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Trust and Community: The Common Interest Community as Metaphor and Paradox

Paula A. Franzese* and Steven Siegel**

I. INTRODUCTION

This Article explores the power of trust to shape where we live and how we live.1 It aims to provide a new set of first principles to reshape the common interest community (CIC)2 paradigm, so that the promise of social trust, rather than control and punishment,3 can enhance the cultural and economic success of this Goliath of residential living.

What is at stake is quite substantial. Over the past several decades, common interest communities (an umbrella designation that includes planned single-family home developments, gated and walled communities, condominums and housing cooperatives all under the aegis of a homeowners association) have become the standard template for new residential development in the United States.4 Yet, the CIC paradigm is palpably deficient in many ways, premised, since its inception, on a “command and control” rule regime

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2. See Restatement (Third) of Property: Servitudes § 6.2 (2000) (defining common interest community as a “real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal”). These burdens include payment for the use or maintenance of property held in common or fees for services or facilities to either commonly held property or individually owned property. Id.
4. See infra notes 19-21 and accompanying text.
that attempts to regulate all manner of land use and behavior. The legal straightjacket of rules, in many cases, has lead to confusion, misunderstanding, inefficiency and the abridgement in some instances of the personal autonomy of CIC homeowners. 

Free market advocates have argued that the CIC movement and standardized template is nothing more or less than the product of consumer demand for privatized communities, and, in particular, demand for privatized communities that incorporate a tightly controlled regime of rules aimed at maintaining and enhancing property values. Those commentators further argue that, because the CIC rule regime is a natural outgrowth of the demands of the housing marketplace, the regime should remain undisturbed by meddlesome legislators and regulators.

We reject both of those notions. We argue instead that the standard CIC rule-template is far from the inevitable by-product of unfettered market forces. Its continued dominance is, rather, a product of distorted market forces – just as the underlying CIC movement persists as a consequence of skewed markets. 

The source of that market distortion is three-fold. First, mounting evidence suggests that the CIC phenomenon is, increasingly, the direct product of conscious and deliberate government policy aimed at load-shedding municipal functions and services onto newly created CICs. We have termed this policy “public service exactions,” by which we mean a formal or informal policy of local government that requires developers, as a condition of subdivision approval, to establish a homeowners association as the mechanism to carry out functions and services that traditionally were the responsi-


6. See Rahe, supra note 5; Nelson, supra note 5; U.S. ADVISORY COMM’N, supra note 5; Reichman, supra note 5.

7. See infra Part III.A. See also Steven Siegel, The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government Land Use Policies That Eliminate the Legal Requirements to Privatize New Communities in the United States, 38 URB. LAW. 859, 873-98 (2006).
bility of the municipality itself. For this reason, the privatization of new communities is occurring even in those instances when the market would not otherwise have "chosen" the same, or even the establishment of a CIC in the first place.

Second, even in circumstances when they are not the direct result of public service exactions, CICs are not necessarily the product of well-functioning market forces. Quite the contrary, the housing market for them often falls far short of the conditions that characterize efficient markets. A well-functioning marketplace usually requires some rough equality of bargaining power between the market players, or, in the alternative, a strong governmental role in protecting the consumer. Further, healthy markets typically depend on market players having meaningful access to all of the information needed to make informed decisions. Then too, consumer-oriented markets require that consumers be afforded meaningful choices among different types of products. In key United States real estate markets dominated by CIC housing, few, if any, of those factors are present.

The third form of market distortion arises as a consequence of the unique role of the developer in the establishment of each new CIC, imposing on a cookie-cutter basis a standardized template for homeowners association governance and a similarly standardized comprehensive declaration of covenants, conditions and restrictions (commonly known as CC&Rs). The latter regulate in onerous detail all sorts of matters affecting land use and resident behavior. In particular, the developer makes the most critical decisions concerning CIC organization and governance long before the CIC is constructed and the first homeowner has taken occupancy.

Of course, if the interests of developers and the interests of homeowners were to correspond in every respect, this disjuncture between the political organizer (i.e., the developer) and the ultimate political constituent (i.e., the homeowner) would not pose a problem. But developer and homeowner interests are not congruent. Nor is the disjuncture resolved by the influence of consumer preferences on critical pre-construction decisions made by CIC developers with respect to the organization and governance of the CIC.

As a practical matter, housing consumers in high-growth parts of the United States simply cannot "vote with their feet" with respect to CIC organization and governance because, at present, there exists no meaningful consumer choice amongst CIC organizational structures. In general, developer-
imposed CIC templates are remarkably uniform. 13 Nor can it be said that CIC homeowners are free to amend the governing documents once the developer has surrendered control. Amendments typically require a supermajority vote of the owners, an outcome that, as a practical matter, is extremely difficult to accomplish.

Thus, the "dead hand" of the developer all too often bequeaths to the CIC a rule regime that does not necessarily comport with the needs of the residents themselves or, more broadly stated, the needs of the housing market. Buyers are left to contend with a draconian package of restrictions that, unfortunately, is remarkably resistant to change.

In this Article we propose a new framework that more closely aligns CICs with market forces and public choice. The rule-bound boilerplate that governs the traditional CIC is best replaced by a legal template that places far less emphasis on regimentation and punishment and far greater reliance on the power of social trust and community. We do not suggest, however, that those social virtues alone can do the work best achieved by a combination of intrinsic ethical and cultural norms with relevant legal constructs. Hence, we suggest that the promise of social capital be supported by a legal foundation that includes: (1) a new set of governance choices afforded to CIC homeowners based on the sunsetting of the developer-imposed servitude regime once the developer relinquishes control of the CIC; (2) clear and immutable statutory rights accorded to CIC residents; (3) a fair, equitable and affordable alternative dispute resolution process; (4) an ombudsman with a mandate to resolve homeowner issues and provide relevant information before those matters metastasize into full-blown legal conflicts; and (5) procedures to promote transparent management and accountability.

Just as important as the substance of this proposed CIC reform model is a realistic and workable program to achieve it – with respect to new as well as existing CICs. This will require state statutory reform, as well as a modification of municipal land-use policies. 14 No less important is a change in the attitude of the key actors. In this regard, mandatory leadership training programs as well as fiscal integrity training for all CIC board members are appropriate and warranted. Such programs are the norm in both governmental

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13. DILGER, supra note 12, at 38.
14. See infra Part IV.
and private sectors, and have been shown to be effective in inculcating leadership skills and ethical responsibility.\textsuperscript{15}

CIC board members are entrusted with responsibility for budget-making, service-delivery, revenue collection, rulemaking, informal adjudication, and land-use review. They must be properly trained to perform those complex tasks. Certainly, effective training is needed to render board members conversant with applicable legal strictures, ethical responsibilities, management basics and, perhaps most essentially, the rule of reasonableness.

Still, a broad program of statutory reform and training initiatives, although necessary, is not sufficient. The elusive but essential social virtues of trust and community must be consciously cultivated, tended to and reinforced by CIC leadership and, most importantly, by CIC residents themselves. Neighborliness works. When all is said and done, the power of social trust and cooperation must be given the chance to do its job.

\textbf{II. THE RISE OF THE COMMON INTEREST COMMUNITY IN THE UNITED STATES}

The CIC\textsuperscript{16} is a private organization formally established by the devel-

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16. The term “community interest community” is generally used to refer to three distinct but closely related legal entities: planned single-family home developments, condominiums and housing cooperatives.

In a planned single-family home development, a homeowner generally holds title to both the exterior and interior of a residential unit and the plot of land around it. The planned development association (often called a homeowners’ association) owns and manages common properties, which may include streets, parking lots, open spaces, and recreational facilities.

In a condominium, a homeowner holds title to a residential unit (sometimes just the interior of an apartment) and to a proportional undivided interest in the common spaces of an entire condominium property. A condominium association manages the common spaces but does not hold title to any real property. A condominium property is usually situated in either a single high-rise apartment building or in attached housing units frequently known as “townhouses.” In general, an owner of a condominium unit does not own, in individual fee, the ground under his or her unit, in contrast to the owner of a home in a planned single-family home development.

In a housing cooperative, the entire property is owned by a cooperative corporation, and the members of the cooperative own shares of stock in the corporation and hold leases that grant occupancy rights to their residential units. Housing cooperatives usually, but not always, are situated in apartment buildings. In the United States, the cooperative form of housing ownership is exceedingly rare, and is largely confined to owner-occupied apartment buildings in New York City.

The foregoing legal typology is made more complex by the fact that condominium units sometimes can be found in planned developments, wherein the devel-
oper of a new suburban subdivision. Many CICs maintain streets and parks, provide curbside refuse collection, operate water and sewer service, regulate land use and home occupancy, impose rules of general applicability on constituent homeowners, and collect fees from homeowners that are in many ways the functional equivalent of property taxes. Those are functions and services that traditionally were performed by local government. But in many fast growing areas of the United States, municipal provision of those and other services is rapidly becoming a distant memory.

In recent years, the number of CICs in the United States has grown dramatically. In 1980, there were an estimated 36,000 CICs in existence throughout the country. Today, that number stands at approximately 286,000. CICs are home to roughly 1 in 5 Americans – almost 60 million people. In the largest metropolitan areas, more than fifty percent of new

For purposes of this article, the typology of legal ownership of common-interest property is less important than a broad characterization of CICs as either "territorial" or "nonterritorial." See U.S. ADVISORY COMM'N, supra note 5, at 11-12 (adopting and explaining typology of "territorial" versus "nonterritorial" community associations). As noted above, some CICs are geographically limited to a single high-rise apartment building. These are nonterritorial CICs, which are owned either in the form of either a condominium or a housing cooperative. Other CICs manage a significant amount of real estate. These territorial CICs most frequently encompass planned single-family home associations, but may include, in whole or in part, dwelling units subject to the condominium form of ownership. Territorial CICs exercise authority over a network of streets, parking lots, open space, and recreational facilities. Like municipalities, territorial CICs typically provide services such as street cleaning, trash collection, maintenance of open space, and security. Territorial CICs also exercise extensive land-use powers traditionally associated with the municipal zoning and police-power authority, such as review of proposed home alterations and enforcement of rules governing home occupancy. See id.

This article is exclusively concerned with territorial CICs. 17. See U.S. ADVISORY COMM'N, supra note 5, at 13.
18. DILGER, supra note 12, at 38. See also id. at 18 (noting that, according to estimates made by the Community Associations Institute, "nearly all new residential development in California, Florida, New York, Texas, and suburban Washington D.C., is governed by a [residential community association]").
20. Id.
home sales are connected to a homeowners association.\(^2\) Indeed, ""[i]n many rapidly developing areas . . . nearly all new residential development is within the jurisdiction of residential community associations." \(^3\) The number of community associations presently exceeds the number of municipalities by a factor of eight.\(^4\)

The nature and sources of CIC power and authority are often misunderstood. All CICs derive their essential authority over constituent residents from covenants, conditions and restrictions (CC& Rs) attached to the homeowners' deeds.\(^5\) "All purchasers of property within the CIC automatically become members of its homeowners association, and are required to obey the association's rules and pay its fees and special assessments. In this respect, a homeowners association is quite different than a voluntary civic or neighborhood association."\(^6\)

CICs are financed by mandatory assessments.\(^7\) As with municipal real estate taxes, those assessments are levied on residential real property, and the proceeds of the assessments are used to pay for local services, such as street maintenance, curbside refuse collection and maintenance of open space. The dollar value of CIC assessments, like the amount of municipal real estate taxes, typically varies in proportion to the relative value of the residence. A

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23. EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 11-12 (1994) (quoting U.S. ADVISORY COMM'N, supra note 5, at 3). See also DILGER, supra note 12, at 18 (noting that, according to estimates made by the Community Associations Institute, "nearly all new residential development in California, Florida, New York, Texas, and suburban Washington D.C., is governed by a [residential community association]").

24. Siegel, supra note 7, at 867.


26. Siegel, supra note 22, at 466 (citing U.S. ADVISORY COMM'N, supra note 5, at 9).

[A CIC] homeowner's failure to pay [a CIC] assessment will result in a lien on the homeowner's residence and, ultimately, may lead to the forced sale of the residence through the enforcement of the lien. Once an individual chooses to purchase a home in [a regional contribution agreement ("RCA")], community, the individual can no more escape payment of [a CIC] assessment than he can escape payment of a municipal real estate tax.

*Id.* at 466 n.17.

27. Siegel, supra note 22, at 461, 468 (CIC's powers include "the assessment and collection of mandatory fees that may be considered the functional equivalent of real estate taxes"; these assessments are enforced "through the familiar common-law mechanisms of real estate servitudes").
homeowner’s failure to pay an assessment, like the failure to pay a municipal real estate tax, results in the imposition of a lien on the residence and, ultimately, could lead to the forced sale of the residence as a consequence of the lien’s enforcement.28 Indeed, for all intents and purposes, CIC assessments are the functional equivalent of municipal real estate taxes.

