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COMMON INTEREST COMMUNITY COVENANTS AND THE FREEDOM OF CONTRACT MYTH

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INTRODUCTION

A generation ago, only 1% of the United States population lived in a privately governed common-interest community (“CIC”).¹ Today, approximately 64 million people (20% of the

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¹ “Common interest community” is defined by the Restatement (Third) of Property to be a “development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal (1) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or (2) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or the neighborhood.” RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.8 (2000). Sometimes the term common interest development or CID is used to refer to the same thing. CICs include condominiums and homeowner associations, also known as PUDs (planned unit developments). While structured differently, cooperative ownership developments are often included within the rubric of CIC. The Community Associations Institute (CAI) is a trade association representing all CICs nationwide. According to CAI, approximately 2 million out of a population of 203 million people (0.9%) in 1970 resided in a CIC. *Industry Data*, CMTY. ASS’NS INST.,

country's population) reside in one of the more than 300,000 CICs in the United States.² Residents in CICs are bound to a private governance scheme that includes written obligations that have been recorded in the local land records and run with the land as well as rules and regulations enacted from time to time by the board of directors of the community association.³ These covenants and rules form the private law of the community, and generally courts will grant injunctions or specific performance to enforce such regulations. State law also permits a CIC association to assess lien-backed fines for non-compliance.⁴ Buyers of homes in a CIC are deemed to have voluntarily elected to be legally bound to all the private community rules, to have such rules

<http://www.caionline.org/info/research/Pages/default.aspx> (last visited Feb. 12, 2014).

² CAI tracks data regarding the number of CICs and their residents. CMTY. ASS'NS INST., INDUSTRY DATA, <http://www.caionline.org/info/research/Pages/default.aspx> (last visited Feb. 12, 2014). CAI's data indicates that the number of residents of common interest communities has increased to 63.4 million today. This figure represents 20.2% of the population of the U.S.A., estimated by the U.S. Census Bureau in 2012 to be approximately 313.9 million. *U.S. & World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock/> (last visited Feb. 12, 2014). The percentage of the population residing in a CIC continues to grow. WAYNE S. HYATT & SUSAN F. FRENCH, *COMMUNITY ASSOCIATION LAW: CASES AND MATERIALS ON COMMON INTEREST COMMUNITIES* 3 (2d ed. 2008); Andrea J. Boyack, *Community Collateral Damage: A Question of Priorities*, 43 LOY. U. CHI. L.J. 53, 58 (2011) [hereinafter Boyack, *Community Collateral Damage*]. The proliferation of the CIC form is not uniformly heralded as a positive development. See David E. Grassmick, *Minding the Neighbor's Business: Just How Far Can Condominium Owners' Associations Go in Deciding Who Can Move into the Building?*, 2002 U. ILL. L. REV. 185, 189 (asserting that in a sort of "Gresham's Law" (bad money drives out good) a "condominium or owners' association-governed community is crowding out other types of housing from the market").

³ RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 6.4, 6.7, 6.16 (2000); see also HYATT & FRENCH *supra* note 2, at 95-104 (discussing the power of an association to enact rules governing the community).

⁴ See WAYNE S. HYATT, *CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW* 105, 121 (3d ed. 2000) (discussing assessments and other collection devices).

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specifically enforced, and to subject their property to a security interest securing their obligations to the community.

For the most part, courts do not undertake a substantive analysis of the desirability of individual community covenants.⁵ Courts reason that all members of a community have agreed to be contractually bound to this private governance scheme,⁶ and therefore judicial deference to community choices is mandated by freedom of contract policies.⁷ The proper judicial role, under this conception of the CIC, is to ensure that any changes to the private legislative content (covenant amendments or rule enactments) occur according to the privately enumerated process.⁸ Focusing

⁵ For example, the court in *Powell v. Washburn*, 125 P.3d 373, 376 (Ariz. 2006), enjoined a homeowner from keeping a recreational vehicle on his property by holding that CIC covenants should be enforceable according to the intent of the drafting party, specifically departing from and rejecting the rule of strict construction of covenants that run with the land. *See also* Jeffrey A. Goldberg, Note, *Community Association Use Restrictions: Applying the Business Judgment Doctrine*, 64 CHI.-KENT L. REV. 653, 673; (1998); Robert G. Natelson, *Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41, 45-47 (1990).

⁶ *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637, 639-40 (Fla. Dist. Ct. App. 1981) (asserting that CIC restrictions "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, e.g.*, *Lookout Mountain Paradise Hills Homeowners' Ass'n v. Viewpoint Assocs.*, 867 P.2d 70, 74 (Colo. App. 1993); *Joslin v. Pine River Dev. Corp.*, 367 A.2d 599, 601 (N.H. 1976).

⁷ Courts reason that while a community's group preferences may not coincide with individual owner preferences, those owners have agreed to subordinate their individual wishes to the choices of a group. This concept, that the interrelationship among owners in a CIC justifies some curtailment of individual rights, is a fundamentally accepted aspect of CIC covenant enforcement. *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 181-82 (Fla. Dist. Ct. App. 1975) ("[T]o promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.").

⁸ If regulations and amendments apply equally to all members and are

solely on how covenants are amended and how rules are enacted does ensure that community members enjoy some level of procedural due process with respect to changes to CIC governing provisions. However, there is little actual substantive limit on the covenants and regulations that CICs can impose, either through amendment or as part of the original recorded covenants and community rules.

Courts unrealistically presume that purchasing property within a CIC is in itself an adequate manifestation of assent to be bound to CIC governing provisions. General deference to parties' substantive choices in contracting is proper. But freedom of contract is an inadequate justification for covenant enforcement in the context of privately governed communities. Such covenants do not necessarily represent voluntary owner assent to obligation and do not necessarily reflect neighborhood preferences. The covenants are perpetual, non-negotiable contracts of adhesion, bundled with one of the most personal, expensive, and complicated purchases an individual will ever make—the purchase of a home.⁹ As servitudes, CIC covenants enjoy duration and specific enforceability that go beyond typical contract rights.¹⁰ In addition, the terms of a community's laws are not self-imposed; instead, they are crafted by developers and driven by the requirements of lenders and governments.¹¹ The only escape from a given CIC governance scheme is sale of one's

promulgated according to the procedures set forth in the governing documents, courts will generally uphold them. HYATT, *supra* note 4, at 56, 173. *See, e.g.*, Kroop v. Caravelle Condo, Inc., 323 So. 2d 307 (Fla. Dist. Ct. App. 1975) (holding that amendments severely limiting an owner's right to lease his unit were valid because the amendment was passed according to the procedure set forth in the CIC declaration).

⁹ *See infra* Part II.A.

¹⁰ *See infra* Part II.B; *see also* Stewart E. Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 617 (1985) (explaining the “difficult questions of intergenerational fairness” that arise in the context of CIC restraints).

¹¹ *See infra* Part II.D. The content of CIC covenants is motivated in part by mortgage market constraints imposed by federal agencies or Fannie Mae and Freddie Mac.

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home,¹² and in some markets even this will be ineffective due to lack of real choice among residential neighborhood options.¹³

Contract analogy should not create presumptive validity for all CIC covenants and properly enacted rules. The reality of CIC governance is more complicated and implicates property and constitutional concerns as well as contract law. The proper approach to CIC governance review must draw from all three of these areas of the law. The subject matter scope of CIC governance should be limited based on servitude law principles. Constitutional protections should be legislated for members of CICs. And bona fide, deliberate assent should be prerequisite to holding owners bound to CIC obligations.

Part I of this Article explores the origins and judicial treatment of the private laws of self-governed communities. CIC covenants are legal hybrids—enforced as contracts but specifically enforceable against successive landowners because they are servitudes. Part II explains how CIC covenants and rules diverge from the typical contractual model. CIC covenants are contracts of adhesion, made up of completely non-negotiable, recorded terms bundled into home acquisition. Developers and lenders generally prescribe the content of such covenants, and they may not reflect community desires or values. Part III explains how a refocused freedom of contract rationale, an updated variant of traditional servitude requirements, and new legislation regarding important personal freedoms can bring clarity and fairness to common interest community law.

I. THE CURIOUS CASE OF COMMON INTEREST COMMUNITIES

A. Legal Hybrids: Contracts Enforced as Servitudes and Functioning as Constitutions

CICs are creatures both of property law and of contracts. In terms of function, they are akin to “mini governments.”¹⁴ The

¹² See *infra* Part II.C.

¹³ See *infra* notes 94–95 and accompanying text.

¹⁴ Wayne S. Hyatt & James B. Rhoads, *Concepts of Liability in the*

foundational structure of CICs, however, is servitude law.¹⁵ In a CIC, all property owners are bound together under a system of real covenants and share certain financial obligations and property rights.¹⁶ Every property owner within a CIC is also a mandatory member of a contractually defined association that provides private governance for the community.¹⁷ The power of an association to govern, to assess owners for upkeep, and to enforce rules regarding use and appearance of individual properties is established through a recorded declaration of covenants (sometimes called CC&Rs). These covenants bind all successive owners of the property by virtue of their ownership, a concept called “running with the land.” Although framed much like a multilateral contract, CIC covenants transcend typical contractual obligation and become obligations of the property itself, binding its successive owners and specifically enforceable

Development and Administration of Condominium and Home Owners Associations, 12 WAKE FOREST L. REV. 915, 918 (1976) (explaining that a CIC association is a “quasi government entity, paralleling in almost every case the powers, duties, and responsibilities of a municipal government”); *see also* David L. Callies & Adrienne I. Suarez, *Privatization and the Providing of Public Facilities Through Private Means*, 21 J.L. & POL. 477, 499 (2005) (explaining how courts have used the “mini-government theory” to justify implying assessment powers where governing documents failed to explicitly so provide).

¹⁵ A servitude is a legal device that creates a right or obligation that runs with the land. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1(1). A servitude can be an easement, profit, or covenant. *Id.* § 1.1(2). The Restatement calls covenants that are servitudes “covenants running with the land.” *Id.* § 1.3. Modern courts do not distinguish between equitable and real covenants. *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 84 P.3d 295, 298–99 (Wash. App. 2004). In this article, I use both “covenant” and “real covenant” to refer to covenants running with the land.

¹⁶ *See* Boyack, *Community Collateral Damage*, *supra* note 2, at 60 (“All types of CICs . . . share the same essential service and payment structure: homeowner-elected directors manage common upkeep, and all homeowners contribute their pro rata portion of the common costs.”); *see also* HYATT & FRENCH, *supra* note 2, at 11 (discussing the power of an elected board of directors); HYATT, *supra* note 4, at 84–88, 105, 121 (discussing powers of a board, community assessments, and collection devices).

¹⁷ HYATT & FRENCH, *supra* note 2, at 6, 13–14.

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in perpetuity.¹⁸ The covenant obligations in CICs are not static because the association can amend the CC&Rs or pass rules to further clarify or carry out the purposes of the community.¹⁹

In addition to recorded covenants contained in a community's CC&Rs, the board of the community association can pass specific regulations authorized by the recorded declaration. These regulations can be changed as the board sees fit. CIC obligations can therefore arise either from the terms of the original recorded declaration, from amendments to the declaration, or from the rules promulgated by the board of directors to carry out the general purposes of the association.²⁰ Courts generally are more deferential to recorded covenants than to rules enacted by the board, reasoning that owners had more notice of recorded covenants and that such covenants are not as easily changed.²¹ In addition, state statutes sometimes limit the ability of a board to promulgate rules governing individually owned property (as opposed to common elements) and individuals' behavior.²²

¹⁸ Any associated financial obligations are secured by a lien on the subject property. HYATT, *supra* note 4, at 120–21.

¹⁹ CIC purposes are almost always defined as preserving and promoting property values and owner "lifestyle." Apple II Condo. Ass'n v. Worth Bank & Trust Co., 659 N.E.2d 93, 95–97 (Ill. App. Ct. 1995); *see also* Ngai Pindell, *Home Sweet Home? The Efficacy of Rental Restrictions to Promote Neighborhood Stability*, 29 ST. LOUIS U. PUB. L. REV. 41, 43–46 (2009); Zachary M. Rawling, *Reevaluating Leasing Restrictions in Community Associations: Rejecting Reasonableness in Favor of Consent*, 5 J.L. ECON. & POL'Y 223, 224–25 (2009).

²⁰ HYATT, *supra* note 4, at 82–88 (discussing the powers of a board of directors of a CIC association); *see also* Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 242 (1992) (noting that CIC enforcement is justified based on the unanimous assent of its members to covenant terms and explaining that later amendments "pose special problems").

²¹ *Id.* at 50–51; *Nahrstedt v. Lakeside Vill. Condo. Assn.*, 878 P.2d 1275, 1283 (Cal. 1994).

²² UNIFORM COMMON INTEREST OWNERSHIP ACT § 3-102 (1994) [hereinafter UCIOA]; HYATT, *supra* note 4, at 52; *see also* Buddin v. Golden Bay Manor, Inc., 585 So. 2d 435 (Fla. Dist. Ct. App. 1991) (declaring a

Occasionally, public policy provides a substantive outer limit on restrictive covenants. For example, in a handful of cases, a non-compete covenant or a restriction on alienation has been declared unenforceable as contravening public policy.²³ Aside from such outlier cases, however, courts today will generally enforce covenant obligations that have something to do with the property as long as the obligations have been created by an intentional, recorded writing.²⁴ This is different than in the past. Traditionally, in order for landowners to create a real covenant, the covenant must be in writing, specifically intended to run with the land, touch and concern the real property, be adequately publicized (usually by recordation in the applicable local land records in order to create third party notice), and be authored by parties who were linked in “horizontal privity.”²⁵ Modernly, courts have moved away from strictly requiring these elements exist in order for a covenant to have been created. The newer approach relies on an intentional, recorded writing alone, focusing on upholding as a servitude any provision specifically intended to be a servitude. This approach dispenses with the

board rulemaking *ultra vires*).

²³ See, e.g., Davidson Bros., Inc. v. D. Katz & Sons, Inc., 579 A.2d 288 (N.J. 1990) (striking down a covenant not to compete for a grocery store property); Riste v. E. Washington Bible Camp, Inc., 605 P.2d 1294 (Wash. App. 1980) (striking down a restriction on conveying property without church approval).

²⁴ E.g., Powell v. Washburn, 125 P.3d 373, 376 (Ariz. 2006); Vulcan Materials Co. v. Miller, 691 So. 2d 908, 913 (Miss. 1997); Runyon v. Paley, 416 S.E.2d 177 (N.C. 1992). The requirement that a covenant “touch and concern” the land requires that the substance of the covenant relate to the real property itself. By requiring that a covenant touch and concern the land in order to run with the land, the common law sought to ensure that personal obligations unrelated to the ownership of the property would only bind the original parties—in contract—and would not be deemed servitudes that would continue as specifically enforceable obligations for all landowners.

²⁵ RESTATEMENT OF PROP. § 537 cmt. h (1944) (justifying the touch and concern requirement as a means to reduce the number of permissible real covenants). “Horizontal privity” requires both parties to simultaneously hold an interest in the same property, such as a landlord and tenant or buyer and seller. Neighbors, for example, would not be in horizontal privity.

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formalistic requirement of privity and, to some extent, the touch and concern test.²⁶

Most of the requirements for covenant creation deal with required formalities, but the touch and concern requirement—to the extent it still exists—has to do with substance and limits the scope of perpetually restraining covenants.²⁷ For example, traditionally, a promise to pay money could not be a covenant obligation as it was considered not to touch and concern the land. But courts eventually accepted that the assessment of property to pay for joint amenities was a proper subject matter for real covenants,²⁸ and it was this expansion of the notion of touch and concern that spurred growth of suburban planned communities across the country.²⁹ In the past several decades, the touch and

²⁶ Courts adopting the new Restatement of Property approach no longer closely examine concepts of privity and touch and concern in order to deny servitude enforcement. *E.g.*, *Oliver v. Schultz*, 885 S.W.2d 699, 701 (Ky. 1994); *Matter of Parcel of Land Located on Geneva Lake, Town of Linn, Walworth Cnty.*, 477 N.W.2d 333, 339 (Wis. Ct. App. 1991); RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 2.1, 3.1, and 3.7 (2000). Some scholars likewise argue that the touch and concern test is unnecessary. *See* Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1359–60 (1982) [hereinafter Epstein, *Notice and Freedom of Contract*]. The approach of the Restatement (Third) is still controversial and several jurisdictions have refused to embrace its approach. *E.g.*, *Nickerson v. Green Valley Recreation, Inc.*, 265 P.3d 1108, 1115 (Ariz. Ct. App. 2011); *Regency Homes Ass'n v. Egermayer*, 498 N.W.2d 783, 791 (Neb. 1993). For an example of the rare case of a court finding that a covenant does *not* touch and concern the land and therefore does not run with the land, see *Ebbe v. Senior Estates Golf & Country Club*, 657 P.2d 696 (Or. App. 1983). *See also supra* note 24.

²⁷ Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 449 (1984) [hereinafter Korngold, *Privately Held Conservation Servitudes*]. *See also* RESTATEMENT OF PROP. § 537 cmt. h (1944) (justifying the requirement as a means to reduce the number of permissible real covenants).

²⁸ *See, e.g.*, *Regency Homes Ass'n v. Egermayer*, 498 N.W.2d 783 (Neb. 1993); *Neponsit Property Owners Association, Inc. v. Emigrant Industrial Savings Bank*, 278 N.Y. 248 (1930).

²⁹ EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE*

concern requirement has faded in importance. The new Restatement calls it unnecessary. But without the touch and concern requirement, covenants have no substantive limits beyond the public policy restraints placed on all contracts.

The legality of CIC governance crystallized during the last century.³⁰ But the outer boundary of permissible subject matter for CIC regulation remains the subject of heated debate.³¹ As courts over the past century began to take a more permissive view toward CICs and associated covenant requirements, developers increasingly structured communities with common amenities and assessment obligation servitudes, confident that courts would uphold the governance scheme. In the twentieth century, community real estate development became a big part of the real estate industry. Developers pioneered using servitude law to achieve their visions of community planning and design. At first, developers relied on restrictive covenants to limit land uses as a

RISE OF RESIDENTIAL PRIVATE GOVERNMENT 31–32 (1996).

³⁰ Although the modern CIC did not appear until the 1970s, the underlying legal forms that make CICs possible can be traced back to the sixteenth century's breakdown of the English common field system. The Industrial Revolution heralded changes in land use that increased potential negative externalities on neighbors. Property law expanded the law of servitudes as an adaptation to these new developments. *Id.*; see also JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 668–70 (5th ed. 2002). Initially courts were worried that this ownership structure would negatively impact alienability. See, e.g., *Hutchinson v. Ulrich*, 34 N.E. 556 (Ill. 1893) (holding that since limitations on free alienability are disfavored at law, ambiguities are to be resolved against the restrictive covenants); Carol M. Rose, *Property Law and the Rise, Life, and Demise of Racially Restrictive Covenants* (Ariz. Legal Studies Discussion Paper No.13-21, 2013), reprinted in POWELL ON REAL PROPERTY (Michael Allan Wolf & Richard R. Powell, eds., 2013), available at <http://ssrn.com/abstract=2243028>. Initially, courts were concerned that enforcing this new brand of servitude would adversely affect alienability of land. MCKENZIE, *supra* note 29, at 32.

³¹ See, e.g., Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 293–94 (1976) (advocating a robust “touch and concern” test as a way of limiting the scope of permissible CIC regulations); Brower, *supra* note 20, at 272–73 (advancing a theory that presumptive enforceability of CIC covenants should turn on the extent of the particular liberty right curtailed).

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way to preserve values, particularly for affluent suburban communities.³² Many early generation covenant communities were created by obtaining the unanimous consent of all neighborhood residents, and these covenants focused on restricting undesirable uses³³ and users.³⁴

In the 1960s and the 1970s, there was a further revolution in CIC ownership form through the increased use of condominiums. During this time, new developments increasingly were structured as privately governed communities prior to sale of the first unit, and in these communities owner assent was presumed through purchase of property already burdened with CC&Rs. Although the cooperative form had previously been used to approximate real property ownership of a unit in a multi-family building,³⁵ in the 1960s, actual fee simple property ownership of apartment units was made possible by the enactment of condominium-

³² *Neponsit*, 15 N.E.2d at 793.

³³ Community covenants are very useful in addressing negative external impacts that the use of one parcel imposes upon other proximate parcels, and are preferable to reliance on nuisance law to protect property from such negative externalities. See Andrea J. Boyack, *Community Covenant Alienation Restraints and the Hazard of Unbounded Servitudes*, 42 REAL ESTATE L.J. 450 (2013) [hereinafter Boyack, *Community Covenant Alienation Restraints*].

³⁴ “Occupancy restrictions perhaps were the *raison d’être* of early-generation covenant-based communities.” *Id.*; see also Grassmick, *supra* note 2; LEE ANNE FENNELL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* 123 (2009). For a thorough discussion and analysis of historic racial occupancy restrictions in CICs, see RICHARD R.W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* (2013).

