CONTRACTING COMMUNITIES

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Private residential developments governed by homeowners associations have rapidly proliferated in recent decades. The servitudes that form the backbone of these private developments are usually viewed as autonomy- and value-enhancing private contractual arrangements that are presumptively valid. Unfortunately, the appealing contractual justification for private land use regimes seems to have shut down many of the usual paths of inquiry into the ability of the resulting arrangements to deliver on consumer preferences. In this article, Professor Fennell seeks to bring the theory surrounding these developments up to speed by focusing on factors that can drive a wedge between homeowner preferences and the private land use regimes that the market provides.

In many parts of the country today, a homebuyer who wishes to purchase a new home is likely to find that home in a private development governed by a homeowners association.[1] The growth of such communities has exploded over the last few decades, and shows no sign of slow-

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1. *See, e.g.,* NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 112 (1998) (noting that seventy percent of new housing in Los Angeles and San Diego counties is within residential community associations and that such communities "make up more than 50 percent of new home sales in the fifty largest metropolitan areas"); Stephen E. Barton & Carol J. Silverman, *Common Interest Communities: Private Government and the Public Interest Revisited*, *in* COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST 31, 36 (Carol J. Silverman & Stephen E. Barton eds., 1994) (noting that "in some areas very little is available that is not in such a development"); David L. Callies et al., Ramapo *Looking Forward: Gated Communities, Covenants, and Concerns*, 35 URB. LAW. 177 (2003) (discussing growth of common interest communities).

ing.[2] The resulting transformation of U.S. neighborhoods, cities, and metropolitan areas promises to be profound. Robert Nelson has suggested that this shift "may yet prove to have as much social significance as the spread of the corporate form of collective ownership of private business property in the second half of the nineteenth century."[3] These private developments, which go by a variety of names in the literature,[4] are remarkably diverse. They can be either gated or ungated, can comprise anything from a single condominium building to a large neighborhood of single-family homes, and may be targeted at consumers in a variety of income strata.[5] However, all such developments are organized around the same principle: the use of servitudes to privately control land use.[6]

In private developments, a reciprocal, community-wide set of conditions, covenants, and restrictions (CC&Rs) controls each homeowner's use of her own property, the use and maintenance of common property and amenities, and other details of community life and governance.

2. The Community Associations Institute estimated that there were 249,000 community associations in the United States in 2003, housing approximately fifty million people. CMTY. ASS'NS INST., DATA ON U.S. COMMUNITY ASSOCIATIONS (2003), *at* http://www.caionline.org/about/facts.cfm (last visited June 14, 2004). About half of these were planned communities; five to seven percent were cooperatives; and the balance were condominiums. *Id.* For background on the history and recent explosive growth of these forms of housing, see Robert H. Nelson, *Zoning by Private Contract*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 157, 159–66 (F.H. Buckley ed., 1999).

3. Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, *in* THE VOLUNTARY CITY: CHOICE, COMMUNITY AND CIVIL SOCIETY 307, 307 (David T. Beito et al. eds., 2002); *see* Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 5 (1989) ("Residential associations . . . have proliferated so much in the past two decades that they may represent the dominant aspect of the late twentieth century contribution to American residential group life.").

4. Terms include "common interest developments," "common interest communities," "proprietary communities," "residential community associations," "homeowners associations," "property owners associations," and so on. One difficulty in selecting appropriate terminology inheres in the fact that the community is one thing, and its governance structure another. Here, I will use the term "private development" to reference the community itself, and the term "homeowners association" to refer to its governance apparatus.

5. Private developments are no longer the exclusive domain of the very wealthy, and are increasingly marketed to people of more modest means. Nevertheless, the poor are not typically found within these developments. *See* Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 82 (1998) (observing that "although RCAs [residential community associations] appear in many varieties, in most of them members are relatively homogeneous and also relatively prosperous (or at least not poor)").

6. *See, e.g.,* RESTATEMENT (THIRD) OF PROP.: SERVITUDES, ch. 6, introductory note (2000) (noting that "[s]ervitudes underlie all common-interest communities, regardless of the ownership and organizational forms used"); Nelson, *supra* note 2, at 158–59 (observing that despite the variety of names given to private developments, "[a]ll these types of arrangements have in common that they internalize neighborhood interdependencies under a collective form of private ownership"); Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 279 (1976) (noting the centrality of law of servitudes, as well as that of voluntary associations, to private developments); *id.* at 279–80 (explaining that the servitudes in private communities can be understood as "discretionary" ones insofar as the private governance system can alter them later, and describing these "discretionary servitudes" as "the key to the proper functioning of the entire residential private government system").

Upon entering the community, homeowners automatically become members of a mandatory homeowners association and are obligated to contribute financially to the services and amenities provided by the association. The servitudes that form the backbone of private developments are usually treated as autonomy- and value-enhancing private contractual arrangements that are presumptively valid.[7] Consumer reactions to private developments, and reports of those reactions, have been mixed.[8] While this form of ownership is plainly thriving, significant numbers of these communities have become hotbeds of litigation and acrimony.[9]

7. *See* Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 693 (1993) (noting that courts tend to afford a "strong presumption of validity" to the restrictions set out in the declaration); *see also infra* notes 29–33 and accompanying text.

8. The Community Associations Institute (CAI) reports survey results that suggest homeowners who live within community associations have slightly more positive perceptions of their communities or neighborhoods than homeowners who are not community association members have of their own communities or neighborhoods. *See* CMTY. ASS'NS INST. RESEARCH FOUND., NATIONAL SURVEY OF COMMUNITY ASSOCIATION HOMEOWNER SATISFACTION 60 (1999) (reporting that members of community associations returned a mean score of 3.97 on a five-point scale running from very negative (1) to very positive (5), while nonmembers returned a mean score of 3.92). It is doubtful that any meaningful inferences can be drawn from these results, given that there were many demographic differences between the groups for which no controls were attempted. *See id*. at 61–67. For example, nearly half (forty-nine percent) of the community association members surveyed had incomes of $55,000 or more, while only twenty-eight percent of the surveyed nonmembers had incomes that high. *Id*. at 64. Another CAI survey result shows seventy-five percent of community association members were satisfied with their association experiences, *id.*, but again, interpreting these results proves difficult. *See* Paula A. Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553, 559 (2002) (noting that survey results reported by the CAI are "significantly at odds" with other available information about community association life); Wayne Hyatt, *Reinvention Redux: Continuing the Evolution of Master-Planned Communities*, 38 REAL PROP. PROB. & TR. J. 45, 57–58 (2003) (critiquing Franzese's critique of the survey results, but observing that a seventy-five percent approval rating is not a sign of great success in an industry housing some fifty million people). For additional views on the level of consumer satisfaction within private developments, see, for example, Gregory S. Alexander, *Conditions of "Voice": Passivity, Disappointment, and Democracy in Homeowner Associations*, *in* COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST, *supra* note 1, at 145, 162 (concluding, based on his interviews with residents in HOAs, that the "[r]esidents of the HOA-governed developments studied do not appear to be 'happy campers'"); Robert C. Ellickson, *The (Limited) Ability of Urban Neighbors to Contract for the Provision of Local Public Goods*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT, *supra* note 2, at 192, 194 (noting the "resounding market acceptance" of these communities); Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods,* 7 GEO. MASON L. REV. 827, 865 (1999) ("The fact that so many people, including people with many options, chose this style of private living is strong evidence that it has much to offer."); James L. Winokur, *Choice, Consent, and Citizenship in Common Interest Communities, in* COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST, *supra* note 1, at 87, 115 (discussing homeowner dissatisfaction as manifested in apathy and litigation).

9. *See, e.g.,* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.13 cmt. b (2000) (observing that "the quantity of litigation arising out of homeowner challenges to association actions in recent years may be regarded as excessive"), *quoted in* Paula A. Franzese, *Building Community in Common Interest Communities: The Promise of the Restatement (Third) of Servitudes*, 38 REAL PROP. PROB. & TR. J. 17, 41 (2003) [hereinafter Franzese, *Building Community*]; Spencer Heath MacCallum, *The Case for Land Lease Versus Subdivision: Homeowners' Associations Reconsidered*, *in* THE VOLUNTARY CITY: CHOICE, COMMUNITY AND CIVIL SOCIETY, *supra* note 3, at 371, 372 ("[J]udging from the numbers of complaints and litigation, these neighborhood governments are often arbitrary, unresponsive, and dictatorial."); *id.* at 390 ("CIDs are notorious for their litigiousness."). Ideally, we would want to know

The notion of voluntary residential communities based on contractual free choice has generated a robust, ongoing scholarly debate. On the one hand, these private developments are often viewed as representing a laudable shift in the direction of consumer choice.[10] On the other hand, critics question the extent to which the developments represent a voluntary choice on the part of homebuyers, and express concern about the impact of privately administered servitude regimes on those within the regimes, as well as on society at large.[11] As the construction of new private developments continues apace, scholars also have begun discussing the possibility of extending the private development template to ordinary neighborhoods.[12] The possibility that covenant regimes might supplant zoning as the dominant form of land use control in this country has thus enjoyed an important recent revival[13]—one that may have long-lasting implications for the meaning of residential choice.

As useful as the burgeoning literature on private developments has been, it has largely failed to come to grips with a number of factors that may keep such communities from being value maximizing for the people who live within them, assuming for present purposes that this is the relevant goal. The literature also has failed to glean and adapt insights from existing theoretical analyses in related areas, such as zoning and pollution control. As a result, we are suffering from a kind of "theory lag" with regard to these rapidly proliferating communities.[14] The appealing

whether there is more litigation among neighbors inside private developments than outside of them (after controlling for the relative sizes of the populations). Silverman and Barton ask the right question: "[A]re the problems of associations any worse than those of a small town government?" Carol J. Silverman & Stephen E. Barton, *Shared Premises: Community and Conflict in the Common Interest Development*, *in* COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST, *supra* note 1, at 141, 141. They do not have data on this point, but they speculate that the problems "are worse because of the ways CIDs differ from small town governments, but many, although not all, differences may be more a matter of degree than of kind." *Id; see also* Franzese, *supra* note 8, at 573 (discussing study showing forty-four percent of 600 HOAs surveyed had been threatened with litigation in a single year) (citing Dennis R. Judd, *The Rise of the New Walled Cities*, *in* SPATIAL PRACTICES 144, 158 (Helen Ligget & David C. Perry eds., 1995)); James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 63–64 (discussing "mushrooming litigation" and other indications of dissatisfaction among residents in association-controlled communities).

10. *See, e.g.,* Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982); Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375 (1994).

11. *See, e.g.,* EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT (1994); Winokur, *supra* note 9.

12. *See, e.g.,* Nelson, *supra* note 2, at 171–77 (proposing formation of private neighborhood associations to govern existing neighborhoods); Steven J. Eagle, *Devolutionary Proposals and Contractarian Principles*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT, *supra* note 2, at 184 (discussing and critiquing this proposal).

13. The idea that land use could be successfully controlled without zoning has been around for some time. *See, e.g.,* BERNARD H. SIEGAN, LAND USE WITHOUT ZONING (1972); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

14. *See, e.g.,* Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303, 306 (1998) (noting that the topic has not been addressed in sufficient depth to ensure "that the legal evolution will keep pace with the practical evolution"); Winokur, *supra* note 8, at 116 ("The sheer size and suddenness of the community associations' movement, and the complexity

contractual foundation of private developments seems to have shut down many of the usual paths of inquiry into the ability of the resulting arrangements to deliver on consumer preferences. If one assumes that private developments are here to stay, then a first step is to bring the theory surrounding them up to speed with the reality of these communities. The goal of this article is to begin that process.

A few preliminary words about the nature and scope of the inquiry are in order. First, my analysis centers on a particular subset of difficulties—those arising from land use controls in private developments made up of single-family residences. While portions of the analysis are more broadly applicable to other types of private developments[15] and to other sorts of problems arising within them, this focal point provides a useful means of illustrating and unpacking the relevant theoretical issues.

Second, this article does not set out to demonstrate the normative inferiority, on balance, of covenant-based land use arrangements as compared with zoning, nor of private developments as compared with traditional neighborhoods. I make no claims about whether people are, other things equal, more unhappy or more litigious in private developments than in traditional neighborhoods. Nor am I suggesting that the difficulties of living together in a community are uniquely present in private developments; indeed, most of the problems I discuss have analogues in traditional neighborhoods. However, certain aspects of these problems are presented more starkly in the private development context than in traditional neighborhoods, and, more importantly, have not yet received the theoretical attention that might lead to their amelioration. My goal is to identify some unexplored and underexplored reasons why private developments might fail to live up to the promise associated with enhanced consumer choice and autonomy. Many of these problems may be remedied by appropriate adjustments in the private arrangements and in background legal rules.[16]

Third, to focus my inquiry on the success of private development arrangements for the parties involved, in this article I will consciously set aside any discussion of the impact of the exclusion practiced by private developments on those who are excluded and on society at large. Those questions are important ones, but I am deferring them to a later day to answer logically antecedent questions about the value and workability of the private development arrangement for those who are in a position to

of its components . . . all suggest that the CIC ownership vehicles will require substantial adjustment and refinement well into the future.") (footnote omitted).

15. The cooperative ownership form both differs significantly from that of other common interest communities and implicates different sets of legal and policy questions than those I discuss here. Residents in housing cooperatives are shareholders in a corporation that holds title to the entire building and hold long-term leases rather than fee interests in their individual units. *See* WAYNE S. HYATT & SUSAN F. FRENCH, COMMUNITY ASSOCIATION LAW: CASES AND MATERIALS ON COMMON INTEREST COMMUNITIES 23 (1998).

16. *See infra* Part VI (providing some preliminary thoughts on possible ways of addressing these problems).

choose it. Until we understand how private developments work for those who live in them and who presumably have the most to gain from them, it is difficult to carefully frame any tradeoffs that might exist between the interests of those inside the communities and those on the outside.

For similar reasons, this article does not provide any definitive policy proposals, although it does provide some concluding observations about the prospects for resolving the problems I identify. This article constitutes only one piece of what ultimately will be a larger inquiry. Before offering policy prescriptions or deciding what the role of the law should be, it will be necessary to assess the role of externalities generated by private developments, including the impact on those who are excluded. It might well be the case that the most direct methods of resolving the concerns discussed here, which are internal to private developments, would merely permit private developments to more easily generate costly externalities. In other words, it will be necessary to put together the interior view presented here with an exterior view of private developments before saying anything definitive about the appropriate direction for legal reform. This integration of internal and external views also will be essential in answering larger questions of land use control, such as the desirable respective roles of municipal and private control.

The analysis here proceeds in six parts. I begin by sketching the conceptual underpinnings of private developments, after outlining some of the relevant features of the legal landscape in which they are presently multiplying. Part II examines the problems that arise from the fact that servitudes are typically uniform—and uniformly enforced—across an entire community. The inability of individuals to work out private deals that would selectively release them from a given servitude is directly analogous to the problems that are notorious in the zoning context. Part III examines two dynamics that might push servitude regimes toward a stricter convergence point than many individuals might desire: the interaction of numerous servitude regimes within the same metropolitan area and the path dependence of community formation. Part IV considers some additional obstacles to the realization of consumer preferences in servitude regimes, including gaps in consumer understanding and difficulties that consumers face in effectively sending market signals to developers. Part V considers the implications of a contract-based and association-administered regime for the development and deployment of norms and social capital within a community. The argument here is that the structural arrangements could get in the way of certain potentially value-maximizing interactions. Part VI presents some concluding observations.

I. AN OVERVIEW OF PRIVATE DEVELOPMENTS

The concept of a private community controlled by servitudes dates back to at least the eighteenth-century English practice of building a clus-

ter of homes around a common square.[17] While some common interest developments appeared in the nineteenth and early twentieth centuries in the United States,[18] most land use control in this country has been accomplished through zoning, an approach that swept the country beginning in the 1910s.[19] In 1960, there were less than 500 homeowners associations managing common property in the United States.[20] As of 2003, there were an estimated 249,000 such communities.[21] What is new, then, is the prevalence of this form of private common ownership and its subtle replacement of one regime of land use control with another, very different system.

A. Contractual Justifications and Running Covenants

Servitudes differ from contracts in that they bind successors of the original parties—that is, they "run with the land."[22] While this feature historically caused servitudes to be viewed with judicial skepticism as problematic restraints on alienation, the modern trend, beginning more than a century and a half ago, has been to relax formal impediments to servitude enforcement.[23] An increasing reliance on contract principles and rhetoric accompanied this shift, as James Winokur explains:

17. *See* Stephen E. Barton & Carol J. Silverman, *History and Structure of the Common Interest Community, in* COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST, *supra* note 1, at 1, 7.

18. *See id.*; Gerald Korngold, *The Emergence of Private Land Use Controls in Large-Scale Subdivisions: The Companion Story to* Village of Euclid v. Ambler Realty Co., 51 CASE W. RES. L. REV. 617, 619–22 (2001) (discussing "community builders" of the early twentieth century and the covenant-controlled community developed by the Van Sweringen brothers). Racially restrictive covenants became common during the early part of the twentieth century. *See* Richard H. Chused, Euclid's *Historical Imagery*, 51 CASE W. RES. L. REV. 597, 606 (2001). The Supreme Court held that racially restrictive zoning violated the Fourteenth Amendment in *Buchanan v. Warley,* 245 U.S. 60, 82 (1917), but signaled the validity of private restrictive covenants for this purpose several years later in *Corrigan v. Buckley*, 271 U.S. 323 (1926), *dismissing appeal from* 299 F. 899 (D.C. Cir. 1924). Homeowners associations with the sole purpose of enforcing racially restrictive covenants receded after 1948, when the Supreme Court held in *Shelley v. Kraemer*, 334 U.S. 1 (1948), that judicial enforcement of racially restrictive covenants violated the Constitution. Barton & Silverman, *supra* note 17, at 9–10. *But cf.* Richard W. Brooks, Covenants & Conventions 12 (2002) (Inst. for Policy Research Working Paper No. WP-02-03) (suggesting that unenforceable racially restrictive covenants continued to play a signaling role for a significant period of time after *Shelley*), *available at* http://www.northwestern.edu/ipr/publications/papers/2002/WP-02-03.pdf.

19. *See* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 213 (2001) (discussing rapid spread of zoning after 1910); Ellickson, *supra* note 13, at 692 ("Today, zoning is virtually universal in the metropolitan areas of the United States, where more than 97 percent of cities having a population over 5,000 employ it.").

20. Barton & Silverman, *supra* note 17, at 10.

21. *See* CMTY. ASS'NS INST., *supra* note 2.

22. *E.g.,* Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 215 (1992) (explaining that "[u]nlike contractual rights, private land arrangements are enforceable by current and future owners against current and future owners"); Reichman, *supra* note 6, at 279 (noting that servitudes in residential associations "'run with the land' and bind subsequent purchasers").

23. For an historical overview of the law of servitudes, see, for example, Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177 (1982). *See also* Winokur, *supra* note 9, at 4–5 ("Since the mid-nineteenth century, courts have liberalized doctrines that had once limited the

> Contract concepts were used to reconceptualize arrangements affecting but not transferring possession, arrangements previously rejected as violating strict property principles. Promissory servitudes restricting land use, earlier disdained in a property-dominated society as title encumbrances hindering alienability, came to enjoy recognition in the service of an expanded, modern market in which land-related contract obligations (alternatively conceived of as fractionated property rights) were recognized as transferable commodities.[24]

The roots of this conceptual move towards contract can be traced back to the 1848 English opinion, *Tulk v. Moxhay*,[25] the case that found a servitude binding in equity on a successor landowner, despite the absence of horizontal privity.[26] Characterizing the case as one of contract enforcement, the court stated, "the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased."[27] Another significant data point in the trend line is the 1929 case of *Dixon v. Van Sweringen Co*.[28] This case signaled a judicial shift from suspicion of covenants to a reconceptualization and appreciation of their value-enhancing potential.[29] The *Dixon* court characterized the covenant as a contract that had been freely accepted by the individual who purchased the land to which the covenant was attached.[30] The court treated the parties bound by the covenant like any other contracting parties who had made a deal in order to achieve a mutually beneficial result, concluding that "we see no reason for denying the right of these parties to contract between themselves, the result of such contracts . . . [being] to create a highly exclusive and valuable residential district."[31]

This judicial move tracks the contractarian argument for recognizing covenants that run with the land. Gregory Alexander explains:

> The standard explanation used to reconcile running covenants with individual freedom is that a legal system that holds a subsequent owner to a promise made by a predecessor is in fact enforcing private intentions. The intentionalist model necessitates assuming that

enforceability of promissory servitudes between successors. More recently, commentators have urged further liberalization and simplification.") (footnote omitted); *id.* at 11–16 (tracing historical development of promissory servitudes).

24. Winokur, *supra* note 9, at 13–14 (footnote omitted).

25. 41 Eng. Rep. 1143 (Ch. 1848); *see also* Winokur, *supra* note 9, at 13 (discussing *Tulk*).

26. *Tulk*, 41 Eng. Rep. at 1143.

27. *Id.* at 1144–45.

28. 166 N.E. 887 (Ohio 1929).

29. *See* Korngold, *supra* note 18, at 623 ("*Dixon* is an important milestone in de-demonizing real covenants and in recognizing the value and importance of subdivision arrangements.").

30. *See id.* at 624.

31. *Dixon*, 166 N.E. at 892; *see* Korngold, *supra* note 18, at 624 (observing that "[u]nlike other courts, the *Dixon* court treated real covenants like other contracts deserving of enforcement under the concept of freedom of contract").

> the person who succeeded to the promisor's estate has assented to the obligation even though he may never have expressed his consent. The purchaser manifested her assent simply by purchasing land subject to a discoverable obligation. The obligation is not law-imposed but privately created, and the whole regime of land-use obligations running with the land is thereby erected on the foundation of free choice.[32]

Courts now consistently view servitudes as vehicles capable of facilitating the autonomous choices of individuals and enhancing the value of land.[33]

B. Homeowners Associations and the Law

Using the law of servitudes as a starting point, courts, legislatures, and bodies such as the American Law Institute and the National Conference of Commissioners on Uniform State Laws have sought to shape and define the legal terrain within private developments.[34] In addition to common law, there is a significant body of statutory law governing private developments. Much legislation goes to broader questions of structure and governance,[35] but some state statutes place specific substantive limits on permissible use restrictions[36] or set out presumptions regarding restrictions and homeowner association actions.[37] Federal statutes, such

32. Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 889 (1988).

33. Winokur, *supra* note 9, at 15 ("The perceived value-enhancing effect of servitudes is buttressed by the corollary perception that servitudes increase the liberty of landowners, allowing them increased autonomy and control over their own assets.").

34. The American Law Institute recently completed the Third Restatement of Property, Servitudes, which contains a substantial chapter devoted to common interest communities. *See* RESTATEMENT (THIRD) OF PROP: SERVITUDES, ch. 6 (2000). The National Conference of Commissioners on Uniform State Laws drafted the Uniform Common Interest Ownership Act (UCIOA), which was originally enacted in 1982, and later amended in 1994. The 1982 version was adopted by six states (Alaska, Colorado, Minnesota, Nevada, West Virginia, and Connecticut), *see* UNIF. COMMON INTEREST OWNERSHIP ACT (1982), 7 pt. 2 U.L.A. 1–2 (2002) (prefatory notes), and the 1994 version has been adopted by Connecticut and Vermont, *see* UNIF. COMMON INTEREST OWNERSHIP ACT (1994), 7 pt. 1 U.L.A. (1997 & 2003 supp.) (prefatory notes). The UCIOA was designed to unify three previous uniform laws addressing common interest forms of ownership: the Uniform Condominium Act, the Uniform Planned Community Act, and the Model Real Estate Cooperative Act. *See* 7 pt. 1 U.L.A. 472 (1997) (prefatory note).

35. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 925 (5th ed. 2002) (describing how nearly every state has a statute addressing the organization of common interest communities, requiring, among other things, that governing rules be set out in a declaration and disclosed to purchasers).

