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Applying Communal Theories to Urban Property: An Anthropological Look at Using the Elaboration of Common Property Regimes to Reduce Social Exclusion from Housing Markets

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APPLYING COMMUNAL THEORIES TO URBAN PROPERTY: AN ANTHROPOLOGICAL LOOK AT USING THE ELABORATION OF COMMON PROPERTY REGIMES TO REDUCE SOCIAL EXCLUSION FROM HOUSING MARKETS

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“Property is not the sacred right. When a rich man becomes poor it is a misfortune, it is not a moral evil. When a poor man becomes destitute, it is a moral evil, teeming with consequences and injurious to society and morality.”

Lord Acton

ABSTRACT

The advantages of privatized property regimes and common property regimes have been debated in legal and economic discourse for ages. Although private property is prevalent in the developed world, a reading of the available anthropological literature shows that common property regimes still thrive in many parts of the developing world to maintain natural resources and to spread the risk of property ownership. Considering the recent U.S. housing crisis and its global effect on world markets, perhaps the developed world should incorporate more communal theories to—what has now become the developed world’s scarce resource—urban land. In fact, after a close look at the lessons learned from the successful operation of common property regimes in the developing world related to their natural resource systems, we see that the theories are relevant to the understanding of a wide-variety of property regimes used in modern societies such as the United States. Thus, the developed world should embrace a more pluralistic property regime. Why? The elaboration of common property regimes in the United States, as in more widespread use of instruments such as land trusts, could lessen the social exclusion from the right to property by making housing more affordable. With affordable housing and less risk, we can possibly avoid future housing crises.

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INTRODUCTION

Economists projected home foreclosures in the United States would rise regardless of Barack Obama's election to the U.S. presidency.¹ In fact, whether you were reading the Wall Street Journal, the Sydney Morning Herald, or the Financial Times back in 2007, the news headlines projected a U.S. housing crisis, and that it would cause global turbulence in world markets.² In less than two years, it did.³

¹ But see Patrick Rucker, *U.S. Housing Agency Must Rise To Crisis-Lawmakers*, REUTERS, Jan. 13, 2009, available at <http://uk.reuters.com/article/americas/RegulatoryNes/idUKN1336586220090113> (discussing newly appointed U.S. Secretary of Housing and Urban Development Shaun Donovan's responsibilities of managing Federal Housing Agency in effort to refinance struggling borrowers).

² See generally Eoin Callan, *Downturn in US Housing Market Worsens*, FIN. TIMES, Aug. 15, 2007, available at http://www.ft.com/cms/s/0/5e3002e6-4b69-11dc-861a-0000779fd2ac.html?ncklick_check=1 (discussing crisis in U.S. subprime mortgage market causing double digit fall in nationwide home sales); Adele Horin, *To Solve the Housing Crisis, Let's Think Out of the Box*, SYDNEY MORNING HERALD, Aug. 4, 2007, available at <http://www.smh.com.au/news/opinion/to-solve-the-housing-crisis-lets-think-out-of-the-box/2007/08/03/1185648142489.html?page=fullpage#contentSwap1> (discussing Australian housing affordability crisis and alternative ways to create affordable housing); *Housing Affordability Crisis 'Worsening'*, SYDNEY MORNING HERALD, July 30, 2007, available at <http://www.smh.com.au/articles/2007/07/30/1185647791412.html?sssdmh=dm16.271429> (discussing statistics demonstrating Australian housing affordability crisis is worsening and affecting all types of housing across nation); Zuckerman, Gregory et al., *Impact of Mortgage Crisis Spreads*, WALL ST. J., Aug. 10, 2007, at A1 (discussing impact of U.S. mortgage crisis on international financial markets, commenting on European and Asian markets in particular).

Then, in response to the struggling housing market, on February 18, 2009, the Obama Administration released its foreclosure-prevention plan. The plan included modifying terms of delinquent loans, refinancing underwater mortgages, and funneling more money into federal housing agencies to keep mortgage rates low.⁴ The main thrust of the plan is to spend up to \$75 billion of the Treasury's TARP funds in order to allow for voluntary restructuring of loans.⁵ The plan attempts to distinguish between borrowers that were caught off-guard by complex mortgages and those borrowers, who borrowed imprudently and could not actually afford their homes—helping the former but not the latter.⁶ The success of this foreclose-prevention plan is yet to be seen.⁷ Yet, ripe for analysis is the query: “How did we get to this point and where to we go from here to prevent crises like this from happening again?”

After years of booming housing prices and cheap credit, the U.S. housing market retreated to a state in which loans and houses were far too expensive to afford, causing higher numbers of defaults, foreclosures and

³ See FRED E. FOLDVARY, *THE DEPRESSION OF 2008* (2d ed. 2007) (suggesting that credit crisis lead to drastic bankruptcy of large banks and in turn led to economic downfalls throughout world); Vikas Bajaj, *As Housing Bill Evolves, Crisis Grows Deeper*, N.Y. TIMES, June 29, 2008, available at http://www.nytimes.com/2008/06/29/washington/29housing.html?_r=1&scp=6&sq=housing%20crisis&st=cse (discussing worsening housing crisis despite rescue packages by Congress for struggling homeowners); *Northern Rock Gets Bank Bail Out*, BBC NEWS, Sept. 13, 2007, available at <http://news.bbc.co.uk/1/hi/business/6994099.stm> (discussing Bank of England's bail-out of Northern Rock due to widespread losses made by investors in loans to U.S. homebuyers with poor credit).

⁴ Barbara Kiviat, *Will President Obama's New Housing Plan Work?*, TIME.COM, Feb. 19, 2009, available at <http://www.time.com/time/business/article/0,8599,1880473,00.html> (discussing Obama Administration's new foreclosure prevention plan aimed at restructuring loans designed to help specific group of borrowers); see also Lisa Lambert, *Some U.S. States Embrace Housing Plan, Others Skeptical*, REUTERS UK, Feb. 22, 2009, available at <http://uk.reuters.com/article/bondsNews/idUKN2227640820090222>; Tara Siegel Bernard, *Details on Obama's Housing Plan Are Pending, but First Some Answers*, N.Y. TIMES, Feb. 18, 2009, at A16, available at <http://www.nytimes.com/2009/02/19/your-money/mortgages/19modify.html?fta=y>; Sheryl Gay Stolberg & Edmund L. Andrews, *\$275 Billion Plan Seeks to Address Housing Crisis*, N.Y. TIMES, Feb. 18, 2009, at A1, available at http://www.nytimes.com/2009/02/19/business/19housing.html?_r=1&scp=2&sq=housing%20plan&st=cse.

⁵ Kiviat, *supra* note 4 (discussing that TARP funds will be spent to pay \$1,000 to servicers, companies that collect mortgage payments, each time they cut interest rates on loans to reduce monthly payment amount so as not to exceed 38% of borrower's gross income).

⁶ *Id.*

⁷ See *Waiting Game*, N.Y. TIMES, Jul. 14, 2009, at A24, available at <http://www.nytimes.com/2009/07/15/opinion/15wed1.html> (discussing that more time is needed to see results from Obama's foreclosure relief plan, but opining that there has been lack of progress on modifying bad loans, and that if Administration really wanted to kick-start loan modifications, it should revive efforts to allow bankruptcy judges to modify bad loans).

repossessions as borrowers struggled to make their home loan repayments.⁸ The once well-intentioned but misdirected government land-use policies had hurt the quality of life, health and long-term stability of the urban housing markets in the United States and elsewhere in the developed world, making affordable housing difficult to build and sustain. Unfortunately, the crisis continues.⁹

However, there is hope. Perhaps we should consider communal urban land policies like the successful operation of common property regimes used in the developing world to maintain their scarce natural resources, and apply those theories to what has now become the United States' scarce resource: urban land. By considering different property regimes than those assumed in most U.S. communities, more people will be able to attain rights to property and obtain a standard of living too difficult to achieve in a strictly privatized property regime. Anthropologists can shed some light on possible solutions to these issues by offering local and municipal governments in urban areas some steps taken from the communal property theories of the developing world that might help begin to fix the ever-growing affordable housing crisis in much of

⁸ See Les Christie, *Subprime Creep: From City to Burbs*, CNNMONEY.COM, Mar. 3, 2008, available at http://money.cnn.com/2007/12/11/real_estate/foreclosure_creep/index.htm?postversion=2007121209; Les Christie, *Most Middle Class Still Can't Buy a House*, CNNMONEY.COM, Jan. 31, 2008, available at http://money.cnn.com/2008/01/29/real_estate/Housing_unaffordability_persists/index.htm; Chris Isidore, *Home Ownership in Record Plunge*, CNNMONEY.COM, Jan. 29, 2008, available at http://money.cnn.com/2008/01/29/news/economy/home_ownership_vacancies/index.htm?postversion=2008012913; Chris Isidore, *How They Got Housing Wrong*, CNNMONEY.COM, Dec. 28, 2007, available at http://money.cnn.com/2007/12/28/news/economy/housing_forecasts/; Alan Zibel & Dan Caterinicchia, *U.S. Housing Aid Needed, Schumer Says*, ASSOCIATED PRESS, Apr. 11, 2007, available at YAHOO NEWS, http://news.yahoo.com/s/ap/20070411/ap_on_bi_ge/housing_woes;_ylt=AmYm4kUx.VsUeMoSIRX5c_MWM0.

