

THE RULES ARE DIFFERENT HERE

An Institutional Comparison of Cities and Homeowners Associations

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Homeowners associations (HOAs) are quickly becoming the most common and fastest growing units of local governance in the United States. Like the cities to which they are often compared, HOAs provide services, regulate activities, levy taxes, and ultimately elect their governing bodies. Because the courts view HOAs as business enterprises rather than as governments, HOAs' governing provisions are not required to conform to basic democratic principles for participation. This article uses theories from the new institutionalism to compare the typical governing provisions of cities and HOAs to consider how these provisions shape civic life in urban areas.

Keywords: *homeowners association; cities; institutions; voting; taxes; assessments; urban governance*

A homeowners association (HOA) in Boca Raton, Florida, cited and sued a resident, claiming her dog weighed more than 30 lbs, a violation of association rules. The results of the court-ordered weigh-in were inconclusive with the scales fluttering above and below the limit. The case was settled out of court on undisclosed terms (cited in McKenzie, 1994).

In 2000, a Houston couple was late paying their association dues on a house they had owned for 17 years. In June, after paying their \$300 dues in installments, they got a letter from the association's lawyer. The letter informed the residents that, if they did not pay \$604 (an amount that included legal fees) within 2 weeks, they would be sued for foreclosure on

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their home and additional legal fees. By the time the lawsuit reached the court's docket, the bill for legal fees had reached \$28,000 (Marshall, 2002).¹

The accounts of conflicts between residents and their HOAs found in the popular press highlight the petty and sensational. There is a serious subject, largely ignored in news accounts, beyond the outrageous tales: HOAs are transforming civic life in the United States. In fact, HOAs are the fastest growing organization for local governance. Some 50 million people currently live within an HOA or other community association (Community Associations Institute, 2003). Almost unheard of 50 years ago, HOAs now outnumber cities 13 to 1.² Increasingly, urban residents find themselves holding dual citizenship as residents of their cities and members of their HOAs.³ HOAs are often compared with cities: Both provide services, levy taxes, and regulate individual behavior. But HOAs have been called "private governments" (McKenzie, 1994) and cities "creatures of the state" (Dillon, 1911). Cities and HOAs spring from different roots and rely on different rules of social choice in making collective decisions. These rules—concerning who may participate, how to participate, and how to translate individual preferences into a collective choice—highlight the distinction between democratic ideals and the models of social choice (Riker, 1982) and underscore some of the contrasts between politics and markets as systems for social choice (Lindblom, 1977).

This article uses insights from the new institutionalism in political science and economics to examine the origins of these organizations, the function of their rules, and the implications of institutional differences for citizenship and governance.⁴ The first section discusses systems for social choice, describes legal differences between cities and HOAs, and provides a primer on HOAs. The second section draws from the new institutionalism to more formally consider the purpose and function of rules. The third section examines the rules governing participation that HOAs and cities typically apply in handling similar situations, whereas the final section raises questions about how the simple fact that the rules are different translates into the promotion of values that influence the civic life and governance of urban areas.

SYSTEMS FOR SOCIAL CHOICE: POLITICS AND MARKETS, CITIES, AND HOAS

As creatures of the state, cities are organizations of politics. As private governments most often incorporated as private nonprofits, HOAs are

organizations of markets. The distinctions between politics and markets provide a useful starting point for understanding the differences between cities and HOAs and the rules that govern them. Politics and markets are social systems that allocate benefits (Lindblom, 1977). In a capitalist democracy, both systems rely on participation, individual freedom, and choice (Friedman & Friedman, 1980). Politics and markets, however, rely on different instruments to express choice, with politics relying on the vote and markets relying on the dollar. At this point, the similarities in values between the ideals of democratic politics and markets diverge. The democratic ideal promotes the notion of political equality among individuals, expressed as the notion of one person, one vote. Markets, on the other hand, depend on inequality among individuals to bring about economic efficiency. In the free market ideal, successful individuals or firms produce what consumers demand. Competition leads to an equilibrium between supply and demand and weeds out the inefficient. In this way, politics and markets work to attain different goals, rely on different mechanisms to make social choices, and follow different sets of rules to generate those choices. These rules shape how the organization responds to its environment and establish the signals for recognizing individual choices.

As a signal, democratic political entities rely on voice, citizens' active expression of their preferences (Hirschman, 1970; Lyons & Lowery, 1986; Lyons, Lowery, & Hoogland DeHoog, 1992). In the United States, a range of constitutionally protected freedoms—including the right to vote and the freedoms of speech, association, and assembly—support citizens' expression of voice. For markets, entry and exit signal consumers' preferences, and market models of community life envision consumers shopping for the community with a package of taxes and services that best fits their preferences (Schneider, 1989a; Tiebout, 1956). Constitutional protections including property rights and the right to travel also support consumers' demonstration of the exit (or entry) signal.

