A *Mount Laurel* for Climate Change? The Judicial Role in Reducing Greenhouse Gas Emissions From Land Use and Transportation

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Summary

Greenhouse gas emissions from transportation in the United States have remained persistently high. One cause is common low-density land use patterns that make most Americans dependent on automobiles. Reducing these emissions requires increasing density, which U.S. local government law makes difficult to achieve through the political process. *Mount Laurel*, a 1975 New Jersey Supreme Court case that addressed an affordable housing crisis by restraining local parochialism, provides a potential solution. Environmental advocates may be able to mount similar state-law challenges against low-density zoning based on the high carbon emissions it produces. Such a challenge is legally and normatively defensible in New Jersey and other states.

The successes some states have had combating climate change mask a troubling trend. For example, California has ambitious goals—it seeks to reduce greenhouse gas (GHG) emissions to 40% below 1990 levels by 2030, and to net zero by 2050[1]—and it has already met its 2020 goal four years early.[2] However, even as California's overall emissions shrink, its GHG emissions from transportation are still rising.[3] The culprit is the personal automobile.[4] Vehicular emissions are a product of vehicle miles traveled (VMT) and the emissions rate per mile.[5] State and federal regulations target emissions per mile.[6] VMT have grown.[7]

The situation is similar nationally. Twenty-eight percent of U.S. emissions are due to transportation, and transportation is the sector responsible for the largest growth in GHG emissions since 2010.[8] Thanks to high VMT and inefficient vehicles,[9] the U.S. transportation system's energy intensity is higher than any other country's, and is rising.[10] This has persisted even though 19 states have policies aimed at VMT reductions.[11] Improvements in fuel economy[12] were offset by a 44% increase in VMT for light-duty vehicles between 1990 and 2016.[13]

The root problem is that the low-density suburban sprawl promoted by local zoning makes Americans dependent on automobiles. Transportation by any other method is virtually impossible in much of the country.[14] Sprawl leads to higher VMT by pushing places further apart, lengthening

1. U.S. Climate Alliance, 2018 Annual Report: California, *available at* https://static1.squarespace.com/static/5a4cfbfe18b27d4da21c9361/t/5c2e53f3c2241b1c7333f22e/1546540019855/USCA_2018+Annual+Report_20180911-FINAL_CA.pdf.
2. California Air Resources Board, California Greenhouse Gas Emissions for 2000 to 2016, at 2 (2018), *available at* https://www.arb.ca.gov/cc/inventory/pubs/reports/2000_2016/ghg_inventory_trends_00-16.pdf.
3. *Id*. at 5.
4. *Id*.
5. *See* Rachel Medina & A. Dan Tarlock, *Addressing Climate Change at the State and Local Level: Using Land Use Controls to Reduce Automobile Emissions*, 2 Sustainability 1742, 1744 (2010).
6. 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62623 (Oct. 15, 2012) [hereinafter GHG and CAFE Standards] (to be codified in scattered sections of 40 and 49 C.F.R.); Cal. Code Regs. tit. 13, §1961.3 (2018).
7. Caltrans, *Monthly Vehicle Miles of Travel*, https://dot.ca.gov/programs/traffic-operations/census/mvmt (last visited Aug. 21, 2019).
8. U.S. Environmental Protection Agency (EPA), Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2017, at ES-24 (2019) (EPA 430-R-19-001), *available at* https://www.epa.gov/sites/production/files/2019-04/documents/us-ghg-inventory-2019-main-text.pdf. When electricity emissions are assigned to end-use sectors, transportation accounted for 36% of emissions. *Id*. at ES-12.
9. Emma Foehringer Merchant, *A Look at the Passenger Transportation Challenge for the US*, Greentech Media, Jan. 1, 2019, https://www.greentechmedia.com/articles/read/the-u-s-s-passenger-transportation-challenge.
10. *Id*.
11. *See* Louise W. Bedsworth & Ellen Hanak, *Climate Policy at the Local Level: Insights From California*, 23 Global Envtl. Change 664, 664 (2013).
12. *See* GHG and CAFE Standards, *supra* note 6.
13. U.S. EPA, *supra* note 8, at ES-12 to ES-13.
14. *See*, *e.g.*, David Owen, Green Metropolis 101-05 (2009); Jeff Speck, Walkable City 4 (2012).

commutes and other trips.[15] Greater transit use would have multiplicative benefits in reducing VMT,[16] and thus GHG emissions, but is impossible to achieve without high residential density.[17] Electric vehicles can help mitigate emissions, but not enough to meet state climate goals; an analysis in California found that if, in 2050, all vehicles were electric and 75% of energy came from renewable sources, the state would still not meet its climate goals without reducing VMT by 15% beyond current projections.[18]

Additionally, buildings, which generate more than one-third of GHG emissions nationally,[19] emit GHGs at higher rates when built at low density.[20] Conversely, a 2007 study showed New York City was responsible for 1% of U.S. GHG emissions, despite containing 2.7% of the population.[21] Addressing low-density sprawl is crucial to addressing climate change. Technically feasible density increases could massively reduce U.S. carbon emissions.[22]

Mitigating climate change requires changing suburbs and their land use laws. Despite widespread criticisms of sprawl since at least the 1950s,[23] low-density housing continues to predominate in the United States; studies consistently show that the majority of Americans live in suburbs.[24] Land use regulation is seen as a fundamentally local power due to historical traditions of local autonomy.[25] This perception has withstood efforts to shift land use power to the state level.[26] While some larger central cities are trying to fight climate change,[27] they have been hesitant to target land uses that promote car dependency.[28] Even if they did, their potential impact is limited given the continued dominance of the suburbs.[29]

15. Mac Taylor, Legislative Analyst's Office, Perspectives on Helping Low-Income Californians Afford Housing 5 (2016), *available at* https://lao.ca.gov/Reports/2016/3345/Low-Income-Housing-020816.pdf; Bert van Wee & Susan Handy, *Key Research Themes on Urban Space, Scale, and Sustainable Urban Mobility*, 10 Int'l J. Sustainable Transp. 18, 19 (2016) ("[T]ravel is mostly a derived demand: people travel because they want to participate in activities such as working, education, recreation, and social activities. The different locations of these activities—land-use patterns—determine the options available to people with respect to what destinations are found at what distances from home."); *see also* Song Bai et al., *Integrated Impacts of Regional Development, Land Use Strategies, and Transportation Planning on Future Air Pollution Emissions*, *in* Transportation Land Use, Planning, and Air Quality: Proceedings of the 2007 Conference 192, 198 tbl. 2 (Srinivas S. Pulugurtha et al. eds., American Society of Civil Engineers 2008) (finding VMT and trip distance shrink with controlled growth and rises with uncontrolled growth compared to the baseline in the San Joaquin Valley).
16. John W. Neff, *Estimating Values of the Transit Land-Use Multiplier Effect From Published Federal Highway Administration and Federal Transit Administration Data*, *in* Proceedings of the 54th Annual Transportation Research Forum 196, 196 (2013).
17. *See* Edward L. Glaeser, *Green Cities, Brown Suburbs*, City J., Winter 2009, https://www.city-journal.org/html/green-cities-brown-suburbs-13143.html.
18. Alissa Walker, *Electric Cars Won't Save California*, Curbed, Oct. 24, 2018, https://www.curbed.com/a/texas-california/electric-cars-climate-change-sacramento-california; *see also* California Air Resources Board, 2018 Progress Report: California's Sustainable Communities and Climate Protection Act 28 (2018) ("Even if the share of new car sales that are [zero emission vehicles] grows nearly tenfold from today, California would still need to reduce VMT per capita 25% to achieve the necessary reductions for 2030."), *available at* https://ww2.arb.ca.gov/sites/default/files/2018-11/Final2018Report_SB150_112618_02_Report.pdf. Electric vehicles also have other problematic environmental impacts, including the spread of particulate matter, continued congestion, and collisions. Walker, *supra*.
19. Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 Minn. L. Rev. 231, 245 (2008).
20. Yosef Rafeq Jabareen, *Sustainable Urban Forms: Their Typologies, Models, and Concepts*, 26 J. Plan. Educ. & Res. 38, 40 (2006); John R. Nolon, *The Land Use Stabilization Wedge Strategy*, 34 Wm. & Mary Envtl. L. & Pol'y Rev. 1, 24 (2009).
21. Owen, *supra* note 14, at 16-17; *see also* David Owen, *The Greenest Place in the U.S. May Not Be Where You Think*, Yale E360, Oct. 26, 2009, https://e360.yale.edu/features/greenest_place_in_the_us_its_not_where_you_think.
22. Patrick Sisson, *As Cities Confront Climate Change, Is Density the Answer?*, Curbed, Dec. 11, 2018, https://www.curbed.com/2018/12/11/18136188/city-density-climate-change-zoning; Alfred Twu, *How California Can Build 3.5 Million New Homes*, Medium, Jan. 8, 2019, https://medium.com/@firstcultural/how-california-can-build-3-5-million-new-homes-dfe2f0ba3466. This would stem primarily from reductions in VMT: a 2008 study calculated that truly compact development could reduce VMT by 10% to 15%. Alice Kaswan, *Climate Change, Consumption, and Cities*, 36 Fordham Urb. L.J. 252, 261 (2008).
23. Kenneth A. Stahl, *The Suburb as a Legal Concept*, 29 Cardozo L. Rev. 1193, 1269 (2008). These criticisms include racial and economic segregation, structural sexism, diminished democratic impulses and capabilities, congestion, reduced economic growth, and vast environmental damage. *See*, *e.g.*, Rosalyn Baxandall & Elizabeth Ewen, Picture Windows: How the Suburbs Happened 149-52, 159-60, 171-90 (2000); Lewis Mumford, The City in History: Its Origins, Its Transformations, and Its Prospects 493-96, 511-13 (1961); David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255, 2258 (2003); John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. Rev. 823, 831-32 (2019).
24. Hari M. Osofsky, *Suburban Climate Change Efforts: Possibilities for Small and Nimble Cities Participating in State, Regional, National, and International Networks*, 22 Cornell J.L. & Pub. Pol'y 395, 399 (2012); Jed Kolko, *How Suburban Are Big American Cities?*, FiveThirtyEight, May 21, 2015, https://fivethirtyeight.com/features/how-suburban-are-big-american-cities/. This finding is consistent across studies, even though suburb and sprawl are poorly defined. Steve P. Calandrillo et al., *Making Smart Growth Smarter*, 83 Geo. Wash. L. Rev. 829, 839 (2015); Whitney Airgood-Obrycki & Shannon Rieger, Joint Center for Housing Studies of Harvard University, Defining Suburbs: How Definitions Shape the Suburban Landscape 26 tbl. 5 (2019) (noting three different definitions all show that at least 60%—and up to 80%—of the country lives in suburbs), *available at* https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_Airgood-Obrycki_Rieger_Defining_Suburbs.pdf.
25. Bronin, *supra* note 19, at 235-39. The U.S. Supreme Court has endorsed local zoning, most notably in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), which extolled the ability of a locality to separate uses, *see id*. at 389-90. The Court has continued to idealize the notion of "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs." Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9, 4 ELR 20302 (1974).
26. Bronin, *supra* note 19, at 231-32. *Mount Laurel* fits into this tradition.
27. New York City, for example, intends to achieve 80% emissions reductions by 2050. City of New York, 1.5°C: Aligning New York City With the Paris Climate Agreement (2017), *available at* https://www1.nyc.gov/assets/sustainability/downloads/pdf/publications/1point5-AligningNYC-withParisAgrmt-02282018_web.pdf.
28. Berkeley, for example, resisted building housing in the acres of parking lots around its transit stations. *See* Rachel Barber, *BART to Build Housing at North Berkeley Station, Other Station Parking Lots*, Daily Californian, Jan. 24, 2019, http://www.dailycal.org/2019/01/23/bart-to-build-housing-at-north-berkeley-station-other-station-parking-lots/.
29. Osofsky, *supra* note 24, at 398. A critical mass of suburbs is continuing to grow faster than the nation as a whole. Hyojung Lee, *Reconciling the Back-to-the-City Thesis With Sustained Suburban Growth*, Housing Persp.,

Changing this system is difficult because most local governments lack the political incentives or legal authority to mitigate climate impacts. Local governments generally cannot control their neighbors' land use regulations, but car dependence requires regional solutions: suburban residents frequently cross municipal boundaries. Even if local governments could act, most would choose not to promote density because local homeowners, who see current land use policies as a way to guarantee their largest investment, would resist it.[30]

State land use statutes tend to be ineffective[31] or counterproductive, often slowing down development and preventing density rather than encouraging it.[32] Further, the background legal structure that states use to regulate localities, particularly regarding taxation, disincentivizes density.[33] Even statutes that promote density suffer from a lack of enforcement and wide loopholes.[34] This is not true of all areas of local climate action. In 2010, 36 states already had preempted some local restrictions of small-scale renewable energy, such as rooftop solar.[35] But density remains a challenge.

