PROTECTING NEIGHBORHOOD ENVIRONMENTS PRIVATELY

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An important governance change has taken place recently in American society. It involves, among other things, the character of American housing, property rights, and local government. As I examined in detail in my 2005 book, *Private Neighborhoods and the Transformation of Local Government*, the system of local government in the United States at the micro level is being decentralized to a neighborhood scale and is being privatized at that level.[1] This is the result of the rise since the 1960s of the "private neighborhood association." A main purpose of private neighborhood associations is to protect the neighborhood environment.

There are three main kinds of neighborhood associations – homeowners associations, condominiums, and cooperatives. When a person moves into a neighborhood governed by one of these associations, he or she is required to agree as a condition of purchase to the private terms of governance. These include the power to levy "assessments" – amounting to private taxation. Neighborhood associations assert comprehensive private regulatory controls over the environment within their boundaries. They also provide many neighborhood services such as garbage collection; street cleaning; maintenance of swimming pools, tennis courts and other recreational facilities; private security patrols; and others.

A Private Neighborhood Movement

In newer and more rapidly growing parts of the United States, private neighborhood associations are becoming the main instrument of micro-level local government. In these areas, almost every new major housing development is now being established with a private neighborhood association for governance. This is true in particular in states such as Florida, Texas, Arizona, Nevada, and California. In California at present, 60 percent of all new housing is being built under the governance of a private neighborhood association.[2]

Because home buyers have to agree as an initial condition of purchase, a private neighborhood government is feasible only when it is created as a part of the initial development process. In parts of the United States built before 1960, therefore, neighborhood associations are less common. The first condominium in the United States did not even exist – there was no legal provision in the U.S. for condominium ownership – until 1962. It was built in Salt Lake City.

But since the 1960s, private neighborhood associations to protect the surrounding environment have exploded in numbers across the country. Half the new housing built in the United States between 1980 and 2000 was in a neighborhood association. In 1970, about 1 percent of Americans lived in a private neighborhood association. Today, about 18 percent do. That amounts to about 55 million people. They live in 275,000 neighborhood associations. More than 1.25 million Americans serve on the board of directors of a neighborhood association. And all these numbers are rising very rapidly.[3]

This all amounts to the rise of private neighborhood government in the United States.[4] Americans may want less government at the national level but at the neighborhood level they seem today to want more. The delivery of services and the regulation of land are now being undertaken by neighborhoods, where before the unit of local government would have been larger, often much larger. A neighborhood

association can be as small as a single building and as large as a small city of 50,000. But the typical size is around 200 to 300 housing units with a population of perhaps 500 to 1,000 people. The association is governed by a private board of directors elected by the owners of housing units within the neighbourhood.

This does not mean that there is no need for local government in the public sector. The rise of private neighborhood associations is leaving local public governments to focus on things with a wider territorial scope such as sewers, water, air pollution, and arterial highways. The basic units of local public government are also becoming larger, often a core city or a powerful county government, leaving the small scale "micro" services to private neighborhoods to provide.

In the 1960s and 1970s, there was a neighborhood movement that advocated shifting many government responsibilities to the neighborhood level. The leading advocates in this movement were talking about the public sector. But it never really happened. Within the local public sector, there was too much institutional resistance to such a basic change in governance. Instead, and to many people's surprise, a "private neighborhood movement" emerged in the United States. It has been a much wider and more important social change than most people had anticipated.

Neighborhood Environmentalism

The rise of the private neighborhood association, which commenced in the 1960s, coincides with the growth of the environmental movement in the United States. The common timing may not be altogether coincidental. America's concern for environmental quality is not limited to forests, wetlands, and other parts of wild nature. It extends as well to the urban environment where concerned Americans have made heroic efforts over the past 40 years to reduce air pollution, water pollution, exposure to hazardous wastes, and the presence of other potentially harmful substances. Most people spend their time outdoors closer to their homes than anywhere else; therefore, their own neighborhood surroundings figure prominently in their desire for a high-quality environment. In 1974, when environmental concern in the United States was at its peak, the U.S. Supreme Court in its *Belle Terre* decision strongly endorsed the use of local zoning powers to protect neighborhood environmental quality.[5] Justice William Douglas, author of many books and articles in support of environmental protection throughout the nation, authored the opinion. Private neighborhood associations have followed in the wake of zoning, providing a new and more comprehensive form of private regulatory protection of neighborhood environmental quality.[6]

