

The Rise of Private Neighborhood Associations:
A Constitutional Revolution in Local Government

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For most of American history, the standard form of housing was a single home or apartment that was owned or rented by an individual household. If there was a need for collective action among individual home owners, this need was met by a local government in the public sector. Local governments provided public services such as the construction and upkeep of streets, picking up the garbage, enforcement of law and order and many others. Following the introduction of zoning in the United States in 1916, they also regulated the interactions among individual properties that could significantly affect the quality of the surrounding neighborhood environment.

Since the 1960s, however, this historic role of local governments has increasingly been privatized at the neighborhood level. About one percent of all Americans were living in 1970 in a private community association.¹ By 2000, more than 15 percent lived in a homeowners association, a condominium or a cooperative – and very often these private collective ownerships were of neighborhood size. Since 1970, about one third of the new housing units constructed in the United States have been included within a private community association. The Community Associations Institute estimates that, nationwide, about 50 percent of new housing units in major metropolitan areas are presently being built within a legal framework of private collective ownership.

This privatizing of the American neighborhood over the past 40 years represents a fundamental development in the history both of local government and of property rights in the United States. The rise of private neighborhoods, as Steven Spiegel declares, is achieving “a large-scale, but piecemeal and incremental, privatization of local government.”² It is significantly altering the basic manner of provision of housing for tens of millions of Americans. As one authority on homeowners association and

condominium law states, the new forms of housing ownership are creating “a revolution in American housing patterns.”³ Another states that more broadly there is today an ongoing “massive social transformation represented by restricted-access living” across the United States.⁴ An estimated 1.25 million Americans are today participating directly in local governance as members of the boards of directors of their private community associations.⁵

A revival of the neighborhood is seen by many commentators as a key element in a wider effort to reenergize the intermediate institutions of American society.⁶ The weakening of these institutions is blamed for a decline in trust, public spirit, and generally an erosion of civic values in the United States in recent decades. The rise of the private neighborhood follows in the wake of the rise of the corporate form of business ownership of property in the late nineteenth century, both representing fundamental turns away from individual ownership of private property and towards new collective forms of private ownership. Indeed, the rise of private neighborhood associations represents the most important property right development in the United States since the rise of the modern business corporation. By 1994, the California Supreme Court would declare that “common interest developments are a more intensive and efficient form of land use that greatly benefits society and expands opportunities for home ownership.”⁷

In 1988 the Advisory Commission on Intergovernmental Relations (ACIR) convened a conference to officially announce the arrival of an important new player on the American governmental scene. In the introductory remarks, the ACIR stated that “traditionally the intergovernmental system has been thought to include the national government, state governments, and local governments of all kinds.” Such thinking had

to be revised now because "the concept of intergovernmental relations should be adapted to contemporary developments so as to take account of territorial community associations that display many, if not all, of the characteristics of traditional local government." As a result, the ACIR declared, "the governance of local communities in the United States can [now] be said to exist increasingly in two worlds, one public and one private."⁸

Wayne Hyatt, a leading practitioner in the field of community association law, recently predicted that in the future private associations will "perform more [new] community services for their members" such as transportation and education which "were formerly public services." This will have increasing "legal, political, social, and economic consequences ... [that will] implicate corporate, municipal, constitutional, and other areas of law as well as social and public policy concerns."⁹ Given the much different groundrules under which private governments work, as compared with public governments, it is no exaggeration to say that there is an ongoing revolution in local government taking place at this time in the United States.

Neighborhood Associations

There are three main legal forms of collective ownership of residential property: the homeowners association, the condominium, and the cooperative. In a homeowners association, each person owns his or her home individually, often including a private yard. The homeowners association -- which any new entrant into the area is required to join -- is a separate legal entity that holds formal title to the "common areas" such as streets, parks, recreation facilities, and other common property. It also enforces neighborhood covenants with respect to the allowable uses and modifications of individually owned homes and other structures. The individual owners of neighborhood

properties are also automatically the “shareholders” in the homeowners association who collectively own the assets and control the actions of the association.

The other leading legal instrument for collective ownership of residential property is the condominium. In a condominium, all the individual owners have title to their own personal units and, as "tenants in common," automatically also share a percentage interest in the "common elements." These common elements can include things like dividing walls, stairways, hallways, roofs, yards, green spaces, golf and tennis clubs, and other parts of the project area exterior to the individually owned units.¹⁰ Despite the somewhat different legal arrangements, the operating rules and methods of management for homeowners associations and condominium associations generally are quite similar. As shown in Table 1, there were 10.6 million housing units in homeowners associations in 1998; and 5.1 million housing units in condominium associations.

Table 1 – U.S. Housing Units in Neighborhood Associations, by Type and Year

Type of Association	1970	1980	1990	1998
Condominium	85,000	1,541,000	4,847,921	5,078,756
Homeowners Association	265,000	613,000	5,967,000	10,562,964
Cooperative	351,000	482,000	824,000	748,840
Total Assoc. Housing Units	701,000	3,636,000	11,638,921	16,390,560
Total Number of Associations	10,000	36,000	130,000	204,882
Total U.S. Housing Units	69,778,000	87,739,000	102,263,678	111,757,000
Neighborhood Assoc. Units, as % of US Total	1.22%	4.14%	11.38%	14.67%

Source: Community Associations Institute, *Community Associations Factbook*, Frank H. Spink, ed. (Alexandria, VA: 1999), p. 19.

The third instrument of collective property ownership in the United States is the cooperative. Cooperatives are more likely to be a single building. They became popular in New York City in the decades after World War II, partly as a method for avoiding problems that rent control was posing for owners of rental apartment buildings. As of 1995, there were 416,000 cooperative apartments in New York City.¹¹ A cooperative is the truest form of collective ownership in that the entire property, including the individually occupied housing units, is owned jointly. Individual occupants of apartments have legal entitlements to the use of their units but are not, strictly speaking, the owners even of the interior portions.

The idea of a private community is synonymous in the minds of some people with a “gated community.” However, although they have attracted wide publicity (and considerable critical commentary), gated communities are a limited part of the total number of community associations. By one recent estimate, there are around 8 million people nationwide living in about 20,000 gated communities.¹² Based on such estimates, about 10 percent of neighborhood associations are gated, and 20 percent of the total residents of neighborhood associations live in a gated community (partly because of the cost of maintaining the gate, gated communities tend to be considerably larger than the average neighborhood association).*

* In California, gated communities are particularly common. In Orange County, about half of the housing in unincorporated areas of the county is in a gated community. One survey in January 1999 showed that 68 percent of the houses available for sale in the county were located in gated communities. In 1990, a survey of homebuyers in southern California found that 54 percent wanted to buy a home in a gated community. One critic foresees a future of the Los Angeles suburbs in which “vast, sprawling clusters of gated communities are connected to one another and to fortress buildings, enclosed malls, and sports stadiums by a web of freeways and interchanges.” See Richard Damstra, “Don’t Fence Us Out: The Municipal Power to Ban Gated Communities and the Federal Takings Clause,” 35 *Valparaiso University Law Review* (Summer 2001).

The homeowners' association and the cooperative have had a long if until recently modest place in the history of home ownership in the United States. The condominium form of collective ownership of housing did not arrive in this country until the early 1960s. In describing these several forms of collective ownership, different commentators have grouped them together under terms such as "residential community association," "common interest community," "residential private government," and others. In the remainder of this paper I will refer to all such arrangements as a "neighborhood association" -- recognizing that in practice collective residential ownerships may be as small as a single building or as large as a mid-size city.*

About 80 percent of neighborhood associations involve the "administration of territory such that they resemble communities in the broader sense rather than simply buildings."¹³ The average private collective ownership of residential property is of neighborhood size, about 200 housing units.† But others are much larger -- Reston in Northern Virginia covers 74,000 acres; has a population of more than 35,000; and contains 12,500 residential units and more than 500 businesses. Sun City in Arizona has 46,000 residents and ten shopping centers.¹⁴

* The term "neighborhood association" has frequently been used in the past to refer to a group of neighbors who join together well after the neighborhood has been settled. The neighborhood group has no authority to require membership and any dues or assessments are paid on a voluntary basis. Some members of the neighborhood typically do not join. The purpose of the association may be to organize events such as a crime watch or neighborhood barbecue. In this book, "neighborhood association" is being used in a different sense, to refer to a formal neighborhood arrangement in which all the owners are required to join the association as an initial condition of purchase of their homes, and to agree to the future enforcement of private land use restrictions and to pay association assessments to cover the costs of neighborhood services.

† This is about the same size, interestingly enough, as the "deme" in ancient Greece, the "small, territorially based associations, which formed the basic political unit of the Athenian polity." Indeed, the deme "shares many characteristics" with the neighborhood association. There were about 150 demes in ancient Athens, each having from 400 to 1,200 residents. Among their key roles, they controlled citizenship and voter registration. See Michael Sarbanes and Kathleen Skullney, "Taking Communities Seriously: Should Community Associations Have Standing in Maryland?," 6 *Maryland Journal of Contemporary Legal Issues* (Spring/Summer 1995), p. 292.

A Divided Society?

Not surprisingly, given the degree of social change it represents, the shift from individual to collective ownership of residential property, and from public to private forms of local government, is provoking wide controversy today. Political scientist Evan McKenzie, for one, finds the "astonishing nationwide growth" in private neighborhood associations since the 1960s to be a disturbing trend.¹⁵ One consequence is that those who are wealthy enough to afford a private neighborhood will become "increasingly segregated from the rest of society."¹⁶ The private character of the neighborhood associations that dominate many suburban areas, it is said, may divert the attention of the citizenry from pressing national and international matters. Absorbed in their neighborhood issues and concerns, the residents of private neighborhood associations may lose touch with and become indifferent to the broader problems of American society, including poverty, racial discrimination and other urgent national priorities.* In the case of gated communities the severest critics have gone so far as to describe them as "a return to the Middle Ages, to moats and drawbridges (with modern amenities)" or as "a gang way of looking at life" that could ultimately even lead to "the end of civilization" as we know it.¹⁷

Two hundred years ago, it was common to require ownership of property as a requirement for voting in American elections.¹⁸ Such practices were gradually abolished, however, as part of the extension of the franchise to every American. Universal voting

* Law professor Sheryll Cashin laments that the rise of neighborhood associations has "put the nation on a course toward civic secession." The spread of "secessionist attitudes" is promoting a "reduced empathy" for people outside the neighborhood association boundaries, a rise of "regional polarization," and in general a reduced capacity for "shared sacrifice and redistributive spending" within metropolitan areas. See Sheryll D. Cashin, "Privatized Communities and the 'Secession of the Successful': Democracy and Fairness Beyond the Gate," 28 *Fordham Urban Law Journal* (June 2001), pp. 1677, 1685, 1690, 1683, 1686.

rights are widely seen as one of the great triumphs of modern democracy. Yet, private neighborhoods revert to the earlier systems of allocating voting rights based on ownership of property.* As far back as 1969, Albert Foer argued in the *University of Chicago Law Review* that "a strong case can be made for the position that ... the property basis of political participation in [the private] Reston and Columbia [communities] may violate the equal protection clause" of the constitution.¹⁹ Foer turned out to be wrong constitutionally (thus far at least) but many observers continue to argue that, legal or not, a system of community voting rights based on the ownership of property is unacceptable in contemporary America. Stephen Barton and Carol Silverman, for example, label the private governance regimes of neighborhood associations as "profoundly undemocratic."²⁰

Professor Gregory Alexander of the Cornell Law School considers that "residential associations ... may represent the dominant aspect of the late twentieth century contribution to American residential group life." This new social innovation is "fundamentally different from both traditional fee ownership of the detached house and apartment living. Common unit developments represent attempts to infuse a social experience of groupness into modern ownership of residential property." Yet, as Alexander finds the empirical evidence, it suggests that "the vision of self-governance and participatory democracy within these groups is illusory."²¹ Most residents, he contends, are uninterested and uninvolved in the affairs of their association, or worse are

* Renters thus are entirely disenfranchised in most neighborhood associations. Yet, one 1987 survey in California found that the majority of units were occupied by renters in 15 percent of the neighborhood associations, and that the median association had 20 percent of the units occupied by renters. See Steven Spiegel, "The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After *Marsh v. Alabama*," 6 *William & Mary Bill of Rights Journal* (Spring 1998), p. 539.

actively discouraged and disillusioned. Boards of directors, partly reflecting an ambiguity in their dual role as resident and manager, often fail to take effective charge of enforcement and service provision responsibilities. These are only part of the reasons for the significant gap that "exists between the Panglossian image of many residential associations and [the] reality."²²

Private Suburbs

The privatization of the American neighborhood did not begin with the rise of private neighborhood associations. The key development was found much earlier in the public sector in the rise of zoning. It was zoning that first effectively privatized American neighborhoods. Indeed, the differences between a small suburban municipality and a neighborhood association of equal size are not very large. Among the residents themselves, "a small suburban town is often seen ... as little more than a form of homeowners association."²³ The significance of the neighborhood association is not that it is accomplishing a brand new privatization of the suburbs; rather, it is formalizing and extending further a process of privatization of long standing.²⁴

Sociologist David Popenoe writes of the pervasive "privatization of space in metropolitan communities" over the years.* The well off suburb in America has a

* The process of privatization in the suburbs has taken many forms. It seems that, as human beings (or at least Americans) become wealthier, they are willing to expend a considerable part of their additional resources on achieving greater privacy. Despite those who regard "private" motives as uncivic, these motives appear to have a great strength and staying power. A greater desire for privacy can be found within the design of individual homes, as well as in the choice of neighborhood types. A recent report thus notes that the greatest change in the design of new suburban homes is the increase in the number of bathrooms. Fifty years ago, the typical new home had one bathroom; now it has two or three, and many homes have more. A Harvard University researcher declared that "the biggest change in housing in the past 60 years has been in plumbing." There were multiple reasons for the increase in the number of bathrooms but a principal reason was the desire for greater personal privacy. The buyers of new homes today:

want to be alone: That means, if they've got the money, they're not interested in teaching the lessons they learned from their parents about the merits of sharing. They want privacy.

“deeply private feel” as a place where the households “live behind the protection of fence, hedge, or wall, venturing forth only within the confines of a motorized enclosed box.”²⁵ All in all, as Popenoe complains,

It is in the privatization of space, because it is so tangible and visible, that the breakdown of the public realm in metropolitan life can most clearly be seen. The American suburb is the extreme case, but privatization is a dominant motif in most of the other ecological zones of the metropolis as well. Streets and sidewalks that once provided public pedestrian interaction and even entertainment have for the most part been abandoned to the utter privacy of the automobile; public parks have fallen into disuse and misuse; town squares have become the mostly ornamental appendages of commercialism. ... Where is the public space in a Houston or a Los Angeles? It does exist, but is overwhelmed by the dominance of essentially private spheres.²⁶

The political analyst William Schneider comments similarly that "to move to the suburbs is to express a preference for the private over the public.... Suburbanites' preference for the private applies to government as well" – and not only in the formation of neighborhood associations but in the very basic structure of municipal organization of suburban governance.²⁷ Or as another social commentator wrote recently, "the suburb is the last word in privatization."²⁸ Fully half of all American municipalities have fewer than 1,000 people; three-quarters have fewer than 5,000 people.²⁹ The majority of public municipalities in the United States thus are of about the same size as a private neighborhood association.*

“We all shared a bathroom – parents and five children – when I was a kid,” said Better Homes and Gardens editor and bathroom maven Joan McCloskey, “but I have no idea how we did it.”

