

LOCAL GOVERNMENT AS PRIVATE PROPERTY

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Local government exists in an awkward legal status in the United States. For most legal purposes, local government is considered a legitimate form of “government” that belongs in the public sector. However, in practice local government – especially as it has developed in the suburbs of major metropolitan areas – has very much a “private” character. Local zoning serves many of the functions of a collective private property right – giving the residents of the local suburban community the power to exclude unwanted uses.¹ In private community associations, virtually the same power is exercised directly as a right of private property ownership.² There are now more than 200,000 private community associations in the United States, housing almost 50 million people. In 1970, around one percent of Americans lived in a private community association; today the figure has reached 17 percent.³

The rise of the private community association has raised in a dramatic way the issue of the legal status of local government. Functionally, there is little difference between many private community associations and many local governments in the public sector. Indeed, among the residents themselves, "a small suburban town is often seen ... as little more than a form of homeowners association."⁴ Sociologist David Popenoe writes of the pervasive “privatization of space in metropolitan communities.” The well off suburban municipality in America has a “deeply private feel” as the households there “live behind the protection of fence, hedge, or wall, venturing forth only within the confines of a motorized enclosed box.”⁵ The political analyst William Schneider comments 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 basic structure of the

municipal organization of suburban governance.⁶ Yet another social commentator has written recently that "the suburb is the last word in privatization."⁷

The courts have often seen suburban municipalities in private terms. 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." In one case, 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 [local] community so it embodies their conception of the 'decent life.'" The main purpose of suburban zoning, Frug observes, is "the protection ... of the private sphere of home and family, property, and community." It is common for cities to be "envisioned, and regulated, like property owners. Both property owners and cities can be defined in terms of territory, organized to advance 'parochial interests,' and be understood as having a concrete self-interest to promote."⁸

In a series of law journal articles over the course of the 1990s, Columbia law professor Richard Briffault provided a valuable critique of the basic legal arrangements and the workings of local governments in the United States.⁹ 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]."¹⁰ A local government may be particularly advantaged as a "firm" because it can employ the coercive powers of government – for instance, to require individual property owners to accept a collective regime of control over the use of their own properties. 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.”

Critics of private community associations often argue that they represent an undesirable combination of “private” and “governmental” powers. They suggest that the significant differences between a suburban municipality and a private community association should be reduced. The private status of a community association, for example, should not be allowed to shelter it from free speech and other constitutional requirements normally applied to local municipalities. Voting rights in private community associations perhaps should be newly extended to renters.

In this paper, I suggest the opposite tack. Instead of requiring private community associations to conform to the legal requirements and social expectations of a municipality, I propose to liberate the municipality to function in the manner of a private business. Local government in America will continue to evolve towards a new form of collective private property – and this will be a good thing.¹¹

The Frug-Ellickson Exchange

In a 1980 article in the *Harvard Law Review*, Frug argued that the constricted range of current municipal functions is an historical development of fairly recent vintage. As he states, "before the nineteenth century, there was no distinction in England or America between public and private corporations, between businesses and cities."¹² However, by the late nineteenth century leading economic and legal theorists had come to see the local governments as parochial entities that represented an obstacle to the political and economic rationalization of society that was the progressive-era mission. As a result, there was a concerted "attack on city power" in the United States that was "but an example of the more

general liberal hostility towards all entities intermediate between the state and the individual, and thus all forms of decentralized power."¹³

As the new professional classes in the social sciences and other expert fields saw matters, power should be concentrated in the marketplace, on the one hand, and in government at the national level, on the other hand. The market worked to advance national (and even international) economic efficiency; if automobiles could be manufactured at lower cost in Detroit than in other places, then the workings of markets meant that Detroit could supply the automotive needs of the whole nation. Similarly, as Frug wrote, at the national level "a rational, bureaucratic government of experts" would be entrusted with "wielding power in the public interest" for the benefit of the entire United States.¹⁴ There was little place for any real local autonomy in these schemes for organizing American society.

Frug contended, however, that the progressive-era claims to scientific rationality and management are no longer believable. Governing is about choices of values at least as much as about expert decisions, and these choices can only be made through the political process, preferably in Frug's view at the local level. The current need therefore is for "a genuine transfer of power to the decentralized units" of American society. In this category, Frug mentions regions, cities and neighborhoods. Yet, it will be no small task because "real decentralization requires rethinking and, ultimately, restructuring American society itself," including an end to "the current powerlessness" of America's cities. The objective should be to create a new "ability of a group of people, working together, to control actively the basic social decisions that affect their lives."¹⁵

Frug says that this would require, as one element, "recognizing the rights of the city as an exercise of freedom of association." It would involve a turn back to an earlier era

when cities were seen as corporations and "there was no difference between a corporation's property rights and its rights of group self-government." If the old concept were revived, the city could be "an association promoted by a powerful sense of community and an identification with the defense of property." However, regrettably, cities today have "lost the elements of association and economic strength that had formerly enabled them to have an important part to play in the development of Western society."¹⁶

Business corporations and local governments represent alternative forms of association among people. The former are based on people coming together in their association for the purposes of economic production; the latter are based on a territorial basis for association. Frug suggests that at present the private status of the business sector gives it a large and unfair advantage in meeting the needs for mutual interaction of Americans. In order to help to equalize the competition, he proposes that local governments have the authority to operate their own private banks, credit unions, insurance companies and retail food outlets, among other possible business functions. The city must be given powers to match those of a private business corporation because territorial association presents a fertile ground for reinjecting into American life the elements of community that have been lost in the headlong rush to modernization and economic "progress" and rationalization of society:

A territorial association.... can readily include every individual in the geographic area, thereby presenting the greatest opportunity for widespread participation in its decisions. Because of this inclusiveness, it can further a broad range of possibilities for human association. It can also further stable expectations, since once formed, it cannot simply pack up its economic assets and leave town.

Given such observations, it is remarkable that, writing in 1980, Frug did not seem to notice that one obvious way to empower local communities was to further encourage the rise of the private community association. It was Robert Ellickson, responding in 1982 in part to Frug's article, who made the connection. Ellickson commented that "the private homeowners association.... not the business corporation, is the obvious private alternative" to municipal and other local governmental forms of territorial association.¹⁷ In either case, to be sure, Frug and Ellickson, each representing a very different point of view on the law, could agree that local government should assume more of the character of a private enterprise.

On the whole, Ellickson agreed with Frug that the legal distinctions between local governments in the public sector and private community associations may no longer be useful. In one area, agreeing here with Frug's basic contention that cities are unduly restricted, Ellickson proposes that the constitutional possibilities for local governments might be expanded by means of a new Supreme Court decision that would "overrule Avery (and related decisions) to eliminate the current federal constitutional requirement that local elections be conducted on a one-resident/one-vote basis."¹⁸ Municipalities in the public sector – like current community associations -- might be free to adopt, for example, "some system that weighted votes by acreage or property value,"¹⁹ -- as was in fact the case in many local elections in the eighteenth century history of the United States.

From Medieval to Modern

A breakdown of the distinction between public and private at the local level would not be a novel development in western civilization. Indeed, the current attempt to maintain this distinction is of comparatively recent vintage, an artifact of "modern" habits of thought.

If we are today entering into a “post-modern” era, one sign could be a return to earlier concepts of local community that are neither “public” nor “private” in the modern sense.

In terms of the geographic scope of social and economic arrangements, medieval society might be described as a world of local communities. The trade in goods and services among manors, monasteries, small towns and others of these small social units of medieval Europe was by present-day standards remarkably small. Each such local unit was mostly self-sufficient in the provision of food, shelter, clothing and other essentials. The vertical elements that did exist in medieval society consisted mainly in the lines of authority within the Roman Catholic Church, and the feudal relations among the king, vassals, and their feudal dependents. The current boundaries of nation states counted for little in the political geography of medieval Europe.

The shift from the medieval to the modern world changed all this. In the modern era, based on the miraculous discoveries of science, and the extraordinary advance of modern economic progress, secular religions based on ideas of a salvation here on earth increasingly displaced hopes for salvation in the hereafter. Marxists saw the workings of economic history as bringing about a new heaven right here on earth. The winners in history – the triumphant class of Marxism, the successful businessmen of social Darwinism, and still others – were in effect now blessed by a secular god whose fundamental truths of the world were revealed by the “scientific” laws of history. In all of these modern political and economic visions, there was little or no place for local communities with any real degree of political autonomy. Indeed, any substantial independence for the small community was most likely to impede the forward march of the new God of History.

In the medieval era, if an association of people sought an official legal status for their collective efforts, they would constitute it legally in the form of a corporation. Medieval towns first existed as corporations; later, one of the most famous cases in the history of English law involved the legal significance of the corporate status of the City of London. New York City would later be organized under a similar corporate status. Private businesses were organized under the same corporate legal arrangements as municipalities. Indeed, in some cases it was possible for a single corporation to have roles of both territorial governance and private profit making. The Hudson's Bay Corporation, it may be recalled, played an important part in the early governance of the North American continent, and was also supposed to make money for its owners.

For many centuries the corporate legal status of a small city served to limit attempts by higher levels of government to infringe on municipal prerogatives. Reflecting its legal status as a corporation, a municipality was in many ways more "private" than "public." The towns were able to retain much of their political independence until the nineteenth century. Another modern development, however, the rise of the nation-state, acted to undermine local authority. It was part of a rise from the medieval to the modern era in public philosophies that undermine the power of the intermediate institutions in society.

The decline in the legal autonomy of the municipality, relative to that of the private business corporation, coincided closely with the rise of the industrial revolution. By the mid-nineteenth century the economic potential of modern industry to end age-old struggles for food, shelter and clothing was becoming widely evident. The building of railroads was achieving drastic reductions in transportation costs across the full American

continent, for many manufacturing firms creating for the first time the possibility of a national market. Soon the miracles of electricity would be yielding telephones, radios, washing machines, movies, refrigerators and a host of other new consumer items to ease and improve the daily conditions of life for most people. The evidence was everywhere that a new age of economic abundance had arrived. Then, if the fierce material conflicts of the past could finally be abolished, as it seemed to many leading thinkers of the period, a great improvement in the ethical and spiritual side of the human condition as well could be expected.²⁰

The private business corporation was an essential element in such economic progress; hence, its operating independence from the state must be tightly protected both in theory and in practice. When a corporation took a municipal form, however, an opposite conclusion would be reached. Any large degree of operating autonomy for the municipal corporation was more likely to be an obstacle than an aid to the economic progress of the world. If every large corporation, for example, had to submit to widely varying regulatory and other demands of many thousands of local municipalities across the United States, economic confusion if not outright chaos could be expected to result.