⁹ See April Charlton, *Groups' paper offers solutions to housing 'crisis'*, SANTA MARIA TIMES, July 26, 2007; Lita Epstein, *Foreclosures top 1.5 million with no end in sight*, DAILY FINANCE, Jul. 16, 2009, available at <http://www.dailyfinance.com/2009/07/16/foreclosures-top-1-5-million-with-no-end-in-sight/>; Manny Fernandez, *An Optimistic History of Public Housing*, N.Y. TIMES, Sept. 26, 2008, available at <http://cityroom.blogs.nytimes.com/2008/09/26/an-optimistic-history-of-public-housing/?scp=19&sq=affordable%20housing%20failure&st=cse>; Peter S. Goodman & Jack Healy, *Job Losses Push Safer Mortgages to Foreclosure*, N.Y. TIMES, May 24, 2009, available at <http://www.nytimes.com/2009/05/25/business/economy/25foreclose.html>; Dan Levy, *Foreclosure Filings in U.S. Reach Record 1.5 Million*, BLOOMBERG, Jul. 16, 2009, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=afOsHVj02UMc>; Sudhir Venkatesh, *To Fight Poverty, Tear Down HUD*, N.Y. TIMES, July 25, 2008, available at http://www.nytimes.com/2008/07/25/opinion/25venkatesh.html?pagewanted=1&_r=1&sq=sudhir%20venkatesh&st=cse&scp=1; Alan Zibel, *Foreclosures Rise 15% in 2009*, TIME, Jul. 16, 2009, available at <http://www.time.com/time/nation/article/0,8599,1910912,00.html>.

the developed world.¹⁰

The elaboration of common property regimes, as in the use of instruments such as land trusts—more specifically, community land trusts—could lessen exclusion from property ownership by making housing more affordable and by hedging the risk of property ownership. In general, a community land trust is a non-profit organization that acquires and sells land for the benefit of the local community. It is usually organized as a corporation, with a board of directors elected by the land trust members. The land trust could acquire land by donation or by purchase from a private owner. The land trust would function to separate the land from the property built upon it, thereby lowering the costs associated with traditional home buying by removing the cost of the land from the purchase price of the home. The underlying land is held permanently by the land trust, and the property that sits on the land could be purchased and owned by a private homeowner. The homeowner would pay for and own the property, but not the land upon which it sits. When the land trust sells a home, it leases the underlying land to the homeowner through a long-term (usually 99-year) renewable lease. This leasehold gives the homeowner, and the homeowner's descendants, the right to use the property for, practically, as long as they wish. However, if the homeowner chooses to sell the home, the land lease usually requires that the home be either sold back to the land trust or to another lower income household at an affordable price, and with an assignment of the underlying land-trust lease. This model ensures that future generations could afford housing (particularly in urban areas) by permanently fixing the cost of land to an affordable price that is not increased by population growth and economic investment. This way, housing remains affordable and attainable for future generations.¹¹ With affordable housing and increased communal access to property, we can possibly avoid future housing crises.

Traditional land-use regulations, grounded partly in property values, favor detached single-family housing.¹² However, for many people detached

¹⁰ See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (Harvard University Press 1971); Elinor Ostrom, *How Types of Goods and Property Rights Jointly Affect Collective Action*, 15/3 J. THEORETICAL POL. 239, 239–70 (2003). See generally Arun Agrawal, *Sustainable Governance of Common-Pool Resources: Context, Methods, and Politics*, 32 ANN. REV. ANTHROPOLOGY 243, 243–62 (2003) (discussing major findings and accomplishments of scholarship on common property, then followed by two strategies of critique).

¹¹ See *The Community Land Trust Model*, ICECLT.ORG, <http://www.iceclt.org/clt/cltmodel.html> (last visited Oct. 10, 2009). The Institute for Community Economics (ICE) is a federally certified Community Development Financial Institution that makes loans for permanently affordable homeownership across the United States. ICE is the originator of the community land trust (CLT), a housing model that develops equity for homeowners, while preserving public subsidy and affordability in perpetuity. *Id.*

¹² Alice E. Ingerson, *Urban Land as Common Property*, 9:2 LAND LINES, at 3, available at

single-family housing is either inappropriate or priced beyond reach.¹³ Excluding these people from their access to property rights is often exacerbated by advocates of privatization, who argue for converting existing common properties into private ownership, often to promote reinvestment or to increase property values.¹⁴

Instead, I propose that policies favoring land trusts in local property rights regimes make housing more affordable, which will fight the housing woes if elaborated upon, while also spread the risks associated with property ownership such that dramatic changes in economic variables by uncontrollable market forces do not result in widespread foreclosures.

Urban land is a unique economic good because it exists in a fixed quantity; it is not as if more urban land can be made to meet an increased demand for it. Furthermore, urban land cannot be created through manipulations in residential and industrial zoning, because zoning regulations prevent a private landowner from using his or her land in a manner that they so choose, or even using the land at all.¹⁵ The supply of urban land cannot simply be solved by re-zoning cities because the scarcity of urban land is not directly in the lack of space but, rather, very much in the public's lack of access to the land due to unaffordable costs. Accordingly, because the supply cannot rise to meet growing demands, the price is highly affected by market forces and is understandably very expensive; this is why 'booms' that we have seen in the recent past have made owning property a wise investment for those with access to ownership. Now, in many communities, property ownership is seen less as an investment than as a cause for constant concern over becoming homeless.¹⁶ Perhaps those communities can use land trusts to separate the ownership of a house from the land on which it sits, taking the urban land out of the market, and thus protecting the urban environment from unpredictable market forces. This, in turn, would protect the homesteads of the peoples who live there.

http://www.lincolnst.edu/pubs/489_Urban-Land-as-Common-Property (Lincoln Institute of Land Policy, March 1997).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See generally John R. Nolon, *Zoning and Land Use Planning*, 36 REAL. EST. L.J. 351, 353 (2007) (discussing environmental zoning).

¹⁶ See Vikas Bajaj & Tara Siegel Bernard, *Trying to Help Financially Troubled Homeowners*, N.Y. TIMES, Feb. 5, 2009, at B1, available at <http://www.nytimes.com/2009/02/06/business/06lend.html>; Julie Scelfo, *After the House is Gone: Losing More than a Roof Overhead*, N.Y. TIMES, Oct. 22, 2008, at D1, available at <http://www.nytimes.com/2008/10/23/garden/23foreclosure.html>.

I. THIS ARTICLE

The purpose of this article is neither to report on the recent housing market crisis nor to use statistics to deride privatized property regimes. Likewise, the issues addressed here will not compare or contrast the benefits of private property regimes versus those of common property regimes. Instead, this article looks at the key arguments offered by proponents of both private- and common-property arrangements and seeks to analyze the social exclusion aspect underlying all property law—specifically looking at urban land allocation and identifying the winners and losers of the attainable-housing game in different property rights regimes.¹⁷

I have looked at the socioeconomic effects of land privatization and the resulting social exclusion across many cultures to examine alternative common property regimes. In this article, I hope to create an awareness of the social effects of land-use law in contemporary societies. I have approached this article's guiding questions from a Law and Society jurisprudential perspective of property law in today's world; that is, laws have social consequences, so let us have laws that are socially responsible.

The guiding questions are: 1) What really are property rights and how are they established; 2) What are the various property rights regimes and what explains the variations between them; 3) What governs these property regimes and how are property rights enforced; 4) What is social exclusion; 5) How do different property rights regimes socially exclude people; and, 6) What can be done to limit social exclusion from property rights.¹⁸

In my view, the causes of social exclusion (and in particular the causes of social exclusion from the right to urban land and housing options in the developed world) have been attributed to economic and social changes in free-market economies and to weaknesses in government policies and services that are meant to address the needs of the excluded, which ultimately compound this problem as society progresses economically; and, while social exclusion can happen to anyone, individuals who belong to underprivileged groups or minority social groups are especially vulnerable.¹⁹ As such, I believe that it is important to consider the local use of communal theories to urban property in order to minimize social exclusion from property rights.

This article will touch on the perpetuation of poverty through strict privatization in the current market. Today, the hope of owning real estate (or

¹⁷ See *infra* Parts III, IV, V, VI, VII.

¹⁸ See *infra* Parts II, VIII.

¹⁹ See *infra* Part VI. Cf. Damien Cave, *Falling Prices Draw First-Time Home Buyers*, N.Y. TIMES, Apr. 3, 2009, at A1, available at <http://www.nytimes.com/2009/04/03/us/03florida.html> (economic downturns allow for first time home buyers to take advantage of lower housing prices).

even being able to afford a mere rental) is an unobtainable goal for many people living in the developed world. Unless free-market economies relax their neoclassical assumptions and embrace alternative, common property regimes (not to be confused with open-access regimes), social exclusion of underprivileged classes from property ownership and nationwide problems with poverty and indigence will remain.²⁰ I will use as anthropological examples different government policies toward property rights and argue that the use of communal theories will lessen the social exclusion from the right to property because if common property arrangements in the developing world can be successful in maintaining a resource so more people can reap the benefit of the asset, let us use these theories to spread the benefits of the scarce resource of urban land by embracing communal theories in the developed world.²¹

Then, I will suggest and explain the specific option of community land trusts to possibly address the need for affordable housing in the local sphere.²² I conclude by maintaining that pluralistic property regimes should not only be retained, but should also be developed generally through favorable municipal support at the local level.

II. DISCUSSION OF PROPERTY RIGHTS

In the past, to perceive a privatized property regime as a source of social exclusion from obtaining or maintaining property rights, namely ownership, required most lawyers to buy a new pair of glasses. Now, as foreclosures escalate and Congress scrambles to address the housing crisis, we might now better understand the inaccessibility to property and be open to the possibility of communal property ownership. Instead of the conventional view that property law facilitates market inclusion and access to rights,²³ applying a socioeconomic lens demands that we evaluate property law as a governance mechanism that steers and controls markets and private ordering, which—in the final analysis—might exclude many people from the rights afforded

²⁰ See *infra* Part II. It is important to distinguish between common property and open-access property because of the differences in the resource management dilemmas presented by these regimes. Open access is where anyone may use a resource and no one may be excluded from the resource; common property is where a distinguishable group, such as a farm family or tribe, controls the access to the resource. See Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 552 (2001).

²¹ See *infra* Part IV.

²² See *infra* Part IX.

²³ See Anselm Kamperman Sanders, *Intellectual Property, Free Trade Agreements and Economic Development*, 23 GA. ST. U. L. REV. 893, 893 (2007) (noting that property interest in return for market access is commonly understood as reason for enforcing intellectual property rights).

ownership and/or possession of property.²⁴

“Land use is a central issue in social organization because human beings live on the land.”²⁵ Accordingly, it is no surprise that property rights have been a subject of discussion among legal scholars, politicians, economists, philosophers, and anthropologists for a long time.²⁶ More recently, the political discourse in the United States regarding property rights has focused on where to draw the line between private and public rights in land.²⁷ Common property, that is community- or group-owned private

²⁴ Compare Donald J. Kochan, “Public Use” and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49, 57–59 (1998) (arguing value in protecting private property), with Andrea D. Haddad, *Subsidized Housing and HUD Projects: Economic Confinement on Low-Income Families*, 31 NEW ENG. J. ON CRIM. & CIV. CONFIN. 243 (2005) (arguing that private developers buying out mortgages of federally subsidized apartments have decreased available low-income housing).