³⁵ The cooperative ownership structure allowed shareholders of an owning entity to obtain exclusive, perpetual possessory rights with respect to a single apartment unit. Cooperatives are generally included in the definition of CICs even though their ownership form is based on lease and corporate law. Cooperatives, often known as co-ops, are more commonly found in earlier urbanized areas, such as New York City. Susan Stellan, *Co-op vs. Condo: The Differences Are Narrowing*, N.Y. TIMES, Oct. 5, 2012, at RE9. Cooperative buildings do not permit fee simple ownership of a given unit, instead, the entire building is owned by an entity, and each “owner” holds a share of membership interest in the entity. The shareholders have, as an appurtenance to their ownership interests, a perpetual lease on “their” unit.

enabling statutes.³⁶ By the 1970s, every state had adopted a statute specifically permitting condominium ownership.³⁷ In 1977, the National Conference of Commissioners on Uniform State Laws began drafting the Uniform Condominium Act based on the 1974 Virginia model. Subsequently, the Conference prepared uniform laws governing the three forms of CICs (condominiums, cooperatives, and homeowners associations) and combined the resulting three acts into the Uniform Common Interest Ownership Act (UCIOA).³⁸ To date, eight states have adopted the UCIOA.³⁹

³⁶ The Condominium is a creature of statute that permits fee simple ownership defined along three-dimensional planes, rather than common law two-dimensionally defined land ownership boundaries. In the common law, the third dimension is *ad coelom*: a column of space “from the center of the earth to the heavens.” See William Schwartz, *Condominium: A Hybrid Castle in the Sky*, 44 B.U. L. REV. 137, 141 (1964) (noting the traditional view that “whatever is attached to the land belongs to the land” and, consequently, to the person who owns the land itself); Charles W. Pittman, Note, *Land Without Earth—The Condominium*, 15 U. FLA. L. REV. 203, 205–06 (1962) (noting the general hostility expressed in European civil codes to the concept of horizontal property). Condominium ownership is the only way to own an apartment in fee simple. The earliest state condominium statutes tracked the FHA Model Act and in some key aspects were insufficient, ambiguous and ineffective. See Robert Kratovil, *The Declaration of Restrictions, Easements, Liens, and Covenants: An Overview of an Important Document*, 22 J. MARSHALL L. REV. 69 (1988). Once condominium-enabling statutes were passed in the early 1970s, condominium ownership of apartments rapidly replaced the cooperative form as the most common way to obtain “ownership” of an apartment unit. The condominium ownership structure made ownership of urban apartment dwelling units possible and has proved so flexible that today fee simple ownership can exist with respect to “postage stamp” buildings (the outlines of the building alone without any surrounding land), parking spaces, interior store spaces, and even air space for telecommunications equipment.

³⁷ Every state adopted a condominium statute in the 1960s, and this paved the way for a huge condominium “boom” during the next few decades. HYATT, *supra* note 4, at 11.

³⁸ UCIOA, *supra* note 22. The UCIOA was created by combining the Uniform Condominium Act, the Uniform Planned Community Act, and the Model Real Estate Cooperative Act.

³⁹ Boyack, *Community Collateral Damage*, *supra* note 2, at 100.

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Other states have retained their early condominium statutes or have made updates thereto but have not adopted the uniform statute.⁴⁰

Three similar but legally distinct ownership structures fall under the CIC rubric. In planned unit development, individual owners hold title to lots and are members of an association that owns common property. The condominium association, in contrast, does not own any property. In condominiums, owners hold fee simple title to their unit and are tenants in common with all other unit owners with respect to common property. All property in a cooperative is owned by an association, and all “owners” are shareholders of that association as well as tenants under a perpetual lease with respect to their unit. Although the legal structure of ownership among the three forms of CICs differs,⁴¹ all CICs allow buyers to obtain amenities that they could not otherwise afford individually, and owners of any property within a community are automatically members of the CIC—there is no opt out.

The possibility for shared private contribution to the costs of community amenities and upkeep through CIC ownership structures proved popular with local governments. Municipalities quickly perceived the benefit of creating taxable housing that provided its own community maintenance framework (including

⁴⁰ *Id.*

⁴¹ In condominium ownership, every member owns her unit in fee simple and all members collectively hold the remainder of the condominium (the roof, lobby, elevators, amenities, parking garage, electrical system, etc.) as tenants in common. PUD development is similar to condominiums, but typically the lot owners do not own common areas as tenants in common; instead, the association owns the common areas. In all three forms of CICs, property ownership is synonymous with membership in the governing association, and in all three ownership forms, members must abide by recorded covenants and rules established by the association’s board. The association is responsible for maintenance of the CIC and is funded in full by assessments levied on the members. The obligation to pay assessments is secured by a lien on the real property owned by the member. *See generally* HYATT & FRENCH, *supra* note 2; Boyack, *Community Collateral Damage*, *supra* note 2.

snow removal, paving, and in some cases even fire and safety).⁴² Because of this ability to privatize public function, local governments have actively encouraged the spread of CIC form as a way to privately finance community services.⁴³ Municipalities have even required new residential developments to be structured as CICs in order to generate revenue rather than as non-CICs which demand more municipally funded infrastructure and upkeep.⁴⁴ The governmental budgetary motive for encouraging private CIC structuring reflects demands for lower property taxes.⁴⁵ On the other hand, as municipalities push for CIC structuring, buyers who specifically would like to live outside a CIC may be unable to find non-CIC housing. In addition, owners in CICs effectively are taxed twice—once through municipal

⁴² See CLIFFORD TREESE ET AL., RESEARCH INST. FOR HOUS. AM., CHANGING PERSPECTIVES ON COMMUNITY ASSOCIATION MORTGAGE UNDERWRITING AND CREDIT ANALYSIS 6 (2001), available at http://www.housingamerica.org/RIHA/RIHA/Publications/48502_ChangingPerspectivesonCommunityAssociationMortgageUnderwriting.pdf (stating that government privatizes its functions, requiring community associations to fulfill an otherwise municipal obligation); see also HYATT & FRENCH, *supra* note 2, at 13–14 (explaining how CICs function like local governments); Boyack, *Community Collateral Damage*, *supra* note 2, at 121 (comparing the function of associations to that of local governments and comparing association assessments to property taxes).

⁴³ Susan F. French, *Making Common Interest Communities Work: The Next Step*, 37 URB. LAW. 359 (2005).

⁴⁴ TREESE ET AL., *supra* note 42, at 3 (discussing methods that communities utilize to minimize taxes); Boyack, *Community Collateral Damage*, *supra* note 2, at 60 (“The CIC structure enables more community amenities and upkeep, permitting neighborhoods to self-fund and allowing local governments to avoid raising taxes in response to more housing developments.”).

⁴⁵ In California, Proposition 13 limited municipal ability to increase property taxes to meet demand for community services, and CIC governance was a way to provide community amenities without draining tax revenue. The trend away from property tax funded amenities is self-perpetuating because residents in CICs, who have to pay community assessments in addition to property taxes, are strong and local voting blocks against property tax increases. Callies & Suarez, *supra* note 14, at 493.

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property taxes and once through CIC assessments.⁴⁶

On balance, the innovation of the CIC is a positive development. CIC structures have led to increased home ownership in the United States. CICs also address the problem of neighborhood nuisances⁴⁷ and increase available neighborhood amenities.⁴⁸ Still, CIC jurisprudence shows troubling claims of overreaching by association governments and the enforcement of abusive covenants.⁴⁹ Some scholars bemoan the erosion of

⁴⁶ In one state, New Jersey, taxpayers have successfully claimed the right to offset a portion of their community assessments from property taxes, claiming that they were penalized by double taxation without this offset. HYATT, *supra* note 4, at 133 (citing Borough of Englewood Cliffs v. Estate of Allison, 174 A.2d 631, 640 (N.J. Super Ct. 1961) (reasoning that a property's true value does not include the value of rights transferred to a community)). Other than in New Jersey, however, assessments are not deductible from tax impositions. *Id.* at 106.

⁴⁷ In situations where neighbors do not have community covenants, or where covenants do not explicitly prohibit an objectionable activity, neighbors can claim that the objectionable activity should be proscribed as a nuisance. Relying on the tort of nuisance to prohibit uses of neighboring property, however, is unpredictable, inconsistent, and often ineffective. For example, In *Turudic v. Stephens*, an Oregon court found that keeping two "pet" cougars in a residential neighborhood did not constitute a nuisance. 31 P.3d 465 (Or. Ct. App. 2001). On the other hand, courts routinely limit uses of property based on restrictions in a community's CC&Rs without requiring that the use be proven to be a nuisance. *See, e.g.,* Laumbauch v. Westgate, C.A. No. 2442-VCS, 2008 WL 3846419 (Del. Ch. Aug. 19, 2008), *aff'd*, 966 A.2d 349 (Del. 2009).

⁴⁸ *See* Boyack, *Community Covenant Alienation Restraints*, *supra* note 33; Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829; French, *supra* note 43.

⁴⁹ *See, e.g.,* Note, *The Rule of Law in Residential Associations*, 99 HARV. L. REV. 472, 473 (1985) (explaining the potential for CICs to become "illiberal communities," namely "communities that repudiate norms embodied in traditional civil rights"); Kristina Caffrey, *The House of the Rising Sun: Homeowners' Associations, Restrictive Covenants, Solar Panels, and the Contract Clause*, 50 NAT. RESOURCES J. 721, 738 (2010) (explaining how "faction abuse and tyranny of the majority" prevents CICs from adequately resolving issues regarding solar panels); Jeffrey A. Goldberg, *Community Association Use Restrictions: Applying the Business Judgment Doctrine*, 64 CHI.-KENT L. REV. 653, 670 (1988) (explaining that CIC boards have

personal freedom, property rights, and neighborhood diversity that has resulted from the proliferation of the CIC ownership model.⁵⁰

B. Judicial Oversight of CIC Governance

The CIC phenomenon is impacted by an array of legal disciplines, including association governance, constitutional rights, and property law. But more and more, courts have conceived of CIC governing provisions under the rubric of contract jurisprudence. The rhetoric of freedom of contract is often used as the primary justification for upholding CIC regulations and restrictions.⁵¹ The reality of how parties become obligated to CIC covenants and board-enacted rules, however, calls into question just how appropriate and far-reaching freedom of contract rationale is in the CIC context.

Courts have struggled with the best way to characterize CIC covenants and rules, but for all courts, the analysis of CIC

enormous power and thus enormous potential for abuse of that power); Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1531 (1982) (explaining how wealth redistribution and other economic abuses of power can impose “victimization costs” on dissenting owners in a CIC); Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 275 (1976) (explaining how personal biases may lead to governing power abuse in CICs). Even in upholding CIC governing acts, the *Nahrstedt* court cautioned that “[b]ecause of its considerable power in managing and regulating a common interest development, the governing board of an owners association must guard against the potential for the abuse of that power. *Nahrstedt v. Lakeside Vill. Condo. Assn.*, 878 P.2d 1275, 1281–82 (Cal. 1994). Professor Stewart Sterk suggests, however, that the democratic basis of association governance provides a built-in protection against abuse of power by a CIC board. Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 341 (1997).

⁵⁰ *E.g.*, MCKENZIE, *supra* note 29; Paula A. Franzese & Steven Siegel, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 MO. L. REV. 1111 (2007).

⁵¹ *E.g.*, *Nahrstedt*, 878 P.2d at 1286; *Hidden Harbour Estates v. Basso*, 393 So. 2d 637, 639–40 (Fla. Dist. Ct. App. 1981); *Apple II Condo. Ass’n v. Worth Bank & Trust*, 659 N.E. 2d at 93, 96 (Ill. App. Ct. 1995).

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regulation validity starts with the foundational assumption that owners voluntarily obligate themselves to CIC governance when they buy into the community. Based on this presumption, courts explain that owners voluntarily agreed to relinquish “a certain degree of freedom of choice” when they became members of the CIC.⁵² Therefore, the covenants and properly enacted rules are presumptively binding as contract terms. In particular, provisions of the recorded declaration as of the date of an owner’s purchase are presumptively binding unless the provisions violate public policy.⁵³

Theoretically, a court may strike down CIC covenants based on finding that they infringe upon members’ “constitutional rights.”⁵⁴ But constitutional violations must involve state action, and this is a difficult hurdle to overcome in the context of CIC associations.⁵⁵ Sometimes disgruntled owners claim that an association’s power is restrained by state or federal constitutions based on an expansive conception of state action. For example, one theory—made in reference to the 1944 Supreme Court case of

⁵² HYATT, *supra* note 4, at 50–51 (explaining how widely cited this foundational assumption is); *see also* *Basso*, 393 So. 2d at 637.

⁵³ Public policy limits the substance of covenants in the same way that public policy limits the substance of contracts. For example, some covenants not to compete have been held unenforceable as a matter of public policy. *Davidson Bros., Inc. v. Katz & Sons, Inc.*, 579 A.2d 288 (N.J. 1990). Theoretically, public policy should also restrain covenants that unduly limit alienation of real property. *See, e.g.*, *Riste v. E. Wash. Bible Camp, Inc.*, 605 P.2d 1294 (Wash Ct. App. 1980).

⁵⁴ *See* HYATT, *supra* note 4, at 62–63. The standard for review is whether any category one restriction is wholly arbitrary, in violation of public policy or an individual’s constitutional rights. *Pines of Boca Barwood Condo. Ass’n v. Cavouti*, 605 So. 2d 984, 985 (Fla. Dist. Ct. App. 1992).

⁵⁵ There must be “state action” to enforce constitutional rights. *Comm. For A Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n*, 929 A.2d 1060, 1067 (N.J. 2007); *see also* HYATT, *supra* note 4, at 62–63. For example, one court specifically explained that a covenant limiting occupancy that would violate constitutional rights if created by the local government through a zoning ordinance did not create a constitutional problem because it was privately enacted. *See White Egret Condo., Inc. v. Franklin*, 379 So. 2d 346, 349 (Fla. 1979).

Shelley v. Kraemer—is that even if acts by an association are not themselves state action, state action exists when a court enforces such governance acts, and it is this judicial state action that renders the covenant's substance vulnerable to constitutional scrutiny.⁵⁶ Most courts, however, decline to apply *Shelley* outside the private racial zoning context.⁵⁷ Another theory, made in reference to the 1946 Supreme Court case of *Marsh v. Alabama*, posits that CICs are the functional equivalent of local governments and should therefore be bound to the same constitutional constraints.⁵⁸ However, this theory has not gained widespread support, perhaps because today's CICs do not completely replace local public governments in the same way that a company town did in the time of *Marsh*.⁵⁹ Both of these theories have generally been rejected by courts.⁶⁰ Today, aside from Fair Housing Act prohibitions of sale transfer restrictions that are

⁵⁶ *Shelley v. Kraemer*, 334 U.S. 1, 18 (1944); *Midlake on Big Boulder Lake Condo. Ass'n v. Cappuccio*, 673 A.2d 340 (Pa. Super. Ct. 1996) (holding that the owners “contractually agreed to abide by the provisions in the Declaration at the time of purchase, thereby relinquishing their freedom of speech concerns regarding placing signs on the property”); *but see Goldberg v. 400 E. Ohio, Condo.*, 12 F. Supp. 820 (N.D. Ill. 1998).

⁵⁷ See Katherine Rosenberry, *An Introduction to Constitutional Challenges to Covenant Enforcement*, 1 J. COMM. ASS'N 23 (1998).

⁵⁸ *Marsh v. Alabama*, 326 U.S. 501 (1946).

⁵⁹ HYATT, *supra* note 4, at 64–65; *see also, e.g.*, *Goldberg v. 400 E. Ohio Condo. Ass'n*, 12 F. Supp. 2d 820 (N.D. Ill. 1998) (“Demonstrating that condominiums do certain things that state governments also do doesn't show that condominiums are acting as the state or in the state's place.”). The holding in *Marsh* has been applied to cases having to do with public accommodation and access. *Id.*; *see also Amalgamated Food Emp. Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), *abrogated by* *Hudgens v. NLRB*, 424 U.S. 507 (1976). For an interesting discussion regarding the extent to which CICs function as municipal governments with respect to non-members, see David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761(1995).

⁶⁰ HYATT, *supra* note 4, at 67. *See, e.g.*, *Pines of Boca Barwood Condo. Ass'n v. Cavouti*, 605 So. 2d 984, 985 (Fla. Dist. Ct. App. 1992); *White Egret*, 379 So.3d at 349.

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based on a constitutionally protected classification (race, religion, etc.),⁶¹ and the odd outlier decision,⁶² the U.S. Constitution apparently does not provide any substantive oversight of common interest community covenants.

A few courts have been willing to invalidate CIC governing acts on the basis of *state* constitutional violations.⁶³ Cases where state constitutional guaranties have been applied to CIC governance mostly deal with freedom of speech and rights of access.⁶⁴ But other constitutional challenges abound. For example, recent cases dealing with both state and federal constitutional claims have raised the issue of whether freedom of religion guaranties can prohibit CIC regulation of placement of a mezuzah on a doorframe⁶⁵ or painting a kolam on a driveway.⁶⁶

⁶¹ Fair Housing Act, 42 U.S.C. §§ 3601–19 (2012). The Act, as amended, prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status (including children under the age of 18 living with parents or legal custodians, pregnant women, and people securing custody of children under the age of 18), and disability. *Id.* § 3604.

⁶² For example, in *Gerber v. Longboat Condominium*, a veteran's right to fly the American flag in violation of CIC covenants was upheld by the court striking down the covenant prohibition as a violation of the Constitution. 724 F. Supp. 884 (M.D. Fla. 1989), *aff'd in part on reh'g*, Gerber v. Longboat Condominium, 757 F. Supp. 1339, 1341 (M.D. Fla. 1991). A different court criticized the *Gerber* decision as being based on emotion, not on law. Goldberg v. 400 East Ohio Condo., 12 F. Supp. 820 (N.D. Ill. 1998).

⁶³ *E.g.*, Comm. For A Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060, 1072 (N.J. 2007) (explaining that New Jersey constitutional application does not necessarily require a public actor); *see also* HYATT, *supra* note 4, 67–73; Frank Askin, *Free Speech, Private Space, and the Constitution*, 29 RUTGERS L.J. 947, 960–61 (1998).

⁶⁴ *E.g.*, Laguna Publishing Co. v. Golden Rain Found. of Laguna Hills, 182 Cal. Rptr. 813 (Cal. Ct. App. 1982); Guttenberg Taxpayers & Rentpayer's Ass'n v. Galaxy Towers Condo. Ass'n, 688 A.2d 156, 158–59 (N.J. Super. Ct. Ch. Div. 1996); Midlake on Big Boulder Lake Condo. Ass'n v. Cappuccio, 673 A.2d 340 (Pa. Super. Ct. 1996). *See also* Pruneyard Shopping Ctr. v. Robins, 474 U.S. 74 (1980) (explaining that a state's constitution may protect individuals from private actors even when the U.S. Constitution would not).

⁶⁵ A mezuzah is a small container holding handwritten parchment with a

State action problems also plague state constitutional claims in the CIC context, and the law in this area is muddled and inconsistent.⁶⁷

Unless proven to be “arbitrary, against public policy or

scriptural passage that is affixed to the entranceway to a home by devout Jews. The Seventh Circuit in *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009), held that a CIC rule prohibiting “objects of any sort” outside a resident’s door was neutral as to religion and therefore reasonable and enforceable. It is common for CICs to restrict changes to the exterior of homes without association permission. See Angela C. Carmella, *Religion-Free Environments in Common Interest Communities*, 38 PEPP. L. REV. 57, 68 (2010) (discussing “aesthetic controls on signs, symbols, decorations, statuary, or items of any kind”).

⁶⁶ A kolam is a Hindu religious symbol of welcome, typically made with colored rice flour. In 2008, a devout Hindu resident of a Virginia CIC painted a kolam on their driveway rather than using rice flour because of expected rain. The association fined the family \$900 for failing to keep their driveway asphalt in its “original black state.” Annie Gowen, *Driveway Painting Tests Religious Freedom*, WASH. POST (Dec. 8 2008), http://articles.washingtonpost.com/2008-12-08/news/36795471_1_kolam-driveway-hindu.

⁶⁷ Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303 (1998) [hereinafter Hyatt, *Common Interest Communities*] (explaining that the property application of constitutional principles to CIC governance is an unsettled area of the law). There are occasional cases that test the application of constitutional protections to CIC governance actions, and the most emotionally charged cases do much to muddy the jurisprudence in this area. An example is *Gerber v. Longboat Condominium*, in which a CIC denied a veteran’s right to fly an American flag. The court found that this act violated the owner’s constitutional rights. 724 F. Supp. 884 (M.D. Fla. 1989), *aff’d in part on reh’g*, *Gerber v. Longboat Condo.*, 757 F. Supp. 1339, 1341 (M.D. Fla. 1991). During the post-9/11 patriotic fervor, Congress felt compelled to pass a law guaranteeing the right of homeowners to fly Old Glory. The Freedom to Display the American Flag Act, codified at 4 U.S.C.A. § 5 (2012), prohibits a CIC from adopting or enforcing any policy that would unreasonably restrict or prevent a member of the association from displaying the flag of the United States. See Robin Miller, Annotation, *Restrictive Covenants or Homeowners’ Association Regulations Restricting or Prohibiting Flags, Signage, or the Like on Homeowner’s Property as Restraint on Free Speech*, 51 A.L.R. 6TH 533 (2010) (cataloguing the various statutes that impact flag display and other “free speech” rights in CICs).