One approach to socioeconomically exclusionary zoning, another symptom of American suburban sprawl, suggests a way out of this mess. In 1975, the New Jersey Supreme Court decided *Southern Burlington NAACP v. Township of Mount Laurel* (*Mount Laurel I*).[36] Faced with a long history of exclusionary zoning in the suburbs that gutted central cities and led to an affordable housing crisis,[37] the court held that the municipal zoning that created the crisis was impermissible.[38] Instead of their existing parochial policies, municipalities had to use their delegated zoning power to promote the general welfare of the state as a whole.[39]

This meant making "realistically possible" the provision of affordable housing.[40] Municipal inaction followed; the New Jersey Supreme Court eventually responded with a second *Mount Laurel* decision, creating actionable, enforceable remedies.[41] The state legislature partially codified the doctrine in the state's Fair Housing Act (FHA), which still mandates the construction of affordable housing today.[42]

The *Mount Laurel* doctrine can and should be applied to climate change. The New Jersey Supreme Court's anti-parochial reasoning in *Mount Laurel I* and *II* is not restricted to affordable housing. Instead, it suggests a new way of thinking about local power. Under *Mount Laurel*, no matter what local governments are empowered to do by state constitutions and statutes, they cannot impose significant negative externalities to the point of creating a statewide crisis. Climate change is one such crisis. It is caused in substantial part by the externality of high fossil fuel emissions brought about by common zoning practices.

Numerous states have climate mitigation goals, but as long as their constituent local governments refuse to zone for greater density—that is, as long as the status quo persists—the states will almost certainly fail to meet them. The *Mount Laurel* doctrine is designed to combat local inaction and collective action problems. Structural incentives prevent state political branches from meeting the crisis. The state judiciary should step in, even though this might put it in an activist role, to change the bounds of permissible local regulation.

Although New Jersey is the only state to have adopted the *Mount Laurel* doctrine in full, a claim based on the case could be brought in other states. The fundamental premise of the case—that local power, as designated state power, is subject to certain limits—is true in every U.S. state.[43] The case's other premises develop from that broadly accepted starting point. Although no state followed *Mount Laurel* in its full effect, any state court could use its reasoning to address the climate crisis.

Additionally, *Mount Laurel* may be an outlier, but the case pulled other states along in its wake. Some states have less robust versions of *Mount Laurel*,[44] and exclusionary ordinances have been invalidated under less comprehensive doctrines in others.[45] There are also state statutes similar to New Jersey's FHA, such as the Massachusetts Anti-Snob Zoning

Oct. 16, 2018, https://www.jchs.harvard.edu/blog/reconciling-the-back-to-the-city-thesis-with-sustained-suburban-growth/. This is true despite projections in the early 2000s that millennials' living preferences would lead to a resurgence of central cities. *Id*.

30. *See infra* Section III.C.
31. S.B. 375 in California is one widely cited example. *See*, *e.g.*, Felicia Marcus & Justin Horner, *Response to* The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States *by Sara Bronin*, 40 ELR 10743, 10744-45 (Aug. 2010); Bedsworth & Hanak, *supra* note 11, at 665; Medina & Tarlock, *supra* note 5, at 1755; Kaswan, *supra* note 22, at 300. It has not led to GHG emissions reductions. Uma Outka, *The Energy-Land Use Nexus*, 26 J. Land Use & Envtl. L. 245, 248-49 (2012); Walker, *supra* note 18. For other examples of state statutes, see Bronin, *supra* note 19, at 270-72; Gerald P. McCarthy, *Making the Land Use/Transportation Connection: Quietly Revolutionizing Land Use in the 21st Century*, 40 ELR 10746, 10746 (Aug. 2010).
32. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 70-71 (1990).
33. Gerald E. Frug & David J. Barron, City Bound: How States Stifle Urban Innovation 82, 111 (2013); Kenneth A. Stahl, *Yes in My Backyard: Can a New Pro-Housing Movement Overcome the Power of NIMBYs?*, Zoning & Plan. L. Rep., Mar. 2018, at 8. The background federal legal infrastructure—specifically tax and transportation policy—also encourages low-density, single-family housing. Kaswan, *supra* note 22, at 294-95; Steven Higashide, *We Can't Tackle Climate Change if We Ignore the Main Polluter—Transportation*, Hill, Jan. 15, 2019, https://thehill.com/opinion/energy-environment/425500-we-cant-tackle-climate-change-if-we-ignore-the-main-polluter.
34. Uma Outka, *Siting Renewable Energy: Land Use and Regulatory Context*, 37 Ecology L.Q. 1041, 1079-80 (2010).
35. Marcus & Horner, *supra* note 31, at 10745. *But see* Troy A. Rule, *Renewable Energy and the Neighbors*, 2010 Utah L. Rev. 1223, 1245-46 (noting vague mandates in Connecticut and Pennsylvania are ineffective), 1249-53 (2010) (criticizing preemption of local solar regulations in eight states because it forbids local tailoring).
36. 336 A.2d 713 (N.J. 1975).
37. *Id*. at 717-24.
38. *Id*. at 726-28.
39. *Id*.
40. *Id*. at 728.
41. S. Burlington NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 456 A.2d 390, 410 (N.J. 1983); *see also* Charles M. Haar, Suburbs Under Siege: Race, Space, and Audacious Judges 36 (1996).
42. *See* N.J. Stat. Ann. §§52:27D-301 to 52:27D-329.19 (West 2018); Hills Dev. Co. v. Bernards Twp. (*Mount Laurel III*), 510 A.2d 621, 631 (N.J. 1986) (noting the FHA was "the Legislature's response to the *Mount Laurel* cases"); In re Adoption of N.J.A.C. 5:96 & 5:97 by the N.J. Council on Affordable Hous. (*Mount Laurel IV*), 110 A.3d 31 (N.J. 2015).
43. *See* 1 John F. Dillon, Municipal Corporations 448-51, 452 (5th ed. 1911); *cf.* Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907).
44. *See*, *e.g.*, Associated Home Builders Inc. v. City of Livermore, 557 P.2d 473, 7 ELR 20155 (Cal. 1976); Berenson v. Town of New Castle, 341 N.E.2d 236 (N.Y. 1975); Appeal of Girsh, 263 A.2d 395 (Pa. 1970).
45. Briffault, *supra* note 32, at 42 n.164.

Act.[46] A *Mount Laurel* challenge for climate mitigation could have a similar effect.

Some calls for reform have sounded similar notes. Judge David Barron, for example, suggested a judicial approach to home rule in which courts would be asked to distinguish "between exclusionary and inclusionary local measures."[47] Prof. Paul Diller also sought to articulate a preemption doctrine "that maximizes . . . good faith policy experimentation while minimizing the tendency of cities to pursue parochial and exclusionary policies."[48] Both Judge Barron and Professor Diller see a role for the judiciary,[49] but Judge Barron, concerned about judicial legitimacy, favors changes to background property tax law rather than an empowered judiciary,[50] while Professor Diller focused on judicial interpretation of statutes and implied preemption rather than state constitutional claims.[51]

This Article endorses a different solution: a comprehensive judicial check on a broken political process that makes externalities inevitable in an area of crisis. It also proposes a specific mechanism under current law for achieving such a result. Part I details the history of the *Mount Laurel* cases. It argues that the *Mount Laurel* doctrine is applicable beyond affordable housing, including to climate change. Part II sketches out such a challenge. Like affordable housing, climate should be considered a part of the general welfare.

Once that is established, *Mount Laurel* triggers certain obligations for localities, in this case to reduce carbon emissions caused by local land use. Part II also identifies some examples of local policies that could be challenged if climate were made part of the general welfare. Part III argues that a *Mount Laurel* doctrine for climate change is not only possible under current law, but desirable. Part IV concludes.

A *Mount Laurel* for climate can change the bounds of local power to overcome parochialism and collective action problems that are an inescapable fixture of current American local government law. It would admittedly shift power to state courts, placing judges in an activist role. Courts can legitimately take on this role because the political system makes the externalities of local land use regulation almost impossible to address without judicial action. Courts also have the necessary institutional competence.

Mitigating climate change is challenging for many reasons, one of which is that no level of government can act at all of the scopes necessary to mount an effective response.[52] Federal environmental law typically does not target individuals, but individuals and households were responsible for more than one-half of U.S. GHG emissions in 2009, due in large part to personal vehicles.[53] Addressing climate change thus requires overcoming structural problems with local political systems. A radical shift is needed. In the 1970s, *Mount Laurel* provided a model of such a shift, overcoming seemingly insurmountable barriers to make possible the provision of affordable housing. Its powerful reasoning is available again today.

I. *Mount Laurel:* A Judicial Response to Exclusionary Zoning

Mount Laurel I was a bold approach to lessening the effects of suburban sprawl on people of low and moderate incomes. In the face of a long history of exclusion in zoning regulation that was judicially endorsed and impossible to remedy through a typical political process, the New Jersey Supreme Court tried to force systemic change. Its reasoning touched tangentially on issues of equal protection and fundamental rights, but the ultimate basis for its decision was a condemnation of local parochialism. Despite substantial criticism, the doctrine made an important practical impact, and has shown remarkable durability. Since it was introduced in 1975, the *Mount Laurel* doctrine has survived several further cases and the enactment of a major state statute, the state's FHA; although the main mechanism for affordable housing in New Jersey today is the FHA, the *Mount Laurel* doctrine still provides an important floor.