²⁵ Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1317 (1993); see also Kathrine Dixon, *Working With Mixed Commons/Anticommons Property: Mobilizing Customary Land in Papua New Guinea The Melanesian Way*, 31 HARV. ENVTL. L. REV. 219, 277 (2007); Richard A. Epstein, *How to Create — Or Destroy — Wealth in Real Property*, 58 ALA. L. REV. 741, 742 (2007); Eric T. Freyfogle, *Ethics, Community, and Private Land*, 23 ECOLOGY L.Q. 631, 661 (1993); Shi-Ling Hsu, *What Is a Tragedy of the Commons? Overfishing and the Campaign Spending Problem*, 69 ALB. L. REV. 75, 80 (2005); Robert P. Merges, *Of Property Rules, Coase, And Intellectual Property*, 94 COLUM. L. REV. 2655, 2673 (1994); Emily Sherwin, *Two — and Three — Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1083 (1997).

²⁶ Consider that in 1861, Henry Sumner Maine wrote *ANCIENT LAW*, concluding that: “it is more than likely that joint-ownership, and not separate ownership, is the really archaic institution, and that the forms of property that will afford us instruction will be those that are associated with the rights of families and of groups of kindred.” SIR HENRY JAMES SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION TO THE HISTORY OF EARLY SOCIETY, AND ITS RELATION TO MODERN IDEAS* 271 (1861). Maine supported his conclusions by drawing on his own research in India, and also on the work of Georg Ludwig von Maurer on the primitive Germanic village communities, the Mark, and on the work of William Blackstone. Maine’s arguments ignited many theorists to write, both challenging and supporting his conclusions. This debate had much more than academic importance, as major political struggles continued throughout the nineteenth century over the status of the many remaining forms of common property in Europe, and eventually led to the passage of legislation to eliminate collective landholding rights and to authorize enclosures and the takeover of communal properties of individuals. Elinor Ostrom, *Private and Common Property Rights*, in 2 *ENCYCLOPEDIA OF LAW AND ECONOMICS IN CIVIL LAW AND ECONOMICS* 332, 333 (2000) [hereinafter Ostrom, *Private*], available at <http://allserv.rug.ac.be/~gdegeest/2000book.pdf>; see also Dean Lueck & Thomas J. Miceli, *Property Law*, in *HANDBOOK OF LAW AND ECONOMICS* 183, 183 (A. Mitchell Polinsky & Steven Shavell, eds., 2007).

²⁷ *Ingerson*, *supra* note 12, at 1; see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002) (discussing whether moratorium on private land-use motivated by public environmental concerns was regulatory taking under Fifth Amendment of the U.S. Constitution, thus requiring just compensation). See generally *Kelo v. City of New London*, 545 U.S. 469 (2005) (finding lawful public entity’s use of eminent domain to transfer land from one private owner to another private owner in hopes of spurring economic

property, seems to straddle that line.²⁸

In much of the developing world, common property regimes continue to thrive as the predominant organization of property and the major determinant of property rights.²⁹ Natural resources held under common property regimes are usually the significant assets of a community that both sustain lives and preserve the cultural traditions of many societies, including the poor and marginalized communities of such societies.³⁰ As such, most common property regimes consist of rural people in developing countries holding communal rights to natural resources.³¹ However, the idea of common property could apply also to certain assets in the developed world; the notion is that common property theories might contribute to the policies underlying land-use rights to urban areas of the United States and other developed countries and could offer fresh and innovative ideas to the political debates concerning downtrodden housing markets.³²

Before examining how the elaboration of common property regimes might lessen the social exclusion from property rights, it is necessary to understand the vocabulary associated with this topic. For purposes of this article, I operated with the understanding that a property right is a "social relationship between a resource user and other potential users, with respect to a particular object, place, or feature of the land."³³ Accordingly, property

development for public good).

²⁸ Ingerson, *supra* note 12, at 1; cf. James C. Wood, *Intergenerational Equity and Climate Change*, 8 GEO. INT'L ENVTL. L. REV. 293, 309 (1996) (explaining "common property" in terms of openness and subtractibility).

²⁹ Andrew Fuys et al., *Securing Common Property Regimes in a 'Modernizing' World: Synthesis of 41 Case Studies on Common Property Regimes from Asia, Africa, Europe and Latin America*, presented at Survival of the Commons: Mounting Challenges and New Realities, The Eleventh Conference of the International Association for the Study of Common Property (Bali, Indonesia, June 19–23, 2006).

³⁰ Ostrom, *Private*, *supra* note 26, at 338; Barton H. Thompson, *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 241, 241 (2000); David J. Hayes, *Privatization and Control of U.S. Water Supplies*, 18 NAT. RESOURCES & ENV'T 19, 24 (2003); Brigham Daniels, *Emerging Commons and Tragic Institutions*, 37 ENVTL. L. 515, 518 (2007).

³¹ Ostrom, *Private*, *supra* note 26, at 336, 338. But see J. Mijin Cha, *Environmental Justice in Rural South Asia: Applying Lessons Learned From the United States in Fighting For Indigenous Communities' Rights and Access to Common Resources*, 19 GEO. INT'L ENVTL. L. REV. 185, 188 (2007) (discussing government's efforts to limit common property claim of rural and indigenous communities on natural resources).

³² See *infra* Part IV.

³³ Elinor Ostrom & Edella Schlager, *The Formation of Property Rights*, in RIGHTS TO NATURE: ECOLOGICAL, ECONOMIC, CULTURAL, AND POLITICAL PRINCIPLES OF INSTITUTIONS FOR THE ENVIRONMENT, 127–56 (Susan Hanna et al. eds., Island Press, Washington, D.C., 1996) cited in Synne Movik, *Some Notes on Common vs. Private Property Rights to Natural Resources*, presented at The Commons in an Age of Global Transition: Challenges, Risks and Opportunities, The Tenth Conference of the International Association for the Study of

regime has two components: 1) property rights, consisting of bundles of entitlements defining an owner's rights and duties to the use of a particular resource; and, 2) property rules, which are the rules under which those rights are exercised.³⁴ Property rights regimes differ in many respects; for instance, ownership of the asset and the rights and obligations of the owner are different depending on the nature of the property regime.³⁵ Thus, it is appropriate to introduce the four predominant property rights regimes: 1) state ownership; 2) open access; 3) private ownership; and, 4) common ownership.³⁶

State property, which is sometimes referred to as public property or collective property, is property owned by the citizens of a political entity.³⁷ These citizens invest rule-making authority with a public entity or agency and retain the right to use the resource in compliance with the rules established by the public entity or agency.³⁸ This property regime is quite common worldwide and vast amounts of land, buildings, and capital equipment are held by governments.³⁹ State property is similar to common property in that no individual stands in a specially privileged position with regard to any resource, but is different from common property in that the state has a special status or distinct interest in the property,⁴⁰ however, it is beyond the scope of this article to discuss the resource management of state property.⁴¹

An open access property regime is characterized by a lack of rules and rights to govern a particular resource.⁴² In other words, open access to property is the absence of property rights.⁴³ In open-access regimes anyone

Common Property (Oaxaca, Mexico, August 9–13, 2005) at 2.

³⁴ Susan S. Hanna, Carl Folke, Karl-Goran Maler, *Property Rights and the Natural Environment*, in *RIGHTS TO NATURE: ECOLOGICAL, CULTURAL, AND POLITICAL PRINCIPLES OF INSTITUTIONS FOR THE ENVIRONMENT I* (Susan S. Hanna, Carl Folke, Karl-Goran Maler eds., 1996). See generally Daniel W. Bromley, *ENVIRONMENT AND ECONOMY: PROPERTY RIGHTS AND PUBLIC POLICY* (Basil Blackwell, Oxford, 1991).

³⁵ See *infra* Part II.

³⁶ *Id.*

³⁷ Lynda L. Butler, *Environmental Water Rights: An Evolving Concept of Public Property*, 9 VA. ENVTL. L.J. 323, 361 (1990) (identifying elements of "public property rights"); see also Dagan & Heller, *supra* note 20, at 557–58.

³⁸ Lueck & Miceli, *supra* note 26, at 183; Movik *supra* note 33, at 3.

³⁹ The U.S. government owns over one-third of the total land area in the United States. *Id.*

⁴⁰ Dagan & Heller, *supra* note 20, at 557–58.

⁴¹ Given the great variety of state-held property, the analysis of state property regimes requires a detailed knowledge of the asset being addressed and of the relevant administrative agency responsible for the administration of that asset; a workable theory of state bureaucracy is also vital. Such analysis goes beyond the scope of this article. For an economic analysis of state property compared to other property regimes, see Lueck & Miceli, *supra* note 26, at 183.

⁴² Siegfried V. Ciriacy-Wantrup & Richard C. Bishop, "Common Property" as a Concept in Natural Resource Policy, 15 NAT. RESOURCES J. 713, 715 (1975) (articulating open access as property regime where there are no legal rights to exclude).

⁴³ *Id.*; see also Stephen R. Munzer, *Commons, Anticommons, and Community in*

may use a resource, and no one may be excluded from the resource.⁴⁴ Economic analysts have shown that open access to property tends to lead to overuse of the asset to which there is open access and the eventual complete dissipation of its value.⁴⁵ This circumstance is commonly referred to as the “tragedy of the commons.”⁴⁶ It is essential in this article to note upfront that common property regimes are substantially different from open-access property regimes, particularly in resource management.⁴⁷

Private ownership is often suggested to be the straightforward solution to the open access problem of the tragedy of the commons.⁴⁸ With open access, no user has any incentive to use inputs that have future payoff. On the other hand, private property creates incentives for the productive use of the asset because privatized property regimes assign property to identifiable individuals, which guarantees them control of access to the asset and the rights to the socially acceptable uses of it.⁴⁹ Private property regimes are considered by most economists to be essential for economic development because of the incentive to put property to productive use.⁵⁰

Common property is best viewed as occupying the middle ground between open access and private ownership.⁵¹ Common property is owned by

Biotechnological Assets, 10 THEORETICAL INQUIRIES L. 217271, 273 (2009) (defining open-access resources).

⁴⁴ Dagan & Heller, *supra* note 20, at 552.

⁴⁵ Ostrom, *Private*, *supra* note 26, at 336, available at <http://allserv.rug.ac.be/~gdegeest/2000book.pdf>. But see Jason Scott Johnson, *The Rule of Capture and the Economic Dynamics of Natural Resource Use and Survival Under Open Access Management Regimes*, 35 ENVTL. 855, 861 (2005) (arguing, under certain biological and economic conditions, stock extinction is not inevitable).

⁴⁶ Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1243–48 (1968), cited in Movik *supra* note 33, at 4.

⁴⁷ See Ellickson, *supra* note 25, at 1322 (distinguishing open-access regime from ownership by group); Shi-Ling Hsu, *A Two-Dimensional Framework For Analyzing Property Rights Regimes*, 36 U.C. DAVIS L. REV. 813, 816 (2003) [hereinafter Hsu, *Two-Dimensional*] (distinguishing “commons” from “open access”); Dagan & Heller, *supra* note 20, at 552.

