

**THE RADICAL KERNEL WITHIN CONSERVATIVE DOCTRINE:
INTRASTATE PREEMPTION, RESIDENTIAL ZONING, AND CLIMATE
CHANGE**

Climate Change Law, Research & Writing (Spring 2025): Final Paper

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I. Introduction

During the height of the COVID-19 pandemic governments across the world mandated “lockdowns” intended to prevent the spread of the SARS-CoV-2 virus, reduce deaths from the disease, and enable public health systems to efficiently distribute resources. An unintended although predictable result of the lockdowns – which involved decreased travel, decreased production, and decreased energy consumption – was a sudden and sharp decline in global greenhouse gas emissions.¹ Unfortunately, these reductions were short lived and as the world recovered from the pandemic and the economy returned to the something approaching the status quo, emissions skyrocketed.² This brief interlude in emissions provided empirical support to what even the most committed ideologue knows but may never admit: to meaningfully address anthropogenic climate change, we must radically alter how we live and achieve large reductions in global economic activity.³ This is particularly true in the global north, where wealthy nations sit within a privileged core while imposing underdevelopment on a poor periphery⁴, and consume more than their fair share of energy.⁵

This paper makes the case for the normative desirability of intrastate preemption of residential zoning from a pragmatic eco-socialist and degrowth perspective. Specifically, I argue that intrastate preemption of residential zoning is normatively desirable because if it is successfully implemented it can. In Section II, I describe the intersections between climate change, GHG emissions, and residential zoning density.

¹ P. Bhanumati et. al., *Greenhouse Emissions Rise to Record, Erasing Drop During Pandemic*, IMF Blog (June 30, 2022), <https://www.imf.org/en/Blogs/Articles/2022/06/30/greenhouse-emissions-rise-to-record-erasing-drop-during-pandemic#:~:text=Greenhouse%20Emissions%20Rise%20to%20Record%2C%20Erasing%20Drop%20During%20Pandemic,-The%20latest%20data&text=Emissions%20of%20carbon%20dioxide%20and,mobility%20and%20hampered%20economic%20activity>

² *Id.*

³ Jason Hickel, *Degrowth Is About Global Justice*, Green European Journal (Jan. 5, 2022),

<https://www.greeneuropeanjournal.eu/degrowth-is-about-global-justice/#:~:text=Degrowth%20is%20therefore%20a%20demand,appropriation%20and%20decolonise%20the%20atmosphere>

⁴ Carlos A. Martinez-Vela, *World Systems Theory*, 3-4, <https://web.mit.edu/esd.83/www/notebook/WorldSystem.pdf>

⁵ See generally Jason Hickel and Aljosa Slamersak, *Existing climate mitigation scenarios perpetuate colonial inequalities*. The Lancet Planetary Health (July 2022). <https://www.sciencedirect.com/science/article/pii/S2542519622000924>.



In Section III, I provide a brief history of the emergence of single family zoning in the United States. In Section IV, I describe the mechanics of intrastate zoning preemption, its traditional use, and articulate the political stakes of what has been termed in the scholarship as the “new preemption.” In Section V, I offer as normative justifications for embracing intrastate zoning preemption of single family residential zoning its potential to reduce GHG emissions as comporting with eco-socialist and degrowth politics and the potentiality of serving as a pragmatic step towards a real eco-socialist transition and discuss Oregon’s House Bill 2001 as an example of a successful implementation of intrastate zoning preemption and as a model for future efforts.

There are many proposed liberal solutions to climate change, particularly those from within economics, that attempt to imagine a way forward through the paradigm of growth.⁶ On the political left, which often acknowledges the necessity of some form of degrowth, the proposals are either anachronistic or rudimentary: Andreas Malm wants to channel the radical interventions of the Bolsheviks during the Russian Civil War, while Jodi Dean can muster only the suggestion that we must build a mass party if we are to combat climate change through politics in the global north.⁷ What unites these two suggestions (perhaps provocations is the better term), besides their attachments to a now bygone era of mass politics, is that they read like the protests of the powerless, what Nietzsche termed *ressentiment*. Instead of denouncing the civilizational drivers of climate change from outside – as Dean and Malm appear to do – or going back to the well of liberalism and mainstream economics, another approach to combating climate change could

⁶ See generally Lexi Smith, *LPE Primer: The Neoliberal Economics of Climate Change*, LPE Project, <https://lpeproject.org/wp-content/uploads/2022/07/The-Neoliberal-Economics-of-Climate-Change.pdf>; Michelle M’Gonigle and Louise Takeda, *The Liberal Limits of Environmental Law: A Green Legal Critique*, 30 Pace Envtl. L. Rev. 1005 (2013).

