



NORTH CAROLINA LAW REVIEW

Volume 97 | Number 2

Article 2

1-1-2019

The Role of States in Liberalizing Land Use Regulations

Anika Singh Lemar

Follow this and additional works at: <https://scholarship.law.unc.edu/nclr>

 Part of the [Law Commons](#)

Recommended Citation

Anika S. Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293 (2019).

Available at: <https://scholarship.law.unc.edu/nclr/vol97/iss2/2>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

THE ROLE OF STATES IN LIBERALIZING LAND USE REGULATIONS*

ANIKA SINGH LEMAR**

Across the political spectrum, economists agree that local land use regulations exacerbate inequality, decrease opportunity, and hinder economic growth by inflating housing prices. Local governments are structurally ill-equipped to solve this problem, which must instead be solved at the state level. Advocates of local control, however, decry nascent state intervention efforts as unprecedented overreach by state officials.

These efforts are not unprecedented, but they are misunderstood. Contrary to assumptions embedded in both the political debate and the land use scholarship, state-level liberalization of zoning has benefited users such as family day cares and mobile homeowners for at least forty years. These interventions remove local authority to ban certain land uses, while expressly permitting local governments to address a limited set of potential impacts of those land uses. This kind of tailoring requirement, which both addresses local governments' propensity to overregulate land use and recognizes local competency to address discrete aspects of development, ought to serve as a model for contemporary state intervention efforts. These intervention efforts, in turn, are a key component of any effort to address growing barriers to economic opportunity.

* © 2019 Anika Singh Lemar.

** Clinical Associate Professor, Yale Law School. This Article would not have been possible without the efforts of Yale Law School librarians Michael VanderHeijden and Jason Eiseman and the financial support of the Oscar M. Ruebhausen Fund at the Yale Law School. I am grateful to David Schleicher, Claire Priest, Marisol Orihuela, Eric Helland, Heather Gerken, Bob Ellickson, Nestor Davidson, Muneer Ahmad, the editors of the North Carolina Law Review, and participants in the 2016 State & Local Government Law Works-in-Progress Conference for their comments and suggestions. Heather Wong, Paul Rink, Andrés Lopez-Delgado, and Austin Bryniarski provided valuable research assistance. All errors are my own.

294	<i>NORTH CAROLINA LAW REVIEW</i>	[Vol. 97]
	INTRODUCTION	294
I.	A TAXONOMY OF STATE INTERVENTION	297
	A. <i>Why Deregulation?</i>	297
	B. <i>Understanding State Interventions</i>	299
	1. Procedural Interventions	300
	2. Double Veto Interventions.....	301
	3. Clawback Interventions	302
	4. Deregulatory Interventions	304
	C. <i>Contemporary Calls for Intervention</i>	304
II.	INTERVENTIONS	305
	A. <i>Family Day Care Homes</i>	307
	B. <i>Manufactured Housing</i>	318
	C. <i>Small-Scale Residential Alternative Energy</i> <i>Infrastructure</i>	327
	D. <i>Group Homes</i>	331
III.	WHAT MOTIVATES INTERVENTION?	344
	A. <i>States Provide a Lobbying Opportunity for Interests</i> <i>that Cannot Compete with “Homevoters” at the Local</i> <i>Level</i>	345
	B. <i>State Bureaucracies Advance Local Deregulation</i>	348
	C. <i>Tailoring Requirements Replace Local Vetoes with</i> <i>Standards</i>	350
IV.	EMBRACING TAILORING REQUIREMENTS.....	352

INTRODUCTION

For the first time in decades, there are widespread calls for states to intervene in local land use regulation. Previous generations of interventionists sought to address environmental concerns and advance desegregation.¹ Today’s interventionists, from California to Massachusetts, seek to advance economic opportunity, decrease inequality, and further national economic growth by undoing

1. Nearly fifty years ago, the President’s Commission on Environmental Quality commissioned a book assessing instances in which states or regional governments assumed regulatory oversight over land use. The book’s authors argued that federal and state governments increasingly exercised authority over land use in an effort to address externalities imposed by local governments. They termed this trend a “quiet revolution.” Fifty years later, however, local governments retain primary control over land use planning. FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION* 3 (1972); see also Celeste M. Hammond, *Foreword: 40th Anniversary of the Quiet Revolution in Zoning and Land Use Regulation*, 45 J. MARSHALL L. REV., at iii, iii (2012).

restrictive local zoning.² Local governments, as others have persuasively argued, ignore the interests of first-time home buyers, renters, real estate developers and investors, employers, and others in favor of preserving incumbent homeowners' property values.³ As a result, across the political spectrum, economists and others agree that local land use regulations decrease mobility and hinder economic growth by inflating housing prices.⁴

Even when federal and state governments intervene, they are deeply hesitant to restrict local authority to act. In response to localist instincts, state and federal interventions often supplement, rather than displace, local regulatory authority.⁵ As a result, property owners are forced to expend significant time and money navigating multi-tiered regulatory regimes. Development proposals face the possibility of veto at any one of two or three levels of review.⁶ These interventions add to, rather than take away from, a property owner's regulatory burden and are not models for state interventions seeking to encourage development or decrease housing prices. Because state and federal interventions fail to address the problem of local overreach, they do not decrease housing prices.

In a few notable (and oft-overlooked) cases, however, a substantial number of states have intervened to limit or prohibit local regulation, thus decreasing development costs.⁷ Examining legislative history sources in over forty states, this Article seeks to learn from

2. See, e.g., Kriston Capps, *Oregon May Strip Portland of Its NIMBY Powers*, CITYLAB (June 19, 2017), <https://www.citylab.com/design/2017/06/oregons-hb-2007-would-preempt-cities-zoning-rights/528612/> [<https://perma.cc/5HGC-XMZZ>]; Lorraine Woellert, *Why Washington Can't Fix the New Housing Crisis*, POLITICO (July 7, 2017, 5:24 AM), <http://www.politico.com/agenda/story/2017/07/07/housing-crisis-shortage-no-fix-000472> [<https://perma.cc/D6T5-VAPU>].

3. WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* 72–97 (2001) [hereinafter FISCHER, *HOMEVOTER HYPOTHESIS*]; Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227, 231–33 (2014).

4. See discussion *infra* Section I.A.

5. See, e.g., WILLIAM A. FISCHER, *ZONING RULES! THE ECONOMICS OF LAND USE REGULATION* 54–57 (2015) [hereinafter FISCHER, *ZONING RULES!*]; Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 67 (1990).

6. Interestingly, some states choose to adopt statewide building codes while others permit local governments to adopt building codes. Building codes are not the subject of this Article, but perhaps future scholarship can provide some insight into the causes and impacts of statewide versus local building codes.

7. These are family day care homes, manufactured housing, alternative energy infrastructure, and group homes. See *infra* Part II.

those instances in which localist instincts give way to deregulatory state intervention in a large number of states: small and large, urban and rural, and red and blue.

This Article seeks to learn from state interventions that meaningfully shift control away from local governments. In Part I, I differentiate between those interventions that substantively limit local land use regulatory authority, “displacing interventions,”⁸ and those that do not.⁹ The remainder of the Article will focus on those displacing interventions that can be found in a significant number of states across the country.

In Part II, I examine four land uses—family day cares, group homes, manufactured housing, and small-scale alternative energy infrastructure—that benefit from displacing interventions in a significant number of states. In Part III, I argue that a state’s decision to intervene is a function of three key factors. First, states provide a lobbying opportunity for well-organized interests that cannot compete at the local level due to the entrenched power of homeowners. Second, states act when local regulations frustrate the workings of the state bureaucracy, even when the state does not own the property affected by local regulation. Third, states craft standards that balance state interests in liberalized land use regulations and local interests in mitigating discrete undesirable impacts of certain kinds of development. These are effectively tailoring requirements, which allocate land use authority between states and local government according to which level of government is most competent to exercise that authority. This Article ends by arguing in favor of tailoring requirements, which are underutilized in land use law. Tailoring requirements strip local governments of the ability to enact outright prohibitions on disfavored uses, while permitting them to regulate discrete perceived harms associated with those uses. State interventions that embrace these tailoring requirements are key to increasing mobility and addressing regional economic inequality.

8. This term is defined, *infra* Section I.B.

9. Richard Briffault describes the concept of “state action displacing local authority.” Briffault, *supra* note 5, at 12 n.35. He introduces the concept in order to then describe very limited efforts by state legislatures and courts to “displac[e] the structure of decentralized responsibility for education finance and unfettered local control over land use.” *Id.* at 19. Oftentimes, this end result is accomplished by state legislatures “devolving broad authority to localities and then declining to pass laws displacing the operations of policies of their local governments.” *Id.* at 18.

I. A TAXONOMY OF STATE INTERVENTION

Local regulation of land use is the default rule in the United States. While zoning is an exercise of the police power, normally the domain of state governments, every state has delegated that authority to local government via a zoning enabling act. Most of these are modeled on the Standard State Zoning Enabling Act promulgated by the United States Department of Commerce in 1926.¹⁰

Contrary to the prevailing view, states, from time to time, intervene in local land use planning to decrease rather than increase regulatory burdens. These statutes have not garnered the scholarly attention paid to interventions like New Jersey's *Mount Laurel* cases or Oregon's regional growth management.¹¹ Nevertheless, these interventions constitute a significant phenomenon in land use law, and they deserve a more thorough scholarly treatment. Indeed, they have much to tell us about how and when states choose to intervene in local land use decision-making.

A. *Why Deregulation?*

A September 2016 White House white paper makes plain the appeal of and need for deregulatory intervention.¹² The paper argues that “[o]ver the past three decades, local barriers to housing development have intensified” and that “[t]he accumulation of such barriers—including zoning, other land use regulations, and lengthy development approval processes—has reduced the ability of many housing markets to respond to growing demand.”¹³ Synthesizing recent economics scholarship, the white paper identifies three national problems arising out of overly restrictive zoning: “[t]he growing severity of undersupplied housing markets is jeopardizing housing affordability for working families, increasing income inequality by reducing less-skilled workers’ access to high-wage labor markets, and stifling GDP growth by driving labor migration away from the most productive regions.”¹⁴ These concerns are shared

10. John R. Nolon, *Zoning's Centennial: A Complete Account of the Evolution of Zoning into a Robust System of Land Use Law—1916–2016 (Part I)*, ZONING & PLAN. L. REP., Oct. 2016, at 1, 3.

11. See *infra* Section I.B.3.

12. THE WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT 2–3 (2016), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf [<https://perma.cc/9UMS-TFVQ>].

13. *Id.* at 2.

14. *Id.*

across the political spectrum. While the white paper was issued by Barack Obama's White House, the economist driving Donald Trump's housing policy has embraced it.¹⁵

The problem, as identified by the white paper and the various economists, social scientists, and legal scholars upon whose work the white paper relies, is overregulation of land use.¹⁶ It is therefore not surprising that five of the ten policy measures that the white paper advocates are deregulatory in nature.¹⁷ These measures would, if implemented across towns and states, increase the number of housing units one could build on a given parcel, in a given town, and nationally. They would also decrease the time and expense of regulatory review processes. Developers could spread the cost of land over many units, enjoy the efficiencies of multifamily development, and increase supply to the extent that the market (rather than a zoning commissioner) will bear. These measures, if enacted in a sufficient number of places, could begin to rectify the three national problems identified in the white paper.

The white paper stakes no role for the federal or state governments in deregulatory land use policy. There have already, however, been instances when states have entered the fray. The day after the White House released its white paper, California Governor Jerry Brown embraced one of the white paper's suggested policy measures by signing into law an attempt to force local governments to loosen restrictions on accessory dwellings.¹⁸ One year later he signed into law a requirement that towns approve affordable housing developments, subject to certain state-imposed conditions.¹⁹ In early

15. See Woellert, *supra* note 2 (“[Mark] Calabria, chief economist to Vice President Mike Pence and an administration point person on housing . . . is an advocate of zoning deregulation—he called land use a ‘crucial economic issue’ for the whole country Last fall, he tipped his hat to Obama after the president tried to jawbone cities and counties into easing up on zoning restrictions.”).

16. THE WHITE HOUSE, *supra* note 12, at 2.

17. The five policy measures are (1) establish by-right development, (2) streamline or shorten permitting processes and timelines, (3) eliminate off-street parking requirements, (4) enact high-density and multifamily zoning, and (5) allow accessory dwelling units. *Id.* at 3.

18. Act of Sept. 27, 2016, ch. 720, sec. 2, § 65583.1, 2016 Cal. Stat. 4945, 4946 (codified at CAL. GOV'T CODE § 65583.1 (West Supp. 2018)). Accessory dwellings are “small, secondary dwelling units commonly located behind the primary home or above a garage, but may also be in a converted basement or attic.” Edward J. Sullivan, *Meeting the Disruption of the Hot Housing Market: Some Thoughts from North America*, ZONING & PLAN. L. REP., July 2018, at 3.

19. Act of Sept. 29, 2017, ch. 366, sec. 1, § 65400, 2017 Cal. Stat. 2935, 2936 (codified at CAL. GOV'T CODE § 65400 (West Supp. 2018)).

2018, that bill's sponsor introduced legislation that would require California towns to permit high-density multifamily housing proximate to transit stops.²⁰ The bill had its detractors, to put it mildly. As one newspaper reported, "Berkeley Mayor Jesse Arreguín characterizes the bill as 'a declaration of war against our neighborhoods.'"²¹

State efforts to ease local zoning (and the backlash they engender) are not limited to California. In June 2016, the Massachusetts Senate passed a bill loosening some restrictions on accessory dwellings and requiring each municipality to identify at least one zone permitting multifamily zoning of some minimum density.²² Oregon legislators are considering a proposal to accelerate local administrative review of affordable housing developments.²³ In these states, famously restrictive zoning and resultant high housing prices discourage economic development by increasing the cost to hire employees in the state.²⁴ To date, these are halfhearted (and only partially successful) efforts, but, as this Article argues below, a better understanding of the history of successful displacing interventions should inform efforts to strip local governments of the ability to overregulate land use.

B. *Understanding State Interventions*

Scholars concerned with exclusionary aspects of local zoning have repeatedly argued for some form of state intervention (or, more accurately, return of power and authority granted by the states in the first instance). In order to assess these interventions, it is important to

20. S. 827, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018); *see also* Scott Wiener, *California Needs a Housing-First Agenda: My 2018 Housing Package*, MEDIUM: ART + MARKETING (Jan. 4, 2018), <https://artplusmarketing.com/california-needs-a-housing-first-agenda-my-2018-housing-package-1b6fe95e41da> [<https://perma.cc/D7MA-SBXA>].

21. Janis Mara, *Berkeley Mayor on Wiener-Skinner Housing Bill: 'A Declaration of War Against our Neighborhoods,'* BERKELEYSIDE (Jan. 22, 2018), <http://www.berkeleyside.com/2018/01/22/berkeley-mayor-wiener-skinner-housing-bill-declaration-war-neighborhoods/> [<https://perma.cc/35HM-8V5U>].

22. S. 2311, 189th Gen. Court, 2015–2016 Reg. Sess. (Mass. 2016).

23. H.R. 2007, 79th Legis. Assemb., 2017 Reg. Sess. (Or. 2017).

24. While economists have attempted to calculate the costs imposed on the national economy by restrictive zoning, no one has attempted to calculate the costs to individual states. Chang-Tai Hsieh & Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth 1* (Nat'l Bureau of Econ. Research, Working Paper No. 21154, 2015). While there is no full accounting of the costs borne by states with restrictive zoning, there is strong evidence that those states' zoning policies slow their economic growth. *See, e.g., id.*

differentiate among them. There are four categories of intervention: procedural, double veto, clawback, and deregulatory. While each category will be explained in turn, this Article is concerned only with the latter two categories, those substantive interventions that displace, rather than supplement, local authority. I refer to clawback and deregulatory interventions collectively as “displacing interventions.”

1. Procedural Interventions

Procedural interventions are the most commonly used of the four types. These interventions impose conditions on the exercise of local zoning authority. The Standard State Zoning Enabling Act largely consists of mandatory procedures.²⁵ It requires, for example, establishment of local boards and commissions, public hearings, and appeals procedures.²⁶ Many scholars have focused on one procedural intervention in particular: the requirement that zoning ordinances comport with a local or regional plan.²⁷ Planning requirements are common, though some state courts have interpreted their state’s zoning enabling act to permit localities to treat the zoning ordinance itself as the plan.²⁸ As a result, the planning requirement is a nullity. The ordinance need only be consistent with itself in order to meet the planning requirement.

One example of a procedural intervention is New York’s State Environmental Quality Review Act (“SEQRA”).²⁹ SEQRA imposes

25. See ADVISORY COMM. ON ZONING, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITY MAY ADOPT ZONING REGULATIONS 6–7 (rev. ed. 1926). It is admittedly a bit odd to speak of the zoning enabling acts as interventions when they are the basis of local land use authority. Many of the components of contemporary zoning enabling acts are additions and interventions made after the first wave of zoning enabling acts passed in the 1920s. And, for the purposes of this Article, it is useful to compare the kinds of limitations imposed by the Standard State Zoning Enabling Act and contemporary zoning enabling acts with the limitations imposed by displacing interventions. For these reasons, I catalogue enabling acts here in my taxonomy of state interventions.

26. See *id.*

27. ROBERT C. ELICKSON ET AL., LAND USE CONTROLS: CASES AND MATERIALS 74–75 (4th ed. 2013) (collecting sources).

28. *Id.* at 361–63. A minority of states, fewer than fifteen, require a separate planning document that is consistent with the zoning code. Stuart Meck, *The Legislative Requirement that Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute*, 3 WASH. U. J.L. & POL’Y 295, 305 & n.25 (2000).

29. Act of Aug. 1, 1975, ch. 612, 1975 N.Y. Laws 895, 895–902 (codified as amended at N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 2018)).

on state and local governments requirements comparable to those imposed on the federal government by the National Environmental Policy Act (“NEPA”).³⁰ Because “the scope of SEQRA is nearly coextensive with the authority of local government in the land use field,” almost every land use decision must comport with SEQRA’s requirements.³¹ But SEQRA does not strip local governments of the authority to act. It only conditions their actions on meeting certain procedural requirements.

2. Double Veto Interventions

“Double veto” interventions are likely the second-most common form of intervention.³² These interventions place their thumb on the scale against development. Double veto interventions do not strip local governments of their veto authority over development; they simply add a second or third veto to the approval process, exercised by a regional authority, the state government, or the federal government.³³ Richard Briffault describes these as “developments of regional impact.”³⁴ Because they impose impacts on the state and not just the locality, they are subject to two or more sets of approvals in order to proceed.

