

DISCIPLINING UTOPIA:

THE FUTURE OF COOPERATIVE LANDHOLDING

BY

JEDIDIAH J. KRONCKE*

Experimentation in communal land is an American tradition. From the colonial era onward, citizens have been inspired to build communities predicated on religious or economic ideas of property that would today be considered radical. Many historical American social movements, especially those tied to racial justice, explicitly imagined a communal relationship to land. Thus, while often held out internationally as the leading normative proponent of individual property rights, the United States has historically been seen as a destination for enacting experiments in cooperative landholding.

While customary land practices are still pervasive globally, the trope of the tragedy of the commons has nevertheless lent an air of inevitability to the privatization of land. Yet, at the turn of the twentieth century the most popular American economist was Henry George. George inspired attempts at home and abroad to recommunalize land based on an aggressive critique of private land markets. Georgist communities used common law trusts to organize land collectively on which communities could then grow. While experiments in this vein and other traditions of what are now called “intentional communities” have shown some durability, they have not yet been able to provide an easily accessible precedent for large segments of the American population to “opt-out” of land markets—equally true internationally in the struggle over alternative forms of development.

This Article examines these visions of cooperative landholding through a historical and comparative analysis to develop new insights for this now-frustrated and submerged American tradition. Primary among these is the growing disconnect of intentional land communities from social movement politics and their flawed embrace of idealized imaginations of how traditional communal land tenure systems operated. Such traditional systems were both routinely nondemocratic, and required the production of coercive norms which precluded easy exit by participants. In contrast, the domestic and international experience of other common interest land communities demonstrates

* Associate Professor of Law, The University of Hong Kong.

that modern legal forms are unlikely to generate these types of coercive bonds on their own, and that thinner forms of commitment are more likely to produce dynamics of replication. Conservation and indigenous land trusts hold similar lessons for how the legal design of communal land is central to their success.

At the same time, the transition over the twentieth century from communal land being held in a trust to being held through the corporate form has only hastened the degeneration of land cooperatives, as many communitarians have prioritized localist direct democracy over the legal self-discipline that enables longitudinal commitments and durability. This Article posits that constructive legal self-discipline can be achieved through a renewed use of trusts or hierarchically-organized corporate collectives. Networking such institutions can more effectively confront startup barriers and regulatory dissonance, but most importantly allows communitarian land holding develop into genuine alternative models which can be accessed by citizens from all strata of society.

I.	INTRODUCTION.....	454
II.	TURNING BACK THE CLOCK: THE CHALLENGE OF RE-COMMUNALIZING LAND.....	467
	A. <i>The American Tradition of Utopian Land</i>	467
	B. <i>The Rise and Fall of Social Activism in American Intentional Communities</i>	471
	C. <i>The Flawed Imagination of Traditional Communal Governance</i>	479
III.	THE COMPARATIVE CONTINUUMS OF COLLECTIVE LAND HOLDING	483
	A. <i>Community and Land as Global Conundrum</i>	483
	B. <i>Participatory Norms and Communitarian Land Holding</i>	486
	1. <i>Community Through the Corporate Form</i>	486
	2. <i>The Corporatization of Community Land Trusts</i>	492
	C. <i>Corporate Flexibility or Fiduciary Self-Discipline</i>	500
IV.	CONCLUSION	505

I. INTRODUCTION

The legal and economic history of the United States is far more radical than is generally acknowledged today. Many ideas now considered settled about what is both genuinely American and “natural” as to how the nation regulates core aspects of its society were very much in contest at the turn of the twentieth century. The progressive dislocations of industrial capitalism generated a pace of social change which unfurled far faster than the

traditional mechanisms of law could track, especially in order to serve the needs of less enfranchised members of society.¹

With growing intensity over the nineteenth century, immigration, urbanization, and the end of slavery unsettled the spatial and demographic categories which had previously shaped the structure and composition of communities across the nation. One result of this tumult was a rise in public and private initiatives to manage and channel these changes into new legal forms. From religion to work, the syncretism of ideas old and new led to conflict and experimentation far more diverse than what is now considered normatively “American.” And no realm of law witnessed more radical experiments than that of property.²

It is not possible to fully catalog here this diversity of legal thought and practice, but its consistent volume establishes that the spirit of experimentation in property is a long-standing American tradition. Even before the more intense industrialization of the American economy, religious groups had come to the United States to attempt to recreate their imagined utopias of communal work and land as part of their view of the American promise.³ The accessibility of land in the United States was historically easier than it had become in Europe—at least once indigenous claims were nullified or marginalized. If one had the resources do to so, exit to unsettled land to try and recreate a new, or recapture an old, system of land holding appeared in practical reach. If local political will existed, or state regulation was sufficiently indifferent, this same recreation could be attempted in urbanized areas.

The historical relationship of government to private land in America has also been one of recurrent intervention, as evident in the foundational acts of eminent domain through which land ownership was reordered and redistributed from colonial times onwards.⁴ For a non-communist nation, the United States still has internationally high levels of public land ownership,⁵ the scale of which has led to numerous administrative creations and re-workings at the state and federal levels.⁶ Today the United States Department of the Interior and the United States Department of Agriculture oversee diverse land management practices for wide swaths of national territory.⁷ The central role of public stewardship over formal and residual public land drove Joseph Sax’s popularization of the public trust doctrine to

¹ See, e.g., HAROLD HOWLAND, *THEODORE ROOSEVELT AND HIS TIMES: THE PROGRESSIVE MOVEMENT* 112–13 (1921).

² See *The Amana Colonies*, NAT’L PARK SERV., <https://perma.cc/35HW-MH5U> (last visited May 9, 2019).

³ See *id.*

⁴ See Eric T. Freyfogle, *Property Law in a Time of Transformation: The Record of the United States*, 131 S. AFR. L.J. 883, 902–03 (2014).

⁵ See CAROL VINCENT ET AL., *FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA* 6 (2017).

⁶ *Id.* at 15–16, 20.

⁷ *Id.* at 4–5.

grapple with the downsides of ignoring this historical legacy.⁸ That there was a significant shift in the ideology, if not practice, of government intervention in land use can be seen in the aggressive American promotion of land reform in post-World War II Japan, Korea, and Taiwan, but then its later Cold War retreat from such promotion in the Philippines and Latin America.⁹

What is less well-known is that the United States has the highest global level of privately-owned collective land held in a variety of conversation, community and local land trusts.¹⁰ There are lost, but recently re-explored, traditions of American political economy which advanced extensive critiques of the commodification of land at the heart of industrial transformation.¹¹ At the turn of the twentieth century, the most prominent American economist was Henry George.¹² George explicitly rejected the rental markets derived from absentee land ownership and developed a theory of taxation on unimproved land—the land value tax—that many felt could exclusively finance an extensive welfare state.¹³ George's ideas reflected a thread in long-standing critiques of privatized land use among classic political economists, including Adam Smith, and his ideas were echoed for decades into the twentieth century by social critics such as Thorstein Veblen.¹⁴

Parallel to these intellectual trends were private initiatives to reorder land ownership either directly linked to George's ideas or of idiosyncratic inspiration.¹⁵ These initiatives became a consistent, if minority, aspect of American landholding as they tried to return to the more communal patterns of land ownership that preceded industrialization—and the social life

⁸ See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 478, 480 (1970); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 160 (1971).

⁹ See Jong-sung You, *Land Reform, Inequality, and Corruption: A Comparative Historical Study of Korea, Taiwan, and the Philippines*, 12 KOR J. INT'L STUD. 191, 203, 205–06 (2014). See generally JAMES PUTZEL, *A CAPTIVE LAND: THE POLITICS OF AGRARIAN REFORM IN THE PHILIPPINES* (1992).

¹⁰ Privately-owned collective land is in contrast to publicly owned collective land (where the United States also ranks highly). For a survey of the growing amount of conversation trusts, which hold the majority of this category of land, see THE NATIONAL LAND TRUST CENSUS, <https://perma.cc/K877-CDEM>.

¹¹ See generally AZIZ RANA, *THE TWO FACES OF FREEDOM* (2010). For recovering lost American theories of property, see Anna di Robilant, *Populist Property Law*, 49 CONN. L. REV. 933, 949–57, 965–71 (2017) (discussing the National Reformers Association's homesteading legal innovation and the National Farmers Alliance's proposals for homesteading, cooperation, and the subtreasury), and of labor, see ALEX GOUREVITCH, *FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH* (2014).

¹² See Terence M. Dwyer, *Henry George's Thought in Relation to Modern Economics*, 41 AM. J. ECON. & SOC. 363, 363 (1982).

¹³ For an overview of George's life, see CHARLES BARKER, *HENRY GEORGE* (1974).

¹⁴ See generally THORSTEIN VEBLEN, *ABSENTEE OWNERSHIP AND BUSINESS ENTERPRISE IN RECENT TIMES* (1923).

¹⁵ See Renato Cirillo, *Leon Walras and Social Justice*, 43 AM. J. ECON. & SOCIOLOGY 53, 53 (1984).

imagined to have accompanied them.¹⁶ Whatever their normative value, a variety of these private communitarian initiatives continue, and variations are now discussed with increasing frequency as solutions to pressing issues of social inequality and economic citizenship.¹⁷ Notably, many post-Civil War attempts to achieve racial justice in land embraced George's ideas and attempted to use land trusts to insulate minoritized groups from discrimination while rebuilding their communal strength.¹⁸

The primary secular trend which these initiatives agitate against, or at least seek to adapt to, is regulating land through the prism of individualized norms distinct from collective land use interests. As Ugo Mattei has recently noted, the centrality of individual claims to land is not purely novel, but the sum weight of the human history of landholding is primarily a collective one.¹⁹ The legal regulation of property through the dominant lens of private ownership was an unrealized ideal only argued for before its recent ascension as a material reality in some countries.²⁰ As rapid as the normalization of the individual property rights frame became during the twentieth century, this ascension carried with it a persistent tension over how this individualized frame relates to community life and the formation and regulation of common property institutions at the micro and macro-levels of society.²¹

The normative justifications for privatization in land constitute their own wide-ranging intellectual history. But *in nuce* they are captured by the now classic trope of the "tragedy of the commons" popularly attributed to Garrett Hardin.²² As one instantiation of Mancur Olson's influential articulation of "collective action problems,"²³ this tragedy results from individual opportunism in the exploitation of collective resources that causes their rapid exhaustion when governed by the increasingly weak social norms of modern society.²⁴ Given that this idea gave normative support to strengthening individual property rights, it is the very exemplar of a self-fulfilling prophecy. As industrial capitalism disrupted and destabilized traditional patterns of life and social organization, so too did it bring into

¹⁶ ROBERT SWANN ET AL., *THE COMMUNITY LAND TRUST: A GUIDE TO A NEW MODEL FOR LAND TENURE IN AMERICA*, at xvi (1972).

¹⁷ *Id.*

¹⁸ The place of this tradition in competing visions of American black liberation is discussed in GERALD HORNE, *BLACK & RED: W.E.B. DU BOIS AND THE AFRO-AMERICAN RESPONSE TO THE COLD WAR, 1944–1963* (1986).

¹⁹ Ugo Mattei, *First Thoughts for a Phenomenology of the Commons*, in *THE WEALTH OF THE COMMONS* 37 (David Bollier & Silke Helfrich eds., 2012).

²⁰ *Id.*

²¹ See generally, ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

²² Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1244 (1968). For a critique of Hardin's elision of contravening evidence available at the time, see Michael Morin, *Indigenous Peoples, Political Economists and the Tragedy of the Commons*, 19 *THEORETICAL INQ. L.* 559 (2017). For an extension to the influential presumptions of Harold Demetz, see *id.* at 562.

²³ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 1 (1965).

²⁴ *Id.* at 1–2.

existence the need to re-regulate land following its own individualistic logic.²⁵

In modern property law theory, this development has left scholars struggling over the best conceptual frame through which to disentangle use rights and access to land.²⁶ Typically traced in America to the influence of pioneering legal realist Wesley Hohfeld, the metaphor of a “bundle of rights” has been used now globally to engage with the complex overlay of claims to land that, while generally situated with a primary property owner, are almost always beset by claims from other citizens and various collective entities.²⁷ The popularity of the “bundle” metaphor has received criticism not from those seeking to re-center communal claims (at least in the United States) but rather those who want to re-center the power of individual exclusion.²⁸ Other analytic frames for property are ever-emerging,²⁹ and no conceptual frame has, as of yet, satisfied the particular individual/communal tensions which Mattei noted are of recent vintage in human land holding.³⁰

As such, scholarly attempts to clarify and refine the analytic frame of individual property rights ownership has not dimmed the more commonsensical and practical reality that private land is subject to what Peter Salsich has called a “public mortgage.”³¹ Beyond concerns with aggregate efficiency, the need to place limitations on private land use has inspired historical debates on the exact relationship of land ownership to democratic norms.³² A general valuation of economic democracy argues that the same norms of democratic participation and process should govern private transactions as much as they do public ones, but even this claim is relatively unspecific given how broadly democratic norms can be interpreted.³³ Does this mean electoral systems of governance? Republican norms of indirect representation? Is the normative aim general social equality, or more substantive norms of economic interdependence? As diverse as these answers can be, so too have been the experiments in land which continue to test the line between collective and individual ownership at various strata of property law.

However, the history of these experiments has been one of few sustained alternatives.³⁴ As will be discussed herein, successful innovations in partially collective forms of ownership have in some cases become

²⁵ ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* (1992).

²⁶ See, e.g., Henry Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1691 (2012).

²⁷ *Id.* at 1695, 1696.

²⁸ For an overview of critique of this development in American context, Kartrina Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183 (2017), and Lee Ann Fennell, *Property Beyond Exclusion*, 61 WM. & MARY L. REV. 1 (2019).

²⁹ Larissz Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 277 (2008).

³⁰ Ayelet Shachar & Ran Hirschl, *Citizenship as Inherited Property*, 35 POL. THEORY 253, 254 (2007).

³¹ See Peter W. Salsich, Jr., *Homeownership: Dream or Disaster?*, 21 J. AFFORDABLE HOUSING 17, 25 (2012).

³² *Id.* at 18, 19.

³³ See Katz, *supra* note 29, at 313.

³⁴ SWANN ET AL., *supra* note 16, at 7–15.

mainstreamed, with the least intensive but most extensive being condominiums.³⁵ But alternatives which fully reprioritize collective ownership—and those that also aspire to enable collective living—have continued to emerge but with very short average life spans.³⁶ These attempts to re-engineer patterns of land ownership and governance from an imagined past face innumerable challenges, not the least of which is interfacing with legal and economic patterns of organization which they explicitly reject but are now dominant throughout the rest of society and the legal system.³⁷

This mismatch also explains why attempts to address social problems in land and housing through competing rights claims have also been so elusive.³⁸ Even countries with fully enshrined revolutionary constitutional commitments to social views of property have struggled to actualize such reframings to remedy the dislocations of land privatization.³⁹ On the micro-level, the general limitations on correcting the asymmetries of power between residential lease holders and landlords has tested the limits of non-structural solutions in the face of growing inequality in patterns of landownership itself.⁴⁰

Eric Freyfogle has made the more aggressive claim that the very idea of a property right itself needs be reconstructed.⁴¹ Freyfogle argues that the real problem of modern property is a “tragedy of fragmentation” whereby the hyper-individualization of land stewardship leads to an inability to achieve any social planning in land use.⁴² More moderate articulations of this position have gained traction in recent years, generally under the rubric in the United States of “progressive property.”⁴³ Similar to theories of the “social function” of property present internationally,⁴⁴ scholars working within the progressive property frame have developed an array of critiques

³⁵ See generally Setha Low, Gregory Donovan, & Jen Giesecking, *Shoestring Democracy: Gated Condominiums and Market-Rate Cooperatives in New York*, 34 J. URBAN AFFAIRS 279 (2012).

³⁶ Timothy Miller, *American Intentional Communities*, in 3 ENCYCLOPEDIA OF AM. SOC. MOVEMENTS 759, 998, 1006 (Immanuel Ness ed., Routledge 2015).

³⁷ See, e.g., JESSIE HOHMANN, *THE RIGHT TO HOUSING: LAW, CONCEPTS, POSSIBILITIES* 179 (2013) (stating that communitarians view individual rights, like those of property, as being “egoistic, individualistic and diverse, acting to prevent the development of a sense of common responsibility and community based morality”).

³⁸ *Id.*

³⁹ See, e.g., Karen Engle, *Commentary: Comparative Constitutional Law and Property: Responses to Alviar and Azuela*, 89 TEX. L. REV. 1957, 1960–61 (2011).

⁴⁰ See Marc L. Roark, *Under-Propertied Persons*, 27 CORNELL J.L. & PUB. POL’Y 1, 11–17, 33–36 (2017). For the consequences of this asymmetry in practice, see David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 434–39 (2011).

⁴¹ Eric T. Freyfogle, *Private Ownership and Human Flourishing: An Exploratory Overview*, 3 STELLENBOSCH L. REV. 430, 453 (2013).

⁴² ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY & THE COMMON GOOD* 177–78 (2003).

⁴³ See Gregory Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743–44 (2009).

⁴⁴ For an overview of the “social function of property,” with reference to American property theory, see Sheila R. Foster & Daniel Bonilla, *The Social Function of Property: A Comparative Perspective*, 80 FORDHAM L. REV. 1003, 1008–11 (2011).

concerning the normative and descriptive validity of the individual property rights frame.⁴⁵ These critiques are predominately aimed at addressing social inequality reproduced through current property practices, what Gregory Alexander has called “de-marginalizing property.”⁴⁶ While not without significant scholarly precedent,⁴⁷ this revival forthrightly places republican notions of economic governance at the forefront of their analyses, seeking a reorientation of property law towards productive interdependence and community building rather than allocative market efficiency.⁴⁸ Generally less confident than Freyfogle about abandoning the individual frame in its entirety, progressive property scholars look to remodel land regulation with new socially-infused standards, rather than rules, to capture the same commonsensical intuitions that citizens in practice feel about the reciprocal claims that land ownership produces within lived communities.⁴⁹ Even those who generally embrace the individual frame have conceded that public land is inevitably part of any privately-oriented system.⁵⁰

Yet, this new intellectual movement has yet to translate into new property institutions, and in many cases Freyfogle’s more explicit rejection of the individual frame more accurately maps the values of those seeking to recomunalize, rather than reregulate, land ownership.⁵¹ As a result, attempts to recollectivize land, today generally described as “intentional communities” (ICs), often take on the quality of an “opt-out.”⁵² Opt-out here means that a group of individuals seeking to re-order their personal and social relationships through collective land ownership do so, in large part, by isolating themselves from society at large, often geographically as well as legally.⁵³ However, in the context of the modern nation-state the ability of citizens to voluntarily remove themselves from society is limited, and even the most robust grants of localized opt-out rights are both historically specific and controversial.⁵⁴ As such, there is always a nexus of legal questions facing such communities, as modern law requires that some cognizable legal individual hold title to all land within a nation’s borders. Moreover, no system of human relationship is governance-free, and the

⁴⁵ *Id.* at 1003–04.

⁴⁶ Gregory S. Alexander, *Five Easy Pieces: Recurrent Themes in American Property Law*, 38 U. HAW. L. REV. 1, 27 (2016).

⁴⁷ William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1338, 1340 (1991).

⁴⁸ See generally Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237 (2005); Joseph William Singer, *Democratic Estates*, 94 CORNELL L. REV. 1009, 1046–47 (2008); JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* (2010).

⁴⁹ See generally Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369 (2013).

⁵⁰ Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1381 (1993).

⁵¹ Benjamin J. Pauli, *Commune*, in *ENCYCLOPEDIA OF POLITICAL SCIENCE* 283 (George Thomas Kurian et al. eds., 2011).

⁵² See *id.* at 284 (Pauli uses the term “drop out” in place of “opt-out”).

⁵³ See *id.*

⁵⁴ In the United States, this is traditionally discussed with reference to the relative insulation of the Amish community from general social obligations. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 216–18, 222 (1972).

common rapid breakdown of these communities is often due as much to governance failures within them as it is to friction with the regulatory logics outside of them.⁵⁵ These issues are complicated by the common pattern of simultaneous recomunalization of land and labor, with even less intensive forms of income pooling requiring steady inputs of either voluntary or compulsory collective labor.⁵⁶

The lack of effective legal design common to these recomunalization attempts has been matched by a resurgence in the study of collective ownership itself. Many scholars have begun to push back on the analytic universality of Hardin's tragic commons, with Carol Rose commonly cited for her assertion that the commons is still often as comic as it may be tragic.⁵⁷ The 2009 award of the Nobel Prize in Economic Science to Elinor Ostrom granted visibility to her decades of work detailing the logic and structure of successful commons across the globe.⁵⁸ The centrality of institutional design to Ostrom's careful and comprehensive case studies makes sensible, in part, the shift to an individual property rights frame under conditions of massive social dislocation and inequality.⁵⁹ Under such conditions, authoritarianism emerges as ever-ready to step into social vacuums with its simplified form of decision making and ability to coerce uncoordinated actors.⁶⁰ To wit, the largest "private" landowners in the world are still former monarchs, authoritarian political leaders and their families.⁶¹

Many of Ostrom's case studies were there to be studied exactly because they had either weathered or been isolated from severe social dislocations.⁶² For those who seek to "opt-out" in a more asocial sense, and especially those doing so within landholding systems that have already been privatized, the need for institutional design is thus critical.⁶³ This relationship between reformist imagination and legal necessity is captured in Erik Olin Wright's concept of "real utopias."⁶⁴ Wright notes that simply acting on radical critiques in an uncoordinated fashion is unlikely to produce the type of

⁵⁵ See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 190 (1990).

⁵⁶ Eric T. Freyfogle, *Better Ways to Work Together*, in *THE EVOLUTION OF NATURAL RESOURCES LAW AND POLICY* 98, 117–18, 120–22 (Lawrence J. MacDonnell & Sarah F. Bates eds., 2010).

⁵⁷ Carol Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U. CHI. L. REV. 711, 723 (1986).

⁵⁸ *The Prize in Economic Sciences 2009*, NOBELPRIZE.ORG (Oct. 12, 2009), <https://perma.cc/3UN4-7XL7>. For a detailed account of Ostrom's work on the commons, see generally OSTROM, *supra* note 55.

