

**THE NEW URBAN COMMONS:
ENABLING LAND AND
RESOURCE STEWARDSHIP IN CITIES**

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I. INTRODUCTION

Last year, over forty people, mostly single mothers with young children, began to occupy boarded up, vacant homes in North Philadelphia.¹ The owner of the properties, the Philadelphia Housing Authority (PHA), had no plans to renovate them and planned to let them sit idle until they found an interested buyer.² As such, a coalition that includes Occupy PHA, Black and Brown Workers Cooperative, and the Revolutionary Workers Collective,

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1. Lizzie Tribone, *These Mothers Are Fighting for Their Families by Occupying Vacant Homes*, REWIRE NEWS GROUP (July 30, 2020), <https://rewirenewsgroup.com/article/2020/07/30/these-mothers-are-fighting-for-their-families-by-occupying-vacant-homes/>. In orchestrating the occupation, advocates were inspired by Moms4Housing, a group of homeless and marginally housed Black mothers in Oakland, California. Moms4Housing occupied an empty house, privately owned by a real estate company, and were evicted. Fortunately, a few weeks after the eviction, the real estate company agreed to sell the house to the Oakland Community Land Trust, which acquires land for the benefit of low-income communities. MOMS4HOUSING, <https://moms4housing.org/> (last visited Nov. 11, 2021).

2. *Id.*

began quietly moving in families.³ The coalition of advocates argued that the PHA, the largest landlord in Pennsylvania, had become indistinguishable from a private developer, leading to gentrification and displacement while ignoring the needs of the city's low-income residents.⁴ They also argued that, instead of being sold to developers who would build market-rate housing, the homes should be transferred to a community land trust that would repair and manage them in perpetuity as affordable housing for the city's poorest residents.⁵

Around the same time, another group of housing-insecure mothers in Los Angeles, under the name "Reclaiming Our Homes,"⁶ began to move into vacant homes owned by Caltrans, the state transportation authority. They called themselves "reclaimers" of the property and argued that it was unacceptable that usable homes owned by the state were lying empty when people were homeless and living on the street.⁷ As part of a transitional housing program, none of the reclaimers were evicted and state officials agreed to lease more than twenty of the houses to the city's housing authority, which then allowed a dozen families to live in them for two years.⁸

Across the country, mothers with children in their care are leading the movement to make claims on vacant homes. They view these occupations as a rational response to the intersecting problems of homelessness, lack of affordable housing, and family separation. Unsurprisingly, these occupations expose them and their families to the risk that they can be removed at any moment by the state or local government. What is surprising is the increasing willingness of local governments to transfer or dedicate underutilized or unutilized resources—e.g., vacant or abandoned land and property—to these mothers and housing activists. They can convince municipalities to clear title and transfer these homes

3. *Id.*

4. Lizzie Tribone, *These Mothers Are Fighting for Their Families by Occupying Vacant Homes*, Rewire News Group (July 30, 2020), <https://rewirenewsgroup.com/article/2020/07/30/these-mothers-are-fighting-for-their-families-by-occupying-vacant-homes/>.

5. Susan Phillips, *Homeless Mothers Squat Federal Housing Sites as Encampment Deadline Looms*, WHY PBS: OPINION (Sept. 8, 2020) <https://why.org/articles/homeless-mothers-squat-federal-housing-sites-as-encampment-deadline-looms/>.

6. Reclaiming Our Homes, <https://reclaimingourhomes.org/> (last visited Nov. 30, 2021).

7. Interview by Cardiff Garcia with Robin Urevich, Staff Writer, Capital & Main in Los Angeles, Cal. (Mar. 1, 2021).

8. *Id.*

to limited equity forms of ownership in order to provide long-term affordable housing for neighborhood residents.⁹

Some local governments are going a step further and enabling the creation of institutions like community land trusts (CLTs) in low-income neighborhoods and communities in danger of gentrification and displacement.¹⁰ As an example, in 2017, New York City announced a \$1.65 million grant to support the development of CLTs;¹¹ and an additional \$750 million was allocated in 2019 to foster a network of CLTs across the city.¹² More recently, the city appointed a director of CLT initiatives to the city's housing agency and, as a solution to helping tenants at risk of eviction, is considering the transfer of land on which apartment buildings already exist to a CLT controlled by residents.¹³

It is not just housing. Increasingly, local governments are willing to dedicate or transfer property within the public domain to CLTs for urban gardens and farms in food insecure neighborhoods, and commercial and cultural spaces to maintain affordability for entrepreneurs and artists.¹⁴ Consider the recent announcement by the City of Seattle to transfer a decommissioned fire station, and one million dollars, to the Africatown Land Trust located in a historically Black neighborhood, the Central District.¹⁵ The grant

9. See e.g., Lisa. T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 271 (2015) (noting that, rather than leaving these homes vacant and blighted, local public officials often condone the occupation and transformation of these structures by community members who aim to return the asset to productive use in ways that beautify and improve the properties and, by extension, the surrounding neighborhood).

10. See generally, Ben Adler, *A Surprising Tool to Show Gentrification: Land Trusts*, GRIST (Feb. 13, 2015), <https://grist.org/cities/a-surprising-tool-to-slow-gentrification-land-trusts/>.

11. "The grantees are Cooper Square CLT, to expand its portfolio; the East Harlem/El Barrio CLT, to rehabilitate low-income, city-owned rental housing to be owned and operated as a CLT; the Interboro CLT, a new group created by four local nonprofits to promote affordable homeownership in Queens and Brooklyn; and the New York City Community Land Initiative (NYCCLI), a four-year-old advocacy group for CLTs, to support capacity-building for nine organizations, including the Mott Haven-Port Morris Community Land Stewards." URBAN OMIBUS, *Community Land Trusts* (Jan. 20, 2018), <https://urbanomnibus.net/2018/01/community-land-trusts/>.

12. Caroline Spivack, *Community Land Trusts Score Crucial Funds*, CURBED NY (June 18, 2019), <https://ny.curbed.com/2019/6/18/18682466/nyc-community-land-trusts-funding-city-budget>.

13. Abigail Savitch-Lew, *New York City Considers A Bold Idea To Keep People From Being Pushed Out Of Their Homes*, THE APPEAL (May 29, 2021) <https://theappeal.org/new-york-city-considers-a-bold-idea-to-keep-people-from-being-pushed-out-of-their-homes/>.

14. See e.g., Nicole Martinez, *CLTs Still Going Commercial—Nonprofit Offices, Hairdressers, and a Sausage Factory*, SHELTERFORCE (Apr. 5, 2021); see also *Agricultural and Commercial Community Land Trusts*, GROUNDED SOLUTIONS NETWORK (Apr. 2013), <https://groundedsolutions.org/tools-for-success/resource-library/agricultural-and-commercial-community-land-trusts>.

15. See *infra* notes 17–21.

from the city is designed to catalyze inclusive, heritage rich development in the district, which includes, in addition to affordable rental housing, the development of cultural spaces and community businesses. The fire station will be used to establish a Center for Cultural Innovation in the neighborhood, a collaborative effort between the neighborhood, the city's Department of Neighborhoods, and its Office of Planning and Community Development.¹⁶

The transfer of vacant, abandoned, underutilized land and property in the public domain to the control and management of a community of users is consistent with the idea that certain kinds of resources can be collectively shared and governed as a common good or "commons."¹⁷ Urban commons, as my previous work has shown, are often the result of utilizing available urban infrastructure to create, or construct, material goods or services that are collectively managed or overseen by a community of local users.¹⁸ These urban commons can provide vulnerable or marginalized populations with access to affordable housing and commercial spaces, fresh food and vegetables, green space, and basic utilities such as wireless or broadband access. Legal arrangements like CLTs, and some forms of limited equity corporate forms,¹⁹ hold the title to land and property but allocate limited rights and responsibilities to resource users and vests them with the duty of maintaining and keeping accessible and/or affordable the resource for future users and generations.²⁰

Over the last few years, my colleagues and I have surveyed hundreds of examples from cities around the world of self-organized groups of users and residents that collectively or collaboratively construct and then manage shared resources

16. Gregory Scruggs, *Plaza Heralds New Era of Afrocentric Development in Seattle Neighborhood*, NEXTCITY (Aug. 7, 2018), <https://nextcity.org/daily/entry/plaza-heralds-new-era-of-afrocentric-development-in-seattle-neighborhood>. The transfer of this station is only one of several parcels that the historic African American community has been pressing the city to transfer to it. Community activists, including the head of the community land trust, want control over vacant lots, a nursing home, and other properties. Additionally, they want to establish a \$500 million anti-gentrification land acquisition fund as part of a larger push to increase racially equitable outcomes in metrics like homeownership, wealth, and college attainment in King County by 2038. Gregory Scruggs, *In Seattle, Protests Over Racial Equity Turn to Land Ownership*, CITYLAB (June 23, 2020), <https://www.bloomberg.com/news/articles/2020-06-23/can-community-land-trusts-build-racial-equity>.