Double veto interventions impose additional requirements on the private real estate development market but do not preempt local authority. One example of interventions that impose an additional layer of review is federal wetlands regulations. Similarly, “smart growth” reforms in Florida subject development proposals to a regional approval and the possibility of rejection at the regional level only after local approvals have been granted.³⁵

30. Compare *id.*, with National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 101, 83 Stat. 852, 852–53 (codified at 42 U.S.C. § 4331 (2012)) (illustrating how national environmental policies differ from state and local government environmental policies).

31. John R. Nolon, *The Erosion of Home Rule Through the Emergence of State-Interests in Land Use Control*, 10 PACE ENVTL. L. REV. 497, 545–46 (1993).

32. FISCHER, *ZONING RULES!*, *supra* note 5, at 48 (arguing that the overwhelming effect of “higher government intervention,” which includes both state and federal interventions, has “been to make zoning more exclusive”).

33. *Id.* at xi (“In the few instances where they have displaced local authority, state and federal regulations have tilted zoning mostly toward more restrictiveness. They have seldom made local governments accept developments that local residents do not want.”). Fischer, as is clear from the quoted text, uses the verb “displaced” loosely. These interventions do not in fact displace but, instead, supplement local authority.

34. Briffault, *supra* note 5, at 65.

35. FISCHER, *ZONING RULES!*, *supra* note 5, at 55.

3. Clawback Interventions

The third category, clawback intervention, is preemptive state regulation of land use. Through clawback interventions, states take back land use regulatory authority, typically on the grounds that local decision-making undermines a state interest. States do not, for example, allow local governments to exercise zoning authority over state-owned land.³⁶ In addition, most states allocate permitting and siting authority for utility infrastructure to state administrative agencies rather than to local governments.³⁷ A large region benefits from the energy produced by a power plant. Only the town in which it is located, however, must suffer the most immediate traffic and aesthetic costs of that plant. Acknowledging that localities do not have incentives to accommodate these projects and that the state's economy would suffer without them, states retain the authority to site these uses.

Other forms of clawback intervention are much touted but quite rare in practice. Regional governance is one form in which states take back land use regulatory authority and reallocate it to a regional entity.³⁸ New Jersey and New York intervene in land use decision-making in environmentally sensitive areas, such as New Jersey's Highlands and New York's Pine Barrens and Adirondack Park.³⁹

A number of states use clawback interventions to facilitate the development of affordable housing. These provisions, many of which

36. A few states expand this concept to include projects sponsored by the state even if the projects will not ultimately be owned or operated by the state. New York State's Urban Development Corporation has the authority to site industrial projects without regard to local zoning but must defer to local zoning for residential projects. Briffault, *supra* note 5, at 68–69; Nolon, *supra* note 10, at 533–34.

37. See, e.g., CONN. GEN. STAT. ANN. §§ 16-50g to 16-50ll (Westlaw through 2018 Feb. Reg. Sess.); Briffault, *supra* note 5, at 12 n.35 (“State action displacing local authority often involves the siting of public utilities that serve large regions. A locality may adopt zoning requirements that would exclude the utility, but the cost of the reduced power-generation capacity would be felt regionally or state-wide. Thus, states often pass statutes that preempt local authority to affect the siting of such utilities.”).

38. Outside of greater Portland, Oregon's growth management intervention is conditional in nature. It conditions local planning on state approval, but land use approvals are not granted by the State of Oregon. See Lesley R. Attkisson, Note, *Putting a Stop to Sprawl: State Intervention as a Tool for Growth Management*, 62 VAND. L. REV. 979, 1001–02 (2009).

39. Anika Singh, *Implementing Planned Development: The Case of New Jersey*, 30 N.Y.U. REV. L. & SOC. CHANGE 151, 193 (2005); see also Patricia E. Salkin, *The Politics of Land Use Reform in New York: Challenges and Opportunities*, 73 ST. JOHN'S L. REV. 1041, 1050–51 (1999).

are based on New Jersey's *Mount Laurel* cases,⁴⁰ strip or limit local governments' authority to zone affordable housing. These are based on bad behavior by local government. They typically apply only when the locality in question has failed to provide or zone for affordable housing. While no other state supreme court has fully embraced the New Jersey Supreme Court's *Mount Laurel* doctrine, a few states have passed milder statutory versions.⁴¹ Massachusetts adopted its Anti-Snob Zoning Act in 1969.⁴² Connecticut followed in 1989.⁴³ By way of example, Connecticut's Affordable Housing Appeals Act shifts the burden in zoning appeals from would-be developers to municipalities.⁴⁴ If a municipality denies a land use approval for a development that meets the state statutory definition of affordable housing, the municipality bears the burden to prove that "(A) the decision is necessary to protect substantial public interests in health, safety or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development"⁴⁵ In a limited fashion, the state claws back the municipality's authority to zone and replaces it with the developer's preferred land use plan,

40. I thank Bob Ellickson for the insight that while *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983), and the New Jersey Fair Housing Act, ch. 222, 1985 N.J. Laws 996 (1985) (codified at N.J. STAT. ANN. § 52:27D-301 (Westlaw through L.2018, c. 140 and J.R. No. 12)) (responding to *Mount Laurel II*), are clawback interventions, *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*, 336 A.2d 713 (N.J. 1975), and *Oakwood at Madison v. Township of Madison*, 371 A.2d 1192 (N.J. 1977), receded from by *Mount Laurel II*, 456 A.2d 390 (N.J. 1983), which some read as a retreat from *Mount Laurel I*, were actually deregulatory interventions. In *Mount Laurel I* and *Oakwood*, the Supreme Court of New Jersey stripped growing municipalities of the authority to enact exclusionary zoning but did not replace that municipal power with any kind of state authority. Only later did the legislature replace local authority to zone with state authority to require zoning for concrete numbers of affordable housing units.

41. See generally Brian R. Lerman, Note, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, B.C. ENVTL. AFF. L. REV. 383 (2006) (discussing the differences between mandatory inclusionary zoning approaches on the East Coast and the West Coast of the United States).

42. Act of Aug. 23, 1969, ch. 774, 1969 Mass. Acts 712, 712–15 (codified as amended at MASS. GEN. LAWS ch. 40B, §§ 20–23 (Westlaw through ch. 322 of the 2018 2d Ann. Sess.)).

43. Act of June 29, 1989, Pub. Act No. 89-311, 1989 Conn. Acts 790, 790–92 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. ANN. §§ 8-30g to 8-30j (Westlaw through 2018 Feb. Reg. Sess.)).

44. *Id.*

45. CONN. GEN. STAT. ANN. § 8-30g(g) (Westlaw through 2018 Feb. Reg. Sess.).

subject only to the locality evidencing “substantial public interests” in favor of denying that plan.

4. Deregulatory Interventions

Finally, states limit the type, volume, or intensity of the regulations local governments are permitted to impose. These interventions do not claw back land use authority for use by the state or its delegate. Instead, either as a formal or practical matter, these powers are left unused by government, thus resulting in a deregulatory state intervention. For example, Virginia simply prohibits regulation of certain kinds of home-based commercial fishing activities.⁴⁶ This fourth type of intervention does not replace or condition local authority; it simply forbids the application of land use law to discrete subject matters. States, or in the case of the Religious Land Use and Institutionalized Persons Act,⁴⁷ the federal government, simply prohibit land use regulation of certain discrete subject matters.

C. Contemporary Calls for Intervention

While economists and local law scholars are increasingly cognizant of the ways in which local overregulation stymies the national economy, local control continues to dominate our country’s approach to land use policy.⁴⁸ The structure of state and local relations results in near-complete local control of major components of nonfederal policy, including education, land use, and policing. “To the extent that local governments understand the powers they

46. VA. CODE ANN. § 15.2-2307.1 (2018) (“Registered commercial fishermen and seafood buyers who operate their businesses from their waterfront residences shall not be prohibited by a locality from continuing their businesses, notwithstanding the provisions of any local zoning ordinance. This section shall only apply to businesses that have been in operation by the current owner, or a family member of the current owner, for at least 20 years at the location in question. The protection granted by this section shall continue so long as the property is owned by the current owner or a family member of the current owner.”).

47. 42 U.S.C. § 2000cc(a)(1) (2012) (“No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.”).

48. See Briffault, *supra* note 5, at 2048; Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2048 (2000); see also *supra* text accompanying note 5.

exercise as *their* powers, committed to them as a matter of a seemingly pre-political right to self-determination, any effort by the state to limit them is understood as a direct threat to local autonomy.”⁴⁹ And, “once this way of thinking about local control takes hold, it is difficult to overcome.”⁵⁰ In the author’s own experience as an advocate, opponents of state interventions routinely complain that the state seeks to encroach on local power. They never concede that the state is simply reassuming authority that it originally granted to local governments.⁵¹

Understanding why and how states have successfully undertaken deregulatory state interventions should inform future policymaking in this area. To that end, in Part II, I undertake a close examination of four discrete legislative battles that have resulted in deregulatory and clawback interventions in a substantial number of states. Based on this examination, in Parts III and IV, I argue that states ought to take more seriously their role as deregulatory actors in the land use sphere.

II. INTERVENTIONS

Given the myriad problems that result from local control, it might seem inevitable that states will eventually take up the mantle of intervention. One scholar has argued that “[i]f local governments continue to fail to exercise responsible land use decision-making, they will likely forfeit the control and authority they currently possess to a higher level of government.”⁵² But sound policymaking is hardly a given. What follows is an attempt to understand why and when state legislatures intervene to solve land use problems which are culturally, historically, and often legally understood to be the province of local governments.

The four land uses that are the subject of Part II were selected after reviewing every state’s land use laws and identifying matters in which a significant number of states imposed displacing interventions.

49. David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 397 (2001).

50. *Id.*

51. See, e.g., Neena Satija, *1990 Law Spurs Affordable Housing Development, and Anxiety*, CT MIRROR (July 5, 2012), <http://ctmirror.org/2012/07/05/1990-law-spurs-affordable-housing-development-and-anxiety/> [<https://perma.cc/AJV2-E5D6>] (describing Connecticut’s Anti-Snob Zoning Act as “a state statute that interferes with the sovereignty of towns”).

52. Salkin, *supra* note 39, at 1064.

I then focused on the four uses described here: family day care homes, manufactured housing, small-scale alternative energy infrastructure, and group homes. Sometimes interventions appear not in the zoning enabling act but elsewhere in a state's statutes. For example, an intervention in favor of group homes might appear in a state's social services law rather than the zoning enabling act. After reading every state's zoning enabling act and noting various uses that states protected from local overregulation, I searched more broadly, outside of zoning enabling acts. Once all of the states were identified, I procured legislative history for nearly every relevant bill, including initial enactments and later amendments.⁵³ I did not search for, or review, failed bills. The legislative history, supplemented by newspaper accounts, was used not to interpret statutory meaning or legislative intent but to understand which interests sought to advance or halt the bill and which arguments in favor of the bill ultimately convinced legislators to support it.⁵⁴

Before considering each use in turn, an additional explanatory note is appropriate. In many of the cases described below, a displacing intervention requires that localities treat a certain land use just as they treat single-family homes. Traditional American Euclidean zoning⁵⁵ establishes a hierarchy of uses. At the top are single-family homes, which are presumed to have no negative externalities and are, therefore, permitted in every zone. Thus

53. Availability of legislative history varies greatly by state. In some states, no records were available other than bill text. Other states provided reams of transcribed legislative testimony. Most provided something in between.

54. While it is tempting to try to deduce why some states intervene and others do not, this is a very tricky question, particularly when considering multiple unrelated policies. Intervening states are red and blue, large and small. They exist in all regions of the United States. They include states in which local zoning is very restrictive and states in which local zoning is less restrictive. These four land uses were selected in part on the basis that a wide swath of states sought to protect them, and on that basis, they might say something about states generally. They were not selected in an attempt to understand why some states and not others intervene, though future work by myself or others might seek to elucidate those differences.

55. The most fundamental feature of Euclidean zoning, so named for the case *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), is a rejection of mixed-use districts. In addition, Euclidean zoning establishes a hierarchy of residences, excluding multifamily housing from single-family zones but permitting single-family housing in multifamily zones. The basic American zoning ordinance is a pyramid. At the top are the most restrictive zones, which permit only single-family residences. As you go down the pyramid, each zone permits the uses permitted in the more restrictive zones above. As a result, single-family residences are permitted in every zone. At the bottom are the most inclusive zones, which permit everything above plus potentially noxious uses, such as heavy industry and junkyards.

requiring local governments to treat a use just as they treat single-family homes constitutes deregulation.

A. *Family Day Care Homes*

The debate whether to protect family day care homes from land use regulation occurred in multiple states over the course of the 1980s and early 1990s. State agencies responsible for ensuring that child care facilities met public health and safety requirements began to understand that local regulations undermined their mission. The local regulations did not contradict state regulations, and they did not overlap in subject matter or scope. As a result, normal preemption and home rule doctrines did not apply. Nevertheless, local regulations made it harder for state bureaucrats to advance their own function—namely, inspecting and licensing home-based day cares. As a result, perhaps counterintuitively, state bureaucrats became key advocates for deregulation.

In many countries, home-based occupations and small-scale commercial activities are considered “residential” in nature and are permitted as of right in residential zones.⁵⁶ Such is not the case in the United States.⁵⁷ For much of this country’s history, working from home was the norm. With the advent of the industrial revolution, however, work and home became separate locations for a significant number of workers. Euclidean zoning,⁵⁸ itself a response to the industrial revolution, codified and exacerbated the separation.⁵⁹

American zoning ordinances address the possibility that nonresidential uses will inflict negative externalities on residential neighborhoods by banning nonresidential uses entirely. Some have noted in this context that outright prohibition is a heavy-handed approach to regulation. Nicole Stelle Garnett, for example, argues that these restrictions go farther than necessary to protect legitimate

56. SONIA A. HIRT, *ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION* 60–89 (2014).

57. Nicole Stelle Garnett, *On Castles and Commerce: Zoning Laws and the Home-Business Dilemma*, 42 WM. & MARY L. REV. 1191, 1205–10 (2001) (summarizing zoning restrictions on home businesses “in a nutshell”).

58. *See supra* note 55 and accompanying text.

59. Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 201 (2012), also worked to codify the separation by prohibiting certain categories of work in an employee’s home. This prohibition is intended to facilitate enforcement of wage and hour laws that might otherwise be skirted in the context of piecework. FLSA does not prohibit either a business owner or salaried employee from using his or her home for commercial purposes. In these cases, the operative prohibition is local zoning.

local interests in preventing negative externalities.⁶⁰ She proposes that local governments regulate those externalities rather than prohibit home businesses altogether.⁶¹

Garnett argues in favor of easing restrictions on small business.⁶² Bans on home business ignore the “dot com revolution” and are archaic. Home businesses allow working parents to care for their children while earning an income. One primary concern of land use planners, easing traffic, is advanced by home business, many of whose workers walk ten steps rather than drive ten miles to work. Advocates make additional arguments in favor of deregulation: home businesses provide a necessary entry point for start-up enterprises without sufficient capital to pay rent, and “[h]ome-based businesses also bring goods and services into areas whose needs are not being met because they are far from commercial centers.”⁶³ Some local governments, seeking to facilitate entrepreneurial activity, have eased land use restrictions barring home-based small business activities.⁶⁴ But these local governments are the exception rather than the rule. Most continue to prohibit home-based work in residential districts, and, for the most part, states have not intervened.⁶⁵

There is an exception. In the case of family day cares, eighteen states preempt local zoning.⁶⁶ Family day care homes are child care

60. See Garnett, *supra* note 57, at 1239 (“[T]he zoning restrictions on home businesses, like all zoning rules, are not designed solely to prevent externalities.”).

61. *Id.* at 1240.

62. See *id.* at 1197–98.

63. Garrett Atherton, *Half of US Businesses are Home-Based. So Why Do Some Cities Want to Kill Them?*, INST. FOR JUST. (May 5, 2015), <http://ij.org/action-post/half-of-us-businesses-are-home-based-so-why-do-some-cities-want-to-kill-them/> [<https://perma.cc/D5KT-D94F>].

64. Nicole Hong, *More and More There’s No Place Like Home for Small Firms*, WALL ST. J. (Sept. 30, 2013), <http://www.wsj.com/articles/SB10001424127887323734304578543600308218768> [<https://perma.cc/NNZ3-4ZH6> (dark archive)].

65. However, states like Maryland and Vermont have laws that allow home-based work in residential districts. See MD. CODE ANN., HEALTH–GEN. § 21-330.1 (LEXIS through 2018 Reg. Sess.); VT. STAT. ANN. tit. 6, § 3302(39) (LEXIS through 1st Spec. Sess. of 2018).

66. CAL. HEALTH & SAFETY CODE §§ 1597.40–465 (West Supp. 2018); CONN. GEN. STAT. ANN. §§ 8-3e, 8-3f, 8-3j (Westlaw through 2018 Feb. Reg. Sess.); FLA. STAT. ANN. § 125.0109 (West Supp. 2019); HAW. REV. STAT. ANN. § 46-15.35 (Westlaw through Act 220 of the 2018 Reg. Sess.); IND. CODE ANN. § 36-7-4-1108 (Westlaw through 2018 2d Reg. Sess. and 1st Spec. Sess.); MICH. COMP. LAWS ANN. § 125.3206 (Westlaw through 2018 Reg. Sess.); MINN. STAT. ANN. § 462.357 (Subd. 7) (Westlaw through 2018 Reg. Sess.); MONT. CODE ANN. § 76-2-412 (Westlaw through Oct. 1, 2017 sess.); NEB. REV. STAT. ANN. § 43-2616 (Westlaw through 2d Reg. Sess. of 105th Leg.); N.J. STAT. ANN. § 40:55D-66.5b (Westlaw through L.2018, c. 140 and J.R. No. 12); N.Y. SOC. SERV. LAW

centers operated out of a residence, typically the provider's home. If anything, home-based day cares are more likely than other home businesses to impose on their neighborhoods the sort of negative externalities Garnett believes support reasonable local regulation. Children are loud.⁶⁷ Parents are likely to pick up and drop off their children in a car at rush hour, creating traffic concerns.⁶⁸ Family day cares sometimes employ staff who do not live in the home and commute by car. Why, then, is this the one type of home business that benefits from state-granted zoning relief in eighteen states?

