

## LAND TRUSTS THAT CONSERVE COMMUNITIES

*James J. Kelly, Jr.\**

### I. INTRODUCTION

Recent property law scholarship has welcomed increased attention to the relevance of “virtue ethics” to the reshaping of fundamental concepts within property jurisprudence.<sup>1</sup> Several preeminent legal scholars have issued a brief manifesto stating that “[t]he common conception of property as protection of individual control over valued resources” is “inadequate as the sole basis for resolving property conflicts or for designing property institutions.”<sup>2</sup> Carrying on Aristotle’s ethical tradition, they urge an exploration of the richness of human flourishing and the social relationships it entails.<sup>3</sup> They have focused primarily, if not exclusively, on how the law governing various kinds of property disputes can be recast to support the common good instead of merely to maximize aggregate individual gain.<sup>4</sup> Confronting the transactional half of the identified inadequacy, however,

---

\* Assistant Professor of Law and Director, Community Development Clinic, University of Baltimore School of Law. I thank Tim Sellers, Audrey McFarlane, Keith Blair, Margaret Johnson, Maureen Sweeney, Fritz Bauerschmidt, and Nestor Davidson for their comments on drafts of this Article. I appreciate the feedback I received when I presented prior versions of this Article at the Midwest Clinical Legal Conference, the Mid-Atlantic Clinical Theory and Practice Workshop, the Association of American Law Schools Conference on Clinical Legal Education, and the London Metropolitan University Human Rights and Social Justice Research Institute’s Conference on Alasdair MacIntyre’s Revolutionary Aristotelianism. I am grateful for the funding provided by a University of Baltimore Summer Research Fellowship and the loving support generously given by my family, especially my wife, Lisa.

1. See ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 8 (2003); LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 143, 146 (2003); Gregory S. Alexander, *The Social-Obligation Norm in Property*, 94 *CORNELL L. REV.* 745, 761 & n.65 (2009); Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 *THEORETICAL INQUIRIES L.* 127, 134–45 (2009); Eduardo M. Peñalver, *Land Virtues*, 94 *CORNELL L. REV.* 821, 864–74 (2009); Eduardo M. Peñalver, *Property As Entrance*, 91 *V.A. L. REV.* 1889, 1938–58 (2005); Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 *U. CHI. L. REV.* 1237, 1251–65 (2005).

2. Gregory S. Alexander, et al., *A Statement of Progressive Property*, 94 *CORNELL L. REV.* 743, 743 (2009).

3. *Id.*

4. See, e.g., Alexander, *supra* note 1, at 773–801 (illustrating how a neo-Aristotelian would strike sensible balances in controversies over regulatory takings, eminent domain, and nuisance law); Alexander & Peñalver, *supra* note 1, at 154–60 (discussing a South African case that dealt with squatters’ rights to land).

**R**

**R**

can bring us beyond the focus on the cat-and-mouse game between market and state actors. Groups of citizens that have found neither their interests nor their ideals reflected in the activities of the market and the policies of the state have turned to alternative property-holding institutions to sustain the gains that they have achieved by resisting threats to their work,<sup>5</sup> their homes,<sup>6</sup> and their ways of life.<sup>7</sup>

Inspired by the civil rights movement and community organizing efforts to defeat Urban Renewal,<sup>8</sup> the community economic development movement has fostered a variety of institutions that have challenged conventional corporate and property notions of creating and distributing wealth.<sup>9</sup> With any such innovation, the Community Land Trust (CLT) model embodies far-sighted collective action for the common good.<sup>10</sup> More than 160 of these democratically controlled community-based nonprofits have created and sustained resale-restricted homes, community-owned common spaces, or both, in cities, towns, and rural areas within and outside the United States.<sup>11</sup> Those CLTs that have sought to foster economically diverse communities of choice in inner-city neighborhoods<sup>12</sup> best illustrate a “revolutionary Aristote-

---

5. See JAMES DEFILIPPIS, UNMAKING GOLIATH: COMMUNITY CONTROL IN THE FACE OF GLOBAL CAPITAL 61–85 (2004); Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 321–22 (Sarat & Scheingold eds., 2006); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 428–45 (1995).

6. See Cummings, *supra* note 5, at 305–07; DEFILIPPIS, *supra* note 6, at 87–111; Barbara L. Bezdek, *To Attain the Just Rewards of So Much Struggle”: Local Resident Equity Participation in Urban Redevelopment*, 35 HOFSTRA L. REV. 37, 101–02 (2006). R

7. For a discussion of how the residents of Boston’s Dudley Street neighborhood responded to decades of disinvestment and degradation of their land, see PETER MEDOFF & HOLLY SKLAR, STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD 70–72 (1994); *infra* Part II.A.

8. See WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT 7–13 (2001); Roger A. Clay, Jr. & Susan R. Jones, *A Brief History of Community Economic Development*, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 257, 260–61 (2009).

9. See DEFILIPPIS, *supra* note 5, at 113; Michael Swack, *Community Finance Institutions*, in BEYOND THE MARKET AND THE STATE: NEW DIRECTIONS IN COMMUNITY DEVELOPMENT 79–80 (Severyn T. Bruyn & James Meehan eds., 1987). R

10. See JOHN EMMEUS DAVIS, SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE-RESTRICTED, OWNER-OCCUPIED HOUSING 18 (2006); JOHN EMMEUS DAVIS & RICK JACOBUS, THE CITY-CLT PARTNERSHIP: MUNICIPAL SUPPORT FOR COMMUNITY LAND TRUSTS 2, 4 (2008); INST. FOR CMTY. ECON., COMMUNITY LAND TRUST LEGAL MANUAL (2d ed. 2002); David M. Abromowitz, *Community Land Trusts and Ground Leases*, 1 A.B.A. J. AFFORDABLE HOUSING & COMMUNITY DEV. L., Spring 1992, at 5.

11. See Burlington Associates, *Community Land Trusts in the United States*, <http://www.burlingtonassociates.net/resources/movies/CLTlist8.7.05.pdf> (last visited Aug. 22, 2009).

12. Only a handful of Community Land Trusts (CLTs) in the United States focus on particular inner-city communities. This Article focuses on CLTs that operate in urban neighborhoods be-

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 71

lianism,”<sup>13</sup> one that not only criticizes the instrumentalism and individualism that hamper conventional understandings of private land ownership but also offers a constructive alternative vision.<sup>14</sup>

Having helped launch the virtue ethics revival with the publication of *After Virtue* in 1981,<sup>15</sup> Alasdair MacIntyre has constructed a post-modern Thomistic social philosophy that calls for the cultivation of the “virtues of acknowledged dependence”<sup>16</sup> through “networks of giving and receiving.”<sup>17</sup> His “politics of self-defense”<sup>18</sup> offers an account of both the need to resist the destructive impacts of the market and the state and a constructive vision of the local institutions that are needed to sustain an authentic politics of virtue.<sup>19</sup> Although unapologetically idealistic, MacIntyre does not embark upon nor encourage the laying out of a road map to a utopian future in which nation-states and capitalist structures succumb to the overwhelming appeal of local

---

cause they most vividly demonstrate the struggle to create justice in a political economy that is dominated by market and state institutions.

13. See generally KELVIN KNIGHT, *ARISTOTELIAN PHILOSOPHY: ETHICS AND POLITICS FROM ARISTOTLE TO MACINTYRE* 1–3, 186–88 (2007) (noting that MacIntyre’s Aristotelianism is revolutionary in its “identification of excellence with those who resist rather than exercise institutionalized power.”).

14. Theorists of grassroots organizing and community lawyering have frequently turned to radically skeptical accounts of political and legal institutions as tools of subordination. See, e.g., MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1977); ERNESTO LACLAU & CHANTAL MOUFFE, *HEGEMONY & SOCIALIST STRATEGY* (2d ed. 2001); GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 *YALE L.J.* 2107, 2128–29 (1990); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1, 55–58 (1990). Other theorists of progressive advocacy have noted that these postmodern reductions of normative dialogue to assertions of personal perspective make sustained cooperative activity difficult if not impossible. See, e.g., Romand Coles, *Liberty, Equality, Receptive Generosity: Neo-Nietzschean Reflections on the Ethics and Politics of Coalition*, 90 *AM. POL. SCI. REV.* 375, 380 (1996); Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 *CLINICAL L. REV.* 541, 548 (2006); Ascanio Piomelli, *Foucault’s Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 *UTAH L. REV.* 395, 468–72; William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 *U. MIAMI L. REV.* 1099, 1111–14 (1994).

15. See generally ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1984) (critiquing the Enlightenment era rejection of socially constituted ethics as inevitably leading to intractable skepticism and indeterminacy in contemporary moral discourse).

16. See generally ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES* 120 (1999) (arguing for a communal ethic centered around the inescapable vulnerability of humans as animals).

17. *Id.* at 146.

18. ALASDAIR MACINTYRE, *Three Perspectives on Marxism: 1953, 1968, 1995*, in 2 *ETHICS AND POLITICS* 145, 155 (2006).

19. See KNIGHT, *supra* note 13, at 186–88.

R

cooperatives.<sup>20</sup> He does not even foresee a time when the small-scale political communities that he champions will be able to exist completely independently of dominant private and public institutions.<sup>21</sup> Thus, any such attempts to create and sustain true justice must be able to contend continually with both the market and the state for the foreseeable future.

Although grassroots efforts to control local economic resources depend heavily on the collective assertion of power, neighborhood activists seeking the resources that are needed to develop a CLT must also be able to articulate the social benefits of community-based efforts that foster equal access to housing and local amenities. As MacIntyre’s categorical rejection of liberal individualism<sup>22</sup> may not itself offer the rhetorical tools to persuade many local government officials or other key supporters, CLT proponents are well-advised to also look to the work of Amartya Sen, a Nobel laureate economist who has used Aristotelian thought to broaden conventional policy discussions. Rejecting the maximizing of income as the universal key to quality of life, Sen urges a focus on capabilities, which he defines as the actual opportunities to live a quality life.<sup>23</sup> He also argues for expanding conventional economic understanding of rational choice to include other-regarding motives.<sup>24</sup> Sen’s neo-Aristotelian correctives support public investment in CLTs in order to reduce social inequality,<sup>25</sup> strengthen communal conviviality,<sup>26</sup> and increase resident capacity for collective action.<sup>27</sup> All three of these goals can be expressed, in the cost-benefit parlance that dominates policy discussions, as varieties of social capital.<sup>28</sup>

20. See THOMAS D. D’ANDREA, TRADITION, RATIONALITY, AND VIRTUE: THE THOUGHT OF ALASDAIR MACINTYRE 425 (2006); MACINTYRE, *supra* note 16, at 133.

R  
R

21. See D’ANDREA, *supra* note 20, at 425; MACINTYRE, *supra* note 16, at 133; Mark C. Murphy, *MacIntyre’s Political Philosophy*, in ALASDAIR MACINTYRE 152, 170 (Mark C. Murphy ed., 2003).

22. For MacIntyre’s critique of the “emotivist culture” that he traces to the perceived success and actual failure of the Enlightenment project, see MACINTYRE, *supra* note 15, 51–78

R

23. See AMARTYA SEN, DEVELOPMENT AS FREEDOM 72–76 (1999); Amartya Sen, *Capabilities and Well-Being*, in THE QUALITY OF LIFE 34–35 (Martha Nussbaum & Amartya Sen eds., 1993).

24. See SEN, *supra* note 23, at 270; Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 326 (1977).

R

25. See *infra* Part II.B.1.

26. See *infra* Part II.B.2.

27. See *infra* Part II.C.

28. Robert Putnam describes two types of social capital: bonding and bridging. The former flows from and encourages close relationships. The latter deals with the connections between persons of distinctly different backgrounds. Both play crucial roles in the success of civil society that is so central to translating personal income into capabilities. See ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 22–24 (2000). For a

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 73

In justifying the need for social equality at the neighborhood level, proponents of CLTs need Sen's expansive understanding of cost-benefit analysis. They must be able to empirically show how their strongly "place-based" approach to community development delivers social capital in all its dimensions.<sup>29</sup> The community members themselves, however, cannot rally one another to action with calls of "Optimal use of in-kind subsidies!" Their vision for a just and prosperous neighborhood must be animated by their own understanding of the creation of justice as an indispensable part of human flourishing. The philosophical foundations of any community organization must seriously consider the residents' interests and their ideals, as well as the shared traditions that shaped them both.

In stewarding perpetually affordable homes and communal spaces through nonprofit membership organizations, CLT members develop and express their world view as they face important issues concerning alienability of subsidized homes, collaboration with local government in the control of communal spaces, and integration of shared interests and ideals in self-governance.<sup>30</sup> In describing the localist economic institutions needed to sustain community, MacIntyre draws upon an account of authentic politics as a social practice that prizes awareness of our inescapable interdependence and human vulnerability.<sup>31</sup> By integrating prudence—the quintessentially rational character trait for many economists—with the other cardinal virtues of justice, moderation, and courage, MacIntyre addresses the modern divide between egoism and altruism, between self-interest and moral idealism.<sup>32</sup> He completes his constructive vision with the capstone virtue of just gen-

---

description of a third type of social capital, referred to in this Article as "animating social capital," see *infra* note 123 and accompanying text.

29. Even among those who advocate for substantial proactive investment in order to reduce socioeconomic inequality, there has been sharp disagreement as to how to focus resources. "People-based" community development advocates direct subsidies to low-income households, which frees them to improve their capacities and build wealth. Proponents of "place-based" interventions press for investment in neighborhood revitalization and the empowerment of communities. See Randall Crane & Michael Manville, *People or Place?: Revisiting the Who Versus Where of Urban Development*, 20 *LAND LINES*, July 2008, at 2, 4–7 (summarizing the cases for and critiques of mobility and community-based strategies), available at [http://www.community-wealth.org/\\_pdfs/articles-publications/cross-sectoral/article-crane-manville.pdf](http://www.community-wealth.org/_pdfs/articles-publications/cross-sectoral/article-crane-manville.pdf) (last visited on October 28, 2009). Nestor Davidson has shown how the debate over budget priorities has overshadowed the complementarity of these positions. See Nestor M. Davidson, *Reconciling People and Place in Housing and Community Development*, 16 *GEO. J. ON POVERTY L. & POL'Y* 1, 6–9 (2009).

30. See *infra* Part IV.A to IV.B.

31. See MACINTYRE, *supra* note 16, at 129–31, 144–46.

32. See *id.* at 119; D'ANDREA, *supra* note 20, at 380.

R

R

R

erosity.<sup>33</sup> This key virtue of acknowledged dependence addresses how an organization that is dedicated to full social inclusion of the most vulnerable people can hope to express the everyday interests of the neighborhood as a whole. Sen's nuanced welfare economics gives credibility to CLTs by demonstrating the policy significance of conserved communities that act as "producers" of social capital.<sup>34</sup> But those who actively pursue neighborhood control of vital economic resources can best understand their own work in MacIntyrean terms, as creative resistance that conserves inclusive, attractive communities.

Drawing upon the actual struggles and achievements of inner-city neighborhood residents, this Article shows that CLTs conserve urban communities and sustain inclusive, creative neighborhoods in a manner that reflects a uniquely neo-Aristotelian approach to economic development, which in turn can guide CLTs in their critical policy choices. Part II shows the ways in which CLTs contend with conventional inner-city market dynamics in their community conservation efforts, and it elicits the questions raised by CLTs' challenge to state and market dominance of political economy at the neighborhood level.<sup>35</sup> Part III of the Article examines the neo-Aristotelian thought of Amartya Sen and Alasdair MacIntyre, and it argues that their work provides respectively external and internal rationales for community conservation institutions in a world divided between the market and the state.<sup>36</sup> The Article concludes by showing that a theoretical awareness of the connection between human flourishing and local communities might profitably inform the corporate and property relationships of inner-city neighborhoods that are involved in creating and sustaining economically diverse communities of choice.