⁵⁹ See Elinor Ostrom, *Coping with Tragedies of the Commons*, 2 ANN. REV. POL. SCI. 493, 498 (1999) ("When the resource units produced by a common-pool resource have a high value and institutional constraints do not restrict the way resource units are appropriated, individuals face strong incentives to appropriate more and more resource units, leading to congestion, overuse, and even the destruction of the resource itself.").

⁶⁰ OSTROM, *supra* note 55, at 41.

⁶¹ Thornton McEnery, *The World's 15 Biggest Landowners*, BUS. INSIDER (Mar. 18, 2011), <https://perma.cc/Y3XK-BPQV>.

⁶² See Ostrom, *supra* note 59, at 493, 509.

⁶³ *Id.* at 495.

⁶⁴ ERIC OLIN WRIGHT, *ENVISIONING REAL UTOPIAS* 6 (2010).

systemic and scalable models akin to those cataloged by Ostrom.⁶⁵ Even successful political movements that center ideology over design can lead to disastrous results, as was clearly on display during communist collectivization efforts.⁶⁶ Here again Carol Rose has noted that purely communitarian ideals that make no place for the individual or opportunism are often as insufficient as purely individuated economic models for explaining land tenure in practice.⁶⁷

Following in Ostrom's stead, a contemporary surge of legal work has emerged concerned with rebuilding a concept of the "law of the commons" both in the United States and abroad.⁶⁸ While significant divergences still exist as to whether these new commons can be born from within modern property law, or require more radical legislative/political change,⁶⁹ the centrality of new forms of law and legal practice are recognized as key to enabling any sustained systemic institutional change in landholding.⁷⁰ The experience of ICs specifically helps direct attention to the fact that the terms of acquisition are often as key to the life cycle of property as trailing governance decisions.⁷¹ Mistakes, or injustices, at the outset of any new property regime can have detrimental path-dependent effects,⁷² even those that attempt to institutionalize progressive ideas or social innovations.⁷³

What seems to frustrate most attempts at land re-collectivization is not only a lack of concern with legal design, but also a concurrent lack of appreciation of the need to manage conflict. Among these private initiatives there are often open and aggressive claims that participatory norms of direct democracy are important to communal land use and, further, that such participation is a good onto itself. As such, many ICs are doubly vulnerable to design flaws as they often possess a strong self-identification as "anti-legal" and emphasize recognizing the particularity of local conditions as necessary for genuine participatory governance.⁷⁴ While there have been those within ICs who have tried to shift attention to legal design, the ideological pre-commitments of most participants have left design issues at the root of the failure of most of these initiatives, and more durable successes exceptions that prove the rule.⁷⁵ In contrast to the "law of the

⁶⁵ Erik Olin Wright, *Transforming Capitalism through Real Utopias*, 78 AMER. SOC. REV. 1 (2013).

⁶⁶ See generally FRANK DIKÖTTER, MAO'S GREAT FAMINE: THE HISTORY OF CHINA'S MOST DEVASTATING CATASTROPHE, 1958–1962 (2010).

⁶⁷ See generally CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP (1994).

⁶⁸ Jane B. Holder & Tatiana Flessas, *Emerging Commons*, 17 SOC. & LEGAL STUD. 299, 301 (2008).

⁶⁹ Maria Rosaria Marella, *The Commons as a Legal Concept*, 28 L. & CRITIQUE 61, 61 (2017).

⁷⁰ Janelle Orsi, *Three Legal Principles for Organizations Rebuilding the Commons*, in LAW AND POLICY FOR A NEW ECONOMY 119 (Melissa Scanlan eds., 2017).

⁷¹ David Ellerman, *On Property Theory*, 48 J. ECON. ISSUES 601, 601 (2014).

⁷² David Fagundes, *Buying Happiness: Property, Acquisition, and Subjective Well-Being*, 58 WM. & MARY L. REV. 1851, 1909–11 (2017).

⁷³ Yael R. Lifshirz, *Rethinking Original Ownership*, 66 U. TORONTO L.J. 513, 516 (2016).

⁷⁴ See discussion *infra* Part II.B.

⁷⁵ See *id.*

commons” movement, these initiatives have also had a very ambivalent historical relationship as to whether their attempt to “opt-out” is meant to be illustrative for others or simply a complete retreat from society at large.⁷⁶

The aim of this particular Article is to provide both a functional critique of the localist ideological commitments of ICs and assert that these commitments continue to be a barrier to their contribution to the broader movement of the “law of the commons.” The Article will provide a historical and comparative analysis of the spectrum of attempts to recommonalize land that point to the relevance of non-local expertise and, even more critically, to the development of self-disciplined participation. Such self-discipline can be enabled both through the choice of legal form used to take land out of private markets, as well as engagement with networked governance institutions to stabilize recommonalized land and allow for broader social access to these private alternatives.

At the heart of this normative critique is a claim that most modern actors seeking to recommonalize land are limited by empirically false idealizations of past communitarian land ownership, especially selective interpretations of indigenous land stewardship. Traditional systems of collective ownership were, in the clear majority, decidedly not democratic and were often underpinned by collective violence. Traditional communal land holding could be as authoritarian and inequality reproducing as many modern communitarians now view privatized land regimes.⁷⁷ The belief that commitment to participatory democratic norms is in itself a template for cohesive collective governance is both wrong as a matter of historical fact and elides the central reality that traditional “custom” was often as coercive as “law” in modern societies. Moreover, such customary norms were embedded in a range of social institutions from which individuals subject to them had no option to exit, and this lack of exit was critical to their effective functioning.⁷⁸

Implicit in Hanoch Dagan and Michael Heller’s concept of a “liberal commons” is an aspirational freedom to choose one’s favored form of property, but such choice was a remote possibility for most of human history. A flexible menu of property options is almost completely an invention of the very social fluidity of modern life that destabilized collective land tenure systems to begin with. As such, adding exit options to the commons requires significant legal innovation, rather than simple imitation of past systems, to achieve widespread adoption.⁷⁹ Otherwise, discussion of the normative value of such arrangements will continue to be too easily

⁷⁶ See Louise Meijering et al., *Intentional Communities in Rural Spaces*, 98 *TJDSCHRIFT VOOR ECONOMISCHE EN SOCIALE GEOGRAFIE* 42, 43–44 (2007) (discussing how Intentional Communities differ in their ways of rejecting mainstream society).

⁷⁷ See discussion *infra* Part.II.C.

⁷⁸ *Id.*

⁷⁹ Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 *YALE L.J.* 549, 553 (2001). For an similar modern defense of liberal conceptions of property, see Hanoch Dagan & Avihay Dorfman, *The Human Right to Property*, 18 *THEORETICAL INQ. L.* 391 (2017). The relationship of exit to republican notions of freedom is also explored in Alan Bogg, *Republican Non-Domination and Labour Law*, 33 *INT’L J. COMP. LAB. L. & INDUS. REL.* 391 (2017).

undercut by critics who can make revealed preference arguments that such efforts are inherently fringe or unwanted variations.⁸⁰

Moreover, interrogating this misrepresentation of the past reveals that any modern legal form is likely incapable of fully recreating the type of socially extensive norms that undergirded traditional forms of communitarian ownership. If more collective forms of ownership are to proliferate, they need first to find a sustainable strategy for taking land out of individual land markets, and promoting local participatory government second. The focus on designing alternative private land holding institutions should not prioritize generating more social capital within them, but allowing participation and contribution without any mandatory or extensive behavioral requirements. Housing cooperatives in the United States are but one example of a semi-collective form that was initiated by communitarian impulses with high governance costs, but one which eventually became generally available only to those in high socio-economic strata. An architecture of access, which facilitates the durable organization of collective land, is required before other variations can develop which emphasize communal living or working.

This focus on ease of access is central to discussions of the *numerus clausus* principle in property law, which has traditionally held that any legal system of property can only functionally sustain so many options given the need for citizens to actually understand the property claims among them.⁸¹ However powerful a restraint on private property experimentation *numerus clausus* should be, it is nevertheless true that even direct government subsidy can only be of temporary assistance to the development of self-sustaining alternative forms that have to compete under conditions of individual choice and limited information.⁸² At this point in time, collectivized forms of ownership are far from extensive enough to generate the necessary network effects to overcome their marginality, and their focus on localism places them at a distinct disadvantage against extant property forms with high levels of ideological support and which involve no participatory costs.⁸³

Without large public subsidies, the only real alternative for fomenting the necessary networks effects is just that, a private network.⁸⁴ In contrast to a vision of freedom as pure voluntarism, there is no way to avoid the self-

⁸⁰ Jon Elster, *From Here to There; Or, if Cooperative Ownership is so Desirable, Why Are There so Few Cooperatives?*, 6 SOC. PHIL. & POL'Y 93, 110 (1989).

⁸¹ Anna Di Robilant, *Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law*, 62 AM. J. COMP. L. 367, 416 (2014).

⁸² Benito Arrunada & Amnon Lehavi, *Prime Property Institutions for Subprime Era*, 8 BERKELEY BUS. L.J. 1, 29–30 (2011).

⁸³ “Yet to take root such innovations need more than rhetorical support; they require practical and ideological strengthening to secure flows of resources and legitimacy required for survival alongside professionalised and better resourced forms of organisation.” Tom Moore & David Mullins, *Scaling-Up or Going-Viral: Comparing Self-Help Housing and Community Land Trust Facilitation 1* (Third Sector Res. Ctr. Working Paper No. 94, 2013), <https://perma.cc/QYM7-TRNK>.

⁸⁴ *Id.* at 4.

disciplining function of contributing to and introducing third-parties into modern communitarian arrangements, not only in the formation of ICs, but also into their governance arrangements. Self-discipline has always been part of common law property, what Robert Gordon has called the “paradoxical” nature of property rights to fully bind the right holder’s own actions into the future.⁸⁵ To affect a new movement in landholding requires further binding oneself to communities without the option for instant and costless exit. Lawyers engaged with the commons movement, or “sharing law,” often defensively struggle with asserting the value of their expertise given the strongly anti-hierarchical presumptions of the clients they work with.⁸⁶ While it is easier to accept upfront technical assistance, the strength of past and current networking institutions in cooperative land has been decisively limited by these presumptions.

The primary mechanisms in American property law for building in third-party agents for land governance have been trust mechanisms and incorporation.⁸⁷ Originally, most ICs, especially those in the Georgist tradition, chose to place land in trusts that permanently removed it from private markets.⁸⁸ Many of these trusts still exist today.⁸⁹ Trust mechanisms impose strong fiduciary duties on the relevant 3rd-party decision-maker and grants weaker removal powers for beneficiaries.⁹⁰ Early in the twentieth century the use of trusts was also driven by their comparative transactional simplicity and the then less extensive nature of the corporate form. The subsequent modern spread of corporate forms to organize intentional communities reflects their new extensivity and accessibility, as well as their ability to accommodate participatory norms based on electoral procedures. Incorporation also imposes much weaker duties on elected corporate agents with commensurately easier removal powers by shareholders. This trend away from the use of trusts has thus only accentuated the localist weaknesses of modern ICs, as the shift to the corporate form, especially in allowing for easier dissolution, has made them even less durable when they inevitably face internal conflicts. Moreover, trust mechanisms are more amenable to standards-based decision making, whereas values beyond profit-maximization are still being tested in modern corporate governance, leaving decision makers free from stronger state-imposed fiduciary duties. The impact of this recent shift to the corporate form has been to further perpetuate the false hope that ICs can thrive and flourish without strong

⁸⁵ Robert W. Gordon, *Paradoxical Property*, in EARLY MODERN CONCEPTIONS OF PROPERTY 95, 102 (John Brewer & Susan Staves eds., 1995).

⁸⁶ JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMIES ch. 2, pt. 6 (2012) (discussing how there are often unique challenges regarding fee arrangements for lawyers practicing in a sharing economy).

⁸⁷ Dylan Oliver Malagrino, *Applying Communal Theories to Urban Property: An Anthropological Look at Using the Elaboration of Common Property Regimes to Reduce Social Exclusion from Housing Markets*, 10 U.C. DAVIS BUS. L.J. 33, 37 (2009).

⁸⁸ See INST. FOR CMTY. ECON., THE COMMUNITY LAND TRUST HANDBOOK 19, 28–29 (1982).

⁸⁹ *Id.* at 29.

⁹⁰ 76 AM. JUR. 2D TRUSTS *Trusts* § 351 (2019); *id.* at § 225.

self-disciplining legal relationships within the community—or networked relationships outside of it.

While the United States may have had a vibrant history of experiments in land holding, it is important to note that reconciling individual and collective interests in land use has always been a global issue.⁹¹ The ongoing contest over property rights in “development” itself is another arena of struggle over whether individual property rights can fully address collective needs.⁹² Any argument about the essential nature and future potential of property has to reconcile itself with this global array of empirical reference points, much as that which informed Ostrom’s pioneering work.⁹³ Many of these global efforts are effectively alegal or even illegal, as they challenge the regnancy of, and explore the unresolved tensions in, individual property rights frameworks.⁹⁴ Even authoritarian regimes are consciously performing experiments which test the line between individual and collective forms of land ownership⁹⁵ and the implications of transitioning between land holding regimes.⁹⁶ These variations help us think through the limits and motivations of property rights experimentation, especially in cooperatives to planned communities, and further helps us see clearly what conditions new property forms to degenerate or propagate.

To chart and diagnose the lessons of ICs as communitarian legal form, this Article will proceed in three parts. Part II will provide a basic outline of the history and previous study of American international communities, along with their dominant ideological terms and hereto consistent vulnerability. It will trace the general retreat of ICs from participation in larger social movements to a decided embrace of localism, and then present a critique of their disabling mis-imagination of traditional communal governance. Part III will proceed to compare IC’s to the success and challenges of other private and public initiated forms of land holding with communitarian aspects, including the rapid proliferation of condominiums, the trajectory of community land trusts, and the development of environmental and indigenous land trusts. It will outline the turn of ICs to using incorporation in lieu of trusts, and present a critique of this development. It will also present one creative alternative of collective self-discipline through networked incorporation. Part IV then concludes by advancing a broader

⁹¹ See David Bollier, *Reinventing Law for the Commons*, in LAW AND POLICY FOR A NEW ECONOMY: SUSTAINABLE, JUST AND DEMOCRATIC 137 (Melissa K. Scanlan ed., 2017) (explaining how communities around the world rely on collective interests and various forms of commons in order to survive).

⁹² See *id.* at 137–38 (discussing how commoners are devising new legal mechanisms to protect their collective interests due to the inadequacy of current laws).

⁹³ See generally *id.* at 141 (summarizing the work of Elinor Ostrom).

⁹⁴ *Id.* at 142.

⁹⁵ Donald Clarke, *China’s Stealth Urban Land Revolution*, 62 AM. J. COMP. L. 323, 324 (2014) (arguing that China’s land use rights have largely moved the country away from collective forms of land ownership towards a more individualized form of land ownership similar to a fee simple).

⁹⁶ Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 623–24 (1998).

argument about the relationship of legal self-discipline to a more focused movement to decommmodify land, and then discusses potential future uses of communitarian property forms.

II. TURNING BACK THE CLOCK: THE CHALLENGE OF RE-COMMUNALIZING LAND

A. *The American Tradition of Utopian Land*

When Sir Thomas More first coined the term “utopia” in 1516, he articulated a long-standing human tradition of imagining a better world governed by principles which diverged from those then socially dominant.⁹⁷ The word has been subsequently deployed in innumerable ways, but this desire to escape and recreate a new way of living remains central.⁹⁸ Utopian thought is most active in eras when rapid social change prompts challenges to existing modes of social organization, and also makes such reorganizing change appear more plausible.⁹⁹ The nineteenth century witnessed the onset of perhaps the most intense historical quickening in human social change, and this rapidity inspired utopian literary imaginings, while in the same stride motivated the creation of positivist social science.¹⁰⁰

In his attempts to grapple with the changing nature of European society in the nineteenth century, Emile Durkheim produced his seminal distinction between organic and mechanical solidarity to distinguish between the holistic nature of socio-economic roles in traditional societies and the integrated specializations of industrialization.¹⁰¹ This distinction captures the basic divide between a society where norms were generated and understood under conditions of general homogenization and that of modern life which disaggregated and re-allocated labor and land through market mechanisms.¹⁰² While at a high level of conceptual generality, Durkheim’s distinction was effective for explaining the alienation citizens felt when isolated from these traditional patterns of collective belonging. His classic sociological text *Suicide* tied this sense of alienation, or anomie, to a psychological despair that led to the rising rates of suicide cataloged in the same work.¹⁰³ Many other thinkers looking back at this era would make similar observations about the effects of fragmenting and reconstituting social relationships. Karl Polanyi’s *The Great Transformation* is now a classic cite for locating much of modern social anxiety in the uncertainties

⁹⁷ Gregory Claeys & Lyman Tower Sargent, *Introduction*, THE UTOPIA READER 1, 3 (Gregory Claeys & Lyman Tower Sargent eds., 2017).

⁹⁸ *Id.*

⁹⁹ *Id.* at 4.

¹⁰⁰ *Id.* at 3–4 (explaining how utopian literature developed after the transformation of socialism in 1848).

¹⁰¹ EMILE DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY (1893).

¹⁰² *Id.* (establishing the classic distinction between organic and mechanical solidarity).

¹⁰³ See generally EMILE DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY (John A. Spaulding & George Simpson trans., 1951).

resulting from commodifying core social institutions such as land and then governing them through logics of individual market participation.¹⁰⁴

It is this sense of alienation, of something lost in the past now at the heart of modern ills, that has motivated experiments in land to recreate the conditions of past communal solidarity. Such sentiment was not completely an invention of industrialization, as similar nostalgic longing has followed urbanization throughout most of civilized history. The less mature social organization and less densely populated terrain of early American society created a perceived openness to striking out to re-establish new social relationships based on various communitarian norms.¹⁰⁵ There certainly have been those satisfied with individuating their social status and there is a parallel history of the Jeffersonian ideal of the self-sufficient farmer, civically engaged but economically autonomous.¹⁰⁶ Yet, it is only backward looking views of this history that fully conflate self-sufficiency with the idea that collective claims on land were weak or consistently seen as adverse to common American values. While one can debate the relative strengths of these histories, one need only quickly peruse the writings of popular early American writers such as Thomas Paine to see quite strident articulations of collective claims on land.¹⁰⁷

The particular challenges of reconciling the place of individuals and communities in nineteenth century America led to what historian Mark Holloway has called a “golden age” of intentional communities.¹⁰⁸ With common motivation to reject the onset of Polanyi’s commodified property and labor relations,¹⁰⁹ such experiments involving close to 100,000 residents during this era are catalogued by Holloway.¹⁰⁹ Such communities were driven by religious sentiments as often as they were new secular ideas, drawing on long traditions of intertwined theological and economic communitarian norms.¹¹⁰ These diverse motivations would persistently inspire attempts to isolate communities from modern society, all aimed at preserving some implicit understanding of the social sources of traditional solidarity identified by Durkheim.¹¹¹

Like Holloway, scholars have devoted significant effort to unearthing and recapturing the *longue durée* of American intentional communities. In

¹⁰⁴ See Fred Block, *Introduction to KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME*, at xxv–xxvii (Beacon Press 2d ed. 2001) (1944).

¹⁰⁵ See John F. Hart, *Takings and Compensation in Early America: The Colonial Highway Acts in Social Context*, 40 AM. J. LEGAL HIST. 253, 304–05 (1996).

¹⁰⁶ See Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means: Values, Constraints, and Finance in the Design of a Comprehensive and Contemporary American “Ownership Society”*, 79 S. CAL. L. REV. 45, 101 (2005).

¹⁰⁷ BERNARD VINCENT, *THE TRANSATLANTIC REPUBLICAN: THOMAS PAINE AND THE AGE OF REVOLUTIONS* 128 (2005).

¹⁰⁸ See MARK HOLLOWAY, *HEAVENS ON EARTH: UTOPIAN COMMUNITIES IN AMERICA 1680–1880*, at 18 (1951).

¹⁰⁹ See *id.*

¹¹⁰ *Id.* at 18–19

¹¹¹ Philip Smith & Jeffrey C. Alexander, *Review Essay: Durkheim’s Religious Revival*, 102 AM. J. SOC. 585, 587 (1996) (book review).

recent decades, Robert Fogarty¹¹² and Timothy Miller¹¹³ have traced this lineage up through the mid-twentieth century. Yet, the fecundity of America for such experiments was noted much earlier. John Noyes wrote his *History of American Socialisms* in 1870 and Charles Nordhoff wrote *The Communist Societies of the United States* in 1875.¹¹⁴ At the onset of the Great Depression, Charles Gide authored *Communist and Co-Operative Colonies*.¹¹⁵ All of these works in some way noted that the very founding of the American colonies by English Puritans was itself the establishment of an intentional community which sought to divorce itself from what was seen as the inter-related moral and economic decay of a home society.¹¹⁶

Following in the Puritan model, Anabaptist Hutterites who fled persecution in Russia in the 1870s, established a number of colonies predicated on communal land ownership.¹¹⁷ Similarly, the English Christian sect commonly referred to as the Shakers moved to the United States at the end of the eighteenth century to found communities which were strictly segregated from outside society and operated on principles of communal economic organization.¹¹⁸ Other religious communities in this mold generally hewed to some form of religious revelation that attempted to explain or critique new social dislocations. One well-known community in New York led by John Humphrey, Oneida, practiced what they called “Bible Communism” which involved a rejection of individual marriage for “complex” marriage between all members to achieve a form of spiritual eugenics.¹¹⁹

The early dominance of religious motivations for founding ICs soon gave way to secular inspirations in the late nineteenth century.¹²⁰ The intellectual history of what then might be called radicalism in the history of American land has a diverse and wide-ranging scope.¹²¹ Just as the notion of wage-labor was seen by some as incompatible with republican values, so too was tenancy seen as a holdover from aristocratic feudalism. Like the religious communities before them, some European thinkers had their radical social critiques translated into concrete attempts only in the United

¹¹² ROBERT S. FOGARTY, *ALL THINGS NEW: AMERICAN COMMUNES AND UTOPIAN MOVEMENTS 1860–1914* (1990).