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violat[ive of] some fundamental constitutional right of unit owners,” covenants contained in a CIC’s original declaration are presumptively valid.⁶⁸ Public policy and constitutional constraints on the substance of CIC covenants are quite limited, and in the vast majority of cases, covenants are upheld. Courts and scholars reason that “[t]he initial members of a homeowners association, by their voluntary acts of joining, unanimously consent to the provisions in the association’s original governing documents.”⁶⁹ Covenant amendments or rules enacted by the board of directors, however, are subject to *slightly* more judicial oversight, although the proper standard of review for such association or board actions is subject to some debate.⁷⁰ Some courts use the Business Judgment Rule, borrowed from corporate law,⁷¹ in order to assess the validity of CIC governing acts.⁷² Other courts claim that CIC amendments and rules must be “reasonable” in order to be valid.⁷³ And some jurisdictions use both tests: the more permissive Business Judgment Rule when associations are performing “business responsibilities” and the slightly less deferential rule of reasonableness when associations are engaging in community “governance.”⁷⁴ The problem with this approach is

⁶⁸ *Apple II Condo. Ass’n v. Worth Bank & Trust Co.*, 659 N.E.2d 93, 98 (Ill. App. Ct. 1995); *see also Nahrstedt v. Lakeside Vill. Condo. Ass’n*, 878 P.2d 1275 (Cal. 1994); *Hidden Harbour Estates v. Basso*, 393 So. 2d 637, 639–40 (Fla. Dist. Ct. App. 1981).

⁶⁹ Ellickson, *supra* note 49, at 1526–27.

⁷⁰ HYATT, *supra* note 4, at 89–97.

⁷¹ The Business Judgment Rule is not a standard of conduct but rather a standard of review. DENNIS J. BLOCK ET AL., *THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS*, Ch. 2, § A2 (4th ed. 1993 & Supp. 1995); *see also Aronson v. Lewis*, 472 A.2d 802, 812 (Del. 1984) (explaining the application of the business judgment rule as procedural, rather than substantive, judicial oversight).

⁷² *See, e.g., Schwarzmann v. Ass’n of Apartment Owners of Bridgehaven*, 655 P.2d 1177 (Wash. Ct. App. 1982).

⁷³ *See, e.g., Villa De Las Palmas Homeowners Ass’n v. Terifaj*, 90 P.3d 1223, 1234 (Cal. 2004); *Noble v. Murphy*, 612 N.E.2d 266, 270 (Mass. App. Ct. 1993).

⁷⁴ HYATT, *supra* note 4, at 89.

that it is difficult to determine when an association is acting as a business and when it is acting as a government, since “there is no bright line between the two” roles.⁷⁵

The Business Judgment Rule is a deliberately deferential standard of review. Under this standard, “absent a showing of fraud, dishonesty, or incompetence, it is not the court’s job to second-guess the actions of directors.”⁷⁶ According to the Business Judgment Rule, if a business decision is made in good faith based on an honestly held rational belief that the decision is in the best interest of the entity, courts will not critique the decision.⁷⁷ When applying the rule of reason, on the other hand, courts purport to balance the benefit of a particular governing act against its cost. In reality, however, courts do not engage in any precise cost-benefit analysis, and simply consider generally whether the particular governing act pertains to “the health, happiness and peace of mind of the unit owners.”⁷⁸ The burden is on a complaining homeowner to prove a lack of nexus, and that a CIC governing act is therefore unreasonable.⁷⁹

Many scholars and judges conclude that this hands-off approach is appropriate because of freedom of contract. These commentators opine that there should be no real substantive judicial oversight of CIC governing acts and provisions.⁸⁰ The proper role for a court, under this formulation, is to ensure the good faith of the decision-makers and the integrity of the process.

⁷⁵ *Id.*

⁷⁶ *Schwarzmann*, 655 P.2d at 1181.

⁷⁷ *See* *Aronson v. Lewis*, 472 A.2d 802, 812 (Del. 1984) (explaining the application of the business judgment rule as procedural, rather than substantive, judicial oversight); *Cuker v. Mikalauskas*, 692 A.2d 1042, 1045 (Pa. 1997).

⁷⁸ *E.g.*, *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 181–82; (Fla. Dist. Ct. App. 1975); *Preserve at Forrest Crossing Townhome Ass’n v. DeV Vaughn*, No. M2011-02755-COA-R3-CV, 2013 WL 396000 (Tenn. Ct. App. Jan. 30, 2013). *See also infra* notes 89–96 and accompanying text.

⁷⁹ *HYATT*, *supra* note 4, at 88–97.

⁸⁰ *See e.g.*, Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 920 (1988) [hereinafter Epstein, *Covenants and Constitutions*].

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Other scholars justify a more robust judicial review of covenant amendments and rule-making, asserting that courts have the power to make a substantive inquiry as to whether an association is acting within its scope of authority and whether the action bears a rational relationship to legitimate purposes of the CIC.⁸¹

In the corporate context, the Business Judgment Rule is justified based on judicial policy of leaving business decisions to the business experts. In the context of CIC governance, the decision-makers are volunteer laypeople, not corporate executives.⁸² Nevertheless, the several courts that have embraced the Business Judgment Rule standard to review CIC governance have failed to note this difference in context. For example, New York's Superior Court, in *Levandusky v. One Fifth Ave. Apartment Corp.*, acknowledged that "[e]ven when the governing board acts within the scope of its authority, some check on its potential powers to regulate residents' conduct, life-style and property rights is necessary," but then it concluded that the Business Judgment Rule is the most appropriate standard of review to achieve that "check" on association power.⁸³ According to the *Levandusky* court, adopting the Business Judgment Rule means that judges should not inquire into actions taken in good faith "in the lawful and legitimate furtherance of corporate purposes."⁸⁴ California agreed with New York's *Levandusky* opinion and adopted the Business Judgment Rule approach to CIC governance in *Lamden v. LaJolla Shores Clubdominium Homeowners Ass'n*.⁸⁵ Thus, in at least the two of the most populous states, CIC governance decisions are unconstrained by

⁸¹ HYATT, *supra* note 4, at 98; *see also* Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1414 (2013).

⁸² CICs are really not corporations in the traditional sense. For example, they are not staffed by professional corporate directors and there are no disinterested directors. HYATT, *supra* note 4, at 90.

⁸³ *Levandusky v. One Fifth Ave. Apartment Corp.*, 554 N.Y.S.2d 807, 811 (1990).

⁸⁴ *Id.* The court specifically rejected the reasonableness standard adopted by the appellate court.

⁸⁵ 980 P.2d 940 (Cal. 1999) (finding that Business Judgment Rule applies regardless of corporate form for CIC association board actions).

any substantive judicial oversight.

Other jurisdictions purport to apply the rule of reason in assessing the validity of CIC governance. The courts' use of reasonable review theoretically includes an element of subjective review, but in practice, reasonableness review of CIC actions focuses almost exclusively on whether the association followed the enumerated procedures in amending the CC&Rs or passing community rules.⁸⁶ Although most courts assert that only "reasonable" governing acts will be upheld, courts rarely explain what this standard means or engage in any methodical balancing of equities.⁸⁷ In many cases, courts have essentially defined reasonable to include anything that could possibly promote community purposes, typically defined as preserving and improving property values and owner "lifestyle."⁸⁸ In circular logic, some courts give the board of the CIC association the discretion to determine which of its governing acts are "reasonable."⁸⁹ Meanwhile, other courts claim to require reasonableness but instead actually apply the Business Judgment Rule standard of review.⁹⁰

⁸⁶ See Hyatt, *Common Interest Communities*, *supra* note 67, at 354.

⁸⁷ *Id.* Robert C. Ellickson opined that "reasonableness" in CIC jurisprudence means different things to different courts. Ellickson opposed "reasonableness" review in the name of freedom of contract. He stated:

"Reasonable," the most ubiquitous legal adjective, is not self-defining. In reviewing an association's legislative or administrative decisions, many judges have viewed the "reasonableness" standard as entitling them to undertake an independent cost-benefit analysis of the decision under review and to invalidate association decisions that are not cost-justified by general societal standards. This variant of reasonableness review ignores the contractarian underpinnings of the private association.

Ellickson, *supra* note 49, at 1530.

⁸⁸ See *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275, 1290 (Cal. 1994); *Cohen v. Kite Hill Cmty. Ass'n*, 191 Cal. Rptr. 209 (Cal. Ct. App. 1983); *Laguna Royale Owners Ass'n v. Darger*, 174 Cal. Rptr. 136 (Cal. Ct. App. 1981).

⁸⁹ See *Ryan v. Baptiste*, 565 S.W.2d 196 (Mo. Ct. App. 1978).

⁹⁰ *Papalexou v. Tower West Condo*, 401 A.2d 280, 284 (N.J. Super. Ct.

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Considering the actual approach that most courts use in analyzing the validity of CIC amendments and rulemaking, the distinction between the various purported standards of review blurs. Although different jurisdictions purport to adopt distinct oversight standards, in effect, most courts approach this issue in essentially the same way: original covenants are presumptively valid, and covenant amendments and rules adopted in accordance with the procedures enumerated in the declaration are also valid unless they are arbitrary or promulgated in bad faith.⁹¹ In *Lieber v. Point Loma Tennis Club*, for example, the court held that a regulation is deemed “reasonable” if it is not arbitrary and there are valid reasons that an association might choose to enact the rule.⁹² This standard is not a cost-benefit balancing test, but rather mirrors oversight in administrative law, upholding rules duly enacted as long as they are not arbitrary and capricious.⁹³ Regardless of standard used, courts almost universally uphold and enforce CIC covenants and regulations.

II. THE COVENANT—CONTRACT MISMATCH

A. Adhesion and “Assent”

If contracts are not voluntary, the liberty and efficiency justifications for their enforcement evaporate. In the context of standard form and adhesion contracting, the voluntariness associated with freedom of contract is diminished.⁹⁴ Nevertheless,

Ch. Div. 1979).

⁹¹ HYATT, *supra* note 4, at 56–57.

⁹² *Lieber v. Point Loma Tennis Club*, 47 Cal. Rptr. 2d 783, 788–89 (Cal. Ct. App. 1995) (finding that if it is not arbitrary, meaning there are valid reasons that an association might choose a regulation, it is “reasonable”).

⁹³ See *Hidden Harbour Estates v. Norman*, 309 So. 2d 180 (Fla. Dist. Ct. App. 1975); Note, *Review of Condominium Rulemaking*, 94 HARV. L. REV. 647 (1981); see also HYATT, *supra* note 4, at 58. The lack of substantive review of CIC covenants has inspired calls for a return to a robust “touch and concern” test as a way of reigning in CICs. See, e.g., Reichman, *supra* note 31, at 293–94.

⁹⁴ In adhesion contracts, “[a]ctual assent is not just a fiction because of

contracting pursuant to a non-negotiable standard form, particularly in agreements between parties of disparate bargaining power, is an increasingly common facet of modern reality,⁹⁵ and courts have uniformly upheld the enforceability of adhesion contracts absent some special circumstance.⁹⁶ Nevertheless, it is important to recognize that contractual theory imperfectly fits with the reality of non-negotiable forms.⁹⁷ Standard, boilerplate terms are rarely read or negotiated.⁹⁸ The resulting contractual

voluntary choices by consumers; it is effectively impossible.” Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 242 (2002); see also Batya Goodman, Note, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319, 332 (1999); Shelley Smith, *Reforming the Law of Adhesion Contracts: A Judicial Response to the Subprime Mortgage Crisis*, 14 LEWIS & CLARK L. REV. 1035 (2010).

⁹⁵ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 600 (1991); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1225 (1983) [hereinafter Rakoff, *Contracts of Adhesion*]; Friedrich Kessler, *Contracts of Adhesion: Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943). Generally, courts find that a non-negotiable standard form contract “offered on a take-it-or-leave-it basis” by a party with superior sophistication and bargaining power is an “adhesion contract.” David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 432 (2009).

⁹⁶ *Nw. Nat’l. Ins. Co. v. Donovan*, 916 F.2d 372, 377 (7th Cir. 1990). Modern contractual theory is based on objective manifestation of assent rather than subjective “meeting of the minds.” An indication of assent such as clicking “I accept” to posted terms or by initialing a form contract is clearly sufficient for legally binding obligation. Russell A. Hakes, *Focusing on the Realities of the Contracting Process—an Essential Step to Achieve Justice in Contract Enforcement*, 12 DEL. L. REV. 95, 99–100 (2011).

⁹⁷ Several scholars have articulated the problematic disconnect between freedom of contract rhetoric and theory and the realities of the contracting process in the context of standard, non-negotiable forms. *E.g.*, Hakes, *supra* note 96, at 96.

⁹⁸ One April Fools’ Day, British retailer GameStation added a clause to its posted terms and conditions providing that customers were selling their “immortal souls” to the retailer. Approximately 88% of the contracting customers did not opt out of this clause. *7,500 Online Shoppers Unknowingly Sold Their Souls*, FOX NEWS (Apr. 15, 2010), <http://www.foxnews.com/tech/2010/04/15/online-shoppers-unknowingly-sold-souls/>. Scholarly consensus

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substance therefore represents one party's demands and the other's acquiescence rather than jointly determined content. Although enforceable, the terms of such a contract do not necessarily reflect mutual intent.⁹⁹ And when a contract's terms are not actually elected by both parties, the contract does not necessarily promote efficient outcomes or create wealth.¹⁰⁰

supports the conclusion that standard form contracts are rarely read. Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1231–32 (2006); Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1237–38 (2006) [hereinafter Rakoff, *Law and Sociology*]; Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469 (2008); Hakes, *supra* note 96, at 100. Recently, Judge Richard Posner publicly admitted that he never read the documents he signed at his mortgage loan closing. David Lat, *Do Lawyers Actually Read Boilerplate Contracts?*, ABOVE THE LAW (June 22, 2010, 2:42 PM) <http://abovethelaw.com/2010/06/do-lawyers-actually-read-boilerplate-contracts-judge-richard-posner-doesnt-do-you/>.

⁹⁹ This can result in standard contract language that works to the detriment of both parties, but somehow persists in light of adverse interpretation. See MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* (2012); Andrea J. Boyack, *Sovereign Debt and The Three and a Half Minute Transaction: What Sticky Boilerplate Reveals About Contract Law and Practice*, 35 WHITTIER L. REV. 1 (2013).

¹⁰⁰ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3, 9, 48–49 (8th ed. 2010) (explaining that rational self-interest and voluntary contracting is why transactions are efficient); Howard C. Ellis, *Employment-at-Will and Contract Principles: The Paradigm of Pennsylvania*, 96 DICK. L. REV. 595, 596–97 (1992) (explaining that voluntary contracting promotes efficiency). Economic theory posits that optimal efficiency results when individuals may contract freely, and judicial protection of the future expectations created by contracts increases societal wealth. LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 10, 22–23 (1965). Wealth maximization through contract enforcement is a foundational concept in the law. See, e.g., HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 157 (2000) (“Law is the instrument that fixes and realizes capital.”); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562–63 (1933) (“[A] regime in which contracts are freely made and generally enforced gives greater scope to individual initiative and thus promotes the greatest wealth of a

Adhesion contracts are enforceable, but legal theory has evolved to take into account the lack of voluntariness and content input inherent in adhesion contexts through modern doctrines such as unconscionability¹⁰¹ and distinct approaches to interpretation for adhesion contracts.¹⁰² Courts recognize that traditional deference to contractual terms may be inappropriate for contracts of adhesion, and they therefore sometimes monitor the substantive fairness of a contract in an adhesion contract context.¹⁰³ This paternalistic approach diverges markedly from traditional hands-off contract enforcement and has led some observers to opine that contract law is now evolving along two

nation.”). Economic theory asserts that unfairness and social inefficiencies in form contracts will be winnowed out through market competition, but this theory incorrectly assumes unbounded rationality of the consumer. The realities of adhesion contracting processes and consumer rationality undercut this theory and permit inefficient and socially unjustified terms to persist even in a free market. *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

¹⁰¹ *See* *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (“Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”).

¹⁰² When a written contract has been drafted solely by one party, courts invoke the doctrine of *contra proferentum* (“against the offeror”) that “requires that ambiguity in non-negotiated or adhesion contracts to be construed against the profferer.” *Karnette v. Wolpoff & Abramson, L.L.P.*, 444 F. Supp. 2d 640, 647 (E.D. Va. 2006). In the context of adhesion contracts, courts sometimes construe a contract “to effectuate the reasonable expectations of the average member of the public who accepts it.” RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. E (1981); *see also* *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 172 (Iowa 1975).

¹⁰³ *See* *Stelluti v. Casapenn Enters., LLC*, 975 A.2d 494, 502 (N.J. Super. Ct. App. Div. 2009), *aff’d*, 1 A.3d 678 (N.J. 2010) (explaining that in adhesion contracts, a court should consider the “substantive contents of the agreement” as well as the process that led to its execution); *C & J Fertilizer*, 227 N.W.2d at 174–75 (explaining that the court is responsible for exercising oversight with respect to the fairness and content of terms in a contract of adhesion). Professor Rakoff advocates that adhesion contracts be considered presumptively unenforceable. *See* Rakoff, *Contracts of Adhesion*, *supra* note 95, at 1176.

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tracks: a traditional assessment of process-based oversight for agreements between equally situated parties and a protective, regulatory approach with respect to “unsophisticated parties” in contracts of adhesion.¹⁰⁴

Contract theorists justify the enforceability of contracts of adhesion with reference to market forces that will act to monitor and constrain the content of such contracts.¹⁰⁵ But market checks only work when the market provides choices. It is increasingly true that in many areas of the country, most home purchase options are in CICs.¹⁰⁶ Shopping around among various CICs

¹⁰⁴ Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493 (2010); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 545 (2003); see also *L & L Wings, Inc. v. Marco-Destin, Inc.*, 756 F. Supp. 2d 359 (S.D.N.Y. 2010) (holding that party sophistication and bargaining power should be a factor to consider in determining whether a liquidated damages provision is enforceable). This latter approach has more in common with the European policy of prospectively approving the substance of form contracts prior to enforcement. See LEONE NIGLIA, *THE TRANSFORMATION OF CONTRACT IN EUROPE* (2003) (explaining how contract law in Europe has evolved to deal with standard form contracts).

¹⁰⁵ See James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 29–32 (1989) (explaining the theory that “marginal consumers” will operate as market checks on overreaching by drafters of non-negotiable forms).

¹⁰⁶ Franzese & Siegel, *supra* note 50, at 1113–14; Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461, 469 (1998) [hereinafter Siegel, *The Constitution and Private Government*]; see also ROBERT JAY DILGER, *NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE* 38 (1992) (“Although [CICs] do provide more consumer options in the abstract, in many areas of the country [association-related housing] now dominate[s] the local housing market and [is] increasingly offering fairly uniform levels and types of services.”); JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 189 (1991) (“If you want a new home, it is increasingly difficult to get one that doesn’t come with a homeowners’ association.”); Boyack, *Community Collateral Damage*, *supra* note 2, at 59 (“The states with recent growth booms . . . have the highest percentage of citizens residing in privately governed CICs.”).

offers no real choice either: most CIC declarations are virtually identical.¹⁰⁷ In this context, market forces cannot justify the content of a contract of adhesion.

CIC declarations clearly fit the definition of an adhesion contract.¹⁰⁸ Terms of a declaration are completely non-negotiable; in fact, prior to contracting they are prescribed and recorded in the land records.¹⁰⁹ In addition, because one form binds multiple parties, no party has the ability to diverge from the recorded provisions. It is a perfect example of “take-it-or-leave-it” contracting.

Furthermore, CIC covenants are bundled with a real estate purchase. If a would-be buyer does not agree to the terms, she must relinquish the right to buy that property. Since each parcel of real property is presumed unique in our legal system,¹¹⁰ a buyer who forgoes a particular purchase has no true substitute. Homebuyers consider numerous factors in choosing which parcel

¹⁰⁷ See Franzese & Siegel, *supra* note 50, at 1113–14 (“There exists no meaningful consumer choice amongst CIC organizational structures. In general, developer-imposed CIC templates are remarkably uniform.”). Even if buyers could shop around based on the particular provisions of a given CIC regime, this would be unlikely. Buyers often do not see the CIC declaration and associated documents until at or close to closing, and at closing, disclosure requirements mandate that a tremendous amount of paperwork is given to buyers. The sheer volume provided minimizes the likelihood that the buyer will review or understand the disclosures. Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647, 650 (1981).

¹⁰⁸ *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 174–75 (Iowa 1975). Professor Rakoff has enumerated seven criteria that indicate a contract of adhesion: standard form drafted by one party who engages in repeated transactions of the sort presented as non-negotiable to the adhering party who enters into relatively few transactions of the sort, signed by the adhering party, and principally obligates the adhering party to pay money. Rakoff, *Contracts of Adhesion*, *supra* note 95, at 1177.

¹⁰⁹ See Winokur, *supra* note 105, at 33 (concluding that such “built-in, substantive limitations on modification of uniform servitude forms present obstacles to market discipline by marginal consumers”).