It is ... a far cry from the 1940s. ... It’s also far different from the experience of baby boomers who shared [a bathroom] with siblings in the 1950s or 1960s. See Sandra Fleishman, “Builders’ Winning Play: A Royal Flush,” *The Washington Post* (November 24, 2001), p. H1.

* Neighborhood associations have been slowest to take hold as a new instrument for collective ownership of housing in the Northeast and in the Midwest. The role of private neighborhood associations is greatest in places such as California, Florida and Texas where the largest amount of new housing development is taking place. In order to form a neighborhood association, it is necessary to put the founding documents in place and to require agreement as a condition of initial purchase in the neighborhood, all this occurring

The courts have often seen suburban municipalities as effectively falling in a private category. Harvard law professor Jerry Frug comments that “many recent Supreme Court cases suggest that cities can best empower themselves by acting just like property owners.”³⁰ In one 1980s Supreme Court opinion, Chief Justice Warren Burger wrote that “I believe that a community of people are – within limits – masters of their own environment. ... Citizens should be free to choose to shape their community so it embodies their conception of the ‘decent life.’”³¹

Within the American system of de facto “private” suburbs, zoning functions as the de facto private property right that gives the suburb a legal power to exclude others from the use of its “common property.”³² University of Texas law professor Lee Fennell thus recently described a system of “collective property rights created through zoning. Zoning splits property rights between the individual landowner and the local government by vesting a set of collective property rights in the community.” The practical effect of this arrangement is that:

prior to development. In older areas of the United States, existing neighborhoods were often built before the 1960s when there was much less likelihood of forming a neighborhood association. These neighborhoods have resorted to public zoning powers to protect neighborhood environmental quality. The small suburb in the Northeast or Midwest thus is in many ways the functional equivalent of a private neighborhood association in the Southeast or the Southwest. Perhaps because private neighborhood governance was available, there was less resistance in these regions to annexation laws that favored central city expansion, resulting in cities such as Houston and Phoenix that have spread over vast geographic areas. As Richard Briffault comments, “Southern and Western metropolitan areas generally have fewer municipalities than their Northern and Eastern counterparts.” In 1967, there were only 14 separate municipalities in the greater San Diego area, and 18 in the Phoenix area, compared with hundreds of independent municipalities in the New York, Chicago and other northern and eastern metropolitan areas.

The rise of neighborhood associations is thus opening the way for a new pattern of organization of local government in the United States. In the South and West where many areas are newly developing, the small scale services such as garbage collection and street maintenance are provided privately through the neighborhood association, leaving larger units of local government to focus on those services such as connecting highways, sewage and water that may operate most efficiently at a regional scale. The small municipalities, as found in such large numbers surrounding center cities in the Northeast and Midwest, have much less of a role to play in this new Southern and Western pattern of land development and governance. Their role is instead fulfilled privately in these regions. See Richard Briffault, “Our Localism: Part I – The Structure of Local Government Law,” 90 *Columbia Law Review* (March 1990), p.81.

These collective property rights allow the community some degree of control over the landowner's use of her own land. While traditional notions of nuisance grant the community some power to limit land use, zoning shifts certain additional property rights from the landowner to the community. Thus, under current zoning law, the community's interest in maintaining a particular atmosphere or growth pattern is protected by a property rule. A landowner cannot simply choose to violate a land use regulation and pay for the damage caused, as she could under a liability rule, but instead must obtain permission from the community before proceeding with any nonconforming use. As long as the land use regulation furthers a legitimate government interest, the community can refuse to grant this permission.³³

In a series of law journal articles over the course of the 1990s, Columbia law professor Richard Briffault provided an insightful overview of the basic legal arrangements and the workings of local governments in the United States.³⁴ As he describes it, zoning was only one aspect of a broader pattern of local government serving as an instrument of the private purposes of the municipal residents. Briffault suggests that there are three basic models for the role of local governments in the United States: (1) the democratic "polis," (2) "the firm," and (3) "the administrative arm of the state" government.³⁵ Zoning represents the local government acting in its private "firm" capacity – and the stockholders in this firm are effectively the residents of the municipality.

A local government may be particularly advantaged as a firm because it can employ the coercive powers of government for various purposes – for instance, to impose on individual property owners a new collective regime of control over the use of their properties. Zoning can be seen as the retroactive creation of a de facto collective property right, made feasible only by the use of government powers to overcome free-rider and holdout problems.³⁶ As Briffault observes, the instrument of local government can be particularly useful because it can serve as a device "for using the coercive power

of the state for private economic ends.”³⁷ Moreover, these private ends may also function in a way to serve broader public goals, much as the creation of a system of private property rights can be an essential element in maintaining a viable economic system.³⁸

Protecting the Neighborhood Environment

The functions of a private neighborhood association include essentially the same purpose as suburban zoning – protection of the environmental quality of suburban neighborhoods. Private neighborhoods differ in two important respects, however. First, by virtue of their private status in the legal system, they have a wider latitude in the manner and extent of regulation of land uses within a neighborhood. They generally exercise a finer degree of control than the typical zoning ordinance (although the example of historic districts shows that similar comprehensive controls can arise in a public setting as well). Neighborhood associations also offer an alternative governance model to the conduct of municipal affairs. They have different voting rules, management systems, taxing methods, boundary setting mechanisms, and other governance features. The consequences and social desirability of these private differences will be examined further in later sections of this paper.

It is clear, however, that many Americans prefer private protection of their neighborhood environmental quality. Although the far-reaching regulatory powers of neighborhood associations may seem intrusive, many people are happy to sacrifice elements of their own personal autonomy in order to obtain greater control over the actions of their neighbors. As one person observed, in a neighborhood association "your neighbor will probably be prevented from rebuilding his '57 Chevy in his front yard, or

parking his recreational vehicle for six months at a time." A Southern California woman declared that "I thought I'd never live in a planned unit development but then I realized I wanted a single-family detached home with some control over my neighbors. I looked at one house without a homeowner association. The guy next door built a dog run on the property line. All night long his Dobermans ran back and forth."³⁹

Private neighborhood associations, like zoning, represent yet another form of institutional response to "the tragedy of the commons," as it was so famously portrayed many years ago by Garrett Hardin.⁴⁰ Without the ability to exclude other uses, higher quality neighborhoods would be invaded by lower quality uses. These uses would be able to capture the benefits of the high environmental quality in the neighborhood, while not contributing to and in fact detracting from this quality. Indeed, if prospective creators of high quality neighborhoods knew in advance that they would lack tight controls over incoming uses in the future, they would never create such neighborhoods in the first place. There is thus a potential "tragedy of the neighborhood commons" to match the better known tragedy of the grazing commons. As Hardin emphasized, a solution to the tragedy of the commons can be found in either a governmental regulation or a private property right.* In the suburban neighborhood context, the establishment of zoning has constituted the regulatory route; the establishment of a neighborhood association has been the private property approach.

* To be sure, Elinor Ostrom and others have since shown that many commons situations are effectively handled without resort to either formal regulatory or property right approaches. In small communities, a powerful cultural bond is often sufficient to achieve voluntary cooperation among users of the common areas of the community. In some of these communities, common resources have been well managed and conserved for hundreds of years. See Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (New York: Cambridge University Press, 1990).

Judged at least by a market test, neighborhood associations are a resounding success. The rapid increase in the numbers of people living in neighborhood associations over the past few decades offers strong evidence that the tradeoffs among advantages and disadvantages of collective home living is favorable for many Americans. In a survey of more than 750 owners of condominium units in Florida, 81 percent stated that they would make the same decision to live in their current condominium, if given the choice all over again. More than 92 percent rated the existence of collective controls over the uses of neighboring properties to have been an "important" factor in choosing to live in the neighborhood association. Nearly 85 percent rated the opportunity to participate in neighborhood governance as either "important" or "very important" in a positive way to their housing decision.*

In the second half of the nineteenth century and early twentieth century, the rise of large private business corporations provoked wide fears about new social divisions in American society, as well as the private power and control over the lives of their employees of these corporations. Despite the public anxieties of that era, Americans have come to accept the shift of ownership of American industry from the small business firm to the large private corporation. Although neighborhood associations are much criticized today, there may well be a similar long run outcome. The rapid spread of private neighborhood associations suggests a social and economic force that is not likely

* In another survey completed in 1990, 95 percent of the board members of neighborhood associations nationwide stated that they believed the full membership of the association regarded it as either an "excellent" or "good" provider of common services. Only 22 percent believed that there existed any association services that could be delivered more efficiently by a local government in the public sector. Indeed, some studies have suggested that private neighborhoods are obtaining services at costs as much as 30 to 60 percent below the costs to municipal governments, partly because they are much more aggressive about contracting out to private providers. See Robert Jay Dilger, *Neighborhood Politics: Residential Community Associations in American Governance* (New York: New York University Press, 1992), pp. 89-90.

to be reversed. Americans seemingly want tighter and more direct control over their immediate neighborhood environment than is afforded by the mechanisms of municipal land use regulation, and land developers are simply responding to the demands of the private marketplace.

This is not to say that government has no role. Business corporations have operated under state charters that establish various stockholder rights, disclosure requirements, governance procedures, and other features of corporate business operation. Since the 1930s, the federal government has set further ground rules for the functioning of business corporations, including the various requirements of the Securities and Exchange Commission. Neighborhood associations also operate within a legal framework established by state law. Already, California has amended the Davis-Stirling Act -- its basic statute for overseeing the activities of neighborhood associations -- more than 35 times since its enactment in 1985.⁴¹ Neighborhood associations must comply with existing federal laws prohibiting racial, sexual, age, and other forms of discrimination. The proper scope of governmental action in setting limits to and overseeing the workings of collective private rights to residential property is likely to be a leading subject for public policy debate in the future.

“Public” and “Private” Ambiguities

If the rise of private neighborhood associations has not fundamentally altered the private character of the suburbs that already existed, it has modified it in a variety of significant ways. The legal process for establishing the boundaries and governing authority of a new private neighborhood, for example, is much different from the process for incorporating a new suburban municipality. The courts are being called upon to make

various rulings concerning the permissible manner of private regulation of individual actions within neighborhood associations. In making such rulings, the longstanding legal distinction between public and private often plays an important role.⁴² In a 1992 opinion, Supreme Court Justice Anthony Kennedy declared that if something “is a product not of state action but of private choices, it does not have constitutional implications.”⁴³ Or, as law professor Gerald Wetlaufer explains, a basic assumption of the American legal system is that “there is a public sphere and a private sphere, and that the state may act legitimately within the public sphere but not within the private sphere” to anywhere near the same extent.⁴⁴

Given the legal importance of the private-public distinction, and the emphasis on the private character of the neighborhood association in much of the social and legal commentary, it is surprisingly difficult to pin this distinction down. The courts have struggled without much success with the problem of defining legally a “state action.” One legal commentator says that the doctrine of state action was long regarded as a “conceptual disaster area” in the law, although more recently new court thinking has meant that it has been “considerably yet imperfectly narrowed.”⁴⁵ Another commentator finds that “the words public and private may seem distinct enough – and they are used in popular and political discourse as if they were – but they are not.”⁴⁶

It is not only lawyers and judges who have trouble defining the boundaries of public and private. Political scientists, economists and other students of local government have also not been able to offer a clear resolution. Various distinctions and concepts might be proposed but none seem to fit the bill.

Some people might suggest that the definition of “public” be taken to mean “governmental.” However, neighborhood associations are themselves forms of government and yet are private.* The small suburban municipality may nominally be “public” but as a practical matter its actions often have more of a “private” character. As Richard Briffault comments, Americans show a powerful “ideological commitment to local autonomy” in their public institutions of local government that is similar to the autonomy of a private property status.⁴⁷ The U.S. Supreme Court has not only accepted this private autonomy of local governments but in a number of decisions has seemed actively to encourage it.†

* Many observers do in fact contend that private neighborhood associations – or at least the larger ones – should be regarded legally as state actors. Steven Siegel declares that the rise of neighborhood associations in America “is an exceedingly important political and legal development that touches core constitutional values.” In his view many neighborhood associations “could be deemed state actors by means of a robust application of one or more of the established state-action theories.” In 1946, the Supreme Court had declared that a control over the use of private property could nevertheless be regarded as a state action for constitutional purposes. The City of Chickasaw, Alabama was entirely owned by the Gulf Shipbuilding Corporation. A Jehovah’s Witness, Grace Marsh, was arrested and convicted for distributing religious literature on the streets of Chickasaw. In *Marsh v. Alabama*, the Supreme Court struck down this conviction on the grounds that a company-owned town was the functional equivalent of a public municipality and therefore should also be treated as a “state actor.” See Steven Spiegel, “The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After *Marsh v. Alabama*,” 6 *William & Mary Bill of Rights Journal* (Spring 1998), pp. 563, 557.

† Despite the wide criticisms among traditional zoning scholars of the “exclusionary” effects of zoning, attempts to challenge zoning practices in the courts over the past few decades generally met with little success. The Supreme Court delivered a ringing endorsement of the use of zoning to protect local environments in its 1974 *Belle Terre* decision. In general, the Supreme Court during the 1970s and 1980s continued its longstanding deference to the actions of local governments in zoning matters. As one legal commentator saw the situation, in the jurisprudence of the Supreme Court during the Burger years

community self-determination seemed to attain the status of a penumbral, quasi-constitutional principle that provided substantive protection for local governments against constitutional claims asserted in the federal courts, especially claims premised upon the Equal Protection Clause. Indeed, in some cases the [Supreme] Court even deferred to local government decisions which had severe exclusionary effects or which undercut the important principle of public participation. ... Thus, the Court’s general pattern was broad deference toward local government structures and decisionmaking. See M. David Gelfand, “The Constitutional Position of American Local Government: Retrospect on the Burger Court and Prospect for the Rehnquist Court,” 14 *Hastings Constitutional Law Quarterly* (Spring 1987), p. 636.

Yet another possibility would be to define “public” by the presence of an element of coercion. Only a government, for example, has the power to put someone in prison. However, many actions that fall in the public category do not involve any degree of coercion. A poor person is free to accept or reject an offer of public welfare assistance entirely on a voluntary basis. There is no compulsion for anyone to use the railroad services provided by Amtrak.

On the other hand, a potential element of coercion is also present in many private acts. When a business organization fires an employee for poor performance, or when a private club expels a member for failing to pay his or her dues, it is taking a step backed by the police powers of the state. If a mob engages in vigilante justice, it is a private act of violence. The difference between the mob and a state action is in the legitimacy accorded the state use of coercion. Yet private violence can be deemed legitimate as well – as when someone responds in kind to a direct physical attack on his or her person.

Private neighborhood associations impose the practical equivalent of taxes in the form of assessments that each housing unit is required to pay. If it is always possible to avoid the assessment by moving out of the neighborhood, it is similarly possible to avoid a municipal tax by leaving the municipality. It is even possible to emigrate from a nation-state if its income or other taxes become too high – as the tennis star Bjorn Borg once did in leaving Sweden to become a citizen of Monaco. Thus, even taxes are in some sense voluntary.