For an organization developed along territorial lines, the legal status and rights of “private” are similar to “sovereign.” A sovereign political entity has the power to control entry and exit onto its territory, as well as to conduct its internal affairs in whatever manner desired (at least within broad social limits). The owner of private property has a similarly wide scope of legal autonomy; he or she can exclude others and use the property as desired. To treat the municipal corporation as a “private” legal entity – in the

same legal category as a private business corporation -- would therefore have been to grant the municipality a virtual sovereign status.

As the future legal status of the municipal corporation was being resolved in the United States, the Civil War had recently been fought to preserve the Union against the efforts of southern secessionists. Any elements of real sovereignty for small territorial units such as American municipalities (and neighborhoods) might be seen as another form of “secession” from the nation and the economy. Sovereign (or private, there was not so much difference in practice) municipalities would be “medieval” and “feudal,” as opposed to “modern” and “progressive,” a triumph for the heirs to Jefferson Davis as opposed to Abraham Lincoln. The nation was admittedly borne in an act of secession from England. The Declaration of Independence in 1776 laid out the principled grounds for this secession. However, the civil war marked the end of the idea of the American union as a diverse assemblage of sovereign states. Ever since the Civil War, arguments for greater state and local authority have often been linked with acts of racial prejudice and discrimination, first in defending slavery in the nineteenth century and then in defending political and economic oppression of blacks in the South for much of the twentieth century.

Dillon’s Rule

In short, as American municipal law evolved in the second half of the nineteenth century, American municipalities must be denied any “private” status in the manner of a business corporation. According to “Dillon’s rule” – formulated by John Dillon in the 1870s -- the legal status of a municipality would be transformed to make it a creature of state government. In legal theory, a state government could now abolish any municipality,

redraw its boundaries, alter its taxing authority, assign or withdraw public service responsibilities, all at the state's complete discretion (subject to be sure to the practical limitations of political acceptability). The U.S. Supreme Court in *Hunter v. City of Pittsburgh* in 1907 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.²¹

As such thinking reflected, any large degree of municipal autonomy was seen as a threat to the efficiency of American business, and must be kept under tight reins by the courts and higher levels of government. Taming the autonomy of the town and city, in short, was a key part of the overall modern project. If a conflict between the values of association in a group and of individual property rights must be resolved, the individual rights would necessarily trump the collective rights of association at the local level.²² In an age when economic progress was the national religion of the United States, nothing less than the future secular salvation of the nation – and in the long run the world -- might depend on it.

Formally at least, the legal status of municipalities is little changed today. As Richard Briffault comments, “under both federal and state constitutional law, local governments have no rights against their states. Localities may not assert the contracts clause, the equal protection clause or the privileges and immunities clause against their state governments. Nor do the residents of local governments have any inherent right to local self-government:

local residents may not assert a constitutional claim to belong to a particular government or to have any local government at all.”²³ Under the laws of New York State, municipalities are – with a few exceptions – not allowed to own the stock or bonds of a private corporation. The state government of New York imposes “obligations on local governments” in the areas of contracting and employment practices “that have no analogue to the obligations that the state imposes on private firms.” Local taxation is comprehensively regulated by the state; thus, another of “the striking features of New York’s intergovernmental relations is the relative lack of local autonomy with respect to fiscal matters.” Unfunded mandates are often used by the state government to “commandeer local governments to state ends and [to] divert local resources from local control to state-determined programs.”²⁴

All in all, as Briffault finds, local governments have “next to no protection” from state oversight of their affairs – other than that afforded by their own political skills and power in the state arena.* The large degree of autonomy from state oversight shown by many suburban municipalities is a matter of local political realities rather than of the structures of the law. Although suburban municipalities have few formal legal protections, they can still be politically effective in asserting their own interests at the level of state government. Briffault recommends revising the New York State constitution in order to confirm more formally in the law the current political realities on the ground. He would newly “protect the structural integrity of local governments, broadly defined to include employment, contracting, and other ‘housing-keeping’ aspects of local performance of local government functions” from intrusive state interventions.²⁵

* “Home rule” laws do provide some legal autonomy for localities but these laws themselves could be changed or amended at any time by the state legislature; the governing rules and regulations of any municipality could be wiped out at any moment with one stroke of the pen of the state legislature. See cite on home rule.

In other words, like Frug, Briffault would move backwards in time to a day when the legal distinctions between public and private at the local level were much less stark than they are today. The weak formal status of the municipality in the law is in considerable contrast to the current protections afforded by the U.S. Constitution for private property. Under the Constitution, for example, the federal government or a state government can not “take” the private property of a community association and its governing body without paying compensation. Higher levels of government -- including the state governments that nominally have almost unlimited power over municipalities -- are constitutionally required to observe due process, equal protection, and other requirements in their regulation of and other dealings with private parties. As Ellickson suggested, those who seek greater powers and autonomy for local governments would do well to look to the existing private community association as a working model.

Scientific Management of America

In the second half of the nineteenth century, however, any substantial degree of legal autonomy for local government was objectionable as a barrier to the workings of the free market. As the nineteenth century came to a close, the role of the free market in American life came under growing challenge. This was associated with the rise of the progressive movement. It did not mean, however, a turn back to local autonomy. To the contrary, progressivism brought perhaps an even stronger centralizing message to American public discourse. By the turn of the century, the progressive movement was optimistic that the scientific management of economic progress at a national scale could offer material gains of a magnitude almost unimaginable only 100 years earlier.

As the Progressives believed, careful planning in advance could avoid the bankrupt companies, the product designs rejected by consumers, and the many other failures of a chaotic trial and error process of many small firms competing in the free market. Much as large business corporations were introducing new systems of internal planning and administration, the progressives argued that the operation of American government should benefit from newly scientific methods. The workings of government at all levels should be transformed from the patronage-ridden, backward, wasteful political machines of the nineteenth century to new, sleek, efficient administrative designs suited to the scientific realities of the twentieth century. This would require a great expansion in planning and administration on the part of governments everywhere, and most of all at the federal level.

A recent review article in *Public Administration Review* finds that the aspirations of the progressive era reflected not only a theory of scientific government but also a prescription for the political institutions necessary to put expert knowledge to use. As Eliza Lee says, the progressive-era theory of “scientific management redefines what had hitherto been political problems as management problems, the solution of which is governed by the logic of science.” That is to say, scientific management sought “the establishment of science as the institution of governance and the centralization of power in the hands of scientists” and others who would know best how to apply scientific methods. This was possible in progressive thinking because the very processes of government administration were regarded as “objective, universal, natural, altogether devoid of historical and cultural contexts, and dictated only by scientific laws.”²⁶

The American Economic Association was created in 1885, and many other professional groups soon followed, with the purpose to provide the necessary technical

knowledge and to supply the trained personnel for the scientific management of American business, government and other key social institutions. The universities were reorganized in the late nineteenth century along the disciplinary lines of the social sciences and other fields of professional knowledge. New progressive agencies such as the Interstate Commerce Commission (1887), the Federal Reserve System (1913), and others were established. A constitutional amendment in 1913 to authorize a federal income tax proved a pivotal event in American history, giving the federal government for the first time access to the large revenues needed to perform a host of new tasks.

Local governments, like small firms, would never be able to afford the best and the brightest of the expert professions. The comprehensive planning of American land use required a vision and an ability to coordinate on a scale that necessarily transcended the individual municipality. Many progressives would thus seek the consolidation of urban governing responsibilities at the full metropolitan and even at the national levels. A centralization of governing authority, progressives were confident, would mean a much more efficient use of the natural and human resources of society – the realization of the highest social values to be found in the progressive "gospel of efficiency."²⁷

Science versus Democracy

In 1896 the percentage of Americans who went to the polls in national elections was 79 percent of those legally eligible. By 1924 voter participation rates had plummeted to 49 percent (and are still at about that level today).²⁸ In short, even as it represented a period of great ferment in the design of new institutions of American governance, the progressive era witnessed the sharpest fall in democratic participation in elections in the history of the

United States.* Adding to the paradox is that progressive reformers were at this very time introducing a host of new political institutions designed to foster popular democracy. Such innovations included the direct election of Senators, the primary election as a method of nominating party candidates for office, voter recalls, popular referenda and initiatives, and finally in 1919 universal suffrage for women.

Nevertheless, the simultaneous rise of the new progressive design for American governance, and a rapidly declining democratic involvement in American politics, may not have been a coincidence. Historians such as Robert Wiebe trace the loss of the democratic habit -- the increasing alienation of "the People" from the political processes in the United States -- to the very contents of the progressive plan for American government.²⁹ On further reflection, moreover, it is apparent that a belief in government as a form of scientific enterprise is bound to pose a conflict with democratic traditions.[†] Scientific management will be antagonistic to any powerful forms of localism as well, including any prominent role for local communities in American governance.

Wiebe comments that progressive political and economic theorists believed the complex problems of modern government required "a new category of governors: a permanent, well-paid civil service of experts to manage technical problems in public policy." Although there were some leading progressives who "pictured the experts

* To be sure, part of the explanation for the sharply declining democratic participation early in the twentieth century was the disenfranchisement of blacks in the south, taking hold from the 1890s onward. The arrival of large numbers of immigrants from Europe and then the granting of suffrage to women in 1919 created new blocks of voters unaccustomed to going to the polls, and who may have been less inclined to vote for this reason.

† To the extent that some progressive theorists did make any real attempt to resolve the tensions between the scientific method and democratic practice, it was by means of asserting the famous "dichotomy" of politics and administration. According to this progressive prescription, ordinary democratic opinion might still legitimately enter into politics within the former domain; it need only be excluded from the technical and administrative sides of government. However, the progressives also believed that the areas of scientific understanding in government would be steadily expanding to ever wider parts. It followed that the scope for popular democratic participation in government could be expected to diminish correspondingly over time.

supplementing electoral democracy," a number of the most influential, such as Walter Lippmann, "pictured them substituting for it." For the new professional classes who came to power under the banner of progressive ideas, the "ideal-type citizen subsisted on a regimen of facts, scientifically digested," and impersonally applied by the most qualified experts in the nation. The end result of such thinking, Wiebe says, was "a crisis in democracy [along with] a crisis in citizenship" in the progressive era.³⁰ It is no wonder that many people no longer bothered to vote.

The resistance of scientific progressives to decentralized authority – including any major degree of autonomy for local governments – was blessed with all the power of religion. Indeed, the progressive era took up the cause of the reform of American society with all the fervor of a great religious cause. Gifford Pinchot, a leading progressive and the founder of the U.S. Forest Service in 1905, declare that the ultimate object of his many efforts in the progressive cause had been "to help in bringing the Kingdom of God on earth."³¹ America in the progressive era, one might say, became a kind of secular national church with an official catechism of economic progress through scientific management of society.

