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.
4 See infra ch. III, section B.1, 1601–05.
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/qFHW-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

1. 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. 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. 1922). 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. JOHNNY NOLAN, 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,” JOHN R. 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, 92 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.regsiurbeco.2021.10352 [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 parasites[,] 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[es] 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, 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. Euclid ratified the racist zoning policies that localities enacted in response to Buchanan’s moratorium on explicitly racial zoning ordinances, policies that localities continue to enact today.

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

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. 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.

245 U.S. 60 (1917).

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.

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


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).


Frug, supra note 9, at 1068.


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


See id. at 402.

See id. at 403.

detached housing.\textsuperscript{29} This statistic includes cities like Chicago (79\% of residential land zoned for detached single-family housing), Seattle (81\%), and San Jose (94\%).\textsuperscript{30} The sprawl that restrictive zoning policies engender, combined with a lack of investment in public transit infrastructure,\textsuperscript{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;\textsuperscript{32} Des Moines, Iowa, possesses around seven parking spaces per resident.\textsuperscript{33} Restrictive policies also exacerbate the country’s widespread lack of housing, resulting in the affordability crisis that the United States faces today.\textsuperscript{34} Nearly half of all renters spend over 30\% of their pretax income on housing, and around one-quarter spend over 50\%.\textsuperscript{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.\textsuperscript{36}

Furthermore, even though the United States no longer permits race-based zoning\textsuperscript{37} or race-based covenants,\textsuperscript{38} restrictive zoning has resulted in de facto housing segregation.\textsuperscript{39} For years, Black tenants faced violence when they attempted to desegregate neighborhoods;\textsuperscript{40} municipalities known as “sundown towns” forbade Black people from living within

\begin{itemize}
\item \textsuperscript{30} Badger & Bui, supra note 3.
\item \textsuperscript{31} Shill, supra note 23, at 538.
\item \textsuperscript{32} Id. at 547.
\item \textsuperscript{33} Id. at 545.
\item \textsuperscript{34} Architect Daniel Parolek describes this phenomenon as the “missing middle housing.”
\item \textsuperscript{35} Daniel Parolek, Missing Middle Housing 8 (2020).
\item \textsuperscript{37} Matthew Desmond, Heavy Is the House: Rent Burden Among the American Urban Poor, 42 Int’l J. Urb. & Reg’l Sch. 160, 160 (2018).
\item \textsuperscript{38} See Buchanan v. Warley, 245 U.S. 60 (1917).
\item \textsuperscript{39} See Shelley v. Kraemer, 334 U.S. 1 (1948).
Even after the Civil Rights Era and passage of the Fair Housing Act, 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. 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.

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. 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, which would have offered states money to create more careful processes to determine land use. Opposed by both states and localities, the bill failed. 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.” 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

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44 Archer, supra note 41, at 175–76; see also Layser, 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).
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.
quickly shut down the effort.\textsuperscript{50} Since then, the federal government has done little to address the problems associated with exclusionary zoning\textsuperscript{51} and has largely discontinued its regional planning initiatives.\textsuperscript{52} And except for certain isolated efforts,\textsuperscript{53} states have also avoided intervening.

2. Zoning Law's Climate Impacts. — Land use decisions undeniably impact the world’s climate.\textsuperscript{54} Policies that foster sprawl, loosely defined as development characterized by low population density,\textsuperscript{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.\textsuperscript{56} Dispersed housing also requires the construction of more municipal infrastructure, like streets and sewers,\textsuperscript{57} and encourages the construction of larger houses with correspondingly larger energy demands.\textsuperscript{58} These homes, which are typically detached, lack the energy efficiencies associated with shared walls and


\textsuperscript{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 . . . ").

\textsuperscript{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.

\textsuperscript{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)).

\textsuperscript{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.


\textsuperscript{57} Trisolini, supra note 54, at 714.

increased insulation. 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. Furthermore, sprawling housing patterns reduce the benefits of constructing low-carbon public transport.

Research generally finds that relaxing zoning restrictions leads, in the long run, to denser housing. This finding makes sense intuitively: the demand for housing exceeds supply in many areas, and the limiting factor appears to be buildable land, 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%.

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

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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. 19,122–25, 19,128 (2020).


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 (2000) (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%.”).


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).


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

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.” 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. 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.

Studies produce mixed results on the impact of upzoning — altering a zoning code to allow more development — on housing density, affordability, and GHG emissions, but there is reason to believe that they generally underestimate 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.”

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].


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


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

\subsection*{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.\textsuperscript{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.

\subsubsection*{1. 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 units\textsuperscript{79} (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.

\begin{footnotesize}
\begin{enumerate}
\item Kaswan, supra note 74, at 266.
\item Baca & Lebovits, supra note 73.
\item One scholar describes this trend as a “not-so-quiet revolution in land use regulation.” John Infranca, \textit{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. \textit{Id.} at 828, 836–44. As evidenced by the housing crisis we face today, none of these efforts were particularly successful.
\end{enumerate}
\end{footnotesize}
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.”

