HOME IS WHERE THE HEART IS: LOCATING LEGITIMACY AND RESIDENTIAL COMMUNITY ASSOCIATIONS

BY

WILLIAM LYLES SMITH

(Under the Direction of Alexander Kaufman)

ABSTRACT

Political legitimacy is an extremely important yet notoriously complex concept in political theory. Two reasons for this complexity are the numerous aspects of a political system or government deemed related to legitimacy and the difficulty in locating or balancing them in real-world political institutions. This paper develops a four-part framework (consisting of consent, participation, policy, and exit) designed to clarify the way we think about legitimacy. I use this framework to consider the potential for legitimacy in a residential community association context. I argue that residential community associations have a strong claim to a high degree of legitimacy, perhaps one higher than traditional governments. That said, the degree of legitimacy in residential community associations is not as high as it could be, and there are various political and economic considerations which complicate our understanding of the future relationship between legitimacy and residential community associations.

Index Words: Legitimacy, Residential community associations
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by

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DEDICATION

I have approached this paper not simply as an opportunity to explore ideas I find fascinating, but as a means of crafting a work which will, in some way, honor certain people. First and foremost, I want to express the utmost gratitude to my parents, Scott and Lisa Smith, to whom I owe everything, not the least of which my intellectual curiosity and belief in the importance of political issues. In addition to my parents, I also dedicate this paper to my sisters, Mary Elizabeth and Sarah, to whom I am grateful for countless rewarding moments. Furthermore, I dedicate this paper to my extended family, who have been instrumental in shaping me into the person I am today.

Outside of my family, there is one person in particular who has been especially influential and supportive in my academic, and more broadly speaking, intellectual development: my advisor from my undergraduate studies, Dr. Daniel Cullen. Your classes were easily some of the most enjoyable and rewarding aspects of my undergraduate experience, and indeed played a major role in my decision to pursue a career in academia. I have long considered you a prime role model for what a professor should be, both in and out of the classroom. Finally, I would like to dedicate this paper to my friends, who have provided me with immeasurable amounts of advice, pleasure, and support over the years.
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CHAPTER I: INTRODUCTION

Somewhere in many American households, there is probably some knickknack bearing the phrase “Home is where the Heart is.” While this is probably true in the context of an individual’s life, in the context of a democratic, if not liberal sociopolitical system, the “heart” is said to be found outside the home, in the “public sphere.” A healthily functioning liberal democratic political system requires a citizenry active in public affairs. When Benjamin Franklin quipped “a republic, if you can keep it,” it is likely that one of his worries was that the government might become controlled by those concerned primarily with interests aside from protecting the liberty of the members of the American body politic, and that a crucial requirement for a legitimate government was a citizenry attentive to the ways in which its government might become unjust.

Political legitimacy—having a morally justified claim that laws are obligatory—is far from being an abstract concept of relevance only to political theorists, but rather, is a serious issue of pressing concern for many individuals. While many Westerners may see the question of legitimacy as mostly irrelevant one, as the liberal democracies in which they live are widely perceived to be legitimate, it was not that long ago that brutal wars were fought in which questions of political legitimacy were of central importance. More recently, the “Arab Spring” saw witness to citizens’ uprisings against their governments, fueled to a significant degree by beliefs that the regimes were somehow illegitimate. Ultimately, the importance and relevance of legitimacy is quite clear: if we believe concepts like freedom, equality, fairness, desert, and justice matter, then we necessarily must be concerned with legitimacy, as it is precisely those things, among others, which inform our thoughts about legitimacy. In the simplest terms, if it matters in a moral sense how people are treated, it will matter how people are treated in political contexts, and if our conceptions of legitimacy are informed by our ideas about how people ought to be treated, legitimacy remains a relevant issue.
In all but the most extreme situations, it is to be expected that whatever the diagnosis of legitimacy, people will seek to improve the legitimacy through the currently existing political institutions. Revolutions and radical “completely from scratch” institution building are incredibly risky and costly enterprises, and are therefore not only unlikely but probably undesirable. With that said, however, if we truly take legitimacy seriously, then we should seek to develop the most legitimate institutions we can, even if this means building new institutions or turning to institutions not commonly considered as “political.” In any case, it is inevitable that compromises will be made out of practical concerns, and the issue of which practical concerns, and at what point practical concerns ought to be decisive, is an important and interesting one, but beyond the scope of this paper.

Rather, my purpose in this paper is first, to develop a four-part framework for evaluating a government’s legitimacy, and second, to explore the potential for residential community associations to achieve legitimacy as measured through the framework. I argue that the most useful, robust framework for thinking about legitimacy takes account of consent, participation, policy, and exit. I will not attempt to formulate a new normative account of legitimacy, but I will assume a basic liberal approach to legitimacy, namely that the respect of individual rights forms the core standard or value for any appropriate theory of legitimacy. I conclude the discussion of the legitimacy framework by arguing that although there are ways to clearly establish a lack of legitimacy, the nature of the four aspects and their interconnection suggest that once established, legitimacy is best considered as a scalar concept. Second, I will argue that residential community associations (RCAs) have the potential to achieve minimal requirements of legitimacy, if not reach higher levels than traditional governments, in all four aspects. Perhaps the most interesting of these is the fact that the ever-elusive express consent, or a functional equivalent, can be found in RCAs. Nevertheless, due to the current reality of their formation and operation, this potential is limited. As a result, although RCAs hold the promise of being robustly legitimate, and likely more so than traditional governments, as currently constituted, the actual level of legitimacy is perhaps not as high as it could be.
CHAPTER II: LITERATURE REVIEW

1. Legitimacy

Liberal theories of legitimacy can address legitimacy from a variety of perspectives, but one of the most influential are the consent-oriented approaches. In the context of establishing political authority, “consent” means essentially “the agreement to recognize a person or group of persons as holding political authority over oneself.” In addition to the historical centrality of consent theory within liberal legitimacy theory, I will focus on consent because it is perhaps the most interesting of the four aspects in the context of RCAs. Thomas Hobbes’ *Leviathan* introduces the concept of a “social contract” between persons-as-equals as an explanation of the creation and purpose of governments.\(^\text{1}\) The content of a Hobbesian social contract is an agreement between persons to invest authority in one or more persons (“the sovereign”); there is *not* any agreement between the sovereign and its subjects\(^\text{2}\). This lack of any kind of agreement between the “people” and the government clearly poses problems for those concerned with protecting individual rights, as there is no strong understanding of the limits to the sovereign’s authority.

This problem would be addressed by John Locke in his *Second Treatise of Government* through the introduction of individual rights into the social contract. Locke’s social contract theory argues that individuals hold certain natural, inalienable rights (to life, liberty, and property) equally, and that the purpose of governments is to protect these rights\(^\text{3}\). Because these rights are natural and inalienable, they can only be acceptably restricted through a process of giving agreement (that is, of consent); Locke claims that “the only way whereby any one divests himself of his natural liberty, and *puts on the bonds of civil society* (emphasis in original) is by agreeing with other men to join and unite into a community…”\(^\text{4}\); he continues to discuss this concept later in the book, where he claims that “every man (is) *naturally free* and nothing being able to put him in subjection to any earthly power, but only his own consent….no body


\(^{2}\) Ibid, 109

doubts but an express consent of any man, entering into any society, makes him a perfect member of that
society, a subject of that government (emphasis in original).” 4 Yet Locke recognizes that people who did
not, for whatever reason, give express consent will fall under that community’s political jurisdiction; to
account for such a persons’ obligation to obey such a government’s laws (which entails abandoning one’s
natural liberty), he introduces the concept of tacit consent, whereby a person who owns or “enjoys” any
“dominions” (land) within a particular political jurisdiction is understood to “take it with the
condition...of submitting to the government of the commonwealth (emphasis in original).”5

As stated earlier, Locke improves on Hobbes’ social contract approach by introducing the concept
of rights as a limit to what governments may do. This argument is developed throughout the Treatise, but
can be summarized in the following passage:

whenever the legislators endeavour to take away, and destroy the property of the people, or
reduce them to slavery under arbitrary power, they put themselves into a state war with the
people, who are thereupon absolved from any farther obedience...Whenev...
Though Locke’s social contract theory is attractive due to the importance of individual rights, his, along with most other social contract theories has long been treated with skepticism. Davide Hume expressed doubt about the realism of a literal contract or other act of express consent, offering a much more realistic view of the origin of governments; writing in his essay “Of the Original Contract” he claims that

we find every where princes who claim their subjects as their property, and assert their independent right of sovereignty, from conquest or succession. We find also every where subjects who acknowledge this right in their prince, and suppose themselves born under obligations of obedience to a certain sovereign….These connexions are always conceived to be equally independent of our consent….Almost all the governments which exist at present, or of which there remains any record in story, have been founded originally, either on usurpation or conquest, or both, without any presence of a fair consent or voluntary subjection of the people. 7

The doubts of Hume and others regarding the historical accuracy of social contract accounts, and the development of utilitarianism during the eighteenth and nineteenth centuries lead to consent theory, with regard to legitimacy, being displaced in favor of theories focused more on the outcomes of government action that the method of regime creation.

Social contract/consent theory did not regain prominent status until the publication of John Rawls’ 1971 book A Theory of Justice. In this book, Rawls re-imagines the social contract as a thought experiment through which people would choose foundational political principles. Rawls argues that people in such a situation would choose two principles, the “Equal Liberty” principle and a second principle composed of two parts: the famous “Difference Principle” (inequalities must be of benefit to the least advantaged), and the “fair equality of opportunity” principle (all offices and positions must be open to all persons under fair equality of opportunity). 8 Rawls returned to the issue of consent and legitimacy in

1993’s *Political Liberalism*, in which he offers this standard: “Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.” Rawls’ version of the social contract allows us to achieve a kind of consent while avoiding the problems of express and/or “front-end” consent; that is, we can justify already existing governments using his approach. Furthermore, Rawlsian consent is made in a moralized approach: there is no

The power of Rawls’ approach to consent (or perhaps more broadly, all “public reason” approaches) has made it one of the dominant theories of legitimacy in contemporary political theory. Yet as useful as this approach may be, it still lacks the clarity and specificity of express consent insofar as it is unable to tie obligation to a specific government. In the post-Humean world, attempts to locate express consent in actual or even theoretically plausible institutions are rare. In this paper, I will attempt to do just that by arguing that membership in residential communities governed by RCAs is achieved through an act which is essentially the functional equivalent of express consent, although express consent may be possible.

While the literature discussed above approaches legitimacy through the aspect of consent, note that many of the theories also incorporate policy (and potentially participation and exit) considerations: Locke and Rawls (and certainly others) are clearly concerned with either the basic structure of political systems and/or the specific kinds of policies governments create.

2. Residential Community Associations

The scholarly attitude towards residential community associations’ ability to embody/reach legitimacy is mixed. Charles Tiebout’s 1956 paper “A Pure Theory of Local Expenditures” attempts to provide a set of characteristics, that (assuming their existence), could lead to an efficient market for local

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governments; the applicability to residential community associations is not hard to see. (Tempered) optimism can be found in Robert Ellickson’s essay “New Institutions for Old Neighborhoods,” in which he argues that mandatory membership in “Block Improvement Districts” (an urban counterpart to RCAs, which typically refer to suburban homeowner’s associations) can help communities improve their quality of life through provision of services (funded by a form of taxation) and cultivating social capital. Ellickson’s essay serves as a model for RCAs to act in a “civic” role; that is, more like a traditional government but with a more robust sense of community. Robert H. Nelson also holds an optimistic view; in his 2004 article “The Private Neighborhood,” he explains that courts have largely recognized the right of RCAs to control their own policies, based on the view that vast numbers of Americans choose to live in RCA-controlled communities, and who “explicitly agreed to abide by the terms of the neighborhood restrictions as a condition of the original purchase of their home”; he also argues that allowing residents of communities without RCAs to create their own would give such residents greater control over the areas they live in.

There are also those who are more skeptical of neighborhood associations (or more broadly, the suburban context in which many of them exist) and their role in improving participation and/or legitimacy, both in the larger political community and within themselves. In “Metropolis, Memory, and Citizenship,” Richard Dagger explains that one of the crucial components of a healthy body politic is the existence of a shared “civic memory,” but that the trends of of increasing size of cities, sociopolitical and economic urban/metropolitan fragmentation, and the mobility contribute (all factors that contribute to or stem from suburban development) to the erosion of civic memory. A more clearly skeptical depiction of (private) residential communities is found in Mike Davis’ City of Quartz, in which he depicts Los

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Angeles’ gated communities as both a symptom and cause of disturbing trends towards an increased militarization and fragmentation of society.\textsuperscript{14}

Perhaps one of the most thorough and accessible skeptical accounts of these organizations is provided by Evan McKenzie. In his 1994 book \textit{Privatopia}, McKenzie provides a historical and explanatory account of what he calls “Common Interest Developments,” or “CIDs.”\textsuperscript{15} McKenzie followed \textit{Privatopia} with \textit{Beyond Privatopia}, in which he takes an updated look at residential community associations, paying special attention to the various ideological and positive interpretations of the CID model. The main argument of \textit{Beyond Privatopia} contains two main claims: first, that residential community associations are neither fully voluntary nor governmental, and second, that the “neoclassical” or libertarian view of “CIDs” is implausible due to the nature of their creation and operation.\textsuperscript{16}

\begin{itemize}
\item \textsuperscript{14} Davis, Mike. 1992. \textit{City of Quartz: Excavating the Future in Los Angeles.}
\end{itemize}
CHAPTER III. LEGITIMACY: THE FOUR-PART FRAMEWORK

Political legitimacy is a characteristic of political institutions, and insofar as political institutions have various characteristics, it will prove useful to approach legitimacy focusing on these different yet complementary aspects. In this chapter, I want to propose a “methodological framework” for evaluating legitimacy (in the context of a specific regime or political system). I do not attempt to propose a new normative account of legitimacy; that said, I do assume a liberal account of legitimacy which treats the protection of individual rights (namely those to life, liberty, and property), and the acknowledgment that all persons are morally equal in some basic sense as the decisive factors in evaluating the legitimacy of a regime. Which rights, and to what extent the moral equality of all is embodied in the law, are crucial questions for any substantive normative theory of legitimacy, but such a project falls outside of the scope of this paper; that said, the right to participate in political life, property rights, and the right to travel and associate figure prominently in my analysis. Generally, however, my present concern is simply to propose a way to clarify our understanding of legitimacy through a multi-aspect approach.