Entry and exit are dichotomous signals of choice without the nuances of voice (Hirschman, 1970). Even voting, a seemingly straightforward expression of choice, can be ambiguous. Different ways of adding up individual votes can result in different outcomes, which makes discerning the popular will from individual votes problematic (Arrow, 1966). The meaning of an individual vote can also be nebulous: Is the voter showing a true preference or casting a vote strategically (Farquarson, 1969)? Markets are not subject to these vagaries. Aggregating individual choices signals demand. Buying decisions are fairly simple calculations of individual preference and ability to pay: If they want Pepsi, people do not buy Coke

because they want Coke to outperform Pepsi in soft drink industry market shares. On the other hand, people will vote for a less preferred primary candidate if they believe he or she has a better chance of winning the general election. Politics and markets are different in the ways they work to allocate benefits in society, in how they discern what people want, and in the rules they follow to carry out this function. As organizations of politics or markets, cities and HOAs also differ in their rules. These differences are accentuated by the powers conferred on these organizations by state laws and the construction of these laws by the courts.

As organizations, cities and HOAs are nested within the state institutions that establish how each may be formed and how their governing documents may be adopted. A city can be organized under state general law or under a charter, which serves as the city's governing document, a kind of city constitution (Krane, Rigos, & Hill, 2001). HOAs, on the other hand, are mostly established under state law as private, nonprofit corporations.⁵ For them, the declaration of covenants, conditions and restrictions (CC&Rs) and, to a lesser extent, the association bylaws are the governing documents (Natelson, 1989). The declaration is recorded in county land records. It identifies the property and development plan, the HOA's rights, duties, and mode of operation, and the permanent restrictions that will be placed on the property and subsequent landowners (Hyatt, 2000; Sterk, 1997). Bylaws, on the other hand, are adopted by the HOA's governing board (board of directors) and may or may not be recorded in the declaration. Bylaws address the HOA's internal governance including voting rights and elections (Hyatt, 2000).

The extent of HOAs' powers stems from their legal status as private enterprises and their usual organization as private, nonprofit corporations under state laws.⁶ In general, the courts protect private entities from government intrusion in their internal operations (Frug, 1980). The courts have viewed HOAs as business enterprises, not governments (Hyatt, 1985, 2000; McKenzie, 1994). As a result, HOAs have considerable autonomy from their host city and state. Cities, on the other hand, have the authority of government, but the courts view them as creatures of the state (Dillon, 1911). States can create or dissolve cities, change cities' boundaries, and require cities to perform some actions and forbid them from undertaking others. Once established, neither the state nor its cities can extinguish an HOA, modify its jurisdiction, or demand that it perform tasks not assigned to it in its organizing documents. Cities' government status also prevents them from infringing on the rights of individuals including such so-called artificial persons (Black, 1979) as private corpo-

rations. Both cities and HOAs are grounded in state laws, but these laws and their interpretation by the courts have conferred more autonomy on HOAs than on cities. Without city action, however, HOAs would not exist.

Rising land costs spurred changes in the housing industry and led to the creation of HOAs as developers sought options that allowed clustered housing on smaller individual parcels of land with larger common areas. Many local governments responded by amending their zoning ordinances to allow flexible lot lines with higher housing densities grouped on less land and open areas maintained as green space or other amenities. Clustered housing offered developers increased flexibility in locating structures, often at higher density levels and lower development costs. For cities, this form of development offered the potential of more affordable housing, the protection of open spaces and environmentally significant areas, and the ability to shift some infrastructure and maintenance costs. Development within an HOA may include basic yet privately owned and operated infrastructure such as streets, water, and sewage as well as such amenities as golf courses, swimming pools, and tennis courts, all of which reduce the city's responsibility for service provision and maintenance. Developers, however, needed a realistic means to end their responsibilities to the project once it was built, without a continued maintenance obligation (Hyatt, 2000). Lenders needed a technique that would allow mortgages on individual housing units with provisions to care for common areas and amenities (Krasnowiecki, 2002). HOAs provided an answer.

