

The Liberal Case for Community Land Trusts

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Abstract

This paper argues that community land trusts (CLTs) can be part of a liberal housing policy from both an economic and a legal point of view. In this, I depart from the defense of community land trusts based on the so-called ‘decommodification’ of housing. First, from an economic point of view, CLTs are a comparatively better option than other traditional policies, such as rent control, once the political complexity of housing policies is considered. Second, fostering autonomy and the capacity for self-authorship requires that individuals be able to choose from a diverse set of valuable institutional designs; CLTs correspond to that ideal and bring a unique nuance to the existing options within common-interest communities. Additionally, I look at the somewhat recent legal innovations that brought CLTs to Canada and continental Europe to show that the institutional flexibility of CLTs allows them to support different visions of self-realization through ownership.

Keywords: *property; liberal; community land trust; Dagan; common-interest communities*

1. Introduction

1.1. Why not community land trusts instead?

In the early 2020s, social tensions around housing appear to be blowing up, with legal and political battles for urban spaces raging in Western countries. As California passed Senate Bill 9, or the HOME Act, to increase urban density, rent control and other constraints on landlords’ property rights were revamped in Europe.¹ Berlin, Germany, is a striking example of this dynamic: In April 2021, its freeze on nominal rents, an addition to the existing rent control laws, was struck down by Germany’s Supreme Court.² Activists swiftly counter-attacked in September 2021 with a victory on a non-binding referendum that

1. US, SB 9, *California Housing Opportunity and More Efficiency (HOME) Act*, 2021-22, Reg Sess, Cal, 2021.

2. See Erika Solomon, “Germany’s highest court strikes down Berlin rent freeze”, *Financial Times* (15 April 2021), online: www.ft.com/content/7156504f-6a37-47a2-8c81-2065a6730194.

proposed the expropriation of a large part of the properties of major corporate landlords.³

The revival of support for rent control and the socialization of housing policies can be partially explained by their moderate reassessment by economists⁴ formerly united in their rejection of it.⁵ While complete rent freezes are now out of fashion, new schemes tend to regulate rent increases based on market analysis rather than on a strict conception of the ‘fair’ price for housing. Meanwhile, the claims of rent control supporters are more moderate than before: Instead of making cities cheaper for all, it would keep *some* inhabitants from being priced out. The main argument in favor of housing market interventions is that having access to towns and their opportunities is essential and that denying it is unjust. However, this comes at the cost of a trade-off between stability and diversity on the one hand and a loss of mobility for both insiders and outsiders on the other. The rental market shrinks as owners turn to other uses for their property, making the city *de facto* less accessible from the outside.⁶

From a liberal perspective that values individual autonomy as self-authorship,⁷ this trade-off seems difficult to accept, even if the original intention—to preserve diversity in neighborhoods—is legitimate. Starting from this intuition, I argue in this paper that if the preservation of diversity and stability is the *raison d’être* of policies like rent control, then community land trusts (CLTs) can achieve that function in a way that is more compatible with a liberal housing market and with the general promotion of autonomy. Beyond that first point, the paper makes the case for CLTs as a legal design in their own right, responding to the objection that such innovative property arrangements bring unnecessary complexity. I aim to show that CLTs are a valuable addition to the existing range of options available among common-interest communities. Attempts to import the CLT model into other legal systems, particularly civil law or hybrid systems (Québec in Canada, France, and Belgium), confirm its fitness for such a purpose.

1.2. What are CLTs?

CLTs are non-profit foundations that buy land and sell only the housing units to low-income residents, who will not own the land. The price of units is thus low

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3. See Riham Alkousaa & Matthias Inverardi, “Berliners vote to expropriate large landlords in non-binding referendum”, *Reuters* (27 September 2021), online: www.reuters.com/world/europe/berliners-vote-expropriate-large-landlords-non-binding-referendum-2021-09-27/.
 4. See Joshua D Ambrosius et al, “Forty years of rent control: Reexamining New Jersey’s moderate local policies after the great recession” (2015) 49:12 *Cities* 121; John I Gilderbloom & Lin Ye, “Thirty Years of Rent Control: A Survey of New Jersey Cities” (2007) 29:2 *J Urban Affairs* 207; David P Sims, “Out of control: What can we learn from the end of Massachusetts rent control?” (2007) 61:1 *J Urban Economics* 129
 5. See Richard M Alston, JR Kearn & Michael B Vaughan, “Is There a Consensus Among Economists in the 1990’s?” (1992) 82:2 *American Economic Rev* 203.
 6. See Rebecca Diamond, Tim McQuade & Franklin Qian, “The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco” (2019) 109:9 *American Economic Rev* 3365.
 7. See Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986).

compared to market prices for housing units and land combined. The number of CLTs has steadily increased in recent decades, at least in the United States, where the legislation formally validated them as a property arrangement in 1992.⁸ In the US, CLTs originated in the 1970s as a tool for empowering black people through property ownership, and quickly developed as a general model promoting an alternative, communal way of life, secluded from the rest of society.⁹ In recent decades, CLTs have concentrated almost exclusively on providing affordable housing in urban areas. This is partly how they spread to Canada and the UK before expanding recently to continental Europe, where the first CLT, the Community Land Trust Brussels (CLTB), was founded in 2012. Then, following the impetus of the city of Lille in northern France, the French legislation was adapted in 2014 to allow the constitution of CLTs.¹⁰ The actual use of the law came several years later, and only in 2021 did the city of Paris announce the start of its city-managed CLT.

1.3. Argument and outline of the paper

The spread of CLTs to Canada and, recently, to the European continent—which sometimes required profound changes within property law—provides direct observations of how a legal system can innovate to promote specific goals. To assess whether CLTs and their importation to other legal systems promote the liberal ideal of autonomy, two main questions need to be answered.

First, are CLTs more compatible with a liberal housing market than other options, and do they provide an adequate answer to concerns about the impact of such markets on the poorest members of society?

Second, are CLTs autonomy-enhancing institutions in their own right, through the institutional diversity they provide beyond the mere purpose of supporting the autonomy of individuals by providing them access to cities?

Section 2 of the paper explains how a liberal housing market should strike a balance between having private property rights on the one hand and a concern for the autonomy of all individuals in the market on the other. I analyze Scanlon's defense of a liberal and private housing market to show that its focus on corrective measures to the market's distributive injustices is necessary but insufficient.¹¹ A perspective centered on autonomy within the housing market must also address the issue of how property rights are structured and how individuals can autonomously redesign them.¹²

8. See *Housing and Community Development Act of 1992*, Pub L No 102-550, 106 Stat 3606 (1992).

9. See John Emmeus Davis, "Origins and Evolution of the Community Land Trust in the United States" in John Emmeus Davis, ed, *The Community Land Trust Reader* (Lincoln Institute of Land Policy, 2010) 3; Jean-Philippe Attard, "Un logement foncièrement solidaire: le modèle des community land trusts" (2013) 74:2 *Mouvements* 143.

10. *Loi n° 2014-366 du 24 mars 2014 pour l'accès au logement et un urbanisme rénové*, JO, 26 March 2014, no 0072 [*Loi ALUR*].

11. See TM Scanlon, *Why Does Inequality Matter?* (Oxford University Press, 2018).

12. See Hanoch Dagan, *A Liberal Theory of Property* (Cambridge University Press, 2021).

Section 3 of the paper takes this definition of a liberal housing market and confronts it with discourses that promote the ‘de-commodification’ of housing and view CLTs as an anti-market tool to preserve diversity in cities. While the liberal view is incompatible with the ‘anti-commodification’ discourse, one must consider that housing markets, even with proactive policies to increase supply, will likely remain exclusionary for the poor, partly for complex political reasons. Assuming this, CLTs do seem useful to preserve some diversity in cities, the access to which is required by a concern for the autonomy of individuals.

In section 4 of the paper, I contend that CLTs make a valuable contribution to individual autonomy based on their own merits. As an institutional form, common-interest communities—of which CLTs are part—are valuable for individuals, as they help them realize individual goals collectively. These goals range from cooperating for efficiency only through economies of scale, to forming substantial communal bonds around a shared conception of the good life. As such, in their diversity, they support the autonomy of individuals. With the particular balance between individual control, communal bonds, and cooperation they provide, CLTs widen the scope of existing institutional forms in a way that fills a void within this spectrum. This potential is confirmed by the regularity and the ingenuity of legal innovations designed to welcome them in other legal systems.

2. What is a liberal housing market?

2.1. *The burden of housing*

While definitions of affordability vary, it is uncontroversial that reduced access to housing is a significant issue, especially for the less wealthy.¹³ Because of the lack of housing options in major cities, people are forced to rent their homes at the highest prices or live too far away to benefit from jobs or educational opportunities. For example, in the European Union, housing represents an average of 20% of a family’s budget.¹⁴ For single persons and single persons with children, it means more than 30% of incomes, while 9.6% of the population of the European Union spends more than 40% of their income on housing. More critically, housing costs bear more heavily on the poorest: the share of people overburdened by housing costs (meaning that more than 40% of their income is dedicated to housing) is by far the highest in the first-income quintile among Europeans. The situation in the US is very similar, as rents are rising and states have gradually fewer low-rent units.¹⁵ In Canada, despite significant improvements in recent years, the rate of ‘unaffordable housing’ (i.e., the proportion

13. See Michael E Stone, “What is Housing Affordability? The Case for the Residual Income Approach” (2006) 17:1 Housing Policy Debate 151.