36. *See, e.g.,* CAL. CIVIL CODE § 1360.5 (Deering Supp. 2001) (limiting the restrictions that homeowners associations can place on pet ownership); DEL. CODE ANN. tit. 25, § 2242 (Supp. 2002) (stating that no regulation, restriction, or covenant may impair the right of a unit owner to display an American flag measuring up to three feet by five feet on a pole outside the unit); TEX. PROP. CODE ANN. § 5.025 (Vernon 1984) ("To the extent that a deed restriction applicable to a structure on residential property requires the use of a wood shingle roof, the restriction is void.").

37. *See, e.g.,* CAL. CIVIL CODE § 1354(a) (Deering Supp. 2001) (use restrictions set forth in the recorded declaration are "enforceable equitable servitudes, unless unreasonable"); TEX. PROP. CODE ANN. § 202.004 (Vernon 1995) ("An exercise of discretionary authority by a property owners' association or other representative designated by an owner of real property concerning a restrictive covenant is presumed reasonable unless the court determines by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory.").

as the Fair Housing Act,[38] impose additional substantive limits on servitudes.

While a comprehensive survey of the present state of homeowners association law is beyond the scope of this article, it is helpful to point out a few features of the law in this area, beginning with a brief outline of the typical process through which homeowners in a private community become bound by servitudes on the land. In the usual case, a developer drafts and records a master deed, also known as a declaration, which contains a set of CC&Rs. These vary in content from development to development, but often include deed restrictions that limit the uses to which the property may be put. Restrictions designed to preserve certain aesthetic values, such as limits on paint color, yard art, structural changes, fences, building materials, and the like are commonplace. Because the content of the declaration is determined before any lots in the development have been sold, homeowners purchase their homes with the community-wide deed restrictions already attached. These are servitudes that run with the land, and thus they are binding not only on the original set of homebuyers, but also on their successors. Changes in the CC&Rs are possible not only through negotiated releases, but also through amendment procedures set out in the declaration itself.[39] New use restrictions can also be added as provided in the original declaration.[40] The result is a two-tiered set of restrictions: those initially contained in the CC&Rs that were part of the declaration and new restrictions adopted later.[41]

Some courts have treated these two types of restrictions differently.[42] The former are often treated as presumptively valid unless viola-

38. 42 U.S.C. §§ 3601–3619, 3631 (2000).

39. Reichman, *supra* note 6, at 279 (explaining that residential private governments add to traditional property servitudes a grant of "comprehensive powers to the association" including, among other things, "the right to impose new restrictions, amend or annul old ones, [and] apply and specify the standards of existing restrictions (for example, architectural controls)").

40. *Id*. The association's power to make reasonable rules governing the use of property can also be implied. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7 (2000) (providing for implied rulemaking powers except where inconsistent with statute or governing documents, but limiting the scope of that power).

41. New restrictions can be further broken down into two different categories, based on the way in which they were introduced: (1) through amendment of the original declaration, which typically requires a supermajority vote; and (2) through enactment of new rules based on explicit or implicit rule-making powers reserved to the homeowners association, which typically requires only action by the governing board or a simple majority vote. The new Restatement treats these two categories of new restrictions differently. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7 cmt. b (2000) (distinguishing "rules" from amendments to the declaration, and providing a rationale for the limits its default rule places on the former).

42. *See* Hidden Harbour Estates, Inc. v. Basso, 393 So. 2d 637, 639 (Fla. Dist. Ct. App. 1981) (distinguishing between these two categories of restrictions and observing that restrictions found in the declaration "are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed"); *see also* Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275, 1283–84 (Cal. 1994) (noting this distinction). The new Restatement also draws a distinction between restrictions contained in the declaration and later-enacted rules; it creates a default rule against new rules on use or occupancy of individual

tive of public policy or otherwise shown to be arbitrary and without any basis.[43] Indeed, at least one court has taken the position that restrictions in the declaration evincing a degree of unreasonableness would be upheld.[44] The reason for presumptive enforcement of these restrictions arises out of the contract-based justification discussed above.[45] Where the purchaser had constructive notice of the restriction at the time of purchase, as will be the case for the CC&Rs contained in the declaration, the purchase is construed as consent to the restriction.[46] Later-enacted restrictions strain the contract analogy, because they can be enacted without the consent—indeed over the objections—of a given unit owner.[47] Here, courts will usually apply a rule of reasonableness.[48] Robert Natelson describes the differing approaches to the two sorts of rules as follows:

> When a complaining unit owner has approved an association decision by an act of effective consent, a court generally enforces the decision without inquiry into its reasonableness. When the complaining unit owner has not effectively consented, a court constructs a hypothetical bargain, that is, it substitutes the rules of constructive consent called reasonableness review. Reasonableness review is informed by the same efficiency, unanimity, and compensation prin-

units that were not contained in the declaration, except to the extent those new restrictions apply to or control impacts upon commonly owned property. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7 (2000). The Restatement's default approach would, however, apparently permit amendments to the declaration to introduce new restrictions. *See supra* note 41.

43. *See, e.g.,* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7 cmt. b (2000) (taking the position that "[s]ervitudes included in the declaration are valid unless illegal, unconstitutional, or against public policy"); Brower, *supra* note 22, at 240–42 (discussing the high degree of deference that courts afford original covenants in private developments).

44. *See Hidden Harbour Estates*, 393 So. 2d at 640 (explaining that "a use restriction *in a declaration of condominium* may have a certain degree of unreasonableness to it, and yet withstand attack in the courts" and observing that otherwise owners would be unable to rely on these restrictions "since such restrictions would be in a potential condition of continuous flux") (emphasis in original).

45. *See supra* text accompanying notes 22–23.

46. *See, e.g.,* Brower, *supra* note 22, at 216 ("[S]tate disclosure laws and real estate policies mean that each homeowner essentially is entering into an original consensual transaction with neighbors and the residential association. . . . Therefore, consent, rather than land ownership or status, is the key to servitude enforcement."); *see also infra* note 87 and accompanying text (discussing commentators' analytic focus on consent).

47. One can, of course, argue that even those who are outvoted with regard to a given change still "consented" to it because, by entering the community (or failing to leave it), they agreed to be bound by the development's procedures for making changes. *See, e.g.,* Brower, *supra* note 22, at 243 (discussing this argument); Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 274, 282 (1997) (describing this view). On this reasoning, however, implied consent to all outcomes generated by a known political process would also be present whenever a person chooses to enter (or decides not to exit) any political subdivision. *See infra* note 87 (discussing significance of consent-based distinctions between cities and private developments).

48. Some jurisdictions apply a "business judgment rule" rather than a reasonableness test in reviewing the actions of board members. *See* Levandusky v. One Fifth Ave. Apartment Corp., 553 N.E.2d 1317, 1321–23 (N.Y. 1990) (adopting a business judgment rule in reviewing cooperative board's actions with respect to a kitchen renovation).

ciples that inform certain other areas of private law in situations in which genuine consent is not practicable.[49]

Enforcement of use restrictions and other matters of association governance are handled by the association's managing board.[50] This approach facilitates the enforcement of covenants in private developments by solving the collective action problem that otherwise would exist if individual landowners were left responsible for enforcement.[51]

An association's failure to enforce a given servitude in one setting may weaken its ability to enforce the same servitude in another setting.[52] Although framed in various ways, this principle shows up with some regularity in decided cases. For example, covenants may be deemed abandoned through nonenforcement, such that they will not be enforced.[53] Alternatively, enforcement in a community may be deemed so

49. Robert G. Natelson, *Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41, 87 (1990).

50. *See* ROBERT G. NATELSON, LAW OF PROPERTY OWNERS ASSOCIATIONS § 3.5.1, at 101–03 (1989) (describing powers and duties of the managing board); *see also* Neponsit Prop. Owners' Ass'n, Inc. v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938) (holding that a homeowners association could sue to enforce covenants within the development, despite the fact that the association owned no land and was not in privity of estate with any party benefited by the covenants); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.8 cmt. a (1998) (noting that historical doubts about the ability of a homeowners association to enforce servitudes without owning benefited land "have long been resolved" in favor of allowing such enforcement).

51. *See, e.g.,* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.8 cmt. a (1998) (explaining that "collective enforcement by the community is one of the chief benefits of owning property in a common-interest community" because "[t]he association is able to spread the costs of enforcement over the entire community"); Nelson, *supra* note 8, at 832 (explaining that "[e]nforcement of covenants to protect the quality of existing neighborhoods often proved unreliable, because no one entity was responsible for bringing the necessary legal actions. Collective private ownership provided the developer a way of overcoming the free rider problem."); *infra* note 226 and accompanying text (further discussing the free rider problem solved through centralized enforcement).

52. *See, e.g.,* HYATT & FRENCH, *supra* note 15, § 8.04(A)–(C) (presenting materials on defenses of arbitrary application, selective enforcement, and waiver); Hyatt, *supra* note 8, at 51–52 (discussing role of formalism and a variety of judicial doctrines in perpetuating the belief that community associations must enforce rules to avoid setting a bad precedent); Jay Weiser, *The Real Estate Covenant as Commons: Incomplete Contract Remedies over Time*, 13 S. CAL. INTERDISC. L.J. 269, 288–89 (2004) (discussing doctrines that create pressure toward rigid covenant enforcement); Amos B. Elberg, Note, *Remedies for Common Interest Development Rule Violations*, 101 COLUM. L. REV. 1958, 1987 & n.170 (2001) (discussing the possibility that nonenforcement will lead to waiver, and citing cases). *But see* Katharine N. Rosenberry, *Home Businesses, Llamas and Aluminum Siding: Trends in Covenant Enforcement*, 31 J. MARSHALL L. REV. 443, 477–78 (1998) (observing that courts are less likely to find waiver when unenforced violations are few or distinguishable, especially if a provision in the governing documents recites that nonenforcement does not constitute waiver); Elberg, *supra*, at 1987 n.170 (noting that waiver is alleged much more often than it is found). Doctrines that cause legal entitlements to "erode" when encroachments upon those entitlements go unenforced are not unique to covenants; they appear in a variety of contexts. *See* Omri Ben-Shahar, *The Erosion of Rights by Past Breach*, 1 AM. L. & ECON. REV. 190 (1999) (presenting examples from a number of doctrinal contexts and analyzing the impact of such erosion doctrines). Requiring people to enforce their rights or risk losing those rights has the effect of raising the stakes associated with minor violations far beyond the actual costs associated with those violations, thereby increasing the amount that the rightholder will be willing to spend on enforcement. *See id*. at 192–93 (describing this dynamic).

53. *See* Mountain Park Homeowners Ass'n, Inc. v. Tydings, 864 P.2d 392, 396–97 (Wash. Ct. App. 1993) (discussing standards for finding a covenant abandoned, and concluding that those standards were not met in the case at hand).

arbitrary and capricious as to constitute an affirmative defense to an enforcement action.[54] Finally, past patterns of enforcement may bear on the interpretation of some of the more subjective and malleable standards, such as "architectural uniformity."[55] These doctrines help to fuel association fears of creating an unfavorable precedent by forgoing enforcement in a given instance.[56] Therefore, homeowners associations may feel pressure to enforce all association rules in order to preserve the right of enforcement in the future.[57]

C. Conceptualizing the Private Development

Private developments involve an interesting mix of private ordering through covenants and collective ordering through the private development's governance structure, set against a backdrop of public law that includes familiar features such as zoning ordinances, building codes, and nuisance law. Now that some of the legal features accompanying this form of ownership have been outlined, a conceptual sketch can be attempted.

There are at least three types of gains that people might seek to achieve in a private development. First, they might desire the gains that accompany the collective ownership and management of common property.[58] The private development might include amenities and facilities

54. *See* Southland Owners Ass'n, Inc. v. Myles, 555 S.E.2d 530 (Ga. Ct. App. 2001) (holding that homeowner who added a second driveway without approval was deemed to have made out an affirmative defense by identifying other second driveways in the neighborhood, as well as other stylistic inconsistencies).

55. *See* Town & Country Estates Ass'n v. Slater, 740 P.2d 668, 671 (Mont. 1987) (holding that "harmony of external design" was an impermissibly vague standard upon which to base disapproval of building plans where community exhibited "a cacophony of styles").

56. *See, e.g.,* KENNETH BUDD, BE REASONABLE! 74 (1998) ("For nearly 30 years, since developers formed the first condominium and homeowner associations, boards of directors—and many attorneys—have clung to a sacred yet unwritten belief: thou shalt enforce every rule. Make one exception to the architectural covenants, let one homeowner violate a restriction, and the result will be chaos. Members will rebuild cars on their balconies, they'll fill their yards with garden gnomes and old washing machines, they'll let packs of wild animals roam the streets."); Hyatt, *supra* note 14, at 314 ("Much enforcement litigation is the result of the unwillingness of the association manager and attorney to refrain from enforcing association rules for fear of setting 'a precedent.'").

57. At least some official advice to homeowners associations has carried this message. *See* MCKENZIE, *supra* note 11, at 131 (stating that under "the conventional professional wisdom regarding rule enforcement . . . . [b]oard members are routinely advised to be extremely aggressive and inflexible in the enforcement of CC&Rs"). *But see* BUDD, *supra* note 56, at 38–40 (discussing possible circumstances in which a well-documented exception to enforcement might be advisable, while noting the risks that can accompanying nonenforcement); DONALD R. STABILE, COMMUNITY ASSOCIATIONS: THE EMERGENCE AND ACCEPTANCE OF A QUIET INNOVATION IN HOUSING 192–93, 215 (2000) (describing the shift in philosophy within the Community Association Institute, beginning around 1995, from advocacy of strict enforcement of rules to a new emphasis on flexibility). In an effort to counter overzealous enforcement pressures, the new Restatement has set a high standard for a showing of waiver. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.3(2) & cmt. f, at 502 (2000).

58. *See, e.g.,* RESTATEMENT (THIRD) OF PROP.: SERVITUDES, ch. 6, introductory note (2000) (noting that one reason for the popularity of common interest communities is "their ability to increase the amenities available to residents by providing a workable mechanism for sharing enjoyment and spreading the costs across a stable base of contributors"); Brower, *supra* note 22, at 205 (observing

(for example, a golf course, a swimming pool, tennis courts, a clubhouse) that are valued by the members of the development, but which none of them would find it worthwhile to fund and manage on their own. I will largely set this interest to one side in the discussion that follows, as it is conceptually indistinguishable from the formation of a private club for purposes of providing collective amenities.

The second kind of potential gain in private developments is social or associational in nature.[59] One way of achieving this gain might be through covenants that serve a population-screening function, as opposed to merely a behavior-screening function.[60] For example, a private development may provide a mechanism for clustering by socioeconomic status and may, therefore, promote a level of homogeneity yielding a variety of effects.[61] In addition, a private development might foster community by providing a cohesive sense of neighborhood identity or by providing concrete opportunities for community-building interactions, either through the governance structure or through the use and enjoyment of common areas and amenities.[62] As noted at the outset, the dynamics of exclusion and the impact on the excluded consciously are set aside in this article.[63] However, the implications of the governance structure and covenant enforcement regime for the prospects of community building will be explored at some length later in the article.[64]

Third, individuals entering private developments often seek to realize gains associated with the reciprocal control of land use.[65] While there

that the advantages associated with residential associations include "amenities such as parks, swimming pools, and clubhouses"); Nelson, *supra* note 8, at 832 (explaining that "[c]ollective ownership . . . allowed developers to provide common recreational and other facilities that new housing owners increasingly demanded").

59. *See* Brower, *supra* note 22, at 206 (identifying protection of "social or life-style preferences" as among the goals of the rules governing common interest developments); Gillette, *supra* note 10, at 1396–97 (suggesting that "covenants have the capacity to form a basis of association for those who share a view of the good life").

60. *See* Ellickson, *supra* note 13, at 751 (suggesting the possibility that some uses, such as mobile homes, are disfavored because they are associated with people of lower socioeconomic status); Gillette, *supra* note 10, at 1396–97 (discussing the possibility that the land uses prohibited by covenants might serve as proxies for personal characteristics or propensities that are deemed undesirable).

61. *See* Gillette, *supra* note 10, at 1394–97 (observing ways that private developments might foster homogeneity). Efforts to achieve socioeconomic homogeneity in housing is not, of course, limited to private developments. *See id.* at 1397–98 (discussing the sorting by income and wealth that occurs in communities even in the absence of covenants).

62. *See, e.g.,* FRED FOLDVARY, PUBLIC GOODS AND PRIVATE COMMUNITIES 97 (1994) (positing that democracy in a residential community "can foster a sense of community and induce volunteer efforts"); *infra* note 290 and accompanying text.

63. *See supra* text accompanying notes 15–17.

64. *See infra* Part V.

65. *See, e.g.,* RESTATEMENT (THIRD) OF PROP.: SERVITUDES, ch. 6, introductory note (1998) (observing that one advantage of common interest communities inheres in "the mechanism they provide for controlling the community environment" through means such as rules, design controls, and servitudes); Ellickson, *supra* note 13, at 712–13 (discussing covenants as a device for achieving improvements in the allocation of land use rights between neighbors); Uriel Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139, 144 (1978) (discussing the use of servitudes to coordinate land uses for maximum efficiency).

might be any number of land use controls in a given development, their unifying purpose, I posit, is the production of a local public good that we might call "premium ambience."[66] The word "premium" in this formulation signifies both that the quality of ambience sought in such developments represents a subjectively valuable step beyond that which would prevail under existing principles of nuisance and zoning law, and also that this step is a purchased one—it comes, quite literally, at a premium.[67] Those seeking to secure premium ambience might desire to consume it themselves, but they also may be motivated by the belief that this local public good will be capitalized into the resale price of their homes.[68] This third sort of gain arising from the production of premium ambience within private developments, will be the primary focus of this article.

Residents in private developments purchase premium ambience by ceding property rights of their own, both directly through acceptance of reciprocal restrictions on their own land, and indirectly through the installation of a governance regime with the power to alter and enforce the prevailing land use controls.[69] A stylized example will help break apart the work done by the covenants themselves, on the one hand, and the governance structure on the other.[70] Imagine a group of ten people considering buying houses in the same block. Each landowner attaches some value to the ability to place items of her own choosing in her own front yard but believes that, in general, objects placed in the front yard detract from the neighborhood's ambience. If each piece of yard art brings $100 worth of benefits to its displayer but imposes $200 worth of costs on the group—that is, $20 worth of aesthetic dismay or reduced property value borne by each resident—then people would be expected to put out "too much" yard art because they internalize the full benefit without bearing the full cost.[71] There is a possible gain from trade in this setting. In exchange for giving up the privilege of displaying each item of yard art, a privilege that is worth $80 net per item, a homeowner in the

66. A "public good" in the economic sense is one that exhibits nonrivalry of consumption and nonexcludability of benefits. RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS 6–7 (1986). A "local public good" is a public good "whose benefits involve only a small jurisdiction such as a municipality or town." *Id*. at 24.

67. I use the phrase "premium ambience" as a generic term. Members of different private developments will have different ideas of the sort of premium ambience they wish to seek through controls on land use and will adjust the content of the controls accordingly. One confounding possibility, which I will simply note for present purposes, is that a central component of the ambience some people seek in private communities is the presence or absence of certain sorts of other people.

68. *See* FISCHEL, *supra* note 19, at 45–46 (discussing studies showing evidence of capitalization of "location characteristics" into home values); *see also* Brower, *supra* note 22, at 205 (maintaining that a traditional goal of rules in common interest developments is "to protect investment-backed expectations"); *infra* note 169 (property value preservation as a motivation for covenants).

69. *See* Reichman, *supra* note 6, at 279–80, 303 n.192 (discussing the interaction between servitudes and the private governance regime in a private residential community).

70. This dichotomy is something of a simplification, as the two components interact with each other.

71. This is a standard "tragedy of the commons" scenario. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244–45 (1968).

community could obtain similar surrenders from the other residents and thereby be shielded from $180 of potential costs in the form of yard art displayed by others. Land use covenants reciprocally binding all residents to forbear from yard art therefore would provide gains to all of the residents under these assumptions.[72]

It is true of course that someone who netted more than $180 in benefits associated with displaying yard art would not enjoy any gains from trade and would, therefore, not be expected to enter into such a covenant arrangement. On the other hand, some people derive no net benefit from displaying tacky yard art. For them, entering into the agreement requires surrendering nothing of value; the covenant does not act to restrain any behavior that they would otherwise choose to take. Between these two groups are those who would display tacky yard art in the absence of the covenant, but for whom the covenant is more valuable than the right to display the yard art. The "no yard art" covenant provides a convenient way of drawing together those for whom such a covenant would represent a gain and delivering that gain to them, while screening out those for whom such a covenant would represent a loss.

The move of agreeing to such a reciprocal covenant effects a shift of property rights from the individual to the individual's neighbors, while delivering to the individual some of the property rights originally held by the neighbors. Even before the shift, some rights with respect to the use of an individual's land were already held by the community under background principles of nuisance law and, typically, zoning restrictions.[73] As additional rights over the use of privately owned property are transferred from the individual to the community, the individual's rights over the use of her own property shrink accordingly. The compensation for this diminution comes in the form of additional rights over the use of the property of others within the neighborhood.[74] Presumably, everyone making such a trade views it as a worthwhile one; the expanded control over the property of others more than compensates for the diminished control over one's own property.

Figure 1 provides a stylized representation of such an exchange in a two-person community. The two squares represent the original property rights, as conditioned by existing law, that two homeowners would have in a piece of residential property. Each homeowner agrees to slice away

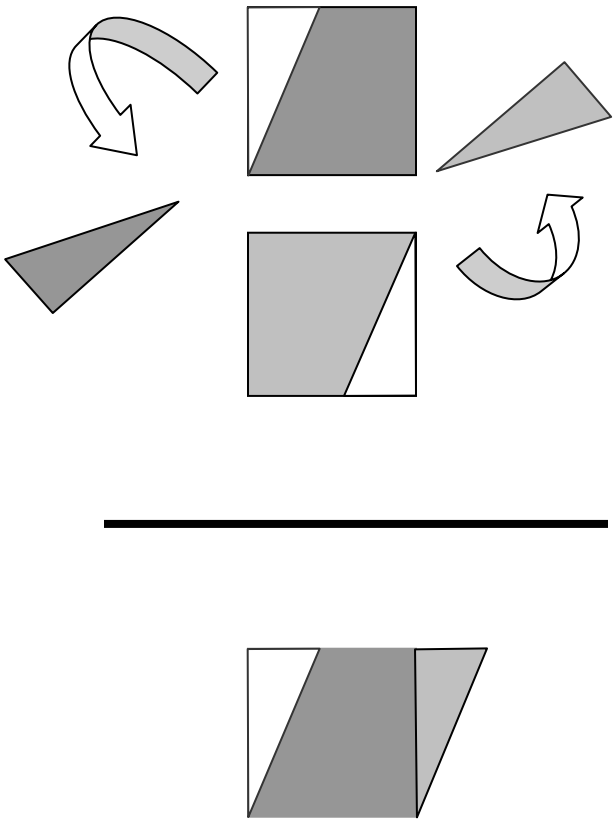
72. *See* GARY D. LIBECAP, CONTRACTING FOR PROPERTY RIGHTS 19 (1989) ("Capturing a portion of the aggregate gains from mitigating common pool losses is a primary motivating force for individuals to bargain to install or to modify property rights arrangements.").

73. *See, e.g.*, WILLIAM A. FISCHEL, REGULATORY TAKINGS 343 fig.9.1 (1995) (illustrating the various ways that land use entitlements might be divided between the landowner and the community); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 18 fig.1, 19–20 (2000).

