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MINORITY PROTECTION IN RESIDENTIAL PRIVATE GOVERNMENTS

STEWART E. STERK*

INTRODUCTION

What services should government provide? How should they be financed? What lifestyle restrictions should government impose? These questions often dominate the agenda in federal, state, and local politics, and the extensive media coverage they receive reflects that domination. Although less extensively reported, the same questions dominate the agendas of privately created residential governments—homeowner associations, condominium associations, and cooperative associations. These governments affect the lives of the millions of Americans who live or do business in common interest communities.

Community association decisions, like other government decisions, often provoke sharp disagreement. Residents who fail to persuade the association’s governing body sometimes look to courts for vindication. In this respect, these residents differ little from citizens and groups that are dissatisfied with decisions made by Congress or by state or municipal legislatures.

How and why democracy should be constrained to protect minorities—those whose views have “lost” in the democratic process—has been a central focus of American constitutional scholarship. What is clear is that

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our constitutional scheme protects members of minority groups against untrammeled majority rule. To take two obvious examples, the First Amendment\(^3\) protects unpopular religious and political groups against majoritarian oppression, and the Takings Clause\(^4\) protects property owners against legislation that would single them out for particularly unfavorable treatment.

What implications does our discomfort with majoritarianism have for private residential governments? On one view, none. Because community associations—unlike cities, states, and nations—are almost invariably formed with the unanimous consent of all members, dissident residents have no complaint if they dislike decisions reached in accordance with institutional arrangements to which they have explicitly agreed. On this view, when members of a community association contract to have disputes resolved democratically, there is little reason for courts to interfere with the agreed upon process.\(^5\)

Although the contract argument against judicial intervention in community association decisions has considerable force, it is not a show-stopper. First, our legal regime does not sanction absolute freedom of contract. Contract enforcement is the norm in our system, at least in part because enforcement simultaneously promotes personal autonomy, facilitates shifting of resources to higher-valuing users, and provides a basis, rooted in reciprocity, for reaching just results.\(^6\) But when particular contracts, or particular categories of contract, do not advance the goals that underlie contract enforcement, doctrines often emerge to counteract the norm. The unconscionability doctrine in contract law\(^7\) and nonwaivable warranty of habitability in landlord-tenant law\(^8\) are prominent examples.

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\(^3\) U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

\(^4\) Id. amend. V ("No . . . private property [shall] be taken for public use, without just compensation.").

\(^5\) See Richard Epstein, Covenants and Constitutions, 73 Cornell L. Rev. 906, 922-25 (1988) (arguing that courts should respect decision making structures created by unanimous private agreement, but conceding some room for judicial gap-filling).


\(^7\) See U.C.C. § 2-302 (1996) (providing that a court may refuse to enforce a contract it considers to have been unconscionable at the time it was made); see also Arthur A. Leff, Unconscionability and the Code: The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 485 (1967) (recounting the "misdrafting" of U.C.C. § 2-302 as "statutory pathology").

Second, and more important, all contracts require interpretation. In relational contracts intended to endure for a substantial period, parties rarely are able to anticipate and explicitly resolve all disputes that might arise. In the common interest community context, for instance, does a delegation of rulemaking power to an association include a delegation of power to require suits and ties in common areas, or to require residents to vote Democratic in municipal elections? Because parties to contracts rarely would confer unbridled power on contract partners, courts typically construe contracts to confine discretion, even when the contract itself includes no limiting language. The obligation to deal "in good faith" reflects this unwillingness to permit the exercise of unbridled power.

The appropriate role of contract in allocating power between majority and minority has received considerable attention in the corporate literature. In publicly held corporations, the majority of shareholders, through the management it selects, typically has broad discretion to act even in ways that displease minority shareholders. Discretion is not unlimited, however; courts and commentators alike acknowledge that management may not simply shift wealth from some shareholders to others.

Unlike shareholders in public corporations, who generally are focused on a single goal—maximization of share price—community association residents tend to have varied concerns. Moreover, community association residents typically hold less diversified portfolios than corporate shareholders. These differences counsel against transplanting rules from the corporate context to the community association context.

The problems facing community association residents more closely resemble those confronting shareholders in closely held corporations, for whom share price is rarely a complete measure of investment value, and who, like community association residents, tend to have a substantial percentage of their assets tied up in a single investment. When closely held corporation disputes arise, at least some courts have been willing to protect minority shareholders against freeze-outs. The protection has not been indiscriminate; courts recognize that some business purposes can only be accomplished at some cost to minority shareholders. Moreover, courts afford protection to minority shareholders only against decline in

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9 Compare Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 234-36 (1991) (arguing that in the case of close corporations, courts should enforce shareholder contracts about governance rules), with Melvin A. Eisenberg, The Structure of Corporation Law, 89 COLUM. L. REV. 1461, 1466 (1989) (arguing that courts should be able to overrule bargains "when necessary to prevent opportunism and protect probable fair expectations").

10 Cf. Easterbrook & Fischel, supra note 9, at 125 ("A requirement that all investors receive at least the market value of their positions prior to the transactions would be a useful rule of thumb for separating beneficial deals from potentially harmful ones.").
market value, not loss of other benefits derived from the corporate association.

Similarly, in the community association context, a regime that protected minority residents against all losses would result in organizational paralysis. Instead, analysis suggests—and case law generally supports—protection against redistribution of market value, but not against other harms suffered by unit owners.

This Article explores the appropriate limits on majority rule in community associations. Part I provides an introduction to current law. Part II surveys the reasons for protecting minorities that have emerged in the public law literature. Part III establishes that contract law rarely leaves parties with unconstrained discretion, while Part IV outlines the limits corporate law imposes on majoritarian actions that adversely affect minority shareholders. Building on insights derived from other areas of law, Part V develops a model for minority protection in community associations.

I. COMMUNITY ASSOCIATION STRUCTURE

A. Types of Community Associations

Developers have used a variety of legal frameworks to govern interdependent communities. Many residential buildings, especially in New York City, are held in cooperative ownership. Individual residents do not “own” their apartments, but instead own shares in the cooperative corporation, which owns the building and issues a “proprietary lease” to each resident-shareholder’s apartment. Elsewhere, condominium ownership is more prevalent.11 Moreover, many owners of detached single-family homes are bound together by servitudes which require them to maintain facilities shared by a group of neighbors.12 In recent years, the “common interest community” label has become used with increasing frequency to describe all arrangements in which unit owners are obligated to pay for common services or for maintenance of common facilities.13

11 The Community Associations Institute estimates that in 1990, there were 4,847,921 condominium units in the United States and 824,000 cooperative units. See COMMUNITY ASS’NS INST., supra note 2, at 13.

12 Indeed, the Community Associations Institute estimates that as of 1990, 42% of community associations were condominiums, 7% were cooperatives, and the remaining 51% were other forms of planned communities. See id.

13 See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.2 (Preliminary Draft No. 12, Sept. 20, 1995):

A common interest community is a real estate development or neighborhood in which the individually owned units, lots, or parcels are burdened by a servitude that imposes an obligation

(a) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the owners of the individually owned property; or

(b) to pay dues or assessments to an association that provides services or facili-
Interdependence among neighbors is significantly greater in New York City cooperatives than it is in most suburban homeowner associations. As a result, New York co-op boards generally exert considerable influence, not only over matters of finance and design, but even over selection of apartment occupants. By contrast, in some suburban homeowner associations, boards are responsible for maintenance of recreational facilities, but little else. Condominium associations generally split the difference, with more extensive powers than suburban homeowner associations, but without power to veto prospective purchasers.

Despite the marked differences among common interest communities, a number of similarities emerge. In each form of common interest community, a community association enjoys a measure of financial control over residents. Community associations have some power to enforce lifestyle restrictions and to allocate benefits and burdens among members of the common interest community. These powers are generally granted—and often limited—by the documents governing the common interest community.

B. Governing Documents

Most common interest communities are created by a single developer, not by agreement among neighboring landowners. Before a developer sells off any individual units in a common interest community, the developer typically drafts and records a "Declaration of Covenants, Conditions and Restrictions" ("CC&Rs"), a "Declaration" ("Declaration") or "Master Deed" designed to bind each unit purchaser in the community. The Declaration generally imposes use restrictions on unit owners and creates an association with power to levy assessments against the unit owners and to make rules. In addition, the Declaration typically provides for its own amendment. The developer also drafts bylaws for the association to property held or enjoyed in common, or to the individually owned property, or that enforces the servitudes burdening the property in the development.

The comment to the section notes that condominium and cooperative developments fall within the chapter's scope. See id. § 6.2 cmt.


15 See generally Robert G. Natelson, Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association, 51 OHIO ST. L.J. 41, 47-48 (1990) (noting that the level of community association power tends to increase as units become more interdependent).

16 See generally WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 355-62 (2d ed. 1988) (discussing the theory and practice of drafting CC&Rs for community associations); see also Natelson, supra note 15, at 44-47 (discussing functions of property owners' associations).

17 See HYATT, supra note 16, at 370-71 (providing a sample table of contents for a condominium declaration); id. at 373-77 (providing the same for a homeowner associ-
ciation. These typically provide for a board of directors and for election of the board's members. The bylaws also define the scope of the board's power, and specify the procedures the board must follow in its rulemaking and servitude enforcement capacities. In addition, bylaws typically include an amendment procedure.\textsuperscript{18}

Typically, the governing documents also include an initial set of rules for the development. Once the development becomes operational, the association's board may amend the rules, enact new ones, and levy assessments on the unit owners. If a particular unit owner fails to comply with the board's rules or fails to pay assessments, the board may act, in accordance with the bylaws, to enforce the rules or assessments.

C. Source and Enforceability of Owner Obligations

Within the structure of the common interest community, use restrictions and assessment obligations may emanate from several sources: the Declaration, association enactments or rules, or, less frequently, association bylaws. Courts are far more likely to enforce use restrictions that appear in the recorded Declaration than they are to enforce restrictions imposed by subsequent vote of the association's board. This subpart explores the relationship between the source of a restriction and its judicial enforcement.

1. Express Restrictions in the Declaration at the Time of Purchase

A restriction included in a condominium Declaration or in a subdivision's CC&Rs looks much like a common law easement or covenant. By the terms of the restriction, each landowner makes an express promise, for the benefit of one or more neighbors, to take some action or to abstain from taking some action. Although historically a variety of hoary requirements (including "touch or concern" and "privity of estate") impeded enforcement of such promises, those requirements increasingly have been relegated to the dustbin. Indeed, the current Restatement of
Property declares all servitudes to be valid unless they contravene constitutional or statutory rights or violate public policy.\textsuperscript{19}

Since 1938, when the New York Court of Appeals decided \textit{Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank},\textsuperscript{20} American courts have, with increasing regularity, enforced covenants requiring payment of annual dues or assessments for the maintenance of common facilities.\textsuperscript{21} The few recent cases in which courts have refused to enforce assessments generally have been cases in which unit owners challenged an assessment imposed by board action in a circumstance in which the Declaration itself provided little guidance about the potential scope or size of the assessment.\textsuperscript{22} In other words, when the Declaration imposes a clear financial obligation on a unit owner, courts hold the unit owner to that obligation.\textsuperscript{23} Indeed, for condominium owners, the obligation to pay annual assessments generally derives from statute.\textsuperscript{24}


\textsuperscript{20} 15 N.E.2d 793 (N.Y. 1938).

\textsuperscript{21} \textit{See, e.g., Streams Sports Club, Ltd. v. Richmond, 457 N.E.2d 1226, 1232 (Ill. 1983) (upholding an assessment for recreational facilities as a binding covenant running with the land); Regency Homes Ass'n v. Egermayer, 498 N.W.2d 783, 793 (Neb. 1993) (finding that an assessment for recreational facilities "touch[e]d and concern[e]d" land and was therefore enforceable); Harbison Community Ass'n v. Mueller, 459 S.E.2d 860, 861 (S.C. Ct. App. 1995) (finding enforceable an assessment for maintenance of common facilities); Inwood North Homeowners' Ass'n v. Harris, 736 S.W.2d 632, 637 (Tex. 1987) (finding a covenant to pay an annual assessment to a homeowners' association enforceable as a lien superior to Texas homestead rights).}

\textsuperscript{22} \textit{See Petersen v. Beekmere, Inc., 283 A.2d 911, 923 (N.J. Super. Ct. Ch. Div. 1971) (finding a covenant to pay dues to be too vague when no constraint existed on association's power to levy assessments); Beech Mountain Property Owners' Ass'n v. Seifart, 269 S.E.2d 178, 184 (N.C. Ct. App. 1980) (finding a covenant to pay assessments to be too indefinite to determine whether particular assessments were authorized); Ebbe v. Senior Estates Golf & Country Club, 657 P.2d 696, 697 (Or. Ct. App. 1983) (refusing to enforce an initiation fee introduced in the bylaws of a country club when the Declaration mentioned no such fee but merely required owners to become members of the club). \textit{But see } Raintree Corp. v. Rowe, 248 S.E.2d 904, 909 (N.C. Ct. App. 1978) (holding that a covenant to pay country club dues did not "touch and concern" the land and thus was not enforceable as a real covenant, even when the obligation to pay such dues was included in the Declaration). \textit{Raintree} apparently is limited to dues for membership in off-premises country clubs. Thus, in \textit{Four Seasons Homeowners Ass'n v. Sellers}, 302 S.E.2d 848 (N.C. Ct. App. 1983), the court, distinguishing \textit{Raintree}, enforced a covenant for the maintenance of recreational facilities. \textit{See id. at 853.}

\textsuperscript{23} \textit{See generally} Ellickson, \textit{supra} note 1, at 1528-29 (arguing that courts should not evaluate the reasonableness of restrictions found in a Declaration).

\textsuperscript{24} \textit{See generally} \textit{Unif. Condo. Act} § 3-115 (1977) (providing for annual assessments for common expenses); \textit{id.} § 3-116 (providing for lien for assessments). The UCIOA includes parallel provisions for all common interest communities, including
Similarly, courts typically have enforced use restrictions included in the Declaration, even against challenges that the restrictions inhibited free speech or undermined personal autonomy. They have almost invariably enforced Declaration provisions requiring unit owners to obtain approval from an architectural control committee before making specified improvements. They have upheld Declaration restrictions against signs, despite free speech and antitrust challenges. And, particularly in the both condominiums and single family home communities linked by a community association. See UNIF. COMMON INTEREST OWNERSHIP ACT §§ 3-115, 3-116 (1994).

To say that courts enforce covenants requiring approval by architectural control committees is not to say that courts abstain from reviewing decisions made by those committees. See, e.g., Westfield Homes, Inc. v. Herrick, 593 N.E.2d 97, 102 (Ill. App. Ct. 1992) (finding a homeowners' association's architectural control covenant to be unreasonable); Indian Hills Club Homeowners Ass'n v. Cooper, No. 01A01-9507-CH-00319, 1995 Tenn. App. LEXIS 832, at *13 (Tenn. Ct. App. Dec. 29, 1995) (concluding that a committee unreasonably exercised its power under an architectural control covenant).


See Fran Welch Real Estate Sales, Inc. v. Seabrook Island Co., 809 F.2d 1030, 1033 (4th Cir. 1987) (rejecting an antitrust challenge to a restriction on “for sale” signs); Tansey-Warner, Inc. v. East Coast Resorts, Inc., No. 720, 1978 WL 22460, at *3 (Del. Ch. Nov. 27, 1978) (rejecting a free speech challenge to a sign prohibition in a condominium Declaration); Knolls Ass'n v. Hinton, 389 N.E.2d 693, 697 (Ill. App. Ct. 1979) (enforcing a Declaration prohibition on signs); Murphy v. Timber Trace Ass'n, 779 S.W.2d 603, 606 (Mo. 1989) (rejecting free speech and antitrust challenges to a Declaration restriction on hours during which “for sale” signs could be posted); Harrison v. Tucker, 342 S.W.2d 383, 384 (Tex. App. 1961) (enforcing a sign prohibition while refusing to enforce a racially restrictive covenant). No litigation appears to have arisen over a unit owner's posting of political signs in violation of a sign prohibi-
case of condominium developments, courts have enforced Declaration restrictions prohibiting or restricting ownership of pets.  

Courts are less likely to enforce Declaration restrictions in one important class of cases: those in which the restriction excludes some class of potential residents. Usually, statutes command that such restrictions not be enforced. The 1988 amendments to the federal Fair Housing Act preclude enforcement of age restrictions, subject to a narrow exception for housing for the aged. Even in the absence of an express statute, courts have been reluctant to enforce restrictions that would, for example, exclude group homes for physically or mentally disabled individuals.

This dichotomy—between enforcement of non-exclusionary restrictions and non-enforcement of exclusionary restrictions—does not capture doctrine perfectly, but it comes close. Moreover, the dichotomy is consistent with a vision of servitudes that emphasizes the fairness and efficiency of holding homeowners to their bargains. A homeowner who agrees, upon purchasing a home, to abide by express, easily discoverable restrictions should not be heard to complain when her neighbors seek to enforce those restrictions against her. At the same time, the fact that the developer—whose primary interest lies in marketing the units—included restrictions in the Declaration provides strong evidence that the development in a common interest community's Declaration. However, the same contractual rationale for rejecting free speech arguments against prohibitions of commercial signs would also apply in the context of political signs.


28 The Fair Housing Amendments Act of 1988 prohibits discrimination on the basis of "familial status" in the sale or rental of housing. See 42 U.S.C. § 3604 (1994). The statute was designed, in part, to prohibit discrimination against families with children, and the statute has been applied to preclude enforcement of age restrictions in restrictive covenants. See Lanier v. Fairfield Communities Inc., 776 F. Supp. 1533, 1537 (M.D. Fla. 1990) (sustaining a challenge to a residential community's exclusion of persons under 18 because the community did not qualify as housing for older persons under the Fair Housing Act). The statute does provide a narrow exception for providers of "housing for older persons." See 42 U.S.C. § 3607(b) (1994); see also Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 796 F. Supp. 1499, 1503-06 (S.D. Fla. 1992) (applying the exception to a residential subdivision). Of course, even before the 1988 amendments, it was clear that racial restrictions were unenforceable. See 42 U.S.C. § 3604 (enacted 1968).