¹¹⁰ See *Shelton v. Keller*, 748 S.W.2d 153, 154 (Ark. Ct. App. 1988); *Real Estate Analytics, LLC v. Vallas*, 72 Cal. Rptr. 3d 835, 836 (Cal. Ct. App. 2008).

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of real property to buy, including school districts, lot size and configuration, tax assessment and appraisal, quality of construction, and even such things as the smell of the home and the orientation and exposure to natural light.¹¹¹ The content of CIC covenants and rules is likely not even a factor considered prior to purchase or, if considered, is a fairly unimportant detail in the home purchase calculus.

UCIOA and statutes in virtually every state mandate that a seller of real property disclose the details of a private governance regime prior to or at the closing of a real estate purchase.¹¹² However the delivery of pages upon pages of legalese at or shortly before closing may do little to actually inform a buyer.¹¹³

¹¹¹ The Department of Housing and Urban Development has even promulgated a homebuyer checklist to help purchasers track important aspects of properties they may buy. While extensive, the checklist does not explicitly discuss the scope or content of CIC governing provisions, although it does bring up “pet restrictions” as a line item for consideration. Aside from pet restrictions, however, the only reference to neighborhood covenants is a line item as to whether they are “good, average or poor” (whatever that means). For more information on the HUD homebuyer checklist and related documents, see *Buying a Home*, U.S. DEP’T OF HOUSING & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/topics/buying_a_home (last visited Feb. 13, 2014).

¹¹² *E.g.*, UCIOA, *supra* note 22, § 4; COLO. REV. STAT. ANN. § 38-35.7-102 (West 2013); FLA. STAT. ANN. § 720.401 (West 2013); HAW. REV. STAT. ANN. § 508D-3.5 (West 2013); N.C. GEN. STAT. ANN. § 47E-4 (West 2013).

¹¹³ The quantity of disclosures made in connection with a real estate purchase diminishes the ability of the disclosures to truly inform. *See, e.g.*, Melvin Aron Eisenberg, Comment, *Text Anxiety*, 59 S. CAL. L. REV. 305 (1986) (finding that “consumers who are faced with the dense text of form contracts characteristically respond by refusing to read”). Timing of disclosure in real estate conveyancing—in particular, disclosures made after a buyer has made an offer on a home—diminishes disclosure effectiveness as well. Stephanie Stern, *Temporal Dynamics of Disclosure: The Example of Residential Real Estate Conveyancing*, 2005 UTAH L. REV. 57. Recent studies of home mortgagors found that these buyers misapprehend or fail to read even the most basic parts of mortgage loan disclosure forms. Debra Pogrud Stark, et al., *Ineffective in Any Form: How Confirmation Bias and Distractions Undermine Improved Home-Loan Disclosures*, 122 YALE L.J. ONLINE 377, 379 (2013) (explaining that studies of consumers show that they have

Typically, homebuyers are not represented by counsel in home purchase negotiations,¹¹⁴ and legal counsel conducting real estate closings do not generally undertake to review and advise the buyer with respect to CIC obligations.¹¹⁵ Under these circumstances, it is highly unlikely that a buyer reads or understands CC&Rs prior to closing.

Finally, assent to the CIC terms does not even require a specific manifestation of acceptance thereof; rather, a party is deemed to have agreed simply by buying the land. Although this is true for any servitude, it is not the general rule for contract law, where a voluntary act manifesting intent to be bound is prerequisite to obligation.¹¹⁶ This simple fact further divorces true assent from legal obligation in the context of CIC covenants.

B. Servitude Damages and Duration

In the name of liberty and market freedom, our legal system generally eschews perpetual obligation and permits individuals to elect to walk away from their commitments (after payment of

“miss[ed] the critical information that disclosure forms were designed to communicate”).

¹¹⁴ Most homeowners do not employ counsel to represent them in the conveyancing transaction. Debra Pogrud Stark et. al., *Dysfunctional Contracts and the Laws and Practices That Enable Them: An Empirical Analysis*, 46 IND. L. REV. 797, 801 (2013). Nor do buyers typically even have a realtor representing their interests because the agent working with a buyer is legally a seller’s sub-agent. The agent that works with the buyer is, in fact, often a seller’s subagent. Ann Morales Olazabal, *Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses*, 40 HARV. J. ON LEGIS. 65, 66 (2003).

¹¹⁵ Lawyers who conduct residential real estate closings typically prepare the deed and coordinate with the title company and mortgage lender, if applicable, with respect to recordation. Such counsel facilitates the closing, but does not actually advise the buyer or assist buyer in reviewing disclosure documents. Gary D. Beelen, *Odds Are, It’s Not “Your” Closing Attorney*, 21 DREW ECKL & FARNHAM, LLP J., no. 126, 2009, at 1, 1–5, available at <http://www.deflaw.com/articles/odds-are-its-not-your-closing-attorney>.

¹¹⁶ RESTATEMENT (SECOND) OF CONTRACTS § 18 (1981).

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appropriate damages), and obtain a “clean slate.”¹¹⁷ The law reasonably protects a contracting party’s future autonomy from inescapable restraint by allowing exit via breach and reimbursement of the non-breaching party’s expectation interest in nearly all cases.¹¹⁸ Although breach typically provides an exit from perpetual contract obligation, when contracts take on an *in rem* character, attaching to real property as servitudes, that exit closes. Servitudes are generally enforced through “property” rules,¹¹⁹ meaning that the default remedy is specific performance.¹²⁰ When an obligation is specifically enforceable, a

¹¹⁷ See NATHALIE MARTIN & OCEAN TAMA, *BANKRUPTCY LAW: WHAT MATTERS AND WHY* 24–25 (2d ed. 2011) (explaining that “a fresh start is deeply embedded in the American dream.”). For example, Bankruptcy law offers an exit from perpetual debt. *Id.*; see also *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934). There are a few exceptions to perpetual debt obligation. See generally Kurtis K. Wiard, Comment, *Brunner’s Folly: The Road to Discharging Student Loans Is Paved with Unfounded Optimism*, 52 WASHBURN L.J. 357 (2013) (explaining bankruptcy courts’ varied applications of “undue hardship” in the student loan context). Employment law preserves exit from perpetual commitments of labor. RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (1981) (“A promise to render personal service will not be specifically enforced.”). Several states have passed statutes prohibiting specific performance of a personal service contract. See, e.g., MONT. CODE ANN. § 27-1-412. And family law freely permits divorce. Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 271 (1997) (discussing the “no-fault divorce revolution” of the past half-century).

¹¹⁸ See POSNER, *supra* note 100, at 149–51; Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). Specific performance is only available when an award of damages would not be adequate and various equitable requirements are met. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* §16.1–.6 (4th ed. 1998). See also Ben Depoorter & Stephan Tontrup, *How Law Frames Moral Intuitions: The Expressive Effect of Specific Performance*, 54 ARIZ. L. REV. 673, 717 (2012).

¹¹⁹ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). For a thorough discussion of how remedies in the case of CIC covenant violations unjustifiably diverge from contract damages, see Amos B. Elberg, Note, *Remedies for Common Interest Development Rule Violations*, 101 COLUM. L. REV. 1958 (2001).

¹²⁰ Winokur, *supra* note 105, at 37 (“[T]he general availability of specific

party cannot opt out of the continuing affirmative requirement to comply.

Servitudes depart from contract law in another key aspect that impacts individual liberty—their potentially infinite duration. A servitude obligation—unlike a contract—presumptively exists in perpetuity, binding against current and future owners of the land, and cannot be terminated through breach.¹²¹ For servitudes, contracting decisions today limit not only the contracting parties' own future freedom but also the freedom of future generations of property owners.¹²² Problems of dead-hand control are thus endemic to covenants that run with the land.¹²³ Under the common law, however, courts are generally empowered to strike down covenants that unduly restrain alienation on the basis of public policy.¹²⁴ First-generation CICs created before widespread

performance as a remedial alternative to damages precludes an owner's unilateral election to breach the servitude and pay damages.”). Issuing a mandatory injunction is the typical way that restrictive covenants are enforced. *See, e.g.*, *Depeyster v. Town of Santa Claus*, 729 N.E.2d 183, 190 (Ind. Ct. App. 2000); *Metzner v. Wojdyla*, 886 P.2d 154 (Wash. 1994). Servitude law draws a distinction between specifically enforceable equitable servitudes and real covenants that are enforceable through a grant of money damage, but this is a distinction without a difference. A given covenant-based servitude can be the subject of an action either in equity or in law at a plaintiff's election, and it is easier to prove equitable grounds for recovery. *See Runyon v. Paley*, 416 S.E.2d 177, 182–83 (N.C. 1992); JAMES L. WINOKUR ET AL., *PROPERTY AND LAWYERING* 642–43 (2002); Alfred L. Brophy, *Contemplating When Equitable Servitudes Run with the Land*, 46 ST. LOUIS U. L.J. 691, 698 (2002).

¹²¹ *See Citizens for Covenant Compliance v. Anderson*, 906 P.2d 1314, 1320 (Cal. 1995); *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275, 1283 (Cal. 1994); *Thodos v. Shirk*, 79 N.W.2d 733, 739 (Iowa 1956); *Arnold v. Chandler*, 428 A.2d 1235, 1237 (N.H. 1981).

¹²² CIC covenants can be modified through supermajority vote of community members, but it is both cumbersome and practically difficult to amend CIC declarations.

¹²³ *See HERBERT T. TIFFANY & BASIL JONES*, 2 *TIFFANY REAL PROP.* § 392 (3d ed. 2013); *see also Earle v. Int'l Paper Co.*, 429 So. 2d 989, 995 (Ala. 1983). The (in)famous Rule Against Perpetuities does not apply to servitudes. *See, e.g., Laguna Royale Owners Ass'n v. Darger*, 174 Cal. Rptr. 136, 144. (Cal. Ct. App. 1981).

¹²⁴ *See, e.g., City of Oceanside v. McKenna*, 265 Cal. Rptr. 275, 279

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common interest ownership statutes were enacted in the 1970s and 1980s were cognizant of the common law's hostility toward perpetual restrictions on land and contained expiration dates.¹²⁵ Today, statutes in every state explicitly or implicitly authorize CIC ownership structures, and courts routinely uphold CIC covenants even without effective temporal limits.¹²⁶ Because CIC covenants have a virtually unlimited duration, their impact and effect is more expansive than contract law. Without durational restraints, substantive limitations are more justifiable. A CIC covenant that has an expansive or troubling scope—one that ties up land alienability or impacts personal freedoms, for example—will not eventually just disappear. If courts lack the tools to constrain the subject matter of covenants, it may be impossible to nullify the legal impact of such covenants, even if the covenant eventually contradicts the values of society as a whole or the impacted neighborhood in general.

Servitudes come in several flavors and have different, and evolving, legal formation requirements. Modernly, servitudes are

(Cal. Ct. App. 1989) (balancing the purposes of a restriction against the level of restrictiveness to determine validity); *Cast v. Nat'l Bank of Commerce Trust & Savs. Ass'n of Lincoln*, 183 N.W.2d 485, 490 (Neb. 1971) (finding restrictions on alienation in a fee simple estate "void and against public policy"); *Mountain Springs Ass'n v. Wilson*, 196 A.2d 270, 276 (N.J. Super. Ct. Ch. Div. 1963) (invalidating an unreasonable restraint on alienation); *Eagle Enter, Inc. v. Gross*, 39 N.Y.2d 505, 508 (1976) (refusing to enforce an affirmative covenant as an unreasonable restraint on alienation); *Gregory v. State Dep't of Mental Health, Retardation & Hosps.*, 495 A.2d 997, 1000, 1002 (R.I. 1985) (reinterpreting a covenant to promote free alienability). In addition, most states have statutes granting judiciaries the power to invalidate restraints on alienation. *E.g.*, CAL. CIV. CODE § 711. (West 2012).

¹²⁵ See *Welshire, Inc. v. Harbison*, 91 A.2d 404 (Del. Ch. 1952) (30 years); *Van Sant v. Rose*, 103 N.E. 194 (Ill. 1913) (43 years); *Easton v. Careybrook Co.*, 123 A.2d 342 (Md. Ct. App. 1956) (8-year initial term, then continued until modification by vote of majority of owners).

¹²⁶ Typically, CIC restrictions provide for automatic renewal after a given initial term. Under the law of Louisiana, however, restrictions imposing affirmative obligations cannot exist in perpetuity. *Diefenthal v. Longue Vue Found.*, 865 So. 2d 863, 882 (La. Ct. App. 2004), *writ denied*, 869 So. 2d 883 (La.).

generally grouped into easements and covenants.¹²⁷ The variant closest to a conveyance is the easement—a right to make beneficial use of another’s land.¹²⁸ Covenants running with the land, on the other hand, are closer in form and substance to contracts among neighbors, although of unlimited duration and specifically enforceable.¹²⁹ Drawing the line between contracts that bind only the parties thereto and covenants that run with the land, thus binding on future owners is maddeningly difficult.¹³⁰ The law of servitude formation has been progressing from a more formalistic approach that demanded strict adherence to formal requirements of privity and property relevance (the so-called “touch and concern” requirement) toward a more liberalized approach such as that advocated by the *Restatement (Third) of Property*.¹³¹ Under the Third Restatement’s approach, anything that a valid contract can achieve can now be achieved in perpetuity by a covenant. This approach offers nothing to constrain the content of covenants aside from public policy limits that apply to contracts generally. Once, the touch and concern rule for valid formation of real covenants operated to limit the

¹²⁷ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.3 (2000) no longer uses the terms “real covenant” and “equitable servitude” to distinguish between types of covenants. Instead, the Restatement calls both covenants created in writing and enforceable at law and a servitude implied in equity “covenants.”

¹²⁸ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 (2000) defines “easement” as a “nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.” A “profit” is closely related to an easement, except that it additionally gives the beneficiary the right to extract something from the burdened land. *Id.*

¹²⁹ The current Restatement of Property departs from the use of the terms “real covenant” and “equitable servitude,” to refer to contracts that run with the land and therefore take on the character of property. *Id.* § 1.4.

¹³⁰ *E.g.*, *Barton v. Fred Netterville Lumber Co.*, 317 F. Supp. 2d 700, 704 (S.D. Miss. 2004); *Raintree Corp. v. Rowe*, 248 S.E.2d 904, 907 (N.C. Ct. App. 1978).

¹³¹ RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 2.1, 3.1, & 3.7 (2000). *See also supra* notes 25–31 and accompanying text.

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scope of perpetually restraining covenants,¹³² but as this requirement has been watered down and in some cases (per the new Restatement's approach) eliminated, little substantive control remains with respect to what types of obligations real covenants can impose.¹³³ Some courts purport to limit covenant enforcement to obligations that are "reasonable,"¹³⁴ but many courts only apply reasonableness restraint to CIC covenant *amendments*, not the original covenants. Furthermore, the test for reasonableness is not rigorously nor consistently applied.¹³⁵

Servitude restrictions on land use preserve the status quo. Although this may be the very goal sought by the authors of the servitude, perpetual real property stasis imposes future opportunity costs. Servitude rigidity is potentially problematic for all easements and covenants, but most recent scholarly debate on the costs of rigidity has focused on the context of conservation servitudes.¹³⁶ Conservation servitudes restrain use of land

¹³² Scholars who argue that covenants should be completely analogized to contracts have been the most vocal critics of the touch and concern test in the context of common interest communities. *E.g.*, Epstein, *Covenants and Constitution*, *supra* note 80.

¹³³ Without substantive limits on the scope of CIC covenants, neighborhood private laws can "dictate basic aspects of a resident's mode of living within the privacy of his or her own unit." Armand Arabian, *Condos, Cats, and CC&Rs: Invasion of the Castle Common*, 23 PEPP. L. REV. 1, 1 (1995).

¹³⁴ *E.g.*, *White Egret Condo., Inc. v. Franklin*, 379 So. 2d 346, 351 (Fla. 1979) (pre-FHA amendment case upholding age restrictions on condominium occupancy as "reasonable"); *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275, 1283 (Cal. 1994) ("[O]ur Legislature has made common interest development use restrictions contained in a project's recorded declaration 'enforceable . . . unless unreasonable.'" (emphasis in original) (citation omitted)).

¹³⁵ See *supra* notes 80–85 and accompanying text.

¹³⁶ For a definition and overview of conservation easements, see Michael R. Eitel, Comment, *Wyoming's Trepidation Toward Conservation Easement Legislation: A Look at Two Issues Troubling the Wyoming State Legislature*, 4 WYO. L. REV. 57, 59 (2004). Conservation servitudes "present a difficult choice among conflicting social values. Although authorization of private conservation servitudes in gross reinforces freedom of contract, promotes the

indefinitely and are deliberately difficult to terminate.¹³⁷ Placing perpetual burdens on land ignores the possibility of unexpected changes in land use needs.¹³⁸ Even though today's perfect candidate for conservation may be better allocated in the future to development, legally un-burdening land from servitude restraints

benefits of private initiative, and assists conservation of the natural environment, other important social policies suffer." Korngold, *Privately Held Conservation Servitudes*, *supra* note 27, at 435. The term "conservation easements" is a misnomer because such servitudes are not non-possessory use rights of a non-owner but instead are restrictions on an owner's ability to use her own land. *Id.* at 436–37. There are some key differences between CIC restraints on transfer and conservation servitudes, most importantly that the former involves a restriction on alienation and the latter only restrains use.

¹³⁷ *Id.* at 439–43. Indeed, the whole point of conservation easements is to render future land development impossible. *Id.* at 479, 453–54; *see also* Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 767 (2002) ("[C]onservation servitudes can achieve their goals if and only if the future options of owners of burdened land are constrained.").

¹³⁸ Korngold, *Privately Held Conservation Servitudes*, *supra* note 27, at 479. Some scholars have advocated a periodic review by courts to determine whether the easement merits continued validity or should be stricken as a matter of fairness or efficiency. Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525 (2007) [hereinafter Korngold, *Resolving the Intergenerational Conflicts*]; Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Use Land Process*, 2007 UTAH L. REV. 1039 [hereinafter Korngold, *Solving the Contentious Issues*]. Another approach would be to make the beneficiaries of such easements public entities, constrained by the democratic process. *See* Korngold, *Privately Held Conservation Servitudes*, *supra* note 27. Other scholars contend that the perpetual validity of conservation servitudes must be vigorously upheld. *See* Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENVTL. L. REV. 1, 3 (2012); Nancy A. McLaughlin & Mark Benjamin Machlis, *Protecting the Public Interest and Investment in Conservation: A Response to Professor Korngold's Critique of Conservation Easements*, 2008 UTAH L. REV. 1561; Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements*, 9 WYO. L. REV. 1 (2009).

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may be impracticable.¹³⁹ Future generations will bear the costs of today's land restraints.¹⁴⁰ These same worries regarding unlimited duration and specific enforceability that have engendered much debate in the context of conservation easements also apply to community CC&Rs. Such covenants impose a particular vision of community use and behavior that is resistant to change and difficult to avoid.

C. Covenant Predictability and Community Exit

Although any type of perpetual covenant may become onerous and undesirable over time, the content of community CC&Rs are less rigid than conservation servitudes and other types of easements and covenants. Unlike traditional servitudes, CIC covenants can be amended by community vote.¹⁴¹ This flexibility mitigates some of the concerns otherwise posed by the unlimited duration of CIC servitudes. The ability to amend covenants is also a great advantage to the CIC structure compared with earlier neighborhood deed restriction schemes that provided no method for modification or termination of servitude restraints. But the

¹³⁹ See Korngold, *Privately Held Conservation Servitudes*, *supra* note 27; Mahoney, *supra* note 137, at 769; see also Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1098 (1996).

¹⁴⁰ Several scholars have focused on the issue of perpetual validity of conservation servitudes and have pointed out that the *status quo* may not give adequate weight to the costs of alienation restraints. *E.g.*, Cheever, *supra* note 139; Korngold, *Privately Held Conservation Servitudes*, *supra* note 27; Mahoney, *supra* note 137; Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L.J. 121, 144 (2011).

¹⁴¹ CIC declarations can be amended by prescribed procedures, typically by supermajority vote of the owners. UCIOA provides that the declaration may be amended with a 67% affirmative vote unless the declaration specifies a different percentage or certain occupancy rules are impacted (threshold in that case is 80%). UCIOA, *supra* note 22, § 2-117. In addition to amending covenants, association boards enact (and change) implementing rules and regulations from time to time as they see fit.

benefit of flexibility is achieved at the cost of predictability. Because CC&R establish a dynamic association government, CICs are more adaptable than regimes that are controlled solely by the rigid provisions of a recorded document, but the changing nature of obligation in the case of CICs renders the obligation itself more difficult to justify on contractual reliance grounds.¹⁴² Thus, there are two opposite problems potentially posed by the possibility of changing CIC governing provisions. First, changes may be too difficult to achieve and may not in fact be forthcoming even when changing circumstances so warrant. Second, rule changes may be inspired by the whims of vocal neighborhood minorities and not actually reflect changing circumstances or new community values. If changes are non-unanimous (as is almost universally the case), then it is more difficult to justify the application of such changes to dissenting homeowners based on their supposed assent. Furthermore, unforeseen changes to community covenants may frustrate the reasonable expectations and desires of dissenting owners who bought into a community that was governed by a different set of substantive rules.