As the United States took on the character of one overarching church of progress, William Schambra finds that Americans increasingly thought of themselves in terms of a single "great national community." It was a community in which ethnic and class rivalries – the group identities that had characterized the multiple publics of the nineteenth century – should and would be eradicated. The United States would be a great melting pot in which the old diversity of cultures, religions, and other traditional forms of private association

would give way to a common set of modern and “enlightened” values. Schambra thus explains that for progressives,

The decentralized, self-governing, civically vital way of [nineteenth century] life within America's "island communities" ... was doomed.... Irresistable forces of modernity were beginning to sweep away the boundaries.... Modern means of transportation and communication -- the railroad, telegraph, telephone, the high-speed press -- had breached the small town's borders... Technology had given rise to vast corporate giants whose operations reached far beyond the jurisdiction of any single state or city. Great cities had sprung up, populated by aggregates of isolated, disconnected individuals, rather than by tightly knit neighbors.

In short, the forces of modernity had precipitated a crisis of community and civil society in America: the small town and its civic virtues had been shattered.... While it was pointless, in the Progressive's view, to try to preserve or restore the civic and moral ethos of the small town (that had been the failed Populist response), it was now possible to move to a new and higher form of community: the great, national community.³²

Chastened Progressives

The year 1920 is commonly regarded by American historians as the ending point of the progressive era. If an ever increasing degree of affluence had been expected to yield an ever increasing harmony among men and women, the useless battlefield slaughter of 8 million young men from 1914 to 1918 in Europe suggested that some essential element in the human condition had been overlooked. Although the American philosopher John Dewey was born in 1860, his most influential writings came fairly late in life, many of them published in the period from 1920 to 1940. Dewey was concerned that enormous economic progress had failed to bring about a corresponding moral improvement. Instead, there was a wide ethical “confusion that accompanies transition from an old order to a new one.” Many people had been plunged into “an economic regime so novel that there was no adequate preparation for it and which dislocated the established relations of persons with one another.”³³

The plans for economic progress had indeed often succeeded wonderfully – “production of the material means of a secure and free life has been indefinitely increased and at an accelerated rate” – but for Dewey there was a grave new problem – the “management and direction of the new physical energies so they would contribute to realization of human possibilities.” The problem of setting the right goals for society was all the more serious because the “immense possibilities represented by the physical means now potentially at our command” could apparently be used for evil purposes as well as good.³⁴ A main answer, as Dewey would now suggest in his writings, was very much at odds with the trends of the times. Dewey had come to the view that the large size of many institutions in modern life was a major contributing factor to the ethical problems being experienced. As he wrote in 1939, “individuals can find the security and protection that are prerequisites for freedom only in association with others” – that is to say, that “individuality demands [close] association to develop and sustain it.”³⁵

Strong bonds of association were more likely to be found in local interactions – at the scale of living and working of say a local community or neighborhood – than in the functioning of modern behemoths such as the nation state.*³⁶ As Dewey declared,

Evils which are uncritically and indiscriminately laid at the door of industrialism and democracy might, with greater intelligence, be referred to the dislocation and unsettlement of local communities. Vital and thorough attachments are bred only in the intimacy of an intercourse which is of necessity restricted in range. ... Democracy must begin at home and its home is the neighborly community.³⁷

* Such a step would not be without costs, however. Dewey acknowledged that strong neighborhoods and other local groups might impose “limits [on] the freedom of those who have entered them.” The obverse of a strong local bond among people would be a power to exclude those unwilling to conform to local group values. Yet, because thriving associations would be important to nurturing the moral foundations of American society, a greater willingness to accept a degree of restriction on individual human freedom might now be necessary.

Back to Pluralist Politics

By the 1950s and 1960s, it was becoming obvious to many American observers that government performance also was bearing little resemblance to the progressive design. A new generation of political scientists made their reputations by demonstrating a large gap between the progressive ideals and the governmental realities in the United States.* One problem was the very idea of a “public interest,” supposedly transcending the individual interests of businesses, unions, farmers, real estate developers, and other groups in society. Reflecting the new thinking as it was taking shape in the 1950s, political scientist David Truman explained in The Governmental Process that it was a myth to think that American government was capable of defining a set of common social goals and then acting to pursue these goals in a rational fashion.³⁸ In the real world of government, as leading political scientists such as Truman now declared, when someone spoke of “the public interest,” it should typically be understood as a rhetorical device designed to camouflage a private aim. Truman would explain in 1951 that:

Many assume explicitly or implicitly that there is an interest of the nation as a whole, universally and invariably held and standing apart from and superior to those of the various groups included within it. This assumption is close to the popular [progressive] dogmas of democratic government based on the familiar notion that if only people are free and have access to "the facts," they will all want the same thing in any political situation.... Such an assertion flies in the face of all that we know of the behavior of men in a complex society.

Assertions of an inclusive "national" or "public interest" is an effective device in many ... situations.... In themselves, these claims are part of the data of politics. However, they do not describe any actual or possible political situation within a complex modern nation.³⁹

* These political scientists included David Truman, Robert Dahl, Charles Lindblom, Grant McConnell, and Norton Long. Along with many others, they were busy showing that the traditional concept of politics as the resolution of conflicting ideas and interest in society was still as valid as ever. They provided a full description of the basic workings of pluralist democratic politics in the United States -- often yielding a politics of interest-group negotiation well removed from progressive ideals of banishing “private power” from the system. See, for example, Raymond Seidelman, Disenchanted Realists: Political Science and the American Crisis, 1884-1984 (Albany: State University of New York Press, 1985).

There was a growing recognition that the progressive scheme was an inadequate description of American government in other key respects as well.* Charles Lindblom famously stated in 1959 that the two functions of goal setting and implementation were inextricably interwoven in a governing process of “muddling through” that moved only in small incremental changes.⁴⁰ This meant, among other things, that any aspirations for comprehensive social and economic planning would normally be utopian. Attempts to set out the goals of society in advance were likely to yield vague generalities. Efforts to formulate more substantive objectives could easily provoke fierce disagreements that would be socially and politically disruptive. Hence, politicians and other men and women of affairs typically avoided such a process of formal goal setting that had small returns and high potential costs.

The crisis of progressive thought was felt in the 1960s and 1970s in many areas of public policy, including urban land use. One leading political scientist, Robert Wood, still took a traditional scientific management approach, lamenting the fragmentation of governmental responsibility and the inability to plan comprehensively that resulted from the balkanization of responsibilities among as many as 1400 local governments in the New York metropolitan region. As Wood argued, “the individual strategies of individual municipalities are condemned to frustration because of the sheer number of their neighbors.”⁴¹

* Herbert Simon complained as early as 1946 that the scientific capabilities within the field of public administration were turning out – despite several decades of research – to be much less than the progressive theorists had advertised.* Indeed, there was now considerable doubt that the subject of government administration could properly be considered a scientific area at all. In another important matter, it had become apparent that there could be no separation of government into distinct domains of value-laden and value-free activities, as the old progressive dichotomy of politics and administration had sought to achieve.

Another leading student of American land use, Harvard law professor Charles Haar, similarly declared that in metropolitan areas there was a basic "need for a revamping of the distribution of responsibilities and powers to allow for unitary response at appropriate levels of scale to problems that are inherently indivisible." If land use problems could not be addressed through a more "unified approach," the preconditions would be lacking "to make solutions even possible" to fundamental issues of metropolitan scope.⁴² However, Haar realized by 1972 that trends were running the other way. Metropolitan-level government had never been popular in the United States, even in the years when there was a much greater public willingness to defer to the authority of professional experts. As Haar now commented, "for many years the balance has been on the side of technical skills: the use of neutral 'experts,' the emergence of the 'technocracy' as a controlling force in both public and private sectors of the economy, the attempted exclusion of 'political' considerations from local decision making." But such habits of thought – the legacy in the field of land use of the old progressive designs for the scientific management of society -- were increasingly "coming under attack."⁴³

Another leading political scientist, Theodore Lowi, would famously declare in the late 1960s that the acceptance of a central decision-making role for private interests in government had become widespread. Lowi christened this new set of political ideas as "interest-group liberalism."⁴⁴ Such thinking had extended as well to international arenas where Gunnar Myrdal commented approvingly in 1960 that "in the fully realized welfare state" of Sweden, "resource allocation would be accomplished through a process of bargaining among the leading social interests."⁴⁵

If government could not agree in advance on its ends, and if no principled method existed for resolving the claims of contending parties in the political process, no other option existed. The workings of government in a democracy would simply have to involve a contest for political influence among the interested participants.* The alternative might be outright warfare in society, an obviously calamitous and unacceptable prospect for everyone. However, the best that interest-group liberalism could offer might be described as a new political philosophy opposed to all other political philosophies – a new negative kind of “ideology of anti-ideology.” Such a vague political formulation could hardly provide a compelling basis for governmental activism on the scale of the modern welfare and regulatory state of the United States.

Hence, if the governing institutions grounded in the American progressive gospel of the early twentieth century were to be sustained, some new set of higher aspirations must take their place. Otherwise, American government would not work; it might be preferable simply to abolish major parts of it, retaining only the core functions such as national defense that involved a clear public necessity. The 1970s and 1980s did in fact see the rise of a powerful libertarian strain in American political thought that advocated a solution of this kind.†

* The economist John Kenneth Galbraith, for example, had written favorably of a political system grounded in the routine interactions of “countervailing powers.” Big business was not a threat to the national interest because its power was countered by big unions. Within the business world, there were often competing interests that prevented one or another firm from employing government and economic national power for its own narrow benefit. It was in some ways a political version of the “hidden hand” of the free market, as long ago described by Adam Smith. See John Kenneth Galbraith, *American Capitalism: The Concept of Countervailing Power* (Boston: Houghton Mifflin, 1956).

† Lowi did not himself advocate libertarian policies but did consider that a mere ratification of the existing pluralist workings of interest-group politics in the United States could not provide a satisfactory basis for governance. The growing acceptance of the interest-group view of American politics – especially among the professional elites, the former leading defenders of the progressive plans for government -- was creating a “crisis of public authority.” Mere interest-group negotiation would “tend to cut out that part of the mass” of the people who were not represented by any powerful group. It would “create privilege” for certain

The problems, moreover, were most severe at the federal level, the part of the government that had grown especially rapidly under the banner of progressive ideas. Government at the local community level, by contrast, would be less affected; the problems of interest-group pressures and influence were less severe at a level of government grounded in close personal interaction. Small communities were more likely to be homogeneous, posing less of a problem in reconciling conflicting interests. The fast talkers and others skilled in rhetorical manipulations might find the national scene well suited to their talents; their strategies would be more quickly be ferreted out, however, in the frequent daily interactions of a group of close neighbors.