⁴⁸ Hardin, *supra* note 46, at 1245 (proposing selling of commons as private property as solution to tragedy of commons).

⁴⁹ Lueck & Miceli, *supra* note 26, at 183; Thompson, *supra* note 30, at 244 (stating that when resource is privatized, owners will incur entire cost of overuse and thus carefully use it).

⁵⁰ Fred S. McChesney, *When Bad Books Happen to Good People: Robert Nelson’s Economics As Religion*, 56 CASE W. RES. L. REV. 601, 606 (2006) (stating that economists rely on empirical evidence in determining poor effects of common property).

⁵¹ Ciriacy-Wantrup & Bishop, *supra* note 42, at 715 (defining common property as property regime where legal rights are clearly defined, unlike open-access framework). Carol Rose views common property as “commons on the inside, [private] property on the outside.” Carol M. Rose, *The Several Futures of Property: Of Cyberspace and the Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 155 (1998) (highlighting that, although in open access and in common property there are multiple users in both regimes, user groups for privatized property regimes and common property regimes are clearly defined, whereas user

an identified group of people, invested with the right to exclude non-owners, and the duty of maintaining the property through constraints placed on the use of it.⁵² Yes, in social science discourse, the “commons” once referred to the circumstances now known as open access to property.⁵³ However, in law and legal theory, the “commons” and more specifically “common property” means the exclusive ownership of an asset by a group, which is very different than the premise of open access without property rights.⁵⁴

Common property regimes are—well—common. They are widely documented in anthropological research, especially for the use and maintenance of natural resource stocks in developing communities; and, their details have been studied in many settings. In fact, many writers on common property have noted the gains from group enforcement of rights to the resource asset.⁵⁵

In reality, property rights regimes are more complex than the forgoing state property, open access, private property, and common property discussions above suggest.⁵⁶ Property regimes are mixtures of these basic types; and, very little scholarship is available to understand what determines the optimal combination of property rights.⁵⁷ However, a look at the advantages of common property regimes shows that the communal theories of many developing communities toward their natural resource maintenance systems are relevant to understanding a wide variety of property regimes, including the predominantly privatized property regime in the United States, and can therefore be used in modern societies to provide alternative solutions to urban problems such as today’s housing crisis.⁵⁸ Let us take a closer look at private- and common-property arrangements.

III. WHY PRIVATIZED PROPERTY RIGHTS?

William Blackstone framed private property as the sole and despotic

group for open access is not).

⁵² See Ostrom, *Private*, *supra* note 26, at 334–5.

⁵³ Lueck & Miceli, *supra* note 26, at 183.

⁵⁴ *Id.*; see also Ellickson, *supra* note 25, at 1322 (distinguishing open-access regime from ownership by group); Hsu, *Two-Dimensional*, *supra* note 47, at 816–17 (distinguishing “commons” from “open access”).

⁵⁵ See Fuys, *supra* note 29, at 1; Movik *supra* note 33, at 5.

⁵⁶ Lueck & Miceli, *supra* note 26, at 183.

⁵⁷ *Id.* See also Dagan & Heller, *supra* note 20, at 559 (stating, “there is significant analytic and normative traction to be gained from synthesizing features of existing types, private and commons, to create vigorous hybrids”). But see Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163 (1975) (arguing that we see property arrangements covering spectrum from common property to private property because of variety of factors contributing to costs and benefits of each of these arrangements).

⁵⁸ See *infra* Part IV.

dominion, which “one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”⁵⁹

Economists tout privatized property regimes as the best property rights arrangement to create sustainable growth because of the incentives associated with optimal and efficient resource use of the asset in a privatized property arrangement.⁶⁰

In 1967, Harold Demsetz argued in *Towards a Theory of Property Rights* that privatized property regimes were better than common property regimes.⁶¹ He wrote that private property rights were superior because they “internalize the externalities” associated with property ownership.⁶² Although I hesitate to elaborate fully on the economics of why privatized property regimes are celebrated in scholarship, it is necessary to briefly describe Demsetz’s argument as a foundation for further discussion.

In discussing the favorability of private property, Demsetz explained that there are three types of costs from common property regimes: 1) increased negotiating costs because of holdouts; 2) increased policing or monitoring costs; and, 3) the difficulties of too high a discount rate that lead commoners to fail to internalize fully the interests of future generations.⁶³ Instead, private property solves these problems by concentrating costs and benefits on owners, creating incentives to use resources more efficiently.⁶⁴

Using title to land ownership as the example, Demsetz stated that private ownership to land internalizes many of the externalities associated with communal ownership; for example, private ownership reduces the costs

⁵⁹ Dagan & Heller, *supra* note 20, at 556; 2 WILLIAM BLACKSTONE, COMMENTARIES 2 (1769).

⁶⁰ Garrett Hardin, Harold Demsetz, Anderson and Hill, Ellickson, and others have helped establish a generally accepted sense of the inevitability of privatization and the necessary failure of commons ownership. Dagan & Heller, *supra* note 20, at 565 (arguing that “[c]ommons property may be temporarily efficient, but in time, as the demand for scarce resources inevitable increases, privatization prevails”). See generally Hardin, *supra* note 46, at 1244–45; Harold Demsetz, *Towards a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967); Anderson & Hill, *supra* note 57, at 169–70. Note that Ellickson acknowledges the possible merits of commons property with regard to “large events,” i.e., that group ownership of land can sometimes be advantageous because of increasing returns to scale and the desirability of spreading risks. Ellickson, *supra* note 25, at 1362 n.237.

⁶¹ Demsetz, *supra* note 60, at 356; Movik *supra* note 33, at 7. Dagan and Heller comment that Demsetz’s proposition that private property is more cost-beneficial once demand pressures are high enough remains the conventional wisdom. Dagan & Heller, *supra* note 20, at 561.

⁶² Demsetz, *supra* note 60, at 354.

⁶³ Dagan & Heller, *supra* note 20, at 560–61 (citing Demsetz, *supra* note 60, at 356–57 (1967)).

⁶⁴ *Id.*; see Anderson & Hill, *supra* note 57, at 178.

of negotiating the rights of use and the enforcement of rules.⁶⁵ As such, an individual owner, who is vested with the ability to exclude other potential users, is able to realize better the benefits of the property's assets. According to Demsetz, private ownership of property creates a situation where the owner of the property must bear the costs associated with the property to receive the rewards of its ownership, and this scenario leads to efficient property management.⁶⁶ Additionally, he argued that private ownership significantly reduces the costs of negotiating the remaining externalities, so that the transaction costs of negotiation are less in a private property regime.⁶⁷

Since Demsetz's assertions supporting privatized property regimes, other scholars have offered arguments reinforcing his main claims.⁶⁸ For

⁶⁵ Demsetz, *supra* note 60, at 356; *see also* Dixon, *supra* note 25, at 234–35 (stating that strategy of privatizing communally owned land would tend to decrease overall losses and transaction costs associated with communal land regime); James L. Huffman, *Land Ownership and the Level of Regulation: Land Ownership and Environmental Regulation*, 25 *ECOLOGY L.Q.* 591, 601 (1999) (stating that private ownership, in conjunction with private market transactions, will prove to be particularly effective in maximizing net social welfare while respecting rights of individuals); Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 *J. LEGAL STUD.* 131, 141 (2000) [hereinafter Smith, *Semicommon*] (stating that private ownership will internalize many benefits and costs, leading to greater total value of production).

⁶⁶ Demsetz, *supra* note 60, at 356; *see also* Douglas W. Allen, *The Rhino's Horn: Incomplete Property Rights and the Optimal Value of an Asset*, 31 *J. LEGAL STUD.* 339, 239–40 (2002); Stuart Banner, *The Evolution of Property Rights*, 31 *J. LEGAL STUD.* 359, 359 (2002); Reza Dibadj, *Reconceiving the Firm*, 26 *CARDOZO L. REV.* 1459, 1470 (2005); Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 *UCLA ENT. L. REV.* 97, 100 (1994); Vincent M. Roche, *Road Hunting and Regulatory Takings: An Examination of the South Dakota Supreme Court's Opinion in Benson v. State*, 11 *GREAT PLAINS NAT. RESOURCES J.* 1, 5 (2006); Sabrina Safrin, *Chain Reaction: How Property Begets Property*, 82 *NOTRE DAME L. REV.* 1917, 1919 (2007); Smith, *Semicommon*, *supra* note 65, at 133; Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 309 (1996); Kirsten Westerland, *Nepal's Community Forestry Program: Another Example of the Tragedy of the Commons or a Realistic Means of Balancing Indigenous Needs with Forestry Conservation?*, 18 *COLO. J. INT'L ENVTL. L. & POL'Y* 189, 196 (2007).

⁶⁷ To support his argument, Demsetz refers to the Montagne Indians, a Native American Indian tribe in the American Southwest engaged in fur trade, based on the work of the anthropologist Eleanor Leacock. The findings of Leacock revealed a relationship between the evolution of private ownership to land among this society, and their increased engagement in the commercial fur trade. Demsetz used this progression fact to substantiate his argument that private property leads to greater efficiency and productivity. *See* Demsetz, *supra* note 60, at 351, 356; *see also* Movik *supra* note 33, at 4–5.

⁶⁸ *See* Daniel H. Cole, *Clearing the Air: Four Propositions About Property Rights and Environmental Protection*, 10 *DUKE ENVTL. L. & POL'Y F.* 103, 119 (1999); Demsetz, *supra* note 60, at 356; Ellickson, *supra* note 25, at 1320; F. Scott Kieff, *IP Transactions: On the Theory & Practice of Commercializing Innovation*, 42 *Hous. L. Rev.* 727, 735 n.25 (2005); Donald J. Kochan, *Runoff and Reality: Externalities, Economics, and Traceability Issues in Urban Runoff Regulations*, 9 *CHAP. L. REV.* 409, 419 (2006); Movik *supra* note 33, at 4–5; Henry E. Smith, *Exclusion Versus Governance: Two Strategies For Delineating Property*

example, key arguments in support of private property rights include greater security of tenure, induced investment leading to higher productivity and efficiency, the enabling of investments for the potential of private property functions as collateral for loan, and the belief that secure private tenure curbs degradation of the asset by taking into account the costs of externalities.⁶⁹

Significantly, one advocate in support of privatized property regimes is the Peruvian economist Hernando de Soto. According to de Soto the failure of capitalism in the developing world is specifically due to the lack of formal property titles. In *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE*, de Soto argues for formalizing private property rights in the developing world by establishing entitlements in the form of titles to the property.⁷⁰ He opines that without formal titles to property, people in the developing world are stuck in poverty; that, although people in the developing world have and own assets, the assets are of no use to their plight because without formal title to those assets, the owners cannot invest or use their assets for collateral. He states that “informally owned assets represent dead capital, whereas formal titling systems would enable the conversion of that dead capital into live capital.”⁷¹ Although de Soto’s arguments extend to cover ownership of natural resources and rural land, he mostly focuses his research and scholarship on urban land owners, possessors, and entrepreneurs. As such, the main criticisms of de Soto have been that it is not possible to formalize title in many rural contexts because territorial boundaries are not set and the rural strategy for hedging the risks associated with their livelihood has been to establish communal ownership of land.⁷²

Moreover, with poverty so prevalent in privatized property regimes too, how can de Soto suggest that formal titling to property is the avenue toward sustainable wealth?⁷³ This focus on titling might be off the mark as the

Rights, 31 J. LEGAL STUD. 453, 453-54 (2002).