The *Mount Laurel* cases sought to counter one of zoning's original purposes: exclusion. Exclusion of "undesirable" people and land uses has been a crucial motivation behind zoning since the first zoning ordinances were passed in the early 20th century.[54] When the U.S. Supreme Court first upheld local zoning, it did not mention these exclusionary motivations,[55] but the lower court in the case was more explicit in relating the use restrictions at issue to hypothetical ordinances with "the purpose of segregating in like manner various groups of newly arrived immigrants" or preventing "[t]he blighting of property values and the congesting of population [that occur] whenever the colored or certain foreign races invade a residential section."[56]

As suburbanization accelerated and sprawl spread in the 1950s, racist and nativist fears mixed with economic incentives that further cemented exclusionary tendencies. Inflation in the 1970s made housing an even more important asset for middle-class homeowners.[57] Consequently, sub-

46. *Id.* at 68-70; Alan Mallach, *The* Mount Laurel *Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, 63 Rutgers L. Rev. 849, 860 (2011).
47. Barron, *supra* note 23, at 2362.
48. Paul Diller, *Intrastate Preemption*, 87 B.U. L. Rev. 1113, 1117 (2007).
49. Barron, *supra* note 23, at 2363-64; Diller, *supra* note 48, at 1158-59.
50. Barron, *supra* note 23, at 2364.
51. Diller, *supra* note 48, at 1116.
52. *Cf.* Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 Cornell L. Rev. 1153, 1160-61 (2009). Prof. Richard Lazarus discusses the absence of a "global lawmaking institution" that can address the global problem; analogously, in the United States, only states can address the problem of local land use.
53. Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Towards a New Environmental Norm*, 33 Harv. Envtl. L. Rev. 117, 120-22, 126 (2009).
54. Jerry Frug, *The Geography of Community*, 48 Stan. L. Rev. 1047, 1082-83 (1996).
55. *See* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
56. Ambler Realty Co. v. Euclid, 297 F. 307, 313 (N.D. Ohio 1924).
57. William A. Fischel, The Rise of the Homevoters: How the Growth Machine Was Subverted by OPEC and Earth Day 4 (Dartmouth College Economics Department, Working Paper, 2016), https://www.dartmouth.edu/~wfischel/Papers/Rise_of_Homevoters_Fischel_Nov2016.pdf. Decreasing land availability due in part to restrictive zoning ordinances was one culprit behind this inflation. Edward Glaeser, *Reforming Land Use Regulations*, Brookings, Apr. 24, 2017, https://www.brookings.edu/research/reforming-land-use-regulations/. This process did not reverse once inflation subsided because zoning laws were intentionally made difficult to change

urban homeowners fought to preserve their investments by preventing change in their neighborhoods, thus preserving property values.[58] Thus, as suburbs isolated themselves, the exclusionary effects of zoning persisted, entrenching economic and racial segregation in housing.[59]

New Jersey was no exception to this trend. Its plentiful suburbs surrounding two major cities—New York and Philadelphia—grew significantly after World War II, resulting in "economic discrimination and exclusion of substantial segments" of the population.[60] Suburban sprawl proliferated across the state, initially with judicial approval. From 1949 to 1962, the New Jersey courts did not invalidate any exclusionary zoning ordinance and gave local governments broad powers to enact exclusionary and parochial land use ordinances.[61] Laws making incorporation easy and preventing the consolidation of municipalities created rigid local boundary lines and a proliferation of small municipalities; fragmentation and economic segregation were pervasive.[62] This led to a crisis of affordable housing availability by the 1970s.

Mount Laurel I was a profound check on this. The New Jersey Supreme Court shifted the frame of judicial analysis from the local to the regional and state levels. To place new, unprecedented obligations on municipalities, the court took three crucial logical steps. First, it noted that local regulation is an exercise of delegated state police power, which, "like any police power enactment, must promote public health, safety, morals, or the general welfare."[63] Second, following from the first point, it argued that local regulation must promote the general welfare of the state as a whole, rather than the general welfare of the locality alone.[64] Third, it found that adequate housing for everyone in the state, including people of low and moderate income, was part of the state's general welfare.[65]

Justice Frederick Hall's majority opinion began by reviewing the history of the township of Mount Laurel, a suburb of Philadelphia and the defendant in the case.[66] He noted that, as the town freely admitted during the litigation, "the effect of Mount Laurel's land use regulation has been to prevent various categories of persons from living in the township because of the limited extent of their income and resources."[67] He identified specific parts of the zoning ordinance that accomplished this effect and made it nearly impossible to build low- or moderate-income housing, including large minimum lot sizes and dwelling floor areas, an overuse of industrial designations, and prohibitions on multifamily housing, among others.[68]

The zoning ordinance, in Justice Hall's view, embodied hostility toward low-income housing.[69] But his opinion did not rely on this hostility or a finding of any discriminatory motivation: the town claimed, and Justice Hall accepted, that its zoning ordinance excluded people with low and moderate incomes because the town's residents wanted to keep property taxes low by minimizing the cost of public education and other social services.[70] Justice Hall concluded his framing of the case's background by looking at the regional situation: widespread parochialism had caused an affordable housing crisis in the suburbs, while central cities' tax bases eroded.[71] The shift to a regional focus is the case's key insight,[72] and a long-standing goal among several scholars of local government law.[73]

Faced with this crisis, Justice Hall found the exclusionary ordinance invalid based primarily on the state/local relationship. While there is admittedly some ambiguity as to the actual doctrine that emerged from *Mount Laurel I* and led to its result—even a proponent of the decision acknowledges its "minimal linkage to prior case law"[74]—the driving force of the opinion is the relationship between the state and the town:

> Land use regulation is encompassed within the state's police power . . . . [A]ll police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws . . . . [A]ffirmatively, a zoning regula-

and because many of the new restrictions, such as covenants and conservation easements, ran with the land. Fischel, *supra* at 9-10.

58. Fischel, *supra* note 57, at 6-7. Ironically, given the subject of this Article, this placed suburban homeowners in an alliance with environmentalists, who also sought to prevent growth. *Id*. This was a subconscious deal in which environmental organizations received members and homeowners received "a unifying ideology" besides the preservation of property values. *Id*. This history has caused tensions that were never fully resolved. In 2018, the Sierra Club opposed a bill in California that would have overridden local zoning ordinances to mandate denser housing near transit, offering a rationale that was inconsistent with its prior actions (the bill died in committee). Henry Grabar, *Why Was California's Radical Housing Bill so Unpopular?*, Slate, Apr. 20, 2018, https://slate.com/business/2018/04/why-sb-827-californias-radical-affordable-housing-bill-was-so-unpopular.html.
59. James A. Kushner, *Affordable Housing as Infrastructure in the Time of Global Warming*, 43 Urb. Law. 179, 183-89 (2010/2011); Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographic Scale*, 40 Fordham Urb. L.J. 1667, 1670-73 (2013). "Sprawl" lacks a widely accepted precise definition, but generally includes "detached, single-family homes, set far from the curb, on large lots, in (almost) purely residential neighborhoods, containing wide streets upon which residents will drive to jobs and shopping centers in potentially distant commercial zones—in other words, all of the built forms more commonly referred to as 'suburban.'" Calandrillo et al., *supra* note 24, at 839 (footnote omitted).
60. *Mount Laurel I*, 336 A.2d 713, 718 (N.J. 1975).
61. Briffault, *supra* note 32, at 39. This was not inevitable: although the scope of local power in New Jersey had gradually expanded since the 18th century, the state supreme court had been a consistent check on it, and it was imaginable that the court would have prevented clearly parochial actions. Robert C. Holmes, *The Clash of Home Rule and Affordable Housing: The Mount Laurel Story Continues*, 12 Conn. Pub. Int. L.J. 325, 334-37 (2013).
62. Daniel R. Mandelker, *The Affordable Housing Element in Comprehensive Plans*, 30 B.C. Envtl. Aff. L. Rev. 555, 556, 557 (2003). *See generally* Briffault, *supra* note 32, at 73-81 (discussing how localities' small sizes are due to state law on local government formation, annexation, and consolidation, and how small size contributes to exclusionary zoning).
63. *Mount Laurel I*, 336 A.2d at 725.
64. *Id*. at 726.
65. *Id*. at 727-28.
66. *Id*. at 718, 723.
67. *Id*. at 717.
68. *Id*. at 718-24.
69. *Id*. at 722.
70. *Id*. at 723.
71. *Id*. at 723-24.
72. Serkin & Wellington, *supra* note 59, at 1693. Also crucial was looking at "gestalt effects" rather than an individual's right to housing. Susan J. Kraham, *Right for a Remedy: Observations on the State Constitutional Underpinnings of the* Mount Laurel *Doctrine*, 63 Rutgers L. Rev. 835, 845 (2011).
73. *See*, *e.g.*, Barron, *supra* note 23, at 2366; Richard Briffault, *Smart Growth and American Land Use Law*, 21 St. Louis U. Pub. L. Rev. 253 (2002); Gerald Frug, *Beyond Regional Government*, 115 Harv. L. Rev. 1763 (2002).
74. Haar, *supra* note 41, at 19.

> tion, like any police power enactment, must promote public health, safety, morals, or the general welfare.[75]

Thus, the primary basis for the opinion was that local land use regulation was merely an exercise of state power. This was not an unusual or groundbreaking claim. Justice Hall's innovation was to find within it a substantive limit on local regulation. Local power, like all state police power, is meant to serve the general welfare, an amorphous and broad requirement. The court dug into these words to ask, "*whose* general welfare must be served" when local governments regulate.[76]

The answer was the general welfare of the state: "[W]hen regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served."[77] In some ways, this argument followed clear logic: no one disputed that local governments were exercising state power, and the state almost certainly would not have wanted to delegate power that would be used to undermine its welfare. Indeed, Justice Hall attempted to frame his decision as consistent with past state and federal case law.[78] Still, moving this concept from an abstraction to an actual substantive standard was novel.

The culminating part of the opinion—and its most "activist" part—was to make housing part of the state's "general welfare." Justice Hall justified this finding on pragmatic grounds, noting that "shelter, along with food, are the most basic human needs."[79] He bolstered this point by citing somewhat eclectic sources—mortgage finance case law and legislative findings in an unrelated statute—discussing the importance of housing.[80] He provided relatively little reasoning beyond this:

> It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality.[81]

This language established affordable housing as part of the general welfare standard. Under this standard, because Mount Laurel's zoning ordinance made affordable housing impossible to build, it was "presumptively contrary to the general welfare and outside the intended scope of the zoning power."[82] The town's fiscal rationale—its desire to keep property taxes low—could not save the ordinance.[83]

The court's somewhat conclusory language in a crucial part of the opinion has led to some confusion over the actual justification for the decision.[84] It is not entirely clear what the general welfare means, or what differentiates it from other constitutional theories. Determining the actual justification is important because it affects how far, and to what other topics, the doctrine can be extended. Scholars have proposed several potential theories that could underlie the decision, including economic integration, protection of the poor, or a conditional right to shelter triggered only in the absence of legislative protection.[85]

Despite the ambiguity, the most likely justification for the decision is a judicial strike against local parochialism: the general welfare is defined in part under *Mount Laurel* by the sources of threats to it. This conclusion is supported by the language quoted above, which specifically frames the opinion in terms of externalities. Furthermore, local government autonomy was central to the town's defense,[86] and Justice Hall was influenced by work that was broadly concerned with parochialism.[87] Thus, the doctrine is best characterized as saying that local regulation cannot cause significant problems beyond the borders of the locality. Affordable housing is a component of the general welfare because it is a basic need threatened by local action.[88] The precise bounds of the general welfare are left unsettled, but the thrust of the case is a judicial check on local parochialism. Such a characterization is crucial for applying *Mount Laurel* outside of the affordable housing context.