Before I proceed, it will be useful to briefly explore the difference between two related concepts: legitimacy and authority. I offer this discussion to address any claims that legitimacy and authority are separate concepts such that laws may be somehow justified, if not obligatory, when only one or the other is present. The relationship between legitimacy and authority is complex due to their shared relevance to the “rightness” of government and laws and to the fact that they are determined by the same kind of considerations (namely, what kinds of standards must be met for rules to be binding on people?), yet they refer to slightly different things (and thus the standards are different depending on the aspect of the law). Political “legitimacy” is best understood to mean having the quality that creates obligations to obey, as determined by the satisfaction of certain (moral) requirements (for example, a legitimate law is one that imposes a morally justified obligation on individuals: that is, they must obey it). “Authority” has two relevant meanings: first, as a characteristic, it refers to the right to make and enforce laws; second,
“authority” can refer to a *position* (such as “the authorities”). Note that when authority is used in its “characteristic” sense, legitimacy is implied: regardless of whether someone occupies a position “of authority,” if they lack an acceptable claim to create and/or enforce laws, we say they “lack” authority, *not* that they have “illegitimate authority.” Furthermore, when someone has authority, it is assumed that the laws they make necessarily have at least some claim to be obligatory, for to say someone has a right to make (and certainly enforce) laws, but that none of the subsequent laws are obligatory, would be nonsensical and would render meaningless the practice of lawmaking.

We can clarify the association between legitimacy and authority by working out their relationship in the context of making and enforcing laws. Let us start by remembering that legitimacy is what makes laws obligatory. Next, we should recognize that it is a necessary condition for a law to be legitimate qua law that it is made by a person with a valid claim to (wield) authority. Stated differently, for laws to be binding (legitimate) insofar as they *are laws*, they must be made by a particular class of persons with valid claims to belonging to that class: in the United States, for example, only duly elected legislators can make new laws; any other assembly of persons making rules is incapable of making “law.”

“Valid claims” in this context refer to those which can satisfy the moral requirements attached to legitimacy. So, when authority is present, those requirements have been met; therefore, if authority is present, then legitimacy (in regards to the right to make and enforce rules) is necessarily present. Likewise, if legitimacy in that regard is lacking, then authority is necessarily lacking. The characteristic sense of “authority” is thus best understood as a specific name for a specific kind of legitimacy. It is important to realize that this discussion focuses on legitimacy as it relates to authority; legitimacy is also contingent on at least the process by which laws are made and the content of the laws themselves, and as I will argue later, the nature of these aspects can affect the extent to which authority is present.

Let us now return to the framework for analyzing legitimacy. Like any other association, governments (or more generally, political systems) have an origin, an “acting nature” (that is, how they

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17 The other two main components to a law’s legitimacy are the process by which a law was made and the content of a law.
operate and what they do), and are subject to the loss of members; put another way, individuals create and/or enter, operate within, and leave or dissolve governments. With this in mind, there are four aspects with which we can assess the legitimacy of the government: consent, participation, policy, and exit. As explained earlier, I will be using a liberal conception of legitimacy; such a conception holds individual rights and a basic moral equality between persons to be the central and decisive criteria with which legitimacy is evaluated. Each of the four aspects is relevant to (a liberal conception of ) legitimacy in the following way: Consent is relevant in light of the belief that individuals have rights, and that one of the few justifiable ways to restrict these rights is when permission to do so has been given by the rights-holder; participation is relevant because it reflects attitudes about the basic moral status between persons, allows people to shape the rules they must live under, and also because it possibly helps indicate that some form of consent has been given; finally, policy and exit are relevant to legitimacy insofar as they are related to the extent rights are protected, granted, and restricted. I will now turn to exploring each of the four aspects of legitimacy in detail.

Consent refers to an individual freely (that is, absent of coercion) expressing their willingness to grant to others the permission to create and enforce binding rules. Such an agreement between members of a body politic is what is meant by the phrase “the social contract. Given natural individual rights and the moral equality of persons, the importance of consent is clear: rights can only be legitimately restricted when the rights-holder has given permission to do so. Since the essence of governments is the coercive regulation of individual behavior, freedom—and thus rights—are restricted (indeed, the very existence of government limits freedom/rights); therefore, at the very least, consent gives a very strong foundation to a government’s claim to legitimacy. A strict interpretation will view such consent as absolutely necessary to establish the legitimacy of a government, while a weaker one will view such consent as greatly enhancing legitimacy, though perhaps not necessary.

The “golden standard” of consent theory is that of “express consent,” in which parties to a government clearly state their willingness to recognize in others the authority to make and create laws which the former will be bound by. According to this interpretation, in order for a government to be
legitimate, its members must receive the express consent of all those, or arguably, at the very least, a majority, over whom they would exercise authority. Express consent is the strongest form of consent because it provides the clearest, most easily identifiable evidence of consent, as one can point to a specific statement or action which clearly expresses a willingness to recognize authority. We should note, however, that such consent is likely to be acceptable—or at least, is most acceptable—when it is the product of careful, reflective thought, as opposed to a whim. There may be a shared burden between the potential consent-giver and consent-receiver: the consent-giver must be willing to behave in good faith (not renge by claiming his consent was not “reflective enough,” and more generally, to accept his own consent as giving rise to his obligations), yet the consent-obtainer has a duty to not defraud, or perhaps purposefully obstruct the consent-givers’ efforts to understand the terms of association. In any case, express consent remains the most specific, clear, and direct form of consent.

Unfortunately, there are two main reasons why the likelihood of express consent occurring is extremely small. Due to the temporal and spatial nature of governments, governmental systems typically last longer than the founding generation; furthermore, given the size of political jurisdictions, the logistical difficulties of achieving unanimous consent are prohibitive. Therefore, the majority of persons under government’s jurisdictions will never have had an opportunity to consent to either their creation or their (legal) duty to obey their laws. Finally, no government is likely to acknowledge and respect a resident’s failure to consent to its authority.

Various alternative forms of consent designed to bypass the problems plaguing express consent have been proposed. One such argument is the concept of “tacit consent,” which asserts that by merely staying under a jurisdiction and/or refraining from actively opposing a state (or in the Lockean interpretation, owning land), a person gives their consent to that government. Yet tacit consent is itself highly flawed. One problem, discussed by Ronald Dworkin, is that tacit consent is “empty” given a lack of real choice, insofar as there is no place a person can live that is not under the jurisdiction of a

18 Naturalized citizens may be the best, if not only example of contemporary express consent within a traditional state-subject context. Still, even when this does occur, the majority of persons whom states declare power over never gave any such consent.
government; in this view, tacit consent is akin to asking a person whether they want to eat ice cream when the only food available is ice cream.\textsuperscript{19} One can imagine a tacit-consent advocate responding that “it is simply a fact of reality that governments claim authority over all the land on the planet, thus the relevant choice must be between \textit{which government}, leaving individuals a good deal of choice.” One could make a valid point that such a choice is “diluted,” but perhaps a better critique of tacit consent is that it places an unreasonable burden on the individual, and thus does not demand enough from those seeking to justify a government. By requiring a person to actively leave or resist a government’s authority, tacit consent theory places individuals in a very difficult position: the only way they can express their disapproval is by behaving in very costly ways. More specifically, if we believe individuals have natural (or something similar) rights, then the burden of justification should fall on those who would claim the authority to restrict these rights. Tacit consent, however, puts the burden on those who would protect their rights. Insofar as the point of rights is to set up a defense against encroachment into individuals’ control of their lives, tacit consent makes the quite illiberal move of reversing the situation, so that the restriction of rights by a particular group of people is seen as the default legitimate situation.

Another alternative theory of consent is the reciprocal theory of consent, sometimes known as the “fair play” theory of consent. This theory claims that by willingly accepting such benefits as a government may provide, people incur a duty to obey the government’s laws. Yet merely receiving a benefit does not create a duty to return anything; suppose a generous professor gives lectures on the sidewalk, does the passerby who gains new knowledge owe anything to the professor?\textsuperscript{20} To say “yes” would eliminate the logic, if not the possibility of altruistic action, impose countless duties, and with regard to legitimacy, would make it all but inevitable. We can see the latter in the following examples: a person cannot presently live in an area \textit{not} under the jurisdiction of a government (or some entity with coercive powers), and thus cannot avoid benefitting from certain acts of the government, such as the

\textsuperscript{19} Dworkin, Ronald. 1986. \textit{Law’s Empire}. Cambridge, MA: Belknap. 193
\textsuperscript{20} The original version of this example is provided in Nozick, Robert 1974. \textit{Anarchy, State, and Utopia}. New York: Basic Books. 93; my example more closely follows that in Dworkin 1986, 194. See Dworkin 1986, 194-95 for an explanation of the difficulties of defining “benefiting from a political organization” and how these difficulties undermine the fair play theory.
provision of military deterrence; alternatively, consider the fact that use of public roads is essentially inevitable. To ground consent on the performing of a necessary action or the unavoidable receipt of benefit, would be to make consent (or more broadly, legitimacy) inevitable, which of course is no consent/legitimacy at all.

As mentioned earlier, some have attempted to argue for a form of consent that is hypothetical rather than express. Rawls’ “Original Position” thought experiment and his claim about how to identify legitimacy in Political Liberalism (essentially, that the reality of a government’s actions align with constitutional principles all persons would endorse) constitute such attempts. The central belief in these theories is that a government’s legitimacy must be assessed in a way that is fair, with “fairness” defined by the presence of only morally relevant knowledge and the acknowledgement of all people as having rights and being moral equals. The main benefits of this approach are that it excludes the acceptability of unreflective agreement, incorporates a substantive theory of morality into consent, and avoids the stark conclusion that the lack of foundational and/or express consent renders (all) governments illegitimate; thus, it is a more “practical” approach. As explained above, it does have the shortcoming, however, of not being as clear and specific as express consent.

Given the impractical nature of express consent, and the difficulties with other theories of consent, is the notion of consent even useful for a political context? The answer is decidedly “yes”: if consent is relevant in other serious contexts, such as business contracts or sexual relations, then it certainly ought to be taken seriously in a political context, for the reasons for relevance are the same in each of these contexts: the acceptability of individual behavior is dependent on a person’s willingness to allow such behavior; rights and the respect thereof are intimately and inevitably at the center of this scenarios. Furthermore, I believe there is a solution to the lack of express consent to be found in the process of gaining membership rights to RCA-governed residential communities. If I am right, this will rescue express consent from the limbo of uncertainty it has languished in for so long.
The second component to the legitimacy checklist is participation, by which I refer to both the opportunities for political participation and actual status of political participation. There are at least three primary approaches to arguing for the importance of participation in politics: consequentialist, virtue, and deontic. The consequentialist approach emphasizes the importance of citizen participation in the political system as a means of preventing the development of corruption and tyranny. The fundamental premises of this argument are first, that corruption and tyranny occur when the interests and/or actions of a government do not match the interests of the governed, and second, it is inevitable that these two groups, among others, will have conflicting interests; therefore, it is vital that the “ordinary people” (those not forming the government) have the freedom and ability to influence, if not directly participate in, the process of governing. By allowing ordinary citizens to have a direct role in crafting, enforcing, and judging laws, determining who holds political office, and to freely associate and express their views, these political systems provide, at least formally, avenues for citizens to attempt to ensure the government does not become abusive, and thus prevent the government from becoming illegitimate.

Some go beyond focusing on the benefits of participation and treat political participation as a virtue. Political participation makes up part of what is called “civic virtue, which Richard Dagger defines as doing “what a citizen is supposed to do.” But what is it that citizens are supposed to do? The main aspect of civic virtue is to have “the disposition to further public over private good in action and deliberation.” The concepts of private good and common good (or their related names, such as “self-interest” and “common interest”) have various interpretations, but one common view is that self-interest is opposed to the public interest. This view is too simplistic for the following reason: “self-interest” refers to that all of that which is in an individual’s interest, as judged by the individual. “Common interest,” or “common good,” means that which is in the self-interest of all, or at least a very substantial majority, of the affected population. Therefore, the public interest is best understood as simply the set of all shared

23 This does not rule out the possibility that a person may hold a poor understanding of his or her self-interest.
individual interest, or at least interests shared by majorities. Furthermore, one’s self-interest can easily entail altruistic behavior, and to say that “self-interest” is only that which benefits only a specific individual ignores this fact.