Most importantly, CICs are empowered to issue rules of general applicability affecting residents – as well as nonresidents – within the associations’ territorial jurisdiction. CICs “exercise extensive land-use powers traditionally associated with the municipal zoning and police-power authority, such as [the] review of proposed home alterations and enforcement of rules governing home occupancy.”29 For example, CIC rules can restrict the age of those who may own homes in the community,30 the number and ages of overnight visitors,31 the color a homeowner may paint her house,32 whether a homeowner may build an addition to her house,33 whether residents may assemble in streets and open spaces,34 and whether a homeowner may display political signs on her home that are visible to the adjoining street.35 An infraction of the rules can lead to the imposition of penalties against the homeowner, often in the form of significant fines,36 the denial of the right to use the facilities,37 and even foreclosure.38

The ascendancy of CICs has been described aptly as a “quiet revolution.”39 Almost twenty years ago, Professor Gerard Frug presciently observed, “[t]he privatization of [local] government in America is the most important thing that’s happening, but we’re not focused on it. We haven’t

29. Siegel, supra note 22, at 467. See also MCKENZIE, supra note 23, at 135; DILGER, supra note 12, at 23-24.
30. See GARREAU, supra note 12, at 190; MCKENZIE, supra note 23, at 15.
32. See DILGER, supra note 12, at 23.
33. See id. at 23-24.
34. Siegel, supra note 22, at 469-70.
35. Id. at 469.
37. Id.
38. See Giantomasi, supra note 28.
thought of it as government yet." Those observations resonate even more powerfully today.

Some scholars and commentators contend that the privatization of local government is all for the public good. They argue that the "genius" of the marketplace has replaced wasteful, inefficient government with well-run private organizations, and newcomers, in choosing to live in CICs, have simply voted with their feet.

But what if the explosive growth in the number of CICs is not primarily a market-driven phenomenon? What if instead a salient part of their proliferation is the product of a conscious and deliberate government policy to privatize new communities as a way to load-shed the costs of providing traditionally municipal services and additionally, to minimize taxes for the given town’s existing taxpayers? What if many of the people moving to CICs have little conception of what they are buying into, and have no idea that they are checking their constitutional rights at the door? What if there is no choice in a given housing market other than to live in a CIC? What if the net effect of municipal privatization policy is to substantially drive up the cost of most affordable new housing? And what if municipalities required developers to establish CICs even when those developers would have preferred to establish traditional suburban enclaves with traditional public services?

All of those "what ifs" are true. As is discussed at length in the following section, the CIC phenomenon, with its tightly-bound servitude regime and privatized governance and service-provision template, is far from the inevitable product of market forces. It is rather a distortion of market forces – just as the underlying CIC movement itself is a distortion of market forces. Any effort at reform of the CIC paradigm must begin with this basic insight.

III. THE CIC AS A PRODUCT OF NON-MARKET FORCES AND THE MYTH OF THE MARKET AS SELF-CORRECTIVE

A. The Role of Local Government in CIC Proliferation

Mounting evidence suggests that the CIC's continued proliferation in a number of venues is, to a considerable extent, the direct product of conscious and deliberate government policy aimed at load-shedding municipal functions

40. GARREAU, supra note 12, at 185.
41. See, e.g., Rahe, supra note 5, at 552 (arguing that the homeowners' association is properly viewed as "the product of individual [consumer] choices"); Nelson, supra note 5, at 828 (opining that "economic forces . . . made private neighborhood associations the choice for millions of people for their residential property"); U.S. ADVISORY COMM’N, supra note 5, at 13 (noting that "strong proponents of [community associations] argue that these organizations provide a vehicle for greater consumer choices"); Reichman, supra note 5, at 255-56 (opining that community associations are "of a 'private' nature" because they are "based on private initiative, private money, private property and private law concepts").
and services onto newly created CICs.\textsuperscript{42} We refer to this policy as “public service exactions,” meaning that local governments, as a condition of land-use approval of new residential subdivisions, often require developers to establish a homeowners association as the mechanism to carry out functions and services that traditionally were the responsibility of the municipality itself.\textsuperscript{43} For this reason, the privatization of new communities, and attendant continued rise in CIC numbers, is occurring even when the market would not otherwise have “chosen” them.

That the privatization of local government is often the conscious product of public policy decisions made by government itself is made plain in a number of land-use codes. Some municipal land-use ordinances require, quite explicitly, the establishment of homeowners associations as a condition of land-use approval.\textsuperscript{44} Texas and New Jersey’s municipal code provisions are illustrative.

In Texas, the City of Dallas Development Code provides:

Prior to Final Plat Approval, the owner(s) of the Property must execute an instrument creating a homeowners association for the maintenance of common areas, screening walls, landscape areas (including perimeter landscape areas), private streets and for other functions. The instrument must be approved as to form by the City Attorney, approved by the City Planning Commission and filed in the Dallas County Deed Records (Ord. Nos. 22477, 25267).\textsuperscript{45}

In New Jersey, the Township of Jackson Zoning Code requires the creation of a homeowners association in all residential developments in areas zoned as planned unit development (PUD) multifamily housing districts and “planned retirement communities” districts.\textsuperscript{46} The homeowners association is responsible for maintenance of common property, solid waste disposal and “the replacement and repair of all private utilities, street lighting, sidewalks, landscaping, common open space and recreation facilities and equipment.”\textsuperscript{47}

Even when municipal exaction policy is not codified, the result is often the same. Municipalities simply can decide, and have decided, on an informal basis, that a developer must establish a homeowners association as a condition of land-use approval. Developers have no choice but to acquiesce if they wish to obtain the necessary permission to build.

\textsuperscript{42} See generally Siegel, supra note 7, at 873-98.
\textsuperscript{43} Id. at 886-87.
\textsuperscript{44} Id. at 889-95.
\textsuperscript{45} DALLAS, TEX., DEVELOPMENT CODE ch. 51P (2007).
\textsuperscript{46} JACKSON, N.J., ZONING CODE ch. 109, art. IV, § 109-46J (2006); id. ch. 109, art. VI, §§ 109-48L, 109-49N.
\textsuperscript{47} Id. ch. 109, art. IV § 109-46J(2).
Some residential developers have gone on the record and spoken quite candidly of this practice.\textsuperscript{48} For instance, a prominent developer based in the fast-growing Phoenix area was asked about his personal knowledge of formal and informal municipal requirements. In response, he stated: “[C]ities throughout the metro Phoenix area generally require [homeowners associations]. [T]he builder is really not given much of a choice.”\textsuperscript{49}

Similarly, an executive of the Orange County Chapter of a California homebuilders association observed that, “‘in California specifically,’ the establishment of a community association generally operates as a form of municipal ‘exaction’ against new home development.”\textsuperscript{50} Attributing this practice to the enactment of California’s Proposition 13 in 1978 – the ballot initiative that sharply limited the ability of the State’s local government to rely on the property tax as a revenue source – she added that Proposition 13 “was the beginning of the end of local government provision of municipal services.”\textsuperscript{51}

Some free market advocates continue to embrace the policy of privatizing new communities.\textsuperscript{52} Yet, when privatization is actually compelled by government, the first principle of free-market economics is violated: i.e., a presumption of noninterference by government in the private marketplace. Indeed, it is difficult to conceive of a more heavy-handed public interference in the private marketplace than a government rule or practice that mandates a highly particularized form of governance on new housing development – the CIC – and then precludes, without public discussion or judicial review, alternate forms of residential development that previously were available and that, until recently, were the dominant forms of suburban community development in the United States.

Moreover, municipal privatization can work against the goal of housing affordability. The policy makes new home development more expensive by saddling CIC residents with the costs of operating and maintaining traditionally municipal infrastructures. Those costs are imposed by way of homeowners association assessments, fees and dues. Yet, CIC residents seldom receive a local tax credit to offset such charges,\textsuperscript{53} even though they may pay twice for

\textsuperscript{48} Siegel, \textit{supra} note 7, at 895-98.

\textsuperscript{49} \textit{Id.} at 895-96 (citing Unpublished Written Statement of Larry Kush, President, Montevina Estate Homes, Scottsdale, Arizona (July 6, 2006)).

\textsuperscript{50} \textit{Id.} at 897 (quoting Unpublished Written Statement of Kristine Thalman, Chief Executive Officer, Building Industry Association of Orange County, Irvine, California (May 22, 2006)).

\textsuperscript{51} \textit{Id.} (quoting Unpublished Written Statement of Kristine Thalman, Chief Executive Officer, Building Industry Association of Orange County, Irvine, California (May 22, 2006)).

\textsuperscript{52} See \textit{supra} note 5.

\textsuperscript{53} New Jersey – alone among the States – has attempted to address this inequality on a statewide basis. In 1990, New Jersey enacted the Municipal Services Act (“MSA” or “Act”), which requires all local governments to provide certain municipal services to qualifying CICs, or, in the alternative, to require local governments to
the same services. In effect, municipal privatization makes possible a two-tier taxation structure to pay for services – one for those residing in newly established community associations, and the other for existing taxpayers residing in other parts of town. Somehow, this arbitrary tax inequity has not yet been found to violate the law.54

Municipal privatization policy has brought with it other untoward results. The rapid growth in the number of homeowners associations has resulted in a literal diminution of public space where people were once assured of first amendment rights of speech and association.55 In association-run communities, those rights are largely unavailable. In virtually all reported

reimburse CICs for the value of the services furnished by the associations themselves. See N.J. STAT. ANN. §§ 40:67-23.2 to -23.8 (West 1992). Covered services include refuse collection, snow removal, and street lighting. See id. § 40:67-23.3. Note that one effect of the MSA is to lessen the economic incentive of New Jersey municipalities to impose CICs as a condition of land-use approval, because, under the MSA, the municipality is required to pay for street-related service costs whether or not the street is owned by the CIC or by the municipality itself. However, the MSA, while reducing municipal economic incentives to privatize, falls far short of eliminating those incentives entirely. For example, the MSA does not require municipal reimbursement of CIC costs associated with the operation of a substantial open space, a private sewage treatment plant or storm drains. Hence, a municipality that requires a developer to establish and operate these services will reap an economic benefit. Therefore, notwithstanding the MSA, New Jersey municipalities continue to have an incentive to require a developer to establish a CIC as a condition of land-use approval. See, e.g., JACKSON, N.J., ZONING CODE ch. 108, art. VI, §§ 109-46J, 109-48L, 109-49N (2006) (requiring the establishment of a homeowners association in all residential developments in areas zoned as PUD districts, multifamily housing districts and planned retirement communities, and mandating that the association assume responsibility for, among other things, maintenance of common property, solid waste disposal and “the replacement and repair of all private utilities . . ., sidewalks, landscaping, common open space and recreation facilities and equipment”).

Although New Jersey’s system of reimbursement reduces tax inequality as between CIC and non-CIC housing, we believe a system that better achieves this result would be premised on generally mandatory acceptance by the municipality of public facilities that are offered for dedication. For further discussion of this point, see infra Part IV.F. See also Siegel, supra note 7, at 943-44.

54. Indeed, the system of “double taxation” described in the text above arguably would be unconstitutional under the “equal taxation” clauses found in most state constitutions, if courts were to hold that homeowner fees, as the functional equivalent of municipal real estate taxes, should be treated as taxes for constitutional purposes.

55. See, e.g., Schneider v. Irvington, 308 U.S. 147, 162 (1939); Hague v. Comm. of Indus. Orgs., 307 U.S. 496, 515-16 (1939) (holding that speech and assembly conducted on certain types of public property, particularly streets and parks, are entitled to special protection and solicitude under the First Amendment).
cases, courts have declined to apply rights guaranteed by the Constitution to private communities.\textsuperscript{56}

Then there is the matter of gated communities – the private subdivisions surrounded by fences and guardhouses that are becoming increasingly common in many parts of the country.\textsuperscript{57} Although not all common interest communities are gated, all gated communities are within the purview of homeowners associations. Gated communities raise many of the same issues that are raised by private residential communities generally, as well as a host of other related social, economic and political concerns. The very establishment of a gated community affects members of the wider community, who, at a minimum, are compelled to forgo their rights to what was once public space. More importantly, gated communities are symptomatic of a "secessionist mentality" that has profound implications for the future of the body politic and civic participation, as well as the willingness of all income groups to contribute to the cost of government through general taxation.\textsuperscript{58}

There are significant consequences when "the have" insulate themselves from the consequences of their actions.\textsuperscript{59} Gated communities, in particular, compromise the range of individual freedoms while building real and metaphorical walls that separate and divide, diminishing the motivation of


\textsuperscript{57} See generally EDWARD J. BLAKELY & MARY GAIL SNYDER, FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES 3 (1997); SETHA LOW, BEHIND THE GATES: LIFE, SECURITY AND THE PURSUIT OF HAPPINESS IN FORTRESS AMERICA 15 (2003); Sheryl D. Cashin, Privatized Communities and the "Secession of the Successful": Democracy and Fairness Beyond the Gate, 28 FORDHAM URB. L.J. 1675, 1676 (2001).

\textsuperscript{58} See BLAKELY & SNYDER, supra note 57; LOW, supra note 57; Cashin, supra note 57. There are significant consequences when "the have" insulate themselves from the consequence of their actions. Gated communities compromise the range of individual freedoms while building real and metaphorical walls that separate and divide, diminishing the motivation of those behind the gates – with their privatized provisions and services – to want to contribute to the public equivalent of those services.