Theoretically, a community's ability to amend covenant restrictions should provide a means to update neighborhood governance to reflect new cultural preferences and technological changes impacting property use. In reality, covenants are difficult to amend.¹⁴³ Whether a given community is able to mobilize sufficient votes for a given amendment turns on the idiosyncratic concerns of owners and the level of popular participation in the community.¹⁴⁴ When restrictions in recorded declarations are

¹⁴² See Brower, *supra* note 20, at 242 (noting that CIC enforcement is justified based on the unanimous assent of its members to covenant terms and explaining that later amendments "pose special problems").

¹⁴³ Amendments to CC&Rs are difficult to achieve in reality because of the generally low level of community engagement and participation coupled with the high levels of required assent. See *generally* Sterk, *supra* note 10.

¹⁴⁴ STEPHEN E. BARTON & CAROL J. SILVERMAN, COMMON INTEREST HOMEOWNERS' ASSOCIATIONS MANAGEMENT STUDY (Cal. Dep't Real Estate ed., 1987) (showing low levels of participation in community governance and concluding that many communities are not governed according to majority

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difficult to modify, outdated laws will govern behavior and land use in the community. For example, many CC&Rs drafted in the 1970s and 1980s prohibit “satellite dishes,” based on the concern over blocked views and the unsightly nature of enormous satellite dishes such as those used at the time.¹⁴⁵ Today’s satellite dishes are tiny and unobtrusive, yet covenants banning “satellite dishes” remain legally binding until they are removed by a supermajority.¹⁴⁶ Other covenant restrictions that commonly persist, despite being criticized as obsolete, include prohibitions on trucks and laundry lines. Such blanket prohibitions seem unwarranted based on the modern trends of, respectively, driving a small pick-up truck as a passenger vehicle¹⁴⁷ and air-drying of clothes in an effort to be more eco-friendly.¹⁴⁸ It would appear,

desires but rather the idiosyncratic concerns of a vocal minority).

¹⁴⁵ See *River Oaks Place Council of Co-Owners v. Daly*, 172 S.W.3d 314, 325 (Tex. App. 2005) (an association may ban satellite dishes notwithstanding FCC regulations).

¹⁴⁶ *Id.* But see *Portola Hills Cmty. Ass’n v. James*, 5 Cal. Rptr. 2d 580, 583 (Cal. Ct. App. 1992) (striking down a restriction on satellite dishes as unreasonably obsolete), *disapproved of by Nahrstedt v. Lakeside Village Condo. Ass’n*, 878 P.2d 1275, 1290 (Cal. 1994) (reasonableness should be determined facially, not as applied to a particular circumstance).

¹⁴⁷ In *Bernardo Villas Mgmt. Corp. v. Black*, a California court invalidated a restriction on trucks as unreasonable “as applied to clean, noncommercial pickup truck used by owners solely for personal transportation.” 235 Cal. Rptr. 509 (Cal. Ct. App. 1987), *disapproved of by Nahrstedt*, 878 P.2d at 1290 (reasonableness should be determined facially, not as applied to a particular circumstance).

¹⁴⁸ “Virtually all” CICs ban outdoor clotheslines. Laura Thomas Gebert, Comment, *A Survey of Selected Government-Sponsored Energy Plans and Recommendations for Florida’s Future Energy Policy*, 8 BARRY L. REV. 149, 166 (2007). A typical covenant provides that “[n]o laundry or other clothes may be hung or displayed outside any Unit.” *Mazdabrook Commons Homeowners’ Ass’n v. Khan*, No. DC-011532-08, 2010 WL 3517030, at *12 (N.J. Super. Ct. App. Div. Sept. 1, 2010), *aff’d*, 46 A.3d 507 (N.J. 2012). Florida and Utah now have statutes protecting the “right to dry,” but statutory fixes are recent and exist in a minority of states. See FLA. STAT. ANN. § 163.04(1)–(2) (West 2006); UTAH CODE ANN. § 10-9a-610 (West 2006). See also Dusty Horwitt, *The Right to Dry Laundry on the Line*, LEGAL AFF., Jan./Feb. 2004, at 10, 11 (“In California, about seven million people can’t

however, that changing community opinions and mores is easier than changing community covenants.

Spotty public participation in community governance, hold-outs, and idiosyncratic vocal minorities make the flexibility of the CIC governance model haphazard. This unpredictable flexibility means that rules may change in unexpected ways. An association may enact a completely new restriction, never anticipated by members when they purchased property in the community.¹⁴⁹ For example, in a 1978 California case, a mother and her two children were forced out of their home when their association passed a covenant amendment prohibiting occupancy by anyone under 18.¹⁵⁰ More recently, a smoker who purchased a

hang their clothes in public because of the policies of about 40,000 community associations.”). For a general discussion of ways that CIC covenants inhibit green living practices, see Mark A. Pike, Note, *Green Building Red-Lighted by Homeowners' Associations*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 923, 932–35 (2009).

¹⁴⁹ There is a thread of case law that attempts to distinguish between changes to CIC covenant terms and the addition of new terms, with courts holding that amendment provisions in an original declaration authorize changes but not additions. *E.g.*, *Lakeland Prop. Owners Ass'n v. Larson*, 459 N.E.2d 1164 (Ill. App. Ct. 1984); *Boyles v. Hausmann*, 517 N.W.2d 610, 616 (Neb. 1994). The reasoning in these cases has been criticized as logically flawed. *See Evergreen Highlands Ass'n v. West*, 73 P.3d 1 (Colo. 2003). For example, changing a provision explicitly permitting leasing to explicitly prohibit leasing would be permitted under the reasoning of *Boyles*, but adopting a leasing prohibition would not be permitted if the original declaration was silent as to an owner's ability to lease. More recent cases have implicitly overruled or simply ignored these holdings. *See, e.g.*, *Apple II, Condo. Ass'n v. Worth Bank & Trust Co.*, 659 N.E.2d 93 (holding that addition of leasing limitation was valid without even acknowledging the conflict with the *Lakeland* precedent).

¹⁵⁰ *Ritchey v. Villa Nueva Condo. Ass'n*, 146 Cal. Rptr. 695, 700 (Cal. Ct. App. 1978). Age-based restrictions were not prohibited by statute in 1978, but a later amendment of the Fair Housing Act created a statutory basis for striking down such restrictions. *See Fair Housing Act of 1968*, 42 U.S.C. §§ 3601–19 (2012). The Act, as amended, prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status (including children under the age of 18 living with parents or legal custodians, pregnant

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condominium unit in Colorado likewise did not anticipate that his association would later amend the declaration to prohibit smoking in any part of the building, including inside his home.¹⁵¹

By purchasing property in a CIC, an owner is deemed to have agreed to be bound not just to the terms of the recorded declaration but also to any changes that a sufficient percentage of her neighbors may later enact.¹⁵² In many cases, the standard for judicial review of declaration amendments is a variant of the Business Judgment Rule—changes to owner obligations are deemed valid as long as the association acted in good faith and followed procedures enumerated in the governing documents.¹⁵³

women, and people securing custody of children under the age of 18), and disability. *Id.* § 3604.

¹⁵¹ After the judge's ruling, the homeowner complained to the press that, "I can't relax and have a cigarette in my own home." Ann Schrader, *Couple's Smoking at Home Snuffed*, DENVER POST (Nov. 16, 2006), http://www.denverpost.com/news/ci_4667551; see also David B. Ezra, "Get Your Ashes Out of My Living Room!": *Controlling Tobacco Smoke in Multi-Unit Residential Housing*, 54 RUTGERS L. REV. 135, 139 (2001) (exploring the legal aspects of prohibiting smoking inside condominium units); Staci Semrad, *A New Arena in the Fight Over Smoking: The Home*, N.Y. TIMES, Nov. 5, 2007, at A18 (detailing efforts within condominiums across the country to ban smoking inside units).

¹⁵² While oversight of amendments is minor, judicial review of restrictions contained in the original declaration is often even more cursory. See *Noble v. Murphy*, 612 N.E.2d 266, 270 (Mass. Ct. App. 1993); *Brower*, *supra* note 20, at 242. A complaining owner must prove that an amendment is "unreasonable" or it will be specifically enforceable. See *Villa De Las Palmas Homeowners Ass'n v. Terifaj*, 90 P.3d 1223, 1234. (Cal. 2004). Amendments are presumed enforceable against all owners "unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit." *Nahrstedt*, 878 P.2d at 1287. In some jurisdictions all amendments and rules properly enacted are clothed with a strong presumption of validity unless a plaintiff can show bad faith. See *Arabian*, *supra* note 133.

¹⁵³ A typical approach is uphold any rules and regulations that have been enacted by the board, acting within the scope of its authority and not abusing its power or acting arbitrarily and capriciously. *Unit Owners Ass'n of Buildamerica-1 v. Gillman*, 292 S.E.2d 378, 386–87 (Va. 1982). This is essentially the same approach taken in approving corporate decision-making

Judges reason that by buying into a community, owners in a CIC have manifested their assent to the terms of the declaration, including the procedures for amending its terms.¹⁵⁴ Courts conclude that by agreeing to amendment procedures, owners implicitly agreed to be bound to whatever restrictions a majority of their neighbors sees fit to impose in the future.¹⁵⁵

Because community restrictions are subject to majority-rule changes, they operate much like a social contract and unlike servitudes in the absence of an association or built-in amendment procedure.¹⁵⁶ In a very real sense, CIC covenants are really

under the Business Judgment Rule. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006). *See also supra* notes 65–66 and accompanying text.

¹⁵⁴ *See, e.g.*, *Woodside Vill. Condo. Ass'n v. Jahren*, 806 So. 2d 452, 461 (Fla. 2002) (finding that a recorded condominium declaration puts owners on notice that the restrictions governing the subject properties are “subject to change through the amendment process” and that owners have thereby agreed “that they would be bound by properly adopted amendments”); *Kroop v. Caravelle Condo, Inc.*, 323 So. 2d 307, 309 (Fla. Dist. Ct. App. 1975) (upholding amendment prohibiting leasing because “[p]laintiff acquired title to her condominium unit with knowledge that the Declaration of Condominium might thereafter be lawfully amended”); *Hill v. Fontaine Condo. Ass'n*, 334 S.E.2d 690 (Ga. 1985) (an amendment restricting residence to adults only is enforceable on all owners); *McElveen-Hunter v. Fountain Manor Ass'n*, 386 S.E.2d 435, 436 (N.C. Ct. App. 1989), *aff'd*, 399 S.E.2d 112 (N.C. 1991) (holding that an amendment prohibiting leasing “does not infringe upon any legal right of the plaintiff’s; for she had notice before the units were bought that the declaration was changeable”).

¹⁵⁵ *E.g.*, *Ritchey v. Villa Nueva Condo. Assn.*, 146 Cal. Rptr. 695, 700 (Cal. Ct. App. 1978); *Burgess v. Pelkey*, 738 A.2d 783, 787 (D.C. 1999); *Flagler Fed. Sav. & Loan Ass'n of Miami v. Crestview Towers Condo. Ass'n*, 595 So. 2d 198, 199 (Fla. Dist. Ct. App. 1992); *Breezy Point Holiday Harbor Lodge-Beechside Apt. Owners' Ass'n v. B.P. P'ship*, 531 N.W.2d 917, 920 (Minn. Ct. App. 1995); *Cape May Harbor Vill. & Yacht Club Ass'n v. Sbrag*, 68, 22 A.3d 158, 166 (N.J. App. Div. 2011); *Worthinglen Condo. Unit Owners' Ass'n v. Brown*, 566 N.E.2d 1275 (Ohio App. 1989). *C.f.*, *Breene v. Plaza Tower Ass'n*, 310 N.W.2d 730 (N.D. 1981).

¹⁵⁶ Most CC&R amendments require approval by a supermajority of owners. Changes to rules, however, are made by the board of directors for the association. This board is elected by majority vote.

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dynamic governing constitutions. The operation of a CIC therefore raises entity governance issues, such as how decisions are made, minority voting rights, and limits of governing power.

Group decision-making can be justified by showing that members of the group enjoy sufficient “voice” (or participation) and have the ability to “exit” (or leave) if unsatisfied with group decisions.¹⁵⁷ At first blush, the CIC model seems to pose no problem on these grounds. Every owner has a vote (voice) in community governance.¹⁵⁸ And although owners are bound by majority-enacted rules, this presents no real liberty concerns as long as owners can “vote with their feet” and leave if dissatisfied (exit).¹⁵⁹ In the context of corporate governance, exit is the relatively simple matter of selling one’s stock. But CIC membership is bundled with homeownership and the only way to exit is to sell one’s home and move. This makes exit from a CIC tremendously burdensome. Real property is quite illiquid; it may take quite some time to find a buyer. In addition, it is personally and psychologically disruptive to relocate or divest one’s homeownership.¹⁶⁰ Therefore, although exit is available in theory, market and psychological realities create a practical barrier to exit in CICs.

In some cases, restrictive covenants create legal barriers to

¹⁵⁷ The terms “voice” and “exit” are borrowed from the corporate governance classic, ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

¹⁵⁸ Brower, *supra* note 20, at 245 (noting that “[p]articipatory consent substitutes democratic decision-making and consensus building for state regulation over substantive terms”).

¹⁵⁹ *Id.* at 242 (explaining the argument that assent exists even for amendments because dissatisfied owner members in a CIC are always free to leave the community if they disagree with its rules).

¹⁶⁰ *Id.* at 224 (referring to the “financial and psychological stakes raised” by requiring a home sale to exit). Much of the impetus behind defaulting mortgagor rescue efforts has been the individual harms from forced home sales. See Julia Patterson Forrester & Jerome Michael Organ, *Promising to Be Prudent: A Private Law Approach to Mortgage Loan Regulation in Common-Interest Communities*, 19 GEO. MASON L. REV. 739, 739 (2012) (calling a forced sale of a home “clearly devastating to the homeowner”).

CIC exit as well, by limiting an owner's ability to sell or lease her property. Some CIC covenants may provide that property transfers can occur only with association consent.¹⁶¹ Others may grant the association a first right of refusal with respect to any proposed transfer.¹⁶² Restrictions on who can occupy a unit and prohibitions on leasing of a unit are even more common.¹⁶³ When restrictions constrain an owner's ability to exit a CIC regime, it no longer is valid to say that continued membership or occupancy in the private community is truly voluntary and necessarily manifests a continuing desire to be bound by the governance

¹⁶¹ *E.g.*, *Laguna Royale Owners Ass'n v. Darger*, 174 Cal. Rptr. 136 (Cal. Ct. App. 1981).

¹⁶² *E.g.*, *Lakeside Manor Condo. Ass'n v. Forehand*, 513 So. 2d 1104 (Fla. Dist. Ct. App. 1987); *Wolinsky v. Kadison*, 449 N.E.2d 151, 155 (Ill. App. Ct. 1983); *Anderson v. 50 E. 72nd St. Condo.*, 505 N.Y.S.2d 101 (N.Y. App. Div. 1st Dep't 1986), *appeal dismissed*, 504 N.E.2d 700 (N.Y. 1987).

¹⁶³ Boyack, *Community Covenant Alienation Restraints*, *supra* note 33. Although limitations on occupancy based on race now are illegal and ineffective, for decades racial segregation was upheld as an acceptable way to promote the accepted policy goals of high property values and social harmony. HARRY GRANT ATKINSON & L.E. FRAILEY, *FUNDAMENTALS OF REAL ESTATE PRACTICE* 428-29 (1946); BROOKS & ROSE, *supra* note 34; MCKENZIE *supra* note 29, at 60-68; ROBERT C. WEAVER, *THE NEGRO GHETTO* 231 (1948). Prior to the 1988 amendment of the Fair Housing Act, many CICs contained occupancy restrictions that prohibited residence by children. *See, e.g.*, *Ritchey v. Villa Nueva Condo. Ass'n*, 146 Cal. Rptr. 695, 698 (Cal. Ct. App. 1978); *Everglades Plaza Condo. Ass'n v. Buckner*, 462 So. 2d 835, 837 (Fla. Dist. Ct. App. 1984); *Hill v. Fontaine Condo. Ass'n*, 334 S.E.2d 690 (Ga. 1985). The most common occupancy restraint and alienability restraint in CIC covenants today is a restriction on occupancy by non-owner tenants. Katharine N. Rosenberry, *Home Businesses, Llamas and Aluminum Siding: Trends in Covenant Enforcement*, 31 J. MARSHALL L. REV. 443, 461-66 (1998); *see also, e.g.*, *Villa De Las Palmas Homeowners Ass'n v. Terifaj*, 90 P.3d 1223, 1234 (Cal. 2004); *Nahrstedt v. Lakeside Village Condo. Ass'n*, 878 P.2d 1275 (Cal. 1994); *White Egret Condo., Inc. v. Franklin*, 379 So. 2d 346 (Fla. 1979); *Flagler Fed. Sav. & Loan Ass'n of Miami v. Crestview Towers Condo. Ass'n*, 595 So. 2d 198 (Fla. Dist. Ct. App. 1992); *McElveen-Hunter v. Fountain Manor Ass'n*, 386 S.E.2d 435 (N.C. Ct. App. 1989), *aff'd*, 399 S.E.2d 112 (N.C. 1991); *see also* Rawling, *supra* note 19, at 225.

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regime. This calls into question the continuing legitimacy of the CIC social contract.

D. Covenant Drafting: Authors and Influences

CIC “agreements” consist of non-negotiable covenants that have already been drafted and recorded by the developer to create a binding servitude on the land before homes are ever sold.¹⁶⁴ This not only informs the reality of homeowner choice, it also reveals that none of the community residents actually authors the covenants that bind the community. Who, then, dictates these adhesive provisions?

At first blush, the answer seems to be that it is the developer who drafts the governing documents, forms the CIC association, and records the declaration, but the reality is more complicated.¹⁶⁵ Some market theorists claim that the unilateral act of a developer in designing CIC covenants is not troubling because in choosing to create a CIC and in crafting the content of community CC&Rs,

¹⁶⁴ See MCKENZIE, *supra* note 29, at 127; *supra* Part I.B. Prior recordation is required to legally sell a condominium unit and is prudent in order to create a binding servitude on subsequent property owners. HYATT, *supra* note 4; Winokur, *supra* note 105. Some early CICs were established from existing neighborhoods, and in such cases, homeowners did theoretically have some input into a declaration’s content. MCKENZIE, *supra* note 29, at 33–36.

¹⁶⁵ See generally WAYNE S. HYATT, *CONDOMINIUMS AND HOME OWNERS ASSOCIATIONS: A GUIDE TO THE DEVELOPMENT PROCESS* (1985) (explaining the developer’s process of creating a CIC and explaining how home buyers are recipients of, rather than shapers of, the initial servitude regime). In a section titled “Developer-Appointed Boards Should Actively Lead the Owners,” Hyatt notes: “[M]ost people, by obvious logic, are followers in most aspects of their lives—some in virtually all respects. Social order would not be obtained without that condition.” See also MCKENZIE *supra* note 29 at 21, 127 (describing the developer’s role in establishing CC&Rs and bemoaning lack of resident input into the governing terms); Franzese & Siegel, *supra* note 50, at 1127–30 (“CIC residents play no direct role in the critical decision-making process leading to the organization of the CIC.”); Winokur, *supra* note 105, at 58–60 (explaining the complete lack of homeowner input with respect to the content of CIC covenants).

the developer takes into account consumer preferences as a way to maximize sale price.¹⁶⁶ This makes sense in theory, but in reality, this has never been completely true. Instead, as a condition of zoning approval, local municipalities often require that a new development be organized as a common interest community, and this factor drives CIC creation perhaps more than anything else. Furthermore, Fannie Mae and Freddie Mac (each a “Government Sponsored Enterprise” or “GSE”),¹⁶⁷ and the Federal Housing Administration (“FHA”) indirectly determine the content of CIC covenants through their mortgage finance underwriting guidelines.¹⁶⁸ Because of the influence of these government actors, CIC covenants have become standardized in the industry and may fail to represent developer marketing strategy or consumer preferences.¹⁶⁹

The vast majority of mortgage loans made today are insured by the FHA or earmarked for resale to Fannie Mae or Freddie Mac.¹⁷⁰ The GSEs were at one time private entities but have

¹⁶⁶ Forrester & Organ, *supra* note 160, at 744–45.

¹⁶⁷ Fannie Mae (formerly the Federal National Mortgage Association) and Freddie Mac (the Federal Home Loan Mortgage Corporation) were chartered by Congress and regulated by federal agencies and since 2008 have been in conservatorship with the federal government. See Andrea J. Boyack, *Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac*, 60 AM. U. L. REV. 1489, 1499–1502 (2011) [hereinafter Boyack, *Laudable Goals*] (giving an overview of the market role and enumerated purposes of Fannie Mae and Freddie Mac).

¹⁶⁸ See Boyack, *Community Collateral Damage*, *supra* note 2.

¹⁶⁹ Franzese & Siegel, *supra* note 50; Steven Siegel, *The Public Role in Establishing Private Residential Communities: Towards A New Formulation of Local Government Land Use Policies That Eliminates the Legal Requirements to Privatize New Communities in the United States*, 38 URB. LAW. 859, 873–98 (2006) [hereinafter Siegel, *The Public Role*]; see also DILGER, *supra* note 106, at 38 (explaining that CICs are “increasingly offering fairly uniform levels and types of services.”).

