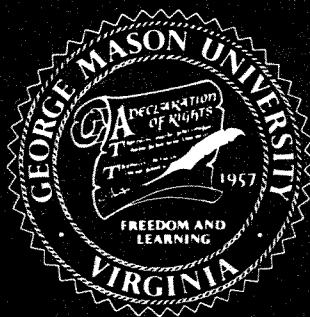

GEORGE MASON LAW REVIEW



PRIVATIZING THE NEIGHBORHOOD: A PROPOSAL TO
REPLACE ZONING WITH PRIVATE COLLECTIVE PROPERTY
RIGHTS TO EXISTING NEIGHBORHOODS

Robert H. Nelson

VOLUME 7

SUMMER 1999

NUMBER 4

PRIVATIZING THE NEIGHBORHOOD: A PROPOSAL TO REPLACE ZONING WITH PRIVATE COLLECTIVE PROPERTY RIGHTS TO EXISTING NEIGHBORHOODS

*Robert H. Nelson**

INTRODUCTION

Two researchers recently announced a "quiet revolution in the structure of community organization, local government, land-use control, and neighbor relations" in the United States.¹ They were referring to the spread of homeowners' associations, condominium ownership of property, and other forms of collective private ownership of residential property. In describing these forms of ownership, different commentators have used terms such as "residential community association," "common interest community," "residential private government," "gated community" and others. Whatever term is best—and I will refer to such ownerships as "neighborhood associations" in this Article, recognizing that some collective ownerships are smaller than the average neighborhood, and others are larger—the spread of collective private ownership of residential property is a development of fundamental importance in the history of property rights in the United States.

Indeed, it may yet prove to have as much social significance as the spread of the corporate form of collective ownership of private business property in the second half of the nineteenth century. At that time, a new ease of transportation, economies of scale in mass production, improved management techniques of business coordination, and other business innovations led American industry to operate at a new scale, and corporate ownership proved financially and otherwise advantageous. Thus, although there were few business corporations before the Civil War, by 1900 corporations produced almost two-thirds of U.S. manufacturing output, a figure that reached 95% in the 1960s.² In 1932, Adolf Berle and Gardiner Means announced the transformation of the basic relationship between private

* Professor, School of Public Affairs, University of Maryland; Senior Fellow in Environmental Studies, Competitive Enterprise Institute, Washington, D.C. This article is based upon a paper presented at the Donner Conference on Freedom of Contract in Property Law, sponsored by the Law and Economics Center, George Mason University School of Law, December 1997.

¹ Stephen E. Barton & Carol J. Silverman, *Preface* to COMMON INTEREST COMMUNITIES at xi (S. Barton and C. Silverman eds., 1994) [hereinafter BARTON & SILVERMAN].

² See *Economic Concentration, Part I—Overall and Conglomerate Services, Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 88th Cong. 12, 15 (1964) (statement of Gardiner C. Means).

ownership of property in the United States and the managerial control over the means of production caused by the rise of corporate ownership.³

In the second half of the twentieth century, new economic forces wrought yet another transformation in private property ownership. These forces included: (1) higher densities of development, (2) the desire for precise control over neighborhood character, (3) more economical private provision of common neighborhood services, and (4) greater interest in common recreational and other facilities. They made private neighborhood associations the choice for millions of people for their residential property.⁴ If private neighborhoods continue to spread at the pace of recent years, the long-run result may be collective ownership of most private property (residential and business) in the United States. Such a result would be a remarkable transition from the general expectation of individual ownership of property that long prevailed in American political and economic thought.⁵

To date, almost all neighborhood associations have arisen as part of the development of a new neighborhood. The developer assembles the raw land and builds the neighborhood from its initial stages, including the establishment of the neighborhood association. Purchasers of new housing units must accept membership in the association as part of the original terms of ownership. However, in neighborhoods previously developed with individual ownership of the land and structures, there is little prospect for the formation of a neighborhood association. Doing so would require the individual members of the neighborhood to surrender voluntarily part of their individual rights and accept collective control over the use of the exterior parts of their property by their neighbors. Obtaining such voluntary consent from several hundred or more property owners is extremely time consuming and almost certainly would involve major problems with holdouts and other high transactions costs. Few existing neighborhoods have even considered making such an effort.

In this Article, I propose enactment of legislation to facilitate the establishment of neighborhood associations in existing neighborhoods.⁶ The

³ ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

⁴ See *RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM?* (U.S. Advisory Comm'n on Intergovernmental Relations ed., 1989) [hereinafter *RESIDENTIAL COMMUNITY ASSOCIATIONS*]; ROBERT J. DILGER, *NEIGHBORHOOD POLITICS* (1992); EVAN MCKENZIE, *PRIVATOPIA* (1994).

⁵ See J.W. HARRIS, *PROPERTY AND JUSTICE* (1996). Of course, the spread of individual ownership was itself a development only a few centuries old. It was part of the evolution of property right institutions by which capitalism supplanted feudalism as the dominant social form.

⁶ The growing importance of private neighborhoods, and a proposal for new legal mechanisms of collective private ownership in existing neighborhoods, are also explored in Robert Nelson, *Contracting for Land Use Law: Zoning by Private Contract*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* (F.H. Buckley ed., forthcoming 1999).

establishment of a new legal mechanism for this purpose would allow existing neighborhoods to take advantage of collective control over the neighborhood common environment and the private provision of common services, just as new neighborhoods are doing in such large numbers. Moreover, such an approach would facilitate the "deregulation" or "privatization" of zoning. Private neighborhood associations could administer the collective controls over neighborhood quality now exercised through land use regulations at the municipal level. Compared with a private property right regime, and as described below, the governmental exercise of zoning powers has several major disadvantages.⁷

I. THE RISE OF THE NEIGHBORHOOD ASSOCIATION

As of 1998, there were about 205,000 neighborhood associations in the United States in which almost 42 million people lived, or about 15% of Americans.⁸ In the fifty largest metropolitan areas, more than half of new housing is now built in neighborhood associations.⁹ In the Los Angeles and San Diego metropolitan areas, this figure exceeds 60%.¹⁰ California, along with Texas and Florida, have the greatest concentrations of neighborhood associations.¹¹ Other places where neighborhood associations are common include New York, Illinois, and the suburbs of Washington, D.C. In the D.C. area, about one third of the residents in affluent Montgomery County live in neighborhood associations.¹²

The average neighborhood association serves a population of about 200 people.¹³ In 1990, about 42% of the units in neighborhood associations consisted of townhouses.¹⁴ Single family homes represented 18% of the units.¹⁵ Most associations extended beyond individual buildings to include territorial responsibilities of some sort. The typical operating budget of a neighborhood association was \$100,000 to \$400,000 per year in 1990, but five percent of those associations belonging to the Community Association Institute had budgets in excess of \$1.5 million per year.¹⁶

⁷ For reviews of this literature, see WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS* (1985) [hereinafter FISCHER, *ECONOMICS OF ZONING LAWS*]; WILLIAM A. FISCHER, *REGULATORY TAKINGS* (1995) [hereinafter FISCHER, *REGULATORY TAKINGS*].

⁸ See CLIFFORD J. TREESE, *COMMUNITY ASSOCIATIONS FACTBOOK 3* (Frank H. Spink ed., 1999).

⁹ See *id.* at 19.

¹⁰ See BARTON & SILVERMAN, *supra* note 1, at 12.

¹¹ See *id.* at 11.

¹² See MCKENZIE, *supra* note 4, at 120.

¹³ See *COMMUNITY ASSOCIATIONS FACTBOOK 13* (Clifford J. Treese ed., 1993) [hereinafter *FACTBOOK*].

¹⁴ See *id.* at 17.

¹⁵ See *id.*

¹⁶ See *id.* at 22.

As recently as 1962, there were fewer than 500 neighborhood associations in the United States.¹⁷ By 1970, this number rose sharply to 10,000 associations, but they still accounted for only one percent of U.S. housing units.¹⁸ As of 1970, the terms of condominium ownership governed 12% of existing neighborhood associations.¹⁹ The subsequent rapid spread of condominium ownership, reaching 42% of all neighborhood associations by 1990, was a key factor in the growth of collective ownership of American housing.²⁰

A. *Types of Ownership*

Besides condominium ownership, the other main instrument for collectively owned residential property is the homeowners association in a planned unit development (PUD).²¹ In a homeowners association, each person owns his or her residential unit individually, typically including the yard. The homeowners association, which every new homeowner must join, is a separate legal entity that holds title to the streets, parks, neighborhood common buildings, and other "common areas." The association also enforces the neighborhood covenants governing the allowable uses and modifications of individually owned units. In contrast, condominium owners have title to both their own personal units and, as a "tenant in common," a percentage interest in the "common elements."²² These common elements include things like dividing walls, stairways, hallways, roofs, yards, parks and other parts of the project outside the individually occupied units.²³

As of 1998, PUDs accounted for 64% of housing units in neighborhood associations and 31% of the units were in condominiums.²⁴ The other five percent were housing units in cooperatives, in which the collective ownership extended to all the land and buildings, including the interiors.²⁵ Cooperative ownership is most common for individual apartment buildings in New York and a few other large cities.²⁶ Under cooperative ownership, individual occupants have tenancy agreements with the cooperative that entitle them to the use of their own personal units.

¹⁷ See C. James Dowden, *Community Associations and Local Governments: The Need for Recognition and Reassessment*, in *RESIDENTIAL COMMUNITY ASSOCIATIONS*, *supra* note 4, at 27.

¹⁸ See *FACTBOOK*, *supra* note 13, at 13.

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.* at 9.

²² *Id.* at 1.

²³ See Wayne S. Hyatt, *Condominium and Home Owner Associations: Formation and Development*, 24 *EMORY L.J.* 977 (1975).

²⁴ See *TREESE*, *supra* note 8, at 3.

²⁵ See *id.*

²⁶ DAVID CLURMAN ET AL., *CONDOMINIUMS AND COOPERATIVES* (1984).

The typical neighborhood association provides a range of services to residents such as garbage collection, street maintenance, snow removal, lawn mowing, gardening, and maintenance of recreational facilities and the common areas of the neighborhood. To cover the costs of these activities, the neighborhood association levies an assessment on each member. A typical fee is approximately \$100 to \$150 per month.²⁷ A member of the neighborhood association who fails to pay the assessment is subject to a lien on his property.

Often neighborhood associations enforce covenants written by the developer to maintain the original character of the neighborhood.²⁸ Generally speaking, neighborhood covenants are much more detailed than zoning regulations, controlling not only types of land uses but also matters of aesthetics. Such matters can include the color of the house paint, the placement of trees and shrubbery, the size and location of fences, the construction of decks and other housing extensions, the parking of automobiles in streets and driveways, and the use and placement of television antennas, among others.²⁹ In most neighborhood associations, the "conditions, covenants and restrictions" (CC&Rs) regulate these matters and an architectural review committee oversees enforcement. Neighborhood associations of senior citizens often require that at least one of the unit occupants be fifty-five years or older. Restrictions on possession of pets are another means by which associations often assert control over the neighborhood environment.

A board of directors elected by the full membership of the association governs the association.³⁰ Usually, only property owners may vote. The exclusion of renters from the franchise has resulted in considerable criticism that private neighborhoods are "undemocratic."³¹ Nevertheless, renters can still participate in the political life of the neighborhood by coming to board meetings and serving on committees. The assignment of voting shares in neighborhood associations can be done according to a number of formulas, commonly one vote per residential housing unit (thus potentially giving the same person multiple votes if he owns more than one unit). Voting rights also may be allocated in proportion to measures (such as unit square feet) of shares of property value.

²⁷ See TREESE, *supra* note 8, at 13.

²⁸ AMANDA G. HYATT, TRANSITION FROM DEVELOPER CONTROL 22-23 (1996).

²⁹ For a description of one planned community, Celebration, Florida, created by the Disney Corporation in the vicinity of Disney World, see Michael Pollan, *Town-Building is No Mickey Mouse Operation*, N.Y. TIMES MAG., Dec. 14, 1997, at 56.

³⁰ COMMUNITY ASSOCIATION LEADERSHIP: A GUIDE FOR VOLUNTEERS (A. Calmes ed., Community Associations Institute, 1997).

³¹ Albert A. Foer, Comment, *Democracy in the New Towns: The Limits of Private Government*, 36 U. CHI. L. REV. 379, 397-98 (1969); see also JOEL GARREAU, EDGE CITY 200-201 (1991).

B. *Private Governments*

As Uriel Reichman described in an early article noting the rise of neighborhood associations, they "possess much of the power and trappings of local municipal government but arise out of private relationships."³² Indeed, Reichman chose to describe them as "residential private governments."³³ From this perspective, the rise of neighborhood associations represents the most comprehensive privatization occurring in any sphere of government functioning in the United States today.

Initially the rise of private neighborhoods was not conceived in such broad terms.³⁴ Collective ownership of neighborhood property emerged as a matter of real estate practice, designed to meet certain practical needs of land developers.³⁵ Enforcement of covenants to protect the quality of existing neighborhoods often proved unreliable, because no one entity was responsible for bringing the necessary legal actions. Collective private ownership provided the developer a way of overcoming the free rider problem.

Collective ownership also allowed developers to provide common recreational and other facilities that new housing owners increasingly demanded. With higher densities of development, such as townhouses, maintenance of yards and other common areas became critical. Finally, the fiscal crisis of many local governments in the 1970s and 1980s meant that these governments were unwilling to accept new responsibilities for building and maintaining streets, collecting garbage and providing other services. Providing these services privately, through a neighborhood association, often became a condition of municipal approval for a new neighborhood.³⁶

Although primarily economic forces drove the establishment of neighborhood associations, government took several critical steps to promote their use. In 1961, the Federal Housing Administration (FHA) approved the provision of mortgage insurance for condominiums and in 1963 for residential units included in PUDs with homeowners associations.³⁷ Between 1961 and 1967, prompted in part by FHA actions, almost every

³² Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 253 (1976).

³³ *Id.*

³⁴ For a history of the development of condominium forms of land tenure outside the United States, see Rober G. Natelson, *Comments on the Historiography and Condominium: The Myth of Roman Origin*, 12 OKLA. CITY U. L. REV. 17 (1987).

³⁵ See MCKENZIE, *supra* note 4, at 29-55; Marc A. Weiss & John W. Watts, *Community Builders and Community Associations: The Role of Real Estate Developers in Private Residential Governance*, in RESIDENTIAL COMMUNITY ASSOCIATIONS, *supra* note 4, at 95-103.

³⁶ See generally Dowden, *supra* note 17.

³⁷ See FACTBOOK, *supra* note 13, at 11; Steven E. Barton & Carol J. Silverman, *History and Structure of the Common Interest Community*, in BARTON & SILVERMAN, *supra* note 1, at 10.

state enacted a model condominium property act, thereby providing a firm legal foundation for condominium ownership.³⁸ Another key step was the approval in the mid-1970s by the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC) of purchases of condominiums and PUD unit loans in the secondary mortgage loan market.³⁹ With these steps, the ownership of housing units in neighborhood associations could offer the same forms of government support that had done so much to promote the spread of individual home ownership in the years following World War II.