HOAs are "automatic, mandatory membership organizations" (Hyatt, 1985, p. 6). The mandatory membership requirement resolves collective action problems by eliminating the potential for free riders (Dilger, 1992; Olson, 1965). By taking title to property in the association's jurisdiction, the property owner becomes a member of the association and must abide by the property restrictions laid out in the CC&Rs. These restrictions run with the land and bind all current and future owners of the property. CC&Rs address a myriad of issues related to the development and generally serve to regulate taste. CC&Rs address such matters as parking (especially the parking of "illegal" vehicles such as trucks, boats, or campers), sign posting, pet ownership, exterior colors, landscaping, architectural standards, play equipment, and decor, sometimes even interior decor visible from the street (Blakeley & Snyder, 1997; Hyatt, 1985, 2000; McKenzie, 1994).

As business enterprises rather than governments, HOAs grant their members more limited rights than cities accord their citizens. HOAs can

ban campaign signs, evangelistic solicitation, protest demonstrations, and the distribution of newspapers, actions that if done by a city would violate basic constitutional rights (The Harvard Law Review Association, 1985; Siegel, 1998). HOA rules can also cover minute actions of daily life such as leaving your house by the back door or kissing your spouse by the front door (Franzese, 2002). For the most part, the covenants, conditions, and restrictions favor the security of restricted collective preferences over the uncertainty of future, unpalatable individual choices (Heckathorn & Maser, 1990). These limits on individual expressions of taste are often perceived as attempts to maintain property values throughout the HOA community (McKenzie, 1994).

Like cities, HOAs are faced with problems of collective ownership of common property and of monitoring and enforcing regulations. HOAs, however, can impose heavy penalties in carrying out these functions. The HOA holds title to the common areas and is responsible for their maintenance. Assessments against individual homeowners pay for maintaining the common property and other actions. Failure to pay HOA assessments can be met with liens or, in some states, nonjudicial foreclosure on the property, fairly powerful enforcement mechanisms. The association is also responsible for monitoring and enforcing the CC&Rs and is frequently empowered to impose penalties (such as fines or bans on the use of the association's common areas, including its streets) on rule breakers (Hyatt, 2000; Hyatt & French, 1998). City land-use regulations (such as zoning regulations) perform a similar function in regulating property use but without the level of detail that governs individual property choices in HOAs (Nelson, 1999).

The developer drafts the HOA's governing rules before the land is sold to individual owners (Sterk, 1997).⁷ In the initial phases of development, the developer both establishes and appoints a governing body (a board of directors) with the authority to levy assessments, maintain common areas, and make management decisions. Ultimately, the association members will elect the board. The developer serves as the institutional entrepreneur who drafts the CC&Rs that establish the association and regulate property use, fiscal matters, and bylaws, which establish the overall provisions of governance (Hyatt, 1985, 2000). HOA rules, then, are initially crafted by an individual whose goal is to sell, but not necessarily to live in, the community he or she has created. For that reason, these rules may do more to facilitate property sales and maintenance than community governance.

CITIES, HOAs, AND THE NEW INSTITUTIONALISM

Organizations of politics and organizations of markets operate under different kinds of rules that govern participation in collective decision making. With its focus on the function and effect of rules, the new institutionalism offers a useful framework for systematically examining cities and HOAs. Cities' and HOAs' rules of governance each set procedures, secure rights, and express restrictions for directing future decisions. These rules all reduce uncertainty, one of the most vital functions of institutions (North, 1990). The new institutionalism often considers laws and rules as well as social customs and norms, but these two kinds of institutions are not identical. Unlike social norms, which may evolve unintentionally (Hayek, 1967), rules are deliberately created by their designers to satisfy the designers' purposes (Burns, 1994; Clingermayer & Feiock, 2001).

Each organization has a hierarchy of rules with constitutional-level rules at the top. Constitutional-level rules set up the overall system of governance, whereas lower-level substantive rules apply only to specific issues such as land use or taxation (Brennan & Buchanan, 1980, 1985). This rules hierarchy is nested so that constitutional-level rules control which substantive rules are enacted and how they are implemented. Like a computer's operating system, constitutional-level rules act as superceding principles that manage the process for making specific choices (Ostrom, 1990; Ostrom, Gardner, & Walker, 1994). At a minimum, constitutional-level rules define who can participate, how to participate, and the margin needed to win in making a substantive decision.