## II. INNER-CITY COMMUNITY LAND TRUSTS

Before exploring the thought of Sen and MacIntyre as they relate to institutions that support the long-term community control of land resources, it is important to show how CLTs are conserving inner-city neighborhoods faced with the "creative destruction"<sup>37</sup> that is the dark side of the neighborhood life-cycle.<sup>38</sup> These CLTs bear more than a

---

33. See MACINTYRE, *supra* note 17, at 120; *cf.* D'ANDREA, *supra* note 20, at 379.

34. See *infra* notes 152–158, 167–169 and accompanying text.

35. See *infra* notes 38–123 and accompanying text.

36. See *infra* notes 124–243 and accompanying text.

37. See generally JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 81–86 (6th ed. 1987) (discussing the concept of creative destruction).

38. See generally John T. Metzger, *Planned Abandonment: The Neighborhood Life-Cycle Theory and National Urban Policy*, 11 HOUSING POL'Y DEBATE 7 (2000) (analyzing the neighborhood life cycle theory). *But see generally* Anthony Downs, *Comment on John T. Metzger's*

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 75

distant historical relationship to the community organizing struggles that brought an end to the Urban Renewal era.<sup>39</sup> Their resident founders came to their commitment to direct control of neighborhood land through struggles against disinvestment, displacing development, and environmental degradation.<sup>40</sup> The CLTs they created to secure and build upon their hard-won gains reflect the same interests and ideals that motivated these grassroots campaigns. The substance and process of neighborhood-based land control, however, present issues very different from the ones that animate popular struggles. Articulating the need for a deeper understanding of the rationale for saving and conserving these neighborhoods will set the stage for the exploration of the social philosophies that can best justify and guide CLTs.

*A. The Need for Community Control of Land Resources*

As with other inner-city communities, the years following World War II brought a massive demographic change to the Dudley Street neighborhood in the Roxbury area of Boston. White residents moved to suburbs, many of which were first established through racist lending practices.<sup>41</sup> A cynical effort to promote African-American homeownership in the late sixties caused more white flight and resulted in half of the properties that had been sold to African-Americans, many at inflated prices and unsustainable loan terms, being taken from them through foreclosure and passed on to investors.<sup>42</sup> More than one absentee landlord solved the problem of declining property values by “selling to the insurance company,” a euphemism for arson.<sup>43</sup> The arson epidemic spawned vacant lots, making the neighborhood a target for illegal dumping of construction debris and other garbage.<sup>44</sup> As the environmental situation became completely intolerable, residents

---

“*Planned Abandonment: The Neighborhood Life-Cycle Theory and National Urban Policy*”, 11 HOUSING POL’Y DEBATE 41 (2000) (presenting counterarguments to Metzger’s thesis).

39. The twenty-five years that followed the end of World War II witnessed the wholesale destruction of many inner-city neighborhoods in the United States. See BERNARD FRIEDEN & LYNNE SAGALYN, *DOWNTOWN, INC.* 133–47 (1990); GERALD FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 133–35 (1998).

40. See *infra* Part II.A.

41. ELISE M. BRIGHT, *REVITALIZING AMERICA’S FORGOTTEN NEIGHBORHOODS: AN INVESTIGATION OF INNER-CITY REVITALIZATION EFFORTS* 70–72 (2000); (providing detailed demographic information for the Boston area for 1950–1990); MEDOFF & SKLAR, *supra* note 7, at 14–16. See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 49–51 (1993) (discussing studies that document discriminatory real estate practices).

42. See MEDOFF & SKLAR, *supra* note 7, at 25–27.

43. *Id.* at 30–32; BRIGHT, *supra* note 41, at 77 (“[M]ore than 20% of the [Dudley Street] neighborhood had been denuded of buildings by arsonists in the 1960s.”).

44. MEDOFF & SKLAR, *supra* note 7, at 32–33.

R

R

R

R

learned that the Boston Redevelopment Authority had designs to remake the neighborhood with minimal community input and significant displacement effects.<sup>45</sup> The arson, dumping, and threats of large-scale dislocation that absentee landowners and city officials imposed on the people of Dudley Street mobilized them to fight for a radically different vision of their neighborhood's future.

Founded in 1985, the Dudley Street Neighborhood Initiative (DSNI) focused on people and land, short-term crises and long-term goals.<sup>46</sup> Like many "people's organizations,"<sup>47</sup> it used the indignity and inescapability of the widespread dumping along Dudley Street to galvanize the community around the need for change. The "Don't Dump on Us" campaign resulted in the padlocking of several unlicensed waste transfer lots as well as the beginning of an unlikely alliance with then-Mayor Ray Flynn.<sup>48</sup> Having already defeated a Boston Redevelopment Authority plan that would have caused displacement of long-time residents, DSNI worked with surrounding neighborhoods to secure the mayor's guarantee of community control—not mere consultation—over future redevelopment plans.<sup>49</sup> DSNI built upon the enthusiasm engendered by the successes of its antidumping campaign to create a community plan that incorporated not only the residents' input but also their commitment to fighting for its realization.<sup>50</sup> In so doing, DSNI was able to move beyond the immediate anger and short-term crises that typically dominate community organizing agendas and foster a belief in the creation of social justice.

---

45. *Id.* at 50–52.

46. *Id.* at 52–53.

47. SAUL D. ALINSKY, *REVEILLE FOR RADICALS* 132 (Vintage Books 1969) (1946) ("A People's Organization is a conflict group. . . . Its sole reason for coming into being is to wage war against all evils which cause suffering and unhappiness.").

48. See BRIGHT, *supra* note 41, at 80; accord MEDOFF & SKLAR, *supra* note 7, at 67–87. Ray Flynn had made his political name in Boston by standing with those who opposed court-ordered school desegregation. He drew upon his anti-busing background to defeat Mel King, a progressive African-American veteran of the civil rights movement, in the primary election for the Democratic nomination for mayor. See MEDOFF & SKLAR, *supra* note 7, at 63–64.

49. See MEDOFF & SKLAR, *supra* note 7, at 50–52, 89–91. For a discussion of the difference between superficial and substantive community participation in local government planning efforts, see Sherry R. Arnstein, *Eight Rungs on the Ladder of Citizen Participation*, in *CITIZEN PARTICIPATION: A CASE BOOK IN DEMOCRACY* 335, 337–38 (Edgar S. Cahn & Barry Passett eds., 1970); Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 *BROOK. L. REV.* 861, 870 & n.25 (2000).

50. See BRIGHT, *supra* note 41, at 80–81; MEDOFF & SKLAR, *supra* note 7, at 86–91.

R

R

R

R

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 77

This vision was inspired as much by the calls of Martin Luther King Jr. for economic justice<sup>51</sup> as by the more pragmatic counsel of Saul Alinsky, father of the community organizing movement, who called upon activists to organize around the problems identified by residents.<sup>52</sup> King's vision of a "Beloved Community" in which people of different races and classes lived and worked together to create justice was and is undoubtedly utopian,<sup>53</sup> but for the people of Dudley Street, it seemed no less attainable than a neighborhood that was not a crime-ridden landfill. The residents' horrible experiences of absentee land ownership and predatory real estate practices led them to make community control of land resources a priority during any development process.

Through a focus on the land, the people of Dudley Street were able to succeed where so many other community groups had failed after successfully fighting city hall. They were able to sustain their enthusiasm from protest into the more drawn-out phases that lasting productivity requires. The community created a plan for development without displacement.<sup>54</sup> They made community development history by securing a delegation of eminent domain authority from the Boston Redevelopment Authority.<sup>55</sup> The vacant lots that once represented disinvestment and environmental degradation became the resources for the rebirth of the community. While maintaining the traditional community organizing focus on the immediate needs of the residents, DSNI's leadership employed control of land resources to connect the collective long-term interests of residents to justice ideals.

The plan adopted by DSNI included two aspects of land trust work that are essential to creating and sustaining economically diverse communities of choice. First, new owner-occupied homes would be affordable not just to the first homeowners, but to successive

---

51. For an examination of this underappreciated part of King's legacy, see generally TAYLOR BRANCH, *AT CANAAN'S EDGE: AMERICA DURING THE KING YEARS 1965-1968* (2006). Anthony Cook has shown King's vision of the Beloved Community to be radically egalitarian. See Anthony E. Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, 68 *GEO. WASH. L. REV.* 959, 974-76 (2000).

52. See ALINSKY, *supra* note 47, at 92-93. ("Only a fool would step into a community dominated by materialistic standards and self-interest and begin to preach ideals. . . . [Community organizing techniques] are the instruments used in preparing the scaffolding for the building of an environment which will permit people to express their innate altruism.")

53. See Cook, *supra* note 51, at 974-76.

54. For an account of the work of David Nesbitt—a planning consultant with DAC International, which is a firm that was hired by DSNI—and a description of the plan that the community created in 1987, see MEDOFF & SKLAR, *supra* note 7, at 99-113.

55. *Id.* at 122-125.

R

R

R

generations of income-qualified households thereafter.<sup>56</sup> Second, the plan pictured not just a safe, attractive bedroom community, but an urban village that included shared common space, gardens, and business activity that benefited the entire community.<sup>57</sup> To secure both these objectives, DSNI turned to the Community Land Trust model. For the people of Dudley Street, the confluence of unbearable sanitation conditions, encroaching development pressures from Boston's city center, and a new mayor looking to mend fences created an opportunity to build a community-based organization that could succeed in bringing significant investment into the community. The Community Land Trust model allowed them to use those funds to facilitate individual homeownership in a way that kept those subsidies in the community.

In Los Angeles, the manner by which the community acquired the affordable housing investment differed somewhat. The Figueroa Corridor Coalition for Justice comprises a variety of community organizations.<sup>58</sup> While the Dudley Street Neighborhood Initiative has been lauded for its unique use of governmental condemnation authority, the Figueroa Corridor offers a prime example of the importance of a community benefits agreement.<sup>59</sup> The opening of the Staples Center—home to the Los Angeles Lakers—in 1999 was soon followed by the announcement of a related large-scale commercial development nearby.<sup>60</sup> This for-profit development project required massive public investment in land, building construction, and public infrastructure. Because of the importance of political support for the financing, labor union involvement in both the creation of the project and the business activity it would generate was absolutely essential.<sup>61</sup> The unions' interest in the local communities as sources of members made them sensitive to the impacts of these projects on the working families

---

56. See *id.* at 158–59.

57. *Id.* at 105–06.

58. See Cummings, *supra* note 5, at 315–17.

59. A community benefits agreement is “a negotiated agreement between community groups and developers (or sometimes city agencies) that requires the delivery of specific benefits to communities affected by the development project.” Scott L. Cummings, *The Emergence of Community Benefits Agreements*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 5, 5 (2008); accord Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 35, 36–40 (2008); Patricia E. Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 113, 114 (2008).

60. See Cummings, *supra* note 5, at 316.

61. Local community organizations also used the threat of challenging the development deal in environmental and land use administrative proceedings to gain critical leverage just before an agreement was reached in May 2001. *Id.* at 317–21.

R

R

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 79

of the nearby Figueroa Corridor.<sup>62</sup> Although the community groups alone lacked the political power to extract significant concessions from the private investors or the city officials who backed the projects, the neighborhood's alliance with labor unions gave the community groups a strong, albeit limited, opportunity to make provision for affordable housing, parking, job development, and open space in a formal agreement; this agreement would be appended to the City's larger agreement that established the public-private partnership behind the development.<sup>63</sup>

Although the source of funds and the reason for governmental support were different in Los Angeles than they were in Boston, the need to retain these gains within the community was just as strong. The resident activists of the Dudley Street and Figueroa Corridor neighborhoods could not look to the market or the local government to preserve the affordable housing and public amenities gains that they had won for their communities. To steward the inclusionary housing and community space over the long-term, they needed an institution that would endure as long as their cities. But in facing future resource questions, they needed it to be just as accountable to local residents as the campaigns that brought in the subsidies had been.

*B. CLTs and Economically Diverse Communities of Choice*

*1. Perpetually Affordable Homes*

CLTs develop affordable housing in much the same way as other nonprofit community development corporations. A CLT provides homes to economically disadvantaged people who are interested in becoming community members by using a combination of donations, grants, and public subsidies to reduce the cost of acquiring, developing, and marketing a decent single-family home.<sup>64</sup> Two of the inner-city communities discussed in this Article have innovated the ways in which they have obtained the support for their CLTs. The residents of the Figueroa Corridor organized around the linkage opportunity that the development by a large-scale, public-private partnership presented.<sup>65</sup> The Community Benefits Agreement they signed pro-

---

62. *Id.* at 315.

63. *Id.* at 321–22. The full text of the terms of the community benefits agreement is available at <http://www.saje.net/atf/cf/%7B493B2790-DD4E-4ED0-8F4E-C78E8F3A7561%7D/communitybenefits.pdf> (last visited Aug. 22, 2009).

64. Like other community-based nonprofits, CLTs obtain both capital and operational funding from private foundations and federal programs that are administered by local governments, such as Community Development Block Grants and the HOME Investment Partnership Program. See DAVIS & JACOBUS, *supra* note 10, at 19–20.

65. See *supra* notes 58–62 and accompanying text.

vided that twenty percent of all the housing produced as part of the development would be affordable to and set aside for the area's low- and moderate-income residents who were displaced by the project.<sup>66</sup> The leaders of DSNI achieved a major victory in 1989 when they persuaded the Ford Foundation to lend Dudley Neighbors, Inc.—their CLT—the remaining \$2 million that it needed to exercise its eminent domain authority and buy the privately owned vacant land in the DSNI target area.<sup>67</sup> Both DSNI and Figueroa Corridor wanted to construct housing that would remain affordable as their communities improved.

In a recent article, Lee Fennell demonstrates how the current residential land tenure options of rental and homeownership too frequently limit the possibilities for fairness and efficiency among community members.<sup>68</sup> Outside of the very few jurisdictions that provide meaningful rent regulation, tenants have little or no security of land tenure.<sup>69</sup> Homeownership offers this long-term stability but only to those who can afford the enormous capital investment required.<sup>70</sup> Even most of those who are fortunate enough to buy a home must invest an overwhelming percentage of their total wealth in a single, undiversified asset that is subject to forces beyond their control.<sup>71</sup> Fennell proposes a market-oriented, shared equity financing model to reduce the financial commitment a homeowner must make in order to enjoy the use benefits of stable residential land tenure.<sup>72</sup>

In a similar manner, the CLT Homeownership model disaggregates the investment and consumption aspects of homeownership. CLT homeowners live in their homes in the same way as their neighbors who bought on the market. They can stay in their homes indefinitely.<sup>73</sup> They can, with CLT consent, improve their properties.<sup>74</sup> Their children or other heirs can inherit the home.<sup>75</sup> They can acquire

---

66. See Cummings, *supra* note 5, at 321–22.

67. MEDOFF & SKLAR, *supra* note 7, at 147–50.

68. Lee Anne Fennell, *Homeownership 2.0*, 102 Nw. U. L. REV. 1047 (2008).

69. See *id.* at 1054–56.

70. See *id.* at 1048, 1054.

71. See *id.* at 1055.

72. In referring to this equity partnership approach to housing affordability as “shared equity financing” as opposed to “shared equity homeownership,” I follow the terminology used by John Davis. See DAVIS, *supra* note 10, at 5–6.

73. Although the CLT ground lease does not exceed ninety-nine years, most CLT leases allow for a renewal of the lease at the option of the CLT homeowner. See INST. FOR CMTY. ECON., *supra* note 10, at 13–4.

74. *Id.* at 12–6 to 12–7.

75. *Id.* at 13–18 to 13–19.

R

R

R

R

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 81

conventional financing for the purchase of their homes.<sup>76</sup> They can, like owners of market-purchased homes, build up equity that increases their wealth.<sup>77</sup> But CLT homeownership differs from conventional homeownership in two crucial ways.

