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

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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

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 to do 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 reworkings 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 swathes 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).


\(^3\) See id.


\(^6\) Id. at 15–16, 20.

\(^7\) Id. at 4–5.
grapple with the downsides of ignoring this historical legacy. 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.

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. 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. At the turn of the twentieth century, the most prominent American economist was Henry George. 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. 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.

Parallel to these intellectual trends were private initiatives to reorder land ownership either directly linked to George’s ideas or of idiosyncratic inspiration. 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

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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).
imagined to have accompanied them.\footnote{\textsc{Robert Swann Et Al.}, \textit{The Community Land Trust: A Guide to a New Model for Land Tenure in America}, at xvi (1972).} 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.\footnote{\textit{Id.}} 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.\footnote{The place of this tradition in competing visions of American black liberation is discussed in Gerald Horne, \textit{Black & Red: W.E.B. Du Bois and the Afro-American Response to the Cold War, 1944–1963} (1986).}

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.\footnote{Ugo Mattei, \textit{First Thoughts for a Phenomenology of the Commons}, in \textit{The Wealth of the Commons} 37 (David Bollier & Silke Helfrich eds., 2012).} 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.\footnote{\textit{Id.}} 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.\footnote{See generally, \textsc{Robert Putnam}, \textit{Bowling Alone: The Collapse and Revival of American Community} (2000).}

The normative justifications for privatization in land constitute their own wide-ranging intellectual history. But in \textit{nuce} they are captured by the now classic trope of the “tragedy of the commons” popularly attributed to Garrett Hardin.\footnote{Garrett Hardin, \textit{The Tragedy of the Commons}, 162 S.C.L. 1243, 1244 (1968). For a critique of Gardin’s elision of contravening evidence available at the time, see Michael Morin, \textit{Indigenous Peoples, Political Economists and the Tragedy of the Commons}, 19 \textit{Theoretical Inq.} L. 559 (2017). For an extension to the influential presumptions of Harold Demetz, see \textit{Id.} at 562.} As one instantiation of Mancur Olson’s influential articulation of “collective action problems,”\footnote{Mancur Olson, \textit{The Logic of Collective Action} 1 (1965).} 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.\footnote{\textit{Id.} at 1–2.} 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
existence the need to re-regulate land following its own individualistic logic.\textsuperscript{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.\textsuperscript{26} Typically traced in America to the influence of pioneering legal realist Wesley Hohfield, 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.\textsuperscript{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.\textsuperscript{28}

Other analytic frames for property are ever-emerging,\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{34} As will be discussed herein, successful innovations in partially collective forms of ownership have in some cases become

\begin{thebibliography}{9}
\bibitem{ULRICH\ BECK} Ulrich Beck, Risk Society: Towards a New Modernity (1992).
\bibitem{26} See, e.g., Henry Smith, Property as the Law of Things, 125 Harv. L. Rev. 1691, 1691 (2012).
\bibitem{27} Id. at 1695, 1696.
\bibitem{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).
\bibitem{29} Larissz Katz, Exclusion and Exclusivity in Property Law, 58 U. Toronto L.J. 275, 277 (2008).
\bibitem{31} See Peter W. Salsich, Jr., Homeownership: Dream or Disaster?, 21 J. Affordable Housing 17, 25 (2012).
\bibitem{32} Id. at 18, 19.
\bibitem{33} See Katz, supra note 29, at 313.
\bibitem{34} Swann et al., supra note 16, at 7–15.
\end{thebibliography}
mainstreamed, with the least intensive but most extensive being condominiums. 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. 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.

This mismatch also explains why attempts to address social problems in land and housing through competing rights claims have also been so elusive. Even countries with fully enshrined revolutionary constitutional commitments to social views of property have struggled to actualize such refrairings to remedy the dislocations of land privatization. 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.

Eric Freyfogle has made the more aggressive claim that the very idea of a property right itself needs be reconstructed. 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. More moderate articulations of this position have gained traction in recent years, generally under the rubric in the United States of “progressive property.” Similar to theories of the “social function” of property present internationally, scholars working within the progressive property frame have developed an array of critiques

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.
concerning the normative and descriptive validity of the individual property rights frame. These critiques are predominately aimed at addressing social inequality reproduced through current property practices, what Gregory Alexander has called “de-marginalizing property.” While not without significant scholarly precedent, 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. 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. Even those who generally embrace the individual frame have conceded that public land is inevitably part of any privately-oriented system.