It might be suggested that “private” organizations, even when they employ coercive devices, do so as a result of previous voluntary agreements. The objects of the coercion have agreed in advance that a failure to comply with the rules will bring about

the use of the powers of the state. The incoming resident of a private neighborhood association, for example, formally agrees to abide by a set of covenants and other foundational documents. No such formal agreement usually exists with respect to the rules of municipal governments in the public sector. Nevertheless, the very act of moving into the municipality amounts to an implied statement of consent, an agreement to accept municipal regulatory and other decisions that have been legitimately reached by the local political process. This “implicit contract” may be no less meaningful and binding – and may be equally clear in its terms and provisions – as the written contract of a private neighborhood association (which may in any case have many “fuzzy” aspects). If it could be said that the children that are born and brought up in a municipality may never have formally consented to its rules, this is no less true of children born and brought up in a neighborhood association.

In short, we may make much use of the terms “public” and “private” in ordinary speech but it is often in different ways. Knowledge of a specific usage often depends closely on the context and may shift with changing conventions of language. The courts have found it difficult to deal with such definitional ambiguities.* With respect to

* The confusions of the courts are illustrated by their efforts to say whether a private shopping center should be treated in the law as a “public” or a “private” entity – in legal terms whether or not any of its rules should be regarded as a “state action.” In 1968, the U.S. Supreme Court seemed to declare that shopping centers in important respects must be regarded as state actors. The Court ruled that a shopping center could not invoke its private status to prohibit the picketing by union members against the employment practices of businesses operating in the center. However, four Justices, including Justice Hugo Black, dissented strongly. Then, four years later, the Supreme Court seemingly backtracked, ruling that a shopping center was within its rights to exclude protesters against the Vietnam War from coming on the premises. The majority of the court declared that “property [does not] lose its private character merely because the public is generally invited to use it for designated purposes” and this fact “does not change by virtue of being large or clustered with other stores in a modern shopping center.” Then, a few years later the Supreme Court shifted course again, this time overturning its 1968 ruling outright. In a private shopping center, the court declared, “the constitutional guarantee of free expression has no part to play.”

Finally, in 1980 the Supreme Court confused the matter still further. It allowed a California Supreme Court ruling to stand, even though this California ruling had adopted a position very similar to the 1968 decision of the U.S. Supreme Court (now rejected by that court itself). Even though basic

neighborhood associations, David Kennedy finds that “state courts have reached wildly different conclusions when faced with the argument that a residential association qualifies as a state actor.”⁴⁸ All in all, as Dan Tarlock has similarly commented, “American law has [traditionally] drawn a distinction between public and private associations to decide how power should be allocated between the state and individual” but neighborhood associations clearly “strain this distinction.”⁴⁹

Private Prerogatives

Despite the difficulty in finding a single general definition of public and private, it nevertheless frequently makes a large difference in American law how a specific activity ends up being classified. If an action is deemed to be private -- however that might have been determined -- this will often have major implications in terms of the views and expectations of the courts. For example, the range of legally permissible actions and obligations of a private neighborhood association in many areas will be considerably wider than or a municipal government in the public sector (in concept of identical population and geographic size). Some important examples of this wider set of options for neighborhood associations include:

1. A private neighborhood association can legally assign voting rights according to the extent of property ownership, or in concept on the basis of a wide range of other possible voting criteria. A general purpose municipal government is legally required under the U.S. constitution – as determined by the U.S. Supreme Court in its 1968 *Avery* decision -- to allocate voting rights on the basis of one person/one vote.⁵⁰

constitutional rights seemed to be at issue, the U.S. Supreme Court declared that California courts could follow the guidance of the California state constitution, which might have a different outcome or standard for state action, as compared with the federal constitution. For discussion of these cases, see Harvey Rishikof and Alexander Wohl, “Private Communities or Public Governments: ‘The State Will Make the Call,’” 30 *Valparaiso Law Review* (Spring 1996), pp. 536-541.

2. A private neighborhood association can discriminate in admitting residents to the neighborhood in various ways that would not be acceptable for a municipal government. For example, a neighborhood association for senior citizens can exclude younger people, including any children, from living there permanently. It is doubtful that a municipality in the public sector could legally sustain a similar discriminatory rule to exclude people from the whole municipality based on the age of potential residents.

3. If it wishes, a private neighborhood association can sell for money the rights of entry into the neighborhood. A municipal government could not similarly sell a zoning change, even though the zoning change might have the identical practical consequence of granting entry. In the public sector a direct monetary sale of entry rights – of zoning -- by a government would be regarded as an illegal act of “bribery” or other form of municipal “corruption.”

4. A private neighborhood association can explicitly enforce precise numerical controls over the total numbers of residents allowed into the neighborhood – or even the numbers allowed by the specific type of resident (as long as its actions are not based on race or some other illegal category). An identical action by a municipal government in the public sector would be regarded as establishing a local “immigration” policy. It would be an unconstitutional infringement on the exclusive prerogative of the federal government to control matters of internal and external migration – as established by the Supreme Court in various interstate commerce and “right to travel” decisions.

5. A private neighborhood association can enter into many forms of commercial activities within (or in concept outside of) the neighborhood -- such as operating a neighborhood grocery store or gas station, publishing a neighborhood newspaper, or

running a restaurant. Under most state laws (although these could be changed), it would at present be difficult or impossible for a municipal government in the public sector to engage in a similar range of commercial activities oriented to the general public and that may be directly competitive with private suppliers.

6. A private neighborhood association can make a commitment to undertake future actions that would be legally binding and enforceable in court for the lifetime of the association; a current municipal government in the public sector would find it more difficult to bind similarly the future actions of a duly elected municipal legislature.

7. A private neighborhood association can hire a new employee, or dismiss an existing employee, under the same legal rules as a business corporation or other private firm making. In most public jurisdictions this same action would be subject to different – and typically more exacting -- standards of judicial review. Governments generally face greater difficulties in firing their tenured civil servants than businesses do in dismissing the members of their private work force.

8. A neighborhood association of virtually any size or shape can in principle be created as an exercise of the private rights of the owner of an appropriate parcel of land (subject to municipal regulatory review and approval under zoning). The establishment of a new neighborhood government in the public sector – even one falling on exactly the same geographic lines -- would have to proceed in a legally and politically more complicated way, involving compliance with state laws for municipal incorporation. In some states, any such changes in the jurisdictional boundaries of local governments would have to be approved by the state legislature – an involvement of state government that would not come into play for a new neighborhood association.

A private status, as these examples illustrate, in most cases confers a wider range of possibilities that give a greater flexibility in shaping new institutions of local governance. However, a private status can also create some forms of obligations and burdens that would not fall on a government in the public sector. A private neighborhood association is typically required to pay property and other taxes to municipal governments but a municipal government of neighborhood size in the public sector would have no such financial obligations to any higher level of government. In practice, even if it would be constitutionally permissible, the upward transfer of funds to higher levels of government, in the manner of making private tax payments, is almost never required of a local municipality. To the contrary, such governments typically receive significant transfers of funds from state and federal governments – transfers that in most cases would not be available to a private neighborhood association.

Alternative Constitutional Regimes

On further reflection, then, it seems that perhaps the best way to think about the distinction between “public” and “private” is as follows. There is one broad legal framework for the functioning of a government that operates in the United States under the status of a “public” entity. There is another legal framework for a government that operates under the status of a “private” entity. These two legal regimes – often grounded in U.S. constitutional requirements as well as statutory law – are often markedly different. A distinguishing characteristic of the “private” legal framework, relative to the “public,” is the greater flexibility of the “private” regime.* In most of the areas described above, the options

* As one observer comments, “one of the main reason why CICs [common interest communities] are so attractive as a housing option is that their contractual underpinnings allow residents to define the norms of their own community. Thus, the retention of flexibility in community association governance is critical; community associations must [continue to] be allowed a relatively free reign over the substantive

available to a private neighborhood association encompass and then go well beyond those available to a municipal government in the public sector of similar size.* Or, as Wayne Hyatt comments, “in the absence of unusual circumstances or perhaps an emotionally driven decision, the United States Constitution does not apply in common interest community situations today” for most issues.⁵¹

The determination of whether an action falls in a public or private status is not well defined or fixed. It shifts over time with changes in political and economic thinking and shifting court interpretations of the law. Historically, the progressive era in the United States opened up a long period over the course of the twentieth century when many formerly private actions shifted to take on a public status. The Supreme Court initially sought to limit increasing governmental regulation of private actions but eventually capitulated in the New Deal years. As a result, government has undertaken the regulation of many aspects of the use of private property, even when it might deprive the owner of a large part of the value of the property. Such matters as the operation of a restaurant or the renting of housing units in an apartment were once seen as strictly private but have now come to be regarded as coming under the legal requirements of a state action. Most recently, social practices in the workplace that were formerly regarded as private matters between fellow employees are

regulations governing their community. Indeed, a convincing criticism of the position advocated by many concerned with the ‘illiberal’ and anti-communitarian tendencies of CICs, which calls for judicial review of association activities as if they were state action, is that such a [new] standard of review would reduce the membership’s flexibility.” See David C. Drewes, “Putting the ‘Community’ Back in Common Interest Communities: A Proposal for Participation-Enhancing Procedural Review,” 101 *Columbia Law Review* (March 2001), p. 343-44.

* The differences between a public and private status may extend, as one legal commentator has noted, to the kinds of permissible “limitations on First Amendment rights to freedom of speech and association; the right to travel; due process issues raised by the applications of an association’s rules to nonmembers; and equal protection questions raised by discrimination on the basis of race or class.” In almost every case, the neighborhood association now has wider freedoms. See David J. Kennedy, “Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers,” 105 *Yale Law Journal* (December 1995), pp. 790-91.

now regarded as matters for state oversight under sexual harassment and other workplace laws.

Nevertheless, although the legal significance of a private status has been much eroded in the past century, important differences do remain, as described above in comparing a neighborhood association with a municipality. The legal authority of a neighborhood association today is similar to that of a private business corporation. Indeed, neighborhood associations are generally organized under state law as a form of private corporation.*

As a result of the private status of neighborhood associations, a private land developer has the flexibility to tailor a system of governance according to the individual needs of the neighborhood association membership (just as a business corporation might chose between bonds and stocks as a method of financing, or the issuing of different kinds of stocks with different voting rights). This may allow for institutional innovations in the governance of a neighborhood association that are as important to the success of the private community as its physical design. In the case of the DC Ranch private community in Scottsdale, Arizona, for example, the developer sought to create “a governance structure as special as the physical qualities the development would offer to community residents. The internal governance system that was created combines a sense of stewardship with enforcement techniques that truly work.”⁵²

* The corporate form of governance of businesses became a prominent feature of American life in the progressive era. Evan McKenzie sees the neighborhood association as an extension of social attitudes concerning business and in this respect as a continuation of the “progressive” tradition. As he writes, the standard form of neighborhood association is “a Progressive-era creation. . . . Pro-business, anti-politics rhetoric was a staple of the Progressive-era urban reformers and was the ideological basis for creating the city manager form of government. In other words, the business corporation was the model for the city manager system, and the city manager system then became the model for the CID’s [common interest development’s] managerial government.” See Evan McKenzie, “Reinventing Common Interest Developments: Reflections on a Policy Role for the Judiciary,” 31 *John Marshall Law Review* (Winter 1998), p. 408.

A Constitutional Revolution

In light of all this, the rise of the private neighborhood association in American life might be described as a grand new experiment in local constitutionalism. The specific provisions of the private constitution of each neighborhood are contained in its founding documents or, legally speaking, its “declaration.” Like other constitutions, the declaration sets out a governing process for the neighborhood, including the form of the legislature (the board of directors), voting rules and eligibility, the areas of neighborhood government responsibility (as reflected partly in covenants), neighborhood appeal procedures, and the manner of amending the neighborhood constitution. As a leading legal practitioner in this area, Wayne Hyatt, explains, “the declaration is not a contract but, as a covenant running with the land, is effectively a constitution establishing a regime to govern property held and enjoyed in common.”⁵³

Reflecting the constitutional character of the founding documents, law professor Susan French has explored the possible provisions of a local “bill of rights” for a new private neighborhood.⁵⁴ Even if people have moved into a neighborhood association in full knowledge of its ground rules, most neighborhood associations have provisions for changing the rules (usually by supermajority votes). If this process were abused, the power to change the covenants and other controls on individual property in the neighborhood, French says, could “substantially reduce the value of units to their owners or force them to move.” Inattentive or unlucky owners could face the prospect that “dreams can turn to nightmares for homeowners who are forced to make a choice of

moving or giving up beloved pets, lovers, or even children." To minimize the likelihood of any such event, French recommends that developers should include provisions in the neighborhood founding declaration to guarantee new home buyers "that the majority cannot unite to deprive them of the liberties they are not willing to sacrifice for the advantages of ownership in the community."⁵⁵

Unlike the federal Constitution that applies a common set of civil rights and other basic rules everywhere in the United States, the terms of a neighborhood constitution – perhaps including a bill of rights -- might vary considerably from one neighborhood to another, reflecting local preferences and circumstances. French recognizes that there is a tradeoff to living in a private neighborhood association in which "Americans have been willing to give up some degree of freedom to secure the advantages of ownership in common interest communities." Moreover, the tradeoff need not be resolved in the same manner from one neighborhood to another:

Since different common interest communities are designed to appeal to various segments of the larger community, the contents of the constitution and bill of rights for any particular development should be tailored to the interests and fears of the group the developer intends to target. People who are interested in living in communities designed for special activities or interest groups will obviously be willing to give up more of different liberties than those who simply want good housing in a good neighborhood that will retain its value. Even within the group of those who are simply looking for housing, the degrees of liberty people are willing to give up to acquire various amenities will vary. However, certain fears are likely to appear with sufficient frequency that developers should consider addressing them in the constitutions for any community they create.⁵⁶

Compared with the Bill of Rights in the U.S. Constitution, the provisions in a neighborhood bill of rights might be less restrictive of government actions in some respects and more restrictive in other respects. For example, requirements for the separation of church and state that make sense at the national level may be undesirable in

the case of a private neighborhood. Congress has previously recognized, in one instance, that American Indian tribes on their reservations should face fewer restrictions relating to the combining of church and state. Some of the U.S. Constitutional provisions for freedom of speech might properly be limited in their application in private neighborhoods, allowing these neighborhoods say to exclude sex shops, X-rated movies, or other pornographic land uses that would be offensive to the residents (but could not be constitutionally prohibited over the entire United States). Overtly discriminatory policies based on sex, age, family circumstance, ethnic background, professional status, sexual gender preference, occupation, recreational interests or any number of other specialized categories might be allowed (other than racial discrimination) for a private neighborhood, even though the same policies for a state actor might violate the equal protection clause or other provisions of the U.S. Constitution.⁵⁷

Thus, one leading authority on neighborhood association law, Katherine Rosenberry, argues that "attempts to apply [traditional federal] constitutional analysis in common-interest developments" will face major difficulties, if such efforts are directed to neighborhood actions with respect to "voting rights, discrimination, inverse condemnation, or freedom of speech and religion." She finds that "common-interest developments are consensual in nature and [federal] constitutional principles which have evolved in response to actions of state and local governments are not necessarily applicable in the common-interest setting" of the neighborhood association. Indeed, as Rosenberry argues, whenever possible the courts "should refuse to apply the body of [federal] constitutional law to documents governing common-interest developments" -- even if private neighborhoods admittedly "have many of the trappings of government."⁵⁸

Rather, these matters of basic individual rights within the neighborhood can be addressed – perhaps in many different ways -- in the separate writing of many private constitutions that set out the specific governing rules for each neighborhood association. If a person does not like the rules, he or she is under no obligation to move into the neighborhood.