In return for the opportunity to purchase a home that they could not afford at market rate, household members purchasing a CLT home make two promises to the Community Land Trust. First, they pledge to occupy the property as their home during their ownership of it.<sup>78</sup> Second, the homeowners covenant that, when they decide to move from the property, they will sell the home to another qualified household at an affordable price.<sup>79</sup> The agreement between the CLT and the homebuyer includes a formula that determines what the resale price will be.<sup>80</sup> The membership-elected directors of a CLT face core policy decisions when crafting the resale formula that will be offered to prospective CLT homebuyers.<sup>81</sup> In setting the formula, CLTs balance the homeowner’s interest in a fair return on an important investment with the future homebuyer’s need for affordability. Preserving affordability does not necessarily require the elimination of the homeowner’s equity appreciation. It is essential, however, that dramatic increases in real estate prices not destroy the opportunities for future low- and moderate-income households to afford homeowner-

76. *Id.* at 10-1 to 10-2.

77. See DAVIS, *supra* note 10, at 102–06 (discussing a 2003 study of ninety-seven CLT homeowner resales that showed widespread equity gains through amortization of mortgage principal and share in home value appreciation).

R

78. See INST. FOR CMTY. ECON., *supra* note 10, at 1-11.

R

79. A CLT protects against full price market sale of a CLT home principally through a preemptive option to purchase the property once the seller has declared the intent to transfer it. *Id.* at 2-3, 13-21 to 13-23. Some states protect these efforts by allowing housing organizations to create and enforce these restrictions as perpetual housing covenants. See, e.g., VT. STAT. ANN. tit. 27, § 610 (2007) (authorizing the creation and enforcement of perpetual housing covenants). However, most CLTs secure their ability to protect the affordability of the home by making the preemptive option a provision in a ground lease of the property. See INST. FOR CMTY. ECON., *supra* note 10, at 2-10, 13-21 to 13-23. For a review of the possible enforceability of these provisions under the property law doctrines of invalid restraints against alienability and perpetuities, see generally Abromowitz, *supra* note 10; Michael F. Keeley & Peter B. Manzo, *Resale Restrictions and Leverage Controls*, 1 J. AFFORDABLE HOUSING & CMTY. DEV. L., Spring 1992, at 9, 9–10; James J. Kelly, Jr., *Homes Affordable for Good: Covenants and Ground Leases as Long-Term Resale-Restriction Devices*, 29 ST. LOUIS U. PUB. L. REV. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1466388](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1466388) (last visited Oct. 28, 2009).

R

R

80. INST. FOR CMTY. ECON., *supra* note 10, at 2-1 to 2-3. As an alternative to a price-restrictive covenant, many nonprofit developers recoup some or all of the subsidy in cash upon resale of the property. These subsidy recapture provisions discourage quick resale but do not necessarily keep the particular subsidized property available to another income-qualified household. *Id.* at 2-2; DAVIS, *supra* note 10, at 80–84.

R

R

81. For a discussion of the considerations of homeowner return and future affordability at issue in establishing a resale formula, see DAVIS, *supra* note 10, at 64–69.

R

ship. Resale formulas take a variety of approaches in balancing these concerns.

Some CLTs seek to insure affordability by indexing equity appreciation to a general consumer purchasing power. For instance, the amount by which a CLT homeowner's equity could appreciate might be capped so as not to exceed increases in the local or national consumer price index.<sup>82</sup> Likewise, a CLT might try to "lock in" affordability by indexing equity appreciation to the increase in local wages.<sup>83</sup> This increase allows the homeowner's original monetary investment to keep pace with inflation, but not to grow significantly. Other CLTs use the resale formula as an opportunity to allocate the equity appreciation between the household and the community at large. These CLTs might allow the homeowner to take twenty-five percent or more of the total appreciation in equity.<sup>84</sup> Another approach gives the homeowner the full appreciation value, but only on the unsubsidized portion of the home value.<sup>85</sup>

Like other providers of subsidized housing, CLT advocates must be able to make the case for the dedication of public resources in order to close the affordability gap. They must marshal arguments for social as well as economic equality. As stewards of economically diverse communities of choice, CLTs must also make the case for keeping all or most of the subsidy in place rather than allowing qualified homeowners to pocket it by selling the home on the open market or having it repaid to the subsidy provider to have it recycled elsewhere. CLTs cannot enter the arena of cost-benefit analysis to explain the value of economically diverse communities of choice if the analysis focuses only on aggregate income gains. They must be able to argue for the indispensability of both the economic equality and the bridging social capital that permanently affordable homes advance.

---

82. This is the approach that Dudley Neighbors, Inc. has taken with regard to the approximately two hundred homes it stewards. See Dudley Neighbors, Inc., Leaseholder Information Resell Formula, [http://www.dsni.org/DNI\\_Web\\_Pages/pr02.htm](http://www.dsni.org/DNI_Web_Pages/pr02.htm) (last visited Aug. 22, 2009).

83. DAVIS, *supra* note 10, at 66. The most common income-based CLT resale formula index is the change in the Area Median Income.

84. *Id.* at 68. For example, suppose a CLT homeowner bought a house valued at \$200,000 for \$120,000. If that same home was appraised at \$560,000 ten years later when she decided to move, then she could sell it for \$210,000—the \$120,000 she originally invested plus one-quarter of the \$360,000 increase in market value over ten years. Even such a modest increase in the cost of the house might require some further subsidy by the CLT to make the house affordable to the next generation of qualified homebuyers, whose incomes may not allow them to afford even twenty-five percent of the increase in home prices. But by sharing the equity, CLTs can promote economic opportunities over a wide spectrum and allow individual households to achieve their dreams of homeownership, especially in areas that may have been unavailable to them previously.

85. *Id.*

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 83

CLT proponents should also develop their own understanding of their goals to sustain economically diverse communities of choice. They must be able to balance the needs of both current and future CLT homeowners. CLT homes offer their current homeowners security of tenure and can also, depending on the resale formula, offer financial gain that can enable educational and other beneficial investments. Every dollar of original subsidy and equity appreciation paid out will presumably increase the price of the property to the succeeding homeowners.<sup>86</sup> Developing an understanding of the trade-offs involved will not lead to a one-size-fits-all resale formula. Too many aspects of a CLT's particular real estate market come into play to permit such a categorical response. The CLT members themselves must strike the balance, and they may have to revisit the issue as conditions change.

## 2. *Neighborhood Spaces*

The need for economically diverse neighborhoods and regions as well as the supply of funds for affordable housing production has kept CLTs focused on the creation of and stewardship over homes, particularly single-family homes. CLTs have also been involved in developing community green spaces and other sites for resident interaction.<sup>87</sup> The Dudley Street Neighborhood Initiative has created not only housing, but also public art and spaces for positive community action, and it has involved the neighborhood youth in every aspect of the community's growth.<sup>88</sup> The environmental activism of DSNI's antidumping campaign inspired grassroots efforts to create neighborhood greening and cleaning programs under the banner of Dudley PRIDE.<sup>89</sup> More elaborate landscaping, farming, and art projects followed through partnerships with the Massachusetts Horticultural Society, the Massachusetts Audubon Society, and UrbanArts, among others.<sup>90</sup>

While CLTs have been careful to protect community spaces from aggressive private development, assertion of community control be-

---

86. Proponents of the CLT model frequently emphasize its efficiency in long-term subsidy management by assuming that future affordability will be controlled by the resale formula alone. See, e.g., DAVIS & JACOBUS, *supra* note 10, at 7–9. The preemptive option allows the CLT to buy down the price of its property through the investment of an additional subsidy. **R**

87. See *infra* notes 89–97 and accompanying text.

88. See MEDOFF AND SKLAR, *supra* note 7, at 181–82, 220–24. **R**

89. *Id.* at 179–81.

90. *Id.* at 182–83. Projects on land owned by Dudley Neighbors, Inc. include a local playground, a community garden, an orchard, and a large greenhouse. See Dudley Neighbors, Inc., Open Space Projects, [http://www.dsni.org/DNI\\_Web\\_Pages/services.htm](http://www.dsni.org/DNI_Web_Pages/services.htm) (last visited Aug. 22, 2009).

comes even more important for land that no one seems to want. It may first appear that a community's struggle to gain control of land resources makes sense only when private developers, either directly or through local government development officials, are poised to take it from them. Inner-city communities battling chronic disinvestment, however, are claiming key pieces of vacant land in their neighborhoods so that drug-dealing and other criminal activity do not take root.<sup>91</sup> Both the Time of Jubilee CLT<sup>92</sup> in Syracuse, New York and Charm City Land Trusts<sup>93</sup> in Baltimore, Maryland have converted vacant lots to community gardens that encourage the young people in the neighborhoods to grow produce and seek solace. Like their counterparts in Boston, the residents of the southwest section of Syracuse have used the vacant lots left by abandoned house demolitions not only as sites for new construction but also as spaces to grow food. They have launched the Urban Delights Youth Farmstand Project to engage young people to work the land as urban farmers.<sup>94</sup> The Amazing Grace Lutheran Church and the residents of the McElderry Park neighborhood have worked to transform a crime-ridden block in East Baltimore into a spiritual oasis, complete with an embedded stone labyrinth that facilitates meditation.<sup>95</sup> The effect on that community has been quiet but profound. Drug dealers have moved on, and their customers who still pass through now respect the attractiveness of the space.<sup>96</sup>

Certainly, CLTs did not invent the small neighborhood park, and many local governments have community gardening programs, some of which use lots resulting from house demolitions.<sup>97</sup> The subsidies

---

91. Often cited research has shown that visible signals of disorder, such as abandoned houses and vacant lots, can spur further disorder and that seemingly superficial investments in neighborhood appearance can lead to more substantive community improvements. See James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29, 31–32. For statistical evidence that community gardens produce positive externalities that affect neighboring property values, see generally Vick Been & Ioan Voicu, *The Effect of Community Gardens on Neighboring Property Values*, 36 REAL EST. ECON. 241 (2008).

92. See Jubilee Homes of Syracuse, Inc., Urban Delights Youth Farmstand Project, <http://www.jubilee-homes.org/Urban%20Delights.html> (last visited Aug. 22, 2009).

93. The author is a founding board member of Charm City Land Trusts, Inc. For more information about Charm City Land Trusts, Inc., see Charm City Land Trusts, <http://www.parksandpeople.org/cclt/> (last visited Aug. 22, 2009).

94. See Jubilee Homes of Syracuse, Inc., *supra* note 92; Metro Voices, <http://blog/syracuse.com/metrovoices/index.html> (July 23, 2008, 2:26 EST).

95. See Anne Raver, *Public Spaces Meant to Heal*, N.Y. TIMES, Oct. 15, 2008, at D7.

96. *Id.*

97. See Jane E. Schukoske, *Community Development Through Gardening: State and Local Policies Transforming Urban Open Space*, 3 N.Y.U. J. LEGIS. & PUB. POL'Y 351, 373–90 (2000).

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 85

available for community gardening and passive recreation are significantly smaller than those available for housing development. In the context of neighborhood spaces, the issue for justifying CLT ownership is not the need to invest, but rather who should control the land. Jane Schukoske has documented a number of municipal programs that support community-controlled creative greening activities on publicly owned land.<sup>98</sup> While these collaborations last, there may be very little disagreement between community and municipal partners over the proper use of the land. Schukoske has also documented, however, that municipal administrations can change direction and undercut creative efforts.<sup>99</sup> In 1998, then-Mayor Rudolph Giuliani exercised the contractual right of the City of New York to cancel dozens of GreenThumb garden leases on lots that he wished to make available for private auction to housing developers.<sup>100</sup> Although a subsequent lawsuit failed to garner an injunction against the City's auction, two newly formed land trusts succeeded in purchasing many, but not all of the lots at issue.<sup>101</sup> The experience in New York has caused other urban greening organizations to prioritize the acquisition of legal control over the land to which they dedicate themselves. For example, the church members and residents behind Baltimore's Amazing Port Street Sacred Commons worked with local foundations to acquire more than \$40,000 to purchase the space.<sup>102</sup> At the same time, they partnered with Charm City Land Trusts, Inc. to acquire title to the different rowhouse lots that make up the site.<sup>103</sup>

### C. *CLTs and Democratic Governance*

In both their commitment to permanently affordable homeownership and common spaces as permanent fixtures of their particular communities, neighborhood-based CLTs exhibit an interesting blend

---

98. *See id.*

99. *Id.* at 386–88; accord Amnon Lehari, *Mixing Property*, 38 SETON HALL L. REV. 137, 190–91 (2008); see also ADAM BLOCK, PARKS & PEOPLE FOUNDATION, NEIGHBORHOOD OPEN SPACE MANAGEMENT: COMMUNITY GREENING SURVEY AND LAND TRUST STRATEGIES FOR BALTIMORE CITY 3 (2003), available at <http://www.parksandpeople.org/cclt/pdf/community-green-report.pdf> (stating that in 1995 the City of Baltimore had evicted previously authorized community gardeners so that the land could be converted into a parking lot).

100. *See* Lehari, *supra* note 99, at 191; Schukoske, *supra* note 97, at 386.

101. *See* Lehari, *supra* note 99, at 191; Schukoske, *supra* note 97, at 386–88.

102. Raver, *supra* note 95.

103. *See* BLOCK, *supra* note 99, at 22; accord Charm City Land Trusts, Inc., Amazing Port Street Community Green, <http://www.parksandpeople.org/cclt/webpages/amazing-port-cs.html> (last visited Aug. 22, 2009). Charm City Land Trusts, Inc., with legal assistance from the students and attorneys of the University of Baltimore Community Development Clinic, has secured clear title to more than ninety percent of the site.

of partisanship and idealism. Both the Dudley Street and Figueroa Corridor residents did not just express a willingness to improve their communities, but they also actively fought for the resources and political authority to make affordable housing and community amenities a reality. They did so in the context of economic growth that made these investments feasible, but their strategies for acquiring the necessary funds inevitably put them in competition with other neighborhoods that sought resources for improvement. This concentration of limited resources is even more striking in communities such as Syracuse where the public investments being made are taking place not in the context of growth, but in continuing economic retraction.<sup>104</sup> While there is no apology made for the particularism inherent in this localist advocacy, the CLT approach also tempers this partisanship, sustained by a democratic structure, with openness to the needs of vulnerable members of society at large and attention to the needs of future generations.

The classic CLT governance structure consists of a tripartite board of directors that is elected by the membership of the CLT. Residents of CLT homes are automatically members of the organization, but anyone can become a member of the CLT.<sup>105</sup> The resident members nominate and elect one-third of the board with another third being named and elected by the non-resident members.<sup>106</sup> Nominations for the remaining seats are provided by the Board and are voted upon by the entire membership as a whole.<sup>107</sup> In this way, the governance structure guarantees direct representation on the board to CLT homeowners and to other community members invested in the CLT. The CLT board itself also has the opportunity to seek out other people as directors, perhaps outside the neighborhood, who might help advance the CLT's mission.

The classic board structure has been modified to fit the needs of the various communities using the CLT model. Dudley Neighbors, Inc. is a corporate subsidiary of the Dudley Street Neighborhood Initiative.<sup>108</sup> The majority of its twelve members are appointed by DSNI, at least one of whom must be a CLT property resident.<sup>109</sup> The majority of the DSNI board is directly elected by its resident membership—

---

104. MATTHEW P. DRENNAN, ROLF PENDALL & SUSAN CHRISTOPHERSON, *TRANSITION AND RENEWAL: THE EMERGENCE OF A DIVERSE UPSTATE ECONOMY* 3–4 (2004), available at [http://www.brookings.edu/reports/2004/01demographics\\_pendall.aspx](http://www.brookings.edu/reports/2004/01demographics_pendall.aspx) (last visited Oct. 28, 2009).

105. INST. FOR CMTY. ECON., *supra* note 10, at 5-13.

106. *Id.* at 5-19 to 5-21.