¹¹³ TIMOTHY MILLER, *THE QUEST FOR UTOPIA IN TWENTIETH-CENTURY AMERICA* (1998).

¹¹⁴ JOHN HUMPHREY NOYES, *HISTORY OF AMERICAN SOCIALISMS* (1870); CHARLES NORDHOFF, *THE COMMUNISTIC SOCIETIES OF THE UNITED STATES* (1875).

¹¹⁵ CHARLES GIDE, *COMMUNIST AND CO-OPERATIVE COLONIES* (1930).

¹¹⁶ In recent decades, it has become an annual American ritual to rehash the contested debate over the role of communal land in the original Pilgrim settlements, with notable energy devoted by proponents of individual property rights to the notion that abandoning communal tenure was needed for the colonies to survive. Kate Zernike, *The Pilgrims Were . . . Socialists?*, N.Y. TIMES (Nov. 20, 2010), <https://perma.cc/HS6Z-65R2>.

¹¹⁷ Karl Peter & Ian Whitaker, *The Hutterite Economy: Recent Changes and Their Social Correlates*, 78 ANTHROPOS 535, 535–36 (1983).

¹¹⁸ CHARLES NORDHOFF, *THE COMMUNISTIC SOCIETIES OF THE UNITED STATES* 117 (1875).

¹¹⁹ See NORDHOFF, *supra* note 118, at 264, 276.

¹²⁰ See NOYES, *supra* note 114, at 672.

¹²¹ See John Emmeus Davis, *Origins and Evolution of the Community Land Trust in the United States*, in *THE COMMUNITY LAND TRUST READER* 3 (John Emmeus Davis ed., 2010).

States. Notably, the French socialist thinker Charles Fourier had numerous followers who tried to apply his ideas on American soil.¹²² The most well-known of these foreign-inspired transplants was that of the Welsh entrepreneur Robert Owen.¹²³ In the 1820s Owen attempted to create his own communities predicated on the abolishment of private property and wage-labor in England, but felt America held out both greater spatial and intellectual freedom.¹²⁴ Even though his New Harmony community was short lived, it gained great popular notoriety.¹²⁵

Over time these intellectual influences became more U.S.-centric as popular culture was saturated with new literary and academic writings on reforming American society using new principles. Edward Bellamy's 1888 best-seller *Looking Backward* was the subject of great debate, including its implicit call for the nationalization of all land—then called “Nationalism.”¹²⁶ Most new ideas were expressed in tandem through such literary re-imaginings, and Ignatius Donnelly's 1890 *Caesar's Column* was widely read as a practical vision of agrarian populism.¹²⁷

These more communitarian ideas were not without their critics. Of equal fame was Henry David Thoreau's 1854 *Walden* which rejected collective life and embraced a much more individualistic concept of human freedom.¹²⁸ Yet, Thoreau's individualism was itself a form of utopianism and he is credited with the idea of “intentional living” that came to frame the “intentional community” movement. Even historical critics of these communitarian movements like Thoreau had their own critiques of modern consumerism as a source of human suffering and malaise.¹²⁹ Many contemporary scholars of ICs note their efficacy in articulating, even in the critiques they inspired, the classic American tension between freedom as individualism and social commitment as submission.¹³⁰

¹²² JONATHAN BEECHER, CHARLES FOURIER: THE VISIONARY AND HIS WORLD 501 (1986).

¹²³ See Phil Carradice, *Robert Owen: Social and Visionary*, BBC (Jan. 21, 2011), <https://perma.cc/7NXE-K53R>.

¹²⁴ *Id.*

¹²⁵ The failure of New Harmony predated its actual collapse, as few of its participants knew that Owen was subsidizing the community for most of its operational life. UTOPIAS: SOCIAL IDEAS AND COMMUNAL EXPERIMENTS 98–99 (Peyton Richer ed., 1971).

¹²⁶ See generally EDWARD BELLAMY, *LOOKING BACKWARD 2000–1887* (1888) (a fictional envisioning of a communist America without private property).

¹²⁷ See Walter B. Rideout, *Introduction*, IGNATIUS DONNELLY, *CÆSER'S COLUMN* vii, at xxiii (1890); see also Laila Metjahic, *Caesar's Column: A Work of Marxist and Populist Influence*, BLOGS @ BARUCH (Oct. 13, 2014), <https://perma.cc/8FHA-28J9>.

¹²⁸ See generally HENRY D. THOREAU, *WALDEN; OR, LIFE IN THE WOODS* (1854).

¹²⁹ See, e.g., JOSEPH WOOD KRUTCH, *THE MODERN TEMPER: A STUDY AND A CONFESSION* 164 (1929).

¹³⁰ Paul S. Boyer, *Foreword*, in *AMERICA'S COMMUNAL UTOPIAS*, at xi (Donald Pitzer ed., 1997).

B. The Rise and Fall of Social Activism in American Intentional Communities

After the nineteenth century, American ICs would continue to become ever-diverse in their motivations.¹³¹ They persisted in continued religious and secular versions of what Donald Pitzer calls “self-conscious communal experimentation.”¹³² At the turn of the twentieth century, the main dichotomy that emerged among ICs was that many religious communities continued to pursue social isolation, while secular communities were tied to larger ideals of social transformation in land ownership. While charismatic instigators of these experiments—and very few if any did not have a strong personality at their core—promoted various ideas about the pathologies of modern landholding, it was Henry George who came to provide a common intellectual framework for many of these private initiatives.¹³³ George’s 1879 text *Progress and Poverty* was an international best-seller, and quickly propelled him to global fame.¹³⁴ George had clear Jeffersonian sympathies and saw landlordism, specifically absentee landlordism, as the bane of a productive and just society.¹³⁵ His most lasting idea was that all tax revenue could be derived from a tax on the value of unimproved land.¹³⁶ The aim of this tax was to give the full fruits of increased social productivity to labor and capital, rather than landholders passively adjacent to it.¹³⁷

However one evaluates George’s ideas, they were incredibly popular in his time and the travel of his ideas abroad reveals a consistent transnational dynamic in communalization experiments. George is cited as an inspiration for the creation of the Jewish National Fund in 1901, and China’s leading post-dynastic political figure, Sun Yatsen, claimed to have been foundationally shaped by George’s ideas.¹³⁸ In the United Kingdom, Ebenezer Howard would gain similar notoriety for his plan to have all land held in municipal trusts governed by socially prudent trustees.¹³⁹ His text *To-Morrow* was also cited as roadmap for reacting to the excesses of private property, and it was influential in its aspiration to use the common law trust as a mechanism for taking land out of private markets.¹⁴⁰ Howard and George’s followers thus formed strong transatlantic bonds.

Americans inspired by these thinkers took to building Georgist intentional communities in Arden, Delaware; Fairhope, Alabama; and in

¹³¹ LUCY SARGISSON & LYMAN TOWER SARGENT, *LIVING IN UTOPIA: NEW ZEALAND’S INTENTIONAL COMMUNITIES* 5 (2004).

¹³² Donald E. Pitzer, *Introduction*, in *AMERICA’S COMMUNAL UTOPIAS* 6 (1997).

¹³³ THE COMMUNITY LAND TRUST: A SCHOOL OF LIVING POSITION PAPER (1988), <https://perma.cc/6R44-X94N>.

¹³⁴ HENRY GEORGE, *PROGRESS AND POVERTY* (1879).

¹³⁵ Bob DeNigris, *Henry George and the Single Tax*, HENRYGEORGE.ORG (Oct. 2007), <https://perma.cc/4AH4-4H9F>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Paul B. Trescott, *Henry George, Sun Yat-Sen and China: More than Land Policy Was Involved*, 53 AM. J. ECON. & SOC. 363 (1994).

¹³⁹ John Simkin, *British History, History of Socialism, Ebenezer Howard*, SPARTACUS EDUC., <https://perma.cc/LAVJ-FJ7X>.

¹⁴⁰ SIR EBENEZER HOWARD, *GARDEN CITIES OF TO-MORROW* 68–75 (1898).

Celo, North Carolina to note some of the most prominent.¹⁴¹ Most of these communities followed the pattern of moving land into a trust which then leased parcels at maintenance cost to individuals or communities who built up their own improvements.¹⁴² The revenue from these leases funded general improvements to the land and, if successful, expansion of the trust through new purchases.¹⁴³ Ralph Borsodi was the first follower of Georgist ideas to explicitly coin the term “land trust” when he founded the School of Living in 1934 in Suffern, New York.¹⁴⁴ The School was a trust that leased land to other intentional communities in the then-standard mold, with the aspiration that some would eventually learn to move on to their own land trusts.¹⁴⁵ As we will return to later, the School of Living is still in operation today.¹⁴⁶

In the post-Civil War era, the one group of citizens whose relationship to land was most transformed was that of freed slaves. Much has been written about the forsaken promises to provide former slaves with enough land to form their own self-sufficient communities, and the common pattern of black citizens returning as sharecroppers to work the same land still owned by their former masters.¹⁴⁷ The desire to “opt-out” of mainstream American society was here quite understandable for black citizens, and the move to create either racially distinct or racially integrated intentional communities is a call that is still made today.¹⁴⁸ Over time, many marginalized groups would look to collective forms of land ownership to insulate themselves from discrimination, and feminist and/or lesbian intentional communities have continued to persist since their initial growth in the 1960s and 1970s.¹⁴⁹

It would be this integration of Georgist ideals with the civil rights movement that would help inspire some of the movement’s more lasting legacies. In contrast to groups who simply sought to isolate themselves from society *in toto*, the desire to create a model for racial justice communities led to a broader national conversation about how to structure ICs.¹⁵⁰ One of

¹⁴¹ MILLER, *supra* note 113, at xvi.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Ralph Borsodi*, ROOTS & BRANCHES, <https://perma.cc/XYE7-X69Y> (last visited May 9, 2019).

¹⁴⁵ Bill Sharp, *The Life of Ralph Borsodi: Unsung American Back-to-the-Land Pioneer*, NEW SCH. LIVING (April 10, 2013), <https://perma.cc/MX5Z-MH7L>.

¹⁴⁶ See *School of Living: A Non-profit Educational Network*, SCH. LIVING, <https://perma.cc/HV7T-5DCF> (last visited May 9, 2019).

¹⁴⁷ See, e.g., Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. L. REV. 505 (2001).

¹⁴⁸ Elizabeth L. Carter, *Community Planning, Sharing Law and the Creation of Intentional Communities: Promoting Alternative Economies and Economic Self-Sufficiency Among Low-Income Communities*, 44 SW. L. REV. 669, 671 (2015).

¹⁴⁹ Heather Jo Burmeister, *Rural Revolution: Documenting the Lesbian Land Communities of Southern Oregon* (June 12, 2013) (unpublished M.A. thesis, Portland State University), <https://perma.cc/VV3N-G9RZ>.

¹⁵⁰ See *Brief History*, KOINONIA FARM, <https://perma.cc/2XY9-6DGM> (discussing how the IC was structured with racial equality in mind).

the most influential ICs was New Communities, formed in Albany, Georgia, for landless Southern blacks. Bob Swann, a disciple of civil rights leader Bayard Rustin, was the first to argue that community members should be added to the governance of land trusts.¹⁵¹ Clarence Jordan helped found the Koinonia Farm in 1942 as an attempt to form a racially integrated and economically self-sufficient community.¹⁵² And it was in these areas that the transnational Georgist influence rebounded back to the United States, with visits to foreign IC initiatives as late as the 1968 trip by the National Sharecroppers Fund to Israel to study the kibbutzim.

Yet, the model building that motivated the civil rights-inspired ICs increasingly became less common after the early twentieth century surge of interest in Georgism. Many of those involved in this tradition became more engaged in politics than in community formation, though they laid the groundwork for the community land trust movement discussed later. Most mid-twentieth century ICs hewed to either religious or other idiosyncratic motivations for their move to opt-out.¹⁵³ Some embraced a full rejection of private personal property as well as land, and it was not uncommon for some members to take a vow of poverty and make no claim to any contributed equity if they chose to leave.¹⁵⁴ This more consistent local focus on ICs left them increasingly peripheral to broader social movements, and they were primarily perceived not as radical economically but as culturally reactionary.¹⁵⁵ Timothy Miller has provided substantial descriptive detail concerning the ICs of this era.¹⁵⁶

It was this turn inward that transformed academic interest in ICs away from the instantiation of new intellectual ideas and toward themselves objects of social scientific inquiry. Following the empirical turn in psychology, academic interest arose to study ICs as laboratory-like microcosms of group psychology unavailable elsewhere in society.¹⁵⁷ These studies generally took for granted the observation that ICs emerged in reaction to the type of modern anomie identified by Durkheim, and also saw them as fertile ground for studying attempts to translate charismatic into bureaucratic authority in neo-Weberian fashion.¹⁵⁸ IC's generally short life spans made those that endured as exceptions to be explained.¹⁵⁹ The primary

¹⁵¹ See ROBERT SWANN, *Land Trusts As Part of a Threefold Economic Strategy for Regional Integration*, INT'L INDEPENDENCE INST. (Apr. 1973), <https://perma.cc/78NG-MCCH>.

¹⁵² *Brief History*, *supra* note 150.

¹⁵³ See Meijering et al., *supra* note 76, at 42, 43 (discussing the motivations for IC members to withdraw from society).

¹⁵⁴ See *Our Way of Life*, FIAT SPIRITUS CMTY., <https://perma.cc/85FS-TQG8> (last visited May 9, 2019) (emphasizing the importance of poverty in shared living communities).

¹⁵⁵ Meijering et al., *supra* note 76, at 43.

¹⁵⁶ See generally TIMOTHY MILLER, *THE 60S COMMUNES: HIPPIES AND BEYOND* (1999).

¹⁵⁷ See generally MICHAEL HOGG, *THE SOCIAL PSYCHOLOGY OF GROUP COHESIVENESS* (1992) (discussing how collective groups can be studied as subjects in psychology).

¹⁵⁸ See BENJAMIN ZABLOCKI, *ALIENATION AND CHARISMA* 6 (1980) (stating a contrary view that communes should not be viewed as microcosms).

¹⁵⁹ "Maintaining group solidarity and momentum over the 5-7 years it can take to establish a shared vision, develop group processes, access land, secure funding and navigate a hostile

findings of this genre of study emphasized the mechanisms by which commitment to the group was generated and enforced.¹⁶⁰

This academic turn was not wholly without its own cross-pollination into the formation of ICs. The primary literary extension of this scholarly interest was behavioral psychologist Burrhus Frederick Skinner's 1948 novel *Walden Two*.¹⁶¹ Here Skinner advanced the argument that specific social and environmental conditions could be designed by an external agent to induce a self-regulating community otherwise free from explicit social coercion.¹⁶² As this particular notion clashed with the more democratic orientation of other secular ICs, Skinner's theories came to represent the large gap that had developed between the motivations of academic scholars and those of the communities they studied.¹⁶³ Though popular for a brief time, there is only one surviving IC, Los Horcones in New Mexico, which still pursues Skinner's form of self-conscious psychological engineering.¹⁶⁴

While the motives for joining ICs remained diverse, they still had common traits such as charismatic leadership/initiation and an articulated shared spiritual philosophy, with recent ICs adding in more explicit ecological motivations.¹⁶⁵ The tension between charismatic leadership and more communitarian norms is an issue for many ICs,¹⁶⁶ and the psychological literature regarded the ideological content of ICs as less of a material issue than the sole source from which to build diffuse systems of "reinforcers" of group identity.¹⁶⁷ As a result, this literature bridged analyses of religious and secular ICs by emphasizing the power of shared religious conviction, especially of a pre-existing and established religious tradition, as the largest explanatory factor in the survival of ICs.¹⁶⁸ The interconnection between property, religion and community has a long social and academic pedigree,¹⁶⁹ but from a psychological standpoint religious belonging generating more costly "signals" to other group members of their individual commitment to the project.¹⁷⁰ Of note, Rosabeth Kanter's 1972 *Commitment and Community*

building regulatory system, typically results in 70–90% of groups failing to achieve their goal." JOHN BUCK & SHARON VILLINES, *CONSENTING TO A DEEPER DEMOCRACY* 17 (2007).

¹⁶⁰ See generally ROSABETH KANTER, *COMMITMENT AND COMMUNITY* (1972) (suggesting that communities are established and maintained through commitment rather than coercion).

¹⁶¹ B.F. SKINNER, *WALDEN TWO* (1948).

¹⁶² See generally *id.*; B.F. Skinner, *The Design of Experimental Communities*, in 16 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 271–75 (D.L. Sills ed., 1968).

¹⁶³ See Mark H. Burton & Carolyn Kagan, *The Verbal Community and the Societal Construction of Consciousness*, 4 BEHAV. & SOC. ISSUES 87 (1994).

¹⁶⁴ *Los Horcones Community*, LOS HORCONES COMUNIDAD WALDEN DOS, <https://perma.cc/2WFN-XT8G> (last visited May 9, 2019).

¹⁶⁵ See Meijering et al., *supra* note 76, at 45–46.

¹⁶⁶ See generally STEVEN CARLTON-FORD, *THE EFFECTS OF RITUAL AND CHARISMA* (1993).

¹⁶⁷ Angel Sanguinetti, *The Design of Intentional Communities: A Recycled Perspective on Sustainable Neighborhoods*, 21 BEHAV. & SOC. ISSUES 5, 16 (2012).

¹⁶⁸ Christopher D. Bader et al., *Where Have All the Communes Gone? Religion's Effect on the Survival of Communes*, 45 J. SCI. STUDY RELIGION 73, 74 (2006).

¹⁶⁹ John J. Infranca, *(Communal) Life, (Religious) Liberty, and Property*, 2017 MICH. ST. L. REV. 481, 487 (2017).

¹⁷⁰ Richard Sosis & Eric R. Bressler, *Cooperation and Commune Longevity: A Test of the Costly Signaling Theory of Religion*, 37 CROSS-CULTURAL RES. 211, 223 (2003).

helped promote longevity as the particular metric that ICs should be judged by.¹⁷¹

The major shift in the study of ICs in recent decades has been recognition by participants, and now serial participants with decades of experience, of a renewed sense that they need to engage with each other to create some general frameworks for facilitating the durability of their initiatives.¹⁷² In consonant turn, most current academics studying ICs have shifted away from the psychological frame to a more sympathetic position of trying not to judge ICs by their longevity but by their members' self-satisfaction.¹⁷³ Following this position, there is an active Communal Studies Association and a Society for Utopian Studies.¹⁷⁴ These groups study and debate new intellectual strands of communitarian thought,¹⁷⁵ and are academic nexus points for continued sympathetic study by sociologist and anthropologists.¹⁷⁶

The consonance between the self-study and academic study of ICs can be seen in a shift away from the language of group psychology¹⁷⁷ and to a greater emphasis on how to promote values of sharing and coordination.¹⁷⁸ In general, this has led to more proactive planning of IC formation, and to more specific thought devoted to details such as the spatial arrangements which facilitate shared living.¹⁷⁹ The major split that remains is that academic study focuses more on mechanisms of conflict-resolution, whereas the self-produced literature emphasizes the positive production of social cohesion.¹⁸⁰

Part of this new proactive planning is an attempt by some to argue for concern with legal design.¹⁸¹ Especially for serial participants, there is awareness that there are essential legal elements to the formation and exit/entry processes of communal arrangements.¹⁸² Even if ICs were formed without fully detailing the legal relationship of their members, issues such as the payment of property taxes quickly bring such issues to the fore.¹⁸³ While some ICs still attempt to build themselves using more traditional forms of

¹⁷¹ KANTER, *supra* note 160.

¹⁷² UTOPIAS, *supra* note 125; JYOTSNA SREENIVASAN, UTOPIAS IN AMERICAN HISTORY (2008).

¹⁷³ SARGISSON & SARGENT, *supra* note 131, at xiii–xiv.

¹⁷⁴ INTENTIONAL COMMUNITY: AN ANTHROPOLOGICAL PERSPECTIVE, at vii, 8 (Susan L. Brown ed., 2002).

¹⁷⁵ Amitai Etzioni, *Introduction* to THE ESSENTIAL COMMUNITARIAN READER, at ix (Amitai Etzioni ed., 1998).

¹⁷⁶ Gretchen Siegler, *In Search of Truth: Maintaining Communitas in a Religious Community*, in INTENTIONAL COMMUNITY: AN ANTHROPOLOGICAL PERSPECTIVE 41 (Susan L. Brown ed., 2002).

¹⁷⁷ Sanguinetti, *supra* note 167, at 6.

¹⁷⁸ Lucy Sargisson, Utopia and Intentional Communities 4 (2004) (unpublished manuscript), <https://perma.cc/HB77-N2QG>.

¹⁷⁹ LYNN F. PEARSON, THE ARCHITECTURAL AND SOCIAL HISTORY OF COOPERATIVE LIVING 217 (1988); Sanguinetti, *supra* note 167, at 17.

¹⁸⁰ Sargisson, *supra* note 178, at 7–8.

¹⁸¹ See Albert Bates et al., *Legal Options for Intentional Communities*, FELLOWSHIP INTENTIONAL COMMUNITIES, <https://perma.cc/5GZW-66EB> (last visited May 9, 2019).