29 See, e.g., Crane Neck Ass'n v. New York City/Long Island County Servs. Group, 460 N.E.2d 1336, 1337 (N.Y. 1984) (holding that public policy prevented enforcement of a restrictive covenant excluding homes for the mentally retarded).
er believed that the community as a whole would be more valuable with the restrictions than without. If the developer's surmise turns out to be wrong, and a restriction makes the units less attractive to potential purchasers, the developer will have to pay for the mistake in the form of reduced purchase prices for the units. Market forces would then discourage other developers from repeating the mistakes of their predecessors. By contrast, the terms of an agreement between developer and homeowners, however bargained for by the parties, provide no answer to claims of unfairness by third parties excluded from the development.30

2. Restrictions Created by Declaration or Bylaw Amendment, or by Board Action

The contract argument for enforcing a Declaration's non-exclusionary servitudes could, of course, be extended to all non-exclusionary servitudes—even those enacted after the homeowner purchases his unit. When a homeowner buys a unit in a common interest community, the homeowner buys not only subject to express restrictions in the Declaration, but also subject to the Declaration's provisions for amendment and to the creation and operation of a community association. Under the contract theory, the homeowner should not be heard to complain when, as anticipated by the documents, the association imposes a new restriction by amending the Declaration, by amending its bylaws, or by ordinary board action.31 To the extent the homeowner has agreed to submit to the association's "jurisdiction," one might argue, the association's determination should be final. Yet, matters are not so simple.

a. Disputes about the Scope of Association Power

Even when the Declaration confers rulemaking power on the association,32 courts have invalidated association rules by finding them inconsistent with the Declaration's CC&Rs.33 Indeed, in those jurisdictions where it has been adopted, the Uniform Common Interest Ownership Act ("UCIOA") expressly limits an association's power, absent express authorization in the Declaration, to regulate "use of or behavior in" indi-

30 Similarly, the fact that all homeowners agreed to the restrictions provides less compelling evidence that the restrictions are efficient if the restrictions generate negative externalities.
31 Indeed, in many jurisdictions, statutes limit the power of associations to amend their Declarations, often requiring a supermajority for amendment. Cf. UNIF. COMMON INTEREST OWNERSHIP ACT § 2-117(a) (1994) (requiring a 67% vote).
individual residential units.\textsuperscript{34}

At the same time, courts in other cases have sustained association power to levy assessments beyond those authorized in the Declaration. For instance, in \textit{Lake Tishimongo Property Owners Ass'n v. Cronin},\textsuperscript{35} covenants limited annual assessments in a lake community to fifty-five cents per lake-front foot. An accumulation of sediments caused a majority of owners to support a one-time special assessment of $2.60 per front foot to pay for dredging the lake. The Missouri Supreme Court upheld the special assessment against the challenges of the minority, citing the necessity of the dredging operation.\textsuperscript{36} And, in \textit{Meadow Run & Mt. Lake Park Ass'n v. Berkel},\textsuperscript{37} a Pennsylvania court authorized an association to levy an assessment for repair of dams and roads, even though no deed covenant authorized the assessment.

Neither the cases requiring express authorization in the Declaration for an association's actions nor those cases permitting an association to exercise powers beyond those granted to it are inconsistent with the contract argument for enforcing newly created servitudes. Instead, courts in these cases purport to engage in a form of contract construction. When courts or legislatures limit association power to act, they surmise that the parties did not intend to confer broad authority on the association. When courts permit association action in the absence of express authorization, or even in direct conflict with express deed limitations, they conclude that the parties surely would have intended that the association be empowered to act.\textsuperscript{38}

\textsuperscript{34} See \textsc{Unif. Common Interest Ownership Act} § 3-102(c). Moreover, the \textsc{UCIOA} permits amendment of the Declaration to restrict permitted uses of or behavior in individual units only upon 80% approval. See \textit{id.} § 2-117(f); cf. \textit{Township III Condo. Ass'n v. Mulligan}, No. CV 92 50183 S, 1995 Conn. Super. LEXIS 749, at *8, *9 (Conn. Super. Ct. Mar. 13, 1995) (finding that a condominium board could not, by rule, prohibit use of washers and dryers within a condominium unit; such use restrictions must have been incorporated into the Declaration or bylaws); \textsc{Restatement (Third) of Property: Servitudes} § 6.7(4) (Preliminary Draft No. 12, Sept. 20, 1995).

\textsuperscript{35} 679 S.W.2d 852 (Mo. 1984) (en banc).

\textsuperscript{36} According to the court, 163 property owners, representing 1,976 votes, voted for the assessment, while 83 property owners, representing 928 votes, voted against the assessment. See \textit{id.} at 854. In upholding the special assessment, the court concluded that the operations were:

- both reasonable and necessary for the preservation of the property value of the more than 900 lots in the subdivision. Under the unique circumstances attending this case, our sense of fairness and justice compels us to enforce the clear equitable obligation of appellants to bear their share of the costs necessary for preserving the common property essential for continuation of the subdivision.

\textit{Id.} at 857.


\textsuperscript{38} See, e.g., \textit{id.} at 1026. As the \textit{Meadow Run} court observed:

This deed, while making no mention of an assessment, does put appellants on
When questions arise about the association's power to enact rules, the association often can avoid arguments about construction of the Declaration by amending the Declaration itself. Even that tactic, however, raises some construction questions.  

b. Disputes about Association Actions when the Association's Authority to Act is not Challenged

Even if a dissident unit owner does not question community association power to regulate on a particular issue, the owner may challenge a particular regulation. Courts do not simply dismiss such challenges by concluding that homeowners, who accepted the terms of association governance when purchasing the unit, have no cause to complain about democratically chosen association policies. Rather, courts examine the association's actions. They do not engage in de novo review of the wisdom of the association's action,  

but instead ask whether the board's action was "reasonable" or examine whether the association made a plausible notice that should an association of lot owners be formed in the future, they would be bound by any rules the association adopted concerning usage of development facilities. Implied in the existence of rules and regulations concerning usage of the facilities is the necessity for rules and regulations concerning maintenance of these facilities.

Moreover, in construing the original contract among unit owners, courts tend to exalt their own independent judgment over the judgment of the majority of unit owners. Even in those cases, like Lake Tishimongo and Meadow Run, in which courts sustain actions taken by an association's majority, the opinions are more concerned with establishing the necessity of the association's action than with paying homage to majority rule. And in other cases involving construction of Declaration language, courts evidence no tendency to defer to associations. For example, in Lake St. Louis Community Ass'n v. Leidy, 672 S.W.2d 381, 382, 383 (Mo. Ct. App. 1984), the court concluded that an association could not enjoin a landowner from parking an "eighteen-foot long Ford Holiday Ramblette Mini Motor Home" pursuant to a covenant prohibiting parking of "trucks or commercial vehicles, boats, house trailers, boat trailers, and trailers of every other description." See also Krein v. Smith, 807 P.2d 906, 907 (Wash. Ct. App. 1991) (construing a covenant prohibiting parking of "[b]oats, campers, vacation trailers, and so on" to cover motor homes, but treating the question as one of law).
"business judgment."42

More often than not, the association's action ultimately is sustained. But, of course, any scrutiny of association action increases litigation costs, especially because not all cases are resolved on summary judgment motions.43 Moreover, in a significant number of cases, the association loses, the court concluding that the association has acted unreasonably and that its action should be invalidated.

For instance, community associations frequently impose restrictions on the renting of individual units. Resident owners often object, for one reason or another,44 to the presence of transients within the community.45

At the same time, even resident owners recognize that at some time in the future they might need to rent out their own units. Because blanket prohibitions on renting often are unpopular, community associations develop compromise solutions. In Graham v. Board of Directors of Riveredge Village Condominium Ass'n,46 the court invalidated one such compromise as unreasonable. The association required that all rentals be for at least one month, and it doubled the $100 monthly maintenance assess-


43 See, e.g., Lyman v. Boonin, 635 A.2d 1029, 1032-33 (Pa. 1993) (refusing to grant summary judgment in dispute over association's parking policy); Gillman, 292 S.E.2d at 752 (refusing to grant summary judgment in a dispute over restrictions on trucks).

44 The two most common objections to transient occupants are: (1) financing for individual units is often difficult to obtain unless the development is substantially owner-occupied; and (2) renters, compared with owner-occupants, may have less incentive to observe association rules and to maintain the premises. See generally Hyatt, supra note 16, at 305-07 (describing restraints on the sale, lease, and occupancy of units within an association).

45 Cf. Laguna Royale, 174 Cal. Rptr. at 147 (invalidating an association's refusal to consent to transfer a unit to four separate time-share owners).

ment for any month during which a unit was rented. The court, in concluding that the restriction was unreasonable, noted that the condominiums were located in a tourist area catering to short-term vacationers.\textsuperscript{47}

Community associations often find it necessary to allocate benefits and burdens on some basis, and disaffected unit owners sometimes have been successful in challenging those allocations. \textit{Ridgely Condominium Ass'n v. Smyrniodis}\textsuperscript{48} furnishes a recent example. In a mixed-use condominium comprising 225 residential units and seven commercial units, the association enacted a bylaw banning access to the commercial units through the interior lobby, requiring access through the exterior entrances. Although the bylaw was enacted in response to security concerns, the court concluded that the bylaw was nevertheless unreasonable in light of the investments the commercial owners had made in their units.

Perhaps the largest class of cases in which courts have intervened to overturn community association actions involves challenges to architectural control committee decisions. Courts have refused to enforce design control decisions on the ground that either the committee could not articulate a sufficiently concrete standard for its decision,\textsuperscript{49} or, even when the committee was entirely clear about the criteria it imposed, simply because the court deemed the committee’s decision to be “unreasonable.”\textsuperscript{50}

c. \textit{Summary}

Even when the Declaration confers broad powers on the association, courts have intervened to overturn association decisions by concluding that the Declaration gave only limited powers to the association or that the association’s action was “unreasonable.” As a matter of interpreting the bargain homeowners make when they purchase their units, neither justification for judicial intervention is implausible. Few homeowners would believe that when purchasing their homes they surrendered unlim-

\textsuperscript{47} The court also indicated that the master deed did not confer on the association the power to regulate rentals, despite a provision stating that “[a]ny lease or rental agreement must be in writing and subject to the requirements and provisions of this Master Deed and the Association.” \textit{Id.} at *7 (emphasis added).


\textsuperscript{49} See, e.g., \textit{Young v. Tortoise Island Homeowners Ass'n}, 511 So. 2d 381, 384 (Fla. Dist. Ct. App. 1987) (overturning an association's disapproval of a building plan involving a flat roof, finding that review board's power to pass on aesthetics, harmony, and balance was deemed too personal and vague); \textit{Town & Country Estates Ass'n v. Slater}, 740 P.2d 668, 671 (Mont. 1987) (overturning a rejection of plans when committee could not articulate a design standard).

ited authority over their lives to a community association, and few would believe that they ceded to the association the power to act unreasonably. At the same time, neither justification is long on content. The scope of association power may not be unlimited, but how do we decide what that scope is? Why are courts better situated to make that decision than the majority of homeowners as represented by their association? What makes particular rules supported by a majority of homeowners unreasonable, other than a court's conviction that the rule ought not be enforced? Answering these questions requires an understanding of the potential evils of majority rule.

II. MAJORITY RULE AND ITS LIMITS

A. Why Majority Rule?

Much of our legal system—both public and private—is based on the assumption that collective decisions should be made by majority vote. All citizens are entitled to vote for a variety of public officials, and those elections are decided in favor of the candidates who garner the most votes. Similarly, when public issues are decided by referenda, the fate of the proposition is decided by majority vote. Within representative bodies, too, most issues are decided by majority vote. Even in government institutions supposedly more insulated from democratic processes—appellate courts, for example—decisions are made by majority vote.

The majority rule principle is not limited to government institutions. Corporate decisions, too, are generally decided by majority vote, whether that of shareholders or directors. And majority rule is the organizing principle for decision making in many other private organizations.

The natural question is why we should look to majority rule as a basis for making important social decisions. Few of us believe that important scientific questions should be resolved by majority rule. If 51% of the members of a calculus class concluded that the derivative of $3x^2$ was $5x$, should they be entitled to have that answer marked correct on an examination? Fewer still believe that religious truth can or should be deter-

\[51\] When corporate shareholders vote, success requires assent of a majority of shares voted, not a majority of shareholders. This difference makes inapplicable some justifications for majority rule, while enhancing the power of others.


\[53\] Within the judicial decision making process, what counts as admissible scientific evidence is a matter of considerable controversy. See Daubert v. Merrell Dow Pharm. Corp., 509 U.S. 579, 595-96 (1993) (noting controversy over whether the newly elaborated standard would permit fringe scientific theories to have inappropriate influence over courts); Rochelle Cooper Dreyfuss, Is Science a Special Case? The Admissibility of Scientific Evidence After Daubert v. Merrell Dow, 73 Tex. L. Rev. 1779, 1780 (1995) (noting the controversy that the Daubert opinion has engendered).
mined by majority vote. Yet, we continue to rely on majority rule to make determinations of political and financial significance. Why?

One answer stems from the premise that every member of a collective body should share equally in political power. If less than a majority could bind the whole to act, proponents of action each would wield more political power than a larger body of opponents. Conversely, if action required a supermajority, opponents of an action each would enjoy more power than any individual proponent. Only majority rule preserves equality among all members of the group.

The premise that political power should be equally distributed is central to prominent, if controversial, justifications for judicial review of legislative action. In particular, John Hart Ely has argued that courts should, as a matter of constitutional law, protect those most likely to be excluded from political power in a majoritarian regime. Indeed, even those who question process-based theories of judicial review often start from the premise that political power should be distributed equally.

Equal distribution of political power cannot, however, serve as an absolute principle. The principle is incoherent without some delineation of the political realm. Not all decisions can be treated as political decisions over which all members of the collective body have an equal say. Voting rights provide the most extreme example. If we treat voting rights as a political issue to be decided by majority rule, a majority would be empowered to disenfranchise members of the collective body. Such disenfranchisement would clearly violate the principle that political power be distributed equally.

To make the equal distribution principle coherent, the principle itself must be subject to limits. To identify those limits, one must start by identifying reasons for distributing power equally (and, derivatively, for allowing majorities to rule). One reason is that sharing political power increases the power of individuals to shape their own lives in a society marked by state regulation. Another is that giving each citizen an equal say in governmental decision making processes may also promote self-
respect among the citizenry. To the extent society deems an individual unworthy of an equal role in making critical decisions, the individual may question his own worth.

These reasons for distributing power equally are peculiar to notions of citizenship in a coercive state, but less persuasive in the context of a voluntary association. Concerns about self-determination are less critical in voluntary organizations, because the choice to join—or to leave—gives an individual a measure of control, even if the individual has no "voice" in the organization's decision making process. Concerns about promoting self-respect, too, appear less significant in voluntary organizations, because the individual can choose not to participate in an organization whose governing rules are offensive.

Other reasons for equal distribution of power, and hence for majority rule, translate more easily from the public to the private sphere. In particular, majority rule in any sphere can be viewed as a form of applied utilitarianism, likely to produce better outcomes than other decision making processes. Since each individual typically is the best respecter of his own interests, a decision making system will produce better outcomes if participation is open to all individuals with a stake than if power is di-

See id. at 107 ("Self-respect . . . is dependent upon the possession of political power.").

See id. at 108 (describing the negative impact that the deprivation of political power has on the individual).

For the classic work comparing "exit" and "voice" as mechanisms for influencing organizational outcomes, see Albert O. Hirschman, Exit, Voice, and Loyalty 40-41 (1970). Professor Gregory Alexander has suggested that lumping all "voluntary" organizations together and treating them under the same legal rubric is a mistake. Alexander distinguishes between voluntary associations formed for instrumental ends and "communities . . . drawn together by shared visions that constitute for each of them their personal identity." Gregory S. Alexander, Group Autonomy: Residential Associations and Community, 75 Cornell L. Rev. 1, 26 (1989). Alexander uses the monastery as an example of an organization in which membership is essential to the realization of self-identity. See id. at 27. Alexander also suggests that homeowner associations have community elements and should not be treated simply as groups created by contract. See id. at 42. And, indeed, once a homeowner becomes a member of an association, she does, in many ways, become bound up with the group. "Exit" becomes difficult. See infra Part III. Nevertheless, with a community association, unlike a monastery, it is difficult to see how the initial decision to join could be a decision largely outside of the homeowner's control.

Ely has written:

It is possible to assert, I suppose, that the best way to find out what makes the most people happy is to appoint someone to make an estimate, but no one could really buy this idea. The more sensible way, quite obviously, is to let everyone register her own preference. . . . Thus democracy is a sort of applied utilitarianism . . . .

voiced from interest. 62

Indeed, if we assume that each member of the collective has an identical interest in the group's decision, the utility of majority rule flows systematically from the premise—essential to a market system—that, on average, each individual makes decisions that advance his own interests. 63

The premise, put in other terms, is that when faced with a binary decision, the individual makes the "right" decision about his interests more than 50% of the time. If this premise is correct, it follows that a decision favored by a majority of any group with identical interests is more likely to be the right decision for the group than that favored by the minority. 64

And, as the probability that individuals make right decisions about their own interest increases, the probability that majority vote will yield "right" decisions also increases. 65

When members of the collective have an unequal stake in the collective's decisions, the costs of gathering information suggest that weighing votes by stake will generate better outcomes. Members with the greatest stake have the greatest incentive to invest resources in acquiring information about the wisdom of alternative courses of action. Assuming information contributes positively to the quality of decisions, those members with a greater stake are, therefore, likely to make better decisions. On this theory, rules like "one share, one vote" are more likely to generate optimal outcomes than rules like "one shareholder, one vote." 66

Finally, equal distribution of power among members of a collective body may create a tighter sense of community among members of the

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62 See PENNOCK, supra note 54, at 108 (arguing that each person should be the judge of what gives him satisfaction and should have the power to effectuate that judgment).

63 This premise derives from the basic analytical tool of economists: "the assumption that people are rational maximizers of their satisfactions." RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 1 (1981). If, on average, individuals made decisions that left them worse off, market transactions would shift resources to lower-valuing users, and would thereby decrease social welfare.

64 For more extensive development, see Shmuel Nitzan & Uriel Procaccia, Optimal Voting Procedures for Profit Maximizing Firms, 51 PUB. CHOICE 191, 198-203 (1986) (comparing the efficacy of corporate voting procedures), and Zohar Goshen, From Dictatorship to Democracy: A Study of Strategic Voting in Corporate Law (unpublished manuscript on file with author). See also KENNETH J. ARROW, SOCIAL CHOICE AND JUSTICE 167-69 (1983) (arguing that majority voting is a satisfactory social choice mechanism if done under conditions of neutrality, anonymity, independence from irrelevant alternatives, and positive response).

65 Cf. JOHN RAWLS, A THEORY OF JUSTICE 358 (1971):
The suggestion goes back to Condorcet that if the likelihood of a correct judgment on the part of the representative legislator is greater than that of an incorrect one, the probability that the majority vote is correct increases as the likelihood of a correct decision by the representative legislator increases.

66 See generally Goshen, supra note 64, at 6 n.6.
collective, causing each member to take better account of the interests of the others. To the extent that this sort of community increases individual happiness and improves the quality of decision making, these benefits should be capable of realization in a privately created collective body.

Thus, the case for majority rule is a substantial one. At the same time, as we have already seen, majority rule can never be an absolute principle. What remains for the next subpart is an exploration of the reasons for limiting majority rule.

B. Limits on Majority Rule

1. Protecting Fundamental Rights

The argument that majorities ought not be permitted to abridge fundamental rights has become a staple in American constitutional theory. The argument rests on the simple premise that majority rule is not an end in itself, but a means of assuring that government respects personal liberties and promotes social welfare. If one views liberty of conscience, a measure of personal autonomy, or even security from economic predation as more essential to a liberal society than political liberty, one would support constraining the power of political majorities when these critical interests are at stake. Moreover, if majority rule is designed to foster equal input into the political process, it is self-evident that majorities should not be permitted to entrench their own powers by limiting the

67 See Pennock, supra note 54, at 106-07 (arguing that shared political power creates the conditions for a cohesive community).

68 See, e.g., David A.J. Richards, A Theory of Free Speech, 34 UCLA L. Rev. 1837, 1877 (1987) (arguing that the inalienable right of conscience cannot be surrendered to the state); Mark V. Tushnet, Foreword, Symposium on Democracy and Distrust: Ten Years Later, 77 Va. L. Rev. 631, 634 (1991) (identifying the rights-based approach with Justice Blackmun's opinion in Roe v. Wade, and treating it as one of the major currents in contemporary constitutional theory).