107. *Id.*

108. MEDOFF & SKLAR, *supra* note 7, at 126–27.

109. *Id.*

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 87

more than 3,500 strong at last count.<sup>110</sup> The bylaws of Charm City Land Trusts, Inc. permit partnering community-based organizations to become members of the Community Land Trust and to elect their own representatives, who comprise a minority of the organization's board.<sup>111</sup>

In many ways, CLTs deploy the same kind of legal tools as homeowner associations (HOAs) and other kinds of common interest community associations. HOAs frequently hold full legal title to parking areas, common green spaces, and community amenities.<sup>112</sup> They also enforce use restrictions and, less frequently, transfer restrictions on the private parcels owned by their members.<sup>113</sup> Michael Heller has described HOAs and other common interest developments as mixing elements of commons and anticommons ownership.<sup>114</sup> They avoid the tragedies of the commons and anticommons varieties through governance.<sup>115</sup> Corporate boards that are democratically elected by the property owners take responsibility for the management of shared spaces and administration of restrictive covenants.<sup>116</sup> The governance structure of these associations facilitates the effective decision making that is so crucial to avoiding both dissipation and gridlock.<sup>117</sup> The limits they impose on use and development are designed to stabilize the resident owners' expectations of the built environment.<sup>118</sup> The HOA property is shared, but its use is generally restricted to its members.<sup>119</sup> HOA members open their common spaces to outsiders when and to the extent that it suits their collective interests.

---

110. *Id.*; Dudley Street Neighborhood Initiative, DSNI Historic Timeline, <http://www.dsni.org/timeline.shtml> (last visited Aug. 22, 2009).

111. See Charm City Land Trusts, Inc., Amended Bylaws 3, 6 (Nov. 11, 2001) (on file with author). These bylaws reflect the author's previous experience in helping to found the New Columbia Community Land Trust in Washington, DC in 1990.

112. See Clayton Gillette, *Courts, Covenants and Communities*, 61 U. CHI. L. REV. 1375, 1382 (1994).

113. *Id.* at 1383–84.

114. See Michael A. Heller, *Common Interest Development at the Crossroads of Legal Theory*, 37 URB. LAW. 329, 329, 331 (2005).

115. Just as the tragedy of the commons is associated with overuse and underinvestment due to overlapping rights of use, the tragedy of the anticommons yields underuse and underinvestment because overlapping rights of exclusion create gridlock. See MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION AND COSTS LIVES* 1–3 (2008). See generally Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998) (articulating the theory of the tragedy of the anticommons).

116. See Heller, *supra* note 114, at 331–32.

117. *Id.*

118. *Id.*

119. *Id.*

As nonprofit membership corporations, CLTs also employ democratic governance to sustain balance in their affirmative and negative control of land resources. As charitable entities, however, they add yet another dimension to this already complex approach to property ownership. Because even small CLTs serve large and less privatized spaces, their attempts to improve the lives of their community members have a broad public purpose on scale alone. But CLTs differ from HOAs not only in the size of their constituencies but in the nature of their goals. CLTs are committed to social welfare purposes that cannot be reduced to the aggregation of their members' individual interests. Specifically, their organizational documents commit them to providing housing for low- and moderate-income persons.<sup>120</sup> A purely partisan community organization is free to pursue any and all of the collective interests of the resident members. A CLT does not merely focus its efforts on long-term collective needs but also elevates its goals to provide for those whose needs are most likely to be neglected by market activities in the neighborhood. Although democratically controlled, the CLT structure as a tax-exempt 501(c)(3) organization challenges, and to some extent requires, its resident constituents to act as trustees for the resources that have been trusted to it.

In connecting with outside groups and institutions, the activists behind CLTs need to communicate both their interests and their ideals. In asserting their goals in the hurly-burly of city politics, neighborhood activists must be able to demonstrate that significant numbers of constituents are resolved to fight for their interests. In approaching public and private investors, however, community-based development advocates must also show that the plans they have formed make good policy sense. DSNI has demonstrated its success in both these areas. DSNI not only forced the City to end illegal dumping in their neighborhood, it also secured an extraordinary delegation of eminent domain authority to Dudley Neighbors, Inc., its CLT.<sup>121</sup> Its subsequent community development accomplishments have made it a point of reference for any discussion about increasing social capital in inner-city neighborhoods.<sup>122</sup> But the very success in bringing people together has come from the engagement of residents in the creation of a community that is not only vibrant but also just. The empowerment of the residents of Dudley Street can be described from the outside as a

---

120. See INST. FOR CMTY. ECON., *supra* note 10, at 6-3 to 6-8.

121. See *supra* note 55 and accompanying text.

122. See SIMON, *supra* note 8, at 67-68; Michele Estrin Gilman, *Poverty and Communitarianism: Toward a Community-Based Social Welfare System*, 66 U. PITT. L. REV. 721, 790-93 (2005).

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 89

growth in social capital.<sup>123</sup> But a creative, activist spirit cannot be sustained through an internal process that focuses on cost-benefit analysis, even one that embraces community-friendly metrics. Such a broadened public policy framework benefits discourse between the community and external institutions rather than within the community organization itself. The fight to prevent a deteriorated community from being discarded altogether may, in fact, preserve and produce a certain quantum of social capital. Moreover, the recognition of this cost-benefit factor may lead those outside the neighborhood to reconsider the significance of its struggle for survival. The residents' own understanding of their communal life, however, cannot be so objective. The very passion that creates their cohesion flows from their commitment to the ideals, needs, hopes, and dreams shared among the community members themselves.

### III. WHY NEIGHBORHOOD LAND AND COMMUNITY MATTER

The previous Part of this Article illustrates how CLTs allow communities to perpetuate themselves through market upheavals. Certainly, CLTs such as Dudley Neighbors, Inc., the Figueroa Corridor CLT, and the Time of Jubilee CLT are sustaining economically diverse communities with strong social cohesion. But to fully understand the value of the substantial public investments into these efforts, we must place in a social, political, and economic framework the struggle against the problems of social deterioration and displacement caused by both disinvestment and gentrification. The focus on the importance of developing communities not only challenges particular development strategies but many of the assumptions underlying conventional economic theory. An evaluative framework that is restricted to household income maximization will identify some asset-building benefits of sustaining economic diversity, but it will miss many others.<sup>124</sup> Policies based on such a narrow view of economic improvement will contort

---

123. The sustaining of community within inner-city neighborhoods that CLTs foster can be described in cost-benefit terms as three different types of social capital. Through the creation of perpetually affordable homes, CLTs secure economic equality and produce bridging social capital. By providing for community-controlled common spaces, CLTs foster bonding social capital. In their democratic governance structure, CLTs seek to sustain the collective commitment and drive to community transformation that brought the resources to their community. I call this purpose-driven civic engagement "animating social capital."

124. Most of these overlooked gains can be accounted for as some form of social capital. *See supra* note 123; *see also* David Brooks, Op-Ed, *Edwards, Obama and the Poor*, N.Y. TIMES, July 31, 2007, at A19 (noting the author's preference for then-Senator Obama's emphasis on neighborhood revitalization over Senator Edwards' plan because the former appeared to value social capital more).

community development efforts to the detriment of sustainable social development.

Before further exploring the issues involved in restricted-resale homeownership, community control of neighborhood spaces, and the decision making structure of CLTs, it is necessary to develop the theoretical resources that might be brought to bear. Certain neo-Aristotelian approaches offer an alternative to the modernist dichotomy of state and market.<sup>125</sup> Even as they offer new ways forward, drawing upon the latest developments in understanding human behavior, they also invite us to look back and reclaim a wholeness of thought that has been lost in the compartmentalization that so thoroughly characterizes modern thinking.<sup>126</sup> Amartya Sen shows that a desire for exactly clear and quantifiable economic measures has led welfare economists to discount essential aspects of the improvement of quality of life.<sup>127</sup> His work orients economists, who are ordinarily focused on the aggregation of myriad individual prudential decisions, toward an appreciation of the conscious interdependence of a society's members.<sup>128</sup> Alasdair MacIntyre diagnoses a more fundamental failing in modern thinking and abandons hopes that large-scale markets or governments will ever produce coherent progress.<sup>129</sup>

MacIntyre believes that only community-based institutions can properly sustain the networks of giving and receiving that are so essential to his vision of a truly just polity.<sup>130</sup> Sen broadens welfare economics to account for growth in social capital and the availability of public goods that are essential to quality of life.<sup>131</sup> This move levels the policy playing field to allow proponents of community-focused in-

125. Gregory Alexander and Eduardo Peñalver recognize a wide diversity of approaches to the centrality of community in property law. See Alexander & Peñalver, *supra* note 1, at 129 (such theories include those "that have gone under the names of 'communitarian,' 'liberal communitarian,' 'republican,' 'civic republican,' and even certain theories that have simply called themselves 'liberal'").

R

126. Sen blames a modernist preoccupation with behavioral prediction for this impoverishment of description. "Focusing only on predicting behaviour, the richness of human psychology has been substantially ignored, refusing to see anything in utility or happiness other than choice." AMARTYA SEN, *Description As Choice*, reprinted in CHOICE, WELFARE AND MEASUREMENT 432, 442 (1982).

127. See SEN, *supra* note 23, at 54-63, 67-76.

R

128. See *id.* at 272-81; *infra* notes 138-162 and accompanying text.

R

129. See MACINTYRE, *supra* note 15, at 62-78 (linking the development of emotivism to the rise of the bureaucratic manager as a modern ideal); MACINTYRE, *supra* note 17, at 131-33, 145 (explaining why nation-states cannot foster an authentic political life, arguing that a politics committed to the common good must reject consumer capitalism); *infra* notes 177, 226-229 and accompanying text.

R

R

130. MACINTYRE, *supra* note 17, at 129-46 (rejecting nation-state and family as institutional homes for the practice of politics); see *infra* notes 226-229 and accompanying text.

R

R

131. SEN, *supra* note 23, at 71, 127-29.

R

vestments to prove their case.<sup>132</sup> MacIntyre constructs a political theory that puts community-controlled institutions at the very center.<sup>133</sup> But to understand why we should consider either a moderate or radical embrace of community-controlled land resources over a completely privatized real estate market, we should first turn our attention to Sen's critique of the contemporary preoccupation with total income and the promotion of self-interested behavior that supposedly increases it.

#### A. *Sen: Community Support as Sound Public Policy*

Welfare economists broadly recognize that markets, when functioning properly, will tend to price goods and services to achieve optimal utility.<sup>134</sup> Sen, however, separates the powerful arguments that support freedom of exchange from the libertarian claims that prosperity depends largely, if not entirely, on unfettered access to markets.<sup>135</sup> As an advocate of economic freedom, Sen has urged his fellow welfare economists to "expand the information base" by which they evaluate economic success.<sup>136</sup> Instead of focusing exclusively on maximizing income through unfettered market access, he invites policymakers to expand their view to encompass the growth of individual freedoms, by which he means access to commodity baskets and capabilities to function as persons.<sup>137</sup>

With regard to conventional economics' translation of the good into preferences expressed as demand strength, Sen urges an expansion of the information base by which goods are evaluated.<sup>138</sup> Instead of util-

132. See *infra* notes 152–58 and 169–70 and accompanying text.

133. See *infra* Part III.B.

134. The Arrow-Debreu theorem states that, given a broad range of ideal conditions, markets in general equilibrium will create a system that cannot be improved upon without decreasing the utility of at least one person. See SEN, *supra* note 23, at 117. A state of affairs that can be improved upon only to the detriment of at least one affected person is said to be Pareto optimal. See JEFFRIE G. MURPHY & JULES L. COLEMAN, *THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 213 (1984). The authors give an example of a world with only two persons and one desirable commodity of which there is only ten units. Any initial distribution of that commodity between the two would be Pareto optimal because no redistribution or transfer could improve one person's utility without decreasing the other person's. *Id.*

135. SEN, *supra* note 23, at 70–74 (showing that the translation of income into well-being depends on a variety of non-economic circumstances).

136. *Id.* at 63.

137. Higher incomes do not necessarily translate into increases in substantive welfare indices such as life-expectancy. Countries such as Brazil, however, have increased per capita income without raising life expectancy comparably. Other countries have been able to increase life expectancy even though economic indicators have remained stagnant by comparison. *Id.* at 45–47.

138. *Id.* at 62–63, 67–76 (showing the "capabilities" approach to be more comprehensive than a purely income metric). When conventional development experts identify the poor as those who fail to maintain a certain income, they focus on a proxy value that misses a variety of

R

R

ity, translated as income,<sup>139</sup> being the marker by which economic efficiency is judged, Sen argues that the fostering of individuals' substantive freedoms should serve as the basis for judging the quality of economic structures.<sup>140</sup> Personal freedom should be looked at in terms of an individual's prospects for being able to function as a person and the individual's ability to acquire goods that support human functionings.<sup>141</sup>

As with conventional definitions, Sen's understanding of freedom centers on a person's unencumbered ability to choose. However, the mere number of available options is meaningless if the alternatives are all equally unappealing. As Sen writes, "It is odd to conclude that the freedom of a person is no less when she has to choose between three alternatives which she sees respectively as 'bad', 'awful', and 'gruesome' than when she has the choice between three alternatives which she assesses as 'good', 'excellent', and 'superb.'"<sup>142</sup> Implicit in Sen's point is an appreciation for the role that individual and societal limitations play in shaping actual freedom, as distinguished from theoretical freedom.<sup>143</sup>

To accommodate a more robust understanding of opportunity without rendering empirical analysis completely unworkable, Sen offers the linked concepts of "functionings" and "capabilities." Functionings are essentially elements of human flourishing. They are modes of doing and being that human beings generally embrace as contributing to a life.<sup>144</sup> They can include extremely important aspects of living, such as adequate nourishment or the ability to speak out on political issues of personal significance.<sup>145</sup> Likewise, they can include trivial things as

---

important factors relevant to the elimination of needless suffering and the promotion of basic equality. As Aristotle recognized, monetary wealth cannot be the sole focus of any rigorous evaluative exercise because it has no intrinsic value and is useful only insofar as it allows the holder to secure something else. *Id.* at 14 (citing ARISTOTLE, *NICHOMACHEAN ETHICS* (Terence Irwin trans., 2d ed. 1999)).

139. *Id.* at 69.

140. *Id.* at 72–76.

141. Functionings can range from the highly personal and sometimes trivial—for example, using a particular brand of laundry detergent—to the basic and indispensable. Sen's Aristotelian approach supports an acknowledgment of basic functionings that are independent of the market demand for them. For a list of these components of basic well-being, see Robert Erikson, *Descriptions of Inequality: The Swedish Approach to Welfare Research*, in *THE QUALITY OF LIFE*, *supra* note 23, at 67, 68 tbl.1.

142. Sen, *supra* note 23, at 34–35.

143. The libertarian may point to the possibility of a determined market participant working to expand her options from the first set to include those in the second, more attractive grouping, but Sen would insist on attention to the likely outcomes for such an investment of effort. *Id.*

144. *Id.* at 31.

145. *Id.* at 75.

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 93

well.<sup>146</sup> Sen defines the capabilities of people as those functionings that are available to them. More precisely, Sen defines a capability as a set of functionings that a person could choose. Capability, then, embodies the notion of the ability to choose among different ways of well-being and not just the kind of well-being that, by some standard, is considered optimal.<sup>147</sup> As implied in his quote in the foregoing paragraph, Sen contends that a full accounting of the importance of someone's capabilities, as compared with functionings still out of reach, cannot be judged apart from knowledge of the person's own values.<sup>148</sup> Nevertheless, "basic capabilities," those indispensable to more discretionary functionings, can be generically identified, even if their relative priority may vary considerably among different societies.<sup>149</sup> Informally, he lists some of them: "The ability to move about . . . the ability to meet one's nutritional requirements, the wherewithal to be clothed and sheltered, [and] the power to participate in the social life of the community."<sup>150</sup> Basic capabilities such as these are the focal point for Sen's egalitarianism.<sup>151</sup> Just as "freedom," defined in terms of capabilities, substitutes for "utility" in Sen's welfare economics, basic capabilities take the place of unfettered access to markets in Sen's presentation of equality of opportunity.

The fundamental significance that Sen attaches not only to shelter but also to social inclusion can support public investment in the creation and sustenance of economically diverse communities of choice.<sup>152</sup> A growing sociological literature has documented the debilitating ef-

---

146. Sen refers to an example from Bernard Williams of using a particular brand of laundry detergent. *Id.* at 32.

147. *Id.* at 38.