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 recommunalize, rather than reregulate, land ownership. As a result, attempts to recollectivize land, today generally described as “intentional communities” (ICs), often take on the quality of an “opt-out.” 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. 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. 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.
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 recommunalization 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 recommunalization 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.”\(^{64}\)


\(^{58}\) The Prize in Economic Sciences 2009, NOBELPRIZE.ORG (Oct. 12, 2009), https://perma.cc/5UN4-7XL7. 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.


\(^{62}\) 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. Even successful political movements that center ideology over design can lead to disastrous results, as was clearly on display during communist collectivization efforts. 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.

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. 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, the centrality of new forms of law and legal practice are recognized as key to enabling any sustained systemic institutional change in landholding. 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. Mistakes, or injustices, at the outset of any new property regime can have detrimental path-dependent effects, even those that attempt to institutionalize progressive ideas or social innovations.

What seems to frustrate most attempts at land recollectivization 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. 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.

In contrast to the “law of the commons” both in the United States and abroad.

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68 Jane B. Holder & Tatiana Flessas, Emerging Commons, 17 SOC. & LEGAL STUD. 299, 301 (2008).
70 Janelle Orsi, Three Legal Principles for Organizations Rebuilding the Commons, in LAW AND POLICY FOR A NEW ECONOMY 119 (Melissa Scanlan eds., 2017).
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.\footnote{See Louise Meijering et al., Intentional Communities in Rural Spaces, 98 TIJDSCHRIFT VOOR ECONOMISCHE EN SOCIALE GEOGRAFIE 42, 43–44 (2007) (discussing how Intentional Communities differ in their ways of rejecting mainstream society).}

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 recommunalize 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 recommunalized 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 recommunalize 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.\footnote{See discussion infra Part.II.C.} 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.\footnote{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).}

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.\footnote{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).} Otherwise, discussion of the normative value of such arrangements will continue to be too easily
undercut by critics who can make revealed preference arguments that such efforts are inherently fringe or unwanted variations.\textsuperscript{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 \textit{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.\textsuperscript{81} However powerful a restraint on private property experimentation \textit{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.\textsuperscript{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.\textsuperscript{83}

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

\begin{thebibliography}{99}
\bibitem{80} Jon Elster, \textit{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).
\bibitem{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, \textit{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.
\bibitem{84} \textit{Id.} at 4.
\end{thebibliography}
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. 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. 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. Originally, most ICs, especially those in the Georgist tradition, chose to place land in trusts that permanently removed it from private markets. Many of these trusts still exist today. Trust mechanisms impose strong fiduciary duties on the relevant 3rd-party decision-maker and grants weaker removal powers for beneficiaries. 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).
89 Id. at 29.
90 76 AM. JUR. 2D 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).
argument about the relationship of legal self-discipline to a more focused movement to decommodify 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. The word has been subsequently deployed in innumerable ways, but this desire to escape and recreate a new way of living remains central. 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. 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.

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. 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. 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.

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 SOCILOGY (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.\textsuperscript{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.\textsuperscript{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, civicly engaged but economically autonomous.\textsuperscript{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.\textsuperscript{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.\textsuperscript{108} With common motivation to reject the onset of Polanyi’s commodified property and labor relations,\textsuperscript{100} such experiments involving close to 100,000 residents during this era are catalogued by Holloway.\textsuperscript{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.\textsuperscript{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.\textsuperscript{111}

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

\textsuperscript{109} See \textit{id}.
\textsuperscript{110} \textit{Id} at 18–19
recent decades, Robert Fogarty and Timothy Miller 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. At the onset of the Great Depression, Charles Gide authored *Communist and Co-Operative Colonies*. 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.

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. 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. 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.

The early dominance of religious motivations for founding ICs soon gave way to secular inspirations in the late nineteenth century. The intellectual history of what then might be called radicalism in the history of American land has a diverse and wide-ranging scope. 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

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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.
119 See Nordhoff, *supra* note 118, at 264, 276.
120 See Noyes, *supra* note 114, at 672.
States. Notably, the French socialist thinker Charles Fourier had numerous followers who tried to apply his ideas on American soil.\textsuperscript{122} The most well-known of these foreign-inspired transplants was that of the Welsh entrepreneur Robert Owen.\textsuperscript{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.\textsuperscript{124} Even though his New Harmony community was short lived, it gained great popular notoriety.\textsuperscript{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 \textit{Looking Backward} was the subject of great debate, including its implicit call for the nationalization of all land—then called “Nationalism.”\textsuperscript{126} Most new ideas were expressed in tandem through such literary re-imaginings, and Ignatius Donnelly’s 1890 \textit{Caesar’s Column} was widely read as a practical vision of agrarian populism.\textsuperscript{127}