⁶⁹ Ostrom, *Private*, *supra* note 26, at 335; *see also* Movik *supra* note 33, at 5.

⁷⁰ HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (NEW YORK BASIC BOOKS 2000) *cited in* Movik, *supra* note 33, at 5.

⁷¹ *Id.*

⁷² For instance, Maryam Niamir-Fuller discusses the successful common property arrangements of pastoralists in dryland Africa, where property is held communally as a means of risk spreading. MARYAM NIAMIR-FULLER, *MANAGING MOBILITY IN AFRICAN RANGLANDS: THE LEGITIMIZATION OF TRANSHUMANCE*, (Intermediate Technology Publications, London, 1999). For a critique of Hernando de Soto’s arguments in *THE MYSTERY OF CAPITAL*, *see generally* Alan Gilbert, *On the Mystery of Capital and the Myths of Hernando de Soto: What Difference Does Legal Title Make?*, 24 INT’L DEV. PLANNING REV. 1, 1-19 (Feb. 2002).

⁷³ *See* William P. Quigley, *Revolutionary Lawyering: Addressing the Root Causes of Poverty and Wealth*, 20 WASH. U. J.L. & POL’Y 101, 129 (2006) (arguing for redefinition of property laws to maintain justice, equality and human dignity).

market itself is a barrier to property ownership.⁷⁴ Instead, perhaps we should look to design effective governmental policies to bring property ownership to the masses and use innovative ownership bonds to retain these property rights—especially in the developed world where the culture appears to be one where people *want* to own property, and *want* to have something to leave for their kin, but *obtaining* property is an uphill battle.⁷⁵

IV. WHY COMMON PROPERTY RIGHTS?

Historical economists tend to view common property regimes as more primitive than private property regimes, concluding that the developed world is a result of the change from common property arrangements to private property arrangements.⁷⁶ However, some research has investigated and challenged the accuracy of that assumption.⁷⁷

Nonetheless, many writers have written optimistically about the features of common property regimes and the benefits of maintaining common property regimes in a variety of circumstances.⁷⁸ Much of this research has focused on certain natural common pool resources and the management of particular systems, such as irrigation systems,⁷⁹ social forestry,⁸⁰ and the

⁷⁴ See James J. Kelly, Jr., “We Shall Not Be Moved”: Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation, 80 ST. JOHN’S L. REV. 923, 925–26 (2006).

⁷⁵ Kris Bulcroft, *A Cross-National Study of the Laws of Succession and Inheritance: Implications for Family Dynamics*, 2 J. L. & FAM. STUD. 1, 4, (2000) (noting that majority of studies conclusively show that kin remain primary beneficiaries of inheritance).

⁷⁶ See Ostrom, *Private*, *supra* note 26, at 334.

⁷⁷ See Barry C. Field, *The Evolution of Property Rights*, 42 KYKLOS 319 (1989). Field’s research derives from a European social history that strongly suggests communal agricultural property regimes emerged after individualistic systems, which consisted of small individual fields rather than commonly held lots. Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 563 (2001) (citing Barry C. Field, *The Evolution of Property Rights*, 42 KYKLOS 319 (1989)).

⁷⁸ See ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 35–36 (1990) [hereinafter OSTROM, GOVERNING]; Movik, *supra* note 33, at 5–6; see also Thomas T. Ankersen & Thomas K. Ruppert, *Defending the Polygon: The Emerging Human Right to Communal Property*, 59 OKLA. L. REV. 681, 684 (2006); Fuys, *supra* note 29, at 3–4; Tom Ginsburg, *Ways of Criticizing Public Choice: The Uses of Empiricism and Theory in Legal Scholarship*, 2002 U. ILL. L. REV. 1139, 1148 (2002); H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124, 124 (1954); Stephen M. Nickelsburg, *Mere Volunteers? The Promise and Limits of Community-Based Environmental Protection*, 84 VA. L. REV. 1371, 1378 (1998); William J. Willand, *Evolving Strategies for Twenty-First Century Natural Resource Problems*, 81 N.Y.U. L. REV. 1518, 1519 (2006).

⁷⁹ For research regarding the use of communal theories to manage irrigation systems, see REDDY, M. VENKATA, *MANAGING COMMON PROPERTY—IRRIGATION IN INDIA AND THE PHILIPPINES* (SAGE PUBLICATION, NEW DELHI, 1991), cited in Agrawal, Arun, *Sustainable Governance of Common-Pool Resources: Context, Methods, and Politics*, 32 ANN. REV.

systems of herding of livestock.⁸¹ Yet, common property regimes also are important to modern economies. For example, families and other close-knit groups organically apply common property understandings to govern their groups' resources.⁸²

As such, in *Reformulating the Commons*, Elinor Ostrom⁸³ identified the following elements as some key features that characterize a common pool resource: high exclusion costs, the production of public goods, the benefit of spreading risk among members of a group, and the widely presumed equity of communal systems.⁸⁴

Much of the research on common property regimes has centered on identifying the conditions under which such systems succeed.⁸⁵ These arguments suggest there are two conditions that must be met for common property regimes to function: 1) a clear demarcation of the physical boundaries of the resource asset, and, 2) the presence of clear social boundaries, that is group membership must be determined for common property regimes to work.⁸⁶

In *Common Resources and Institutional Sustainability*, Arun Agrawal analyzes many of the major research findings regarding common-property regimes and determines that there are several overlapping factors determining the viability of such communal systems.⁸⁷ As such, he presents a list of enabling factors, or preconditions, that, according to the scholarship he analyzed, need to be fulfilled to ensure a viable framework for common

ANTHROPOLOGY 243, 243–62 (2003).

⁸⁰ For an example of the use of communal theories for social forestry, see David Brokensha, *Village-level Management of Common Property Resources, Especially Fuelwood and Fodder Resources in Karnataka, India*, Report Prepared for the World Bank (1988) available at <http://www.odi.org.uk/fpeg/publications/greyliterature/socialforestry/brokensha/index.html>. For a discussion of the effect of privatization on social foresters in Zimbabwe, see Movik, *supra* note 33, at 12–13.

⁸¹ For a discussion of the effect of privatization on the pastoralists in Mongolia, see Movik, *supra* note 33, at 10–11.

⁸² *Id.*; cf. Alyssa A. Vegter, *Forsaking the Forests For the Trees: Forestry Law in Papua New Guinea Inhibits Indigenous Customary Ownership*, 14 PAC. RIM L. & POL'Y J. 545, 553 (2005).

⁸³ Elinor Ostrom received The 2009 Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel (Nobel Prize in Economics) for her “analysis of economic governance, especially the commons.” See http://nobelprize.org/nobel_prizes/economics/laureates/2009/.

⁸⁴ Ostrom, Elinor, *Reformulating the Commons*, 6/1 SWISS POL. SCI. REV. 29, 29–52 (2000) [hereinafter Ostrom, *Reformulating*].

⁸⁵ Movik, *supra* note 33, at 6.

⁸⁶ *Id.*

⁸⁷ Arun Agrawal, *Common Resources and Institutional Sustainability*, in ELINOR OSTROM ET AL., *THE DRAMA OF THE COMMONS*, COMMITTEE ON THE HUMAN DIMENSIONS OF GLOBAL CHANGE (2002) [hereinafter OSTROM ET AL., *DRAMA*], cited in Movik, *supra* note 33, at 6.

property regimes to operate in a sustainable manner.⁸⁸

According to Agrawal, there are four major categories of factors enabling the sustainability of common property regimes: 1) characteristics of resources; 2) characteristics of the group using the resources; 3) institutional arrangements; and, 4) external environment.⁸⁹ The resource characteristics include small size, well-defined boundaries, low levels of mobility, possibility of storage of benefits from the resource, and predictability.⁹⁰ The group characteristics are also small size, clearly defined boundaries, shared norms, past successful experiences, appropriate leadership, interdependence among group members, heterogeneous endowments, homogeneous identities and interests, and low levels of poverty.⁹¹ The institutional arrangements call for rules simple and easy to understand, locally devised access and management rules, rules easily enforced, graduated sanctions, availability of low-cost adjudication, and accountability of monitors to users.⁹² The external environment needs low-cost and adaptable technology, low levels of articulation with external markets, a supportive and non-interfering state, and nested enterprise.⁹³

Common property regimes can arise out of many different rights arrangements. For example, both private contracting to communal rights, as seen in some unitized oil reservoirs or groundwater districts, and customary law, as seen in common pastures and forests, have borne common property regimes in relation to those particular assets.⁹⁴ Further, the regimes might have a legal basis, as in riparian water rights, or a regulatory basis, as in hunting and fishing regulations.⁹⁵

Some of the threats to common property regimes include privatization

⁸⁸ *Id.* See also, Arun Agrawal, *Sustainable Governance of Common-Pool Resources: Content, Methods, and Politics*, 32 ANN. REV. ANTHROPOLOGY 243, 243–62 (2003) [hereinafter Agrawal, *Sustainable Governance*.].

⁸⁹ Agrawal, *Sustainable Governance*, *supra* note 87, at 243–62 (2003).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Movik, *supra* note 33, at 7. For an example of a successful community management regime that adheres to these principles, look to the Iriaichi system in Japan, where strict management rules were formulated by the community and enforced by patrolling. Yoko Kijima et al., *Iriaichi: Collective versus Individualized Management of Community Forests in Postwar Japan*, J. ECON. DEV. & CULT. CHANGE 867 (Univ. of Chicago Press, 2000). For another example of successful community management of resources, look to the communally managed forests in the hill regions of Nepal. KEIJIRO OTSUKA & FRANK PLACE, *LAND TENURE AND NATURAL RESOURCE MANAGEMENT: A COMPARATIVE STUDY OF AGRARIAN COMMUNITIES IN ASIA AND AFRICA* (The Johns Hopkins University Press, Baltimore & London, 2001).