14. See “Housing costs a challenge to many households” (20 May 2020), online: *eurostat* ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20200520-1

15. See Joint Center for Housing Studies of Harvard University, “America’s Rental Housing 2022” online (pdf): www.jchs.harvard.edu/americas-rental-housing-2022?s=03.

of households that spent 30% or more of their income on shelter costs) remained high (56%) for renters earning below the median household income of all renters.¹⁶

The rising cost of housing is a direct financial issue. Still, its consequences are more profound since education and job opportunities—often concentrated in areas where these costs are the highest—are increasingly more challenging to access. This obstacle hinders people’s path to fulfilling and forming new goals. Unfortunately, there are no easy solutions to this issue. Increasing supply seems like an apparent policy to lower prices and make housing more affordable.¹⁷ Since restrictive land-use regulations generally make housing prices rise, lowering them would have desirable effects.¹⁸ Zoning restrictions, in particular, are deemed quite costly,¹⁹ and, more critically, for the increase of supply via construction, there is a direct link between the cost of housing and restrictions.²⁰ However, there are no panaceas, partly because results are not always as effective as hoped, but mainly because competing political and individual interests are substantial obstacles to any reform.²¹ Therefore, ‘simple’ solutions such as the complete liberalization of zoning policies are not attainable goals. To these obstacles are added historic preservation laws and environmental considerations.²² Consequently, pragmatism recommends gradual and careful densifying efforts at a rate that hardly meets short- and medium-term needs. This means that some measures, which, ideally, may not be necessary, are needed to mitigate the effects of the undersupply of affordable housing. Beyond this, the need for some social housing might never be fully extinguished as a vital support to the poorest populations, following ‘neoliberal’ arguments.²³

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16. See “To buy or to rent: The housing market continues to be reshaped by several factors as Canadians search for an affordable place to call home” (21 Sept 2022), online: *Statistics Canada* www150.statcan.gc.ca/n1/daily-quotidien/220921/dq220921b-eng.htm
 17. See Vicki Been, Ingrid Gould Ellen & Katherine O’Regan, “Supply Skepticism: Housing Supply and Affordability” (2019) 29:1 Housing Policy Debate 25.
 18. See John Landis & Vincent J Reina, “Do Restrictive Land Use Regulations Make Housing More Expensive Everywhere?” (2021) 35:4 Economic Development Q 305; Jenny Schuetz & Cecile Murray, “Is California’s Apartment Market Broken? The Relationship Between Zoning, Rents, and Multifamily Development” (2019) 2019:7 Brookings Institution Reports, online (pdf): search.proquest.com/reports/is-california-s-apartment-market-broken/docview/2577514336/se-2
 19. See Lawrence Katz & Kenneth T Rosen, “The Interjurisdictional Effects of Growth Controls on Housing Prices” (1987) 30:1 *JL & Econ* 149.
 20. See Edward L Glaeser, Jenny Schuetz & Bryce Ward, “Regulation and the Rise of Housing Prices in Greater Boston: A study based on new data from 187 communities in eastern Massachusetts” (2006) Pioneer Institute for Public Policy Research & Rappaport Institute for Greater Boston, online (pdf): www.hks.harvard.edu/sites/default/files/centers/rappaport/files/regulation_housingprices_1.pdf
 21. See ADH Crook et al, “The incidence, value and delivery of planning obligations in England in 2007-08” (2010) Department of Communities and Local Government: London, online (pdf): www.cchpr.landecon.cam.ac.uk/system/files/documents/Full-Report_8.pdf; Bernard Fingleton, Franz Fuerst & Nikodem Szumilo, “Housing affordability: Is new local supply the key?” (2019) 51:1 *Environment & Planning A: Economy & Space* 25.
 22. See Peter V Schaeffer & Cecily Ahern Millerick, “The Impact of Historic District Designation on Property Values: An Empirical Study” (1991) 5:4 *Economic Development Q* 301.
 23. See Nick Cowen, *Neoliberal Social Justice: Rawls Unveiled* (Edward Elgar, 2021).

2.2. Focusing on autonomy: from Scanlon to Dagan

Which solutions to the housing problem should be put forward from a liberal point of view favoring autonomy as self-authorship?²⁴ A first step taken by Scanlon would be to argue that, while individual property rights and markets are necessary for autonomy, the cost this market imposes on the autonomy of others needs some compensation, viewed as redistribution.²⁵ Nevertheless, a problem with this perspective can come from the way it contemplates markets from the outside, as a black box producing negative externalities that need fixing. The limitations of this view of the housing market as a pre-determined and fixed institutional form should motivate a further step. Indeed, if property rights must promote self-authorship, they must provide, in addition to safeguarding the “right to the city,” ways of designing and redesigning one’s life through a substantial variety of valuable property arrangements.²⁶ Without forgetting distributive concerns, justice is also about the relations that property rights bring to individuals and communities.²⁷ In what follows, I argue that, at least in the context of housing, the former distributive perspective is complemented by the latter, before addressing the issue of the justification for adding another type of property arrangement—here, CLTs—to existing ones.

Scanlon first examines the issue of housing in his discussion of inequality. At the most general level, inequality raises two concerns and therefore grounds two objections: first, it gives the wealthy unjustifiable power over others, and second, it undermines the equality of economic opportunity.²⁸ Justice would therefore require tackling these inequalities through redistributive policies, which justify taxes. If one looks at property rights and the problem of housing inequalities, would this justify, for instance, certain expropriations? Following Scanlon’s contractualism, institutions are justified if the interests they serve are a sufficient reason to support them.²⁹ Scanlon, therefore, justifies property rights in general by the way they protect one’s fundamental interest in having “stable control” over “objects that are needed to provide for one’s life,” to “plan” and “carry out one’s projects.”³⁰ Some degree of control over objects and how we can transfer them is thus necessary to be the author of one’s own life. However, this justification of property rights is collective: it must apply to all and, therefore, does not support unlimited control over one’s property, since “[g]iving me that kind of control might be incompatible with the reasons that others have to carry out *their* projects.”³¹

24. See Raz, *supra* note 7 at ch 14, ch 15.

25. See Scanlon, *supra* note 11.

26. Loren King, “Henri Lefebvre and the right to the city” in Sharon M Meagher, Samantha Noll & Joseph S Biehl, eds, *The Routledge Handbook of Philosophy of the City* (Routledge, 2019) 76.

27. See Hanoch Dagan & Avihay Dorfman, “Just Relationships” (2016) 116:6 Colum L Rev 1395.

28. See Scanlon, *supra* note 11 at 8.

29. See TM Scanlon, *What We Owe to Each Other* (Belknap Press, 1998).

30. Scanlon, *supra* note 11 at 106.

31. *Ibid* at 108 [emphasis in original].

Scanlon provides a crucial justification for a private housing market within this framework: A housing market enables individuals to discover their taste in housing and act on their preferences. I propose elaborating on this essential point through the relatively common example of two students who came to the same city separately. Over the years, they tried several possibilities, such as having roommates and living independently, until they met and later decided to move in with each other. This process enables them to refine their housing preferences regarding a wide range of features (general layout, location, etc.) in connection with the evolution of their income and needs. One only needs to look back at one's choices in accommodation to realize that past situations that may have appeared not only acceptable but desirable (e.g., sharing an apartment with friends) may now be considerably less appealing.

Let us assume, rather broadly, that their choices fully align to the point of knowing whether or not they wish to have children and raise them in the city. The couple who wishes to stay in the city and have children but cannot get a larger apartment is constrained. Their choice lies between two non-ideal options: forgetting their desire to have a child or leaving their much-appreciated city life. The way one's range of opportunities is thus limited is indirect. Still, it is an obvious sign of how one's autonomy is affected by the discrepancy between one's life plans and the limits the housing supply places on what individuals can afford.

However, one may consider that constraints on opportunities like those mentioned here are insufficient to affect otherwise-justified property rights. Nevertheless, as observed before, the poorest tend to be affected the most by the lack of housing supply. The opportunity cost of not living in or close to a big city may be as consequential as losing educational or job opportunities. In response to that problem, Scanlon does not suggest putting a cap on rents or expropriating landlords' holdings. Instead, for the housing market to be justified, assuming that limitations on property rights are legitimate for them to be justified, one is not necessarily "entitled to the full scarcity premium of his or her property."³² Therefore, a tax on real estate transactions should secure the necessary funds to support two measures that will attenuate the negative consequences of an otherwise desirable private housing market: the provision of social housing on the one hand and the guarantee of a basic income on the other.

While essential, Scanlon's perspective appears incomplete. It maintains both a distributive view of justice and an external point of view of the housing market, thereby disregarding the way property rights are specifically designed within it. It is not, however, incompatible with an internal perspective that would focus on how property rights promote autonomy. On the contrary, as seen before, Scanlon grounds the justification of property rights in the way they promote one's "basic personal interests" to having "stable control" over some things of this world, which is essential to carrying out our plans.³³ In addition, Scanlon's contractualism draws his attention to objections against property rights, enabling him

32. *Ibid* at 112.

33. *Ibid* at 106.

to weigh the importance of the interests they support against those they undermine. Such objections are raised in the name of the autonomy of non-owners against that of owners. For example, while one owner's plan to purchase an apartment to get additional income from renting for short-term stays is perfectly valid, its potential interference with long-term tenants' plans in a city suffering from a housing shortage is worth careful consideration. Distributive justice may require that interventions are aimed at supporting the less wealthy as a priority, since they suffer the consequences the most. However, because scarcity is, according to Scanlon, what creates both the premiums that he wishes to tax and the difficulties of others to find housing, structural interventions on markets are required to increase the housing supply as an overall priority.

In that case, if autonomy is as essential as Scanlon seems to believe, then a universal basic income is not an incorrect but rather an insufficient answer, as it may only prevent the complete economic domination of tenants by landlords instead of enabling the former to fully enjoy the opportunities of the city and the diversity of property arrangements. The supply of social housing is also essential to a certain extent. Still, it can be highly damaging to the autonomy of entire communities when it becomes synonymous with social and spatial exclusion. It is also quite limiting when individuals struggle to move away from it, and it is just unfair when not distributed to those who need it the most.