The result of placing housing in the general welfare was new affirmative and negative obligations[89]: each municipality had to "bear its fair share of the regional burden" of tax-burdening affordable housing.[90] This meant making "realistically possible a variety and choice of housing."[91] *Mount Laurel I* provided a burden-shifting framework for future litigation against municipalities accused of failing to provide a realistic possibility of affordable housing.[92] Still, the remedy was tentative. The

75. *Mount Laurel I*, 336 A.2d at 725. Justice Hall found a statutory basis for this too in the state zoning enabling act, but rested the decision on state constitutional grounds. *Id.*
76. *Id.* at 726.
77. *Id.* Justice Hall also argued this was supported by *Euclid*, but still rested the decision exclusively on state, rather than federal, constitutional grounds. *Id.* This was contrary to the wishes of the plaintiffs, who had asked for a decision on federal grounds. Prentiss Dantzler, *Exclusionary Zoning: State and Local Reactions to the* Mount Laurel *Decision*, 48 Urb. Law. 653, 658-69 (2016).
78. *Mount Laurel I*, 336 A.2d at 727-28.
79. *Id.* at 727.
80. *Id.*
81. *Id.* at 727-28.
82. *Id.* at 729-30.
83. *Id.* at 731.
84. Holmes, *supra* note 61, at 327 ("The court's intention has been characterized, for example, as pro-affordable housing, pro-sound planning, pro-environmental protection, pro-smart growth, pro-housing diversity, and pro-racial integration, among others.").
85. Haar, *supra* note 41, at 23; Richard H. Chused, Mount Laurel*: Hindsight Is 20-20*, 63 Rutgers L. Rev. 813, 827-28 (2011); John M. Payne, *Reconstructing the Constitutional Theory of* Mount Laurel II, 3 Wash. U. J.L. & Pol'y 555, 564, 569-70, 581 (2000).
86. Haar, *supra* note 41, at 21; Briffault, *supra* note 32, at 23-24.
87. Kraham, *supra* note 72, at 836-37.
88. Haar, *supra* note 41, at 193-94; Holmes, *supra* note 61, at 327. Other theories have fatal flaws. Regarding the right to shelter, see Haar, *supra* note 41, at 24 (noting that the words "fundamental right" or "interest" are never used); Holmes, *supra* note 61, at 325 n.2 (citing Robinson v. Cahill, 351 A.2d 713 (N.J. 1975)) (noting that, if *Mount Laurel* offers a conditional right to shelter, it was less explicit than an analogous case regarding education). Regarding race, see Haar, *supra* note 41, at 23 (noting race is not used in the opinion). Regarding economic status as a suspect class, see Chused, *supra* note 85, at 827-28 (noting that the remedies did not go far enough to actually promote economic integration).
89. *Mount Laurel I*, 336 A.2d 713, 728 (N.J. 1975).
90. *Id.* at 733.
91. *Id.* at 728.
92. *Id.*

court did not nullify the town's entire zoning ordinance, but rather gave the town an opportunity to correct it.[93] This tentative remedy would not fix the problem of exclusionary zoning.

Thus, although the core of the doctrine is found in *Mount Laurel I*, it was not made truly effective until the case returned to the Supreme Court in 1983 as *Southern Burlington County NAACP v. Township of Mount Laurel*[94] (*Mount Laurel II*). In *Mount Laurel II*, the court provided a remedy to vindicate the promise of *Mount Laurel I*.[95] *Mount Laurel II* is a massive opinion; it took the court two years to write.[96] Building on a concurrence from *Mount Laurel I*, the court bolstered the doctrine while arguing that only the remedy, rather than the constitutional obligation, had changed.[97] In the face of legislative inaction[98] and municipal hostility, the court created a complex system to adjudicate *Mount Laurel* claims.

Three judges, selected by the Chief Justice, would handle all *Mount Laurel* litigation statewide, using guidance from experts to determine regional needs and fair shares.[99] Legal challenges within this system would be incentivized by the new "builder's remedy": if a developer successfully challenged a town's zoning ordinance under *Mount Laurel*, the town would lose all control over that development.[100] Thus, in *Mount Laurel II*, a court sought to systematically change political incentives in order to solve a systemic problem. Municipalities were also required to take some steps beyond rezoning to make opportunities to build housing actually "realistic," such as providing incentives for developers to set aside some units as affordable.[101]Additionally, certain zoning restrictions, such as townwide bans on mobile homes, were given a heavy presumption of invalidity.[102]

Despite promising signs of effectiveness, *Mount Laurel II*, particularly the builder's remedy, was met with immediate condemnation. The governor called the decision "an undesirable intrusion on the home rule principal [sic]," and rescinded the state planning documents the court recommended using to determine regional need.[103] Proposals to amend the state constitution attracted bipartisan support, including from the governor, although none were passed.[104] The case's legal grounding also garnered criticism.[105] Still, the three-judge system did lead to "generally accepted solutions" guided by professional special masters.[106]

The intense opposition spurred legislative action. The state legislature passed the FHA in 1985.[107] It created a new agency, the Council on Affordable Housing (COAH), to oversee and implement affordable housing mandates.[108] It also undid some of the impulse toward integration in the *Mount Laurel* opinions by allowing regional contribution agreements (RCAs), in which wealthier municipalities could pay poorer ones to take on some of their affordable housing obligations.[109] The New Jersey Supreme Court, three years after forcing a builder's remedy in *Mount Laurel II*, accepted this approach without complaint.[110]

Still, the *Mount Laurel* doctrine lives on.[111] Between 1983 and 2010, the doctrine "generated 40,000 new low- and moderate-income housing units throughout New Jersey, . . . provided for the refurbishing of 15,000 substandard units, and generated over $200 million to refurbish urban housing."[112] RCAs were eliminated in 2008, forcing all municipalities to provide a fair share of affordable housing.[113] In some ways, the FHA was a vindication of the original vision of *Mount Laurel I*, which had expressed a preference for legislative action over judicial intervention and anticipated that the legislature would eventually render judicial action unnecessary.[114]

Further, courts remain an important backstop: in upholding the FHA, the state supreme court stated that the judiciary would resume its intervention if the FHA failed in its

93. *Id.* at 734.
94. *Mount Laurel II*, 456 A.2d 390 (N.J. 1983).
95. *Id.* at 410 (stating the court's intention to "put some steel into [the *Mount Laurel*] doctrine").
96. Haar, *supra* note 41, at 36.
97. *Mount Laurel II*, 456 A.2d at 410, 415, 430. However, there were important differences. Housing was labeled "fundamental," and the starting premise for the decision mixed the parochialism rhetoric with notes that implied an equal protection dimension. *Id.* at 415 ("[T]he State controls the use of land, *all* of the land. In exercising that control it cannot favor rich over poor."). The court also changed the doctrine by extending it to all municipalities; it had previously only applied to "developing" ones, causing confusion. *Id.* at 418. Affirmative obligations were also specified to include "encouraging or requiring the use of available state or federal housing subsidies" and inclusionary zoning devices, such as incentive zoning and set-asides. *Id.* at 419, 443-50.
98. *Id.* at 417.
99. *Id.* at 419, 420, 440.
100. *Id.* at 420.
101. *Id.* at 443.
102. *Id.* at 450-51.
103. Briffault, *supra* note 32, at 53.
104. Holmes, *supra* note 61, at 349.
105. *See, e.g.*, Haar, *supra* note 41, at 19 (calling the decision a "doctrinal free-for-all"); Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the* Mount Laurel *Cases*, 70 Neb. L. Rev. 186, 188 (1991) (calling the decision legislative in nature and a potential taking). Even proponents accept that the court "combined what were conventionally understood as legislative and executive functions with its traditional equity jurisdiction." Haar, *supra* note 41, at 10.
106. Haar, *supra* note 41, at 70, 86.
107. *See* N.J. Stat. Ann. §§52:27D-301 to 52:27D-329.19 (West 2018); *Mount Laurel III,* 510 A.2d 621, 631 (N.J. 1986) (noting the FHA was "the Legislature's response to the *Mount Laurel* cases").
108. N.J. Stat. Ann. §52:27D-305 (West 2018).
109. *See, e.g.*, Briffault, *supra* note 32, at 54-55 (noting the FHA mandated housing, not integration, and segregation persists); William A. Fischel, *The Evolution of Zoning Since the 1980s: The Persistence of Localism*, *in* Property in Land and Other Resources 259, 266 (Daniel H. Cole & Elinor Ostrom eds., Lincoln Institute of Land Policy 2012) (noting that the FHA's reliance on percentages of housing deemed affordable may incentivize restrictions on all growth); Rachel Fox, *The Selling Out of Mount Laurel*, 16 Fordham Urb. L.J. 535 (1987) (discussing RCAs); Holmes, *supra* note 61, at 353 (noting the FHA was intended to help towns circumvent *Mount Laurel*). Economic integration was not the primary force driving either *Mount Laurel I* or *Mount Laurel II*, but was recognized—at least implicitly—as connected to the doctrine emerging from those cases. *See supra* notes 66-73 and accompanying text.
110. *Mount Laurel III*, 510 A.2d 621.
111. *See, e.g.*, *Mount Laurel IV,* 110 A.3d 31 (N.J. 2015) (allowing builders' associations and affordable housing advocates to sue municipalities in state courts without going through COAH processes because COAH failed to promulgate updated regulations).
112. Daniel Meyler, *Is Growth Share Working for New Jersey?*, 13 N.Y.U. J. Legis. & Pub. Pol'y 219, 221 (2010).
113. There have been calls to revive them, but they remain unusable currently. *See, e.g.*, Vin Ebenau, *Shore Assemblyman Sean Kean Looking to Revive RCA's in New Jersey*, WOBM, May 17, 2017, https://wobm.com/shore-assemblyman-sean-kean-looking-to-revive-rcas-in-new-jersey/.
114. Holmes, *supra* note 61, at 344-48.

purpose.[115] The state supreme court has invalidated COAH regulations that it found would not fulfill the *Mount Laurel* mandates.[116] The *Mount Laurel* doctrine has thus had, and continues to have, an important impact. The legislature's action does not obviate the need for the initial judicial intervention or make it any less legitimate or worthwhile, especially since such action would likely not have happened if the judiciary had not taken the first step.[117]

Admittedly, New Jersey remains an outlier. No other state embraced the full logic of *Mount Laurel*.[118] Still, less robust versions of it exist in California,[119] New York,[120] and Pennsylvania,[121] and exclusionary zoning ordinances have been invalidated under other doctrines in Connecticut, Michigan, and Washington.[122] Further, the case's key insights about the relationship between local and state power are applicable elsewhere. Part II will discuss the application of these insights, in New Jersey and beyond, to the problem of low-density land use.

II. Applying *Mount Laurel* to Climate Change

The *Mount Laurel* doctrine was developed to confront New Jersey's housing crisis, but its reasoning is not limited to affordable housing. Climate advocates can use *Mount Laurel* to challenge land use regulations that, by mandating low-density development, foster dependence on automobiles and increase GHG emissions from buildings. Such a challenge could lead to judicial intervention that makes a meaningful difference in reducing GHG emissions.

This part sketches out a *Mount Laurel* challenge for climate advocates. It argues that GHG emissions fit into the *Mount Laurel* framework because the state's general welfare includes mitigating climate change. Therefore, under *Mount Laurel*, local zoning must not thwart the general welfare of the state by zoning primarily for low-density housing in separate-use zones. It concludes by identifying specific local land use policies that might be required or subject to challenge under a *Mount Laurel* doctrine for climate change.

As discussed in Part I, *Mount Laurel I* took three logical steps. It observed that local regulation is an exercise of delegated state police power, argued that local regulation must promote the general welfare of the state as a whole, and found that adequate housing for all was part of the state's general welfare.[123] In any state, a *Mount Laurel* challenge focused on climate mitigation would be based on these three premises, culminating with low GHG emissions replacing affordable housing in the last as an element of the state's general welfare. A court would then have to specify what local actions are mandated or prohibited by this general welfare theory, just as the New Jersey Supreme Court did in the *Mount Laurel* cases.

The first premise—that local power is merely delegated state power—is a fundamental tenet of U.S. local government law: local governments only have powers granted to them by the state.[124] This would be simple to establish in any state court in the country.

The second premise is that local regulation must promote the general welfare of the state as a whole. This requires limiting the police power on its own terms, rather than on due process or other grounds. This is an unusual framing, particularly if applied to state governments,[125] but *Mount Laurel* applies it to cities in New Jersey, and cases in other states apply it to cities too.[126] This premise can potentially be found in any state because it follows naturally from principles of local government law.

One of the foundational treatises of local government law notes that cities "can only exercise their powers over their respective members for the accomplishment of limited and well defined objects."[127] This limited conception of local power—part of Dillon's Rule, named for the treatise's author—is still theoretically practiced in most states, subject to home-rule limitations.[128] By undermining state regulation and creating externalities, localities can have significant impacts beyond their borders. This appears to violate Dillon's Rule. A substantive limit on local exercises of the police power thus maintains the typical structure of state and local government.

