Accessory Dwelling Units and the Preemption of Land Use Regulation

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Abstract

The Standard State Zoning Enabling Act of 1922 encouraged states to delegate land use regulation to local governments via zoning, a task that became a core part of local government. One hundred years later, with increasing criticism of local land use regulation, state governments are rethinking local control over land use, including limiting the zoning powers of local governments. An example of this is state preemption of Accessory Dwelling Unit (ADU) regulations. This article reviews the preemptions from the nine states that have implemented them, and describes how these policies have evolved over time, showing that additional states have adopted these policies and that the preemptions have been strengthened. It also develops a framework of stronger versus weaker policies, with stronger policies more completely preempting local governments, applying to more jurisdictions, and having fewer exemptions. Despite the overall strengthening of state ADU preemptions, the preemptions often remain weak. State governments may find it difficult to effectively preempt local governments through continued legislation, and more effective preemptive regulatory power may be better placed in the hands of state agencies.

Introduction

American residential land use policy is almost entirely conducted by local governments. Briffault (1990) calls land use control "the most important local regulatory power." Fischel (2005) provides several examples of cities in the greater Seattle area that incorporated in order to gain greater control over land use.

Zoning policies started to proliferate in the early 20th century. In 1922, the U.S. Department of Commerce issued the first version of A Standard State Zoning Enabling Act (SZEA), a model act that laid the legal framework for state governments to give zoning power to their local governments (Meck, 1996). By 1925, 19 states had included the enabling act wholly or in part in their laws (U.S. Department of Commerce, 1926). All states today have planning and zoning-enabling legislation, mostly based on the original model (Meck, 1996).

This arrangement brought on by SZEA is not without its critics (Connolly and Brewster, 2021). Local land use regulation has been blamed for artificially increasing home prices by restricting supply and furthering racial and economic segregation (Gyourko and Krimmel, 2021; Rothwell and Massey, 2009). Mechanisms for community involvement, rather than being representative processes, may overrepresent certain people—especially those who are older, whiter, or homeowners (Einstein, Glick, and Palmer, 2020). Homeowners have the motivation and ability to be particularly effective at getting local jurisdictions to pass policies that increase and protect their home values. (Fischel, 2005).

Statewide intervention in the details of local zoning policy has traditionally been rare. States are increasingly focusing on local land use policy, especially in areas with high home prices. One area of activity is states preempting local governments over the prohibition of accessory dwelling units (ADUs). Those preemptions limit what standards local governments can apply to the regulation of ADUs. Because of this, ADU preemptions insert themselves into the fabric of local zoning in a more fundamental way than many other housing preemptions.

Although ADU preemptions are important because they represent an expansion of state authority into local zoning, they also appear to be having some success. In California, a substantial increase in ADU permitting occurred in the last 5 years, which coincides with significant changes in state ADU policy. ADU permits have become four times greater since 2005, with over 23,000 issued in 2022. Los Angeles permitted the most ADUs in 2022 with 7,160, well above the city's 1,387 permits for single-family homes (Werner, 2023). Although a more rigorous analysis needs to be done to establish the causal role that preemption plays in this increase, ADU preemption has the potential to play a significant role in unlocking ADU production.

ADU preemption is a fundamental but narrow change to land use policy, but scant literature exists comparing these policies across states. This article adds to the literature by documenting the differences between the preemptions, how these preemptions limit local regulatory authority, and how the preemptions have been strengthened over time.

State Interventions

States have intervened with local governments' housing policies in various ways. Manji et al. (2023) reviewed state governments' pro-housing policies and created a three-level typology by combining the functional goal and the market segment[1] that it targets, examining the policy levels employed, and determining if there is an "escape hatch." The most common policy levers required planning, whereas the least common policy levers penalized local governments. The authors also highlighted the importance of "state standards"—including policies that prohibit design standards, prevent displacement, limit parking requirements, or allow ADUs—as housing policy interventions.

A common goal for state-level housing policy interventions has been to try to expand affordable housing to otherwise recalcitrant communities. One prominent example is Chapter 40B in Massachusetts. This statute allows a developer trying to build affordable housing where less than 10 percent of housing is affordable to appeal to a state board and have the zoning rules waived.

[1] One of which is ADUs.

Rhode Island has a similar approach. New Jersey's policies, which stem from the Mount Laurel court decisions of 1975 and 1983,[2] allow developers to seek out a "builder's remedy" if a local government's land use regulations are prohibitive in allowing affordable housing (Bratt and Vladeck, 2014).

Those policies have had some success. Massachusetts's 40B is credited with producing more than 60,000 housing units, with over one-half of them reserved for those making less than 80 percent of the median income. More important to the primary goal, 15 percent of local governments have made at least 10 percent of their housing affordable to low- and moderate-income households, compared with less than 1 percent when the policy began. However, the ability to produce affordable housing under the Massachusetts 40B policy has fluctuated over time, with changes in regulation and shifts in power between state and local governments (Hananel, 2014).

Replacing local policy preferences with those of the state legislature may have costs. That approach may limit the ability of local governments to experiment with new policies. Interest groups may influence a single state legislature more easily than they would by advocating across multiple local governments. For this reason, tobacco companies often use state-level advocacy to fight against local smoking laws (Goodman, Hatch, and McDonald, 2021). State action can interfere with local governments efficiently matching policies with the preferences of residents, an important role when residents can select from local governments with different policies (Tiebout, 1956).

Land Use Preemption

Although the previous examples represent a shift in power, they are still limited exceptions that largely leave land use control in the hands of local governments. A more aggressive approach is to preempt local governments' authority over land use and giving state governments direct control over land use regulation, at least in the preempted policy areas.

Unmentioned in the United States Constitution, American local governments are legally considered to be "creatures of the state" under Dillon's rule (Richardson, 2011), which allows states to choose to exercise their power and limit the policymaking scope of their local governments. Goodman, Hatch, and McDonald (2021) define preemption as "the use of coercive methods to substitute state priorities for local policymaking." Preemption can be done by any branch of government and occurs in a wide variety of policy areas, including housing, public health, education, taxation, labor, immigration, anti-discrimination (Schragger, 2017), local taxes on sweetened beverages (Crosbie, Schillinger, and Schmidt, 2019), fracking, LGBTQ issues, and the minimum wage (Riverstone-Newell, 2017). In terms of housing, states have preempted affordable housing policies, rent control, inclusionary zoning, short-term rental regulation, and prohibitions on source of income discrimination (Goodman and Hatch, 2022). In one of the few studies looking at the outcomes of state preemption in housing, Melton-Fant (2020) finds an association between states

[2] The township of Mount Laurel, NJ, had been zoned exclusively for detached single-family residences. A group of African-American and Hispanic residents sued, claiming the zoning was discriminatory against low-income residents. The Supreme Court of New Jersey held that, under the New Jersey constitution, municipalities must make a range of housing options possible. Follow-up cases and changes in state law, especially the 1985 Fair Housing Act, provided mechanisms to enforce this "fair share" requirement.

that have preempted local governments from adopting inclusionary zoning policies and worse health outcomes among African-American adults.

State housing preemptions usually only intervene in local governments' zoning powers in limited ways. Zoning involves specific regulations on use, bulk, and size (Kayden, 2004), and most housing preemption policies do not intervene with these regulations or do so only to a limited extent. Planning requirements leave local governments to do the planning. Rent control laws do not aim to alter use. Inclusionary zoning prohibitions, despite having the word "zoning" in the name, do not directly prohibit a particular use; instead, they ban an affordability requirement. Fair share laws can, in some circumstances, preempt intensity regulations. However, this preemption is limited in that it only applies to affordable housing, only applies in certain places, and requires a decision be appealed to the Housing Appeals Committee.