74. Reichman, *supra* note 6, at 281 ("By purchasing a home in a residential private government community, the owner waives part of the incidents of his title; he is compensated for this diminution of his rights, however, by the generally improved living conditions and the extra services provided for all the members of the community.").

some of those rights and give them to the other homeowner in exchange for receiving the same set of rights from the other homeowner. The

FIGURE 1:
TWO-HOUSEHOLD BARGAINS

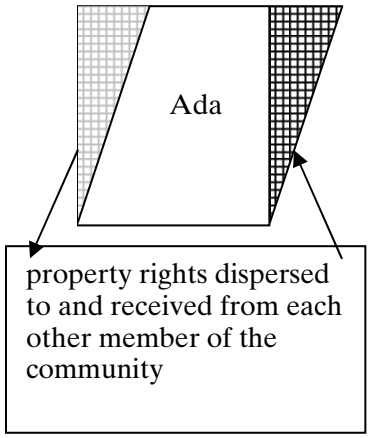


lower portion of Figure 1 compares the original property rights, represented by the square, with the newly reshaped property rights, represented by the parallelogram, and shows the resulting gain and loss to the homeowner. The rights obtained from the other party, represented by the gray triangle on the right-hand side, are presumably more valuable than those given up, represented by the white triangle on the left. That surplus represents the gain from trade that corresponds to the generation of the local public good of premium ambience.

In this simple two-household bargaining scenario, each household receives the entire slice of rights given up by the other party, and likewise gives up its own slice of surrendered rights to just one party. In a multiple-household bargaining scenario, the rights surrendered by any given

homeowner are dispersed among a number of other homeowners, while that same individual receives rights over the land use of a number of other homeowners. Figure 2 illustrates this. A given landowner, Ada, surrenders the rights represented by the triangular area on the left to the other members of the community. Each of the small squares represents a veto power over her activities on her land, and each of these activity-blocking entitlements goes out to a different neighbor. Likewise, the triangle on the right is made up of the individual property rights surrendered to Ada by each other member of the community. Each small square represents a veto right that she gains over the land-use activities of given neighbor.

FIGURE 2:
BARGAINING IN A LARGER COMMUNITY



Because the developer is able to act as a central locus for forming these reciprocally binding covenants, transaction costs for bargains of the sort depicted in Figure 2 are quite low.[75] Ada is able to alienate property rights to dozens, hundreds, or even thousands of other individuals, while simultaneously receiving property rights from the same number in exchange, simply by purchasing a lot in a private development that is subject to a particular set of CC&Rs.

Undoing the deal is obviously much harder, at least in the absence of a governance structure capable of realigning rights without unanimous consent. Should Ada wish to reclaim an entitlement already alienated, such as the ability to display yard art, she must cobble the lost entitlement together by repurchasing the right to display yard art from each of the many community members to whom it was alienated. Because she needs the full triangle on the left to engage in the action in question, each

75. Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 914–15 (1988) (noting the efficiency of this arrangement).

of her neighbors holds a veto. In a community of any significant size, the transaction costs, including holdout problems, are likely to make obtaining releases from a given servitude from all other community members a logistical impossibility, even when doing so would be efficient.[76] Every member of the community faces the same difficulty in assembling the rights necessary to engage in activities prohibited by covenant. The resulting situation has the structure of an anticommons.[77] Every community member has a right to exclude every other community member from making forbidden incursions into the aesthetic space cleared by the covenants, with the result that even efficient entries into that forbidden space are unlikely to occur.[78] That cleared aesthetic space may, therefore, generate a level of premium ambience that is inefficiently high.

Yet even as the covenant scheme in a private development creates a problem of fragmentation, it also solves another problem that could be similarly characterized as one of fragmentation, although it has not traditionally been thought of in those terms.[79] When Ada disperses land use rights to her neighbors, she also collects rights over neighborhood aesthetics from each of them. That process of collection can be understood as bringing together in Ada's hands something that was previously fragmented among the neighbors—power to control certain aspects of neighborhood aesthetics. Before Ada can personally and decisively ex-

76. *See, e.g.*, Elberg, *supra* note 52, at 1981–83 (noting the difficulty a homeowner faces in attempting to obtain unanimous consent to a servitude release).

77. The anticommons was originally conceptualized as a resource that everyone had the power to exclude everyone else from using, but that nobody had the power to use without the permission of everyone else. *See* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1322 n.22 (1993); Frank I. Michelman, *Ethics, Economics and the Law of Property, in* NOMOS XXIV: ETHICS, ECONOMICS AND THE LAW 3, 6, 9 (J. Roland Pennock & John W. Chapman eds., 1982). The anticommons notion was later reformulated to cover a range of real world situations involving veto powers held by limited numbers of people. *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 668 (1998). While questions remain about the contours of the concept, *see* Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907 (2004) (arguing for a functional distinction between commons and anticommons that eschews the distinguishing criteria currently in use), an anticommons situation is plainly presented when an individual who highly values a particular resource is unable to assemble the fragmented entitlements necessary to make use of that resource.

An anticommons need not inevitably produce inefficiencies. *See* Heller, *supra*, at 673–76 (discussing nontragic anticommons, and suggesting that a developer's use of restrictive covenants "to convert raw land to anticommons form can be an efficiency-enhancing move"). The possibility that common interest communities might present an anticommons problem by locking in suboptimal entitlement allocations was recognized in Michael Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1185 (1999) [hereinafter Heller, *Boundaries*.]

78. *Cf.* James Buchanan, *The Institutional Structure of Externality*, *in* 15 COLLECTED WORKS OF JAMES BUCHANAN: EXTERNALITIES AND PUBLIC EXPENDITURE THEORY 174, 179 (2001) (observing potential for too few straying cattle in a setting featuring many ranchers and many farmers, where each farmer has the power to withhold permission to allow a given rancher's cattle to stray; "[t]his possible tendency toward an underproduction of the externality-generating good or service is the central flaw in the proposals to resolve environmental quality problems by the creation and assignment of new 'amenity rights' to citizens").

79. In other words, before we can know what counts as fragmentation, we need to have some idea of what constitutes a unified whole. For a discussion of historical principles of unity in property, see Francesco Parisi, *Entropy in Property*, 50 AM. J. COMP. L. 595, 603–10 (2002).

ercise control over the aspects of neighborhood ambience that the neighbors severally hold entitlements to affect, she must gather together in her own hands all of those entitlements.

The private development form of ownership provides a neat solution to this latter form of fragmentation, while leaving unresolved the fragmentation problem that results from the alienation of use rights to many neighbors.[80] Of course, private developments are more than just a collection of people holding reciprocally binding covenants—there is typically also a governance regime capable of realigning property rights on less than unanimous consent.[81] This eases in some measure the concerns just described, even as it introduces some new complications. The homeowners association generally has the power to change the original covenants, add new rules, remove old rules, interpret the prevailing rules, and make enforcement decisions. People in private developments, then, are not just opting for private ordering in the form of covenants, but also are opting for a privatized form of collective decision making that can undo, replace, modify, or augment the private ordering already achieved.

A private governance regime that can make changes on less than unanimous consent delivers a measure of flexibility to the members of the community and might help achieve the community's collective goals. These gains come at a price: a risk that decisions adverse to the individual homeowner will be made.[82] Two kinds of entitlements are put into jeopardy when a landowner cedes control to a collective decision-making body capable of acting on less than unanimous consent: first, the landowner's entitlements in her own property that remained reserved to her after the reciprocal exchange of covenants (the white area shown in Figure 2); and, second, the set of servitudes governing *other people's land* that each landowner received in the reciprocal exchange (the cross-

80. Because of this article's internal focus on private developments, I will not elaborate on the fragmentation of neighborhood environment rights that exists in ordinary neighborhoods. Such concerns would be critically important in making judgments between forms of land use control and, therefore, must be taken into account in the larger project of which this article forms one component. In addition, any solutions for overcoming the fragmentation problem associated with alienation of use rights in a private development may threaten or weaken the property rule protection granted to the newly assembled rights over the neighborhood environment. The two kinds of fragmentation are mirror images of each other; one can only be overcome at the expense of the other. *See* Fennell, *supra* note 77, at 966–71 (discussing this point in greater detail).

81. *E.g.*, Reichman, *supra* note 6, at 274 (discussing the ability of homeowners associations to make changes on majority or supermajority vote); *id.* at 281 ("[I]t would be intolerable if one owner could veto all regulatory changes (as he could with regular servitudes)."); ROBERT H. NELSON, PRIVATE NEIGHBORHOODS: A REVOLUTION IN LOCAL GOVERNMENT (forthcoming 2005, Urban Institute Press) (Sept. 2003 manuscript, Introduction at 16) (observing that most private developments' governing documents do not require unanimous consent for most amendments); *id.*, ch. 4, at 10–12, (noting that amendment of the community "constitution" typically requires a supermajority, but not unanimous consent).

82. By turning decisions over to collective control on anything less than unanimous consent, an individual risks harm from decisions adverse to that individual's interests, but these risks may be justified by the cost savings achieved in reaching decisions. JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962), *reprinted as* 3 THE COLLECTED WORKS OF JAMES M. BUCHANAN 65–73 (Liberty Fund 1999).

hatched triangular area on the right in Figure 2). Various constraints, whether contained in the development's declaration itself or implied through the operation of law, may be placed on the collectivity's ability to intrude on these sets of property rights, yet the collective is likely to have power to transfer some of the individual landowner's entitlements to the collective or back to their previous owners against the landowner's will.

If covenants that were the basis of reciprocal gains from trade may be altered or replicated through collective decision making, then one might question why the covenants were necessary at all. The set of CC&Rs that each new member agrees to upon entry is not insignificant, of course. As noted above, the idea that these CC&Rs have received unanimous consent in the form of home purchase leads to higher levels of judicial deference than for later-enacted rules.[83] The original CC&Rs also endow residents with rights that may become entrenched over time, and could provide a baseline against which compensation might be made for changes.[84] In addition to providing the default rules against which this new form of privatized collective action takes place, the original CC&Rs might be expected to provide valuable information to would-be homebuyers about what is valued by the members of the community that the homebuyer may potentially join. In other words, the original covenants would ideally serve both information and coordination functions in assembling like-minded members of new collective decision-making units, as well as substantively operating to control the use of land.[85]

By bringing together a community of people for whom the original covenants secure gains from trade and providing them with a private self-governance mechanism, the private development might seem to offer an ideal vehicle for delivering on consumer preferences. Why, then, does it appear that people are not always able to get what they want in private communities?

II. THE PROBLEM OF UNIFORM RULES

The first reason why consumers might be unable to get what they want in private developments is inherent in the reciprocal, community-wide structure of the covenants and the uniform manner in which they tend to be enforced. Typically, the CC&Rs in a given community apply across the board and cannot be selectively modified for an individual homeowner, unless that homeowner secures a release from every neighbor benefited by a given covenant. It is true that a homeowner un-

83. *See supra* text accompanying notes 22–23.

84. *See infra* text accompanying notes 129–32 (discussing use of a Takings Clause analogue in private developments).

85. *See* Gillette, *supra* note 10, at 1394–95 (describing how covenants in private communities facilitate signaling and coordination among those with similar tastes).

happy with the rules can try to gain sufficient political power to get the rule globally changed through the homeowners association, but this, as we shall see, does not change the basic problem of uniform rules.[86]

This problem of uniform rules is not unique to the homeowners association setting. Instead, I describe a basic problem associated with rulemaking in a heterogeneous society in which people have varying preferences. Unless people with sufficiently strong preferences about a given rule are able to bargain with the other members of the community for an exemption or otherwise translate the strength of their preferences into political outcomes, the rule is likely to operate inefficiently with regard to at least some of the population.[87] This is just as true in the case of zoning and other forms of majoritarian rulemaking as it is in the case of private restrictive covenants. Yet, the problem of uniform rules is particularly significant in the homeowners association setting for three reasons.

First, this foundational problem has received surprisingly little attention in this context, perhaps because of the presumed greater degree of choice and consent involved in entry into a private development in the first place.[88] Therefore, simply observing the presence of the problem in this arena and setting out its precise nature is useful. Second, the problems associated with uniform rules may be particularly troubling in the private development setting, given the reduced constraints on private

86. *See infra* notes 87–95 and accompanying text. I am using the term "rules" broadly and generically here to encompass use restrictions contained in covenants. The term is sometimes used in a more specialized way in this context. *See, e.g.*, *supra* note 41 (noting the Restatement's distinction between "rules" and declaration provisions).

87. *See, e.g.,* E.J. Mishan, *Pareto Optimality and the Law*, 19 OXFORD ECON. PAPERS 255, 259–61 (1967) (presenting a numeric example involving heterogeneous individuals in which a majority rule will produce suboptimal results, and in which Pareto superior arrangements can be reached through weighted voting or bargaining); Philip B. Heymann, *The Problem of Coordination: Bargaining and Rules*, 86 HARV. L. REV. 797, 840–42 (1973) (discussing Mishan's example and its implications for general rules).

Consensus-based models of decision making can incorporate the relative strength of preferences into the process, if parties defer on issues about which they care little and gain the deference of others to their own strongly held views. *See* Mark Fenster, *Community by Covenant, Process, and Design: Cohousing and the Contemporary Common Interest Community*, 15 J. LAND USE & ENVTL. L. 3, 13–14 (1999) (describing the consensus model of decision making in cohousing groups, where hand signals or color-coded cards are used to indicate strength and direction of preferences, often augmented by a "fallback" system of majority or supermajority voting should a group reach impasse). Other mechanisms for incorporating strengths of preferences into community voting systems have been explored in, *e.g.*, Ellickson, *supra* note 10, at 1546–47; NELSON, *supra* note 81, ch. 15.

88. *See, e.g.,* FOLDVARY, *supra* note 62, at 60 (contrasting "explicit" contractual consent that accompanies entry into private community with "simply living in or even entering into a sovereign community" which, he argues, "does not imply any agreement with all its rules or its constitution"); Ellickson, *supra* note 10, at 1520, 1523 (distinguishing public and private communities based on "perfect" voluntariness in the latter). *But see* Gerald E. Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589, 1590–91 (1982) (questioning this distinction, and noting that some cities were originally formed through the voluntary actions of residents); Nelson, *supra* note 8, at 861 (observing that residents of both municipalities and homeowners associations enter voluntarily, and suggesting that any distinction based on voluntary formation will disappear over time as homeowners associations age).

governance and the generally more intrusive nature of the restrictions themselves.[89] If we have reason to believe that the content of the covenants arises through a process that is not particularly responsive to consumer preferences, or that preferences move out of alignment with the rules over time,[90] then the argument from consumer sovereignty does not dispel these concerns.

Finally, many of the considerations that can inhibit flexible adjustment of rules in public settings, such as concerns about "selling" the police power to the highest bidder,[91] are absent in private development settings where the rules in question are the work of private bargains, rather than the exercise of the police power.[92] Private developments, then, would seem to offer an ideal setting for examining and testing flexible responses to the problems associated with uniform rules.[93] Yet it appears very little experimentation of this nature has occurred.[94] It is worth asking why that is the case. The reasons for this lack of innovation seem to be partly the result of inertia and inexperience and partly the result of specific features of the legal landscape in which homeowners associations operate.[95]

89. *See, e.g.*, Brower, *supra* note 22, at 218–19 (providing a list of the sorts of items and activities regulated in homeowners association neighborhoods); Gillette, *supra* note 10, at 1384 (noting that covenants can impose greater restrictions than would be imposed under common law or local ordinances); Nelson, *supra* note 2, at 159–60 (describing the larger scope and greater detail of private regulation, as compared with zoning); Reichman, *supra* note 6, at 269–75 (detailing the ways in which residential private communities curtail traditional property rights); *id*. at 274 (observing that "the homeowners' organization claims to possess at least the same powers that municipalities have—without the concomitant limitations of public law"); A. Dan Tarlock, *Residential Community Associations and Land Use Controls*, *in* RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 75, 78 (Advisory Comm'n on Intergovernmental Relations ed., 1989) (noting both the heightened level of control over residential land use and behavior in residential community association neighborhoods and the possibility that a member in one of these communities "may have less protection against arbitrary actions than a citizen of a general purpose government"); *infra* note 209 and accompanying text (referencing arguments concerning the applicability of constitutional protections within homeowners associations).

90. *See infra* Parts II.C–IV.

91. *See, e.g.,* Fennell, *supra* note 73, at 25–26 & n.97 (discussing this point); William A. Fischel, *Equity and Efficiency Aspects of Zoning Reform*, 27 PUB. POL'Y 301, 327 (1979) ("Selling zoning, as long as this [police power] rationale persists, is analogous to selling health inspections to restaurants, elevator safety certification to apartment houses, and licenses to speed to automobile operators.").

92. Nelson, *supra* note 2, at 173.

93. *See* NELSON, *supra* note 81, Preface, at 12 (making this observation); *id*., Part V (discussing possible directions for innovation).

94. *Id*., Preface, at 12, Introduction to Part V, at 4.

95. *See* Hyatt, *supra* note 8, at 53 (observing role of "institutional inertia" in perpetuating patterns of behavior in common interest communities). There are practical limits to innovation, to be sure. *See id.* at 47 (observing that "any evolution in community association formation and operation must not be so daring as to make developments unmarketable, nor should the evolution be so complex as to make projects unmanageable"). Because innovation is costly and risky, developers would only be expected to experiment with new approaches when the expected internalized gains exceed the expected costs associated with the innovation. *See* Weiser, *supra* note 52, at 299 (discussing conditions under which developer innovation would be expected). If innovators are unable to capture the full value of their innovation because successful approaches can simply be copied by others without payment, then we might expect to see inefficiently low levels of innovation. However, if governance innovations can be protected as intellectual property so that the gains of innovation are assigned to the

A. Common Pools and Blunt Tools

The collective-action problem to which servitudes respond, as well as the signature difficulty associated with uniform, community-wide rules for controlling this collective-action problem, can be demonstrated with a simple example. Imagine a community in which a particular phenomenon—say, the presence of concrete gnomes—is costly to the community as a whole in terms of aesthetic disutility or falling property values. Individual homeowners who derive benefits from displaying gnomes in their front yards may display gnomes to an inefficient extent because they only internalize a fraction of the cost associated with gnome display. For example, Astrid might derive a benefit of $100 from displaying a gnome in her front yard, but a gnome might impose $500 in total costs on her 100-person community. Because Astrid bears only 1/100 of those costs, she will choose to display the gnome, even though this is not efficient. A gnome-forbidding rule would lead to an efficient result in Astrid's case.

Next consider Beasley, who derives a benefit of $600 from gnome display. The gnome-forbidding rule leads to an inefficient result in Beasley's case. Yet a community that must write a uniform rule regarding gnomes applicable to both Astrid and Beasley will choose to forbid the gnomes. Two gnomes will cost the community $1000, while the benefits derived by both Astrid and Beasley total only $700. Significantly, it is not so easy for Beasley to negotiate with the rest of the community to buy the right to display the gnome. Because there are ninety-nine neighbors holding servitudes that prohibit Beasley's gnome display, purchasing releases is likely to be impossible. Beasley is also unlikely to succeed in the political arena of the homeowners association if his extreme gnome appreciation is unusual in his community.[96] A different sort of mechanism, such as a gnome tax, would offer a plausible way to force people to internalize the costs of their gnome-related behavior. However, setting the tax is difficult, especially if we suspect that there is an increasing marginal cost associated with additional gnomes—that is, the addition of a tenth gnome harms the community more than the addition of the first gnome.

Some additional dimensions of the problems associated with using uniform rules to regulate the neighborhood environment can be illus-

innovator, then more innovation might be expected. *Cf.* Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791 (5th Cir. 2002) (en banc) (addressing the question of copyright protection for model building codes); *id*. at 824 (Weiner, J., dissenting) (stating that internet posting of model codes enacted into law could deprive the drafting organization "of income used in its socially valuable efforts of confecting, promulgating, and revising model codes"). I thank John Duffy for bringing this line of inquiry to my attention.

96. A simple majority or supermajority vote does not register differences in strengths of preferences. Thus, one individual with a strong preference for a given rule can (and usually will, in the absence of side payments or logrolling) be outvoted by two or more individuals with relatively trivial preferences for the opposite rule. *See, e.g.,* Mishan, *supra* note 87, at 259–60 (presenting a numeric example illustrating this point).

trated by considering a stylized example involving a much simpler common-pool resource: fish. Imagine a fishing area containing three kinds of fish (Redfish, Bluefish, and Yellowfish) that is owned communally by three people (Ronald, Beth, and Yves). Due to differential skills and preferences, the benefits derived from catching a given type of fish vary from individual to individual, as follows:

TABLE 1
MARGINAL BENEFITS (BY FISHER AND TYPE OF FISH)

	Redfish	**Bluefish**	**Yellowfish**
Ronald	$50	$10	$10
Beth	$10	$50	$10
Yves	$10	$10	$50

Thus, Ronald derives benefits of $50 from each Redfish, but only derives benefits of $10 from each Bluefish or Yellowfish. Beth derives benefits of $50 from each Bluefish, but only $10 from each Redfish or Yellowfish. Yves derives benefits of $50 from each Yellowfish, but only $10 from each Redfish or Bluefish.

Assume further that the marginal cost imposed on the pool for each extracted fish is $25, regardless of the type of fish, up to a maximum of sixty fish per day total. At that point, the marginal cost skyrockets to $60 per fish because the pool begins to become dangerously depleted. Each of the three fishers internalizes one-third of the cost that each extraction imposes on the pool, as shown in Table 2.

It is clearly in the interests of the group to prohibit the extraction of more than sixty fish per day because the costs of doing so outweigh the benefits in all cases. Below the sixty-fish-per-day limit, it is inefficient for any fisher to extract any fish other than their "special" fish—the one that derives the $50-per-fish benefit. Even though extracting the other fish

TABLE 2
EXTRACTION COSTS

	Cost to Pool	**Individual Cost**
Per Fish, up to 60 per Day	$25	$8.33
Per Fish in Excess of 60 per Day	$60	$20

will yield a net personal benefit to the individual fishers (a benefit of $10, compared with the internalized cost of $8.33), it will impose a net social cost (a benefit of $10, compared with a cost to the entire pool of $25). Therefore, the efficient and fair solution is for Ronald to extract twenty Redfish, Beth to extract twenty Bluefish, and Yves to extract twenty Yel-

lowfish.[97] The total benefits enjoyed by the group in this scenario will be $3000 ($50 x 60), and after subtracting out the costs imposed on the pool ($25 x 60), a net surplus of $1500 per day will be enjoyed by the group. The participants could set a simple twenty-fish daily catch limit to achieve this result. If permitted only twenty fish, each fisher will harvest only the type of fish that the fisher finds most profitable.

If, however, a prevailing legal rule requires that separate catch limits be set for each type of fish, and further requires that these limits be uniformly applied to all fisherfolk, then it suddenly becomes impossible to reach the efficient result through the legal rules. If forced to set a uniform limit for Redfish that will apply to Beth and Yves, as well as to Ronald, a uniform limit for Bluefish that will apply to Ronald and Yves, as well as to Beth, and a uniform limit for Yellowfish that will apply to Ronald and Beth, as well as to Yves, then the group will choose a catch limit of zero for all three fish. Even if a daily catch limit of one fish of each type is imposed on the group's members, the costs associated with extraction would still exceed the benefits derived from fishing.[98]

Of course, we know that in the real world, Ronald, Beth, and Yves would be very likely to reach an agreement about fishing from the common pool that would produce the efficient result.[99] In the event that they could not do so, one would hope that regulatory bodies monitoring the world of fishing would perceive the problem and either raise the catch limits and make the catch permits tradable, or switch to a regime in which the catch limit is set for all fish and not by fish type. Sophisticated onlookers would surely not dismiss the specter of an idle fishing pool simply because the parties had joined the pool consensually.

Yet something much like this may be happening in private developments. If the common pool resource that community members want to be careful not to overdraw is something rather general and amorphous—such as premium ambience—but the specific "draws" made against that common resource take a multitude of different forms, then the shape of the problem becomes clear. Instead of three people who receive differential profits from three different kinds of fish, a private development may feature one-hundred people who receive differential pay-

97. There are many efficient solutions. As long as the total is kept below sixty fish per day and each fisher extracts only his or her "special" fish, it does not matter, from an efficiency perspective, how many fish each fisher gets to extract. Presumably, however, the fishers will choose the efficient solution that is also distributionally fair.

98. If each fisher is permitted to take one Redfish, one Bluefish, and one Yellowfish, then each fisher will enjoy benefits of $70 ($50 + $10 + $10), but will impose extraction costs of $75 on the pool ($25 x 3).