Day care providers forced to seek approvals from local land use boards face an uphill battle. Land use boards are famously responsive to homeowners' concerns that uses other than single-family homes might decrease their property values.⁶⁹ Darlene Feldman, a Michigan day care provider and advocate, fought zoning battles on the local level but found that many towns refused to permit "day care in their neighborhoods because they're concerned about property values decreasing."⁷⁰

§ 390(12)(a) (McKinney 2018); OHIO REV. CODE ANN. § 5104.054 (LEXIS through SB 221 of 132d Gen. Assemb.); OR. REV. STAT. ANN. § 329A.440 (Westlaw through 2018 Reg. Sess. & 2018 Spec. Sess.); 45 R.I. GEN. LAWS § 45-24-37(b) (LEXIS through Jan. 2018 Sess.); VT. STAT. ANN. tit. 24, § 4412(5) (LEXIS through 1st Spec. Sess. of 2018); VA. CODE ANN. § 15.2-2291 (2018); WASH. REV. CODE ANN. §§ 35.63.185(1), 36.70.757(1) (Westlaw through 2018 Reg. Sess.); WIS. STAT. ANN. § 66.1017 (Westlaw through 2017 Act 370). These statutes do not explicitly address restrictions on home businesses included in restrictive covenants, homeowner association rules, condominium documents, and residential leases. Courts in some states have disallowed such restrictions, finding that they are against public policy. They have based that finding, in part, on the states' prohibition on local zoning restrictions undermining family day care operations. *See, e.g.,* Quinones v. Bd. of Managers of Regalwalk Condo. I, 673 N.Y.S.2d 450, 453–54 (N.Y. App. Div. 1998) (concluding that a condominium declaration prohibiting the operation of family day cares is barred by public policy and unenforceable (citing N.Y. SOC. SERV. LAW § 390 (McKinney 2018))).

67. Kathy Prentice, *Disquiet on the Home Day-Care Front: Proposal to Challenge Zoning Restrictions*, DETROIT FREE PRESS, Feb. 4, 1988, at 1G [hereinafter Prentice, *Disquiet on the Home Day-Care Front*] (citing neighbors' opposition to a home-based day care in Hazel Park, Michigan, on the basis that "the children's presence created traffic and noise").

68. Patricia Anstett, *Burgeoning Day Care Demand Spotlights Debate over Zoning*, DETROIT FREE PRESS, June 9, 1988, at 3A (quoting attorney for Gross Pointe Woods, stating that local zoning did not permit day care homes in residential neighborhoods because "it generates a great deal of motor vehicle traffic, and it's the operation of a business out of a residence").

69. FISCHER, HOMEVOTER HYPOTHESIS, *supra* note 3.

70. Kathy Prentice, *Home Care: About a Quarter of a Million Michigan Children Spend Their Weekdays in Unregulated Day Care Programs*, DETROIT FREE PRESS, Apr. 14, 1987, at 1B [hereinafter Prentice, *Home Care*].

Even if a provider entertained a hope of prevailing before a local land use board, he or she faced prohibitively high entry costs. As a 1990 New York Times article described, family day care providers are often “discovered after an angry neighbor files a complaint and then they are treated as illegal businesses in residential zones. It is possible to circumvent zoning by applying for variance. But this can be a complicated process lasting months and costing thousands of dollars in legal fees.”⁷¹

A Connecticut provider told the *Hartford Courant*, “[w]e’re not getting rich for what we do, so for us to spend the money and go before several boards is hard.”⁷² In Washington State, a state employee described “get[ting] calls from women—often nearly in tears—who find out they will have to spend up to \$500 for a [local zoning] permit after they have already received the [State of Washington] licensing[.]”⁷³ Citing not just financial costs but the value of providers’ time, Feldman asked the *Detroit Free Press*, “[h]ow do you change the world when you’re busy changing diapers?”⁷⁴ The *Detroit Free Press* documented multiple instances of family day care providers seeking land use approvals, only to be denied in the face of local opposition from nearby homeowners.⁷⁵ One such provider, while waiting for her case to be resolved in court, stopped watching children in her own house. Instead, she commuted to “one of her day-care families’ homes. If she stops by her own house during the day, [she]

71. Anthony DePalma, *When Day Care Clashes with Zoning Laws*, N.Y. TIMES, Nov. 6, 1990, at B6. One recent study reports that the average family day care provider grosses just \$20,000 to \$25,000 a year while incurring operating expenses of up to \$15,000, greatly limiting providers’ ability to pay significant application or licensing fees or to pay attorneys to help them navigate complicated regulatory processes. See WILLIAM WAITE ET AL., CONN. CTR. FOR ECON. ANALYSIS, ASSESSING THE ECONOMIC IMPACT OF THE AOK FAMILY CHILD CARE LICENSING PROGRAM 21, 23 (2011), https://webshare.business.uconn.edu/ccea/studies/CCEA_AOK-EconImpact_2011jul.pdf [<https://perma.cc/T493-VK9Q>]. A variance is a site-specific permission to deviate from the applicable zoning ordinance where application of the ordinance to the site would result in some hardship. See, e.g., CONN. GEN. STAT. ANN. §§ 8-3d, 8-6 (Westlaw through 2018 Feb. Reg. Sess.).

72. Ann Marsh, *State Opinion Limits Local Restrictions on Home Day Care*, HARTFORD COURANT, Aug. 16, 1990, at C13B.

73. *Children’s Bill Wins More Praise*, SPOKANE DAILY CHRON., Feb. 8, 1989, at A2.

74. Prentice, *Home Care*, *supra* note 70.

75. Kathy Prentice, *Day Care Operators in Conflict with Zoning*, DETROIT FREE PRESS, Feb. 25, 1988, at 7A; Prentice, *Disquiet on the Home Day-Care Front*, *supra* note 67; see also Kim Murphy, *Supervisors Approve Zoning Amendment to Ease the Licensing of Day-Care Homes*, L.A. TIMES, June 21, 1984, at R6.

‘has to pull our car way up front so nobody can see her and sneak them (the children) in,’” her husband told the *Detroit Free Press*.⁷⁶

Even in the face of these regulatory hurdles, some proponents of family day care hesitated to advance a deregulatory solution. In a 1972 report funded by the Federal Office of Economic Opportunity, advocates identified zoning as an unnecessary obstacle to the development of day care centers. The report found that “municipal planning people” considered day care a “‘problem use,’ to be permitted only under certain careful conditions.”⁷⁷ As a result, local governments excluded day cares from residential zones, so as to protect residential uses from the “commercial” provision of child care, but also excluded day cares from commercial and industrial zones, so as to protect children from commercial and industrial uses.⁷⁸ Counterintuitively, the report found that “the better a job of zoning and planning a city is doing, the more obstacles it is creating for the care of its children.”⁷⁹ Underlying this claim is an assumption that more regulations are generally “better.” Consistent with that view, the task force rejected displacing interventions and instead advocated “reaching local planning people with educational materials through their professional organizations, meeting with local citizens, and the state and federal agencies to which they relate, to bring about changes in local zoning regulations and philosophy.”⁸⁰ The task force accepted that “zoning is a local responsibility and function”⁸¹ and sought to influence local decision-making rather than reallocate decision-making power.

Unlike the Day Care and Child Development Council of America, the Cato Institute did not hesitate to advocate deregulatory state intervention that sought to prohibit local governments from using zoning to regulate day care facilities serving six or fewer children.⁸² A 1985 Cato Institute report cites local zoning as an

76. Prentice, *Disquiet on the Home Day-Care Front*, *supra* note 67.

77. Gwen G. Morgan, *Preface to DAY CARE & CHILD DEV. COUNCIL OF AM., INC., MODELS FOR DAY CARE LICENSING: CHILD CARE BULLETIN NO. 8: ZONING FOR DAY CARE 2* (1972).

78. *Id.*

79. *Id.* at 3.

80. *Id.*

81. *Id.* at 7.

82. KAREN LEHRMAN & JANA PACE, CATO INST., *DAY-CARE REGULATION: SERVING CHILDREN OR BUREAUCRATS?* (1985), <http://www.cato.org/pubs/pas/pa059.html> [<https://perma.cc/4LZU-V8JA>] (endorsing “preemption statutes to exempt family day-care homes from local zoning ordinances”). At the time the report was published, six states had adopted such statutes. *Id.*

especially egregious example of overregulation.⁸³ The report also found that state licensing and minimum staffing ratios increased the cost of day care but found, ultimately, that “[t]he highest hurdle facing family providers is often the first—obtaining the approval of local zoning officials.”⁸⁴ The report authors opined that zoning regulations, being both onerous and useless, exacerbated the problem.⁸⁵ The report argued that zoning restrictions were irrelevant to any legitimate aims of regulation: “[O]f all local day-care regulations, however, zoning statutes have the least relevance to the quality of care and the safety of the children.”⁸⁶ Exacerbating the likelihood that regulations would be used for purposes irrelevant to the quality of care provided to children, local zoning board hearings provided a forum for “neighborhood squabbling” and “the airing of neighborhood tensions unrelated to the issue of child care.”⁸⁷

Advocates took the route suggested by Cato. At the state capitol, day care providers had the opportunity to fight the battle once. If they won, they put an end to repeated local battles at which individual providers were often outgunned by neighbors. California, Connecticut, Florida, Michigan, and Washington provide representative examples of the debates and storytelling that accompanied state interventions intended to protect family day care providers from overzealous zoning.

In 1987, Connecticut⁸⁸ enacted a prohibition on any local zoning regulation that “PROHIBIT[ED] THE OPERATION OF ANY FAMILY DAY CARE HOME, CHILD DAY CARE CENTER OR

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. While I have not reviewed local zoning ordinances to confirm that towns actually comply with any of the prohibitions described in this Article, it is almost certainly true that some do not and that affected property owners may be unaware that the prohibited zoning regulations are unenforceable. See Margaret F. Brinig & Nicole Stelle Garnett, *A Room of One's Own? Accessory Dwelling Unit Reforms and Local Parochialism*, 45 URB. LAW. 519, 523–24 (2013) (finding that localities subject to state deregulatory interventions intended to encourage the development of accessory dwelling units “have responded to local political pressures by delaying the enactment of local ADU legislation (and, in a few cases, simply refusing to do so despite the state mandate), imposing burdensome procedural requirements that are contrary to the spirit, if not the letter, of the state-law requirement that ADUs be permitted ‘as of right,’ requiring multiple off-street parking spaces, and imposing substantive and procedural design requirements”).

GROUP DAY CARE HOME IN A RESIDENTIAL ZONE.”⁸⁹ The explicit “statement of purpose” was “[t]o prohibit the restrictive zoning of family day care homes, child day care centers and group day care homes.”⁹⁰

Connecticut’s deregulatory intervention on behalf of family day care providers was not motivated by a desire to decrease the cost of doing business. Instead, legislators were concerned with the indirect consequences of local land use prohibitions on family day care homes. Legislators worried that providers might not seek state licensure for fear of bringing their business operations to the attention of local zoning authorities.⁹¹ Instead of seeking licensure, providers would then operate unlicensed day care homes.

Thus, local regulations threatened a state agency’s policy agenda, but not because the local regulations addressed matters also regulated by the state. Local governments did not attempt to impose one set of safety requirements on family day care homes while the state imposed another. Instead, local law forced day care homes underground. The threat of falling afoul of local zoning authorities encouraged or required family day care homes to operate without a state license. When family day care homes operate without a state license, the state loses its opportunity to perform background checks on providers and confirm that the home meets safety requirements. As the sponsoring legislator stated on the floor of the Connecticut House of Representatives, “[t]he problems that we found in the state is that the majority of these classes of day care centers presently are underground, where we have no control of what’s happening and no inspections to protect the young children in these homes.”⁹² This

89. An Act Concerning the Zoning of Child Day Care Facilities, Pub. Act 87-232, § 8-2, 1987 Conn. Acts 317, 317–18 (Reg. Sess.) (1987) (codified as amended at CONN. GEN. STAT. ANN. § 8-2 (Westlaw through 2018 Feb. Reg. Sess.)).

90. Comm. B. 441, 1987 Gen. Assemb., Jan. Sess. (Conn. 1987).

91. Connecticut’s licensure process includes background checks on the provider and any other residents of the home as well as a safety check of the home itself. CONN. GEN. STAT. ANN. § 19a-87b(a), (c) (Westlaw through 2018 Feb. Reg. Sess.). It also sets a maximum number of children who can be enrolled at any time (typically up to six children total, four of whom must be at least two years old). *Id.* § 19a-77(a)(3). While family and group day care homes are subject to regulations regarding their operations, they are not subject to any building code requirements beyond what is required for residences, whether single or multifamily.

92. *An Act Concerning the Zoning of Child Day Care Facilities: Hearing on S.B. 441 Before the H. Comm. on Planning and Dev.*, 1987 Gen. Assemb., Reg. Sess. 5489 (Conn. 1987) [hereinafter *Hearing on S.B. 441*] (statement of Rep. Gelsi).

concern is echoed in the 1985 Cato Institute report described above.⁹³ Cato worried about market inefficiencies, specifically that parents would have trouble finding “underground” day cares and that many would-be providers simply would not enter the market at all.⁹⁴

In the Connecticut legislature, lawmakers focused on the safety risks associated with unregulated family day cares:

We’re either going to put them in places where people are going to have the courage to get licensed so that we know where they’re at, or we’re going to keep them underground and I think to keep the[m] underground is going to be a shame and the first time that something goes wrong in one of those unlicensed homes, I can tell you what the screaming in this Chamber is going to be. We got to get them licensed and we got to regulate them.⁹⁵

Lawmakers echoed bureaucrats’ longstanding concerns. Four years earlier, Connecticut’s director of the Office of Child Day Care, Frances Roberts, told the *New York Times* that in the face of stringent local requirements, “the number of homes may diminish or they may go underground.”⁹⁶

The same debate occurred in Florida, Michigan, California, and Washington, all of which similarly require that family day cares be permitted in residential zones.⁹⁷ The primary supporting argument in favor of the Michigan bill, for example, was that “the alternative to [bill passage], i.e. exclusionary zoning laws that drive child care homes underground, is unacceptable.”⁹⁸ One licensed provider told the *Detroit Free Press* that she worried that prohibitive zoning laws prevented unlicensed providers from seeking licensure: “Our fear is that with mallets over their heads, providers are not going to step forward to be licensed.”⁹⁹

93. Cato estimated that “90 percent of home day-care providers operate without a license” and found that “[t]he most frequently cited reason for ‘going underground’ is the complex and costly maze of requirements that must be met.” LEHRMAN & PACE, *supra* note 82.

94. *Id.*

95. *Hearing on S.B. 441, supra* note 92, at 5493–94 (statement of Rep. Gelsi).

96. Andree Brooks, *Child-Care Homes Divide Communities*, N.Y. TIMES, July 19, 1984, at C1.

97. For the time period in question, Connecticut makes available transcripts of the Connecticut General Assembly’s floor discussions and some committee hearings. Many other states provide only minutes of these meetings.

98. MICH. SENATE FISCAL AGENCY, BILL ANALYSIS: S.B. 687, 688, & 689 (1988).

99. Prentice, *Home Care, supra* note 70.

Bureaucrats' and advocates' fears regarding unlicensed family day cares were not simply theoretical. In Massachusetts, the Town of Norwood's building inspector used a list of family day care providers registered with the state's Office of Children to find the providers in violation of local law.¹⁰⁰ In Florida, state law required registered providers to comply with all local laws. As a result, county officials refused to register family day care providers who resided in municipalities that prohibited family day care.¹⁰¹ When a bill removing local authority to zone family day cares passed the legislature, the director of Broward County's Social Services Division's Child Care Unit "predicted that many mothers caring for children in areas where it is illegal 'are now going to come out of the woodwork.'"¹⁰² In short, across states, local laws repeatedly undermined the state's requirement that family day care providers register and undergo background checks.

Not surprisingly then, bureaucrats led the charge to remove local authority to use land use laws to prohibit family day cares. In Michigan, the state's own Department of Social Services was the bill's primary proponent.¹⁰³ On the floor of the Michigan Legislature, bill sponsors bemoaned the fact that "[i]t is often because the operators of such homes, generally women with families, have tried to comply with the State licensing requirements that the existence of the homes has become public knowledge and the operators have become the targets of complaints and harassment."¹⁰⁴ The Michigan Bill Analysis estimated that "there are as many as eight 'underground' homes for each licensed home" and queried whether "such a situation, i.e.,

100. Kay Longcope, *Day Care and the Zoning Laws*, BOS. GLOBE, Oct. 28, 1983, at 15. Massachusetts responded to local objections to proposed displacing interventions by adopting a default rule favoring family child care rather than adopting a true displacing intervention. MASS. GEN. LAWS ch. 40A, § 3 (Westlaw through ch. 322 of the 2018 2d Ann. Sess.) ("Family child care home and large family child care home, as defined in section 1A of chapter 15D, shall be an allowable use unless a city or town prohibits or specifically regulates such use in its zoning ordinances or by-laws.").

101. Jenni Bergal, *Political Infighting Stalls Day Care Bill*, SUN-SENTINAL (Tallahassee May 10, 1986), http://articles.sun-sentinel.com/1986-05-10/news/8601280280_1_day-care-family-day-care-homes [<https://perma.cc/MH5H-4EAJ>].

102. Rick Pierce, *Senate Passes Home Day-Care Bill*, SUN-SENTINAL (Tallahassee June 5, 1986), http://articles.sun-sentinel.com/1986-06-05/news/8602030051_1_home-day-day-care-care-operators [<https://perma.cc/468R-3R6B>].

103. MICH. HOUSE LEGISLATIVE ANALYSIS SECTION, BILL ANALYSIS: SENATE BILLS 687-89 (1988). Other proponents included the Michigan Trial Lawyers Association, various child care associations, and a parents' group.

104. MICH. SENATE FISCAL AGENCY, *supra* note 98; *see also supra* text accompanying note 98.

unlicensed, unregulated homes [should] be permitted to continue or should the operators of these homes be encouraged to apply for licensure with the assurance that they will not be subject to exclusionary zoning laws?”¹⁰⁵

The desire to increase the availability of “day care for single family parents and/or two parents that are working”¹⁰⁶ provided an additional motivation for intervention.¹⁰⁷ In all of these states, the notion that family day cares serve children’s and parents’ needs provided only a secondary motivation. In Connecticut, no legislator mentioned quality early childhood care on the floor or in a committee meeting. Just one person testified on this point before the committee.¹⁰⁸ Similarly, the desire to eliminate a barrier to entrepreneurship surfaced in just one piece of handwritten testimony in Connecticut and in no other state.¹⁰⁹ These were secondary arguments. The primary argument in favor of intervention was advancing state bureaucratic functions.