⁷ Jodi Dean and Kai Heron, *Climate Leninism and Revolutionary Transition*, Spectre Journal (June 26, 2022) <https://spectrejournal.com/climate-leninism-and-revolutionary-transition/>



involve identifying and developing extant legal concepts that might be radically repurposed in the future and perhaps become instrumental in achieving something like degrowth in the global north. There are several theoretical foundations supporting this proposed form of praxis. First, the reality of climate change and its impacts on human life are likely to eventually force governments in the global north to innovate from existing law means by which to more efficiently manage the climate crisis.⁸ Second, many radical theories of law now recognize the autonomy of law from economics and the fundamental roles law – and lawyers – play in structuring our economic and ecological worlds.⁹ Third, despite the urgency of the climate crisis, some scholars have proposed that to actually achieve a transition to a more ecologically sustainable society will require privileging pragmatic, results-oriented thinking over abstract utopianism.¹⁰

One potential area for research of this type is the express preemption of local zoning laws by state legislatures. Historically, preemption of local laws by state governments has been utilized as a means through which conservative political factions undermine attempts to craft

⁸ See generally, Joel Wainwright and Geoff Mann, *Climate Leviathan: A Political Theory of Our Planetary Future* (Verso 2018). The basic idea of this book is that States will have to alter themselves on the level of sovereignty in order to manage climate change and preserve capitalist social relations. Wainwright and Mann imagine a quasi-global sovereign largely concerned with controlling who may and may not emit carbon at various levels. In order to do this, beyond changes in the concept of sovereignty, States will also need to revisit law that is seemingly precious to them currently. Mann and Wainwright outline several possibilities, chief among them being “Climate Leviathan” – characterized by a more global form of sovereignty but otherwise preserving the social relations of capitalism – and “Climate Mao” – an anti-capitalist, State-based regime of governance akin to the People’s Republic of China, where the State, in the name of the people, quite forcefully intervene in the economy to reduce emissions. It should be noted that Mann and Wainwright also outline the possibility of the emergence of a “Climate Behemoth”, characterized by reactionary populism, anti-democracy, and the wanton burning of fossil fuels. As of the date of this writing, it appears that Climate Behemoth is winning, at least in United States.

⁹ See Generally, Katharina Pistor, *The Code of Capital* (Princeton University Press. 2019). For a succinct review, see Juvaria Jafri, *Book Review: The Code of Capital: How Law Creates Wealth and Inequality by Katharina Pistor*, LSE Review of Books Blog (September 26th, 2019), <https://blogs.lse.ac.uk/lsereviewofbooks/2019/09/26/book-review-the-code-of-capital-how-the-law-creates-wealth-and-inequality-by-katharina-pistor/>. Although Pistor is writing largely about the role of law in the creation of assets within capitalism, it can be contrasted with the more deterministic formulations of orthodox Marxism, which subordinates the law to the economic base.

¹⁰ See generally, Michael J. Albert, *Ecosocialism for Realists: Transitions, Trade-Offs, and Authoritarian Dangers*, Capitalism Nature Socialism, Issue 1, Volume 34 (2024).

liberal and progressive policies within urban areas.¹¹ In fact, state preemption has often been utilized for anti-progressive, anti-urban, and anti-environmental ends.¹² However, there have been both recent and historical instances of preemption wherein the overcoming of local authority has enabled progressive achievements, most notably within the context of residential zoning density and the availability of affordable and equitable housing.¹³ This paper follows a recent trend in scholarship on zoning density and affordable housing that conceptualizes improvements in these areas as necessarily addressing climate change.¹⁴

II. Sprawl, Suburbanization, and Gentrification as Climate Problems

The United Nations International Resource Panel authored a report in 2018 pertaining to resource consumption and urban populations titled “The Weight of Cities.” This report identified a global trend towards urbanization and projected that by 2050 nearly 66% of the global population will live in cities.¹⁵ The report also projected that if this increase in urbanization were to occur in a manner consistent with the current trend of low-density urban development, global urban land use would increase by more than 1 million kilometers.¹⁶ Additionally, the report found that if no changes are made, these cities will consume nearly 90 million tons of material resources by 2050, an increase of 50 million tons consumed in 2010.¹⁷ Although much of this dramatic growth in

¹⁰ See generally, Michael J. Albert, *Ecosocialism for Realists: Transitions, Trade-Offs, and Authoritarian Dangers*, Capitalism Nature Socialism, Issue 1, Volume 34 (2024).

¹¹ State Preemption of Local Zoning Laws as Intersectional Climate Policy, 135 Harv L. Rev. 1592, 1603 (2022).

¹² *Id.* at 1610-11.

¹³ *Id.* at 1602.

