CITIES AND HOMEOWNERS ASSOCIATIONS: A REPLY

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Although Professor Ellickson twice describes himself as a "Prisoner of Liberal Thought" in his article *Cities and Homeowners Associations*,[1] I doubt he really sees himself as an exponent of liberal ideology. He does, after all, also identify himself as an "empiricist," as someone who relies on hard, observable facts and on inductive reasoning that builds on those facts rather than on deductions from generalized abstractions of the kind invented by armchair theorists.[2] Yet I do not think that the facts on which he relies can be understood apart from the ideological prism through which he sees them, any more than the arguments he advances can be understood other than as a modern articulation of a particular strand of liberal political theory. Thus, although I intend to respond to the specific suggestions he makes in his article, I think it essential for a full understanding of his argument first to indicate its place within liberal political thought.

Professor Ellickson wants to convince us that homeowners associations are a better vehicle for decentralized power than are cities. To do so, he must make a convincing distinction between the two forms of associations, a convincing public/private distinction. This he bases on the voluntary/involuntary distinction—homeowners associations are formed voluntarily, while cities are formed at least in part involuntarily.[3] But to persuade us that homeowners associations are formed voluntarily, he needs to have us think of them as a miniature version of the liberal society envisioned by John Locke. Thus, Professor Ellickson describes the homeowners association as an example of a Lockean social contract: a unanimous agreement of property owners that creates a constitution for (at least part of) the social order.[4] It is this unanimous agreement that makes the association voluntary. Like Locke before him, however, Professor Ellickson simply invents this "wholly voluntary"

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[1] *See* Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1521, 1563 (1982).

[2] *Id.* 1565.

[3] *See id.* 1523.

[4] *Cf.* J. LOCKE, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT § 87, at 341-42 (P. Laslett 2d ed. 1967).

contract as a postulate on which to base his argument. Although he asserts that the original membership in homeowners associations is wholly voluntary and that cities have involuntary members when first formed, this assertion has no empirical support. Cities can be, and have been, formed by the voluntary association of their citizens,[5] while the original constitution of a homeowners association might well be the work of a developer without the participation of a single person who becomes a resident of the community.[6] To support his voluntary/involuntary distinction, Professor Ellickson treats homeowners associations as if they come into existence by the voluntary agreement of the original settlers and treats cities as if they are created only after the residents are already in place. Yet, this public/private distinction is hypothesis and nothing more.

Perhaps Professor Ellickson is suggesting not that we simply accept this hypothesis, but that we make an inquiry in each case to determine whether the association was in fact originally formed by its residents, a developer, or some other group of people. But that kind of inquiry would not distinguish cities from homeowners associations: instead it would distinguish some of each from others of each. It thus would not reproduce the current public/private distinction at all. It also would be hard to do, because exactly when cities were formed is a matter open to considerable debate. We certainly need not accept the positivist definition of the formation of a city in terms of its being granted a corporate charter.[7] Moreover, the circumstances of the original formation rapidly lose relevance as new residents move in, children take over their parents'

[5] "More than anything else the fully developed ancient and medieval city was formed and interpreted as a fraternal association." M. WEBER, THE CITY 96 (D. Martindale & G. Neuwirth trans. 1958) (footnote omitted). A famous English medieval example was the meeting of the whole town of Ipswich on June 29 and July 2, 1200, in which officers were elected and "all the men of the town swore a solemn oath to obey their officers, and to maintain the liberties and free customs of their borough." C. PLATT, THE ENGLISH MEDIEVAL TOWN 130 (1976). The most famous American example was the Mayflower Compact signed prior to the settling of Plymouth, Mass. *See* DOCUMENTS IN AMERICAN HISTORY 15-16 (H. Commager 7th ed. 1963); for a discussion of its significance, see H. ARENDT, ON REVOLUTION 167-68 (1963).