In economic models, including public-choice models, competition is seen as vital to bringing about efficient outcomes. In communities, however, all-out competition can have perverse effects if each individual pursues his or her self-interest at the expense of the whole. If, for example, homeowners in a deteriorating neighborhood improve their properties, the homeowner who refuses to cooperate gains aesthetic and possibly financial benefits from his or her neighbors' efforts without contributing his or her own resources. The noncontributing homeowner stands to make the greatest gains because he or she has made no investment. The social dilemma is that if all the neighbors followed suit, there would be no gains, only losses. In communities, social dilemmas such as this abound (Dawes, van de Kragt, & Orbell, 1990), and cooperative arrangements often yield better results than does pure competition (Mansbridge, 1990). Cooperative efforts require a decision-making logic that is appropriate for the col-

lective, not just the individual. Collective decision making demands that the question, “Am I better off?” be translated to, “Are we better off?” Constitutional-level rules are grounded on the need for cooperation (Maser, 1998), and one of first considerations is defining *we* in the rules governing participation.⁸

Rules covering the who and how of participation and the winning margin vary according to the way the institution’s designers envisioned the cooperation problem and the purpose to be served by cooperation. The designer’s understanding of the threats to cooperation gives rise to constitutional-level rules for overcoming those threats (Maser, 1985). Basic threats to cooperation include incoordination, a failure to meet the collective preference; inequitable division, an unfair allocation of costs or benefits; and defection, a withdrawal from the collective or the collective choice (Heckathorn & Maser, 1987; Maser, 1998). The risk of incoordination rises when there is volatility. Volatility increases uncertainty among citizens and threatens commitment to and within the community. Cooperation becomes less likely if decision makers are erratic or can easily undo the actions of their predecessors, situations that can arise in a so-called pure, populist democracy (Riker, 1982). Arrow’s (1966) theorem, for example, demonstrates that because the social choice selected may depend on the method used to pick the winning option, the chosen option may change from one vote to the next. As proponents of the losing options band together in election after election, the alternative selected may cycle from vote to vote. Institutions are necessary to break the cycle (Shepsle, 1979). Constitutional-level rules that promote stability address this need (Maser, 1998). These rules often concern who can participate in collective decision making and how those decisions can be made and the votes needed to win (Shepsle & Weingast, 1984). Examples of rules that foster stability include separation-of-power provisions or supermajority requirements for the winning margin (Hammond & Miller, 1987). When citizens realize that the rules to solve controversies and enforce agreements are stable so that cooperative benefits can be secured, cooperation increases.

In cities and HOAs, residents’ likes and dislikes are bound to differ, even in the most homogenous community. These differences give rise to the second barrier to cooperation, a division problem that concerns how residents’ preferences are taken into account in collective decisions. Rules have distributional consequences: They address who gets—and who pays for—what, and when and how (Knight, 1992; Lasswell, 1950). Because the external environment and residents’ preferences are unpredictable over time, rule makers cannot settle the substance of division problems in

advance. Instead, institutional designers draft procedures for how future negotiations will proceed (Heckathorn & Maser, 1987). The most basic risk is that the decision makers will act without concern for what their constituents would have done had they been able to negotiate an agreement on their own. To combat this risk, constitutional rules make provisions for responsiveness to citizens' voice (Hirshman, 1970) and typically deal with voting, among other things. In democracies, universal suffrage (Michelman, 1982) and decisions by majority rule are common provisions that address the need for responsiveness (Maser, 1998).

Finally, cities' and HOAs' constitutional rules address one more obstacle to coordination, defection problems. How can citizens be sure that others will not renege on a collective agreement or that their decision makers, even if elected, will act in the community's best interest? Defection problems arise when one engages in individually rational, opportunistic behavior at the expense of the whole. Monitoring (Moe, 1984) the governing body and granting it powers of enforcement are checks against defection among members (Heckathorn & Maser, 1990). To counter defection problems by decision makers, rules grant citizens power over their governors. Frequent elections allow citizens to evaluate their elected officials' performance, and measures such as recall provisions empower citizens to oust unfaithful governors from office (Maser, 1998).

There are clear trade-offs in the purposes to be achieved by rules depending on the way the institutional designers defined the cooperation problem, *ex ante*. Clearly, a rule cannot promote both stability and responsiveness (Knight, 1992). The allocation of voting rights and the rules for the winning margin indicate which objective, stability or responsiveness, is being pursued. The distinctions between HOAs and cities as community organizations for local governance become evident when their constitutional-level rules are compared. Looking at these rules in the context of the kinds of decisions they control also illuminates each organization's prevailing values and relationships to its citizens and environment.

COMMON PROVISIONS OF HOAs AND CITIES

Despite differences in specific governing rules in both HOAs and cities, three major influences—professional associations, state laws, and the need to address the cooperation problem—have resulted in common approaches to governance in HOAs and cities. Through publications, training, and outreach, professional associations have provided a forum

for considering preferred governance approaches for HOAs. The National Commission on Uniform State Laws and the American Law Institute/American Bar Association are among the professional associations that have disseminated model state-enabling legislation or governing documents.⁹ In addition, the institutional entrepreneurs that form HOAs (particularly developers and their attorneys) typically modify boilerplate forms when preparing the organizations' governing documents (Hyatt, 1998; Krasnowiecki, 2002). As a result, many HOAs have similar governance schemes with regard to voting rules.