148. Martha Nussbaum rejects relativism with regard to prioritizing functionings. See Martha Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in *THE QUALITY OF LIFE*, *supra* note 23, at 242, 246–47. Sen maintains that nothing in the capabilities approach itself requires such a universalist approach. See Sen, *supra* note 23, at 47.

149. See Amartya Sen, *Equality of What?*, in *CHOICE, WELFARE AND MEASUREMENT*, *supra* note 126, at 353, 367–68.

150. *Id.* at 367.

151. Sen argues that basic fairness requires equality of some sort but that the interesting question is what should be considered equal. See AMARTYA SEN, *INEQUALITY REEXAMINED* 12–19 (1992).

152. Because Sen, along with his collaborator Martha Nussbaum, has become so prominent in the theory of international development, it may seem that he is addressing only the most extreme deprivations of housing and dignity. Sen has made it clear, however, that he believes poverty should be measured relative to a society's standard of living. See AMARTYA SEN, *Poor, Relatively Speaking*, in *RESOURCES, VALUES AND DEVELOPMENT* 325 (Harvard Univ. Press 1997) (1984) (relative deprivation with regard to income, commodities, and resources leads to non-relative deprivation with regard to capabilities).

fects caused by geographic concentration of poverty.<sup>153</sup> Neighborhoods hold the key to elementary, and often secondary, public education opportunities.<sup>154</sup> Some authors have decried how extreme segregation reinforces antisocial, destructive behavioral patterns with regard to work, education, and gender roles that undermine child development and education.<sup>155</sup> Some community development experts have used these observations to advocate for creating exit strategies for those who wish to “escape” poverty by moving out of poor neighborhoods.<sup>156</sup> But Sen’s emphasis on capabilities does not dictate an everyone-for-herself approach alone. Relocation out of public housing has not universally yielded social inclusion.<sup>157</sup> Mobility strategies often aggravate the isolation of those that remain behind.<sup>158</sup> Bridging social capital can be lost by those who move and those who remain. Advocates of place-based strategies need not argue for constraining motivated residents of low-income neighborhoods from moving. But when a community as a whole indicates its commitment to raising the quality of life for the neighborhood as a whole, Sen’s inclusion of social capital metrics and his emphasis on the needs of the most deprived provide ample justification for place-based development as sound public policy. Moreover, his belief in the prospects for social equality flows from his less individualistic account of personal decision making.

---

153. See generally PAUL A. JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY* (1997) (“Residents of high-poverty areas have lower labor force participation, higher unemployment, more part-time jobs, and lower wages than residents of other neighborhoods, yet they receive approximately the same proportion of their total income from wages and tend to work in the same industries as other neighborhoods”); MASSEY & DENTON, *supra* note 41 (examining concentration of poverty in African-American inner-city neighborhoods as the legacy of continuing racial segregation in American metropolitan areas); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 20–62 (1987) (exploring sociological factors associated with chronic poverty of African-American inner-city residents).

R

154. MASSEY & DENTON, *supra* note 41, at 141 (“The organization of public schools around geographical catchment areas . . . reinforces and exacerbates the social isolation that segregation creates in neighborhoods.”).

R

155. See MASSEY & DENTON, *supra* note 41, at 140–41 (“Because welfare receipt, unwed childbearing, and marital disruption are strongly associated with poverty, they are concentrated by any structural process that geographically concentrates poverty.”); WILSON, *supra* note 153, at 21 (listing “black crime, teenage pregnancy, female-headed families, and welfare dependency” as factors in “the tangle of pathology in the inner-city”).

R

156. See MASSEY & DENTON, *supra* note 41, at 229–32 (calling for “[d]ismantling the [g]hetto”).

R

157. See LARRY ORR ET AL., U.S. DEP’T OF HOUS. & URBAN DEV., *MOVING TO OPPORTUNITY: INTERIM IMPACTS EVALUATION* viii–ix (2003), <http://www.huduser.org/Publications/pdf/MTOFullReport.pdf>.

158. See Davidson, *supra* note 29, at 7.

R

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 95

Free market advocates' primary argument against imposed substantive equality centers on the burdens that the necessary redistribution efforts would impose on economic efficiency and aggregate prosperity. Essential to their arguments against enforced equity is the premise that unobstructed self-interested behavior spontaneously orders resources for optimal efficiency.<sup>159</sup> Adam Smith is often cited to explain how self-interest unexpectedly produces social benefits:

It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love. . . .<sup>160</sup>

By pursuing their own wants, citizens develop productive enterprises that complement one another and raise welfare overall.<sup>161</sup> Sen, however, states that the depiction of rational choice as fundamentally self-serving is an unrealistic account of human motivation and inconsistent with Smith's views.<sup>162</sup>

Sen demonstrates that the very important self-regarding motivation of prudence is supplemented by sympathy and commitment.<sup>163</sup> Sympathy explains actions that people are naturally inclined to take even though it is not consistent with their personal advantage, at least not in a narrowly defined sense.<sup>164</sup> Commitment refers to decisions that people make in the interests of others even though it goes against both their self-interests and their inclinations.<sup>165</sup> When we take the time to help others, not for the hope of recompense or a boost in social standing but because we derive personal relief from lessening their suffering, we act out of sympathy for them.<sup>166</sup> Our happiness, not diminished from our investment, is actually increased to a degree that often exceeds the gain from any other activity that we could have

159. See F.A. HAYEK, *STUDIES IN PHILOSOPHY, POLITICS, AND ECONOMICS* 96–105 (1967). (emphasizing the power of unintended consequences of human action in social theory)

160. SEN, *supra* note 23, at 256 (quoting ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 26–27 (R.H. Campbell & A.S. Skinner eds., 1976)). Later on in *The Wealth of Nations*, Smith animates the contractarian reciprocity that makes seemingly anti-social characteristics so widely beneficial, writing that the market participant is “led by an invisible hand to promote an end which was no part of his intention.” *Id.* (quoting SMITH, *supra*, at 456).

161. Sen does not reject the idea that our acts—both self-interested and selfless—can have unintended, if not unforeseeable, consequences. He does, however, take issue with the implication that all publicly minded economic planning is doomed to frustration and failure. *Cf.* SEN, *supra* note 23, at 254–57.

162. *Id.* at 270–72.

163. *Id.*; SEN, *supra* note 24, at 326.

164. See SEN, *supra* note 23, at 270; SEN, *supra* note 24, at 326.

165. See SEN, *supra* note 23 at 270–71.

166. *Id.* at 327.

R

R

R

R

R

done instead. In this sense, these actions are both other-regarding and efficient in maximizing personal utility. We are better off even though our actions cannot be explained by self-interest alone, at least not by a narrow definition of self-interest that makes sympathy irrelevant.

But sympathy cannot account for all other-regarding behavior, some of which clearly goes beyond personal happiness and clearly involves self-sacrifice. Sen describes committed behavior as that which people undertake to further their ideals.<sup>167</sup> In developing moral principles, we understand that we may be called upon to make sacrifices for those we do not know or those we do know but with whom we have no emotional connection at all.<sup>168</sup> An account of human action that claims that anyone who acts to further an ideal without taking some pleasure in the act simply fails to describe a large part of public-minded activity. A society benefits when social capital makes it possible for relationships among community members to be robust enough to have community-supporting activities encouraged by both sympathy and commitment. Trust and the ability to work cooperatively are important to business transactions that facilitate growth in private wealth, but they are absolutely indispensable to the creation and effective distribution of public goods, such as healthcare, education, parks, and other shared space amenities. Social capital is crucial to and can be in turn increased by small-scale collaborative projects to keep land available for community needs. By dedicating land to permanently affordable homeownership, CLTs sustain economic diversity among residents that is crucial to bridging social capital. By protecting community space for community activities that displace nuisance uses, CLTs contribute to bonding social capital. By engaging residents in the stewardship of the land, CLTs also foster a type of social capital that is not adequately classified as bridging or bonding social capital. The commitment of community members to collective action on behalf of the ideals and the interests protected by the CLT represents “animating social capital.”<sup>169</sup> CLTs cannot inspire this dedication, however, by talking to its members about the statistical gains from increased social capital of any kind. To guide CLTs in their own visioning processes, proponents need to move beyond cost-benefit analyses to a richer understanding of practical reasoning.

---

167. *See id.* at 336–37.

168. *Id.*

169. *See supra* note 124. Putnam recognizes the “new identities and extend[ed] social networks” that are formed by people engaged in grassroots struggles that they regard as just. He questions whether such benefits accrue to members of institutionally driven movements. *See PUTNAM, supra* note 28, at 153.

*B. MacIntyre: Community Conservation as Essential to  
Human Flourishing*

Sen has moved welfare economics in a neo-Aristotelian direction by focusing its attention on the basic components of the quality of life and by showing that income alone does not offer an adequate measurement of prosperity. Sen's understanding of freedom as the goal and the means of development particularizes human flourishing. So conceived, freedom inevitably requires personal dignity, social capital, and the broad satisfaction of basic human needs, none of which are guaranteed by functioning markets alone. Sen's more nuanced cost-benefit analysis nevertheless sees human capabilities primarily as a means of satisfying personal needs and wants.

Departing more radically from instrumentalism in human development, Alasdair MacIntyre argues that the distinctively human mode of discerning and acting for our own good is not only the way to human flourishing but also is itself a central part of flourishing.<sup>170</sup> It is not enough that we are more successful than other animals in satisfying our desires; to flourish, we must become independent practical reasoners.<sup>171</sup> As human beings, we develop not only the ability to have reasons for actions but also the capacity to reflect on those reasons for actions and fit them into larger understandings of our life projects.<sup>172</sup> This growth in practical reasoning necessarily takes place within one or more communities.<sup>173</sup> As children, we learn from others what constitutes our good.<sup>174</sup> MacIntyre emphasizes that a person's mature understanding of her good inevitably connects her to a community's conception of the common good.<sup>175</sup> Only a society that promotes holistic human development both for its own sake as well as for the material success it yields can hope to thrive.<sup>176</sup> In the absence of meaningful moral discourse,<sup>177</sup> however, the market and the state sus-

---

170. See MACINTYRE, *supra* note 17, at 67 ("Human beings need to learn to understand themselves as practical reasoners about goods, about what on particular occasions it is best for them to do and how it is best for them to live out their lives.").

171. *Id.*

172. *Id.* at 69 ("The small child, if possible, acts on its desires, finding in them reasons for actions, as dolphins do, as gorillas do. What the use of language enables it to achieve is . . . the evaluation of its reasons.").

173. See D'ANDREA, *supra* note 20, at 377-78.

174. *Id.* at 376.

175. See MACINTYRE, *supra* note 17, at 107-09.

176. See KNIGHT, *supra* note 13, at 156.

177. A full exploration of MacIntyre's critique of contemporary moral and political thought is beyond the scope of this Article. Suffice it to say that by jettisoning particular moral traditions in favor of universal mandates, modern moral philosophy has contributed to a political discourse characterized by endless conflict over competing interests that are articulated as rights and the

R

R

R

R

tain themselves through bureaucratic manipulation.<sup>178</sup> MacIntyre argues that a society that enables acquisitiveness does not free its members but instead prevents their authentic development.<sup>179</sup> To repair the modernist breach, MacIntyre proposes a craft-based ethic in which life-sustaining social practices reveal guiding values through their own internal logic.

Fundamental to MacIntyre's neo-Aristotelian virtue ethics is the concept of a "practice." A practice is a set of shared, skilled activities that provides internal goods as well as external goods.<sup>180</sup> MacIntyre offers a trawler crew catching fish as an example of a group engaged in a practice.<sup>181</sup> The crew members work together in order to get fish for personal consumption and sale, but in doing so they also grow in their mastery of the skills involved in good fishing.<sup>182</sup> Effective fishing produces benefits readily identified as external goods. The caught fish feed the fishermen and their families. They sell the fish to non-fishermen for money. Their success brings them prestige and admiration within their community. Even these last, intangible rewards are external goods. A good that is internal to a practice, however, can be obtained only through repeated excellence in the activity according to the shared standards through which its participants define the practice.<sup>183</sup> In a later work, MacIntyre refers to these as the "goods of excellence."<sup>184</sup> He renames external goods, "goods of effectiveness."<sup>185</sup> Outsiders in particular might confuse awards and other tan-

---

reduction of moral propositions to expressions of personal taste. *See generally* MACINTYRE, *supra* note 15, at 62–78. "[P]rotest is now almost entirely that negative phenomenon which characteristically occurs as a reaction to the alleged invasion of someone's *rights* in the name of someone else's *utility*." *Id.* at 71.

R

178. In the absence of a shared substantive understanding of communal good, the state promotes acquiescence around the policies that support state and market structures by showing how they maximize consumer choice. *See id.* at 227–29.

179. *Id.* at 227. ("*Pleonexia*, a vice in the Aristotelian scheme, is now the driving force of modern productive work.").

180. *Id.* at 187; *accord* D'ANDREA, *supra* note 20, at 269–70; KNIGHT, *supra* note 13, at 146–48; CHRISTOPHER STEPHEN LUTZ, TRADITION IN THE ETHICS OF ALASDAIR MACINTYRE: RELATIVISM, THOMISM, AND PHILOSOPHY 40–42 (2004).

R

181. *See* Alasdair MacIntyre, *A Partial Response to My Critics*, in *AFTER MACINTYRE: CRITICAL PERSPECTIVES ON THE WORK OF ALASDAIR MACINTYRE*, 283, 284–86 (John Horton & Susan Mendus eds., Univ. of Notre Dame 1994) (1994).

182. *Id.*

183. MacIntyre claims that only those persons who are involved in a practice and who accept the standards of excellence that define it can participate in the growth of that practice. *See* MACINTYRE, *supra* note 15, at 188–89. In presupposing engaged participation for any critical reflection, MacIntyre fashions a variation on the Marxist concept of "praxis"—engaged revolutionary thinking—that he sees as having continuing contemporary vitality. KNIGHT, *supra* note 13, at 188–89.

R

R

184. ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 35 (1988).

185. *Id.*

gible marks of achievement with the sense of accomplishment and belonging that accompanies authentic excellence. Only the latter, however, brings the practitioner into the realm of the virtues.<sup>186</sup>

The virtues are those human characteristics that allow persons to obtain goods, both internal and external. At the level of the practice, virtues are easily conflated with certain general internal goods themselves. But the concepts are distinguishable: virtues are human attributes, while internal goods are something like the shared experience of putting those qualities into practice. But in order for a human trait to qualify as a virtue, it must lead its bearer beyond success, even authentic success, in individual practices.<sup>187</sup> If, as MacIntyre maintains, specific human actions are only truly intelligible in the context of a life story, then only those qualities of mind, body, and spirit that allow us to balance the competing demands of various practices can truly be called virtues.<sup>188</sup> At a third, even higher level, the virtues not only animate practices and individual lives but also sustain the life of the community in its historical development through its members' corporate articulation of and search for their common good.<sup>189</sup> MacIntyre refers to this integrated ethical and theoretical history of a community as its tradition.<sup>190</sup> Through their traditions, communities perpetuate and develop their understandings of quality in human action.<sup>191</sup>

For MacIntyre, the narrative of a human life lacks intelligibility when it is completely isolated from the life of the community.<sup>192</sup> All the systems of activities that qualify as genuine practices bring their

186. The concept of goods internal to a practice is the linchpin for MacIntyre's attempt to reunite self-centered instrumental thinking with other-regarding moral reasoning. He illustrates the concept, which is vital to the general practices of family and community life, with the example of an adult who teaches a child to play chess. At first, the child may tolerate the bother of learning complex rules and the slow pace of the game because of the ego boost or material rewards associated with his or her putative winning, but the child's increasing appreciation of the game's challenges and the child's increasing skill in meeting those challenges may accompany or even supplant the desire to win for recognition or material gain. While the external goods can be obtained by successful cheating, the goods of excellence by their nature cannot be stolen in this way. See MACINTYRE, *supra* note 15, at 188; cf. KNIGHT, *supra* note 13, at 156.