17. See generally THE CAMBRIDGE HANDBOOK OF COMMONS RESEARCH INNOVATIONS, (Sheila R. Foster & Chrystie F. Swiney eds., 2021).

18. See generally Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57 (2013).

19. See e.g., East Bay Permanent Real Estate Cooperative, <https://ebprec.org/>.

20. Sheila R. Foster & Christian I. Jaione, *The City as a Commons*, 34 YALE L. & POL'Y REV. 281 (2016).

together, utilizing existing and often underutilized urban infrastructure.²¹ These “urban commons” emerge from small and larger-scale resources—e.g., vacant lots, empty buildings, neighborhood parks, digital infrastructure, etc.—that rely on the collective efforts of resource users who must work with other public and private actors to co-create innovative forms of affordable housing, community-shared digital networks, and other community-controlled and shared goods and services.

What is *new* about these bottom-up, collective efforts, is that they are increasingly being enabled by local governments through the adoption of specific policies or practices. These policies and practices create the enabling conditions for these efforts by offering new legal authority or adapting existing laws that allow for the private use of public assets.²² Opening up access to this infrastructure allows residents to directly address a range of challenges in their community or neighborhood. Local government policies can facilitate, for example, a variety of co-governed enterprises like CLTs within a city. Doing so allows residents to actively take part in the regeneration of their neighborhoods, create shared goods to sustain themselves and flourish, and develop and nurture the communities to which they belong.²³

In this Article, I reflect on how we might understand these state-facilitated forms of resource sharing with communities of local users as a form of urban stewardship that is attentive to structural inequalities in their access to essential goods and services. Although stewardship is a well-known concept, its applicability to the built or constructed environment is less well understood and articulated. As such, I will spend some time in this Essay tying the obligations of stewardship to the particular features of, and challenges in, many urban environments. Given that resources in the built environment are entangled with state ownership and regulation, as well as with land markets, I also situate the role of the state as central to facilitating the stewardship relationship between those resources and the intended communities of users.

21. See Sheila R. Foster & Christian Iaione, *Co-Cities: Innovative Transitions Toward Just and Self-Sustaining Communities*, MIT PRESS (forthcoming, 2022).

22. *Id.* (discussing the emergence of policies and different legal tools ranging from collaboration “pacts” or agreements to civic use regulations allowing the private use of a public assets).

23. *Id.*

II. CONTESTED CLAIMS TO URBAN LAND AND INFRASTRUCTURE

Cities and neighborhoods characterized by growth, and those characterized by shrinkage and decline, contain significant amounts of vacant land and empty or underutilized structures.²⁴ In all kinds of cities available land and infrastructure can become a highly contested resource. There is often a tension between present users of the land and members of the surrounding community who want to be able to exploit these resources, and the local government, which may be hoping to sell abandoned property to private developers or investors.²⁵ I have argued previously that, in many respects, the type of vacant available land in cities is property in transition—land is moving away from a past use and towards a future use that is unknown and unplanned.²⁶ These resources are, in some sense, “up for grabs.” While in this transitory state, moving away from a past use and towards a future use that is unknown and unplanned, vacant land and structures are quite vulnerable to contestation of uses.

A. Land and Property in Transition

Land and structures become vacant or underutilized for many reasons, depending on whether the resources are public or private property.²⁷ In some cases, public buildings owned by the state may fall into disrepair or disuse due to lack of public money to take care of them. In most other cases, private land and structures can end up in the public domain when owners default on their tax obligations or otherwise abandon the obligations of property ownership.²⁸ Local governments or local redevelopment authorities assume responsibility over these parcels as result of tax foreclosure actions or as a means to remedy potential criminal

24. Alan Mallach, *The Empty House Next Door: Understanding and Reducing Vacancy and Hypervacancy in The United States*, 24–26, LINCOLN INSTITUTE OF LAND POLICY (2018), <https://www.lincolnst.edu/publications/policy-focus-reports/empty-house-next-door>.

25. See, e.g., Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527 (2006) (recounting the struggle over community gardens in New York City, pitting resident gardeners against local government officials over the use of the previously vacant lots where the gardens were cultivated).

26. Foster & Iaione, *supra* note 20.

27. Mallach, *supra* note 24.

28. *Id.*

activity and blight.²⁹ They become—at least temporarily—a form of under- or unutilized “public” property while in the domain of the local government.

As I have argued elsewhere, there is very little conceptual clarity about the legal character of land and physical resources that end up in the public domain after a previous private use has ended.³⁰ This property is distinct from what most of us understand to be the public “estate” that members of the public share—streets, parks, sidewalks, squares, etc.—albeit subject to state-imposed limits.³¹ It seems clear to me that previously privately owned or held property that ends up in public domain is some form of “public” property. However, it begs the question whether the character of ownership mimics, or is distinct from, the entitlements that are understood to accompany private property rights.

Nevertheless, vacant and abandoned lands and properties can contribute to community decline and disinvestment and have been associated with crime and plunging property values.³² In some communities, high vacancy rates are associated with a risk of displacement and gentrification.³³ Moreover, conflicts often emerge regarding present versus future uses and different possibilities for future use. Many residents begin treating vacant land or abandoned structures as an open access resource to be shared broadly and utilized to produce goods for the community (as in the case of community gardens or urban farms or using abandoned homes to house the homeless).³⁴

Local governments on the other hand, often value these assets for their potential market exchange value. Public authorities often

29. See e.g., Jennifer Aronsohn, *Community Claim of Right*, *THE URBAN LAWYER* 2021 (May 1, 2021).

30. Sheila R. Foster, The Eleventh Annual Wolf Family Lecture Series on the American Law of Real Property, University of Florida Levin College of Law: *Who Owns the City?: Public Property and Land Stewardship* (Aug. 20, 2018). Delivered by Sheila Foster, published in Michael Allan Wolf, Powell on Real Property (LexisNexis Matthew Bender).

31. JOHN PAGE, *PUBLIC PROPERTY, LAW AND SOCIETY: OWNING, BELONGING, CONNECTING IN THE PUBLIC REALM* 37–41, Routledge Press (2021).

32. *Id.*

33. Victoria C. Morckel, *Empty Neighborhoods: Using Constructs to Predict the Probability of Housing Abandonment*, *HOUSE POLY DEBATE* 469 (May 2013). At least one study found that this risk of gentrification was particularly strong in neighborhoods with clustered residential and commercial vacancies because they attract new investors and catalyze redevelopment. Ryun Jung Lee & Galen Newman, *The Relationship Between Vacant Properties and Neighborhood Gentrification*, *LAND USE POLY* 101, (Feb. 2021).

34. *Vacant and Abandoned Properties: Turning Liabilities Into Assets*, in Evidence Matters: Transforming Knowledge Into Housing And Community Development Policy, HUD Office of Policy Development & Research, (2014) <https://www.huduser.gov/portal/periodicals/em/winter14/highlight1.html>.

put these properties in a land bank or public receivership until title is clear for their transfer to a private investor or developer.³⁵ Given the restrictions on the ability of most local governments to raise revenue through new taxes, municipal officials view the divestment and sale of public property as an economic necessity and actively attempt to place the land back into productive use.³⁶

The tension between exchange and use value has long existed in urban markets. As John Logan and Harvey Molotch famously argued, this tension tends to play out at the neighborhood level with residents defending the use of land to satisfy the essential needs of everyday life, to build informal support networks, establish security and trust, capture agglomeration benefits, and fortify shared identity.³⁷ The tension between use and exchange values continues today but arguably at an even more heightened level in large part because urban land values are at historic highs, particularly in the most productive cities and metropolitan areas where economic opportunity is concentrated today.³⁸

Of course, not all urban land is valuable. Residents in what scholars refer to as the “urban prairie”—areas of shrinking cities like Detroit and St. Louis that have seen widespread abandonment—desire control over vacant land and abandoned structures to rebuild their communities and to obtain essential goods ranging from fresh vegetables, green spaces, and housing.³⁹ Even in more successful or economically productive cities, vacant land and structures are often concentrated in neighborhoods that suffer from a history of neglect, segregation, redlining, predatory

35. This is particularly true for previously privately held properties. The ability to hold onto neglected or abandoned private property until a private investor comes along (as land banks help to facilitate) may make macroeconomic sense to raise much needed funds for basic services and other local goods for which property taxes are paid. Giorgio Resta, *Systems of Public Ownership, in Comparative Property Law*, GLOBAL PERSPECTIVES 216, 240 (Michele Graziadei and Lionel Smith, eds., 2017).