Not in My Neighborhood Backyard

As long as progressive values held sway in American life, leading urban planners and builders such as Robert Moses in New York City had been able to succeed in many of their designs. They could sustain the political support to build urban transportation systems of bridges and highways, to use urban renewal to clear whole neighborhoods, and to take other steps that might require the relocation of hundreds or even thousands of people.⁴⁶ It was all considered a routine and necessary part of the "price of progress." By the 1960s, however, such displacements of large populations – including whole neighborhoods -- was

private parties skilled or otherwise favored in politics "and it is a type of privilege particularly hard to bear or combat because it is touched with the [progressive] symbolism of the [welfare and regulatory] state." Moreover, whatever the overlay of progressive rhetoric, interest-group government would actually be "conservative in almost every sense of the term" because interest groups would typically move aggressively to block any changes that threatened their governmental prerogatives – an assessment similar to the economic theories of Mancur Olson a few years later that sought to explain why American society seemed so often to face managerial and policy gridlock.

Lowi was in effect saying that any political system must be legitimate; the government must have a satisfactory way of explaining its workings that the citizenry will believe in and accept. It would never do, as interest-group liberalism seemed to be saying, to tell the American people that their government was little more than a large grounds in society for disposing of a vast range of special claimants for favors. See Theodore J. Lowi, *The End of Liberalism: Ideology, Politics, and the Crisis of Public Authority* (New York: W. W. Norton, 1969), pp. . See also Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* (New Haven: Yale University Press, 1982).

no longer possible. The values of neighborhood stability and vitality now trumped for the first time the claim that the loss of a neighborhood was a necessary element in the future economic advance of American society.

In the 1960s a new generation of citizen activists emerged to lead vigorous political campaigns in defense of the greater autonomy of neighborhoods. The defenders of neighborhoods deployed innovative legal arguments in making court challenges; pressured political leaders; engaged in street theatre; offered other graphic images to attract the attention of the media; and used other effective methods of political activism. Increasingly in the 1960s and 1970s, the neighborhood activists prevailed. For example, a number of roads that had been planned for the national interstate highway system, going through downtown areas of New York City, Washington, D.C. and other major cities, were cancelled.

For neighborhood defenders, it was often easy to debunk the “expert” claims of urban planners. There were in fact many “biases” and other “unscientific” elements in virtually any urban plan – it was the nature of the game that planning involved the introduction of strong value preferences. In the past the plans had survived only because ordinary citizens had been reluctant to challenge the authority of the progressive “priesthoods” – the expert professional groups such as the urban planners. Once the authority of experts was more seriously called into question on a broad basis, the legitimacy of the products of urban planning (and many other professional areas of activity) was significantly eroded.

In earlier decades, American society might have insisted that an individual citizen – or an individual neighborhood – should not put its own private concerns and interests above

the greater good of American society. Indeed, such rank selfishness for private purposes should be rejected by all Americans of good will. In a new era of interest-group liberalism, however, one might think of the residents of a particular neighborhood as yet another interest-group. Like other interest-groups, the members of a neighborhood could be expected to fight for their own cause, even if it negatively affected other groups in society. There was less need to show much restraint in fighting for the neighborhood self-interest. All over American society other self-interested groups were fighting in the political process for their own forms of private advantage. That was the basic nature of a world of interest-group liberalism?

Many of the most enthusiastic grass roots defenders of neighborhoods were people who, a decade or two earlier, might well have been committing their energies to European socialist or American progressive causes. Perhaps inadvertently and without a full awareness, their views had shifted so far that they were now effectively advocating a new form of “privatization” of American society. Not only the free market but American politics should be seen as an arena where the results were determined by a process of competition among private actors.

Similar challenges to central authority were manifested in the rapid rise of the environmental movement, symbolized by the first Earth Day in 1969. Power plants, dams, ski resorts, timber harvests, oil wells and all manner of other development projects were being blocked all over the United States.* Instead of “socialist solidarity” in the name of the

* There was a significant element of irony, to be sure, that the environmental movement in the 1990s more often sought the imposition of strong national powers on local levels. The Environmental Protection Agency, under laws such as the Clean Air Act and Clean Water Act, has replaced the transportation and housing departments of the 1950s and 1960s as the leading federal symbol for many local people of the coercive imposition of national power on neighborhoods and communities. The Forest Service and the Bureau of Land Management repeatedly took actions on the public lands without consulting with and often in the face of local preferences. Admittedly, this assertion of federal authority is now justified in the name of environmental values well

scientific and economic progress of American society, the vanguard of neighborhood and environmental activism could now often be found in the "not-in-my-backyard" (or "NIMBY") phenomenon. Prominent American intellectuals were now proclaiming the merits of local autonomy, a substantial degree of neighborhood or other local independence from big city or any other higher levels of authority.

The "Privatization" of Local Government

The progressives had for the most part expected voluntary acceptance of social plans by those affected; a good citizen should contribute his or her part to the greater good of American society. There was no expectation in the old progressive schemes that people displaced by progress should be paid compensation for complying with a social and economic plan that would serve the public interest. But this attitude as well began to shift in the 1960s. The newer NIMBY attitudes transformed the actions of the neighborhood residents from a "public spirited" act into something more like a private transaction. Absent adequate financial or other forms of compensation to achieve voluntary consent, urban political leaders found that they could no longer impose large burdens on individual neighborhood or other small community groups. Negotiations with neighborhoods increasingly looked like negotiations with private businesses; a deal had to be struck, and a method of payment of compensation (often informal) from one party to another would have to be devised. The neighborhood residents might in effect be seen as "selling" their willingness to bear costs of social adjustment or of having to leave the neighborhood altogether. The rights to the neighborhood became a private "possession" that could be alienated, much like an ordinary automobile or home that could also be sold.

removed from the progressive gospel of efficiency, but the practical consequences for centralization of governmental power are in many respects the same as found in the old progressive prescriptions.

A similar trend towards converting “social” relationships to “market” relationships – to the “privatizing” of new areas of social interaction -- was widely manifested across American life from the 1960s onwards. Within the family, divorce rates soared, as the parties to a marriage increasingly regarded it as a private contract for mutual benefit between two people. If the marriage “deal” no longer served the individual interest of one party, he or she was now free to terminate it. One student of marriage trends would be moved to describe them as the “privatization” of family relationships, much as the relationship between neighborhoods and the broader society was being privatized.⁴⁷

In other areas as well -- abortion, gay rights, drug use, euthanasia – advocates of individual choice sought new freedom from old social conventions. Individual rights were emphasized over obligations to society. As the results of 1998 polling for the *Washington Post* were described,

[Over the past 30 years], trust in government has ... declined radically. In 1968, 61 percent said they trusted the government in Washington to do the right thing most or all the time; in 1998, only 33 percent felt that way.

Pollster Dan Yankelovich wrote that "the transformation of values from the mid-'60s to the late-'70s confronts us with one of the sharpest discontinuities in our cultural history." In that period's "radical extension of individualism ... from the political domain to personal lifestyle," he notes, the concepts of duty, social conformity, respectability and sexual morality were devalued, in favor of [individual] expressiveness and pleasure seeking.⁴⁸

It was part of a new libertarian trend in American society that was deriving as much impetus from the “left” as from the “right” side of the political spectrum. In more and more areas, a claim of national purpose and expertise was no longer adequate justification for a coercive measure imposed on an individual (or a neighborhood). It all went together -- a decline in social trust, loss of confidence in national institutions, a greater focus on individual self-expression, and a new resistance in many areas to centralized governing

authority. If these forces amounted to the “liberation” of the individual from many social constraints of the past, the liberating forces extended as well to small social groups such as the neighborhood and the small municipality.

A central principle of a libertarian political philosophy -- voluntary agreement as a fundamental organizing principle in society -- was increasingly accepted, even by those who rejected the libertarian label. Along with environmentalism, libertarian tendencies of thought (to be distinguished clearly from the dogmatism of the official Libertarian party), had become the two most important movements on the cutting edge of American political and economic thought at the end of the twentieth century.*

Whatever their other differences, both libertarianism and environmentalism took as a starting point the failure of the old progressive designs for the scientific management of American society.

The Neighborhood Movement

A sign of the times was the emergence in the 1970s of a movement for neighborhood government. The early advocates of greater neighborhood autonomy could find little support in political and economic thought. The neighborhood movement in the 1960s was mostly a grass roots and populist affair. By the 1970s, however, a new intellectual literature in defense of neighborhoods was emerging.

* Between 1975 and 2000 economists teaching in the economics department of the University of Chicago, or otherwise closely connected, won 13 of the Nobel prizes awarded in economics. The Chicago school won all those prestigious awards at least in part because it now offered a well developed political and economic answer to the most urgent of issues facing current political philosophy. As Milton Friedman, George Stigler, Frank Knight, and many other Chicago economists argued, a first step would be to tear down much of the apparatus of an illegitimate progressive state. A government that lacked any greater purpose than interest-group bargaining would eventually turn American society into a war of all against all, competing for mere scraps of government largesse. Chicago economics gave an official academic imprimatur to the libertarian directions in American society. See Robert H. Nelson, *Economics as Religion: From Samuelson to Chicago and Beyond* (University Park, PA: Penn State Press, 2001), Part III.

In Neighborhood Power: The New Localism, David Morris and Karl Hess (a well known advocate of libertarian causes) noted that "throughout the twentieth century the scale of social organization has been moving away from and not toward the scale of neighborhoods." More and more people were living at a "huge, dehumanized scale in social organization, economic organization, and in the organization of resources and technology." In a world of big government, managed by professional experts, the answers to administrative and policy questions were determined by technical calculations. For these and other reasons, Morris and Hess saw Americans turning away from the national institutions, conceivably leading eventually to "the collapse of many functioning units of big government."⁴⁹

Many opponents of large central government -- such as the members of the Chicago school of economics -- favored the free market as an alternative. As Morris and Hess saw matters, however, the market could also squash the individual in its pursuit of broad social goals, typically justified in abstract, grandiose ways. The market and central planning were alike in their ultimate dedication to economic progress; their disagreement was about the best means of achieving progress. In either case, the individual -- or the neighborhood or any others small community -- must be subordinated to the imperatives of progress.

By their very nature, however, and as Morris and Hess now argued, people "enjoy living with, being with, working with, loving with, arguing with, and creating with and for other people." If there could be grounds for hope in the future, it would lie in a revival of social institutions of neighborhood scale because "the neighborhood *is* the way people have lived historically throughout the world." In reviving neighborhoods, the possibility would open up that "human activity could be brought back together so that work, play, love, life,

politics, science, and art could be a shared experience by people sharing a space, sharing agreements as to how to live together, and mutually aiding one another to enjoy the fullest, ripest existence as human beings in a humane setting."⁵⁰ If this sounded utopian, the trends of utopian thought have often held important clues to future events in the real world.