The organized environmental movement in the United States, admittedly, has paid little attention to the quality of the neighborhood environment over the past four decades. Issues such as wilderness protection and endangered species have commanded much greater interest. However, some environmental thinkers have recently suggested that the environmental movement should reconsider its priorities. William Cronon, author of *Changes in the Land* (the environmental history of New England), declared in a 1995 article that "any way of looking at nature that encourages us to believe we are separate from nature—as wilderness tends to do—is likely to reinforce environmentally irresponsible behavior." We must develop a new attitude toward nature, he suggests, recognizing that "the tree in the garden is in reality no less other, no less worthy of our wonder and respect, than the tree in an ancient forest that has never known an ax or a saw." The American environmental movement, Cronon argues, must begin to devote greater attention to "the part of nature we intend to turn toward our own ends . . . asking whether we can use it again

and again and again—sustainably—without its being diminished in the process."[7] Private neighborhood associations in fact are today serving such purposes.

The rise of the private neighborhood association in the late 20th century thus shows yet another side to the American movement for high environmental quality. Like many environmental policies, this "neighborhood environmentalism" was a response to a problem of the commons. Within a neighborhood, the private incentive is for less desirable uses to move into sites now occupied by more desirable uses, thus benefiting from their surroundings and raising the welfare of the new entrants. Individual landowners, moreover, will be willing to sell lots for such redevelopment at much higher densities with cheaper housing. One apartment house in a neighborhood of low density homes will enrich the owner. However, if each landowner behaves in this fashion, the overall result will be a deterioration of the neighborhood environment. As Garret Hardin famously argued in 1968, whether it is open grazing lands or urban neighborhoods, a solution to "the tragedy of the commons" requires either a system of government regulation or a system of private property rights.[8] Zoning represented the public regulatory option; the private neighborhood association represents a private regulatory approach based on the creation of a collective private property right.

Private Restrictions

Neighborhood associations typically maintain tight restrictions on how property within their environmental surroundings can be used. These restrictions (the "conditions, covenants, and restrictions," or "CC&Rs") are specified in the property deeds and described in the founding document (the "declaration," or "private constitution" of the neighborhood). These restrictions are designed to exclude many land uses in order to protect the neighborhood environment's character. As James Winokur observes, "concern for segregation of land uses," or providing protection from "industrial, commercial and even multi-family residential uses," is a prime objective of most neighborhood associations.[9]

These protections also usually include private regulatory elements that go well beyond the level of environmental control achieved by conventional zoning in the public sector.[10] Any significant exterior modification of a property, such as the installation of a new roof, the construction of a fence, or the planting of shrubbery, is likely to require collective neighborhood approval. In northern Virginia, art teacher Peggy Nigon "likes that the home colors" in her private neighborhood association mostly "all match." There is a pair of "bright teal houses" that she drives past on the way to work, and she wonders "how that happened."[11] Millions of other unit owners in neighborhood associations across the United States share her opinion and have acted together to control strictly the exterior colors of homes in their neighborhoods. Some neighborhood associations regulate the placement of basketball hoops, or prohibit their installation altogether. In Maryland, the Middlebury Homeowners Association allows the construction of in-ground swimming pools, but rules out above-ground pools.

Some of these rules seem excessive, although many unit owners support even the tightest controls. In Colorado the South Creek Eight Homeowners Association demanded that a unit owner remove a hot tub. The Plantation Walk Homeowners Association in Tennessee regulates the grass height and edging style used in mowing lawns. Other associations regulate such details as the color of swing sets or even the size (to the 1/16th of an inch) of screws used for balcony railings. The Sunstream Homeowners Association in San Diego prohibited a unit owner from attaching a

ceramic sign with the family name to the outside of the owner's entry door. According to the rules of the association, the hanging or placement of any signs in the common areas—including every part of a property's exterior—requires association approval.

