



ADVANCE SHEET– AUGUST 7, 2020

President's Letter

In this issue, we entertain the hypothesis that many of today's discontents are due to excessive concentrations of power in both the private and public sector. For some critical views of these tendencies, we include three widely separated documents. The first, a protest against the economic concentration of the Gilded Age and a precursor of the progressive era of Theodore Roosevelt and William Howard Taft, is a speech on The New Feudalism delivered by a little remembered Allegany County lawyer, Benjamin Richmond, before the Maryland State Bar Association in 1898. The second is Judge Learned Hand's eulogy of Mr. Justice Brandeis, delivered in the Supreme Court chamber in 1942. The third is a symposium on Creating Community in Planned Communities conducted by the Calvert Institute for Policy Research in 2004.

The version of Judge Hand's speech here set out is from the Supreme Court Reports. It is also reprinted in a collection of Judge Hand's essays edited by Irving Dilliard, *The Spirit of Liberty* (New York: Knopf, 3rd ed. 1960). Of this, one of my mentors in the law, the late Professor Philip Kurland observed: "I dislike dogma whatever its source, except perhaps the essays of Learned Hand", of which he confessed to have worn out three copies. Perhaps the sample here may inspire some of our readers to follow his example.

We also include the present writer's 'take' on the ambitious recent 1000 page history of the United States by Jill Lepore, *These Truths* (New York: Norton, 2019).

Finally, for the benefit of our less industrious members, like the undersigned, shut in by the coronavirus, we furnish below a link to the New York Times Book Review's helpful recent guide to Nordic Noir mystery novels:

<https://www.nytimes.com/2020/07/24/books/review/nordic-noir-guide.html>

George W. Liebmann



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Bar Library Greeting/Note Cards

In many ways, the last few months have seen us return to a quieter and slower pace of life. Long walks, or even just sitting in our yards watching and listening to the birds. I might at this juncture recommend another old fashioned pursuit, sending someone a letter or a note. Since our daughter went in the Army several years ago, I have discovered the great good pleasure of receiving a letter from her. My wife on the other hand is more into “face time,” which I suppose is o.k. too.

A number of years ago the Bar Library commissioned local artist Martha Dougherty to render works of the Bar Library and Mitchell Courthouse. They were so well received that additional images of the Museum of Baltimore Legal History, Ceremonial Courtroom 400 and the Supreme Bench Courtroom (Courtroom 600), were completed. In turn, these images were used to create Bar Library greeting/note cards. These marvelous representations evoke a dignity and sophistication that make them ideal for just about any occasion. The cards are blank inside (a brief description of what is portrayed is set forth on the back). They sell for \$1.50 each or \$14.00 for a box of ten, which, as anyone who has recently purchased a card can tell you, is quite

a bargain. To get a look at the cards go to www.barlib.org and put your cursor over the Information “button” on the left which will present you with a number of options including “Greeting Cards for Sale.” After you click on it, the cards will appear on the right. For a larger view, just click on the particular card. To purchase, just stop by the Library, phone us at 410-727-0280 or send an e-mail to jwbennett@barlib.org.

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LEADERS IN DISPUTE RESOLUTION SINCE 1995

Bar Library Lecture Series

We are living at a time where more than anything else, we need something to look forward to. With that in mind, please circle the date of Thursday, November 19, 2020, when Prof. Christopher R. Riano is scheduled to appear in the Main Reading Room of the Bar Library to speak on his book *Marriage Equality: From Outlaws to In-Laws*. As always, the lecture will be followed by a wine and cheese reception. I cannot begin to tell you how much I hope to see you there.

THE NEW FEUDALISM.

By BENJAMIN A. RICHMOND, Esq.

When our forefathers had accomplished the independence of the American Colonies, they did not underestimate the difficulties before them in the formation of a new government. The Confederacy, with its discordant elements, offered, they well knew, but a feeble outline of what their government should be. The republics of the past furnished neither an approved model for imitation nor an assured hope of future experiment. Their plan therefore was to be new in the experience of nations.

Nevertheless the new endeavor in government a republic must be. The leaders so willed it and the people approved it. The task was set and the workers were at hand. Their new ship of state was to be built for a long and noble voyage to unknown shores and through, it might be, heavy seas and stormy weather and over treacherous reefs and hidden breakers. Her governmental timber must therefore be strong and well-seasoned, and so nicely joined together, and so truly adjusted in all its parts, so armored without and buttressed within, that neither time nor tempest could show a flaw in the shipwright's art.

In this great work their feet were lighted by all the lamps of the past, and armed with history and the experience of others they peered into the future, confident in the hope, that whatever could arise might be foreseen, and strong in the purpose that all that could be foreseen should be safeguarded.

But there was one cardinal feature their new government should proclaim and perpetuate. All men were equal and all men should be free. Jefferson had written it; the Continental Congress had declared it, and the blood of the yeoman of New England and the patrician of Virginia, mingled on many a field of patriotic battle, had sealed and confirmed it. The heat and friction of the war, added to their lasting remembrance of a long series of preceding wrongs and outrages, had fixed in their hearts an unalterable hatred of certain features of the European systems. Of imperialism and dictatorships they would have none. Titles and appellations designative of class and nobility should be abolished.

The law of primogeniture, so indispensable to effective feudalism, had never been viewed with favor in America, even in the earliest times, and there was certainly no desire on the part of any one to revive it now. Favoritism by government in individual enterprise was not to be tolerated and monopoly in any form was declared to be odious. The system of feudal land tenures had never obtained in any of the colonies, except in name and in the theory of the law. In many of the earlier charters a fortunate reference had been made to the custom of land tenures in Kent, where for reasons unexplained by the early law writers, the allodial possessions of the Saxons had not been so severely or so permanently impressed by the military features of the vassalage imposed by the Conqueror. And in nearly all the charters the grant was by the tenure of free and common socage and not "*in capite* by knight service."

Thus, and especially after the statute of Charles the Second, the holdings in the Colonies, though nominally of the King, for all practical purposes of alienation or devise, or as affected by descent, had come to be at the date of the Revolution, as strictly allodial as they are to-day.

This, however, was not enough. Even the name, the shadow the semblance of this badge of European vassalage must be obliterated. One of the least oppressive of the attributes of the later feudalism was fealty to the Lord. This graduated fealty from yeoman to knight and from knight to baron and from baron to king, had never existed here in substantial fact, and indeed had been practically obsolete in England itself, since the statute of Charles. Nevertheless each colony proceeded at once to stamp out the nominal vestige of the hated system. New Jersey and South Carolina at once repudiated the idea of any such tenure. The early courts of New York declared that no guardianship in socage had existed in that State since 1776. Service and feudal tenures were expressly abolished in Virginia, by statute, in 1779. Similar laws were passed in Connecticut in 1783. And the courts of Pennsylvania and Maryland speedily decided their lands to have been allodial since the recognition of our independence. All the graded and scattered fealties of the ancient system were regarded as reduced and compounded into one common and equal allegiance to the State, and the sovereignty of the Crown was assumed to have been conferred upon the governments of the separate colonies, by the recognition of their independence. And this sovereignty, our forefathers fondly believed, concealed and carried no latent germ of power which might arise to stifle or oppress the liberties of even the humblest of their citizens.

And so they builded our Constitution and set the wheels of the new government in motion. Fears they had and plenty. Madison thought there was much to be apprehended from the aggrandisement of the several states themselves, and declared that under the Feudal System, if there had been no external dangers, enforcing internal harmony, the great baronies would have arrived at independent princedoms. Hamilton admitted that there might be a dangerous contention for supremacy between the landed and the mercantile interests, but argued ably to allay this fear. Some dreaded centralization, while others thought our chiefest danger lay in foreign intervention.

But that there existed or ever could exist, within the very bosom of the State sovereignties themselves, or in the new constitution of their own creation, a seedling, which watered by legal ingenuity, would in time bring forth and re-establish the substance of those oppressions from which their English ancestors had so hardly and so recently escaped, was forseen by none. For them the oppressive monopolies of Edward and Henry and James were things of the past; mere instructive scraps of history. The feudalism by which the industry and the fealty of the yeomanry of whole shires had been made tributary to the fortunes, or a pander to the pleasures of a single baronial lord, was but an unpleasant dream from which their fathers had long since awakened. Under it they remembered that Pembrokes and Galways and Salisburys had arisen and compelled kings to their will or hurled them from their thrones, but what was all that to them? Had they not now abolished even the name of the hated system? And if new dangers arose were there not safeguards provided? Were not the people at last sovereign? Were they not now all freemen and each invested with an equal suffrage? Were they not their own lawmakers? And could they not be trusted to secure and keep their own liberties?

Why what would you? How could the plan fail and wherein was the fatal point in the calculation? Surely a free and enlightened people so circumstanced could work out their own salvation. To believe otherwise was to doubt their loyalty or to name them slaves. If laws were needed they could make them; and if those they made oppressed, they could repeal them; if their chosen rulers proved unwise or unfaithful they could lawfully and peaceably replace them. In every battle against wrong, or for the right, each freeman would take the field on equal terms with his antagonist. For such a conflict the day would be set and in this bloodless struggle each combatant would be armed with an equal arm, certain in its aim, secret in its work and omnipotent in its

execution. In such an onset wealth would count for no more than penury, and weakness would be as strong as strength. To this contest no Warwicks could compel retainers nor titled lordlings summon cohorts from rotten boroughs. Dangers to the new *regime* there might be; dangers from within as well as from without. But danger of a revival in any form of the features of the feudalism of the past was impossible; that much at least was fixed and settled forever.

It was a beautiful ideal; a dream which could only have been born of the generous hope and magnificent trust of those splendid men, to whose unselfish and exalted patriotism the pages of all history, disclose nothing that is comparable.

Upon the new state sovereignties descended all the powers of grant and gift which had belonged to the throne of the great nation from which they had just parted. Of these a great and noble part had, of course, been yielded up in that mighty act of forming a more perfect union, but those that were left were believed to have been so pruned and so fettered as to deprive them of all possible menace to the future welfare of the commonwealth.

One prerogative of sovereignty however still remained; an infant power so small and withal so innocent, that if it caught the eye of our confident lawgivers at all, it was rather to receive their passing caress, than to invoke their prudent scrutiny. Yet from this strippling, unnoticed, or unfeared by our ancestors, has sprung a race of giants who hold to-day within their powerful grasp the material, the social, and the political welfare of all the people of this Union.

If it be true, as we are assured upon high authority, that Numa Pompilius first devised the scheme of the private corporation, it is to be regretted that he could not have survived to the present day to behold the marvelous success of the mighty engine he set in motion. But whether it originated with him or not, it certainly very early made its appearance and took its permanent place in the civil law. Its adoption, however, seems to have affected no marked result either in the political or commercial affairs of Rome until the times of Julius Cæsar, who found it necessary to curb its threatening importance. And Seutonium informs us that during the reign of Augustus the power of these corporations was so great that they had become forces of oppression and centers of disorder, whereupon the more dangerous of them were abolished by imperial decree. And history well attests that the subsequent rulers of the Roman Empire, till the day of its fall, were not less jealous of their increase and influence than were the early Cæsars.

When they first made their appearance in England is uncertain. But it is quite certain, that borrowing precedent of the civil law,

two private charters were granted by Henry the Second and one perhaps by even the Norman himself.

Although emanating from the same source and close in their actual, though not apparent, kinship to the feudal tenures as we shall see, they could not in warlike times and among an uncommercial people, attain to much success. The genius of the times and their uncongenial surroundings left them an unfruitful soil in which to take root and prosper. The field was occupied and their progress overshadowed by the military feudatories, their elder brothers, while both were held in check by the Crown, their common parent and master. Thus they languished and only prospered as the feudal tenures waned, and only then in so far as a careful, a prudent or a jealous sovereignty, saw fit to give them rein.

But when the government of these United States was formed, stripped, as it was fondly supposed, of every attribute of feudalism, and when, after 1815, the minds of the people were turned at last from the alarms of war to the fruitful arts of peace, with no hindrance from a watchful or fearful sovereignty and with no rivals to hamper its progress, the time and opportunity had at last arrived for a full and fair exploitation of the Pompilian scheme of the private corporation.

For more than two thousand years it had patiently held its place in the law of civilized nations, but so humbly and so modestly that even so late a writer as Sir William Blackstone gave it in his great work but the passing notice of a single chapter.

But now America, disenthralled of all errors of past government, offered a fair field for its enterprise. No social or religious caste existed or should exist, and no distinctions of blood or class threatened to become especially significant. The independent, individual homogeneity of all its people was to be the chief corner stone of the future liberty and equality of all the land. Primogeniture did not and should not obtain and the natural law of an equal inheritance, or the equitable provisions of testamentary disposition, would surely prevent the accumulation of great wealth, and through it great and dangerous power, in isolated hands.

Thus the private corporation began its new career under the most favorable auspices. Here was a vast domain, fruitful and responsive alike to the endeavors of agriculture, of manufacture and of commerce; its forests and fields exhaustless and its mines "undrainable of ore." But to these were soon to be added the tremendous aids of science. Strange and unlimited powers were discovered in the forces of nature, which could be utilized and controlled. Transportation, communication, agriculture, manufacture, mining, the industrial and productive arts of every kind

were revolutionized, their uses changed and their efficiency multiplied a thousand fold.

Into the congenial soil of this riot of industrial, mechanical and commercial wealth the private corporation now struck its sturdy and vigorous roots. Fostered by legal skill and industry, favored by the law, and freed from all rival restraints, or governmental apprehension, its progress, in the language of Chancellor Kent, was "truly astonishing." The state legislatures were early besieged for charters, which were as readily granted. New York indeed, seems to have scented danger, for in 1821 this state required a two-thirds vote in both branches of the legislature to grant a charter, but as we are told by an eminent authority, even this failed to mitigate the evil, for at the succeeding session of the legislature, thirty-nine new charters were granted under this law, a fact which soon led to its repeal. All restraints in most of the states were thereafter abandoned, and the granting of charters has since proceeded with such freedom and celerity that to-day there is not an industry; there is not an avenue of commerce or a branch of manufacture; there is not a provision of nature or an invention of art which is not more or less, directly or indirectly, beneath the control of the private corporation. Within a single century it has become the marvel, if not the menace, of the age.