99. The ability of members of a multiparty group to form shifting coalitions regarding the division of the surplus associated with a proposed realignment of property rights represents a separate problem. *See* Herbert Hovenkamp, *Bargaining in Coasian Markets: Servitudes and Alternative Land Use Controls*, 27 J. CORP. L. 519, 530–31 (2002) (presenting an example in which five individuals with differing preferences about servitudes may be unable to unanimously agree on a move that would leave all of them better off). This is an example of the vote-cycling problem identified by Condorcet and Arrow, *see id*. at 533–34 & n.47; it is, of course, not limited to the covenant context.

offs from different kinds of draws against neighborhood ambience. One individual might greatly enjoy tinkering with a car in the driveway, another individual might greatly enjoy riding a motorcycle, a third individual might derive great pleasure from keeping four dogs, while a fourth individual might receive tremendous utility from displaying concrete gnomes in her front yard. It might be efficient for each of these individuals to take their preferred "draws" against the neighborhood atmosphere; yet if everyone were allowed to do all of these things at once, then neighborhood atmosphere might rapidly deteriorate, as people undertook draws that were costly on balance. Forced to choose a single rule for each specific use that will apply community-wide, developers and homeowners associations might be expected to select rules that are inefficiently restrictive for some individuals with regard to some uses.[100]

Significantly, neighborhood residents are largely unable to make the adjustments that we readily assumed our fishing group would make. As already discussed, differential enforcement is a risky choice for homeowners associations.[101] Nor can residents simply violate the covenants and pay for the damage. Land use covenants are typically enforced through injunctive relief (in contract terms, specific performance),[102] or through escalating fines.[103] One can attempt to get the rule changed through the governance process, but the changed rule would typically be an all-or-nothing proposition as well.[104]

100. This assumes that developers and homeowners associations are making calculations based on overall efficiency in designing covenant content and setting rules for community life. It is possible that a homeowners association might instead respond to pressure from some powerful faction of the homeowners to remove uniform rules that are efficient (in the limited sense just discussed). In other words, perhaps the Redfish faction takes over a pool that is made up of a mix of all three types of fisherfolk and gets the Redfish limit raised to twenty (while retaining the ban on Yellowfish and Bluefish). The result will be efficient extraction of Redfish by the fisherfolk who have Ronald's preference profile, but inefficient extraction of Redfish by the people with preferences aligning with those of Beth and Yves. This is no less troubling than the unduly restrictive example given in the text.

101. *See supra* text accompanying notes 97–100.

102. *See, e.g.,* Weiser, *supra* note 52, at 287 n.69 (collecting cites on the availability of injunctive relief for the violation of negative covenants); Elberg, *supra* note 52, at 1970–73 (discussing history and use of specific enforcement for land use agreements at common law).

103. *See, e.g.,* Weiser, *supra* note 52, at 295 (observing that although fines often begin at "compensatory" levels, they are often graduated to reach much higher levels over time if violations persist); Elberg, *supra* note 52, at 1973–76 (discussing the availability of supercompensatory fines under the UCIOA). Legal fees assessed against noncompliant owners can also significantly increase the total penalty associated with a violation. For a recent example, see Motoko Rich, *Homeowner Boards Blur Line of Just Who Rules the Roost*, N.Y. TIMES, July 27, 2003, at A1 (reporting that one individual who violated a community's rule regarding trash can placement was ordered to pay nearly $12,000 in fines and legal fees).

104. *See, e.g.,* Licker v. Harkleroad, 558 S.E.2d 31, 34–35 (Ga. Ct. App. 2001), *cert. denied,* No. S02C0569, 2002 Ga. LEXIS 424 (May 13, 2002) (invalidating an attempted covenant amendment that would release only some of the lots in a private development from residential use and collecting cases from other jurisdictions supporting that outcome); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.10 (1998) (stating that nonuniform amendments are ineffective without consent of negatively affected parties, except where purchasing parties receive notice of potential for such amendments), *cited and discussed in Licker*, 558 S.E.2d at 34–35; Patrick A. Randolph, Jr., *Changing the Rules: Should Courts Limit the Power of Common Interest Communities to Alter Unit Owners' Privileges in the Face of Vested Expectations?*, 38 SANTA CLARA L. REV. 1081, 1082, 1103–04 (1998) (finding that courts

Epstein mentions the possibility that a private development could include a rule whereby a party burdened by negative restrictions on use could "free his own unit from the restrictions in question" upon obtaining a sufficient number of signatures from other unit owners.[105] However, such an arrangement could operate to the detriment of those most directly affected by the use—the unit owner's near neighbors—if the unit owner could obtain enough signatures elsewhere in the community.[106] One might also try to buy a release from the servitude from each of one's neighbors, but this is likely to be impossible in practice. The possibility of tradable or marketable covenant-violation permits, which would help to address this problem by allowing people to take the draws that are efficient for them, has not penetrated the world of private developments.[107] Even blunter land use tools, such as variances, might be adapted to supply much-needed flexibility in the private development context.[108]

The voluntary nature of residents' entries into private developments has obscured the fact that all of the same sorts of inflexibility lamented in the context of municipal zoning exist in an even more rarified and unalleviated form in private developments.[109] Indeed, some of the scholars who have been most critical of restrictions on private adjustments in the zoning context have embraced the private development paradigm with-

were more likely to invalidate attempts to make covenant changes that would differentially affect particular individuals or particular lots, as compared with uniformly applied changes); Reichman, *supra* note 65, at 158 & n.54 (observing that "[w]here powers to amend a general scheme are held by a home association or a developer, spot permits are regularly invalidated," and collecting case citations); Weiser, *supra* note 52, at 310 & n.162 (citing cases for the proposition that courts will often overturn attempts to selectively release lots from covenants, but observing that the results might be otherwise if the declaration specifically provided for such selective releases).

105. Epstein, *supra* note 75, at 922.

106. As Epstein notes, "[I]t would be quite unthinkable for the majority to be able to vote to release all its units from the force of the covenants while continuing to impose those covenants upon others." *Id*. at 922. A rule permitting individualized release of a unit upon a majority of signatures could yield precisely this result, if we imagine a majority faction that all agreed to sign each other's petitions for release of their own units, but refused to sign similar petitions for the minority faction. *See* Hovenkamp, *supra* note 99, at 531–32 & nn.38–41 (discussing difficulties with cycling coalitions that might be produced by a rule permitting piecemeal changes, and citing case law restricting ability of homeowner associations to make changes on a less than uniform basis).

107. This is not to suggest that such tools are uncontroversial, or that they are without difficult design issues of their own. *See, e.g.,* Jonathan Remy Nash & Richard L. Revesz, *Markets and Geography: Designing Marketable Permit Schemes to Control Local and Regional Pollutants*, 28 ECOLOGY L.Q. 569 (2001) (providing an overview of literature regarding the problem of "hot spots" potentially generated by marketable permit schemes, and providing a proposed solution). I mean merely to observe that the theoretical solutions that have been explored in other settings have not yet been contemplated in this context to determine whether or not they—or some suitably modified variation on them—might, on balance, improve matters.

108. *See* DUKEMINIER & KRIER, *supra* note 35, at 984–85 (presenting variances and special exceptions as among the methods for adding flexibility to zoning). The use of variances or similar devices is, in fact, not unknown in private developments.

109. *See supra* note 88 (demonstrating analytic focus on consensual entry).

out noting this difficulty.[110] Zoning, like environmental law, has received innovative attention from legal scholars concerned with removing impediments to gains from trade. What is needed, then, is the same application of imagination and theory to the problems of life in private developments.[111]

B. Heterogeneity and Exit

An obvious response to the previous argument is to invoke the availability of "exit," which includes decisions not to enter a particular private development, as well as decisions to leave.[112] If there is an abundance of different communities catering to different preferences, then we might expect people to sort themselves out in ways that would obviate the inefficiencies that could otherwise be created by uniform rules. To put this in terms of the example given above, people who highly value Redfish would cluster into one pool, while people who highly value Bluefish and Yellowfish would cluster into their respective pools. In the Redfish-lovers pool, setting the Redfish catch limit at twenty and the Yellowfish and Bluefish catch limit at zero imposes no inefficiencies on the group, all of whom enjoy the payoff schedule attributed to Ronald above. Similarly, people who enjoy fixing cars could enter one community, while people who enjoy displaying and viewing concrete gnomes could enter a different community.

The Tiebout hypothesis suggests that people choosing local governments look for the same sort of preference match,[113] but few scholars would contend that the resulting zoning regimes are always optimal.[114] Proponents of private developments, however, might point out that it is more likely that a small private development, formed ab initio and empowered to more closely regulate land use and community life, will be better able to maintain various sorts of homogeneity that will permit vin-

110. *See, e.g.,* FOLDVARY, *supra* note 62, at 96 (observing that "[z]oning is difficult to change for a landowner yet subject to change at any time by the city," while ignoring parallel problems in covenant schemes and suggesting that covenant-bound neighborhoods suffer only from enforcement difficulties); Ellickson, *supra* note 13, at 687, 691, 713 (discussing disadvantages associated with "centralized mechanisms" of land use control that restrain an individual "from undertaking a prohibited activity, even if he is willing to pay for its external costs" and criticizing zoning on these grounds, but suggesting that developer-crafted covenants will be efficient).

111. *See, e.g.,* Ellickson, *supra* note 13, at 703 (discussing "imaginative leap" in zoning associated with sale of development rights in New York City); NELSON, *supra* note 81, Introduction to Part V, at 4 (suggesting that there has been a lack of imagination and experimentation thus far in private developments).

112. *See* FISCHEL, *supra* note 19, at 73 (explaining that economists use the term "exit" to encompass not only decisions to leave a jurisdiction, but also "the unwillingness of outsiders to enter a jurisdiction because of the unappealing conditions there").

113. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 422 (1956) (analogizing consumers' choices among communities to "the private market's shopping trip").

114. *See, e.g.,* Nelson, *supra* note 8, at 843–52 (discussing critiques of zoning).

dication of specific preferences.[115] Furthermore, the problem of universal rules is not nearly as serious in the private development setting as it might be in the zoning context, some would argue, because in the former situation one is intentionally and voluntarily choosing a community that matches one's individual preferences.[116] Finally, a private entity may be more responsive to exit—that is, more sensitive to market demand—than a public entity such as a municipality, given the clear mandate of the profit motive in the former case and the lack of such clear motive in the latter case.[117]

Despite these considerations, it remains implausible that there will be a sufficient number and variety of private developments in a given metropolitan area to enable each resident to find one that aligns perfectly with that resident's own preferences. Yet, even if all imaginable bundles of covenants cannot realistically be provided in a particular metropolitan area, it might seem sufficient that each person can select the bundle most well-suited to that person's own tastes—understanding that some degree of divergence from personal preferences will be inevitable.[118] Private developments typically feature a multitude of different rules that are designed to foster a particular neighborhood environment and to preserve property values. People within those communities may be heterogeneous with regard to the benefits they would derive from violating each of those many rules. It is possible that the surplus a given individual receives from the enforcement of certain rules outweighs the losses other rules generate for that individual, so that the overall bundle remains a good bargain. However, the fact that the bundle represents a better deal than the other available bundles does not mean that the results cannot be improved upon. There is no reason to ignore the remaining sources of inefficiency, and the prospect for additional gains that might be associated with addressing them.

Whether addressing those inefficiencies would cost more than it is worth is a separate question. In answering that separate question, it is important to clearly define the goal of the land use controls in question. If a large part of the goal is to assemble groups of people who have similar tastes in matters such as yard art—perhaps to fulfill some of the social or associational gains mentioned above—then perhaps we can do no better than hope for a proliferation of different communities into which people might sort themselves. If the goal is instead to produce the local

115. *See* FOLDVARY, *supra* note 62, at 71 (observing that "communities can be created anew and fashioned to suit the preferences of a group").

116. *See* sources cited *supra* note 88 (discussing the role of voluntary choice in private communities).

117. *See, e.g.,* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 356 (2000) (arguing that there is no reason to assume "that government, as a collective entity, will rationally pursue any particular goal, let alone rationally maximize wealth or any other single variable").

118. *See* FOLDVARY, *supra* note 62, at 71 (noting that communities can provide close matches on key attributes even if they cannot offer "impossibly perfect matches").

public good of premium neighborhood ambience, then there may well be people who agree in principle on what such ambience would look and feel like, but for whom the lowest-cost way of making their own contribution to the ambience would vary.

This point can be clearly illustrated by drawing an analogy to pollution. There are many pollutants and many means through which pollution can be generated and controlled, all of which bear on the overall air quality of a particular area. Imagine that, in response to industrialists' concerns that the air quality in industrial areas was becoming unhealthy for workers, a new group of developers began setting up private industrial parks in which ambient pollution was to be controlled through private covenants. Industrialists could choose which industrial park to enter, but would have to abide by that industrial park's rules, unless a release could be purchased from every other factory in the community. If the only tool that these private developments had for controlling pollution was a set of "command-and-control" limits equally applicable to all factories (*e.g.,* uniform rules requiring installation of particular scrubbers and filters, uniform maximum limits on each effluvium), then the potential for inefficiency would be clear to everyone, notwithstanding the fact that, in this hypothetical, the factory owners got to choose which industrial community to join. For reasons that have been explored elsewhere, enabling each factory to choose the forms of pollution abatement that are cheapest for it would likely be a better solution,[119] especially if we knew that the large number of factories involved made it a virtual impossibility for any factory to negotiate release from particular covenants with all of the other factories.

In the pollution example, nothing of value is gained by assembling together groups of factories for whom the same means—say, attachment of a particular filter—is the cheapest way of contributing to premium air quality. This is a bit less clear in the private development context, in part because what constitutes premium neighborhood ambience is open to question in a way that air quality is not. Those for whom refraining from yard art is the cheapest way to contribute to neighborhood ambience may well suffer more agony from the presence of yard art than would another person for whom refraining from yard art is more costly. A second difference is that homeowners in private developments might seek associational gains that can only be achieved by assembling together people with common aesthetic preferences. It remains an open empirical question whether private developments fit better with the model of general pollution control (controlling tackiness of all sorts to generate a premium ambience) or whether significant gains are achieved by assembling

119. *See* Ellickson, *supra* note 13, at 688–89 ("Prevention costs will tend to be higher when either or both of the parties are compelled to undertake specific steps than when they are permitted to select voluntarily among available preventative measures.").

together people based on specific means of achieving a particular neighborhood environment.

C. Preference Misalignments over Time

Even if we assume, counterfactually, that every homebuyer is able to find and enter a private development that, at the moment of closing, has in place servitudes that perfectly fit with that homebuyer's preferences in every respect, preference misalignments continue to loom. We live in a dynamic world where people's preferences change and where the membership in any given community is fluid. Thus, as time passes, the homebuyer's preferences may begin to diverge from those expressed in the set of servitudes imposed by the community.[120] There are two basic ways this can happen. First, the homebuyer's preferences might change. Second, the community's use restrictions might change. While both possibilities have been mentioned in the literature, the idea that they are two sides of the same coin and that they together point to a basic structural problem in private servitude regimes has not been fully explored.

This is somewhat surprising, for these are precisely the same risks that have long been recognized in the municipal land use setting, where there are mechanisms in place that attempt, however imperfectly, to manage those risks. In the public sphere, we have the Takings Clause[121] and the nonconforming use doctrine[122] to protect against the risks presented by rule changes regarding the use of land. In addition, zoning law provides some mechanisms, such as the variance and the special exception, for allowing the homeowner to petition for individual, parcel-by-parcel changes. The results are admittedly imperfect. Many would say that the Takings Clause and the nonconforming use doctrine do too little to protect landowners from majoritarian rule changes,[123] and some have argued that nothing short of open market sale of zoning rights would al-

120. If people were blessed with perfect foresight and could perfectly predict their own future preferences, the future preferences of potential purchasers of their homes, and the future course of the community's use restrictions, then all of these factors could be taken into account at the outset and these later changes would not pose a problem. Of course, such is not the case. *See* Stewart E. Sterk, *Foresight and the Law of Servitudes*, 73 CORNELL L. REV. 956, 967–71 (1988) (discussing the inadequacy of foresight in the servitude context).

121. The Takings Clause in the U.S. Constitution states: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Most state constitutions have parallel clauses; moreover, the federal Takings Clause is incorporated into the Fourteenth Amendment's Due Process Clause, and thereby made applicable to the states. DUKEMINIER & KRIER, *supra* note 35, at 1093 n.2. While the Takings Clause does place some limits on regulatory encroachments into land use, those limits are quite unclear. *See id.* at 1232–38 (summarizing a variety of academic views on regulatory takings jurisprudence).

122. *See* JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS 721 (8th ed. 2002) (discussing law permitting continuation of preexisting nonconforming uses, subject to various limitations).

123. *See, e.g.*, Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEO. J.L. & PUB. POL'Y 77 (2002) (discussing the property rights movement's critique of existing protections).

low optimal readjustments of individual land use rights.[124] Yet, as maligned and imperfect as the municipal analogs for dealing with the problems of land use are, they represent finer-grained solutions to problems of community life than many private developments provide through covenant-based controls.

Of course, the governance structure of the homeowners association tries, in a rough fashion, to balance these risks of community life by setting up certain procedures for changing the rules. For example, a supermajority vote might be required for certain changes. However, because the rules that govern private development life generally are changed, or not changed, on an all-or-nothing basis, there is little opportunity to make adjustments for individual landowners. Moreover, the requirement of a supermajority only reduces, but does not eliminate, the majoritarian risks associated with rule change.[125]

These problems represent inefficiencies, and they do not go away just because people voluntarily signed themselves into the regime and could choose to go elsewhere—any more so than municipal inefficiencies associated with zoning go away because people voluntarily chose to live in a particular place and could choose to move away.

The possibility that preference or membership changes among the necessary majority or supermajority will lead to rule changes that disadvantage a minority interest within a community has received a good bit of attention.[126] This problem is analogous to that of regulatory takings in the municipal land use setting.[127] For example, a person who moves into a community that has no rules against motorcycles might be disadvantaged by a later rule change by the majority that takes away her right to ride a motorcycle in the community. Alternatively, a person who moves into a community that presently bans motorcycles might be disadvantaged if motorcycle riders became powerful enough politically to push through a lift on the ban. There have been suggestions that the governing documents (the "constitution") of the private development should

124. *See* Marion Clawson, *Why Not Sell Zoning and Rezoning? (Legally, That Is)*, CRY CAL., Winter 1996–67, at 9, 9 (asking "[w]hy should the zoning of land for intensive development, or rezoning to a higher use, not be openly sold in competitive bidding?"); Fischel, *supra* note 91, at 321–29 (presenting a proposal for salable zoning); Nelson, *supra* note 8, at 848–49 (discussing proposals for open sale of zoning).

125. *See supra* note 82 (discussing tradeoffs involved in permitting changes on less than unanimous consent); *see also* Hovenkamp, *supra* note 99, at 535–36 (suggesting that the unanimity requirement traditionally associated with servitude changes can lock homeowners into suboptimal situations, while a governance regime that permits changes through a majority or other voting rule risks "highly unstable, chaotic outcomes"); *cf.* Eagle, *supra* note 12, at 188 (observing that "[b]argains achieving only supermajority consent may make unwilling participants worse off"). The fact that a previous, unanimously adopted bargain included a supermajority procedure might be viewed as extending consent to the outcomes of that process, *see supra* note 47 (discussing this view), but it does not alter the fact that changes adopted over the objections of individual homeowners may make them worse off in ways that they did not contemplate, *see* Frug, *supra* note 88, at 1591 (observing that changes made after residents are already present in a homeowners association introduce the risk of coercion).

126. *See, e.g.,* Ellickson, *supra* note 10, at 1533–34; Sterk, *supra* note 47, at 273–74.

127. *See* Ellickson, *supra* note 10, at 1535.

include a takings clause, granting compensation to those who are harmed by a rule change.[128]

Robert Ellickson discussed this possibility in some detail twenty years ago.[129] His analysis discusses possible ways of getting the takings clause into the private development constitution, including the possibility that it could be implied as a matter of law, rather than expressly added.[130] He also suggests that the appropriate "just compensation" measure would take into account not only market value, as the "real" Takings Clause does, "but also an amount equal to what a 'reasonable person' in the claimant's particular life situation would lose in irreplaceable surplus."[131] Compensation may not be as valuable to the person disadvantaged by the rule change as relief from the rule would be, but arguably it would force majorities to consider the costs imposed on others as a result of their actions. The idea of addressing majoritarian risks through a "bill of rights" for private development residents has also been discussed more recently by Susan French.[132]

When rule changes generate losers requiring compensation, they also generate winners. Therefore, the "givings" side of the problem also must be confronted.[133] It would make sense to formulate some mechanism for requiring majorities who stand to benefit from a particular rule change or adjustment to pay those in the minority who are harmed by the change. More than this rule of "majorities compensate minorities" is necessary to confront the first problem identified above—that of individual changes in preferences, where the individual in question is unable to muster a majority, or supermajority, for a global rule change. What is necessary, then, is not only a principle of compensation to losers in the political process who suffer from rule changes, but also a mechanism for those who have experienced preference changes to initiate realignments of land use requirements by offering compensation to others in the group who are disadvantaged by that realignment. At present, no such mechanism appears to be in general use. To be sure, the doctrine of changed

128. *Id*. at 1535–39.

129. *See id*. (discussing potential of private takings clauses to reconcile "majoritarian flexibility and minority rights").

130. *Id*. at 1536.

131. *Id*. at 1538. The example Ellickson gives involves the impact of an amendment that prospectively bans children on a currently childless but still-fertile couple. *See id.* at 1538–39 (noting that the claimant would still be expected to mitigate damages, by moving if necessary). The Fair Housing Act now prohibits private discrimination in housing on the basis of family status (that is, the presence of minor children), subject to an exception for communities made up primarily of older residents. *See* 42 U.S.C. §§ 3604, 3607(b) (2003).

132. *See generally* Susan F. French, *The Constitution of a Private Residential Government Should Include a Bill of Rights*, 27 WAKE FOREST L. REV. 345 (1992) (discussing the need for such a bill of rights, and sketching out some possible provisions).

133. *See* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 550 (2001) (observing that "[f]or every type of taking, there exists a corresponding type of giving"); *cf.* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 4 (1993) (explaining that "the same set of problems" that are implicated in governmental "takings" also "arises with respect to the other side of the transaction—where government *gives* things to certain individuals").

conditions may be used to set aside, or limit remedies for the violation of, covenants based on changes in the community.[134] Yet preference changes in individuals can occur even in the absence of changes in the community.[135]

If enough people are concerned about the possibility of preference and rule changes, then we would expect the market to respond by offering communities that are relatively free of restrictions and that strictly control the ability of the homeowners association to impose additional restrictions.[136] After all, developers have no personal desire to impose a particular aesthetic standard or level of regimentation on unwilling subjects; they are merely concerned with maximizing profits.[137] If the market is not responding by providing less restrictive options, then why does this

134. *See* Reichman, *supra* note 65, at 156–58 (discussing and critiquing judicial discretion to deny specific performance or, in extreme cases, to extinguish the land use obligation where circumstances have changed and the servitude has become obsolete); Stewart E. Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 652–54 (1985) (discussing the changed conditions doctrine).

135. For example, a childless couple might have a child, leading them to desire to use their property in somewhat different ways. A person might take up a hobby, or get married, or decide to share their living space with friends or family. Judicial reluctance to release individual parcels based on a doctrine of changed conditions also limits the amount of flexibility that this doctrine can provide. *See* Reichman, *supra* note 65, at 158 (linking judicial reluctance to release individual parcels based on changed conditions to limits on homeowner association powers to engage in "spot" permitting, asking "[i]f private organizations have to adhere to equality of treatment, how can the courts ignore the very principle which they enforce?").

136. Of course, the lack of rules generates inefficiencies also, which is presumably the reason covenants were used in the first place. If the inefficiencies associated with the lack of rules are larger than those arising from uniformly restrictive rules, then we still might see the uniformly restrictive rules. In other words, the fact that uniformly restrictive rules are selected over no rules does not establish their superiority over other alternatives, such as liability rules, flexible standards, or tradable permits.