Neighborhood association rules frequently limit the way individual properties are used. Some associations stipulate that garage doors must be kept closed when not in use. Associations often specify the types of motor vehicles allowed in the neighborhood—prohibiting house trailers, larger trucks, or even any kind of truck at all—and the manner of parking permitted on neighborhood streets and driveways. In proposing "sample rules," an industry leader, LuciaTrigiani, suggests, "No playing or lounging shall be permitted, nor hall baby carriages, velocipedes, bicycles, playpens, wagons, toys, benches, chairs, or other articles of personal property be left unattended in common areas of the building, stairwells, building entrances, parking areas, sidewalks, or lawns or elsewhere on the common elements."[12] As one judge declared in considering a legal challenge to the powers of a particular neighborhood association, "although William Pitt, Earl of Chatham, may have declared, in a famous speech to Parliament, that a man's home is his castle, this is not necessarily true of condominiums" and other neighborhood associations.[13]

Many restrictions also go beyond property use. Many associations also maintain prohibitions or restrictions on unit rentals. Furthermore, collective controls may extend into various realms of social behavior, such as the playing of loud music or the hosting of late-night parties. Trigiani suggests that associations include a rule specifying that "all persons shall be properly attired when appearing in any common area of the Property including stairwells, community buildings, and any other public spaces."[14] Reflecting an apparent residual puritanism, a few associations have even regulated swimwear and public displays of affection. In 1991, a 51-year-old California woman received an official reprimand from her condominium association because she was seen "parking in [a] circular driveway . . . kissing and doing bad things for over one hour" with a local businessman; the association threatened a fine if there were repetitions.[15] In the 1970s, a Florida association banned the use of alcoholic beverages in the neighborhood clubhouse.

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

> In Green Valley the restrictions are detailed and pervasive. . . . Clotheslines and Winnebagos are not permitted, for example; no fowl, reptile, fish, or insect may be raised; there are to be no exterior speakers, horns, whistles, or bells. No debris of any kind, no open fires, no noise. Entries, signs, lights, mailboxes, sidewalks, rear yards, side yards, carports, sheds—the planners have had their say about each. . . . [They also regulate] the number of dogs and cats you can own . . . as well as the placement of garbage cans, barbecue pits, satellite dishes, and utility boxes. The color of your home, the number of stories, the materials used, its accents and trim. The interior of your garage, the way to park your truck, the plants in your yard, the angle of your flagpole, the size of your address numbers, the placement of mirrored glass balls and birdbaths, the grade of your lawn's slope, and the size of your FOR SALE sign should you decide you want to leave.[16]

There is, admittedly, a backlash now in some neighborhood associations against the full extent of such tight controls. There are calls for loosening of

restrictions in some associations. Developers are reconsidering whether all these controls are really necessary or desirable – whether they add to or detract from property values. The institution of the private neighborhood association can be flexible in this regard. It is a legal instrument for collective ownership of housing and management of the neighborhood environment. The exact goals and manner of that management are up to land developers and then unit owners to determine in each neighborhood individually.

Regulating the Social Environment

In exercising their private property rights, neighborhood associations can engage in forms of social discrimination that would not be available to a municipal government in the public sector. To be sure, the precise extent of legally acceptable social exclusions from a neighborhood environment —which kinds of people can be kept out legally, and which forms of discrimination will be prohibited—are currently being worked out in the courts, legislative bodies, and other policymaking forums. Whether it would be possible to create a neighborhood association limited, say, to unmarried adults, gay people, or people who are deaf or blind remains legally in question.

Such issues may have to be confronted in the near future. As the *New York Times* reported in 2004, "Retirement communities are springing up that let you grow old in the company of people with similar backgrounds or mutual passions that go far deeper than a shared interest in golf." They range from "communities for gay men and lesbians to centers shaped for members of specific ethnic groups. Retired military officers have formed communities around the country."[17] The *Washington Post* found similarly in 2004 that developers were "building an archipelago of gay retirement communities across the Sun Belt."[18] The demand for new homes has been exceeding the supply in these gay neighborhood associations, creating long waiting lists and high prices—and high profits for developers clamoring to build more such developments.

Some people assume that neighborhood association residents want conformity, but the *New York Times* finds otherwise in at least some cases. Reporting on a community in southern California, the *Times* reported, "Sunset Hall in Los Angeles bills itself as a 'home for free-thinking elders.'" Other examples identified by the *Times* include neighborhood associations "for artists [that are] in the works in Manhattan, the ElderSpirit Center . . . [a community] based on spiritual principles . . . in Abingdon, Virginia, and an assisted-living center in Gresham, Oregon, for retirees who are deaf or blind."[19] In a recently created, northern Virginia neighborhood association, EcoVillage, "the idea is to live in harmony with Earth, and with one another. Residents have forged an uncommonly tight-knit neighborhood, with covenants designed to foster a sense of community, and promoted an equally remarkable devotion to protecting the environment, with homes and land use rules that take nature into consideration."[20]