At first, from the point of view of the political economist, the sociologist, or the politician, they attracted but little attention. By the legal profession it was early seen that they afforded a safe, convenient and profitable method of combining many persons and much capital in the development of large enterprises. But that they carried the seeds of a more important evolution and were destined to affect other and vastly different interests than those of mere business and commerce, seems not to have been suspected. Their vast power for good in the fostering of eleemosynary and educational institutions had long been known and observed, and this feature of commendation doubtless contributed largely in bringing about the unfortunate precedent of the Dartmouth College Case. But when later they were found not only convenient but controlling in the utilization of steam, electricity and other newly applied powers, and in the promotion of great affairs in mining, manufacturing and production of every kind, they soon became other than mere business factors; they became factors in popular as well as financial dynamics; factors in sociology; factors in political economy; factors in government.

The legal theory of the propriety as well as the usefulness of their creation, is, and always has been, based upon the idea of the convenient combination of large amounts of capital, to be embarked in enterprises which, while they might be profitable to

the promoters, would also at the same time be greatly beneficial to the public. These were supposed to be their sole and only purposes, and coming to the aid of a nation of vast natural, but undeveloped resources like ours, it can be easily claimed for them that they have abundantly promoted and accomplished both these objects. But in these later years they have gradually assumed a third and more startling phase of purpose. Their rapid and successful manipulation has not only resulted in enormous aggregations of profitable capital, embarked in endeavors of great public benefit, but what is vastly more important, in the organization and efficient control of large bodies of men.

In the management of their immense business interests, men of parts are called to lead in their control and to fully exploit and develop, their grant of powers from the State. These must, of necessity, retain under them large numbers of superintendents, managers, legal advisers, bosses and sub-bosses, and these again in turn, retain and employ their innumerable hosts of subalterns, clerks, laborers, hewers of wood and drawers of water, down to the humblest toiler of the workshop or the merest drudge in the mine. All are interdependent and none is independent. The corporation holds of the state, and its officers hold of the corporation, and their retainers, managers and servants, all hold the tenure of the their employment of their superiors in office, from the highest to the lowest. And so while we now have our railroad kings and coal barons, we also have our lesser knights of the shire, our yeomen and our socmen, and have not failed to have also our villiens regardant. Thus at last there has developed in our unconscious and unsuspecting midst a NEW FEUDALISM, whose fiefs are as potent as the baronies of John and whose lordlings are as bold as the earldoms of Edward.

It was regarded as important to the successful continuity of feudalism that the power, property and privileges of the ancestor should descend upon and vest in a single person. By the corporate grant all these things may now forever continue in the same person. We were proud to be rid of primogeniture; in its place we now have immortality.

A corporation, said Chief Justice Marshall, "is an artificial being, invisible, intangible, and existing only in contemplation of law. Among its most important properties are immortality, and if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same and may act as a single individual."

In this prime particular, therefore, we have only abolished to again reinstate in more permanent and potential form, one of the chief functions and attributes of the manorial grant.

In all else we have discarded only the forms and paraphernalia, while we have retained the sense and substance of the old feudalism. The power which formerly went with property and titles, is now found to go equally well with property without titles. Power in its final essence, whether in war or work, is the ability to use and control men. And property in the present, as well as the past, alone gives and has given that. It was no more potent after Hastings than it is to-day.

For after all, what was feudalism but a device whereby to organize, to control, to use and to appropriate the loyalty or the labor of men. Property then consisted mainly of the land and through the land, the organization was perfected from the manorial grant down to the *villenage* in gross. The larger the manor, the more powerful the lord, the more splendid his retainers, the more numerous his tenantry, the more humble his villeins. So now, the richer the corporation, whether it be in land or factories, or mines or railroads, the more important its officers, its managers, its subalterns, the more numerous its servants, the more abject its employees. All are gathered and held together by that one word property, and its control in vast amounts in the hands of a single actor is made alike equally possible, whether by the patents of kings, or the charters of republican sovereignties. For the baronial grant we have substituted the corporate charter. For the splendors and privileges and prerogatives of the lesser knight-hood, we have substituted the high salaries and pompous airs of the officers, superintendents and managers. For the tenant holding on by his farm, we have the employee held on by his job. The ancient outward, and official ceremony of homage we have not, but that its substance is with us to-day is amply attested by the obsequious subserviency of the subaltern to his corporate superior. Tennyson's "new made lord whose splendor plucked the slavish hat from the villager's head," has its exact counterpart in the instant court and consideration which is paid by all to the newly made president, superintendent or manager of the great corporations.

As to fealty—if we no longer have fealty to the Lord by the law of the land, we have a more certain fealty to the corporation by the law of dependent labor. Strikes there are against supposed oppressions in the present; revolts there were against supposed oppressions in the past; but in every contest, of whatever kind, between the corporation and third parties, no retainer was ever more faithful to his feudal lord, than the humblest employee is to the interest of his corporate master. This is so well understood that the experienced lawyer will count upon it even in the witness box,

and the discreet and practical politician finds it his most certain and potent ally. Through this unlegalized fealty, but fealty nevertheless in fact, the ballot, that surest safeguard in the fond estimation of our ancestors, is now but another aid for the perpetuation and extension of the corporate powers. Instead of a sure weapon of defence in the hands of the helpless subordinate, it has become the unexpected instrument of his own discomfiture. That independent, individual homogeneity of all the people so confidently relied upon by our forefathers, has in the skillful hands of the modern corporation been transformed into a consolidation of heterogeneous energies which now move by the impulse of a single volition. In all contests with rival powers, the corporate forces can be rallied and set in motion, for even hazardous undertakings, with all the spirit and celerity of military organizations. In all endeavors each member of the corporate body, from the highest officer down to the meanest employee, can be absolutely depended upon for concert of action, so that the whole operates with the force of a mighty projectile.

If, unlike the feudatories of the past, they do not make and unmake kings, yet, like them, they do make and unmake all that stands to us in the place of kings. There is hardly a council board of government, whether of the executive, the judicial, or the legislative departments to which they have not forced their way and in which their power is not successfully exerted. There is not a financial, commercial or political undertaking of any magnitude or importance, of which they are not already either in control, or must be reckoned with as controlling forces. Availing themselves of the liberality of our sovereignties they have grown and swollen, until they have set themselves up as *imperia in imperiis*, and have become the final repositories of all our powers and the arbiters of all our fortunes. By the granted charter they have been given more than lease with primogeniture in descent; they have been given life with immortality. By their franchises they have been given more than landed wealth upon which to gather retainers; they have been given the right, and a convenient means of integrating all properties in mighty financial nuclei, to which gravitate, and around which cling and cluster more organized potencies than were ever boasted by England's greatest baronies.

Even the early years of the New Feudalism are already marked by the development of a reactionary feature, which reveals its true kinship to its ancient prototype. As the original feudal grant was only at the will of the lord, until time and sentiment, and a sense of justice ripened it into the tenure for life, and finally into the inheritable estate, so now there are already those who claim that the

corporate servant, in consideration of his fealty, should be entitled as matter of legal right to certainty of continuous employment. And so rapidly is this feeling investing the public mind, that only a few years ago a senator of the United States, boldly proclaimed upon the floor of the Senate, that the tenantry of the great corporations, by their long service, and by their inevitable attachment to the place of their life and their labors, had acquired an equitable right to demand the possession of their homesteads at a fair rental value. Startling as this proposition may seem, it is no more or less than the beginning of that same first step, which changed the ancient tenures; at will, into tenancies for life. And those who are interested in corporate property and who are not blind to the shadow of coming events, may anxiously but confidently look to the future for the appearance here of those same sentiments which, in England, finally wrought out the great estate of inheritance from the lowly tenancy at will.

Sociologists are fond of speaking of the feudal age as being followed by the capitalistic age. But I am convinced that this is but a change of names for very similar things. Feudalism was based upon capital, but nearly all the capital then was land. Charterism is based upon capital embracing all other wealth as well as land, and of which the land now forms only a conspicuous part. Feudalism was adapted to warlike times and warlike people. Charterism to peaceful times and commercial people, but both alike to the ultimate control, through capital, of the people. Discarding outward form and looking to inward final purpose and result, in substance, I see no other difference. We have banished the knightly captains of the feudal tenantry, and in their places we have set up the skilled lawyers to lead and guide the organized hosts of our trusts and corporations.

The compass of this paper does not permit me to further extend this parallel, but a moment's reflection will suggest to the trained legal mind a hundred minor points, wherein the evolutions of the new system are coincident in substantial purpose with the operations of the old. The net resultant of one was power from organized fealty and service in arms. The net resultant of the other is power from organized fealty and service in labor. Both are based alike on property and the control of this in each case flows alike from grants of sovereignty.

In the foregoing I do not wish to be understood as complaining of the establishment of the New Feudalism. Considering the times and manners in which it flourished I do not know that the Old Feudalism was not an improvement upon preceding systems. Looking to our own times and environment, it may be claimed that

the new is a further improvement upon the old. Whether its rapid and extraordinary development along the unexpected lines I have indicated portends danger to our civil liberty on the one hand, or to the integrity and safety of corporate property on the other, and whether its growing power and importance can, or ought to be, curbed or throttled, or its wonderful energies guided into new channels, and if so in what way, and by what means, are important and serious questions, the discussion of which is aside from both the limits and the object of this paper.

I postulate no evil and I propose no remedy. What the wisdom of our revolutionary forefathers failed to foresee, or seeing did not fear, I certainly shall not presume to characterize as error. I content myself in this instance with pointing to what I am convinced is an undeniable fact, that, aside from legal sanction, in all the ultimate essence and substance of feudalism, we have it with us now.

It may be, as said by Goldsmith,

“That those who think, must govern those who toil;
And all that Freedom’s highest aims can reach,
Is but to lay proportioned loads on each.”

It may be that human nature and the affairs of this earth are such, that in the promotion and progress of government, the abnormal development of these extraordinary internal forces is inevitable, and that if the present system were abolished, another Pompilius would arise with a new device, whose success would threaten still greater danger. I cannot tell. But at the close of this eventful century, in the presence of this legal phenomenon, and remembering that the members of our profession were its chief architects, I have thought that in this assemblage of lawyers, the rise of the New Feudalism might be briefly examined with profit.

I am certain there is no other subject in the law at the present time so inviting to our studious interest, or which so much deserves, it may be, our anxious scrutiny.

PROCEEDINGS IN MEMORY OF MR. JUSTICE
BRANDEIS.

Members of the Bar of the Supreme Court of the United States met in the Supreme Court Building on Monday, December 21, 1942, at 10 o'clock a. m.¹

The meeting was called to order by Mr. Solicitor General Fahy.

Address of the
Honorable Learned Hand, Circuit Judge

A man's life, like a piece of tapestry, is made up of many strands which interwoven make a pattern; to separate a single one and look at it alone, not only destroys the whole, but gives the strand itself a false value. So it must be with what I say today; this is no occasion to appraise the life and work of the man whose memory we have met to honor. It would be impossible at this time to do justice to the content of so manifold a nature and so full a life; its memorial stands written at large, chiefly in the records of his court; perhaps best preserved in the minds of living men and women. Before passing to my theme, I can therefore do no more than allude to much that I can ill afford to leave out: for instance, to his almost mystic reverence for that court, whose tradition seemed to him not only to consecrate its own members, but to impress its sacred mission upon all who shared in any measure in its work, even menially. To his mind nothing must weaken its influence or tarnish its lustre; no matter how hot had been the dispute, how wide the final difference, how plain the speech, nothing ever appeared to ruffle or disturb his serenity, or to suggest that he harbored anything but regard and respect for the views of his colleagues, however far removed from his own. Nor can I more than mention the clear, ungarnished style which so well betrayed the will that lay behind; the undiverted purpose to clarify and convince. How it eschewed all that might distract attention from the thought to its expression. The telling

phrase, the vivid metaphor, the far-fetched word that teases the reader and flatters him with the vanity of recognition—these must not obtrude upon that which alone mattered: that conviction should be carried home. So put it that your hearers shall not be aware of the medium; so put it that they shall not feel you, yet shall be possessed of what you say. If style be the measure of the man, here was evidence of that insistence upon fact and reason which was at once his weapon and his shield. Others too must speak of the fiery nature which showed itself when stirred, but which for the most part lay buried beneath an iron control; of that asceticism, which seemed so to increase that towards the end one wondered at times whether, like some Eastern sage, the body's grosser part had not been quite burnt away and mere spirit remained; of those quick flashes of indignation at injustice, pretence, or oppression. These and much more which would make the figure stand out more boldly against its background, I shall not try to portray:—I must leave them to others who can speak more intimately and with more right.

At the risk of which I spoke a moment ago, I mean to choose a single thread from all the rest, which I venture to believe leads to the heart and kernel of his thinking, and—at least at this present—to the best of his teaching. I mean what I shall describe as his hatred of the mechanization of life. This he carried far indeed; as to it he lived at odds with much of the movement of his time. In many modern contrivances which to most of us seem innocent acquisitions of mankind—the motor car for instance—he saw a significance hostile to life's deeper, truer values. If he compromised as to a very few, the exceptions only served to emphasize the consistency of his conviction that by far the greater part of what passes for improvement, and is greedily converted into necessity, is tawdry, vain and destructive of spiritual values. In addition, he also thought that the supposed efficiency with which these wants were supplied was illusory, even technologically. He had studied large industrial aggregations as few have

and was satisfied that long before consolidation reached its modern size, it began to go to pieces at the top. There was a much earlier limit to human ability; minds did not exist able to direct such manifold and intricate structures. But that was only an incident; the important matter was the inevitable effect of size upon the individual, even though it neither limited nor impaired efficiency. Allied with this was his attitude towards concentration of political power which appeared so often in what he said from the bench. Indeed, his determination to preserve the autonomy of the states—though it went along with an unflinching assertion of federal power in matters which he reckoned truly national—amounted almost to an obsession. Haphazard as they might be in origin, and even devoid of much present significance, the states were the only breakwater against the ever pounding surf which threatened to submerge the individual and destroy the only kind of society in which personality could survive.