While state agencies with regulatory oversight over family day care providers supported these bills, the opposition included the municipal lobby and various individual towns and neighborhood associations.¹¹⁰ The opposition argued that the bill “would set a precedent of allowing State interests to supersede local zoning interests which take into account the various types and needs of communities.”¹¹¹ In other words, the state’s solution failed to account for the on-the-ground facts in different towns, knowledge held by and best applied by each local zoning authority. In addition, opponents

105. MICH. SENATE FISCAL AGENCY, *supra* note 98 (assuaging the fears of those who might argue that day care centers would attract traffic, trespassers, and other annoyances).

106. *Hearing on S.B. 441, supra* note 92, at 5489 (statement of Rep. Gelsi).

107. The bill was part of a package of bills, others of which more explicitly and directly furthered the goal of creating additional day care slots in the state. *Id.*; see *Work and Family Agenda: Mar. 12, 1987, Hearing Before the J. Standing Comm. on Family & the Workplace*, 1987 Gen. Assemb., Reg. Sess. 5 (Conn. 1987) (statement of Ms. Simon).

108. *Work and Family Agenda: Mar. 10, 1987, Hearing Before the J. Standing Comm. on Family & the Workplace*, 1987 Gen. Assemb., Reg. Sess. 725 (Conn. 1987) (statement of Gail Hamm) (“It is clear that children should be cared for in areas of town where there are trees—not asphalt. Where there is grass, rather than traffic. Child care facilities belong in residential areas. There is a clear state purpose and necessity to provide greater quality and quantity of day care and we encourage you to do your best.”).

109. *Id.* at 750 (statement arguing that inconsistent regulations across jurisdictions put providers out of business).

110. See, e.g., MICH. HOUSE LEGISLATIVE ANALYSIS SECTION, *supra* note 103; Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 642–45 (2001) (discussing how local governments are very effective lobbyists of state government).

111. MICH. SENATE FISCAL AGENCY, *supra* note 98.

objected to “usurping local planning and local zoning to achieve a special interest” and argued that the bill undermined democracy by “cutting out the local units of government; cutting out the neighborhoods.”¹¹² One objector testified that the bill constituted a “derogation of the homeowners rights to live on a piece of property which is zoned residential”¹¹³

Intervention statutes did not, however, ignore all local concerns. They simply required local regulation to be tailored to specific local concerns. While Michigan, for example, required towns to permit family day cares in residential zones, it gave credence to certain local concerns regarding larger group day cares.¹¹⁴ Towns are required to permit larger home-based day cares only if they meet state statutory criteria intended to address various local concerns.¹¹⁵ Larger facilities must be dispersed.¹¹⁶ They must meet certain parameters set by the state with respect to hours of operation, parking, and signage.¹¹⁷ But they must also meet *local* parameters: they must have appropriate fencing “as determined by the local unit of government”¹¹⁸ and must be maintained “consistent with the visible characteristics of the neighborhood.”¹¹⁹

The sphere of local influence is limited but not eliminated. In essence, the state identifies discrete legitimate issues of local concern and incorporates them into the statute. It acknowledges that there may be negative externalities at the local level. Rather than allow the locality to prohibit the use, which would result in the loss of positive externalities experienced at the state level, it requires localities to tailor their regulation to the local impacts acknowledged by the statute.¹²⁰ This kind of intervention—refusing local regulators the power to prohibit a use but permitting them to regulate certain enumerated aspects of that use—is an example of a tailoring requirement that limits local authority to regulate land use to narrow

112. 2 S. JOURNAL, 1988 Leg., Reg. Sess. 2853 (Mich. 1988).

113. *Id.* at 2852.

114. MICH. COMP. LAWS ANN. § 125.3206(4) (Westlaw through 2018 Reg. Sess.).

115. *Id.*

116. A group day care is not entitled to a permit unless it is at least 1500 feet from a community-based institution, such as a substance abuse treatment facility, halfway house, or another group day care. *Id.*

117. *Id.* § 125.3206(4)(d)–(f).

118. *Id.* § 125.3206(b).

119. *Id.* § 125.3206(c).

120. FISCHER, HOMEVOTER HYPOTHESIS, *supra* note 3 (distinguishing between liability rules at the state level and property rules at the local level).

requirements intended to address truly local impacts. That model will reprise throughout the three remaining legislative history case studies.

B. Manufactured Housing

Manufactured homes, or mobile homes, are factory-built structures that require minimal assembly on-site to render them habitable. They may be placed upon a foundation or tied down upon delivery. But the bulk of the construction process takes place off-site, in a factory. Because they are factory built, they are mass produced and benefit from economies of scale and assembly line methods. As a result, they are less expensive to construct than the alternative, known in contrast as site-built homes.¹²¹ Some portion of these cost savings pass down to the consumer. Manufactured housing has long served as unsubsidized affordable housing for low- and moderate-income people.¹²²

As evidenced by zoning codes, manufactured homes are perceived by local regulators to be less aesthetically pleasing and of lower quality than site-built homes. “[Z]oning laws . . . treat [manufactured homes] differently from conventional site-built homes. Zoning boards routinely push [manufactured home] parks to undesirable, low-property-value areas.”¹²³ Fearing that these homes will lower the values of nearby properties, municipal governments use land use regulations to relegate manufactured homes to designated mobile home parks or to prohibit them altogether. As a result, local regulations restrict availability of a less expensive alternative to site-built housing, thus inflating housing costs.

Local governments regulate manufactured housing for many of the same reasons that they regulate land uses, even single-family residential uses, generally. First, precisely because it is less expensive, manufactured housing yields less in property taxes than site-built single-family homes.¹²⁴ Fiscal zoning—using land use regulation to

121. See Ann M. Burkhart, *Taxing Manufactured Homes*, 67 TAX LAW. 909, 912–13 (2014).

122. *Id.* at 909 (“Manufactured homes (commonly called mobile homes) are the most important form of unsubsidized affordable housing in this country. They are home to more than 22 million people. The residents are predominantly lower-income, including a large proportion of older people.”).

123. Amy J. Schmitz, *Promoting the Promise Manufactured Homes Provide for Affordable Housing*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 384, 395 (2004) (footnotes omitted).

124. *Id.* (“Historically, zoning boards shunned [manufactured homes] because they were taxed as vehicles and therefore drained community services without contributing to

maximize property tax revenues while minimizing local expenditures—is hardly limited to manufactured housing.

Local governments also regulate manufactured housing in an effort to preserve property values.¹²⁵ Undergirding much of local zoning law is an assumption that a neighborhood’s property values will fall and rise in concert. The value of a well-maintained single-family home will turn in large part on whether it is adjacent to another well-maintained single-family home, a junkyard, or something in between. Both because they are responsive to the concerns of existing residents and, due to fiscal zoning concerns, local governments seek to ensure that property values are high. If local governments perceive manufactured housing to be more akin to a junkyard than to a well-maintained single-family home, they may prohibit manufactured housing entirely. Alternatively, towns can segregate them from other residential communities. Zoning codes that require manufactured housing to be located in mobile home parks or limit manufactured housing to multifamily, commercial, or industrial zones seek to protect single-family homes from the possibility that property values in the most exclusive neighborhoods, those zoned for single-family use only, will decline as a result of the presence of manufactured housing.¹²⁶

These policy considerations are precisely those that drive much local residential zoning. They are no more or less sensible than zoning codes that require minimum built square footage,¹²⁷ regulate aesthetics,¹²⁸ or establish minimum lot sizes,¹²⁹ all restrictions that seek

local property tax revenues in the same manner as real estate. Although [manufactured homes] are now taxed as real estate, policy makers continue to justify [manufactured homes] zoning restrictions based on [manufactured homes’] inability to generate property tax revenues on par with conventional homes.”).

125. See, e.g., *Tex. Manufactured Hous. Ass’n v. City of Nederland*, 101 F.3d 1095, 1097 (5th Cir. 1996); *Mar. 24, 1999, Hearing on S.B. 323 Before the S. Comm. on Gov’t Affairs*, 1999 Leg., 70th Sess. 5–6 (Nev. 1999) [hereinafter *Mar. 24 Hearing on S.B. 323*] (detailing how one commenter on the subject believed it was only a myth that manufactured housing depressed property values and cited to several studies); *id.* at 20 (detailing the opinions of one lobbyist on the subject who believed “it would be unfair [to allow manufactured housing] to property owners who have relied on established law in making substantial investments in property”).

126. See Schmitz, *supra* note 123, at 395.

127. 3 EDWARD H. ZIEGLER, ET AL., *RATHKOPF’S THE LAW OF ZONING AND PLANNING* § 54:11 (4th ed. 2005).

128. See generally Anika Singh Lemar, *Zoning as Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics*, 90 IND. L.J. 1525 (2015) (summarizing the history of aesthetic zoning and noting that the advent of zoning provisions singularly focused on aesthetics of residential neighborhoods post-1980).

to protect property values and, as a result, increase and inflate housing prices.

Nevertheless, over thirty states restrict local authority to regulate manufactured housing.¹³⁰ The vast majority of these states otherwise impose no meaningful restrictions on local regulation of housing.¹³¹ While advocates and scholars cite manufactured housing's price point as its primary benefit, clearly something other than simple concern for affordability drives these state laws.

States do not follow a single model when restricting local ability to regulate manufactured housing.¹³² Generally these statutes restrict

129. See generally Gavin L. Phillips, Annotation, *Validity of Zoning Laws Setting Minimum Lot Size Requirements*, 1 A.L.R. 5th 622 (1992) (dealing with minimum lot size requirements as a form of municipal density control).

130. ARK. CODE ANN. § 14-54-1604 (LEXIS through 2018 2d Extraordinary Sess.); CAL. GOV'T CODE §§ 65852.3, .11 (West 2018); COLO. REV. STAT. §§ 31-23-303(3), 30-28-115 (LEXIS through 2018 Legis. Sess.); FLA. STAT. ANN. § 553.35, .38 (West 2019); GA. CODE ANN. § 8-2-112 (2015); IDAHO CODE § 67-6509B (LEXIS through 2018 Reg. Sess.); IOWA CODE ANN. §§ 335.30, 414.28 (Westlaw through 2018 Reg. Sess.); KAN. STAT. ANN. § 12-763 (Westlaw through July 1, 2018); KY. REV. STAT. ANN. § 100.348(3) (Westlaw through 2018 Reg. Sess.); ME. REV. STAT. ANN. tit. 30-A, § 4358 (Westlaw through 2d Spec. Sess. of 128th Leg.); MICH. COMP. LAWS ANN. § 125.2307 (Westlaw through P.A.2018, No. 361, also 367, of 2018 Reg. Sess.); MINN. STAT. ANN. §§ 394.25, 462.357 (Westlaw through 2018 Reg. Sess.); MISS. CODE ANN. § 17-1-39 (Westlaw through 2018 Reg. and 1st Extraordinary Sess.); MONT. CODE ANN. §§ 76-2-202, -302 (Westlaw through Oct. 1, 2017 sess.); NEB. REV. STAT. ANN. §§ 14-402, 23-114 (Westlaw through 2d Reg. Sess. of 105th Leg.); NEV. REV. STAT. ANN. §§ 278.02095, .02325 (Westlaw through 79th Reg. Sess.); N.H. REV. STAT. ANN. § 674:32 (Westlaw through ch. 379 of 2018 Reg. Sess.); N.J. STAT. ANN. §§ 40:55D-104 to -105 (Westlaw through L.2018, c. 140 and J.R. No. 12); N.M. STAT. ANN. § 3-21A-3 (Westlaw through 2d Reg. Sess. of 53rd Leg.); N.Y. EXEC. LAW § 616 (McKinney Supp. 2018); N.C. GEN. STAT. §§ 153A-341.1, 160A-383.1 (2017); OHIO REV. CODE ANN. §§ 303.212, 519.212 (LEXIS through SB 221 of 132d Gen. Assemb.); OR. REV. STAT. ANN. §§ 197.312, .314, .480, .493 (Westlaw through 2018 Reg. and Spec. Sess. of 79th Legis. Assemb.); 53 PA. STAT. ANN. § 10604 (Westlaw through 2018 Reg. Sess. Acts 1 to 153 and 155 to 164); S.C. CODE ANN. § 23-43-130 (2018); S.D. CODIFIED LAWS § 11-10-5 (Westlaw through 2018 Reg. and Spec. Sess.); TENN. CODE ANN. § 13-24-201 (LEXIS through 2018 Reg. Sess.); TEX. LOC. GOV'T CODE ANN. §§ 231.074, .104, .133 (Westlaw through 2017 Reg. and 1st Called Sess. of 85th Leg.); UTAH CODE ANN. §§ 10-9a-514, 17-27a-513 (LEXIS through 2018 2d Spec. Sess.); VT. STAT. ANN. tit. 24, § 4412 (LEXIS through 2018 1st Spec. Sess.); WASH. REV. CODE ANN. §§ 35.21.684, 36.01.225 (Westlaw through 2018 Reg. Sess.); W. VA. CODE ANN. § 8A-7-2 (Westlaw through 2018 1st Extraordinary Sess.).

131. California, New Hampshire, New Jersey, and Pennsylvania are exceptions. See CAL. GOV'T CODE §§ 65852.3, .11 (West 2018); N.H. REV. STAT. ANN. § 674:32 (Westlaw through ch. 379 of 2018 Reg. Sess.); N.J. STAT. ANN. §§ 40:55D-104 to -105 (Westlaw through L.2018, c. 140 and J.R. No. 12); 53 PA. STAT. ANN. § 10604 (Westlaw through 2018 Reg. Sess. Acts 1 to 153 and 155 to 164).

132. S. Mark White, *State and Federal Planning Legislation and Manufactured Housing: New Opportunities for Affordable, Single-Family Shelter*, 28 URB. LAW. 263, 267-69 (1996) ("State anti-discrimination laws directed to manufactured homes generally

the ability of local governments to treat manufactured housing differently from site-built housing. These statutes permit local governments to subject manufactured housing to generally applicable zoning requirements, including height restrictions, setback requirements, and aesthetic mandates. They do not allow local governments to single out manufactured housing for additional regulation, though some permit very limited bulk and aesthetic restrictions particular to manufactured housing.¹³³

All of these bills passed despite sentiment, expressed in both public hearing testimony and floor debate, that they unnecessarily interfered with local control of land use regulation. As one municipal official argued before the Washington State Legislature, they “preempt[] the ability of a local government to make zoning decisions that serve the best interests of the community. Zoning should continue to be a matter of local control and there is no need for the state to intervene with respect to manufactured homes.”¹³⁴

Nevada’s statute, and its legislative history, is typical of displacing interventions that favor manufactured housing. As a result of legislation passed in 1999, Nevada defines the term single-family residence to include manufactured homes, provided those homes meet certain state mandates.¹³⁵ Just as Connecticut deregulated family day cares by requiring local governments to permit them in residential (including single-family) districts, Nevada deregulated manufactured housing by requiring that it be permitted in those very same zones.¹³⁶ The Nevada statute, like the California alternative

tend to follow four models: accommodation legislation, equal treatment legislation, residential districting legislation, and legislation barring the complete exclusion of manufactured homes from a community.”).

133. *E.g.*, CAL. GOV’T CODE § 65852.3 (West 2018); NEB. REV. STAT. ANN. § 14-402 (Westlaw through 2d Reg. Sess. of 105th Leg.). Nebraska allows local governments the option to impose requirements for a minimum square footage of nine hundred feet, a minimum roof pitch, and a nonreflective roof. § 14-402. In addition, Nebraska permits local governments to subject manufactured housing to architectural design regulations so long as such apply to all housing in the relevant zone. *Id.* California permits manufactured-housing-specific regulation of roof overhang, roof material, and siding material, but the requirements vis a vis material cannot “exceed” those applicable to site-built housing. § 65852.3.

134. H.B. REP. ON S.B. 6593, 2004 Leg., 58th Sess., at 3 (Wash. 2004), <http://lawfilesexternal.wa.gov/biennium/2003-04/Pdf/Bill%20Reports/House/6593.HBR.pdf> [<https://perma.cc/HJ35-F2S5>] (summarizing Mark Brown’s testimony before the State of Washington’s House Committee on Local Government).

135. NEV. REV. STAT. ANN. § 278.02095 (Westlaw through 79th Reg. Sess.).

136. *Id.* As a general matter, American zoning codes do not set density floors on residential housing. As a result, while multifamily homes may be prohibited from single-

energy statute described below and the Michigan family child care statute described above, validates local aesthetic concerns. The statute itself sets state standards for certain aesthetic elements.¹³⁷ It then imposes tailoring requirements, restricting local regulation to certain enumerated aesthetic considerations including siding materials, roofing materials, and covering above-ground foundations.¹³⁸

Introducing the bill in committee, Senator Mark E. Amodei presented the bill as a deregulatory intervention, one that would undo restrictions on industry and limitations on consumer choice that undermined free markets and affordability.¹³⁹ He almost immediately anticipated the objection that the bill undermined “local control.”¹⁴⁰ He argued, however, that “whether [a structure] is a stick-built home or a manufactured home,” “the land uses are identical.”¹⁴¹ As a result, local control of land use is not undermined by requiring similar treatment of manufactured and site-built homes.

Amodei framed his argument in terms of both equity to the manufactured home industry and the manufactured home resident, stating that “I think there are good reasons for the evolution of this industry to be given a fair shot at giving people a choice.”¹⁴² Manufactured housing, like alternative energy infrastructure, but unlike family day care homes, is represented in state legislatures by an industry lobby that can seek to combat the influence of lobbyists representing local governments. That lobbying force includes both manufacturers and the various professional service organizations that are employed by them.¹⁴³ Indeed, the Nevada Manufactured Housing

family zones, single-family homes are nearly always permitted in multifamily zones. See Sonia Hirt, *The Devil is in the Definitions: Contrasting American and German Approaches to Zoning*, 73 J. AM. PLAN. ASS'N 436, 439 (2007).

137. The Nevada statute applies only to manufactured housing units that are 1200 square feet or larger. NEV. REV. STAT. ANN. § 278.02095(2)(a)(5) (Westlaw through 79th Reg. Sess.).

138. The statute further limits such regulations by providing that these standards must be objective and documented clearly and must not be adopted to discourage or impede the construction or provision of affordable housing, including, without limitation, the use of manufactured homes for affordable housing. *Id.* § 278.02095.

139. *Mar. 24 Hearing on S.B. 323*, *supra* note 125, at 2–4 (statement of Sen. Amodei, Guest Legislator).

140. *Id.* at 3–4.

141. *Id.* at 3.

142. *Id.* at 4.

143. *Who We Are*, MANUFACTURED HOUSING INST., <https://www.manufacturedhousing.org/who-we-are/> [<https://perma.cc/6ZBT-RNZZ>].