36. In declining and shrinking cities, these properties are assets that can be sold in order to restore fiscal solvency to the local government. Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L. J. 1118, 1125–26 (2014).

37. John R. Logan & Henry L. Molotch, *Urban Fortunes: The Political Economy of Place*, U.C. PRESS 2, 103–10 (1987) (“The pursuit of exchange values in the city does not necessarily result in the maximization of use values for others. Indeed, the simultaneous push for both goals is inherently contradictory and a continuing source of tension, conflict, and irrational settlements”).

38. Nearly half the total value is packed into just five metro areas in the U.S.: New York, Los Angeles, San Francisco, Washington, D.C., and Chicago, with land in and around the urban center being the most valuable. Mark J. Perry, *Many U.S. Metro Areas Have Greater GDP Than Entire Developed Nations*, FEE (Oct. 2, 2018), <https://fee.org/articles/many-us-metro-areas-have-greater-gdp-than-entire-developed-nations/>.

39. Christopher G. Prener, Taylor Harris Braswell & Daniel J. Monti, *St. Louis's Urban Prairie: Vacant Land and the Potential for Revitalization*, 42 J. OF URB. AFF. 371, 371–89 (2020).

lending, and underinvestment, which creates both an opportunity and a risk for residents that undertake to construct new urban resources or goods that may not be sustainable given their precarious claim to the resource.⁴⁰ Thus, a tension arises around access to underutilized land and infrastructure seen as not only an opportunity for collective bottom up resource management by neighborhood groups, but also an opportunity for top down land distribution initiatives initiated by local governments that are not always favorable towards the most marginalized residents.

By pushing to make productive use of available urban infrastructure and land, residents in marginalized and underinvested communities are akin to contemporary “property outlaws,” as articulated by Eduardo Peñalver and Sonia Katyal.⁴¹ As their work has demonstrated, those excluded from property often respond in ways that end up reshaping legal norms on property ownership and use.⁴² From “illegal” lunch counter sit-ins during the civil rights movement to selective online copyright infringement, “property outlaws” often strengthen the role that property should and can play in changing the legal and social order.⁴³

In a similar way, the claiming of underutilized land, structures, and other urban assets challenges the public/private binary of property ownership in which either the state or private actors have sole and exclusive dominion over urban property. In other words, squatting in abandoned or empty houses, as in the examples above, becomes part of an effort to transform a strictly private or public good into a “common” good, one made accessible (affordable) for use and possession by present and future generations.

B. Resource Tensions in a Resurgent City

It is worth looking more closely at how the above-mentioned tensions are playing out in a previously declining but now resurgent city. Detroit, like many post-industrial cities, has experienced continuous decline over the last few decades as its workforce withered away and white residents fled to the suburbs, leaving a predominantly Black population to struggle for more

40. *Id.* at 384.

41. *See generally*, EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTORS IMPROVE THE LAW OF OWNERSHIP*, YALE UNIV. PRESS (2010).

42. *Id.*

43. *Id.*

equitable housing conditions and political power.⁴⁴ Shortly before Detroit became the largest American city to declare bankruptcy in 2012, the city began redistributing public property, increasing tax foreclosures, privatizing public services, and increasing private investments into the city.⁴⁵ In its quest to raise money in a context in which there is no regional tax sharing with its more affluent suburbs, Detroit has been characterized as a “predatory city”—a reference to the claim that public officials are dispossessing predominantly Black residents of their homes through, among means, questionable property tax foreclosures.⁴⁶

Today, Detroit is often referred to as a “tale of two cities.”⁴⁷ In one of these cities, private capital is fueling development in the downtown and Midtown areas, including areas close to some of the city’s universities and hospitals, populated by gentrifying young White professionals. The other consists of mostly Black residential neighborhoods populated by long-time residents who have not been able to, or wanted to, flee the city during its darkest days.⁴⁸

Detroit’s land bank program has been a sore point with many of its long-time residents who are not directly reaping the benefits of the city’s downtown and midtown revitalization. The Detroit land bank authority holds the title to the majority of the city’s vacant homes that it has acquired through tax foreclosures, and thousands of vacant lots. In total, the land bank has an inventory of roughly 90,000 properties in the city.⁴⁹ To some observers, the city has had no problem selling hundreds of parcels of vacant lots to large corporations to expand its

44. Grace Lee Boggs, *Detroit, Place, and Space to Begin Anew*, IN THE NEXT AMERICAN REVOLUTION: SUSTAINABLE ACTIVISM FOR THE TWENTY-FIRST CENTURY, U.C. Press 75 (2010).

45. Sara Safransky, *Rethinking Land Struggle in the Postindustrial City*, 49 ANTIPODE 1079, 1079–1100, 1082 (2017).

46. Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107, 107–82 (2020).

47. See, e.g., Laura Gottesdiene, *Detroit: A Tale of Two Cities, Post-Bankruptcy, Inequality*, BILL MOYERS.COM (Nov. 18, 2014), <https://billmoyers.com/2014/11/18/two-detroits-separate-unequal/>; <https://billmoyers.com/2014/11/18/two-detroits-separate-unequal/>; see also Laurie Levy, *Detroit: A Tale of Two Cities*, HUFF POST (Aug. 22, 2017), https://www.huffpost.com/entry/detroit-a-tale-of-two-cities_b_599c3985e4b0ac90f2cba9d1.

48. Sarah Alvarez & Leah Samuel, *Real Estate is Hot in Detroit. But its Top Owner, the City, Isn’t Selling*, BRIDGE (Aug. 21, 2018), <https://www.bridgemi.com/urban-affairs/real-estate-hot-detroit-its-top-owner-city-isnt-selling>.

49. John Gallagher, *Detroit Land Bank Admits Faults, Carries on Amid Complaints it Moves Too Slowly*, DETROIT FREE PRESS (Dec. 3, 2019, 6:24 AM) <https://www.freep.com/story/money/business/john-gallagher/2019/12/03/detroit-land-bank-criticism-weve-accomplished-tremendous-amount/2586225001/>.

commercial urban tree nurseries in Detroit, renovate dilapidated homes, and free up land for a car assembly plant.⁵⁰

Small-scale, long-established Black farms in the city, in contrast, have had difficulty acquiring the land on which they farm from the land bank.⁵¹ According to one account, despite their interest and attempts to purchase the land on which they have stewarded acres of farm sites that serve the needs of food insecure homes and neighborhoods, Black farmers have been unsuccessful in convincing the city to allow them to purchase the land.⁵²

As Sarah Safransky has documented—drawing on original interviews and observations at public meetings—many Detroit community members and activists are concerned about the “top-down re-territorialization” approaches in the city that do not take into consideration historical attachments to these lands, the people that are most impacted, and how are those people included, or excluded, from the narrative of urban revitalization.⁵³ Many Black community members believe that this land is “black man’s land”⁵⁴ and serves as a site of historical and collective memory. There is an emotional and physical connection to Detroit as a product of the Great Migration much like there is an emotional and physical connection to the rural land of the U.S. southern region that Black families left behind for economic and political advancement.⁵⁵ For many of these residents, claiming resident-stewarded land is a means to an end in the long running struggle for social justice.⁵⁶

50. Aaron Mondry, *City of Detroit Acquires Land Necessary to Complete FCA Plant Deal*, CURBED DETROIT (May 3, 2019, 6:19 PM) <https://detroit.curbed.com/2019/5/3/18528813/fca-plant-detroit-land-deal-moroun>; Kirk Pinho, *Hantz Quietly Sells off \$2.8 Million in Properties as Interest Grows in Neighborhood*, CRAIN’S DETROIT BUS (Sept. 19, 2021, 12:13 AM) <https://www.craindetroit.com/real-estate/hantz-quietly-sells-28-million-properties-interest-grows-detroit-neighborhood>; Chad Livengood, *Detroit Strikes Land Deal with Hantz Farms as Part of FCA Plant Project*, CRAIN’S DETROIT BUSINESS (Apr. 15, 2019) <https://www.craindetroit.com/real-estate/detroit-strikes-land-deal-hantz-farms-part-fca-plant-project>.

51. Tom Perkins, *The Detroit Land Bank and its Many Controversies, Explained*, CURBED DETROIT (Apr. 30, 2020, 10:02 AM) <https://detroit.curbed.com/2020/4/30/21166791/detroit-land-bank-authority-vacant-house-for-sale>.

52. Rachael Baker, *Racial Capitalism and a Tentative Commons*, in *Commoning the City: Empirical Perspectives on Urban Ecology, Economics and Ethics* 28–29 (2021).