¹⁴ *Id.* at 1593.

¹⁵ International Resource Panel. *The Weight of Cities: Resource Requirements for Future Urbanization*, 1, 21 (2018), <https://www.resourcepanel.org/reports/weight-cities>

¹⁶ *Id.* at 87.

¹⁷ *Id.* at 69.



urbanization will occur in the developing world – most dramatically in China, India, and Nigeria – urbanization in North America and Europe is also projected to increase.¹⁸ By 2050 more than 90% of the population of North America will live in a city.

Furthermore, because North America has urbanized via extant development and land use patterns, North American cities currently use more land than any other region of the world while also maintaining one of the lowest levels of urban density.¹⁹ Finally, and perhaps most crucially, the UN Report found that the most important determinant to decoupling emissions from urban growth was city design that prioritized public transportation and high levels of density.²⁰

In the United States, high levels of urbanization are complicated by a corresponding crisis of affordable housing. This has led to several disturbing social trends, most notably gentrification, sprawl, and homelessness.²¹ Likely the most common and dominant response to affordable housing crises has been for residents – both homeowners and renters – to move further and further away from urban cores where many of them work.²² Commutes to urban cores for work from residents of both suburbs and exurbs can sometimes take hours and amount to traveling nearly 120 miles per day.²³ The impacts of such housing patterns on GHG emissions are obvious: sprawl leads to more driving, which leads to increased emissions.²⁴ At least one researcher has concluded that urban sprawl accounts for more than one-third of all greenhouse gas emissions.²⁵

¹⁸ *Id.* at 36-37.

¹⁹ *Id.* at 52.

²⁰ *Id.* at 78.

²¹ Alex Horowitz, Chase Hatchett, Adam Staveski, *How Housing Costs Drive Levels of Homelessness*, Pew, (August 22, 2023), <https://www.pewtrusts.org/en/research-and-analysis/articles/2023/08/22/how-housing-costs-drive-levels-of-homelessness>

²² Mike Scheider, *Going Downtown or to the 'burbs? Nope. The exurbs are where people are moving*, AP (Nov. 16, 2024), <https://apnews.com/article/census-exurbs-growth-moving-florida-texas-c98972d87c37faa9ceb89cfcfa07ce1d>

²³ *Id.*

²⁴ Josephine A. Phillips, “Zoning” *In on Affordable Housing and Climate Change*, The Regulatory Review (Mar 20, 2024), <https://www.theregreview.org/2024/03/20/phillips-zoning-in-on-affordable-housing-and-climate-change/>

²⁵ See Michael Mehaffy, *Urban Form and Greenhouse Gas Emissions: Findings, Strategies, and Design Support Technologies*, A+BE. Architecture and the Built Environment, 5(14), 1–192. <https://doi.org/10.7480/abe.2015.14.1092>



A huge chunk of these emissions come from transportation related activities.²⁶ In fact, the EPA reports that light-duty trucks, a category which includes sport-utility vehicles, constitute 37% of transportation related emissions, while passenger cars make up an additional 20%.²⁷ Even when cities in the United States achieve desirable levels of density the corresponding reduction in emissions are often completely offset by the city's surrounding suburbs.²⁸

Furthermore, the increasing desirability of urban life and carbon conscious lifestyles among certain segments of Americans has caused an increase in the cost of living in dense, walkable urban cores.²⁹ This pattern of urban development – gentrification - tends to displace poor city residents who are more often than not people of color.³⁰ Making the urban core accessible only to those residents with relatively large disposable incomes also tends to mitigate the climate benefits of density, because those residents have much higher consumption lifestyles than low- income residents, even if they are not driving a personal vehicle.³¹

It's clear from the preceding facts that zoning – one of the key tools for promoting or discouraging density – is not only a land use, housing, or racial justice issue but also a climate issue. The “Weight of Cities” report makes this clear.³² The “Weight of Cities” report also provides those of us seeking progressive change in regards to climate change with some hope. The report points to several cities – Stockholm, Copenhagen, and Hong Kong – whose economic development has been effectively decoupled from transportation related emissions.³³ The report also highlights several cities where appropriate zoning has achieved low levels of personal vehicle usage and high

²⁶ Environmental Protection Agency, *Transportation Sector Emissions*, (last updated March 31, 2025), <https://www.epa.gov/ghgemissions/transportation-sector-emissions#:~:text=From%202021%20to%202022%2C%20emissions,increase%20of%20CO2%20emissions>

²⁷ *Id.*

²⁸ Robert Sanders, *Suburban sprawl cancels carbon-footprint savings of dense urban cores*, UC Berkeley News (January 6, 2014), <https://news.berkeley.edu/2014/01/06/suburban-sprawl-cancels-carbon-footprint-savings-of-dense-urban-cores/>

²⁹ UN, *supra* note 15 at

³⁰ *Id.*

³¹ *Id.*



levels of both public transportation and bicycle usage.³⁴ This data suggests that alternatives to low-density, sprawling cities do exist and that one of the primary methods to achieve their creation is zoning designed to promote density. Unfortunately, for reasons that will be expanded upon in the next section, local governments and municipalities are not very likely to adopt such zoning policies on their own initiative.