\textsuperscript{59} Franzese, supra note 15, at 347 (citing JARED DIAMOND, COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED (2004)).
those behind the gates – with their privatized provisions and services – to contribute to the public equivalent of those services.\textsuperscript{60}

Unfortunately, municipal privatization practices and strategies have been neither vetted appropriately nor subjected to the sort of broad policy debate warranted by the stakes. Consider, by contrast, other privatization initiatives, such as the government's periodic proposals to privatize Social Security. Whatever its merits or drawbacks, that matter has been (and will continue to be) subjected to a public vetting process, rigorous scrutiny and review. By contrast, the consequence-laden large-scale privatization of local government in the form of common interest community has been neither aired nor, for that matter, made plain. The very issue itself – that is, the existence of a conscious and deliberate government policy to privatize new communities – remains largely unknown.

In the fastest growing regions of the United States, what began as a narrow and expedient municipal cost-shedding device has become the engine for creating a new kind of social, political and constitutional order. That the policy has remained unexamined betrays the public trust. It is past time for the practice of municipal privatization to come under the lens of public scrutiny, review and debate.\textsuperscript{61}

\textit{B. The Standard CIC Template and its Attenuated Relationship to Homebuyer "Consent" and Consumer Demand}

Even when CICs are not the direct products of public service exactions, the housing market for them can fall short of the conditions that characterize efficient markets. A healthy marketplace depends on some modicum of equal bargaining power between its players, or, in the alternative, a meaningful governmental role in protecting the consumer. A well-functioning marketplace finds its players sufficiently armed to make informed decisions. For that matter, consumer-oriented markets require that consumers have choices among different types of products. In CIC-dominated real estate markets, few, if any, of those factors are present.\textsuperscript{62}

\textsuperscript{60} Id.

\textsuperscript{61} See infra Part IV.F (proposing state statutory reform intended to curtail the municipal role in the establishment of CICs by reigning in municipality's unfettered power to refuse dedication of public facilities, including streets, sewers and drainage systems).

\textsuperscript{62} See DILGER, supra note 12, at 38 ("Although [CICs] do provide more consumer options in the abstract, in many areas of the country [association-related housing developments] now dominate the local housing market and are increasingly offering fairly uniform levels and types of services."); id. at 18 (noting that, according to estimates made by the Community Associations Institute, "nearly all new residential development in California, Florida, New York, Texas, and suburban Washington, D.C., is governed by a [residential community association]").
Importantly, the traditional view of homebuyer "consent" to the CIC servitude regime presupposes an efficient and well-functioning housing market. This voluntary consent theory holds that residents consent to the rules and restrictions when purchasing, and that those who do not wish to subject themselves to CIC rules are free to buy elsewhere.63

This notion of homebuyer consent to the CIC servitude regime, and to the choice to live in a CIC in the first place, is decidedly wanting when viewed from the perspective of the individual seeking to purchase an affordable new home in a high-growth area of the United States. Particularly there, the CIC is becoming the only game in town.

Most new residential development in the fastest growing southern and western states is subject to governance by a homeowners association. In fact, nearly all new residential development in many quick growth regions is within the province of a homeowners association.64 One housing market analyst has declared, "[i]f you want a new home, it is increasingly difficult to get one that doesn't come with a homeowners' association." 65 Then too, CICs can be the most affordable housing available in certain housing markets—meaning that moderate- and middle-income homebuyers in many fast growing areas are particularly deprived of alternatives to common interest forms of housing.66

Not only is there often little choice as between CIC housing and comparable non-CIC housing in key United States housing markets, there is often little effective choice among the types of CIC amenities and rule-regimes that come attached to a CIC home. Thus, "[a]lthough [CICs] do provide more consumer options in the abstract, in many areas of the country [homeowners associations] now dominate the local housing market and are increasingly offering fairly uniform levels and types of services."67 Moreover, developer-imposed CIC rule regimes are remarkably uniform, having been cut from the same legal boilerplate time and again.68

The complex CIC servitude regime that buyers "assent" to is more akin to an adhesion contract than the product of informed, meaningful choice.

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63. See, e.g., Richard Epstein, Covenants and Constitutions, 73 CORNELL L. REV. 906, 922-25 (1988) (freedom of contract should be lens through which to view servitude regime).
64. McKENZIE, supra note 23, at 11-12 (emphasis added) (quoting U.S. ADVISORY COMM'N, supra note 5, at 3).
65. GARREAU, supra note 12, at 189 (quoting Douglas Kleine, a consultant and former research director for the Community Associations Institute).
66. See Barton & Silverman, supra note 39, at 137 (residents buy into CICs by default in many venues, simply because "few 'ordinary' neighborhoods exist[] in the area they want[] to buy in"); McKENZIE, supra note 23, at 56-57. In Orange County, California, for example, the median price of a home subject to an RCA is $45,000 less than the median price of a non-RCA home. See id.
67. DILGER, supra note 12, at 38.
68. McKENZIE, supra note 23, at 21, 127.
prospective homebuyer can no more effectively negotiate with respect to the complex provisions of CIC governing documents – and the intricate and all-encompassing rule template contained therein – than a consumer can negotiate with an insurance carrier with respect to the boilerplate terms and conditions of an insurance policy. In each case, the superior party simply “offers” the contractual provisions on a take-it-or-leave-it basis.

Traditional contract theory assumes not only the ability of both parties to engage in effective bargaining, but also presupposes that both parties have reasonable access to the information that becomes the basis of the bargain. In the particular sphere of consumer contracts, the law often imposes explicitly the requirement that a consumer’s acceptance of a contract’s terms be accompanied by the consumer’s “informed consent.” 69 Yet, in the context of a CIC home purchase (which, as with all housing, represents the most significant investment that any consumer is likely to make in her lifetime), empirical research suggests that even rudimentary informed consent is lacking. For example, a study of California CIC residents found a “widespread lack of understanding” on the part of homebuyers of the complex private law regime which the homebuyers had become subject to by virtue of purchasing their homes. 70 This absence of understanding was evident even though California law requires sellers of association-related housing units to provide buyers with a copy of the CIC governing documents before the sale is closed. 71

A CIC home purchase is decidedly not a context in which the state should decline to regulate the parties’ contractual relations on the ground that the parties – as independent agents capable of making informed and voluntary decisions – should be left well enough alone. Quite the contrary. This is a context that can be characterized by unequal bargaining power, a lack of in-

69. Marc Galanter, Contracts Symposium: Contract in Court; Or Almost Everything You May or May Not Want to Know About Contract Litigation, 2001 Wis. L. Rev. 577, 623 (2001) (quoting Peter W. Huber, Liability: The Legal Revolution and Its Consequences 216 (1988)) (“A return to contract, built on open warning and informed consent, would permit once again infinite calibration to the varying needs of individual consumers. . . . Contract, in its very essence, is a meeting of the minds, and in the most private cases only two minds need meet for there to be a deal”). See, e.g., state statutes requiring: (1) that certain consumers contracts be expressed in plain language; (2) that certain terms of a particular consumer contract be placed in large-case lettering or in boldface; (3) that certain consumer contracts contain a statement of consumer rights that are mandated by law; or (4) that certain consumer contracts not become effective for a specified number of days after the consumer executes the contract. A covered consumer contract that does not adhere to these requirements may be void or voidable.

70. Barton & Silverman, supra note 39, at 137.

71. See id. See also Dilger, supra note 12, at 38 (“[M]any consumers are not fully aware of the [community association’s] powers or their own role in [community association] governance when they purchase their home. As a result, the homeowners’ consent to the [association’s] CC&Rs is often reduced to a purely theoretical premise and, unfortunately, often does not reflect their autonomous will.”).

https://scholarship.law.missouri.edu/mlr/vol72/iss4/6
formed consent on the part of the homebuyer, an absence of meaningful housing alternatives, the curtailment of individual autonomy and a complex servitude regime that abridges personal freedoms as it regulates the smallest details of daily living. Indeed, in this context the need for increased governmental oversight and enhanced consumer protection appears especially compelling.

The foregoing suggests that the CIC’s predominance is not the natural and inevitable product of market forces, and it is not owed the deference that might be due if it actually reflected the unfettered needs and aspirations of the housing marketplace. Rather, evidence suggests that the privatization of new communities is occurring even when the market would not otherwise have chosen the privatization of traditionally municipal services, let alone the establishment of a CIC in the first place. 72

C. The Developer's Role in the Establishment and Operation of the CIC: Another Break in the Relationship Between the CIC Template and Public Choice

CICs are not created by the residents who inhabit them. Rather, they are created by developers who plan, design, and construct them, and then offer individual units for sale to homebuyers. 73 It is the developer who imposes the governance template for the community, as well as its applicable covenants, conditions and restrictions, long before even a single unit is sold.

Thus, CIC residents play no direct role in the critical decision-making process leading to the organization of the CIC and its servitude regime. Nevertheless, they will be bound by that intricate array of “one-size fits all” rules that, once implemented, can be modified typically only by a supermajority vote of the residents. 74

For that matter, the developer’s role extends far beyond the formation of the CIC and the adoption of its governing documents. The developer maintains control of the operation and management of the CIC by controlling most or all of the board positions until a majority of the constituent housing units is sold. Depending on the laws of the jurisdiction and the nature of the development, this could mean that the developer retains control of the CIC for five years or more. 75

72. See supra Part III.A. See also Siegel, supra note 7, at 887-98.
73. See McKenzie, supra note 23, at 21, 127.
74. Id.; U.S. Advisory Comm’n, supra note 5, at 16. As Professor McKenzie notes, changes to CIC rules are rendered particularly difficult because the governing documents typically require a supermajority not just of those who have a cast a vote, but rather of all who are eligible to vote by virtue of ownership in the community association. McKenzie, supra note 23, at 21.
75. In the early years of a CIC, the developer usually dominates the board of directors. Typically, “the developer staffs all board positions with his own employees and... retains three votes for every unsold unit, so the developer is effectively in
Of course, if the interests of the developer and the interests of the homeowners were to correspond, this disjunction between developer (i.e., the political organizer) and homeowner (i.e., the political constituent) would not pose a problem. But developer and homeowner interests are not congruent. A developer’s interest, of course, is to sell housing units. A developer’s interest is to maximize profit during the period of time in which the developer is in control. A developer’s interest is to make as much money as possible from ancillary services and amenities provided to the CIC. A developer’s interest is not served by fully financing maintenance and repair funds that are intended for use long after the developer has left the scene. A developer’s interest is to impose a draconian and comprehensive rule regime in order to please its lender, which presumably abhors any perceived risk to property values.76 None of those interests coincide with the best interests of the constituent homeowners.

Yet, CIC residents must live, quite literally, with the developer’s legacy. As previously noted, it is highly unlikely that a CIC homeowner, at the time of her home purchase, consented meaningfully to the CIC’s complex governance structure and rule regime.77 For that matter, once within its grasp, that homeowner will find it exceedingly difficult to alter those governing documents after the developer has left the scene, mindful that amendments usually require supermajority vote.78 In short, “the [CIC] developer’s idea of how people should live is, to a large extent, cast in concrete.”79

Consider for a moment the critical differences in the initial organization and ratification of governance systems that exist between (on the one hand) a common interest community, which functions, de facto, as a mini-government of sorts, and (on the other hand) other democratic political entities, such as nation-states or municipalities. Certainly, the future residents of any democratic political community play no direct role in the establishment or endorsement of that community’s legal regime. For example, none of us participated in the Constitution’s ratification. But, at least in theory, we are

76. Indeed, as pointed out by Professor McKenzie, an influential early publication by the Federal Housing Administration (FHA) strongly recommended “rigidity” in the CIC servitude regime. Id. at 127. In particular, the FHA strongly advocated the imposition of supermajority requirements to amend CIC governing documents. Such supermajority requirements “were seen as an asset for mortgage insurance purposes because it tended to prevent owners from banding together.” Id. Since the FHA’s “recommendations” were backed by the promise of FHA mortgage insurance, developers and lenders took the “recommendations” very seriously.

77. See supra Part III.B.

78. See supra note 74 and accompanying text.

today the successors-in-interest of its drafters and ratifiers,\textsuperscript{80} which is why it can be fairly stated (legal niceties aside) that each new generation need not ratify the Constitution.

By contrast, CIC homeowners cannot be said to be the developer's "successors-in-interest." First, the interests of those homeowners diverge fundamentally from the interests of the developer. Most importantly, the developer's "dead hand" bequeaths to residents a "command-and-control" rule regime designed to satisfy the purposes and objectives of the developer, its lender, and their attorneys. After the developer has left the scene, homeowners are left to contend with the harsh realities and often unexpected consequences of those hard and fast rules that, unfortunately, are remarkably resistant to change.

In short, the CIC rule-regime is not the inevitable by-product of unfettered market forces. Rather, it is the product of a confluence of factors, including such critical non-market influences as municipal CIC privatization policy, the lack of sufficient consumer understanding of the complexities of the servitudes package, the absence in many markets of meaningful and affordable non-CIC alternatives, the disparities in bargaining power between housing producers and consumers, the divergence of interest between CIC developers and homebuyers, and the ability of CIC developers to lock in a governance system and rule set that remains in place long after the developer has relinquished control over the CIC. These factors serve as powerful impediments to the exercise of meaningful consumer choice and the emergence of true market preferences.