Scanlon's recommendations, tackling the distributive injustices of the housing market from the outside, can, therefore, be complemented by measures shaping property rights to promote collective autonomy and not merely the owners' autonomy. This way, while having a housing market with private ownership does enable individuals to discover and act on their preferences, the promotion of autonomy as self-ownership requires more than a 'free' market and property rights, particularly if one believes that the *telos* of property rights is to promote self-authorship in general.³⁴ Markets that promote self-authorship are liberal in that sense.³⁵ This means, first, that other objectives, such as independence (meaning freedom from constraints) or strict aggregate welfare, are secondary goals. Following this liberal view, what comes first is the ability of all individuals to design and redesign their lives through access to the opportunities that cities provide.

This liberal vision thus relies on "two necessary pillars": structural pluralism—or the provision of different forms of property so that people may realize different goals—on the one hand, and the "right to be included" on the other.³⁶ It has crucial consequences on the direct limitations there should be to the private authority of owners, and on the plurality of legal structures that are on offer to individuals, "especially in the contexts of housing and the

34. See Dagan, *supra* note 12 at ch 3.

35. See Hanoch Dagan, "Markets for Self-Authorship" (2017) 27:3 *Cornell JL & Pub Pol'y* 577; Hanoch Dagan et al, "The Law of the Market" (2020) 83:2 *Law & Contemp Probs* i at i.

36. Dagan, *supra* note 12 at xi.

workplace.”³⁷ ‘Promoting’ self-authorship collectively, and not just as an individual right, thus requires empowering all individuals to make short- or long-term plans and to change them.³⁸ For this reason, the available set of valuable options must be as extensive as autonomy itself allows, since a commitment to autonomy implies a “commitment to stability and predictability” to respect both the “mission of stabilizing expectations” and that of facilitating “people’s self-determination.”³⁹ This also means that these options should allow everyone to be included because of the opportunities dense cities provide. Finally, diversity should be cultivated as a good *per se*, since it increases opportunities to experiment with one’s vision of the good life. Within this framework, large cities made up of only individual tenants under corporate landlords, while potentially very efficient, are rejected because of the lack of diversity of opportunities and ways of life. So too would be a model that would only offer social housing, market rentals to individual landlords, or CLTs, etc.

2.3. *What autonomy requires of the housing market*

In summary, liberal policies that would include both internal and external perspectives, as well as relational and distributive perspectives, should tend to do the following:

1. Make sure that the autonomy of the most vulnerable individuals is maintained by taking care of the background conditions to maintain access to housing. This can justify the need for social housing and other redistributive measures, such as a universal basic income.
2. Diminish the damaging effects of the autonomy of owners on non-owners, not only by protecting tenants if and when necessary but also by limiting the rights of owners and others to block the construction of new housing and limiting behaviors that currently aggravate the housing crisis while actively increasing the supply of housing through reforms of zoning laws.
3. Promote access to property ownership as an inclusive goal to all who may desire it, and in different forms, for the sake of structural pluralism and autonomy in general.

None of these considerations, including a liberal “right to the city,” imply that every person has a right to live in the center of the center of a country.⁴⁰ This also does not mean one has the right to be an owner. However, while one may argue that a concern for “domination” does not support a right to ownership, a concern for autonomy requires at least the possibility of becoming an owner, which is generally in line with the promotion of a plurality of options to design one’s life

37. *Ibid* at 7. See also *ibid* at 4, 62.

38. See Raz, *supra* note 7 at ch 10.

39. Dagan, *supra* note 12 at 172-73.

40. King, *supra* note 26.

plan.⁴¹ Ownership also enables one to design their private space and the space they share with co-owners in a way that renting cannot. Even the most robust tenant rights can hardly provide the same sense of control over one's space and the amount of time one will spend in it. There is, in fact, a sense of great arbitrariness in the legitimate ability of the landlord to terminate a lease, even in systems that are the most protective of tenants.

Does this mean that there is a form of economic domination in that situation? It may be, if the sole existence of such arbitrariness and vulnerability to another's legal power is considered 'domination'. This may be the one element that cannot be removed from a lease, considering it would negate owners' essential right and interest in disposing of their property. At least from the perspective of Scanlon's contractualism, the tenant's undeniable interest in the stability of their position does not seem to justify the denial of a landlord's most fundamental property right. This holds, providing that the conditions for termination are respectful of a tenant's vulnerability: for example, by providing them time to find new housing.

However, for those who value long-term control of where their home is more than the flexibility that renting provides, hopping from one private rental to the next—even with strong legal protections—is not a desirable option. In addition, being the owner of one's housing unit allows one to truly inhabit a space without requiring a landlord's authorization to make modifications. Dismissing this desire as a futile wish to 'decorate' one's space—such as by installing a premium stove or creating more kitchen space to express one's cooking skills—ignores how influential minor tweaks in the design of one's home can be. On top of being at the mercy of their landlord's willingness to make such changes, a tenant may suffer economic losses and penalties for effectuating them when exiting an apartment. This does not make ownership a strictly superior option for all individuals, since that often comes with its own troubles and should not be fetishized. Renting does correspond to multiple lifestyles and can even make financial sense. However, having a diverse set of valuable options is a requirement of autonomy.

Where do CLTs belong in that framework? A simple argument in favor of CLTs could be that they contribute to the third category of goals described above by providing an additional opportunity to become homeowners to people who otherwise might not have been able to do so. The mere cutting in half of the price of a housing unit is a good argument for CLTs, as it fills the gaps between social housing and the 'regular' housing market. Dagan only suggests this, and this paper mainly elaborates on that intuition.⁴² However, CLTs are not necessarily simple in design, and their creation and management increase transaction costs in an environment (cities) where regulations are confusing. This objection, which makes stability a core value of property law, is an important one to Dagan's 'structural pluralism', which cannot be a license to unbounded complexity and

41. Katy Wells, "The Right to Housing" (2019) 67:2 Political Studies 406 at 417.

42. See Dagan, *supra* note 12 at 108.

complete relativism, in the way certain conceptions of property as a “bundle of rights” may lead to.⁴³

Instead of an all-encompassing answer to that problem, one may suggest criteria to evaluate the validity of a specific proposal to enlarge the spectrum of property arrangements. Overall, one must determine, on an individual basis, whether a particular design fills a ‘gap’ in the set of available designs and thereby performs a needed function. A gap can be noticed in two ways. First, from an empirical point of view, we are informed of it by observing how individuals and communities have been tinkering with available legal resources to solve specific problems. If CLTs could do a better job than existing attempts or if communities have been innovating to approximate CLTs in their legal system, this may be a clue that the general idea behind the design is desirable to specific populations.

Second, from a theoretical perspective, if one aims to promote a specific set of values, a design is desirable if it promotes them in a way consistent with a reasonable concern for legal stability and with other, more internal theoretical constraints. In the case of an autonomy-oriented view, this means that the need for CLTs would be evaluated by their ability to serve individuals’ autonomous purposes (e.g., forming a community) in a way that existing designs have not done yet, all without disturbing the ability of individuals to rely on a stable legal framework. The following sections address these two sets of questions.

3. CLTs as liberalism-compatible

3.1. *Commodification as market relations*

Common justifications of housing policies mix two different views: the idea that the diversity of neighborhoods must be preserved on the one hand, and the idea that housing prices are unfairly driven up by market forces—which requires actions to de-commodify housing—on the other. Even though housing activists will often conflate them, I individuate these lines of argument as the *de-commodification* and *preservation* views.⁴⁴ I first deconstruct the decommodification argument in general and how it is applied to CLTs. I then focus on the preservation argument, which I believe is compatible with liberal ideas and can provide reasonable justifications for using CLTs.

The decommodification view is, in fact, two views. The first is a critique of the fact that housing is a commodity exchanged on markets. The second criticizes the process by which housing has become an asset in financial markets. Following

43. Henry E Smith, “Property Is Not Just a Bundle of Rights” (2011) 8:3 Econ Journal Watch 279 at 279. See also Henry E Smith, “Property as the Law of Things” (2012) 125:7 Harv L Rev 1691.

44. See Patrick Butler, “‘Housing should be seen as a human right. Not a commodity’”, *The Guardian* (28 February 2017), online: www.theguardian.com/society/2017/feb/28/luxury-real-estate-housing-crisis-un-homelessness.

the first critique, the mere fact that housing became a commodity places those in need of housing in a position of submission to those who can provide it within a capitalistic economy. Strangely, this argument's proponents undermine it by referring to feudalism as an example of an era when housing and land were corollaries of other socioeconomic relations. However, instead of defending feudalism, they would rather see housing taken out of market dynamics by placing tenants under the care of the State or of an autonomous non-profit.⁴⁵

The first problem of this argument lies in the optimistic assumption that the State or non-profit will not be as oppressive as landlords. Nevertheless, the deeper issue of this argument is that it generally starts from the questionable premise that market mechanisms *per se* are exploitative. A full critique of this idea lies out of the scope of this paper. Still, one may look at Brennan and Jaworski's analysis of the anti-commodification argument and their conclusions that background conditions, rather than market mechanisms, are usually the underlying reasons.⁴⁶ In the case of the housing market, structural undersupply should be the target, rather than something like the supposed 'greed' of landlords.

3.2. Commodification as financialization

A more refined view of commodification as financialization focuses on the fact that housing has primarily become a "liquid asset."⁴⁷ Commodification would be the process through which housing is viewed as primarily having an exchange value rather than a use value, thereby being disconnected from the needs it should fulfill.⁴⁸ Such concerns are legitimate if housing is bought and hoarded massively with the prospect of future returns, depriving individuals of the opportunity for adequate housing. However, this does not lead to the conclusion that housing should be 'de-commodified'.