As is the case with all our convictions, the foundation for all this lay in his vision of the Good Life. It is, I know, a little incongruous to quote from another's vision of the Good Life who was in most respects at the opposite pole of belief and feeling; but nevertheless there comes to my mind a scrap from the inscription above the gate of the Abbey of Thelême.

"Here enter you, pure, honest, faithful, true,

"Come, settle here a charitable faith,

"Which neighborly affection nourisheth."

He believed that there could be no true community save that built upon the personal acquaintance of each with each; by that alone could character and ability be rightly gauged; without that "neighborly affection" which would result no "faith" could be nourished, "charitable" or other. Only so could the latent richness which lurks in all of us come to flower. As the social group grows too large for mutual contact and appraisal, life quickly begins to lose

its flavor and its significance. Among multitudes relations must become standardized; to standardize is to generalize, and to generalize is to ignore all those authentic features which mark, and which indeed alone create, an individual. Not only is there no compensation for our losses, but most of our positive ills have directly resulted from great size. With it has indeed come the magic of modern communication and quick transport; but out of these has come the sinister apparatus of mass suggestion and mass production. Such devices, always tending more and more to reduce us to a common model, subject us—our hard-won immunity now gone—to epidemics of hallowed catchword and formula. The herd is regaining its ancient and evil primacy; civilization is being reversed, for it has consisted of exactly the opposite process of individualization—witness the history of law and morals. These many inventions are a step backward; they lull men into the belief that because they are severally less subject to violence, they are more safe; because they are more steadily fed and clothed, they are more secure from want; because their bodies are cleaner, their hearts are purer. It is an illusion; our security has actually diminished as our demands have become more exacting; our comforts we purchase at the cost of a softer fibre, a feebler will and an infantile suggestibility.

I am well aware of the reply to all this; it is on every tongue. "Do not talk to us," you say, "of the tiny city utopias of Plato or Aristotle; or of Jefferson with his dream of a society of hardy, self-sufficient freeholders, living in proud, honorable isolation, however circumscribed. Those days are gone forever, and they are well lost. The vast command over Nature which the last century gave to mankind and which is but a fragmentary earnest of the future, mankind will not forego. The conquest of disease, the elimination of drudgery, the freedom from famine, the enjoyment of comfort, yes even that most doubtful gift, the not too distant possession of a leisure we have not yet learned to use—on these, having once tasted them,

mankind will continue to insist. And, at least so far as we have gone, they appear to be conditioned upon the coöperation and organization of great numbers. Perhaps we may be able to keep and to increase our gains without working on so vast a scale; we do not know; show us and we may try; but for the present we prefer to keep along the road which has led us so far, and we will not lend an auspicious ear to jeremiads that we should retrace the steps which have brought us in sight of so glorious a consummation."

It is hard to see any answer to all this; the day has clearly gone forever of societies small enough for their members to have personal acquaintance with each other, and to find their station through the appraisal of those who have any first-hand knowledge of them. Publicity is an evil substitute, and the art of publicity is a black art; but it has come to stay, every year adds to its potency and to the finality of its judgments. The hand that rules the press, the radio, the screen and the far-spread magazine, rules the country; whether we like it or not, we must learn to accept it. And yet it is the power of reiterated suggestion and consecrated platitude that at this moment has brought our entire civilization to imminent peril of destruction. The individual is as helpless against it as the child is helpless against the formulas with which he is indoctrinated. Not only is it possible by these means to shape his tastes, his feelings, his desires and his hopes; but it is possible to convert him into a fanatical zealot, ready to torture and destroy and to suffer mutilation and death for an obscene faith, baseless in fact and morally monstrous. This, the vastest conflict with which mankind has ever been faced, whose outcome still remains undecided, in the end turns upon whether the individual can survive; upon whether the ultimate value shall be this wistful, cloudy, errant, You or I, or that Great Beast, Leviathan, that phantom conjured up as an ignis fatuus in our darkness and a scapegoat for our futility.

We Americans have at last chosen sides; we believe that if it may be idle to seek the Soul of Man outside Society,

it is certainly idle to seek Society outside the Soul of Man. We believe this to be the transcendent stake; we will not turn back; in the heavens we have seen the sign in which we shall conquer or die. But our faith will need again and again to be refreshed; and from the life we commemorate today we may gain refreshment. A great people does not go to its leaders for incantations or liturgies by which to propitiate fate or to cajole victory; it goes to them to peer into the recesses of its own soul, to lay bare its deepest desires; it goes to them as it goes to its poets and its seers. And for that reason it means little in what form this man's message may have been; only the substance of it counts. If I have read it aright, this was that substance. "You may build your Towers of Babel to the clouds; you may contrive ingeniously to circumvent Nature by devices beyond even the understanding of all but a handful; you may provide endless distractions to escape the tedium of your barren lives; you may rummage the whole planet for your ease and comfort. It shall avail you nothing; the more you struggle, the more deeply you will be enmeshed. Not until you have the courage to meet yourselves face to face; to take true account of what you find; to respect the sum of that account for itself and not for what it may bring you; deeply to believe that each of you is a holy vessel unique and irreplaceable; only then will you have taken the first steps along the path of Wisdom. Be content with nothing less; let not the heathen beguile you to their temples, or the Sirens with their songs. Lay up your treasure in the Heaven of your hearts, where moth and rust do not corrupt and thieves cannot break in and steal."

C. Donald Stabile, Wayne Hyatt, Linda Schuett, Marc Porter Magee, Leta Mach, Charles Duff, Jr.
Creating Community in Planned Communities
2004-10-05

Over the course of the last 50 years a 'quiet revolution' fostered by federal mortgage lending regulations has given rise to the creation of thousands of private community associations with the power to impose charges on members. In some areas, these associations are the only effective local governments. This symposium explored means of expanding the role of these associations in the provision of social services like elderly care and cooperative day care, and in the organization of charter schools; their financial relationship with county governments; and the possibility of extending the benefits of associational activity to already established urban neighborhoods.

Wayne S. Hyatt, Featured speaker, Partner, Hyatt and Stubblefield, P.C., Atlanta, Author, *The Law of Community Associations* (Wiley, 1991)

Introduction: Donald R. Stabile, Professor of Economics and Associate Provost, St. Mary's College of Maryland; Author *Community Associations: The Emergence and Acceptance of a Quiet Revolution in Housing* (Greenwood, 2000)

Commentators: George W. Liebmann (moderator), Partner Liebmann and Shively, P.A., Baltimore; Author *Neighborhood Futures: Citizen Rights and Local Control* (Transaction, 2004)

Linda M. Schuett, County Solicitor for Anne Arundel County

Marc Porter Magee, Executive Director, Center for Civic Enterprise, Progressive Policy Institute

Leta Mach, Executive Director, Parent Cooperative Preschools International; Councilwoman, Greenbelt, Md.

Charles Duff Jr., Chief Executive Officer, Jubilee Baltimore Inc.; Executive Director, Midtown Development Corporation

MODERATOR: The notion behind this program is that while a lot of attention has been devoted to residential community associations as property managers, there are other opportunities for them in connection with such things as the development of charter schools, the creation of preschool play groups, day care, the creation of old age clubs, and institutions of this sort.

There are also two other sets of developments that are worth considering. One of them relates to the efforts to secure tax deductibility for community association dues. And in Maryland this has happened notably in Anne Arundel County, and to some extent in Montgomery County, through the creation of special taxing districts, and in Montgomery County through a credit against county taxes for road upkeep and other community association expenses. That development will be explored by Linda Schuett, the County Attorney for Anne Arundel County.

Finally, there are interesting possibilities concerning the application of similar concepts to areas in large cities, and one pioneer in that development is Charlie Duff, who has been heavily involved with the Midtown Community Association in Baltimore, which is really the first large city association of that type in a residential neighborhood, or at least a partially residential neighborhood.

PROFESSOR STABILE: There's a big slice of this history of community associations that is related to Maryland. The first and for me the most important one took place about two or three miles north of here, Roland Park. Many of you may not know this, but Roland Park, which was started in 1891, probably has the best claim for being the first community association in existence in the United States. It started out with a developer, Edward Bouton, who wanted to build a really nice kind of upper class development north of what was then downtown Baltimore.

But he was concerned when he built his development with how could he maintain standards in the community. People bought a lovely home, how could they make sure that their neighbors wouldn't do something to reduce the aesthetics of the neighborhood? So he looked around and he found, a place in New York called Gramercy Park, where there's a small park in the middle of the street, a little square that had been organized using what are now called CC&Rs, conditions, covenants, and restrictions, a set of rules

written into deeds that stipulate how land can be used.

Bouton thought this was a good idea, especially since there was no zoning at the time, and he said this is how I'm going to maintain the integrity. I'm going to put a lot of restrictions on the deeds to the properties that I sell, and therefore, I will make sure the integrity of the community is maintained. He did this; he sold his homes and things were going pretty well. Then about 1895 he said 'there are all these people in this area, but they need to get a more active role in things.' So he formed a civic league. He invited members of the community to join this league to have some control over what happened in their community. Then a few years later he realized that 'I've created this community; there are all these little parks in the area; I've taken care of the roads and everything else; but if I don't do something I'm going to be stuck here for the rest of my career. I need to figure out a way to turn this over to the people who own the homes'. And so, he formed a Roland Park Roads and Maintenance Company and transferred the stock to the civic league.

And the civic league then said, 'if we're going to have to pay for all of this, every year we're going to figure out how much we have to spend on maintenance, and then we're going to put an assessment on every owner in terms of paying their fair share of maintaining the property'. So there we have the basic three elements of community associations in Roland Park: The conditions, covenants, and restrictions, a homeowner's association, and assessment fees. That was a very important step.

The second Maryland connection I'll mention has to do with the most important individual in the development of community associations, a man named Byron Hanke. Byron Hanke was a chief land planner for the Federal Housing Administration from 1945 to 1972. But in addition to being a land planner, he was also a landscape architect. And when he started working for the FHA, he would get all of these land plans that were these grid subdivisions, Levittown, the things we all saw in movies, when I was growing up anyway. And he didn't like them very much. He said you need to have parks and winding roads and hills, and all sorts of things. He wasn't sure how to do that. Then by kind of accident through friends of his in the Washington, D.C. area he wound up buying a little summer cottage in an area in Calvert County called Scientist Cliffs, which was a community association. It's still a lovely area. If you ever have a chance to go down to

visit Southern Maryland, a little side tour. It's right off Route 4 just below Prince Frederick. Scientist Cliffs is a lovely area with a lot of ravines and gullies, huge vistas of the Chesapeake Bay.

Byron Hanke learned all about common property and community associations. He went back to the FHA and said 'this is a great idea. I think we ought to promote this idea.' On his own he helped convince the FHA that they needed to do more to promote community associations. And there were three parts to this. First the FHA in the 1950s approved community associations qualifying for FHA mortgages. Then in 1966 they gave Hanke a leave of absence to go to an organization called the Urban Land Institute where he wrote a 500-page study of community associations called "The Homes Association Handbook" which was then distributed to developers all across the country. It was a very powerful and influential book. Again, it's not like Harry Potter, it didn't make the best seller's list or anything. But it was a very influential book among developers. In the process of writing my book I talked to a number of developers who all said, yeah, that Hanke book; that was what turned things around for us.

And then he also got the FHA to produce a smaller manual that could go out to developers who could come into an FHA office when they were planning a subdivision and you could hand them a little manual and say here, why don't you try setting up a homeowner association. So community associations began growing. And then by the early 1970s calls kept coming into the FHA, people complaining, 'we don't know how to run these things'. Byron then said, ' maybe we need to have an organization that helps people learn how to run community associations.' He got together, and this is the third Maryland connection, with Meg Russell, who at the time worked for the Irvine Company. developers of homeowner associations in Southern California. Previous to that Meg Russell had been the president of the St. Mary's Female Seminary, which is now St. Mary's College. and she came from an old St. Mary's County family.

The two of them formed something called the Community Associations Institute in 1972 as a broad-based national organization with membership of all the different segments of the community association industry: developers, homeowners, managers, other providers of services. All of them are members of this organization, and it's grown and has become a fairly influential organization.

Now, in the course of writing my book, every other Saturday for about two years I went over and spent the afternoon with Byron Hanke, and he would tell me everything he knew or could tell me within that afternoon about community associations and their background. One thing he told me many, many times in our conversations, to segue into our speaker, is that Wayne Hyatt knew better than anyone else what community associations were all about. How did Wayne Hyatt get to know all of that? His background is that he has a bachelor's degree and a J.D. degree in law from Vanderbilt University. Among his many professional memberships, he's a member of the College of Community Association Lawyers of the Georgia Bar. He's been a trustee and a president of the Community Associations Institute, and he's the founder of the Community Associations Law Reporter. In addition he's written a number of books and articles all on law and other aspects of community associations.

What impressed Byron Hanke and what impresses me about Wayne is his sense of how you put the word community into community associations. Oftentimes we read in the press about all these conflicts going on in community associations. And the most important thing is to put a spirit of community in them. And in a lot of his writings Wayne has taken over the term social capital as a way to explain what community associations need to do. Well, social capital sounds like an economics term that I ought to know something about. But actually it developed in sociology and political science first. To give a brief description of it, let me go back to the beginnings of economics, anyone who has taken an economics course knows that Adam Smith is kind of the founder of economics. And if you remember anything more, Adam Smith had the idea that individual self-interest leads to economic good, and he believed this based on the fact that self-interest was really self-preservation.

But there's another side to Adam Smith that often gets missed, and that is that he once said that no matter how self-interested we are, something in us interests us in the well-being of others even if we get no benefit from them. He referred to that as a moral sentiment. Adam Smith recognized that there tends to be this conflict in human beings. Are we going to be self-interested and self preserving, or are we going to follow moral sentiment? Adam Smith believed that this moral sentiment had to be nurtured by society, that self-interest was basic, because it was really self-preservation, but moral sentiment, which we would now call social

capital, has to be nurtured. Wayne looks at how we find a balance between self-interest and moral sentiments, or how we nurture social capital in community associations.