69 See Rawls, supra note 65, at 229-30:

One of the tenets of classical liberalism is that the political liberties are of less intrinsic importance than liberty of conscience and freedom of the person. Should one be forced to choose between the political liberties and all the others, the governance of a good sovereign who recognized the latter and who upheld the rule of law would be far preferable. On this view, the chief merit of the principle of participation is to insure that the government respects the rights and welfare of the governed.

franchise.\textsuperscript{71}

Rights theorists, however, face a critical hurdle: if not by majority rule, how does the society determine which rights merit protection against majoritarian depredation? Our legal system entrusts judges with the power to decide which rights to protect; how they should exercise that power remains a matter of considerable controversy. Cass Sunstein, among others, has suggested that judges use their deliberative faculties to determine appropriate limits on majority rule.\textsuperscript{72} Michael Perry has suggested that courts look to moral consensus as a basis for defining rights against the majority.\textsuperscript{73} Ultimately, however, our legal system finds it critical to locate limits on majority rule in the Constitution itself, however that document is interpreted.\textsuperscript{74} The Constitution commands respect in part because of its status as a contract ratified by each of the sovereign states\textsuperscript{75} and in part out of recognition that the Founders themselves, removed from the heat of battle over particular issues that have since arisen, were well positioned to set ground rules for the majority’s exercise of power.\textsuperscript{76}

\textsuperscript{71} See Frederick Schauer, Judicial Review of the Devices of Democracy, 94 Colum. L. Rev. 1326, 1339 (1994) (discussing the potential for the majority to entrench itself by withdrawing the minority’s right to vote).

\textsuperscript{72} See, e.g., David A.J. Richards, Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution, 30 Hastings L.J. 957, 976-77 (1979) (suggesting that courts should adhere to constraining moral principles); Cass Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 65 (1985) (stating that judge-made law averts the danger of faction formation).


\textsuperscript{74} See, e.g., Griswold v. Connecticut, 381 U.S. 479, 483-86 (1965) (finding a constitutional right of privacy in penumbras emanating from explicit constitutional protections).

\textsuperscript{75} The unanimous consent of the original states mitigates the philosophical difficulty of why the Constitution should be entitled to any more respect than any other set of rules adopted by a majority over the objections of the minority. But cf: Bruce Ackerman & Neil Katyal, Our Unconventional Founding, 62 U. Chi. L. Rev. 475, 478-79 (1995) (noting that the ratification process itself violated the terms of the Articles of Confederation and detailing irregularities in the ratification process). Historically, philosophers have looked at the “social contract” as a justification for government. John Rawls, with his attempt to ground his “just” system on the consent of disembodied individuals acting under a “veil of ignorance,” continues this tradition of defining a just system by reference to a hypothetical contract which has attained unanimous consent. \textit{See Rawls, supra} note 65, at 136-42. As David Carlson has noted, however, “[i]n the Rawlsian model, all people are so completely stripped down that they are precisely alike; a ‘bargain,’ strictly speaking, is not required.” David Carlson, \textit{Philosophy in Bankruptcy}, 85 Mich. L. Rev. 1341, 1343 (1986).

\textsuperscript{76} See Schauer, \textit{supra} note 71, at 1337 (noting that constitutionalization is “premised on the view that decision making about issues of continuing importance can sometimes be improved by removing from the phenomenological foreground the
However powerful rights theory is as a basis for judicial review of legislative decisions, it furnishes little justification for overturning decisions of the majority of a homeowners' association or condominium board. Most of the issues that arise in these contexts are not the sort that one would consider fundamental to the existence of a liberal society. Consider, however, those issues that some might deem fundamental: restrictions on signs or other expressive activity, for example. Existing constitutional jurisprudence permits individuals to execute limited waivers even of First Amendment rights. Thus, although government may not unduly limit the speech rights of employees, no comparable limitation applies in the absence of state action; private employers, and presumably other private entities, are free to restrict the speech of employees. If a private entity can condition one's livelihood on suppression of speech, there seems to be little reason to prevent a homeowners' association from demanding that its residents obey duly enacted speech restrictions.

77 Parking restrictions, satellite dish prohibitions, and assessment levels, for instance, would appear to abridge "fundamental" rights only to property absolutists—the very people most likely to advocate enforcement of contractual arrangements. Compare, e.g., Epstein, supra note 70, at 306-31 (advocating protection of economic interests against majority rule), with Epstein, supra note 5, at 924-25 (advocating routine enforcement of privately created servitudes when majority-rule procedures are in effect).

78 A few states have held, as a matter of state constitutional law, that certain private property owners (shopping center owners) may not prohibit expressive activity on their property. See Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 76, 79 (1980) (affirming, against Takings and Due Process challenges, a California court's holding that the state constitution required a shopping center owner to permit speech and petitioning); Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590, 590 (Mass. 1983) (holding that, under the Massachusetts Constitution, a person may solicit public office nomination signatures in the mall area of a privately owned shopping center); Alderwood Assoc. v. Washington Envtl. Council, 635 P.2d 108, 117 (Wash. 1981) (holding that Washington law permitted the solicitation of signatures at privately owned shopping centers). The United States Supreme Court has held, as a matter of federal constitutional law, that a shopping center owner is free to restrict expressive activity. See Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976) (denying right to picket); Lloyd Corp. v. Tanner, 407 U.S. 551, 552, 570 (1972) (denying right to distribute handbills).


80 The same arguments apply to restrictions on religion, for instance, or to restrictions on economic harm. In each case, a potential homeowner might choose to purchase in a community that protects her against unwanted restrictions. If, however, she chooses to purchase in a community that restricts religious practice or threatens
2. Promoting Deliberation

Civic republican scholars—particularly Frank Michelman and Cass Sunstein—have justified judicial review on the ground that legislative actions are too often the product of dealmaking and too rarely the product of deliberation.81 Civic republicans reject the pluralist notion that political processes are designed to aggregate the preferences of individual citizens, contending instead that legislation should be the product of a process that emphasizes deliberation about the wisdom of alternative policies.82 To inject more deliberation into the political processes, civic republicans support rules and doctrines that would require the process to incorporate a deliberative component,83 as well as the increased use of courts (which may be institutionally better suited for deliberation) to review legislative decisions.84

Civic republicans value deliberation for its transformative promise. In their view, political discussion can generate in citizens a set of preferences both different, and apparently more accurate, than the preferences those same citizens had before engaging in collective dialogue.85 On this theo-

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81 See, e.g., Frank I. Michelman, The Supreme Court, 1985 Term—Foreword: Traces of Self-Government, 100 HARV. L. REV. 4, 74 (1986) (“Unable as a nation to practice our own self-government (in the full, positive sense), we—or at any rate we of ‘the reasoning class’—can at least identify with the judiciary’s as we idealistically construct it.”); Cass Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539, 1579 (1988) (stating that the requirement that statutes be rational to pass judicial scrutiny “is best understood as a requirement of deliberation by political officials”).

82 See, e.g., Sunstein, supra note 81, at 1544:

Under republican approaches to politics, laws must be supported by argument and reasons; they cannot simply be fought for or be the product of self-interested ‘deals.’ Private-regarding reasons are an insufficient basis for legislation. Political actors must justify their choices by appealing to a broader public good.

83 See id. at 1576-78 (endorsing campaign finance reform as an effort to promote deliberation in the legislative process); id. at 1581 (arguing that “one of the tasks of statutory construction is to promote actual deliberation in the lawmaking process and to interpret statutes, within the appropriate confines of the judicial role, so as to minimize the pathologies of pluralism”); id. at 1582-89 (cataloguing rules of statutory construction designed to minimize those “pathologies”).

84 See Michelman, supra note 81, at 75-77 (describing the suitability of courts, and especially multi-judge appellate courts, for engaging in deliberative processes).

85 See id. at 27 (“Any view in which the true, primary interests of individuals are ‘exogenous’ or prior to politics is unrepulican. Republicanism rejects the idea that political activity is, at best, a mere means to the advancement of those prior interests . . . .”). Sunstein echoes the same theme: “The republican position is . . . that existing desires should be revisable in light of collective discussion and debate, bringing to bear alternative perspectives and additional information.” Sunstein, supra note 81, at 1549. Sunstein continues:

A central point here is that individual preferences should not be taken as exoge-
ry, then, mere aggregation of pre-political preferences leads to sub-optimal social results.86

Civic republican theory would lead to the conclusion that majority decisions are optimal only if generated by a deliberative process. And, indeed, the literature critical of ballot initiative and referendum procedures reflects hostility to unmediated exercises of majority power.87

Whatever the merits of deliberation-promoting limitations on majority power in the state and national political processes, promoting deliberation is a more problematic basis for limiting majority power in an organization—like a condominium or homeowners' association—whose foundation and maintenance reflect market forces. Consider first the argument that markets make deliberation-promoting rules unnecessary. Unlike citizens, whose options to exit the polity are limited, potential homebuyers are free not to purchase a home in an association-governed building or subdivision if the association's rules are unattractive. As a result, if rules designed to promote deliberation threaten the financial or other interests of potential home purchasers, the market price of homes in common interest communities should drop. Developers will respond by shifting their efforts to homes without common facilities or to

nous to politics . . . [P]rivate preferences may be a product of adaptation by the disadvantaged and interest-induced beliefs on the part of the relatively well-off. Republicans are thus unlikely to take existing preferences and entitlements as fixed. Both are permissible objects of political deliberation.

Id.; see also Frank I. Michelman, Law's Republic, 97 YALE L.J. 1493, 1528 (1988) (noting that republican politics "contemplates . . . a self whose identity and freedom consist, in part, in its capacity for reflexively critical reconsideration of the ends and commitments that it already has and that make it who it is").

86 Cf. Sunstein, supra note 81, at 1550-51 ("[M]odern republicans invoke civic virtue primarily in order to promote deliberation in the service of social justice, not to elevate the character of the citizenry.").


88 A rule requiring that community association rules be reasonable, on pain of judicial invalidation, is an example.
rental housing. In that event, the "deliberation promoting" rule would not promote deliberation, because there would be no forum in which to deliberate. On the other hand, if potential home purchasers view deliberation-promoting rules as attractive, market forces alone should generate such rules; no legal requirements would be necessary to generate them. Thus, the argument runs, requiring association rules to be deliberation-promoting would be either counterproductive or superfluous.

Those who argue that law should provide a set of default rules for corporate governance rather than mandatory rules frequently advance this argument. The argument counsels rejection of all mandatory rules for community associations. It is not dispositive, however. Market discipline is rarely perfect. Home purchasers may do little investigation into the precise powers the Declaration confers on community associations. Moreover, the Declaration itself may not be precise about the scope of authority it confers. These difficulties leave some room for mandatory rules designed to advance the interests of community residents. However, they do not indicate that mandatory rules should be constructed to promote deliberation among association members or their representatives.

Deliberative decision making is not an unqualified "good." Deliberation requires time and energy that could be devoted to other pursuits, including deliberation about other matters. Perhaps it would be wrong to treat deliberation, in Frank Michelman's words, as "strictly a 'cost' and not a 'benefit' on the ledger books of life," but it would be equally

89 Cf. Ellickson, supra note 1, at 1524-26 (noting that potential purchasers of units in residential associations capitalize the effect of potentially redistributive rules by reducing the amount they are willing to pay for units that may be subject to redistribution). One might respond, however, that a world with fewer community associations might be better than a world with associations whose rules are unattractive. See, e.g., Alexander, supra note 60, at 38 ("Legal interference with some group rules, particularly those controlling membership, undoubtedly does threaten the existence of the affected groups. But group existence is not an unqualified good.").

90 See, e.g., Easterbrook & Fischel, supra note 9, at 17 (noting that, because the terms in corporate governance are fully priced, "the firms that pick the wrong terms will fail in competition with other firms competing for capital").

91 See Winokur, supra note 2, at 59 & n.246 (citing a federal government survey suggesting that 85% of homeowners are not aware of applicable servitude restrictions at the time they purchase their homes); see also Gregory S. Alexander, Freedom, Coercion, and the Law of Servitudes, 73 Cornell L. Rev. 883, 894-95 (1988) (noting that a purchaser may focus inadequately on servitude terms).

92 As Bruce Ackerman said in discussing the appropriate role of citizenship in contemporary America, "the normal duties of citizenship had better not be so onerous as to make it impossible for Americans to put in a full day's work." See 1 Bruce Ackerman, We the People 312 (1991).

93 Michelman, supra note 81, at 27. Michelman was referring to political activity, but his argument would suggest a similar attitude toward deliberation generally.
wrong to ignore the costs of deliberation. Individuals do not deliberate without limit over where to eat lunch, what furniture to buy, or how much to pay for a car, and the state does not generally intervene to second-guess individual decisions about how much deliberation is appropriate. That is, when people make decisions about their own self-interest, our legal system is generally content to permit them to deliberate as much—or as little—as they like.

Why would republican theorists seek to impose a greater duty to deliberate in public decisions? To the extent that deliberation helps individuals transform their perceptions of their own self-interest, it is as valuable in private transactions as in public decisions. For Michelman and Sunstein, however, the primary attraction of deliberation is its capacity to transform attitudes towards the interests of others. Michelman suggests that mutual deliberation will cause individuals to recognize their common ground with others. This recognition, in turn, will lead to empathy for those in different circumstances. Sunstein explicitly recognizes republicanism's redistributive cast.

Because residents of any particular common interest community are typically less diverse economically than citizens of the state or municipality in which the community is located, community association governance rules are unlikely engines for significant wealth redistribution. Nevertheless, community association decisions do have some redistributive potential. To the extent that republican theory relies on the notion that deliberation and dialogue require the beneficiary of a proposed redistribution to confront its consequences to others while making the redistribution more acceptable to the victim, the theory supports deliberation-promoting rules for community association decisions. Moreover, because com-

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94 The qualification "generally" is necessary because, to some extent, statutes and judicially created doctrines do relieve individuals from the consequences of decisions to which they clearly gave too little thought. See, e.g., 16 C.F.R. § 429.1 (1996) (establishing a cooling-off period during which consumers may rescind door-to-door sales agreements).

95 Indeed, Sunstein recognizes that "[s]ome modern forms of republicanism furnish no sharp split between public and private interests, and attempt to channel self-interest in such a way as to promote the common good." Sunstein, supra note 81, at 1565.

96 See Michelman, supra note 81, at 32.

97 See Sunstein, supra note 81, at 1551: [R]epublicans are hardly hostile to redistribution or to collective efforts to reassess the existing distribution of wealth and entitlements. Indeed, because of the republican emphasis on the social conditions for republican deliberation, republican commitments point powerfully in the direction of equalizing political influence . . . .

98 See infra Part V.

99 Cf. Alexander, supra note 60, at 56-59 (arguing for use of standards rather than rules in evaluating community association actions, because standards promote, while rules inhibit, dialogue and conversation).
Community association residents typically share many common interests, delibera
tion may be more effective in resolving disputes and achieving consensus. It is against these potential advantages that the costs of delibera
tion must be weighed.

3. Reducing Agency Costs

Majority rule, like any other collective decision making process short of
unanimous agreement, binds some people to the decisions of others. This
raises two significant issues. First, how, and how well, do majorities de
terminate individual preferences? Second, how well do majorities aggre
gate those preferences? These sorts of problems are often categorized as
agency costs. 100

Majority determination of preferences is a problem because we gener
ally assume that each person is the best judge of his own interests. In a
market, each participant can only bind herself—the person whose prefer
ces she knows best. By contrast, in a collective regime marked by ma
jority rule, all participants are bound by decisions that some of them be
lieve are not in their interests. Even if we assume that all participants in a
collective enterprise try to act in the interests of the body as a whole, they
will be judging the interests of people they understand less well than
themselves. And, of course, the assumption that participants do, or
should, try to act in the common interest rather than in their individual
interests is a hotly contested one. 101

Even if we assume that participants in a collective process could accu
rately assess the interests of other participants, the problem of aggregat
ing those interests remains. If we assume that individuals best know their
own interests, aggregating interests reduces to aggregating preferences.
In a system of majority rule, then, how do the minority’s preferences get
counted in the aggregation process? One answer is that the voting pro
cess itself gives minority preferences adequate attention, and that in a
democracy, as Bruce Ackerman has observed, minorities are supposed to

100 See generally Cass Sunstein, Legal Interference with Private Preferences, 53 U.
Chi. L. Rev. 1129, 1144 & n.59 (1986) (citing the “disjunction between rulers and
ruled”).

101 Much of public choice theory rests on the assumption that individuals’ motiva
tions in the political sphere are not substantially different from their motivations in
market transactions. See, e.g., Buchanan & Tullock, supra note 76, at 19-20. Civic
republicans, by contrast, model a political system in which dialogue leads individuals
to consider the public, as opposed to private, good. See, e.g., Michelman, supra note
81, at 40; Sunstein, supra note 72, at 57. Marci Hamilton has proposed a public law
model in which representatives maintain continuous communication with constitu
ts, but ultimately exercise independent judgment on public law issues. See Marci
Hamilton, Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with
lose.102

Unless majority rule is itself the ultimate end, that answer is inadequate. The question instead must be whether majority rule is suited to achieve the ends for which the collective enterprise is designed. To the extent, for instance, that one views redistribution of resources as an appropriate collective goal,103 one might conclude that majorities are likely to give inadequate weight to the preferences of those without resources to contribute in the pluralist process.104

Whatever its merit in the public law context, the notion that redistribution of resources constitutes an appropriate collective goal is less plausible within privately created associations. If potential members knew that an association was likely to redistribute resources, potential targets of redistribution would be highly unlikely to join.105 Hence, in the context of private associations, criticisms of majority rule as insufficiently redistributive are largely irrelevant.

A more plausible model for a privately created collective enterprise is the Buchanan and Tullock model of the state as an enterprise created by individuals hoping to increase their utility by eliminating external costs and securing external benefits.106 According to this model, a system in which majorities always rule would be ill-suited to serve the ends of the enterprise’s members. Because majority rule does not account for intensity of preferences,107 many individuals would be unwilling to join a collective enterprise in which a mere majority of members could trample on important individual interests.108

As the number of issues and interest groups confronting the collective

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102 See Bruce Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713, 719 (1985) (“[M]inorities are supposed to lose in a democratic system—even when they want very much to win and even when they think (as they often will) that the majority is deeply wrong ...”).

103 See, e.g., RAWLS, supra note 65, at 75-80 (suggesting a scheme designed to improve the expectations of the least advantaged members of society); Sunstein, supra note 81, at 1549 (expressing the republican view that “distribution of wealth is a matter for political disposition”). But see EPSTEIN, supra note 70, at 4 (“The implicit normative limit on the use of political power is that it should preserve the relative entitlements among the members of the group.”).

104 See, e.g., Michelman, supra note 56, at 674-79 (expressing concern that voting equality does not compensate for absence of property). From another perspective, for those who start with an organic conception of the state, the entire enterprise of aggregating individual preferences appears to be fruitless.

105 Cf. Ellickson, supra note 1, at 1524-25 (noting that bargainers with ex ante knowledge of potential redistribution would discount the price of membership accordingly, thereby reducing the amount of actual redistribution).