II. A PROPOSAL: A FIVE STEP PROCESS

The volume of new development in neighborhood associations demonstrates their great appeal. Yet the advantages of private neighborhoods remain unavailable for people living in existing neighborhoods with individual ownership of the units. Many of these neighborhoods were built before the emergence of neighborhood associations. Today, even if most residents wanted to form a neighborhood association, the transactions costs of assembling unanimous neighborhood consents voluntarily would be prohibitive. Hence, as a solution, I propose that state governments enact a new legal mechanism, making collective ownership of residential property available to existing neighborhoods.

To offer the advantages of neighborhood associations to existing neighborhoods, state governments should enact a new law to allow self-governance in these neighborhoods, through new collective private ownerships. For purposes of discussion, I propose the following five-step process, recognizing that many variations are possible.

1. A group of individual property owners in an existing neighborhood could petition the state government to form a neighborhood association. The petition should describe: (a) the boundaries of the proposed private neighborhood; (b) the instruments of collective governance intended for it; (c) the services the neighborhood association would perform; and (d) the estimated monthly assessment. The petition should come from owners cumulatively possessing more than 60% of the total value of neighborhood property.

2. The state government would then certify that the proposed neighborhood met certain standards of reasonableness, including: (a) having a contiguous area; (b) boundaries of a regular shape; (c) an appropriate relationship to major streets, streams, valleys and other geographic features; and (d) other considerations. The state would also certify that the proposed

³⁸ See MCKENZIE, *supra* note 4, at 95-96.

³⁹ See FACTBOOK, *supra* note 13, at 12.

private governance instruments of the neighborhood association met state standards.

3. If the application met state requirements, the state would authorize a neighborhood committee to negotiate a service transfer agreement with the appropriate municipal government. The agreement would specify the possible transfer of ownership of municipal streets, parks, swimming pools, tennis courts, and other existing public lands and facilities located within the proposed newly private neighborhood (possibly including some compensation to the city). It would also specify the degree to which the neighborhood would assume responsibility for garbage collection, snow removal, policing and fire protection. Finally, the transfer agreement would specify future tax arrangements, including any property or other tax credits that the members of the new neighborhood association might receive in compensation for assuming existing municipal burdens. Other matters of potential importance to the municipality and the neighborhood also would be addressed. The state government would serve as an overseer and mediator in this negotiation process.

4. Once the state certified the neighborhood's proposed municipal transfer agreement, the state would schedule a neighborhood election. The election would occur at least one year after the submission of a complete description of the neighborhood proposal, including the articles of neighborhood incorporation, the municipal transfer agreement, estimates of assessment burdens, a comprehensive appraisal of individual neighborhood properties, and other relevant information. During the one year waiting period, the state would supervise a process to inform property owners and residents of the neighborhood of the details of the proposal and to facilitate public discussion and debate.

5. The state would supervise the neighborhood election. Approval of the neighborhood association would require both of the following: (1) an affirmative vote of property owners cumulatively representing 90% or more of the total value of the proposed neighborhood; and (2) an affirmative vote by 75% or more of the individual unit owners in the neighborhood. If the election met these conditions, all property owners in the neighborhood would be required to join the neighborhood association and would be subject to the full terms and conditions of in the neighborhood association charter. The neighborhood association would have the right to collect assessments to fund its operation from each association member.

III. ADVANTAGES OVER ZONING

Municipal zoning already serves many of the functions of neighborhood associations.⁴⁰ Zoning protects the character of the neighborhood by excluding detrimental uses. Zoning regulates many of the details of housing design, such as the size of the lot, the amount of floor space, the setback from the street, and other such matters. Why, then, go to the trouble of devising a whole new property right institution for neighborhoods and a new legal regime?

While zoning and neighborhood association control over neighborhood environmental quality do overlap in a number of key respects, the private neighborhood has several major advantages. For example, except where an historic or other special district can be justified, zoning does not cover the fine details of neighborhood architecture, trees and shrubbery, yard maintenance, and other aesthetic matters that may have a major impact on the character of the neighborhood. Thus, neighborhood associations have a considerably greater degree of authority over actions potentially influencing the character of the neighborhood than zoning typically affords.

In addition, the administration of zoning takes place at the municipal level, where political considerations often include many people who are not residents of the neighborhood. But, in matters such as the control of fine details of neighborhood architecture, there is no need or justification for broader municipal involvement. Indeed, under zoning the substantial influence on such matters by outsiders leaves the neighborhood exposed to regulatory actions that it does not want. This lack of secure control over the details of the administration of neighborhood zoning leads to neighborhoods' reluctance to accept more precise and comprehensive zoning controls over aesthetic matters.

Moreover, because zoning is a form of public regulation, the direct sale of zoning is not considered permissible (it would be "bribery"). However, if the exclusion of a use was an ordinary exercise of a private property right, neighborhoods could sell rights of entry (say for a new neighborhood convenience store) into the neighborhood, sell rights to make certain broader changes in land use within the neighborhood, or even sell all the neighborhood property in one package for comprehensive redevelopment. The private neighborhood's ability to put rights of entry into the neighborhood in the market would introduce greater flexibility in metropolitan land markets, significantly improving the efficiency of their operation.

⁴⁰ See generally JOHN DELAFONS, *LAND-USE CONTROLS IN THE UNITED STATES* (1969); FRANK POPPER, *THE POLITICS OF LAND-USE REFORM* (1981); see also DENNIS COYLE, *PROPERTY RIGHTS AND THE CONSTITUTION* (1993).

Furthermore, the ability to sell zoning allows the neighborhood to manage a transition to a different use of the neighborhood. Currently, because an entity outside the neighborhood controls changes in land uses under zoning, and because these changes often do not bring financial gains to the neighborhood collectively (and may involve losses for some individuals), the residents of existing neighborhoods typically resist almost all land use change.⁴¹ Zoning serves many neighborhoods well as a protective instrument for maintaining the existing character of the neighborhood, but fails wherever the objective is the transition from one type of use to another. Similarly, as described below, the legal mechanism of private neighborhood ownership could usefully be extended to "neighborhoods" of farmers owning large tracts of vacant land in transitional developing areas on the fringes of metropolitan regions.

Lastly, the advantages of neighborhood associations extend beyond improvements on zoning. Neighborhood associations can serve as a vehicle to provide more efficient and effective garbage collection, recreation facility maintenance, and many other common services. Creating a neighborhood association can establish and sustain a strong spirit of community in the neighborhood, not usually found in neighborhoods without a formal institutional status. Private neighborhoods might also encourage residents' involvement in political affairs, both locally and at higher levels of government.

IV. FROM ZONING TO NEIGHBORHOOD ASSOCIATIONS

The proposal to create a new legal regime for the establishment of neighborhood associations in existing neighborhoods is more radical in form than in substance. Indeed, it would, in effect, formalize and extend existing arrangements that evolved under zoning.⁴² In an existing neighborhood, the practical consequence of zoning is to provide a de facto collective private property right to the neighborhood environment.⁴³

A. *Origins of Zoning*

A de facto property right was not the original intent of the founders of zoning. New York City adopted the first zoning ordinance in the United States in 1916.⁴⁴ During the 1920s, zoning spread rapidly across the United

⁴¹ See STEVEN J. EAGLE, *REGULATORY TAKINGS* 347 (1996).

⁴² See Robert H. Nelson, *The Privatization of Local Government: From Zoning to RCAs*, in *RESIDENTIAL COMMUNITY ASSOCIATIONS*, *supra* note 4, at 45-51.

⁴³ See ROBERT NELSON, *ZONING AND PROPERTY RIGHTS* 22-51 (1977); see also Robert Nelson, *A Property Right Theory of Zoning*, 11 *URB. LAW.* 713 (1979).

⁴⁴ See SEYMOUR I. TOLL, *ZONED AMERICAN* 172-87 (1969).

States.⁴⁵ In 1926, in a decision of great historic significance, the Supreme Court upheld the constitutionality of zoning, despite many doubters.⁴⁶ The Court accepted the arguments of zoning defenders that it met two essential needs. First, zoning extended and improved on nuisance law, in that it provided advance notice that certain types of uses were incompatible with other uses in a particular district. Thus, zoning standardized the ad hoc procedures devised by individual judges ruling in individual nuisance cases. The nuisance justification was particularly important because zoning, like the enforcement of nuisance law, was considered an exercise of the local government's police power.⁴⁷

The second argument for zoning, which also significantly influenced the Supreme Court, was that zoning was a necessary municipal planning instrument.⁴⁸ This argument reflected the general philosophy of the progressive movement, which believed that scientific management could be applied in all areas of American society, and improve the efficiency and effectiveness of American institutions.⁴⁹ Applying scientific management methods to the municipal scene would allow comprehensive land use planning. Thus, instead of the disorderly and haphazard patterns of land development of the past, American cities in the future would be planned according to a rational design. They would work much better economically and be visually more attractive—at least this was the great hope of progressive municipal planners.⁵⁰

Specifically, as envisioned by proponents, a city planning staff would study housing, transportation, job market, and other economic and social trends to project future housing needs. Planners would then allocate housing among parts of the city. Zoning would provide the practical legal instrument to enforce this design. Zoning would require that new housing be located and built according to the city's comprehensive plan.⁵¹

In practice, however, this grand land use planning and regulatory scheme proved utopian.⁵² Like the high hopes for socialist scientific planning in many fields, it presumed a predictability of economic events and

⁴⁵ See EDWARD M. BASSETT, *ZONING* (1936).

⁴⁶ See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

⁴⁷ Robert A. Williams, *Euclid's Lochnerian Legacy*, in *ZONING AND THE AMERICAN DREAM* 278-80 (Charles M. Haar & Jerold S. Keyden eds., 1989) [hereinafter *ZONING AND THE AMERICAN DREAM*].

⁴⁸ See A. Dan Tarlock, *Euclid Revisited*, 34 *LAND USE LAW* 8 (1982).

⁴⁹ See Eliza Wing-Yee Lee, *Political Science, Public Administration and the Rise of the American Administrative State*, 55 *PUB. ADMIN. REV.* 538 (1995); DWIGHT WALDO, *THE ADMINISTRATIVE STATE* (1984).

⁵⁰ See *A CITY PLANNING PRIMER* (Advisory Committee on Zoning, U.S. Department of Commerce, 1928).

⁵¹ See Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 *HARV. L. REV.* 1154 (1955).

⁵² See James L. Huffman and Reuben C. Plantico, *Toward a Theory of Land Use Planning: Lessons from Oregon* 14 *LAND & WATER L. REV.* 1 (1979); MARSHALL KAPLAN, *URBAN PLANNING IN THE 1960S* (1973).

capacity for central scientific understanding and management of human affairs that real planners never realized. Moreover, although progressive theory prescribed that politicians should concede power to professionals in matters of scientific expertise, such as land use, the politicians had other ideas—especially when the scientific skills of the experts often seemed in doubt, as in city planning.⁵³ Indeed, as Dennis Coyle commented recently, “beneath the arcane language and technicalities, disputes about property rights [to land] reveal fundamental clashes between opposing perspectives on the proper society,” matters that could hardly be left to technicians to resolve.⁵⁴

Instead, land development occurred opportunistically, as housing or other facilities were proposed for particular locations.⁵⁵ The local municipality then decided whether it wanted that particular development at that particular time in that particular place. In making these decisions, municipalities often found that they could not rely on existing land use plans to guide them. They had to do a new assessment and make a decision based on some other grounds. Approval of new development was not achieved by verifying consistency with an existing comprehensive plan, as legal theory prescribed. Rather, the municipality typically amended the zoning ordinance, granting specific approval for individual development. The process resembled a business negotiation between the municipality and the developer. The parties made or did not make a deal regarding a particular proposed development project according to the specific benefits to each party.⁵⁶

As a result of these complications, formal plans often gathered dust on shelves while development proceeded through a process of finding projects mutually beneficial to individual builders and individual municipalities. Yet zoning required a comprehensive plan; therefore a new profession of land use planners continued to turn out numerous costly planning documents. They acted out a fiction that had little bearing on land development but was required by the rituals of the law.⁵⁷

The nuisance justification for zoning was equally a myth. In some cases, zoning did regulate true nuisances, for example, excluding a noisy factory from a development of single family homes. Yet, far more often, zoning excluded uses that were never in any real sense a nuisance. A typical zoning ordinance, for instance, might require that homes be built on

⁵³ See R. ROBERT LINOWES & DON T. ALLENSWORTH, *THE POLITICS OF LAND USE* 23-24 (1973); see also R. ROBERT LINOWES & DON T. ALLENSWORTH, *THE POLITICS OF LAND-USE LAW* (1976).

⁵⁴ COYLE, *supra* note 40, at 18.

⁵⁵ See RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* (1966).

⁵⁶ See CITY DEAL MAKING (Terry Jill Lassar ed., 1990); ALAN A. ALTSHULER & JOSE A. GOMEZ-IBANEZ, *REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS* (1993).

⁵⁷ See ALAN A. ALTSHULER, *THE CITY PLANNING PROCESS* 392-405 (1965); BERNARD J. FRIEDEN, *THE ENVIRONMENTAL PROTECTION HUSTLE* 157-83 (1979).

lots of one acre or more. Although the neighborhood prohibited half acre lots, this exclusion could not be justified by any reasonable understanding of traditional nuisance standards. Zoning was in fact being used to address aesthetic matters and neighborhood environmental attractiveness generally, areas normally outside the scope of nuisance control.

B. *A Property Right to the Neighborhood Environment*

Maintaining the character of existing neighborhoods was thus the actual purpose of zoning.⁵⁸ A neighborhood of one acre lots excluded half acre lots because it was inconsistent with the "ambiance," the "prestige," and the "quality" of the neighborhood. Zoning ensured that only people of sufficient economic means, those able to afford at least a one acre lot, could enter the neighborhood. In such respects, zoning conferred a collective property right to neighborhoods. If the defining feature of a property right is the power to exclude others, zoning gave neighborhoods precisely this legal ability. Zoning created a collective property right because it gave the entire neighborhood, exercising its political influence over the municipal administrators of zoning, the collective power to exclude unwanted uses.

As with any ordinary property right, an important social consequence of zoning was the segregation of residential neighborhoods according to economic means.⁵⁹ Although this kind of wide-ranging protective function for neighborhood quality was never part of the early official legal justifications for zoning,⁶⁰ the actual purposes that zoning served were well understood by at least the 1960s. In 1968, the National Commission on Urban Problems observed that:

Zoning . . . very effectively keeps the poor and those with low incomes out of suburban areas by stipulating lot sizes way beyond their economic reach. Many suburbs prohibit or severely limit the construction of apartments, townhouses, or planned unit developments which could accommodate more people in less space at potential savings.⁶¹

[Zoning] regulations still do their best job when they deal with the type of situation for which many of them were first intended; when the objective is to protect established character and when that established character is uniformly residential. It is in the "nice" neighborhoods, where the regulatory job is easiest, that regulations do their best job.⁶²

If the practical consequence of zoning was to provide a collective private property right, why not simply provide this property right directly

⁵⁸ See EAGLE, *supra* note 41, at 347.

⁵⁹ See *id.* at 349-50.

⁶⁰ TOLL, *supra* note 44, at 266; see also BABCOCK, *supra* note 55, at 116.

⁶¹ NAT'L COMM'N OF URBAN PROBS., BUILDING THE AMERICAN CITY, H.R. DOC. NO. 91-34, at 7 (1969).