These more communitarian ideas were not without their critics. Of equal fame was Henry David Thoreau’s 1854 \textit{Walden} which rejected collective life and embraced a much more individualistic concept of human freedom.\textsuperscript{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.\textsuperscript{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.\textsuperscript{130}

\begin{footnotes}
\footnotetext{122}{JOHN BEECHER, CHARLES FOURIER: THE VISIONARY AND HIS WORLD 501 (1986).}
\footnotetext{124}{\textit{Id.}}
\footnotetext{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).}
\footnotetext{126}{See generally \textit{Edward Bellamy, Looking Backward} 2000–1887 (1888) (a fictional envisioning of a communist America without private property).}
\footnotetext{128}{See generally \textit{Henry D. Thoreau, Walden; Or, Life in the Woods} (1854).}
\footnotetext{129}{See, \textit{e.g.}, Joseph Wood Krutch, \textit{The Modern Temper: A Study and a Confession} 164 (1929).}
\footnotetext{130}{Paul S. Boyer, \textit{Foreword, in America’s Communal Utopias}, at xi (Donald Pitzer ed., 1997).}
\end{footnotes}
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. They persisted in continued religious and secular versions of what Donald Pitzer calls “self-conscious communal experimentation.” 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. George’s 1879 text *Progress and Poverty* was an international best-seller, and quickly propelled him to global fame. George had clear Jeffersonian sympathies and saw landlordism, specifically absentee landlordism, as the bane of a productive and just society. His most lasting idea was that all tax revenue could be derived from a tax on the value of unimproved land. 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.

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. 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. 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. 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

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134  HENRY GEORGE, PROGRESS AND POVERTY (1879).
136  Id.
137  Id.
139  John Simkin, British History, History of Socialism, Ebenezer Howard, SPARTACUS EDUC., https://perma.cc/L4VJ-FJ7X.
140  SIR EBENEZER HOWARD, GARDEN CITIES OF TO-MORROW 68–75 (1898).
Celo, North Carolina to note some of the most prominent.\textsuperscript{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.\textsuperscript{142} The revenue from these leases funded general improvements to the land and, if successful, expansion of the trust through new purchases.\textsuperscript{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 Sufferen, New York.\textsuperscript{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.\textsuperscript{145} As we will return to later, the School of Living is still in operation today.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{in toto}, the desire to create a model for racial justice communities led to a broader national conversation about how to structure ICs.\textsuperscript{150} One of

\begin{itemize}
\item \textsuperscript{141} Miller, supra note 113, at xvi.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Id.
\item \textsuperscript{144} Ralph Borsodi, \textit{Roots & Branches}, https://perma.cc/XYE7-X69Y (last visited May 9, 2019).
\item \textsuperscript{146} See School of Living: A Non-profit Educational Network, SCH. LIVING, https://perma.cc/HV7T-5DCF (last visited May 9, 2019).
\item \textsuperscript{149} Heather Jo Burnmeister, \textit{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.
\item \textsuperscript{150} See \textit{Brief History}, KOINONIA FARM, https://perma.cc/2XY9-6DGM (discussing how the IC was structured with racial equality in mind).
\end{itemize}
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.\textsuperscript{151} Clarence Jordan helped found the Koinonia Farm in 1942 as an attempt to form a racially integrated and economically self-sufficient community.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{155} Timothy Miller has provided substantial descriptive detail concerning the ICs of this era.\textsuperscript{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.\textsuperscript{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.\textsuperscript{158} IC's generally short life spans made those that endured as exceptions to be explained.\textsuperscript{159} The primary

\begin{enumerate}
\item 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.
\item Brief History, supra note 150.
\item See Meijering et al., supra note 76, at 42, 43 (discussing the motivations for IC members to withdraw from society).
\item 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).
\item Meijering et al., supra note 76, at 43.
\item See generally TIMOTHY MILLER, THE 60S COMMUNES: HIPPIES AND BEYOND (1999).
\item See generally MICHAEL HOGG, THE SOCIAL PSYCHOLOGY OF GROUP COHESIVENESS (1992) (discussing how collective groups can be studied as subjects in psychology).
\item See BENJAMIN ZABLOCKI, ALIENATION AND CHARISMA 6 (1980) (stating a contrary view that communes should not be viewed as microcosms).
\item “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. 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. 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. 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. 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.

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. The tension between charismatic leadership and more communitarian norms is an issue for many ICs, 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. 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. The interconnection between property, religion and community has a long social and academic pedigree, but from a psychological standpoint religious belonging generating more costly “signals” to other group members of their individual commitment to the project. 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).


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.