Second, as organizations nested within state laws that allow for city and HOA self-governance, state institutions (and their interpretation by the courts) shape city and HOA governance provisions. Most of the 48 states that grant cities home rule power also grant them discretionary authority over their structural and functional choices (Advisory Commission on Intergovernmental Relations, 1995; Krane et al., 2001). However, cities' freedom to choose how residents participate in local elections is limited. Court cases challenging electoral practices have led to great similarity in the rules governing participation in city elections, as this section later demonstrates. For HOAs, most states have adopted general legislation governing condominium associations, but fewer than 20 states have adopted similar legislation governing HOAs (Krasnowiecki, 2002). At least two states require that the HOA be incorporated, but incorporation is the standard practice of larger HOAs (Hyatt & French, 1998; Natelson, 1989). State statutes seldom address the internal governance of HOAs beyond what is required for corporate governance. States such as California, Arizona, Florida, and Texas (Pena, 2002), with a longer history of HOA activity, have developed more detailed laws regarding HOA governance (e.g., pertaining to issues of disclosure or open meetings) and the regulation of individual behavior (e.g., displaying the U.S. flag).¹⁰ Six states—Alaska, Connecticut, Minnesota, Nevada, Vermont, and West Virginia—have adopted the model Uniform Common Interest Ownership Act as of 2003 (National Conference of Commissioners on Uniform State Laws, 1994; see <http://www.ncusl.org>). For the most part, however, the treatment of individual participation in collective decision making is left up to the organization, subject to review by the courts. For these reasons, the next section's consideration of voting institutions relies heavily on information from law reviews, court cases, and professional association publications.

Cities or HOAs often possess similar governance provisions because each organization faces the coordination problem, which requires that

participation in joint decision making be addressed. The basic prerequisites for participation—particularly the allocation of voting rights—in city institutions differ fundamentally from HOA institutions. In cities, registered voters who are residents of the jurisdiction are eligible to vote. Despite the fact that an increasing number of Americans own second homes and are essentially residents of more than one community, most state laws restrict people to one official residence. These so-called dual residents, an estimated 10% of all homeowners, are not allowed to vote in local elections but are subject to the tax, spending, and regulatory decisions of local officials (Ostrow, 2002). HOAs reverse this approach. In HOAs, only HOA members may vote, and membership is defined by property ownership (Gillette, 1994; Natelson, 1989). There are many rationales for linking property ownership to the vote, but foremost among them is that this linkage shifts the power of controlling the organization and its leadership to the group that directly bears the costs and benefits of the organization's decisions (Ellickson, 1998). Unhinging property ownership and the vote may lead to a fiscal illusion in which nonowners support higher (or poorly conceived) spending funded by property taxes or assessments under the misperception that their costs are \$0 (Oates, 1991). Theoretically, limiting the vote to property ownership enhances economic efficiency by keeping taxes and spending in line with the taxpayers' preferences.

Efficiency, however, is not the only important value. Democratic ideals advocate participation in all decisions that affect one's life, widely distributing voice (deLeon & deLeon, 2002). These ideals are seldom fulfilled in fact, as institutions for participation in cities and HOAs demonstrate, but HOA voting rights stress the efficiency value. In HOAs, the voting right is usually meted out by a rule dictating one vote for one unit of ownership. Whereas this may be problematic for homeowners jointly owning a single unit but holding different preferences, the connection between property ownership and voting power is especially troublesome for renters. In most HOAs, renters are disenfranchised (McKenzie, 1994; Michelman, 1982), a provision that strengthens the power of nonresident owners (Alexander, 1989). The rental population will vary among HOAs, and the population size is not precisely known. One California study found the median number of renters in that state's HOAs to be 20% (Alexander, 1989). Although renters are unqualified to vote, they are subject to the HOA governing board's decisions and to the CC&Rs. In HOAs, the distribution of voting rights helps to assure responsiveness to property owners but not necessarily to residents. Many HOAs further restrict voting to members in good

standing (Hyatt, 1985), particularly those who have paid their assessments. In cities, voting privileges extend to all residents registered as voters under state law. In most states, this provision excludes convicted felons but not those involved in a tax dispute with the city. When the good standing provision is in place, HOAs further limit responsiveness to those who conform to the HOA rules, effectively removing these dissenting voices from the election.