¹⁷⁰ See CTR. FOR AM. PROGRESS, A RESPONSIBLE MARKET FOR HOUSING FINANCE: A PROGRESS PLAN TO REFORM THE U.S. SECONDARY MARKET FOR RESIDENTIAL MORTGAGES (2011), available at <http://www.americanprogress.org/issues/2011/01/pdf/responsiblemarketforhousingfinance.pdf>; see also Boyack, *Community Collateral Damage*, *supra* note 2, at 82–84, 105–06

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always been heavily regulated at the federal level and were established with an implicit (later explicit) government guaranty.¹⁷¹ They exist in order to promote homeownership.¹⁷² But historically and today, the GSEs do more than funnel money into the residential mortgage market: through approval requirements and form documents, the GSEs and the FHA dictate the terms of housing arrangements at every level.¹⁷³

In order to qualify for resale to one of the GSEs, a mortgage must be secured by an acceptable property. In the CIC context, that generally means that the community in which the property is located must meet GSE underwriting mandates.¹⁷⁴ The Department of Housing and Urban Development maintains a list of “Approved Condominium Projects,” and typically Fannie Mae and Freddie Mac will only purchase mortgages on units in condominiums that are on the approved list.¹⁷⁵

(noting that the GSEs and FHA are involved in most new mortgages); Jody Shenn & John Gittelsohn, *FHA Home-Loan Volume is Sign of “Very Sick System,” Agency’s Stevens Says*, BLOOMBERG (May 24, 2010), <http://www.bloomberg.com/news/2010-05-24/fha-home-loan-volume-is-sign-of-very-sick-system-agency-s-stevens-says.html> (stating that the FHA and GSEs have been financing 90% of home lending since the 2008 market collapse).

¹⁷¹ See Boyack, *Laudable Goals*, *supra* note 167, at 1491; David Reiss, *The Federal Government’s Implied Guarantee of Fannie Mae and Freddie Mac’s Obligations: Uncle Sam Will Pick Up the Tab*, 42 GA. L. REV. 1019, 1022 (2008).

¹⁷² Boyack, *Laudable Goals*, *supra* note 167, at 1495.

¹⁷³ In crafting CIC declarations, developers lift language directly from government forms and model documents and mirror precisely GSE and FHA underwriting requirements. Winokur, *supra* note 105, at 59.

¹⁷⁴ Both Fannie Mae and Freddie Mac prohibit any ownership concentration in condominiums, meaning that if one owner holds title to 10% or more of the units, no unit in the CIC may secure a GSE mortgage. Additional requirements include required community majority owner occupancy for loans to owner-investors, at least 10% of the association’s budget earmarked to fund reserves, and no more than 15% of the members being delinquent on paying their assessments. FREDDIE MAC CONDOMINIUM UNIT MORTGAGES (July 2013, available at <http://www.freddiemac.com/learn/pdfs/uw/condo.pdf>); EFANNIEMAE SEC INSTRUMENTS (2014), available at <https://www.efanniemae.com/sf/formsdocs/documents/secinstruments>.

¹⁷⁵ See Mortgagee Letter 2009-19 from Brian D. Montgomery, Assistant

Communities with a high percentage of non-owner-occupied units or a high percentage of members in default on assessment payments will not appear on the approved lists and thus will likely not qualify for GSE mortgage funds.¹⁷⁶ The precise threshold percentages vary from time to time, and precise mandates of Fannie Mae and Freddie Mac may differ, but the GSEs typically preclude mortgage loans secured by properties in CICs where more than 15% of the owners are delinquent in their assessments or where more than 50% of units are non-owner-occupied.¹⁷⁷ This latter provision justifies community restrictions on leasing. Because of the community owner occupancy requirement, standard form declarations provide for various levels of control over an owner's ability to lease, ranging from complete or near-complete prohibition of leasing to nearly ubiquitous (and GSE/FHA-mandated) restrictions on short-term rentals.¹⁷⁸ In some contexts it is tricky to comply with both GSE owner occupancy standards and the mandates of the FHA,

Sec'y for Hous. Fed. Hous. Comm'r, U.S. Dep't of Hous. & Urban Dev., to All Approved Mortgagees & All FHA Roster Appraisers 1 (June 12, 2009), *available at* <http://www.bestfhalender.com/wp-content/uploads/2010/01/09-19ml.pdf>; Mortgagee Letter 2009-46B from David H. Stevens, Assistant Sec'y for Hous. Fed. Hous. Comm'r, U.S. Dep't of Hous. & Urban Dev., to All Approved Mortgagees and All FHA Roster Appraisers 1 (Nov. 6, 2009), *available at* <http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/09-46bml.pdf>.

¹⁷⁶ Boyack, *Community Collateral Damage*, *supra* note 2, at 105–06.

¹⁷⁷ Until recently, Fannie Mae and Freddie Mac would not purchase mortgages secured by property in CICs with a high percentage of non-owner-occupied units. FREDDIE MAC, CONDOMINIUM UNIT MORTGAGES 3 (2013), *available at* <http://www.freddie-mac.com/learn/pdfs/uw/condo.pdf>; Mortgagee Letter 2012-18 from Carol J. Galante, Acting Assistant Sec'y for Hous. Fed. Hous. Comm'r, U.S. Dep't of Hous. & Urban Dev., to All Approved Mortgagees & All FHA Roster Appraisers 6–10 (Sep. 13, 2012), *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=12-18ml.pdf>. Recently, the underwriting requirements with respect to community owner-occupancy have been softened for purchasers intending to become owner occupants themselves. Nevertheless, for decades, CIC owner-occupancy levels have been factors in mortgage funding decisions of Fannie Mae and Freddie Mac.

¹⁷⁸ *See supra* notes 166–71 and accompanying text.

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however. The FHA views a complete ban on leasing as an unlawful restraint on alienation, but the GSEs require high community owner occupancy rates. Because of this, conventional wisdom in crafting CIC declarations is to prohibit most—but not all—units from being leased.¹⁷⁹ This allows a CIC to walk the line between running afoul of the FHA rules and disqualifying the community from GSE investment.

Complying with the underwriting requirements of Fannie Mae, Freddie Mac, and the FHA can make or break a CIC project. Properties in qualifying communities have access to vastly more mortgage capital, and liquidity bolsters property values. Conversely, property in a community with too many tenants or too many assessment-delinquent owners will be cut off from mortgage funds, decreasing the property's liquidity and market price and perhaps even rendering the property unsellable.¹⁸⁰ Developers across the nation want their products sold for the highest prices and therefore need their would-be buyers to have access to the requisite funds. This requires that the developers will frame the CC&Rs to match the guidelines of the GSEs and the FHA whenever possible.¹⁸¹

¹⁷⁹ See, e.g., ELIA B. GILBERT, *FHA CONDOMINIUM CERTIFICATIONS: THE REQUIREMENTS AND THE PROHIBITIONS*, available at <http://www.hindmansanchez.com/sites/default/files/resources/FHA%20Condominium%20Certifications%20The%20Requirements%20and%20Prohibitions.pdf>; Matt McMullin, *FHA Approval and Rental Restrictions—A Curious Relationship*, VIAL FOTHERINGHAM LLP (Oct. 15, 2013), <http://www.vf-law.com/articles/fha-information>; Jim Slaughter, *FHA Guidelines & Condominium Rental Restrictions*, ROSSABI BLACK SLAUGHTER, PA (Mar. 1, 2013), <http://www.lawfirmrbs.com/blog/fha-guidelines-condominium-rental-restrictions/>. It is literally possible to satisfy both GSE and FHA requirements of CIC covenants provided that only one unit may be rented at any time.

¹⁸⁰ This sets up a strange dichotomy: in communities with no-leasing covenants, owners cannot legally rent, but in communities without such covenants, too many neighborhood rentals will make it practically impossible for an owner to sell. The existence of GSE guidelines on owner occupancy thus necessarily restricts (practically if not legally) the owners' ability to transfer. For a more detailed discussion of this conundrum, see Boyack, *Community Collateral Damage*, *supra* note 2.

¹⁸¹ See Winokur, *supra* note 105, at 59.

Because meeting FHA and GSE requirements is so vital to community success, changes to entity and agency policies can rapidly and effectively impact covenant content for future CICs. One such example is how new policies of the GSEs and FHA rapidly changed the use of private transfer fees (PTF) covenants in CC&Rs. Over the past decade, many developers started including PTF covenants in CC&Rs as a way to defer and privatize payment of today's development costs.¹⁸² PTF covenants require that a fee equal to a percentage of the sale price be paid either to the association or to a designated third party as a condition of property resale.¹⁸³ More than eleven million homes are currently encumbered by PTF covenants.¹⁸⁴

Innovators of such PTF covenants claim that these covenants keep housing affordable by temporally spreading the ballooning costs of development.¹⁸⁵ Mimicking the traditional freedom of

¹⁸² For example, between 2001 and 2006, Lennar Corporation included PTF covenants into CC&Rs governing 13,000 homes in California. These PTFs are payable to the Lennar Charitable Housing Foundation. See Robbie Wheelan, *Home-Resale Fees Under Attack*, WALL ST. J. (July 30, 2010), <http://online.wsj.com/news/articles/SB10001424052748703314904575399290511802382>. In New York, Freehold Partners crafted a creative solution to building costs by entering into agreements with developers to buy the right to collect PTFs in exchange for upfront development fees. Freehold then securitized the obligations by pooling and selling shares in the aggregate income stream from PTFs. *Id.* ("Municipalities have long used similar fees, called transfer taxes, to raise revenues or recoup public subsidies for private development projects, but private transfer fees are relatively new."). For an excellent and thorough discussion of PTFs, see R. Wilson Freyermuth, *Private Transfer Fee Covenants: Cleaning Up the Mess*, 45 REAL PROP. TR. & EST. L.J. 419 (2010).

¹⁸³ Freyermuth *supra* note 182; see also Richard Mansfield, *Private Transfer Fee Covenants: A Thing of the Past?*, WORLDWIDE ERC (Feb. 7, 2011, 10:32 AM), <http://www.worldwideerc.org/Blogs/MobilityLawBlog/Lists/Posts/Post.aspx?List=c020aee5%2D48ad%2D47b2%2D8295%2D4cf71ba9e34&ID=57> (explaining how PTFs work and when they came into use).

¹⁸⁴ Burke T. Ward & Jamie P. Hopkins, *Private Transfer Fees: Developer Exploitation or Legitimate Financing Vehicle?*, 56 VILL. L. REV. 901, 901 (2012).

¹⁸⁵ See FREEHOLD CAPITAL PARTNERS, LEARN HOW CAPITAL

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contract rationale in CIC oversight cases, PTF proponents argue that PTF covenants are not unfair because buyers in CICs, by the very act of purchasing the property in the first place, have agreed to pay these resale fees in the future.¹⁸⁶ But many buyers, policy makers, and legislatures objected to an imposition of a long-term private tax on transfers of property, particularly when the proceeds of such fees went to private investors.¹⁸⁷ At least thirty-six states responded to the advent of PTFs by passing laws limiting their validity,¹⁸⁸ typically channeling PTF proceeds to community associations and prohibiting payment of PTFs to private for-profit third parties.¹⁸⁹

It is recognized that state governments can pass statutes to directly prohibit certain types of covenant restrictions. The federal government's ability to control the content of CIC

RECOVERY FEE INSTRUMENTS CAN HELP YOU, *available at* http://www.freeholdcapitalpartners.com/forms/freehold_brochure.pdf [hereinafter FREEHOLD CAPITAL].

¹⁸⁶ The act supposedly manifesting assent to the PTF covenants included in recorded CC&Rs was the home purchase. Ward & Hopkins, *supra* note 184, at 902; *see also* Freyermuth, *supra* note 182 (explaining the problematic aspects of inferring consent in this way). One law review article considering the issue of PTF covenants contends that buyers would simply decrease their offer price when purchasing property burdened by PTF covenants in recognition of their obligation to pay in the future, but there is no indication that buyers actually do this. Ward & Hopkins, *supra* note 184, at 913–16 (arguing that every buyer “willingly agrees to buy the property knowing, *at least constructively*, about the existence of the PTF” and can adjust their price accordingly (emphasis added)). The authors advocate for a stronger disclosure approach to PTF enforceability. *Id.*

¹⁸⁷ *Id.* The Coalition to Stop Home Resale Fees asserted that PTFs are “Wall Street lining their pockets while stealing equity from homeowners.” Wheelan, *supra* note 182. Most PTFs are not designed to exist in perpetuity, but rather provide an expiration date, typically 99 years. Mansfield, *supra* note 183; Ward & Hopkins *supra* note 184.

¹⁸⁸ By 2011, 36 states had passed some limiting legislation with respect to PTFs. Ward & Hopkins, *supra* note 184, at 902.

¹⁸⁹ Only a handful of regulating states prohibit PTFs. Most of the legislative focus has been on to whom the fees are paid, not whether the fees are payable. *Id.* California's statutory fix permits all types of PTFs but mandates special disclosures. Mansfield, *supra* note 183.

covenants, however, is less obvious. No federal agency has the authority to ban certain types of covenants from CIC declarations, but the Federal Housing Finance Agency (FHFA)¹⁹⁰ can achieve this indirectly. The FHFA controls the actions of Fannie Mae and Freddie Mac. The FHFA regulates the GSEs, and GSE underwriting requirements drive CIC structuring. When the FHFA tells the GSE to refrain from purchasing mortgages secured by property burdened by certain types of restrictions, it indirectly—but tremendously effectively—mandates the content of CIC covenants.¹⁹¹ In March 2012, the FHFA published a rule prohibiting Fannie Mae, Freddie Mac, and the Federal Home Loan Banks from purchasing mortgages on properties encumbered by PTFs payable to third parties.¹⁹² This FHFA regulation has been tremendously effective, virtually wiping out privately directed PTF covenants in CICs formed after March

¹⁹⁰ The FHFA was created by the Housing and Economic Recovery Act of 2008. See Pub. L. No. 110-289, 122 Stat. 2654 (2008) (codified as amended in scattered sections of 12, 15, 26, 37, 38, and 42 U.S.C.A.). The primary purpose of FHFA is to regulate Fannie Mae, Freddie Mac, and the Federal Home Loan Banks.

¹⁹¹ One commentator opined that the FHFA regulation “virtually guarantees that [PTFs] will be used no more.” Bobby Saadieh, *FHFA’s Final Ruling Will Restrict Private Transfer Fees*, PERTRIA (Apr. 12, 2012, 11:04 AM), <http://www.pertria.com/2012/fhfas-final-ruling-will-restrict-private-transfer-fees-2/>.

¹⁹² FHFA Restrictions, 12 C.F.R. § 1228 (2012). The FHFA rule does not address PTFs payable to a community association. The FHFA rule also excludes PTFs paid to certain tax-exempt organizations that use the PTF proceeds to benefit the property, but includes any fees not allocated to property improvement and upkeep. *Id.* The rule also applies only prospectively (from its announcement in 2011), and thus impacts CIC declarations recorded after that time, but not any of the previously recorded CC&Rs that included PTF provisions. *Id.*; see also Mansfield, *supra* note 183 (explaining that this rule will not affect the thousands of existing mortgages for deeds containing a PTF covenant). For further discussion of the FHFA rule, see *Announcement SEL-2012-05*, SELLING GUIDE (Fannie Mae, Washington, D.C.), June 19, 2012, at 1, available at <https://www.fanniemae.com/content/announcement/sel1205.pdf>. Freehold Capital, however, estimates that over \$600 billion worth of PTF securities are currently in commerce. FREEHOLD CAPITAL, *supra* note 185.

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2012. This example provides an interesting glimpse into how federal agency action can directly impact the content of “private” CC&Rs.

Locally, municipalities can also impact covenant communities by requiring a CIC structure in exchange for granting zoning approval for new projects.¹⁹³ Since zoning approval is a prerequisite to creating a new community, local regulators’ preferences, with respect to the existence and content of CC&Rs, are incorporated whenever possible. In mandating covenant substance, many municipalities adhere to the FHA guidelines with respect to CIC structuring.¹⁹⁴ Financial realities motivate municipal requirements as well. Local governments have long realized that the CIC ownership structure can be used as a vehicle for privatizing traditional municipal functions.¹⁹⁵ The greater the percentage of community amenities and upkeep that can be channeled to private community maintenance, the better for the municipal budget.

These external influences on the content of CIC covenants is obscured by continued judicial assertions that such covenants represent the private contractual choices of the residents in a given community.¹⁹⁶ In reality, covenant terms do not necessarily

¹⁹³ See Siegel, *The Public Role*, *supra* note 169, at 877–95 (calling the CIC ownership concept as “a form of ‘grand bargain’ between developers and municipalities” and citing to several local zoning statutes that require use of the CIC form).

¹⁹⁴ The FHA prescribes numerous “initial” terms for CC&Rs and also strongly advocates the imposition of supermajority requirements to amend CIC governing documents. Such supermajority requirements attempt to promote predictability preferred by FHA insurers and “prevent owners from banding together.” MCKENZIE, *supra* note 29, at 127. These “recommendations” are backed with the possibility of FHA mortgage insurance and have been widely followed. Franzese & Siegel, *supra* note 50, at 1114.

¹⁹⁵ TREESE ET AL., *supra* note 42, at 3; Boyack, *Community Collateral Damage*, *supra* note 2, at 60; Siegel, *The Public Role*, *supra* note 169, at 879.

¹⁹⁶ Franzese & Siegel, *supra* note 50, at 1112 (the “CIC phenomenon is, increasingly, the direct product of conscious and deliberate government policy . . .”). The CIC covenant situation is an example of an adhesion contract drafted by *neither* party to the transaction, “where the terms are proffered by a third party and both contracting parties are reduced to the humble role of

represent homeowner will in any real sense.¹⁹⁷ Rather, CIC covenants are more likely to reflect the extent to which a developer acquiesces to municipal requirements and follows FHA and GSE underwriting “guidance.”¹⁹⁸

III. A LEGAL-HYBRID APPROACH TO CICS

A. *Refocusing Freedom of Contract Policy*

CIC covenants are legal hybrids, not contracts. Servitude law determines their duration and enforceability, and their functions approximate association governance or even, to some extent, public local governments. Because CIC covenants are real property servitudes that create dynamic private community governance systems—not mere contracts—contract law should not create a basically un-rebuttable presumption of validity.¹⁹⁹ The

adherent.” Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 YALE J. ON REG. 313, 346 (2011).

¹⁹⁷ To the contrary, numerous studies have shown that homeowners are dissatisfied with the content of their community covenants and, as a general rule, the provisions of CC&Rs diverge markedly from community preferences. Winokur, *supra* note 105, at 63 n.260–61; *see also* STEPHEN E. BARTON & CAROL J. SILVERMAN, CAL. DEP’T OF REAL ESTATE, COMMON INTEREST HOMEOWNERS’ ASSOCIATIONS MANAGEMENT STUDY (1987). A report published by the Urban Land Institute found that a majority of residents in CICS were greatly dissatisfied with their community. CAROL NORCROSS, TOWNHOUSES & CONDOMINIUMS: RESIDENTS’ LIKES AND DISLIKES 80 (1973). The report characterized residents as “unhappy, resentful, discouraged, and disillusioned about their associations,” with “[a] considerable number of families . . . so angry that they are selling their homes and moving away . . . to get away from what they think of as strait-jacket controls on their lives.” *Id.*

¹⁹⁸ NORMAN WILLIAMS, JR., & JOHN M. TAYLOR, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER § 49.2 (rev. ed. 2013) (explaining that in a CIC, “the actual decisions on land use and building forms in the district, and perhaps also on density, are explicitly to be made, not by a general public policy adopted in advance, but by negotiation between the municipality and the developer”); Siegel, *The Public Role*, *supra* note 169, at 879–80.

¹⁹⁹ Contracts voluntarily entered into should be enforceable notwithstanding unfairness created by their terms. Economic and liberty theory

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economic justifications for presumptive enforcement of contracts voluntarily entered into do not always apply to CIC covenants. Unlike voluntary contracts, CIC covenants are not necessarily freely chosen by owners who voluntarily elect to be bound by their terms. Autonomy and efficiency policy goals, therefore, are not necessarily promoted by CIC covenant enforcement. Promoting the underlying values that freedom of contract represents should inform the decision of whether to enforce CIC governing acts, but CIC covenants and regulations should not be upheld simply based on the rhetoric of freedom of contract as an end in and of itself. At a minimum, an owner's overt act specifically manifesting assent should be prerequisite to being bound to the provisions of community CC&Rs. In addition, unlike contracts, courts and legislators should protect the public interest by limiting CIC governance's permissible subject matter and scope. To summarily validate private community regulations as if they were mere contract provisions does not necessarily promote the values of autonomy and efficiency. To the contrary, in some cases, it threatens these same values.

Freedom to voluntarily obligate oneself in contract to terms of one's choice is a paramount and protected legal right allocated to capable parties in our society.²⁰⁰ Each person with this freedom to

justifies this result. Treating CIC covenants as if they were contracts freely chosen by the members who are bound by their terms, however, does not necessarily promote autonomy and efficiency.