53. Safransky, *supra* note 45, at 1079–82.

54. See James Bogg, *The City is the Black Man’s Land*, 17 *Monthly Review* 11 (1966); see also, James Boggs & Grace Lee Boggs, *The City Is the Black Man’s Land*, in *PAGES FROM A BLACK RADICAL’S NOTEBOOK: A JAMES BOGGS READER* 162 (Stephen M. Ward ed., 2011).

55. Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricis*, 2005 *WIS. L. REV.* 557, 561 (2005).

56. As Safransky notes, the claim to resident-stewarded land “is one part of a broader struggle to re-appropriate modes of social reproduction to serve the community rather than capital” and part of grassroots organizing efforts “seeking to undo colonial spatial orders and structures of white supremacy by building new organizing infrastructures, commons-

Bottom-up approaches to land stewardship often focus on greening and urban agriculture as a viable use of the land.⁵⁷ Beyond efforts to claim and utilize vacant land, residents in vulnerable communities view abandoned homes, factories, strip malls, and other structures as opportunities for productive reuse.⁵⁸ As the opening anecdotes also illustrate, vulnerable residents in marginalized communities in places like Detroit, Oakland, and Philadelphia are drawing attention to the amount of unused and underused spaces in resurgent and shrinking cities. By drawing attention to these resources, they hope to push public officials to recognize the value of utilizing abandoned private and public property to meet their needs.⁵⁹ These residents are also expressing a desire for more control and authority over how vacant land and structures will be remade and ultimately managed or governed over the long term, to ensure that these resources are kept accessible and affordable for others.⁶⁰ In essence, as I will highlight below, their efforts should be seen as making a claim to convert exclusively public assets into user-managed assets through the participatory governance structure of institutions like community land trusts.

III. URBAN LAND AND INFRASTRUCTURE AS A COMMON GOOD

The idea that some urban communities, or a group of users, can assume control of and collectively manage shared, common resources is reminiscent of Elinor Ostrom's observation that successful forms of community resource governance are possible, even for large scale resources, with the enabling of central authorities.⁶¹ My study of the "urban commons" began over a decade ago by investigating how different kinds of urban assets such as community gardens, parks, and neighborhoods could be reconceived akin to the kind of user-managed resources that

based institutions, decentralized forms of governance, and social and ecological relationships" See Safranky, *supra* note 45, at 1093.

57. See, e.g., Bentley, George C., Priscilla McCutcheon, Robert G. Cromley and Dean M. Hanink, *Race, Class, Unemployment, and Housing Vacancies in Detroit: an Empirical Analysis*, 5 URBAN GEOGRAPHY 37, 785-800.

58. Mallach, *supra* note 24.

59. Alexander, *supra* note 9.

60. Erin Baldassari & Molly Solomon, *How Moms 4 Housing Changed Laws and Inspired a Movement*, KQED (Oct. 19, 2020) <https://www.kqed.org/news/11842392/how-moms-4-housing-changed-laws-and-inspired-a-movement>.

61. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); Foster, *supra* note 18, at 62.

Ostrom identified as possible and sustainable.⁶² These urban commons involve groups of residents and resource users who are willing and able to organize themselves, work together to establish rules for sharing resources, and monitor themselves often with the support of the state.⁶³ I have also argued that thinking of some urban infrastructure as a shared, common resource is a way to acknowledge that a city can be *generative*, capable of providing for different social and economic needs of its population.⁶⁴

A. *Ostrom in the City*

Ostrom overturned decades of economic thought which suggested that there were only two ways to manage and govern shared resources: public control or private ownership. She found examples all over the world of resource users cooperatively managing and stewarding a range of natural resources—uncultivated lands, fisheries, and communal forests, groundwater basins, and irrigation systems—using “rich mixtures of public and private instrumentalities.”⁶⁵ In her examples, resource users devise and enforce their own rules for sustainably using, and sharing, the resource without overconsuming or depleting it.⁶⁶ These rules and the community’s right to enforce them were recognized by external governing bodies and public agencies.⁶⁷

Most of Ostrom’s examples involve small-scale resources and stable communities who were able to self-govern these resources in the absence of public or governmental control, or the endowment of private property rights in the resource.⁶⁸ Ostrom found, however,

62. Foster, *supra* note 18, at 57–134. Apart from my own work, the urban commons has become an important conceptual framework across many disciplines for examining questions of resource access, sharing, governance, and distribution of a range of both tangible and intangible resources in cities. *URBAN COMMONS: RETHINKING THE CITY* (Christian Borch & Martin Kornberger eds., Routledge 2016). Urban commons in this growing body of literature encompasses both material and immaterial resources—ranging from housing, urban infrastructure, and public spaces to culture, labor, and public services. *Urban Commons: Moving Beyond State and Market*, in 154 *BAUWELT FUNDAMENTE* (Mary Dellenbaugh et al. eds., Birkhäuser 2020).

63. I later have explored, with Christian Iaione, to conceive the city itself as a commons—as a shared infrastructure on which a variety of urban actors can cooperate and collaborate and where various initiatives of collective action can emerge, flourish and become sustainable. Foster & Iaione, *supra* note 20, at 281–349; Sheila R. Foster & Christian Iaione, *Ostrom in the City: Design Principles and Practices for the Urban Commons*, in *ROUTLEDGE HANDBOOK OF THE STUDY OF THE COMMONS* (Dan Cole et al. eds., Taylor & Francis Grp. 2016).

64. Foster & Iaione, *supra* note 20.

65. Ostrom, *supra* note 61, at 182.

66. *Id.* at 61–68.

67. *Id.* at 101–102.

68. *Id.*

that for larger and more complex resources, resource users had to work with government agencies and public officials to design, enforce, and monitor rules of use in so-called “nested” governance enterprises.⁶⁹ That is, the rules, procedures, monitoring, and sanctions put in place are organized in a “nested” institutional structure with layers of activity by different actors. This nesting might occur between user groups using the same resource and/or between user groups and central authorities (e.g. local or regional government agencies).⁷⁰

Ostrom’s case studies of collectively governed resources involved communities managing natural resources alongside some private property rights to access those resources.⁷¹ Ostrom made clear that the common property being managed by communities is not the same as the “commons” open to everyone (*res nullius*) as conceived by many scholars since publication of Hardin’s “Tragedy of the Commons.”⁷² Rather, the common property regimes she observed existed “where the members of a clearly demarcated group have a legal right to exclude non-members of the group from using a resource.”⁷³ These communities utilized these natural resources and created the rules, or conditions, of access for themselves and others with built-in incentives for responsible use and sanctions for overuse.

Ostrom’s work has sparked the study of a variety of new kinds of collectively held and managed resources, beyond the kind of natural resources she studied, that require thinking about the process of developing and enforcing rules, social norms, and other legal or governance tools for sharing and sustainability utilizing those resources.⁷⁴ Scholars have conceptualized and articulated new kinds of commons which involve “communities working together in self-governing ways in order to protect resources from enclosure or to build newly open-shared resources”.⁷⁵ These include

69. *Id.* at 90.

70. *Id.*

71. Those common property rights in many cases were centuries old and co-existed with the development of private rights to those resources over time. OSTROM, *supra* note 61, at 63.

72. *Id.* at 2–3.

73. Elinor Ostrom, *Private and Common Property Rights* 2000, 335–336, <https://www.sfu.ca/~allen/common%20property.pdf>.

74. *See, e.g.*, THE CAMBRIDGE HANDBOOK OF COMMONS RESEARCH INNOVATIONS, *supra* note 17.

75. Charlotte Hess, *Mapping the New Commons* 40 (July 1, 2008) (unpublished manuscript) (accessible at <http://dx.doi.org/10.2139/ssrn.1356835>).

knowledge commons, cultural commons, infrastructure commons, and digital commons, among others.⁷⁶

What was lacking from commons literature was a serious effort to apply these insights to the built environment in cities, or to transpose Ostrom's insights into the urban context in a way that captures the social and legal complexity of that environment. For one, most urban commons are constructed from existing urban infrastructure as opposed to users subtracting units from pre-existing resources (e.g., water or fish or wood). Cities are highly proprietary environments in which land and resources are often enclosed by ownership and exclusion rights that tolerate empty, abandoned, and unproductive surplus property to sit underutilized for long periods of time. Constructing urban commons such as community gardens, urban farms, and community land trusts must confront existing legal and property arrangements to create and sustain these resources.⁷⁷ In some instances, they require changing local laws to recognize or allow urban land and infrastructure to be used in common or creating new institutions that disaggregate and redistribute property rights and entitlements.⁷⁸

Scholars writing about new kinds of commons have also largely failed to grapple with the challenges of user-managed, shared resources in crowded, dense, heterogenous, and socially complex urban environments. As Amanda Huron's work has more recently noted, urban commons emerge in "saturated" spaces and often are constituted by the coming together of strangers.⁷⁹ Relatively high densities of population on a relatively small amount of space means that people are forced to either share or compete for resources, as Huron argues, making the process of constructing urban commons more challenging than in the kind of rural and small-scale environments that Ostrom and her academic progeny have studied.