Voting is not synonymous with democracy; it is democracy's mechanism (Riker, 1982). In 1964, the U.S. Supreme Court held that granting some votes greater weight than others was unconstitutional (*Reynolds v. Soms*, 1964). Reapportionment in Alabama was topic at issue in *Reynolds*, but the Supreme Court later applied the equal-vote principle to cities.¹¹ Before 1968 and the Supreme Court's *Avery v. Midland County* (1968) decision, many municipalities used voting schemes such as those that HOAs now use, with voting keyed to property ownership. In particular, elections to ratify municipal debt frequently restricted franchise to property owners and taxpayers within the city. The court invalidated those provisions for cities on the grounds that all residents would be substantially affected by election results and are due the right to exercise choice in its outcome (*Cipriano v. City of Houma*, 1969; *City of Phoenix v. Kolodziejwski*, 1970). For more than a quarter of a century, citizens' rights to express their preferences in city elections have followed the one-person, one-vote rule, making all citizens politically equal. The court extended this approach to school districts and community college districts but stopped short its application to some special districts it considered proprietary in nature (Briffault, 1993). In these cases, the connection between property and the vote may remain. In *Smith v. Salt River Project* (1997), for example, the court upheld a land-based voting scheme for a special district/utility that provides water and electric power throughout much of the Phoenix metropolitan area. For cities themselves, however, voting rules promote responsiveness to voting-age residents.

The rhetoric of democracy and the notion of a contract often lead one to expect that the parties' rewards and bargaining strengths are equal, but often they are not (Heckathorn & Maser, 1987). In addition to keying responsiveness to property owners, HOAs' connection between property and voting is strategically important to the developer entrepreneur. Most HOAs provide for dual membership, with the developer granted weighted votes for each unit of ownership (Hyatt, 1985). Typically, the developer holds three votes for each unit owned (McKenzie, 1994). The developer's voting rights diminish as units are sold and are extinguished once all units

have been purchased. This voting scheme has two chief advantages for the developer entrepreneur. First, the weighted vote gives the developer control over the association and its rules in the project's early stages. The developer can then react to the market's response before build-out. Second, attenuating the developer's voting power with property sales allows the developer to end his or her membership in and responsibility for the project once all units have been sold. Throughout the development process, however, the distribution of voting rights within the HOA diminishes uncertainty for the developer by providing additional stability in joint decisions. These rules erect additional barriers to residents' collective action efforts that may have influenced the final build-out of the developer's plan for the community. Most importantly, the developer's voting strength adds stability to the governance provisions he or she established in the HOA's founding documents. Changing these provisions is impossible until the developer's voting power has diminished through sufficient property sales. Even after homeowners gain control of the board, court action often reifies the developer's original governance plan because courts are reluctant to find restrictions in the original declaration to be unreasonable (Drewes, 2001).

Rules governing the winning margin also add stability to HOA institutions. Most municipal elections are decided on the basis of majority rule, with the majority defined as those voting in the election. This principle does not necessarily apply to HOAs, which often rely on supermajorities to change the rules governing land uses and lifestyles. To modify the CC&Rs, HOAs often require the acceptance of two thirds of all members, not just of those voting in the election (McKenzie, 1994). This requirement is offset somewhat by provisions for proxy voting, allowable because of the courts' treatment of HOAs as private entities (Hyatt, 1985). The Uniform Common Interest Ownership Act (National Conference of Commissioners on Uniform State Laws, 1994; see <http://www.ncusl.org>) recommends supermajorities of at least 67% or more (as specified in the declaration) for amending the declaration or changing the community boundaries and 80% or more for terminating the HOA or for limiting permitted actions (such as owning a pet) in one's home. In some cases, changing the CC&Rs may require approval by mortgage lenders (Alexander, 1989). Early guidance from the federal government and the Urban Land Institute not only recommended the two thirds rule for modifying the CC&Rs but also suggested that changes required a 3-year waiting period before they became effective (Urban Land Institute, 1964).

The stability granted to the CC&Rs also protects HOA members from defection by their neighbors and elected board members. The CC&Rs narrow the range of permissible changes to the appearance and use of property within the HOA. Some courts have held that boards have a fiduciary duty to enforce the CC&Rs (e.g., *Posey v. Leavitt*, 1991; *Riley v. Ferguson*, 1999). Many boards enforce rules without discrimination out of concern that enforcement of some but not all rules will be found arbitrary, a potentially successful defense against the board's action (*Coventry Square Condo Association v. Halpern*, 1981; Elberg, 2001). As a result, homeowners within an HOA have much greater certainty about what their neighbors will do to their homes, and how officials will respond, than do homeowners outside HOAs.