IV. THE CIC RULE REGIME: A LEGACY OF DISTRUST AND DYSFUNCTION

In the recent leading case of Committee for a Better Twin Rivers v. Twin Rivers Community Trust,\textsuperscript{81} the New Jersey Supreme Court determined that plaintiffs — homeowners association residents — had not shown that their homeowners association violated the free speech and right to assembly clauses of the New Jersey Constitution. The court, however, appeared to hold out the possibility that aggrieved CIC residents might, in the appropriate case, seek constitutional redress against an association that "unreasonably infringes with free speech rights."\textsuperscript{82}

\textsuperscript{80} Of course, this statement needs to be qualified for African-Americans and women, who quite plainly were not "successors-in-interest" of the framers and ratifiers of the Constitution for a substantial portion of our history. Perhaps it can be said that these groups ultimately became "successors-in-interest" to Madison, Jefferson and their cohort — however belatedly — by virtue of the adoption of the 13th, 14th, 15th and 19th Amendments, and by more recent statutory enactments.

\textsuperscript{81} 929 A.2d 1060, 1072-74 (N.J. 2007).

\textsuperscript{82} Id. at 1074.
The voluminous record in Twin Rivers contains some significant clues as to what might, in the appropriate case, give rise to a constitutional violation – an issue that is beyond the scope of this Article.\(^{83}\) For present purposes, however, that record is quite useful, as it provides a meaningful referent for what ails the CIC paradigm.\(^{84}\) This is a realm where governance is less than participatory, homeowners association boards can devolve into mini-autocracies, rules can become weapons, and attorneys can brazenly call for dissenting residents to leave\(^{85}\) (no matter the absence, in some markets, of meaningful choice) and where a cottage industry of professionals get paid handsomely to oppose the rights of the very same homeowners who pay their bills.

The published opinion of the intermediate appellate court in Twin Rivers devoted particular attention to a report by Edward Hannaman, the “association regulator” in the Bureau of Homeowner Protection of the New Jersey Department of Community Affairs (hereafter “the Hannaman Report”). The Appellate Court in Twin Rivers quoted the Hannaman Report as follows:

Hannaman said that complaints revealed an ‘undemocratic life’ in many associations, with homeowners unable to obtain the attention of their board or manager. Boards ‘acting contrary to law, their governing documents or to fundamental democratic principles, are

\(^{83}\) For a thorough examination of the Twin Rivers case, see Franzese & Siegel, \textit{supra} note 56.

\(^{84}\) The Twin Rivers “backstory” is also instructive, and illustrative of the deficiencies in the CIC model. The targeted Twin Rivers homeowners were able to afford counsel only because the matter was taken up, on a \textit{pro bono} basis, by Professor Frank Askin and the Rutgers Law School Constitutional Litigation Clinic. Professor Askin, who has represented aggrieved homeowners in a host of disputes with CIC boards, makes the observation that in all of the disputes I am aware of, there is a total absence of trust between the board and the complaining homeowner. In Twin Rivers, there is no love lost between the two sides. The complaining homeowners consider the board despotic and tyrannical – often with good reason. The Twin Rivers dispute flared because a couple of dissidents won election to the board with a campaign that relied heavily on lawn signs in violation of long-standing rules that were never enforced. As soon as the dissidents won, the majority of the board decided to enforce the rules for future elections.

Interview with Frank Askin, Professor, Rutgers Law School, in Newark, N.J. (February 19, 2007).

\(^{85}\) The Twin Rivers litigation generated hundreds of thousands of dollars in legal fees and costs. Aware of residents’ disapproval of the costly and protracted battle, the board’s attorney declared summarily that if residents are “not happy with [Twin Rivers] policies, they should look elsewhere to live.” Paula Franzese & Margaret Bar-Akiva, \textit{Homeowner Boards Can’t Exclude Democracy}, NEWARK STAR-LEDGER, Feb. 20, 2006.
unstopable without extreme owner effort and often costly litiga-
tion.’ Board members ‘dispute compliance’ with their legal obliga-
tions and use their powers to punish owners with opposing views.
‘The complete absence of even minimally required standards,
training or even orientation for those sitting on boards and the lack
of independent oversight is readily apparent in the way boards ex-
ercise control.’

Hannaman described instances of abuse of power in some detail
while conceding that there were ‘many good associations.’ He
stressed, however that typically, power was centralized in boards,
which acted as executive, legislature and judiciary.86

The Hannaman Report is notable for its candor and its breadth. For ex-
ample, Mr. Hannaman states: “It is obvious from the complaints [made to the
State regulatory agency] that [home]owners did not realize the extent associa-
tion rules could govern their lives.”87 Mr. Hannaman goes on to set forth at
length numerous examples of abuse of homeowner rights by New Jersey
CICs, and the ineffectual and inadequate safeguards that presently exist to
prevent and remedy such abuse. As to this point, the following extended
quotation is instructive:

Overwhelmingly . . . the frustrations posed by the duplicative com-
plainants or by the complainants’ misunderstandings are dwarfed
by the pictures they reveal of the undemocratic life faced by own-
ers in many associations. Letters routinely express a frustration
and outrage easily explainable by the inability to secure the atten-
tion of boards or property managers, to acknowledge no less ad-
dress their complaints. Perhaps most alarming is the revelation
that boards, or board presidents desirous of acting contrary to law,
their governing documents or to fundamental democratic princi-
pies, are unstoppable without extreme owner effort and often
costly litigation.

Problems presented by complainants run the gamut from the frivo-
lous (flower restrictions and lawn watering), to the tragically cruel
(denial of a medically necessary air conditioner or mechanical win-
dow devices for the handicapped), to the bizarre (president having
all dog owners walk dogs on one owner’s property, air conditioners
approved only for use from September to March). Curiously, with

86. Comm. for a Better Twin Rivers v. Twin Rivers Cmty. Trust, 890 A.2d 947,
87. Edward R. Hannaman, Report Presented to Rutgers University Center for
Government Services: State and Municipal Perspectives - Homeowners Associations
(March 19, 2002).
rare exceptions, when the State has notified boards of minimal association legal obligation to owners, they dispute compliance. In a disturbing number of instances, those owners with board positions use their influence to punish other owners with whom they disagree. The complete absence of even minimally required standards, training or even orientations for those sitting on boards and the lack of independent oversight is readily apparent in the way boards exercise control.

... [C]omplaints have disclosed the following acts committed by incumbent boards: leaving opponents' names off the ballots (printed up by the board) by "mistake"; citing some trivial "violation" against opponents to make them ineligible to run; losing nominating petitions; counting ballots in secret - either by the board or their spouses or someone in its employ - such as the property manager deciding to appoint additional board members to avoid the bother of elections; soliciting proxies under the guise of absentee ballots; holding elections open until the board obtains the necessary votes to pass a desired action; declaring campaign literature by their opponents to be littering; using association newsletters to aggrandize their 'accomplishments' but forbidding contrary opinions by owners . . . ; routinely refusing to release owner lists to candidates-despite the board mailing owners (at association expense) their positions (it has become routine for the State to refer candidates to the municipal tax office to obtain the names of their fellow association owners); rejecting candidate platforms or editing them to conform to the board's idea of fair comment which includes eliminating any criticism of the board. 88

The Hannaman Report is a significant indictment of the status quo of CIC regulation in New Jersey. His findings, as the on-record statement of New Jersey's association regulator, an independent monitor entrusted with CIC oversight for the entire State, cannot be summarily dismissed as the isolated complaints of a few disgruntled residents or disaffected malcontents.

Unfortunately, the governance and management difficulties identified in the Hannaman Report are not unique to New Jersey. While homeowners associations can and do function fairly and effectively in a host of venues, difficulties - including miscommunication, acrimony and abuse of power - have arisen in virtually all States with large numbers of CICs. For instance:

- In Texas, Wenonah Blevins owed $814.50 in back dues, and said she never knew she faced foreclosure until after the association sold her $150,000 home for $5,000. [A former official of

88. Id.
the Community Association Institute] said the association “did everything right in the foreclosure, other than realize the lady is [82] years old.”

- In Florida, 74-year-old Anne Grove suffered foreclosure, then eviction, handcuffing, jailing for five days, and apparent theft of her belongings because of a $1,200 debt to the association. Apparently she had not understood what was happening, and a law firm paid $2,400 to buy her home appraised at more than $150,000.

- In Arizona, Barbara (a retired paralegal) and Dan Stroia (a disabled construction worker) paid nearly $8,000 to attorneys collecting what began as a $66 debt. The Stroias had not known of a $6 increase in quarterly charges, or a $30 one-time assessment. A lawsuit first sought $565. A month later, the Stroias tried to pay $850, and ultimately had to pay more than $7,000 more for disputing the fees. The association attorney blamed the family: “People just get emotional about things because it’s their home . . . The Stroias, unfortunately, reacted very emotionally.”

- In North Carolina, a CIC homeowner was fined $75 per day because his dog exceeded the weight limitation imposed by the servitude regime. He was forced to declare bankruptcy after he was ultimately assessed $11,000 in fines.

- In Florida, an association fined a homeowner for having an unauthorized “social gathering” when he was joined on his front lawn by two friends to chat.

- In California, an association officially warned a 51-year-old grandmother of an association rule violation after she was seen in front of her home kissing a date goodnight.


91. See Bridget Hall Grumet, Condo Board Says Three's a Crowd, ST. PETERSBURG TIMES, Nov. 18, 2003, at 1B.

Accounts such as those provide personal and sometimes tragic glimpses into cultures of inefficiency, distrust and dysfunction. Certainly, it is difficult to know the full extent of resident perceptions of CIC living, given the lack of detailed and authoritative opinion research of a national scale. The Community Association Institute (CAI), the industry’s trade association, which is comprised of the many for-profit enterprises and professional associations that derive significant financial gain from homeowners associations, strives to paint a picture of overwhelming resident satisfaction. Its financial interest in the continued appeal of CIC living tends to diminish the persuasiveness of its surveys, which report as much as a 97% resident approval rating.

Certainly, CICs can, and no doubt do, work well in many venues. But it is difficult to accept the integrity of survey results that produce as astonishingly high an approval rating as 97% when the poll’s sponsor has a vested financial interest in that outcome, and in fact authored the very survey instrument itself. Polls can yield different outcomes merely by the design of the questions presented. Unfortunately, given the sheer magnitude and costs of the task, truly independent empirical data of national scope has yet to be culled.

The independent work of a more regional dimension makes plain that there is some trouble in “privatopia.” For example, a California poll revealed that 41% of homeowners associations found “major problems with rule violations,” and that 84% of residents who purchased into a homeowners association were not seeking to do so. The survey’s authors, independent empiricists, concluded that CICs are often in some difficulty at the very start, because they have owners who, if they understood the restrictions on homeowners’ individual freedom that are inherent in a [common interest development], did not really want to purchase in a [common interest development] in the first place and did so only reluctantly because they could not afford a home in an ordinary neighborhood or be-

95. See MCKENZIE, supra note 23, at 5.
96. Barton & Silverman, supra note 39, at 137.
cause few ‘ordinary’ neighborhoods existed in the area they wanted to buy in.97

The portents of CIC dysfunction are contained in its governing template, with its maze of restrictions and broad grant of enforcement authority to boards of directors whose dealings go largely unchecked. Under the standard CIC originating documents, a key mandate of those boards is to enforce the developer-imposed servitudes scheme and to mete out penalties against homeowners who fail to comply.98 Few checks are in place to protect from autocratic, petty or misguided rule.99 Indeed, homeowners associations are authorized to finance the costs of board enforcement and compliance initiatives, no matter how aggressive or litigious, by passing on the attorneys’ fees and other expenses to the CIC residents themselves, as part of the annual and monthly assessments that are charged.100 The temptation to resort to a more litigious course can be compounded by the long arm of the CAI,101 which functions as a monolithic national lobbying and trade organization that, as noted, represents lawyers, accountants, other professionals and contractors that profit handsomely as CIC service-providers.102 The CAI can readily

97. Id.


99. See Franzese, supra note 15, at 342-43 (noting that homeowners’ associations are often vested with the broad “authority to serve as judge, jury, and executioner” in creating and enforcing rules); Franzese & Bar-Akiva, supra note 85; Sharon L. Bush, Beware the Associations: How Homeowners’ Associations Control You and Infringe Upon Your Inalienable Rights!!, 30 W. ST. U. L. REV. 1, 4-5 (2003) (“Association boards of directors can take the position of wielding a big stick and conducting themselves unfairly and sometimes outrageously.”); Susan F. French, Making Common Interest Communities Work: The Next Step, 37 URB. LAW. 359, 365 (2005) (“The community association governance structure, which is based on the corporate model, lacks the checks and balances that typically constrain cities from abusing their residents.”); Dennis R. Judd, The Rise of the New Walled Cities, in SPATIAL PRACTICES 144, 158 (Helen Liggett & David C. Perry eds., 1995) (examining homeowners’ associations “tendency toward autocratic rule” and resultant threats of litigation).