137. *See* YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY RIGHTS 115 (2d ed. 1997) (observing that developers attaching private covenants to the property "presumably believed that the restrictions would increase the net value of the projects to their buyers, thereby increasing the total net amount they themselves could extract"); Ellickson, *supra* note 13, at 713 (arguing that developers will be motivated to offer optimal covenants because the developer's "land values will rise only if his home buyers perceive that the covenants will reduce the future nuisance costs they might suffer by an amount greater than the sum of their loss of flexibility in use and future administrative costs"); Epstein, *supra* note 75, at 917 (observing that a developer "has all the right incentives to offer the ideal mix of burdens and benefits. If he offers inferior terms, then his return from sales will suffer because the price that he can command in the market for the units will be reduced.").

The foregoing assumes that consumers are the only audience that developers must try to please in designing covenant regimes. Because developers must also gain the approval of lenders and local governments to do their projects, these players may also shape the resulting regime and governing documents in various ways. *See* Marc A. Weiss & John W. Watts, *Community Builders and Community Associations: The Role of Real Estate Developers in Private Residential Governance*, *in* RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENT IN THE INTERGOVERNMENTAL SYSTEM?, *supra* note 89, at 95, 99–100 (discussing FHA policies during the period from 1935 to 1963, which "strongly promoted the use of comprehensive deed restrictions and insisted that they be vigorously enforced"); *id*. at 101–02 (explaining that "[d]evelopers creating associations increasingly are responding to local governments' subdivision regulations rather than to the home buyers' interests," diluting the "market-driven rationale"). To the extent these additional players are imperfect agents of consumers, further disconnects between consumer preferences and market offerings might be introduced. I thank Michael B. Kelly for prompting me to consider this line of inquiry.

fact not provide convincing proof that people living in private developments really *do* want the restrictions they are getting? Indeed, one might begin to suspect that the only people who are unhappy with the resulting arrangements are intermeddling academics like myself. While such a possibility is well worth entertaining, there are reasons to suspect that the market is less capable of reliably delivering on consumer preferences for servitudes than often has been assumed. In the following parts,[138] I explore some reasons why.

III. MARKET IMPERFECTIONS RELATING TO DEVELOPMENT DYNAMICS

Imperfections in the market for servitudes create additional risks that servitudes in private communities may fail to align with the preferences of the individuals living within them. In this part, I consider two sources of such risk: the intercommunity dynamics that result from a multitude of private developments in the same metropolitan area,[139] and the path-dependent dynamics of CC&R formulation.[140]

A. Intercommunity Interactions

A developer does not make decisions about the servitudes for a given community in a vacuum. Rather, the fact that the developer's community will draw from the same pool of potential customers as other communities within the same metropolitan area makes developer decisions subject to interdependencies. The interdependence of developer decision making about servitudes may not play a major role where many nonservitude neighborhoods exist, but as the overall market share of private developments increases, we would expect these interdependencies to become more pronounced.

The interdependence of decision making among municipalities within a given metropolitan community has long been recognized. In *Southern Burlington County NAACP v. Township of Mount Laurel*,[141] for example, the Supreme Court of New Jersey recognized that a sort of strategic game may play out among local governments in municipal areas regarding undesirable or costly uses, such as low-income housing units.[142] Because provision for such uses within the greater metropolitan region

138. *See infra* Parts III–IV.

139. *See infra* Part III.A.

140. *See infra* Part III.B.

141. 336 A.2d 713, 723 (N.J. 1975). This case was the first of a trilogy regarding municipal obligations with respect to low-income housing. *See also* S. Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) (Mount Laurel II); Hills Dev. Co. v. Township of Bernards, 510 A.2d 621 (N.J. 1986) (referred to as "Mount Laurel III").

142. *Mount Laurel*, 336 A.2d at 723 (explaining that "[a]lmost every one [of the developing municipalities in the region] acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base, despite the location of the municipality or the demand for varied kinds of housing").

benefits all municipalities (by, for example, giving low-wage workers a place to live), but the costs fall only on the municipality that accommodates the uses, the problem takes the form of a Prisoner's Dilemma. As Clayton Gillette explains, if municipalities are allowed to exclude disfavored uses, and most do so, then a situation is created in which "municipalities that might accept a 'fair share' of such homes would fear that they will end up accepting all of them if other localities proscribe such uses."[143]

In the municipal context, this dynamic is usually explained by reference to the impact of the disfavored uses on the tax base.[144] For example, a high-density, low-income housing complex will contain many people who will need to use municipal services, but each resident will be contributing relatively little to the tax base because of the low value of the properties they are occupying.[145] There is much more to municipal zoning than this sort of "fiscal zoning," however.[146] Often, certain uses are excluded because of a desire not to live near that use, which, in turn, often boils down to a desire not to have certain types of people as neighbors.[147] This is just as true—indeed, arguably more true—in private developments as it is in municipalities. If enough private developments are able to keep out enough uses, then the choices of the excluded become constrained, raising obvious questions of social justice.[148] Less obvious, but directly relevant here, choices may also end up being simultaneously constrained for the *included*—that is, for those who end up living within private developments. Thus, even if most individuals in most communities would prefer a more lenient servitude regime, no development wants to be the only lenient one in a field of stringent communities. The problem is one of adverse selection,[149] as the following illustrations will show.

143. Gillette, *supra* note 10, at 1437.

144. *See, e.g., Mount Laurel,* 336 A.2d at 723 ("There cannot be the slightest doubt that the reason for this course of conduct has been to keep down local taxes on *property* . . . and that the policy was carried out without regard for non-fiscal considerations with respect to *people*, either within or without its boundaries.").

145. *See* Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975).

146. *See* Wallace E. Oates, *The Use of Local Zoning Ordinances to Regulate Population Flows and the Quality of Local Services*, *in* ESSAYS IN LABOR MARKET ANALYSIS 201, 201–19 (Orley C. Ashenfelter & Wallace E. Oates eds., 1977) (discussing possibility that zoning might be motivated not only by fiscal considerations but also by concerns about the effects of population characteristics on public goods).

147. *See, e.g.,* Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 642–45 (2002) (reviewing WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION. SCHOOL FINANCE, AND LAND-USE POLICIES (2001)) (discussing role of preferences about people in municipal land use decisions).

148. Gillette, *supra* note 10, at 1438 ("As the number of communities who endorse the same exclusion multiplies, however, the mobility of the excluded may become so constrained as to trump the interests in upholding the exclusion.").

149. *See* Yoram Barzel & Tim R. Sass, *The Allocation of Resources by Voting,* 105 Q. J. ECON. 745, 752 & n.12 (1990) (observing that if self-selection with regard to a jointly held asset is permitted,

First, consider homeowner dues collection. Imagine a starting point in which all communities have harsh collections procedures and use the full power of the law, including foreclosure mechanisms, to effectuate those collections.[150] Many people dislike the harsh dues enforcement regime, but they effectively have no choice because all communities have the same procedures. Recognizing this unmet consumer demand, one community, Heart Hollow, decides to become more forgiving; it will work with people if they fall behind on their dues, and legally binds itself to never foreclose or take any other harsh enforcement action. The community uses this as a selling point, stressing that it is a "real community" with a "big heart." It is easy to see what will happen. People who are most likely to fall behind on their payments, the Slackers, will self-select into Heart Hollow. Solvent people who will not need this leniency, the Sticklers, will go elsewhere to avoid having to cross-subsidize the Slackers. Soon Heart Hollow will no longer be able to maintain its common areas because it is filled with Slackers and nobody is paying on time. This does not mean that Heart Hollow's developer misread consumer demand—it might well be the case that everyone would prefer a world in which lenient procedures, rather than harsh procedures, were used. Unless this is imposed globally, however, an adverse selection problem will occur.

A similar dynamic could apply to other sorts of restrictive covenants, such as strict limits on pets, lawn ornaments, exterior paint colors, and motorcycles. While it might be the case that many people would not mind an occasional house with, for example, four pets, or a motorcycle, or a gnome in the front yard, obvious difficulties arise if one's community is the only one in the metropolitan area that allows a particular use. The concern would be that permitting a particular use would attract an unwelcome concentration of the particular phenomenon, rather than just the expected, and perhaps unobjectionable, "fair share" that one might get from a random cross-section of the population. For example, a development might wish to permit homeowners free expression in paint color, but if all of the other developments in the area restrict paint colors to very boring palettes, the development might fear that only people who have no sense of decorum will flock to its free-painting zones. Even people who have a mild preference for a house with purple trim may fear that the neighborhood will go to seed once it is filled with paint anarchists and that home values will drop.

Relatedly, some people might be concerned about living near a concentrated number of the "type of people" who really, really care about being able to paint their houses the color of their choosing. They might

some of the self-selectors will be "adverse selectors—individuals who value the asset highly because they can gain at others' expense").

150. *See* NATELSON, *supra* note 50, § 5.3, at 173–74 (discussing remedies available to property owners' associations, including foreclosure).

imagine that people who have strong preferences about paint color are insufficiently serious-minded or unduly frivolous. To the extent that covenants constitute signals about community member characteristics,[151] developers and residents will take pains to control the content of the signals that they send. In a world where most communities strictly regulate external aesthetic elements, permissiveness about one or more of those elements sends a stronger signal than it would in a world where permissiveness of that sort is widespread. If those for whom the signal has the greatest attraction are believed to possess undesirable personal characteristics, then the signal will repel those who do not want to live near large concentrations of likely signal-responders—including those who have no objection to, or even a mild preference for, the underlying use.[152]

B. Path Dependence

The foregoing account explains why there might be a reluctance for any one community to deviate from the restrictive norms that dominate in a given metropolitan area, but it does not explain how those restrictive norms were established in the first place. One explanation would go something like this: the first people to form private developments were those who were the least tolerant of various sorts of deviations from certain conservative standards.[153] As they left the "ordinary" neighborhoods and entered into private developments with severe restrictions, this altered the mix in the ordinary neighborhoods, making them less conservative, on the whole, than they were before the exodus. This likely spurred additional departures from the next least tolerant strata of homebuyers,[154] who would again be expected to impose rather strict servitudes to keep the less conservative elements from following them. As more and more private developments were added to the mix, the perceived risk of drawing a self-selected concentration of a particular undesirable use increased. This increasing risk kept the servitudes restrictive, even as the communities began to attract many people who did not necessarily share the ultra-conservative views of those whose preferences shaped the earlier communities.

151. Gillette, *supra* note 10, at 1395 (explaining that for those for whom "service packages and homogeneity are inherently related," covenants can be valuable insofar as they "provide a salient signal, reducing both the search costs involved in finding like-minded individuals and the risk of regret that would be suffered should one discover, after making an expensive home purchase, that the neighborhood is less hospitable than originally assumed").

152. For example, Gillette explains that "even where individuals do not have an aversion to certain practices that are prohibited in covenants, such as maintenance of trailer homes, they may believe that there is a correlation between the subject of the covenant and characteristics that can serve as the basis for a desirable affinity." *Id.* at 1396.

153. I am using "conservative" here to refer to aesthetic sensibilities, not political positions.

154. *See* THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 150–51 (1978) (describing the "chain reaction" that can result from movement of individuals, given the fact that "[e]verybody who selects a new environment affects the environment of those he leaves and those he moves among").

This is just one possible account of how servitude regimes might start out strict and stay strict, even when this ends up ultimately not serving the preferences of the people who live within them. It is similar to path dependent stories that have been told in other contexts.[155] A related explanation would also begin with the premise that the earliest private developments were formed by those holding the most conservative preferences, but would attribute the later adoption of similarly strict servitudes in later-formed communities to developer inertia. In this account, the same paperwork was simply recycled and used in new community after new community, because it was easy to do, had been field-tested without terrible results, had been formulated to comply with applicable governmental and lender standards, and did not seem to be encountering any serious market resistance.[156]

Another type of path dependence also bears examination. Developers typically maintain control of the development during the early stages of the development's life, only relinquishing control to the homeowners association when the project is close to completion and most of the homes have been sold.[157] To see how this dynamic might affect servitude content, it is necessary to recall that the only homebuyers who could

155. A standard, albeit disputed, example is the QWERTY typewriter keyboard. *See* S.J. Liebowitz & Stephen E. Margolis, *The Fable of the Keys*, 33 J.L. & ECON. 1 (1990) (contending that the path-dependent account of the keyboard's dominance is not well-supported). Whether or not the keyboard's persistence is actually an example of path dependence (which turns on the subsidiary claim that other, better keyboarding systems came along later, but were not adopted because of the entrenchment of the QWERTY system), it plainly illustrates the kind of setting in which we might expect path dependence to be important. *See* Michael J. Dorf, *The Paths to Legal Equality: A Reply to Dean Sullivan*, 90 CAL. L. REV. 791, 807 & n.103 (2002). Yet, as the typewriter dispute illustrates, it is not easy to distinguish dominance facilitated by path dependence from that won through superiority on the merits—a fact that counsels against jumping too readily to conclusions about the role of path dependence.

156. *See, e.g.,* Hyatt, *supra* note 14, at 336–37 (presenting "reliance upon forms" as an "impediment to evolution"); Winokur, *supra* note 9, at 75–78; David C. Drewes, Note, *Putting the "Community" Back in Common Interest Communities: A Proposal for Participation-Enhancing Procedural Review*, 101 COLUM. L. REV. 314, 329–30 (2001) ("The prevalence of this ethos of restrictiveness has been amplified by the fact that, to facilitate the booming growth of and respond to the growing demand for CICs, developers and their attorneys have recycled restrictive form documents, originally crafted according to the principle the more restrictive the better."); *see also* Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 719–29 (1997) (describing benefits of the use of standard terms in contracts, including network and learning externalities, more efficient drafting, familiarity of terms to others, and decreased uncertainty about the terms as a result of judicial precedent); Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1605–08 (1998) (presenting experimental results supporting inertia as a behavioral influence, and suggesting that it plays a role in content of form contracts).

157. *See, e.g.,* Barton & Silverman, *supra* note 1, at 34 (explaining that "[t]he association normally remains under developer control until 75 percent of the homes are sold" and that "[i]n a system with one vote for each home, the developer will hold a block of votes until all units are sold"); Donald J. Boudreaux & Randall G. Holcombe, *Contractual Governments in Theory and Practice*, *in* THE VOLUNTARY CITY, *supra* note 3, at 289, 295 (explaining that in Park West, a community in Fairfax County, Virginia, "the developer retains the right to three votes per lot until either a purchaser or renter occupies the property"); Reichman, *supra* note 6, at 286 ("The covenants and bylaws of the typical homeowners' association are aimed at securing absolute control for the developer until a substantial part of the project is sold.").

even theoretically have any impact at all on the content of the restrictions are the first set of buyers, who are looking at homes before the declaration has been recorded.[158] These buyers face a lengthy period in which the developer will maintain dictatorial control and they themselves will have no say in matters. The developer who inserts stringent covenants will find homebuyers more willing to make early purchases against that backdrop of powerlessness and uncertainty. In this way, the developer precommits to a particular development plan.[159]

Because the earliest residents bear the greatest risk—unlike later residents, they cannot reassure themselves about a community by scanning the completed neighborhood—they are likely to desire a high level of protection against uncertainty in the form of restrictive servitudes. Once the restrictions are in place, everyone else who enters the community must agree to abide by them. It is true that if a majority (or supermajority) of the community later wished to lift some restrictions, they could do so. However, they would be doing so in a world where all of the other communities are located at the same starting point—relatively strict servitudes—making the lifting of restrictions in a single community risky for the reasons described above.[160]

It is also true that a developer would not bow to early purchasers' pressures for overly strict covenants if the developer expected that such covenants would generate enough market resistance among later buyers to reduce the overall present-value return on the development. Instead, the developer might lure in the earlier buyers with less costly inducements, such as price concessions.[161] If homebuyers are significantly more risk averse than developers, however, then it is not clear that price concessions would be a viable alternative. Risk-averse homebuyers would have to be compensated rather handsomely, in excess of the expected value of losses, for taking a chance on the neighborhood, while developers would be unlikely to give up a lump sum of cash that is significantly in excess of the expected costs associated with later market resistance due to the covenants. Moreover, the market signals from buyers to developers are often muted, calling into question whether developers are in a position to accurately discern and respond to the preferences of all homebuyers. The following part addresses these points.

158. Hyatt & Stubblefield, *supra* note 7, at 653 & nn.253–54 (noting that where the developer does not record the development's governing documents until just before closing on the first lot, the first set of purchasers may have a chance to ask about and potentially influence those documents; however, purchasers in commercial developments take advantage of this opportunity more often than do residential homebuyers).

159. Such self-binding is at the heart of contractual obligation. *See* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 13 (1981) ("If it is my purpose, my will that others be able to count on me in the pursuit of their endeavor, it is essential that I be able to deliver myself into their hands more firmly than where they simply predict my future course.").

160. *See supra* text accompanying notes 153–54.

161. I thank Bob Nelson for this point.

IV. ADDITIONAL OBSTACLES TO PREFERENCE VINDICATION

In this part, I explore a cluster of additional factors that may generate a gap between homebuyer preferences and the servitude regimes that prevail in private communities. First, I explore a curious dynamic through which homeowner risk aversion about resale values may generate changes in resale values that are independent of the actual preferences of homebuyers but to which homebuyers must rationally respond.[162] This may drive homebuyers to choose blander environments and more restrictive regimes than they would themselves prefer. Next, I consider the problem of bundling and its tendency to blunt the market signals that homebuyers send to developers about servitudes.[163] Third, I explore the relatively well-recognized problem of homebuyer ignorance from a slightly different perspective.[164] I focus on the ways in which background expectations about the meaning of property ownership, governance, and community may render homebuyers less able to understand the terms of the arrangement they are entering, and hence less able to provide the necessary degree of market discipline.

A. Homeowner Risk Aversion

Risk aversion in homeowners, when coupled with certain commonplace assumptions about the resale market, may systematically push communities in the direction of greater regimentation than most individuals desire. Homeowners are risk averse for good reason: for most of them, the home is their single largest asset (human capital aside) and few of them have much in the way of savings outside of home equity.[165] Because the home represents an undiversified investment that cannot be insured against a drop in value, people seek other means of control over the financial risk that the home represents.[166] In the municipal setting, this often takes the form of political action designed to safeguard home values.[167] In the private development setting, it may take the form of restrictive covenants.[168]

162. *See infra* Part IV.A.
163. *See infra* Part IV.B.
164. *See infra* Part IV.C.
165. FISCHEL, *supra* note 19, at 4.
166. *Id*. at 10–12.
167. *Id*. at 4–12.
168. Spencer MacCallum describes the way the home investment risk might influence the behavior of a typical couple in a private development:

> If they want to make their investment less speculative, their recourse is to try to control some of those locational, or neighborhood, factors influencing the value and liquidity of their individual site. In plain words, that means controlling who their neighbors are and how their neighbors live. The effect of this conflict between resale value and enjoyment of "community" is frequently a sterile neighborhood.

MacCallum, *supra* note 9, at 392.

One might reasonably object that a key purpose of restrictive covenants is to protect property values,[169] and that the fact people use them for this purpose merely illustrates how well the system is working. Yet this dynamic can—at least in theory, and quite possibly in practice—lead to greater restrictiveness than most people would personally prefer. To see why, it is necessary to recognize the dual nature of the home as both an item of consumption and a financial investment. A homeowner hopes to maximize the sum of two things (discounted to present value): the stream of utility achieved through living in the house and the amount realizable on resale.[170] At times, these two goals are in some tension. William Fischel offers an example of this phenomenon—the fact that people who remodel their homes must decide to what extent they should attempt to please themselves and to what extent they should attempt to please the market.[171] While the degree to which each objective will govern decision making depends on a variety of factors, including discount rates and the length of time before one plans to move or borrow against the house, concerns about resale value often figure prominently.

This concern with resale value translates into a general reduction in aesthetic risk-taking among homeowners. Blandness in architectural designs is the risk averse choice, because it permits one to reach the broadest spectrum of the resale market. As Constance Perin explains:

> Architecturally innovative housing is said to be unsuccessful among the majority of housing consumers—but that is because they are looking ahead to being producers. They are on the lookout for prospective buyers, when that time comes. Those wealthy consumers who commission "Falling Waters" and "Glass Boxes" as well as those buying less opulent but still avant-garde housing have other assets to rely on and are able to wait out the search for a buyer from their narrower market.[172]

If daring choices tend to diverge from each other and elicit strong and conflicting reactions, while bland choices tend to converge on just a few models that resemble each other closely, then the bland choices would

169. Courts have viewed the protection of property values as an important benefit that can be secured through restrictive covenants. *See, e.g.,* Dolan-King v. Rancho Santa Fe Ass'n, 97 Cal. Rptr. 2d 280, 288 (Cal. Ct. App. 2000) ("Maintaining a consistent and harmonious neighborhood character, one that is architecturally and artistically pleasing, confers a benefit on the homeowners by maintaining the value of their properties."). On the prominence of property values as a justification for restrictions, see, for example, Franzese, *supra* note 8, at 557 & n.29; Hyatt & Stubblefield, *supra* note 7, at 612. *See also* MCKENZIE, *supra* note 11, at 19 (observing that in many common interest developments "[p]reservation of property values is the highest social goal, to which other aspects of community life are subordinated").

170. *See* Jan K. Brueckner & Man-Soo Joo, *Voting with Capitalization*, 21 REGIONAL SCI. & URB. ECON. 453 (1991) (discussing these two components of home value and modeling their impact on homeowners' political behavior); Fennell, *supra* note 147, at 646 & n.121 (discussing this point); *see also* Ben-Shahar, *supra* note 52, at 218 (observing that asset owners are concerned both with the "income flow" associated with the "instantaneous use and enjoyment of the asset" and with the "stock" or resale value of the asset).

171. FISCHEL, *supra* note 19, at 150.

172. CONSTANCE PERIN, EVERYTHING IN ITS PLACE 139 (1977).

likely capture a plurality of the market, even if many people preferred more daring choices. To put it another way, the divergence between a bland choice and any given person's preference is likely to be less than the divergence between one extreme choice and a different extreme choice. If so, and if the distribution of preferences is spread evenly along a spectrum, then picking something that is "middle-of-the-road" will minimize the divergences between the home and the individual preferences of homebuyers, and thereby broaden the market for the home.[173]

The same concern with resale value that drives personal decisions about decoration and architecture also influences choices about restrictions in a private development. As Korngold observes, "[t]he ugly residence injures surrounding property values, particularly with relation to possibilities of re-sale. This represents a damage for which there is no insurance coverage."[174]

It is worth asking why, and in what sense, an "ugly" home in the neighborhood would cause the value of neighboring homes to drop. To frame the inquiry, let me specify that I am speaking not of a house that is in disrepair, or that is smaller or cheaper than the others in the neighborhood, but of a house that is simply ugly in its design or decorating scheme. The assumption seems to be that the visual agony inflicted by the ugly home is so great as to diminish the enjoyment neighboring residents can derive from their consumption of housing. But this is only part of the answer. The other part of the answer is that the ugly house causes a drop in property values because the would-be buyers are already worrying that the ugly house will impair their ability to resell. In fact, would-be buyers might pay less for a home that is next to the ugly house, even if they themselves found it kind of charming, if they assumed that other people in their potential resale pool would find it ugly. The same goes for the merely unusual house, or the one with flamboyant paint colors.

It is presumed that a drop in market value provides irrefutable evidence of ugliness. Frank Michelman asserts that "[t]he decline in market value, therefore, ought to be regarded as a kind of socially computerized, objective evidence that the regulated activity is by a social consensus deemed intrinsically ugly, negatively suggestive, or destructive of prior existing beauty."[175] Yet, for people concerned about resale value, fears of others' reactions can create a self-fulfilling prophecy with respect to property values. Thus, the fear that others might find something ugly could impede sales, even if nobody actually found it ugly. The result may be more blandness than anyone really wants.