⁶² *Id.* at 16.

through private means? As noted above, this is in fact what has happened since the 1960s, as the creation of neighborhood associations has become standard operating procedure for new development in many parts of the country. A neighborhood association provides privately the same legal authority afforded by zoning, namely, the establishment of detailed control over the use of property as it affects the character of the neighborhood. Because the neighborhood association is explicit about its exclusionary function, it can provide greater administrative discretion and flexibility for the neighborhood than public zoning controls.

Although neighborhood associations were just coming into prominence in the 1960s, the National Commission on Urban Problems recognized the similarity of function and the potential for substitution of private regulatory regimes for existing zoning. Indeed, for existing neighborhoods the Commission report in 1968 suggested that:

Another [reform] approach would be to create forms of land tenure which would recognize the interest of owners in what their neighbors do. Such tenure forms, which do not exist but which might resemble condominium tenure, might more effectively reconcile the conflicting interests of neighboring property owners than do conventional regulations. The objective of such tenure would be to leave the small scale relationships among neighbors for resolution entirely within the private sector, while public regulation would continue to apply to the neighborhood as a whole. In addition to giving neighborhood residents greater control over minor land-use changes within their neighborhood, such tenure could include provision for cooperative maintenance of properties where owners desire their services.⁶³

C. *An Exercise in Coercion*

The Commission did not follow up on this proposal with any specifics for implementation. Although new neighborhoods widely adopted the types of tenure proposed by the Commission, few existing neighborhoods followed this course. Older neighborhoods continue to rely on zoning, essentially because the transactions costs of assembling a new land tenure are prohibitive. Zoning never faced this problem because, as a form of government regulation, it could be imposed by fiat.

In existing neighborhoods where zoning was first imposed, government simply used its police power authority to redistribute coercively property rights in the neighborhood, canceling individual rights and imposing a collective property right regime. It was in a sense an exercise in eminent domain: The municipality took certain important rights from the neighborhood residents, but then provided compensation by giving the residents other new and valued collective rights. In most cases, the compensation was sufficient as the majority of neighborhood residents considered themselves as significantly better off in the end, and thus supported

⁶³ *Id.* at 248.

the new zoning for the existing neighborhood.⁶⁴ Some objectors were inevitable.⁶⁵ Under zoning, the preferences of holdouts were simply overridden by government action in accord with the wishes of the majority.

Nothing in American legal and policy traditions justified such a coercive government redistribution of residential private property rights within neighborhoods.⁶⁶ The closest analogy might be the urban renewal programs of the 1950s and 1960s, although in that case the government paid cash to owners of condemned property, rather than compensation through an assignment of new rights in the overall project.⁶⁷ Given the legal climate of the 1920s, had zoning been described accurately, the Supreme Court might have held it to be unconstitutional. At a minimum, the Court would have required local governments to enact legislation spelling out the true purposes of the rights assembly process provided by zoning, and the way in which new rights were created to compensate for the rights being taken. Instead, zoning operated under the various myths and fictions noted above, because it would have been politically difficult, if not impossible, to obtain acceptance for zoning if its real workings and purposes had been made explicit.

Thus, in retrospect, the nuisance law and planning justifications for zoning provided the necessary camouflage, as it were, to permit a fundamental land law innovation that was much more radical than the early advocates of zoning cared to admit.⁶⁸ Zoning did nothing less than redistribute neighborhood property rights to create a new *de facto* private collective right to the neighborhood environment, decades before the collective rights that are more explicitly and formally created today, as neighborhood associations spread across the landscape.⁶⁹

Today, of course, zoning is entrenched in many thousands of American neighborhoods. Given this history, it would be a less radical step now to recognize formally the real workings of zoning by acting to privatize its functions in these neighborhoods. In short, the proposal to allow existing neighborhoods to establish neighborhood associations would in many ways formally recognize and improve upon a process that has existed in-

⁶⁴ Otherwise, politically, the zoning would not have happened.

⁶⁵ See BABCOCK, *supra* note 55, at 140.

⁶⁶ See *id.* at 115.

⁶⁷ In other countries, there have been "land pooling" programs whereby the government condemns property in an area expected to be redeveloped in a new use, and then pays the original property owners by assigning them new rights in the overall collective land holding resulting from the pooling effort. See LAND READJUSTMENT: A DIFFERENT APPROACH TO FINANCING URBANIZATION (William A. Doebele ed., 1982).

⁶⁸ See BABCOCK, *supra* note 55, at 115-16.

⁶⁹ The growing popularity of historic districts in recent years reflects the fact that they accomplish much the same purposes as a full fledged neighborhood association and, like zoning, can be created by government fiat over the wishes of neighborhood holdouts. See Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473 (1981).

formally for many years. It would be a logical extension of longstanding American zoning practice.⁷⁰

D. *How Property Rights Evolve*

Such an evolution of zoning from a de facto collective right to a formal collective property right recognized in the law, moreover, would be consistent with longstanding patterns of property right evolution.⁷¹ Except in times of revolutionary turmoil, legislatures seldom create new property rights from whole cloth.⁷² Rather, property rights emerge gradually from informal practice, often at odds with the accepted economic and property right theories of the day. As experience accumulates, however, the informal practice becomes better understood and the merits better appreciated. At a still later point, the informal practice may then gain full acceptance and perhaps codification.⁷³ The typical role of the legislature, in short, is not to create new rights but to ratify rights that evolve. This process can take decades or even centuries.⁷⁴

For example, early settlers of the American west engaged in widespread illegal occupancy of the land.⁷⁵ Although the federal government regarded squatters as law breakers, it was without the power to stop their actions on a distant frontier. Eventually, political pressures drove the federal government to confirm the original squatter occupancy as a legal property right. When the Homestead Act passed in 1862, it was not a new idea but a final recognition by the federal government that squatting was a fact of frontier life. Rather than futile and ultimately harmful efforts to prevent it, the better course was accepting and regulating squatter actions, as the Homestead Act did.

Describing the long history of British land law, Sir Frederick Pollock wrote that "[t]he history of our land laws, it cannot be too often repeated, is a history of legal fictions and evasions, with which the Legislature vainly endeavoured to keep pace until their results . . . were perforce acquiesced in as a settled part of the law itself."⁷⁶ Although the substantive workings changed dramatically, the outward form of English land tenure

⁷⁰ NELSON, *supra* note 43, at 7-21.

⁷¹ See Robert H. Nelson, *Private Rights to Government Actions: How Modern Property Rights Evolve*, 1986 U. ILL. L. REV. 361.

⁷² See Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).

⁷³ See OLIVER WENDELL HOLMES, *THE COMMON LAW* (Mark DeWolfe Howe ed., 1963) (1881).

⁷⁴ The law of usury, for example, evolved in this manner. Usury was at first prohibited formally, but the charging of interest was widely practiced through a host of indirect devices that had the same practical effect. Eventually, although it took many centuries, the direct charging of interest became routine and legally permissible. See JOHN T. NOONAN, *THE SCHOLASTIC ANALYSIS OF USURY* (1957).

⁷⁵ See PAUL W. GATES, *A HISTORY OF PUBLIC LAND LAW DEVELOPMENT* (1968); see also ROBERT H. NELSON, *PUBLIC LANDS AND PRIVATE RIGHTS* ch. 1 (1995).

⁷⁶ FREDERICK POLLOCK, *THE LAND LAWS* 64-65 (Fred B. Rothman & Co. 3d ed. 1979) (1883).

varied little from the thirteenth to the nineteenth centuries. As Pollock described the manner of property right evolution in Britain up to the late nineteenth century,

[Over this period] the system underwent a series of grave modifications. Grave as these were, however, the main lines of the feudal theory were always ostensibly preserved. And to this day, though the really characteristic incidents of the feudal tenures have disappeared or left only the faintest of traces, the scheme of our land laws can, as to its form, be described only as a modified feudalism.⁷⁷

In the twentieth century, we like to think that the world is more rational; governments should do what they say they are doing. Whole professions, including the field of American public administration, depend upon the assumption that the true goals of society can be stated directly, and realized by a process of rational selection among the alternatives. However, the history of zoning suggests otherwise. Zoning followed the traditional route of property right development; it was yet another process of land law making and evolution of rights under the guise of various legal myths and fictions that served to obscure its real purposes.

V. THE PROPERTY RIGHT SCHOOL OF ZONING

As the land law evolves, there usually have been some people who have foreseen and advocated the later property right outcome. As the evolving nature of the land laws is better understood, and the merits of new ways of doing things better appreciated, their views might even prevail. In the short run, the mainstream tended to dismiss their arguments as heretical and unacceptable because acceptance of these arguments would endanger the existing property right regime, an unacceptable outcome to the broader society.

In the 1960s, Richard Babcock, a leading American zoning lawyer took a dangerous step towards eroding the legitimacy of the system. Babcock provided an accurate depiction of zoning practice in the trenches, showing that there was little connection to the received legal theory.⁷⁸ By avoiding radical cures and proposing that the solution to zoning problems instead lay in reviving the original planning principles of zoning, however, Babcock largely preserved his mainstream status.

Instead, it was the members of a new "property right" school of zoning who flirted with, if not fully entered into, the realm of zoning heresy.⁷⁹ Although the members of this school differ on a number of points, they have in common outright dismissal of the traditional rationales for zoning

⁷⁷ *Id.* at 53.

⁷⁸ BABCOCK, *supra* note 55.

⁷⁹ Robert H. Nelson, *Zoning Myth and Practice: From Euclid into the Future*, in ZONING AND THE AMERICAN DREAM, *supra* note 47, at 299, 306.

and instead analyze zoning as a redistribution of property rights with certain social and economic consequences.

A. *Coasian Analysis*

Ronald Coase's path-breaking 1960 article, "The Problem of Social Cost," revived scholarly interest in the institutional role of property rights, first among economists and then extending to legal scholars through the law and economics movement.⁸⁰ In the article, Coase highlighted that adequately defined property rights obviated the need for government intervention in many perceived social problems. Instead, private negotiation could often resolve these problems.

An "externality," for example, did not necessarily require government regulation, as most economists had long supposed. Rather, a party negatively affected by the external impacts of some action could also stop it by paying for its cessation or modification. Or, if this party already had the legal right to stop the activity, payments could compensate him for allowing continued activity. In either case, the most economically efficient outcome resulted. The social importance of well-defined property rights was that their clear specification up front might greatly reduce the transactions costs of such efficient bargaining.⁸¹

Since zoning attempts to deal with the pervasive externalities in the urban land market, the institution of zoning was an obvious candidate for the application of Coasian principles. Among the first to recognize this possibility was Dan Tarlock, who argued in 1972 that

contemporary zoning should be conceptualized as a system of joint ownership between the public entity and the regulated private owner. It is a form of joint ownership in which the owner of the fee [simple ownership] retains possession of the right to manage subject to a veto by a comanager, the public entity.⁸²

Although Tarlock did not say so directly, such a form of joint ownership is also characteristic of a homeowners association, condominium or other collective private property ownership.

For existing neighborhoods with separately owned properties, Tarlock found that high transactions costs of private actions to protect neighborhood quality often posed an insurmountable obstacle to collective private efforts.⁸³ Zoning was therefore a second-best choice; lacking a solution to the free rider problem, government had to "intervene through a zoning

⁸⁰ R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). This article was the most important reason for Coase's receipt of the Nobel prize in economics in 1991.

⁸¹ There was also a significant effect on the distributional outcome.

⁸² A. Dan Tarlock, *Toward a Revised Theory of Zoning*, in LAND USE CONTROLS ANNUAL 141 (Frank S. Bangs, Jr. ed., 1972).

⁸³ *Id.* at 146.

ordinance to simulate the result that would have been accomplished had the initial landowners but for high transaction costs been able to impose a covenant scheme on surrounding landowners."⁸⁴ Zoning could thus be justified because by itself "private collective action fails to provide sufficient quantities of a desired public good, in this case [neighborhood] amenity levels."⁸⁵

However, Tarlock recognized a problem: Municipalities tended to rigidly administer their new zoning authority. Unlike an ordinary private property owner, the municipality could not profit monetarily (legally, that is) from the transfer of the zoning rights to someone else. To address this problem, and thereby improve the efficiency of land market operations, Tarlock suggested it would be helpful "if existing [neighborhood] users took some sort of collective action to bind themselves to a bargain such as a voting procedure or the creation of a board to act for them."⁸⁶ With this collective organization they could bargain with potential entrants into the neighborhood. As Tarlock elaborated:

Under the existing zoning system subsequent users who wish to deviate from the surrounding land-use pattern must "buy" their way in through the political process. Majority approval from an appointed commission or elected local legislative body is required. The process, I have argued, is very costly and produces doubtful efficiency gains. Arguably the costs of administering a zoning system would be decreased and efficiency gains more certain if entrants had to bargain directly with surrounding landowners. The function of the government would be to impose an initial covenant scheme and then let the market or a close proxy determine subsequent reallocations of land.⁸⁷

In other words, as Tarlock suggested, the neighborhood should possess the property rights to neighborhood entry, with the option to sell these rights. This approach would open the land market to greater and easier entry for new uses that might be socially desirable. Professor Robert Ellickson developed a related proposal, if in considerably more detail, for the application of Coasian principles to land use regulation.⁸⁸ Nuisance law and zoning, Ellickson observed, ignored important options that might promote a more efficient use of the land.⁸⁹ If the courts declared an activity a nuisance, under current law they would simply issue an injunction to halt it or use zoning to keep it out in the first place.

⁸⁴ *Id.*

⁸⁵ *Id.* at 145.

⁸⁶ *Id.* at 146.

⁸⁷ *Id.* at 147.

⁸⁸ Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973) [hereinafter Ellickson, *Alternatives to Zoning*]; see also Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977) [hereinafter Ellickson, *Suburban Growth Controls*].

⁸⁹ Ellickson, *Alternatives to Zoning*, *supra* note 88.

B. *Compensation for Regulatory Changes*

A more economically efficient result, however, might be for the objectionable activity to locate where it wished but to pay nearby property owners compensation for any damages. For example, if a high tech company had a strong incentive to move into a particular neighborhood (perhaps its most valued employees lived there), it might be better to allow the company to negotiate with the neighbors living nearby, rather than issuing an absolute prohibition on nuisance or zoning grounds. In effect, following a Coasian scheme, this approach emphasizes property right negotiation, rather than public regulation of a perceived unacceptable harm through nuisance or zoning law.

In 1977 Ellickson extended this analysis to broader aspects of land use law.⁹⁰ He argued that there should be a "normal" standard of zoning restriction defined for undeveloped land in the specific circumstances of each suburban community. If the municipality wanted to impose tighter restrictions on a particular parcel, say to preserve open space, it would have to adequately compensate the landowner for the loss of land value. In effect, establishment of a "normal" standard of development created a legal criterion that allowed division of the development rights at any given site between the municipality and the land owner. The landowner would possess some "sticks" in the overall bundle of land rights outright, while the municipality shared the remaining development rights. Unlike a number of others in the property right school, for fairness and other reasons, Ellickson did not propose allowing the municipality to sell its zoning rights for general municipal revenues or other types of broad benefit.⁹¹ Thus, the municipality would not possess the full benefits of ownership of its portion of the development rights (and in this respect, partly depending on how well "normal" development was defined, there could remain a legal obstacle to the efficient use of the land).