Association not only testified in favor of the bill but also, at Senator Amodei's invitation, presented the details of the bill to the committee.¹⁴⁴

In addition, Amodei argued that the bill would enable consumer choice.¹⁴⁵ A few minutes later, a lobbyist for the Nevada Manufactured Housing Association echoed this free market argument in favor of the bill. He argued that because of zoning restrictions, owners of manufactured homes are locked into renting space at mobile home parks and have no realistic opportunity to move their homes to a more affordable lot, because local regulations prohibit it. If instead they "were permitted to move their home to a single-family residential lot, and many would like this option, a level of competition would be added to the mobile home park lot rents."¹⁴⁶ Testifying in favor of the bill, Karl Braun, President of the Nevada Association of Manufactured Homeowners, repeated this point. The rent he paid for the land under his home continued to steadily increase. He hoped that this bill would enable him to move his home to land he owned.¹⁴⁷

Amodei also argued that the fact that the state authorizes local governments to regulate land use "means that the state has always been in the planning and zoning business."¹⁴⁸ This is a line of reasoning—that the police power originates with the state which then delegates it to local governments—heard often in law school classrooms and not much anywhere else. Once local authority to regulate land use is a commonly accepted background principle, it is very hard to dislodge it, even where the law is, on its face, quite clear that ultimate authority to exercise the police power rests with the state.

144. *Mar. 24 Hearing on S.B. 323*, *supra* note 125, at 5 (statement of Charles W. Joerg, Lobbyist, Nevada Manufactured Housing Association).

145. *Id.* at 4 (statement of Sen. Amodei, Guest Legislator) ("In a statewide sense, in rural areas and urban areas, this is an option that ought to be available in a redevelopment sense, in an affordable housing sense and in a choice sense for our constituents."). This narrative choice is consistent with that made by proponents of similar bills in other states. In Washington, for example, the bill was titled, "An act relating to prohibiting discrimination against consumers' choices in housing." H.B. REP. ON S.B. 6593, 2004 Leg., 58th Sess., at 1 (Wash. 2004), <http://lawfilesextra.leg.wa.gov/biennium/2003-04/Pdf/Bill%20Reports/House/6593.HBR.pdf>. [<https://perma.cc/HJ35-F2S5>].

146. *Mar. 24 Hearing on S.B. 323*, *supra* note 125, at 5 (statement of Charles W. Joerg, Lobbyist, Nevada Manufactured Housing Association).

147. *Id.* at 19–20 (statement of Karl Braun, President, Nevada Association of Manufactured Homeowners).

148. *Id.* at 3 (statement of Sen. Amodei, Guest Legislator).

Opposing the bill, municipal officials argued that the bill undermined local control, threatened property values, was unnecessary to correct market failures, and threatened local jobs.¹⁴⁹ The first two arguments are unsurprising.¹⁵⁰ As described above, they are commonly made by advocates of local control of land use. Robert F. Joiner, a planner for Carson City, Nevada, submitted a letter making the typical argument: “This is a local planning issue which should be left to each local government to decide with their respective residents. . . . [W]e respectfully request that you maintain our ability to decide within our community where to allow mobile homes.”¹⁵¹

The final two arguments are less intuitive. Because manufactured housing can be constructed off-site, including out of state, to the extent that it displaces site-built housing, it may also displace local jobs.¹⁵² The Planning and Economic Development Manager of Douglas County testified that he had “concerns for Nevada jobs. Testimony had been heard from manufacturers in California. [The bill] would take away jobs from the construction industry; that is to say, Nevada residents, Douglas County residents, Carson City residents and Las Vegas residents.”¹⁵³ In fact, the Builders Association of Western Nevada, the Builders Association of Northern Nevada, and individual home builders actively opposed the bill.¹⁵⁴ Speaking on behalf of the Builders Association of Western Nevada, Gayle Farley argued that the bill would undermine “economic[] diversification . . . because manufactured homes were not developed in Nevada. [It] would have an adverse effect on

149. *Id.* at 20–24 (statements of Lesa M. Coder, Lobbyist, Clark County, and Robert F. Joiner, Lobbyist, Nevada Chapter of American Association).

150. *See, e.g.*, H.B. REP. ON S.B. 6593, 2004 Leg., 58th Sess., at 3 (Wash. 2004), <http://lawfilesexst.leg.wa.gov/biennium/2003-04/Pdf/Bill%20Reports/House/6593.HBR.pdf> [<https://perma.cc/HJ35-F2S5>] (describing two arguments against deregulatory intervention in favor of manufactured housing: first, “[a]ll cities allow for the siting of manufactured homes somewhere within the community,” thus rendering the intervention unnecessary; and second, it protects “local control”). These arguments are consistent with those made in other states.

151. Letter from Robert F. Joiner, Am. Inst. of Certified Planners, to Sen. Ann O’Connor, Chair, S. Comm. on Gov’t Affairs on behalf of Carson City and the Nev. Chapter of the Am. Planning Ass’n (Mar. 24, 1999) (on file with the North Carolina Law Review).

152. *Mar. 24 Hearing on S.B. 323*, *supra* note 125, at 26 (statement of John T. Doughty, Planning and Economic Development Manager, Douglas County).

153. *Id.*

154. *See generally Apr. 29, 1999, Hearing on S.B. 323 Before the Assemb. Comm. on Gov’t Affairs*, 1999 Leg., 70th Sess. (Nev. 1999) [hereinafter *Apr. 29 Hearing on S.B. 323*] (summarizing various entities’ opposition to the bill).

homebuilders, suppliers, electricians, and many other professional trades in the area.”¹⁵⁵ Legislators in other states heard similar testimony regarding business interests, i.e. whether manufactured homes were built in or out of state.¹⁵⁶

Local and state legislators face different incentives in this regard. On the local level, deregulation is a losing proposition. Existing homeowners fear decreased property values.¹⁵⁷ In the eyes of existing homeowners, decreased housing costs are an unqualified evil. And the cost savings do not accrue locally. Local workers fear losing jobs to out-of-state manufactured housing factories. The people likely to benefit from reduced housing costs reside out of town, perhaps even out of state.¹⁵⁸ To state legislators, the cost-benefit analysis is not quite so clear. Decreased housing costs yield savings that accrue to low- and moderate-income homeowners, even if deregulation simultaneously results in decreased property values for existing homeowners.

State legislators are also more likely to take account of federal developments, including federal regulations and funding environments. As a result, interventions in local zoning take place against the backdrop of federal intervention. Generally, building codes are adopted by states and local governments. In an effort to improve the structural conditions of manufactured homes, in the

155. *Id.* at 25 (statement of Gayle Farley, Executive Officer, Builders Association of Western Nevada).

156. *See, e.g.*, H.B. REP. ON S.B. 6593, 2004 Leg., 58th Sess., at 3 (Wash. 2004), <http://lawfilesexext.leg.wa.gov/biennium/2003-04/Pdf/Bill%20Reports/House/6593.HBR.pdf> [<https://perma.cc/HJ35-F2S5>] (“There are three companies in this state that build them, though most come from companies in Oregon.”); *Mar. 2, 1993, Hearing on LB 511 Before the Comm. on Urban Affairs*, 1993 Leg., Reg. Sess. 98 (Neb. 1993) [hereinafter *Mar. 2 Hearing on LB 511*] (statement of Don Hansen) (testifying that 3000 manufactured homes were constructed in Nebraska the previous year but that 90% of those homes were sold out of state).

157. For example, a Nevada association of realtors submitted written testimony arguing that the bill would upset the settled expectations of property owners, many of whom “had resided in their homes for many years and were counting on the appreciation of the home as a retirement nest egg. There was always a possibility that placement of a manufactured home in an existing neighborhood might jeopardize that investment.” *Apr. 29 Hearing on S.B. 323, supra* note 154, at 15–16 (statement of Deborah Uhart, Past President, Carson-Douglas-Fallon-Lyon-Tahoe Board of Realtors).

158. Indeed, in Nebraska, legislators heard testimony that the ability to construct manufactured housing affected people’s decisions where to live. “Kansas has the law, and people are moving across from Missouri because they can find an affordable home.” *Mar. 2 Hearing on LB 511, supra* note 156, at 100 (statement of Frank Bellizio) (“It’s increasing those communities’ tax bases, income taxes for the state, and other sales taxes that are run up by people living in the community.”).

1970s the federal government adopted a code applicable to manufactured housing.¹⁵⁹ It is commonly referred to as the “HUD Code” because it is promulgated by the Department of Housing and Urban Development.¹⁶⁰

The HUD Code, however, does not preempt local land use regulations. “The general rule is that local zoning regulations are not subject to the preemptive language of the [HUD Code] because land-use issues are not governed by the HUD Code. The use, density, and bulk restrictions of local zoning are not ‘aspects of performance’ regulated by the HUD Code.”¹⁶¹ Courts have concluded that “under federal law, [zoning] ordinances that discriminate against mobile homes will be upheld unless the ordinances are based on construction or safety standards which are contained in the federal act.”¹⁶² Localities cannot pass construction standards affecting manufactured housing, but traditional zoning regulations are permitted.¹⁶³

Despite its lack of *federal* preemptive effect on local zoning matters, the HUD Code is regularly cited by industry lobbyists arguing for *state* preemption of local zoning. In Nevada, lobbyists argued that the HUD Code assuaged any reasonable local concerns

159. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633, 700 (codified at 42 U.S.C. §§ 5401–5426 (2012)).

160. According to the National Consumer Law Center, “the HUD code sets standards for heating, plumbing, ventilation, air conditioning and electrical systems, design, construction, transportation, energy efficiency, wind resistance and fire safety.” NAT’L CONSUMER LAW CTR., MANUFACTURED HOUSING RESOURCE GUIDE: WEATHERIZATION AND REPLACEMENT OF HOMES 2 (2010), https://www.nclc.org/images/pdf/manufactured_housing/accessing-public-resources.pdf [<https://perma.cc/GQY2-BEL3>]. “It does not guarantee quality in manufactured homes, and there have been problems with inspection or enforcement, but the quality of newer HUD code homes is generally much better than that of older ‘pre- ‘76’ mobile homes.” *Id.* For example, the HUD Code did away with the usage of 2x2’s rather than 2x4’s in manufactured housing. *Id.*

161. White, *supra* note 132, at 267–69.

162. Sanford A. Minkoff & Melanie N. Marsh, *State and Federal Preemption in the Mobile Home Arena: What Can Local Governments Truly Regulate?*, 77 FLA. B.J. 42, 44 (2003).

163. Local zoning that limited “trailer coaches” to trailer parks was challenged on the basis that it was in conflict with federal law regulating the manufacture of mobile homes in *Texas Manufactured Housing Ass’n v. City of Nederland*, 101 F.3d 1095, 1095 (5th Cir. 1996). When A. J. Waller sought to place a mobile home on his lot, he was denied a permit since his lot was not within a designated park. *Id.* at 1098. The fact that his home had been manufactured pursuant to regulations of the federal Department of Housing and Urban Development formed the basis of the complaint. *Id.* Federal law prohibits state or local government from applying safety standards that differ from federal standards. *Id.* at 1099. The Fifth Circuit, however, found that the zoning at issue had the purpose of preserving property values and was not a safety law barred by federal law. *Id.* at 1100. Thus, the preemption argument failed. *Id.* at 1100–01.

regarding safety. The HUD Code's applicability provided some comfort to state legislators that a deregulatory intervention would not leave the industry entirely unregulated.

The HUD Code did not, however, convince state legislators that all local input ought to be preempted. While Nevada stripped local ability to prohibit or segregate manufactured housing, it permitted localities limited authority to regulate certain enumerated aesthetic elements. Local governments may require, for example, that a manufactured home “[h]ave exterior siding and roofing which is similar in color, material and appearance to the exterior siding and roofing primarily used on other single-family residential dwellings in the immediate vicinity of the manufactured home.”¹⁶⁴ As we have already seen with Michigan's family day care statute, and as we will see with California and Maine's alternative energy interventions and various states' group home interventions, Nevada adopted tailoring requirements for land use regulation in the case of manufactured housing. It stripped local government of its most powerful tool, a straight prohibition on an undesirable land use. At the same time, it allowed local government the power to address those limited concerns that the state considered to be legitimate.

C. *Small-Scale Residential Alternative Energy Infrastructure*¹⁶⁵

The alternative energy case study echoes both of the previous case studies. In this case, state interventions are driven both by states' own bureaucratic interests and industry lobbyists, who find a more welcoming seat in state capitols than they do in city halls.

As is the case with family day care homes and group homes, local prohibitions on alternative energy infrastructure¹⁶⁶ can frustrate state

164. NEV. REV. STAT. ANN. § 278.02095(2)(a)(3) (Westlaw through 79th Reg. Sess.). Other provisions of the statute permit local governments to require that manufactured housing “be permanently affixed to a residential lot” and that it “[c]onsist of at least 1,200 square feet of living area.” *Id.* § 278.02095(2)(a)(1), (5).

165. I focus on small-scale infrastructure rather than, for example, wind farms, which are more analogous to the power plants, cell phone towers, and other utility infrastructure already protected by state preemption of local zoning laws. See Jesse Heibel & Jocelyn Durkay, *State Legislative Approaches to Wind Energy Facility Siting*, NAT'L CONF. ST. LEGISLATURES (Nov. 1, 2016), <http://www.ncsl.org/research/energy/state-wind-energy-siting.aspx> [<https://perma.cc/R6YW-3JPG>].

166. Alternative energy infrastructure is a broad term that includes a range of technologies from solar panels and wind turbines to clotheslines. Local zoning affects all three. State interventions protecting small-scale infrastructure vary, but most focus on solar panels.

policy goals.¹⁶⁷ Twenty-nine states have established renewable portfolio standards, statewide policies, and quantitative goals with respect to the use of alternative energy sources.¹⁶⁸ An additional eight states have established voluntary renewable energy objectives.¹⁶⁹ Of the twenty-nine states¹⁷⁰ that restrict local authority to zone various types, both large- and small-scale, of alternative energy infrastructure, twenty-two¹⁷¹ have quantitative goals that they are seeking to achieve by a date certain.¹⁷²

California, one of the first states to restrict local ability to regulate solar panels, provides a useful case study of a state influenced by an organized and powerful lobbying group that found itself disadvantaged in local politics. Unlike family day care homes and group homes but like manufactured housing, solar panels are represented by an active lobby including established environmental groups and industry associations consisting of both manufacturers and installers. The solar industry does not have standing to litigate zoning regulations in municipalities in which it does not own property. Like

167. See Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 235 (2008) (arguing that “the states must take back at least some of their powers to regulate land use and facilitate green building as a solution to the significant extralocal negative externalities of conventional construction”).

168. U.S. DEP’T OF ENERGY, RENEWABLE PORTFOLIO STANDARD POLICIES (2016), <http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2014/11/Renewable-Portfolio-Standards.pdf> [<https://perma.cc/PL27-CLS9>].

169. Jocelyn Durkay, *State Renewable Portfolio Standards and Goals*, NAT’L CONF. ST. LEGISLATURES (July 7, 2016), <http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx> [<https://perma.cc/552J-MAT2>].

170. See ENVTL. LAW INST., STATE ENABLING LEGISLATION FOR COMMERCIAL-SCALE WIND POWER SITING AND THE LOCAL GOVERNMENT ROLE 18–19 tbl.2 (May 2011), <http://www.eli.org/sites/default/files/eli-pubs/d21-02.pdf> [<https://perma.cc/A87Y-4PEC>] (illustrating which states restrict local zoning authority with respect to wind turbines); see also Troy A. Rule, *Renewable Energy and the Neighbors*, 2010 UTAH L. REV. 1223, 1249–50 (highlighting states that restrict local zoning authority with respect to solar energy). Between those two sources the states that restrict local zoning authority include California, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

171. California, Colorado, Connecticut, Delaware, Hawaii, Indiana, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Rhode Island, Vermont, Virginia, Washington, Wisconsin. See U.S. DEP’T OF ENERGY, *supra* note 168.

172. *Id.* For example, Oregon has set a target of incorporating twenty-five percent renewable energy sources into its energy production portfolio by 2025. Durkay, *supra* note 169.

the manufactured housing industry, it must rely on each consumer to resolve expensive, time-consuming land use challenges as they arise with respect to his or her property. It is not surprising, then, that in California, the California Solar Energy Industries Association (“CALSEIA”), now known as the California Solar and Storage Association, led the 2004 fight to adopt state legislation strengthening the prohibition on local zoning of solar energy systems.¹⁷³ According to its website, CALSEIA’s members include financiers, consultants, manufacturers, installers, contractors and others.¹⁷⁴ CALSEIA commissioned a report documenting the “serious obstacles in the way of solar power system installation” imposed by California localities.¹⁷⁵ The Clean Power Campaign, the Planning and Conservation League, the Sierra Club,¹⁷⁶ the East Bay Municipal Utility District, and the League of Women Voters also lobbied in favor of the bill.¹⁷⁷

Not every intervention in favor of alternative energy is backed by an industry lobby. In service of energy conservation, nineteen states prohibit local governments from outlawing clotheslines.¹⁷⁸ In Maine, sponsoring legislators fought the culture of local land use control with that of New England penny-pinching.¹⁷⁹ Portland resident Bryan Wentzell testified that local zoning and homeowner association restrictions on clotheslines “run counter to the Maine Yankee ethos of saving money in the easiest and simplest of ways.”¹⁸⁰ Representative Jon Hinck, who sponsored the legislation, testified,

173. See CAL. ASSEMBLY COMM. ON LOCAL GOV’T, BILL ANALYSIS: AB 2473, at 4 (2004); Cal. Senate Local Gov’t Comm., Bill Analysis: AB 2473, at 1 (2004) (“Industry advocates say that over the last 25 years, local officials and homeowners’ associations have increased their requirements, making it harder to install solar energy systems.”).

174. *Our Members*, CAL. SOLAR & STORAGE ASS’N, <http://calseia.org/our-members/> [<https://perma.cc/MLU7-PKXJ>].

175. CAL. ASSEMBLY COMM. ON LOCAL GOV’T, *supra* note 173, at 2.

176. See *id.* at 4.

177. CAL. SENATE RULES COMM., BILL ANALYSIS: AB 2473, at 4 (2004).

178. Martha Neil, *19 ‘Right to Dry’ States Outlaw Clothesline Bans; Is Yours Among Them?*, ABA J. (Aug. 14, 2013, 8:24 PM), http://www.abajournal.com/news/article/20_right_to_dry_states_outlaw_clothesline_bans_is_yours_among_them [<https://perma.cc/Y696-DTQX>] (“States that already have such bans include Arizona, California, Colorado, Florida, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Nevada, New Mexico, North Carolina, Oregon, Texas, Vermont, Virginia and Wisconsin, the Seattle Times reports.”).