There are now more than 200,000 neighborhood associations in the United States, about ten times the number of municipalities. In its founding declaration each of these associations sets out a constitutional arrangement for neighborhood governance. The rise of neighborhood associations amounts to a new exercise in constitution writing on a far wider scale than has been seen before in the United States. In the process the constitutional status of local government in this country is being radically changed today .

An alternative path of this kind of constitutional revolution would have required the Supreme Court to revisit and reinterpret the constitutional status of local governments in the public sector.* The wider constitutional constraints on municipal actions – most of them the result of Supreme Court decisions over the past 150 years -- could have been reconsidered and perhaps many of them loosened or abolished.† However, any such

* Robert Ellickson has in fact suggested the 1968 Supreme Court decision in *Avery*, applying the one person/one vote rule to municipalities in the public sector, perhaps should be reconsidered. Ellickson would give local governments wider flexibility in designing their institutions of governance, including the possibility of establishing property requirements for voting in some cases. See Robert C. Ellickson, “Cities and Homeowners Associations,” 130 *University of Pennsylvania Law Review* (June 1982).

† In the early years of American history the legal status of municipalities gave them considerable formal autonomy – similar in fact to that of a private property owner. Many towns were legally established under the same laws of incorporation as private businesses. Until the mid nineteenth century, the legal status of New York City under state law, for example, differed little from that of a private business corporation. In the second half of the nineteenth century, municipalities came to be regarded in the law as a “state actor.” As a public entity, but one never specifically mentioned in the U.S. constitution, a municipality would now be seen as drawing its authority from a higher level of American government that did have a well defined constitutional status, the states.

Strictly speaking, a municipality would now be seen as a part of state government. By the end of the nineteenth century, towns and cities had come to be seen legally and constitutionally in the United States as the “creations” of the states. Following the principles of “Dillon’s rule,” all local powers were delegated powers of state governments, and these powers could be rescinded as well. If a state government wanted to abolish a municipality, curtail its authority, alter its form of government, or take

rethinking of the constitutional status of municipal governments would be a long and slow process with a very uncertain outcome. It has been much easier and simpler to shift the institutions of local government from the public sector to the private sector. By this means, a constitutional revolution in local government could be accomplished in a much shorter time and with much less political stress and strain.

A New Field of Study

The full social significance of the corporate form of ownership of business property was not widely appreciated by economists until long after business corporations had become a central feature of American society. Indeed, it was not until 1932 that Adolf Berle and Gardiner Means in a celebrated work brought this development to the full attention of the economics profession, announcing that the rise of the modern corporation had transformed the basic relationship between the ownership of business and the managerial control over the instruments of business production.⁵⁹ Even today, much of the apparatus of formal economic analysis is still best suited to a market

other radical steps to change its internal workings, all these actions would fall within its legal authority. The U.S. Supreme Court in *Hunter v. City of Pittsburgh* early in the twentieth century went so far as to declare that:

The State ... at its pleasure may modify or withdraw all [city] powers, may take without compensation [city] property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will [with respect to towns and cities], unrestrained by any provision of the Constitution of the United States.

All this is in considerable contrast to the protections afforded by the U.S. Constitution for private property, including private neighborhood associations. Under the Constitution, for example, the federal government or a state government can not “take” the private property of a neighborhood association without paying compensation. Higher levels of government are required to observe due process, equal protection, and other requirements that constitutionally apply to actions that regulate or otherwise affect private parties. There are no analogous constitutional requirements for actions by higher levels of government as they might affect municipal governments. See Joan C. Williams, “The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law,” *Wisconsin Law Review* (Issue 1, 1986); and Gerald E. Frug, *City Making: Building Communities without Building Walls* (Princeton: Princeton University Press, 1999).

framework of atomistic business firms operated by individual owners and decision makers.

In the area of the collective ownership of residential property as well, economists and other social scientists have been slow to recognize fundamental changes occurring in American life. In their professional writings (and in contrast to their own private housing choices), economists have not paid much attention to the rise of the private neighborhood association.⁶⁰ If the rise of private neighborhoods constitutes a social revolution in American housing, property rights, and local governance, for most professional economists it has been an unknown revolution.

It is not as though economists do not have a useful set of analytical tools that might be applied to the study of neighborhood associations. As least since the contributions of James Buchanan, there has been a body of economic analysis of the workings of private clubs.⁶¹ Buchanan, Gordon Tullock, and others in the public choice school have explored numerous issues of governance and other aspects of collective choice from an economic perspective.⁶² A new field of constitutional economics has emerged from these efforts in the past two decades.⁶³ The insights of Mancur Olson's classic *The Logic of Collective Action* are readily applicable to the collective decision making of neighborhood associations.⁶⁴ Economists have shown a longstanding interest in the evolution and role of private property rights in an economic system. Insights from all of these fields of economic literature could fruitfully be applied to neighborhood associations – potentially occupying the time and effort of many economists.

Following the classic article of Charles Tiebout, there has also developed a substantial literature of “fiscal federalism.”⁶⁵ Tiebout in effect argued that a system of

local governments could function like a set of private clubs – and that there could in theory at least be a level of economic efficiency in the taxing and service delivery of local governments to match the standard of market efficiency for ordinary private goods and services. Much of the subsequent economic literature has examined the real world constraints that make it difficult for municipal governments actually to function according to the Tiebout standard. As discussed above, there are many limits imposed on state actors by the legal system that do not apply to private actors. For example, as Bruce Hamilton discussed, local governments must be able to exclude unwanted uses but these governments are not allowed simply to refuse entry to any party they want to exclude. The economic importance of zoning was that its workings in practice provided a reasonable approximation of the necessary exclusionary power (if with some inevitable “frictions,” as compared with a true private property right solution).⁶⁶ One might say that the rise of private neighborhood associations is bringing the real world of local governance into steadily closer conformance with the theoretical requirements for the existence of a true Tiebout world – another potential area for economic research.

Political scientists have given somewhat greater attention to the rise of neighborhood associations, as compared with economists. A small band of political scientists in the 1990s began to take note of the great social significance.⁶⁷ They often offered criticisms of neighborhood associations as a challenge to American ideals of social equality and national community. For them, the private character of the neighborhood association represented a step backward from the “progressive” trends of the twentieth century that had extended the government role into more and more areas of life. Progressivism had also focused the attention of Americans on the national

community, and on the federal government as the instrument for achieving the common goals of a unified nationwide citizenry. The rise of the private neighborhood association, for many critics, has represented a step back towards parochialism and division, towards an emphasis on the rights of small local communities over the interests of the nation as a whole.

Although the social science literature remains slim, lawyers have been more attentive to the growing social importance of neighborhood associations. This is partly because an estimated 4,000 cases involving the actions and rights of private neighborhood associations have already been taken up in the courts.⁶⁸ A large body of writings now exists in the law journals that describes the rise of the neighborhood association and the many legal issues raised.⁶⁹ The remainder of this paper – drawing heavily on this legal literature – will examine the workings of private neighborhood associations in further detail.

Why Collective Ownership?

The 1960s were a period of rapid changes in many areas of American life, from the Beatles in music, to escalating crime rates, to the introduction of coeducation in many colleges, to the rise in general of a counterculture among the young. It was a period of fundamental change in American housing as well. Indeed, the timing was not altogether coincidental. The upheavals in American society in the 1960s coincided with the arrival of the first members of the baby boom generation to adulthood, bringing not only increased demands for housing but also new social values that this generation would soon be advancing in American life.

Less enamored of “progress,” and more concerned about the “environment” than previous generations, there were new social pressures that acted to limit the availability of housing, including the slowing of new highway construction, tighter suburban limits on land use supplies, demands for more and larger open space areas, and greater pressures to limit growth generally. Such factors contributed to a new tightness in metropolitan land markets and rapid escalation in many areas of the price of land. In 1948 the cost of land represented 11 percent on average nationwide of the total cost of suburban housing; by the 1970s land costs had shot up to 25 to 30 percent of the total cost of housing.⁷⁰

Rising land and housing prices meant a growing demand for housing at higher densities of occupancy. Building housing at higher densities allowed for the realization of significant economies in the use of land, including joint provision of parks, green spaces and other common facilities for a whole neighborhood. Townhouses became a form of “apartment” living adapted to the individual ownership and other circumstances of the suburbs. Home buyers were increasingly confronted with a choice; either purchase a home far out in the distant suburbs where land costs remained low, or give up on the idea of living on an individual lot with an acre or so of land for personal use. Only people in the top part of the income scale could now afford such a level of luxury in well located suburban areas.

As many people found that they would have to accept higher densities in order to economize on the use of land, they also found themselves living in closer proximity to their neighbors. A stereo system blaring music 300 feet away might be barely audible; 30 feet away it could keep you up all night. The actions of neighbors in general became

more important to residents and to the enjoyment of their shared neighborhood environment. A new demand thus emerged for collective controls over the actions of individual property owners within the shared neighborhood environment, accompanied by a greater willingness to sacrifice elements of individual autonomy in order to gain such collective controls.

Zoning had always been a crude device for maintaining neighborhood quality. It could keep out new industrial and commercial uses well enough but traditionally had not regulated “aesthetic” matters such as the paint color of a house, the placement of shrubbery, the building of a deck and many other fine details of neighborhood land use. If these kinds of things were to be put under collective neighborhood control, the wider regulatory leeway afforded by a private system of regulatory controls might be needed. A private set of controls would also have the advantage – in the case, for example, of future disputes -- that each resident had already given his or her explicit voluntary consent to the controls.

As compared with the standard workings of municipalities in the public sector, a higher quality of neighborhood services could also often be achieved by obtaining them privately. Many city neighborhoods were required to negotiate with distant bureaucracies concerning the appropriate levels and manner of service delivery to the neighborhood. These bureaucracies were often unresponsive and insensitive to local needs, as well as inefficient in their delivery of services. Where the option existed, many neighborhoods in the suburbs concluded they could do better on their own, buying the services from private providers operating under the competitive pressures of the marketplace.

Many new neighborhood associations across the United States, for example, were built around golf courses as an organizing feature. Compared with the usual municipal golf course, a private association often limited the levels of golfer use more tightly, and maintained a higher standard of upkeep of fairways and greens. In a privately maintained park, the association members could plant gardens, have the lawn mown regularly and otherwise maintain facilities more attractive than most of their municipal counterparts. Indeed, in the 1970s and 1980s many common areas of municipal governments appeared seedy and run-down; they often suffered from inadequate maintenance. Private police patrols could be used in neighborhood associations to supplement the level of security already being provided by municipal police. Thus, as Marc Weiss and John Watts comment, neighborhood associations "continued to enforce deed restrictions [on types of neighborhood uses] but their essential purposes increasingly reflected other priorities: the provision of attractive services and the economical maintenance of common property."⁷¹

Changing thinking about urban planning and the appropriate design of suburban land development projects also played a role in promoting the rise of private neighborhoods. The typical zoning ordinance specified that each home should have its own separate lot. The planning ideal underlying the creation of zoning was that each home should be well insulated from negative impacts of adjoining home owners. As one might say, each person in a perfect world of zoning would be wealthy enough to create his or her own private "park" for his or her individual enjoyment at home, living in a neighborhood with other residents of similar incomes and lifestyles. Jane Jacobs and other critics, however, argued that such zoning goals were a prescription for sterile, aesthetically unattractive, boring, and in general bland and unappealing land

development.⁷² Zoning emphasized the autonomy of the individual at the cost of less opportunity to live in and among the members of a more diverse and vital community environment. Zoning employed government powers to legally enforce patterns of land use in which neighborly interactions with other people would be held to a minimum.

The new architectural goals of the “planned unit development” were conceived, and from the 1960s increasingly accommodated by municipalities, in part as an antidote to such concerns about the impacts of zoning. Retail and other commercial establishments might be provided in closer proximity to the homes of residents. Some people might like to walk to a corner convenience store. They might like to get their hair cut at a neighborhood barber shop. Zoning rules had to be changed in order to accommodate such mixtures of uses in new land development projects. Under the concept of the planned unit development, it would be the density of the entire development, and no longer the size of the individual lots, that would count for overall compliance with density controls. The trees and areas of green space were found less on the individual lots and more as part of a common area of open space for the whole neighborhood – a “public” rather than a “private” space (or “public” at least for all the members of the neighborhood association).

The real estate industry is in the business of providing what home buyers want and are willing to pay for. These kinds of economic forces in the land market and the shifting aesthetic preferences in land development required corresponding changes in the legal instruments for the ownership of residential property in the United States. In most planned unit developments, a collective form of private property ownership such as the homeowners association would be necessary.

The first homeowners association in the United States was created in 1831 in order to provide for the upkeep of Gramercy Park in New York City. The idea of the mandatory homeowners association -- where each purchaser of a home or lot was required to join the association as an initial condition of purchase -- was pioneered in the early twentieth century. Mission Hills in Kansas City, build by a leading American community developer, J. C. Nichols, was one of the first large developments to establish a mandatory association.⁷³ Nichols sought, among other aims, to transfer the burden of future common property maintenance, and private service delivery, to the residents themselves. In earlier developments, where the developer retained this role long after the homes had been built, there had often been many disputes with residents concerning such matters. The use of homeowners associations spread further after World War II, as large private developments became more common across the United States. Nevertheless, until at least the 1960s the predominant form of protection of neighborhood environmental quality was achieved by means of public zoning.

Condominium Ownership

The increasing demand for collective private ownership of residential property led to a basic property right innovation of the 1960s. The first condominium development in the United States was the Greystoke in Salt Lake City in 1962.⁷⁴ Within forty years, there would be 2 million people living in condominium units in Florida alone, and condominium units would represent 5 percent of the total American housing supply.

Outside the United States, forms of condominium ownership have ancient origins. Some of the earliest known antecedents can be found in the Middle Ages in Germany where "story property" -- the separate ownership of different stories within the same

structure – is known to have existed as long ago as the 1100s.⁷⁵ The modern form of condominium ownership was adopted in Brazil in 1928 and it soon spread rapidly to other parts of Latin America. A rudimentary condominium law was enacted in 1951 in Puerto Rico, and the first condominiums in the United States were built there.

In 1960, partly at the request of Puerto Rican representatives, hearings were held by the Congress on the workings of condominium ownership. The National Housing Act of 1961 extended the availability of FHA mortgage insurance to the purchasers of individual units in condominiums. FHA promptly took steps to promote wider condominium ownership, including the publication of a model condominium statute.⁷⁶ By 1967, based in part on the FHA model, almost every state had adopted some kind of legislation setting a legal framework for condominium ownership.