106 See BUCHANAN & TULLOCK, supra note 76, at 43-44.

107 See id. at 126-28, 131-44.

108 See id. at 82 (“The individual will anticipate greater possible damage from collective action the more closely this action amounts to the creation and confiscation of
grows, the risk to minority interests shrinks. Each group seeking to garner support for action promoting its own strongly held preferences on an issue will trade votes with members of other groups, increasing the chance for each group to implement its strongly held preferences. Indeed, vote trading increases the likelihood that minorities with strongly held preferences will wield too much power as they overwhelm the interests of larger but more diffuse groups who face greater difficulty organizing into a successful pressure group. Nevertheless, much constitutional scholarship rests on the premise that interest-group politics will inadequately protect the interests of “discrete and insular” minorities.

Hence, to the extent that the range of decisions facing community associations is relatively small, majority rule may risk undervaluing the interests of minority members. This problem is not, as we shall see, unique to community association law.

III. CONTRACT AS A CONSTRAINT ON PROTECTION OF MINORITY INTERESTS

A. The Contract Argument

The public law debate over protection of minority interests has, in essence, been a debate about the terms of the social contract. Since the social contract represents a theoretical construct rather than a historical event, scholars in a variety of disciplines and with a variety of perspectives have devoted much energy to identifying its appropriate terms. In their classic work on public choice, Buchanan and Tullock developed models of collective decision making “[b]y approaching the problem of the calculus of the single individual as he confronts constitutional choices, not knowing with accuracy his own particular role in the chain of collective decisions that may be anticipated to be carried out in the future.” Similarly, Rawls expounds his principles of justice by constructing a hypothetical bargain among persons so situated that “no one is able to design principles to favor his particular condition.” Because the hypothetical human and property rights. He will, therefore, tend to choose somewhat more restrictive rules for social choice-making in such areas of potential political activity.”

109 See Robert Dahl, A Preface to Democratic Theory 146 (1956) (concluding that government decisions are not so much the pronouncements of majorities as “the steady appeasement of relatively small groups”).

110 See Mancur Olson, The Logic of Collective Action 127-28 (2d ed. 1971) (arguing that the groups most likely to be successful in a pluralist process are small interest groups in which each member has a large stake).

111 See, e.g., Ely, supra note 55, at 135-79 (developing an approach to constitutional interpretation dedicated to protecting under-represented minorities).

112 Cf. Easterbrook & Fischel, supra note 9, at 15 (noting the basic fiction of social contract theory).

113 Buchanan & Tullock, supra note 76, at 92.

114 Rawls, supra note 65, at 12.
choices are made by hypothetical people with hypothetical characteristics, the shape of the resulting social contract—and particularly the scope of minority protections—might vary enormously.

No comparable problems afflict the constitutions that govern private residential communities.\textsuperscript{115} By purchasing a home in a community governed by a declaration that contemplates an association with rulemaking power, a flesh-and-blood person agrees to abide by the association's rules. If purchasers want protection against interference with important rights, declarations can be drafted to secure those protections. If purchasers want to ensure deliberation in the association's processes, declarations can provide appropriate procedures for association action. If purchasers are concerned about agency costs, covenants can be drafted to reduce those costs.

It would be absurd to argue that a prospective home purchaser will find it worthwhile to negotiate for declaration provisions that maximize her own welfare. If, however, protections against association action are important, developers should find it worth their while to design attractive provisions that will induce homeowners to choose their developments, in the same way that homeowners choose units with attractive kitchens and bathrooms.\textsuperscript{116} \textit{Choosing} among governance provisions is much less onerous for potential homeowners than \textit{designing} those provisions. And, of course, the potential homeowner concerned about community association governance retains the option to buy a home not subject to association governance.

Moreover, few people casually decide to purchase a home. Because purchasing a home is the largest single investment most people will make, they generally take time to assess the quality of that investment.\textsuperscript{117} In many jurisdictions, though certainly not all, purchasers are routinely represented by counsel who provide advice about any dangers associated with community association governance. As a result, home purchasers have both the incentive and the opportunity to become informed about

\textsuperscript{115} See Ellickson, supra note 1, at 1527 ("The feature of unanimous ratification distinguishes [the Declaration of covenants, articles of association, and association bylaws] from and gives them greater legal robustness than non-unanimously adopted public constitutions, not to mention the hypothetical social contracts of Rousseau or Rawls.").

\textsuperscript{116} Moreover, the increasing sophistication of community association lawyers makes it more feasible to tailor declarations to reflect particular market concerns. Thus, community association lawyers have their own professional group, the Community Associations Institute, which sponsors the usual range of seminars and publications for interested practitioners. See, e.g., COMMUNITY ASS'NS INST., supra note 2.

\textsuperscript{117} See Natelson, supra note 15, at 60-61 (noting that the size of a home purchaser's investment makes "examination of the documents and employment of legal counsel highly cost-effective"). \textit{But cf.} Winokur, supra note 2, at 59-60 (reporting that most home purchasers do not retain counsel to review purchase documents).
their decision to purchase in a development governed by a community association.
That, in sum, is the contract argument against extending more protection to community association minorities than is provided in the governing documents themselves.

B. Objections to the Contract Argument

The contract argument, for all of its credibility, faces at least three challenges. First, because provisions creating association powers are bundled with other items more significant to housing consumers, a consumer's purchase should not necessarily be treated as a decision to be bound by association governance. Second, the contract argument for providing less protection to minorities in private settings assumes a distinction between the private and public spheres, a distinction that is in fact illusory. Third, the contract argument ignores the "good faith" requirement and other doctrines of contract law that routinely operate to constrain power apparently bestowed by one party to a contract on the other. This subpart considers these three challenges.

1. The Bundling Problem

In arguing that all servitudes should be subject to discretionary judicial review, Gregory Alexander has invoked the "bundling" problem.118 Alexander notes that a land purchaser might buy subject to a servitude, even if the purchaser did not want the servitude. He rejects the notion that such a purchaser would obtain a discounted price to compensate for the unwanted servitude, arguing that because of the complexity of the transaction, the purchaser might not have focused on the servitude provision.119 If Alexander's argument has force for servitudes made explicit in the deed, the argument carries even more force with respect to association power to impose new obligations on the purchaser; the purchaser might well have failed to focus on those unknown obligations.

Alexander expressly relies on the premise that purchasers engage in irrational behavior.120 Taken broadly, as Alexander recognizes, this premise challenges not merely enforcement of bundled agreements, but enforcement of all contracts.121 Taken more narrowly to apply only when

118 See Alexander, supra note 91, at 894. Alexander attributes the term "bundling" to Mark Kelman. See generally MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 107-09 (1987) (applying bundling theory to explain courts' treatment of coercive covenants running with the land).
119 See Alexander, supra note 91, at 894.
120 See id. at 895.
121 Alexander writes: "The real question is what implications the irrational choice phenomena should have for the legal role. My view is that it should affect that legal system's willingness to interfere with preferences, the realm of private ordering." Id. at 895 n.35.
contracts involve bundling, the premise is peculiar. Every decision to enter into a contract involves bundled choices.122 A golf club member can hardly complain about a club dress code or a monthly charge for uneaten meals on the grounds that he agreed to those burdens only unwillingly as the price for using the club's golf course. An academic could not likely avoid teaching responsibilities by contending that he was forced to accept them as the price of joining a faculty. Every commitment requires some sacrifice of personal autonomy, but if we preclude people from making commitments, we exact from them an even greater sacrifice of autonomy.123

One might limit the bundling argument to cases in which the unwanted obligation was trivial in comparison with the overall transaction, making it more plausible that the promisor had not focused on the obligation's importance. But that modification hardly saves the argument. The more trivial the obligation, the less reason for close judicial scrutiny to protect the promisor. Bundling problems, then, furnish little justification for rescuing unit owners from a contractually created majority rule regime.

2. The Asserted Emptiness of the Public-Private Distinction

The contract argument against minority protections assumes that an agreement to purchase a unit subject to association governance is fundamentally different from the purchase of a home subject to state and municipal governance.124 That supposed distinction, however, has been hotly contested. Gerald Frug, for one, has argued that some cities, like many homeowner associations, were initially formed by the unanimous consent of all residents.125 Frug has suggested, moreover, that the circumstances of original formation lose significance with the passage of time, as "children take over their parents' homes, and the like."126

One might also argue that the decision to reside in a particular municipality, like the decision to purchase in a particular common interest com-

122 See Glen O. Robinson, Explaining Contingent Rights: The Puzzle of "Obsolete Covenants", 91 COLUM. L. REV. 546, 578 (1991) (noting that virtually all goods are bundled, and that bundling should be a concern only when combined with monopoly power); see also Clayton P. Gillette, Courts, Covenants, and Communities, 61 U. CHI. L. REV. 1375, 1407 (1994) (agreeing with Robinson that bundling is not threatening in the absence of true duress).

123 As Richard Epstein noted in response to Alexander's argument: "Any bargain in any context requires each party to give up something of value in order to obtain something else." Epstein, supra note 5, at 912.

124 See Ellickson, supra note 1, at 1521-26 (suggesting that the presence of involuntary members in an organization makes the organization "public" and justifies substantially different legal treatment).


126 Id. at 1590-91.
munity, is a "voluntary" act that signifies consent to be governed in accordance with the municipality's charter. Indeed, Charles Tiebout theorizes that competition among municipalities regulates municipal provision of public goods, because potential residents shop among municipalities to find one that provides the mix of public goods best suited to their desires. 127 This theory rests in large measure on the premise that individuals choose their municipalities, much as they choose their homes, cars, and other items of importance to them. That premise, however, suggests that there is little reason to identify contract as a reason to provide community association minorities with less protection than would be accorded minorities unhappy with local government or even state decisions.

The argument that minorities choose to submit to local government power just as they choose to submit to community association power, however, should not be dispositive. Whenever we confront the argument that a party should be morally or legally bound by his choice, we need to inspect the conditions that led the party to make that choice. In the extreme case, choices made with a gun to the head are not entitled to much legal or moral force. In general, the constraints imposed on a potential purchaser deciding whether to buy a home in an area governed by a community association are far less significant than the constraints facing a resident trying to decide whether to move into (or to leave) a particular municipality. 128 A lifelong resident of New York City might find the costs of leaving to be daunting, even if the resident was fed up with City policies. Without leaving the city, however, the same person would be free to choose among many apartments and homes, governed by a variety of community associations or subject to no associations at all. In this sense, the "choice" to join—and not to leave—an association is more meaningful than the choice to move to, or remain in, a particular municipality. That is, although the difference is largely a matter of degree, contract does provide somewhat greater justification for binding minority members to the decisions of a community association than for binding minority residents to the decisions of a local government.

3. Constraints on Power Internal to Contract Law

A unit owner's agreement to abide by the decisions of a community association does not immediately obligate the owner to perform a specified act or pay a particular sum of money. Rather, the agreement binds


the unit owner to determinations the association might make in the future. As a result of the agreement, the association has power to impose new duties not specified in the agreement itself. This situation resembles the classic relational contract, "characterized by uncertainty about factual conditions during performance and an extraordinary degree of difficulty in describing specifically the desired adaptations to contingencies."\(^{129}\)

The agreement, here embodied in the Declaration, deals with the uncertainty by creating a mechanism for coping with future problems: association governance.

When relational contracts appear to put one party at the mercy of another, contract doctrine constrains the broad discretion conferred on one party, either by holding the agreement unenforceable altogether or by reading the agreement's terms to limit discretion. The extreme example of an agreement unenforceable because it would give one party complete discretion over the other is a contract to enslave oneself.\(^{130}\) By contrast, the obligation to deal in good faith, implied in all contracts, construes the contract's terms to limit a party's discretion, even when the letter of the agreement appears to confer that discretion.\(^{131}\) For instance, when a contract obligates a seller to deliver as many units as the buyer requires, or when the contract obligates the purchaser to take the seller's entire output, the good faith requirement protects the promisor from the promisee's otherwise unlimited discretion to determine "requirements" or "output."\(^{132}\)

The good faith obligation rests in large measure on the assumption that both parties to the agreement intended to derive benefit from the agreement, that neither party intended, by conferring discretion on the other,

\(^{129}\) Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. Rev. 1089, 1127 (1981); see also Gillette, *supra* note 122, at 1413-17 (exploring the relational nature of community associations).

\(^{130}\) Cf. U.S. Const. amend. XIII (prohibiting slavery and involuntary servitude).


\(^{132}\) See Burton, *supra* note 131, at 380-81 (noting that the buyer or seller in these agreements may manipulate its requirements or output by modifying its methods of marketing or production); Deborah A. DeMott, *Fiduciary Preludes: Likely Issues for LLCs*, 66 U. Colo. L. Rev. 1043, 1059-60 (1995) (arguing for stronger good faith constraints within limited liability companies).
to make a "gift." \(^{133}\) Hence, if one party's exercise of contractually conferred discretion would be inconsistent with the notion that the other party expected to benefit from the contract, then the discretion has not been exercised in good faith.

The point is not to define limits on a community association's exercise of discretion; that enterprise is the focus of the next Part. Instead, the point is that contract law constrains the exercise of discretion even when the parties have not included explicit limits on its exercise. Of course, one might argue that in the community association context, in which minority unit owners have a "voice" in the decisions to which they object, courts should be less concerned about the association's decisions than they are in contract cases in which the two parties are not engaged in an ongoing enterprise. This argument, however, ignores much of the relational contract literature, which establishes that in long-term contracts, the parties are almost inevitably locked together in an ongoing enterprise, each with a voice in the other's decisions. \(^{134}\) Moreover, even if courts should defer to community association decisions, the basic point remains: the existence of a contract among unit owners does not end discussion about the scope of association power or the desirability of affording protection to minority members. \(^{135}\) Because contract law generally constrains the exercise of discretion by contracting parties, one would also expect to see limits on the exercise of community association discretion. In examining those limits, an appropriate next step would be to explore the other area in which contractually created decision making bodies exercise discretion in ways that displease minority members: corporate law.

**IV. CONSTRAINTS ON MAJORITY POWER: LESSONS FROM CORPORATE LAW**

Like community associations, corporations are voluntary arrangements that bind some people to the actions of others. The issues that arise in

\(^{133}\) See Wood v. Lucy, Lady Duff-Gordon, 118 N.E.2d 214, 214-15 (N.Y. 1917) (implying a promise to use reasonable efforts, because the agreement would not have "such business efficacy as both parties must have intended" without such an implied promise). For further discussion of the point, see DeMott, *supra* note 132, at 1060-61 (arguing that without the duty of good faith, an investment in an LLC that gave its control persons too much power would resemble a gift).


\(^{135}\) As Professor Coffee has put it in the context of opt-out rules for corporate charters, " contractual freedom logically can mean no more than the freedom to contract to the extent permitted by the law of contracts. Thus, it follows that no exculpatory provision or other provision should be tolerated that abridges the duty of good faith." *Coffee, supra* note 131, at 1665.
community association governance are by no means identical to corpo­rate governance issues. The purposes of the enterprises, the incentive structures under which their decisionmakers operate, and the threats to minority interests differ significantly. Nevertheless, at a time when community association law is in its infancy, or at best early adolescence, the more developed body of corporate law provides a useful background against which to examine problems of community association govern­ance.

Corporate governance debates have focused, in large measure, on two types of conflicts: those between corporate managers and shareholders, and those between majority and minority shareholders. Manager/shareholder issues arise even when all shareholders share an identical interest in maximizing the market value of their investment. Because the manager might have personal interests that conflict with shareholder objectives, corporate governance literature has focused on how to discipline managers to act in the interest of the shareholders. By contrast, majority/minority conflicts generally arise not when shareholders have common interests, but when shareholder interests diverge, as they do most frequently in closely held corporations. The question in these situations is how much account the majority must take of minority preferences.

Both types of conflict exist in community associations. The following subparts consider the treatment each type of conflict has received in the corporate context, and examine possible applications of corporate learning to the community association context.

A. Manager/Shareholder Conflicts

Corporate managers ostensibly act on behalf of shareholders. Indeed, the law treats them as fiduciaries for the shareholders. At the same time, however, managers have their own interests, some of which create a significant potential for conflict with the interests of shareholders. Managers, like other agents, may shirk their responsibilities; that is, they may invest less energy in corporate decision making than would be optimal for the shareholders. They may also divert corporate assets to personal use. Finally, managers may be interested in using their corporate offices to maximize their compensation or preserve their position with the corporation. A principal question in the corporate governance literature,


137 Melvin Eisenberg has identified these three divergences of interest between corporate managers and shareholders, and has labeled them, respectively, shirking, traditional conflicts of interest, and positional conflicts. See Eisenberg, supra note 9, at 1471-72.
therefore, is how best to structure the entity to assure that the interests of shareholders and managers converge; that is, to minimize agency costs.

1. The Contract Paradigm

In the academic literature, debate has raged about the extent to which mandatory rules (as distinguished from default rules that may be modified by provisions in the corporate charter or bylaws) are necessary to protect shareholders from management misbehavior. For a time, some commentators argued that mandatory rules were entirely unnecessary, because markets would discipline managers adequately. The central tenet of the argument was the Efficient Capital Markets Hypothesis—the notion that market prices reflect all public information about firms, including information about governance structures. Hence, if a firm adopted inefficient governance rules, the firm would have difficulty attracting investors, stock prices would drop, the firm would become a takeover target, and management would be replaced.

This absolutist approach has been rejected as a matter of corporate doctrine, and, to a large degree, as a matter of academic theory. Virtually all state corporation statutes include at least some mandatory rules. Scholars have identified a number of problems with the free-market approach, including shareholders' insufficient incentive to inquire into governance structures and their lack of control over the structure and timing of the amendment process.

The focus on deficiencies in the process of creating a corporate governance structure, however, has reinforced the notion that shareholders and

\[138\] See Easterbrook & Fischel, supra note 9, at 19-21 (arguing that, in an efficient market, prices will reflect information about corporate governance mechanisms).

\[159\] Put more modestly, the argument ran that even if markets imperfectly assessed the efficiency of competing governance structures, market assessments would remain relatively better than assessments made by state legislators or other alternative rule givers. See id. at 19.

\[140\] See Bratton, supra note 136, at 1084-85, 1103 (noting the developing consensus that the pure economic model is flawed and that the American Law Institute has since adopted mandatory norms).


\[142\] See Coffee, supra note 131, at 1674-75 (describing the potential for agenda manipulation by management).
managers, like most contracting parties, contract with each other with the expectation of mutual benefit. Were it not for the deficiencies in the process that make it implausible to treat corporate charter provisions as an accurate reflection of the parties' expectations, there would be little reason to impose mandatory rules. Because of these deficiencies, the argument runs, mandatory rules are necessary to implement shareholder expectations. In particular, corporate shareholders and managers may not agree to dispense with the managers' duty of loyalty—or, as the ALI has recently restyled it, the duty of fair dealing.

Nevertheless, in defining shareholder rights and managerial duties, courts have considered the likelihood that informed parties would bargain for judicial relief from managerial misbehavior. The following sections examine two such areas in which courts have done so: the business judgment rule and the limitations on managerial self-dealing.

2. The Duty of Care and the Business Judgment Rule

Both the ALI's Principles of Corporate Governance and the courts of most states apply the business judgment rule when shareholders challenge the wisdom of a managerial decisions. The rule insulates from legal challenge the actions of corporate directors "taken in good faith and in the legitimate exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" even if "the results show that what they did was unwise or inexpedient."