First, this phenomenon only affects part of the housing market. Tensions generally arise because of a lack of supply to meet demand. This would be confirmed by the relationship between rent prices and vacancy rates: increased vacancies would lead to decreases in rent, and vice-versa.⁴⁹

Second, the very existence of the opportunity to financialize housing points to the root of the problem: Investment funds turn to land or housing as an investment precisely because other uses, like dense development, are not attractive enough. Conversely, the existence of investment mechanisms, such as mortgage-backed securities, facilitates the financialization of housing.

45. See David Madden & Peter Marcuse, *In Defense of Housing: The Politics of Crisis* (Verso, 2016) at 18.

46. See Jason Brennan & Peter M Jaworski, *Markets Without Limits: Moral Virtues and Commercial Interests* (Routledge, 2015).

47. Madden & Marcuse, *supra* note 45 at 26.

48. See Ana Maria Peredo & Murdith McLean, "Decommodification in action: Common property as countermovement" (2020) 27:6 *Organization* 817.

49. See Masahiro Igarashi, "The rent-vacancy relationship in the rental housing market" (1991) 3:1 *J Housing Economics* 251.

Third, more supply is at least a partial solution to this problem, even though there is no apparent reason to believe that the financialization of housing is caused, in part or totally, by structural undersupply. Financial bubbles and their subsequent bursting suggest a wide gap between the financial value of an item and its value in the real economy. This caveat, however, only reinforces the impression that the two problems—the financialization of housing and the lack of affordable housing—are not directly related.

Fourth, financialization must be distinguished, as Madden and Marcuse seem to do, from other profitable housing uses, such as buying-to-let, short-term rental platforms, or development targeting the rich via luxury housing.⁵⁰ All are profitable primarily because of limited supply in a context where the choice is, for example, between renting out an apartment or using Airbnb, and selling one's property or leaving it empty. Some measures may be acceptable to limit some uses in favor of others (i.e., caps on the number of Airbnb nights, long-term vacancy taxes, etc.). Moreover, in the case of luxury housing, developers often only have one option: making money via selling rare, expensive goods to the few, since selling plenty of affordable goods to the many is made impossible by zoning laws themselves, e.g., when an area is zoned as single-family only. More critically, the recent literature suggests that building luxury and market-rate housing has chain-reaction effects that improve housing mobility, so this should not be such a prominent problem.⁵¹

Ultimately, the deep disconnect that the anti-commodification argument sees between exchange- and use-value is fundamental to any market. The price of housing on the market is indeed disconnected from its use value for the individual, since it only reflects the aggregate decisions of the members of large groups. However, it allows different individuals with different use values for housing units to exchange goods in a way that matches their idiosyncratic preferences. The exchange value is, therefore, a means to an end using housing, and the financialization of housing is a symptom that a market is dysfunctional rather than a call to abolish it.

Where does this leave us regarding efforts to 'de-commodify'?

1. Specific measures to curtail the financialization of housing and solutions dedicated to mitigating the effects of undersupply on the regular market (i.e., vacancy taxes, limitations on short-term rentals, etc.) do not question commodification in the first sense.
2. Rent control, on top of limiting mobility and access to cities to provide stability to some, comes from a critique of commodification in the first sense. As such, it only tackles the symptoms instead of the cause of a market that suffers from undersupply.

50. See Madden & Marcuse, *supra* note 45 at ch 1.

51. See Evan Mast, "JUE Insight: The effect of new market-rate housing construction on the low-income housing market" (2023) 133 J Urban Economics 103383; Cristina Bratu, Oskari Harjunen & Tuukka Saarimaa, "JUE Insight: City-wide effects of new housing supply: Evidence from moving chains" (2023) 133 J Urban Economics 103528.

3. Social housing gives the State and local authorities the responsibility to invest in housing with diminished to non-existent returns, potentially undercutting commodification in the second sense. Does social housing undercut commodification in the first sense? It may be that it does and that CLTs do, too, so I now address this specific argument.

3.3. *Decommodification applied to CLTs.*

Peredo and McLean develop an elaborate version of the classical defense of CLTs, centered on decommodification as a tool to fight the “hegemony of the market system” by building alternatives.⁵² Land, for instance, is abstracted from meaningful human relations to become impersonal on the market.⁵³ Under this view, CLTs are an economic practice with a “foundation in common property and the attenuation of commodification.”⁵⁴ This view generally relies on two recurring characteristics of CLTs, strikingly common to all their specific instantiations in the legal systems mentioned in the next section. First, the land on which housing units are built is owned by the non-profit foundation or organization that runs the CLT. This land is generally declared inalienable in perpetuity, and the CLT’s board is entrusted solely with its management without the right to sell it. Second, owners of housing units also see their alienation rights curtailed, as the CLT’s board determines the selling price and the profile of potential heirs and buyers.

Nevertheless, it is difficult to contend that the first restriction on alienation places CLTs beyond markets, reversing commodification. Peredo and McLean do acknowledge that these practices of decommodification are not “all-or-nothing” but rather an attempt at partially “re-embedding” land within a human context.⁵⁵ The management duties and non-profit character of the CLT board make it a market player just as art foundations are. They may not be able to sell individual pieces of an art collection, but they are encouraged to profit from their display by granting access to it. In the words of legal theory, CLTs still possess part of the ‘sticks’ that compose the bundle of property rights, and the housing units they sell are still commodities. An accurate view of how property rights work in practice undermines all-or-nothing anti-commodification arguments, since there is a large spectrum between non-commodities and commodities.⁵⁶

Therefore, CLTs do not allow de-commodification in the first sense. This is confirmed by the fact that their price and reselling formula are systematically aligned with market prices.⁵⁷ The result is similar when housing is socialized

52. Peredo & McLean, *supra* note 48 at 818.

53. *Ibid* at 821.

54. *Ibid* at 819.

55. *Ibid* at 822.

56. See Tsilly Dagan & Talia Fisher, “Rights for Sale” (2011) 96:1 Minn L Rev 90.

57. See CA Seeger, “The Fixed-Price Preemptive Right in the Community Land Trust Lease: A Valid Response to the Housing Crisis or an Invalid Restraint on Alienation?” (1989) 11 Cardozo L Rev 471.

or made affordable through subsidies. For instance, the proposal to buy back large amounts of land from corporate landlords, put forward by some Berliners in 2021, does not prove that housing can be de-commodified.⁵⁸ Instead, it shows that the State may buy back real estate to subsidize rents. In this situation, the State acts like the constrained manager of a trust. The potential of CLTs to de-commodify housing may be limited to the second sense of de-commodification as de-financialization, at best, with reservations. In the meantime, CLTs are not at all extracted from market relations.

3.4. CLTs and the liberal preservation view

From the ‘preservation’ perspective, access to cities means access to opportunities and diverse ways of life, an essential component of effective individual autonomy undermined by an exclusionary housing market. This draws attention to measures that aim to mitigate the effects of markets and preserve access to the city and its density rather than proposing to take housing off the market. Rent control tends to be incompatible with this imperative for two reasons.

First, it suffices to say that rent control is unlikely to lead to an increase in housing supply, whether for lack of incentives to build or simply because promoters of rent control consider, at best, that increasing supply is not a priority. Second, while rent control may preserve some of the diversity of neighborhoods, it does so by limiting the mobility of individuals.⁵⁹ Current inhabitants trade the benefits of rent control for a loss of mobility. At the same time, potential newcomers are kept out as more owners either leave their properties vacant, sell them, aim for more exclusive markets, or convert them. Preserving neighborhood diversity via rent control, though at first defended for the sake of autonomy and opportunities, comes at a double cost to the autonomy of individuals, on top of a tendency to discourage landlords and developers and to slow down construction.

While stating that CLTs can significantly contribute to increasing the housing supply would be premature, they are unlikely to reduce construction. Types of CLTs, as will be discussed in section 4, vary greatly in design. However, some of their recurring features suggest, at the very least, that their governance structure and built-in incentives make them less susceptible to letting incumbents use their political and legal power to prevent newcomers from benefiting from the mechanism. The management powers of residents are generally reduced compared to other forms of common-interest communities. Conversely, managing boards, usually composed of external actors like municipal or community representatives, have broader interests in mind and can be directly constrained by the statutes of the CLT to make its social purpose prevail over other considerations. Additionally, they lack the ‘traditional’ landowner’s interest in preventing new constructions. Finally, they have incentives to prioritize the long-term sustainability of the CLT, avoid the degradation of the building and housing units,

58. See Alkousaa & Inverardi, *supra* note 3.

59. See Diamond, McQuade & Qian, *supra* note 6.

and prevent long-term vacancies. Considering that these last factors are important contributors to housing crises on top of the lack of construction, CLTs appear less anti-supply than rent-control policies.

A French example explored in section 4 suggests that enabling as many economic actors as possible to launch CLTs—including traditional social housing developers—can help them positively contribute to providing more supply. CLTs may also be more equipped to face the obstacles that densification policies systematically face. Indeed, one must recognize the housing market's complexity and politics, particularly in areas with conflictual local politics and active historical conservation efforts.⁶⁰ As a result, densifying European capitals, for instance, to make them considerably more affordable in less than a generation, remains idealistic. Similar obstacles may block other desirable options, such as a land-value tax.⁶¹ However, the undersupply of housing is a structural issue that affects all kinds of policies, and the potential of CLTs is just as conditional on the evolution of the broader legal and political context as any other alternative.