MR. HYATT: Hearing you talk about Byron brings back many memories. It's hard to believe that he's been gone as long as he has. It was long ago when we all started working in this area. Those of you who do not have a copy of the Home Associations Handbook, it's out of print, but there are still some floating around. It's quite a piece of work. And Byron and Professor Krasnowiecki from the University of Pennsylvania Law School and a couple others who were co-authors truly did something that began the process.

I got into this business because I came home from the service in 1972, my wife and I wanted to live in the city of Atlanta. But we discovered that if I could afford it, it didn't pass code. Some of you may remember those days. And I wound up buying a condominium unit. A condominium unit in 1972 was something that was rather unusual. But it was great for us because we could afford it and it was a great lifestyle. I came home from work one day and discovered that somebody had circulated a flier saying we really need to get organized and deal with the developer. There will be a meeting at Sarah Smith School at such and such a time on such and such a day, and Wayne Hyatt will chair this meeting. I knew absolutely nothing about that. One of the people that lived in the community worked at the same school where my mother-in-law was head mistress, they had said, oh, let Wayne do it. So I did. And I held a meeting.

We did get organized, 162-unit condominium project. We dealt with the process of transition for seven months, and then I became the first president of the association. I realized that in 1972/73, at least in the Atlanta area, there was no one representing associations, and Manda, my late wife, said 'maybe there's a practice here.' I started representing associations at about the same time that two or three people here in the Washington/Baltimore area started doing it, a couple in Southern California, a couple in Florida. But in the early '70s there weren't very many of us that were representing associations. By the late '70s I said, 'you know, I've seen enough mistakes I think I know what works.' Beginning in the late '70s, early '80s I started representing developers; though we still occasionally will represent an association or a club in something that is

very unusual, basically I represent the developers. And my goal is, at the outset, to strike a balance and to make the community association work. And I think that best describes my perspective.

My perspective is one of a theoretical pragmatist. Because I know at the end of the day if I advise a client to do X and X doesn't work, then I have hurt that client. Because they've got to be able to sell that product, and know that in so doing they're going to leave a legacy of constructive governance in a community that works rather than sell it and go on.

I was on a panel one time and a lawyer from down in south Florida, from a very large firm in Miami, said "I don't know why developers should worry about this; they're going to sell it out and be gone." And we pulled the microphones off of the stands and beat him to death because he obviously did not understand the concept that a community association is like a shell for the turtle to the developer because you carry it around with you. Your reputation continues. And so you have to be pragmatic, even as you try to be theoretical. Everything I'm going to suggest works. And I know it works because we've used it. We've been blessed in that we've worked in 49 of the 50 states, in seven or eight foreign countries, and have done community associations in some places that are really rather unusual; Montana, Bolivia, and believe it or not, England. Because England doesn't have the same laws that we do that allow covenants that make people pay assessments run with the land. So they've not done community associations the way we've done community associations in the United States.

Everything I'm going to talk about we've done somewhere. We have seen that it works. My goal for the day is to stimulate the thinking process, to provoke some new ideas, and to propose some new approaches. I'm going to proceed by first raising some essential questions and definitions. I'm going to focus on defining the objective. And I'm going to make some suggestions for new approaches and new results. And lastly, I'm going to challenge us all to think differently. Because in all aspects of our business life we have this tendency to think the way we've done it in the past. And those of us who are lawyers in community associations and those of you that are managers in community associations tend to hold to those practices that you've done in the past because they're comfortable. They're the way you know that you can make it work because that's the way you've made it work in the past. But sometimes all you're doing is replicating a mistake or

replicating less than the ideal that you can reach in doing. I was on a panel and I heard a land planner say about what he did: "What we do has the power to affect our social fabric. Good design is the catalyst for positive change in the way we lead our lives." I thought to myself, creative governance, that which we do, can accelerate and can empower that positive change. That's really what we're talking about. We're trying to move away from the rigid old approaches to new approaches that truly can be a catalyst for positive change in the way we lead our lives. That's all about community, as Don said. That's the key word.

We really started thinking about that in 1991 when we started doing the project down in Orlando called Celebration, Disney's new town, new community, which has gotten an awful lot of battering in the press, most of it ill advised and inaccurate. Because that's really been a very successful project. It's been a very successful project from a business point of view and it's been a very successful project from the quality of life point of view. But you saw the consultants and you saw the team focusing on different ways of doing a community so that there was really a focus on the community. We've talked community but we've never really walked community, in most of the years of the development of the master plan communities. When we say a common interest community, we mean just that, a community in which there is a common interest, a sharing of tangibles and intangibles where you have property that's privately owned and managed for the common use and enjoyment.

When you talk about a community association you're talking about a generic thing. There are many different types. But any community association is the operational entity for the common interest community. You've got three rationales, obviously, that you can use. Some of this goes back to 1950 and its projects. You want something that will own and maintain property. That's the management side. You want something that will preserve and enforce the development plan, and you're using it because of land planning needs.

Every community association, every one, wherever it is, whatever type it is, has three distinct attributes. It's got a mandatory membership. That's one of the interesting things about a community association, you are creating something that everyone must be a member of because that's the way the deeds say it's structured. You want to live here, fine, you buy the

product; you buy the process. It's very important to remember that when you're creating a community association you're creating both the product and that process. So you've got a mandatory membership. And then you have the power to levy, the power to tax, if you will, because the assessment backed up by the association lien is only a half a step away from a tax. And lastly, you have the power to control. All of those attributes and all of those powers focus more on control, on management. They're Darth, if you will. And I'll connect Darth and see if we can't find a Yoda in a little bit.

The third aspect is community. And that's where the real rub comes, because how do you define community? And there is no consistent definition. There is no meaningful widespread commitment to what community means. People use the term, people use the word, people mean different things from it, but we don't have a consistent, unified, widely-accepted definition. We should be all able to agree, however, on what a community is not. And maybe that's the place to start. A crowd is not a community. Just because we've got lots of people living in a place doesn't make it a community. A community is not autocratic. A community is not corporate in mindset even if it's corporate in structure. Think about the difference. A community is not corporate in mindset even if it is corporate in structure. Communities are not highly or overly regimented, not successful communities, not communities in which people want to live. And communities are not overly or highly regulated. Communities are not bland. Communities are not compulsive, and communities, except in the movies, are not contrived.

And lastly, communities are not places where ownership is more important than relationships. But those characteristics that we say don't mark the community are exactly the attributes that mark most community associations because that is what community governance, as it has been drafted over the last quarter century, actually compels. There's a wonderful book entitled *A Nation Under Lawyers* [Farrar Straus and Harvard University Press] not a nation under law, but *A Nation Under Lawyers* written by a professor at Harvard [Mary Ann Glendon]. And she's right on point, because in many ways that's exactly what we have pushed our community governance into when we focus not on making them great places to live, but more importantly great places to look at.

So the question really remains, how do we turn a crowd into a community? How do we change a development into a neighborhood? Let's see what transformations have been begun and how we can accelerate them. And let me suggest some basic steps. Let me suggest some lessons learned. Number one, if you're going to create a community, you have to destroy the command and control mentality and methodology. You have to move away from governance structure on paper, and indeed, where the primary focus is telling people what they can and cannot do, where we are more interested in prohibiting rather than empowering.

You have to move, number two, from an emphasis upon people and property management to building and sustaining community. Now, saying that can become very threatening to those who are in the business of property management. But I'm not saying that we don't need the property management; we do. We have to protect the asset. We have to enhance the value of the asset. We have to maintain the property. It's a mindset. Now, does that mean that every property manager is going to be someone who will embrace the community? I fear it does not. But does that mean that all property managers are excluded from this new approach? Certainly not. It really depends on the person. Because if you're a good property manager, a really good property manager, you're probably a good people person. And it's the focus on the people as something other than tenant/owner/delinquents that we have to invigorate. Number three, we have to create systems, documents and design approaches that empower, not impose. Number four, we have to say that governance is as concerned with relationships as ownerships. We have structured governance that empowers the owner of the property to vote, to serve on a board, to serve on a committee. And if you're not on the deed you're nowhere. And yet we have communities, particularly the larger communities, where there are plenty of people for one reason or another that are not on the deed. You might have a wife that's on the deed and the husband who is not; you might have a husband that's on the deed and a wife that's not, for purely personal, business, liability, tax, inheritance, other reasons that have nothing to do with the commitment to the community.

And you might have people, God help us, that are renters. I love going into meetings of owners and saying 'how many of you rented before you bought your first house?' And obviously almost all of them do except those that were born with a silver spoon stuck in their ear, we all rented before

we bought. And I asked them 'how many of you were really bad people until you bought your first house? How many of your children are renters?' Sometimes it's sort of iffy because, you know, it depends on where they are in the child spectrum. That might be a dangerous one; we don't want that person in the community. But my point is that you can have a genuine deep abiding commitment to a community and be a renter. But we exclude them. We don't look for ways of opening up the process. Did I say throw the process totally open and knock the doors down? I did not. I said open up the process and find ways to involve them. Because if we're going to have community, it's relationships.

When I was a kid growing up in a small town outside of Atlanta, population of about 2,500 people, I had multiple mothers. I had one, 93 years old and she stills lives there, and she's still my momma. But if I were out on the street doing something wrong, there were a host of folks that looked at me as someone who was within her zone of responsibility. And I knew that if she told me to knock it off, I probably best knock it off. That's about relationships, not ownership. That's building community from the essential building blocks that we all have available to us.

And number five, we have to recognize that developers, in fact, all of us in the process, can do good and do well at the same time. Too often we focus on doing well, getting stuff for us, and we fail to realize that sometimes we can get more stuff when we do good stuff. And I'll talk about some communities that proved that. There's one in Orange County, California called Ladera. And Ladera is a master plan community of considerable size, as most of them are in Orange County. And they have embraced community building and soft infrastructure, and they have pretty well swallowed hook, line and sinker this whole line that I'm talking to you about. And they can put on the wall their numbers ?? I've seen them at Urban Land Institute meetings ?? that demonstrate a 9 percent lift in their prices because of the community building activities, and the cost of goods sold is essentially one really good staff person and some paper. Because they have differentiated themselves from their competition, not only in making their project look good, but in making it live well. And they are giving back to their community.

There are communities now in Florida, Arvida communities, Bonita Bay communities, just to take two examples, that are giving back tens of

thousands of dollars on an annual basis to their broader community and raising the level of all, and thus enhancing the quality of their life. George was telling me about a building, a hotel across the way, that when it was Section 8 housing, the prices were depressed. It's no longer Section 8 housing. It's now going to be dormitories for the music school. The whole neighborhood changes. I know a neighborhood in Orlando where the master plan community, the YMCA, or the Y, because it's now boys and girls, and the local school are in an alliance. They have lifted the entire process. They're doing good and doing well. Does that make it better to live in this community? Of course it does.

There are communities where the planned community has adopted the local public school so they have their own HOPE scholarship program, if you will, their own additional source of money because it's coming from the private side into the public side. Does any schoolkid who goes to that school get a benefit, even if they don't live in the community? Of course they do. But who gets the primary benefit? The people who live there and send most of the kids to the school. Doing good and doing well at the same time.

To make this work you've got to look at governance and say governance is a strategic tool. Governance is a major part of the process. And community governance is a system of thinking as well as a system of acting. When a developer comes in to you and says give me a set of decs. I need a set of decs to create my community, decs being CC&Rs, declaration of CC&Rs. We don't even call it that anymore. We call it a charter. We've changed the whole vocabulary, because the current vocabulary is negative, it's regulatory, it's off-putting, it's written for lawyers, not for people. And the important thing is that you have to look at governance as a system of thinking as well as a system of acting. And it requires different approaches and different mindsets. We use, for example, or suggest that clients use something that I call the community extension agent. I grew up in the rural south where we had county extension agents. Some of you may remember the person who would come out and help you learn how to do all kinds of things, whether it was canning, or anything. The county extension agent worked for the county government, and would come out and facilitate activities through the county. To me that's a great tool. You have a person who is committed to community building. And that person, the most successful ones that we have seen have come out of the

public sector, the 501?C3s, the non-profits. But they are people who are committed to the vision of the community and to a vision of community.

You have to understand that the components are interlocking. They're not a la carte. If you're going to do community, you're going to do new governance; you can't build it on the basis of old governance. You've got to change your mindset. And that really gets me back to my Star Wars example, you do have a need for command and control. But we can make command and control more user-friendly. We can draft it differently and apply it differently. But we still have the old way, and that's Darth. And I like to say that the new way is Yoda. The creation of community using these tools empowers Yoda. And I gave a talk on this subject in Prague, the Czech Republic, a few weeks ago at a meeting. And one of the reviewers gave me a new term, because I talked about the use of 501?C3s, how important they can be. And in his recapitulation he said that he had been introduced to Yoda and Darth and 501-C3 , and I thought that was great. Because we're really saying we want to have 501-C3 involved, and he brings an awful lot to the table. And I'll talk about how in just a minute.

But what works and how is it being done? You need a holistic approach in order to consider all aspects of the planning, governing, and living issues. Because it's got to reflect multiple disciplines and interests, including the diverse homeowner interest. You've got to have a vision, a vision for community and a vision for this community. I know you're all going to say vision statements are so yesterday and worrying about vision doesn't make any sense. But the fact is that the inability to agree upon and to articulate a vision results in a reliance upon absolutes. And when you rely upon absolutes, who have you empowered? You've empowered lawyers. Because when you don't have something that you intuitively can go to, you go to codes and laws and covenants, and you go to hyper-restrictiveness. And hyper-restrictiveness kills communities. So you need to be able to articulate a vision. When you can agree upon and articulate that vision it makes you focus. It makes governance focus. It sets and conditions expectations because you use that vision in the sales process. But it creates values, tolerances and acceptances, because people know this is not a place that is the domain of the condo commando. It's the domain of the community extension agent.

Vision is what you turn to when any decision does not intuitively flow.

It becomes your guiding principle. Another on the list of things to do is to make governance documents user-friendly. There's another wonderful book that's had a profound impact on community associations. It's called *Privatopia* [Yale University Press]. *Privatopia* came along probably ten years ago or so. It was written by a professor from the University of Illinois in Chicago named Evan McKenzie. Evan is a recovering lawyer. He was a trial lawyer who represented community associations in litigation in Southern California. So he's gone through the bad side of the worst side. And he became a professor, political science professor and he wrote this book, *Privatopia*, and it is a scathing denunciation of community associations.