Accessory dwelling unit preemptions differ from those mentioned previously because they directly interact with and override local zoning laws.[3] As opposed to simply attempting to channel local authority in the way that planning mandates do (Infranca, 2019), ADU preemptions directly mandate an increased level of intensity over single-family homes and limit the regulations that local governments can adopt.

Recently, Oregon, Maine, and California[4] have gone the furthest by enacting laws that limit single-family zoning and largely preempt local governments' abilities to prevent duplexes. Other states have attempted to preempt land use regulations but with limited success. The Connecticut legislature introduced multiple pieces of legislation that would preempt local land use regulations in 2021; only the ADU preemption was successfully passed into law (*Harvard Law Review*, 2022).

This article provides a snapshot and comparison of ADU preemptions and tracks how those policies have evolved. These preemptions provide an example of the issues and challenges that might face other, more expansive forms of land use preemption in the future.

Accessory Dwelling Units

Accessory dwelling units, also known as "secondary units," "granny flats," "laneway homes," or "backyard cottages," are detached or attached living units that are placed on the same lot as a single-family dwelling (although they can also be placed on lots with multifamily dwellings). The "unit" is a self-contained living area with its own cooking, sleeping, and sanitation facilities (MRSC, 1995).

Accessory dwelling units provide a more flexible housing option, particularly for smaller households and older Americans. This option is increasingly important as household sizes decline, with more one-person and two-person households. ADUs are beneficial for multigenerational

[3] The most similar preemption may be the preemption of municipal banning of manufactured homes. Most states restrict local authority to apply separate zoning standards to manufactured housing than to site-built housing. Like ADU preemptions, these standards are a form of preemption on residential development (Lemar, 2019). Both ADUs and manufactured homes are often advocated for as forms of "naturally" affordable housing.

[4] HB 2001 in Oregon preempted single-family zoning, and Cal. Gov. Code §65852.21 made duplexes legal statewide through ministerial review and under certain conditions. Maine's policy went into effect on July 1, 2023. (Me. Rev. Stat. Ann. title.30-A §4364-A.)

households (Infranca, 2014) and are attractive to older adults, providing them with additional income or an alternative way to age in place. Because of this, ADUs have been championed by advocacy groups such as AARP, which has produced model legislation for states and model ordinances for cities (AARP, 2020).

Accessory dwellings, with their lack of land development costs and lower construction costs, are often cheaper than single-family housing, providing an affordable housing option. The additional housing units they supply could help improve housing affordability (MRSC, 1995). California allows potential ADUs to be counted as part of its Regional Housing Needs Allocation process. However, these units do not necessarily translate into actual low-income housing, especially if that housing is not deed-restricted (Ramsey-Musolf, 2018).

Local governments regulate accessory dwelling units. Regulations may include where in the jurisdiction the units may be located; the size of the units in terms of height, floor area, and number of bedrooms; the position on the lot in terms of setbacks; and parking—both the minimum required and the way the parking is delivered (for example, if tandem parking is prohibited). Other subjects of regulation include design standards; restrictions on entrances and passageways; regulations on utilities, including fees for new utility connections; regulations on use, such as restrictions requiring owner occupancy; restrictions on renting (especially short-term rentals); or affordability requirements.

Infranca (2014) reviewed several cities' policies on accessory dwelling units and micro apartments, highlighting several barriers that continue to hamper their construction. Financing can be challenging, as are parking requirements, design restrictions (especially on prefabricated units), and height and setback limits. Accessory dwelling unit reform is often subject to community pushback. Neighborhood concerns focus on parking, increased density, and changes to neighborhood character.

Methodology

This article is an analysis of accessory dwelling preemption policies across and within states. Policies are listed in exhibit 1. States were identified by searching the state statute for the phrase "accessory dwelling unit." Web searches for "accessory dwelling unit + [state name]" were also conducted to verify that other terms, such as "second unit," were not missed. Other sources, such as the AARP ADU handbook, were consulted to establish the list of states that have had ADU preemption policies. With policy changing rapidly in this area, it is important to note the timing of the work. Policies reflect those in place in early 2023, prior to the 2023 legislative session, although some legislation pending at the time of writing is also mentioned.

Exhibit 1

Statutes Reviewed

State	Statute Reviewed
Washington	Wash. Rev. Code Ann. §§36.70A.696-99 Wash. Rev. Code Ann. §43.63A.215
Vermont	Vt. Stat. Ann. 24, §4412 (E)
Utah	Utah Code Annotated §17-27a-526 Utah Code Annotated §10-9a-530
Rhode Island	R.I. Gen. Laws §45-24-37 R.I. Gen. Laws §45-24-73:76
Oregon	Or. Rev. Stat. §197.312
New Hampshire	N.H. Rev. Stat. §674:72
California	Cal. Government Code §65852.2
Connecticut	Conn. Gen. Stat. §8-2o
Maine	Me. Rev. Stat. Ann. title. 30-A §4364-B

States identified as having preemptions were reviewed longitudinally using the legislative history feature available on either Westlaw (an online legal research service) or a state's legislative website. Policy details were recorded,[5] including the effective date of each policy change, where the policy applies, limits within a jurisdiction, and any process requirement—such as requiring a ministerial review, floor area requirements, height, setbacks, lot size and coverage, parking design, utilities, fees, restrictions on occupancy, and owner occupancy requirements. California has a more complicated preemption policy. Like other preemptions, it allows local governments to craft their own ADU policies while limiting what restrictions they can implement. Unlike other policies, it also specifies that ADUs that meet specific requirements are allowed regardless of local policies (Cal. Gov. Code §65852.2€). To accommodate this policy, a category of "allowed regardless of local ordinance" was introduced, although it applies only to California.

ADU preemptions are compared using their "strength," or, in other words, the degree to which they limit local government authority to regulate ADUs. The strength of ADU preemptions is largely determined by three primary factors. The first is which local governments are impacted by the preemption. In states with no preemption, no local governments are preempted, so the preemption is obviously maximally weak. Policies otherwise vary in terms of which local governments are excluded from the preemption. For example, the state of Washington exempts cities with populations under 20,000, which is a weaker preemption than Oregon, which exempts cities with a population under 2,500. The second factor is what exceptions are covered within a local government. For example, Utah's policy is limited to interior accessory dwelling units. Rhode Island's policy is largely limited to family members, so even though the policy applies to many local governments, it makes for a weak policy. The final factor is the degree to which those local governments are being subpreempted (that is, the degree to which their ability to regulate ADUs is being restricted). A preemption that restricts local governments from enacting owner occupancy requirements is a stronger preemption than one that does not. Likewise, a preemption that requires

[5] Full data are available upon request.

a maximum size of at least 800 square feet is weaker than one that requires a maximum size of at least 1,000 square feet.