179. ME. REV. STAT. ANN. tit. 33, §§ 1421–1424 (Westlaw through 2d Spec. Sess. of 128th Leg.).

180. *Testimony of Bryan Wentzell on L.D. 73 Before the J. Standing Comm. on Utils. & Energy*, 2009 Leg., 124th Sess. 3 (Me. 2009) (statement of Bryan Wentzell, Volunteer Board Member, Project Laundry List).

quoting an op-ed in the *Providence Journal*, “[f]orbidding sheets and undershirts to flap in the New England sunshine is akin to banning boiled lobsters or requiring New Hampshire town clerks to smile.”¹⁸¹ The bill in question sought to protect the right to erect both clotheslines and solar panels.¹⁸² The latter proved more controversial.

In Maine, unlike California, no industry association, manufacturer, or installer of solar panels testified in favor of the bill.¹⁸³ Just four proponents, including the bill’s sponsor, testified in its favor.¹⁸⁴ None represented the solar industry.¹⁸⁵ Six opponents testified against the bill.¹⁸⁶ All of the opponents represented organized lobbies, including the Maine Real Estate & Development Association, the Maine Realtors, and the Maine Apartment Owners and Business Association.¹⁸⁷ Both the Maine Municipal Association and the Maine Association of Planners expressed concern that the bill would interfere with local ability to address issues of local concern.¹⁸⁸

In response to local officials’ objections, the sponsoring legislators agreed to revise the bill to clarify that local governments and homeowners’ associations could adopt “reasonable restrictions” in service of public safety and protection of “historic or aesthetic values” so long as such restrictions did not increase the cost of solar installation by more than ten percent or “inhibit the solar energy device from operating at its intended maximum efficiency.”¹⁸⁹ The final text, as codified, permitted local governments to enact any reasonable restriction, defined as “any restriction that is necessary to protect: A. Public health and safety . . . B. Buildings from damage; C. Historic or aesthetic values, when an alternative of reasonably comparable cost and convenience is available; or D. Shorelands under

181. *Testimony of Jon Hinck on L.D. 73 Before the J. Standing Comm. on Utils. & Energy*, 2009 Leg., 124th Sess. 3 (Me. 2009) (quoting Froma Harrop, Opinion, *The ‘Right to Dry’ Versus Starbuckization*, PROVIDENCE J., Feb. 19, 1999, at B-07).

182. L.D. 73, 2009 Leg., 124th Sess. (Me. 2009).

183. *See Jan. 27, 2009, Hearing on L.D. 73 Before the J. Standing Comm. on Utils. & Energy*, 2009 Leg., 124th Sess. (Me. 2009) (testimony sign in sheet).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *See Testimony of the Maine Municipal Association on L.D. 73 Before the J. Standing Comm. on Utils. & Energy*, 2009 Leg., 124th Sess. 1 (Me. 2009); *Testimony of the Maine Association of Planners on L.D. 73 Before the J. Standing Comm. on Utils. & Energy*, 2009 Leg., 124th Sess. 1 (Me. 2009).

189. *Feb. 19, 2009, Hearing on L.D. 73 Before the J. Standing Comm. on Utils. & Energy*, 2009 Leg., 124th Sess. 2 (Me. 2009).

shoreland zoning provisions.”¹⁹⁰ The final statute does not define restrictiveness with reference either to increased cost of installation or the effect of the regulations on efficiency.¹⁹¹ The final statute acknowledges that local governments may have some interest in the manner in which solar infrastructure is installed.¹⁹² Simultaneously, however, the statute refuses to allow local governments to address that interest by enacting outright bans on solar and other small-scale alternative energy infrastructure.¹⁹³

Again, a deregulatory intervention embraces a tailoring requirement, stripping local government of the ability to overregulate but allowing limited local authority to render local land uses less noxious to local regulators. As in the case of family day care homes and manufactured housing, in the case of small-scale alternative energy infrastructure, states recognize local propensity to overregulate while allowing a limited sphere of influence for local regulators to address truly local impacts of particular land uses.

D. Group Homes

Over a twenty-five-year period, beginning around 1970, over forty states enacted measures to protect group homes from local zoning prohibitions.¹⁹⁴ Others have argued whether such measures

190. ME. REV. STAT. ANN. tit. 33, § 1423(4) (Westlaw through 2d Spec. Sess. of 128th Leg.).

191. *See id.*

192. *Id.*

193. *See id.* § 1423(2).

194. Daniel Lauber, *A Real Lulu: Zoning for Group Homes and Halfway Houses Under the Fair Housing Amendments Act of 1988*, 29 J. MARSHALL L. REV. 369, 369 (1996). As is the case with family day cares, *see supra* Section II.A, these zoning laws have been interpreted to limit nonzoning prohibitions on group homes in residential communities.

In addition to preempting local zoning ordinances, many state statutes also limit or void private restrictions in deeds, land contracts, or leases that would exclude group homes from residential properties or subdivisions. In New York, for example, a state law known as the Padavan Law specifically preempts local zoning laws by permitting small group homes in all residential areas, provided certain procedures are followed regarding the selection of the site. The New York Court of Appeals rejected an attempt to circumvent this law in *Crane Neck Ass'n v. N.Y.C./Long Island County Services Group*. In *Crane Neck*, a neighborhood association sought to enforce a restrictive covenant, adopted in 1945, limiting the use of property within its boundaries to ‘single family dwellings’ to exclude a group home for eight adults with severe mental retardation. Although the group home violated the restrictive covenant, the court refused to enforce the covenant because ‘to do so would contravene a long-standing public policy favoring the establishment of such residences for the mentally disabled.’ Thus, the court held

were necessary or appropriate as a normative matter.¹⁹⁵ I will focus on a few states in order to tell their stories, as I have in previous sections, to illuminate the relationship between state and local governments.

The national movement in favor of moving mentally disabled people from large institutions to small community-based facilities began in the 1960s when the American Psychiatric Association collected data and commissioned studies supporting “normalization” and the benefits to patients’ health that resulted from deinstitutionalization.¹⁹⁶ In the 1970s, advocates initiated a litigation strategy, arguing that large state-run institutions failed to meet their patients’ needs and, in some cases, abused their patients.¹⁹⁷ Simultaneously, advocates mobilized at the federal level to advance legislation intended to enable developmentally disabled people to live in subsidized community-based facilities.¹⁹⁸

The federal government responded. In the Developmental Disabilities Assistance and Bill of Rights Act of 1975, the federal government both required that developmentally disabled people be treated “in the setting that is least restrictive of the person’s personal liberty”¹⁹⁹ and mandated statewide protection and advocacy programs intended to ensure that people with developmental disabilities not be subject to abuse and neglect.²⁰⁰ In addition, the federal government

that although it explicitly addresses only local laws and ordinances, the Padavan Law also preempts restrictive covenants.

Arlene S. Kanter, *A Home of One’s Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U. L. REV. 925, 978 (1994) (quoting *Crane Neck Ass’n v. N.Y.C./Long Island Cty. Servs. Grp.*, 460 N.E.2d 1336, 1337, 1339 (N.Y. 1984)).

195. See, e.g., Robert J. Hopperton, *A State Legislative Strategy for Ending Exclusionary Zoning of Community Homes*, 19 URB. L. ANN. 47, 60–61 (1980). More recently, some have argued that the amendments to the Fair Housing Act rendered such interventions unnecessary (and may have rendered certain compromises embedded in those interventions unlawful). Because they are not relevant to this discussion, I ignore these debates here.

196. See, e.g., Kanter, *supra* note 194, at 926.

197. See, e.g., Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 14 (2012).

198. See, e.g., Hopperton, *supra* note 195, at 47. While this advocacy is commonly referred to as the deinstitutionalization movement, according to a 1982 study, approximately thirty-two percent of group home residents had never lived in large institutions but, instead, had resided with family.

199. Developmental Disabilities Assistance and Bill of Rights Act, Pub. L. No. 94-103, § 201, 89 Stat. 502, 502–03 (1975), *repealed by* Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 (2012).

200. *Id.*

began reimbursing states for expenditures incurred in the development and operation of community-based homes.²⁰¹

As they responded to federal incentives and court-ordered mandates, states found that local zoning codes often forced group homes into less than ideal locations. Deinstitutionalization advocates touted the benefits of placing developmentally disabled people in residential neighborhoods, where they could become part of an existing community.²⁰² Instead, local zoning codes forced group homes into industrial and commercial areas or concentrated them in low-income urban areas lacking the political clout to object.²⁰³ By 1977, the problem was sufficiently well understood that the American Bar Association published model state legislation stripping local zoning authority over group homes.²⁰⁴

Having overcome barriers to deinstitutionalization at the federal and state levels, advocates and state agencies began to focus on local zoning. Instead of seeking to revise thousands of towns' zoning codes, advocates focused on the states. In some states, displacing or clawback zoning statutes were introduced as part of a package of bills intended to assist developmentally disabled people.²⁰⁵ In these states, the zoning provision tended to attract less attention and opposition as it hid among a plethora of provisions restructuring administrative agencies and allocating funding to social services.²⁰⁶

201. See NEV. LEGISLATIVE COUNSEL BUREAU, BULLETIN NO. 83-1: STUDY OF THE PROBLEMS AND TREATMENT OF MENTALLY RETARDED ADULTS 4 (1982); K. Charlie Lakin & Margaret Jean Hall, *Medicaid-Financed Residential Care for Persons with Mental Retardation*, HEALTH CARE FINANCING REV., 1990 supp., at 149, 150.

202. See Hopperton, *supra* note 195, at 50.

203. See *id.* at 52–53.

204. See American Bar Ass'n, *Zoning for Community Homes Serving Developmentally Disabled Persons*, 20 MENTAL DISABILITY L. REP. 794, 804, 806–10 (1977).

205. See, e.g., Act of May 27, 1986, ch. 637, 1986 Md. Laws 2288 (codified at MD. CODE ANN., HEALTH-GEN. § 7-101-802 (LEXIS through 2018 Reg. Sess.)) (“This bill completely rewrites the ‘Mental Retardation and Developmental Disabilities Law.’”); Act of Mar. 19, 1983, ch. 61, § 1, 1983 Nev. Stat. 220, 220–21; Act of May 1, 1981, ch. 154, 1981 Nev. Stat. 321; Act of July 6, 1978, ch. 468, § 1, 1978 N.Y. Laws 1, 1–3 (codified as N.Y. MENTAL HYG. LAW § 41.34 (McKinney 2018)).

206. Similarly, many deregulatory interventions in favor of family child care were just one component of a package of policies intended to bolster family day cares. CONN. GEN. STAT. ANN. §§ 8-2, -3e, -3f, -3j (Westlaw through 2018 Feb. Reg. Sess.); NEB. REV. STAT. ANN. § 2616 (Westlaw through 2d Reg. Sess. of 105th Leg.) (resulting in no testimony on the zoning provision itself); WASH. REV. CODE ANN. §§ 35.63.185, 36.70.757 (Westlaw through 2018 Reg. Sess.); see also William J. Booher, *Child-Related Bills Keep Legislators Busy on Last Day*, INDIANAPOLIS STAR, Apr. 30, 1993, at E3 (introducing training requirements for child care employees and increasing the maximum number of children certain centers could care for among other components of the legislation).

Again, state bureaucrats proved an unlikely ally in a deregulatory project. State social services agencies endorsed removing local regulations limiting siting of group homes. In Michigan, for example, the Department of Social Services was first on the list of groups that supported the bill.²⁰⁷

State bureaucrats argued that local zoning undermined their charge to effectively and cost-efficiently care for developmentally disabled and mentally ill people. Michigan advocates of state intervention argued that local governments used zoning to “exclude [group homes] from those residential areas where they could be most effective” resulting in clusters of group homes in the commercial and industrial zones where towns tolerated them.²⁰⁸ Thus, “[t]he intent of community based care is subverted because neither the neighborhood nor the home itself provides a ‘normal’ living situation.”²⁰⁹ Bill proponents argued that the state ought to intervene in order to prevent local regulation from subverting state policy in favor of deinstitutionalization and community-based care.²¹⁰ In Maine, legislators heard testimony that “[t]he Commissioner of Mental Health, and Retardation, Commissioner Concannon, feels that the most important piece of legislation that this legislature will be confronting this year, is this Bill that deals directly with group homes.”²¹¹ Maine, like many other states, operated under a consent decree and existing laws requiring the state bureaucracy to place people in community-based facilities, which were sometimes hampered by operation of local zoning law.²¹² In Nevada, a representative of the state’s Division of Mental Hygiene and Mental Retardation testified to the decreased costs of housing people in community-based group homes as compared to large institutions.²¹³

207. MICH. HOUSE LEGISLATIVE ANALYSIS SECTION, BILL ANALYSIS: H.B. 4896, at 3 (1976).

208. *Id.* at 1. Prior to state interventions, clusters of facilities were found in urban areas across the country. For example, in 1979 the *Los Angeles Times* reported that most facilities were “clustered in old downtown sections” and “commercial zones,” resulting in “impacting certain areas least able to cope with the facilities and their residents.” Sam Kaplan, *Community Care Versus Zoning: A Legal Conflict*, L.A. TIMES, Apr. 24, 1979, at E1.

209. MICH. HOUSE LEGISLATIVE ANALYSIS SECTION, *supra* note 207, at 1.

210. *Id.*

211. 110 LEGIS. REC., 110th Leg., 2d Reg. Sess., at 478 (Me. 1982) (testimony of Sen. Conley).

212. H.P. 2067, 110th Leg., 2d Reg. Sess. (Me. 1982).

213. Mar. 25, 1981, *Hearing on S.B. 268 Before the Assemb. Comm. on Gov’t Affairs*, 1981 Leg., 61st Sess. 1192 (Nev. 1981) [hereinafter *Mar. 25 Hearing on S.B. 268*]

As with family day cares and manufactured housing, states deregulated group homes by requiring towns to treat them as residential uses. Arizona's deregulatory intervention in favor of group homes, for example, provides that "[u]nrelated persons living together notwithstanding, a residential facility which serves six or fewer persons shall be considered a residential use of property for the purposes of all local zoning ordinances if such facility provides care on a twenty-four hour per day basis."²¹⁴ Not only must local governments treat group homes as residential uses, they must treat them as they do the most privileged of residential uses, the single-family home: "For the purposes of all local ordinances, a residential facility which serves six or fewer persons shall not be included within the definition of any term which implies that the residential facility differs in any way from a single family residence."²¹⁵ Because single-family homes are typically permitted in all residential neighborhoods and many commercial zones, the effect is to deregulate group homes.²¹⁶ A small number of states took a similar approach but treated single-family districts more gingerly than they did multifamily districts. In Utah, for example, single-family districts must permit group homes by conditional permit, but multifamily districts must permit them as of right.²¹⁷

While state agencies supported zoning interventions, municipalities and local governments opposed them. In Michigan, for example, the Michigan Municipal League, Michigan Townships Association, and seventeen towns opposed the bill. No locality or advocate for localities endorsed the bill. Having convinced federal and state officials of the importance and urgency of their cause, advocates failed, or did not try, to woo local politicians.

In various states, the floor debate evidenced state legislators' difficulty embracing a state-level solution to a land use problem. A state senator responded to a lobbyist for the Nebraska Association for Retarded Citizens that the state was the wrong forum for resolving concerns about discriminatory land use regulation, because

(statement of Jack Middleton) ("It is much cheaper as you can see to go the group home care method, and it is allowing mentally retarded individuals to live in a homelike setting.").

214. ARIZ. REV. STAT. ANN. § 36-582(A) (Westlaw through 2d Reg. Sess. of 2018).

215. *Id.* at § 36-582(B).

216. Edward H. Ziegler, Jr., *The Twilight of Single-Family Zoning*, 3 UCLA J. ENVTL. L. & POL'Y 161, 206-07 (1983).

217. Act of Mar. 3, 1981, ch. 51, 1981 Utah Laws 326 (repealed 1997).

“[t]hat looks to me like it’s a zoning problem here.” When the lobbyist responded, “[t]hat’s why I think it’s necessary that there be a state zoning law,” the senator expressed confusion, failing to understand why it was necessary to “impose it up on the whole state if you have problems with [a local law.]”²¹⁸ The senator could not fathom a role for the state in zoning.

Similarly, while intervention advocates framed the issue as one of liberty from burdensome local regulation, some state legislators resisted casting local laws as regulations at all. Intervention supporters cited, among other things, the layers of bureaucracy to which group homes were already subject.²¹⁹ In Nevada, bill sponsors embraced the deregulatory nature of the project and framed the issue as one of liberty: “This will encourage the development of community-based care for the mentally retarded persons to live in an environment that is less restrictive of their personal liberty.”²²⁰ But some legislators remained unconvinced that state interventions could be deregulatory in nature. A Nebraska state senator referred to state law as a “mandate,” while ignoring the fact that local laws, like state laws, exert control and impose mandates. In effect, he conflated “local” with “deregulatory” while also conflating “state law” and “mandate.”²²¹ In later testimony, a local director of planning supported this stance, arguing that “[l]ocal control is basically at issue here. I believe most people would agree that we have enough federal and state directives without adding additional ones dealing inside local zoning ordinances.”²²² Proponents and opponents of Nebraska’s bill agreed that there were, to put it colloquially, “too many regulations.” But the opponents failed to see the local laws as regulations.

Similarly, in Maine, bill opponents objected to an effort “to in some way override local community zoning ordinances.”²²³ One state senator objected to the state bureaucracy “asking this Legislature to say to local communities that . . . we know better than the local

218. *Feb. 26, 1979 Hearing on L.B. 525 Before the Pub. Health & Welfare Comm.*, 86th Leg., 1st Sess. 37 (Neb. 1979) [hereinafter *Feb. 26 Hearing on L.B. 525*] (statements of Sen. Clark and Ms. Everett).

219. For example, in support of Nebraska’s law, a representative of a nonprofit community-based services provider described the plethora of fees and public hearings to which group homes were subject. *Id.* at 41–42 (statement of Chuck Martens).

220. NEV. LEGISLATIVE COUNSEL BUREAU, *supra* note 201, at 6.

221. *Feb. 26 Hearing on L.B. 525, supra* note 218, at 44 (statement of Sen. Clark).

222. *Id.* at 48–49 (statement of Nelson Helm).