That said, this principle is likely not implementable if it stands alone. The premise echoes the historically popular idea of *imperium in imperio*, a form of home rule in which localities had total power, including immunity from state interference, over all purely local affairs; this proved unworkable because almost every issue can be thought of as both local and regional.[129] Similarly, prohibiting local

115. *Mount Laurel III*, 510 A.2d at 633.
116. Haar, *supra* note 41, at 122; Holmes, *supra* note 61, at 358.
117. *See infra* Section III.D.
118. Kushner, *supra* note 59, at 189. Only four state supreme courts actually reviewed local authority in an exclusionary zoning case, and no state besides New Jersey required state oversight of zoning in the remedy. Briffault, *supra* note 32, at 42.
119. Associated Home Builders Inc. v. City of Livermore, 557 P.2d 473, 7 ELR 20155 (Cal. 1976). However, California exempted zoning approved through voter-initiated ordinances from judicial review under this doctrine. Briffault, *supra* note 32, at 47-48.
120. Berenson v. Town of New Castle, 341 N.E.2d 236 (N.Y. 1975).
121. Appeal of Girsh, 263 A.2d 395 (Pa. 1970). This doctrine is locally focused, without a regional frame. Serkin & Wellington, *supra* note 59, at 1694. Pennsylvania today does not even accept the use of zoning as a socioeconomic tool. Precision Equities, Inc. v. Franklin Park Borough Zoning Hearing Bd., 646 A.2d 757 (Pa. 1994).
122. Briffault, *supra* note 32, at 42 n.164. The key difference with these cases is that they found the desire to exclude to be legitimate. *Id.* at 43-46.
123. *See supra* notes 63-65 and accompanying text.
124. *See* 1 Dillon, *supra* note 43, at 448-51, 452; *cf.* Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907). While some cities enjoy greater protection from home-rule provisions in state constitutions, such protections are simply state-designated power in a different form. *See generally* Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 La. L. Rev. 1045 (2017).
125. For an argument that the police power has inherent limits separate from other constitutional limitations, see Randy E. Barnett, *The Proper Scope of the Police Power*, 79 Notre Dame L. Rev. 429 (2004). Prof. Randy Barnett presents this idea as innovative and contrary to conventional wisdom, *see id.* at 429-31, demonstrating the general acceptance of an unlimited police power.
126. *See*, *e.g.*, Associated Home Builders Inc. v. City of Livermore, 557 P.2d 473, 487, 7 ELR 20155 (Cal. 1976); Berenson v. Town of New Castle, 341 N.E.2d 236, 242 (N.Y. 1975).
127. 1 Dillon, *supra* note 43, at 451 (quoting Spaulding v. Lowell, 40 Mass. (23 Pick.) 71, 75 (1839)).
128. Briffault, *supra* note 32, at 7-8.
129. *Id.* at 10.

governments from imposing *any* externalities would probably leave no room for any local government action. Another layer of doctrine is needed to give this premise any coherence.[130] Under the scheme suggested by *Mount Laurel*, the state government—either the legislature or the judiciary—elucidates the general welfare. Thus, this second premise could potentially be established in any U.S. state, but state law must give it shape for it to have any practical impact.

The third premise, then, is that state law should provide actual content to the general welfare, and that low GHG emissions should be a component. Declaring any substantive policy area part of the state's general welfare is the most fraught step for judges, and would be the most novel aspect of applying *Mount Laurel* to climate mitigation. Despite the difficulty, advocates can plausibly argue that low GHG emissions should be part of a state's general welfare.

First, advocates could make a statutory argument. Twenty-three states and the District of Columbia have enacted statutory GHG emissions reduction goals.[131] New Jersey is one example: the Global Warming Response Act of 2007 establishes statewide GHG emissions goals for 2020 and 2050.[132] Advocates in these states could argue that the legislature, by expressly announcing a state goal, has impliedly decreed that mitigating climate change is part of the state's general welfare. The premise of this argument would be that when the legislature has clearly announced a goal, cities, as recipients of delegated legislative power, cannot work against it.

The argument's weakness is that it implies that the state legislature cannot set a goal without reorienting all local policy. This is an exceptionally broad reading of legislation that could create conflicting mandates, confusion, and uncertainty for local governments. Further, the legislature's pronouncement of a goal does not necessarily mean that it endorses any particular tactic.[133] This is particularly salient in states, including California and New Jersey, whose legislatures have passed affirmative emissions reduction policies.[134] A canon of statutory interpretation, *expressio unius est exclusio alterius* (the expression of some items in a category implies the exclusion of others),[135] suggests that these legislatures did not mandate any policies beyond those expressly passed in state legislation. Thus, while legislatively enacted climate goals can be a useful indicator of how elected representatives define the general welfare, they cannot support a *Mount Laurel* claim on their own.[136]

Establishing that low GHG emissions[137] are part of the general welfare under the state constitution is a more promising route, but requires more assertive judicial activism. For this final principle, the approach may vary in every state; I will use New Jersey to demonstrate one example. One potential grounding for a constitutional argument requires linking low GHG emissions to housing and food; the former is the one component of the general welfare established in precedent, and *Mount Laurel I* mentions the latter in dicta.[138] Climate can be framed as part of the general welfare because it impacts both housing and food.

Flooding after sea-level rise will threaten people's homes and livelihoods,[139] as will extreme weather induced by climate change. For example, in 2012, Hurricane Sandy caused $50 billion in property damage and the destruction of 375,000 housing units in New Jersey and New York.[140] Climate change will disrupt ecosystems and human life, leading to risks to health, water supply, and food security.[141] Increased atmo-

130. *Cf.* Diller, *supra* note 48 (seeking to articulate a judicially implementable doctrine of intrastate preemption that allows good-faith policy experimentation but prevents parochialism and exclusion).

131. Center for Climate and Energy Solutions, *U.S. State Greenhouse Gas Emissions Targets*, https://www.c2es.org/document/greenhouse-gas-emissions-targets/ (last updated July 2019).

132. N.J. Stat. Ann. §§26:2C-39, -40 (West 2018).

133. It is possible to argue that recipients of delegated power are substantively bound by legislative goals, but this departs dramatically from typical American statutory interpretation. The most well-known version of this argument in environmental law is Judge Skelly Wright's interpretation of the National Environmental Policy Act (NEPA). *See* Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1111, 1 ELR 20346 (D.C. Cir. 1971):

> Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material "progress." But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. . . . NEPA . . . is cast in terms of a general mandate and broad delegation of authority to new and old administrative agencies.

Although the opinion laid out important principles that influence how NEPA is implemented today, Judge Wright's implication that the statute contained a substantive mandate for agency decisionmaking was rejected. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 558, 8 ELR 20288 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.").

134. *See*, *e.g.*, Cal. Health & Safety Code §§38560-38566 (West 2019); N.J. Stat. Ann. §§26:2C-41, -42, -47 (West 2018).

135. *See*, *e.g.*, Nat'l Labor Relations Bd. v. SW Gen., Inc., 137 S. Ct. 929, 940 (2017).

136. The legislature, could, of course, rewrite the act to clarify that low GHG emissions should be considered part of the general welfare of the state for purposes of judicial review of local polices under *Mount Laurel*. However, this is unlikely to happen due to the legislature's political incentives. *See infra* note 213 and accompanying text. If the legislature were motivated to act, it could directly regulate local land use and a judicial challenge would be unnecessary.

137. The somewhat awkward framing of "low GHG emissions" rather than "a healthy climate" is deliberate. A state court cannot guarantee a healthy climate—the actions of numerous actors beyond any given state will determine the fate of the earth's climate. New Jersey's Global Warming Response Act expresses its goals in terms of emissions reductions, not climate results. *See* N.J. Stat. Ann. §§26:2C-39, -40 (West 2018). This difference is important because a *Mount Laurel* challenge is not based solely on constitutional rights.

138. *Mount Laurel I,* 336 A.2d 713, 727 (N.J. 1975).

139. Ove Hoegh-Guldberg et al., *Impacts of 1.5°C of Global Warming on Natural and Human Systems*, *in* Global Warming of 1.5°C §3.4.5.1 (V. Masson-Delmotte et al. eds., Intergovernmental Panel on Climate Change 2018) [hereinafter IPCC], *available at* https://www.ipcc.ch/site/assets/uploads/sites/2/2019/02/SR15_Chapter3_Low_Res.pdf.

140. John Manuel, *The Long Road to Recovery: Environmental Health Impacts of Hurricane Sandy*, 121 Envtl. Health Persp. A153, A153-54 (2013); *see also* Furman Center & Moelis Institute for Affordable Housing Policy, New York University, Sandy's Effects on Housing in New York City 3 tbl. 1 (2013) (noting that there were more than 300,000 housing units in Hurricane Sandy's surge area in New York City alone), *available at* http://furmancenter.org/files/publications/SandysEffectsOnHousingInNYC.pdf.

141. IPCC, *Summary for Policymakers*, *in* Global Warming of 1.5°C §I.B.5 (V. Masson-Delmotte et al. eds., Intergovernmental Panel on Climate Change 2018), *available at* https://www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_version_stand_alone_LR.pdf; IPCC, *supra* note 139, §3.4.6.

spheric carbon dioxide concentrations have been linked to lower crop yields and decreased nutrient content in food.[142]

Climate change threatens a state's housing and food security like little else. Given how low-density zoning exacerbates climate change, its threat to housing and food is undeniable, although the causal chain is more attenuated than the one between exclusionary zoning and affordable housing. A limiting principle to this argument would have to stem from the magnitude of the effect: almost nothing affects housing and food security on as wide a scale and to the same degree as climate change will.

Alternatively, a constitutional claim could rely on a potential difference between the general welfare and fundamental rights to give the former concept more shape and make low GHG emissions one of its components. To frame this argument, it is important to note that a *Mount Laurel*-style challenge to suburban sprawl would not seek to establish a state constitutional right to a healthy climate. The litigation proposed in this Article is not a state-level *Juliana v. United States*[143]: a challenge under the *Mount Laurel* doctrine would argue that current local zoning practices are simply beyond the power of local governments because their effects outside of each municipality are too strong. The original *Mount Laurel I* did not say that the plaintiffs had a right to affordable housing[144]; rather, it said localities could not use state power to work against the provision of affordable housing or, impliedly, food.

This raises the question of what the difference is between the general welfare and fundamental rights. Although the New Jersey Supreme Court has not clarified the precise difference, it is notable that *Mount Laurel* cannot be applied against the state itself—or at least, the New Jersey Supreme Court has not explained how it would be—whereas fundamental rights doctrine can be.[145] This differentiated treatment makes sense: state courts relate differently to the state legislature than they do to cities exercising delegated power.[146] This contrast suggests that the general welfare can be understood as encompassing the unique impacts of local regulation. Thus, *Mount Laurel* frames affordable housing in terms of externalities of local regulation. Municipalities cannot, through their land use power, deny affordable housing to state residents outside their borders.

Similarly, cities' land use policies have a significant impact on GHG emissions, and thus on all state residents. While there are of course many actors involved, local influence stretches much farther in this area than in others. Thus, like housing, low GHG emissions could be a component of the general welfare precisely because local regulation threatens to thwart it. In this mode of reasoning, there are two limiting principles. First, this doctrine only applies to local action, and not to action by the state government. Second, this doctrine only applies if externalities have an unusually large magnitude. Almost any local action will have external effects, but only some will, through collective action problems or other exacerbating mechanisms, cause a crisis. For example, the external effects of municipal policing practices are likely smaller than those of low-density zoning. *Mount Laurel* need not target "good faith policy experimentation,"[147] but at a certain point, externalities rise to impermissible levels.

A constitutional approach will likely raise accusations of judicial activism. A decision recognizing climate as part of the general welfare could be seen as legislative in nature, especially if it lacked a persuasive limiting principle.[148] However, the inability of state political systems to confront low-density zoning makes any appearance of activism worth the cost, as Part III will discuss.

