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Stewarding the City as Commons: Parks Conservancies and Community Land Trusts

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STEWARDED THE CITY AS COMMONS: PARKS CONSERVANCIES AND COMMUNITY LAND TRUSTS

John Krinsky & Paula Z. Segal†

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INTRODUCTION

Civil society is a battleground.

If we understand civil society to mean the whole panoply of voluntary associations that are neither governmental nor “market” organizations—i.e. not organizations oriented toward profit—we immediately understand how vast a field for battle it really is. It comprises parent-teacher associations and mosques, unions, environmental advocacy groups, evangelical churches, rifle clubs, and much, much else. Alexis de Tocqueville noted the importance of a robust civil society for democratic governance, stating that Americans’ penchant for civic association developed the interpersonal trust necessary for the nonviolent resolution of conflict.¹ But, it has also become clear that a robust civil society *eases* the work of formal governing by effecting a division of labor between governmental and private organizations in the matter of social welfare provision and of social integration, and does so beyond the democratic context. A robust and independent civil sphere reduces the costs of governance by forming a complex context of consent, wherein the very intersecting networks of group membership and participation help keep both discourses of support for and opposition to the state and its policies within bounds and render civic groups unlikely to organize as an alternative claimant to state power.²

Because civil society is so diverse, it contains groups of all persuasions and of many, often-shifting, functions, and they often come into conflict. Civil society organizations, such as unions, come into conflict with other civil society organizations, such as chambers of commerce, over minimum wages, and tenant organizations come into conflict with landlord lobbying groups. Equally, tenant organizations sometimes become nonprofit landlords, as they did in great numbers during the 1980-90s in New York City, when the municipal government sought to dispose of thousands of tax-foreclosed properties it had taken from landlords who

¹ See 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 895-902 (James T. Schliefer trans., Eduardo Nolla ed. 1835).

² See ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (ElecBook London, Quentin Hoare & Geoffrey Nowell Smith trans. & eds. 1999) 236-38 (1971). See also IRA KATZNELSON, *CITY TRENCHES: THE PATTERNING OF CLASS IN THE UNITED STATES* 19 (1981) (adapting Gramscian understandings to contemporary institutional divisions in urban politics); Joseph Buttigieg, *The Contemporary Discourse on Civil Society: A Gramscian Critique* 32 *BOUNDARY 2*, at 33, 40-41 (2005) (discussing the relation of civil society and the state).

abandoned them.³ The government looked to tenant organizations and turned them into partners, paying them to be part of a solution for the blossoming housing crisis. Similarly, the City mobilized and consolidated existing volunteer efforts to care for its parks when the fiscal crisis of the late 1970s led to steep cuts in parks maintenance and the layoffs of hundreds of parks workers.⁴ These efforts, especially those galvanized in the late 1990s, after another round of layoffs in the early 1990s, became an array of parks conservancies, “Friends of” various parks, and additional similar organizations, which the City government coordinated.⁵ In parallel, residents of neighborhoods dotted with vacant lots in the wake of a building collapse transformed them into spaces that functioned as parks without municipal support or, frequently, without permission. Decades later, as a result of protest and litigation, the City government finally recognized that these open spaces, created by residents and stewarded independently of the City, were as valuable to New Yorkers as the parks that the City itself had created (and abandoned).⁶

This paper considers efforts to steward urban land in the distinct forms of affordable housing and public parks in the shared context of their growth in New York City from the 1980s until today.

The stewardship efforts for affordable housing take the form of community land trusts (CLTs), which are nonprofit organizations that own and lease land. In so doing, CLTs use the lease mechanism to enforce restrictions on the use and affordability of housing.⁷ Boards of directors, made up of individuals selected to represent different community constituencies, run CLTs.

³ See COREY ROSSI, UNIV. AT BUFFALO LAW SCH., *MARKETING CITY-OWNED PROPERTIES* 12-14 (2008), <https://perma.cc/MB47-F2RP>; see also generally DOUG TURETSKY & MARGARET MITTLEBACH, *WE ARE THE LANDLORDS, NOW: A REPORT ON COMMUNITY-BASED HOUSING MANAGEMENT* (1993); Desirée Fields, *Contesting the Financialization of Urban Space: Community-Based Organizations and the Struggle to Preserve Affordable Rental Housing in New York City* 37 J. URB. AFF. 144 (2015); Laura Wolf-Powers, *New York City’s Community Housing Movement: Achievements and Prospects*, in *COMMUNITY ACTION AND PLANNING: CONTEXTS, DRIVERS AND OUTCOMES* (Nick Gallent & Daniela Ciaffi eds., 2014).

⁴ JOHN KRINSKY & MAUD SIMONET, *WHO CLEANS THE PARK? PUBLIC WORK AND URBAN GOVERNANCE IN NEW YORK CITY* 5, 52, 156-61 (2017); see generally KIM PHILLIPS-FEIN, *FEAR CITY: NEW YORK’S FISCAL CRISIS AND THE RISE OF AUSTERITY POLITICS* 4-7 (2017) (providing a detailed account of New York City’s fiscal crisis and how austerity politics continue to impact New York today).

⁵ KRINSKY & SIMONET, *supra* note 4, at ch. 5.

⁶ See, e.g., Camille Bautista, *34 Community Gardens Saved from Demolition After City Makes Them Parks*, DNA INFO, <https://perma.cc/U64V-C93V> (last updated Jan. 3, 2016, 9:10 AM).

⁷ John Emmeus Davis, *Common Ground: Community-Led Development on Community-Owned Land*, ROOTS & BRANCHES (June 1, 2015), <https://perma.cc/G7Q4-CQ46>.

Stewardship efforts for parks take the forms of, on the one hand, conservancies and “Friends of” groups—which are self-perpetuating non-profit organizations that coordinate volunteer efforts in parks and sometimes contract with the City to provide staff and capital improvements—and, on the other, unincorporated associations self-anointed as creators of new park spaces.⁸

Organizations engaged in the stewardship of land for housing and of land as open space in the City can be understood—and sometimes understand themselves—in the context of “the commons” and its governance. Each organization struggles with its own dilemmas with respect to their role in governing the commons, dilemmas typical of other groups that have been the subject of commons scholarship. But there are contrasts between their approaches to these dilemmas that suggest that a variety within and between each form of commons is consequential from a political and a policy standpoint. In addition, these contrasts illustrate that not all “commoning” is alike, in part because the relationship of the organizations to place-based capital—in this case, urban land—diverges in critical, and even opposed, ways.⁹

This article examines the mechanisms for commoning the city itself. It begins with a brief introduction to an understanding of the commons and of commoning, following the lead of Elinor Ostrom’s “design principles” for governing common pool resources (CPRs). The article then discusses the ways in which urban land can be understood as a CPR but locates the discussion of commons governance more clearly in a critical reading of the recent history of neoliberal governance. An introduction to CLTs and parks conservancies in some more historical detail follows, presenting their governance strategies against the background of Ostrom’s principles, and discussing their typical governance dilemmas and results. Lastly, the article discusses ways in which both CLTs and conservancies diverge from others of their same class (some conservancies from others; some CLTs from others), largely based upon their respective effects on urban land values, and hence, on the ability of each of the organizations to steward resources *for the commons* and *in common*.

⁸ KRINSKY & SIMONET, *supra* note 4, at 156-60.

⁹ See generally JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 147-99 (1987) (arguing that the interests of place-based capital, which is capital dependent on the intensified use of urban land for profit, create sometimes strange-bedfellow coalitions that dominate urban decision-making). Conservancies and CLTs differ in that CLTs explicitly seek to remove land from capital circulation.

Throughout, John Krinsky and Maud Simonet's *Who Cleans the Park?*¹⁰ will be used for a discussion of conservancies; the authors' ongoing research and participation in community land trust (CLT) activism in New York City forms the foundation for the discussion of CLTs.

I. GOVERNING THE (NEOLIBERAL) COMMONS

The "commons" is best understood as a set of collective practices that support collective rights.¹¹ Elinor Ostrom further specifies that the commons applies to the management of common pool resources (CPRs).¹² A common pool resource is a "natural or man-made resource system that is sufficiently large as to make it costly (but not impossible) to exclude potential beneficiaries from obtaining benefits from its use."¹³ Commons stewardship mediates the clash between private and public interests: there is a public interest in the continued availability of the resource, but a private interest in appropriating and using the resource to the exclusion of others. In this way, CPRs are both similar and different from public goods, such as clean air, which is available to all, but not divisible into appropriable and depletable portions. Hence, while there are free-rider problems in preserving CPRs, in the same way as there are with public goods, the possibility of preserving *some* private appropriation *while helping to renew, preserve, and expand the resources* remains a key theme in efforts at "commoning."¹⁴ Commons are less about the right to the *use* of a resource, and more about the right to participation in how a resource is preserved and expanded.¹⁵ Commoning is thus an inherently expansionist and future-oriented project.

David Harvey describes the process of creating shared value in commoning:

There is, in effect, a social practice of *commoning*. This practice produces or establishes a social relation with a common whose

¹⁰ KRINSKY & SIMONET, *supra* note 4, *passim*.

¹¹ See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 20, 27 (Dec. 10, 1948) ("Everyone has the right freedom of peaceful assembly and association . . . Everyone has the right freely to participate in the cultural life of the community . . ."); see also Michael Freeman, *Are There Collective Human Rights?*, 43 POL. STUD. 25, 28-29, 32-35 (1995).

¹² ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 30 (1990).

¹³ *Id.*

¹⁴ See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2 (1965) (detailing more information on the cost of collective action to preserve individual interests in public goods).