Moreover, because of racial, social and economic inequalities in many urban environments, specific groups and populations

76. *Id.*

77. See, e.g., Nate Ela, *Urban Commons as Property Experiment: Mapping Chicago's Farms and Gardens*, 43 *FORDHAM URB. L.J.* 247, 291 (2016) (urban commons are created by users "experimenting with rules by which to govern particular pieces of land and tinkering with the possibilities made available by existing laws and the features of private property.").

78. *Id.* at 274 ("gardeners also draw on rules and norms available at different scales such as municipal ordinances, aldermanic policies, even rules from religious texts. They experiment with these rules, seeing what works for gardeners, and what does not, sometimes trying to change higher-order rules such as composting ordinances, which would enable greater sharing of resources.").

79. Amanda Huron, *Working with Strangers in Saturated Space: Reclaiming and Maintaining the Urban Commons*, 47 *Antipode*, 963–79 (Jan. 2015).

are less able to access resources that can be user-controlled and managed. In recent work, myself and my colleagues bring attention to the historical, political, and sociological contexts that greatly undermine the ability of poor and marginalized populations to claim resource commons.⁸⁰ More specifically, we note that the processes of reclaiming urban spaces as common property are often “rooted in historically entrenched inequalities in access to resources” and that creating and sustaining urban commons requires “strong mobilization of the institutions of the state, especially if the goal is to serve communities and groups, who have been pushed to the social, economic, and political margins of a society.”⁸¹

B. Adapting Property Rights to Urban Commons

Another reality that renders difficult the creation of new forms of constructed, user-managed shared resources in the urban context is the cost of land. Urban land and various kinds of urban infrastructure are increasingly a vehicle for high investment returns and the target of public and private efforts to capture and exploit their market exchange value.⁸² The increasing cost of land and the competition for it in highly productive cities leads to what Saskia Sassen refers to as “expulsions”—unprecedented displacement, evictions and eradication of living spaces and professional livelihoods.⁸³ Gaining and/or retaining access to these resources in cities often involves a struggle or effort to recognize something akin to a collective property right to those resources for the urban poor.⁸⁴

As property scholars have begun to recognize, to meet the demands of the increasingly urbanized, interdependent world in which most people live requires a mix of approaches to mediate access to resources, particularly for those who have much less of them. It requires, at the very least, embracing approaches that

80. Prakash Kashwan, Praneeta Mudaliar, Sheila R. Foster, Floriane Clement, *Reimagining and Governing the Commons in an Unequal World: A Critical Engagement*, CURRENT RESEARCH IN ENVIRONMENTAL SUSTAINABILITY, Volume 3, 2021, 100102. <https://www.sciencedirect.com/science/article/pii/S2666049021000785>.

81. *Id.* at 5.

82. Saskia Sassen, *Who Owns Our Cities—And Why This Urban Takeover Should Concern Us All*, THE GUARDIAN (Nov. 24, 2015, 3:30 EST), https://www.theguardian.com/cities/2015/nov/24/who-owns-our-cities-and-why-this-urban-takeover-should-concern-us-all?CMP=share_btn_tw.

83. See generally Saskia Sassen, EXPULSIONS: BRUTALITY AND COMPLEXITY IN THE GLOBAL ECONOMY, CAMBRIDGE (2014).

84. Nicholas Blomley, *Enclosure, Common Right and the Property of the Poor*, 17 SOC. & LEGAL STUD. 311 (2008).

recognize relational property interests and resource governance that advance access to urban goods and services for the most vulnerable and marginalized communities facing resource uncertainty and precarity.

Lee Fennel has argued, for example, that the dominant Western model of property and resource ownership—the “fee simple”—looks increasingly ill-fitting for our contemporary world.⁸⁵ Endowing owners (public or private) with a monopoly on urban land/resources, this form of legal ownership “misses most of how urban property creates value” through spatial relationships that result from the density and proximity characteristic of urbanization.⁸⁶ Moreover, as she notes, urbanization has “raised the costs and lowered the benefits of granting individual owners perpetual monopolies on rooted fragments of space,” making it difficult to meet the challenges of cities today.⁸⁷

Gregory Alexander notes, importantly, that the “dominant mode of [private property] ownership today” today is “governance property.”⁸⁸ Governance property is a form of multiple property ownership in which each person’s property interest is entangled with another person’s property interest. Examples are common interest communities (such as condos and housing co-ops), marital and domestic partnership property, other forms of joint property ownership (cotenancies), and many types of corporate ownership, and commercial trusts.⁸⁹ Alexander argues that the rise of governance property reverses the “tendency to agglomerate in a single legal person . . . the exclusive right to possess, privilege to use, and power to convey the thing.”⁹⁰ In his view, that governance property “contributes to the development of certain virtues that promote human flourishing. These virtues include community, cooperation, trust, and honesty.”⁹¹

85. Lee Anne Fennel, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457 (2016).

86. *Id.* at 1460–61.

87. *Id.* at 1463.

88. Gregory S. Alexander, *Governance Property*, 160 U. OF PA. L. REV. 1853 (2012).

89. Governance property involves multiple owners or users collectively making decisions and rules about access, use, enjoyment, and transfer of property. These rights may be as robust as full ownership rights, including coterminous rights to use, possess, manage, and transfer the asset; the rights could also be more limited, such as use rights (including common use) with respect to assets owned by others. Because interests of multiple and divided owners can come into conflict—as in divorce or when joint tenants can’t agree on how to use property or regarding trustees and future interest holders—they require internal mechanisms or governance “norms” (and rules) to regulate relations between owners or interests. *Id.* at 1855.

90. *Id.* at 1858.

91. *Id.* at 1859.

Finally, as Maria Rosaria Marella notes, it is possible to adapt and unbundle the legal entitlements to share and use property in a way that satisfies both the normative commitments animating private property law and those animating the commons as a transformative discourse and practice.⁹² More specifically, legal entitlements to property can be allocated and re-allocated to different owners/users and/or limited through legal restrictions that make possible the inclusion of different classes of rights holders. The bundle of legal entitlements or rights of property ownership need not be aggregated in one owner (or even a collection of owners) and need not be without internal limits or restriction. These resources can be stewarded, even in the absence of a fee title, by an identified group of people or community who are vested with the duty of maintaining and keeping accessible (or affordable) the resource for future users and generations.

C. Old Institutions as Urban Commons

Two relatively longstanding institutions—limited equity cooperatives and community land trusts—illustrate the adaptive capacity of private property arrangements to create urban common goods. As this section will explain, LECs and CLTs operate like urban commons for three reasons. First, they impose internal limits on property ownership, ensuring that the resources remain affordable and accessible to future generations. Second, they place the responsibility for setting the rules for property use and transfer with users and surrounding communities likely to experience most of the benefits and costs of those decisions. Finally, they privilege the *use* value of urban land and infrastructure over its *exchange* value by removing property from the speculative market.

LECs and CLTs place internal limits on the right to hold and sell property, limits that property owners normally would not have in traditional private property arrangements in which the owner or owners have total freedom as to how to use, sell, or transfer property.⁹³ In return, limited equity owners gain sustainable wealth building opportunities and lasting affordability.⁹⁴ LECs and CLTs effectively take shared resources off the speculative market

92. Maria Rosaria Marella, *The Commons as a Legal Concept*, 28 L. AND CRITIQUE 61, 61–86 (2017).

93. Foster & Iaione, *supra* note 20, 292–293 (explaining the difference between condominiums and commons-based institutions).

94. See Stephen R. Miller, *Community Land Trusts: Why Now Is the Time to Integrate This Housing Activists' Tool Into Local Government Affordable Housing Policies*, 23 J. AFFORDABLE HOUS. & CMTY. DEV. L. 349, 356 (2015).

while creating the possibility for users, such as housing occupants, to sell their interests back to the trust or cooperative for limited equity. LECs and CLTs are also designed to allow communities to self-govern their common property or resource to keep it affordable and accessible to future users.