Some associations center their shared social environments around religious beliefs. At the Martha Franks Baptist Retirement Center in South Carolina, one resident commented, "One can become more faithful here in church attendance because they make it so convenient." She added, "I feel like I need the support of Christian people," who are among her neighbors.[21] Eric Jacobsen, associate pastor at the First Presbyterian Church in Missoula, Montana, asserts that a successful "community also requires grace." Most neighborhoods will experience internal tensions and the presence of a shared religious commitment may go far to defuse

resident disagreements. As Jacobsen explains, "We also need forgiveness from our neighbors whom we will invariably offend in the course of living in close proximity to one another. And, as it is nearly impossible to offer grace until we have experienced grace, therefore, the theological promise that God provides grace freely is foundational to many communities." The building of a healthy social environment may require "some more visiting among neighbors" and this will be encouraged in those neighborhoods where "the church and the Christians in that community have a distinct and vital role to play."[22]

Tastes for social environments in America are infinitely varied. While one community association might define a Jewish character by requiring the wearing of yarmulkes on the Sabbath, other associations might have much different ideas. Reporting in the *Chicago Tribune*, Mary Umberger notes, "I've come across residential enclaves that appeal specifically to golfers, airplane owners, horse lovers, and even to Latvians." A neighborhood association she found near Las Vegas set a "new standard," however. In 1999, it included 177 custom homes and 350 condominiums on 550 acres, but—distinctively—the plans also included "more than a dozen shooting ranges." As Umberger noted, this new association was designed for a special group of unit owners, a community of "gun lovers."[23]

University of Virginia law professor Glen Robinson comments, "Conventional wisdom is that [private] covenants based on such personal attributes as race, religion, or ethnicity are unenforceable, though aside from racial restrictions . . . there is remarkably little case law to support this assumption. There is equally little examination of why it should be so."[24] Such issues of the private regulation of the social as well as the physical environment of neighborhoods are likely to receive growing judicial attention; as law professor Stewart Sterk notes, "community association law is in its infancy, or at best early adolescence."[25]

Private Regulations in Established Neighborhoods

The creation of a private neighborhood association is now effectively limited to new areas of land development. Unanimous consent to the rules of the association is achieved by requiring private agreement as a condition of initial purchase. Yet, most metropolitan areas include many neighborhoods that were built up before the rise of the private neighborhood association. These neighborhoods now typically protect their environmental quality through zoning and other public regulations. If they could do it all over again, however, many of them might choose the legal instrument of a private neighborhood association; they would establish their own private government and private regulatory controls to protect their surrounding environmental quality. As a private entity, a neighborhood association might also provide common services more efficiently that would be more closely tailored to neighborhood homeowners' specific desires.

This is not feasible at present because the retroactive creation of a private neighborhood association in an established older area would require the unanimous consent of the property owners – and that would be impossible to achieve in the great majority of cases. However, state governments could enact legislation to allow for the creation of private neighborhood associations in established neighborhoods with less than unanimous consent.[26] The owners in an established neighborhood of existing homes and other properties could vote to accept or reject the creation of such an association. In order to be approved, the affirmative vote would have to be well above a simple majority, but less than complete unanimity. If the required supermajority vote were achieved, the minority of property owners who had voted against the proposal would

nevertheless be legally required to join the private association and would become subject to its private regulation of the neighborhood environment.

This procedure would offer a third way in which a neighborhood might deal with the high transaction costs of organizing collective action to protect its environmental quality. As described above, current neighborhood associations establish their private systems of regulation in advance of development and then require the consent of all home buyers. As a form of public regulation, zoning solves the collective action problem by using government's coercive powers. The initial imposition of zoning resembles an exercise in eminent domain; government for practical purposes condemns certain individual rights of property owners in the neighborhood, and then provides compensation in the form of new collective rights that are effectively assigned to all the owners.[27] If some particular neighborhood individuals are inevitably opposed to this zoning transfer of rights, their losses are regarded by the broader society as an acceptable price to pay for the collective gains in neighborhood environmental protection.