The basic thrust of the Tarlock and Ellickson arguments is that, in essence, zoning constitutes a redistribution of property rights and that there are significant advantages to more formally recognizing and dealing with it as such. Another law professor, Bernard Siegan, also viewed zoning as a matter of a redistribution of property rights but came to a much different policy conclusion.⁹² The nuisance and planning justifications for zoning, he agreed, are patently false. Indeed, in Siegan's view there is no justification—either in legal thought or in social or economic theory for the coer-

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* (1972) [hereinafter SIEGAN, *LAND USE WITHOUT ZONING*]; see also BERNARD H. SIEGAN, *PROPERTY AND FREEDOM* (1998); BERNARD H. SIEGAN, *OTHER PEOPLE'S PROPERTY* (1976).

cive redistribution of property rights between municipalities and landowners that zoning accomplished.⁹³ The whole scheme is a fraud of sorts.⁹⁴ Once municipalities took possession of their new zoning rights, municipal politicians found it impossible to resist the temptation to exercise the rights promiscuously. Zoning ultimately served the political interests of the most powerful elements of the municipality, rather than any public interest. This result was unnecessary. As Siegan contends, and sought to demonstrate by his study of Houston,⁹⁵ covenants and other private solutions achieve valid zoning purposes just as well.⁹⁶ The solution to all this, as Siegan argued, is straightforward: Zoning must be abolished.

In 1977, I made the redistribution of property rights accomplished by zoning in existing neighborhoods still more explicit.⁹⁷ On the whole, while the legal profession did not get high marks for intellectual forthrightness or integrity, the scheme seemed to work in such neighborhoods. Creating new collective property rights for neighborhoods had the same beneficial incentive and other effects as any other system of property rights would have in other areas of economic activity. Property rights in neighborhood environmental quality created the necessary incentives to build and maintain high quality neighborhood environments. Similarly, the private rights to the profits of a business created the necessary incentives to form new businesses, or the private rights to the future use of one's personal property created the incentive to purchase and then maintain this property.

In undeveloped areas, however, I argued that the policy considerations relating to zoning were fundamentally different from existing neighborhoods.⁹⁸ On farm and other vacant land on metropolitan fringes, land facing the prospect of new housing development, zoning effectively redistributed the property rights from the original landowners to others in the municipality. Recent entrants, arriving at higher densities of housing development and with the voting strength to take political control in the municipality typically benefited from this redistribution. In existing neighborhoods zoning met a key test, as described by Richard Epstein, of an acceptable government regulation.⁹⁹ Although the existing neighborhood residents lost some rights, they gained sufficient other rights in return that, in most cases, they were adequately compensated. In an undeveloped area, however, farmers or other original landowners lost the development rights but did not receive any significant rights or other compensation in return.

⁹³ SIEGAN, *LAND USE WITHOUT ZONING*, *supra* note 92, at 231.

⁹⁴ *See id.* at 75-76.

⁹⁵ Houston is the only major city in the United States without zoning.

⁹⁶ SIEGAN, *LAND USE WITHOUT ZONING* *supra* note 92.

⁹⁷ *See NELSON*, *supra* note 43.

⁹⁸ *See id.* at 22-51.

⁹⁹ RICHARD EPSTEIN, *TAKINGS* 195-96 (1985).

In effect, zoning resulted in an outright confiscation of development rights by the municipal government.

C. *Buying and Selling Zoning*

One solution, following Siegan, would be to abolish zoning for undeveloped land, as an unconstitutional taking of private property. However, given the great political uproar that would follow any such step, and the inevitable hesitation of the courts to provoke such intense public anger, I suggested what might be a politically more promising possibility.¹⁰⁰ Municipalities should be allowed to sell zoning directly. This approach recognizes the urgent social need to make more land development rights available in the market, and that the municipalities effectively possess these rights.

Sale of zoning might be ethically questionable because it would reward municipalities for an unjustified initial confiscation of property rights. Nevertheless, in many cases the courts' failure to put any real limits on government zoning actions occurred decades ago; the resulting taking is an accomplished fact of life. There may be no way to compensate the original losers; subsequent purchasers of the land did not suffer any loss, because they had paid a lower price, reflecting the restricted development rights that went with the land. Indeed, giving later purchasers new development rights would bestow an unexpected windfall on this group.

Economics Professor William Fischel, in a series of writings beginning in 1978, focused his attention on the problem of zoning undeveloped land.¹⁰¹ Like others in the property right school, Fischel argued that zoning transferred key development rights from owners of vacant land to the municipality. In his view, the problem was that the justifications for zoning also made the municipal sale of zoning difficult or impossible. Governments are not supposed to sell relief from their regulations; that would be regarded as "bribery."¹⁰²

In practice, municipalities routinely sold zoning.¹⁰³ One commentator said in the mid-1960s that by the very nature of its workings, zoning posed an almost irresistible "invitation to bribery."¹⁰⁴ In 1966, observing the widespread corruption in zoning decisions, Marion Clawson proposed that

¹⁰⁰ Robert H. Nelson, *Marketable Zoning: A Cure for the Zoning System*, LAND USE L. & ZONING DIG., Nov. 1985, at 3.

¹⁰¹ FISCHEL, *ECONOMICS OF ZONING LAWS*, *supra* note 7; see also William Fischel, *Zoning and Land Use Reform: A Property Rights Perspective*, 1 VA. J. NAT. RESOURCE L. 69 (1980); William Fischel, *Equity and Efficiency Aspects of Zoning Reform*, 27 PUB. POL'Y 301 (1979) [hereinafter Fischel, *Equity and Efficiency*]; William Fischel, *A Property Rights Approach to Municipal Zoning*, 54 LAND ECON. 64 (1978).

¹⁰² See JOHN T. NOONAN, JR., *BIBES: THE INTELLECTUAL HISTORY OF A MORAL IDEA* (1984).

¹⁰³ RICHARD F. BABCOCK & WENDY U. LARSEN, *SPECIAL DISTRICTS 1-2* (1990); see also ALTSHULER & GOMEZ-IBANEZ, *supra* note 56.

¹⁰⁴ Alfred Balk, *Invitation to Bribery*, HARPER'S MAG., Oct. 1966, at 18.

it would be simpler and better to dispense with the fictions and to have "open, competitive sale of zoning and zoning classifications."¹⁰⁵ In essence, what Clawson was saying was, "Let's call it a property right and put it back into the marketplace like any other property right." In 1979, Fischel made a similar proposal, suggesting adoption of a new system in which "any existing zoning restriction may be sold by the community."¹⁰⁶ The payments received "should be made to the general municipal treasury, to be dispersed as decided upon by community rules."¹⁰⁷

D. Zoning under Attack

By the early 1980s, the critique of zoning as developed by the property right school achieved wider recognition. New influential articles portrayed zoning as a redistribution of property rights with perhaps some practical benefits but also many harmful consequences. A succession of law journal articles appeared with titles such as *Abolish Zoning*,¹⁰⁸ *California's Land Planning Requirements: The Case for Deregulation*,¹⁰⁹ *Deregulating Land Use: An Alternative Free Enterprise Development System*,¹¹⁰ *Brandeis Brief for Decontrol of Land Use: A Plea for Constitutional Reform*,¹¹¹ and *Local Land Use Controls: An Idea Whose Time Has Passed*.¹¹² By 1983, Douglas Porter asked, "Who likes zoning? Hardly anyone, if you listen to recent criticisms of zoning standards, zoning procedures, and the whole zoning concept. Bemoaning zoning seems to be a major sport these days."¹¹³

The critics' common theme was that the hopes for expert management of urban land use through comprehensive land planning had failed. Critics argued that a narrow group captured zoning benefits; zoning restrictions kept valuable suburban land bottled up in less productive uses; and that, in general, the broader public interest in a fair and efficient land

¹⁰⁵ Marion Clawson, *Why Not Sell Zoning and Rezoning (Legally, That Is)*, CRY CAL., Winter 1966-67, at 9.

¹⁰⁶ Fischel, *Equity and Efficiency*, *supra* note 101, at 322.

¹⁰⁷ *Id.*

¹⁰⁸ Jan Z. Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719 (1980).

¹⁰⁹ George Lefcoe, *California's Land Planning Requirements: The Case for Deregulation*, 54 S. CAL. L. REV. 447 (1981).

¹¹⁰ Douglas W. Kmiec, *Deregulating Land Use: Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28 (1981).

¹¹¹ Mark S. Pulliam, *Brandeis Brief for Decontrol of Land Use: A Plea for Constitutional Reform*, 13 SW. U. L. REV. 435 (1983).

¹¹² Orlando E. Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 MAINE L. REV. 261 (1984).

¹¹³ Douglas Porter, *On Bemoaning Zoning*, URBAN LAND, Mar. 1983, at 34; *see also* Robert Nelson, *Rethinking Zoning*, URBAN LAND, July 1983, at 36.

market suffered as a result.¹¹⁴ The biggest beneficiaries were the groups already well off in American society, while the losers were those whose income level precluded them from finding good land at acceptable prices for homes. Lower and moderate income groups remained clustered in older housing in existing cities, the only places that they could afford.

The Report of the President's Commission on Housing in 1982 carried these arguments from the law journals to the public policy arena. The Commission found that "[e]xcessive restrictions on housing production have driven up the price of housing generally," creating concern for "the plight of millions of Americans of average and lesser income who cannot now afford homes or apartments."¹¹⁵ To redress this unacceptable outcome, the Commission offered recommendations for a detailed "program of land use deregulation."¹¹⁶

E. 1980s Trends

The old zoning warrior and practitioner, Richard Babcock, regarded these attacks on zoning as the lamentations of yet another group of academics removed from the real world. Babcock declared that, whatever the legal and economic scholars were saying, "people love zoning" and therefore it is "alive and well . . . in every urban and suburban neighborhood" and would remain for a long time to come.¹¹⁷ Zoning was going its merry way, independent of all the scholarly fussing and fuming.¹¹⁸ Rather than theorizing about an end to zoning, Babcock characteristically thought it more important to see what was really happening on the ground. Here, he discerned two basic trends in the 1980s in zoning practice. One was an increasing insistence by municipalities that they be compensated for zoning changes.¹¹⁹ As Babcock wrote:

Governments simply are not playing the game unless they demand exactions. In one of the last cases in which I was involved, a city asked the developer of a particular project to build a \$750,000 swimming pool—on the other side of town from the project. What did the developer do? After figuring out the cost of litigation, the time it would take, and the interest on the construction loan he was paying the bank, he agreed to build the swimming pool—even though it had nothing to do with his development.¹²⁰

¹¹⁴ See RESOLVING THE HOUSING CRISIS: GOVERNMENT POLICY, DECONTROL, AND THE PUBLIC INTEREST (M. Bruce Johnson ed., 1982).

¹¹⁵ THE REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING 199 (1982).

¹¹⁶ *Id.*

¹¹⁷ Richard Babcock, *The Outlook for Zoning*, URBAN LAND, Nov. 1984, at 34.

¹¹⁸ RICHARD F. BABCOCK & CHARLES L. SIEMON, *THE ZONING GAME REVISITED* (1985).

¹¹⁹ See Richard Babcock, *The City as Entrepreneur: Fiscal Wisdom or Regulatory Folly*, in CITY DEAL MAKING, *supra* note 56.

¹²⁰ Babcock, *supra* note 117, at 34.

In Washington, D.C., the Department of Housing and Community Development wanted its compensation in cash, rather than an in-kind payment like a swimming pool. For example, in 1987 *The Washington Post* reported that the Hadid Development Company proposed building a large office building near the D.C. Convention Center. In exchange for development permission, Hadid offered to donate \$1.4 million to a general purpose low income housing fund but the D.C. government wanted \$4.6 million. The *Post* reported that "the zoning commission sent the entire Hadid case to the housing agency to determine if the cash offer was appropriate."¹²¹

The second important trend Babcock noted was the rise of "special districts" by municipalities. Cities exercised tighter control over new development in these districts. They also often imposed detailed requirements for development permission. For instance, New York City effectively required that new office towers and hotel buildings provide a Broadway theatre on the lower floors in the Times Square special district.¹²²

As usual, Babcock was an accurate and insightful reporter on recent zoning practices. Unfortunately, his analysis in some ways missed the forest for the trees. The key fact that Babcock failed to note was that these trends are consistent with the predictions and recommendations of the property right school of zoning. By 1990, Babcock observed that the "bargaining for zoning—the let's make a deal mentality—became the common denominator of zoning in the 1980s. . . . Cynical observers suggested that the system of bargains and exactions was little more than 'zoning for sale.'"¹²³

In other words, the earlier recommendations of Tarlock, Fischel and others that municipalities sell zoning were in a real sense being followed; cities and suburban municipalities alike routinely marketed zoning and other regulatory permissions. Marketable zoning also had the predicted salutary effect of opening up space for socially desirable new uses of land. Ironically perhaps this marketing reduced the pressures for more direct zoning reforms. But true to the history of land law evolution, this shift took place in indirect and informal ways, often at odds with the received theory of zoning. Babcock, for example, rather than welcoming it as a necessary corrective to fundamental problems in the basic workings of zoning, expressed his dismay and disgust with the widespread, thinly disguised

¹²¹ Tom Precious, *D.C. Seeks to Raise Hadid 'Linkage' Fee*, WASH. POST, Nov. 14, 1987, at E1.

¹²² BABCOCK & LARSEN, *supra* note 103, at 32.

¹²³ *Id.* at 1-2.

sale of zoning. His criticisms notwithstanding, Babcock offered no practical proposal of his own to open up more land for development.¹²⁴

A similar observation applies to special zoning districts.¹²⁵ Special districts were most common in larger cities. One effect of the special district was to shift the focus of zoning administration from the municipal to the neighborhood level. Rather than city-wide administration of zoning, each neighborhood had its own special zoning arrangements. Indeed, special districts often had much more detailed rules than in an ordinary zoning district, covering matters of architectural style and other aesthetic concerns. When combined with a "business improvement district," special districts can assess property owners within the district for security, street cleanup, and other district services.¹²⁶ In short, the new special district was virtually a private neighborhood association, except that it was created in an existing city neighborhood, rather than by the developer of a brand new neighborhood in the suburbs. Special districts also often actively entered into the ongoing bargaining processes for zoning sales as districts granted development permission in return for other general benefits provided by the developer.

VI. THE ORIGINS OF PRIVATE NEIGHBORHOODS

On the whole, the members of the property right school tended to focus on the need to recognize zoning as a basic new property right institution, and on the importance of allowing the freedom to buy and sell newly created rights in the market. There has been much less attention among the members of this school to the need to develop intermediate institutions such as the neighborhood association as a means of facilitating such market transactions.¹²⁷ Zoning theorists also pay less attention to the

¹²⁴ For a more ambitious set of proposals, see ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* (1994).

¹²⁵ See BABCOCK & LARSEN, *supra* note 103.

¹²⁶ Richard Briffault, *A Government for our Time?: Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. (1999); see also LAWRENCE O. HOUSTON, JR., *BUSINESS IMPROVEMENT DISTRICTS* (1997).