Several factors make measuring preemption strength difficult. One factor is that some subpreemptions are likely to be more important than others. Owner occupancy requirements and parking requirements probably fall into this category. To complicate matters further, some subpreemptions interact with each other, and local governments may strategically use unpreempted regulations to substitute for preempted ones. It may be the case that preemptions do not materially impact production until they reach a point where local governments lack the regulatory authority to block ADUs. Even two decades into California's ADU preemptions, their effectiveness was limited because of the continued ability of local governments to regulate many aspects of ADUs[6] (Brinig and Garnett, 2013). Since California introduced those preemptions, both the degree of preemption and the permitting of ADUs have increased dramatically. Another challenge includes balancing a regulation such as Connecticut's, which enacts robust subpreemptions but allows local governments to opt out of the preemption entirely.

For these reasons, this article does not attempt to quantify or rank preemption strength explicitly, though it seems that California has the strongest ADU preemptions and Rhode Island has the weakest. Instead, the article implicitly tracks the strength of preemptions within states over time. Examining which preemptions have been adopted in each state and how they have been amended shows how preemptions' strength has changed over time.

It is worth noting the limitations of this project. ADU preemptions are evolving rapidly and have changed even during the writing of this article. The emphasis of the analysis is therefore on general trends and not on state-level policy specifics. The article is not intended to fully capture the complexities of land use regulation in each state, nor does it aim to provide a comprehensive overview of all regulations that could impact ADU development in each state. This article also does not examine the impacts or effectiveness of these policies, an important task for future research to pursue.

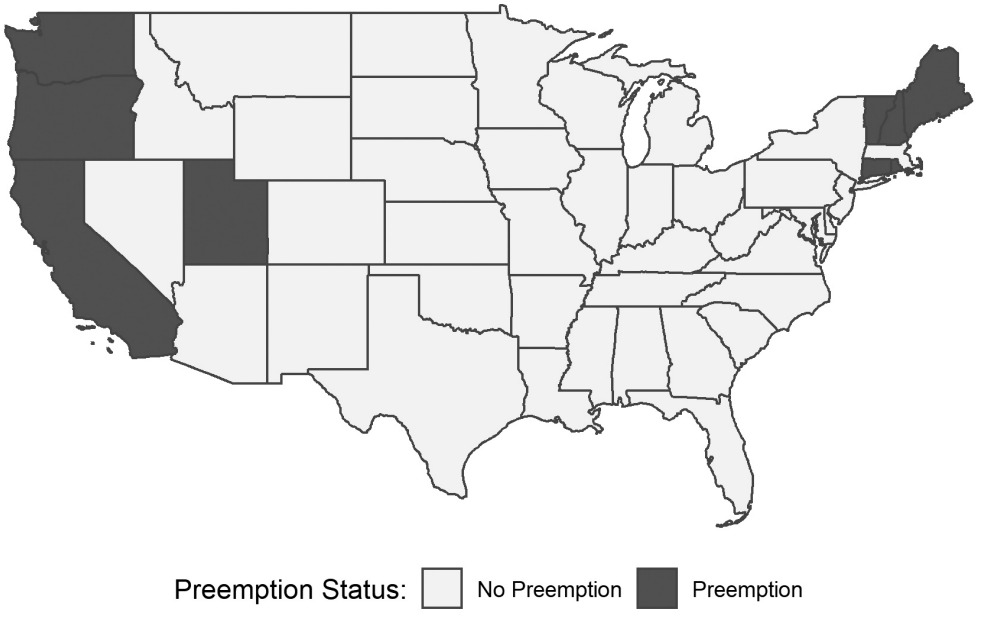
Which States Preempt ADUs

Nine states currently preempt some form of ADU regulation: Washington, Oregon, California, Utah, Maine, New Hampshire, Vermont, Connecticut, and Rhode Island (exhibit 2).

[6] The limit of preemption has been an issue for other reforms, such as California's lot-splitting preemption SB 9 (Alameldin and Garcia, 2022).

Exhibit 2

States with ADU Preemptions

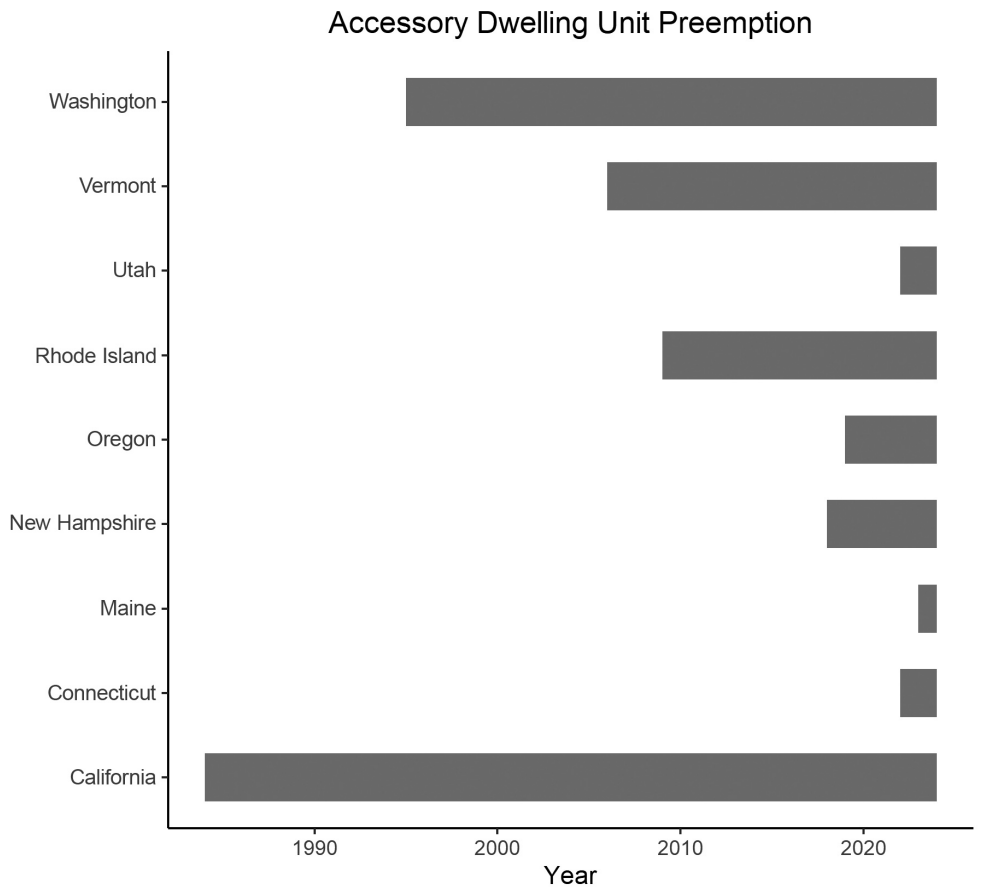


Source: Author's review of accessory dwelling unit policies

The number of states with accessory dwelling unit preemptions has increased in the last few years (exhibit 3). California has the oldest policy still in existence, with its first tentative preemption dating from 1983. Most preemptions are much more recent, including Utah in 2021 and Connecticut in 2022, and Maine's preemption is scheduled to go into effect in mid-2023. In other states, including Maryland (S.B. 0871, 2022) and Virginia (H. B. 151, 2020), bills have been introduced but have failed to be passed into law. Some states, such as Florida, have policies that encourage ADUs as affordable housing but fall short of preemption (Manji et al., 2023). ADU preemption policies do not follow some of the national trends in local preemption by state governments generally. Whereas Republican-controlled states may be more likely to preempt generally (Fowler and Witt, 2019), most of the states with ADU preemptions (except for Utah and New Hampshire) have Democratic-controlled state governments.