Neighborhood Consciousness Raising

The neighborhood movement brought together an unusual coalition from the left and the right sides of the American political spectrum. Another prominent advocate of neighborhood empowerment, Harry Boyte, came from a political background in social activism for the poor. In *The Backyard Revolution*, Boyte argued in 1980 that the processes of "community renewal" in American life "had to begin within the neighborhoods themselves." Neighborhood power was an implicit rebuke to organizations willing to sacrifice ordinary people to the imperatives of technocratic efficiency – organizations such as banks, military contractors, builders, oil companies, and federal agencies. Big businesses wanted to be free to relocate their employees wherever and whenever it was useful to the business; implicitly, the message was that loyalty to the firm should transcend loyalty to the fellow residents of a small territorial area such as the neighborhood. However, Boyte in the late 1970s was seeing the ongoing rise of a "neighborhood consciousness" that was yielding a brand "new sense of pride and dignity" for neighborhoods.⁵¹

Indeed, Boyte in 1980 found that there were already 20 million people who had belonged in the previous decade to one or another form of neighborhood group, and at least several million who had engaged in some form of political activism on behalf of their neighborhood -- from protesting against the proposed building of a new road to demanding that city hall provide better services to the neighborhood. Boyte sought to advance the

neighborhood cause by promoting a reorganization of municipal government functions, seeking "changes in city charters and governance laws" to accomplish a "decentralization of functions like planning and zoning" to the level of the neighborhood.⁵² For some important areas of public responsibility, the neighborhood should be the governing unit.

The number of neighborhood organizations had become large enough by the mid 1970s to spur the creation of a National Association of Neighborhoods. The director of the Association declared that "the country's not going to be saved by experts and bureaucracies. It's going to be saved by some moral vision and some moral hope coming from the grassroots and the neighborhoods."⁵³ At its national convention in 1976, the Association published a "Neighborhood Bill of Responsibilities and Rights:"

The ideal of neighborhood government rests upon the belief that people can and should govern themselves democratically and justly. The essence of a democratic government is that people are responsible collectively to make choices which directly affect their lives together. The neighborhood is a political unit which makes this possible, since the smallness of the neighborhood enables all residents to deliberate, decide and act together for the common good.

We share our neighborhoods with individuals and families of diverse needs, interests, backgrounds, and beliefs. When neighbors respect their diversity in their collective decision, their self-government can be just. Similarly, our neighborhoods share city and world life with other neighborhoods. When neighborhoods respect their diversities and interdependence in inter-neighborhood decision and action, justice will be further served.

In the past neighborhoods and their citizens have been denied the opportunity for exercising their political rights and assuming their responsibilities. Consequently justice has not been achieved. In order to overcome this past failure, we assert that all governments and private institutions must recognize [new rights of neighborhood association].

By the late 1970s, the Congress (then controlled in both branches by the Democratic Party) and President Jimmy Carter joined together to establish a National Commission on

Neighborhoods. The Commission issued its final report in 1979, finding that the neighborhood had been a much-neglected institution in American society. If legal barriers and other obstacles were torn down, a revival of neighborhoods could accomplish great things.

If city, state and federal governments are to effectively respond to people's needs, and if the natural resource of every person is to be converted into energy for the common good, then healthy neighborhoods are essential. Neighborhoods are human in scale, and they are immediate in people's experience. Since their scale is manageable, they nurture confidence and a sense of control over the environment. Neighborhoods have built-in "coping mechanisms" in the form of churches, voluntary associations, formal and informal networks. The neighborhood is a place where one's physical surroundings become a focus for community and a sense of belonging.⁵⁴

The federal status of the Neighborhood Commission did not prevent it from criticizing the existing workings of the federal government. Articulating a new opposition to centralized planning and management, the Commission saw many federal agencies as too distant from the American citizenry. Federal and state officials now often fought to sustain their own prerogatives. The most extreme examples were found in other nations where socialist governments oppressed their citizens; in such foreign countries, one sometimes found a small governing class looting the national treasury, and otherwise treating the powers of the government as a private domain. In the United States matters fortunately had not reached this point, but it was nonetheless the case that "middle income, working, and poor neighborhoods alike experience the frustration of government that does too little, costs too much, and denies meaningful influence to the vast majority. Power has been more centralized; people have become more alienated. More Americans live together, yet live alone. Increasingly government deals with Americans as clients, not citizens; as sources of

revenue, but not of authority.”⁵⁵ It was a remarkable statement from a national commission formed at the federal level to reflect a wide range of American public opinion.

American metropolitan areas, it seemed, were increasingly divided into central cities managed by large bureaucracies in the name of the old progressive aspirations for the unity and the scientific management of society, while the better-off members of society lived in suburban neighborhoods that had the right to exclude other people as they wished, and had other private-like powers. The large cities often served their residents very poorly; the suburban neighborhood enclaves typically served their residents very well. The neighborhood movement, as one might say, now proposed to extend the suburban pattern of “private” governance into the big city as well. It sought to achieve this, however, within a framework of “public” institutions. For many people, the hold of the old progressive categories of thought was still too powerful for an explicit rejection of an ethos of the necessity of “public” action.

A Private Neighborhood Movement

The operating autonomy of cities and towns to govern themselves, as Frug has usefully been reminding us, was much greater until the modern era. Despite their many areas of disagreement, the advocates of free markets, European socialists, American progressives, and many other believers in progress had one critical area of belief in common – that the progress of the whole nation must dominate over the local community. The cost of any significant departures from national values – any significant elevation of local over wider social values -- would be too high in terms of frustrating the future economic progress of the nation.

It was in fact a valid argument, given the extraordinary high priority that was being given to economic progress. Any return to more “medieval” forms of interaction among the basic political units in society would undoubtedly come at some significant cost in terms of economic efficiency. But in the 1970s some people were willing to forego substantial “progress” in order to promote a greater sense of community in American life, as seen in the rise of the neighborhood movement.*

The new advocates of neighborhood empowerment mostly had in mind neighborhood governments in the public sector. In the event, however, there was little real decentralization in the public sector of government authority to the neighborhood level. Too many powerful local interests had too much stake in the existing manner of organization of local government. It was part of the general gridlock and stalemate that blocked any major reform of the welfare and regulatory state, despite wide discontent and criticism of its workings in many areas.

Instead, as often happens in history, new forces had to be expressed through new and unexpected channels. There was in fact a powerful neighborhood movement that arose in the late twentieth century. Surprising to earlier neighborhood advocates, it turned out to be a private neighborhood movement. A revolution occurred in local government, housing, and property rights over the last few decades of the twentieth century, based on the rise of the private community association. The legal arrangements for private community associations were not based on any avante garde social designs of prominent political scientists or economists. The private community association arose

* A recent observer finds that in Europe in the early twenty-first century “economics is taking a back set to politics. Europeans have decided that they are willing to pay a price in inefficiency for their political values (no matter how strange those values might seem on this side of the Atlantic).” See Fareed Zakaria, “Globalization Grows Up and Gets Political,” *The New York Times*, December 31, 2000, p. WK 9.

as a practical way of managing the neighborhood commons. It was adopted one neighborhood at a time by land developers in search of improved collective management of the neighborhood environment. To the extent that there was any broader thinking, the leading theorists were government bureaucrats in the housing agencies and real estate lawyers. It has only been in recent years that the radically new character of the rise of the private community association has come to be more widely appreciated.

The rise of the private neighborhood may well have done more to decentralize the structures of American governance than any other social development of the twentieth century. It was not that neighborhood associations brought back the individual home owner free of regulatory control over his or her private actions. A private neighborhood is somewhat of a paradox. It is a product of the free market but it also represents – much like a private business corporation – a turn away from the autonomy of the individual agent in the market place. Collective control over individual actions affecting the neighborhood environment substitutes for individual freedom within the neighborhood. Indeed, private community associations probably have enhanced substantially the total extent of collective control over individual actions exercised in American life. This outcome – private socialism American style, as it might be described -- ironically has been the result of millions of voluntary decisions made freely and privately in the context of the market place.

The Privatization of Municipal Government

The shoe manufacturer Nike bears little relationship to industrial giants such as AT&T, General Motors and GE that dominated the U.S. economy for much of the twentieth century. Nike does not manufacture its own shoes; it does not transport the

shoes or sell them in its own stores. Virtually every physical task associated with the production, distribution and sale of Nike shoes is outsourced. The shoes themselves are made at a plant in Asia. The function of Nike employees consists largely of developing ideas and coordinating their implementation by others. Nike signs contracts with sports stars such as Michael Jordan and Tiger Woods; works with advertising agencies to craft the “Nike” image; and arranges for the various stages of production and distribution of the end-line product. Many other current firms such as the Dell computer company operate in a similar manner.

The rise of the private community association is only the most radical element of a general privatization of local government in the United States. Local governments in the public sector increasingly contract out the delivery of services. A private firm can often pick up the garbage more efficiently than a city government could do the job itself. Although it is controversial, there are numerous private prisons in the United States. The provision of law and order is considered a core public function but there are now three times as many guards and other private security employees as municipal policemen.

One might speculate that local government in the future will follow in the path of Nike. It might leave most “micro” service functions to private neighborhood associations. The “macro” services such as sewer and water might be contracted to large private companies. The main task of local government might be the definition and maintenance of a local sense of “place” and “community” and the coordination of local service deliveries from private sources. Local governments would decide what kinds of land uses should be located within their jurisdictions, consistent with the type and ambiance of local community sought; they would also decide the levels of public

services. Such local governments would then outsource to private companies to monitor land uses and deliver the services.

Even the use of local streets in urban areas could in concept be privatized. A traffic jam is a case study in a tragedy of the commons. In certain hours of the day, each car entering a highway creates larger social costs than the private costs incurred. However, the collective pursuit of individual driver interests yields a social result – very congested streets at peak hours -- that does not serve the overall interests of all car drivers. Like other tragedies of the commons, a solution requires either a system of private property rights or government regulation. In the case of automobile traffic, current congestion at peak hours could be eliminated by an appropriate system of highway pricing, charging the highest prices during the periods of greatest user demand. In the past, such a system might have been technically difficult to implement but satellite geopositioning systems now make it practically feasible to keep track of the exact position of every car at every moment. The decision to implement such a system of highway pricing would have to be a public function but the implementation could be a private undertaking. If there is any one step that could be taken to help to resolve the problems of metropolitan growth, a more rational system of highway price is it.