¹⁵ See DAVID HARVEY, REBEL CITIES: FROM THE RIGHT TO THE CITY TO THE URBAN REVOLUTION 72-73 (2012) [hereinafter HARVEY, REBEL CITIES].

uses are either exclusive to a social group or partially or fully open to all and sundry. At the heart of the practice of commoning lies the principle that the relation between the social group and that aspect of the environment being treated as a common shall be both collective and non-commodified—off-limits to the logic of market exchange and market valuations.¹⁶

When applied to real property in the urban context, this appears “absurdly optimistic” because the market captures the value created by new amenities, such as more stable neighborhoods, lower crime, cleaner parks, commercial activity, and “people living in proximity and creating art and culture”: the market translates all of that into “land value.”¹⁷ Capturing that value interrupts the function of a city as a commons.¹⁸ “As long as land can be bought, the enclosure of the *common wealth* created by people in proximity of that land is a certainty.”¹⁹ Even when the land is a private house purchased by a single buyer, “its market value is the sum total of its context; that value (with) draws from the collaborative and parallel efforts of people other than the buyer, seller, and [even] public entities and the infrastructure that they provide.”²⁰

It may seem like a truism of the real estate industry that collective assets near a marketable “private” property make that property worth more to prospective buyers. But, that calculation of worth is itself an enclosure: [the] privatization of shared labor that threatens to displace the very individuals whose labor resulted in the creation of the asset that drives prices up.²¹

¹⁶ *Id.* at 73.

¹⁷ Amy Laura Cahn & Paula Z. Segal, *You Can't Common What You Can't See: Towards a Restorative Polycentrism in the Governance of Our Cities*, 43 *FORDHAM URB. L.J.* 195, 230 (2016).

¹⁸ See generally Sheila Foster & Christian Iaione, *The City as a Commons*, 34 *YALE L. & POL'Y REV.* 281, 313 (2016) (arguing that real estate markets cannot be relied upon “to assemble urban participants optimally or to maximize the positive agglomeration benefits of urban common space”).

¹⁹ Cahn & Segal, *supra* note 17, at 230 (citing Nicholas Blomley, *Enclosure, Common Right and the Property of the Poor*, 17 *SOC. & LEGAL STUD.* 311 (2008)) (discussing how the dynamics of inner-city gentrification constitute an enclosure of urban poor commons).

²⁰ *Id.* at 230-31; see Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 *NOTRE DAME L. REV.* 527, 529 (2013) (“Legal scholars have yet to fully grapple with the costs imposed on the social networks and ties, or social fabric of a community, arising from land use and development decisions.”).

²¹ Cahn & Segal, *supra* note 17, at 231. Cf. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 146-83 (Vintage Books ed., 1992).

This is exactly “what David Harvey terms, ‘accumulation by dispossession,’”²² and “what John Davis describes as ‘immoral’: the private capture of community-generated value and its transformation into individual ‘wealth.’”²³

There is optimism in the reality that institutions have arisen that challenge and distort this market logic by their stewardship of land outside this system of immoral dispossession. Yet, how well they succeed is a question of how much they actually manage to transform urban land into a commons.

Understanding housing as a traditional CPR is fairly straightforward: given our conventions of domesticity, after a certain point, when someone lives on a parcel of land, another person cannot. Thus, not only is the *availability* of the resource depleted, but once appropriated, there is no common right to occupy a given parcel.

The issue of urban land as a common pool resource is less clear when one thinks about parks. Instead, parks seem to be more of a public good—indivisible and non-exclusive. But, there are uses of the parks—including in their administration—that either result in the generation of excludable goods or are excludable and private goods in themselves.

In New York State, where the inquiry here is focused, the public trust doctrine protects the public’s recreational enjoyment of land that has been set aside as parkland.²⁴ Courts affirm that once land has been dedicated to use as a park, it cannot be diverted for uses other than recreation, in whole or in part, temporarily or permanently, even for another public purpose, without legislative approval.²⁵ In order to convey parkland to a non-public entity, or to use parkland for another purpose, even temporarily, “a municipality must receive [prior] authorization from the State” in the

²² Cahn & Segal, *supra* note 17, at 231 (citing DAVID HARVEY, *Capital Bondage*, in *THE NEW IMPERIALISM* 87-136 (Oxford Univ. Press ed. 2003)).

²³ *Id.* (quoting Davis, *supra* note 8).

²⁴ The law recognizes that some lands deserve protection because the government explicitly dedicates them for use as a park, and some lands gain protection because the totality of government action is sufficient to induce the public’s reliance on the open space, even without a formal dedication. *See* Appellants’ Brief at 25-27, *State v. City of New York*, Nos. 200-02038, 2000-02678, 2000 WL 34551035 (N.Y. App. Div. Mar. 29, 2000) (filed to protect community gardens from being auctioned by the City). The standard for implied dedication was reiterated by the New York Court of Appeals in *Glick v. Harvey*, 25 N.Y.3d 1175, 1180 (2015) (“A party seeking to establish such an implied dedication and thereby successfully challenge the alienation of the land must show that (1) ‘[t]he acts and declarations of the land owner indicating the intent to dedicate his land to the public use [are] unmistakable in their purpose and decisive in their character to have the effect of a dedication’ and (2) that the public has accepted the land as dedicated to a public use.”) (alterations in original) (citations omitted).

²⁵ *United States v. City of New York*, 96 F. Supp. 2d 195, 202 (E.D.N.Y. 2000) (citing *Williams v. Gallatin*, 229 N.Y. 248, 253 (1920)).

form of legislation enacted by the New York State Legislature and the Governor.²⁶ Local government holds municipal parkland in trust for the public; the State Legislature must approve its sale or conveyance, as the representative of the people.²⁷ This rule is based on “the importance of parks to a community’s health and the happiness of its citizens.”²⁸ This has been the law in New York since at least 1871.²⁹

Krinsky and Simonet urge an understanding of parks not just as places of leisure, but also as sites of both direct and indirect accumulation and as worksites.³⁰ Here, they draw attention to the ways in which New York City’s municipal government has degraded the labor contracts of city workers, on one hand—staffing the department increasingly with “workfare,” “trainees,” and people sentenced to community service, as well as relying increasingly on individual, civic-group-organized, and corporate volunteers—and privatized the management of many parks through nonprofit conservancies on the other.³¹ Thus, within the context of the regulated non-exclusive use of parks as places of leisure, there are

²⁶ N.Y. STATE OFFICE OF PARKS, RECREATION & HISTORIC PRES., HANDBOOK ON THE ALIENATION AND CONVERSION OF MUNICIPAL PARKLAND 3 (2017) [hereinafter ALIENATION HANDBOOK], <https://perma.cc/DT3D-DZDJ>; Thomas Honan, Comment, *These Parks Are Our Parks: An Examination of the Privatization of Public Parks in New York City and the Public Trust Doctrine’s Protections*, 18 CUNY L. REV. 107, 123-24 (2015).

²⁷ ALIENATION HANDBOOK, *supra* note 26, at 3, n.4 (citing *People v. New York & Staten Island Ferry Co.*, 68 N.Y. 71, 78 (1877)) (“The State, in place of the crown, holds the title, as trustee of a public trust, but the legislature may, as the representative of the people, grant the soil, or confer an exclusive privilege in tide-waters, or authorize a use inconsistent with the public right, subject to the paramount control of congress, through laws passed, in pursuance of the power to regulate commerce, given in the federal Constitution.”); *see also* *Brooklyn Park Comm’rs v. Armstrong*, 45 N.Y. 234, 243 (1871) (“It was within the power of the legislature to relieve the city from the trust to hold it for a use only, and to authorize it to sell and convey.”).

²⁸ ALIENATION HANDBOOK, *supra* note 26, at 3 (citing *Williams*, 229 N.Y. at 254) (“[Parklands] facilitate free public means of pleasure, recreation and amusement and thus provide for the welfare of the community.”); *see also* *Aldrich v. City of New York*, 208 Misc. 930, 940 (N.Y. Sup. Ct. Queens Cty. 1955) (“Parks play a vital role in the health of a community, which ‘has more to do with the general prosperity and welfare of a State than its wealth or its learning or its culture.’”).

²⁹ ALIENATION HANDBOOK, *supra* note 26, at 3. Simultaneously to the development of this legal doctrine, Central Park was developed in the years between 1857 and 1873. Site selection, design and construction were managed by the State of New York (not the City). Increases in property tax revenue to the City were one of the incentives that the State presented to NYC residents as flowing from the project.

³⁰ *See* KRINSKY & SIMONET, *supra* note 4, at 219-30 (contrasting direct accumulation as getting value out of the labor process, which in the public sector, usually means paying workers less, while indirect accumulation means deriving value from trade in the products whose value the workers enhance, such as land values and concessions).

³¹ *Id.* at 20-25, ch. 2.

divisible goods—mostly bad jobs, but occasional access to good ones—on the labor side. On the conservancy side, there is contest over City contracts and their terms, especially over the amount of money that conservancies can retain for their own operation from food and other concessions located in the parks that they manage. For the concessionaires, moreover, parks are sites for employment *and* for sales. When parks give concessions to more expensive vendors—by replacing a hot dog stand with an artisanal barbecue vendor, for example—it puts the full experience of the park out of reach for anyone unable to afford the new concession.³²

Crucially, for people owning property in close proximity to parks that are well cared for, there is a significant premium on their real-estate value that they get to appropriate privately and nearly in its entirety.³³ Ironically, even as it gives explicit protection to a process of commoning, the public trust doctrine can also be viewed as a mechanism to protect the pecuniary interests of property owners who purchase marketable property near parks.³⁴ By preventing the private appropriation of parkland for non-park uses, it protects the park-enhanced market value—or “exchange value,” in Marx’s terms—of neighboring properties.

The labor-cost saving imperative of conservancies, combined with issues concerning a park’s retention of concession revenues, can lead to several situations in which parks take on the character of CPRs. For example, it is an increasingly common practice to preserve the appearance

³² See *id.* at 164-66.

³³ In community gardens, the Parks Department abdicates all responsibility for care, shifting it to residents who have survived decades of disinvestment in every kind of local infrastructure. It may seem that the Department is only lured back by evidence that well-appointed gardens increase property values, see Ioan Voicu & Vicki Been, *The Effect of Community Gardens on Neighboring Property Values*, 36 REAL EST. ECON. 241, 268 (2008), as opposed to the evidence that they improve quality of life. Similarly, as KRINSKY & SIMONET, *supra* note 4, at 221-30, find, recent justifications for the care of parks focus on their role as economic engines. See also APPLESEED, INC., *THE CENTRAL PARK EFFECT: ASSESSING THE VALUE OF CENTRAL PARK’S CONTRIBUTION TO NEW YORK CITY’S ECONOMY* 35-43 (2015), <https://perma.cc/8HN5-LQNM>. Even in the 1850s, the State touted the potential bump to property taxes as a reason that New Yorkers should embrace Central Park; some then did not believe it, opposing the seizure of occupied private land by eminent domain because its dedication as parkland would permanently remove it from the tax rolls. Those New Yorkers were right to concern themselves with the communities, like Seneca Village, that lost their place so that the whole City could have a park. But they were mistaken to worry about the fiscal health of the City as a whole—what the creation of the park took away in terms of individual property tax accounts it gave back by increasing what was due on neighboring properties.