Once low GHG emissions are established as part of the state's general welfare, reviewing courts would need to apply this conclusion to specific local regulations. As in *Mount Laurel I*, courts may impose affirmative and negative obligations on municipalities to provide for a realistic opportunity for residents to emit low amounts of GHGs. A wide array of local regulations could be challenged.

First, challenges could target regulations that promote car dependence; the municipality would take on the negative obligation to not force trips by personal automobile, and the positive obligation to promote alternative transportation.[149] In addition to challenging large lot sizes and bans on apartments, just as the challengers in *Mount Laurel I* did, advocates could challenge residential and commercial parking minimums, which induce driving, are frequently unnecessary, and occasionally reach absurd ratios of parking spots to residents or expected users of a building.[150] For example, someone build-

142. *See, e.g.*, Samantha Ahdoot & Susan E. Pacheco, *Global Climate Change and Children's Health*, 136 Pediatrics e1468, e1476 (2015); Andy Haines & Kristie Ebi, *The Imperative for Climate Action to Protect Health*, 380 New Eng. J. Med. 263, 266 (2019); Jonathan A. Patz et al., *Climate Change: Challenges and Opportunities for Global Health*, 312 JAMA 1565, 1570 (2014); John R. Porter et al., *Food Security and Food Production Systems*, *in* Climate Change 2014: Impacts, Adaptation, and Vulnerability 485, 505 (Christopher B. Field et al. eds., Cambridge Univ. Press 2014).

143. 217 F. Supp. 3d 1224, 46 ELR 20072 (D. Or. 2016). Indeed, a good deal of precedent suggests that a federal court could not intervene in local zoning to the extent a state court could. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (refusing to find an equal protection violation in an exclusionary local zoning ordinance where discriminatory intent had not been shown); Milliken v. Bradley, 418 U.S. 717 (1974) (holding a district court could not mandate a school desegregation plan that acted across district lines); Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907) (finding cities had no federal constitutional protections against actions by states).

144. The language of rights appears nowhere in *Mount Laurel I*. Prof. John Payne, who focused on the cases throughout his career, argued that a right to housing emerged from the synthesis of the first three *Mount Laurel* decisions, but he characterized the right as merely "conditional," enforced only in the absence of legislative action, unlike other fundamental rights. Payne, *supra* note 85, at 564-70.

145. The Court, in *Mount Laurel III*, remained committed to enforcing the demands of the *Mount Laurel* doctrine if the state's FHA failed to do so. 510 A.2d 621, 633 (N.J. 1986). However, such enforcement would still be directed at cities who zoned in an exclusionary manner, not the state itself.

146. *See* 1 Dillon, *supra* note 43, at 452-55. This is analogous to administrative law: federal courts relate differently to agencies exercising power granted by the U.S. Congress than to Congress itself.

147. Diller, *supra* note 48, at 1117.

148. Payne, *supra* note 85, at 556-57 (noting critiques that the judges in the *Mount Laurel* cases were "Lochnerizing"); *see also* Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 Fordham Urb. L.J. 133, 171 (2017).

149. The importance of promoting transportation alternatives is discussed in the introduction to this Article.

150. *See, e.g.*, Speck, *supra* note 14, at 122-28; Sara Bronin, *Rethinking Parking Minimums*, 84 Planning 9, 9 (2018); Kushner, *supra* note 59, at 205-06;

ing a restaurant and facing a large parking requirement that curtailed the proportion of the property he or she could use for a building might bring a challenge. Municipalities could also fulfill positive obligations by pedestrianizing town centers, providing bicycle infrastructure, and zoning for mixed uses.[151]

Second, challenges could target building codes. A court could impose an affirmative obligation to design buildings for energy efficiency, potentially using performance standards for energy use or specific design requirements, such as vegetated roofs, integrated building management, passive solar design, or adherence to Leadership in Energy and Environmental Design guidelines.[152] A court could also impose a negative obligation to avoid prohibiting green building.[153]

Finally, challenges could target municipal barriers to small-scale renewable energy; the municipality would have the negative obligation to not unduly prohibit distributed rooftop solar through height limits, complicated and expensive permitting processes, and aesthetic tests.[154] Affirmative obligations may play a lesser role here, but could include updating zoning provisions to explicitly account for distributed renewable energy, so that provisions targeted at other issues do not block its spread.[155]

III. The Normative Case for a *Mount Laurel* for Climate Change

The previous part argued that a challenge to low-density zoning based on its high emissions is legally defensible. This part will argue that the judiciary should sustain such a challenge. Courts must take on an expanded role to correct a failure of the political system. Without judicial intervention, neither state nor local governments will have the right political incentives to make the drastic changes necessary to promote density and curb sprawl. Judicial intervention may not be a perfect solution, but it is the one with the best promise for a meaningful impact.

Section A argues that judicial intervention can be effective. Section B argues that any reliance interests induced by long-standing expectations that land would remain zoned for low-density housing should not deter courts from implementing radical change. Section C argues that, notwithstanding the benefits of decentralization and local democracy, the restrictions on local power that a *Mount Laurel* for GHGs would bring are desirable and, in some ways, liberating. Section D examines the judicial role. It argues that judicial intervention is warranted, legitimate, and within the judiciary's institutional competence

A. *The Potential Efficacy of Using* Mount Laurel

Applying *Mount Laurel* to climate change may be legally defensible, but it is a pointless waste of resources if the ultimate result does not change land uses and curb GHG emissions. There are many reasons to fear that even a successful legal challenge would have minimal impact. Most importantly, local resistance could block a favorable decision from being properly implemented. Localities have typically resisted and watered down state efforts to reform land use regulation.[156] If municipalities do meet judicially imposed mandates, a top-down order may disincline them to go any further in reducing emissions.[157]

The history of *Mount Laurel* also provides a warning: although the doctrine eventually made an impact, there was virtually no progress for several years due to judicial tentativeness in *Mount Laurel I* and intense local opposition.[158] Even if localities were willing to comply with a new ruling, there would still be difficult practical barriers to significantly reducing emissions rates. Successful VMT reductions require both

Vicki Been et al., Furman Center for Real Estate & Urban Policy, Searching for the Right Spot: Minimum Parking Requirements and Housing Affordability in New York City 2, 11 (2012), *available at* http://furmancenter.org/files/publications/furman_parking_requirements_policy_brief_3_21_12_final_1.pdf; Rachel Weinberger et al., Guaranteed Parking—Guaranteed Driving 1 (2008), *available at* https://www.transalt.org/sites/default/files/news/reports/2008/Guaranteed_Parking.pdf.

151. *See* Jabareen, *supra* note 20, at 41; Kaswan, *supra* note 22, at 281-82.

152. *See*, *e.g.*, Damian Pitt, Taking the Red Tape Out of Green Power: How to Overcome Permitting Obstacles to Small-Scale Distributed Renewable Energy 10 (2008), *available at* https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/report-pitt.pdf; Jabareen, *supra* note 20, at 42; Kaswan, *supra* note 22, at 282-83; Nolon, *supra* note 20, at 24, 37; Patricia E. Salkin, *Sustainability and Land Use Planning: Greening State and Local Land Use Plans and Regulations to Address Climate Change Challenges and Preserve Resources for Future Generations*, 34 Wm. & Mary Envtl. L. & Pol'y Rev. 121, 160 (2009); Edna Sussman, *Reshaping Municipal and County Laws to Foster Green Building, Energy Efficiency, and Renewable Energy*, 16 N.Y.U. Envtl. L.J. 1, 11-14, 21-23 (2008).

153. *See* Bronin, *supra* note 19, at 249. For example, historic district regulations may block the installation of energy-efficient windows. *Id.* at 251-52.

154. Pitt, *supra* note 152, at 47-52, 65-66. *See generally* Armory Lovins, Reinventing Fire: Bold Business Solutions for the New Energy Era (2011).

155. *See*, *e.g.*, Sussman, *supra* note 152, at 30; Uma Outka & Richard Felock, *Local Promise for Climate Mitigation: An Empirical Assessment*, 36 Wm. & Mary Envtl. L. & Pol'y Rev. 635, 658-59 (2012) (noting that 9% of Florida localities responding to a survey had new zoning for solar farms "under consideration," but less than 2% already had such zoning). Any affirmative obligations could be met through a cap-and-trade model for renewable energy capacity. *See* Jazz M. Tomassetti, *We're All in This Together: A Fair Share Approach to Renewable Energy*, 32 J. Land Use & Envtl. L. 193 (2016). It is also possible to go beyond pushing for distributed generation to more ambitious visions of renewable energy. First, advocates could push for community-scale renewable energy, which has garnered less attention, *see generally* Hannah J. Wiseman & Sara C. Bronin, *Community-Scale Renewable Energy*, 4 San Diego J. Climate & Energy L. 165 (2012/2013). Additionally, some advocates of distributed generation go further and call for a restoration of the ancient lights doctrine to guarantee solar access. *See*, *e.g.*, Sussman, *supra* note 152, at 32-33; Outka, *supra* note 34, at 1079. This Article does not endorse that approach because of its potential to inhibit density. *Cf.* David Roberts, *California Will Require Solar Panels on All New Homes. That's Not Necessarily a Good Thing*, Vox, Dec. 6, 2018, https://www.vox.com/energy-and-environment/2018/5/15/17351236/california-rooftop-solar-pv-panels-mandate-energy-experts.

156. Margaret F. Brinig & Nicole Stelle Garnett, *A Room of One's Own? Accessory Dwelling Units and Local Parochialism*, 45 Urb. Law. 519, 519-20, 567 (2013); John R. Nolon, *Climate Change and Sustainable Development: The Quest for Green Communities (Part I)*, 61 Plan. & Envtl. L. 3, 4-5 (2009). In the 1970s, the beginnings of a shift to state control of land use fizzled in the face of local backlash. A. Dan Tarlock, *Land Use Regulation: The Weak Link in Environmental Law*, 82 Wash. L. Rev. 651, 655-58 (2007) (discussing the Quiet Revolution). The one exception to this may be environmentally sensitive areas, such as coastlines. Briffault, *supra* note 32, at 65.

157. William A. Fischel, Zoning Rules! The Economics of Land Use Regulation 202-03, 359-63 (2015). The experience of Massachusetts, which enacted affordable housing requirements similar to New Jersey's, suggests that this backlash is unavoidable no matter which branch of government tries to force a change to typical low-density, exclusionary zoning. *Id.* at 361.

158. Haar, *supra* note 41, at 36.

increased density and increased opportunity for public transit usage.[159] A *Mount Laurel* for climate might improve the former, but the latter can likely only be offered by the state itself; a court ruling may be insufficient.[160]

Still, there is reason to think that a *Mount Laurel* approach, though imperfect, could lead to meaningful progress because simply creating density is a major step forward. Density creates a possibility for public transit and a constituency to advocate for it. Where the state fails to provide transit, private actors can step in and play a role while still taking cars off the road.[161] Additionally, even if people remain dependent on cars to leave their town, making a town itself walkable can have a significant impact. In 2017, more than one-third of Americans' trips in cars were two miles long or shorter, and more than 45% were three miles or shorter.[162] Given better infrastructure, these trips could be taken by bike or, for shorter trips, by foot.[163]

Further, the major sources of VMT growth are not work-related.[164] This suggests that simply encouraging mixed-use zoning could have substantial benefits by keeping commercial and residential areas close together, thus making it possible to replace driving with walking for recreational or shopping trips. Finally, *Mount Laurel* mandates regional thinking, creating incentives for interlocal collaboration where possible.[165] With the right planning, aided by experts,[166] a *Mount Laurel* for climate change could have a positive direct impact and set the stage for further action.

Judges could also assume a more active role more quickly than they did in the 1970s and introduce important changes that fit the structure of the doctrine. Local resistance is powerful, but the history of *Mount Laurel* shows that it can be overcome, especially if courts act efficiently and forcefully. Further, state mandates can be a powerful driver of local action.[167] Judicial remedies would also be easy to implement if they target the specific policies discussed in Part II, such as building codes, mixed-use zoning, lot sizes, and the siting of small-scale renewable energy generation facilities (such as rooftop solar).[168] Judges could implement these obligations, ideally quickly and explicitly, to make the doctrine an effective force for change.