R  
R

187. See MACINTYRE, *supra* note 15, at 201-03 ("[A]ny account of the virtues in terms of practices could only be a partial and first account.")

188. Cf. *id.* at 219 ("[The virtues] furnish us with increasing self-knowledge and knowledge of the good."); LUTZ, *supra* note 180, at 78.

R  
R

189. Cf. D'ANDREA, *supra* note 20, at 279; LUTZ, *supra* note 180, at 78-79.

190. See D'ANDREA, *supra* note 20, at 220.

R

191. MacIntyre rejects the notion of evaluating traditions by universal criteria that transcend any particular socially embedded tradition. For a brief discussion of MacIntyre's account of how traditions progress or fail on their own terms, see *infra* notes 215-219 and accompanying text.

R  
R

192. See MACINTYRE, *supra* note 15, at 209.

participants deeper into that community life.<sup>193</sup> MacIntyre argues that community plays an indispensable role in shaping human practical reasoning.<sup>194</sup> Some practices address the members' material needs; others concern the manner in which members relate to one another.<sup>195</sup> MacIntyre argues that no practice should be more important or less specialized than the practice of politics.<sup>196</sup> In exploring the practice of politics, MacIntyre sets out his account of a virtue that he calls "just generosity."

In his 1999 publication of lectures entitled *Dependent Rational Animals: Why Human Beings Need the Virtues*, MacIntyre constructs an account of human development that moves vulnerability and dependence from the margins to the center.<sup>197</sup> Completely realized moral agents do not just drop from the sky fully formed. Beginning life in a state of extreme dependency, they grow and gradually take their parts in networks of giving and receiving within, but also beyond, our immediate families.<sup>198</sup> MacIntyre also stresses that fully realized independent practical reasoners are never free from dependency. They receive as well as give.<sup>199</sup> MacIntyre argues that the widespread need for reciprocity among humans comes from the inescapable vulnerability that is part and parcel of our animality.<sup>200</sup> If sufficiently initiated into practices of giving and receiving, community members will develop "just generosity."<sup>201</sup>

Just generosity differs from altruism in that the former is a virtue that informs our relationships as opposed to our capacity for self-denial in pursuit of abstract ideals.<sup>202</sup> In some sense, MacIntyre's char-

---

193. See *id.* at 190–91 (“[I]t is characteristic of [goods internal to a practice] that their achievement is a good for the whole community who participate in the practice.”).

194. See MACINTYRE, *supra* note 16, at 83 (“What we need from others . . . to develop the capacities of independent practical reasoners are those relationships necessary to evaluate, modify, or reject our own practical judgments. . . .”).

195. See MACINTYRE, *supra* note 15, at 187–88.

196. See MACINTYRE, *supra* note 16, at 129.

197. MACINTYRE, *supra* note 16.

198. *Id.* at 81–83.

199. Among the virtues of acknowledged dependence, then, is “graciousness in receiving” as well as “just generosity.” Here, MacIntyre parts company from Aristotle. He criticizes Aristotle’s idealization of the *megalopsychos* (“the great man”) who gives to others but needs nothing in return. *Id.* at 127; see *infra* note 210 and accompanying text.

200. *Id.* at 82–83.

201. *Cf. id.* at 126.

202. MacIntyre laments Adam Smith’s conceptual isolation of other-regarding behavior from reciprocity through his promotion of the term “altruism.” *Id.* at 119–20. Implicitly counseling the virtue of humility even when acting out of benevolence, MacIntyre goes so far as to claim that “[w]hen men and women identify what are in fact their partial and particular causes too easily and too completely with the cause of some universal principle, they usually behave worse than they would otherwise do.” MACINTYRE, *supra* note 15, at 221.

R

R

R

R

R

R

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 101

acterization of this virtue of local political life brings together aspects of Sen's understandings of sympathy and commitment.<sup>203</sup> MacIntyre invokes a Lakota term, *wancantognaka*, which he describes as a particularly reciprocal form of generosity.<sup>204</sup> Just generosity is not compatible, under MacIntyre's view, with a calculating approach to reciprocity.<sup>205</sup> Genuine personal and community growth can take place only in networks of giving and receiving that include the vulnerable and disabled as well as the able-bodied.<sup>206</sup> The reciprocity that the young members of a community experience is not symmetrical, even when generational succession is accounted for.<sup>207</sup> Apprentices in the sustaining practices of the community understand that they are someday to bear primary responsibility for meeting the bodily needs of the community members.<sup>208</sup> They also understand that others will be incapable of contributing in the same way at any point in their lives.<sup>209</sup> These disabled are, nevertheless, not charity cases to be suffered, but equal members of the community.<sup>210</sup> In critiquing Aristotle's ideal of the megalopsychos,<sup>211</sup> who gives to but does not receive from those he sees as being of lesser quality, MacIntyre offers a different ideal: one who strives to understand how each person, however deprived, contributes to the good of the community and appreciates those benefits conferred.<sup>212</sup>

In a fully formed MacIntyrean community, the just community member takes part in a continuous dialogue with his fellow community members about the ordering and distribution of goods. This deliberation is the heart of the social practice that is politics.<sup>213</sup> The community members' shared understanding of what it means to be

203. See *supra* notes 163–168 and accompanying text.

204. MACINTYRE, *supra* note 16, at 120–21 (“‘Wancantognaka’ names a generosity that I owe to all those others who also owe it to me” (citing Lydia Whirlwind Soldier, *Wancantognaka: The Continuing Lakota Custom of Generosity*, 7 TRIBAL COLLEGE 3 (Winter 1995–1996))).

205. See *id.*

206. Cf. *id.*

207. Cf. *id.*

208. *Id.* at 99–100.

209. *Id.* at 127.

210. MacIntyre has credited the disability rights movement and feminist literature on disability as being particularly influential on the arguments he presents in *Dependent Rational Animals*. See MACINTYRE, *supra* note 16, at 2–5; EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCE* 75–99, 147–61 (1999) (critiquing Rawlsian equality and offering a personal narrative of dependency care); ANITA SILVERS, DAVID WASSERMAN & MARY B. MAHOWALD, *DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY* 13–146 (1998) (exploring disability civil rights theory).

211. See *supra* note 198.

212. Cf. MacIntyre, *supra* note 17, at 127.

213. See *id.*

R  
R

R

R  
R

just not only shapes their behavior within specific practices but orders the priority of goods available from various practices and the distribution of these goods to the various members.<sup>214</sup>

Despite its focus on the well-being of the marginalized, it may seem that this “revolutionary Aristotelianism” is hopelessly conservative. On MacIntyre’s account, socially generated narratives are to be evaluated only for internal consistency and not subject to external, objective markers of rationality outside the tradition.<sup>215</sup> This apparent embrace of relativism seems to involve MacIntyrean communities in corporate rather than individualized moral arbitrariness.<sup>216</sup> MacIntyre, however, sees traditions of moral enquiry moving forward in a manner analogous to the progress made in scientific revolutions.<sup>217</sup> Although he does not propose a “scientific method” for evaluating moral propositions, he points out that those traditions most likely to survive the challenges that internal contradiction and other aspects of their own inadequacy will eventually provoke will be those traditions that maintain openness to falsification.<sup>218</sup> A community must protect itself against destructive forces, but it should not isolate itself from the signals that indicate its fundamental failure on its own terms.<sup>219</sup>

C. Market, State, and Community

The normative theories of both Sen and MacIntyre open up a place for community that is not available in conventional cost-benefit calculus. Sen expands the information base for cost-benefit analysis but remains sensitive to both the evaluative judgments involved in setting out capabilities metrics and the understandable but misguided empiricist tendency to seek objectivity in income measurements.<sup>220</sup> Even with the new variables that the capabilities approach introduces,

214. *Id.*

215. See LUTZ, *supra* note 180, at 46–47.

216. For an early critique of MacIntyre’s ethical theory on this point, see Robert Wachbroit, *A Genealogy of Virtues*, 92 *YALE L.J.* 564, 575–76 (1982). For MacIntyre’s reply, see MACINTYRE, *supra* note 15, at 275–77.

217. MacIntyre draws upon the related but distinct philosophies of science of Thomas Kuhn and Imré Lakatos. See D’ANDREA, *supra* note 20, at 215–16 (“MacIntyre argues that we should steer a middle path between . . . Kuhn . . . (according to which the move from Theory A to rival Theory B can only occur by . . . an intuitive seeing of the matter in entirely different light), and the quasi-historical rationalism of Imré Lakatos.”); LUTZ, *supra* note 180, at 48–49 (noting that Lakatos’ account of theoretical progress involves one scientific research program yielding to the superior predictive capacity of a rival research program).

218. MACINTYRE, *supra* note 16, at 197.

219. For a discussion of how this issue relates to legal scholarship concerning the importance of “exit” in sustaining healthy communities, see *infra* notes 273–275 and accompanying text.

220. See SEN, *supra* note 23, at 81.

R  
R  
R  
R  
R  
R

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 103

Sen's perspective remains that of a social engineer, and his prescriptions are fundamentally technocratic. His insights support external appreciation of social inclusion, conviviality, and solidarity as forms of social capital that provide a baseline for the holistic success of individual community members. MacIntyre, on the other hand, moves the focus of human flourishing from effectiveness in meeting perceived needs and wants to a sense of personal excellence, grounded in human vulnerability and interdependence. Within MacIntyre's framework, persons making internal resource decisions for themselves and their community members should reject cost-benefit analysis out of hand as a short-circuiting of the deliberation that is essential to the authentic practice of politics.<sup>221</sup>

Although MacIntyre draws a sharp distinction between institutions and practices, one that parallels the key difference between goods of effectiveness and goods of excellence, he recognizes that communal practices that provide for basic human needs cannot subsist without institutional support.<sup>222</sup> A reading of MacIntyre offers guidance as to the size and other basic characteristics of suitable structures. First, the structures must be intimate enough to allow for the close personal cooperative activity through which shared understanding of the common good is discerned and communicated.<sup>223</sup> Second, they must be large enough to meet the needs of their members who are living in a world that is hostile to their goals.<sup>224</sup> Third, and most importantly, the institutions themselves must be subordinated to the practices they support and the internal goods that those practices offer.<sup>225</sup> With these criteria in mind, we can now evaluate the nation-state, the family, and the neighborhood-based development organizations as social structures capable of supporting an authentic politics of the common good.

221. MACINTYRE, *supra* note 16, at 129, 145. As community members express the value of their communal strength to policy makers, nothing about their self-understanding prevents them from articulating this solidarity in the policy-conversant terms of bridging, bonding, and animating forms of social capital. *See infra* Part IV (arguing that CLTs should be internally guided by MacIntyre's thought even as they make a policy case for external support in terms supported by Sen's approach).

222. *See* MACINTYRE, *supra* note 15, at 194; D'ANDREA, *supra* note 20, at 270; KNIGHT, *supra* note 13, at 158.

223. MACINTYRE, *supra* note 16, at 129, 132–33.

224. *Id.* at 134–35.

225. *See* MACINTYRE, *supra* note 15, at 194 (“[T]he cooperative care for common goods of the practice is always vulnerable to the competitiveness of the institution.”). Certain virtues—such as truthfulness, justice, and courage—are particularly important in ensuring that a preoccupation with external goods does not allow institutions to debase the practices that they are supposed to embody and sustain. *Id.* at 194; KNIGHT, *supra* note 13, at 158.

R

R

R

R

R

R

The first condition alone disqualifies contemporary governmental entities as institutional sites around which flourishing communities can be formed. Although MacIntyre has understandably been described as a communitarian, he has rejected that label vociferously.<sup>226</sup> He identifies the communitarian cause with claims that the state must adopt some minimal notion of the good in order to function and that it can do so to the benefit of its constituents.<sup>227</sup> MacIntyre agrees with the communitarians on the former point, namely, that the state cannot function without adopting some substantive notion of the good.<sup>228</sup> On the latter point, however, MacIntyre insists that any attempt by the nation-state, or any large governmental entity, to embody a meaningful understanding of the human good inevitably degenerates into nationalistic totalitarianism.<sup>229</sup>

The second requirement—that the structures must be large enough to meet the developmental needs of their members—leads MacIntyre to reject the notion that the nuclear, or even extended, family can itself foster networks of giving and receiving of sufficient size and scope.<sup>230</sup> MacIntyre does not attack the family as an obstacle to authentic human development as he does with both the state and the market.<sup>231</sup> Indeed, the generous reciprocity typical of family life seems to offer a commonplace, contemporary example of the quality of relationships that MacIntyre pictures as extending beyond kinship groups. He rejects the family, however, as the fundamental form of association in which the virtues can be cultivated because it is too small to be anything but dependent on the surrounding social environment.<sup>232</sup>

---

226. See MacIntyre, *supra* note 181, at 302.

R

227. *Id.*

228. Cf. MACINTYRE, *supra* note 15, at 252–53 (“[M]odern politics cannot be a matter of genuine moral consensus. . . . [It] is civil war carried on by other means.”); Murphy, *supra* note 21, at 154–60 (“MacIntyre agrees with the communitarians against the liberals that the neutralist state must lack authority.”).

R  
R

229. Cf. D’ANDREA, *supra* note 20, at 424; Murphy, *supra* note 21, at 159–60 (“MacIntyre agrees with liberals against the communitarians that a non-neutralist state is, in the end, intolerable.”). The apparent contradiction in MacIntyre’s beliefs that the state must adopt a notion of the common good and that the state should not do so is resolved by MacIntyre’s view that the modern state is an inherently self-contradictory institution that cannot succeed, even on its own terms. Cf. Murphy, *supra* note 21, at 160.

R

230. See MACINTYRE, *supra* note 16, at 133–35.

R

231. Cf. KNIGHT, *supra* note 13, at 185. (“Less antagonizing has been MacIntyre’s account of the family as a ‘practice-emboding institution’. . . . [I]t is the main institution within which most people experience mutually beneficial relations of giving and receiving and of critical scrutiny of actions and reasons.”)

R

232. See MACINTYRE, *supra* note 16, at 132–34.

R

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 105

These scale boundaries, both upper and lower, point those who would follow MacIntyre's guidance toward local community institutions. An advocate of community economic development will recognize in MacIntyre's vision not only a mix of the practical and the high-minded but also the size of institutions offered by the community development movement: big enough to have a meaningful impact yet small enough to be responsive to individual community members' input.<sup>233</sup> MacIntyre's description of the proper scale for authentic politics puts the reader even more clearly in mind of a neighborhood:

Neither the state nor the family then is the form of association whose common good is to be both served and sustained by the virtues of acknowledged dependence. It must instead be some form of local community within which the activities of families, workplaces, schools, clinics, clubs dedicated to debate and clubs dedicated to games and sports, and religious congregations may all find a place.<sup>234</sup>

The size of an inner-city neighborhood seems to be just right for both the closeness and the diversity that is necessary to support social practices. But scale is not the only concern.

Given MacIntyre's vision of a community's social practices forming a single, coherent tradition, residents of inner-city neighborhoods might wonder how such a political model would have any relevance to their pluralistic communities or the particularized struggles in which they are engaged. The virtues that members demonstrate in communal deliberations are the same ones that they acquire in community sports and creative activities. Every community member need not be a renaissance person, excelling in a wide range of pursuits, but it appears that authentic politics can only fully develop in a community that is well-rounded and coherent in its moral vision.<sup>235</sup> Even an impressively engaged neighborhood such as Dudley Street does not seem to match up with MacIntyre's vision of a group of persons with a

---

233. Keith Breen rejects MacIntyre's localism for the same reason that MacIntyre himself cannot fully embrace a form of anarchism that would hold the family up as the ideal association for moral development. Breen contends that local communities are inherently dependent on the state to provide moral as well as economic goods. See Keith Breen, *The State, Compartmentalization and the Turn to Local Community: A Critique of the Political Thought of Alasdair MacIntyre*, 10 *EUROPEAN LEGACY* 485, 494–96 (2005). Breen argues that by limiting authentic political discourse to the communal level, MacIntyre has ceded the world of large-scale politics and the many important issues that can be resolved in it alone to his Weberian adversaries. *Id.* at 498.