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. SCL STUDY RELIGION 73, 74 (2006).


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helped promote longevity as the particular metric that ICs should be judged by.\textsuperscript{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.\textsuperscript{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.\textsuperscript{173} Following this position, there is an active Communal Studies Association and a Society for Utopian Studies.\textsuperscript{174} These groups study and debate new intellectual strands of communitarian thought,\textsuperscript{175} and are academic nexus points for continued sympathetic study by sociologist and anthropologists.\textsuperscript{176}

The consonance between the self-study and academic study of ICs can be seen in a shift away from the language of group psychology\textsuperscript{177} and to a greater emphasis on how to promote values of sharing and coordination.\textsuperscript{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.\textsuperscript{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.\textsuperscript{180}

Part of this new proactive planning is an attempt by some to argue for concern with legal design.\textsuperscript{181} Especially for serial participants, there is awareness that there are essential legal elements to the formation and exit/entry processes of communal arrangements.\textsuperscript{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.\textsuperscript{183} While some ICs still attempt to build themselves using more traditional forms of

\footnotesize{\textsuperscript{171} KANTER, supra note 160.}
\textsuperscript{172} UTOPIAS, supra note 125; JYOTSNA SREENIVASAN, UTOPIAS IN AMERICAN HISTORY (2008).
\textsuperscript{173} SARGISSON & SARGENT, supra note 131, at xiii–xiv.
\textsuperscript{174} INTENTIONAL COMMUNITY: AN ANTHROPOLOGICAL PERSPECTIVE, at vii, 8 (Susan L. Brown ed., 2002).
\textsuperscript{175} Amitai Etzioni, Introduction to THE ESSENTIAL COMMUNITARIAN READER, at ix (Amitai Etzioni ed., 1998).
\textsuperscript{177} Sanguinetti, supra note 167, at 6.
\textsuperscript{179} LYNN F. PEARSON, THE ARCHITECTURAL AND SOCIAL HISTORY OF COOPERATIVE LIVING 217 (1988); Sanguinetti, supra note 167, at 17.
\textsuperscript{180} Sargisson, supra note 178, at 7–8.
\textsuperscript{181} See Albert Bates et al., Legal Options for Intentional Communities, FELLOWSHIP INTENTIONAL COMMUNITIES, https://perma.cc/5GZW-66EB (last visited May 9, 2019).
\textsuperscript{182} Id.
\textsuperscript{183} Id.
individual title, and some simply exist permissively on one of the member's personal land. ICs have now been formed using a wide range of legal forms. 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.”

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,” and many still lament that “some . . . still adopt the position that love and goodwill will obviate the need for rules.”

For example, traditional joint-tenancy or tenancy-in-common allows for unilateral decisions by rights holders, including forced sales. Similarly, survivorship rights of these forms are not suited to facilitating inter-generational transfers based on group consensus. 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. 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. 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.

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

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185  See Bates et al., supra note 181.
186  OIST, supra note 86.
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. 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.

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.

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. You can find ICs incorporated under the Internal Revenue Code as 501(c)7 social clubs, religious corporations under 501(d), and most often 501(c)3 as social non-profits. 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. Ultimately, many ICs are still formed without careful consideration of the possible legal forms involved. 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.

While there have been increasingly comprehensive attempts to generalize and spread knowledge about the legal issues that ICs face, the view that communal living can be sustained by shared values alone continues to be powerful. 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. Outside parties offering up “best practices” based on more technical expertise can just as often be seen as threats as assets, especially if they

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194 Id.
195 Id.
196 Id.
197 Id.
199 Henson et al., supra note 187.
201 Gwendolyn Hallsmith, Ecovillage Infrastructure, FELLOWSHIP INTENTIONAL COMMUNITY, https://perma.cc/7DBB-83H6 (last visited May 9, 2019).
203 DIANA LEAF CHRISTIAN, CREATING A LIFE TOGETHER, at xx (2003).
204 Id.
question localist governance norms. 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.

As a result, institutional attempts to network ICs have faced even more acute organizational challenges to-date. The most consistent attempt to network ICs is the Fellowship of Intentional Communities (FIC), created during work to first link ICs in the 1940s. The FIC has published a variety of informational materials and sponsored national and regional meetings to discuss relevant issues. There is also a Federation of Egalitarian Communities formed in 1976 with similar aims. 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. As a result, funding for these institutions is highly unstable and they routinely merge or are re-initiated after years of dormancy.

If anything, the rise of ecological motivations for ICs has made localist tendencies even more acute. 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. 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. 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.

