at the end of the day, ultimately derives from state authority.¹⁷⁹

Conclusion

State preemption of single-family zoning will not solve climate change or housing affordability — no one policy will. Still, interventions that make dense zoning possible are necessary to reduce the copious emissions that sprawl engenders. And increasingly, those interventions are coming not from municipalities, the traditional sources of zoning policy, but from state governments passing policies that preempt local density restrictions. While some doubt the desirability of preventing municipalities from making their own policy, zoning may be a special case that warrants an exception: exclusionary zoning imposes externalities on the rest of a state, and collective action problems make it likely that municipalities will not incentivize denser housing on their own initiative.

States should continue to prohibit municipalities from allowing single-family zoning, but they must go further in order to spur the development of dense, environmentally friendly housing. In addition to subsidizing the development of affordable housing, they should use tax incentives to encourage developers to build dense housing located close to transit and require housing to contain a certain minimum number of units. States could go even further, employing zoning policy not only to mitigate climate change, but also to make cities and towns more resilient to climate change's inevitable impacts.¹⁸⁰ Such adaptive policies should, for the same reasons already articulated, also be designed to address a range of societal problems. Only with a comprehensive effort, worthy of the problems that we face today, will states do what is necessary to address housing affordability, segregation, and climate change.

¹⁷⁸ Katherine Levine Einstein, *The Privileged Few: How Exclusionary Zoning Amplifies the Advantaged and Blocks New Housing — And What We Can Do About It*, 57 URB. AFFS. REV. 252, 261 (2021) (describing how “[m]ost observers concerned about the deleterious effects of land-use regulations on the housing market” want “changes in land-use regulations — not necessarily their elimination”).

¹⁷⁹ As one California politician observed, local control over zoning “isn’t biblical.” Stahl, *supra* note 1, at 180 (quoting Scott Wiener, *Senator Wiener’s Statement on Huntington Beach Suing to Overturn Housing Streamlining Law He Authored*, SB 35, MEDIUM (Jan. 27, 2019), <https://scott-wiener.medium.com/senator-wieners-statement-on-huntington-beach-suing-to-overturn-the-housing-streamlining-law-he-bb4c43573868> [<https://perma.cc/8YFU-67LA>]).

¹⁸⁰ See Glicksman, *supra* note 51, at 1173 (describing how “restrict[ing] development in areas vulnerable to flooding or . . . preserv[ing] open space to provide connective corridors for migrating wildlife species” are two examples of how zoning can be used to adapt to climate change).