III. How Did We Get Here?

Perhaps one obvious factor that promotes low-density cities in the United States is that relative to many other places in the world, the United States has an abundance of land. As such, it is often easier and simpler to “build out” rather than “build up.” However, this simple observation actually does little to explain the prevalence of low-density cities in the United States. This pattern of urban living proliferated due rather to more complex factors, most notably the intense racism that gripped America for most of the 20th century³⁵ and the historically unique economic conditions in the country following the conclusion of World War II. Those conditions being, specifically, a massive increase in disposable income among certain segments of the American population, an abundance of relatively low-cost automobiles, and government assistance in helping white Americans become suburban homeowners.³⁶

As Richard Rothstein recounts in his now famous work on law and racial segregation, *The Color of Law: A Forgotten History of How Our Government Segregated America*, restrictive residential zoning is developed in the United States, first in Baltimore and then several other cities, in an explicitly racist context and with explicitly racist language and intent.³⁷ Following the

³⁴ *Id.*

³⁵ See generally, Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (Liveright 2017).

³⁶ See generally, Karen Kopecky, A Quantitative Analysis of Suburbanization and the Diffusion of the Automobile. *International Economic Review*. Vol 51. No. 4. November 2010.

³⁷ Rothstein, *supra* note 34, pgs. 58-76.



Supreme Court's decision in *Buchanan v. Warley*,³⁸ which struck down a racial zoning restriction in Louisville as violating the due process clause, American cities turned to restrictive zoning designations based on economics rather than race.³⁹ In St. Louis, where this work-around to *Buchanan* was pioneered, city planners deliberately zoned any neighborhood that had a large concentration of white residents and a history of racially restrictive deeds as permitting only single family housing.⁴⁰ The Supreme Court would uphold such zoning practices in 1926 as a legitimate use of the police power.⁴¹ These zoning practices were combined with the well-known and racist redlining practices of the federal government and further zoning decisions that tended to deteriorate non-white and low-income neighborhoods and impose upon them significant environmental burdens.⁴² Despite the problematic origins of restrictive single family residential zoning, the practice remains prevalent today and the zoning designation occupies a privileged position within American zoning law.⁴³ Currently, local governments seemingly precious relationship to restrictive zoning densities are often motivated by a problematic and parochial concern of homeowners to maintain their property values that is obviously imbricated within the history of racism just discussed and premised on the implied maintenance of residential racial segregation.⁴⁴

IV. The Mechanics of Preemption and What's at Stake

In the United States, the Constitution grants the States plenary powers and does not contemplate local governments at all.⁴⁵ Localities typically derive their powers from an express grant from the State and also enjoy some protection from State interference with these powers, although such protections can originate from diverse sources, including constitutional, statutory, and judicial sources.⁴⁶ This protection is referred to generally as “home rule,” and while the details of the varieties of

³⁸ *Buchanan v. Warley*, 245 U.S. 60 (1917)

³⁹ Rothstein, *supra*, note 34, 67-68.

⁴⁰ *Id.*

⁴¹ *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). This opinion features language that many observers have characterized as thinly-veiled racism, likening apartment dwellers as parasites seeking to take advantage of their single family neighborhood host.

⁴² Sarah J. Adams-Schoen, *The White Supremacist Structure of American Zoning Law*, 88 Brook. L. Rev. 1225, 1226 (2023).

⁴³ *Id.*

⁴⁴ John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. Rev. 823, 835 (2019)

⁴⁵ Julianna Bennington, *Intrastate Preemption: A New Frontier in Burdening Choice*, 40 Colum. J. Gender & L. 93, 97 (2020).

⁴⁶ *Id.* at 99.



of home rule and their implications are beyond the scope of this paper, in practice home rule enables localities to “make policy and manage its implications” without significant supervision and retains for localities the State’s police power.⁴⁷ As readers might recall, the exercise of the police power was the Supreme Court’s legal justification for exclusionary residential zoning in *Euclid*.