Civic virtue can be presented from both consequentialist and “intrinsic” grounds: respectively, because of the benefits of participation, it is a habit that should be admired and encouraged, and that participation embodies some inherent characteristic of humanity that ought to be recognized and celebrated. If we accept the aforementioned definition of civic virtue, then it should not be hard to see why (virtuous) political participation is inherently “good”: striving to achieve rules and policies which benefit everyone and/or treat all members of society fairly is a manifestation of respect and goodwill towards others. Furthermore, it is not simply the advocacy of the common good, but it is the discipline to set aside one’s own, perhaps more intensely felt “narrow” interests for the sake of the common interests which makes participation desirable; because this can be difficult, oftentimes involving forgoing substantial benefit (or even experiencing loss) to oneself, choosing to pursue the common good over the “selfish” good is admirable. Other reasons to see political participation as an intrinsic virtue is that political participation is an affirmation of our inherent quality of being “social beings” and the necessity to make rules constraining our behavior.

Finally, there are duty-based arguments in favor political participation. A deontic argument in favor of political participation declares individuals to have a duty to participate. Such a duty may be founded on either consequentialist or intrinsic grounds; the former will base the duty on the benefits of participating and the dangers of failure to do so, while the latter might ground the duty to participate in the inherent nature of human life or society. Hannah Arendt provides a view which might take the form of the latter approach: “(once) excluded from participation in the management of public affairs that involve

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25 It is entirely possible that an individual’s self interest is either compatible with or directly advocates the “common interest,” again, the relevant distinction here is between an interest which would benefit only a few and an interest which will benefit at least the majority. If the “narrow self interest” in question was a right, then depending on the actual right in question and the overall context, then it would possibly not be virtuous to reject one’s self-interest.
all citizens, the individual loses his rightful place in society and his natural connection with his fellow-
men.”26 A less demanding deontic argument will support a duty to allow participation, but will not
require citizens to actively participate.

Each of these three approaches may utilize the notions of common interest and self-interest, almost always arguing that the only appropriate actions of government are those which pursue the “common interest.” But it is not always the case that the “common interest” is in alignment with the liberal value placed on rights and moral equality—or is it? Suppose a majority of persons want to restrict the rights of a minority to practice their religion peacefully—would this not constitute the common interest, and thus the appropriate policy would be to restrict the minorities’ rights? There are two related reasons why we should not accept this conclusion. First, the function of individual rights is to provide the highest kind of protection against interference by others; thus they must override all other considerations.27 If we believe individual rights matter, then they cannot be overridden by the majorities’ desires. Therefore, even if we accept that the restriction of rights is indeed “in the common interest,” (insofar as we understand the common interest to be simply revealed by stated preference) this sort of common interest is unacceptable, for the pursuit of the common interest is secondary to the protection of rights due to rights’ nature as fundamental characteristics of all persons. We may be able to make an even stronger claim than this: let us agree that what is common in the sense of unanimity is superior in some sense to what is common in terms of a simple majority (say, fifty-one percent). What is unanimously common, but the desire—and right—to have one’s rights protected? For example, all persons share a right (and presumably, the desire) to be able to exercise their religious views, or lack thereof; surely the restriction-happy majority would not want their own rights restricted in this way. With this in mind, and given moral equality of persons, individual rights are therefore more reflective of the common interest

27 If rights are purely at the mercy of majority desire, then there is simply no
than the desire to restrict the minorities’ rights, and indeed, the pursuit of the common interest necessarily requires the protection of individual rights.\textsuperscript{28}

Of these three approaches to justifying the importance of participation, is any one more relevant to—or is able provide the best case for—the relationship between legitimacy and participation (assuming a liberal understanding of legitimacy)? The consequentialist argument certainly rests on very solid ground, as it is inevitable that laws reflect the interests of the individuals involved in their crafting, and insofar as there are people who want laws to limit the rights of others or to adhere to some view other than the moral equality of persons, liberals need to be active in the political process in order to defend rights. Seeing virtue in political participation may contribute to the “health” of a political community, but it is hard to see how it is directly related to legitimacy. The strict deontic argument, however, suggests an extremely relevant set of questions: whether there is some minimum level of participation necessary to achieve legitimacy, and to what extent might it undermine a government’s legitimacy when it forces citizens to participate?

I will not attempt to provide an exhaustive answer to these questions here, but we can be sure that equal \textit{rights} to participate are absolutely essential to the legitimacy of a government: if participation is only allowed on the basis of heredity, favoritism or “acceptability to the regime,” or ability to pay, this would run afoul of the commitment to the basic moral equality and standing of all members of a political community; thus the government certainly has a duty to \textit{allow} participation. Furthermore, there can be no obligation to participate in the political process of an unjust or illegitimate regime, insofar as such participation furthers the regime’s goals or helps it to establish a sense of authority. Indeed, if there is any sort of obligation to participate in political behavior in this context, it would be to engage in activity which \textit{opposes} the regime. Finally, a government which enforced a “duty” to participate would be placing

\begin{footnotesize}
\footnote{28}{The equal holding of individual rights ensures that there will \textit{always} be a common interest, even if there is more division regarding more specific interests. Furthermore, there are certain interests common to all humans, such as protection from aggression, a healthy environment, or equality under the law; for these reasons, there will always be a common interest in every society. That said, problems arise when any of the following occur: individuals do not believe all persons are morally equal (and thus do not share the same rights); individuals believe that other concerns or certain rights trump (other) rights; and when individuals simply ignore or are indifferent to the rights claims of others.}
\end{footnotesize}
its legitimacy in dubious territory: first, if the government currently lacks the amount of participation needed to be considered authoritative, then it cannot make morally obligatory laws.\textsuperscript{29} Second, forcing citizens to participate in the political process not only runs the risk of forcing them to support practices or candidates they may find morally abhorrent, but (assuming the government is legitimate) insofar as legitimacy is dependent on the possibilities of voluntary action (that is, the extent to which the right to liberty is recognized), there is a good reason to believe that forcing citizens to participate in the political process \textit{diminishes} legitimacy.\textsuperscript{30} This is especially true when the “participation” in question is something requiring an extended period of forced labor, such as a draft or similar program. To summarize, we can say that the only decidedly defensible duty regarding participation is the duty to allow citizens to participate and possibly to duty to obstruct illegitimate regimes.

One final consideration of participation will be useful: might we be able to locate consent in political participation, perhaps in the following way: “when people agree to participate in the political process, they agree to be bound by certain rules and norms, similar to the way in which a participant in a game is understood to agree to abide by the rules”\textsuperscript{31}? There are at least three reasons why we should doubt that participation necessarily constitutes granting or recognizing authority. First, the stakes involved with a government are far more serious than in a game, and it seems we should require more than some “implicit” consent. Second, a person may sincerely believe the government is illegitimate, but simply vote or run for office based on a purely pragmatic, if not cynical recognition that it is better to have the government dominated by people with certain views rather than others. Third, while a person may accept that living in a society requires limits to freedom in the form of rules, this is not equivalent to recognizing a certain institution and/or person’s authority to make rules for the society. For these reasons, it is not clear why we should interpret acts of political participation as equivalent to granting consent to a

\textsuperscript{29} If less than a majority of eligible voters vote in an election, this might constitute such a situation. See Buchanan and Tullock 1962 for a discussion of relevant concerns. A clearer example is the government which gains power through deception or violence.

\textsuperscript{30} It could be the case that a person deliberately chooses not to vote or otherwise participate is doing so to express his or her political views, and to force them to participate not only fails to recognize this, but may constitute a demeaning disrespect of a person’s reasoned position.
government. That said, the above discussion of the importance of participation as a way to shape policy does allow citizens to provide what may be the “second best”, if not equally important alternative/complement of consent: input into the allocation of government offices and the shaping of policy.

Because injustices most often occur in the actions, or products, of governments, it is necessary to analyze the policies of political authorities. Perhaps no other aspect of legitimacy is as contentious as the policy aspect, due to the disagreement concerning the appropriate scope and purpose of governments and their policies. The questions of which rights are relevant, which rights are more important than others, and what degree of restriction or violation is acceptable or not are extremely influential in shaping our analysis of the legitimacy of governments, not just regarding the policy aspect but all four aspects. The possibilities range from reaching anarchistic conclusions to endorsing generous welfare states. This crucial effort is far beyond the scope of this paper, although as mentioned earlier, I do emphasize the right to participate in political life, property rights, and the rights to travel and associate, and I will soon discuss why this uncertainty is relevant to the framework approach.

Finally, there is the question of exit, referring to both the right and ability to a person to leave the jurisdiction of a political regime. “Leaving the jurisdiction” may be interpreted either to mean leaving the geographical jurisdiction of one regime for that of another (emigration), or to “withdraw” from the jurisdiction of an existing regime with others to form a new jurisdiction (secession); between these, the former is more widely accepted than the latter. A regime may be quite unjust, but if it allows citizens to leave its jurisdiction, then there are at least two important rights being respected: the right to freedom of association and freedom to travel. Exiting allows individuals to escape undesirable, if not unjust circumstances in the hope for a better life. The presence of exit rights acknowledges individuals’ status as

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31 One reason secession is viewed with suspicion is the belief that it would be greatly disruptive to the larger community. Some of this disruption, however, is merely the result of people’s opposition to the creation of a new political community (and is thus “manufactured disruption”), and if we accept individuals’ right to associate, and if it is legitimate to dissolve an unjust government, it is hard to see why it would not be legitimate to withdraw from an unjust government to create a new political body (the arguments given above regarding duties to an illegitimate government are relevant here; namely, there is no obligation to support an illegitimate government in any way).
moral agents whose associations and choice of location are critical factors in their pursuit of self-realization; from a liberal perspective endorsing self-ownership, exit rights respect the true nature of individuals as possessors of control rights over their bodies. To emphasize the importance of exit rights, we can understand a government which limits exit rights (at least in terms of emigration) to effectively place citizens in an enormous cage, with various kinds of opportunities to leave.

It is not simply the right to exit which matters, as the ability to exit is important. We can think of a persons’ ability to exit as comprised of their actual ability to relocate and of the range of choices they have. The more choices of alternative communities one has (both in terms of number and variety), the more meaningful exit becomes, since it is more likely that they will be able to find an option matching their preferences. Another factor in the ability to exit is financial ability; this will certainly affect the choices one can reasonably choose from. Finally, assuming consent was given, at all the act of exiting a jurisdiction (or more accurately, renouncing citizenship) is reasonably interpreted as a way of expressing the withdrawal, or in any case, is the only way in our contemporary world in which a person may have their failure to (or denial of) political consent respected; at the very least, it could be a sign that the individual strongly prefers not to be bound by that government’s laws.

There are those (primarily republicans, deliberative democrats, and communitarians) who might recoil at the use of exit rights; after all, as Mark Pennington points out, “the favoured alternative to the classical liberal principle of ‘exit’ in this context is a ‘voice-based’ conception of deliberative democracy.”32 The latter may be viewed as morally superior because it allows marginalized groups to voice their concerns “in a public forum and to be heard with equal respect,33” among other reasons. But while this may be true, the reality does not always facilitate this: a minority person living in a highly restrictive, intolerant culture is likely to have a very hard time “deliberating” with others, and given this and the other disadvantages she may face, along with our desire to see people actually living in just communities, there do not seem to be strong reasons to criticize that person for exiting those communities.

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32 Pennington, Mark, 2011. Robust Political Economy. Edward Elgar Cheltenham, UK. 50
in hopes of life in a fairer society.\textsuperscript{34} Ideally, people will (and inevitably must) work to change a negative culture, but at the same time, to criticize a person for leaving an unjust community to seek membership in a just community not only fails to respect freedom of association but also twists our priorities.\textsuperscript{35}

Thus concludes the explanation of the four aspects; at this point, I want to consider exactly how we might use our considerations of these aspects in the process of evaluating a government’s legitimacy. Perhaps the most pressing questions is whether any of the aspects are more important than the others. We can begin to consider this question by recognizing that there are three “levels” within any government: first, the foundational structure of laws and principles governing how laws are made and offices are gained, and the history of how these came about; second, the actual persons who hold office; and third, the laws not related to the foundational structure (policy). To clarify this potentially confusing distinction, let us suppose “the United States Constitution” is an example of the first level, “the current political officeholders in the United States federal government” are an example of the second level, and “federal labor law” is an example of the third level.\textsuperscript{36}

The four different legitimacy aspects apply to these different levels of government in specific ways. Namely, consent differs from the three other aspects in that it is the most fundamental and abstract, as it is mostly concerned with the rightful existence of the government system itself, in addition to current office holders, whereas participation, policy, and exit, are typically concerned primarily with either the persons holding office or the non-fundamental laws of a government. Furthermore, while participation, policy, and exit are easily measured, identified, and (arguably) practiced, theories of consent often locate it on hypothetical, abstract, or implicit behavior; thus consent is more abstract than the other three. This is, to be sure, not a hard-and-fast distinction: for example, participation is arguably a manifestation of

\textsuperscript{34} Pennington 2011, 73-74

\textsuperscript{35} Presumably, our desired outcome is that people live in just, fair, desirable communities. To criticize those who leave the opposite communities for the former is to criticize them for taking action to achieve this very goal, and to even further burden those whose welfare we are ostensibly concerned with.

\textsuperscript{36} It may strike some as problematic that I include both rules and persons in the different “levels” of government; I do not find it problematic because these levels are naturally flowing: the fundamental rules set the basis for who is able to make rules and how they are made; persons who hold office must do so in accordance with these rules; the job of those persons is to make policy.
consent, thus it can operate at the fundamental level. In any case, because consent operates at this more fundamental, abstract level, there may seem to be a prima facie reason to treat it as the most important aspect of an analysis of legitimacy.