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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).
208 Id. at 2.
210 Id.
211 About Us, FED’N EGOALITARIAN COMMUNITIES, https://perma.cc/606L-9ZUG (last visited May 9, 2019).
212 MANZELLA, supra note 207, at 6.
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. HUINDORF, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{232} The Amish also possess a proactively anti-technological stance that helps foster their relative economic isolation.\textsuperscript{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-
reproductive capacity and relied on intense outside social dissatisfaction to sustain their membership.\textsuperscript{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.\textsuperscript{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.\textsuperscript{236} Only for very specific transactions, and under very specific social conditions, can modern contexts recreate co-operative norms outside of judicial enforcement.\textsuperscript{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.\textsuperscript{238} Again, this is only possible in the modern context of free and costless exit.\textsuperscript{239} By contrast, under pre-modern conditions the smaller a social group was, the more fiercely social norms needed to be enforced.\textsuperscript{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.\textsuperscript{241} Thus the eternal link between law and violence classically articulated in by Robert Cover was far less obscure in communalized land tenure systems.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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

\textsuperscript{234} Erin Blakemore, There Are Only Two Shakers Left in the World, SMITHSONIAN (Jan. 6, 2017), https://perma.cc/2Y7F-XJ6M.
\textsuperscript{235} Lee Anne Fennell, Contracting Communities, 2004 U. ILL. L. REV. 829, 888 (2004).
\textsuperscript{236} Id. at 887–89.
\textsuperscript{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).
\textsuperscript{238} Id. at 128–29.
\textsuperscript{239} Id. at 284–85.
\textsuperscript{240} CHRISTO FABRICIUS ET AL., RIGHTS, RESOURCES, AND RURAL DEVELOPMENT: COMMUNITY BASED NATURAL RESOURCE MANAGEMENT IN SOUTHERN AFRICA 164 (2004).
\textsuperscript{241} See id. at 4.
\textsuperscript{244} Sanguinetti, supra note 167, at 12.
which humans experience land use is rarely referenced. Attempts to preserve communal land tenure systems have been complicated throughout the world, where cultural norms have been weakened by the same social forces decried by ICs participants. Moreover, studies of such systems often emphasize the self-interested actions of traditional leaders in non-democratic structures of authority, who resist land privatization not out of altruism but to sustain their own base of power. 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, or with the merit of deconstructing larger systems of oppressive feudalism.

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. 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. In the United States there are examples of communities whose informal land use has been permanently impaired simply by the imposition of property taxes.

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

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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. 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. 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.

A common flash point for these debates has been the work and affiliated reform agendas of Hernando De Soto. 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. 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, and even ardent “pro-property” advocates have been somewhat chastened by the complex realities of land reform. In many cases, transforming informal communal land into individual property titles leads to cycles of dispossession and land concentration, as De Soto’s credit-driven mechanism confronts locally

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257 Id. at 8–10.
embedded structures of political and economic power as well as low financial literacy.\textsuperscript{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.”\textsuperscript{264} In the wealthiest cities of the world land informality persists alongside strong formal protection of property rights,\textsuperscript{265} and the challenges of providing affordable housing refracts economic and racial inequality.\textsuperscript{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.\textsuperscript{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.\textsuperscript{268} In all of these modern contexts, formal ownership and a sense of powerful attachment have be shown to not be necessarily coincident.\textsuperscript{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.\textsuperscript{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.\textsuperscript{271} Parallel to developments in the United States, there are academic organizations, such as the International Communal Studies

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\begin{itemize}
  \item \textsuperscript{264} See Nicholas Blomley, \textit{Unsettling the City: Urban Land and the Politics of Property}, at xviii (2004); Barrie Needham, \textit{Planning, Law and Economics} (2006); David Harvey, \textit{Rebel Cities: From the Right to the Cities to the Urban Revolution} 14 (2012).
  \item \textsuperscript{266} Tore Sager, \textit{Neo-liberal Urban Planning Policies: A Literature Survey 1990-2010}, 76 PROGRESS IN PLANNING 147, 181 (2011); Duncan Kennedy, \textit{The Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society}, 46 HOWARD LJ. 85, 110 (2002).
  \item \textsuperscript{268} Shann Turnbull, \textit{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, \textit{Housing Cooperatives: Possible Roles in Havana’s Residential Sector}, 15 CUBA IN TRANSITION 167, 176 (2005).
  \item \textsuperscript{269} Amelia Thorpe, \textit{Hegel’s Hipsters: Claiming Ownership in the Contemporary City}, 25 SOC. & LEGAL STUD. 27 (2018).
  \item \textsuperscript{270} For a discussion of comparative property analysis, see Yun-chien Chang & Henry Smith, \textit{Structure and Style in Comparative Property Law}, in \textit{COMPARATIVE LAW & ECONOMICS} 131 (Theodore Eisenberg & Giovanni Ramello eds., 2016).
  \item \textsuperscript{271} COMMUNITIES DIRECTORY (Sarah Bunker et al. eds., 2016).
\end{itemize}
Association, which have emerged in recent decades to study this transnational phenomenon.\textsuperscript{272} The earlier perception that America represented the most open forum to pursue land experiments later shifted to Australia and New Zealand, which have witnessed phases of relatively intense IC formation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{275} Private attempts to create new property forms confronted some variation of the \textit{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.\textsuperscript{276} At the same time, many scholars in the “law of the commons” movement have argued that the \textit{numerus clausus} principle must be interpreted as a pro-social doctrine that allows for democratic experimentalism.\textsuperscript{277} The debates around \textit{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.\textsuperscript{278} The global range of experiences in moving between individual and communal land holding thus brings to bear a more