³⁴ See, e.g., *THE TRUST FOR PUB. LAND, THE ECONOMIC BENEFITS OF PARKS, TRAILS, AND CONSERVED OPEN SPACES IN BEAUFORT COUNTY, SOUTH CAROLINA* 2 (2018), <https://perma.cc/4TDT-JERB> (“Parks, trails, and conserved open spaces increase[d] the value of nearby residential properties in Beaufort County because people enjoy these amenities and are willing to pay for this proximity.”).

and health of lawns in parks by fencing them off from the public for significant periods of time.³⁵ One can imagine that the pristine appearance of parks accrues to land values around it, even when this is linked to the public's inability to access significant areas of the park itself. Similarly, controversy has recently arisen around whether ticketed events, such as concerts and galas—themselves a kind of concession—amount to “alienation” of public access;³⁶ this has even extended to *non-ticketed* events such as weddings—for which the wedding party pays—and to free, but closed events, such as barbecues for community-garden members, in gardens that are administered under the Parks Department's Green Thumb program.³⁷

None of this, of course, means that parks are technically a CPR *all the time*, but in their everyday hybridity—and certainly for land that is *not yet but could be* parkland—there are similar problems of governance that civil society organizations face. In an idealized world, the totality of urban land itself *would be* a CPR and everyone—or, at least, the members of the

³⁵ See *Raritan Baykeeper, Inc. v. City of New York*, 42 Misc. 3d 1208(A) (N.Y. Sup. Ct. Kings Cty. 2013). Filed in 2006, this long-running litigation involves a 20-acre composting facility operated by the City Department of Sanitation in Spring Creek Park in Old Mill Creek, Brooklyn. The facility was intended to process leaves and other organic waste collected from around the City for use as fertilizer in Spring Creek Park and other parks. Petitioners alleged that the placement and operation of the composting facility within Spring Creek Park without State approval violated the public trust doctrine, on the basis that a solid waste management facility could not be considered an appropriate park use and that the public was deprived of recreational access to the area of the facility. The City argued that the composting facility fell within the meaning of a legitimate “park use” under the public trust doctrine because the compost would be used in park maintenance. Interpreting the term “park use,” the Court focused on whether the use was consistent with the public's recreational enjoyment of the park and held that the composting facility was not. Other examples of uses that require alienation by the State Legislature include museums, roads, public works facilities and storage space, parking for municipal vehicles, and housing. ALIENATION HANDBOOK, *supra* note 26, at 6-7. Uses incidental to parks are not considered alienation; these include public libraries, monuments, zoos, playgrounds, rest houses, parking lots for park patrons, restaurants and snack bars, bike share stations and recreational facilities (e.g., batting cages, golf courses, skating rinks, boat launches and marinas, and the associated equipment concessions). *Id.* at 7, 7 n.34 (citations omitted). Is the cordoning off of grass really incidental to park use? Or is it more akin to storage space? No court has yet considered this question.

³⁶ See *SFX Entm't, Inc. v. City of New York*, No. 124059/01, 2002 WL 1363372, at *8-10 (N.Y. Sup. Ct. N.Y. Cty. 2002) (finding a violation of public trust doctrine and City concession regulations where an amphitheater hosting events with average \$30 ticket price was to be built on parkland on Randall's Island and confirming that it did not serve a park purpose because not all members of the public could afford it), *rev'd* 297 A.D.2d 555, 555 (N.Y. App. Div. 2002); see also Honan, *supra* note 27, at 107-09 (discussing ticketed events and amenities).

³⁷ Phone Interviews with Gardeners and Staff Members of NYC Parks Department (Aug. 10-12, 2018).

common governance body—would have a say in its allocation and its potential for expansion and renewal. Sectarianism and the inheritance of a neoliberal body politic has kept this ideal world from becoming our entire reality by 2019, but the seeds are planted. To some degree, this is a justification for urban land-use regulations and zoning: there is a common interest that must be safeguarded that supersedes the private interests of appropriation.³⁸

In the background to all of this over much of the last half century is massive disinvestment of private capital from urban space coupled with disinvestment by the state in its social infrastructure and its selectively making urban space available for targeted reinvestment. What this has amounted to is akin to an “enclosure” of the commons, ensnaring both common pool resources and public goods under what is still best described as “actually existing neoliberalism.”³⁹ Here, “neoliberalism” is not simply a stand-in for a fully realized program of for-profit marketization, but rather a variegated strategy to *refashion* institutions of labor, capital, and the state, as well as their relationships with each other. As Marxist scholars of the state have repeated, states grapple with the problem of needing to support capital accumulation on one hand, and the need for popular legitimacy on the other.⁴⁰ In the context of a post-1970s world with rapidly increasing inequality and increased frequency of bubble-driven crises that lead to mass economic displacement, the turn to non-profit civil-society organizations as a critical adjunct to urban governance has been a strongly legitimizing move. It has provided some real benefits to the dispossessed, and, even while significantly empowering organized philanthropy,⁴¹ has also created new terrains of contest over urban

³⁸ Additionally, there is a tension between uses: if a given parcel is to be assigned a use as publicly accessible open space, it cannot simultaneously be used for housing, and vice versa. Yet, it is indisputable that cities need both.

³⁹ See generally Neil Brenner & Nik Theodore, *Cities and the Geographies of “Actually Existing Neoliberalism,”* 34 *ANTIPODE* 349 (2002) (discussing “a critical geographical perspective on neoliberalism that emphasizes (a) the path-dependent character of neoliberal reform projects and (b) the strategic role of cities in the contemporary remaking of political-economic space.”).

⁴⁰ See, e.g., JAMES O’CONNOR, *THE FISCAL CRISIS OF THE STATE* 6-10 (Routledge ed. 2017) (1973).

⁴¹ See generally DAVID CALLAHAN, *THE GIVERS: WEALTH, POWER, AND PHILANTHROPY IN A NEW GILDED AGE* (2018) (describing how major donors’ charitable giving overlaps with their political aims).

power.⁴² These contests, in turn, often focus on the extent of commodification, on the right to common pool and public goods, and on the exclusion of entire groups of people and the neighborhoods they live in from the benefits appropriated by others.⁴³

Ostrom proposes eight “design principles” for the governance of CPRs.⁴⁴ They are as follows:

- (1) CPRs are clearly defined and users with the right to appropriate CPR units are clearly defined;
- (2) Rules of appropriation of CPR units are defined according to the ability to replenish the common pool;
- (3) People with a right to withdraw from the pool have a say over the governance arrangements and their modification;
- (4) Collectively accountable monitoring of the system;
- (5) System of escalating sanctions for violating the rules that get more severe with each violation or with the seriousness of the violation;
- (6) Easy-to-access conflict resolution mechanisms;
- (7) Users have a “minimal right to organize” a body to govern the CPR without interference from a government entity; and
- (8) For more complex systems of common pool resources, these functions exist throughout a nested set of organizations.

As we will see in the next section, individual CLTs and conservancies differ in the extent to which they fulfill these governing tasks. And for land that goes to housing as opposed to land that goes to parks, the clarity of categories of users, of rules, of the prospect of resources to renew the pool, and of accountability and dispute mechanisms diverge considerably. Moreover, the support for conservancies by the City—and its almost intrusive encouragement of “independent initiative”—contrasts with its much more suspicious and less facilitative stance toward CLTs. Choices that activists in each group face, however, center around questions of public or governmental support and of whether the goods that they steward are, in their estimation, best protected through processes of *decommodification* or through processes that *deepen commodification*.

⁴² See, e.g., Alan S. Oser, *Perspectives: The Cooper Square Plan; Smoothing the Path to Redevelopment*, N.Y. TIMES (Jan. 27, 1991), <https://perma.cc/8DT7-58BQ> (stating that the city agreed to rehabilitate 430 units that were once taken for urban-renewal development).

⁴³ See Cahn & Segal, *supra* note 17, at 199-200.

⁴⁴ Ostrom, *supra* note 12, at 90.

II. MANIFESTATIONS OF COMMONING

A. *Community Land Trusts*

Community Land Trusts (CLTs) are a form of nonprofit organization that owns land and leases it for housing and other uses as a way to keep the property from foreclosure.⁴⁵ A CLT is more than a deed and a ground lease, however: it is an organization designed to steward property.⁴⁶ Typical CLT ground leases are renewable 99-year leases that contain significant restrictions on resale and use of the buildings on the land it owns.⁴⁷ Based originally on the economics of Henry George, who identified private land ownership and speculation as the key source of exploitation,⁴⁸ CLTs have roots in Civil Rights-era struggles over land access in the rural South and in urban areas throughout the United States, Britain, and several countries in Europe as a way to “common” land and housing for community use.⁴⁹

CLTs are typically governed by a “tripartite” board, with representatives of three groups with interests at stake: (1) residents and leaseholders of the housing on CLT land, whose interest is in the ongoing stewardship of the CLT’s resources; (2) community residents, whose interest is in the CLT’s expansion to control more property in the area; and (3) other “outside” directors whose expertise is in housing and other skills of possible use to the CLT board, and whose interest is in the ongoing functioning of the CLT.⁵⁰ Some CLTs have elected boards, others have self-perpetuating appointed ones, but most still follow some general version of this model.⁵¹

However they are set up, CLTs largely fulfill the demands of most of Ostrom’s “design principles.” The basic tripartite governance structure is itself based on a definition of boundaries among classes of interested

⁴⁵ Davis, *supra* note 8, at 2.

⁴⁶ *Id.*

⁴⁷ *Id.* at 2 n.5.