CLTs, for example, are governed by resource users (e.g. those living in the CLT's housing units) along with others who have a stake in the long-term sustainability and use of the resource as a common good. For instance, the traditional governing board of a CLT represents "tripartite" interests: users, community, and the public (represented by a variety of stakeholders such as public officials, local funders, non-profit providers of housing or social services, and others).⁹⁵ CLTs are rooted in a desire for community control over land, to remove land from the speculative market and to facilitate sustainable uses that benefit disadvantaged communities, although some CLTs have moved away from the community control model of governance.⁹⁶

The governance structure of the typical CLT notably differs from the kind of closed, private governance of condos, coops, and other "common interest communities." The governance structure of the prototypical CLT represents not a closed governance consisting only of property owners, but rather represents what Anna di Robilant has called "democratic deliberative" property.⁹⁷ The governance structure of CLTs promotes its public-oriented character through decision making, enforcement, and monitoring by "multiple actors affected by the use of resources that implicate public values and collective interests."⁹⁸ In this way, it reflects the normative goals of the urban commons. As Barbara Bezdek has argued, CLTs put into practice "an alternative vision of what development and land value can look like . . . to center use-value goals over land-value. Those practices of self-governance transform CLTs into a type of commons institution."⁹⁹

95. *Id.*

96. James DeFilippis et al., *W(h)ither the Community in Community Land Trusts?*, 40 *J. OF URB. AFF.* 755, 756 (2018).

97. See generally Anna diRobilant, *Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law*, 62 *AM. J. OF COMP. L.* 301 (2014).

98. *Id.* at 306. Further, "decisions concerning the use and management of resources that implicate fundamental public interests" are not made by a single owner, even if a public official or agency, but rather "through a more deliberative democratic process in which representatives of affected parties participate as equals and give one another reasons that are mutually acceptable." *Id.* at 304–305.

99. See, e.g., Barbara L. Bezdek, *To Have and to Hold? Community Land Trust as Commons*, in *THE CAMBRIDGE HANDBOOK OF COMMONS RESEARCH INNOVATIONS* 164, 168 (Sheila R. Foster & Chrystie F. Swiney eds., 2021).

LECs, on the other hand, in many ways are akin to common interest communities like condominiums and traditional coops.¹⁰⁰ A cooperative is governed by a board but consists only of private property owners who can sell their individual shares at market value without much constraint. Unlike a traditional co-op, however, in an LEC the owners can restrict the resale and equity gains to keep the housing affordable. LECs thus differ from traditional housing cooperatives in that they ensure long-term affordability by removing the housing from the speculative market, limiting the resale amount, and collectively subsidizing low-income owners.

Washington D.C.'s Tenant Opportunity to Purchase Act (TOPA), for example, enables low-income tenants to collectively purchase their buildings and convert them to limited equity cooperatives, especially those in danger of being displaced because of rising rents.¹⁰¹ The TOPA process starts when an owner gives notice of the sale of their building, triggering a forty-five day period for tenants to organize and form an association for the purpose of purchasing the building and creating a shared ownership structure. The city also provides low-cost financing to low-income tenant associations to help with those purchases; however, making this purchase option a meaningful one in a city with high land and property values is challenging.¹⁰²

Amanda Huron has characterized LECs, of the type in Washington D.C., as an urban commons.¹⁰³ She explains her characterization of LECs as urban commons by recounting the experience of hundreds of residents across D.C. who found themselves faced with eviction notices to make way for the razing of their structures in order to build tall luxury condominium

100. Julie D. Lawton, *Limited Equity Cooperatives: The Non-Economic Value of Homeownership*, 43 WASH. U. J. L. & POL'Y 187 (2014).

101. *Tenant Opportunity Purchase Assistance*, DEP'T OF HOUSING AND COMM' DEV., <https://dhcd.dc.gov/service/tenant-opportunity-purchase-assistance> (last visited Apr. 28, 2022); Kathryn Howell, Scott Bruton & Anna Clemons, *Creating and Sustaining Limited Equity Cooperatives in Washington DC*, CNHED 1 (2020), https://cnhed.org/wp-content/uploads/2020/10/Creating-and-Sustaining-Limited-Equity-Cooperatives-in-Washington-DC_REV.pdf.

102. Most TOPA projects use public funding from the D.C. Housing Trust Fund which mandates that funds benefit all income groups. By some accounts that funding support has been declining since the 1990s as the city has rapidly gentrified. Howell et al., *supra* note 101; Judy Meima, *Lessons from 20 Years of Enabling Tenants to Buy Their Buildings*, SHELTERFORCE (Nov. 23, 2020), <https://shelterforce.org/2020/11/23/the-keys-to-the-tenant-opportunity-to-purchase/>; Jenny Reed, *DC's First Right Purchase Program Helps to Preserve Affordable Housing and Is One of DC's Key Anti-Displacement Tools*, DC FISCAL POL'Y INST. 1 (Sept. 24, 2013), https://www.dcfpi.org/wp-content/uploads/2013/09/9-24-13-First_Right_Purchase_Paper-Final.pdf.

103. AMANDA HURON, *CARVING OUT THE COMMONS: TENANT ORGANIZING AND HOUSING COOPERATIVES IN WASHINGTON, D.C.* 89 (Univ. of Minn. Press 2018).

apartment buildings in a quickly changing city.¹⁰⁴ The D.C. residents, mostly low- or moderate-income African Americans and other minorities, were vulnerable to eviction at a time when middle class residents were returning to centrally located, historic city centers.¹⁰⁵ Tenants across the city worked together to fight their evictions, pooled their money to purchase their apartment buildings, and remained in place to exercise control over the increasingly scarce resource of affordable housing.¹⁰⁶

To create and sustain this collectively owned and controlled resource, however, residents who were often strangers to each other (and did not even speak the same language) had to create their own governing structures, negotiate with city officials, find financing, work together to repair and remodel their buildings, write bylaws for making decisions, and decide on house rules and rules of access and exclusion (i.e., who is and is not allowed to buy into the co-ops).¹⁰⁷ Huron describes the creation of these urban commons as “unintentional” in the sense that the residents involved were not seeking to create common interest communities nor to create a new institution to democratically govern themselves and their shared resource. Nevertheless, they were able to overcome collective action challenges because they were compelled to respond to a housing crisis under intense pressures of time and money.¹⁰⁸

Like CLT, she argues that LECs function to “keep land and housing off the speculative market, controlled by community members, and affordable in the long run.”¹⁰⁹ In justifying the use of the term “commons” to describe LECs, along with other shared-equity ownership, she argues that for people without access to capital, urban stewarding is rational economic behavior, as well as part of a larger civil rights struggle to maintain freedom through community control of land and housing.¹¹⁰ Market rate ownership has not been a possibility for the vast majority of them. Although

104. *Id.*

105. *Id.*

106. *Id.* at 87.

107. Despite the barriers of culture and language, these “strangers” were able to claim and create a common resource together—in some instances, even holding all of their meetings in as many as three different languages. HURON, *supra* note 103, at 87.

108. “It is about creating spaces not just for the people members know and love—though, as seen, this is certainly an important part of it—but for people they don’t yet know, perfect strangers tossed their way by the currents of urban life.” *Id.* at 160.

109. *Id.* at 76.

110. *Id.* at 77 (“land was the economic basis for life and for freedom from white supremacist control over black labor. In the urban context, control over land became control over housing”).

LEC members are clearly benefiting financially, their economic self-interest is not driving their ability to overcome collective action challenges.¹¹¹ Rather, these institutions help to create and support economies that provide community, stability, control, and affordability.¹¹²

While CLTs and LECs protect common resources against exploitation and create stable property rights for those who occupy and use the good, it is important to note that they are not barriers to creating wealth in economically marginalized communities. This was reaffirmed by a recent 2019 study of fifty-eight shared equity homeownership programs, including CLTs and LECs, over the past three decades in the United States.¹¹³ The study found that this form of homeownership can be a pathway to entry to the larger market for homeowners. Six of ten limited equity homeowners used their earned (though limited) equity to eventually purchase a traditional market rate home.¹¹⁴ The study also found that limited equity homeownership serves predominantly first-time homeowners that tend to be members of vulnerable populations, particularly low-income racial and ethnic minorities, and female-headed households. Limited equity homeownership also provides for financial security and mitigates risk during times of economic turmoil (e.g. less home foreclosures).

In sum, CLTs and LECs are a way to ensure that critical urban resources remain accessible to individuals and communities by adapting private property entitlements to the norms of a common good or common property.¹¹⁵ They maintain affordability, and hence accessibility, of the resource by limiting the amount of equity that can be extracted from these goods so that future generations can share in their use. They are governed in a way that maintains control over the good or service within the community served, but with rules in place that avoid the cooptation or enclosure of the good. They privilege the right to be included in a community over the right to exclude those most socially and economically vulnerable from the goods and services that shared infrastructure can generate.

111. *Id.* at 93.

112. *Id.* at 105–110.

113. The study analyzed the characteristics of households owning shared equity homes and the performance of these forms of property ownership across the nation. Ruoniu Wang et al., *Tracking Growth and Evaluating Performance of Shared Equity Homeownership Programs During Housing Market Fluctuations 1* (Lincoln Inst. of Land Pol’y., Working Paper No. WP19RW1, 2019).