The goals and content of those rules remain a matter of considerable dispute. Some scholars have suggested that the rules should reflect the hypothetical bargain the parties would have reached had it not been for impediments to contracting. See, e.g., Jonathan R. Macey, Courts and Corporations: A Comment on Coffee, 89 COLUM. L. REV. 1692, 1694-95 (1989) (arguing that the hypothetical bargain and traditional fiduciary duty approaches to interpretation of the corporate charter produce essentially the same results). On the conceptual difficulties associated with the hypothetical bargains approach, see generally Charny, supra note 6, at 1816-17 (noting that in practice the hypothetical bargain analysis quickly becomes complex and subjective). Coffee, by contrast, argues that, rather than seeking to construct hypothetical bargains, courts should construct mandatory rules that induce parties to bargain concretely for terms they want. See Coffee, supra note 131, at 1625-28.

See AMERICAN L. INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 5.01 (1994) (articulating the duty of fair dealing). Comment d to § 5.09 permits shareholders or disinterested directors to approve specific types of self-dealing transactions, but provides that the Principles do not "permit[ ] the corporation's directors or shareholders to dispense generally with or generally modify the substantive and procedural rules . . . that govern conduct of directors and senior executives and the judicial review of such conduct (as contrasted with the approval of a specific transaction or type of transaction)." Id. § 5.09 cmt. d.


Pollitz v. Wabash R.R. Co., 207 N.Y. 113, 124 (1912). As Easterbrook and Fischel have noted, "[s]tatements of the [business judgment] rule vary; its terms are far
Is there reason to believe that informed shareholders would bargain for the business judgment rule, which denies them the right to recover for losses caused by management's bad judgment? There is if one assumes that the market is better than the courts at disciplining managers who "shirk" their duties by acting carelessly.147 How does the market discipline managers and directors? Because capital markets are generally efficient, a corporation's bad management will soon result in higher borrowing costs and a reduced stock price. These changes send signals to three important groups: shareholders, who may choose to replace ineffective managers and directors; individuals and firms looking for takeover targets, who may see an undervalued firm plagued by poor management as an inviting opportunity; and other potential employers, who will take past performance into account in deciding which managers to hire.148 Hence, a manager or director whose decisions cause costs to rise or stock prices to decline may personally bear many of the consequences of those bad decisions. The business judgment rule, then, rests in some measure on the conviction that courts, with little stake in their own decisions, will be less able to discern and advance the interests of shareholders than corporate managers and directors, who have strong incentives to make sound and careful business judgments.

The risk aversion of corporate managers, who are less able than ordinary shareholders to diversify their risk profile, provides another justification for the business judgment rule.149 Shareholders can diversify their portfolios to avoid excessive risk. They want each corporate manager to pursue opportunities that offer a high expected return, even if that return comes only at substantial risk. Managers, by contrast, might be wary of

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147 Courts typically justify the business judgment rule by noting that judges, compared to corporate directors, are ill-equipped to make business judgments. See, e.g., Auerbach, 47 N.Y.2d at 630-31 (noting that the "individual capabilities and experience [of corporate directors] peculiarly qualify them" to render business judgments). As Judge Easterbrook and Professor Fischel have observed, courts often foray into technical areas where they lack expertise. See Easterbrook & Fischel, supra note 9, at 94 (noting that judges decide such matters as "whether engineers have designed the compressors on a jet engine properly," and "whether the farmer delivered pomegranates conforming to the industry's specifications"). When courts decline to second-guess business judgments, they do so, according to Easterbrook and Fischel, because they could not hope to discipline manager misbehavior better than the market does. See id. at 94-100 (discussing the increased incentives of managers in the context of long-term relational contracts to be faithful agents).

148 See Easterbrook & Fischel, supra note 9, at 96-97 (noting the disciplining effect on managers of the larger market for corporate control).

149 See Joy v. North, 692 F.2d 880, 886 (2d Cir. 1982) (Winter, J.) (finding that the business judgment rule is necessary to remove disincentives that would otherwise prevent corporate managers from taking risks).
such opportunities, even without the added threat of liability for breach of fiduciary duty. The business judgment rule, by mitigating the risk of liability, reduces the incentives for overly cautious corporate decision making.

A number of courts have purported to apply the business judgment rule to community associations, often citing the experience that board members have in dealing with association issues. The rule’s fit, however, is problematic in the community association context. The personal incentives that induce corporate officers and directors to act carefully do not apply with equal force to members of a community association board. Officers and board members typically are not compensated for their efforts, and they are unlikely to be concerned about whether some other community association, at some time in the future, might want their services as an officer or director. Community association board members do not put their livelihoods on the line whenever they make a decision of significance to the community. Moreover, unlike corporate shareholders, community association residents are not generally in a position to diversify. For most, their home will be their most significant investment. Residents, then, may want managers to act cautiously; risk-taking may be undesirable. As a result, even assuming that all community association shareholders have identical interests, it is not at all clear that market forces will be adequate to induce board members to perform their duties with the optimal level of care.

3. Self-Dealing

Melvin Eisenberg has drawn a useful distinction between two kinds of self-dealing in the corporate context: traditional conflicts of interest—unfair diversion of shareholder assets to manager use; and positional conflicts—attempts to maintain and enhance managerial position at shareholder expense. In the corporate context, Eisenberg concludes that traditional conflicts are a far less serious problem because most top managers have internalized social norms against diversion of shareholder as-

\[150 \text{ See, e.g., } \text{Levandusky v. One Fifth Ave. Apartment Corp., } 553 \text{ N.E.2d } 1317, 1322 (N.Y. 1990) (applying the business judgment rule to the decisions of a co-op board, and commenting that “board members will possess experience of the peculiar needs of their building and its residents not shared by the court”). See generally Natelson, supra note 15, at 52 (noting that, “despite their stated reliance upon [the business judgment rule,] the courts that purport to apply it to [private ownership associations] actually impose reasonableness standards”).

\[151 \text{ Cf. } \text{Gillette, supra note 122, at 1428 (noting that, unlike corporate board members, association board members stand to gain little financially from their efforts). Although outside directors of business corporations do not typically earn their livelihood from board service, they do have a financial stake in retaining their positions.}

\[152 \text{ See } \text{Eisenberg, supra note 9, at 1471-72 (distinguishing between the two forms of self-dealing).} \]
sets. By contrast, he argues, most top managers achieved their positions "in part through the appetite for position," suggesting that a weaker set of moral constraints operates when positional conflicts are involved.

Corporate law has long prohibited diversion of shareholder assets, and in recent decades has engaged in more extensive policing of positional conflicts. In the community association context, however, positional conflicts are rarely a money issue. There is little opportunity for uncompensated community association officials to enhance their unpaid positions at the expense of association members. Although community association officials may use their positions to satisfy their own instinctive or subconscious drive for power and authority, residents harmed by arbitrary use of power will generally know they are being harmed. This makes the voting mechanism an effective one for disciplining officials who abuse power.

As with corporate officials, socialization serves as a strong protection against diversion of shareholder assets. Nevertheless, developer diversion of shareholder assets did provoke enactment of the federal Condominium and Cooperative Conversion Protection and Abuse Relief Act. The Act permits associations to nullify sweetheart deals between developers and related entities made before the developer loses control of the association. The Act thus polices a form of abuse comparable to the self-dealing prohibited by corporate law.

B. Majority/Minority Conflicts

Much of the literature on corporate governance focuses on the extent to which markets discipline the behavior of corporate managers. Mar-

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153 See id. at 1472-73.
154 See id. at 1473.
155 See Gillette, supra note 122, at 1428 ("Service as a member of an association board of directors does not return the kind of benefits that might lead those who occupy management positions in other contexts to maximize objectives other than their constituents' welfare.").
157 See West 14th St. Commercial Corp. v. 5 West 14th Owners Corp., 815 F.2d 188, 201 (2d Cir. 1987) (holding that the statute grants co-op shareholders the right to terminate a lease between the co-op board as lessor and the sponsor as lessee when the leased premises were designed to serve the cooperative unit owners). Before the West 14th Street case, the statute generally was understood to bar self-dealing contracts when "the sponsor retained, as a condition of purchase, the right to provide recreation and other essential services to the shareholders for high fees." Jonathan Honig, Leases Between New York Co-ops and Sponsors, N.Y. REAL EST. L. REP., May 1996, at 8.
158 Compare Easterbrook & Fischel, supra note 9, at 93-97 (arguing that market prices make it relatively easy for investors and employers to evaluate managerial performance, and consequently managers have a strong incentive to perform well), with Victor Brudney, Corporate Governance, Agency Costs, and the Rhetoric of Con-
kets are less likely to discipline corporate shareholders, who are likely to be less concerned about keeping salaried positions with the company or impressing potential employers. In this sense, as in others, the difficulties facing unit owners in a common interest community more closely resemble majority/minority conflicts in corporate law. How then, does corporate law treat these conflicts?

Corporate law reflects a tension between two often repeated premises. First, each shareholder is entitled to act out of "selfish ownership." Second, some shareholders—particularly those who enjoy control of the corporation—owe a fiduciary duty to the others.\(^{159}\)

1. Publicly Held Corporations

Conflicts among shareholders would not be serious in publicly held corporations if we were to assume that all shareholders seek the same benefit out of stock ownership: an increase in value of their investment. Shareholders as such generally have no managerial responsibilities, so duty of care issues rarely arise.\(^{160}\) Moreover, so long as all shareholders are identically situated, any shareholder action that affects one share affects all shares. By acting in self-interest, each shareholder acts in the common interest. Of course, even identically situated shareholders might disagree about important corporate issues, but informed shareholders should perceive that a combination of voting rights and market forces make majority rule an acceptable, if not optimal, mechanism for resolving those disagreements. As we have seen, majority rule generally produces optimal

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\(\text{tract, 85 COLUM. L. REV. 1403, 1421 (1985) (noting that the market for hiring top managers is virtually non-existent and that hiring is all done by directors who are responsible to current management for their positions).}\)

\(\text{159 See Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663 (Mass. 1976) (noting the tension between the majority shareholder's fiduciary duty to the minority and its right to "selfish ownership"); see also J.A.C. Hetherington, Defining the Scope of Controlling Shareholders' Fiduciary Responsibilities, 22 WAKE FOREST L. REV. 9, 12 (1987) (arguing that imposing a fiduciary duty upon controlling shareholders is necessary to protect minority shareholders).}\)

\(\text{160 But cf. Smith v. Atlantic Properties, Inc., 422 N.E.2d 798 (Mass. App. Ct. 1981). In Smith, the corporation's articles of organization and bylaws included a provision that required approval of shareholders holding 80% of shares before the board could take any binding action. Because the corporation had only four equal shareholders, the provision effectively gave each shareholder veto power over any corporate action. One shareholder refused to approve the declaration of dividends, which resulted in significant tax penalties. See id. at 800. The court held that the dissenting shareholder had violated "any reasonable interpretation of a duty of utmost good faith and loyalty." Id. at 803 (internal quotations omitted). This conclusion appears to have been based in part on the dissenting shareholder's desire to avoid personal income taxation on any dividends declared. Had it not been for this divergence between personal interests and those of the other shareholders, however, the court might well have treated the same behavior as a breach of the duty of care.}\)
outcomes when the interests of each voter are identical. Moreover, if a particular shareholder disagrees with the majority's choices, the shareholder has a ready market for his shares.

Shareholders are not identically situated, however. Even in a publicly held corporation, some shareholders will have interests other than maximizing share value. A majority shareholder, for instance, might have a substantial interest in a potential contract partner of the corporation. A contract unfavorable to the corporation could still be in the interest of the majority shareholder, who could use the contract as a device to siphon corporate assets away from the corporation and its minority shareholders. Such an arrangement involves classic self-dealing. Investors would not buy shares in a corporation with the expectation that the majority shareholder would engage in such behavior, and courts typically scrutinize these self-dealing contracts with great care.

Similarly, if controlling shareholders concoct an arrangement to appropriate value from other shareholders to themselves, courts will not sustain the arrangement if it advances no business purpose of the corporation. Zahn v. Transamerica Corp. is the leading case on this issue. Axton-Fisher had issued two classes of common stock. Class A stockholders held a privilege to convert their shares to Class B stock on a one-for-one basis. The corporation had the right to call shares of Class A stock at $60 per share, plus dividends accrued. Class B stockholders held most of the voting power in Axton-Fisher. Transamerica acquired about 80% of Axton-Fisher's Class B stock and two-thirds of the Class A stock. According to the complaint, when Transamerica learned that the value of Axton-Fisher's principal asset—leaf tobacco—had tripled, Transamerica called all of the Class A stock at $60 per share. Transamerica then sold the tobacco, liquidated Axton-Fisher, and pocketed the proceeds. On

161 See supra text accompanying notes 63-65.
162 See, e.g., Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971). Sinclair, the majority shareholder of its subsidiary, caused the subsidiary to contract with a related entity and then arranged for the related entity to breach the contract, to the subsidiary's detriment. See id. at 722-23. In holding Sinclair liable to the subsidiary's minority shareholders, the court noted the self-dealing aspect of the transaction and concluded that it "does not satisfy the standard of intrinsic fairness." Id. at 723. Of course, courts could treat cases like Sinclair Oil as breaches of duty by the subsidiary's officers and directors, all nominees of the parent. But those officers and directors act in the interests of the owner of the majority of shares. Only the divergence of interest between majority and minority, and the conclusion that the majority is not arbitrarily entitled to impose its will on the minority, would result in any fault on the part of the officers and directors.
163 162 F.2d 36, 46 (3d Cir. 1947) (stating that directors did not act in the shareholders' interest in redeeming their stock rather than allowing them to participate in the liquidation of the company).
164 According to the court, 71.5% of outstanding Class B stock constituted 46.7% of the voting stock in the corporation. See id. at 39.
these facts, the Third Circuit held that Axton-Fisher’s board, dominated as it was by Transamerica’s nominees, was not entitled to act on behalf of the dominant Class B stockholders at the expense of the Class A stockholders. The court emphasized that “under the allegations of the complaint there was no reason for the redemption of the Class A stock to be followed by the liquidation of Axton-Fisher except to enable the Class B stock to profit at the expense of the Class A stock.” A majority owner, therefore, may not engage in pure redistribution from one class of shareholders to another without some independent business purpose.

At the same time, majority shareholders are entitled to pursue a business policy that is in their own self-interest, so long as their actions do not involve a disproportionate transfer of assets from the corporation to themselves. Thus, if a majority shareholder who is strapped for cash seeks declaration of large dividends, the majority breaches no duty, even if reinvestment arguably would be better for the corporation. Here, the majority shareholder takes only its proportionate share of dividends and also bears a proportionate share of any decline in stock price if the market concludes that the corporation’s dividend policy is unwise. There is no reason to believe that shareholders would want to contract to bar the majority from setting such a dividend policy, since the market would protect against abuse of power by the majority.

Control of the corporation gives majority shareholders (and even shareholders who own a minority, but controlling, bloc of stock) a premium on their investment, an opportunity to derive benefits not available to all shareholders. This opportunity has led some to argue that controlling shareholders should share this premium with other shareholders. Defenders of existing doctrine, which generally permits controlling shareholders to keep the control premium, argue that an obligation to share

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165 Id.

166 Easterbrook and Fischel characterize corporate rules that prevent pure redistribution as rules against theft—rules that any shareholder would support:

A rule against confiscation would be created by contract even if it were not part of the law. Whoever controlled a corporation would find it advantageous to insert an anticonfiscation provision in the articles of incorporation. If he did not, the firm could not expect to receive much for its shares. New shareholders would fear confiscation and take (expensive) steps to protect their interest.

EASTERBROOK & FISCHEL, supra note 9, at 125.

167 See Sinclair Oil, 280 A.2d at 721-22 (holding that a parent corporation did not act improperly when it caused its subsidiary to declare large dividends at a time when the parent was in need of cash).

168 See William D. Andrews, The Stockholder’s Right to Equal Opportunity in the Sale of Shares, 78 Harv. L. Rev. 505, 515 (1965). Andrews argued that sharing of the control premium would not deter efficient transfers. He reasoned that if a transfer is efficient, the control buyer should be willing to purchase all of the corporate shares, not simply a controlling block, because each share would be more valuable after replacement of the existing inefficient management. See id. at 517-18.
would deter efficient transfers of control. They argue that sharehold-
ers generally would want sellers to keep those premiums as a mechanism
for keeping the corporation efficient and stock prices high. The explic-
it assumption is that shareholders generally are risk neutral investors who
can diversify their investments. Hence, so long as a particular rule
maximizes corporate value, shareholders would prefer that rule ex ante,
even if it might result in an unequal division of corporate gains.

2. Closely Held Corporations

Because shareholders in close corporations typically do not have diver-
sified portfolios, they tend to be risk averse rather than risk neutral.
Not only do these shareholders tend to have a large proportion of their
tangible assets invested in the enterprise, but in many cases their
human capital—their means of earning a living—is also tied up with the
enterprise. Moreover, their investment is not liquid. Even if close cor-
poration shareholders wanted to divest themselves of a significant portion
of their investment, the market for minority interests in close corpora-
tions is not a vigorous one.

Even if it were easy to measure the value of shares in a closely held
corporation, it is not at all clear that the founders of such a business
would want the controlling shareholders to maximize share value above

169 See Easterbrook & Fischel, supra note 9, at 127 ("Sharing the control pre-
mium would stifle transfers rather than enrich minority investors."); cf. Einer Elhauge, The Triggering Function of Sale of Control Doctrine, 59 U. CHI. L. REV. 1465, 1493-1523 (1992) (attempting to reconcile existing case law with a formulation that would sometimes, but not always, permit controlling shareholders to retain con-
trol premiums).

170 See Easterbrook & Fischel, supra note 9, at 119-26 (arguing that minority
shareholders benefit from control transactions, even if they obtain less than their pro-
rata portion of the overall gain); Elhauge, supra note 169, at 1522 n.201 ("In establish-
ing a default rule, the best corporate law can do is to assume the parties would have
consented to the rule that produces the greatest wealth for the participants.").

171 See Easterbrook & Fischel, supra note 9, at 120 (arguing that large financial
institutions generally have these characteristics).

172 See Hetherington, supra note 159, at 23-24 (contrasting the ownership of public
and closely held corporations).

173 See Lawrence E. Mitchell, The Death of Fiduciary Duty in Close Corporations,
138 U. PA. L. REV. 1675, 1690 (1991) ("Close corporation shareholders tend to have
invested substantial personal wealth in the enterprise, magnifying the consequences of
any business decision as to a particular shareholder." (footnote omitted)).

174 See F. Hodge O'Neal, Introduction to Symposium, 22 WAKE FOREST L. REV. 1,
6 (1987) (emphasizing the expectation of future employment). Our legal system fre-
quently balks at arrangements by which individuals lose the benefit of their human
capital. See generally Stewart E. Sterk, Restraints on Alienation of Human Capital, 79 VA. L. REV. 383, 385 (1993) (examining such restraints in areas of employment, debt-
or-creditor, and family law).
all else. Often, the expectations of shareholders revolve around employment opportunities, dividend policies, and other aspects of the business not easily reducible to the simple "maximize share value" formula. For instance, if a close corporation had a policy of declaring no dividends, and combined that policy with a refusal to hire minority shareholders, a minority shareholder might be unable to derive any effective benefit from his unmarketable shares. Few close corporation shareholders would willingly put themselves at such risk, even if the corporation's policy was to maximize the value of the business (and therefore of corporate shares in the aggregate).