173. *Cf.* Fennell, *supra* note 147, at 647 (discussing circumstances in which a homeowner would make political choices designed to please the "median homebuyer").

174. Korngold, *supra* note 18, at 626.

175. Frank Michelman, *Toward a Practical Standard for Aesthetic Regulation*, PRAC. LAW., Feb. 1969, at 36, 37.

B. Unique Bundles

The "unique" character of parcels of land has been historically stressed and underlies the justification for specific performance of contracts for the sale of land.[176] Yet this same uniqueness hints at a difficulty with the typical choice situation that confronts homebuyers. The choice a homebuyer makes about the community and its servitude regime is necessarily bundled with a much larger and more salient choice about a particular house located on a unique parcel.[177] Whether one buys into a private community or an ordinary neighborhood, it is impossible to purchase a home without also purchasing the environment in which that home is located. This means that there is no potential for competition among "environment providers" for the business of any given homeowner, once that homeowner has decided on a house in a particular location.[178]

In ordinary neighborhoods, most of the details of neighborhood ambience are left to some combination of chance and politics. Hence, the "environment provider" is a composite of one's neighbors and of the municipal government. In a private development, the developer provides the environment in the form of CC&Rs. Perhaps part of what makes one "fall in love" with a given house is the neighborhood environment, which consciously or unconsciously factors into one's assessment of the merits of the house and location. Nevertheless, the servitudes are not decided on separately, nor could they be. Moreover, the covenants themselves are bundled together and are not negotiated indi-

176. *See, e.g.*, Pardee v. Camden Lumber Co., 73 S.E. 82 (W. Va. 1911) (explaining that "as no two pieces of land can be regarded as equivalent in value and character in all respects, equity will always enforce specific performance of a valid contract for the sale thereof"); DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 37–38 (1991) (noting that the irreplaceable nature of land supports the well-settled rule that "contracts to sell real estate are specifically enforceable"); Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 364–65 (1984) (noting that equitable relief is discretionarily available in cases where damages would not fully compensate the plaintiff, and explaining that "[t]he typical cases in which this under-compensation is said to arise are in the sale of 'unique goods,' the sale of land (considered by the law, largely for historical reasons, to be a unique good), and long-term input contracts").

177. *Cf.* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 108–09 (1987) (noting that courts have sometimes refused to enforce covenants against subsequent owners where the courts believe "that subsequent purchasers may not adequately reevaluate the large bundle (say, a home in a particular location) based on a small feature (a mildly annoying covenant)").

178. A futuristic thought experiment illustrates this point. We might imagine a world in which residential properties were wrapped in layers of virtual reality technology that provided the residents' selected environments—complete with sounds, smells, sights, and perhaps even personalized weather. One resident might choose a dynamic "city" environment that provided the simulated experience of lively bustle, while another might choose a bucolic farm setting featuring distant cows, green pastures, and chirping crickets. This would have the effect of unbundling the unique parcel of land and the house from the selected environment. Real competition among providers of this virtual reality technology would then be possible, in just the same way that telephone companies can now compete for the business of a given homeowner. In the real world, the bundling problem cannot be avoided.

vidually, making it less likely that any homebuyer will pay attention to a given servitude provision.[179]

While the bundling point has been made by scholars in the context of discussions about whether to limit the enforceability of covenants against subsequent purchasers,[180] the same idea illuminates something important about covenants for our purposes: we—and the developers—cannot tell whether particular covenants attached to a home in a private development are adding to, or subtracting from, the consumer surplus that an individual consumer derives from a home purchase.[181] Bundling is ubiquitous in the marketplace, of course, and is usually not viewed as inconsistent with consumer autonomy.[182] While it necessarily limits consumer choice, and might thereby reduce the available consumer surplus in a given transaction,[183] it also adds value in other ways by, for example, reducing production costs, adding convenience for consumers, or reducing their search costs. Moreover, it is impossible, in any home purchase context, whether inside or outside a private development, to make a truly unbundled choice.[184] Even if individual homeowners eschew private developments altogether, or choose ones with loose rules, they do not really solve the bundling problem. Each homeowner would still be buying a house that was "bundled" with a particular, although perhaps quite uncertain, environment—albeit one resulting from the many individual choices of neighbors, rather than from the unilateral choice of a developer.

179. *See* Alexander, *supra* note 32, at 894–95 ("In a complex transaction the successor (*S*) may not have adequately focused on the servitude term. *S* might have demanded a higher level of compensation for the servitude term, had that term been negotiated individually rather than as part of a package containing many items."); *id*. at 895 (citing Mark Kelman for the "bundling problem").

180. *Id*.; *see also* KELMAN, *supra* note 177, at 108–09.

181. *See* Hovenkamp, *supra* note 99, at 530 (stating that the fact that a homebuyer, B, agrees to purchase subject to a set of servitudes "does not guarantee that B received the optimal set of servitudes from her perspective," but rather "tells us only that B was willing to pay some mutually acceptable price"). By looking at the prices paid under different covenant schemes, however, it might be possible to infer something about their value. One empirical study of condominiums located in an upscale portion of Chicago near the lakefront attempted to assess the value added or subtracted (as measured by sale price) by various kinds of pet covenants. Roger E. Cannaday, *Condominium Covenants: Cats, Yes; Dogs, No,* 35 J. URB. ECON. 71 (1994). The author concluded that "cats only" covenants added value compared to a "no pets" covenant, while covenants that also allowed dogs reduced value. *Id*. at 80 & tbl.3.

182. Glen O. Robinson, *Explaining Contingent Rights: The Puzzle of "Obsolete" Covenants*, 91 COLUM. L. REV. 546, 577 (1991) ("Virtually all goods are sold as an aggregation of physically separable units that some buyers would prefer to have unbundled."); *see also* Gillette, *supra* note 10, at 1407 (arguing that "analysis of the scope of association autonomy is not much advanced by recognizing that even those who are aware of covenants may prefer only some of them, but are locked into a 'coercive,' all-or-nothing regime"); Sterk, *supra* note 47, at 302–03 (noting the ubiquity of bundling in all contractual settings and suggesting that the bundling critique of homeowners associations is unconvincing).

183. As Mark Kelman explains, "The inability to control the availability of all technically feasible unbundled packages is undoubtedly an enormous source of impotence and determined choicelessness in private life." KELMAN, *supra* note 177, at 108.

184. *See* Gillette, *supra* note 10, at 1408 (noting that municipality residents "similarly must purchase bundled municipal services").

Given this, we might think that a developer's bundles of home and environment would be more likely to maximize value than would the bundles of home and environment that result from the uncoordinated choices of many individuals. As discussed above, CC&Rs respond to collective action problems—the tendency of homeowners to undertake personally beneficial but socially costly actions with respect to the neighborhood environment.[185] While it is true that developers hold geographic monopolies with respect to their developments, a rational monopolist will be able to maximize profits by providing customers with a desirable product.[186] Thus, the mere fact that developers are offering bundles that are partly composed of "unique" real estate does not suggest that they will try to pawn off undesirable servitudes on unwilling subjects.

If the developer thought the homebuyers would not notice the difference, however, the developer might adopt a suboptimal set of servitudes if doing so would save her money (say, because she could reuse boilerplate from an earlier development).[187] Home purchasers likely pay attention to only a few salient attributes in making their purchase decisions, and servitudes may not make the cut.[188] Of course, seller exploitation of consumer inattention by skimping on less salient features is not unique to the monopoly situation, but would also occur in competitive markets where price is among the salient characteristics.[189]

The real problem with bundling in this context is not that it permits developers to exploit homebuyers or force them to accept servitudes that the developers know they dislike, but rather that it blunts the market signals that consumers might otherwise be able to send to developers about their preferences for particular servitude regimes. Because homebuyers are not in a position to "vote separately" on the servitude regime with their dollars, even the most vigilant consumers cannot convey through a home purchase whether the servitudes were valuable to them or something that they are only putting up with. In other words, a developer may be unable to tell whether the servitudes were increasing or decreasing the consumer surplus associated with the home purchase.[190]

185. *See supra* notes 38–51 and accompanying text.

186. Epstein, *supra* note 75, at 918.

187. *See* Russell B. Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1234 (2003) (suggesting that "non-salient attributes [of products] are subject to inefficiencies driven by the strategic behavior of sellers attempting to increase their profits at the expense of unknowing buyers").

188. *See id.* at 1227–29 (presenting evidence on decision making that suggests buyers often pay attention to only a limited number of attributes, and citing a study involving choices among houses that suggests accuracy in decision making drops as the number of attributes rises); *see also infra* Part IV.C (discussing role of consumer ignorance in private developments).

189. *See* Korobkin, *supra* note 187, at 1234 (explaining that if consumers pay attention to only the most salient attributes—including price—in making purchase decisions, "market pressures will force sellers in competitive markets to offer low-quality non-salient contract terms, whether or not such terms are efficient").

190. In an ordinary neighborhood where land use is controlled by zoning, people often do have the opportunity to express preferences for land use measures a la carte, through the political process.

Thus, bundling may keep developers from being able to gather useful information about buyer preferences that might enable them to better provide what homebuyers really want.

One might think, however, that competition *between* private developments would alleviate this problem by providing an array of choices to which consumers might respond. Private developments are usually geographically smaller than municipalities, and it is probably a bit of a fiction to suppose that each one is really "unique" where, for example, dozens of private developments are positioned at points equidistant from a city center in a metropolitan area. Of course, given the adverse selection problem discussed above,[191] developers might be reluctant to directly compete on the dimension of leniency, preferring instead to default to a fairly restrictive model, if that seems to prevail in the area. The prevalence of bundling, when coupled with a relatively restricted servitude choice set for homebuyers, leads to a phenomenon in which developers may remain unaware of homebuyer preferences. If this is the case, then the market may not supply the servitude regimes that are actually desired by homebuyers. Margaret Jane Radin observes that "it is not clear that the nature of the land market and the residential housing market is such (or everywhere such) that developers will be forced by competition to create optimal servitude packages."[192] The problem is exacerbated by high levels of consumer ignorance about the private development experience, as the next subpart discusses.

C. Homebuyer Ignorance and the Role of Expectations

Much has been written about the fact that most people who buy into private communities do not fully understand what they are getting into.[193] If home purchases arise from misunderstandings, then they cannot provide meaningful market signals to developers. Arguments based on the assertion that homebuyers are entering into purchase agreements without full knowledge sound rather anemic, however. Surely it is not necessary that every buyer be well-informed in order for market discipline to operate. Even a small minority of well-informed shoppers can ensure that prices reflect the factors that consumers find important.[194]

So too, theoretically, do homeowners in private developments insofar as they can amend their CC&Rs through the governance structure. However, the real world participation levels may be insufficient to teach developers very much about consumer preferences.

191. *See supra* text accompanying notes 149–52.

192. Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 756 (1986).

193. *See, e.g.,* Winokur, *supra* note 8, at 99 & n.32 (collecting cites indicating that "few prospective owners intelligently review the restrictions to which they subject themselves upon acceptance of a deed to land burdened by servitudes"). *But see* Natelson, *supra* note 49, at 62–63 (describing a Florida study in which ninety-two percent of respondent condominium owners said the "regulatory scheme" contributed to their purchase decision, while acknowledging that this does "not demonstrate that purchasers knew of all matters important to consent").

194. *See* FISCHEL, *supra* note 19, at 44 (observing that markets can operate efficiently even if only a few consumers pay attention to quality differences). *But see* Winokur, *supra* note 9, at 31–32 (dis-

Nonetheless, some minimal conditions must be met in order for this market discipline to work effectively.

First, the response of the vigilant minority must be perceptible to the suppliers in question—here, the developers. For reasons discussed above, signals to developers about covenants may be significantly muted. Second, the response of the vigilant minority must meaningfully represent the interests of the acquiescent majority. This, too, may not be the case. Here, it is initially helpful to think of homebuyers as occupying a spectrum with regard to the tradeoff between free use of property and the restriction of property use. Some homebuyers are glad to put up with many restrictions because they value having their neighbors restrained more highly than they value their own freedom from constraint. Other homebuyers prefer fewer restrictions because they value their own freedom to use their property more highly than they value restraining the freedom of their neighbors. Yet consumer input can only play a role before the CC&Rs have been recorded in the declaration, given that they are uniform community-wide. Given homeowner risk aversion and the dynamics of path dependence, those who are most interested in imposing restrictions are likely to have the most influence during the crucial window of time when home-buying input might be possible. If the vigilant minority that is providing signals to developers about what homebuyers want is skewed toward the "restriction-friendly" end of the spectrum, then the interests of many people on that spectrum will not be protected in the marketplace.

In addition, homebuyers often do not fully appreciate the significance of the relevant documents, because of expectations that they bring with them to the home purchase.[195] It is plausible that those toward the "free property use" end of the spectrum come to the home-buying transaction with particularly strong background assumptions about the meaning of private property. My argument is not that people purchasing in private developments are systematically coerced or tricked,[196] but rather that they often are genuinely surprised—and for reasons that are quite understandable.

The explosive growth of private developments in recent years means that many consumers are encountering this new form of ownership for the first time. Often, homes in private developments are the

cussing role of "marginal consumers" in providing market discipline in context of form contracts, and explaining why this source of market discipline might be absent in the servitudes context).

195. *See* FOLDVARY, *supra* note 62, at 99 (noting that "some purchasers of RCA [residential community association] units do not fully understand the association they are being tied into"); Brower, *supra* note 22, at 246–47 (observing that, notwithstanding required disclosures, "empirical evidence indicates that most purchasers neither read nor understand those documents, nor do they fully comprehend what common ownership entails") (footnote omitted).

196. *See* Alexander, *supra* note 3, at 44 ("The caricature of developers as villains dressed in black and twirling their mustaches while purchasers sign residential association agreements is, of course, only that—a caricature."); *see also* FOLDVARY, *supra* note 62, at 99–100 (arguing that incomplete information about private communities does not render consumer choices involuntary).

only affordable choices for young couples making their first home purchases.[197] More experienced homebuyers might bring with them to the purchase a set of background expectations based upon their past homeowning experiences, which were likely not in a private development. Not only do the CC&Rs explicitly include terms that may be unfamiliar, they also accompany a different sort of ownership regime that silently dispenses with many core background assumptions to which people are accustomed. In particular, the servitude regimes that prevail in private developments tend to clash with background expectations about the meaning of property, governance, and community.[198]

Lay notions about the meaning of property lack technical precision and are heavily conditioned by culture and experience.[199] This is perhaps nowhere more true than in the case of the detached single-family dwelling, which, for many U.S. homeowners, has come to epitomize the idea of private property.[200] The Blackstonian vision of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe"[201] obviously overstates matters, but it is an entrenched part of our cultural heritage that continues to cast a long shadow over lay understandings of property ownership.[202] Indeed, it

197. *See* Callies et al., *supra* note 1, at 178 (observing that "[i]n many parts of the country, it is increasingly difficult for prospective homeowners to find housing outside such [private] communities").

198. Silverman & Barton, *supra* note 9, list several reasons that problems may be greater in a private development than in an ordinary neighborhood or small town. Some of these reasons involve the failure of the experience in a private development to square with expectations or established understandings, and track some of the points made in this section. *See* Silverman & Barton, *supra* note 9, at 141–42 (observing that "the use of common ownership as a vehicle for meeting public needs violates people's understandings of ownership," and that "the idea of neighbors policing neighbors is not only in contradiction to cultural understandings of homeownership, but also it fails to provide the internal checks and balances that people associate with fairness in the U.S. system of government"); *see also* Hyatt, *supra* note 14, at 314 (discussing the theme of "expectations" in critiques of private developments).

199. *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION *passim*, 94, 98–99 (1977) (contrasting lay notions of property held by an "Ordinary Observer" with those of a "Scientific Policymaker," and discussing the impact of social expectations and the socialization process on the former); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 10 (2000) (discussing "cultural underpinnings" of conventional presumptions about property entitlements); *see also* Bernard E. Jacob, *The Law of Definite Elements: Land in Exceptional Packages*, 55 S. CAL. L. REV. 1369, 1395 (1982) ("Our language constantly suggests that what I own is part of me. . . . Such a myth, simultaneously mighty and childlike, does not wait to unravel complexes of jural relations.").

200. *See* SINGER, *supra* note 199, at 29 ("In imagining the meaning of property, people call on a particular set of core conceptions, images, examples, and pictures of the social world. Property is about ownership, and the core image of ownership is ownership of a home."). To be sure, many private developments are made up of townhouses or condominium units, rather than single-family dwellings. Because the clash with lay understandings of property is likely to reach its apex in the case of a single-family detached home, I will use that as the prototype for this discussion. The same reasoning may apply, to some extent, to the ownership of other housing types.

201. WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND *2.

202. *See, e.g.,* SINGER, *supra* note 199, at 3 (quoting Blackstone in connection with his discussion of the "ownership model" of property); Thomas C. Grey, *The Disintegration of Property*, *in* NOMOS XXII: PROPERTY 69, 73 (J. Roland Pennock & John W. Chapman eds., 1980) (quoting Blackstone and

serves as a mental starting point against which claims of other individuals or of society at large may be assessed.[203] Of course, most people readily recognize that the enjoyment of their homes is properly conditioned and circumscribed by social considerations and that reciprocal restraint underlies life in a community. Yet the notion of "ownership" remains vital. As J.W. Harris explains, "[o]wnership acts as an irreducible organizing idea in the daily, non-contested functioning of a property institution."[204]

It seems likely that people have preconceived, culturally conditioned notions about the content of "ownership" and the types of claims that may properly be made against their private property rights.[205] It is telling that many critics of private developments provide specific examples of use restrictions, often offering anecdotes about enforcement actions.[206] This is an effective way of capturing reader interest for the very reason that the restrictions featured in these anecdotes tread upon our embedded understanding of what property ownership means. The frustration that results from this sort of line-crossing is evident in the words of one of the homeowners interviewed by Gregory Alexander: "I find the rule that you can't build any structure without the [approval] of the board to be completely unreasonable. The homeowners' association has got to be kidding; this is my property!"[207]

Another factor contributing to consumer confusion about the nature of private developments inheres in lingering uncertainty about the legal status and appropriate conceptualization of the private development. Indeed, Wayne Hyatt and Jo Anne Stubblefield have suggested that communities governed by homeowners associations suffer from an "identity crisis."[208] For example, there is an ongoing debate about whether, and to what extent, the actions of private developments should constitute "state action" for constitutional purposes.[209] While I do not

explaining that "[t]he conception of property held by the legal and political theorists of classical liberalism coincided precisely with the present popular idea, the notion of thing-ownership"); Jacob, *supra* note 199, at 1391–95 (citing Blackstone in discussion of the influence of the "complete ownership model" and the tendencies that perpetuate it).

203. *See* SINGER, *supra* note 199, at 3–4 (discussing the pervasiveness of the "ownership model" of property, in which freedom from property regulation is the baseline assumption, and the burden lies with those who would limit the uses of property).

204. J.W. HARRIS, PROPERTY AND JUSTICE 65 (1996).

205. SINGER, *supra* note 199, at 3 (noting that the principle that one's own land use must be limited to avoid harm to others is often "understood narrowly").

206. *See, e.g.,* MCKENZIE, *supra* note 11, at 15–18 (presenting examples of HOA enforcement actions against seemingly uncontroversial conduct, such as putting up a fence to keep one's young child from falling off a 400-foot cliff); Franzese, *supra* note 8, at 555–56 (providing examples of HOA restrictions, which govern such matters as doghouse construction materials, cooking implements, and required attire in the common areas); *id.* at 574 (describing violations that led to litigation); Winokur, *supra* note 8, at 107 & n.62 (providing examples of HOA power over "many seemingly minor details of personal behavior and aesthetic judgments").

207. Alexander, *supra* note 8, at 160. To be sure, not all homeowners resent private development rules; another of Alexander's interviewees described the rules as "just perfect." *Id.*

208. Hyatt & Stubblefield, *supra* note 7, at 593.

209. *See, e.g.,* HYATT & FRENCH, *supra* note 15, ch. 4 (presenting materials on the constitutional issues surrounding the public/private question); Brower, *supra* note 22, at 250–55 (discussing various

wish to join that fight here, it is worth noting that as long as questions remain about whether and to what extent actions taken within a private development are constitutionally constrained, critics of private developments may not feel free to make the kinds of representations about those communities that might actually aid in consumer comprehension about the nature of the governance regime they are joining. Those who believe homeowners associations should be treated as state actors might oppose boilerplate disclosures indicating that the homeowners association is not a state actor bound by the Constitution, for example. Consumers, therefore, do not receive a clear and blunt message to the effect that buying into a private development means leaving the protective fold of constrained government and entering a private regime that may not be subject to the same constitutional constraints.

The problem is not necessarily a lack of information,[210] but a lack of an understanding of the significance of that information. It is admittedly difficult to cure this latter lack. Disclosure that is different in kind may be required, such as very simple statements that call attention to the fact that one will be living under a different legal regime than that which prevails in the municipality in which the private development is located, and that property rights are configured and protected differently in this regime.

A banking analogy may help. When banks began to sell mutual funds and other non-FDIC insured investment products, a primary concern was consumer confusion. Regulators worried that consumers who have come to expect a certain level of governmental protection and safety when they purchase a product in a bank would not easily understand that banks were now offering investment products that lacked those familiar protections.[211] The FDIC and other federal bank regulators ultimately issued the 1994 Interagency Statement of Retail Sales of Nondeposit Investment Products, which required specific disclosures to customers—both orally and in writing—that the investment is not FDIC insured, that it is not backed by the bank, and that it carries an invest-

arguments relating to this question); Callies et al., *supra* note 1, at 188–91 (discussing this question); Note, *The Rule of Law in Residential Associations*, 99 HARV. L. REV. 472 (1985) (arguing that residential associations should be treated like cities for purposes of constitutional civil liberties).

210. The UCIOA requires numerous, detailed disclosures, UNIF. COMMON INTEREST OWNERSHIP ACT § 4-103, 7 pt. 1 U.L.A. 12 (1994), and various state statutes have for some time required certain disclosures. *See, e.g.,* NATELSON, *supra* note 50, at 364–66 (discussing disclosure requirements); Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647, 649–50 (1981) (describing "second-generation" statutes requiring more detailed disclosures, including "disclosure of any covenants or restrictions affecting the owners' use of their property"); *id.* at 650 n.16 (noting that municipalities may also have their own disclosure requirements).

211. *See* Helen A. Garten, *The Consumerization of Financial Regulation*, 77 WASH. U. L.Q. 287, 295–96 (1999) (explaining that "each subsequent expansion of bank securities powers was coupled with new rules designed to protect consumers," including "firewalls" between the banking and security parts of the institution that "were intended to prevent retail customers from confusing deposits with security products").

ment risk, including the risk of loss of principal.[212] These disclosures were deemed necessary to put people on notice that their established expectations about bank products do not apply to certain investment options now offered in banks. Similarly, when people enter the familiar realm of a residential neighborhood, they may expect that the "usual rules" of governance apply. A clear disclosure that this is not the case would seem to be essential in clarifying the nature of the choice.

In addition, people who imagine themselves to be entering into a "community" might pay little attention to codified rules, on the theory that things can no doubt be amicably worked out, and that no serious burden on any interests of importance will be imposed.[213] One might object that consumers, in joining a community, are nonetheless signing a contract. No matter how rosy-hued their perceptions of "community" may be, people know, or at least ought to know, that contracts are formal legal obligations that have binding force. Yet consumers' past experiences with contracts are unlikely to prepare them for the regimes they are entering. Most laypeople entering into home purchase agreements will have had some experience with employment contracts, residential leases, and the like. They will have learned a thing or two in the course of those dealings. First, what the contract says is often irrelevant to one's day to day interactions. Second, you can always try to bargain for favorable changes with the other party. Third, if bargaining does not work, you can typically just break the agreement and pay a penalty.