¹⁸² *Id.*

¹⁸³ *Id.*

individual title, and some simply exist permissively on one of the member's personal land,¹⁸⁴ ICs have now been formed using a wide range of legal forms.¹⁸⁵ This search for appropriate legal form has been primarily reactive. Lawyers who work with ICs often lament that existing laws present distinct challenges given that they were crafted by those “that didn't foresee collaborative relationships.”¹⁸⁶

This legal search is generally intertwined with the participatory processes they allow. Part of the localist turn away from social movement participation was driven by the challenges of running ICs with dense governance requirements which made participants focus on even the smallest details of community administration. The aversion to using formal law was also grounded in the perception that it did not allow for democratic collective processes, and that it invariably disrupted ICs by drawing in outside authorities to resolve disputes. One lawyer and serial IC participant noted that “many of us involved in intentional communities have an aversion to legal procedures, government regulation, and taxes,”¹⁸⁷ and many still lament that “some . . . still adopt the position that love and goodwill will obviate the need for rules.”¹⁸⁸

For example, traditional joint-tenancy or tenancy-in-common allows for unilateral decisions by rights holders, including forced sales.¹⁸⁹ Similarly, survivorship rights of these forms are not suited to facilitating inter-generational transfers based on group consensus.¹⁹⁰ Some ICs experimented with partnership structures, which allow for more consensus-based decision making and better insulated the community from creditor claims against individual members.¹⁹¹ However, the entry/exit issues in partnerships present a challenge for ICs, and the potential death of any member could lead to demands by other partners or heirs that would force dissolution.¹⁹² Most secular ICs and even most with explicit spiritual, if not traditional religious, content have embraced the legal form that allows for the most direct forms of consensual decision making and theoretical perpetuity—the corporation.¹⁹³

While the possible forms of incorporation in American law have grown substantially over the twentieth and into the twenty-first century, the general advice now given within the IC community has trended strongly toward

¹⁸⁴ John Page, *Common Property and the Age of Aquarius*, 19 GRIFFITH L. REV. 172, 178 (2010).

¹⁸⁵ See Bates et al., *supra* note 181.

¹⁸⁶ ORSI, *supra* note 86.

¹⁸⁷ Dave Henson et al., *Legal Structure for Intentional Communities in the United States*, FELLOWSHIP INTENTIONAL COMMUNITY, <https://perma.cc/PW6A-Y5W9> (last visited May 9, 2019).

¹⁸⁸ AUSTL. NAT'L INTENTIONAL CMTYS. CONFERENCES & S.E. AUSTL. CMTYS. GATHERINGS, INTENTIONAL COMMUNITIES MANUAL 27 (1st ed. 2001), <https://perma.cc/77K3-LAS3>.

¹⁸⁹ Henson et al., *supra* note 187.

¹⁹⁰ *Id.*

¹⁹¹ Page, *supra* note 184, at 178; Henson et al., *supra* note 187.

¹⁹² Henson et al., *supra* note 187.

¹⁹³ *Id.*

advocating incorporation as LLCs.¹⁹⁴ The internal governance arrangements of LLCs can be quite diverse, but most importantly they are able to accommodate consensus-based forms of voting, allow easy entry/exit of new and old members, and insulate collective assets from individual creditors.¹⁹⁵ The corporate forms also allows for the possibility of a more regular legal interface with general society, and the easier potential use of tax and other state-provided benefits tied to land ownership.¹⁹⁶

Practitioners working with ICs have become knowledgeable about the various non-profit designations best suited to different ICs, especially given the type of collective economic activity which some ICs aim to incorporate.¹⁹⁷ You can find ICs incorporated under the Internal Revenue Code as 501(c)7 social clubs, religious corporations under 501(d),¹⁹⁸ and most often 501(c)3 as social non-profits.¹⁹⁹ Some states even have cooperative-specific laws that ICs can make use of, or laws on mutual benefit corporations that grant recognition of the particularity of consensus-based cooperative living—though these are still relatively exceptional given the lack of coordinated political activity by ICs.²⁰⁰ Ultimately, many ICs are still formed without careful consideration of the possible legal forms involved.²⁰¹ Like Skinner’s “planner-manager,” usually a charismatic-initiator or recognized religious leader of the group either retains title to the land or decides on the legal form unilaterally.²⁰²

While there have been increasingly comprehensive attempts to generalize and spread knowledge about the legal issues that ICs face,²⁰³ the view that communal living can be sustained by shared values alone continues to be powerful.²⁰⁴ Even religious groups that more explicitly recognize forms of hierarchy often see religious devotion as degraded by an explicit legalization of relationships. Thus whether participation is through more secular norms of consensus or religious obedience, IC participants focus on strength of conviction as the primary driver of group survival.²⁰⁵ Outside parties offering up “best practices” based on more technical expertise can just as often be seen as threats as assets, especially if they

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Meade Emory & Lawrence Zelenak, *The Tax Exempt Status of Communitarian Religious Organizations: An Unnecessary Controversy?*, 50 *FORDHAM L. REV.* 1085, 1109–11 (1982).

¹⁹⁹ Henson et al., *supra* note 187.

²⁰⁰ *State-by-State Co-op Law Info*, CO-OPLAW.ORG, <https://perma.cc/LH7F-8SLA> (last visited May 9, 2019).

²⁰¹ Gwendolyn Hallsmith, *Ecovillage Infrastructure*, FELLOWSHIP INTENTIONAL COMMUNITY, <https://perma.cc/7D8B-83HG> (last visited May 9, 2019).

²⁰² Christoph Brumann, *The Dominance of One and Its Perils: Charismatic Leadership and Branch Structures in Utopian Communes*, 56 *J. ANTHROPOLOGICAL RES.* 425, 425–26 (2000).

²⁰³ DIANA LEAFE CHRISTIAN, *CREATING A LIFE TOGETHER*, at xx (2003).

²⁰⁴ *Id.*

²⁰⁵ See generally WILLIAM METCALF, *SHARED VISIONS, SHARED LIVES: COMMUNAL LIVING AROUND THE GLOBE* (1996).

question localist governance norms.²⁰⁶ Experience or academic study that directly points to the merits of more centralized forms of organization are heavily coded for IC consumption in aesthetically-stylized language such as “learned wisdom,” rather than expertise, or “leadership,” instead of hierarchy.²⁰⁷

As a result, institutional attempts to network ICs have faced even more acute organizational challenges to-date.²⁰⁸ The most consistent attempt to network ICs is the Fellowship of Intentional Communities (FIC), created during work to first link ICs in the 1940s.²⁰⁹ The FIC has published a variety of informational materials and sponsored national and regional meetings to discuss relevant issues.²¹⁰ There is also a Federation of Egalitarian Communities formed in 1976 with similar aims.²¹¹ Yet, even in the structure of such networks consensus-based decision making is emphasized and great effort is expended to portray the role of such organizations as consonant with total local independence.²¹² As a result, funding for these institutions is highly unstable and they routinely merge or are re-initiated after years of dormancy.²¹³

If anything, the rise of ecological motivations for ICs has made localist tendencies even more acute.²¹⁴ The focus of such efforts on “local sustainability” has re-emphasized the aesthetic primacy of small scale social organization and, regardless of aspiration, in effect further isolated ICs from larger social politics.²¹⁵ Another corollary of this shift is that many ICs have increasingly strict behavioral requirements in regards to consumption and diet, which make consensus-based decision making and scalability even more difficult.²¹⁶ From a social movement perspective, the focus on sustainability has exacerbated the racial and class tensions that flow from a rejection of modern technology or vows of intentional poverty.²¹⁷

²⁰⁶ Take, for example, accounts where centralization of decision making allowed collapsing groups to survive. SUSAN CAMPBELL, *EARTH COMMUNITY LIVING EXPERIMENTS IN CULTURAL TRANSFORMATION* 57 (1982).

²⁰⁷ JOSEPH C. MANZELLA, *COMMON PURSE, UNCOMMON FUTURE: THE LONG, STRANGE TRIP OF COMMUNES AND OTHER INTENTIONAL COMMUNITIES* 170 (2010).

²⁰⁸ *Id.* at 2.

²⁰⁹ *About the Fellowship for Intentional Community*, FELLOWSHIP INTENTIONAL COMMUNITY, <https://perma.cc/9D8H-N6E3> (last visited on May 9, 2019).

²¹⁰ *Id.*

²¹¹ *About Us*, FED’N EGALITARIAN COMMUNITIES, <https://perma.cc/696L-9ZUG> (last visited May 9, 2019).

²¹² MANZELLA, *supra* note 207, at 6.

²¹³ JAMES MORRIS & ANDREA KROSS, *THE A TO Z OF UTOPIANISM* 101 (2009).

²¹⁴ GEORGE L. HICKS, *EXPERIMENTAL AMERICANS: CELO AND UTOPIAN COMMUNITY IN THE TWENTIETH CENTURY* 168 (2001).

²¹⁵ *Id.* at 168, 170.

²¹⁶ *Id.*

²¹⁷ MANZELLA, *supra* note 207, at 173–74.

C. The Flawed Imagination of Traditional Communal Governance

In many ways, the type of localist idealism that now pervades ICs reflects Carol Rose's observation that presumptions about human nature precede and then shape how one sees property.²¹⁸ It also explains why the survival rate of ICs remains so low. The needs of any community changes and general ideological consonance can never prevent differences over how to reallocate resources over time. This is especially acute when ICs involve voluntary or mandatory communal labor, as group-decision making becomes more complex when the variable skills and competencies of members lead to differential demands on their contributions. Yet, the common practice remains that the failure of ICs is placed by participants, and some academic observers, on individual failings, or, at the least, the irascible damage done to individuals by the mainstreaming of consumer individualism.²¹⁹

In the mid-nineteenth century, there were still opportunities for IC members or affiliated intellectuals to observe some form of traditional communal landownership.²²⁰ Yet, whether for reasons of moral ambivalence or political naïveté, there was rarely any sustained examination of the actual practices of indigenous landholding or engagement with fields like anthropology that had studied these institutions.²²¹ Instead, and especially for those groups who did not adhere to a rigorous intellectual framework, there was amorphous but regular reference to traditional forms of communal landholding.²²² The specific imagined content of a past communalism lost varied by one's geographic and economic experience, but over the twentieth century it became increasingly popular for IC participants to claim that they were recreating the land stewardship practices of Native Americans or other native groups in the world.²²³

Yet, the central failure of many ICs to sustain themselves is rooted in the fact that they failed to replicate key elements of traditional communal land governance.²²⁴ Their conflation of such practices with their version of consensual and voluntary participation is not only historically and anthropological inapposite, it also represents some of the same naïve idealism that indigenous rights activists critique about outside characterizations of native governance and histories.²²⁵ These idealizations

²¹⁸ See generally ROSE, *supra* note 67.

²¹⁹ See MANZELLA, *supra* note 207, at 170. Some communities establish mentoring programs for new members to learn the norms of the community. SARGISSON & SARGENT, *supra* note 131, at 166.

²²⁰ See Davis, *supra* note 121, at 6–9.

²²¹ See Laura Nader & Jay Ou, *Idealization and Power: Legality and Tradition in Native American Law*, 23 OKLA. CITY U. L. REV., Spring and Summer 1998, at 13, 16–17 (discussing a few contexts in which anthropologists have studied other issues with these institutions such as idealization).

²²² See Davis, *supra* note 121, at 25, 29–30.

²²³ *Id.* at 4.

²²⁴ See generally *id.* at 18–19, 22, 24, 37, and 39 (discussing the internal changes and external pressures that drove changes in ICs).

²²⁵ SHARI M. HUHNDORF, GOING NATIVE: INDIANS IN THE AMERICAN CULTURAL IMAGINATION 5–10 (2001). In particular reference to Native American governance, see Nader & Ou, *supra* note 221,

fundamentally elide the fact that nearly all indigenous land tenure systems had strongly hierarchical, often completely centralized, decision-making structures.²²⁶ Moreover, the focus in ICs on “recreating” shared communitarian norms further elides the reality that the wholly integrated social and cultural reality in which most communal land tenure systems were embedded were functional exactly because this embeddedness made them powerfully coercive.²²⁷ And even those systems that allowed some form of non-authoritarian political participation did so almost exclusively through the rubric of family structures, which again were governed by extensive non-democratic norms.²²⁸ Most all of these systems were not consciously or voluntarily adopted by participants and the possibility of free exit, itself only introduced by modern economic change, often stressed or even doomed the sustainability of these systems.²²⁹

Within legal anthropology, it has long been recognized that it is hard to establish what indigenous legal systems were, in some ideal sense, before the impact of colonialism or other significant cultural contact.²³⁰ Yet, from the earliest known studies it has always been clear that even in European history legal norms were undergirded by their holistic integration with non-legal norms and that legal rationality was rarely cleanly distinct from substantive values.²³¹ This intertwining forms the basis of the never-ending debate on where the analytical line should be drawn between law and custom.

The issue of cultural extensivity and lack of exit characterizes the ultimate collapse of even the most successful religious ICs of the past. The most well-known and lasting religious group to retain some cohesiveness in the United States is the Amish, who have long fought for the right to completely exclude themselves from the social obligations of the outside world, and who deploy shunning as an absolute cost on members who seek to violate any of its isolationist tenets.²³² The Amish also possess a proactively anti-technological stance that helps foster their relative economic isolation.²³³ The Shakers, by contrast, were in many ways more successful than the Amish in their heyday, but their fundamental commitment to asexuality meant that they crippled their own self-

at 13, 14–15, see also Brooke McNaughton, *The Noble Savage and Ecological Indian: Cultural Dissonance and Representations of Native Americans in Literature* 18, 29, 37. (2010) (unpublished B.A. thesis, Utah State University), <https://perma.cc/2U7H-9TDC> (juxtaposing the literature given the ecological thought underlying many ICs).

²²⁶ Nader & Ou, *supra* note 221, at 41–42.

²²⁷ MANZELLA, *supra* note 207, at 147–49.

²²⁸ See Meijering et al., *supra* note 76, at 44, 46.

²²⁹ See, e.g., HUHNDORF, *supra* note 225, at 145.

²³⁰ MARTIN CHANOCK, *LAW, CUSTOM AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA* 3–4 (Cambridge Univ. Press 1985).

²³¹ *Id.* at 4–5.

²³² See *The Amish*, BBC, <https://perma.cc/5TA3-MN48> (last visited May 9, 2019).

²³³ *Id.*

reproductive capacity and relied on intense outside social dissatisfaction to sustain their membership.²³⁴

For modern ICs, Lee Fennell's observation that "norms may be cheaper in the long run than constant litigation, even if people have to incur some initial costs to get them going," is perhaps a prohibitive understatement.²³⁵ To create the depth of social and cultural integration that makes norms effective requires them to approach the coercive line that so blurs the traditional law/custom divide. Exit has to be restricted so members cannot escape sanction when violating group norms and an inability to remove social contributions as a counter-leveraging tactic.²³⁶ Only for very specific transactions, and under very specific social conditions, can modern contexts recreate co-operative norms outside of judicial enforcement.²³⁷

Underlying much localist governance idealism is also the view that the more localized and small a group is, the more genuinely free it is.²³⁸ Again, this is only possible in the modern context of free and costless exit.²³⁹ By contrast, under pre-modern conditions the smaller a social group was, the more fiercely social norms needed to be enforced.²⁴⁰ Hunter-gatherer groups in low-surplus ecosystems engaged in intense community policing and sanctioning as any single violation of communal norms could doom the entire group.²⁴¹ Thus the eternal link between law and violence classically articulated in by Robert Cover was far less obscured in communalized land tenure systems.²⁴² Stephen Clowney has written of the dark side of what are today called "informal" property rights regimes, where the "evidence from history, sociology, and anthropology demonstrates that property systems governed by informal social controls inevitably rely on force—often ferocious displays of force."²⁴³ Such inherent violence teaches the opposite lesson that modern ICs often imagine flow from past experience, and exacerbates their ideological tendency to design governance systems without negative reinforcement.²⁴⁴

The interpretation of traditional land tenure systems by IC proponents is often almost at the level of literary imagination. The fact that customary systems of land tenure are actually still a globally dominant form through

²³⁴ Erin Blakemore, *There Are Only Two Shakers Left in the World*, SMITHSONIAN (Jan. 6, 2017), <https://perma.cc/2Y7F-XJ6M>.

²³⁵ Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 888 (2004).

²³⁶ *Id.* at 887–89.

²³⁷ The law and social norms literature explores the bounds of this observation, as well as the continued role of social norms under presumptive formal legal rationality. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 132, 135, 153, 169 (1991).

²³⁸ *Id.* at 128–29.

²³⁹ *Id.* at 284–85.

²⁴⁰ CHRISTO FABRICIUS ET AL., *RIGHTS, RESOURCES, AND RURAL DEVELOPMENT: COMMUNITY BASED NATURAL RESOURCE MANAGEMENT IN SOUTHERN AFRICA* 164 (2004).

²⁴¹ See *id.* at 4.

²⁴² See generally Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, (1986).

²⁴³ Stephen Clowney, *Rule of Flesh and Bone: The Dark Side of Informal Property Rights*, 2015 U. ILL. L. REV. 59, 62 (2015).

²⁴⁴ Sanguinetti, *supra* note 167, at 12.

which humans experience land use is rarely referenced.²⁴⁵ Attempts to preserve communal land tenure systems have been complicated throughout the world,²⁴⁶ where cultural norms have been weakened by the same social forces decried by ICs participants.²⁴⁷ Moreover, studies of such systems often emphasize the self-interested actions of traditional leaders in non-democratic structures of authority,²⁴⁸ who resist land privatization not out of altruism but to sustain their own base of power.²⁴⁹ The persistence of local authoritarianism is why efforts to deconstruct these land tenure systems through privatization are often cast as liberating for traditionally marginalized groups,²⁵⁰ or with the merit of deconstructing larger systems of oppressive feudalism.²⁵¹

Furthermore, rather than *sui generis* in nature, the challenges of accommodating communal land tenure land systems is one that has been routinely confronted around the globe. Even in countries that have recognized indigenous land claims, how these claims interact with national and local land markets and regulation remains a contested question.²⁵² Even under a formally sympathetic regime, the Communal Land Rights Acts in South Africa was deemed unconstitutional because of its misfit with notions of liberal individualism.²⁵³ In the United States there are examples of communities whose informal land use has been permanently impaired simply by the imposition of property taxes.²⁵⁴

If this type of imaginary reconstruction of traditional communalism is far removed from the liberal ideals of consensual democracy, is there a way to reconcile the desire for ICs to “opt-out” of land markets without recreating these oppressive communal dynamics? The benevolent dictator-designer mold of Owen and Skinner has yielded little to suggest it presents a sustainable solution. Whatever solution could present itself must be of the

²⁴⁵ Liz Alden Wily, *Customary Tenure: Remaking Property for the 21st Century*, in *COMPARATIVE PROPERTY LAW* 458 (Michele Graziadei & Lionel Smith eds., 2016).

²⁴⁶ Liz Alden Wily, *Formalizing the Informal: Is There a Way to Unlock Human Potential Through Land Entitlement? A Review of Changing Land Administration in Africa*, in *LINKING THE FORMAL AND INFORMAL ECONOMY* 263, 273 (Basudeb Guha-Khasnobis et al. eds., 2006).

²⁴⁷ Liz Alden Wily, *'The Law is to Blame': The Vulnerable Status of Common Property Rights in Sub-Saharan Africa*, 42 *DEV. & CHANGE* 733, 735 (2011).

²⁴⁸ Hanri Mostert, *South Africa's Communal Land Rights Act: A Plea for Restraint in Reform*, 54 *J. AFR. L.* 298, 307 (2010).

²⁴⁹ Admos Chimhowu & Philip Woodhouse, *Communal Tenure and Rural Property: Reflections on Land Transactions in Svosve Communal Area Zimbabwe* 9 (BWPI Working Paper No. 25 2008).

²⁵⁰ Silvia Federici, *Women, Land Struggles, and the Reconstruction of the Commons*, 14 *J. LAB. & SOC'Y* 41, 44 (2011); PATRICK MCAUSLAN, *LAND LAW REFORM IN EASTERN AFRICA* 19, 29, 48, 76, 83 (2013).

²⁵¹ Liz Alden Wily, *Community Based Land Reform: Could This Be a Way Forward?* 5 (June 2009) (unpublished manuscript), <https://perma.cc/8BXR-5ZQ2>.

²⁵² Ian G. Baird, *'Indigenous Peoples' and Land: Comparing Communal Land Titling and its Implications in Cambodia and Laos*, 54 *ASIA PAC. VIEWPOINT* 269, 276–77 (2013).

²⁵³ Press Release, Press Statement on the Constitutional Court Judgment on the Communal Land Rights Act (May 11, 2010) (on file with the University of Cape Town).

²⁵⁴ Faith R. Rivers, *The Public Trust Debate: Implications for Heirs' Property Along the Gullah Coast*, 15 *SE. ENVTL. L.J.* 147, 153 (2006).

same ilk where the difficult negotiation of individual freedom and community commitment present no free tradeoffs for either.

III. THE COMPARATIVE CONTINUUMS OF COLLECTIVE LAND HOLDING

A. Community and Land as Global Conundrum

The rise of individual property rights as the dominant frame for viewing modern American property law often belies the fact that, while estimates vary, close to half the world's land is still held communally.²⁵⁵ Similarly, in those countries like the United States where the transition to individual land holding has been predominant there have routinely been intense reactions to the dislocation it has effected on communities and social ordering.²⁵⁶ The now global debate on property rights draws in heated arguments about the normative desirability of various frames of regulating or further transforming individuated property rights regimes.²⁵⁷

A common flash point for these debates has been the work and affiliated reform agendas of Hernando De Soto.²⁵⁸ De Soto is best known for his argument that global inequality is in large part rooted in the persistence of informal property rights regimes, which prevent the leveraging of land as collateral for capital lending.²⁵⁹ A number of countries and international financial institutions undertook reforms inspired by De Soto's theory as yet another silver technocratic bullet to spur economic growth. The empirical track record of these efforts has been murky as best,²⁶⁰ and even ardent "pro-property" advocates have been somewhat chastened by the complex realities of land reform.²⁶¹ In many cases, transforming informal communal land into individual property titles leads to cycles of dispossession and land concentration,²⁶² as De Soto's credit-driven mechanism confronts locally

²⁵⁵ Peter Veit & Katie Reytar, *By the Numbers: Indigenous and Community Land Rights*, WORLD RES. INST. (Mar. 20, 2017), <https://perma.cc/592N-NZQG>.

²⁵⁶ JOHN CHRISTMAN, *THE MYTH OF PROPERTY: TOWARD AN EGALITARIAN THEORY OF OWNERSHIP* 4 (1994).

²⁵⁷ *Id.* at 8–10.

²⁵⁸ See generally HERNANDO DE SOTO, *THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM* (1st ed. 1989).

²⁵⁹ See *Hernando de Soto and Patrick Byrne Unite to Challenge Global Poverty & Inequality*, GLOBE NEWSWIRE (Dec. 13, 2017) <https://perma.cc/8CW5-RNFJ> (last visited May 9, 2019).