Yet when we look at any given government’s four aspects, it will become clear that the relationship between them is complex. The first fact to note is that no one aspect is decisive in determining the legitimacy of the entire government; that is, if legitimacy is found in one aspect, it is still necessary to consider the status of legitimacy in the others. The most likely aspect the decisiveness claim is to be placed in is consent, as consent is understood to grant legitimacy to the rules, actions, etc., that flow from it: legitimate consent confers legitimacy on subsequent rules/manifestations of participation, policy, and exit. Yet this cannot be an absolute relationship, for consent—even express consent—leaves too much open in the context of government. People may agree to recognize a certain system and/or group of people as legitimate authorities, but if we take individual rights seriously, to grant legitimacy to any and all potential laws a duly sanctioned government may make would be a dangerous, if not absurd move. Agreements to restrict specific rights are more easily justified because there is clear evidence that the rights-holder agreed to the specific restriction, whereas there is no such evidence in the case of a government. Furthermore, the interpretation of rules which a consent-giver had knowledge of at the time of consent may be so restrictive or punitive that the consent is nullified. Thus, even though the restriction of rights may be implicit in the creation of a government, the mere establishment of a legitimate law-making body cannot be understood to grant carte blanche in regard to what laws that body may make, or how they are enforced; natural rights continue to exist in individuals after the establishment of a government and are existentially independent of a government’s observance of them, and continue to be important beyond the establishment of a body with the authority to limit them. Far from abolishing them, the establishment of a government vastly increases the importance of (protecting) these rights. Because of these reasons, and because the other three aspects are closely tied to rights, the decisiveness argument thus fails.
The second feature is what I call the “cross-aspect” nature of legitimacy. This refers to the fact that legitimacy in one aspect, or lack thereof, can affect the status of legitimacy in another aspect. I have already explained this in the case of consent and the other three aspects, but we can see it perhaps more clearly in the relationship between participation and policy. Insofar as the lawmaking authorities and the rules governing lawmaking are part of the participation aspect, participation and policy can affect each other in the following ways: first, if a lawmaking authority makes a law which respects rights but violated the rules governing lawmaking procedure, then the policy becomes illegitimate; second, while lawmakers may make laws in accordance with the procedural rules, if the content of the laws violates/restricts rights in a certain way, then the lawmakers may lose their authority. John Locke gives what is perhaps the most famous, if not influential argument regarding the appropriateness of such a view when he claims that rights-violative authorities “put themselves into a state of war with the people” who are thereupon absolved from any farther obedience…by this breach of trust they forfeit the power, the people had put into their hands…”37 This might seem quite the provocative statement, but there are strong reasons to consider it valid. If it is correct to not only see the rights-violative actions of ordinary citizens as lacking in obligation, but to condemn and punish the committer of such acts, then if government policies are unjust, then surely we have a strong moral ground to object not only to the policy itself but also to the policymaker, for the policymaker has violated the duty to respect people’s rights.38 The importance of rights is such that it is of the utmost necessity for them to be protected, and regarding rights-violative policies as lacking binding power, and their creators as lacking authority (and especially actually legally revoking their authority) is a powerful way to protect rights.

Yet this brings up a notoriously difficult question: which rights violations confer illegitimacy? As I have mentioned before, a serious consideration of this issue is outside the scope of this paper, but we can surely recognize that there are some rights violations, or failures to acknowledge moral equality, that

37 Locke 135
38 To draw a parallel, the act of kidnapping is unjust, and we rightly believe both that the victim has no duty to obey the kidnapper and that the kidnapper has committed a moral wrong worthy of punishment. Those in positions of political power have an especially strong duty to respect rights given the amount of power they yield.
are so heinous that they are decidedly illegitimate; for example, the institution of slavery, the establishment of a totalitarian dictatorship, or the forced sterilization of an entire race. Beyond these extreme (and rare) examples, there is much valid disagreement over which rights are more important, how far rights restrictions may go, etc. Unless we are willing to embrace anarchism (which perhaps may be the most pure manifestation of respect for rights and moral equality)—if we are not ready to dispense of the state as a morally justified phenomenon—then we need to find a way to incorporate this conflict in our assessments of legitimacy.

Due to the fact of non-decisiveness (in terms of importance) between aspects, the cross-aspect nature of legitimacy, and the fact that despite some obvious examples, there is much valid disagreement regarding which rights restrictions are legitimate, the best interpretation of legitimacy to use with the four-part framework is one that has a clear “bottom limit” yet is scalar above it. The “bottom limit” refers to the point at which any rights/moral equality failures worse than that are decidedly illegitimate, and the “scalar” characteristic incorporates the just-mentioned disagreement. The scalar trait is applicable both within a particular aspect and in a holistic view of government. For example, two governments may be legitimate insofar as neither has any of the “decisive” rights violations or failures to treat people as equals under the law, yet one may be more legitimate in one aspect than another, which is more legitimate in another aspect in the former. This may or may not translate into greater legitimacy overall for either of the governments. The four-part framework approach, in addition to clarifying our understanding of the “components” of governments, enables us to specify exactly how governments differ in terms of legitimacy. More generally, the scalar approach is sensible insofar as rights and moral equality are desirable and we seek to maximize the extent to which they are respected by governments; that is, because legitimacy is inherently good, we should seek to maximize legitimacy. In conclusion, the four part framework and the nature of governments suggest using a scalar assessment; with this, instead of trying to fit round pegs into square holes by agonizing over which aspect of a regime are decisive in terms of legitimacy, we can seek to build the most legitimate institutions we can.
CHAPTER IV. RESIDENTIAL COMMUNITY ASSOCIATIONS

1. What They Are and Their Relevance to Legitimacy

As I mentioned earlier, part of the difficulty inherent in thinking about legitimacy is the difficulty in finding ways to identify legitimacy in a concrete feature of political institutions. In this paper, I argue that a particular type of voluntary institution (“residential community associations”) is reasonably capable of meeting basic liberal standards of legitimacy (as seen through my framework) perhaps more so than with traditional governments. “Residential community associations” (RCAs) refer to several kinds of formal (legally recognized) associations between people who live in the same residential “community” whose purpose is to make and enforce rules relating to the property use and certain behavior of the residents and perhaps to provide certain services. These communities include subdivisions, neighborhoods, apartment buildings, condominium complexes, or even loose yet defined geographic areas. The most familiar type is homeowner’s associations (HOAs), which are typically located in subdivisions. While the following discussion can apply to residential community associations of any type, I will primarily use the model of a HOA association, as it is perhaps the most familiar type of RCA.

Residential community associations have a few characteristics which make them uniquely interesting and relevant to concerns about political legitimacy (namely, their similarities with traditional governments). Some of these similarities are as follows. The most obvious similarity is that RCAs have a rulemaking authority with a geographically limited jurisdiction: the “board of directors (of an RCA) is a residential private government with jurisdiction over its members in many areas of their lives…”39

Furthermore, as with governments, people are born into the jurisdictions of RCAs and are bound by their rules, without the opportunity to consent. Another important similarity is that as with governments, RCAs are typically created not out of a voluntary agreement of all residents but by the decree of the communities’ developer and/or their attorneys; furthermore, membership is often mandatory and

changing the rules can be difficult.\textsuperscript{40} Traditional governments and RCAs are both host to a similar dynamic of private and common interests, although in the context of the real estate industry, the term “interest” refers to the ownership stakes a resident in a RCA-run community owns: the “individual interest” refers to the actual residential property one owns, while the “common interest” refers to a stake in the “common property.”\textsuperscript{41} When I use “self-interest,” “common interest,” and their similar terms, I refer to the more conceptual understanding of “interest;” however, residents have (through the “institutional interests” as well as the conceptual) private and common interests just as citizens of a political community do, and like citizens, residents’ self-and-common interests clash with each other. Finally, the kinds of factors people consider when determining where to live are the same in both a residential and political context: people choose a residential community based on factors such as price, geographic location, the quality of the local schools, and overall quality of life; when choosing from cities or larger political units, people consider the cost of living, geographic location, the nature of the government and economy, and the culture and lifestyle associated with the area.

Yet there are important differences between governments and RCAs. First, unlike governments, RCAs do not make claims to a \textit{monopoly on the legitimate use of violence to enforce their rules} (the Weberian definition of a state as an entity capable of enforcing claims of a monopoly on the use of legitimate physical force is commonly understood to be at least one valid descriptor of the nature of a state).\textsuperscript{42} Furthermore, unlike governments, membership in RCAs is more voluntary than with governments, since the former involves a mechanism close to, if not actually consisting of, express consent. While both RCAs and governments have a mix of private and common interests, the common interests in residential communities are more readily identifiable due to the much smaller scope of concerns and (typically) smaller populations. Another difference between traditional governments and

\textsuperscript{40} ibid. 19. There is one instance where the conceptual debate between the “non-intervention” and “opportunity” aspects of freedom, insofar as there is an absence of coercion but also an absence of (many) alternative choices.

\textsuperscript{41} Ibid. 8

\textsuperscript{42} While an RCA may claim to be the sole authoritative governing body within the development (insofar as it would not approve of a rival, or smaller RCA within the same development), state and federal law retain jurisdictions in these developments, so the RCA does not have, de facto or de jure, the status of such a monopoly.
RCAs is that while no contemporary political community exists which was deliberately designed to appeal to people with very particular interests, many residential communities were designed with a particular “clientele” in mind; perhaps the most well-known example is the country club with a golf course adjacent to homes.

Finally, there is the fact that RCAs are regulated by governments, ranging from local city government laws to Supreme Court decisions. These characteristics combine to form a “meta-characteristic” that RCs/RCAs are neither completely within the “institutional” realm or the “civil society” realm; Evan McKenzie argues that due to certain similarities and various social, economic, and political factors, many RCAs and local governments may best understood to be in either a “convergence” relationship in which RCAs act more like local governments and local governments more like RCAs or an “extension” relationship where RCAs function as an informal—or perhaps formal—private contractors for local governments.43 Due to their similarities and differences with political traditional (the nearest civil society parallel to government), residential communities provide an especially interesting context to explore political legitimacy outside, and compared to, traditional political systems.

2. RCAs and Legitimacy: The Assessment

I will now begin the argument that residential community associations have the potential to achieve a decent degree of legitimacy within the framework I developed, perhaps more so than actual governments. To do this successfully, however, I will need to lay out the case against this argument so the reader will know objections what my argument must overcome. The existing scholarly view (and for that matter, the views of ordinary citizens) on the political possibilities of RCAs is mixed. Evan McKenzie provides a useful categorization of the various scholarly approaches and attitudes about residential community associations (McKenzie favors the term “Common Interest Developments” or CIDs), organizing the field into four different approaches: institutional analysis, communitarian, critical urban theory, and neoclassical economics/libertarian.44 The institutional approach focuses on the history

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43 McKenzie 2011, 65, 80, 88-90, 92, 108-09
44 McKenzie 2011, 32
and design of institutions and how these facts shape their actions, character, place in society, etc.; McKenzie’s own approach is primarily institutional. Those who see in RCAs the potential to foster “common values or social capital” are categorized as “communitarians,” and those who champion RCAs as a means of achieving efficient provision of services and a plural, voluntary system of governance as adherents to the “neoclassical” or “libertarian” view. Opposed to both the communitarian and libertarian view are critical urban theorists, who see in RCAs not thriving communities or exemplars of voluntarism, but rather a sinister fragmentation and retreat from public life, often coming with a heavy dose of militarism; in short: “unhealthy, inegalitarian, and undemocratic.” My own view is primarily falls within the libertarian approach, though it does share some communitarian beliefs; McKenzie’s institutional approach is generally skeptical, yet yields conclusions similar to those of the critical urban theorists.

For this paper, I will focus my attention on McKenzie’s critique of the libertarian vision of RCAs; before discussing his critique, however, we need to gain a clearer understanding of how he understands the libertarian vision. According to McKenzie, the libertarian view of RCAs is grounded in rational choice/neoclassical economic theory and a specific normative argument regarding consent. The function of the formal theories is to establish RCAs as a workable, if not superior institution to (local) governments. The public-choice (or more broadly, libertarian) argument that government planning and implementation of policies suffers from a knowledge problem (specifically, the lack of accurate knowledge related to people’s desires and valuation of things), thus resulting in the “overproduction of public goods, with accompanying waste and inefficiency” is central to this effort. Due to the improved chances of local, market-driven decision making methods having greater access to relevant knowledge than large-scale, bureaucratic government decision-makers, “advocates of private communities want to

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45 Ibid 32
46 Ibid 34, 41, 47
47 Ibid 38-39
48 Ibid 46-51
49 Ibid 41
move decision-making responsibility to a lower scale and further privatize and decentralize decision-making power (; thus) private communities are close to the optimal form of urban government”.

Charles Tiebout’s model for a varied, efficient market for local governance is extremely useful for thinking about RCAs, given their similarities to (traditional) local governments; in fact, McKenzie considers it a major component of the libertarian defense of RCAs. Tiebout’s model relies on the presence of the following conditions: first, “consumer-voters” must be fully mobile and willing and capable of moving to a community which best satisfies their (set) preferences; second, consumer-voters have full knowledge of the differences between options and will behave based on this knowledge; third, there are a large number of communities to choose from (it is assumed that there is variation between the communities); fourth, any restrictions based on employment factors are irrelevant; fifth, the actions of local governments create no negative externalities; sixth, for every type of community, there is an optimum size; and finally, the residents/governors of communities will seek to achieve their optimum size. If these conditions exist, then individuals will be able to make choices using cost-benefit analyses and a market for residential communities will develop, leading to a housing market catering to a variety of interests and preferences, all the while being more efficient than government planning. If Tiebout’s model is realized in an RCA context, then variety, access to information, and competition will provide a more fertile ground for more legitimate policies and more meaningful consent and exit, if not participation as well. Robert Nelson believes that the possibility for this is quite realistic for “‘with the rise of private neighborhood associations, the real world of local governance more closely conforms to the assumptions of a Tiebout world.’”