For example, individuals starting a new job are often confronted with piles of documentation about office rules. Most individuals do not spend hours poring over these terms before accepting the job, knowing through experience that informal norms are likely to trump the written rules. Similarly, parties in ongoing contractual relationships may carry on business in accordance with unwritten norms, rather than strictly insisting on compliance with written contract terms—at least until a rupture in the relationship occurs.[214] Because entering a community is not likely to be viewed as a threatening juncture in one's life, people may erroneously assume that the rather careless and dismissive attitude toward legal texts that has served them in good stead throughout their lives remains appropriate. Yet, for some of the structural and doctrinal reasons discussed above,[215] the usual sorts of "everyday" ways of dealing with

212. Interagency Statement on Retail Sales of Nondeposit Investment Products, 1 Fed. Reserve Reg. Serv. 3-1579.51 (Transmittal 177, Nov. 1995); *see* Garten, *supra* note 211, at 296–97 (discussing the consumer protections contained in the Interagency Statement).

213. *See* Winokur, *supra* note 8, at 100–01 (explaining that even those homebuyers aware of the restrictions on their properties may "inaccurately expect[] that friendly relations with neighbors will avoid hostile disagreements between residents over enforcement").

214. *See* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1796–98 (1996) (discussing differences between "relationship-preserving norms" and "end-game norms" used by merchants in the grain and feed industry).

215. *See supra* Part II.

other people without resorting to legal texts may not be available in private developments. Homebuyers may, therefore, fail to fully appreciate that they are entering a regime in which rules have real bite, and in which difficulties with those rules cannot be readily smoothed over or negotiated around.

Of course, consumer mistakes based on faulty expectations can be remedied through combinations of experience and disclosure.[216] Expectations thwarted often enough are eventually adjusted to align with reality, and disclosures may work to "reset" expectations more quickly than experience alone.[217] Yet the problems remain important ones to discuss, in part precisely because they are so readily remedied. If unmet expectations explain a significant proportion of the problems in homeowners associations today, then we should see improvement over time. If people come to understand what they are getting into and do not like it, then they will presumably demand something different. If, however, people remain unable to get what they want from private developments even after their expectations have been realigned, then that points to deeper problems in the private development regime.

V. THE IMPACT OF SERVITUDE REGIMES ON NORMS AND SOCIAL CAPITAL

There is an additional factor that may keep people who enter private developments from getting what they want—the impact of the servitude regime itself on the prospects for community, and on the development and deployment of social norms.[218] Homeowners are concerned not only with their homes' resale values, but also with the quality of the homeownership experience. The quality of that experience depends, in turn, not just on the physical or aesthetic environmental outcomes that the development manages to achieve or maintain, but also on the charac-

216. Life in a community constitutes an "experience good"—a type of good that has qualities which cannot be directly observed by a consumer in advance. *See, e.g.,* Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 720–21 (1985) (distinguishing "experience" goods from "search goods" whose attributes can be observed prior to purchase, and crediting Phillip Nelson for establishing this distinction). Consumers can obviously gain information about the attributes of experience goods over time, but when purchases are large and infrequent, the information-gathering process takes longer. *Id.* at 721. Because an experience good interposes a period of delay between consumer purchase and consumer feedback about a product, it would be expected to reduce producer responsiveness. I thank Alan Schwartz for suggesting the applicability of "experience good" analysis.

217. *See infra* notes 285–86 (discussing interplay between experience and expectations). Relying on experience to reset expectations can yield unfortunate distributive results, as it means some people must learn lessons "the hard way"—through experiences that fall short of prior expectations. However, disclosures can only speed shifts in expectations to the extent they are read and understood.

218. Frank Michelman has observed that while private property may often be "a prudent response to a given state of trustlessness," it is also possible that "particular private property arrangements sanction and reinforce trustlessness." Michelman, *supra* note 77, at 34; *see also* Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2073 (1996) (discussing the possibility that "law can interact destructively with social norms" by "failing to appreciate the overall systems through which norms are created, enforced, and changed").

ter of the interactions that take place among neighbors.[219] The idea that using contractual mechanisms to control interactions among neighbors may erode something valuable in the community experience is explored at length in a recent article by Paula Franzese.[220] Franzese concludes that "present CIC [common interest community] planning patterns and modes of dispute resolution, with their emphasis on formalized mandates and broad enforcement mechanisms, create cultures of distrust. . . . [F]ormal legal institutions are called upon to accomplish what once was left (and is best left) to informal networks and social capital."[221] This observation ties in with concerns about the loss of community and the alleged general decline in social capital in this country.[222]

Before examining this problem, it is worth articulating the benefits that might flow from the use of formal legal mechanisms to control the finer points of community life. The primary benefit has to do with ease of enforcement: one need not confront a neighbor directly about a particular rule infraction and risk hard feelings or retaliation; instead, there is a 900-pound gorilla—the homeowners association—that can be called in to do the enforcement dirty work.[223] Constance Perin explains that even though Americans dislike confrontation, they appear perfectly willing to complain anonymously to authorities about their neighbors.[224] While there are authorities to whom one can complain whether or not

219. *See* Hanoch Dagan & Michael Heller, *The Liberal Commons*, 110 YALE L.J. 549, 572–74 (2001) (observing that people find cooperative social interactions intrinsically valuable, and that social as well as economic benefits can flow from cooperative management of a common resource); Reichman, *supra* note 6, at 281 (observing that the purpose of a private community is not "only to maximize services while minimizing costs," but also "to increase the overall enjoyment of the community").

220. *See generally* Franzese, *supra* note 8.

221. *Id*. at 561–62; *see also id*. at 589 (citing Putnam and Lang & Danielson on dangers of shifting from informal mechanisms for resolving disputes to formal legal apparatus).

222. *See e.g.*, ROBERT E. LANE, THE LOSS OF HAPPINESS IN MARKET DEMOCRACIES 103–09 (2000); ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 147 (2000) ("For better or worse, we rely increasingly—we are forced to rely increasingly—on formal institutions, and above all on the law, to accomplish what we used to accomplish through informal networks reinforced by generalized reciprocity—that is, through social capital."). The concern is obviously not unique to homeowners associations. *See generally* Hyatt, *supra* note 8 (questioning Franzese's reliance on generalized social phenomena in her critique of common interest communities). However, the fact that private developments offer their residents greater control over the terms of their interactions presents a valid opportunity to explore whether a move that exacerbates or counteracts this generalized societal trend is preferable.

223. *See* CONSTANCE PERIN, BELONGING IN AMERICA 80 (1988) ("Directly complaining to a neighbor can readily be seen as telling them what to do. When a personal show of superiority is culturally forbidden, substituting the impersonal, yet legitimate, authority of local government and homeowner boards makes much sense."); *cf. id.* (describing the idea of the "'generalized bastard,'" which is "one of several peace-keeping devices American communes use").

224. *Id*. at 68–69. This same idea was echoed by one of Gregory Alexander's interviewees:

> My neighbor's pool had no draining ditch so the water was ruining our garden. We asked them twice to do something about it but they did nothing. Then we took it to the homeowners' association and action was taken by the board. This was much more comfortable for us since we can still be friendly with them and hostile confrontation was minimized.

Alexander, *supra* note 8, at 161.

one lives in a private development,[225] the servitude regime, by codifying in greater detail the rules of behavior and by providing a dedicated mechanism for enforcing those rules, legitimates a wider scope of complaints and makes complaining more effective.

In one sense, this move is efficient. Punishment is always costly to the punisher, and there is a tendency to let things go and to try to free ride on the punishment efforts of others.[226] Precommitting to uniformly harsh punishment by setting up a system to do the punishing is one way of keeping the system of rules from breaking down.[227] In another sense, it may be socially costly if it causes a decline in skills relating to neighbor interaction and retards the development and entrenchment of social norms that could do the work of law without the involvement of law.[228] People in ongoing reciprocal relationships with neighbors may exhibit a certain degree of tolerance and forbearance, a "live and let live" mentality that facilitates life in a community.[229] Where these relationships are robust, longstanding, and multifaceted, frequent recourse to authorities is unnecessary.[230]

One might argue that contract is simply the wrong model for interaction in certain settings, such as families or neighborhoods.[231] Yet even contractual relationships need not involve the detailed rules and strict enforcement actions that often typify life in private developments. Com-

225. PERIN, *supra* note 223, at 68–69 (observing that neighbors will complain anonymously not only to homeowners associations, but also to building inspectors and animal control personnel, and predicting that people would complain to the police more frequently about their neighbors if it were possible to do so anonymously).

226. *See* Nelson, *supra* note 2, at 158 (explaining that enforcement of private covenants "creates a free rider problem" because "[l]egal action against a violator of the covenants can be expensive for one neighbor who would be providing a free service for all the others in the neighborhood"); *see also* YORAM BARZEL, A THEORY OF THE STATE: ECONOMIC RIGHTS, LEGAL RIGHTS, AND THE SCOPE OF THE STATE 45 (2002) (observing that "[i]nflicting punishment is costly," and discussing use of third-party enforcement to overcome the problems associated with self-enforcement); JON ELSTER, THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER 41 (1989) (explaining that punishment concentrates costs on the punisher while bestowing diffuse benefits on all the members of the group).

227. *See, e.g.,* Gillette, *supra* note 10, at 1400–01 (explaining that "the association, as the members' representative, is capable of overcoming the obstacles to collective action. . . . The presence of the association reduces enforcement costs by creating a repeat player who is charged with monitoring compliance and designating the association as the party who must seek redress").

228. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 207–29 (1991) (discussing remedial norms).

229. *See id.* at 52–62 (discussing norms of reciprocity, a willingness to "'lump'" small amounts of damage, and general attitude of "'live and let live'" that prevails among Shasta County rural neighbors); PERIN, *supra* note 223, at 71 (quoting one neighbor with seven children who chose not to confront a neighbor about a barking dog, reasoning that her children may have created annoyances for that neighbor at times).

230. ELLICKSON, *supra* note 228, at 59 (explaining that "[t]he longtime ranchers of Shasta County pride themselves on being able to resolve their problems on their own," and rarely contact public officials for assistance; ranchette owners, in contrast, will sometimes contact authorities to deal with a minor trespass issue).

231. *See* PERIN, *supra* note 223, at 74 (suggesting that much of the discomfort between neighbors arises out of the confusing mixture of market and personal elements involved in homeownership); Virginia Held, *Mothering Versus Contract*, *in* BEYOND SELF-INTEREST 287 (Jane J. Mansbridge ed., 1990) (critiquing the pervasive application of the contract template to social reality).

plex contractual relationships that involve uncertain future contingencies often contain obligations that are framed in quite general terms.[232] In addition, repeat-play contractual relationships often permit a greater degree of give and take than the contractual language itself might suggest.[233] Parties in ongoing contractual relationships often confer small benefits on each other, including forbearance where minor deviations from contractual obligations are necessary. Despite the existence of written contracts spelling out obligations, parties often hold back from requiring them to be enforced to the letter, in a spirit of mutual cooperation.[234] Of course, even where reciprocal forbearance is the rule, things can shift to an "end-game" state involving resort to the strict terms of the contract when the relationship sours.[235] Insistence upon contract terms, then, may be symptomatic of a failed relationship. One businessman in Stewart Macauley's study of noncontractual business practices put it this way: "You don't read legalistic contract clauses at each other if you ever want to do business again."[236] Likewise, a neighbor's resort to legal authorities or insistence upon legal rights may signify a breakdown in the neighborly relationship.[237]

As Lisa Bernstein has emphasized, a legal approach that looks to parties' course of performance in adjudicating the meaning of contractual terms may make it less likely "that transactors in ongoing relationships will flexibly adjust their contractual obligations, even in situations

232. *See* Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1092 (1981) (explaining that "[a] typical response to this problem of complexity and uncertainty is to define the performance standard in unusually general terms"). Clayton Gillette has suggested that private developments can be understood as relational contracts, *see* Gillette, *supra* note 10, at 1413–21, and he argues that this characterization is not undermined by the relatively specific terms contained in the development's covenants, *id*. at 1418–19. It is ultimately an empirical question whether the arrangements that prevail in private developments manage to obtain the advantages associated with relational contracts, but the possibility that overspecification of duties and rights impedes the sorts of flexible interactions characteristic of well-functioning relational contracts deserves attention.

233. *See* Bernstein, *supra* note 214, at 1796–1802 (discussing merchants' use of "relationship-preserving norms").

234. *See id.* at 1787–88 (explaining that "[i]n many contexts, transactors accept late payment, vary quantity terms, assume new obligations, waive covenants, and adjust prices in ways that their written contracts do not require"); *id*. at 1787 n.82 (collecting sources on divergence of actual business practices from written contractual terms).

235. *See id*. at 1800–01 (concluding that "Macaulay's study suggests that the terms of a written contract are viewed as relevant primarily when transactors have decided not to deal again, that is, when their relationship is at an end-game") (citing Stewart Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963)).

236. Stewart Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61 (1963), *quoted in* Bernstein, *supra* note 214, at 1800.

237. *See, e.g.,* ELLICKSON, *supra* note 228, at 60 (discussing the rarity of lawsuits and claims for monetary relief among neighbors in rural Shasta Country, because, as one resident explained, "Being good neighbors means no lawsuits"); PERIN, *supra* note 223, at 72–73 (describing pattern by which previously ignored concerns are reported to authorities when some triggering event occurs between the neighbors, often completely unrelated to the concern that ends up being reported).

where it would be desirable for them to do so."[238] In other words, parties may be reluctant to tolerate the ordinary deviations from contract language that are the stuff of ongoing relationships—accepting late payments, for example—if doing so will cause a court to later interpret the contract to permit such deviations. Thus, enabling parties to deal with each other flexibly while leaving intact strict contract language to which they may resort in the event things reach an end-game state may be value maximizing.[239] By the same token, neighbors might wish to have a set of legally enforceable rules to which they could resort if necessary, but might prefer to operate most of the time according to informal neighborly norms that do not involve strict adherence to those rules.[240] Yet this approach is difficult in the private development setting, at least to the extent that courts will construe a failure to enforce a rule in a given instance as a waiver or abandonment of that rule that will preclude its enforcement in a later instance.[241]

The detailed codification itself could also reduce incentives towards cooperation that might otherwise be present. It is sometimes asserted that reducing uncertainty through explicit rules will reduce litigation, as the parties will know the precise consequences of each contemplated action.[242] Parties will know their rights and will steer clear of conflict by either abiding by the rules or bargaining around them.[243] In the private development context, however, explicit bargaining over entitlements will often be impossible or futile. At the same time, detailed CC&Rs remove the kinds of uncertainty over legal entitlements that might grease the wheels of mutually beneficial cooperation.[244] In a world where home-

238. Bernstein, *supra* note 214, at 1809 (discussing the potentially deleterious effects of the Uniform Commercial Code's treatment of "course of performance").

239. *See id.* at 1811 (discussing potential interference of the Code's approach with the ability of parties to choose "the value-maximizing combination of legally enforceable contractual provisions and extralegal provisions"); *see also* JEREMY WALDRON, LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, at 387 (1993) (explaining value of formal "fallback" rights in enabling people to deal with each other in informal ways most of the time).

240. *See* Pildes, *supra* note 218, at 2073 (explaining that social norms "include norms of enforcement, including norms analogous to the state's 'prosecutorial discretion'"); *id*. (describing wide range of responses available in a norm-based system featuring decentralized enforcement and explaining that such a system permits "enforcement to be tailored to subtle differences in the contexts of violations").

241. *See supra* text accompanying notes 53–57; *see also* Ben-Shahar, *supra* note 52, at 235 (observing that "rules that allow rights to erode even as a result of *friendly*, negotiated, breach may indeed serve as an obstacle to cooperatively agreeing on ad hoc, value-increasing, concessions").

242. *See, e.g.,* Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 75 (1987) (contending that litigation is more likely if there is more uncertainty).

243. *See* Terry L. Anderson & Fred S. McChesney, *Introduction: The Economic Approach to Property Rights, in* PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 6 (Terry L. Anderson & Fred S. McChesney eds., 2003) (presenting as a basic postulate that "a system of well-specified and transferable property rights encourages positive-sum games with mutual gains from trade" and explaining that this system avoids the conflict that might accompany unclear or underenforced rights).

244. *See* Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1035 & n.29 (1995) (arguing that legal uncertainty about the ownership of a given entitlement can lead to more efficient bargaining); Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J.L. ECON. & ORG. 256, 257 (1995) (explaining that where

owners' land uses are not closely controlled through detailed written rules, it is not always clear who holds the entitlement with respect to a given use—say, having a single pet llama on a three-acre residential lot. If it is not clear whether the authorities would require the removal of the llama or uphold the llama-owner's right to keep the pet, then the llama-owner and the neighbor are more likely to arrive at a compromise that reflects the respective values they place on that aspect of neighborhood life.[245]

The servitude regime not only takes away the uncertainty that might facilitate bargaining, it takes away any possibility of binding bargains between neighbors. Even if the two neighbors reach an agreement, the homeowners association could still enforce a "no llamas" covenant against the llama-owner.[246] By removing this source of power from individual neighbors, a servitude regime also strips neighbors of the ability to refrain from the exercise of such power—that is, to confer gifts on their neighbors in the form of forbearance. Vestiges of favor-giving remain, however, where some violations remain unknown to the homeowners association, and neighbors have the opportunity to refrain from reporting the violation.[247] Nevertheless, the codification and uniform enforcement of rules may erode trust in insidious ways, if neighbors become "informants" who "report" violations to the "authorities."[248]

A related concern is that formal rules mandating and prohibiting specific actions may crowd out internally motivated acts of neighborliness.[249] For example, a person who might spend extra money on nice

parties possess private information about how much a given entitlement is valued, or how harmful an encroachment on it might be, "bargaining may be more efficient under a blurry balancing test than under a certain rule").

245. *See* Ayres & Talley, *supra* note 244, at 1099–1100 (providing a similar example in which it is unclear whether a factory or a nearby laundry holds the entitlement to control the factory's pollution; because either party might be in the position of either buying or selling the entitlement, valuations will be more honest, facilitating bargains).

246. *See* MCKENZIE, *supra* note 11, at 17 (presenting the example where a couple's presentation of a petition signed by three-fourths of the homeowners in the community was insufficient to get the homeowners association to permit a metal swing set in the couple's backyard).

247. In the words of another of Alexander's interviewed homeowners: "I have become friendly with my neighbors because water from our backyard was seeping into theirs and they did not call in the homeowners' association. Instead, they chose to speak to us personally and now we continue to be friendly." Alexander, *supra* note 8, at 161.

248. PERIN, *supra* note 223, at 80 ("American convictions about avoiding a fuss and not settling one face to face do, however, have a social cost. They ostensibly keep the local peace, but the person who's been 'turned in' is likely to remain permanently suspicious of neighbors once the anger boils off; long-time friendships come to grief."); Alexander, *supra* note 8, at 161 (relating the complaint of a homeowner, who claimed neighbors would "come to visit outwardly acting friendly but they are really checking up on you. My neighbors reported me for having a clothes line in my back yard, out of sight of the road, when they were supposedly visiting casually.").

249. *Cf.* William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 124 (1978) ("Under a regime of liability for failure to rescue, it would be impossible for a rescuer to prove that he was motivated by altruism—for how could he negate the inference that he really was motivated by fear of liability?"); *see also* Mark A. Cohen, *Norms Versus Laws: Economic Theory and the Choice of Social Institutions*, *in* SOCIAL NORMS AND ECONOMIC INSTITUTIONS 95, 99 (Kenneth J. Koford & Jeffrey B. Miller eds.,

fencing material, in part to confer a benefit on a neighbor, may now be required to use the nicer fencing material, making the act one of obligation rather than one of altruism or generosity. In turn, the benefited neighbor is unlikely to feel any sense of gratitude or deeper connection with the fence-builder as a result of the choice of construction material, having received only what was due under the terms of the CC&Rs. Likewise, specifying formal penalties for deviations from norms of neighborly behavior could negatively alter the terms of the neighborly interaction, potentially leading to less neighborliness.[250]

If law is displacing or disabling the operation of norms of cooperation, then it is worth investigating whether norms are more efficient than legally binding covenants in this context.[251] Norms may be cheaper in the long run than constant litigation, even if people have to incur some initial costs to get them going.[252] Also, if some degree of cooperation is important in creating a good community, it may be the case that social norms work better at fostering the kind of trust necessary for this cooperation than do legal restrictions. At a minimum, we should be conscious about the effects of increased codification of the finer points of daily life and recognize that this may be displacing some other values. This is not to suggest that we could necessarily get the same detail and level of control through norms as we currently have under the law. Indeed, if norms

1991) (citing Landes & Posner and discussing the interaction between internally motivated samaritanism and legal rules imposing liability).

250. Uri Gneezy & Aldo Rustichini found an analogous effect in their study of private day care centers in Israel. When a fine was introduced for the late pick-up of children, late pick-ups rose significantly. Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 1 (2000). The authors posit that the introduction of the fine may have altered the participants' perceptions of the rather imprecisely defined strategic interaction in which they were engaged, hence changing their behavior in an unexpected fashion. *Id*. at 15–16. Before the fine was introduced, parents may have been loathe to "take advantage" of the teacher's generosity in staying late to care for their children; after the fine was introduced, the teacher's after-hours childcare was likely viewed as a service provided for a fee. *Id*. at 13–14. In instances where social norms supporting a given cooperative behavior are not robust, attaching a price to noncooperative behavior may increase cooperation. *See* Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231, 1255–60 (2000) (discussing the positive effects of San Diego's FasTrak program, which permits solo drivers to use HOV lanes for a price, on carpooling and on compliance with HOV lane designations). Significantly, however, drivers on the freeway are strangers to each other, not neighbors engaged in repeat interactions. *See id.* at 1273–74 (discussing this contextual feature of freeway norms).

251. We should not, however, automatically assume that norms are always better than law. In some situations, law may offer a less costly alternative. *See* Cohen, *supra* note 249, at 96 (arguing that law should be chosen over norms whenever "the social cost of enforcing norms exceeds the social cost of enforcing laws").

252. Importantly, the existence of legal rules can influence the degree to which people find themselves willing to incur these start-up costs. For example, the absence of law may both increase the pressure toward the development of cooperative norms and leave space for such norms to develop. *See* Franzese, *Building Community*, *supra* note 9, at 33 (arguing that common interest communities "have it backwards" by beginning with rigid rules, and that they should instead "give informal norms a chance to develop"); James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light,* 70 N.Y.U. L. REV. 440, 464 (1995) (suggesting that people might be more likely to learn how to reduce the costs of bargaining with each other where law does not step in to render such bargaining unnecessary).

tend to generate a world in which small infractions are tolerated in a spirit of reciprocity, then the kinds of extreme regimentation found in some private developments might be impossible to sustain through a norm-based system. Yet if the goal is not regimentation per se, but rather a premium ambience, then regimentation is just a means to an end. Norms might well provide a better means to that same end, while also helping to serve some of the important social ends associated with life in a community.

More is at stake than just the experiential quality of community life that residents of private developments experience, as important as that may be. These private developments must also govern themselves, an activity that requires a certain amount of participatory interaction. Multiplying the number and complexity of rules in order to help neighbors stay out of each others' way may be exactly the wrong way to foster the kinds of cooperative norms that would facilitate robust, resilient communities. It has been well noted that most private development residents are apathetic about matters of community governance.[253] Alexander argues that residents may lack a "participatory consciousness" and that this may explain their apathy and frustration in private developments.[254] It might also explain their failure to make meaningful use of voice, even in circumstances where it should be attractive—that is, where dissatisfaction exists and exit is costly.[255] It is perhaps ironic that people who have by some accounts "defected" in the larger public game of community responsibility by fleeing to a private development[256] are now faced with new collective action problems that are just as insoluble and no less contentious or problematic than the ones they left behind.

Indeed, the rather atomistic, consumer-oriented view of homeownership upon which private developments are premised may be fundamentally at odds with the kind of participatory ethic necessary to make the private development responsive and workable over the long run.[257]

253. *See, e.g.,* Silverman & Barton, *supra* note 9, at 138–39 (describing general phenomenon of underparticipation and disinterest in HOA governance, and quoting one HOA board president who explained that "'[a]pathy reigns supreme—most owners want some unpaid volunteer to make decisions for them rather than attending board or annual meetings. We are running out of fools who will volunteer their time'").