Historically, intrastate preemption typically involved a court making determinations as to whether a locally created law conflicted with a pre-existing law created by a State legislature.⁴⁸ But as a result of relatively modern political developments – specifically, where Republicans often control the Legislature and Governor’s office while Democrats dominate urban city governments – intrastate preemption has evolved into what many scholars refer to as the “New Preemption.”⁴⁹ The “New Preemption” is characterized by efforts at preemption that eliminate the possibility of locally created laws relevant to some politicized social issue.⁵⁰ Examples include firearms regulations, minimum wages, paid sick leave, fracking bans, regulation of employers generally, plastic bag bans, and gender identity protections, among many others.⁵¹ As can be intuited from the preceding list, most scholars and reporters paying attention to the new preemption focus on instances where conservative political factions kill progressive efforts in their cribs.⁵²

It isn’t only ideological concerns that are present with the rise of the so-called new preemption. Indeed, there are some real policy and philosophical concerns at play as well. As

⁴⁷ *Id.* at 100

⁴⁸ Richard Briffault, *The Challenge of the New Preemption*, 70 Stan. L. Rev. 1995, 1997 (2018).

⁴⁹ *Id.* at 1995.

⁵⁰ *Id.*

⁵¹ Briffault, *supra* n.47 2000-2002.

⁵² *See Generally*, Kathleen Morris, *Rebel Cities, Bully States: A New Preemption Doctrine for an Anti-Racist, Pro-Democracy Localism*, 65 How. L.J. 225 (2022).



some scholars have noted, the idea of local authority is in essence uncontroversial.⁵³ Everyone recognizes, even the most calculating conservative legislature, that some matters are simply better left to the control and determination of localities. The scope of that authority is what is at play.⁵⁴ Some observers have offered that localism offers the opportunity for policy experimentation not available at other levels of government. The thinking goes that as localities attempt to craft solutions to uniquely local problems, the solutions they are empowered to come up with might be broadly beneficial to democratic governance. It's a way of trying out solutions that could later scale to larger social deployments.⁵⁵ However, even scholars favoring varying levels of localism are quick to point out that localism is not inherently good.⁵⁶ There are certain areas of governance – like residential zoning – where local interests are structurally encouraged towards a kind of parochialism.⁵⁷

V. The Normative Desirability of Intrastate Zoning Preemption from a Realist Degrowth Perspective

As recent scholarship has clearly indicated, one of the most attractive features of intrastate zoning preemption is its ability to address multiple crises at once.⁵⁸ Those intersecting crises being urban sprawl, housing affordability, and the enduring legacy of residential segregation.⁵⁹ Downstream of intrastate preemption's ability to address each of these issues are further advantages: it has broad appeal to diverse stakeholders, and it has been empirically demonstrated that it is achievable, even in areas not traditionally associated with progressive

⁵³ Darien Shanske and David A. Carillo, *A Proportionality Analysis Should Govern Home Rule Disputes*, 44 Cardozo L. Rev. 1843, 1850 (2023).

⁵⁴ *Id.*

⁵⁵ Infranca, *supra* note 44 at 844.

⁵⁶ Carillo, *supra* note 53, at 1843.

⁵⁷ Infranca, *supra* note 44 at 835.

⁵⁸ State Preemption of Local Zoning Laws as Intersectional Climate Policy, *supra*, note 11

⁵⁹ *Id.*



stances towards climate change.⁶⁰ Obviously, intrastate preemption's most promising capability concerning climate change is the possibility of reducing transportation related GHG emissions through promoting denser housing forms by banning single family residential zoning and encouraging urban development patterns that discourage high carbon means of travel like personal automobiles. While there are critics on the political left that warn proponents of intrastate zoning preemption of the dangers of conceding authority to what tend to be conservative legislatures, this critique is weakened by the fact that the tendency of intrastate preemption is likely to continue apace despite progressive ideological opposition.⁶¹ Furthermore, the centralization of decision making authority is likely a feature of governance that will only increase as the climate crisis deepens.⁶²

However, these are not the only normative justifications. For those of us whose politics exist somewhere on the spectrum of what might be termed the "ecological left," the intrastate preemption of residential zoning authority corresponds to some basic political and economic principles. As John Bellamy Foster describes it, "degrowth stands for a family of political-economic approaches that, in the face of today's accelerating planetary ecological crisis, reject unlimited, exponential economic growth as the definition of human progress."⁶³ A foundation of degrowth politics is the belief that "Science has established without a doubt that, in today's "full-world economy," it is necessary to operate within an overall Earth System budget with respect to allowable physical throughput." There is also a strong international justice and anti-

⁶⁰ *Id.* at 1592.

⁶¹ See generally, Richard C. Shragger, *The Attack on American Cities*, 49 *Envtl. L. Rep. News & Analysis* 10761 (2019)

⁶² Geoff Mann and Joel Wainwright, *supra*, note 8.