234. MACINTYRE, *supra* note 16, at 135.

235. Thomas D'Andrea has observed that MacIntyre's romanticism of rural life has created an overly pessimistic view of the possibility for radical democracy in the city. See D'ANDREA, *supra* note 20, at 422.

basic agreement about what constitutes their common good.<sup>236</sup> As complete and idyllic as his picture of craft practitioners who are engaged in a joint search for the common good seems to be,<sup>237</sup> MacIntyre assures his readers that his ethics is not a program to achieve some perfected state of affairs and that isolated creative projects of resistance provide encouraging examples of the community action he supports.<sup>238</sup>

MacIntyre suggests that the social foundations for any move toward promoting the virtues will come from community-based projects that challenge dominance by market and state institutions.<sup>239</sup> The successes of the low-income residents of Roxbury and Central Los Angeles offer positive examples of both the engagement with and the active resistance toward the market and the state that MacIntyre sees as necessary for any community of the common good to exist in the contemporary world. The people of Dudley Street and the Figueroa Corridor clearly illustrate how

[t]o be good, to live rightly, and to think rightly . . . is to be engaged in struggle and a perfected life is one perfected in key part in and through conflicts. . . . [This includes] those engaged in by members of some rank and file trade union movements, of some tenants' associations, of the disability movement, of a variety of farming, fishing, and trading cooperatives . . . .<sup>240</sup>

Many communities struggling for justice cannot now and may never achieve the wholeness that MacIntyre depicts as weaving morality, theoretical understanding, art, and productivity together. But his call for attention to the virtues as a form of resistance is not limited to

---

236. If anything, the Dudley Street Neighborhood Initiative, with four different ethnic and racial groups represented on its board, is more impacted by the pluralism that characterizes cities both in the United States and worldwide. DSNI has worked hard to engage all of the cultures in the community by providing real-time translation of community meetings and by sponsoring diversity activities. See MEDOFF & SKLAR, *supra* note 7, at 57, 256–58.

R

237. MacIntyre's insistence on the unity of a community's tradition may seem hopelessly anachronistic in our thoroughly pluralist modern world. "Welsh mining communities, . . . farming cooperatives in Donegal [Ireland], [and] Mayan towns in Guatemala and Mexico" are offered as contemporary heirs to the democratic excellence of the Greek "city-states from a more distant past." MACINTYRE, *supra* note 16, at 143. But MacIntyre offers these somewhat fragile and isolated examples as opportunities to better understand the travails of fully integrated communities in the modern world, rather than holding them out as models for the authentic development of inner-city urban neighborhoods. *Cf. id.*

R

238. Alasdair MacIntyre, Book Review, U. NOTRE DAME PHIL. REV. (2006) (reviewing RAYMOND GUESS, *OUTSIDE ETHICS* (2005)), <http://ndpr.nd.edu/review.cfm?id=5922>; KNIGHT, *supra* note 13, at 180–83; see *infra* text accompanying note 240.

R  
R

239. *Cf.* MacIntyre, *supra* note 238; KNIGHT, *supra* note 13, at 180–83 (discussing MacIntyre's account of how authentic communal projects persist despite the dominance of bureaucratic institutions).

240. MacIntyre, *supra* note 238.

R

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 107

idealized villages. Any group that acts to achieve basic social equality through radical democracy can help to bring about its own flourishing as human beings. The residents of an inner-city neighborhood are not excluded from this progress merely because of their diversity or even their mobility.<sup>241</sup> On the other hand, nothing about the appropriate scale of a community warrants complacency in the development of an authentic political dialogue. MacIntyre denies that “there is anything good about local community as such.”<sup>242</sup> Local community structures are particularly prone to provincial failings such as bigotry, self-satisfaction, internal domination, corruption, and narrow-mindedness.<sup>243</sup> Key to the success of local communities in sustaining practices that will cultivate the requisite virtues will be the types of institutions they form to sustain the networks of giving and receiving.

#### IV. LAND FOR GOOD: STEWARDSHIP AND SUSTAINING COMMUNITIES

MacIntyre’s project of breaking down the division between prudential and other-regarding modes of practical reasoning echoes Sen’s critique of contemporary economists’ failure to acknowledge the relevance of rational motivation that is other-regarding. Community Land Trusts, as nonprofit organizations dedicated to ideals of social welfare but democratically controlled to reflect the actual interests of community members, also straddle this separation between effectiveness and moral excellence. In integrating understandings of irreducible goods and of other-regarding motivation, Sen is careful to preserve workable metrics for policy analysis.<sup>244</sup> MacIntyre rejects this calculation altogether in favor of a communal deliberation that is

241. Although MacIntyre generally reinforces the importance of the moral unity of a virtue-centered community by referring to “community” in the singular, he adds that

[w]e are often members of more than one community and we may find a place within more than one network of giving and receiving. Moreover we move in and out of communities. If therefore from now on I continue for simplicity’s sake to speak of the community or network to which someone belongs, the reader should supply the missing arm of the disjunctions: ‘community or communities’, ‘network or networks.’

MACINTYRE, *supra* note 17, at 122–23 (emphasis omitted).

242. *Id.* at 142.

243. For a discussion of undemocratic community organizations from the perspective of community lawyers, see generally Michael Diamond & Aaron O’Toole, *Leaders, Followers, and Free Riders: The Community Lawyer’s Dilemma When Representing Non-Democratic Client Organizations*, 31 *FORDHAM URB. L.J.* 481 (2004).

244. See SEN, *supra* note 23, at 75 (“The amount or the extent of each functioning enjoyed by a person may be represented by a real number, and when this is done, a person’s actual achievement can be seen as a *functioning vector*. The ‘capability set’ would consist of the alternative functioning vectors that she can choose from.”).

R

R

accountable only to the virtues, especially to just generosity.<sup>245</sup> But intentional imprecision in reciprocity can well serve residents of an economically diverse community, as long as they do not cut themselves off from crucial feedback.

Community Land Trusts move away from the market's allocation information in the contexts of housing and open space management. They create inclusionary housing by making homes available at below-market prices.<sup>246</sup> CLTs keep the investment in social equality local by limiting the resale of the property.<sup>247</sup> CLTs offer the public good of recreational space in order to bring together the diverse communities that they have fostered.<sup>248</sup> By retaining corporate ownership of the land, members of the community are able to allocate these resources in a manner consistent with their interests and commitment to just generosity. In this Part of the Article, the discussion will turn to how a CLT's interaction with the market, the state, and its own members might beneficially reflect the neo-Aristotelian ideas of Amartya Sen and, in particular, those of Alasdair MacIntyre.

#### A. *Contending with the Market*

Both Sen and MacIntyre argue for cooperative efforts—specifically, efforts to increase equality—that pay attention to the actual availability of basic goods such as housing, education, and social inclusion.<sup>249</sup> An unrestricted market will not spontaneously generate this movement and may work to undo attempts to promote equality through in-kind assistance.<sup>250</sup> In this context, rules prohibiting the cashing-in of these benefits are promoted, and criticized, as paternalistic attempts to protect marginalized recipients against the same poor judgment that is presumed to have caused their need for help in the first place.<sup>251</sup> This condescending view of the appropriate scope and function of inalienability rules does not give a full account of their benefits for the property owner and says nothing about their social benefits. Peggy Radin moves beyond consequentialist concerns by showing how removing certain goods from the domain of commodities sup-

---

245. See *supra* Part III.B.

246. See *supra* Part II.B.1.

247. See *supra* notes 79–87 and accompanying text.

248. See *supra* Part II.B.2.

249. See *supra* Part III.A, B.

250. See Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 959–60 (1985).

251. For a more abstract framing of paternalistic inalienability, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1113 (1972).

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 109

ports property relationships that are constitutive of personhood.<sup>252</sup> She and others have pointed to the home as a prime example of a property relationship that has resisted complete commodification because of its importance to the self.<sup>253</sup> But the investigation of the social benefits of inalienability has come from a more utilitarian perspective. A law and economics dialogue—once dominated by calls for maximizing the realm of the free market—now includes the recognition by some of the relevance of alienability restrictions to supporting community and other social goods.<sup>254</sup>

Structuring property entitlements to shape how the market allocates resources has been a favorite topic of legal scholarship for three decades. In *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, Guido Calabresi and A. Douglas Melamed set out a three-part taxonomy of property rights protection that has sparked an enduring interest in how property law increases or decreases the prospects for efficient transfers.<sup>255</sup> Liability rule entitlements, which are protected only by money damages, generally allow for involuntary compensated transfers.<sup>256</sup> On the other hand, transfers of property rule entitlements, which are protected by injunctive relief, require the consent of the holders, some of whom may hold out for exorbitant premiums.<sup>257</sup> Inalienable rights are even less liquid in that they cannot be legally transferred even with the cooperation of the owner.<sup>258</sup> Those advocating maximum availability of efficiency-promoting transfers have pressed for favoring liability rule protection

---

252. See generally Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 991–1002 (1982) (discussing sanctity of the home).

253. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 108–10 (1996); accord Benjamin Barros, *Home As a Legal Concept*, 46 *S. CLARA L. REV.* 255, 282–300 (2006) (surveying legal doctrines that balance and that fail to balance the importance of home with competing interests); Lorna Fox, *The Idea of Home in Law*, 2 *HOME CULTURES* 25, 26–27 (2005) (providing an analysis of residential ownership as an internationally protected human right in the context of foreclosure); 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, 958–61 (2006) (showing that owners of homes taken by eminent domain are often not adequately compensated by payment of market value). *But see* Stephanie Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 *MICH. L. REV.* 1093, 1110–15 (disputing treating homes as constitutive of the personal identities of the resident owners).

254. See, e.g., Lee Anne Fennell, *Adjusting Alienability*, 122 *HARV. L. REV.* 1403, 1451–57 (2009) (noting that resale restrictions can filter out buyers who do not focus on use value of the property); Amnon Lehavi, *Mixing Property*, 38 *SETON HALL L. REV.* 137, 200–02 (2008) (examining CLTs as an innovative mixed property regime)

255. Calabresi & Melamed, *supra* note 251, at 1092–93.

256. *Id.* at 1092.

257. *Id.*

258. *Id.* at 1092–93.

of entitlements.<sup>259</sup> But more recently, advocates of property rules and even inalienability rules have been able to make the case for the social benefits of these types of entitlement protections as well.<sup>260</sup>

Abraham Bell and Gideon Parchomovsky have argued that property rule approaches can better promote social gains associated with stability in voluntary ownership.<sup>261</sup> If an owner values his or her property more highly than the market does, a compelled transfer to someone who is willing to pay only the market price could be an inefficient reallocation.<sup>262</sup> Fennell has proposed a system of “revealing options” to elicit the amount of this owner surplus so as to allow it to be more precisely protected.<sup>263</sup> The difference between use value and exchange value also plays a central role in justifying certain efficient deployments of inalienability rules.

In her recently published article, *Adjusting Alienability*,<sup>264</sup> Lee Fennell shows that alienation restrictions are able not only to stabilize attempts at redistribution but also to support, rather than to frustrate, attempts to allocate goods, such as community membership, to those who will put them to highest and best use. As the article’s title suggests, Fennell emphasizes that the right to transfer one’s property “is not a binary switch to be turned on or off.”<sup>265</sup> Alienability can be shaped to minimize the harms that are created by blocking efficient transfers to users who genuinely value the property more highly while offering benefits that tailored alienability restrictions might uniquely, or at least most effectively, offer.<sup>266</sup> Fennell shows that, in circum-

---

259. See, e.g., Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 723–756 (1996) (finding that the deployment of liability rules is unambiguously superior in the context of harmful externalities, but not in the property rights arena).

260. See, e.g., Fennell, *supra* note 254, at 1451–57 (explaining the utility of inalienability rule protection in certain circumstances); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1754–91 (2004) (exploring the information cost advantages provided by use of property rules). R

261. See Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 615 (2005).

262. Cf. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines As Land Use Controls*, 40 U. CHI. L. REV. 681, 736 (1973); Kelly, *supra* note 253, at 950–51. R

263. See, e.g., Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1433–37 (2005) (explaining the uses of mandatory self-made options); Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 995–96 (applying self-assessed valuation to the problem of efficiently pricing subjectively valued property in an eminent domain condemnation). R

264. Fennell, *supra* note 254.

265. *Id.* at 1408.

266. Fennell’s project of blurring the line between alienability and inalienability is, in many ways, analogous to the work that Abraham Bell and Gideon Parchomovsky have done. Their work involved identifying and promoting the utility of what they call “pliability rules,” which are rules that adjust along the boundary of strong, injunction-based protection and more flexible,

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 111

stances where the goal of transfer is to ensure the maximum in-kind valuation of the property, alienability restrictions can promote self-selection among buyers, thereby weeding out speculators.<sup>267</sup> Pricing mechanisms and screening processes may provide alternative but not as efficient means of achieving this same goal.<sup>268</sup> With regard to the purchase of a primary residence, differences in so-called willingness to pay reflect income disparities more than actual consumer valuations of homes and community memberships. Thus, monetary pricing of the property will not necessarily transfer the property to those who value it most for its opportunity to provide the shared goods of community. Instead, the property may go to those who value these goods less but have the finances available to bid the property up. A subsidy-based approach can avoid this result by pricing the property sufficiently below market in order to attract a large pool of willing, income-qualified buyers. The buyers could then be interviewed to see not only if they highly value membership in the community but also if they meet other characteristics that are attractive to those interested in creating an economically diverse community of choice. Fennell, like Rose-Ackerman before her, points out that a restriction on the alienability of the property can discourage those who are more interested in the exchange value than the use value of the property from even attempting to purchase it.<sup>269</sup> These alienability restrictions do not need to replace pricing, or especially, screening mechanisms as important evaluators of potential buyers, but the self-selection process can be an important tool to attract persons ready to increase the community's social capital.

Fennell suggests that put options can help avoid trapping entitlement holders who are subjected to alienability restrictions.<sup>270</sup> A put option, the inverse of a call option, allows the entitlement holder to demand an identified buyer to purchase the property at a preset price.

---

damages-based protection. See Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 5 (2002). For examples of pliability rule approaches to homeownership and community control of land resources, see Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807, 1875–78 (2004) (proposing a community referendum on specific or monetary relief in environmental justice cases); Fennell, *supra* note 263, at 995–96 (proposing that homeowners be allowed to opt out of vulnerability to condemnation by paying a premium on their property taxes); Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465 (2008) (proposing the enabling of collective bargaining to overcome holdout problems that are usually resolved by eminent domain); Kelly, *supra* note 253 (proposing increased property rule protection for residential condemnees in urban redevelopment projects).

267. See Fennell, *supra* note 254, at 1453.

268. See *id.*

269. *Id.* (citing Rose-Ackerman, *supra* note 250, at 940).

270. *Id.* at 1457.

R

R

R

R

In this way, a homeowner whose desire to remain in the house decreases can be assured that alienability restrictions will not prevent him or her from having the freedom to move. By structuring their resale restrictions as preemptive options, CLTs achieve these same goals. The CLT never prohibits the homeowners from selling their homes; instead, it requires that they notify the land trust when the homeowners decide to sell.<sup>271</sup> The land trust, then, has a certain prescribed period of time to purchase the property at the price set by the formula.<sup>272</sup>

As important as it is to be able to attract residents to a community who truly value membership for its own sake, the land trust alienability structure is set up in anticipation of expected changes.<sup>273</sup> Even if the land trust model may promote stability in homeownership, it is also designed to accommodate the mobility that is a fact of life, particularly in urban communities. The need to structure exit provisions for homeowners offers another salient feature that is important for the overall health of the community.