The focus of this paper remains on the impact of institutional designs like rent control and CLTs on autonomy. Considering both as compensation mechanisms for the 'flaws' of the market, I argue that in a context where densification policies are doomed to be too slow and individuals still struggle to access cities, CLTs complement a toolbox that preserves diversity. They may fulfill a unique role in that spectrum of measures by targeting medium-income households that may have been able to remain tenants but not own or those who need a larger dwelling but would need to move to a more affordable area to obtain one. Another strength of CLTs is their adaptability to the complex context of 'historic' city centers, which are either already dense or too complex to densify further because of preservation rules and local opposition. Such environments may be somewhat hostile to full-blown developments, including when large-scale renovations are needed, and the housing units' affordability may help neighbors accept some development. CLTs can also intervene in co-ops in financial trouble, investing in repairs and leading careful densification efforts while encountering less opposition. With this goal in mind, American CLTs have proven their ability to become non-profit foundations that can raise large amounts of funds from investors, therefore being financially viable.⁶² The money is invested in ways that increase the value of the surrounding property. Therefore, CLTs can be attractive

60. See Peter Esaiasson, "NIMBYism—A re-examination of the phenomenon" (2014) 48 *Social Science Research* 185.

61. See Henry George, *Progress and Poverty. An Inquiry into the Cause of Industrial Depressions, and of Increase of Want with Increase of Wealth: The Remedy* (D Appleton, 1879); Joseph E Stiglitz, "The Origins of Inequality, and Policies to Contain It" (2015) 68:2 *National Tax J* 425.

62. See Susan Braden, "Essex affordable housing Lofts in village center, a success story for CT nonprofit", *CT Insider* (10 February 2022), online: www.ctinsider.com/shoreline/article/Essex-affordable-housing-Lofts-in-village-center-16845876.php; Oscar Perry Abello, "With Donations as Small as \$20, Land Trust Makes \$9.4M Affordable Housing Buy in S.F.", *Next City* (1 February 2022), online: nextcity.org/urbanist-news/with-donations-as-small-as-20-land-trust-makes-9m-affordable-housing-buy.

for investment funds with a social ‘mission’ instead of a tool for ‘de-financializing’ housing.

Simply put, CLTs can be a decentralized, market-compatible, and potentially pro-supply alternative to heavy regulations like rent control. They provide similar mitigation effects—mainly preserving diversity in dense cities—without their illiberal aspects. This does not mean that other measures to ensure an increase in supply are not the priority, but only that CLTs are helpful when the ideal amount of housing cannot be built. The main limitation of this argument is that it makes CLTs a mere second-best to ideal policies or less illiberal options. In the next section, I propose to show that CLTs are also a property arrangement that deserves to be included in the range of possibilities that autonomous individuals should have in any kind of housing market, functional or not.

4. CLTs among common-interest communities

4.1. *Common-interest communities: cooperation and interdependence*

In this section, I develop a non-comparative defense of CLTs as a design required by a concern for individual autonomy. CLTs should enlarge the spectrum of existing options among the current category of common-interest communities, which are essential in enabling individuals to associate themselves with others and become interdependent. This answers potential objections to Dagan’s ‘structural pluralism’, as it shows that CLTs bring a valuable option within the spectrum of property designs, thereby compensating for the complexity and the transaction costs they generate.⁶³

First, one must recognize that institutional designs do not happen in a void but rather among existing social environments and, in this case, within an existing property rights system. This does not mean that only existing designs are valid and significant innovations are impossible. Nevertheless, such an innovation must be an extension of the *ratio* of its system that can be embedded, time allowing, within its social, political, and legal environment. Luckily, CLTs are part of a subset of property arrangements already recognized in different legal systems: common-interest communities. Consequently, it is by their contribution to this subset, to an “incomplete” menu of “shared-interest residential developments,” that the contribution of CLTs should be assessed.⁶⁴ Why, then, should this subset be ‘completed’? The extension must be supported in a way that justifies an increase in institutional complexity: first from the point of view of autonomy as self-authorship itself, since unbounded complexity and instability undermine the ability of individuals to make plans; and second, by referring to cardinal

63. See Thomas W Merrill & Henry E Smith, “Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle” (2000) 110:1 Yale LJ 1.

64. Dagan, *supra* note 12 at 107.

values in Dagan's framework ("independence, personhood, community, and utility").⁶⁵

To do this, it is necessary to take a step back and look at what makes common-interest communities, in general, valuable for individual autonomy. Those familiar with co-op bylaws would hardly associate them with autonomy, considering all the constraints they create and the frustratingly unending debates that ensue. From a point of view that would associate property with independence, it is clear that property rights and individual autonomy appear limited within common-interest communities. This needs to be clarified regarding autonomy. First, associating autonomy with independence or an individual's abstract ability to set their own rules and make their own choices in isolation is quite a narrow view. However, refining the view of autonomy to make it the capacity of an individual to identify their choices as authentically theirs remains too much of an "atomistic" view, since it denies the "centrality of relationships" and shared norms and values in "constituting the self."⁶⁶

Nevertheless, while social interactions must indeed be understood as essential in the constitution of autonomy,⁶⁷ such a relational view of autonomy can end up reifying the social nature of the person and relinquishing a legitimate concern for the ability of individuals to assess their choices critically.⁶⁸ This is why a 'narrative' point of view over how individuals came to form and may later reassess their preferences is essential.⁶⁹ Where does Dagan's theory stand concerning these considerations? Following Alexander, and contrary to a view that would associate both autonomy and property with independence, Dagan's approach to property is not only relational, i.e., socially constituted, but it is also substantial in that it maintains that private law should be shaped by a concern for the autonomy of the individuals it binds together.⁷⁰ This does not only mean that tenancy laws should care for the relatively weak position of tenants concerning their landlords. Instead, it questions the very place of self-sufficiency as the structuring value of property rights. Other values, such as personhood, utility, and community, would all be rationales that structure the variety of property arrangements at our disposal.⁷¹ This would widen our perspective to include common-interest communities within the spectrum of property arrangements more oriented than others towards the value of community.

65. *Ibid* at 64.

66. Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale JL & Feminism 7 at 8, 9. Cf Gerald Dworkin, "Autonomy" in Robert E Goodin & Philip Pettit, eds, *A Companion to Contemporary Political Philosophy* (Blackwell, 1993) 359.

67. See Marina AL Oshana, "Personal Autonomy and Society" (1998) 29:1 J Soc Philosophy 81; Marina AL Oshana, "Autonomy and Self-Identity" in John Christman & Joel Anderson, eds, *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge University Press, 2005) 77.

68. See John Christman, "Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves" (2004) 117:1/2 Philosophical Studies 143.

69. See John Christman, "Autonomy and Personal History" (1991) 21:1 Canadian J Philosophy 1.

70. See Gregory S Alexander, "Hanoch Dagan and the liberal concept of autonomy" (2022) 18:2 Intl JL in Context 237.

71. See Dagan, *supra* note 12 at ch 3.

Nevertheless, if it stood alone, a rationale like ‘forming a community’ could justify any kind of property arrangement, including ones that would cripple the autonomy of the individuals that participate in it. Considering, as Dagan does, that autonomy is a collective good does not mean that the primary focus is no longer on its individual expressions. This would be the danger of a conception of autonomy prioritizing the social group individuals belong to over their constant ability to be the authors of their own lives.⁷² Therefore, Dagan’s view of autonomy as self-authorship remains primarily individualistic while making room for autonomy’s relational and narrative nature. It is illustrated, for example, by Dagan and Heller’s normative description of what the commons need to be ‘liberal’.⁷³ They show an underlying concern for the capacity of individuals to be continuously autonomous and an awareness of the dangers of exceedingly anchoring autonomy in social relations. This gives this framework the ability to self-contain while still promoting institutional innovations for the sake of autonomy.

Moreover, I believe that the potential of Dagan’s theory to provide a comprehensive understanding of property designs in all their diversity lies in its combinational nature: The values he relates to autonomy—*independence, personhood, utility, and community*—can be mixed in varying ways. Dagan’s definition of ‘community’ is also that of a broad framework within which individuals cultivate interpersonal relations and thereby enjoy the benefits, as well as the costs, of “cooperation, support, trust, and mutual responsibility.”⁷⁴ In fact, one does not necessarily belong to common-interest communities to live with like-minded individuals. On the contrary, a primary reason why individuals agree to form common-interest communities is to pool resources. This efficiency-oriented view is particularly visible in arrangements like housing cooperatives and condominiums, where co-ownership enables individual owners to enjoy otherwise too-costly amenities. Another reason individuals get together is also the communal feeling some communities might create. Retirement communities are the perfect example of individuals agreeing to live next to each other to cut expenses and form a community in the primary sense of a group sharing specific characteristics, values, or ways of life or avoiding isolation.⁷⁵

Some of these communities describe themselves as “intentional cohousing,” emphasizing explicitly, in the case of older people, the desire to form a community of care and support to preserve their autonomy, including in the most basic sense.⁷⁶ These communities provide much-needed safe spaces for individuals who might otherwise suffer from discrimination, fear, or lack of

72. See Christman, *supra* note 69.

73. See Hanoch Dagan & Michael A Heller, “The Liberal Commons” (2001) 110:4 Yale LJ 549.

74. Dagan, *supra* note 12 at 52.

75. See AJ Horch, “The new retirement living: More baby boomers shun housing mega-developments”, *CNBC* (21 September 2020) online: www.cnn.com/2020/09/21/new-retirement-living-more-boomers-shun-mega-developments.html.

76. Anne P Glass, “Aging in a Community of Mutual Support: The Emergence of an Elder Intentional Cohousing Community in the United States” (2009) 23:4 *J Housing for the Elderly* 283 at 283.

acceptance from ‘generic’ retirement communities, as is the case for the LGBTQIA community.⁷⁷

Consequently, the contribution of CLTs to the set of common-interest communities should be evaluated through the particular balance they can offer between independence on the one hand and cooperation and communal bonds on the other. Common-interest communities can thus no longer be described as institutions in which individuals relinquish ‘full’ property rights. Cooperation, interdependence, and inclusivity replace independence and exclusion as a structuring rationale.⁷⁸ With Fig. 1, I propose to represent schematically the way common-interest communities are situated on a double spectrum, with one axis being the level of cooperation and the other the level of independence/interdependence.