⁶³ John Bellamy-Foster, *Planned Degrowth: Ecosocialism and Sustainable Human Development*. Monthly Review. Online. <https://monthlyreview.org/2023/07/01/planned-degrowth/#:~:text=Degrowth%2C%20which%20specifically%20targets%20the,and%20promoting%20sustainable%20human%20development>.



colonial perspective running through degrowth thinking, where it is often proposed that a differential approach to investment is required to address uneven development and historical injustice in the global south. As the thinking goes, decreased economic activity and investment in the global north free up capital and resources to improve infrastructure in the periphery.⁶⁴

The elimination of single family residential zoning within urban cities of any considerable size via intrastate preemption is broadly amenable to the aforementioned political and economic goals of degrowth. Ideally, how such preemptions will work is through express statements by state legislatures that cities and municipalities of particular sizes must permit more dense housing options on lots currently zoned exclusively for single family homes. Preferably, this would be combined with additional restrictions that altogether prevent or at least make it more difficult or expensive to develop housing outside of the designated urban core. In a truly ideal scenario, the locality would still be permitted to utilize traditional zoning tools to either further promote ecologically sound development or cater development to specific local conditions.⁶⁵ Granted, simply permitting the construction of more dense housing is likely not enough. These efforts will have to be combined with a robust investment in public transportation and intelligent urban design.

⁶⁶ While it might appear that increased urban development in the global north – that is, the construction of exponentially more housing – might be the apotheosis

⁶⁴ *Id.*

⁶⁵ See Generally, Jonathan Rosenbloom, *Sacrifice Zones* 24 Nev. L.J. 891 Spring 2024 (describing several implementations of traditional and novel zoning tools in response to climate change’s impact on local land); see also Christopher Serkin, *Climate Zoning*, 99 Notre Dame Law Review 1093 March 2024. Granted, this is the rub with intrastate preemption – it provides the legislature with a means to impose positive changes on stubborn localities, but also permits the exercise of progressive local authority. In the case of zoning preemption, this fraught nature may be of less concern, as the existence of overlapping crises and the possibility of addressing them via preemption is one of the reasons they are appealing to conservative and progressive lawmakers alike. Although only experience can provide us with an answer, it may be possible to preserve localities power to implement ecologically conscious building codes and other ecologically restrictive zoning tools alongside denser residential zoning.

⁶⁶ See UN, *supra* n whatever. For an eye-opening comparison between metropolitan areas of similar population and the carbon impact and land usage consequences of urban planning, consult Figure 3.6 – “Comprison of Atlanta and Barcelona at the same scale.”



of degrowth, intelligent and coordinated investments in urban infrastructure in the present tend to result in drastic reductions in GHG emissions in the near and distant futures.⁶⁷ The theorized result of all of this planning and zoning activity are communities that are affordable, walkable, energy efficient, and whose residents have little to no need for personal automotive vehicles. Even if the creation of these urban cores require significant upfront investment, the resulting reduction in GHG will still qualify such efforts as degrowth policies.

Unfortunately, there are some significant shortcomings present in degrowth and eco-socialist approaches to climate change. Additionally, it is not enough for intrastate preemption of single family zoning to simply be agreeable to proponents of degrowth ideology; degrowth and eco-socialist ideology do not currently attract any kind of truly popular support. Perhaps the most salient critique of degrowth and eco-socialist approaches is their tendency towards utopianism.⁶⁸ While degrowth and eco-socialist perspectives are excellent at critiquing the prevailing conditions of the climate crisis and the kinds of civilizational changes necessary to prevent ecological catastrophe, they are short on concrete proposals that might move us away from capitalism and fossil fuel usage towards some kind of more ecologically sound transition stage.⁶⁹

As Michael J. Albert has observed, “At their best such visions can provide useful regulative ideals, but the problem is that none of these authors explain how these futures might be realized in practice, beyond the (necessary though insufficient) gestures towards working class struggle.”⁷⁰ According to Albert, part of the appeal of utopianism is that it permits an avoidance of

⁶⁷ International Resource Panel, *supra*, note 15 at 161. See projections for densified Minneapolis.

⁶⁸ Albert, *supra* n. 5 at 2.

⁶⁹ *Id.* at 5.