114. *Id.*

115. See e.g. BEZDEK, *supra* note 99, at 164.

IV. UNDERSTANDING URBAN COMMONS AS PROPERTY AND LAND STEWARDSHIP

Scholars and practitioners characterize CLTs as organizations “designed to steward property.”¹¹⁶ They equate stewardship to the kinds of governed or managed “commons” that Elinor Ostrom observed, but there is very little explanation of exactly how stewardship connects with the concept of the Ostromian commons.¹¹⁷ As such, the characterization of these institutions as forms of “stewardship” begs the question of the relationship between property/land in the public domain and the obligation of resource users to the larger community, or to future generations. This section will connect more robustly the concept of stewardship to institutions such as CLTs and LECs created in “thick” urban markets.

A. The Obligations of Stewardship

The concept of stewardship has a long pedigree, beginning with biblical teachings on the relationship between humans and the earth and our custodial relationship to the natural environment.¹¹⁸ This custodial relationship is also at the root of modern ecological thought, exemplified by Aldo Leopold’s “land ethic,” according to which humans are not just living off the land but living with the land and thus have a duty to preserve it for future generations.¹¹⁹

While Leopold and early ecologists referenced scarce and nonrenewable natural resources, stewardship can encompass duties and rights that individuals have to *any* resource held or managed on behalf of others. As William Lucy and Catherine Mitchell so elegantly explain, “[t]he hallmark of stewardship is land holding subject to responsibilities of careful use, rather than the extensive rights to exclude, control and alienate that are

116. The original CLT was created to be “a legal entity, a quasi-public body, chartered to hold land in stewardship for all mankind present and future while protecting the legitimate use-rights of its residents.” ROBERT S. SWANN ET AL., *THE COMMUNITY LAND TRUST: A GUIDE TO A NEW MODEL FOR LAND TENURE IN AMERICA* 1 (International Independence Institute 1972).

117. See e.g. John Krinsky and Paula Z. Segal, *Stewarding the City as Commons: Park Conservancies and Community Land Trusts*, 22 CUNY L. REV. 270 (2019).

118. William N.R. Lucy & Catherine Mitchell, *Replacing Private Property: The Case for Stewardship*, 55 CAMBRIDGE L. J. 566, 584 (1996).

119. ALDO LEOPOLD ILLUSTRATED BY CHARLES W. SCHWARTZ, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* (Oxford Univ. Press 1949).

characteristic of private property.”¹²⁰ The duties of stewardship are the limits, or constraints, on the rights that the steward holds to the property.

The concept of stewardship is thus rooted in a custodial relationship with obligations that accompany the rights that the steward holds to the property. Although stewards have rights to access, use, control, and transfer the resource, those rights are exercised on behalf of the beneficiaries of the resource. That beneficiary can be an individual, group, community, or the public (as in the public trust doctrine). Stewardship does not mean that the individuals or entities with authority over, and rights to, use a resource cannot benefit from that resource. To the contrary, the steward(s) are likely to be part of the very group, community, or public on whose behalf the resources are being managed or governed.

Lisa Alexander, for instance, describes some kinds of tiny home villages for homeless populations as embodying a new form of property stewardship” in high-cost housing markets.¹²¹ She defines this “stewardship as a housing tenure or property relation that affords unhoused people access to land and space,” often without formal title or without paying rent, in exchange for various obligations of co-management.¹²² This co-management is akin to a “contractual obligation, or a strongly encouraged social norm, to participate in a productive community that enhances the human flourishing of all involved.”¹²³ Property stewardship, she argues, is created by removing the profit motive and by allocating rights and responsibilities in a way that gives stewards decision-making control over resources in a manner similar to ownership, but without the emphasis on sole dominion and the individual exchange value of property.¹²⁴

Similarly, consider the concept of “local environmental stewardship,” which reimagines the relationship between humans and the natural world through a commitment to community participation in the restoration practices of valuable or scarce

120. William & Mitchell, *supra* note 118, at 584.

121. *See generally* Alexander, *supra* note 9.

122. *Id.* at 389.

123. *Id.* at 390 (explaining how the villages improve quality of life and flourishing by allowing for a plethora of unrealized opportunities and connections for previously homeless and isolated individuals).

124. *Id.* at 402 (In other words, stewardship grants control of and access to resources without formal “fee simple” title, without wealth maximization as a goal of property access, and “connects stewards to economic resources and social networks that maximize their self-actualization, privacy, human flourishing, and community participation.”).

resources in line with a degree of care.¹²⁵ The central role of local populations in local environmental stewarding is to care for valuable or scarce resources that they are proximate to, or connected with, for their subsistence needs and livelihoods.¹²⁶ Environmental stewardship consists of actions taken by individuals, groups, and networks of actors, with various motivations and levels of capacity, to protect, care for, or responsibly use resources in pursuit of environmental and/or social outcomes.¹²⁷ As such, residents' acts of claiming and caretaking public resources and spaces to function as social infrastructure is consistent with the foundational principles of environmental stewardship, particularly in the urban environment.¹²⁸

Urban stewardship, as it is embodied by institutions like CLTs and LECs, similarly embodies the responsibility to hold and manage land and buildings in a manner that benefits current users of the resource but with the obligation to maintain those benefits for future users. Resource users who hold and govern shared urban infrastructure do so to provide critical social goods and services to underserved populations. They also obligate themselves to maintain the resources as affordable to others in their community. In doing so, these stewards constrain their own ability to fully exploit the resources for individual gain.

B. The State's Role in Urban Stewardship

The social, legal and political complexity of many contemporary cities makes it challenging to steward urban resources. Communities cannot operate as completely independent authorities over urban land or infrastructure in the public domain.¹²⁹ This is because local governments have proprietary rights and regulatory authority over this infrastructure.¹³⁰ As the examples in the introduction demonstrate, public authorities often facilitate resident and community governed institutions by making available vacant urban land and structures; sometimes by

125. Emily Barritt, *The Story of Stewardship and Ecological Restoration*, in *ECOLOGICAL RESTORATION LAW: CONCEPTS AND CASE STUDIES* (Afshin Akhtar-Khavari & Benjamin J. Richardson eds., Routledge 2019).

126. Nathan J. Bennett et al., *Environmental Stewardship: A Conceptual Review and Analytical Framework*, 61 *ENVIRONMENTAL MANAGEMENT* 597 (2018).

127. *Id.* at 599.

128. Lindsay K. Campbell et al., *Activating Urban Environments as Social Infrastructure Through Civic Stewardship*, *URBAN GEOGRAPHY* 1–22 (May 4, 2021), <https://doi.org/10.1080/02723638.2021.1920129>.

129. Foster, *supra* note 18, at 84, 92.

130. *See supra* note 77–78.

utilizing state eminent domain power¹³¹ and by expending public dollars to subsidize these arrangements. Stewarding urban resources thus, in most cases, requires an important state role.

The important role of the state should not come as a surprise for those who have studied Ostrom's work carefully. Notwithstanding her findings that it was often small communities that were able to collectively govern shared resources, she observed that for complex resources central regulators played a key role in helping to coordinate the interdependencies of smaller units of community-based governance.¹³² In addition to overcoming any obstacles to cooperation to create rules of access and use, resource users must invest tremendous resources to design institutional arrangements that incorporate new processes and rules that will govern the resource over the long run.¹³³

Even with a strong enabling or facilitator role from the state, communities and individuals sometimes require significant external support to engage in collective governance, constructing and creating new resources out of existing ones, and then managing them sustainably over time. This can seem even more daunting in dense, heterogenous, heavily regulated urban environments, but it is not impossible.

For example, urban residents in places like Chicago, Detroit and New York steward hundreds of city plots as urban gardens and farms. Managing these shared resources across a city, given the legal and regulatory complexity, can involve self-organized small units or groups of users acting relatively autonomously but

131. The nonprofit Dudley Street Neighborhood Association (DSNI) was formed to oversee the process of revitalizing Nubian Square (formerly Dudley Square), one of the poorest areas of Boston at the time, in the late 1980s to early 1990s. After cleaning up many of the vacant lots that littered its neighborhood, DSNI embarked on an ambitious plan to create an "urban village" that would develop the neighborhood without resulting in any displacement of the existing residents. Neighborhood residents worked with city and state officials to acquire, through eminent domain, 15 acres of privately owned, tax-defaulted vacant lots and 15 acres of city-owned vacant lots in an area once called the "Dudley Triangle." The once vacant land has been transformed into an urban village consisting of more than 225 new affordable homes, a 10,000 square foot community greenhouse on the site of a former auto body shop, two acres of community farms, playgrounds, gardens, commercial space, and other amenities. See Harry Smith and Tony Hernandez, *Take a Stand, Own the Land: Dudley Neighbors, Inc., a Community Land Trust in Boston, Massachusetts*, in *ON COMMON GROUND: INTERNATIONAL PERSPECTIVES ON THE COMMUNITY LAND TRUST* 288 (John Emmeus Davis et al. eds., 2020).; See PETER MEDOFF AND HOLLY SKLAR, *STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD* 115–134 (South End Press ed. 1994); See DUDLEY STREET NEIGHBORHOOD INITIATIVE, <http://www.dsni.org/> (last visited Oct. 18, 2021).