100. See Noble v. Murphy, 612 N.E.2d 266, 271-72 (Mass. App. Ct. 1993) (where a condominium by-law allowed the association to recover the cost and expense of handling by-law violations from the offending unit owner). See also Riss v. Angel, 934 P.2d 669, 681 (Wash. 1997) (en banc).


102. About Community Associations Institute (CAI), http://www.caionline.org/about/index.cfm (last visited Sept. 6, 2007) (“For more than 30 years, CAI has been the leader in providing education and resources to the volunteer homeowners who govern community associations and the professionals who support them.”).
provide homeowners association boards with access to a cottage industry of attorneys and various experts to assist, often at considerable resident expense, with the task of rule enforcement, homeowner compliance and penalty collection.

This ready access, coupled with too many rules and too few checks on the rulers, can encourage boards to use missiles to kill mice. Those boards have the capacity to proceed vigorously and even arbitrarily against dissenters, rule-benders and rule-breakers of both good and bad faith. The absence of any formalized training mechanisms for those who serve on boards, together with the dearth of appropriate checks and restraints aimed at promoting transparency and access, yields all sorts of abuses. That governing boards' litigious strategies are financed with residents' money, paid into dues and fees, only adds insult to the potential for individual and collective injury.

Less than participatory governance structures can (and have) shut out voices of reason and restraint. Those who depart from the applicable structures can (and have) been punished, sometimes severely, as they are subjected to fines, costly litigation and even foreclosure. Models of control and punishment do little to inspire reciprocal trust. It is no surprise that they have backfired in a number of CIC domains across the country.

103. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting) ("Today the Court launches a missile to kill a mouse.").

104. See Bush, supra note 99, at 5-7; Nancy L. Rosenblum, Membership and Morals: The Personal Uses of Pluralism in America 117-18 (1998) (discussing how one resident of a private community refers to his homeowners’ association as "little Hitlers"); Franzese, supra note 15, at 344 (noting that some residents refer to their homeowners associations as "petty, tyrannical, and despotic").


106. See Franzese, supra note 15, at 342-43.

107. Id. at 343.

108. See id. at 342; Chuck McCullough, Studying Homeowners Groups Lawmakers Have Concerns About Too Much Power, Foreclosures, San Antonio Express-News, Jan. 13, 1999, at 1H (describing various measures that homeowners' associations have to penalize residents for nonconformity); Benjamin, supra note 105, at 57 (noting that association boards often have the right to "self-help foreclosure," or the ability to sell a resident’s house to collect fines and legal fees without permission from the court).

109. See Franzese, supra note 3, at 572; Dilger, supra note 12, at 135-41 (describing CIC residents' dissatisfaction); Laura Castro Trognitz, 'Yes, It's My Castle': Suits by Unhappy Residents Against Homeowners' Associations Grow, 86 A.B.A. J. 30, 30 (June 2000) (noting that lawsuits by unhappy residents against homeowners' associations are growing).
Disputes tend to flare when the absence or breakdown of trust between governing boards and homeowners takes its toll.\textsuperscript{110} Instances continue to be reported of homeowners associations turning on residents, residents turning on their associations and governing boards, and neighbors turning on neighbors.\textsuperscript{111} Excessive reliance on rules alone to do the work best achieved in tandem with relevant social norms devalues the more virtuous inquiry of resident relations, transforming it from "how is my neighbor doing?" to "what is my neighbor doing?"\textsuperscript{112}

In short, the classic model of CIC organization and governance is flawed because it presupposes that laws and rules can do all of the work — that is, the work that law does most successfully when in partnership with, if not deference to, appropriate social norms.\textsuperscript{113} The standard cookie-cutter regime does not give organic norms of "neighborliness,"\textsuperscript{114} residing in systems of reciprocity\textsuperscript{115} and built on stocks of social capital,\textsuperscript{116} a chance to develop. Rather,

\begin{itemize}
  \item\textsuperscript{110} See Franzese, supra note 15, at 343-44; Susan Thurston, \textit{Case of "Gate Rage" Leads to Lawsuit}, St. PETERSBURG TIMES, Feb. 26, 2003, at 1A (chronicling an incident where a resident, who constantly had to pass through a gate across a public road to get to his home, rammed his truck into the gate); Tim Vanderpool, \textit{But Isn't This My Yard? Revolt Against Neighborhood Rules}, CHRISTIAN SCI. MONITOR, Aug. 18, 1999, at 2 ("[H]eavy handed rules and arbitrary enforcement are sometimes blamed for pitting neighbor against neighbor, and turning serene subdivisions into raucous battle zones. The result may be a budding national backlash.").
  \item\textsuperscript{111} See Franzese, supra note 15, at 343-44; Vanderpool, supra note 110, at 2.
  \item\textsuperscript{112} See Franzese, supra note 3, at 559; FUKUYAMA, supra note 1, at 224 ("There is usually an inverse relationship between rules and trust: the more people depend on rules to regulate their interactions, the less they trust each other, and vice versa."). See also ALAN FOX, \textit{BEYOND CONTRACT: WORK, POWER AND TRUST RELATIONS} 30-31 (1974) (discussing characteristics of high-discretion work role patterns).
  \item\textsuperscript{113} See FUKUYAMA, supra note 1, at 11, 26-27 (noting that by some current theories "trust is not necessary for cooperation: enlightened self-interest, together with legal mechanisms like contracts, can compensate for an absence of trust and allow strangers jointly to create an organization that will work for a common purpose"; however, "[l]aw, contract, and economic rationality . . . must as well be leavened with reciprocity, moral obligation, duty toward community, and trust"); LEON SHASKOLSKY SHELEFF, \textit{SOCIAL COHESION AND LEGAL COERCION: A CRITIQUE OF WEBER, DURKHEIM, AND MARX} (1997) ("The rules of law are in many instances the most definitive exposition of the fundamental norms of a society."); ROSENBLUM, supra note 104, at 154 ("Strict enforcement of association rules rewards rigidity and inhibits face-to-face community.").
  \item\textsuperscript{114} See ROBERT C. ELLICKSON, \textit{ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES} 53, 56, 60 (1991) (discussing "norms of neighborliness" and how neighborliness often "trumps" law); FUKUYAMA, supra note 1, at 29, 41 (noting that Americans are not as individualistic as people believe them to be and, although people are "fundamentally selfish," they "also have a moral side in which they feel obligations to others").
  \item\textsuperscript{115} See ROBERT D. PUTNAM, \textit{BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY} 20-21, 134 (1998) (discussing the mutual obligations that
\end{itemize}
it encourages, tacitly or explicitly, prospective buyers, and then residents, to trust the developer's template, and then to trust the homeowners association, and then to trust the association's governing board to oversee a system predicated, from its very inception, on a lack of trust.117 This disjuncture constitutes one of several fundamental paradoxes implicit in the CIC form.118

CIC patterns of regimentation and control have inspired varying levels of resident discontent and wariness, all at significant economic cost. Too many restrictions, accompanied by too draconian a system of penalties for their breach, continue to be imposed on CIC living. Associational and financial well-being is diminished when too much power is vested in the hands of governing boards that can devolve into mini-autocracies backed by a cottage industry of lawyers, accountants, property managers and service providers all with vested interests in maintaining a status quo that generates substantial attorneys' fees, service contracts and salaries at residents' expense. Residents buying into CICs often have little conception of what they are actually assenting to, with little or no idea that they are checking a host of rights upon entry.

arise from social networks: "[n]etworks of community engagement foster sturdy norms of reciprocity: I'll do this for you now, in the expectation that you (or perhaps someone else) will return the favor").

116. See JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 138 (1961) (being one of the first to coin the term "social capital"). See also James S. Coleman, Social Capital in the Creation of Human Capital, 94 AM. J. OF SOC. (SUPPLEMENT) 95, 95 (1988) (introducing the concept of social capital and examining the social structure conditions under which it arises); Franzese, supra note 3, at 567-68; Michael Woolcock, Social Capital and Economic Development: Toward a Theoretical Synthesis and Policy Framework, 27 THEORY & SOC'Y 151, 155 (1998) (defining social capital as "encompassing the norms and networks facilitating collective action for mutual benefit"); Robert D. Putnam, Tuning In, Tuning Out: The Strange Disappearance of Social Capital in America, 28 PS: POL. SCI. & POLS. 664, 664-65 (1995) (referring to social capital as "the networks, norms, and trust that enable participants to act together more effectively to pursue shared objectives"); PUTNAM, supra note 115, at 18-19 ("the core idea of social capital theory is that social networks have value").

117. See KENNETH J. ARROW, THE LIMITS OF ORGANIZATION 23 (1974) ("Unfortunately [trust] is not a commodity which can be bought very easily. If you have to buy it, you already have some doubts about what you've bought."); Franzese, supra note 15, at 341-42; LOW, supra note 57, at 153. See also supra Part IV for discussion on layers of distrust that accompany CIC living.

118. Another paradox implicit in the CIC paradigm is that existing models of CIC organization and governance are often predicated on varying levels of distrust of government. Thus, CICs – particularly gated communities – are often marketed as better guarantors of property values and better and more efficient providers of certain municipal-like services than local government. Yet, at the same time, the explosive growth in the number of CICs is also a product of deliberate government policy itself – a conscious effort on the part of municipalities to load-shed traditionally municipal services onto developers who, in turn, pass on that service-delivery obligation to the homeowners by way of the CIC mechanism.
What then is to be done? In the section that follows, we propose a new CIC paradigm that more closely aligns CICs with market forces and public choice. The rule-bound boilerplate that governs the traditional CIC is best replaced by a legal regime that places far less emphasis on regimentation and punishment and far greater reliance on the power of social trust and community.

V. FINDING SOLUTIONS – “THE CURE FOR THE AILMENTS OF DEMOCRACY IS MORE DEMOCRACY”¹¹⁹

We have argued that tightly-bound CIC rule sets and modes of governance are not the simple and inevitable products of market forces. On the contrary, CIC governance structures are more accurately portrayed as the product of distorted market forces. In this section, we offer a practical program of CIC reform based in part on changes in law and policy. In the end, we believe that any meaningful and sustainable agenda for CIC reform must more closely align CICs with market forces and public choice.

As more fully discussed below, the developer-imposed, rule-bound boilerplate to attend most CICs ought to be replaced by a legal template that allows systems of reciprocity, best practices of cooperation and, in a word, neighborliness, the opportunity to grow and to endure. Organic social norms must be given the chance to do their work, all the while undergirded by a legal foundation that includes: (1) enhanced CIC homeowner democracy; (2) clear statutory rights accorded to association homeowners; (3) a fair and equitable alternative dispute resolution regime; (4) an ombudsman with a mandate to resolve homeowner issues before those issues metastasize into full-blown disputes with the association; and (5) transparent management and accountability. Taken together, those elements of structural reform will enable CICs to realize their potential to become “communities” in the truer sense of that term.

A. Sunset Developer-Imposed Servitude Regimes

The centerpiece of any CIC statutory reform effort should consist of a mechanism that would enable homeowners to fully consider and then adopt a means of self-governance once the developer has sold its units and no longer has an interest in the CIC. This proposal is not nearly as radical as it might appear: it leaves intact the developer’s right (within statutory limits) to initially define the CIC’s governance and rule regime, and it permits the developer-imposed rules to remain in place during the early years of the CIC. In this sense, the proposal is a compromise, as well as a recognition of the economic reality that the establishment of a CIC is the result of the investment by the developer of substantial sums that are placed at risk in those early years.

¹¹⁹. JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 146 (1927).
Our proposal embraces the premise that a CIC cannot be fully participatory and democratic until the developer has sold its units and left the scene. That is precisely when the CIC can and should be allowed to chart its own course. Accordingly, we propose that the developer-imposed CIC rule regime “sunset” as soon as the developer relinquishes control of the CIC. At that point, meaningful statutory reform would provide a menu of several “association constitutions” for residents to consider and select from by majority vote. This menu-based approach is analogous to the model used when municipalities are first incorporated and entitled to choose from amongst several statutory options when determining their governing structure. Those options include the choice to be organized as a city, township, borough, or village. In the context of CICs, legislatures would create a range of options, allowing association members to select the governance model best-suited to their domain.

We propose that the menu include the option to simply ratify the existing developer-created governing template. If it is working, it should endure. Moreover, residents who value continuity above all should have the option of voting for it.

Conversely, there are CICs whose residents seek substantial change in existing governance structures. Some homeowners will have very particular ideas with respect to the nature and extent of such change. The statute would permit associations to arrive at more tailored provisions for governance that deviate, in whole or in part, from the statutory array of choices. However, the option to depart from the presumptively permissible range would be subject to a supermajority vote rather than a simple majority.

We believe that the mandatory sunsetting of developer-imposed rule regimes would serve a number of salutary purposes. First, it would correct a basic structural flaw in CIC establishment and operation: developer “dead hand” control, exercised long after the developer has left the scene. Second, it would allow homeowners the option to either stay the course in matters pertaining to association governance or take control of the CIC at a critical juncture, when the developer has relinquished control and all units are in residents’ hands. Third, it could help to engage and motivate unit owners to think about and chart the future of their CIC. Once initiated, that engagement could well endure long after resolution of the immediate matters at hand.