²⁰⁰ Courts in Ohio, for example, have called freedom of contract "fundamental to our society." *Royal Indem. Co. v. Baker Protective Servs., Inc.*, 515 N.E.2d 5 (Ohio Ct. App. 1986) (citations omitted). Freedom of contract is a constitutionally protected liberty right. *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972). U.S. case law is replete with citations to freedom of contract as a primary public policy underlying the law. *See, e.g., Venegas v. Mitchell*, 495 U.S. 82, 87 (1990) (requiring, and not finding, specific direction by Congress to limit freedom of contract); *Chambers Dev. Co. v. Passaic Cnty. Utilities Auth.*, 62 F.3d 582, 589 (3d Cir. 1995) ("The sanctity of a contract is a fundamental concept of our entire legal structure. Freedom of contract includes the freedom to make a bad bargain."); *City & Cnty. of Denver v. The Dist. Court of Denver*, 939 P.2d 1353, 1361 (Colo. 1997) ("The right of parties to contract freely is well developed in our jurisprudence."); *DeVetter v. Principal Mutual Life Ins.*, 516 N.W.2d 792,

contract has the power to be his or her own legislature and create binding obligations that will be enforced by the court.²⁰¹ Freedom of contract is a universal concept, a key characteristic of almost every legal system.²⁰² The principle that agreements are binding is the cornerstone of international law²⁰³ and one of the fundamental precepts in our political philosophy.²⁰⁴

Freedom of contract theory requires voluntary assent, and enforcement of private agreements is predicated on personal autonomy both with respect to choosing to be bound in obligation

794 (Iowa 1994) (opining that freedom to contract is a “weighty societal interest”); *Weber v. Tillman*, 913 P.2d 84, 89 (Kan. 1996) (“The paramount public policy is that freedom to contract is not to be interfered with lightly.”) (citation omitted).

²⁰¹ See, e.g., RICHARD CRASWELL & ALAN SCHWARTZ, *FOUNDATIONS OF CONTRACT LAW* (2012); ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW* (1997); Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283 (1990); Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 825 (1985).

²⁰² All common law jurisdictions have cases that reiterate the primacy of the principle of freedom of contract. See, e.g., *News Ltd. v. Austl. Rugby Football League Ltd.* (1996) 135 ALR 33 (Austl.) (explaining judicial hesitancy to “interfere with the general freedom of contract under the law”). Freedom of contract is a foundational piece of European contract law and the contract jurisprudence of all EU Member States of the European Union. See *THE PRINCIPLES OF EUROPEAN CONTRACT LAW*, art. 1:102 (2002).

²⁰³ The Justinian Code made much of *pacta sunt servanda* (the concept that agreements are binding). K.M. Sharma, *From “Sanctity” to “Fairness”: An Uneasy Transition in the Law of Contracts?*, 18 N.Y.L. SCH. J. INT’L & COMP. L. 95, 97 (1999); see also United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, 1489 U.N.T.S. 3 (1988) (setting forth the general principles for international transactions); I.I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law*, 83 AM. J. INT’L L. 513 (1989) (explaining the principle that treaty obligations must be fulfilled as a baseline concept in international law).

²⁰⁴ Western capitalist countries, especially the United States, adhere more strongly to freedom of contract principles in their purest, least constrained form. See P. S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 10 (1985).

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and with respect to choosing the parameters of that obligation.²⁰⁵ Freedom of contract meshes well with American primacy of personal freedom and capitalist economic theory of market self-regulation that considers each contracting party the best judge of his or her own interests.²⁰⁶ In addition, many commentators believe that allowing individuals the power to contract as they choose, substantially free from regulatory interference or oversight, advances liberty interests.²⁰⁷ Economic theory also posits that optimal efficiency results when individuals may contract freely,²⁰⁸ and that judicial protection of the future

²⁰⁵ See REINHARD ZIMMERMAN, *THE NEW GERMAN LAW OF OBLIGATIONS: HISTORICAL AND COMPARATIVE PERSPECTIVES* 205 (2005) (“[F]reedom of contract is not an end in itself. Rather, it must be regarded as a means of promoting the self-determination of those who wish to conclude a contract.”).

²⁰⁶ See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (R.H. Campbell & A.S. Skinner, eds., 1982); see also G.H. TREITEL, *AN OUTLINE OF THE LAW OF CONTRACT* 3–5 (6th ed. 2005) (“[L]aissez-faire” economic theory advises that government “do nothing, and let the market resolve any problem that arises.”).

²⁰⁷ Richard Epstein calls freedom of contract an essential aspect of individual liberty, guaranteeing “to individuals a sphere of influence in which they will be able to operate, without having to justify themselves to the state or to third parties.” Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 293–94 (1975) [hereinafter Epstein, *Unconscionability*]. According to theories of autonomy and individual will, it is empowering to grant contracting parties quasi-legislative powers *inter se*. See, e.g., BRIAN A. BLUM, *CONTRACTS* § 1.4.1 (6th ed. 2013) (“The power to enter contracts and to formulate the terms of the contractual relationship is . . . an integral part of personal liberty.”); E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576 (1969) (drawing parallels between legislation and contract).

²⁰⁸ See FREDERICH A. HAYEK, *STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS* 91–92, 96–105 (1978); POSNER, *supra* note 100, at 48–49. Although widely accepted throughout the twentieth century, the efficient market hypothesis has come under fire during the most recent financial crisis, with some theorists blaming free markets for creating the real estate bubble that sparked a global financial meltdown in 2008. Other theorists opine that it was the interference with the free market that created systemic volatility. For a brief overview of these competing viewpoints, see David Shay Corbett II, *Free*

expectations created by contracts increases societal wealth.²⁰⁹

Even though freedom of a contract is an aspect of personal liberty, all contract enforceability presents a temporal autonomy paradox. An individual who exercises her freedom of contract today binds her future self, necessarily limiting her later freedom.²¹⁰ Future freedom limitations are only justified because they are voluntarily chosen. Protections against involuntary contracting ensure that a party's freedom is only restricted to the extent that she so chooses.²¹¹ Furthermore, the policy of allowing contractual non-performance in exchange for payment of compensatory damages ameliorates concerns about limitations of one's future freedom.²¹² Efficiency policy supports the contract damages approach as well, justifying not only a party's freedom

Markets and Government Regulation: The Competing Views of Thomas Woods and George Cooper, 14 N.C. BANKING INST. 547 (2010).

²⁰⁹ LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA* STUDY 10, 22–23 (2011). Wealth maximization through contract enforcement is a foundational concept in the law. *See, e.g.*, HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 157 (2000) (“Law is the instrument that fixes and realizes capital.”); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562–63 (1933) (“[A] regime in which contracts are freely made and generally enforced gives greater scope to individual initiative and thus promotes the greatest wealth of a nation.”).

²¹⁰ *See* Winokur, *supra* note 105, at 50 (explaining this concept in terms of Ulysses tying himself to his ship's mast, deliberately robbing his future self of the freedom to react to the sirens' song).

²¹¹ For example, the doctrines of duress, undue influence, unconscionability, incapacity, and fraud all protect a contracting party from involuntarily limiting her future freedom of action.

²¹² Courts generally award expectation damages for a breach of contract equal to the economic difference between what the non-breaching party expected to obtain from the breaching party's performance and what actually was obtained (plus foreseeable costs resulting from the breach and less any cost savings from avoiding reciprocal performance and from mitigation). The theory behind expectation damages has been explained as best approximating the value of both retrospective and prospective reliance and as the economic equivalent of the bargained-for interest of the contracting parties. *See* David W. Barnes, *The Net Expectation Interest in Contract Damages*, 48 EMORY L.J. 1137, 1139 (1999); L. L. Fuller & William R. Purdue, Jr., *The Reliance Interest in Contract Damages (Pt. 1)*, 46 YALE L.J. 52, 57–62 (1936).

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to enter a contract but also her freedom to breach the contract upon paying the non-breaching party's expectation interest.²¹³ Freedom to breach a contract and pay damages is a widely touted American innovation that supports the dual values of efficiency and personal liberty, and mitigates the temporal autonomy paradox of contract law.²¹⁴ Although continuing to be obligated to the financial effect of a contract, contracting parties typically can use breach to exit the contracting relationship.²¹⁵ The voluntary manifestation of assent requirement coupled with contract law's approach to damages adequately ensures both freedom and efficiency in a typical contract context.

The same values that underlie freedom of contract theory can only justify the enforcement of CIC covenants if there is a higher threshold of true assent. Because CIC covenant terms are more durable than contracts and are specifically enforceable, the possibility of breach and the passage of time do not ameliorate their effect. Actual informed assent is therefore even more vital

²¹³ In the late nineteenth century, Oliver Wendell Holmes posited that breach of contract is viewed by the law as "amoral," and is essentially an option purchased through payment of expectation damages. Holmes, *supra* note 118, at 462. Theorists of the law and economics school have seized upon this concept and expanded it into the theory of efficient breach, holding that "it is uneconomical to induce completion of performance of a contract after it has been broken" and explaining that the law should encourage (or at least not discourage) any breach that is "efficient." POSNER, *supra* note 100, at 149-51.

²¹⁴ The default remedy in contract breach actions in the United States is a monetary award of expectation damages, but under civil law, breach of contract is typically remedied by an order of specific performance rather than a monetary calculation of damages. See *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 389 (7th Cir. 2002), *cert. denied*, 540 U.S. 1068 (2003) ("[T]he civil law grants specific performance in breach of contract cases as a matter of course.").

²¹⁵ Breach as a tool for flexibility justifies other aspects of contract law such as judicial reluctance to excuse an obligation based on changed circumstances, judicial scrutiny of penalizing liquidated damages provisions, and judicial reluctance to order specific performance. See John D. Wladis, *Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Common Law*, 75 GEO. L.J. 1575 (1987).

in the context of private community covenants.²¹⁶ In addition, because the key act of assent drives obligation under the dynamic governing process, and because individual opt-out is not possible in a CIC (absent sale of the home), the law should require that the amendment and rulemaking processes be specifically known by and explicitly agreed to by owners from the start.²¹⁷ This can be accomplished through (a) requiring homeowners to demonstrate a separate manifestation of intent to be bound by the CIC, apart from the mere purchase of a parcel of real property located in a given community, and (b) through mandating a more effective (earlier, more accessible) disclosure of community covenants and rules.²¹⁸

Public policy restraints in contract law also offer some ideas about how to deal with covenants and rules that impact other important social policies. While courts generally uphold contracts regardless of their content, there is some degree of judicial suspicion with respect to certain contractual provisions such as limitations on a party's autonomy with respect to future contracting or future breach, limits on free trade, and barriers to free alienation.²¹⁹ For example, although parties might agree today that no modification to a contract will be binding unless

²¹⁶ See Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697 (2010) (discussing incomplete consumer notice and barriers to effective modification in CICs).

²¹⁷ For a discussion of how property purchase is deemed assent to current as well as future terms of community governing documents and association acts, see *supra* notes 50–93, 164–73, and accompanying text.

²¹⁸ The Consumer Financial Protection Bureau has been pioneering efforts to increase the effectiveness of consumer disclosures in the context of mortgage lending. A similar effort should drive qualitative improvements of CIC disclosures to homebuyers.

²¹⁹ While some contracts are deemed unenforceable on substantive public policy grounds, this is a rather exceptional result. See RESTATEMENT (SECOND) OF CONTRACTS § 179 (1981); E. ALLAN FARNSWORTH, CONTRACTS § 5.1 (4th ed. 2004); see also *Swaverly v. Freeway Ford Truck Sales*, 700 N.E.2d 181 (Ill. App. Ct. 1998) (finding that public policy strongly favors freedom to contract and enforcement should only be avoided if a contract clearly contravenes articulated public policy).

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that agreement is evidenced by a signed writing, if parties later agree to orally modify the contract, the later oral modification will still be enforced at common law.²²⁰ In spite of the general hands-off approach to the subject matter of contracts, courts do police contractual promises not to compete based on public policy concerns regarding market freedom and an individual's right to earn a livelihood.²²¹ Contractual promises designed to have the *in terrorem* effect of discouraging breach, in the form of penalizing liquidated damages clauses, are likewise subject to judicial restraint and invalidation.²²² And limitations on property alienability have been legally suspect for hundreds of years.²²³

²²⁰ See, e.g., *Barinaga v. JP Morgan Chase & Co.*, 749 F. Supp. 2d 1164, 1173 (D. Or. 2010); *Truhe v. Turnac Grp. L.L.C.*, 599 N.W.2d 378, 383 (S.D. 1999). Statutory provisions have modified this general rule, and the Uniform Commercial Code specifically departs from the common law in making no oral modification clauses presumptively enforceable. U.C.C. § 2-209(2) (2012).

²²¹ Historically, covenants not to compete were held to be invalid restraints on trade. See *Valley Medical Specialists v. Farber*, 982 P.2d 1277, 1281 (Ariz. 1999). Courts will, however, enforce non-compete provisions that are determined to be reasonable in scope. See, e.g., *Estee Lauder Companies, Inc. v. Batra*, 430 F. Supp. 2d 158, 177 (S.D.N.Y. 2006); *Ohio Urology, Inc. v. Poll*, 594 N.E.2d 1027, 1031–32 (Ohio Ct. App. 1991).

²²² See generally Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977).

²²³ See Michael D. Kirby, Comment, *Restraints on Alienation: Placing A 13th Century Doctrine in 21st Century Perspective*, 40 BAYLOR L. REV. 413, 413 (1988) (“Without doubt, the concept of free alienability is a cornerstone of modern Anglo-American civilization”); Merrill I. Schnebly, *Restraints Upon the Alienation of Legal Interests: I*, 44 YALE L.J. 961, 961 (1935) (“Since an early date in the history of the English common law, it has been thought socially and economically desirable that the owner of a present fee simple in land, or of a corresponding absolute interest in chattels, should have the power to transfer his interest.”). The Restatement (Second) of Property asserts that “[m]uch of modern property law operates on the assumption that freedom to alienate property interests which one may own is essential to the welfare of society.” RESTATEMENT (SECOND) OF PROP., DONATIVE TRANSFERS PART II, Introductory Note (1981); see also RESTATEMENT

Correctly interpreting and applying public policy constraints on CIC covenants is vital to ensuring the proper scope and role of private community governing rules.

Another issue involving CIC covenants is their presumptive specific enforceability. Specifically enforcing covenants regardless of their impact on community preferences and their economic costs is an unwarranted dilution of owners' and, in some cases, non-owners' liberty.²²⁴ Only in cases where parties have actually and voluntarily agreed to provisions that restrain important freedoms should courts specifically enforce these sorts of covenants. Over-reliance on the form of freedom of contract without requiring actual assent undermines both autonomy and efficiency—the very social values that freedom of contract is designed to promote.²²⁵

There has been much scholarship endorsing a hands-off judicial enforcement of CIC covenants based on the wholesale application of freedom of contract theory.²²⁶ But this approach is

(SECOND) OF CONTRACTS § 186(1) (1981) (“A promise is unenforceable on grounds of public policy if it is unreasonably in restraint of trade.”); JOHN CHIPMAN GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY* §§ 15–18 (2d ed. 1895) (citing to thirteenth and fourteenth centuries hostility toward restraints on alienation); George M. Cohen, *The Financial Crisis and the Forgotten Law of Contracts*, 87 TUL. L. REV. 1, 37 (2012) (“Contract law has long had a rule that contracts in restraint of trade are unenforceable because they are inconsistent with the ideal of freedom of contract.”).

²²⁴ See, e.g., POSNER, *supra* note 100, at 32; Steven N.S. Cheung, *Transaction Costs, Risk Aversion, and the Choice of Contractual Arrangements*, 12 J.L. & ECON. 23 (1969); Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUMBIA L. REV. 970 (1985) [hereinafter Epstein, *Why Restrain Alienation?*]; Winokur, *supra* note 105, at 25; Boyack, *Community Covenant Alienation Restraints*, *supra* note 33.

²²⁵ Franzese & Siegel, *supra* note 50. *C.f.* Epstein, *Covenants and Constitutions*, *supra* note 80, at 922–25 (arguing that covenants should be presumptively enforceable against buyers with constructive notice because freedom of contract should be the lens through which to view a servitude regime).

²²⁶ See, e.g., Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights in Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 828 (1999) (“[E]conomic forces

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justified if, and only if, the “agreement” to CIC governance really fits the traditional concept of a voluntary assent. If a contact provision truly reflects party will and intent to be bound, and if the obligation only lasts a “reasonable time,” and if it imposes no unwarranted costs on third parties, then a freedom of contract justification is quite compelling.²²⁷ But in reality, many modern CC&Rs do not promote the autonomy and liberty values behind freedom of contract.²²⁸ They are not really products of party intent to be bound, they presumptively last in perpetuity, and they impact personal freedoms of contract parties and non-parties. Because of this covenant-contract disconnect, freedom of contract theory provides insufficient justification for the negative externalities that certain types of CIC restrictions impose.

B. Limiting Servitude Scope

In addition to setting a higher assent threshold in the context of CC&Rs, the law should revitalize the concept of a substantive limit on CIC covenants beyond the outer limit of public policy. Traditional servitude law provided this sort of limitation on covenants scope: the touch and concern test.²²⁹ But years of stretching this test to address all manner of restrictions has

. . . made private neighborhood associations the choice for millions of people for their residential property.”); Laura T. Rahe, *The Right to Exclude: Preserving the Autonomy of the Homeowners’ Association*, 34 URB. LAW. 521, 552 (2002) (“[T]he homeowners’ association” is properly viewed as “the product of individual [consumer] choices.”).

²²⁷ See Kirby, *supra* note 223, at 429 (finding that courts “have not adequately examined freedom of contract and its relationship to promissory restraints” and concluding that “if two parties contract that a particular property will not be subject to sale for some reasonable time” then such agreement should be upheld).

²²⁸ See, e.g., Evan McKenzie, *Reinventing Common Interest Developments: Reflections on a Policy Role for the Judiciary*, 31 J. MARSHALL L. REV. 397, 421–22 (1998) (advocating for a higher threshold of buyer consent, particularly with respect to covenants that impact an owner’s basic rights).

²²⁹ See *supra* notes 23–28 and accompanying text.

deprived it of any real meaning, and several modern scholars have called for its abolition. Yet there remain compelling reasons to have some sort of more restrictive substantive limit in the law of real covenants beyond the public policy limitation of contract law. Opting out is not an option in CICs. Breach does not terminate obligation and a party cannot elect damages in lieu of performance. Changing covenant terms is cumbersome at best and impossible in some cases. Thus, there is a great need to have some initial control of the legitimate subject matter for regulations of private community covenants.

At the other end of the spectrum from those who call for hands-off enforcement of all CIC covenants in the name of freedom of contract are CIC naysayers who condemn this entire system of property ownership and private governance. But calling for elimination of condominiums, planned developments, and association governance goes much too far. CIC governance serves legitimate social functions. It provides a workable solution to the tragedy of the commons, allowing shared neighborhood amenities and common areas. It creates effective ways to combat community nuisances caused by use incompatibilities.²³⁰ And it can (perhaps only theoretically in some cases) foster engagement and involvement at a local, grassroots level in community problems, planning, and coalescence. In order to preserve the

²³⁰ Nuisance law is notoriously difficult to apply and necessitates *ad hoc* decisions of reasonableness of a given use, leading to erratic results. Rose, *supra* note 30, at 5. Prosser famously called the law of nuisance an “impenetrable jungle.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86 (5th ed. 1984). *See also* Boyack, *Community Covenant Alienation Restraints*, *supra* note 33; Winokur, *supra* note 105, at 37. Prior to the advent of association governance, restrictive covenants would only be enforced if an individual owner chose to sue for enforcement in court. Such owner would bear the costs of this lawsuit, but all owners in the community would benefit from having the covenant enforced. *See* MCKENZIE, *supra* note 29, at 35; Marc A. Weiss & John W. Watts, *Community Builders and Community Associations: The Role of Real Estate Developers in Private Residential Governance*, in ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS 98 (1989). This was yet another manifestation of the freeriding problem and generally discouraged legal enforcement of such ungoverned covenant regimes.

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effectiveness and value of these functions, CIC intrusion into illegitimate spheres—such as those that impact important personal freedoms or are not justified by neighbors’ economic interests—should be disallowed.

The challenge comes in distinguishing justifiable realms of community governance from unwarranted incursions of private regulatory power. Because community servitudes can provide a workable solution to neighborhood nuisances, limitations on property use should be presumptively within the proper scope of CIC covenants and association governance, particularly with respect to uses that create cost externalities.