²⁶⁰ Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L.J. 996, 1037 (2006); Paul Van Der Molen, *After 10 Years of Criticism: What is Left of De Soto's Ideas?* (Cadastral and Land Perspectives 2000), <https://perma.cc/MT8W-9U8M>.

²⁶¹ See, e.g., Kenneth W. Dam, *Land, Law and Economic Development* 23 (U. Chicago Law & Economics Working Paper No. 272, 2006).

²⁶² See Ellen M. Bassett, *The Persistence of the Commons: Economic Theory and Community Decision-Making on Land Tenure in Voi, Kenya*, 9 AFR. STUD. QUART., Spring 2007, at 2.

embedded structures of political and economic power as well as low financial literacy.²⁶³

In parallel, the global challenges of urban planning in areas most intensely embracing land privatization have inspired critiques that echo Freyfogle's "tragedy of fragmentation" under the frame of the "new urbanism."²⁶⁴ In the wealthiest cities of the world land informality persists alongside strong formal protection of property rights,²⁶⁵ and the challenges of providing affordable housing refracts economic and racial inequality.²⁶⁶ Even in authoritarian regimes which formally hold to total state-ownership, most notably China, coordinating public planning with more extensive markets logics has remained a stubborn challenge that strikes at the heart of political legitimacy and social unrest.²⁶⁷ These challenges do not clearly cut against the utility of individual property rights, as one understudied phenomenon was the powerfully stabilizing effect of transferring state-owned apartments to their occupants during the post-Soviet transition.²⁶⁸ In all of these modern contexts, formal ownership and a sense of powerful attachment have been shown to not be necessarily coincident.²⁶⁹

These more global developments relate to ICs by providing a rich empirical baseline for examining attempts to manage the line between individual and communal ownership.²⁷⁰ Attempts to reverse the individualization of property have not been the sole province of American radicalism, to wit there are thousands of communities worldwide that now identify as ICs.²⁷¹ Parallel to developments in the United States, there are academic organizations, such as the International Communal Studies

²⁶³ H.W.O. Okoth-Ogendo, *The Tragic African Commons: A Century of Expropriation, Suppression and Subversion*, 1 U. NAIROBI L.J. 107 (2003); Liz Alden Wily, *Custom and Commonage in Africa: Rethinking the Orthodoxies*, 25 LAND USE POL'Y 43, 46–47 (2008).

²⁶⁴ See NICHOLAS BLOMLEY, UNSETTLING THE CITY: URBAN LAND AND THE POLITICS OF PROPERTY, at xviii (2004); BARRIE NEEDHAM, PLANNING, LAW AND ECONOMICS (2006); DAVID HARVEY, REBEL CITIES: FROM THE RIGHT TO THE CITIES TO THE URBAN REVOLUTION 14 (2012).

²⁶⁵ See Ananya Roy, *Urban Informality: Toward an Epistemology of Planning*, 71 J. AMER. PLANNING ASS'N 147, 147–48 (2005); Sheila R. Foster, *Urban Informality as a Commons Dilemma*, 40 U. MIAMI INTER-AMER. L. REV. 261, 267 (2009).

²⁶⁶ Tore Sager, *Neo-liberal Urban Planning Policies: A Literature Survey 1990-2010*, 76 PROGRESS IN PLANNING 147, 181 (2011); Duncan Kennedy, *The Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society*, 46 HOWARD L.J. 85, 110 (2002).

²⁶⁷ Xiaoyang Zhange, *Contemplating Privatisation of China's Rural Land Ownership*, 92 AMICUS CURIAE 9 (2012); Shenjing He & Desheng Xue, *Identity Building and Communal Resistance Against Landgrabs in Wukan Village, China*, 55 CURRENT ANTHROPOLOGY S126, S127 (2014).

²⁶⁸ Shann Turnbull, *There Are Even Alternatives to Private or Public Lawn Ownership*, in LAND FOR HOUSING THE POOR 512 (Shlomo Angel et al. eds., 1983). The same is now potentially true in Cuba. See Mario A. González Corzo, *Housing Cooperatives: Possible Roles in Havana's Residential Sector*, 15 CUBA IN TRANSITION 167, 176 (2005).

²⁶⁹ Amelia Thorpe, *Hegel's Hipsters: Claiming Ownership in the Contemporary City*, 25 SOC. & LEGAL STUD. 27 (2018).

²⁷⁰ For a discussion of comparative property analysis, see Yun-chien Chang & Henry Smith, *Structure and Style in Comparative Property Law*, in COMPARATIVE LAW & ECONOMICS 131 (Theodore Eisenberg & Giovanni Ramello eds., 2016).

²⁷¹ COMMUNITIES DIRECTORY (Sarah Bunker et al. eds., 2016).

Association, which have emerged in recent decades to study this transnational phenomenon.²⁷² The earlier perception that America represented that most open forum to pursue land experiments later shifted to Australia and New Zealand, which have witnessed phases of relatively intense IC formation.²⁷³

Moreover, this wide-range of experiments with managing individual and collective needs through land helps produce a broader frame for considering what type of dynamics govern the longevity and sustainability of communal land forms which have so plagued ICs in the United States.²⁷⁴ This broader frame also allows ICs to be understood as just one point along a continuum of innovations in land holding which integrate degrees of communalism within ecosystems formally dominated by individuated property holding.

As discussed in the previous Part, the very idea of having multiple forms of land holding widely available for individuals to freely choose between is a relatively recent development.²⁷⁵ Private attempts to create new property forms confronted some variation of the *numerus clausus* principle to limit their proliferation. While the common law has generally favored more permissive regulation of private law ordering, even here there have been long-standing debates about just how private innovation should be tempered in light of informational concerns about equal access and understanding of property forms among citizens.²⁷⁶ At the same time, many scholars in the “law of the commons” movement have argued that the *numerus clausus* principle must be interpreted as a pro-social doctrine that allows for democratic experimentalism.²⁷⁷ The debates around *numerus clausus* are especially relevant for ICs as they direct attention to the issue of replication and scale that straddle the tension among IC participants about whether they are simply seeking to opt-out of society or create a model for emulation.

The turn of many ICs in the United States to form as LLCs reflects the success of the corporate form itself as a relatively modern development, which has gone from a once controversial and critiqued legal innovation to one whose operation has been broadly legitimated by judicial systems across the world.²⁷⁸ The global range of experiences in moving between individual and communal land holding thus brings to bear a more

²⁷² *About ICSA*, INT’L COMMUNAL STUD. ASS’N, <https://perma.cc/VR7P-UJV5> (last visited May 9, 2019).

²⁷³ SARGISSON & SARGENT, *supra* note 131, at xiv.

²⁷⁴ For a primer on the challenges of comparative property law, see Bram Akkermans, *The Comparative Method in Property Law*, in 90 RESEARCHING PROPERTY LAW (Susan Bright & Sarah Blandy eds., 2016).

²⁷⁵ See discussion *supra* Part II.B.

²⁷⁶ Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 7 (2000); Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373, S376 (2002).

²⁷⁷ Robilant, *supra* note 81, at 370 n.7.

²⁷⁸ As one commonly cited IC legal advisor notes, “[The corporation] is familiar to investors, and legal precedence has been established for every possible sticky situation.” Henson et al., *supra* note 187, at 4.

longitudinal frame for thinking beyond the need to match immediate client needs with extant legal forms,²⁷⁹ and allows for consideration of how privately initiated communal land projects transition from idiosyncratic experiments into a more widely accessible social options.

B. Participatory Norms and Communitarian Land Holding

1. Community Through the Corporate Form

While ICs may represent a more thorough-going attempt to communalize land, there have been numerous less-extensive communitarian attempts to overcome the limits of individual land holding.²⁸⁰ As with many urban locales around the world,²⁸¹ in the early twentieth century cities in the United States began to confront problems reconciling the norm of home ownership with rapidly increasing market values.²⁸²

As traditionally one of the more dense and expensive American cities, New York City (NYC) has in microcosm played out many of the struggles in managing the housing needs of a diverse working population.²⁸³ And in NYC one can find the first attempts to grapple with this problem by introducing communitarian elements through the creation of housing cooperatives.²⁸⁴ Cooperatives operate at the intersection of individual and communal land holding by granting an individual within the cooperative the right to live in a designated space, yet where the entire property is held collectively by a single corporate entity generally governed by its occupants.²⁸⁵ The earliest cooperatives in NYC were formed in the 1920s by individuals who, like ICs, already had some pre-existing social bond, in this case based on ethnicity or through membership in a labor union.²⁸⁶

Housing cooperatives were a mix of private and public initiatives which were ultimately enabled by municipal legislation.²⁸⁷ Other attempts to form non-profit housing cooperatives as part of public policy included Arthur Morgan's efforts to provide cooperative housing for post-war veterans and

²⁷⁹ An admirably comprehensive collection of co-housing legal advice can be found in ORSI, *supra* note 86, at 337.

²⁸⁰ Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 791 (2009).

²⁸¹ MULTI-OWNED HOUSING: LAW, POWER AND PRACTICE (Sarah Blandy et al. eds., 2010).

²⁸² Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEGAL STUD. 25, 27 (1991).

²⁸³ Gerald W. Sazama, *Lessons from the History of Affordable Housing Cooperative in the United States: A Case Study in American Affordable Housing Policy*, 59 AMER. J. ECON. & SOC. 572, 577–78 (2000).

²⁸⁴ *Id.* at 578.

²⁸⁵ Julia D. Lawton, *Unraveling the Legal Hybrid of Housing Cooperatives*, 83 UMKC L. REV. 117, 118 (2014).

²⁸⁶ Sazama, *supra* note 283, at 577–78. At the same time, these efforts were often stymied when they attempted to include diverse ethnic groups. *Id.* at 578.

²⁸⁷ *Id.* at 595–96.

workers assigned to dam projects for the Tennessee Valley Association.²⁸⁸ The fate of cooperatives as a tool for public housing would generally be one of general decline after the Great Depression following the federal Housing Act of 1937,²⁸⁹ which shifted housing policy towards tax incentives and subsidies within an individual market frame.²⁹⁰ Yet, cooperatives persisted in many urban locales, and their proponents would effectively lobby for their accommodation in municipal and federal housing legislation.²⁹¹

Like ICs today, these early cooperatives took advantage of the corporate form by allocating voting rights among shareholders, following much of the Progressive inspirations of American corporate law as a pro-cooperative undertaking.²⁹² Early scholarship on cooperatives advised the use of the corporation as allowing for both limited liability and control,²⁹³ and made arguments about how cooperatives should benefit from homestead and other legal protections while avoiding some of the growing scrutiny of investment securities.²⁹⁴ At that time, the hybrid nature of cooperatives generally presented the issue of whether they constituted true individual ownership, and how the rights of members were balanced against the agency of the cooperative's collective decisions.²⁹⁵

Yet, the utility of cooperatives as a public housing solution was not simply an issue of government support, but also of the tension generated by their denser web of communal governance. Over time, cooperatives generally became associated with wealthier citizens who, while unable to buy large properties in cities like NYC, nevertheless had the resources to lobby to protect the legal status of coops, litigate against dissident members, and to proactively engage in their management.²⁹⁶ While many would

²⁸⁸ AARON PURCELL, ARTHUR MOGAN: A PROGRESSIVE VISION FOR AMERICAN REFORM 162–66 (2014).

²⁸⁹ 42 U.S.C. §§ 1437–1437bbb-9 (2012).

²⁹⁰ Robert Quercia & George Galster, *The Challenges Facing Public Housing Authorities in a Brave New World*, 8 HOUS. POL'Y DEBATE 535, 537 (1997). For two recent overviews of subsidies for homeownership purchases and property development, respectively, see Matthew Rossman, *In Search of Smarter Homeowner Subsidies*, 40 U. HAW. L. REV. 203 (2017), and Brandon Weiss, *Locating Affordable Housing: The Legal System's Misallocation of Subsidized Housing Incentives*, 70 HASTINGS L.J. 214 (2018).

²⁹¹ ISRAEL PACKEL, *THE LAW OF COOPERATIVES* (1956).

²⁹² Progressive thinker Nicholas Butler is often cited for his claim that the LLC is “the greatest single discovery of modern times.” NICHOLAS MURRAY BUTLER, *WHY SHOULD WE CHANGE OUR FORM OF GOVERNMENT?* 82 (1912). Such citation is generally made by proponents who would find Butler's reasons for this claim quite the opposite of market triumphalism: “[T]he era of unrestricted individual competition has gone forever. . . . taken up into a new and larger principle of cooperation.” *Id.* at 81.

²⁹³ Philip N. Smith, *A Survey Of The Legal Aspects Of Cooperative Apartment Ownership*, 16 U. MIAMI L. REV. 305, 305 (1961).

²⁹⁴ Walter W. Miller, Jr., *Cooperative Apartments: Real Estate or Securities?*, 45 B.U. L. REV. 465, 481 (1965); Carolyn S. Bratt, *Cooperative Apartments: A Survey of Legal Treatment and an Argument for Homestead Protection*, 1978 U. ILL. L.F. 759, 761–62 (1978).

²⁹⁵ Robert Marks & Kenneth J. Marks, *Coercive Aspects of Housing Cooperatives*, 42 ILL. L. REV. 728, 735 (1948); Lawton, *supra* note 285, at 117–18.

²⁹⁶ Lawton, *supra* note 285, at 117–18.

continue to champion cooperatives as a neglected public housing option,²⁹⁷ the problem remained that cooperatives required equity buy-ins and many low-income residents did not have the time or resources to similarly lobby for,²⁹⁸ and govern around,²⁹⁹ the complex line between communal and individual ownership. The spread of cooperatives in other high-density cities over time does present a data point about how a primarily private legal innovation can acquire enough social recognition to modify local property law to accommodate its distinctive structure.

This history of American cooperatives exists then in contrast to the primarily European example where cooperatives were advanced as a major tool of housing policy.³⁰⁰ Starting in the early twentieth century, most urbanizing countries in Europe developed comparatively high levels of housing cooperatives, with the highest levels in Nordic countries.³⁰¹ The smaller scale of these countries and much weaker forms of land use federalism also allowed the easier transmission of knowledge about new property forms, and the growth of public and private housing associations which promoted their formation and operation.³⁰² In fact, the European market for cooperatives is strong enough today that there are private consulting firms which actively compete to sell their services to cooperatives.³⁰³ Yet, the literature on European housing cooperatives in many ways signals the same limitations of dense governance requirements hampering their large scale replication and making governance demands that often outstrip their occupants' resources.³⁰⁴ Even the most successful cooperative movements in Europe have struggled to expand without themselves becoming landlords, and, notably, the more extensive they become they less democratic they become in operation.³⁰⁵

This tension between intensive governance and replicability has generally stymied attempts to form housing cooperatives in developing countries where citizens again have fewer resources to devote to collective

²⁹⁷ Michael Diamond, *Rehabilitation of Low-Income Housing through Cooperative Conversion by Tenants*, 25 AM. U. L. REV. 285, 285–86 (1976); Terry Lewis et al., *Bringing Residents to the Table: the Feasibility of Co-Operative Governance in Rural Low Income Housing in the USA*, INT'L J. CO-OPERATIVE MGMT., Sept. 2013, at 46–47.

²⁹⁸ Sazama, *supra* note 283, at 575; Arruñada & Lehavi, *supra* note 82, at 9–11.

²⁹⁹ DEWEY BANDY, CHARACTERISTICS AND OPERATIONAL PERFORMANCE OF CALIFORNIA'S PERMANENT HOUSING COOPERATIVES 2–3 (1993); Matthew Thompson, *Between Boundaries*, 47 ANTIPODE 1021, 1040 (2015).

³⁰⁰ Sukumar Ganapati, *Enabling Housing Cooperatives: Policy Lessons from Sweden, India and the United States*, 34 INT'L J. URB. & REGIONAL RES. 365, 366 (2010).

³⁰¹ *Id.* at 369.

³⁰² *Id.* at 377–78.

³⁰³ See Åshild Hauge et al., *How to Maximize the Changes of Sustainable Renovation in Housing Cooperatives*, 58 ENERGY PROCEDIA 193, 193–95 (2014).

³⁰⁴ *Id.* at 194.

³⁰⁵ Hugo Priemus, *The Future of Social Housing: The Dutch Case*, INT'L J. CO-OPERATIVE MGMT., Sept. 2013, at 13, 16–17; Nele Aernouts & Michael Ryckewaert, *Reconceptualizing the 'Publicness' of Public Housing: The Case of Brussels*, 3 SOC. INCLUSION, no. 2, 2010, at 17, 27.

governance.³⁰⁶ Several attempts have been made to expand cooperatives as part of development policy in Africa, which flounder when extensive foreign aid wanes and they succumb to a lack of local governmental support for legal adaptations or insufficient mechanisms for all but very wealthy citizens to engage in equity buy-ins.³⁰⁷

In contrast to this trajectory for cooperatives, the more successful American private initiative in property that has spread globally is that of the condominium.³⁰⁸ Originating out of Puerto Rico during an urban housing squeeze in the late 1950s,³⁰⁹ condominiums represented a less governance intensive solution to high land prices whereby individuals could own their individual apartments but with only an undivided interest in collective common areas.³¹⁰ The formal distinction between owning a share in a cooperative corporation and participation in the homeowners association which governs condominium common areas became quite significant in practice³¹¹

Legally, formal individual ownership had made the legal adaptations required for condominiums to be less extensive, especially in regards to taxation.³¹² Condominiums are also more freely bought and sold without the same processes of cooperative approval, and generally make collective participation purely optional for most residents.³¹³ This does not preclude conflicts between condominium owners and their associations, but it often migrates conflict resolution into the judicial realm.³¹⁴

As with housing cooperatives, condominiums have not served as effective tools for addressing public concerns about housing. Condominiums have primarily become an enabling property form for middle-class Americans—and again the history of condominiums in NYC has presaged developments elsewhere.³¹⁵ While cooperatives have maintained a foothold in NYC, condominiums have spread throughout the United States, and now

³⁰⁶ See A.T. Adeboyejo & J.A. Oderinde, *Housing Cooperative Societies and Sustainable Housing Delivery in Oyo State, Nigeria*, INT'L J. CO-OPERATIVE MGMT., Sept. 2013, at 61, 73.

³⁰⁷ See Nguluma Huba, *Access to Housing Through Cooperatives: Potentials and Challenges from Tanzania*, INT'L J. HUM. SOC. SCI. & EDUC., Sept. 2016, 100, 101.

³⁰⁸ See William K. Kerr, *Condominium: Statutory Implementation*, 38 ST. JOHN'S L. REV. 1, 3–6 (1963).

³⁰⁹ *Id.* at 1–2.

³¹⁰ John E. Cribbet, *Condominium: Home Ownership for Megalopolis*, 61 MICH. L. REV. 1207, 1208–09 (1963).

³¹¹ *Id.* at 1237–38.

³¹² Edward M. Ross, *Condominium in California: The Verge of an Era*, 36 S. CAL. L. REV. 351, 356–57 (1963).

³¹³ See Herbert J. Friedman & James K. Herbert, *Community Apartments: Condominium or Stock Cooperative*, 50 CAL. L. REV. 299, 299–301 (1962).

³¹⁴ *Id.* at 309–10.

³¹⁵ David A. Fine, *Condominium Conversion Problem: Causes and Solutions*, 1980 DUKE L.J. 306, 315–24 (1980); Kathleen Nesi, *Condominium Conversations: Balancing Tenants' Rights and Property Owners' Interests*, 27 WAYNE L. REV. 349, 352–53 (1980); Richard C. Eisen, *The Rental Housing Conversion and Sale Act: A Practitioner's Roadmap to Tenant Ownership*, 2 D.C. L. REV. 91, 110 (1993).

across the globe.³¹⁶ Henry Hansmann has argued that this rapid spread is exactly a result of the “relative transactional efficiency” of condominiums as the form of communal property which legally and practically deviates the least from individual property norms.³¹⁷ Indeed, developers have successfully lobbied to pass enabling statutes for condominiums in both common and civil law countries, with the best example of this rapid spread is in Canada.³¹⁸ Here condominiums followed a similar trajectory of urban densification coinciding with a shift in housing policy from public housing toward decentralization and tax subsidies.³¹⁹ The same pattern repeats itself where provincial Canadian statutes promoting condominiums are cast in pro-ownership terms that will lessen issues of growing inequality and exclusion in property ownership.³²⁰

Often grouped alongside cooperatives and condominiums as “common interest communities” (CICs), “planned communities” are a further watering down of communal ownership.³²¹ These communities involve not apartments but individual homes mediated by an association which owns some amount of interstitial common space or facilities, but in which the home owners have no legal interest.³²² Through deed covenants homeowners are given voting rights in the association and cede authority to the association over specific land use arenas.³²³ The intensity of this ceded authority can vary dramatically, but generally involves some baseline restrictions on the aesthetic maintenance of associated properties.³²⁴ Popularly expressed through the image of the “gated community,”³²⁵ planned communities are generally aimed at economically advantaged purchasers who seek to cluster around other economically, or racially,³²⁶ similar owners.³²⁷ This exclusionary intent without actual communal legal form has led in practice to a gap between the expectations of planned community owners and judges over their ability to fully immunize themselves from public claims on their land use.³²⁸ Nonetheless, like the condominium, this form has spread globally

³¹⁶ See, e.g., Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEGAL STUD. 25, 28 (1991).

³¹⁷ *Id.* at 25.

³¹⁸ Douglas C. Harris, *Condominium and the City: The Rise of the Property in Vancouver*, 26 L. & SOC. INQUIRY 694, 695 (2011).

³¹⁹ *Id.* at 706–08.

³²⁰ Douglas C. Harris, *Anti-Social Behavior, Expulsion from Condominium and the Reconstruction of Ownership*, 2016 OSGOODE HALL L.J. 53, 61–63 (2016).

³²¹ Mark Fenster, *Community by Covenant, Process, and Design: Cohousing and the Contemporary Common Interest Community*, 15 J. LAND USE & ENVTL. L. 3, 4 (1999).

³²² *Id.* at 10–12.

³²³ See *id.* at 19.

³²⁴ See Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 438, 441 (2006).