And one of the great pastimes of people in Washington, D.C. is when a new book comes out they immediately go to the index to see if they're quoted or if they're cited or if they're referred to. And when *Privatopia* came out we all went to the index to see whether we were in it, and then with trepidation you flipped the pages back to see how you were treated. For a long time Evan didn't have any friends. But the point is he makes some really telling points about the way the people who live in these things look at them and how they react to it. He and I have become good friends and colleagues and work together a lot. I called him up finally one day and said, you know, we ought to talk. And I flew up to Chicago and he came out to O'Hare and we had a meeting at the O'Hare Hilton right there at the Airport, and had lunch and a nice visit, and we really have become good friends over the years. And he brings an awful lot to the table. He brings a side of the business that most of us don't want to talk about.

And he says the vast majority of people believe that community association documents are written in such an arcane, obtuse way that only lawyers could read them, and that that's purposely done. Now, I don't believe that lawyers are that conniving. But they are written in a way that most people can't read them. We need to make them clear and readable. We need to make them usable. We need to make our governance structure something that people can become involved in rather than something that people ignore. And in doing that we need to soften the corporate edges. We need to restructure the governance mechanism. We need to turn to judgment and not lists. We need to say it's okay, board of directors, to use your common sense, to make decisions. You are empowered to make a decision, and if you make the wrong decision, that's okay, so long as you

do it in the right way.

And that's really the law of every jurisdiction. It's called the business judgment rule, which sometimes has been referred to as the honest mistake doctrine. If you make a mistake, but you do it in accordance with the right rules, you're okay, because no one is perfect. We need to move to regulation and not prohibition. We need to move to standards and not rules. There's another little article written by Professor Carol Rose at Yale Law School called "Crystals or Mud." And it really sums it up. Because so much of what we are dealing with is really more like mud. When we prohibit and not regulate, we are saying 'no, no, no', rather than 'let's find a way to say no when it's appropriate and yes when it is appropriate.'

We need to empower to deal with needs and not be formalistic. We need to provide reviews and accountability. We need to make it clear that there's no obligation on behalf of a board to file a suit. You in the east have been free from the pestilence of construction defect litigation that has infected the west. You've had your share, but nothing compared to the invasion of locusts in Southern California that has now spread into Nevada and Arizona where developers are being sued because they were told by their counsel that if they didn't sue the board of directors, if they didn't sue the developers, they would be sued for breach of their fiduciary duties because you have a duty to sue the developer because there is a construction problem and we'll find out what it is on discovery.

But there is no cognizable duty to sue. And the courts of appeals of various jurisdictions have made it clear, these are judgment calls. But when we don't make it clear in our governance, when we don't make it clear in the way we relate to people that they are empowered to make decisions, we're losing the battle. We need to articulate the business judgment rule that I mentioned a moment ago and what it means, and we need to implement some leveling mechanisms, statement of the bill of rights and expectations, similar treatment, household competition. We use a bill of rights in our governing documents. It's very simple, very straightforward. But it sets expectations. You want to give some assurances to the people in the community, assurances as to voice, inclusiveness in governance, best efforts to communicate, and openness to listen.

You know, most people are not worried about not having a vote.

They're worried about not having a voice. They want to be heard. They want to be heard in a meaningful, realistic way. Mr. Justice Douglas is supposed to have said "I don't care who makes the decisions, so long as I can state the facts." There's a lot of truth to that. Give us the opportunity to be heard and we'll be okay. And then it's important to set out the expectations of the owners to be informed, to be civil, and to be constructive. And if you have that, you have the basis for community.

And then, as I quickly move through this, some structural changes. Interaction with other organizations, 501-C3s, 501-C4s, we really use 501-C4s as a community assembly with new tools and new approaches, a funded community person, the community extension agent, involving the youth. I have some developers that are afraid of this. But I have some developers who have become very, very happy with how the results have paid off. We create a youth board, 13 to 19-year-olds, give them some money, give them power and say you're responsible for activities that deal with the young people. It really takes a faith that you can trust that. But what we have found is when you trust it, it pays off because it's the antithesis of bored youths, and bored youths are the place where we have the problem. But if you create something that gets the bored into different kinds of activities, it can make a big difference.

Technology, volunteering, most Americans want to volunteer; they don't know how; they don't know where; they don't know the way to do it. So if you have, as part of your community building, a volunteering process, alliances, alliances with non-profits and alliances with profits, there are all kinds of ways, as I mentioned the one in Orlando, to build relationships and then interactions with other non-profit organizations. And then certainly the use of 501-C3, the tax-exempt, tax-deductible organization where you've got a service area that's the public at large. It's not just for your community, but the community becomes the focal point. And we've seen this successfully done in areas such as environmental activity, education, health, the arts, sports, recreation, great opportunities. There's really an endless list in which you can build the relationships. And then strategic partnerships, we've seen these with schools, with wives, with age-restricted and youth, with boys and girls clubs, with other non-governmental organizations, local government, religious institutions, and adults. And in different parts of the country you have different needs and different opportunities. One size doesn't fit all. One approach doesn't fit all. The

important thing is there is a new approach and we can build on that approach and use it to make it work.

We pay for this in a variety of ways. We pay for it through assessments; we pay for it through association contributions; we pay for it through grants and subsidies, and in appropriate cases, but not every case, we pay for it through taking a transfer fee on the sale of each unit, a sale by the developer, a sale by the builder, and every resale in perpetuity, going into the organization that is doing the things that raise the value of the home so that you're taking back a small piece of the spread from what it would have been to what it is, because you have converted a blight to a positive. That's one example. But in my example you've not had a blight. But you've taken it from here to here because of the things you're doing. You take a little bit of that to help the process move forward. That can also be done to fund affordable housing.

Finally, if you're going to make this work, you've got to retreat from restrictiveness. You've got two major conflicting principles, individualism and restrictiveness. It's all wrapped up in form documents and form assumptions that we've got to enforce the rule every time or we'll set a bad precedence. Boy, is that one of the things that goes back to the early '70s. This is one of the things that Byron, if he had it to do over again, would do over again. Because it doesn't mean that if we say it's okay to have that pink flamingo, we can never ever say to every other person you can't have it. You must have one because we said it's there. It's a judgment issue; it's a fact issue; it's a circumstances issue. But we have a mindset among the lawyers and managers that it's easier to say no all the time. You know why? Because then we don't have to think. We don't have to use our judgment. And what we have to do is realize that Americans want to have it their way now.

But when you move into a common interest community some of your interests must give. The developers and their lawyers, such as I, are a big part of this problem, because we've drafted documents that are overly restrictive. My definition of restrictiveness is an attitude as well as written regulations. Evan calls it legalistic managerialism. But it's basically an emphasis upon management, management people, management property. There's no genuine sense of purpose. There's excessive detail and inadequate flexibility, and there is non-discretionary enforcement. Why is

restrictiveness an issue? Very simply, it negatively affects the market. It engenders apathy and worse. Nobody wants to be involved in a community association when all it does is pinch its neighbors. Only the condo commando gets excited about that. You come home from work. You're tired; you've been involved in hostility all day long and you've had to put up with road rage. Do you want to come home and spend the rest of the evening at a board meeting when all you're doing is telling somebody they can't do this and they can't do that? No.

But if you came home and what you were doing was genuine community building with exciting dynamic activities, you'd be involved. It entails significant opportunity cost because we're spending our efforts and our money and our energy in the wrong direction. But it produces real cost management, less litigation. Lawyers are not cheap. And finally, restrictiveness, unenlightened restrictiveness disrupts community formation and chills that sense of community. And as Don said, community, vibrant, genuine sustainable community is, after all, what we're all about.

In the land planning and architecture side of our business there's a guy named [James] Kunstler that's written a lot. And Kunstler has been very tough on Americans in their architecture and their design. And he has talked about our development as reflecting *The Geography of Nowhere*. But one of the great writers, to me, of the last century, or certainly the last half of the last century, one of the great American writers, was a guy named Wallace Stegner, some spectacular work. And Stegner wrote about, in his words, "the geography of hope." And I will put that against brother Kunstler, because I believe that when we focus on the new opportunities we focus on what we can create with new approaches and new governance, with new design, new development, and new relationships We can build something that gives us not the geography of nowhere, but the geography of realized hope.

MODERATOR: One of the things to which Wayne spoke was the relationship to local government. And our next speaker, Linda Schuett, will talk about some rather unusual developments that have taken place in Anne Arundel County involving the incorporation of parallel taxing districts with boundaries coextensive with those of community associations and what has driven that movement.

MS. SCHUETT: I'm here today to talk to you about how communities are created in Anne Arundel County. Communities with a charter or with covenants that get created through the recordation in the land records are one type of community. But what happens when those documents haven't been recorded in connection with the creation of the community and therefore the people in the subdivision aren't bound by or aren't attuned to the requirements or the aspirations of the community and they want something? They don't have that system already in place. But they'd like to have a system in place for some particular reason.

In Anne Arundel County we have what are called special community benefit districts, and being a good government lawyer I always talk in acronyms. We call them SCBDs. And an SCBD is really a community that starts with some people who have an idea about something that they think would be good for their community. It can be any number of things. It can be private roads that were in the community that are now deteriorating that need to be upgraded. In Anne Arundel County waterfront issues are huge, so they often think 'I'd like a new pier or I'd like a pier, or I'd like a pavilion, or we really need some basketball courts for the kids in our community now, and how do we go about getting the money to do that as a community as opposed to as individuals?'

SCBDs have been in Anne Arundel County since the '20s. The first one was created in a portion of Anne Arundel County to maintain private roads. They have been through a significant amount of litigation, up to the appellate courts on more than one occasion. And back in 1994, the last reported opinion by Judge Eldridge, there were 42 special community benefit districts in Anne Arundel County. And today there are over 60. More and more are constantly being created for new and different and ever more imaginative reasons. The process starts with usually a handful of people, or maybe more, that have an idea about something that they want. And the very first step in the creation of the process is absolutely the most difficult one, even though it sounds simple when I describe it. You need to literally get a piece of paper. It's called a petition to establish a special community benefit district. And on that petition you have to say what the reason is, what your purpose is in creating this new community. And then you also need to identify specifically, either by metes and bounds or by reference to a tax account number, specifically those properties that will be included within this new community. Then you must identify how it is you

plan to go ahead and tax the members of this new community if it's created. Then you must put in your petition the name of the civic or community association that will be responsible for running the SCBD.

There are numerous purposes, I've already alluded to some, for getting these together. But many, many pages of our code are filled with these purposes for more than 60 communities that have been created. They are often created to acquire community-owned property, to construct or maintain community-owned buildings such as clubhouses and pavilions, to maintain private roads, signs, fences, lighting, drainage ditches, to have a community that has special police protection, or to get together and gather together money to get rid of the gypsy moths or insects, pest control purposes, to cut the grass in the community area, to remove the snow, to take the trash out, to do landscaping, and, as I said, numerous water-related purposes such as community-owned or operated piers, beaches, jetties, bulkheads, pilings, boat ramps, general shore erosion prevention and control, and dredging.

The purpose of the community and the purpose of the taxes that are about to be imposed on this community have to be a public purpose. That doesn't mean that everybody in Anne Arundel County or elsewhere has the right to come in and use the particular thing, but it does mean that, generally speaking, the people within the community have the right to use it. And everybody within this community is automatically a member of the community association that's going to run it. But defining the community itself seems to be getting more and more complicated. In the older SCBDs, the more traditional ones, it really was pretty easy because there had been a subdivision. The homeowners association hadn't been created when it was created, but you knew who the people in the community were. You could tell when you drove in, and you could certainly look at a subdivision plat and say here is this community. So in a community of that nature it's pretty easy to find out where all the properties are and write them down in a petition.

However, there are times when people want to create a community that really doesn't have any of the traditional characteristics or aura of community. And I think the most blatant example of that is a recent one in Anne Arundel County where people got together in order to dredge the mouth of the Little Magothy River. And the community to be created were

all of the owners on either side of the river going up the river from the mouth of the Chesapeake on up. And they believed that dredging the mouth of the river and having this community be taxed to pay for it would make the river a better place environmentally, and also allow boating and other river activities to occur in a better way.

That community had a lot of issues attached to it. There was lots of discord within this community from the outset. For example, there were people on either side saying, 'well, who decided who the people were that were going to be in this community? I live way up the river and it's marshy and the water outside my house isn't going to be any better whether or not you dredge the mouth of this river. I shouldn't be in it and I shouldn't be paying the taxes to dredge the mouth of the river way down there.' Other people said, 'hey, there are lots of people that come and use this river other than just us. Anybody can come use it, for one thing. But there are lots of people who have access to this river, are recorded easements, how come they're not paying. My cost is going to go up because you didn't include everybody within this community that should have been included.' And then we have the interesting issue of communities within the newly defined community because we have numerous waterfront lots that are owned by a community association. And the question was if they were going to pay one share of the total cost to dredge the mouth, is that fair, because the community association had loads of people within it who could come and use the river by virtue of their membership in the community association.

So I think this is an example because no matter how you define this community, it is a community that is contrived, in a sense, because it has nothing in common other than it sits on either side of a river. In Anne Arundel County, this particular one created more discord amongst what was supposed to be a community than any other one that we've ever had. In order to create an SCBD not only do you need to have this petition, you need to have it defined in a precise way. You need to have 51 percent of the people within the community, as you've defined it, say yes. That means, necessarily, that 49 percent may say no. However, you don't even need to present the petition to everybody in the community. So after you get 51 percent saying yes, you may just stop. That means the rest of the people in the community don't even know you're about to form a special community, and therefore, tax them, and they'll be members whether they like it or not. In addition to that 51 percent, though, you do need to take this petition to

the county council and have it be approved. That has often been a relatively easy thing to do. In connection with the community to dredge the mouth of the river, immediately there were nasty e-mails being exchanged, political alliances to attempt to defeat this new community, and it really was a very long and difficult battle.