120. It is beyond the scope of this article to delineate with particularity the substantive content of this menu of governance options to be authorized in a CIC model statute. Suffice it to say that the “menu” could provide either a “strong” board or “weak” board; a higher or lower threshold level for petitioning and recall; and a higher or lower threshold for amendment of governing documents. Importantly, the baseline statutory rights and procedures that we propose in this section would be incorporated by reference into all menu options, and could not be subject to change by an action of the CIC board, by a vote of CIC homeowners, or otherwise.

121. The baseline statutory rights and procedures that we propose in this section could not be subject to change by a vote of CIC homeowners.
B. Afford CIC Homeowners Baseline Statutory Rights

CICs are best governed by traditional principles of participatory democracy. This means, of course, that the will of the majority ought to carry the day in most matters. But democracy – in its most enlightened conception – is far more than mere majority rule, lest the majority be permitted to devolve into tyranny. This basic insight, one of the great theoretical contributions of the Constitution’s framers, has withstood the test of time.122

The framers prevented the undue concentration of political power through a combination of federalism – i.e., the allocation of powers among the national and state governments – and the doctrine of separation of powers among the constituent branches of the national government. At the national level, the establishment of an independent judiciary became not only a means to prevent overreaching by the political branches, but also a guardian of essential rights intrinsic to the democratic conception and best shielded from the changing winds of popular sentiment. This is perhaps the most important legacy of the summer of 1787.

We do not, however, invoke the Constitution as a literal model for a new form of CIC governance. Certainly, notions of federalism, separation of powers and an independent judiciary have no direct application to CICs, which, by definition, are unitary entities that need not be subject to the same complexities. For that matter, CICs are not literally sovereign in the way that federal and state governments are sovereign. Rather, they are actors in an intergovernmental system, thereby subject, of course, to the authority of those governmental actors superior to them.

The self-evident proposition that CICs are subject to law suggests that fundamental restraints on CIC constituent rights and democratic will are to be imposed by statute, and not by some internal mechanism of CIC governance. Just as the Constitution itself is extrinsic to, and superior to, the statutory and administrative legal regime that governs the workings of the federal government, so too the most important restraints on the CIC body are properly extrinsic rather than intrinsic. Yet, in most states, CICs are subject to little or no regulation or oversight by any level of government.

What is needed, then, is a set of basic homeowner rights that is conferred by statute, and that cannot be abrogated or displaced by private-law governing documents. The conferral of statutory rights on CIC homeowners provides the essential check on CIC majoritarian overreaching, a check that is sorely lacking in the complex privatized regimes imposed by CIC developers. Those private constraints are designed to maximize the prerogatives and range of authority of those in charge of the CIC. Initially, that authority is vested exclusively with the developer. Thereafter, the developer’s template

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122. See RONALD DWORKIN, FREEDOM'S LAW: A MORAL READING OF THE CONSTITUTION 17 (1996) (stating that a “constitutional conception of democracy” implies majoritarian rule, albeit one that is subject to conditions).
vests authority in the hands of boards of directors, whose decision-making processes are subject to none of the underpinnings of participatory, efficient governance. To wit, essential norms predicated on the laudable ends of transparency, accountability, meaningful access and fair process are absent.

David Kahne has proposed a progressive statutory “bill of rights” for CIC homeowners that accommodates aims of majority rule while also taking into account individual homeowner dignity and autonomy, organizational efficiency, accountability and transparency. Among the statutory rights that Kahne proposes are the following:

- **The Right to Security against Foreclosure**

  An association shall not foreclose against a homeowner except for significant unpaid assessments, and any such foreclosure shall require judicial review to ensure fairness.

- **The Right to Be Told of All Rules and Charges**

  Homeowners shall be told – before buying – of the association’s broad powers, and the association may not exercise any power not clearly disclosed to the homeowner if the power unreasonably interferes with homeownership.

- **The Right to Stability in Rules and Charges**

  Homeowners shall have rights to vote to create, amend, or terminate deed restrictions and other important documents. Where an association’s directors have power to change operating rules, the homeowners shall have notice and an opportunity, by majority vote, to override new rules and charges.

- **The Right to Individual Autonomy**

  Homeowners shall not surrender any essential rights of individual autonomy because they live in a common-interest community. Homeowners shall have the right to peaceful advocacy during elections and other votes as well as use of common areas.

- **The Right to Oversight of Associations and Directors**

  Homeowners shall have reasonable access to records and meetings, as well as specified abilities to call special meetings, to obtain oversight of elections and other votes, and to recall directors.

123. *KAHNE, supra* note 89.
The Right to Vote and Run for Office

Homeowners shall have well-defined voting rights, including secret ballots, and no director shall have a conflict of interest.\textsuperscript{124}

This articulation of basic and inviolate homeowner rights provides a helpful starting point for the attainment of more progressive and democratic CIC governance mechanisms. Moreover, the framework establishes a solid foundation for the fragile, non-legalistic conceptions of trust and community to take root and grow.\textsuperscript{125}

\textbf{C. Implement a Fair and Equitable System for Alternative Dispute Resolution}

The importance of a fair and equitable procedure for CIC alternative dispute resolution should be beyond dispute. Litigation is a hugely expensive and inefficient process and is particularly ill-equipped to resolve the many small-scale disputes that tend to arise in common interest communities.

Moreover, litigious systems tend to be inherently unfair when applied to CIC-homeowner disputes. Many CICs employ experienced counsel and have significant resources (i.e., the funds derived from fees and assessments imposed on the homeowners themselves) from which to fund protracted proceedings. Furthermore, because of one-sided fee-shifting clauses in CIC gov-

\textsuperscript{124} Id. at 11-12.

\textsuperscript{125} Unfortunately, the most influential model for statutory reform in this field does not adequately accomplish these objectives. In 1982, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") promulgated the Uniform Common Interest Ownership Act ("UCIOA" or "Model Act"), which encompasses the formation, management, and termination of common interest communities. The 1982 version of UCIOA has been adopted or adapted in five states: Alaska (1984); Colorado (1991); Minnesota (1993); Nevada (1991); West Virginia (1986). A modified version was promulgated by NCUSL in 1994, which was thereafter adopted in two states: Connecticut (1995) and Vermont (1998). \textit{See} 2 \textsc{Michael T. Madison, Jeffry R. Dwyer} \& \textsc{Steven W. Bender}, \textsc{Law of Real Estate Financing} 10:1 (2007).

The model legislation was crafted by attorneys of the Community Association Institute. Its text, while helpful in parts, continues to give excessive power to CIC boards, while failing to ensure that homeowners are adequately protected. Moreover, UCIOA has been criticized for not being sufficiently transparent and comprehensible. \textit{See} Ira Meislik, \textit{Community Associations: An Overview}, available at \texttt{http://library.findlaw.com/1999/jun/1/128681.html}.

Although the most influential of model acts, UCIOA nevertheless has not been widely adopted by the states. Almost all of the states that have adopted the UCIOA are states that have relatively few CICs. The states with probably at least three-quarters of the nation’s common interest associations (i.e., California, Florida, Arizona, Texas, New York and New Jersey) have \textit{not} adopted UCIOA.
erning documents, the CIC association, if it is the prevailing party, often may collect its fees and costs from the homeowner. By contrast, the homeowner, if the prevailing party, may be barred from receiving the same benefit. Further, homeowners often cannot afford counsel, have little experience with litigation and stand to lose everything – including their homes – if they lose. Viewed against this backdrop, principles of fairness have, in effect, been contracted away.

It is necessary, therefore, to restore equitable considerations of basic fairness by statutory mechanism. A statutory scheme that mandates an efficient alternative dispute resolution process benefits both sides to a CIC dispute. It reduces transaction costs and, perhaps most essentially, it helps to avoid the polarizing consequences associated with litigation.

A few states have adopted mandatory alternative dispute resolution ("ADR") procedures for CICs. California’s approach provides an excellent example of a fair and balanced model tailored to the needs of CIC homeowners and associations. Notably, California does not require any particular ADR mechanism, but rather mandates that any such mechanism satisfy the following baseline requirements:

(a) The procedure may be invoked by either party to the dispute. A request invoking the procedure shall be in writing.

(b) The procedure shall provide for prompt deadlines. The procedure shall state the maximum time for the association to act on a request invoking the procedure.

(c) If the procedure is invoked by a member, the association shall participate in the procedure.

(d) If the procedure is invoked by the association, the member may elect not to participate in the procedure. If the member participates but the dispute is resolved other than by agreement of the member, the member shall have a right of appeal to the association’s board of directors.

(e) A resolution of a dispute pursuant to the procedure, that is not in conflict with the law or the governing documents, binds the association and is judicially enforceable. An agreement reached pursuant to the procedure, that is not in conflict with the law or the governing documents, binds the parties and is judicially enforceable.

126. See, e.g., CAL. CIV. CODE § 1363.830 (West 2005); FLA. STAT. § 718.1255 (2007); NEV. REV. STAT. §§ 38.300 to .360 (2007).
(f) The procedure shall provide a means by which the member and the association may explain their positions.

(g) A member of the association shall not be charged a fee to participate in the process.\textsuperscript{127}

If a CIC cannot demonstrate that its own ADR procedure satisfies the statutory requirement of "a fair, reasonable, and expeditious dispute resolution procedure," the statute prescribes the following process:

1. The party may request the other party to meet and confer in an effort to resolve the dispute. The request shall be in writing.

2. A member of an association may refuse a request to meet and confer. The association may not refuse a request to meet and confer.

3. The association's board of directors shall designate a member of the board to meet and confer.

4. The parties shall meet promptly at a mutually convenient time and place, explain their positions to each other, and confer in good faith in an effort to resolve the dispute.

5. A resolution of the dispute agreed to by the parties shall be memorialized in writing and signed by the parties, including the board designee on behalf of the association.\textsuperscript{128}

Importantly, the California model affords CICS some flexibility in the design of an ADR procedure, so long as certain baseline requirements are met. By the same token, California provides the state's imprimatur on a detailed ADR procedure, which CICs may freely adopt or use as a model. The prescribed ADR procedure ensures a fair and expeditious dispute resolution mechanism without undue complexity or cost to the homeowner. It places a premium on "meeting and conferring" – which, we believe, is the proper approach.

\textbf{D. Empower CIC Ombudsmen to Resolve Homeowner Disputes and Provide Information}

The term "ombudsman" is a gender-neutral term derived from the Swedish word meaning "intermediary" or "go-between."\textsuperscript{129} An ombudsman has

\textsuperscript{127.} \textit{Id.}

\textsuperscript{128.} \textit{Id.} § 1363.840.
been described as an “office that investigates and resolves complaints about the functioning of an entity.”

The ombudsman is decidedly not a new concept. The first formal ombudsman was appointed by the Parliament of Sweden in 1809. Thereafter, the ombudsman model was widely adopted by other European countries and more recently, at the national level, in countries as diverse as Costa Rica, South Africa, Poland, Thailand and the Philippines. Ombudsmen are widely used as well in private-sector organizations.

At its best, an ombudsman is a multipurpose resource. It need not – and should not – function as a heavy-handed regulatory agency. A state-appointed CIC ombudsman – with a mandate to resolve disputes – would provide substantial benefits to both associations and homeowners. The ombudsman would complement the ADR process, and would be available as a resource to the parties in the context of ADR or as a means to resolve a dispute without formal ADR. In this regard, the ombudsman would serve the important role of information-provider and resource, supplying clear and unbiased information and guidance. In some cases, this may be all that is needed to bring parties together.

Some states, including Florida and Nevada, have enacted legislation creating an office of ombudsman. Consistent with its multiple roles, Florida and Nevada ombudsman offices are empowered to resolve disputes as well as provide a wide range of publications and training programs. The Nevada office is funded by a small fee levied on each homeowner.

The imposition of a modest fee on CIC homeowners to support the operation of a State Ombudsman Office is appropriate, although almost certain to generate controversy and political resistance as a form of “tax.”


130. See Michele Bertran, Judiciary Ombudsman: Solving Problems In the Courts, 29 FORDHAM URB. L.J. 2099, 2101 (2002).


133. FLA. STAT. § 718.5011; NEV. REV. STAT. § 116.625(4)(b).

134. FLA. STAT. § 718.5012; NEV. REV. STAT. § 116.31155. We believe that the imposition of a modest fee on CIC homeowners to support the operation of a State Ombudsman Office is critical to ensuring the Office’s independence, as well as to ensuring a constant and predictable stream of revenue to support the Office’s operations. Moreover, since CIC homeowners are the beneficiaries of the Office, it is appropriate that they – not the State’s taxpayers as a whole – bear the cost of the operation of the Office.

135. NEV. REV. STAT. § 116.31155.
theless, that fee will help to ensure the independence of the office, as well as help to secure a constant and predictable stream of revenue to support its operations. Moreover, since CIC homeowners are the beneficiaries of the office, it is appropriate that they – and not the State’s taxpayers as a whole – bear the costs of its operation. Perhaps most importantly, payment of a fee, however modest, provides homeowners with a direct stake in the office’s operation and management, which itself may promote its accountability and responsiveness to homeowner concerns.