254. *See* Alexander, *supra* note 8, at 163–68 (discussing the need for, and preconditions for, "participatory consciousness").

255. *Id.* at 163 (observing that "[a] paradox exists here: residents are disgruntled, but they neither leave nor participate to change the way their developments are governed").

256. *See, e.g.,* Sheryll D. Cashin, Essay, *Privatized Communities and the "Secession of the Successful": Democracy and Fairness Beyond the Gate*, 28 FORDHAM URB. L.J. 1675 (2001); Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, § 6 (Magazine), at 16 (discussing movement of the well-off into communities that are homogeneous with regard to income, and a resulting failure to identify with, or recognize responsibility for, the problems of poorer communities).

257. *See* Barton & Silverman, *supra* note 1, at 303 (observing that "[t]he libertarian, free-market perspective draws on a widely held belief that private property ownership does allow one to escape from interdependence from others"); Gillette, *supra* note 10, at 1440 (observing that "it seems somewhat anomalous to assume that association members migrate to a common area in order to seek isola-

We might even query whether at least some of the people who have self-selected into such communities have done so in part because they are less skilled at cooperative participation[258] and would prefer a world in which they simply "don't have to deal" with the unpredictable interactions that typify life in a heterogeneous community.[259] As private developments become more ubiquitous and heterogeneous, any such self-selection should wane. Nevertheless, we might consider whether the image of a homeowner as an independent consumer seeking a hassle-free, single-serving housing product has influenced the formal legal mechanisms for controlling land use in private developments, shaping them in ways that make authentic cooperative interactions among neighbors more difficult and unlikely.

VI. CONCLUDING OBSERVATIONS

The factors discussed above might keep the market from delivering what people really want in a servitude regime. Some of the factors work together to push servitudes toward a strict convergence point, and then keep them there.[260] Other factors keep developers from learning and reacting to consumer preferences.[261] Still other factors are inherent in the servitude regime as it is presently constituted, but need not inevitably be so.[262] Together, they suggest that law might play some valid role in removing obstacles so that the market can deliver on preferences. In this article, I have focused on pointing out problems, while saying very little about possible solutions. It may be that the problems facing residents in private communities are no worse than the problems facing residents in ordinary municipal neighborhoods. It may also be the case that any fully examined solutions would present more problems and costs than they would resolve. Moreover, because the prescriptions will vary for each of the imperfections described, a starting point for reform would be an empirical assessment of the extent to which each factor contributes to the disconnect between consumer demand and market supply. Finally, it is not really possible to begin making recommendations without first examining some of the problems that have been left consciously unexamined in this article—the impacts of private communities on those who are excluded and on the fabric of society as a whole. I will therefore close with

tion within homogeneity and to live by highly tailored, privatized regulations, and simultaneously to assume that they seek the robust debate of a diverse political marketplace").

258. *See* PERIN, *supra* note 223, at 74 ("In drawing the line between their Personal and Property relationships, suburban neighbors may be financially adept, but, as a consequence, socially clumsy.").

259. *See* Gillette, *supra* note 10, at 1440–41 (discussing this possibility). In other words, one might say that people who consciously choose private developments are seeking a "plug and play" version of neighborhood life that minimizes the hassles that accompany interactions with others. I thank Scott Peppet for this turn of phrase.

260. *See supra* Part III.

261. *See supra* Part IV.

262. *See supra* Part V.

just a few general observations that correspond to the points made above.

A. Introducing Greater Flexibility

The neighborhood environment is obviously vulnerable to collective action problems of the "tragedy of the commons" variety, and servitude regimes represent a response to that threat.[263] Less recognized is the possibility that this response may create an aesthetic anticommons of sorts.[264] The use of detailed uniform rules, which can be eased only with the consent of every other person in the development, blocks efficient draws against neighborhood ambience. The likely result is an inefficiently low incidence of ambience-impacting homeowner behaviors. The problem might also be conceptualized as overproduction or overprotection of the local public good of premium neighborhood ambience. Internal political solutions are unlikely to address these shortfalls in a meaningful way, particularly in instances involving intense but unusual preferences.

In addressing these difficulties, we might start by considering adapting those tools that have long been used in the municipal zoning context: the Takings Clause, the nonconforming use doctrine, the variance, and the special exception. To interject more market freedom into the system, private developments might make release from a given covenant marketable, with compensation to be paid to those most directly affected.[265] Perhaps there would even be a way to introduce an analog to the tradable emission permit in the private development setting—something like a "tradable eccentricity permit" that would relieve a homeowner from their choice of any one of a designated set of aesthetic use restrictions. These might be auctioned off to the highest bidder, or assigned to homeowners upon their entry into the community.

Alternatively, the use of standards rather than rules to control land use could permit importation of some information about the benefits derived by a given actor.[266] For example, someone who violates a rule about fencing in order to keep a young child from falling off of a cliff is clearly receiving a much larger benefit from the fencing action than is someone who simply prefers having a noncompliant fence for aesthetic reasons. It is completely plausible that a standard (e.g., a rule limiting

263. *See supra* note 71 (discussing the tragedy of the commons problem).

264. *See supra* note 77 (discussing the anticommons problem).

265. *See* NELSON, *supra* note 81, ch.17, at 21–27 (discussing possibility of extending Robert Ellickson's idea of private zoning bargains to private development context) (citing Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 CHI. L. REV. 681 (1973)).

266. *See, e.g.,* Hyatt, *supra* note 8, at 69–70 (urging an approach to governance employing standards rather than rules); James L. Winokur, *Ancient Strands Rewoven, or Fashioned out of Whole Cloth?: First Impressions of the Emerging Restatement of Servitudes*, 27 CONN. L. REV. 131, 149–50 (1994). Much has been written on the choice between rules and standards in law. *See, e.g.,* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

fences to those reasonably necessary for safety) could be formulated to take this difference in benefits into account in some rough way. Such extreme cases aside, however, it will often be difficult to accurately assess the extent of benefits that different people receive, at least in the absence of some pricing mechanism. There are also additional administrative costs associated with applying a flexible standard rather than a bright-line rule, and the additional discretion vested in a decision maker who uses a standard may be independently worrisome.[267]

Another possibility would be for private developments to specify in the governing documents that enforcement of servitudes will be limited to damages;[268] however, it is nearly impossible to imagine how a court would begin to arrive at the damages amount for many sorts of violations. Assessments of such matters as aesthetic pain, the marginal impact on resale values, and diminution of premium ambience are inherently problematic. Such a specification of relief might be workable, however, if accompanied by a specified schedule of damages, perhaps allowing adjustments in either direction, not to exceed a certain percentage annually. This schedule of damages would serve a sorting and informational function; people would know the price of violations in a given community and could sort themselves out accordingly.[269] My point in raising these possibilities is not to suggest that there are off-the-shelf options that can be costlessly applied to the private development setting, but rather to suggest some directions in which innovation and experimentation might move.

In addition, we might do well to rethink the liberalization of servitude enforcement that has overtaken the courts. In this vein, we might consider the work that was previously done by formalistic requirements for real covenants, and the reasons underlying the former judicial hostility towards servitudes in general.[270] It is easy to understand the modern antipathy toward any impediments that stand in the way of the gains

267. *See, e.g.,* Winokur, *supra* note 266, at 149–50 (noting these drawbacks).

268. I thank Francesco Parisi for bringing this possibility to my attention. *Cf.* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1996) (discussing the possibility, in the intellectual property realm, that parties could "contract into" organizations that would then be governed by liability rules chosen by mutual agreement).

269. *See* Elberg, *supra* note 52, at 1995–96 (discussing signaling function of supercompensatory contract clauses and the potential for their use in common interest developments, as well as their limitations in that setting); *cf.* Merges, *supra* note 268, at 1303 (suggesting that organizations handling intellectual property matters could "offer a fixed menu of terms" that would be "determined by their members and not the government"). A schedule of fines would not work well if people failed to read the schedules. *See supra* Part IV.C (discussing homebuyer ignorance). A "price list" for violations might also sharpen some of the concerns about norm atrophy. *See supra* Part V. In a forthcoming article, I revisit the idea of liability rule schedules and explore a more fine-grained approach to addressing problems in the neighborhood commons. Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. (forthcoming March 2005).

270. *See* Winokur, *supra* note 9, at 84–96 (discussing some of the functions served by traditional requirements for running covenants).

people might be able to achieve through servitudes.[271] As Richard Epstein has noted, the private development structure enables large numbers of parties to enter into reciprocally binding covenants with each other through the central figure of the developer, rather than separately entering into pairwise contracts with each other resident, and vastly reduces the transactions costs associated with covenanting.[272] Enabling the central entity of a homeowners association to enforce covenants also eliminates free rider problems that might otherwise eviscerate covenant enforcement.[273] Yet these gains come at a price.

Homeowners in private developments who glean the advantages of easy covenant formation and enforcement give up the option of later working out individualized adjustments in light of changes in their preferences or personal circumstances. Contracts are always about giving up options, of course; that is their point. But ordinary contracts create in personam rights that run in favor of a limited number of known parties;[274] if circumstances change, then one can return to those same parties to seek a release or attempt a renegotiation. Covenants in a private development, in contrast, are formed wholesale in a single moment with an entire neighborhood of current and future property owners, and effectively scatter what were previously in rem property use privileges among a multitude of parties.[275] The law has placed no limit on the number of parties to whom one can bind oneself with a single purchase, yet each of those parties must be dealt with individually in order to secure any change in

271. *See* Epstein, *supra* note 75, at 908 ("[W]hat the law can do is try to reduce the transactions costs of the voluntary arrangements needed to exploit real estate within the confines established by law.").

272. *Id*. at 914–15 (observing that 4950 pairwise covenants would have to be created in a 100-person community, were it not possible to handle covenants through a central party such as a developer, who can make a single covenant with each resident that reciprocally binds and benefits that resident vis à vis all other residents in the community).

273. *See supra* note 226 (citing sources describing this problem).

274. *See* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 776–77 (2001) (distinguishing in personam contract rights which only bind specific parties, with in rem property rights which "bind 'the rest of the world'"); *id.* at 780 & n.14 (discussing the development of this idea).

275. The in rem character of property is usually expressed in terms of exclusion rights; if one owns property, "the whole world" must stay off unless invited on. *See id.* at 782, 789 (focusing on exclusion rights in property). However, the in rem notion logically extends to permissible property uses—"privileges" in Wesley Hohfeld's schema. *See id.* at 782–83 (noting that any of Hohfeld's jural conceptions could be in rem or in personam). If the law gives a homeowner the privilege to use her land in a particular way, then that privilege runs against everyone else in the world who might wish to stop that use. As long as she holds the privilege, they have no legal recourse to stop it; in Hohfeldian terms, they have a "no-right." *See id.* at 781 n.20 (citing Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 38 (1913)). In a private development, homeowners typically relinquish many of the use privileges that are part of their standardized property bundle in exchange for obtaining veto rights over the land uses of others. This is accomplished in one fell swoop as to all one's neighbors in a fashion that is consistent with the in rem character of the use privileges that one is ceding. However, there is no mechanism (aside from the internal political process of the homeowners association) for regaining that in rem privilege "whole"—instead, it must be painstakingly reassembled through a multitude of in personam moves. *See infra* note 278 and accompanying text (discussing the asymmetrical nature of the fragmentation).

the contractual terms to which one is bound. This results in an interesting asymmetry. It has never been easier to bind oneself and one's successors to a covenant that benefits hundreds or even thousands of other landowners, and it has never been easier for those numerous other landowners to hold one to the covenant. However, nothing analogous has been done to make it easier for individuals to modify these easily formed and readily enforced servitudes.[276]

The significance of this asymmetry relates to the economic argument that permitting parties to consensually decompose property without government intervention will advance efficiency.[277] In most settings, this makes sense—small-number interactions are necessary to effect each new transfer of a property entitlement, and presumably those same small-number interactions can undo the work later if need be. Thus, the decomposition is typically self-limiting—it goes no farther than pairwise or small-number interactions can take it, and can move nearly as quickly back in the direction of composition by the same means.[278] In the private development setting, the natural limits on decomposition provided by the requirements of small-number bargaining have been removed, but no analogous help has been provided for moving back in the direction of composition. From the individual homeowner's perspective, the liberalization of servitude enforcement operates like a one-way ratchet[279]—it is remarkably easy to get oneself bound, and well-nigh impossible to get oneself unbound (short of moving away).[280]

Formal obstacles to the enforcement of covenants, or closer judicial scrutiny of them, would make it harder for landowners to achieve gains

276. Jay Weiser makes a similar point in observing that the advances in enforcement capabilities in private developments have not been accompanied by similar improvements in the ability to renegotiate the arrangements. Weiser, *supra* note 52, at 308. It is true that an individual can exit the neighborhood and hence get out of unwanted servitudes. This course of action may be costly, especially if the individual places a high subjective value on the home, has made idiosyncratic improvements to it, or has engaged in other site-specific nontransferable investments (*e.g.,* investments in friendly relationships with the neighbors, development of daily routines and vendor relationships based on the location of the home, investments in the neighborhood school, and the like).

277. *See* Michelman, *supra* note 77, at 18 (discussing and critiquing this argument).

278. Fragmentation of property is often said to be easier to accomplish than reunification. *See, e.g.,* Heller, *Boundaries*, *supra* note 77, at 1165–66 (explaining that "[b]ecause of high transaction costs, strategic behaviors, and cognitive biases, people may find it easier to divide property than to recombine it"); Parisi, *supra* note 79, at 626–27 (noting the asymmetries in transaction costs associated with fragmentation and reunification of property, respectively, that generate a "one-directional stickiness" and a tendency towards entropy). While it is common to speak of fragmentation as if there were an alternative, some property interest will be fragmented under any conceivable arrangement. *See* Fennell, *supra* note 77. A better way of framing the concern would be to observe that certain kinds of fragmented interests are particularly difficult to overcome because the production function associated with their reunification exhibits a "step" pattern. *See id.*

279. Heller, *Boundaries*, *supra* note 77, at 1185 (observing that "[c]urrent CIC laws represent an example of the one-way ratchet of fragmentation within a limited-exclusion anticommons").

280. Stewart Sterk makes a similar point when he notes that the ease with which servitudes can be undone bears upon the restrictions we might wish to place on those servitudes. *See* Sterk, *supra* note 120, at 956 (observing that "there would be little reason to restrict contractual freedom to impose servitudes if the transaction costs of removing servitudes were always low").

through those covenants and would be costly for that reason. But making it too easy to create running covenants with large numbers of other people also makes it harder for landowners to achieve gains over the long run by optimally adjusting the benefits and the burdens in light of changing preferences and circumstances. This is not to say that courts should embrace formal obstacles to, or skepticism about, running covenants. Discarding impediments to covenant formation and enforcement without introducing some mechanism for achieving individualized flexibility over the long run, however, may ultimately lead to more inefficiency than is initially avoided through the liberalization of servitude enforcement itself.

B. Counteracting Problematic Dynamics

One primary point flows from the discussion of community interdependencies and path dependence: The possibility that communities could end up with more limits in place than the individuals living within them would prefer is in no way undermined or negated by the observation that the individuals in those communities voluntarily chose to live under the restrictions in question. Collective action problems typically take precisely that form: What individuals might voluntarily choose acting on their own may leave them collectively worse off than if they had managed to coordinate their choices. This suggests that substantive limits on covenants might, in some instances, better vindicate individual preferences than would uncoordinated individual action in the marketplace. Yet, how can we tell in a given instance whether a restriction represents the true preferences of residents, or whether it instead represents the sort of market failure that has been presented here as a theoretical possibility? Under present legal and market conditions, it may be difficult to know.

Hence, my second observation: law may have a role to play in setting up rules that elicit and respond to individual preferences more reliably than the existing system. For example, mechanisms that permit a number of communities to act in concert in setting or adjusting servitudes might help to counter adverse selection. New default rules or required standard forms may help to counter path dependence by presenting parties with a fresh starting point.[281]

In addition, the law might consider ways to accommodate and encourage restrictions that limit, but do not eliminate, a given use or activity—or, alternatively, to discourage categorical bans on uses that can be carried on at some level of frequency or intensity without having any cognizable impact on neighboring properties. In many cases, a given use

281. *See* Korobkin, *supra* note 156, at 1605–08 (presenting findings in support of an "'inertia theory'" that posits negotiators will tend to accept default terms and terms in form contracts, other things being equal, because acceptance of those terms requires no action).

may become objectionable only when pursued at a high level of intensity, or with great frequency. Yet, simply banning the practice outright might seem administratively easier. However, outright bans in numerous communities can create dynamics that encourage further bans, even when small amounts of the use in question would be efficient. Making it easier for private developments to make and enforce partial bans on uses would alleviate this pressure. Mechanisms designed to introduce flexibility into the covenant scheme by enabling people to trade off covenant violations or achieve customized adjustments through the application of standards, rather than rules, would have the same effect.

C. Refining Market Signals

If part of the difficulty with servitude regimes relates to the poor quality of the signals transmitted by consumers and received by developers,[282] then law might play a role in sharpening those signals. One approach would be to require developers to offer the first set of would-be residents in a given community an a la carte menu of use restrictions, and permit them to choose the ones that they would like to make binding on their community. For example, the first set of home sales contracts in a given development might contain a contingency clause relating to the CC&Rs, permitting the homebuyer to rescind the contract if the version of CC&Rs recorded in the master deed diverged from the homebuyer's own preferred slate of choices. A developer might be required to use the input provided by sales contracts on some set percentage of units in the development (e.g., ten percent) to formulate the CC&Rs in the declaration.[283] A rational developer would be expected to negotiate with the homebuyers and accommodate their preferences in order to avoid losing sales. While such negotiation is already possible today, it is less common in the residential context than in the context of commercial developments.[284] Making it an established and required part of the residential development process would likely help to refine the market signals sent to developers and facilitate their response to those signals.

It is worth reiterating that, to the extent homebuyers fail to impose proper market discipline as a result of a mismatch between expectations and reality, the problem should self-correct over time as people gain experience with this new model of ownership and learn about its attrib-

282. *See supra* text accompanying notes 162–217.

283. This is not a perfect solution because, as noted above, the first entrants into a given community are likely to be the most risk averse about what is to follow. Another difficulty with this approach is that (tentative) entry into the community precedes the setting of use restrictions, so that preset restrictions cannot serve as a way of initially drawing together people with similar preferences. It is a bit like requiring movie theaters to wait until ten percent of the audience has arrived, and then collaboratively decide with them what movie will be shown. However, one might argue that this manner of proceeding would better fit preferences than would a system where an unresponsive group of theater owners insisted on always showing the same movie everywhere.

284. Hyatt & Stubblefield, *supra* note 7, at 653 n.254.

utes.[285] Expectations are malleable; if thwarted consistently, then they will be extinguished or reshaped along lines corresponding to experienced reality.[286] Given the relative infrequency of home purchases, however, waiting for expectations to catch up with reality may not be a defensible course—more proactive forms of expectation readjustment might be necessary if the choices that consumers make are to be meaningful.[287] For example, requiring developers to articulate to homeowners what they understand to be the scope and limits of homeowner association power might serve a helpful clarifying function. Perhaps more important would be a set of disclosures that would put homebuyers on notice as to the legal differences between purchasing in an ordinary neighborhood controlled by municipal land use controls and in a private development governed by private covenants and controlled by a homeowners association.

D. Developing New Models for Community

Despite the concerns raised in the foregoing account, the neighborhood remains an intriguing and highly promising locus of action—both inside and outside of private communities. The neighborhood, which Perin terms "the penultimate nesting box of ourselves as social beings,"[288] exists at a scale conducive to grassroots involvement, and ought to be an ideal vehicle for fostering a meaningful sense of community.[289] The promise of community contained in private development marketing materials continues to strike a resonant chord with many homebuyers, and a longing for authentic community forms a strong undercurrent in loca-

285. *See, e.g.*, French, *supra* note 132 ("As our collective experience with life in common interest communities increases, more of us will become aware of the risks involved in buying a home in a common interest community."); Nelson, *supra* note 2, at 163 (discussing "learning curve" in adapting to new forms of property).

286. This observation corresponds to a well-known circularity in legal doctrines involving expectations. What people expect is shaped by what people experience, and what people experience is shaped by the law. *See, e.g.,* Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1, 56 (1996) (describing the "reasonable expectations" model in takings jurisprudence as "hopelessly circular," and that "reasonable expectations are founded on perceptions of what the law will protect, so the law's protections cannot be based on reasonable expectations"); Robinson, *supra* note 182, at 564 (explaining that using expectations to gauge property interests is circular, because "[t]he only basis for determining what people expect . . . is what they have been told to expect based on their legal rights.").

287. Barton & Silverman, *supra* note 1, at 36 (arguing that "[i]n order to have a genuine choice people must also understand what they are choosing"); *see supra* Part IV.C (discussing homebuyer ignorance).

288. PERIN, *supra* note 223, at 81.

289. *See* Ellickson, *supra* note 8, at 196 (explaining that block-level organizations can serve as "incubators of local social capital"); Franzese, *supra* note 8, at 590 ("Common interest communities, at least in theory, have the potential to be models for a revitalized, revivified sense of community."); Reichman, *supra* note 6, at 263 (observing that "the structure of the homeowners' association could unwittingly provide a mechanism for reversing the anti-community trends of the last century," and noting that "[s]ince the compactness of the community makes each vote count, participatory democracy might be reinvigorated").

tional decisions generally.[290] In addition, neighborhood organizations, or smaller block-level organizations, may be uniquely well suited to provide local public goods and to achieve certain social ends.[291] For example, if a neighborhood or block-level subunit has a strong sense of its own collective identity, its members might view themselves as responsible for the common areas within its boundaries, and might also identify with other community members. This level of identification with the neighborhood and with one's neighbors, which is likely to lead to crime-deterring patterns of monitoring,[292] might be strengthened by contextual cues such as signs and gates,[293] as well as by interactions—whether structured or informal—among the neighbors themselves.

Because homeowners associations provide a ready-made superstructure for coordinating small-scale collective action, scholars such as Robert Ellickson and Robert Nelson have recommended applying the structural template offered by homeowners associations to existing neighborhoods.[294] Ellickson concludes that "[t]he resounding success of RCAs [residential community associations] in new housing developments indicates the merits of enabling the stakeholders of inner-city neighborhoods to mimic—at the block level—the micro institutions commonly found in the suburbs."[295] These ideas are intriguing ones that are well worth exploring. Before transplanting features of homeowners associations into existing neighborhoods, however, we would do well to consider whether and how well those institutions are working to achieve the desired ends.

290. *See, e.g.,* Franzese, *supra* note 8, at 571 (observing that private development advertising plays on homebuyers' longing for a sense of community).

291. *See* Ellickson, *supra* note 5; *see also* Ellickson, *supra* note 8, at 193 (arguing that "[t]he block is the optimal level for the provision of many public goods").

292. One study involved showing convicted burglars a videotape of various dwellings and eliciting comments about the suitability of each one as a target. TREVOR BENNETT & RICHARD WRIGHT, BURGLARS ON BURGLARY 63 (1984). Many comments explicitly or implicitly expressed "the fear that neighbors will know who is a stranger to the area, or to the occupants of the house, and will be more likely than passers-by to do something about it." *Id.* at 63. The burglars in the Bennett & Wright study also paid attention to a number of other risk factors in selecting targets, including the amount of cover provided, the target's proximity to the road, cues that indicated likely occupancy, the availability of escape routes, whether or not the dwelling afforded rear access, and the perceived presence or absence of a dog or a burglar alarm. *Id*. at 62–66.

293. *See* Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1058–62 (2002) (discussing use of architectural features to create a sense of territoriality among residents). Some of the visual devices that could be used to heighten an internal sense of identity (such as gates and walls) would also necessarily foster a sense of separation from the outside world that could have negative societal impacts. I am setting aside this set of concerns for present purposes, but they would obviously have to be taken into account in forming any policy prescriptions.

294. *See* Ellickson, *supra* note 5; Nelson, *supra* note 3, at 312–13.

295. Ellickson, *supra* note 8, at 200.