⁴⁸ See generally HENRY GEORGE, *PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS AND OF INCREASE OF WANT WITH INCREASE OF WEALTH, THE REMEDY* bks. III-X (50th ed. 1935).

⁴⁹ See generally GROUNDED SOLUTIONS NETWORK, <http://cltnetwork.org/> (last visited July 26, 2019). See JOHN EMMEUS DAVIS, *LINCOLN INST. OF LAND POL’Y, THE COMMUNITY LAND TRUST READER* 6-7 (2010); EBENEZER HOWARD, *GARDEN CITIES OF TO-MORROW* 76-84 (2d ed. 1902); DENNIS HARDY, *UTOPIAN ENGLAND: COMMUNITY EXPERIMENTS 1900-1945*, at 85-97 (2000). See also JOHN KRINSKY & SARAH HOVDE, *BALANCING ACTS: THE EXPERIENCES OF MUTUAL HOUSING ASSOCIATIONS AND COMMUNITY LAND TRUSTS IN URBAN NEIGHBORHOODS* 19-22 (1996), <https://perma.cc/B24S-UAGU>.

⁵⁰ Davis, *supra* note 7, at 2 n.4.

⁵¹ *Id.* at 3.

parties—e.g. residents, leaseholders, the larger community—and builds in a kind of arbiter within a third category. CLT boards that are *unelected* are nearly always drawn from a larger neighborhood organization whose directors *are* elected or include nested organizations (as in design principle 8) that have elected governance, as with housing cooperatives and mutual housing associations.⁵² The idea is to maintain democratic control over the land resource and to balance that control with mechanisms that would prevent opening the CPR to exploitation by outsiders like private developers or their agents, and that therefore would preserve the governance arrangements over the long term.

There are more than two hundred CLTs across the United States,⁵³ but most individual CLTs have fewer than fifty housing units under their control.⁵⁴ Many are rural, and even those that are urban often focus on leasing land to owners of single-family houses.⁵⁵ In New York City, two CLTs were formed in the 1980s and 1990s with a mission of keeping housing affordable: Cooper Square and Rehabilitation in Action to Improve Neighborhoods (“RAIN”) CLTs, both based in New York’s traditionally working-class but now gentrified Lower East Side neighborhood.⁵⁶ They have been doing so at different scales for decades.⁵⁷ Four CLTs formed to steward community gardens in the early 2000s.⁵⁸

⁵² *Id.* at 2-4.

⁵³ See MICHAEL ZONTA, CTR. FOR AM. PROGRESS, COMMUNITY LAND TRUSTS: A PROMISING TOOL FOR EXPANDING AND PRESERVING AFFORDABLE HOUSING 5 (2016), <https://perma.cc/V7CD-8CPB>.

⁵⁴ TOM ANGOTTI, COMMUNITY LAND TRUSTS AND LOW-INCOME MULTIFAMILY RENTAL HOUSING: THE CASE OF COOPER SQUARE, NEW YORK CITY 9 (2007), <https://perma.cc/9YMR-Q8JQ>.

⁵⁵ *Id.* at 1.

⁵⁶ ANGOTTI, *supra* note 54, at 5-7 (Cooper Square CLT); KRINSKY & HOVDE, *supra* note 49, at B-6, B-15 (1996) (Cooper Square and RAIN). Oksana Mironova, *The Value of Land: How Community Land Trusts Maintain Housing Affordability*, URB. OMNIBUS (Apr. 29, 2014), <https://perma.cc/R5BG-3RZ4> (discussing Rehabilitation in Action to Improve Neighborhoods (“RAIN”) CLT, which was also formed via residential efforts and organizers in the 1970s and 1980s).

⁵⁷ See, e.g., KRINSKY & HOVDE, *supra* note 49, at B-6, B-15.

⁵⁸ See Elissa Sampson, *A Flowering of Resistance: The Gardens of the East Village*, SIXTH STREET CENTER (Aug. 12, 2009), <https://perma.cc/KH8P-5NG2> (describing how the Manhattan Land Trust came to own gardens); *About Us*, BROOKLYN QUEENS LAND TRUST, <https://perma.cc/9L2P-Z5V2> (last visited July 26, 2019) (describing the history of the Brooklyn Queens Land Trust); *Five Local Gardens Working Together Towards The Same Green Mission = B.A.N.G.*, WARREN ST. MARKS COMMUNITY GARDEN, <https://perma.cc/K8D8-BSS7> (last visited July 26, 2019) (describing the Brooklyn Alliance of Neighborhood Gardens (“BANG”) land trust); *NYC Community Gardens Turned Over to Local Land Trusts*, THE TR. FOR PUB. LAND (June 28, 2011), <https://perma.cc/LHQ2-84G2> (describing the history of Manhattan Land Trust and Bronx Land Trust). In addition, the El Sol Brillante garden is owned

Today, the larger, more active, and more expansionist housing CLT, the Cooper Square CLT, owns the land under twenty-three buildings with over 600 apartments organized into a scatter-site mutual housing association (MHA) and cooperative, and is in the process of acquiring two more buildings.⁵⁹ The Cooper Square Committee is the Cooper Square CLT's and MHA's parent organization; the Committee was organized in 1959 to fight Robert Moses' urban renewal plans for the neighborhood. Cooperative residents elect the MHA board. The CLT board members appoint themselves and their replacements: one-third of the members of the CLT board are selected by the MHA and must be shareholders in the cooperative; the others are chosen via a traditional board search to represent the interests of the local community.

CLTs and MHAs gained some early traction in the late 1980s and early 1990s, as tenant cooperatives that had been formed by people inhabiting vacant tax-foreclosed housing ran into physical repair and governance problems, and as many of the tenant groups-turned-community-development-corporations began to realize that they had become the targeted "agency" or "landlord" to tenants for whom they used to fight.⁶⁰ Some community development corporations and cooperatives had never invested in the development of democratic accountability and stewardship mechanisms that might have fulfilled Ostrom's fourth, fifth, and sixth principles. Further, low-balled repair budgets in the initial development and handover from City ownership (design principle 2) meant that cash-strapped housing groups began to look for organizational forms that could provide economies of scale, democratic accountability mechanisms, and the corrective functions of stewardship. Yet, by the end of 1993, with the election of Rudolph Giuliani as mayor, and over the next twenty years as his two terms were followed by Michael Bloomberg's subsequent three terms, planned MHAs and CLTs were put on hold and generally withered on the vine.⁶¹ The City reoriented its redevelopment by stopping the rehabilitation of the housing supply by ceasing tax foreclosures entirely and

by a non-profit incorporated under the New York State Housing Development Fund Corporation law, which permits community management and stewardship. See *El Sol Brillante*, LIVING LOTS NYC, <https://perma.cc/AF8W-AYW2> (last visited July 26, 2019).

⁵⁹ Press Release, NYC Hous. Pres. & Dev., *Enterprise Awards New York City \$1.65 Million to Support the Formation and Expansion of Community Land Trusts* (July 19, 2017), <https://perma.cc/8TW4-ZAXV>.

⁶⁰ See Krinsky & Hovde, *supra* note 49, at 6-7 (detailing the history of CLTs and MHAs nationally and in New York City).

⁶¹ Although some of the ongoing Mutual Housing Associations and Community Land Trusts inventoried by Krinsky and Hovde in 1996 continued to develop housing, no new efforts in New York City were undertaken for twenty years, and several groups folded, after a flurry of organizational foundings in the late 1980s and early 1990s.

by overwhelmingly selecting for-profit developers of affordable housing, even when non-profit ones were willing and able to do the work.⁶²

In 2012, partially in anticipation of a promised new opening in housing policy, a coalition formed among homeless activists, economic justice advocates, housing developers and advocates for resident-controlled, affordable housing.⁶³ The New York City Community Land Initiative (NYCCLI)⁶⁴ coalition now has more than two dozen member groups.⁶⁵ Despite rhetoric that suggested that a new mayor in 2014 would bring support for a commoning of New York City, Bill de Blasio's mayoral administration has been, at best, lukewarm to NYCCLI's advocacy for CLTs, particularly for CLTs that develop and preserve housing for people who are poorer than those generally served by the City's "affordable" housing programs and most at risk from gentrification and the City's rezoning plans. Yet, in response to a funding opportunity created out of settlement dollars from a subprime lending lawsuit brought by the State Attorney General's office against a major banking institution, the City applied to be part of a short-term arrangement to support the development of CLTs.⁶⁶ It funded the seminar series for nine CLTs-in-formation, Cooper Square CLT's operations, and property acquisitions by two additional CLTs (one formed as a pilot project for NYCCLI in the East Harlem neighborhood, closely modeled on Cooper Square, and Interboro CLT, formed by several members of NYCCLI and allied groups to focus on using existing City programs to develop cooperatives and homeownership for moderate-income residents on a CLT spread across the city).⁶⁷

In June 2019, the City of New York dedicated its first ever funding for groups organizing to create and sustain CLTs.⁶⁸

⁶² See STEPHANIE SOSA, ASS'N FOR NEIGHBORHOOD & HOUS. DEV., *THE FOR-PROFITIZATION OF AFFORDABLE HOUSING DEVELOPMENT AND THE DE BLASIO PLAN 1* (2017), <https://perma.cc/4KJ3-CMDJ>.

⁶³ See Hillary Caldwell et al., *Learning a New Politics of Land and Housing in New York City*, ACME: INT'L J. FOR CRITICAL GEO. (forthcoming); Abigail Savitch-Lew, *The NYC Community Land Trust Movement Wants to Go Big*, CITY LIMITS (Jan. 8, 2018), <https://perma.cc/C6NA-9WME>.

⁶⁴ Pronounced "nicely."

⁶⁵ Savitch-Lew, *supra* note 63.

⁶⁶ See Oscar Perry Abello, *Momentum for NYC Community Land Trusts Gets \$1.65 Million Boost*, NEXT CITY (July 26, 2017), <https://perma.cc/TJ9M-UJVN>; see also Emma Whitford, *City Just Made Its Biggest Commitment Ever to a Radical Affordable Housing Model*, GOTHAMIST (Aug. 4, 2017, 1:23 PM), <https://perma.cc/26LW-XLHA>.

⁶⁷ Abello, *supra* note 66.