Exhibit 3

ADU Preemptions Timeline



Source: Author's review of accessory dwelling unit policies

Concerns about affordable housing often precede ADU preemption. Although all states created their preemptions legislatively, studies on affordable housing preceded the preemptions in several states. In Maine, the policy followed recommendations from a legislative commission. In 2021, the legislature established a commission to study zoning and land use restrictions in the state. The 15-member committee recommended allowing accessory dwelling units by right in all zoning districts currently zoned for single-family homes, eliminating single-family zoning across the state entirely, and allowing four residential units as a statewide minimum (*Commission to Increase Housing Opportunities in Maine by Studying Zoning and Land Use Restrictions Report*, 2021). In the 2022 legislative session, the legislature passed LD 2003, which codified several of the commission's recommendations, including an ADU preemption.

Similarly, Washington's policy also came into effect following the recommendations of a board that reviewed issues of housing affordability. ADU preemption was undertaken in Washington in 1993 as part of the *1993 Housing Policy Act* (S.B. 5584, 1993), which established an Affordable Housing Advisory Board. In consultation with that board, the state required the Department of Community, Trade, and Economic Development to produce a report. It included recommendations "to encourage the development and placement of accessory apartments in areas zoned for single-family residential use." (Wash. Rev. Code Ann. §43.63A.215 (1)(b)). The law required local governments to adopt the recommendations into their zoning codes. However, the law indicated that "[t]o allow local flexibility, the recommendations shall be subject to such regulations, conditions, procedures, and limitations as determined by the local legislative authority" (Wash. Rev. Code Ann. §43.63A.215(3). This clause gave local governments the opportunity to decide how and to what extent they should adopt the recommendations. Washington is now in the process of updating the ADU recommendations, and the Washington Department of Commerce recently released updated draft recommendations that included prohibitions on requiring owner occupancy or off-street parking, limiting setbacks, design standards, and increasing maximum sizes for ADUs (Washington State Department of Commerce, 2023).

Washington's policy is the only one whose preemptions come from the recommendations of a committee and an administrative agency. Whereas most other state preemptions lay out limitations on the regulations that local governments may establish, Washington models the restrictions that local governments should be putting on ADUs.

Preemption Changes Over Time

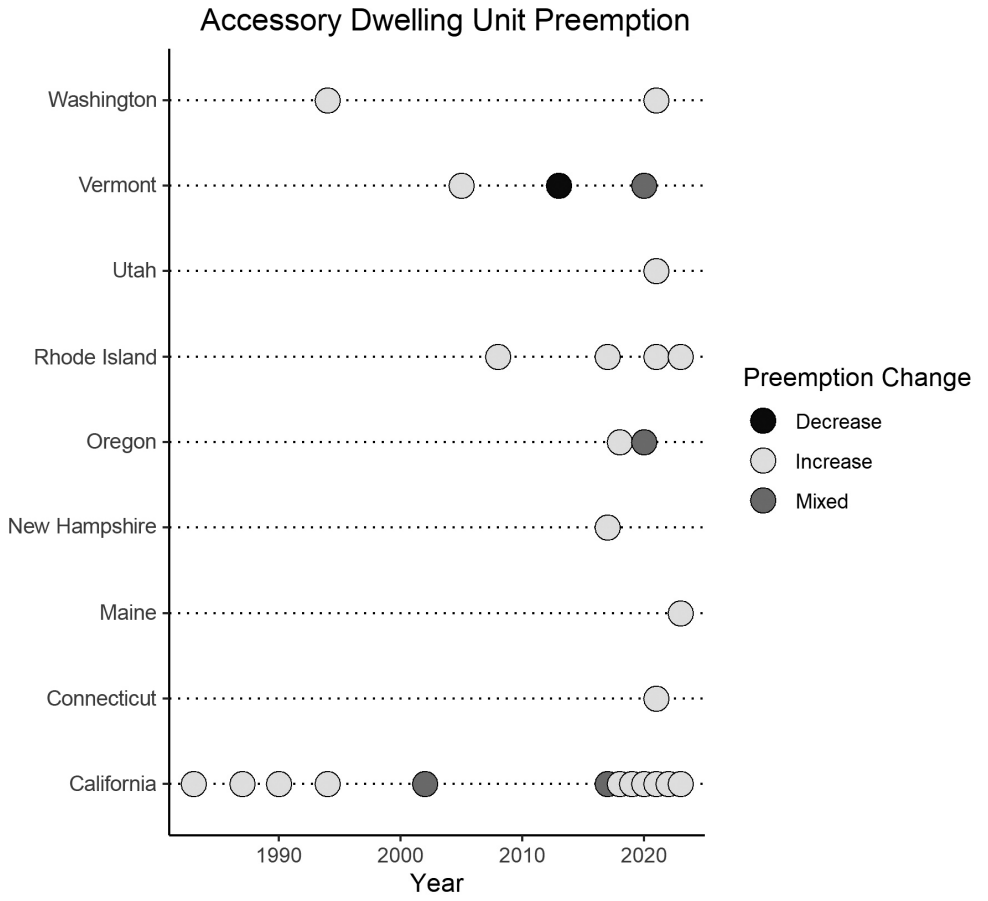
Over time, preemptions have been amended in nearly every state that has enacted them. The exceptions are New Hampshire, Utah, and Maine, which have passed policies relatively recently (2017, 2021, and 2022 respectively). Exhibit 4 shows the changes in policy by each year and records whether the state increased the preemption (reduced the powers of local government), decreased the preemption (expanded the powers for local governments), or did both. It is important to note that exhibit 4 is not an indication of the net impact of these changes, merely the presence of increasing or decreasing the preemption.

The overwhelming pattern of change is in increasing the preemption over time, although many of the changes were small. Aside from Hawaii,[7] Vermont is the only state to have reduced the strength of its preemption in 2013 (H. 401, 2013), and this change provided that the ADU preemption did not apply to flood areas or fluvial erosion areas. A contributor to the recent "mixed" changes is the explicit ability of local governments to regulate short-term rentals. For example, Oregon's H.B. 2001 (2019) clarified that owner occupancy and parking requirements could not be established, but that "vacation occupancies" could still be regulated.

[7] Starting in 1982, Hawaii required its counties to allow at least two single-family units on a lot where residential dwellings are permitted. Although the statute did not explicitly reference ADUs, it built on Hawaii's history of Ohana (i.e., family) units. The statute was changed in 1989 to read, "Each county may adopt reasonable standards to allow the construction of two single-family dwelling units on any lot where a residential dwelling unit is permitted," thereby ending the preemption (Kea, 1991). Previously built ADUs remain across the state (Fujii-Oride, 2022).

Exhibit 4

Changes in Preemption Over Time



Notes: Years reflect policy implementation date. "Increase" indicates a policy that increased the preemption of Accessory Dwelling Units, "Decrease" indicates a policy that decreased the preemption of Accessory Dwelling Units, and "Mixed" indicates a policy that did both.

Source: Author's review of accessory dwelling unit policies

Limitations

State ADU preemptions do not apply universally, and many of them have significant limitations. Many preemptions exempt smaller cities and counties. Oregon has an urban growth boundary policy, and the preemption applies only to municipalities within the urban growth boundaries (Or. Rev. Stat. §197.312 (5)(a). Washington's policy applies only to counties that plan under the Growth Management Act or those with populations greater than 120,000 (Wash. Rev. Code Ann. §43.63A.215 (4)). Both the Washington and Oregon policies also have exemptions for smaller municipalities: 2,500 for Oregon (Or. Rev. Stat. §197.312 (5)(a)) and 20,000 for Washington (Wash. Rev. Code Ann. §43.63A.215 (4)(a)).