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

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81 Id. § 2.
82 Id.
Quality Act,\textsuperscript{86} a procedural law that opponents of residential development have co-opted to prevent the creation of affordable and transit-oriented housing.\textsuperscript{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.\textsuperscript{88} Neither that bill, nor a bill that would have required municipalities to develop their fair share of affordable housing,\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{92} The law also requires every city to develop an affordable housing action plan that includes goals for the development of middle housing.\textsuperscript{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.\textsuperscript{94} In a related law, the Middle Income Workforce Housing Investment Act,\textsuperscript{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

\textsuperscript{86} CAL. PUB. RES. CODE §§ 21,000–21,006.


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

\textsuperscript{92} Id. § 4(1).

\textsuperscript{93} Id. § 3(6).

\textsuperscript{94} Id. § 5(2).

\textsuperscript{95} Id. §§ 11–19.
value between $125,000 and $275,000. 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.

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.” 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.

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. 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, including one that would have required all localities to allow the development of one ADU per single-family dwelling.

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, would have required almost all municipalities to allow ADUs on land zoned for single-family use; the proposal resembled what actually passed in Connecticut. The second, introduced two days later, 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.
104 S. 5812, 66th Leg., Reg. Sess. § 3 (Wash. 2019).
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. The third, introduced in 2020, 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. 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.

Finally, in Maryland, the Planning for Modest Homes Act of 2020 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). An earlier version of the bill would have preempted certain local regulations that prevent the development of multifamily housing. 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.

2. Zoning Preemption as Climate Policy. — This Chapter is not the first analysis to recognize this trend in state land use law. However, Professor John Infranca gives the trend a scholarly treatment, labeling it the “not-so-quiet revolution” in land use law. 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
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.\footnote{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.).}

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.”\footnote{Id. at 27 (statement of Patrick Leahy, Nebraska chapter of the American Institute of Architects).}

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.\footnote{This “zoning law as climate policy” is a welcome change from the prevailing paradigm of “zoning law as segregation.”}

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.\footnote{Sedona Chinn et al., Politicization and Polarization in Climate Change News Content, 1988–2017, 42 SCI. COMMC’N 112, 120 (2020); Most Important Problem, GALLUP, https://news.gallup.com/poll/1675/most-important-problem.aspx [https://perma.cc/6ZTE-WB5X].}

Most Republicans might not find climate
change mitigation a particularly motivating concern,\textsuperscript{126} but almost everyone agrees that housing is too expensive.\textsuperscript{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.\textsuperscript{128} In blue states, preemptive measures designed to enhance housing density have similarly received bipartisan support.\textsuperscript{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,\textsuperscript{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,\textsuperscript{131} and recent

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\textsuperscript{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/C4C2-J5GK] (noting that California’s Senate Bill 9 was bipartisan).

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

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research finds that, across every demographic, including political identification, people prefer single-family housing. 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.

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, 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. The Sunrise Movement, which organizes around the Green New Deal, similarly emphasizes that climate policy must be intersectional and all-encompassing. Academics have also jumped on board. 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

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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.).

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

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. 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. But as Professor Jonathan Rodden observes, partisan gerrymandering explains only part of the problem. 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. 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.” 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

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139 Archer, supra note 41, at 181 (“[L]ocal governments have historically broken new ground in public health, education, sanitation, and infrastructure development.”).
142 JONATHAN RODDEN, WHY CITIES LOSE 166–67 (2019).
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. 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. States have also blocked cities from imposing restrictions on the use of plastic bags or requiring homeowners and landlords to report on their energy usage.

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. 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. But other states did actively thwart attempts by cities to raise the minimum wage. States have also preempted city action relating to paid leave, antidiscrimination protections, and municipal broadband.

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. Schragger takes a different tack, writing against state preemption because it has previously failed to make

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147 Goho, supra note 146, at 5–8.


149 Grabar, supra note 148.


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. 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

156 Id. at 159.
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.\footnote{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].} 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.\footnote{162}{See Glaeser et al., *supra* note 65, at 2.}

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.\footnote{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).} These “homevoters,” who are overrepresented in local governments,\footnote{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. *Id.* at 910–11.} tend to oppose any action that might endanger home values, such as the construction of multifamily housing.\footnote{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.} 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.\footnote{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.}

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.\footnote{167}{See Davidson, *supra* note 140, at 961, 990–92.} 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.\footnote{168}{See Davidson, *supra* note 140, at 961, 990–92.} This assertion comports with subsidiarity, the
“notion that action should be taken at the lowest level of government at which particular objectives can adequately be achieved.”

In response to the critiques articulated by Serkin and Schragger, Professor David Schleicher offers several convincing counterarguments. 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. 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 housing or institute rent controls. They could change how local schools are funded or impose high taxes on land. 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. They could enact minimum zoning mandates, refusing, for example, to allow new single-family development in certain areas close to transportation or business centers. They could establish damages remedies against municipalities with exclusionary policies. They could even pass state constitutional amendments that recognize affordable housing as a right, which could facilitate challenges to exclusionary zoning policies. No, liberalized

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).
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. 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.

**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. 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.

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178 Katherine Levine Einstein, *The Privileged Few: How Exclusionary Zoning Amplifies the Advantaged and Blocks New Housing — And What We Can Do About It*, 52 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”).


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).