\textsuperscript{272} \textit{About ICsA, INT’L COMMUNAL STUD. ASS’N}, https://perma.cc/VR7P-UJV5 (last visited May 9, 2019).
\textsuperscript{273} SARGISSON & SARGENT, \textit{supra} note 131, at xiv.
\textsuperscript{274} For a primer on the challenges of comparative property law, see Bram Akkermans, \textit{The Comparative Method in Property Law, in} 90 RESEARCHING PROPERTY LAW (Susan Bright & Sarah Blandy eds., 2016).
\textsuperscript{275} See discussion \textit{supra} Part II.B.
\textsuperscript{277} Robilant, \textit{supra} note 81, at 370 n.7.
\textsuperscript{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., \textit{supra} note 187, at 4.
longitudinal frame for thinking beyond the need to match immediate client needs with extant legal forms,\textsuperscript{279} and allows for consideration of how privately initiated communal land projects transition from idiosyncratic experiments into a more widely accessible social options.

\textbf{B. Participatory Norms and Communitarian Land Holding}

\textit{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.\textsuperscript{280} As with many urban locales around the world,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{286}

Housing cooperatives were a mix of private and public initiatives which were ultimately enabled by municipal legislation.\textsuperscript{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

\textsuperscript{279} An admirably comprehensive collection of co-housing legal advice can be found in ORSI, \textit{supra} note 86, at 337.


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


\textsuperscript{284} \textit{Id} at 578.


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

\textsuperscript{287} \textit{Id} at 595–96.
workers assigned to dam projects for the Tennessee Valley Association. 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, which shifted housing policy towards tax incentives and subsidies within an individual market frame. Yet, cooperatives persisted in many urban locales, and their proponents would effectively lobby for their accommodation in municipal and federal housing legislation.

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. Early scholarship on cooperatives advised the use of the corporation as allowing for both limited liability and control, and made arguments about how cooperatives should benefit from homestead and other legal protections while avoiding some of the growing scrutiny of investment securities. 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.

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.

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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.
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, 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, and govern around, 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. 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. 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. 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. 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. 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.

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

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).
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 PROCEEDIA 193, 193–95 (2014).
304 Id. at 194.
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.\textsuperscript{306}

In contrast to this trajectory for cooperatives, the more successful American private initiative in property that has spread globally is that of the condominium.\textsuperscript{308} Originating out of Puerto Rico during an urban housing squeeze in the late 1950s,\textsuperscript{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.\textsuperscript{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 practice.\textsuperscript{311}

Legally, formal individual ownership had made the legal adaptations required for condominiums to be less extensive, especially in regards to taxation.\textsuperscript{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.\textsuperscript{313} This does not preclude conflicts between condominium owners and their associations, but it often migrates conflict resolution into the judicial realm.\textsuperscript{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.\textsuperscript{315} While cooperatives have maintained a foothold in NYC, condominiums have spread throughout the United States, and now

\begin{thebibliography}{9}
  \bibitem{309} \textit{Id.} at 1–2.
  \bibitem{311} \textit{Id.} at 1237–38.
  \bibitem{314} \textit{Id.} at 309–10.
\end{thebibliography}
across the globe.  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. 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. Here condominiums followed a similar trajectory of urban densification coinciding with a shift in housing policy from public housing toward decentralization and tax subsidies. 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.