[6] Professor Ellickson himself recognizes this. In his discussion of the choice of voting rights for a homeowners association, he presents the issue as a question of the options available to the developer, not to the residents. *See* Ellickson, *supra* note 1, at 1543-44.

[7] Professor Ellickson dates the existence of cities from the award of their corporate charters. *See id.* 1523. But many cities existed long before they were awarded corporate charters. In colonial America, for example, most cities were not corporations at all. Moreover, in England, London became a city by prescription, not by the grant of a royal charter. *See* Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1095-98 (1980).

homes, and the like. It therefore seems unlikely that Professor Ellickson would allow an historical proof that Plymouth, Mass., was formed by a social contract [8] to determine the city's legal status today.[9] But without history, we are left simply with his liberal postulate, one that we are free to reject. I do reject it. I can see no difference at all—no legitimate public/private distinction at all—between cities and homeowners associations.

Professor Ellickson relies on the public/private distinction for more than simply his unsuccessful attempt to separate cities from homeowners associations. He deduces certain legal rules from the existence of the asserted distinction [10] and, more significantly, frames his two most important arguments by relying on it. But in these arguments he does not use the public/private distinction to divide cities from homeowners associations; he uses it instead to classify both forms of association as public for some purposes and as private for others.

Thus in part II of his article, Professor Ellickson argues for a stringent taking clause to protect residents of homeowners associations from their governing boards. Since a taking clause would seem an unlikely suggestion for an association truly envisioned as private (such as the family), recommendation of such a clause for the homeowners association indicates that he envisions these groups as having qualities generally associated with public organizations. Like Locke, Professor Ellickson seems to recognize that the governing board of even a "purely voluntary" association is invested with power that can threaten the association's members. Once a homeowner is in place, any rule made by the governing board not authorized by the original agreement threatens him with coercion. To that extent, the homeowners association and the city are equally dangerous to the liberty of their residents. As a result, Professor Ellickson seeks to limit the power of the board of directors of his

[8] *See supra* note 5.

[9] It is by no means clear why even a voluntary contract formed by one group of people should bind others. After all, property law limits covenants that run with the land and equitable servitudes. Indeed the binding nature even for the original parties is a puzzle for liberal theorists. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 150-55 (1977).

[10] *See, e.g.*, Ellickson, *supra* note 1, at 1527: "The feature of unanimous ratification distinguishes [homeowners association agreements] from and gives them greater legal robustness than non-unanimously adopted public constitutions . . . . In most instances, familiar principles of contract law justify strict judicial enforcement of the provisions of a private constitution." This attempt to deduce the appropriate judicial reaction to a contract from the voluntariness of the contract is a classic formalist mistake. *See* Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 575-78 (1933).

homeowners association, like Locke limited the power of the state, by the articulation and defense of property rights of the members against the governing board. In arguing for strict limits on the board of directors' ability to alter the rules of the association once it is under way, Professor Ellickson, unlike Locke, can rely on modern property law concepts and on judicial review to protect the property owner. And the extent of the protection of property rights he suggests is impressive indeed—he proposes a truly astonishing version of the "taking clause," preventing the governing board from doing almost anything not authorized by the original charter unless it pays compensation.[11] Professor Ellickson apparently has no trouble in applying public law to the governance of a homeowners association with at least the severity he would apply it to cities.

When, however, Professor Ellickson in part III turns to his second principal argument—the one dealing with the democratic franchise—he seems to recategorize both cities and homeowners associations from public to private. How else can one understand his rather startling modern defense of a property-based franchise, one that departs from a two-hundred-year-old tradition within liberalism seeking to accommodate political equality with property rights,[12] except as a reduction of both cities and homeowners associations to matters of essentially private concern? He does, after all, retain a full democratic franchise for truly "public" governments, like the state and federal governments.[13] Moreover, he first discusses the limit on the franchise in the context of private homeowners associations. Here he seems to feel on comfortable ground: after all, homeowners associations are purely private organizations, and democracy is out of place in private as distinguished from public affairs. Then he extends his defense of allocating the franchise to the absentee property owner and not to his tenant—and

[11] *See* Ellickson, *supra* note 1, at 1535-39.