The more relevant aspect of the libertarian view of RCAs, with regard to legitimacy, however, is the view that they are voluntary “political” communities, and given the superiority of voluntary

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50 Ibid 45, 49-50
51 Ibid 54
53 McKenzie 2011 49-50
associations over coercive ones, RCAs are legitimate (if not more so than traditional governments).

McKenzie claims that this normative account has its roots in the Lockean view of natural individual rights and the resulting view that due to these rights, voluntary “binding contracts” are the only legitimate source of cooperation, and in Robert Nozick’s *Anarchy, State, and Utopia*, in which Nozick imagines individuals in a state of nature voluntarily agreeing to obey the rules of “‘private protective associations” which provides services to its members; even if these private associations eventually merged to form something resembling a “traditional” government, it would be legitimate due to the voluntary nature of its origin. Robert Nelson connects this vision to (RCAs) insofar as

a private neighborhood association thus stands for greater pluralism and choice in American life and governance. It increasingly seems likely that these will be essential elements of future communities…Contrary to earlier utopian visions that saw one ‘correct’ society for the whole world, Nozick reflected a new view that expected a long-run pluralism of social values and corresponding social organizations. Thus, RCAs serve as a stand-in for Nozickian private protection association; McKenzie writes: “if a metropolitan area could be constituted as an array of CIDs and mobile consumers operating consistently with Tiebout’s assumptions, the basic conditions of Nozick’s ethical model would…seem to be satisfied.”

To be sure, RCAs will not fit the model entirely, since they exist in a context in which a traditional government claims complete authority; at least, this is the reality currently and for the foreseeable future.

**McKenzie’s Argument Against a Libertarian RCA-Legitimacy Connection**

Though McKenzie provides a critique of a rational choice/economical approach to RCAs, the more relevant criticisms for our purposes are those directed at the normative theory of consent used to justify RCAs. That said, the Tieboutian model’s relevance to the legitimacy of RCAs does call for some attention to McKenzie’s critique of that model. McKenzie’s critique of both the Tieboutian model and the

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57 McKenzie 2011, 60
consent theory rely on showing a disconnect between the assumptions of the theories and their supposed failure to manifest in the reality of RCAs.

Let us look first at the Tieboutian model. McKenzie finds real-world shortcomings in each of the components of the model. First, he explains that consumers find their choices limited in regards to the nature of RCA governing documents due to standardization fueled by industry-government negotiation and the fact that many governments require developers to create covenants; this undermines the third requirement. 58 Furthermore, the legal meaning of covenant content is supposedly often inaccessible to all but specialist attorneys; this, along with the fact that potential residents are unable to customize their agreements with the RCA/property owner undermines both the first and second requirements, as it reduces buyers’ knowledge and their ability to act on information in line with their preferences. 59 Given the resulting lack of “full knowledge” and diversity, the choice that exists is perhaps not that “meaningful,” thus the entire model is undermined. 60 Furthermore, the constraints on exiting (such as financial costs and various legal requirements hindering the process of sale, such as paying fines) undermine the model’s requirement of exit capabilities. 61 McKenzie admits to the difficulty in gauging the occurrence of negative externalities (“diseconomies”), but accepts the likelihood that the actions of CIDs (“especially large ones”) are likely to have an impact on the surrounding area. 62 Finally, the fact that residential developments have a limited number of residence units and space to expand constrains the ability to reach, or even determine, an “optimum size.” 63

McKenzie’s argument against the libertarian theory of consent in the context of RCAs is very similar to his argument against the Tieboutian model: the facts of RCA creation and operation fail to embody the nature of consent found in the libertarian argument. McKenzie characterizes libertarian

59 McKenzie 2011 55-56
60 Ibid, 56
61 Ibid, 56
63 McKenzie 2011 56
political theory as “posit(ing) a natural order of individual liberties and try(ing) to build upon it a system of collective decisionmaking about public goods that is efficient and that violates those liberties as little as possible.”64 As we have seen in the context of RCAs, the relevant decision-making process is the consent given to a RCA by a willing buyer of residential property. Yet, McKenzie argues that the real-world nature of (RCAs) is such that any consent present is barely consent at all, thus greatly undermining the ability to justify RCA legitimacy.

McKenzie understands libertarian ethics to hold that a institutionalized, formal system of rules only has authority over people if those people were parties to the formation of these rules, yet RCA rules are “made by and between real estate developers and local governments in the form of development agreements that specify the terms under which the local government is granting a construction permit to the developer,” and that “the processes by which CIDs are created, structured, and populated are handled by large institutions, and the resulting contracts reflect their interests.”65 Ultimately,

Not only are the (dwelling unit) owners not parties to those contracts, they are not involved in any way. In fact, nobody even knows who the owners will be, because all this is done at the conceptual stage (prior to building the units). The notion that individual owners agreed among themselves to perform these services for each other, and subsequent owners took over from them, is entirely fictional.66

This seems damning for the libertarian conception of consent, but perhaps all is not lost: what of the agreement made by the buyer when they agree to purchase a home in a development; is this not “the contract to which libertarians attach significance”?67 It is, but McKenzie believes it is a weak support for legitimacy, since no buyer can negotiate the rules which will apply to her in regards to her property, making “the private government and its rules…a take-it-or-leave-it proposition. Consequently, a

64 McKenzie 2011 58
65 Ibid, 60
66 Ibid, 60
67 McKenzie 2011, 61
meaningful contractual relationship exists between the developer and the original purchaser (only) on the issue of price and features… He concludes with this frank remark:

the fact is the developer imposes the rules on the owners, along with the obligation to enforce those rules against each other in perpetuity…Indeed, CIDss would probably be less conflictual if people could and did structure their own relationships. But as CIDs are organized in the real world…the entire regime is imposed on buyers as nonnegotiable boilerplate, drafted by one party who has all the power, who isn’t even going to live there, whose interests are largely short term, but who is given perpetual influence by this fiction of equal contracting parties.

In an interesting turn, McKenzie invokes a neoclassical view (which is supposedly used to support the libertarian view) that this lack of buyers’ ability to negotiate as a good thing: according to a rational choice-influenced view, Donald Boudreaux and Randall Holcombe argue that developers drafting the “private constitutions” is an “excellent way to reduce costs and proves the superiority of (these rules) to municipal laws;” the authors insinuate that the logistics of gathering all of the residents to meet and debate, and ultimately choose, rules governing property and services would be enormous, and “that existing neighborhoods so rarely produce such constitutions even though they have demonstrated value in new neighborhoods is an indication of the prohibitive nature of the decision-making and agreement costs at the constitutional stage.” To McKenzie, such a view “devalues” politics, as it is “reduced to negotiating over costs and benefits, and that can be better done by others…the private government is assumed to reflect the perfect compromise of constitutional values that the residents would have chosen if they actually held their own constitutional convention.” But such a view “makes a mockery” of legitimacy theory, which is

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68 ibid
71 McKenzie 2011, 62
why libertarianism is important to the neoclassical case for (RCAs), as it is used to justify what would otherwise be “undemocratic paternalism, by asserting that the ability of individual owners to make their own decisions and the fairness of having them live by the choices they make validate all departures from the norms of liberal democracy. The libertarian argument is that there was in fact a clear, voluntary choice: the decision to buy a particular house, memorialized in a fully enforceable real estate sales contract, reflected in a deed, and duly recorded with a government agency.72

Yet McKenzie claims that the only real way such choice would exist is if there were the option of non-CID housing; without this choice, “the libertarian justification for the many deprivations of liberty disappears… (and because) lack of choice is increasingly common (due to government mandated-CIDs)”, the libertarian justification may be easily blown over.73

A final argument McKenzie makes against the libertarian case for RCAs is that they actually constitute more “government,” (or at least no significant decrease in government), something any consistent libertarian would presumably be opposed to. Although he admits that some residential communities have the status of a “government-free zone,” he argues that the “increase in state (and) local regulation (of RCAs), the continued existence of double taxation…and the municipal mandates” will continue, insofar as they benefit current local governments; that double taxation makes RCAs essentially informal adjuncts of local governments; and that the increasingly complex nature of RCA regulation and high costs may “dry up” volunteers and financial resources to keep them existing as private institutions.74

In addition to the supposed problems with consent, there are factors which potentially undermine a liberal (libertarian and otherwise) view of legitimacy. In regards to participation, in addition to the lack of a role in drafting the original set of rules, there are two main factors discouraging people from becoming too active in their RCAs. First, as McKenzie points out, board members are unpaid, untrained, unlicensed volunteers, who are “unsupported by the governments whose work they are only doing,” with

72 McKenzie 2011 62-3
73 Siegal 2006, cited in McKenzie 2011 63
74 McKenzie 2011, 92
the support they do get coming from contracting with “property management firms.”75 Another reason is that given the often negative impression—often borne out by reality—that people have of RCAs as hotbeds of pettiness and intrusiveness, it is easy to understand why people would want to avoid them as much as possible. This intrusiveness is mainly the result of the dominant influence in RCA policy: the desire to protect property values. On its face, this poses a problem for a liberal theory of legitimacy (especially a distinctly libertarian one), as liberals value at least some protection of property rights. It is likely for these reasons that McKenzie claims that RCA membership holds “so little appeal…that it must be forced on (residents)...Community associations are ‘closed shops’ that would not exist in significant numbers if they had to compete with other social groups for people’s loyalty.”76 Finally, in regards to exit, as was explained above, residents are constrained in their exit rights by legal requirements to settle any debts owed to the RCA before one is allowed to sell their house, and the meaning of exit is diluted by the homogenization of covenants.

**RCAs and the Possibilities of Legitimacy**

McKenzie’s arguments may seem powerful, and there is no doubt there is an element of truth to much of their content. That said, they generally suffer from a flawed interpretation of both the requirements of a Tieboutian model and the libertarian consent theory. I will address the Tieboutian specifically, and then proceed to explore the critique of consent through an analysis of the legitimacy of RCAs using the four part framework.

McKenzie argues that reality does not match the requirements of the Tieboutian model, but certain relaxations of the criteria will make the model more realizable. First, perfect knowledge is not needed for a market to exist, and in our context, people can inquire about covenants before purchasing a residential property. While some covenants may be written in inaccessible language, this is not necessarily always the case, and buyers could find ways to clarify their understanding of the rules. Second, the specific exit requirement is not needed (though of course, some right/ability to exit is

75 McKenzie 2011, 14
76 Ibid. 52
necessary). McKenzie’s point about legal obstacles to exiting is valid, yet they are not severe enough to render the ability to exit practically nonexistent. Third, the requirement of no “diseconomies” is unnecessary and unfeasible, as diseconomies (negative externalities) are inevitable, and occur in contexts ranging from competing restaurants to states “competing” for citizens and business, and while they may be undesirable, do very little, if anything, to limit the existence of markets. Fourth, it is not necessary for every conceivable “bundle of services” to be offered; there simply needs to be some variety; it may be the case that only three or four general rule-schemes are what is supported by the market. Finally, the best way to think about “optimization” is not after RCs have been built, but rather before they are built. While McKenzie is correct that members of RCAs have limited abilities to “optimize” the size of the population of their communities, optimization is possible in the planning stage: developers will be sensitive to market signals which will point them towards what size of development (in terms of housing units) will be most profitable; due to this (and depending on the type of housing they specialize in), developments will be influenced by a kind of “optimum.” Residents contribute to the shaping of optimum sizes through their choice of what size development they purchase property in, and in their ability to make developments more attractive by customizing the covenants. Tiebout himself explains that optimization occurs both through prior actions (such as zoning, implicit agreements, etc) and through the choices of consumers. McKenzie’s best argument against the Tieboutian model’s applicability is the homogenization of covenant rules, although there remains the potential for dedicated residents (and perhaps less likely, developers) to increase the variety of rule and service offerings. In conclusion, a relaxed version of Tiebout’s model makes it more feasible, and in turn, increases the chance its’ effect on legitimacy will be achieved.

Consent

Before delving into an analysis of consent and RCAs, it may be helpful to briefly review the problems encountered with locating consent in real governments. If a jurisdiction were small enough, however, and rightful residence was gained by an act more expressive than simply staying in an area, then

77 Tiebout 1956, 419-20
it is possible that a literal social contract, or at least something approximating it, could exist. Given the superiority of express consent to other forms of “consent,” if it—or something functionally equivalent—could be established in a real-world setting, it would do much to enhance the legitimacy of the rule-making institution.

The process of choosing to live in a particular residential community (with an association) contains an act of express consent, or at least something very closely approximating express consent. When someone agrees to purchase or rent a dwelling unit in a residential development with covenants, they enter into a legal and moral agreement to recognize the RCA as a legitimate rule-making body and to obey its rules. This agreement is express, rather than implicit, because it is made by the willful signing/receiving of legal papers relating to the sale (such as the deed to the property) expressing the commitment to reside in a unit and to pay for it. The legal process of purchasing or renting property has been structured so that the very act of doing so commits a person to recognizing the RCA as a legitimate authority; that is, one cannot legally purchase a residence in a development with an RCA without agreeing to this recognition.\textsuperscript{78} RCA authority is attached to each property within a development, so that it “runs with the land;” this means that accepting the authority of an RCA is directly tied to the purchase of a property. In other words, if a person agrees to purchase a property, by the very act of doing so, they are agreeing to recognize the authority of the RCA. This can be thought of as similar to the way in which a person is bound by a service’s “terms of use” clause when they agree to use the service; a person cannot legally reject the terms and continue on to use the service.