223. 110 LEGIS. REC., 110th Leg., 2d Reg. Sess., at 478 (Me. 1982).

communities.”²²⁴ Later, another senator expressed “regret” that bill supporters “ha[d] so little confidence in the people of the State of Maine, acting in their own communities.”²²⁵ Bill opponents described the law as a restriction on “people” rather than on local government and concluded that the vote would come down to “whether we, as representatives of the people, have enough confidence in those people that we will let them act in their own communities with their own common sense and their own compassion.”²²⁶

As in Nebraska and Maine, in Ohio, the primary opponent was local government, as represented by the Ohio Municipal League. Its executive director argued that “[i]t goes without saying that the League position is that policy questions relating to the zoning of community-based residence facilities for the mentally retarded are *matters for local decision-making processes*.”²²⁷ Municipal leagues and other consortia of local interests are themselves a special interest,²²⁸ but they did not hesitate to decry group home advocates as special interests and state interventions on behalf of group homes as “an erosion of local zoning control . . . that could set a precedent for other special interest groups to make similar requests of the legislature in the future.”²²⁹

Bureaucrats and other advocates responded by interrogating local concerns. They cited studies, for example, that found that group homes did not decrease nearby property values, a primary concern raised by local opponents of group homes.²³⁰ This fact—that studies

224. *Id.*

225. *Id.* at 480 (testimony of Sen. Collins).

226. *Id.*

227. *See* Hopperton, *supra* note 195, at 60.

228. Rodriguez, *supra* note 110, at 673.

229. Feb. 27, 1981, *Hearing on S.B. 268 Before the S. Comm. on Gov't Affairs*, 1981 Leg., 61st Sess., ex. E, at 197 (Nev. 1981) (written testimony of Leann McElroy, Principal Planner, City of Reno).

230. *Id.* ex. C, at 195 (testimony of Jack Middleton, Administrative Coordinator for the Division of Mental Hygiene and Mental Retardation). These studies echo contemporary efforts to determine whether affordable housing decreases nearby property values. The general consensus is that it does not. *See, e.g.*, CTR. FOR HOUS. POLICY, “DON’T PUT IT HERE!”: DOES AFFORDABLE HOUSING CAUSE PROPERTY VALUES TO DECLINE NEARBY? 1 http://furmancenter.org/files/media/Dont_Put_It_Here.pdf [https://perma.cc/M648-VF8U]. Nevertheless, local governments routinely act on the assumption that it does. *See* Sheldon S. Shafer, *Redesign Prospect Cove, Planners Order*, COURIER-JOURNAL (Feb. 1, 2017, 11:06AM), <http://www.courier-journal.com/story/news/local/2017/02/01/redesign-prospect-cove-planners-order/97332216/> [https://perma.cc/7HB2-U9T5] (reporting homeowners’ concerns over affordable housing bringing more crime and decreasing property values in a Louisville, Kentucky, neighborhood).

demonstrate that group homes do not decrease nearby property values—was often repeated by legislators in floor debate and hearing testimony. Property owners advocating for zoning changes and relief before local regulators rarely have the opportunity to introduce that kind of evidence. Even when they do, local regulators will routinely dismiss rigorous empirical studies in favor of “first-hand” accounts from angry neighbors. In the land use context, states provide a more neutral arbiter of these kinds of facts and accounts.

Nevertheless, given the debate, it is not surprising that states acted cautiously. First, state legislators demanded proof of the underlying problem. For example, North Dakota did not pass its intervention the first time it was introduced. A number of legislators who supported the bill that passed in 1983 claimed not to have voted for it earlier because they had no evidence of local discrimination or bad actors. By 1983, however, advocates had convinced state legislators that there was a problem. One of those legislators described her turning point: “[A] year ago something came up and people did come in and protest against the group homes, and all the uglies came out”²³¹ Conversely, in Ohio, the state exempted localities “that had in effect on June 15, 1977 an ordinance specifically permitting licensed residential facilities in residential zones . . . so long as the ordinance remains in effect without any substantive modification.”²³² In essence, the statute exempted good actors from the state’s mandate.

Second, some states, including Nevada and New York, initially passed a pilot statute, scheduled to sunset after some set period of time.²³³ In Nevada, the pilot period allowed bill sponsors to evaluate local concerns. In the words of one bill sponsor seeking to make the zoning provision permanent:

The central debate in the last session, had to do with what effect this would have on the neighborhoods in which such groups [sic] homes had been established. We now have some results as

231. *An Act to Redefine “Developmentally Disabled Person” and to Require Residential Zoning for Group Homes for Developmentally Disabled Persons in Counties, Cities, and Townships: Hearing on H.B. 1447 Before the S. Political Subdivisions Comm.*, 1983 Leg., 48th Sess. 2 (N.D. 1983) (statement of Rep. D. Olsen).

232. OHIO LEGISLATIVE SERV. COMM’N, SUMMARY OF 1977 ENACTMENTS: JAN.–OCT., at 128 (Ohio 1977) (summarizing Am. Sub. S. B. 71).

233. Act of July 6, 1978, ch. 468, sec. 2, § 41.34, 1978 N.Y. Laws 1, 1–3 (codified as amended at N.Y. MENTAL HYG. LAWS § 41.34 (McKinney 2018)); Act of May 1, 1981, ch. 154, 1981 Nev. Stat. 321, 321 (expired July 1, 1983).

to that particular effect, and I am pleased to announce to you today that I have not yet had one adverse report involving such things as the proximity of such a group home to any other residential area.²³⁴

Holly Elder, Project Director of the Developmental Disabilities Advocate's Office, cited the decreased costs of group homes compared to large institutions.²³⁵ She also described the daily life tasks, like traveling by bus, developmentally disabled adults learned in group homes that they could not learn in large institutional settings.²³⁶

Third, some states exempted some local governments or some resident populations from the statute's purview. Florida exempted municipalities that adopted a model zoning provision permitting group homes.²³⁷ It also allowed for some local input on group home location decisions, so long as local objections were based on a local overconcentration of group homes.²³⁸ In Nebraska, in response to opposition by municipalities, the sponsors applied the intervention only to homes for developmentally disabled and handicapped people.²³⁹ As the result of local opposition, group homes for the mentally ill did not receive the statute's protections.²⁴⁰ Similarly, in Virginia, a subcommittee convened for the express purposes of "study[ing] methods of site selection of community residences for the mentally disabled, juveniles, substance abusers and others who require treatment which includes assimilation into the community"²⁴¹ quickly decided that "the clear intent of [the above-quoted joint

234. *Feb. 15, 1983 Hearing on A.B. 34 Before the Assemb. Comm. on Gov't Affairs*, 1983 Leg., 62d Sess. 1-2 (Nev. 1983) (statement of Assemb. David D. Nicholas).

235. *Id.* at 5 (statement of Holly Elder, Project Director, Developmental Disabilities Advocate's Office).

236. *Id.*

237. FLA. HOUSE COMM. ON HEALTH & REHAB. SERVS., STAFF ANALYSIS & ECONOMIC IMPACT STATEMENT: H.B. 1269, at 5 (1989).

238. *Id.* at 4.

239. *Jan. 15, 1980, Hearing on L.B. 525*, 87th Leg., 1st Sess. 6006 (Neb. 1980) (testimony of Sen. Sieck) ("L.B. 525 has been changed quite a bit from the original draft. We had quite a bit of opposition at the hearings from the municipalities and in working with the municipalities we have been able to come up with a clean bill which would be accepted by all individuals.").

240. Later, partially as a result of that exception, Nebraska repealed the Act because of fears it violated the Fair Housing Act. *See* Act of June 6, 1991, L.B. 825, 1991 Neb. Laws 825; Effect of Federal Fair Housing Amendments Act of 1988 on Neb. Rev. Stat. §§ 18-1744 through 18-1747, Neb. Att'y Gen. Op. No. 90013, 1990 WL 485340, at *1 (1990).

241. S.J. Res. 220, 1989 Leg., Reg. Sess. (Va. 1989).

resolution] was that the study focus primarily upon the siting of group homes and other residential facilities for the mentally disabled.”²⁴²

Finally, as with family day care, residential solar, and manufactured housing, some of the blunted interventions allow for limited, tailored local input. Colorado’s intervention permitted local bulk and aesthetic zoning restrictions on group homes, even as it prohibited local governments from enacting use regulations that “would be tantamount to prohibition of such homes from any residential district.”²⁴³ Ultimately, the Ohio Municipal League secured procedures allowing local elected officials to comment on the state’s licensure of group homes.²⁴⁴ Lawmakers in New York and West Virginia made similar concessions to local governments, incorporating opportunities for local governments to voice concerns while stripping them of decision-making power in the case of group homes. Initially, West Virginia allowed districts that permit only single-family homes or duplexes to continue to exclude group homes.²⁴⁵ In 1985, West Virginia removed the exemption for single-family and duplex neighborhoods, but created a process for neighbors to complain about specific activity taking place in group homes.²⁴⁶

The most common tailoring in the group home context is dispersal. Dispersal provisions prohibit similar uses from locating within some set distance from one another.²⁴⁷ Some zoning codes, for

242. VA. J. SUBCOMM. STUDYING SITE SELECTION OF RESIDENTIAL FACILITIES FOR MENTALLY DISABLED, REPORT TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, S. DOC. NO. 36, at 1 (1990).

243. COLO. REV. STAT. § 31-23-303(2)(c) (LEXIS through 2018 Legis. Sess.); *see also* OHIO REV. CODE ANN. § 5123.19(N) (LEXIS through SB 221 of 132d Gen. Assemb.) (permitting bulk and design zoning regulations to continue applying).

244. Hopperton, *supra* note 195, at 72–73.

245. Act of Mar. 4, 1980, ch. 101, § 27-17-2, 1980 W. Va. Acts 554, 556 (codified at W. VA. CODE ANN. § 27-17-2 (Westlaw through 2018 1st Extraordinary Sess.)).

246. Act of Apr. 13, 1985, ch. 85, § 27-17-2, 1985 W. Va. Acts 1015, 1017 (codified at W. VA. CODE ANN. § 27-17-2 (Westlaw through 2018 1st Extraordinary Sess.)).

247. While some argue that dispersal requirements violate either the United States Constitution or the federal Fair Housing Act, in particular the 1988 amendments to the Act, I do not address either of those arguments here. I focus instead on how dispersal requirements can mollify local governments facing state intervention in local land use decision making. For an analysis of the fair housing implications of dispersal requirements, see Daniel R. Mandelker, *Housing Quotas for People with Disabilities: Legislating Exclusion*, 43 URB. LAW. 915, 915–16 (2011) (“Housing quotas for persons with disabilities are a rigid, unacceptable, and illegal means for allocating housing opportunities. They clearly violate constitutional and statutory rights to free choice in the distribution of housing opportunity.”).

example, require liquor stores²⁴⁸ or adult uses²⁴⁹ to be dispersed. Nebraska's statute, as a concession to local government opponents,²⁵⁰ required group homes to be at least 1200 feet away from one another and set a maximum number of group homes per locality as a function of local population.²⁵¹ In New Jersey, for example, a dispersal provision appears in the final version of the group home intervention, but not in the initial proposed bill.²⁵²

Dispersal requirements have three related impacts.²⁵³ First, they limit concentration of a particular use. Dispersal requirements effectively cap the number of group homes, or other locally undesirable land uses ("LULUs"),²⁵⁴ in a single town. Dispersal requirements may mollify local regulators by assuring them that a displacing intervention will not have a disproportionate impact on any one town. Daniel Mandelker argues that these effective quotas are discriminatory as they "allow a municipality to prohibit additional group homes once the occupants of existing group homes exceed a specified number or a certain percentage of the population, or when there is an 'excessive concentration' of group homes."²⁵⁵

Second, they limit the impact, across any one municipality, of a displacing intervention. State lawmakers may push for dispersal requirements not in an effort to mollify local lawmakers and homeowners but instead in an effort to ensure that group homes are

248. See, e.g., NEW HAVEN, CONN., ZONING ORDINANCE art. V, § 42.1(c)(2) (2017) ("No package permit shall be permitted to locate within 1,500 feet of another package permit.").

249. See, e.g., *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 52 (1976) (upholding Detroit ordinance prohibiting an adult use from locating less than one thousand feet from another adult use or less than five hundred feet from a residential neighborhood).

250. Effect of Federal Fair Housing Amendments Act of 1988 on Neb. Rev. Stat. §§ 18-1744 through 18-1747, Neb. Att'y Gen. Op. No. 90013, 1990 WL 485340, at *2 (1990).

251. Act of Feb. 14, 1980, L.B. 525, § 3, 1980 Neb. Laws 227, 227.

252. See S.B. 210, 1978 Leg., 179th Sess. (N.J. 1978) (as passed by Senate, Nov. 13, 1978).

253. It is worth noting that dispersal is not feasible without state intervention. As North Dakota's Governor's Council on Human Resources argued in a memorandum in support of that state's intervention, dispersal requires state action. So long as the vast majority of localities chose to exclude group homes, those that permitted them risked becoming "a magnet for large numbers of homes." *An Act to Redefine "Developmentally Disabled Person" and to Require Residential Zoning for Group Homes for Developmentally Disabled Persons in Counties, Cities, and Townships: Hearing on H.B. 1447 Before the H. Political Subdivisions Comm.*, 1983 Leg., 48th Sess. app. D, at 1 (N.D. 1983).

254. See ELLICKSON ET AL., *supra* note 27, at 811-12.

255. Mandelker, *supra* note 247, at 941 (footnote omitted).

not concentrated in neighborhoods that were once residential but become, over time, clusters of group homes. As a 1983 General Accounting Office (“GAO”) report described, “[m]any mental health and mental retardation professionals believe that excessive clustering of special population facilities adversely affects community placement objectives, particularly by decreasing the opportunities for clients to associate with persons who are not members of special population groups and by changing the character of neighborhoods.”²⁵⁶

Third, dispersal rules provide a rough guidepost for differentiating between inclusive and exclusionary municipalities. Once a town has permitted (or been forced to accommodate) some number of group homes, the beneficiaries of those uses are residents and constituents of the town. And neighbors’ willingness to accommodate development will be informed by past experience rather than baseless fears of property devaluation. As a result, once the quota has been met, the state may be less concerned that that town is inclined to discriminate against group home residents. Similarly, Connecticut and Massachusetts exempt towns in which more than ten percent of housing units are affordable²⁵⁷ from their Anti-Snob Zoning Acts.²⁵⁸ One argument in favor of the ten percent rule and dispersal rules is that negative externalities are associated with high concentrations of LULUs. But another is that states simply assume that if a town accommodates a number of LULUs, whether group homes or affordable housing, there is less reason to worry that the town is acting in an exclusionary manner.

Dispersal provisions are akin to the tailoring provision in Maine’s alternative energy statute or Nevada’s manufactured housing law. Responding to local concerns, state lawmakers attempt to differentiate between legitimate and illegitimate local interests. They then craft interventions to address or permit local governments to

256. U.S. GEN. ACCOUNTING OFFICE, B-204732, AN ANALYSIS OF ZONING AND OTHER PROBLEMS AFFECTING THE ESTABLISHMENT OF GROUP HOMES FOR THE MENTALLY DISABLED 27 (1983).

257. The term “affordable” is defined differently in each of the three statutes. Massachusetts defines affordable to mean subsidized by the federal or state government. MASS. GEN. LAWS ch. 40B, § 20 (Westlaw through ch. 322 of the 2018 2d Ann. Sess.). Connecticut includes in its definition all deed-restricted housing, provided the deed restrictions limit rental rates or resale value as well as residents’ incomes. CONN. GEN. STAT. ANN. § 8-30g (Westlaw through 2018 Feb. Reg. Sess.).

258. These laws provide an appeals process for affordable housing developers who are denied land use approvals. CONN. GEN. STAT. ANN. §§ 8-30g to -30i (Westlaw through 2018 Feb. Reg. Sess.); MASS. GEN. LAWS ch. 40B, §§ 20–23 (Westlaw through ch. 322 of the 2018 2d Ann. Sess.).

address the legitimate local interests. In the case of group homes, the legitimate local interest is deconcentration. Concentration of multiple group homes in a small geographic area might unfairly concentrate the harms purportedly experienced by neighbors of group homes. In addition, it is contrary to state policy in favor of integrating disabled people into residential communities. State statutes acknowledge that local concern by addressing it in the state statute itself.²⁵⁹ But because local governments are likely to overreach by prohibiting uses that ought to be permitted but regulated, states remove that power from local hands.

These rules allow states to have a significant local impact without micromanaging local land use decision-making. Again, in the case of group homes, states embrace tailoring requirements in allocating zoning authority. States made some concessions to local government while successfully promoting the establishment of group homes in residential neighborhoods.

State legislators quickly moved to limit local zoning authority over group homes. “In 1977, when the first national survey of state zoning laws was conducted, only five states—California, Colorado, Minnesota, Montana, and New Jersey—had state statutes preempting local zoning laws.”²⁶⁰ In less than a decade, that number grew from five to over twenty-five. In 1986, Peter Salsich noted that “[i]n recent years, more than half the states have enacted statutes that attempt to resolve local conflicts over group homes in various ways.”²⁶¹ By 1994, one commentator said that “[t]oday most states have statutes that preempt local zoning ordinances by restricting localities from using their zoning laws to prevent people with mental disabilities from living in residential neighborhoods. If this trend continues, virtually every state will soon have legislation promoting the acceptance of group homes in local communities.”²⁶²

By 1983, a sufficient number of states had adopted interventions such that the GAO could compare those that had to those that had

259. In fact, some state statutes permit local governments to override the dispersal requirement, suggesting that dispersal is often a concession to local governments rather than a policy choice intended to benefit group home residents. *See, e.g.*, N.J. STAT. ANN. § 40:55D-66.1 (Westlaw through L.2018, c. 140 and J.R. No. 12); UTAH CODE ANN. §§ 10-9a-102, -205 (Westlaw through 2018 2d Spec. Sess.).

260. Kanter, *supra* note 194, at 975.

261. Peter W. Salsich, Jr., *Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome*, 21 REAL PROP. PROB. & TR. J. 413, 424–25 (1986).

262. Kanter, *supra* note 194, at 975 (footnote omitted).

not. The GAO's study compared group home location in states with zoning interventions and those without. States with preemptive laws had more group homes in the suburbs.²⁶³ "States with preemptive zoning laws appeared to facilitate the establishment of group homes for the mentally disabled in residential zones. Where these laws were passed a significant shift took place in the location of homes from the urban centers to more residential suburban-type areas."²⁶⁴ The change was significant. The GAO found that "a pronounced decrease took place in the proportion of homes established in urban center areas—from 29 to 7 percent."²⁶⁵ These shifts riled residents of those suburban communities. The report found that, "after the laws were passed, community opposition increased, especially in suburban areas."²⁶⁶ In other words, prior to state zoning interventions, group home administrators did not attempt to locate in towns likely to oppose them. After the state zoning interventions, group home administrators were free to select the best locations, without worrying about the costs and delays associated with local zoning battles.