[12] Professor Ellickson's argument is based on his fear that political equalization will lead to economic equalization. *See id.* 1554-56. But many liberal thinkers since the late 18th century have argued against the inevitability of such a result. For example, the idea that property and democracy were mutually reenforcing and not mutually inconsistent was espoused in America by Tom Paine in 1776. *See* E. FONER, TOM PAINE AND REVOLUTIONARY AMERICA 94-96 (1976). In England, James Mill was a central figure in the reconciliation of property with democracy; he argued that the great majority of the people would be guided in their exercise of the franchise by the advice and example of their betters. *See* J. MILL, AN ESSAY ON GOVERNMENT (C. Shields ed. 1955). For a discussion of Mill's influence on the issue, see E. HALEVY, THE GROWTH OF PHILOSOPHIC RADICALISM (M. Morris trans. 1966). For a demonstration that political equality has not in fact led to economic equality, see G. KOLKO, WEALTH AND POWER IN AMERICA (1962).

[13] *See* Ellickson, *supra* note 1, at 1558.

presumably to the titleholder and not to his wife—to the case of cities as well. Dressing up his argument for limiting the franchise to owners of land in modern law-and-economics garb, he presents people's choice of cities in which to live in private, market-like terms: one should be free to choose whether to live in a city run by nonresident landlords, by a single private corporation that owns most of the land, or by residents, in the same way one is free to choose whether to buy one toothpaste or another in the supermarket. It is this ability to privatize choices about city life that seems to allow him to advance ideas of plutocracy from which other liberal thinkers have shrunk for almost two centuries.

This oscillation between public and private imagery to describe homeowners associations and cities is important because it reveals that Professor Ellickson's arguments for a property-based franchise cannot be properly understood as a defense of freedom of choice for territorial associations concerning their form of organization. Although he says that his argument is based on a preference for decentralized decisionmaking,[14] Professor Ellickson in fact suffers from the typical liberal schizophrenia about the role of any form of group power that is intermediate between a centralized state and the individual. I contended in my *City* article that decentralization to intermediate groups is a dilemma within liberal thought.[15] Liberals, I claimed, seek both to buttress intermediate groups to defend individuals against the state and to buttress the state to defend individuals against intermediate groups. They have been caught in the perilous contradiction: they want both to enhance and restrict the power of intermediate groups, but they quite rightly are frustrated in trying to do both at the same time. Professor Ellickson criticizes this contention on the ground that it lacks empirical support; his own article nicely provides the empirical support he is asking for.

In part II of his article, which deals with the taking clause, Professor Ellickson is concerned about the danger the power of the homeowners association poses to the individual. Because he sees the intermediate group as a threat to individual property rights, he seeks to enhance the power of the state to limit that threat. Thus he applauds strict judicial scrutiny of association actions subsequent to its original charter and recommends an unusually

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[14] *See id.* 1576-77. Yet even his position on voting rights is subject to some state-imposed restrictions on the exercise of the association's freedom of choice. *See id.* 1557-58.

[15] *See* Frug, *supra* note 7, at 1121-24.

stringent taking clause to protect the vested rights of the home owner. The taking clause he espouses is far more restrictive of group action than that current in federal constitutional jurisprudence: rezoning of the association area—even destruction of a view of Mt. Hood—requires compensation in Professor Ellickson's view.[16] Moreover, such a clause is so important that we cannot allow the homeowner the freedom to choose not to have one. It should be imposed by legislation, even by judicial activism, to protect the individual.[17] Here, then, we have one version of the liberal attitude toward intermediate groups. Here the state is seen as a friend, protecting the individual from the threat of group tyranny.