Often grouped alongside cooperatives and condominiums as “common interest communities” (CICs), “planned communities” are a further watering down of communal ownership. 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. Through deed covenants homeowners are given voting rights in the association and cede authority to the association over specific land use arenas. The intensity of this ceded authority can vary dramatically, but generally involves some baseline restrictions on the aesthetic maintenance of associated properties. Poplarly expressed through the image of the “gated community," planned communities are generally aimed at economically advantaged purchasers who seek to cluster around other economically, or racially, similar owners. 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. Nonetheless, like the condominium, this form has spread globally.

317 Id. at 25.
319 Id. at 706–08.
322 Id. at 10–12.
323 See id. at 19.
326 Strahilevitz, supra note 324, at 439–40.
along the vectors of developer interest and high-income residential lobbying.\footnote{Thomas, supra note 327, at 208–09.}

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,\footnote{See Georgette Chapman Phillips, Boundaries of Exclusion, 72 Mo. L. Rev. 1287, 1293–94 (2007).} and are part of a general breakdown of social capital formation in modern society.\footnote{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).} Some proponents of CICs have even cautioned that the growth of equal protection principles and antidiscrimination statues may undermine their future growth, especially those CICs that effectively organize themselves through covenantal restrictions.\footnote{Rohan, supra note 331, at 10–12, 34–36.}

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.”\footnote{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).} Many co-housing adherents borrow the language of “intentional living” but do so completely within the frame of individual home ownership.\footnote{Id.} Inspired in large part from developments in Denmark, a cohousing movement has spread internationally that serves as a forum of best practices to voluntarily simulate community participation.\footnote{Id.} 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.\footnote{See Jo Williams, Designing Neighborhoods for Social Interaction: The Case of Cohousing, 10 J. Urb. Design 195, 201–02 (2005).} Thus, cohousing has become a brand of sort in urban developments across Europe, and now in the United States and other higher-income municipalities.\footnote{Id.}

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...
exit by owners. 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.

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. And yet again, studies of cohousing also point to their highly skewed elite and homogenous demographics, leading to their characterization as just another form of exclusionary gentrification and a dominance of collective decision making by participants with sufficient leisure time. 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.

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. The advice of most ICs legal advisers to adopt the corporate form reflects this flexibility. 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

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).
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. 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. The early history of ICs before the rapid diffusion of the corporate form commonly involved trusts. 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. 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. However, the ICs inspired by Georgist intellectual ideas used trusts to specifically take land out of private markets.

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

Trusts as such can have multiple trustees, and the designation of trustees can have more complex designation procedures. The evolution of complex and charitable trusts has advanced over the twentieth century, if not with the same energy of the corporate form. 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

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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).
360 Id.
underlying principles would be altered following large upswings in market valuations. 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. 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. 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.

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. 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. 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. The language of “trust” and “trustee” was maintained in large part to retain the image of duty and obligation inherent in earlier Georgist endeavors. Yet, in contrast to even housing cooperatives, the shift to use of the corporate form did not lead to

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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 Bhoomidhan 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. 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. In contrast, the symbol for the renewed promise of CLTs is the Champlain Housing Trust. 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. 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. 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. 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. 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.

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. Yet, a recent survey has shown that a majority of CLTs operate without community representation, and 25% operate without any leaseholder representation.

369 INST. FOR CMTY. ECON., supra note 88, at 18.
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).
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.
378 James DeFilippis et al., Whither 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. 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. 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. CLTs still face significant legal uncertainty, in part because of a lack of national assessment standards for their property tax liabilities, 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. 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, though building such properties on leased land remains legally unsure, if not illegal, in some areas.

Many have challenged the pro-social potential of modern CLTs, especially as a majority of local social services are funded through property taxes. 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. Other CLTs have introduced waivers of their resale restrictions in instances of foreclosure, moving some to argue that

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381 See Fireside, supra note 371, at 344.


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.

Local municipalities have often traded their support for full control over CLT operations, and even approval of new tenants. 391 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. 392

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. 393 These challenges included maintaining active community engagement and a general social justice orientation, given local political concerns. 394

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. 395 Key to this success has been the build-up of national and regional networks to share technical advice, and even startup capital. 396 Various guidebooks are circulated by pro-CLT interests,

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.
393 Davis, supra note 121, at 38.
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).\textsuperscript{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.\textsuperscript{399} The Institute has itself been reorganized multiple times, most recently during its recent collapse in 2003.\textsuperscript{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.\textsuperscript{401} Yet, most attempts to create national CLT networks have led to patterns similar to ICE’s recurrent reformulation.\textsuperscript{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.\textsuperscript{403} The involvement of local governments has led to more consolidated resistance to outside partners,\textsuperscript{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.\textsuperscript{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.\textsuperscript{406} Some Canadian CLTs, such as