One may argue that express consent only occurs when someone makes a statement explicitly confirming their agreement to recognize the authority of the RCA during the legal process of exchanging ownership of the property. If it is the case that there is no explicitly given consent, it could be easily achieved through the inclusion of a consent clause in the legal paperwork. Even if we take the “explicit” consent view and find it missing from the reality of entry into residential communities, the functional

\textsuperscript{78} Though it is becoming less common, it is (or was) possible for a person to purchase a dwelling unit without joining (and thus being accountable to) an RCA; they were still bound to whatever stipulations were in the deed, but had no obligations nor privileges with the RCA.
equivalent of express is present due to the intertwined relationship between recognizing the authority of the RCA and purchasing the property; that is, there is still a specific act which expresses consent.

Now that I have more clearly explained the presence of consent in the RCA context, what ought we to make of McKenzie’s argument against the libertarian consent arguments? His first two claims (that the “consent” involved in RCAs barely exists, since no resident is involved in the drafting of the covenants, and that the “consent” on which the libertarian defense of RCA legitimacy is based—the agreement between the individual buyers and seller—is barely consent at all) misunderstand the kinds of contracts acceptable to libertarians, if not those which are even possible in a political context. It is not necessary for all parties to a contract to have participated in the contract’s creation in order for it to be binding, nor is it necessary for the terms of use attached to a product or service to be specialized for each individual customer. When someone agrees to purchase a product, they are understood to agree to obey the stipulations the companies’ attorneys have written in the terms of sale or use—a process the buyer is in no way involved in—and yet libertarians do recognize these contracts are understood to be valid.

That said, we should approach Boudreaux and Holcombe’s efficiency argument with skepticism, because while it may be more efficient for a singular specialist to draw up the rules, McKenzie is probably correct that if residents had the ability to create the rules, there would be less conflict.79 There is also reason to doubt the efficiency of the predetermined, specialist-created system of rules: residents may have better knowledge of the sorts of rules they would want to live under, and if their participation would result in less conflict, then overall, this may be a more efficient system. It seems, however, that the problem of time constraints, risk-aversity, and various logistical issues preclude such a collaborative effort amongst the residents, thus leaving the developers and their attorneys responsible for the initial creation of rules.

To return to my analogy of the “terms of use,” perhaps “political” consent should be more demanding than commercial consent, due to the former’s serious nature. Yet there are at least four reasons why “pre-completion” and/or “customized bargaining” are either unnecessary or unfeasible. First, McKenzie 2011, 61
“commercial consent” can relate to serious issues, including the right to use the product, the right to bring legal action, and the willingness to incur bear the burden of any risk to life, health, or property. Second, there may yet be a way community bargaining is possible. The decision to purchase a residential property is not solely based on the nature of RCA covenants; every residential property is a “package” of various attributes, including aesthetic considerations, school quality, etc., along with RCA regulations. Because it may be possible, perhaps likely, that buyers choose their properties for reasons other than the nature of the RCA rules, requiring a mandatory deliberation amongst the residents after all units were sold would allow residents to participate in the first sort of bargaining activity discussed by McKenzie. This, however, may be unlikely since buyers would be facing a large risk due to the likely lack of any guaranteed rules, unless there were “boilerplate” rules drafted to reassure potential residents. Third, even if this specific negotiation instance does not occur), residents do enjoy the right to participate in the political process of the RCA, which includes determining what the rules are. Finally, given the fact that governments exercise authority over multiple people, it is unlikely that any government—even Nozick’s “private protective associations”—would have a unique agreement with each of its members. Not only would the logistics of creating these specialized contracts prove challenging, but it is likely that there would arise conflicts of interest which would undermine, among other things, equality before the law. For these reasons, a government with “personalized” laws would be unfeasible if not illegitimate.

The third component to McKenzie’s claim that consent barely exists in the context of RCAs is the observation that there is little variation across RCA covenants. While it is certainly the case that the more variation in the rules there is, the more meaningful the consent is due to the higher likelihood that there is alignment between the rules and the buyers’ preferences, all that is required for the purposes of legitimacy is that residents have the right to create new rules. Merely demonstrating a relative lack of variety does not prove consent is lacking, or that the opportunity to participate is lacking; again, it may be that there are a small number of basic rule systems that people “demand.” Furthermore, it could be that there is great variety in the way that the rules are enforced, but this tacit diversity may not be readily identifiable by the casual observer.
How does the consent in the RCA context compare with consent in the traditional government context? The consent expressed in a person’s agreement to purchase a home in a residential community with a RCA may not be ideal, but it is superior to that of traditional governments. RCAs have a stronger claim to legitimacy as seen through consent than traditional governments due to the fact that every residential owner has given their express consent, or some functional equivalent, to the authority of the RCA, whereas in any given country, the vast majority of residents have done nothing remotely resembling this. This does much to strengthen the legitimacy of RCAs, as it is a clear justification of the RCA’s authority to limit the rights of residents and of the residents’ obligations to obey the rules of the RCA. An additional way in which consent could be more “meaningful” in RCAs than with traditional governments is that even though governments may currently surpass RCAs in terms of the variation in rule content, the sheer number of RCAs (about 314,200 in the United States as of 2011) sets the stage for more meaningful residential choice, as the greater number of RCAs provides a larger number of rule systems; the more “systems,” and the small size of many residential communities, may contribute to more rule variation (thus the more variation, the better the Tieboutian model is realized and the more individual preferences may be satisfied).80

Participation

In the beginning of this paper, I argue that participation is an important aspect of the legitimacy of a political regime. In this section I will explore ways in which people can participate in ways both directly and indirectly concerned with legitimacy.

-The Right to Participate in Governing Process

As explained earlier, the right to participate in one’s political system is the “next best alternative” if (express) consent at the time of the creation of the government is not feasible, and indeed, would nevertheless be vitally important even in the presence of express consent. RCA members can participate in the governing process through membership on the Board of Directors (open to all members), the

members of which are chosen through a voting process in which all members are able to participate. Additionally, every member typically has the right to vote on changes to the covenant rules, albeit usually through a “one-unit, one-vote” system. Furthermore, because board members are one’s neighbors, it is much easier to contact them than it is regular government officials, thus minimizing the divide between the “politicians” and ordinary “citizens” which oftentimes breeds hostility and flawed policy.

That said, there are two ways in which the participation aspect of legitimacy is undermined in RCAs: first, renters often lack voting rights, yet they are bound to obey the RCA’s rules, and second, some residential communities (oftentimes the larger ones) are more or less operated (though not necessarily “governed”) by “management companies” which provide services including financial management, covenant enforcement, property maintenance, and liaison services between residents and the board.  

Because management companies are typically chosen either by a developer or the board, with potentially little input from ordinary residents, they are likely to be biased in favor of either their own interests or those of the board. Though this does not establish the superiority of RCAs to traditional governments in terms of legitimacy, it should be noted that regarding the two participation-related flaws, RCAs are no different from traditional governments: noncitizens living in the US lack voting rights or representation, yet are taxed and bound by American laws, and the bureaucracies and private contractors charged with implementing government policy have their own interests. Ultimately, however, all that is needed to establish legitimacy is the right to participate in the political process, which RCA members certainly enjoy.

\[\textit{Training ground/liaison institution for local governments}\]

In addition to being active in the political process within their residential communities, RCAs can also provide a liaison service between citizens and local governments; indeed, this is one of the most well-documented activities of RCAs. Because of the geographic nature of the community and the concerns related to property values, and more generally, quality of life, residents have strong interests in the developments, whether political, economic, or social, in the general geographic area in which they

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reside. Oftentimes, RCA-led education and involvement campaigns focus on issues relating to property values, but these issues include concerns about, crime, education, commercial development, roadwork, and taxes.

The most common method by which residents are brought to participation in larger political issues in the context of residential communities is through notification by fellow residents (often those in who sit on RCA boards) of local issues and public meetings, as well as various organized efforts. It is not unusual to find a specific position within the RCA whose main responsibility is to be the liaison between local government officials and bodies and the residents of their RC. There may even be a voluntary organization which serves as a liaison between RCAs and local governments; for example, in the area in which the author lives, the “East Cobb Civic Association” is an organization, comprised of representatives from a number of local HOAs and independent homeowners, which endeavors to educate and encourage residents to become involved in local economic and political issues through meetings, email newsletters, and information distributed directly to the HOA representatives. Not only can these RCA services potentially increase the legitimacy of local governments by encouraging citizen participation, but they can indirectly improve the legitimacy of individual RCAs by specifically working to shape the local government’s policies regarding RCAs.

-Dispute resolution, Rule Enforcement, and Security

One of the more important aspects of a government related to legitimacy is the approach to resolving disputes between citizens, and especially between itself and its citizens, given that these actions are related to the protection of rights and the upholding of the rule of law. Much of the hostility directed towards RCAs is based on their all-too-common nature as hotbeds of petty disputes, many of which arise out of the violation of RCA policies. Typically, such disputes are “solved” through one, or some

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82 Liberals understand that a crucial—and for libertarians, the only legitimate—role of governments is the protection of rights. The “rule of law” is also crucial for liberals because of the commitment to the moral equality of persons requiring all people to be treated as equals before the law. On another note, the following discussion may perhaps be equally, if not better discussed through the “policy” aspect, yet I choose to discuss it under the participation aspect because of the possibility that ordinary RCA members can take an active role in dispute resolution within their communities.
combination of, the following three methods: the parties involved reach an agreement between themselves, the RCA intervenes, or the police become involved. Certainly some types of disputes (those involving violence, illegal activity, abuse, etc.) are best handled by the police, but for most disputes, RCAs have the ability to resolve many of the disputes that occur in a residential community context.

RCAs typically approach dispute resolution/rule enforcement by notifying the violator of his or her violation, giving them a specified amount of time in which to fix the violation. Should the violator fail to cooperate, the RCA will fine the violator. Should the violator fail to pay the fine, RCAs are legally allowed to place a lien on the violator’s property. Occasionally, one party (usually an accused violator) will file a lawsuit against the RCA. Because lawsuits against RCAs result in the residents bearing the legal costs to defend the RCA, all residents have an incentive to avoid contributing to a culture in which lawsuits are likely; lawsuits often prove painfully expensive for all parties, in addition to imposing social and emotional costs. In particular, it is possible that a litigious development’s property values may decrease or at the very least, the “local tacit value” (that is, the locals’ attitude of desirability of the development) of the development will decrease, causing prospective buyers to avoid them, eventually leading to unsold, empty houses and related undesirable outcomes. Likewise, involving police in the process of dealing with (some) covenant violations will often only serve to aggravate the situation and increase animosity, in addition to distracting police from activities designed to prevent violent crime.

How might RCAs be able to improve their dispute resolution services? The first point to make is that neighborliness can help minimize problems between neighbors and help them to be solved quickly and calmly when they do arise. By becoming familiar with one’s neighbors, one is likely to trust them more and show them common courtesies and respect, whereas neighbors who have no or minimal interaction with each other are more likely to approach dispute resolution with a stubborn, hostile attitude. The optimal solution—that is, the “cheapest” and most respectful solution—would be for neighbors who are party to a dispute to work together, outside of the RCA, to solve their problem in a way that is mutually acceptable.
Unfortunately, this is not always feasible, and thus there is a need for a third party to help adjudicate the dispute. One approach would be to establish “residential courts” in which all involved parties would present a case to the board, or preferably to a (larger) body of fellow residents, after which the board (or the assembly of residents) makes a decision. There will inevitably be the problem that factions will exist within a residential community, and so members may not be able to receive a fair hearing within their own residential communities. To account for this, multiple residential associations may form a residential court system; if residents of one community have a dispute, their case may be sent to another development’s “court” to be heard, either at the outset or as an “appeals” process.

The implementation of either will not be without difficulty. Given McKenzie’s point that the officials on RCA boards are not professionals, and have lives outside of their residential communities, asking residents to form their own courts may be unrealistic. For this reason, along with the aforementioned bias/interest issue, utilizing mediation agencies may thus prove an attractive solution, but there is the question of whether residents would abide by the decisions of such agencies (or the residential courts). There are a number of reasons to believe they would. First, RCA covenants may require residents who lose a case to pay whatever fine is levied (or else a lien is placed); second, the more “communal” nature of residential courts may help accused residents feel more respected than a government court, and the “mutually acceptable” approach of mediation agencies are more likely to find solutions satisfactory to all parties. Finally, RCAs can ban violators from common property and through social pressure can increase the psychological costs of failing to comply.

At the same time, however, developers—and residents—primarily focused on protecting property values may be skeptical about embracing a dispute resolution system that may lead to more decreases of those values. Nevertheless, even though the residential court system and the mediation approach are not necessary for legitimacy (all that is required for legitimacy is that residents have some ability to plead their case before other residents of the community), these practices would likely greatly improve the dispute resolution and rule enforcement approaches of RCAs insofar as they may provide better protection for individual residents’ interests.
Another rule-related service on the short list of what a legitimate government consists of is some form of security provision. Residents have an interest in protecting themselves from threats outside of their community; this interest is quite strong, so residential associations should have little difficulty encouraging residents to participate in, or at least support, some form of security services. Certainly some options, such as hiring a private security company, may be open mostly to wealthier communities, but even lower-income communities can participate in neighborhood watch programs. Other low-cost security programs include working with local police to set up seminars on home safety and police notification bulletins. While RCAs have no authority to prosecute outside threats (private security officers may remove trespassers, however), they do provide services designed to help residents avoid rights violations. In conclusion, insofar as the provision of a method of dispute resolution and rule enforcement is a necessary function for a legitimate government, RCAs meet this requirement for legitimacy.