From a starting point of essentially zero in 1960, housing units in condominiums by 1970 represented 12 percent of the housing units found in neighborhood associations across the United States. Condominium ownership spread particularly rapidly during the 1970s, now further encouraged by high inflation and a period of national economic instability that was creating new financial pressures on state and local governments. Local fiscal deficits meant that local governments were less willing to accept any new responsibilities for building and maintaining streets, collecting garbage, and providing other municipal services to new entrants within the community. In 1978 the passage of Proposition 13 in California limited the ability of local governments to raise their property taxes. In California and many other states, providing local services privately through a neighborhood association, and thus relieving part of the fiscal burden on a municipality, was often a condition for municipal approval of a large new planned

development.⁷⁷ As James Winokur comments, “there is substantial evidence to suggest that the ‘load shedding’ of local government fiscal responsibilities onto common interest communities has been a conscious governmental strategy for relieving strain on shrinking resources.” Indeed, developers often find that local regulations “either require or encourage them to create commonly owned property managed by community associations.”⁷⁸

In the mid 1970s another important form of encouragement for neighborhood associations was the acceptance by the Federal National Mortgage Association (FNMA) and by the Federal Home Loan Mortgage Corporation (FHLMC) of the inclusion of condominium and planned unit development loans in the bundling of mortgages in the secondary lending market. As home buyers then voted with their feet, the number of housing units in neighborhood associations rose from 1 percent of the total U.S. housing supply in 1970, to 4 percent in 1980, and then reaching 11 percent in 1990. By 2000 more than 15 percent of Americans – more than 40 million people -- were living in a private neighborhood association of some kind.

Growing Pains

As might have been expected for such a new social institution, increasing complaints about the operation of private neighborhood associations also were beginning to be heard by the 1970s. Developers sometimes did not follow through on their commitments to incoming residents, or misrepresented their intentions. The process of transition from developer control to management by the unit owners themselves was often difficult and confusing. In 1973, a survey of 1,760 condominium residents found that most were satisfied with their overall condominium experience but 61 percent were

unhappy with one or another aspect of the specific workings of their association management.⁷⁹

In that same year, leaders in the real estate industry joined together to form the Community Associations Institute (CAI) with the purpose is to improve the quality of management of private neighborhood associations. The CAI (now located in Alexandria, Virginia just outside Washington, D.C.) over the years has provided a wide range of technical assistance for various aspects of association governance. Besides its numerous written materials, CAI also provides a wide range of instructional programs in the management of neighborhood associations.⁸⁰

Many state legislatures responded to public complaints about neighborhood association operation by passing a second generation of condominium statutes. The number of states adopting new condominium laws increased after the publication in 1977 of a “Uniform Condominium Act” by the National Conference of Commissioners on Uniform State Laws.⁸¹ Under the recommendations of the model condominium law, the full details of neighborhood land use restrictions and of required assessments to pay for services should to be fully and clearly disclosed to purchasers of units prior to the final closing. New state legislation often provided for improved methods of enforcement to achieve greater compliance of residents with neighborhood rules. The model law recommended a 67 percent vote of approval for amending the foundational documents of a neighborhood association. As of 1998, new laws in 21 states had been enacted that followed the design – in some cases with considerable modification –laid out in the Uniform Condominium Act.⁸²

The National Conference on Uniform State Laws also published a Uniform Planned Community Act (later adopted by Oregon and Pennsylvania) and a Model Real Estate Cooperative Act (adopted by Virginia and Pennsylvania). Given the considerable overlap among the various model laws by then in existence, a consolidated Uniform Common Interest Ownership Act (UCIOA) was issued in 1982. The UCIOA contained various recommendations to set ground rules for the exact legal status and collective decision procedures of neighborhood associations.⁸³ It suggested, for example, that a quorum requirement should be 20 percent attendance for meetings that involved all of the unit owners of a neighborhood association, and 50 percent attendance for members at the meetings of the board of directors. The UCIOA recommends that the builder should retain management and land use control within a development until 75 percent of the units have been sold. At that point, the majority of voting rights – and management control -- would transfer to the residents themselves. (However, even then, the members of the neighborhood association would be legally required to permit the developer to complete the project according to the plan.)

Various voting rules are recommended in the UCIOA for achieving collective approval of neighborhood association actions, varying by the kind of action. In order to recall a member of the board of directors, a vote of 67 percent of the unit owners is recommended. A 67 percent vote is also recommended for approval of most types of amendments to the original covenant restrictions and other founding documents of the association. A higher standard is suggested for some special types of amendments that would represent more fundamental alterations in the basic workings of the neighborhood association. For example, the UCIOA would require an 80 percent vote to amend the

founding documents to allow a new type of use within the neighborhood (to allow say a commercial venture). Full and unanimous consent is required to make any changes in the neighborhood association in the division of voting interests among the unit owners.

Neighborhood Environmentalism

The rise of the private neighborhood association since the 1960s coincides with the rise of the environmental movement in the United States. Indeed, the rise of the neighborhood association could accurately be described as representing yet another side to American environmentalism (if with little connection to the official environmental movement). This “neighborhood environmentalism” is dedicated to the improvement and protection of the quality of the immediate surrounding home environment – the one place where most Americans spend the largest part of their time outdoors.

As described above, the environmental protections in most neighborhood associations go well beyond conventional zoning. Neighborhood association rules also often limit the manner of use of individual property. Some associations require, for example, that garage doors must be kept closed when not in use. Rules for the types of motor vehicles allowed – prohibiting house trailers, large trucks, or even any kind of truck at all -- and the manner of their parking on neighborhood streets and driveways are common features in neighborhood associations. As one judge declared in considering a legal challenge to the powers of a neighborhood association, “although William Pitt, Earl of Chatham, may have declared, in a famous speech to Parliament, that a man’s home is his castle, this is not necessarily true of condominiums” and other private neighborhood associations.⁸⁴

Collective neighborhood control may extend into various realms of social behavior such as the playing of loud music or the holding of late-night parties. Apparently reflecting a residual American Puritanism in some places, a few of them have regulated the wearing of bathing suits and even kissing goodnight in public. One Florida association in the 1970s banned the use of alcoholic beverages in the neighborhood clubhouse. Many associations have restrictions on the ownership of pets, sometimes based on their size and weight.* A common restriction in neighborhood associations is a ban on any home-based businesses, in some cases even personal businesses interior to a housing unit that would generate little or no automobile traffic or other exterior impacts. Other aspects of the behavior of residents that have been restricted by neighborhood associations include the use of patio furniture, the holding of outdoor barbeques, the frequency of toilet flushing, and the type of soap used in dishwashers.

Green Valley is a master-planned community near Las Vegas, Nevada. As described by one observer, this private community provides for control over the common neighborhood environment in all of the following ways:

In Green Valley the restrictions are detailed and pervasive. ... Clotheslines and Winnebagos are not permitted, for example; no fowl, reptile, fish, or insect may be raised; there are to be no exterior speakers, horns, whistles, or bells. No debris of any kind, no open fires, no noise. Entries, signs, lights, mailboxes, sidewalks, rear yards, side yards, carports, sheds—the planners have had their say about each. ...[They also regulate] the number of dogs and cats you can own ... as well as the placement of garbage cans, barbecue pits, satellite dishes, and utility boxes. The color of your home, the number of stories, the materials used, its accents and trim. The interior of your garage, the way to park your truck, the plants in your yard, the angle of your flagpole, the size of your address numbers, the placement

* In one celebrated case, a neighborhood association limited dogs to under 30 pounds. When a resident had a dog of about this weight, the association conducted a weigh-in. It raised the obvious question – what if the dog weighs 29.5 pounds one day, and then 30.5 the next. It raised the specter of dogs being deprived of food and drink in the period before the formal weigh-in, much as human boxers and wrestlers who compete in certain weight categories must often do.

of mirrored glass balls and birdbaths, the grade of your lawn's slope, and the size of your FOR SALE sign should you decide you want to leave.⁸⁵

Court Oversight

The private status of a neighborhood association, to be sure, does not mean an absence of any legal limits to its authority. In the past, for example, some courts have shown a willingness to overturn neighborhood restrictions that affected only the interior portions of an individual housing unit. One neighborhood association, for example, was prohibited from imposing a ban on the installation of a TV satellite dish that would have been placed in a way to be entirely out of sight.

In other cases, courts have simply ruled that actions of neighborhood associations have been too intrusive without any reasonable basis. A court thus overturned a neighborhood rule to ban the parking of a small noncommercial pickup truck in a driveway – although an ordinary car would have been allowed under association rules in exactly the same place. The court reasoned that "cultural perceptions" change and neighborhoods must adjust; in recent years light trucks have no longer had a "pejorative connotation" and instead for many people are rather fashionable – perhaps even the contemporary social "equivalent of a convertible in earlier years." Hence, as this court ruled, it was altogether unreasonable for the association to ban the parking of a small pickup truck in a driveway within the neighborhood.

Law professor Gerald Korngold argues that, although there will be a few exceptions, the courts should nevertheless respect the autonomy of neighborhood associations to control their own land uses "in virtually all situations." He finds that "in almost every case" the restrictions of neighborhood associations do represent a reasonable effort of the residents to protect an attractive neighborhood environment.⁸⁶ As

courts across the United States are increasingly asked to review issues of the legal acceptability of the actions of neighborhood associations, this has become a fast growing area of the law.⁸⁷

For the most part, much as Korngold advocates, the courts have thus far deferred to the private autonomy of neighborhood associations. One should give substantial deference, the courts seem to be saying, to the expressed preferences of many millions of Americans who have already chosen to live under the collective system of neighborhood controls of a neighborhood association. They knew in advance what they were getting into, and explicitly agreed to abide by the terms of neighborhood restrictions. Hence, absent a compelling demonstration to the contrary, the normal decision making and enforcement procedures of neighborhood associations should be allowed to operate according to the rules of the founding documents – the original “neighborhood constitution” – with a minimum of judicial intervention.

In one much cited 1975 case, a Florida court thus upheld the prohibition (noted above) on the use of alcoholic beverages within the clubhouse area of the Hidden Harbor Estate association. The Florida Supreme Court first described the routine workings of neighborhood associations.

Inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization. The Declaration of Condominium involved herein is replete with examples of the curtailment of individual rights usually associated with the private ownership of property. It provides, for example, that no sale may be effectuated without approval; no minors may be permanent residents; no pets are allowed.⁸⁸

In upholding the restrictive actions of the Hidden Harbor association, this Florida court then declared that “certainly, the association is not at liberty to adopt arbitrary or capricious rules bearing no relationship to the health, happiness and enjoyment of life of the various unit owners. On the contrary, we believe the test is reasonableness. If a rule is reasonable, the association can adopt it; if not, it cannot.”⁸⁹ As a practical matter, this test of “reasonableness” has amounted to a presumption in favor of the actions of neighborhood associations but with the courts maintaining an option to intervene in particular circumstances that they may perceive as grossly unfair or arbitrary.*

An Evolving Body of Law

The California Supreme Court has also sought to flesh out the acceptable boundaries of neighborhood association authority. In one important case a unit owner, Natore Nahrstedt, was keeping three cats in violation of a ban that had been imposed by the Lakeside Village Condominium Association.⁹⁰ According to association rules, unit owners were not allowed to have pets. However, Mrs. Nahrstedt claimed that, because her three cats were not allowed to go outside her unit, it was arbitrary and unreasonable that she should be forced to get rid of them (or alternatively be forced to move out of the

* One problem is that neighborhood associations are often very rigid in their enforcement of covenants, even in the face of powerful extenuating circumstances. In 2000, the St. Petersburg Times in Florida reported that:

Deed restrictions in Tampa Palms require removal of a treehouse, the only place where a boy with leukemia finds peace and solace. ... To his parents ... the treehouse is a symbol of hope, a reminder of the brief time doctors thought Brage had beaten cancer and he felt well enough to build it with his father. ... Yet, the homeowners association that governs the Tampa Palms community has decided that the treehouse must come down: it violates deed restrictions. ... [The association manager complained that] “your treehouse structure is in direct violation of the Covenants, Conditions and Restrictions for Tampa Palms.”

In the end, under severe media pressure, the association was forced to back down and to allow the treehouse to remain. This case is described in Paula A. Franzese, “Neighborhoods: Common Interest Communities: Standards of Review and Review of Standards,” included in a Festschrift in honor of Daniel R. Mandelker, 3 *Washington University Journal of Law and Policy* (2000), pp. 663-664.

neighborhood). Her neighbors countered that she had known about the association rule banning pets all along, and had blatantly acted to defy the expressed wishes of her fellow unit owners in acquiring the cats. This cat lover lost in the first court to consider the case, then won at an appeals level, but finally lost on further appeal to the California Supreme Court.

Using widely cited language, the California Supreme Court declared that “subordination of individual property rights to the collective judgment of the owners association together with restrictions on the use of real property comprise the chief attributes of owning property in a common interest development.”⁹¹ That is to say, the collective preferences of the unit owners, as clearly expressed in restrictive use covenants that are included in the founding documents of an association, must not be lightly overthrown.* Following the California ruling, the common interpretation of state courts is that a restriction imposed by a neighborhood association should be legally sustained as “reasonable” if it can meet three tests. It must not “(1) violate a fundamental public policy, (2) bear no rational relationship to the protection, preservation, operation, or purpose of the affected land, or (3) create more harmful effects on homeowners’ land use than benefits.”⁹² (This third test, it must be admitted, seems to invite rather wide judicial intervention in association affairs, if carried out to the full letter of the court opinion. For the most part, it seems to have been interpreted narrowly in practice.)

* The California Supreme Court also seems to have been concerned that it was important to establish a strong barrier to prevent the court system from being overwhelmed by a flood of suits involving neighborhood associations. If every losing party in a neighborhood decision sought to reverse this decision in court, the number of suits could be virtually without limit. Thus, as one legal commentary notes, the court saw a need to establish a “judicial barricade” that spared the court system the significant “problem of judicial, social, and financial burdens resulting from the detailed factual determinations necessary under the previous, fact-specific standard.” See “The Reasonable Pet: An Examination of the Enforcement of Restrictions in California Common Interest Developments After *Nahrstedt v. Lakeside Village Condominium Ass’n, Inc.*,” 36 *Santa Clara Law Review* (1996), pp. 808-809.

Although the courts have supported the enforcement of neighborhood association covenants in the great majority of cases, it is still a developing area of the law. In 1997, the Supreme Court of Washington State showed that the courts are also capable of tighter scrutiny. In 1992, William and Carolyn Riss purchased a home in the Mercia Heights area of the City of Clyde Hill. The Risses later sought the approval of the Mercia Homeowners Association to tear down their existing home and to build a new one. As proposed, the new home would have complied fully with the covenants as recorded by the original developer in the 1950s. The Association board turned down the request and then, after an appeal from the Risses to the full membership, the members of the association voted decisively against their request as well. The Supreme Court of Washington, however, overturned the actions of the Mercia Homeowners Association. In ruling in favor of the Risses, the Court declared that the association had acted “without adequate investigation, ... based on inaccurate information, and thus was unreasonable and arbitrary.”⁹³ The Mercia homeowners were probably objecting most of all to the neighborhood disruptions of demolishing an existing home and constructing a new one but apparently that type of concern was not explicitly addressed in the covenants and the Court felt free to interject its own judgment.