And at that county council hearing there was lots of testimony in opposition to the creation of this particular SCBD. Now, there is sometimes opposition to the creation of any SCBD. But when an SCBD is formed to maintain existing private roads or an existing clubhouse within a traditional kind of community, the opposition who doesn't want to do that doesn't garner a lot of sympathy because someone needs to maintain the roads, and someone needs to maintain the clubhouse. The opposition to the creation of the community takes on a little bit more strength when the community has decided to create something new and expensive, for example, a waterfront pavilion or the building and maintenance of a pier. That can be a very expensive proposition over time, and if 49 percent of the community doesn't want to do it, their argument is 'I don't need it; I don't want it, and most importantly, perhaps, I can't afford it, and 51 percent of the people here are forcing me to pay for a dock or a pavilion that I won't use and can't afford to build.'

But the opposition becomes even stronger and more sympathetic when the community doesn't feel like a community, like the people on either side of the river. And there were numerous people who came in and testified against the creation of that SCBD, and they said things like 'I believe that dredging the mouth of the river is really a governmental function. The state ought to be doing that; in fact, the state has done that. Or the county ought to do it, because, in fact, the county has done it. Why are we doing it when the public can come in and use the river, when everybody can use the river? It's not our river.' Or we would hear 'I don't have a pier and I don't have a boat, and really the 51 percent who have signed this petition to create the community, they're really just the rich yuppies who have moved in with their big boats and they can afford it and we can't.' Or we heard 'I'm 70 years old; I've lived along this river for as long as I can remember; I can barely afford to pay the new-found property taxes on my waterfront property, I can barely afford to keep my house up, let alone pay to dredge the mouth of this river that's not so close to me.'

So there was lots of opposition. In fact, the legislation was adopted anyway, and those people are all now contributing through using the county's taxing power to gather together enough funds to dredge the mouth of the river. In this community every property owner gets a vote. One vote usually per property, sometimes per tax account. But if two people own the house, both people have to sign even though they get one vote. So renters don't get to vote. But husband and wife who own together each must sign, even though they together only get one vote. I think the most interesting aspect of these new communities within Anne Arundel County, at least now from my perspective as county attorney, is the relationship between the use of the governmental taxing power and the private community. Because the county's role in this is really not huge. We look over their petition. It comes through the law office to see whether they have reasonably identified those properties that will reasonably benefit from the purpose. We make them do a budget, and they can only spend the money in accordance with the budget, and the budget has to show that it's being spent for the purposes identified in the petition. And if there's enough money involved, we might do an audit. But, generally speaking, that's it. So our taxing power is being used to collect taxes that are collected in the same fashion as property taxes and could result in a house going to foreclosure or tax sale for not having been paid. That all being done, the money is turned over to this private association that is run in accordance with its own bylaws and its own charter.

Lots of times the citizens within the community will call the county and say 'those people in that association, they just decided that they were going to build yet another new thing and I can't afford it and I want you to step in there and stop this; this has gotten out of control.' Or they'll say, 'you know, they just hired this person to do this work and I really think something odd is going on here. I think they were showing favoritism in who they selected to do the work'. None of the county purchasing laws apply. In fact, none of our laws apply to any of it. Our response to all of those kinds of questions is your community association is your community. You have documents that relate to it, and you must find out what they are and what they say, if you can read them. And your redress, if you have any at all, is through a private cause of action. So that's the creation of community in Anne Arundel County.

MODERATOR: One of the main concerns of any resident in a community

is with the children of the community, and that has manifested itself in two ways. Traditionally, and this has not been really possible in this state, there's been a link between the formation of new communities and the formation of school districts. In Maryland we've traditionally had only 24 school districts and that link doesn't exist.

In some places like Arizona where charter schools can readily be formed, some developers have added to the attractiveness of their developments by sponsoring the formation of a charter school. And that's an area that may become of greater pertinence in future years. Adela Acosta, who is the principal of a school that is trying to convert to a charter school, was supposed to be with us today but couldn't make it due to a stroke suffered by one of her teachers. She would have addressed those questions.

The second aspect of the role of community in relationship to its children relates to day care and preschool children. And there is a model. We tend to think of day care as a very bureaucratic public sort of instrumentality. But there is a model known as cooperative day care that accounted until recently for something like 40 percent of day care in Britain and in the Netherlands where parent volunteers operating in rotation provide most of the manpower to run day care centers aided by a salaried professional. And the cost of doing that is much less than that of public day care and the system has the advantage that it keeps parents in touch with parents of their friends, keeps them in touch with their children, and it keeps them in touch with their children's friends to a much greater degree than a more professionalized model of day care. Leta Mach, our next speaker, has been engaged in endeavoring to promote the increased use of that model in the United States and she will tell us about it.

MS. MACH: I am personally very familiar with all kinds of cooperatives. I have lived in a housing co-op. I've served on the board of food co-ops, and currently I am president of Parent Cooperative Preschools International. I also live in Greenbelt, Maryland, which is one of the earliest planned communities in this nation. So really your message resonates with me.

Cooperatives take pride in working with one another to provide services and facilities, and indeed, one of the seven cooperative principles is cooperation among cooperatives. And what makes it possible for people

to join together in cooperative endeavors and provide these services are the principal tenets of cooperation. These include democratic control, providing an economic benefit for your members, insisting on education, training and information, because without the education and training you'll find that your cooperative business is likely to dissolve within a generation or two because the new members will not understand what the cooperative was all about. And then the values of self-help and self-responsibility are traditional within the cooperative business. And we can't ignore the social aspects of the cooperative.

So what are the essentials of a cooperative preschool? First of all, a well-formulated philosophy of education with stated objectives and purposes. Typically the philosophy believes in learning through play. And this philosophy of education will be one that the members, the parents have agreed upon. It's not going to be one that's imposed from the outside. The major tenet of a parent cooperative is parent education. And that is because this will promote the understanding by parents of child development and what early childhood education is all about. And this will lead finally to a group of dedicated enthusiastic parents who have been oriented into the program and the equipment and the philosophy, and the whole classroom of the cooperative preschool.

There are many examples of co-ops that have created other cooperatives and have created community benefits. These range everywhere from a very informally organized group to formally incorporated businesses. In the childhood education arena it's everything from very, very informal baby-sitting co-ops in which a group of parents will get together to exchange baby-sitting based on credits earned for watching children, and then on the other end would be your incorporated child care centers and preschools. A good example would be the Amalgamated Nursery School in the Bronx. This is a nursery school that's sponsored by the Amalgamated and Park Reservoir Housing Cooperative. It was established in 1933. And its purpose was to serve the immediate community as well as the surrounding area, and this is what it continues to do to this day. It holds a charter from the New York State Department of Education and a license from the New York City Department of Health. And it's accredited by NAEYC, the National Association for the Education of Young Children. So it is a very well-respected preschool cooperative.

I'd like to diverge just a bit and say that there are cooperatives that have also done things like sponsor credit unions, which are financial cooperatives, or in the case of my credit union, the Greenbelt Federal Credit Union, what we've done is extended membership by opening up our membership to anyone who would be a member of the local food co-op. Previously the credit union limited its membership just to anyone who lived or worked in the city of Greenbelt. And that brings me to another example, cooperative food buying clubs. That's another way that people can get together and create community among themselves by joint purchasing of food. These are very, very informal types of cooperatives. On the more formal food buying spectrum, you would see storefront food co-ops. So the list is endless. In addition to preschool, you could have meal preparation co-ops, transportation, carpooling, adult day care. And that brings me to services for seniors and others. Again, Housing Cooperatives in New York City pioneered services for their Naturally Occurring Retirement Community, or we call that a NORC. And this was to help their seniors age in place with dignity. So there are many benefits, and I'm a true believer, of course, in cooperatives. As membership organizations they are responsive to their members' needs.

Cooperative preschools offer quality child care at moderate prices. They offer an emphasis on parent education. And they give the parents and the members an opportunity to assist in the operation of the business and learn business skills, as well as a chance to help out in the classroom and observe and learn about child development. It was many, many years ago, of course, in my own case, when my children went to the Greenbelt Cooperative Nursery School where I suddenly found myself elected treasurer and had to learn double entry bookkeeping. So there's opportunity to enhance your skills as an adult as well as learn what is typical child behavior. When you are in the cooperative preschool helping the trained director and the trained teachers you may learn that what you thought was very unusual that you should be worried about is typical. And there are appropriate ways to handle those discipline problems that the staff can help you out with.

There also are child care centers that realize that today's parents with two income-earners in the family often can't get in the classroom to help out as much as in previous decades. And these child care centers do make allowances for that, and they provide opportunities for other parents or

other people to take over what we call the co-oping duties for working in the classroom. But those parents who are giving up some of their co-oping time are still involved in the preschool, in the cooperative in other ways. They may be involved by serving on committees, or they may be involved by being in fund-raising activities, or they may be involved by dropping in to the preschool to help out and to share some of their talents and their skills with the class at other times. So we have made allowances for changes in society, but still have built in the sense that all together we own this business and it is our business, and by working together we make it better.

So how do you go about setting up a preschool cooperative and what are some of the things to be aware of? First of all, you need leadership. You need good planning and a sound foundation. And let me emphasize again, leadership to get started and to determine the support for the project. What is the need and what is the interest? And then you should be prepared for meetings, meetings, and more meetings, beginning with a very informal meeting to discuss your common needs and to identify the specific services you're going to provide. Then you'll want to conduct surveys, do a financial analysis, develop a business plan, and then hold meetings and meetings and meetings to discuss these before going forward. You definitely need and want involvement and committee participation. You want a steering committee or an interim board. Not only does this help get the project off the ground, but it really starts to build that group of people, that involvement in that community. Naturally you have to draw up legal papers and incorporate, typically, your bylaws and your articles of incorporation.

Now, in an employer-sponsored child care center you can have parent-run, employer-sponsored child care centers. In the employer-sponsored child care center or even in a child care preschool that might be sponsored by a housing cooperative such as the Amalgamated example I gave you in the beginning, you definitely want to have a separate incorporation to help address liability issues. So after you've drawn up the documents, then you want to call a meeting of your potential charter members and adopt the bylaws, elect a board of directors, and during all this don't forget you're having a membership drive. You need to call the first meeting of the board of directors, elect your officers. And in an employer-sponsored child care center or in one that might be sponsored by a housing cooperative or community association, it is typical to have representation on the board

from that sponsoring group.

Of course, you need a budget, you need to get a tax status, usually a 501-C3, and necessary licenses. These vary from state to state. In some states you can go through the Department of Education, you can go through the Department of Health. It really varies from state to state, so you really need to check that out. And of course you'll want to acquire facilities. In a sponsored child care center by an employer or by a community association, a housing cooperative, it's often typical to have shared resources, donated space for the classroom, donated space for the playground, and even donated or shared office equipment, a shared library; those kinds of things can be helpful to the cooperative. But you definitely do want to still have a separate address and phone in order to avoid any confusion and make sure people can contact the preschool cooperative. And again, a professional director is essential, and the membership drive is important. You want to prioritize membership for the members of the sponsoring organization, but open it up to others outside that sponsoring organization, and then begin operation. And it will be very worthwhile for you and your family.

MODERATOR: We've spoken about the young. We will now address the elderly. The elderly are popularly thought of in public policy?making as dependents and recipients of societal benefits. But the fact of the matter is that most elderly people are in good health most of the time and are in a position to render services to each other and to the community. Marc Porter Magee of the Progressive Policy Institute in Washington has been actively involved in a number of proposals for activities of this kind, and he will address us on the potential in building community of services by and for the elderly.

MR. MAGEE: I'm going to speak a little bit about some of our most recent work on the potential of this boom in free time among baby boomer retirees that will be taking place over the next decade. I want to talk a little bit about the other trends taking place in community building and the way those might link up to use some of what we've already heard about this potential to build community among community organizations.

It seems to me when I was listening, reading the paper and listening to Mr. Hyatt speak, that there are three major trends that have run parallel to this effort to build community among community organizations. The first

is this tremendous growth we've seen over the last decade in service programs. One of the things we've worked on is building up senior service programs which have reached 500,000 participants per year serving in their communities in different capacities. And we see that growing even more as the baby boomer generation moves through into later years. We see this tremendous explosion in free time.

We've also seen a tremendous growth in service programs on the youth front through programs like Service Learning that connects what the students are doing in the classroom to service in non?profits in their towns and cities. And actually, Maryland was a pioneer in this in the early '90s setting up a mandatory service requirement for high school students, 75 hours a week, and that's spread to other districts in other states. And finally, we have this young adult movement through programs like Americorps where people after high school or college serve for a year or two in exchange for education benefits. And that's grown to 75,000 members. And then most recently after 9/11 we've seen the growth of organizations like Citizen Corps Councils which are now running 1,300 strong across the country reaching a majority of the American population focused on issues like emergency preparedness. So that's one big trend in terms of service programs.

Another trend we've seen is the growth of network government solutions. We've heard a little bit about this in terms of charter schools. Basically in network government, the government focuses less on providing goods and services to citizens and more on empowering this network of non?government organizations who are already tackling those public problems and scaling them up to the level to make a difference in their communities. We saw a lot of focus on this in the 1990s. One was the 1996 Welfare Law, which focused less on the rules and regulations of welfare that were traditionally sort of top?down from the federal government and more on getting the states block grants to empower their own local organizations to make a difference. And we also saw this with the growth of charter schools in 1990s, letting independent groups start their own public schools to serve the need for their community.

And then this third trend, as I spoke a little bit earlier, is this tremendous growth that's coming down the pipeline in terms of baby boomers retiring. We think that this creates a tremendous opportunity to

move beyond the simple approach to retirement as a time simply of leisure to incorporate a mixture of service and leisure and use that to help fulfill the connections within a community and also make a real difference in some of the public problems that we're going to face.