³²⁵ Ron Levi, Note, *Gated Communities in Law's Gaze: Material Forms and the Production of a Social Body in Legal Adjudication*, 34 L. & SOC. INQUIRY, 635, 636 (2009).

³²⁶ Strahilevitz, *supra* note 324, at 439–40.

³²⁷ Ross Thomas, *Ungating Suburbia: Property Rights, Political Participation, and Common Interest Communities*, 22 CORNELL J.L. & PUB. POL'Y 205, 208–11 (2012).

³²⁸ Levi, *supra* note 325, at 637–39.

along the vectors of developer interest and high-income residential lobbying.³²⁹

The lessons of common interest communities would seem to simply reiterate in less intense form the problems faced by ICs—their distance from individual property ownership generates the need for substantial lobbying efforts to produce legal adaptations, and that their governance intensity makes them attractive only to a small subset of the population. Moreover, the general literature on CICs points to how their exclusionary motivations in practice deconstruct communities,³³⁰ and are part of a general breakdown of social capital formation in modern society.³³¹ Some proponents of CICs have even cautioned that the growth of equal protection principles and antidiscrimination statutes may undermine their future growth, especially those CICs that effectively organize themselves through covenantal restrictions.³³²

In fact, the development of CICs as methods of exclusion rather than community building has left those seeking communitarian norms to sometimes altogether abandon creating new legal forms and instead move to explore neighborhood design practices generally lumped under the rubric of “cohousing.”³³³ Many co-housing adherents borrow the language of “intentional living” but do so completely within the frame of individual home ownership.³³⁴ Inspired in large part from developments in Denmark, a co-housing movement has spread internationally that serves as a forum of best practices to voluntarily simulate community participation.³³⁵ Part of this European genesis derives from the very same dissatisfactions with promoting community solely through modification of ownership forms, and a growing lack of public support for cooperative formation.³³⁶ Thus, cohousing has become a brand of sort in urban developments across Europe, and now in the United States and other higher-income municipalities.³³⁷

The voluntary nature of cohousing can take the form of buying a property under traditional co-ownership patterns and then laying out purely voluntary rules for group decision making. But it also means that there is an absence of any shared governance hierarchy, and it offers fully unrestricted

³²⁹ Thomas, *supra* note 327, at 208–09.

³³⁰ See Georgette Chapman Phillips, *Boundaries of Exclusion*, 72 MO. L. REV. 1287, 1293–94 (2007).

³³¹ Paula A. Franzese & Steven Siegel, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 MO. L. REV. 1111, 1112, 1137–38 (2007). *Contra* Patrick J. Rohan, *Preparing Community Associations for the Twenty-First Century*, 73 ST. JOHN'S L. REV. 3, 5–9 (1999).

³³² Rohan, *supra* note 331, at 10–12, 34–36.

³³³ Helen Jarvis, *Towards A Deeper Understanding of the Social Architecture of Co-Housing: Evidence From the UK, USA and Australia*, 8 URB. RES. & PRAC. 93, 95 (2015).

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ See Jo Williams, *Designing Neighborhoods for Social Interaction: The Case of Cohousing*, 10 J. URB. DESIGN 195, 201–02 (2005).

³³⁷ *Id.*

exit by owners.³³⁸ These developments often invoke many of the same communal idealization as IC proponents, along with the aspiration that they can generate social network effects and a sense of community through purely voluntary design features and an adherence to shared ideology.³³⁹

While cohousers who seek to share individual units take on a more spatially intense version of this ethos, their intensity is matched by similarly transitory and short-lived patterns of participation as one finds in collective land holding ICs.³⁴⁰ And yet again, studies of cohousing also point to their highly skewed elite and homogenous demographics,³⁴¹ leading to their characterization as just another form of exclusionary gentrification³⁴² and a dominance of collective decision making by participants with sufficient leisure time.³⁴³ Here again, critiques of cohousing has not led to an abandonment of these communitarian idealizations, but laments about the lack of individual willingness to internalize communitarian norms.³⁴⁴

2. *The Corporatization of Community Land Trusts*

The widespread use of the corporate form to accommodate communitarian and individual norms reflects its general success as a once novel legal form that now pervades modern American society.³⁴⁵ The advice of most ICs legal advisers to adopt the corporate form reflects this flexibility.³⁴⁶ Embedded in this advice, and also embedded in the early literature on housing cooperatives, is a citation and then dismissal of any consideration of the traditional IC legal form, the trust. Of much longer legal

³³⁸ KATHRYN MCCAMANT & CHARLES DURRETT, COHOUSING: A CONTEMPORARY APPROACH TO HOUSING OURSELVES 17–19 (1994).

³³⁹ CHRIS SCOTTHANSON & KELLY SCOTTHANSON, THE COHOUSING HANDBOOK 3–5 (2005); Maria Laura Ruiu, *The Social Capital of Cohousing Communities*, 50 SOC. 400, 403–05 (2016).

³⁴⁰ One notable aspect of this literature is the parallels between group breakdown around communal labor and the gendered nature of communal housework in informal cohousing. Dick Vestrbro & Liisa Horelli, *Design for Gender Equality: The History of Co-Housing Ideas and Realities*, 38 BUILT ENV'T 315, 333 (2012).

³⁴¹ Lisa Dawn Poley, *Community and the Habits of Democratic Citizenship: An Investigation into Civic Engagement, Social Capital and Deocratic Capacity-Building in U.S. Cohousing Neighborhoods* 57–62 (Sept. 6, 2007) (unpublished Ph.D. dissertation, Virginia Polytechnic University), <https://perma.cc/9GUM-M4KF>.

³⁴² Francesco Chiodelli & Valeria Baglione, *Living Together Privately: For a Cautious Reading of Cohousing*, 7 URB. RES. & PRAC. 20, 26–27 (2013). *But see* Helen Jarvis & Alastair Bonnett, *Progressive Nostalgia in Novel Living Arrangements*, 50 URB. STUD. 2349, 2352–53 (2013) (discussing the changes to the co-housing movement as an incorporation of newer and modern cultural in an effort to reclaim some of the nostalgia of village living).

³⁴³ Tom Moore & Kim McKee, *Empowering Local Communities?: An International Review of Community Land Trusts*, 27 HOUSING STUD. 280, 287 (2012).

³⁴⁴ Susannah Bunce, *Pursuing Urban Commons: Politics and Alliances in Community Land Trust Activism in East London*, 48 ANTIPODE 134, 146–49 (2016).

³⁴⁵ Some have gone as far as to claim that changes to rules about corporate governance can provide the levers to solve most every pressing social ill (though notably not for inequality in land). Lynn Stout & Sergio Gramitto, *Corporate Governance as Privately-Ordered Public Policy: A Proposal*, 41 SEATTLE U. L. REV. 551, 552–54 (2018). *Contra* Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 359, 367–68 (2016).

³⁴⁶ See Henson et al., *supra* note 187.

lineage, at least in the common law, the trust is often associated with values distasteful to social radicals, primarily the aristocratic reproduction of inherited wealth.³⁴⁷ For modern IC adherents, the trust is now decisively seen as orthogonal to their concerns as it does not allow for the democratic participation enabled by corporate shareholding.

As noted earlier, this was not always so.³⁴⁸ The early history of ICs before the rapid diffusion of the corporate form commonly involved trusts.³⁴⁹ Religious communities which did not prioritize democratic participation but rather some form of authoritative hierarchy often held their land in trust with religious leaders as trustees.³⁵⁰ For secular ICs, the communitarian aspect of endeavors like Robert Owen's New Harmony was undergirded by the traditional ownership of the land by a single individual.³⁵¹ However, the ICs inspired by Georgist intellectual ideas used trusts to specifically take land out of private markets.³⁵²

Under the traditional Georgist model, land is either donated or bought from private owners and then placed in a trust.³⁵³ The beneficiaries of the trust are defined as those making use of the land, who are generally assigned leases.³⁵⁴ The leases can involve land improvements, but generally improvements are not owned by the trust itself.³⁵⁵ Lessees pay a fee that is used to maintain the underlying land.³⁵⁶ While not always maintained in practice, this distinction between land and improvements was central to George's promotion of the land value tax.³⁵⁷ The longest lasting Georgist institution is the School of Living in Julian, Pennsylvania, which still operates under these principles.³⁵⁸

Trusts as such can have multiple trustees, and the designation of trustees can have more complex designation procedures.³⁵⁹ The evolution of complex and charitable trusts has advanced over the twentieth century, if not with the same energy of the corporate form.³⁶⁰ Most Georgists restricted the influence of land occupants on trustee selection to intentionally limit the possibility that the trust would be dissolved at any point, or that its

³⁴⁷ See Debra Cassens Weiss, *States' Repeal of Rule Against Perpetuities Creates US Aristocracy, Law Prof Says*, ABA J. (July 12, 2010), <https://perma.cc/2BB6-V6X6>.

³⁴⁸ See discussion *supra* Part I.

³⁴⁹ INST. FOR CMTY. ECON., *supra* note 88, at 18.

³⁵⁰ Lawrence J. McCrank, *Religious Orders and Monastic Communalism in America*, in AMERICA'S COMMUNAL UTOPIAS 204 (Donald Pitzer ed., 1997).

³⁵¹ INST. FOR CMTY. ECON., *supra* note 88, at 18.

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.* A variety of other "schools" operate under different models in urban contexts. For example, the Henry George School of San Francisco. See HENRY GEORGE SCH. S.F., <https://perma.cc/D2JQ-NRXU> (last visited May 9, 2019).

³⁵⁹ Rachel Emma Silverman, *How Many Trustees Do You Need?*, WALL STREET J. (July 12, 2007), <https://perma.cc/8GKU-DPUL>.

³⁶⁰ *Id.*

underlying principles would be altered following large upswings in market valuations.³⁶¹ For Georgist enterprises, maintaining land outside of the market required a form of longitudinal self-discipline which was largely absent from other secular ICs which sought simply to opt-out of mainstream society.

The devolution of the primacy of trusts, even by those self-identified as Georgists, was driven by many of the contemporary concerns regarding elitism in social movement leadership. For example, the early strand of ICs which took racial justice as a core motivation was generally within the Georgist movement.³⁶² By the mid-twentieth century, many Georgists had witnessed a decline in popular sentiment regarding George's idea, but had also seen communities in and outside of the U.S. collapse when held by single individuals or governed by direct democracy.³⁶³ Yet, concerns about white paternalism and black self-empowerment led influential land trust proponent Robert Swann to add community representation within the "community land trust" (CLT) model, a move that also shifted it towards incorporation even when retaining the trust label.³⁶⁴

This concern with community participation eventually led most all endeavors titled "community land trusts" to follow the general trend of forming as non-profit corporations which held the land, rather than a trust.³⁶⁵ The first land trust in this model is generally attributed to the work of Slater King and his brother who in 1969 drafted the corporate charter for New Communities in southwest Georgia as a vehicle for landless Southern blacks to live and generate collective wealth.³⁶⁶ It was this version of the CLT that Swann then popularized, and which inspired other efforts to replicate the model in communities across the United States.³⁶⁷ The language of "trust" and "trustee" was maintained in large part to retain the image of duty and obligation inherent in earlier Georgist endeavors.³⁶⁸ Yet, in contrast to even housing cooperatives, the shift to use of the corporate form did not lead to

³⁶¹ Int'l Indep. Inst., *FROM The Community Land Trust: A Guide to a New Model for Land Tenure in America*, in THE COMMUNITY LAND TRUST READER 113, 223, 225 (John Emmeus Davis ed., 2010).

³⁶² James J. Kelly, Jr., *Land Trusts That Conserve Communities*, 59 DEPAUL L. REV. 69, 76, 77 (2009).

³⁶³ The trajectory of the Gramdan movement in India was a well-known example where donated land was placed into trusts after many failed communal land projects which used legal forms without strong intra-group disciplinary mechanism. Sarat Parida, *Twenty-Five Years of Bhoodan Movement in Orissa (1951-76)—A Review*, ORISSA REV., May-June 2010, at 70, 70-72. Learning of this experience solidified the sentiments of many Georgists about the necessary use of trusts in such scenarios.

³⁶⁴ Swann was a disciple of civil-rights leader Bayard Rustin, whose brand of socialist-inspired black activism was largely marginalized during the NAACP's embrace of liberalism signaled by the removal of W.E. Du Bois as its President in 1948. HORNE, *supra* note 18, at 100, 104; Davis, *supra* note 121, at 10 (referencing the mentor relationship between Swann and Rustin).

³⁶⁵ *Id.* at 15-16, 18-19.

³⁶⁶ The not only legal but also racial hostility these communities faced led them to follow the general trend of short lifespans for incorporated "land trusts." *Id.* at 16.

³⁶⁷ *Id.* at 15, 16, 18, 19.

³⁶⁸ Int'l Indep. Inst., *supra* note 361, at 221.

widespread dissemination of the land trust model, as its combination of governance intensity, social mission and uncertain legal status stood in stark contrast to the less ambitious aims of the condominium and other common interest communities.

Interest in CLTs in this form has been reignited in recent years by those who see them as a potential public housing solution.³⁶⁹ In brief, faith that a variety of demand-side tax incentives and supply-side subsidies can bridge growing housing inequity has progressively faltered in recent decades.³⁷⁰ In contrast, the symbol for the renewed promise of CLTs is the Champlain Housing Trust.³⁷¹ With antecedent organizations founded in the early 1980s in Burlington, Vermont, Champlain has achieved some of the original Georgist ambitions while managing over \$40,000,000 in assets taken out of private land markets.³⁷² The Trust was not privately initiated, but formed through public subsidy—notable also for the involvement of now-national political figure Bernie Sanders who was instrumental in including CLT provisions in the 1992 Housing and Community Development Act.³⁷³ The land that Champlain, as a non-profit corporation, holds was purchased using public funds, and the CLT creates a shared-equity arrangement with lease holders who generally rely on wage-backed mortgages to build their homes.³⁷⁴ As a public housing policy, the Trust has been able to successfully manage the deferred maintenance issues common to state-run housing projects, and insulated homeowners from the acute risks of housing market shocks.³⁷⁵ The tradeoff is that participation is income-contingent, and lease holders accept a restricted sales price based on formulas meant to recapture land value increases for the Trust. In the case that a homeowner falls behind on their mortgage, the Trust also retains a first right to cure the mortgage and repurchase their improvements.³⁷⁶

The governance of CLTs today generally follows the original model advanced by Swann, with 1/3 of the board members drawn from lease holders, 1/3 from non-leasing community members in the surrounding areas, and 1/3 otherwise designated as representatives of the public interest.³⁷⁷ Yet, a recent survey has shown that a majority of CLTs operate without community representation, and 25% operate without any leaseholder representation.³⁷⁸

³⁶⁹ INST. FOR CMTY. ECON., *supra* note 88, at 18.

³⁷⁰ See Helen S. Cohen, *Diminishing Returns: A Critical Look at Subsidy Recapture*, in THE COMMUNITY LAND TRUST READER 320, 323 (John Emmeus Davis ed., 2010).

³⁷¹ See Daniel Fireside, *Community Land Trust Keeps Prices Affordable—For Now and Forever*, in THE COMMUNITY LAND TRUST READER 342 (John Emmeus Davis ed., 2010).

³⁷² CHAMPLAIN HOUSING TRUST, CHT ANNUAL REPORT 2017 19 (2017).

³⁷³ See Fireside, *supra* note 371, at 342.

³⁷⁴ See *id.* at 342–43.

³⁷⁵ See *id.* at 342, 344.

³⁷⁶ See *id.* at 343.

³⁷⁷ James J. Kelly Jr., *Land Trusts That Conserve Communities*, 59 DEPAUL L. REV. 69, 86 (2009).

³⁷⁸ James DeFilippis et al., *W(h)ither the Community in Community Land Trusts*, 40 J. URB. AFF. 755, 759 (2017); see also EMILY THADEN, RESULTS OF THE 2011 COMPREHENSIVE CLT SURVEY (2012).

This renewed interest in CLTs has led to at least one attempt to create parallel endeavors in the majority of U.S. states.³⁷⁹ Surveys of CLT performance have primarily focused on large municipally sponsored efforts which have been shown to provide equity building options for lower-income citizens.³⁸⁰ Moreover, broader studies have confirmed the counter-cyclical effect of CLTs whereby leaseholders were significantly less likely to face foreclosure in the aftermath of the 2008 financial crisis.³⁸¹ CLTs still face significant legal uncertainty, in part because of a lack of national assessment standards for their property tax liabilities,³⁸² and unresolved issues about potential challenges to their covenantal restrictions as violating either the rule against perpetuities or the general enforceability of its specific restraints on alienation.³⁸³ Similarly, attempts to build CIC properties on CLT land has been used to amplify their public housing aims, especially the use of limited equity cooperatives,³⁸⁴ though building such properties on leased land remains legally unsure, if not illegal, in some areas.³⁸⁵

Many have challenged the pro-social potential of modern CLTs, especially as a majority of local social services are funded through property taxes.³⁸⁶ Many less participatory CLTs have arisen in areas with much higher property values than Vermont, where the CLT only acts as a third-party enforcer of deed covenants which mark a commitment to resell at a reduced rate to a low-income buyer.³⁸⁷ Other CLTs have introduced waivers of their resale restrictions in instances of foreclosure, moving some to argue that

³⁷⁹ Catherine L. Hardy, *Community Land Trusts for Affordable Housing: A Case Study of the Burlington Community Land Trust* 21–27 (Sept. 14, 1992) (unpublished M.A. thesis, Carleton University), <https://perma.cc/HL3Z-LXNZ>.

³⁸⁰ KENNETH TEMKIN ET AL., *BALANCING AFFORDABILITY AND OPPORTUNITY: AN EVALUATION OF AFFORDABLE HOMEOWNERSHIP PROGRAMS WITH LONG-TERM AFFORDABILITY CONTROLS* 2–3, 5–6, 32 (2010).

³⁸¹ See Fireside, *supra* note 371, at 344.

³⁸² Alese Bagdol, *Property Taxes and Community Land Trusts: A Middle Ground*, 91 TEX. L. REV. 939, 939–40, 944, 946–48, 950, 956, 959 (2013). There is also some variation in whether CLTs pass through property taxes to lease holders.

³⁸³ Christopher Seeger, *The Fixed-Price Preemptive Right in the Community Land Trust Lease: A Valid Response to the Housing Crisis or an Invalid Restraint on Alienation*, 11 CARDOZO L. REV. 471, 499–500 (1989).

³⁸⁴ See generally David M. Abromowitz, *An Essay on Community Land Trusts: Towards Permanently Affordable Housing*, 61 MISS. L.J. 663 (1991); MEAGAN EHLENZ, *LIMITED EQUITY COOPS BY CLTs* (2013). For a general discussion on LECs, see Kennedy, *supra* note 266; Julie D. Lawton, *Limited Equity Cooperatives: The Non-Economic Value of Homeownership*, 43 WASH. U. J.L. & POL'Y 187 (2013). *Contra* Deborah Kenn, *Paradise Unfound: The American Dream of Housing Justice for All*, 5 B.U. PUB. INT. L.J. 69 (1995); Kim Skobba & Ann Ziebarth, *Empowerment in Leasehold Cooperatives and Its Influence on the Member/Management Relationship*, 29 HOUSING & SOC'Y 13 (2001).

³⁸⁵ See generally James J. Kelly, Jr., *Sustaining Neighborhoods of Choice: From Land Bank(ing) to Land Trust(ing)*, 54 WASHBURN L.J. 613 (2015).

³⁸⁶ Bagdol, *supra* note 382, at 953.

³⁸⁷ The Chicago Land Trust exemplifies this approach. See generally Matthew Towey, *The Land Trust Without the Land: The Unusual Structure of the Chicago Community Land Trust*, 18 J. AFFORDABLE HOUSING 335 (2009). Notably, only Massachusetts and Vermont have statutes explicitly authorizing deed covenants with affordability clauses.

they will simply revert to market-rate housing following any future financial crisis.³⁸⁸

Many of these modifications reflect that the move to reimagining CLTs as a public housing solution has shifted start-up financing to public sources.³⁸⁹ CLTs, like some European cooperatives, have looked to generate greater income by expanding into retail enterprises or by directly engaging in market-rate developments and rentals using third-party property managers.³⁹⁰ CLT board members have attempted to moderate some of these developments by endorsing pro-tenants policies such as lease-to-purchase programs or by lobbying to have rental payments reported to credit agencies.³⁹¹

Local municipalities have often traded their support for full control over CLT operations, and even approval of new tenants.³⁹² As with housing projects in the past, such participation raises the specter of high profile creation of CLT projects, but little long-term effort to maintain their effective operations. The turn to municipal partnership introduces time-horizons into CLT operation that, while not of the market variety, induce significant uncertainty about the priorities of their directors. This turn to municipal partnership is often cited by traditional Georgists as just another dilution of the original aims of the land trust movement.³⁹³

For example, while the legacy of land trusts' earlier ties to the civil rights movements still exists in Georgia, attempts to develop CLT projects in Atlanta in 2010 and the municipal transformation of the Athens Land Trust in 2004 led to significant challenges.³⁹⁴ These challenges included maintaining active community engagement and a general social justice orientation, given local political concerns.³⁹⁵

Yet, for all these difficulties, modern CLTs have spread more rapidly in past decades than traditional trust-based communities in any time outside of the turn of the twentieth century.³⁹⁶ Key to this success has been the build-up of national and regional networks to share technical advice, and even startup capital.³⁹⁷ Various guidebooks are circulated by pro-CLT interests,

³⁸⁸ See generally Sarah Ilene Stein, *Wake up Fannie, I Think I Got Something to Say to You: Financing Community Land Trust Homebuyers Without Stripped Affordability Provisions*, 60 EMORY L.J. 209 (2010) (giving examples of other CLT's taking the referenced course of action).

³⁸⁹ John Emmeus Davis and Rick Jacobus, *FROM The City-CLT Partnership Municipal Support for Community Land Trusts*, in THE COMMUNITY LAND TRUST READER 535 (John Emmeus Davis ed., 2010).

³⁹⁰ Some CLTs have co-sponsored consumer or producer co-operatives on their land, but this remains a minority phenomenon. Kimberly Zeuli & Kamie Radel, *Cooperatives as a Community Development Strategy*, 35 J. REGIONAL ANALYSIS & POL'Y 43, 50 (2005).