At the national level, the public sector may have to operate the money system, fight wars, build an interstate highway system, send men to the moon, and undertake other tasks that differ in basic character from the delivery of local services. At the local level, however, the activities of government resemble those of a private business. Indeed, with the rise of private community associations, local governments today are once again

being organized, as they were until the early nineteenth century, to operate under the legal status of a private (now non-profit) corporation.

There is in fact little in the character of local government that requires the direct involvement of the public sector? The necessity of public involvement relates to the manner of establishing local governing authority in the first place, rather than the manner of subsequent operation. For example, zoning functions are today routinely performed by private neighborhood associations all over the United States. In an existing neighborhood without a neighborhood association in place, however, such zoning would be nearly impossible to establish; the transactions costs of voluntary agreement among the neighbors would be too high. The solution was found by making the zoning a “public” responsibility. Unlike a private action, the public sector does not require unanimous consent to establish a zoning system in the first place.

In practice, of course, there must be political consent. But it need not be unanimous consent among the affected parties. A “public” entity has the authority to compel holdouts, free riders, and other people simply with unconventional tastes to accept new government authority. If they refuse, their only option is to leave the jurisdiction. Under “private” rules, by contrast, a dissenting minority possesses a veto power; little or nothing can be done unless everyone agrees to make a change (or agrees to a set of private rules for making such changes without unanimous consent).

Because of the greater potential coercive element in the operation of a local government in the “public” sector, society enforces a different set of groundrules. These rules are designed to protect the minority “customers” of the local government from abuse and exploitation. The ultimate protection is the freedom of exit from the

geographic area of a local government monopoly. Because the transactions costs of exit can be high, society offers greater protection of the “rights” of local citizens of territorial governments, as compared with the rights of the stockholders of an ordinary private business corporation (another form of “government”).

In an ordinary business corporation, each “member” joins a corporate “group” by the act of purchasing shares of stock. Then, in making future changes in the membership of a business corporation, the change is accomplished by the act of buying or selling the stock. Mergers and acquisitions, along with divestitures, are a routine part of the evolution of American industrial organization. All this exchange of ownership shares can take place with a moderate level of transactions costs. If stockholders don’t like the way a corporation is being run, “exit” consists of simply selling the shares on Wall Street.

In order for territorial forms of local governments to “merge” or “divest,” by contrast, the process is much more cumbersome. In a private neighborhood association, unless there is explicit agreement otherwise in the founding documents, a split of one group from the association would require unanimous consent. In the public sector, such a split would amount to an act of secession. There is provision for secession -- or “deannexation” -- in the laws of most states . However, few secessions have occurred over the years, due in part to the high transactions costs of meeting the requirements for state approval of a secession.

If local governments – public or private -- are perhaps better regarded as a special category of “business,” perhaps they should all be treated more like other businesses and less like “government”. Local governments typically produce tangible goods and

services in the manner of a business; if they are distinguished by the territorial and collective fashion of their product delivery, it is still a business-like activity.

Competition in the “Government” Sector

In principle, the “industrial organization” of “business units” of local government, like private businesses within a standard industrial sector, could be determined by a competitive process. Indeed, some leading students of urban affairs have argued that the key to improved service delivery at the local level lies in a much greater flexibility of city size, thus providing a much wider scope for the evolution of new government units. It should be easier to assemble larger governing units from building blocks of smaller local units, or to divest smaller units from larger ones. All this would be facilitated if local government were conceived in private terms.

Ronald Oakerson in the mid 1980s undertook a study of local governance in metropolitan areas for the U.S. Advisory Commission on Intergovernmental Relations. Oakerson concluded that there should be much wider opportunity for institutional experimentation in service delivery at the local level. As he put it, “of central importance is the authority to create, modify, and dissolve [local 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.”⁵⁶ If it were possible to adjust the sizes and responsibilities of units of local government on a routine basis, a Darwinian process of selection of “the fittest” could be put to work in this sector of the economy as well.

Many local government functions, for example, involve land use interdependencies that extend only over a limited area. Such small areas can be

characterized as “a neighborhood.” Oakerson considered that the lack of neighborhood-level institutions of government was a major gap in existing metropolitan systems. As he stated, “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 the local possession of authority for the provision of “some types of goods and services [that] can [best] be provided on a ‘neighborhood’ scale.”⁵⁷ At present, however, the organizational arrangements for metropolitan governance “tend to preclude or inhibit the development of smaller, nested provision units – neighborhood governments – within [wider city] boundaries.”⁵⁸

The workings of a market process can be expected to yield new units of local government not only at the neighborhood level but of many different sizes and scopes. In the ordinary business world, large corporations have typically won out in the competition of the marketplace over atomistic firms. These business corporations are in effect little “socialist” economies based on central planning and management – although the business corporation may employ various financial and other market-like devices. Surprisingly, until the 1970s the main apparatus of formal economic theory offered little help in understanding this constant flux of business organization within markets. However, since the pioneering work of Oliver Williamson (who was following in the path of Ronald Coase), a “new institutional economics” has shed greater light on the economic forces that can lead to different degrees of vertical and horizontal integration within an industry.⁵⁹

The modern business corporation is now seen by economists as a solution to various information and transactions cost problems that face any participant in a market economy. A leader in the development of the new institutional economics (and a winner of the 2001 Nobel prize in economics for these efforts), Michael Spence explained in 1975 that there is “an impressive and growing body of literature ... [which] suggests [that] the firm, in large part, consists of nonmarket institutions whose function is to deal with resource allocation in the presence of informational constraints that markets handle poorly or do not handle at all.”⁶⁰ The large business corporation represents a solution to the problem of an inability to define property rights for many forms of valuable information; instead of a market of many competitors, the large firm succeeds by internalizing the externalities -- the use of valuable information -- within one business operation.

In a metropolitan economic system, if there were more flexibility in governing forms, there would be similar economic issues relating to the “industrial organization” -- the degree of horizontal and vertical integration -- of units of local government. As Williamson analyzed industrial organization in business, the form of metropolitan organization might be understood as a matter of relative transactions costs of different metropolitan forms. A larger unit of government might be able to take advantage of economies of scale in delivering services such as water and sewer. A large city may have access to various forms of specialized, professional knowledge that would be beyond the means of a small municipality to obtain. However, a large city might also face a significant disadvantage in other respects. It might be difficult to create a system of positive incentives within a large city bureaucracy that would serve to motivate the most

productive efforts by the workforce. Large city size will also involve greater diversity of population and hence greater divergences between individual service demands and the common levels of services provided citywide.*

At the neighborhood level, the time burdens required for full democratic processes and other transactions costs of neighborhood governance will set a minimum neighborhood size. It may be also desirable to have a larger neighborhood in order to realize economies of scale in local service delivery (it is impossible to buy half of a police patrol car). A neighborhood should be large enough in geographic size that it can offer a self contained physical environment of high quality. On the other hand, larger units of government may realize greater economies of scale but suffer from other transactions cost problems.

There are a host of such transactions cost and other considerations that can influence the degree of vertical and horizontal integration among the units of local government. The best way to resolve these issues may be through an evolutionary process driven by competition among competing forms of metropolitan governance. As Oakerson explains,

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.

* Pietro Nivola of the Brookings Institution observes with respect to the public system of municipal service provision 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.

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.⁶¹

In the normal course of events, some businesses survive and others fail; the survivors may be larger or smaller, depending on the many factors that play a role in determining industrial organization. If a similar process applied to units of local government, one might witness the steady expansion, contraction, termination or other modification of such units of local government. Governmental boundaries could be altered – creating larger or smaller units for collective service provision – with the agreement of those citizens directly service by local government.

It is possible in concept that a unit of government in the public sector could have the flexibility to accomplish such boundary adjustments with ease. Most states do have provision for annexations and deannexations within the existing metropolitan system of governance. However, a system of local governments that have a private status is more likely to show a flexibility of organizational evolution and adaptation that would correspond to the institutional flexibility that now exists in the world of private business corporations. If there were more room for such private trial and error, there would be no need to attempt to prescribe an ideal governmental size or type. A world of local private units of government thus would be an evolving world in which the units could expand or contract from time to time as new economic forces might warrant such changes. As in any other market place, economic change would occur as a response to the forces of private competition.

An the absence of such flexibility, a system of metropolitan governance is like a private industry in which the sizes and boundaries of business firms have largely been fixed at one point in time and the forces of competition and economic change must operate thereafter within these existing business structures.* In such circumstances, it should not be surprising that the system of metropolitan governance should tend toward less and less efficient forms, relative to ordinary private businesses. The standard processes of evolutionary change that drive market efficiency are simply frustrated in a metropolitan system that has fixed boundaries for its units of all-purpose governance.

There are other significant obstacles that obstruct an evolutionary process among units of local governance. Even where it is technically feasible, units of local governments are often prevented from selling their services to other units of government. As Richard Briffault comments, “localities actually lack the authority to provide extralocal services and require a special legislative grant of power before they are permitted to project their services across the local boundary line.” In the rare cases where

* Just as there may need to be flexibility in governing mechanisms within the public sector, Wayne Hyatt argues that private neighborhood associations may want to consider various options for allocating responsibilities, including different “structures” of neighborhood governance. It is likely to be easier, however, to rearrange the governance structures when they are in the private sector. As Hyatt explains the need for new arrangements,

[Neighborhood association] owners desire to be a part of the larger community. At the same time, homeowners want to maintain a neighborhood feeling. These desires can be “accommodated by a growth in neighborhood structures without the sub-associations which often balkanize communities, increase costs, and polarize attitudes. Alternative structures, more like unified county-city governments, will meet consumer desires and permit cost effective community government.”

These neighborhoods within [private] communities will meet different needs and reflect different attitudes and desires. Associations can restore a neighborhood feeling and still retain the advantage of being part of an integrated comprehensive community structure. Affordability issues can be accommodated by shifting costs within the community. In part, this is accomplished by the use of a cost center on neighborhood assessments. This cost center permits neighborhoods to choose services desired and to be paid for above the level of the general assessment for the entire community. The goal of making communities inclusive and of providing meaningful diversity within those communities is a part of the reestablishment of neighborhoods. Neighborhood structures can aid in achieving this goal. See Wayne S. Hyatt, “Common Interest Communities: Evolution and Reinvention,” 31 *John Marshall Law Review* (Winter 1998), pp. 387-388.

local governments have obtained such extra-jurisdictional grants of authority, they function with a degree of “autonomy normally accorded private firms and [the law] absolves localities of all but their private contractual obligations to service recipients and potential service recipients.” However, it is confusing for a local government to operate simultaneously in a “public” capacity within its own boundaries and then turn around and operate in a “private” capacity outside these boundaries.⁶² Perhaps it would be better for them to be able to operate privately in all capacities.