\textsuperscript{398} See generally INST. FOR CMTY. ECON., supra note 88.  
\textsuperscript{399} See Davis, supra note 121, at 29.  
\textsuperscript{400} Id. at 31.  
\textsuperscript{401} See Organizational Start-Ups, BURLINGTON ASSOCIATES, https://perma.cc/MSYD-87DB (last visited May 9, 2019) (showing the clients Burlington Associates has helped implement central-server systems).  
\textsuperscript{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.  
\textsuperscript{403} See generally Community Land Trusts, DEMOCRACY COLLABORATIVE, https://perma.cc/L8Y4-XYYV (last visited May 9, 2010) (providing a general overview of CLT and offering demographic statistics of membership).  
\textsuperscript{404} See Emily Thaden & Jeffrey S. Lowe, Resident and Community Engagement In Community Land Trusts 18–19 (2014).  
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


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


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).


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.\footnote{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/9BSD-LEY9.}

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 recommunalize 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 been 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
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).


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


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

Given that they generally involve more diverse land use patterns than conservation trusts, the best analogy to ICs is in fact indigenous land trusts. 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. The most extensive of these trusts exists in Fiji, where 92% of all land is held in trust for its inhabitants. 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, and difficulties in managing changing land tenure needs over time. 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. Again, indigenous trust governance faces many of the same internal conflicts and heterogeneous preferences that
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.  

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. Even scholars who have taken a more sympathetic view of the transient localism of many ICs have noted the importance of external support networks, and the use of third-party organizations to stabilize ICs.

Chippenham Community in New Zealand, currently one of the oldest surviving secular (and urban) ICs, exemplifies this dynamic. 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. 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.

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.

The most striking successes in worker cooperatives follow the same pattern of introducing forms of hierarchical organizations which limit individual cooperative self-government.

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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.


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. 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. Here individual housing cooperatives were still formed as LLCs, with the internal allocation of full participatory rights to residents. 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. 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. 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. 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. In the last three decades, the Syndikat has rapidly grown in membership across Germany.

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

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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.


446 Id. at 219.

447 Id.

448 Id. at 218.

449 Id. at 221.

450 Cf. id. at 198–99, 210, 222.

451 Id. at 218–19.

hybrid legal regimes, perhaps this form of networked LLC will provide a more suitable model in many national contexts. 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.

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.” 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. 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.

Given this sense of inevitability it may seem harsh to judge the retreat of ICs from their commitment to social movement politics. George Celo wrote of the confidence that inspired the early Georgists to form a community which would serve as “an example to a diseased world.” 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

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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. 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. 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.

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. 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.

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. 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.

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. Pairing this

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460 See id. at 11–13.
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.” O RSI, 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).
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. 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.

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. 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. 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. 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,
but over who will decide how such land is transferred from state to private ownership in the first instance.\footnote{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); Yonhgua Zou et al., Marketization of Collective-Owned Rural Land: A Breakthrough in Shenzhen, China, SUSTAINABILITY, 2014, at 9121–22).}

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.\footnote{Orsi, supra note 86, at 491.} At some general level, ready access to legal forms which can adapt to heterogeneous preferences should be one goal of any regulatory regime,\footnote{Wendy E. Taylor, Property Rights—and Responsibilities? The Case of Kenya, HABITAT INT’L, 2004, at 275.} and in this way the common law has presented many such opportunities for innovation in the United States and elsewhere over time.\footnote{Francesco Minora et al., Governing for Habitability 6 INT’L J. CO-OPERATIVE MGMT. 33, 33 (2013).} 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.\footnote{See Julie D. Lawton, Unraveling the Legal Hybrid of Housing Cooperatives, 83 UMKC L. REV. 117, 117–21 (2015).}

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.\footnote{Dominic Parker, Land Trusts and the Choice to Conserve Land with Full Ownership of Easements, 44 NAT. RESOURCES J. 483, 513, 515 (2004).} 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.\footnote{Evan J. Criddle, Liberty in Loyalty: The Republican Theory of Fiduciary Law, 95 TEX. L. REV. 903, 1038 (2017).} The desire to infuse communitarian land with this sense of
heightened responsibility is why so many corporations with a social mission still call themselves trusts, and label their board of directors “trustees.”

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. 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. 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.

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. 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. 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. 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.
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. 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 to be to community breakdown around property. 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.

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. 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. Not surprisingly, “Naturally Occurring Retirement Communities” have primarily sprung up around religious organizations which care for retirees motivated by shared religious norms. 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

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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).
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).
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.

\(^{495}\) O RSI, supra note 86, at 470.


\(^{497}\) 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.