A third approach, as proposed here, would provide for the creation of a new private neighborhood association in place of existing zoning and also with less than unanimous consent. This approach can be defended within a utilitarian framework of thought—as a system of private neighborhood controls that will work better than municipal zoning in protecting environmental quality in neighborhoods and provide superior services. Even if the "disutility" of the use of government coercion is factored into the equation, the social benefits may exceed the overall costs. If the margin of difference is large, there are ample precedents for government actions where collective benefits exceed collective costs—even when the exercise of state power is necessary to override the objections of a losing minority of voters. The very institution of government can be seen as an institutional response to the impossibility (in most circumstances) of organizing collective action in a group of any significant size by unanimous consent.

Although it involves applying government coercion, the proposal outlined here might nevertheless be defended as a step forward in the overall freedoms of property owners.[28] Individual liberty is never absolute. Although it is often portrayed in the writings of libertarian theorists, there has never been a society in which the infringements on personal freedom were limited to preventing direct harms to one individual resulting from others' actions. The very use of income taxation, for example, amounts to the "taking" by the state of a certain portion of each person's earnings. Even in a private neighborhood association, it is impossible to write a contract that specifies all future contingencies. Many unit owners thus find that their freedoms are limited in ways that they did not fully anticipate or understand in advance. In short, there will always be real world trade-offs of one form of freedom for another.

New legal provision for the creation of private neighborhood associations in older areas would also provide a wider range of choice for new residents in search of a neighborhood physical and social environment corresponding to their own individual preferences. The ability to join with others in shaping a common neighborhood environment privately is itself an important individual right. It is a part of the individual liberties associated with "freedom of association." Thus, greater neighborhood autonomy, even when it involves tight restrictions on individual behavior within most neighborhoods, still advances the freedom of Americans in this other dimension of their rights.

Yale law professor Robert Ellickson observes that, in most times and places, property rights have been in a constant state of evolution. A system of rights appropriate to the technology and other circumstances of today may not work nearly as well 50 years from now. One problem is that property rights may become

"excessively decomposed," making it hard to aggregate rights into functional economic units. In general, "when a group is stymied by large-number coordination problems, it is possible that a state or other higher authority may usefully intervene to facilitate" a new property-right solution.[29] The retroactive creation of private neighborhood associations in older, established neighborhoods might be seen in this light.

Privately Protecting the Local Commons

There are many other local commons besides residential neighborhoods. In many cases, as in an older neighborhood, the common area is already divided up into separately owned properties. Yet, as with a neighborhood environment, a collective private regime of property rights may be the best approach to protecting and maintaining the environment of a local commons. It might therefore be desirable, not only to allow for creation of private neighborhood associations retroactively, but also to enact generic legislation to allow as well for new private regulation of many other types of local commons.

For the purposes of discussion, the following six-step process represents an approval procedure for creating such a generic "private commons association," recognizing that many variations in the specific details are possible.

1. A Petition Request—A group of individual property owners in an older established common area petition the state to form a private commons association. The petition describes the boundaries of the proposed commons association and the instruments of collective private governance intended for it. The petition states the services the association expects to perform and offers an estimate of the required monthly assessments. The petitioning owners must include cumulatively more than 40 percent of the commons area property owners, representing at least 60 percent of the total value of existing properties.

2. State Review—The state then certifies that the proposed area of private commons government meets certain standards of reasonableness, including the presence of a contiguous area; boundaries of a regular shape; an appropriate relationship to major streets, streams, valleys and other geographic features; and other relevant considerations. The state also verifies that the proposed private constitution meets state standards for private commons associations.

3. Municipal-Commons Area Negotiations—If the application meets state requirements, a commons-area committee is formed to negotiate a service transfer agreement with the municipal (or other) local government with jurisdiction over the area. The agreement specifies the future possible transfer of ownership of municipal streets, parks, swimming pools, tennis courts, and other existing municipal lands and facilities located within the newly proposed private association, possibly including some compensation to the municipality. It specifies the future private assumption of garbage collection, snow removal, policing, fire protection, and other services—to the degree that the private commons government will assume responsibility for such collective services. The transfer agreement also specifies future tax arrangements, including any property or other tax credits that the commons association might receive in compensation for assuming existing municipal service burdens. Other matters of importance to the municipality and to the proposed private commons association are also addressed. As needed, the state government serves as an overseer and mediator in this negotiation process.

4. A Commons-Area Vote—Once state certification of the proposal to create a new private commons association is received, and a municipal transfer agreement has been negotiated, a commons area election is called for a future date. The election should occur no less than one year after the certification process is completed and a full description of the commons proposal is available to all interested parties, including the founding documents for the commons association, the municipal transfer agreement, estimates of assessment burdens, a comprehensive appraisal of the values of individual commons properties, and other relevant information. During the one-year waiting period, the state oversees a process to inform property owners and other residents of the commons area of the details of the proposal and to facilitate public discussion and debate.