“FOCJs”

Bruno Frey is a well known Swiss economist who also proposes fundamental changes in the institutions of local governance. Frey contends that local government historically has been associated with a territorial monopoly that is neither necessary nor desirable. He suggests that most existing tasks of local government should instead be performed by “Functional Overlapping Competing Jurisdictions”—or “FOCJs”.⁶³ A FOCJ would differ from a standard local government at present both in that it would be more specialized by function and could have an overlapping jurisdiction with the territory of another FOCJ.

Because different FOCJs could be allowed to operate within the same geographic area, they would often find themselves in competition with one another. Consumers would choose among competing FOCJs much in the manner that they now choose between Walmart or K-Mart or among car dealers when purchasing an automobile. However, a FOCJ would differ from an ordinary business in that the purchasers would also be the owners of the business; the management of the FOCJ would be overseen by a democratic process of purchaser/owner decision making. In this respect there is a close resemblance to a system of

private clubs – with the concept of a FOCJs extending beyond the familiar private golf and tennis clubs to a much wider range of types of local service “clubs,” each performing a function historically associated with local government. Frey nevertheless considers that FOCJs would be genuinely “governmental – they would have enforcement power and could, in particular, levy taxes.”⁶⁴

Frey finds that there is today a worldwide proliferation in the forms of governance. At the world level, the International Olympic Committee might be regarded as a true form of government that is limited to one particular function – the holding of the Olympic Games every four years. At the local level in Washington, D.C., a private, non-profit organization, Washington Area Girls Soccer (WAGS), oversees advanced soccer competition for girls of 10 years to 18 years throughout the Washington area, crossing many political jurisdictions. In other places in the United States, a similar function could just as well be the responsibility instead of a recreation department of a large city government. Instead of each local government maintaining a territorial monopoly on a wide range of services within its borders, a host of new arrangements, many of them crossing municipal borders, would be permitted to arise.

The current reworking of the organizational structure of public education in the United States also illustrates Frey’s main themes. Traditionally, a local public school has had a territorial monopoly; all the students within a given set of boundaries go to the same public school. By ending such territorial exclusiveness, as advocated by the “school choice” movement (and in fact undertaken in many jurisdictions), public schooling in effect adopted one of the important elements of a “FOCJ” – the establishment of overlapping jurisdictions for service providers. The idea of “charter schools” moved yet another critical

step towards a full FOCJ – the competing schools could now be newly created and run democratically by groups of parents, operating with considerable independence of traditional education rules and regulations, including teachers unions.*

Besides charter schools, it would also be possible to have “charter police,” “charter garbage collection,” “charter tennis clubs,” “charter snow removal,” and a host of other “charter” institutional rearrangements at the local level. One might describe the evolution of the telephone industry over the past 20 years as a transition from a single monopoly (although AT&T was private, it operated under close government oversight and control) to a number of “charter telephone companies.” The case of the telephone industry illustrates how technological innovations can alter the organizational forms of local service delivery. It was a breakthrough in the technology of long distance telephone service that enabled a system of competition to emerge in place of the old AT&T monopoly. Yet, MCI had to fight long and hard in the courts before it was permitted to enter into competition for long distance telephone service with AT&T. At the local level, the telephone system continued as a monopoly into the 1990s. It has been the emergence of cell telephones that has permitted the recent proliferation of local telephone services in fierce competition with one another. What was once a territorial monopoly has now become a multiplicity of overlapping service jurisdictions in competition with one another in the telephone business.

Frey’s vision of functionally oriented forms of local government that overlap and compete with one another is thus already being realized in part. Moreover, it holds out the

* A system of vouchers then further extends such a concept, in this case providing parents of children in private schools with access to public funds (although there may be significant restrictions imposed as a condition of eligibility of a private school to receive such government assistance). The ultimate in private education is perhaps “home schooling” which has been exploding in the numbers of children educated this way in recent years. In terms of Frey’s proposals, a charter school would be an example of a FOCJ – possessing the qualities of being functional, overlapping, competing, and a jurisdiction of government

prospect of being extended into many areas that now involve a public monopoly within a given territorial area. A turn towards FOCJs could hold out the prospect of whole new forms – more “business-like” in character – of local governance. Indeed, there may not be any need for a FOCJ to be a part of a government in the public sector. Although Frey sees FOCJs as belonging within the category of “public” government, there is nothing about them that would prevent them from functioning as private entities altogether.

Commenting in the *Journal of Institutional and Theoretical Economics* on Frey’s vision, Jurgen Eichberger finds much to praise but offers criticism in two respects. First, not all forms of government can be functionally specialized; it is necessary to have some overarching rules of the game that require a territorial jurisdiction. As Eichberger puts it, “a legal system, jurisdiction, regulation, and enforcement of rules require a territorial government. Though one may envisage each club organizing its own protective force, this appears utterly inefficient.” A second concern is Frey’s insistence that each FOCJ must have “direct election of management by members.” Frey proposes that the “constitutions” of a FOCJ should “encourage members ... to participate actively in the management of FOCJ affairs.” Eichberger suggests instead that there need be no automatic presumption of “the general superiority of a participatory membership rule. Even casual observation of the multiplicity of existing governmental institutions suggests that the appropriate form of FOCJs will vary with their functions. Depending on the public good that the club provides and the number of competing clubs active in a given territory, different governance forms may be optimal.”⁶⁵

In a second comment in the *Journal*, Wolfgang Kerber finds that “the concept of FOCJ shows convincingly that many tasks traditionally fulfilled by jurisdictions with

territorial monopoly can also be provided by other types of jurisdictions (e.g., functional ones).” This applies even to the provision of an “underlying legal order” that will provide, among other things, “a set of metarules that ensure that a system of FOCJs is really able to enhance the welfare of the citizens.” Kerber suggests that a competitive process may be put to work in the development of a legal order; it may be possible for “individuals or firms [to] have the right to choose between legal rules or whole legal orders. This will lead to competition among legal rules or legal orders, a phenomenon that can already be observed. If firms do business on an international level, they have the right to choose which kind of contract law they want to use, e.g., German, British, or U.S. law.”⁶⁶

Kerber considers that Frey’s work is part of a basic rethinking of the role and function of local government that should be undertaken. With “the FOCJ concept,” Frey points to the fact “that in reality we do not have ‘the’ government but a multitude of governments.” This is raising a basic federalism issue of the “proper scope of government” at all levels. In addressing this issue,

We not only have to think about governments in the plural but also have to distinguish between different types of governments with possibly different “proper scopes.” Already in traditional federalism theory, different tasks are assigned to the governments of the jurisdictions on different federal levels. It is the optimal number of federal levels, the optimum size of these territorially defined jurisdictions on each level, and the vertical assignment of tasks to the different levels that make up the question of the proper scopes of governments. If we take into account the potential establishment of functional jurisdictions according to the FOCJ concept, additional types of governments emerge, implying new kinds of “proper scopes.” Consequently, the question of the proper scope of government is being transformed into the question of the proper structure of the entire system of territorially and nonterritorially defined jurisdictions, including the proper assignments of tasks and competences to these various jurisdictions. ... Their determination is an additional task for the underlying competitive order.⁶⁷

A Secession Option

If Oakerson and Frey have been challenging the underlying assumption of a

territorial monopoly in local government, others have retained the assumption of exclusive monopoly but in other ways sought a much greater degree of flexibility of local government organization. If an existing government is serving the citizenry poorly, exit can take two forms. The residents can simply move out one at a time to other jurisdictions – a form of exit that is at present readily available, if perhaps costly to the individual. However, another form of exit would allow the residents to stay put in their existing homes and instead to withdraw as a group from the existing governing jurisdiction – that is to say, to secede. The seceding group might form a brand new unit of local government or it might choose to join with another existing unit of government (in most cases adjacent). Unlike the process of exit one person at a time, the option of secession as a group is largely precluded at present by the legal rules that limit the ability to secede from a municipality. Yet, the transactions costs of one group exit might be much less than a large number of individual exits.

A neighborhood is a logical size of area for the secession of a group from a municipality. Neighborhood secession may be a response to poor service from a higher level of government. However, secession might also be sought simply because of the advantages of neighborhood-level governance. Indeed, law professor Georgette Poindexter argues that “the need to find meaningful participation in the political process underlies the very existence of a democratic government. The smaller the political community, the more likely a resident will see an impact of her political voice.” Thus, “the neighborhood would be the optimal level for city government.” Poindexter would thus recognize a right of neighborhoods to secede from the larger political jurisdictions in which they are now located. Much like the new laws providing for no-fault divorce from marriage that were enacted by states in the 1960s and 1970s, she suggests a similar provision for no-fault

neighborhood separation from the larger city:

I propose that “no-fault,” consensual [municipal] secessions be granted. To be sure, a resident is always free to leave a jurisdiction. Secession, though, involves more than a group of dissatisfied residents moving out of the jurisdiction. By seceding, the group wants to leave the jurisdiction and wants to take its property along.

Instances will arise where the existing municipality has fulfilled every duty to a group that nevertheless wants to secede. ... This secession should be granted because secession is based, not upon a failure of the majority, but upon a community’s desire to express an individuality that it cannot express while remaining in the existing municipality. ... Secession in this context is not at odds with democracy because it does not reject majority rule. Rather, it rejects the majority itself.⁶⁸

It might be argued that secession should be regarded as a basic political freedom. If a group of people want to leave a governing jurisdiction, what is the justification for the application of government coercive powers to prevent them from forming their own government. There are admittedly practical problems in arranging secession, as there are practical problems in many ordinary divorces that end a marriage (who gets the children, the division of property, etc.). Yet, traumatic as the process sometimes is, such issues can be worked out.

Fred Foldvary has applied such a perspective to the specific possibility of neighborhood secession. From the standpoint of the preservation of individual and group liberties, Foldvary argues that ideally “any person or organization having a title to land [could] withdraw the site from any government jurisdiction and create its own governance.” In such a regime of “legalized geographic exit,” it would be possible for people collectively to “withdraw from a dysfunctional process as an alternative to [attempting] an infeasible reform of the system.” Neighborhoods choosing to withdraw could do so at their option, like the 1990s dissolution of the old Czechoslovakia into the

two current nations of Slovakia and the Czech Republic, and thus would not be required to provide "any substantive grounds to justify the secession" of the neighborhood.⁶⁹

Private Secession

Near Key Biscayne, Florida, Fisher Island is an entirely private and self contained body of land governed in Miami Bay. It is governed, streets and all, by a private community association. Some of the richest and most prominent people in the United States maintain homes there. At controlled entry points, access to the island is tightly restricted to the residents and the friends and associates they may choose to bring in. As far as the opportunity of an ordinary American citizen for entry and exit, Fisher Island is for all intents and purposes a foreign country with a strict visa requirement.