B. Thwarting Entrenched Reliance Interests

Overturning a century of zoning laws that codified a preference for low-density, single-family homes will thwart reliance-backed expectations, but courts should nonetheless implement a *Mount Laurel* for climate change. The problem of reliance is particularly acute in this context because zoning ordinances are designed to induce real estate purchases by assuring buyers that the neighborhood will not change, and thus that their property values will remain stable.[169] Given that homes represent the majority of most homeowners' assets,[170] this implied assurance may give reformers pause. However, there are good arguments for proceeding with a change.

First, if reliance interests stem from the economic value of the property, increasing density might not interfere with those interests at all: high density can in some cases increase property value.[171] Indeed, proximity to transit often increases property values within a metropolitan region.[172] Second, the influence of zoning on property values relative to broader economic factors is frequently overestimated.[173] Finally, it is questionable whether this reliance interest should be recognized in the first place. To the extent that reliance was built on a fundamentally racist, exclusionary tool, courts should hesitate to enshrine an

159. Kushner, *supra* note 59, at 198.

160. *Cf.* Serkin & Wellington, *supra* note 59, at 1674 (noting that the actual *Mount Laurel* doctrine is hampered by treating jurisdictional lines differently from how the poor see them). Additionally, state and federal law subsidizes driving in innumerable ways. Gregory H. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. Rev. (forthcoming 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3345366. Changing land use law will have a major impact, but cannot undo the entire system.

161. For example, private vans play an important role in New York City neighborhoods underserved by its public transit network. *See* Annie Correal, *Inside the Dollar Van Wars*, N.Y. Times, June 8, 2018, https://www.nytimes.com/2018/06/08/nyregion/inside-the-dollar-van-wars.html. Zipcar is another example: it makes it possible for its members to not own cars, leading, in at least one city, to increased rates of walking and biking, but the company is unwilling to expand to low-density cities where everyone needs a car and thus already has one. Speck, *supra* note 14, at 158-59.

162. National Household Travel Survey, *Explore Vehicle Trips Data*, https://nhts.ornl.gov/vehicle-trips (last visited Aug. 21, 2019).

163. A common objection raised to this is that bikes are impractical for traveling with children or with heavy bags. This problem is easily surmountable with cargo bikes. *See* Nara Schoenberg, *Cargo Bikes Can Do the Job of a Minivan*, Chi. Trib., Oct. 24, 2016, https://www.chicagotribune.com/lifestyles/parenting/sc-minivan-of-bikes-family-1025-20161021-story.html. Although still rare in the United States, these bikes are gaining in popularity and are already common elsewhere. *Id.*

164. Kristin Lovejoy et al., *Measuring the Impacts of Local Land-Use Policies on Vehicle Miles of Travel: The Case of the First Big-Box Store in Davis, California*, 6 J. Transport & Land Use 25, 27 (2013) ("[N]on-work travel accounted for most of the growth in average VMT and vehicle trips per household from 1983 to 2001; for shopping alone the average annual person miles traveled per household grew 90% during this period." (citation omitted)).

165. Interlocal agreements are often impossible under state law. Frug & Barron, *supra* note 33, at 209-11. Still, merely aligning incentives could lead to cooperation in the political sphere to reshape such laws.

166. Charles Haar offered several guidelines for implementing judicial institutional remedies, including, among others, using professional experts, using affirmative remedies based on clear and realistic targets, avoiding micromanaging, and finding a political or economic lever to implement the decision (the builder's remedy in the affordable housing context). Haar, *supra* note 41, at 137-46.

167. *See* Bedsworth & Hanak, *supra* note 11, at 666, 673 (noting that localities in California passed climate policies because of co-benefits, cost savings, general support for environmentalism, and, most importantly, state mandates).

168. *See supra* notes 149-55.

169. Kenneth Stahl, *Reliance in Land Use Law*, 2013 BYU L. Rev. 949, 962-63 (2013). *See also* Fischel, *supra* note 109, at 260 (defining zoning as "a collectively held entitlement that redounds to the benefit of the politically dominant faction in the community"); Stahl, *supra* note 23, at 1266-67 (arguing *Euclid v. Ambler Realty* "recapitulated zoning as a *collective public property right* belonging to the community of homeowners").

170. Stahl, *Reliance*, *supra* note 169, at 952.

171. Serkin & Wellington, *supra* note 59, at 1685; Urban Land Institute, Higher-Density Development: Myth and Fact 13-15 (2005), *available at* https://uli.org/wp-content/uploads/ULI-Documents/HigherDensity_MythFact.ashx_.pdf.

172. *See*, *e.g.*, Center for Neighborhood Technology, The New Real Estate Mantra: Location Near Public Transportation (2013), *available at* https://www.apta.com/resources/statistics/Documents/NewRealEstateMantra.pdf; Keith Wardrip, Center for Housing Policy, Public Transit's Impact on Housing Costs: A Review of the Literature 2 (2011), *available at* http://www.reconnectingamerica.org/assets/Uploads/TransitImpactonHsgCostsfinal-Aug1020111.pdf; Tom Acitelli, *Boston Transit Proximity Really Adds a Premium to Home Prices*, Curbed Boston, Mar. 22, 2017, https://boston.curbed.com/2017/3/22/15009942/boston-transit-proximity-home-prices.

173. Stahl, *Reliance*, *supra* note 169, at 1019-20.

unjust system solely because of reliance interests.[174] Reliance may also arguably be unreasonable because zoning can change at any time,[175] and there have been efforts—albeit unsuccessful ones—to restrict sprawl for decades.[176] These factors all suggest that, even if there are valid reliance interests that are threatened by increased density, thwarting them is a harm of far less magnitude than the threat of global climate change.

C. *The Value of Changing Local Power Structures*

Local government law is not equipped to confront the crisis of climate change. Local decentralization has benefits, but it also allows homeowners to control suburban political processes and keep density and growth to a minimum. Fixing this requires a greater state role in controlling land use.

Decentralization of power to local governments is ostensibly beneficial because it provides for more efficacious policies, greater democratic legitimacy, and protection against tyranny.[177] Efficacy benefits stem from a conception of the city as a laboratory of democracy. Local governments can innovate and experiment, gather and share information, and tailor policy to local conditions, all with less bureaucracy than state or federal government and potentially in competition with other localities for the "best" policy.[178] In certain cases, including addressing localized environmental problems—which, to be explicit, do not include global climate change—local governments may also "race to the top" to provide the most environmental protection, keeping residential property values high and preserving their tax base.[179] Local governments are also thought to play a legitimizing role and to protect against tyranny by keeping government close to the people and by serving as "schoolhouses of democracy" where people "learn the skills of self-government."[180]

However, the small size of municipalities and restriction of local enfranchisement to residents allow "homevoters" to dominate the political process, causing problems beyond the control of individual local governments. Homevoters—a term coined by Prof. William Fischel—are homeowners who, because their homes represent the majority of their assets, vote in local elections with the primary motivation of preserving residential property values.[181] They typically believe that strict zoning rules preventing density are the best way to keep property values high.[182] These voters dominate the municipality, and thus the political process; local government will be responsive to them and craft land use policy accordingly.[183]

Homevoters' political power is bolstered by traditional American conceptions of the suburbs as a place of sanctuary and an extension of the home, leading to exclusionary impulses; popular narratives favor homevoters.[184] The resulting low-density policies perpetuate segregation[185] and prevent growth and densification.[186] Individual local governments create a car-dependent way of life in their municipality, with negative impacts externalized to the world, which gets no vote in land use policy. Local government law prevents regional thinking, creating a situation in which city officials view home rule as the right to impose costs on their neighbors.[187]

Thus, action at the state level is needed. States are the only actors that can provide a counterweight to municipalities; the federal role in land use is minimal,[188] there is no federal constitutional protection for localities in state/local relationships,[189] and the Supreme Court has rejected challenges to exclusionary zoning under federal law.[190] State law enabling fragmentation and preventing regional thinking created the current situation; state law must change to fix it. Specifically, only state law can

174. *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1948) (finding state action in judicial enforcement of a racially restrictive covenant and thus finding the covenant unenforceable); Nw. Real Estate Co. v. Serio, 144 A. 245 (Md. 1929) (refusing to uphold a restraint on alienation that was likely meant as an anti-immigrant measure); Briffault, *supra* note 32, at 57 (noting that the current American vision of local autonomy allows residents to "decide who their neighbors will be").

175. Stahl, *Reliance*, *supra* note 169, at 963.

176. Calandrillo et al., *supra* note 24, at 850.

177. Alice Kaswan, *Climate Adaptation and Land Use Governance: The Vertical Axis*, 39 Colum. J. Envtl. L. 390, 394-95 (2014).

178. Frug & Barron, *supra* note 33, at 49-51; Barron, *supra* note 23, at 2340-41; Nolon, *supra* note 156, at 4-5; Osofsky, *supra* note 24, at 456; Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 Emory L.J. 877, 881 (2011) (advocating for devolvement of local authority with a federal floor, in which the federal government would partner with localities instead of states); Jonathan Rosenbloom, *New Day at the Pool: State Preemption, Common Pool Resources, and Non-Place Based Municipal Collaborations*, 36 Harv. Envtl. L. Rev. 445, 464 (2012); Richard Briffault, The Challenge of the New Preemption 39 (Columbia Public Law Research Paper No. 14-580, 2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119888.

179. William A. Fischel, The Homevoter Hypothesis 162-83 (2001).

180. Frug & Barron, *supra* note 33, at 49-50.

181. The Homevoter Hypothesis, *supra* note 179, at 14.

182. Stahl, *Reliance*, *supra* note 169, at 952; Stahl, *supra* note 33, at 4; *cf.* Robert A. Dahl, Who Governs? Democracy and Power in an American City 224-25 (2d ed. 2005) (discussing how most people in a city were inattentive to politics unless directly and negatively impacted). *See generally* The Homevoter Hypothesis, *supra* note 179. Some sustainability measures may be appealing or neutral to homevoters, such as growth boundaries or green building requirements that raise construction costs and prevent growth. Rule, *supra* note 35, at 1230-36. However, density cuts against long-standing American idealizations that have been enshrined in law and culture. Tarlock, *supra* note 156, at 659-60; *cf.* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 4 ELR 20302 (1974). *See generally* Stahl, *supra* note 23.

183. Stahl, *supra* note 33, at 4.

184. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 Colum. L. Rev. 346, 444-46 (1990).

185. *Id.* at 403.

186. This results in what one commentator has labeled a tragedy of the commons, as each locality emits more GHG into the common air than they should to preserve the resource in a healthy state for human civilization. Jonathan Rosenbloom, *Local Governments and Global Commons*, 2014 BYU L. Rev. 1489, 1492-93 (2015); Rosenbloom, *supra* note 178, at 461.

187. Frug & Barron, *supra* note 33, at 209. Furthermore, once low-density zoning is put in place, high transaction costs make it difficult to change. Rule, *supra* note 35, at 1244-45; Fischel, *supra* note 109, at 261.

188. Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174, 31 ELR 20382 (2001) ("Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."); Nolon, *supra* note 156, at 6. More generally, local governments theoretically have no power in the federal system, although the Supreme Court has occasionally empowered local governments by providing them Tenth Amendment protections or by implicitly endorsing their ability to exclude. Richard Briffault, *Local Autonomy and Constitutional Law: An Uncertain Relationship*, *in* Law Between Buildings: Emergent Global Perspectives in Urban Law 1 (Nisha Mistry & Nestor M. Davidson eds., Routledge 2017).

189. Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907).