- Theoretical Considerations of Participation in RCAs

I now want to consider, in a more general sense, the comparative abilities of traditional governments and RCAs to encourage public/political participation. The factors which influence political participation are numerous, but the most relevant ones for our purposes in this paper are the amount of laws, the size of a political jurisdiction and what I call “interest factors.” Compared to traditional political communities, residential communities enjoy participation-related advantages in each of these three areas.

The amount and content of laws is relevant to participation insofar as they determine the kinds of obstacles to gaining awareness facing citizens. The more laws there are, and the more complex they are, the more difficult it will be for the average person to be able to hold even a basic working knowledge of federal, state, and local policy, thus the more unlikely it will be that they participate (at least, in an informed manner). Compared to traditional governments, the rules of RCAs, while they can be, as McKenzie notes, difficult to understand, are less numerous and complex than those of the former.
Because the obstacles to gaining awareness are lesser, this suggests that people might likely to participate as members of an RCA than as citizens (again, at least in an informed manner).\textsuperscript{83}

The geographic size of a government’s jurisdiction plays an important role in shaping the nature of political participation in at least two important ways. First, jurisdictions of a certain size and population necessitate the existence of a small, specialized class of people to conduct the everyday affairs of government. Second, the larger a jurisdiction, and the more populous it is, the harder it will be for residents to meet with policymakers due to the increased number of constituents and organized interests vying for access and the increased costs of traveling to meet with such persons.\textsuperscript{84} Therefore, the size of a political jurisdiction not only affects individuals’ likelihood of participating in the political process in certain ways, but affects their ability to influence policy. The relatively small size of many residential communities (though certainly not all) means at least three things (compared to similar considerations in a traditional government context): first, it is more likely that an individual will hold office; second, it is easier for residents to meet with those who hold political office, due to lowered costs of participation; and three, both an increased “weight” of any one individuals’ influence and chance that policy might reflect interests of the “typical” resident. It is certainly the case that a certain sort of person may be attracted to positions of authority within RCAs, or that the typical resident wants rules which greatly restrict property rights, but even when this is the case, residents have easy access to the authorities and presumably desire the rules to be enforced fairly (that is, they desire for all to be equal under the rules).

We can also think about the affect the size of a community has on participation through a rational-choice perspective. Mancur Olson’s seminal work \textit{The Logic of Collective Action: Public Goods and the Theory of Groups} explores the various incentive dynamics affecting members of groups.

\textsuperscript{83} This claim should be tempered by the fact that there are many more ways in which people may be active as citizens. One should keep in mind, however, that the issues relevant to individuals as members of RCAs are often the very same ones relevant to them as citizens under local/municipal governments; thus when they do participate in activity regarding these political issues, they can be considered to be acting in the residential capacity as well as the “civic” capacity.

\textsuperscript{84} It is likely that the larger the jurisdiction and/or the greater the number of individuals within a jurisdiction, the proportion of ordinary residents to members of the political class will shrink, thus placing more demands on the latter’s time, which raises the cost of accessing them in personal meetings.
specifically regarding coordination problems. Olson points out that in addition to having a common interest(s), group members have “purely individual interests, different from those of the others in the organization or group.” 85 That said, coordination problems can arise even when all interests are shared interests. 86 One way coordination problems can occur is in the presence of public goods. Olson explains that a member of a large organization—such a taxpayer in a state—is able to take advantage of this situation because “his own efforts will not have a noticeable effect on the situation of his organization, and he can enjoy any improvements brought about by others whether or not he has worked in support of his organization.” 87 Furthermore, Olson asserts this behavior can based on shared: “each (member) would prefer that the others pay the entire cost, and ordinarily would get any benefit provided whether he had borne part of the cost or not”; he proceeds to suggest that this will occur in both large and small groups 88 .

Smaller groups, however, will have an advantage in minimizing coordination problems. While larger groups’ outcomes will be seen as public goods by their members, in smaller groups, each members’ participation is more important to the success of projects, thus each member is likely to view her own participation with more importance; furthermore, small groups are best able to utilize social “selective incentives,” such as praise or ostracism, to entice members to participate (indeed, Olson believes these really only work in groups small enough for face-to-face contact) due to the higher likelihood of repeat play and ease of sharing information. 89 Due to RCA’s commonly small size, repeat play is a strong possibility, and the ease of using selective incentives is also greater than in traditional government contexts.

Finally, there are “interest factors,” which cut across all other factors relating to participation. These may be concisely stated as follows: “time is limited,” and “many people simply lack a strong

86 For example, members of the World Wildlife Fund share an interest in supporting (funding) efforts designed to get conservationist policies enacted, yet they also share an interest in having a large amount of spending money for themselves. The latter interest may win out over the former, even though both are shared.
87 Olson 1965, 16
88 Olson 1965, 21
89 Olson 1965, 53-62.
interest in politics.” These two factors are related to people’s awareness of both the transaction and opportunity costs of participation. It may be a mundane point, but the fact that people have limited time in which to pursue activities has an enormous impact on persons’ decision to participate in politics. Political activity is only one out of many activities that people have to choose from, and many acts of participation, such as attending meetings and demonstrations, visiting elected officials, and even becoming informed about political issues, often take up a significant portion of time and other resources (partially due to jurisdictional size), and given the fact that much political involvement involves uncertain, unclear, and/or long-term benefits, along with the common nature of politics as hostile and divisive and the rational desire to maximize benefit while minimizing costs, it is not surprising that many people do not participate much in traditional politics beyond voting and the occasional political conversation. The “political” issues relevant to people qua members of residential communities, however, are precisely those which people will find themselves preoccupied with even if they lack an interest in politics in the traditional sense: what they can do on their property, the safety of the surrounding area, the quality of schools in their areas, and commercial development. As a result, there is a good reason to believe that people are more likely to be involved with their RCA (regarding both “interior” and “exterior” issues) on a regular basis than they are in a broader (state, and certainly national-level) political context.

In case the reader feels that I have strayed from the association between participation and legitimacy, a brief review may be helpful. Participation is relevant to legitimacy insofar as a government must allow its citizens to participate in the political process and the right/ability to participate allows individuals an important means of protecting their rights through shaping policy. I have argued that due to three main qualities—a less complex set of regulations (“laws”), smaller political jurisdictions (and fewer people), and the particular nature of RCA-related issues—it is easier for (and perhaps more likely that) people to participate in activities relating to those “local” issues than it is for people as citizens of larger (traditional) political units. Therefore, this ease of participation creates the possibility for residents to hold each other (whether on the RCA board or not) accountable and to uphold the rule of law and protect
property rights, both within their residential communities and their local government community.\textsuperscript{90}

Finally, while the theory of legitimacy I use in this analysis is liberal, I want to make a general note that because of their voluntary nature, (oftentimes) small scale, and (again, oftentimes) intimate nature, RCAs ought to be attractive to a number of ideological persuasions, especially libertarians, communitarians, and conservatives, but more generally, to those who desires a more hands-on, intimate form of “political” life.

\textit{Policy}

In the previous section, I mentioned several times the value of participation as a way to ensure a RCA/government’s policies are legitimate. I will now turn to focus on two specific policies of RCAs highly relevant to legitimacy: equality under the law and the status of property rights regarding the protection of property values.

\textit{-Equality under the Rules}

One fundamental liberal belief is that all people are morally equal in some minimum way, and therefore they must be treated as equals by an authority. A more specific way of putting this is that “all persons must obey the law to the same degree, and the law must apply to all as equals.” Owner-members of RCAs are considered as equals under the covenants, meaning that the rules must be uniformly and fairly enforced, and no person has any inherent claim to authority. In fact, using state power to enforce racial discrimination by covenants was ruled unconstitutional by the \textit{Shelley v. Kraemer} decision\textsuperscript{91}, and in any case, a RCA with overtly discriminatory policies will most likely be unattractive to most potential residents. As explained above, however, renters often lack voting rights yet are bound by RCA rules; they are therefore not treated as equals under the rules, and as a result, we must recognize that this might undermine the strength of RCA legitimacy. Even though renters may be aware of this policy when they

\textsuperscript{90} Of course, the ease of participation does not benefit liberal legitimacy-minded residents alone; those who would use the regulations for their private advantage or to restrict the rights of others beyond reasonable limits may be able to take advantage of the nature of RCAs as well. Even so, those who defend rule of law, pursuit of common interest, and reasonable property use policy have the means to fight these efforts, and it does not change the fact that the ease of participation is greater in a RCA (and indirectly, in a local government context) than in a traditional, larger political community.

agree to begin renting, to not have any formal way to offer input does diminish an important right. The size of some RCAs, however, is small enough to allow renters the opportunity to use informal methods of input (such as simply speaking with other residents), so the overall effect on legitimacy is perhaps not as negative as it may seem.

-Protection of Property Values

No discussion of RCAs would be complete without a discussion of property values. Property values are a matter of concern for residents because they affect the taxes property owners pay and the worth of one’s house. Because property values are heavily influenced by the nature of the development and the surrounding area, a person concerned with property values is necessarily a person concerned with the rules of a community and developments within and near the community. Because this interest is an immediate, relatively intense interest, people are likely to be attentive to changes which could affect their property values and to take action when their property values may be affected. As part of my research for this paper, I conducted several interviews with local residents active in RCAs and/or RCA-liaison associations: a common theme was that the protection of property values was the main reason for the existence of RCAs. Within a residential community context, property values are related mostly to property aesthetics, amenities, development costs, nearby schools, and the nature of nearby development.

There are inevitably conflicts over property rights and property values, as any number of activities done on or to one’s property affects not only one’s own property values but also those of surrounding residents. Such conflicts are not simply matters of “narrow” self-interest vs. common interest, as every person shares both an interest in having control rights over their own property and in the protection of their property values; practically, this means that people want the freedom to personalize their property, but want to limit the freedom of others to do the same. A natural, response to this is that in order to live peacefully amongst other people, people must accept limits to their freedom. Yet in the context of political (and moral) theory, this is usually limited to things involving drastic rights violations,

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92 In practice, many residents may not care much about their property rights; the variation in aesthetics enables potential residents to choose properties that match their preferences in this regard. This does not change the interest dynamic, however.
such as refraining from aggressively against others, and arguably, positive duties reflecting fairness (such as the duty to contribute to some sort of fund to help the lesser well-off). In the case of residential communities, the relevant “duty” is to abstain from behavior which lowers the property value of others; this may include altering the appearance of one’s house, where and what kind of vehicles are allowed, and the construction or demolishing of any structures. The rules governing such behavior range from the reasonable to the disconcertingly intrusive.

What sort, if any, of RCA restrictions on property rights, are morally justifiable? Certainly those which are aimed at protecting “second-parties” from harm (such as requirements to remove tall dead trees) are justifiable through the duty to avoid behavior which exposes non-consenting parties to unreasonable risks, but what of the rules limiting the paint colors residents may use, or the style of mailbox, or the size of flags they may fly? One promising approach to evaluating the moral validity of such restrictions is to invoke Mill’s Harm Principle. The trivial-seeming rules of RCAs are justified by claiming that behavior which lowers the property values of others, and in doing so, conceivably harms them. The question we face, then, is whether the decrease in property values due to another person’s behavior constitutes the sort of harm we have convincing claims against—claims which justifying preventive or punitive measures.

We can confidently say that there is no right to not suffer a property value decrease in general, for the following reasons: The value of anything (as in its price) is determined by the dynamic, interconnecting perceptions of individuals—and actions based on these perceptions—regarding its desirability. These perceptions are themselves functions of a variety of considerations, ranging from the supply and demand signals of the market to the idiosyncratic tastes of individuals (in fact, these signals are themselves influenced by these tastes). To assert a right against one’s property value decreasing at all is to demand that one’s property be immune from the forces of supply and demand, or for that matter, to demand that individuals value an object at a predetermined level; the former would damage an economy or market (even command economies are subject to supply and demand, and one of their flaws is that they try to ignore these signals), and the latter would be an intrusive denial of individuals’ agency.
But might we have a (moral, or “external”) right against specific, identifiable actions which decrease our property values (assuming we could know with certainty whether an action specifically caused a decrease in property values)? In order to prove the existence of such a right, we will have to show that there is a legitimate expectation against certain kinds of behavior. I am not confident that we can easily locate such an expectation. The business owner cannot have a legitimate expectation that his business will not suffer as a result of a superior competitor, for the very acts which lead to this loss are strongly seen as legitimate and reasonable (providing a superior product, a more efficient business model, etc); similarly, the actions often prohibited or regulated by covenants are merely aesthetic personalization on a person’s property which pose no risk to the well-being of others, and thus ought to fall well within the realm of reasonableness. Stated alternatively, most of the relevant actions associated with property ownership (such as customizing the appearance of one’s property) are best understood as falling within the rights of property ownership. The mere fact that an individual’s aesthetic tastes offend others is not a de facto valid reason for forcibly preventing or punishing their peaceful behavior involving the pursuit of tastes. Perhaps there is room for debate over what is reasonable (there may be a legitimate claim against a person who paints a Nazi swastika on their roof), but if I am correct then the legitimacy of many, if not most of the policies of RCAs is in serious doubt.

But there is a way to rescue these rules, and thus the legitimacy of RCAs. We must remember that when someone agrees to live in a residential community with regulations restricting the things one may do to their property, they are agreeing to give up their exclusive control over their property. Still, aside from the benefit of reasonable rules, if we are serious about protecting rights, then we cannot simply accept any and all rules emanating from an authority which has received even unanimous consent, for the possibility that rules which involve unacceptably extreme restrictions remains. Surely we would be justified in regarding laws forbidding criticism of the regime or instituting slavery as illegitimate, even if the government received total consent. Of course, these are extreme examples in the context of RCA rules, but there can be draconian restrictions on property rights which may render a rule nonbinding. In any case, due to the consent given by all who live in the community, RCA rules governing property ought
to be approached as legitimate; because of the presence of express consent or its functional equivalent, the burden of proof is on those who would claim illegitimacy.