⁶⁸ Caroline Spivack, *Community Land Trusts Score Crucial Funds in City Budget*, CURBED N.Y. (June 18, 2019, 8:50AM), <https://perma.cc/25ZJ-VHNG>.

Among the CLTs that took part in the seminar series, and others in their infancy now,⁶⁹ there is a wide range of goals for their commoning efforts, from preservation and development of deeply affordable housing, to job-creation, gaining space for arts and health programming to environmental stewardship. Many do not yet have boards in place or formal legal status that would allow them to become owners of real property.⁷⁰ The different impeti for these discrete efforts range from being a grass-roots response to the destabilizing effects of capital influx into a specific neighborhood to a strategic decision by an existing organization with a housing development history to incorporate a CLT into its project portfolio. None, save Cooper Square, have control over land and housing at the time of this writing.⁷¹

B. *Parks Conservancies*

If CLTs are in their relative toddlerhood in New York City, conservancies are at least in late adolescence. The fiscal crisis of the 1970s was a turning point for NYC parks, just as it was for housing. In its aftermath, the City began to experiment with new ways of adhering to the austerity mantra of “doing more with less.” But it was equally true that the loss of city workers during the crisis revealed how parlous a condition the parks had fallen into. And the fact was that, after Robert Moses was replaced as parks commissioner by Mayor Robert F. Wagner, Jr. in 1960, the department’s management systems became unmoored.⁷²

Mayor Edward I. Koch’s parks commissioner, Gordon Davis, reconstituted a system of managers that had become autonomous in each of New York’s five boroughs and introduced several other management innovations.⁷³ Among them was to draw on a report done in 1976 by E.S. Savas, a proponent of privatization, and funded by the Central Park Community Fund, founded by liberal financier George Soros and conservative

⁶⁹ NYCCLI is also in contact with several that do not; one of the authors is also counsel to several seminar series member CLTs and several others that are emerging from grassroots efforts not recognized by HPD; the other author is on the curriculum development team for the series.

⁷⁰ Authors are involved in these efforts as counsel and advisors.

⁷¹ Interboro CLT and the East Harlem El Barrio CLT are approaching property acquisition. Abigail Savitch-Lew, *City Limits: City Dips Toe into Funding Community Land Trusts*, NEW ECON. PROJECT (July 19, 2017), <https://perma.cc/2DL6-ATXN>.

⁷² KRINSKY & SIMONET, *supra* note 4, at 136-39 (discussing two main park conservancy administrators’ recounting of the context into which they were hired). The centralized system for administering parks, which Moses put in place, did not work without a strong leader in the center. For twenty years, management suffered system-wide under Moses’ successors.

⁷³ *See id.* at 138-39; *see also* CENT. PARK CONSERVANCY, *CENTRAL PARK: A RESEARCH GUIDE* 15, 28 (2016), <https://perma.cc/6P2G-GCT8>.

investor and lawyer Richard Gilder.⁷⁴ Savas' report suggested that a philanthropic body be founded to steward Central Park, which would consolidate and expand volunteer and philanthropic efforts already directed to the park, and be run by a "Board of Guardians."⁷⁵ Davis shed the pretentious language but tapped an urban planner and biographer of Frederick Law Olmsted, Elizabeth Barlow (later Elizabeth Barlow Rogers), to become the "Administrator" of Central Park, who founded the Central Park Conservancy, selected its Board of Directors and systematized restoration operations in the park.⁷⁶ The Central Park Conservancy was founded in 1980, and it soon began to hire its own staff once the Parks Department allowed the unionized municipal workforce to diminish in the park.⁷⁷ As it did so, the Conservancy expanded the scope of its work, its branding, and its fundraising, so that by the time it got a contract to manage Central Park on its own in 1998, it effectively had been running the park for ten years, and had a workforce as large as the City's workforce in the park. By 2008, just ten years later, it would pay for seventy-five percent of the park's operations and employ nearly ninety percent of its workforce.⁷⁸

Around the same time that the Central Park Conservancy was founded, two other early conservancies were founded: Prospect Park Alliance and Bryant Park Restoration Corporation.⁷⁹

Davis hired Tupper Thomas, a liberal planner with experience in affordable housing, as the Administrator for Prospect Park.⁸⁰ Like Barlow, Thomas was brought onto the city payroll but also expected to launch a nonprofit that would support the park.⁸¹ In 1980 Brooklyn, Prospect Park

⁷⁴ KRINSKY & SIMONET, *supra* note 4, at 138; *see also* TED SMALLEY & ADAM STEPAN, COLUMBIA UNIV. SCH. OF INT'L AFFAIRS CASE CONSORTIUM, *Public-Private Partnerships for Green Space in NYC* 3 (2014), <https://perma.cc/G9ZA-D9NE> ("[F]inance mogul George Soros and investor Richard Gilder co-founded the Central Park Community Fund, which commissioned chemist-turned-urban administrator and Columbia University management Professor E.S. Savas to study the park and make recommendations.").

⁷⁵ *See generally* EMANUEL S. SAVAS & JOHN BENSON, *A STUDY OF CENTRAL PARK* 44-46 (1976). This language curiously echoed the British workhouse of the 19th century. The Poor Law of 1834 formed "unions"—administrative districts—for the governance of poverty relief, mainly done "indoors" through the work-house. The unions were overseen by "Boards of Guardians." Timothy Besley et al., *Understanding the Workhouse Test: Information and Poor Relief in Nineteenth-Century England* 4, 11 (Econ. Growth Ctr., Yale Univ., Working Paper No. 701, 1993).

⁷⁶ KRINSKY & SIMONET, *supra* note 4, at 138-39.

⁷⁷ *Id.* at 131-32, 136-47 (describing the formation of conservancies).

⁷⁸ *Id.* at 143-44, 155-56 (detailing the personnel shifts from 1980-2008 and the budgetary arrangements with the City).

⁷⁹ *Id.* at 131-32.

⁸⁰ *Id.* at 136-37.

⁸¹ *Id.* at 144-45 (stating that this would become the Prospect Park Alliance).

did not have neighbors with the wealth that Central Park's neighbors had at the time; so Thomas could rely less on philanthropy and on having her own staff, and more on city workers, involving local civic organizations, and creating extensive volunteer programs.⁸²

If Central Park Conservancy represented a philanthropic model for conservancies, and the Prospect Park Alliance a civic model, the third early conservancy, the Bryant Park Corporation, represented a more corporate model. Located next to the main branch of the New York Public Library in midtown Manhattan near Times Square, Bryant Park was decried as a "public urinal" by Mayor Koch in the late 1970s.⁸³ Under Koch, the City had no money to fix up the park nor to begin redeveloping the porn-theater-, prostitution-, and drug-dominated economy of Forty-Second Street. Instead, the Rockefeller Brothers Fund, a philanthropy of the Rockefeller family, which owned a great deal of west-Midtown property, agreed to provide funds to renovate the main branch of the public library abutting the park as long as the park itself was rehabilitated.⁸⁴ To protect its investments in both the library and the neighborhood as a whole, the Fund required the City to create and initially fund an organization, then called the Bryant Park Restoration Corporation (BPRC), to redevelop and manage the park.⁸⁵ The Koch administration accepted the terms of the Fund, and soon, the BPRC closed the park for three years while it underwent a total renovation (and through which it could close the park to drug dealers and users), then reopened the park in such a way as to promote its

⁸² KRINSKY & SIMONET, *supra* note 4, at 144-45. *See generally* BETSY BRADLEY ET AL., N.Y.C. LANDMARKS PRESERVATION COMMISSION: UPPER WEST SIDE/CENTRAL PARK WEST HISTORIC DISTRICT DESIGNATION REPORT VOLUME I (Marjorie Pearson & Elisa Urbanelli eds., 1990) (stating that the promises of increased property values made to the New Yorkers by the State in its efforts to get approval for the construction of Central Park in the 1850s had been realized).

⁸³ The main branch of the Public Library is now, tellingly, named the Schwarzman Building, after the CEO of the private equity "vulture" fund, Blackstone, which has made a mint in property speculation and evictions--a kind of post-crisis enclosure of what otherwise could have returned to the commons. David J. Madden, *Revisiting the End of Public Space: Assembling the Public in an Urban Park*, 9 CITY & COMMUNITY 187, 193-95 (2010).

⁸⁴ Gayle Berens, *Bryant Park, New York City*, in URBAN PARKS AND OPEN SPACE 46 (Washington DC: Urban Land Institute et al., 1998) ("[I]n the late seventies, when the Rockefeller Brothers Fund began to consider contributing money to renovate the library, the fund concluded that the library renovations should proceed only if the park's problems and derelict condition were dealt with."); *see also* ROBERT FITCH, THE ASSASSINATION OF NEW YORK 152-55 (1993) (detailing the role of the Rockefeller Brothers Fund in financing and influencing redevelopment of some New York City areas like 42nd Street).

⁸⁵ *See* Terry Benoit, *Bryant Park Before BPC*, MIDCITY NEWS (Mar. 7, 2012), <https://perma.cc/637A-PDM4>.

use in both the daytime and evening. It also allowed permanent concessions, including two full restaurants on the east side of the park and an increasing number of food kiosks and even an outdoor bar on the west side. It funds its operations largely through these concessions, as it was able, from the start, to keep the full amount of concession money in the park.⁸⁶

All three models have had a significant impact on the form of later conservancies.⁸⁷ But in the late 1980s, frustrated that only Central Park Conservancy had the private staff and recreational activities, Henry Stern, the parks commissioner during Mayor Koch's third term, formed the City Parks Foundation to raise money for activities in other parks.⁸⁸ Several years later, when parks commissioner again under Mayor Giuliani, Stern spearheaded the formation of Partnerships for Parks, a public-private partnership between the Parks Department and the City Parks Foundation— itself set up by the *public* Parks Department—to organize volunteers in parks across the city and to encourage them to form “Friends of” groups to raise funds and coordinate volunteer activities in their local parks. Some of these groups would be encouraged to become conservancies themselves, and the city has hundreds of arrangements, some formal and contractual and others not, with “Friends of” groups and conservancies. They have no uniformity and, on some level, conservancies are as flexible an organizational form as CLTs.⁸⁹

Seen from the standpoint of Ostrom's design principles for governing the commons, however, conservancies and “Friends of” groups' distinctions from CLTs emerge. The obvious difference in dealing with land as parks and as housing means that fewer people are excluded from enjoying the goods in or of parks. To the extent that a specific person's enjoyment of a park is curtailed, it is usually due to cultural differences from other users or by the high price of amenities offered there as concessions.