Utah's preemption is limited because it applies only to internal accessory dwelling units; it is offered for long-term rental and where the primary residence is occupied by the owner. The statute also allows cities to implement several restrictions, including design standards, additional parking for the primary residence, prohibitions on lots 6,000 square feet or less, and short-term rental prohibitions, among others (Utah Code Annotated § 10-9a-530 (4)). In addition, municipalities may ban ADUs in an area that is 25 percent or less of the total single-family zoning area in the municipality and 67 percent if the municipality contains a major university (Utah Code Annotated §10-9a-530 (4)f(ii)). At the time of this writing, legislation has been introduced that would restrict the ability of municipalities to regulate based on internal connectivity and would include attached garages as "interior" space for ADUs (S.B. 174, 2023).

An unusual aspect of Connecticut's preemption is that it allows local governments to opt out of the regulation[8] (Conn. Gen. Stat. §8-2o (f)). The policy, which took effect on January 1, 2022, allows one attached or detached ADU to be permitted ministerially. The locality may designate areas where ADUs are permitted but must allow them on all lots that contain a single-family dwelling. The opt-out process begins with a two-thirds vote of the zoning commission or planning and zoning commission. The commission must hold a public hearing and then state the reasons for the decision. Finally, the legislative body or board of selectmen must complete the opt-out with a two-thirds vote. Several municipalities have opted out, especially in southwest Connecticut (Prinz, 2022). Even municipalities that choose to opt out, however, may be adjusting their ADU policies in response to the preemption. Fairfield opted out of the preemption, but the Planning and Zoning Commission recommended increasing the districts where ADUs are allowed (Town of Fairfield Memo, 2022).

ADU Regulations and Subpreemptions

There are many avenues of ADU regulation. In its review of local ADU policies in Washington, the Municipal Research and Services Center, a nonprofit that works with local governments in the state, identified a wide range of rules that local governments apply to ADUs: approval procedures, owner occupancy requirements, size regulations, attached vs. detached, occupant restrictions, number of occupants, parking requirements, design or appearance standards, illegal ADUs, density controls, regulations regarding the age of the home and length of residence, recording requirements, utility service requirements, barrier free ADUs, maximum numbers of ADUs per lot, ADUs and home occupations, periodic permit renewal, automatic ordinance review, and reporting on ADU applications (MRSC, 1995).

ADU preemptions require local governments to allow some form of ADU. However, even under these preemptions, land use regulation remains primarily under local control. Local ADU regulation is a series of rules that govern aspects of ADU construction. It is the combination and interactions of these regulations that determine what can be built and how easily.

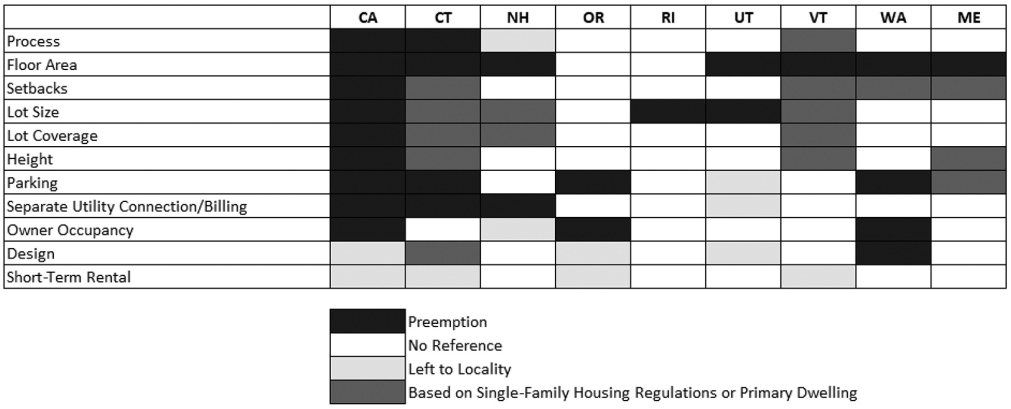
[8] This bears some similarity to California's original second unit preemption, which forbade local governments from banning second units outright unless they acknowledged this would limit housing opportunities and contained specific findings on the "adverse impacts on the public health, safety, and welfare that would result from allowing second units within single-family and multifamily zoned areas" (CA Statutes of 1982, Chapter 1440).

ADU preemption must similarly deal with many aspects of ADU development. ADU preemption does not merely require local governments to allow ADUs; it must also preempt local use of particular regulations that can block or discourage ADUs. An ADU preemption that requires local governments to allow ADUs but gives them full latitude to regulate those ADUs would essentially be no preemption at all. Indeed, the ability of local governments to regulate ADUs and respond to preemptions has caused some researchers to suggest that the earlier preemptions have little impact (Brinig and Garnett, 2013).

In this manner, the different state preemptions each involve *subpreemptions*, the underlying regulatory preemptions that together determine how strong the preemption is. For example, as part of a preemption, a state may limit the ability of local jurisdictions to regulate the height of an ADU, which would be a subpreemption on height. Exhibit 5 shows how different states vary in their approach, with some allowing local governments more discretion than others. Certain aspects are more likely to be preempted, such as parking regulations, setbacks, and ADU size.

Exhibit 5

Accessory Dwelling Unit Subpreemptions



Source: Author's review of accessory dwelling unit policies

Although it would be tempting to view preemptions that have more subpreemptions to be necessarily stronger than those that do not, this is not necessarily the case. Strength can vary in terms of how strict each subpreemption is. For example, a subpreemption requiring that no parking be mandated by a local government is much stronger than one that allows local governments to require one parking space.

Changes in Subpreemption Intensity and Scope

Equally important as the spread of ADU preemptions across states is the change of subpreemptions within states. This next section reviews in detail how subpreemptions on parking, review process, occupancy requirements, short term-rental, and size requirements have changed over time in the reviewed states. These subpreemptions show the overall trend of increased preemption *within* states over time. It also shows that subpreemptions occasionally undergo rapid change and reversal.

Some examples include Washington first requiring that ADUs have parking but then limiting the parking that local governments can require, or California's change from requiring conditional use to ministerial review.

Whereas the overall trend is the strengthening of subpreemptions, not all subpreemptions have increased in strength. Increasingly, states are explicitly granting local governments the ability to regulate or prohibit ADUs from being used as short-term rentals, such as those rented out on Airbnb. California, Connecticut, and Vermont explicitly allow their local governments the ability to regulate short-term rentals.

Each of the following sections contains a chart categorizing the subpreemption into different categories of intensity. Given that ADU policy and preemptions are complicated, these sections provide a visual depiction of the overall trend and highlight changes but cannot capture the details of the policies in their entirety.

Parking

Parking is a source of contention in local development, and minimizing parking requirements is an important policy for encouraging ADU construction (exhibit 6). ADU parking subpreemptions have changed in Washington, Oregon, and California.