Generally speaking, the comparison of RCA regulations to government laws will fall back on the difference between consent. One would be justified in bringing up the fact that government regulations are far more numerous and intrusive than RCA rules, thus creating a possible presumption that—at the very least—the burden to prove legitimacy is higher on traditional governments than on RCAs. Regardless of the truth of this claim, this is probably just a characteristic dependent on the fact that governments “already” have such regulations; in the absence of government regulation, it may be the case that RCAs would create such regulations. This would not by itself affect the legitimacy of RCAs, due to the possibility of previous knowledge of such rules and the status of consent; however, it would increase the likelihood that some rule may “go too far” and render itself illegitimate.

Exit Rights and Capabilities

As previously explained, the right to exit is relevant to legitimacy because when present, it acknowledges the right to travel and to choose one’s associations and because it allows people to escape the jurisdiction of unjust governments. The right to exit an RCA is certainly present, with the only formal restrictions being those relating to liens or legal obligations to disclose property-related lawsuits, and the laws governing the process of selling a residential property. Similarly to traditional government contexts, one reason people may exit their residential community is because they are unsatisfied with the covenant’s rules and/or the “culture of enforcement” in a residential community. If this is the reason for the desire to exit, it is likely that exercising one’s exit rights will only be used as a measure of last resort after all deliberative and dispute resolution actions have failed, due to the costs of exiting. In fact, the financial ability to relocate (outside of that community) is perhaps the most significant limit to the ability to exit for most people.93

93 It is plausible that the greater the financial costs of exiting, the stronger the incentives to shape RCA rules and enforcement to align with the desires of the residents will be. This may introduce more hostility into RCA life, but the end result may nevertheless be a more desirable, legitimate set of rules.
That said, exiting from a residential community is profoundly less expensive than doing so from larger political communities: while the financial, emotional, time, and information costs can be quite high at any level of moving, the greater the distance traveled, the greater these costs, thus generally, the larger the political jurisdiction a person is exiting from, the more expensive exiting will be. Because residential communities are the smallest political communities in many societies (certainly American society), exiting from these will be cheapest. Furthermore, larger political units (namely, countries) place far more formal obstacles in the way of potential émigrés: passports or visas, immigration quotas, and various bureaucratic requirements contribute to the already very high cost of emigration.

When one chooses to exit a residential community, one is also saddled with the choice of what sort of residential arrangement to move into; therefore, the “meaningfulness” of choice is relevant here. While all that legitimacy requires is for there to be no unreasonable formal burden or obstacle regarding exiting, the more various the options for new residential communities one has, the more “meaningful” their choice is, since it is more likely that they will be able to find an option which satisfies their preferences. The previously-discussed possibility that there may be only a few variations in the covenants of RCAs should, again, not be necessarily understood as a sign of a lack of meaningfulness: it may be the case that there is really only that much demand for variation, and there is always the fact that the “enforcement culture,” which may not be the sort of thing one can easily ascertain beforehand, can vary greatly. Furthermore, the residents can always attempt to change the regulations to their liking. While traditional governments may currently offer greater rule variety than RCAs, the vastly greater number of RCAs than traditional governments (which is ultimately reducible to the number of countries in the world) means that there is at least the possibility of far more meaningful choice in the former, given a certain amount of rule/enforcement variety.

Finally, it will not be in a resident’s interest to own a home in a development from which people are constantly fleeing; therefore, it is in each resident’s interest to attempt to build an accommodating culture in an effort to minimize exiting. In practice, this would mean attempting to keep regulations reasonable and to seek out more win-win solutions. If this culture does not develop—if attempts at
persuasion have fallen on deaf ears, and property rights remain overly limited, if violations are assessed arbitrarily or far too quickly, if neighbors are intolerant, etc.—exit provides a dignified, morally sound way to improve one’s situation. In conclusion, due primarily to the fewer and “cheaper” costs of exiting, RCAs enjoy greater legitimacy in the exit aspect than traditional governments.
CHAPTER V: CONCLUSION

This paper should be treated not as presenting a (new) normative theory of legitimacy or a definitive analysis of a phenomenon, but rather as offering a proposal for a methodological way of thinking about legitimacy and how a particular institution—residential community associations—may embody legitimacy. With regard to the former, using a basic liberal theory of legitimacy as my ethical standard, I argue that by assessing the nature of consent, participation, policy, and exit in a political regime, we can arrive a thorough understanding of its legitimacy. Because of the importance of each of these aspects to legitimacy, and due to its cross-aspect nature, legitimacy is best understood as having both an absolute and scalar nature. While there are some policies or actions that are decisively illegitimate, it is unclear what the total set of those such policies are, or even which rights are superior to others; therefore, for this reason, and the possibility of legitimacy differing between aspects and between governments, legitimacy—when present—is best interpreted along a “more/less” type scale. Such a scalar approach will allow for more nuanced assessments of legitimacy.

With regard to RCAs and legitimacy, my project is important because if we are truly committed to maximizing legitimacy in our political institutions, then we must be aware of the various possibilities to do so. More specifically, I have offered a normative complement to a Tieboutian-informed positive case in favor of RCAs. Though legitimacy theory has traditionally focused on “traditional governments,” I believe exploring legitimacy in private residential community associations is promising. A useful context in which to study legitimacy due to the similarities with traditional governments, RCAs prove an especially interesting case due to the presence of the functional equivalent of express consent, and the ease with which actual express consent may be located. If I am right about the presence of express consent/its equivalent, then I will have provided substantial evidence that this concept—both widely viewed as a very strong, if not the strongest form of consent yet also as impractical—is indeed useful in
real-world political institutions. Furthermore, RCAs have a stronger claim to legitimacy than traditional
governments, due to the particular kind of consent found in the former.

Using the four-part framework to analyze the legitimacy of RCAs returns promising results in the
remaining three aspects. The right to participate in the political process of RCAs (governed by majority
rule), and the ease with which it is done, not only meets the basic liberal democratic concerns regarding
the right to and importance of participate(ing) in the political process, but makes it easier for residents to
keep their “government” accountable. The status of participation is not perfect (the lack of representative
powers for renters is a glaring weakness), but even so, disenfranchised persons have an easier time
shaping policy as members of a residential community as they do as members of a body politic. Third,
from a policy perspective, the equal standing before RCA rules satisfies the liberal demand for equality
under the law, and the fact of unanimous consent to the RCA’s authority gives their rules a “default”
legitimacy. Of course, this legitimacy is not ironclad, as consent to a government does not completely
nullify one’s rights. Finally, exiting from an RCA is both easier than exiting from a government, and
there is at least the potential for a far more meaningful exit in the former than in the latter given the
number of the former when one considers the possibilities of rule variation. In conclusion, RCAs have a
strong claim to a high degree of legitimacy in each aspect and thus may be said to be highly legitimate
overall; furthermore, due mainly to the superiority of RCA consent, though not exclusively, one may even
be able to make a reasonable case that RCAs are more legitimate than traditional governments. That said,
the level of legitimacy in RCAs is likely to be far from what it could be, but there are a few observations
which may prove helpful in that regard.

The best chances for the maximization of legitimacy in RCAs are likely to be found in smaller
communities where all service provision is performed by ordinary residents. Furthermore, if residents
were to actively think about the connection between RCAs and legitimacy, the latter would likely be
improved, particularly in regard to participation and policy. Whether this is likely is unclear; it would
almost surely require the presence of a few motivated individuals who were able to represent this
perspective in an appealing way. That said, the potential for improved participation, if not more property-rights-friendly rules, is promising given the small scale of many residential communities.

One important issue remains to be considered: how are we to think of the legitimacy of RCAs (and traditional governments) insofar as the former are creations of the latter? Part of the answer to this will depend on to what extent RCAs are understood to be private organizations. I have mentioned numerous times, along with McKenzie, that governments are greatly involved in the regulation of RCAs.

To what extent can something be private insofar as its characteristics are controlled by governments? Abstracting from RCAs may help us understand this. Governments are deeply involved in many aspects of human action, yet we do not refer to those aspects as “public.” For example, markets are heavily regulated, but we do not consider them to be “public” endeavors. There are at least three likely considerations used when separating public from private endeavors: first, the actors (buyers, sellers, producers) are not usually acting in an official government capacity; two, there is a sense in which the word “public” is limited to that which the market cannot supposedly provide (“public” goods); lastly, there is another sense in which “private” or “voluntary” is attached to those things which we believe ought to be within an individuals’ control.

It is mostly with regard to the first point which makes RCAs seem more like a public institution. With so much of the regulations of RCAs originating either directly or indirectly from governments, the board members may feasibly be seen to an extent as informal “adjuncts of municipalities”; when one’s actions are more in line with the demands of another than one’s own preferences, then one is essentially acting as an agent of another as opposed to in one’s own agency. This may become more formal if McKenzie’s prediction about the drying of the “volunteer well” come true, as governments may have to take over more of the responsibilities of RCAs. Even if RCAs were to become “official” political subunits within local governments, they likely retain the strongest claim to legitimacy due to the likely continued presence of express consent or its equivalent and the other reasons explained above.

92 McKenzie 2011, 89, 92
There is also the question of history regarding legitimacy, RCAs, and traditional governments. Were we to take a historical account of the legitimacy of all political and economic institutions, we would find that virtually all governments and all property holdings are illegitimate. That conclusion, if taken seriously, (and inspired implementation of “correctives”), would likely result in vast amounts of harm and disruption, and is therefore simply not desirable, if not perhaps lead to even more illegitimacy. Instead, we can take political institutions as a given, and pursue legitimacy looking forward (and perhaps back to the recent past as well). With this view, we can acknowledge the superiority of the RCA model to traditional governments according to a liberal view of legitimacy and the analysis presented here, yet at the same time, recognize that a government which allows RCAs to exist (especially with some degree of autonomy) has its own legitimacy enhanced, insofar as it creates an institution in which “express” consent is possible, etc. Things are not quite that simple, for some government intervention may increase the legitimacy of RCAs; McKenzie discusses a recent state supreme court case (Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association) in which the court rejected a claim that the RCA rules should be bound by the state constitution protections of freedom of expression; McKenzie also claims that “something akin to a bill of rights could set some areas off-limits to the actions of the association and provide for their eventual dissolution if that became necessary,” thus injecting (more) Lockean rights/legitimacy theory into the RCA world. Ultimately, some regulation may decrease the legitimacy of RCAs, while some may increase it; yet even that which increases the legitimacy may diminish its’ status as a private, even voluntary (in the sense that the rules may become less open to resident change) phenomenon.

In summary, the best approach to RCAs and legitimacy regarding their connection to traditional governments is this: within the context of traditional governments, RCAs are government-like organizations that enjoy characteristics supporting a “strong” classification of legitimacy; that is, they are likely to be the most legitimate governments. Should they become extensions of traditional states, they

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are likely to remain most legitimate level of government. Either way, the legitimacy of traditional governments is enhanced by the presence of RCAs, though the level of legitimacy will depend on the extent to which RCA autonomy and individual rights are protected; thus.

There is still much conceptual and “practical” analysis left which would greatly improve our understanding of legitimacy and its relationship to residential community associations. One such theoretical issue is to better explore how, or if, the four different aspects of legitimacy could work together to function as a normative tool for analyzing legitimacy. Part of this project will include further consideration of how and when legitimacy, or the lack thereof, can “cross aspects.” Another theoretical issue is to what kind of a role should toleration play in regards to RCAs; what should be done, for example, about a racist community living in the midst of a liberal one?

Yet another important issue is the likelihood of RCAs to encourage sociopolitical fragmentation and other potentially negative trends, and whether the advancements in legitimacy and participation might override these trends (or whether the trends are truly that negative). The critical urban theorists have produced much pessimistic literature in this context, arguing that “the spread of private governance…represents deterioration of the public realm and portends a sharp spatial polarization between the haves and have nots,” and Mike Davis, in City of Quartz, depicts late twentieth-century Los Angeles as being split into “fortified enclaves for the affluent and militarized public spaces where a hostile police force terrorizes the poor,” with the ultimate implication being that urban communities are experiencing a shift into a “postliberal” era.96 Robert Reich, former Secretary of Labor, gave this view its most famous slogan when he decried the “secession of the successful.”97

Finally, perhaps one of the most general yet interesting results of this paper is the provision of evidence that legitimacy is best achieved in small political units. While RCAs may not be able to serve as


much of a model for most traditional governments, partially due to their large size making express consent or its functional equivalent impossible, if we seek to maximize legitimacy, this fact (and the analysis of RCAs given here) should play a prominent role in analyzing the legitimacy of certain innovative projects such as charter and free cities.

More empirical routes of analysis could explore how the variation in “density contexts” (urban, suburban, etc) affects the nature of the problems RCAs face and the services they provide. A second issue deserving further research is what socioeconomic and legal trends point to as far as the future of residential culture and political institutions. Might RCAs as they presently exist be an anachronism in the near future? Will they continue on the path towards total assimilation into traditional local governments? Perhaps, but until then, we should recognize that they presently do—or at the very least, are capable—of achieving a level of legitimacy not commonly found in our current world. Yet the maximization of legitimacy will only be achieved through the dedicated, active participation of legitimacy-minded residents with a sense of sober optimism. If I am correct, and if these kinds of residents become active, then contrary to popular wisdom, it very well may be that the home is the heart of legitimacy.
CHAPTER VI: WORKS CITED


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