⁹⁴ Lueck & Miceli, *supra* note 26, at 183.

⁹⁵ *Id.*; see also Hsu, *Two-Dimensional*, *supra* note 47, at 840.

for commercial development, expansion of small-holder agriculture, the appropriation of common property regimes from conservation under various arrangements and obligations, legal ambiguities and a non recognition of customary law.⁹⁶ However, there are strategies for securing common property regimes and access to the natural-resource assets. For example, instruments usually thought to protect private property interests, such as state recognition and backing, are also found to be relevant and fundamental to securing common property regimes—especially protecting the common property regimes from external threats.⁹⁷ Securing these rights and entitlements is crucial. Strengthening internal governance structures and arrangements, such as conflict resolution, rule making, and enforcement, and making them more equitable and accountable may ensure more equitable decision making and benefit distribution, both of which are also crucial for securing against internal threats.⁹⁸

V. COMMUNAL THEORIES ALREADY EXIST IN PREDOMINANTLY PRIVATIZED PROPERTY REGIMES

Although most of the common property discourse focuses on the natural resources found in the developing world, the lessons learned from successful common property regimes are relevant for many situations and uses in traditionally privatized property regimes of the developed world.⁹⁹ In fact, we see this elaboration in many everyday situations.

Most urban land in the United States is either private or public property.¹⁰⁰ Yet, this land might already be more like common property than is realized. For example, restrictions such as zoning and environmental regulations disallow private landowners from doing anything on their land.¹⁰¹

⁹⁶ Ostrom, *Private*, *supra* note 26, at 349–50; *see also* Gerald R. Faulhaber, *The Question of Spectrum: Technology, Management, And Regime Change*, 4 J. TELECOMM. & HIGH TECH. L. 123 (2005) (discussing generally proposed solutions for regulation of radio spectrum under commons regime).

⁹⁷ Ostrom, *Private*, *supra* note 26, at 337, 345–46.

⁹⁸ *Id.* *See generally* Faulhaber, *supra* note 96, at 154–56 (arguing that regulation is political process that allows regulators potential to use coercive power of government to intervene in markets; this regulatory process is used to achieve group objectives).

⁹⁹ *But see* Carol M. Rose, *Expanding The Choices For The Global Commons: Comparing Newfangled Tradable Allowance Schemes To Old-Fashioned Common Property Regimes*, 10 DUKE ENVTL. L. & POL'Y J. 45 (1999) (discussing “tradable environmental allowance” system, hybrid property scheme, compared with traditional common property regimes). *See generally* Mara Kimmel Hoyt, *Breaking the Trade Barrier: Common Property Solutions to Tropical Deforestation*, 5 MINN. J. GLOBAL TRADE 195 (1996) (citing common property systems as example management regime for access to land and natural resources).

¹⁰⁰ Ingerson, *supra* note 12, at 2.

¹⁰¹ *See generally* Nolon, *supra* note 15 (discussing environmental zoning).

Instead, there are restrictions. For example, the private owners of land located next to a river might not be permitted to bury oil storage tanks below the surface of their property.¹⁰² So we already see that some aspects of land use affecting the community's quality of life or shared environment are managed like common property regimes.¹⁰³

Also, many housing developments—including both apartment houses and single-family homes—involve individual property rights to the housing unit itself, coupled with the communal property rights to the grounds, halls, recreational facilities, laundry areas, and other spaces.¹⁰⁴ When individuals transact to buy or sell their individual housing units, they assume a set of duties and obligations regarding the communal properties.¹⁰⁵ In fact, the periodic fees for the repair and maintenance of the common properties are similar to assessments made by a community of irrigators on themselves for the maintenance of their own irrigation system.¹⁰⁶ Plus, the purchase and sale of property often requires the permission of other members of the community. Additionally, many sports gyms apply quotas on use of the facilities to its members, and assess periodic fees on members for the maintenance of the common facilities.¹⁰⁷

Further, a business corporation, often seen as the model of private property ownership, also operates with common-property understandings. For instance, although the buying and selling of shares of corporate stock is a clear example of exclusion and individual property rights, the relationships within a modern corporation are far from being “individual” ownership rights. For example, because the income that will be shared between stockholders, management, and employees is itself a “common pool,” there is potential for free-riding and overuse of corporate assets being found within the structure of the modern corporation without any regulation of the assets from within the entity. Thus, where many individuals will work, live, and play in the developed world the property is governed and managed by mixed systems of communal and individual property rights.¹⁰⁸

Moreover, these common property glimpses could be implemented now to address new property-related issues, such as the housing crisis the

¹⁰² Ingerson, *supra* note 12, at 2.

¹⁰³ See generally JANELLE ORSI AND EMILY DOSKOW, *THE SHARING SOLUTION: HOW TO SAVE MONEY, SIMPLIFY YOUR LIFE & BUILD COMMUNITY* (2009) (discussing possibilities for sharing items such as land, houses, cars to survive and thrive in recessionary times).

¹⁰⁴ Ostrom, *Private*, *supra* note 26, at 351.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*; cf. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.5 (2000) (stating that common-interest community has power to charge fees for services or use of common property).

¹⁰⁷ Ostrom, *Private*, *supra* note 26, at 351.

¹⁰⁸ *Id.*

United States is currently facing by encouraging effective government policy to bring property ownership to the masses. Already, new forms of the “commons” are springing-up to assist in providing more opportunities for people to obtain property rights.¹⁰⁹ For example, instruments such as land trusts and limited-equity cooperatives, incidental open spaces, group homes, gated or common-interest developments, the use of urban public property by the homeless, and converted military bases provide some alternatives to privatized property holdings and allow for less people to be excluded from obtaining property rights.¹¹⁰

VI. WHAT MAKES SUCCESSFUL COMMONS AND CAN THE SUCCESS TRANSLATE TO URBAN LAND IN THE DEVELOPED WORLD?

Ostrom identified the following two requirements for successful common property regimes: 1) there must be social stability in the group of owners/users; and, 2) the system must face significant environmental uncertainty.¹¹¹

Social stability is a common set of beliefs shared by a community of landholders, which creates a social cohesion focused on the success of the common property.¹¹² Social stability is often achieved when there is a community of owners/users bound by an “us-ness” that is deeply rooted in how the owners/users identify themselves.¹¹³ These communities thus share a stable set of members because of their shared set of beliefs, which are deeper than those beliefs or goals that bind them to resource management of the common property itself, whether they be kinship, religious, or tribal bonds.¹¹⁴ As Ostrom says it, commoners must have “shared a past and expect to share a

¹⁰⁹ See generally Angela M. Christy, *Chair's Message: New Markets — New Opportunities*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 298 (2000) (discussing new frameworks for affordable housing); Dana Young, *The Laws of Community: The Normative Implications of Crime, Common Interest Developments, and “Celebration”*, 9 HASTINGS WOMEN'S L.J. 121 (1998) (examining different forms of communal living, including common-interest developments).

¹¹⁰ Ingerson, *supra* note 12, at 2–3.

¹¹¹ Ostrom, *Reformulating*, *supra* note 84, at 29–52; see also Dagan & Heller, *supra* note 20, at 565 (2001) (citing Sara Singleton & Michael Taylor, *Common Property, Collective Action and Community*, 4 J. THEORETICAL POL. 309, 311 (1992) (explaining that communities with mutual vulnerability is what endows some groups with the means to regulate their common property themselves); see also MICHAEL TAYLOR, *COMMUNITY, ANARCHY AND LIBERTY* 104–29 (1982).

¹¹² Ostrom, *Reformulating*, *supra* note 84, at 29–52 (2000), cited in Movik, *supra* note 33, at 6. See generally OSTROM, *GOVERNING*, *supra* note 78 (presenting empirical examples of successful and unsuccessful efforts to govern and manage common resources).

¹¹³ See *supra* note 112.

¹¹⁴ *Id.*

future.”¹¹⁵ Further, they must be capable of not just “short-term maximization” or the “me-ness” of the resource asset, but also the “long-term reflection about joint outcomes” emphasizing the “us-ness” of the resource maintenance.¹¹⁶ In the developing world, we often see this social stability being achieved through a shared set of binding beliefs and goals.¹¹⁷ Plus, often there is a lack of great economic or social differences among the community members, such that it is easy to maintain the group’s social cohesion toward the successful integration, operation, and management of the resources of the common property; differences in income, wealth, class, race, languages and religion, among others will weaken the conditions for community and threaten the success of the common property.¹¹⁸

Environmental instability is required because the instability gives commoners an incentive to share the risks associated with the property ownership.¹¹⁹ Environmental instability is an event that has a calamitous or disastrous effect on a property, such as a decrease in value or a diminished use of the land. Environmental instabilities can exist in both urban and rural areas. Environmental instability can include instabilities in the physical surroundings, such as natural disasters, or more broadly, instabilities in society, such as problems with gentrification. Instability in the social environment is already prevalent in the developing world—as demonstrated by the current U.S. housing crisis—thereby providing incentive for the public to subscribe to communal regimes in order to avail themselves to property ownership. For instance, a rural landowner would normally face the risk of environmental instabilities such as floods, droughts, or parasite infestations. On the other hand, urban landowners would normally face the risk of environmental instabilities such as the close of a factory or a new zoning law that restricts the use of land for its intended purpose. Although the type of environmental instability varies depending on whether the land is rural or urban, both areas face environmental instabilities that could be catastrophic and devastating to the landowners.

Social stability is required because it allows or forces the commoners to preserve resources for future generations.¹²⁰ For example, in many Alpine villages, herds are held as private property but summer pastures are a common property asset.¹²¹ To avoid the threats that overgrazing and free-riding present

¹¹⁵ *Id.*

¹¹⁶ Ostrom, *Reformulating*, *supra* note 84, at 29–52 (2000), *cited in* Movik, *supra* note 33, at 6.

¹¹⁷ Singleton & Taylor, *supra* note 111, at 311.

¹¹⁸ *Id.*

¹¹⁹ Ingerson, *supra* note 12, at 2.

¹²⁰ *Id.*; *see also* Daniels, *supra* note 30, at 532–35 (discussing stability in context of common property theory).