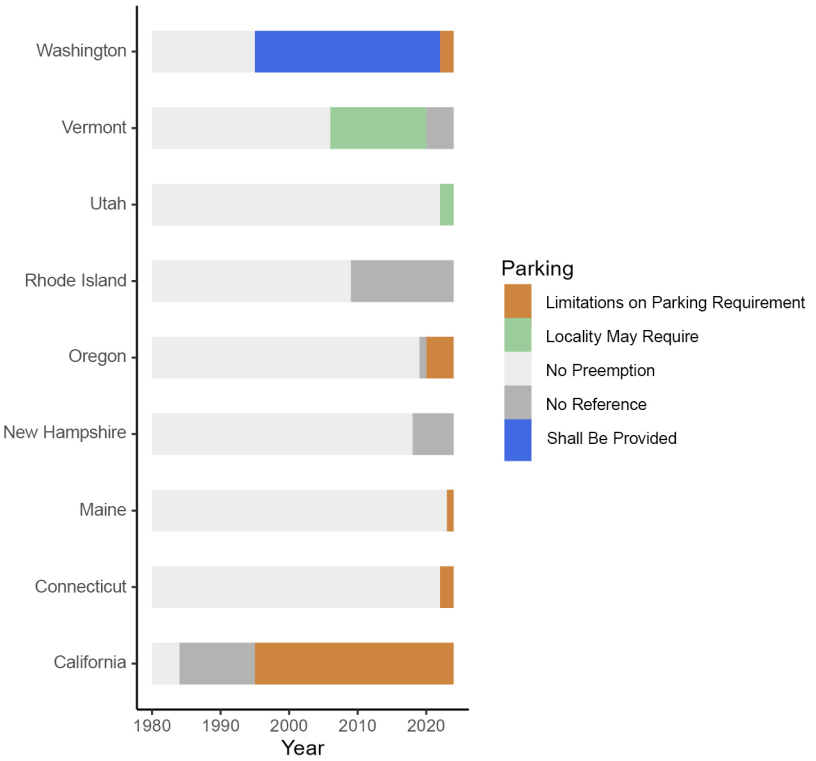
Parking requirement subpreemptions in Washington have undergone the starkest change, from requiring parking for ADUs to limiting where localities can require parking. The original recommendations from Washington included requiring additional parking for the accessory dwelling unit: "One off-street parking space, in addition to that which is required by the Ordinance for the underlying zone, shall be provided or as many spaces deemed necessary by the (building official) to accommodate the actual number of vehicles used by occupants of both the primary dwelling and the ADU" (Washington State Department of Community, Trade, and Economic Development, 1994). In 2020, Washington passed Senate Bill 6617, which limited the ability of cities to require parking for ADUs within one-quarter mile of a transit stop.

California has also increasingly preempted the ability of cities to use parking as a means of blocking ADUs. Parking subpreemptions were first introduced in 1994, which limited (with exceptions) the ability of cities to require more than one parking space per unit or per bedroom. In 2017, this was strengthened to preempt parking requirements within one-half mile of transit, in historic districts, when the ADU is part of an existing structure, if parking permits are not offered to the ADU residents, or if there is a carshare within one block. The policy was tweaked slightly in 2018 so that only one parking space is required per unit or per bedroom, whichever is less.

Although Oregon does not explicitly preempt many areas of local ADU regulation, in 2020 the state entirely preempted local governments from requiring parking for ADUs. (Or. Rev. Stat. §197.312(5)(b)(B)). In Maine, municipalities may not require additional parking beyond what is required for a single-family home (Me. Rev. Stat. Ann. title. 30-A § 364-B(4)(C)). In Connecticut, only one parking space per ADU is allowed (Conn. Gen. Stat. §8-20(a)(6)(c)).

Exhibit 6

Changes in Parking Requirements



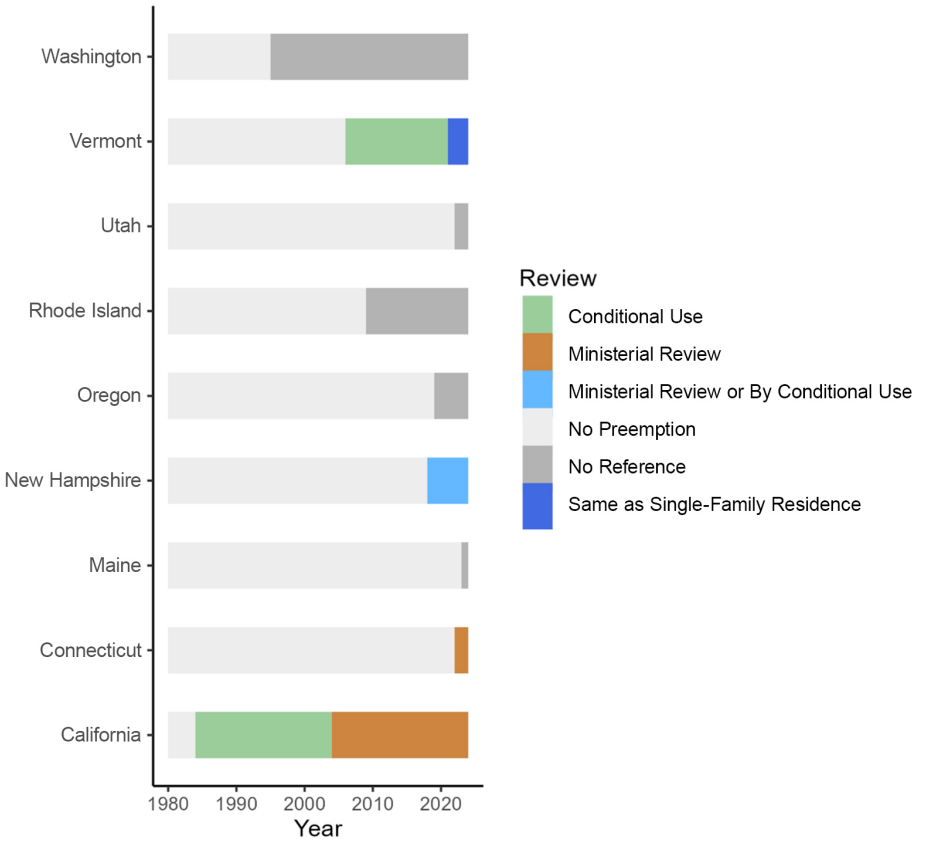
Source: Author's review of accessory dwelling unit policies

Review Process

Another important aspect of land use regulation is the process and procedures required before approval is given (exhibit 7). The primary distinction is between "conditional use" and "ministerial review," with the former involving discretionary approval, subjective standards, and the incorporation of public hearings. Ministerial review is based on administrative procedures with objective standards; if the proposed development meets the standards, it is approved. Ministerial review is more accommodating toward new development. California switched from requiring conditional review to requiring ministerial review in 2003. Both Connecticut and California require a ministerial process and give timelines for decisions, 65 days for Connecticut (Conn. Gen. Stat. §8-20(b)) and 60 days for California (Cal. Gov. Code 65852.2(a)(3)(A)). Vermont also changed its review policy from conditional use to the same as a single-family residence without an ADU, which is often approved ministerially.

Exhibit 7

Changes in Review or Permitting Process



Source: Author's review of accessory dwelling unit policies

Occupancy Requirements

Occupancy restrictions are also important aspects of ADU regulation. In terms of preemption, these restrictions take two forms: familial occupancy requirements and owner occupancy requirements. Two states have preemptions regarding familial occupancy requirements but in opposite directions (exhibit 8).