As a result of this reality, some courts have limited the right of majority shareholders to freeze out minority shareholders. *Wilkes v. Springside Nursing Home, Inc.*\(^{175}\) has become a leading case on the protection of minority interests in close corporations. After some deterioration in relations between Wilkes and the three other shareholders, Wilkes announced his intention to exercise his appraisal rights. The corporation then held a directors' meeting, at which the board expelled Wilkes from the corporate position he had long held and denied him a salary.\(^{176}\) At the next annual meeting, Wilkes was not re-elected as a corporate director or officer. He then sued for breach of fiduciary duty. The Massachusetts Supreme Judicial Court held that Wilkes's complaint stated a claim, indicating that majority shareholders in a closely held corporation may not squeeze out a minority shareholder without first demonstrating a legitimate business purpose for their action.\(^{177}\) The court emphasized that "[t]here was no showing of misconduct on Wilkes's part as a director, officer or employee of the corporation which would lead us to approve the majority action as a legitimate response to the disruptive nature of an undesirable individual bent on injuring or destroying the corporation."\(^{178}\) The court went on to state that even if a corporation did have a business purpose for acting adversely to the interests of a minority shareholder, the shareholder might still be able to prevail by showing that the purpose "could have been achieved through an alternative course of action less harmful to the minority's interest."\(^{179}\)

Shareholders in close corporations rarely draft agreements that resolve in advance all potential conflicts among them. Because the corporation is designed to be an enduring enterprise rather than a one-shot endeavor, shareholders would find it impossible to anticipate all the circumstances that might enable one group of shareholders to harm another.\(^{180}\) As a

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\(^{175}\) 353 N.E.2d 657 (Mass. 1976).

\(^{176}\) See id. at 661.

\(^{177}\) See id. at 663.

\(^{178}\) Id. at 664.

\(^{179}\) Id. at 663.

\(^{180}\) See Charny, *supra* note 6, at 1871 (commenting that opportunities for gain may be difficult to anticipate in advance); Eisenberg, *supra* note 9, at 1465 (noting that
result, courts must construe the parties' agreement as disputes arise. But the same wide variety of contingencies that makes it difficult for parties to specify rights and obligations by contract also makes it difficult for courts to issue definitive pronouncements with sufficient generality to have significant precedential effect. In Wilkes, for instance, the court held that the majority had acted improperly by excluding Wilkes from employment. In other circumstances, however, excluding a shareholder from employment may be entirely appropriate.

Nevertheless, Wilkes is significant because the court tried to set out a general delineation of the duty owed to minority shareholders in close corporations. The duty differs from the wealth-maximization norm that typically guides analysis of management decisions in publicly held corporations. According to the Wilkes court, a decision that serves a demonstrable business purpose nevertheless violates the rights of minority shareholders if the corporation could have accomplished the same purpose with less harm to the minority. At the same time, the court's formulation does not require majority shareholders to maximize the return to minority shareholders; Wilkes implicitly rejects any corporate version of Rawls's egalitarian difference principle. To the extent that the Wilkes principle reflects the understanding of close corporation share-

long-term contracts are unlikely to account for all future contingencies, "because the tree of events will branch beyond the ideas of the future that will be conceived when the contract is made").

How courts should approach this task has been a matter of considerable controversy. The dominant school suggests that courts should seek to give effect to the parties' probable expectations, derived not only from contract documents, but from other circumstances. See Eisenberg, supra note 9, at 1466 (discussing cases of "judicial intervention when enforcement of bargained-out structural and distributional rules would defeat a shareholder's fair expectations"); Hetherington, supra note 159, at 23 (arguing that this position is faithful to the intent of the parties, because "[i]t is unlikely that the parties would have agreed, had they addressed explicitly the issue from the outset, that in the event of disagreement the majority should have the right to exclude the minority from the profits of the business"). David Charny, by contrast, has suggested interpretive rules that minimize bargaining costs by inducing parties to expend the least effort in bargaining around the court's interpretation—even if that interpretation does not reflect the choice most parties would want. See Charny, supra note 6, at 1877-78. Charny also notes that questions about the generality of assumptions about the parties attend all hypothetical bargains. See id. at 1820.

See Mitchell, supra note 173, at 1706-07 ("Obviously, the decision to employ an individual is a business decision generally entrusted to a corporation's board of directors. Equally obviously, it cannot always be a breach of fiduciary duty, even in a close corporation, to refuse or cease to employ a particular shareholder in the business.").

See supra text accompanying notes 162-71.

See Wilkes, 353 N.E.2d at 663.

See Rawls, supra note 65, at 75 (stating that social order should not "establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate").
holders, that understanding appears to be that majority shareholders may pursue wealth maximization at the expense of shareholder equality, but only if they can demonstrate that the two goals are mutually exclusive.

In a number of ways, the position of a member of a community association is akin to that of a minority shareholder in a closely held corporation. First, the agreements creating and regulating the association, like those governing the close corporation, are relational in nature and designed to endure for a long period of time. As a result, it is unrealistic to expect the parties to anticipate all of the conflicts that might arise during the agreement's life. Not all disputes, therefore, will be resolvable by referring to the agreement's explicit language. Second, a unit owner in a common interest community, like a close corporation minority shareholder, faces difficulty in diversifying his investment; even the down payment required to qualify for a mortgage is likely to represent the largest single investment most homeowners will make. Third, market value inadequately reflects the benefit a unit owner expects from his investment, just as market value inadequately reflects the benefits expected by a close corporation shareholder. Homeowners typically derive benefits beyond market value from their homes, such as memories, attachments to neighbors and neighborhoods, and the costs and inconveniences of moving.

Each of these similarities might lead unit owners to prefer limited protection against community association action, even when the governing documents confer no explicit protection. Because of the relational nature of the agreement among unit owners, the governing documents themselves cannot be expected to specify all of the protections an owner might want in the future. Because most unit owners will not be able to diversify, risk aversion would lead them to reject a rule that permitted associations to maximize the collective welfare without regard to the distributio nal effects of association decisions. Finally, because a unit's sale price does not represent its full value to its owner, for most unit owners selling the unit will not be an adequate response to undesirable association policies.

V. MINORITIES IN THE COMMUNITY ASSOCIATION CONTEXT: ADDRESSING CONCRETE PROBLEMS

As we have seen, despite its apparent advantages, majority rule risks undervaluing minority interests. By outvoting the minority, the majority avoids confronting and evaluating minority concerns. This results in two sorts of inefficiency. First, the organization itself may take actions that generate costs without commensurate benefits. Second, the prospect of such actions may discourage others from entering into collective enter-

186 See generally Natelson, supra note 15, at 52 (noting analogies between the close corporation and community associations).
prises, even when collective action could eliminate inefficient holdout and freerider problems.

In the corporate setting, institutional constraints on the behavior of managers and majority shareholders mitigate some of the most serious difficulties of majority rule. When institutional constraints are inadequate, an express contract among the members may reduce the risk of harm to the minority. One of the lessons from close corporation law, however, is that the range of opportunities for collective action is so great that express contracts cannot contemplate all of the circumstances that might lead a majority to act opportunistically. Legal rules may therefore be helpful in defining the appropriate scope of majority power.

This Part explores the range of situations in which community association majorities might inflict harm on minority members. Based in part on a background derived from other areas of public and private law, the Part examines whether and when legal constraints on association action are desirable, and when, by contrast, institutional constraints on majority action make judicial intervention superfluous, if not counterproductive.

A. Community Association Decisions that Redistribute Market Value

Start with two relatively uncontroversial assumptions. First, unit owners in common interest communities generally expect net benefit, not net harm, from community association activity. Second, because their units represent a large portion of their total assets, unit owners tend to be risk averse with respect to their units. Given these assumptions, it is not difficult to see that unit owners generally would oppose giving community associations the power to take actions that redistribute market value from some units to others. Indeed, even if we assume that unit owners are risk neutral, they might oppose redistributive actions to the extent those actions encourage members of the association to engage in unproductive rent-seeking, rather than more productive activity. On similar grounds, Easterbrook and Fischel justify prohibitions on redistribution in publicly held corporations, where they assume shareholders are risk neutral. See Easterbrook & Fischel, supra note 9, at 124-26 (likening prohibitions on redistribution to prohibitions on theft).

Moreover, to the extent that associations deal with too few issues to permit effective formation of shifting coalitions, the risk that the majority will not account for minority preferences is significant. Members of the majority on one issue will be unlikely to worry that they might need minority support on some other issue. At the time the association is

\[187\] Indeed, even if we assume that unit owners are risk neutral, they might oppose redistributive actions to the extent those actions encourage members of the association to engage in unproductive rent-seeking, rather than more productive activity. On similar grounds, Easterbrook and Fischel justify prohibitions on redistribution in publicly held corporations, where they assume shareholders are risk neutral. See Easterbrook & Fischel, supra note 9, at 124-26 (likening prohibitions on redistribution to prohibitions on theft).

\[188\] Moreover, as Robert Ellickson has pointed out, even if residents are not risk averse, the administrative costs of redistributive programs make redistribution a negative sum game. See Ellickson, supra note 1, at 1525 (noting that administrative expenses will result in a dead-weight loss to unit owners).
formed, potential members would find it difficult to anticipate, and pro-
hibit, all potential forms of redistribution, so that failure to bar a particu-
lar action in the Declaration or in the association's bylaws would hardly
establish that association members were willing to confer uncontrolled
power on the majority. The case for judicial invalidation of purely re-
distributive actions, then, is particularly strong.

Few association actions are purely redistributive, however. Most redis-
tributive actions serve some community purpose. As we have seen, a
number of scholars have championed deliberation-promoting rules as a
means of persuading victims of redistribution that their losses are neces-
sary to promote the common good. But to the extent that the burden
of the action falls on a small number of unit owners, redistribution should
not be necessary to promote the common good. The association would
not face a heavy administrative burden if forced to compensate affected
unit owners for the harm they suffer. Risk averse unit owners would cer-
tainly support a compensation requirement. Hence, one would expect
courts to invalidate any measure that significantly reduces the market
value of a particular unit or set of units, even if the association's action
creates some community-wide benefit.

Ridgely Condominium Ass'n v. Smyrniodis furnishes perhaps the
best illustration. In Ridgely, a mixed-unit condominium had 232 units,
seven of which were commercial units with access both from the outside
and from the interior lobby of the building. After the commercial units
were sold, the association, for security reasons, enacted a bylaw prohibit-
ing customers of the commercial units from using the interior lobby. This
made access to those units less attractive and consequently made them
less valuable. The court invalidated the bylaw as unreasonable. Of

189 The situation might be different if the governing documents explicitly conferred
on the majority the power to take particular actions that might have a redistributive
effect. In that case, a reviewing court would have no basis for substituting its percep-
tion of the original understanding of the parties. In any case, these provisions pre-
sumably would be priced into the original transaction. But see Kelman, supra note
118, at 107-09 (noting that bundling enables one party to slip in undesirable terms
without affecting price).

190 See supra Part II.B.3.

191 If the association offered just compensation to those whose land would decline
in value as a result of the association's proposed regulation, there would be little rea-
son to invalidate the regulation. Cf. Ellickson, supra note 1, at 1536-37 (suggesting
that courts imply taking clauses into declarations). However, whether courts should
order compensation, rather than simply invalidate the regulation and give the associa-
tion the opportunity to draft a new regulation with compensation, is a different ques-
tion. In any event, associations appear rarely to have offered harmed landowners
compensation for losses resulting from regulation.


193 See id. at 951 (finding that "[t]he provision did not reasonably relate to the
health, happiness and enjoyment of unit owners" (internal quotations omitted)).
course, if security had been a significant concern for the residential users, they could easily have compensated the seven commercial users for loss of lobby access. Their failure to do so made the case an easy one for the court. The governing principle is analogous to that which the Wilkes court invoked in the close corporation context: an action that serves a permissible purpose—here, improving security—is nevertheless invalid if the same purpose could have been accomplished without harm to minority members (here, by compensating the commercial unit owners).

Similarly, in Boyles v. Hausman, the Nebraska Supreme Court invalidated a covenant, affecting only a minority of landowners, that prohibited building within 120 feet of a county road. The association imposed the covenant after the complaining unit owner had purchased his parcel. The covenant significantly diminished his parcel's value. Had the association compensated the unit owner for the value of an easement over his parcel, the association's position would have been more defensible. As it was, however, the association's action constituted unnecessary redistribution, and the court responded accordingly.

B. Discrimination Against Non-Resident Unit Owners

Many community association actions are designed to promote the residential character of the community. Associations may prohibit rentals altogether, prohibit short-term rentals, or provide benefits to resident owners not equally available to non-resident owners. At first glance, actions like these appear redistributive in nature: they benefit the majority of resident owners at the expense of the minority of non-resident owners. On closer examination, however, these restrictions are far less troublesome, and generally should be sustained.

A number of justifications underlie the common preference for resident owners. Resident owners may prefer other resident owners on the theory that, because residents have a long-term financial stake in the community, they are likely to work harder at maintaining their units and common areas, which will result in higher long-term market value for all units. Indeed, lenders apparently share this view, because they often condition financing of associations on the maintenance of a high percentage

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194 See supra text accompanying notes 175-83.
195 517 N.W.2d 610, 618 (Neb. 1994).
196 The court wrote: "The law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants." Id. at 617. See also Blood v. Edgar's, Inc., 632 N.E.2d 419, 420 (Mass. App. Ct. 1994), in which a mixed-use condominium association decided to subsidize a rental program that benefitted only residential unit owners. When the sole commercial owner attacked the subsidy, the court held that the association had no power to alter the previous practice, which had been to assure that the rental program was self-sustaining. See id. at 422-23.
Beyond market value, resident owners may value the sense of community that comes with a stable neighborhood and may fear that renters—especially short-term renters—will interfere with that sense of community.

If resident owners want to restrict rentals, should they be required to compensate non-resident owners for loss of the right to rent or for other disadvantages imposed on non-renters? Not necessarily. To the extent that restrictions on renting make the community more attractive, those restrictions may well increase the market value of all units, including those owned by non-residents. Moreover, the restrictions apply equally to all units, not only to units owned by non-residents, so the potential for redistribution is minimal.

In addition, self-interest should restrain resident owners from imposing unduly onerous restrictions on renting. If rental restrictions reduce market value, the resident owners—most of whom ultimately will want to sell their units—will have taken money out of their own pockets. As a result, resident owners will be careful to structure rental restrictions in a way that eliminates the negative impact on market values.

Finally, the only interest most non-resident owners have in their units is a financial one. Because these owners have chosen not to live in the community, they are not likely to care about the impact rental restrictions (like eliminating "interesting" transients) will have on the quality of life, so long as that impact does not reduce market value of their units. In this sense, non-resident owners are more like shareholders of a publicly held corporation, whose focus is almost exclusively on share value, than shareholders in a close corporation, whose interests typically transcend share price. And in publicly held corporations, in which the ultimate interests of majority and minority are the same, courts generally invoke the business judgment rule to reject challenges to the decisions of majority-selected officers and directors.

Statutes and judicial decisions generally uphold limitations on renting when associations set them by amending their Declarations. The UCIOA, for instance, permits restrictions on alienation so long as they are included in the Declaration. Courts, too, appear likely to sustain leasing restrictions over the objections of non-resident owners when im-

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197 See Wayne S. Hyatt & Jo Anne P. Stubblefield, The Identity Crisis of Community Associations: In Search of the Appropriate Analogy, 27 REAL PROP. PROB. J. 589, 684-86 (1993) (noting the desire of lenders to minimize the friction between owner-occupants and investor-owners, and to preserve their ability to sell the resulting mortgages on the secondary market).

198 See supra Part V.A.2.

199 See UNIF. COMMON INTEREST OWNERSHIP ACT § 2-105(a)(12) (1994) (stating that the Declaration must contain "any restrictions upon the use, occupancy, and alienation of the units").
posed by amendment to the Declaration.\textsuperscript{200}

By contrast, the UCIOA permits associations to promulgate leasing re-
strictions by rule only if the rules are designed to comply with lender
requirements.\textsuperscript{201} This limitation on majority power appears unnecessary
in light of the limited threat that rental restrictions present to minority
owners.

The situation is different, however, if the Declaration confers on unit
owners authorization to rent. In that instance, the association should only
be able to withdraw that power by amending the Declaration itself, not
by enacting a rule inconsistent with the Declaration. In a number of
cases, non-resident owners have successfully challenged restrictions on
renting when the association has attempted to circumvent rights appar-
ently conferred by the Declaration. For example, if the Declaration or
the association bylaws provide for association review of leasing applica-
tions, courts have held that the association may not, by rule, prohibit leas-
ing altogether.\textsuperscript{202} Similarly, a California court has held that if the CC&Rs
grant all members a right to use common areas subject to uniform associ-
ation rules, the association may not, by rule, prohibit non-resident mem-
bers from using the common facilities.\textsuperscript{203}

C. Decisions that Deprive Unit Owners of Idiosyncratic Value

1. The Framework

Community association decisions can have an impact—positive or neg-

1989) (sustaining an amendment to a Declaration that prohibited leasing for less than
a year and forbade leasing to corporations).

\textsuperscript{201} See UNIF. COMMON INTEREST OWNERSHIP ACT § 3-102(c)(3).

\textsuperscript{202} See Mohrani v. La Cancha Condo Ass'n, 590 So. 2d 36, 38 (Fla. Dist. Ct. App.
1991) (holding invalid an association rule that placed substantial restrictions on leasing,
in conflict with the Declaration); Buddin v. Golden Bay Manor, Inc., 585 So. 2d
435, 437-38 (Fla. Dist. Ct. App. 1991) (holding that a co-op could not prohibit subleas-
ing by rule when its proprietary lease and bylaws provided a mechanism for sublease
approval).

\textsuperscript{203} See Major v. Miraverde Homeowners Ass'n, 9 Cal. Rptr. 2d 237, 243 (Cal. Ct.
App. 1992) (striking down a rule that forbade non-resident owners from using associ-
tion tennis courts unless signed in by a resident who was personally present at the
courts). In \textit{Major}, the non-resident owners were family members of a senile 82-year-
old resident who was physically incapable of using the tennis courts. See id.; see also
Thanasoulis v. Winston Towers 200 Ass'n, 542 A.2d 900, 905 (N.J. 1988) (relying on a
master deed provision requiring unit owners to pay a proportionate share for mainte-
nance of common elements as a basis for nullifying a rule imposing differential park-
ing rates for residents and non-residents). \textit{Major} and \textit{Thanasoulis} involved not
prohibitions on renting, but unequal treatment of non-resident members. The issues
raised, however, are closely related. If an association can prohibit leasing altogether,
one would think it could also take the less drastic step of permitting leasing on the
condition that the non-resident owner give up certain rights to use common facilities.
ative—on particular homeowners, even if those decisions have no impact on the market value of the units. Suppose, for instance, that an association is about to decide whether to improve existing swimming pool facilities and expand the hours during which the pool is open. Suppose further that these enhancements will cost $100 per year per unit owner. For Sally Swimmer, who would have paid $200 per year for upgraded pool facilities, the proposal is attractive. Lucy Landlubber, by contrast, would not willingly pay even a dollar for the upgrade, because she never uses the facilities. Each of the other association members values the enhancements somewhere between zero and $200 per year. If a majority of association members approves the upgrade, and approves an assessment of $100 per year to pay for the enhancement, should a court step in to protect Lucy, who has been made $100 per year worse off as a result of the association’s action?204

At first glance, one might dismiss Lucy’s complaint by noting that Lucy could simply sell her unit and avoid the $100 annual expense. The very fact that a majority of unit owners supported the improvements and was willing to pay the annual assessment is good evidence that potential buyers would find the benefit worth the cost. If the majority preferences of existing owners reflect the preferences of potential buyers, Lucy will not suffer any loss in market value as a result of the pool improvements.205

The problem with this approach is that it denies Lucy the idiosyncratic

204 An immediate—but incorrect—response would be to require the board to finance the improvements through user fees. One might assume that user fee assessments could achieve efficiency objectives without harming other unit owners—the sort of test that the Wilkes court proposed in the closely held corporation context. See supra text accompanying notes 175-83. User fee financing, however, might provide too few incentives for efficient improvements to the pool, while simultaneously resulting in charges to members who derive no benefit from the pool.