In cities, changes to substantive-level rules can usually be made by a majority vote of the elected council, and cities rely on constitutional-level rules that emphasize responsiveness to the majority will. The focus on responsiveness recognizes that cities' external and internal environments can change, transforming the demands placed on the government. Population growth or decline and changes in a city's demographic makeup, economic fortunes, predominant lifestyles, values, or tastes can influence city residents' demands for government action (Berry & Lowery, 1987). Residents can make their dissatisfaction known retroactively at the next election. This responsiveness makes land use and public service decisions subject to the vicissitudes of local politics, which may pit neighborhood interests against city interests (Ferman, 1996; Gillette, 1994; Peterson, 1981; Schneider, 1989b; Swanstrom, 1985). On the other hand, HOAs' typical provisions requiring a supermajority vote of the membership to change permitted uses afford great stability within the HOA boundaries. This stability makes it difficult and costly for the HOA to adjust to changing conditions, even in relatively small matters.

To change constitutional-level rules in the bylaws, most HOAs allow amendments through a majority vote of the governing board. In other words, HOAs typically confer more stability to the substantive-level rules that regulate property use than to the constitutional-level rules that establish provisions for coordination within the community. In addition, the suggested approaches in the American Law Institute/American Bar Association publications contain no mention of grassroots provisions that allow HOA members to request changes in either the substantive or constitutional rules. This contrasts sharply with cities' practices. In most cities, charters and substantive laws may be subject to popular action because most city charters provide citizens with tools to make their voices

heard directly, not just through the actions of their elected representatives. In its 2001 survey of more than 25,000 cities, the International City Managers Association found that most cities of all sizes provide their residents with instruments of direct democracy. Of the responding cities, 58% provided for initiatives and 72% for legislative referendums (MacManus & Bullock, 2003). Both tools have a distinct purpose. Essentially, initiatives “allow voters to correct legislative sins of omission and popular referendums enable voters to correct legislative sins of commission” (Magelby, 1984, p. 35). Initiatives allow voters to gather petition signatures to place a proposed measure on the ballot. Referendums allow elected officials to place a proposal on the ballot for voter ratification or rejection. According to the survey, most cities require that bond measures and charter revisions be ratified by referendum (64% and 55%, respectively). Some cities—about 18%—require voter approval of at least some ordinances. In essence, the voting provisions common to HOAs take the provisions of democratic institutions and turn them firmly on their heads, granting flexibility to the constitutional-level rules of governance and stability to the substantive rules governing property and lifestyle.

DISCUSSION

Organizations and their institutions are created to meet the intended purposes of their designers. Throughout the 1950s and 1960s, suburban cities were incorporated to provide a low-tax haven and racial exclusion, maintained by the enactment and enforcement of city land-use regulations (Burns, 1994). From the 1950s on, special districts were created to provide municipal infrastructure outside of the political, administrative, and fiscal restrictions on city governments (Briffault, 1999; Burns, 1994; Doig & Mitchell, 1992; Foster, 1997; McCabe, 2000). Particularly since the 1970s, HOAs have been established to govern the commons created through innovations in housing developments. In other words, the motives for creating any organization are not necessarily lofty, and the rules established to guide the organization’s future decisions are influenced by those motives. Currently in the United States, entrepreneurs are motivated to create HOAs more than other kinds of organizations. There are approximately 19,431 municipalities, 35,937 special districts (U.S. Bureau of the Census, 2002), and 250,000 HOAs (Community Associations Institute, 2003). Each of these organizations makes decisions about the level and type of services their constituents will receive, and each operates in an

institutional setting that may or may not afford citizens the right to participate in those decisions.

HOAs have revolutionized community organizations in the United States (Alexander, 1989; Silverman & Barton, 1994). Some have criticized this development as an attenuation of individual rights, as a privatization of government, or as an example of the so-called secession of the successful (Blakely & Snyder, 1997; Cashin, 2001; Franzese, 2002; Kennedy, 1995; McKenzie, 1994). Others have recommended the HOA model as an efficient substitute for municipal land-use controls, particularly zoning (Nelson, 1999), or as a means for eliminating urban blight (Ellickson, 1998). The characterizations of HOAs as bane or boon derive from their institutions, especially those governing participation, and the ends that those institutions attain. Theories of social choice suggest that there is no single rational method for divining the collective will. Instead, institutions allow for the construction of a collective voice, subject to rules that favor stability, responsiveness, or efficiency (Maser, 1998), depending on the nature of the decision at issue. There may be many reasons for subjecting different kinds of decisions to rules that stress different values. Municipal reforms of the Progressive era demonstrate a sensitivity to these differences.