5. Required Percentages of Voter Approval—In the actual election, approval of the creation of a new private commons association requires (1) an affirmative vote by 60 percent or more of the individual unit owners in the commons area and (2) that these affirmative voters must cumulatively represent 70 percent or more of the total value of commons area property. If these conditions are met, all property owners in the commons area are required to join the private commons association and are subject to the full terms and conditions laid out in the commons association founding documents (the "declaration," or as it would amount to in practice, the commons area private "constitution").

6. A New Private Right—Following the establishment of a new private commons area association, the municipal government transfers the legal responsibility for regulating the land use and other features of the environment in the commons area to the unit owners in the commons association, acting through their instruments of collective decisionmaking. The public zoning authority within the boundaries of the commons association is abolished—except where such zoning regulates significant adverse impacts of one commons on other properties that are located outside its boundaries. (The activities within a private commons association are not permitted to create a nuisance for other commons areas outside the association.)

As is well known, it is not only in residential neighborhoods but many environment problems reflect the negative effects of the incentive structure of a commons. If a collective solution to regulate the commons is proposed in an area of individually owned properties at present, this has typically been in the public sector. However, the rise of private neighborhood associations in the United States shows the advantages of a solution based on the establishment of new collective private property rights to protect the neighborhood environment.

Similar private approaches might be suitable for commons areas in general. Because most commons are already under separate property ownership, however, it would be necessary to have a new legal procedure -- such as that proposed above -- for bringing together individually owned properties into a new private commons association with the power to exercise private control over the environment there.

"Unitization" Precedents

There are precedents in other areas of American law for the state to assist a group of property owners in pooling their assets for collective management. Such an assembly process takes place in the oil and gas industries, for example, under the legal

procedures for "unitization" of oil and gas holdings. Consider a case in which a single oil pool is discovered beneath the land parcels of many individual owners. If each owner were to develop the oil individually, the result could be a potential "tragedy of the commons," where each owner quickly drills a well to drain off as much of the total oil pool ahead of other landowners as possible. In the resulting rush to drill, oil reserves would be depleted at an excessive rate and other significant economic losses would result. Unitization of the oil pool allows for collective management to maximize the total value of the oil pool to all the property owners.

One might argue that private markets will solve the oil and gas problem. The landowners collectively will benefit by joining together in a cooperative manner under a single management plan. However, the transaction costs of assembling the various owners are likely to be prohibitive. Holdouts are likely to frustrate the assembly process, especially if misinformed about the relative contribution of their own property to the total value of the oil pool. Recognizing such problems, every major oil state except Texas (where there is statewide regulation of individual oil well production) provides a legal mechanism by which an oil pool can be unitized with less than unanimous consent of the rights owners.

These state laws vary in a number of details, such as the percentage of owners required to approve a unitization. In Oklahoma, the voting requirement for a compulsory unitization is 63 percent. The vote of each individual owner is weighted by his or her relative share of the total acreage above the pool. One study finds that there was less than unanimous consent in more than half the cases of successful unitizations in Oklahoma.[30]

The institutional problems of groundwater management are much the same as those associated with an underground pool of oil. In many areas with little or no control over groundwater use, water supplies have rapidly depleted. Some states are therefore turning to regulatory systems to control groundwater use. Arizona, for example, requires state permits within areas of special groundwater concern (Active Management Areas).[31] The development of formal unitization laws for groundwater has been slow, relative to oil, partly reflecting water's lower value and the resulting smaller incentives to bear the costs of devising new institutional mechanisms.

Another precedent for the private commons association proposal here exists in labor law. It is difficult to obtain the voluntary agreement of 100 percent of a business or industry work force to support a single bargaining agent. However, if a subgroup of workers negotiates a better wage rate, all the workers benefit. To address this free-rider problem, Congress enacted the Wagner Act in 1935 to provide that, if a simple majority of workers vote to join a union, the union by law becomes the sole collective bargaining agent, and individual workers must accept the bargaining outcome. This labor union "unitization" law, which created a system of government-supervised union elections, provided a charter that helped establish the current role of labor unions in American industrial relations. A new "Wagner Act" for environmental commons situations —but with a high supermajority requirement for approval—could have a similarly large impact on the future protection of commons area environments in the United States.