In the next section of his article, however, Professor Ellickson simply reverses his position on the comparative threat of the homeowners association and the state. Here the issue is whether the state should be so bold as to require one-person/one-vote elections in cities or other forms of the franchise in homeowners associations. Now the state appears as a threatening outsider, and the association assumes the role of protective friend. How dare the state intervene to prevent the group from deciding what form of franchise the group wants, Professor Ellickson inquires. We want to protect intermediate groups as a buttress of freedom-to-choose from the imposition of state tyranny.

Now what explains Professor Ellickson's willingness to call on the state to limit group power in part II and his opposition to calling on the state to limit group power in part III? Sometimes he seems to be for state restrictions on intermediate groups, and sometimes he seems to be against them. The reader might notice that Professor Ellickson's appeal to the state for help occurs in the section in which he defends property rights from the threat of group power, and his resistance to state interference occurs in the section when the democratic franchise is in issue. The reader might therefore suspect that this property/democracy distinction is simply an application of the particular branch of liberal ideology Professor Ellickson is advancing. He is making a value choice for property rights as against voting rights—indeed, he argues that voting rights should be based on property rights.[18] Even his assertion

[16] *Compare* Ellickson, *supra* note 1, at 1536, 1538 *with, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (not all actions that adversely affect property rights constitute a taking).

[17] *See* Ellickson, *supra* note 1, at 1536.

[18] That Professor Ellickson believes a property-based franchise is a good idea on the merits, and not just an option that people might accept, is made clear throughout his argument concerning the franchise. *See id.* 1544, 1546-47, 1554-56.

that residents should have a market-like freedom of choice to select among possible allocations of voting power appears to be not a preference for freedom but another example of preferring property to democracy. It has long been an open secret that, in a society with an uneven distribution of property, "freedom to choose" can mean freedom to submit to the power of "private" property owners. Whether the amount of coercion these property owners exercise through state enforcement of contract and property rules is more oppressive than that exercised directly by state action depends on the definition of property and contract that the state enforces.[19] The property/democracy choice is not between freedom and coercion but between different forms of social life both of which allow the exercise of coercion. In this regard it is interesting to note that Professor Ellickson alters the definition of property rights within his article in a way that creates specific power relations among property owners. In part II he very broadly defines property rights because he wants to use a taking clause to protect almost any value associated with property from adverse collective decision-making. But in part III he recognizes only real estate values as the ingredient of property that should entitle a citizen to vote. It should be clear that if every item considered as property protected from a taking in part II—such as a view of Mt. Hood and the expectation of young couples to have children—were treated as property in part III, everyone, including tenants, would be property owners with an economic stake in the franchise. Thus, the only way to limit the franchise to landowners in part III is to alter the definition of property from a broad reading (the taking-clause definition) to a narrow reading (the franchise definition). This alteration in the definition of property has the same effect as the change in characterizing cities and homeowners associations from public to private and as the oscillation between seeking protection from intermediate associations and seeking protection from the state. Each move masks a political choice designed to protect property at the expense of democracy.[20]

I oppose Professor Ellickson's attack on the democratic franchise in both of its proposed forms. The stringent taking clause

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19 2 M. WEBER, ECONOMY AND SOCIETY, 729-31 (G. Roth & C. Wittich eds. 1978); Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935).

20 For another author's discussion on the connection between rhetoric and political choice, see M. J. Frug, *Introduction: The Proposed Revision of the Code of Professional Responsibility: Solving the Crisis of Professionalism or Legitimating the Status Quo?*, 26 VILL. L. REV. 1121 (1981).

he advocates would reallocate wealth by defining as property expectations not previously protected by law.[21] Although Professor Ellickson's definition of property is so open that a prediction as to the effect of such a reallocation is impossible, the Supreme Court's recent preference for protecting "investment-based" expectations over other kinds of expectations demonstrates how such a clause can be used to protect the rich—those with money to invest—in preference to the poor.[22] Moreover, a stringent taking clause prevents collective decisionmaking by requiring compensation whenever a change in social organization is proposed. "Government hardly could go on," Justice Holmes said, "if to some extent values incident to property could not be diminished without paying for every such change in the general law."[23] It seems that Professor Ellickson's taking clause is designed precisely to prevent government—that is, the collective choice of the residents of the homeowners association—from going on. The taking clause thus by itself attempts to limit the role of democracy.