III. WHAT MOTIVATES INTERVENTION?

It is worth noting the simple fact that states *do* intervene to strip local governments of zoning authority. Scholars have focused on procedural interventions and double vetoes, or they have focused on large-scale interventions that occur in a small number of states. But displacing interventions do occur in diverse and numerous states, and they tend to occur under certain common circumstances.

Analyzing forty years of legislative history across over forty-two states allows for some conclusions regarding those common circumstances. First, counterintuitively, states intervene to protect groups that are minorities at both the local and state levels. Second, states intervene to protect the interests of state bureaucracies and administrative agencies, even when those agencies do not own or manage property.²⁶⁷ Lastly, states are not blind to local interests. Even when they strip local governments of the ability to enact outright use prohibitions, states will permit local governments to regulate discrete impacts of those uses.

263. U.S. GEN. ACCOUNTING OFFICE, *supra* note 256, at 18–19 (1983).

264. *Id.* at 24–25.

265. *Id.* at 25.

266. *Id.*

267. States, of course, also exempt their own property development from local land use regulation. *See supra* note 36 and accompanying text.

A. *States Provide a Lobbying Opportunity for Interests that Cannot Compete with “Homevoters” at the Local Level*

States provide a lobbying opportunity for groups that otherwise have little clout at the local level. For example, while every state counts manufacturers and employers among its population, many localities do not. In communities that are entirely residential, manufacturers and employers may have no clout at all.

On the other hand, manufacturers and employers are highly persuasive lobbies in state capitols. Manufacturers and employers are represented in the state population even if they may not be counted among the population of any one town. One might expect that states will intervene in local affairs where a group is underrepresented in the local population relative to its population in the state as a whole. Consider the recent debates over transgender rights in North Carolina and Texas. Following the passage of bills protecting transgender people in Houston and Charlotte, the states of Texas and North Carolina intervened to preempt those bills. Religious conservatives exercised their power at the state level to preempt legislation that they did not have the numbers to defeat at the local level. The demographic differences between the city of Charlotte and North Carolina as a whole and between the city of Houston and Texas as a whole drove the states’ decisions to intervene. This is a fairly straightforward story.²⁶⁸

This fairly straightforward story, however, does not explain at least two of the interventions described in this Article. With respect to group homes and family day care homes, there are two possible interest groups, providers (i.e., social service agencies, family day care providers) and users (i.e., mentally disabled people, working parents).²⁶⁹ With respect to either group, it is unlikely that the state

268. See David A. Graham, *North Carolina Overturns LGBT-Discrimination Bans*, ATLANTIC (Mar. 24, 2016), <http://www.theatlantic.com/politics/archive/2016/03/north-carolina-lgbt-discrimination-transgender-bathrooms/475125/> [<https://perma.cc/H9LW-YVQ7>]; Elizabeth Reiner Platt, *States Attempting to Preempt LGBT-Friendly Municipalities*, COLUM. L. SCH.: PUB. RTS., PRIV. CONSCIENCE PROJECT (Feb. 11, 2016), <http://blogs.law.columbia.edu/publicrightsprivateconscience/2016/02/11/states-attempting-to-preempt-lgbt-friendly-municipalities/> [<https://perma.cc/E7RL-CR55>].

269. Day care centers, which compete with family day care homes, are also relevant interest groups. Interestingly, this project turned up just one instance of a day care center testifying against liberalizing regulations affecting family day care homes. *Hearing on L.B. 1013 Before the S. Comm. on Health & Human Serv.*, 1988 Leg., 90th Sess. 12–19 (Neb. 1988) (statement of Jerry Erdman, Executive Vice President of West Omaha Child Care Services, S. Comm. on Health & Human Servs.). Notably, Mr. Erdman testified on a

population is significantly higher or lower, as a percentage of total residents, than that of any one locality. At the same time, each group is dispersed throughout the state and likely to be of some interest to all state legislators, rather than, for example, only to legislators who represent rural areas or only to legislators whose districts include certain natural resources or industry sectors. These groups are able to exercise power at the state level despite the fact that they do not constitute a majority of the state's population. They are a minority at both the local and state level. This suggests that the issue is not that they gain power at the state level but that some other opposing lobby loses power at the state level.

As has been well theorized and documented, homeowners, dubbed "homevoters" by William Fischel, dominate local land use politics.²⁷⁰ Because most homeowners concentrate their wealth in a single asset, their home, they are extremely motivated to oppose any development that might decrease the value of that asset, even if the risk is low. Land use scholars and students of real estate development patterns have long theorized that while homeowners and residents dominate local policymaking in suburban towns, developers dominate policymaking in large cities.²⁷¹ Recent empirical work casts doubt on the theory that developers control land use policy even in the largest cities.²⁷²

Homevoters effectively control decision-making at the local level. Because homevoters are numerous, it is difficult for lobbyists to reach them. And because homevoters are highly and self-interestedly risk averse, it is difficult for lobbyists to persuade them, even when those lobbyists are armed with otherwise convincing data and facts. As one group homes advocate stated the problem in legislative testimony, "[t]he groups involved in helping the mentally retarded do not have the money to totally re-educate the public to bring them to

package of bills intended to advance family day care and did not specifically speak to the provision regarding local zoning. One reason for the infrequency of centers testifying against these provisions might be the absolute scarcity of day care slots. Centers do not fear competition because the need is so high. Another might be that centers and family day care homes do not compete. They may serve different clientele, seeking different price points, quality measures, and levels of convenience.

270. FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 3.

271. *See, e.g.*, JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE 62–75 (1987).

272. Been et al., *supra* note 3, at 231, 259 (concluding that homevoters "are more powerful in urban politics" than other stakeholders).

an awareness of the fact that they have a vast basket of irrational fears regarding mentally retarded people.”²⁷³

But state capitols pose a challenge for homevoters, one that they may not be able to overcome in the face of organized opposition. Relative to state bureaucrats, industry lobbyists and even social service agencies, homevoters have less opportunity to participate in the state political process. And, without a specific identifiable development project on the line, they have less reason to do so.²⁷⁴

Homevoter influence drives decisions at the local level in part because the contested issues are embodied in individual proposed developments with anticipated negative effects on specific existing residents. Because localities rarely engage in a wholesale revision of the zoning ordinance, land use disputes occur around individual proposed projects.²⁷⁵ These projects are almost always in someone’s backyard and are highly salient to homevoters. Consider the example of family day care. A neighbor is likely to take the time to challenge a nearby family day care before a local land use board. For its part, a land use board is likely to be swayed by a neighbor’s eyewitness account of traffic and noise concerns caused by the day care. It is unlikely to respond to empirical evidence that day care homes do not *generally* decrease property values, for instance, in the face of an angry neighbor insisting that *this* day care home will.

Local public participation opportunities are intended to be convenient to homevoters. Lay volunteer boards are appointed to hear land use applications. Zoning hearings are often scheduled at night to accommodate volunteer commissioners and the town residents that might wish to testify on a proposed zoning change or variance. And, by definition, they occur in the town where a resident opposing a project lives. Public hearings before state legislatures, on the other hand, are scheduled to accommodate full-time legislators and lobbyists. They occur during normal business hours in state capitols that can be hundreds of miles from where a homeowner lives.

With rare exception, state policymaking, by contrast, is made without reference to specific projects. The anticipated ill effects of additional development are not concrete and are therefore significantly less salient to individual homevoters. The legislative

273. *Mar. 25 Hearing on S.B. 268*, *supra* note 213, at 8 (statement of Susan Haas).

274. See Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the “Zoning Budget,”* 62 CASE W. L. REV. 81, 89–96 (2011).

275. *Id.*

process is less accessible to homevoters but more accessible to professional lobbyists. Average homevoters are unlikely to challenge a general state intervention because, until the issue is a specific proposed development on their block, the issue is not salient. Conversely, child care advocates, family day care provider networks, and advocates for working families are experienced repeat players at the state capitol. They cannot, however, appear before every local board on behalf of every local provider. The state capitol provides an opportunity for input that they do not have at the local level. Those seeking to engage in land uses opposed by homevoters will have a voice in state capitols, even if they are poorly suited to advocate at the local level.

In short, states provide a forum less likely to be used by angry neighbors. In opposition to Michigan's intervention, one state legislator argued that "[w]e're assuming that local people, local elected officials, don't have the same concern for children and child care as we have."²⁷⁶ The issue, however, is not that local officials do not care for children; it is that the structure of local government prioritizes concentrated special interests' property values over the interests of children. State legislators, on the other hand, have the flexibility to consider other issues and balance them against homeowners' fears regarding property values.

B. State Bureaucracies Advance Local Deregulation

Once at the capitol, interest groups are able to make arguments that are compelling to state legislators even though local zoning commissions might have considered them irrelevant. First among these is the argument that local policymaking undermines state administrative functions.

Local choices often impose externalities outside of local borders. Based on a straight analysis of externalities, one might assume that states will intervene anytime their interests diverge from local interests. If a development imposes negative externalities locally but positive externalities at the state level, the state might eliminate local approvals processes. If a development imposes positive externalities locally but negative externalities at the state level, the state might impose a requirement that the development procure both state and local approvals. Where state and local incentives align, much of the

276. 2 S. JOURNAL, 1988 Leg., Reg. Sess. 2854 (Mich. 1988).

existing scholarship assumes that local control of land use ought to be the default rule.

This analysis does not account, however, for salience. The simple existence of externalities does not ensure that the state will step in to address them. States will consider intervention only when the parties affected by the externality can organize themselves to advocate for intervention. The problem of large lot and other exclusionary zoning, which imposes positive externalities locally but negative externalities statewide and nationwide, evidences the importance of salience and organization. Very few states intervene in exclusionary zoning of multifamily and other forms of denser housing. The externalities are diffuse and their impact on any one person is small. In contrast, perceived positive externalities at the local level are highly salient.

In the case of family day care homes, alternative energy infrastructure, and group homes, however, the otherwise diffuse negative externalities are felt by a state agency, thus solving for salience and organization. Local zoning limited the ability to pursue bureaucratic functions such as licensing family day cares, deinstitutionalization, and meeting renewable energy goals. State governmental agencies, whether directly or indirectly, felt the impact of local regulations. And the local regulatory process did not account for that impact. Responding to risk-averse homevoters, local governments rely on outright prohibition rather than simply regulating discrete negative externalities.

In the case of alternative energy, family day care, and group homes, the fact that a state bureaucracy—not just individual solar power users, day care providers, and disabled individuals—is subjected to negative externalities of local land use regulation corrects for the problem of salience. Displacing interventions follow because the state bureaucracy has an interest in correcting local instincts to prohibit LULUs rather than simply regulate minor local negative externalities.

These examples suggest that state government has a powerful role to play in what is essentially a libertarian project: stripping local authorities of the power to zone and refusing to replace it with federal or state zoning power. These are “big government” arguments for smaller government. If, however, one appropriate role for

government is ensuring that markets operate efficiently,²⁷⁷ it should not at all be surprising that states have a deregulatory role to play in reining in overzealous local zoning authorities. While state regulations apply to family day care homes, manufactured housing, alternative energy infrastructure, and group homes, the interventions are nevertheless deregulatory because they eliminate land use regulations entirely (even while health, safety, consumer protection, and other regulations might be imposed by the state).

State interventions are, in turn, often informed by federal priorities. Group home interventions, for example, followed the availability of federal funding for community-based care. Similarly, federal incentives to license family day cares led to more licensing statutes which, in turn, led to zoning interventions. In situations in which the federal government has an interest in local zoning—clean air, affordable housing, fair housing, climate change prevention and mitigation—federal bureaucrats may have a role to play, even where Congress is unwilling to intervene directly in local authority to zone.

C. *Tailoring Requirements Replace Local Vetoes with Standards*

It is not surprising that states are more likely to displace local regulation where another regulatory rubric is available. Whether the standard is state licensing requirements for group homes and family day cares or the federal HUD Code for manufactured housing, it does not matter that the standard does not itself preempt local zoning authority. Instead, the standard assures state lawmakers that the land use in question will not go entirely unregulated even after local governments' authority to regulate them is restricted.

What is more interesting and informative is that states sometimes adopt new standards where they did not exist before. The Standard State Zoning Enabling Act imposes very little in the way of standards for local zoning decisions. But in the case of these displacing interventions, states routinely craft standards and rules to confine local action. The displacing intervention allows local governments to regulate some aspects of LULUs, but not exclude them entirely. As one family child care advocate described these battles, “[w]hile zoning has always been a peculiarly local function, . . . there was . . . no justification for absolute prohibition of homes in any community,

277. See generally Reeve T. Bull, *Market Corrective Rulemaking: Drawing on EU Insights to Rationalize U.S. Regulation*, 67 ADMIN. L. REV. 629, 679–80 (2015) (discussing the role agencies play in addressing a market failure).

regardless of local conditions.”²⁷⁸ In short, state legislators address some local objections by allowing local governments to regulate specific enumerated aspects of a local development. They refuse, however, to allow local governments to *overregulate* and enact blanket prohibitions.

These standards and rules are crafted to address only those local concerns that state lawmakers find compelling. Because displacing interventions are passed without regard to any one specific development, proponents of local control must identify categories of local concerns that might be relevant to future development proposals. Where the state concludes that overconcentration is a legitimate concern, the standard might be a group home or family day care quota effectuated through dispersal. Where the legitimate concern is aesthetics, the state might permit localities to require roofs of manufactured homes to match the pitch of roofs on neighboring houses. Where the legitimate concern is safety, the state might allow localities to require family day care providers to erect fencing.

In all of these cases, whether family day cares in Michigan, manufactured housing in Nevada, or alternative energy infrastructure in California, the state restricts both the means and the ends of local regulations. Only limited interests are recognized. And regulations must be crafted to protect those interests. Tailoring requirements are rare in zoning enabling acts. It is a welcome surprise to find them here, where the state recognizes both its interest in encouraging certain land uses and the local interest in mitigating their impact on their immediate surroundings.

These interventions demonstrate the role that states and the federal government can play in what is, essentially, a libertarian project. States and the federal government can intervene to deregulate certain land uses for the benefit of people and industries often sidelined by local governance structures. And they can do so in a way that improves upon the Standard State Zoning Enabling Act by considering the local interest in regulating discrete aspects of certain land uses alongside the broader interest in permitting those uses to exist. When they do occur, displacing interventions often successfully balance state and local interests. They remove local authority to prohibit certain land uses but expressly permit local governments to address discrete enumerated potential negative impacts of those land

278. CAROL STEVENSON ET AL., CHILD CARE LAW CTR., FAMILY DAY CARE ZONING ADVOCACY GUIDE 29 (1989).

uses. This kind of tailoring requirement, which both addresses local government's propensity to overregulate land use and recognizes local competency to address discrete aspects of development, ought to serve as a model for state zoning enabling acts more broadly. Tailoring requirements refuse to consider land use authority as a binary, that the power to zone must reside either with localities or with the state. Instead, they acknowledge local competency to mitigate certain negative impacts of development while also acknowledging state competency to balance the interests of homevoters against those of other relevant lobbying groups.

IV. EMBRACING TAILORING REQUIREMENTS

Bureaucratic agencies are, of course, regulators. But, as this Article demonstrates, they are sometimes also the subject of regulation. In the case studies examined above, state agencies bearing the brunt of local regulations led the charge to dismantle those regulations. Had it not been for those state agencies, various powerless constituencies—disabled individuals, family day care providers, clotheslines users, and families seeking low-cost child care—would have remained subject to overzealous land use regulations despite the cost that those regulations imposed on society at large. Can we then look to the states to solve perhaps the most pernicious overregulation problem in the country: local zoning that dramatically inflates both housing consumption and housing cost?

Perhaps. Affordable housing politics are fraught, to say the least. To a degree that the economists, political scientists, lawyers, and psychologists have not yet completely explained, the development of low-cost housing poses an existential threat to voters across the political spectrum. Surely, racism,²⁷⁹ the Internal Revenue Code,²⁸⁰ and risk aversion²⁸¹ all play a role and no one of these problems will be solved overnight. I would, however, propose one possible solution to the problem of the power of the homeowner lobby, advocating for local control to the exclusion of all other priorities, with the full understanding that local control means homeowner control.

279. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (discussing the connection between racism and affordable housing).

280. EDWARD L. GLAESER & JOSEPH GYOURKO, *RETHINKING FEDERAL HOUSING POLICY: HOW TO MAKE HOUSING PLENTIFUL AND AFFORDABLE* 88–119 (2008).

281. FISCHER, *HOMEVOTER HYPOTHESIS*, *supra* note 3, at 8–10.

Every state has a bureaucracy dedicated to affordable housing. One might wonder why state housing agencies have not played this role to advance state interventions to permit affordable and multifamily housing development. One answer lies in the distinction between subsidized and low-cost housing.²⁸² State housing agencies are charged with the former. They administer federal and state housing subsidies. Typically, that is their only charge. They are not held to account for the high cost of market housing by function of either federal or state law. The analysis undertaken by this Article suggests that holding state housing agencies accountable for the high cost of market rate housing would force them to take action here. In other words, expanding the authority of a state agency might result, counterintuitively, in less government regulation by inducing the agency to correct for local regulatory overreach.

Where state bureaucrats feel the brunt of onerous local regulations, they recognize the need to limit local authority to impose those regulations. Tailoring requirements enable state governments to respect local ability to identify and correct discrete unpleasant impacts of land development while stripping local governments of the power to overreach by prohibiting entire categories of land uses altogether. Counterintuitively, liberalizing local land use regulations may require empowering state bureaucracies so as to acknowledge the role that the states must play in a deregulatory project.

282. In the classroom, I routinely distinguish between “capital ‘A’ Affordable Housing” (subsidized housing) and “lower case ‘a’ affordable housing” (low-cost unsubsidized housing). The term is not uncontroversial, but increasingly, the literature refers to “naturally occurring affordable housing.” See, e.g., Joe Cortright, *The Myth of Naturally Occurring Affordable Housing*, CITYCOMMENTARY (Oct. 10, 2017), <http://cityobservatory.org/the-myth-of-naturally-occurring-affordable-housing/> [<https://perma.cc/EE62-FGU6>]; H. Blair Kincer & Michael Novogradac, *Filtered, As Opposed to Naturally Occurring, Affordable Housing*, NOVOGRADAC & COMPANY (Dec. 19, 2017), <https://www.novoco.com/notes-from-novogradac/filtered-opposed-naturally-occurring-affordable-housing> [<https://perma.cc/B2VW-Q7ES>].