¹²⁷ One partial exception is Robert Nelson, *Private Neighborhoods: A New Direction for the Neighborhood Movement*, in *LAND REFORM, AMERICAN STYLE* (Charles C. Geisler & Frank J. Popper eds., 1984). The concept developed in this paper is briefly sketched in an earlier article as follows:

Current trends toward greater collective possession of important neighborhood property rights could be significantly stimulated by the creation of a new, more satisfactory neighborhood tenure. Protection of neighborhood quality ought to be provided under private tenures. A new private tenure instrument—the neighborhood association—is proposed here for that purpose. The legal status of the neighborhood association would resemble in certain respects each of the already existing forms of collective property ownership. . . .

Under zoning, the local government effectively holds the rights to control new uses and major changes in property in a neighborhood. Under the tenure proposed, the zoning rights would instead be held directly by the neighborhood association. Hence, where a neighbor-

non-zoning benefits of private neighborhoods, such as the provision of neighborhood services or the encouragement of a stronger sense of neighborhood identity and community spirit.¹²⁸

Yet there is a rich history here. While the explosion of neighborhood associations occurred after the 1960s, neighborhood associations have been around in the United States since the nineteenth century, although used on only a limited scale.

A. *Early Neighborhood Associations*

The first neighborhood association in the United States was formed in 1831 to supervise the use of Gramercy Park in New York City.¹²⁹ A land developer, Samuel Ruggles, set aside and fenced in a common area for the mutual enjoyment of 66 surrounding residential lot owners. Ruggles then deeded over ownership of the central area to trustees with the lot owners collectively as the beneficiaries. The first homeowners association was established to provide for the upkeep of Louisberg Square in Boston. Built in 1826, the development included a central common area, but there was no special provision for its maintenance. In 1844, the twenty-eight nearby lot owners signed a mutual agreement establishing the Committee of the Proprietors of Louisberg Square, binding themselves and their successors to care for the park. This agreement was a rare instance in which a neighborhood association formed after the fact of development in individual home ownership.

Beginning in the 1890s, housing developers in the United States began building an increasing number of large planned private communities. To protect the character of the community environment, developers included extensive private covenants in the deeds binding both initial purchasers and subsequent owners. Enforcement in many cases depended on some individual pursuing the necessary legal actions. Since enforcement was uncertain, dependent on a volunteer willing to shoulder the costs, developers conceived the idea of a mandatory association to enforce the covenants and provide certain other common services. In 1914, a leading American community builder, James Nichols, established the first such association at the Mission Hills development near Kansas City, Missouri.¹³⁰

hood association was formed, the first step would be to transfer to it the existing zoning rights now held by the local government.

NELSON, *supra* note 43, at 207-08.

¹²⁸ Other writers have, however, addressed these potential benefits of neighborhood revitalization. See HARRY C. BOYTE, *THE BACKYARD REVOLUTION* (1980); PEGGY WIREMAN, *URBAN NEIGHBORHOODS, NETWORKS, AND FAMILIES* (1984); DAVID J. MORRIS & KARL HESS, *NEIGHBORHOOD POWER* (1975); NAT'L COMM'N ON NEIGHBORHOODS, *PEOPLE BUILDING NEIGHBORHOODS* (1979).

¹²⁹ This history draws heavily on MCKENZIE, *supra* note 4, at 29-78.

¹³⁰ See *id.* at 40; see also MARC A. WEISS, *THE RISE OF THE COMMUNITY BUILDERS* (1987).

By the 1920s, similar land development projects spread across the United States. The famous Radburn new town in New Jersey, designed in the 1920s by progressive reformers seeking to demonstrate the advantages of comprehensive social and physical planning, included an association that enforced an extensive set of covenants.¹³¹ The growing use of covenants and homeowner associations was, interestingly enough, almost coincident with the rapid spread of zoning. Both new property right institutions met similar needs; but, as noted above, in most cases only zoning was feasible in existing neighborhoods of individually owned homes. Where collective property rights could be established before-the-fact, it was possible to maintain a much tighter degree of control over neighborhood quality, as well as to employ the neighborhood association for various other common purposes. Another factor motivating the use of covenants was that the Supreme Court declared racial zoning unconstitutional in 1917, whereas it did not declare racially exclusive private covenants unconstitutional until 1948.¹³² A formal policy of racial segregation was an unfortunate feature of many large housing developments in both the north and south in the period between the wars.

Following World War II, individual home ownership soared in the United States. The Urban Land Institute (formed in 1936) and other builder organizations promoted the mandatory homeowner association to take care of parks, tennis courts and other common property in large developments.¹³³ Many developers employed this device although, as noted above, it is estimated that fewer than 500 neighborhood associations existed in the United States in 1962.¹³⁴ By 1973, the creation in that year of the Community Associations Institute reflected the fact that neighborhood associations were now a routine part of the American land development process.¹³⁵

VII. THEORIZING ABOUT PRIVATE NEIGHBORHOODS

Neighborhood associations were largely the response of land developers to practical real estate needs. However, although their work received little public attention, and had little impact on real world events, a few theorists wrote about private neighborhoods as early as the 1930s.¹³⁶ In a recent book, Fred Foldvary provides a useful survey of this early literature, introducing some of this insightful body of writings to a wider audience.¹³⁷

¹³¹ See Weiss & Watts, *supra* note 35, at 99.

¹³² See MCKENZIE, *supra* note 4, at 74-76.

¹³³ See *id.* at 39.

¹³⁴ See Dowden, *supra* note 17, at 27.

¹³⁵ See MCKENZIE, *supra* note 4, at 27.

¹³⁶ See FRED FOLDVARY, *PUBLIC GOODS AND PRIVATE COMMUNITIES* (1994).

¹³⁷ See *id.* at 86-113.

A. *Privatization of Local Governance*

In 1936, Spencer Heath proposed substituting private neighborhoods for local governments.¹³⁸ Heath's concept was that "the proprietary department eventually will take on and exercise its full administrative functions over all the public services."¹³⁹ Private proprietors would provide services to neighborhood residents (including enforcement of land use restrictions), charge land rent for the services, and keep any residual as the profit for their entrepreneurial role. Heath used the hotel as a model. The hotel represented "an organized community with such services in common as policing, water, drainage, heat, light and power, communications and transportation, even education facilities such as libraries, musical and literary entertainment, swimming pools, garden and golf courses, with courteous service by the community officers and employees."¹⁴⁰ In the future, whole neighborhoods of many homes and other types of properties, Heath suggested, should be organized and managed on the model of the private hotel.

Heath's grandson, Spencer Heath MacCallum, took up the cause. MacCallum observed in a 1965 article that a new species of private property emerged in the United States after World War II.¹⁴¹ The private shopping center, for example, built and operated by private entrepreneurs, was supplanting the strip highway development of the past. Other new forms of land development included industrial parks, professional and research centers, marinas, mobile home parks, medical centers, and many types of multifunctional building complexes. In these new forms of property, one found "all of the functional requirements of municipalities."¹⁴² Indeed, MacCallum argued that "there are no longer any political functions being performed at the municipal level and upward in our society that differ substantially from those that we can observe being performed on a smaller scale entirely within the context of normal property relations."¹⁴³

In 1970, MacCallum observed further that in private ownerships "the manner of the relationship of each toward the others is specified in the terms of the individual contracts, the sum of which at any time is the social charter or constitution of the community."¹⁴⁴ Hence, constitutions were not

¹³⁸ Spencer Heath, *Politics Versus Proprietorship* (1936) (unpublished manuscript, on file with author).

¹³⁹ Spencer Heath, *Outline on the Economic, Political, and Proprietary Departments of Society* 65-66 (1936) (unpublished manuscript, on file with author).

¹⁴⁰ SPENCER HEATH, *CITADEL, MARKET AND ALTAR* 82 (1957).

¹⁴¹ Spencer MacCallum, *The Social Nature of Ownership*, 9 *MODERN AGE* 49, 58 (Winter 1964-65) [hereinafter MacCallum, *Social Nature*]; see also Spencer MacCallum, *Associated Individualism: A Victorian Dream of Freedom*, 4 *REASON* (April 1972).

¹⁴² MacCallum, *Social Nature*, *supra* note 141, at 58.

¹⁴³ *Id.*

¹⁴⁴ SPENCER MACCALLUM, *THE ART OF COMMUNITY* 5 (1970).

limited to nations, states, or other sovereign entities. A private organization, like a neighborhood association, could have a constitution of sorts as well, setting well defined and difficult-to-change rules governing future relations among those who lived within its boundaries.¹⁴⁵

Municipal governments also had charters or other founding documents that represented yet another constitutional form. However, private territorial associations had an advantage in that their private status offered flexibility in constitutional design typically denied to public bodies. For example, as required by the Supreme Court, the rule of one-person, one-vote applied necessarily to a public entity, but private associations could experiment freely in this regard.¹⁴⁶ Private associations could engage in various profit making activities generally considered inappropriate for a municipal agency. They might, for example, operate a drug store, bank or insurance office. As mentioned above, they might also decide to enter the business of selling entry into a neighborhood, while a municipality could not similarly sell the zoning (or at least could not do so legally, in a manner that could be formally authorized by its constitution).

Another advantage of the private neighborhood association is its greater insulation from unilateral governmental alteration of the initial constitutional terms. For example, if the government attempted to regulate a private association such regulation might be declared a taking of private property, requiring that the state either desist or pay compensation for its impositions on the neighborhood. Certainly, new judicial decisions and legislation can override the provisions of a neighborhood association's founding documents, such as a new law banning age or handicapped discrimination in any private actions, including those of a neighborhood association. However, municipal governments are the creatures of state governments and the full terms of their municipal founding documents are potentially subject to state revision. The security of municipal constitutional forms, thus, may be less than private associations.

The private developers of new neighborhoods, MacCallum observed, seek "to optimize the total environment of each site within a system of sites to maximize the combined rents they will command."¹⁴⁷ MacCallum notes that in shopping centers and other large business properties, the ownership is typically retained by the developer, who then rents out space to the business tenants. In residential private neighborhoods, however, ownership typically transfers directly to the residents themselves through collective ownership vehicles such as a condominium or a homeowners

¹⁴⁵ See Susan F. French, *The Constitution of a Private Residential Association Should Include a Bill of Rights*, 27 WAKE FOREST L. REV. 345 (1992); Richard Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906 (1988).

¹⁴⁶ See *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁴⁷ MACCALLUM, *supra* note 144, at 50.

association. MacCallum, who strongly favors the shopping center model of a single private owner renting to individual tenants, attributes the prevalence of individual resident ownership of one's own unit to the greater federal tax advantages afforded to owning a residence, as compared with renting.¹⁴⁸ Foldvary suggests that the scarcity of rental arrangements may be due as well to the "economic and cultural values of living in a democratically run community."¹⁴⁹ There may also be significant psychological benefits to owning property.¹⁵⁰

Another possible explanation is that the "principal-agent" problem may take a different form in business and residential common properties. Many tenants of shopping centers typically have time horizons of five years or less, while purchasers of homes and other residential units commonly plan to stay for twenty years or more. It may be easier to move out of a shopping center that proves to have incompetent management, as compared with leaving a residential community. The determinants of neighborhood quality may involve greater elements of subjective judgment in the case of residential property, thus making it more difficult to specify in a contract the standards of quality to be maintained over a long period of time. As a result, residents of neighborhoods may prefer to take collective ownership of their own neighborhood, while control of business "neighborhoods," like shopping centers, is left more easily in the hands of the developer under a rental agreement with the tenants.

Drawing on the writings of Heath, MacCallum and others, Foldvary proposes that the advantages of private neighborhoods are so great that the place of municipal governments in American life should be greatly circumscribed. As Foldvary explains:

To sum up, the theory of contractual community thus has these elements. The private ownership of space permits the collection of the rents generated by the civic services which induce the rents. Communities such as hotels, shopping centers, industrial parks and estates, and ships are examples of the [private] proprietary provision of civic goods. Residential community associations are another form of contractual governance, many of which implement Ebenezer Howard's conception of city services financed by site leases. Their constitutions are typically provided for by the developers, enhancing the value of the property with constraints against future exploitation by the association governance. Civic entrepreneurs also foster community spirit, sympathy with the community, which enables non-excludable civic goods to be produced in addition to funding by rental assessments. Finally, a theory of public goods needs to recognize that society is always in community, and that the realistic choice in the provision of civic goods is not market versus governance, but whether the governance that provides the goods is imposed or voluntary.¹⁵¹

¹⁴⁸ See Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEGAL STUD. 25 (1991).

¹⁴⁹ FOLDVARY, *supra* note 136, at 97.

¹⁵⁰ See Mark Frazier, *Privatizing the City*, POL'Y REV. 91 (Spring 1980).

¹⁵¹ FOLDVARY, *supra* note 136, at 111.

B. *Liebmann Concept*

Another recent advocate of private neighborhoods is George Liebmann who, in a 1993 article, called for substantial "devolution of power to [private] community and block associations."¹⁵² Private associations, he argued, could assume a much greater role in functions such as day care, traffic regulation, zoning adjustments, schooling, and law enforcement. Liebmann proposed that state governments enact enabling legislation to allow existing neighborhoods to form a neighborhood association. In order to establish a new association, he suggested a requirement that two-thirds of the neighborhood residents approve it.¹⁵³

Neighborhood associations would have the authority to provide services in the neighborhood and would have much greater flexibility than existing zoning in administering controls over the entry of new uses into the neighborhood. Specific responsibilities suggested by Liebmann for neighborhood associations included, among others:

1. Operating or permitting the operation of family day care centers;
2. Operating or permitting the operation of convenience stores, of not more than 1,000 square feet in area, whose signage is not visible from a public road;
3. Permitting the creation of accessory apartments where a principal residence continues to be owner occupied;
4. Cooperatively acquiring building materials and services for the benefit of its members;
5. Partially closing roads and streets, imposing right of way regulations, and enhancing safety barriers, except where local government finds that the closure, regulation, or obstruction interferes with a street necessary to through traffic;
6. Petitioning local government for imposition of a juvenile curfew on association property;
7. Contracting with local government to assume responsibility for street paving, trash collection, street lighting, snow removal, and other services;
8. Acquiring from local government contiguous or nearby public lands;
9. Petitioning local government for realignment of election precinct and voting district boundaries to conform to association boundaries;

¹⁵² George Liebmann, *Devolution of Power to Community and Block Associations*, 25 URB. LAW. 335 (1993) [hereinafter Liebmann, *Devolution of Power*]; see also GEORGE LIEBMANN, *THE LITTLE PLATOONS* (1994); George Liebmann, *Modernization of Zoning: A Means to Reform*, 23 URB. LAW. 1 (1991).

¹⁵³ See Liebmann, *Devolution of Power*, *supra* note 152, at 382-83.

10. Maintaining an unarmed security force and appropriate communications facilities;
11. Issuing newsletters, which may contain paid advertising; and
12. Operating a credit union, to the extent otherwise permissible under state or federal law.¹⁵⁴

The flexibility of the neighborhood association, as seen by Liebmann, would thus promote a happier blend of functions traditionally divided artificially into public and private domains.

C. *Cities as Private Businesses*

If municipal governments are today constitutionally restricted, in comparison to private neighborhood associations, an alternative reform would be to loosen the restrictions on the municipality. Indeed, in a 1980 article, Professor Gerald Frug demonstrated that the constricted range of current municipal functions is an historical artifact of the past 150 years.¹⁵⁵ As Frug observed, "before the nineteenth century, there was no distinction in England or America between public and private corporations, between businesses and cities."¹⁵⁶

By the late nineteenth century, however, leading economic and legal theorists came to see the neighborhood and the city as parochial entities that presented an obstacle to the political and economic rationalization of society.¹⁵⁷ As a result, there was a concerted "attack on city power" 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."¹⁵⁸ Instead, 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 more cheaply in Detroit than in other places, then the workings of markets meant that Detroit would 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.¹⁵⁹

¹⁵⁴ See *id.* at 381-82.