132. OSTROM, *supra* note 61, at 103–142. For example, State legislation authorizing the creation of special water districts by local citizens was a crucial element in encouraging users of groundwater basins to invest in self-organization and the supply of a local institution.

133. OSTROM, *supra* note 61, at 136–138.

within a federated system that reduces the cost of creating and sustaining urban commons. Government support can leverage the efforts of urban stewards to share the resource effectively and sustainably. This support might include regulatory changes, fiscal or technical support which remove barriers to cooperation or make it more beneficial or convenient for individuals to engage in cooperative behavior.¹³⁴ In some cases—depending on the scale and size of the resources—the rules, procedures, monitoring, and sanctions put in place are organized in a “nested” institutional structure with layers of activity by different actors.

Nate Ela’s socio-legal mapping of community gardens in Chicago’s South Side highlights how stewardship of even small-scale resources involves significant interaction with local regulations and administrative processes.¹³⁵ As his study reveals, self-organization often occurs in relation to the rules created by state and local governments.¹³⁶ In the case of gardens, Ela emphasized the ways that individuals and small groups were iteratively searching for ways to secure use and ownership rights over land and its products. Claiming access rights to a particular space or plot of land required more than strong social norms between strangers. It also required navigating a thick layer of laws and regulations that need to be realigned with recognizing community gardening as a form of property stewardship.¹³⁷

Chicago’s city-wide NeighborSpace [NS] land trust¹³⁸ is an example of the kind of “nested” and multilevel governance structure that facilitates the community stewardship of gardens by reducing barriers to land access and providing resources to stewards.¹³⁹ Neighborspace is an independent, nonprofit land trust that preserves urban land throughout the City of Chicago for community gardens and open space. Created in 1996 by three government entities—the City of Chicago, the Chicago Park District, and the Forest Preserve District of Cook County—Neighborspace oversees 115 land-based sites located in 33 wards across the city, many of which are involved in community

134. *See supra* note 18.

135. Ela, *supra* note 77, at 250.

136. *Id.* at 287–289

137. *Id.*

138. *See* NEIGHBORSPACE, <http://www.neighbor-space.org/> (last visited Oct. 17, 2021). (The information contained in this paragraph is based in large part based on material on its website and a phone interview with Neighborspace staff on Apr. 18, 2018 by Chrystie Swiney, a research fellow employed by Georgetown University.)

139. Ela, *supra* note 77, at 288 (“Gardeners, farmers, and entities like NeighborSpace govern space through rules and practices that are symbiotic with, and often constrained by government-mandated rules.”).

gardening projects.¹⁴⁰ Neighborspace operates as a higher-level authority over the community gardens that it oversees, while the real control and management over day-to-day affairs is handled by local members and groups in the community where the land is located.

Once a land grant is established, the government generally relinquishes operational control to the land trust, which itself transfers most of that control to the local gardeners and community groups that act as stewards over the land.¹⁴¹ The land trust, however, is not involved in the day-to-day management of the land plots, which is left to the community, and plot users, in what is described as a “non-hierarchical” governance structure that prevents the centralization of power in any one individual’s (or one group’s) hands.¹⁴² The rules of the land trust require collective governance over the acquired plots, which are prohibited from having a single lead gardener or overseer, but must have multiple leaders overseeing its development, as well as community support and buy-in.

Elinor Ostrom, and others, refer to this kind of distributed ecosystem of autonomous governance units as “polycentric” to capture the idea that although higher level governments or officials might take the lead on a large-scale problem, the care and responsibility for shared goods can operate at different levels.¹⁴³ While the central government authority remains an essential player in facilitating, supporting, and even supplying the necessary tools to govern shared resources, in polycentric systems multiple governing entities or authorities operate at different scales with a high degree of independence to make norms and rules within its own domain.¹⁴⁴ Polycentric systems can unlock what Ostrom called “public entrepreneurship”—opening the public

140. Neighborspace’s primary goal is to preserve and protect community-managed open spaces, particularly in areas where open space is lacking or vanishing, which tends to occur in underserved areas. The idea for NS was first conceived when city leaders became increasingly concerned about the lack of open space in Chicago and the vanishing number of vacant plots being bought by private developers. Neighborspace, *supra* note 138.

141. In effect, Neighborspace, the land trust, handles the land purchases, performs environmental assessments and title work, holds the titles, easements or leases that it acquires, provides liability insurance and legal defense, and works to secure a dedicated water line for every parcel of land that it obtains. It also provides some guidance and other forms of support, “including a signage template, a list of gardeners’ rights and responsibilities, and a tool lending library,” and it acts as the liaison between the government and the participating community groups. *Id.*

142. *Id.*

143. Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, AMER. ECON. REV. 100, no.3 641–72 (2010).

144. *Id.*

sector to innovation in providing, producing, and encouraging the co-production of essential goods and services at the local level without privatizing those goods.¹⁴⁵

Of course, there are many reasons to be critical or cautious about decentralized governance resource regimes, even as a partial answer to the rising inequality of resources in cities today. The dangers of decentralization are certainly present—the capture of smaller units, the enclosure of public goods and spaces, the temptation for free-riding, and the possibility that the coordination effort required for their upkeep will outweigh their potential benefits.¹⁴⁶ There are also questions of disparities in power, social-economic conditions that constrain certain participants, and the inclusiveness and fairness of some institutional arrangements.

In the end analysis, we must be attentive to the possibility that key actors are often omitted from collaborative arrangements, in which powerful actors tend to prevail, and outcomes are often unequally distributed in ways that reproduce existing power inequalities and injustices.¹⁴⁷ At the same time, we know from experience that community-based stewardship and polycentric governance can present opportunities for more robust participation from historically underrepresented groups.¹⁴⁸

V. CONCLUSION

Local policies and practices that facilitate and scale community land trusts and limited equity cooperatives have emerged as a means of providing marginalized communities and populations with essential services and goods, while supporting their economic and social self-sustainability. The creation of state-enabled, stewarded urban common goods can also be responsive to calls to address the lingering effects of systemic racism. Enabling low-income residents of color to control and govern the land in their communities is an important part of a larger, unfinished racial and economic justice project in America.¹⁴⁹ As Jessica Gordon

145. Elinor Ostrom, *Unlocking Public Entrepreneurship and Public Economies*, WORLD INST. FOR DEV. ECON. RES. (2005), <https://www.wider.unu.edu/publication/unlocking-public-entrepreneurship-and-public-economies>.

146. Keith Carlisle & Rebecca L. Gruby, *Polycentric Systems of Governance: A Theoretical Model for the Commons*, THE POL'Y STUDIES J. 47, no. 4 927–952 (Aug. 2017).

147. Gustavo A. García-López & Camille Antinori, *Between Grassroots Collective Action and State Mandates: The Hybridity of Multi-Level Forest Associations in Mexico*, CONSERVATION AND SOCIETY 16, no. 2 193–204 (2017).

148. Fernando Tormos-Aponte & Gustavo A. García-López, *Polycentric Struggles: The Experience of the Global Climate Justice Movement*, ENVTL. POL'Y AND GOV. 28, no. 4 284–294 (2018).

149. See KATHERINE FRANKE, REPAIR: REDEEMING THE PROMISE OF ABOLITION (2019).

Nembhard's groundbreaking research demonstrates, stewardship and cooperative ownership mechanisms like community land trusts have their origins in the fight for Black civil rights in reaction to the failure of markets and the persistence of racial discrimination.¹⁵⁰

The opportunity for those marginalized communities to control and steward publicly held land also represents a kind of property relation that is tied neither to public nor private ownership, and which valorizes shared practices of use and community rather than individual possession.¹⁵¹ Urban stewardship can be a path to de-commodifying property and distributing land and resources through new configurations of property governance. It can also be disruptive of a social economic system that has been at the root of so much historical and contemporary justice, while offering the promise of healing for so many communities that lack the resources for human flourishing in a society with more than enough land and resources to share.

150. See JESSICA GORDON NEMBHARD, *COLLECTIVE COURAGE: A HISTORY OF AFRICAN AMERICAN COOPERATIVE ECONOMIC THOUGHT AND PRACTICE* (2014).

151. See BRENNA BHANDAR, *COLONIAL LIVES OF PROPERTY: LAW, LAND AND RACIAL REGIMES OF OWNERSHIP* (2018).