So in thinking about those three trends and about the role that community organizations might play, I think that linking those trends to these community organizations might help provide a little bit of a push behind this community movement. One of the things I was thinking about in reading the paper is this interesting idea of youth boards. And one way that you might make these youth boards and sort of get them kick-started and off with a bang is to connect them to this growing service learning movement. So in Maryland you might allow students to fill their time of community service, up to 75 hours, by serving on one of these youth boards and serving in their communities. I think it would also be interesting to think of this community extension agent as a person that is sort of a clearinghouse for the different service programs that are already out there that people haven't quite connected to. We've had tremendous success in having Senior Corps members and Americorps members serve in say Habitat for Humanity. And they're not out there building. They get out there early to make sure the nails and the hammers and the wood is there so that the volunteers who do come in can make sure that their time is well spent. For every one Americorps or Senior Corps member serving in Habitat for Humanity we've found that that helps leverage 50 additional community volunteers. So adding just one or two of these full-time service members to one of these community associations can really make a big difference in helping facilitate volunteering across the community.

We have a tremendous need for charter schools in America. But we have a limited amount of capacity to help host these. And I think that one thing we should think about is the way that community associations might serve as charter authorizers to actually help facilitate the start-up of a charter school, not by creating the whole thing themselves, but by playing the role of bringing in innovative programs like KIP, schools that have proven very successful in playing host to them, to help start up a satellite school in their community. Those are just a few thoughts on the paper and I hope that will spur further discussions.

MODERATOR: One of the problems with community associations is that

for the most part they only exist when developers have created them. We've heard from Linda Schuett about a new mechanism for the creation of community associations in established neighborhoods in Anne Arundel County. And Charlie Duff will now address us on the analogous effort that's been made in places in Baltimore City to the same end.

MR. DUFF: I feel as if I should give my autobiography. Here we began with Don Stabile telling us about Roland Park. I grew up in Roland Park. We just heard about cooperative nursery schools. I went to a cooperative nursery school. In fact, I once heard my mother tell one of her friends that all of my many problems were attributable to that cooperative nursery school.

And now I return to this room which is the first place I ever fell literally on my fanny in front of girls in 8th grade in dancing class. The most embarrassing single moment of my life. So whatever I may do here won't be that bad. And continuing the memory lane theme, I now live about six blocks away from here, and the house that I live in was built in the 1850s some time before people had invented most of the mechanical systems that we now take for granted in houses. So when you walk into my house you'll see pipes running in places where you don't normally see pipes running because pipes didn't exist when my house was built, and when they invented central heat they had to figure out where to put them and there was no ready-made spot. And then again, if you're in my house and you have to go to the bathroom, you'll find that the bathroom, or actually all of the bathrooms are in very unusual places. One of them takes up what used to be an entire bedroom, because the house was built before there was indoor plumbing. And so they had to fit indoor plumbing in somewhere. My house had to be retrofitted after it was built, and it had to be retrofitted after it was built so that people could live a normal modern life in accordance with the evolving standards of normal modern life.

And what is true of old houses is true of old communities. We've heard about how new communities, when they're born, are equipped not just with streets and with buildings, but also with charters rather as if they had been born with trust funds. These charters are like plumbing and heating in my old house. Things like charters, and indeed, all of the things that we've been talking about have been invented since most of America's old neighborhoods were built.

They're good things, and neighborhoods ought to have them. But the old neighborhoods of America cannot rely on their developers and their good lawyers, like Wayne Hyatt, to hop on time machines and go back to the 1850s and equip these neighborhoods with charters as part of their precedent. So the question is what can we do, those of us who care about America's old neighborhoods, who live in America's old neighborhoods, what can we do to retrofit our old neighborhoods so that they can have the modern legal cultural community systems that our evolving notions of modern life require? We do it to houses by putting in bathrooms. How do we do it to neighborhoods?

There are four of these basic retrofitting mechanisms going now that I'm aware of, and I have the good fortune to be involved in two of them myself—actually, I'm involved somewhat in three of them. The first, if you think about what do community associations do, probably the first thing that comes to your mind is architectural control. That's Darth Vader number one, architectural control. And you read the standard decs—Wayne, wonderful word—standard decs—they'll tell you you can't have white wild flowers in your front lawn, you can't keep pigs, all kinds of things you can't do in standard decs.

And what are you going to do if you live in a world where homeowners expect to have architectural control but old neighborhoods don't have it? The standard American answer to that question, the first of the four retrofits, as I see it, is historic districts. All over America you'll see that old towns, old villages and old neighborhoods have had themselves made historic districts, and each one of them has a board that tells you what color you can and can't paint your front door. And these boards cloak themselves in the mantel of history. In fact, I've never known anyone on any architectural review board in any historic district who knew anything about historic paint colors.

Historic district commissions are an attempt to retrofit old neighborhoods with the community systems of architectural control that are part of the evolving notions of a good modern life. So that's the first of them. And that applies mainly to residential districts. And the history of historic districts shows successes and failures. The successes much more visible than the failures. And historic districts are sort of like medicine. They say that doctors are lucky; they can bury their mistakes. Historic

districts are lucky, because if you don't like them, you don't live there, and there are lots of other places you can live. So people who live in historic districts tend to be happy with them.

The second kind of retrofit has to do with retail districts. Old residential districts have to compete with suburban subdivisions that have good decs. Old retail districts have to compete with malls, and malls have certain advantages over old retail districts that even go beyond the basic advantage of convenient parking. And the advantages that malls offer include two that can be corrected through retrofits. One is common area maintenance and the other is common advertising and promotion. How often have you gone through a shopping mall and seen someone in a uniform pushing a broom down the central aisle? Pretty often. How often have you seen that happen on a retail main street? Not very often. Go down to the Inner Harbor in Baltimore, go to Harbor Place developed by the Rouse Company, and still owned by the late great Rouse Company, and every couple of weeks you'll see somebody coming along with a high pressure hose cleaning the bubble gum off the bricks outside the buildings of Harbor Place. When is the last time you ever saw anybody do that on any city street, on any main street in an American town? Well, you may have seen it, but if you've seen it, you've seen it on a retail street that had been retrofitted with some kind of a special business taxing district that financed people to do that.

Cities and towns tend not to do that. Business owners, property owners have to get together in these things that are called business improvement districts. And there are several other forms, but the business improvement district is the evolved form, and they are attempts to retrofit old business districts with many of the advantages of the mall or of the evolving standards of modern life.

The third of these things carries it a step further, and it gets back to a point that Don Stabile made when he talked at the beginning of today about the formation of this Baltimore place called Roland Park. He said that about four years into the life of Roland Park the Roland Park company turned over the maintenance of their roads—do you remember that—turned over the maintenance of their roads to the residents. Now, why on earth would residents want to have to maintain the roads in their neighborhood? Why didn't they just let the town do it or why didn't they let the county do it?

And the answer is that in 1895, Roland Park was situated in a political community that didn't care about maintaining roads, didn't have a high standard of road maintenance. It was a poor political community. It was run by people who thought the Roland Parkers were fat cats and just spoiled brats who didn't want to spend their tax money doing it. And so the Roland Parkers had to take the maintenance into their own hands and pay extra to do it. That political community I should mention was Baltimore County back then, which was poor and was run by poor people and didn't want to spend money on fat cats.

And that brings me to the modern incarnation of this which you will see premiered in Baltimore City, because Baltimore County is now rich and is hospitable to fat cats, and it's Baltimore City who is poor and wants to skin them. So in Baltimore City the standard of maintenance of public areas is lower than the upper middle class standard, because Baltimore City is poorer than an upper middle class community and is not run by upper middle class people. So you will find that Baltimore City has led the nation in extending the concept of business improvement districts to residential neighborhoods, or neighborhoods that are largely residential. Now, you'd think it might be controversial within the neighborhood, remember what Linda Schuett said about those people in the Little Magothy River, do you really want to be taxed so that your neighbor can run his boat past your house?

In fact, these benefits districts in Baltimore City neighborhoods have not been very controversial within the neighborhoods. There are three or four people in Charles Village who will argue with me until 6 o'clock every morning for the next 12 years, and I hope you don't live next to them, but in general these things have not been very controversial within the community of people who have to pay the freight. Where they have been controversial is in the wider community. Because for some reason there are a lot of people in Baltimore who are afraid that somehow it would be unfair if people spend their own money to get something in their neighborhood but not in my neighborhood. I've never quite figured that one out. But there are certainly people like that.

And so Baltimore has now extended this concept of business improvement districts to two predominantly residential districts, Charles Village and Midtown. And if you own property in one of those two

districts, you pay a little bit extra, an extra 6 percent on your 2 and a half percent property taxes, and somebody comes along once a week and sweeps your street and they can walk you home from the symphony. And in my neighborhood, at least, in Midtown, this has made a tremendous difference. It sounds like a small silly thing but I have a very good measure. Which is before there was a Midtown benefits district, when I went out in the morning and walked the dog, I took two plastic bags, one for the dog, the other for the trash on the sidewalk. They created the Midtown district, and I'm a one-bag man. You just don't need to pick up trash on the sidewalk.

This brings me to the fourth of these attempts to retrofit old neighborhoods with the benefits of new subdivisions. And that is a curious thing. The thing that everybody takes for granted in a new neighborhood is the developer. Every new neighborhood has a developer. That's what new neighborhoods are. Old neighborhoods don't have developers, do they? Of course not. But they need them. New neighborhoods need developers to build new houses. Old neighborhoods need developers to rebuild old houses or build new buildings on vacant lots. But old neighborhoods are not development projects. So old neighborhoods need some way of retrofitting themselves with developers. It seems ridiculous. It's like God inventing the devil. Why do you have to do this? But you do have to do this. Or else the vacant house next door will never get fixed up and the vacant lot will always have crack vials on it. You really need to have developers in your neighborhood.

For 35 years there has been a national movement called community development corporations working under this promise that neighbors can build neighborhoods, that people in communities can become the developers of their communities. It's never worked particularly well, and the reason it's never worked particularly well is that community development corporations have never been enabled to raise money democratically from the people who control them.

We've been talking about benefits districts, picking up trash, sweeping streets. We've figured out ways to raise money democratically, building and maintaining piers, dredging recreational rivers. We've figured out ways to raise the money democratically so that the people who pay for it, control it, and the people who control it, pay for it. And we can all pool our resources to help our communities. But nobody has ever really figured out how to do

that in the attempt to retrofit old neighborhoods with developers. And the result of that failure has been that America's community development corporations, of which there are about 3,000, two of them headed by me, America's community development corporations have been primarily financed by foundations and by units of government. And if you follow the golden rule, those who have a golden rule, you realize that the community development corporation has not yet succeeded in putting Americans into the position of developing their own neighborhoods. Because if you use the golden rule where the money comes from foundations and governments, who ultimately is deciding what goes on, the golden rule.

So here are four things that Americans are doing, four things that we are doing right here in Baltimore to retrofit Americans' old neighborhoods and to give them the benefits that we now expect with our evolving standards in the neighborhoods that we want to live in. Three of these things actually exist and they are functioning well, need only to be expanded. The fourth of them, the community development corporation, has not yet reached a perfected form. And I would hold that up as a challenge. And if we can use the methods of democracy and taxation which are behind this, to rebuild our communities in a physical sense, then we can use them to rebuild our communities in a non-physical sense, and can equip them with the benefits of community associations that are not merely the cop, but also the activities director, to equip our communities with schools for little kids and big kids with after-school programs, in short, to equip our communities with whatever we think our communities ought to have, just as my old house now has bathrooms and air conditioning.

I'll close with a quote from a man who may not be often quoted in a symposium of the Calvert Institute. It may not even be an accurate quote but I'll do the best I can. The man is John Kenneth Galbraith, and Galbraith says quite wisely that we Americans drive the biggest cars over the bumpiest roads in the developed world. What he means is that we have a political economy that is really good at allowing us to have things that are ours, to use and maintain things are ours, but that we lag far behind in having things that belong to all of us. Our system of having and cherishing and maintaining public goods lags far behind our system of having and maintaining private goods. So the old communities of America need the ideas that we've been hearing about today and need yours.

MR. HYATT: I'll be very brief in my response. I think you've heard some wonderful ideas that come along to follow my suggestions, some concrete real world suggestions of how to put into practice some of the theoretical discussions that I had. Anything from our remaining audience.

AUDIENCE MEMBER: I was wondering what opportunities there are in community building with affordable housing in Section 8. You talked a little bit about Section 8 and I was curious what your thoughts were?

MR. HYATT: Well, my experience is not with Section 8. I have seen in rare master plan community situations where the master plan community developer does affordable housing. The interesting thing is that increasingly to get permitted in lots and lots of parts of the country, mostly west of the Mississippi, you have to have a substantial component of affordable housing in order to get your market housing done. Hawaii, for example, is 60 percent affordable, 40 percent market. So you have to come up with concepts. And the tragedy to me of most affordable housing programs is they're affordable on the way in. But then they're immediately turned into market so somebody gets a great windfall but you no longer have any affordable housing.

And I think that some of the tools we've been talking about today, some from the panel and some out of my presentation, allow you to structure systems that put affordable housing in the marketplace as part of the original development, and then through the use of C3s and C4s and community associations you maintain them as affordable by doing a pool and repurchase and mandatory caps and recaptures of appreciation so that you can allow the home buyer, that first-time home buyer that's going into the affordable to have a piece of the American dream, which is really appreciation. But not have all of it. So that there are mechanisms to keep the housing in the pool of affordable housing. I think we're going to see more and more of that because local governments are saying more and more you have to do it. It's another part of the privatization of governmental responsibility, and we're not commenting on whether that's a good or bad idea, it may very well be that the private sector can and will do it better than the public sector has.

MS. MACH: You might want to look into cooperative housing, particularly limited equity cooperative housing. That will be where people

get together to jointly create that housing and they put a limit on the equity that they can get when they sell their share. They're just getting a share of that cooperation, not getting a single family property. They have a share of something owned by the whole cooperative.

MR. HYATT: The experience of doing the non-cooperative approach is in large measure borrowing from the experience of the limited equity co-op.

MR. DUFF: What you're talking about is a great part of the history of the community development corporation movement. And all the techniques of building and financing affordable housing are generally known. But the one thing that's missing is the financial and legal structures that really make communities or make neighborhoods the owners. The system is not called capitalism by accident, and even if you wanted to do a limited equity co-op, you need to own a couple of hundred thousand dollars just to get the thing started. Those couple of hundred thousand dollars are very hard to come by and whoever puts up that money you're beholden to.