E. “Sunlight is The Best Disinfectant”\textsuperscript{137} – Promote Transparency and Accountability in CIC Governance

Participatory governance structures require more than the holding of periodic elections. In the broadest sense, principles of democratic rule demand that those who govern be held accountable to their constituents. For example, in a well-functioning democracy, government conducts its business in public, posts as a matter of public record its expenditures and revenues, opens its contracts to public bidding and makes available its documents and files for public inspection. Without those basic principles of transparency, those who govern cannot be held to account, and the participatory process loses significant meaning.

Principles of transparency and access must apply to CIC governance. Homeowners associations have assumed many of the functions traditionally provided by local government. As previously noted, many CICs today are entrusted with such important responsibilities as maintaining streets and parks, providing curbside refuse collection, operating water and sewer service, regulating land use and home occupancy, and collecting fees from homeowners that are in many ways the functional equivalent of property taxes.\textsuperscript{138} CICs “exercise power over members and even nonmembers in vital areas of concern, [including] what individuals do in the privacy of their own home and what they do with the physical structure of the house and its surroundings.”\textsuperscript{139}

In light of their quasi-governmental powers, as well as the special realm in which they wield their authority, the requirements of stringent accountability and transparency are, without question, of critical importance in the CIC realm.

\textsuperscript{138} See supra note 17 and accompanying text.
\textsuperscript{139} McKENZIE, supra note 23, at 135.
F. Rein in Local Government

As discussed, mounting evidence suggests that CIC dominance is, increasingly, the direct product of conscious and deliberate government policy aimed at load-shedding municipal functions and services onto this privatized realm.\(^{140}\) We have termed this policy "public service exactions," meaning that local governments, as a condition of land-use approval of new residential subdivisions, typically require developers to establish a homeowners association as the mechanism to carry out functions and services that traditionally were the responsibility of the municipality itself.\(^{141}\)

Public service exactions are harmful to the public interest. The policy is antithetical to the goal of housing affordability; it creates an inequitable twotiered system of taxation to the detriment of CIC residents and to the benefit of non-CIC residents; imposes complex servitude regimes on homeowners without their deliberate, participatory consensus, and interferes with the sovereignty of the housing consumer and the wisdom of independent market forces.\(^{142}\)

Municipalities unquestionably have the right to impose reasonable conditions on land use approval, including the requirement that developers build infrastructure that is to be turned over and operated by the municipality.\(^{143}\) But to require that a developer build infrastructure and create a CIC for the purpose of operating the infrastructure – i.e., the public service exaction – is a qualitatively different requirement, and one that imposes special harms.\(^{144}\)

We propose statutory reform to rein in municipalities’ ability to impose public service exactions. Quite simply, the statute would make clear that municipalities generally must accept dedication of traditional public facilities – streets, sewage treatment plants, drainage facilities, certain forms of substantial community open space and the like – unless the municipality can show that such dedications are serving distinctly private ends. The statute would place the burden on the municipality to establish that the proposed dedication is not in the public interest, such as, for example, when a roadway offered for dedication is not built to generally accepted design or construction standards or when the roadway is more in the nature of a private driveway or parking lot than a thoroughfare.

At present, there is a dearth of empirical research aimed at determining what percentage of CICs is the direct product of public service exactions, as opposed to the product of a developer’s unfettered decision to provide a package that is responsive to market demand. One thing is certain: meaningful reform should yield greater diversity in housing, as markets that offer new

\(^{140}\) See supra notes 4, 6-7, 43, 62 and accompanying text.
\(^{141}\) See supra notes 4, 6-7, 43, 62 and accompanying text.
\(^{142}\) See supra notes 43-45 and accompanying text.
\(^{143}\) Siegel, supra note 7, at 901-03.
\(^{144}\) See id. See also supra notes 43, 62 and accompanying text.
housing that is exclusively CIC-related\textsuperscript{145} would be freed up to present a wider range of alternatives (including traditional non-CIC housing) that more fully accommodates market demand.\textsuperscript{146}

Those who would prefer not to live in a CIC would be afforded that choice. The overall effect would be more responsive markets, as well as CICs that are comprised of people who truly want to live there.\textsuperscript{147}

The latter outcome ranks as one of the most important long-term positive effects of a policy aimed at eliminating municipal CIC mandates. Such mandates directly and indirectly undercut the paramount goal of establishing a new CIC paradigm that is premised on notions of voluntary consent, trust and community. Plainly, such an objective is compromised – if not placed out of reach – when a substantial percentage of CIC residents from the very outset “did not really want to purchase in a CIC in the first place and did so only reluctantly because they could not afford a home in an ordinary neighborhood.”\textsuperscript{148}

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145. See Dilger, supra note 12, at 18 (noting that, according to estimates made by the Community Associations Institute, “nearly all new residential development in California, Florida, New York, Texas, and suburban Washington, D.C., is governed by a [residential community association]”).

146. Our proposed statute would apply not only to CIC developers at the point at which they are seeking municipal approval of a new subdivisions, but also to mature CICs that wish to explore the option of dedication of facilities as a means of fiscal relief or for other reasons. We see no reason why a private street should not be public, assuming the CIC owners desire this change in status, the street is truly public in character, and all reasonable municipal design and construction standards are satisfied. Indeed, a municipal takeover of the private CIC facility by way of voluntary dedication would be the fairest way to provide the CIC homeowners with fiscal relief while protecting the interests of the remaining taxpayers of the municipality, particularly when the local government already provides the same services to other non-association residences in the municipality.

Furthermore, such a policy would have an important side-benefit: it would encourage the removal of gates in existing gated communities, since the continuing maintenance of such gates would be fundamentally incompatible with taxpayer-maintained streets. Given the harm to the public interest posed by gated communities, see Blakely & Snyder, supra note 57, at 3, this statutory public purpose is not to be minimized.

147. After all, a common interest community – in its literal sense – presupposes that the residents of the community made a voluntary and informed choice to live there. Stated succinctly, a “common interest community” assumes that the residents genuinely possess a “common interest.”

148. Barton & Silverman, supra note 39, at 137 (“In a 12-county survey in California of resale buyers, we found that 84 percent of those who bought a home in a CID were not looking for a CID to buy in.”).
VI. THE OVERRIDING OBJECTIVES OF CIC REFORM: TRUST AND COMMUNITY

The idea of trust and its power to shape cultural as well as economic life has been explored in more general governmental and political realms.\(^{149}\) In this section we apply some of those concepts to the common interest community. It is the interdependence of the CIC polity and its market success that provides incentives to repair existing models of homeowners associations design and management, while enhancing opportunities for authentic communities to emerge.

Francis Fukuyama has explored meaningfully the premise that cooperation promotes prosperity.\(^{150}\) Trust has the power to shape cultural and economic life.\(^{151}\) By contrast, as various social scientists have made plain, diminishing stocks of social capital impose considerable strain on social and legal systems.\(^{152}\) Politicians too have weighed in on the matter, offering prescriptions for social reform that speak to the power and the promise of community.\(^{153}\)

The cultural characteristic of trust can help to inform a new set of first principles to reinvent the CIC archetype, so that cooperativeness, social capital, systems of reciprocity, and a sense of duty to others can become cornerstones of the cultural and economic success of this giant of residential living. Significantly, the very archetype of CIC invention says, “Trust us.” Trust us, the developers, to know what is best for those like “us.” (That conceptualization of “us” as opposed to “them” can turn, benignly or more insidiously, on assumptions based on economic and social class, race, age, familial status and more.)\(^{154}\) Then, trust your homeowners association and board to carry out that vision.

\(^{149}\) See generally Fukuyama, supra note 1; Arrow, supra note 117; Coleman, supra note 116.

\(^{150}\) See Fukuyama, supra note 1, at 335-36 (“Virtually all economic activity in the contemporary world is carried out not by individuals but by organizations that require a high degree of social cooperation.”).

\(^{151}\) See generally id.

\(^{152}\) See generally Putnam, supra note 115.

\(^{153}\) See, e.g., Hillary Rodham Clinton, It Takes a Village (1996).

\(^{154}\) Various articles have explored the exclusionary aspects of CIC living, including race-based, social, and economic dimensions. See, e.g., Timothy Egan, The Serene Fortress: A Special Report; Many Seek Security in Private Communities, N.Y. Times, Sept. 2, 1995, at A1; McKenzie, supra note 23, at 141, 186-87 (discussing CIC preoccupation with security measures); Dennis R. Judd, The Rise of the New Walled Cities, in Spatial Practices 155 (Helen Liggett & David C. Perry eds., 1995) (stating that CICs were “the means of continuing the housing industry’s and the federal government’s decades-old policies that segregated residential areas by income, social class, and race”); id. at 160 (comparing walled communities to “walled cities of the medieval world, constructed to keep the hordes at bay”); Dana Young,
The paradox is that the same system that asks to be trusted does not trust. It presumes that residents cannot be trusted to self-regulate. Just look, it urges, at the decline of the traditional middle class suburb.\textsuperscript{155} Government cannot be trusted to provide suitable services. Look at our decaying cities and towns. In certain respects, the phenomenon of privatization and the advent of CICs emerged as the antidote to this parade of perceived inadequacies. Yet, CIC “privatopias”\textsuperscript{156} now find themselves falling prey to the same ills that plague their public counterparts.

In some ways, the classic CIC model of regimentation and control is a response to the perception that individualism, if left untempered, can wreak havoc on property values, security, aesthetics and orderliness. Fukuyama describes the ills of self-atomization when he presents the contradictory picture of a society living off a great fund of previously accumulated social capital that gives it a rich and dynamic associational life, while at the same time manifesting extremes of distrust and asocial individualism that tend to isolate its members. This type of individualism, Fukuyama had noted, always existed in a potential form, yet through most of America’s existence it had been kept in check by strong communal currents.\textsuperscript{157}

Certainly, untempered individualism can run amok. In the residential setting, there are whole books and websites devoted to chronicling the transgressions of strange and errant neighbors with tendencies to place their oddities on display by, for example, painting their homes in wildly unusual ways or decorating their lawns with strange objects.\textsuperscript{158} The CIC, with its regime of

\textit{The Laws of Community: The Normative Implications of Crime, Common Interest Developments, and “Celebration”}, 9 Hastings Women’s L.J. 121, 133 (1998) (suggesting that, rather than addressing social problems, such as crime, people escape to “crime-free bubbles,” perhaps even “exporting crime to the outlying communities which cannot afford the same safety”).


156. See generally McKenzie, supra note 23.

157. See Fukuyama, supra note 1, at 29, 50 (explaining that the United States has always “possessed a rich network of voluntary associations and community structures to which individuals have subordinated their narrow interests”). See also id. at 57 (stating that countries like the United States, Japan, and Germany were able to succeed economically in large part because “there was a high degree of trust between individuals who were not related to one another, and hence a solid basis for social capital”).

rules and controls, can seem the remedy for the fears inspired by a “Weird America.”

The problem is that an exclusively rule-based response cannot check in legitimized ways the vices of asocial atomization. The CIC template gets it wrong. Meaningful solutions reside not in overlegalizing, but in rebuilding social capital. Too many laws, rules and regulations run the risk of distorting relevant litmus tests of virtue and appropriate conduct, collapsing them into a frame of reference that presumes, “if it’s legal, it’s ethical.”

Neither trust nor moral obligation alone can take the place of relevant legal frameworks. But trust, when added to the mix, reduces transaction costs. Trust is an important lubricant of any social system. It is efficient. It saves a lot of trouble to be able to rely on another’s word. When people trust, they can depend on systems of generalized reciprocity more than on rigid rules and formal procedures to chart their behavior and predict its outcomes.

Fukuyama describes trust, loyalty, and truth-telling as “externalities,” meaning that they are commodities with practical and economic value. He continues that economically, some ethical habits are virtues. The virtuous – those that contribute to the formation of social capital – include reciprocal trust, a sense of duty to others, and cooperativeness. Those virtues “increase the efficiency of the system” of which they are a part, obviating the need to spell out all things and allaying the impulse to zealously prosecute

159. See generally Moran & Sceurman, supra note 158; Mark Moran & Mark Sceurman, Weird N.J.: Your Travel Guide to New Jersey’s Local Legends and Best Kept Secrets (2003) (used as a guide for “oddy sightseeing” that encourages the public to come to these sites).

160. See Putnam, supra note 115, at 134-35 (“When each of us can relax her guard a little ... the costs of the everyday business of life, as well as the costs of commercial transactions ... are reduced.”); Fukuyama, supra note 1, at 336 (explaining that property, contract, and commercial law are all “indispensable institutions,” but transactions costs are reduced if “such institutions are supplemented by social capital and trust”); id. at 223 (“rules and contract have not done away with the need for trust”).

161. See Putnam, supra note 115, at 134 (describing generalized reciprocity as the “[t]ouchstone of social capital”); id. at 135 (“A society that relies on generalized reciprocity is more efficient than a distrustful society ... ”).