Assuming that the proposed pool upgrade benefits the average association member by $110, and that the cost of the upgrade will be $100 per unit, a user fee of $110 might be insufficient to finance the enhancements, because some percentage of unit owners would not pay the user fee. Moreover, as the user fee increases, more and more unit owners would elect to avoid the fee by not using the pool. Unless the association could practice perfect price discrimination—taxing each unit owner for just less than the benefit that owner derives from the pool improvements—there would be no assurance that the association would even make the improvements. Moreover, even if it did, some people who placed no value at all on the improvements would end up paying for them. For instance, an owner who valued the improvements above zero, but who valued the pre-existing pool at more than $110 per year, would pay the user fee—bearing a cost that produced no benefit to him. User fees, then, do not eliminate the risk that some unit owners will pay for benefits enjoyed by others.

205 The assumption is that the pool improvements are equally accessible to all unit owners, differentiating this case from those in which particular decisions benefit some unit owners and harm others. See supra text accompanying notes 185-87.
value she almost certainly attaches to her unit. Economic theory teaches that all current owners of housing (and, for that matter, other assets) value their units more than the market does; if they did not, they would be indifferent to selling their units and moving or remaining. With housing, there is a particularly good reason for assuming that owners attach idiosyncratic value to their units: moving is costly, both in terms of finances as well as changed affiliations (new schools, new neighbors) and personal attachments. In other words, the cost of "exit" for Lucy is high, often higher than the loss she might suffer at the association's hands.

Lucy's predicament is not the "bundling" problem she would face when deciding whether to purchase a unit with a swimming pool she does not want. In that situation, Lucy would not yet have formed the attachments that make leaving difficult in the case where the association approves pool renovations after she has lived in the community for a time. Moreover, because Lucy's attachments in the latter situation lock her into her current unit, she has less incentive to make an informed decision about pool improvements than if she was deciding whether to buy in the first place.

Focusing on Lucy's predicament, however, obscures the advantages of sustaining the association's action. First, there is good reason to believe that the majority's gains will exceed the minority's losses. Sheer numbers do not capture intensity of preferences, but in the case of community association decisions, those with intense preferences have two alternatives: they can seek to influence the association's decision, or they can move. The first option is likely to be more effective in the community association context than in the close corporation, because majority members of the association must confront members of the minority on a regular basis—in the neighborhood or when using common facilities. Regular contacts like these would be quite uncomfortable if it was clear that the majority was ignoring strongly held preferences of the minority. Thus, the majority will be more inclined to compromise than in the close corpora-

206 See Ellickson, supra note 1, at 1525 (noting that redistributive policies can have bite whenever a member "is obtaining irreplaceable surplus value (perhaps as a result of a long-lived membership)").
207 See Margaret Radin, Property and Personhood, 34 STAN. L. REV. 957 (1982) (discussing the impossibility of compensating the loss of highly personal value).
208 See supra Part III.B.1.
209 See Bebchuck, supra note 141, at 1828-29. In discussing amendments to charters of publicly held corporations, Bebchuck notes that, at the time of the original charter, a purchaser who does not like its provisions can take them into account when deciding whether to purchase. However, at the amendment stage, a shareholder cannot escape the consequences of a value-decreasing amendment. Bebchuck further points out that a stock purchaser has a much greater incentive to make an informed decision than does a voting shareholder, because the voter's decision is not likely to be pivotal. See id. at 1837.
tion context, in which the majority could, absent legal constraints, simply "freeze out" minority shareholders. 210

In addition, because units in a common interest community are readily marketable—unlike minority interests in close corporations—the exit option furnishes the ultimate safety valve for dissident residents of a common interest community. So long as the association's actions do not redistribute market value from some units to others, those who are particularly unhappy with the association's decision know that, at worst, they can sell their unit at the market price. 211 Moving would result in a loss of idiosyncratic value, but there is no way to protect both the minority's intense preferences and its idiosyncratic value without imposing parallel—and presumptively larger—costs on the majority. That is, if we assume that some members of the majority are at least as likely to have intense preferences as members of the minority, annulling the association's action would put the former to the same choice. Either they could stay, their intense preferences ignored, or they could leave, losing whatever idiosyncratic value they attach to their units. Collective action problems make it virtually impossible to solve the dilemma by compensating minority members. As long as the losses the minority suffers are not reflected in market value, no readily available mechanism exists for determining what compensation should be paid, or who should pay it. 212

Two analogies to close corporation law suggest that the majority ought to prevail in cases like Lucy's. First, we have seen that even in a close corporation case like Wilkes, in which the court protected a minority shareholder against a freeze-out, the court indicated that the majority

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210 Cf. HIRSCHMAN, supra note 60, at 40-41 (noting that "voice is costly and conditioned on the influence and bargaining power customers and members can bring to bear within the ... organizations to which they belong"). The potential for freeze-outs reduces bargaining power, and hence, the potential for voice within a close corporation. By contrast, to the extent minority residents of a common interest community can exercise bargaining power simply by making majority members uncomfortable in their daily lives, minority members with intense preferences have more opportunity to exercise a "voice" in association decisions. Clayton Gillette has noted that an association is unlikely to take an action against any minority residents unless their behavior is extraordinarily bothersome to the majority:

A board of directors is unlikely to bring a costly and time-consuming action in the association's name until it has heard multiple complaints against a neighbor, made in independent investigation, and attempted informal resolution of the matter. Where the association decides to proceed, therefore, it is unlikely that the complainers have been idiosyncratic.

Gillette, supra note 122, at 1422-23.

211 The assumption here is that the association's decision will not reduce market value; that is, that self-interested association members will not enact measures that reduce the value of all units in the community.

shareholders would be entitled to disadvantage the minority shareholder if they could not accomplish their legitimate business purpose without harming the minority shareholder.\textsuperscript{213} If a community association cannot accomplish a purpose of importance to a majority of unit owners without diminishing the idiosyncratic value of minority unit owners, the Wilkes principle suggests that the majority should prevail.

Second, a number of states have enacted statutes authorizing dissolution of close corporations when those in control have oppressed minority shareholders.\textsuperscript{214} These statutes permit controlling shareholders to avoid dissolution by purchasing the shares of the minority shareholders at a fair price.\textsuperscript{215} In effect, then, a dissenting shareholder who establishes that her expectations of corporate office or employment have been unjustifiably frustrated by the majority's action is entitled to recover only the market value of her shares, not whatever idiosyncratic value she attached to her job or affiliation with the company. There is good reason for denying dissenting shareholders (and dissenting unit owners) compensation for lost idiosyncratic value: that value is notoriously difficult to measure.\textsuperscript{216}

To the extent these analogies to close corporation law are appropriate, they suggest that those who join an association generally expect that the association could pursue policies that most members would find beneficial, so long as those policies do not redistribute market value among units.\textsuperscript{217} On the other hand, this presumption of association power should serve merely as a default rule. When parties have revealed expec-

\textsuperscript{213} See supra text accompanying notes 175-83.

\textsuperscript{214} See, e.g., CAL. CORP. CODE § 1800(a)(2), (b)(4) (West 1990) (providing shareholders a remedy of involuntary dissolution where those in control of the corporation engage in "persistent and pervasive fraud, mismanagement or abuse of authority or persistent unfairness toward any shareholders," or waste or misapply corporate property); N.Y. BUS. CORP. LAW § 1104-a (McKinney 1986) (permitting shareholders to petition for dissolution when the directors, or other control persons, engage in "illegal, fraudulent or oppressive actions toward the complaining shareholders," or "property or assets of the corporation are being looted, wasted or diverted for non-corporate purposes").

\textsuperscript{215} See CAL. CORP. CODE § 2000(a); N.Y. BUS CORP. LAW § 1118(a).

\textsuperscript{216} See United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) ("Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule. . . . The Court therefore has employed the concept of fair market value to determine the condemnee's loss . . . ."). But cf. Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. CHI. L. REV. 681, 736-37 (1973) (proposing legislatively defined compensation for lost surplus value).

\textsuperscript{217} But cf. Natelson, supra note 15, at 69-70 (suggesting that prospective members would only agree to regulations that would hold them harmless from all losses, without distinguishing between market value losses and other losses).
tations that association power is limited, those expectations should be honored.\textsuperscript{218}

The most obvious way for parties to reveal their expectations about the scope of association power is to make them explicit in the documents creating the association. Thus, if the Declaration limits association power to alter appurtenances without unanimous approval of record owners, an association majority should not be able to convert a tennis court into a parking area.\textsuperscript{219} Similarly, the Declaration can limit the power of the association board by requiring supermajorities for particular actions.\textsuperscript{220}

Moreover, if the Declaration explicitly permits particular landowner activities, one would not expect that an association could prohibit those activities without amendment to the Declaration. Simply enacting a rule should be insufficient.\textsuperscript{221}

Even when the Declaration is silent about association behavior, if a unit owner makes a substantial and obvious investment, either financial or emotional, with the expectation, created by existing association structure, that certain behavior would be permitted, the association should be estopped from regulating that behavior if it took no steps to stop the unit owner from making the investment. Property law often protects expectations, whether or not reduced to a writing, when a party has made investments that all parties understand he would not have made but for the expectation.\textsuperscript{222} Zoning law's non-conforming use doctrines provide simi-

\textsuperscript{218} Professor Ellickson has suggested that unit owners should be compensated for lost idiosyncratic value, measured by "an amount equal to what a 'reasonable person' in the claimant's particular life situation would lose in irreplaceable surplus." Ellickson, supra note 1, at 1538. How that amount would be measured in the case of a prospective prohibition on pets or aluminum siding is difficult to imagine. Indeed, virtually any unit owner might make a claim. Professor Ellickson's illustration—"fertile young couples who had joined the association in reliance on an express policy allowing children"—is one of those cases in which, by hypothesis, there has been reliance on past policy and harm is therefore assumed. Hence, as suggested below, the association should be estopped from enforcing the restriction. \textit{See infra} Part V.C.2. Incidentally, the particular restriction Professor Ellickson used to illustrate his point has been rendered moot by the 1988 amendments to the Fair Housing Act. \textit{See} 42 U.S.C. § 3604(b) (1994) (outlawing discrimination in the sale or rental of a dwelling on the basis of "familial status").

\textsuperscript{219} \textit{See} Gilmore v. Ciega Verde Condo. Ass'n, 601 So. 2d 1325, 1325 (Fla. Dist. Ct. App. 1992) (rejecting an association's attempt to convert a tennis court into a parking lot without the unanimous consent of its residents, as required by its CC&Rs); Young v. Ciega Verde Condo. Ass'n, 600 So. 2d 528, 528 (Fla. Dist. Ct. App. 1992) (same).

\textsuperscript{220} See generally Ellickson, supra note 1, at 1533-34 (discussing the utility of supermajorities in limiting association power).

\textsuperscript{221} \textit{See}, e.g., Parkway Gardens Condo. Ass'n v Kinser, 536 So. 2d 1076 (Fla. Dist. Ct. App. 1988) (holding unenforceable a rule prohibiting pets when the Declaration permitted them).

\textsuperscript{222} American property law generally imposes on neighbors the obligation to coop-
lar protection for expectations: if a party develops land for a particular use, subsequent zoning regulation changes do not generally require immediate cessation of the pre-existing use. The same principles should serve to limit community association action. For instance, if a unit owner erected a satellite dish or installed a washer and dryer without any notice that these devices were prohibited, courts could appropriately enjoin the association from enforcing any subsequently enacted prohibition against that unit owner. Similarly, a prohibition on pets even if enforceable prospectively, ought not to require a particular unit owner to part with a pet acquired without notice of any restriction.

2. The Case Law

A focus on unit owner expectations leads to the conclusion that association actions should be upheld unless either there is clear indication that a unit owner expected protection against a particular kind of association rule, or the association has adopted rules that redistribute value from some units to others. The case law generally, albeit imperfectly, reflects this framework. This section examines the judicial approach to these questions in the areas of assessments, design controls, and lifestyle restrictions.

a. Assessments

So long as no express language in the Declaration limits the association's power to impose assessments on unit owners, and so long as the association does not use assessments to redistribute the market value of units, one would expect courts routinely to enforce assessments despite the complaints of unit owners who would prefer to avoid them. Indeed, because an individual who successfully escapes his obligation to pay an assessment can nevertheless free-ride on the payments of other unit owners, one would expect courts to be especially reluctant to upset assess-

erate with each other. See generally Sterk, supra note 212, at 95-103 (discussing the scope of the obligation). In particular, a neighbor generally may not stand silent while his neighbor makes substantial investments, and then require the neighbor to forfeit those investments. See id. at 59-63 (discussing various easement and boundary dispute doctrines that protect neighbors who have made substantial investments in reliance on an understanding, sometimes mistaken, about their right to use their land). Presumably, the obligation to cooperate should be even stronger in the community association context, in which the parties have a continuing formal legal relation, as well as a social relation as neighbors.

223 See, e.g., MICH. COMP. LAWS § 125.583a(1) (1996):
The lawful use of land or a structure exactly as the land or structure existed at the time of the enactment of the ordinance affecting that land or structure, may be continued, except as otherwise provided in this act, although that use or structure does not conform with the ordinance.
ments (as compared with other association actions that generate less potential for free-riding).

In fact, courts have become increasingly inclined to enforce association-imposed assessments. In one oft-cited 1971 case, *Petersen v. Beekmere, Inc.* 224 a New Jersey court refused to enforce an express covenant that required unit owners to pay dues and assessments to the association, expressing concern about leaving unit owners at the mercy of the association. More recent cases in New Jersey and elsewhere have enforced express covenants requiring unit owners to pay dues and assessments. 225 Indeed, courts have implied association power to impose assessments, even when the Declaration is silent as to such power. 226 The stated rationale generally has been that a unit owner who subjects himself to association power has notice and an expectation that the association may require financial support for the maintenance of common facilities. 227 Perhaps more significant to these outcomes, however, is the built-in insti-

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225 See, e.g., Paulinkill Lake Ass'n v. Emmich, 397 A.2d 698, 699 (N.J. 1978) (enforcing a covenant requiring all property owners to pay their share of the costs of maintaining the community); see also Cerro de Alcala Homeowners Ass'n v. Burns, 216 Cal. Rptr. 84, 86 (Cal. App. Dep't Super. Ct. 1985) (holding that an abandoning condominium owner is nevertheless responsible for assessments); Chattahoochee Chase Condo. Ass'n v. Ruben, 472 S.E.2d 520, 522 (Ga. Ct. App. 1996) (noting generally that "collective owners of a condominium unit are liable for the unit's portion of the total assessment levied by the Association on all units"). See generally *Restatement (Third) of Property: Servitudes* § 6.5 (Preliminary Draft No. 12, Sept. 20, 1995), entitled "Assessments and Fees," which provides in part:

Except as expressly limited by statute or the governing documents, an association has the power to raise the funds reasonably necessary to carry out its functions by levying assessments against the individually owned property in the community and by charging fees for services or use of the common property.

In the absence of a controlling statute or provision in the governing documents, assessments may be allocated among the individually owned properties on any reasonable basis, and are secured by a lien against the individually owned properties.

226 See, e.g., Meadow Run & Mt. Lake Park Ass'n v. Berkel, 598 A.2d 1024, 1026 (Pa. Super. Ct. 1991) (finding that an indication in the Declaration that an association might be formed in the future was sufficient to bind unit owners to assessments later imposed by that association); cf. William W. Bond, Jr. & Assoc., Inc. v. Lake O' the Hills Maintenance Ass'n, 481 So. 2d 1043, 1045 (Miss. 1990) (holding that the association's failure to insert the amount of its annual assessment in the deed did not excuse a property owner from paying the amount assessed).

227 See *Meadow Run*, 598 A.2d at 1026:

This deed, while making no mention of an assessment, does not apppellants on notice that should an association of lot owners be formed in the future, they would be bound by any rules the association adopted concerning usage of development facilities. Implied in the existence of rules and regulations concerning usage of the facilities is the necessity for rules and regulations concerning maintenance of these facilities.
tutional protection against abuse: the majority of association members would have little reason to impose assessments that would devalue their own properties.

Courts have even sustained assessments that differentiate between unit owners, so long as the association proffers a plausible justification for the differential assessments. Thus, in *Weatherby Lake Improvement Co. v. Sherman*,228 in which the association sought to pay for improvements to a dam and spillway by requiring owners of improved waterfront lots to pay 40% more than owners of unimproved lots without lake frontage, the court approved the assessments over the objection of an interior lot owner who complained that waterfront owners should have been required to pay even more.229

Conversely, when an association levies an assessment for services that provide no benefit to a well-defined minority of unit owners, courts recognize that, even if the assessment is applied equally to all unit owners, this form of redistribution was not within the contemplation of the parties. Thus, in *Blood v. Edgar's, Inc.*,230 the court invalidated an assessment that would have required all unit owners, residential and commercial alike, to support a rental operation that benefited only the residential owners.

To the extent that courts treat association assessment power as an implied term in the agreement between landowners, one would expect courts to respect express limitations on this power. In one significant case, however, the Missouri Supreme Court upheld an association's power to impose a one-time special assessment in excess of express assessment limits included in the Declaration. In *Lake Tishimongo Property Owners Ass'n v. Cronin*,231 the court noted that the Declaration made no provision for amendment, and that members of the association had voted 2-1 in favor of an assessment to finance the dredging of a lake in which

228 611 S.W.2d 326, 332 (Mo. Ct. App. 1980) (rejecting a claim that an assessment was unreasonable because it imposed an excessive burden on lot owners who would benefit the least from the improvements).

229 The court quoted a 1918 opinion in which the Missouri Supreme Court wrote:

> It is true exact equality in apportioning the burdens of improvements is beyond human wisdom, and no heed will be given complaints against a rule which approximates justice as nearly as reasonably may be. Exceptional cases of hardship in the natural and ordinary application of a principal [sic] of apportionment generally fair and just must be borne as one of the imperfections of human things.

*Id.* at 332 (quoting Commerce Trust Co. v. Blakely, 202 S.W. 402, 404 (Mo. 1918)). In *Weatherby Lake*, the association had approved three levels of assessment: the basic assessment for unimproved interior lots, a 20% premium for improved interior lots and unimproved waterfront lots, and a 40% premium for improved waterfront lots. *See id.* at 330.


231 679 S.W.2d 852, 857 (Mo. 1984) (en banc).
sediments had accumulated. Perhaps the lesson to be drawn from Lake Tishimongo is that parties can never anticipate all issues that will arise over the long term. As a result, if a multi-party agreement makes no express provision for modification in light of unanticipated events, courts will imply an understanding that modification is appropriate in light of unanticipated contingencies.

b. Design Controls

Design controls are among the most litigated of association actions. Often, the governing documents of a community association create an architectural review committee with the power to review plans for structures or improvements within the community. The function of the architectural review committee is to maintain the community’s character and to preserve values within the community. Even when the governing documents create no architectural control committee, an association might enact rules prohibiting certain structures or activities thought to interfere with the community’s function or aesthetics. Frequently, the association or committee ends up in disputes with unit owners who have their own ideas about aesthetics or function.