The Tragedy of the "Anticommons"

The familiar "tragedy of the commons" involves a large number of individuals who possess equal access to a resource, thus leading to overexploitation of open rangelands and many other commons. In several recent articles, Columbia University law professor Michael Heller has described a related "tragedy of the anticommons."[32]

In this situation, a large number of individuals have the rights to a resource, but these rights may be useless individually when each holder possesses a veto on the coordinated use of the rights. The tragedy then is not the overexploitation but the underexploitation of the common resource. To use the resource, many individual rights would have to be assembled—but the cost would be prohibitive. Heller offers the example of a new technological innovation that requires the accumulation of many patents held by diverse private parties. The usual holdout and other transaction costs may easily frustrate the assembly of the full set of patent rights and thus prevent the development or use of an important new technology. As Heller explains,

> The danger with fragmentation is that it may operate as a one-way ratchet: Because of high transaction costs, strategic behaviors, and cognitive biases, people may find it easier to divide property than to recombine it. If too many people gain rights to use or exclude, then bargaining among owners may break down. With too many owners of property fragments, resources become prone to waste either through overuse in a commons or through underuse in an anticommons.[33]

Traditionally, one solution to this problem has been to limit the division of property rights in the first place. Historically, primogeniture laws had this purpose, preventing equal property division among siblings. The "rule against perpetuities" also limited the ability of current owners to divide the future property rights in order to control permanently the actions of later owners.[34] If individual rights are nevertheless so divided that they become useless, then the reassembly process might reasonably be undertaken even without compensating the owners of the rights. As Heller explains, "When resources are so fragmented that internal governance mechanisms predictably fail and multiple owners cannot productively manage the resource with respect to the external world, then the ownership fragments are no longer usefully protected as private property"—and it may no longer be appropriate to apply the constitutional protection against "takings" of these fragments.

In other cases, the separate rights might be worth much more grouped together as part of the development of a common unit, though each right still has some value individually. In such cases, a government plan for consolidating rights will necessarily include compensating the individual rights holders. In many cases, that compensation might well consist of an individual ownership share in the future common property. In effect, government's role will be to employ its powers to transform the management of the resource from a decision rule of unanimity to a voting rule of less than unanimity. Whatever the specific institutional mechanism, as Heller observes, there is a long tradition in "the private law of property [that] routinely develops anti-fragmentation mechanisms that prevent, and sometimes abolish, valuable [individual] privately-held interests" for the social purpose of promoting a more valuable coordinated use of the newly combined land and property holdings.[35]

The anticommons issues raised by Heller bear directly on the private commons association possibility for local environments. The circumstance of an older, established commons area in current diverse ownership might be seen as an anticommons in Heller's language. In seeking collective management, it will be essential to devise a fair and reasonable formula of compensation for current users. In a private commons association, as proposed above, new individual rights in the resulting common property could be granted, meeting the compensation requirement in this way. The urban renewal programs of the 1950s and 1960s in the United States took a less satisfactory approach that failed to provide adequate compensation to affected property owners and this assembly process

was soon discredited. Other nations, however, have been more imaginative in this regard and have provided legal mechanisms for pooling land areas and granting new rights in the newly combined properties to the old owners.[36] The proposal above would add to these options.

Conclusion

The rise of the private neighborhood association in the United States shows how it is possible to provide comprehensive environmental protection of local areas through systems of collective private property rights. The private neighborhood association in effect takes the place of public zoning in serving this purpose. The great popularity of private neighborhood associations, now being created in conjunction with almost all new housing developments over large sections of the United States, suggests that a private property right approach is superior in many cases to a public regulatory approach in protecting local environments.

There are many other local commons situations besides that of residential properties within a given neighborhood. A system of collective private property rights might also better serve the needs of the property owners within these local commons areas. Most of these situations, however, would involve a group of existing owners and – absent government involvement -- a new private property regime of environmental protection would require unanimous consent. In most cases this would be a practical impossibility. State governments therefore should enact generic legislation allowing for property owners in a local commons area to create a new private association to regulate and manage their common environment. Approval of such a collective property right to the area of the local commons should require approval by a supermajority of property owners but less than 100 percent.