Rhode Island preempts based on use. The state allows for ADUs in owner-occupied single-family residences, but only for "reasonable accommodation for family members with disabilities or who are sixty-two (62) years of age or older, or to accommodate other family members" (R.I. Gen. Laws § 45-24-37(e)). Since 2008, ADUs were only allowed for disabled family members; in 2017, the law was changed to allow family members 62 years old or older.

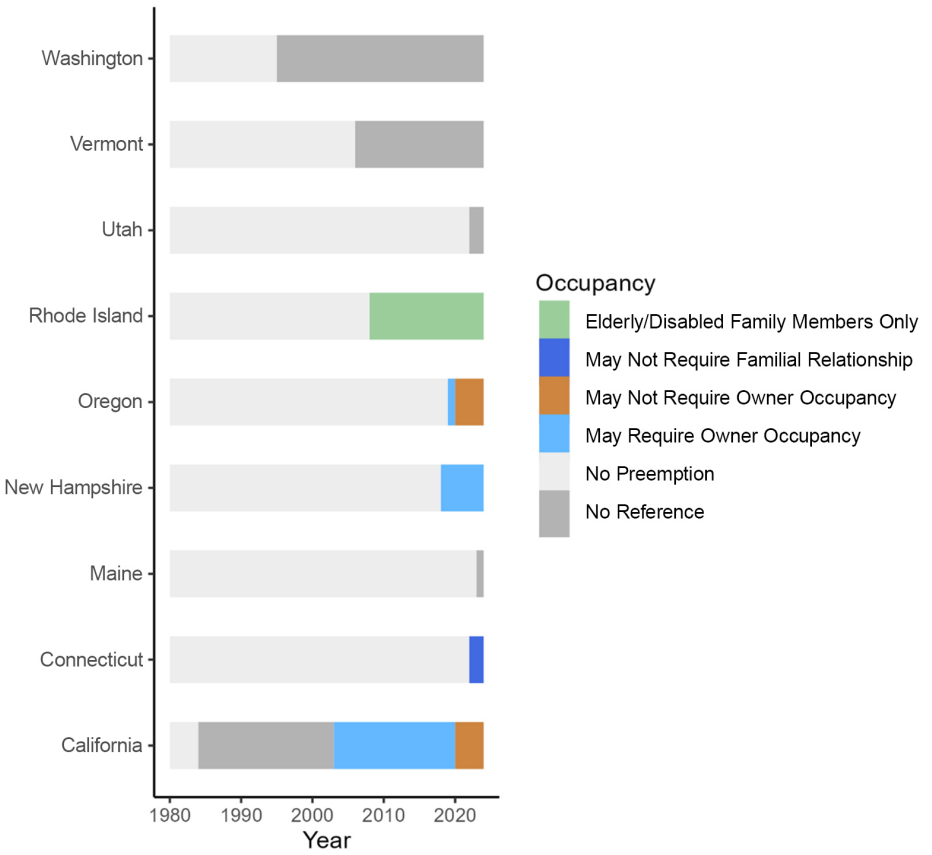
The definition of ADUs was tweaked in the 2022 session, along with other changes in ADU policies. These changes did not fundamentally alter the preemption, with additional requirements applying

only to "any municipality that chooses to permit accessory dwelling units" (R.I. Gen. Laws § 45-24-73(a)). This requirement has created a two-track policy, with Accessory Family Dwelling Units being preempted and Accessory Dwelling Units that municipalities can opt into. However, confusion remains, and interest groups are advocating for clarifying reforms (American Planning Association-Rhode Island Chapter, 2023). At the time of this writing, a bill was introduced that would remove the family member requirement and provide uniform standards for ADUs (H.B. 6082).

More common are owner occupancy requirements, which typically require the owner of the primary residence to occupy either the primary residence or the ADU. California and Oregon preempt local governments from requiring owner occupancy, policy changes that occurred in 2020. Prior to that preemption, both states explicitly allowed localities to require owner occupancy. In California, owner occupancy cannot be imposed for dwellings permitted between 2020 and 2025, but it can be imposed as of January 1, 2025 (Cal. Gov.Code§65852.2 (a)(8)(B)).

Exhibit 8

Changes in Occupancy Requirements



Source: Author's review of accessory dwelling unit policies

Maximum and Minimum Size Requirements

Several states limit the size restrictions that local governments can place on ADUs. These regulations are usually expressed as a limitation to the total square footage or, for interior ADUs, a percentage of the area of the primary unit. Like other aspects of ADU preemption where the policy has changed, it has increased the strength of the preemption. California and Vermont have changed their preemption policies to either have a maximum size or to increase the allowable maximum size. Exhibit 9 provides an overview of how these policies have changed over time. Like other subpreemptions, subpreemptions on minimum and maximum size have increased in strength over time.

Exhibit 9

Changes in Maximum and Minimum ADU Size

State	Variable	1995–2004	2005–2016	2017	2018	2019	2020	2021	2022	2023
California	Maximum	May Restrict	May Restrict	1200 sq ft	1200 sq ft	1200 sq ft	1200 sq ft (min 850 sq ft)	1200 sq ft (min 850 sq ft)	1200 sq ft (min 850 sq ft)	1200 sq ft (min 850 sq ft)
	Minimum	Must allow efficiency unit	Must allow efficiency unit	Must allow efficiency unit	Must allow efficiency unit	Must allow efficiency unit	Must allow efficiency unit	Must allow efficiency unit	Must allow efficiency unit	Must allow efficiency unit
Connecticut	Maximum	No Preemption	No Preemption	No Preemption	No Preemption	No Preemption	No Preemption	No Preemption	1000 sq ft	1000 sq ft
	Minimum	No Preemption	No Preemption	No Preemption	No Preemption	No Preemption	No Preemption	No Preemption	No Reference	No Reference
Maine	Maximum	No Preemption	No Preemption	No Preemption	No Preemption	No Preemption	No Preemption	No Preemption	No Preemption	May Restrict
	Minimum	No Preemption	No Preemption	No Preemption	No Preemption	No Preemption	No Preemption	No Preemption	No Preemption	190 sq ft
New Hampshire	Maximum	No Preemption	No Preemption	May Restrict but not less than 750 sq ft	May Restrict but not less than 750 sq ft	May Restrict but not less than 750 sq ft	May Restrict but not less than 750 sq ft	May Restrict but not less than 750 sq ft	May Restrict but not less than 750 sq ft	May Restrict but not less than 750 sq ft
	Minimum	No Preemption	No Preemption	May Restrict	May Restrict	May Restrict	May Restrict	May Restrict	May Restrict	May Restrict
Vermont	Maximum	No Preemption	30% of SF Dwelling	30% of SF Dwelling	30% of SF Dwelling	30% of SF Dwelling	30% of SF Dwelling or 900 sq ft (whichever is larger)	30% of SF Dwelling or 900 sq ft (whichever is larger)	30% of SF Dwelling or 900 sq ft (whichever is larger)	30% of SF Dwelling or 900 sq ft (whichever is larger)
	Minimum	No Preemption	No Reference	No Reference	No Reference	No Reference	No Reference	No Reference	No Reference	No Reference
Washington	Maximum	40% of area not more than 800 sq ft	40% of area not more than 800 sq ft	40% of area not more than 800 sq ft	40% of area not more than 800 sq ft	40% of area not more than 800 sq ft	40% of area not more than 800 sq ft	40% of area not more than 800 sq ft	40% of area not more than 800 sq ft	40% of area not more than 800 sq ft
	Minimum	300 sq ft	300 sq ft	300 sq ft	300 sq ft	300 sq ft	300 sq ft	300 sq ft	300 sq ft	300 sq ft

sq ft = square feet.