The first spectrum deals with the degree of *communal living* in the common-interest community. Communal living involves an active commitment to form communal bonds and promote an interdependent lifestyle. While co-ops do not mandate commonalities and reciprocal support, ‘intentional’ communities may, on the contrary, emphasize them. The ‘opposite’ of communal living would be the independence of individuals, who would be free to live their private lives isolated from other community members. This independence can be characterized by actual spatial exclusion, for example, with one house per lot or a low level of intentional interactions, like neighbors in a condominium.

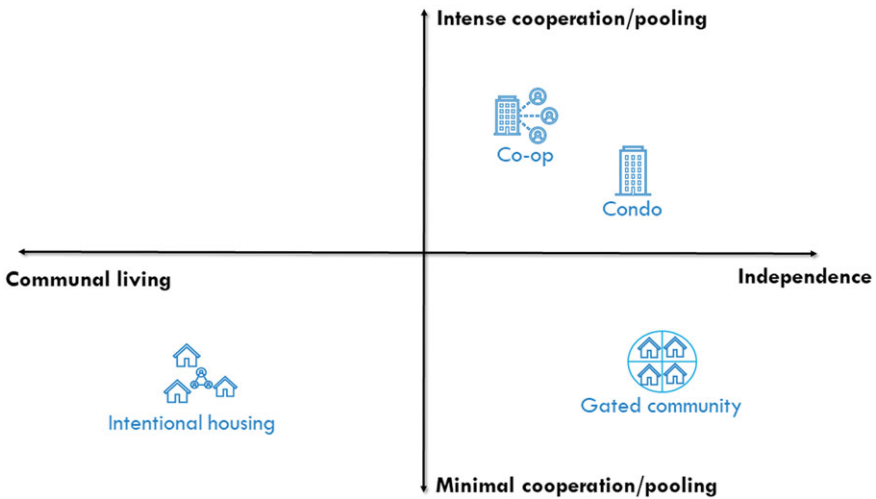
The second spectrum deals with the level of *integrated cooperation*. Individuals join these communities, from classical co-ops to LGBTQIA retirement communities, for the benefits of resource pooling and cooperation. Communities situated more on the upper part of this axis will likely require individuals to relinquish a significant amount of their independent decision-making power to a managing body that may be participatory. A distinction may be drawn between strict resource pooling for efficiency and an active commitment to invest resources for community development. In all cases, a managing board implies that some decisions are not made by individuals in isolation but rather at a higher, collective level. Governance structures will vary to reflect these trade-offs between different levels of cooperation and interdependence.

Consequently, a specific set of property rights and cooperative patterns will correspond to each community, so any further generalizations might be inaccurate. In Fig. 1, condominiums and housing co-operatives, based on American examples, would be situated close to each other. Still, members of co-ops might be considered less ‘independent’ while being involved more directly in the management of the building and facilities they share. A choice between different common-interest communities is, therefore, not a choice between more or less independence but somewhat between more independence and less cooperation

77. See Kathleen M Sullivan, “Acceptance in the Domestic Environment: The Experience of Senior Housing for Lesbian, Gay, Bisexual, and Transgender Seniors” (2014) 57:2-4 J Gerontological Social Work 235.

78. See Thomas W Merrill, “Property and the Right to Exclude” (1998) 77:4 Neb L Rev 730.

Fig. 1. Common-interest communities on a double spectrum.



on the one hand and less independence and more cooperation on the other. As such, they do not seem to be exceptions within property arrangements, which would be structured around the idea of exclusion. At the very least, one may argue that they belong to a different, parallel set of institutional designs. Nevertheless, I believe that the chart presented above, built around the cooperation/independence axis, can be extended beyond common-interest communities to include even the most ‘independent’ property arrangements, like a piece of land with a suburban home on it, or a cabin, which are both characterized by high levels of independence, but are not devoid of cooperation, as getting electricity to one’s house is rarely achieved alone. Fig. 2, below, represents this attempt at integrating a more comprehensive range of property arrangements into the independence/cooperation chart.

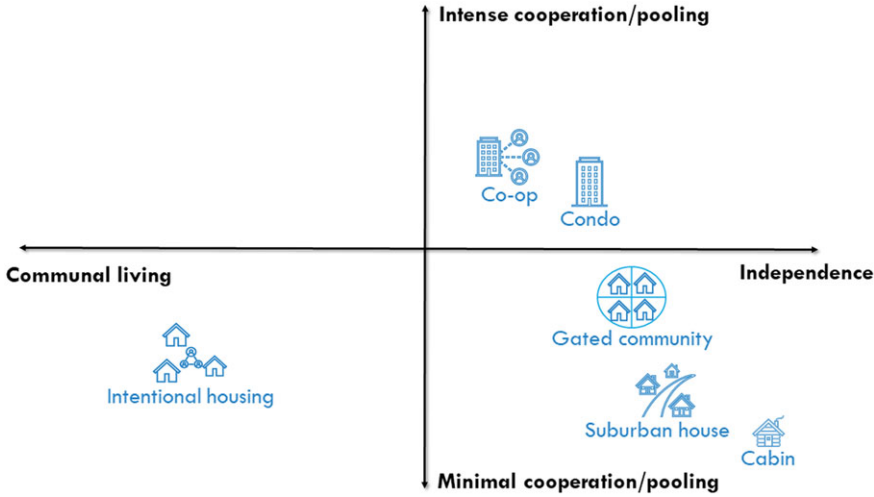
4.2. Transferring CLTs for the sake of autonomy

4.2.1. Why focus on ‘transfers’ of CLTs to other systems?

In what follows, I briefly study three examples of importation of the CLT model to other legal systems: Québec in Canada, France, and Belgium. These examples answer the ‘complexity’ objection, as they show how CLTs can be integrated into existing legal frameworks in a manageable way.

However, before moving to this, one must remember that community land trusts are not, in fact, trusts, and that they do not resort to the split in ownership between fiduciaries and beneficiaries, which is classic of common law trusts and finds its origin in equity. Instead, the original American model is that of a non-profit organization that retains ownership of land and, in the case of housing

Fig. 2. Property designs on a comprehensive cooperation/independence axis.



CLTs, then sells rights to occupy or build upon it. These rights are defined by a form of ground lease, which, in the case of CLTs, imposes limitations on both the use and sale (price and purchasers) of the rights to the housing unit. The CLT, as a non-profit, gives itself the perpetual purpose of providing affordable housing and is managed by a board, generally representing the local community and the CLT's stakeholders in a broad sense.⁷⁹

The fact that CLTs are not trusts could only have made their importation towards other systems easier, since civil law traditions struggle greatly with trusts. However, in Québec, Belgium, and France, adapting the non-profit model to the local legal systems still led to serious tinkering or outright innovation. This makes CLTs a formidable test to see how additional complexity can reasonably be brought into a system for the sake of autonomy. In what follows, I describe how each host system adopted CLTs to show that they represent a manageable expansion of existing legal categories despite what can sometimes be considered substantial innovations.

These variations are proof of the inner diversity of CLT-inspired institutional designs. They are a testament to the attractiveness of the model in general and how it can undergo creative variations that foster individual autonomy in diverse ways. Each version thus strikes a specific balance between efficiency, communal bonds, and democratic participation, thereby making the case for 'structural pluralism' within a liberal framework for property.

⁷⁹ See David M Abromowitz, "An Essay on Community Land Trusts: Towards Permanently Affordable Housing" (1991) 61:3 *Miss LJ* 663; David M Abromowitz, "Community Land Trusts and Ground Leases" (1991) 1:2 *J Aff Housing & Community Dev L* 5.

4.2.2. CLTs in Québec

The way CLTs were transferred to Canada strongly echoes their development in the US. The constituted non-profits were not initially focused on housing in dense urban areas but on preserving land for environmental or agricultural purposes. The model, however, has become more and more attractive for the provision of affordable housing, and its characteristics were transferred for that purpose, somewhat distancing itself from the value of land stewardship emphasized in previous non-urban land trusts. Bunce and Aslam cite Vivacite in Québec and the Vancouver Community Land Trust in British Columbia as examples of these recent developments,⁸⁰ confirmed by how the Canadian Network of Community Land Trusts defines CLTs on its website.⁸¹

Nevertheless, the name ‘Community Land Trust’ is not necessary for a structure to encapsulate this spirit, especially considering that it does not refer to a very defined institutional form. Property law in Québec allows any foundation to separate its ownership of land from the ownership of anything above ground thanks to the *droit de superficie*, or *right of superficies*,⁸² a legal tool shared with Belgium but not France. Starting from there, the civil law in Québec offers tools that can allow the CLT model to develop its potential further. Two recent innovations have embodied this tendency in the last few years. The first is the introduction of a new form of trust in Québec civil law that is convenient to structure CLTs. The second is a form of housing co-op focused on individual capitalization to allow its members to gradually become housing unit owners by repaying a mortgage.

During the 1994 reform of its Civil Code, Québec adopted a renewed version of the trust, called *fiducie*, several types of which, it has been argued, can serve the purpose of developing CLTs.⁸³ A trustor may constitute the land that makes up the trust as a “patrimony by appropriation” dedicated to a specific purpose, managed by a trustee for the sake of beneficiaries.⁸⁴ After the ‘appropriation’, the land in trust is neither the property of the settlor nor that of the trustee or beneficiaries, a construction that bypasses the absence of the historical distinction between legal and equitable ownership in the civil law tradition. This patrimony, which transfers can flexibly augment,⁸⁵ may be perpetual,⁸⁶ even though it does not have legal personhood. Such trusts can be private but also “social trust[s]”

80. See Susannah Bunce & Farrah Chanda Aslam, “Land Trusts and the Protection and Stewardship of Land in Canada: Exploring Non-Governmental Land Trust Practices and the Role of Urban Community Land Trusts” (2016) 25:2 Can J Urban Research 23.