⁷⁰ *Id.*



thinking through tough strategic questions concerning transition, the tradeoffs degrowth policies might contain, and the risks inherent in advancing them seriously within society.⁷¹

Against this utopian strain of thought Albert proposes a “realist utopian” approach, wherein concrete proposals concerning transitions are made and the risks and tradeoffs of ostensibly degrowth policies are openly discussed.⁷² I submit that the intrastate preemption of single family zoning in cities is one such concrete proposal that should be seriously considered as one path to imagine a transition away from fossil capitalism. One reason advancing intrastate preemption as a step towards transition is attractive is because the risks posed to its proponents are relatively minimal. As this paper has mentioned repeatedly, the reason zoning preemption appeals to a majority of policymakers is because it presents itself as a tool for solving an acute crisis impacting individuals across the ideological and political spectrum. Because the lack of affordable housing has taken on crisis dimensions, politicians and policymakers are strongly incentivized to associate themselves with potential solutions, even if they are historically associated with their ideological opponents. While the ability to implement climate change policies without explicitly naming them as such is advantageous in some respects, publicly associating oneself with the resolution of a crisis offers far more political upside than sneaking through reforms.⁷³ If a political movement associated with degrowth and eco-socialism were able to play a role in solving the current housing crisis with a policy it promotes explicitly as a climate policy, the appeal of that political movement might enjoy a massive increase in support. This increase in support by way of successful problem solving will provide such movements with a kind of legitimacy that could be mobilized to advance even more radical change.

⁷¹ *Id.* at 2.

⁷² *Id.*

⁷³ State Preemption of Local Zoning Laws as Intersectional Climate Policy, *supra*, note 11 at 1606.



Obviously, there is always the risk of failure. But such a risk within this context simply means a continuation of the status quo: high rents, high home prices, and nothing being done about climate change.

Because intrastate preemption of single family zoning is broadly popular due to the housing crisis, it is also much easier to actually achieve than other proposals. There have been successful preemption of efforts or attempts to implement preemption recently in Oregon, California, Virginia, Washington, Connecticut, Nebraska, Maryland, and Utah.⁷⁴ Beyond preemption's ability to potentially help solve the housing crisis, I suspect that part of its high likelihood of legislative success is attributable to its avoidance of extremes. Indeed, single family housing remains the preferred housing choice for the majority of Americans. Generally speaking, the existing attempts to do away with single family residential zoning have sought to encourage what is often referred to as the "missing middle" options for housing. The "missing middle" refers to housing styles such as townhomes, accessory dwelling units, and duplexes, living arrangements that are more dense than single family housing but less dense than high-rises or large apartment complexes.⁷⁵ Rather than abruptly demanding that we all move to the city, live in a high-rise, and reject our country ways, this kind of gradual transition to more dense forms of housing arguably enables degrowth advocates to still achieve meaningful results in terms of GHG reductions while avoiding alienating average people. However, there are trade-offs associated with gradualism. Most notably, the climate crisis increasingly appears to be a time sensitive issue.⁷⁶ Furthermore, catering to the status quo too intensely also tends to negate any

⁷⁴ Id. at 1601

⁷⁵ Lena Zeebuth and Mallore Moore, *Missing Middle Housing: Accelerating America's Transition From Single Family Zoning*, 64 Nat. Resources J. 63

⁷⁶ UNEP, *Time running out to defuse climate "time bomb"* (Mar. 21, 2023), <https://www.unep.org/news-and-stories/story/time-running-out-defuse-climate-time-bomb>



potential GHG reductions of increased density.⁷⁷ If preempting single family zoning is not done with sufficient attention to detail and an eye towards the ultimate goal of GHG reductions, it could easily just make things worse, even if it solves other more popular problems.⁷⁸

Despite these tradeoffs, I believe that the gradualism embedded in efforts at preempting single family zoning is one of its strongest features. Indeed, this gradualism is apparent on the political-ideological level as well. The idea for this paper began with a kind of intense frustration upon encountering conventional utopian musings about the necessity of implementing degrowth or various forms of eco-socialism in face of the climate crisis. After a long day of reading, I found it difficult to accept that the most anyone on the left had come up with is that we need to organize a mass party or that we should imitate the Bolsheviks and use state violence to rapidly curtail emissions. Liberalism and capitalism are not overcome in one fell swoop, and certainly not off the strength of our insistence alone. Just as average Americans are likely to gradually accept more dense forms of housing as a suitable alternative to a single family home, they will likely also gradually come around to a more progressive understanding of their legal rights. I think this is especially true – for both housing and rights – when attempts at change take note of already existing momentums⁷⁹ and their implementation actually solves real problems.

Essentially, the message sent by eradicating single family zoning via intrastate preemption would be that individuals are of course free to own property, free to exercise any one of their property rights, and free to choose where they like to live, but that the practical exercise of these freedoms is conditioned by our collective ecological constraints. Furthermore, if implementing residential zoning preemption leads to the kind of success its proponents believe possible, the result will be

⁷⁷ Serkin, *supra*, note 65 at 1103-1104.