But there are other differences, as well. The units appropriating goods are *not* as well defined in parks because parks are generators of private real-estate value, commercial income, and jobs. Perhaps ironically, this is because the *corporate* and *philanthropic* models of conservancies are best positioned to set rules of appropriation defined by the local ability to replenish the goods. “Friends of” groups and civic conservancies, on the other hand, which rely far more on partnering with municipal

⁸⁶ KRINSKY & SIMONET, *supra* note 4, at 142.

⁸⁷ See generally Honan, *supra* note 26 (describing the Brooklyn Bridge Park and Hudson River Park as progeny of the Central Park Conservancy, Bryan Park Conservancy, and Prospect Park Alliance).

⁸⁸ KRINSKY & SIMONET, *supra* note 4, at 159.

⁸⁹ See *id.* at 159-61.

workers, are much more at the mercy of larger budgeting processes that may not take their parks into consideration. It is also the case that there is nothing in *any* of the conservancy models that necessitates participation in governance—or even representation of different interests—on a board of directors.⁹⁰ Even so, the baseline protections offered by the public trust doctrine only work if the legislative process is able to adequately represent the interests of those impacted by the stewardship of parkland under conservancy care.⁹¹ Needless to say, there are no real mechanisms to ensure this representation.

Even “Friends of” groups may have self-selecting members and directors and yet, if chosen by the Partnerships for Parks as an official group, are under no obligation to expand their representativeness. Accordingly, too, there may not be *internal* mechanisms to punish violators or air grievances; instead, these tend to get deflected up to the Parks Department, addressed via police or security guard intervention, or simply handled by conservancy staff. On the other hand, parks conservancies may be seen as *nested within* a Parks-Department-coordinated governance *system* in which conservancies’ “minimal right to organize” (design principle 8) affords them specific and defined roles within the system, even while bringing some subsidiarity to the operations of the Department, i.e. the principle that those closest to the situation should have some say in its governance.⁹²

⁹⁰ *See id.*

⁹¹ *See, e.g.,* Cyane Gresham, *Improving Public Trust Protections of Municipal Parkland in New York*, 13 FORDHAM ENV'T'L L.J. 259, 284-86 (2002) (discussing the local community's ability to prevent legislation if legislative approval is required).

⁹² The relationship between parks development and accumulation by dispossession is nowhere clearer than in the legislative enactments that created New York's High Line, a private/public venture and relatively new park that is built atop an abandoned elevated railway. The City partially funded the creation of this amenity on the explicit understanding that it would lead to uses around the former rail for which property owners would pay more in taxes. New zoning encouraged the transfer of air rights from parcels under the line to those on the adjacent corridor, allowing high rise luxury development where it had previously prohibited. *See* DEP'T OF CITY PLANNING, WEST CHELSEA ZONING PROPOSAL 8 (2005), <https://perma.cc/JF2J-AJ57>. This new permission to build up put pressure on land owners in the corridor to sell to investors who could take advantage by building hotels and outrageously priced housing. *See* N.Y.C., N.Y., ZONING RESOL. § 98-33 (2017) (“Transfer of Development Rights to the High Line Transfer Corridor.”). Displacing the low-rise tenements and businesses that stood on the lots in the corridor at the time of the rezoning was part of the park-creation plan. In other words, as Honan explains, “The Highline . . . has helped to promote some of the most rapid gentrification in the City's recent history. The Highline has been attributed to increasing the property values in the neighborhood by 103 percent.” Honan, *supra* note 28, at 112 (citations omitted). The park itself is operated by the Friends of the High Line, a not-for-profit organization that relies heavily on contributions from the real estate concerns that own the properties along its edges, the same properties that have their values driven up

III. PROBLEMS OF COMMONING BY CLT OR CONSERVANCY

The historical enclosure of the commons that serves as a departure for much of commons scholarship are physical places: pastures in the centers of English towns and woodlands at the towns' peripheries that landless peasants relied upon as crucial places to grow food for their families, to collect firewood, and to graze any livestock that they owned for meat and milk.⁹³ The enclosure of those commons was done quite literally, by evicting the peasants and fencing their land to divide it and facilitate treating formerly commonly-accessible sites as private property. In the context of the city as commons, enclosure of land is the privatization of resources that have been, or should be, publicly accessible. When applied to land-based resources (homes, parks, gardens, farms), this privatization is enclosure both literally (fences, eviction) and by analogy (the capture of publicly-created value by private actors who can then trade it as a commodity).⁹⁴

A CLT's ambition to keep acquiring property in a given area—even when largely unfulfilled—is a way to limit the effects of community development's basic contradiction in the wake of the City's disinvestment and abandonment of its property and related services in the 1970s and 1980s. This contradiction was that, to the extent that groups rooted in low-income communities could attract government and private funds to rehabilitate housing and generally make their neighborhoods better and safer

by proximity to the High Line. Lisa W. Foderaro, *Record \$20 Million Gift to Help Finish the High Line Park*, N.Y. TIMES (Oct. 26, 2011), <https://perma.cc/KH4P-5EYH>. Further evidence coupled improvement of the park with the increased monetary value of nearby property: the new zoning includes an “improvement bonus” of bulk that would otherwise be prohibited, allowing property owners who pay for elevator access, restrooms, small plazas, and structural repair and remediation of the High Line open space, or stairs up to the High Line to then build larger buildings full of luxury units that can be priced to reflect these nearby amenities. See N.Y.C., N.Y., ZONING RESOL. §§ 98-25, 98-70, Appendix E (2017) (outlining the “High Line Improvement Bonus” and “Special Regulations for Zoning Lots Utilizing the High Line Improvement Bonus and Located Partially Within Subareas D, E, G or I”). Even the founders of Friends of the High Line recognize that the close coupling of real estate interests and park development has not been a boon for low-income neighbors and businesses that pre-existed the transformation. See, e.g., Eleanor Gibson, *High Line Creators Launch Website to Advise on Avoiding Gentrification*, DEZEEN (June 22, 2017), <https://perma.cc/C5Q9-5WAY> (“[Robert] Hammond, who co-founded the High Line in 1999 with Joshua David, want[ed] to help others avoid the gentrification and inequality that occurred in its surrounding Chelsea neighbourhood as a result.”); see also Mirna Nashed, *The Gentrification of West Chelsea*, NYCROPOLIS (May 3, 2018), <https://perma.cc/HJ4Z-TNC4>.

⁹³ 1 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 510 (Progress Publishers, Samuel Moore et al. trans., 1890) (1867); see also E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS 198 (Vintage Books) (1964).

⁹⁴ See Foster & Iaione, *supra* note 1, at 324-25.

for their residents, they risked demonstrating to investors that the area was again safe for investment. This put the neighborhood—and all of their efforts—at risk of gentrification and displacement and allowed new investors to enclose the value of the improvements they made.

In fact, CLTs remove land from the speculative market to preserve the value of whatever public investment initially goes into its acquisition and improvement and to prevent others from appropriating it.⁹⁵ Thus, a CLT translates initial government subsidies into something comparable to a long-term CPR. But, a CLT can only succeed in doing so only to the extent that it can expand the governance of neighboring land as a CPR and enforce clear rules about withdrawal and membership to an ever-growing geographic area.

The requirement of expansion, in turn, puts CLTs in a difficult position because it requires the City to change the course of its land policies in broader ways. As Harry DeRienzo, a longtime housing advocate and developer observed then, by 1994 nonprofit housing organizations had begun to “manage the crisis” for the City but were not well positioned to push the city to expand low-income housing more generally.⁹⁶ Indeed, as the City under Mayors Giuliani and Bloomberg reoriented its housing policy toward for-profit developers, the nonprofit housing developers and low-income cooperatives found themselves to have been a historically transitional organizational mediation of the neoliberalizing state.

Further, CLTs may be compelled to agree to commodification of neighborhood resources in order to secure some land to common. The Cooper Square Committee, for example, agreed to let the City sell a large lot in the neighborhood, instead of transferring it as an additional development site to the CLT and MHA, as a way of capitalizing the already-built housing to which the CLT and MHA were taking title from the City so that it could be used as housing for very low income residents.⁹⁷ These buildings were in need of expensive repairs—due to their disinvestment and neglect by the City itself—and the sale brought in funds that the City earmarked to enable the repairs to happen.⁹⁸

Finally, CLTs have to figure out several other problems of commoning. For example, *before* they have land, to whom must they be accountable? Who are the users, in Ostrom’s terms, if acquisition of actual land that can actually be used is still in the organization’s future? Or who can

⁹⁵ See, e.g., JOHN EMMEUS DAVIS, NAT’L HOUS. INST., SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE RESTRICTED, OWNER -OCCUPIED HOUSING 7-8 (2006), <https://perma.cc/M6YV-ZR9X>.

⁹⁶ See Harold DeRienzo, *Managing the Crisis*, CITY LIMITS, Dec. 1994, at 25.

⁹⁷ See, e.g., Oser, *supra* note 42, at R5.

⁹⁸ See *id.*

be a member of the CLT, with control of the corporation's governance, in nonprofit law terms?⁹⁹ Or, how does the CLT think about the tradeoff between paying decent construction wages and the affordability of the housing it stewards?