81. See “About Community Land Trusts” (last accessed 13 May 2024), online: *Canadian Network of Community Land Trusts* www.communityland.ca/faqs/.

82. Art 1110 *et seq* CCQ.

83. See Ernest Vaudry & Susan Altschul, “Using Civil Law Trusts for Affordable Housing: A Community Land Trust Model” (2004) 106:1 R du N 75.

84. Art 1261 *et sq* CCQ.

85. Art 1293 CCQ.

86. Art 1273 CCQ.

dedicated to a “purpose of general interest,” providing a path to ownership for low-income households.⁸⁷

This latter instrument provides a convenient alternative for non-profits using the American CLT model, but it is attractive mostly because of its great flexibility in structural design. Anyone, legal or naturalized citizens, can be a settlor, and the category of beneficiaries is quite open. A social trust must naturally have a social purpose, the achievement and legitimacy of which is subject to judicial control.⁸⁸ Settlers are free to determine how trustees will be appointed, allowing for significant variations in the governance structure. Once again, any legal or natural person can be a trustee, and diverse groups can form boards of trustees. This leaves the possibility of including the community in the management of the CLT, as the original model intended. The ‘appropriation’ mechanism then ensures that the land will be perpetually used for its social purpose and promotes the autonomy of a community in the long term by making each of its members a steward of the common patrimony without locking anyone in.

Another instrument that can rely on such trusts (but does not need to) is a form of housing cooperative that grants usufructuary rights to its members in return for payment of a mortgage and participation in the management of the cooperative. These ‘*coopératives d’habitation à capitalisation individuelle*’, imagined by Frenette and Brochu, combine existing legal tools ingeniously.⁸⁹ A foundation separates the ownership of the land from the right of superficies. It may or may not keep the ownership of the land, but it donates the right of superficies to a housing cooperative with legal personality. These rights are placed under the regime of divided co-ownership. The cooperative only distributes transferable usufructuary rights for an extended period to voluntary members in exchange for regular mortgage payments. Meanwhile, the cooperative remains the legal owner of the right of superficies until the period is over. Members will later be able to sell their rights and leave the cooperative, but transfers are conditional. Members can only get a pre-defined profit margin; the purpose of the cooperative and the housing units it manages must remain the same. Meanwhile, they are guaranteed a role in the management of the cooperative and are expected to embrace one.

The housing cooperative Havre des Pins was the first to rely on this legal mechanism in 2019, and projects are growing in size and ambition to provide housing to larger and larger numbers.⁹⁰ Following Brault, this legal design is

87. Art 1270 CCQ.

88. Art 1294 CCQ.

89. See François Frenette & François Brochu, “Les Coopératives d’Habitation à Capitalisation Individuelle” (2004) 106:2 R du N 205; François Frenette, Vincent Roy & Jean Bouchard, “La Coopérative d’Habitation à Capitalisation Individuelle: Retour sur les Voies de Son Accomplissement en Droit Civil Québécois” (2012) 114:3 R du N 501.

90. See François Frenette, “La coopérative d’habitation à capitalisation individuelle, son avènement au Québec” (2019) 45:3 Géomatique 12. See also “Presentation of Owner Cooperatives!” (17 February 2022), online: [Quebec Confederation of Housing Cooperatives](https://www.fondscap.ca/accueil/projets/); “Projects” (last accessed 13 May 2024), online: [Fond Coop Accès Proprio](https://www.fondscap.ca/accueil/projets/).

“using the law to maximize the balance between protecting the collective and the private interests of the members.”⁹¹ It thereby combines the “individualism” of property and the value of “community” with “collective ownership *embedded* in the encoded concept of private property,” following Dagan’s blueprints for a ‘liberal’ theory of property.⁹² Both social trusts and these housing cooperatives fulfill the original intention behind CLTs in slightly different ways: for example, by ensuring the direct and democratic participation of members in the management of the cooperative on the one hand, and by putting only designated trustees, constrained to act only in the interest of the land trust on the other. Québec thus provides a plurality of property arrangements and governance structures, echoes of which can be found in the French and Belgian examples.

4.2.3. *The Community Land Trust Brussels*

The Community Land Trust Bruxelles (CLTB) officially started in 2012 and remains relatively close to the original US models.⁹³ As trusts did not exist in Belgian law, a Foundation of Public Interest was created that acquired the land with the financial support of the Brussels-Capital Region and built the housing projects. The Foundation owns the land but delegates its management to a non-profit association. Homeowners purchase the housing units but not the land, which remains in the hands of the Foundation. In Belgian law, this is possible by purchasing another form of *droit de superficie*, a leasehold estate that gives a right *in rem* to the housing units built on the land.⁹⁴ This ‘lease’ lasts 50 years but is renewable. In the CLTB, homeowners can transfer their rights to their heirs and sell them as well, in both cases under specified conditions, and use them as security for a loan. What owners cannot do is resell their rights to the housing unit at the full market price. They are only entitled to a predefined share of the small capital gain from reselling the unit. This allows the CLTB to resell the unit at a lower-than-market price to the next owner while collecting part of the proceeds of the sale to fund its operations. A pre-determined formula sets the reselling price.

The most distinctive characteristic of the CLTB lies in a strongly democratic model, with a dual governing body for the non-profit association that promotes a form of governance embedded in the local community. There is a Board of Directors, constituted by one-third of members representing homeowners (elected during a General Assembly), one-third representing the surrounding community, and one-third comprising public officials (designated by the Government of the Brussels-Capital Region). Then, a team of specialists and

91. Sébastien Brault, “La coopérative d’habitation à capitalisation individuelle: réflexion sur l’émergence des communautés comme vecteur d’accès à la propriété” (2020) 50:1 *Revue de droit de l’Université de Sherbrooke* 43 at 62 [translated by author].

92. *Ibid* at 60 [emphasis added, translated by author].

93. See Davis, *supra* note 9. For the history of the CLTB, see “Our history” (last accessed 13 May 2024), online: *Community Land Trust Bruxelles* www.cltb.be/our-history/?lang=en.

94. Belgium, *10 janvier 1824—Loi sur le droit de superficie*, no 1824011051, replaced by Belgium, *17 mars 2020—Loi portant le livre 3 « Les biens » du Code civil*.

non-homeowners (coordinators, sociologists, architects, etc.) work for the CLT. The team is part of the governing body but remains under the supervision of the Board. The governing body interacts with the local authorities (regional and municipal) to gather support, funding, and land. It chooses and advises future homeowners and integrates them into the long process of getting to homeownership. The system relies on developers and banks, the latter being essential to potential owners getting preferential loans.

The focus of this whole system is to provide access to property to a diverse set of people who would otherwise not be able to become homeowners. Current and prospective homeowners are then involved in communal activities in a model of “co-production” of housing.⁹⁵ The CLTB should also benefit the surrounding community and form a cohesive social group. This seems to match with Lovett’s view that CLTs institutionalize Alexander’s “human flourishing” view of property.⁹⁶ The team that supervises the CLT believes, in fact, in the ability of the structure to empower people through their immersion in a diverse and inclusive community while not only preserving the diversity of a neighborhood but promoting it.⁹⁷ The idea of stewardship of the housing units, shared spaces, and the land is at the forefront, and preserving the value of the CLTB is a priority.⁹⁸

This communal inclusiveness is meant to accompany members of the CLT on a co-constructed path to autonomy, thanks to a network of relations based on mutual respect for self-determination. This way, by intent at least, the CLTB fosters and respects its members’ autonomy. Unfortunately, the complexity of the model makes it difficult to scale up, but it still needs to be determined whether that should be its purpose. Indeed, the CLTB has been targeting relatively poor neighborhoods on their way to gentrification. Their intention is to preserve some diversity and accessibility while making the CLT an island from which a ‘communal glow’ would radiate instead of freezing neighborhood development like mere rent control would.

4.2.4. *The French Organismes de Foncier Solidaire (OFS)*

Also directly inspired by CLTs, a 2014 French act called *Loi ALUR* created the *Organisme de Foncier Solidaire* or OFS.⁹⁹ Its dispositions were clarified in 2016

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95. Nathalie Colasanti, Rocco Frondizi & Marco Meneguzzo, “The Co-production of Housing Policies: Social Housing and Community Land Trust” in Andrea Bonomi Savignon et al, eds, *Cross-Sectoral Relations in the Delivery of Public Services, Volume 6* (Emerald, 2018) 155 at 155ff.
96. John A Lovett, “Community Land Trusts: Institutionalizing the Human Flourishing Theory of Property” (2019) 29 *Cornell JL & Pub Pol’y* 621 at 623, citing Gregory S Alexander, *Property and Human Flourishing* (Oxford University Press, 2018).
97. See Verena Lenna, “Riconoscimento e responsabilità. Il ruolo del progetto nel Community Land Trust di Bruxelles” (2019) 4:1 *Ardeth* 31.
98. See Jeffrey S Lowe & Emily Thaden, “Deepening stewardship: resident engagement in community land trusts” (2016) 37:4 *Urban Geography* 611; Bunce & Aslam, *supra* note 80.
99. See Vincent Le Rouzic, *Essais sur la post-propriété: les organismes de foncier solidaire face au défi du logement abordable* (PhD Thesis, University Paris Panthéon-Sorbonne, 2019) [unpublished]; *Loi ALUR*, *supra* note 10.

and 2017.¹⁰⁰ OFS is based on similar principles to the CLTB and is built around the priority of providing ‘intermediary’ housing, meaning affordable housing for the middle classes that cannot afford the prices in large cities while being too wealthy to benefit from social housing. For instance, in Paris, purchasing a housing unit of the brand-new OFS costs around 5.000 euros/m², half of the full price. The purchase of the housing unit without the land was made possible via the creation of a modified emphyteutic lease, the *bail réel solidaire*, which gives *in rem* rights to the housing unit, lasts 99 years, is transferable through inheritance (under conditions of income), can be used as security for a loan, and is alienable and recharged at every alienation to avoid any diminution of its value.¹⁰¹ Units sell and resell below market price via a formula adjusted for inflation.