By weeding out speculative buyers, alienability restrictions do not encourage purchase by people who are committed to community in the abstract so much as people who value the particular community they are joining. If their desire to remain in that community changes not because of a change in their own life situations, but because the community itself is no longer as attractive, then severe alienability restrictions might hamper important early signals of community distress. In inner-city communities where interdependence is a lived reality, it may be even more important for the community not to insulate itself from indications that its members are becoming more likely to secede. Alasdair MacIntyre has written that a community seeking to preserve its traditions against the influence of the market and state has ominously suggested that it may be necessary to impose "limits to labor mobility."<sup>274</sup> However, as discussed in the previous Section,<sup>275</sup> his underlying philosophy of community sustainability ultimately values the

---

271. See *supra* notes 78–81 and accompanying text; see also Kelly, *supra* note 79.

272. The language of the option generally allows the CLT to assign its rights to a qualified homebuyer. See *INST. FOR CMTY. ECON.*, *supra* note 10, at 13-21 to 13-24.

273. For a discussion of the importance of planning for the future need to adjust alienability restrictions on subsidized homes, see Kelly, *supra* note 79.

274. MACINTYRE, *supra* note 17, at 145.

275. See *supra* notes 215–219 and accompanying text.

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 113

falsification information that gradual exit of community members can provide.<sup>276</sup>

MacIntyre approaches the fundamental questions underlying community control of vital resources from the viewpoint of the community members themselves.<sup>277</sup> MacIntyre insists that an authentic ordering of a community's tangible economic resources must come from the members' shared understandings of and communal deliberations about the common good.<sup>278</sup> His focus is on the need to control those resources that protect the integrity of the networks of giving and receiving, which are essential to an authentic and sustainable politics.<sup>279</sup> Although his vision is deliberately devoid of detail, inclusive community membership and community-based decision making on questions that relate to the common good are fundamental. As uncompromising as MacIntyre's call for decommodification of community membership is, his insistence that a community remain open to signals of unsustainability also supports a measured approach to restricting the resale of CLT homes. This moderate approach to collectivization resonates with contemporary commons legal scholarship that emphasizes the importance of exit options to sustainability.

By judicious use and retention of housing subsidies, CLTs can create and sustain economic diversity in communities that are truly characterized by choice. In setting resale formulas that share some of the equity appreciation, the CLT membership as a whole exemplifies just generosity for both current and future CLT homeowners.<sup>280</sup> The shared belief in the possibility of a multi-class neighborhood produces various kinds of important social capital but is not itself driven by the goal of optimizing social capital.<sup>281</sup> It is instead a commitment to development and improvement without displacement and exclusion.

---

276. For a discussion of the issues of "exit" in communal reform movements in Israel, see generally Amnon Lehari, *How Property Can Create, Maintain, or Destroy Community*, 10 *THEORETICAL INQUIRES* L. 43 (2009).

277. See MACINTYRE, *supra* note 16, at 129–30, 144–45.

278. *Id.*

279. *Id.*

280. The terms of the resale formula constitute a core policy decision for the Community Land Trust. As such, adoption and amendment of the formula is generally put to a vote of the entire CLT membership. See *INST. FOR CMTY. ECON.*, *supra* note 10, at 5-40 to 5-41 (noting that even those CLTs that empower the Board to set the original resale formula often require that any amendment of it be ratified by the membership).

281. Peter Byrne and Michael Diamond have rightly criticized as a "strawman" Robert Ellickson's hypothetical "Waring Blender" model of neighborhood social composition in which every neighborhood would be engineered to be precisely reflective of the social composition of the general population as a whole. J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 *FORDHAM URB. L.J.* 527, 564 (2007) (citing Robert C. Ellickson, *The Puzzle of the Optimal Social Composition of Neighborhoods*, in *THE*

R

R

Residents of various economic disposition show just generosity not by demanding a neighborhood that precisely reflects the social composition of the entire region as a whole. This depiction of community egalitarianism would be as distorted as a caricature of a Tieboutian household that would refuse to stay in a neighborhood unless everyone in it was socioeconomically identical to it.<sup>282</sup> By adjusting the alienability of subsidized homes, CLTs make room for sustained imprecision in reciprocity.

CLTs fashion a residential property model for what Wallace Stegner referred to as the “stickers,” which are persons whose relationship with the land and the community are constitutive parts of their lives rather than stepping stones to an imagined optimal future.<sup>283</sup> MacIntyre understands human flourishing as necessarily involving authentic relationships among persons, able-bodied and disabled alike, sustained through networks of giving and receiving.<sup>284</sup> However, his radical rejection of instrumentalism also opens the door to an ethic of community that includes the land itself.<sup>285</sup> Everything about life in an inner-city neighborhood would seem to cut against both long-term planning and awareness of the land. Poverty, violence, and substance abuse provide just some of the occasions for recurring crises. The lack of natural features would seem to make land a historical rather than present reality. Yet CLT community members are embracing care of the land not only as that which literally brings them together but as an integral feature of their lives with one another.<sup>286</sup> In protecting not only affordable housing but natural spaces in their neighborhoods,

---

TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES 199, 201 (William A. Fischel ed., 2006)).

282. Tiebout’s theory that homebuyers, when choosing residential locations, are shopping for a basket of locally provided public goods, has dominated law and economics discourse on local government issues. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); accord WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001).

283. WALLACE STEGNER, *WHERE THE BLUEBIRD SINGS TO THE LEMONADE SPRINGS: LIVING AND WRITING IN THE WEST* xxvii (2002).

284. See *supra* Part III.B.

285. Eric Freyfogle has advocated land use and conservation practices that express the “land ethic” of Aldo Leopold: “A thing is right . . . when it tends to preserve the integrity, stability, and beauty of the biotic community.” FREYFOGLE, *supra* note 1, at 140 (quoting ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* 224–25 (1949)). Leopold’s conception of “the biotic community” includes the land itself as something “akin to a living organism.” *Id.* at 136.

286. See *supra* Part II.B.2. For an exploration of the connection between urban community gardens and the environmental conservation movement, see PETER FORBES, *THE GREAT REMEMBERING: FURTHER THOUGHTS ON LAND, SOUL, AND SOCIETY* 49–55 (2001).

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 115

they are fostering communities that are not only extensive in their diversity but also intensive in their sense of conviviality.

*B. Governmental Control or Community Control?*

Although the permanent affordability of homes remains the core issue for CLTs, the control of shared spaces also raises issues as to the need for small parks and community gardens to be controlled by democratically controlled nonprofit organizations, as opposed to local governments that are less directly accountable to residents. This discussion of local versus sublocal stewardship over neighborhood gathering spaces in turn leads to questions of how a community decision making process within a CLT would differ from the land use planning processes that are typically offered by municipal parks departments. Together, the two issues offer an opportunity to explore the practical and philosophical implications of community conservation in a neo-Aristotelian mode.

Partnership agreements between local community groups and municipal parks departments can accomplish many of the benefits of community investment and can increase confidence in local governments' commitments to preserve small-scale amenities such as parks and gardens. In cities facing long-term economic decline, community groups looking to steward green space may find themselves in long-term agreements with municipal governments looking to "right size" their jurisdictions.<sup>287</sup> But in cities with rapidly appreciating real estate markets, there may be no substitute for CLT title ownership of these green jewels of open space.<sup>288</sup>

A deeper understanding of the social theory behind Community Land Trusts helps their proponents develop them appropriately as they contend with and complement dominant market and state institutions. The seemingly anarchist vision of Alasdair MacIntyre provides that popularly controlled local institutions are essential for the proper

---

287. See Joseph Schilling, *Blueprint Buffalo—Using Green Infrastructure to Reclaim America's Shrinking Cities*, [http://metrostudies.berkeley.edu/publications/proceedings/Shrinking/18Schilling\\_PA\\_final.pdf](http://metrostudies.berkeley.edu/publications/proceedings/Shrinking/18Schilling_PA_final.pdf). As one Michigan local government official said recently, "If it's going to look abandoned, let it be clean and green . . . Create the new Flint forest—something people will choose to live near, rather than something that symbolizes failure." David Streitfeld, *In Flint, Mich., Fighting to Save a Failing Town by Shrinking It*, N.Y. TIMES, Apr. 22, 2009, at A12.

288. This commitment to protecting natural features against destructive development might be especially important for land that plays a key role in the neighborhood watershed. For a discussion of how urban conservation practices impact storm water runoff into environmentally sensitive streams and bays, see Miriam Avins, "What You Can Do with a Vacant Lot": The Role of Community Gardens and Pocket Parks in a Sustainable Land Bank Plan (August 7, 2008) (unpublished manuscript, on file with author).

stewardship of basic resources that are necessary to “the networks of giving and receiving” that are at the center of a just community.<sup>289</sup> Moreover, these institutions must be prepared for constant, if only arms-length, engagement with the private businesses and state agencies that control the public as well as private goods that the community cannot do without.<sup>290</sup> It would seem that MacIntyre’s categorical mistrust of corporate and governmental bureaucracies would push communities influenced by his thinking to insist on complete and direct control over all community space land resources.<sup>291</sup> But even though the virtues clearly counsel a long-term view that resists preoccupation with external goods, nothing about the “politics of self-defense” prevents an authentically pragmatic approach to the mode of community control over common space.

Appropriate community governance of a CLT and other institutions of neighborhood economic empowerment require ongoing deliberation as to the interests and ideals of the community. The governing documents will include certain commitments to charitable goals of the organizations. In certain program areas, such as affordable housing, these priorities will often be quite specific. But more importantly, CLT bylaws reserve the control of certain essential aspects of the organization’s mission to the membership itself. The formula for calculating the option price for CLT homes expresses such a core element of the organizational mission that its original enactment and subsequent amendment are reserved to the CLT membership as a whole.<sup>292</sup> Likewise, any decision to sell CLT land is presumed to be contrary to the organizational mission and must be ratified by the CLT membership.<sup>293</sup> But procedures cannot produce authentic dialogue; instead they can only make room for it.

The substance of community discussions over how to protect and use land resources must reflect the traditions and lived experiences of the community members. Without some shared understanding of the common good, even a small-scale organization will become a forum for competing interests arbitrarily asserting claims. But by drawing upon the problem-solving resources that helped them not only to survive but also to create their CLTs, these communities will be able to articulate land use plans that reflect both their common interests and

---

289. See *supra* notes 193–214 and accompanying text.

290. See *supra* notes 287–288 and accompanying text.

291. The more consequentialist capabilities approach of Sen, on the other hand, would point toward an empirical examination of whether or not community control yielded increased benefits, including greater social capital. See *supra* Part III.B.1.

292. See INST. FOR CMTY. ECON., *supra* note 10, at 5-40 to 5-41.

293. *Id.* at 5-38 to 5-39.

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 117

ideals.<sup>294</sup> If they keep themselves open to information that may call into question their achievements or success, they may discern the need to make fundamental changes in their approach to the control of land resources.

In addition to, or in lieu of, pursuing outside resources for community amenities and inclusionary subsidies, CLTs may try to institute a way of marshaling the monetary wealth of their own community. For years, law and economics scholars have written about transplanting the idea of homeowners associations to existing urban neighborhoods.<sup>295</sup> Now, special assessments imposed by community referenda are funding community benefits districts in Maryland.<sup>296</sup> But the decision to pursue this strategy should be the product of deliberation on how it would advance that community's understanding of the common good of all its members, not just those who are most likely to contribute to some optimal assortment of public goods.

Similarly, the resident members of a CLT may see the need to connect with other communities with similar interests, ideas, and issues. Scott Cummings has cited the constructive efforts of the Figueroa Corridor Coalition for Economic Justice as a model for progressive coalitions that can both demand and create social justice.<sup>297</sup> As with any such efforts, there will be disagreements and conflicts over how to proceed. It is certainly possible that the resolution of these differences will be determined purely by which group has more power relative to the other; however, with some shared understanding of the justice of their common cause and a commitment to truthfulness and just generosity, neo-Aristotelian organizing might produce deeper understanding and empowering bonds between groups.<sup>298</sup>

## V. CONCLUSION

The Community Development movement arose from the ideals, strategies, and victories of the Civil Rights and Community Organiz-

---

294. For a postmodernist approach to collective problem solving that takes community traditions seriously, see generally Gerald P. López, *Shaping Community Problem Solving Around Community Knowledge*, 79 N.Y.U. L. REV. 59 (2004).

295. See, e.g., Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75 (1998); George W. Liebmann, *Devolution of Power to Community and Block Associations*, 25 URB. LAW. 335 (1993); Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827 (1999).

296. See R. Lisle Baker, *Using Special Assessments As a Tool for Smart Growth: Louisville's New Metro Government As a Potential Example*, 45 BRANDEIS L.J. 1, 26–27 (2006).

297. See Cummings, *supra* note 5, at 303–04, 313–30.

298. For a discussion of the importance of the neo-Nietzschean virtue of receptive generosity in progressive coalitions, see Coles, *supra* note 14, at 381–86.

R

R

ing movements.<sup>299</sup> The latter brought about the defeat of Urban Renewal by grassroots neighborhood organizations that were scattered throughout America's inner-cities.<sup>300</sup> The planned decimation of viable working class and poor urban communities inspired not only constant vigilance but also proactive economic planning among city dwellers. Defending the community space against large private and public interests has been the hallmark of the community organizing movement and many of the development organizations that it has inspired. As the Urban Renewal era ended, gentrification of certain urban communities was recognized as the new threat.<sup>301</sup> Even the most well-intentioned efforts to revitalize struggling neighborhoods were regarded with suspicion because vanguard strategies to secure an area for more affluent taxpayers thereby displaced current residents who were unable to keep up with the rising tide of rents and property tax obligations. The Dudley Street Neighborhood determined that the proximity of its Roxbury neighborhood to some of the fast growing areas in Boston demanded a long-term land control strategy. Once they had control of the land, they wanted not only to generate the initial development plans but to retain sufficient control in order to ensure community-supportive uses into the distant future. Similarly, organized residents of the Figueroa Corridor succeeded in securing housing trust funds from the City of Los Angeles as part of a community benefits agreement that made construction of the Staples Center possible.<sup>302</sup> They also saw that investment presented critical displacement pressures that could only be addressed through the long-term dedication of land to affordable housing.<sup>303</sup>

The successes of the low-income residents of Roxbury and Central Los Angeles offer positive examples of both the engagement with and the active resistance toward the market and the state that MacIntyre sees as necessary for any community of the common good in the contemporary world. The very nature of the cooperative activity that the people of Dudley Street have undertaken scarcely allows them individualistic detachment from one another. The creation of new archi-

---

299. See Scott L. Cummings, *Community Economic Development As Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 413–21 (2001) (recounting how civil rights advocacy led to federal funding for community development and how Alinsky's neighborhood organizing gave rise to grassroots political coalitions for economic justice).

300. McFarlane, *supra* note 49, at 871–75.

301. John A. Powell, & Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433, 435–54 (2003).

302. Cummings, *supra* note 5, at 322.

303. *Id.*

2009] *LAND TRUSTS THAT CONSERVE COMMUNITIES* 119

ecture and public art requires exploration of their needs, their history, and their hopes for the future. The questions of how to allocate scarce resources continually presents them with issues of internal justice. The selection of residents for new housing, if it is to be sustained, cannot be founded merely on procedurally engineered compromise among factional interests, but on a growing sense of the good that this housing venture is serving. This entails reflection on the fundamental inadequacies of the market and the state in meeting basic human needs and further exploration of the new residents as contributing members of the growing community.

The formation of a CLT in no way guarantees MacIntyre's "goods of conflict," much less the networks of giving and receiving through which justice and just generosity, as well as commitments to truth and beauty, are cultivated. A CLT is an institution, hopefully one that allows for, and even encourages, a local politics that is oriented toward justice. The neighborhood proponents of the CLT model understand, along with MacIntyre, that the true value of its structure is its contribution to the possibility for, rather than assurance of, genuine sustainable community. The CLT exemplifies the sort of intermediate institution that MacIntyre delimits by rejecting both the state and the family as primary institutions for political deliberation and action. By reserving the vital resources of land for community control, the foundation and development of the CLT places its members and their shared understanding of the goods and the common good for which land should be used in conflict with the state and especially the market. Community economic development activists, especially those who are veterans of the community organizing movement, understand the vital role that this conflict plays in defining and strengthening the community's polity.