Conservancies, by contrast, never take ownership of the land; they *manage it*, often through an exclusive contract with the City.¹⁰⁰ This, combined with their not having to have any mechanism of accountability to parks users beyond the quality of the service they provide,¹⁰¹ has pushed at least the corporate and philanthropic conservancies toward an embrace of independence. Interestingly, such independence means something quite different for parks conservancies and CLTs. Instead of independence for conservancies, meaning that the direct users of the CPR gain greater control over the resource (as it does for a CLT), independence can lead to the abandonment of the conservancy's role as a steward of the *public* trust. Even though the City, as the land's owner, is still the ultimate policy-setter, conservancy independence provides cover to the City's practices that limit even the public's recreational enjoyment of land, as well as uniform and equitable access to the other valuable goods which parks provide. The *providers* of the funds that enable the renewal of parks after the long period of disinvestment, whether philanthropists or real-estate owners who pay into a business improvement district (as is the case for Bryant Park) become the *de facto* stewards of the public trust, but do so in ways that clearly increase their power *over* the public. Their resources give them outsized power to determine the uses of, and labor practices in, public park land through funding and participation in conservancies. If one abandons all hope of a functioning democracy as a means of distributing the assets of the city as commons, such a management paradigm starts to appear quite attractive.¹⁰² While the New York City of 2019 is a distorted democracy, leaning in this and other ways toward plutocracy, representative government does still operate here.

⁹⁹ See NOT-FOR-PROFIT CORP. LAW § 601 (McKinney 2019).

¹⁰⁰ KRINSKY & SIMONET, *supra* note 4, at 147-48 (stating this distinction is important, too, to the defenders of conservancies, as it mitigates critics' claims that public goods have been privatized).

¹⁰¹ *Id.* at 178-84. Even here, the City would be unlikely to take over management of a park from a contracted conservancy even when maintenance lags in quality, in part because the City would need staff to manage it.

¹⁰² See, e.g., Michael Murray, *Private Management of Public Spaces: Nonprofit Organizations and Urban Parks*, 34 HARV. ENVTL. L. REV. 179, 199 (2010) (NPOs assume sole physical responsibility for the public space, becoming ultimately answerable for the success or failure of its management . . . "This clear line of responsibility contrasts strongly with the diffuse accountability within governmental organizations").

To get a sense of the way in which this distortion has played out, we can look at a proposal made in 2013 by then-State Senator Daniel Squadron. Squadron drafted a bill that would require well-financed conservancies to share 20 percent of their revenue to be placed in a common pool to help other parks with less capacity to raise funds.¹⁰³ Large conservancies opposed the bill vociferously.¹⁰⁴ They argued, variously, that the amount of sharing required would have real operational consequences for the rich conservancies, but could not be spread around in such a way that they would have commensurate operational benefits for the poorer ones, and that the bill would erect a significant barrier for any conservancy's fundraising efforts and staffing.¹⁰⁵ Former Parks Commissioner Adrian Benepe spoke against the proposal before Mayor de Blasio took office:

If we said to the Brooklyn Museum, "You know you've done a great job fund-raising, but you know, we're gonna take 10 or 20 percent of your money and reallocate it to the Queens Museum, because they haven't done quite as good of a job of fund-raising," or "Jennifer Raab has done an extraordinary job raising money for Hunter College, and you know what, let's take some of that \$40 million she brought in this year and reallocate to the Bronx Community College because they need the money more . . ." That's not the way democracy works. They're both public institutions. One raises money, the other doesn't as much.¹⁰⁶

Further, while CLTs may balk at their lessees' hiring union or prevailing-wage labor rate—as cost of a project done with fairly paid labor can push against the goal of deep affordability—in principle and sometimes in fact, they can embrace paying higher wages for construction in recognition of its importance in other ways, to the project of commoning. Corporate and philanthropic conservancies, however, have actively resisted organizing among their workers, to dodge real accountability to

¹⁰³ KRINSKY & SIMONET, *supra* note 4, at 183.

¹⁰⁴ *Id.* at 183-84.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 186. On the other hand, he allowed that, "if you become dependent on that revenue, then you start to exploit the parks as much as you can for that revenue. I think the risk is that if a lot of our budget is dependent on how much revenue we bring in, that will start to turn the parks into a cash cow. We have a little bit of that now. We have some parks where revenue stays in the parks. As a long-term model it's hard to say. Is it a good model or a bad model? I suppose that depends on who's in charge, who's running things, and how much oversight there is." *Id.* at 245; see Dan Rosenblum, *Is the Revenue-Generating Park a Good Thing? Commissioner Benepe Says It "Depends on Who's in Charge,"* POLITICO (Aug. 11, 2011, 5:28 PM), <https://perma.cc/UFD3-DFF9>.

their labor force.¹⁰⁷ In fact, one of the Central Park Conservancy management's stories about why the Conservancy hired its own staff was that union workers refused to do work outside of their union job descriptions without further compensation when the fish in a large pond in the park died suddenly *en masse* and needed to be removed.¹⁰⁸ Similarly, Elizabeth Barlow Rogers, Central Park Conservancy's founding president, spoke of calling the conservancy's first non-managerial staff "interns" in order to skirt union objections.¹⁰⁹

By way of partial contrast, civic conservancies such as the Prospect Park Alliance and many of the "Friends of" groups that it had a significant role in training, are more embedded in the complex systems of the Parks Department and rely more on public workers.¹¹⁰ Even so, they rely heavily on volunteers, whose work itself both accrues to the value of the surrounding land and buildings, which goes up with increased park maintenance *and* constitutes, in some ways, a *use* of the park resource, as well. As feminist sociologists have noted in other contexts, like several other forms of "free labor," volunteer work creates value that others may partially appropriate, but achieves this by calling work something other than work: civic engagement, giving back to the community, etc.¹¹¹ This is further complicated by the fact that, in Prospect Park, city workers might work under the supervision of Prospect Park Alliance staff.¹¹² Thus, clearly classifying the constituencies with interest in the park as a CPR gets more difficult.

Yet, at the same time, civic conservancies and "Friends of" groups are more likely to connect with other local, civil society organizations. Tupper Thomas, who went from being Prospect Park's City Administrator to the founding president of the Prospect Park Alliance, hired an anthropologist to help the group identify the organizations in the communities surrounding the park and inviting them to serve on a policy-making "community committee," which still meets twenty years after it was organized.¹¹³ Thomas's emphasis on organizing for community support of Prospect Park became a model for the Partnerships for Parks' efforts to organize more "Friends of" groups and conservancies around the city.

¹⁰⁷ KRINSKY & SIMONET, *supra* note 4, at 143-44, 150-51.

¹⁰⁸ *Id.* at 144.

¹⁰⁹ *Id.* at 143.

¹¹⁰ *Id.* at 145-46.

¹¹¹ *See generally id.* at ch. 7 (contrasting four types of free labor, including volunteers, workfare and JTP workers, and out-of-title work to demonstrate how the Parks Department and nonprofits use this vocabulary to manage and justify their use of free labor).

¹¹² KRINSKY & SIMONET, *supra* note 4, at 146.

¹¹³ *Id.* at 145-46, 270 n.11.

Nevertheless, it is still important that not even the civic conservancies nor the “Friends of” groups treat the parks *as* part of a larger city or community beyond parks, wherein, for example, the value added to surrounding real estate could be pooled and shared according to rules that are collectively devised by the *various* interests in the CPR.¹¹⁴ At the same time, these proposals are all limited to funding parks, not to ensuring, for example, that neighboring residents and businesses can share enough of the increase in value so as to be able to continue to enjoy the parks equitably.¹¹⁵

Of course, “philanthropic,” “corporate” and “civic” are rough types; no conservancy completely embodies one or the other. But the typology is useful in drawing out differences both among the conservancies and their “commoning” or “anti-commoning” approaches to parks stewardship, and between them and nascent NYC CLTs’ approaches and problems in commoning. The table below summarizes some of the ways in which the problems of governance of the commons characterizes CLTs and the three types of conservancy. Understanding the types allows us to forecast possible futures for the CLTs that we are working with and observing: we can see clearly from the path that conservancies have followed that who is at the table at the start, who creates the menu and what motivations animate the endeavor go a great distance in determining how well the entity formed will do as a steward of the commons. We can at least attempt to use this history as a guide to the possible futures of CLTs.

¹¹⁴ There have been several ideas close to this floated in the last decade. *See, e.g.*, NEW YORKERS FOR PARKS, SUPPORTING OUR PARKS: A GUIDE TO ALTERNATIVE REVENUE STRATEGIES 1-2, 14 (2010), <https://perma.cc/KTH8-R8LE> (suggesting the possibility of funding parks with a tax on the incremental benefit to property owners who live close to parks). This is also fairly close to “Parks Improvement Districts” based on the Business Improvement District or BID model. *Id.* at 14. Battery Park works through this model to some degree. *Id.*

¹¹⁵ *Id.* at 6, 14, 23.

| <i>Commons Design Principle</i> | <i>Community Land Trust</i> | <i>Parks Conservancy</i> | | |
|---|---|---|---|---|
| | | <i>philanthropic</i> | <i>corporate</i> | <i>civic</i> |
| (1) common pool resource (CPR) is clearly defined | yes - in an expansionist view, the resource is the neighborhood itself that falls into the CLT catchment area; in the limited view of City agencies, the resource is the specific properties under CLT ownership | yes but no - the resource is mis-defined as ending at the boundary of the park | yes but no - the resource is mis-defined as ending at the boundary of the park | yes but no - the resource is mis-defined as ending at the boundary of the park |
| (1 cont'd) users with the right to appropriate CPR units are clearly defined | no - potential residents of CLT housing or renters of commercial space are infinite and undefined; yes - those with current leases are known | yes - the property owners who get benefit in the form of increased value are known and finite no - who will visit the park is unknown | yes - the property owners who get benefit in the form of increased value are known and finite no - who will visit the park is unknown | yes - the property owners who get benefit in the form of increased value are known and finite no - who will visit the park is unknown |
| (2) rules of appropriation of CPR units defined according to the ability to replenish the common pool | yes - e.g. Cooper Square uses a lottery system for distributing scarce housing units | no | no | no |

| <i>Commons Design Principle</i> | <i>Community Land Trust</i> | <i>Parks Conservancy</i> | | |
|--|---|---|---|---|
| | | <i>philanthropic</i> | <i>corporate</i> | <i>civic</i> |
| (3) modifiable governance arrangements | yes | yes but very difficult to change | yes but very difficult to change | yes |
| (3 cont'd) people with a right to withdraw from the pool have a say over the governance arrangements and their modification | yes - residents have right to select some board members of formal organization | not usually - unless park users or nearby property holders secure seats on board | not usually - unless park users or nearby property holders secure seats on board | sometimes - park users and neighbors are likely to have seats on board |
| (4) collectively accountable monitoring of the system | sometimes - this is up to how the founders set up the structure of the organization | no | no | sometimes - this is entirely up to the discretion of the actual people who have self-selected to be the stewards of a public space |
| (5) system of escalating sanctions for violating the rules that get more severe with each violation or with the seriousness of the violation | no sanctions for enclosure of common wealth; yes attempts to violate the ground lease can lead to loss of the lease | no sanctions for enclosure of common wealth | no sanctions for enclosure of common wealth | no sanctions for enclosure of common wealth |