190. Briffault, *supra* note 32, at 18 n.58, 84-107 (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Vill. of Belle Terre v. Boraas, 416 U.S. 1, 4 ELR 20302 (1974)).

prevent local land use regulation that makes high GHG emissions inevitable.[191] This likely requires a larger state role in land use regulation, with more forceful mandates.

Such a change would generate more equity and efficiency,[192] in part because states' larger size allows them to represent more interests.[193] A larger state role need not end local democracy. It will merely reshape the bounds of local power, refocusing the already limited scope of what local governments can do.[194] State law would provide a mandate: reduce carbon emissions generated by local regulation. Although doing so may be impossible without greater density, cities would still have flexibility to choose specific tactics. This would preserve the benefits of local autonomy.[195] Further, local governments that already wanted to act may be *less* restrained.[196] Forcing regional thinking and preventing the externalities of sprawl will free those localities to actually begin to solve regional problems.

Proposed legal changes that seek to address sprawl without a larger state role have fatal flaws. Some commentators, for example, have advocated for voluntary local partnerships to solve collective action problems while promoting representation, public virtue, and efficiency.[197] But their voluntary nature will likely lead to insufficient participation to meet the climate crisis,[198] and state law often limits when and how such partnerships can be used.[199] Regional government, which has been proposed as a way to promote interlocal cooperation and fight parochialism,[200] also depends upon state political processes to create it. State lawmakers are subject to the same political pressures as locally elected mayors or city councils, making them unlikely to create a regional government that would threaten low-density zoning.[201] Thus, fighting climate change requires more and different state control of land use. Further, a clear extension of the objection to regional government is that, although a change in state law is needed, the state legislature is likely not the institution that will actualize it. Effective climate mitigation requires turning to state courts.

D. The Judicial Role

Perhaps the greatest objection to a *Mount Laurel* for climate change stems from what it demands of judges. This section addresses those concerns and shows that judicial intervention is within the judicial competence, does not threaten judicial legitimacy, and is, in fact, essential.

The judiciary has the competence to administer complex remedies of the sort a *Mount Laurel* targeting low-density zoning would demand. Proceedings in lower courts under *Mount Laurel* were admittedly complex. The doctrine "place[d] extraordinary informational burdens on judges and bureaucrats, because [it forced] public officials to do the job of siting housing, a task usually reserved for housing markets rather than law," leading to attempts to game the formula.[202] A *Mount Laurel* application based on GHG emissions would presumably face some of the same issues. However, the problem can be mitigated by simplifying the fair share formula and using some per se rules for particular zoning practices.[203]

Further, judicial competence is only one side of the coin. In the face of a problem that stems from parochialism, the judiciary is arguably better suited than state legislators who represent particular districts to identify problematic local ordinances.[204] The aftermath of *Mount Laurel II* also provides grounds for an optimistic view of judicial competence: the judiciary developed innovative procedures to address complex cases and implement remedies, and they largely worked.[205] The same success is possible in the climate context.

Creating a *Mount Laurel* doctrine for GHG emissions would not threaten judicial legitimacy or take judges beyond their proper role. Like the original *Mount Laurel*, its application to low-density zoning could be criticized as judicial activism in which unaccountable judges overthrow the will of the people.[206] But this is exactly the sort of case where judges should intervene. Climate change is an urgent problem, but the structure of local government law means that no individual suburb will take the necessary action to fix it. Instead, every individual locality will continue to externalize its negative impacts[207] and prioritize car dependence, in the (likely mistaken) belief that preserving property values requires doing so. In the face of a threat to civilization, action is basically impossible. The state legislature will provide no help, because districts are small enough that homevoters can dominate that political process too.[208]

This is a case where the political process has broken down; local governments and state legislatures have been captured by anti-density factions who externalize the nega-

191. Furthermore, state mandates are one of the most important motivators of local action, suggesting that the state must take the lead in confronting low-density zoning. Bedsworth & Hanak, *supra* note 11, at 666; Deborah Salon et al., *Local Climate Action: Motives, Enabling Factors, and Barriers*, 5 Carbon Mgmt. 67, 72-74 (2014).
192. Briffault, *supra* note 32, at 19.
193. *Our Localism*, *supra* note 184, at 447-48.
194. Prof. Paul Diller has proposed an analogy to this in preemption doctrine: he calls for courts to develop a preemption doctrine that would allow localities to engage in "good-faith" policy experimentation but forbid parochial and exclusionary policies. Diller, *supra* note 48, at 1117.
195. This tactic echoes one proposed by Judge David Barron, who argued for challenging specific grants and limits of local power, along with the background structure that mandates certain substantive outcomes of local policy, rather than home rule as a whole. Barron, *supra* note 23, at 2263, 2378. Judge Barron's specific suggestions to control sprawl target state taxation policy, substantive limits in state zoning enabling acts, barriers to interlocal agreements, and prohibitions on antidiscrimination ordinances, including exclusionary zoning. *Id.* at 2346-51, 2357.
196. *See generally* Frug & Barron, *supra* note 33.
197. Bedsworth & Hanak, *supra* note 11, at 647; Osofsky, *supra* note 24, at 440-52; Rosenbloom, *supra* note 178, at 467-72, 481-83.
198. Rosenbloom, *supra* note 178, at 484.
199. Frug & Barron, *supra* note 33, at 9. This is part of the background legal structure that may reinforce defensive localism and the status quo. *Id.* at 206-07.
200. *See* Frug, *supra* note 73.
201. Bronin, *supra* note 19, at 264-66. *See also infra* Section III.D.
202. Roderick M. Hills, *Saving* Mount Laurel*?*, 40 Fordham Urb. L.J. 1611, 1613 (2013).
203. *Id.* at 1613-14, 1630, 1631.
204. Diller, *supra* note 48, at 1161-63.
205. Haar, *supra* note 41, at 133.
206. *See* Barron, *supra* note 23, at 2362-64; Mallach, *supra* note 45, at 860. But state judges, who are often elected or face potential recall, are more politically accountable than federal judges. Diller, *supra* note 48, at 1164-65.
207. Briffault, *supra* note 32, at 73-81.
208. Bronin, *supra* note 19, at 264-66.

tive impacts they create.[209] The issue is particularly intractable because a solution to the problem—density—touches on the nation's urban/suburban divide, and thus has racial salience.[210] Political processes make reform or centralization impossible.[211] These problems suggest that judicial intervention is appropriate.[212] State legislatures have the power to fix the problem, but even advocates of state legislative action cannot offer a theory for why they would use the power they have.[213] Courts can and should step in.

This is also a proper judicial function because courts are not starting from a place of neutrality or a blank slate. Rather, like the New Jersey Supreme Court before *Mount Laurel*,[214] courts across the country have already entered the field to enable sprawl.[215] Easy incorporation laws combined with local fiscal autonomy enabled small groups to isolate themselves and pay no heed to those left outside; courts endorsed this practice.[216] To say that courts cannot undo what they have done is not a neutral statement about the judicial role, but rather an endorsement of a judiciary that serves as a one-way ratchet toward parochialism.

Judicial intervention is also proper because the end result need not be permanent judicial control of local zoning. Rather, the history of *Mount Laurel* can be a model. A judicial decision could explicitly invite legislative action, in the hope that drastic judicially imposed remedies will spur it.[217] Although judicial action would risk backlash,[218] political leadership can channel that backlash to create a compromise solution that both addresses the problem and preserves local democracy. Thus, the judiciary can and should take on low-density zoning. It is unclear who else can adequately address this crucial component of the climate crisis.

IV. Conclusion

Our climate continues to change; most Americans still live in sprawling suburbs.[219] Fighting climate change requires a dramatic change to American land use. So far, planner-led movements have not abated VMT growth or brought us widespread sustainable urbanism.[220] State legislatures, too, will not take the lead: when they have acted, they have tended to exacerbate sprawl, rather than contain it.[221] Public officials have implemented major climate initiatives at multiple levels of government, with little impact on transportation emissions. There is a troubling gap. This situation parallels the background to *Mount Laurel I*. We are running out of solutions to an urgent problem, and judicial intervention appears to be the best remaining hope.

A *Mount Laurel* for climate change would be bold and novel, but within a court's purview. Courts have a power; they should use it. The judicial role may be stretched by a *Mount Laurel* claim, but it would help courts fulfill another important role: that of "a trustee for future as well as present generations."[222]

209. Haar, *supra* note 41; Stahl, *Reliance*, *supra* note 169, at 980-81; *cf.* Kenneth A. Stahl, *The Artifice of Local Growth Politics: At-Large Elections, Ballot-Box Zoning, and Judicial Review*, 94 Marq. L. Rev. 1, 61-62 (2010). This may be a corrective—or overcorrective—to a "growth machine" in other parts of local politics. Stahl, *The Artifice of Local Growth Politics*, *supra* at 55.
210. Mallach, *supra* note 45, at 861.
211. Gerald E. Frug, *Against Centralization*, 48 Buff. L. Rev. 31, 31-33 (2000).
212. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); Keith E. Whittington, *Constitutionalism*, *in* The Oxford Handbook of Law and Politics (Gregory A. Caldeira et al. eds., Oxford Univ. Press 2008), *available at* https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199208425.001.0001/oxfordhb-9780199208425.
213. Zoning Rules!, *supra* note 157, at xi; *Our Localism*, *supra* note 184, at 451. Two recent articles complicate this point, but do not defeat it. First, state legislatures have never fully given up their power over local control of land use. *See* Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. Rev. 293 (2019). However, they have limited themselves to regulating discrete uses in response to well-organized interests. *See id.* at 296. Environmental organizations may be unable to play the role of the organized interest to combat sprawl because of their historical alliance with homeowners. *See* Fischel, *supra* note 57, at 6-7. Another recent article argues that states have become increasingly willing to intervene in local land use regulation. *See* Infranca, *supra* note 23. However, efforts to force density directly, rather than make small-scale changes around the edges (such as preempting prohibitions on accessory dwelling units), have still faced substantial resistance. *See id.* at 851-53 (discussing California's S.B. 827), 856-57 (discussing two Massachusetts reform bills that died in committee), 875 (noting that recent reforms "preempt or displace specific elements of local land use regulation"). One ambitious effort in California recently failed. Bryan Anderson & Hannah Wiley, *High-Profile California Housing Bill Dies Without a Vote: "I'm Deeply Disappointed,"* Sacramento Bee, May 16, 2019, https://www.sacbee.com/news/politics-government/capitol-alert/article230481529.html. This reluctance to comprehensively address the problem is problematic, especially because zoning is "a complex, locally generated web of regulations [for which] cutting any single strand is not likely to compromise its overall strength." Zoning Rules!, *supra* note 157, at x.
214. Briffault, *supra* note 32, at 39.
215. Stahl, *Reliance*, *supra* note 169, at 979; Stahl, *supra* note 23, at 1196.
216. Briffault, *supra* note 32, at 1-5, 73-81. In the exclusion context, even cases striking down exclusionary ordinances start from a premise that exclusion is typically valid. *Id.* at 101-07 (discussing, among other cases, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)).
217. *See* Paula A. Franzene, Mount Laurel III: *The New Jersey Supreme Court's Judicious Retreat*, 18 Seton Hall L. Rev. 30, 46-49 (1988) (arguing that *Mount Laurel I* provided the legislature an opportunity to act and *Mount Laurel II* addressed that inaction, making the judicial retreat in *Mount Laurel III* "appropriate and predictable"). *Cf.* Haar, *supra* note 41, at 177 (arguing that judges can focus attention and spark debate on an issue, helping spur legislation).
218. *See* The Homevoter Hypothesis, *supra* note 179, at 98-129 (discussing the backlash to an education funding case in California).
219. Kushner, *supra* note 59, at 192-93, 196. *See also supra* note 24 and accompanying text.
220. Kaswan, *supra* note 22, at 259 (discussing smart growth).
221. Fischel, *supra* note 109, at 259.
222. Haar, *supra* note 41, at 176.