My objections to Professor Ellickson's proposals to restrict the franchise to property owners are the same as my objections to his taking clause proposals. Indeed, the similarity of my objections demonstrates the similarity of his two proposals. First, as my colleague Frank Michelman has shown, a restriction on the franchise is itself a transfer of wealth, a transfer likely to be from the poor to the rich.[24] Secondly, the restriction on the franchise will prevent all non-property owners (as Professor Ellickson defines them) from engaging in collective decisionmaking over their future. Indeed, if one takes seriously Professor Ellickson's claim (in his taking clause section) that a voting right, once allocated, is a property right that cannot be diluted without compensation, the result of his two proposals, taken together, would be not only to restrict the franchise to property owners, but to deter the reestablishment of a fully democratic franchise by requiring compensation before the exclusive voting rights of property owners could be changed.

The last major point Professor Ellickson raises in his article more directly confronts a specific contention I made in my *City*

[21] The idea that legal protection creates wealth is a familiar one. *See, e.g.*, J. BENTHAM, THE THEORY OF LEGISLATION 113 (C. Ogden ed. 1931) ("Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.").

[22] *See* Kaiser Aetna v. United States, 444 U.S. 164 (1979).

[23] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[24] *See* Michelman, *Universal Resident Suffrage: A Liberal Defense*, 130 U. PA. L. REV. 1581, 1585 (1982).

article. He suggests that, contrary to my contention, cities are in fact not powerless. I am not at all sure why he considers this point important; perhaps he is suggesting that cities already have too much power rather than not enough. In any event, because he quite elaborately criticizes what I think is a misreading of my article, some response seems necessary. It is true that I claimed that municipalities are generally restricted by law to nonprofit activities, as indeed they are.[25] Of course, there are some profit-making city ventures, and Professor Ellickson mentions quite a few. But I doubt that it is a controversial observation that profit-making activity in the United States is overwhelmingly a private concern, and that only a tiny portion of municipal business is profit-making. Professor Ellickson seems to think that I contend that the reason cities do not engage in profit-making activities is simply the existing legal restrictions on them. But I make no such claim. The much more powerful restraint on city profit-making business is the liberal conviction that profit-making is a private rather than public activity; the legal restrictions are simply examples of that ideological position, as is the vote in Minot, North Dakota, to which he refers.[26]

More importantly, Professor Ellickson seems to contend that, although not generally engaged in business for profit, cities are nonetheless powerful because they can tax and regulate, have an increasing number of employees, are sometimes immune from tort and antitrust liability, are preferred in federal grant programs, and, above all, have tax advantages under both the federal and local tax laws.[27] Professor Ellickson rightly does not do more than mention most of these advantages. After all, it was he who pointed out that private homeowners associations can also tax and regulate.[28] Moreover, the cities' power to do so—like their power to hire employees, escape tort or antitrust liability, and receive grants-in-aid—is subject to restraint or abolition in accordance with the wishes of state governments.[29] Current political events demonstrate that

[25] As far as I can tell, neither Professor Ellickson nor the authorities he cites in fact argue the contrary. *See* Ellickson, *supra* note 1, at 1569-72; 2 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS ¶ 10.31 (3d ed. 1980); 56 AM. JUR. 2D *Municipal Corporations, Counties and Other Political Subdivisions* § 210 (1971).

[26] *See* Ellickson, *supra* note 1, at 65, 1572-73. This point was made in my *City* Article. *See* Frug, *supra* note 7, at 1066-67, 1077, 1152-54.

[27] *See* Ellickson, *supra* note 1, at 1572, 1573-76.

[28] *See id.* 1522-23.