Progressive reformers worked to change the institutions of municipal governance to combat political corruption and to erect barriers to politicians' abilities to deliver particularistic benefits (Hofstadter, 1955; Knott & Miller, 1987; Lineberry & Fowler, 1967). Progressives pushed for changes in the rules governing popular participation in cities by advocating the adoption of at-large elections, initiatives, referendums, and recall provisions. Whereas these reforms were aimed at making politics—and politicians—more accountable to the people, other reforms such as the council-manager form or special district governments were intended to separate politics from businesslike administration. In a sense, Progressive reforms called for more democracy in selecting policies and politicians and less democracy in the mechanics of executing those policies.

Progressive reformers believed that changing the rules would change the outcomes, but many did not work out as planned. The seemingly bright line between politics and administration blurred, as public administration scholars have noted over the years. Some have come to view the instruments of direct democracy as tools of special interests (Broder, 2000). The institutions and organizations of urban governance have grown as ad hoc, piecemeal responses to the procession of separate problems and opportunities. At the beginning of the 21st century, we are left

with urban polyarchies (Lindblom, 1977), overlapping organizations of politics and markets, with individuals' abilities to participate in these organizations' decisions differing from one organization to the next. This complexity stymies efforts to build community and citizen commitment to the collective. Again, as in the Progressive era, mainstream public administration faces the need to lead a dialogue on municipal reform by considering the normative and empirical questions of urban governance and community building.

Participation in the decisions that affect one's life is the touchstone of democratic thought, and the questions posed about the who, the how, and the winning margin in participation will be jarring. For example, does the one-person, one-vote rule get in the way of effective democratic metropolitan governance, as some have charged (Seliga, 2001)? Do voting rules with winner-take-all majorities protect minority interests, or would an alternative voting scheme do a better job (Pildes & Donoghue, 1995)? If there is a conflict between the need to pay for public services and the commitment to community participation in decision making, how can that conflict be addressed (Briffault, 1993)? Recognizing that there must be trade-offs in the values pursued, what kinds of decisions should be subjected to rules that promote stability or responsiveness?

Clearly, governance of the urban polyarchy raises many questions beyond those discussed here. HOAs and cities provide a natural experiment for examining the relative strengths and weaknesses of the market and the polity. The fact that the rules are different in each type of organization makes it possible to evaluate the relationship between rules and decision outcomes so that relationships that work in theory can be observed in practice before wholesale institutional change is advocated. The contrasts in the rules of participation between HOAs and cities make it possible to evaluate what happens when government does indeed run like a business, where market inequalities are translated into political inequalities.

NOTES

1. These stories are selected to typify the kind of story found in the popular press; they are not presented as examples of the kind of action usually taken by a homeowners association (HOA).

2. There are roughly 250,000 community associations in the United States, and between 6,000 and 8,000 new associations are created each year (Community Associations Institute, 2003). According to the 2002 Census of Governments (U.S. Bureau of the Census, 2002), there are 19,431 municipalities and approximately 87,900 total local governments.

3. HOAs are the most common form of community association, a term that includes HOAs, condominium associations, and housing cooperatives. About half of all housing built in U.S. metropolitan areas lies within a community association (Community Associations Institute, 2003).

4. Consistent with the ideas of the new institutionalism, the terms institution and organization have a distinct definition: "Institutions are sets of rules that structure interactions among actors, and organizations are collective actors who might be subject to institutional constraints" (Knight, 1992, p. 3). For example, a city charter is an institution, but a city is an organization.

5. A few states (e.g., Florida and Georgia), require HOAs to incorporate, but most states do not. Most HOAs incorporate because incorporation brings the body of corporate law to bear on the organization's actions, clarifies its status, and limits the liability of its members (Hyatt, 1985).

6. Federal law governs the award of nonprofit status, but the organizations are incorporated under state laws.

7. These restrictions and governing rules are drafted and recorded in the land records office by the developer in a declaration of covenants, conditions and restrictions (Sterk, 1997).

8. Participation and expressing voice can take many forms, but this essay concentrates on voting.

9. For more than 100 years, the National Commission on Uniform State Laws (see <http://www.ncusl.org>) has drafted and lobbied for the passage of model legislation (including property law) in areas in which uniformity among the states is seen as beneficial. The commission's Uniform Condominium Act, Common Interest Ownership Act, and Planned Community Act have, to varying degrees, influenced states' adoption of legislation. Since 1947, the American Law Institute/American Bar Association has been the leading provider of continuing legal education, and this research cites publications from its experts on community association law (see <http://www.ali-aba.org>).

10. Citations to statutes were supplied by the Community Associations Institute and reviewed by the author.

11. *Avery v. Midland County* (1968) and many subsequent Supreme Court cases marked a change in the standards applied to local elections, which had previously viewed local governments as creatures of the states and not subject to federal oversight with regard to their voting provisions (Briffault, 1993).

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