MR. HYATT: But if it's done as part of the development of the overall planned community, then you're spreading the cost over the developing cost of all of the market housing which can make that capital more available.

MR. DUFF: You're the second person today who has made me wish I was in Hawaii. The first one was talking about surfing.

MR. HYATT: The problem in Hawaii is when you take 60 percent of all new housing and say it has to be affordable and only 40 percent of the market, then you bring all the folks from east and west that want to buy the market housing, you're pricing out a huge sector of the mainland. We're somewhat egocentric when we call the mainland the mainland, because to Alaska and Hawaii, you're not the lesser land. But you'll have not just the schoolteacher and policemen and firemen who are having a hard time finding housing, but you'll find lawyers and doctors and Indian chiefs in Hawaii who are living at home because that 40 percent is in such demand, prices are so high. So there is, as there always are, trade-offs that come along in the process. Anything else?

MODERATOR: I would just remark in response to what Charlie Duff said about the fourth category of the inner city community development

corporation, that there is in several foreign countries, notably Germany, Japan and Korea, a mechanism called land readjustment, which basically is community development at a block level where the owners of the property in the block can organize themselves if they obtain a certain majority and agree to a reconfiguration and sale of a block so that the dissenters are either excluded or bought out at an appraised value. Owner-occupiers have the right to exclude themselves. Anyone who is not an owner-occupier can be forcibly bought out at an appraised value and then the remaining owners can develop. The mechanism is one which usually requires a developer to organize it. In other words, a developer will see a promising block, go to the owners on the block to see if he can get 51 or 60 percent of them to sign up, and then they will exclude the owner-occupiers who don't want to be in and proceed with the development plan of the existing properties. The existing owners can be compensated either with improved property or cash, as the case may be.

This sounds very theoretical. But it accounts for something like 60 percent of the development in Japan and Korea since the war and is particularly good in neighborhoods that are seriously dilapidated. It was used originally to repair war damage. It is something that would be worth trying to adapt to American inner city conditions.

MR. DUFF: Let's try it.

MR. HYATT: We have seen in Atlanta over the last half a decade or thereabouts a tremendous return of the developer to the city and our last census, interestingly, showed what is traditionally called white flight but in reverse, because we had a net in-migration back into the city of Atlanta. And in large measure it was because the developers had come back and were building new housing, renovating housing and building on those vacant lots. I live in Midtown Atlanta and you live in Midtown Baltimore and I find it to be a vibrant, exciting, wonderful way of living. But not that long ago we wouldn't have said that.

MR. DUFF: Not that long ago I was a two-bag dog owner.

MR. HYATT: We're delighted to hear that you are now back to being a one-bag dog owner.

Book Review by George W. Liebmann

These Truths: A History of the United States (New York: Norton, 2018, 932 pp.) by Jill Lepore

This extravagantly praised one-volume history of the United States is fraught with paradoxes. With its fixation on the conditions of blacks, of women, and to a lesser extent those of Native Americans, it is afflicted with the vice of presentism. Yet, curiously, its discussion of the last seventy years is the strongest and most original and objective portion of the book.

Ms. Lepore's account of the Founding finds the new nation's governing principles as political equality, natural rights, and popular sovereignty, extrapolating from Jefferson's rhetoric "that all men are created equal and independent [with] rights inherent and inalienable" with governments "deriving their just powers from the consent of the governed." The Declaration, however, as many have pointed out, was the Declaration of a confederacy, whose constituent states had different origins and premises, both as to slavery, as to religion, and as to mixed government. Likewise the Constitution was the work of framers deeply concerned with the horrors of classical antiquity who for the most part sought to foster not pure democracy but mixed government, later described by Justice Brandeis as designed "not to avoid friction, but by means of the inevitable friction incident to the governmental powers among three departments, to save the people from autocracy." It also contemplated, as General De Gaulle, not a mean constitution-maker, later observed in 1970 "only two parties, which are opposed on none of the fundamental issues—nationhood, moral law, institutions, defense, freedom, ownership. It is a federation of States each of which, with its governor, its representatives, its judges and its officials—all elected—takes upon itself a large part of the immediate business of politics, administration, justice, public order, economy, health, education, etc. while the central government and Congress normally confine themselves to larger matters: foreign policy, civic rights and duties, defense, currency, overall taxes and tariffs."

Not for Ms. Lepore is the statement of Baltimore's civil war mayor George William Brown that the Constitution, Lincoln to the contrary notwithstanding, contemplated a nation 'half slave and half free.' For her, Mr. Jefferson is "a man of sight, and of blindness." She buys into the Sally Hemings narrative of the exploited, even raped, slave, disputed by many historians. But we are nowhere told that it was Jefferson who sought in 1775 to prohibit slavery in the western lands of Virginia extending to the Mississippi, who in 1784 came within one vote of prohibiting it in all lands thereafter to be acquired by the United States, and whose Northwest Ordinance ultimately prohibited it in the Upper Midwest. Nor were slave owners' relations with their household servants, where they existed, notably different from the relations of British and French with their domestic servants; we may recall Mencken's remark "As a result of this preference of the southern gentry for mulatto mistresses, there was created a series of mixed strains containing the best white blood of the south, and perhaps of the whole country." She does acknowledge Jefferson's unsuccessful effort to denounce slavery and the slave trade in the Declaration of Independence, and his deathbed reflection, almost unique among the framers, that "the mass of mankind has not been born with saddles on their backs, nor a favored few, booted and spurred, ready to ride them". But debunking the greatest of our men, and one of the greatest of our Presidents, is an academic fashion today that not even the David Woods Kemper '41 Professor of American History at Harvard University can withstand.

Her account of secession is also partisan and partial. The precipitating event for four states in the Upper South was not the firing on Fort Sumter but Lincoln's call for Northern troops to coerce the South, and his rejection of compromise efforts in the four months interceding between his election and inauguration. The reconstruction policy initially pursued by Andrew Johnson was not greatly different from that urged by Lincoln before his death, and bore no resemblance to that of the Radical Republicans. Had Lincoln lived, he almost certainly would have experienced the phenomenon of a revolution devouring its own. Nor is her account of the so-called 'compromise of 1877' anything but misleading. Reconstruction did not succumb to "the seedy compromises, underhanded dealings, personal viciousness and outright fraud of small-minded and self-gratifying men." Had Tilden been allowed to win the 1876 election, the result would have been the same. By the time of the election, the Grant Administration had abandoned military control of all but two or three states; its officials, notably Secretary of State Hamilton Fish and Attorney General Alphonso Taft were intent on fostering an orderly transfer of power and avoiding a flare-up of civil war.

The discussion of the aftermath of the civil war omits its effects on the South. The black historian John Hope Franklin was the author of a book entitled "From Slavery to Freedom." It might better have been entitled "From Slavery to Peonage," for that was the lot of both whites and blacks in the South for nearly a century thanks to the Republican protective tariff regime initiated by Lincoln and continuing with only minor interruptions until being undone by four Southern free traders, Hull, Clayton, Byrnes and Vinson in the wake of World War II. South Carolina on a per capita basis was the richest state in the union in 1860. By 1945 it was the second poorest. Ms. Lepore would have benefitted from exploration of the third volume of the Cambridge Economic History of the United States.

Ms. Lepore's account of the Gilded Age is the conventional one discussing the populist and progressive movements and the horrors of Jim Crow, which was not in full bloom until the later part of the period thanks to the influence of social Darwinism. Of the advances in black literacy from 1865 to the turn of the century, much of it due to the efforts of Northern philanthropists, little will be found here. Nor is there any account of the development of civil society in the midwest and west—of the pastor-led migrations from the East and Europe, the construction of small towns and their law enforcement institutions, of churches, public schools, and denominational colleges, of the Morrill acts and the development of public colleges, of the beginnings of road development and the organization of townships and new states following the Jeffersonian design. There is a fixation on the ex-slaves, one-eighth of the population, then concentrated in the South. W.E.B. Du Bois, with nine index references, is seen to be their spokesman; Booker Washington with his advocacy of industrial education and gradualism is nowhere to be found. This is not really a history of the United States.

There is also a distorted fixation on the beginnings of the suffrage movement. Yet women, albeit to a lesser degree than blacks, were not fully literate at its beginnings. The index contains five references to Elizabeth Cady Stanton, one to Victoria Woodhull, and five to Susan B. Anthony. The female social reformers of the Progressive era and afterwards are nowhere mentioned. Mary Ellen Richmond, the founder of American social work is absent, as is Belle Moskowitz, the architect of unemployment insurance and other welfare state measures and the

Abbott sisters, the most important influence on the creation of social security. Alfred E. Smith is a non-person; the state-level reforms of Robert La Follette are unmentioned. Yet the celebrated suffrage movement gave us the election of Wilson over Hughes in 1916, a tragedy for the world as well as the United States; Ms. Lepore does acknowledge its contribution to prohibition, nativism, pacifism, isolationism and the Neutrality Act of the 1930s. Even at this late date, she regards an Equal Rights Amendment as “a political settlement necessary to the stability of the republic.” Except for invalidation of remaining anti-abortion laws, it is unclear what it would contribute that Ginsbergian feminism has not. The latter with its doctrinaire denial of the relevance of sexual differences deprived women of the benefits of permanent alimony, the maternal preference rule in custody cases and in some circumstances labor protective legislation and lower insurance rates. It should be clear by now that the ‘sexual revolution’ benefitting college women like Ms. Lepore has had a less beneficial effect on the fortunes of bank tellers and supermarket clerks; the ranks of single mothers and those suffering from the ‘feminization of poverty’ have been greatly enhanced.

The account of depression and war is conventional. She obscures the extent to which party warfare in 1930-32 curtailed the more constructive initiatives of President Hoover including the Home Owners Loan Corporation and the Reconstruction Finance Corporation, and the extent to which the persistence of the Depression was chargeable to monetary policy. She gives Hoover his due as the Secretary of Commerce and promoter of radio and civil aviation, but not for the Norris-La Guardia Act or the Banking Act of 1933, drafted by the Hoover treasury department.

It is, surprisingly, in her account of the post-war period that Ms. Lepore comes into her own. She comments on the abandonment by both parties of anti-monopoly policy and by the Democrats of the interests of labor in favor of the ‘knowledge class’, “the age of the snob.” “The left has abandoned solidarity across differences in favor of the meditation on and expansion of suffering, a politics of feeling and resentment, of self and sensitivity.” Both the claims for reproductive rights and for gun rights rest on weak constitutional foundations, increasing the virulence with which they are asserted. She discusses the role of Robert Kennedy (aided by Justice Douglas) in fostering his brother’s intervention in Vietnam, and also speaks of the role of the Johnson and Nixon administrations in fostering the Law Enforcement Assistance Administration and the boasts of the Clinton administration about 100,000 more local policemen and 125,000 more state prison cells.

She has a jaundiced view of the influence of public opinion polls and their use to qualify primary candidates and participants in political debates. She decries the culture of ‘war rooms’ and perpetual campaigns accelerated by the Clinton administration and observes that the last several administrations, Republican as well as Democratic, have been the victims of attempted coup d’etats, attempting to depose them through ethics investigations. She charges the Democrats with spurning electoral politics for judicial remedies, and purity crusades. She decries the demise during the Reagan administration of the ‘fairness doctrine’ and the rise of a totally unregulated Internet due to the Telecommunications Act of 1996, giving rise to a national public opinion unmediated by Congress and political parties. Both Governor Romney and Mrs. Clinton spurned the concerns of half the electorate as beneath notice.

The remedy she finds in the recovery of the original values of equality, respect for rights and political consent, as recast in a quotation from a speech by former President Obama re-defining ‘these truths’ of her title as “honesty and hard work, courage and fair play, tolerance and curiosity, loyalty and patriotism.” As a critique of our current situation and how we got there, her last chapters can scarcely be improved upon. The flaws of her work are in the neglect of the quiet development of civil society and a decentralized economy and polity, which has given the nation its powers of endurance.

Everything Old Is New Again – Or – Same As It Ever Was?

The title of our article presents us with two old expressions, both of which conjure up a myriad of examples that support each. If a poll were taken, and wow, in an election year don’t we want another poll, there would probably be a substantial majority in favor of the former over the latter. Movies, music, fashion, and probably the clearest example of all, television. Is there a show on the air today that was not on thirty, forty and even fifty years ago? Magnum, Hawaii Five-0, the F.B.I. Is the new MacGyver still on?

When I think of “same as it ever was”, the first thought that comes to my mind is the Bar Library. Now, to say this about a place can be a complement or an insult depending upon what it was to begin with. It can also be a complement or an insult depending upon the context. Let’s take a look at the Bar Library measured against “same as it ever was.”

What was the Bar Library in 1840, the year that it was established? The Library was a place where the lawyers of Baltimore could come and utilize a first rate collection of legal works in order to advance the causes of their clients. This material would, in many instances, otherwise be unavailable to them. Kind of sounds like our promotional brochures of today, only with subscriptions to a vast number of legal databases, and yes, a book or two as well, the Library offers more than it ever has in its history.

There are other instances, however, when “same as it ever was” would be an insult, an insinuation that an institution was an anachronism that had failed to change with the times. “I talked to the guy at the Bar Library today. He said in five or ten years they were thinking of adding a computer.” Would not be good. Would not be accurate either. With one of the most extensive collections of Westlaw databases of any library in the area, databases that we frequently add to upon member request, the Bar Library has striven to not just stay up with the times but ahead of them.

In many ways the Bar Library represents the very best of America. In that the Library was established by the bench and bar after attempts to have a library formed by the local authorities failed, it reflects American initiative, a can do attitude of “we’ll do it ourselves.” It also represents something that America has fallen short of frequently, and still grapples with today, and that is equal treatment for all, regardless of race or gender. Everett J. Waring, the first African-American admitted to practice in Maryland and Etta Haynie Maddox, the first woman

admittee, were members of the Library at a time when they were unwelcomed by just about every other legal organization there was. Today, the Honorable Harry A. Cole Self-Help Center provides resources to self-help litigants in their efforts to obtain access to justice. So, you see, at the Bar Library it truly is "Same As It Ever Was." Thanks for your help over the years in making it that way.

Joe Bennett