¹⁵⁵ Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980).

¹⁵⁶ *Id.* at 1082.

¹⁵⁷ ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 138-61 (1995).

¹⁵⁸ Frug, *supra* note 155, at 1080.

¹⁵⁹ *Id.* at 1082.

Frug believes that the progressive-era claims of scientific rationality and management that justified the subsequent centralization of governing authority are no longer credible. 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 at the local level.¹⁶⁰ The current need, therefore, is for "a genuine transfer of power to the decentralized units" of American society.¹⁶¹ In this category, Frug mentions regions, cities and neighborhoods. Yet, such a transfer will be no small task because "real decentralization requires rethinking and, ultimately, restructuring American society itself," including an end to "the current powerlessness" of American neighborhoods and cities.¹⁶² 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."¹⁶³

Frug says that this shift would require, as one element, "recognizing the rights of the city [and neighborhood] as an exercise of freedom of association."¹⁶⁴ It would involve a turn back to an earlier era when cities acted as corporations and "there was no difference between a corporation's property rights and its rights of group self-government."¹⁶⁵ Under the old model, Frug comments, the city (or neighborhood) could be "an association promoted by a powerful sense of community and an identification with the defense of property."¹⁶⁶ Regrettably, neighborhoods and cities today have "lost the elements of association and economic strength that formerly enabled them to have an important part to play in the development of Western society."¹⁶⁷

Business corporations and cities represent alternative forms of decentralized association of people. Corporations are based on people coming together for the purposes of economic production; cities are based on a territorial kind of association. Frug suggests that the present private status of business gives it a large and unfair advantage in meeting the needs for communal association of Americans. To help equalize the competition, he proposes authorizing cities to operate their own private banks, credit unions, insurance companies and retail food outlets, among other business possibilities. The city must have powers more like those of a private business corporation because territorial association presents a fertile ground for reinjecting into American life the elements of community lost in the headlong rush to modernization and economic rationalization:

¹⁶⁰ See *id.* at 1070.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 1122.

¹⁶⁴ *Id.* at 1106.

¹⁶⁵ *Id.* at 1107.

¹⁶⁶ *Id.* at 1119.

¹⁶⁷ *Id.* at 1119-20.

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. On the other hand, a territorial association seems to present a visible threat to its participating members. Once a decision is made, members must choose to accept the decision, leave the association, or face the consequences of being dissenters. Being tied to a geographic area is in this sense a restriction of freedom.¹⁶⁸

D. *Privatization by Neighborhood Association*

It is remarkable that, writing in 1980, Frug did not comment on the obvious parallels between his proposal for enhanced power for neighborhoods and cities and the rise of private collective ownership of property. It was Professor Robert Ellickson, responding in part to Frug's article, who made the connection. In 1982, Ellickson commented that "the private homeowner association . . . not the business corporation, is the obvious private alternative to the [public] city."¹⁶⁹

Ellickson observed that the judiciary tended to treat municipalities and homeowner associations differently, sometimes to the advantage of the former and sometimes the latter. This different treatment reflected a view in the public mind that a definite distinction could be made between "public" and "private," a distinction that Frug rejected. Also finding this distinction tenuous, Ellickson suggested that perhaps the absence or presence of "involuntary members" could serve as an adequate basis of distinction. Ellickson suggested that membership in a homeowner's association is entirely voluntary, therefore making this a private activity, and justifying a freedom from many constitutional restrictions normally applied to governmental activities. However, cities contain at least some residents whose presence is involuntary, thus making them public entities.¹⁷⁰

On reflection, however, this distinction may be difficult to sustain. The initial move into a small municipality seems just as voluntary as the initial move into a homeowners association. Thus, at some point, everyone (or at least their parents or some other ancestor) voluntarily chose to live in the municipality. It is true that among the members of a neighborhood association, most are likely to have entered more recently, thus making their grant of consent to its founding documents seem more clear. However, this greater element of voluntariness is a product of the relative youthfulness of the average neighborhood association, and does not provide a long run basis for making any fundamental distinctions between the two forms of territorial association.

¹⁶⁸ *Id.* at 1145.

¹⁶⁹ Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1519 (1982).

¹⁷⁰ *See id.* at 1523.

Rather, as suggested above, perhaps the best explanation for the difference between "public" and "private" is that these terms today create different legal and cultural expectations with respect to the permissible elements of a local constitution and the allowable procedures for a constitutional amendment.¹⁷¹ Indeed, as Ellickson pointed out, the original governing documents of a private neighborhood association "are a true social contract" amounting to "a private 'constitution.'"¹⁷² Ellickson also observed that private governments have a range of constitutional options open to them in structuring democratic rules for decision-making, while cities are bound by the one-person, one-vote rulings of the Supreme Court. In a surprising twist, agreeing with Frug's basic viewpoint that cities are unduly restricted, Ellickson proposed that the constitutional possibilities for cities 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."¹⁷³ Municipalities might then be free to adopt, for example, "some system that weighted votes by acreage or property value,"¹⁷⁴ as was the case in local elections in the early history of the United States.¹⁷⁵

The exchange between Frug and Ellickson showed that the current concepts of the private neighborhood association and the small local municipality are the product of one time and place in American history and culture. At least for the purposes of discussion, there is room for exploring many new constitutional options for both types of institutions. Frug himself advocates steps to "privatize" local government, not by turning to private neighborhoods, as suggested in this Article, but by rethinking the basic concept of the municipality to make it comparable in property status to the private business corporation.¹⁷⁶ Although they did it in different ways, what is most important and interesting in the exchange between Frug and Ellickson is that both, representing two very different outlooks on the law,¹⁷⁷ came to a similar conclusion: That local government in the United States, presumably including its land use regulatory functions, should have more "private" activity status.¹⁷⁸

¹⁷¹ See CAROL ROSE, *PROPERTY AND PERSUASION* (1994).

¹⁷² Ellickson, *supra* note 169, at 1527.

¹⁷³ *Id.* at 1558.

¹⁷⁴ *Id.* at 1560-61.

¹⁷⁵ Robert J. Steinfield, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989).

¹⁷⁶ See Frug, *supra* note 155.

¹⁷⁷ Frug wrote as a member of the critical legal studies movement, Ellickson as a member of the law and economics movement.

¹⁷⁸ Norman Macrae prophesies that in the future the dominant form of local governance may consist of "profit-making local governments run by private-enterprise performance contractors." NORMAN MACRAE, *THE 2025 REPORT* 124 (1984).

VIII. A MONSTER LET LOOSE?

By some estimates, neighborhood associations will house more than 50 million Americans, or about 20% of the population by the year 2000.¹⁷⁹ This remaking of the face of property ownership in suburban America occurred in a few decades without much critical scrutiny. Academic researchers and theorists recognized this trend only slowly; in the beginning, they had almost no role in initiating these property right developments.

Eventually, however, this was bound to change. A key event was a conference in 1988 sponsored by the Advisory Commission on Intergovernmental Relations (ACIR) on *Residential Community Associations: Private Governments in the Intergovernmental System?* The subsequent ACIR report stated that "traditionally the intergovernmental system has been thought to include the national government, state governments, and local governments of all kinds."¹⁸⁰ Such thinking now had to be modified to recognize that "the concept of intergovernmental relations should be adapted to contemporary developments so as to take account of territorial community associations that display many, if not all, of the characteristics of traditional local government."¹⁸¹ Given the explosive growth of such associations, by which "private organizations substitute for local government service provision," it would be important to devote much greater critical attention to this new social phenomenon.¹⁸²

Perhaps encouraged by the ACIR, and the ever-increasing number of Americans living in neighborhood associations, the literature on private neighborhoods is now growing rapidly.¹⁸³ On the whole, the more recent writings tend to have a less sympathetic outlook than earlier commentators. Indeed, some of the newer commentators are harsh critics, going so far as to suggest the unleashing of a new private monster in the land.¹⁸⁴ Although they recognize the great political obstacles at this point, rather than expand the realm of private neighborhoods further, some critics even suggest that it might be desirable to curtail sharply, or possibly eliminate, the role of the private neighborhood association from the land use scene.¹⁸⁵

¹⁷⁹ See DILGER, *supra* note 4, at 145.

¹⁸⁰ See RESIDENTIAL COMMUNITY ASSOCIATIONS, *supra* note 4, at ii.

¹⁸¹ *Id.*

¹⁸² *Id.* at ii-iii.

¹⁸³ See BARTON & SILVERMAN, *supra* note 1; DILGER, *supra* note 4; GERALD KORNGOLD, PRIVATE LAND USE CONTROLS: BALANCING PRIVATE INITIATIVE AND THE PUBLIC INTEREST IN THE HOMEOWNER ASSOCIATION CONTEXT (Lincoln Institute of Land Policy, 1995); MCKENZIE, *supra* note 4; Robert G. Natelson, *Consent, Coercion and "Reasonableness" in Private Law: The Special Case of the Property Owners Association*, 51 OHIO STATE L.J. 41 (1990).

¹⁸⁴ See GARREAU, *supra* note 31, at 183-93.

¹⁸⁵ Gregory Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. (1989); see also Gregory Alexander, *Conditions of "Voice": Passivity, Disappointment, and Democracy in Homeowner Associations*, in BARTON & SILVERMAN, *supra* note 1.

Evan McKenzie, for one, rues the "astonishing nationwide growth" in neighborhood associations.¹⁸⁶ One consequence of the growth is that those who are wealthy enough to afford a private neighborhood and government will become "increasingly segregated from the rest of society."¹⁸⁷ Even the people who live in these private neighborhoods may become disenchanted.¹⁸⁸ For Americans used to democratic procedures, private associations are "illiberal and undemocratic."¹⁸⁹ For example, they disenfranchise renters, putting all the political power in the hands of the property owners. McKenzie argues that the proponents of private neighborhoods, are the captives of a "utopian faith." Like the advocates of other utopian communal movements, they believe that "the route to community is through joint ownership of private property by an exclusive group living according to its own rules."¹⁹⁰

McKenzie quotes approvingly the characterization of Robert Reich, former Secretary of Labor, that neighborhood associations represent the "secession of the successful" from society.¹⁹¹ Reich contends 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. (The number of private security guards in the United States now exceeds the number of public police officers.)"¹⁹²

Among a certain circle of American intellectuals, the private neighborhood association represents the epitome of a long lamented, indeed disastrous, trend—the balkanization of American life attendant to the suburbanization of the nation.¹⁹³ One critic wrote that "the suburb is the last word in privatization, perhaps even its lethal consummation, and it spells the end of authentic civic life."¹⁹⁴ More moderately, as political commentator William Schneider observed, "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."¹⁹⁵

¹⁸⁶ MCKENZIE, *supra* note 4, at 11.

¹⁸⁷ *Id.* at 22.

¹⁸⁸ For complaints about oppressive local controls in historic districts and other contexts, see Clint Bolick, *Leviathan in the Suburbs*, WKLY. STANDARD, Dec. 18, 1995; see also CLINT BOLICK, GRASSROOTS TYRANNY (1993).

¹⁸⁹ MCKENZIE, *supra* note 4, at 21.

¹⁹⁰ *Id.* at 24.

¹⁹¹ Robert Reich, *Secession of the Successful*, N.Y. TIMES MAG., Jan. 20, 1991, at 16.

¹⁹² *Id.* at 42.

¹⁹³ See NANCY BURNS, THE FORMATION OF AMERICAN LOCAL GOVERNMENTS (1994).

¹⁹⁴ Andres Duany & Elizabeth Plater-Zyberk, *quoted in* William Schneider, *The Suburban Century Begins*, ATLANTIC MONTHLY, July 1992, at 37.

¹⁹⁵ Schneider, *supra* note 194, at 37.

For many critics, the ultimate symbol of the private neighborhood is the gated community. According to some estimates there are now 30,000 gated communities in the United States with nearly four million residents.¹⁹⁶ As many as one million Californians are believed to be living in what Edward Blakely and Mary Snyder characterize as "walled security compounds."¹⁹⁷ In a report for the Lincoln Institute of Land Policy, Blakely and Snyder see all this in the direst of terms:

The fortifying up phenomenon also has enormous policy consequences. By allowing some citizens to internalize and to exclude others from sharing in their economic privilege, it aims directly at the conceptual base of community and citizenship in America. The old notions of community mobility are torn apart by these changes in community patterns. What is the measure of nationhood when the divisions between neighborhoods require armed patrols and electric fencing to keep out other citizens? When public services and even local government are privatized, when the community of responsibility stops at the subdivision gates, what happens to the function and the very idea of democracy? In short, can this nation fulfill its social contract in the absence of social contact?¹⁹⁸

It was inevitable, given the rapidly increasing social importance of private neighborhoods, that a public debate would arise concerning their social consequences. Thus far, however, it has been a more heated than insightful discussion. The critics often make points that apply to any system of private property rights.¹⁹⁹ As long ago as Plato, private property was condemned as socially divisive and an encouragement to base motives of self interest. It is no great contribution to public discussion to repackage these utopian themes for a new form of contemporary private property.

IX. NEIGHBORHOOD ASSOCIATIONS IN INNER CITY AREAS

The criticisms of private neighborhoods, although now heard with growing frequency, may have matters almost exactly backwards. The real inequality may not be the social divisions resulting from economically and socially segregated patterns of living in the suburbs. The fact that so many people, including people with many options, chose this style of private living is strong evidence that it has much to offer. Rather, the greatest inequality may be the denial of a similar private opportunity to people in the inner city. Many inner city residents would like to exclude criminals, hoodlums, drug dealers, truants, and others who often undermine the possibilities for a peaceful and vital neighborhood existence there.²⁰⁰

¹⁹⁶ See EDWARD BLAKELY & MARY SNYDER, *FORTRESS AMERICA* 7 (1997).

¹⁹⁷ *Id.* at 1.

¹⁹⁸ *Id.* at 2.

¹⁹⁹ See *id.* at 81.

²⁰⁰ James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29.

Politically, rather than join the suburbs, civil rights groups and other organized supporters of inner city residents often seek to undermine suburban powers of exclusion.²⁰¹ A wiser approach, could they overcome their ideological straightjackets, might be to bring suburban powers of exclusion—the rights of private property, if now in a collective form—into the inner city. This strategic redirection requires strong inner city neighborhoods, free from the meddling of city hall, and able to choose who will live in and who will be excluded from the neighborhood. Inner city private neighborhoods could then exercise authority over their own police, garbage, street cleaning, snow removal, recreational facilities, and other services. They could have the ability to enforce aesthetic controls on the uses and alterations in neighborhood properties, thus ensuring the maintenance of an attractive exterior environmental appearance.²⁰² In short, what inner city neighborhoods really need is some form of private neighborhood association.