The courts often distinguish between land use restrictions that are contained in the founding documents of a neighborhood association, and any subsequent rules that have been adopted by the association governing officers (or through an internal referendum vote among all the unit owners in the neighborhood). Each new buyer of a unit in an association knows before the purchase the basic covenants and other land use restrictions of the neighborhood -- or has the opportunity to find out. (Simply looking around the

neighborhood to observe the homogeneous character of the existing properties will normally also be very informative in this regard.) Hence, as Wayne Hyatt and Jo Anne Stubblefield write, the courts have generally given a “strong presumption of validity” to restrictions contained in the founding documents.⁹⁴ However, when a new rule has been voted by the association governing body at a later date, and thus no claim can be made to unanimous initial consent, the courts have been less deferential. In such cases, “rational rules and restrictions that are rationally enforced – and that promote a legitimate goal – will generally be considered reasonable,” but the courts tend to accept a greater responsibility to scrutinize the actions of a neighborhood association.⁹⁵

The potential range of decisions that the governing officers of neighborhood associations are called upon to resolve can seem almost limitless. Most of them fortunately do not end up in court. In a neighborhood association in Fairfax County in Northern Virginia, for example, the 30 or so unit owners were recently pondering the following issue.⁹⁶ The streets of the association are privately maintained, and some of these streets now needed significant capital improvements, requiring a special capital assessment of around \$2,000 per unit owner. However, a few members of the association live in housing units that front on a public road. They make little use – and in theory could make no use at all -- of the private road network internal to the neighborhood association and that is used by most unit owners. These outside-facing owners would therefore derive little or no direct benefit from the street capital improvements. Should they nevertheless pay the full amount, or should they perhaps be given a discount, or even complete relief from having to pay for the cost of the internal road improvements for their neighborhood association?

Another thorny issue before this same Northern Virginia neighborhood involved the possibility of placing Christmas lights on a part of the common elements of the association. The large majority of the unit owners are Christian and most of them wanted to put up the lights during the holiday season – involving a cost of no more than a few hundred dollars in total to the association. However, the association also has a few Jewish members. At least one objected – recognizing that the rights to the common elements amount to a form of “property ownership” – that it would be offensive to his religious beliefs for him to pay for Christmas lights on what was, in part at least, “his” property. The association had to consider whether this was a reasonable view or perhaps an unreasonable objection that would frustrate the will of the majority of the unit owners – people who were simply looking to celebrate in a few small ways the Christmas holiday.

Another issue is the extent of constitutional protection of free speech within the boundaries of a neighborhood association. Under the U.S. Constitution the extent of such protections typically differs according to whether the setting is public or private. In a 1990s Pennsylvania court case, an owner had placed a for-sale sign in the window of his unit. When the association demanded that the sign be removed (prior written permission for the posting of any signs was mandatory under the rules of the association), the owner claimed that his constitutional rights of free speech under the First Amendment were being abridged. A lower court agreed but on appeal a higher court sustained the actions of the neighborhood association, declaring that freedom of speech in this case would have to give way to the rights of private property as manifested in existing land use covenants within a neighborhood.⁹⁷

Who Can Live There?

Neighborhood associations may also seek to maintain the desired neighborhood environment by means of controls on the age or potentially other personal characteristics of prospective entrants. Given the long history of active racial discrimination in the United States, this is a particularly sensitive area of neighborhood exercise of collective control over the neighborhood environment.

Although private restrictive covenants to exclude blacks were once widespread in American housing, they were declared unconstitutional by the U.S. Supreme Court in 1948 in *Shelley v. Kraemer*.⁹⁸ There is thus no question that it would be unconstitutional for a neighborhood association to deny entry to any prospective unit owner on the basis of his or her race. However, the ability of an association to accept or reject entry of new unit owners based on other personal characteristics is subject to wide current debate. Discriminatory actions that are unconstitutional in a “public” setting could well be constitutional in a “private” setting.*

Some forms of social discrimination -- such as exclusions from a neighborhood based directly on ability to pay -- are entirely legal. The level of income required to buy into a neighborhood can often be measured rather precisely (as a savings and loan or other mortgage officer would be able to calculate it). Still other forms of discrimination are not constitutionally prohibited but may be illegal at present under one or another statute. In these cases, the law could be changed, and whether to make such a change is potentially an important subject for public policy debate.

* Even racial discrimination is entirely legal in a host of “private” areas of life. Racial motives, for example, obviously -- and legally -- enter into private choices of marriage partners for many whites and blacks alike (if race were not a factor, statistically, there would have to be many more interracial marriages than are actually seen).

In general, the ability to assert strong values of a community will depend on the ability to exclude people who do not share those values. As Michael Sarbanes and Kathleen Skullney note, “‘community’ is ... filled with the related tension between cohesion and exclusion. The very self-definition which binds some people within a community is likely to exclude others.”⁹⁹ University of Virginia law professor Glen Robinson comments that “real communities are very selective about whom they include. ... A Jewish community comprised of a mixture of Christians, Jews and secular individuals is a contradiction. An Italian-American community half comprised of Irish or Russians is impossible.”¹⁰⁰

Since the 1960s, public policy in the United States has often emphasized individual rights over the rights of the community to define its own membership. However, there has been growing concern in recent years – partly stimulated by a new “communitarian movement” -- to provide greater encouragement to the local “intermediary” institutions in American society.¹⁰¹ This may require a new willingness to permit exclusionary practices on the part of local communities in the interest of sustaining the internal cohesion of these communities. Although the legal acceptability of such practices is in doubt, it remains for the most part to be resolved. As Robinson comments, “conventional wisdom is that covenants based on such personal attributes as race, religion or ethnicity are unenforceable, though aside from racial restrictions ... there is remarkably little case law to support this assumption. There is equally little examination of why it should be so.”¹⁰²

The concept of freedom has always involved a tension as seen in the old debate over whether a person should be “free to choose not to be free.” We can easily agree that

complete freedom is unacceptable when it might extend, for example, to some person choosing to sell himself into slavery. However, maintaining the freedom to choose many other kinds of limits on future freedom of individual action will not involve such obvious tensions with basic social values. Indeed, a “freedom of association” is also a basic right in the pantheon of American civil rights, one that government should not infringe upon lightly.¹⁰³

Age-Group Communities

Thus far, the issue of the legal right to discriminate has received the most attention in the case of discrimination on the basis of age.¹⁰⁴ Public policy has been caught between two powerful trends in society. Legislatures in general have been moving to include age as a prohibited category for discriminatory actions. On the other hand, the creation of neighborhood associations that limit residents to certain age groups has proven very popular. Neighborhood associations limited to senior citizens today constitute a significant portion of all private associations.

From the 1960s to the late 1980s it was not only neighborhoods of senior citizens but many others that limited residents to adults only; their founding documents prohibited entry to families who had children below a minimum age.* Such actions were soon challenged in the courts, based on the argument that they represented an unconstitutional, or otherwise illegal, form of social discrimination. It seems likely that, if a municipal government in the public sector were to limit residency according to the age of potential entrants, this restriction would be struck down by the courts. In most cases involving

* Although it was not restricted to neighborhood associations, a 1980 nationwide survey by the Department of Housing and Urban Development found that 25 percent of all U.S. rental units had rules against occupancy by children.

private neighborhood associations, however, state courts ruled that their private status allowed them to discriminate on the basis of age. In 1978, for example, a California court of appeals upheld the restrictive requirement of a neighborhood association that required any permanent occupant to be 18 years or older.¹⁰⁵

In another leading case in this area, the Florida State Supreme Court in 1979 considered the constitutionality of a restriction in the White Egret neighborhood association that denied residency to any child under the age of 12. In upholding this restriction, the Florida court reasoned that:

The urbanization of this country requiring substantial portions of our population to live closer together coupled with the desire for varying types of family units and recreational activities have brought about new concepts in living accommodations. There are residential units designed specifically for young adults, for families with young children, and for senior citizens. The desires and demands of each category are different. ... The units designed principally for families are two- to four-bedroom units with recreational facilities geared for children, including playgrounds and small children's swimming pools. ... We cannot ignore the fact that some housing complexes are designed for certain age groups. In our view, age restrictions are a reasonable means to identify and characterize the varying desires of our population. The law is now clear that a restriction on individual rights on the basis of age need not pass the "strict scrutiny" test, and therefore age is not a suspect classification. ... We do recognize, however, that these age restrictions cannot be used to unreasonably or arbitrarily restrict certain classes of individuals from obtaining desirable housing. Whenever an age restriction is attacked on due process or equal protection grounds, we find the test is: (1) whether the restriction under the particular circumstances of the case is reasonable; and (2) whether it is discriminatory, arbitrary, or oppressive in its application.¹⁰⁶

The court in essence reasoned that a neighborhood should have substantial freedom to define its own social as well as physical environment. Indeed, the presence of children in a neighborhood could impose significant burdens on others. The owner of a housing unit did not have any automatic right to impose such costs on the rest of the neighborhood.

The 1988 Fair Housing Act

Across the entire United States, the wide range of legislative and judicial arenas means that it is possible to lose in one place and still win in another. After losing in California, Florida and most state courts, the opponents of age restrictions in neighborhood associations finally prevailed in 1988 in the U.S. Congress. The enactment of the Fair Housing Act Amendments in that year significantly altered the legal environment for age discrimination by neighborhood associations. Congress now made housing discrimination on the basis of “familial status” illegal under federal law. (“Familial status” is defined by the presence or absence of a child under 18 years who is living permanently as a member of the family.) Reflecting the political realities, it was necessary to give neighborhoods for senior citizens an exemption from this new limitation. At present private neighborhood associations can gain senior citizen status, and the legal right to exclude children, if they have at least 80 percent of their units occupied by at least one person 55 years or older.

The precise extent of legally acceptable exclusions – which kinds of people can be kept out, and when attempts at exclusion cross the boundary to become impermissible forms of discrimination – may arise in many other forms. These issues are being worked out at present in the courts, legislatures and other public policy making arenas. Whether it would be possible to create a neighborhood association limited say to unmarried adults, or to gay people, remains cloudy. Neighborhood association law in general is an area in rapid flux. As law professor Stewart Sterk writes, “community association law is in its infancy, or at best early adolescence.”¹⁰⁷

Questions of separation of church and state, for example, will likely come before future courts in considering the actions of neighborhood associations. Under the U.S.

Constitution, a person is generally free to choose his or her own associates in private behavior, and this freedom of association extends with special force to religion.

Churches can legally limit their membership to fellow believers in the faith. When churches become involved in property ownership and management, issues of freedom of religion may then extend into a land use setting. Some churches, for example, operate summer retreats where a declared commitment to the faith is expected among those occupying a cabin. Yet, the courts at present might well rule against any similar attempt to restrict full-time residency in a neighborhood association to a particular religion – an attempt by a developer to establish say a neighborhood association limited to Mormons or Seventh Day Adventists.*

However, it is possible that any tight legal restrictions on the forming of religious groups – including neighborhoods -- may in the future come to be seen as an unconstitutional form of state interference in the religious freedoms of Americans. The government might in effect be denying religious believers the right to create the social institutions necessary to sustain their own faith-based convictions -- and which may in their view require, for example, that children should be raised in a religiously supportive neighborhood environment, one limited to people who share the same faith. As law professor Thomas Berg puts it, “active, welfare-state government now regulates many areas of life. As a result, ...maintaining church/state separation or religious liberty requires treating religion quite differently from other activities.” But this treatment may

* The only case that seems to have addressed this issue involved the Theosophical Society in America. In 1983 a California court invalidated deed restrictions that limited residents in a retirement community to members of the Society. The court did not recognize the Society as a religious group but nevertheless invalidated the covenant restrictions as a violation of a state law prohibiting deed restrictions based on race, ethnicity, sex or religion. See *Taormina Theosophical Community, Inc. v. Silver*, 190 Cal. Repr. 38 (California Court of Appeals, 1983).

effectively discriminate against religion. “As government grows, separationist efforts to shelter it from religious influence and to bar it from doing anything that aids religion are bound to push religion into a smaller and smaller corner of public life, violating both religious liberty and the equal status of religion with other ideas.”¹⁰⁸

Law professor Richard Epstein of the University of Chicago argues for the widest possible legal protections for freedom of association. Indeed, in the private sector he would abolish almost any kind of restraint on freedom of association. As Epstein reasons, for example, the effective expression of a viewpoint often requires the collective efforts of an association of advocates. Denying the right of free association – for whatever the reason -- is equivalent to denying the right to express some forms of speech. Yet, the Supreme Court has in the past has protected even odious forms of speech such as the protest marches of American neo-Nazis. Hence, as Epstein writes, “freedom of association is ... a derivative right of freedom of speech” and if the state is to avoid interfering with speech, it “carries with it the idea that the right to exclude or include can be exercised for private reasons that need no validation by any public body.” It should therefore be “flatly unconstitutional for the U.S. to force any private organization to adopt a color-blind or sex-blind policy in hiring or admission to membership. One university can go all out for affirmative action; an all-girls school can hire only female teachers; a religious school can admit only co-religionists.”¹⁰⁹ The same reasoning would apply, it would seem, to a private neighborhood association – and with freedom of association also a derivative right of freedom of religion (one might say that religion is the most important form of “speech”).

Neighborhood “Taxes” and Services

As part of protecting and maintaining an attractive neighborhood environment, most neighborhood associations also provide common services of one kind or another. The services provided most frequently include garbage collection, lawn mowing, street maintenance, snow removal, landscaping, and management of common recreation facilities.* Another important function in many neighborhood associations is to protect the personal security of residents through maintaining internal patrols and other private policing methods. Some neighborhood associations also provide services such as bus transportation, child care, nursery schools, health clinics and a community newsletter. The privatization of government functions was a worldwide trend in the 1980s and 1990s but affected the United States less at the national level because there were many fewer government owned enterprises at that level.¹¹⁰ Instead, the leading arena for privatization in the United States has been local government.

Neighborhood associations pay for the administration and delivery of services by levying assessments on members. In 1995 survey conducted by the Community Associations Institute, the median neighborhood association budget was \$165,000; however, the average budget (reflecting the existence of some very high budget associations) was \$510,000.¹¹¹ There is wide variation but a typical association assessment falls in the range of \$100 to \$300 per month per housing unit. It amounts to a private form of taxation but is typically closer to a “head tax” – so much money per housing unit per month. Municipalities, by contrast, collect property taxes that are

* Nationally, 69 percent of neighborhood associations provide swimming pools, 46 percent clubhouses or community rooms, 41 percent tennis courts, 28 percent playgrounds, 20 percent parks or natural areas, 17 percent exercise facilities, 16 percent lakes, 4 percent golf courses, 4 percent marinas, and 4 percent restaurants.

assessed as a percentage of value. However, there is little or no expectation in a neighborhood association that the “taxing” system will be used for internal redistributive purposes. Each unit owner should pay according to that owners use of (or the opportunity to make use of) the common grounds and facilities, as well as to partake in other association benefits. A neighborhood association, for example, would be most unlikely to impose an income tax on its members.