Endnotes

[1] Robert H. Nelson, *Private Neighborhoods and the Transformation of Local Government* (Washington, DC: Urban Institute Press, 2005).
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[3] See the web site of the Community Associations Institute, Alexandria, Virginia, http://www.caionline.org/about/facts.cfm . See also Doreen Heisler and Warren Klein, *Inside Look at Neighborhood Association Homeownership: Facts, Perceptions* (Alexandria, VA: Community Associations Institute, 1996), p. 34.
[4] See Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (New Haven, CT: Yale University Press, 1994); Steven E. Barton and Carol J. Silverman, eds., *Common Interest Communities: Private Governments and the Public Interest* (Berkeley, CA: Institute of Governmental Studies Press, University of California, 1994); and Robert Jay Dilger, *Neighborhood Politics: Residential Community Associations in American Governance* (New York: New York University Press, 1992).
[5] *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).
[6] See Robert H. Nelson, *Zoning and Property Rights: An Analysis of the American System of Land Use Regulation* (Cambridge, MA: MIT Press, 1977).
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[8] Garrett Hardin, "The Tragedy of the Commons," *Science* 162 (December 13, 1968).
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[12] Lucia Anna Trigiani, "Sample Rules That Really Work," paper presented to the Community Leadership Forum, sponsored by the Community Associations Institute, Orlando, Florida, October 24–26, 2002.
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[14] Trigiani, "Sample Rules That Really Work."
[15] Kenneth Budd, *Be Reasonable!: How Community Associations Can Enforce Rules without Antagonizing Residents, Going to Court, or Starting World War III* (Alexandria, VA: Community Associations Institute, 1998), p. 7.
[16] David Guterson, "No Place Like Home," *Harper's 287* (November 1992).
[17] Hilary Appelman, "All Your Neighbors Are Just Like You," *New York Times* (April 13, 2004), p. E1.
[18] Lee Hockstader, "Gray and Gay?: These Communities Want You," *Washington Post* (May 31, 2004), p. A1
[19] Appelman, "All Your Neighbors Are Just Like You," p. E1.

[20] Jason Ukman, "New Standard of Living Blossoms at 'EcoVillage': Loudoun Subdivision's Residents Bond through Social, Environmental Pact," *Washington Post* (May 31, 2004), p. B1.
[21] Appelman, "All Your Neighbors Are Just Like You," p. E1.
[22] Eric O. Jacobsen, "Receiving Community: The Church and the Future of the New Urbanist Movement," *Journal of Markets and Morality* 6 (Spring 2003), pp. 78–79.
[23] Mary Umberger, "A Builder with a Target Audience: Gun Lovers," *Chicago Tribune* (May 15, 1999), New Homes, p. 1.
[24] Glen O. Robinson, "Communities," *Virginia Law Review* 83 (March 1997), p. 302.
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[26] I have previously proposed such an approach in in Robert H. Nelson, "Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods," *George Mason Law Review* 7 (Summer 1999). A revised version was reprinted as Robert H. Nelson, "Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods," in David T. Beito, Peter Gordon, and Alexander Tabarrok, eds., *The Voluntary City: Choice, Community, and Civil Society* (Ann Arbor: University of Michigan Press, 2002). See also Robert H. Nelson, "Zoning by Private Contract," in F. H. Buckley, ed., *The Fall and Rise of Freedom of Contract* (Durham, NC: Duke University Press, 1999); Robert H. Nelson, "The Rise of the Private Neighborhood Association: A Constitutional Revolution in Local Government," in Dick Netzer, ed., *The Property Tax, Land Use and Land Use Regulation* (Northampton, MA: Edward Elgar with the Lincoln Institute of Land Policy, 2003); and Robert H. Nelson, "Local Government as Private Property: Towards the Post-Modern Municipality," in Harvey M. Jacobs, ed., *Private Property in the 21st Century: The Future of an American Ideal* (Northampton, MA: Edward Elgar with the Lincoln Institute of Land Policy, 2004).
[27] See Nelson, *Zoning and Property Rights*.
[28] For criticism of the infringement on individual liberty and the private property rights of a losing minority, see Steven J. Eagle, "Privatizing Urban Land Use Regulation: The Problem of Consent," *George Mason Law Review* 7 (Summer 1999); and Steven J. Eagle, "Devolutionary Proposals and Contractarian Principles," in F. H. Buckley, ed., *The Fall and Rise of Freedom of Contract* (Durham, NC: Duke University Press, 1999).
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[35] Heller, "The Boundaries of Private Property," p. 1217.
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