| <i>Commons Design Principle</i> | <i>Community Land Trust</i> | <i>Parks Conservancy</i> | | |
|---|---|---|---|---|
| | | <i>philanthropic</i> | <i>corporate</i> | <i>civic</i> |
| (6) easy-to-access conflict resolution mechanisms | maybe - this is up to how the founders set up the structure of the organization | no | no | maybe - this is entirely up to the discretion of the actual people who have self-selected to be the stewards of a public space |
| (7) users have a "minimal right to organize" a body to govern the CPR without interference from a government entity | partly - CLT efforts can organize independently and could possibly get land independently, but city agencies are highly involved in current CLT efforts in NYC through land disposition and subsidy programs | no - users are not the ones organizing | no - users are not the ones organizing | no - city agencies directly help to create "Friends of" groups and conservancies and continue to own the land and grant access |
| (8) For more complex systems of common pool resources, these functions exist throughout a nested set of organizations | yes | no | no | sometimes - they certainly can, but this is, again, up to the participants |

IV. DIVERGENT PATHS, CONTESTED FUTURES

In New York City, parks conservancies and CLTs, divergent as they are, share roots in city-dwellers' response to the fiscal and social collapse of the city in the mid-1970s, when job-loss, federal disinvestment, and local land-use policy combined to push the City to near-bankruptcy. The late Robert Fitch argued that a significant cause of New York City's industrial decline in the 1960s was due to machinations by the Rockefeller family, whose early 20th-century speculative bets on real estate would otherwise have gone bad.¹¹⁶ With David, one Rockefeller brother as the chairman of Chase Manhattan Bank, and Nelson, another brother, in the Governor's mansion in Albany, these socially liberal Republicans oversaw the decimation of New York City's thriving port (they had long advocated moving port functions to Newark and Elizabeth, New Jersey) and with it, its diverse and small-scale manufacturing base.¹¹⁷ As the Rockefellers and other real-estate owners pushed out manufacturing uses in order to make way for more lucrative commercial and residential space—their deep pockets allowing them to do so with long-term strategies—the City's loss of more than half a million jobs between 1965 and 1975 also meant that its population was shrinking, its tax base was shrinking, and its increasingly poor population needed more public services.¹¹⁸ This, and the combination of the Oil Crisis in 1973 and President Nixon's "new federalism," pushed the City to spend well beyond its means and into its epochal fiscal crisis. Under the new, banker-led neoliberal regime in Washington, New York became more dependent on owners of real estate as its diversified tax-base collapsed into a finance, insurance, and real-estate (so-called "FIRE" sector) monoculture.¹¹⁹

The range of efforts that we describe above emerged out of this context. Until recently, the language of the "commons" and "commoning" was, well, uncommon to describe land stewardship projects led by regular citizens and by local state-civil society hybrid efforts. CLTs and other nonprofit housing models served the dual task of helping to rehabilitate some of the housing that had been decimated by neglect and ensuring that

¹¹⁶ See generally FITCH, *supra* note 84.

¹¹⁷ *Id.*; see also JOSHUA B. FREEMAN, WORKING-CLASS NEW YORK: LIFE AND LABOR SINCE 1945 11 (2000) (calling New York City's early postwar economy a "non-Fordist city in the age of Ford" and considering New York City had a flexible manufacturing base characterized by significant innovation and small firm size, in contrast to the massive factories of the Rust Belt).

¹¹⁸ WILLIAM K. TABB, THE LONG DEFAULT: NEW YORK CITY AND THE URBAN FISCAL CRISIS 43-45, 75-80 (1982).

¹¹⁹ See generally PHILLIPS-FEIN, *supra* note 4. See also generally KIM MOODY, FROM WELFARE STATE TO REAL ESTATE: REGIME CHANGE IN NEW YORK CITY, 1974 TO THE PRESENT (2007).

the new or existing low-income tenants would not be able to reap a private windfall from the application of public funds toward their housing. Here, there is some recognition of *what was lost and then rehabilitated* as some kind of common pool resource that needs sustaining and renewal into the future. CLTs, of all the organizational forms applied in this arena, make this most explicit.

Similarly, conservancies and “Friends of” parks groups *also* recognize the need for the ongoing renewal and sustenance of recreational spaces that had similarly been decimated by neglect—and, in the case of community gardens, often *generated* by this neglect as buildings were torn down after falling victim to arson or structural abandonment. All of these groups, in their diverse ways, seek to manage publicly owned resources in ways that ensure their openness to a wide range of users, even if this means closing off the spaces, selectively, from time to time, or giving some space to vendors whose prices are hardly in line with a “general” public’s ability to pay to enjoy all the park’s amenities.

The conservancies’ compromises, however, differ in several important ways from those of CLTs, such as Cooper Square’s, noted above. First, many conservancies have *not* been formed in a context of neglect, but in the context of a newly privatizing and corporate-oriented local state. It is not that the City *cannot* pay for park maintenance and improvement, but rather that successive administrations have found that park stewardship can be farmed out to civil society, on one hand, and that the residual public staff can be largely supplanted with contingent and precarious workers, on the other. Second, and closely related, the City has found that many Manhattan and Brooklyn parks can be maintained with significant funds generated in their local areas from businesses and private citizens. Aside from the enormous gifts that it sometimes receives, such as the \$100 million gift from private-equity mogul John Paulson in 2012,¹²⁰ the Central Park Conservancy has over 40,000 donors, many making small donations.¹²¹ Neighbors of conservancy-run parks who own property reap private rewards through the premiums—running into the hundreds of millions of dollars in aggregate—on their real estate values (while renters get pushed further away from such parks because they get

¹²⁰ KRINSKY & SIMONET, *supra* note 4, at 140; Lisa W. Foderaro, *A \$100 Million Thank-You for a Lifetime’s Central Park Memories*, N.Y. TIMES (Oct. 23, 2012), <https://perma.cc/ATQ5-JXYC>.

¹²¹ KRINSKY & SIMONET, *supra* note 4, at 140; *see also* Jason Sheftell, *Central Park: The World’s Greatest Real Estate Engine*, N.Y. DAILY NEWS (June 3, 2010), <https://perma.cc/9D6G-X6K8>.

priced out of the area).¹²² The City, in turn, reaps tax benefits both from the commercial activity prompted by parks and from the significant increment in raised real-estate values. Indeed, as New Yorkers For Parks, a parks advocacy organization, argued, “smart parks investment pays its way.”¹²³ Third, and most obviously, civil-society-based parks stewardship rarely contains specific provisions for the commoning of land *outside* of the parks, and indeed partly relies on the *intensified commodification of this land*.¹²⁴

By ignoring the impact that management of the open space has outside its physical edge, and treating *parks only* as “the commons”—to the extent that they do—conservancies’ commoning projects hypostatize the boundaries of the park in ways that work against larger projects of urban commoning in the wake of neoliberal enclosure. In so doing, they threaten to deepen the dynamic of enclosure itself.

The compromises facing both conservancies and CLTs suggest that the language of commoning is much as Marx describes religious suffering: it is, he wrote, “*an expression of real suffering and a protest against real suffering*.”¹²⁵ Commoning strategies are, similarly, both an expression of contemporary neoliberalizing urban life and a protest against it. But the form and content of the protest matters lest it become a simple amplification of the conditions themselves.

We conclude by noting that, in the Partnerships for Parks, the City created a public-private partnership with a private entity that it set up itself. It did so in order to put resources behind community organizing and education around what *could be described* as commoning strategies for local “Friends of” groups, but that can *also* be described as an indirect way of promoting private accumulation as a way of paying for a once-publicly managed resource. By contrast, the City has supported the formation of a CLT “learning exchange”—with far less money and none for

¹²² The former administrator of Prospect Park, Tupper Thomas, suggested that the communities of color that used to be prevalent on the park’s east side have largely been pushed further east, and laments that people in poor communities—with some reason—suspect that parks improvements are part of a plan to gentrify their neighborhoods and displace them. See KRINSKY & SIMONET, *supra* note 4, at 257.

¹²³ See generally NEW YORKERS FOR PARKS, ANALYSIS OF SECONDARY ECONOMIC IMPACTS NEW YORK CITY PARKS CAPITAL EXPENDITURES (2002), <https://perma.cc/ZJW3-GXHN> (researching the secondary economic impacts of investment in parks and finding that strategic capital investment results in positive economic gains for neighborhoods, investors, and the City).

¹²⁴ See generally *id.*

¹²⁵ JOHN VAN DER HOEVEN, KARL MARX: THE ROOTS OF HIS THOUGHT 35 (1976) (alterations in original) (quoting KARL MARX, CONTRIBUTION TO THE CRITIQUE OF HEGEL’S PHILOSOPHY OF RIGHT (1844), reprinted in KARL MARX: EARLY WRITINGS (T.B. Bottomore & Maximilien Rubel eds., T.B. Bottomore trans., 1963)).

organizers—only through money generated through a legal settlement between an investment bank and the State Attorney General’s office. In many respects, the imbalance between government support for the two efforts is unsurprising; governments rely on private accumulation, and local governments rely specifically on real estate taxes, and CLTs push against each by both removing land from the tax rolls and trying to depress local land values through expanded presence in areas otherwise ripe for speculation and reinvestment. On the other hand, governments also have to legitimize their policies and to respond to pressure from the governed. We have not yet abandoned the promise or the reality of a democratic urbanity.

By pushing the commoning efforts of CLTs—and also devising ways to re-common conservancies—advocates for an urban commons can better show where the battle lines are drawn, who is included among those with a say over common pool resources, where the accountability lies, and how the resources themselves are embedded in the complex organizations of the state.