⁷⁸ *Id.*

⁷⁹ International Resource Panel, *supra*, note 15 at 35.



the creation of communities with a totally different relationship to urban spaces than what currently exists in the global north. In this new context, it may be possible for new coalitions – ones more inclined towards degrowth and radical politics – to emerge. Additionally, depending on the level of success, this new configuration of urban life could create new political subjects, ones more attuned to their embeddedness in the natural world and the limits this fact presents. The hybrid nature of intrastate preemption of single family zoning – where significant reductions in GHG emissions are possible alongside a gradual approach to change that slowly acclimates people towards more radical interventions – make it a highly desirable means by which to begin a transition towards a more sustainable society.

One of the most impressive instances of intrastate preemption of local zoning authority is Oregon’s House Bill 2001. Passed by the Oregon state legislature in 2019, the legislation requires that municipalities with populations exceeding 25,000 people permit “the development of all middle housing types” in any area zoned for residential housing.⁸⁰ It also dictates that municipalities above 10,000 people but less than 25,000 people permit duplexes to be built in all areas zoned residential.⁸¹ These recent zoning changes are complemented by the historically “tight grip that state regulators keep on local land use.”⁸² Essentially, Oregon has implemented a system of land use regulation wherein each city is assigned an “Urban Growth Boundary” beyond which typically urban style development is not permitted. The purpose of these boundaries is to prevent sprawl.⁸³ Subsequent developments have further complimented the single family zoning ban. In 2021, the legislature permitted lot divisions to encourage

⁸⁰ H.B. 2001, 82nd Legislative Assembly, Reg. session (Or. 2023).

⁸¹ *Id.*

⁸² Oregon’s Single-Family Zoning Ban Was a ‘Long Time Coming,’ Bloomberg.
<https://www.bloomberg.com/news/articles/2019-07-02/upzoning-rising-oregon-bans-single-family-zoning>

⁸³ *Id.*



development of higher density housing on lots where single family homes already existed. Additionally, the state land use commission banned local parking minimums near transit stations.

⁸⁴ All of this has been accomplished with scant reference to climate change, and while the changes are still relatively new, most of the data being tracked around the changes pertain to monitoring things relevant to housing supply, such as building permits. ⁸⁵

VI. Conclusion

Currently the impact this preemption has had on GHG emissions is unknown, but considering the attention paid to density and public transportation, it's reasonable to expect that should Oregon continue down this development path they may make significant strides in reducing transportation related emissions. It's also not a perfect system. Portland, Oregon is a very expensive housing market and the Urban Growth Boundaries and commitment to keeping development within specified areas has contributed to a sense of impossibility among aspiring homebuyers in the area. ⁸⁶ Despite these shortcomings, it's clear that a system like Oregon's possesses many of the positive qualities I articulated above. While it is not yet certain if House Bill 2001 will be able to solve the housing crisis in Portland, it is clear that it has contained sprawl and solved a real problem Oregonian's were confronted with. ⁸⁷ Furthermore, it has arguably created a kind of constituency that I speculated about earlier, made up of farmers, ecologically minded Oregonians, and urbanites all concerned with density and sprawl on some level and all willing to accept that their rights to prosperity, housing, and land have ecological

⁸⁴ Owen Minott and Julia Selby, *Eliminating Single-Family Zoning and Parking Minimums in Oregon*, Bipartisan Policy Center, <https://bipartisanpolicy.org/blog/eliminating-single-family-zoning-and-parking-minimums-in-oregon/>

⁸⁵ *Id.*

⁸⁶ Jeff Mapes, *Oregon's unique growth has preserved open space but also led to new fights*, Oregon Public Broadcasting, <https://www.opb.org/article/2022/08/19/oregon-land-use-laws-urban-growth-management-system-portland-conservation/>

⁸⁷ Jeff Mapes, *Oregonians once feared their state would be wrecked by out-of-control sprawling development*. Oregon Public Broadcasting. <https://www.opb.org/article/2022/07/15/oregon-land-use-laws-willamette-valley-farms-urban-development-commercial-farmers-crops/> (documenting the concern with sprawl in Oregon as a result of degradation of Oregon's forest and farm lands).



limits. While far from perfect, the experiment with banning single family zoning via intrastate preemption in Oregon has provided us with a blueprint to potentially manage sprawl and promote density in urban core areas, which is one potential platform by which we might start to build out a real transition. While it is not as romantic as conjuring up Lenin, it's certainly much more specific. Concerning the radical potential of HB 2001 and Oregon's land use system, Jeff Mapes provides a story about a Texas land developer visiting Oregon that could prove prophetic: upon learning that much of the land he was viewing was off-limits for subdivision development due to the Urban Growth Boundaries, the developer offered a surely reply: "You mean Oregonians are a bunch of communists."⁸⁸

⁸⁸ *Id.*