[29] Professor Ellickson makes much of home rule as a doctrine that can defend cities against state power, *id.* 1569, but home rule has not in fact significantly limited state power to control city decisionmaking. *See* Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 650-52 (1964). Even the most often-cited recent case affirming municipal home-

power subject to such a liability is fragile indeed. The same point, of course, can be made for the city's tax advantages, the aspect of city power Professor Ellickson most emphasizes. Moreover, many of these tax advantages are not special indicia of city power at all: the Ford Foundation and private voluntary hospitals have the same tax exemptions as do cities. The distinction the Internal Revenue Code makes is a profit/nonprofit distinction, not a public/private distinction.[30] It is also by no means clear that the city's ability to issue tax-exempt bonds demonstrates the city's power over the private industrial sector rather than the private sector's ability to use city tax advantages to achieve its own purposes. But whether this totality of advantage really produces city power can perhaps best be understood by a hypothetical suggestion to IBM that it trade its legal status for that of a municipal corporation. It can gain tax advantages, and perhaps some tort immunities and grants-in-aid as well. Of course, in return it would become subject to the power of the state to control all its decisions comparable to the way the state controls the decisions of its Department of Transportation, not to mention becoming subject to civil service laws, restrictions on its ability to raise revenue and to borrow, and democratic control of its officials. Would Professor Ellickson suggest that a rational maximizer of power would consider IBM in a more powerful legal position if it traded?

One final point about the influence of liberal ideology in Professor Ellickson's arguments needs to be made. Many of his arguments are apparent deductions from assumptions about human nature that seem to be at least a caricature of the liberal assumptions about human nature.[31] Professor Ellickson's people are stereotypes derived from modern-day welfare economics. They exhaustively calculate all costs imposed on them and care not a whit about helping others in need. Since the choices in life seem to be divided

rule immunity from state control, State *ex rel.* Heinig v. City of Milwaukie, 231 Or. 473, 373 P.2d 680 (1962), has been significantly narrowed by a recent decision, City of La Grande v. Public Employees Retirement Bd., 281 Or. 137, 576 P.2d 1204, *aff'd on rehearing*, 284 Or. 173, 586 P.2d 765 (1978). *See generally* Anderson, *Resolving State/Local Governmental Conflict—A Tale of Three Cities*, 18 URB. L. ANN. 129 (1980).

[30] *See* I.R.C. § 501 (1976).

[31] *See, e.g.*, Ellickson, *supra* note 1, at 1535:

> Although an entrant into an association would be chary of a rule requiring unanimous member approval of wealth-creating amendments, he would also fear being regularly on the losing end of the amendment process. A taking clause in the original constitution that entitled losers from amendments to compensation would appear to be an attractive way to resolve the entrant's dilemma.

into only two categories—redistribution of wealth and maximization of wealth—they by nature oppose the first and seek the second. No one in Professor Ellickson's world would even suggest that their association be called "Solidarity." Moreover, Professor Ellickson relentlessly reduces human activity to that of being a consumer. His people shop for homeowners associations and shop for cities in which to live; as consumers, they now refuse to buy one-person/one-vote in homeowners associations,[32] and, if his ideas are adopted, they will select from brochures offering different voting rights in cities. Even my modest suggestion of city banks and insurance companies is viewed from the consumer's point of view; it is criticized because the more banks people can patronize the better.[33] What is missing here, of course, is seeing human activity in its creative, productive form—not the shopping for banks but their management, not the selection among cities or homeowners associations but their operation. It is from this point of view that I called for participatory democracy for all groups intermediate between the individual and the state. The value to be advanced was not "freedom to choose" but " 'public freedom'—the ability to participate actively in the basic societal decisions that affect one's life." [34]