¹²¹ *Id.* For further study of this seasonal and ecological approach to common property rights,

to the commons, individual farmers cannot graze more sheep and goats on the summer pastures than they can feed privately over the winter.¹²² However, the access to the summer pastures helps all families, whatever their private resources, have a chance to earn a living.¹²³

Environmental instability usually is associated with rural places because rural landowners are the property holders who more often face the random risks of droughts, floods, and plagues. Social stability is also usually associated with rural areas because it is often assumed, whether accurate or not, that rural societies have a deeper sense of community.¹²⁴

However, these requirements exist in urban United States, too. In applying Ostrom's analysis to urban society we can find environmental instability if we define "the environment" in social and economic terms instead of strictly a physical surrounding. For example, in many cities the residents fear depopulation, gentrification, factory and military base closings, which can be just as random and as devastating as floods and plagues.¹²⁵ The social stability prong also is found in urban neighborhoods. It may be largely involuntary, created by economic and racial barriers to mobility; but it exists nonetheless. Further, analysts see the education in urban communities, the social relationships, and the physical structures in such places as a stabilizing "social capital" that can be used to mobilize urban development through new forms of property ownership.¹²⁶

VII. WHAT PREJUDICES IN USING COMMON PROPERTY THEORIES TO URBAN LAND EXIST IN THE UNITED STATES?

Most scholars who have written about common property have seen common property owners as "political and economic underdogs".¹²⁷ For

see Netting, Robert M., *What Alpine Peasants Have in Common: Observations on Communal Tenure in a Swiss Village*, 4/2 HUM. ECOLOGY 135 (APRIL 1976).

¹²² Ostrom, *Private*, *supra* note 26, at 344; *see generally* Ingerson, *supra* note 12, at 2.

¹²³ Ingerson, *supra* note 12, at 2.

¹²⁴ *Id.*; *but see* Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159, 191 (2006) (stating that law respects private property rights of rural landowners more than those of urban ones).

¹²⁵ Bryan M. Seiler, *Moving From "Broken Windows" To Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors*, 92 MINN. L. REV. 883, 905 (2008) ("It is difficult to resolve which interest is the strongest between poor defendants and poor inner-city residents, since both are particularly vulnerable and thus will be strongly affected by the allocation of legal entitlements. But constant public nuisance intervention in cities prices out urban investment; given the instability of property investment in volatile neighborhoods, regulations should be a last resort."); *see also* Elinor Ostrom, *Community and the Endogenous Solution of Commons Problems*, 4 J. THEORETICAL POL. 343, 347 (1992) [hereinafter Ostrom, *Community*].

¹²⁶ Ingerson, *supra* note 12, at 2.

¹²⁷ *Id.*

example, picture a community of villagers defending their traditional forest grazing ground against timber companies who want to clear cut the forest, or government foresters who want to prohibit grazing to protect tree seedlings and prevent erosion.¹²⁸ But, common property owners might also be prosperous or even highly privileged. For example, watching a few episodes of the popular U.S. reality television program *Laguna Beach* shows the goal of many private- or gated- common interest communities is to wall in high home values and wall out social and economic diversity.¹²⁹

As such, we cannot exclude the possibility that communal theories toward property ownership learned from the developing world can—and should—influence the land-use laws of the developed world to address today's property rights issues because urban land is sort of communal already.¹³⁰ Let us simply expand the use of common arrangements.

VIII. HOW CAN URBAN LAND BE COMMUNAL?

There have been a few experimental forms of communal land ownership and management in the United States—including land trusts,¹³¹ neighborhood-managed parks, community-supported agriculture and limited-equity housing cooperatives.¹³² All these new forms of common property aim

¹²⁸ *Id.*

¹²⁹ Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303, 312 (1998) (acknowledging negative depictions of common interest communities as “elite enclave[s] behind gates excluding public at large”); see David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 763 (1995); cf. Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: “The State Will Make The Call,”* 30 VAL. U. L. REV. 509, 512 (1996).

¹³⁰ Bill Yanek, *Leadership and Systematic Reform: Keys to Urban Education Reform*, 10 KAN. J.L. PUB. POL’Y 293, 294-95 (2000) (describing Portland, Oregon as model urban community).

¹³¹ A community land trust is a private, non-profit corporation, created to acquire and hold land for the benefit of a community, and provide secure affordable access to land and housing for community residents. In particular, Community Land Trusts attempt to meet the needs of residents least served by the prevailing land market in these ways: 1) gain control over local land use and reduce absentee ownership; 2) provide affordable housing for lower income residents in the community; 3) promote resident ownership and control of housing; 4) keep housing affordable for future residents; 5) capture the value of public investment for long-term community benefit; and, 6) build a strong base for community action. See Types of Land Trusts – Land Trust Alliance, <http://www.landtrustalliance.org/conserves/about-land-trusts/types-of-land-trusts> (last visited Dec. 20, 2009). The Land Trust Alliance is a non-profit organization that combines the efforts of several community land trusts for the purpose of preserving and protecting natural resources. *Id.*

¹³² Limited equity housing cooperatives are business corporations in which residents share ownership of a building. Co-op members work together to reach mutual goals based on democratic control and decision-making. Limited equity housing cooperatives offer

to foster or protect specific land uses or groups of users.

These experimental forms of property rights and responsibilities raise questions that few researchers, either on urban development or on common property, have yet to address; questions such as: When and how should local policymakers support common property arrangements? For example, should local and state officials help remove regulatory barriers to group ownership of land, or support new criteria for mortgage financing of group owned land?¹³³

And, there are also long-standing laws against “perpetuities”—restricting future property possessor’s uses of their land.¹³⁴ To avoid the rules against perpetuities, communal property holdings must sometimes seek special exemptions, or even change state property laws, to exist.¹³⁵ As such, we find in the United States that the long-term costs and benefits of common property arrangements sometimes depend more on politics than on the actual distribution of land.¹³⁶

Regarding land trusts and limited-equity cooperatives, let me first note that land’s market value depends on many factors, including whether it contains important natural resources or is located in a desirable community.¹³⁷ In fact, the 19th-century American philosopher Henry George argued that much of land’s value is created by something other than individual private action, and therefore should be captured for the public’s benefit through

ownership opportunities to lower income households while limiting the return from resale that they can receive from the housing. It contrasts with market rate cooperatives, where memberships can be transferred at market value. A limited equity housing cooperative is one approach to resident-controlled housing. Others include limited equity condominiums, mutual housing associations, co-housing and community land trusts (CLT). Some of these tools may be combined, such as the limited equity housing cooperative and the community land trust. Limited equity housing cooperatives 1) build member participation in the corporation; 2) operate as nonprofits; 3) combine business and social goals; 4) rely on democratic participation; and, 5) create voluntary membership. In the United States, there are more than 400,000 units of limited equity housing. See PolicyLink – Limited Equity Housing Cooperatives, <http://www.policylink.info/EDTK/LEHC/> (last visited Dec. 20, 2009). PolicyLink is a national research and action institute advancing economic and social equity by working with non-profit organizations that focus on improving a local community, such as housing projects for community land trusts. *Id.* See also Judith Bernstein-Baker, *Cooperative Conversion: Is It Only For the Wealthy? Proposals That Promote Affordable Cooperative Housing in Philadelphia*, 61 TEMP. L. REV. 393, 425 (1988) (citing Boston housing trust fund that contains guidelines for disbursement of funds to limited equity cooperatives).

¹³³ Ingerson, *supra* note 12, at 3.

¹³⁴ See generally W. Barton Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973 (1965) (reviewing Rule Against Perpetuities).

¹³⁵ Ingerson, *supra* note 12, at 3.

¹³⁶ *Id.*

¹³⁷ See generally Andrew Hysell, *Are Property Owners Constitutionally Entitled To Compensation for Environmental Remediation Funds?*, 13 BUFF. ENVTL. L.J. 1, 110 (2005) (noting that higher land quality results in increased economic value).

taxation.¹³⁸

Likewise, in recent times, land trusts have been used for distributing the costs and benefits of land development in a way that is similar to what was proposed by Henry George, but through new forms of land ownership rather than taxation. For example, Boston's Dudley Street Neighborhood Initiative is a land trust that has made the land in an inner-city redevelopment area the common property of a nonprofit group, while allowing private ownership of homes and other buildings, and has found success in providing more affordable housing for low-income families.¹³⁹ These types of land trust initiatives, however, face serious social and economic obstacles in that proposals to build low-income housing are often met with "not in my backyard" (NIMBY) reactions.¹⁴⁰

The greatest economic challenge that a land trust will face is the burden of obtaining funding for its projects. Because a land trust is a non-profit entity, it must depend entirely on financing sources such as loans, donations, foundation grants, and tax credit dollars to obtain funding for its projects. A land trust normally will obtain funding by donations from like-minded individuals and organizations in the private, government, or non-profit sectors. It is not uncommon for a single project to be funded by multiple sources. Unfortunately, multiple funding sources could pose significant burdens on the land trust because each funding source might have a set of standards and regulations that must be satisfied. On the other hand, these standards serve as a safeguard for the benefit of homeowners because community land trust projects must typically meet strict requirements for housing quality, energy efficiency, historic preservation, handicapped accessibility, lead, asbestos, other environmental mitigation, and levels of affordability. Thus, the entire community benefits from this thorough

¹³⁸ Ingerson, *supra* note 12, at 1. The Henry George Foundation furthers the spirit of Henry George's philosophy by conducting research exploring many social and economic issues, including monitoring land value, housing affordability, and the benefits of community land tenures. For more information see <http://www.henrygeorgefoundation.org>.

¹³⁹ Ingerson, *supra* note 12, at 1. For more information regarding the Dudley Street Neighborhood Initiative, see <http://www.dsni.org>. The Dudley Street Neighborhood Initiative has recently become one of the first nongovernmental agencies to acquire foreclosed homes. Laura Crimaldi, *Nonprofits Help Stave Off Neighborhood Crisis*, BOSTON HERALD, Jan. 4, 2009, at 9 available at <http://news.bostonherald.com/news/regional/view.bg?articleid=1142951&format=text>; see also *Boston's Dudley Street Neighborhood Initiative to Conduct New Orleans Leadership Forum*, Nov. 15 2007, <http://belfercenter.ksg.harvard.edu/publication/17674/bostonsdudleystreetneighborhoodinitiativetconductneworleansleadershipforum.html8>.