The levels of services and assessments will then reflect the collective demands of the residents of each neighborhood association. Just as income redistribution is not part of the revenue-raising plan, it is also excluded from the neighborhood association objectives in the delivery of services. Of course, there may be redistribution in practice because a neighborhood association is a political entity and virtually all political bodies witness coalition formation and group negotiation. However, a main goal in designing the constitution of a neighborhood association will be to preclude the possibility of one group within the neighborhood “exploiting” another. The ability to achieve such constitutional protection may significantly influence the value of the neighborhood housing units – and therefore also affect the level of profit accruing to the developer. A wealthy person would be very reluctant to join a neighborhood association if there were any prospect of his or her wealth being tapped for the general benefit of the association membership.

Besides the constitutional structure of neighborhood governance, another way to avoid any pressures for internal redistribution within neighborhoods will be to have small neighborhoods with homogeneous populations. The neighborhood assessments collected from unit owners will be the equivalent of a price in the market and the actual levels of

neighborhood service provision will correspond to a common level of demand of like neighbors. If everyone wants the same things, there is much less chance of internal redistribution taking place. The process of collective choice will in general be simpler as there is more uniformity of preferences in a neighborhood.

Yet, the time burdens of democratic governance and other fixed “transactions costs” in neighborhoods will set a limit to how small a neighborhood can be. It may also be desirable to have a neighborhood greater than some minimum size in order to realize economies of scale in the delivery of services (it is impossible literally to buy half of a police patrol car). A neighborhood should be large enough that it can offer a self contained environment of high quality. On the other hand, larger communities may suffer from other kinds of transaction cost problems as seen in the well known maladies of bureaucracy. Large city size will also involve greater diversity of population and hence greater differences between the public service demands of individuals and the common levels of city services provided to these individuals.* In a metropolitan economic system, there will thus be various economic forces affecting the desirable degree of “horizontal and vertical integration” within the system of cities, municipalities, neighborhoods, and other local governing institutions.

* . Pietro Nivola of the Brookings Institution observes with respect to systems of municipal service provision in the public sector that:

Disparities in services among jurisdictions commonly reflect not only differential tax bases but varying local tastes for public goods. Inasmuch as unitary governmental institutions help equalize the quality of services within metropolitan areas by effectively sharing revenues on an area-wide basis, these arrangements may level local inequalities, thus promising a distributional adjustment, if not an efficiency gain. But inasmuch as equalization reduces the ability of communities and neighborhoods to choose their own preferred baskets of services, the process interferes with the exercise of consumer sovereignty. The logic of such interference is questionable: If public goods should be everywhere the same at the metropolitan level, why not at the state level? And if equal among states, why not nations? See Pietro S. Nivola, *Laws of the Landscape: How Policies Shape Cities in Europe and America* (Washington, D.C.: Brookings Institution Press, 1999), p. 64.

In principle, the sizes of governmental units, like the sizes of business units within a private industry, could be determined by the workings of a competitive process.¹¹² Indeed, some students of urban affairs have argued that the key to improved metropolitan service delivery lies in a much greater flexibility of city size and an associated much wider room for competition with respect to forms of governance. It should be possible to create new kinds of local government institutions, perhaps larger ones assembled from building blocks of smaller ones (the latter perhaps specializing in one or a few services). As Ronald Oakerson comments,

There is no fully objective way of determining an appropriate set of provision units apart from the expressed preferences of local citizens for public goods and services. The ease with which a single provision unit can satisfy individual preferences decreases with the preference heterogeneity of the community. By the same token, the ability to satisfy diverse preferences increases with an increase in the number of provision units in a local public economy – at least up to some point. The creation of provision units is constrained by the expected transaction costs of organizing and operating an additional unit. Transaction costs include the costs of citizen participation. The choice is between greater preference satisfaction, obtained by creating an additional provision unit, and lower transaction costs. Citizens face a trade-off that only they can decide.¹¹³

That is to say, as Oakerson suggests, there should be much wider opportunity for institutional experimentation in local government delivery of services. He contends that “of central importance is the authority to create, modify, and dissolve [public service] provision units. The structure of the provision side – including the variety of provisions units – depends on who can exercise this authority and under what conditions.”¹¹⁴ Many economic functions that require collective action within a metropolitan economy involve land use interdependencies that only extend over a small area. Such small areas can be characterized as “a neighborhood.” Oakerson considers that the lack of neighborhood-level institutions is a major omission in current metropolitan governance. In achieving

the greater institutional flexibility among city forms that is needed, as he puts it, “what is essential is that small-scale communities have the capability to organize themselves to act collectively with respect to common problems. This requires that locally defined communities be able to self-govern, exercising the powers of government within a limited sphere – limited in terms of both territory and the scope of authority.” It includes local assumption of authority for the provision of “some types of goods and services [that] can [best] be provided on a ‘neighborhood’ scale.”¹¹⁵

At present, however, the organizational arrangements for metropolitan areas “tend to preclude or inhibit the development of smaller, nested provision units – neighborhood governments – within [larger city] boundaries.”¹¹⁶ In general, the potential benefits from a process of competition among types and sizes of governments within an existing metropolitan area are limited by the current public status of cities. It is possible in concept to enlarge or contract cities by means of the processes of municipal annexation or deannexation. But these processes are so slow and so cumbersome that in practice little realignment of city boundaries takes place. Once a metropolitan area has achieved a certain set of city and municipal boundaries, these boundaries tend to remain fixed indefinitely. The metropolitan area is thus like a private industry in which the sizes and boundaries of individual business firms in the industry are largely established at some point and the forces of economic competition and change must thereafter operate within these existing business forms. In this light, it should not be surprising that the organization of metropolitan areas tends toward less and less efficient forms, as compared with the private business sector.

Although he acknowledges the growing importance of private neighborhood associations, Oakerson does not give many specifics concerning the means of neighborhood governance. Yet, a private neighborhood is an obvious answer. A major advantage of the private status is a greater ease of integration of neighborhood actions into a market economy. If private neighborhood “constitutions” are properly designed, they can allow for the ready expansion, contraction, termination or other modification of the boundaries and the internal organizational arrangements of private neighborhoods, as new economic conditions or other changing circumstances may prove to warrant such changes. Neighborhood territories could be altered – creating larger or smaller collective units for service provision – with the consent only of those affected. It is possible in concept that small-scale neighborhood governments in the public sector could have a similar flexibility of adjustment. However, given the existing legal rules that apply to “state actors,” this is much less likely in practice.

Legislative and Executive Branches

The levels of services delivered, internal assessments and other elements of the management of neighborhood associations are typically determined by elected boards of directors. They serve as the private equivalent of the members of a town council. There may be various subcommittees of the neighborhood association board such as an architectural review subcommittee that typically oversees enforcement of neighborhood covenants and other land use restrictions. The residents of a neighborhood association choose the members of the board of directors through an election. The terms of members are usually staggered so that only part of the board is elected at any given time.

Candidates generally run as individuals without any party labels. A typical term might be two or three years.

Most elections are at large; all the candidates run against one another and the highest vote getters win the allotted number of seats on the board of directors. In some particularly large neighborhood associations, the overall area of the association may be divided into districts (like city wards). Each district may have its own board of directors to oversee the smallest scale interactions within that area. Districts (or combinations of districts) may also send their own representatives to be members of an association-wide board of directors.

In the normal arrangement, voting rights in neighborhood elections are assigned equally to each housing unit -- or votes may be allocated in proportion to square feet or some other measure of the value of the housing units. Hence, multiple owners of single units must share a single vote, and renters usually do not have any vote at all. Where two or more adults share a housing unit, it is up to them to find a way to reach a common decision for the use of their one allotted vote.

The Board of Directors of a neighborhood association deals with the basic management of the neighborhood. More “foundational” or “constitutional” issues are likely to require a full referendum among all the members of the neighborhood association. The Board will normally have its own voting rules that apply for the standard kinds of decisions it handles. Typically, and like most town councils in municipal governments, a Board of Directors of a neighborhood association will operate by majority rule.

As in the case of the U.S. constitution, there is a further issue of the division of governance responsibilities between a “legislature” and an “executive.” In theory at least, the U.S. Congress determines the budget and sets the broad policy; the executive branch under the leadership of the President then carries out these instructions. In a private neighborhood, the board of directors – the legislature -- may hire a professional administrator to handle the daily affairs of the neighborhood. Thus, unlike the election of the mayor of a city, few neighborhood associations choose their chief administrative officer by popular vote of the unit owners. In 1990, 42 percent of neighborhood associations contracted with an outside private party for their management. Another 26 percent undertook their own management but hired an onsite staff to perform particular management functions. Most of the remainder – typically the smaller associations – managed themselves through voluntary contributions of time and effort of the members.¹¹⁷

A manager under contract will normally live outside and otherwise have no personal connection with the neighborhood. Indeed, it is normally best that he or she should not be a unit owner. Instead of an election, managerial selection in private neighborhoods thus more closely resembles competitive bidding in a business environment – an economic form of decision making in which the working of the market replace the standard political processes as found in municipal governments. If a change is necessary, the act of contracting with a brand new private firm to manage the neighborhood association is tantamount to dismissing the mayor and the entire civil service of a municipal government – and it may be much easier to accomplish this kind of transition when it is done privately in such a fashion.

Within the scope of authority as laid out by the board, the private management firm has the power, in effect, to make certain kinds of collective choices for the neighborhood. A private manager might, for example, have the authority to hire and fire neighborhood association employees. He or she may chose subcontractors to perform specific neighborhood service functions. The resolution of certain types of internal disagreements among the residents concerning acceptable land uses within the neighborhood may also fall to the private manager.

Amending the Constitution

Existing neighborhoods are already beginning to face significant demands for amendments to the terms and conditions of their founding documents. Many neighborhood associations, for example, are now under strong pressure to relax tight restrictions on home-based businesses, reflecting the communications revolution in the American work place and the spreading practice of part-time or even full-time work from home. In one 1995 survey by the Community Associations Institute, 28 percent of neighborhood associations had tried on at least one occasion to amend the land use provisions in their Covenants, Conditions and Restrictions (CC&Rs). Of these efforts, 67 percent had succeeded in fulfilling the necessary requirements for achieving an amendment.¹¹⁸

A constitutional change in a neighborhood association generally requires a full vote of the unit owners. The percentage required for approval can vary considerably from neighborhood to neighborhood. Although a requirement of unanimous consent for approving an amendment would be ideal in some respects, in practice there are almost certain to be dissenters and holdouts in any neighborhood group that is larger than a small

number. Some of these dissenters may not really object to the changes proposed but may hope to gain personally by pursuing complex bargaining strategies that end up with the whole neighborhood decision resting in their hands. They might then be able to “sell” their vote for a high personal gain. Other than the initial approval of the founding documents that unit owners must accept on entering the neighborhood, it will thus be difficult for most neighborhoods to operate under a requirement of unanimity for other forms of neighborhood decision making. Nevertheless, a few neighborhood documents lack any explicit procedure for subsequent amendment. In effect, these neighborhoods are operating under a requirement of 100 percent approval for constitutional revisions.

Most neighborhoods that have explicitly considered the issue have opted for a requirement of less than unanimity. Like the rules for the Congress established by the U.S. Constitution, the required vote of approval may depend on the type of decision under consideration (approval of a treaty with foreign nations, for example, requires a two-thirds vote of the Senate). The more radical the departure from the initial neighborhood declaration, and the greater the potential impact on the unit owners, the higher the required percentage is likely to be. For example, the Pennsylvania Uniform Planned Community Act, adopted in 1996, requires a two-thirds vote to amend a founding declaration but a four-fifths vote to sell common property of the association. Termination of the association also can be achieved by a four-fifths vote of the unit owners.¹¹⁹

Table 2 below shows the distribution of approval requirements for standard types of changes in the governing rules of neighborhood associations, as found in a survey of 199 associations done for the Community Associations Institute. Among other many

ways in which neighborhood practices can differ, the base of the voting population may be defined differently. In some neighborhoods, the required number of votes is calculated as a certain percent of the total eligible votes in the neighborhood. In other neighborhoods, the required vote is calculated as a percent of those actually participating in the voting. In the former case, the most common requirement for approval is a 75 percent agreement to the proposed amendment.

Table 2 – Percent of Unit Votes to Amend a Neighborhood Constitution

Required vote for approval of amendment	Among all unit owners ¹	Among unit owners actually voting ²
51%	12 %	10 %
60%	2%	8%
66%	24%	31 %
75%	33 %	27 %
80%	2%	4%
90 %	11 %	4 %
100 %	3 %	0 %
Other	13%	16%

(1) Associations in which the required vote for approval is a percent of all units in the association.

(2) Associations in which the required vote for approval is a percent of voting units only.

Source: Doreen Heisler and Warren Klein, *Inside Look at Community Association Homeownership – Facts, Perceptions* (Alexandria, VA: Community Associations Institute, 1996), p. 32.

In *The Calculus of Consent* in 1962, James Buchanan and Gordon Tullock explored in a general way the tradeoffs involved in setting a voting percentage for approval of a collective decision.¹²⁰ They noted that majority rule was the prevailing standard in most legislatures but this was more a matter of habit than of any logical necessity. Indeed, there might well be different percentages required for different circumstances. The basic tradeoff involved two forms of cost. One was the negotiation and decision making cost of reaching any required minimum voting percentage. As the required percentage approached unanimity, decision making could in itself become

extremely costly. The other form of cost might be labeled the “losing-side” cost. For every losing voter in an election, this voter would suffer a decline of his or her welfare from the implementation of the decision. As the voting rule for collective decisions approached unanimity, the cumulative losing-side cost would approach zero.

In short, as one form of collective choice cost goes up, the other form of cost will go down. There will be a specific percentage required for a vote of approval that will minimize the total costs – and typically this will not be 51 percent. Whether they think of it this way or not, many thousands of neighborhood associations across the United States have been making this tradeoff in writing their voting rules into their new constitutions. It has been an application of the principles of “constitutional economics” to the writing of more brand new constitutions than perhaps has ever occurred in such a short time before.*

Termination

One important type of collective choice that many neighborhoods have not addressed is the possibility of termination of the neighborhood association itself. In the long run, few neighborhoods will last forever. There might be, for example, a future change in economic circumstances that would make the entire neighborhood uneconomic for its existing location. A new subway stop, for example, could open up nearby. As a result, it might make economic sense to demolish the existing structures in order to accommodate say the construction of an office tower or large apartment building. A

* In another area of recent application, the European Union (EU) is now considering how to deal with the problems of expanding to a considerably larger group with the inclusion of many Eastern Europe nations. Traditionally, many EU decisions have required unanimous consent. But it is now generally accepted that some form of basic changes in the EU “constitution” will be needed in order to avoid an escalation of transaction costs, and a consequent breakdown in EU functioning. As agreed at a 2000 meeting in Nice, the reaching of EU approval will now require in many cases more than a simple majority vote but less than unanimity. The significant new cost, however, will be more and more aggrieved EU nations in the future, as they find themselves compelled to go along with specific EU decisions that adversely affect them.

developer might well be willing to offer the unit owners a price equal to two or three times the existing value of the properties.