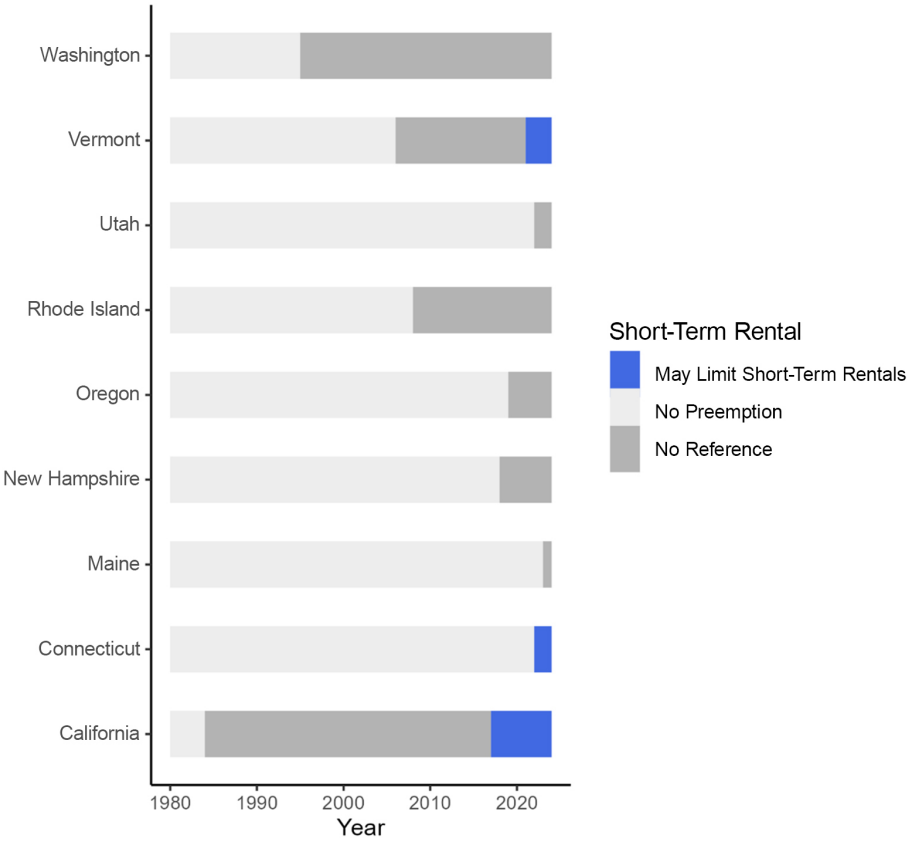
Source: Author's review of accessory dwelling unit policies

Short-Term Rental

One political concern for allowing accessory dwelling units is that they might be used for short-term rentals instead of longer-term housing. Increasingly in state preemption of ADU policies, the preemption explicitly maintains the right of local governments to regulate short-term rentals. Vermont, California, and Connecticut explicitly allow local governments to limit the use of accessory dwelling units for short-term rentals. At the time of this writing, Rhode Island introduced legislation that would prohibit ADUs from being rented "for tourist or transient use" (H 5599, 2023). Whereas ADU preemptions have for the most part gotten stronger, short-term rentals are examples in which state statutes explicitly grant local governments authority to limit a particular use of ADUs (exhibit 10).

Exhibit 10

Short-Term Rental Restrictions



Source: Author's review of accessory dwelling unit policies

Discussion

ADU preemption provides an instructive example of how state land use preemptions have evolved over time. ADU preemption is a mild form of land use preemption, and perhaps because of this has had more legislative success than other forms of land use preemption. If broader land use preemption is going to be enacted, such as setting a minimum intensity of quadplexes, it may follow some of the same patterns as ADU preemption.

The clearest trend documented in this article is the increase in preemption of regulations on ADUs. This increase has breadth, with more states adopting policies that preempt ADUs, and depth, as those states have adopted additional subpreemptions or strengthened the subpreemptions they already had. The policies have been amended in most states, nearly always increasing the strength of the preemptions, although the intensity of these preemptions still varies widely. This strengthening has not been universal. State governments are increasingly explicitly allowing local governments to regulate ADUs use as short-term rentals.

This strengthening suggests that the politics of ADU preemption have required gradual introduction, with exceptions and limitations, to be enacted. Once enacted, though, the trend has been toward increased preemption, with amendments to legislation increasing the strength and effectiveness of the preemption. This trend suggests that the relatively weak preemptions first enacted by many states were viewed as ineffective at increasing ADU production. Subsequent strengthening may have been a result of the interaction between state-level restrictions and the response of local policymakers who may use what authority they retain to regulate ADUs. State governments then may react by increasing the strength of the preemption in order to counter local government response. This response is probably best shown by California's continued efforts to strengthen ADU preemptions.

Given the substantial amount of uncertainty in the legislative process and the policy process more broadly, it is by no means certain that state governments will be able to iteratively pass legislation that continues to strengthen ADU preemptions. State legislatures looking to preempt their local government's land use policies should recognize that statewide preemptions may be avoided or weakened by local governments that retain enough land use controls. Legislatures looking to preempt local land use regulation may wish to vest broad powers in state agencies to preempt and allow the preemption to take place through rule. This approach could allow more flexibility in terms of which specific policies are needed to preempt local governments. Of course, such an approach may be subject to its own political difficulties.

Conclusion

Two routes are possible for continued policy evolution for accessory dwelling units. The first route is policy diffusion to states that have not yet preempted ADUs. The relative success of ADU preemption compared to other forms of land use preemption is likely partially due to its mildness relative to other potential liberalizations. Preempting ADUs is a good first step for state governments looking to do more in local land use regulation. ADU preemption will likely spread to additional states, although the task of predicting which states will have to be a focus of other research.

The second route for policy evolution is continued policy progression within states that have adopted these policies. This approach is perhaps most likely where the current preemptions are the weakest. Rhode Island, with its preemptions only for elderly or disabled family members, is a leading candidate. Utah and New Hampshire only preempted attached or interior ADUs. Preemptions may also have significant exemptions. Utah's preemption largely excludes university towns. Connecticut allows towns to opt out. Further revision of current policies to strengthen subpreemptions is probably necessary for these preemptions to be effective.

This work offers several notes for future research. The first echoes Goodman and Hatch (2022), highlighting the significant value of studying individual preemptions in a specific policy area. More research should be done focusing on individual preemptions. On ADU preemptions specifically, more research is needed to determine the effect of preemption on ADU permitting and construction, especially on which subpreemptions, or combination of subpreemptions, generate the most units. A further focus should be on outcomes that ADUs are supposed to improve, such as housing affordability or housing outcomes for older adults.

Empowered by states following A Standard State Zoning Enabling Act, land use regulation has been a focus of local governments for most of the last century. Now some of that power is being retrieved by the states. ADU preemption is an example of how different states are doing this, and it reveals the challenges of pursuing a land use regime through state preemption. Given the history and current state of land use politics and centrality of land use regulation to local governments, it is difficult to imagine a complete regulatory shift away from local governments to state agencies. Land use regulation will likely remain largely the purview of local government; however, the rise of ADU preemptions and other preemptions suggests that state governments are increasingly keen to directly intervene in one of the most sacred areas of local government control.

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