³⁹¹ *Id.* at 47–48.

³⁹² See, e.g., *The City-CLT Partnership*, LINCOLN INST. LAND POL'Y, <https://perma.cc/GKY9-5C9K> (last visited May 9, 2019).

³⁹³ Davis, *supra* note 121, at 38.

³⁹⁴ JEFFREY YUEN & GREG ROSENBERG, BEYOND HOUSING: NATIONAL CLT NETWORK NON-RESIDENTIAL PROJECT DIRECTORY (Apr. 2013).

³⁹⁵ EMILY THADEN, RESULTS OF THE 2011 COMPREHENSIVE CLT SURVEY 18 (2012).

³⁹⁶ John Emmeus Davis, *Common Ground*, 51 U.S.F. L. REV. 1, 50 (2016).

³⁹⁷ See Davis, *supra* note 121, at 44 n.57.

including the oft-cited Community Land Trust Handbook first produced in 1982 by the Institute for Community Economics (ICE).³⁹⁸ The Institute is an example of the legacy of Georgist groups' attempts to create a national network for the promotion of land trusts, and ICE has sponsored journals and loan funds of varying longevity over time.³⁹⁹ The Institute has itself been reorganized multiple times, most recently during its recent collapse in 2003.⁴⁰⁰ Growing out of the Champlain House Trust success, Burlington Associates is a separate non-profit which has worked to advance what it calls the "central-server" model of regional CLT advocacy groups.⁴⁰¹ Yet, most attempts to create national CLT networks have led to patterns similar to ICE's recurrent reformulation.⁴⁰²

Such networking attempts, while often more professionalized and better capitalized than their IC counterparts, have struggled with the same localist tendency of CLT participants which continue to valorize local experience and have progressively thinned out their requirements for membership to include general social progressivism but no particular ideology regarding land.⁴⁰³ The involvement of local governments has led to more consolidated resistance to outside partners,⁴⁰⁴ and many more idealistic CLT proponents have grown frustrated that the compromised ideology of modern CLTs has left them incapable of creating any type of social movement around land.⁴⁰⁵

The international experience of modern CLTs has replayed this three-pronged pattern of shifting away from trusts to incorporation, a persistent lack of replication, and a subsequent degeneration of common purpose. The Canadian story of CLTs follows the same pattern as in the United States, where non-profit corporations were sponsored by municipalities in response to a general devolution of housing policy.⁴⁰⁶ Some Canadian CLTs, such as

³⁹⁸ See generally INST. FOR CMTY. ECON., *supra* note 88.

³⁹⁹ See Davis, *supra* note 121, at 29.

⁴⁰⁰ *Id.* at 31.

⁴⁰¹ See *Organizational Start-Ups*, BURLINGTON ASSOCIATES, <https://perma.cc/M8YD-87DB> (last visited May 9, 2019) (showing the clients Burlington Associates has helped implement central-server systems).

⁴⁰² In 2006, the National Community Land Trust Academy was formed during a high point of recent interest in CLTs, but recently merged into a more generalized housing policy organization. Some cities have developed smaller-scale networks, such as the Boston Community Land Trust Network formed in 2015. See Davis, *supra* note 121, at 30 (portraying the objectives of the National Community Land Trust Academy); *Greater Boston Community Land Trust Network Launch*, DUDLEY ST. NEIGHBORHOOD INITIATIVE (Apr. 7, 2015) <https://perma.cc/SL2L-QVQT>.

⁴⁰³ See generally *Community Land Trusts*, DEMOCRACY COLLABORATIVE, <https://perma.cc/L8Y4-XVYV> (last visited May 9, 2019) (providing a general overview of CLT and offering demographic statistics of membership).

⁴⁰⁴ See EMILY THADEN & JEFFREY S. LOWE, RESIDENT AND COMMUNITY ENGAGEMENT IN COMMUNITY LAND TRUSTS 18–19 (2014).

⁴⁰⁵ See JAMES DEFILIPPIS, UNMAKING GOLIATH: COMMUNITY CONTROL IN THE FACE OF GLOBAL CAPITAL 110–11 (2004) (discussing the limitations of collective housing to restructure existing property markets).

⁴⁰⁶ Jeanne M. Wolfe, *Canadian Housing Policy in the Nineties*, 13 HOUSING STUD. 121, 121 (1998).

the Vancouver Community Land Trust, are directly managed by the city to provide leases on reclaimed land, but have struggled to expand beyond initial public grants and a reliance on volunteer labor for any socially active engagement.⁴⁰⁷

By contrast, in the past decade there has been a sustained effort to promote CLTs in the United Kingdom, with national campaigns instigated by the lobbying efforts of New Economics Foundation⁴⁰⁸ and the U.K. Carnegie Trust, alongside university-based research projects.⁴⁰⁹ In partial recognition attempts to spread CLTs in the United States, one core tenant of CLT proponents in the United Kingdom has been the creation of national networks and umbrella CLTs to help local CLTs access government resources and reshape land holding norms.⁴¹⁰ While some still argue that government sponsorship of CLTs are detrimental to their larger social ambitions,⁴¹¹ at a minimum U.K. proponents have primarily remained committed to linking the future of CLT to a larger social movement that could transcend the localism of individual organizations.⁴¹²

Some development agencies have sponsored CLT-like projects as part of their foreign aid missions, with some episodic success. One well-studied example is the Tanzania-Bondeni CLT implemented in Voi, Kenya as part of a local governmental collaboration with the German GTZ development agency.⁴¹³ Yet, after a retreat of foreign sponsorship the Voi CLT has faced great difficulty in rallying any permanent legal accommodation within the Kenyan legal system, and has primarily relied on pre-existing social relationships and norms to maintain forms of collective governance.⁴¹⁴ Ironically, the lack of a flexible non-profit corporate option led the Voi to have its land held in an actual trust, which has enabled the Voi CLT to continue to operate even though it has faced recurrent hostility from some tenants and government agencies.⁴¹⁵ In fact, the lack of a parallel development in corporate legal forms abroad has often pushed foreign CLTs to follow more of the classic Georgist pattern of trust-based landholding.⁴¹⁶

⁴⁰⁷ See Leslie Anne Roach, *In Perpetuity: Governance and Capacity of Building of Local Land Trusts in Ontario* 46–54 (2007) (unpublished M.A. thesis, University of Waterloo) (discussing the limits of volunteer-run land trusts).

⁴⁰⁸ See generally PAT CONATY ET AL., COMMON GROUND FOR MUTUAL HOME OWNERSHIP (2003).

⁴⁰⁹ See BOB PATERSON & KARL DAYSON, PROOF OF CONCEPT: COMMUNITY LAND TRUSTS (2011).

⁴¹⁰ See *id.* (providing examples showing the benefits of umbrella CLTs).

⁴¹¹ Margaret Harris, *Third Sector Organizations in a Contradictory Policy Environment*, in HYBRID ORGANIZATIONS AND THE THIRD SECTOR: CHALLENGES FOR PRACTICE, THEORY AND POLICY 25 (David Billis ed., 2010).

⁴¹² See PATERSON & DAYSON, *supra* note 409, at 9–11 (discussing the formulation of the National Community Land Trust Network).

⁴¹³ Bassett, *supra* note 262, at 2, 6; Emmanuel Midheme & Frank Moulaert, *Pushing Back on the Frontiers of Property: Community Land Trusts and Low-Income Housing in Urban Kenya*, LAND USE POL'Y, Jan. 2014, at 73, 78.

⁴¹⁴ See Ellen M. Bassett, *Tinkering with Tenure: The Community Land Trust Experiment in Voi, Kenya*, 29 HABITAT INT'L 375, 389–91 (2005).

⁴¹⁵ *Id.* at 379.

⁴¹⁶ See INST. FOR CMTY. ECON., *supra* note 88, at 28 (discussing the development of CLTs in relation to the Georgist ideology).

While generally cited in the same stead as modern CLTs by U.S. proponents, successful land trust experiments in Bolivia (the Maria Auxiliadora community) have formally held land through a trust rather than a corporation.⁴¹⁷

C. Corporate Flexibility or Fiduciary Self-Discipline

The turn to the corporate form to accommodate communitarian aspects of land holding has been powerful enough to marginalize what remains of the Georgist roots of American land experimentation. Ironically, the attraction of ICs to fully recomunalize land using the corporate form is a decidedly non-radical tactic in their otherwise radical self-conception. At the moment of conception, the flexibility of the corporate form is alluring to accommodate the self-governing aspirations of groups who seek to introduce norms at odds with land privatization. The fact that these communitarian corporate forms have precedents and imitations abroad is a testament to how difficult this accommodation is in a larger regulatory ecosystem which follows the type of transactionally oriented informational dynamics noted by Hansmann and at the heart of Smith and Merrill's exclusionary conceptual framework for property.

The shift in ICs from individual or trust ownership based on concerns for participatory legitimacy reflects again the tensions that social movements, especially those under democratic regimes, face when trying to build and actuate broad-scale solidarities. Yet, one does not need to ascribe to a full-blown theory of elite-driven change to recognize that strong localist norms and minoritized social status are difficult building blocks for a social movement. Just as historians of ICs note their place within the classic struggle between individualism and social commitment, they also bring to the fore the tension between freedom and discipline which social philosophers have long debated as the heart of substantive liberty.

The turn in communitarian land organization to the corporate form's flexible and customizable formal participatory mechanisms in many ways replicates the desire for pure horizontal organization among worker cooperatives, arrayed against the often concurrent commodification of labor. But just as worker cooperatives have struggled to replicate and conjoin with extant social movements, ICs valorization of participatory logics has exacerbated their disconnect from traditional forms of inescapably coercive social norms. The desire for consensus-based decision making and free exit makes the corporate form desirable, but it does so by presenting the false dream of freedom without discipline.

This is in part the force behind the superior track record of religious ICs which gained longevity due to submission to group authority. But it is also the lesson of the comparative durability of ICs based on trusts like the

⁴¹⁷ Robin King et al., *Confronting the Urban Housing Crisis in the Global South: Adequate, Secure, and Affordable Housing* 26 (World Res. Inst., Working Paper, 2017), <https://perma.cc/9B8D-LEY9>.

School of Living. In contrast to partially communitarian legal forms like the housing cooperative, these secular ICs traditionally imposed very few restrictions on how leaseholders carried out their lives.⁴¹⁸ Their main priority was to liberate land from the private market as a sufficiently radical act in itself.⁴¹⁹ While leaseholders gave up full participatory powers over the land they inhabited, they were effectively left to pursue whatever variations of economic and social endeavor they so desired.⁴²⁰

If we turn to study what land holding agenda has taken advantage of this longitudinal function of trusts, the most evident is that of environmental land trusts. While again founded with varying motivations, most conservation land trusts simply aspire to take land out of the private market or acquire easements to severely restrict their use.⁴²¹ The growth of such trusts has swallowed up large swaths of land, now far outstripping forms of communally-held land in the United States.⁴²² Mimicking in private the justifications advanced by proponents of public trust doctrines for governmental or residual land, the conservationist aims of these trusts make participatory norms initially less relevant.⁴²³ The lack of a traditional beneficiary dependent on trust assets for income also generates its own issues, as the motive for beneficiaries to monitor and challenge land held in conversation or historical trusts is weaker.⁴²⁴ Some have argued that third-party or governmental accreditation is needed for land trust organizations or the trustees they appoint.⁴²⁵ Yet, the simplicity of the aims of such land trusts has also led to their global proliferation,⁴²⁶ even with the same common

⁴¹⁸ See *Articles of Incorporation and School of Living By-laws*, SCH. LIVING, <https://perma.cc/CF5T-62JY> (last visited May 9, 2019) (“[T]he rights of the members of the school to absolute freedom of religion, politics, association, expression, production, and exchange shall never be abridged or impaired by the group, except insofar as the freedom of individual members conflicts with the rights of other members.”).

⁴¹⁹ See *id.* (“It is the intent of the School to remove [land] resources from the speculative marketplace.”).

⁴²⁰ See *id.*; see also Davis, *supra* note 121, at 7, 176 (describing the School’s communal property ownership and providing an example of one member’s use of his economic freedom).

⁴²¹ Meagan Roach, *Local Lands Trusts: A Comparative Analysis in Search of an Improved Template for Land Trusts*, 38 WM. & MARY ENVTL. L. & POL’Y REV. 767, 772 (2014) (defining a “conservation easement” that is one of the most common tools used by land trusts).

⁴²² *Id.* at 770 (asserting that the majority of land is protected by land trusts rather than by government regulation).

⁴²³ Erin B. Gisler, *Land Trusts in the Twenty-First Century: How Tax Abuse and Corporate Governance Threaten the Integrity of Charitable Land Preservation*, 49 SANTA CLARA L. REV. 1123, 1128 (2009).

⁴²⁴ *Id.* at 1144–47 (highlighting some unethical misdeeds by land trusts, where “the most egregious practices involved deals with the organization’s own board members or corporate partners”).

⁴²⁵ William M. Felmlee, *Establishing Accreditation for Land Trust Organizations: Seeking Public Trust in the Conservation Easement Movement* 1, 3 (Dec. 2009) (unpublished M.A. thesis, Georgetown University), <https://perma.cc/2CXB-SGQP>.

⁴²⁶ See Susannah Bunce & Farrah Aslam, *Land Trusts and the Protection and Stewardship of Land in Canada: Exploring Non-Governmental Land Trust Practices and the Role of Urban Community Land Trusts*, 25 CAN. J. URB. RES. 23, Winter 2016, at 24; see also SUSANNAH BUNCE ET AL., URBAN COMMUNITY LAND TRUST HANDBOOK: LESSONS FROM CANADA, THE UNITED STATES,

challenges of translating common law trust mechanisms across national legal systems.⁴²⁷ However one may judge conservation trusts, or conservation easements in general, even their most prominent critics cite their durability as a primary feature.⁴²⁸

Given that they generally involve more diverse land use patterns than conservation trusts, the best analogy to ICs is in fact indigenous land trusts.⁴²⁹ Rather than beginning with a voluntary concept of belonging and exit, these trusts have been established in numerous countries where indigenous communities seek to, as a first priority, insulate themselves from national land regimes that have been hostile, if not genocidal, historically.⁴³⁰ The most extensive of these trusts exists in Fiji, where 92% of all land is held in trust for its inhabitants.⁴³¹ It is not unexpected that a recurrent critique of these arrangements is the lack of formal empowerment of the beneficiaries who live on trust land,⁴³² and difficulties in managing changing land tenure needs over time.⁴³³ Yet, what also is clear is that the legitimization of these trusts is not tied purely, or even predominately, to their wealth generating possibilities, but to the stable preservation of the collectively owned character of the land over time.⁴³⁴ Again, indigenous trust governance faces many of the same internal conflicts and heterogeneous preferences that

AND BRITAIN 4 (2013), <https://perma.cc/3CVH-CA2T> (mentioning the spread of community land trusts from the United States to Canada).

⁴²⁷ Gerald Korngold, *Globalizing Conservation Easements: Private Law Approaches for International Environmental Protection*, 28 WISC. J. INT'L L. 585, 637–38 (2011).

⁴²⁸ See Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 769 (2002) (accepting that “conservation servitudes are engineered to be hard to undo”); Julia D. Mahoney, *The Illusion of Perpetuity and the Preservation of Privately Owned Lands*, 44 NAT. RESOURCES J. 573, 574–77 (2004) (realizing the durability of conservation trusts but that our successors may have differing ideas regarding which lands warrant protection and may reconsider many of today’s policy choices).

⁴²⁹ See Mary Christina Wood & Zachary Welcker, *Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 32 HARV. ENVTL. L. REV. 373, 432 (2008); Mary Christina Wood & Matthew O’Brien, *Tribes as Trustees Again (Part II): Evaluating Four Models of Tribal Participation in the Conservation Trust Movement*, 27 STAN. ENVTL. L.J. 477, 544 (2008).

⁴³⁰ See Wood & Welcker, *Tribes as Trustees Again (Part I)*, *supra* note 429, at 374–75 (discussing how Native Americans might have to insulate themselves from American citizens to secure natural systems necessary for human survival).

⁴³¹ Ronita Devi Singh & Mahendra Reddy, *Corporate Governance in Fiji’s Native Land Trust Board*, 22 PAC. ECON. BULL. 36, 37 (2007).

⁴³² See Jocelyn B. Garovoy, “*Ua Koe Ke Kuleana O No Kanaka*” (*Reserving the Rights of Native Tenants*): *Integrating Kuleana Rights and Land Trust Priorities in Hawaii*, 29 HARV. ENVTL. L. REV. 523, 568 (2005) (describing the difficulties of proceeding with legal remedies to quiet title to *kuleanas* in Hawaii).

⁴³³ John Crosetto, *The Heart of Fiji’s Land Tenure Conflict: The Law of Tradition and Vakavanua, The Customary “Way of the Land”*, 14 PAC. RIM L. & POL’Y J. 71, 75, 101 (2005) (discussing land tenure conflicts with traditional law in Fiji where eighty-three percent of the land is owned by indigenous Fijians).

⁴³⁴ See Louise Crabtree, *Community Land Trusts and Indigenous Housing in Australia—Exploring Difference-Based Policy and Appropriate Housing*, 29 HOUSING STUD. 743, 745 (2014) (recognizing that land trust reform might not lead to economic efficiency, especially when indigenous peoples’ cultural values and their concepts of the value of land are diverse).

emerge in any society, but they do take effective advantage of the insulation of beneficiaries from their ultimate governance in order to effectuate this core communal purpose.⁴³⁵

What this type of collective self-restraint through the trust represents is a more open acknowledgement of the inherent need to trade some formal freedom of self-government for self-discipline in order to achieve broader social goals. Some long-term scholars of ICs straightforwardly critique what they see as a relatively immature attitude of participants who prioritize localism over all other values and that this localism interferes with committing to maintaining the external network relationships that have been crucial for virtually all long-standing ICs.⁴³⁶ Even scholars who have taken a more sympathetic view of the transient localism of many ICs have noted the importance of external support networks,⁴³⁷ and the use of third-party organizations to stabilize ICs.⁴³⁸

Chippenham Community in New Zealand, currently one of the oldest surviving secular (and urban) ICs, exemplifies this dynamic.⁴³⁹ Here internal factionalization among the original donors over the use of newly valuable property almost destroyed the community, but it survived when it was reconstituted with trustees from other ICs.⁴⁴⁰ The fact that many trust-based ICs do not maintain their idiosyncratic ideological commitments is often mischaracterized as failures when actually their ability to outlive their original constituents should be celebrated.⁴⁴¹ At the same time, this pattern of external networking requires a clear view of the collective purpose of ICs, as their now-growing behavioral demands on participants militates against long-term survival.⁴⁴² The most striking successes in worker cooperatives follow the same pattern of introducing forms of hierarchical organizations which limit individual cooperative self-government.⁴⁴³

⁴³⁵ See Samuel W. Rose, *A New Way Forward: Native Nations, Nonprofitization, Community Land Trusts, and the Indigenous Shadow State*, 2 *NONPROFIT POL'Y F.*, 2011, at 11–15 (discussing community land trusts and the relevance of those models to American Indians, some of which have already transitioned to such a model of governance). It should be noted that the “trust” relationship that is used to characterize the federal government of the United States’ regulatory powers over some American Indian lands is an example in reverse. Here there is no true recourse against abuse of any putatively fiduciary duty by the “trustee.” Jessica Shoemaker, *Transforming Property: Reclaiming Indigenous Land Tenures*, 107 *CAL. L. REV.* 101 (2019).

⁴³⁶ HICKS, *supra* note 214, at 148–51.

⁴³⁷ SARGISSON & SARGENT, *supra* note 131, at 181.

⁴³⁸ *Id.* at 177, 181–82.

⁴³⁹ *Id.* at 84, 86.

⁴⁴⁰ *Id.* at 10.

⁴⁴¹ See Olive Jones, *Keeping It Together: A Comparative Analysis of Four Long-Established Intentional Communities in New Zealand*, 234–35 (2011) (unpublished Ph.D. dissertation, University of Waikato), <https://perma.cc/22P2-A8NU>.

⁴⁴² Warwick Fisher, *The Future for Rural Landsharing Communities in Far North Coast New South Wales*, 8 *S. CROSS U. L. REV.*, 2004, at 51, 66–67.

⁴⁴³ Two relevant examples are the Kibbutz experience in Israel, which has relied over time on increasingly authoritarian forms of self-organization, and the hierarchical structure of the Mondragon worker cooperative, itself far more hierarchical than its popular citation would represent. *Cf.* HENRY NEAR, *WHERE COMMUNITY HAPPENS: THE KIBBUTZ AND THE PHILOSOPHY OF*

There then seems to be two primary options if ICs are to emerge as anything but idiosyncratic opt-outs.⁴⁴⁴ The first would be to mimic the trajectory of environmental land trusts by thinning their substantive ideological content and re-adopting the more basic Georgist desire to simply accumulate the largest amounts of land possible outside of private markets. ICs structured as trusts could be disciplined by fiduciary duties rather than some version of shareholder democracy. At a minimum, third party institutions could be empowered to certify or appoint a set number of directors, with the aim of stabilizing the commitment of trustees to the communitarian land-holding project.

The other would be to develop creative hybrid corporate forms that formally include self-disciplining limitations on self-government. In the early 1990s, growing dissatisfaction with the failure of local housing cooperatives, and their reversion to private land markets, led to the creation of the Mietshäuser Syndikat in Freiburg, Germany.⁴⁴⁵ Here individual housing cooperatives were still formed as LLCs, with the internal allocation of full participatory rights to residents.⁴⁴⁶ However, in the process of joining the Syndikat individual cooperatives transfer ownership of the land to an apex LLC in which each local LLC had a single voting share.⁴⁴⁷ This exchange of a single voting share for actual ownership of their land was motivated by a shared commitment to the long-term removal of the land from private markets as well as recognition that idealism had been a poor guarantor against the failure of previous cooperative developments.⁴⁴⁸ To facilitate growth, membership is predicated simply on adopting this networked corporate form, and local LLCs are free to pursue whatever behavioral practices or demands that they see fit.⁴⁴⁹ The apex LLC also has built-in restrictions on electing board members who are not residents, curtailing the ability to be drawn into opportunistic partnerships with public agencies or other private actors.⁴⁵⁰ In the last three decades, the Syndikat has rapidly grown in membership across Germany.⁴⁵¹

Given the continued resistance of many civil law countries to importing the common law trust's segregation of ownership and patrimony,⁴⁵² including

COMMUNALISM 30 (2011); SHARRYN KASMIR, *THE MYTH OF MONDRAGON: COOPERATIVE, POLITICS, AND WORKING-CLASS LIFE IN A BASQUE TOWN* (1996).