In that case, the great majority of unit owners might prefer to abolish their neighborhood association and to move away – and to be rewarded for leaving by taking large windfall gains with them. It would be desirable to have available some form of neighborhood collective process to approve or disapprove such a sale of the entire neighborhood (presumably as one large block of properties or perhaps as several large packages). It would be in the same spirit as the procedures whereby the stock holders of a business corporation might vote to accept a takeover offer by another corporation, possibly abolishing the corporation outright in return for new stock or other appropriate compensation.

If a private neighborhood association were to vote to abolish itself in this fashion, there would be important issues of the proper voting procedure, the percentage of votes required, exactly how the properties in the neighborhood would be sold, and how the profits would be divided up (in proportion to square feet, to individualized assessments of properties, or in other ways). At present, few neighborhood associations have made any provision in their voting rules for such a radical form of “amendment” in their founding declarations.

The possibility of neighborhood termination represents one of the important ways in which a land use system based on private neighborhood associations may offer large advantages over the current zoning system. Under zoning, it is virtually impossible to organize an orderly process of transition from one basic type of land use in a neighborhood to another. The city would have to change the zoning in advance to

accommodate the new use. However, the existing residents of neighborhoods will almost always resist any such changes. Instead, speculators may have to buy up neighborhood properties one or a few at a time, possibly letting the neighborhood run down during an interim period of transition. Eventually, if enough properties are sold, and enough older residents of the neighborhood move out, it may be possible to change the zoning to accommodate a brand new use of the land. In such a process – which is very disruptive for the older residents -- much of the ultimate gain in land value ends up going to the speculators. The financial losers are the original owners who failed to act collectively and were instead picked off one at a time.

In effect, a neighborhood constitution that allows for full neighborhood termination might be regarded as a new system of urban land assembly. Urban renewal was used in the 1950s and 1960s for the purpose of putting together large land parcels that would allow comprehensive redevelopment of a whole neighborhood area. However, urban renewal was involuntary for many participants; the city condemned the properties, often generating great ill will. Much of the monetary gain then also went to the city on the resale of the land, not to the property owners. Neighborhood termination might be described as providing instead a private system for accomplishing the aims of urban renewal (if most likely to be applied at present in suburban areas where neighborhood associations are found). It would not be entirely voluntary because some neighborhood unit owners might vote against termination. However, assuming a large supermajority vote of the neighborhood association – say 90 percent -- were required to approve its termination, the number of such losing voters would be a small percentage of

the total units in the neighborhood. And the decision to override their preferences would be in the hands of their fellow unit owners, not some distant municipal officials.

The greatest obstacle to planned redevelopment in existing built-up areas is the land assembly process. In the outer suburbs today, large attractive communities with hundreds of housing units can be planned and built from scratch. These are the same places where neighborhood associations are now being formed to provide for private governance. Lacking a way of assembling large enough units of land, similar planned communities are now very difficult or impossible in areas closer in to big cities. Yet, based on the evidence of consumer choice in the market, there is a high demand among Americans for planned developments with new kinds of governing institutions that a private status makes possible.

A Proposal: Neighborhood Associations for Existing Neighborhoods

In previous writings I have offered a proposal for resolving the land assembly problem in existing neighborhoods that may be facing powerful transitional pressures. Those interested in a more complete explanation can consult these papers for further details.* I will merely sketch here the basic concept.

I propose to establish a legal mechanism by which an existing neighborhood could create a private neighborhood association. It would be similar to the incorporation

* A version of this proposal was first presented in Chapter 8 of my 1977 book, *Zoning and Property Rights* (MIT Press). I have developed it in various other writings over the years, most recently in Robert H. Nelson, "Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods," 7 *George Mason Law Review* (Summer 1999); and Robert H. Nelson, "Zoning by Private Contract," in F.H. Buckley, ed., *The Fall and Rise of Freedom of Contract* (Durham, NC: Duke University Press, 1999). These two articles were both adapted from a paper initially presented at the Donner Conference on Freedom of Contract in Property Law, sponsored by the Law and Economics Center, George Mason University School of Law, Alexandria, Virginia, December 1997. At this conference, the commenters on the paper included Steven Eagle (who organized the conference), William Fischel, and Robert Ellickson. Revised versions of their comments on my paper were published in Buckley, ed., *The Fall and Rise of Freedom of Contract*. An additional set of (different) comments by Fischel and Eagle were included in the Summer 1999 issue of the *George Mason Law Review*.

of a new municipality but it would instead result in the creation of a private neighborhood, based on a private property relationship among the property owners of the neighborhood. In order to approve the establishment of the new private neighborhood association, a large supermajority vote would be required. Assuming this supermajority could be achieved, those who voted against forming a neighborhood association would nevertheless be required to become members.

There are many possible ways that such a concept could be implemented.* For the purposes of discussion, I propose that the legislature of each state enact a law to provide for the following six-step process.

1. A group of individual property owners in an existing neighborhood could petition the state to form a private neighborhood association. The petition should describe the boundaries of the proposed neighborhood and the instruments of collective governance intended for it. The petition should state the services expected to be performed by the neighborhood association and an estimate of the monthly assessments required. The petitioning owners should possess cumulatively more than 60 percent of the total value of neighborhood property.

2. The state would then have to certify that the proposed neighborhood met certain standards of reasonableness, including having a contiguous area; boundaries of a regular shape; an appropriate relationship to major streets, streams, valleys and other geographic features; and other considerations. The state would also certify that the proposed private governance instruments of the neighborhood association met state standards.

3. If the application met the state requirements, a neighborhood committee would be authorized to negotiate a service transfer agreement with the municipal government that had jurisdiction over the neighborhood. The agreement would specify the future possible transfer of ownership of municipal streets, parks, swimming pools, tennis courts, and other existing public lands and facilities located within the proposed private neighborhood boundaries (possibly including some compensation to the city). It would

* Reflecting a similar goal to encourage private improvement efforts in existing neighborhoods by establishing better property right incentives, Robert Ellickson has offered a somewhat different proposal for new neighborhood governance. He would follow more closely in the line of the successful efforts to create "business improvement districts" in many American cities, involving a less radical departure from existing governance mechanisms. See Robert C. Ellickson, "New Institutions for Old Neighborhoods," 48 *Duke Law Journal* 75 (1998). For an earlier proposal along these lines, see also George W. Liebmann, "Devolution of Power to Community and Block Associations," 25 *The Urban Lawyer* (Spring 1993).

specify the future assumption of garbage collection, snow removal, policing, fire protection, in so far as the private neighborhood would assume responsibility for such services. The transfer agreement would also specify future tax arrangements, including any property or other tax credits that the members of the neighborhood association might receive in compensation for assuming existing municipal service burdens. Other matters of potential importance to the municipality and to the neighborhood would also be addressed. The state government would serve as an overseer and mediator in this negotiation process, and could overrule a municipality as a last resort in order to resolve disputes.

4. Once state certification of the neighborhood proposal was received, and a municipal transfer agreement had been negotiated, a neighborhood election would be called for a future date. The election would occur no less than one year after the submission of a complete description of the neighborhood proposal, including the founding documents for the neighborhood association, the municipal transfer agreement, estimates of assessment burdens, a comprehensive appraisal of the values of individual neighborhood properties, and other relevant information. During the one-year waiting period, the state would supervise a process to inform property owners and other residents of the neighborhood of the details of the proposal and to facilitate public discussion and debate.

5. In the actual election, approval of the creation of a new private neighborhood association would require both of the following: (1) an affirmative vote of unit owners cumulatively representing 80 percent or more of the total property value within the proposed neighborhood; and (2) an affirmative vote by 70 percent or more of the individual unit owners in the neighborhood. If these conditions were met, all property owners in the neighborhood would be required to join the neighborhood association and would then be subject to the full terms and conditions laid out in the neighborhood association documents (the "declaration," or as it would amount to in practice, the neighborhood "constitution").

6. Following the establishment of a neighborhood association, the municipal government would transfer the legal responsibility for regulating land use in the neighborhood to the unit owners in the neighborhood association, acting through their instruments of collective decision making. The municipal zoning authority within the boundaries of the neighborhood association would be abolished -- except in so far as such zoning served to regulated direct adverse impacts on other property owners located outside the boundaries of the neighborhood association.

As I have argued elsewhere, the creation of private neighborhood associations would create market incentives for the redevelopment of many deteriorated neighborhoods in existing cities and inner suburbs.¹²¹ At the same time much of the monetary benefit of such redevelopment would be received by the current property

owners. In outer suburbs, new private “landowner associations” could be formed along the same lines.¹²² This would facilitate a change in democratic voting procedures to allow developers to retain control over the process of development of large parcels of land until it is nearing completion. At present, under the one person/one vote rules that apply to municipal government, residential newcomers obtain political control over land use at a much earlier stage of development. They have often used this control to block the completion of socially desirable and efficient development plans. This has not only been unfair to the land owners but has been socially inequitable from a full metropolitan perspective. It has resulted in the tying up of large areas of undeveloped land in less productive forms of use than are warranted by the quality and location of the land.¹²³ The biggest losers have been lower and moderate income groups who have been denied access to new housing opportunities in attractive locations within their means.¹²⁴

Conclusion

The privatization of the American neighborhood was an ongoing process over much of the twentieth century. Most “private” neighborhoods, however, operated formally until the 1960s under a public status. These neighborhoods were parts of a small suburban municipality that might have one or a few neighborhoods. Entry into such a neighborhood was almost as restricted as today it is in a typical private neighborhood association. Zoning was the key legal instrument in this system. Zoning regulations in effect enforced a collective property right to the local neighborhood environment, operating in the guise of a “public” action. Fenced off from the outside world by their controls on new land uses, over the course of the twentieth century

suburban municipal governments would increasingly become private entities for many practical purposes.

Various legal fictions then had to be maintained to justify the use of zoning for such private purposes.¹²⁵ It added another chapter to the long history of the workings of the land laws. Perhaps more often than not in this history, the legal form of the land laws has born little relationship to the actual practice. Richard Pipes writes of the institution of property that there has been a longstanding “difficulty of distinguishing law from reality” in this area.¹²⁶ Informal understandings on the ground have frequently been more important than any formal codes written in the law books.¹²⁷ The judiciary would learn to look the other way when obvious discrepancies between legal theory and practice might arise.¹²⁸

New property rights to land thus are seldom created by legislatures from whole cloth. Rather, such rights typically emerge gradually from informal practice, often at odds with the accepted economic and legal theories of the day. As experience accumulates over many years, the informal practice comes to be better understood and the merits to be more fully appreciated. At a still later point the informal practice may come to be accepted and finally codified by the legislature in the law. In describing the evolution of property rights to land in England over many centuries, Sir Frederick Pollock once wrote that "the history of our land laws, it cannot be too often repeated, is a history of legal fictions and evasions, with which the Legislature vainly endeavoured to keep pace until their results ... were perforce acquiesced in as a settled part of the law itself."¹²⁹

This process can take decades or even centuries. In the long transition from medieval property concepts to those of a capitalist economic system, the law of usury evolved in this manner.¹³⁰ For many centuries, there were also strong social prohibitions on the sale of land. For much of history, as Pipes writes, “land was universally considered a resource that one could exploit exclusively but not own and sell.”¹³¹ In England it took from the thirteenth to the nineteenth century to establish the modern concepts of private property rights with respect to land, including the right to sell the land. As Pollock wrote at the end of the nineteenth century, although “the really characteristic incidents of the feudal tenures have disappeared or left only the faintest of traces, the scheme of our land laws can, as to its form, be described only as a modified feudalism.”¹³²

In the United States things have not been much different. In the nineteenth century millions of squatters illegally entered the public lands. Although the federal government regarded them as criminal law breakers, it was powerless to do anything on a distant frontier. After a few years, strong political pressures often resulted in the Congress retroactively confirming the original squatter occupancy, granting a formal property right.¹³³ When the Homestead Act passed in 1862, it was not a new concept but a final recognition by the federal government that a squatting mode of land settlement was a simple fact of life on the western frontier.¹³⁴

The evolution of American land law in the twentieth century has followed once again in these ancient patterns. Zoning was a radical departure in American land law but it was justified in terms that served to obscure the real degree of change from traditional practice. The practical effect of zoning, along with other laws and court rulings, was the

privatization of the suburban municipality. It became virtually a form of private government. When the various zoning fictions were eventually exposed as such, judges were simply forced to look the other way. Short of a revolution in American land law, they had little choice but to sustain longstanding property arrangements – whatever the legal awkwardness.

It is also typical of the land laws that the informal practice is eventually given greater recognition and perhaps at some point official acceptance. The rise of the private neighborhood association can be seen in this light. It represents a new formal recognition in the law of the longstanding private status of suburban governments as it had developed over the course of the twentieth century. To be sure, private neighborhood associations are not only a matter of bringing the legal form into alignment with the practical realities. As this chapter has explored, the private legal status of the neighborhood association opens up a host of new constitutional possibilities for local government. Zoning and other local laws and practices carried the privatization of local government a long way forward but the rise of private neighborhood associations has acted to carry it further. The very fact of now officially recognizing the private status of suburban local governments in the United States is likely to have major practical consequences in itself in the future.

During the twentieth century many people were convinced that the world was becoming a more rational place. Society finally would deal in the realm of facts; political deceptions would cease; governments would finally be able to say directly what they were actually planning and doing. Whole professions, such as the field of public administration, depended on the assumption that the true goals of society could be stated

up front and explicitly, and then the goals realized by a process of rational selection from among the alternatives. However, the history of the American land laws in the twentieth century offers little to support this view. The details were now different but the pattern of evolution in the land laws remained much as it had always been in England and the United States.* It was a process of unplanned outcomes and unintended results of the actions of the governments involved.

Today, at the beginning of the twenty-first century, perhaps the time has arrived for a new truth in advertising with respect to the American land system and the processes of land development and local governance. It may be time to dispense with the old zoning fictions and to align the official forms of the law more closely with the actual realities on the ground. Perhaps the true function of zoning should be explicitly recognized for what it long ago became – a private collective right to the common elements of the neighborhood environment. The creation of neighborhood associations can accomplish this purpose reasonably well in the outer suburbs, the places where most new development is occurring today. A new legal mechanisms is necessary, however, for the privatizing of land use controls and neighborhood governance in inner cities and other existing developed areas. If such a mechanism were established by a state legislature – perhaps along the lines sketched above – private neighborhood government might extend some day to encompass the entire metropolitan area. It would not only be the well off residents of new developments in the outer suburbs but the poorer residents of existing

* Remarkably, Scotland has only abolished the last vestiges of feudal land tenure very recently. According to a 2002 report, “Scotland has kept feudal land laws for 800 years. The feudal system of land tenure, under which all land ultimately belonged to the monarch, at the top of a hierarchical pyramid, was formally abolished only two years ago, in a law establishing absolute ownership and finally abolishing feuduties – the token fees paid to feudal superiors for land titles.” See David White, “Scots Stake their Claims in Land Shake-Up,” *Financial Times* (March 5, 2002), p. 10.

neighborhoods in inner cities who would gain a much higher degree of control over their own immediate environments.

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