The single greatest problem for many neighborhoods in the inner city is the general lack of personal security for residents. Few things would do more to improve the overall quality of inner city life than a significant reduction in crime. Urban scholar John Dilulio recently argued that declining crime rates in the United States in part reflect the spread of private neighborhoods in the suburbs. As he put it, “potential victims are making it more difficult for criminals to prey on them,” partly by moving into a “common interest development.” Private neighborhoods “virtually guarantee . . . greater safety from crime: No criminals need apply, strangers are stopped before entering, and troublemakers are easily evicted.”²⁰³

There is no physical or other practical reason why an inner city neighborhood could not become a gated neighborhood.²⁰⁴ The potential benefits to the residents in reduced crime and general control over the character of the neighborhood environment are significant. That there are almost no such neighborhoods in inner cities shows that ideas do matter; many people are appalled at the idea of dividing the city into a web of walled neighborhoods.²⁰⁵ Yet, it is the poor who pay a great price in the name of preserving an abstract ideal of an America undivided by racial, class, or other lines. The rich in the suburbs, given wider choices, refuse to make a similar sacrifice.

²⁰¹ See CHARLES MONROE HAAR, *SUBURBS UNDER SIEGE* (1996); see also MICHAEL N. DANIELSON, *THE POLITICS OF EXCLUSION* (1976).

²⁰² For a study of the important role of neighborhoods in the city of Baltimore, suggesting an even greater potential with the proper institutional supports, see MATTHEW A. CRENSON, *NEIGHBORHOOD POLITICS* (1983).

²⁰³ John Dilulio, Jr., *A More Gated Union*, WKLY. STANDARD, July 7, 1997, at 14.

²⁰⁴ There are, however, ideological obstacles.

²⁰⁵ RICHARD LOUV, *AMERICA II* 127-46 (1985).

Hence, the proposed procedures described above for the creation of neighborhood associations should be available in inner cities as well. Indeed, this may be their most important application. Inner city neighborhoods should have the right to establish land use and other controls, including building neighborhood walls, if necessary, to maintain neighborhood quality. Just as businesses have been creating "business improvement districts" (BIDs) to improve the surrounding environment in cities across the United States, the residents of cities should be able to create what might be called "residential improvement districts" (RIDs).²⁰⁶

One American city has such a policy on a limited scale. Since the nineteenth century, St. Louis has allowed the privatization of municipal residential streets, an authority that remains in force.²⁰⁷ In recent decades, a number of St. Louis neighborhoods have used this authority to take over ownership of their streets, including closing off streets to traffic and creating a neighborhood association to manage the street area. According to community planner Oscar Newman, the "residents claim that the physical closure of streets and their legal association together act to create social cohesion, stability and security."²⁰⁸ Newman summarizes the findings from his study of this St. Louis experiment as follows:

For many students of the dilemma of American cities, the decline of St. Louis, Missouri, has come to epitomize the impotence of federal, state, and local resources in coping with the consequences of large-scale population change. Yet buried within those very areas of St. Louis which have been experiencing the most rapid turnover of population are a series of streets where residents have adopted a program to stabilize their communities, to deter crime, and to guarantee the necessities of a middle-class lifestyle. These residents have been able to create and maintain for themselves what their city was no longer able to provide: low crime rates, stable property values, and a sense of community. Even though the areas surrounding them are experiencing significant socio-economic change, high crime rates, physical deterioration, and abandonment, these streets are still characterized by middle-class ownership—both black and white. The distinguishing characteristic of these streets is that they have been deeded back from the city to the residents and are now legally owned and maintained by the residents themselves.²⁰⁹

New institutions that facilitate the much wider privatization of inner city neighborhoods could offer similar benefits in cities across the United States. After decades of urban renewal, public housing, and other government efforts to improve the quality of life in inner city neighborhoods, the

²⁰⁶ See Robert Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75 (1998).

²⁰⁷ See David T. Beito & Bruce Smith, *The Formation of Urban Infrastructure Through Nongovernmental Planning: The Private Places of St. Louis, 1869-1920*, 16 J. URB. HISTORY 263 (May 1990); see also DAVID T. BEITO & BRUCE SMITH, *OWNING THE "COMMANDING HEIGHTS": HISTORICAL PERSPECTIVES ON PRIVATE STREETS* (Public Works Historical Society, Chicago, Ill., December 1989); Ronald J. Oakerson, *Private Street Associations in St. Louis County: Subdivisions as Service Providers*, in *RESIDENTIAL COMMUNITY ASSOCIATIONS*, *supra* note 4, at 55.

²⁰⁸ OSCAR NEWMAN, *COMMUNITY OF INTEREST* 126 (1980).

²⁰⁹ *Id.* at 124.

time has come to try a private property approach, empowering local residents to help themselves and rely on market incentives.

X. LANDOWNER ASSOCIATIONS IN NEWLY DEVELOPING AREAS

Under the original zoning concept, municipalities determined in advance what housing would be located in which neighborhoods, and then established zoning districts accordingly. The net effect of the zoning was the imposition of a kind of rationing scheme on the supply of undeveloped land in the municipality. So many acres were available for townhouses, so many for certain types of homes on one-acre lots, so many for homes on three-acre lots, and so forth. With similar actions occurring throughout a metropolitan area, the cumulative rationing scheme among all municipalities controlled the total supply of each kind of undeveloped land throughout the region.

Yet, among other problems, metropolitan land use planners had no economic or other models to project future housing needs with sufficient accuracy to meet the information requirements of this land allocation system. Moreover, in practice, zoning actions by one municipality were seldom closely coordinated with zoning actions of other municipalities. If the zoning districts remained fixed in place, as early zoning advocates urged, the overall effect inevitably would be to create systematic mismatches between available land supplies and the demands for different types of housing.

In practice, municipalities typically resolve this problem in part by refusing to zone in advance for a final lot size and type of housing. Instead, they zone undeveloped land for a highly restrictive category that prohibits virtually all new housing development. In order to develop, a rezoning is necessary—effectively transferring the development rights from the municipality to the developer. Then, as discussed above, municipalities negotiate the terms of rezonings with developers, typically exacting some kind of compensation for the transfer of rights. In the more extreme cases, municipal practices verge on the outright sale of the zoning changes.

While such municipal flexibility in zoning administration introduced a necessary element of realism into the system, averting some of the worst potential problems, it still falls well short of resolving the problem of an adequate supply of undeveloped land for many kinds of new housing.²¹⁰ California courts have been particularly tolerant of municipal restrictions, essentially giving municipalities the latitude to do almost anything they want with their zoning (or other types of growth controls). According to one study, the California Supreme Court has been “more hostile to devel-

²¹⁰ See SIDNEY PLOTKIN, *KEEP OUT: THE STRUGGLE FOR LAND USE CONTROL* (1987).

opment than any other high court in the nation.'²¹¹ Combined with the strong preference for open spaces and environmental amenities of many California residents, the result has been a severe restriction on the amount of land available for new housing in most metropolitan regions.

The net effect of this restriction is significant, it drives up the price of developable land in California and thus raises the price of housing. One study found housing in communities with growth controls selling at prices 17 to 38% higher than in communities without such controls.²¹² In 1970, even before the growth control enthusiasm spread to municipalities throughout the state, the price of California housing on average was 35% higher than the rest of the nation.²¹³ By 1980, the cost of California housing was 79% higher than the national average, and by 1990 it was 147% higher.²¹⁴ Adjusted for quality, one estimate in 1978 showed that the cost of California housing was 57% higher than in other parts of the United States.²¹⁵

Not all Californians wanted strict limits on new development. Many owners of undeveloped land would have preferred fewer restrictions and higher land prices. To understand why planners ignored the preferences of such land owners, it is necessary to examine the typical political dynamics of municipalities that lie in the path of metropolitan development.

A. *Suburbanites versus Farmers*

Consider a hypothetical municipality consisting initially almost entirely of farmers. Due to growth of the metropolitan area, development approaches this municipality and the price of land rises. However, to preserve farming, and control the pace of development, the municipality imposes a ten-acre requirement for homes, effectively excluding almost all development. At some point, however, the rising land prices will cause some farmers to sell. Their fellow farmers have no incentive to block such sales, partly because they may expect to follow suit at some point in the future. Hence, the municipality will probably change the zoning to allow development, perhaps granting approval for homes on lots one or two acres in size. Such rezonings are likely to occur piecemeal, as developers

²¹¹ Joseph F. DiMento et al., *Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Eras*, 27 UCLA L. REV. 859, 872 (1980).

²¹² See FISCHER, REGULATORY TAKINGS, *supra* note 7, at 223.

²¹³ See *id.*

²¹⁴ See *id.*

²¹⁵ Rosen describes an "affordability crisis" for California housing in which many current home buyers could not afford to buy the house they currently live in. See KENNETH T. ROSEN, CALIFORNIA HOUSING MARKETS IN THE 1980S 45 (1984).

propose new subdivisions and the municipality responds to some of the proposals favorably.

At some point, as development of the municipality proceeds, the incoming newer residents will begin to outnumber the farmers. At some further point, they will very likely obtain the political power to determine future municipal zoning decisions. Now, a new set of incentives comes into play. Unlike the remaining farmers, who stand to make a large profit from sale of their land, the incentive for the new residents is to limit further housing development as much as possible, to preserve open space and environmental amenities for their own enjoyment. If the courts allow them to exclude most prospective development, as has been the case in California and a number of other states, and if the new residents are indifferent to the fate of the farmers, the politically dominant majority of newer residents will simply refuse any further rezonings. The overall effect across many municipalities in similar circumstances will be to remove a large area of undeveloped metropolitan land from the market.²¹⁶

While this example is hypothetical, and the typical circumstance in the real world involves a larger number of players and a more complex set of motivations, this basic scenario has repeated itself many thousands of times over the years in metropolitan areas across the United States.²¹⁷ Over the past few decades the "doorslammer" or "last-to-get-in" phenomenon has been a common practice. Large areas of metropolitan land in the United States have been held out of development, at large cost to the society as a whole but providing substantial environmental benefits to the locally dominant political groups of homeowners. As Fischel has explained:

[Through zoning] communities can have a substantial impact on the overall density of population. The major reason is that courts of law are willing to sustain zoning laws (or, more frequently, amendments to zoning laws) that substantially reduce the value of undeveloped land. This allows the community to reap the benefits of restrictive zoning (to current homeowners and other voters) without having to confront the cost that these regulations impose on developers and prospective residents. . . . Communities do not have to do anything approximating benefit-cost analysis before imposing land use regulation. This leads to overregulation and residential densities that are too low.²¹⁸

Much of the policy literature of zoning seeks a solution to this problem. A common, though politically naïve, policy proposal is that municipalities should take full account of broader metropolitan needs in their

²¹⁶ See NO LAND IS AN ISLAND: INDIVIDUAL RIGHTS AND GOVERNMENT CONTROL OF LAND USE (1975); see also DOWNS, *supra* note 124, at 9-11.

²¹⁷ See PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME (1968); see also ADVISORY COMM'N ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, NOT IN MY BACKYARD (1990); EAGLE, *supra* note 41, at 346-351.

²¹⁸ FISCHEL, ECONOMICS OF ZONING LAWS, *supra* note 7, at 65.

planning, and then actually follow their plans.²¹⁹ Others propose that state governments exercise greater oversight over municipal land use regulatory actions, ensuring the protection of statewide interests.²²⁰ Still other observers suggest that the courts should more aggressively overturn unduly restrictive zoning practices.²²¹ The Supreme Court of New Jersey has prominently pursued this course.²²²

As discussed above, a much different policy alternative would allow the sale of zoning, giving municipalities a significant financial incentive to relax zoning. Through "impact fees" and other exactions, commitments to build recreational facilities for the benefit of all the municipal residents, and in other ways, developers possess a number of indirect ways of paying municipalities for valuable rezonings. Yet, while this strategy can work in practice, it requires the courts to look the other way in terms of ignoring the large departure from received legal theory.

The courts are not always willing to do this. Indeed, the Supreme Court in *Nollan v. California Coastal Commission*,²²³ and in *Dolan v. City of Tigard*²²⁴ posed significant new obstacles that potentially impede the ability of municipalities to go much further in selling zoning. In each case, the Court said that municipalities could establish conditions for rezonings that are closely related to the actual impacts of the specific project.²²⁵ Such well intentioned interventions by the Court are economically harmful, and in that respect misguided. If carried to their logical conclusion, judicial interventions would upset much of the existing practices by which developers are now able to pay off municipalities to obtain socially desirable rezonings. The Court's insistence that future rezonings be in full accord with received zoning theory could bring the whole land development process to a virtual standstill.

²¹⁹ See ROBERT M. ANDERSON, *AMERICAN LAW OF ZONING* (1968); NORMAN WILLIAMS, *AMERICAN PLANNING LAW* (1974).

²²⁰ See TASK FORCE ON LAND USE AND URB. GROWTH, *THE USE OF LAND* (William Reilly ed., 1973); see also MODEL LAND DEV. CODE (1976); JOHN M. DEGROVE, *PLANNING AND GROWTH MANAGEMENT IN THE STATES* (1992); *PLANNING THE OREGON WAY: A TWENTY-YEAR EVALUATION* (Carl Abbott et al. eds., 1994).

²²¹ See Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); DANIELSON, *supra* note 201, at 325; FISCHER, *REGULATORY TAKINGS*, *supra* note 7, at 329. Hagman argued that courts should instead require the payment of compensation for unreasonable regulations. See Donald G. Hagman, *Compensable Regulation*, in *WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION* 292-93 (Donald G. Hagman & Dean J. Mischynski eds., 1978).

²²² *Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713 (N.J. 1975); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 390 (N.J. 1983); see also HAAR, *supra* note 201.

²²³ 483 U.S. 825 (1987).

²²⁴ 512 U.S. 374 (1994).

²²⁵ See EAGLE, *supra* note 41, at 255-57, 75.

B. *A Proposed Solution*

The proposed procedures described above for the creation of new neighborhood associations offer an effective and practical solution to the problem of insufficient land supplies for new development in suburban areas. Finding a solution starts with a recognition that the voting rules for private neighborhoods and municipalities serve to protect land owners from later confiscations of their development rights.

Consider the same example described above. Assume that everything is unchanged, except that instead of a municipality, the farmers formed a neighborhood association to hold their rights in collective ownership and assume control over land development in their area. Also assume that the municipality, now redundant, abolished its zoning restrictions over the area covered by the neighborhood association. Politically, this would be possible because the farmers would still have firm political control over the municipality.

In almost every large private development project over the past three decades, it has been understood from the start that there will be many potential conflicts of interest between the developer and the early residents of the project. It is well established and accepted among all the parties that the developer must have firm legal protection from the early residents of the project taking premature political control over later land development decisions.²²⁶ Developers will not commit large amounts of capital if they face the risk that their development plans will later be overturned. Without such protection, the incoming residents of a project might, for example, block the developer from completing a key portion of the overall private project plan, or revise the plan significantly, and thereby deny the developer much of the total profit he expected. The incoming residents would benefit, however, from more greenspace than the original plan contained.

Protection for the developer from such outcomes is found in the voting rules generally adopted by neighborhood associations. In most new associations, the developer retains the majority of the votes until the late stages of project development, when he is no longer exposed to the risk of subsequently imposed restrictions. In the interim, the developer may transfer control over certain day-to-day aspects of project management to the residents, but retain control over the implementation of the overall development design for the project. In a typical arrangement, the developer retains three votes for every one assigned to new resident owners, until the overall development project is at least 75% complete.