I think that Professor Ellickson is mistaken in thinking that one can deduce any form of social life from his assumptions about human nature. But it might be useful at least to mention a nonliberal version of the formation of territorial associations to demonstrate how powerfully Professor Ellickson's particular assumptions influence his analysis. For example, compare *Cities and Homeowners Associations* with the description of the creation of territorial associations in Aristotle's *Politics*. In that work, Aristotle sought to explain why men formed together in a *polis,* a term that

[32] Although Professor Ellickson asserts consumers make this choice, *see id.* 1543-44, he also says that voting rights are set by state statute. *See id.* 1543. But if the statutes exist, why aren't they, and not consumer choice, the explanations for the absence of democracy in homeowners associations? To this Professor Ellickson responds: "If the condominium statutes were preventing developers from maximizing profits, one might expect developers to seek passage of statutory amendments authorizing voting by residency in private associations. I am aware of no evidence that either developers or entrants into new private communities are unhappy with the prevailing system of voting by economic stake. This is a clue that one-resident/one-vote does not have much consumer appeal as a *private* voting system." *Id.* 1543-44 (emphasis in original). This response takes behaviorist political science about as far as it can possibly go. *See generally* S. LUKES, POWER: A RADICAL VIEW (1974).

[33] *See* Ellickson, *supra* note 1, at 1567.

[34] Frug, *supra* note 7, at 1068 (footnote omitted).

is normally translated as "city" but that could also be translated as "homeowners association" because its membership was limited to landowners.[35] The reason for the creation of the *polis,* Aristotle argued, was not wealth maximization or protection from redistribution of wealth, but friendship.[36] Since the drive for human friendship was natural, men by nature lived in a *polis.*[37] If one were to substitute the term friendship every time Professor Ellickson appeals to wealth maximization as the goal of cities or homeowners associations, I think that his arguments for a taking clause to prevent the redistribution of wealth or for the allocation of the franchise by the dollar value of the property owned would appear bizarre. The development of the bonds of friendship, like the development of "the capacity for communal self-governance across the entire existential space of life," [38] would not seem likely to be advanced by allocating power and protection within the friendship on the basis of wealth. Of course, the exact form that a social organization based on friendship would take is uncertain and certainly cannot be determined by deduction. But new possibilities for the structuring of social life will occur to us if we allow ourselves to go beyond the limited possibilities of human relationship allowed by the seller/customer relationship to which Professor Ellickson so often refers.

You may have noticed that I have suddenly switched into utopian thinking; but Professor Ellickson's reliance on the concept of a "free market" is no less utopian.[39] The critical difference between us is not the difference between being utopian and being practical: the difference is between our utopias. I think decisions about the future will be legitimate only if based on values generated by small-scale groups organized as participatory democracies. This

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[35] On the limit to the membership of the *polis,* see M. FINLEY, THE ANCIENT ECONOMY 95-97 (1973). In Athens, however, property owner-citizens had equal voting rights regardless of wealth; they would have considered Professor Ellickson's proposal to allocate the franchise in accordance with the value of the land owned as an argument for substituting aristocracy in place of democracy. *See* ARISTOTLE, POLITICS 207-11 (H. Rackham trans. 1959).

[36] A *polis* "does not exist for the sake of trade and of business relations . . . . [It] is a partnership of families and of clans in living well . . . . [Its] organization is produced by the feeling of friendship, for friendship is the motive of social life . . . ." ARISTOTLE, *supra* note 35, at 213-19.

[37] *Id.* 9.

[38] Klare, *The Public/Private Distinction in Labor Law,* 130 U. PA. L. REV. 1358, 1419 (1982).

[39] For an analysis of the market as a utopian vision, see generally K. POLANYI, THE GREAT TRANSFORMATION (1944).

is what I mean by rethinking and restructuring American society.[40] Whether we call these groups cities, homeowners associations, corporations, or soviets does not much matter to me. Professor Ellickson considers property rights and wealth maximization as the road to a just society, but I favor the enriching process of genuine democratic participation, a process designed to change our ideas about how society can be organized and how people ought to treat each other.

[40] *See* Frug, *supra* note 7, at 1154.