Indeed, Robert Reich, former Secretary of Labor in the Clinton administration, characterizes private community associations in general as the "secession of the successful" from society.⁷⁰ Reich argued in 1991 that "condominiums and the omnipresent residential communities dun their members to undertake work that financially strapped local governments can no longer afford to do well -- maintaining roads, mending sidewalks, pruning trees, repairing street lights, cleaning swimming pools, paying for lifeguards, and, notably, hiring security guards to protect life and property."⁷¹ Evan McKenzie comments similarly that the residents of private neighborhood associations may "develop an attenuated sense of loyalty and commitment to the public communities in which their CIDs are located, even to the point of virtual or actual secession."⁷²

A private status conveys many of the attributes of sovereignty, including a wide discretion to control entry and to set rules and regulations for the conduct of internal

affairs. When such qualities of privateness are extended to territories and to basic governance, the result might be described as the functional equivalent in many ways of a tiny nation state. Indeed, the creation of a private community association might also be described as a small act of territorial secession. It may be the most important form of secession that has arisen in recent times within the boundaries of the United States. Admittedly, it is not a perfect analogy. But the trend may be toward a future of more perfect secession – and a future of wider reliance on private structures of local government.

Conclusion

For many years, writers across the political spectrum have been suggesting the need for a strengthening of the institutions of local community in the United States. A strong sense of community goes along with a large dose of local autonomy, including an ability to exclude people who do not fit the community norms. It would be difficult in the United States to provide that large element of autonomy to local institutions in the public sector. However, there would be less tension in empowering local private institutions with strong powers of exclusion. A private property owner is like a small sovereign with respect to his or her property.

When the property is an area of homes and other facilities that are collectively owned, the fact of private ownership converts the common private area into a kind of mini-state. Yet, it is a state that is encouraged to be part of the wider economy through the workings of the market process. If the collective property became too valuable, the state might even be dissolved and the members of the community might move elsewhere, taking their profits with them.

Local governments also provide many services that have a business character. The appropriate size of local government to take advantage of economies of scale, while acting to minimize transactions costs, might best be determined by a competitive process. Different institutional forms at the local level could compete with one another. Rather than develop an administrative plan for local government, the shape of local government could emerge from the private workings of the market. If such an evolutionary process is to work, it will be necessary to have greater flexibility in altering local boundaries than can be obtained in the public sector. It requires a private concept of local government to conceive of a routine flow of “mergers,” “breakups,” “divestitures,” and other competitive rearrangements of the units of local government.

For these reasons and others mentioned in this paper, a fundamental property right development in the twenty-first century might be the privatization of local government. Many local governments in private community associations are already fully and formally private. Local municipal governments in the public sector have already taken on much of the character of a private government, responsible for in effect the management of a private (collective in this case) property. The next step would be to convert these nominally public units of government to a formal private status that accords with their actual workings. The result would be a new conception – or actually a return to an old conception – of local government as private property.

Endnotes

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- ² See Robert H. Nelson, "The Rise of Private Neighborhood Associations: A Revolution in Local Government," paper presented to a conference on "The Property Tax, Land Use and Land-Use Regulation," sponsored by the Lincoln Institute of Land Policy, Scottsdale, Arizona, January 13-15, 2002.
- ³ See Community Associations Institute, *Community Associations Factbook*, Frank Spink, ed., (Alexandria, VA: 1999), p. 19. The latest data can be obtained at the website of CAI.
- ⁴ Carol J. Silverman and Stephen E. Barton, "Shared Premises: Community and Conflict in the Common Interest Development," in Stephen E. Barton and Carol J. Silverman, *Common Interest Communities: Private Governments and the Public Interest* (Berkeley, CA: Institute of Governmental Studies Press, University of California, 1994), p. 141.
- ⁵ David Popenoe, *Private Pleasure, Public Plight: American Metropolitan Community Life in Comparative Perspective* (New Brunswick, NJ: Transaction Books, 1985), p. 117.
- ⁶ William Schneider, "The Suburban Century Begins," *The Atlantic* (July 1992), p. 37.
- ⁷ Andres Duany and Elizabeth Plater-Zyberk, quoted in Schneider, "The Suburban Century Begins," p. 37.
- ⁸ Jerry Frug, "Decentering Decentralization," 60 *University of Chicago Law Review* (Spring 1993), pp. 265, 266, 270.
- ⁹ Richard Briffault, "Our Localism: Part I – The Structure of Local Government Law," 90 *Columbia Law Review* (January 1990); Richard Briffault, "Our Localism: Part II – Localism and Legal Theory," 90 *Columbia Law Review* (March 1990); Richard Briffault, "Who

Rules at Home?: One Person/ One Vote and Local Governments,” 60 *University of Chicago Law Review* (Spring 1993); Richard Briffault, “The Local Government Boundary Problem in Metropolitan Areas,” 48 *Stanford Law Review* (May 1996); Richard Briffault, “The Rise of Sublocal Structures in Urban Governance,” 82 *Minnesota Law Review* (December 1997); and Richard Briffault, “A Government for Our Time?: Business Improvement Districts and Urban Governance,” ? *Columbia Law Review* (March 1999).

¹⁰ Briffault, “Who Rules at Home?,” pp. 383, 419

¹¹ See also 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).

¹² Gerald E. Frug, “The City as a Legal Concept,” 93 *Harvard Law Review* (April 1980).

¹³ *Id.*, p. 1080.

¹⁴ *Id.*, 1082.

¹⁵ *Id.*, pp. 1070, 1060, 1122.

¹⁶ *Id.*, pp. 1106, 1107, 1119, 1119-1120.

¹⁷ Robert C. Ellickson, “Cities and Homeowners Associations,” 130 *University of Pennsylvania Law Review* (June 1982).

¹⁸ *Id.*, p. 1558.

¹⁹ *Id.*, pp. 1560-61.

²⁰ See Robert H. Nelson, *Reaching for Heaven on Earth: The Theological Meaning of Economics* (Lanham, MD: Rowman & Littlefield, 1991); also Robert H. Nelson, *Economics as Religion: From Samuelson to Chicago and Beyond* (University Park, PA: Penn State University Press, 2001).

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- ²¹ See *Hunter v. City of Pittsburgh*, U.S. (1907?).
- ²² Frug, *City Making*, pp. 45, 44.
- ²³ Richard Briffault, "Our Localism: Part I – The Structure of Local Government Law," 90 *Columbia Law Review* (January 1990), p. 7.
- ²⁴ Richard Briffault, "Local Government and the New York State Constitution," 1 *Hofstra Law & Policy Symposium* (1996), pp. 91, 101, 101-02, 105, 99, 101.
- ²⁵ *Ibid.*, p. 101.
- ²⁶ Eliza Wing-yee Lee, "Political Science, Public Administration, and the Rise of the American Administrative State," *Public Administration Review* (November/December 1995), pp. 541, 543.
- ²⁷ Samuel P. Hays, *Conservationism and the Gospel of Efficiency: The Progressive Conservation Movement, 1890-1920* (Cambridge, MA: Harvard University Press, 1959).
- ²⁸ Frances Fox Piven and Richard A. Cloward, *Why Americans Don't Vote* (New York: , 1988), pp. 54, 86-88.
- ²⁹ Wiebe, *Self-Rule*, p. .
- ³⁰ *Ibid.*, pp. 172, 173, 175, 176.
- ³¹ Gifford Pinchot, *The Fight for Conservation* (Seattle: University of Washington Press, 1967 – first edition ?), p. 94.
- ³² William A. Schambra, *Is There Life Beyond the Great National Community?* (National Commission on Civic Renewal, Working Paper No. 5, 1997), pp. 16-17.
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- ³⁴ *Ibid.* , pp. 37, 168, 172, 169, 168-170.
- ³⁵ *Ibid.*, pp. 162, 162-63, 166.

³⁶ Ibid., pp. 166, 167.

³⁷ John Dewey, *The Public and its Problems* (Chicago: Swallow Press, 1985 – first ed. 1927), pp. 212-213.

³⁸ David B. Truman, *The Governmental Process: Political Interests and Public Opinion* (New York: Alfred A. Knopf, 1951).

³⁹ Ibid., pp. 50-51.

⁴⁰ Charles E. Lindblom, "The Science of 'Muddling Through,'" *Public Administration Review* (Spring 1959). See also Norton E. Long, "Public Policy and Administration: The Goals of Rationality and Responsibility," *Public Administration Review* (Winter 1954).

⁴¹ Robert C. Wood, "The Political Economy of the Future," in Benjamin Chinitz, ed., *City and Suburb: The Economics of Metropolitan Growth* (: Prentice-Hall, 1964), p. 153. This chapter is excerpted from Robert C. Wood, *1400 Governments: The Political Economy of the New York Metropolitan Region* (Cambridge, MA: Harvard University Press, 1961).

⁴² Charles M. Haar, "Introduction," in *Metropolitanization and Public Services* (Resources for the Future, 1972), pp. 4-5.

⁴³ Ibid., p. .

⁴⁴ Theodore J. Lowi, *The End of Liberalism: Ideology, Politics, and the Crisis of Public Authority* (New York: W.W. Norton, 1969), pp. 46.

⁴⁵ Gunnar Myrdal, *Beyond the Welfare State: Economic Planning and Its International Implications* (New Haven: Yale University Press, 1960), p. 96.

⁴⁶ Cite to Robert Caro.

⁴⁷ Cite in Buckley book.

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- ⁴⁸. David S. Broder and Richard Morin, "Struggle Over New Standards," *The Washington Post*, December 27, 1998, p. A1. The poll results for 1998 reported in this and other *Post* articles were the product of a collaboration between the *Post*, the Kaiser Family Foundation and researchers at Harvard University.
- ⁴⁹. David Morris and Karl Hess, *Neighborhood Power: The New Localism* (Beacon Press, 1975), p. 3,5,8.
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- ⁵¹. Harry C. Boyte, *The Backyard Revolution: Understanding the New Citizen Movement* (Temple University Press, 1980), p. 68, 69, 70.
- ⁵² *Ibid.*, pp. 70, 71.
- ⁵³. Quoted in Boyte, *The Backyard Revolution*, p. 69.
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- ⁵⁵. *Ibid.*, at 7.
- ⁵⁶. Ronald J. Oakerson, *Governing Local Public Economies: Creating the Civic Metropolis* (Oakland, CA: ICS Press, 1999), p. 81.
- ⁵⁷. *Ibid.*, p. 127, 85.
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- ⁶⁵ Jurgen Eichberger, "Comment" on Frey, 157 *Journal of Institutional and Theoretical Economics* (March 2001), p. 178.
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