Accordingly, if the farmers in the example above formed a neighborhood association, such a set of private voting rules would apply. The farm-

²²⁶ See HYATT, *supra* note 28, at 17-26.

ers would then retain political control over new uses of land, denying the incoming residents full voting power until the entire plan for sale of their farmland and its development neared completion. Unlike current political arrangements under zoning, the new residents in a private regime would not be able to change the planned future land uses or to impose other unreasonable restrictions on the sale of developable land in the area.

In concept, a municipal government could adopt the same voting procedure disenfranchising recent residents in land development matters. In fact, Ellickson hinted at such a solution in his proposal noted above—that the Supreme Court should abandon its one-person, one-vote rulings, and instead allow municipal voting rules based on considerations such as ownership of land and property.²²⁷ However, short of a surprising reversal of the Court's earlier constitutional interpretations in this area, this approach is not available. Under the Court's current jurisprudence, and the cultural attitudes toward "public" and "private" that prevail in the United States today, it is simply a fact of life that private neighborhood associations will have considerably greater constitutional flexibility than municipalities in designing their internal voting rules.²²⁸

Hence, I propose that in a municipality containing mostly farmers and other owners of undeveloped land, the owners should have the legal option of following the five-step process laid out in Part II of this Article to create a new neighborhood association with collective ownership of the local development rights. If approved in an election along the lines proposed in Part II, the resulting private "neighborhood" of farmers, by law, would retain the right to regulate land use, until the entire municipality reached an advanced stage of land development. Until then, the incoming owners of residential property in the area encompassed by the farmer "neighborhood association" would have only a minority vote in basic land use matters. Upon completion of development (a process that could last as long as ten or twenty years), the majority of municipal residents would then be free to regulate land development however they wished, whether by continuation of the private association or through newly established municipal zoning powers.

In current political jurisdictions, with a mixture of some existing densely-developed residential areas along with substantial vacant farm land, the state government might have to mandate a similar process to establish one or more farmer land development associations. States should limit the zoning powers of such municipalities to the land areas already developed and occupied by recent (suburban residential) arrivals at higher densities.

²²⁷ See *supra* text accompanying notes 171-173.

²²⁸ See Ellickson, *supra* note 206, for a discussion of innovative voting rules based on property.

XI. SECESSION, VOTING RULES, AND PROVISION OF PUBLIC SERVICES

Critics of neighborhood associations sometimes argue that they represent a form of secession from the municipality. As McKenzie comments, "some feel this division is reaching the point at which many CID [common interest development] residents 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."²²⁹

Indeed, a few proponents of neighborhood associations would like to see their independence from existing municipal authority extended to the point of a true secession. Foldvary suggests that in an ideal world "any person or organization having a title to land [could] withdraw the site from any government jurisdiction and create its own governance."²³⁰ 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."²³¹ Neighborhood groups choosing to withdraw from an existing municipality could do so at their option, like a no-fault divorce from a marriage, and thus would not be required to provide "any substantive grounds to justify the secession."²³²

Despite some suggestions to the contrary, neighborhood associations do not represent true secessions from the municipality.²³³ First, the members of neighborhood associations commonly continue to pay their full share of municipal taxes. Second, the municipality continues to provide some services, such as schools. And, third, members of neighborhood associations have full voting rights in municipal elections.

In some cases, however, there have been steps toward secession. In Montgomery County, Maryland, and some other jurisdictions, the local government gives a property tax rebate to compensate for the costs of public service burdens that the neighborhood associations assumed.²³⁴ If this approach were carried to its ultimate logical conclusion, the neighborhood association could provide all the services, and get a complete tax rebate. In that case, one might also argue that members should not vote in municipal elections, since the most important municipal decisions involve matters of public services. It would all amount to, as a practical matter, a true secession of the neighborhood from the municipality.

²²⁹ MCKENZIE, *supra* note 4, at 186.

²³⁰ FOLDVARY, *supra* note 136, at 206.

²³¹ *Id.*

²³² *Id.*

²³³ In recent years, some local areas have actively attempted to secede from their existing jurisdictions. Two such efforts with high national visibility have been the attempts of Staten Island to secede from the City of New York and, most recently, the San Fernando Valley area from the City of Los Angeles.

²³⁴ RESIDENTIAL COMMUNITY ASSOCIATIONS, *supra* note 4, at 20.

Whether it would be a good thing to provide a full secession option for appropriate groupings of neighborhood residents of a municipality raises a number of complex issues.²³⁵ Secession from an existing local government to incorporate as a new municipality is possible under existing laws of municipal incorporation for appropriate geographic groupings. Thus, the significance of a neighborhood association is not that it creates a secession option where none existed before. Rather, creating a private neighborhood allows a new form of secession as compared with incorporating a new public entity under current law. This potentially greater ease of exit is yet another example of how private neighborhoods provide greater constitutional flexibility. This flexibility creates institutional alternatives that would not otherwise be available.

Albert Hirshman provided a general analysis for all kinds of social issues of the secession option versus staying put and improving the existing system.²³⁶ If a municipality is in the business of providing certain services, secession simply means taking your business elsewhere, just as someone might decide to buy a Chevrolet after driving a Ford for ten years. As the current debate over school vouchers and charter schools illustrates, there are many advantages to expanding the field of choices and the resulting enhancement of competition within the public sector.

The provision by a neighborhood association of some important public services, but reliance on the municipality for others can create significant complications for municipal governance. First, the members of the neighborhood association then have an interest in minimizing municipal spending for the services they obtain through their own private association, and potentially the voting power to express this preference effectively in municipal elections. On the other hand, other residents of the municipality (those not living in a neighborhood association) have an interest in providing a higher level of the same municipal services. They factor into their calculations the fact that the members of the neighborhood association will contribute significant taxes but not get any service benefits in return, thus significantly reducing the average cost per resident of those who continue to be publicly served.

There are possible ways of resolving these problems, although they are likely to be cumbersome to implement and may not work well in practice, depending on the specific local circumstances. Let us say a municipality provides a public service such as a school. Let us also say that the neighborhood association then decides to build and operate its own private elementary school to educate the children living in the private neighbor-

²³⁵ See ALLEN BUCHANEN, *SECESSION* (1991); see also Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633 (1991); David Gauthier, *Breaking Up: An Essay on Secession*, 24 CANADIAN J. OF PHIL. 357 (1994).

²³⁶ ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (1970).

hood. Although seldom the case today in education, one can imagine that in the future, municipalities might even pressure developers to build and operate neighborhood schools, because provision of new schools is potentially costly to the municipality.

Then, a possible method of resolving the problems noted above would be as follows. For each student at the neighborhood school, the municipality would rebate the neighborhood the average public cost per elementary school student (amounting to an indirect voucher scheme). In turn, in any municipal election on new taxes for public schools, the residents of the neighborhood association would be ineligible to vote. If school matters came before the municipal council for a vote, the representatives from the district(s) with private neighborhoods would withdraw from the vote (as they might if they had any other type of conflict of interest). For this scheme to work, city council districts would have to match closely the boundaries of neighborhood associations.

Admittedly, a perfect system of municipal taxing, service provision and voting rules will never be possible. The difficulties posed in these regards by private neighborhoods are not fundamentally different from similar problems that already exist today, especially in larger local jurisdictions with a wide mixture of residents from different backgrounds and with different public service preferences.²³⁷ For example, residents who currently send their children to private schools have an incentive to vote to minimize public school funding. In some municipalities where many children attend Catholic schools, this issue has long been divisive.²³⁸ Some people will always be heavier users than others of particular municipal services, creating diverse incentives within the municipality.

XII. DISMANTLING A PROGRESSIVE LEGACY

De Tocqueville found the prominent role of associations to be one of the distinguishing features of American life.²³⁹ As he commented, "nothing, in my view, deserves more attention than the intellectual and moral associations in America."²⁴⁰ Americans were devoted to achieving "equality of conditions" but it was equally important that "the art of association must develop and improve among them at the same speed."²⁴¹ In his travels, he found that this requirement was being met amply:

²³⁷ See FISCHER, *REGULATORY TAKINGS*, *supra* note 7, at 253-88.

²³⁸ For a discussion of the effects of various fiscal incentives, see HELEN F. LADD & JOHN YINGER, *AMERICA'S AILING CITIES* (1989).

²³⁹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 517 (Jacob Peter Mayer ed., 1969) (1835).

²⁴⁰ *Id.*

²⁴¹ *Id.*

Americans of all ages, all stations in life, and all types of disposition are forever forming associations. There are not only commercial and industrial associations in which all take part, but others of a thousand different types—religious, moral, serious, futile, very general and very limited, immensely large and very minute. Americans combine to give fetes, found seminaries, build churches, distribute books, and send missionaries to the antipodes. Hospitals, prisons, and schools take shape in that way. Finally, if they want to proclaim a truth or propagate some feeling by the encouragement of a great example, they form an association.²⁴²

However, the nineteenth century American tradition of forming associations has, in significant part, been lost in the twentieth century. Frequently, government assumes the social roles formerly played by private associations. Where churches and other private charitable organizations provided support for the poor in the nineteenth century, in the twentieth century government welfare programs provide poverty relief. This movement away from associations was part of the shift to “scientific management” of American society, the guiding political ideal since the progressive era early this century.²⁴³

Scientific management was by its nature a centralizing undertaking.²⁴⁴ The national government had the resources to find and attract the best scientists and to distribute the findings throughout the nation. The national government had the necessary scope of authority to implement comprehensive plans and coordinate economic activities throughout the United States. The assumption was that government decisions made on a scientific basis would provide the best answer in most circumstances. Because government was best equipped to discover this answer, the federal government could reasonably claim the authority and legitimacy to make the ultimate social decisions for every part of the nation.²⁴⁵

In the last decades of this century, there is a growing body of criticism that the progressive design did not serve the nation well.²⁴⁶ In many cases, central scientific management means bureaucratic management. The methods of science, as applied in social and administrative realms, have been much less powerful than the earlier high progressive hopes. Government has been driven by interest-group bargaining, rather than expert determinations. Political meddling has not been separated from the day-to-

²⁴² *Id.* at 513.

²⁴³ See ROBERT NELSON, *REACHING FOR HEAVEN ON EARTH* ch. 5 (1991); see also WALDO, *supra* note 49.

²⁴⁴ See Lee, *supra* note 49, at 544.

²⁴⁵ Progressive ideas of scientific management justified, for example, the retention of management responsibility for the federal lands (almost 30% of the U.S. land area) at the federal level. See NELSON, *supra* note 243, at 47-51; ROBERT NELSON, *THE MAKING OF FEDERAL COAL POLICY* 15-22 (1983); A. Dan Tarlock, *The Making of Federal Coal Policy: Lessons for Public Land Management From a Failed Program, an Essay and Review*, 25 NAT. RESOURCES J. 349 (1985).

²⁴⁶ This literature is voluminous. For a few examples, see EPSTEIN, *supra* note 99; MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962); R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988); WILLIAM A. NISKANEN, *POLICY ANALYSIS AND PUBLIC CHOICE* (1998).

day management of the government; and the transfer of major governing responsibilities to the national level all too often yielded partisan conflict and gridlock.

Indeed, an emerging conviction is that a revival of American democracy and of American civic life may require a turn away from traditional progressive precepts.²⁴⁷ This could involve a rediscovery of the habits of small scale association of the nineteenth century. Robert Wiebe reports that in the nineteenth century there was a "vision of an all-inclusive People" that helped to hold American democracy together.²⁴⁸ This vision found powerful symbolic expression in the rituals of a national presidential election, a time when the feeling of being part of a broad community of all Americans reached its height. The greater sense of community was one reason voter participation rates in national (and local) elections were much higher in the nineteenth century than they are today. If American democracy in that era was a rough and tumble affair, it also possessed a degree of vitality and energy now missing.

As Wiebe finds, beneath the "universalistic covering" of nineteenth century American democracy "lay a multitude of particularistic groupings whose values set boundaries and whose behavior policed them. The meaning of democracy flowed as much from these everyday urges toward exclusiveness as it did from an overarching spirit of inclusiveness, and the results, scarcely a celebration of universalism, showed it."²⁴⁹ Government in the United States was characterized by "a persisting decentralization, even after the Civil War, [that] ensured an unevenness, an uncertainty to decisions about inclusion and exclusion."²⁵⁰ Some groups were able to hold their own within "lodge democracies roughly egalitarian competition," while others were excluded from active participation.²⁵¹ Yet, even here, the struggles between "insiders and outsiders," involving a "procession of claimants" to full political inclusion, stimulated political activity and the sense of being part of a common national process of representative democracy.²⁵² The "tension between these assertions [of the various groupings] and the resistance to them became in its own right a defining component of democratic life" in the United States.²⁵³

²⁴⁷ An early prominent example of this body of writings is PETER BERGER & RICHARD NEUHAUS, *TO EMPOWER PEOPLE* (1977). More recently, Rivlin has called for a reversal of centralizing trends in American government. See ALICE RIVLIN, *REVIVING THE AMERICAN DREAM* (1992).

²⁴⁸ WIEBE, *supra* note 157, at 110.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 86.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

Like many others, Wiebe also faults the progressive era as the point at which a basic loss of civic energy occurred in American life.²⁵⁴ It was perhaps an inevitable result of a governing vision that saw the political process as dominated by the discovery of expert solutions to well defined technical problems of management, hardly a vision designed to inspire the involvement of the citizenry. A turn away from the progressive vision could include a revival of the role of neighborhoods in American life. However, if neighborhoods are to become more important, new legal mechanisms are necessary to provide the requisite institutional support and foundation.

Neighborhood associations in new neighborhoods have already significantly displaced the role of one of the most important regulatory innovations of the progressive era, zoning control over the use of private land. The creation by state governments of a new and practical legal mechanism by which existing neighborhoods can also form their own private neighborhood associations, thereby rendering municipal zoning superfluous in these neighborhoods as well, would represent a large step towards the full dismantling of the failed zoning legacy of the progressive era.

CONCLUSION

As proposed in this Article, state governments should enact legislation enabling the creation of new private neighborhood associations to own and manage the common elements in existing neighborhoods. Citizens in an existing neighborhood could petition the state government, triggering procedures that could lead to the formation of this new instrument of private neighborhood ownership and governance. The full details of each collective ownership arrangement for each neighborhood, a kind of private constitution that could be tailored to the needs of each individual neighborhood, would have to be negotiated and presented to all the residents of the neighborhood. In order to create a new private neighborhood, a positive vote of (some kind of) super-majority of the neighborhood would have to occur.

New legal procedures for the creation of private neighborhoods would go far towards solving two urgent social problems. In inner city areas, creation of new private neighborhood associations would help greatly to improve the quality—including reducing the rate of crime—in these often deteriorated environments. In rural areas that will soon face development, new collective ownership instruments for groups of farmers (farmer “neighborhoods”), including voting rules to protect the original farmer developers, could open large areas of land for lower and moderate income housing. Generally, the establishment of private neighborhoods throughout

²⁵⁴ *Id.* at 113.

urban and suburban areas would offer major social and economic advantages over the existing zoning and public service delivery system. In the twenty first century, the general adoption of collective private ownership of residential property could offer social benefits as great as those experienced in the twentieth century as a result of widespread private corporate ownership of business property. There seems to be an inexorable process of collectivism in the ownership of private property—first business and now residential property—taking place in response to the institutional imperatives of modern life. State governments should facilitate this evolution, rather than obstruct it.