Other permissible areas of community governance relate to the valuable CIC function of solving two economic failures of common property: first, regulation of common areas to prevent overuse, and second, requiring affirmative contribution to common area upkeep to prevent freeriding. It is therefore legitimate for CIC covenants to address the uses of both common and individual property in the community. And CICs should also be empowered to mandate pro rata owner assessment contributions, take actions to collect these assessments, and ensure the upkeep of common areas.²³¹ Solving the “tragedy of the commons”²³² in terms of overuse and freeriding has been one of the tremendous contributions that CICs have made.²³³ CICs reap societal gains in encouraging community amenities, providing for fair allocation of maintenance costs, and arbitrating between use incompatibilities. Covenants addressing use, upkeep,

²³¹ Most associations’ governing documents explicitly provide for assessment funding of association obligations. *See* HYATT, *supra* note 4, at 105, 108. Where covenants do not so provide, courts have liberally implied the power to collect assessments from owners who are benefitted by community amenities and upkeep. *See, e.g.*, *Evergreen Highlands Ass’n v. West*, 73 P.3d 1 (Colo. 2003).

²³² Garret Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1244–45 (1968).

²³³ *See* TREESE ET AL., *supra* note 42, at 3–5 (noting that common upkeep also allows a community to take advantage of cost savings from economies of scale); Ellickson, *supra* note 49, at 1522–23 (discussing the equitable methods of assessments and distribution of costs amongst property owners).

and owner maintenance contribution should therefore be considered justifiably within the substantive limits of servitude law.

A modern conception of “touch and concern” could draw the appropriate distinction, holding that how a property is used and the requisite maintenance of that property—and requisite contribution to common property—are aspects that are substantively related to the real property itself.²³⁴

Other types of community covenants and rules, however, fall beyond the permitted scope for governance by servitude. Controlling who resides in a property, for example, is not the same as controlling what the use of the property is.²³⁵ Occupancy limitations, leasing prohibitions, and transfer restrictions are not legitimate solutions to “commons” issues, but rather are unjustifiable attempts by members of a community to control their neighbors’ identity. Likewise, rules controlling behaviors that are completely contained within a home are difficult to justify on the basis of neighborhood externalities.²³⁶ Such covenants should be

²³⁴ Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 770 (1986).

²³⁵ The use *of the property* turns on how it is enjoyed and employed by the party in possession. For example, between a landlord and a tenant, it is the *tenant’s* use that defines the use to which the property is being put. Several courts have specifically held that renting a unit in a CIC (even short-term rentals) does not render the “use” of that unit “commercial” rather than residential. *E.g.*, *Kiekel v. Four Colonies Homes Ass’n*, 162 P.3d 57 (Kan. Ct. App. 2007); *Lowden v. Bosley*, 909 A.2d 261, 266 (Md. 2006); *Kaufman v. Fass*, 756 N.Y.S.2d 247 (App. Div. 2d Dep’t 2003); *Scott v. Walker*, 645 S.E.2d 278 (Va. 2007). Leasing and occupancy restrictions are clearly restraints on alienation of the right to possess, not a restriction on property use. A residential occupant, no matter what her race and regardless of whether she holds legal title or a leasehold interest, possesses and uses the property in the same way as another residential occupant. To the extent leasing is a use, it is but a use of the landlord’s investment capital. The actual use *of the property* turns on how it is enjoyed and employed by the party in possession. This concept is explained in greater depth in Boyack, *Community Covenant Alienation Restraints*, *supra* note 33.

²³⁶ See Brower, *supra* note 20, at 204 (discussing the broad scope of CIC governing provisions, including behavior inside homes). There are in-home

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limited by a modern substantive “touch and concern” requirement in servitude law.

The best method to sort out which covenants are proper and which are overreaching is to adopt a twenty-first century updated “touch and concern” test. This test would require economic justification for communal governance schemes rather than focusing on the amorphous concept of relating to the land. If a given covenant acts to remediate a cost externality—such as a nuisance or an aspect of the “tragedy of the commons”—then characterizing that provision as a servitude *would* be justified. An agreement among neighbors that does not address a cost externality, however, should not be elevated to the status of a real covenant running with the land, regardless of the authors’ intent. Rather, such neighborhood agreements that are not economically justified should be mere personal contracts, analyzed and enforced as such. Any non-covenant provisions of a neighborhood agreement may (if they meet the formation requirements of contract law) create *in personam* obligations among the contracting parties. And the breach of these obligations would give rise to a claim for contract damages. But these terms would not run with the land nor would they be specifically enforceable. This approach would preserve the value of community covenants without allowing either the CIC structure or the “touch and concern” limitations on covenant-making to unduly encroach onto residents’ autonomy.

C. Solving the Constitutional Conundrum

Private regulation of certain personal freedoms generates popular outrage.²³⁷ Courts have upheld association restrictions on

behaviors that may generate cost externalities. One example is smoking. *See, e.g.,* Ezra, *supra* note 151.

²³⁷ *See* DILGER, *supra* note 106, at 135–41; MCKENZIE, *supra* note 29; Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883 (1988); Paula A. Franzese, *Does It Take A Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553, 562 (2002); Laura Castro Trognitz, “*Yes, It’s My*

free speech,²³⁸ but public opinion backlash has been substantial. CIC restrictions on religious displays and practices have generated critical scholarship.²³⁹ And rights of persons to privacy and autonomy within their own homes have been fervently defended.²⁴⁰ Although “constitutional” violations are often asserted by discontented CIC members,²⁴¹ absence of state action is usually fatal to such claims.²⁴² Constitutional jurisprudence with respect to CICs is a bit of a mess—emotional outliers make for bad law—and Supreme Court precedents can be misleading.²⁴³ This has led to disparate state law treatment of personal freedoms in community covenant contexts.²⁴⁴ The tension in the law with respect to constitutional freedoms and CIC functions needs to be resolved.

Castle,” 30 A.B.A. J., June 2000, at 30; Tim Vanderpool, *But Isn’t This My Yard?*, CHRISTIAN SCI. MONITOR (Aug. 18, 1999), <http://www.csmonitor.com/1999/0818/p2s2.html>; Brian L. Weakland, *Condominium Associations: Living Under the Due Process Shadow*, 13 PEPP. L. REV. 297, 299 (1986).

²³⁸ *Midlake on Big Boulder Lake Condo. Ass’n v. Cappuccio*, 673 A.2d 340, 350 (Pa. Super. Ct. 1996) (holding that the owners “contractually agreed to abide by the provisions in the Declaration at the time of purchase, thereby relinquishing their freedom of speech concerns regarding placing signs on this property”).

²³⁹ *E.g.*, Angela C. Carmella, *Religion-Free Environments in Common Interest Communities*, 38 PEPP. L. REV. 57 (2010); Amanda Hopkins, Note, *What’s Wrong with My Nativity Scene?: Religiously Discriminatory Restrictive Covenants in New York*, 13 RUTGERS J.L. & RELIGION 415 (2012). *See also supra* notes 60–61 and accompanying text.

²⁴⁰ *See, e.g.*, Arabian, *supra* note 133.

²⁴¹ Hyatt, *Common Interest Communities*, *supra* note 67, at 338–39 (discussing the tendency to claim violation of constitutional rights in CIC governance).

²⁴² *See supra* notes 51–56 and accompanying text; *see also* Lisa J. Chadderdon, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21 J. LAND USE & ENVTL. L. 233, 240 (2006).

²⁴³ *See Shelley v. Kraemer*, 334 U.S. 1 (1948); *Marsh v. Alabama*, 326 U.S. 501 (1946).

²⁴⁴ *See HYATT & FRENCH*, *supra* note 2, at 114–55; Hyatt, *Common Interest Communities*, *supra* note 67, 338–42.

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Proposed solutions to the CIC constitutional conundrum fall into two general categories. One approach is to treat CIC associations as if they were public government units, thereby giving residents protection through the First Amendment and other constitutional rights against community interference.²⁴⁵ This approach is problematic and creates worrisome precedents, as evidenced by the substantial judicial resistance to analogizing private groups to public actors.²⁴⁶ The second, and preferable, approach is a legislative solution—enact a “Bill of Rights” for homeowners in CICs.

Professor Susan French was among the first to suggest a homeowners’ bill of rights solution to the constitutional governance gap in CICs.²⁴⁷ Professor French conceived of this quasi-constitutional guaranty of personal freedoms as being a provision included in the governing documents of the CIC.²⁴⁸

²⁴⁵ See, e.g., Siegel, *The Constitution and Private Government*, *supra* note 106; Adrienne Iwamoto Suarez, *Covenants, Conditions, and Restrictions on Free Speech? First Amendment Rights in Common Interest Communities*, 40 REAL PROP. PROB. & TR. J. 739 (2006).

²⁴⁶ See, e.g., *Hudgens v. NLRB*, 424 U.S. 507, 516 (1976) (holding that private property can only be treated as if it were public “when the property has taken on *all* the attributes of a town” (emphasis in the original)); *Illinois Migrant Council v. Campbell Soup*, 574 F.2d 374 (7th Cir. 1978) (illustrating how difficult it is to prove that private property has “all” aspects of a town); *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978) (explaining that state regulation alone does not constitute state action); *NCAA v. Tarkanian*, 488 U.S. 179 (1988) (holding that regulatory power over an entity does not render acts of that entity susceptible to Constitutional scrutiny); *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987) (same). For discussions of the limits of state action application to private communities, see G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333 (1997); Katharine Rosenberry, *The Application of the Federal and State Constitutions to Condominiums, Cooperatives and Planned Developments*, 19 REAL PROP. PROB. & TR. J. 1 (1984).

²⁴⁷ See Susan F. French, *The Constitution of a Private Residential Government Should Include a Bill of Rights*, 27 WAKE FOREST L. REV. 345, 350 (1992).

²⁴⁸ *Id.*

More recently, groups have called for state legislatures to enact a homeowners' bill of rights that would apply to all CICs in the state.²⁴⁹ The National Conference of Commissioners on Uniform State Laws has considered including a bill of rights for homeowners in CICs as part of its UCIOA revision.²⁵⁰ State legislators could add great value by undertaking to identify and guaranty important individual rights in the context of private CIC governance. Statutory protection could solve the issue of to what extent CIC governance can be analogized to public governance. Creating special legislative protection for owners in CICs would not only address the most emotionally charged topics of CIC regulation (and siphon off the hard cases that make bad law) but would also bring clarity to the contentious issue of constitutional applicability to CIC governance.

CONCLUSION

Commentators and courts routinely consider the purchase of a home in a CIC as a conscious, voluntary choice to be bound by the applicable neighborhood covenants. Based on this assumption, CIC covenants and rules promulgated thereunder are treated presumptively enforceable, just like any other contract. The realities of home-purchasing decisions and the CIC creation process cast significant doubts on this approach. Although courts claim that in enforcing CIC covenants they are upholding neighborhood desires, in fact, the terms of community covenants may not necessarily be expressions of community preference. The original form of community covenants are imposed by developers

²⁴⁹ The AARP is promoting a Bill of Rights for Homeowners Associations. The proposed Bill of Rights includes "the right to resolve disputes without litigation," the right to be informed of any changes to the rules, and "the right to oversight of associations and directors." For a summary of the proposed bill, see *A Bill of Rights for Homeowners in Associations*, IN BRIEF (AARP Pub. Policy Inst., Washington, D.C.), July 2006, at 1-2.

²⁵⁰ See *Common Interest Ownership Act*, UNIFORM LAW COMM'N, <http://www.uniformlaws.org/ActSummary.aspx?title=Common%20Interest%20Ownership%20Act> (last visited Mar. 16, 2014).

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at the direction of municipalities and mortgage market actors, not elected by the residents themselves. Furthermore, CIC restrictive covenants are perpetual, mandatory, non-negotiable requirements of owning a home in the community. And even if buyers actually know, understand, and accept the content of recorded covenants at the time of purchase, the content of neighborhood rules may thereafter change in ways unforeseeable by a purchaser and essentially unconstrained by courts or constitutions. Members can opt out of this system of private regulation—but only by selling their home.

The solution to the contract-covenant disconnect is to recognize that recorded CC&Rs that impose neighborhood obligations are not, in fact, simple contracts. CIC governance is founded on and impacts three areas of the law: contracts, property, and constitutional governance. The proper judicial conception of CIC covenants and rulemakings, then, must draw upon all three of these areas by requiring a bona fide manifestation of assent to be bound, by appropriately limiting the substantive scope of neighborhood covenants, and by protecting homeowner rights from governmental overreaching.

First, a higher consent threshold is vital. In the context of CIC covenants, the contractual temporal autonomy paradox is augmented. Recorded declarations are non-negotiable contracts of adhesion, and as such, it is unlikely that buyers—by the mere act of purchase alone—have truly, voluntarily consented to the obligations. A CIC homebuyer is not a “Ulysses,” deliberately choosing to be bound in order to limit future action (for his own benefit).²⁵¹ Rather, a CIC homebuyer is bound without her deliberate election and is subject to terms she has no hand in crafting and no choice but to accept. Her supposed manifestation of assent is the purchase of a home, and she cannot buy that particular piece of property without acquiescing to the imposed terms.

In other contexts, lack of buyer input with respect to adhesive

²⁵¹ In *THE ODYSSEY*, Ulysses tied himself to the ship’s mast in order to restrain himself from reacting to the sirens’ song. See Winokur, *supra* note 105, at 50 (explaining contractual obligation with reference to this metaphor).

contract terms is rendered less objectionable because market prices and market choices reflect general consumer preferences and values among varying options.²⁵² But in the context of CICs, the lack of variation among CIC forms and the lack of non-CIC housing choices in several parts of the country undermine these market checks.²⁵³ In addition, a homebuyer usually comparison-shops with respect to the real property and not with respect to associated covenant terms. Furthermore, CIC covenant terms may not even be made available to or reviewed by a buyer until closing (if at all). Providing a copy of CC&Rs only at closing renders homebuyer “consent” specious. At residential home closings, the homebuyer lacks both time and the benefit of counsel to assist in navigating the often lengthy and complicated CIC declaration, bylaws, and associated rules. Even when a purchaser is aware of the content of the applicable CIC covenants prior to closing, it is still pure fiction to claim that the owner manifests her “choice” to be obligated thereunder when she closes the home purchase. A homebuyer chooses *the property* and merely acquiesces to associated covenants, most likely without even knowing or understanding what these covenants require.

Combatting lack of true homeowner assent must be supplemented by limitations on CIC covenant scope and legislative protections of homeowner rights. These protections are

²⁵² While limitations on autonomy may be value-detracting, most theorists, courts and developers see a counterbalance in the ability of owners to have input into controlling the autonomy of their neighbors in turn. In addition, the CIC ownership structure permits shared amenity upkeep that makes such amenities, and perhaps homeownership in general, more affordable. See *Nahrstedt v. Lakeside Vill. Condo. Ass’n*, 878 P.2d 1275, 1282 (1994) (“Notwithstanding the limitations on personal autonomy that are inherent in the concept of shared ownership of residential property, common interest developments have increased in popularity in recent years, in part because they generally provide a more affordable alternative to ownership of a single-family home.”).

²⁵³ See Franzese & Siegel, *supra* note 50, at 1121 (“[I]t is difficult to conceive of a more heavy-handed public interference in the private marketplace than a government rule or practice that mandates a highly particularized form of governance on new housing development.”).

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necessary because (a) the homeowners are not the authors of community covenant content, and (b) the impact of overreaching *covenants* extends far beyond the impact of overreaching terms in *contracts*.

Unlike most contracts, governments and government-related entities shape the content of CIC declarations to a far greater degree than do preferences of the contracting parties—here the neighborhood residents. To obtain zoning approval, developers craft CC&Rs that address municipal priorities, such as creating privately funded community amenities and upkeep.²⁵⁴ To create communities that will qualify for FHA insurance and GSE secondary market purchases, developers include provisions to meet enumerated underwriting criteria, such as limitations on the percentage of non-owner-occupants in a neighborhood.²⁵⁵ When the CC&Rs are crafted and recorded, it is the desires of these authorities that influence their content, not the theoretical and unarticulated preferences of unidentified future buyers.²⁵⁶ This fact alone argues for the implementation of some “bill of rights” type of protection for the parties who are thus governed.

In addition, unlike typical contracts, CIC covenants presumptively exist in perpetuity.²⁵⁷ The durability of covenants makes it vital to reconsider subject matter limitations on CIC governance and spheres of homeowner protection. Covenants

²⁵⁴ See *id.* at 1112 (asserting that “government policy aimed at load-shedding municipal functions and services onto newly created CICs” drives the content of CC&Rs); see also Siegel, *The Constitution and Private Government*, *supra* note 106 (claiming that governments dictate CIC formation and content); *supra* notes 64, 72, 149, 151 and accompanying text (discussing the concept of privatization of public function).

²⁵⁵ See *supra* notes 152–57 and accompanying text. The Restatement takes the position that the only permissible leasing restrictions should be those required by institutional lenders. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.7 cmt. b (2000).

²⁵⁶ Franzese & Siegel, *supra* note 50, at 1113; Grassmick, *supra* note 2, at 212.

²⁵⁷ Although some early-generation CICs and CICs in Louisiana do have expiration dates, most CIC covenants today continue indefinitely unless terminated by supermajority (sometimes unanimous) vote. See *supra* note 126.

should not be permitted to achieve in perpetuity every end that would be achievable among original contracting parties. To run with the land, a covenant should be justified by an economic need—the problem of incompatible uses, negative externalities, or free-riding, for instance. Only when covenant content supports the legitimate function of CIC governance should the covenant be enforceable as a servitude and not a mere personal contract.

Third, in addition to mandating a higher threshold for owner consent and judicially limiting the scope of servitude provisions, states should act to protect important owner and occupant rights through legislation. Consent alone cannot protect future generations of CIC owners from being bound by the value judgments of today.²⁵⁸ For example, Professor Korngold explained that even though proponents of perpetually enforceable servitudes argue that dead hand control is rendered unobjectionable by adequate notice,²⁵⁹ “this begs the question of whether the deprivation of individual opportunity and autonomy is itself ‘fair.’”²⁶⁰ For example, notice of a racial segregation covenant would not justify its enforcement.²⁶¹ Similarly, notice that a covenant regime exists prior to purchase of a property in a neighborhood should not necessarily justify the enforcement of private regulations that impinge on individual rights or are

²⁵⁸ Dead hand control is perhaps the “most compelling reason” that courts should be wary of treating freedom of contract as dispositive in determining servitude enforceability. Korngold, *Privately Held Conservation Servitudes*, *supra* note 27, at 457.

²⁵⁹ Susan F. French, *Toward A Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1282 (1982).

²⁶⁰ Korngold, *Privately Held Conservation Servitudes*, *supra* note 27, at 457. *See also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 (2000) (noting that duration of the restraint is an important consideration); Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and A Troubled Future*, 73 DENV. U. L. REV. 1077, 1098 (1996) (“Generally, courts’ willingness to accept restrictions that limit alienability has been inversely proportional to the duration of the restriction.”).

²⁶¹ Korngold, *Privately Held Conservation Servitudes*, *supra* note 27, at 457.

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unjustifiable based on economic exigency. Notice is not synonymous with choice.

Subject matter constraint is also warranted because servitudes are specifically enforceable; an owner cannot choose to pay expectation damages rather than comply.²⁶² A breach, even numerous breaches, of an obligation does not terminate the restriction. And although a supermajority of owners can amend or perhaps even terminate CIC restrictions, these options are cumbersome and practically difficult to achieve.²⁶³ When it comes to CIC obligations, opting out of particular covenants is not a possibility and neither is exit by breach. The only way to escape obligations imposed by a CIC regime is to transfer ownership or mobilize a sufficient number of community members to vote for covenant revisions.²⁶⁴ Some CICs require near unanimity to change or eliminate the governance regime, and this poses a collective action problem that grows with the size of the subject community.²⁶⁵

There is a clear disconnect between freedom of contract ideals and the realities of CIC covenant formation. Reflexive enforcement of CIC governing provisions based on contract principles perpetuates the myth of knowing consent by owners to

²⁶² See *supra* notes 195–99 and accompanying text.

²⁶³ See Winokur, *supra* note 105, at 35–37 (explaining the practical difficulties involved in amending CIC covenants). Several state enabling statutes provide that a CIC can only be dissolved through unanimous vote of the members. *E.g.*, ARIZ. REV. STAT. ANN. § 33-556 (Supp. 1964); MASS. GEN. LAWS ch. 183A, § 19 (Supp. 1964).

²⁶⁴ CICs are plagued with participation problems that transcend even issues of lack of participation in democracies generally. See generally David C. Drewes, Note, *Putting the “Community” Back in Common Interest Communities: A Proposal for Participation-Enhancing Procedural Review*, 101 COLUM. L. REV. 314, 315 (2001); Ross Thomas, Note, *Ungating Suburbia: Property Rights, Political Participation, and Common Interest Communities*, 22 CORNELL J.L. & PUB. POL’Y 205 (2012).

²⁶⁵ See Steven A. Ramirez, *The Special Interest Race to CEO Primacy and the End of Corporate Governance Law*, 32 DEL. J. CORP. L. 345, 383–84 (2007) (concluding that the collective action problem increases with group size); Sterk, *supra* note 10, at 617 (explaining the problem of holdouts and collective action costs in the context of CIC amendment).

be bound to these provisions. The reality of CIC covenant creation suggests that courts and legislatures should take a more proactive approach to protect owners from covenant overreaching and balancing competing public policies. True manifestation of knowing assent to CIC governance—covenant terms *and* governing processes—should be prerequisite to buying into a community. And the law should impose subject matter limitations on the scope of CIC governance, both through limiting what obligations can become servitudes and by legislatively protecting important individual rights.