162. Id. at 20 (“Social capital ... can have ‘externalities’ that affect the wider community, so that not all the costs and benefits of social connections accrue to the person making the contact.”).

163. Id.

164. See Fukuyama, supra note 1, at 26 (“Trust is the expectation that arises within a community of regular, honest, and cooperative behavior, based on commonly shared norms, on the part of other members of the community.”); id. at 11 (calling for law and contract to be supplemented with “reciprocity, moral obligation, duty toward community, and trust”).

165. Id. at 152.
and persecute. In the CIC setting, if residents can come to believe in the good faith of the relevant players – their governing boards of directors, their neighbors, the “system” and its procedures for fair dispute resolution – they can begin to act in accord with self-interest rightly understood. 166 This, after all, is the first principle of any system of reciprocity: Do unto others as you would have them do unto you.

Instead, in residential venues across the nation, costs are compounded as CIC patterns of regimentation backfire, inspiring varying degrees of resident discontent. Implicit in the CIC model of excessive regulation and zealous rule enforcement to privately control land use and behavior is a distrust of residents to comport on their own to appropriate norms of conduct. Yet, it is in the residents’ own best interests to do just that. If nothing else, abiding by principles of basic neighborliness and the fundamentals of decorum preserves and protects property values, an aim that homebuyers have in common.

Particularly in the residential setting, rules and regulations alone cannot do the work that is best achieved in partnership with social consensus and intact social bonds. Distrust tends to yield more of the same. Hence, “privatopia” 167 can be anything but, as rule regimes inspire preoccupation with compliance and punishment for the rule-breakers. This, in turn, inspires a certain wariness of, if not outright disdain for, the “rule-police.” Distrust, and the transaction costs that it imposes, promotes contempt. Against this backdrop, the lure and promise of community can yield too readily to dissension, disagreement and misunderstanding. It is not surprising, then, that by various indicators the social fabric of some CICs is strained at the seams.

The structural and social foundations of the standard-form CIC model do little to kindle trust, which is an essential anchor of community. Trust is a social lubricant, 168 stabilizer and predictor of cooperation. 169 It promotes

166. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1836).
167. MCKENZIE, supra note 23 (chronicling phenomenon of privatization as manifested by common interest communities).
168. See PUTNAM, supra note 115, at 135, 288 (explaining that “[h]onesty and trust lubricate the inevitable frictions of social life” and social capital “greases the wheels that allow communities to advance smoothly”); Pamela Paxton, Is Social Capital Declining in the United States? A Multiple Indicator Assessment, 105 AM. J. SOC. 88, 101 (1999) (referring to trust as a “lubricant that eliminates the need for third-party insurers or enforcers”); Gunnar Lind Haase Svendsen & Gert Tinggaard Svendsen, On the Wealth of Nations: Bourdieconomics and Social Capital, 32 THEORY & SOC’Y 607, 615 (2003). ARROW, supra note 117, at 23 (explaining that “trust has a very important pragmatic value, if nothing else. Trust is an important lubricant of a social system. It is extremely efficient; it saves a lot of trouble to have a fair degree of reliance on other people’s word.”).
169. See Johannes Fedderke, Raphael de Kadt & John Luiz, Economic Growth and Social Capital: A Critical Reflection, 28 THEORY & SOC’Y 709, 711 (1999) (explaining that “social trust facilitates coordination, communication, and thus resolves dilemmas surrounding collective action”); FUKUYAMA, supra note 1, at 26 (noting that trust is expected in communities of which members are honest and cooperative);
assioational and economic prosperity.\textsuperscript{170} Trust is efficient.\textsuperscript{171} It is an asset.\textsuperscript{172}

Distrust contributes to inefficiencies of a broad scale.\textsuperscript{173} The absence or breakdown of trust does not come cheap, as lawyers, accountants, and monitors enter the fray to force results best achieved by intact social bonds.\textsuperscript{174} Indeed, it is the interdependence of the CIC polity and its financial well-being that creates incentives for developers as well as residents themselves to re-

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Svendsen & Svendsen, supra note 168, at 619 (noting that the ability to cooperate often “derives precisely from shared values and ultimately out of mutual trust in a society”); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, Trust in Large Organizations, 87 AM. ECON. REV. 333, 337 (1997) (“[T]rust promotes cooperation, especially in large organizations.”).

170. See generally FUKUYAMA, supra note 1 (discussing how the level of trust inherent in a society is directly correlated to its social and economic success); PUTNAM, supra note 115, at 18-19 (noting that individuals, neighborhoods, and even nations that are high in trust and social capital are better off socially and economically); ARROW, supra note 117, at 26 (observing that “among the properties of many societies whose economic development is backward is a lack of mutual trust”).

171. See generally FUKUYAMA, supra note 1; PUTNAM, supra note 115, at 288 (“[S]ocial capital greases the wheels that allow communities to advance smoothly.”); J. David Lewis & Andrew Weigert, Trust as a Social Reality, 63 SOC. FORCES 967, 969 (1985) (“[T]rust reduces complexity far more quickly, economically, and thoroughly than does prediction.”); Paxton, supra note 168, at 95 (referring to James Coleman’s example of the wholesale diamond market: “it is only in the presence of both high associations and high trust that we see the economic efficiency gains from the trusting exchange of diamonds”); Stephen Knack and Philip Keefer, Does Social Capital Have an Economic Payoff? A Cross-Country Investigation, 112 Q. J. ECON. 1251, 1252 (1997) (“Individuals in higher-trust societies spend less to protect themselves from being exploited in economic transactions.”).

172. See PUTNAM, supra note 115, at 135 (“[T]rusting communities, other things being equal, have a measurable economic advantage.”); DISTRUST: MANIFESTATIONS AND MANAGEMENT (Russell Hardin, ed. 2004) (exploring implications of distrust within management, corporate and political structures); ADAM B. SELIGMAN, THE PROBLEM OF TRUST 3 (1997) (“Power, dominance and coercion can . . . be a temporary solution to the problem of social order . . . but they will not in themselves provide the basis for the maintenance of said order over time.”).

173. See FUKUYAMA, supra note 1, at 152-53 (discussing how a world “devoid of trust” would be inefficient).

174. See id. at 310-11 (explaining that the “decline of social trust is evident on both sides of the law, in both the rise of crime and civil litigation,” and “[t]he increase in litigation means that fewer disputes are capable of being resolved informally, through negotiation or third-party arbitration”); PUTNAM, supra note 115, at 325 (noting that without trust, “we end up squandering our wealth on surveillance equipment, compliance structures, insurance, legal services, and enforcement of government regulations”).
dress flaws in existing models of CIC structure and governance to enhance opportunities for authentic community-based norms to emerge.175

It is the inherent distrust of government to appropriately police, preserve neighborhood property values and provide essential services, and then the disinclination to trust that residents can come to suitable normative bases for acceptable behavior on their own, that helps to justify, however in error, highly regimented models.176 Yet, the impulse to excessively regulate and then control can and does backfire.177 Weak communal currents, in turn, hinder relational prosperity, which hurts economic well-being.178

Distrust imposes a host of transaction costs that are best reduced by strong social and ethical currents. In the context of common interest community redesign, trust has a significant role to play. Social trust, when maximized, makes communities healthier, more prosperous179 and ultimately wiser.180 When eroded, untoward consequences follow. Acrimony does not

175. See Nelson, supra note 5, at 865 ("The fact that so many people, including people with many options, chose this style of private living is strong evidence that it has much to offer.").
176. See Fukuyama, supra note 1, at 27 ("[P]eople who do not trust one another will end up cooperating only under a system of formal rules and regulations, which have to be negotiated, agreed to, litigated, and enforced, sometimes by coercive means."); Rosenthal, supra note 104, at 121 (making mention that economists often argue that homeowners elect to buy into private communities and restrictive covenants serve to "resolve... coordination problem[s]" within these communities).
177. See generally Fukuyama, supra note 1, at 361 ("Many of the cases covered in [Trust: The Social Virtues and the Creation of Prosperity] stand as a cautionary tale against overcentralized political authority.").
178. See Arrow, supra note 117, at 23 (“Trust and similar values, loyalty or truth-telling, are examples of what the economist would call ‘externalities.’ They are goods, they are commodities; they have real, practical, economic value; they increase the efficiency of the system, enable you to produce more goods or more of whatever values you hold in high esteem.”).
179. See Fukuyama, supra note 1, at 152-53, 336 (explaining how “it is possible to economize substantially on transaction costs if [property rights, contracts, and commercial law] are supplemented by social capital and trust” by painting a picture of what a world “devoid of trust” would look like by providing examples of how people would have to approach contracts, explaining that people would never do more than that which they are legally obligated out of fear they would be exploited or taken advantage of, remarking that disagreements would rarely be able to be negotiated or left to arbitration and “[e]verything would have to be referred to the legal system for resolution”); Putnam, supra note 115, at 135, 288 (“A society that relies on generalized reciprocity is more efficient than a distrustful society, for the same reason that money is more efficient than barter.” Where trust is present, “everyday business and social transactions are less costly.”); Paxton, supra note 168, at 93 (“social capital allows for efficient economic transactions”).
180. See Franzese, supra note 3, at 563; Putnam, supra note 115, at 287 (“[A]n impressive and growing body of research suggests that civic connections help make us healthy, wealthy, and wise.”); Eric M. Uslander, Trust and Social Bonds: Faith in
come cheap. Indeed, the inefficiencies associated with the breakdown of neighborliness are prohibitive.

VII. CONCLUSION

CICs are a unique and paradoxical species. As creatures of private law, they have been free in most respects from meaningful oversight. Yet, they have evolved into quasi-political organizations that can be larger than traditional municipalities and that are authorized, if not compelled, to perform services that are municipal in all but name.

Their paradoxical nature is reflected, as well, in popular perception and marketing strategies. CICs can be viewed in some ways as a product of distrust in government. Indeed, they are often marketed as better guarantors of property values and as more efficient providers of certain municipal-like services than local government. Yet, simultaneously, the explosive growth in the number of CICs is increasingly a product of deliberate government policy itself—a conscious effort on the part of municipalities to load-shed traditionally municipal services onto developers who, in turn, pass on that service-delivery obligation to homeowners by way of the CIC mechanism.

That particular paradox has been the source of considerable confusion and misunderstanding. For too long, conventional wisdom has been that CICs are nothing more or less than the product of market forces, and that the elaborate CIC servitude regime is nothing more or less than a market response to consumer demand. This received wisdom ignores the realities of several distinctly non-market phenomena, including the pervasive privatization policies of local governments and the self-interested motives of CIC developers, that are at variance with the best interests of CIC homeowners. It also fails to respond meaningfully to gaps in resident consent to the CIC servitude regime in the first place. Those market distortions have played a critical role in sustaining less than desirable rule-bound CIC templates. One consequence is that the status quo CIC paradigm cannot be justified as the inevitable product of market forces or consumer choice. In fact, we have argued the contrary to be true.

Any effort to reform the CIC model must take proper account of its essential paradoxes. Most importantly, CIC reform should begin with the premise that CICs need to be more closely aligned with market forces and public choice. However, to fully accomplish this objective, external and public intervention—including statutory reform—is required. That is to say: CICs, which are creatures of private law, can only be made more market-responsive through the intervention of public law. Thus, it may be said that resolution of the CIC paradox requires, inevitably, a policy that is itself paradoxical.


https://scholarship.law.missouri.edu/mlr/vol72/iss4/6
We propose that the rule-bound boilerplate that governs the traditional CIC be replaced by a legal regime that places far greater reliance on the power of social trust and community and far less reliance on the traditional command-and-control rule regime. A new structure would be based on far fewer *intrinsic* rules, but would require more *extrinsic* baseline rules, in the form of a new CIC statutory foundation. This seeming contradiction is readily reconciled when mindful of the essential differences in the nature and extent of existing and proposed rule regimes.

In particular, we propose a new legal foundation for CICs composed of the following elements: (1) a new set of governance choices based on a sunsetting of the developer-imposed servitude regime after the developer relinquishes control of the CIC; (2) a series of clear statutory rights for residents; (3) a fair, equitable and affordable alternative dispute resolution regime; (4) an ombudsman with a mandate to resolve homeowner issues before such issues metastasize into full-blown wars; and (5) the imposition of systems of transparent management and accountability.

Finally, if not most essentially, community and trust *do matter*. We live in times of weariness and wariness. In residential arenas, that individual and collective malaise can be as much a cause as an effect of CIC living. As reform models continue to be explored, it is time to consider the idea and the promise of social trust, and its power to shape cultural and economic life.181 The applicability to the CIC setting of relevant social virtues as predictors of prosperity and well-being can help to inform the renewal effort, both legislatively as well as from within.

Ultimately, CICs must be afforded the opportunity to shed their command-and-control rule regimes in favor of templates aimed at reinforcing norms of basic neighborliness. This way, similarly situated residents, all of whom share the goals of minimizing their own transaction costs while preserving and protecting their property values, are given the chance to live the essential wisdom of "self-interest rightly understood."182

181. See generally FUKUYAMA, *supra* note 1 (examining "the improbable power of trust" as an essential predictor of economic and social prosperity).

182. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1836).