When the basis for the association’s rejection of a proposed structure or modification rests on a rule that the association applies to all units within the community, courts generally should enforce the association’s decision. So long as restrictions apply equally to all unit owners, they are unlikely to have any redistributive effect. Moreover, the self-interest of association members provides an institutional protection against enactment of restrictions that would reduce market value. Again, a majority of unit owners is unlikely to support restrictions that would make them worse off. Hence, unless the governing documents provide otherwise, the association’s generally applicable rules should be enforceable.

Many, but not all, courts have taken this position. For example, in Gillman v. Pebble Cove Home Owners Ass’n, the court upheld an association’s right to prohibit parking on the development’s private streets. In

See id. at 854.

The principle resembles the rationale for the “changed conditions” doctrine in servitude law. See generally Stewart E. Sterk, Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions, 70 Iowa L. Rev. 615, 652-54 (1985) (explaining that the changed conditions doctrine prevents enforcement of servitudes when conditions have changed to such a degree as to make enforcement impossible or inequitable). On the inadequacy of foresight as a justification for restricting contractual freedom in servitude law, see id. at 631-34 and Stewart E. Sterk, Foresight and the Law of Servitudes, 73 Cornell L. Rev. 956, 957-61 (1988). But see Epstein, supra note 5, at 923 (arguing that “there is no need for any public doctrine of changed conditions to limit the scope and effect of private covenants”).


O’Buck v. Cottonwood Village Condominium Ass’n, the court held that the association had the right to prohibit outdoor television antennas. And in Dunlap v. Bavarian Village Condominium Ass’n, the court sustained a rule prohibiting storage of vehicles on the premises.

Results are similar when the governing documents delegate decision making authority to an architectural control committee. Thus, in McNamie v. Bishop Trust Co., the court upheld a committee’s decision to prohibit a two-story addition in a community made up exclusively of one-story homes. In Coral Gables Investments, Inc. v. Graham Cos., the court upheld a prohibition on fiberglass shingles. And in Palos Verdes Homes Ass’n v. Rodman, the court upheld a committee policy requiring that solar heating units meet detailed specifications. In each of these cases, the committee or association had applied its prohibition across the board.

By contrast, a few courts have refused to enforce blanket prohibitions on certain kinds of structures, finding that the provision for architectural control provided insufficient notice to unit owners of the committee’s power to prohibit particular structures or expressing antipathy to regulation of aesthetics. Thus, courts have invalidated bans on vinyl siding, factory-built homes, and above-ground pools. When an association’s design prohibition rules have not been applied across the board, courts should be, and are, much less likely to uphold the association’s action. Unless a common interest community has, from its inception, featured distinctly different types of units in different areas,

Sup. Ct. 1990) (holding that a residential community owner had the right to immobilize unauthorized parked vehicles).

237 780 P.2d 1012, 1016-17 (Alaska 1989).
238 616 P.2d 205, 213 (Haw. 1980).
239 528 So. 2d 989, 990 (Fla. Dist. Ct. App. 1988).
241 See, e.g., Westfield Homes, Inc. v. Herrick, 593 N.E.2d 97, 102 (Ill. App., Ct. 1992) (invalidating a blanket rule against above-ground swimming pools when the covenant did not specifically prohibit these structures).
242 See, e.g., Point Farm Homeowner’s Ass’n v. Evans, No. 1505, 1993 Del. Ch. LEXIS 110, at *8 (Del. Ch. June 28, 1993) (noting that architectural review is unreasonable to the extent that it is “based on purely aesthetical considerations”).
243 See id. at *10-*11 (holding unenforceable a restriction against vinyl siding imposed for purely aesthetic reasons).
244 See Chesapeake Estates Improvement Ass’n v. Foster, 288 A.2d 329, 333 (Md. 1972) (invalidating a restriction against modular homes because such homes were not specifically prohibited in the covenant).
245 See Westfield Homes, 593 N.E.2d at 102 (holding a blanket restriction against above-ground pools unreasonable); see also Kies v. Hollub, 450 So. 2d 251, 256 (Fla. Dist. Ct. App. 1984) (invalidating an association decision to ban light poles on tennis courts for aesthetic reasons).
few purchasers would expect that an association would prohibit them from using design features permitted elsewhere in the community. Moreover, if decisionmakers themselves do not suffer the burdens of a restriction they impose on others, there is no institutional safeguard against the redistribution of market value. These principles are reflected in cases like *Indian Hills Club Homeowners Ass'n v. Cooper*, in which the court invalidated the association's attempt to enjoin a unit owner from building a driveway apron, noting that many other homes had similar aprons. Similarly, in *Young v. Tortoise Island Homeowners Ass'n*, the court held that the association could not prevent a unit owner from using a flat roof when a number of other homes in the community also had flat roofs.

Concern for inequitable enforcement—and consequent redistribution—also leads to greater judicial scrutiny of design controls when a design committee's decisions do not rest on any rule, but rather on an amorphous standard such as a requirement that new structures harmonize with pre-existing ones. Some courts suggest that standards like these may be unenforceable per se. Most examine the board or committee decision to assure that the decision addressed an identifiable evil.

Finally, when there is strong evidence that a particular design control would frustrate a unit owner's expectations, courts are reluctant to enforce the control. When, for instance, the CC&Rs expressly prohibit cer-

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246 Of course, if a community has been developed in part with townhouse units and in part with single-family homes on large lots, purchasers might expect that some restrictions applicable to one sort of unit would not be applicable to the other.


249 See also *Jackson Square Town House Homes Ass'n v. Mims*, 393 So. 2d 816, 818 (La. App. 1981) (invalidating a blanket prohibition against building new storage sheds when the covenant permitted outbuildings). Of course, deciding whether similar uses pervade the community is not always an easy matter. Thus, in *Killearn Acres Homeowners Ass'n v. Keever*, 595 So. 2d 1019, 1021-22 (Fla. Dist. Ct. App. 1992), the court upheld the architectural control committee's right to prohibit a satellite dish, even though the community association had taken no action against eight other dishes in the community of more than 700 units. The court noted that the other dishes were located in areas less visible from the street than that of the complaining unit owner. See id.

250 Cf. *Town & Country Estates Ass'n v. Slater*, 740 P.2d 669, 671 (Mont. 1987) (finding that a covenant requiring "harmony of external design" was not per se ambiguous).

tain kinds of structures, a number of courts have held that an architectural control committee may not enact a blanket prohibition of other structures. The premise is that unit owners could reasonably expect that only the listed structures would be absolutely prohibited, and that other proposed structures would have to be evaluated for their effect on the community. Similarly, a few courts have invoked estoppel-like principles to preclude an association from imposing new restrictions when unit owners have made expenditures in reliance on an apparent right to make the disputed improvement.

c. Lifestyle Restrictions

Community associations are sometimes depicted as Orwellian “Big Brothers” that intrude into the personal lives of their members. One can conjure up a variety of association rules that might interfere with the autonomy of individual residents, like restrictions on clothing, prohibitions on homosexual activity, limitations on political advocacy, or requirements of religious conformity. Lifestyle restrictions of this sort raise two important questions. First, do association rules inappropriately exclude members of disfavored groups from the housing market? Second, do those rules inappropriately constrain the personal freedoms of those who do buy units within the community?

Over the last several decades, concern about exclusion of disfavored groups from the housing market has led to state and federal legislation limiting the power of housing purveyors to choose with whom they deal. Much of this legislation limits the power of community associations to

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252 See Westfield Homes, Inc. v. Herrick, 593 N.E.2d 97, 102 (Ill. App. Ct. 1992) (finding that homeowners were entitled to rely on the fact that above-ground swimming pools were not specifically prohibited in the covenant); Point Farm Homeowners Ass’n v. Evans, No. 1505, 1993 Del. Ch. LEXIS 110, at *4, *10 (Del. Ch. June 28, 1993) (holding that when the covenant contained detailed provisions for stick-built homes, minimum roof pitch, and setback, and prohibited television towers and satellite systems, its silence as to types of siding foreclosed the association’s absolute prohibition of vinyl siding).

253 See First Hyland Greens Ass’n v. Griffith, 618 P.2d 745, 747 (Colo. Ct. App. 1980) (holding that, although an association did not approve a homeowner’s plan to construct a pool house, the association was estopped from denying that its decision could be construed as permission to construct a pool house meeting covenant specifications); Seabreak Homeowners Ass’n v. Gresser, 517 A.2d 263, 270-71 (Del. Ch. 1986) (invalidating an association’s prohibition against new construction when the homeowners acted under a reasonable but incorrect belief that their project would be approved and had made substantial expenditures).

254 See, e.g., David Willman, Woman Faces Fine for Kissing Her Date, L.A. TIMES, June 16, 1991, at A3 (reporting a woman’s feeling of being “controlled” and “watched” by her neighbors in a community association that sanctioned her for kissing a man).
exclude or discriminate against members of protected groups. By the same token, the legislation continues to permit housing purveyors—including home sellers and landlords—to discriminate among consumers on bases other than those enumerated in the statutes. Although a plausible case could be made for expanding the protection of the fair housing laws, there is little reason to impose on associations stricter prohibitions against exclusion than those that apply to other housing purveyors. Indeed, given the interdependence of community association members and their sharing of common facilities, one might argue that community associations should enjoy a greater measure of freedom to choose associates than generally would be available to individual sellers or landlords.

What, then, of the effect of lifestyle restrictions on persons who buy within the community? The issue is not whether some broad public policy entitles unit owners to engage in activities the community association wants to restrict. Whether unit owners should be permitted to waive "rights" to engage in activities in their own homes could easily be resolved by reference to landlord-tenant law. If courts would enforce a lease provision barring signs in a window, or pets, or abortion counseling, there is little reason to prevent unit owners from waiving comparable "rights."

Instead, the significant question is whether association restrictions, often enacted after purchase of individual units, frustrate the expectations held by a minority of unit owners at the time they initially bought units within the community. The UCIOA clearly reflects a fear that association restrictions have significant potential to frustrate minority expecta-

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255 For instance, the Fair Housing Act, 42 U.S.C. § 3604(b) (1994), makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision or services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." A community association would clearly violate the statute if it were to enact rules barring women or children, or banning the wearing of hats (including yarmulkes) in common areas. See also CAL. GOV'T CODE § 12955 (West 1992) (prohibiting housing discrimination); N.Y. EXEC. LAW § 296 (Consol. 1996) (same).

256 See, e.g., Kramarsky v. Stahl Management, 401 N.Y.S.2d 943, 945 (N.Y. App. Div. 1977) (sustaining a landlord's alleged practice of discriminating against lawyers: "Absent a supervening statutory prescription, a landlord is free to do what he wishes with his property, and to rent or not to rent to any given person at his whim.").

257 Gregory Alexander has argued that courts should regulate community associations to protect against exclusion and domination. See Alexander, supra note 60, at 37-39. Alexander suggests that the problem of domination is neither limited to racial discrimination nor, presumably, to other forms of discrimination prohibited by positive law. See id. at 37. Alexander does not suggest, however, why community associations should be more constrained in their power to exclude than, say, landlords.

258 Indeed, even the Fair Housing Act makes allowances for rentals in owner-occupied dwellings that house four or fewer families. See 42 U.S.C. § 3603(b) (1994).
tions. Thus, the UCIOA prohibits restrictions on use of individual units unless the restrictions are included in the Declaration,\(^{259}\) and requires an 80% supermajority to amend the Declaration to restrict uses within individual units.\(^{260}\)

The wisdom of the hurdles the UCIOA places before community associations seeking to respond to unit owner preferences remains an open question. In general, lifestyle restrictions should not pose a significant threat to unit owner expectations. First, the self-interest of the majority of owners provides institutional protection against value-decreasing restrictions. At the same time, across-the-board restrictions on lifestyle present little opportunity for redistribution of market value; if one unit was to decline in market value as a consequence of a restriction on speech or pets, all units would be likely to suffer a decline. Hence, associations are unlikely to promulgate value-decreasing lifestyle restrictions.\(^{261}\)

Second, at the time of purchase, prospective unit owners seem unlikely to expect judicial protection from lifestyle restrictions that do not diminish the market value of any units and enhance the idiosyncratic value most unit owners attach to their units. This is especially so when prospective owners know that they will have the opportunity to voice opposition to the restriction, and, at worst, to sell their units and exit the community.

Of course, expectations in particular cases might be different. The question is what evidence should be sufficient to establish an expectation that particular lifestyle restrictions would not be imposed. In general, express language in the governing documents or the association's failure to respond to a unit purchaser's reliance on pre-existing rules would provide good evidence of an understanding that the association would not later enact restrictions inconsistent with those rules.

Existing practice and decided cases bear out much of this analytical framework. First, litigated cases about restrictions on speech (including signs), on sexual conduct, on religious practices, or on other fundamental lifestyle issues are virtually nonexistent. The absence of cases suggests that when community associations enact or enforce restrictions of this sort, residents generally are pleased with them. At the same time, the absence of cases also suggests that associations may eschew more extreme restrictions, either out of concern about their effect on market value or out of opposition to such restrictions on personal freedom.

Second, with respect to more commonly promulgated lifestyle restric-

\(^{259}\) See UNIF. COMMON INTEREST OWNERSHIP ACT § 3-102(c) (1994).

\(^{260}\) See id. § 2-117(f).

\(^{261}\) Leading community association practitioners report that restrictions on signs and access to the community (prohibiting solicitation and canvassing) are quite common. See Hyatt & Stubblefield, supra note 197, at 686-88. They argue that sign restrictions prevent the appearance of instability that might have a negative effect on property values, and that access restrictions provide desirable security and privacy to community residents.
tions such as prohibitions on pets or alcohol consumption in common areas, courts generally uphold prospective regulations, although some insist that those restrictions be incorporated into the association’s Declaration or bylaws. There is, for instance, nearly universal agreement that if a community association includes a pet prohibition in its Declaration or association bylaws, the prohibition is enforceable. But courts divide, however, about whether an association may prohibit pets by rule. A number of courts have enforced prohibition by rule, but in recent years courts in Illinois and Massachusetts have invalidated association rules prohibiting pets, relying on state statutes providing that “restrictions on and requirements respecting the use and maintenance of . . . units” be included in the bylaws. Of course, amendment of the bylaws may be a more cumbersome process than mere promulgation of a rule. This perhaps assures some degree of deliberation before an association imposes significant lifestyle restrictions on neighbors with different values. The ultimate conclusion, however, is that an association may enact a prohibition on pets even if the original Declaration does not address the issue.

At the same time, courts have been unwilling to sustain pet prohibitions that are inconsistent with the Declaration. Thus, if the Declaration expressly contemplates that unit owners can keep pets, the association may not, by rule, prohibit pets. Moreover, a Colorado court has held

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263 See, e.g., Dulaney Towers Maintenance Corp. v O’Brey, 418 A.2d 1233, 1235 (Md. Ct. Spec. App. 1980) (holding a dog restriction to be enforceable, and noting that “courts have adopted a hard-line approach and have upheld condominium board of directors’ regulations as to dogs . . . as being reasonable and enforceable”).


265 Johnson, 331 N.E.2d at 882.

266 See supra Part II.B.2.

that if the Declaration permits a unit owner to keep a pet with the permission of the association board, the association may not, by rule or by-law, promulgate a blanket prohibition on pets.268 Instead, the association must evaluate each application on a case-by-case basis.

In addition, when unit owners have acquired pets in reliance on the absence of a pet prohibition, associations often “grandfather” existing pets while prohibiting new ones.269 And when an association does seek to apply a pet prohibition retroactively, a court is less likely to sustain the association’s action.270 Although pet prohibitions are the most frequently litigated of lifestyle restrictions, courts also have sustained activity restrictions that might impinge on the lifestyle of some residents, such as the consumption of alcoholic beverages in common areas271 or the installation of satellite dishes and television antennas.272

D. Summary

Although community associations could promulgate rules that cause significant harm to individual unit owners, institutional constraints substantially reduce the risk of harm. So long as association rules have a similar impact on all units, those rules are not likely to have an adverse impact on the units’ market value. A majority of landowners would be unlikely to promulgate a rule that made them all worse off. The principal harm an individual unit owner is likely to suffer when the association promulgates a rule applicable to all unit owners is a loss of the idiosyncratic value she attaches to her unit. That loss, however, will be matched—and generally exceeded—by a gain to other unit owners, and in most cases there will be no way to generate the gain without also im-


269 See, e.g., Winston Towers 200 Ass’n v. Saverio, 360 So. 2d 470, 470-71 (Fla. Dist. Ct. App. 1978) (per curium) (holding unenforceable a bylaw prohibiting the replacement of pets). Some associations go a step further, permitting purchasers with pets to move into the association so long as they do not replace the pets when they die. See, e.g., Wilshire Condo. Ass’n v. Kohlbrand, 368 So. 2d 629, 631 (Fla. Dist. Ct. App. 1979) (upholding a bylaw that permitted purchasers to move in with pets but prohibited replacement).

270 See Winston Towers, 360 So. 2d at 470-71 (“[T]he amendment to the bylaws was void and unenforceable inasmuch as it was an attempt to impose a retroactive regulation.”).

271 See Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 179, 182 (Fla. Dist. Ct. App. 1975) (upholding a restriction on alcoholic beverages in common areas, noting that “restrictions on the use of alcoholic beverages are widespread throughout both governmental and private sectors,” and that “there is nothing unreasonable or unusual” about such restrictions).

272 See O’Buck v. Cottonwood Village Condo. Ass’n, 750 P.2d 813, 815 (Alaska 1988) (holding that an association had the authority to ban television antennae as specified in the Declaration).
posing the loss. In this instance, the legal system should—and generally does—let the association’s decision stand, leaving the dissident owner the option of persuading other members to change the course they have followed. The same considerations and the same result should apply whether the issue before the association is the size of the annual assessment, the wisdom of a restriction on renting individual units, or the merits of a control on unit owner lifestyles.

Three significant exceptions apply. First, when the association’s governing documents expressly limit the association’s power to regulate particular activities, the association may not promulgate rules inconsistent with those documents. Second, when the context of dealings between the unit owner and association reveals a mutual understanding that the unit owner will engage in particular conduct, and when the unit owner relies on that understanding, the association is effectively estopped from prohibiting the conduct in question. Finally, when the impact of association rules does not fall on all unit owners, but instead redistributes value from some unit owners to others, the association should not be entitled to promulgate the regulation without compensating the adversely affected owners.

CONCLUSION

Although majority rule has, over the past few centuries, become the most acceptable mechanism for making collective decisions, majority rule is no panacea. In every setting in which majority rule is the foundation for decision making, society has developed legal constraints to protect minorities from overreaching by majorities. It would be surprising indeed if community associations, which amount to residential private governments, were an exception.

At the same time, in virtually every decision making setting, there are some built-in protections against majority abuse. And again, community associations are no exception. One would expect the legal constraints on majority rule to reflect the built-in institutional protections against abuse of the minority. And, indeed, protections against minority abuse by government are different from protections against minority abuse by corporate majorities. Moreover, different corporate settings generate different sorts of minority protections. As community association law develops, judicial protection against abuses of minorities should increasingly reflect the particular institutional setting that surrounds community association decisions.