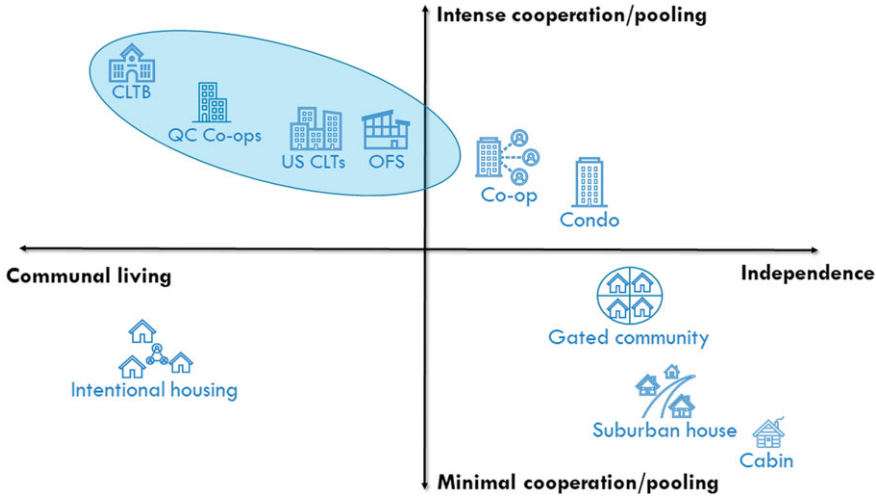
The primary and stark difference between French and Belgian CLTs is the relative lack of communal elements. Collective stewardship is almost absent in the French OFS. The OFS is controlled mainly by public actors, such as the city (as in Lille or Paris) or developers already specializing in social housing. For instance, the Board of the *Foncière de Paris*, Paris OFS, is headed by city representatives and is composed of elected officials and representatives of social housing developers. The French model is, therefore, less participative but remains managed by a plurality of actors. Contrary to the CLTB, though, it is not focused on the co-construction of autonomy and interdependence but has a more individualistic perspective on autonomy: It empowers individuals to make plans that include living in a dense city in stable conditions while allowing them to change plans. It also eliminates the barrier that crushing down-payments represent for the ability of prospective buyers. Its less democratic and participatory nature nevertheless renders it much easier to scale up.

Less democratic processes may not be a problem for individuals attracted to the idea of having ample rights to modify their housing unit but have no taste for the communal commitment of cooperative oversight. While the OFS is technically just supposed to be one of the co-owners, the full scope of its prerogatives remains to be determined. Indeed, the OFS is entrusted with management rights superior to unit owners. The OFS board alone can decide to significantly alter, improve, or enlarge the property and its built components by purchasing a new property. It is also empowered to create common areas, regulate general use, grant easements, and agree to co-ownership elements shared with adjoining properties such as walls. Unit owners only manage ‘everyday’ issues, particularly utility expense decisions. This means unit owners will have fewer conflicts with each other and other properties as they trade some tranquility for reduced management rights (and duties). Acting as one agent, the OFS is, therefore, like the corporation

100. A series of French decrees describes the relevant clarifications. See *Décret n° 2016-1215 du 12 septembre 2016 relatif aux organismes de foncier solidaire*, JO, 14 September 2016, no 0214; *Décret n° 2017-1037 du 10 mai 2017 relatif aux organismes de foncier solidaire*, JO, 11 May 2017, no 0110; *Ordonnance n° 2016-985 du 20 juillet 2016 relative au bail réel solidaire*, JO, 21 July 2016, no 0168; *Décret n° 2017-1038 du 10 mai 2017 relatif au bail réel solidaire*, JO, 11 May 2017, no 0110.

101. *Loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques (rectificatif)*, JO, 8 August 2015, no 0182, art 94 [BRS].

Fig. 3. The Québec, Belgian, and French CLT-inspired models among property designs.



owning a condominium that can improve or extend it. Since it bypasses the potential vetoes of individual owners to neighboring construction, it is more compatible with the autonomy of potential owners and tenants who would benefit from additional buildings in a dense urban environment. Simply put, the OFS design solves collective action problems that affect the life of common-interest communities and the ability of cities to densify further.

4.2.5. CLT examples on the independence/cooperation chart.

The chart above, (Fig. 3), shows that the variations of CLTs studied above are part of an entire section of possibilities within the spectra of both property arrangements and common-interest communities. More specifically, CLTs contribute to each spectrum and promote individual autonomy in two ways. First, they broaden the scope of choices necessary for the exercise of self-authorship. Second and more importantly, they are aligned with the consideration that common-interest communities, in general, are an essential part of a relational conception of autonomy that promotes the ability for individuals to be interdependent if they so desire.¹⁰²

5. Conclusions and future directions

This paper aimed to find a liberal rationale to support the spread of CLTs to a wide range of legal systems despite their being usually defended as

102. See Dagan & Dorfman, *supra* note 27.

anti-capitalistic institutions. ‘Liberal’ means pro-market—supporting individual property rights—and fostering self-authorship. As it turns out, two main ways exist to support CLTs within a liberal framework. The first one is a negative defense, which argues that CLTs, in a politically-constrained context, are more acceptable for liberals than other options, like the flagship policy of ‘rent control’. The second defense argues positively that CLTs add needed nuances to a spectrum of property designs that combine the values of independence, cooperation, and community at varying levels. Within a pluralist framework, CLTs thus appear as more than just a ‘patch’ to mitigate the consequences of the undersupply of housing. They bring a genuine contribution to the category of common-interest communities, focusing either on communal bonding for some or simplified access to co-ownership for others. As such, they should be available whether there are housing crises or not.

Meanwhile, one core issue could make CLTs problematic from the point of view of autonomy: restraints on alienation. Owners of housing units in CLTs generally may resell them but at a price that remains far below the market price, following a pre-determined formula. Transfers are possible but with conditions. For example, heirs may be forced to sell their inheritance if their income is too high. However, legislators have worked to make titles to CLT units marketable: hence, the transferability and rechargeability of the French *bail réel solidaire*.¹⁰³ An additional important clause is that not only may owners modify and improve their unit, but they should also reap the benefits of any improvements during the sale of the unit.

Such restraints are not excessive for several other reasons. First, the reselling formula of housing units remains anchored to the market, which applies to US, Québec, and European CLTs.¹⁰⁴ Second, owners freely consent to restraints on alienations. While there is a case for the argument that contractual freedom is quite idealized in the context of entering other common-interest communities, there is no reason to believe that CLTs are worse in that respect.¹⁰⁵ It might be the contrary: Purchasing a unit is part of an explicit process that requires pedagogy to introduce the model’s specificity, especially for the most ‘communal’ models like the CLTB.

These answers are nevertheless insufficient. Indeed, a more pressing matter specific to CLTs lies in the current tendency to divide the value of housing equally between the managing foundation and the housing unit owners. This 50/50 split can be quite troublesome for anyone who believes in the fundamental principles of Georgism, for which the value exchanged on the housing market mainly lies in the land because of the effects of urban density.¹⁰⁶ An assessment

103. See *BRS*, *supra* note 101.

104. See Seeger, *supra* note 57; Stacey Janeda Pastel, “Community Land Trusts: A Promising Alternative for Affordable Housing” (1991) 6:2 *J Land Use & Envtl L* 293.

105. See Andrea J Boyack, “Common Interest Community Covenants and the Freedom of Contract Myth” (2013) 22:2 *Brooklyn JL & Policy* 767.

106. See George, *supra* note 61.

of the fairness of that tendency is, therefore, necessary but lies outside the scope of this paper and would undoubtedly require complex econometric tools.

This is linked to the broader issue of the imbalance of power that the CLT model establishes between housing unit owners and managing boards or trustees. At first glance, compared to US housing cooperatives, for example, the restraints placed on the ownership of housing units in CLTs are not so exceptional. The two main reasons that make such constraints justified in US housing cooperatives—protecting the financial stability of the community and asserting the right to collective governance—are fully applicable to CLTs.¹⁰⁷ The problem of the arbitrary exercise of power remains to be addressed for a theory of autonomy within common-interest communities to be complete. Still, there is no indication that it is specific to CLTs.

If CLTs are thus deemed desirable, at least provisionally, what prevents them from being widely adopted? The surprising success that the French example encountered suggests that a national legal framework that focuses on the narrow ‘essence’ of CLTs that is both simple and open to a diversity of socioeconomic actors—i.e., the separation between the ownership of the land and that of housing units and its primary social purpose—could be enough. Significant innovations in the realm of property law are not an obstacle in that case. Nevertheless, comparing that model with its neighbor, the Belgian CLTB, shows that CLTs may be varied in type and form to fulfill different purposes. Government support and basic information about such complex designs could make setting up the most participatory models easier. Still, one might need to accept that some forms of CLTs, like the CLTB, will remain fairly rare. A concern for autonomy does not require that any design becomes majoritarian. On the contrary, plurality should prevail in order for individuals and groups to be offered the maximum diversity, avoiding burdensome complexity.

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107. See *Weisner v 791 Park Ave Corp*, 160 NE (2d) 720 at 724 (NY 1959).