¹⁴⁰ Tom Peterson, *Community Land Trusts: An Introduction*, PLAN. COMMISSIONERS J., Summer 1996, available at <http://www.plannersweb.com/articles/pet112.html>.

approach to development. As a result, extensive outreach and education is required to build support and understanding for these types of projects.¹⁴¹

Boston's Dudley Street Neighborhood Initiative is a good example of a land trust that significantly improved—and continues to improve—its community. The Dudley Street Neighborhood Initiative is a non-profit organization that depends on donations to fund projects that are part of its comprehensive neighborhood improvement plan. To obtain donations and funding, the organization creates strategic partnerships with individuals and groups in the private, government, and non-profit sectors that are willing to provide funding and support for its redevelopment projects. The Dudley Street Initiative had its greatest victory when—with the support of local government officials—it convinced Boston's city government to take the unprecedented step of granting the community (by power of eminent domain) authority over much of the vacant land characterizing the neighborhood.¹⁴² This authority applies to 60 acres of land that has now been established as a community land trust for the purposes of ensuring land affordability and ownership.¹⁴³

Also using arguments similar to Henry George's theory on property taxation, groups such as Equity Trust, Inc.¹⁴⁴ have dedicated the "social increment" in property values, which is "the increase in land prices as a neighborhood recovers from blight, or a small town grows," to social purposes.¹⁴⁵ For instance, the portion of a house's sale price that represents the increase in the value of the land—rather than, say, housing construction costs—is used to subsidize the purchase price for the next homebuyer; also, making housing more affordable despite rising property values in much of the United States.¹⁴⁶

Regarding incidental open spaces, such as vacant lots, old cemeteries, and partially buried urban streams, these spaces become opportunities for the management of urban land as common property to the benefit of the public.¹⁴⁷

¹⁴¹ *Id.*

¹⁴² See *History*, DSNI, available at <http://www.dsni.org/history.shtml>.

¹⁴³ *Id.*

¹⁴⁴ Equity Trust, Inc. is a small, but national, non-profit organization based in Connecticut. The group's goal is to help communities gain ownership interests in their food, land, and housing by "working with people to make economic changes that balance the needs of individuals with the needs of the community, the earth, and future generations." For more information regarding Equity Trust, Inc., see <http://www.equitytrust.org>.

¹⁴⁵ Ingerson, *supra* note 12, at 1.

¹⁴⁶ *Id.*

¹⁴⁷ One such group is a New York based organization known as "Common Ground." See Dominic Casciani, *Common Ground on Housing Crisis*, COMMON GROUND, Jan. 13, 2009, available at <http://www.commonground.org/?p=157>. This group seeks to alleviate homelessness through a "supportive housing" scheme that divides affordable housing developments into two different tenancies — one geared towards "local essential workers"

Groups seeking to claim or to use such urban land often persuade private owners to permit land use in exchange for help maintaining the land.¹⁴⁸

Regarding urban housing, traditional land-use regulations, grounded partly in concerns about property values, favor only detached single-family housing.¹⁴⁹ However, for the elderly or indigent, low-income, or the single-parent households, detached single-family housing is either inappropriate or priced beyond reach; resulting in the exclusion of these groups from obtaining even mere possession of property.¹⁵⁰ This social exclusion is often exacerbated by advocates of privatization, who argue for converting common property into private ownership to promote reinvestment or to increase property values.¹⁵¹

Yet, there is some scholarship that has proposed managing a community's "housing stock" as a form of common property, both to meet the urban housing needs not met by single-family detached housing and to encourage neighborhood reinvestment. For example, Patricia Baron Pollak, researching in the United States, has examined the sources of opposition to, and the consequences of, converting some single-family homes into group quarters, accessory apartments, and elder cottages.¹⁵² Interestingly enough, many home and business owners who oppose these land uses, expecting them to depress property values, are actually unaware that their neighborhoods already contain some of this alternative housing, and oppose simply based on prejudice.¹⁵³

IX. A CLOSER LOOK AT ONE POSSIBLE IMPLEMENTATION OF COMMUNAL THEORIES TO AID THE HOUSING CRISIS: COMMUNITY LAND TRUSTS

Allowing more land trusts in local property rights regimes will

and the other targeted for the homeless. *See id.*

¹⁴⁸ *Id.*

¹⁴⁹ Peter W. Salsich, Jr., *Toward a Policy of Heterogeneity: Overcoming a Long History of Socioeconomic Segregation In Housing*, 42 WAKE FOREST L. REV. 459, 463 (2007) (noting that for over eighty years Euclidean zoning, form of land-use regulation, separated single-family detached housing from all other forms of permissible land use).

¹⁵⁰ Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate Over Zoning For Exclusivity Private Residential Areas, 1916-1926*, 56 U. PITT. L. REV. 367, 376 (1994) (noting that ordinances excluding all but single-family dwellings resulted in areas where few working-class people could afford to live).

¹⁵¹ *Id.*; *See also* Pollak, Patricia Baron, *Rethinking Zoning to Accommodate the Elderly in Single Family Housing*, 60 J. AM. PLAN. ASS'N 521 (1994).

¹⁵² Lees, *supra* note 150, at 376; *see also* Baron Pollak, *supra* note 151, at 525.

¹⁵³ Ingerson, *supra* note 12, at 3.

“unbundle” the ownership of property from its function in the future.¹⁵⁴ Let us think of land, and specifically urban land in demand, as a unique economic good because it exists in a fixed quantity; it is not as if more urban land can be made to meet an increased demand for it. As such, because the supply cannot rise to meet growing demand, the price is highly affected by market forces. Urban land is very expensive. For example, according to a 2005 report from the Urban Land Trust, a home in the Boston area might cost approximately \$376,000, at a time when the average cost of living expenses for a family of four was approximately \$64,000.¹⁵⁵ Also consider, the urban sprawl that has intensified the housing demand in Southern California’s Orange County—once, as the name suggests, a land of orange groves—has resulted in the average home price to be upwards of \$427,750.¹⁵⁶

On the other hand, the housing supply can be increased by building in greater density, yet this increase in supply often cannot happen quickly enough to meet the housing demand.¹⁵⁷

However, communities can use housing land trusts to separate the ownership of a house from the land on which it sits. For example, conservation land trusts take land out of the market to protect the natural environment.¹⁵⁸ Community land trusts take land out of the market to protect the urban environment, including the people who live there.¹⁵⁹

How can this communal theory lessen the social exclusion from the right to property? It can make housing more affordable. The task is for a local entity to acquire property—any parcel of land through purchase, foreclosure, donation, etc.—and arrange for a housing unit to be built on the parcel if a housing unit does not already exist on it. Sell the building but retain ownership of the underlying land. Lease the land to the homeowner for a nominal sum. This model would support affordable housing in several ways as

¹⁵⁴ Daniel Fireside, *Burlington Busts the Affordable Housing Debate: The Burlington Community Land Trust’s Radical 20-Year Experiment in Affordable Housing*, DOLLARS & SENSE, available at <http://www.dollarsandsense.org/archives/2005/0305fireside.html>.

¹⁵⁵ Scott S. Greenberger, *Report Rates Boston Most Expensive City*, ULI.ORG, Sept. 8, 2005, available at <http://commerce.uli.org/AM/Template.cfm?Section=Research&CONTENTID=39528&TEMPLATE=/CM/ContentDisplay.cfm>

¹⁵⁶ Peter Hong, *Southern California Median Home Price Climbs 2.6% in August*, L.A. TIMES, Sept. 16, 2009, at B1, available at <http://www.latimes.com/business/la-fi-home-sales16-2009sep16,1,2108681.story>.

¹⁵⁷ Fireside, *supra* note 154.

¹⁵⁸ Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment On Private Lands*, 41 NAT. RESOURCES J. 373, 396–414 (citing five case studies demonstrating how land trusts and conservation organizations protect environment through easements).

¹⁵⁹ Kelly, *supra* note 74, at 963 n.189 (discussing proposed land trust affording affordable homeownership of Dudley Street Neighborhood Initiative).

seen in the success of Boston's Dudley Street Neighborhood Initiative.¹⁶⁰ First, homebuyers would be low-income or some other historically socially excluded minority group. Second, the buying price of the home is less because it does not include the price of the land underneath. Third, the trust works with lenders to reduce the cost of the mortgage by using the equity of the land as part of the mortgage calculation. This reduces the size of the down payment and other closing costs and eliminates the need for private mortgage insurance.

And this model will help the U.S. housing market crisis too because, when a normal house is offered for sale on the usual terms, it does practically nothing to make the overall housing market more affordable. On the other hand, a land-trust home creates a permanently affordable property because the land it sits on is removed from the market. Most of the appreciation is retained by the housing trust often to the benefit of the community as a whole, rather than any particular individual. In this way, the common property—the land-trust model in this scenario—creates a bridge between what is often thought of as private—and perceived of as public—property. Because the increase in property value is owned by the trust, prices of the properties on the land can, for the most part, remain stable and predictable. The result is the lessening of social exclusion from the right to property by preventing the concentration of land in the hands of the haves.

Under this land-trust model, the dream of owning a home could now become a reality for those who could not do so because of the socially exclusive nature of purely privatized property regimes. Finally, property ownership would no longer be exclusively available to the wealthy and privileged, but those of diverse social and economic backgrounds could also acquire property, improve it, and pass it on for the use of future generations. Because our nation's population is composed of people from many diverse nationalities, backgrounds, and social groups, it is imperative that all members of society—not just those who are wealthy and privileged—are allowed to acquire property that is both attainable and affordable.

CONCLUSION

Instability in housing markets is socially problematic. By looking at land—specifically urban land in this discussion—as a right rather than merely a market good, and by considering alternative property regimes inspired by the holdings of natural resources in the developing world, it may be possible to create a sustainable model for affordable housing that deserves to be

¹⁶⁰ See Dudley Street Neighborhood Initiative, <http://www.dsni.org>, (last visited Dec. 20, 2009).

emulated across the developed world.¹⁶¹ In fact, most communities should have a land trust as the dominant model to keep housing affordable and lessen the social exclusion from obtaining the right to property.¹⁶² And, as is often the case, well-crafted laws can facilitate economic stability through social cooperation.¹⁶³

Clearly, there is no single solution to the lack of homes being built in developed countries that the workforce and new families can afford. However, providing a better mix of housing and property-holdings arrangements than is presently being provided now in the developed world is bound to help. Likewise, there is no single action we can take that will suddenly fix the property affordability crisis facing certain communities, but changing land-use and housing policies now might start making things better soon.

¹⁶¹ See *supra* Part VI.

¹⁶² See *supra* Part IX.

¹⁶³ Cf. Paul D. Carrington, *The New Social Darwinism*, 1 GREEN BAG 2D 235, 236, 241 (1998).