⁴⁴⁴ It is not that such attempts are somehow in and of themselves immoral, but they do not provide any basis for eliciting third-party interest in their sustainability.

⁴⁴⁵ John C. Carroll, *Economic Democracy, Made in Germany: The Mietshäuser Syndikat Model as a Framework for Developing Democratic Enterprises*, 42 SYRACUSE J. INT'L L. & COM. 193, 217–20 (2014).

⁴⁴⁶ *Id.* at 219.

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.* at 218.

⁴⁴⁹ *Id.* at 221.

⁴⁵⁰ *Cf. id.* at 198–99, 219, 222.

⁴⁵¹ *Id.* at 218–19.

⁴⁵² See, e.g., Ruiqiao Zhang, *A Comparative Study of the Introduction of Trusts Into Civil Law and Its Ownership of Trust Property*, 21 TRUSTS & TRUSTEES 902 (2015); PRINCIPLES OF EUROPEAN TRUST LAW 3, 11 (David Hayton et al. eds., 1999).

hybrid legal regimes,⁴⁵³ perhaps this form of networked LLC will provide a more suitable model in many national contexts.⁴⁵⁴ Whatever the specific complications of international translation, the primary issue remains that recognizing legal self-discipline is a necessity for interdependence among diverse actors committed to a movement for communalizing land, rather than full voluntariness and total ideological consonance.

IV. CONCLUSION

The motivation to recapture community through an imagination of the past naturally suffers from some idealization. However, claims in the present about what is natural or inevitable are often equally illusory. The rapid changes accompanying the privatization of land in the nineteenth and twentieth century have coincided with a near global and instantaneous ability to spread new ideas about the normative and functional possibilities of land use. And those whose ideas come to dominate intellectual and social discourse can quickly cast the novel as natural. The precipitous decline in the reputation of the commons is but one arena where this rewriting inspires a callow certainty about the future.⁴⁵⁵

In his recent intellectual travelogue across the United States, Erik Reece describes how he felt drawn to revisit the history of intentional communities in order “to resist, or at least to escape for a while that air of inevitability.”⁴⁵⁶ This particular inevitability was that certain forms of community were forever lost, and that, even if one were to accept great personal sacrifice, collective living was one option that was no longer available.⁴⁵⁷ While such possibilities still exist in numerous other countries, the nature of human community rarely allows a citizen to travel and freely join those whom are culturally distant.⁴⁵⁸

Given this sense of inevitability it may seem harsh to judge the retreat of ICs from their commitment to social movement politics. George Celso wrote of the confidence that inspired the early Georgists to form a community which would serve as “an example to a diseased world.”⁴⁵⁹ Such confidence has been harder to ground in recent decades, especially as notions of what is essentially American in the realm of economic ideology has hardened to the point that the radical experiments persistent throughout

⁴⁵³ See, e.g., Kai Lyu, *Re-Clarifying China's Trust Law: Characteristics and New Conceptual Basis*, 36 LOY. L.A. INT'L & COMP. L. REV. 447, 450–51 (2015); Alexandra Popovici, *Trust in Quebec and Czech Law: Autonomous Patrimonies?*, 24 EUR. REV. PRIVATE L. 6 (2016).

⁴⁵⁴ But see Steven L. Schwarcz, *Commercial Trusts as Business Organizations: An Invitation to Comparatists*, DUKE J. COMP. & INT'L L., Summer 2003, at 336; Alexandra Braun, *The State of the Art of Comparative Research in the Area of Trusts*, in COMPARATIVE PROPERTY LAW 121 (Michele Gaziadei & Lionel Smith eds., 2016).

⁴⁵⁵ See e.g., Eric T. Freyfogle, *The Enclosure of America* 3, 5–6 (Illinois Public Law and Legal Theory Research Paper No. 07-10, 2007).

⁴⁵⁶ ERIK REECE, *UTOPIA DRIVE: A ROAD THROUGH AMERICA'S MOST RADICAL IDEA* 5 (2016).

⁴⁵⁷ *Id.* at 5–6.

⁴⁵⁸ MILLER, *supra* note 113, at xvi–xvii.

⁴⁵⁹ HICKS, *supra* note 214, at 150.

American history run against currents ideological grains.⁴⁶⁰ Following rapid developments in digital communication, utopian thinkers have been drawn in recent years more often to virtual spaces than physical land in attempts to imagine and constitute new forms of community.⁴⁶¹ The permutations of ecological thinking which so emphasize smallness and local governance have heightened some of this escapism, and in some cases transmuted claims for solidarity grounded in universal human needs into a personalized frame which casts human needs as a moral imposition on nature.⁴⁶²

While still limited by the racial injustice which inspired many early secular ICs, the twentieth century did witness many attempts by the state to insulate citizens from the shocks and uncertainty of commodified land.⁴⁶³ Welfare politics were thoroughgoing enough in many countries to make experiments in communal land seem unnecessary. Though, as in the United States, the global retreat from direct public provision of housing to market subsidies has led to renewed interest in private initiatives such as the *Mietshäuser Syndikat*.⁴⁶⁴

The American history of private initiative in land use shows that they are not automatically to be celebrated. Legal creativity can be both democratic and anti-democratic, and even anti-aristocratic principles can be retooled to limit attempts to promote equitable access to land ownership.⁴⁶⁵ The original idealism that drew energy to housing cooperatives in the United States eventually led to exclusionary dynamics that serve the interests of very different populations divorced from their original intent. The charismatic origins of many ICs themselves show how easily intertwined idealism and authoritarianism can become and that the power to insulate oneself from the claims of the state can often lead to an inability to shield oneself from the claims of other private actors.⁴⁶⁶

Yet, as long as citizens feel unmoored from community, or feel unbuffered from the uncertainties of private land markets, they will agitate informally and formally to recreate a sense of security.⁴⁶⁷ Pairing this

⁴⁶⁰ *See id.* at 11–13.

⁴⁶¹ Linda Hansen, *Where Have all the Utopias Gone?* 262, 266, 268 (June 6, 2010) (unpublished M.A. thesis, University of Denver), <https://perma.cc/K84X-4YE5>.

⁴⁶² MANZELLA, *supra* note 207, at 174–76; *see also* HICKS, *supra* note 214, at 150.

⁴⁶³ As Janelle Orsi notes from her long engagement with local communities: “loss is scary, but uncertainty is scarier.” ORSI, *supra* note 86, at 555. For the motivational aspects of uncertainty over episodic land loss in ICs, *see* EVERETT WEBBER, *ESCAPE TO UTOPIA: THE COMMUNAL MOVEMENT IN AMERICA* (1959).

⁴⁶⁴ *See, e.g.*, Ghada Farouk Hassan, *The Enabling Approach for Housing Supply: Drawbacks & Prerequisites – Egypt Experiences*, 50 ALEXANDRIA ENG’G J. 421, 423 (2012).

⁴⁶⁵ *See, e.g.*, Ngai Pindell, *Fear and Loathing: Combating Speculation in Local Communities*, 39 U. MICH. J.L. REFORM 543, 545 (2006) (discussing the negative perceptions of property speculations); Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769, 1773–74 (2014) (discussing the constitutionality of perpetual trusts in states with provisions prohibiting perpetuities).

⁴⁶⁶ Andreas Rahmatian, *Indirect Sovereignty through Property Rights*, NOTRE DAME J. INT’L & COMP. L., 2017, at 74–75.

⁴⁶⁷ The relationship between property ownership and insulation from the claims of others presumes a stable and complete claim to ownership that is often lacking in modern land and

insecurity with the direct observation of unused land is one of the historical drivers of adverse possession in the common law, which now has morphed into calls for transforming foreclosed land into community institutions.⁴⁶⁸ While constitutional litigation has been used as a limited means for achieving housing security, some have argued that housing rights can rhetorically help form the foundation of new popular movements for economic justice.⁴⁶⁹

The central role of land in new social visions is a classic one, but it has always required contemplating legal design in the context of larger movements. The great failure of Robert Owen's New Harmony community revealed that his desire to solve the problems of communal living through a constant rewriting of the town's legal constitutions left him isolated from the community he sought to reform.⁴⁷⁰ Simultaneously, ignoring legal design for a full faith in ideological commitment has been shown to be equally prone to failure. The formation of any IC may momentarily satisfy personal desires for interconnection, but such impatience has rarely led to more than the ephemerality of said satisfaction.

Scholars and activists coalescing around the law of the commons movement have come to recognize that they are engaged in a mutually constitutive set of legal and cultural challenges. The history of ICs presses these scholars and those who identify as progressive property scholars to take seriously the full life-cycle of land ownership acquisition, possession and potential disposition.⁴⁷¹ Battling over a conceptual framework for facilitating judicial claims against individual property holders does not answer more longitudinal concerns about the allocation of property in a society, and the limited international track record of constitutional rights to property have demonstrated the limits of purely juriscentric victories.⁴⁷² The largest contemporary land reform project underway today in China is one which is understood by those with the most to lose through the privatization of land as not simply a battle over weak or strong individual property rights,

home ownership. For a critical defense of this presumption, see Katrina Wyman, *In Defense of Fee Simple*, 93 NOTRE DAME L. REV. 1 (2017).

⁴⁶⁸ Robert Hockett, *It Takes a Village: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Local Economic Recover*, 18 STAN. J.L. BUS. & FIN. 121, 168–69 (2012); Valerie Schneider, *Property Rebels: Reclaiming Abandoned, Bank-Owned Homes for Community Uses*, 65 AM. U. L. REV. 399, 425–27 (2015).

⁴⁶⁹ Lisa T. Alexander, *Occupying the Constitution Right to Housing*, 94 NEB. L. REV. 245, 250 (2015).

⁴⁷⁰ *Owenites in Indiana*, in UTOPIAS: SOCIAL IDEALS AND COMMUNAL EXPERIMENTS 98, 99 (Peyton Richer ed., 1971).

⁴⁷¹ See generally Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763, 763–65 (2011).

⁴⁷² See generally Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 1, 107, 122 (2013); Marella, *supra* note 69, at 63. As Marella notes, the best courts can usually do is avoid sanctioning legal innovations, rather than demanding their production. *Id.* at 75.

but over who will decide how such land is transferred from state to private ownership in the first instance.⁴⁷³

For those directly engaged with ICs, the turn to the corporate form makes all too much sense in the present. Janelle Orsi has produced one of the most systematic practical legal guides to enabling alternative work and living practices, and therein states that there seems little reason to advise clients to structure their living arrangements through trusts.⁴⁷⁴ At some general level, ready access to legal forms which can adapt to heterogeneous preferences should be one goal of any regulatory regime,⁴⁷⁵ and in this way the common law has presented many such opportunities for innovation in the United States and elsewhere over time.⁴⁷⁶ But allowing participants to fully self-design their own experiments in land has given many ICs less impetus to think through how limiting the satisfaction of every one of their desires hampers their ability to participate in larger social processes of change. Moreover, the idea that participation at the local level instantly leads to greater social democracy has been another disabused lesson of community interest communities in the United States—where local participation can be insulating from and draining of social activism.⁴⁷⁷

The use of trusts in traditional Georgist communities represented this form of self-discipline, now found with full expression in the growth of conservation easements. There is no way to ever fully insulate any human organization from corruption over time no matter how carefully conceived its legal structure.⁴⁷⁸ The very ideal of the rule of law inherently depends on human decision makers. But the limitation of beneficiary's powers against trustees, coupled with fiduciary duties imposed by the state, allows private longitudinal commitments even under the most hostile social contexts. The School of Living has long out-survived the many ICs it has enabled by removing core issues of land stewardship from these same communities. Recognizing the comparative expertise of trustees may continue to be seen by some as incompatible with localist direct democracy, but expertise, especially expertise tied to duties, is not inherently the enemy of social democracy.⁴⁷⁹ The desire to infuse communitarian land with this sense of

⁴⁷³ See generally Ting Xu, *The End of the Urban-Rural Divide?*, 96 ARCHIV FUER RECHTS- UND SOZIALPHILOSOPHIE 557, 557 (2010) (exploring contemporary land reform in China); Yonhguia Zou et al., *Marketization of Collective-Owned Rural Land: A Breakthrough in Shenzhen, China*, SUSTAINABILITY, 2014, at 9121–22).

⁴⁷⁴ ORSI, *supra* note 86, at 491.

⁴⁷⁵ Wendy E. Taylor, *Property Rights—and Responsibilities? The Case of Kenya*, HABITAT INT'L, 2004, at 275.

⁴⁷⁶ Francesco Minora et al., *Governing for Habitability* 6 INT'L J. CO-OPERATIVE MGMT. 33, 33 (2013).

⁴⁷⁷ See Julie D. Lawton, *Unraveling the Legal Hybrid of Housing Cooperatives*, 83 UMKC L. REV. 117, 117–21 (2015).

⁴⁷⁸ Dominic Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership of Easements*, 44 NAT. RESOURCES J. 483, 513, 515 (2004).

⁴⁷⁹ Evan J. Criddle, *Liberty in Loyalty: The Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993, 1038 (2017).

heightened responsibility is why so many corporations with a social mission still call themselves trusts, and label their board of directors “trustees.”⁴⁸⁰

The trust is no cure-all for this issue of legal design and social commitment, as the controversies following the success of conservation trusts speak to. Moreover, recent developments in the United States have tested the outer limits of restraints on beneficiaries’ powers against trustees.⁴⁸¹ Jurisdictional competition under American federalism has led to greater attention paid to the feudal potential of trusts for perpetuating inter-generational dynasties of concentrated wealth than to their potential as facilitators of economic equity.⁴⁸² And there is room for trusts to grow in this regard, as more sophisticated developments in trust decanting could provide greater flexibility for charitable trusts to adapt to change, especially if decanting provisions involve participation by third-party non-profits committed to their purpose.⁴⁸³

The example of the Mietshäuser Syndikat shows that private creativity with different legal forms can link local and social agents, but only if there is an explicit acknowledgment that such arrangements involve local self-discipline.⁴⁸⁴ The Burlington Associates’ “central-server” model for regional CLTs attempts to create some of the benefits of networking, but does so with an explicit disavowal of any reciprocal coercive powers.⁴⁸⁵ This same weakness of other IC networking institutions render them fundamentally incapable of concentrating the type of political power needed to induce the accommodating legal change that led to the rapid proliferation of self-interested and profit-driven community interest communities.

Moreover, the early Georgist successes and that of other semi-communal property forms demonstrate that part of this self-disciplining is accepting narrower forms of association.⁴⁸⁶ Beyond demands about sustainability, ICs should move slowly to combine decommodifications of land and labor, and prioritize the former over the later. Jumping to fully

⁴⁸⁰ While some progress has been made to infuse corporate governance with more substantive norms, such developments are still quite nascent and contested. See Ann E. Conaway, *The Global Use of the Delaware Limited Liability Company for Socially-Driven Purposes*, 38 WM. MITCHELL L. REV. 772, 773–80 (2012); Elizabeth Pollman, *Social and Asocial Enterprise*, in THE CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE LAW 11–25 (Joseph Yockey & Benjamin Mean eds., 2017).

⁴⁸¹ Deborah S. Gordon, *Forfeiting Trust*, 57 WM. & MARY L. REV. 455, 462 (2015). For an examination of this trend in Canada, see Lionel Smith, *Massively Discretionary Trusts*, 70 CURRENT LEGAL PROBS. 1, 17–54 (2017). For a fine comparative example of the dissonance these trends create abroad, see Frances Foster, *American Trust Law in a Chinese Mirror*, 94 MINN. L. REV. 602 (2010). For an examination of how changes in the law governing trusts in Australia made them more difficult for ICs to use, see INTENTIONAL COMMUNITIES MANUAL, *supra* note 188, at 29.

⁴⁸² Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 410–11 (2005); Bridget Crawford, *Less Trust Mean More Trusts*, 75 WASH. & LEE L. REV. ONLINE 74, 82 (2019).

⁴⁸³ For the secular rise in decanting provisions, see Robert H. Sitkoff, *The Rise of Trust Decanting in the United States*, 23 TRUSTS & TRUSTEES 10, 976 (2017).

⁴⁸⁴ See Carroll, *supra* note 445, at 217–20.

⁴⁸⁵ See Champlain Housing Trust, *supra* note 372, at 19.

⁴⁸⁶ See THE COMMUNITY LAND TRUST READER, *supra* note 361.

integrate collective land and labor alienates already economically marginalized groups who cannot assume the great risks or enforced technological step-downs, and who doubly struggle to recreate cooperative norms that, again, cannot be conjured out of thin voluntary air.⁴⁸⁷ The negative act of removing land from the market is a far easier achievement to preserve legally and socially than labor cooperation. As nations around the globe continue to confront and contest land use policy, pursuing thinner ideological bases for networking is almost a necessity no matter how similar reactions may be to community breakdown around property.⁴⁸⁸ The general indifference, and sometimes hostility, to communitarian projects in land make governmental support a potential long-term outcome of such organizing, but not a reliable resource in the moment.⁴⁸⁹

If this type of private networking seems itself idealistic, one should consider that the relatively recent nature of land individuation has just begun to conflict with the communal organization of the family. The massive demographic aging in industrial economies where such individuation has been most intensive has led to a growing crisis in housing for the elderly.⁴⁹⁰ Already arguments have been advanced about using community interest communities to provide stability for those in the increasingly long in-between of retirement and average life expectancy.⁴⁹¹ Not surprisingly, “Naturally Occurring Retirement Communities” have primarily sprung up around religious organizations which care for retirees motivated by shared religious norms.⁴⁹² Here again third-party involvement will be key, as the ability of any incapacitated person to assert claims for pre-death/incapacity exploitation without outside cooperation are quite limited.

Whatever demographic pressure will amplify systemic communal interests in land, changing social and political winds will require rapt attention to how private initiatives can inhibit or facilitate the social change they imagine themselves to embody. Some may be understandably wary of

⁴⁸⁷ Law of the commons scholar and activist, David Bollier, calls for an iterative process of “commoning.” His writings can be found at: BOLLIER.ORG, <https://perma.cc/2RRV-DLWX> (last visited May 9, 2019).

⁴⁸⁸ John Sturzaker & Giulio Verdini, *Opposition and Resistance: Governance Challenges Around Urban Growth in China and The UK*, 6 J. URB. MGMT. 1, 31, 38 (2017).

⁴⁸⁹ Certainly, landlords have been able to make these networks emerge from axes of their common interests. See, e.g., Paula A. Franzese et al., *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS L. REV. 1, 24 (2016).

⁴⁹⁰ Ann Bookman, *Innovative Models of Aging in Place: Transforming our Communities for an Aging Population*, 11 CMTY., WORK & FAM. 419, 420–21 (2008); Kathryn E. McDonough & Joan K. Davitt, *It Takes a Village: Community Practice, Social Work, and Aging-in-Place*, 54 J. GERONTOLOGICAL SOC. WORK 528 (2011).

⁴⁹¹ Patricia Baron Pollak, *Rethinking Zoning to Accommodate the Elderly in Single Family Housing*, 60 J. AM. PLAN. ASS'N 521 (1994); Christina M. Anastasia, “Cooperative Living in Retirement: A Narrative Inquiry Exploring Innovative Retirement Living Arrangements” 19–20 (Nov. 2008) (unpublished Ph.D. dissertation, Capella University).

⁴⁹² Rebecca Morgan, *What the Future of Aging Means to All of Us*, 48 IND. L. REV. 125, 134 (2014).

the further expansion of private governance regimes in land,⁴⁹³ or that locking land in trusts will do anything but dull work towards transforming larger cultural norms of land stewardship.⁴⁹⁴ But if the ultimate aim is broad participation in a “non-speculative housing system,”⁴⁹⁵ then simplification, rather than densification, of the underlying legal forms will be necessary.⁴⁹⁶ Moreover, given the multiple uncertainties modern citizens face in work and land, active governance participation must not be seen as a good in itself but as a moderated resource. The only other option is an implicit elitism that will alienate many who land communitarians seek to gain the trust of, or end up producing institutions as superficially democratic in practice as the now fallen dream of shareholder democracy.⁴⁹⁷

If there is to be a new communitarian movement in land, it must be one that leaves behind its naïve, and misleading, idealization of what human community is. There is no state of freedom where one is both tied to others and simultaneously free to enter and exit these associations without cost. One is not limited to a choice between communal authoritarianism and pure whimsy, but to live in relationship with others. Especially if the aim is to impact dominant forms of these relationships, self-discipline is necessary as is an ongoing conversation in which binaries offer only the illusion of escape. If the values of intentional communities are to become more than increasingly marginalized esoterica of those with the resources to “opt-out,” then perhaps the larger movement towards communitarian land would be better served by accepting their self-marginalization than in devoting resources to arresting it.

⁴⁹³ Sarah Blandy et al., *Conclusion*, in *MULTI-OWNED HOUSING* 233 (Sarah Blandy et al. eds., 2010).

⁴⁹⁴ See FREYFOGLE, *supra* note 42, at, 226–27.

⁴⁹⁵ ORSI, *supra* note 86, at 470.

⁴⁹⁶ Jennifer Cohoon McStotts, *Dwelling Together: Using Cooperative Housing to Abate the Affordable Housing Shortage in Canada and The United States*, 32 GA. J. INT'L & COMP. L. 131, 162–63 (2004).

⁴⁹⁷ Many still argue for corporate governance reforms to enable true shareholder democracy. See Lisa M. Fairfax, *The Future of Shareholder Democracy*, 84 IND. L.J. 1259, 1307–08 (2009). Yet, as the limited practical traction of stakeholder theory has shown, the general trend in American corporate governance remains director primacy. *Id.* at 1263.